

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1148 OF 2004

The State of Maharashtra)....Appellant
(Org.Complainant)

V/s.

Shaikh Jabbarlal Mohamad)
Age : Adult, R/at Vetalnagar, Chinchwad,)
Pune.)....Respondent

Ms.Anamika Malhotra APP for appellant.
Mr.Saif Dingankar amicus curiae present.

CORAM : K.R.SHRIRAM,J
DATE : 5.3.2020

ORAL JUDGMENT :-

1. This is an appeal impugning an order and judgment dated 22.4.2004 passed by the Judicial Magistrate First Class, A.C Linked Court, Pune, acquitting respondent (accused) of offences punishable under sections 304-A (*Causing death by negligence*), 279 (*Rash driving or riding on a public way*), 338 (*Causing grievous hurt by act endangering life or personal safety of others*), 427 (*Mischief causing damage to the amount of fifty rupees*) of the Indian Penal Code (IPC) and 78/112, 89(A), 116 of the Motor Vehicle Act (MV Act).

2. The 3 witnesses Atul Arvind Bhalerao (PW-1), Niraj Prabhakar Kulkarni (PW-2), Vaibhav Raghunath Modak (PW-3) and one Avadhoot Wagh on 8.10.1987 at about 00.30 hr. were riding on 2 two-wheelers. One two wheeler was being driven by PW-2 and PW-1 was his pillion rider and PW-3 was riding the second two wheeler and Avadhoot was his pillion rider. When they reached at Balgandharv Rang Mandir chowk, a bus bearing registration No.MHJ 3375 driven by accused allegedly in negligent manner, dashed against the bike driven by PW-3, resulting in PW-3 and Avadhoot suffering serious injuries. A day later i.e., 9.10.1987 Avadhoot succumbed to the injuries. The two wheelers were proceeding on Ghole road towards Balgandharv chowk and the bus was coming down Jangli Maharaj road towards the chowk. The bus was to the left of the two wheelers and both were perpendicular to the other.

3. As nobody was appearing for the accused, this court by an order dated 25.2.2020 appointed Mr.Saif Dingankar as Amicus Curiae. I must express my appreciation for the assistance rendered and endeavour put forth by Mr.Dingankar, learned Amicus Curiae.

4. Mr.Dingankar submitted a snapshot from Google map indicating the direction in which accused was travelling and the direction in which the prosecution witnesses, i.e., motorcyclists were travelling. The same is taken on record and marked 'X' for identification. Learned APP agrees with the marking on the map.

5. I have considered the impugned order, the evidence as well as heard the learned APP and Amicus Curiae. The trial Court's finding cannot be faulted with. It has come in the evidence that the motorcyclists i.e., PW-2 and PW-3 who were riding 2 two-wheelers with PW-1 and Avadhoot, respectively, as pillion riders, ought to have stopped in the intersection at the chowk, whereas only PW-1 stopped the motor cycle in the chowk, but PW-3 did not and went ahead resulting in the collision with the bus. The fact that the said bus was involved in the collision or accused was driving the bus is not disputed and the fact that Avadhoot succumbed to the injuries suffered in the accident is not seriously disputed.

6. It has also come on record that the Jangli Maharaj road on which the bus was coming was a main road and Ghole road on which the 2 motorcyclists were coming was a bye-lane. The Court has rightly come to the conclusion that PW-3 ought to have stopped the motor

cycle and checked before proceeding to the chowk as was done by PW-2. Moreover, there is no evidence that has come on record to note at what speed accused was driving the bus. Whether a vehicle was being driven rash and negligently is subjective and varies from case to case. There are no photographs also placed of the spot apart from the evidence of PW-1, PW-2 & PW-3. There is no eye witness to the incident. Except making a bald statement that accused was speeding the bus in rash and negligent manner, there is nothing else in the complaint or the evidence. In my view, that will not prove the guilt of accused. Prosecution has to place on record evidence to show the speed of the vehicle and the manner in which it was being driven to show rashness and negligent on the part of accused especially when accused was approaching the chowk. Paragraph nos.7 & 8 of **Vinod Kumar Vs. State**¹ relied upon by Mr.Dingankar reads as under :-

“7. No evidence or any other material was placed on record by the prosecution to show the manner in which the petitioner was driving the said vehicle to prove the rashness and negligence of the petitioner. No photographs of the spot or the bus have been taken. PW 10 the alleged eye witness to the incident has also not deposed anything in regard to the accident or manner in which the vehicle was being driven by the petitioner, except making a bald statement that the driver of the bus was driving the bus in a rash and negligent manner which does not prove the guilt of the petitioner. There is no evidence placed on record to show the speed of the vehicle or the manner in which it was being driven to show rashness and negligence on the part of the petitioner, especially when the area was a crowded one.

1 2011 SCC OnLine Del 4347

8. *The essential ingredients to constitute an offence punishable under section 279 IPC are that there must be rash and negligent driving or riding on a public way and the act must be so as to endanger human life or be likely to cause hurt or injury to any person. For an offence under section 304A, the act of accused must be rash and negligent, which should be responsible for the death which does not amount to culpable homicide. The prosecution in the present case has failed to prove how the act of the petitioner was rash or negligent to bring the same under the purview of Sections 279/304A IPC.”*

Mr.Dingankar also placed on record an unreported judgment of a single Judge of this Court (Nagpur bench) in ***Syed Mumtaz Syed Moosa Vs. The Divisional Controller***² to submit that mere fast speed would not necessarily amount to rash and negligent driving. Paragraph-13 of the said judgment reads as under :-

“13. After examining the inquiry report, I find that the conclusions as recorded by the Inquiry Officer are not based on evidence. The findings recorded by the Inquiry Officer that the petitioner was driving the State Transport bus rashly and negligently and at a high speed without maintaining sufficient distance with the matador is based on the assumptions. While finding out the guilt of the delinquent, it is permissible for the Inquiry Officer to examine preponderance of probabilities, however, it does not mean that the inquiry Officer can give his findings as per his assumptions without there being objective consideration of the facts on the record. The inquiry Officer has not endeavoured to examine whether the driver of the matador had licence at the relevant time. The Inquiry Officer has not endeavoured to examine as to how many passengers were travelling in the matador. In my view, these facts were required to be considered by the Inquiry Officer as it has come on the record that the passengers were hanging outside the matador and three passengers died and 17 suffered injuries which shows that large number of passengers were travelling in the bus. The case of the petitioner is that the

2 Writ Petition No.497 of 2010 dated 28.10.2014 (Nagpur Bench)

matador stopped at the Kolambi Phata to enable the passengers to alight from the matador. It was necessary for the Inquiry Officer to bring on record the situation of the bus and the matador at the time of accident and to record the finding that there was no mistake on the part of the driver of the matador. The Inquiry Officer got swayed by the result of the accident without examining the cause of the accident.

The Enquiry Officer has emphasised too much on the point that the petitioner was driving the bus at a high speed, without maintaining sufficient distance between the bus and the matador. According to the Enquiry Officer this amounted to rash and negligent driving by the petitioner. Apart from the fact that there is no material on the record to show that the petitioner was driving the bus at a high speed or without maintaining sufficient between bus and the matador, it cannot be said that only because the bus is driven at a high speed it amounts to rash and negligent driving. The Hon'ble Supreme Court in the judgment given in the case of Ravi Kapur Vs. State of Rajasthan reported in MANU/SC/0659/2012 : AIR 2012 SC 2986 has recorded as follows:-

10 "In order to examine the merit or otherwise of contentions (b) and (c) raised on behalf of the appellant, it is necessary for the Court to first and foremost examine (a) what is rash and negligent driving; and (b) whether it can be gathered from the attendant circumstances. Rash and negligent driving has to be examined in light of the facts and circumstances of a given case. It is a fact incapable of being construed or seen in isolation. It must be examined in light of the attendant circumstances. A person who drives a vehicle on the road is liable to be held responsible for the act as well as for the result. It may not be always possible to determine with reference to the speed of a vehicle whether a person was driving rashly and negligently. Both these acts presuppose an abnormal conduct. Even when one is driving a vehicle at a slow speed but recklessly and negligently, it would amount to 'rash and negligent driving' within the meaning of the language of Section 279 IPC. That is why the legislature in its wisdom has used the words 'manner so rash or negligent as to endanger human life'. The

preliminary conditions, thus, are that (a) it is the manner in which the vehicle is driven; (b) it be driven either rashly or negligently; and (c) such rash or negligent driving should be such as to endanger human life. Once these ingredients are satisfied, the penalty contemplated under Section 279 IPC is attracted.

(11) 'Negligence' means omission to do something which a reasonable and prudent person guided by the considerations which ordinarily regulate human affairs would do or doing something which a prudent and reasonable person guided by similar considerations would not do. Negligence is not an absolute term but is a relative one; it is rather a comparative term. It is difficult to state with precision any mathematically exact formula by which negligence or lack of it can be infallibly measured in a given case. Whether there exists negligence per se or the course of conduct amounts to negligence will normally depend upon the attending and surrounding facts and circumstances which have to be taken into consideration by the Court. In a given case, even not doing what one was ought to do can constitute negligence.

(12) The Court has to adopt another parameter, i.e., 'reasonable care' in determining the question of negligence or contributory negligence. The doctrine of reasonable care imposes an obligation or a duty upon a person (for example a driver) to care for the pedestrian on the road and this duty attains a higher degree when the pedestrian happen to be children of tender years. It is axiomatic to say that while driving a vehicle on a public way, there is an implicit duty cast on the drivers to see that their driving does not endanger the life of the right users of the road, may be either vehicular users or pedestrians. They are expected to take sufficient care to avoid danger to others.

(13) The other principle that is pressed in aid by the courts in such cases is the doctrine of res ipsa loquitur. This doctrine serves two purposes one that an accident may be its nature be more consistent with its being caused by

negligence for which the opposite party is responsible than by any other causes and that in such a case the mere fact of the accident is prima facie evidence of such negligence. Secondly, it is to avoid hardship in cases where the claimant is able to prove the accident but cannot prove how the accident occurred. The Courts have also applied the principle of res ipsa loquitur in cases where no direct evidence was brought on record. The Act itself contains a provision which concerns with the consequences of driving dangerously alike the provision in the IPC that the vehicle is driving in a manner dangerous to public life. Where a person does such an offence he punished as per the provisions of Section 184 of the Act. The Courts have also taken the concept of 'culpable rashness' and 'culpable negligence' into consideration in cases of road accidents. 'Culpable rashness' is acting with the consciousness that mischievous and illegal consequences may follow but with the hope that they will not and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite consciousness (luxuria). 'Culpable negligence' is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him and that if he had, he would have had the consciousness. The imputability arises from the neglect of civic duty of circumspection. In such a case the mere fact of accident is prima facie evidence of such negligence. This maxim suggests that on the circumstances of a given case the res speaks and is eloquent because the facts stand unexplained, with the result that the natural and reasonable inference from the facts, not a conjectural inference, shows that the act is attributable to some person's negligent conduct. [Ref. Justice Rajesh Tandon's 'An Exhaustive Commentary on Motor Vehicles Act, 1988' (First Edition, 2010)].

This Court in the judgment given in the case of Paul Peter D'Mello Vs. State of Maharashtra reported in 1975 (1) LJSoft 217 has also observed that mere fast speed would unnecessarily amount to rash or negligent driving. The

relevant paragraph no.9 is reproduced as follows:-

"(9) Excepting this the prosecution has lead no other evidence to prove the evidence. The only part of the evidence of the said two witnesses that relates to the question of rash or negligent act is a solitary statement by Malhari that the taxi was in a fast speed at that time. In my view, this evidence by itself would not necessarily show that the accused was driving the tax either rashly or negligently. The said evidence does not throw any light on how the incident had taken place. There is no other evidence to indicate how the injured person had crossed the road at that time, whether he had crossed from front of the taxi or from its rear, whether the accused had put on the light, blow the horn, etc. which would have been necessary, to find out whether the accused had driven the taxi rashly or negligently. If the injured person had been examined he would have been able to shed light on this. Mere fast speed would not unnecessarily amount to rash or negligent driving. (emphasis supplied). Even the evidence does not show the rate of speed at which the taxi was being driven by the accused. The fact that the accused had sped away cannot be relevant to show that accused was driving rashly or negligently. Medical evidence does not show that the injuries suffered by the injured person were due to any rash and negligent act. In my view, therefore, the evidence led by the prosecution fails to prove that the accused was guilty of rash or negligent act. The learned Magistrate was therefore, in error in holding the accused guilty of the charge under Section 279 or 338 of I.P.C."

7. The Apex Court in ***Chandrappa & Ors. V/s. State of Karnataka***³ in paragraph 42 has laid down the general principles regarding powers of the Appellate Court while dealing with an appeal

³ (2007) 4 SCC 415

against an order of acquittal. Paragraph 42 reads as under :

“42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

8. There is an acquittal and therefore, there is double presumption in favour of accused. Firstly, the presumption of innocence available to accused under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court which rightly observed that the prosecution had failed to prove its case. The order of the trial Court of acquittal, in my view, need not be interfered with.

9. Appeal dismissed.

10. High Court Legal Services Committee to award fees of the learned Amicus Curiae fixed at Rs.10,000/-.

(K.R.SHRIRAM,J)