(1970) 02 BOM CK 0044

Bombay High Court

Case No: Criminal Appeal No. 131 of 1969

Tukaram Sitaram Gore		APPELLANT
	Vs	
State of Maharashtra		RESPONDENT

Date of Decision: Feb. 27, 1970

Acts Referred:

- Penal Code, 1860 (IPC) - Section 304A

Citation: (1970) MhLj 763

Hon'ble Judges: J. R. Vimadalal, J

Bench: Single Bench

Advocate: S. R. Bontal and Mrs. V. S. Bontal, for the Appellant; V. T. Gambhirwala, Asstt. Govt. Pleader, For State, for the Respondent

Final Decision: Allowed

Judgement

J. R. Vimadalal, J.

This is an appeal by the accused who has been convicted by the learned Presidency Magistrate, 29th Court, Dadar, of the offence u/s 304A of the Indian Penal Code and sentenced to one year''s rigorous imprisonment. The facts of the prosecution case are that there is a road somewhere near Wadala, known as Rafi Ahmed Kidwai Road which is in four lanes, each of which is separated from the other by a slightly raised reservation track for pedestrians. It has been conceded before me by the learned Assistant Government Pleader, Mr. Gambhirwala, after taking instructions from an officer of the Traffic Control Department in Court, that of these four lanes, the two eastern lanes are one way, namely, for traffic proceeding from North to South; and the two western lanes are for traffic proceeding the other way, namely, from South to North. It has also been conceded by Mr. Gambhirwala after taking instructions as aforesaid, that the outer lanes on either sides, that is, the lanes running along foot-paths on each side, are intended for heavy traffic, namely, for buses and trucks, whereas the other lanes are for private cars and taxis. It has also been conceded before me by Mr. Gambhiwala that by virtue of Notification No. 11698/Traffic dated

June 29, 1962 issued by the Commissioner of Police, Greater Bombay, in exercise of the powers conferred upon him by Rule 268 (2) of the Bombay Motor Vehicles Rules, 1959 published in the M. G. G. Part I, Bombay Division, dated August 30, 1962, page 1456, there was and still is, at the place where the incident occurred, an absolute prohibition inter alia against the blowing of horn by drivers of motor vehicles, I am stating these facts at the outset because they do not appear on the record, but Mr. Gambhirwala has, very fairly, assisted the Court by taking necessary instructions and making the statements just recorded by me so as to avoid the case having to be sent back for the purpose of formal evidence being taken to prove these facts.

2. At about 11-30 a. m., on March 13, 1968, a beggar-boy aged about 8, was crossing Rafi Ahmed Kidwai Road from west to east. He had already gone across 3 of the 4 lanes of the road and had come upto the reservation track between the 3rd and the 4th lanes, the 4th lane being the one adjoining the eastern foot-path. At that time, the motor lorry driven by the accused came along the 4th lane proceeding in a north to south direction and knocked down the boy just as he began to cross that lane and had walked about 3 paces from the reservation track. The facts stated by me till now are in the nature of admitted facts. Though in the written statement filed by the accused in the trial Court, he has tried to make out that the deceased boy might have dashed against the rear wheel of his lorry, that could not be a correct statement, having regard to the evidence in the case. In my opinion, however, even accepting in toto the evidence of the two eye-witnesses Kasturi Satayya Lingayya and Yasminkhan Yasinkhan, the former of whom has lodged the First Information Report in this case, the prosecution has failed to prove that the death of the unfortunate boy was due to any rashness or negligence on the part of the accused. Three facts are relied upon by the State for that purpose, as having been proved by the evidence of these two eye-witnesses as well as the panchnama (exhibit "B") and the evidence of Sub-Inspector Garud, and they are these:
(1) the two eye-witnesses Kasturi Satayya Lingayya as well as Yasminkhan Yasinkhan have stated that the lorry was being driven by the accused at the time of the incident "in a fast speed";

(2) those two witnesses state that the accused did not blow the horn; and

(3) the motor lorry did not stop immediately, but stopped about 100 or 150 feet away from the spot where the boy was knocked down.

These facts were relied upon by Mr. Gambhirwala as showing that the accused was driving the motor lorry in a rash and negligent manner. I must, therefore, proceed to deal with each of these facts relied upon by Mr. Gambhirwala on behalf of the prosecution.

3. As far as the first point is concerned, the Supreme Court has, in its unreported decision dated March 21, 1968 in Criminal Appeal No. 154 of 1965, held that the use of the expression "high speed" (that being the expression used by a witness in the

case before the Supreme Court) was not enough to prove rashness or negligence, unless evidence was elucidated from the witness who used that expression as to what his notion of speed was. As far as witness Kasturi Satayya is concerned, no evidence whatsoever has been elicited from him to show what his notion of "fast speed" was. As far as witness Yasminkhan is concerned, an attempt has been made to elicit from him, in the course of cross-examination, as to what his notion of "fast speed" was, and he stated that the lorry was, in his opinion, proceeding at a speed of 35 miles per hour when the boy was knocked down. The speed of 35 miles per hour is, no doubt, slightly in excess of the speed-limit in the city (except along Marine Drive), but it can by no means lie said to be a speed which is so excessive as to amount, per se, to rashness or negligence. The evidence that the accused was driving the motor lorry at a fast speed at the time of the incident is, therefore, of no avail to the prosecution in the present case.

4. That brings me to the next point which was relied upon by Mr. Gambhirwala, and that is the fact that the accused did not blow the horn. Not blowing the horn cannot, of course, amount to rashness, but Mr. Gambhirwala''s contention is that it docs amount to negligence. As far as that contention is concerned; I am afraid notions prevailing prior to the introduction of the silence zone in the city still persist as far as subordinate Courts are concerned. As already stated by me above, it is common ground that the place of the incident in this case fell within the silence zone. Under those circumstances, to expect the driver of a motor vehicle to blow the horn is to invite him to do an act which is not only improper, but which violates a Notification issued under Rules which have statutory force. The Supreme Court has defined the expression "criminal negligence" used in section 304A of the Indian Penal Code as meaning gross and culpable neglect or failure to exercise the reasonable and proper care which it was the imperative duty of the accused to have exercised (Bhalchandra Waman v. The State 1968 Mh. L J 423 (S C)=(1967) 71 Bom. L R 634, S C, at p. 637). If the driver of a motor vehicle does not blow the horn because the prevailing traffic rules prohibit him from doing so, in my opinion, it cannot be said that he has failed to exercise "reasonable and proper" care, nor could it be said that the duty to blow the horn was "imperative" upon him, so as to hold him guilty of negligence. Moreover, it must be borne in mind that the boy was on the reservation track which was meant for pedestrians and, if he stepped down suddenly and walked across 2 or 3 paces, as the evidence seems to show, there would hardly be any time for the accused to blow the horn, or to avoid the impact.

5. The third contention of Mr. Gambhirwala mentioned above, would have some force, but for the fact that the subsequent conduct of the accused in getting out of the motor-lorry and running away showed that he did not stop the motor-lorry immediately, either because he was afraid of being manhandled by the crowd, or what is perhaps more likely, because he wanted to disappear so as to be able to deny, later on, that it was he who was at the wheel of the motor-lorry at the time of the incident. This, therefore, is not a case in which the only inference that can be

drawn from the fact that the motor-lorry was not stopped by the accused till 100 or 150 feet away from the place of the incident would be that he could not control the motor-lorry. Under those circumstances, the Court cannot infer rashness or negligence on the part of the accused from that fact.

6. There is no other fact emerging from the prosecution evidence from which such an inference can be drawn. Hearing criminal appeals during the last few months, I have come across several cases of prosecutions u/s 304A in which Magistrates appear to have presumed negligence, once a pedestrian is knocked down and killed by a motorist. There can be no such presumption. Not only must there be evidence of rashness or negligence acceptable to the Court but, as laid down by the Supreme Court in the case of Suleman Bahiman v. State 1968 Mh. L J 413 (S C)= (1967) 70 Bom. L R 536, S C, at p. 538, there must be proof that the rash or negligent act of the accused was the proximate cause of the death and there must be a direct nexus between the death of the person and the rash or negligent act of the accused. In the running-down cases the death of the pedestrian May very well be purely accidental, or may be due to his own negligence. To presume that because a pedestrian has been knocked down and has died, the driver of the motor vehicle that knocked him down must be guilty of rashness or negligence overlooks these two possibilities. It is necessary for subordinate Courts to bear in mind that the prosecution must produce evidence to establish rash or negligent driving of the motor vehicle by the accused. I am told that, at one time, it was the practice of the Chief Presidency Magistrate of Bombay to allot running-down cases only to those Magistrates who knew motor-driving. The traffic problem in the city has now become very acute and I wonder whether it would not be advisable for the Chief Presidency Magistrate to revert to that practice, if it is possible to do so.

7. In the result, I allow the appeal and set aside the conviction as well as the sentence passed upon the accused by the trial Court. Bail bonds cancelled.