

(1983) 06 BOM CK 0009

In the Bombay High Court

Case No : Criminal Revision Application No. 197 of 1982

Bhausahab Sakharam Mhasruk

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 27-06-1983

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397
Penal Code, 1860 (IPC) — Section 279, 304A

Citation : (1984) ACJ 689 : (1983) 2 BomCR 729

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Advocate : R.M. Agarwal, for the Appellant; S.B. Patil, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Sharad Manohar, J.—The revision is filed by the original accused, a driver of a bus of State Transport Corporation, against concurrent orders of conviction and sentences by the two courts below, convicting him for the offence of rash and negligent driving, resulting in the death of an old woman on the street waiting for the bus, the offence u/s 304-A as also u/s 279 of the Indian Penal Code.

2. Since it was a concurrent finding of guilt recorded by both the courts below, I was hesitant initially in disturbing the same, but when Mr. Agarwal, the learned Advocate for the petitioner satisfied me that certain part of the prosecution evidence was of the positive effect that no conviction could have been brought home against the accused, and that the same was overlooked by the courts below, I went through the entire evidence as also through the judgments of both the courts below, and after examining the said evidence carefully, I am satisfied that the grievance of Mr. Agarwal was more than justified and that the error committed by both the courts below is of such a gross character that this Court would not only be having jurisdiction sitting in revisional jurisdiction to interfere with the said finding but would even be under obligation to do so.

3. Before stating the prosecution case relating to the offence, certain factual position relating to the geography of the place of the incident may be mentioned. The place of offence is near the inter-section of two roads, viz., the Dhule Chalisgaon Road which goes north, and the Arvi Parola Road which goes west to east. Near the inter-section of these roads are the bus-stops in village Borkund. We are concerned with the bus-stop for the bus going on the Dhule Chalisgaon Road to Chalisgaon. That bus-stop is just before the intersection towards the northern side. It is an admitted position that near the bus-stop there is a sugar cane shop. This sugar-cane shop is described in these parts as "Rasavanti". There is further no dispute that on the opposite side of the road i.e. on the western side there is a hotel and there is no dispute that on the date in question the hotel was closed. There is the further admitted position that just as the Borkund bus-stop for the bus going from Dhule to Chalisgaon is situated on eastern side just before the intersection. Likewise, the bus-stop for the bus going from Arvi to Parola is on the northern side of the road just after the intersection.

4. The prosecution case is that on 19-4-1980 some time between 7.00 a.m. and 8.00 a.m. the old woman Dhrupadabai the deceased, in the instant case, came to Borkund. She was to go by the bus going from Dhule to Chalisgaon. She was to go to Verul which is on the way. There is no dispute that her son Bhimrao came by a bus which came by Arvi Parola Road. He got down from the bus at the intersection. What happened subsequently is the matter of dispute and hence it cannot be stated that it was an admitted factual position. The case of the prosecution is that Bhimrao was looking after his mother Dhrupadabai with a view to help her to get into the bus going from Borkund to Verul and both of them were standing on the bus-stop on the eastern side of the road. The State Transport bus in question driven by the accused who is the petitioner before me, came at an excessive speed and knocked down Dhrupadabai throwing her away at a distance of about 44 feet and thus killing her instantaneously. The further case of the prosecution is that the bus thereafter stopped at a distance of about 55 feet from the place where the deceased Dhrupadabai was knocked down, and stopped there. All the formalities, such as drawing up of panchanama etc., were made and the accused was prosecuted for having committed offence of rash and negligent driving made punishable u/s 304-A as well as u/s 279 of the Indian Penal Code.

5. I do not propose to set out the reasoning upon which the findings of the trial Court as well as the Appeal Court were based, because I shall have occasion to deal with them as I discuss the evidence in the instant case. It is sufficient here to state that the learned Judicial Magistrate was satisfied about the prosecution case which consisted of the evidence of Bhimrao Ramchandra (P.W. 2), Madhukar Shivram (P.W. 3) and Sheikh Isa Sheikh Burhan (P.W. 4). The substance of the evidence of Bhimrao was that while the deceased Dhrupadabai was waiting for the bus at the bus stop on the eastern side of the Dhule Chalisgaon Road going north, the bus driven by the accused came at an excessive speed, and on account of rash and negligent driving of the accused, the bus knocked down the

deceased Dhrupadabai killing her instantaneously.

6. The substance of the evidence of Madhukar Shivram (P.W. 3) was that though Dhrupadabai wished to go by the bus going from Dhule to verul and hence she should have been waiting at the bus stop on the eastern side of the road, she had in fact kept her cloth bag opposite the hotel on the western side of the road. His evidence was that Dhrupadabai saw Bhimrao getting down from the bus running between Arvi Parola and hence she crossed the road from west to east ; that both of them had a talk and that she crossed the road, went to the western side of it and took her cloth bag; that with the cloth bag she again proceeded towards east (to the Rasavanti which is on the easier side). The witness stated in his evidence further that as she was proceeding towards the Rasavanti with her cloth bag, the bus driven by the accused came at a high speed from Dhule and gave a dash to deceased Dhrupadabai. The witness went further to state that the bus was being driven at a high speed and that after the knocking the bus proceeded about 53 to 60 feet killing Dhrupadabai instantaneously. In cross-examination, the witness stated that the talk between the mother and the son, evidently on the eastern side of the road. Took place for about five minutes. It was further stated by the witness in the cross-examination as follows :---

"It is true after the said talk was over, Dhrupadabai came towards western side of the road and that Bhimrao was looking after his mother. It is true that after taking the cloth bag, Dhrupadabai proceeded towards the Rasavanti immediately."

It was further stated by the witness in the cross-examination as follows :---

"It is not true that the S.T. bus was passing with an excessive speed."

7. The third witness Sheikh Isa Sheikh Burhan (P.W. 4), stated in the examination-in-chief as follows :---

"One bus came from Dhule side, Dhrupadabai crossed the road and was proceeding towards eastern side towards her son. She saw one S.T. Bus coming from Dhule side and therefore returned. Meanwhile the bus came near her and dashed against the lady Dhrupadabai. That lady was lifted to some height by the dash and she fell down in between the two wheels and the bus proceeded ahead after crossing 20 to 25 feet. Dhrupadabai was seen found dead immediately. The speed of the S.T. Bus was moderate."

8. The next piece of evidence relied upon by the prosecution was all that contained in the panchanama and the evidence of the panchas. The panchanama of the place of offence mentions that the total width of the Dhule Chalisgaon road is 36 feet and that the middle portion of 12 feet is a tar road which tar road is skirted by metal road of 12 feet on both the sides. It was further stated in the panchanama that from the place where the bus knocked down the deceased at a distance of about four feet broken pieces of bangles and of the head-lights were lying and that the bus was standing at a distance of about 55 feet from the place where the broken glass pieces were lying. The other portion of the panchnama is

not relevant for the purposes of this judgment, at all.

9. Relying upon this evidence, the trial Court held that the offence of rash and negligent driving resulting in the death of the deceased Dhruvadabai was made good against the accused and hence the trial Court convicted him of the offences punishable under sections 304-A and 279 of the Indian Penal Code and section 116, of the Motor Vehicles Act, and sentenced him to suffer rigorous imprisonment for six months and to pay a fine of Rs. 500/- and in default to undergo rigorous imprisonment for a further period of five months. This was the sentence under both the counts, u/s 304-A, as well as u/s 279, of the Indian Penal Code, but the sentences were ordered to run concurrently.

In appeal, the order of conviction and sentence has been confirmed by the learned Sessions Judge. Hence this revision application.

10. As stated at the outset, this is a case where the charge against the accused of rash and negligent driving has been upheld by the trial Court and the same has been confirmed by the Appeal Court. Normally, the High Court is slow in interfering with such a concurrent finding when it is sitting in its revisional jurisdiction; but after perusal of the evidence not very deeply in the first instance and with utmost care and circumspection in the second instance, I am satisfied that the finding recorded by both the courts cannot be justified at all in the context of the nature of the evidence. I find that the evidence led by the prosecution itself consisted of the oral testimony of two absolutely independent witnesses both of whom went a long way to support the case of the accused rather than that of the prosecution and that part of the evidence has been totally overlooked by both the courts below. If such is the position, I do have jurisdiction and justification to interfere with the order of conviction and sentence even in my revisional jurisdiction.

11. The reasons why the appeal Court has held the petitioner guilty are two-fold. Firstly, it is held that the oral evidence of three witnesses goes to show that no fault whatsoever lay on the part of the deceased and the knocking down incident could not be imputed to conduct on her part. Secondly, it is held that the accused had been driving the said S. T. bus at such an excessive speed that he could not avoid the impact and that the excessive speed itself betokened the rash and negligent driving on his part.

To my mind, neither of these aspects of the prosecution case has been made good by the evidence led by the prosecution.

12. I have already mentioned the substance of the evidence of Bhimrao as regards the first point, viz., that there lay no mistake on the part of the deceased Dhruvadabai which resulted in the unfortunate accident. But it is worthwhile setting out the relevant portion of his evidence on this point. Upon comparison of the said evidence with the other evidence of the independent witnesses and the other witnesses, it becomes clear that the evidence of Bhimrao is thoroughly incredible. This is what Bhimrao has stated in his examination-in-chief on this

point :---

"I saw my mother near Raswanti. I intended to see my mother as there was some time and immediately one bus (ST) came from Dhule side. It was Sakri Jalna bus proceeding towards Chalisgaon. I intended to get accommodation for my mother in that S.T. bus and hence gave signal by raising my hand. That very bus was in excessive speed. As it was in excessive speed and as the said bus came towards me abruptly I went back to a side. My mother was at a distance of five to ten feet from me towards southern side and the said S.T. bus gave dash to my mother. I was standing on metal road when I gave signal. My mother was also on metal road. Due to said dash my mother fell in between the two wheels of the bus and the bus proceeded ahead, by 20 to 30 feet. All the persons then present raised alarm and the driver stopped the bus."

In his cross-examination, he has stated as follows :---

"It is correct that on seeing bus coming from Dhule side I intended to get accommodation of my mother proceeding to Chalisgaon. There were about 10-15 passengers near my mother at that juncture. My mother was standing at a distance of 3 to 10 feet towards South West Corner of Raswanti at its corner having a cloth bag in her hand. I had no talk with my mother. I did not go near my mother."

But in paragraph 4 of his deposition, he has stated as follows :---

"My mother was lying on the corner of tar road and metal road. It might be that I have not stated before police that my mother fell in between two wheels and bus proceeded ahead. It is true that in my presence my mother came from western side of the road along with a bag. It did not so happen that in my presence that my mother went towards western side from eastern side and then returned abruptly along with bag. It did not so happen that the driver tried to avert the dashing against my mother by giving turn but still she was hit with from side of S.T. Bus, and that she was thrown to a distance causing injuries to her head. It is not true that the S.T. Bus was driven with moderate speed. It is not true that I falsely say that my mother was towards eastern side of the road nearby and that she never went towards western side and returned."

13. From this evidence, it will be evident that according to this star witness of the prosecution, the deceased Dhrupadabai was just standing on the eastern side of the road waiting for the bus and that the bus came practically ploughing through the mob gathered there, that the others managed to escape unscathed but that the deceased was unable to escape and was dashed down while she was standing on the metal road on the eastern side. If this is the case of the prosecution and if this was proved, there would be hardly any doubt that the accused was driving the bus in a reckless manner, spelling out a clear case of rashes and negligence.

14. But, as against this, it will be worthwhile examining the case of the accused

in the first instance and the evidence to the said defence version. The defence case on this point can be said to have been summarised in Answer to Question No. 3 put to the accused by the Court in his examination u/s 313 of the Criminal Procedure Code. The Question No. 3, and the answer to the same are as follows :---

"Q. 3:---It is in evidence of Bhimrao, Exh. 13, Madhukar Exh. 14, Sk. Isa, Exh. 15, that your S.T. Bus gave dash to Dhrupadabai and that she was thrown and that your S.T. Bus was seen stopped at some distance, what have you to say about it?" Ans :---The Road was clear. The lady proceeded from east to west after crossing the tar road. She again went towards east till tar road and she abruptly proceeded towards west. My bus reached near her. I applied brakes. Meanwhile that lady dashed against headlight of conductor side and fell down. I stopped my bus at a distance of 3/4 feet from the spot."

It will thus be seen that the defence version is that this old woman was in two minds while crossing the street; she went from east to west and again came from west to east suddenly with the result that it became impossible for the accused to avoid the impact. The rest of the prosecution evidence can be examined in the background of this version of the defence.

15. Madhukar Borse (P. W. 3), owns land which is situated just on the western side of the S.T. Bus shed. He has been examined by the prosecution because he had reason to be present at the spot of the accident in the nick of time. The following is the relevant position of the evidence of this witness in his examination-in-chief :---

"For about five minutes Bhimrao has a talk with his mother Dhrupadabai. It is true that after said talk was over Dhrupadabai came towards western side of the road and that Bhimrao was looking after his mother. It is true that after taking cloth bag Dhrupadabai proceeded towards Raswanti immediately. Dhule-Chalisgaon is State Highway. There was no other vehicle standing on the road. I was sitting after taking tea. It is not true that the S.T. bus was passing with excessive speed."

16. The evidence of Sheikh Isa (P.W. 4) another quite independent witness is Practically to the same effect. It goes to state further in favour of the defence version. This is Sheikh Isa (P.W. 4) has stated in his examination-in-chief :---

One bus came from Dhule side Dhrupadabai crossed the road and was proceeding towards eastern side towards her son. She saw one S.T. Bus coming from Dhule side and thereafter returned. Meanwhile the bus came near her and dashed against the lady Dhrupadabai. That lady was lifted to some height by the dash and proceeded ahead after crossing 20 to 25 feet. Dhrupadabai was found dead immediately. The speed of S.T. Bus was moderate."

In the cross-examination, the witness stated as follows :---

"It is true that the lady Dhrupadabai was carrying the cloth bag and after seeing

the arrival of S.T. bus went behind and she was dashed against by the bus."

17. I may state here that the entire relevant portion of the evidence has been set cut by me above. So far as the evidence of P.W. 3 (Madhukar Borse) and P.W. 4 (Sheikh Isa) is concerned, it would not be lie in the mouth of the prosecution to contend that the evidence is not the evidence of independent witness. On the other hand, the accused is perfectly justified in contending that so far as the evidence of Bhimrao (P.W. 2) is concerned, it is the evidence of an interested person in the sense that his own mother had met with death by a bus which was driven by the accused. Between the two pieces of evidence. It can be said with every bit of confidence that the evidence of Madhukar Bores (P.W. 3) and Sheikh Isa (P.W. 4) is the evidence of independent persons.

What we gather from the said evidence is that the deceased Dhrupadabai was moving to and fro from east to west then from west to east and it is possible that while moving from west to east she met with the accident. It is an admitted fact in the instant case that Dhrupadabai wanted to go by bus going from Borkund to Verul which is towards the south. This means that if she was waiting for the bus, she would be waiting on the eastern side of the road. All the same, as per the evidence it is shown that she kept her cloth bag on the western side of the road in front of the hotel while was closed at that time. The evidence further shows that when she spied her son getting down from the bus, across the road, she crossed the road, came to him and had a talk with him. Evidence further shows that she went back to collect the cloth bag. The evidence still further shows that she saw the S.T. Bus coming from the north and still turned immediately and rushed back towards the east. This clearly means that she was in two minds. A picture is portrayed before the mind almost vividly that she was running to and fro like chicken. It is difficult to understand in the first place, as to why she kept her cloth bag on the western side if she was to travel by a bus whose stop is on the eastern side. But assuming that for some reason she kept it there, and wanted to pick it up before the bus arrived, she had no business until she saw a bus come, then rush across the road to pick up the bag and thereafter rush back immediately, as is clearly stated by Madhukar Borse (P.W. 3). It can be said that accused saw her crossing the road toward the west, but he certainly could not expect her to make a return journey immediately. She rushed back immediately to the utter chagrin of the driver. In any event this could well be a case of an error of judgment. Rashness and negligence in driving cannot be inferred from the mere fact that the crossing pedestrian was knocked down by the bus. As will be presently pointed out by me, in the hustle and bustle of present day life, the most essential element of carefulness and diligence in the activity such as driving is constant anticipation, but its postulate is normal condition. In the instant case, if Dhrupadabai had crossed over to the western side on seeing the bus coming and still decided to cross back to the eastern side immediately unmindful of the approach of the bus, the driver cannot be blamed for not anticipating her last trip towards the east and if he was pardoned for not anticipating such suicidal return journey on the part of the deceased, case of rashness and negligence on his part

is ruled out.

18. The same is the position relating to the finding concerning excessive speed. Contention was urged by the prosecution in the lower courts and it has been strenuously urged also before me that the evidence on record spells out the case of excessive speed and the very excessive character of the speed spells out rashness and negligence. Both the courts below have accepted even this part of the prosecution case, but while doing so they have clearly lost sight of the important part of the prosecution's own evidence. Two independent witnesses examined by the prosecution state in absolutely unequivocal terms that the bus was not being driven at any excessive speed. Madhukar Bores (P.W. 3), no doubt, states in his examination-in-chief that the bus came at a very high speed from Dhule, but in his cross-examination he had admitted in no equivocal terms that it was not being driven at excessive speed as such. Likewise, Sheikh Isa (P.W. 4), has stated in his examination-in-chief itself that the speed of the bus was moderate. I may mention here that this evidence led by the prosecution itself is totally ignored by the learned Sessions Judge.

19. However, it was strenuously urged before me by Mr. Patil, the learned Public Prosecutor, that the panchanama of the scene of offence clearly proved the excessive character of the speed of the vehicle. Substance of the relevant portion of the panchanama has already been set out above. Mr. Patil contended that between the place where the broken pieces of bangles and of the head-light glasses were lying, and where the bus had been stopped, a distance of about 55 feet could be measured. He, therefore, contended that the bus could not be stopped by the driver before it rushed 55 feet ahead. In the alternative, he contended that in any event this betokens the fact that the driver had failed to apply the brakes just before the time of the impact. I may state here that so far as the second contention relating to the application of the brakes is concerned, it has to be rejected for the very simple reason that the evidence on record concerning prosecution's own witnesses rules out the case relating to the application of the brakes. If the woman crossed the road towards west after seeing that the bus was approaching and the driver sees her so crossing, he would be pardoned for not expecting her to come back and commit harakiri, and if she still comes back to keep her tryst with destiny, the driver cannot be blamed for not expecting her suicidal move. It is a case where he cannot be blamed for not applying the brakes. The theory of negligence for non-application of brakes before the impact cannot, therefore, be invoked.

The second theory is that the very fact that the bus stopped at a distance of about 55 feet from the place of the accident means that it was being driven at an excessive speed. But what this line of argument loses sight of, in the instant case, is that there is no evidence whatsoever worth the name to show that after application of the breaks the bus stopped at a distance of about 55 feet. The relevant portion of the evidence of the panch witness Abdul Karim Sheikh Bhikhan (P.W. 1) is as follows :---

"The front right hand wheel was on the tar road while the front left hand side wheel is on the metal road. I also found one dead body of a lady lying behind the bus at a distance of 10 feet from the bus. The dead body was on the tar road. I had seen some brake marks of S. T. at a distance of about 10 feet."

This evidence shows that from the place where the brakes were applied the deceased was dashed to a distance of about 10 feet and that the bus went ahead and stopped at a further distance of about 10 feet. This means that the bus stopped at a distance of 20 feet after the application of the brakes. It is true that the distance between the places where the broken pieces of bangles, head-light glasses etc., were found and the place where the bus was stationed was mentioned in the panchanama as 55 feet, but as already stated above, if the accused had no opportunity to apply brakes before the impact and if he applied the brakes afterwards and if the bus stopped within 20 feet from the place where the brakes were applied, such evidence would not, necessarily speak of excessive speed.

20. But that apart, in the instant case to mind, the accident is not a result of an excessive speed. The cause causans of the accident might be the hesitance movements of the deceased herself. We have heard the evidence of the prosecution witnesses themselves who state that the speed at which the vehicle was moderate and not excessive. This is the opinion of a passes-by who had no reason to depose either against the deceased or in favour of the accused. But apart even from that, the point is that the resultant impact in the instant case cannot be attributed to the excessive speed in the sense that the impact could not be avoided by the driver driving even at a moderate speed, because the action of the pedestrian left no scope for its avoidance. If this is the position the accused surely cannot be condemned for committing offence u/s 304-A or section 279 of the Indian Penal Code. It may be that he may be guilty of driving the vehicle at a speed in excess of that which is allowed on the road, but there is no evidence led by the prosecution to that effect at all. This being the position, to my mind, the inference of rashness and negligence on the part of the accused, merely because the vehicle was not stopped by him instantly, cannot be justified.

For all these reasons I am of the opinion that even though it is a concurrent finding recorded by both the courts below, the finding of rashness negligence on the part of the accused cannot be sustained.

21. The revision application, therefore, must be allowed. Rule earlier issued is hereby made absolute. The accused is acquitted of the offences with which he has been charged. The bail- bond to stand cancelled. Fine, if paid, is ordered to be refunded to the accused.