

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: 6th November, 2009*
Judgment Delivered on: 11th November, 2009

+ **CRL.REV.P.575/2001**

DHARAM PAL Petitioner
Through: Mr.Rajesh Mahajan, Adv.

versus

STATE Respondent
Through: Ms.Fizani Husain, APP.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

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

INDERMEET KAUR, J.

1. On 28.8.1992 at about 9.00 PM on the Nelson Mandela Road, Vasant Vihar an accident had occurred between tanker No.DHL 2965 and a TSR No.DL 1R 5517. Two persons namely Mahendra Singh and Surinder Pal Singh had succumbed to their death. As per the version of the prosecution the offending tanker was being driven by the petitioner Dharam Pal. The eye-witness account of PW-1 Gurdyal Singh had found favour with the Trial Court.

2. PW-1 had on oath deposed that on 28.8.1992 at about 9.00 PM he was travelling in his car on the Nelson Mandela Road; after

crossing the Vasant Continental about 1 km. ahead towards Vasant Kunj, a TSR No.DL1R 5517 was going ahead of his car; a water tanker No. DHL 2965 came at a fast speed from the side of Vasant Kunj being driven in the middle of the road, the tanker all of a sudden turned towards the right and hit against the TSR and then turned towards the left. PW-1 managed to save himself and stopped his car on the left side of the road; the TSR was over-run by the tanker; the TSR had come under the front wheel of the tanker; there was one passenger and one driver in the TSR; one being a sikh and another being a mona; the driver was a mona. PW-1 has further deposed that the petitioner had come down from the truck; he stood at the spot for about one or two minutes and thereafter fled away. Within 5-7 minutes the PCR van had reached the spot who removed the injured to the hospital. In his cross-examination PW-1 has stated that the incident had occurred at about 8.45 PM. There was no tail light on the TSR which was ahead of him. The witness has further admitted that he cannot say whether there is a tail light on the TSR or not as the head light was falling on his eyes from the front and due to this nothing was visible. He has further stated that it was dark; the head light was coming from the opposite direction; there was no street light at that time. PW-1 had admitted that he has seen the accused for half a minute. His statement was recorded on the same day i.e. on 28.8.1992. PW-1 has further stated that the after the incident he

had identified the driver in the court. He had not given any description of the accused to the police; in his presence no site plan was prepared. He denied the suggestion that he was deposing falsely as the victim was related to him.

3. SI Kaushal Raj, the Investigating Officer has been examined as PW-9. He has on oath deposed that he had met the eye-witness Gurdyal Singh at the spot and at his pointing out he had prepared site plan Ex.PW-9/D. This version of PW-9 is not in conformity with the version of PW-1 who has stated that no site plan was prepared at this instance. PW-9 has further deposed that owner of the truck Ashok Kumar had been summoned pursuant to a notice under Section 133 of the Motor Vehicle Act. The said notice has been proved as PW-9/G and the reply of Ashok Kumar is at Mark X. Since the accused has fled away from the spot he was arrested three days later i.e. on 31.8.1992. PW-9 has further deposed that accused was identified by Gurdyal Singh who had come to the police station and his statement under Section 161 Cr.P.C.was recorded. In his cross-examination PW-9 has stated that he did not get the TIP of the accused conducted. He denied the suggestion that he had arrested the accused on the saying of the owner or that the accused was not the driver of the offending tanker.

4. Owner of the tanker Ashok Kumar had come into the witness box as PW-8. He had on oath deposed that he is owner of the

tanker no.DHL 2965 which was released to him on superdari vide memo Ex.PW-8/A.

5. The post-mortem on the deceased persons was proved by Dr.B Swaub as Ex.PW-2/A and Ex.PW-2/B. As per opinion in the post-mortem Surinder Pal Singh had died because of spinal shock due to blunt force impact. The cause of death of Mahendra Singh was opined to be haemorrhagic shock followed due to blunt force impact.

6. This evidence collected by the prosecution had formed the basis of the conviction of the petitioner. He had been convicted on 27.4.2001 under Section 279/304-A of the IPC and vide order of sentence dated 14.5.2001 he had been sentenced to undergo SI for 6 months and to pay a fine of Rs.1000/-; in default of payment of fine to undergo SI for two months for the offence punishable under Section 279 of the IPC; for the offence punishable under Section 304-A of the IPC he had been sentenced to undergo SI for two years and to pay a fine of Rs.4000/-; in default of payment of fine to undergo SI for six months.

7. In appeal before the Additional Sessions Judge vide judgment dated 27.9.2001 the appeal had been dismissed; no modification was made in the sentence either.

8. On behalf of the petitioner two broad submissions have been made

(i) The eye-witness PW-1 has admitted that he had seen the accused for a fleeting glance i.e. for half a minute; admittedly, accused was not known to PW-1; PW-1 has admitted that he identified the accused in the court for the first time; such an identification is a useless piece of evidence and no reliance can be placed upon such an identification, this by itself entitles the accused for a benefit of doubt and a consequential acquittal. For this proposition reliance has been placed upon Kanan & others vs. State of Kerala AIR 1979 SC 1127 It is stated that the admission of PW-9 in his cross-examination that the accused had been identified in the police station by PW-1 is also not worthy of any credence; accused not having being known to the witness from before, no identification parade having been held; an identification for the first time in the police station is value less; for this proposition reliance has been placed upon Mohanlal Gangaram Gehani vs. State of Maharashtra 1982 CCC 45 (SC). The notice under Section 133 of the Motor Vehicle Act has been proved only through the version of Investigating Officer who at best could have proved the notice but not the reply which had purportedly been written by Ashok Kumar. Ashok Kumar was the owner of the tanker and he had come into the witness box as PW-8 yet the learned Prosecutor chose not to put this piece of evidence before PW-8; in the absence of which it can nowhere be said that the reply appended on Ex.PW-9/G is in the handwriting of Ashok Kumar; cumulative effect

of this evidence which has been collected by the prosecution shows that the accused has not been identified and the prosecution has failed to discharge the burden that it was the petitioner Dharam pal who was the driver of the offending vehicle. In this context testimony of PW-1 is also relevant; it is submitted that his version is highly suspect; admittedly, there were blinding lights coming from the opposite direction which had made the visibility of PW-1 almost nil; he had seen the accused only for a passing moment; identification in these circumstances of the petitioner in court when he had come into the witness box on 20.9.1994 i.e. after a lapse of two years is difficult to comprehend.

(ii) The second submission is on the quantum of sentence. It is submitted that if this court is not inclined to alter the conviction, the court must appreciate that this offence relates to a period 17 years from today. The petitioner as per the record had suffered a sentence of about two months; his appeal had been dismissed on 27.9.2001; he had been bailed out on 27.11.2001. In these circumstances, fairness and justice demand that the petitioner be not remanded back to custody, he be given a sympathetic consideration in the grant of sentence; benefit of probation be given. For this proposition reliance has been placed upon a judgment of the hon'ble Apex Court in Parkash Chandra Agnihotri vs. State of Madhya Pradesh 1990 (supp) SCC 764 and Jagdish

Chander vs. State of Delhi (1973) 2 SCC 203 as also another judgment reported in State vs. Kaptan Singh 2008 (1) JCC 397.

9. Arguments have been heard; record has been perused.

10. Admittedly, PW-1 had seen the accused for a fleeting moment. In his cross-examination PW-1 has admitted that he had seen the accused for half a minute. It has also come on record that the incident had occurred at about 8.45 PM; it was dark; there was no street light; there were blinding lights coming from the opposite direction; because of light falling on his eyes from the front nothing was visible to PW-1; his statement was recorded on 28.8.1992. He has not given any description of the accused to the police; accused was admittedly arrested on 31.8.1992. PW-1 has further admitted that he had identified the accused in the court for the first time.

11. PW-9 stated that the accused was identified by PW-1 when he had come to the police station where his statement was recorded.

12. Record shows that there are two statements of PW-1 recorded under Section 161 of the Cr.PC; the first statement was recorded on 28.8.1992; thereafter there is a subsequent statement which has been recorded by the Investigating Officer on 31.8.1992. This was after the arrest of the accused. This statement clearly states that in the police station PW-1 had identified Dharam Pal as the person who was driving the offending tanker.

13. Accused was a person unknown to PW-1; PW-1 had seen to him for a passing moment. As per his version he had identified him in the court for the first time which was after two years; as per PW-9, PW-1 had identified the accused in the police station; in either eventuality such an identification is a valueless identification. Admittedly, no judicial TIP had been conducted in this case for which there is no explanation by the Investigating Officer. Notice under Section 133 of the Motor Vehicle Act had been served upon the owner but at the time when the owner Ashok Kumar PW-8 had come into the witness box, this notice had not been put to him; PW-8 had nowhere been asked as to whether the reply appended on Ex.PW-9/G is the reply given by him. This is a serious omission. PW-8 had come into the witness box; there is no explanation or answer as to why this document had not been put to this witness in order to prove the version set up by the prosecution that PW-8 had stated therein i.e. on Mark X of Ex.PW-9/G that the driver of the offending vehicle as on that date was Dharam Pal. This omission coupled with the fact that no TIP had been conducted for which there is no explanation by the Investigating Officer; the fact that the eye-witness was not known to the accused; accused had fled away from the spot; accused had been apprehended three days later; accused had been produced in the police station where he was identified by PW-1; such an identification become a valueless piece of evidence under Section

9 of the Indian Evidence Act ; identity of the accused has not been established. Prosecution not having proved its case beyond all reasonable doubt, the fundamental rule of criminal jurisprudence being that the prosecution must stand on its legs; prosecution having failed to discharge this burden, accused is thus entitled to a benefit of doubt and the necessary consequences which flow from it.

14. In Mohanlal Gangaram Gehani vs. State of Maharashtra (supra) Supreme Court had held that:

“20. Thus, as Shetty did not know the appellant before the occurrence and no Test Identification Parade was held to test his power of identification and he was also shown by the police before he identified the appellant in Court, his evidence becomes absolutely valueless on the question of identification. On this ground alone, the appellant is entitled to be acquitted. It is rather surprising that this important circumstance escaped the attention of the High Court while it laid very great stress in criticizing the evidence of Dr. Heena when her evidence was true and straightforward.

21. For these reasons, therefore, we are unable to place any reliance on the evidence of Shetty so far as the identification of the appellant is concerned.”

15. PW-1 is admittedly the only eye-witness of this case. The identification by him having been rejected by this court, the necessary corollary is that the accused is entitled to an acquittal. He is acquitted of the charges levelled against him. His bail bond and surety bond stand cancelled.

(INDERMEET KAUR)
JUDGE

11th November, 2009
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