**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an appeal in terms of the Section 331 of the Code of Criminal Procedure Act, No. 15/1979.

The Democratic Socialist Republic of Sri Lanka.

**Complainant**

CA. No. 63/2017

High Court of Kurunegala

Case No. 114/2007

Vs.

Herath Mudiyanselage Premaratne

**Accused**

**And Now Between**

HerathMudiyanselage Premaratne

**Accused-Appellant**

Vs.

Hon Attorney General

Attorney General's Department,

Colombo 12.

**Complainant-Respondent**

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Anil Silva PC., with Mark Anton for the for the Accused-Appellant.

Haripriya Jayasundera SDSG., for AG.

ARGUED ON : 02.02.2021

DECIDED ON : 05.03.2021

**R. Gurusinghe, J.**

The Accused–Appellant (Appellant) had been indicted in the High Court of Kurunegala on 14 counts framed under Section 298 of the Penal Code for causing the death of 14 persons named in those counts by rash and negligent driving of the bus No. 62-8390 on 4th July 2003 and on 28 counts framed under Section 329 of the Penal Code for causing grievous hurt to 28 persons by the same act of rash and negligence driving.

The prosecution has called a large number of witnesses. The Appellant had admitted all the Post-mortem Reports, Medico Legal Reports and the Report of Examiner of Motor Traffic. The Appellant has made a dock statement and also called a witness from Kurunegala North CTB depot and produced in evidence the daily control report which shows that the bus had started from Madagalla at 9.20 a.m. on 4th July 2003. The accident happened at about 11.00 o' clock. The bus had taken one hour and forty minutes to go that distance.

After trial, learned High Court Judge convicted the Appellant of all14 counts framed under Section 298 of the Penal Code and of the19 counts framed under Section 329 of the Penal Code and then imposed a term of two years rigorous imprisonment for each count 1 to 14 and a term of 6 months rigorous imprisonment for rest of the counts. The aggregate of the sentences is 37 and half years of rigorous imprisonment.

The grounds of appeal argued for the Appellant are that there were defects in the bus as per report of the Examiner of the Motor Vehicle and that fact was totally ignored by the trial Judge, there was no analysis of the evidence and the dock statement of the Appellant was not considered.

The report of the Examiner of Motor Vehicles was produced in evidence and it was admitted by the prosecution and the defence as well. According to that report there were few defects in the bus. It is true that the learned trial Judge has said in the Judgment that there were no defects in the bus. Since the report of Examiner of the Motor Vehicles was admitted, we have to admit it without reservation. According to the report, the bus was running with a cracked leaf spring. The shortcomings of the bus are listed in the report as follows:

<u>බස් රථයේ අඩුපාඩු පහත දක්වමි.</u>

1. සස්පෙන්ෂන් පද්ධතිය නඩත්තු කර නැත.
2. සොක් ඇබ්සෝබර් සවි කර නැත.
3. දුනු බුෂ් ගෙවී ඇත.
4. වම් පසු පස පිටත ටයරය ගෙවී සිනිඳු වී ඇත.
5. අත්තිරිංග පද්ධතියේ කොටස් නැත.
6. ස්ටැබිලයිසර් බාර් බුෂ් ගෙවී ඇත.
7. එන්ජිමෙන් සහ ගියර් පෙට්ටියෙන් අධික ලෙස තෙල් කාන්දු වී ඇත.
8. දකුණු ඉදිරි ප්‍රධාන දුන්න පුපුරා තිබියදී ධාවනය කර ඇත. එය අනතුරට

   ප්‍රථම කැඩී යාම හේතු වෙන් රථය මහා මාර්ගයේ දකුණු පසට ඇදී ගොස් ඇත.

9. දකුණු ඉදිරි දුනු මිටියේ දෙවන කොලය ස්ථාන දෙකකින් පුපුරා තිබී ඇත.

We have considered whether the reason for the accident was the above-mentioned defects and the Accused-Appellant could be exonerated of the charges for the above short comings. However, having considered the evidence as a whole we are compelled to decide against it.

The report further states as follows:

මෙම බස් රථයේ කැඩී ගිය දකණු ඉදිරි දුනු මිටිය ගලවා වෙනත් දුනු මිටියක් හා සුක්කානමක් සවි කර රථය මහා මාර්ගයේ ධාවනය කර පා තිරිංග පරීක්ෂා කරන ලදී. එය 65% කි. මෙම තිරිංග

ප්‍රමාණය නියමිත වේග සීමාව තුල ගමන් කළේ නම් අනතුරක් වළක්වා ගැනීමට ප්‍රමාණවත් බව මගේ හැඟීමයි. තවද අප පරීක්ෂණ මංඩලය සිද්ධිය වූ ස්ථානයටද ගියෙමු. සිද්ධිය වූ ස්ථානයේ පාර ඉතා හොඳ තත්වයක් ඇත. පාරේ කළ කොටසේ පළල අඩි 17 අගල් 5 කි. සිද්ධිය වූ ස්ථානයේ ටයර් සළකුණු අඩි 91 ක් දිගට ඇත. තවද එම ටයර් සළකුණු අසල රථයේ වම් ඉදිරි පාපුවරුවේ කොටස් පාරේ වැදී ගිය සළකුණු ඇත. මේ අනුව බලන කල රථය අධික වේගයෙන් ධාවනය කර ඇත. තවද මෙම රථය දීර්ඝ කාලයක් නඩත්තු නොකළ රථයකි. මේ සමග රථයෙන් ගලවන ලද වම් ඉදිරි දුනු මිටියේ පළමු හා දෙවන දුනු කොළ වල කොටස් හා වම් ඉදිරි ටයරයේ ගැලවී ගිය කොටස ඔබට ඉදිරිපත් කරමි.

The Examiner of the Motor Vehicle was of the opinion that if the bus had driven at a moderate speed the accident could have been avoided. This opinion should be considered with the evidence of the witnesses who had faced the accident.

According to the evidence, Appellant had driven the bus at a moderate speed up to a certain place. Thereafter he started to drive at excessively high speed. Most of the witnesses testified that the bus had been driving at excessive speed at the time of the accident. Some witnesses say they raised concerns and told the conductor to ask the driver to slow down. The answer of the conductor was to 'hold tight'. Even the seated passengers had feared that they would be thrown out from it. One witness stated that the manner in which the bus had driven, she feared that an accident could happen any moment.

When considering the evidence of the passengers in toto, it is clear that the Accused–Appellant had driven the bus at an excessively high speed. This cannot be treated as mere speeding. According to the evidence there were about 80 passengers in the bus. He totally forgot that the lives of many were in his hands. He tried to take a bend at the same speed. As he was taking the bend there was a sound and the bus went out of control of him and went to the right side, toppled and crashed into a tree.

In view of the evidence the accident cannot be attributed for the defects in the bus. The evidence is sufficient to establish the fact that the Accused-Appellant drove the bus in a rash and negligent manner. Therefore, the learned trail Judge cannot be faulted for the conviction. We affirm the conviction.

Now we consider whether the punishment imposed upon Accused-Appellant is excessive. The Accused-Appellant is sentenced to a total term of 37 and half year rigorous imprisonment. Section 16(2) of the Code of Criminal Procedure Code Procedure Act is as follows:

"16(2) for the purpose of appeal aggregates sentence under subsection (i) in the case of conviction for several offences at one trial shall be deemed to be a single sentence".

The term of 37 and half year rigorous imprisonment we consider as single sentence for the purpose of the appeal.

In the case of Bandara Vs. Republic of Sri Lanka [2002] 2 Sri LR 277 the Court of Appeal increased the total period of imprisonment 30 months to 60 months stating that the accused in that case deserved a longer period of imprisonment. In that case 14 persons had died as a result of an accident. Two other persons were injured.

In this case also 14 passengers died. A number of persons injured. However, in Bandara's case, the accused-appellant was more negligent than the Appellant in this case. In Bandara's case the Appellant had driven the bus after consuming liquor. It was a hilly road with sharp bends. The accused had taken his hands off the steering wheel and clapped whilst looking at the passengers through the mirror. The Accused– Appellant in this case has not done such negligent acts similar to the above.

The Appellant has admitted all the Post-Mortem Reports, Medico-Legal reports and the Report of the Examiner of Motor Vehicles without burdening the prosecution to call the doctors and the other officers as witnesses. The Accused-Appellant expressed his willingness to plead guilty to the charges before the trial started expecting a lenient punishment for which the State did not agree. The Accused-Appellant has no previous convictions.

Although the crack in the leaf spring was not the cause of the accident, it could have some bearing in aggravating the result of the accident.

In view of the above, we are of the opinion that 37 and half year sentence imposed upon the Appellant is too harsh and excessive. Therefore, the sentence imposed by the learned trial Judge is set aside. We impose a term of 05 years rigorous imprisonment on the Accused-Appellant to take effect from the date of conviction, namely 20th March 2017.

Subject to the variation of the sentence, the appeal of the Appellant is dismissed.

Judge of the Court of Appeal

**N. Bandula Karunarathna, J.**

I agree.

Judge of the Court of Appeal