IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA:

1.Cr. Appeal No. 170 of 2005.

2.Cr.Appeal No. 97 of 2005.

Judgment reserved on:3.5.2013.

Date of Decision: **May 31 ,2013.**

1.**Cr.Appeal No. 170 of 2005**.

State of H.P.

……Appellant.

Vs.

Surinder Pal Singh. ……Respondent.

For the appellant: Mr. Sandeep Sharma, Assistant Solicitor General of India.

For the respondents: Mr. Jagdish Vats, Advocate.

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2. Cr.Appeal No. 97 of 2005.

State of H.P. ….Appellant.

Vs.

K.Shanmugham. …Respondent.

For the appellant: Mr. Sandeep Sharma, Assistant Solicitor General of India.

For the respondent Mr.R.K.Bawa, Sr. Advocate with Mr. R.P.Thakur, Advocate.

Coram:

Hon'ble Mr. Justice Dev Darshan Sud, Judge.

Whether approved for reporting1?yes.

Dev Darshan Sud, J.

The appellants challenge the judgment passed by the learned Additional Sessions Judge, Fast Track Court, Shimla acquitting the accused of offences under Section 304-A I.P.C. Two appeals arise out of the same judgment, viz. Cr. *Appeal No. 170 of 2005 titled State of H.P. and Surinder Pal Singh and Cr. Appeal No. 97 of 2005 titled State of H.P. Vs. K. Shanmugham* and are being disposed of by this common judgment.

2. According to the prosecution, on 28.5.1995, 77 students (59 boys & 18 girls) and staff members of Dalhousie Public School, Badhani (Pathankot) (hereinafter DPS for short) went for a picnic on 28.5.1995 on the banks of river Beas at Tanda Patan, Indora. Both the accused according to the prosecution had been deputed by the head master to look after and ensure the safety of the students studying in 5th and 6th classes.

3. During lunch break, the accused entered the river and inspected the water level to ascertain whether it was safe for children. A zone was earmarked by them where children could play. The depth of the water was up to the knee level.

Whether reporters of the Local papers are allowed to see the judgment?No..

Both the accused were supposed to have stationed themselves on north and south corners of the selected zone where the children were allowed to play. Everything was fine; children started frolicking in the water. According to the prosecution, at around 1.30 p.m., the accused proceeded down stream where the water was deep and without examining as to whether it was safe or not, they allowed the children to enter the river as a result 14 students drowned. They were charged for offences under Section 304-A of the Indian Penal Code (hereinafter I.P.C.).

4. Twenty four witnesses were examined by the prosecution in support of its case. The learned Chief Judicial Magistrate, on the evidence, convicted the accused holding that the proved facts squarely attracted Section 304-A I.P.C. The learned Magistrate relying upon the decisions in ***Suleman Rahiman Mulani and another Vs. State of Maharashtra, AIR 1968 S.C. 829*** and ***Balwant Singh Vs. State of Punjab and another, 1994 Supp.(2) S.C.C. 67***, holds that the acts of the accused were rash and negligent. He summaries his finding by holding that there was sufficient evidence adduced by the prosecution to justify the fact that the accused had not checked the depth of the water where they allowed children to enter and since the children were of 4th and 5th classes, it was the bounden duty of the accused to ensure their safety knowing fully well as to how children of this age group behave.

5. In appeal, learned appellate Court acquitted the accused holding that there was no conclusive evidence on the record that the accused were negligent in the discharge of their duties. The learned appellate Court considered the evidence of the prosecution holding that the site was specifically chosen and allowed by the school authorities for picnicking and earlier this site had been used by the children of this school on 7.5.1995 and there was no issue of safety. The Court then proceeds to consider the factual scenario which was that both the accused were also accompanied by three lady teachers, who remained standing on the river banks. The evidence of PW5 Sh. Manpreet Singh, who was one of the students, was that one of the deceased Ujjal Gurpreet had strayed into the water and the accused at that point of time had ordered the other children not to go after him but in disobedience of this order, they entered the river resulting in the accident. The learned Court also holds that the depth of the water had already been checked by the accused and on consideration of the totality of the evidence acquitted the accused holding no culpable negligence attributable to them had been proved on the record.

6. Shri Sandeep Sharma, learned Assistant Solicitor General appearing for the appellant-State urges that the learned appellate Court has been re-miss in appreciating the evidence and that the appreciation by the learned trial Court is in concord with the established principles of law. Learned Assistant Solicitor General urges that the very same set of

witnesses on which the learned appellate Court relies to acquit the accused have in no uncertain terms indicted the accused and that it is not open to the learned appellate Court to assess only selected portions of the evidence while discarding the entirety of the statements which have to be read as a whole.

7. There is no dispute with the proposition that the evidence has to be assessed as a whole and it is not open to the Court to assess some selected portions. The principles are by now well established in ***C.Magesh and others Vs. State of Karnataka (2010) 5 SCC 645***, the Supreme Court deals with the principles as to how evidence is to be appreciated, holding:

> *"45 It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasize, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Suraj Singh V. State of U.P. (2008) 16 SCC 686 has held: (SCC p. 704, para 14)*
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> *"14.'21…The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.."*
>
> *46. In a criminal trial, evidence of the eyewitness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so", hence utmost caution is required to be exercised in dealing with situations where there are multiple testimonies and equally large number of witnesses testifying before the court. There must be a string that should join the evidence of*

all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses". (P. 655)

8. In ***Paramjit Singh alias Pamma Vs. State of Uttarkhand, (2010) 10 SCC 439***, the court reiterates :

"10. Standard of Proof:

A criminal trial is not a fairy tale wherein one is free to give flight to one's imagination and fantasy. Crime is an event in real life and is the product of interplay between different human emotions. In arriving at a conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case, in the final analysis, would have to depend upon its own facts. The court must bear in mind that "human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions." Though an offence may be gruesome and revolt the human conscience, an accused can be convicted only on legal evidence and not on surmises and conjecture. The law does not permit the court to punish the accused on the basis of a moral conviction or suspicion alone. "The burden of proof in a criminal trial never shifts and it is always the burden of the prosecution to prove its case beyond reasonable doubt on the basis of acceptable evidence." In fact, it is a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof required, since a higher degree of assurance is required to convict the accused. The fact that the offence was committed in a very cruel and revolting manner may in itself be a reason for scrutinizing the evidence more closely, lest the shocking nature of the crime induce an instinctive reaction against dispassionate judicial scrutiny of the facts and law. (Vide : Kashmira Singh v. State of Madhya Pradesh, AIR 1952 SC 159; State of Punjab v. Jagir Singh Baljit Singh & Anr., AIR 1973 SC 2407; Shankarlal Gyarasilal Dixit v. State of Maharashtra, AIR 1981 SC 765; Mousam

Singha Roy & Ors. v. State of West Bengal, (2003) 12 SCC 377; and Aloke Nath Dutta & Ors. v. State of West Bengal, (2007) 12 SCC 230).

(Pp.445&446)

9. In ***R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple and another, (2003) 8 SCC 752,*** the principles of appreciation of evidence have been established as:

> ***"28****. Whether a civil or a criminal case, the anvil for testing of 'proved', 'disproved' and 'not proved', as defined in Section 3 of the Indian Evidence Act, 1872 is one and the same. A fact is said to be 'proved' when, if considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of a particular case, to act upon the supposition that it exists. It is the evaluation of the result drawn by applicability of the rule, which makes the difference.*
>
> > *"The probative effects of evidence in civil and criminal cases are not however always the same and it has been laid down that a fact may be regarded as proved for purposes of a civil suit, though the evidence may not be considered sufficient for a conviction in a criminal case. BEST says : There is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision: but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. (BEST, S. 95). While civil cases may be proved by a mere preponderance of evidence, in criminal cases the prosecution must prove the charge beyond reasonable doubt." (See Sarkar on Evidence, 15th Edition, pp.58-59)*

In the words of Denning LJ (Bater Vs. B, 1950, 2 All ER 458,459):

> *"It is true that by our law there is a higher standard of proof in criminal cases then in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. So also in civil cases there may be degrees of probability."*

Agreeing with this statement of law, Hodson, LJ said:

> *"Just as in civil cases the balance of probability may be more readily fitted in one case than in another, so in criminal cases proof beyond reasonable doubt may more readily be attained in some cases than in others." (Hornal V. Neuberger P. Ltd., 1956 3 All ER 970, 977).*
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> *(P.767)*

10. I find that this principle was the bedrock which had to be followed by the learned courts below.

11. Adverting to the principles applicable for adjudicating culpable criminal negligence, in ***Mahadev Prasad Kaushik Vs. State of Uttar Pradesh and another, (2008) 14 SCC 479,*** the Court holds:

> ***23****. Section 304-A was inserted by the Indian Penal Code (Amendment) Act, 1870 (Act XXVII of 1870) and reads thus;*
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> > ***"304-A. Causing death by negligence-****Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both"*
>
> *The section deals with homicidal death by rash or negligent act. It does not create a new offence. It is directed against the offences outside the range of Sections 299 and 300, IPC and covers those cases where death has been caused without*

'intention' or 'knowledge'. The words "not amounting to culpable homicide" in the provision are significant and clearly convey that the section seeks to embrace those cases where there is neither intention to cause death, nor knowledge that the act done will in all probability result into death. It applies to acts which are rash or negligent and are directly the cause of death of another person.

***24**. There is thus distinction between Section 304 and Section 304A. Section 304A carves out cases where death is caused by doing a rash or negligent act which does not amount to culpable homicide not amounting to murder within the meaning of Section 299 or culpable homicide amounting to murder under Section 300,IPC. In other words, Section 304A excludes all the ingredients of Section 299 as also of Section 300. Where intention or knowledge is the 'motivating force' of the act complained of, Section 304A will have to make room for the graver and more serious charge of culpable homicide not amounting to murder or amounting to murder as the facts disclose. The section has application to those cases where there is neither intention to cause death nor knowledge that the act in all probability will cause death.*

***25.** In Empress v.India Beg, (1881) ILR 3 All 776, Straight, J. made the following pertinent observations which have been quoted with approval by various Courts including this Court;*

> *"……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".

***26**. Though the term 'negligence' has not been defined in the Code, it may be stated that 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……..."*

(P.487)

12. In ***Postgraduate Institute of Medical Education and Research, Chandigarh Vs. Jaspal Singh and others, (2009) S.C.C.330***, the Court holds:

***12.** The learned counsel for PGI would submit that Smt. Harjit Kaur died due to burn injuries and the other connected reasons arising out of said injury and not due to mismatched blood transfusion and, therefore, no negligence can be attributed to the hospital and the attending doctor's. He relied upon two decisions of this Court namely (i) Jacob Mathew v. State of Punjab and Another, (2005) 6 SCC1 and (ii) Martin F D'Souza v. Mohd. Ishfaq, (2009)3 SCC1.*

***13.** The term negligence is often used in the sense of careless conduct. Way back in 1866 in Grill vs. General Iron Screw Collier Co. 1866 LR 1 CP 600 at 612 , Wills J. referred to negligence as:*

" …… the absence of such care as it was the duty of the defendant to use."

Browen L.J. in Thomas v. Quatermaine (1887) 18 QBD 6854 stated, " …idea of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract; negligence is simply neglect of some care which we are bound by law to exercise towards somebody".

14. *In Donoghue v. Stevenson, 1932 AC 562, Lord Macmillan with regard to negligence made the following classic statement:*

> *"The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty."*

15. *In Jacob Mathew this Court while dealing with negligence as tort referred to the Law of Torts, Ratanlal and Dhirajlal, (24th Edn., 2002 edited by Justice G.P. Singh) and noticed thus:*

> *"Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property.... the definition involves three constituents of negligence: (1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty; (2) breach of the said duty; and (3)consequential damage. Cause of action for negligence arises only when*

> *damage occurs; for, damage is a necessary ingredient of this tort."*
>
> ***16.*** *Insofar as civil law is concerned, the term negligence is used for the purpose of fastening the defendant with liability of the amount of damages. To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law.*
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> ***17.*** *In Syed Akbar v. State of Karnataka,(1980) 1 SCC 30, this Court dealt with in details the distinction between negligence in civil law and in criminal law. It has been held that there is a marked difference as to the effect of evidence, namely, the proof, in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man, beyond all reasonable doubt".* *(P.334-336)*
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> *(emphasis supplied)*

13. I may also refer to the earlier decision of the Supreme Court in ***Kurban Hussein Mohamedalli Rangawalla Vs. State of Maharashtra, AIR 1965 S.C. 1616***. On the interpretation of Section 304-A, holding:

> ***4***. *We may in this connection refer to Experor V. Omkar Rampratap, 4 Bom LR 679, where Sir Lawrence Jenkins had to interpret S. 304-A and observed as follows:*
>
> > *"To impose criminal liability under Section 304-A, Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the causa causans; it is not enough that it may have been the causa sine qua non."*

This view has been generally followed by High Courts in India and is in our opinion the right view to take of the meaning of S.304-A. It is not necessary to refer to other decisions, for as we have already said this view has been generally accepted. Therefore, the mere fact that the fire would not have taken place if the appellant had not allowed burners to be put in the same room in which turpentine and varnish were stored, would not be enough to make him liable under S. 304-A, for the fire would not have taken place, with the result that seven persons were burnt to death, without the negligence of Hatim. The death in this case was, therefore, in our opinion not directly the result of a rash or negligent act on the part of the appellant and was not the proximate and efficient cause without the intervention of another's negligence. The appellant must, therefore, be acquitted of the offence under S. 304-A."

(P.1618)

14. Subsequently *in* ***Ambalal D. Bhatt Vs. The State of Gujarat, AIR 1972 S.C. 1150***, these principles were reiterated holding:

"8. *It appears to us that in a prosecution for an offence under section 304A, the mere fact that an accused contravenes certain rules or regulations in the doing of an act which causes death of another, does not establish that the death was the result of a rash or negligent act or that any such act was the proximate and efficient cause of the death. If that were so, the acquittal of the appellant for contravention of the provisions of the Act and the Rules would itself have been an answer and we would have been then examined to what extent additional evidence of his acquittal would have to be allowed, but since that is not the criteria, we have to determine whether the appellant's act in giving only one batch number to all the four lots manufactured on 12-11-62 in preparing batch no. 211105 was the cause of deaths and whether those deaths were a direct consequence of the appellant's act that is, whether the appellant's act is the direct result of a rash and negligent act and that act was the proximate and efficient cause without the intervention of another's negligence. As*

observed by Sir Lawrence Jenkins in Emperor v. Omkar Rampratap. (1902) 4 Bom. LR 679 the act causing the deaths "must be the cause causans; it is not enough that it may have been the causa sine qua non". This view has been adopted by this Court in several decisions. In Kurban Hussein Mohem-medali Rangwala v. State of Maharashtra, 1965-2 SCR 622 = (AIR 1965 SC 1616), the accused who had manufactured wet paints without a licence was acquitted of the charge under section 304A because it was held that the mere fact that he allowed the burners to be used in the same room in which varnish and turpentine were stored, even though it would be a negligent act, would not be enough to make the accused responsible for the fire which broke out. The cause of the fire was not merely the presence of the burners within the room in which varnish and turpentine were stored, though this circumstance was indirectly responsible for the fire which broke out, but was also due to the overflowing of froth out of the barrels. In Suleman Rahiman Mulani v. State of Maharashtra (1968) 2 SCR 515 = (AIR 1968 SC 829) the accused who was driving a car only with a learner's licence without a trainer by his side, had injured a person. It was held that by itself was no sufficient to warrant a conviction under section 304A. It would be different if it can be established as in the case of Balachandra v. State of Maharashtra, (1968) 3 SCR 766 = (AIR 1968 SC 1319) that deaths and injuries caused by the contravention of a prohibition in respect of the substances which are highly dangerous as in the case of explosives in a cracker factory which are considered to be of a highly hazardous and dangerous nature having sensitive composition where even friction or percussion could cause an explosion, that contravention would be the causa causans".

(P.1155&1156)

15. In ***Ashish Batham Vs. State of M.P. (2002) 7 S.C.C.317,*** the Supreme Court affirms the principle for adjudicating criminal liability thus:

***8**. Realities or truth apart, the fundamental and basic presumption in the administration of criminal law and justice delivery system is the innocence of the alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or*

unimpeachable evidence, the question of indicting or punishing an accused does not arise, merely carried away by heinous nature of the crime or the gruesome manner in which it was found to have been committed. Mere suspicion, however, strong or probable it may be is no effective substitute for the legal proof required to substantiate the charge of commission of a crime and grave the charge is greater should be the standard of proof required. Courts dealing with criminal cases at least should constantly remember that there is a long mental distance between 'may be true' and 'must be true' and this basic and golden rule only helps to maintain the vital distinction between 'conjectures' and 'sure conclusions' to be arrived at on the touch stone of a dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case as well as quality and credibility of the evidence brought on record."

(P.327)

16. To similar effect is the principles affirmed in ***Sanjiv Kumar Vs. State of Punjab, (2009) 16 S.C.C. 487,*** holding:

"20*. We cannot lose sight of the principle that while the prosecution has to prove its case beyond reasonable doubt, the defence of the accused has to be tested on the touchstone of probability. The burden of proof lies on the prosecution in all criminal trials, though the onus may shift to the accused in given circumstances, and if so provided by law. Therefore, the evidence has to be appreciated to find out whether the defence set up by the appellant is probable and true.*

(P.493)

17. I need not multiply precedent any further. It is in the backdrop of this law that the case of the prosecution has to be considered.

18. The distinction between rash and negligent act has been considered by the Supreme Court in ***Bhalachandra Waman Pathe Vs. The State of Maharashtra, 1968 ACJ 38,*** holding:

"11*. An offence under Section 304-A Indian Penal Code may be committed either by doing a rash act or a negligent act.*

There is a distinction between a rash act and a negligent act. In the case of a rash act as observed by Straight, J. in Idu Beg's case 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. Negligence is an 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 prudent and reasonable man would not do. Again as explained in Nidamarti Negaghu-shanam's case, a culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him and if he had he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection.

***12**. As between rashness and negligence, rashness is undoubtedly a graver offence……."*

19. So also in ***Mohammed Aynuddin alias Miyam Vs. State of A.P. (2000) 7 S.C.C 72***, the Court holds:

"9. A rash act is primarily an over hasty act. It is opposed to a deliberate act. Still a rash act can be a deliberate act in the sense that it was done without due care and caution. Culpable rashness lies in running the risk of doing an act with recklessness and with

indifference as to the consequences. Criminal negligence is the failure to exercise duty with reasonable and proper care and precaution guarding against injury to the public generally or to any individual in particular. It is the imperative duty of the driver of a vehicle to adopt such reasonable and proper care and precaution"

(P.74&75)

20. To similar effect is the decision in ***Rathnashalvan Vs. State of Karnataka, (2007) 3 SCC 474 ,*** holding:

> ***8****. As noted above, "rashness" consists in hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury. The criminality lies in such a case in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence on the other hand, 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.*
>
> ***9.*** *The distinction has been very aptly pointed out by Holloway, J. in these words:*
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> > *"Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness (luxuria). Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection." (See Nidamarti Nagabhushanam, In re7 Mad HCR 119, Mad HCR pp. 119-20.) (P.477)*

21. It is these settled principles which govern the case and evaluation of the evidence on record. Adverting to the

evidence of PW1 Jaspreet Singh, he states that he was teaching 6th class in Dalhausie Public School when the incident took place. The management of the school had arranged for picnic on 28.5.1995. A batch of 77 students (59 boys and 18 girls) has gone there under supervision of the accused and lady teachers Ms.Tajender, Ms.Anita and Smt. Kalpana. They reached the picnic spot at around 11.30/11.45 a.m. and started playing there. The students were divided into six groups. There was one leader of one group. Before lunch, the children played in the water and castable by both accused on either side. The children entered the water (including the teachers who started playing there). Lunch was served at around 1.30 p.m. and after some rest, he asked the teachers as to whether they would go for boating. The girls were sent in order of priority and thereafter the students of 5th Class. While the children were waiting for their turn to go boating, both the accused said that they could play one game of "catch catch" but before that "*Unohonay Kaha ki pahalay hum panni ki gehrai check kartay hai*". (They said that first they will check the depth of the water). PW10 Sh.Varun Sharma, who is one of the students, had told them that he was an expert swimmer as such, he was allowed to accompany them. The children accompanied Sh.Varun Sharma after some distance and he (this witness) followed them. When they were walking along with 'D.P.Sir' (accused-Surinder Pal Singh), the water reached till the level of his neck. He came out of the water and after that he heard sounds of "*Bachao Bachao*"

and he saw that the children with the 'D.P.Sir' were drowning. At this, accused Shanmugham called out to the driver for help. In cross-examination he says that when the incident of drowning occurred the game had already been in progress for about 15 minutes and they had gone into down stream 15/16 metres. 'D.P.Sir' started rescuing the children the moment he found that they were unable to cope with the water. In cross examination, he admits that before playing the game "catch catch", the depth of the water was checked. " *Yeha thik hai ki doshi number aaik nay catch up walli game khelanay say pahalay panni ki geharai check up ki thee".(*It is correct that before playing the game of catch up, the first accused had checked the depth of the water).

22. Adverting to the statement of PW10 Sh.Varun Sharma, he states in examination-in-chief about the picnic being organized and that before lunch both 'D.P.Sir' and the 2nd accused had gone to check the water level/depth. He then states that the children were divided into groups. He admits that after checking the water level, 'D.P.Sir' had fixed the point and asked the children not to proceed beyond that. PW3 Smt. Kalpana Sharma has not stated a single word about the negligence on the part of the accused. PW5 Manpreet Singh stated that the level of the water had been checked and only after that they were allowed to enter the water. He also states that at one point of time, the accused has said that nobody should follow him.

23. On the totality of the evidence on record which comprised on the statements of PW8 Sh. Sumit Mahajan, PW9 Sh. Sourav Sharma, PW10 Sh. Varun Sharma, PW12 Sh. Ankur Sharma, PW14 Ranbir Singh, PW15 Sh. Jasbir Singh and PW16 Sh. Arpan Verma, the learned appellate Court assesses that nothing has been stated by these witnesses about the recklessness/criminal rashness of the accused in permitting the children to enter uncharted water.

24. I also note from the evidence of PW2 Sh. R.Kenedy Principal of the school that prior to the present picnic, which ended up in disaster, on 7.5.1995 he had himself accompanied the children to the same very spot and was frolicking with the children in the water. In other words, it was not an uncharted spot which was *per se* dangerous for the children to play in the water. In these circumstances, it becomes difficult to hold that the children were deliberately led to a spot which was dangerous. The learned trial court should and ought to have considered the fact that if the accused had entered in untested water, the accused themselves were also risking their lives. On a combined reading of the evidence on record, it is clear that the level of the water was checked before lunch as also after lunch when the game of “catch catch” was played. There is nothing on the record to show that after lunch the level of the water suddenly rose which made it extremely dangerous to enter the water. In these circumstances, it becomes difficult to hold that the accused had the *mens rea* or were guilty of culpable

negligence. It is unfortunate that on an occasion for joy and fun had turned into a ghastly tragedy but that emotive response would not be *per se* sufficient to convict the accused.

25. Sh. Sandeep Sharma, learned Assistant Solicitor General has urged that the learned trial Court has correctly appreciated the evidence and in this view of the matter the learned appellate Court was in grave error in acquitting the accused. He submits that they were young children who could not be allowed to enter the water which act by itself was *per se* sufficient to attribute criminal negligence to the accused. I do not find that the learned trial Court has paid any attention to the fact situation and has been swayed simply by the fact that some school children have died. The learned trial Court holds that the statement of PW10 Varun Sharma that the depth of the water was checked after lunch does not inspire confidence which fact I do not find established on the record. He also discards the evidence of PW1 Sh. Jaspreet Singh and PW10 Sh. Varun Sharma. He ignores the statement of PW2 Sh. R.Kenedy, Principal of the school. I do not find that the learned trial Court has applied the established principles for appreciation of evidence. The findings are tentative. Surely, when the level of water had been checked before lunch there was no reason as to why it should not have been checked post lunch. There is also no reason to discard the statements of these two witnesses, who stated that such level was in fact checked when the game commenced. He also rejects the submission made on behalf of

other accused K.Shanmugham that the boys were divided into groups and no children from his group had drowned. After holding that the children were, in fact, divided in groups, he simply set aside the submission by holding that he (accused) was responsible for the act by omission. Surely, if this is the logic used by the learned Judge, then the other teachers present there would also be guilty for the acts. I do not find that the evidence of PW2 Sh.R.Kenedy Head Master implicates the accused. When read as a whole, this very Head Master had organized the picnic at the spot with the other children on previous date 7.5.1995 and had played with them in the water. The principles applied for appreciation of evidence have not been properly considered by the learned trial Judge. His finding that on the second occasion the children had been taken to the depth of water which was more than that of the morning cannot be accepted.

26. On the second aspect, all that I need say that the act of entering in the water by itself is *per se* not sufficient to attract criminal liability under Section 304-A. In the cases considered (supra), it has been held that the ingredients have to be established beyond reasonable doubt before any punishment is imposed. On the appreciation of evidence, learned Assistant Solicitor General refers to the decision in ***Suchha Singh and another Vs. State of Punjab, AIR 2003 S.C. 3617*** to urge that exaggerated devotion to the rule of benefit of doubt cannot be invoked. On the established facts I

do not find this to be the actual situation as even the basic facts have not been proved. There is no exaggerated emphasis on acquittal. On the principles as considered by me, I hold that the prosecution has not been able to prove its case. In these circumstances, there is no merit in this appeal which is accordingly dismissed. Bail bonds furnished by the respondents are discharged. This judgment has no bearing on any civil claim of the victims but considers only criminal liability.

(Dev Darshan Sud),
Judge.

May 31,2013(R)