

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ Crl.REV.P. 365/2007

% Date of hearing : 18.03.2008
Date of decision: 31.03.2008

RAI SINGH ...PETITIONER
Through: Mr.C.P.Nanda, Advocate.

Versus

STATE (N.C.T. DELHI) ...RESPONDENT
Through: Mr.Jaideep Malik, APP.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

SANJAY KISHAN KAUL, J.

- 1) The petitioner was driving a Rajasthan Roadways Bus on 2.9.1994 at about 5.00 A.M. and it is alleged that the bus was driven on the wrong side rashly and negligently. In the process, the petitioner is alleged to have hit an unknown person crossing the road, who died on the spot. The petitioner was charged for offences u/s 279/304A IPC and pleaded not guilty and prayed for trial.

- 2) The case of the prosecution is that the body of the deceased person was taken for post-mortem and the medical report was placed on record. The prosecution examined seven witnesses, but the only direct evidence is of PW1, Mr.Om Prakash, who is alleged to be an eye witness. Mr.Om Prakash has deposed that he was attending to the nature's call in the morning when he saw the bus being driven in a rash and negligent manner by the petitioner on the wrong side which resulted in the bus hitting the deceased and causing his death on the spot. The witness further deposed that the bus Driver/petitioner stopped the bus and PW1 detained him till the arrival of the police.
- 3) The petitioner in his defence appeared and deposed himself. The defence is that the dead body was lying on the road and on seeing the same, the petitioner stopped the bus and, in fact, informed the police by personally going to the police station which was in the vicinity of the accident. The police is alleged to have embroiled the petitioner in the case and produced the eye witness PW1 in support of its case. The defence also examined two other witnesses whose depositions are important for the present case. DW1 is a passenger who claimed that he was travelling in the bus on the date of the accident while DW2 is the Conductor. The statement given by both the witnesses is more or less similar and support the case of the defence that there was a

dead body lying on the road when the bus was stopped and the police instead of registering a case, arrested the petitioner and seized his license and the bus and falsely implicated him. DW1 was put a specific question as to whether he had kept the bus ticket, to which he deposed that he should not be expected to retain the bus ticket for a long time as he did not know that such a situation would arise. It may, however, be noted that both the witnesses were brought by the defence and not summoned through the process of the court.

- 4) On completion of trial, the learned MM convicted the petitioner u/s 279/304A IPC in terms of the judgment dated 6.10.2006 and passed an order of sentence on 12.10.2006 whereby the petitioner was directed to undergo RI for six months u/s 304A IPC and further SI for one month u/s 279 IPC and to pay a fine of Rs.500/- and in default of payment of fine, to further undergo SI for ten days. The sentences were to run concurrently.
- 5) The petitioner aggrieved by the said order of conviction and sentence, preferred an appeal before the learned ASJ. In terms of an order dated 19.5.2007, the appellate court upheld the order of conviction, but modified the order of sentence to RI of six months under both the aforesaid sections. The present revision has, thus, been preferred against the said order.

- 6) It is trite to say that this Court while exercising the revision jurisdiction has to only satisfy itself as to the correctness, legality or propriety of any finding, sentence of order and it is not the function of the Court to sit as a Court of second appeal. Learned counsel for the petitioner conscious of the said limitation made the submissions within the parameters aforesaid.
- 7) The plea of learned counsel for the petitioner was that there was no medical evidence proved on record to support the case of the prosecution as the prosecution had failed to produce the doctor who had conducted the post-mortem as a witness and the post-mortem report had neither been accepted nor proved. In order to substantiate the infirmity in the case of the prosecution, learned counsel has relied upon the judgment of a learned single Judge of this Court in Suresh Kumar Vs. State 74 (1998) DLT 607 where it has been observed as under:

“Both the courts below have overlooked the fact that the injured deceased had not died on spot. He was removed to the hospital and had died afterwards. It is not proved on record when the deceased had died and what was the nature of injuries and cause of his death. Only a clerk from the hospital (PW-5) has been examined who has only proved the MLC Ex.PW-5/A in the absence of the doctor. The injured was alive when this MLC was recorded. The nature of injuries has not been proved. The doctors who had examined and treated the injured have not been examined nor it is proved that the death was caused due to the accidental injuries. The doctor who had conducted the post-mortem has also not been examined and the postmortem has also not been examined and

the post-mortem report has not even been proved. This has been overlooked by the two courts. Evidently the prosecutor as well as the two courts have not acted with due diligence and carefully. The finding of conviction under Section 304-A IPC thus is not based on evidence. The conviction and sentence thus are illegal and not warranted by law and are not sustainable.”

(emphasis supplied)

- 8) A scrutiny of the two impugned orders shows that the important aspect of the deposition of the doctor and the proving of the post-mortem report has not been correctly appreciated in the law by the trial courts below. The only observation made is that the judgment in Suresh Kumar Vs. State (*supra*) would not be applicable in view of the following reasoning:

“No doubt there are observations in the said judgment that doctor who conducted post-mortem was not examined and that was one of the grounds of acquittal. But in that case the victim has not died at the spot. He died later on in the hospital. It was not proved when he died and what was the nature of injuries and cause of death. The same is not applicable to the case in hand.

...I am constrained to observe that the accused nowhere disputed the cause of death before the Ld. Trial Court.”

- 9) The aforesaid distinction sought to be carved out by the appellate court cannot be sustained. No doubt the difference is that in the present case the victim had allegedly died on the spot. However, the cause of the death, nature of injuries caused being post-mortem or anti-mortem or the time thereof could only be proved through

the process of examination of the doctor and proving the post-mortem report.

- 10) The principal defence of the petitioner was that the dead body was already lying on the road when the bus approached at the spot. The bus was stopped and the petitioner informed the police and rather than appreciating the conduct of the petitioner, the police made the petitioner an accused. In such circumstances, the petitioner is not expected to know the cause of death of the deceased and thus the question of disputing the cause of death does not arise. There are two eye witnesses in support of the case of the petitioner, being DW1 and DW2. DW2 is an eye witness who in the natural sequence of events would have been present at the spot, being a Conductor. DW1 claims to be a passenger and other than cross-examining the said witness on the aspect of absence of ticket with him after a lapse of time, nothing material has come on record to doubt the deposition of the passenger. These defence witnesses can hardly be ignored when the only eye witness produced by the prosecution was one who claimed to be on the spot on account of the call of the nature and the surrounding circumstances of the said witness being allegedly a stock witness of the police. It has been emphasized by the Apex Court in Banti Vs. State of Maharashtra (2004) 1 SCC 414 that the evidence of defence witnesses has to be decided on

the touchstone of reliability, credibility and trustworthiness, particularly when he attempts to resile from and speak against records and in derogation of his earlier conduct and behavior. If after doing so, the court finds it to be untruthful, there is no legal bar in discarding the testimony. However, in the present case the witnesses would be in the natural course of events present at site on account of their being the conductor and passenger in the bus.

- 11) A different yardstick cannot be put for determining the credibility of a defence witness and in the absence of any cogent and convincing reason, the testimony of defence witnesses is not to be rejected as held in Nayudu Srihari Vs. State of A.P. (1996) 10 SCC 393. The prosecution has been unable in the present case to cast any doubt on the veracity of the deposition of the defence witnesses and there was no reason for the trial courts to summarily reject the same. The mere fact that these witnesses were coming before the court for the first time cannot be a good ground to reject their depositions.
- 12) The aforesaid aspect has to be examined taking into consideration that the police itself never examined the conductor or any of the passengers, whereas the undisputed fact is that the bus was supposed to be carrying about 15-20 passengers and yet the IO could not find any independent witness/passenger of the bus to depose to the

incident. The time of the incident was 5.00 A.M. and the presence of PW1 is hardly explained at the site. In the absence of relevant witnesses of prosecution, the testimony of the doctor who examined the deceased and conducted the post-mortem becomes material. I fail to appreciate how the prosecution could have been lax in proving the post-mortem report which was a material piece of evidence. As noticed above, the time of the death of the deceased would be a material factor which could be proved only through the post-mortem report.

- 13) The prosecution in support of its case had produced certain photographs Ex. P1 to P3 showing the head of the deceased badly crushed. The prosecution did not take care to send the tyres of the bus to FSL for its report as in case of such bleeding and injuries the tyres should have had some blood marks or strands of hair of the deceased on it. There was also a great possibility of skid marks on the face/person of the deceased in case the bus was being driven rashly and negligently and the post-mortem report would have gone a long way in the absence of these material facts to, at least, link the petitioner to the crime.
- 14) The trial court appears to have been weighed by the factum of the demise of the deceased and the bus coming on the wrong side of the road, but that by itself would not be sufficient to hold the petitioner guilty of the offences of

causing death of the deceased due to rash and negligent driving unless the accident/death is linked to the petitioner driving the bus. In my considered view the prosecution has failed to prove the case against the petitioner beyond reasonable doubt.

- 15) The incident in question is almost 12 years old. It is not even a case where it would be appropriate to direct fresh investigation and remand the matter back to the trial court. Thus, even though there are concurrent findings of the trial court and the first appellate court, in view of the aforesaid infirmities, the impugned orders cannot be sustained. The revisionary jurisdiction has to be exercised to ensure that the decision is as per the canons of criminal jurisprudence and there is no mis-carriage of justice as the correctness, legality and impropriety of an order is within the domain of scrutiny in revisional jurisdiction.
- 16) The result of the aforesaid is that the order of conviction and sentence against the petitioner as affirmed in appeal are set aside and the petitioner is given benefit of doubt and is consequently acquitted.
- 17) Revision petition is accordingly allowed.
- 18) The bail bond and surety stand discharged.
- 19) Trial court record be sent back.

MARCH 31, 2008
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SANJAY KISHAN KAUL, J.