SYAD AKBAR

v.

STATE OF KARNATAKA

July 25, 1979

[R. S. SARKARIA AND R. S. PATHAK, JJ.]

Evidence Act—Res ipsa loquitur—*If applicable in criminal trials—Appellant driving a bus on a narrow road with deep ditches on both sides—A child suddenly attempts to cross the road—Bus swerved to right—Child crushed to death—Prosecution declared eye witness hostile—Driver—If could be held negligent.*

Hostile witnesses—Cross-examined by prosecution—Their evidence—If could be treated as washed off the record.

The appellant, who was a driver of a bus, was driving the vehicle by a road which ran through a village. On either side of the road there were deep ditches. A mother who was going from the village on the left side of the road to the fields on the right, was being followed at some distance by her daughter (the deceased), a girl of four years. Before crossing the road the mother stopped on the left side and remonstrated with the girl to go home. Then crossing the road at that point the mother descended on the right side of the road and went out of sight. In the meantime the bus had slowed down because a few feet away it had to cross a narrow bridge. The child, which by then reached the left side of the road, seemed to be in two minds whether to cross the road or go back. She, however, dashed across the road with a suddenness. The driver blew the horn and to save the chlid from accident swerved the vehicle to the right. But the child by then came under the left front wheel and was crushed to death.

The appellant's defence was that the accident could not be avoided in the circumstances of the case despite the best care taken by him to avoid it.

Alleging that there were considerable discrepancies in the statements of the eye-witnesses, between what they stated to the police and what they stated at the trial, the prosecution attempted to impeach their credit and treated all of them as hostile.

The Sessions Judge agreed with the view of the trial court about the unreliability of the eye-witnesses, mainly because they had been treated 'hostile' and cross-examined by the prosecution. He concluded that even if the evidence of the eye-witnesses, who had been treated by the prosecution as hostile, was discarded in its entirety, then also on the principle of *res ipsa loquitur,* the circumstance and nature of the accident itself, was sufficient to hold that the accident was due to rash and negligent driving by the accused.

The High Court affirmed the view of the Sessions Judge that the principle of *res ipsa loquitur* was attracted to the facts of the case.

In appeal to this Court the two questions for consideration were: (i) whether the courts below were right in discarding the evidence of the eye wit-

A nesses on the ground that they were treated hostile by the prosecution and cross-examined; and (ii) whether the principle *res ipsa loquitur* was applicable in criminal proceedings and, if so, whether it could be invoked in the circumstances of the case to presume rashness and negligence on the appellant's part.

Allowing the appeal,

B HELD: 1. The evidence of the prosecution witnesses cannot be rejected wholesale merely on the ground that the prosecution had dubbed them hostile and had cross-examined them. Even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court by the party calling him, his evidence cannot be, as a matter of law, treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness C stands thoroughly discredited or can still be believed in regard to a part of his testimony. If, in a given case, the whole of the testimony of the witness is impugned and in the process the witness stands totally discredited, the Judge should as a matter of prudence discard his evidence in toto. [101F-H]

Sat Paul v. *Delhi Administration* [1976] 2 S.C.R. 11, followed.

In the instant case the courts below were not justified in brushing aside D the testimony of the witnesses. The eye witnesses were only asked omnibus questions and were not contradicted on material facts and their credit with regard to their testimony in examination-in-chief had not been shaken in cross-examination.

2. (a) *Res ipsa loquitur,* which is more of a convenient label to describe certain peculiar fact-situations, rather than an abstract legal doctrine, belongs, E in reality, to the law of torts. Even in actions in torts, as a rule, it is for the plaintiff to prove that the injury occurred due to the negligence of the defendant, and the mere fact that an accident has occurred the cause of which is unknown, is not, evidence of negligence. But the peculiar circumstances constituting the event or accident in a particular case may themselves proclaim negligence of somebody as cause of the accident. Satisfaction of this condition alone is not sufficient for *res ipsa* to come into play, and it has to be further F satisfied that the event which caused the accident was within the defendant's control. Thus, the two-fold requirement for the application of the maxim is that the *res* must not only bespeak negligence but pin it on the defendant. [103B-E]

(b) (i) There are two lines of approach in regard to the application and effect of the maxim, *res ipsa loquitur.* According to the first, where the maxim G applies, it operates as an exception to the general rule that the burden of proof of the alleged negligence is, in the first instance, on the plaintiff. In this view, if the nature of an accident is such that the mere happening of it is evidence of negligence, the burden shifts or is in the first instance on the defendant to disprove his liability. Such shifting or casting of the burden on the defendant is on account of a presumption of law arising against the defendant from the constituent circumstances of the accident itself, which bespeak negligence of the H defendant. [105F; 106A-B]

Moore v. *R. Fox & Sons,* [1956] 1 Q.B. 596; Halsbury's Laws of England, Vol. 28, 3rd Edn., referred to.

(ii) According to the other line of approach *res ipsa loquitur* is not a special rule of substantive law; but only an aid in the evaluation of evidence, a means of estimating logical probability from the circumstances of the accident. In this view, *res ipsa* does not require the raising of any presumption of law which must shift the onus on to the defendant. It only allows the drawing of a *permissive* inference of fact as distinguished from a *mandatory* presumption, having regard to the totality of the circumstances and the probabilities of the case. [106 C-D]

(c) The first line of approach cannot be invoked in the trial of criminal cases where the accused stands charged for causing injury or death by a negligent or rash act. The primary reasons for non-application of *res ipsa loquitur* as an abstract doctrine to criminal trials, are: firstly, in a criminal trial the burden of proving everything essential to the establishment of the charge against the accused always rests on the prosecution; secondly, while in civil proceedings a mere preponderance of probability is sufficient to establish a fact in issue, it is not so in criminal proceedings wherein the presumption of guilt must amount to such a moral certainty as convinces the mind of the court, as a reasonable man, beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not negligence merely based upon an error of judgment. [107A-B]

Andrews v. *Director of Public Prosecutions*, [1937] 2 All. E.R. 552 : [1937] AC 576, referred to

(d) (i) Understood in the broad, general sense as by the other line of approach—only as a convenient ratiocinative aid in assessment of evidence and in drawing permissive inferences under s. 114, Evidence Act, *res ipsa loquitur* can be usefully invoked in the trial of criminal cases wherein the negligence of the accused is a fact in issue. Such functional use of the maxim will not conflict with the provisions and principles of the Evidence Act, peculiar to criminal jurisprudence. [107G]

(ii) However such simplified and pragmatic application of the notion of *res ipsa loquitur* as a part of the general mode of inferring a fact in issue from another circumstantial fact, is subject to all the conditions the satisfaction of which is essential before an accused can be convicted on the basis of circumstantial evidence alone. These conditions are: (i) All the circumstances including the objective circumstances constituting the accident, must be firmly established; (ii) those circumstances must be of a determinative tendency pointing unerringly towards the guilt of the accused, and (iii) the circumstances should make the chain so complete that they cannot reasonably raise any other hypothesis save that of the guilt of the accused. [108A-B]

In the instant case, the maxim could have no application. The circumstance of taking the bus suddenly to the extreme right of the road, which was the reason given by the courts below for invoking the maxim, did not bespeak in clear and unambiguous voice, negligence on the appellant's part to exercise due care and control. Moreover, the appellant gave a reasonable and convincing explanation of his conduct in swerving the vehicle to the right and his version was fully supported by four prosecution witnesses.

A The mother firmly told the child to return home and then crossed the road and descended the deep ditch on the right side. The child was undecided for a while but then, suddenly ran across the road. The appellant who had slowed down the vehicle earlier, suddenly saw the child at a short distance ahead of the bus. It was difficult for him to judge with any degree of accuracy whether the child would go back or dash forward. The question for the driver at that point of time was whether to swerve to the left or to the right. The B road was narrow with deep ditches on both sides. To swerve to the extreme left would have meant taking as much risk of rolling the bus down the ditch as swerving it to the extreme right. He could not, without incurring far greater risk to many in the bus, take the vehicle off-course further to the right beyond the point he did. Had the bus gone further than it did, towards the right, it would have met with a much bigger disaster. His calculations went wrong and he failed in his attempt to avoid the accident. Clearly, therefore, the C accident occurred not on account of his negligence but due to an error of judgment in the circumstances of the situation. An error of judgment of this kind which comes to light only on post-accident reflection, is not a true index of negligence. A grave error of judgment, particularly one apparent as such in the light of after-events, is not negligence of the kind contemplated in Section 304-A Penal Code, if the person responsible thought that he was acting in the best interests of the passengers and of the vehicle he was driving. Here, D all happened in a fraction of a moment. Even if the worst was assumed against the appellant, the highest that could be said was that a misjudgment on his part too slight to be branded as culpable negligence could well account for the accident resulting in the death of the child.

Horabin v. *British Overseas Airways Corporation*, [1952] 2 QBD 1016; referred to.

E In the circumstances, the prosecution had failed to prove beyond reasonable doubt that the appellant had caused the death of the child by negligent or rash driving. [110G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 456 of 1978.

F Appeal by Special Leave from the Judgment and Order dated 22-3-1978 of the Karnataka High Court in Criminal Revision Petition No. 357/77.

S. S. Javali, B. P. Singh and *A. K. Srivastava* for the Appellant.

G *M. Veerappa* and *J. R. Dass* for the Respondent.

The Judgment of the Court was delivered by

SARKARIA, J. By a short order we had allowed this appeal by special leave directed against a judgment, dated March 22, 1978, of the High Court of Karnataka, and acquitted the appellant. We now give our reasons in support of that Order :

H On March 18, 1974 at about 8.30 p.m., the appellant was driving a passenger bus No. MYM-5859 on Dharampura-Hiriyur Road towards

Hiriyur. When the bus reached at a place from where a kacha path bifurcates for villages Hariyabbe, a girl named Gundamma, aged 4 years, ran across the road. The appellant swerved the vehicle towards the extreme right side of the road. In spite of it, the child was hit and died at the spot. A complaint was lodged by the Patel of the village, Gunde Gowda, at Hariyabbe Police Station. The Station House Officer (P.W. 7) after registering a case, reached the spot and sent the dead body of the child for post-mortem examination, and recorded the statements of witnesses, including some of the passengers in the Bus.

On these facts, the appellant was sent up for trial before the Judicial Magistrate, 1st Class, Chitradurga, who convicted him under Section 304A of the Indian Penal Code and sentenced him to six months' simple imprisonment with a fine of Rs. 500/- and in default, to one month's imprisonment.

At the trial, the prosecution examined 11 witnesses. The parents of the deceased child were also examined, but they were admittedly not eye-witnesses of the occurrence. P.W. 2, a passer-by, and P.W. 5, P.W. 6 and P.W. 9, who were passengers in the bus at the material time, were examined as eye-witnesses by the prosecution.

The substance of the story that emerges from the testimony of these eye-witnesses, taken as a whole, was that at the material time the accused was driving the bus slowly as there was a narrow bridge 30 feet ahead. The mother (P.W. 4) came from the habitation of the village to go to the field across the road at some distance, where her husband was working. The ill-fated child was following the mother. Before crossing the road, the mother asked the child not to come after her but to return home, but, when the mother had crossed the road and descended into the deep ditch on the other side, the child crying 'Amman' suddenly dashed across the road to join her mother. The accused in order to save the child swerved the vehicle to the extreme right side of the road. According to the eye-witnesses, excepting one, the accused blew the horn, also. But the child was caught under the left front wheel of the vehicle and was crushed to death. It was further evident from the statement of G. Ramakrishnappa (P.W. 5) that if the appellant had taken the bus beyond the point where the child was hit, the bus would have fallen into the deep ditch, along with the passengers.

The Public Prosecutor, however, treated all the four eye-witnesses as hostile, and cross-examined them to impeach their credit, with the permission of the Court. The Public Prosecutor did not contradict

A them with their Police Statements with regard to the facts that the vehicle was coming slowly; that the child came suddenly on the road and that the driver had swerved the vehicle towards the extreme right to save her, but was unable to do so. The only portion of the Police statements of the eye-witnesses, with which they were specifically confronted, was that before the Police they had stated that the accident B took place due to the negligence of the accused, while at the trial they were saying something to the contrary.

During his examination under Section 313 Cr.P.C., the appellant stated that he was driving the vehicle slowly, and the child came on the road from the left, all of a sudden, to cross it; that in order to C avoid a collision with the child, he immediately swerved the vehicle towards the right side of the road, but he failed to save the child. Thus the defence plea was that the accident could not be avoided in the circumstances, in spite of the care taken. The trial court held that the eye-witnesses were not speaking the truth.

D In appeal, the Sessions Judge agreed with the trial court about the unreliability of the eye-witnesses. In spite of it, he upheld the conviction with these observations :

> "This is a case where the principle *res ipsa loquitur* should be invoked because the passengers in the bus are not E giving out the truth and their evidence is made highly improbable....Though P.W. 2 has been treated hostile by the prosecution, the fact that the child was following the mother finds corroboration in their (P.W. 2 and P.W. 4) evidence. So, now, if the driver of the vehicle could see the mother and child coming from village and he has dashed F against the child on the extreme right side of the road on the kutcha portion, it is suggestive of rash and negligent driving. The evidence of P.Ws. 2, 5, 6 and 9 who have been treated hostile by the prosecution even though discarded in entirety still it must be held that the material on the record is sufficient to hold that the accused was both rash and negli- G gent in driving the vehicle at that point."

In Revision, the High Court also endorsed the view taken by the Sessions Judge that the principle of *res ipsa loquitur* was attracted to the facts of the case.

H Thus, two questions arise for consideration; First whether the courts below were right in discarding entirely the evidence of the said eye-witnesses merely on the ground that they were treated as hostile by

the prosecution and cross-examined. Second, whether the principle of *res ipsa loquitur* is applicable in criminal proceedings. If so, could it be invoked in the circumstances of the case in favour of the prosecution to presume rashness and negligence on the part of the accused ?

In regard to the first question, it may be noted that the police statements of the eye-witnesses were not put specifically, bit by bit to them by the prosecution, in cross-examination. Only an omnibus question was asked as to whether they had stated before the police that the accident occurred due to the negligence of the accused. This was, at best, a matter of inference to be drawn by the Court. The witnesses were not contradicted with regard to material facts which were the product of their direct sensory perception. For instance, their version with regard to the speed of the vehicle, the blowing of horn, the child running across the road and sudden swerving of the vehicle to the right in an attempt to save the child, etc., was not impeached by the prosecution in cross-examination. In short, the credit of these witnesses with regard to the substratum of their examination-in-chief had not been shaken in cross-examination by the prosecution.

As a legal proposition, it is now settled by the decisions of this Court, that the evidence of a prosecution witness cannot be rejected wholesale, merely on the ground that the prosecution had dubbed him 'hostile' and had cross-examined him. We need say no more than reiterate what this Court said on this point in *Sat Paul* v. *Delhi Administration*(1) :

> "Even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the Court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness

(1) [1976] 2 SCR. 11.

A stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence in toto."

The instant case is not one where the whole of the testimony of these witnesses was impugned in cross-examination by the prosecution. Their credit, on material points, was hardly shaken. The courts below, B therefore, were not justified in brushing aside their testimony.

Coming to the second question, it may be observed that *res ipsa loquitur* (thing speaks for itself) is a principle which, in reality, belongs to the law of torts.

The jurisprudential status and functional utility of *res ipsa loquitur* C have been the subject of much debate. In *Ballard* v *North British Railway Co.*,(1) Lord Shaw said, nobody would have called it a principle if it had not been in Latin. While warning against the tendency to magnify this expression into a rule of substantive law, the Noble Lord conceded that this Latin phrase "simply has place in that scheme of, and search for, causation upon which the mind sets itself working". D In the same case, Lord Dunedan emphasised : "It is not safe to take the remarks which have been made as to the principle of *res ipsa loquitur* in one class of cases and apply them indiscriminately to another class".

No less an authority than the authors of "Salmond on the Law of Torts", (15th Edn. by R. F. Houston, p. 310) have suggested not to E treat this maxim as a special rule of evidence. This is what they say :

> "Much of the confusion is due to a failure to appreciate that cases where *res ipsa loquitur* applies may vary enormously in the strength, significance and cogency of the *res* proved....Looked at in this light, it is not easy to see why F the maxim should be treated as a special part of the law of evidence."

Lord Dunedan, in *Ballard's case,* (supra) thought it no more a rule of evidence than a means of shifting the onus to prove negligence. Lord Atkin in *Mc Gowan* v. *Stott*(2) treated it as equivalent to a G statement that on the facts in evidence the plaintiff has satisfied the burden of proof enough to shift it on to the defendant.

John G. Fleming (in his 'Law of Torts', 5th Edn., page 302) thinks it as "no more than a convenient label to describe situations where, notwithstanding the plaintiff's inability to establish the exact H cause of the accident, the fact of the accident by itself is sufficient, in

(1) [1923] Sessions Cases (H.L.) 43.
(2) [1923] 99 L.J. (K.B.) 357 at p. 360.

the absence of an explanation, to justify the conclusion that most probably the defendant was negligent and that his negligence caused the injury". A

As a rule, mere proof that an event has happened or an accident has occurred, the cause of which is unknown, is not evidence of negligence. But the peculiar circumstances constituting the event or accident, in a particular case, may themselves proclaim in concordant, clear and unambiguous voices the negligence of somebody as the cause of the event or accident. It is to such cases that the maxim *res ipsa loquitur* may apply, if the cause of the accident is unknown and no reasonable explanation as to the cause is coming forth from the defendant. To emphasise the point, it may be reiterated, that in such cases, the event or accident must be of a kind which does not happen in the ordinary course of things if those who have the management and control use due care. But, according to some decisions, satisfaction of this condition alone is not sufficient for *res ipsa* to come into play and it has to be further satisfied that the event which caused the accident was within the defendant's control. The reason for this second requirement is that where the defendant has control of the thing caused the injury, he is in a better position than the plaintiff to explain how the accident occurred. Instances of such special kind of accidents which "tell their own story" of being off-springs of negligence, are furnished by cases, such as where a motor vehicle mounts or projects over a pavement and hurts somebody there or travelling in the vehicle; one car ramming another from behind, or even a head-on-collision on the wrong side of the road. See per Lord Normand in *Barkway* v. *South Wales Transport Co.*(1); *Cream* v. *Smith*(2) and *Richlev* v. *Fanll*(3). B C D E F

Thus, for the application of the maxim *res ipsa loquitur* "no less important a requirement is that the *res* must not only be speak negligence, but pin it on the defendant."

It is now to be seen, how does *res ipsa loquitur* fit in with the conceptual pattern of the Indian Evidence Act. Under the Act, the general rule is that the burden of proving negligence as cause of the accident, lies on the party who alleges it. But that party can take advantage of presumptions which may be available to him, to lighten that burden. Presumptions are of three types : G

(1) [1950] 1 All. E.R. 392 at 399. H
(2) [1961] 8 All. E.R. 349.
(3) [1965] 1 W.L.R. 1454.

A (i) Permissive presumptions or presumptions of fact.

(ii) Compelling presumptions or presumptions of law (rebut-table).

(iii) Irrebuttable presumption of law or 'conclusive proof'.

B Clauses (i), (ii) and (iii) are indicated in clauses (1), (2) and (3) respectively, of Section 4, Evidence Act. 'Presumptions of fact' are inferences of certain fact patterns drawn from the experience and observation of the common course of nature, the constitution of the human mind, the springs of human action, the usages and habits of society and ordinary course of human affairs. Section 114 is a general section C dealing with presumptions of this kind. It is not obligatory for the Court to draw a presumption of fact. In respect of such presumptions, the Act allows the judge a discretion in each case to decide whether the fact which under section 114 may be presumed has been proved by virtue of that presumption.

D In case of a 'Presumption of Law' no discretion has been left to the Court, and it is bound to presume the fact as proved until evidence is given by the party interested to rebut or disprove it. Instances of such presumptions are to be found in sections 79, 80, 81, 83, 85, 89 and 105, Evidence Act.

E The distinction between the effect of the *first* and the *second* kind of presumptions on the burden of proof, is important. Presumptions of Fact merely affect the "burden of going forward with the evidence." 'Presumptions of Law', however, "go so far as to shift the legal burden of proof so that, in the absence of evidence sufficient to rebut it on a balance of probability, a verdict must be directed". (Fleming).

F Though some decisions particularly of Courts in England are inclined to adopt a somewhat different approach the predominant view held by Courts in United States, Australia and Canada (See *Temple* v. *Terrace & Co.*, (1) *G.I.O.* v. *Fredrichberg*(2); *United Motors Service* v. *Hutson*(3) seems to be that the *maxim res ipsa loquitur* raises only G a 'Permissive Presumption' exemplifying merely "the general principle of inferring a fact in issue from circumstantial evidence where the circumstances are meagre but significant". On this reasoning, Fleming has opined that "the *maxim* is based merely on an estimate of logical probability in a particular case not on any overriding legal policy that controls initial allocation of the burden of proof or, by means of man-

H (1) [1966] 57 D.L.R. 2d 63.
(2) [1968] 11 C.L.R. 403.
(3) [1937] S.C.R. 294

datory presumptions, its reallocation regardless of the probabilities of the particular instance". Fleming, then illustrates this proposition, by giving an example, which for our purpose, is pertinent : A

> "....If a Truck suddenly swerves across the road and knocks into a car drawn up on the shoulder of the opposite side, this would *without more* raise an inference of negligence against the driver. Yet the plaintiff would fail, if the Trier of the fact at the end of the case deems it no less probable that the accident was caused by an unexpectable break of the steering arm than by culpable maintenance of the wheel assembly." B

(Emphasis supplied) C

From what has been said above, it is clear that even in an action in torts, if the defendant gives no rebutting evidence but a reasonable explanation, equally consistent with the presence as well as with the absence of negligence, the presumptions or inferences based on *res ipsa loquitur* can no longer be sustained. The burden of proving the affirmative, that the defendant was negligent and the accident occurred by his negligence, still remains with the plaintiff; and in such a situation it will be for the Court to determine at the time of judgment whether the proven or undisputed facts, as a whole, disclose negligence. [See *Ballard's* case (supra); *The Kite*(1); Per Evatt J. in *Davis* v. *Bunn*(2), *Mummary* v. *Irvings Proprietary Ltd. (Australia)* (3); *Winnipeg Electrical Company Ltd.* v. *Jacob Geal*(4) See also : *Brown* v. *Rolls Royce Ltd.*(5); *Hendersons* v. *Henry E. Jenkins and Sons*(6). D E

From the above conspectus, two lines of approach in regard to the application and effect of the maxim *res ipsa loquitur* are discernible. According to the *first,* where the maxim applies it operates as an exception to the general rule that the burden of proof of the alleged negligence is, in the first instance, on the plaintiff. In this view, if the nature of an accident is such that the mere happening of it is evidence of negligence, such as, where a motor vehicle without apparent cause leaves the highway, or overturns, or in fair visibility runs into an obstacle; or brushes the branches of an overhanging tree, resulting in injury or where there is a duty on the defendant to exercise care; and F G

(1) [1933] p. 154.
(2) [1936] 56 C.L.R. 246 at 267.
(3) [1956] 96 C.L.R. 99.
(4) AIR 1932 p.c. 246.
(5) [1960] 1 All. E.R. 577.
(6) [1970] A.E. 282. H

A the circumstances in which the injury complained of happened are such that with the exercise of the requisite care no risk would in the ordinary course ensue, the burden shifts or is in the first instance on the defendant to disprove his liability. Such shifting or casting of the burden on the defendant is on account of a presumption of law arising against the defendant from the constituent circumstances of the accident
B itself, which bespeak negligence of the defendant. This is the view taken in several decisions of English Courts. [For instance, see *Burke* v. *Manchester, Sheffield & Lincolshire Rail Co.,*(1) *Moore* v. *R. Fox & Sons*(2). Also see Paras 70, 79 and 80 of Halsbury's Laws of England, Third Edition, Vol. 28, and the rulings mentioned in the
C Foot Notes thereunder].

According to the other line of approach, *res ipsa loquitur* is not a special rule of substantive Law; that functionally, it is only an aid in the evaluation of evidence, "an application of the general method of inferring one or more facts in issue from circumstances proved in
D evidence". In this view, the maxim *res ipsa loquitur* does not require the raising of any presumption of law which must shift the onus on the defendant. It only, when applied appropriately, allows the drawing of a *permissive* inference of fact, as distinguished from a *mandatory* presumption properly so-called, having regard to the totality of the circumstances and probabilities of the case. *Res ipsa* is only a means
E of estimating logical probability from the circumstances of the accident. Looked at from this angle, the phrase (as Lord Justice Kennedy put it(3) only means, 'that there is, in the circumstances of the particular case, some evidence which, viewed not as a matter of conjecture, but of reasonable argument, makes it more probable that there was some
F negligence, upon the facts as shown and undisputed, than that the occurrence took place without negligence.... It means that the circumstances are, so to speak, eloquent of the negligence of somebody who brought about the state of thing which is complained of."

In our opinion, for reasons that follow, the first line of approach
G which tends to give the maxim a larger effect than that of a merely permissive inference, by laying down that the application of the maxim shifts or casts even in the first instance, the burden on the defendant who in order to exculpate himself must rebut the presumption of negligence against him, cannot, as such, be invoked in the trial of criminal cases where the accused stands charged for causing injury or death

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(1) [1870] 22 L.J. 442.
(2) [1956] I.Q.B. 596.
(3) *Russell v. London and South-Western Railway Co.* [1908] 24 T.L.R. 548

by negligent or rash act. The primary reasons for non-application of this abstract doctrine of *res ipsa loquitur* to criminal trials are : Firstly, in a criminal trial, the burden of proving everything essential to the establishment of the charge against the accused always rests on the prosecution, as every man is presumed to be innocent. Until the contrary is proved, and criminality is never to be presumed subject to statutory exception. No such statutory exception has been made by requiring the drawing of a mandatory presumption of negligence against the accused where the accident "tells its own story" of negligence or somebody. Secondly, there is a marked difference as to the effect of evidence, viz. 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. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment. As pointed out by Lord Atkin in *Andrews* v. *Director of Public Prosecutions*(1), "simple lack of care such as will constitute civil liability, is not enough;" for liability under the criminal law "a very high degree of negligence is required to be proved. Probably, of all the epithets that can be applied, 'reckless' most nearly covers the case".

However, shorn of its doctrinaire features, understood in the broad, general sense, as by the other line of decisions, only as a convenient ratiocinative aid in assessment of evidence, in drawing permissive inferences under section 114, Evidence Act, from the circumstances of the particular case, including the constituent circumstances of the accident, established in evidence, with a view to come to a conclusion at the time of judgment whether or not, in favour of the alleged negligence (among other ingredients of the offence with which the accused stands charged), such a high degree of probability, as distinguished from a mere possibility has been established which will convince reasonable men with regard to the existence of that fact beyond reasonable doubt. Such harnessed, functional use of the maxim will not conflict with the provisions and the principles of the Evidence Act relating to the burden of proof and other cognate matters, peculiar to criminal jurisprudence.

Such simplified and pragmatic application of the notion of *res ipsa loquitur*, as a part of the general mode of inferring a fact in issue from another circumstantial fact, is subject to all the principles, the

(1) [1937] 2 All E.R. 552-[1937] AC 576

satisfaction of which is essential before an accused can be convicted on the basis of circumstantial evidence alone. Those are : *Firstly,* all the circumstances, including the objective circumstances constituting the accident, from which the inference of guilt is to be drawn, must be firmly established. *Secondly,* those circumstances must be of a determinative tendency pointing unerringly towards the guilt of the accused. *Thirdly,* the circumstances should make a chain so complete that they cannot reasonably raise any other hypothesis save that of the accused's guilt. That is to say, they should be incompatible with his innocence, and inferentially exclude all reasonable doubt about his guilt.

Let us now see whether the appellant, in the instant case, could with the aid of *res ipsa,* as explained and described in the preceding paragraph, be held guilty of causing death by negligent or rash driving. The primary reason given by the courts below for invoking the maxim is that the appellant had swerved the bus to the extreme right side of the road, where the unfortunate child, who came running from the left side of the road, struck against the bus and was fatally knocked down by its left front wheel.

In our opinion, this circumstance of taking the vehicle suddenly to the extreme right of the road, did not bespeak negligence or dereliction of duty to exercise due care and control, on the part of the accused in *clear and unambiguous* voice. Nor could it be said, that the cause of swerving the vehicle to the right, was unknown. The accused gave a reasonably convincing explanation of his conduct in doing so, and his version was fully supported by four prosecution witnesses who had seen the occurrence. In these circumstances, the maxim *res ipsa loquitur* could have no manner of application.

The picture of the occurrence that can be gathered and pieced together from the statement of the accused recorded under section 313, Criminal Procedure Code, and the testimony of the eyewitnesses, is that when the mother was about to cross the road, she firmly told the child who was following her at some distance, not to follow her, but to return home. The child it seems, stopped for a moment in the road, probably on its left side, while the mother went ahead, crossed the road and descended into the deep ditch on the other side from where, according to her own admission, she could not see the bus approaching the scene of occurrence. The child was, it seems, for the moment undecided as to whether it should go back or go forward after the mother, and then ran or was poised to run towards the right of the road. It was just at this juncture the accused, who according to the passenger-witnesses was driving the vehicle slowly, suddenly saw

the child a short distance ahead of the bus, in the road. In that situation, it was extremely difficult, even for a cautious and skilled driver in the position of the accused, to foresee and judge with accuracy as to whether the child would go back to the left or shoot forward to the right side of the road. In that split second he had to decide about the better course to be adopted to avoid a collision with the child. Whether it was better to swerve the vehicle to the extreme left or to the extreme right side of the road, that was the question for his instant decision. It was in evidence that the metalled road there was hardly 12 feet in width, and there were very deep ditches on both sides of the road. Since the child was at that critical moment, initially, in the road more towards the left-side, the accused might have thought that if he tried to run past the child from the extreme left, there was every risk of the bus rolling down into the ditch. He therefore, thought that the best way to avoid the ditches and to avoid the collision and forestall the move of the child would be to steer the vehicle to the extreme right side, and thus pass and dodge the child by a parabolic manouver. But there was a limit to it. He could not, without incurring far greater risk of harm to many in the bus, take the vehicle off-course further to the right, beyond the point he did. It was in evidence (Vide PW 5) that there was a very deep ditch on the right of the road, close to the scene of the accident, and that if the bus had gone further towards that side, it would have met with disaster of a far bigger magnitude, resulting in death or injury to the passengers and damage to the vehicle. Unfortunately, his calculations went wrong and he failed in his attempt to avoid the accident.

It was thus evident that the accident happened due to an error of judgment, and not negligence or want of driving skill on the part of the accused. An error of judgment of the kind, such as the one in the instant case, which comes to light only on post-accident reflection, but could not be foreseen by the accused in that fragmented moment before the accident, is not a sure index of negligence, particularly, when in taking and executing that decision the accused was acting with the knowledge and in the belief that this was the best course to be adopted in the circumstances for everyone's safety.

In *Horabin* v. *British Overseas Airways Corporation*(1) the Court was required to consider, more or less an analogous question, namely : whether an act done contrary to instructions or standards, necessarily constitutes wilful misconduct on the part of the person doing the act. Borry J. answered this question in the negative, with the following observations :

(1) [1952] 2 Q.B.D. 1016.

A "The mere fact that an act was done contrary to a plan or to instructions, or even to the standards of safe-flying, to the knowledge of the person doing it, does not establish wilful misconduct on his part, unless it is shown that he knew that he was doing something contrary to the best interests of the passengers and of his employers or involving them in a greater risk than if he had not done it. *A grave error of* B *judgment, particularly one apparent as such in the light of after events, is not wilful misconduct if the person responsible thought he was acting in the best interest of the passengers and of the aircraft.*"

(Emphasis supplied)

Though *Horabin* was a case arising out of an aircraft accident and C the observations extracted above were made in the context of an allegation of 'wilful misconduct', yet the reasoning employed and the principle enunciated, particularly in the last sentence which has now been underlined are applicable to the facts of the case before us. The 'wilful misconduct' or 'wilful default' in issue in *Horabin's* case was not very different from a change of negligence, because 'negligence' has D two meanings in the law of tort : *it may mean either a mental element* which is to be inferred from one of the modes in which some torts are committed, or it may mean an independent tort which consists of breach of a legal duty to take care which results in damage, undesired by the defendant." (See Earl Jowitt's Dictionary of England Law)

E As in *Horabin,* here also, the accused had swerved the vehicle to the extreme right side of the road, not only to avoid collision with the ill-fated child but also to avoid the risk of the vehicle falling into deep ditches on either side of the road, with the resultant possibility of far greater harm to the passengers in the bus.

F After going through the English translation of the evidence of the witnesses, furnished by the counsel and closely analysing the happening and its circumstances in the light of arguments advanced on both side, we are of opinion that the prosecution had failed to prove beyond reasonable doubt that the appellant had caused the death of the child by negligent or rash driving. All happened in fraction of a moment; G and even if the worst was assumed against the appellant, the highest that could be said was that a misjudgment on his part too slight to be branded as *culpable* negligence, could well account for the accident resulting in the death of the child.

These, then, are the reasons which we give in support of our Order by which we had allowed Syad Akbar's appeal and acquitted him. H

P.B.R. *Appeal allowed.*