



"C.R."

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

TUESDAY, THE 16TH DAY OF JANUARY 2024 / 26TH POUSHA, 1945

CRL.APPEAL NO. 957 OF 2018

AGAINST THE JUDGMENT DATED 27.07.2018 IN SC 496/2015 OF

THE I ADDITIONAL SESSIONS COURT, ERNAKULAM

CP 3/2015 OF ADDITIONAL CHIEF JUDICIAL MAGISTRATE (E&O),

ERNAKULAM

CRIME NO.9735/2014 OF THE TRAFFIC POLICE STATION WEST,

ERNAKULAM

APPELLANT/ACCUSED:

RENJITH RAJ,
AGED 29/14, S/O.RAJU K.K., KUZHUPPILLYPARAMBIL,
PALLILAMKARA, HMT COLONY P.O., THRIKKAKARA
VILLAGE, ERNAKULAM.

BY ADV SRI.S.NIRMAL KUMAR

RESPONDENT/COMPLAINANT:

STATE, REPRESENTED BY C.I. OF POLICE
CITY TRAFFIC (WEST) POLICE STATION IN CRIME
9735/2014 OF CITY TRAFFIC (WEST) POLICE
STATION, REPRESENTED BY PUBLIC PROSECUTOR, HIGH
COURT OF KERALA, ERNAKULAM.

SMT.PUSHPALATHA MK, SR.PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL
HEARING ON 11.01.2024, THE COURT ON 16.01.2024
DELIVERED THE FOLLOWING:

**P.G. AJITHKUMAR, J.****"C.R."****Crl.Appeal No.957 of 2018****Dated this the 16th day of January, 2024****JUDGMENT**

The appellant challenges his conviction and sentence for an offence under Section 304A of the Indian Penal Code, 1860 (IPC) in this appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973 (Code). He was tried for an offence under Section 304 of the IPC by the I Additional Sessions Judge, Ernakulam. He was convicted for the offence under Section 304A of the IPC.

2. The Circle Inspector of Police, City Traffic (West) Police Station, Ernakulam filed final report in Crime No.9735 of 2014 of the said police station with the following allegations:

At about 12.50 p.m. on 08.11.2014 the appellant drove the bus bearing Reg.No.KL-02-AE-6673 along Ernakulam Paramara Road from north to south and while negotiating the bus to enter the Banerji Road, it hit against the handrails



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separating the footpath from the road. Body part of the bus tore off and that hit against Sri.Velayudhan, who was waiting on the road side. He got entangled under the bus and suffered serious injuries. He succumbed to the injuries. Alleging that the appellant drove the bus with the knowledge that he was likely by such act to cause death of passengers or pedestrians, he was charged for the offence under Section 304 of the IPC.

3. At the trial before the court below PWs.1 to 16 were examined and Exts.P1 to 36 were marked, besides Ext.C1. During the examination under Section 313(1)(b) of the Code, the appellant denied the incriminating circumstances appeared in evidence against him. He maintained that he was innocent. No evidence was let in on his side. The court below, after appreciating and analysing the evidence, found that it was the appellant, who was driving the bus at the time of occurrence and his rash and negligent driving was the proximate cause for dashing the bus against the handrails on the side of the road entering the footpath



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and hitting against the deceased, resulting in his death. By holding that the evidence tendered by the prosecution proved beyond doubt the identity of the appellant as well as his rash and negligent driving had resulted in the death of Sri.Velayudhan, the court below convicted and sentenced him for the offence punishable under Section 304A of the IPC. The appellant challenges the said findings in this appeal.

4. Heard the learned counsel for the appellant and the learned Public Prosecutor.

5. The facts that the bus bearing Reg.No. KL-02-AE-6673 dashed against the handrails on the side of the road and it ran over to the footpath at Paramara Road - Banerji Road junction at 12.15 p.m. on 08.11.2014, resulting in damaging the handrails and causing injuries to Sri.Velayudhan, a pedestrian, are not in dispute. Sri.Velayudhan succumbed to the injuries also is not in dispute.

6. Sri.Velayudhan was immediately taken to the General Hospital, Ernakulam where he was pronounced dead. PW12 is a senior civil police officer. He was on duty on



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08.11.2014 near the place of occurrence. Hearing a hue and cry he looked to see the bus in question stopped at the place of occurrence. He rushed to the spot. PW11 is a civil police officer. He was on traffic duty at the place of occurrence itself. He deposed that on hearing sound and pandemonium he looked to the spot and saw the bus stopped ramming against the handrails and passing over the footpath. People alarmed that one person was entangled under the bus. He found a person below the bus and hence he asked the driver to move the bus behind. He, with the help of onlookers, took out the injured. PW12 along with another person took the injured to the General Hospital, Ernakulam. PW12 further deposed that the doctor who examined Sri. Velayudhan pronounced him dead.

7. Ext.P9 is the inquest report prepared by PW14, a Sub Inspector attached to the city traffic police station. PWs 3 and 4 are witnesses to the inquest and attestors to Ext. P9. Ext.P29 is the report of the autopsy, where the extensive nature of the injuries sustained by Sri. Velayudhan and that



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such injuries resulted in his death are stated. Cause of death of Sri.Velayudhan is indisputable in the light of the said evidence. He died due to the injuries sustained by him in the incident.

8. The appellant contends that the prosecution did not prove that the appellant was the driver of the bus at the time of occurrence and that the prosecution failed to rule out the possibility of mechanical defect of the bus to be the cause of the incident. Another contention set forth by the appellant is that his conviction for the offence under Section 304A of the IPC after trying him on a charge for an offence under Section 304 of the IPC, is illegal and impermissible.

9. PW1, Shine K.K., is the owner of the shop near the place of occurrence. He is running a mobile shop. The Paramara Road-Banerji Road Junction is quite in front of his shop. The vehicles coming from the Paramara Road have to take a left turn in front of his shop to enter the Banerji Road. He deposed that just in front of his shop the bus in question came in an enormous speed, hit against the handrail and ran



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over to the footpath. His definite version is that while the bus was negotiating to enter the Banerji Road, it had hit the handrail and in that course, a person waiting on the pavement was hit at. The fact that Sri.Velayudhan was the person whom the bus had hit at and resultantly died are now beyond dispute.

10. PWs.11 and 12 reached the spot immediately after the incident. They did not see the bus hitting against the handrail. But on hearing the sound they noticed the incident and soon reached and at that time, the deceased was lying under the bus. PW11 added that he asked the driver to move the bus behind for rescuing the injured. Both PWs.11 and 12 deposed as to the manner in which the bus was stopped. It dashed against the handrails, damaged it and a part of its body tore off and protruding out. A part of the bus was on the footpath.

11. The learned counsel for the appellant tried to bring out certain circumstances based on inconsistencies appeared in the evidence of Pws.1, 11 and 12 in support of his plea to



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disbelieve the said witnesses. True, PW1 did not identify the driver of the bus. The first information statement, Ext.P1 was recorded from him immediately after the incident, based on which the crime was registered by PW13 as per Ext.P32 FIR. When the assertions in Ext.P1 are in terms of what he has stated before the court in regard to the manner in which the incident had occurred, there is no reason to discard his evidence for the reason of some minor inconsistencies in his evidence.

12. PWs.11 and 12 were on traffic duty near the place of occurrence. Although they did not see the bus ramming against the handrails and hitting the deceased, they noticed the bus immediately after the incident. PW11 reached soon and following him PW12 also reached the place of occurrence. They are natural witnesses. PW11 produced his duty diary before the investigating officer, where the details of the incident were narrated. There is absolutely no reason to disbelieve these witnesses. From their testimonies, the way in which the bus was driven resulting in the incident is quite



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evident. The description of the damages to the handrails are mentioned in Ext.P10 scene mahazar. It was prepared by PW15, the investigating officer. PWs.5 and 12 are attestors to it. Both of them stated that in their presence the mahazar was prepared.

13. The learned counsel for the appellant pointed out a discrepancy in the evidence of PW5. He stated in court that the bus was at the place of occurrence when the mahazar was prepared. Whereas, from the narration in the mahazar and from the evidence of PWs.12 and 15, it is clear that the bus was not there at that time. PW13, a Sub Inspector of Police, stated that he had removed the bus to the Police Station after some time of the incident. From the said evidence, it is obvious that PW5 mistakenly stated that the bus was available at the place of occurrence while the scene mahazar was being prepared. The said mistake cannot have the effect of creating any doubt as to the correctness of the scene mahazar. The evidence brought through PWs.1, 11, 12 and 15 has proved beyond any doubt the nature in which the incident had



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occurred. The narration in Ext.P5 goes in tandem to the said evidence. Thus proved that on account of driving the bus in such a rash manner, it happened to enter the footpath, dashed against the handrails and cause fatal injuries to the deceased.

14. The submission of the learned counsel for the appellant is that the mechanical defect of the bus was the cause of the incident. The said contention is untenable for more than one reason. PW11 on his spontaneous reaction on knowing a person lying underneath, asked the driver to move the bus backward. It was after that only PW11 with the help of the onlookers could rescue the injured. As stated, PW13 had removed the bus to the police station. There is nothing in evidence to show that the bus had to be repaired before moving it from the place of occurrence. Further, PW10, Motor Vehicle Inspector, after inspecting the bus on 10.11.2014 certified that the break system and steering column of the bus were defect free. Ext.P26 is his report. From the above it is established that the bus had no mechanical defect.



15. Coming to the identity of the driver, the learned counsel for the appellant seriously assailed the evidence of PWs.11 and 12. PWs.1 and 2 are the occurrence witnesses. PW1 stated regarding the incident, but maintained that he did not see the driver of the bus at that time. PW2 did not say about the details of the incident. He only stated that the bus rammmed against the handrail and a person sustained fatal injuries. On the other aspects, he turned hostile to the case of the prosecution.

16. Similarly, PWs.7 and 8, who were the owner and conductor respectively of the bus also did not support the prosecution in the matter of proving the identity of the driver. They also denied having stated to police about the identity of the driver also. Ext.P20 is the trip sheet book seized from the bus. PW8 denied his signatures in it, including in Ext.P20(a), which is the page in the trip sheet concerning 08.11.2014. He admitted his signature in Ext.P21, the mahazar prepared for the seizure of the trip sheet book. But when he denied his signature in Ext.P20(a), evidence was lacking to prove its



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contents. The learned counsel for the appellant urged that the trip sheet book was not maintained strictly in accordance with Rule 224 of the Kerala Motor Vehicle Rules, 1988 and therefore it cannot be considered in evidence at all. Ext.P20 is a bound volume and what is lacking is printing of the consecutive page numbers. When page numbers are supplied by the conductor, the same cannot be said to be an inadmissible document. But when the contents of Ext.P20(a) is not proved, the same is not helpful to establish the identity of the driver of the bus. That, however, does not affect the other evidence tendered by the prosecution to prove the identity of the driver of the bus.

17. As stated, PW11, the person reached immediately after the incident, stated about the identity of the driver of the bus. PW11 had identified the appellant before the court as the driver. The narration of PW11 that he instructed the appellant to take the bus backward to rescue the injured and he detained the appellant and handed him over to the Sub Inspector certainly establishes the identity of the driver of the



bus. PW12, who rushed to the spot on hearing the sound, also stated that the appellant was the driver. From PW11, PW13- the Sub Inspector got the appellant in custody and brought to the police station. His arrest was followed. There is absolutely no reason to disbelieve PWs.11, 12 and 13 in the above respect. They are natural witnesses having no reason to give evidence against the appellant. In the said circumstances, the finding of the court below that the prosecution proved beyond doubt that it was the appellant who drove the bus at the time of incident is confirmed.

18. The court below found that evidence was lacking to find the appellant guilty of an offence of culpable homicide. But it was held that the rash and negligent driving of the bus by the appellant resulted in the incident. Accordingly, the court below convicted the appellant for the offence under Section 304 A of the IPC.

19. The learned counsel for the appellant would submit that the conviction was illegal inasmuch as Section 304A is not a lesser offence of Section 304 of the IPC. The decisions



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of this Court in **Benny v. State of Kerala [1991 (1) KLT 695]** and **Binish v State of Kerala** (Judgment dated 02.11.2021 in Crl.Appeal No.623 of 2008) are relied on by the learned counsel in support of that contention. Yet another decision referred to by the learned counsel is **Mahadev Prasad Kaushik v. State of U.P. and another [(2008) 14 SCC 479]**.

20. In **Benny** (supra) this Court held that Section 304A is not a minor offence of Section 304 of the IPC. Therefore, in a case where the trial was held on a charge under Section 304 of the IPC, no conviction under Section 304A can be had invoking the provisions of Section 222 of the Code. In that case, the charge was, *inter alia*, under Section 302 of the IPC and the conviction by the trial court was for an offence under Section 304, Part II of the IPC. The allegations against the accused were that the deceased, who did not know swimming, was forcibly pushed down in water from a bridge ignoring his protest. He drowned to death. Considering the evidence tendered by the prosecution to



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prove such a charge, the court held that a conviction for an offence under Section 304A of the IPC could not be had on the basis of the proved facts.

21. Following the aforesaid principle, this Court in **Binish** (supra) held that the charge being one under Section 304 of the IPC, conviction under Section 304A of the IPC was not possible. The accused was accordingly acquitted by setting aside his conviction under Section 304 of the IPC. That was a case where a passenger boarded the bus had fallen out through the door as a result of the accused moving the bus forward suddenly from a bus stop. That resulted in the death of that person.

22. In **Mahadev Prasad** (supra) the charge was for an offence under Section 304 of the IPC and the incident was one relating to medical treatment. The distinction was drawn by the Apex Court between offence under Sections 304 Part I, 304 Part II and 304A in the context of the fault in the medical treatment. The law laid down in the facts of that case cannot have strict application in this case.



23. **Alister Anthony Pareira v. State of Maharashtra [(2012) 2 SCC 648]** is a case where the accused faced trial on the allegations that while he was driving a car rashly and negligently with knowledge that people were asleep on footpath rammed the car over the pavement; caused death of seven persons and injuries to eight persons. At the time of the incident, the accused was found to have consumed alcohol. The Sessions Judge, who tried the accused for the offences punishable under Sections 304 Part II and 338 of the IPC had convicted him under Sections 304A and 337 of the IPC. The High Court in appeal convicted him for the offences punishable under Section 304 Part II and Sections 337 and 338 of the IPC. One of the questions considered by the Apex Court was, whether indictment on the two charges, namely, the offence punishable under Section 304 Part II IPC and the offence punishable under Section 338 of the IPC are mutually destructive and legally impermissible? The question mooted alternatively was that, whether it is permissible to try and convict a person for the offence punishable under Section 304



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Part II of the IPC and the offence punishable under Section 338 of the IPC for a single act of the same transaction? While answering the said question the Apex Court held as under:

“39. The scheme of S.279, S.304A, S.336, S.337 and S.338 leaves no manner of doubt that these offences are punished because of the inherent danger of the acts specified therein irrespective of knowledge or intention to produce the result and irrespective of the result. These sections make punishable the acts themselves which are likely to cause death or injury to human life. The question is whether indictment of an accused under S.304 Part II and S.338 IPC can co - exist in a case of single rash or negligent act. We think it can. We do not think that two charges are mutually destructive. If the act is done with the knowledge of the dangerous consequences which are likely to follow and if death is caused then not only that the punishment is for the act but also for the resulting homicide and a case may fall within S.299 or S.300 depending upon the mental state of the accused viz., as to whether the act was done with one kind of knowledge or the other or the intention. Knowledge is awareness on the part of the person concerned of the consequences of his act of omission or commission indicating his state of mind. There may be knowledge of likely consequences without any intention. Criminal culpability is determined by referring to what a person with reasonable prudence would have known.

40. Rash or negligent driving on a public road with the knowledge of the dangerous character and the likely



effect of the act and resulting in death may fall in the category of culpable homicide not amounting to murder. A person, doing an act of rash or negligent driving, if aware of a risk that a particular consequence is likely to result and that result occurs, may be held guilty not only of the act but also of the result. As a matter of law - in view of the provisions of the IPC - the cases which fall within last clause of S.299 but not within clause 'fourthly' of S.300 may cover the cases of rash or negligent act done with the knowledge of the likelihood of its dangerous consequences and may entail punishment under S.304 Part II IPC. S.304A IPC takes out of its ambit the cases of death of any person by doing any rash or negligent act amounting to culpable homicide of either description.

41. A person, responsible for a reckless or rash or negligent act that causes death which he had knowledge as a reasonable man that such act was dangerous enough to lead to some untoward thing and the death was likely to be caused, may be attributed with the knowledge of the consequence and may be fastened with culpability of homicide not amounting to murder and punishable under S.304 Part II IPC.

42. There is no incongruity, if simultaneous with the offence under S.304 Part II, a person who has done an act so rashly or negligently endangering human life or the personal safety of the others and causes grievous hurt to any person is tried for the offence under S.338 IPC.

43. In view of the above, in our opinion there is no impediment in law for an offender being charged for the



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offence under S.304 Part II IPC and also under S.337 and S.338 IPC. The two charges under S.304 Part II IPC and S.338 IPC can legally co - exist in a case of single rash or negligent act where a rash or negligent act is done with the knowledge of likelihood of its dangerous consequences.

44. By charging the appellant for the offence under S.304 Part II IPC and S.338 IPC - which is legally permissible - no prejudice has been caused to him. The appellant was made fully aware of the charges against him and there is no failure of justice. xxx"

(Underlines supplied)

The principles emerge from the above are:

1. Indictment of an accused under Section 304 Part II and Section 338 of the IPC can co-exist in a case of single rash or negligent act. Those two charges are not mutually destructive.
2. A person, responsible for a reckless or rash or negligent act that causes death which he had knowledge as a reasonable man that such act was dangerous enough to lead to some untoward thing and the death was likely to be caused, may be attributed with the knowledge of the consequence and may be fastened with culpability of homicide not amounting to murder and punishable under Section 304 Part II of the IPC.
3. There is no incongruity, if simultaneous with the offence under Section 304 Part II, a person who has done an act so rashly or negligently endangering human life or the personal safety of the others and causes grievous hurt to



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any person is tried for the offence under Section 338 of the IPC.

4. There is no impediment in law for an offender being charged for the offence under S.304 Part II IPC and also under Sections 337 and 338 of the IPC.
5. By charging a person for the offence under Section 304 Part II and Section 338 of the IPC no prejudice would be caused to him. If the accused is made fully aware of the charges against him, there is no failure of justice.

On a juxtaposition, the facts of this case are more similar to the facts of **Alister Anthony [(2012) 2 SCC 648]** than the facts of **Benny [1991 (1) KLT 695]** and **Binish** (Crl.Appeal No.623 of 2008). Therefore, the law laid down by this Court in **Benny** and **Binish** (supra) shall have no application in this case.

24. Reverting to this case, the charge framed against the appellant was for an offence punishable under Section 304 of the IPC; he was convicted for the offence punishable under Section 304 A of the IPC. The question is whether in the light of the charge framed, the conviction for the offence punishable under Section 304A of the IPC is illegal? The charge framed by the court below in this case reads:



“That you, Renjith Raj on 08.11.2014 at or about 12.15 p.m with the knowledge that negotiating curve by taking bus through foot path is likely to cause death of pedestrian using the footpath being the driver of service bus bearing Reg.No.KL-02-AE-6673 drove the same along the Paramara road from north to south in over speed and entered into Banerji Road by taking the bus through the foot path on the north-eastern corner Town Hall Junction and in that attempt the bus dashed against the railings of the foot path and due to the impact of the hitting the body of the bus was torn off, and the torn off portion hit against the deceased namely Velayudhan, S/o Puthval nikarthil parambil Kurumban, Eramalloor, piercing his head and on the way to the hospital he breathed his last due to the severity of the injury and thereby committed offence punishable u/s. 304 part - II of IPC and within the cognizance of the court of session.”

25. In the charge Section 304 A of the IPC and the word, rashly or negligently were not mentioned. But, from a reading of the charge, it can be seen that the ingredients of the offence under Section 304 A of the IPC were stated and brought to the notice of the accused. Therefore, at the best, there is a defect in framing the charge by not specifically stating Section 304 A of the IPC and the word, rashly or negligently. Section 464 of the Code is attracted to the instant



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case. Section 464 of the Code. reads as under:

"464. Effect of omission to frame, or absence of, or error in, charge.- (1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommended from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction."

26. While interpreting Section 464 of the Code the Apex Court held in **Fainul Khan v. State of Jharkhand [(2019) 9 SCC 549]** that in case of omission or error in framing a charge, the accused has to show failure of



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justice/prejudice caused thereby. In **Annareddy Sambasiva Reddy v. State of Andhra Pradesh [(2009) 12 SCC 546]** the contention of the accused was that in the absence of a specific charge under Section 149, accused cannot be convicted under Section 302 read with Section 149 as Section 149 of the IPC creates a distinct and separate offence. The Apex Court repelled that contention and held that mere non-framing of a charge under Section 149 of the IPC would not vitiate the conviction in the absence of any prejudice caused to the accused. In the context of Section 464 of the Code it was held that mere defect in the language, or in narration or in the form of charge would not render a conviction unsustainable, provided the accused is not prejudiced thereby. It was further held that if ingredients of the Section are obvious or implicit in the charge framed, then conviction for that offence can be sustained, irrespective of the fact that said Section has not been mentioned in the charge. That view was reiterated by the Apex Court in **State of Uttar Pradesh v. Subhash @ Pappu [(2022) 6 SCC 508]**.



27. Viewed in the light of the law laid down in the aforesaid decisions, omission in the charge to mention Section 304A of the IPC and the words 'rashly or negligently' would not render the conviction illegal, inasmuch as the appellant was given enough notice about the allegations constituting the charge against him. The charge framed against him contains the allegation that the bus was driven through footpath in over-speed and that was the proximate reason for his causing the bus hitting the handrails and the body of the deceased. Therefore, the contention of the learned counsel for the appellant pertaining to the lack of charge is untenable. No prejudice to the appellant owing to the aforementioned omission in the charge is made out as well.

28. Before parting with, I may refer to Section 221 of the Code, which reads,-

"221. Where it is doubtful what offence has been committed.- (1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at



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once: or he may be charged in the alternative with having committed some one of the said offences.

(2) It in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (1), he may be convicted of the offence which he is shown to have committed, although he was not charged with it."

29. In view of the provisions of sub-section (2) above also, the conviction of the appellant for an offence under Section 304A of the IPC cannot be held to be bad. All the same, every court while framing a charge in cases of death involving use of motor vehicles and a final report is filed alleging offence under Section 304 of the IPC, the trial court is obliged to apply mind and decide whether an alternative charge for an offence punishable under Section 304A is also to be framed as provided in Section 221 of the Code.

30. In view of what are stated above, I find no reason to interfere with the conviction of the appellant. Considering the gravity of the offence, the sentence imposed on the appellant cannot be held to be excessive. The appeal



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therefore fails and it is accordingly dismissed.

P.G. AJITHKUMAR, JUDGE

dkr