



Crl.A.No.720 of 2017

In the High Court of Judicature at Madras

Reserved on: 05.1.2024	Delivered on: 12.01.2024
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Coram :

The Honourable Mr.Justice SUNDER MOHAN

Criminal Appeal No.720 of 2017

1.David
2.Loorthysamy

...Appellants

Vs

State by its Inspector of
Police, Thalavadi Police
Station, Erode District.

...Respondent

APPEAL under Section 374(2) of the Indian Penal Code against the conviction and sentence imposed in the judgment dated 07.11.2017 made in S.C.No.91 of 2016 on the file of the Additional Sessions Court, Magalir Neethi Mandram (Fast Track Mahila Court), Erode.

For Appellants : Mr.N.Manokaran
For Respondent : Mr.E.Raj Thilak, APP (Crl.Side)

JUDGMENT

This criminal appeal has been filed by the appellants challenging the conviction and sentence imposed vide judgment dated 07.11.2017 in S.C. No.91 of 2016 on the file of the Additional Sessions Court, Magalir Neethi Mandram (Fast Track Mahila Court), Erode.



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2. Heard the learned counsel appearing for the appellants and the learned Additional Public Prosecutor (Criminal Side) appearing for the respondent.

3. The case of the prosecution is as follows:

(i) During the relevant point in time, one Sandhya was studying in the 10th standard at Divine Vidhyalaya Matriculation School, Thottakajanur. On 07.1.2013 at about 5.45 PM, while she was walking in the playground after a special class in the school, the first appellant, who had a learner's licence and who was learning to drive the vehicle from the second appellant, came in a Mahindra Max Jeep bearing registration No.TN-36-V-8551 in a rash and negligent manner, knowing fully well that their act would endanger the lives of the school children and dashed against both the said Sandhya and her friend Kusuma - P.W.2, as a result of which, the said Sandhya sustained fatal injuries and the said Kusuma sustained grievous injuries.

(ii) On learning that the said Sandhya met with an accident, her father - P.W.1 lodged a complaint, which was recorded by P.W.14 - the then Sub-Inspector of Police of the respondent police station. On receipt of the complaint - Ex.P.1, P.W.14 registered the first information report - Ex.P.6 in Crime No.6 of 2013 for the offences under Sections 279, 338,



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and 304 Part II of the Indian Penal Code (for short, the IPC).

(iii) After registration of the first information report, P.W.18 took up the investigation, conducted an inquest over the body of the deceased in the presence of panchayatdhars, and prepared the inquest report - Ex.P.7. Thereafter, he sent the body of the deceased for postmortem examination. P.W.11 - the doctor conducted the postmortem and issued the postmortem certificate - Ex.P.3. Further, P.W.18 went to the scene of the occurrence and prepared the observation mahazar - Ex.P.8.

(iv) After examination of some of the prosecution witnesses, P.W.18 handed over the investigation to P.W.19. Subsequently, P.W.19 continued the investigation, examined the other prosecution witnesses, and filed the final report against the appellants for the offences under Sections 279, 338, and 304 Part II of the IPC before the learned Judicial Magistrate, Sathyamangalam.

(v) On appearance of the appellants, the provisions of Section 207 of the Criminal Procedure Code were complied with, and the case was committed to the Court of Sessions in S.C.No.91 of 2016 and was made over to the Additional Sessions Court, Magalir Neethi Mandram (Fast Track Mahila Court), Erode, for trial. The Trial Court framed charges under Sections 279, 338, and 304 Part II of the IPC as against the



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appellants, and when questioned, the appellants pleaded 'not guilty'.

(vi) The prosecution examined P.W.1 to P.W.19 and marked Ex.P.1 to Ex.P.8. The appellants have not examined any witnesses or marked any documents. The Trial Court, after considering the oral and documentary evidence, found (i) the first appellant guilty of the offences under Sections 279, 338, and 304 Part II of the IPC; and (ii) the second appellant guilty of the offences under Sections 279 read with 35, 338 read with 35, and 304 Part II read with 35 of the IPC and sentenced them as below:

<i>Against</i>	<i>Offence under IPC</i>	<i>Sentence imposed</i>
<i>1st appellant</i>	<i>Section 279</i>	<i>To undergo 6 months RI with fine of Rs.1,000/-, in default, to undergo 1 month SI</i>
	<i>Section 338</i>	<i>To undergo 2 years RI with fine of Rs.1,000/-, in default, to undergo 6 months SI</i>
	<i>Section 304 Part II</i>	<i>To undergo 10 years RI with a fine of Rs.10,000/-, in default, to undergo 2 years SI</i>
<i>The above sentences were directed to run concurrently</i>		
<i>2nd appellant</i>	<i>Sections 279 r/w 35</i>	<i>To undergo 6 months RI with fine of Rs.1,000/-, in default, to undergo 1 month SI</i>
	<i>Sections 338 r/w 35</i>	<i>To undergo 2 years RI with fine of Rs.1,000/-, in default, to undergo 6 months SI</i>
	<i>Sections 304 Part II r/w 35</i>	<i>To undergo 10 years RI with a fine of Rs.10,000/-, in default, to undergo 2 years SI</i>
<i>The above sentences were directed to run concurrently</i>		



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(vii) Challenging the same, the appellants are before this Court.

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4. The learned counsel for the appellants submitted that the evidence disclosed that the occurrence took place at 5 PM on 07.1.2013, that the occurrence place is a playground, that the appellants are church fathers who are working in an NGO situated in the said school premises itself, that the first appellant requested the second appellant to teach him driving, and that with the permission of the correspondent of the school, they had driven the jeep in the school playground after school hours. According to him, the evidence also disclosed that the school was closed at 4 PM, that there was a special class for 10th standard students till 5 PM, that all the children left the school by road, that the deceased and P.W.2 unexpectedly came out of the class to the playground and that no *mens rea* can be attributed to the appellants for the offence under Section 304 Part II of the IPC.

5. The learned counsel for the petitioner further submitted that apart from P.W.2, there was no eyewitness to the occurrence, that from the evidence of P.W.2, it cannot be inferred that the appellants had driven the jeep in a rash and negligent manner, and that on the contrary, the evidence only suggested that the deceased and P.W.2 had unexpectedly



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walked in the playground when the other children left the school through the main road. He also submitted that even the offence under Section 304 - A of the IPC is not made out, as neither negligence nor rashness have been established by the prosecution.

6. Per contra, the learned Additional Public Prosecutor (Criminal Side) appearing for the respondent submitted that the prosecution had established its case beyond reasonable doubt and that the principle of *res ipsa loquitur* can be applied in the instant case to infer that the appellants had the requisite *mens rea* for committing the offences charged against them. According to him, there is no reason to interfere with the findings of the Trial Court. Ultimately, he prayed for dismissal of the appeal.

7. This Court has carefully considered the rival submissions and perused the records.

8. Admittedly, P.W.2 is the injured witness, who was walking along with the deceased when the unfortunate incident occurred. It is in her evidence that when she and the deceased were walking in the playground, the vehicle driven by the first appellant dashed against both of them. It is also her version that the classes were over at 4 p.m. and that since they were studying in the 10th standard, they had special



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classes till 5 p.m. P.W.2 would admit that she was aware of the fact that the first appellant was learning to drive in the playground, that the appellants were church fathers working for an NGO in the school premises itself, and that they had permission to use the playground for driving.

9. It is not in dispute that the first appellant had a learner's driving licence and that the second appellant had a valid driving licence. Therefore, this Court finds that there is no illegality, per se, in their driving the vehicle in the playground. The evidence of P.W.2 also does not suggest that the appellants had driven the jeep in such a manner as to infer knowledge of causing the death and to charge them for the offence under Section 304 Part II of the IPC.

10. It is trite that the culpable mental state of "knowledge" is graver than a culpable mental state of "rashness" or "negligence". The prosecution had not established that the appellants had the requisite knowledge to cause the death. As stated earlier, the appellants had used the playground only after school hours. The occurrence was said to have taken place at 5 p.m. The classes got over by 4 p.m. and the special class got over by 5 p.m. Therefore, their act of driving the vehicle in the playground cannot be said to be with the knowledge that it is likely to



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cause death of a school child. Therefore, this Court is of the view that the offence under Section 304 Part II of the IPC is not made out.

11. However, though the appellants were given the necessary permission by the correspondent of the school to drive in the playground, they ought to have exercised due care and caution while driving in the playground. From the evidence of P.W.2, it can be seen that both P.W.2 and the deceased were hit from behind by the vehicle. There is no evidence to suggest that P.W.2 and the deceased were guilty of any negligence. The manner in which the accident took place, suggests that the appellants did not exercise the necessary care and caution while driving on the play ground. Further, the nature of injuries sustained by the deceased, as seen from the postmortem certificate - Ex.P.3, would show that the deceased sustained serious head injuries and that the skull was found to be open. The injuries sustained by the deceased and the evidence of P.W.2 would also show that the accident had happened due to the gross negligence of the appellants. The first appellant was charged for the offence under Section 304 Part II of the IPC besides the offences under Sections 279 and 338 of the IPC. In view of for the reasons above, the first appellant would be guilty the offence under Section 304-A of the IPC and the offences of Sections 279 and 338 of the IPC. As regards the second appellant, he was charged for the offences under Sections 304 Part II, 279 and 338 of the IPC r/w 35 of the IPC. Since this Court has



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held that Section 304 Part II of the IPC is not made out, the second appellant cannot be convicted for the offence under Section 304-A of the IPC with the aid of Section 35 of the IPC. Section 35 of the IPC, deals with an act done with criminal "knowledge" or "intention" by several persons, and stipulates that each of such persons who joins in the act with such "knowledge" or "intention" is liable for the act in the same manner as if the act was done by him alone. However, the *mens rea* for the offence under Section 304 – A of the IPC is either "rashness" or "negligence" and not "knowledge" or "intention." Thus, Section 35 of the IPC cannot be invoked. However, the act of the second appellant in intentional cooperation in the commission of the offence under Section 304 – A of the IPC, would make him also liable for the offence under Section 304 – A of the IPC with the aid of section 37 of the IPC. As stated earlier, the second appellant also had not taken due care and caution while imparting the driving training to the first appellant and hence, he would be liable for the offence under Section 304 – A of the IPC r/w 37 of the IPC.

12. Though the appellants have not been charged for the offence under Section 304 - A of the IPC, this Court is of the view that since the appellants were charged for the offence under Section 304 Part II of the IPC, they can be convicted for the offence under Section 304 - A of the



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IPC, which would be a minor offence within the meaning of Section 222 of the Criminal Procedure Code. No prejudice would be caused to the appellants if they were convicted for the offence under Section 304 - A of the IPC, as the trial Court had charged them for a rash and negligent act in causing injury to P.W.1 and found them guilty of the offence under Sections 279 and 338 of the IPC. Hence, this Court is of the view that the appellants are guilty of the offences under Sections 279, 338, and 304 - A of the IPC.

13. When the appeal came up for admission on 13.12.2017 in Crl.M.P.No.14165 of 2017, this Court suspended the sentence of imprisonment alone imposed against both the appellants and further directed that they be enlarged on bail. In view of the mitigating circumstances that the appellants had the requisite licence and requisite permission and used the playground after school hours and that they could not have normally expected the presence of the deceased and P.W.2 in the playground, this Court is also of the view that the sentences imposed on them can be reduced to the period already undergone by them for the aforesaid offences and the interest of justice would be met if substantial fine amounts are imposed for the offence under Section 304 - A of the IPC. It is reported by the learned Additional Public



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Prosecutor that the first appellant was in jail from 09.01.2013 to 18.02.2013 (41 days) during the investigation and was in custody after conviction from 07.11.2017 to 21.12.2017 (45 days), totalling 86 days. The second accused was in custody from 09.01.2013 to 07.02.2013 (30 days) during the investigation, and from 07.11.2017 to 21.12.2017 (45 days), totalling 75 days.

14. Accordingly, the first appellant is sentenced to imprisonment for the period already undergone and directed to pay a fine of Rs.2,10,000/- for the offence under Section 304 - A of the IPC, in default to undergo two years S.I. The sentence of imprisonment imposed for the offences under Sections 279 and 338 of the IPC is modified and restricted to the period of imprisonment already undergone. The second appellant is sentenced to undergo imprisonment of the period already undergone for the offence under Section 304 - A r/w 37 of the IPC and to pay a fine of Rs.2,10,000/- in default to undergo two years Simple Imprisonment. Likewise the second appellant is guilty of the offences under Sections 279 and 338 r/w. 37 of the IPC and the sentence of imprisonment imposed on him for those two offences is also modified and restricted to the period of imprisonment already undergone. Since the appellants have already paid Rs.10,000/- each for the offence under Section 304 Part II of the IPC as



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fine, they shall pay the remaining fine amount of Rs.2,00,000/- each.

On payment of the said fine amounts by both the appellants, the Trial Court shall ensure that a sum of Rs.3,00,000/- (Rupees three lakhs only) is paid as compensation to P.W.1 - the father of the deceased, and a sum of Rs.1,00,000/- (Rupees one lakh only) is paid as compensation to P.W.2 (the injured victim).

15. With the above directions, the above criminal appeal is partly allowed by modifying the judgment dated 07.11.2017 in S.C.No.91 of 2016 on the file of the Additional Sessions Court, Magalir Neethi Mandram (Fast Track Mahila Court), Erode, to the extent indicated above.

12.01.2024

RS/dk

Index : Yes (or) No

Neutral Citation : Yes (or) No

Speaking Order : Yes (or) No



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To

- 1.The Additional Sessions Court,
Magalir Neethi Mandram
(Fast Track Mahila Court), Erode.
- 2.The Judicial Magistrate,
Sathyamangalam.
- 3.The Inspector of Police,
Thalavady Police Station,
Erode District.
- 4.The Public Prosecutor,
High Court, Madras.



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P.D.Judgment in
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