

S.K.S.

Appeal allowed. A

KULDEEP SINGH

v.

STATE OF HIMACHAL PRADESH
(Criminal Appeal No.1106 of 2008)

JULY 16, 2008 B

[DR. ARIJIT PASAYAT AND HARJIT SINGH BEDI, JJ.]

Penal Code, 1860:

ss. 304A, 279, 337 and 338 – Truck carrying marriage party met with accident – Allegation that the driver was drunk and lost control and the truck rolled down in the fields – Causing death of four persons, simple injuries to 18 persons and grievous injuries to 8 persons – Trial Court acquitted the accused-driver holding that there was no rash or negligent driving as claimed by the prosecution – However, High Court convicted the accused on basis of evidence of three eye witnesses after holding that rash and negligent driving was established – On appeal, held: Evidence of the three witnesses clearly shows that more than 50 persons were there in the truck and the accused was driving the same at a very high speed – Conviction justified. C D E

s.304A – Applicability of – Discussed.

Words and Phrases – ‘Negligence’ and ‘reckless’ – Meaning of. F

According to the prosecution case, on the fateful day, Appellant was driving a truck carrying a marriage party of around 50 persons. It is alleged that he was drunk and lost control and as a result the truck went off the road and rolled down in the fields leading to death of four persons, simple injuries to 18 persons and grievous injuries to 8 persons. PW-1-constable was an eye witness while PW-3 was an occupant of the truck and father of the bridegroom whose marriage party was travelling. The Trial G H

A Court held that there was no rash or negligent driving as claimed by the prosecution and acquitted the accused-Appellant. On appeal, the High Court, relying upon the evidence of PWs 1, 3 and 4 held that the rash and negligent driving was established and convicted and sentenced the Appellant u/ss.279, 337, 338 and 304A IPC. Hence the present appeal.

Dismissing the appeal, the Court

C HELD:1.1. S.304-A IPC applies to cases where there is no intention to cause death and no knowledge that the act done, in all probabilities, will cause death. This provision is directed at offences outside the range of ss. 299 and 300 IPC. S.304-A applies only to such acts which are rash and negligent and are directly the cause of death of another person. Negligence and rashness are essential elements under s.304-A. [Para 7] [1068-B,C]

D 1.2. S.304-A carves out a specific offence where death is caused by doing a rash or negligent act and that act does not amount to culpable homicide under s.299 or murder under s.300. If a person willfully drives a motor vehicle into the midst of a crowd and thereby causes death to some person, it will not be a case of mere rash and negligent driving and the act will amount to culpable homicide. Doing an act with the intent to kill a person or knowledge that doing an act was likely to cause a person's death is culpable homicide. When the intent or knowledge is the direct motivating force of the act, s.304-A has to make room for the graver and more serious charge of culpable homicide. The provision of this section is not limited to rash or negligent driving. Any rash or negligent act whereby death of any person is caused becomes punishable. Two elements either of which or both of which may be proved to establish the guilt of an accused are rashness/negligence, a person may cause death by a rash or negligent act which may have nothing to do with driv-

ing at all. Negligence and rashness to be punishable in terms of s.304-A must be attributable to a state of mind wherein the criminality arises because of no error in judgment but of a deliberation in the mind risking the crime as well as the life of the person who may lose his life as a result of the crime. S.304-A discloses that criminality may be that apart from any *mens rea*, there may be no motive or intention still a person may venture or practice such rashness or negligence which may cause the death of other. The death so caused is not the determining factor. [Para 8] [1068-E,F,G,H 1069-A]

1.3. In the present case, the evidence of PWs 1, 3 & 4 clearly show that the vehicle was being driven at a very high speed. Evidence on record show that more than 50 persons were there in the truck and the appellant was driving the same at a very high speed. One of the witnesses has stated that the truck was being driven as if it was an aeroplane. Therefore, the conviction as recorded cannot be faulted. [Para 17] [1073-E,F]

Naresh Giri v. State of M.P. (2008) 1 SCC 791; Syed Akbar v. State of Karnataka, (1980) 1 SCC 30 and Dalbir Singh v. State of Haryana, 2000 (5) SCC 82 – referred to.

Director of Public Prosecutions v. Camplin (1978) 2 All ER 168; Andrews v. Director of Public Prosecutions (1937) (2) All ER 552; R. v. Briggs (1977) 1 All ER 475 and R. v. Caldwell (1981) 1 All ER 961; R v. Lawrence (1981) 1 All ER 974- referred to.

Halsbury's Laws of England (4th Edition) Volume 34; Kenny's Outlines of Criminal Law, 19th Edition (1966), p.38; Restatement of the law of Torts published by the American Law Institute (1934) Vol. I, Section 28 and Law of Torts by Fleming, p.124 (Australian Publication 1957) – referred to.

A From the final Judgment dated 17.9.2007 and Order of sentence dated 18.9.2007 of the High Court of Himachal Pradesh at Shimla in CrI. Appeal No. 128/2000

Arun K. Sinha and Vikram Kapoor for the Appellant.

B Naresh K. Sharma for the Respondent.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Leave granted.

C 2. Appellant faced trial for offences punishable under Sections 279, 337, 338 and 304(A) of the Indian Penal Code, 1860 (in short the 'IPC') and Section 185 of the Motor Vehicles Act, 1988 (in short the 'MV Act'). The appellant was acquitted by learned Judicial Magistrate, Hamirpur. State of Himachal Pradesh preferred an appeal before the Himachal Pradesh High Court which by the impugned judgment set aside the judgment of acquittal passed by the trial court and directed conviction of the respondent for offences punishable under Sections 279, 337, 338 and 304(A) IPC and imposed various sentences, which were directed to run concurrently. The maximum sentence imposed was one year.

E 3. Background facts in a nutshell are as follows:

On 15.4.1993 the accused-appellant was the driver of the truck HIU-3837. The said truck was carrying a marriage party. When it reached near village Kacherha, on the public way, at about 11 AM, he lost its control, consequently it went off the road, rolled down in the field, leaving Pratap Singh @ Pinku, Kuldeep Singh @ Jogi, dead on the spot and Kamal Kishore and Manohar Lal injured persons died in the hospital at Bhoranj later, due to accidental injuries, whereas, out of about fifty other members of the marriage-party, who were the occupants of the said truck, Harish Kumar, Amin Chand, Rajesh Kumar, Rattan Chand, Desh Raj, Tej Ram, Rakesh Kumar, Hem Chand, Surjit Singh, Mahant Ram, Prakash Chand, Pawan Kumar, Shambhu Rani, Paras Ram, Ranbir Singh, Prem Chand, Prakash Chand and

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Sanjay, sustained simple injuries, whereas, Anil Kumar, Joginder, Suresh Kumar, another Joginder Singh, Ishwar Dass, Nand Lal, Lekh Ram and Lekh Raj sustained grievous injuries. The appellant was allegedly drunk. He and the cleaner of the truck had absconded. The case was registered. A

The police took the photographs of the spot, prepared the site plan, truck was mechanically examined, the postmortem reports and the MLCs of the injured were taken into possession and after recording the statements of the witnesses, the challan was presented in the Court, for the trial against the respondent. B C

The charges were framed and put to the appellant, to which he pleaded not guilty and claimed trial.

Nathu Ram (PW 1) is a constable, who was on his duty to execute the processes. He is an eye witness of the said accident. Rup Lal (PW3) was an occupant and the father of bridegroom Kuldeep Singh (deceased), whose marriage-party was traveling in the said truck. PW2 Dile Ram (injured), PW4 Rattan Lal, PW5 Rattan Chand (injured) son of Saig Ram, PW6 Surjit Singh, PW 13 Rakesh Kumar, PW8 Lekh Ram, PW 10 Rattan Chand (injured), PW16 Rakesh Kumar (injured) and PW 18 Sagar Singh were occupants of the truck, but they broadly did not support the case of the prosecution, as alleged. However, he admitted the accident. D E

4. The trial court came to the conclusion that there was no rash or negligent driving as claimed by the prosecution. In appeal, the High Court relied on the evidence of the witnesses particularly PWs. 1, 3 & 4 and recorded that rash and negligent driving is clearly established. Accordingly State's appeal was allowed and conviction was recorded and sentences imposed. F G

5. Learned counsel for the appellant submitted that the accident took place not because of negligence but because the appellant tried to save the lives of children who were playing on the road and therefore, the truck climbed on the stones by H

A the side of the road and its rod was broken. It was also submitted that the appellant has already suffered custody of more than nine months and, therefore, the sentence should be restricted to the period already undergone.

B 6. Learned counsel for the State on the other hand submitted that rash and negligent driving has resulted in the death of four persons and several others were seriously injured.

C 7. Section 304-A IPC applies to cases where there is no intention to cause death and no knowledge that the act done, in all probabilities, will cause death. This provision is directed at offences outside the range of Sections 299 and 300 IPC. Section 304-A applies only to such acts which are rash and negligent and are directly the cause of death of another person. Negligence and rashness are essential elements under Section 304-A.

D 8. Section 304-A carves out a specific offence where death is caused by doing a rash or negligent act and that act does not amount to culpable homicide under Section 299 or murder under Section 300. If a person willfully drives a motor vehicle into the midst of a crowd and thereby causes death to some person, it will not be a case of mere rash and negligent driving and the act will amount to culpable homicide. Doing an act with the intent to kill a person or knowledge that doing an act was likely to cause a person's death is culpable homicide. When the intent or knowledge is the direct motivating force of the act, Section 304-A has to make room for the graver and more serious charge of culpable homicide. The provision of this section is not limited to rash or negligent driving. Any rash or negligent act whereby death of any person is caused becomes punishable. Two elements either of which or both of which may be proved to establish the guilt of an accused are rashness/negligence, a person may cause death by a rash or negligent act which may have nothing to do with driving at all. Negligence and rashness to be punishable in terms of Section 304-A must be attributable to a state of mind wherein the criminality arises because of no

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error in judgment but of a deliberation in the mind risking the crime as well as the life of the person who may lose his life as a result of the crime. Section 304-A discloses that criminality may be that apart from any *mens rea*, there may be no motive or intention still a person may venture or practice such rashness or negligence which may cause the death of other. The death so caused is not the determining factor.

9. What constitutes negligence has been analysed in Halsbury's Laws of England (4th Edition) Volume 34 paragraph 1 (para 3) as follows:

"Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence, where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen to be likely to cause physical injury to persons or property. The degree of care required in the particular case depends on the surrounding circumstances, and may vary according to the amount of the risk to be encountered and to the magnitude of the prospective injury. The duty of care is owed only to those persons who are in the area of foreseeable danger, the fact that the act of the defendant violated his duty of care to a third person does not enable the plaintiff who is also injured by the same act to claim unless he is also within the area of foreseeable danger. The same act or omission may accordingly in some circumstances involve liability as being negligent although in other circumstances it will not do so. The material considerations are the absence of care which is on the part of the defendant owed to the plaintiff in the circumstances of the case and damage

A suffered by the plaintiff, together with a demonstrable relation of cause and effect between the two”.

10. In this context the following passage from *Kenny's Outlines of Criminal Law, 19th Edition (1966)* at page 38 may be usefully noted :

B “Yet a man may bring about an event without having
adverted to it at all, he may not have foreseen that his
actions would have this consequence and it will come to
him as a surprise. The event may be harmless or harmful,
C if harmful, the question rises whether there is legal liability
for it. In tort, (at common law) this is decided by considering
whether or not a reasonable man in the same
circumstances would have realised the prospect of harm
and would have stopped or changed his course so as to
D avoid it. If a reasonable man would not, then there is no
liability and the harm must lie where it falls. But if the
reasonable man would have avoided the harm then there
is liability and the perpetrator of the harm is said to be
guilty of negligence. The word ‘negligence’ denotes, and
E should be used only to denote, such blameworthy
inadvertence, and the man who through his negligence
has brought harm upon another is under a legal obligation
to make reparation for it to the victim of the injury who may
sue him in tort for damages. But it should now be
F recognized that at common law there is no criminal liability
for harm thus caused by inadvertence. This has been laid
down authoritatively for manslaughter again and again.
There are only two states of mind which constitute *mens
rea* and they are *intention* and *recklessness*. The difference
G between recklessness and negligence is the difference
between advertence and inadvertence they are opposed
and it is a logical fallacy to suggest that recklessness is
a degree of negligence The common habit of lawyers to
qualify the word “negligence” with some moral epithet such
as wicked’ `gross’ or `culpable’ has been most unfortunate
H since it has inevitably led to great confusion of thought

and of principle. It is equally misleading to speak of criminal negligence since this is merely to use an expression in order to explain itself.”

11. “Negligence”, says the *Restatement of the law of Torts published by the American Law Institute (1934) Vol. I. Section 28* “is conduct which falls below the standard established for the protection of others against unreasonable risk of harm”. It is stated in *Law of Torts by Fleming at page 124 (Australian Publication 1957)* that this standard of conduct is ordinarily measured by what the reasonable man of ordinary prudence would do under the circumstances. In *Director of Public Prosecutions v. Camplin (1978) 2 All ER 168* it was observed by Lord Diplock that “the reasonable man” was comparatively late arrival in the laws of provocation. As the law of negligence emerged in the first half of the 19th century it became the anthropomorphic embodiment of the standard of care required by law. In order to objectify the law’s abstractions like “care” “reasonableness” or “foreseeability” the man of ordinary prudence was invented as a model of the standard of conduct to which all men are required to conform.

12. In *Syed Akbar v. State of Kamataka, (1980) 1 SCC 30*, it was held that “where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment. As pointed out by Lord Atkin in *Andrews v. Director of Public Prosecutions (1937) (2) All ER 552* simple lack of care such as will constitute civil liability, is not enough; for liability under the criminal law a very high degree of negligence is required to be proved. Probably, of all the epithets that can be applied ‘reckless’ most nearly covers the case.”

13. According to the dictionary meaning ‘reckless’ means ‘careless’, ‘regardless’ or heedless of the possible harmful consequences of one’s acts’. It presupposes that if thought was given to the matter by the doer before the act was done, it would

A have been apparent to him that there was a real risk of its having the relevant harmful consequences; but, granted this, recklessness covers a whole range of states of mind from failing to give any thought at all to whether or not there is any risk of those harmful consequences, to recognizing the existence of the risk and nevertheless deciding to ignore it. In *R. v. Briggs* (1977) 1 All ER 475 it was observed that a man is reckless in the sense required when he carries out a deliberate act knowing that there is some risk of damage resulting from the act but nevertheless continues in the performance of that act.

C 14. In *R. v. Caldwell* (1981) 1 All ER 961, it was observed that:-

D “Nevertheless, to decide whether someone has been ‘reckless’, whether harmful consequences of a particular kind will result from his act, as distinguished from his actually intending such harmful consequences to follow, does call for some consideration of how the mind of the ordinary prudent individual would have reacted to a similar situation. If there were nothing in the circumstances that ought to have drawn the attention of an ordinary prudent individual to the possibility of that kind of harmful consequence, the accused would not be described as ‘reckless’ in the natural meaning of that word for failing to address his mind to the possibility; nor, if the risk of the harmful consequences was so slight that the ordinary prudent individual on due consideration of the risk would not be deterred from treating it as negligible, could the accused be described as reckless in its ordinary sense, if, having considered the risk, he decided to ignore it. (In this connection the gravity of the possible harmful consequences would be an important factor. To endanger life must be one of the most grave). So, to this extent, even if one ascribes to ‘reckless’ only the restricted meaning adopted by the Court of Appeal in *Stephenson and Briggs*, of foreseeing that a particular kind of harm might happen and yet going on to take the risk of it, it involves a test that would be described in part as ‘objective’ in current legal

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jargon. Questions of criminal liability are seldom solved by simply asking whether the test is subjective or objective.” A

15. The decision of *R. v Caldwell (Supra)* has been cited with approval in *R v. Lawrence (1981) 1 All ER 974* and it was observed that:

“— Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting ‘recklessly’ if, before doing the act, he either fails to give any thought to the possibility of there being any such risk or, having recognized that there was such risk, he nevertheless goes on to do it”.

16. The above position was highlighted in *Naresh Giri v. State of M.P. [2008(1) SCC 791]*. E

17. The evidence of PWs 1, 3 & 4 clearly show that the vehicle was being driven at a very high speed. Evidence on record show that more than 50 persons were there in the truck and the appellant was driving the same at a very high speed. One of the witnesses has stated that the truck was being driven as if it was an aeroplane. Therefore, the conviction as recorded cannot be faulted. F

18. Coming to the question of sentence, in *Dalbir Singh v. State of Haryana (2000(5) SCC 82)* it has been stated as follows: G

“.....While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime H

A considerations should be deterrence. A professional driver
pedals the accelerator of the automobile almost throughout
his working hours. He must constantly inform himself that
he cannot afford to have a single moment of laxity or
B inattentiveness when his leg is on the pedal of a vehicle
in locomotion. He cannot and should not take a chance
thinking that a rash driving need not necessarily cause
any accident; or even if any accident occurs it need not
necessarily result in the death of any human being; or
C even if such death ensues he might not be convicted of
the offence; and lastly, that even if he is convicted he would
be dealt with leniently by the court. He must always keep
in his mind the fear psyche that if he is convicted of the
D offence for causing death of a human being due to his
callous driving of the vehicle he cannot escape from a jail
sentence. This is the role which the courts can play,
particularly at the level of trial courts, for lessening the high
rate of motor accidents due to callous driving of
automobiles."

E 19. Above being the position, we find no merit in this ap-
peal, which is accordingly dismissed.

B.B.B.

Appeal dismissed.