

Raghunath Behera Vs. State

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Court : Orissa

Decided On : Feb-14-1968

Reported in : 34(1968)CLT500; 1968CriLJ851

Judge : A. Misra, J.

Appellant : Raghunath Behera

Respondent : State

Judgement :

ORDER

A. Misra, J.

1. Petitioner has been convicted under Sections 279 and 304. A Indian Penal Code and sentenced to undergo S.I. for four months under Section 304, while no separate sentence has been awarded for the offence under Section 279, Indian Penal Code.

2. The facts which are not now in dispute may be briefly set out as follows. The tractor bearing O.R.C. 5178 along with another tractor each attached with trailer were taken on hire from D.W. 1 who is in charge of the tractorisation scheme operating in the districts of Kalahandi, Bolangir and Sundergarh for carrying some building and other materials from Bhavanipatna to Koralapat. On 26.3.1964, the two tractors With the attached trailers loaded with materials left Bhawanipatna to

Korlapat. Petitioner was driving the tractor O.R.C. 5178. At about 10.300 a.m. on that day, while the tractor O.R.C. 5178 being driven by petitioner was negotiating the upgradient of the Malkatch ghat dragging the load in the trailer attached behind, the engine suddenly stopped and abruptly the tractor moved backwards due to the down-gradient. The hitch assembly of the trailer broke at a point which had been previously welded, resulting in the trailer being detached from the tractor. It fell into a ditch nearby. One police S.I. named Bhimsen Patnaik and four labourers were seated on the trailer. Three of the labourers jumped from the trailer, while it rolled down, out of whom, two sustained minor injuries. The trailer overturned and capsized in the ditch, as a result of which, the S.I. and the other labourers Bhubah Gouda died. P.I.R. was lodged at the Police station at 12 noon. Ultimately, the Circle Inspector of Police (PW. 10) visited the spot the same day and during investigation, found that the hitch assembly drawbar had previously broken and welded and there were no marks on the spot to show that the driver put the brake immediately when the engine stopped to prevent the vehicle rolling backwards. The M.V.I. (P.W. 11) who examined the vehicle found no mechanical disorder and pointed that due to careless driving and defective hitch assembly of the tractor the accident occurred. The defence plea is that when the engine stopped while negotiating the up. gradient, petitioner applied the brake, but in spite of it, the vehicle rolled backwards, As the trailer also rolled backwards, it twisted the hitch assembly which was broken. Consequently, the trailer rolled into the ditch and capsized resulting in the death of the two persons. He denies that the accident was due to any rashness or negligence on his part. The courts below did not accept the plea of the accused and on the afore, mentioned facts proved by the prosecution, petitioner was convicted under Sections 304A and 279 Indian Penal Code and sentenced, as stated above.

3. The trial court on the evidence came to the conclusion that the accused was negligent in driving the tractor dragging the fully loaded trailer which resulted in the accident and consequent loss of two lives. The reasons given by the trial court for coming to the aforesaid conclusion are firstly, that the drawbar of the hitch assembly was defective since it had been welded and the accused being an employee of the department from which the vehicle had been hired, it will not be open to him to say that he had no knowledge beforehand that it had been so

welded. In other words, he must be deemed to have knowledge of this weak joint in the assembly; secondly, the ghat road was a steep incline and it was not safe to take a 3 ton load by a 30 H.P. Ferguson tractor up that incline; thirdly, as deposed to by P. W. 11, petitioner ought to have tried to take only the tractor to see if it could pull up the ghat, then unloaded the trailer, pulled up the empty trailer to the top, carried the material by man power and loaded it there; fourthly, petitioner failed to apply the brakes when the engine stopped to control the rapid downward motion which the vehicle took and he failed to caution the occupants of the trailer by shouting out and thereby given a chance to them to try their wit to save their lives and lastly, when the ghat was so dangerously steep, petitioner should not have allowed the deceased and other persons to sit on the trailer when he tried to negotiate the incline as the trailer is not meant for transport of passengers.

The Lower Appellate Court, in Para. 6 of its judgment has referred to the opinion of P.W. 11 that the accident was due to careless driving and defective hitch assembly of the tractor, the evidence of P.Ws. 10 and 11 that they found the hitch assembly to have been previously broken and welded and failure of P.W. 10 to find any skid marks on the spot indicating that petitioner failed to apply the brakes which were subsequently found to be in proper order and get the tractor to a standstill position and observed that this is not a case of error of judgment, but callousness on the part of the driver. With these observations, it has come to the conclusion that due to negligent driving and utter disregard of the safety of the occupants of the trailer, the unfortunate incident took place.

4. It is to be observed that the learned Sessions Judge does not appear to have applied his mind or weighed the evidence to determine whether the prosecution has established the requisite ingredients to sustain a conviction of the accused under Sections 279 and 304A Penal Code. To constitute an offence under Section 279, Penal Code, the points to be established are that the accused was driving the vehicle on a public way and that he was driving in a rash or negligent manner. Similarly, to constitute an offence under Section 304A the prosecution has to establish that the act of the accused was responsible for resulting in death and such act of the accused was rash or negligent although it does not amount to culpable homicide.

5. To constitute either of these offences, proof of rashness or negligence is essential. The only distinguishing feature is that in Section 279, the rash and negligent act made punishable relates to the manner of driving or riding on a public way, while the offence under Section 304A extends to any rash or negligent act falling short of culpable homicide. In the present case, it is neither the prosecution case nor is it the finding of the Courts below that the manner of driving by the petitioner was rash. The finding, on the other hand, is that the act of petitioner was negligent. 'Negligence' means breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate conduct of human affairs would do or the doing of something which a prudent and reasonable man would not do. The question for consideration is whether the facts found against the petitioner amount to criminal negligence which would constitute an offence under either of these sections. There is no evidence or suggestion that the petitioner was driving the tractor in question 'in a rash manner or in a negligent manner which resulted in the accident. All that the prosecution has sought to establish and the Courts below have found is, as stated above, that the his assembly joint was weak on account of its having been welded earlier; that petitioner should not have negotiated the ghat gradient with a loaded trailer attached to it; that he should not have allowed the deceased persons to sit on the trailer which was intended to carry goods and not passengers; that when the engine stopped, he should have shouted out a warning and that he failed to apply the brakes which if he had done would not have caused the tractor and attached trailer to roll back. In the decision reported in : [1965]2SCR622 , *Kurban Hussein Mohd. Bangawalla v. State of Maharashtra*, the interpretation of Section 304A, Penal Code came up for consideration. The observations of Sir Lawrence Jenkins in 4 Bom LR 679 to the effect:

To impose original liability under Section 304A, Penal Code, it is necessary that the death should have been the direct result of a rash or negligent act of the accused, and that act must be the proximate and efficient cause without the 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*

were quoted with approval and it was held that in order that a person may be guilty under Section 304A, the rash or negligent act should be the direct or proximate cause of the death. The prosecution evidence and the conclusions of the Courts below fall far short of proof of commission of an offence under either of the sections. The fact that the hitch assembly joint of the trailer had been welded on a previous occasion and thereby left a weak point was not an act of the petitioner. D.W. 1 from whom the tractors had been hired has deposed that before entrusting the vehicle to the petitioner for carrying out the assignment, the mechanics of their organisation had certified about the fitness of the machines and the trailers. It was not the duty of petitioner who was only a driver to attend to these things as separate qualified employees had been kept in the organisation for that purpose. He had also stated that he was present at headquarters when the mechanic tested the machines of the tractor and passed the tractors and trailers as sound. Therefore, if the accident was due to any weak point in the hitch assembly of the trailer, no negligence can be attributed to petitioner and negligence, if any, was of the mechanic, who certified about the soundness or of the Head of the organisation who hired it in that condition. It has not also been suggested that it was any part of the petitioner to examine every bit of the machine or the trailer to satisfy himself about the soundness before taking the vehicle out.

6. The second act of negligence is said to be that petitioner should have detached the trailer, negotiated the tractor over the ghat, then got the unloaded trailer pulled, up, carried the materials by human labour to the top of the ghat and got them reloaded. Again, D.W. 1 has deposed that the dragging capacity of the tractor was 3 ton load on all roads and that it was not necessary for petitioner to unload and then adopt the procedure indicated above. As a matter of fact it is admitted case that two tractors with trailers attached were hired, both were loaded at Bhawanipatna and proceeded on the road to Kiralapat one following the other at a very short distance. The other tractor with the load in the trailer which was of equal capacity and pulling power negotiated the road up the gradient and reached the top. That being so it cannot be expected that there was negligence on the part of petitioner in not adopting the procedure suggested by unloading, dragging the empty trailer, carrying the load by human labour to the top and reloading them. When the tractor had been certified to have the power to pull up such a load even

on ghat roads, it will be difficult to say that there was any negligence on the part of petitioner in negotiating the road with the load. This also cannot be considered an act of negligence on his part.

7. Coming to the third alleged act of negligence, it is suggested that petitioner should not have allowed the deceased persons and others to sit on the trailer which was intended only for carriage of goods. The evidence of P. Ws. 1, 3 and 5 who were going in that vehicle and were present on the spot show that the deceased Sub-Inspector who was sitting in the tractor, himself voluntarily got up and went to the trailer after he had proceeded some distance. It is not the evidence that petitioner asked or permitted him to sit on the trailer. Even assuming that petitioner permitted the deceased and others to sit on the trailer which is not intended for carrying passengers, the petitioner's action may at the worst amount to violation of motor vehicle rules, but it cannot amount to a negligent act on his part which was the direct or proximate cause of the accident which ultimately resulted in the tragedy.

8. The last act of alleged negligence is that petitioner did not put the brake when the engine stopped while negotiating the upgradient, and it is stated that if he had done so, the vehicle or the trailer would not have rolled backward putting strain on the hitch assembly causing it to break from the trailer. Petitioner's case is that he put the brake but due to the gradient and the load behind, the rolling downwards could not be controlled. That he applied the brake is evident from the evidence of the P. Wd. P.W. 1 has stated that when the tractor climbed some distance and suddenly stopped, petitioner applied the brake and again released it D.W. 1 who is an expert has deposed that if brakes are applied to a tractor when it is moving backwards down the slope, the wheels may stop moving, but the momentum will pull the tractor down the slope. P.W. 11 was asked whether when a vehicle is rolling down and brake is applied, the entire force will be on the hitch assembly. He answered in the affirmative. In view of these statements, the plea of petitioner that he applied the brake when the engine stopped, but in spite of it, there was some rolling downwards cannot be outright rejected. The Courts below have laid emphasis on the fact that P.W. 10, who visited the spot sometime after the incident, did not find any skid marks which would have appeared, if in spite of the

brake the vehicle moved backwards. Of course, in such circumstances, when the brake is applied, the movements of the wheels will be checked and there will be skid marks, though not for any appreciable distance. Even, apart from it, P.W. 11 in his cross-examination concedes that skid marks will fade away or erase out, if those impressions are not protected or preserved. He also admits that the skid marks will fade away sooner on a rough road. The road on which the accident occurred was a rough road and the failure of P.W. 10 in finding skid marks when he visited the spot after some hours cannot reasonably lead to a positive conclusion that petitioner did not apply the brake when the engine stopped, and therefore, there was negligence on his part.

9. Thus, none of the circumstances relied upon by the Courts below prove that there was any negligence on the part of petitioner which was the direct or proximate cause of the accident which resulted in the death of the two persons. The learned Standing Counsel appearing for the State stated before me that apart from the aforesaid circumstances, he cannot point out any other circumstance which will show any negligence on the part of petitioner. Considering all these circumstances, I disagree with the Courts below that there was any negligence on the part of petitioner, and therefore, the conviction either under Section 279 or 304A, Penal Code, cannot be sustained.

10. In the result, the revision petition is allowed, the convictions and sentence are set aside and the petitioner is directed to be set at liberty forthwith.