

Shiva Ram Vs. the State

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Court : Allahabad

Decided On : Nov-20-1963

Reported in : AIR1965All196; 1965CriLJ524

Judge : M.H. Beg, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 279, 280, 304A, 336, 337 and 338

Appeal No. : Criminal Revn. No. 764 of 1963

Appellant : Shiva Ram

Respondent : The State

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : Bhola Nath Srivastava and ;Makund Lal Agarwal, Advs.

Disposition : Revision application dismissed

Judgement :

ORDER

M.H. Beg, J.

1. The applicant, Shiva Ram, as a driver of a motor truck who has been convicted by a magistrate of Jhansi, under as, 1279 and 304-A, I. P. C., and sentenced to six

months' rigorous imprisonment under each count. The sentences were ordered to run concurrently. The applicant appealed to the Court of the Sessions Judge, Jhansi, but Ms appeal was dismissed, and the findings arrived at and the convictions and the sentences awarded by the trying Magistrate were affirmed. The applicant now prays for interference by this Court in exercise of its revisional powers.

2. It has been contended by M. Il, Agrawala, very vehemently, that the applicant is not guilty of any offence under Sections 279 and 304A, I.P.C., and that the view of the Courts below that the applicant was driving the truck 'rashly' and 'negligently' within the purview of Section 304A, I. P, C., thereby causing the death of one Pillai, who was sitting on the extreme left on the front seat of the truck, is perverse and contrary to law. The learned counsel contended that the Sessions Judge had failed to distinguish between criminal and civil negligence. Mr. Agrawala cited a number of authorities. He relied particularly on Tika Karn v. Rex AIR 1S350 All 800 and Chaman Lal v. State, 1958 All LJ 689 : (AIR 1954 All 180) and State Government M.P. v. Bhawanesh Kumar, : AIR 1958 MP205 and Bharosi v. State : AIR 1957 MP236 .

3. It has not been argued on behalf of the accused-applicant, either in this Court or to the Courts below, that the immediate cause of death of Filial was not the act of driving by the accused. It has, however, been contended that the applicant has not done any 'grossly' rash or negligent act' and that the requirements of criminal negligence or rashness on the part of the accused were, therefore, wanting in this case. After considering the facts of this case, the law applicable to these facts, and the arguments advanced by Mr. Agrawala, I do not find it possible to accept the contentions advanced on behalf of the applicant. But, as there appears to be some difficulty in distinguishing between civil and criminal wrongs in such cases, I propose to examine the facts and to state my reasons for Holding that all the requirements of Section 304A, I. P. C., are satisfied in this case. The facts of the case, as found by the courts below, are:

Hira Lal (P. W. 7) had hired the truck driven by the applicant to get some wood from Bangawan to Jhansi. The truck left Jhansi on 29-6-1962 in the evening and

reached Bangawan at about mid-night. Hira Lal (P. W. 7), who was in the truck, got the wood loaded immediately after the truck reached Bangawan. After this, instead of taking some rest and going to sleep at Bangawan, like a reasonable and normal individual, the applicant was so rash as to hurry back to Jhansi with the result that, at about 5 a.m., on 30th June, 1962, while 'driving the vehicle, the applicant was suddenly overcome by sleep and dozed off. As a consequence of this dozing off, the applicant lost control over the truck which lurched to the left. The applicant then woke up with a start and swung the truck to the right. The truck turned suddenly and violently to the right and collided against a 'Bheesham' tree after having left the road and crossed the foot-path. As a result of this collision, of the truck with the tree, Pilla, mentioned above, was so seriously injured that he expired soon afterwards at a Hospital where he was taken, and Hira Lal (P. W. 7) was also injured, although he survived.

4-5. The learned Sessions Judge also recorded the following findings :

'I am convinced that the appellant was driving the truck with defective brakes. I am also convinced by the evidence of Hira Lal that the truck, even though loaded, was going at a fast speed. I am also convinced that the appellant had dozed off and had lost control of the truck when the collision took place. It is clear that the appellant had driven the vehicle on a public way in manner so rash and negligent as to endanger human life.'

6. In addition to relying upon Hira Lal (P, W. 7) and Subrani (P. w. 6), who were travelling in the truck, both the courts below relied on the evidence of two other eye-witnesses, Nand Ram (P. 'W. 4) and Panni (P. W. 5), who watched the whole occurrence from a short distance on the road as they were returning home from their fields. Head-constable Abdul Shakoor (P. W. 11), a motor transport expert, who had examined the vehicle soon after the occurrence and found the hand and foot Drakes of the truck in a very defective state, was also, relied upon by the courts below.

7. It was contended by M. L. Agarwala that, even upon the findings of fact arrived at by the courts below, the applicant could not be said to have been held to exhibit that high degree of 'rashness' or 'negligence' which could make it a criminal

offence under Section 304A. I.P.C. Learned counsel's contention was that this was, at the most, a case of civil liability. He sought to distinguish such a case from a case of criminal liability, failing under Section 304A I. P. C. by expatiating upon, the degree of rashness or negligence proved against the applicant, it was argued that to he overcome by sleep, for the first time at any rate, or, to get the first 'Jhonka of sleep', as Mr. Agra-wala puts It, does not disclose a sufficient degree of 'rashness' or 'negligence' to amount to crirminal negligence or rashness.

8. It will be sufficient to refer two cases to this Court relied upon by Mr. Agrawala in support of his arguments. The other cases cited by him lay down the law on the subject In very similar terms to those used In the two cases of this Court.

9. In the case of : AIR1954 All186 it was held:

'Rashness and negligence are not the samethings. Mere negligence cannot be construed to mean rashness. There are degrees of negligence and rashness, and, In order to amount to criminal rashness or criminal negligence, one must find that therashness has been of such a degree as to amount to taking hazard knowingly that the hazard was of such a degree that Injury was most likely to be occasioned thereby. The criminality lies in running the risk or doing such an act with recklessness and indifference to the consequences, criminal negligence is a gross and culpable neglect, that is to say, a failure to exercise that care and failure to take that precaution which, having regard to the circumstances. It was the imperative duty of the individual to take. Culpable rashness is acting with consciousness that mischievous consequences are likely to follow although the individual hopes, even though he hopes sincerely, that such consequences may not follow. The criminality lies in not taking the precautions to prevent the happening of the consequences in the hope that they may not happen. The law does not permit a man to be uncautious on a hope however earnest or honest that hope may be.'

In the case of : AIR1950 All300 Agarwala, J. held: Section 304A, Penal Code, runs as follows:

'Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.'

'This section obviously does not apply to cases where there is an intention to cause death or knowledge that the act done will in all probability cause death. It only applies to cases in which, without any such intention or knowledge, death is caused by what is described as a 'rash' or 'negligent' act. A negligent act is an act done without doing something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or an act which a prudent or reasonable man would not do in the circumstances attending it. A rash act is a negligent act done precipitately. Negligence is the genus, of which rashness is the species. It has sometimes been observed that in rashness the action is done precipitately with the consciousness that the mischievous or illegal consequences may follow, but with a hope that they will not. But, it is not necessary that there should always be this consciousness in a rash act. It has also been observed that in negligence there is no such consciousness of the consequences. This is also untrue as the observation of Lord Atkin quoted hereafter will show.'

'Now what may be called a negligent act in civil proceedings is not necessarily so in criminal cases. The principles of liability governing civil actions based on negligence differ from those governing criminal liability in two important particulars; firstly, that negligence in a criminal case must be culpable and gross and not the negligence which is merely based upon an error of judgment, or arises because of defect of intelligence; and secondly, that the principle of the avoidance of liability when there is contributory negligence by the injured person is no defence in criminal law.'

10. In both the above mentioned cases reliance is placed largely on English authorities in order to explain the meanings of 'criminal negligence' and 'criminal rashness.' I may state, with great respect, that I find nothing wrong in relying upon English authorities in order to determine the nature of mens rea which could be contemplated by Section 304A, I. P. C., because that section does not specify

what is exactly meant by 'rash or negligent act' In our criminal law. We can surely examine the sources of our codified criminal law when we are in, doubt as to the exact meaning of a particular provision in our code.

11. I am aware of a somewhat different view expressed in *Legal Remembrancer, Bengal v. Ambika Charan Dalai*, ILR (1946) 2 Cal 127 at p. 130 where it was observed:

'But, the English Common Law is not the criminal Law In force in India. Every offence, of which the Indian Courts take cognizance, is clearly defined by statute. The Indian legislature has embodied many of the principles of English Common law modified to suit Indian conditions in the criminal law of India. But, Instead of enacting a general principle such as *nemo est reus nisi mens sit rea*, the Indian legislature has included, in the definition of each offence, a clear statement of the mental condition necessary to constitute the offence. If, in any case, the Indian legislature has omitted to prescribe a particular mental condition, the presumption is that the omission is intentional.'

the Calcutta case dealt with a rule under the Defence of India Act, and I may point out that their Lordships of the Privy Council have held, in the case of *Srinivas Mall v. Emperor*, AIR. 1947 PC 135 at p. 139, that the doctrine of *mens rea* was applicable even to offence under the Defence of India Rules, and they quoted, with approval, a passage from a Judgment of the Lord Chief Justice of England where it was held:

'It is, in my opinion, of the utmost importance for the protection of the liberty of the subject that the Court should always bear in mind that, unless the statute, either clearly or by necessary Implication, rules out *mens rea* as a constituent part of a crime a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind.'

I, therefore, do not find it possible to agree with the view expressed in a comment in *Ratan Lal's Law of Crimes* (20th Ed. at p. 151), that the maxim '*actus non facit reum nisi mens sit rea*' has no application to offences under the Indian Penal Code 'because the definitions of various offences contain expressly a proposition as to

the state of mind of the accused' in our Code, it is true that the Indian Penal Code contains specifications of states of mind, by using terms such as 'voluntarily' or 'knowingly' or 'fraudulently' in its definitions of offences, but this does not mean that one is precluded from invoking the aid of basic doctrines underlying criminal liability in interpreting statutory provisions containing rather broadly defined offences such as the offence under Section 304A, I. P. C. is. If the doctrine of mens rea is, as it no doubt is, elaborately and carefully attempted to be incorporated throughout the provisions of the Indian Penal Code, I do not think that this truth is expressed felicitously at all by saying that 'the doctrine does not apply to offences against the Indian Penal code.'

12. It is, however, one thing to say that we could and should gather, from all permissible sources, the correct meaning of a statutory provision creating an offence, and, it is quite another thing to read into our statutory provisions, to which we must first turn for our definitions of the offences they create, meanings which are not found there but which may be derived from the English Common Law. It is against dangers of this kind that the views expressed in the above-mentioned Calcutta case and in Ratan Lal's Law of Crimes are really directed,

13-14. The danger which I have mentioned above is rather well illustrated by the ingenious arguments put forward on behalf of the applicant in this case by relying upon certain passages cited by Mukerji, J. in Chamman Lal's case, 1953 All LJ 689: (AIR 1954 All 186) (supra), and other similar passages. Very great reliance is placed by M. L. Agrawala, on behalf of the applicant, on the following passage from the judgment of Mukerji, J. in Chamman Lal's case : AIR 1954 All 186 :

'I may here refer to a very instructive judgment of the House of Lords in *Andrews v. Director of Public Prosecutions*, 1937-2 All ER 532. In this case Lord Atkin reviewed several of the earlier cases and delivered the leading opinion of the House. Lord Atkin pointed out that the connotations of 'mens rea' are not helpful in distinguishing between degrees of negligence, nor do the ideas of crimes and punishments in themselves carry a jury much further in deciding whether, in a particular case, the degree of negligence shown is a crime and deserves punishment. According to Lord Atkin,

the principle to be observed is that cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence, Simple lack of care such as will constitute civil liability is not enough, For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established.'

Lord Atkin observed that the most 'appropriate epithet which can be applied to such cases is 'reckless'. He further pointed out that:

'It is difficult to visualise a case of death caused by 'reckless' driving in the connotation of that term in ordinary speech, which would not justify a conviction for manslaughter, but it is probably not all-embracing for 'reckless' suggests an indifference to risk, whereas the accused may have appreciated the risk, and intended to avoid it and yet shown in the means adopted to avoid the risk such a high degree of negligence as would justify a conviction.

In an earlier case Lord Ellenborough had pointed out that to substantiate the charge of manslaughter the prisoner must be found to have been guilty of criminal misconduct arising either from the grossest ignorance or the most criminal inattention. Lord Atkin explained this observation of Lord Ellenborough in these words:

'The word 'criminal' in any attempt to define a crime is perhaps not the most helpful, but it is plain that Lord Ellenborough meant to indicate to the jury a high degree of negligence.' Attention was also drawn by Lord Atkin to a passage in a considered Judgment of Lord Hewart, Lord Chief Justice. The passage to which attention was drawn was this:

'In a criminal Court, on the contrary, the amount and degree of negligence are the determining questions. There must be mens rea.

But, as was pointed out by Lord Atkin, the connotation of mens rea do not always prove helpful in determining the guilt of an accused in a particular case.

It appears to me that before a conviction can be had under Section 304A, Penal code a very high degree of negligence must be found negligence which must

amount to recklessness or utter indifference to consequences and not merely negligence of tort,'

15. I have already quoted, in an earlier part of this judgment, the excellent description of the states of mind which constitute, according to Mukerji, J. the criminality which is contemplated by Section 304A, I. P. C. With great respect, I adopt that statement of the ingredients of mens rea required for the offence of 'rash' or 'negligent' act found in Section 304A, I. P. C. I think that the tests laid down by his Lordship, of what constitutes mens rea, as contemplated by Section 304A, I. P. C., are fully satisfied in the present case against the applicant,

15a. It was the duty of the applicant to stop driving the truck and to have some sleep when he started feeling sleepy, instead of risking his own life and the lives of others with him in the truck and of those who may be using the road on which he was driving at 5 a.m., without a rest since the preceding day. The applicant went on driving the truck with defective brakes in spite of the somnolence with which he was assailed. Sleep does not descend upon and strike an individual suddenly like a thunderbolt. It takes sometime before a drowsy individual is actually so overcome by somnolence as to suddenly lose control, even momentarily, over the vehicle he is driving. The driving of a huge and heavy motor vehicle, such as a truck, is obviously fraught with grave danger and risk to the life and limb of persons in the truck as well as of those using the road on which it is being driven, unless the driver is in a fit state and position to control the truck and the vehicle is free from defects making its control problematical. The applicant hoped, in spite of his drowsiness and the defective brakes, that he would be able to control the truck and avoid an accident. The case against the applicant is, therefore, fully covered by what was laid down in the two cases from which I have quoted passages copiously describing the states of mind which constitute mens rea for the purpose of Section 304A, I. P. C.

16. I have however also quoted the passage specially relied upon by M. L. Agrawala on behalf of the applicant, in order to state the answer to the very vehement and earnest arguments which have been advanced as a result of the last passage quoted above and similar passages in other cases. With very great

respect for the views expressed in those passages, I may point out that, although the concept of degrees of negligence and rashness may be helpful. In explaining, in non-technical simple language, to a jury in England, the concept of criminal negligence as compared with civil negligence, it is not more illuminating for lawyers than the concept of mens rea. The considerations which weighed with Lord Atkin, in laying down how criminal negligence should be explained to a jury, are not the same which could be placed in the fore-front in elucidating the meaning of the term 'rash' or 'negligent' act as used in Section 304A, I. P. C. for lawyers and Courts of law. Whatever may have been said by Lord Atkin, in a different context and in order to indicate how the elusive and undefined contents of the crime of manslaughter may be explained to a jury in England, a sound and reasonable interpretation of the language of Section 304A, I. P. C., is enough for our purposes.

17. Speaking from myself, I find that the concept of 'mens rea,' and the descriptions given, in the two above mentioned cases of this Court, of the states of mind it connotes in Section 304A, I. P. C., are far more helpful than the notion of degrees of negligence which does not carry us far. Indeed, in defining and explaining that degree of negligence or rashness which distinguishes a criminally culpable wrong from a tort, involving a civil liability only, one is almost compelled to say that criminal negligence or rashness is one which requires a particular 'mens rea.' That mens rea has been, as I have already observed, admirably described in Chamman Lal's case, : AIR1954 All186 (supra) and Tika Ram's case AIR 1950 All 300 (supra) in terms more precise and clearer than the words 'grossly', or 'high degree' indicate. Another difficulty I find in reading words such as 'grossly' or 'highly',, before words 'rash' or 'negligent', in Section 304A, I. P. C., is that such qualifying words could easily have been used by the legislature but are not there. Applying a well recognised principle of interpretation, the absence of such qualifying words must be deemed to be intentional. But, applying an equally well recognised principle, we can read the requirements of mens rea into a provision creating a criminal offence and proceed to specify what this means with reference to a particular provision, therefore, prefer to conceive of criminal rashness or negligence in terms of the required mens rea.

18. The doctrine of mens rea is neither unhelpful nor abstruse. It is now an essential part of that doctrine that even offences created or defined by statute must rest on the assumption that a mens rea is contemplated by them, unless the offence is one of those 'statutory offences' which, either by the force of express words of the statute or by a necessary implication, exclude the assumption. The doctrine of mens rea was thus explained by H.M's Commissioners on Criminal Law, in 1843:

'the test of guilt is that of knowledge and consciousness on the part of the malefactor that hurt or damage is likely to result... .from what he does; his criminality consists in the wilfully incurring the risk of causing loss or suffering to others.... The principle of exemption from criminal liability in respect of a hurtful consequence is that of bona tide ignorance of the connexion existing between the mere mechanical act and its consequence.'

This statement of the doctrine appears particularly helpful in a case under Section 304A, I. P. C.

19. In applying this fundamental doctrine of our criminal jurisprudence to an offence defined in a statute, when it is applicable as it is to all offences under the Indian Penal Code, one has to assume that there is a mens rea for the offence, and then to proceed, by scanning the words of the statute, to discover it. One cannot, by resorting to it, alter the statutory definition. It enables us to discover the meaning of the statutory provision and not to travel outside it.

20. Section 304A, I.P.C. was added by an amendment of the original Penal Code in 1870 at a time when Sections 279 and 280, 1. P. C., in which the words 'so rash and negligent as to endanger human life' occur, and Sections 336 and 337 and 338, I.P.C., in which the words 'act so rashly or negligently as to endanger human life' occur, were already there. Although words expressly indicating a test of degree were not used in Section 304A, I. P. C. we can infer, from the words used in Section 304A, I. P. C., that the act must be reasonably capable of resulting in the death, which the perpetrator of the act takes the risk of causing, and also that the mens rea must fall short of that which may make it a culpable homicide. In other words, if a test of degree were to be introduced in judging whether the rash

or negligent act causing death is criminally rash or negligent, one may say that, if it is so rash or negligent as to endanger human life, the test of the degree of rashness or negligence, contemplated by Section 304A, 1. P. C. is satisfied. The offences defined by Sections 270 and 280 and 330 and 337 and 338 could be viewed as minor offences included within Section 304A, I.P.C. Whenever human life could reasonably be said to be endangered by a rash or negligent act, and the risk of death is not too remote a consequence of it, and death is actually caused by such an act, an offence under Section 304A, I. p. c. is committed.

21. I may point out that there is nothing in English Law which is the equivalent of our Section 304A of the 1. P. c. creating a separate offence of causing death inadvertently by a rash or negligent act. However, deaths were caused by such acts with increasing frequency in England, and were often dealt with and punished as manslaughter which, being a felony, involved drastic consequences. Hence, in Andrew's case, 1937-2 All ER 552 (supra), the House of Lords considered the offence of 'dangerous driving,' as contemplated by Section 11 of the Road Traffic Act, 1930, and held that a direction to the jury, in terms of what was 'dangerous driving' only under Section 11 of the Road. Traffic Act, 1930, was a mis-direction in a case of alleged manslaughter which is a more serious matter.

22. A consideration which weighed with Lord Atkin, in using the language he used in distinguishing the offence of manslaughter from a civil wrong, resulting in death, was stated as follows in Andrew's case, 1937-2 All ER 552 (supra):

'Expressions will be found which indicate that to cause death by any lack of due care will amount to manslaughter, but as manners softened and the Law became more humane, a narrower criterion, appeared. After all, manslaughter is a felony, and was capital, and men shrank from attaching the serious consequence of a conviction for felony to results produced by mere inadvertence. The stricter view became apparent in prosecutions of medical men or men who professed medical or surgical skill for manslaughter by reason of negligence.'

23. Passages from Andrew's case, 1937-2 All-ER 552 (supra) intended for explaining the modern view of manslaughter in England, are not in my opinion, wholly applicable to the offence defined by Section 304A, I. P. C. The mens rea

which is enough for 'dangerous driving' in England could very well suffice for an offence under Section 304A, I. p. C. which would be committed if death actually resulted as a proximate consequence of the 'dangerous driving'. The fact that an offence under Section 304A. may even be punished with a fine only, the amount of which is left to the Court to determine, also indicates that a lower degree of rashness or negligence that required for manslaughter could be enough for it. Degree of rashness or negligence covered by Section 304A, I. R. may range from that in an offence punishable by a fine only to that in an offence for which the proper punishment may be two years' rigorous imprisonment and a fine. The extent to which areas covered by tortious civil liability and criminal offences, defined by the Indian Penal Code, overlap in this country is much greater than is the case with civil and criminal liability in England. This would be evident to anyone who has even a nodding acquaintance with the English Common Law.

24. It was also argued by Mr. Agarwala that a conviction under Section 279, 1. P. C. is not justified when the applicant has been convicted under Section 304A, I. P. c. which includes the lesser offence. This argument, although correct, does not appear to me to be sufficient to justify the admission of this revision application inasmuch as the sentence of six months' Rule 1. under Section 279, I. P. c. has been made concurrent with that under Section 304A, I. P. C. The applicant will not benefit in any way if his sentence under Section 279, I.P.C. is set aside. His conviction under Section 279, I. P. C. was redundant which caused, no injustice.

25. Lastly, it has been argued that the sentence of six months' Rule I errs on the side of severity. I am unable to accept this contention in a case in which, the applicant was certainly guilty of gross negligence and rashness which caused the death of one individual and which may have resulted in even more tragic consequences. I, therefore, dismiss this revision application.

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