



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

% Order Reserved on: August 26, 2011
Order Pronounced on: September 09, 2011

+ **Crl. Revision Petition No. 316/2008**

HARI CHAND Petitioner
Through: Mr. Ujjwal Jha & Mr. Ramesh
Chand, Advocates

versus

THE STATE Respondent
Through: Mr. Harsh Prabhakar & Ms.
Laxmi Chauhan, Advocates for
Mr. Pawan Sharma, Standing
Counsel for State.

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

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

SUNIL GAUR, J.

1. The legality of the conviction of the petitioner for the offence of having caused death of a passenger by rashly driving DTC Bus No. DL1P 9043 is questioned by the petitioner, a DTC bus driver, who at 12:15 p.m. on 11th August, 1995 is said to have rashly driven his bus so close to the red line bus which was stationed at the NPL Mall Road bus stop in Delhi and in the process, head of one of the passengers who was on the foot board at the entry door of petitioner's bus had struck

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against the stationary bus and the head injury so caused proved to be fatal.

2. Concurrent finding of the trial court as well as of the appellate court is that the petitioner is guilty of rash and negligent driving as he had started his bus without waiting for the signal from the conductor to start the bus after picking up passengers from the bus stop of NPL, Mall Road, Delhi. In this accident, MCD school teacher- Dharamvir, who had also boarded the bus along with his brother-in-law Virender Singh, had sustained injuries and is a witness of this accident in respect of which FIR No. 237/1995 under Sections 279/337/304-A of the IPC was registered at Police Station Mukherjee Nagar, Delhi at the instance of injured passenger Dharamvir. This incident was also witnessed by the driver of the stationary red line bus No. DL 1P 2573 i.e. Prem Kumar. After the investigation at the spot by the police, it was learnt that another passenger on the bus of the petitioner i.e. Virender Singh who had sustained head injury in this vehicular accident had died in the hospital. In the post mortem report, it was opined by Dr. Alexander (PW-8) that death of Virender Singh was due to extensive cranio-cerebral injuries caused by a blunt force as a result of vehicular accident. There were multiple fractures of all the bones of the skull. Mechanical inspection of the petitioner's bus as well as of the red line bus stationed at the spot was got done during the course of investigation of this case conducted by SI Devender Saini (PW-13) and thereafter, the petitioner was charge-sheeted for committing the offence of rash and negligent driving.

3. Charge under Sections 304-A/337/279 of the IPC was contested by the petitioner and at trial deposition of 13

witnesses were recorded and the material evidence which was referred to at the hearing is of the first informant / complainant and injured - Dharamvir (PW-6) and that of Prem Kumar (PW-12), driver of the red line bus which was stationed at the bus stop.

4. Incriminating evidence was put to the petitioner when he was examined under Section 281 of the Cr.P.C. and he chose to get Smt. Bimla (DW-1), a pavement vender examined in his defence. Relevantly, for the first time the defence of the petitioner was disclosed through this witness who had stated that petitioner's bus was in the middle of the road at the time of this accident and red line bus driven by Prem Kumar (PW-12) had come from behind and in the process of overtaking petitioner's bus, it had bruised some passengers who were on the rear entry door of petitioner's bus and one such person had received multiple injuries and the police had come to the spot and had removed the injured to the hospital.

5. Trial court while relying upon the testimony of the injured PW-6 as well as of the red line bus driver (PW-12) had found the petitioner guilty of the offences under Sections 304-A/337/279 of the IPC and had sentenced the petitioner to rigorous imprisonment for two years for the main offence under Section 304 A of the IPC and to a lesser sentence for the allied offences.

6. In appeal, petitioner had laid challenge to his conviction and sentence for the aforesaid offences on the three grounds which are as under:-

"(i) That infact the red line bus came from behind and it over took the DTC bus already standing and struck against the passengers who were trying to board the DTC bus;

(ii) That the Id. Metropolitan Magistrate has wrongly relied upon the mechanical report, whereas the person who conducted the mechanical inspection report has admitted in the cross examination that he did not prepare the report himself and same was prepared at his instance.

(iii) That there are material contradictions in the testimony of PW-6 and PW-12.

7. Upon re-appreciation of the evidence, appellate court had repelled the aforesaid three grounds of challenge and concurred with the decision of the trial court and had upheld it.

8. At the hearing in this revision petition, learned counsel for the petitioner had urged that in the absence of the evidence of the conductor, the prosecution case of petitioner having roughly driven his bus from the bus stop without the conductor blowing the whistle, resulting in accident in question, must fail. It was also urged that this vehicular accident had resulted not due to the fault of the petitioner but due to the negligence of the driver of the red line bus i.e. Prem Kumar (PW-12) who had struck his bus against a passenger who was still on the foot board of the entry door of the petitioner's bus and after this accident, red line bus driver- Prem Kumar (PW-12) had fled away and he had got the petitioner implicated through the owner of the red line bus. According to petitioner's counsel, the evidence on record does not conclusively prove the guilt of the petitioner and the courts below have gravely erred in convicting the petitioner and so the impugned conviction and sentence imposed upon the petitioner deserves to be set aside.

9. On behalf of the respondent- State, it was submitted that the defence now being raised by the petitioner is clearly an afterthought as the same has not been put to the witnesses

and it has not even been put to Prem Kumar (PW-12) driver of the red line bus by the petitioner that the accident was caused due to his negligence. It is submitted that the conviction of the petitioner on the strength of the evidence of the injured (PW-6) and eye witness (PW-12) is legally justified and deserves to be maintained.

10. This Court is of the considered opinion that non-examination of the conductor of the offending bus is not fatal in the facts and circumstances of this case. In any case, it was for the investigation Officer i.e. SI Devinder Saini (PW-13) to explain as to why the conductor of the bus was not made a witness. Unfortunately, for the petitioner there is no cross-examination of the Investigating Officer-PW.13 on these lines, therefore, the petitioner cannot derive any advantage because of the conductor of the offending bus being not examined. In an entirely different context in **Brahmdas Vs. State of Himachal Pradesh** (2009) 7 SCC 353, it was found that the evidence of the conductor was relevant and his non-examination was a fatal infirmity, as the material witness could not disclose as to who was the driver of the offending bus. Thus, reliance placed by petitioner's counsel upon **Brahmdas** (*supra*), is entirely misplaced.

11. Petitioner's counsel cannot be heard to say that this accident was caused by the driver of the red line bus i.e. Prem Kumar (PW-12) because it has not been suggested to this witness (PW-12) that he had struck against petitioner's bus, which was stationed at the bus stop nor it can be so said in the face of the evidence of the eye witness (PW-6), who has clearly deposed that it was the petitioner, who had roughly driven his

bus and had narrowly overtaken the stationary red line bus of Prem Kumar (PW-12) and in the process head of the deceased had struck against the stationary bus. The circumstance of red line bus driver-Prem Kumar (PW-12) leaving the spot after the accident, by itself cannot be held against Prem Kumar (PW-12) because in cross-examination he has clarified that due to fear public persons, who had gathered at the spot after the accident, he had gone to the Police Station. This appears to be plausible explanation. At best it can be said that the testimony of the red line bus driver Prem Kumar (PW-12) ought not be the sole basis of the conviction of the petitioner. However, there is reliable evidence of the injured eye witness (PW-6), who has no animus to falsely implicate the petitioner and to exonerate the red line bus driver- PW-12.

12. As already noted above, there is cogent evidence of the injured eye witness-PW.6, which conclusively establishes that the petitioner had rashly driven his bus from the bus stop, so close to the stationary bus at the spot, that resulted in the accident in question. The self-serving evidence of the defence witness does not and cannot demolish the otherwise reliable evidence of the injured eye witness-PW.6, which clearly implicates the petitioner. Thus, unhesitatingly it can be said that the conviction of the petitioner for the offences in question by the courts below, does not suffer from any illegality or infirmity. But I do find that it emerges from the evidence of eye witness-PW.6 that petitioner's bus was full of passengers and 2-3 passengers were still standing on the foot board at the entry door of petitioner's bus, when the deceased and injured-PW.6 had got onto the foot board of the entry door of the

petitioner's bus. Here is the negligence of the deceased also of boarding petitioner's bus, which was full of passengers, knowing well that he would not be able to get inside the entry door of the bus in question.

13. Though, contributory negligence of the deceased is not a permissible defence, but certainly it is a factor which affects the quantum of sentence awarded for the offence under Section 304-A of IPC. It has been so held by the Apex Court in **Lakshmanan Vs. State of Tamilnadu**, JT 2001 (Supple.2) SC 396 and upon finding it to be a case of contributory negligence, the sentence was reduced to the period of three months already undergone by the offender.

14. Since the instant case is also found to be a case of contributory negligence, as I am of the firm view that finding the petitioner's bus to be full of passengers, the deceased ought to have not boarded it and by dangerously clinging to the rear foot board of petitioner's bus, he had foolishly risked his life. Taking it to be a case of deceased being crushed between the offending bus and the stationary bus, trial court has imposed the maximum sentence. However, a close scrutiny of the record reveals that it was not a case of crushing but of deceased's head hitting hard against the stationary bus due to grossly negligent driving of the bus by the petitioner. Therefore, while upholding the conviction of the petitioner for the offence under Section 304A of IPC, the substantive sentence deserves to be reduced to the period of six months already undergone by the petitioner. Such a view is being taken as the petitioner has unblemished service record as a DTC bus driver with no other accident minor or major, to his discredit and is to retire in the year 2013. Petitioner also has a



daughter of marriageable, ailing wife and two other minor children to support. It is these circumstances, which persuades this Court to take a lenient view on the quantum of sentence. In fact what has primarily weighed with this Court is the factum of contributory negligence of the deceased, which is a decisive factor, leading to the reduction of the substantive sentence imposed upon the petitioner to the period already undergone by him.

15. This Revision Petition is allowed to the extent of reducing the substantive sentence of the petitioner to the period already undergone by him.



SUNIL GAUR, J

September 09, 2011

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