

Crl.Appeal No.1531/08

-:1:-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

FRIDAY, THE 26TH DAY OF FEBRUARY 2021 / 7TH PHALGUNA, 1942

CRL.A.No.1531 OF 2008

AGAINST THE JUDGMENT IN SC 507/2007 DATED 25-07-2008 OF VI
ADDITIONAL DISTRICT & SESSIONS COURT, ERNAKULAM

APPELLANT/ACCUSED:

P.M.RAJU
AGED 47 YEARS,S/O MADHAVAN,
PALAKKUNNEL HOUSE,
KUTTAMPUZHA,
KOTHAMANGALAM.

BY ADVS.
SRI.C.P.UDAYABHANU
SMT.PREETHI K.PURUSHOTHAMAN
SRI.BOBAN PALAT
SRI.P.U.PRATHEESH KUMAR
SRI.NAVANEETH.N.NATH
SHRI.RASSAL JANARDHANAN A.
SHRI.ABHISHEK M. KUNNATHU
SRI.P.R.AJAY

RESPONDENT/COMPLAINANT:

- 1 STATE OF KERALA
REP.BY THE S.I. OF POLICE,
KOTHAMANGALAM, (CRIME NO. 156/07)
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM.
- *2 C. SUNDARAN
AGED 42 YEARS,S/O. CHELLAPPAN ACHARI,
ILLATHUPARAMBU,
ELAVOOR, PURAKKADAVU PANCHAYAT,
PURAKKADAVU VILLAGE,
ERNAKULAM.

Crl.Appeal No.1531/08

-:2:-

*3 SELVARAJ
AGED 42 YEARS,S/O. KUNJAPPAN,
KALLATHU,
KUNNAPPILLYSSERY, PULIAMAM P.O.,
ERNAKULAM.

*(ADDL. R2 AND R3 IMPEADED AS PER ORDER DATED
15/02/2021 IM CRL.M.A. No.8823/2008.

R1 BY SMT.SYLAJA S.L., PUBLIC PROSECUTOR
R2-3 BY ADV. S.RAJEEV
ADV. DHEERENDRA KRISHNAN K.K.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 19-02-2021, THE COURT ON 26-02-2021 DELIVERED THE
FOLLOWING:

“C.R.”

JUDGMENT

Dated this the 26th day of February, 2021

Five score and more young children, along with a dozen teachers went on a fun and frolic for an entire day through the picturesque places around Kothamangalam town. As dusk was setting in, the group decided to wind up their picnic with a short boat ride through the bewitching Periyar river near Thattekkadu.

2. The much awaited picnic which ought to have ended with the boat ride, unfortunately ended in snuffing out the lives of 15 of those young children and three teachers. Water is alleged to have seeped into the boat resulting in its capsize and causing death by drowning of the passengers. What started as great fun for all, ended in a watery grave, at least for a dozen and a half. The news of the tragedy sent waves of sorrow sweeping across the State and tears trickling down those who heard it.

3. The boat driver was blamed by the police and was charged with culpable homicide not amounting to murder. The court which tried the offense, though had modified the charge to include rash and

negligent act causing death also, as an additional charge, found the offender guilty for culpable homicide not amounting to murder. He challenges his conviction and sentence in this appeal.

4. The above description, though brief, sums up the issue that has arisen for consideration. However, for the purpose of completeness, the following is narrated as facts of the case.

The prosecution alleged that on 20.2.2007 at 6.05 pm, the accused, who was the owner as well as the driver of a boat by name "Sivaranjini", having a passenger capacity of 6 persons, carried 61 persons including 53 students, 7 teachers and 1 non-teaching staff of Elavoor St.Antony's U.P. School and that due to overloading while the boat was being turned to return, water started seeping through a hole at its rear end and the boat capsized and sank in the river causing the death of 18 persons including 15 children. The accused was alleged to have committed the offence under Section 304 IPC. After committal of the case to the Sessions Court, charges were framed under Sections 304, 280 and 304A IPC also, to which the accused pleaded not guilty.

5. In order to prove the prosecution case, PW1 to PW67 were examined and Ext.P1 to Ext.P81 were marked while the defence

examined DW1 and marked Ext.D1 to Ext.D8. Material objects were marked as MO1 to MO10.

6. The learned Sessions Judge, after elaborate consideration, found the accused guilty for the offence under Section 304 IPC and sentenced him to undergo rigorous imprisonment for 5 years and to pay a fine of Rs.1,50,000/-. The fine amount, on realisation, was directed to be paid equally to the parents of the deceased children as compensation under Section 357(1)(b) of the Cr.P.C.

7. Aggrieved by the conviction and sentence of the accused as stated above, this appeal has been preferred.

8. We have heard Adv.C.P.Udayabhanu, learned counsel for the appellant and Smt.Sylaja S.L., learned Public Prosecutor for the State. Since the parents of two of the victims were permitted to assist the prosecution, we heard Adv.Dheerendra Krishnan K.K. and Adv.S.Rajeev on their behalf.

9. Adv.C.P.Udayabhanu, learned counsel for the appellant, contended that the prosecution had miserably failed to prove the guilt of the accused. The learned counsel also argued that the ingredients of Section 304 IPC were not attracted in the instant case and nothing was brought out in evidence that could attribute knowledge to the

accused that the act done by him would cause the death of the children. He relied upon the inconsistent evidence of the students as well as the teachers and argued that the accident occurred due to the action of the passengers and since the act of the accused was not the direct cause of the accident, conviction even under Section 304A of the IPC is not warranted in the instant case.

10. The learned Public Prosecutor Smt.Sylaja, contended that the act of the accused clearly comes within the contours of Section 304 IPC and also argued that the appellant does not deserve any sympathy as 18 persons died due to his act, which satisfies the ingredients of Section 304 IPC.

11. Adv.Dheerendra Krishnan K.K., supporting the prosecution argued that the unscientific alteration of the boat along with overload were the main reasons for the boat capsizing, which led to the death of 18 persons and that such unscientific alteration was totally within the knowledge of the accused. He pointed out to the evidence of PW46, PW47 and PW48 and pleaded that the absence of life-saving equipment coupled with the unscientific modification, without displaying the capacity of the boat and the absence of permit or fitness certificate to ply the boat on the water, and the owner of the

boat himself being the driver, clearly evinced the factum of knowledge, under section 304 IPC and sought for affirming the conviction of the accused.

12. I have considered the contentions raised and have perused the materials placed on record along with the evidence adduced, apart from the various decisions cited at the Bar.

13. The accused does not deny ownership of the boat, or navigation of the boat by him as a driver, on the ill-fated day. Though the permitted capacity of the boat was only for 6 passengers, it was not denied that 61 passengers, including 53 children and 8 teachers were on the boat at the time of the incident. However, the reason for the capsizing of the boat and the drowning of the passengers is disputed. When the prosecution alleged that water seeped in through a hole on the yellow boat attached in the middle, causing the boat to overturn, the accused defended that the boat capsized due to other reasons. According to the defense when students came towards one side in their attempt to catch a glimpse of rare bird nests, the boat tilted, and suddenly PW44 - a teacher, jumped out of the boat causing it to overturn.

14. The boat that sustained the accident is of a peculiar build.

It is built using 3 boats that are connected together by a platform and roof. On either side are two white coloured boats with a yellow-coloured boat in the middle. PW46 was the Chief Inspector of Boats, who deposed that the inspection certificate Ext.P21 was issued in the name of one Vipin K.Baby, who had sold the boat to the accused on 18-10-2006 and that though the capacity of the boat was 2 tons, permission was granted to carry only 6 passengers. It was also deposed by him, that whenever any alterations are made to the boat, it was necessary to obtain a fitness certificate and that during his inspection he had found alterations carried out to the boat without permission. He further stated that if the boat carried only the permitted capacity of passengers during the voyage, even if those passengers shift their position to one side of the boat still, the boat will not capsize. He also deposed that he had not found any hole in the boat during his inspection.

15. The primary question that arises for consideration is whether the accused had committed an offence coming under Section 304 of the Indian Penal Code.

16. Section 304 IPC has two parts. Both parts deal with culpable homicide not amounting to murder. Section 299 of the IPC,

explains culpable homicide. It provides that if an act is done with the intention of causing death or with the intention of causing bodily injury that is likely to cause death or with the knowledge that the act is likely to cause death and if ultimately death ensues, then it amounts to culpable homicide. Culpable homicide is of two types. (i) murder and (ii) culpable homicide not amounting to murder. Thus culpable homicide is the genus of which murder is a species. Legally every murder is culpable homicide, while the converse, i.e; every culpable homicide is not murder. Punishment for murder is provided under Section 302 IPC, while punishment for culpable homicide not amounting to murder is provided for in Section 304 IPC.

17. Section 304 IPC, as mentioned above, deals with culpable homicide not amounting to murder. Those acts that fall within the five exceptions mentioned in Section 300 IPC, when done with the intention of causing death or with the intention of causing such bodily injury that is likely to cause death, fall within the first part of Section 304 IPC. The second part of Section 304 IPC deals with culpable homicide not amounting to murder when the act is done without any intention to cause death or bodily injury as is likely to cause death, but with the knowledge that his act is likely to cause death.

18. In the instant case, the prosecution has not alleged that the act committed by the accused was done with any intention to cause death or cause bodily injury as is likely to cause death. Thus, even according to the prosecution, the offence alleged against the accused could come only under Part II of Section 304 IPC.

19. This leads the court to consider the parameters required to be proved by the prosecution. To bring home the guilt of an accused under Section 304 Part II of the IPC, the prosecution has to prove that (i) an act was done by the accused, (ii) the said act of the accused caused death, and, (iii) the said act was done with the knowledge that it is likely to cause death.

20. While appreciating the evidence adduced, it is necessary to identify the act done by the accused. PW1, PW5 and PW38 to PW45 are the occurrence witnesses while PW46 to PW48 are the technical witnesses. PW38 to PW43 are the school children while PW1, PW44 and PW45 are the teachers and all of them were on the boat. From the evidence of PW1 and those of PW44, and PW45, when read along with PW46, what is discernible is that in an unscientifically modified boat, the accused carried passengers beyond the limits of capacity, without proper licenses and without

containing life-saving equipment. PW1 deposed that there was a hole in the boat through which water seeped in while PW37 stated that he is unaware of how water seeped into the boat. PW40 stated that there was no water inside the boat when they started the ride but that water entered the boat when the boat was turned for returning back. The evidence also proves that the passengers moved towards one side of the boat causing it to tilt. The evidence of PW48 on the other hand who inspected the boat later and who is a technical person shows that the boat had no holes through which water could seep in. PW46 referring to Ext.P21 had stated that the permitted tonnage capacity of the boat was 2 tons. In other words, the boat had the ability to carry a weight of 2 tons. Witnesses have also stated that the accused tried his level best to save the passengers from drowning.

21. The evidence of PW46, PW47 and PW48 are all opinion evidence and cannot be given more greater value than an opinion. Though their evidence is relevant, the same is not conclusive.

22. A mere knowledge that if there is overloading on a boat, there is a possibility of the boat sinking, is not the required knowledge contemplated under Section 304 IPC to bring home a case of culpable homicide. The knowledge, contemplated under

Section 299 and 304 IPC is of a higher degree. Knowledge of a mere possibility that the act may cause death is not the knowledge envisaged. The degree of knowledge required to bring an act within the realm of culpable homicide must be a knowledge that is almost on the verge of certainty and not a mere possibility. When the knowledge is laced with several imponderables, to make it likely to cause death, such knowledge cannot be raised to the level of knowledge contemplated in Section 299 IPC to make it punishable under Section 304 Part II IPC.

23. In the decision in **Mahadev Prasad Kaushik vs State of Uttar Pradesh and Another** [(2008) 14 SCC 479], it was held that mere knowledge on the part of a person in driving a vehicle that his act is likely to cause injury or death is not sufficient to make out the offence under Section 304 Part II of the IPC. In other words, the extent and ambit of the knowledge required to be established to bring home guilt under Section 304 Part II are different. It requires an appreciation and an objective enquiry as to how a person, placed in the situation of the accused would have regarded the chance of the act causing death.

24. In **Alister Anthony Pereira v. State of Maharashtra**

[(2012) 2 SCC 648], after considering various decisions dealing with the scope of Section 304 Part II, it was held that the question of whether the accused had the knowledge that would cause the death of others while driving a motor vehicle, ought to be decided on the basis of the facts of each case. This proposition has been reiterated by the Supreme Court in **State through P.S Lodhi Colony, New Delhi v. Sanjeev Nanda** [(2012) 8 SCC 450]. Though all the above-referred decisions are cases that were dealing with the driving of a motor vehicle on the road either in a drunken manner or otherwise, the principles relating to Section 304 IPC are stated in those judgments and they have a bearing while considering the culpability of the accused in the present case.

25. Viewed in the background of the prepositions laid down as mentioned above, and from the nature of the evidence adduced, it can safely be concluded that the accused did not have that degree of knowledge to the extent of knowing that an accident would occur causing the death of passengers. From the evidence of PW1, PW 37, PW40, PW42, and that of PW44 to PW48 it cannot be held that the prosecution had proved beyond reasonable doubt that the accused had knowledge that death of the passengers will occur if the boat ride

is taken. In the above circumstances, I am of the view that the accused is entitled to the benefit of doubt as to the offence under section 304 IPC and hence the conviction of the accused under Section 304 IPC is liable to be set aside.

26. Once the conviction of the accused under Section 304 IPC, is set aside, the question arises as to whether the accused can be convicted under Section 304A IPC. It is true as held in **Vijayan v. State of Kerala** (1991 (1) KLT 325) and **Benny v. State of Kerala** (1991 (1) KLT 695) that a person charged with an offence under Section 304 IPC cannot be convicted for Section 304A IPC in the absence of a charge having been framed, as the accused was never called upon to answer a case of rash and negligent act. However, such a situation does not arise in this instant case, since the court had, prior to the commencement of the trial, amended the charge and added an additional charge under Section 304A IPC. Hence, the accused while going to trial was aware of the charges that were framed against him, which included Section 304, as well as Section 304A IPC.

27. Section 304A IPC applies in cases where death is caused by an act that is done rashly or negligently and such an act does not

amount to culpable homicide. Section 304A IPC applies when death is caused by an act of the accused where all the ingredients of Section 299 IPC are excluded, but the act that caused death was done rashly or negligently. It is settled that criminal liability under Section 304A IPC will arise only when the prosecution proves that the death of the victim was the result of a rash and negligent act of the accused and the act must be the immediate and proximate cause of the death. In other words, the act of the accused must have been the causa causans and not causa sine qua non for the death of the victim in a case under section 304A IPC. The aforesaid proposition can be culled out from the decisions in **Kurban Hussein Mohamedalli Bangawalla v. State of Maharashtra** (AIR 1965 SC 1616) and **Suleman Rahiman Mulani and Another v. State of Maharashtra** (AIR 1968 SC 829). Causa causans means the immediate cause as opposed to a remote cause.

28. The observations of Douglas Straight J., in **Empress of India v. Idu Beg** [(1881) ILR 3 All 776], are quite poignant. It was observed as follows:

“Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences.

Criminal negligence 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.”

29. The above observations have been quoted with approval in the decision in **Mahadev Prasad Kaushik v. State of U.P. and Others** [(2008) 14 SCC 47], where the Supreme Court went on to hold that “though the term negligence has not been defined in the Code, it may be stated that the negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a reasonable and prudent man would not do.

30. In **Prabhakaran v. State of Kerala** [2007 (3) KLT 400 (SC)] the Supreme Court, noticing the distinction between culpable homicide and rash and negligent act causing death, held that criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution.

31. Since from the discussion, it has come out that the death of 18 persons including 15 school children occurred and that the act of

the accused does not amount to culpable homicide, what remains to be considered is whether the accused acted recklessly or indifferently to the consequences or in a manner which reveals culpable neglect or failure to exercise precaution or reasonable care to guard against injury.

32. The act alleged to have been done by the accused is the navigation of the boat. Was the act of navigation of the boat done in a rash or negligent manner? Navigation starts from the time the passengers are permitted on board till they disembark. The accused as an owner and driver of the boat was the person directly in control of the navigation of the boat. He was the person who had knowledge of the passenger capacity of the boat. He was the person who permitted the passengers on board the boat, which was altered unscientifically. He permitted 61 persons to board the boat, knowing fully well that the capacity was only 6 passengers. He was also aware that the boat had no sufficient life jackets or other life-saving equipment to cater to 61 persons. In spite of knowing the deficiencies of the boat as stated above, if the accused permitted 61 persons to board the boat and navigated it through the waters of Periyar river having a depth of more than 6 metres, it bespeaks of a

rash and negligent act. This act of navigation, in gross disregard of the consequences without sufficient precautions to guard against injury, amounts to gross negligence and rashness warranting a finding of guilt under section 304A IPC.I find the accused guilty of the offence under Section 304A IPC.

33. While considering the sentence to be imposed upon the accused, it is necessary to appreciate that the sentencing must have a bearing on the conscience of the society and must reflect a response to society's cry for justice. A liberal attitude in the sentencing policy by imposing a meagre sentence or taking too sympathetic a view would be counter-productive. The principle of deterrence is also an avowed object of the sentencing policy.

34. Death due to boating accidents could be prevented to a large extent or at least be minimized by ensuring compliance to the safety tips in that regard. Responsibility falls equally on the driver as well as the passenger. Insisting on wearing life jackets and ensuring the presence of life saving equipment ought to be the responsibility of those manning the boat. The Officials are also bound to carry out routine inspections of all boats operating on the waters. There is a collective responsibility apart from the duty of care owed by the

driver and owner.

35. Navigating a boat through the waters carries an inherent risk, the degree of which is reduced by using appropriate life-saving equipment, including life jackets. This responsibility squarely falls upon the owner of the boat as well as its driver. Taking into reckoning the fact that the accused was the owner as well as the driver of the boat on the ill-fated day, this court is of the view that the provisions of the Probation of Offenders Act, 1958 cannot be applied, as observed by the Supreme Court in **State Tr. P.S Lodhi Colony, New Delhi v. Sanjeev Nanda**, [(2012) 8 SCC 450].

36. Having regard to the circumstances arising in the case and the nature of the rash and negligent act committed by the accused, this Court is of the view that the accused is liable to be imposed with the maximum sentence provided for the offence under Section 304A IPC, which a Magistrate trying a case under the said section is empowered to impose. The quantum of fine imposed by the Sessions Judge under Section 304 IPC shall be the quantum of fine under Section 304A IPC and the direction to distribute the fine to the 15 children shall stand affirmed.

37. In view of the above, the conviction and sentence imposed on the accused by judgment in SC 507 of 2007 on the files of the Additional Sessions Court Ernakulam, under Section 304 IPC are set aside. However, the accused is found guilty for the offence under Section 304A IPC and he is sentenced to undergo rigorous imprisonment for 2 years and to pay a fine of Rs.1,50,000/- under Section 357 Cr.P.C. As directed in the judgment under appeal, the sentence of fine shall be distributed amongst the victims of the 15 children who died in the tragic accident. If the sentence of fine imposed as above is not paid, the accused shall, in default, undergo simple imprisonment for a further 6 months.

38. The criminal appeal is thus allowed in part.

Sd/-

**BECHU KURIAN THOMAS
JUDGE**

vps

Order under Section 357A Cr.P.C.

39. Immediately after the judgment was delivered, the learned counsel appearing for additional respondents 2 and 3 submitted that the compensation directed to be paid is too meagre an amount and

the same does not serve any purpose as a measure of rehabilitation. He pleaded for a recommendation as contemplated under Section 357 A (3) of the Cr.P.C.

40. The learned counsel for the appellant as well as the learned Public Prosecutor opposed the recording of any recommendation.

41. Even though, I am of the view that the compensation directed to be paid as per this judgment, is not adequate as a measure of rehabilitation to the victims, it is a matter which requires consideration of various aspects. The question whether the scheme itself is applicable to the victims in the instant case, whether any compensation was paid earlier to the victims and also as to whether the victims are entitled to be rehabilitated as contemplated under the provision are matters which require a detailed consideration.

42. While finding that the compensation awarded by this judgment is not adequate, I leave open the above stated questions for consideration by the State Legal Services Authority and grant liberty to the victims in this case to initiate appropriate proceedings/applications for obtaining benefit under Section 357A of the Cr.P.C., in accordance with law and if otherwise entitled to as per

Crl.Appeal No.1531/08

-:22:-

the provision. If any such application is preferred by the victims of the tragedy before the State Legal Services Authority, the said Authority shall consider the same in accordance with law, after considering the questions mentioned above and after hearing the necessary parties.

Sd/-

**BECHU KURIAN THOMAS
JUDGE**

vps

/True Copy/

PS to Judge