

In Re: Kothandam

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Court : Chennai

Decided On : Jan-13-1972

Reported in : (1972)1MLJ408

Appellant : In Re: Kothandam

Judgement :

S. Maharajan, J.

1. This is an appeal against the Judgment of the learned Chief Presidency Magistrate, Madras, convicting the appellant of the offences under Section 304-A of the Indian Penal Code, and Sections 116 and 121 of the Motor Vehicles Act, and sentencing him to undergo rigorous imprisonment for 9 months under the first count and two months on the third count, the sentences to run concurrently, without awarding any separate sentence in respect of the second count. The appellant is the driver of the lorry MDY 4244. At about 5-55 P.M., on nth August, 1969, he was driving the lorry in a northerly direction along Mount Road. P.W. 4 the Traffic Constable who was standing at the pedestrian crossing at Thousand Lights, gave the stop signal for the vehicles coming from the north as well as from the south. It appears that there used to be two constables on duty at that crossing. But one of them had not turned up that day with the result that P.W. 4 had to regulate the entire traffic coming from the south as well as from the north. He gave No. 3 signal by lifting up the right hand and giving stop signal and by extending the left hand parallel to the shoulder to indicate that the pedestrians could cross Mount

Road at that stage. We do not know what was the distance between the lorry driven by the appellant and the Traffic Constable when he gave the No. 3 signal. According to the driver (the appellant), the signal of the Constable Was given suddenly.; As soon as the signal was given, the ; vehicles coming both from the north and t from the south came to a stop and the pedestrians and cyclists started crossing the road along the pedestrian crossing. But unfortunately, the appellant, who was driving MDY 4244 and who applied the foot-brake found that the foot-brake did not act. The Traffic Constable himself appears to have felt that the vehicle had gone out of control. He therefore raised a warning cry to the pedestrians and himself moved eastwards from his point of duty. At that stage, the lorry ran past the constable and knocked down, Jayaraman, who Was walking in a westerly direction along the pedestrian crossing pushing his cycle. The lorry ran over Jayaraman and stopped about 50 feet beyond him. Jayaraman died on the spot. The accused, who pleaded not guilty, said when he was questioned by the Court:

I applied the brakes but the brakes failed suddenly...Despite the stop signal given by the constable at the last moment I tried to stop the lorry. But due to sudden brake failure the lorry did not stop. I was coming only at slow speed. I at once put the lorry into low gear, took it to one side of the road and stopped it. I had to do so to avoid hitting lot of people. I did not notice the lorry hitting Jayaraman since I was changing gears, switching off the engine etc...

The foot-brake of the lorry was in good condition the whole of that day. The brake failed suddenly just near the pedestrian crossing. I do not know how that happened...I did not come driving the lorry rashly or negligently. The brake failure occurred suddenly. If I had not taken the lorry to a side, more people would have been hit by the lorry.

2. P.W. 3. the Motor Vehicles Inspector, who examined the lorry at 12-40 P.M., on 12th August, 1969,the very next day, said:

I found the brake oil to be leaking in the front right wheel. To find out the cause, I put the lorry on a jack and removed the right front wheel. The rubber cup in the wheel cylinder was torn and pushed up with the wheel cylinder piston cup in the

front side and the brake shoe was pushed forward and it was in an expanded condition. The oil was leaking in the rubber cup of the cylinder. Due to the leakage of oil, the foot-brake was not having any efficiency...

On account of the leakage of the brake oil the foot-brake was not acting. It is possible that the rubber cup got torn suddenly and unanticipatedly.

3. The learned Chief Presidency Magistrate rejected the plea of the accused and held him guilty upon the following reasoning:

The accused tries to take shelter under the plea that there was sudden failure of brake and therefore he could not bring the lorry to a halt before the pedestrian crossing. In support of this version, reliance is placed upon the findings of P.W. 3 and his evidence. It is no doubt true that P.W. 3 found the brake oil to be leaking in the front right wheel and found on further examination, the rubber cup in the wheel cylinder to have been torn and pushed up. It has also been elicited from P.W. 3 in cross-examination, that the rubber cup would have got torn suddenly and unexpectedly. Despite these factors, I am not prepared to accept the accused's story that the foot-brake of the lorry failed suddenly when he came near the pedestrian crossing. The accused was driving his lorry along a broad and smooth road in Mount Road. There is no possibility of anything in the road having hit the rubber cup and causing damages to it. If really, there had been sudden failure of brakes, the accused would have showed his desperateness by sounding the horn or applying the hand brake etc. No such thing had been done by the accused. The only inference that can be drawn therefore is, that all along the accused must have been coming with defective brakes and driving in the hope that he can take the lorry to its destination without any mishap. It is in such a culpable and reckless frame of mind, the accused must have come driving the lorry. Therefore the evidence of P.Ws. 2 and 4 and the other circumstances of the case unmistakeably go to show that the accident must have happened only due to the rash and negligent driving of the lorry by the accused.

4. Learned Counsel for the appellant attacks the above finding on the ground that it is based entirely upon conjecture and upon a disregard of the burden of proof which rests in such cases upon the prosecution. As has been held in Matarajan

alias Natesan, In re. (1966) 1 M.L.J. 328 : (1966) M.L.J. (Cri.) 279 : A.I.R. 1966 Mad. 357.

Section 304-A of the Indian Penal Code, is no exception to the general principle of criminal jurisprudence that in regard to offences under the code apart from special statutes which may embody special presumptions, the innocence of a person is to be assumed till the guilt is established. There is no presumption that a person should have driven a motor vehicle in a rash and negligent manner merely because there was an accident. There could be no general presumption that the fact that a car leaves the road is evidence of rash and negligent driving. Whether a person is guilty of rash and negligent driving or not is a question of fact.

5. The evidence of P.W. 3, who is an expert, makes it clear that the lorry was suffering from a grave mechanical deficiency. If, as P.W. 3 says, the rubber cup was torn suddenly and unexpectedly immediately before the lorry crossed the pedestrian crossing, the question would arise whether the driver of the lorry could be held guilty of rash and negligent driving. It has been held in *R. v. Spurge* (1961) All. E.R. 688.

It is a defence to a charge of dangerous driving and to a charge of careless driving that the driver without fault of his own, was deprived of control of the motor vehicle by a mechanical defect therein of which he did not know and which was not such as he should have discovered if he had exercised reasonable prudence; the burden of proof of the defence is not on the accused, though it is for him to put forward the defence.

6. In this case the accused put forward the defence and it is for the prosecution to prove that the mechanical defect as a result of which the foot-brake failed was such as the appellant should have discovered if he had exercised reasonable prudence. The prosecution has not adduced any evidence to show that at any time prior to the accident, the lorry had been checked and found to be mechanically defective. Nor is there any independent evidence to show that at the time, the appellant started on his journey, he had reason to suspect that the foot-brake had become defective. The evidence shows that the lorry was loaded with cement bags. It appears that the lorry was loaded with the bags at the Housing Board in

Nandanam Colony and was proceeding to Ennore along Mount Road. Before coming to the Thousand Lights pedestrian crossing, the driver must have crossed about half a dozen road intersections including the Gemini junction. If the driver had known while crossing these road intersections that the foot-brake was not effective, he would certainly have stopped the lorry at any of these intersections before proceeding on the onward journey, knowing that it would be dangerous and foolhardy to cross the numerous other inter; Sections that lay ahead of him on his way to Ennore. The inference of the learned Chief Presidency Magistrate that the accused must have known about the defective brake and must have been driving in the hope that he could take the lorry to its destination without any mishap seem to be an extravagant inference unsupported by the normal course of human conduct or by any affirmative evidence on record. The learned Chief Presidency Magistrate seems to re-inforce his inference by the failure of the accused to sound the horn or to apply the hand brake. The psychological basis of this inference appears to me to be too slender. According to the driver, he did his best in the circumstances by changing the gear and taking the lorry to the left side of the road and thereby minimising the danger that would arise to the pedestrians as a result of the vehicle that had gone out of control suddenly. Further, the burden of proof is not upon the accused in the circumstances of the case. In fact the admissions of P.W. 3 would go far to discharge such a burden, even if it were to be thrown upon the accused. As Lord Goddard, G.J., said in *Simpson v. Peat* (1952) 1 All. E.R. 447.

It is by no means impossible, and, indeed, it mast on occasions happen that a situation of danger arises in which a motorist is involved, but it cannot be said that he caused it by driving dangerously...Whether the charge is under Section 11(1) or 12(1), the offence can be committed although no accident takes place. Equally, because an aecident does occur it does not follow that a particular person has driven either dangerously or without due care and attention. Bat if he has, it matters not why he did so. Suppose a driver is confronted with a sudden emergency through no fault of his own. In an endeavour to avert a collision he swerves to his right it is shown that had he swerved to the left, the accident would not have happened. That is being wise after the event, and, if the driver Was, in fact, exercising the degree of care and attention which a reasonably prudent driver

would exercise, he ought not to be convicted, even though another, and, perhaps, more highly skilled driver would have acted differently.

7. In this case, I am not satisfied that the accident, however tragic it might be, has been the result of any rashness or negligence on the part of the driver of the lorry. The accident was the result of an unforeseen and sudden failure of the foot-brake. The learned Chief Presidency Magistrate erred in thinking that the rubber cup could not get damaged except as a result of an external object like a stone on the road having hit it, and the Mount Road being a smooth road without stones, the defence plea should be rejected as inherently incredible. The foot-brake can fail for internal reasons even on the most perfect and smoothest of roads. The rubber cup might have got torn due to wear and tear, a circumstances which would be normally beyond the control of the driver of the vehicle.

8. I, therefore, allow the appeal, set aside the convictions and sentences inflicted upon the appellant, acquit him of all the offences of which he was convicted and direct his bail bond to be cancelled.