

(2002) 12 GUJ CK 0026
In the Gujarat High Court

Case No : Criminal Revision Application No. 131 of 1996

Gamanbhai Zinabhai Patel

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 27-12-2002

Acts Referred:

Penal Code, 1860 (IPC) — Section 279, 304A

Citation : (2003) 23 GLH 130

Hon'ble Judges : H.H. Mehta, J

Bench : Single Bench

Advocate : J.B. Pardiwala, for the Appellant; Nandini Joshi, APP, for the Respondent

Final Decision : Dismissed

Judgement

H.H. Mehta, J.—The original accused of Criminal Case No.267/85 conducted, tried and decided by the learned Judicial Magistrate [F.C.], Vandsa [who will be referred to herein after as the "learned Magistrate of the trial Court"] has, by preferring this Criminal Revision Application u/s 397 read with Section 401 of the [for short the "Cr.P.C."] challenged the correctness, legality, propriety and regularity of the judgment Ex.16 dated 12.1.1996 rendered by the learned Additional Sessions Judge, Valsad at Navsari [who will be referred to hereinafter as the "Appellate Judge"] rendered in Criminal Appeal No.11/92, by which the learned Appellate Judge has confirmed the judgment Ex.30 of conviction and sentence dated 30.4.1992 rendered by the learned Magistrate of the trial Court in Criminal Case No.267/85, under which the present petitioner [original accused] has been convicted u/s 255(2) of Cr.P.C. for the offences punishable under Sections 279, 337, 304A of I.P.C. and Section 112 read with Section 116 of the Motor Vehicles Act, 1939 and sentenced to undergo rigorous imprisonment for five months and to pay a fine of Rs.1,000/-- and in default of fine to undergo further simple imprisonment for 30 days for an offence punishable u/s 279 of the Indian Penal Code [for short the "I.P.C."], and to undergo rigorous imprisonment

for one month and to pay a fine of Rs.250/-- and in default of fine to undergo further simple imprisonment of ten days for an offence punishable u/s 337 of I.P.C. and also to undergo rigorous imprisonment for one and half years and to pay a fine of Rs.1,500/-and in default of fine to undergo simple imprisonment for 45 days for an offence punishable u/s 304A of I.P.C. and to pay a fine of Rs.100/- and in default of fine to undergo further simple imprisonment for 3 days for an offence punishable u/s 116 of the Motor Vehicles Act, 1939 for contravention of Section 112 of Motor Vehicle Act, 1939.

By the said judgment, the learned Magistrate of the trial Court acquitted the petitioner [original accused] u/s 255(1) of Cr.P.C. for an offence punishable u/s 426 of I.P.C. as against which the State Government has not preferred any acquittal Appeal. The learned Magistrate of the trial Court also directed, in his judgment, that the accused shall run all sentences concurrently.

2. In this present Criminal Revision Application, the petitioner was the accused and respondent was the prosecution in aforesaid Criminal Case No.267/85 and, therefore, for the sake of convenience the parties will be referred to hereinafter as the "accused" and "prosecution" respectively.

3. The facts leading to this present Criminal Revision Application in a nutshell are as follows :-

3.1 On or about 14.4.1985, during the period from 2.00 to 2.30 P.M., the accused in his capacity as driver of Gujarat State Road Transport Corporation [for short the "S.T."] drove S.T.Bus No.GRU-6246 of the route of Rajkot to Ahava, on Ahava-Vansda state highway road No.15, near Mahuvas village signboard in rash and negligent manner with full speed without observing traffic rules and by his such rash and negligent act, which is not amounting to culpable homicide, violently collided S.T. Bus against on coming Jeep No.GAT-8545 of the P.W.D. Department of the Government of Gujarat and in this motor accident, the driver of the Jeep and one labourer sustained serious and grievous injuries, and they succumbed to the injuries on the spot then and there and two other persons, who were also travelling in the Jeep, sustained grievous and simple injuries.

3.2 It is the case of the prosecution that the accused was by driving his S.T. Bus No.GRU-6246 coming from western side i.e. from Rajkot, Ahmedabad, Navsari, Bilimora and Vasada side. As per the case of the prosecution, the deceased driver Jerambhai Kalubhai by driving Jeep No.GAT-8545 of P.W.D., Department of the Government of Gujarat, was coming from eastern side i.e. from Shirdi, Ahava and Waghai side. It is the case of the prosecution that prior to motor vehicular accident which took place, one another S.T. Bus of the route of Ahmedabad-Shirdi was coming from western side i.e. from Ahmedabad side and that another bus of the route of Ahmedaabad-Shirdi was going ahead of offending S.T. Bus and it came on its correct side and passed the Jeep No.GAT-8545 properly and safely, but immediately, thereafter, the accused by driving offending S.T. Bus No.GRU-6246 came with full speed in rash and negligent manner and dashed

against, on coming Jeep No.GAT-8545, so violently that in that vehicular accident, the driver of Jeep No.GAT-8545 and one labourer Shivram Khiyaram of M/s.Shiv Construction Company lost their lives on the spot and one Deputy Engineer Shri Khandubhai Z. Patel and operator Shri Naginbhai Bhimabhai sustained simple to serious injuries. From the evidence on record, it appears that the prosecution has come with a case that offending S.T. Bus No.GRU-6246, which was just coming behind the S.T.Bus of route of Ahmedabad-Shirdi, over took that Ahmedabad-Shirdi Bus for which, he came on his incorrect side i.e. right side of the driver and drove his bus with much excessive high speed on the southern side of the road giving no chance to the driver of Jeep, No.GAT-8545 to avert the accident and violently dashed against the Jeep, in such a manner that the hood-sheet and other parts of the Jeep were severed from the Jeep and the Jeep was so flung that it dashed against the pillar of the house of P.W.2 Chandubhai Jamshibhai Gamit [Ex.10] which is situated at the distance of 120 feet from the place of scene of offence towards the southern side. His house is situated towards the western side from the scene of offence, but it is 120 feet away, towards the south, from the scene of offence. As per the panchnama of scene of offence, total damage to Jeep was assessed at Rs.30,000/--, while damage to the S.T. Bus was assessed at Rs.1,500/--.

3.3 One Narpatsinh Ajitsinh Zala of M/s.Shiv Construction Company lodged his complaint with regard to the aforesaid incident of accident in Vansda Police Station at 15.15 hours on the same day i.e. 14.4.1985. That complaint came to be registered as C.R.No.I-25/1985. Thereafter, the said Police case was investigated by P.W.8 P.S.I. Shri B.J.Zaa, Ex.23 of Vansda Police Station and on completion of investigation of the case, he filed a charge-sheet against the present criminal petitioner in the Court of the learned Magistrate of the trial Court, on 08.05.1985. That charge-sheet came to be registered as Criminal Case No.267/85.

4. From the record, it appears that, the learned Magistrate of the trial court conducted the trial, as if, it was a trial of summons case by following provisions of Chapter-20 of the Cr.P.C. [From Sections 251 to 259 of Cr.P.C.]. On recording, plea of accused u/s 251 of Cr.P.C., the accused pleaded not guilty to the charge and claimed to be tried. Therefore, the prosecution examined the following eight witnesses.

[1] P.W.1 Ashokbhai Govindrao Joshi Ex.5 [panch witness] [2] P.W.2 Chandubhai Jamshibhai Ex.10 [3] P.W.3 Ashokbhai Reshambhai Ex.15 [4] P.W.4 Somiben Vajirbhai Ex.16 [5] P.W.5 Khandubhai Jhinabhai Ex.17 [6] P.W.6 Naginbhai Bhimabhai Ex.28 [7] P.W.7 Khandubhai Nanubhai Patel Ex.29 [8] P.W.8 P.S.I. Shri B.J.Zaa [I.O] Ex.23

5. The prosecution has also produced the documentary evidence like -

[1] Panchnama of the scene of offence, Ex.6. [2] Inquest panchnama of two dead persons Ex.7. [3] Medical injury certificates of, Ex.12. two injured

persons [3] P.M. Note of deceased Jerambhai Kalubhai, Ex.13. [4] P.M. Note of deceased Shivram Khiyaram, Ex.14. [5] Panchnama with regard to seizure of Ex.21. clothes of Jerambhai Kalubhai, from his dead-body [6] Complaint Mark-A. [7] Police report sent with two dead-bodies Ex.24 & 25. [8] Accident reports issued by Ex.26 & 27. R.T.O. for the offending S.T.Bus and the Jeep

6. On evidence of the prosecution was declared to be over, the circumstances appeared against, were explained to and brought to the notice of the accused and the questions and answers given by the accused were recorded as a result of which, further statement u/s 313 of Cr.P.C. came to be recorded. The defence of the accused is of complete denial. He has not explained the accident. He has neither led any evidence in his defence nor has he examined himself as defence witness. Thereafter, the learned Magistrate of the trial Court, after critically analyzing and carefully appreciating the evidence on record and after hearing the arguments of the learned advocates for both the parties, rendered his judgment Ex.30 on 30.04.1992, by which he convicted and sentenced the accused, as stated earlier in para-1 hereinabove.

7. Being aggrieved against and dissatisfied with the said judgment Ex.30 dated 30.04.1992 rendered by the learned Magistrate of the trial Court in Criminal Case No.267/85, the original accused preferred a Criminal Appeal No.11/92 to the Sessions Court, Valsad at Navsari.

8. The learned Additional Sessions Judge, Valsad at Navsari, after analyzing and re-appreciating the evidence on record and after hearing the arguments of the learned advocates for both the parties, by rendering his judgment at Ex.16 dated 12.01.1996 dismissed the Criminal Appeal No.11/92, and confirmed the judgment Ex.30 of conviction and sentence rendered by the learned Magistrate of the trial Court in aforesaid Criminal Case No.267/85.

9. Being aggrieved against and dissatisfied with the said judgment, Ex.16 dated 12.01.1996 rendered by the Additional Sessions Judge, Valsad at Navsari in Criminal Appeal No.11/92, the original accused has, by filing this Criminal Revision Application No.131/96 carried the subject matter to this Court challenging the correctness, legality, propriety and regularity of the judgment Ex.16 rendered by the learned Appellate Judge.

10. I have heard Mr.J.B.Pardiwala, learned advocate for the criminal revision petitioner and Ms.Nandini Joshi, learned APP for the revision opponent - State of Gujarat in detail at length. Mr.J.B.Pardiwala, learned advocate for the criminal revision petitioner has taken me through the judgment of the trial Court as well as the judgment of the Appellate Court. He has tendered me a bunch of the copies of some police papers, which were furnished to the original accused in the trial Court, for my perusal.

11. Mr.J.B.Pardiwala, learned advocate for the criminal revision petitioner has taken three contentions.

11.1 He has argued that admittedly, one S.T.Bus of route of Ahmedabad - Shirdi was going ahead of the alleged offending S.T.Bus No.GRU-6246 and as there was no other traffic on the road, the accused tried to over take the S.T.Bus of route of Ahmedabad - Shirdi for which, he drove his S.T.Bus on his right side [not correct side] on southern side of the road and while, so overtaking the S.T.Bus of route of Ahmedabad - Shirdi, as per the case of the prosecution, the offending S.T.Bus had gone ahead and dashed with one Jeep No.GAT-8545, which was coming from the eastern side i.e. from opposite direction. He has argued that looking to this admitted fact, this is a case of error of judgment committed by the accused for which the accused cannot be held responsible for the accident. He has further argued that the principles of maxim "res-ipsa-loquitur" will not apply to this present case.

11.2 He has taken a second contention to the effect that there was some contributory negligence on the part of Jeep driver and, therefore, also the accused cannot be held criminally responsible for the accident.

11.3 He has taken a third contention to the effect that the learned Additional Sessions Judge, Valsad at Navsari has observed in para-11 of his judgment that the Jeep was coming on its correct side, while the S.T.Bus of the route of Rajkot-Ahava was going on its wrong side. Mr.Pardiwala has argued that there is no prohibition for the vehicle driver to overtake the vehicle going ahead of it on the highway, when there is an ample space to cover up the distance equivalent to the length of the vehicle going ahead of it and for taking such type of over taking, one is bound to take up his vehicle more on his right side i.e. towards the driver side and when he leaves his correct side for overtaking the vehicle going ahead of it, and, therefore, it cannot be said that he was on wrong side and merely on the basis of this finding that accused drove his vehicle on wrong side he can not be convicted. The case against the accused punishable u/s 337 of I.P.C. cannot be said to have been proved against him. By advancing arguments based on the aforesaid third contention, Mr.Pardiwala has submitted that considering the totality of evidence on record i.e. oral as well as documentary, the case against the accused is not proved beyond the reasonable doubt and, therefore, the learned Magistrate of the trial Court ought not to have convicted the accused for the said vehicular accident. He has further argued that the aforesaid third contention was not dealt with by the learned Appellate Judge, while deciding the Criminal Appeal No.11/92 filed by the accused and in view of this fact, the learned Additional Sessions Judge ought not to have allowed the Criminal Appeal No.11/92 filed by the accused and he ought to have acquitted the accused of the offences for which he was charged. Alternatively, he has argued that in case if this Court comes to a conclusion that this Criminal Revision Application does not deserve to be allowed, then in that case his submission with regard to quantum of sentence be considered sympathetically by this Court. He has argued that in this case, an accident occurred on 14.04.1985 and this Criminal Revision Application is heard in the month of December, 2002 and, therefore, practically seventeen and half years have passed and looking to this long span of period

already passed, after the date of accident, the purpose will not be served by sending him to the Jail. For making a submission with regard to sympathetic approach on the point of quantum of sentence, Mr.Pardiwala has argued that the accused is serving in S.T. Department and, therefore, he was in Government service and after this accident, in departmental action, the accused has lost his job and, therefore, lenient view be taken for inflicting the sentence.

12. In support of his submissions, Mr.J.B.Pardiwala, learned advocate for the criminal revision petitioner has cited following authorities.

[1] P. Rajappan v. State of Kerala, reported in 1986 Cri.L.J. 511.

[2] In re, Ambalal, Accused, Petitioner, reported in AIR 1967 Madras 365.

[3] In Re: Natarajan, .

[4] Syad Akbar Vs. State of Karnataka, .

[5] Nageshwar Shri Krishna Ghobe Vs. State of Maharashtra, .

[6] S.V. Subbarao Vs. State, .

13. Ms.Nandini Joshi, learned APP for the revision opponent - State of Gujarat has submitted that there are concurrent and consistent findings of the fact that the accused drove his vehicle in rash and negligent manner and as a result of such rash and negligent driving the S.T. Bus the accident occurred and in that accident, the offending S.T.Bus violently dashed against the on-coming Jeep and in that accident, two persons lost their lives and two persons sustained simple to grievous injuries. She has further argued that both the Courts below have correctly and properly appreciated the evidence on record, keeping in mind, the well settled principles of law with regard to appreciation of evidence. Therefore, this is not the case in which, it cannot be said that the findings based on evidence are perverse. She has supported the judgment of the Appellate Court as well as the judgment of the trial Court. She has argued that this is not the case in which this court should interfere with the findings arrived at by the trial Court, on the basis of evidence on record. She has argued that this Criminal Revision Application is meritless and, therefore, it requires to be dismissed, by confirming the judgment of both the Courts below. As against the submissions made by Mr.J.B.Pardiwala on the point with regard to quantum of sentence, she has argued that looking to the nature and seriousness of the offence, this is not the case in which the lenient view should be taken by this Court because, in this case, two persons have lost their lives and two persons sustained simple to grievous injuries. She has further argued that looking to Section 304A of I.P.C. the maximum sentence prescribed is of two years, while in this case, the learned Magistrate has by showing sympathy from the very beginning, inflicted the sentence of one and half years and, therefore, now there is no scope for further reducing the sentence already inflicted. She has summed up her arguments saying that this Criminal Revision Application be dismissed. In support of her arguments, she has cited a decision of Shiva Ram Vs. The State, .

14. I have dispassionately considered the submissions made by the learned advocates for rival parties. I have carefully examined the impugned judgment of the Appellate Court as well as the judgment of the trial Court. I have taken into consideration a copy of panchnama, which has been furnished by Mr.J.B.Pardiwala, for my perusal.

15. Before I deal with the submissions of the learned advocates for both the parties, I would like to place on record the legal position with regard to such type of Criminal Revision Application, in which the judgment of the Appellate Court confirming the judgment of conviction and sentence of the trial Court, is challenged. In the case of State of Kerala Vs. Putthumana Illath Jathavedan Namboodiri, , it has been held as under :-

"In its revisional jurisdiction, the High Court can call for and examine the record and any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to reappreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as Sessions Judge in appeal unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."

16. In the aforesaid case, High Court, as observed by the Hon"ble Supreme Court, exceeded its jurisdiction in interfering with the conviction of the respondent by re-appreciating the oral evidence. The Hon"ble Supreme Court has further observed as under ;

"That the High Court also committed further error in not examining several items of evidence relied upon by the learned Additional Sessions Judge, while confirming the conviction of the respondent. In this view of the matter, the impugned judgment of the High court is wholly unsustainable in law."

17. In case of Duli Chand Vs. Delhi Administration, , it has been held by the Hon"ble Supreme Court that the jurisdiction of the High Court in a criminal revision application is severely restricted and it cannot embark upon a re-appreciation of evidence.

18. In case of Bansi Lal and Others Vs. Laxman Singh, , the Hon"ble Supreme Court has held as follows :-

"It is unfortunate that the High Court did not keep in mind the principles laid down in the aforesaid rulings regarding the limits of its revisional powers while dealing with an order of acquittal passed by the subordinate Court. The mere circumstance that a finding of fact recorded by the trial Court may in the opinion

of the High Court be wrong, will not justify the setting aside (of) the order of acquittal and directing a retrial of the accused."

19. In case of Ramu alias Ram Kumar and others Vs. Jagannath, , it has been held by the Hon"ble Supreme Court as follows :-

"It is well settled that the revisional jurisdiction conferred on the High Court should not be lightly exercised particularly when it was invoked by a private complainant."

20. Keeping in mind the aforesaid legal position with regard to the scope and ambit of Criminal Revision Application and the powers conferred u/s 397 read with Section 401 of Cr.P.C. on this court, I will discuss the submissions of learned advocate for both the parties. It is an admitted fact that there are concurrent and consistent findings of facts of both the Courts below. The learned Appellate Judge in Criminal Appeal No.11/92 before him analyzed the evidence and carefully re-appreciated the evidence and as a result of re-appreciation of evidence, he has confirmed the judgment of conviction and sentence rendered by the trial Court. Still, however, this Court has examined the evidence discussed in the judgment of both the Courts below. Looking to the judgment of the trial Court, it appears that, the panchnama of the scene of the offence Ex.6 was tendered in evidence by the prosecution and it was proved by examining panch witness - Ashokbhai Govindrao Joshi, P.W.1, whose deposition was recorded at Ex.5. Looking to a simple copy of panchnama Ex.6 furnished by Mr.J.B.Pardiwala and the evidence discussed by the trial Court, the following facts can be summarized and these facts are not in dispute, seriously by the defence lawyer, who cross-examined the panch witnesses.

[i] The vehicular accident occurred on Bilimora, Ahava, Vansada State Highway Road No.15 on the outskirts of village Mahuva.

[ii] Shirdi, Ahava and Waghai are towards the east while Vasada, Bilimora, Navsari, Rajkot, Ahmedabad are towards the west. The road is leading from east to west. It is of width of 18 feet having shoulder of 07 feet each on both the sides and, therefore, the road is width of 32 feet.

[iii] The offending S.T.Bus No.GRU-6246 was coming from Rajkot side i.e. from western side and it was proceeding towards Ahava i.e. towards eastern side.

[iv] There is a kachcha house of witness P.W.2 Chandubhai Jamshibhai, [Ex.10], 120 feet away from the said road on the southern side and that house was towards the western side from the exact point of accident. After the accident, the Jeep was found lying just near a wall of that kachcha house. That wall was made of chips of bamboo. At the time of preparing panchnama, it was found that the hood and seat of the Jeep were lying on road at a distance of 11 1/2 feet towards the south, from the exact point of accident. The focus of head-light, front right side head light of the S.T.Bus, frame of the Jeep and door of the Jeep were lying on road at a distance of 12 feet towards the south, from the exact

point of accident. The pillar of the kachcha house of P.W.2 Chandubhai was found damaged, as Jeep had dashed with force against the wall of the kachcha house of P.W.2, Chandubhai Jamshibhai, [Ex.10].

[v] The front wheel of the driver side of the of offending S.T.Bus was found on road, just at a distance of 1 foot from road and front wheel of the conductor side of the offending S.T.Bus was found on kachcha road i.e. on southern shoulder of 7 feet of the kachcha road.

[vi] Marks of application of breaks of offending S.T. Bus were found on road upto a distance of 65 feet from the exact point of accident.

21. If we appreciate the evidence, keeping in mind the aforesaid undisputed facts, it can be said that this is a case in which the principle of res-ipso-loquitur can safely be applied. The width of S.T.Bus cannot be more than 10 feet. When the width of the road is 32 feet, the driver of the S.T. Bus had sufficient space for overtaking the S.T.Bus of route of Ahmedabad-Ahava which was going ahead of it, in spite of the fact that the Jeep was coming from the opposite direction. There is nothing on record to show that at that time, there was any traffic and, therefore, the accused would naturally be tempted to overtake the vehicle going ahead of it, but at the same time, he was expected to take due care and caution, while overtaking so as to prevent any untoward vehicular accident. From the evidence, it appears that the eye witness P.W.5 Khandubhai Jinabhai, [Ex.17], was sitting on the seat on the side of the driver's seat of the Jeep. He had full opportunity to see on coming vehicles from the opposite direction. Mr.Khandubhai has admitted in his evidence that he was by travelling in Jeep No.GAT-8545 going to Navsari and at about 2.00 to 2.30 P.M. when their Jeep had reached one village Mahuvas, he saw that one S.T. Bus of the route of Ahmedabad-Shirdi was coming from the opposite direction. He has deposed that when there was a distance of about 500 feet between the S.T.Bus of Ahmedabad-Shirdi route and their Jeep, he saw that S.T. Bus of route of Rajkot-Ahva was coming fast and about five minutes, thereafter, the accident took place. He has deposed that the S.T. Bus of route of Rajkot-Ahmedabad was coming from behind the S.T. Bus of route of Ahmedabad-Shirdi, and it dashed against the Jeep. As per his evidence Jerambhai, driver of the Jeep and one labourer Shivram Khiyaram of M/s.Shiv Construction Company died on the spot there and then. As per the evidence of one operator Shri Naginbhai Bhimabhai, also had sustained injuries. There is no dispute with regard to the fact that the two persons lost their lives in that accident. P.W.6 Naginbhai Bhimabhai, Ex.28 had sustained serious head injury. He had sustained injury of 7 centimeter on his head. While P.W.5 Khandubhai Jinabhai, Ex.17 sustained a simple injury over the right eyelid. The prosecution has examined both the eye witnesses. As per the evidence of prosecution Dy. Engineer Khandubhai Z. Patel and Naginbhai Bhimabhai were thrown-off from the Jeep and had become unconscious. He has further deposed that the Jeep was thrown off from the road and it reached up to the kachcha house of P.W.2 Chandubhai Jamshibhai, [Ex.10], which is at a

distance of 120 feet from the road towards the south. The impact was so heavy that the Jeep was thrown off on the road covering a distance of 120 feet towards south and it broke down, the pillar of the house of P.W.2 Chandubhai Jamshibhai, Ex.10 as that Jeep dashed against the wall, which was prepared of chips of bamboo. The witness Dy. Engineer Khandubhai Z. Patel has deposed in his evidence that their Jeep was proceeding on left side of the road meaning thereby they were proceeding on the southern side of the road. He has further deposed that when offending S.T. Bus over-took the S.T. Bus of route of Ahmedabad-Shirdi their Jeep was at a distance of 300 feet from on coming S.T. Bus. If we give commulative effect to the aforesaid facts, it is a clear case of the negligence and rash on the part of accused, who drove the S.T. Bus on wrong side for the purpose of over taking the vehicle going ahead of it without taking due care and caution and without taking any care of an on coming vehicle, coming from the eastern side. If Khandubhai can see the S.T. Bus on coming from opposite side which was at a distance of 300 feet, naturally accused must have also seen, the Jeep coming from opposite side from a distance of 300 feet. From the evidence, it appears that the offending S.T. Bus had already covered up the distance equivalent to the length of S.T. Bus of route of Ahmedabad-Shirdi, which was going ahead of it. Under the circumstances, when accused saw a Jeep coming from opposite direction from a distance of 300 feet, he ought not to have taken his vehicle more on southern side because he had sufficient space to travel on a road of width of 32 feet. The Jeep was coming on its correct side i.e. on southern side of the road and, therefore, considering the width of the road, the S.T. Bus could have well passed away, even if, it had overtaken the vehicle ahead of it within a distance of 300 feet. He could have come again on its correct side i.e. on northern side of road after overtaking the vehicle. But in this case, he went more on southern side of the road and the S.T. Bus collided against the Jeep, which was coming on its correct side. Thus, all these facts clearly suggest that there was rash and negligent driving of driver of offending S.T. Bus.

22. The contention taken by Mr.J. B. Pardiwala that there was an error of judgment of the accused, when he was overtaking the vehicle going ahead of it. This type of contention was neither taken before the trial Court nor before the appellate Court. There is no slightest evidence or suggestion on record to suggest that there was an error of judgment of accused, while overtaking the vehicle going ahead of it. Mr.J.B.Pardiwala has placed reliance on SYAD AKBAR [Supra]. This authority is cited on the point as to when the principle of res-ipsa-loquitur will apply to this type of case. It is also relied on the point as to what should be the ingredients of negligence. This authority is mainly relied on the point, with regard to the accident due to an error of judgment and inspite of driver adopting best course according to his knowledge and belief. In this case, the Hon"ble Supreme Court has observed in para-19 as follows:-

"..... the event or accident must be of a kind which does not happen in the ordinary course of things if those who have the management and control use due care. But, according to some decisions, satisfaction of this condition alone is not

sufficient for res ipsa to come into play and it has to be further satisfied that the event which caused the accident was within the defendant's control. The reason for this second requirement is that where the defendant has control of the thing which caused the injury, he is in a better position than the plaintiff to explain how the accident occurred. Instances of such special kind of accidents which "tell their own story" of being offsprings of negligence, are furnished by cases, such as where a motor vehicle mounts or projects over a pavement and hurts somebody there or travelling in the vehicle; one car ramming another from behind, or even a head-on-collision on the wrong side of the road."

23. In view of the aforesaid legal position, herein this case also, the accused was in better position to explain how the accident occurred. It is interesting to note that in the further statement of the accused recorded u/s 313 of Cr.P.C., the accused had taken a defence of general denial. He has stated that the evidence is incorrect. He has advanced a plea that there was a curve on the road and there were some trees on the road opposite to each other and, therefore, it was not possible for him to over take the vehicle going ahead of it. The learned Appellate Judge has observed in para-4 of his judgment that the accused has not explained the circumstances under which the accident occurred. From the panchnama, it is not clear as to whether there was a curve on the road, but accused has taken a mere plea that there was a curve. If plea is accepted then in that case, the accused ought to have reduced the speed near a curve by driving the vehicle safely.

24. Mr.J.B.Pardiwala, learned advocate for the criminal revision petitioner has placed reliance on a decision of IN RE, AMBALAL, AACCUSED, PETITIONER, [Supra] on the point as to which act can be said to be rash and negligent. In para-10 of this decision, it has been held as follows :-

"The question then for consideration is whether it can be said that the petitioner caused the death of the boy by doing a rash and negligent act so as to constitute an offence u/s 304A, I.P.C. Is the accident consequent upon any culpable rashness or criminal negligence on the part of the petitioner, is the question for decision. While rashness is acting in the hope that no mischievous consequences will ensue though aware of the likelihood of such consequences, negligence is acting without the awareness that harmful or mischievous consequences will follow, but in circumstances which show that had the actor exercised the caution incumbent on him he would have had awareness of the consequences of his act. Negligence, as such, had not been defined in the Indian Penal code, however, we get an idea of the degree of negligence that would make the act criminal if we refer to the words of Section 279 I.P.C. namely, "whoever drives any vehicle, or rides, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person. Negligence in this context has generally been understood as conduct which falls below the standard established for the protection of others against unreasonable risk of harm - the standard of conduct ordinarily measured by what a reasonable man of ordinary

prudence would do under the circumstances. I would put it, the standard of negligence must be rated in terms of the circumstances, be such, as would be accepted as criminal negligence by an intelligent and sensitive community. Is there a callous disregard of consequences or a lack of elementary caution or ordinary circumspection? But the negligence that may give rise to civil liability will not be enough for the purpose of establishing the crime u/s 304A, I.P.C."

25. In view of the aforesaid legal position, the accused must be presumed to have with knowledge about the fact that, while overtaking the vehicle ahead of it, possibility of some vehicle which may come from opposite direction and probably his vehicle would dash against the vehicle coming from the opposite direction. So he was knowing mischievous consequences which will ensue. Though aware of the likelihood of such consequences, he drove the vehicle in such a way that it swerved more on the southern side of the road and dashed against the Jeep. Thus, in absence of any explanation from the side of accused, no inference can be drawn that there was an error of judgment on the side of the accused. There is no evidence on record to suggest that there was some contributory negligence on the part of the Jeep driver. These two contentions seem to have been taken for the sake of taking before this Court because no such contentions were ever taken before the trial Court or the Appellate Court and, therefore, these two contentions are negatived in absence of at least a little evidence and also in absence of explanation of the accused.

26. Ms.Nandini Joshi, learned APP for the revision opponent - State of Gujarat has argued that the accident occurred before 1988 and, therefore, the provisions of the Motor Vehicles Act, 1939 will be applicable to this case. She has drawn my attention to the Tenth Schedule below the Motor Vehicle Act, 1939. This Tenth Schedule below the Motor Vehicle Act, 1939 contains Driving Regulations. She has argued that for our purpose, Regulation No.4 will be applicable to this case .

"4. The driver of a motor vehicle shall not pass a vehicle travelling in the same direction as himself -

(a) if his passing is likely to cause inconvenience or danger to other traffic proceeding in any direction, or

(b) where a point or corner or a hill or an obstruction of any kind renders the road ahead not clearly visible."

27. In view of the aforesaid Regulation No.4 of the Motor Vehicle Act, 1939, the accused, who was driver of offending S.T. Bus was not excepted to overtake the vehicle going ahead of it, in such a way that it may cause inconvenience or danger to other traffic proceeding in any direction. The words "in any direction" includes "opposite direction". Accused has taken a plea that there was a curve on the road and trees were there on road just opposite to each other and, therefore, he could not see the vehicle coming from the opposite direction. In such circumstances, Clause-(b) of Regulation No.4 will be applicable. He should have taken more care and caution, while negotiating the curve, particularly when

there was obstruction of two trees which rendered the road ahead, not clearly visible.

28. Ms.Nandini Joshi, learned APP for the revision opponent has placed reliance on Shiv Ram Vs. The State [Supra]. In para-9, it has been held as follows :-

"Rashness and negligence are not the same things. Mere negligence cannot be construed to mean rashness. There are degrees of negligence and rashness, and, in order to amount to criminal rashness or criminal negligence, one must find that the rashness has been of such a degree as to amount to taking hazard knowingly that the hazard was of such a degree that injury was most likely to be occasioned thereby. The criminality lies in running the risk or doing such an act with recklessness and indifference to the consequences. Criminal negligence is a gross and culpable neglect, that is to say, a failure to exercise that care and failure to take that precaution which, having regard to the circumstances, it was the imperative duty of the individual to take. Culpable rashness is acting with consciousness that mischievous consequences are likely to follow although the individual hopes, even though he hopes sincerely, that such consequences may not follow. The criminality lies in not taking the precautions to prevent the happening of the consequences in the hope that they may not happen. The law does not permit a man to be uncautious on a hope however earnest or honest that hope may be."

In the case of AIR 1950 Agarwala J. held :

Section 304A, Penal Code, runs as follows :

"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."

"This section obviously does not apply to cases where there is an intention to cause death or knowledge that the act done 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" or "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 an 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, of which rashness is the species. It has sometimes been observed that in rashness the action is done precipitately with the consciousness that the mischievous or illegal consequences may follow, but with a hope that they will not. But, it is not necessary that there should always be this consciousness in a rash act. It has also been observed that in negligence there is no such consciousness of the consequences. This is also untrue as the observation of Lord Atkin quoted hereafter will show."

"Now what may be called a negligent act in civil proceedings is not necessarily so

in criminal cases. The principles of liability governing civil actions based on negligence differ from those governing criminal liability in two important particulars: firstly, that negligence in a criminal case must be culpable and gross and not the negligence which is merely based upon an error of judgment, or arises because of defect of intelligence; and secondly, that the principle of the avoidance of liability when there is contributory negligence by the injured person is no defence in criminal Law."

29. In view of what is discussed hereinabove, this Court has also carefully considered the evidence on record. Keeping in mind the legal position with regard to principles of law with regard to appreciation of evidence, this Court is of the view that both the Courts below have appreciated the evidence in its correct and proper perspective. This case is not the case of "no evidence" and, therefore, it cannot be said that the judgment is "perverse". There is an ample evidence on record to prove the guilt of accused connecting the accused with the crime. On giving total effect to the evidence on record, there cannot be any other conclusion other than conclusion reached by the trial Court to which agreement has been shown by the Appellate Judge. Under these circumstances, this Court finds that the judgment of both the Courts below are legal, proper and correct. There is no material to indicate that findings are illegal or incorrect or improper. Thus, this Criminal Revision Application is devoid of merits and it deserves to be dismissed.

30. Before recording a final order in this Criminal Revision Application, I would like to deal with the submissions of Mr.J.B.Pardiwala, learned advocate for the criminal revision petitioner with regard to quantum of sentence. Mr.J.B.Pardiwala has argued that about seventeen and half years have passed and the petitioner has lost his job, and, therefore, a lenient view should be taken by this Court so far as the sentence is concerned. In case of Dalbir Singh Vs. State of Haryana, , in para-13 the Hon"ble Supreme Court has held as follows :

" Bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, criminal courts cannot treat the nature of the offence u/s 304A IPC as attracting the benevolent provisions of Section 4 of the PO Act. While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost through out his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving need not necessarily result in the death of any human being; or even if such death ensues he might not be convicted of the offence; and lastly, that even if he is convicted he would be dealt with leniently by the court. He must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of the

vehicle he cannot escape from a jail sentence. This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles."

31. Ms.Nandini Joshi, learned APP for the revision opponent - State of Gujarat has argued that in this accident two persons have lost their lives on the spot and two persons have sustained injuries, out of two, one has sustained very serious head injury and in view of these facts, this is not a case in which the Court should show sympathy by reducing the sentence. She has argued that looking to Section 304A of I.P.C., the minimum sentence, which can be awarded is of two years, while in this case, the learned Magistrate of the trial Court has inflicted rigorous imprisonment for only one and half years and, therefore, at the time of inflicting sentence, the learned Magistrate of the trial Court had considered mitigating circumstances to reduce the sentence and, therefore, that circumstances cannot be considered again in this Criminal Revision Application. To award a particular sentence is within the judicial discretion of the learned Magistrate of the trial Court and when he has properly exercised that discretion, this Court finds that there is no other further mitigating circumstances to reduce the sentence inflicted by the learned Magistrate of the trial Court. In view of this, the request of Mr.J.B. Pardiwala for taking a lenient view by reducing the sentence from sentence inflicted by the learned Magistrate of the trial Court to some more lesser sentence, cannot be acceded to by this Court and, therefore, this last request also deserves to be rejected.

32. In view of what is stated and discussed hereinabove and for the foregoing reasons, this Criminal Revision Application deserves to be dismissed and accordingly, it is dismissed. The judgement Ex.16 dated 12.1.1996 rendered by the Additional Sessions Judge, Valsad at Navsari in Criminal Appeal No.11/92, confirming the judgment at Ex.30 dated 30.4.1992 rendered by the learned Judicial Magistrate [F.C.], Vansda in Criminal Case No.267/85 is confirmed. The criminal revision petitioner is ordered and directed to surrender before the trial Court, to serve out the sentence inflicted by the learned Magistrate of the trial Court, within one month from the date of the receipt of the writ of this Court, by the trial Court. The order dated 09.05.1996 of this Court with regard to bail shall stand cancelled. Bail bond furnished by the accused shall stand cancelled. Rule is discharged.