
(2010) 12 RAJ CK 0012

In the Rajasthan High Court

Case No : Criminal Revision Petition No. 1276 of 2010

Abdul Kalam Musalman and Others

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 10-12-2010

Acts Referred:

Mines and Minerals (Development and Regulation) Act, 1957 — Section 21, 4
Penal Code, 1860 (IPC) — Section 120, 120(B), 300, 302

Citation : (2011) CriLJ 2507 : (2011) 7 RCR(Criminal) 924 : (2011) 4 RLW 3065

Hon'ble Judges : R.S. Chauhan, J

Bench : Single Bench

Judgement

R.S. Chauhan, J.—Aggrieved by the order dated 28.11.2010 passed by the Additional Sessions Judge Fast Track, Tonk, whereby the learned Judge has framed charges against the Petitioners for offences under Sections 304, 120B IPC and u/s 4/21 of Mines and Minerals (Regulation and Development) Act, 1957/1952 (hereinafter referred to as the "M.M.D.R., Act"), the Petitioners have approached this Court.

2. The brief facts of the case are that on 28.08.2010, a FIR, FIR No. 144/2010, was registered at Police Station Dooni, District Tonk for offences u/s 304 IPC, read with Section 4/21 of M.M.D.R. Act against the accused Petitioners. After registration of the FIR, the investigation commenced. After investigation and after arresting the accused persons, a charge-sheet was filed before the learned C.J. (J.D.) & J.M. Deoli, District Tonk u/s 304 Part-I, 120 IPC and 4/21 of M.M.D.R. Act. Thereafter, the matter was transferred to learned Additional Sessions Judge, Fast Track, Tonk. Vide order dated 26.11.2010, the learned Judge framed the charges, as aforementioned, against the Petitioners. Hence, this petition before this Court.

3. The learned Counsel has vehemently contended that it is a case where according to the complainant certain provisions of the M.M.D.R., Act were not followed. Secondly, there is a clear-cut distinction between Sections 304 and

304A IPC. Section 304 IPC deals with punishment for culpable homicide. Section 299 defines the term "culpable homicide". Culpable homicide entails the existence of "intention and knowledge", whereas Section 304A speaks of death by "rashness and negligence". In criminal jurisprudence, there is a wide difference between "intention and knowledge", on the one hand, and "rash and negligence", on the other hand. Although rashness contains an element of knowledge, but in rashness despite having the knowledge of the consequences, the act is still done. At worse, even if knowledge were to be attributed to the Petitioners, they may have had the knowledge of the consequences, but they have ignored the consequences. Therefore, the case falls under the category of "rashness". Hence, they would be liable u/s 304A and not u/s 304 IPC. Thirdly, illustration "C" of Section 299 IPC clearly describes when "an act does not amount to culpable homicide". According to the said illustration, if a person intends to do a particular act, while doing that act, unfortunately a death is caused, he cannot be held liable for culpable homicide. In the present case, the intention of the Petitioners was not to kill the labourers. Their intention, in fact, was to carry out the mining operation. Unfortunately, while carrying out the mining operation, few labourers lost their lives. Since the intention was to carry out mining operation, and not to cause the death of the labourers, clearly the present case falls under illustration "c" of Section 299 IPC. Therefore, the act allegedly done by the Petitioners does "not amount to culpable homicide". Since the act does not amount to culpable homicide, it cannot fall within Section 304 IPC. Thus, it is clearly covered by Section 304A IPC and not by Section 304 IPC.

4. On the other hand, Mr. Javed Chaudhary, the learned Public Prosecutor, has strenuously contended that at the time of framing of the charges, the learned Judge should have framed the more grave charge of Section 304 IPC. If during the course of trial, the learned Judge comes to the conclusion that the charge should be reframed, u/s 216 Code of Criminal Procedure. he has the power, to reframe the charge. Moreover, he can always convict the accused persons for lesser offence.

5. Heard the learned Counsel for the parties and perused the impugned order.

6. This case raises an interesting legal issue with regard to the distinction between Section 304 IPC and Section 304A IPC.

7. Section 304 IPC is as under:

Section 304. Punishment for culpable homicide not amounting to murder -

Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, Or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without

any intention to cause death, or to cause such bodily injury as is likely to cause death.

8. Section 304A IPC is as under:

Section 304A. Causing death by negligence Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

9. A bare perusal of these two provisions clearly reveals that they deal with the mental state or mens rea of the accused-person. While Section 304 IPC requires the existence of "intention or knowledge", Section 304A IPC requires the existence of "rashness or negligence". Therefore, it is imperative to understand the ambit and extent of the words "intention", "knowledge", "rashness" and "negligence".

10. Intention is doing of an act with the aim of achieving a particular purpose, or end, or consequence. Knowledge is the awareness of the consequences when an act is done in a particular manner. The words "intention" and "knowledge" have been an integral part of criminal statutes. However, the words "negligence" and "rashness" have been transplanted into the criminal arena from the law of Torts. According to the law of Torts, every person owes a duty towards his neighbor or towards his immediate surrounding to ensure that no harm or damage is done to the neighbor or the surrounding. When this duty is breeched by an act, of which the doer is unaware of the consequences, he said to have committed a negligent act.

11. Halsbury's Laws of England (4th Edition) Volume 34 paragraph 1 (para 3) defines the words "what constitutes negligence" as under:

Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence, where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen to be likely to cause physical injury to persons or property. The degree of care required in the particular case depends on the surrounding circumstances, and may vary according to the amount of the risk to be encountered and to the magnitude of the prospective injury. The duty of care is owed only to those persons who are in the area of foreseeable danger, the fact that the act of the Defendant violated his duty of care to a third person does not enable the Plaintiff who is also injured by the same act to claim unless he is also within the area of foreseeable danger. The same act or omission may accordingly in some circumstances involve liability as being negligent although in other circumstances it will not do so. The material considerations are the absence of

care which is on the part of the Defendant owed to the Plaintiff in the circumstances of the case and damage suffered by the Plaintiff, together with a demonstrable relation of cause and effect between the two.

12. Though the term "negligence" has not been defined in the Indian Penal Code, it may be stated that negligence is the 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 reasonable and prudent man would not do.

13. In the case of Jacob Mathew Vs. State of Punjab and Another, the Hon^{ble} Supreme Court distinguishes between the concept of negligence in civil and criminal law. It observed as under:

What may be negligence in civil law may not necessarily be negligence in criminal law. Generally speaking, it is the amount of damages incurred which is determinative of the extent of liability in tort; but in criminal law it is not the determinative of liability. To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law i.e. gross of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

While negligence is 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 man would not do; criminal negligence is the 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 in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. A clear distinction exists between "simple lack of care" incurring civil liability and "very high degree of negligence" which is required in criminal cases.

14. "Rashness", on the other hand, consists of doing an act where the doer knows the consequences of his act, but hopes that the consequences would not follow. The word "rashness" has also not been defined in the Indian Penal Code. However, in the case of *Empress v. Idu Beg* ILR(1881) All 776, Straight, J. made the following observation with regard to criminal rashness. His Lordship observed as under:

Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the 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 in particular, which, having

regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.

15. These observations have recently been approved by the Hon'ble Supreme Court in the case of Mahadev Prasad Kaushik v. State of U.P. and Anr. [AIR 2009 SC 125].

16. Thus, the distinction between the "rashness" and "negligence" is that while in the former, the doer knows about the consequences, but in the latter, the doer is unaware of the consequences.

17. Undoubtedly, "rashness" does contain an element of knowledge. But a distinction has to be made between Section 304 IPC, requiring knowledge, with regard to the consequences of the act and Section 304A IPC, "rashness", having an element of knowledge about the consequences, but with the hope that the consequences would not follow. In the case of Prabhakaran v. State of Kerala [JT 2007 (9) SC 346]: (AIR 2007 SC 2376), the Apex Court had analysed the ingredients of Section 304A IPC as under:

5. Section 304A speaks of causing death by negligence. This section applies to rash and negligence acts and does not apply to cases where death has been voluntarily caused. This section obviously does not apply to cases where there is an intention to cause death or knowledge that the act will in all probability cause death. It only applies to cases in which without any such intention or knowledge death is caused by what is described as a rash and negligent act. A negligent act is an act done without doing something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do or act which a prudent or reasonable man would not do in the circumstances attending it. A rash act is a negligent act done precipitately. Negligence is the genus, (sic) of which rashness is the species. It has sometimes been observed that in rashness the action is done precipitately that the mischievous or illegal consequences may fall, but with a hope that they will not. Lord Atkin in *Andrews v. Director of Public Prosecutions*, (1937) AC 576 observed as under:

Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence; and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied "recklessness" most nearly covers the case. It is difficult to visualize a case of death caused by reckless driving in the connotation of that term in ordinary speech which would not justify a conviction for manslaughter; but it is probably not all embracing, for "recklessness" suggests an indifference to risk whereas the accused may have appreciated the risk and intended to avoid it, and yet shown in the means adopted to avoid the risk such a high degree of negligence as would justify a conviction.

6. Section 304A applies to cases where there is no intention to cause death and

no knowledge that the act done in all probability will cause death. The provision is directed at offences outside the range of Sections 299 and 300 IPC. The provision applies only to such acts which are rash and negligent and are directly cause of death of another person. Negligence and rashness are essential elements u/s 304A. Culpable negligence lies in the failure to exercise reasonable and proper care and the extent of its reasonableness will always depend upon the circumstances of each case. Rashness means doing an act with the consciousness of a risk that evil consequences will follow but with the hope that it will not. Negligence is a breach of duty imposed by law. In criminal cases, the amount and degree of negligence are determining factors. A question whether the accused's conduct amounted to culpable rashness or negligence depends directly on the question as to what is the amount of care and circumspection which a prudent and reasonable man would consider to be sufficient considering all the circumstances of the case. Criminal rashness means hazarding a dangerous or wanton act with the knowledge that it is dangerous or wanton and the further knowledge that it may cause injury but done without any intention to cause injury or knowledge that it would probably be caused.

7. As noted above, "Rashness" consists in hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury. The criminality lies in such a case in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence on the other hand, is the 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 in particular, which, having regard to all the circumstances out of which the charge has arisen it was the imperative duty of the accused person to have adopted.

8. The distinction has been very aptly pointed out by Holloway J. in these words:

Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him and that if he had, he would have had the consciousness. The imputability arises from the negligence of the civic duty of circumspection.

(See In re: Nidamorti Nagabhusanam 7 Mad. H.C.R. 119).

18. Similarly in the case of Mahadev Prasad Kaushik (supra) the Hon'ble Supreme Court has dealt with the distinction between these two provisions. The Apex Court has held as under:

The section deals with homicidal death by rash or negligent act. It does not create a new offence. It is directed against the offences outside the range of

Sections 299 and 300, IPC and covers those cases where death has been caused without "intention" and "knowledge" The words "not amounting to culpable homicide" in the provision are significant and clearly convey that the section seeks to embrace those cases where there is neither intention to cause death, nor knowledge that the act done will in all probability result into death. It applies to acts which are rash or negligent and are directly the causes of death of another person.

There is thus distinction between Section 304 and Section 304A. Section 304A carves out cases where death is caused by doing a rash and negligent act which does not amount to culpable homicide not amounting to murder within the meaning of Section 299 or culpable homicide amounting to murder u/s 300, IPC. In other words, Section 304A excludes all the ingredients of Section 299 as also of Section 300. Where intention or knowledge is the "motivating force" of the act complained of, Section 304A will have to make room for the graver and more serious charge of culpable homicide not amounting to murder or amounting to murder as the facts disclose. The Section has application to those cases where there is neither intention to cause death nor knowledge that the act in all probability will cause death.

19. Furthermore, in order to understand the distinction between Sections 304 and 304A IPC, it is pertinent to note that while the former Section deals with an act "amounting to culpable homicide", the latter Section deals with an act "not amounting to culpable homicide". Therefore, let's first turn to the definition of "culpable homicide" as contained in Section 299 IPC.

20. Section 299 IPC along with the illustrations reads as under:

299 Culpable homicide - 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 the offence of culpable homicide.

Illustrations

(a) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be caused. Z believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

(b) A knows Z to be behind a bush. B does not know it. A, intending to cause, or knowing it to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

(c) A, by shooting at a fowl with intent to kill and steal it, kills B who is behind a bush; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or to cause death by doing an act that he knew was likely to cause death.

21. A bare perusal of illustrations clearly reveals that Illustrations "A & B" talk about a conscious act done by a person with the intention or with the knowledge that by such an act he is likely to cause a death of a person. Illustration "C" does not deal with a conscious act to cause the death of a human being. According to Illustration "C", the intention is to do a particular act, by which death of a human being would not be caused. But unfortunately, death of a man still ensues. According to Illustration "C" causing of such a death does "not amounting to a culpable homicide". Section 304A IPC deals with causing of death "not amounting to culpable homicide". Therefore, Illustration "C" would have to be read in the context of Section 304A IPC.

22. In the case of Mahadev Prasad Kaushik (*supra*), the Hon'ble Supreme Court has laid down the test of "motivating force". Therefore, this Court is required to see what was the "motivating force" in the mind of the accused persons when death of the five labourers was caused ? According to the prosecution, the Petitioners were carrying out illegal mining. Therefore, their intention was to carrying out the illegal mining of the place. Obviously, "the motivating force" was to extract minerals from the earth. The motivating force was not to cause death of the five labourers. Since their intention was carrying out of illegal mining, and howsoever unlawful it may be to do so, it was certainly not their intention to cause the death of the unfortunate victims. Therefore, their act falls within the ambit of Illustration "C" of Section 299 IPC. Hence, their act is covered by Section 304A and not by Section 304 IPC.

23. Although "rashness" does contain an element of "knowledge", even then the case would not fall within the ambit of Section 304 IPC. For, in Section 304 IPC, the knowledge is about the consequences as the consequences would naturally and obviously follow from the nature of the act. But in "rashness" although there is a knowledge that the consequences may follow or are likely to follow, but the doer hopes that the consequences would not follow. Thus, even if the element of knowledge is common in Section 304 and Section 304A IPC, the extent and ambit of "knowledge" defers in its nature. Therefore, the element of "knowledge" should not lead to any confusion between the scope of Section 304 IPC and scope of Section 304A IPC.

24. According to the prosecution the Petitioners were duty bound to take certain security measures which they failed to do so. Therefore, on the failure of the duty towards the labourers, death was caused. Since the act was done with the knowledge, but while ignoring the consequences, obviously the case would fall under the definition of word "rashness". In case, it was done without having the knowledge, obviously the case would fall within the definition of word "negligence". Therefore, at worse, the Petitioner can be charged for offence u/s 304A. Thus, they cannot be charged for offence u/s 304 IPC.

25. As far as the contention of the learned Public Prosecutor is concerned that the learned trial Court is empowered to subsequently modify the charge or to punish the accused person for lesser crime, such an argument does not hold

water for the simple reason that framing of a charge is a serious legal exercise. Moreover, the accused has to be informed the exact case which he likely to face, and which he is required to meet out. Therefore, charges have to be framed as carefully as possible. They cannot be framed vaguely. Thus, the learned trial Court was duty bound to consider the parameters of the provisions of law and to see under which Section the offence is committed.

26. For the reasons stated above, while quashing and setting aside the particular part of the order dated 26.11.2010 whereby the charge for offence u/s 304 IPC has been framed, this Court remands the case back to the learned trial Court with the direction to frame the charge u/s 304A IPC. Rest of the order dated 26.11.2010 with 16 regard to the charges under the other provisions of IPC and under provisions of M.M.D.R. Act is, hereby, confirmed.

27. With these observations, this petition is, hereby, partly allowed.