

(2020) 06 GUJ CK 0004
In the Gujarat High Court
Case No : R/Criminal Appeal No. 704 Of 2004

Kailashchandra Bansilal Joshi

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 02-06-2020

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 209, 313, 374
Indian Penal Code, 1860 — Section 34, 120B, 302, 304B, 306, 498A
Dowry Prohibition Act, 1961 — Section 2

Citation : (2020) 06 GUJ CK 0004

Hon'ble Judges : Dr A. P. Thaker, J

Bench : Single Bench

Advocate : Gautam H Gadhavi, Yh Motiramani, Jirga Jhaveri

Final Decision : Allowed

Judgement

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Bamaniyabhai Vasava",Exhibit 35

4., "Panch witness Jesingbhai

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as referred to herein above.,,

9. Heard learned counsel Mr.Jitendra Sheth for the appellant-accused and learned APP Mr.Shruti Pathak for the respondent-State at length. Perused,,
the material placed on record and the decisions cited at bar.,,

10. Learned counsel, Mr.Sheth for the accused has submitted that as per the prosecution the accident had happened at late night. He has stated that in",,
the alleged incident, the tempo turned turtle and that the road is sloppy one and during the said accident two persons have died and 40 persons have",,

been injured. According to him, this was really an accident and there was no any negligence or rashness on the part of the accused. While referring to",,

the evidence of witness, learned counsel Shri Sheth has also contended that the witnesses, who were travelling in said tempo have made",,

improvements in their depositions and the improvements have been proved through cross-examination of the investigating officer. While referring to,,

oral and documentary evidence, learned counsel has also submitted that as there was a festival of Holi, the people travelling in tempo were shouting",,

and at the curve, as all the people slid to one side of the tempo, the tempo turned turtle. He has also contended that for the said fact, the appellant-",,

accused could not be held responsible, as it was an accident in real sense. He has also submitted that no proper investigation has been carried out by",,,

the investigating officer and as per the report of FSL, no fault of accused could be found. He also contended that there is evidence on record to show",,,

that there was a slop and that too in a curved nature. According to him, learned trial Court has not considered all the aspects in its proper perspective",,,

and has committed serious error of facts and law in convicting the accused. He has prayed to allow present appeal by quashing the impugned,,

judgment of conviction and sentence. He has relied upon the following decisions in support of his submissions.,,,

(1) Emperor v. Khan Mohammad Sher Mohammad reported in AIR 1937 Bombay 96.,,,

(2) State of Karnataka v. Satish reported in (1998) 8 SCC 493.,,,

11. Per contra, Ms.Pathak, learned APP vehemently submitted that learned trial Court has properly appreciated the evidence on record and has",,,

committed no error of facts and law in convicting the accused and imposing the sentence upon him. She has submitted that the contradiction, if any,",,

made by the witnesses in their depositions, is minor in nature, and those contradictions may not be taken into consideration. She has also submitted that",,,

the persons, who have been examined in this case by the prosecution are all the victims, who were travelling in tempo. She has also invited the",,,

attention of the Court to the deposition of the witnesses and has submitted that the witnesses have clearly stated in their evidence that at the relevant,,

time, the tempo was being driven in rash and negligent manner and with high speed. She has further submitted that as per the injured witnesses, they",,,

have shouted and advised the accused to drive the tempo at a moderate speed, but those requests have not been taken into consideration by the driver",,,

and he had driven the tempo in rash and negligent manner, which has resulted in death of two young persons and injury to 40 persons. She has",,,

vehemently submitted that learned trial Court has considered all the facts and circumstances of the case and has properly convicted the accused and,,

imposed the sentence upon him. Regarding decisions cited by the accused side, learned APP, Ms.Pathak has submitted that the facts of the cited",,,

decisions and the facts of the present case are different and, therefore, these decisions are not applicable in the present case. While relying upon the",,,

following decisions, she has prayed to dismiss present appeal and confirm the impugned judgment of learned trial Court.",,

(1) Gulazarilal v. State of Haryana reported in (2016) 4 SCC 583.,,

11.1 She has also submitted that if there is defective investigation, then that fact itself cannot vitiate the prosecution case and the laxity on the part of",,

the police cannot be considered as fatal to the prosecution case. She has relied upon the decision in the case of Karan Singh v. State of Haryana and,,

Another reported in (2013) 2 SCC 529, wherein it is observed as under:-",,

14. Omissions made on the part of the Investigating Officer, where the prosecution succeeds in proving its case beyond any reasonable doubt by",,

way of adducing evidence, particularly that of eye-witnesses and other witnesses, would not be fatal to the case of the prosecution, for the reason that",,

every discrepancy present in the investigation does not weigh upon the court to the extent that it necessarily results in the acquittal of accused, unless",,

it is proved that the investigation was held in such manner that it is dubbed as a dishonest or guided investigation, which will exonerate the accused.",,

(See: Sonali Mukherjee v. Union of India, (2010) 15 SCC 25; Mohd. Imran Khan v. State Government (NCT of Delhi), (2011) 10 SCC 19 2Sheo",,

Shankar Singh v. State of Jharkhand & Anr., AIR 2011 SC 1403; Gajoo v. State of Uttarakhand, (2012) 9 SCC 532 ;Shyamal Ghosh v. State of West",,

Bengal, AIR 2012 SC 3539; and Hiralal Pandey & Ors. v. State of U.P., AIR 2012 SC 2541).",,

Thus, unless lapses made on the part of Investigating authorities are such, so as to cast a reasonable doubt on the case of the prosecution, or seriously",,

prejudice the defence of the accused, the court would not set aside the conviction of the accused merely on the ground of tainted investigation.â??",,

12. In view of the provision contains in Section 386 of the Criminal Procedure Code, 1973, in an appeal from a conviction, the Appellate Court can",,

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re- tried by a Court of competent jurisdiction subordinate",,

to such Appellate Court or committed for trial; (ii) alter the finding, maintaining the sentence or (iii) with or without altering the finding, alter the nature",,

or the extent, or the nature and extent, of the sentence, but not so as to enhance the same.",,

13. It is well settled that it is the duty of the Appellate Court to look into the

evidence adduced in the case and arrive at an independent conclusion as,,
to whether the said evidence can be relied upon or not and even it can be relied upon then whether the prosecution can be said to have proved the,,
case beyond reasonable doubt by leading evidence. The credibility of a witness has to be adjudged by the Appellate Court in drawing inference from,,
proved admitted facts.,,

14. It is also well settled that the law clearly expects the Appellate Court to dispose of the appeal on merits not merely by perusing the reasoning of,,
the Trial Court in the judgment, but by cross-checking the reasoning with the evidence on record with a view to satisfying itself that the reasoning and",,
findings recorded by the Trial Court are consistent with the materials on record.,,

15. In the case of Emperor v. Khanmohammad Shermohammad (supra), Bombay High Court has at page 98, observed as under:-",,

â??One has to remember that driving motor cars has become an essential part of human activities, and it is impossible to avoid certain number of",,
accidents. In my view, it is no part of duty of the Courts to punish with savage sentences every motorist, who has the misfortune to have an accident",,
which results in a loss of life, even though the accident be due to an error of judgment on the part of the driver. The circumstances of each case must",,
be considered in imposing sentence.â??,,

16. In the case of State of Karnataka (supra) in paragraph 4, Honourable Apex Court has observed as under:-",,

â??â?|â?|In the absence of any material on the record, no presumption of â??rashnessâ?or â??negligenceâ?could be drawn by invoking the maxim",,
â??res ipsa loquiturâ??â?â?|â?|â?|â?|,,

17. The case of Gularilal v. State of Haryana (supra), appears to be a case of murder and the concerned Court has convicted the accused on the basis",,
of evidence, which was in the nature of dying declaration and evidence of other witnesses, the plea of defective investigation was raised. On that",,
point, it was observed that laxity on the part of the police makes no difference if there is consistent evidence in the form of dying declaration and the",,
statements made by the deceased and the witnesses.,,

18. Considering the contentions raised by both the sides and on perusal of evidence on record, it is an admitted fact that on the date of accident, at late",,

night, tempo bearing registration no.GJ-6-V-8851 turned turtle and in such accident, two young persons have died and many persons, who were",,

travelling in said tempo got injuries and they have been treated by the doctors for such injuries. The happening of accident is not disputed. At the same,,

time, though during trial the accused has put up defence that the witnesses could not identify the person, who was driving the tempo, but in the appeal",,

memo filed in this Court, the appellant has categorically stated that it was the fear of mob attacking him, forced him to run away from the place of",,

accident. Now, considering the evidence on record, the only question is as to whether there was any negligence or rashness on the part of the accused",,

and whether he was responsible for the injuries to various witnesses and for causing death of two young persons.,,

19. Now, on perusal of the evidence of Dr.Rakeshkumar Ambalal Tadavi, PW-1, Exh.8, he has performed postmortem on the dead body of the",,

deceased Dharmeshkumar Kumariya Vasava, aged 15 years and Gambhir Maragiya Vasava and found various injuries, as stated in column-7 of the",,

postmortem report and all the injuries were ante- mortem and they have died due to various serious injuries on all the organs of the body. He has,,

produced the papers and has stated that as per the history, he has received, that both have died due to injuries sustained by them in the vehicular",,

accident.,,

19.1 During his cross-examination, he has admitted that both the deadbodies were sent by the Dediapada Police Station and the injuries mentioned by",,

him can be caused by turning of tempo as well as due to other accident. He has admitted that, if any person travelling in a vehicle loses his control and",,

he fell down from moving vehicle, such injuries are possible and death may ensure. Thus, the factum of various injuries to the deceased due to",,

vehicular accident are proved.,,

20. Dr.Sandipkumar Balvantrai Vasava, PW-2, Exh.15 has categorically stated that on 17.4.2011, he and Dr.Shailesh Vasava, were serving in the",,

Community Health Center as Medical Officer in Dediapada and at that time, he received a police yadi mentioning therein that 42 persons have got",,

injuries in a vehicular accident. Accordingly, he gave treatment to 17 patients and all have given history to the effect that tempo turned turtle near bus-",,

stand and in such accident they have sustained injuries. While narrating

individual injuries to 17 persons, he has stated that all the injuries were fresh",,,
injuries and he has given treatment as outdoor patients to them and thereafter
they were referred to government hospital, Rajpipla and he has",,,
telephonically informed the police.,,

20.1 During his cross-examination he has admitted that on the said date, he has
also examined other patients, in addition to the patients as referred to",,,
herein above. He has admitted that the injuries found on the injured could be
possible even if roof falls on the head of the injured and such injuries,,
could be possible if mob tries to run away and if they fall on the land. Thus, the
factum of injury to patients and history given by them and treatment",,,
given to them are proved.,,

21. Dr.Shaileshkumar Vasava, PW-7, Exh.42, has stated that on 17.4.2011, he
and Dr.Sandip Vasava were serving as Medical Officer in the",,,
Community Health Center, and at that time, he received police yadi informing
that 42 persons have got injuries in a vehicular accident and the patients",,,
have also narrated the history to the effect that they have sustained injuries in a
vehicular accident, wherein a tempo turned turtle near bus stand of",,,
Bal Gav. He has examined 20 persons and provided them primary treatment for
the injuries sustained by them. According to his opinion, the injuries",,,
sustained by them are possible in a vehicular accident. He has also stated that
he has given them treatment as outdoor patients and, thereafter,",,
referred them to government hospital, Rajpipla.",,

21.1 In cross-examination, he has admitted the facts that on the date of
examination of aforesaid patient, he has also examined other patients and as",,,
per his opinion, such injuries could be possible if there are many number of
persons in a mob trying to run away and if somebody falls on ground, he",,,
could sustain such injuries. Thus, from the evidence of this witness, it also
appears that various injuries have been caused to the patients and he has",,,
given them treatment.,,

22. Now, considering the evidence of all the injured witnesses, which are on
record, it appears that they have categorically stated similar facts as to",,,
the tempo being driven by the accused and it was in over speed and, their
request to lower down the speed was not paid heed by the accused and the",,,
accused was driving it at excessive speed. All of them have deposed that due to
full speed, the driver lost control over the vehicle and due to that",,,

tempo turned turtle and they all have got injuries.,,

22.1 During their cross-examination, they have admitted when they were passing through Anoti Single road is a single strip road and it is having curve.",,

However, they have denied the suggestion that it was a sloppy road having curve there. They have admitted that at the time of accident, all the",,

persons have slipped on one side of the tempo and due to that, the tempo turned turtle. The evidence of the injured clearly suggests that at the time",,

accident, the tempo was in high speed and the place where the accident has occurred, is sloppy one and having curve.",,

23. It appears from Exh.96, which is an entry made in relevant register, that the persons travelling in a tempo as there was festival of Holi and near",,

the Bal Gav, there was a sloppy road and while going down, the driver has driven the tempo at high speed and because of his negligence, the tempo",,

turned turtle and in that accident, various persons have sustained injuries and two of them have died.",,

24. Panch witness of the panchnama, Jesingbhai Amarsing Vasava, PW-4, Exh.37, and Surambhai Suknabhai Vasava, PW-5, Exh.39, in their",,

deposition have not supported the version of the prosecution that the panchnama at Exh.38 was done in their presence. However, they have admitted",,

their signatures on the said panchnama, but they have not supported the basic version of the prosecution. They have been declared as hostile by the",,

prosecution and they have been cross- examined also. However, during the course of examination of police witnesses, contents of the panchnama",,

have been proved. Therefore, on perusal of Exh.38, i.e. the panchnama of place of occurrence, it is found that the tempo turned turtle near bus station",,

of Bal Gav and the road is of 16 ft. width, however, exact facts regarding the road being sloppy or curvy are not narrated.",,

25. It appears from report of FSL officer, M.N.Trivedi, Scientific Officer, FSL, who has examined the place of occurrence, has stated that he has",,

paid visit to the place on 21.3.2011. In his report, it is specifically stated that near bus stand of Bal Gav, there is sloppy road and blood stains were",,

noticed on road and as the time has elapsed, no brake marks or any other marks have been found. It appears from this note that the officer has made",,

specific observation in his report, Exh.63, that necessary process through RTO officer be carried out. However, on perusal of entire material on",,

record, it appears that no such inspection by RTO Inspector has been carried out to find out as to whether there was any mechanical defect in the",,,
tempo or not.,,

26. It is pertinent to note that version of all the individuals, who are injured is to the effect that at the relevant time, tempo was in high speed. It is also",,,
found from the evidence of the injured that the road was sloppy one and there was curve. It also came on record that almost 70 to 80 persons were,,
travelling in tempo. Further no mark of application of brake is found on road. It also came on record that at the relevant point of time, all persons were",,,
in tempo have slipped to one side of the tempo. It is possible that due to such event the tempo might have turned turtle. It has also come in evidence of,,
the persons travelling in the tempo that they had shouted and instructed the driver to drive the tempo in proper manner as he was driving it in rash,,
manner. However, when a vehicle is in moving condition at a certain speed, the driver may not be able to listen to the shouts of the passengers and,",,
therefore, evidence of these witnesses cannot be believed as a proof against the accused.",,

27. On appreciating the oral evidence of the injured witnesses, it is clearly found that every witness has emphasized on the fact that tempo was being",,,
driven at a high speed and due to that driver has lost control over tempo near the place of occurrence. At this juncture, it is worthwhile to refer to the",,,
decision of Honourable Apex Court in the case of Mrs. Shakila Khader And Ors. vs Nausheer Cama And Ors. Reported in AIR 1975 SC 1324,",,
(1975) 4 SCC 122, wherein it was observed that main criteria for deciding whether driving which relate to accident was rash and negligent is not only",,,
the speed but the width of the road, density of the traffic etc. Further in the case of State of Karnataka v. Satish (supra), the Honourable Supreme",,,
Court has held that merely because truck was being driven at a "high speed" does not bespeak of either "negligence" or "rashness" by,,
itself. "High Speed" is a relative term and criminality is not to be presumed subject of course to some statutory exceptions. In absence of any,,
material on record, no presumption of "rashness" or "negligence" could be drawn by invoking the maxim "res ipsa loquitur".,,
28. In view of above two decisions and on perusal of aforesaid observations of the Honourable Supreme Court, if we peruse the material on record, it",,,

is found that the ingredients of "negligence" "rashness" are not proved by the prosecution in this case. It appears from the impugned,,
judgment that learned trial Court has relied on the maxim of "ipse locutus" on the basis of the evidence produced by the prosecution but,,
when the necessary ingredients regarding rashness or negligence is not brought on record, mere fact of high speed is not sufficient to connect the,,
accused with alleged crime. Learned trial Court has not appreciated these facts and legal point and thereby has committed error of facts and law in,,
convicting the accused and sentencing him for various offences. Impugned judgment is not sustainable in the eyes of law, especially in view of,,
pronouncement of aforesaid two decisions of the Honourable Supreme Court. Therefore, the impugned judgment is required to be set aside.",,
29. Accordingly, present appeal is allowed. The impugned judgment and order of conviction and sentence passed by learned Sessions Judge, Narmada",,
at Rajpipla in Sessions Case No. 27 of 2011 dated 05.10.2011 for the offence under Sections 304, 304(A), 279, 337, 338 of the Indian Penal Code and",,
Sections 177 and 184 of the Motor Vehicles Act is hereby quashed and set aside. The accused is acquitted from the charges leveled against him. Fine",,
if any, paid to be refunded to the accused. Bail bond stands cancelled. Record and proceedings be sent back to the concerned Trial Court forthwith.",,