IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.377 OF 2002

Shivaji Damodar Karne .. Applicant

Versus

The State of Maharashtra .. Respondent

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- Ms. Chitrali Deshmukh, Advocate for Applicant.
- Mr. Chandrakant Mali, APP for State.

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CORAM : MILIND N. JADHAV, J.

DATE : OCTOBER 21, 2024.

JUDGMENT:

1. Heard Ms. Deshmukh, learned Advocate for Applicant and Mr. Mali, learned APP for State.

2. This Criminal Revision Application (for short "**CRA**") takes exception to the twin judgments dated 28.02.2001 passed by the learned 28th Esplanade Court, Mumbai in CC No.40/P/98 and dated 18.06.2002 passed by the Additional Sessions Judge, Mumbai in Criminal Appeal No.102 of 2001. Crime is registered under Section 279 and 304-A of the Indian Penal Code, 1860 (for short "**IPC**") against the Applicant. Applicant is a bus driver in the BEST. First Informant is a traffic police constable who lodged the complaint. Applicant is convicted and sentenced to suffer simple imprisonment of three months and to pay fine of Rs.1,000/- and in default to suffer

simple imprisonment for one month.

3. As per order dated 17.07.2019 passed by this Court, Legal Aid Committee appointed Advocate Ms. Chitrali Deshmukh to represent and espouse the cause of the Applicant.

4. Briefly stated, as per prosecution's case, on 02.12.1997 at about 6:45 p.m. BEST bus on Route No.66 was on its way from Chira Bazaar to Crawford market. It was driven by Applicant. The bus took left turn at the junction of JSS Road at Shamaldas Gandhi Marg and while taking the left turn it dashed with the deceased who fell down and became unconscious at that time. Applicant stopped the bus and with the aid and assistance of the conductor and PW-1 – first informant moved him to G.T. Hospital nearby, where he was declared dead on arrival. Thereafter PW-1 lodged FIR under CR No.152 of 1997 for offences punishable under Sections 279 and 304A of IPC. According to prosecution, the double decker BEST bus bearing No. MH-01-H-8197 was inspected by the Motor Vehicle Inspector on 03.12.1997 and found to be in a good condition without any mechanical defect.

5. Prosecution led evidence of two witness viz; PW-1 - Traffic Police Constable Sadashiv Garde and PW-2 - Investigating Officer Kiran Kabadi. On 09.02.2000, charges were framed against Applicant under Sections 297 and 304A of the IPC to which he pleaded not guilty.

6. Ms. Deshmukh, at the outset, informs the Court that Applicant was arrested on 18.06.2002. She would inform the Court that by order dated 26.06.2003 passed in the present CRA, Applicant was enlarged on bail after spending more than 2 months 8 days in prison.

6.1. She would draw my attention to the deposition of PW-1 and PW-2. PW-1 was the Traffic Inspector on duty at the traffic junction on the date of incident. He has stated that on 02.12.2019, he was given duty at Princess Street Junction from 2:00 p.m. to 10:00 p.m. He has next stated that at about 6:45 p.m., one double decker BEST bus on route No.66 came from JSS Road and took left turn at Princess Street Junction towards Vardhman chowk and while taking the left turn, one person (deceased) was dashed by the bus and he fell down and was unconscious. He stated that he alongwith the conductor took the injured person to nearby GT Hospital when he was declared dead.

6.2. PW-2 the Investigating Officer in his deposition has stated that on 02.12.1997, he was doing his duty when he received telephonic message from GT Hospital that one person was injured by BEST Bus at the junction of JSS Road and Shamaldas Gandhi Marg. He has stated that he alongwith PI Khandagale immediately rushed to the hospital and recorded statement of PW-1 Traffic Constable Sadashiv Garde. He has stated that post-mortem of the deceased was done at

J.J. hospital and after that the body of the deceased was handed over to his brother. He has also stated that BEST Bus No. MH-01-H-8197 was inspected by RTO and no mechanical defect was found with the same.

6.3. Ms. Deshmukh, learned Advocate appearing on behalf of the Applicant would submit that the judgments under challenge are unsustainable as they do not correctly appreciate the facts and evidence on record. She would submit that the real point of controversy in the present case has been completely ignored and neglected by both the Courts below. She would vehemently submit that the issue of occurrence of the accident either due to rash and negligent driving by the Applicant or contributory negligence on the part of the deceased has not been considered by the Courts below while convicting the Applicant. Hence she would submit that the conclusion as drawn is not supported by the available material on record. She would submit that there is only one eye witness to the incident namely PW-1 and he has in his deposition not stated that the bus was driven rashly or negligently by the Applicant. In that view she would submit that the conclusion arrived at ultimately resulting into conviction on the ground of rash and negligent driving by the Applicant is incorrect. She would submit that despite there being no evidence on record, learned Trial Court has held that the Applicant was driving the vehicle with indifference. She would submit that the word indifference cannot

be attributed to rash and negligent driving.

6.4. Next, she would submit that the principle of contributory negligence has been completely neglected by both the Courts below since in the cross-examination of PW-1, the eye witness, he has stated that there was a signal at the junction of JSS Road and Shamaldas Gandhi Marg and therefore if the bus took the left turn on Shamaldas Gandhi Marg and the deceased attempted to cross the road at the same time, then in such circumstances, he was equally negligent. Finally she would submit that the sentence of conviction is completely disproportionate as there is no evidence of rash and negligent driving to indict the Applicant for causing the death of the deceased due to that reason. She would therefore submit that this is a fit case for interference of the Court under Section 397(1) of the Cr.P.C. when the conviction of the Applicant is based upon a singular fact namely that the bus (vehicle) was driven by him indifferently which has no legitimate meaning in law.

7. ***PER CONTRA***, Mr. Mali, learned APP appearing for the State has duly supported both the twin judgments passed by the Courts below and prayed for no interference by this Court. He would submit that it is an admitted position that death of the victim / deceased was caused by the vehicle (bus) driven by the Applicant when he was hit head on and therefore there is no ambiguity on that count. That apart,

he would submit that PW-2 is an eye -witness to the accident who has deposed and his testimony cannot be disbelieved when admittedly a person has died due to negligence of the Applicant. He would submit that powers of this Court while exercising its revisional jurisdiction under Section 397 is very limited and hence the Application be dismissed.

8. I have heard both the learned Advocates for the parties and perused the record of the case. In the decision of the High Court of Himachal Pradesh in the case of ***Bhupinder Sharma Vs. State of Himachal Pradesh***[1] while dealing with a case based on similar facts and circumstances the said Court held that while exercising revisional jurisdiction under Section 397 Cr.P.C., the Court has very limited jurisdiction to re-appreciate the evidence available on record and in that case where the Petitioner was held guilty of the offences under Section 279 and 304A IPC and was convicted and sentenced for six months imprisonment, solely with a view to ascertain that the judgments passed by the Courts below are based on correct appreciation of evidence on record and they are not perverse, the Court undertook the exercise to critically examine the evidence be it ocular or documentary on record. Similar is the case herein. Applicant is convicted for 3 months simple imprisonment and fine of Rs.1,000/- and in default thereof 1 month simple imprisonment.

1 2016 SCC OnLine HP 1762

9. The Court held that as far as scope of power of the Court while exercising revisionary jurisdiction under Section 397 is concerned, the Apex Court in ***Krishnan Vs. Krishnaveni*** [2] has held that in case the Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, whether the sentence or order is not correct, then it is the salutary duty of the High Court to prevent abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by the inferior criminal court in its judicial process or illegality in the order or its sentencing. The relevant paragraph No.8 of the judgment is reproduced as under: -

> *"8. The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to mete out justice. In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, the High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power under Section 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order."*

10. While attributing the aforementioned principles, in the present case, it is seen that none of the attributes of rash and negligent driving by the Applicant have been brought or proven on record by the prosecution through the testimony of its two witnesses. PW-1 being the

2 (1997) 4 SCC 241

eye witness has not testified that he saw the Applicant over-speeding or driving the bus rashly and negligently or for that matter breaking the signal which was installed at the junction of JSS Road and Shamaldas Gandhi Marg. It is seen that the left turn taken by the bus on Shamaldas Gandhi Marg to go towards Vardhaman Chowk is at a 90 degree angle. When such a turn is taken it can only be done if the signal is on so that the incoming traffic on Shamaldas Gandhi Marg from Marine lines station is stopped at the signal. PW-1 was present near the incident spot. He has not deposed or testified that the bus was driven at a high speed or negligently or for that matter rashly. In this regard, it was incumbent upon both the Courts below to consider the available evidence in totality. That is however not been done in the present case. PW-1 the eye witness has not stated in his evidence that the Applicant was over-speeding or he disregarded and broke the signal to reach his destination faster or he applied his brakes in an emergency near the signal.

11. The evidence of the sole eye witness PW-1 is therefore crucial for consideration in the present case. All that PW-1 has stated in his deposition is that while taking the left turn, one person was dashed by the BEST bus due to which he fell down. That is all that he had witnessed. There is nothing else stated in his deposition implying rash and negligent driving or over-speeding or applying brakes which would lead to indictment of Applicant. In his cross-examination he has

deposed that there was electronic signal at the scene of offence. However, he has not stated that the signal was broken by the Applicant while driving the bus. There is another piece of crucial evidence namely the spot panchnama carried out by the Investigating Officer below Exhibit P-3 which has been missed completely by both the Courts below. When read it clearly states that on examination of the incident spot where the collision / accident took place, there were no brake marks on the road at all. Spot panchnama was carried out at 9:45 p.m. on the same date of the incident itself and is on record. This spot panchnama clearly corroborates case of the Applicant since if that be the case, then it cannot be stated that Applicant was over-speeding or driving the bus rashly and negligently. In fact even in the statement of PW-1 recorded by the Investigating Officer on 02.12.1997 itself there is nothing incriminating stated therein to suggest that the bus was driven rashly and negligently by the Applicant.

12. Hence, in view of the aforesaid crucial evidence being completely ignored, conviction of Applicant for causing the death of deceased due to rash and negligent driving as contemplated under Section 279 of the IPC is not proven on the basis of the available material on record. There is no doubt that the incident has led to the death of a person but when there is no evidence relating to rash and negligent driving, as also with respect to contributory negligence on the part of the deceased while crossing the road and attempting to

cross the road in front of the BEST bus, conviction of Applicant is not justified and warranted on that ground. The decisions of both the Courts below proceed on the premise that the death of deceased was caused due to and as a direct result of rash and negligent driving of the bus by the Applicant and hence he has been held guilty and convicted.

13. However, in the present case, deposition and testimony of PW-1, the sole eye witness does not point a finger towards rash and negligent driving by the Applicant. Once that is the case it could be possible that the deceased was equally negligent while crossing the road. Deceased's act of crossing the road therefore could be termed as a step towards contributory negligence when the bus was taking the left turn at a 90 degree angle at a junction controlled by the electronic signal. Hence if the statement given by PW-1 is seen and analysed, one and only one thing emerges therefrom and that is the driving of the BEST bus by the Applicant was clearly not rash and negligent.

14. It is seen that the speed of the vehicle (bus) at the time of accident cannot be ascertained as there is no mechanism to do so and hence only the testimony of the eye witness can be considered to determine the speed of the vehicle. In this case, PW-1, the sole eye witness has not deposed upon the speed of the vehicle (bus). It is also a fact that speed and negligence, both are two different aspects for consideration in such a case. Hence in a case like the present one it

needs to be proven beyond all reasonable doubts that the accident actually occurred due to rash and negligent driving by the Applicant. That is not the case which is proven by the available evidence on record. Reading the evidence of the sole eye witness i.e. PW-1 which in my opinion is cryptic, short and insufficient so as to say that it does not inspire confidence of this Court to treat it as trustworthy for indictment of the Applicant in the present case for the charge of rash and negligent driving. That apart, it is not the prosecution's case that the Applicant driver tried to run away after the accident but it is infact he who moved the injured to the government hospital alongwith the conductor and PW-1.

15. In view of the aforementioned facts and circumstances, the deposition and testimony of PW-1 alone in my opinion is not sufficient enough to hold that Applicant was driving the vehicle (bus) at the relevant time at a high speed and that too negligently. There is no other evidence on record whatsoever to indict the Applicant. The spot panchnama below Exhibit P-3 itself revolts and militates against the prosecution’s case. Therefore the conclusion drawn by both the Courts below that the bus was driven rashly and negligently by the Applicant merely on the basis of the deposition of PW-1 is not sustainable. In the present case the prosecution has failed to prove that there was criminal rashness and culpable negligence on the part of the Applicant which could render him liable for punishment under Section 304A of the IPC

and similar to what is held by the High Court of Himachal Pradesh in the case of *Bhupinder Sharma* (*1st supra*). One of the most glaring aspect of the present case is that while convicting the accused both the Courts below brushed aside all parameters of contributory negligence. Hence the conclusion arrived at by the Courts below appears to be totally contrary to law.

16. The aforesaid decision in the case of *Bhupinder Sharma* (*1st supra*) has further held in paragraph Nos.29 to 33 as under:-

> ***"29.*** *… Very glaring aspect of the present case is that while convicting the present accused both the Courts below brushed aside all the parameters of contributory negligence by saying that concept of contributory negligence is not applicable in criminal jurisprudence. The aforesaid conclusion made by the Courts below appears to be totally contrary to law. The doctrine of contributory negligence is definitely applicable in criminal jurisprudence because to conclude that on whose fault accident occurred, it is necessary to go into the details of the case and find out who was the actual person responsible for the accident. There are number of cases where vehicles were being driven in normal speed on its side but suddenly somebody appears and gets injured by striking with the vehicle. In such like cases and in other number of cases, it has been held by the Courts that it was not the fault of the driver driving the offending vehicle, rather fault was contributory to the person who suddenly appeared before the vehicle and caused the accident.*
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> ***30.*** *Admittedly, in the present case one person has died due to the unfortunate incident but merely, because some person has died, it cannot be said that the accident was deliberate and due to rash and negligent driving. In the present case, there is ample evidence which suggests that deceased Chet Singh was negligent as he was standing in the rear portion of the vehicle and had protruded his head out of the body of the vehicle at the time of accident. In the cases, where prosecution intends to charge the accused/person under Sections 279 and 304-A IPC, it is their bounden duty to place on record specific evidence that vehicle was being driven rashly and negligently. In the present case where there is overwhelming evidence to suggest that deceased Chet Singh was himself negligent, as has come in the statement of PW-1, which, Courts below could have examined from that angle but both the Courts below have brushed aside the concept*

of contributory negligence.

31. *In this behalf Hon'ble Orissa High Court in Bijuli Swain v. State of Orissa, 1981 Crl. L.J.583, held:*

> *"7. If the evidence available on record in the instant case is judged on the principles laid down by this Court, as stated above, it is evident that there is no evidence on behalf of the prosecution that the petitioner was driving rashly and negligently. Due to such rash and negligent driving the accident took place. Merely because some persons have been injured, it cannot be said that the accident was deliberate or due to rash and negligent driving. The prosecution has failed to establish the ingredients of Sections 279 and 304-A, Penal Code, 1860 and, as such, the conviction of the petitioner is not sustainable."*
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> *(P.884)*

32. *In Bagtawar Singh v. State of Rajasthan, 2005 Crl. L.J. 2636, the Hon'ble Rajasthan High Court held:*

> *"4. The deceased, on his own, opened the gate and alighted from the bus, while it was, still, in motion. On asking by the Conductor and the passengers the petitioner immediately stopped the bus. On these facts if the deceased had no patience and without waiting for the bus to come to complete halt, alighted, no negligence can be attributed to the driver of the bus. Thus, even if the prosecution case goes un-rebutted there are no chances of petitioner's being guilty for offence under Section 279 or 304-A I.P.C."*
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> *(P.2636)*

33. *In State of H.P. v. Parmjit Singh, Latest HLJ 2012 (HP) 297, this Court, while dealing with similar type of case, held:*

> *"11. In the light of the law applicable to the facts and circumstances of the case. In the instant case, accident stands admitted and it is also admitted that the accused was driver of the vehicle aforesaid. To prove the offences under Sections 279 and 304-A of the Penal Code, 1860 as alleged against the accused, the prosecution is obliged to prove the rash or negligent act of driving by him, which was responsible for causing the death of Shri Ghami Ram (deceased). In other words, death must be direct result of the rash or negligent act of accused and the act must be efficient cause without 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. There must, therefore, be a direct nexus between death of a person and a rash and negligent act of the accused. The death should be the direct result of rash and negligent act of the*

> *accused and that act must be the proximate and efficient cause without the intervention of another's negligence. Thus, there can be no conviction when rashness or negligence of third party intervenes.*
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> *14. It is a settled law that the speed is not a criterion to prove the rash or negligent act of driving. The prosecution, as already stated above is obliged to prove the necessary ingredients of the offence by direct or circumstantial evidence. To fasten the criminal liability for the offences charged, there should be consistent, convincing and reliable evidence. Even in the exceptional cases, where the rule of res ipsa loquitor applies, it cannot be taken for guaranteed that the driver of the vehicle involved in : the accident is guilty of offence. In the same situation, there could be civil liability as well, in addition to the criminal liability, but so far as the criminal liability, it has to be proved beyond reasonable doubt and civil liability can be proved by preponderance of probabilities.*
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> *15. On the strength of the aforesaid evidence, it is very difficult to conclude that the accused was driving the vehicle rashly or negligently, more specifically when it has also come in the evidence that the deceased came in contact with the offending vehicle while crossing the road. Therefore, in my considered opinion, the offences punishable under Sections 279 and 304-A of the Penal Code, 1860 against the accused are not made out.""*

17. Applying the test of evidence placed on record by the prosecution and from the totality of circumstances in the present case, it appears that both the Courts below appear to have been swayed away with emotion because of the demise of the injured. No doubt, the death has occurred. But whether it occurred due to rash and negligent driving by the Applicant needs to be proven. However, according to the analysis of the evidence and the material on record, and in view of the above observations and findings, I have no hesitation to conclude that the judgments passed by both the Courts below are not based on proper appreciation of evidence available on

record. The offences punishable under Sections 279 and 304A of IPC against the accused are not made out. Hence, both the judgments are quashed and set aside. This Revision Application is allowed. Accordingly, the Applicant – accused is acquitted of charges framed against him under Sections 279 and 304A of the IPC.

18. In the present case it is seen that Applicant is on bail. It is seen that Applicant has already suffered incarceration of 2 months 8 days and has been enlarged on bail on 26.03.2003. However, in view of this judgment, the decisions of both the Courts below dated 28.02.2001 and 18.06.2002 stand quashed and set aside. The Bail bonds furnished by the Applicant are discharged.

19. It is seen that at the time of accident in 1997, Applicant was 32 years old as stated in the FIR. In that view of the matter, he must be 59 years old today. If the Applicant has been suspended or dismissed from service owing to the concurrent decisions of both the Courts below, then he shall be reinstated in service with full backwages notionally with effect from the date of his suspension or dismissal from service. There is no data or status of Applicant's service available before the Court. In the alternate, if the Applicant has retired from service, his retirement / annuity benefits for the same shall be disbursed to him, if so withheld, on production of a server copy of this judgment before the concerned BEST department without insisting on

production of a certified copy of this judgment.

20. The High Court Legal Services Committee, Mumbai is directed to release the fees of Advocate Ms. Deshmukh in accordance with law within a period of two weeks from the date of a server copy of this order being placed before it.

21. With the above directions, Criminal Revision Application stands allowed and disposed.

[MILIND N. JADHAV, J.]

Ajay