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IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.19 OF 2017

Sayyed Nadaf
S/o Shri. Jamalsab Nadaf, Aged 38 years,
R/o House No. 214/9, Muslimwada,
Bhoma, Ponda-Goa
Presently lodged at
Modern Central Jail,
Colvale Goa
Through his next friend and nephew,
Maqbul Patel
Age 29 years, driver,
House No. 214/9
Muslim waddo, Bhoma,
Ponda. ... Appellant.

Versus

STATE
Represented through the Public Prosecutor,
Panaji-Goa. ... Respondent.

Mr. S.D. Lotlikar, Senior Advocate with Ms. Sailee Kenny,
Advocate for the Appellant.

Mr. Gaurish Nagvenker, Additional Public Prosecutor for the
Respondent.

CORAM: BHARAT P. DESHPANDE, J.
RESERVED ON: 6 October, 2022
PRONOUNCED ON: 21 October, 2022

JUDGMENT:

By way of present appeal filed under Section 374 of Cr.PC.
Appellant/Accused is challenging the judgment and order dated
17.03.2017 / 23.03.2017 in Sessions Case No.54/2014, passed by

learned Sessions Judge, Panaji whereby Appellant/Accused was found guilty for the offences punishable under Section 304 Part II, 338, 337, 279 of IPC and sentenced to undergo imprisonment for five years, one year, and a period of six months respectively and pay fine of ₹10,000/- to the next of kin of the deceased and ₹2,000/- each to each injured witness. The Appellant/Accused is also disqualified from holding any driving licence for four-wheeler for a period of one year in terms of Section 20 of Motor Vehicles Act, 1988.

2. Heard Mr. S.D. Lotlikar, Senior Advocate who appears along with Ms. Sailee Kenny, Advocate for the Appellant and Mr. Gaurish Nagvenker, Additional Public Prosecutor for the Respondent.

3. With the assistance of the learned Counsel appearing for the respective parties, I perused the paper-book as well as the records and proceedings of the Trial Court.

4. Learned Senior Counsel Shri Lotlikar submits that conviction under Section 304 Part II of IPC is totally unwarranted as there is no such material or ingredient which the Prosecution has proved. He submitted that it is a vehicular accident between two moving vehicles and therefore, at the most, the provisions of Section 304-A of IPC stand attracted. He then submitted that considering the evidence brought on record by the Prosecution and examination of witnesses during trial, it is clear that Prosecution has even failed to prove that Appellant/Accused is guilty for such offence under Section 304-A of IPC. While inviting attention to the deposition of injured witnesses, learned Senior Counsel pointed out that such depositions are at variance on material particulars and thus, it is difficult to believe the

version of the Prosecution that accident took place while the Accused was in the process of overtaking another vehicle. He claimed that the sketch prepared of the spot of accident and more particularly, the spot of impact is not proved by the witnesses. It is his contention that positions of the vehicles after the impact are not material to prove the rash and negligent act on the part of particular driver. He, therefore, submitted that the tanker which was found in the valley cannot be an indication that the Accused while driving the bus was rash and negligent. He thus submitted that Accused needs to be acquitted of all the charges.

5. The learned Additional Public Prosecutor appearing for the State/Respondents while supporting the findings of the learned Additional Sessions Court, claimed that there is sufficient material to hold the Appellant guilty for the offence punishable under Section 304 (ii) as he knowingly drove the said bus in rash and negligent manner and tried to overtake another vehicle even though the said road was not in straight line. He then submitted that the bus driver was duty-bound to follow the traffic rules and when there is a curve ahead, it is not permissible to overtake a vehicle. According to the learned Additional Public Prosecutor, Appellant/Accused was under the influence of alcohol. Even the passengers travelling in the bus disclosed that said bus was driven in fast speed. Some of the passengers requested the Appellant/Accused to drive the bus with caution. However, in an attempt to overtake another bus, he dashed against the oncoming tanker. Learned Additional Public Prosecutor further pointed out that there was competition between the bus

driven by the Appellant and the bus which he overtook and in that process, one lady lost her life and many passengers were injured.

6. The points for determination are as under together with my findings against them:-

- i. Whether the Prosecution succeeded in proving that the Appellant/Accused caused death of Ms. Pratiksha, daughter of Shamba Dessai, aged 27 years by doing an act (rash and negligent driving on a public road), with an intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death of such lady.
- ii. Whether the Prosecution succeeded in proving that the Appellant/Accused drove the minibus bearing No.GA-01-T-5930 on 31.10.2012 at about 15:30 hours at Konem, Priol, Ponda in such rash and negligent manner endangering human life and while overtaking another bus, dashed against a petroleum tanker thereby causing grievous/simple injuries to the passengers in the bus, driver and cleaner of the tanker.

7. Parties are hereinafter called as Accused and State for the sake of brevity.

8. In a nutshell, it is the case of the State that on 31.10.2012, Accused being the driver of minibus No.GA-01-T-5930, drove his bus in such rash and negligent manner at around 15:30 hours and while trying to overtake another minibus, dashed against oncoming

petroleum tanker bearing registration No.GA-01-U-3536 thereby causing grievous injuries to the occupants of minibus including Ms. Pratiksha, daughter of Shamba Dessai, aged 27 years who succumbed to the injuries while undergoing medical treatment. In the said accident, Shri Murali Pundalik Talkar, Mrs. Sushma Chodankar, Mrs. Prekshma Kubal, Mr. Rajkumar Khairwar, Mr. Rajesh Tigadi and Shri Narayan Shet sustained grievous injuries, whereas, in all 18 other passengers sustained simple injuries. FIR was lodged vide Crime No.346/2012 at Ponda Police Station on 31.10.2012 against the accused for the offences punishable under Section 279, 304, 337 and 338 of IPC, on the basis of complaint lodged by Head Constable Dilip Vithoba Sinari attached to Ponda Police Station.

9. After completion of investigation, charge-sheet was filed before the learned Magistrate at Ponda in Criminal Case No.77/S/IPC/2014/A. By committal order dated 31.10.2014, the case was committed to the Court of Sessions at Panaji by the learned Magistrate, since offence under Section 304 of IPC is exclusively triable by the Court of Sessions.

10. Charges were framed against the Accused vide Exh.6. Upon explaining charges, Accused pleaded not guilty and claimed to be tried vide Exh.7. Matter was posted for trial. Prosecution examined in all 25 witnesses. Statement of Accused was recorded under Section 313 Cr.PC. upon which he denied the case of the Prosecution but answered Question No.50 as under:-

Q.50. Do you wish to say anything in respect of this case?

Ans: On 31.10.2012 when I was bringing the minibus GA01-T-5930 from Panaji to Ponda. The accident took place around 2:30 p.m. I was on the left side of the road that is on my side and driving the minibus in very slow speed. Suddenly the tanker came from opposite direction towards my side as there was a turn and he hit the minibus and fell into the valley. The driver of the tanker took right turn as there is a big circle. I say that the accident was not at all caused by me. I was neither driving in fast speed nor in rash and negligent manner. I say that false case has been filed against me.

11. Learned Additional Sessions Judge in the impugned judgment observed that the Prosecution succeeded in proving all the charges including Section 304 of IPC. While relying upon the case of ***Alister Anthony Pereira vs. State of Maharashtra***¹, the learned Court found that the present case is similar to that of *Alister Anthony Pereira* (supra) and accordingly convicted the Accused, which is under challenge in this appeal.

12. First of all, it is observed that the learned Additional Sessions Court while framing charges against the Accused, did not frame each charge separately, however, all the allegations are clubbed together which is clear from Exh.6.

13. The mandate of law and the purpose of framing charge against the Accused is to give him a clear indication or idea of each and every charge levelled against him by the Prosecution. Similarly, it is also a mandate of law that while framing of charge, the ingredients

¹ (2012) 2 SCC 648

of the particular offence must be disclosed in the charge so that the Accused could effectively answer it.

14. In the present matter, Accused was charged for total five separate offences though arising out of same accident, however, providing different ingredients. The first section under which Accused is charged is in connection with rash and negligent driving of the vehicle on a public road thereby endangering public life which is punishable under Section 279 of IPC.

15. When there are multiple sections/offences which are included in the charge-sheet and when the Court comes to the conclusion that there is sufficient material to frame charges on all counts, it is the bounden duty of the Court to frame each charge separately so as to properly explain ingredients of each offence to the Accused. The practice of recording combined charges and more particularly by extracting the sentences found in para no.16 of the charge-sheet as it is, must be discontinued as such practice does not give proper indication to the Accused as to which offence is connected with which allegation or ingredient contended in the charge-sheet.

16. Be that as it may, there is no ground raised in the present appeal that the Accused was not properly explained about the charges levelled against him and that he was deprived of taking proper defence. Therefore, it is now necessary to go into depositions of the witnesses examined by the Prosecution to prove such charges.

17. PW1-Vinay Alve is the Motor Vehicle Inspector who inspected both the vehicles at the request of Ponda Police and submitted

accident report form of Tata minibus and Ashok Leyland tanker which are at Exhs. 39 and 40 of the paper-book.

18. PW1 disclosed that damages caused to the minibus and the tanker which are as under.

i. Minibus No.GA-09-T-5930:-

- i.** Front show panel fully dented inwardly.
- ii.** Bumper cutoff.
- iii.** Driver side i.e. right hand side door dented.
- iv.** Right hand side i.e. driver side mudguard is bend and damaged.
- v.** Radiator protector grill fully damaged.
- vi.** Radiator fins damaged.
- vii.** Both headlights broken.
- viii.** Driver cabin fully dented inwardly.
- ix.** Left hand side front panel dented.
- x.** Cabin top fully dented on top of drivers seat.

ii. Tanker No. GA-01-U-3536:-

- i.** Front show panel of left hand side fully dented inwardly.
- ii.** Bumper fully damaged at left hand side of M.V.
- iii.** Radiator grill (guard) damaged.
- iv.** Radiator damaged.
- v.** Drivers cabin fully damaged and twisted on left hand side.
- vi.** Chassis bent (visually seen) on left hand side.
- vii.** Cabin upholstery twisted and dented on left hand side top.
- viii.** Cabin dented on rear side.

- ix.** Tank dented on front side.
- x.** Front left hand side mudguard completely pressed and damaged.
- xi.** Scratches on right hand side of tank at the center of the tank.
- xii.** Tank dented on top of the tank at the center portion.
- xiii.** Air tank damaged.

19. PW1 then deposed that since both the vehicles were extensively damaged, they could not be road-tested. He admitted during cross examination that both the vehicles could not be mechanically tested as they were not fit for driving on the road. However, one thing is clear that from the damages caused to both vehicles that it was a head-on collision between the minibus and the tanker in question thereby causing extensive damage to the front portion, the driver's cabin, the radiator, both headlights, etc.

20. PW2-Sudesh Bhingi is a scene of accident pancha witness. Admittedly, he did not witness the actual impact or accident. However, he reached the spot subsequently. He described the positions of the vehicles and also about tyre marks on the side of the west of the girl who was lying dead. He claimed that such tyre marks on the body of the deceased must be of the tyres of the tanker. Thus, it shows that the said girl was thrown out of the bus after the impact and then she was run over by the tyres of the tanker due to which she succumbed to the injuries.

21. PW2-Sudesh then claimed that he had seen the bus driver at the spot of accident and accordingly he identified the Accused as being the same driver in the Court. It is necessary to note that the

Accused did not dispute about his identity as the driver of the minibus. During cross examination, this witness admitted about the distance mentioned in the sketch, positions of the vehicles after the accident and the width of the kutchra road at the spot. He then admitted that the dead body of the girl is not shown in the sketch. He admitted that the tanker was found fallen downwards towards right side of the road if one proceeds from Ponda to Panaji. He also admitted that there is a nullah towards the right side of the road if one proceeds from Ponda to Panaji. He then admitted that the slope is very steep and the level of the road must be at a height of 10 to 15 metres from the level of the nullah. The bus was partly on the kutchra road, whereas the tanker had fallen downwards. He then admitted that he had not seen the dead body of the girl at the spot and his statement in the chief examination that the dead body was having tyre marks is on the basis of information received by him from the people who were present at the spot. He then admitted that the dead body of the said girl was already shifted from the spot before he reached the said spot.

22. PW2 further disclosed during cross examination that the point of impact was pointed out by some persons who were present at the spot. He failed to disclose names of such persons who pointed out such spot while conducting the panchanama. When the sketch attached to the panchanama was shown to him wherein the point of impact is marked, he answered that the same point which is shown in the sketch was shown by some person who was present at the spot. He then admitted that the starting point of the skid marks is as

one proceeds from Panaji to Ponda, at a distance of about 3.00 metres to 3.50 metres, to the left side edge of the road. He then opined that such skid marks appearing on the sketch must be of the bus. He confirmed that there were no brake marks of the tanker. He admits that his statement that the bus was in the process of overtaking another vehicle is on hearsay basis.

23. PW3-Sukanti Fatarpekar was a pancha witness in connection with inquest panchanama on the dead body of the deceased girl which is produced at Exh.15. There is no dispute with regard to the cause of death and the injuries found on the body of the deceased, which is otherwise proved by the medical evidence and the post-mortem report produced on record.

24. PW4-Ulhas Barve, PW6-Sangita Naik, PW8-Smt. Nilima Tari, PW9-Rajesh Tigdi, PW11-Sumit Barekar, PW13-Vishwalaxmi Gholkar, PW14-Priya Naik, PW16-Sushma Chodankar and PW21-Preshma were all travelling in the bus bearing No.GA-01-T-5930. All these witnesses claimed that Accused was driving the bus in fast speed due to which he dashed against the oncoming tanker.

25. PW4-Ulhas deposed that the Accused was driving the bus in fast speed and was overtaking one four-wheeler vehicle and in that process gave dash to oncoming tanker. During cross examination, he was unable to give the speed of the bus. He was also unable to disclose which part of the bus hit the tanker. However, he claimed that at the time of accident, bus driven by the Accused was on the left hand side of the road as one proceeds from Panaji to Ponda. He also admitted that just 50 metres prior to the spot of accident, there

is one bus-stop. He further admitted of not stating to the police that Accused tried to overtake a four-wheeler vehicle when the accident took place.

26. PW6-Sangita claimed that when they reached Konem Priol while travelling in the bus driven by the Accused, it was moving in fast speed and the Accused was trying to overtake another bus which was in front of their bus and in that process gave dash to the oncoming tanker. When she was confronted with the statement, she admitted that the accident took place after the Accused had overtaken another bus and at the time of impact, the other bus was behind their bus.

27. PW8-Nilima stated that Accused was driving the bus in fast speed and when they reached near Konem Priol, Accused overtook another bus which was on the left hand side, while proceeding towards Ponda and in that process dashed against the oncoming tanker. During cross examination, she claimed that when they overtook another bus, the said bus was in motion. She admitted that after the accident, the bus driven by the Accused halted on the left hand side when one proceeds towards Ponda.

28. PW9-Rajesh claimed that he boarded the said bus at Banastari to go to Ponda and he was sitting in the third seat behind the driver's side. He claimed that there was competition going on between Marcel going bus and Jyoti bus. Jyoti bus is the one which the Accused was driving. He claimed that Accused was driving the said bus in fast speed and roughly and he was overtaking vehicles. Passengers in the bus told the driver not to drive the bus in fast

speed. When they reached at Priol Konem and while overtaking another bus, their bus gave dash to the oncoming tanker due to which the tanker turned turtle in the valley. During cross examination, he was asked about the speed of the bus driven by the Accused, however, he was unable to give the exact speed but according to him, any person driving vehicle at a speed of 60 kmph and above would be in fast speed. He was confronted with his statement wherein there is no mention that the Accused and another bus driver were trying to race up and there was competition to go ahead. Thus, such omission has been noted and after giving opportunity, the witness says he does not know how it is recorded in his statement.

29. PW11-Sumit claimed that he was sitting on the last seat of the bus driven by the Accused. He was sleeping in the bus which was driven in fast speed. There was some accident between the said bus and the tanker due to which he woke up but with injuries.

30. PW13-Vishwalaxmi deposed that she boarded the bus bearing No.GA-01-T-5930 at Panjim to proceed to Ponda. The bus was driven in fast speed and after reaching near Farmagudi, the Accused while overtaking another bus, dashed against oncoming tanker. During cross examination, she stated that Jyoti bus was parked on the left hand side of the road. She was sitting in the line behind the driver. She then admitted that it is true that at the time of impact between Jyoti bus and the tanker, the said bus was on left hand side of the road if one proceeds towards Ponda.

31. PW14-Priya claimed that she boarded Jyoti bus from Panaji. Said bus was driven by the Accused in fast speed. While overtaking another bus, accident occurred and the said bus dashed against the oncoming tanker. She was confronted during cross examination with her statement recorded by the police, however, she was unable to explain as to how it is recorded that accident took place after overtaking another bus and after proceeding further.

32. PW16-Sushma claimed that she boarded Jyoti bus bearing No.GA-01-T-5930 and was sitting on the left-hand side seat. The driver of the said bus was driving it in fast speed. When they reached Konem Priol, the driver of the bus was overtaking another bus and in that process gave dash to the oncoming tanker.

33. PW21-Preshma deposed that she was travelling in the said Jyoti bus and occupying the seat behind the cabin of driver. The said bus was proceeding in very fast speed. There was one boy sitting in the cabin of the bus and the driver was busy in talking with him.

34. All these witnesses who claimed that they were travelling in the said bus, stated that the Accused was driving the bus in fast speed and accident took place while he was overtaking another bus. Thus, to visualize such situation, it has to be seen that the bus driven by the Accused was either travelling parallel to another bus in the same direction or little bit ahead but on the right-hand side of the road in order to overtake another bus. At the same time, tanker came from the opposite direction and since there was no road left for the tanker to pass as it was occupied by the bus driven by the Accused, there was head-on collision. It is again necessary to note that

immediately after the collision between the tanker and the bus driven by the Accused, the said tanker proceeded on its right-hand side and then went into the valley. Similarly, if the sketch of the scene of accident is seen, the bus driven by the Accused, after the impact went on the extreme left side of the road and stopped partly on the kutchra road and partly on the tar road.

35. If it is considered that the bus driven by the Accused was proceeding at a speed of 60 kmph or more while overtaking another bus, it has to be accepted that another bus was travelling at least at a speed of 40 kmph or less. Thus, in such circumstances, it was highly probable that either the tanker or the bus driven by the Accused would have come in contact with another bus. However, at the scene of accident, the said other bus is not at all seen or involved in the accident. This aspect is very much important as the Prosecution examined the driver of another bus as PW7 by name Viraj Naik. This witness claimed that he was working as a driver on Kapil bus bearing No.GA-01-W-4222. On 31.10.2012 at around 14:45 hours, he stated from Marcel in order to proceed to Ponda. He reached at Konem Priol at around 15:30 hours. While some passengers were alighting his bus, Accused while driving Jyoti bus bearing No.GA-01-T-5930 came from behind, overtook his vehicle and went ahead. After alighting of passengers from his bus, he started the bus to proceed towards Ponda and after going ahead for some distance, he found that the road was blocked due to accident between one bus and tanker. This witness was cross examined by the Public Prosecutor since he was resiling from his statement. However, it is clear from the deposition of this

witness that his bus by name Kapil was stationary at the bus-stop when bus driven by the Accused overtook his bus and the spot of accident was around 400 to 500 metres from Konem bus-stop.

36. Thus, it is clear from the deposition of PW7-Viraj that his bus was not near the bus driven by the Accused at the time of impact and it was around a distance of 500 metres behind. This further shows that accident did not occur while overtaking the said Kapil bus but it was much at a distance after overtaking such bus. PW7 claimed that his bus was stationary at the bus-stop and some passengers were in the process of alighting. Therefore, in such a situation, it cannot be claimed that the Accused was overtaking a moving bus in a rash manner.

37. Prosecution examined PW5-Vishnu Khodginkar who was the driver of the tanker bearing No.GA-01-U-3536, involved in the accident. During his testimony, PW5 claimed that his tanker was full of diesel which he filled at IOC, Vasco and he was proceeding with the said tanker. When he reached at Konem Priol, he saw one bus coming from Panaji side in fast speed. The driver of the bus took it towards right-hand side as one proceeds from Panaji towards Ponda and came on the wrong side and dashed the tanker. On seeing such bus coming on the wrong side of the road and in order to avoid major casualty, he turned the steering of his tanker on the right hand side and consequently landed in the valley.

38. Interestingly, PW5 did not disclose anything that the Accused while driving the bus, was in the process of overtaking another bus or vehicle and in that process, he came on the wrong side of the

road. During cross examination, PW5 admitted that there was no other vehicle in front of his tanker at the time of accident. He then claimed that he had not seen whether there were any other vehicles coming from Panaji towards Ponda and whether they were in front of the bus driven by the Accused at the time of accident. He admits that from the accident spot upto a distance of 150 metres towards Panaji side, the road is in straight line. However, as one proceeds from Ponda towards Panaji immediately before the accident spot, there is a left turn followed by right turn. This shows that the tanker while coming towards the spot of impact had to negotiate first a left turn and then right turn. He then admitted that it may be possible that if a loaded tanker is driven in fast speed and at the same time left and right turn/curve are taken in same speed, the tanker will not be under control of the driver. He further admitted of not applying brakes even after seeing the bus coming from the opposite direction. He explained of not applying brakes by saying that if he had to apply brakes, there would have been face to face collision between two vehicles resulting in major casualties. He admits that after the accident, the bus was towards left-hand side of the road as one proceeds from Panaji to Ponda. He then stated that he does not know on which side of the road accident took place.

39. Thus, the driver of the tanker involved in the accident first of all did not disclose that the Accused was trying to overtake another vehicle and in that process came on the wrong side. He was unable to disclose the spot of accident as either on the right-hand side or on the left-hand side of the road. He explained that on seeing the bus

which was on the wrong side of the road, he turned the steering wheel of his tanker towards right-hand side in order to avoid major casualty and head-on collision.

40. At this juncture, the sketch produced along with the scene of accident panchanama is of much importance. Admittedly, the tanker was coming from Ponda side and going towards Panaji side. Before the spot, he had to negotiate right turn. Therefore, the contention of driver of tanker that in order to avoid head-on collision, he took his tanker towards right-hand side, is unacceptable as there is kutchra road of 1.5 metres after the tar road. The alleged spot of impact shown in the sketch is slightly towards right-hand side of the road if one proceeds towards Ponda. However, inspite of the said position, there was around 3 metres width tar road available for the tanker to pass through towards Panaji side. The total width of the tar road is seen as 7.10 metres, whereas the spot of impact is shown as 4.10 metres from the edge of the left tar road, thereby showing 3 metres portion of tar road for the tanker to pass through.

41. PW5-Vishnu the tanker driver clearly admits that he did not apply brakes on seeing the bus coming from Panaji side even though he negotiated right turn which is before approaching the spot of impact. This witness failed to disclose which part of the bus hit the tanker. Therefore, the probability which has been brought on record through PW5 that the tanker after negotiating right turn in the same speed and without applying brakes came on the right-hand side and after dashing the bus, went down the hill, cannot be ruled out. This is so because the tanker driver-PW5 nowhere disclosed that Accused

was in the process of overtaking another bus so as to take his bus towards right-hand side of the road. The driver of Kapil bus examined as PW7 already stated that his bus was stationary when the bus driven by Accused passed by the side towards Ponda and the spot of accident is around 500 metres away from the said bus-stop.

42. PW10-Narayan Shet claimed that he was working as conductor of Jyoti bus bearing No.GA-01-T-5930. He claimed that on 31.10.2012 at around 14:35 hours, they left Panaji with passengers to proceed to Ponda. There were in all 27 passengers in the bus. Two passengers i.e. 1 male and 1 female were sitting in the cabin. Driver i.e. the Accused was driving the bus in fast speed and while overtaking another bus at Konem Priol, dashed against oncoming tanker. Due to the said dash, passengers sitting in the cabin were thrown out of the cabin and the tanker fell down and went into the valley which is on the left-hand side of the road. He also received injuries during the said accident. He claimed that the Accused was not talking with him or with any other passengers during the said journey. Therefore, the statement of one of the witnesses that the Accused was talking with one boy sitting in the cabin is not supported by this witness who is the conductor of the bus. He then admitted that at the time of accident, their bus was on the left-hand side of the road. He clarified that after overtaking another bus, their bus had almost come on the left-hand side of the road. When a question was put to him that accident occurred as the tanker came on the wrong side and dashed against the bus, the witness remained silent but tried to explain thereafter that after their bus had

overtaken another bus, the tanker suddenly came in front of the bus and collided.

43. PW12-Parekh Shirodkar is the owner of Jyoti bus No.GA-01-T-5930. He claimed that one Narayan Shet (PW10) was the conductor of the said bus. He identified the Accused as the driver of the said bus.

44. PW15-Gourish Govekar is the owner of the tanker bearing No.GA-01-PU-3536. He claimed that his tanker was engaged in transportation of diesel/petrol from Vasco to Bicholim. On 31.10.2012, his driver Vishnu left the petrol pump at Bicholim to proceed to Vasco along with the cleaner by name Murali and on the same day at around 12:30 hours, he received a message from Vasco regarding loading of diesel in his tanker. Thereafter, his driver Vishnu left Vasco at around 14:00 hours in order to reach Bicholim. At around 15:45 hours, he received phone call about the accident of his tanker at Farmagudi and accordingly he went to the said spot.

45. The cleaner of the tanker by name Murali was examined by the Prosecution as PW18. This witness claimed that the bus by name Jyoti was coming from Panaji side while overtaking another bus and in that process of overtaking, the said bus gave dash to their tanker which then fell into the valley.

46. PW20-Ashok Savoikar, the ASI attached to Ponda Police Station received a wireless regarding the accident and accordingly he reached the spot and shifted passengers to the hospital. The driver of

the bus was trapped in the cabin and he was taken out with the help of fire brigade personnel after cutting some portion of the cabin.

47. PW22-Aditya Mandrekar was on the Robert-31 vehicle attached to Ponda Police Station and on receiving information about the accident reached the spot. He along with other police officers helped the injured persons in shifting to the hospital.

48. PW23-Sadashiv Hunashikatti, the PSI attached to Ponda Police Station deposed that on receiving information about the accident, he deputed Head Constable-Dilip Sinari along with the staff. On the same day, he registered Crime No.346/2012 against the Accused on receiving complaint from Head Constable-Dilip Sinari.

49. The next witness examined by the Prosecution is PW24-Dilip Sinari, the Head Constable. He deposed that on receiving information, he along with the staff went to the spot, shifted the injured persons, conducted the scene of accident panchanama and thereafter he lodged the complaint. He admitted during cross examination that as per the sketch and after the accident, the bus was found towards left-hand side of the road partly on the kutchra road and partly on the tar road, facing towards the valley, whereas the tanker was found down the valley. He admits that the tanker was proceeding from Ponda towards Panaji side. He then claimed that as per the sketch, it shows that the tanker was on the wrong side.

50. When PW24 was asked about the point of impact and how he identified it in the sketch, he claimed that such point of impact was identified by him on the basis of skid marks and broken pieces of

glass fallen on the road. He admits that the skid marks were of the tyres of the bus and that too of the right side tyres of the bus. He admits that there were no brake marks of the tyres of the tanker on the road. He admits that he has shown point of impact somewhere in the middle of the skid marks and he identified such point of impact only on the basis of the broken glass pieces. He then admits that on the day of the accident, he did not see any bus by name Kapil near the place of accident. Therefore, a question was put to him on page 7 which reads as under along with the answer:

Q. Looking at the position at the site as per sketch if Jyoti bus while overtaking another vehicle had an impact with the tanker there would have been some damage to the vehicle which was overtaken?

Ans: I cannot say.

51. During further cross examination, contradictions and omissions brought on record during cross examination of the Prosecution witnesses and mostly the injured persons were proved through these witnesses.

52. PW25-Satish Gaude is the officer of Panaji Police Station who after completion of the investigation, filed a charge-sheet against the Accused. During cross examination, he admits of not recording statement of any witness.

53. As earlier discussed, Accused while answering questions put to him under Section 313 Cr.P.C. denied Prosecution case and claimed his defence which is recorded earlier while answering question No.50.

54. With the above material, the learned Additional Sessions Judge framed two points for determination as found in para No.4 of the impugned judgment. First point is with regard to rash and negligent driving of the bus by the Accused and the second point is with regard to commission of offence under Section 304 of IPC by the Accused. On both these counts, the learned Additional Sessions Judge observed in favour of Prosecution. While doing so, the observations in the case of *Alister Anthony Pereira* (supra) have been quoted in para 32 onwards.

55. The material brought on record by the Prosecution through its witnesses is not consistent. The witnesses mostly injured persons, claimed that accident occurred while the Accused was in the process of overtaking another four-wheeler/bus, which has been negated by Prosecution's own witness i.e. driver of tanker and the driver of the other bus. Similarly, the contentions raised by these witnesses are highly improbable as the tanker immediately after giving dash to the bus, went completely on the right-hand side of the road and went down the valley. In that scenario, there was every possibility of either the tanker or the bus driven by the Accused, hitting another vehicle which was being overtaken. It is clear from the depositions that these vehicles were in motion. In such situation and the fact that immediately after the impact, the bus driven by the Accused went towards extreme left-hand side and halted partly on the kutcha road and partly on the tar road facing towards valley whereas tanker went down the valley. Not a single witness who was travelling in Kapil bus was examined in the present matter to prove that the bus driven by

the Accused was in the process of overtaking their bus. Thus. The story put forth by the witnesses examined by the Prosecution and mostly the injured witnesses is highly improbable. It is but natural that since these witnesses sustained grievous injuries, they are bound to say that Accused was driving the bus in fast speed. However, the road being a National Highway, the speed limit on the said stretch is 60 kmph. No doubt, the said road is not in a straight line but having curves, precaution is required to be taken by the drivers and more particularly by the bus drivers and the tanker drivers.

56. As discussed earlier and found from the deposition of the driver of the loaded tanker, the possibility of the tanker while negotiating right turn, coming on the right side portion of the road cannot be ruled out. Similarly, the contention of the Prosecution witnesses that the Accused was trying to overtake another bus is also not fully established. The said bus was found on the left-hand side of the road and that too after applying brakes since the brake marks are seen on the road which are of the bus driven by the Accused as admitted by the police officer.

57. The spot of impact shown in the sketch is only on the basis of the pieces of glass fallen on the road and not on the basis of information received from any eyewitness. Thus, it cannot be said conclusively that the spot of impact shown in the sketch is the correct spot where the impact between two vehicles had taken place. Thus, from all these eventualities, the contention of the Prosecution that Accused drove his bus in rash and negligent manner cannot be fully established beyond all reasonable doubt. It is well settled that only

driving vehicle in fast speed without disclosing the speed and that too on the National Highway, cannot be considered as rash and negligent driving.

58. Section 299 of IPC defines culpable homicide wherein it is stated that whoever causes death by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits offence of culpable homicide.

59. Exceptions found appended to Section 300 of IPC are also material which provide as to when culpable homicide is not murder.

60. In the present case, admittedly it is a vehicular accident between two moving vehicles. Therefore, the proposition in the case of *Alister Anthony Pereira* (supra) cannot be made applicable only because one girl lost her life in the present accident. First of all, the Prosecution failed to prove that the Accused was driving the said bus in rash and negligent manner and evidence brought on record is not enough to hold in favour of Prosecution without reasonable doubt. Therefore, the question of committing offence under Section 304 of IPC cannot be considered.

61. The learned Additional Sessions Judge while evaluating evidence of Prosecution witnesses, failed to consider the cross examination of the material omissions, and contradictions, which makes their testimonies unreliable. Thus, such findings cannot be accepted for the simple reason that the duty of the Prosecution is to prove the charge levelled against the Accused beyond all reasonable

doubt. All these witnesses claimed that the bus when it came in contact with the tanker was on the left-hand side of the road. Thus, the panchanama and other material brought on record are not sufficient enough to hold the Accused guilty. Accordingly, the findings of the learned Trial Court need to be quashed and set aside together with the conviction of the sentence. The Accused/Appellant is therefore entitled to be acquitted of all the charges on giving benefit of doubt.

62. Both points of determination framed above are answered in negative.

ORDER

- i. Appeal stands allowed.
- ii. Judgment and conviction passed by the learned Additional Sessions Judge in Sessions Case No.54/2014 dated 17.03.2017 / 23.03.2017 is hereby quashed and set aside. Appellant/Accused is acquitted of the offences punishable under Section 279, 337, 338 and 304 of IPC.
- iii. Bail bonds of the Appellant/Accused furnished in this Court shall continue under Section 437-A of Cr.PC. till the period of appeal is over.

BHARAT P. DESHPANDE, J.

JOSE
FRANCISCO
DSOUZA

Digitally signed by Jose
Francisco Dsouza
DN: cn=Jose Francisco
Dsouza, o=, ou=, email=jf.dsouza@cria.org