

(1988) 02 GUJ CK 0016
In the Gujarat High Court

Somabhai Mangalbhai Dabhi

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 06-02-1988

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 360, 367, 377
Penal Code, 1860 (IPC) — Section 304A

Citation : (1989) ACJ 7 : (1989) CriLJ 1945 : (1988) 2 GLR 199

Hon'ble Judges : R.A. Mehta, J

Bench : Single Bench

Judgement

R.A. Mehta, J.—The petitioner has been concurrently found guilty of the offence punishable u/s 304A of I.P.C. for causing death of a ten year old girl by rash and negligent act of driving a motor bus. He has been awarded R.I, for six months and a fine of Rs. 1,000/-, in default, R.I. for two months.

2. This matter was argued at length by the learned Advocate for the petitioner Mr. S.M. Shah. Thereafter, the petitioner filed Criminal Miscellaneous Application No. 2277 of 1987 through Advocate Mr. H. M. Chinoy and that application is really speaking an application in support of the revision application elaborating grounds and arguments. There is no independent or substantive prayer which is not covered by the revision application. Therefore, both these applications are heard and disposed of together.

3. The incident had occurred on 28-2-1984 in the afternoon at about 5-00 p.m. on the National Highway between Ahmedabad and Baroda on the outskirts of village Boriyavi. The accused was driving a State Transport passenger bus. The bus was proceeding from north to south on a tar road which is 22" wide with 9" kutcha shoulder on each side. Thus, the total width of the road is 40". The bus was proceeding on its correct side i.e. eastern side and the incident took place on the extreme western side kutcha shoulder i.e. on the utter wrong side and a ten year old girl was crushed under the rear wheel and died. There is no dispute on these facts. They are also established by the evidence of the panchanama Ex. 9

which is proved by the evidence of panch witness Ranabhai Ex. 8. The panchanama shows that there are fresh wheel marks (not brake marks) of 2.0" from south west and of 30" from north west. The above facts are also established from the oral evidence of the eye witnesses Ramilaben, Ex.6 who is the mother of the deceased girl and Ex. .7 Nirabhai, who is not related to the complainant's side nor having any enmity with the accused.

4. The only question that arises is whether there was any negligence or rashness on the part of the driver. The above facts are eloquent and they speak for themselves. The defence of the accused is that the girl had suddenly entered the road from the eastern side and was crossing the road and going towards the western side and in order to save the girl, the driver had taken the bus to the wrong side and the girl dashed with the rear . left side of the bus and came to be crushed under the wheels. Both the lower courts have considered this defence and found that there was no evidence about the girl having suddenly entered the road and attempting to cross it. There was only a suggestion made in the cross-examination of the eye witnesses and they have denied it. The eye witnesses have stated that the girl was not crossing the road and she was on the other side of the road. It is to be noted that the road "is of a width of about 40" including 22 feet pakka tar road. If the girl had suddenly entered the road, she could not have proceeded up to the other extremity of the road by crossing about 30" by which distance and time, the bus dashed with her on the wrong side of the road. It was day time and the driver had unobstructed view and the driver could have easily seen the girl if she was entering the road when the bus was approaching on its correct side and it is the defence of the driver that he had seen the girl and therefore taken the bus to the wrong side to save her. That means that the ten year old girl could cross more than 30 feet before the bus dashed with her. By that time, the bus must have crossed more than five times the distance crossed by the girl i.e. about 150 feet. Thus, there was sufficient distance, time and opportunity for the driver to stop, slow and to take the bus to the extreme of his correct side ie. eastern side and there was no need whatsoever to go to the utter wrong side. This story and defence of the girl having suddenly entered the road to cross the road is totally improbable. The mother of the girl was with the girl on the site where the accident had taken place. That also shows that the story of the girl crossing the road all of a sudden is absolutely improbable. Both the lower courts have discussed and appreciated the evidence of the eye witnesses add the panchanama and there is nothing to show that their appreciation is in any way erroneous. This concurrent finding of fact cannot be disturbed in revision application.

5. The learned Counsel for the petitioner has submitted that the learned Sessions Judge has not discussed the evidence independently and merely adopted the appreciation of evidence by the trial court and therefore his judgment is illegal/ and for that purpose, he has referred to and relied upon the judgment in the case of Emperor v. Shanmukh Basapa Dhamanji (1930) 32 Bom LR 353 : 1930-31 Cri LJ 925. In that case, the appellate court had passed a very brief

order of five lines to the effect that the trial court's order contains full statement of facts and appreciation of evidence appears to be correct and the appellant's arguments were not convincing and therefore there was no reason for interference. In respect of such an appellate judgment, the Bombay High Court had observed that the judgment failed to satisfy the requirements of Section 367 of the Criminal Procedure Code and that such an irregularity was not a mere technicality because such judgment is required to contain points for determination and reasons for the decision. In that case, there were no reasons. In the present case, the learned Sessions Judge has discussed the evidence of the eye witnesses, Panchanama as well as the defence and has given his decision with reasons on the points for determination.

6. Another judgment in the case of Mohmmad Hussain v. Emperor AIR 1945 Nag 116 : 1945 Cri LJ 595 was also relied upon. In that case also, there were five defence witnesses and their evidence was not discussed and there was no statement of points for decision and no details of the scrutiny of the prosecution evidence. In the present case, there is point for decision, reasons, the decision and all the material has been considered.

7. The learned Counsel for the petitioner has also referred to Supreme Court judgment in the case of Mahadeo Hari Lokre Vs. The State of Maharashtra, . In that case, the Supreme Court observed that if a pedestrian suddenly crosses the road without taking note of the approaching bus, the bus driver cannot save the accident and he cannot be held to be negligent. In the present case, the fact of the pedestrian suddenly crossing the road is negatived and therefore this judgment is of no assistance to the petitioner-accused.

8. In view of the above discussion, there is no reason to interfere with the finding of guilt and conviction of the petitioner for offence punishable u/s 304A of I.P.C.

9. In the end, it was submitted that the petitioner-accused is a first offender involved in an offence not having criminal mind and the offence is of mere negligence and the unfortunate consequence of death of a girl need not result in imprisonment and he should be given benefit of probation under the Bombay Probation of Offenders Act and u/s 360 of the Code.

10. Reliance is also placed on the judgment of the Supreme Court in the case of Aitha Chander Rao v. State of Andhra Pradesh 1982 Cri LR (SC) 7 (2), In that case, the accused, on conviction for offence punishable u/s 304A of IPC, was sentenced to two years R.I. and fine of Rs. 500/-. The Supreme Court observed as under:

The Sessions Judge had found that there was some amount of contributory negligence on the part of the appellant and having regard to the peculiar circumstances of this case, we think it is eminently a fit case in which the appellant may be released on probation.

From this judgment, it is not possible to hold that in every case of Section 304A

of IPC, benefit of probation is required to be given. It would depend on the facts and circumstances of each case. In that case, the Supreme Court relied on the circumstances of contributory negligence and "peculiar circumstances of this case". It is not clear as to what other peculiar circumstances appealed to the Supreme Court in that case.

11. As against that; in another case of Rattan Singh Vs. State of Punjab, , the Supreme Court refused to interfere with rigorous imprisonment for two years for offence punishable u/s 304A of IPC and made the following observations (Para 1) ":

This petition for special leave under Article 136 is by a truck driver whose lethal hands at the wheel of a heavy automobile have taken the life of a scooterist - a deadly spectacle becoming so common these days in our towns and cities. This is a case which is more a portent than an event and is symbolic of the callous yet tragic traffic chaos and treacherous unsafely of public transportation - the besetting sins of our highways which are more like fatal facilities than means of mobility. More people die of road accidents than by most diseases, so much so the Indian highways are among the top killers of the country. Indian Transport is acquiring a menacing reputation which makes travel a tryst with death. It looks as if traffic regulations are virtually dead and police checking mostly absent. By these processes of lawlessness, public roads are now lurking death traps. The State must rise to the gravity of the situation and provide road safety measures through active police presence beyond frozen indifference, through mobilisation of popular organisations in the field of road safety, frightering publicity for gruesome accidents, and promotion of strict driving licensing and rigorous vehicle invigilation, lest human life should hardly have a chance for highway use.

The Supreme Court also quoted the words of Lord Greene M.R. who said:

It scarcely lies in the mouth of the truck driver who plays with fire to complain of burnt fingers.

The Supreme Court further observed (para 3):

Rashness and negligence are relative concepts, riot absolute abstractions. In our current conditions, the law u/s 304A I.P.C. and under the rubric of negligence, must have due regard to the fatal frequency of rash driving of heavy duty vehicles and of speeding menaces.

While dealing with the argument that two years R.I. was excessive especially having regard to the fact that the accused had a large family to maintain, the Supreme Court observed that when a life has been lost and the circumstances of driving are harsh, no compassion can be shown, and refused to interfere with the sentence.

In the case of State of Karnataka v. Krishna alias Raju (1987) 1 R 296 : 1987 Cri LJ 776, the Supreme Court came down heavily when the accused was let off with a fine of Rs. 250/- only for offence punishable u/s 304A of I.P.C. and the

Supreme Court enhanced the sentence to six months R.I. In that case, the learned Trial Magistrate had imposed a fine of Rs. 250/- only. The High Court was moved u/s 377 of the Code of Criminal Procedure for enhancement of sentence by filing an appeal as the State was perturbed and shocked by the callous manner in which the Magistrate had dealt with the case. The Supreme Court noted with regret that the High Court declined to interfere with sentence. The High Court had taken a view that though the sentence of fine was lenient one, the period that had passed between the date of conviction and the date of hearing in the High Court was about two years which must have caused the accused lot of anxiety, and therefore refused to enhance the sentence observing that in such serious cases, the Court is expected to take a serious view of the matter. The Supreme Court observed that (para 6 of Cri LJ):

The utter disregard shown by the Magistrate to the nature of the offences, particularly the one u/s 304A I.P.C. and the sentences provided for them under the I.P.C. and the Motor Vehicles Act, by imposing what may be termed as flea-bite" sentences on the respondent, should have spurred the High Court to not only pass appropriate strictures against (he Magistrate but also to set right matters by enhancing the sentence at least for the conviction u/s 304A of I.P.C. to a conscionable level in exercise of its powers u/s 377 IPC.

In that case, the Supreme Court enhanced the sentence by imposing R.I. for 6 months and fine of Rs. 1,000, i/d R.I. for two months.

12. It has been stated to us while hearing motor accident claim appeals that there are a bout 40,000 fatal motor vehicle accidents in this country every year. If such a large number of offenders who have by their rash and negligent acts, caused such deaths are spared liberally and in all cases given benefit of probation, not only the offender will get away with a feeling of not having been punished, but the society will have the name feeling that a person who has been found guilty of causing death by negligence is liberally spared of the punishment and given benefit of probation. As observed by the Supreme Court, the Indian highways are amongst top killers in the country and more people die of accident than by most diseases.

13. In the case of State of Karnataka Vs. Krishna alias Raju, , this Court had refused to extend probation to ST bus driver who had overtaken a scooterist from its right side and thereafter again turned to the left showing absolute negligence on the part of the driver and by the said accident, a human life was lost. The Court observed in that case as under:

Therefore, having regard to the aforesaid circumstances of the case, nature of the offence and in context of escalating crime whereby a number of people die daily of road accidents and that this deadly spectacle is becoming common these days in our towns and cities (as observed in the aforesaid decision by the Supreme Court), I think it would not be desirable to release the petitioner on probation.

The learned Judge also observed that:

otherwise people may lose faith in judicial system. Judicial instrument has a public accountability and releasing the petitioner on probation may result in cynical disregard of the law which would have its impact on the society.

14. My attention was also drawn to the judgments of learned single Judges of this Court where benefit of probation has been given for offence punishable u/s 304A of I.P.C.

15. In the case of Jadeja Takhubha Lakhubha v. State of Gujarat (Cr. Revn. Appln. No. 208/82 decided on 31-8-82 by S. B. Majmudar, J.) benefit of probation was granted to a driver convicted of offence punishable u/s 304A IPC. That accident had resulted into six deaths. In that case, the driver was about 21 years of age and the learned Public Prosecutor had conceded that the benefit of probation be given to the accused. Thus, there is no ratio laid down in that case so as to assist us in the present case.

16. In the case of Abdul Radar Rasul Malek v. State (Cr. Revn. Appln. No. 26/1983 decided on 1-4-83 by A. P. Ravani, J.) it was observed that it may be an accident inasmuch as the victim had dashed with the rear wheel of the bus. Thus the element of contributory negligence seems to have weighed with the learned Judge for giving the benefit of probation observing that it is an offence not involving moral turpitude.

17. In the case of R.K. Shah v. State (Cr. Revn. Appln. No. 313/83 decided on 29-8-83 , by A. P. Ravani, J.) benefit of probation was given to a young person trying to get himself settled in life and in the beginning of his career, he had become victim of the circumstances.

18. It is not possible to find any ratio or guideline as to in which case and under what circumstances such benefit of probation is to be given. It cannot be said as a principle of law that in all cases for offence punishable u/s 304A of IPC, benefit of probation has to be given to all first offenders. In all these fatal cases, there are always first offenders and very rarely the same driver is convicted again for another such fatal offence. The professional drivers of heavy duty vehicles are in charge of a vehicle which is known in this country to cause large number of fatal accidents. Having regard to the gravity, the duty reasonably expected of them is such that any lapse is required to be viewed with equal gravity.

19. In the present case, it is submitted that the accused is having a family consisting of wife and a child, younger brother and father. These are not special circumstances. These are the circumstances of almost every driver. It is also submitted that his child is handicapped and his younger brother is suffering from tuberculosis. These circumstances also would not justify any liberal view being taken in this case. The facts established in this case show that the driver was driving the vehicle at uncontrollable speed and he went to the utter wrong side of the road and dashed against the innocent girl of 10 years. His negligence and

rashness are of grave category and there is no mitigating circumstance. Hence benefit of probation cannot be extended to the present petitioner-accuse in this case.

20. In the result, rule is discharged in Misc. Criminal Application as well as in the Criminal Revision Application. The petitioner is granted time to surrender to sentence till March 31, 1988.