

S. N. Hussain

Vs

The State of Andhra Pradesh

Criminal Appeal No. 66 of 1969

(P. Jagmohan Reddy, D. G. Palekar JJ)

05.01.1972

JUDGMENT

PALEKAR, J. -

1. This is an appeal by special leave from the order of conviction and sentence passed by the High Court of Andhra Pradesh. The appellant, who was a Bus Driver, had been charged before the learned Munsif Magistrate, Alampur, for offences under Sections 304-A, 338 and 337, I.P.C., but was acquitted. The State Government appealed against the acquittal to the High Court and the High Court has convicted him under all these sections and sentenced him to suffer rigorous imprisonment for two years under Section 304-A, I.P.C. and made the other sentences to run concurrently with the same. Hence the present appeal.

2. The appellant was the Driver of a R.T.C. Bus APZ 1672 and was driving the vehicle on January 1, 1966, from Kurnool to Vanaparthy. The bus left Kurnool at about 6-15 a.m. and reached the Railway level crossing gate between Alampur Road Station and Manopad Railway Station at about 6.30 or 7.00 a.m. The level crossing is in charge of a gateman and it is the duty of the gateman to close the gate when a train is expected to pass by. It is an admitted fact that at the time when the appellant with his bus reached the level crossing the gate was open. The appellant passed through the gate and crossed the meter gauge track when suddenly a Goods train dashed against the bus on the rear side with the result that the bus was thrown off causing serious injuries to the passengers. There were about 43 passengers in the bus. Out of these, one died on the spot, three died later in the hospital and about 21 other passengers received more or less severe injuries. The charge against the appellant was that he was rash or negligent in crossing the railway track when a Goods train was about to pass the gate.

3. The appellant's defence was that he was neither rash nor negligent and the accident was unavoidable. He did not realize at all that a Goods train was passing at the time and since the gate was open he crossed the railway crossing absolutely oblivious of the fact that a train was approaching. The learned Trial Magistrate accepted the defence but the High Court was pleased to hold that the appellant was both rash and negligent.

4. It is contended before us that the learned Magistrate had taken a very reasonable view of the case and, therefore, the High Court should not have interfered with the order of acquittal. It is also contended that the view of the High Court could not be sustained on the evidence which was so conclusively in favour of the appellant that the conviction was improper.

5. A large number of witnesses were examined to prove the case against the appellant but most of

them turned hostile. The High Court, however, relied upon a few witnesses for its finding that the appellant was both rash and negligent, and it is contended before us that these witnesses had not really proved the charge against the appellant.

6. A few facts require to be noted at the outset -

(1) The bus was not driven and could not have been driven fast. The vehicle, before it reaches the level crossing, has to negotiate two bends on the road. The road is U shaped. The base of this U shape is formed by the level crossing and the two arms of the U lie on either side of the Railway track. The approach from Kurnool is at one end of the right arm and to come to the level crossing a vehicle has to negotiate two bends-one near the approach and the other near the level crossing. After these bends are negotiated the road climbs up to the level crossing, the railway track being at a much higher level than the road. The situation, therefore, of the road and the level crossing would clearly go to show that no vehicle which is to negotiate two near bends and climb up a gradient can maintain high speed. As a matter of fact it is admitted by P.W. 13, S. Veerappa who was the conductor of the bus that at the time when the bus was entering the railway gate it was going dead slow. This is also the evidence of P.W. 56, G. Laxaman Rao, Sub-Inspector of Police who was travelling in the bus with his family. He was sitting in the front seat close to the driver and his evidence is important as we will show later.

(2) That the gate of the level crossing which is a manned gate, was open, indicating thereby that no train was expected to come at the time and inviting vehicles to pass.

(3) The railway track was at a higher level and the road was lined by babbool trees and, therefore, a passing train coming from a distance was not visible from the bus.

(4) The bus was making a huge noise because it was not fitted with the silencer.

(5) As a cold breeze was blowing some of the window screens of the bus were lowered for the comfort of the passengers in the bus.

(6) There is no evidence that the train while approaching the level crossing gave any whistle or whistles. In any case there is no evidence that any whistle was heard by any of the occupants of the bus.

7. It is against this background we have to see whether the appellant was either rash or negligent. Rashness consists in hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury. The criminality lies in such a case in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence on the other hand, is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. This definition of criminal rashness and criminal negligence given by Straight, J., in *Empress v. Idu Beg*, (1954 SCR 418 : 1954 SC 179) has been adopted by this Court in *Bhalchandra Waman Pethe v. State of Maharashtra*. ((1966) 1 SCR 709 : AIR 1966 SC 740).

8. The High Court has held that the appellant was guilty of criminal rashness because in its view the

appellant "tried to negotiate the level crossing in a spirit of bravado and absolutely callous and unmindful of the consequences of the impending collision". For this finding the High Court has principally relied on the evidence of P.W. 12, Sayanna, his wife Kanthamma, P.W. 15 and their son Samuel, P.W. 16. All three of them were travelling in that bus. According to Sayanna, who is Railway Gangman, when the bus was crossing the railway line a Goods train dashed against the bus. He further says that when the bus was outside the railway gate and just before it crossed the railway gate, he had shouted that the train had come. But by the time the conductor stood up to warn the driver the bus crossed the railway line and the Goods train dashed against the bus. He further says that the other passengers also in the bus shouted. This evidence is supported by his wife Kanthamma, P.W. 15 and their son Samuel, P.W. 16. The conductor S. Veerappa, P.W. 13 does not, however, say that anybody had warned him about the approaching train or that he had got up from his seat to give the warning bell to the driver. The bus was 21 feet in length and the railway crossing was about 18 feet across and it will be difficult to say from the above evidence if the shouting had taken place in sufficient time to permit the driver to stop the bus before it reached the railway track. The train is much broader than its track and if a collision is to be avoided it can be done only by stopping the bus some feet away from the railway track. It is not improbable that the Gangman Sayanna became conscious of the approaching train just when the gate was being crossed. But that would be too late to avoid the collision. The evidence of the Sub-Inspector already referred to is more cogent and satisfactory in this regard. Laxaman Rao, P.W. 56, who had the same opportunity as the driver of seeing the approaching danger says that he heard some passengers murmuring that the train was coming. This was just when the bus was already on the railway track. Having noticed the approaching train the driver decided to clear the track but in the meantime the collision took place. This evidence establishes that the murmuring by the passengers was too late to prevent the collision because the bus had already crossed the track and the only hope of saving the situation would be to speed up the vehicle, which according to the witness, the driver had done. Unfortunately the bus was too long to pass with the result that the train dashed against the rear side of the bus. The High Court has relied upon the evidence of this Sub-Inspector for coming to the conclusion that the appellant was rash. In fact a portion of his evidence has been quoted verbatim in support of the finding that the appellant was culpably rash. In our opinion, the High Court has completely misread his evidence. One has to only read the evidence as a whole and it is very clear from the evidence that the driver received no warning either from the approaching train or from the passengers in the bus in sufficient time to save the collision. There was no question of the appellant driving the bus in a spirit of bravado or adventure. On seeing the train after he crossed the track the best he could do was to drive as fast as he could in order to avoid the collision. This cannot be regarded either as bravado or adventure. It is, therefore, impossible to say on the evidence that the appellant was criminally rash.

9. As regards criminal negligence the High Court has blamed the appellant for not taking note of the road signals. It is stated that on either side of the railway track, some distance away, there were road signals which required a vehicle to stop, and the High Court finds fault with the driver for not stopping the vehicle. According to the High Court the appellant should have first come to a dead stop at the road signal and made sure that there was no train on the railway line. In our opinion, so much precaution was not necessary to be observed in the present case. Where a level crossing is unmanned, it may be insisted that the driver of vehicle should stop the vehicle, look both ways to see if a train is approaching and there after only drive his vehicle after satisfying himself that there was no danger in crossing the railway track. But where a level crossing is protected by a gateman and the gateman opens out the gate inviting the vehicles to pass, it will be too much to expect of any reasonable and prudent driver to stop his vehicle and look out for any approaching train. Culpable

negligence lies in the failure to exercise reasonable and proper care and the extent of its reasonableness will always depend upon the circumstances of each case. Where the gate is open and there is no train scheduled to pass at the time, the driver would be justified in driving his vehicle through the level crossing. Passenger trains have a time schedule and if a train is expected to come at about the time the appellant reached the level crossing, a regular driver of motor vehicles on that route may, perhaps, be found negligent in crossing the railway track, if by mischance, the gate was open. But the train in the present case was not a passenger train but a Goods train and it is not shown that the Goods train was scheduled to pass the level crossing just at about the time the bus reached the spot. The appellant may not even know that a Goods train would be coming at the moment. We do not, therefore, think that the appellant was guilty of criminal negligence merely because he did not stop when the road signal wanted him to stop. This was a clear case of unavoidable accident because of the negligence of the gateman in keeping the gate open and inviting the vehicles to pass.

10. In the result the appeal succeeds, the order of conviction and sentence is set aside and the appellant is acquitted.

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