
(2011) 06 GAU CK 0044
In the Gauhati High Court
Case No : Criminal Revision No. 616 of 2003

Shri Bijayanta Paul

APPELLANT

Vs

The State of Assam

RESPONDENT

Date of Decision : 10-06-2011

Acts Referred:

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

Citation : (2011) 06 GAU CK 0044

Hon'ble Judges : A.K. Goswami, J

Bench : Single Bench

Advocate : B.M. Choudhury, for the Appellant; B.B. Gogoi, Addl. P.P., for the Respondent

Final Decision : Allowed

Judgement

A.K. Goswami, J.—This Criminal Revision Petition is directed against the judgment and order dated 14.2.2003 passed by the learned Ad-hoc Additional Sessions Judge, Karimganj in Criminal Appeal No. 26(4) of 2001 dismissing the appeal and upholding the conviction and sentence of the accused Petitioner under Sections 304-A/279 IPC and sentencing him to suffer rigorous imprisonment for six (6) months and to pay fine of Rs. 1,000/- u/s 304-A IPC and to pay fine of Rs. 1,000/-, in default, to suffer simple imprisonment for 30 days u/s 279 IPC.

2. The prosecution case, in brief, is that on 16.1.1996 at about 8.55 P.M., one Auto-Rickshaw with Registration No. AS-10-1633, which was driven by the accused Petitioner in a rash and negligent manner, knocked down one Md. Mubarak Ali, who was aged about 70 years, on the National Highway-44, causing grievous injuries to him. Md. Mubarak Ali was taken to the Civil Hospital, Karimganj, where he succumbed to his injuries. With the aforesaid allegation, an FIR was lodged by one Ashis Kumar Dey, Sub-Inspector of Police under Badarpur Police Station and accordingly, Badarpur Police Station Case No. 10/96 u/s

279/304-A IPC was registered.

3. On completion of investigation, and finding materials, police submitted charge sheet against the Petitioner u/s 279/304-A IPC. Charge under Sections 279/304-A IPC having been explained to the accused Petitioner, he pleaded not guilty and claimed to be tried.

4. During the trial, the prosecution examined five (5) witnesses while defence adduced no evidence. It appears that the defence plea was of denial. In his examination u/s 313 Code of Criminal Procedure also, the accused Petitioner had stated that he had not driven the vehicle at a high speed and that the accident had resulted due to carelessness of the deceased. The learned trial Court as well as learned appellate Court concurrently found that the accused Petitioner had driven the Auto-Rickshaw in a rash and negligent manner resulting in causing of death of Md. Mubarak Ali.

5. I have heard Mr. B.M. Choudhury, learned Counsel appearing for the Petitioner and Mr. B.B. Gogoi, learned Addl. Public Prosecutor, Assam.

6. Mr. Choudhury has criticized the judgments of the learned Courts below on the ground that in spite of the fact that the prosecution had failed to prove the guilt of the accused beyond reasonable doubt, the accused was convicted and sentenced as aforesaid. He has also submitted that the non-examination of the Investigating Officer to prove the case of the prosecution has severely prejudiced the Petitioner inasmuch as the contradiction of the prosecution witnesses could not be proved. In absence of sketch map, the location of the place where the accident had taken place is also speculative in character. It is also the submission of the learned Counsel for the Petitioner that in any view of the matter, speed of the vehicle is not a decisive criteria to hold that a particular vehicle was driven in a rash and negligent manner. Mr. Choudhury also tries to impeach the credibility of prosecution witnesses -2,3 and 4 by suggesting that from their evidence, it becomes doubtful as to whether they had really witnessed the incident. The learned Counsel has placed reliance upon the judgments rendered in *Ranjit Singh v. State of Assam*, reported in 1997 (3) GLT 126 , *Kriti Singh Vs. State of Assam*, , *Rang Bahadur Singh and Others Vs. State of U.P.*, and *Madhab Bagh Vs. State of Orissa*, to support his contention.

7. Mr. B.B. Gogoi, learned Addl. Public Prosecutor, Assam on the other hand, contends that both the courts having concurrently recorded the guilt of the Petitioner and there being no perversity in the judgments put to challenge in the instant revision petition, no case for interference with the judgments impugned is made out and the revision petition is liable to be dismissed.

8. In order to appreciate the contention of the learned Counsel for the parties, it would be necessary to examine the evidence on record.

9. PW-1 deposed that the incident had taken place at around 8.30 P.M. and at that time he was proceeding towards his residence after closing his shop and

while he was so proceeding, he saw a person named Mubarak Ali lying by the side of the road. He came to learn that he was knocked down by an Auto-Rickshaw and he also saw the Auto-Rickshaw standing from there bearing Registration No. AS-10/1633. He also came to learn that the present Petitioner was the driver of the said Auto-Rickshaw. It also came out in his deposition that the injured was shifted to Karimganj Civil Hospital by the police and other persons gathered at the place of accident and on the next day, he came to learn that the injured had died. He also said in his evidence that there were lights in both sides of the road.

In his cross examination, he stated that the accident had taken place in front of the shop of one Kalam and he found Mubarak Ali at a distance of about one and half "hand? (27") from the edge of the road in the southern side.

10. PW-2 came to the place of occurrence after hearing shouts and found Mubarak Ali in the southern side of the road in injured condition. According to him, the accident occurred at around 8.30 P.M. and he came to learn that the accident was caused by the Petitioner while he was driving Auto-Rickshaw bearing Registration No. AS-10/1633. He had carried the injured along with others to the hospital. According to him, he did not find the driver of the vehicle in the place of occurrence and he came to learn through one Kalam that the present Petitioner was the driver of the said Auto-Rickshaw. He had also deposed about existence of electric light in the place of occurrence. According to him, the accident took place in front of a Biscuit Factory.

In his cross examination, he had stated that his residence was at a distance of a quarter mile from the place of accident and he had come from his residence after hearing shouts. He had denied suggestion that he had not told police that he had come to the place of occurrence upon hearing shouts and that Kalam had told him that the present Petitioner was the driver of the ill-feted Auto-Rickshaw. He also denied the suggestion that he had not come to the place of occurrence at all.

11. PW-3, Md. Abdul Kalam, stated that the accident took place at about 7 P.M. in front of the Police Station beyond the Badarpur stand. According to him, Auto-Rickshaw in question was coming at a great speed and had knocked down his uncle Mubarak Ali in front of the pan shop. He deposed that he had witnessed the occurrence and further stated that his uncle was walking by the left side of the road.

In cross examination, he had stated that the accident had taken place beyond the black-topping portion of the road on the southern side and the Auto-Rickshaw was proceeding towards West from East side. He stated that the Auto-Rickshaw had applied break but could not avert knocking down Mubarak Ali. The Auto came to a halt at about a distance of 15/20 "hand? (22/30?). It also came out in his evidence that the distance between the Biscuit Factory and the Badarpur Senior Madrassa is about a quarter kilometer. He also denied the suggestion to the effect that no accident had taken place in front of his shop and

that he had not told the police that such accident had taken place in front of his shop. He also stated that Faruk Ahmed, son of the deceased, Abdul Latif, Rafiq Ahmed, Abdul Kadir and others also had witnessed the occurrence. He also denied the suggestion that the accident occurred because of carelessness of Md. Mubarak Ali while he was crossing the road and had suddenly fallen down in front of the Auto-Rickshaw. He also denied the suggestion that he had stated before the police that the accident had taken place while his uncle was trying to cross the road.

12. PW-4, Faruk Ahmed, as noted earlier, is the son of the deceased and he had deposed that the accident had taken place around 8 P.M. in the National Highway near a bakery owned by one Latif. His father was going towards West from East side by the left hand side of the road and an Auto was coming at a considerable speed. He stated that suddenly he had heard a sound about 75 ft. away from where he was and immediately after hearing the sound, he along with Babul, Kalam, Abdul, Kadir etc. came out and found that his father was under the Auto Rickshaw with one wheel going over him and other two wheels jamming his father. According to him, his father was in his senses while he was dragged out. He had also deposed towards his father being taken to the Civil Hospital and he succumbing there to his injuries.

During the cross examination, he had stated that while they had dragged out his father, the police had come to the place of occurrence and had taken his father as also the accused Petitioner to the police station. He had also denied a suggestion to the effect that he had not told the police that he was in the bakery of Latif. He had also denied the suggestion that he had not told the police that he had not seen the vehicle coming at a considerable speed.

13. PW-5 is the Doctor who had conducted the post mortem examination of the deceased, who according to him, was about 70 years of age. He found the following injuries -

1. Lacerated injury of the skull below the occipital region. Oxipital bone is fractured in multiple parts.
2. One big haematoma is present over the occipital area.
3. Margins below the occipital region ruptured and also brain tissue of that area is lacerated.
4. Chest injury.

14. The evidence discussed above, is the substratum of the prosecution case. In order to convict a person u/s 279 IPC, one of the ingredients that has to be present is that the accused was driving the vehicle rashly and negligently and that it had endangered human life or was in likelihood to cause hurt or injury to any other person. Likewise, amongst others, in order to sustain conviction u/s 304-A IPC, the prosecution must lead evidence to prove that the accused caused death by his rash or negligent act, which however, did not amount to culpable

homicide.

15. The negligence that is to be established by the prosecution, must be culpable or gross. In *Kriti Singh*(Supra), this Court had explained that term rashness to be an act done with the expectation that no untoward consequences will ensue though the person is aware of the likelihood of such consequences. It was also observed that negligence is acting with the awareness that harmful consequences would follow. While a person does an act with utter indifference to the consequences, he is acting rashly. Negligence is failure to take that precaution which a reasonable and prudent person is expected to take.

16. In *Ranjit Singh* (Supra), this Court had held that speed is not the only criteria for deciding as to whether the driving which led to the accident was rash and negligent but there are host of other factors such as the width of the road, density of traffic, etc. Same view was taken in *Madhab Bagh*(Supra). A vehicle driven at a speed of about 50 kms per hour on a deserted road may not amount to rash and negligent driving but in a given circumstance, driving of a vehicle in a crowded and congested place even at a speed of 30 kms per hour may amount to rash and negligent driving. Rash and negligent driving will always relate to the manner of driving a vehicle.

17. Learned Counsel for the Petitioner had submitted that the Investigating Officer was also a material witness and his non-examination, even otherwise, has caused a severe dent in the prosecution case and in that respect the learned Counsel had relied on *Rangbahadur Singh* and others(Supra).

18. In the instant case, it is significant to note that none of the witnesses have even remotely suggested rash and negligent driving on the part of the Petitioner. The evidence of the witnesses, more particularly of PW Nos. 3 and 4, are with regard to the speed of the vehicle. The evidence of PW-3 also discloses that the break was applied to avert the accident. Suggestion was given to the PW No. 3 that he had told the police that the accident had taken place at a time when his uncle was trying to cross the road. The evidence of rash and negligent driving is conspicuously absent in the instant case.

19. It is also important to note that Investigating Officer is not examined. It would appear that non-examination of the Investigating Officer has caused prejudice to the defence in that the defence has not been able to prove the contradictions of the statement of the witnesses. There is no explanation as to why the Investigating Officer could not be examined.

20. PW-1 had deposed that the accident had taken place in front of the Badarpur Senior Madrassa while the PW-3 stated that the accident had taken place in front of the Police Station beyond the bus stand. PW-2 had indicated that the accident had taken place in front of the Biscuit Factory. The distance between the Biscuit Factory and Badarpur Senior Madrassa, is about a quarter km. Though it is submitted by the learned Counsel for the Petitioner that the presence of the prosecution witnesses at the place of the accident is doubtful, in my considered

opinion, it is not necessary to go into that aspect of the matter. Even assuming that the PW-3 and 4 had witnessed the occurrence, their evidence do not reveal, as has been noted herein above, the element of rash and negligent driving by the Petitioner.

21. The learned trial Court, without there being any evidence to that effect, had held that the Petitioner had driven the vehicle rashly and negligently and the trial Court was guided to take that view on the premise that the very occurrence of the accident is nothing but "over and above hasty act" of the accused driver who drove Auto-Rickshaw without due care and caution. The speed element also played a dominant role in construing that the vehicle was driven negligently and rashly. It would appear that the learned trial Court had applied the maxim of *res ipsa loquitor*. However, the doctrine of *res ipsa loquitor* cannot be applied to a criminal trial. The appellate court had also presumed that the accused had driven the vehicle in a rash and negligent manner.

22. In the result, the impugned conviction of the Petitioner and the sentence imposed cannot be allowed to stand. Accordingly, the Petitioner's conviction and sentence is set aside. The revision petition is allowed and the Petitioner is acquitted of the charges framed against him and is discharged from bail bond.

23. Send down the LCRs.