
(1970) 12 GUJ CK 0004

Gujarat High Court

Case No: Criminal Appeal No. 483 of 1969

State of Gujarat

APPELLANT

Vs

Maneklal Roognath

RESPONDENT

Date of Decision: Dec. 2, 1970

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 417
- Motor Vehicles Act, 1988 - Section 112, 116
- Penal Code, 1860 (IPC) - Section 279, 304A

Hon'ble Judges: B.J. Divan, J

Bench: Single Bench

Advocate: A.H. Thakar, for the Appellant; K.M. Parikh, for the Respondent

Final Decision: Allowed

Judgement

B.J. Divan, J.

This appeal has been filed by the State of Gujarat against the order of the learned Judicial Magistrate, First Class, Shihor, camp Umrela, in a case in which the Respondent herein, the original accused, was charged with the commission of offences punishable u/s 279 and 304A of the Indian Penal Code and u/s 112 and 116 of the Motor Vehicles Act. The incident out of which the present appeal arises occurred at about 11 A.M. on April 28, 1968. In Bhavnagar District, there is a temple called Khodiyar Temple and the devotees coming to that temple have to travel upto Khodiyar Railway Station by rail and proceed on foot along the road from Khodiyar Temple. On the day of the incident one Dipsing Sursing of Valukad village had come to Khodiyar temple for performing some religious ceremonies. He and members of his family were returning from Khodiyar temple at about 11 A.M. in order to go to Khodiyar Railway Station. When Dipsing, his parents, his sister Kadu and other members of the family were walking on the [road and came near a portion of the road sloping downwards from south towards the north, he and members of his family were on the left hand side of the road and a public carrier i.e., a truck driven by the accused came from behind them. According to the prosecution, the truck was moving

at a very high speed and no horn was blown. As Dipsing heard the sound of the truck, which was coming from behind, he looked back and asked the members of his family to keep on one side of the road. In the meanwhile the truck all of a sudden came near them and dashed against Dipsing's sister Kadu, who was a girl of about 10 years of age. As a result of the impact, Bai Kadu fell down and according to the prosecution, the front wheel of the carrier rolled over the head or some other portion of the body of Bai Kadu and after travelling a little bit further, the carrier came to a stop. It is the prosecution case that after the collision the accused and some labourers who were in the body of the truck got down and started running away leaving the truck unattended. Dipsing ran towards the driver and asked the driver of the truck and the labourers not to run away but they did not listen. Thereafter Dipsing came to the spot where Bai Kadu was lying and he found that there were injuries on her head and on the leg and that Bai Kadu was dead. Thereafter Dipsing went to the Shihor Police Station and lodged the first information report in connection with this incident. Thereafter the investigation started. In the course of the investigation, a Panchnama of the scene of offence was drawn up and the truck was sent to the motor vehicles Inspector at Bhavnagar for the purpose of checking as to whether the mechanism in the brakes etc., was in order or not. The dead body of Kadu was sent for post mortem examination ; and Dr. Mansukhal Shah performed the post mortem examination on the dead body at Shihor Dispensary. After the investigation was over, the accused was chargesheeted in the Court of the learned Judicial Magistrate, First Class, Shihor in Bhavnagar District.

2. The complainant Dipsing Sursing stated in his deposition in examination-in-chief what I have set out as part of the prosecution case ; and according to him the front wheel had rolled over Kadu after the impact and by the time Dipsing came to the spot where Kadu was lying he found that Kadu was dead. According to Dipsing, the driver of the carrier had stopped his vehicle on the road side on the right at a distance of 8 feet from the scene of offence and after the carrier came to a stop, the driver and some labourers who were in the carrier came down and started walking away. According to him, in his cross-examination there was a down ward slope and they were on that downward slope when the incident took place. A suggestion was made to Dipsing in his cross-examination, and that seems to have been the defence version all throughout that just before the impact took place, Kadu had started moving from the right side of the road to the left side and then in the process knocked against the front wheel of the carrier and fell down and received the injuries which ultimately resulted in her death. Dipsing denied that suggestion. According to Dipsing what he had stated in his first information, Ex. 5, was correct and the contents were true. It was stated that the front wheel of the carrier had rolled on the head of the deceased and then after a little distance from that spot, the public carrier was brought to a halt.

3. The medical evidence is that of Dr. Mansukhlal Premchand Shah, P. W. 6, Ex. 12. Dr. Shah noticed three external injuries on the deadbody. They were:?

(1) Contused lacerated wound 6"x3/4"x1/2" on the upper outer part of lower part of left thigh and posterior of left knee upto the medial upper part of the left leg.

(2) Contused lacerated wound 3 1/2-" X 1/2" X 1/2" in "L" shape extending from parietal region to upper part frontal bone on left side with fracture of underlying bones into pieces.

(3) Abrasion on the epigastric region, i.e. left side of right hypochondriac region size about 1 1/4" 1/4.

In the opinion of Dr. Shah, death was due to shock and hemorrhage as a result of the fracture of the skull bones and injury to the vital organs of the body i.e., brain and liver.

4. Dr. Shah proved the post mortem notes, Ex. 13 and the internal examination according to the post mortem notes showed that the liver was pale and weighed about 31 ozs. There was rupture of the portion of the liver on the left side at the site of external injury No. 3. The internal examination of the head showed that the blood clots were present at the site of injury No. 2 and there was a depressed fracture at the site of injury No. 2 about 7/8" x 1" and the depression was about 1 1/4". Laceration of the brain was found at the site of injury No. 2 on the fronto parietal bones. The post mortem examination was performed between 4 P.M. and 5-50 P.M. on April, 28, 1968. According to the doctor, the injuries on the deceased could be caused if the victim has been run over by a motor-vehicle. This statement of Dr. Shah was not challenged in cross-examination, though the accused appears to have been represented by an advocate before the learned Magistrate. Only one fact was elicited in the cross-examination and it was that the injuries on the body of the deceased were on the left side of the body.

5. Mr. Parikh on behalf of the Respondent, original accused, contended that the version of Dipsing that the truck had run over the body of the deceased is inconsistent with the medical evidence, viz., about the presence of only three injuries. Mr. Parikh contended that if the front wheel of the fully loaded truck had run over the head of a young girl, then her bones would have been crushed and there would not be merely two contused lacerated wounds and one abrasion on the dead body. However, the evidence of Dr. Shah in his examination-in-chief clearly expresses the opinion that the injuries which he found on the dead body could have been caused if the victim had been run over by a motor truck. If that evidence of Dr. Shah had not been challenged in cross-examination and if that has gone unchallenged, then it is not possible, in my opinion, to accept the contention of Mr. Parikh that the injuries on the dead body could not have been caused by running over by a motor truck. Under these circumstances, it cannot be said that the evidence of Dipsing regarding the circumstances under which the girl Kadu came to receive the injuries should be rejected.

6. The Panchnama of the scene of offence is Ex. 11 and the Panchnama is properly proved through Panch witness Dhirubha Pratapsing, P. W. 5, Ex. 10. Panchnama shows that at the spot where the incident took place, the road was 17 1/2 feet wide and there

was a slope from the south towards the north. The spot of blood which was noticed on this road was 2 1/2 feet from the left hand side of the edge of the road proceeding from south to north and 15 feet from the right hand side. The blood was lying in an area of 1 Sq. Feet and same drops of blood were lying on the north of that place. What is more important is that the Panchnama mentions that the marks of carrier"s wheels having been dragged were noticed upto a distance 22 feet to the south from the place where the accident took place. Therefore, it is clear that the driver of the vehicle had been applying brakes for sometime before the impact took place and the impact took place on the left hand side of the road and that too on a downward slope. The Panchnama mentions that the road had a slope from south to north. Unfortunately there is no mention in the Panchnama or in any evidence on record about the gradient of the slope on which the incident took place.

7. Maheshkumar Natwarlal Joshi, P.W. 4, Ex. 18, was the Assistant Motor Vehicles Inspector attached to the office of the R.T.O. at Bhavnagar. He examined this vehicle at about 4 P.M. on April 29, 1968. The vehicle in question was registered as GTZ/3989. It was a goods truck. On inspection the witness found that the foot brake was pulling to the left and was poor. The hand-brake was disconnected. The other brake connections were in order and the king-pin bushing showed excessive play. In the opinion of this witness, the accident was caused due to the aforesaid defect. The hand brake was meant for braking and use in emergency. The result of his examination was typed on a regular form meant for such examination and is marked Ex. 9 on the record of the case. At first the witness did not recollect whether the goods truck was loaded at the time when he examined it but he recollected and said that it was in a loaded condition and the police had brought the carrier to the office of the R.T.O. Khodiyar temple which was at a distance of 10 to 11 miles from the office of the R.T.O. In his cross-examination, this witness stated that: it was a fact that no angle was measured for foot brake. He also stated that it is a fact that the periodical inspections of the motor vehicles are done at the office of the R.T.O. whenever the vehicles are brought to the office of the R.T.O. He admitted that no date was mentioned of the filling in of accident form, Ex. 9. This witness had with him the notes which he had taken at the time of inspection by him.

8. I may mention at this stage that the learned Magistrate who heard the case has emphasised that the date on which the report was made was not filled in by this witness. But the learned Magistrate, with respect to him, has overlooked one important aspect and it is that there is a rubber-stamp bearing the date 3rd May 1968. The examination was conducted on April 29, 1968 and there is an inward stamp of Shihor Police Station showing that Ex. 9 was received at the Police Station on May 4, 1968. Under these circumstances, whether the actual date on which the report was signed by this Assistant Inspector was mentioned in the appropriate column or not is of very little significance. The learned Magistrate has criticised the evidence of this witness because of the date not being mentioned in the report. In my opinion, in view of these different dates which are mentioned, the omission to mention the date at the time when the Inspector signed the

report shows that this omission has no importance at all and the learned Magistrate was in error in emphasizing this factor of the absence of the date in Ex. 9 in the appropriate column.

9. It is true as has been elicited in the examination of this witness Maheshkumar Joshi and as was emphasized by Mr. Parikh before me on behalf of the accused, that this witness was not in a position to say that the angle was measured for the foot-brake, presumably meaning thereby that angle of turning to the left when the brakes were applied was not measured by the witness. But the inspection did show that the foot brake when applied pulled the vehicle towards the left and the functioning of the foot-brake was poor. The hand brake had been disconnected. Mr. Parikh urged regarding this witness two contentions; the first contention was that the incident took place near Khodiyar at a distance of about 11 miles from the office of the R.T.O. and it was possible that mal-functioning of the foot brakes and the disconnection of the hand brake might have taken place between the time that the incident took place and the time when the vehicle was inspected by this witness. No question in cross-examination on these lines was put to the witness and, in my opinion, it is not open to the Respondent to urge this contention that the mal-functioning of the foot-brakes or the disconnection of the hand-brakes might have taken place between the time of the accident and the time of inspection by the witness, Maheshkumar Joshi.

10. The second contention of Mr. Parikh was that the very impact with the body of Kadu and the forcible application of the brakes just before the [impact took place might have resulted in mal-functioning of the foot-brakes and the disconnection of the hand-brake. Again no questions were put to expert witness, Maheshkumar Joshi, regarding this aspect of the case. Here we are not concerned with a collision between two trucks or a collision of the truck with a tree or a wall building. It is possible that if collision between trucks or between a truck and a wall and a truck and a building takes place, the very impact might damage the brakes to a certain extent but here the foot-brake was functioning but poorly and the foot-brake when applied was pulling the truck towards the left. It is important to bear in mind in this connection that the point of impact as mentioned in the Panchnama of the scene of offence was 2 1/2 feet from the left side edge of the road. Under these circumstances, the mal-functioning of the brakes and the 22 feet marks shown on the road as the distance over which the brakes were sought to be applied by the driver, indicate that the finding of Maheshkumar that the brakes were functioning poorly was correct.

11. The learned Magistrate in the course of his judgment has observed that no significance should be attached to the fact that the hand-brake was found disconnected because the hand-brake is meant for parking and use in emergency and the learned Judge has observed in his judgment that there was no emergency in the instant case. To my mind this observation of the learned Magistrate in the course of his judgment indicates that he has not properly appreciated the significance of the evidence of this witness and particularly this sentence in the evidence of this witness. I fail to understand what greater

emergency there could have been than this when on a downward slope, a fully loaded truck is moving with foot-brake functioning poorly and pulling the vehicle towards the left when foot-brakes were applied. No greater emergency than this could have arisen. If the hand-brake had been functioning properly and had not been disconnected, it is likely that finding that the foot-brakes were not functioning properly, the driver could have brought the vehicle to a halt by applying the handbrake and thus saved the life of Bai Kadu. The relevant sentence occurs in Para 30 of the judgment of the learned Magistrate and the relevant portion is in these terms:

Moreover, it has come in the evidence of Assistant Motor Vehicle Inspector, at Ex. 8, that hand-brake is meant for (car) parking purposes only, and for use in emergency. No such emergency was pointed out by the prosecution.

The very fact that the driver tried over a distance of 22 feet on a downward slope to stop this fully loaded vehicle and was not able to bring the vehicle to a halt immediately, though there were persons on the road surface in front of him, indicates that an emergency did arise and if the handbrake had been functioning in proper order, the hand-brake would have been available to meet this emergency. To my mind this failure on the part of the learned Magistrate to appreciate this evidence regarding emergency has resulted in a wrong approach towards the appreciation of the evidence of this witness.

12. The evidence so far discussed clearly shows that the hand-brake had been disconnected and the foot-brake was functioning poorly and when applied had a tendency to pull the vehicle towards the left. The brake-marks on the road showed that an attempt to stop the vehicle had been made over a distance of 22 feet before the impact with the child took place and the medical evidence is not inconsistent with the evidence of the eye-witnesses, who say that the front wheel of the vehicle had run over the body of Bai Kadu, the deceased.

13. The evidence which I have summarised in the immediately preceding paragraph also establishes that at the time when the vehicle was being driven on the down-slope, the accused was in charge of the vehicle, which was defective in its mechanism inasmuch as the hand-brake had been disconnected and the foot brake was functioning poorly. If a person drives a vehicle in such a condition, the only conclusion is that driving is rash and negligent.

14. Mr. Parekh on behalf of the Respondent-accused relied upon some decision in support of his contention that merely because the brakes were malfunctioning, it could not be said that the action of the accused in driving the vehicle was rash and negligent.

15. In *Ghisa v. The State* AIR 1950 Ajm 45, the learned Judicial Commissioner took the view that the accused was driving a motor lorry when a girl of 10 was run over, the injuries caused resulted in her death. It was found that the speed was moderate and the

accused was driving on the correct side of the road. It was possible that the accident took place because the girl unexpectedly crossed the road; and it was held that in the circumstances the accused could not be said to be guilty of rashness or negligence. The accused was entitled to the benefit of doubt.

16. In *Emperor v. Akbar Ali* AIR 1936 Oudh 400, it was held by a Division Bench of the Chief Court of Oudh that the rash and negligent act referred to in Section 304A means the act which is "the immediate cause of death and not any act or omission which can at best be said to be a remote cause of death. In that case it was further held that where there was no rashness and negligence on the part of a lorry driver charged u/s 304A for having run over and killed a woman, so far as his use of the road and the manner of driving was concerned, the fact that the accused's lorry had no horn or had inefficient brakes cannot be taken into consideration in convicting the accused u/s 304A, though they can be made the subject of a prosecution under the Motor Vehicles Act, when it is clear that the absence of the horn or the inefficiency of the brakes was not in any way responsible for the accident.

17. In the instant case, I have found that it is the inefficiency of the brakes which was responsible for the vehicle coming into contact with the body of Bai Kadu. If necessary, I would differ from this decision of the Oudh Chief Court in *Akbar Ali's Case* (supra) and hold that every person who takes out a faulty vehicle, faulty in the sense of inefficient mechanism and causes any injury to any person on the road and the impact takes place by reason of the fact that his vehicle was mechanically defective, is per se guilty of rash and negligent driving. If his vehicle is defective, he should drive his vehicle with all the more care and consciousness and in such a manner that it does not cause any accident. It has been well observed in some of the recent decisions that every motor driver owes a duty to other users of the road and by this action of driving on his part they are not to be jeopardised or any harm is not to be caused to others. However in the instant case it is not necessary to go to the extent of differing from the decision of the Oudh Chief Court and even within the four corners of the ruling laid down by the Oudh Chief Court, in the instant case, I have come to the conclusion that the impact with Bai Kadu took place because of poor functioning of the foot-brakes and disconnection of the hand-brake.

18. It is true, as has been observed by the Supreme Court in [Khedu Mohton and Others Vs. State of Bihar](#), the powers of the High Court in considering the evidence on record in appeals u/s 417, Code of Criminal Procedure are as extensive as its powers in appeals against convictions but the High Court at the same time should bear in mind the presumption of innocence of accused persons which presumption is not weakened by their acquittal. It must also bear in mind the fact that the trial Judge has found them not guilty. The Supreme Court further observed that unless the conclusions reached by him are palpably based on erroneous view of the law or that his decision is likely to result in grave injustice, the High Court should be reluctant to interfere with his conclusion. It was further pointed out by the Supreme Court that if two reasonable conclusions can be reached on the basis of the evidence on record then the view in support of the acquittal of

the accused, should be preferred. Here in the instant, case, in view of the evidence on record there is no scope for two possible views. The only possible view is that the accused had taken out a defective vehicle on the road and driven it in such a manner that he was not able to stop it when he found persons using the road ahead of him and, therefore, the accused was guilty of a rash and negligent act and therefore, with respect to him, the learned Magistrate was in error when he acquitted the accused.

19. As regards the question of sentence, Mr. Parikh for the Respondent-accused, has relied on the decision of a Division Bench of the Bombay High Court in [Emperor Vs. Khanmahomed Shermahomed](#), , Beaumont C.J. delivering the judgment has observed:

It is no part of the duty of the Courts to punish with savage sentences every motorist who has the misfortune to have an accident, which results in a loss of life, even though the accident be due to an error of judgment on the part of the driver. The circumstances of each case must be considered in imposing sentence. Moreover, one has to remember that driving motor cars has become an essential part of human activities and it is impossible to avoid a certain number of accidents.

These observations of Beaumont C.J. are of course entitled to great respect but it must be pointed out that in the case before him the accident was due to an error of judgment on the part of the driver. In the instant case there is no question of error of judgment because the accused took out a defective vehicle on the road. That vehicle was fully loaded and proceeding on a downward slope he did not try to bring the speed of the vehicle in control in the manner he should have done and as a result a human life was lost. We find that nowadays there have been a great number of fatal accidents where truck-drivers are involved and if such accidents are to be reduced, it can only be done by imposing the maximum term of imprisonment.

20. I, therefore, allow this appeal and set aside the order of acquittal passed by the learned Magistrate. I hold the accused guilty of the offences punishable under Sections 279 and 304A of the Indian Penal Code and sentence the accused to suffer R.I. for two years for the offence punishable u/s 304A Indian Penal Code. I also convict the accused of the offences punishable under Sections 112 and 116 of the Motor Vehicles Act. However, no separate sentence for each of the offences punishable u/s 279 Indian Penal Code and Sections 112 and 116 of the Motor Vehicles Act is passed. The accused to surrender to his bail.