IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

THURSDAY, THE 07TH DAY OF JANUARY 2021/17TH POUSHA, 1942

Crl.Rev.Pet.No.4296 OF 2007

AGAINST THE JUDGMENT IN Crl.Appeal No.580/2001 DATED 23-09-2005 OF II ADDITIONAL SESSIONS COURT, KOZHIKODE DIVISION

CC 156/1994 DATED 12-10-2001 OF JUDICIAL FIRST CLASS MAGISTRATE COURT-V, KOZHIKODE

REVISION PETITIONER/APPELLANT/ACCUSED:

P.MUHAMMED,
S/O.EANUDHEENKUTTY,
VALIYATHAZHATH HOUSE,
KUZHIMANNA P.O., KONDOTTY,
MALAPPURAM.

BY ADV.SRI.K.M.FIROZ

RESPONDENT/RESPONDENT/STATE:

THE STATE OF KERALA,
(REPRESENTED BY CIRCLE INSPECTOR OF POLICE,
CITY TRAFFIC, KOZHIKODE)
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY SENIOR PUBLIC PROSECUTOR SRI.M.S.BREEZ

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 21-12-2020, THE COURT ON 07-01-2021 PASSED THE FOLLOWING:

[CR]

ORDER

The revision petitioner is the accused in CC.No.156/1994 on the file of the Judicial First Class Magistrate Court-V, Kozhikode and the appellant in Crl.Appeal No.580/2001 on the file of the second Additional Sessions Court, Kozhikode. The offences alleged against the accused are punishable under Sections 279, 337, 338 and 304A of the IPC.

2. The prosecution case in brief is that on 19.1.1993 at about 3 pm., the revision petitioner drove a stage carriage bus bearing registration No.KLM-7408 in a rash and negligent manner through the Ramanattukara National High Way and when it reached in front of the Poovannur mosque at Velipram, the driver took it to the wrong side of the road and the bus hit against a mini bus bearing registration No.KL- 11/7711 and due to the impact of the accident, the passengers of both vehicles sustained

simple and grievous injuries and the driver of the mini bus and one of the passengers therein succumbed to the injuries.

3. When the accused entered appearance before the trial court, he was furnished with copies of the police report and other documents. Upon pleading not guilty to the charge, the entire evidence was taken. By judgment dated 29.4.95, the accused was convicted and sentenced to undergo imprisonment for various counts stated supra. The accused preferred Crl.Appeal No.161/1995 before the Court of Session, Kozhikode. The appeal was allowed and consequently the conviction and sentence passed by the trial court was set aside and the case was remanded back for fresh disposal in accordance with the law. As directed by the Sessions Court, the prosecution examined PW15 and marked Exts.P29 and P30. Further, PWs.1, 2, 5 and 11 were recalled for cross-examination and they were

cross-examined. After their examination, the learned counsel for the accused filed a witness list to examine witnesses on his side. It was allowed and summons was ordered. However, no batta was deposited by the accused and hence the defence evidence was closed.

4. The total number of witnesses examined from the side of prosecution was PWs.1 to 15 and Exts.P1 to P30 and MO1 series. On appreciation of the evidence, the learned Magistrate found the accused guilty of the offences punishable under Sections 279, 337, 338 and 304A of the IPC. Accordingly, he was sentenced to undergo simple imprisonment for a period of two years for the offence punishable under Section 304A of the IPC, simple imprisonment for six months for the offence punishable under Section 279 of the IPC and simple imprisonment for a period of six months for the offence punishable under Section 338 of the IPC. No separate

sentence was awarded under Section 337 of the IPC. It was further directed that the sentences should run concurrently. The revision petitioner filed Crl.Appeal No.580/2001 before the Sessions Court, Kozhikode division. The appellate court dismissed the appeal confirming the conviction and sentence imposed by the trial court.

5. Heard Sri.Firoz.K.M., the learned counsel for the revision petitioner and Sri.M.S.Breez, the learned Senior Public Prosecutor for the respondent-State.

6. The learned counsel for the revision petitioner Sri.Firoz.K.M. contended that the two courts below failed to consider the relevant facts while passing the conviction and sentence. It was further contended that the accused had not caused hurt to any person by doing acts so rashly or negligently so as to endanger human life or personal safety of others. According to the learned counsel for the

revision petitioner, the persons who had sustained injuries in the accident moved claim petitions before the Motor Accidents Claims Tribunal alleging contributory negligence. When the witnesses pleaded contributory negligence to get appropriate compensation from the Tribunal, the prosecution was obliged to produce sufficient materials before the court to prove that the accused drove the offending vehicle in a rash and negligent manner. When contributory negligence is alleged, according to the learned counsel for the revision petitioner, it was obligatory on the part of the prosecution to prove gross negligence before the trial court beyond doubt. Further it was contended that the trial court wrongly appreciated the evidence of PW3 in support of the prosecution case. Further, the courts below failed to consider the aspects relating to tyre marks of both the vehicles in the right perspective.

7. Per contra, the learned Senior Public Prosecutor contended that the two courts below concurrently held that the accused committed the offences punishable under Sections 279, 337, 338 and 304A of the IPC and accordingly he was convicted thereunder. Concurrent findings of facts and law are sought to be set aside in revision. The trial court as well as the appellate court convicted the accused for the aforesaid offences by a process of well-reasoned findings and according to the learned Senior Public Prosecutor, it would not be just and proper to interfere in exercise of powers under Section 401 of the Cr.P.C.

8. PWs.1 and 2 were passengers of the mini bus. They had sustained injuries in the accident. PW1 lodged Ext.P1 FIS before the police. According to PWs.1 and 2 the bus which came in the opposite direction overtook another vehicle and dashed against the mini bus. PWs.1 and 2

stated that the mini bus was driven at minimum speed while the other bus was coming in high speed. PWs.1 and 2 identified the accused before the trial court. PW5 was travelling in the bus driven by the accused. PW5 also sustained injuries. PW5 stated that the accused drove the offending vehicle in a rash and negligent manner so as to endanger human life. According to PW5, over speed of the mini bus was one of the reasons for the accident. PW3 was also a passenger in the bus bearing registration No.KLM 7408. PW3 stated that the said bus hit against the mini bus while overtaking another bus. He maintained that the accused drove the bus in a rash and negligent manner so as to endanger human life. PW3 was not cross-examined. After remand, summons was issued to PW3. It was returned unserved as he was no more.

9. Ext.P22 mahazar was relied on by the two courts below to prove that the bus driven by the accused

was on the wrong side at the accident site. Evidence of the Motor Vehicle Inspector as PW9, and Exts.P15 and P16 reports ruled out brake failure or mechanical defect for any of the vehicles. Relying on the evidence of PWs.1 to 3 and PW9, it was held that the accused was guilty of the offences punishable under Sections 279, 337, 338 and 304A of the IPC.

10. The learned counsel for the revision petitioner mainly contended that PWs.1 and 2 preferred claim petitions before the MACT for getting compensation on account of the injuries sustained in the accident. During cross-examination copies of the claim petitions were confronted to PWs.1 and 2 and marked Exts.D1 and D2. As per Exts.D1 and D2, it is seen that the allegation made therein is that both the drivers of the vehicles were negligent in driving the vehicles at the time of the accident. However, they turned round and deposed before

the trial court that the accident had happened due to the negligent driving of the driver of the bus bearing registration No.KLM 7408. Going by Exts.D1 and D2, it is clear that PWs.1 and 2 pleaded contributory negligence. In **Easo Mathew v. State of Kerala [ILR 1967 (1) Kerala 352]** it was held that contributory negligence of the victim is no defence against a charge under Section 279 or 304A of the IPC. A driver must anticipate reasonably foreseeable negligent act of odd users as doctrine of contributory negligence has no application in criminal law. Thus, the doctrine of contributory negligence does not apply to a criminal liability, where the death of a person is caused partly by the negligence of the accused and partly by his own negligence. Essential ingredients of Section 304A of the IPC are the following:-

i) Death of a person
ii) Death was caused by the accused during any rash or negligent act.

iii) Act does not amount to culpable homicide.

11. In order to prove negligence as defined under Section 304A of the IPC, the prosecution is obliged to prove,

i) The existence of duty
ii) A breach of the duty causing death
iii) The breach of the duty must be characterized as gross negligence.

12. PW1 testified before the court that on 19.1.93 at 3 pm. near to the Poovannur Masjid at Ramanattukara while he was travelling on the mini bus bearing registration No.KL-11/7711, the offending vehicle overtook another vehicle negligently and hit against the mini bus and thereby he along with others sustained injuries. PW2 supported his version. Two of the injured died. During cross-examination PWs.1 and 2 stated that there was no negligence on the part of the driver of the

mini bus. However, Exts.D1 and D2 would show that both the drivers were negligent in driving the vehicles.

13. Driving at a high speed is not in itself a negligent act. In the case of **Ravi Kapur v. State of Rajasthan [AIR 2012 SC 2986]**, the Apex Court held that a person who drives a vehicle is liable to be held responsible for the act as well as for the result and that it may not be always possible to determine with reference to the speed of a vehicle whether a person was driving rashly and negligently and even when one is driving a vehicle at a slow speed, but, recklessly and negligently, it would amount to 'rash and negligent driving' within the meaning of the language of Section 279 of the IPC. Mere driving of a vehicle at a high speed or slow speed does not lead to an inference that negligent or rash driving had caused the accident resulting in injuries to the complainant. Thus, the speed is not a criterion to establish the fact of rash and

negligent driving of a vehicle. When it is alleged that driving of the offending vehicle leads to an accident, the main question arising for consideration is as to whether the driver of the offending vehicle drove the vehicle in a rash and negligent manner. The speed is not the only criterion. The width of the road, density of traffic, tyre marks, etc. are also criteria to decide negligence. It is necessary to appreciate the evidence in unbiased manner especially when two vehicles are involved and the accident is head-on-collision. Although contributory negligence is not a defence in a criminal case, when contributory negligence is set up as a ground by the injured in a case relating to the very same accident before the Motor Accident Claims Tribunal, it is necessary on the part of the prosecution to adduce convincing evidence before the court to prove gross negligence. It is necessary to prove that the death was due to the rash or negligent act of the

accused and the act must be sufficient cause without intervention of another's negligence. In other words, it must be, causa causans; it is not enough that it may have been the causa sine qua non. There must, therefore, be direct nexus between the death of a person and the rash or negligent act of the accused.

14. The important document with regard to the offence is Ext.P22 scene mahazar. Ext.P22 would show that the road lies on North-South direction and the road is straight upto 80 metres towards North and 65 metres towards South. The width of the road at the place of occurrence is 9.30 metres which part of the road has a road margin of 4.50 metres on the western and 3 metres on the Eastern side. The place of occurrence is at 1.5 metres on the western tarred end. Relying on Ext.P22 mahazar as a piece of evidence, the trial court held that no explanation was offered by the accused as to how he

came to the Western side where the width of the road is 9.30 metres and the road is straight.

15. In Ext.P22 mahazar PW11 stated that he identified the place of occurrence as pointed out by one Raimkutty Mohammed Kutty on 20.1.1993 at 3 pm. However the said Raimkutty was not examined as witness during trial. The trial court mainly accepted the contents of scene mahazar as evidence without the evidence to prove its contents. The contents of scene mahazar cannot be treated as 'evidence' to prove any of the facts referred to therein unless and until the witness, who pointed out the place of occurrence, was examined before the court. A learned Single Judge of this Court had an occasion to consider this aspect in detail in **Mohanan v. State of Kerala [2011 (3) KHC 680]**. It is clear from Ext.P22 that the investigating officer identified the place of occurrence based on the information furnished by one

Raimkutty. However, he was not examined to prove the facts stated. Hence Ext.P22 cannot be acted upon to enter a finding that what are all stated in Ext.P22 are proved beyond doubt.

16. PW3 one of the eye witnesses to the occurrence was initially chief-examined before the trial court. He was not cross-examined. After remand when summons was issued to him, the summons was returned with an endorsement that he was no more. Section 33 of the Evidence Act deals with statements of persons who cannot be called as witnesses. A reading of Section 33 of the Evidence Act shows that the evidence in earlier proceedings would be relevant in subsequent proceedings if the ingredients of the proviso were complied with. Those ingredients are:-

(i) that the earlier proceedings were between the same parties or their predecessor-in-interest.

(ii) that the averse party in the first proceeding had the right and opportunity to cross-examine, and

(iii) that the question in issue was substantially the same in the first as in the second proceeding.

17. One of the requirements for application of Section 33 of the Evidence Act is that the adverse party in a proceeding should have the right and opportunity to cross-examine. In the case on hand, the evidence was recorded in chief. However, the witness was not cross-examined. If opportunity for cross-examination was offered, but the party did not avail himself of the right and opportunity, the deposition would be clearly admissible. In the case on hand, such an opportunity was not given. Evidence given by a witness in a previous judicial proceeding or in a later stage of the same judicial proceeding, when the witness is dead, is relevant for the

purpose of proving the matter, provided the witness examined by the prosecution was subjected to cross-examination. Hence, the evidence adduced by PW3 cannot be relied on to enter a finding that the accused drove the offending vehicle in a rash and negligent manner.

18. On going through the oral evidence of PWs.1 and 2, there is nothing to indicate that the accused was driving the vehicle at a speed which would justify holding that he was driving the vehicle rashly and negligently. No tyre mark was noticed in Ext.P22 mahazar to prove that, the offending vehicle, hit against the vehicle involved in the accident, had deviated from its path as alleged by the prosecution. There is no evidence in this case to hold that the death of the two persons was direct result of the rash or negligent act of the accused. When driving leads to an accident, the main question is whether it was rash and negligent. But in deciding this, the speed alone is not the

only criteria. The width of the road, density of traffic, an attempt to overtake, tyre marks are also criterion. In this case, as stated earlier, Ext.P22 is inadmissible in evidence. PWs.1 and 2 have not adduced any evidence to locate the place of occurrence specifically. The width of the road is not proved. Tyre marks are not proved. The mere allegation that the vehicle was driven in a high speed is not enough to prove criminal rashness or criminal negligence to prove the occurrence.

19. When there is glaring defect in the procedure and manifest error on a point of law, the findings are liable to be revised in revision. Hence the conviction and sentence imposed by the two courts below are liable to be set aside.

Resultantly, the criminal revision petition is allowed. The revision petitioner/accused is found not guilty of the offences under Sections 279, 337, 338 and 304A of the

IPC and he is acquitted thereunder. Cancelling his bail bond, this Court directs that he be set at liberty. If any fine amount is deposited by the revision petitioner/ accused during the pendency of this revision, pursuant to an interim order passed by this Court, the same shall be refunded to the revision petitioner/accused in accordance with rules. Pending applications, if any, stand disposed of.

Sd/-

N.ANIL KUMAR,
JUDGE

skj