HIGH COURT OF TRIPURA
AGARTALA

Crl. Rev. P No. 51 of 2016

Shri Amar Krishna Malsom
son of Shri Gour Hari Malsom
Village: East Jumerdepha
P.S.:Melaghar
Sub-division: Sonamura
District : Sepahijala

……Petitioner(s)

Versus

The State of Tripura.

……..Respondent(s)

For the Petitioner(s) : Mr. Mr.S.Das, Adv.
: Mr. S.Chakraborty, Adv.

For the Respondent(s) : Mr. R. Datta, PP

Date of hearing : 09.10.2020

Date of delivery of
Judgment & order : 17.11.2020

Whether fit for reporting :

Yes	No
	✓

B E F O R E

HON'BLE MR. JUSTICE S.G.CHATTOPADHYAY

Judgment & Order

[**1**] This Criminal Revision Petition is directed against the judgment dated 15.11.2014 delivered by the learned Sessions Judge of Gomati Judicial District at Udaipur in Criminal Appeal No.31(3) of 2014 whereby he upheld the

conviction of the accused petitioner under Sections 279, 337 and 304A IPC and affirmed the sentences under Sections 337 and 304A IPC while setting aside the separate sentence under Section 279 IPC awarded by the learned Chief Judicial Magistrate by his judgment and order dated 16.06.2014 passed in case No. GR 309 of 2010.

[**2**] The prosecution story, briefly stated, is that first informant Smt Motak Manti Malsom along with her husband Prasad Haw Malsom was returning home from Aatharabhola in an auto rickshaw bearing registration number TR-01-C-4235 on 18.06.2010 at about 3 p.m. As a result of the rash and negligent driving of the accused petitioner, the vehicle capsized on the way at a place called Laxmanpara and in consequence all the passengers of the vehicle including the first informant and her husband were seriously injured and they were taken to the local hospital where her husband died. The offending vehicle at time of occurrence was carrying 6 passengers besides the driver. Smt. Motak Manti Malsom lodged written FIR with the Officer–in-charge of the jurisdictional police station at about 10.35 p.m. on the same day.

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[**3**] Based on her FIR, Killa Police Station case No. 17 of 2010 under Sections 279,338 and 304A, IPC was registered and the case was taken up for investigation.

[**4**] Shri Jaharlal Debbarma, Sub-Inspector of police carried out the whole investigation of the case and having completed investigation he submitted challan number 26 of 2011 dated 31.07.2011 against accused petitioner Amar Krishna Malsom for committing offence punishable under Sections 279, 337 and 304A IPC.

[**5**] The learned Chief Judicial Magistrate of South Tripura Judicial District at Udaipur (as it was then) took cognizance of offence punishable under Sections 279, 337 and 304A IPC against the accused. At the commencement of trial, the accused denied the charges and claimed a trial. The trial proceeded. During trial, oral evidence of as many as 10 prosecution witnesses was recorded and 08 documents (Exbt.1 to Exbt.8) were exhibited on behalf of the prosecution. The statement of the accused under Section 313 Cr.P.C. was thereafter recorded by the learned trial judge. In reply, the accused simply abjured his guilt and claimed that the charges were foisted on him. He, however, declined to adduce any evidence on his defence.

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[**6**] Having appreciated the evidence, the learned trial court found that the accused petitioner was driving the offending vehicle at the time of occurrence and the accident occurred due to his rash and negligent driving as a result of which life of a passenger was lost. Therefore, the learned trial court held the accused petitioner guilty and sentenced him as follows:

> **"Considering the nature and gravity of offence as well as the facts and circumstances of the case, I do hereby sentence the convict namely, Amar Krishna Malsom under Section 279 IPC to pay fine of Rs.1000/- in default to suffer SI for one month and also under Section 337 IPC to pay fine of Rs. 500/- in default to suffer further period of SI for one month and also under Section 304A IPC to suffer SI for a period of six months. In this way, I think the purpose of justice would suffice."**

[**7**] In appeal, the learned Sessions Judge of Gomati Judicial District arrived at the conclusion that the judgment of the trial court was supported by sufficient evidence which warranted no interference. Though the learned Sessions Judge upheld the conviction of the accused petitioner under Sections 279, 337 and 304A IPC, he found that no separate sentence was necessary under Section 279 IPC and accordingly modified the sentence as under:

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"7.....From the analysis of the evidence it is also found that the convict appellant driver drove the vehicle in the turning with high speed and invited the accident. A man of prudent shall not drove the vehicle in a turning with high speed. Failure to act prudently is definitely a negligence and due to such negligent act the accident occurred and a person died and other suffered injury.

On factual analysis and legal analysis, it is found that the conviction and sentence passed by Learned Chief Judicial Magistrate is warranted by facts and law and deserves no interference. But in passing the sentence, Learned Chief Judicial Magistrate passed separate sentence for each offence under Sections 279/337/304-A of IPC.304-A is the major offence which covers rash and negligent driving causing death. So, separate sentence under Section 279 of IPC should not be awarded when the sentence is given under Section 304-A of IPC. On analysis of the evidence on record it is found that the appellant committed the offence under Section 279/337/304-A of IPC but sentence is to be given under Section 304-A and 337 of IPC not under Section 279 of IPC.

Therefore, point No.1 is decided accordingly.

FINDINGS AND DECISION AND REASONS FOR DECISION ON POINT NO.2.

8. From the appreciation and analysis of the evidence on record it is found that the conviction and sentence passed by the Court of Learned Chief Judicial Magistrate is supported by sufficient evidence and it deserves no interference. However, in the matter of sentence it is interfered and sentence given under Section 279 of IPC separately is set aside.

The conviction and sentence passed under Section 304-A and 337 of IPC is upheld. Therefore, the appeal has no merit.

9. In view of my above findings over the two points, the appeal is disallowed. The conviction and sentence passed by Learned Chief Judicial Magistrate, South Tripura, Udaipur (now Gomati District) under Section 279 of IPC is hereby set aside but the conviction and sentence passed under Section 304-A and 337 of IPC is upheld. Convict appellant, Amar Krishna Malsom is to surrender before the court below to undergo the sentence."

The said judgment dated 15.11.2014 is under challenge in this Criminal Revision Petition.

[**8**] I have heard Mr.Samar Das, learned counsel appearing for the petitioner as well as Mr.R.Datta, learned PP representing the state respondent.

[**9**] It is argued by Mr.Das, learned counsel for the accused petitioner that proof of rash and negligent driving is a sine qua non for establishing charge under Section 304A IPC against a driver and in absence of such proof conviction under Section 304A IPC is completely erroneous. According to Mr.Das, learned counsel of the accused petitioner, other than the allegation of high speed, there is no other proof of rashness and negligence against the accused petitioner. It is contended by learned counsel that mere allegation that the vehicle was driven

in high speed will itself not amount to offence under Section 304A IPC. In support of his contention Mr.Das, learned counsel, has referred to the decision dated 28.06.2016 of the Himachal Pradesh High Court in ***case no. Crl.Rev.P.No.69 of 2008*** in ***Bir Singh Vs. State of Himachal Pradesh*** and the decision of this High Court in ***Bacchu Miah vs. state of Tripura*** reported in ***(2013) 2 TLR 934***. Further contention on behalf of the accused petitioner is that without the material details of the accident, particularly, as to how the accident took place, what was the road condition, whether there was any mechanical defect or not in the offending vehicle, an inference of guilt based on res ipsa loquitur cannot be drawn against the accused driver. Having relied on the decision of this High Court in ***Santosh Chandra Shil vs. State of Tripura*** reported in ***(2017) 2 TLR 80***, Mr. Das, learned counsel has submitted that negligence for the purpose of Section 304A IPC requires criminal rashness which consists of an act of recklessness or indifference to the consequences which, according to Mr. Das, is absent in this case. Mr. S. Das, learned counsel of the accused petitioner, has also contended that the identity of the accused petitioner as the driver of the offending vehicle has not been established and as such his conviction and

sentence is erroneous and liable to be set aside. Finally, it is argued by learned counsel that the judgments of the courts below being erroneous should be set aside and the revision petition should be allowed.

[**10**] Mr.Ratan Datta, learned Public Prosecutor appearing for the state respondent on the other hand argues that unless it is shown that the concurrent findings of the courts below are perverse or wholly unreasonable, the decisions do not call for any interference in revision. It is submitted by Mr.Datta, learned PP that evidently the offending vehicle was carrying passengers beyond its capacity as a result of which the driver lost control over his vehicle and caused the accident which resulted in the death of one of its passengers. It is also argued by Mr.Datta that accident cases causing loss of life are increasing alarmingly and conviction and appropriate sentence of the erring drivers may reduce such occurrence to some extent. Learned PP, therefore, urges the court to uphold the judgments of the courts below and dismiss the petition.

[**11**] During the course of arguments, learned counsel of the parties have taken this court to the evidence on record. The statement of PW-1 is very relevant because as a passenger of the offending vehicle she is an eye

witness and she reported the matter to police by lodging the FIR. According to her, the vehicle was in high speed which lost its control on the way and capsized. Though she could not recollect the number of the vehicle in the witness box, she identified the driver in the court room who drove the offending vehicle at the time of occurrence.

During her cross examination, it was suggested to her on behalf of the accused that she was not travelling in the offending vehicle at the time of accident along with her husband. The PW denied the suggestion. Further suggestion was put to her that at the time of the accident the driver was very careful who drove his vehicle slowly. The PW also denied the suggestion.

[**12**] PW-2, Prabir Bhakta Malsom was another passenger of the offending vehicle who also attributed rashness and negligence to the accused petitioner in driving the vehicle. He categorically stated that the accident occurred after they crossed Laxmanpara and it happened due to the negligent driving of the accused driver.

In his cross examination, it was suggested to him that he did not travel in the vehicle of the accused which was denied by the PW.

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[**13**] The statement of PW-3 does not have any relevance in as much as he was not present at the place of occurrence and he could not say how the accident took place.

[**14**] PW-4, Bikarna Malsom was another passenger of the vehicle who received injury from the accident. He also stated that the accident occurred as a result of the high speed after the vehicle crossed Laxmanpara. About the identity of the driver, the PW stated that the driver was known to him who drove the vehicle at the time of occurrence.

In his cross examination it was suggested to the PW that he was not travelling in the auto rickshaw of the accused and the vehicle which met with the accident was not driven by the accused. The PW denied those suggestions.

[**15**] PW-5, was another passenger of the offending vehicle. He categorically stated that the accident occurred in a turning on the road where the vehicle capsized as a result of high speed. His cross examination was declined.

[**16**] The statement of PW-6, as well as the statement of PW-7 are not relevant in as much as they did not see the accident and could not say anything about the accident.

Similarly, PW-8 is an official witness who received the written FIR at Killa Police Station as the Officer–in-charge of the said police station and registered the case based on the FIR.

[**17**] PW-9 is a medical officer who was posted at Atharabhola PHC at the relevant time where he attended the injured passengers namely Basana Chandra Malsom [PW-5] and Smt. Gonai Manti Malsom [PW-6] who were brought to the health centre with a history of road traffic accident.

[**18**] PW-10 is the Investigating Officer who in the course of his investigation collected the injury reports of the passengers of the offending vehicle and the PM examination report of the passenger who died in the accident and on the basis of the statement of the injured passengers he submitted charge sheet against the accused.

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In his cross examination, it was suggested to him that his investigation was perfunctory which was denied by the PW.

[**19**] The question which falls for consideration is whether in the given facts and circumstances of the case, the concurrent findings of the courts below call for any

interference in the instant revision petition. On a number of occasions, the Apex Court has examined the issue with regard to the revisional jurisdiction of the High Court. In this regard, the Apex Court in ***State of Kerala vs. Puttumana Illath Jathavedan Namboodiri*** reported in ***(1999) 2 SCC 452*** has held as follows:

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"5……In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of Supervisory Jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an Appellate Court nor can it be treated even as a second Appellate Jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tentamount to gross miscarriage of justice. On scrutinizing the impugned Judgment of the High Court from the aforesaid stand point, we have no hesitation to come to the conclusion that the High Court exceeded its jurisdiction in interfering with the conviction of the respondent by re-appreciating the oral evidence……"

[**20**] Similarly, in State of ***Maharashtra vs. Jagmohan Singh Kuldip Singh Anand and Ors.*** reported in ***(2004) 7***

SCC 659 the Apex Court held that *the provisions contained in Section 395 to Section 401 Cr.P.C., read together, do not indicate that the revisional power of the High Court can be exercised as a second appellate power*(vide paragraph 22).

[**21**] In ***Sanjay Sinh Ramrao Chavan vs. Dattatray Gulabrao Phalke*** reported in ***(2015) 3 SCC 123*** it has also been laid down by the Apex Court that revisional power under Section 397 to 401 Cr.P.C. is not to be equated with that of an appeal. Observation of the court in this regard is as under:

> ***"14.....Unless the order passed by the Magistrate is perverse or the view taken by the court is wholly unreasonable or there is non- consideration of any relevant material or there is palpable misreading of records, the revisional court is not justified in setting aside the order, merely because another view is possible. The revisional court is not meant to act as an appellate court. The whole purpose of the revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal jurisprudence. Revisional power of the court under Sections 397 to 401 of Cr.PC is not to be equated with that of an appeal. Unless the finding of the court, whose decision is sought to be revised, is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously, the courts may***

not interfere with decision in exercise of their revisional jurisdiction."

[**22**] In the instant case it has been argued by Mr.S.Das, learned counsel appearing for the petitioner that the trial court erroneously convicted the accused petitioner which was affirmed by the appellate court without any proof of rash and negligent driving. According to learned counsel mere allegation that the vehicle was driven in high speed will itself not amount to offence under Section 304A IPC. In the case of ***Bir Singh***(supra) which has been referred to and relied upon by learned counsel in support of his contention, Himachal Pradesh High Court found that apart from the bare statement of only one witness that the vehicle was being driven by the accused petitioner in high speed there was no other proof of rash and negligent driving against him and it was held by the High Court that "high speed" is an expression which is relative and subjective and therefore, merely because of the vehicle being driven at a high speed does not mean that the driver was driving rashly and negligently (vide para.18). On the same issue, learned counsel of the petitioner has also relied on the decision of this High Court in the case of ***Bacchu Miah*** (supra) wherein this High Court held that merely from high speed, rashness and negligence cannot

be ascertained and there must be other cogent evidence of rash and negligent driving.

[**23**] In the instant case, PW-1 who was a passenger of the vehicle categorically stated that the vehicle lost control as a result of its high speed and capsized on the road which was supported by PW-2, another passenger who stated that the vehicle capsized because of rash driving. PW-4, another passenger gave similar statement and stated that the accident occurred as a result of high speed. PW-5 was also a passenger in the offending vehicle who stated that accident actually occurred at a turning on the road when the vehicle capsized due to high speed. It is also evident that the offending vehicle was carrying passengers more than the capacity of the vehicle. Apart from the first informant [PW-1] and her deceased husband, PW-2 Prabir Bhakta Malsom, PW-4 Bikarna Malsom and PW-5 Basana Chandra Malsom were also travelling in the vehicle. Obviously, thus, the vehicle was carrying 5 passengers other than the driver beyond the permitted capacity of the vehicle which clearly amounted to negligence on the part of the driver of the vehicle because as a driver he could foresee that by carrying passengers beyond the permitted capacity of the vehicle he could meet with an accident resulting in

injuries to its passengers and he did not take any care to avoid such consequence. In the case of ***Santosh Shil***(supra)this High Court observed that criminal negligence is gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally, or to an individual in particular having regard to all the circumstances. In the instant case, apart from the proof that the accused petitioner was driving his vehicle in high speed, it is also proved against him that he was carrying passengers far beyond the capacity of his vehicle as a result of which the accused petitioner lost control over his vehicle and the vehicle capsized at a turning of the road causing the death of one of its passengers and fatal injuries to other passengers. The tests laid down in the case of ***Santosh Shil*** (supra) with regard to negligence for the purpose of Section 304A IPC are fulfilled in the case.

[**24**] With regard to negligence and rashness in terms of Section 304A IPC, the Apex Court in ***Naresh Giri Vs. State of M.P.*** reported in ***(2008) 1 SCC 791*** has held as follows:

> ***"8..... Negligence and rashness to be punishable in terms of Section 304-A must be attributable to a state of mind wherein the criminality arises because of no error in judgment but of a deliberation in the mind risking the crime as well as the life of the person who may lose his life as a result of the crime. Section 304-***

A discloses that criminality may be that apart from any mens rea, there may be no motive or intention still a person may venture or practice such rashness or negligence which may cause the death of other. The death so caused is not the determining factor.

9. What constitutes negligence has been analysed in Halsbury's Laws of England (4th Edition) Volume 34 paragraph 1 (para 3) as follows:

"Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence, where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen to be likely to cause physical injury to persons or property. The degree of care required in the particular case depends on the surrounding circumstances, and may vary according to the amount of the risk to be encountered and to the magnitude of the prospective injury. The duty of care is owed only to those persons who are in the area of foreseeable danger, the fact that the act of the defendant violated his duty of care to a third person does not enable the plaintiff who is also injured by the same act to claim unless he is also within the area of foreseeable danger. The same act or omission may accordingly in some circumstances involve liability as being negligent although in other circumstances it will not do so. The material considerations are the absence of care which is on the part of the defendant owed to the plaintiff in the circumstances of the case and damage suffered by the plaintiff, together with a demonstrable relation of cause and effect between the two".”

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[**25**] From what is discussed above, it has surfaced that the accused petitioner was absolutely heedless of the possible fatal consequence of his act and apparently the accident occurred as a result of his recklessness. In view of the evidence available on record and the law laid down in the various decisions cited above, this court is of the considered view that the impugned judgment and order dated 15.11.2014 passed by the learned Sessions Judge, Gomati Judicial District at Udaipur in case No. Crl. Appeal No.31(3) of 2014 does not call for any interference.

[**26**] Resultantly, the Criminal Revision Petition stands dismissed. The accused petitioner is directed to surrender in the court of learned Chief Judicial Magistrate at Udaipur within a period of one month to suffer the sentence in terms of the said judgment and order of learned Sessions Judge failing which appropriate steps in accordance with law shall be taken by the learned trial court to let him suffer the sentence.

Send back the L.C. Record along with a copy of the judgment forthwith.

JUDGE

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