

*

HIGH COURT OF DELHI : NEW DELHI

Order reserved on: August 26, 2011
Order pronounced on: September 23, 2011

+

Crl. Rev. P. No. 308/2008

% Gagan Verma

... Petitioner

Through: Mr. Rajiv Taneja & Mr. Deepak
Aggarwal, Advocates.

versus

State

... Respondent

Through: Mr. Pawan Sharma, Standing
Counsel (Crl.) & Mr. Harsh
Prabhakar & Ms. Laxmi Chauhan,
Advocates

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?
- No.

SUNIL GAUR, J.

1. In this case of fatal vehicular accident, the question posed is whether the death of a passenger- Jagmohan while alighting from bus No. DL 1P 2540 driven by the petitioner, at Chowki No. 2 on route No.166 at about 11:00 a.m. on 26.1.1995 was due to negligence of the petitioner or because of medical negligence, as Jagmohan is said to have died in the hospital on 12.2.1995 as a

Result of 'Septicemia' due to multiple infected injuries.

Signature Not Certified
Digitally Signed By: AMULYA
Certify that the digital file and
physical file have been compared and
the digital data is as per the physical
file and no page is missing.

The concurrent findings of both the courts below, while

convicting the petitioner for the offence under Section 304-A of the IPC, is that Jagmohan had died due to rash and negligent driving of the bus by the petitioner. Trial court had imposed substantive sentence of one year for the offence under Section 304-A of the IPC and had further sentenced the petitioner to six months for the offence under Section 279 of the IPC. However, both the substantive sentences were made to run concurrently. Appellate court vide impugned order of 14.5.2008 while dismissing petitioner's appeal had upheld the verdict of the trial court.

3. The factual matrix of this case already stands noted in the impugned judgment and need not be recapitulated, as what is required to be seen, to find out as to whether the petitioner had rashly and negligently driven his bus resulting in the fatal accident in question, is the solitary testimony of the eye witness- Ram Rattan (PW-8). The version of the prosecution as unfolded by this eye witness (PW-8) who was also travelling with his cousin brother- Jagmohan in petitioner's bus on the day of the incident, speaks for itself. The ocular version as disclosed by him (PW-8) reads as under:-

On that day, at about 10;30 a.m., I along with cousin brother Jagmohan boarded a bus at DJ Block, the number of the bus was DL1P 2540 route No.166, which registration no. I came to know later. At about 11:15 a.m., I along with my cousin brother Jagmohan while getting down at Chowki No.2, the driver of the said bus applied the brake and I got down from the said bus and he had put one foot on the earth and one foot was on the foot board of the said bus. Suddenly the driver of the said bus drove his bus negligently. Due to that my cousin brother fell down and the back wheel of the said bus dragged Jagmohan.

11

4. Both sides have been heard in this revision petition and with their assistance the record of this case has been perused in order to find out as to whether there is any grave error or infirmity in the impugned judgment causing miscarriage of justice or not.

5. The MLC of Jagmohan has been proved by the record clerk (PW-9) of the concerned hospital who had disclosed the permanent address of the doctor who had prepared this MLC. Still at no point of time any application was made by the petitioner seeking examination of the doctor who had prepared the MLC of Jagmohan. Thus, it has to be taken that the alleged history and the seat of injury as disclosed in this MLC was not disputed by the petitioner. The alleged history as given in the MLC of Jagmohan assumes importance in view of the fact that the said history is purportedly given by Jagmohan himself. What Jagmohan had stated before the doctor at the time of his medical examination, as noted in his MLC, is as under:-

“The alleged H/O R & A, as told by the patient himself is that he met with an accident while getting down from the red line bus at Gulabi Bagh around 10:30 a.m.”

6. The seat of injury as disclosed in Jagmohan's MLC also deserves attention. The injuries noted in the MLC of Jagmohan are as follows:-

Injuries:-

“crush injury Rt. thigh & Rt. lower leg c skin loss”

7. During seventeen days of hospitalization, what treatment was given to Jagmohan has not been sought by the petitioner. Had such a course been adopted by the petitioner, by moving an application under Section 311 of Cr.P.C., then it could have been known as to whether there was any medical negligence or not.

However, it appears from the post-mortem report (PW-7/A) of Jagmohan, proved by the record clerk of the concerned hospital that the cause of death of Jagmohan was 'Septicemia' due to multiple infected injuries found on the right thigh and abdomen area, as a result of blunt force impact. Had the petitioner been serious to bring out the medical negligence aspect, then his counsel ought to have cross-examined the concerned record clerk (PW-7) to find out the whereabouts of Dr. Lalit Kumar who had conducted post mortem on the dead body of the deceased. In any case, upon petitioner's application under Section 311 of Cr.P.C. a substitute doctor would have been summoned by the trial Court to bring on record the aspect of medical negligence, if at all it was there. No such effort was made by the petitioner. Even the evidence of the concerned record clerk (PW-7) remains unchallenged.

8. In the aforesaid context, the plea of the petitioner of Jagmohan dying due to medical negligence, has to be considered. During the course of hearing, petitioner's counsel had placed much emphasis upon the two decisions in '**Sher Singh Vs. State**' 1995 JCC 259 and '**Rajesh @ Vimal Kumar & Anr. Vs. State (Delhi Admn.)**' 1995 JCC 148 to contend that the cause of death has not been proved by the prosecution and so, the offence if any, made out at best would fall under Section 337 of the IPC and not under Section 304-A of the IPC. This contention appears to be preposterous, as the aforesaid two decisions relied upon, were rendered in altogether different context. **Sher Singh (Supra)**, was a case of homicidal death and the cause of death given was not found to be categoric and so, it was said that the lack of evidence of the doctor who had conducted the post mortem examination, was one of the fatal infirmities which had

culminated into the acquittal of the accused. **Rajesh** (*supra*), was a case of attempted murder and in order to find out the nature of injuries having an important bearing on the nature of offence committed, it was observed that the examination of the doctor was necessary to know on what basis he had formed the opinion regarding the nature of injuries.

9. Aforesaid two decisions are of no assistance to the petitioner's case, as there is no dispute about the cause of death of the deceased herein and if at all, the petitioner was to substantiate its plea of medical negligence, then he ought to have got the concerned doctors summoned, as the permanent address of the doctors concerned was very much available.

10. In the impugned judgment it has been said that no evidence was led to make the plea of medical negligence taken by the petitioner, plausible and it is found to be so. Appellate Court has appropriately relied upon the following passage in '**Patel Hira Lal Vs. State**' 2001 VIII AD (SC) 693:-

Mere possibility of other causes supervening during hospitalization is not a safe premise for deciding whether she would not have not died due to burn injuries sustained on 21.10.1998. The cause of death can be determined on broad probabilities. It is preposterous to say the deceased would have contracted infection through some other causes and develop Septicemia. Court of law need not countenance mere Academic possibilities as sequel to the burn injuries sustained by her.

11. It needs no reiteration that what was least expected of the petitioner was to have got the medical treatment record of the deceased summoned and to have got a medical expert examined in defence to make out a case of medical negligence. Having not

done so, the petitioner cannot be heard to say that in the instant case, injured - Jagmohan had died due to medical negligence and not due to the negligence of the petitioner. In view of what has been observed herein-before, the plea of medical negligence urged by the petitioner deserves to be negated outrightly, as it is obvious that septicemia, cause of death of injured-Jagmohan was a direct consequence of the injuries suffered by him in this accident.

12. The next contention advanced on behalf of the petitioner was that prejudice has been caused to the petitioner because on the same very day, when the petitioner was convicted, he was heard on the point of sentence and no opportunity was granted to him for being heard on another day on the point of sentence. According to petitioner's counsel, holding of an accused guilty and passing of the sentence on the same day violates the mandatory provision of i.e. sub-Section 2 of Section 235 of Code of Criminal Procedure. In '**Bishnu vs. State**' 1996 (3) Crimes 251, a Single Bench of this Court, in a case of attempted murder, has set aside the conviction not only on the sole ground of the sentence being awarded on the day of conviction but by taking into consideration the merits of the said case as well. In '**Allauddin Mian & Ors., Sharif Mian & Anr. Vs. State of Bihar**' AIR 1989 SC 1456, Apex Court had converted the death penalty into imprisonment for life and had dealt with sub Section 2 of Section 235 of the Code of Criminal Procedure, observing as under:-

"We think as a general rule the Trial Courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of

15

sentence before it and thereafter pronounce the sentence to be imposed on the offender."

13. Neither it is evident from the impugned order nor it has been asserted in the revision petition as to what prejudice the petitioner had suffered upon his being heard on the same day and as to what evidence he would have led if he would have been heard on another day. In this view of the matter, it can be safely said that petitioner has suffered no prejudice upon being heard on the same day on the point of sentence by the trial court. Though number of grounds have been taken in the revision petition, but no other contention was urged by petitioner's counsel at the hearing of this petition.

14. Now what is to be seen is, whether in view of the testimony of eye witness Ram Rattan (PW-8) the impugned finding of rashness and negligence attributed to the petitioner, deserves to be sustained or not. What the eye witness (PW-8) had disclosed first in point of time is contained in his statement EX. PW8/A which forms the basis of the FIR in question. It is pertinent to note what this eye witness (PW-8) had graphically disclosed in the vernacular language in his statement (Ex.PW-8/A) about the manner in which this accident took place. It reads as follows:-

'meri awaz sunkar bus driver ne bus ko dhima kiya to main bus se niche utar gaya. Parantoo, jab Jagmohan bus se niche utar raha tha to bus driver ne bus ko ek dum laparvahi v tej raftar se chala diya'

15. Upon scrutiny of the deposition of eye witness (PW-8) it becomes abundantly clear that while the deceased was still alighting from petitioner's bus, the petitioner suddenly and negligently drove away his bus. Nothing worthwhile has emerged in the cross-examination of this eye witness (PW-8) to discredit

his version. Thus, it can be said with certainty that the aforesaid rash and negligent conduct of the petitioner suddenly driving away his bus while the deceased was still alighting, brings the offence committed by him within the ambit of Section 304-A of IPC.

16. On the question of quantum of sentence, plea for grant of probation was vehemently made by petitioner's counsel by contending that petitioner is a poor person and a sole bread earner of his family, which is large one and he has faced the agony of these protracted proceedings for the last about sixteen years and after this accident, has left driving and is earning his livelihood by working at the photocopy shop of his brother and has already undergone substantive sentence of about five months and thus, in the peculiar facts of this case, it would cause great hardship to the petitioner and his family if he is now sent behind bars to serve out the remainder of the sentence. Alternatively, it was urged that the present case is fit one for reduction of the substantive sentence imposed upon the petitioner to the period already undergone by him.

17. The opposition to the dilution of the substantive sentence on behalf of the respondent-State is on the ground that the consistent view of the Apex Court, as reflected in its decision in '**Dalbir Singh Vs. State**' AIR 2000 SC 1677, has been against granting probation in cases of rash and negligent driving which is rampant in Delhi. No later decision observing to the contrary to what has been said by the Apex Court in **Dalbir Singh** (*supra*), has been cited by petitioner's counsel. Thus, in the totality of the circumstances of this case, I find the substantive sentence imposed upon the petitioner is already lenient one and calls for no further reduction, nor there are any exceptional circumstances

17

warranting grant of probation to the petitioner.

18. In the light of the aforesaid narration, finding no merit in this petition, it is dismissed. Bail bonds of the petitioner stand forfeited with direction to the trial court to ensure that the petitioner serves out the remainder of the substantive sentence imposed upon him.

19. With directions as aforesaid, this petition stands disposed of.

September 23, 2011
rs/pkb



Sunil Gaur, J.