



BAIL SLIP

The Accused Viz., Anil Kumar, S/o.Madhavan Kutty, was directed to be enlarged on bail, vide order dated 09/07/2015, made in CRL.M.P.No.1 of 2015 in CRL.R.C.No.649 of 2015 on the file of this Honourable Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.10.2021

CORAM

THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

CRL.R.C.NO.649 OF 2015

Anil Kumar

... Petitioner/Appellant/
Accused

.Vs.

State Rep. by
The Inspector of Police,
Nagoor Police Station,
Nagapattinam District.
(Crime No.12 of 2010)

... Respondent/Respondent/
Complainant

PRAYER:-

Criminal Original Petition filed under Section 397 read with 401 Cr.P.C., to set aside the conviction and sentence made in Crl.A.No.28 of 2012 dated 09.06.2014 on the file of the District and Sessions Judge, Nagapattinam, in confirming the Judgment made in C.C.No.256 of 2010 dated 25.06.2012 on filed of the Judicial Magistrate No.II (FAC), Nagappattinam and thus allow the criminal revision.

For Petitioner : Mr.Swami Subramaniam

For Respondent : Mr.E.Raj Thilak
Additional Public Prosecutor



ORDER

This Criminal Revision case has been filed under Section 397 read with 401 Cr.P.C., by the accused in C.C.No.256 of 2010 which was pending on the file of the learned Judicial Magistrate, Nagapattinam, wherein by Judgment dated 25.06.2012, the present petitioner, who was the sole accused was convicted for offence under Sections 279, 338 and 304(A) IPC and was sentenced to undergo one year simple imprisonment for two counts, under Section 304A IPC and separate sentence was not imposed under Section 279 IPC in view of Section 71 IPC and also to pay a fine of Rs.1,000/-, in default to undergo one month simple imprisonment for offence under Section 338 IPC.

2. The petitioner herein questioned that particular conviction and sentence and filed Crl.A.No. 28 of 2012 and the learned District and Sessions Judge, Nagapattinam, by Judgment dated 09.06.2014 had dismissed the Criminal Appeal and had confirmed both the conviction and sentence imposed by the learned Judicial Magistrate No.II, Nagapattinam. Aggrieved by the said Judgment, the petitioner, who is the accused, has filed the present Criminal Revision Case.

3. Heard arguments advanced by Mr.Swami Subramaniam, learned counsel for the petitioner and Mr.E.Raj Thilak, learned Additional Public Prosecutor appearing for the State.

4. On 04.01.2010 at around 22.45 hours, at the Nagore Main Road which admittedly is a National Highway, near Nice Hotel, it is the case of the prosecution that the accused had driven his lorry bearing Registration No.TN 67 B 2934 in a rash and negligent manner and hit against an auto bearing Registration No. TN 51 E 6690 which was coming in the opposite direction. Owing to the collusion, the driver of the auto died on the spot or rather was declared dead when brought to the hospital. The two passengers in the auto were treated for injuries and within a few days, one of the passengers also died. The other passenger, who survived had been examined as PW-1 in the trial.

5. In this connection, the respondent, namely, Inspector of Police, Nagoor Police Station, had registered a First Information Report in Crime No.12 of 2010 against the accused under Sections 279, 338 and 304-A IPC. After investigation of the offences, a final report had been filed before the learned Judicial Magistrate No.II, Nagapattinam, which had been taken cognizance as C.C.No. 256 of 2010.

6. After following due procedure, which included furnishing of copies under Section 207 of Cr.P.C., and framing of charges under the above Section which charges the petitioner/accused



abjured, the prosecution being invited to substantiate the charges. The prosecution examined PW-1 to PW-16 and also marked Exs. P-1 to P-13. On appreciation of the evidence as stated above, the learned Judicial Magistrate No.II, Nagapattinam, had thought it fit to convict the present petitioners for offence under Section 279, 338 and 304A IPC and sentenced him to undergo the imprisonment and to pay fine as aforesaid.

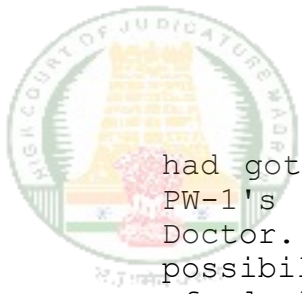
7. PW-1, who survived the accident and his friend, who died owing to the accident had both got into the auto bearing Registration No.TN 51 E 6690 at around 22.45 hours on 04.01.2010 at Nagapattinam to go to their place of residence at South Palpannaicherry. This particular auto was driven by Selvam @ Muruganandam, who was also a resident of that area.

8. It is the case of the prosecution that near Nice Hotel in Nagore Main road, the lorry bearing registration No. TN 67 B 2934, which according to PW-1 in his evidence was being driven at a very high speed came in the opposite direction and dashed against the auto. The driver of the auto and the friend of PW-1 both died. PW-1 also suffered injuries. To drive home the case, prosecution also examined. PW-2 and PW-3, who claimed to have either witnessed the accident or saw the accident immediately after it occurred since they were in that particular main road at that particular time and heard a loud noise.

9. The evidence on behalf of the prosecution with respect to the manner in which the accident occurred primarily rested on the evidence of PW-1, PW-2 and PW-3. Both the learned Judicial Magistrate No.II, Nagapattinam and the District and Sessions Judge, Nagapattinam, had accepted the versions offered by PW-1, PW-2 and PW-3 and had come to a conclusion that the lorry driven by the petitioner herein was driven in a rash and negligent manner and was the cause of the accident. It must also be incidentally pointed out that the Doctor, who treated PW-1 and who declared the other occupant, namely, friend of PW-1 dead, had also deposed before the Court and in the course of his evidence had stated that PW-1 had the smell of alcohol in his breath.

10. Mr.Swami Subramaniam, learned counsel for the petitioner herein, stated that the present revision petition has been filed questioning concurrent finding on facts, but however chose to interpret the facts as presented by the prosecution in a slightly different manner and stated that the manner in which it was appreciated by both the Courts below require re-visitation by this Court.

11. According to the learned counsel, all the three persons, namely, PW-1 and the two deceased were friends and they



had got into the auto and the learned counsel pointed out that PW-1's breath had the smell of alcohol, as stated by the PW-12 Doctor. It is therefore contended that there is every possibility of the others also having been under the influence of alcohol. The learned counsel also stated that PW-1, who was the direct eye witness for the accident had only stated during the course of his chief examination that the lorry was being driven in a high speed and the learned counsel pointed out that very significantly, the witness did not state that the lorry was being driven in a rash or negligent manner. The learned counsel stated that to attract the offences charged, there must be ingredients of rashness or recklessness attached to the act said to have been committed by the petitioner herein. The learned counsel stated that mere driving the lorry at high speed would not attract the offences of Section 279 and 338 IPC and therefore, urged that naturally there should be a re-visitation of the appreciation of the evidence also for the offence charged under Section 304A IPC. The learned counsel questioned the evidence of PW-2 and PW-3 and stated that it is highly improbable that they had witnessed the accident. As a matter of fact PW-3 had only state that he heard a loud noise and then saw the collusion between the two vehicles. The learned counsel very specifically pointed out that neither of the two witnesses had stated that the lorry was being driven in a rash and negligent manner. The learned counsel therefore urged that this Court should grant the benefit to the petitioner herein and should not hold that the lorry was being driven in rash and negligent manner in order to cause the accident which resulted in the death of a two persons. The learned counsel also stated PW-13 had pointed out that the road at that particular place was a narrow road and the learned counsel therefore stated that the cause of the accident cannot be imputed solely on the petitioner herein.

12. The learned counsel further argued that the road was narrow should be examined in conjunction with the evidence of PW-2 and PW-3, who did not state that the lorry was being driven in a rash and negligent manner. The evidence of PW-1 according to the learned counsel also supported this particular fact since he had stated that lorry was being driven only with high speed but did not state that it was driven in a rash or negligent manner. The learned counsel also pointed out that the motor vehicle inspector PW-6 had inspected the lorry after practically six days and therefore, urged that this Court should reject the report filed by PW-6. It had been finally urged by the learned counsel that the petitioner should be exonerated all the charges.

13. In this connection, the learned counsel also relied on the Judgment of the Hon'ble Supreme Court reported (1998) 8 SCC



493 [State of Karnataka Vs. Sathish] which Judgment had been subsequently followed by two learned Single Judges of this Court in CDJ 2016 MHC 6086 [M.Subramani Vs. State] and in 2017 SCC Online Mad 31608 [Madasamy Vs. State].

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14. In (1998) 8 SCC 493 [State of Karnataka Vs. Sathish], the Hon'ble Supreme Court had examined the terms negligent and rash driving and the onus of proof required to hold that the accused actually had driven the vehicle in a negligent and rash manner. The Hon'ble Supreme Court had held that mere driving at a high speed would not lead to an inference that there was negligence in driving or recklessness in driving. The Hon'ble Supreme Court also held that there should be specific evidence to establish both negligence and rashness in driving and also held that in the absence of such evidence, the only natural consequence was that the accused should be acquitted of all the charges relating to those offences. In this connection in paragraph 4, the Hon'ble Supreme Court had held as follows:-

"4. Merely because the truck was being driven at a "high speed" does not bespeak of either "negligence" or "rashness" by itself. None of the witnesses examined by the prosecution could give any indication, even approximately, as to what they meant by "high speed". "High speed" is a relative term. It was for the prosecution to bring on record material to establish as to what it meant by "high speed" in the facts and circumstances of the case. In a criminal trial, the burden of providing everything essential to the establishment of the charge against an accused always rests on the prosecution and there is a presumption of innocence in favour of the accused until the contrary is proved. Criminality is not to be presumed, subject of course to some statutory exceptions. There is no such statutory exception pleaded in the present case. In the absence of any material on the record, no presumption of "rashness" or "negligence" could be drawn by invoking the maxim "res ipsa loquitur". "

15. As stated the dictum laid down in the said Judgment had been followed by two learned Single Judges in the Judgments referred supra.

16. Mr.E.Raj Thilak, learned Additional Public Prosecutor on the other hand pointed out the narrow scope of a revision petition before this Court and stated that this Court cannot sit as an appellate Court over the manner of appreciation of the evidence and pointed out that there can be interference with



concurrent findings of fact only when those findings are based on no evidence or are extremely perverse to the extent that such a conclusion cannot be reached on the evidence available before the trial Court and with the First Appellate Court.

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17. The learned Additional Public Prosecutor pointed out evidence of PW-13, who in cross examination had stated that the road in which the accident took place, who was a National Highway. The learned Additional Public Prosecutor drew the attention of this Court to the mahazar prepared with respect to the place of accident and which had been marked as Ex.P-4 during the evidence of PW-2, where it is stated that the width of the road was nearly about 21 feet. The learned Additional Public Prosecutor also drew attention to the rough sketch prepared by the Investigating Officer with respect to the accident site and specifically pointed out that the accident had occurred at the National Highway where the road is very broad and therefore pointed out that the accident had occurred only owing to the manner in which the lorry was driven. It was also pointed out by the learned Additional Public Prosecutor that the right mudguard of the lorry had suffered damages which naturally meant that it was that portion which had dashed against the auto and also pointed out that the auto had suffered complete damage.

18. The learned Additional Public Prosecutor pointed out the provision under Section 304-A IPC wherein it is stated that both rash and negligent are not the ingredients that either being rash or being negligent, as a result of which if the act causes death, then the person, who acted in a rash or negligent manner would be held culpable under Section 304A IPC. It is the contention of the learned Additional Public Prosecutor that the provision used the conjunction 'or' and not the conjunction 'and'.

19. The learned Additional Public Prosecutor also referred to the evidence of PW-11, the Doctor who had conducted post-mortem over the body of the deceased Auto driver wherein, he had very clearly stated that the report of the forensic laboratory revealed that there was no alcohol within the body of the deceased auto driver. With respect to the observation of PW-12 that PW-1's breath had smell of alcohol, the learned Additional Public Prosecutor stated that he was not the driver of the auto. He and the other deceased person had only boarded the auto and it was only incidental that the auto driver belonged to the same place from where they also came from.

20. The learned Additional Public Prosecutor pointed out that the evidence of PW-1, PW-2 and PW-3 who all stated that the auto was driven in the left extreme side of the road and the lorry which came in the opposite side was driven a very high



speed and dashed against the auto causing damage to the right side of the lorry which naturally mean that the vehicle dragged towards the auto which according to the learned Additional Public Prosecutor was the effect of rash and negligent driving. The learned Additional Public Prosecutor therefore stated that there cannot be any interference of the well considered Judgments that both the learned Judicial Magistrate No.II, Nagapattinam and the District and Sessions Judge, Nagapattinam and urged that this Revision should be dismissed.

21. I have carefully considered the arguments advanced and also perused the records.

22. The facts are not in dispute. PW-1 and his friend had boarded an auto rickshaw bearing Registration No. TN 51 E 6690 in Nagore Main Road. When the auto neared Nice Hotel, the lorry driven by the petitioner herein came in a high speed on the opposite side. That the lorry was driven in a high speed had been spoken to by the witnesses and such evidence had been accepted by both the learned trial Judge and by the learned Sessions Judge. That as a fact cannot be now revisited by this Court. The lorry had also suffered damages on the right side corner. That is again a fact which is established by evidence on record. It dashed against the auto. The driver of the auto was declared dead when brought to the hospital. There is no evidence that he had consumed alcohol or was under the influence of any drug. This is evident from the evidence of PW-11, who conducted the post-mortem. Two passengers, namely, PW-1 and his friend, both suffered injuries. The friend died subsequently. The Doctor, who examined PW-1, stated that there was smell of alcohol in the breath PW-1. But this can never mean that the driver of the auto was also under influence and it cannot certainly be presumed that he was under influence in view of the forensic medical report which indicated that there was no alcohol within the body of the deceased driver.

23. The only issue now to be addressed is whether the lorry was driven in a rash or negligent manner.

24. The evidence on record show that it was certainly driven in a high speed.

25. Mr.Swami Subramaniam had relied on the Judgement of the Hon'ble Supreme Court in State of Karnataka Vs. Sathish referred supra which had been relied by two learned Single Judges in M.Subramani Vs. State referred supra and Madasamy Vs. State referred supra. The Hon'ble Supreme Court had very categorically stated that the evidence that the vehicle was driven in a high speed is not sufficient to hold that it was driven in a rash and negligent manner.



26. I have perused the three Judgments quite carefully. One distinct fact that stands out in the three Judgments is that in State of Karnataka Vs. Sathish referred supra by the Hon'ble Supreme Court, the accident took place at 8.30 a.m., when visibility through sunlight was a definite. The accident in M.Subramani Vs. State referred supra, had taken place at 7.00 a.m., when again visibility through sunlight is possible. The accident in Madasamy Vs. State referred, had taken place at 3.00 p.m., again when visibility through sunlight was definite.

27. In all those three cases, naturally any eye witness, quite apart from stating that the offending vehicle was being driven in a high speed could have also very easily stated that the vehicle was being driven in a rash or negligent manner, if it was so driven. Rashness or negligence in the driving of a vehicle would be evident from the manner in which the vehicle at least swerved from one end of the road to the other side and also in the manner in which the accident had taken place, namely, to cause complete damage to the vehicle which suffered in the accident.

28. In the instant case, the accident took place at 10.45 p.m., in the night. At that particular point of time, every vehicle would be running only with their headlights on. The only aspect which could be gauged with respect to a vehicle coming in the opposite direction is the high speed with which it approached the other vehicle. Only the blinking of the headlights can be seen. Nobody can gauge that the vehicle was being driven in a rash or negligent manner. Driving a vehicle at a high speed at the night hours under headlights itself is as an act of both negligence and rashness.

29. It is also to be noted that in this particular case, PW-1 and his friend were passengers in an auto rickshaw. From the passengers' seat in an auto rickshaw, the visibility of the road is very limited. Every auto is like a triangle, broader at the back, with two wheels and narrower in front with one wheel. The front windshield is also narrow and if the portion is covered by the driver, a passenger at the back cannot have any direct vision of a vehicle coming in the opposite direction particularly when it is a vehicle being driven under headlights. A passenger can never pin pointedly say whether the lorry which is coming in the opposite direction was being driven rashly or negligently. He can only say it was being driven at a very high speed. PW-1 spoke the truth in the witness box. The other two witnesses PW-2 and PW-3 stated that the auto which suffered the accident in which the two deceased also travelled, one as a driver and the other as the passenger was moving on the left side of the road. The road incidentally is, according to PW-13, a National Highway Road. That was stated by PW-13 not in chief



examination but when a question in that regard was put in cross examination. Therefore it is the accused who had invited such an answer from PW-13. That fact is clarified further in the mahazar which had been prepared and in the sketch prepared and presented before the trial court, that the road was quite a broad road of 21 feet. More than sufficient space was available for two vehicles to cross each other without causing an accident. When a lorry causes an accident to a very small vehicle like an auto rickshaw which would take up only a minute space in the road, then naturally it has to be held that the lorry was driven not only at high speed but also in a rash and reckless manner. The vehicle in which PW-1, and the two deceased travelled was not a large vehicle to take up the space of one half of the road in the opposite side. It was only because of the high speed in which the lorry was driven that the accused/driver was not able to control the lorry and therefore dashed against the opposite vehicle. Here the vehicle which suffered the accident was an auto rickshaw and it is common knowledge that the breadth of an auto is much much smaller than that of a small four wheeler vehicle. In the front, it is quite narrow. If a lorry were to dash against such a vehicle, the accident must have occurred only if the driver had been driving it in a high speed coupled with rashness, negligence and recklessness. Witness or a passenger can never speak about rash and negligent driving when the vehicles are being driven at high speed at night particularly when visibility is blurred by the driver owing to the small span of the windshield in an auto and owing to the headlights of the vehicles coming in the opposite side. Therefore that distinguishing fact in this case has to be considered in its proper perspective.

30. In the instant case, I would hold that the vital fact is different from the facts of the Judgments cited and the reasoning therein given would not be applicable to the facts of the present case. Owing to the fact that the accident occurred at night time when vehicles were driven with their headlights on.

31. Once this conclusion is reached, naturally, I cannot in a revision petition, interfere with the appreciation of evidence of either the trial Judge or the Appellate Judge unless it is shown that their evidence was not based on any evidence at all or that they had interpreted the evidence in an extremely perverse manner. That is not a ground taken in this case. An accident occurred. Two persons died. The consequence of causing that accident has to be faced by the accused.

32. In view of the above reasoning, I hold that it would be extremely inappropriate if on the basis of the above observations the Judgments complained in this revision are



interfered.

33. Therefore, I uphold the conviction of the revision petitioner herein.

34. With respect to the sentence imposed, it is seen that both the Courts have correctly applied Section 71 IPC and imposed a very minimum sentence of simple imprisonment alone for offence under Section 304A IPC for two counts and had imposed only fine for the offence under Section 338 IPC. The sentences are extremely reasonable considering the fact that two persons died in the accident. I uphold the sentences imposed.

35. I would place on record my appreciation to both the learned counsels Mr.Swami Subramaniam, who argued on behalf of the revision petitioner and Mr.E.Raj Thilak, learned Additional Public Prosecutor.

36. This Criminal Revision Petition is dismissed. Consequential steps to be taken by the Judicial Magistrate II, Nagapattinam, immediately on receipt of a copy of this Judgment.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

vsg

To

1. The Inspector of Police,
Nagoor Police Station,
Nagapattinam District.
2. The Judicial Magistrate No.II,
Nagapattinam.
3. The District and Sessions Court,
Nagapattinam.
4. The Public Prosecutor,
High Court, Madras.
5. The Superintendent,
Central Prison,
Cuddalore.



6. The Judicial Magistrate No.II,
(Fast Track Court),
Nagapattinam.

7. The Chief Judicial Magistrate,
Nagapattinam.

Copy To:

The Section Officer,
Criminal Section,
High Court, Madras.

CRL.R.C.NO.649 OF 2015

CP (CO)
PBS/02/11/2021