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Crl.R.C.(MD)No.317 of 2018



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date : 18.04.2023

CORAM:

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

Crl.R.C.(MD)No.317 of 2018

Arunachalam ... Petitioner/Appellant/Sole Accused

Vs.,

The Inspector of Police,
Nathampatti Police Station,
Virudhunagar District.
(Crime No.16 of 2011)

... Respondent/Respondent/Complainant

PRAYER : This Criminal Revision Case has been filed under Section 397 r/w 401 of Cr.P.C., to set aside the order of conviction inflicted as against the petitioner passed in C.C.No.9 of 2011 on the file of the learned Judicial Magistrate No.I, Srivilliputhur, Virudhunagar District dated 15.09.2009 confirming the said order passed by the learned Principal District and Sessions Court, Virudhunagar District at Srivilliputhur in C.A.No.143 of 2011 dated 06.04.2017.

For Petitioner : Mr.M.Jegadeeshpandian

For Respondent : Mr.M.Vaikkam Karunanithi

Government Advocate (Crl.side)



ORDER

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This revision has been preferred as against the judgment passed in C.A.No.143 of 2011, dated 06.04.2017 by the learned Principal District and Sessions Court, Virudhunagar District at Srivilliputhur confirming the conviction and sentence imposed upon the petitioner in CC.No.9 of 2011 on the file of the learned Judicial Magistrate No.I, Srivilliputhur, Virudhunagar District, dated 15.09.2009.

2. The case of the prosecution is that on 06.02.2011 at about 07.45 pm., when the deceased was walking near Alagapuri junction Road from South-North and extreme left turn side of the road, the petitioner had driven his bus bearing Registration No.TN 67 N 496 on the same direction in a rash and negligent manner and dashed against the deceased. Due to the said accident, the deceased sustained head injury and died on the spot. On the complaint, the respondent registered FIR in Crime No.16 of 2011 for the offence punishable under Section 304(A) of IPC. After completion of investigation, the respondent filed a final report and the same was taken cognizance by the trial Court in CC.No.9 of 2011.



3. In order to prove the charge, the prosecution had examined P.Ws.1 to 12 and marked Exs.P1 to P10. On the side of the accused, no one was examined and no document was marked.

4. On perusal of the oral and documentary evidences, the trial Court found that the petitioner was guilty for the offence under Section 304(A) of IPC and sentenced him to undergo two years of simple imprisonment and also to pay a fine of Rs.10,000/-, in default to undergo further period of six months of simple imprisonment. Aggrieved by the same, the petitioner preferred an appeal in C.A.No.143 of 2011 on the file of the learned Principal District and Sessions Court, Virudhunagar District at Srivilliputhur and the appellate Court also confirmed the conviction and sentence imposed by the trial Court and dismissed the appeal. Hence, the present revision.

5. The learned counsel appearing for the petitioner submitted that there was contradiction between the prosecution witnesses and exhibits produced by the prosecution. That apart, there was absolutely no possibility to drive the bus in a rash and negligent



manner, since the Alagapuri bus-stop is located within 50 mtrs. from the occurrence place. The bus was driven by the petitioner from Senkottai to Madurai, when the bus was reaching near Alagapuri bus stop, the petitioner could not have driven the bus in a rash and negligent manner and dashed against the deceased. Even assuming that if the petitioner drove the bus in a high speed, it was not amount to rash and negligent driving. Further, the rough sketch produced by the prosecution reveals that the accident happened while the deceased was crossing the road without noticing either side of the road. The deceased was also aged about 5 years at the time of occurrence and therefore, he did not know the consequences. So, without seeing either side, he crossed the road and as such, the petitioner could not able to stop the bus immediately. Therefore, the accident was not happened due to the rash and negligent driving of the petitioner.

6. The learned counsel further submitted that the evidence of P.W.1 and P.W.2 revealed that they could not be eye witnesses, since their evidence are artificial and mechanical in nature and also, stereotyped evidences were given before the Tribunal. It is also



evident from their evidence that the deceased was alone walking on the road without help of his parents. It shows that the child without care of his parents was attempting to cross the road. Therefore, only on the negligence of the deceased, the accident had happened. However, unfortunately, both the Courts below, without considering the above, mechanically convicted the petitioner for the offence punishable under Section 304(A) of IPC and sentenced him. Since the charge itself was not proved by the prosecution, the petitioner is liable to be acquitted and prays for allowing of this revision.

7. Per contra, the learned Government Advocate (Crl.side) submitted that in order to prove the charge against the petitioner, to the prosecution had examined P.Ws.1 to 12 and marked Ex.Ps.1 to 10. P.W.1 and P.W.2 are the eye-witnesses to the occurrence and they categorically deposed that when the deceased was walking on the left turn side of the road, the petitioner had driven the bus in a rash and negligent manner and dashed against him. Therefore, he sustained injuries and died. The motor vehicle inspection report also revealed that the accident was not happened due to any mechanical fault. Hence, mere because of rash and negligent driving of the petitioner,



the accident had occurred and unfortunately, 5 years old boy died in the accident. In fact, the petitioner did not even stop the bus after hitting the five years old child. It shows that he had driven the vehicle in a rash and negligent manner and caused the accident which has resulted in death of a minor child. Therefore, the Courts below rightly convicted and sentenced the petitioner and accordingly, it does not warrant any interference by this Court.

8. Heard the learned counsel appearing on either side and perused the materials available on record.

9. On 06.02.2011 at about 7.45 a.m., the deceased minor child aged about 5 years was walking near Alagapuri junction road from South-North. In the same direction when the petitioner drove his bus bearing Registration No.TN 67 N 496, dashed against the child and due to which, the minor child sustained grievous injuries and died. One of the eye witnesses lodged a complaint, who was examined as PW.1 and P.Ws.2 & 3 were also eye witnesses to the occurrence. So, according to the eye witnesses, they were present in the place of occurrence and they had seen that when the deceased



was coming on the road near Alagapuri bus stand, the petitioner had driven his bus in a rash and negligent manner and dashed against the deceased. Due to which, the deceased sustained grievous injuries and died. A perusal of their evidence reveals that they deposed stereotypically and it looks artificial. They might have seen the occurrence, but their evidences are not proposed to believe. Admittedly, the deceased was aged about 5 years at the time of occurrence. He was alone coming on the road. The said road is a busy road and without assistance of his parent, he alone was walking on the road. This Court can easily visualize that the five years old boy without seeking either side of the road attempted to cross the road in order to visit the petty shop, which is located opposite side of the road. P.W.1 deposed that when the deceased was proceeding to shop, the accident had occurred. P.W.1 also admitted that within 50 mtrs distance from the place of occurrence, there is a bus stand. He also admitted that the accident had taken place in the middle of the road. Therefore, it shows that when the deceased was crossing the road in order to purchase something in the petty shop, the accident had occurred in the middle of the road. It is also seen that the victim was aged about 5 years and without seeing on either side of the road,



suddenly he attempted to cross the road. Therefore, the petitioner could not able to stop the bus immediately. That apart, the bus stand is located in the turning of the road. Therefore, there was absolutely no possibility for the petitioner to drive his bus in a high speed manner and also, in a rash and negligent manner.

10. The rough sketch which was marked as Ex.P.9 also corroborated the evidence of P.W.1 to P.W.3. The accident had occurred in the middle of the road. Therefore, when the deceased was crossing the road, the accident had taken place. Even assuming that the petitioner had driven his bus in a high speed manner, it was not amount to rash and negligent driving. In this regard, it is relevant to rely upon the judgment of the Hon'ble Supreme Court reported in **2022 LIVE LAW (SC) 489** in the case of **Nanchappan and another Vs., State of Karnataka** in which, the Hon'ble Supreme Court held as follows:

“9. Here it would be useful to advert to the dictum in the case of **Syad Akbar Vs. State of Karnataka**¹, in which this Court proceeded on the basis that doctrine of *res ipsa loquitur stricto sensu* would not apply to a criminal case as its



applicability in an action for injury by negligence is well known. In Syad Akbar (supra), this Court opined:

"29. Such simplified and pragmatic application of the notion of res ipsa loquitur, as a part of the general mode of inferring a fact in issue from another circumstantial fact is subject to all the principles, the satisfaction of which is essential before an accused can be convicted on the basis of circumstantial evidence alone. These are: Firstly, all the circumstances, including the objective circumstances constituting the accident, from which the inference of guilt is to be drawn, must be firmly established. Secondly, those circumstances must be of a determinative tendency pointing unerringly towards the guilt of the accused. Thirdly, the circumstances should make a chain so complete that they cannot reasonably raise any other hypothesis save that of the accused's guilt. That is to say, they should be incompatible with his innocence, and inferentially exclude all reasonable doubt about his guilt."

10. In case of circumstantial evidence, there is a risk of jumping to conclusions in haste. While evaluating such evidence the jury should bear in mind that inference of guilt should be the only reasonable inference from the facts. In the present case however, the conviction of the accused persons seems wholly unjustified against the weight of the evidence adduced. As far as the onus of proving the ingredients of an offence is concerned, in the judgment titled as "**S.L.Goswami Vs. State of M.P2**" this Court held:

"5 In our view, the onus of proving all the ingredients of an offence is always upon the prosecution and at no stage does it shift to the accused. It is no part of the prosecution duty to somehow hook the crook. Even in cases where the defence of the accused does not appear to be credible or is palpably false that burden does not become any less. It is only when this burden is discharged that it will be for the accused to explain or controvert the essential elements in the prosecution case, which would negative it. It is not however for the accused even at the initial stage to prove something which has to be



eliminated by the prosecution to establish the ingredients of the offence with which he is charged, and even if the onus shifts upon the accused and the accused has to establish his plea, the standard of proof is not the same as that which rests upon the prosecution....."

11. Bearing in mind the above principles which have been laid down in the decisions of this Court, we are of the view that the Courts below were not justified in convicting the Appellants of negligence under [Section 304A](#) read with [Section 34](#) IPC.

12. For bringing home the guilt of the accused, prosecution has to firstly prove negligence and then establish direct nexus between negligence of the accused and the death of the victim. Perusal of the record reveals that out of various witnesses arrayed by the prosecution, there are no eye witnesses. Any evidence brought on record is merely circumstantial in nature. We are constrained to repeat our observation that it sounds completely preposterous that a telephone wire carried 11KV current without melting on contact and when such current passed through the Television set, it did not blast and melt the wiring of the entire house. It is even more unbelievable that Appellant no. 2 came in contact with the same voltage and managed to get away with a few abrasions. The Appellants therefore are entitled to be given the benefit of doubt; more so, when there is no report of a technical expert to corroborate the prosecution story. "

11. Thus, it is clear that in order to prove the charge, the prosecution has to firstly prove the negligence and then, establish direct nexus between the negligence of the accused and the death of the victim. As stated supra, the prosecution miserably failed to prove the rash and negligent driving of the petitioner herein. The Courts



below mechanically accepting the case of the prosecution, without analysing as to what amounts to rash and negligent act and committed serious error in finding the petitioner guilty and convicted him.

12. However, the Hon'ble Supreme Court of India in the case of ***Ravi Kapur Vs., State of Rajasthan*** reported in **2012 9 SCC 284**, has laid down the dictum that the factum of rash and negligent driving has to be examined in the light of the facts and circumstances of a given case and the preliminary conditions, thus, are that (a) it is the manner in which the vehicle is driven; (b) whether it was driven either rashly or negligently; and (c) whether such rash and negligent driving should be such as to endanger human life. With regard to parameter, i.e., 'reasonable care' in determining the question of negligence or contributory negligence, the Hon'ble Supreme Court of India held that while driving the vehicle on a public way, there is an implicit duty cast on the drivers to see that their driving does not endanger the life of the right users of the road, may be either vehicular users or pedestrians. Further, held that negligence means omission to do something, which a reasonable and prudent person



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

13. The Court has to adopt another parameter namely the reasonable care in determining the question of negligence or contributory negligence. The doctrine of reasonable care imposes an obligation or a duty upon a person to care for the pedestrian on the road and this duty attains a higher degree when the pedestrian happen to be children of tender years. It is axiomatic to say that while driving a vehicle on a public way, there is an implicit duty cast on the drivers to see that their driving does not endanger the life of the right users of the road, may be either vehicular users or



pedestrian. They are expected to take sufficient care to avoid danger to others. In the case on hand, even according to the case of the prosecution, when the deceased child attempted to cross the road to reach petty shop, which is located opposite to the road, the accident had happened. Admittedly, the child was walking on the road alone without helping of any elders. The deceased, who was aged 5 years, without noticing either side of the road, suddenly attempted to cross the road. It is also evident from the rough sketch produced by the prosecution. That apart, in order to prove the rash and negligent driving, the prosecution failed to examine any one of the passenger who travelled in the bus, which was allegedly driven by the petitioner in rash and negligent manner. It is fatal to the case of the prosecution. This fact was ignored by the Courts below while appreciating the evidence. Loss of life does not *ipso facto* makes driver liable to be convicted under Section 304 of IPC, unless it is proved beyond any reasonable doubt that he drove the vehicle in a rash and negligent manner and as such, the rash and negligent driving would not amount to cause of death. The place of occurrence is a village and as such, after hitting the deceased, the driver did not stop the bus. He straight away went to the police station and



surrender before the respondent. Therefore, it could not be assumed that the petitioner after hitting the deceased, run away from the place of occurrence. Further, merely because of the petitioner was driving the bus at high speed, it does not amount to either negligence or rash by itself. None of the witnesses examined by the prosecution deposed that the petitioner had driven the bus in a high speed. It is the duty of the prosecution to establish in what manner the petitioner had driven the vehicle. The prime burden to establish the charge against the accused is always rest on the prosecution and there is a presumption of innocence in favour of the accused, until it is contrary proved. There is no statutory exception in the present case. In the absence of any material on record, no presumption of rashness or negligence could be drawn by invoking the maxim "*res ipsa loquitur*". Therefore, being no evidence of record to establish the rashness or negligence in driving the bus on the part of the petitioner, it cannot be said that the petitioner is liable to be punished for death of a minor child. Further, if a person suddenly crossed the road, even if the driver slowly drove the bus, he may not be in a position to avoid the accident. Therefore, it will not be possibility to hold that the driver of the bus was negligent.



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14. In view of the above, the conviction and sentence imposed by the Courts below cannot be sustained as against the petitioner and they are liable to be set aside. Accordingly, the conviction and sentence imposed upon the petition in C.A.No.143 of 2011 on the file of the learned Principal District and Sessions Judge, Virudhunagar District at Srivilliputhur, confirming the order passed in C.C.No.9 of 2011 on the file of the learned Judicial Magistrate No.I, Srivilliputhur, Virudhunagar District, dated 15.09.2009 is hereby set aside and this Criminal Revision Case is allowed.

18.04.2023

rmk

NCC : Yes/No

Index: Yes/No

To

- 1.The Judicial Magistrate No.I, Srivilliputhur,
Virudhunagar District.
- 2.The Principal District and Sessions Judge,
Virudhunagar District
- 3.The Inspector of Police,
Nathampatti Police Station,
Virudhunagar District.



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4.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

5.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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G.K.ILANTHIRAIYAN , J.,

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