"C.R."

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

FRIDAY, THE 17TH DAY OF JUNE 2022 / 27TH JYAISHTA, 1944

CRL.A NO. 913 OF 2006

AGAINST THE JUDGMENT DATED 28.04.2006 IN SC 32/2006 OF THE ADDITIONAL DISTRICT COURT (ADHOC)-I, KOTTAYAM (CP 29/2005 OF JUDICIAL MAGISTRATE OF FIRST CLASS - I, ETTUMANOOR)

APPELLANT/2ND ACCUSED:

ABDUL ANSAR, S/O. MUHAMMED KUNJU,
NOORJAMALIA HOUSE, KIZHAKKUMBHAGOM KARA,
ETTUMANOOR VILLAGE.
BY ADV NANDAGOPAL S.KURUP

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REP. BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,, ERNAKULAM.
SRI SANAL P. RAJ - P.P

OTHER PRESENT:

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 03.06.2022, ALONG WITH CRL.A.915/2006, THE COURT ON 17.06.2022 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

FRIDAY, THE 17TH DAY OF JUNE 2022 / 27TH JYAISHTA, 1944

CRL.A NO. 915 OF 2006

AGAINST THE JUDGMENT DATED 28.04.2006 IN SC 32/2006 OF THE ADDITIONAL DISTRICT COURT (ADHOC)-I, KOTTAYAM (CP 29/2005 OF JUDICIAL MAGISTRATE OF FIRST CLASS - I, ETTUMANOOR)

APPELLANT/3RD ACCUSED:

BENNY, S/O. IYPE,
KAKKOOR HOUSE, AMBANATTU BHAGOM, PERROR KARA,
PERROR VILLAGE.
BY ADV SRI.JOBI JOSE KONDODY

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.
BY SRI SANAL P. RAJ - P.P

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 03.06.2022, ALONG WITH CRL.A.913/2006, THE COURT ON 17.06.2022 DELIVERED THE FOLLOWING:

"C.R."

JUDGMENT

Challenge in these appeals is to the judgment of conviction and order of sentence dated 28.04.2006 passed by the Additional Sessions Judge (Ad hoc)-I, Kottayam in S.C.No.32 of 2006. The appellants were found guilty and convicted for the offence punishable under Section 308 read with Section 34 of the Indian Penal Code, 1860. They were sentenced to undergo rigorous imprisonment for a period of four years and to pay a fine of Rs.5,000/- with a default sentence of rigorous imprisonment of six months. The amount of fine, if realised, was directed to be paid to the injured, PW1, as compensation under Section 357(1) of the Code of Criminal Procedure, 1973.

2. In these appeals, filed under Section 374(2) of the Code, the conviction and sentence of the appellants are impugned on the ground that without there having any evidence regarding the way in which the incident occurred and also the identity of the appellants, the trial court has convicted and sentenced them and thereby committed illegality.

3. There were three accused in the case. The 1st accused was acquitted of all the charges. The 2nd accused and 3rd accused, who are convicted, filed Crl.Appeal No.913 of 2006 and Crl.Appeal No.915 of 2006 respectively. Both the appeals having arisen from the same judgment, are disposed of by this common judgment. The appellants are referred to as the 2nd accused and 3rd accused for convenience.

4. The case of the prosecution, in brief, is as follows: The 1st accused was the driver of a stage carriage bus bearing Reg.No.KL-5-S-3324. The 2nd accused was the conductor and the 3rd accused was the cleaner of that bus. On 18.08.2005 at or about 9.00 a.m., the bus on its trip from Ettumanoor to Kottayam, stopped at the bus stop at Karithas Junction for alighting and boarding passengers. While PW1 was boarding the bus, the 2nd accused gave the signal by ringing the bell and the 1st accused moved the bus forward. The 3rd accused obstructed PW1 from entering the bus. When the bus moved forward, PW1 who was entering the bus, lost her grip and fell down from the foot-board causing to ran over her body the

rear wheel of the bus. She thereby sustained serious injuries. It is further alleged that the accused had the knowledge that by their acts there was every likelihood of causing death of the passengers, who were trying to board the bus.

5. The injured, PW1, was removed to the nearby Matha Hospital and thereafter to the Medical College Hospital, Kottayam, where she was treated as an inpatient. PW2, another passenger waiting for the bus in the same bus stop, accompanied PW1. The police on receipt of intimation proceeded to the Medical College Hospital and on finding PW1 unconscious, recorded the statement of PW2. PW13 thereafter registered crime No.362/2005 of Ettumanoor Police Station. PW14 conducted the investigation and submitted a final report.

6. PWs.1 to 13 were examined and Exts.P1 to P17 were marked on the side of the prosecution. On the close of the prosecution evidence, the accused were examined as provided in Section 313(1)(b) of the Code. They denied the incriminating circumstances in evidence, which were put to

them. All of them denied their involvement in the incident and thereby put forth a defence of total denial. No defence evidence was let in.

7. Heard the learned counsel appearing for the appellants and also the learned Public Prosecutor.

8. The learned counsel appearing for the appellants would contend that the evidence let in by the prosecution was totally insufficient to prove the involvement of either of the appellants in the incident. Both the learned counsel did not deny the occurrence of the incident. Their contention is that identity of the appellants was not proved by reliable evidence and the trial court acting upon unreliable evidence and surmises entered into a finding that the 2nd accused was the conductor and 3rd accused was the cleaner at the time of occurrence and they were responsible for PW1 falling down from the bus.

9. The learned counsel for the 2nd accused very passionately contended that this is a case of mere accident, which unfortunately resulted in injuries to a minor girl. It

cannot be an attempt to commit culpable homicide; since the appellants could never have knowledge that the act would likely to have caused the death of PW1. He also contended that such an act at the best amounts to the negligence of nature, which may attract Section 338 of the I.P.C.

10. *Per contra*, the learned Public Prosecutor iterated that the appellants were rightly convicted under Section 308 of the I.P.C. as the evidence on record does prove the offence. It is submitted that the prosecution has proved that only because the 2nd accused-conductor rang the bell and the 3rd accused-cleaner failed to ensure that no passenger was boarding while the bus was on the move the incident occurred. Thus, their act and the illegal omission amounted to the offence that is punishable under Section 308 of the I.P.C.

11. The questions that arise for consideration are,-

i) Were the 2nd accused the conductor and the 3rd accused cleaner in the bus bearing Reg.No.KL-5-S-3244 at the time of occurrence?

ii) Did the acts or omissions on the part of accused Nos.2

and 3 result sustaining of injuries by PW1?

iii) Did they have intention or knowledge that their acts would amount to culpable homicide, had death of PW1 resulted thereby?

12. The charge for an offence under Section 279 of the I.P.C. was framed against the 1st accused driver. Since he was acquitted, that question does not arise for consideration. The definite allegation against the 2nd accused is that without ensuring that no passenger has been mounting the bus, he rang the bell thereby giving signal to the driver to proceed. Thereupon, the bus was taken ahead resulting PW1, who was in the course of stepping into the bus, fell down and the rear back tyre of the bus ran over her body.

13. The 3rd accused was the cleaner on the bus. He was standing on the foot-board of the bus. The allegation against him is that he pushed PW2 aside, resulting in her falling down. In order to prove the said allegations, apart from the evidence of PW1, the injured, PW2 and PW7 is also relied on by the prosecution. PWs.3, 4, 5, 6 and 8 are also occurrence

witnesses, but none of them supported fully the case of the prosecution.

14. PW1 deposed that while she was trying to board the bus, it moved ahead, and therefore, she lost grip from the handle and fell down. She had already placed one foot on the foot-board. However, as a result of the sudden movement of the bus ahead, she could not enter inside. Instead, she fell down and the rear wheel of the bus ran over her body.

15. PW2 is a teacher in the school where PW1 and PW7 are studying. She deposed that she was waiting in the bus stop while PW1 and 7 were boarding 'Ponmankal' bus, which is involved in the incident. Since there was a rush in the bus, she waited for the next one. She saw PW7 boarding the bus and behind her as the third passenger, PW1 tried to board the bus. Before she could enter inside, the bell was rung. The bus was moved forward. PW1 lost her grip over the handle and fell down. PW1 would state that immediately the bus was stopped, and therefore, the rear left wheel of the bus partly only ran over the body of PW1. Since the people made a hue

and cry, the bus was stopped and moved back. People immediately took PW1 and carried to the nearby Matha Hospital, where she reached in an autorickshaw. After first aid, PW1 was taken to the Medical College Hospital, Kottayam, where also PW2 accompanied. At the hospital, her statement was recorded by PW13. Ext.P2 is her statement. On the basis of Ext.P2, PW13 had registered the crime as per Ext.P14 F.I.R.

16. PW7 is the sister of PW1. She was inside the bus when PW1 fell down. PW7 deposed that following her, two more girls entered the bus, and while PW1 was trying to board, the bus was moved ahead. She added, it was the 2nd accused, the conductor, who rang the bell saying another bus was trying to overtake. Although PW7 did not see PW1 falling down, hearing the hue and cry and sudden stoppage of the bus she realised what had happened. PW7 also stated that in its attempt to go ahead of another bus coming behind, the 2nd accused hurried by ringing the bell and that resulted PW1 falling down. PW7 identified both the 2nd accused and the 3rd accused as the conductor and cleaner respectively. She also

identified the 1st accused as the driver of the bus. PWs.3, 4, 5, 6 and 8 deposed in court acknowledging that there occurred such an incident, but denying witnessing the incident of PW1 falling down from the bus. They were allowed to be cross-examined by the learned Public Prosecutor. But no evidence with regard to the occurrence, the way in which it occured or the identity of the accused persons could be elicited from them. Therefore, evidence of these witnesses does not render much help to the prosecution.

17. Immediately after the incident, PW1 was taken to a nearby hospital. Ext.P11 is the certificate issued by Dr.Ciby, PW10 who examined PW1 at that hospital. He noticed the following injuries on the body of PW1,-

(1) Blunt injury left side chest;
(2) Blunt injury abdomen;
(3) Multiple abrasion left hand, left side, chest, left side abdomen, left thigh and left leg;
(4) Contusion pelvic area and left side chest; and
(5) Patient is in shock.

While PW1 was subsequently taken to the Medical College, Hospital, Kottayam, she was attended to by PW11, Dr. Manoj

Kumar. After necessary examination, PW11 issued Ext.P12 discharge certificate. The injuries noted in Ext.P12 are the following:

(1) Diaphragmatic injury;
(2) Splenic laceration;
(3) Serosal tear of sigmoid colon; and
(4) Retroperitoneal haematoma.

18. PW11 further deposed that those injuries sustained by PW1 were serious in nature and in the ordinary course would result death of the person, if not treated properly. Evidence of PWs.10 and 11 is not seriously challenged. The accused did not contest also that PW1 fell down from the bus and had sustained injuries. The versions of PWs.1, 2 and 7 in this respect is consistent and remain unimpeached. In the said circumstances, I hold that PW1 fell down from the bus bearing No.KL-5-S-3324 at or about 9.00 a.m. on 08.08.2005 at the bus stop at Karithas Junction, whereby she sustained serious injuries, which would have resulted her death, if not treated timely.

19. The prosecution alleges that the 2nd accused rang the bell to hurry up the trip without ensuring that nobody was

boarding the bus, the 3rd accused pushed PW1 aside to avoid her entering the moving bus. Accused 2 and 3 would contend that they did not involve in the incident and further that as PW1 tried to board the moving bus, the untoward incident occurred.

20. The learned counsel appearing for both the appellants draw my attention to the oral testimony of PWs.1 and 7 to the effect that they were in a hurry to go to the school and having PW7 already entered the bus and her bus fare was with PW1, she tried to capture the moving bus. PWs.1 and 7 are sisters studying in in S.H.Bhavans School, Kottayam. They admitted that PW7 had to reach school early, so she insisted on boarding the 'Ponmankal' bus itself, despite PW1 telling her to wait for the next bus. They also stated that the bus fare was with PW1 and as PW7 had already boarded the bus, PW1 was compelled to board the same bus. In front of her, two more girl students entered the bus and behind them PW1 was trying to mount the bus. At that time, the bus moved ahead.

21. Can accused Nos. 2 and 3 escape the liability by saying that PW1 hurried up and that was the cause. Section 29(2) of the Motor Vehicle Act, 1988, empowers State Governments to prescribe the conditions subject to which a conductor can be given licence. In the Kerala Motor Vehicles Rules, 1989, framed in exercise of the said power, conduct and functions of a conductor are enumerated. It is the duty of the conductor of every stage carriage to act responsibly. As per Rule 89(o) of the Rules, a conductor of a stage carriage, while on duty, shall not interfere with the persons mounting the vehicle. It shows that a conductor has a statutory duty to ensure safety of the passengers and not to interfere with the persons mounting the vehicle. Therefore, the 2nd accused had a bounden duty before ringing the bell thereby giving signal to the driver to proceed to ensure that the foot-board was clear and the door is closed. In this case, the 3rd accused was also allegedly standing in the foot-board. The purpose of employing a cleaner in a stage carriage is undoubtedly to ensure the safety of the passengers, who are boarding and

alighting the bus. Therefore, it was his duty also to see that the bus is not moved ahead with any passenger on the foot-board or before the door is cleared.

22. Pointing out a few contradictions in their evidence, the oral testimonies of PWs.1, 2 and 7 were sought to be rejected as unreliable. Ext.P1 is a contradiction in the evidence of PW1. Ext.P7 is a contradiction brought out during the examination of PW7. As regards the essential fact that PW1 after stepping in on the foot-board that the bus had suddenly moved ahead resulting in her falling down and that the conductor had rung the bell, there is absolutely no contradiction or inconsistency. PWs.2 and 7 categorically stated that it was the 2nd accused, who rang the bell. PW2 is a school teacher going by bus regularly. She often go in the bus in question. Immediately after the incident, the bus stopped and the crew members came out. PW7 also came out. It cannot be said that they did not have any opportunity to see the conductor of the bus at the time of occurrence. In such circumstances their identification of accused No.2 before the

court cannot be found anyway faulty.

23. The prosecution also relied on the evidence of PW9, as also the *kychit* given by her in police, Ext.P10, to prove the identity. PW9 was the owner of the bus. She stated that accused Nos. 1, 2 and 3 were driver, conductor and cleaner respectively in the bus on the date of occurrence. She admitted having given such a document, but she added that under the compulsion of the police, she gave that document and her intention was only to get the bus released. Thus, she maintained that she could not vouch for the correctness of the statements in Ext.P10. Whether or not the contents of it are correct, its evidentiary value is the question. The statement in Ext.P10, though it is written, is a statement given to the investigating officer during the course of investigation. It is, therefore, a statement under Section 161 of the Code. In the light of the bar contained in Section 162 of the Code, the contents of Ext.P10, even on treating it as a declaration under Section 133 of the Motor Vehicles Act can be used only to contradict the witness, and not for any other purpose.

Therefore, the contents of Ext.P10 cannot be used as a substantive or corroborative evidence. Leaving that apart, oral testimony of PW2 and 7 certainly inspires confidence and their evidence prove beyond doubt the fact that it was the 2nd accused, who was the conductor in the bus at the time of occurrence.

24. Coming to the identity of the 3rd accused, the only evidence available is the oral testimony of PW7. PWs 1 and 2 did not identify him in court. PW7 was aged 12 years at the time of examination. She deposed regarding the material particulars, including the fact that the 'Ponmankal' bus was running competing with another bus. But regarding the identification of the 3rd accused, she had explained that except for the conductor, she could not correctly identify other crew members of the bus by agreeing to the question that she knew others only from the news paper. That being the nature of the evidence, it can only be said that the prosecution failed to prove that it was the 3rd accused, who was the cleaner in the bus at the time of occurrence.

25. Based on the discussions made above, I hold that as a result of the 2nd accused ringing the bell without ensuring that nobody was boarding the bus, the driver took the bus ahead and that is the proximate cause of PW1 falling down. The question then arises is whether the said act amounts to an offence under Section 308 of the I.P.C. The learned counsel appearing for the 2nd accused would submit that from the facts proved, no intention or knowledge that there was likelihood of causing death of PW1 can be attributed to the 2nd accused. It can only be an act of negligence or, at the best rashness. Accordingly, the learned counsel canvassed for a position that the conviction of the 2nd accused for an offence under Section 308 of the I.P.C. is unsustainable in law.

26. In order to constitute an offence under Section 308 of the I.P.C., facts required to be proved are that the offender does an act with the intention or knowledge that, under the circumstances it occurred, if by that act death of the person is the result, it would be a culpable homicide not amounting to murder. The Apex Court in **Kunwar Pal v. State of**

Uttarakhand [(2014) 2 SCC 434] held that in order to constitute a culpable homicide not amounting to murder, the offender should have the knowledge that his act is likely to cause death but he had no intention to cause death or such bodily injury likely to cause death. In **Keshub Mahindra v. State of Madhya Pradesh [(1996) 6 SCC 129]**, the Apex Court while drawing distinction between the offences of death due to negligence and culpable homicide not amounting to murder, it was observed,-

> "A look at Section 304 Part II shows that the concerned accused can be charged under that provision for an offence of culpable homicide not amounting to murder and when being so charged if it is alleged that the act to the concerned accused is done with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death the charged offences would fall under Section 304 Part II."

If the act was done with the knowledge which is of such a degree that the likely consequence of the act would be death or causing such bodily injury as is likely to cause death of a person, that will constitute an offence of culpable homicide

not amounting to murder. Attempt to commit such an act is what is punishable under Section 308 of the I.P.C.

27. The nature of the incident in the instant case is that by the bus moving ahead while PW1 was boarding it, she fell down underneath the bus and its left rear wheel almost ran over her body, resulting in serious injuries which in the ordinary course could be fatal. Life of PW1 was saved only miraculously. Unless the bus could be stopped at that stage itself, death was imminent.

28. For the falling down of PW1, the 2nd accused did not do a positive act other than ringing the bell. Can that be the *causa causans* of the alleged offence. Section 32 of the I.P.C. explains that except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions. As pointed out above, Rule 89(o) of the Kerala Motor Vehicle Rules casts a duty on the conductor to ensure safety of the passengers and not to interfere with the passengers mounting the vehicle. When that statutory obligation is shirked, that is an illegal omission

amounting to an act. Therefore, the cause of PW1 falling down from the bus has to be attributed to the 2nd accused and the same amounts to an act as stated in Section 308 of the I.P.C. Every prudent man should know if a person falls down from a moving bus, that would cause fatal injuries to him. If so, a licensed conductor should have sufficient knowledge about such a certain consequence while ringing the bell thereby asking the driver of the bus to move from the bus stop, without ensuring that no passenger is mounting the bus and the door is closed. Hence, in answer to point Nos.1 to 3, I hold that the 2nd accused has committed an offence punishable under Section 308 of the I.P.C. and the trial court rightly had answered the question. The contention of the learned counsel that the act could amount only to an offence punishable under Section 338 of the I.P.C. cannot therefore be accepted. I further hold that conviction of the 3rd accused is liable to be set aside. The 3rd accused is therefore found not guilty of the offence under Section 308 of the I.P.C. and he is acquitted under Section 386(b) of the Code.

29. Coming to the question of sentence, the learned counsel appearing for the 2nd accused would submit that the incident occurred in 2005, and by lapse of 17 years, the purpose of detaining the 2nd accused in prison lost its reformative and even deterrent effect. He accordingly, sought to avoid imprisonment.

30. Having considered the matter in detail, I am of the view that in the nature of the offence, it is not just or legal to avoid imprisonment from the punishment. Taking all aspects into account, including the age of the 2nd accused, I am of the view that the sentence can be modified. The 2nd accused is accordingly sentenced to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs. 50,000/- for commission of the offence punishable under Section 308 of the I.P.C. In default of payment of fine, he shall have to undergo rigorous imprisonment for a further period of 3 months. In the event of realisation of fine, the same shall be paid to PW1. Set-off, if any, will be allowed.

31. Crl.Appeal No.915 of 2006 is thus allowed.

Crl.Appeal No.913 of 2006 is allowed in part by only modifying the sentence as above.

Sd/-

P.G. AJITHKUMAR, JUDGE

dkr