



Crl.A.No.648 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.12.2023

CORAM :
THE HON'BLE MR.JUSTICE SUNDER MOHAN

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Rajkumar

.. Appellant

v.

State rep. by
Deputy Superintendent of Police,
Railway Police Station,
Chennai Central.
(Cr.No.623/2011)

.. Respondent/complainant

Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure, 1973, to call for the records in connection with S.C.No.66 of 2012 on the file of the learned Principal Sessions Judge, Vellore, Vellore District and set aside the conviction and sentence imposed in judgment dated 21.08.2017.

For Appellant : Mr.A.Nagarajan

For Respondent : Mr.A.Gokulakrishnan
Additional Public Prosecutor



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JUDGMENT

WEB COPY This Criminal Appeal has been filed by the accused, challenging the conviction and sentence imposed upon him vide judgment dated 21.08.2017 in S.C.No.66 of 2012, on the file of the learned Principal Sessions Judge, Vellore, Vellore District.

2 (i) It is the case of the prosecution that the appellant/accused was employed as a Train Driver of Indian Railways; that on 13.09.2011, while he was employed as a Loco-Pilot/Motor Man of the Train No.66017 plying between Chennai Beach Railway Station to Vellore Cantonment, at about 9.21pm, while he was driving the said train, between KM 74/12 and 74/14, he contacted a Motor Man viz., Ravi / his friend (PW45), over mobile phone and had driven the train in an excessive speed of 97 kmph in utter and gross violation of the speed limit of 75 kmph, although, there were yellow signal at Melpakkam Railway Station and red signal at Signal No.734, and caused the collision with train No.56007 from behind, which was going from Arakkonam to Katpadi and was moving at a speed of 20kmph; that as a result of that collision, 12 persons died on the spot, 71 passengers sustained severe injuries



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ie. 18 persons sustained grievous injuries and 53 persons sustained simple injuries; and that the total loss caused to the Railways Department was to the tune of Rs.2,20,00,000/-.

(ii) It is the further case of the prosecution that after the accident, PW1 lodged a complaint [Ex.P1] to the respondent herein, on the basis of which the PW73 registered the FIR [Ex.P78] in Cr.No.623 of 2011 for the offence under Sections 279, 337, 338, and 304-A of IPC r/w 154 of the Indian Railways Act.

(iii) Thereafter, PW74 took up the investigation, and examined the witnesses, went to the scene of the occurrence, prepared an observation mahazar (Ex.P2), and a rough sketch (Ex.P79). He collected the money purse, PAN card, ID card and a few other material objects from the scene of occurrence. He conducted an inquest over the dead bodies of the deceased and prepared an inquest report (Ex.P80). Thereafter, he examined the injured passengers and recorded their statements. On the same day, he collected the call records pertaining to the mobile No.8656017733 used by the accused at



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the time of the occurrence. On 23.09.2011, he obtained details regarding the speed at which the train driven by the appellant proceeded on the day of the accident. On 07.10.2011, he examined one M.K.Subramaniam [PW66], the Senior Divisional Electrical Engineer (Operations) and obtained a statement from him, marked as Ex.P63, wherein he stated about the signal aspects at the stations and level crossings on the day of the accident.

(iv) Thereafter, PW74 altered the offences to Sections 323, 324, 326 and 304(II) of IPC r/w Section 154 of the Indian Railways Act and sent the alteration report [Ex.P82] to the Court. After examination of all other witnesses and after completion of the investigation, he filed a final report on 01.03.2012, against the appellant for the offence under Sections 304(II), 308 of the IPC r/w Section 3 of the Tamil Nadu Property (Prevention of Damage and Loss) Act, 1992 (hereinafter referred as to the 'TNPPDL Act') and Section 151 of the Indian Railways Act, before the learned Judicial Magistrate, Arakkonam, in PRC No.1 of 2012.

(v) On appearance of the appellant, the provisions of Section 207



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Cr.P.C. were complied with and the case was taken on file in S.C.No.66 of 2012 and was made over to the learned II Additional District and Sessions Judge, Vellore, at Ranipet.

(vi) The learned II Additional District and Sessions Judge framed the charge under all the offences, viz., under 304(II) IPC (11 counts) and 308 IPC (72 counts), and also under Section 3 of the TNPPDL Act r/w Section 151 of the Indian Railways Act.

(vii) The charge framed by the said Court on 06.11.2012, broadly states that on 13.09.2011 at around 9.24pm between Melpakkam and Chitheri Railway Station, the appellant, contrary to the circulars issued by the Ministry of Railways, was talking to his friend PW45-Ravi, on a mobile phone, and had violated the traffic signals, and was travelling in a rash and negligent manner at an excessive speed, knowing fully well that it was likely to cause the death of persons.

(viii) Thereafter, on 14.02.2013, after the death of one of the injured passengers, the learned II Additional District and Sessions Judge framed a



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new charge (though he referred it as Additional Charge), altering the counts under 304(II) IPC into 12 and the counts under Section 308 IPC to 71 from 72, as against the accused, and when questioned, the accused pleaded 'not guilty'.

(ix) To prove the case, the prosecution examined 74 witnesses and marked 90 exhibits and 11 material objects. When the appellant was questioned u/s.313 Cr.P.C. on the incriminating circumstances appearing against him, he denied the same. On the side of the appellant, DW1 to DW3 were examined, and 5 exhibits were marked as Ex.D1 to Ex.D5.

(x) The trial Court, after taking into consideration the oral and documentary evidence, found the appellant guilty of the charges under Sections 304(II) of the IPC-12 counts, 308 of the IPC-71 counts and Section 3 of the TNPPDL Act, r/w Section 151 of the Indian Railways Act, and accordingly, convicted and sentenced him as follows.

Offence under Section	Sentence imposed
Section 304(II) of IPC 12 counts	To undergo 10 years of RI for each count.
308 of IPC (71 counts)	No separate punishment is awarded since major punishment is awarded for offence under Section 304(II) of the IPC



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Section 3 of TNPPDL Act, r/w Section 151 of the Indian Railways Act	To undergo 5 years of RI and to pay a fine of Rs.1 Lakh, in default to undergo one year of SI.
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The sentences imposed are directed to run concurrently.

Hence, the appellant has preferred the appeal challenging the said conviction and sentence.

3. (i) Mr.Nagarajan, learned counsel appearing for the appellant/accused, submitted that the prosecution has not established the offence under Section 304(II) IPC and other charges against the appellant. The complaint initially filed by PW1 only states that the accident took place. However, in the FIR [Ex.P78], against the column 'the name of the accused', it is shown as 'EMU Train Driver', and the said FIR was sent to the Court five days after the occurrence. The learned counsel therefore submitted that the investigation officer had made up his mind even at this stage to fix the responsibility on the appellant, and the investigation proceeded on those lines and not in a fair and unbiased manner.

(ii) The learned counsel for the appellant submitted that the prosecution has not established the fact that the appellant was talking on a mobile phone



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at the time of the accident. The prosecution had examined PW45 and PW51 and marked Ex.P57 to establish the said fact. The learned counsel pointed to the evidence of PW51 and the entries made in Ex.P57 to show that the said document cannot be relied upon; that a 65-B certificate was not obtained to prove the authenticity of Ex.P57; that the call records of PW45, who is said to have spoken to the appellant at the time of occurrence, have not been collected by the investigation officer to correlate the entries made in Ex.57; that the prosecution has not established that the speed limit of the train was 75kmph by any document and that they had only let in oral evidence, which cannot be accepted in a case of this nature.

(iii) The learned counsel also pointed out to the evidence of PW42, PW43, PW44, PW55, PW59, PW66, and PW67, besides Ex.P63 and Ex.P64, to show how the evidence of these witnesses and the documents do not conclusively establish that the appellant had violated the traffic signals.

(iv) The learned counsel for the appellant/accused pointed out to the cross examination of the investigation officer, who admitted that the data



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logger, which would clearly show the signal aspects on the relevant railway stations and level crossings during the time of the accident, was not seized during the investigation. The learned counsel further pointed out that Ex.P63 and Ex.P64 are replies sent during investigation to the questionnaires sent by the investigation officer would amount to a statement under Section 161 Cr.P.C., and hence inadmissible; and that those letters ought not to have been marked by the trial Court.

(v) The learned counsel therefore submitted that in any case, the evidence does not suggest that the accused had the requisite knowledge/*mens rea* to prosecute him for the offence of culpable homicide and relied upon the judgment of the Hon'ble Supreme Court in ***Prabhakaran Vs. State of Kerala***, reported in **(2007) 14 SCC 269**.

(vi) The learned counsel further submitted that even the offence under Section 304-A IPC would not be made out in the facts of the case as the prosecution has not established that the appellant was guilty of gross negligence and relied upon the judgments of this Court and that of the Hon'ble Supreme Court in support of his submission.



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WEB COPY 4. (i) The learned Additional Public Prosecutor submitted that the appellant drove the train while talking on a mobile phone, violating traffic signals and warnings, and had caused this incident, resulting in the death of several persons. He further pointed out the evidence of PW39, PW40, and PW41 to show that the signals at the relevant time were violated by the appellant, and therefore, he is guilty of the offences charged against him.

(ii) PW40 is the driver of the passenger train plying from Arakkonam to Katpadi, which was rammed from behind by the train driven by the appellant and is said to have collided from behind. PW40 had stated that he noticed the goods train going in front of his train and he was informed through walkie-talkie to wait till the goods train passed. Therefore, he stopped the train for a minute, and there was a danger signal at that time. Subsequently, he started moving the train at 20kmph and at this stage, the train driven by the appellant came and collided from behind. The learned Additional Public Prosecutor pointed to this evidence to show that there was a 'danger' signal, and from this, one can infer that the previous signal positions ought to have been either



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'stop' or 'caution', which have been violated by the appellant. The learned Additional Public Prosecutor took this Court through the evidence of the other witnesses and that of the investigation officer in support of his submission. Thus, he prayed for dismissal of the appeal by confirming the conviction and sentence imposed upon the appellant/accused.

5. Heard the learned counsel appearing for the appellant and the learned Additional Public Prosecutor appearing for the respondent and perused the records.

6.1. (i) This is an unfortunate case, where nearly 12 people died and 71 persons sustained grievous injuries. But the question is whether the appellant is responsible for the same, is there any other reason, or is it a case of an accident. The prosecution, as stated earlier, has examined several witnesses to bring home the charge against the appellant. This Court notices here that the charge framed by the trial Court includes all the offences in one charge. The trial Court ought to have seen that a separate charge has to be framed for every distinct offence as per Section 218 of the Cr.P.C., which reads as



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follows:

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“218. Separate charges for distinct offences.

(1) For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately:

Provided that where the accused person, by an application in writing, so desires and the Magistrate is of opinion that such person is not likely to be prejudiced thereby, the Magistrate may try together all or any number of the charges framed against such person.”

6.1.(ii) Be that as it may, the charge states that the appellant has committed three violations and therefore, is guilty of the offence of culpable homicide. The three violations, as per the charge are

- (a) The appellant was talking to one Ravi [PW45] over his cell phone;
- (b) He drove the train at excessive speed in violation of the speed limit;
- and
- (c) He violated the signals;

knowing fully well that it would cause the accident.

6.1.(iii) The prosecution case, as seen from the charge, is that the appellant, by committing the aforesaid violations, had collided with a



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passenger train, which was moving from Arakkonam to Katpadi [Train No.56007], from behind. The prosecution therefore suggests that the appellant caused the deaths of the passengers and the damages to the two trains by his act. Normally, the prosecution would be under Section 304-A of IPC. It is no doubt true that in exceptional cases, even in cases of death caused by an occurrence which appears to be an accident, knowledge that the act is likely to cause death to prosecute a person under Section 304(II) can be inferred depending on the facts and circumstances. The Hon'ble Supreme Court in *Alister Anthony Pareira Vs. State of Maharashtra*, reported in **(2012) 2 SCC 648**, has made this position very clear. The relevant portions are extracted hereunder:

“46. While observing that Section 304A speaks of causing death by negligence and applies to rash and negligent acts and does not apply to cases where there is an intention to cause death or knowledge that the act will in all probability cause death and that Section 304A only applies to cases in which without any such intention or knowledge death is caused by a rash and negligent act, on the factual scenario of the case, it was held that the appropriate conviction would be under Section 304A IPC and not Section 304 Part II IPC. *Prabhakaran [Prabhakaran v. State of Kerala, (2007) 14 SCC 269]* does not say in absolute terms that in no case of an automobile accident that results in death of a person due to rash and negligent act



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of the driver, the conviction can be maintained for the offence under Section 304 Part II IPC even if such act (rash or negligent) was done with the knowledge that by such act of his, death was likely to be caused. *Prabhakaran [Prabhakaran v. State of Kerala, (2007) 14 SCC 269]* turned on its own facts.

47. Each case obviously has to be decided on its own facts. In a case where negligence or rashness is the cause of death and nothing more, Section 304A may be attracted but where the rash or negligent act is preceded with the knowledge that such act is likely to cause death, Section 304 Part II IPC may be attracted and if such a rash and negligent act is preceded by real intention on the part of the wrong doer to cause death, offence may be punishable under Section 302 IPC.”

6.1.(iv). In order to prosecute a person for the offence under Section 304-A of IPC, the *mens rea* required is either 'Rashness' or 'Negligence'. 'Rash' and 'negligent' have not been defined in the Indian Penal Code. In ***Sushil Ansal v. State***, reported in (2014) 6 SCC 173, the Hon'ble Supreme Court had occasioned to consider the meaning of 'rash' and 'negligent' and based on the judicial pronouncements, had explained the meaning of the words 'rash' and 'negligent'. The relevant observations are as follows:

"57. The terms “rash” or “negligent” appearing in Section 304-A extracted above have not been defined in the Code. Judicial



pronouncements have all the same given a meaning which has been long accepted as the true purport of the two expressions appearing in the provisions. One of the earliest of these pronouncements was in *Empress of India v. Idu Beg* [*Empress of India v. Idu Beg*, ILR (1881) 3 All 776], where Straight, J. explained that in the case of a rash act, the criminality lies in running the risk of doing an act with recklessness or indifference as to consequences. A similar meaning was given to the term “rash” by the High Court of Madras in *Nidamarti Nagabhushanam, In re* [*Nidamarti Nagabhushanam, In re*, (1871-74) 7 Mad HCR 119], where the Court held that ***culpable rashness meant acting with the consciousness that a mischievous and illegal consequence may follow, but hoping that it will not.*** (Emphasis Supplied). Culpability in the case of rashness arises out of the person concerned acting despite the consciousness. These meanings given to the expression “rash”, have broadly met the approval of this Court also as is evident from a conspectus of decisions delivered from time to time, to which we shall presently advert. But before we do so, we may refer to the following passage from *A Textbook of Jurisprudence* by George Whitecross Paton reliance whereupon was placed by Mr Jethmalani in support of his submission. Rashness according to Paton means:

“where the actor foresees possible consequences, but foolishly thinks they will not occur as a result of his act”.

58. In the case of “negligence” the courts have favoured a meaning which implies a gross and culpable neglect or failure to



exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual which having regard to all the circumstances out of which the charge arises, it may be the imperative duty of the accused to have adopted. ***Negligence has been understood to be an omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable person would not do.*** (Emphasis supplied). Unlike rashness, where the imputability arises from acting despite the consciousness, negligence implies acting without such consciousness, but in circumstances which show that the actor has not exercised the caution incumbent upon him. The imputability in the case of negligence arises from the neglect of the civil duty of circumspection."

6.1.(v) The Hon'ble Supreme Court further held that the degree of rashness/negligence to prosecute a person under criminal law must be higher than which is sufficient to prove negligence in a civil action. In other words, the Hon'ble Supreme Court held that in order to constitute an offence under Section 304-A, the rash and negligence must be gross. The relevant observations are as follows:

“73. Conceptually the basis for negligence in civil law is



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different from that in criminal law, only in the degree of negligence required to be proved in a criminal action than what is required to be proved by the plaintiff in a civil action for recovery of damages. For an act of negligence to be culpable in criminal law, the degree of such negligence must be higher than what is sufficient to prove a case of negligence in a civil action. Judicial pronouncements have repeatedly declared that in order to constitute an offence, negligence must be gross in nature. That proposition was argued by Mr Ram Jethmalani at great length relying upon the English decisions apart from those from this Court and the High Courts in the country. In fairness to Mr Salve, counsel appearing for CBI and Mr Tulsi appearing for the Association of Victims, we must mention that the legal proposition propounded by Mr Jethmalani was not disputed and in our opinion rightly so. That negligence can constitute an offence punishable under Section 304-A IPC only if the same is proved to be gross, no matter the word "gross" has not been used by Parliament in that provision is the settled legal position. It is, therefore, unnecessary for us to trace the development of law on the subject, except making a brief reference to a few notable decisions which were referred to at the Bar."

6.1.(vi) The Hon'ble Supreme Court has also clarified that it is impossible to define exactly what would be "gross", "rashness" or "negligence" and that it would depend on the facts and circumstances of each



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case. The relevant portion in Paragraph No.78 of the said judgment is as follows:

"78. There is no gain saying that negligence in order to provide a cause of action to the affected party to sue for damages is different from negligence which the prosecution would be required to prove in order to establish a charge of "involuntary manslaughter" in England, analogous to what is punishable under Section 304-A IPC in India. In the latter case it is imperative for the prosecution to establish that the negligence with which the accused is charged is "gross" in nature no matter that Section 304-A IPC does not use that expression. What is "gross" would depend upon the fact situation in each case and cannot, therefore, be defined with certitude. Decided cases alone can illustrate what has been considered to be gross negligence in a given situation."

6.1.(vii) The 'culpable mental state of knowledge', which is required to prosecute a person for the offence of culpable homicide, is graver than the mental state of rashness or negligence. As held by the Hon'ble Supreme Court in *Alister Anthony Pareira's case* [cited supra], in certain cases, especially when the driver is in an inebriated condition with the knowledge that his act is likely to cause death, the offence of culpable homicide would be made out. The question is whether the accused in the instant case has caused death and the damage, with the requisite knowledge that his act is likely to



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cause the death of the persons.

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6.2.(i) Now we may analyse the facts in the instant case. The first violation alleged by the prosecution is that the appellant/accused is said to have used the mobile phone to talk to PW45, his friend, contrary to the circulars issued by the Ministry of Railways and also in dereliction of his duty as a driver. In order to establish the fact that the appellant had used the mobile phone, the prosecution examined two witnesses viz., PW45 and PW51 and marked Ex.P57, the call record pertaining to the mobile phone used by the appellant. PW51 is the nodal officer attached to the Airtel company. It is his evidence that he sent the call record details via email to the investigation officer on his request. He had furnished the call record details from 01.09.2011 to 13.09.2011 and stated that the investigation officer had taken a print out from the mail sent by him and obtained a signature on the said print-out.

6.2.(ii) Firstly, this Court is unable to comprehend how such a procedure could be adopted. There is no reason why PW51 had to attest to a



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document, that was printed at a police station or by the respondent. Be that as

it may, the 65-B certificate was also not obtained to prove the authenticity of

Ex.P57. Above all, the most important aspect is the admission made by PW51 in the cross examination to the effect that the entries made from 01.09.2011 to 12.09.2011 were in 24 hour format, whereas the entries made on 13.09.2011 (day of the accident) alone were in 12 hour format i.e., it is shown as 'am/pm'. There is another admission by PW51 to the effect that the entries made between 01.09.2011 to 12.09.2011 were in a chronological order, whereas, the entries made on 13.09.2011 were not so and they were not in any particular order. Further, in Ex.P57, it is shown that at 9.21.05 pm, there was a phone call from the appellant's phone number to the following No.9600015708, which belonged to PW45. The said call was for 165 seconds, as per Ex.P57.

6.2.(iii) PW45, in his deposition, would further state that it is true that the appellant made a call to him, but during the call, he informed him that he was yet to board the train. He would also admit that during the conversation, he did not hear any sound. It is pertinent to point out here that it is the



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prosecution case that the accused was talking over the phone at the time of the accident. Strangely, we find another aspect in this case that PW45's call record has not been seized by the police. Common sense and logic would suggest that PW45's call record is a necessary document to corroborate the entries made in Ex.P57, especially when there is a serious doubt with regard to the evidence of PW51 and the entries made in Ex.P57. The investigation officer was questioned on this aspect, and there is no explanation by the investigation officer for not collecting the call record details of PW45. Therefore, for the aforesaid reasons, this Court is of the view that the prosecution has not established the first aspect, viz., that the appellant had used his mobile phone at the time of the accident.

6.3. The second violation alleged by the prosecution is that the appellant drove in an excessive speed. PW66 would state that the train driven by the appellant was proceeding at a speed of more than 90kmph. However, we find that there is no document to show that the speed restriction was 75kmph at the relevant point in time. Further, we also find from the evidence that the speed at which the train travelled was decoded from the speedometer



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as per the evidence of PW74, the investigation officer. However, we find that the person who actually decoded and ascertained the speed from the speedometer has not been examined by the prosecution. In this regard, the answers elicited in the cross examination of the investigation officer (PW74), would be relevant for understanding that the prosecution has not proved the fact that the appellant had driven the train at a speed of 90kmph. The said portion is extracted hereunder:

“எதிரி ஓட்டிய வண்டியின் ஸ்பீடோ மீட்டரில் இருந்து மெமொரி கார்டு விபத்திற்கு பின்பு எடுத்து சென்றார்களா என்று எனக்கு தெரியாது. எடுத்தாரா இல்லை என்பதே எனக்கு தெரியாது. சம்பவம் நடந்த பின்பு குறிப்பாக ஸ்பீடோ மீட்டரையும் மெமொரி கார்டையும் எந்த நபர் எடுத்து சென்றார் என்பது குறித்து வாக்குமூலம் பதிவு செய்யவில்லை என்று சொன்னால் சரிதான். ஸ்பீடோ மீட்டர் மெமொரி கார்டை நான் இதுவரை கைப்பற்றவில்லை. ஸ்பீடோ மீட்டர் மெமொரி கார்டில் உள்ள விவரத்தை யார் டிகோடு செய்தார்கள் என்று அந்த நபரிடம் எந்தவிதமான வாக்குமூலமும் பெறவில்லை என்று சொன்னால் சரிதான்.”

The above evidence would suggests that the memory card in the speedometer was not seized, and the investigating officer was not aware of who decoded the information in the memory card to state that the train travelled at a speed of 90kmph. In such circumstances, one cannot definitely conclude that the train travelled at the speed of 90kmph, as claimed by the prosecution.



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6.4.(i) The third violation alleged by the prosecution is that the appellant had violated the signals and ought to have gone at a speed of only 20kmph, as the signal at the relevant point in time displayed an orange colour, which means the train has to proceed with caution.

6.4.(ii) Firstly, there is nothing on record to show that the orange signal ie., proceed with caution, means the train should maintain a particular speed. The prosecution was probably guided by the fact that the train driver [PW40], of the preceding train stated that he was going at 20kmph, after seeing the 'orange/caution' signal. This cannot be a guiding factor. There must be clear and definite evidence to show that the speed must be within 20kmph when the signal is 'orange/caution'. There is no such evidence in this case. The prosecution has relied upon the evidence of PW42, PW43, PW44, PW55, PW59, PW66 and PW67 to establish the fact that the signal at the relevant point in time was 'orange' and yet the appellant had not slowed down the train, even assuming that he need not have gone at 20kmph.



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6.4.(iii) PW42 and PW44 are the gate keepers at LC34 and LC35, which indicates the level crossing numbers. PW42 says about noticing the danger light behind the passenger train, which went in front of the train driven by the appellant and that he had shown the orange signal to the passenger train, which was plying from Arakkonam to Katpadi. In the cross examination, however, he would admit that he had not shown any specific signal to the train driven by the appellant.

6.4. (iv) PW44 is another gatekeeper at LC35, whose evidence is of no avail to the prosecution. He had only gone to the place of occurrence after hearing a sound and had stated that the accident spot was 1 km away from the level crossing which he manned.

6.4. (v).PW43, is the Senior Section Engineer, who was in-charge of maintaining signals between the Melpakkam and Sholinger regions. He would add that there was no defect in the signals at the relevant point in time, as he



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had not received any complaints. In his cross examination, he would admit that, at the relevant point in time, he did not ascertain the signal position at Signal No.734. We also find that PW43 admitted in the cross-examination that though he had prepared the report to the effect that the signals were functioning properly near the accident spot, he had not handed over the said report to the investigation officer. He would also admit that there is no document to find out exactly what the signal position was in Signal No.734, at the relevant point in time.

6.4.(vi) PW55, was the guard of the train driven by the appellant. His evidence is also of no use to the prosecution. On the other hand, he would admit in the chief examination that he had not noticed the signal. He had also stated in the cross examination that the gate keepers at level crossings Nos.34 and 35 had not given any caution when the train travelled at those gates.

6.4. (vii) PW66 and PW67 are the star witnesses for the prosecution to show that the appellant violated the signals. PW66 was the Senior Divisional Engineer working in the Railways, and it was his duty to supervise and



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ascertain if the drivers of trains were doing their duty properly. On hearing about the news of the accident, he enquired and found that the train had travelled at a speed of 90kmph instead of 75kmph. He had also stated that this train, which was travelling at 90kmph speed had passed through an orange signal, and also a red signal before colliding with the passenger train; that the appellant ought to have exercised caution while passing through the orange signal and since he has not done so, the accident took place due to his negligence. He would further admit in the cross-examination that he had no direct knowledge as to the signal aspect in Signal Nos.734 and 744 at the relevant time. He had also admitted that he was not aware of maintenance of data loggers by the railways, as he was not in-charge of the same. The defence have also elicited certain answers to suggest that he had improved his version during the examination in Court.

6.4. (viii) Ex.P63 is the statement given by PW66 to the investigation officer to the questionnaires put to him during the investigation. The said statement should not have been marked by the trial Court, as it would amount to a statement under Section 161 Cr.P.C., which is inadmissible.



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6.4. (ix) PW67 was also working as a Senior Divisional Engineer, in the Southern Railways, and he sent a reply marked as Ex.P64, in which he had stated that signal numbers 734 and 744 were in red at the relevant point in time. In the remarks column in Ex.P64, it is stated as follows:

Sl.No.	Description	AJJ (West)/MLPM			Auto Signal		
		3A	5	7	734	744	Remarks
1	What is the signal aspect when the MEMU Train NO.66017 crossed Arakkonam Junction, Melpakkam RS, Signal 734, 744. Kindly furnish the chart displaying the signals	Yellow (Caution)	Yellow (Caution)	Yellow (Caution)	Red (Danger)	Red (Danger)	Since the Passenger Train No.56007 and Goods Train in Auto Section, between MLPM-CTRE. Hence both 734 & 744 will be in Danger
2	According to the investigation as per the statement of SM/Melpakkam the signals 1.Home, 2.Starter, 3.LSS were yellow for the EMU Train then what could be the signal at the points 734 and 744 for the same train.	Yellow (Caution)	Yellow (Caution)	Yellow (Caution)	Red (Danger)	Red (Danger)	
3.	What should be the speed of the MEMU Train when it crosses yellow signal	Not concerned with S&T Department					

6.4. (x) It is therefore seen that the reply sent by him, which is recorded in Ex.P64, is a inference by the witness and not based on any



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contemporaneous record. However, as stated earlier, what applies to Ex.P63, applies to Ex.P64 as well. Both documents are inadmissible documents.

Since PW67 has stated that the signal was 'Red', in his deposition also, we may analyse the evidence of PW67 independent of Ex.P64.

6.4. (xi) In the cross-examination, PW67 would admit that the relevant document which would contain the signal aspect is the data logger, and he admits that the data logger was not available for Signal Nos.734 and 744, which are the relevant signals. The investigation officer, PW74, would also admit that he had not taken any steps to collect the data logger which would have clinched the issue. Therefore, this Court is of the view, that here again, it cannot be definitely concluded that the appellant had violated the red or orange signals.

6.4. (xii) The learned Additional Public Prosecutor, by pointing out the evidence of PW59, stated that since the danger light was there in the train, which went in front of the appellant's train, the appellant should have exercised caution. This Court is of the view that even assuming the fact that



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a danger light was ignored by the appellant, considering the fact that the other circumstances, viz., signal violation and talking on a cell phone have not been conclusively established, this would amount only to negligence and not gross negligence since, the accident took place during the night hours.

7.1 The other witnesses examined by the prosecution are mahazar witnesses, who participated in the inquest, official witnesses or injured persons.

- (i) PW2 to PW10 are the passengers who are injured and travelled in the passenger train between Arakkonam and Katpadi.
- (ii) PW11 to PW19 are injured witnesses who travelled in the train.
- (iii) PW20 to PW30 are witnesses and relatives of the deceased who died in the train accident.
- (iv) PW31 to PW35 are the doctors who conducted postmortem on the deceased passengers.
- (v) PW36 to PW38 are the doctors who treated the injured victims.
- (vi) We had already discussed about PW39 to PW45. PW46 to PW50 are the doctors who treated the injured.
- (vii) PW51 is the Nodal Officer, working in AIRTEL, about whom we have discussed earlier.



(viii) PW52 and PW53 are witnesses who came to know of the accident and informed the higher officials.

(ix) PW54, who was working as a Senior Divisional Engineer, who assessed the damage caused to the trains due to the accident.

(x) We have discussed about PW55 earlier.

(xi) PW56 and PW57 are the doctors who had treated the injured.

(xii) PW58, who was the Crew Control Foreman, who came to know of the accident later.

(xiii) We have discussed about PW59 earlier.

(xiv) PW60 to PW64, PW71 and PW72 are the Railway Police Constables, who had handed over the dead bodies for conducting postmortem.

(xv) PW65 is the Crew Controller, who had conducted Breath Test for the appellant and he came to know about the accident later only.

(xvi) We have discussed about PW66 and PW67 earlier.

(xvii) PW68 was working as a Divisional Safety Officer, who assisted in rescue operation.

(xviii) PW69 is the Senior Divisional Operations Manager, who sent the medical team to the accident spot.

(xix) PW70 and PW73 are the Inspectors of Police, Railway Police, who conducted inquest.

(xx) PW74 is the investigation officer.

7.2. From the evidence let in by the prosecution, it is seen that the



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investigation officer had not collected the documents relating to the speedometer, the data logger, and other vital documents, to prove the prosecution case. On the other hand, the prosecution seems to rely on the oral evidence of witnesses, which is fallible. In the absence of any record, it is not known how the witnesses can say that the train was travelling at a speed of 90kmph. Likewise, the best evidence viz., the data logger, which would state the signal position at the relevant signals correctly, has not been produced by the prosecution. Therefore, the defence case that there were malfunctioning in the signals cannot be totally ruled out. DW1 to DW3 have spoken about the frequent signal failures and malfunctions.

7.3. This Court also noticed another aspect of the case that is worth mentioning. PW1 had lodged the complaint [Ex.P1] stating that two trains, viz., the passenger train [No.56007] and the train driven by the appellant viz., Train No.66017, met with the accident. This information was given on 13.09.2011. The FIR was registered on 14.09.2011 at about 5.00am and marked as Ex.P79. The FIR reached the Magistrate on 19.09.2011 at about 6.00pm as could be seen from the endorsement made by the Magistrate and



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also the Court's seal. Strangely, we find that in Column No.7, which contains the details of the suspected accused, it is shown as 'EMU Train Driver'. The complaint, which only refers to a fact that two trains met with the accident, does not accuse the EMU Train driver. However, strangely, in the FIR the 'EMU Train driver', which refers to the appellant, was shown as the accused. Therefore, we find that the investigation proceeded on the premise that the appellant was at fault, and one cannot expect the investigation to be fair when it is commenced on such a premise, though the complaint does not say so.

8. From the above narrative, it would be clear that the offence of culpable homicide not amounting to murder is certainly not made out. The culpable mental state (knowledge in this case) so far as culpable homicide not amounting to murder is graver than the culpable mental state in Section 304-A IPC viz., rashness or negligence as stated earlier. Even with regard to Section 304-A of IPC, it is trite law that the negligence attributed to the accused must be gross. The evidence as narrated above, does not suggest gross negligence on the part of the appellant. Thus, the circumstances relied upon by the prosecution besides not being conclusively established, do not suggest that the appellant had the knowledge that his act would cause the



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deaths of several passengers.

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9. For the aforesaid reasons, the finding of the trial Court holding the appellant guilty for the offence under Sections 304(II) of IPC-12 counts, 308 of IPC-71 counts and under Section 3 of the TNPPDL Act, r/w Section 151 of the Indian Railways Act, is liable to be set aside.

10. In the result, this Criminal Appeal is allowed, and the appellant is acquitted of all the charges, and he is directed to be set at liberty forthwith, unless his conviction is required in connection with any other case. The conviction and sentence passed in S.C.No.66 of 2012 on the file of the learned Principal Sessions Judge, Vellore, Vellore District, *vide* judgment dated 21.08.2017, are set aside. The fine amount, if any, paid by the appellant shall be refunded. Bail bond, if any, executed shall stand discharged.

08.12.2023

Index : yes/no
Neutral citation : yes/no
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To

1. The Principal Sessions Judge,
Vellore, Vellore District.
2. Deputy Superintendent of Police,
Railway Police Station,
Chennai Central.
3. The Public Prosecutor,
High Court, Madras



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SUNDER MOHAN,J.

ars

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08.12.2023