

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLREV No. 695 of 2007

An application under Section 401 read with Section 397 of the Code of Criminal Procedure, 1973.

AFR Baburam Majhi Petitioner

-Versus-

State of Odisha Opp. Party

Advocate(s) appeared in this case:-

For Petitioner : Mr. Sailesh Das, Advocate
(Amicus Curiae)

For Opp. Party : Mr. S.K. Mishra,
Addl. Standing Counsel

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT

20th June, 2022

SASHIKANTA MISHRA, J.

The petitioner in the present revision calls in question the correctness of the judgment dated 09.02.2007 passed by learned Sessions Judge, Koraput at Jeypore in Criminal Appeal No.84 of 2006, whereby,

the judgment of conviction and sentence passed by learned J.M.F.C., Kotpad in G.R. No. 120 of 1999 was confirmed. As per the said judgment, the trial Court held the petitioner guilty of the offence under Sections 279/337/304-A of IPC and sentenced him to undergo RI for six months and to pay a fine of Rs.500/-, in default, to undergo further R.I. for one month on each of the counts under Section 279/337 of IPC and to further undergo R.I. for two years and to pay a fine of Rs.1000/-, in default, to undergo R.I. for two months for the offence under Section 304-A of IPC.

2. The prosecution case, in brief, is that on 29.11.1999 at about 7.30 a.m. the petitioner was driving a Commander Jeep carrying 15 passengers, which capsized on the road leading from Potroguda to Miriguda near a pond known as Kenduguda. As a result, one Kamalu Samarath died and other occupants sustained bodily injuries. The matter being reported to police, Kotpad P.S. Case No.120/1999 was registered followed by investigation. On completion of

investigation, charge sheet was submitted against the petitioner under Sections 279/337/338/304-A of IPC.

3. The petitioner faced trial in the Court of learned J.M.F.C., Kotpad, during which 18 witnesses were examined along with other documentary evidence adduced by the prosecution. After going through the evidence on record, learned Court below held that there was no rashness on the part of the accused driver but he was negligent because despite the fact that the road condition was bad and there were rain-cuts in the road, the accused should have been more careful in driving the vehicle carrying 10-12 passengers. Learned Court below further applied the doctrine of *Res Ipsa Loquitur* to hold that the defence could not dislodge the prosecution allegation. It was however held that the offence under Section 338 was not proved, but the offence under Sections 279/337/304-A are clearly proved. As such, the petitioner was convicted for the aforementioned offences and sentenced as aforesaid.

4. The petitioner carried the matter in appeal to the Court of Sessions mainly contending that the

allegation of rash and negligent driving was not adequately proved. Learned Appellate Court perused the evidence on record and held that the MVI had ruled out the possibility of any mechanical failure of the vehicle and had also opined that the accident occurred due to rash and negligent driving of the accused. Since such evidence of the MVI had not been disputed, the same stood automatically corroborated. Learned Appellate Court further relied upon the doctrine of *Res Ipsa Loquitur* to hold that the driver had not adduced any evidence independently to show that in spite of care and caution on his part, the accident had occurred. It was further held that as the road condition was not good, care and caution was expected from the driver while driving the vehicle. On such reasoning, learned Appellate Court dismissed the appeal confirming thereby the judgment of conviction and sentence passed by the learned Court below.

Feeling further aggrieved, the petitioner has approached this Court in the present revision.

5. Heard Mr. Sailesh Das, learned Amicus Curiae for the petitioner and Mr.S.K. Mishra, learned Addl. Standing Counsel for the State.

6. Mr. S. Das assails the impugned judgment mainly on the ground that it was entirely improper for the courts below to rely on the MVI report ignoring the ocular evidence on record which does not in the least suggest rash or negligent driving by the accused driver. It is further contended by Mr. Das that the application of the doctrine of *Res Ipsa Loquitur* by shifting the burden to the petitioner is also untenable.

7. Per contra, Mr. S.K. Mishra in supporting the impugned judgments contends that the very fact that the vehicle was overloaded carrying 10 to 12 passengers by itself shows the negligence of the petitioner. Further, there is clear proof of death of one of the occupants because of the injuries sustained in the accident as also of the other occupants sustaining bodily injuries. The vehicle did not have any mechanical defect and therefore the only inference that is available to be drawn is that the vehicle was being driven in a rash and

negligent manner. The impugned judgments, according to Mr. Mishra, therefore do not warrant any interference.

8. A perusal of the case record shows that prosecution examined 18 witnesses, out of whom P.W.-4 to 12 and 14 were the occupants of the vehicle. A reading of the depositions of the said witnesses reveals that none of them has even whispered a word that the vehicle was being driven in high speed or dangerously or otherwise in a rash and negligent manner. It is also the consistent case of these witnesses that the vehicle had somersaulted near a pond, called Kenduguda. None of the witnesses has attempted to give a reason for such somersaulting of the vehicle. The MVI was examined as P.W.-16, who proved his report as Ext.-14. In the report marked as Ext.-14, it is stated that it was a morrum road and the road side was washed out at the spot and that due to rash driving and negligence of the driver, when the right-hand side wheel came over this washed out road, it slipped out and the vehicle dragged to the right side and capsized in the pond. Though the MVI

was not cross-examined yet fact remains that he has not stated in clear terms as to why he believed that the right-hand side wheel of the vehicle came over the wash-out road due to rash and negligent driving of the vehicle. So, as it appears from the evidence, the road in question is not a metal road but graveled (morrumb) with rain-cuts on it. As per the spot map prepared by the MVI, the road was 4 feet wide but at the relevant place, there was four rain-cuts due to which the width had reduced to 3.4 feet. There is no evidence whatsoever as to if any warning signal or sign regarding the existence of rain-cuts had been affixed at any place prior to the portion of the road having the rain-cuts. It is also not forthcoming from the evidence as to if the driver had knowledge of the presence of the rain-cuts on the road beforehand. This assumes all the more significance because none of the occupants, as already stated, has blamed the driver even remotely for the accident. So even if there was no mechanical failure of the vehicle, it does not mean that the only inference available to be drawn is that of rashness and negligence of the driver,

rather, it is also quite plausible that the accident could have occurred because of the bad condition of the road. A reading of the impugned judgments shows that both the courts below have overlooked the aforementioned clear evidence in the MVI's report as referred above.

9. The trial Court has held that though rashness is not proved but negligence is proved. 'Negligence' in ordinarily parlance means an omission to do something which a reasonable and prudent person would do or not do. So, in all cases where there is a latent defect in the road which was not within the knowledge of the concerned driver can it be said that the driver was guilty of negligence in driving the vehicle thereupon? In other words, whether the driver could have foreseen the happening of the accident in the instant case? It would obviously depend on his knowledge of the danger that lay ahead of him. If knowing that such a danger exists, he still chooses to drive the vehicle then obviously it can be treated as a negligent act. But in the absence of any evidence of forewarning signals being affixed on the road or to suggest that the driver had knowledge of the

condition of the road, it cannot be said that he was negligent. A similar view was taken by the Himachal Pradesh High Court in the case of ***Bhola Ram vs. State of Himachal Pradesh***, reported in AIR 1982 HP 11.

10. This Court in the case of ***New India Assurance Co. Ltd. vs. Ashok Kumar Acharya*** reported in 1994 (2) TAC 464: AIR 1994 Ori 220 held that:

“..... What constitutes negligence varies under different conditions, and in determining whether negligence exists in a particular case, or whether a mere act or course of conduct amounts to negligence, all the attending and surrounding facts and circumstances have to be taken into account. It is absence of case according to circumstances. To determine whether an act would be or would not be negligent, it is relevant to determine if any reasonable man would foresee that the act would cause damage or not. If the answer is in the affirmative, it is a negligent act.....”

11. From the trend of decisions rendered with regard to negligence, two tests are considered important to determine the liability, i.e., the test of probability and the test of foreseeability. In the former case, it is to be seen whether the driver could have foreseen the danger /possibility of accident the accident was a natural or necessary, or probable

consequence of the act of the accused. In the latter case, it is to be seen whether the accident was a reasonable and possible consequence of this act. In the instant case, as has already been discussed, there is no acceptable evidence that the vehicle was being driven in a rash or negligent manner. The MVI has merely 'opined so' but then he was a post-occurrence visitor to the spot of accident and therefore, his knowledge must be held to have been inferred from what he saw at the spot after the accident. Furthermore, the MVI himself has not given the basis for arriving at his opinion, which makes it all the more vulnerable. As regards the foreseeability aspect, there is no evidence to show that the rain-cuts on the road were clearly visible to the driver from a reasonable distance or that as a prudent human being he could have otherwise reasonably foreseen the danger that lay ahead of him on the road because of the absence of any sort of forewarning signals. It would rather stand to reason to suppose that in the absence of any such signals, the driver would consider the road traffic-worthy and therefore drive normally on it. Thus,

considered as a whole, the evidence would suggest that because of the cuts on the road caused by rain resulting in narrowing of the passage, the right-side wheel of the vehicle had come in contact with the said cuts causing slippage and loss of balance ultimately leading to capsizing of the vehicle. Both the Courts below seem to have mechanically accepted the version of the MVI as sacrosanct ignoring the other telltale evidence on record regarding the poor condition of the road at the spot of occurrence which, in all likelihood was the cause of the accident.

12. This Court is therefore, of the view that the impugned judgments cannot be sustained. In the result, the revision is allowed. The impugned judgment passed by learned J.M.F.C., Kotpad in G.R. No. 120 of 1999, which was confirmed by learned Sessions Judge, Koraput at Jeypore in Criminal Appeal No. 84 of 2006 is hereby set aside. The accused petitioner is acquitted of the charge under Sections 279/338/304-A of IPC. The accused being on bail, his bail bonds be discharged.

13. Before parting with the case, this Court deems it proper to place on record its appreciation for Mr. Sailesh Das, learned amicus curiae for ably assisting the Court. His professional fee is fixed at Rs.10,000/-.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 20th June, 2022/ A.K. Rana

