
(2011) 03 GAU CK 0092

In the Gauhati High Court

Case No : Criminal Revision Petition No. 10 of 2004

Shri Anjala Debbarma

APPELLANT

Vs

The State of Tripura

RESPONDENT

Date of Decision : 17-03-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 251, 313
Penal Code, 1860 (IPC) — Section 279, 304A

Citation : (2011) 4 GLR 204

Hon'ble Judges : U.B. Saha, J

Bench : Single Bench

Advocate : D.C. Roy, for the Appellant; A. Ghosh, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

U.B. Saha, J.—The judgment and order dated 4.2.2004 passed by the learned Sessions Judge, West Tripura, Agartala in Criminal Appeal No. 26 (3) of 2003 upholding the judgment and order of the learned Judicial Magistrate Ist Class, Agartala, West Tripura dated 20.6.2003 passed in Case No. GR 889 of 2001 whereby the Petitioner has been convicted under Sections 279 and 304A of the Indian Penal Code (for short "the Code") and sentenced to suffer S.I. for one month and R.I. for six months respectively with direction that both the sentences shall run concurrently, is under challenge in this revision petition.

2. Heard Mr. DC Roy, learned Counsel for the Petitioner and Mr. A. Ghosh, learned Addl. Public Prosecutor appearing for the State Respondent.

3. The prosecution case, in brief, is that on 25.10.2001 at about 5.30 a.m. when the Petitioner was driving TR-01-A-3083 (Jeep) rashly and negligently with 10/12 passengers towards Rangmala met with an accident at Kanak Choumuhani, as a result of which one of the passengers namely, Suvarani Debbarma sustained serious injuries. She was taken to Bishramganj Hospital and from there to G.B. Hospital where she died. Stating the aforesaid facts one Sukesh Debbarma

lodged an FIR with the Officer-in-Charge of Bisramganj Outpost. Upon receipt of the said FIR police registered a case being Bishalgarh P.S. Case No. 106/2001 under Sections 279 and 304A of the Code. The Petitioner surrendered before the I/O. of the case on 02.11.2001. Upon investigation, the I/O. of the case Shri Kiran Kumar Tripura (P.W.9) submitted charge sheet under the aforesaid sections. The accused-Petitioner was examined u/s 251 of the Code of Criminal Procedure to which he pleaded not guilty and claimed to be tried.

4. In support of its case, prosecution examined as many as nine witnesses. Defense adduced none as its case was of total denial. On completion of examination of witnesses, the accused Petitioner was examined by the learned Magistrate u/s 313 Code of Criminal Procedure where he stated that he did not drive the vehicle at the time of accident and one Mangal Debbarma was the driver of the said vehicle. He also did not admit that he surrendered before the I/O.

5. The points arose for decision before the learned trial court were whether the accused-Petitioner was the driver of the Commander Jeep, which caused the accident and consequent to his negligent driving the said Sova Rani Debbarma died. Upon hearing the learned Counsel for the parties, considering mainly the evidence of P.W.2 and P.W.9, taking note of Exbt.6 and the evidence of the passengers who were in the vehicle at the relevant time, i.e. P.W.s. 3, 4, 5 and 6, the learned trial court convicted the accused-Petitioner and sentenced him as stated supra.

6. Being aggrieved and dissatisfied with the aforesaid judgment and order of the learned Judicial Magistrate Ist Class dated 20.6.2003, the accused-Petitioner preferred an appeal before the learned Sessions Judge, West Tripura, Agartala which was registered as Criminal Appeal No. 26(3) of 2003 wherein the learned Counsel for the accused-Petitioner agitated, inter alia, that the prosecution could not prove beyond reasonable shadow of doubt that on the relevant date and time the Appellant was driving the offending jeep and the learned trial court convicted the Appellant on the basis of the evidence of P.W.2, Shri Bhagaban Debbarma, owner of the jeep as well as the father of the Appellant without considering his evidence in cross. The learned appellate court upon hearing the appeal dismissed the same and affirmed the judgment and order of the learned Judicial Magistrate Ist Class and directed the accused-Petitioner to surrender before the learned Judicial Magistrate Ist Class on 01.3.2004 to suffer the sentence.

7. Being not satisfied with the judgment dated 4.2.2004 passed by the learned appellate court affirming the conviction and sentence passed by the learned Judicial Magistrate Ist Class, the accused-Petitioner preferred this revision petition.

8. Mr. Roy, learned Counsel appearing for the Petitioner submitted that mere identification of a driver of a vehicle does not ipso facto prove the offence u/s 279 of the Code. He further submitted that if a person dies or somebody gets

injury in course of moving by a vehicle it in no way makes the driver of the said vehicle liable unless the prosecution establishes by way of evidence that the driver was negligent while driving the offending vehicle and also the vehicle was driven rashly and due to such rash and negligent driving some persons were injured or died. In the instant case, the prosecution mainly relied upon the evidence of P.W.2, Shri Bhagaban Debbarma who is the owner of the vehicle and also the father of the accused-Petitioner and is not the eye witness of the alleged accident which caused the death of said Sova Rani Debbarma. He submits that P.W.2 nowhere in his statement stated that the Petitioner was driving the vehicle on the relevant date and time, rather he stated that after the accident Daragababu seized the vehicle as well as the relevant documents of the vehicle including driving license of the driver namely, Anjala Debbarma and Anjala Debbarma is his son and he stood as a bailor for the accused-Petitioner. In his cross, this witness stated that at the time of accident, the driver of his vehicle was Mangal Debbarma, son of Bisu Roy Debbarma of Sombaria Bazar and after the accident Mangal Debbarma absconded. This witness also stated such fact to Daragababu and Daragababu told him that if the vehicle is released then he must produce one driver having driving license and that is why he produced the driving license of his son. Referring to the evidence of P.W.3, Dayalhari Debbarma, P.W.4, Susil Debbarma, P.W.5, Swapna Debbarma and P.W.6, Sukesh Debbarma, learned Counsel submitted that though these witnesses in their statement stated that the accident occurred due to fault of the driver and victim Sova Rani Debbarma died due to that accident, but none of them identified the accused-Petitioner as the driver of the said vehicle, which caused the accident. Mr. Roy contended that P.W.6 even stated in his evidence that he did not write the ejahar though in the ejahar his signature is there, which is marked as Exbt.P.2 and in his cross, this witness stated that he was called by the police at Police Station and was told to put his signature on a white paper and he did not lodge any ejahar. Therefore, according to Mr. Roy, the evidence of P. Ws.3 to 6 have no value and the same cannot be utilized against the accused-Petitioner. Mr. Roy again contended that P.W.2, father of the accused Petitioner as owner of the vehicle specifically stated in his cross that at the relevant date and time the driver of his vehicle was one Mangal Debbarma and not the accused Petitioner, which itself creates a doubt regarding the involvement of the accused Petitioner with the alleged accident in absence of any other evidence from any eye witness. Had the accused-Petitioner driven the vehicle on the date of accident, then the passengers of the said vehicle, P. Ws. 3 to 6 could have easily identified him and non-identification of the accused-Petitioner by those witnesses also re-affirms the doubt created by P.W.2. His another contention was that unless the prosecution proves the rash and negligent driving of the said vehicle by the accused-Petitioner, mere death of victim Sova Rani Debbarma cannot be a ground for convicting the accused-Petitioner u/s 304A of the Code as to constitute an offence u/s 304A of the Code, the prosecution has to establish that the act of the accused was responsible for resulting in death and such act of the accused was rash or negligent although it does not amount to culpable homicide and in a case

of vehicular accident if it is found that the driver could not avoid the accident, he cannot be held liable u/s 304A of the Code. Here in this case, the prosecution failed to prove who was the driver of the vehicle at the relevant time, which caused the death of victim Sovarani and consequent thereto it can also be easily said that the prosecution failed to prove who caused the death of victim Sovarani by way of driving the vehicle rashly and negligently. He further contended that the prosecution while tried to prove its case even did not ascertain rashness in driving on the public road by the driver of the vehicle and what was the condition of the road, whether the road was fully traffic at the time of alleged accident or number of persons were frequently moving about on the road and expected to be on the road and the accused-Petitioner was in a position to drive the offending vehicle rashly and negligently. Learned Counsel tried to create doubt in the mind of this Court contending that on both sides of the road where the alleged accident took place the workers were working in the proposed rubber garden, but none of those workers was examined by the prosecution. To show the proposed rubber garden, he placed reliance on Exbt.5, sketch map and Exbt.5/1, the index of the said sketch map where the place of occurrence is marked as B and the proposed rubber gardens are shown as C and D. While closing his submission, Mr. Roy would contend that the accused Petitioner is now on bail as this Court on 26.2.2004 suspended the sentence by way of staying the operation of the judgment dated 20/6/2003 passed in GR Case No. 889/2001 and the judgment dated 4.2.2004 passed in Criminal Appeal No. 26(3) of 2003 and it would be proper for this Court to set aside those judgments and order of conviction and sentence and acquit the Petitioner from the charges leveled against him.

9. Mr. Ghosh while urging for affirming the judgment of the learned appellate court wherein the learned appellate court upheld the judgment of the learned trial court would contend that the surrender of the accused-Petitioner before the I/O. of the case itself proves that it is he who drove the vehicle at the time of alleged accident and due to his rash and negligent driving an innocent citizen like Sova Rani Debbarma died and as such the learned trial court very rightly convicted and sentenced the accused-Petitioner which has also been rightly upheld by the learned appellate court. He submitted that the accused Petitioner while was examined u/s 313 of the code of Criminal Procedure submitted that he did not surrender before the I/O. of the case which is nothing but afterthought and that was done by the accused-Petitioner only to escape him from the charges leveled against him.

10. Having heard the learned Counsel for the parties and after going through the evidence as well as the impugned judgments passed by the learned trial court as well as the appellate court, this Court is of the considered opinion that it would be proper to reproduce the evidence of P. Ws. 2, 6 and 9. It is not necessary for this Court to reproduce the evidence of P.W.1, Dr. Mridul Das who only stated that on 25.10.2001 while he was posted as medical officer at IGM Hospital, he conducted the post mortem examination over the dead body of deceased Sova Rani Debbarma and P. Ws. 3, 4 and 5 as none of them implicated the accused-

Petitioner with the alleged offence. Accordingly, the evidence of P. Ws. 2, 6 and 9 are reproduced herein under:

P.W.2.

I am the owner of the commander jeep having registration No. TR-01-A-3083. About one year three months back my vehicle met with an accident at Rangmala. I also heard one Shova Rani Debbarma died due to that accident. After the accident darogababu seized the vehicle as well as the relevant documents of the vehicle including driving license of the driver namely Anjala Debbarma. Anjala is my son. Accused is identified in the dock. Police arrested Anjala Debbarma in c/w this case and he was released on bail from the court. I stood as a bailor for him.

Cross by defense:

At the time of accident driver of my vehicle was Mangal Debbarma, son of Bisu Roy Debbarma of Sombaria Bazar, P.S. Takarjala. After the accident Mangal Debbarma absconded. I stated to darogababu about Mangal Debbarma. When I went to P./S. darogababu told me that if the vehicle is released then I must produce one driver having driving license.

That is why I produced the driving license of my son.

P.W.6.

About one year six months back in one morning we 10/12 persons were performing journey by a commander jeep towards Rangmala. On the way the vehicle met with an accident at Kanak Choumuhani and due to that Suvarani Debbarma sustained injury and subsequently died. Accident was occurred due to the fault of the driver. I am not able to identify the driver. I did not write the ejahar but the signature in the ejahar is mine. It is marked as Ext. P.2.

Cross by defense:

I was called by police at P.S. and I was told to put a signature on a white paper. I did not lodge any ejahar.

P.W.9

I know the hand writing of ASI Sashadhar Das as a colleague. On 26-10-2001 I was posted as SI of police at Bishramgung outpost. On that date Sashadhar Das was also posted as ASI of police. This is the receipt entry on ejahar made by Sukesh Debbarma and the entry was made by Sashadhar Das. The receipt entry on ejahar is marked as Ext.P.4. After receiving the ejahar Sashadhar Das forwarded the ejahar to Bishalgarh P.S. for registering it. On 27-10-2001 I got information that the ejahar was registered as Bishalgarh P.S. Case No. 106 dated 26-10-2001 u/s 279/304A of IPC. And the case was endorsed to me for investigation by the O.C. of Bishalgarh P.S. on 27-10-2001 I took over the charge of investigation. On that date I visited P.O. with separate index. Hand sketch map and index is marked as Ext.P.5 and P.5/1 respectively. Thereafter I examined the

available witnesses at the place of occurrence and recoded their statements. On that day the owner of the vehicle produced it and I seized the vehicle (commander jeep) bearing No. TR-01-A-3083 along with relevant documents including driving license of Anjula Debbarma by a seizure list. On identification seizure list is marked as Ext.P.6. and signature is marked as Ext.P.6/1. I made a requisition for examination of the vehicle by M.V. Inspector. On 28-10-2001 the vehicle was examined by the M.V. Inspector and I got the accident report. On 2-11-2001 I arrested accused driver namely Anjula Debbarma as he surrendered before the P.S. I have forwarded the accused to the court. On 3-11-2001 the vehicle and documents were released on as per order of court on bail. On 15-1-2002 I received the post mortem report in respect of deceased Suvarani Debbarma. Thereafter on conclusion of the investigation and having found a prima facie case I submitted charge sheet No. 35/2002 dated 29-4-2002 u/s 279/304A of IPC against Anjula Debbarma son of Sri Bhagaban Debbarma of Padmanagar, P.S. Bishalgarh to face the trial. Accused is identified in the dock.

Cross by defense:

Ejहार was written by the complainant himself. The delay of lodging of ejहार was not mentioned in the ejहार. I cannot say who drove the vehicle to bring it at P.S. In C.D. I did not keep note when I meet with the complainant during the course of investigation. This not a fact that my investigation was perfunctory. The place of occurrence is not the junction of four road. There were no houses and shops around the place of occurrence.

11. It appears from the evidence of P.W.2 that this witness nowhere in his statement stated that his son, the accused Petitioner was the driver of the offending vehicle at the relevant time of accident, rather he specifically stated in his cross that one Mangal Debbarma, son of Bisu Roy Debbarma of Sombaria Bazar was the driver. This Court is of the considered opinion that to constitute an offence u/s 279 of the Code, the prosecution has to establish that the accused was driving the offending vehicle at the relevant time of accident on a public road and that such driving was also rash and negligent and to constitute an offence u/s 304A of the Code the prosecution has to establish that the act of the accused was responsible for resulting in death and the act of the accused was rash and negligent although it does not amount to culpable homicide.

12. In Raghunath Behera Vs. State of Orissa, a learned Single Judge of the Orissa High Court taking note of the decision of the Apex Court in Kurban Hussein Mohammedali Rangwalla Vs. State of Maharashtra, in para 5 stated, inter alia, as follows:

To constitute either of the offences u/s 279 or Section 304A of the Code, proof of rashness or negligence is essential. The only distinguishing feature is that in Section 279, the rash and negligent act made punishable relates to the manner of driving or riding on a public way while the offence u/s 304A extends to any rash or negligent act falling short of culpable homicide. In the aforesaid

judgment it is also stated that "Negligence" means breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate conduct of human affairs would do or the doing of something which a prudent and reasonable man would not do. The question for consideration is whether the facts found against the Petitioner amount to criminal negligence which would constitute an offence under either of these sections. There is no evidence or suggestion that the Petitioner was driving the tractor in question in a rash manner or in a negligent manner which resulted in the accident. All that prosecution has sought to establish and the Courts below have found is, as stated above, that the hitch assembly joint was weak on account of its having been welded earlier; that Petitioner should not have negotiated the ghat gradient with a loaded trailer attached to it; that he should not have allowed the deceased persons to sit on the trailer which was intended to carry goods and not passengers; that when the engine stopped, he should have shouted out a warning and that he failed to apply the brakes which if he had done would not have caused the tractor and attached trailer to roll back. In the decision reported in *Kurban Hussein Mohammedali Rangwalla Vs. State of Maharashtra*, the interpretation of Section 304A, Penal Code came up for consideration. The observations of Sir Lawrence Jenkins in 4 BLR 679 to the effect:

To impose original liability u/s 304A, Penal Code, it is necessary that the death should have been the direct result of a rash or 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 *causa causans*; it is not enough that it may have been the *causa sine qua non*

were quoted with approval and it was held that in order that person may be guilty u/s 304A, the rash or negligent act should be direct or proximate cause of the death.

13. In *Baijnath Singh Vs. The State of Bihar*, the Apex Court in para 5 noted, *inter alia*, as follows:

It is significant that there was no trace of the corrugated iron sheets and the Investigating Officer made no mention of any attempt on his part to find them or discover them nor did not prosecution care to find out who the owner of the bus was and who had loaded the iron sheets. This part of the evidence was very material because unless the driver could be held to be entirely responsible for loading the iron sheets and putting them in a negligent manner or not tying them properly it is difficult to sustain his conviction u/s 304A of the Indian Penal Code. Nor could he be convicted for rash driving u/s 279, Indian Penal Code, because there is hardly any evidence worth the name from which it could be inferred that the speed of the bus was such that any iron sheets even if it be assumed that they were loaded on the roof of the bus fell down because of driving at a high speed.

The Apex Court further noted -

Even if we assume that the case of the prosecution is correct that there were some corrugated iron sheets on the roof of the bus we are unable, on the evidence produced in the present case to find that the iron sheets were so loaded that a high degree of negligence could be attributed to the Appellant and that it was his rash and negligent act which could be regarded as the efficient cause of the injuries to Latif.

14. In the instant case also there is a lacuna on the part of the prosecution so far establishment of the fact, inter alia, that the accused-Petitioner was the driver of the offending vehicle at the relevant time of accident consequent where to victim Sova Rani Debbarma died and the learned trial court also failed to consider the aspect that when P.W.2 in his cross stated that one Mangal Debbarma was the driver of the offending vehicle at the time of alleged accident, which is also echoed in similar way by the accused-Petitioner in his 313 statement. Therefore, it can be said that the evidence of P.W.2 and the accused-Petitioner are on the same line and create a doubt in the mind of this Court to come to a conclusion who was the actual driver driving the offending vehicle which caused the accident and consequent thereto the death of Sova Rani Debbarma occurred. This Court is of the further opinion that if a person dies or gets grievous injury while travelling by a vehicle does not ip so facto make the driver of that vehicle responsible for such death or injury u/s 279 of the Code unless the prosecution proves that it is the accused who was the driver of that vehicle and drove the vehicle rashly and negligently at the time of alleged accident and unless rashness and negligence on the part of the driver is proved, offence u/s 304A of the Code cannot also be made out as according to the Apex Court to constitute an offence u/s 304A of the Code, rash and negligent act should be the proximate cause of death.

15. In view of what have been discussed and observed above, this Court is of the considered opinion that this revision petition has merit. Accordingly, the same is allowed. The conviction and sentence as ordered by the learned trial court vide its judgment and order dated 20.6.2003 passed in Case No. GR 889 of 2001 and upheld by the learned appellate court vide its judgment and order dated 4.2.2004 passed in Criminal Appeal No. 26 (3) of 2003 are hereby set aside and the Petitioner being on bail, his bail bond stands discharged.

Send down the L.C. records.