(2015) 03 GUJ CK 0053

In the Gujarat High Court

Case No : Criminal Misc. Application (for Quashing and Set Aside Fir/Order) No. 2942 of 2014

Girishbhai Maganlal Pandya APPELLANT

Vs

State of Gujarat RESPONDENT

Date of Decision : 23-03-2015

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 173, 209, 225, 225, 226
Motor Vehicles Act, 1988 — Section 134(a)(b), 14(3), 164, 177, 181
Penal Code, 1860 (IPC) — Section 114, 279, 299, 300, 302

Citation : (2016) GLH 1 126

Hon'ble Judges : J.B. Pardiwala, J.

Bench : Single Bench

Advocate : A.D. Shah, for the Appellant; L.B. Dabhi, APP, Advocates for the Respondent

Final Decision : Allowed

Judgement

J.B. Pardiwala, J.—Rule. Mr. L.B. Dabhi, the learned Additional Public Prosecutor waives service of notice of rule for and on behalf of the respondent-State of Gujarat.

2. By this writ-application under Section 482 of the Code of Criminal Procedure, 1973, the applicant - original accused No. 4, seeks to invoke the inherent powers of this Court, calling in question the legality and validity of the order dated 24th October, 2013, passed by the Sessions Judge, Valsad, below Exh. 24, in Sessions Case No. 19 of 2011, by which the learned Sessions Judge rejected the discharge application filed by the applicant herein, under Section 227 of the Code of Criminal Procedure Code, 1973.

3. The facts giving rise to this application may be summarized as under:--

"3.1 The applicant herein is the Principal/School Administrator of an English medium school running in the name of "Saraswati International English Medium

School", situated at Abrama, Valsad.

3.2 On 26th October, 2010, a first information report came to be lodged at the Valsad Rural Police Station against the applicant herein and three other persons for the offence punishable under Sections 279 and 304A of the IPC and also under Sections 177 and 284 of the Motor Vehicles Act.

3.3 The first information was lodged by the grand-father of a student, namely - Adit, aged four, who at the relevant point of time was studying in the Junior K.G., regarding the accidental death of Adit on account of the negligence on the part of the accused persons named in the FIR.

3.4 it appears that on conclusion of the investigation, charge-sheet came to be filed against four persons, which includes the applicant herein. The accused No. 1 shown in the charge-sheet is the driver of the school bus No. 13, bearing Registration No. GJ-15X-9974, the accused No. 2 is the cleaner of the said bus, the accused No. 3 is the bus supervisor and the accused No. 4 is the applicant herein.

3.5 it is the case of the prosecution that on 26th October, 2010, the deceased was travelling in the school bus, which was being driven by the original accused No. 1, of which the original accused No. 2 was the cleaner. It is alleged that the tin-sheet beneath the Seat No. 3 on the left side from the door of the bus had got corroded or rusted resulting in a big cavity and from the said cavity, the tyre of the bus was visible as the size of the cavity beneath the seat was admeasuring 37 x 44". It is the case of the prosecution that the length between the cavity on the tin-sheet and the tyre was about 8". It is further alleged that although the driver, the cleaner, the bus supervisor as well as the applicant were in full knowledge about such a cavity in the bus beneath the seat, yet the same was not repaired, but on the contrary the same was kept covered with a thick cloth. On the fateful day, unfortunately, the deceased fell down through the cavity while the bus was in motion and got seriously crushed beneath the tyres. It is alleged that the driver negligently kept on driving the bus, despite the fact that the deceased had fallen down through the cavity. The deceased succumbed to the injuries."

4. It appears that although the first information report was registered of the offence punishable under Section 304A IPC, at a later stage, Section 304 of the IPC came to be added by way of a report filed by the Police Sub Inspector of the Valsad Rural Police Station in the Court of the learned Additional Chief Judicial Magistrate First Class. On conclusion of the investigation, the charge-sheet was filed for the offence punishable under Sections 304, 279, 304A read with Section 114 of the IPC and Sections 177, 184 and 164 of the Motor Vehicles Act.

5. It appears that the applicant herein filed an application before the learned Sessions Judge, Valsad, under Section 227 of the Code, praying that he be discharged from the prosecution as no liability could be fastened on him in his capacity as the Principal/Chief Administrator of the School. However, the learned

Sessions Judge, Valsad, vide order dated 24th October, 2013, rejected the application. Being dissatisfied, the applicant has come up with the present application.

6. Submissions on behalf of the applicant:

"6.1 Mr. A.D. Shah, the learned counsel appearing for the applicant vehemently submitted that the Court below committed a serious error in rejecting the discharge application filed by the applicant herein. He vehemently submitted that the facts emerging from the papers of the charge-sheet do not reveal commission of the offence of culpable homicide not amounting to murder punishable under Section 304 Part-II of the IPC.

6.2 Mr. Shah submitted that having regard to the role of the applicant herein attributed by the prosecution, no offence of even a rash or negligent act punishable under Section 304A is made out. Mr. Shah submitted that the applicant herein is sought to be prosecuted on the ground that the defective school buses were being plied by the drivers and the cleaners without taking appropriate steps for the repairs and maintenance of the same. Mr. Shah submitted that in the entire charge-sheet, the only case against the applicant herein is that the parents of the students had discussed about the poor condition of the school buses, and despite drawing the attention of the applicant herein, no corrective steps were taken. Mr. Shah also pointed out that his client resides at Mumbai. Although he may be the Chief Administrator, yet on the date of the accident he was in Mumbai and this fact is not in dispute.

6.3 Mr. Shah submitted that Section 304 IPC has no application at all since even if the entire case of the prosecution is accepted as true, there is no case of a voluntary commission of offence against the present applicant. Mr. Shah submitted that the accused No. 3 is working as the bus supervisor in the school past five years. On the date of the incident also, he was the bus supervisor. The accused No. 1 shown in the charge-sheet was driving the bus in question, whereas the accused No. 2 was the cleaner of the bus on the date of the incident.

6.4 Mr. Shah submitted that if Section 304 of the IPC is not applicable on the face of the case of the prosecution, then Section 304-A would also not be applicable against the applicant herein. He submitted that under Section 304-A IPC, there is a causal chain which consists of many links. It is only that which contributes to the cause of all causes, namely, the cause causans and not cause sine-qua-non, which fixes the culpability. In other words, it is submitted that it is not enough for the prosecution to show that the applicant''s inaction to get the bus repaired was one of the causes of death. It must show that it is the direct consequence, which in the present case, has not been established even prima-facie."

In such circumstances referred to above, Mr. Shah prays that no case is made out against the applicant herein, and he deserves to be discharged from the prosecution.

7. Submissions on behalf of the State:

"7.1 This application has been vehemently opposed by Mr. Dabhi, the learned Additional Public Prosecutor appearing for the State. He submitted that no error, not to speak of any error of law, could be said to have been committed by the trial Court in rejecting the discharge application. Mr. Dabhi submitted that while deciding a discharge application, the Court has only to consider a prima facie case. The Court has not to consider whether the evidence on record is sufficient to convict the accused. The Court has to merely consider whether there are suspicious circumstances against the accused so as to frame a charge against him. He submitted that it is not necessary for the Court to enter into the pros and cons of the matter or into a weighing and balancing of the evidence and probabilities, which is really his function after the trial starts. He submitted that a four year''s old innocent child lost his life in a shocking and regrettable manner.

7.2 Mr. Dabhi has placed reliance on the decision of the Supreme Court in the case of State of Maharashtra Vs. Salman Salimkhan and anr., reported in 2004 SC 1189."

In such circumstances referred to above, Mr. Dabhi prays that there being no merit in this application, the same be rejected.

8. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for my consideration is whether the trial Court committed any error in passing the impugned order.

Analysis:

9. Since the subject matter before me is an order passed by the trial Court rejecting the discharge application, I deem it necessary to consider the position of law so far as the scope of discharge under Section 227 of the Code is concerned. This issue of the scope of a discharge application has been considered at length by the Supreme Court in the case of Niranjan Singh Karam Singh Punjabi and Others Vs. Jitendra Bhimraj Bijja and others, I may quote the relevant observations of the Supreme Court in this regard, as contained in paragraphs 4 to 7.

"4. Under Section 14(3) of the Act a Designated Court is conferred with the powers of a Court of Session and is required to try any offence under the Act ''as if it were'' a Court of Session. The procedure which it must follow at the trial is the one prescribed in the Code for the trial of cases before a Court of Session. This is of course subject to the other provisions of the Act which means that if there is any provision in the Act which is not consistent with the procedure stipulated in the Code for such trials, it is the procedure in the Act that shall prevail. The procedure for trial before a Court of Session is set out in Chapter XVIII of the Code. Section 225 places the public prosecutor in charge of the conduct of the prosecution. Section 226 requires him to open the prosecution case by describing the charge against the accused and stating by what evidence he proposes to bring home the guilt against the accused. Once that is done the Judge has to consider whether or not to frame a charge. Section 227 of the Code reads as under:

"If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing." Under this section a duty is cast on the Judge to apply his mind to the material on record and if on examination of the record he does not find sufficient ground for proceeding against the accused, he must discharge him. On the other hand if after such consideration and hearing he is satisfied that a prima facie case is made out against the accused, he must proceed to frame a charge as required by Section 228 of the Code. Once the charge is framed the trial must ordinarily end in the conviction or acquittal of the accused. This is in brief the scheme of Sections 225 to 235 of the Code,

5. Section 227, introduced for the first time in the New Code, confers a special power on the Judge to discharge an accused at the threshold if ''upon consideration'' of the record and documents he considers ''that there is not sufficient ground'' for proceeding against the accused. In other words his consideration of the record and document at that stage is for the limited purpose of ascertaining whether or not there exists sufficient grounds for proceeding with the trial against the accused. If he comes to the conclusion that there is sufficient ground to proceed, he will frame a charge under Section 228, if not he will discharge the accused. It must be remembered that this section was introduced in the Code to avoid waste of public time over cases which did not disclose a prima facie case and to save the accused from avoidable harassment and expenditure.

6. The next question is what is the scope and ambit of the ''consideration'' by the trial Court at that stage. Can he marshal the evidence found on the record of the case and in the documents placed before him as he would do on the conclusion of the evidence adduced by the prosecution after the charge is framed? It is obvious that since he is at the stage of deciding whether or not there exists sufficient grounds for framing the charge, his enquiry must necessarily be limited to deciding if the facts emerging from the record and documents constitute the offence with which the accused is charged. At that stage he may sift the evidence for that limited purpose but he is not required to marshal the evidence with a view to separating the grain from the chaff. All that he is called upon to consider is whether there is sufficient ground to frame the charge and for this limited purpose he must weigh the material on record as well as the documents relied on by the prosecution. In the State of Bihar Vs. Ramesh Singh, this Court observed that at the initial stage of the framing of a charge if there is a strong suspicion-evidence which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the

Court to say that there is no sufficient ground for proceeding against the accused. If the evidence which the prosecutor proposes to adduce to prove the guilt, of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. In Union of India (UOI) Vs. Prafulla Kumar Samal and Another, this Court after considering the scope of Section 227 observed that the words ''no sufficient ground for proceeding against the accused clearly show that the Judge is not merely a post office to frame charge at the behest of the prosecution but he has to exercise his judicial mind to the facts of the case in order to determine that a case for trial has been made out by the prosecution. In assessing this fact it is not necessary for the Court to enter into the pros and cons of the matter or into weighing and balancing of evidence and probabilities but he may evaluate the material to find out if the facts emerging therefrom taken at their face value establish the ingredients constituting the said offence. After considering the case law on the subject, this Court deduced as under:

"(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence adduced before him while giving rise to some suspicion but not grave suspicion against the accused he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which (sic) under the present Code is a senior and experienced Judge cannot act merely as a post office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

7. Again in Supdt. and Remembrancer of Legal Affairs, West Bengal Vs. Anil Kumar Bhunja and Others, this Court observed in paragraph 18 of the judgment as under:--

"The standard of test, proof and judgment which is to be applied finally before finding, the accused guilty or otherwise, is not exactly to be applied at the stage of Section 227 or 228 of the Code of Criminal Procedure, 1973. At this stage, even a very strong suspicion founded upon materials before the Magistrate which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged may justify the framing of charge against the accused in respect of the commission of that offence.

From the above discussion, it seems well settled that at the Sections 227-228 stage the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may for this limited purpose sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case."

10. In Union of India (UOI) Vs. Prafulla Kumar Samal and Another, the Supreme Court considered the question regarding discharge under Section 227 of the Code. I may quote the observations of the Supreme Court as contained in paras 7 to 10.

"7. Section 227 of the Code runs thus:--

"If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing." The words ''not sufficient ground for proceeding against the accused'' clearly show that the Judge is not a mere post-office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really his function after the trial starts. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. The sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him.

8. The scope of Section 227 of the Code was considered by a recent decision of this Court in the case of State of Bihar Vs. Ramesh Singh, where Untwalia J. speaking for the Court observed as follows (at p. 2019):--

"Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guild of the accused which is to be drawn at the initial stages is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial." This Court has thus held that whereas strong suspicion may not take the place of the proof at the trial stage, yet it may be sufficient for the satisfaction of the Sessions Judge in order to frame a charge against the accused. Even under the Code of 1898 this Court has held that a committing Magistrate had ample powers to weigh the evidence for the limited purpose of finding out whether or not a case of commitment to the Sessions Judge has been made out.

9. In the case of K.P. Raghavan and Another Vs. M.H. Abbas and Another, this Court observed as follows (at p. 742):--

"No doubt a Magistrate enquiring into a case under S. 209, Cr. P. C. is not to act as a mere Post Office, and has to come to a conclusion whether the case before him is fit for commitment of the accused to the Court of Session". To the same effect is the later decision of this Court in the case of Almohan Das and Others Vs. State of West Bengal, where Shah, J. speaking for the Court observed as follows (at p. 866):--

"A Magistrate holding an enquiry is not intended to act merely as a recording machine. He is entitled to sift and weigh the materials on record, but only for seeing whether there is sufficient evidence for commitment, and not whether there is sufficient evidence for conviction. If there is no prima facie evidence or the evidence is totally unworthy of credit, it is his duty to discharge the accused : if there is some evidence on which a conviction may reasonably be based, he must commit the case." In the aforesaid case this Court was considering the scope and ambit of Section 209 of the Code of 1898.

10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out;

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test of determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced Court cannot act merely as a Post-Office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

11. In the case of State of Madhya Pradesh Vs. Sheetla Sahai and Others, , the Supreme Court once again reiterated the well settled principles, or to put it in other words, the test for the purpose of framing of charge. I may quote the following observations made by the Supreme Court, as contained in paragraphs 51 to 54.

"51. There cannot be any doubt whatsoever that the tests for the purpose of framing of charge and the one for recording a judgment of conviction are different. A distinction must be borne in mind that whereas at the time of framing of the charge, the court may take into consideration the fact as to whether the accused might have committed the offence or not; at the time of recording a judgment of conviction, the prosecution is required to prove beyond reasonable doubt that the accused has committed the offence.

52. In this case, the probative value of the materials on record has not been gone into. The materials brought on record have been accepted as true at this stage. It is true that at this stage even a defence of an accused cannot be considered. But, we are unable to persuade ourselves to agree with the submission of Mr. Tulsi that where the entire materials collected during investigation have been placed before the court as part of the charge-sheet, the court at the time of framing of the charge could only look to those materials whereupon the prosecution intended to rely upon and ignore the others which are in favour of the accused.

53. The question as to whether the court should proceed on the basis as to whether the materials brought on record even if given face value and taken to be correct in their entirety disclose commission of an offence or not must be determined having regard to the entirety of materials brought on record by the prosecution and not on a part of it. If such a construction is made, sub-section (5) of Section 173 of the Code of Criminal Procedure shall become meaningless.

54. The prosecution, having regard to the right of an accused to have a fair

investigation, fair inquiry and fair trial as adumbrated under Article 21 of the Constitution of India, cannot at any stage be deprived of taking advantage of the materials which the prosecution itself has placed on record. If upon perusal of the entire materials on record, the court arrives at an opinion that two views are possible, charges can be framed, but if only one and one view is possible to be taken, the court shall no put the accused to harassment by asking him to face a trial. {See State of Maharashtra, Etc. Etc. Vs. Som Nath Thapa, Etc. Etc.,

12. I may also quote with profit certain observations of the Supreme Court in the case of Keshub Mahindra Vs. State of M.P., (popularly known as the Bhopal Gas Tragedy case). I may quote observations made by the Court in paras 19 to 20 of the said decision.

"19. The learned Senior Counsel for the appellant-accused on the other had submitted that even if taking the material available on record at the stage on its face value the short question is whether any charge could have been framed against the accused under Section 304 Part-II IPC with our without the aid of Section 35 IPC and even for that matter any charges could have been framed under Sections 326, 324or 429 with or without the aid of Section 35 IPC. We may at once state that both the learned Sessions Judge as well as the High Court have taken the view on the aforesaid material that a prima facie case has been made out by the prosecution requiring the accused to face the aforesaid charges and the trial of the accused on these charges can not be cut short or nipped in the bud in the light of the aforesaid material which has to be accepted as prima facie true and reliable at this preliminary stage of framing o charges.

20. It, therefore, becomes necessary for us now to address ourselves on this moot question. As noted earlier the main charge framed against all the accused is under section 304 Part II IPC. So far as Accused 2, 3, 4 and 12 are concerned, they are also charged with offences under sections 326, 324 IPC and 429 IPC read with Section 35 IPC while Accused 5 to 9 are charged substantially with these offences also. We shall first deal with the charges framed against the accused concerned under the main provisions of Section 304 Part II IPC. A look at Section 304 Part II shows that the accused concerned can be charged under that provision for an offence of culpable homicide not amounting to murder and when being so charged if it is alleged that the act of the accused concerned 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 likely to cause death the charged offences would fall under Section 304 Part II. However, before any charge under Section 304 Part II can be framed, the material on record must at least prima facie show that the accused is guilty of culpable homicide and the act allegedly committed by him must amount to culpable homicide. However, if the material relied upon for framing such a charge against the accused concerned falls short of even prima facie indicating that the accused appeared to be guilty of an offence of culpable homicide Section 304 Part I or Part in the interest of justice would get out of the picture. In this connection we have to keep in view Section

299 of the Indian Penal Code which defines culpable homicide. It lays downs that:--

"Whoever cause 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." Consequently, the material relied upon by the prosecution for framing a charge under Section 304 Part II must at least prima facie indicate that the accused had done an act which had caused death with at least such a knowledge that he was by such act likely to cause death. The entire material which the prosecution relied upon before the trial court for framing the charge and to which we have made a detailed reference earlier, in our view, cannot support such a charge unless it indicates prima facie that on that fateful night when the Plant was run at Bhopal it was run by the accused concerned with the knowledge that such running of the plant was likely to cause deaths of human beings. It cannot be disputed that ere act of running a Plant as per the permission granted by the authorities would not be a criminal act. Even assuming that it was a defective Plant and it was dealing with a very toxic and hazardous substance like MIC the mere act of storing such a material by the accused in Tank No. 610 could not even prima facie suggest that the accused concerned thereby had knowledge that they were likely to cause death of human beings. In fairness to the prosecution it was not suggested and could not be suggested that the accused had an intention to kill any human being while operating the Plant. Similarly on the aforesaid material placed on record it could not be even prima facie suggested that the accused had an intention to kill any human being while operating the Plant. Similarly on the aforesaid material placed on record it could not be even prima facie suggested by the prosecution that any of the accused had a knowledge that by operating the plant on that fateful night whereat such dangerous and highly volatile substance like MIC was stored they had the knowledge that by this very act itself they were likely to cause death of any human being. Consequently, in our view taking the entire material as aforesaid on its face value and assuming it to represent the correct factual position in connection with the operation of the Plant at Bhopal on that fateful night it could not be said that the said material even prima facie called for framing of a charge against the accused concerned under Section 304 Part II IPC on the specious plea that the said act of the accused amounted to culpable homicide only because the operation of the Plant on that night ultimately resulted in deaths of a number of human beings and cattle. It is also pertinent to note that when the complaint was originally filed suo motu by the police authorities at Bhopal and the criminal case was registered at the Police Station Hanumanganj, Bhopal as Case No. 1104 of 1984 it was registered under Section 304-A of the IPC. We will come to that provision a little later. Suffice it to say at this stage that on the entire material produced by the prosecution in support of the charge it could not be said even prima facie that it made the accused liable to face the charge under Section 304 Part-II. In this connection we may refer to a decision of the Calcutta High Court to which our attention was drawn by the learned Senior Counsel, Shri Rajendra Singh for the appellants. In the case of Adam Ali Taluqdar v. King-Emperor a Division Bench of the Calcutta High Court made the following pertinent observations which interpreting Section 304 Part-II read with Section 34 IPC:

"Although to constitute an offence under Section 304, Part 2, there must be no intention of causing death or such injury as the offender knew as likely to cause death, there must still be a common intention to do an action with the knowledge that it is likely to cause death though without the intention of causing death. Each of the assailants may know that the act, they are jointly doing, is one that is likely to cause death but have no intention to causing death, yet they may certainly have the common intention to do that act and therefore Section 34 can apply to a case under Section 304, Part 2." 13. Thus, bearing in mind the principles laid down by the Supreme Court in the afore-noted cases, it could be said that at the stage of Sections 227 and 228 of the Code, it is permissible for the Court to evaluate the materials and documents on record with a view to finding out if the facts emerging therefrom taken at their face value discloses existence of all the ingredients constituting the alleged offence. It is permissible for the Court for this limited purpose to sift the evidence, as it cannot be expected even at that initial stage to accept all that the prosecution states as a gospel truth, even if it is opposed to the common sense or the broad probabilities of the case.

14. Applying the aforesaid test, I may now consider first whether Section 304 IPC is attracted in the present case or not. However, before I undertake this exercise, I may highlight few facts emerging from the materials on record, which are not in dispute.

"(a) The bus was being driven by the original accused No. 1, while the accused No. 2 was the cleaner of the bus.

(b) The accused No. 3 is serving in the school as a bus supervisor.

(c) The applicant herein has been arraigned as an accused in his capacity as the trustee/principal of the school."

15. The relevant portion of Section 304 of the IPC reads as under:--

"Whoever commits culpable homicide not amounting to murder shall be punished with... 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 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."

16. A plain reading of the above Section makes it clear that it is in two parts. The

first part of the Section is generally referred to as "Section 304 Part-I", whereas the second part as "Section 304, Part-II". It would thus, appear that if such bodily injury as is likely to cause death is intentionally caused and results in the death of the victim, the case would fall under Part-I and not under Part-II. Stated differently, Part-II comes into play when death is caused by doing an act with the knowledge that it is likely to cause death and when such act is the infliction of a bodily injury, the infliction must not be intentional. A person who intentionally causes the bodily injury with knowledge that such act is likely to cause death must necessarily be a person who does an act with the intent to cause bodily injury likely to result in death.

17. The Makers of the Code observed:

"The most important consideration upon a trial for this offence is the intention or knowledge with which the act which caused death, was done. The intention to cause death or the knowledge that death will probably be caused, is essential and is that to which the law principally looks. And it is of the utmost importance that those who may be entrusted with judicial powers should clearly understand that no conviction ought to take place, unless such intention or knowledge can from the evidence be concluded to have really existed". 18. The Makers further stated:

"It may be asked how can the existence of the requisite intention or knowledge be proved, seeing that these are internal and invisible acts of the mind? They can be ascertained only from external and visible acts. Observation and experience enable us to judge of the connection between men''s conduct and their intentions. We know that a sane man does not usually commit certain acts heedlessly or unintentionally and generally we have no difficulty in inferring from his conduct what was his real intention upon any given occasion". 19. Let me now look into Section 304A of the IPC and compare it with Section 304 IPC.

20. Section 304A was inserted by the Indian Penal Code (Amendment) Act, 1870 (Act XXVII of 1870) and reads thus:

"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." 21. 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'' or ''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 cause of death of another person.

22. Thus, there is a fine distinction between Section 304 and Section 304A.

Section 304A carves out cases where death is caused by doing a rash or 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 under Section 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.

23. In Empress v. Idu Beg, (1881) ILR 3 All 776, Straight, J. made the following pertinent observations which have been quoted with approval by various Courts including the Supreme Court:

"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". 24. Though the term ''negligence'' has not been defined in the 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. [See Mahadev Prasad Kaushik Vs. State of U.P. and Another,

25. In the aforesaid context, I may quote with profit a decision of the Supreme Court in the case of Naresh Giri Vs. State of M.P., In the said case, a bus was going from Ahrauli towards Kailaras. While it was near a Railway crossing, an accident took place. A train hit the bus at the railway crossing. In the accident, the bus which was being driven by the appellant was badly damaged and as a result of the accident, several passengers got injured and two persons died. After completion of the investigation, charge-sheet was filed. The charges were framed in relation to the offence punishable under Section 302 IPC and alternatively, under Sections 304, 325 and 323 of the Penal Code. Questioning the correctness of the charges framed, the revision petition was filed. The case of the appellant was that Section 302 IPC had no application to the facts of the case. The High Court rejected the plea of the appellant. The High Court was of the view that on the basis of the material available, the charges were rightly framed and the intention of the appellant could be gathered at the time when the evidence would be adduced. It was his case that at the best Section 304A IPC would be attracted.

26. In the aforesaid background, the Supreme Court made the following

observations, which are worth taking note of.

"7. Section 304-A IPC applies to cases where there is no intention to cause death and no knowledge that the act done, in all probabilities, will cause death. This provision is directed at offences outside the range of Sections 299 and 300 IPC. Section 304-A applies only to such acts which are rash and negligent and are directly the cause of death of another person. Negligence and rashness are essential elements under Section 304-A.

8. Section 304-A carves out a specific offence where death is caused by doing a rash or negligent act and that act does not amount to culpable homicide under Section 299 or murder under Section 300. If a person wilfully drives a motor vehicle into the midst of a crowd and thereby causes death to some person, it will not be a case of mere rash and negligent driving and the act will amount to culpable homicide. Doing an act with the intent to kill a person or knowledge that doing an act was likely to cause a person''s death is culpable homicide. When the intent or knowledge is the direct motivating force of the act, Section 304-A has to make room for the graver and more serious charge of culpable homicide. The provision of this section is not limited to rash or negligent driving. Any rash or negligent act whereby death of any person is caused becomes punishable. Two elements either of which or both of which may be proved to establish the guilt of an accused are rashness/negligence, a person may cause death by a rash or negligent act which may have nothing to do with driving at all. Negligence and rashness to be punishable in terms of Section 304-A must be attributable to a state of mind wherein the criminality arises because of no error in judgment but of a deliberation in the mind risking the crime as well as the life of the person who may lose his life as a result of the crime. Section 304-A discloses that criminality may be that apart from any mens rea, there may be no motive or intention still a person may venture or practice such rashness or negligence which may cause the death of other. The death so caused is not the determining factor.

9. What constitutes negligence has been analysed in Halsbury''s Laws of England (4th Edition) Volume 34 paragraph 1 (para 3) as follows:

"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". 10. In this context the following passage from Kenny''s Outlines of Criminal Law, 19th Edition (1966) at page 38 may be usefully noted:

"Yet a man may bring about an event without having adverted to it at all, he may not have foreseen that his actions would have this consequence and it will come to him as a surprise. The event may be harmless or harmful, if harmful, the question rises whether there is legal liability for it. In tort, (at common law) this is decided by considering whether or not a reasonable man in the same circumstances would have realised the prospect of harm and would have stopped or changed his course so as to avoid it. If a reasonable man would not, then there is no liability and the harm must lie where it falls. But if the reasonable man would have avoided the harm then there is liability and the perpetrator of the harm is said to be guilty of negligence. The word ''negligence'' denotes, and should be used only to denote, such blameworthy inadvertence, and the man who through his negligence has brought harm upon another is under a legal obligation to make reparation for it to the victim of the injury who may sue him in tort for damages. But it should now be recognized that at common law there is no criminal liability for harm thus caused by inadvertence. This has been laid down authoritatively for manslaughter again and again. There are only two states of mind which constitute mens rea and they are intention and recklessness. The difference between recklessness and negligence is the difference between advertence and inadvertence they are opposed and it is a logical fallacy to suggest that recklessness is a degree of negligence. The common habit of lawyers to qualify the word "negligence" with some moral epithet such as ''wicked'' ''gross'' or ''culpable'' has been most unfortunate since it has inevitably led to great confusion of thought and of principle. It is equally misleading to speak of criminal negligence since this is merely to use an expression in order to explain itself." 11. "Negligence", says the Restatement of the law of Torts published by the American Law Institute (1934) Vol. I. Section 28 "is conduct which falls below the standard established for the protection of others against unreasonable risk of harm". It is stated in Law of Torts by Fleming at page 124 (Australian Publication 1957) that this standard of conduct is ordinarily measured by what the reasonable man of ordinary prudence would do under the circumstances. In Director of Public Prosecutions v. Camplin (1978) 2 All ER 168 it was observed by Lord Diplock that "the reasonable man" was comparatively late arrival in the laws of provocation. As the law of negligence emerged in the first half of the 19th century it became the anthropomorphic embodiment of the standard of care required by law. In order to objectify the law''s abstractions like "care" "reasonableness" or "foreseeability" the man of ordinary prudence was invented as a model of the standard of conduct to which all men are required to conform.

12. In Syad Akbar Vs. State of Karnataka, , it was held that "where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment. As pointed out by Lord Atkin in Andrews v. Director of Public Prosecutions ((1937) (2) All ER 552) simple lack of care such as will constitute civil liability, is not enough; for liability under the criminal law a very high degree of negligence is required to be proved. Probably, of all the epithets that can be applied ''reckless'' most nearly covers the case."

13. According to the dictionary meaning ''reckless'' means ''careless'', ''regardless'' or heedless of the possible harmful consequences of one''s acts''. It presupposes that if thought was given to the matter by the doer before the act was done, it would have been apparent to him that there was a real risk of its having the relevant harmful consequences; but, granted this, recklessness covers a whole range of states of mind from failing to give any thought at all to whether or not there is any risk of those harmful consequences, to recognizing the existence of the risk and nevertheless deciding to ignore it. In R. v. Briggs (1977) 1 All ER 475 it was observed that a man is reckless in the sense required when he carries out a deliberate act knowing that there is some risk of damage resulting from the act but nevertheless continues in the performance of that act.

14. In R. v. Caldwell (1981) 1 All ER 961, it was observed that:--

"Nevertheless, to decide whether someone has been ''reckless'', whether harmful consequences of a particular kind will result from his act, as distinguished from his actually intending such harmful consequences to follow, does call for some consideration of how the mind of the ordinary prudent individual would have reacted to a similar situation. If there were nothing in the circumstances that ought to have drawn the attention of an ordinary prudent individual to the possibility of that kind of harmful consequence, the accused would not be described as ''reckless'' in the natural meaning of that word for failing to address his mind to the possibility; nor, if the risk of the harmful consequences was so slight that the ordinary prudent individual on due consideration of the risk would not be deterred from treating it as negligible, could the accused be described as reckless in its ordinary sense, if, having considered the risk, he decided to ignore it. (In this connection the gravity of the possible harmful consequences would be an important factor. To endanger life must be one of the most grave). So, to this extent, even if one ascribes to ''reckless'' only the restricted meaning adopted by the Court of Appeal in Stephenson and Briggs, of foreseeing that a particular kind of harm might happen and yet going on to take the risk of it, it involves a test that would be described in part as ''objective'' in current legal jargon. Questions of criminal liability are seldom solved by simply asking whether the test is subjective or objective." 15. The decision of R. v Caldwell (supra) has been cited with approval in R v. Lawrence (1981) 1 All ER 974 ENDLAWFINDER and it was observed that:

"Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting ''recklessly'' if, before doing the act, he either fails to give any thought to the possibility of there being any such risk or, having recognized that there was such risk, he nevertheless goes on to do it". 14A. Normally, as rightly observed by the High Court charges can be altered at any stage subsequent to the framing of charges. But the case at hand is one where prima facie Section 302 IPC has no application."

27. In the overall facts of the case, I have reached to the conclusion that the case on hand is not one of voluntary commission of offence against a person. The harmfulness inflicted intentionally or knowingly or caused directly and wilfully would attract Section 304 IPC. I am of the view that the mere act of driving a vehicle mindful of the fact that the same needed some immediate repairs would not be a criminal act. Prima-facie it appears that the driver as well as the cleaner were in knowledge of the fact that there was a cavity beneath the seat on which unfortunately the deceased was sitting, and despite such knowledge the driver and the cleaner kept on plying the vehicle. However, that by itself would not suggest that they had knowledge that by plying a defective vehicle they were in all probability likely to cause death of any student travelling in the bus. Yes, they could definitely be held liable for a rash or a negligent act, punishable under Section 304A of the IPC, if ultimately necessary evidence in that regard comes on record at the time of the trial.

28. In the aforesaid context, the observations made by the Supreme Court in the case of Keshub Mahindra Vs. State of Madhya Pradesh (supra) are very relevant. I have quoted the observations made in paragraphs 19 and 20 in the earlier part of my judgment and therefore, I need not reiterate the same.

29. The above takes me to the question whether the applicant herein should face the charge under Section 304A of the IPC or not.

30. In a prosecution for an offence under Section 304A of the IPC, the Court has to examine whether the alleged act of the accused is the direct result of a rash and negligent act, and that act was the proximate and efficient cause of the death without the intervention of others'' negligence. To put it in other words, whether the mere fact that the applicant herein as the Chief Administrator of the school failed to take appropriate care to ensure the safety of the students by

permitting the defective bus to be plied by itself is sufficient to establish an offence under Section 304A IPC. The answer to this question will determine whether the applicant''s act as alleged by the prosecution is the cause causans or has there been a cause interveniens, which has broken the chain of causation so as to make his act, though a negligent one, not the immediate cause or whether it amounts to an act of gross negligence or recklessly negligent conduct. In this context, it may be observed that in a case of this nature, the death of a small child aged four however, shocking and regrettable it may be, ought not to allow the mind to boggle while considering the aforesaid question.

As to what is meant by cause causans, has been explained by the Supreme Court in the case of Sushil Ansal Vs. State,   , as under:

"As to what is meant by cause causans we may gainfully refer to Black''s Law Dictionary (Fifth Edition) which defines that expression as under:

"Causa causans. - The immediate cause; the last link in the chain of causation." The Advance Law Lexicon edited by Justice Chandrachud, former Chief Justice of India defines Causa causans as follows:

"Causa causans. - The immediate cause as opposed to a remote cause; the ''last link in the chain of causation''; the real effective cause of damage" The expression "proximate cause" is defined in the 5th Edition of Black''s Law Dictionary as under:

"Proximate cause. - That which in a natural and continuous sequence unbroken by any efficient, intervening cause, produces injury and without which the result would not have occurred. Wisniewski vs. Great Atlantic and Pacific Tea Company, 226 Pa. Super 574 : 323 A2d 744 (1974), A2d at p. 748. That which is nearest in the order of responsible causation. That which stands next in causation to the effect, not necessarily in time or space but in causal relation. The proximate cause of an injury is the primary or moving cause, or that which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the accident could not have happened, if the injury be one which might be reasonably anticipated or foreseen as a natural consequence of the wrongful act. An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission." I may also refer to the earlier decision of the Supreme Court in Kurban Hussein Mohammedali Rangwalla Vs. State of Maharashtra, . On the interpretation of Section 304-A, holding:

"4. We may in this connection refer to Experor V. Omkar Rampratap, 4 Bom LR 679, where Sir Lawrence Jenkins had to interpret S. 304-A and observed as follows:

"To impose criminal liability under Section 304-A, Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another''s negligence. It must be the cause causans; it is not enough that it may have been the cause sine qua non." This view has been generally followed by High Courts in India and is in our opinion the right view to take of the meaning of S. 304-A. It is not necessary to refer to other decisions, for as we have already said this view has been generally accepted. Therefore, the mere fact that the fire would not have taken place if the appellant had not allowed burners to be put in the same room in which turpentine and varnish were stored, would not be enough to make him liable under S. 304-A, for the fire would not have taken place, with the result that seven persons were burnt to death, without the negligence of Hatim. The death in this case was, therefore, in our opinion not directly the result of a rash or negligent act on the part of the appellant and was not the proximate and efficient cause without the intervention of another''s negligence. The appellant must, therefore, be acquitted of the offence under S. 304-A."

In my view, having regard to the materials on record, the incident in this case cannot be treated as a direct and proximate cause of the negligence, even if I assume one on the part of the applicant herein in not getting the defective bus repaired. Many other factors might have resulted in the unfortunate incident. It was the Driver and the Cleaner who were actually handling the bus. If little care would have been taken by the Cleaner to ensure that no student occupied the seat beneath which there was a cavity, then probably this incident would not have occurred. Therefore, the alleged negligence from the part of the applicant herein cannot be regarded as the cause causans. Although it may be a cause sine qua non.

31. It must be pointed out that 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 knowing 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 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, in my view, does not permit a man to be un-cautious on a hope however earnest or honest that hope may be.

32. In the case of - A.W. Lazarus Vs. The State, a Bench of the Allahabad High Court held, following the decisions in -''Empress of India v. Idu Beg'', 3 All 776 (B) and - H.W. Smith Vs. Emperor, , that 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. It was pointed out that the criminality in such a case lay in running the risk of doing such an act with recklessness or indifference as to the consequences. The Bench further held that the criminal negligence under Section 304-A, I.P.C. was gross and culpable neglect of failure to exercise that reasonable and proper care and to take precautions to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances attending the charge, it was the imperative duty of the accused person to have adopted. Another important element which goes to make the offence is that the act of the accused must be found to be the immediate cause of the death, that is to say, the act and the death must be ''causa causans''.

33. I may here refer to a very instructive judgment of the House of Lords in - ''Andrews v. Director of Public Prosecutions'', 1937-2 All ER 552 (D). In this case Lord Atkin reviewed several of the earlier cases and delivered the leading opinion of the House. Lord Atkin pointed cut that the connotations of ''mens rea'' are not helpful in distinguishing between degrees of negligence, nor do the ideas of crimes and punishments in themselves carry a jury much further in deciding whether, in a particular case, the degree of negligence shown is a crime and deserves punishment. According to Lord Atkin, "the principle to be observed is that cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. 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."

34. Lord Atkin observed that the most appropriate epithet which can be applied to such cases is "reckless". He further pointed out that "it is difficult to visualise 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 "reckless" 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."

35. In an earlier case Lord Ellenborough had pointed out that to substantiate the charge of manslaughter the prisoner must be found to have been guilty of criminal misconduct arising either from the grossest ignorance or the most criminal inattention. Lord Atkin explained this observation of Lord Ellenborough in these words:

"The word "criminal" in any attempt to define a crime is perhaps not the most helpful, but it is plain that Lord Ellenborough meant to indicate to the jury a high degree of negligence." 36. Attention was also drawn by Lord Atkin to a passage in a considered judgment of Lord Hewart, Lord Chief Justice the passage to which attention was drawn was this:

"In a criminal Court, on the contrary, the amount and degree of negligence are the determining questions. There must be ''mens rea''." But, as was pointed out by Lord Atkin, the connotation of mens rea do not always prove helpful in determining the guilt of an accused in a particular case.

37. The essence of criminal liability under Section 304-A IPC is culpable rashness or negligence and not any rashness or negligence. The difference between the two is what marks off a civil from a criminal liability. The distinction is often an intricate matter and depends on the particular time, place and circumstances. In civil law negligence means inadvertence, which, if it resulted in injurious consequences to person or property, may involve liability to compensate for the damage. In Halsbury''s Laws of England, 3rd Edn. Vol. 28, paragraph 1, it is stated:

''''Negligence is a specific tort and in any given circumstances is the failure to exercise that care with which the circumstances demand. What amounts to negligence depends on the facts of each particular case and the categories of negligence are never closed. 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 accompanying circumstances, and may vary according to the amount of the risk to be encountered and to the magnitude of the prospective injury." 38. The consequence flows from a state of mind which is blank or devoid of any advertence, and the liability for such consequence is to be judged from the standpoint of reasonable foreseeability and the failure to exercise the care which such foreseeability necessarily implies. That I conceive to be the principle of tortious liability for negligence. Kenny in his "Outlines of Criminal Law'''' at page 29 observes,

"But if the reasonable man would have avoided the harm then there is liability and the perpetrator of the harm is said to be guilty of negligence. The word ''negligence'', therefore, in our jurisprudence is used to denote blameworthy inadvertence, and the man who through his negligence has brought harm upon another is under a legal obligation to make reparation for it to the victim of the injury, who may sue him in tort for damages. But it should now be recognised that at common law there is no criminal liability for harm thus caused by inadvertence............ The truth may be that he did not foresee the consequences as a reasonable man would have done, and that he was negligent in the true sense of the word, and therefore civilly, although not criminally, liable." 39. Kenny further points out that for criminal liability for negligence, there must be something more than such blameworthy inadvertence. This aspect is also adverted to in paragraph 1374 of Halsbury''s Laws of England, 3rd Edn. Volume 10,

"A higher degree of negligence is necessary to render a person guilty of manslaughter than to establish civil liability against him. Mere carelessness is not enough. Negligence in order to render a person guilty of manslaughter must be more than a matter of compensation between subjects; it must show such disregard for the life and safety of others as to amount to a crime against the State. Whether negligence is to be regarded as of such a nature is a question for the jury, after they have been properly directed by the Judge as to the standard to be applied, and depends on the facts of the particular case. The number of persons affected by a single act of negligence does not affect the decree of negligence." 40. While on this aspect, it is also instructive to refer to two English cases. Rex v. Williamson, 1807-3 C and P 635, was a case where a man who practised as an accoucheur, owing to a mistake in his observation of the actual symptoms, inflicted on a patient terrible injuries from which she died. After pointing out that in a civil case once negligence was proved, the degree of negligence was irrelevant, Lord Ellenborough, the Lord Chief Justice, said.

"In a criminal court, on the contrary, the amount and degree of negligence are the determining questions. There must be mens rea......... in explaining to juries the test which they should apply to determine whether the negligence in a particular case, amounted or did not amount to a crime, Judges have used epithets such as ''culpable'', ''criminal'', ''gross'', ''wicked'', ''clear'', ''complete''. But whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others, as to amount to a crime against the State and conduct deserving punishment." 41. Mere negligence or rashness is, therefore, not enough to bring a case within the ambit of Section 304A I.P.C. Negligence or rashness proved by evidence must be such as should necessarily carry with it a criminal liability. Whether such liability is present may depend on the degree of culpability having regard in each case to the particular time, place and circumstances. If it is merely a case of compensation or reparation for injury or damage caused to a person or property, it is clearly not punishable under either of the sections. The culpability to be criminal should be such as concerns not merely the person injured or property damaged but the safety of the public on the road. But the nature and extent of the injury or damage will be irrelevant in fixing criminal liability for negligence under the sections.

42. I may quote with profit the case of Ambalal D. Bhatt Vs. The State of Gujarat, wherein the following observations made by the Supreme Court are

worth taking note of.

"8. The learned Advocate contends that even if one batch number was given to several lots prepared on 12-11-62 as was done in respect of batch no 211105, the evidence discloses that this was not an isolated case but such practice was uniformly followed in S.C.L. Ltd. for which the appellant could not alone be held liable. In the circumstances the non-compliance with the rules for giving a batch number to every lot does not make the act of the appellant the cause causans of the death of the persons who were injected with glucose saline prepared by him because it was not only the duty of the Analyst Prabhakaran to test the material before they are issued to the injection department but also to test the solution in such a way as would trace lead nitrate in the sodium chloride content of the solution. As Prabhakaran had not applied the proper test and that too knowing fully well that several lots were given one batch number, he cannot be absolved of his responsibility to take representative samples for testing them instead of testing only one bottle out of 450 bottles comprising batch No. 211105. On this premise it is contended that though section 304A covers various fields of activity, an offence is committed only if a person charged is shown to have neglected to take such action as he is reasonably expected to take to avoid injury to others and that such reasonable steps that are expected to be taken by him should show that there was a failure to take such elementary steps it was necessary for him to take. Inasmuch as in all cases under section 304A there is a casual chain which consists of many links, it is only that which contributes to the cause of all causes, namely, the cause causans and not cause sine qua non which fixes the capability. In other words, it is submitted that it is not enough for the prosecution to show that the appellant''s action was one of the causes of death. It must show that it is the direct consequence, which in this case has not been established. On the other hand, according to the learned Advocate the appellant is separated by two important steps which intervene before the glucose saline is sold for being administered to the needy. These are : (1) that not only should the materials be tested but the solution should be tested properly to detect the dangerous components of the preparation which was the duty of the Chief Analyst; and (2) that the production report and the analysis report have to be seen by the Production Superintendent who is to satisfy himself that proper tests have been carried out before certifying them for sale. The persons who are directly responsible for the saline solution to be certified for sale are the Chief Analyst as well as the Production Superintendent and not the appellant.

9. It is, however, the case of respondent State that had the appellant not given a single batch number to all the four lots when he prepared the offending glucose saline, the analysis by the Chief Analyst would analysis by the Chief Analyst would have certainly discovered the heavy deposits of lead nitrate in the sodium chloride and the lot which contained this would have been rejected. As the appellant has been negligent in conforming to the rules, the deaths were the direct consequence of that negligence.

10. It appears to us that in a prosecution for an offence under section 304A, the mere fact that an accused contravenes certain rules or regulations in the doing of an act which causes death of another, does not establish that the death was the result of a rash or negligent act or that any such act was the proximate and efficient cause of the death. If that were so, the acquittal of the appellant for contravention of the provisions of the Act and the Rules would itself have then examined to what extent additional evidence of his acquittal would have to be allowed, but since that is not the criteria, we have to determine whether the appellant''s act in giving only one batch number to all the four lots manufactured on 12-11-62 in preparing batch No. 211105 was the cause of deaths and whether those deaths were a direct consequence of the appellant''s act that is, whether the appellant''s act is the direct result of a rash and negligent act and that act was the proximate and efficient cause without the intervention of another''s negligence. As observed by Sir Lawrence Jenkins in Emperor v. Omkar Rampratap. (1902) 4 Bom LR 679 the act causing the deaths "must be the cause causans; it is not enough that it may have been the cause sine qua non". This view has been adopted by this Court in several decisions. In Kurban Hussein Mohammedali Rangwalla Vs. State of Maharashtra, the accused who had manufactured wet paints without a licence was acquitted of the charge under section 304A because it was held that the mere fact that he allowed the burners to be used in the same room in which varnish and turpentine were stored, even though it would be a negligent act, would not be enough to make the accused responsible for the fire which broke out. The cause of the fire was not merely the presence of the burners within the room in which varnish and turpentine were stored, though this circumstance was indirectly responsible for the fire which broke out, but was also due to the overflowing of froth out of the barrels. In Suleman Rehiman Mulani and Another Vs. State of Maharashtra, the accused who was driving a car only with a learner''s licence without a trainer by his side, had injured a person. It was held that by itself was no sufficient to warrant a conviction under section 304A. It would be different if it can be established as in the case of Bhalchandra alias Bapu and Another Vs. State of Maharashtra, that deaths and injuries caused by the contravention of a prohibition in respect of the substance which are highly dangerous as in the case of explosives in a cracker factory which are considered to be of a highly hazardous and dangerous nature having sensitive composition where even friction or percussion could cause an explosion, that contravention would be the cause causans.

11. Bearing these principles in view, what we have to see is:

(1) whether there was contravention of the rule? If so, to what extent that contravention by the appellant contributed to the non-discovery of lead nitrate in sodium chloride content of the glucose saline in Batch No. 211105? (2) Whether sodium chloride for which the said solution was prepared was obtained by the appellant from sources other than the Stores of S. C.I. Ltd.? and (3) Whether the method adopted in testing the said batch by Prabhakaran would have, but for the contravention of the rules requiring the giving of one batch number to each lot,

detected the presence of lead nitrate when he analysed samples of the offending batch of glucose saline prepared by the accused. T he answers to these questions will determine whether the appellant''s act is the cause causans or has there been a cause interveniens which has broken the chain of causation so as to make his act, though a negligent one, not the immediate cause or whether it amounts to an act of gross negligence or recklessly negligent conduct. In this context it may be observed that in a case of this nature where as many as 12 persons lost their lives as a result of the parenteral administration of the drug comprised in Batch No. 211105 prepared by the appellant, those deaths however shocking and regrettable they may be, ought not to allow the mind to boggle while appreciating the evidence which must necessarily be free from any such consideration." 43. I may also quote with profit a decision of the Supreme Court in the case of Balwant Singh Vs. State of Punjab and Another, . The following observations of the Supreme Court are worth taking note of.

"8. Then the question would be whether an offence under Sec. 304-A, I.P.C., is made out? The provisions of this Section apply to cases where there is no intention to cause death and no knowledge that the act done in all probabilities will cause death. Therefore this provision is directed at offences outside the range of Ss. 299and 300, I.P.C. and obviously contemplates those cases into which neither intention nor knowledge enters. The words "not amounting to culpable homicide" in the Section are very significant and it must therefore be understood that intentionally or knowingly inflicted violence directly and wilfully caused is excluded. The Section applies only to such acts which are rash or negligent and are directly the cause of death of another person. In other words, a rash act is primarily an over hasty act as opposed to a deliberate act but done without due care and caution. Then the question whether the conduct of the accused amounted to culpable rashness or negligence depends on the amount of care and circumspection which a prudent and reasonable man would consider it to be sufficient and this depends on the circumstances in each case." 44. In a very recent pronouncement of the Supreme Court in the case of Dr. P.B. Desai Vs. State of Maharashtra and Another, , the Supreme Court has explained in details as to when criminal liability would be attracted in cases of medical negligence. It is no doubt true that the Supreme Court was dealing with an issue whether the role of the appellant as a doctor in that case amounted to a rash or a negligent act as to endanger the life of the patient. The Supreme Court made the following observations:--

"(4) Breach of Duty to Take Care: Consequences

42. If the patient has suffered because of negligent act/omission of the doctor, it undoubtedly gives right to the patient to sue the doctor for damages. This would be a civil liability of the doctor under the law tort and/or contract. This concept of negligence as a tort is explained in Jacob Mathew Vs. State of Punjab and Another, , in the following manner:

"10. The jurisprudential concept of negligence defines any precise definition.

Eminent jurists and leading judgments have assigned various meanings to negligence. The concept as has been acceptable to Indian jurisprudential thought is well stated in the Law of Torts, Ratanlal and Dhirajlal (24th Edn., 2002, edited by Justice G.P. Singh).

Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property.... The definition involves three constituents of negligence: (1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former''s conduct within the scope of the duty; (2) breach of the said; and (3) consequential damage. Cause of -action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort."

43. Such a negligent act, normally a tort, may also give rise to criminal liability as well, though it was made clear by this Court in Jacob''s Case (supra) that jurisprudentially the distinction has to be drawn between negligence under Civil Law and negligence under Criminal Law. This distinction is lucidly explained in Jacob''s Case, as can be seen from the following paragraphs:

"12. The term "negligence" is used for the purpose of fastening the defendant with liability under the civil law and, at times, under the criminal law. It is contended on behalf of the respondents that in both the jurisdictions, negligence is negligence, and jurisprudentially no distinction can be drawn between negligence under civil law and negligence under criminal law. The submission so made cannot be countenanced inasmuch as it is based upon a total departure from the established terrain of thought running ever since the beginning of the emergence of the concept of negligence up to the modern times. 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 amount of damages but the amount and degree of negligence that is 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. The essential ingredient of mens -rea cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence. In R. v. Lawrence Lord Diplock spoke in a Bench of five and the other Law Lords agreed with him. He reiterated his opinion in R. v. Caldwell and dealt with the concept of recklessness as constituting mens rea in criminal law. His Lordship warned against adopting the simplistic approach of treating all problems of criminal liability as soluble by classifying the test of liability as being "subjective" or "objective", and said: (All ER p. 982e-f) "Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting ''recklessly'' if, before doing the act, he either fails to give any thought to the possibility of there being any such risk or, having recognised that there was such risk, he nevertheless goes on to do it."

13. The moral culpability of recklessness is not located in a desire to cause harm. It resides in the proximity of the reckless state of mind to the state of mind present when there is an intention to cause harm. There is, in other words, a disregard for the possible consequences. The consequences entailed in the risk may not be wanted, and indeed the actor may hope that they do not occur, but this hope nevertheless fails to inhibit the taking of the risk. Certain types of violation, called optimising violations, -- may be motivated by thrill-seeking. These are clearly reckless.

14. In order to hold the existence of criminal rashness or criminal negligence it shall have to be found out that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent. The element of criminality is introduced by the accused

having run the risk of doing such an act with recklessness and indifference to the consequences. Lord Atkin in his speech in Andrews v. Director of Public Prosecutions stated: (All ER p. 556 C)

"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."

Thus, a clear distinction exists between "simple lack of care" incurring civil liability and "very high degree of negligence" which is required in criminal cases. In Riddell v. Reid (AC at p. 31) Lord Porter said in his speech --

"A higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability." 15. The fore-quoted statement of law in Andrews has been noted with approval by this Court in Syad Akbar v. State of Karnataka. The Supreme Court has dealt with and pointed out with reasons the distinction between negligence in civil law and in criminal law. Their Lordships have opined that there is a marked difference as to the effect of evidence viz. the proof, in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the -- defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man, beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment."

44. Thus, in the civil context while we consider the moral implications of negligent conduct, a clear view of the state of mind of the negligent doctor might not require strictly. This is for the reason the law of tort is ultimately not concerned with the moral culpability of the defendant, even if the language of fault is used in determining the standard of care. From the point of view of civil law it may be appropriate to impose liability irrespective of moral blameworthiness. This is because in civil law two questions are at

issue: Was the defendant negligent? If so, should the defendant bear the loss in this particular set of circumstances? In most cases where negligence has been established, the answer to the second question will be in the affirmative, unless the doctrine of remoteness or lack of foresee ability militates against a finding of liability, or where there is some policy reason precluding compensation. The question in the civil context is, therefore, not about moral blame, even though there will be many cases where the civilly liable defendant is also morally culpable.

(5) Criminal Liability : When attracted

45. It follows from the above that as far as the sphere of criminal liability is concerned, as mens rea is not abandoned, the subjective state of mind of the accused lingers a critical consideration. In the context of criminal law, the basic question is quite different. Here the question is: Does the accused deserve to be punished for the outcome caused by his negligence? This is a very different question from the civil context and must be answered in terms of mens rea. Only if a person has acted in a morally culpable fashion can this question be answered positively, at least as far as non strict liability offenses are concerned.

46. The only state of mind which is deserving of punishment is that which demonstrates an intention to cause harm to others, or where there is a deliberate willingness to subject others to the risk of harm. Negligent conduct does not entail an intention to cause harm, but only involves a deliberate act subjecting another to the risk of harm where the actor is aware-of the existence of the risk and, nonetheless, proceeds in the face of the risk. This, however, is the classic definition of recklessness, which is conceptually different from negligence and which is widely accepted as being a basis for criminal liability."

45. For the foregoing reasons, I am of the view that so far as the applicant herein is concerned, he stands on a different footing as compared to the other accused. The only material against him in the entire charge-sheet is a statement to the effect that in the periodical meetings between the parents and the management of the school, the issue as regards the poor condition of the buses being plied to pick up and drop the students was discussed, but the same was not paid heed to. On such allegations, the applicant herein is sought to be put to trial for the offence of culpable homicide not amounting to murder and in the alternative for the offence under Section 304A IPC. In my view, the applicant

should not be asked to face the trial either for the offence of a rash or a negligent act punishable under Section 304A of the IPC or Section 304 IPC. The persons who could be said to be directly responsible for the unfortunate death of the student are the driver of the vehicle, including the cleaner. This observation, of course, is prima-facie and subject to the evidence that may be led at the time of the trial. However, the applicant''s act of not paying heed to the requests made by the parents regarding the necessary repairs to be carried out in the buses cannot be said to be the cause causans, but there was a cause interveniens, which broke the chain of causation so as to make the act of the applicant though a negligent one, not the immediate cause.

46. At this stage, I may deal with the decision relied upon by Mr. Dabhi, the learned APP. The Supreme Court in the case of State of Maharashtra vs. Salman Salimkhan and Anr. (supra), had the occasion to consider an identical issue. In the said case, the respondent was originally charged of an offence punishable under section 304-A, 279, 337, 338, 427, IPC and section 134(a)(b) read with sections 181 and 185 of the Motor Vehicles Act, 1998 as also under section 66(1)(b) of the Bombay Prohibition Act. All these offences are triable by a court of Magistrate of competent jurisdiction. The charge-sheet, at a later stage, came to be modified based on the additional statement of the complainant, and instead of section 304-A, IPC, section 304, Part II, IPC was substituted which is an offence exclusively triable by a Court of Session. The learned Magistrate, who had taken cognizance of the offence, committed the said case to the Court of Session for trial. On the framing of the charge under section 304, Part II, IPC, the accused filed Criminal Application No. 463 of 2003 in the Court of Session alleging that the facts as narrated in the complaint did not constitute an offence punishable under section 304, Part II, IPC and if at all, only a charge for an offence punishable under section 304-A could be framed against him, apart from other offences triable by the Court of Magistrate. The said application came to be rejected by the Sessions Court and the Sessions Judge, thereafter, proceeded to frame charges, one of which, was for an offence punishable under section 304, Part II, IPC.

47. Being aggrieved by the dismissal of his application and the consequential framing of charge under section 304, Part II, IPC, the accused preferred a criminal application under section 482 of the Code before the Criminal Appellate Bench of the High Court of Judicature at Bombay. The High Court allowed the said application and quashed the order passed by the learned Sessions Judge framing charge under section 304, Part II, IPC against the accused while it maintained the other charges and directed the Magistrate to frame de novo charges under various sections including one under section 304-A, IPC. 36. The State of Maharashtra, feeling dissatisfied, filed special leave petition before the Supreme Court and challenged the order passed by the High Court. The Supreme Court made the following observations:

"Mr. Harish N Salve, learned senior counsel representing the respondent-accused, per contra, contended that from a plain reading of the complaint which is the only material available at this stage for the purpose of framing charges, no reasonable person could ever have come to the conclusion that the respondent ever had any knowledge that by his act of driving the motor vehicle, he would cause such an act which would lead to the death of any person. He further submitted that from the material on record itself it is clear that if at all any act of the respondent is responsible for the death of the victim same cannot be termed anything other than a rash and negligent act punishable under section 304A. Learned senior counsel further submitted that since the learned Sessions Judge while rejecting the application of the petitioner filed before it in altering the charge from section 304 Part II to 304A, IPC, had itself passed a lengthy order which indicated that the said court had formed a conclusive opinion as to the nature of offence which definitely would have prejudiced the case of the respondent in the trial, the High Court was left with no choice but to decide this question as to the nature of offence if at all committed by the respondent.

But for the fact that two courts below i.e. the Sessions Court and the High Court having gone into this issue at length and having expressed almost a conclusive opinion as to the nature of offence, we would not have interfered with the impugned order of the High Court because, as stated above, neither of the sides would have been in any manner prejudiced in the trial by framing of a charge either under section 304A or section 304 Part II, IPC except for the fact that the forum trying the charge might have been different, which by itself, in our opinion, would not cause any prejudice. This is because at any stage of the trial it would have been open to the concerned court to have altered the charge appropriately depending on the material that is brought before it in the form of evidence. But now by virtue of the impugned judgment of the High Court even if in the course of the trial the Magistrate were to come to the conclusion that there is sufficient material to charge the respondent for a more serious offence than the one punishable under section 304A, it will not be possible for it to pass appropriate order. To that extent the prosecution case gets preempted.

We are of the opinion that though it is open to a High Court entertaining a petition under section 482 of the Code to quash charges framed by the trial court, same cannot be done by weighing the correctness or sufficiency of evidence. In a case praying for quashing of the charge, the principle to be adopted by the High Court should be that if the entire evidence produced by the prosecution is to be believed, would it constitute an offence or not. The truthfulness, the sufficiency and acceptability of the material produced at the time of framing of charge can be done only at the stage of trial. By relying upon the decisions of the apex Court most of which were with reference to appeals arising out of convictions, we think the High Court was not justified in this case in giving a finding as to the non-existence of material to frame a charge for an offence punishable under section 304 Part II, IPC, therefore, so far as the finding given by the High Court is concerned, we are satisfied that it is too premature a finding and ought not to have been given at this stage. At the same time we are also in agreement with the arguments of learned counsel for the respondents that even the Sessions Court ought not to have expressed its views in such certain terms which indicates that the Sessions Court had taken a final decision in regard to the material to establish a charge punishable under section 304 Part II, IPC.

Therefore, we think it appropriate that the findings in regard to the sufficiency or otherwise of the material to frame a charge punishable under section 304, Part II, IPC of both the courts below should be set aside and it should be left to be decided by the court trying the offence to alter or modify any such charge at an appropriate stage based on material produced by way of evidence.

The next question which then requires our consideration is whether in view of our above finding, the charge framed by the Sessions Judge for an offence punishable under section 304 Part II, IPC be sustained or one under section 304A as has been done by the High Court, should be retained?

We have been informed that pursuant to the judgment of the High Court, the Metropolitan Magistrate, 12th Court, Bandra, Mumbai, has already framed fresh charges under section 304A and other provisions mentioned hereinabove and the trial has commenced. Since any interference at this stage would not further the cause of justice and would lead only to delay the course of justice, we think it appropriate that the proceedings before the said Magistrate''s Court should continue and the trial should proceed on the basis of the charges framed by it but we make it very clear that at any appropriate stage if the Magistrate comes to the conclusion that there is sufficient material to charge the respondent for a more serious offence than the one punishable under section 304A, he shall proceed to do so without in any manner being hindered or influenced by the observations or findings of the High Court in the impugned order or by the order of the Sessions Court which framed the charge punishable under section 304 Part II, IPC. Such decision of the Magistrate shall be purely based on the material brought in evidence at the trial."

48. The issue before the Supreme Court in the afore-noted case was whether the accused should face the trial for the offence under Section 304, Part-II IPC or Section 304A IPC. The Supreme Court took the view that such issues should be left best to the trial Court to decide and the Sessions Court or the High Court should not undertake such exercise. I am of the view that this decision on which the learned APP has placed strong reliance is not in any manner helpful to the State because I am not deciding whether the applicant herein should face the trial for the offence under Section 304 IPC or Section 304-A IPC. I have taken the view on the basis of the materials on record, more particularly, the case against the applicant herein, that the applicant deserves to be discharged from the prosecution as a whole. So far as civil liability is concerned, the school can be held liable for the tortuous act or liability.

49. Dictating this judgment was a very painful experience. The very thought of a

four year old child getting crushed beneath the tyres of his own school bus makes my heart bleed with pain and agony. I can also imagine the pain and agony the parents of the deceased must be undergoing even as on today. However, such thoughts should not allow the mind of a judge to get boggled, otherwise justice cannot be done. However, harsh one may find the law, but at the same time, the law remains the law and it has got to be respected.

50. In the result, this petition is allowed. The application Exh. 24 filed by the applicant in Sessions Case No. 19 of 2011 is allowed. The applicant herein is ordered to be discharged from the Sessions Case No. 19 of 2011.

51. The trial shall proceed further against the other co-accused, in accordance with law. However, before proceeding further to frame the charge against the other co-accused, the trial Court shall bear in mind the observations made by this Court so far as Section 304 IPC is concerned. Rule is made absolute.

