

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CRIMINAL REVISION CASE NO.2200 OF 2017

ORDER:

Aggrieved by the Calendar and Judgment dated 27.07.2017 in Criminal Appeal No.145 of 2016 passed by the Special Judge for trial of cases under SC/ST (POA) Act-cum-V Additional District and Sessions Judge (hereinafter referred as 'appellate court'), Medak, at Sangareddy, the appellant/ accused preferred this criminal revision case under Sections 397 and 401 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') questioning the propriety, illegality of the judgment in appeal, affirming the judgment dated 18.10.2016 in C.C. No.282 of 2016 passed by the Judicial Magistrate of First Class, Special Mobile Court, (hereinafter referred as 'trial court') at Sangareddy, on various grounds.

The revision petitioner was the accused before the trial court.

The case of the prosecution, in brief, is that on 14.11.2015 at about 8.00 hours, one P.Bakkamma w/o. Ramulu, along with others boarded an Auto bearing No.AP 23 Y 8144 at their Village and went to Maktha Kyasaram Village of Municipality for cotton collecting coolie work. On the same day during evening hours, while they were returning to their respective Villages, boarded the same Auto, on the way, at about 18.30 hours the Auto reached at Tatipally Village outskirts, the driver of the Auto by name Ram Kheer, who is the revision petitioner herein, drove the same in a rash and negligent manner. On account of such act, the Auto

turned turtle due to which the inmates of the Auto including the said Bakkamma died on the spot and others sustained injuries. Thereafter the injured persons were shifted to Government Hospital, Zaheerabad. On intimation, the police registered a case in Crime No.125 of 2015 for the offences punishable under Sections 304-A, 337 and 338 of the Indian Penal Code, 1860, issued first information report and took up investigation.

During investigation, the Police examined several witnesses and recorded their statements under Section 161(2) Cr.P.C., visited the scene of offence, prepared rough sketch of the scene of offence and prepared observation report in the presence of mediators and held inquest over the dead body of the said Bakkamma in the presence of mediators, who in turn opined that the cause of death was due to injuries sustained by her in the accident. The body was sent for autopsy and after conducting autopsy over the dead body, the Doctor issued post mortem examination certificate opining that the cause of death was due to the injuries sustained by her in the accident. Motor Vehicle Inspector also inspected the vehicle and issued a report opining that the accident not occurred due to mechanical defect of the vehicle. Based on the evidence collected during investigation, the Police filed charge sheet against the revision petitioner for the offences punishable under Sections 304-A, 337 and 338 I.P.C.

The trial court took the case on file and after securing presence of the revision petitioner, after following necessary procedure under Section 207 Cr.P.C., examined the revision

petitioner under Section 251 Cr.P.C. for the offence under Section 304-A, 337 and 338 I.P.C. read over and explained to him, for which the petitioner pleaded not guilty and claimed to be tried.

During trial, on behalf of the prosecution, P.Ws.1 to 13 were examined, got marked Exs.P.1 to P.11. After closure of the prosecution evidence against the petitioner, he was examined under Section 313 Cr.P.C. explaining the incriminating material against him in the evidence of the prosecution. He denied and reported no evidence.

Upon hearing, the trial court found the petitioner guilty for the offence punishable under Section 304-A, 337 and 338 I.P.C., convicted and sentenced him to undergo simple imprisonment for a period of one year for the offence under Section 304-A I.P.C., directed to pay an amount of Rs.1000/- in default to undergo simple imprisonment for a period of three months for the offence punishable under Section 338 I.P.C. and to pay fine an amount of Rs.500/- in default to undergo simple imprisonment for a period of three months.

Aggrieved by the conviction and sentence passed by the trial court, the petitioner preferred appeal in Criminal Appeal No.145 of 2016, wherein the appellate court confirmed the conviction and sentence passed by the trial court. Aggrieved by same, the present criminal revision case is filed.

The grounds of revision are that there is no corroborated evidence to establish rash and negligent act of the petitioner at the time of accident, and in the absence of proof of rash and negligence

on the part of the petitioner, conviction recorded by the trial court for the offence punishable under Section 304-A I.P.C. is clear illegality.

It is also contended that the trial court did not consider the evidence of P.Ws.4 and 5, who are present at the time of conducting panchanama, Exs.P.1 to P.3 are not substantive piece of evidence, but the trial court and the appellate court on erroneous appreciation convicted the accused for the offence punishable under Section 304-A I.P.C.

It is also contended that P.Ws.6 to 8, who are eye witnesses, also belongs to the Village of P.Ws.1 to 3 and their evidence is not worthy credence, since they are not independent witnesses and both the courts below did not insist for any independent evidence and committed an error. Finally it is contended that no identification parade was conducted to identify the driver, who allegedly drove the vehicle and that apart there is abnormal delay of one month 12 days in inspecting the Auto by the Motor Vehicle Inspector, which itself suffice to conclude that the accident was occurred not due to rash and negligent act of the driver.

During hearing, Sri P.Sriharinath, learned counsel for the petitioner, contended that the petitioner was not the driver at the time of accident. In the absence of test identification parade and failure to establish identity of the driver, conviction against the petitioner for the offences referred above is a grave illegality. Apart from that, even otherwise, the accident occurred due to rolling saree of a woman with the tire of the Auto, while travelling in the

Auto which resulted accident. Therefore, no rashness or negligence attributable to the petitioner and prayed to set aside the conviction and sentence passed by the trial court. Finally it is contended that the revision petitioner is going to perform his daughter's marriage on 18.10.2017, and he produced the printed marriage invitation card in support of his contention and in case the conviction imposed against the petitioner is confirmed, it is difficult for him to perform the marriage of his daughter and prayed to acquit the petitioner for the offence punishable under Section 304-A I.P.C.

The Public Prosecutor for the State of Telangana supported the finding recorded by the trial court, while contending that this court cannot interfere with the fact finding recorded by both the courts below in view of the limited jurisdiction that conferred on this court under Sections 397 and 401 of Cr.P.C. and prayed to dismiss the Criminal Revision Case.

In view of specific contention urged before this court, during hearing and in the grounds of appeal, it is necessary to examine the scope of powers under Sections 397 and 401 Cr.P.C. The jurisdiction of this Court under Sections 397 and 401 Cr.P.C. is limited. However, Section 401 confers a kind of paternal and supervisory jurisdiction on the High Court over all other criminal Courts established in the State in order to correct miscarriage of justice arising from a misconception of law, irregularity of procedure, neglect of proper precaution or apparent harshness of treatment which has on one hand resulted in some injury to the due maintenance of law and order or on the other hand, in some

undeserved hardship to individuals. The revisional power conferred on the High Court by this section is discretionary power, has to be exercised in the aid of justice and this Court will not exercise jurisdiction under this Section if there has been no failure of justice even though the proceedings of the lower court suffer from irregularity or impropriety as held by Apex Court in **STATE OF WEST BENGAL v. TULSIDAS**¹. The revisional jurisdiction conferred upon this Court by Section 401 Cr.P.C. has to be exercised only for the purpose of relieving persons who have not had a fair trial or whose convictions have been arrived at by nonobservance of material provisions of the law or by such misdirections as must have occasioned a failure of justice as held in **PRAHLAD v. EMPORER**². Further, the High Court can, in exercise of its revisional powers, either suo motu on the basis of its own knowledge derived from any source whatsoever, or on an application by a complainant, exercise the powers of an appellate Court both with respect to acquittal and conviction. This revisional power is subject to the following three limitations:

Firstly, no order can be made to the prejudice of the accused or other person unless he had an opportunity of being heard personally or by a pleader in his own defence;

Secondly, it cannot convert a finding of acquittal into one of conviction;

¹ (1964) 1 Cr.L.J. 443 (SC)

² 48, Cr.L.J 173, 174 (Pat)

Thirdly, no revision can be entertained at the instance of a party who could have appealed under the Code and has not appealed.

Thus, the powers of the High Court are limited, but such power can be exercised sparingly. This Court cannot interfere with the concurrent fact findings recorded by the courts below. As a general rule, the High Court will not in revision, interfere with a finding of fact and this is specially so, where there are concurrent findings of facts of the lower Courts. But, in special and exceptional circumstances, the High Court is entitled to go into questions of fact and do justice, though the power should be rarely exercised, as held by Apex Court in **S.P.S. JAYAM & CO. v. NEHRUSADAN**³.

In revision, the High Court usually accepts the findings on questions of facts recorded by a subordinate Court unless the finding is manifestly perverse or patently erroneous in view of the law declared by the Apex Court in **BANSILAL v. LAXMAN**⁴.

In view of limited scope under Section 401 Cr.P.C., unless the court concludes that there is manifest perversity or apparent error in the concurrent finding recorded by the courts below. This court shall not interfere with the findings of facts.

In the present case, the main contention of the petitioner is that the petitioner was not identified as driver of the Auto by conducting test identification parade. No test identification is required to establish identity of the driver. The purpose of Section

³ 1977 Cr.L.J. 1101

⁴ (1986) 3 SCC 445

9 of the Indian Evidence Act is to establish the identity of any thing or person, whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened. The whole idea of a Test Identification Parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source as held by the Apex Court in **Shyamal Ghosh vs State Of West Bengal**⁵. Therefore, the whole idea of conducting test identification parade is to fix the accused with the offence punishable under Section 304-A I.P.C.

Curiously, in the present case, the witnesses- P.Ws.4 to 8, who were travelling in the Auto, at the time of accident, are injured persons. The testimony of such witnesses is generally considered to be very reliable, as they are the witnesses who comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare their actual assailant in order to falsely implicate someone. Convincing evidence is required to discredit an injured witness. Here, in this case P.Ws.4 to 8 were the injured witnesses whose testimony is worthy of credence. Therefore, their evidence cannot be brushed aside on the ground that they belongs to the Village to which the deceased Bakkamma belongs to.

The identity of the driver is not much in controversy, since the wife of the revision petitioner was examined as P.W.11, who specifically asserted in her examination-in-chief that her husband was the driver of the Auto at the time of accident. When the wife of

⁵ AIR 2012 SC 3539

the revision petitioner was travelling in the auto and identified that her husband was driver of the Auto, no further proof is required to establish identity of the driver at the time of accident, since it is not the case of the revision petitioner that there were any differences between wife and husband. Apart from that identification of the accused by conducting test identification parade which is relevant under Section 9 of the Indian Evidence Act is only corroborative piece of evidence and not substantive piece of evidence.

In **Syed Zameer Vs. State of A.P.**⁶ the Single Judge of this Court held that when no identification parade conducted for identification of accused, who is the driver of the vehicle in a crime for the offence punishable under Section 338 of Indian Penal Code and identification of accused for the first time by the witnesses in the Court without disclosing the name of accused in the FIR, conviction cannot be sustained.

A similar question came up before the Apex Court in **Sheo Shankar Singh Vs. State of Jharkhand and another**⁷ and in **K.Rajaiah Vs. State of Andhra Pradesh**⁸, wherein it was held that failure to hold test identification parade does not have effect of weakening evidence of identification in Court, as to what should be the weight attached to such an identification is a matter which Court will determine in peculiar facts and circumstances of each case. Version of two eye-witnesses that it was accused who had

⁶ 2002(1) ALD (Crl.) 903 (AP)

⁷ AIR 2011 SC page 1403

⁸ 2011(1) RCR (Crl.) page 628

shot deceased. However, only one of witnesses associated with Test Identification Parade in which he identified accused. Failure of prosecution to offer an explanation for not holding Test Identification Parade for other witness will not *ipse jure* prove fatal to case of prosecution.

In the present case, the wife of the revision petitioner herself admitted that the revision petitioner was driving the vehicle at the time of accident. Therefore, failure to hold test identification parade is of no consequence and it is inconsequential to establish the identity of the driver.

The second contention raised by the counsel for the revision petitioner before this court is that the Auto was inspected by the Motor Vehicle Inspector, who issued Ex.P.6 – report certifying that the accident was not occurred due to mechanical defects.

The contention of the revision petitioner is that delay in inspecting the Auto is of serious consequence.

No doubt, delay in inspecting the vehicle is one of the considerations. But it is not the case of the petitioner that the accident was occurred due to mechanical defect of the Auto. No suggestion was put to any witness that the accident was occurred due to any mechanical defect of the Auto. In the absence of raising such plea, the delay in examination or inspection of the Auto will have no bearing on the finding recorded by the trial court and the appellate court. The consistent evidence of P.Ws.1 to 5 coupled with Exs.P.1, P.5 and P.6 clinchingly establish that the cause of

death of the said Bakkamma was due to injuries received by her in the road accident.

The next contention of the counsel for the revision petitioner is that the accident was not occurred due to rash and negligent act of the revision petitioner, who is the driver of the Auto.

In fact, the explanation offered by the petitioner is that saree of a woman passenger rolled to the wheels of the Auto and as such the auto turned turtle. The said fact was deposed by P.W.11 who is the wife of the revision petitioner. But this fact was not acceptable for the reason that it was not their case at any stage, even otherwise it is for the driver to take necessary precaution while driving the Auto. If really, the saree of a woman went and rolled around the rear wheel, it would struck the moments of the Auto immediately and some times it may obstruct the moment, but that by itself is not a ground to believe that the revision petitioner has taken every precaution while driving the Auto.

No doubt, to find guilty of the revision petitioner for the offence punishable under Section 304-A I.P.C., the prosecution has to establish that the revision petitioner was guilty of culpable negligence.

The word 'culpable rashness and negligence' was not defined anywhere in the Indian Penal Code. The Apex Court defined 'culpable negligence' in an unreported judgment in **Mohammed Aynuddin @ Miyam Vs. State of Andhra Pradesh**, wherein it was held as follows

"A rash act is primarily an over hasty act. It is opposed to a deliberate act. Still a rash act can be a deliberate act in the sense that it was done without due care and caution. Culpable rashness lies in running the risk of doing an act with recklessness and with indifference as to the consequences. Criminal negligence is the failure to exercise duty with reasonable and proper care and precautions guarding against injury to the public generally or to any individual in particular. It is the imperative duty of the driver of a vehicle to adopt such reasonable and proper care and precaution."

Similarly, in **G.Kumar Vs. State of A.P. Rep. by Public Prosecutor⁹**, **K.Nagaraju Vs. State of A.P.¹⁰** and **K.Rajayya Vs. State of A.P. rep. by Public Prosecutor¹¹** this court held that mere driving of vehicle at high speed is not the determining factor about culpable rashness and negligence of the rider of the motorcycle or driver of the motorcycle.

In **Subbarao Vs. State¹²** and **Syed Akbar Vs. State of Karnataka¹³** the Apex Court is of the consistent view that to sustain the conviction of the accused for the offence punishable under Section 304-A I.P.C., the prosecution has to establish culpable rashness or negligence on the part of the driver of the vehicle. Rashness is nothing but failure to take necessary precautions as an ordinary prudent driver, while driving the vehicle, knowing the consequences from such driving.

⁹ 2009(3) ALT (Crl.) Page 20 (AP)

¹⁰ 2009(2) ALT (Crl.) Page 298 (A.P.)

¹¹ 2010(3) ALT (Crl.) page 169

¹² 1953 Crl.L.J. Page 643

¹³ AIR 1979 SC page 1848

In the present case on hand, the revision petitioner herein drove the vehicle though at minimum speed did not take minimum care and caution while driving the Auto as an ordinary prudent driver. Therefore, the evidence of P.Ws.4 to 6 – injured witnesses including the wife of the revision petitioner would clinchingly establish that the driver of the Auto, who is the revision petitioner herein, failed to take necessary care and caution while driving the auto as an ordinary prudent driver knowing the ill consequences flow from such driving. Therefore, such driving would amounts to culpable rashness. Hence, the trial court and the appellate court rightly recorded the concurrent fact finding about the rashness and negligence and I find no manifest perversity or an apparent error in the finding recorded by the trial court and the appellate court, holding that the revision petitioner was guilty for the offence punishable under Section 304-A I.P.C. Hence, this court, while exercising power under Section 397 and 401 Cr.P.C., cannot interfere with the fact finding recorded by the appellate court.

Learned counsel for the revision petitioner contended that the punishment imposed by the trial court and confirmed by the appellate court is excessive and the trial court and the appellate court did not consider that it is the first offence and that he did not involve in any other offence subsequent to conviction of the petitioner for the offence punishable under Sections 304-A I.P.C.

No doubt the revision petitioner did not involve in any crime similar to this offence and he was aged 46 years by the date of his conviction and it is his first offence. In such case, the court may

apply Section 4 of Probation of Offenders Act or Section 360 Cr.P.C. and release the petitioner in ordinary offences. But there is an exception to an offence punishable under Section 304-A I.P.C. as held by the Apex Court in **State of Punjab Vs. Balwinder Singh and others**¹⁴ wherein it was held that it is settled law that sentencing must have a policy of correction. If anyone has to become good driver, must have a better training in traffic laws and moral responsibility with special reference to potential injury to human life and limb. Punishment must commensurate with gravity of offence.

By applying the principles laid down in the above decisions, I hold that the sentence of imprisonment passed by the trial court cannot be reduced to the sentence already undergone by the accused if any or to reduce to any extent.

In any view of the matter, the request of the counsel for the revision petitioner is to apply Probation of Offenders Act is not acceptable in view of the principle laid down in **Balvir Singh Vs. State of Haryana**¹⁵ wherein it was held that the provisions of Probation of Offenders Act cannot be applied to the accused in offence punishable under Section 304-A of I.P.C.

In view of the facts and circumstances of the case, I am unable to accept the request of the counsel for the accused to apply the provisions of Probation of Offenders Act and to let off the

¹⁴ AIR 2012 SC page 861

¹⁵ AIR 2000 SC page 1667

accused with fine, since the law laid down by the Apex Court is totally against taking lenient view. On the other hand, the Apex Court in AIR 2002 SC page 1629 directed the trial court to take stringent view in punishing the accused in an offence punishable under Section 304-A of I.P.C.

In view of the law declared by the courts referred supra, I am afraid to take a lenient view and apply the provisions of the Probation of Offenders Act or extend benefit under Section 360 Cr.P.C. to reduce the sentence to any extent accepting the contention of the petitioner that he is going to perform the marriage of his daughter which is supported by marriage invitation card.

However, the revision petitioner is at liberty to apply for parole before the competent authorities on the ground he has to perform the marriage of his daughter.

Granting the above liberty, the criminal revision case is dismissed.

Miscellaneous petitions, if any, pending in this criminal revision case shall stand closed.

M.SATYANARAYANA MURTHY, J

16.08.2017
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