

IN THE SUPREME COURT OF THE
DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal in terms of section
9 of the High Court of the Provinces (Special
Provisions) Act No. 19 of 1990.

SC Appeal 181 / 2016

SC/Spl/LA No. 72/2014

Provincial High Court (Trincomalee)

Case No. HCT/APP/MC 59 / 2009

Magistrate's Court Trincomalee

Case No. 19035/99

Wewala Patabendige Somapala,

Army Camp,

Clappanburge,

China Bay.

Presently at

E 13,

Temple Road,

Aranayake,

Talgaspitiya.

ACCUSED - APPELLANT - APPELLANT

-Vs-

1. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENT - RESPONDENT

2. Officer-in-Charge,
Traffic Branch,
Police Station,
Trincomalee.

**COMPLAINANT - RESPONDENT -
RESPONDENT**

Before: **PRIYANTHA JAYAWARDENA PC J**
MURDU N. B. FERNANDO PC J
P. PADMAN SURASENA J

Counsel:

S A Collure with A P Jayaweera and Ravindra S de Silva for the Accused - Appellant - Appellant.

Induni Punchihewa SC with Kalana Kothalawala for Attorney General.

Argued on : 21 - 01 - 2020 and 11 - 02 -2020

Decided on : 17 - 06 - 2020

P Padman Surasena J

The Accused - Appellant - Appellant (hereinafter sometimes referred to as the Appellant) stood charged in the Magistrate's Court of Trincomalee on four counts, which stated;

1. that he, on 20-10-1998 negligently drove the truck bearing No. යු ඔ 6969, causing the death of Shanmugan Udaya Kumar and Rasaiya Sri Rangan, an offence punishable under section 298 of the Penal Code;
2. that he, at the same time and at the same place, failed to avoid the said accident, an offence punishable under section 149(1) read with sections 214 (1)(a) and 224 of the Motor Traffic Act;
3. that he, at the same time and at the same place, drove the said truck යු ඔ 6969 negligently or without reasonable consideration for the other persons using the highway causing the deaths of Shanmugan Udaya Kumar and Rasaiya Sri Rangan, an offence punishable under section 151(3) read with section 217 (2) of the Motor Traffic Act;
4. that he, at the same time and at the same place, drove the said truck යු ඔ 6969 without a valid driving license, an offence punishable under section 123 (1)(a) read with sections 214(1)(a) and 224 of the Motor Traffic Act.

The Appellant had pleaded not guilty to the said charges.

At the trial, the witness Sinnaiya Kandadas, few witnesses who have identified the bodies of two dead persons, Liyadipitiya Rathnayake Muudiyanselage Thilakarathna who is the other soldier who had travelled in the truck driven by the Appellant, Police Constable 29429 Bowaththa Gamaralalage Gamini Sisira Kumara (an officer from Trincomalee Police Station) and the Interpreter Mudaliyar of the Court had given evidence for the prosecution. After the prosecution closed its case, the Appellant had given evidence on his behalf.

Learned Magistrate at the conclusion of the trial, pronounced the judgment dated 18-05-2005, convicting and sentencing the Appellant on all four counts.

Being aggrieved, by the said judgment of the learned Magistrate, the Appellant appealed to the High Court of Eastern Province holden at Trincomalee. The said Provincial High Court, by its judgment dated 26-03-2014, had affirmed the conviction of the Appellant on the first, second and third counts and acquitted him from the fourth count. The Appellant, in this appeal, seeks to canvass before this Court, the said affirmation of his conviction on the first, second and third counts.

At the time of the argument, learned counsel for both parties agreed before this Court that they would confine their submissions only to the following question of law for the purpose of the instant appeal. The said question of law is as follows.

'Did the Appellant cause the deaths of Shanmugan Udaya Kumar and Rasaiya Sri Rangan, by doing any rash or negligent act not amounting to culpable homicide in terms of section 298 of the Penal Code?'

In order to answer the above question of law, it would be necessary to turn, albeit briefly, to the evidence adduced before Court.

The witness Sinnaiya Kandadas is a person who was riding a bicycle at that time at a place somewhat close to the place of this accident. He has stated in his evidence before the learned Magistrate;

- i. that this incident occurred around 1400 hrs. on 20-10-1998;
- ii. that he was riding a bicycle at that time;
- iii. that he saw an Army truck coming on the road;
- iv. that he jumped to the sea abandoning his bicycle upon seeing the said Army truck;
- v. that he did not see anything else, in particular, a collision;
- vi. that he saw Sri Rangan being taken out from the sea and taken to a three wheeler;
- vii. that he saw Sri Rangan riding a bicycle in front of him before he was taken out from the sea.

Answering the questions posed to him in cross-examination, this witness has categorically stated that he did not see any collision with the Army truck. He had also stated that he did not see the person who drove the truck. When inquired from him about the speed of the truck, his answer was that he could not comment on the speed of the truck.

Thus, evidence of Sinnaiya Kannadas taken at its highest, does not indicate any rash or negligent act on the part of the Appellant. Indeed, it is his evidence that he did not see how this accident occurred.

In addition to the witnesses called by the prosecution to establish the identities of the dead bodies,¹ the prosecution has led the evidence of Liyadipitiya Rathnayake Muudiyanselage Thilakarathna who is the other soldier who had travelled along with the Accused in the Army truck at the time of this accident. His evidence has established;

- i. that this accident had occurred on 20-10-1998;
- ii. that the truck bearing No. 6969 driven by the Appellant had been fully loaded with explosives;
- iii. that they were transporting the said explosives by the said truck to the Trincomalee Navy Camp;
- iv. that this accident occurred around 1440 hrs.; and he was at that time seated on the left side front seat of the truck;
- v. that when the truck was moving ahead, a cyclist had suddenly emerged from a by lane on to the main road at which time the Appellant had taken the truck to his right side of the road;
- vi. that it was at that time that the said cyclist collided with the front side of the truck;
- vii. that at the same time several other cyclist also came at high speed, the said cyclist was looking at the sea and collided with the truck;

¹ I would not deal with the said evidence because they are neither relevant to the question of law under consideration nor contested by the Appellant.

- viii. that another cyclist who came towards the truck abandoned his cycle and jumped into the sea; however, he did not suffer an injury;
- ix. that thereafter, he saw the cycles fallen and the cyclists injured.

Answering the questions posed to him in cross-examination, he had stated;

- i. that the truck was driven carefully, particularly to avoid any collision as it was fully laden with explosives;
- ii. that this accident had occurred because a cyclist had suddenly emerged on to the main road from a by lane;
- iii. that the speed of the truck at that time was approximately about 40 Kmph.

The Accused Wewala Patabendige Somapala had also given evidence under oath. His evidence has established;

- i. that he was the driver of the said Army truck;
- ii. that in addition to him, Lance Corporal Thilakarathna also travelled in the said truck;
- iii. that the said truck was fully laden with explosives and ammunition which he was in the process of transporting to the Trincomalee Navy Camp;
- iv. that this accident occurred at the junction where Inner Harbour Road and Telecom Road meet;
- v. that he was driving the truck from the direction of Trincomalee Police Station towards the Trincomalee Navy Camp on Inner Harbour Road;
- vi. that a cyclist suddenly came from Telecom Road and entered in to the main road;
- vii. that there were threats of suicide bomb attacks during that time;
- viii. that he thought the cyclist who suddenly emerged from the said by road would be a suicide bomber;

- ix. that he therefore, took the truck to the right side of the road because of the said fear;
- x. that the cyclist however, collided with the truck;
- xi. that he saw another cyclist at that time jumping in to the sea;
- xii. that the area was a built up area on either side of the road and he could not afford to allow the truck to collide with any parapet wall on either side of the road as the truck was laden with explosives;
- xiii. that he drove the truck at a speed of approximately 35 Kmph at the time of the accident;
- xiv. that the other cyclist had died because he had drowned in the sea.

It is to be noted that the Appellant had provided straight answers to all the questions posed to him by the prosecution during the cross-examination. Further, perusal of his evidence shows clearly that the prosecution has not been able to assail his evidence even after subjecting it to lengthy cross-examination.

Another notable feature in this case is that the evidence of the Appellant has been corroborated by the evidence of a prosecution witness namely, Lance Corporal Thilekeratna. It is the prosecution which called the witness Liyadipitiya Rathnayake Muudiyanselage Thilakarathna (Lance Corporal Thilekeratna) to give evidence in the trial on its behalf. Thus, as a matter of fact, the prosecution has clearly relied on his evidence.

Apart from said Thilakarathna's evidence, the prosecution is left only with the evidence of witness Sinnaiya Kannadas who gave evidence about the accident. As has already been mentioned above, he denies having seen as to how this accident occurred. Thus, it is clear that the prosecution has failed to establish any rash or negligent act for which the Appellant could be held responsible.

Lord Atkin in delivering the House of Lords judgment in the case of Andrews vs Director of Public Prosecutions² stated as follows.

“The principal 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 constitutes civil liability is not enough. For purposes of criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied ‘reckless’ most nearly covers the case. It is difficult to visualize 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.”

The above paragraph of Lord Atkin’s judgment has been cited by Howard CJ in the judgment of Lorenze vs Vyrmuttu³, The King vs Leighton⁴ and in more recent times by Priyasath Dep PC J (as he then was) in the case of Chandrasiri vs Attorney General.⁵

When considering the evidence adduced at the trial by the prosecution, it is amply clear that the prosecution has failed to establish any of the charges against the Appellant beyond reasonable doubt. Further, the evidence of the Appellant has proved his innocence. Therefore, the conclusion by the learned Magistrate that the prosecution has proved the charges framed against the Appellant cannot be supported by the evidence led in the case. Similarly, the conclusion by the learned High Court Judge too is not justifiable. Therefore, I answer the aforementioned question of law in the negative. Thus, the Appellant is entitled to succeed in his appeal.

In these circumstances and for the foregoing reasons, I set aside the judgment dated 18-05-2005 of the learned Magistrate of Trincomalee and the judgment dated 26-03-2014

² 1937 2 All E R 552.

³ 42 NLR 472.

⁴ 47 NLR 283.

⁵ 2011 (1) Sri L R 10.

by the learned High Court Judge of Trincomalee. I direct that the Appellant be acquitted and discharged from all the charges framed against him.

Appeal is allowed.

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA PC J

I agree,

JUDGE OF THE SUPREME COURT

MURDU N. B. FERNANDO PC J

I agree,

JUDGE OF THE SUPREME COURT