

(2017) 07 KL CK 0007
In the High Court Of Kerala
Case No : 133 of 2011

**THOMAS, S/O.KURIAKOSE Vs STATE OF KERALA (REPRESENTED BY
S.I.O.F? POLICE,**

Date of Decision : 11-07-2017

Acts Referred:

Code of Criminal Procedure, 1973, Section 313 - Power to examine the accused
Indian Penal Code, 1860, Section 304A,
Section 304(A) - Causing death

Citation : (2017) 07 KL CK 0007

Hon'ble Judges : P.Ubaid

Bench : SINGLE BENCH

Advocate : K.A.JALEEL?C.ANILKUMAR, C.Y.VINOD KUMAR, ALEX M.THOMBRA

Final Decision : Disposed

Judgement

1. The appellant herein is a driver of the Kerala State Road Transport Corporation (K.S.R.T.C). He challenges the conviction and sentence against him under Section 304A I.P.C in S.C No.1151/2008 of the Court of Session, Thrissur. He faced prosecution on the allegation that at about 9.30 a.m on 29.1.2008, he drove the K.S.R.T.C Bus No.KL-15/3860 along the National Highway at Chandapura on the Kodungallur-Guruvayoor route in high speed, and also in a rash and negligent manner, hit down a motorcycle, which was overtaking a tourist bus proceeding from south to north, and the said motorcycle got sandwiched in between the two buses. When the riders on the motor cycle fell

down, they happened to be run over by the K.S.R.T.C bus, resulting in their death. The Police registered the crime on the basis of the first information statement given by one of the passengers in the said K.S.R.T.C bus, under Section 304 I.P.C. After investigation, the Police submitted final report before the Judicial First Class Magistrate Court, Kodungallur under Section 304 I.P.C. On committal, the case came up before the Court of Session, from where it was made over to the learned Additional Sessions Judge (Adhoc) I, Thrissur for trial and disposal.

2. The accused appeared before the trial court, and pleaded not guilty to the charge framed against him under Section 304 I.P.C. The prosecution examined 13 witnesses in the trial court, and proved Exts.P1 to P13 documents. When examined under Section 313 Cr.P.C, the accused denied the incriminating circumstances, and projected a defence that the unfortunate accident occurred due to the carelessness on the part of the rider of the motor cycle. The accused did not adduce any evidence in defence.

3. On an appreciation of the evidence, the trial court found that this is not a case of culpable homicide not amounting to murder, but only a case of road traffic accident that occurred due to the extreme rashness and negligence on the part of the driver of the K.S.R.T.C bus. Accordingly, the trial court found the accused not guilty under Section 304 I.P.C, but he was found guilty under ? Section 304(A) I.P.C. On conviction thereunder, he was sentenced to undergo rigorous imprisonment for two years by judgment dated 10.1.2011. The said judgment of conviction is under challenge in this appeal.

4. When this appeal came up for hearing, the learned counsel for the appellant submitted that there is no clear and satisfactory evidence to prove the prosecution case that the alleged accident occurred due to the rashness and negligence on the part of the accused in this case. On legal aspects, the learned counsel submitted that when the allegation is under Section 304 I.P.C, and the prosecution could not prove the essentials of the offence, there cannot be a conviction under Section 304A I.P.C, because the offence under Section 304A I.P.C is not a lesser offence. The learned counsel cited *Vijayan v. State of Kerala* [1991 (1) KLT 325] and *Benny Francis and others v. State of Kerala* [1991 CrL.L.J 2411]. The learned Public Prosecutor submitted that such an alteration is possible, in view of the position settled by the Hon'ble Supreme Court. On factual aspects, the learned Public Prosecutor submitted that the witnesses examined as PW1, PW5 and PW6 have given definite evidence proving the guilt of the accused, that he caused the unfortunate accident by driving the vehicle rashly and negligently.

5. The main witnesses in this case are PW1, PW5 and PW6. The evidence given by the other witnesses is only formal in nature. The accused has not disputed the question of identity of the bus driver. He being a K.S.R.T.C driver, and the vehicle involved being a K.S.R.T.C bus, he probably thought that it would be futile to project such a defence. Anyway, it stands proved by evidence that the K.S.R.T.C bus which caused the accident in this case was in fact driven by the accused. Of course, it is true that PW1, PW5 and PW6 have not stated anything definite about the identity of the

bus driver. Anyway, Exts.P11 and P12 documents will prove that the K.S.R.T.C bus was in fact driven by the accused.

On this aspect much discussion is not required.

6. Now let me see whether the offence under Section 304 A I.P.C stands proved in this case against the accused. PW1 was a passenger in the K.S.R.T.C. Bus. PW5 is an autorickshaw driver and PW6 is a workshop owner. The automobile workshop of PW6 is near the spot of accident, and PW5 was driving autorickshaw from behind.

7. PW1 has given evidence that he had seen the K.S.R.T.C Bus overtaking the motorcycle, and he is definite that it was quite rashly and negligently, the accused in this case overtook the motorcycle which was overtaking a tourist bus proceeding in normal speed from south to north along the eastern side of the road. There is nothing to show that the driver of the tourist bus was in any manner responsible for the accident. Of course, PW1 has stated that the motorcycle had hit on the body of the tourist bus also. But the witness is definite that the accident occurred due to the extreme rashness and negligence on the part of the K.S.R.T.C bus driver. In the process of double overtaking, the K.S.R.T.C bus happened to hit down the motorcycle which got sandwiched in between the two buses, and when the riders fell down, they happened to be run over by the K.S.R.T.C bus. They are husband and wife.

8. The evidence of PW5 is that the K.S.R.T.C bus came from behind while he was driving his autorickshaw and when he gave side, the K.S.R.T.C. bus overtook his vehicle, and immediately he saw the K.S.R.T.C bus overtaking a motorcycle which was carefully overtaking a tourist bus

proceeding in normal speed along the eastern side of the road from south to north. PW5 is definite that the K.S.R.T.C bus happened to hit down the motorcycle only because the K.S.R.T.C bus driver overtook the motorcycle quite rashly and negligently. This is the evidence given by PW6 also. He has also affirmed in evidence that the unfortunate accident occurred, resulting in the death of two persons, only because the K.S.R.T. C driver overtook the motorcycle in extreme rashness and negligence.

9. I find that PW1, PW5 and PW6 are definite in evidence that the unfortunate accident occurred due to the extreme rashness and negligence on the part of the driver of the K.S.R.T.C bus. It stands satisfactorily and properly proved that quite unnecessarily, and with the knowledge of consequence and in extreme rashness and negligence, the accused overtook the motorcycle which was at that time overtaking another vehicle. Due to this double overtaking, the motorcycle happened to be sandwiched in between the two buses, and the bus driven by the accused hit down the motorcycle. When the rider and the pillion rider fell down with the motorcycle, they happened to be run over by the K.S.R.T.C bus. This resulted in the death of the two persons, within no time. Thus, I find that a clear case under Section 304A I.P.C stands well proved in this case.

10. Now let me see the legal issue raised by the petitioner. The question is whether the accused can be convicted under Section 304A I.P.C in a case tried under Section 304 I.P.C. In Vijayan's case cited supra, a conviction under Section 304A I.P.C in a prosecution brought under Section 304 I.P.C was set aside by this Court on the ground

that the two are different and distinct offences. Vijayan's case is not a case of road traffic accident.

11. This is a case where the final report submitted by the Police itself contains the necessary elements of the offence under Section 304A I.P.C, though the charge was brought under Section 304 I.P.C. The very allegation in the final report, and also in the charge framed by the trial court, is that the accused caused the accident by rashly and negligently driving the K.S.R.T.C. Bus. In *Prabhakaran v. State of Kerala* [2007 (3) KLT 400 SC], a case where the accused was convicted under Section 304 I.P.C, the Hon'ble Supreme Court altered the conviction to one under Section 304A I.P.C, on the finding that the evidence in that case revealed only the essentials of the offence under Section 304A I.P.C, I find that this is not a case where the prosecution brought a clear case under Section 304 I.P.C. The final report would practically show that the allegation would come only under Section 304A I.P.C. The court charge also contains the essentials of the offence under Section 304A I.P.C, though the charge was framed under Section 304 I.P.C. If the allegations in the final report and also in the court charge, constitute the essential elements of Section 304A I.P.C, or if the accused is practically called upon to answer the necessary elements of the offence under Section 304A I.P.C, the court can very well convict the accused under Section 304A I.P.C.

12. Whether it is Section 304A I.P.C, or 304 I.P.C what is prominently and essentially involved is causing the death of a person. Causing death by a voluntary act will come under Section 304 I.P.C, whereas causing the death of a

person by an act of negligence or rashness will come under Section 304A I.P.C. I find that the court below rightly convicted the accused under Section 304A I.P.C, on the basis of clear evidence, though the final report was brought under Section 304 I.P.C.

13. The sentence imposed by the court below is rigorous imprisonment for two years. The licence of the appellant was also suspended for three months. The accused had to undergo disciplinary action also by the Department. Now he has retired from service. He must be now aged about 65 years. There is nothing to show that there is any other conviction to his credit. On a consideration of all the aspects, I find that rigorous imprisonment for eight months will be the adequate and reasonable sentence in this case.

In the result, the conviction against the appellant in S.C 1151/2008 of the court below under Section 304A I.P.C is confirmed and the appeal is disposed of accordingly.

However, the jail sentence imposed by the court below will stand reduced to rigorous imprisonment for eight months.