
(2011) 03 MAD CK 0139

In the Madras High Court

Case No : Criminal R.C. No. 242 of 2009 and M.P. No. 2 of 2009

Kumaresan

APPELLANT

Vs

State by the Inspector of Police

RESPONDENT

Date of Decision : 17-03-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 294
Penal Code, 1860 (IPC) — Section 279, 304A, 338

Citation : (2011) 03 MAD CK 0139

Hon'ble Judges : R. Mala, J

Bench : Single Bench

Advocate : N. Manokaran, for the Appellant; S. Rajakumar, Government Advocate (Crl. Side), for the Respondent

Final Decision : Dismissed

Judgement

R. Mala, J.—The Crl.R.C. has been filed against the judgment dated 28.1.2009 in Crl. A. No. 235 of 2008 on the file of the First

Additional Sessions Court, Erode, confirming the conviction and sentenced passed by the District Munsif-cum-Judicial Magistrate, Perundurai, in

C.C. No. 282 of 2003, dated 5.8.2008, whereby the revision Petitioner/accused was convicted for the offence u/s 304A IPC (2 counts) and

sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs. 5,000/-, in default, to undergo rigorous imprisonment for three

months each and no separate sentence was passed for the offence u/s 279 IPC.

2. The case of the prosecution in nut-shell is as follows:

On 21.6.2003 at 18.30 hours, near Sengappalli IOC Petrol Bunk, the deceased Kumaresan and Saravanan were proceeding in a motor cycle

from East to West and in the opposite direction, the revision Petitioner/accused

drove a van bearing Registration No. TN-67-Z-0432 with a rash and negligent manner and went on the wrong side and dashed against the said motor cycle. Saravanan died on the spot and Kumaresan was taken by P.W.2 to hospital and on the way to hospital, he succumbed to death. The complaint has been given by P.W.1. On that basis, the investigating officer P.W.6 (Sub-Inspector of Police) registered a case in Crime No. 150 of 2003 for the offences under Sections 279 and 304A IPC and prepared the printed FIR Ex.P-5 and the vehicle has been inspected by the Motor Vehicle Inspector P.W.4 and the report given by P.W.4 is Ex.P-4. P.W.7 conducted inquest and Exs.P-7 and P-8 are the inquest reports. The Doctor conducted post-mortem and issued post-mortem certificates in Exs.P-9 and P-10. The investigating officer inspected the place of occurrence and prepared Observation Mahazar Ex.P-2 and seized the material objects and concluded the investigation and filed charge sheet against the Petitioner for the offences under Sections 279 and 304A (2 counts) IPC.

3. The trial Court, after following procedures, framed charges against the revision Petitioner/accused since the revision Petitioner/accused pleaded not guilty and after examining P. Ws.1 to 7 and marking Exs.P-1 to P-10, found the revision Petitioner/accused guilty of the offences u/s 279 and 304A (2 counts) IPC, convicted the revision Petitioner/accused for the offence u/s 304A IPC (2 counts) and sentenced him to undergo one year rigorous imprisonment and to pay a fine of Rs. 5,000/-, for each counts, in default, to undergo three months" rigorous imprisonment and the trial Court has not awarded any separate sentence for the offence u/s 279 IPC. Challenging the same, the revision Petitioner/accused preferred appeal before the appellate Court in CrI. A. No. 235 of 2008 and the learned appellate Judge, after considering the arguments of both counsel, confirmed the conviction and sentence passed by the trial Court, against which, the present CrI.R.C. is filed by the revision Petitioner/accused.

4. Learned Counsel appearing for the revision Petitioner/accused put forth his arguments as follows:

(i) The Doctor who conducted the post-mortem was not examined and Exs.P-9 and P-10 post-mortem certificates have been marked through the investigating officer P.W.7 and while marking those documents, they have not

followed the procedures contemplated u/s 294 Code of Criminal

Procedure and hence, the documents Exs.P-9 and P-10 are inadmissible in evidence and so, the cause of death has not been proved and

therefore, the revision Petitioner/accused is entitled for acquittal. To substantiate his contentions, learned Counsel relied on the decisions of the

Supreme Court and this Court.

(ii) There is discrepancy in the evidence of P. Ws.1 and 2.

(iii) Even if the Court comes to the conclusion that the Petitioner/accused is guilty of the offence u/s 304A IPC, he is entitled for leniency in the

sentence.

5. Learned Government Advocate (Crl. Side) appearing for the Respondent-Police submitted that it is true that the procedures contemplated u/s

294 Code of Criminal Procedure have not been followed, but the death is instantaneous and on the spot itself, Saravanan died and on the way to

hospital, Kumaresan died and so, the cause of death has been proved, and so, the decisions relied on by the learned Counsel for the

Petitioner/accused are not applicable to the facts and circumstances of the present case. Learned Government Advocate further submitted that

there is no material contradiction in the evidence of P. Ws.1 and 2 and in the motor accident cases, the minor contradictions will not in any way

affect the findings of the trial Court. Learned Government Advocate further submitted that as per the decision of the Apex Court, in Section 304A,

IPC cases, no leniency could be shown to the motor cycle drivers while they were discharging their duty and causing much road accidents. He

prayed for dismissal of the Crl.R.C.

6. Considering the rival submissions made by learned Counsel on both sides, it is seen that the occurrence has taken place on 21.6.2003 and the

deceased Saravanan and Kumaresan were proceeding from East to West and the revision Petitioner/accused was proceeding in the opposite

direction and went on the wrong side and dashed against the motor cycle, gone 105 feet and over-turned. The rough sketch which has been

marked as Ex.P-6, shows that the occurrence has taken place in the manner stated above, and the vehicle has gone to the extent of 105 feet and it

was over-turned, which shows that the driver of the van has driven the vehicle in a rash and negligent manner and caused the accident, and so, I

am of the view that the Doctrine of ""res ipsa loquitur"" applies to this case and the minor contradiction between the evidence of P. Ws.1 and 2 will

not in any way assail the guilt of the accused u/s 304A IPC.

7. Now, this Court has to decide as to whether the cause of death of the deceased, had been proved by the prosecution.

8. It is true that the Doctor who conducted the post-mortem, was not examined before Court. But the post-mortem certificates have been marked

through P.W.7 investigating officer. But it is also true that the provisions of Section 294 Code of Criminal Procedure have not been followed. It is

pertinent to note that the Government has issued a circular as to how the prosecution has to invoke Section 294 Code of Criminal Procedure But

admittedly, the procedures have not been followed. But however, the documents have been marked.

9. It is now appropriate for this Court to consider the following decisions relied on by the learned Counsel for the revision Petitioner/accused:

(a) 2001 (2) LW (Cri) 773 (Madras High Court) (Arumugam v. State by Sub-Inspector of Police, etc.):

Held: When the above document was marked without examining the author of the document, it was objected by the Petitioner and therefore, it

must be said that the documents were marked without the consent of the Petitioner. Secondly even if a document has been marked u/s 294 Code

of Criminal Procedure it must be in accordance with the procedure contemplated under the said Section, viz., that the list of documents shall be in

such form as may be prescribed by the State Government. The prosecution did not mark the list of documents in the said form prescribed by the

State Government. It is to be remembered at this stage that the Government of Tamil Nadu passed a Government Order in G.O. Ms. No. 258

(Courts-V), dated 8.2.1983, prescribing the proforma stating that the documents can be marked only in the form mentioned in the Government

Order. This is an admitted case where the prosecution did not mark those documents in the said form and also there was objection on the side of

the accused for marking those documents.

In this case, as the prosecution did not prove the contents of Ex.P-6 and Ex.P-7 and therefore, they did not prove the case of death. I am of the

view that the accused is entitled for an acquittal.

(b) 2001 (2) LW (Cri) 615 (Madras High Court) (Jerald v. State by Inspector of Police etc.):

3. The learned Counsel appearing for the Petitioner submits that the Petitioner is entitled for acquittal since the prosecution has miserably failed to

prove the cause of death. Ex.P-6 the post mortem certificate, was produced before the Court by the Investigating Officer and the Doctor, who

conducted autopsy had not been examined and the prosecution has not given any reason for non-examination of the doctor. According to him, the

non-examination of the Doctor is fatal for the prosecution and the contents of the documents are inadmissible as they were not spoken to by the

person who prepared it. I see every force in the contention of the learned Counsel. The doctor, who issued the certificate, though according to the

prosecution conducted autopsy, was not examined and no explanation was offered by the prosecution before the Court, as to why he was not

examined. This Court cannot presume the cause of death as it cannot rely upon Ex.P-6, as the said document was not proved in terms of the

provisions of Evidence Act. As the cause of death is not proved, in my view, the Petitioner is, entitled for acquittal and he, is accordingly acquitted.

The revision is allowed.

10. Relying on the above decisions, learned Counsel appearing for the revision Petitioner/accused argued that since the Doctor was not examined

in this case, the cause of death has not been proved.

11. In the decision relied on by the learned Counsel for the Petitioner/accused, reported in 2009 (3) MLJ 700 (K.K. Mani v. State), this Court

altered the offence from Section 304A IPC to Section 338 IPC, and the injured in that case was admitted in hospital and in course of treatment, he

died, but the Doctor was not examined to prove the cause of death, and in such a situation, this Court held that the cause of death was not proved

by the prosecution and since the deceased sustained grievous injury, which lead to the death, the offence was altered to one u/s 338 IPC. In that

case, this Court observed in paragraph 31 that, "It is a trite proposition of law that to prove the offence u/s 304A of IPC, there should be direct

evidence that the injury sustained by the injured at the time of accident resulted in his death. In case of instantaneous death at the spot itself, this

issue would not arise at all.

12. In the present case, the deceased Saravanan died on the spot itself and another deceased Kumaresan died on the way to hospital and so, it is

clear that the cause of death has been proved by the prosecution. Hence, I am of the view that both the Courts below have rightly found the

Petitioner/accused guilty of the offence u/s 304A IPC (2 counts). It does not warrant any interference, So, I am of the view that the prosecution

has proved that the accused is guilty of the offences under Sections 279 and 304A IPC (2 counts), beyond reasonable doubt.

13. Now, this Court has to consider the argument advanced by learned Counsel for the Petitioner/accused that the Petitioner shall be given

leniency in the sentence. At this juncture, he relied on the following decisions:

(a) Sukhdev Singh Vs. State of Punjab, :

Penal Code, 1860 - Section 304A - Accidental death of a family man - Accused being responsible for the accident convicted and already in jail

for four and a half months - In the circumstances of the case the sentence of imprisonment reduced to that already undergone and instead fine of

Rs. 2,000/- enhanced to Rs. 10,000/- to be paid to the family members of the deceased.

(b) 2011 (1) MLJ 500 (Madras High Court) (V. Kumar v. State):

Contributory negligence can be considered as a mitigating circumstance at the time of awarding sentence to an offender convicted u/s 304A of the

Indian Penal Code.

These two citations are not applicable to the facts of the present case.

14. Learned Government Advocate relied on the decision of the Supreme Court reported in 2008 (14) SCC 795 (Kuldeep Singh v. State of

H.P.) and submitted that no lenience be shown to the Petitioner/accused, and in the said decision, it was held by the Apex Court as follows:

11. Coming to the question of sentence, in Dalbir Singh Vs. State of Haryana, it has been stated as follows: (SCC p.87, para 13):

13. ...While considering the quantum of sentence to be imposed for the offence of causing death by rash and negligent driving of automobiles, one

of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost throughout his working

hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the pedal of a

vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving need not necessarily cause any accident; or even if any

accident occurs it need not necessarily result in the death of any human being; or even if such death ensues he might not be convicted of the

offence; and lastly, that even if he is convicted he would be dealt with leniently by the court. He must always keep in his mind the fear psyche that if

he is convicted of the offence for causing death of a human being due to his callous driving of the vehicle he cannot escape from a jail sentence.

This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving

of automobiles.

15. Considering the rival submissions, since the occurrence has taken place at 6.30 p.m., it is solely on the rash and negligent driving of the

Petitioner/accused, and two lives have been taken away and furthermore, he was in imprisonment only for 24 days.

16. Learned Counsel appearing for the Petitioner/accused submitted that the Petitioner is aged about 40 years and he is having wife and one son

and one daughter and since he is the sole breadwinner of the family and a driver by profession, if he is put in jail for a year, his family would be put

into peril and the learned Counsel for the Petitioner therefore wanted leniency in the sentence.

17. Considering the said argument, the sentence of imprisonment is reduced to six months (2 counts) from one year and the fine amount of Rs.

5,000/- each (for two counts), is enhanced to Rs. 10,000/- (for two counts), and the revision Petitioner/accused shall pay a further sum of Rs.

10,000/-, in default, to undergo three months" simple imprisonment (for 2 counts). Thus, out of the total fine amount of Rs. 20,000/-, Rs. 5,000/-

each shall be paid to the families of the deceased, Saravanan and Kumaresan.

18. In the result:

(a) The Criminal Revision Case is partly allowed.

(b) The conviction of the revision Petitioner/accused for the offences under Sections 279 and 304A (2 counts) IPC, is confirmed.

(c) The sentence of imprisonment for the offence u/s 304A (2 counts) is reduced from one year to six months (2 counts) and the same shall run

concurrently.

(d) No separate sentence is imposed for the offence u/s 279 IPC.

(e) The fine amount of Rs. 5,000/- (2 counts) is enhanced to Rs. 10,000 (2 counts), in default, the revision Petitioner/accused shall undergo three months' 11 simple imprisonment (2 counts).

(f) The trial Court is directed to pay compensation of Rs. 5,000/- to each of the families of the deceased Saravanan and Kumaresan, out of the enhanced fine amount.

(g) Since the revision Petitioner/accused is on bail, the trial Court is directed to take steps to secure his custody to undergo the remaining period of sentence.

(h) The Miscellaneous Petition is closed.