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

In the matter of an appeal under Section 331 of the Code of Criminal Procedure Act No. 15 of 1979

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

Complainant

Court of Appeal Case No.
HCC/151/19
High Court of Panadura
Case No. 3013/13

Vs.

Devarahandi Asiri Kankanamge Sudath Rohana Jayasiri

Accused

AND NOW BETWEEN

Devarahandi Asiri Kankanamge Sudath Rohana Jayasiri

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : **K. PRIYANTHA FERNANDO, J (P/CA)**
WICKUM A. KALUARACHCHI, J

COUNSEL : Accused-Appellant is unrepresented.

Dilan Rathnayake, Senior Deputy Solicitor General for the Respondent.

WRITTEN SUBMISSION

TENDERED ON : 01.02.2022 (Only on behalf of the Respondent)

ARGUED ON : 28.02.2022

DECIDED ON : 28.03.2022

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted in the High Court of Panadura for committing the death of Kapuruge Sunil Jayantha by a rash or negligent act, an offence punishable under Section 298 of the Penal Code. After the trial, the learned High Court Judge convicted the appellant by his judgment dated 26.04.2019. It is against the said conviction and sentence, the accused-appellant preferred this appeal.

Although dates were fixed by the court to file written submissions prior to the hearing, several dates were moved by the learned counsel for the appellant to file written submissions. The learned junior counsel for the appellant was informed by the court on 07.07.2021, that the appeal would be taken up for argument the next date whether written submissions are filed or not. However, upon the requests made on 26.10.2021, further dates were given to file written submissions on behalf of both parties and the matter was fixed for arguments on

28.02.2022. Even then, the written submissions were not filed on behalf of the appellant and only on behalf of the respondent, it was filed.

When this appeal was taken up for hearing on 28.02.2022, the respondent was represented by the learned Senior Deputy Solicitor General. The accused-appellant who was on bail was not present in court and he was not represented by an Attorney at Law. Hence, there was no other alternative for the courts but to take up the appeal for hearing. Accordingly, the learned Senior Deputy Solicitor General made oral submissions.

Although the appellant was not present and not represented, this court has perused his grounds of appeal stated in the petition of appeal. Six grounds have been set out in the petition of appeal but basically, the appellant's grounds are as follows;

I. The learned High Court Judge has failed to appreciate the infirmities in the evidence of the eye witness and failed to consider contradictions between the eye witness and PW 5.
II. The learned High Court Judge has failed to duly analyze the testimony of PW 5.
III. Failure to analyze the defence evidence.
IV. The judgment is contrary to the evidence led at the trial.

In this case, the death of the deceased was caused as a result of this motor traffic accident. The appellant has given evidence and taken up the position of contributory negligence on the part of the deceased. Therefore, the appellant admits that he was the driver of the bus that collided with the deceased. There is only a single eye witness to this case. He was a passenger of the bus and he was right behind the driver at the time of the accident being occurred.

As correctly observed by the learned High Court Judge, the said eye witness is an independent witness. It is apparent that he had no reason to give false evidence against the driver of the bus or in favour of him. According to the said witness, the appellant drew the bus at excessive speed and collided with the deceased. The eye witness stated that the driver did not apply breaks before the accident and has applied breaks only after the accident.

After making a complaint to the police, Police Sergeant Bandara had gone to this place and made his observations. The sketch marked P3 was prepared by him. He is the 5th witness of the prosecution. The learned High Court Judge has observed that PW 5's evidence is improbable and decided not to consider his evidence. The learned Senior State Counsel submitted that the learned Judge's decision not to accept his evidence is correct because his evidence is improbable on certain vital matters. I agree that the evidence of PW 5 is vague and uncertain. It should also be noted that although there is a ground of appeal that the learned High Court Judge has failed to duly analyze the testimony of prosecution witness 5, in fact, the learned Judge has analyzed his evidence and found that he is not a credible witness to rely upon.

However, the eye witness, PW 1 is a credible independent witness. In the aforesaid circumstances, any discrepancies that arise from the vague evidence of PW 5 have no impact on the credibility of the testimony of PW 1.

Anyhow, the sketch prepared by PW 5 could be used to get an idea of how this accident happened because PW 5 was the Police officer who made observations at the scene of the incident. It is true that at times PW 5's testimony is confusing. But when he explains the place of the accident, it appears that the learned State Counsel who led the evidence in the High Court has confused him. In his sketch marked P3, the place

of the accident has been marked as 'X' and correctly, the same was stated in his evidence as well. However, the learned State Counsel asked; 'X' or, is it correct to say that 'I' is that place? Then he answered 'yes' (page 142 of the appeal brief). But, 'I' is not the place of the accident and 'X' is the place of the accident according to the sketch prepared by the PW 5. On page 144 of the appeal brief, he has explained the starting point of the break marks as 'I'. Again, in cross-examination, he confirmed that the place of the accident has been marked as 'X' and the starting point of break marks has been marked as 'I' (Page 158 of the appeal brief). Therefore, according to PW 5 also, break marks appear on the road after passing the place of the accident.

Hence, it is apparent even according to the sketch prepared by PW 5, the appellant applied breaks after the accident. The eyewitness also says that the appellant did not apply breaks before the accident and he applied breaks only after the accident. Although the appellant testified that he saw the deceased crossing the road and applied the brakes and turned the bus towards the middle island of the road, the eyewitness as well as the sketch prepared by the police officer who observed the scene after the accident confirms that the appellant applied the brakes only after the accident. If the appellant applied breaks before the accident, brake marks should be visible on the road from a location before the place where the bus and the deceased collided. Therefore, the appellant's version that he applied breaks prior to the accident could not be accepted.

The accused-appellant attempted to show the contributory negligence of the deceased by showing that the deceased crossed the road halfway, turned back and sat on the road. Even the eye-witness has admitted the said facts. The contention of the learned Senior State Counsel was that there was no negligence on the part of the deceased and the accident happened due to the appellant's negligent highspeed driving.

It is true that turning back and sitting on the road is an unusual behavior of a pedestrian who crosses the road. In the instant action, it appears from the evidence that the deceased was in dilemma what to do in the situation that he faced. There were two lanes on the road for the vehicles to run towards Colombo. The deceased wanted to cross the road from the middle island of the road to the seaside. The deceased saw the bus driven by the appellant coming at excessive speed. Also, the deceased saw another bus coming in the same direction with a terrific speed to overtake this bus. That is why PW 1 stated by answering a question posed by the court, "බස් දෙක රේස් ගිය නිසා තමයි ආපසු හැරුනේ" (Page 111 of the appeal brief). PW 1 has also said that the appellant had also once overtaken the other bus. (Page 112 of the appeal brief). In this situation, the deceased was frightened, shocked and was unable to decide what to do. This helpless person sat on the road, unable to do anything. All these facts were emanated from the evidence of the eye-witness and not in dispute.

In the aforesaid circumstances, one cannot say that it is the contributory negligence of the deceased. Contributory negligence could be established only if the deceased fails to take care of himself. It was held in Lewis V. Denye (1939) 1 K.B. 540 that the defendant has to prove that the plaintiff failed to take care of himself, as a reasonable man would do in the circumstances and that such failure constituted negligence which contributed to the accident. In addition, Lord Denning in Froom V. Butcher (1975) 3 all. E.R. 520 – C.A., distinguished 'negligence' and 'contributory negligence' as follows; *negligence depends on a breach of duty, whereas contributory negligence does not. Negligence is a man's carelessness in breach of duty to others. Contributory negligence is a man's carelessness in looking after his own safety.*

In the instant action, the deceased did everything possible for his own safety. When two buses were speeding past each other, he had nothing to do. The deceased could not go in front of two buses coming at terrific speeds. The helpless man turned back and sat on the road, unable to understand what he could do. Considering these circumstances with the aforesaid legal position, I hold that there is no contributory negligence on the part of the deceased.

The appellant attempted to advance the position that this accident would not have happened, if the deceased had continued to cross the road. The appellant stated in his evidence, he thought that the deceased would cross to the left side of the road and thus he applied break and turned the bus towards the right side of the road. His explanation appears on page 191 of the brief as follows:

ප්‍ර: එතකොට තමන් ගත්තු පියවර මොකක්ද?

උ: මම එම මංතීරුවේ ගිය නිසා අදාල පුද්ගලයා වමට පනියි කියලා අදහස් කරලා මම තිරිංග තද කරලා බස්රථයේ මුහුණත මැද දුපත පැත්තට ඇල්ලුවා.

The said item of evidence clearly shows that the appellant could not stop the bus due to the excessive speed, therefore he turned the bus to the right side of the road to prevent the accident. In perusing the sketch and the report prepared by the PW 5, which was not challenged by the appellant, there was no difficulty for the learned High Court Judge to decide that the bus driven by the appellant came at excessive speed because rightly observed by him, the length of the break mark according to the sketch is 28 meters and 20 centimeters. That is more than 80 feet. Therefore, the appellant's version that he did not drive the bus at an excessive speed is also unacceptable. Hence, for the reasons stated above, the learned High Court Judge is correct in accepting the eye witness's evidence and not accepting the defence version.

Next, this court has to consider the degree of negligence required to prove the charge under Section 298 of the Penal Code. It was decided

in the case of Karunadasa V. OIC Motor Traffic, Nittambuwa Police – (1987) 1 Sri L.R. 155 that a very high degree of negligence is required to be proved in order to establish a charge under Section 298 of the Penal Code.

It was also decided in Premasiri V. Officer-in-Charge, Police Station, Matara – (1993) 2 Sri L.R. 23 that "To establish liability for negligence in a criminal case, a very high degree of negligence should be established. In other words, the accident should have been due either to the recklessness of the accused or due to the reckless driving of the accused, where the accident is attributable to an error of judgement, it is not sufficient to establish criminal liability by negligence or by a rash act".

Now, it has to be considered whether the negligence of the appellant has been proved to the aforesaid high degree. According to the eye-witness, there was a distance of 40/50 meters between the bus and the deceased, when he first saw the deceased crossing the road. Obviously, the appellant also should have seen the deceased within the said distance because he was the driver of the bus. The appellant says that he turned the bus to the right side thinking that the deceased would go to the left side of the road. That means when the appellant saw the deceased from the 40/50 meters distance, the appellant could not stop the bus for him to cross the road and thus he turned the bus towards the right side. In other words, he had driven the bus at an excessive speed where he could not stop the bus even at a distance of 40/50 meters. Thereafter, the bus was run over the deceased and it was stopped about 28 meters and 20 centimeters away. In these circumstances, it is evident that the accident occurred due to the reckless driving of the accused-appellant. Because of his negligent act, the death of the deceased was caused.

In the case of Palansuriya V. Johoran – 48 NLR 400, it was found on the circumstances of that case, that the accused must have driven his lorry at an inordinately excessive speed, and it was held that he was guilty of the very high degree of negligence in the means adopted by him to avoid the risk consequent on the speed of the lorry. In the said case, the lorry went across the grass verge of the road, a distance of nearly 50 feet. In the action before us, although the bus has not gone across the grass verge, it has come in inordinately excessive speed where the appellant could not stop the bus in a distance more than 80 feet even after applying break. It was held further in the said case that there was *prima facie* evidence of negligence casting upon the accused the onus of proving that there was no negligence.

For the foregoing reasons, the aforesaid grounds of appeal would not succeed and I hold that the high degree of negligence required to prove the charge of this case has been proved. Accordingly, I hold that the learned High Court Judge has correctly convicted the appellant. The sentence passed by the learned High Court Judge is also lawful and correct in principle. Therefore, the conviction and the sentence are affirmed and the appeal is dismissed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL