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

+ CRL.REV.P. 484/2007

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Decided on: 18th October, 2011

DEVENDER

..... Petitioner

Through: Mr. D.K. Sharma, Advocate.

versus

STATE

..... Respondent

Through: Mr. Mukesh Gupta, APP

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

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

MUKTA GUPTA, J. (ORAL)

1. By the present petition the Petitioner seeks setting aside of the order dated 17th July, 2007 passed by the learned Additional Session Judge upholding the order of conviction of the Petitioner passed by the learned Metropolitan Magistrate under Sections 304A and 279 IPC, though the order on sentence was modified. Learned Additional Sessions Judge reduced the sentence awarded to the Petitioner under Section 279 IPC to

Rigorous Imprisonment for three months and a fine of Rs. 500/- and in default to further undergo Simple Imprisonment for five days and under Section 304A IPC, Rigorous imprisonment of nine months and a fine of Rs. 1,500/- and in default of payment of fine to further undergo simple imprisonment of 15 days. The learned Metropolitan Magistrate vide order dated 5th August, 2006 had sentenced the Petitioner to undergo Rigorous Imprisonment for 6 months for offence punishable under Section 279 IPC and a fine of Rs. 500/- and in default of payment of fine to undergo simple imprisonment for five days. Rigorous Imprisonment for 1 year and Rs. 1,500/- fine under Section 304A IPC, in default of payment of fine to undergo Simple Imprisonment for fifteen days.

2. Briefly the prosecution case is that on 28th January, 2000 at about 4.30–4.45 p.m. near Chhatta Rail Chowk Shahjad, the Petitioner was driving the bus bearing No. DL-1PA-4579 in a rash and negligent manner and without waiting for the passenger Naushad to get down he started the bus at a fast speed due to which Naushad fell down. Shahjad the brother of Naushad was present with him during this time. The bus was stopped after the crossing and Shahjad got down, came back to the place where his brother was lying. Nuashad was removed to Hindu Rao Hospital where he succumbed to injuries and died on 14th February, 2000. On the basis of the

statement of Shahjad FIR was registered under Sections 279 IPC. After the death of Naushad Section 304A IPC was added. After completion of investigation charge sheet was filed. Learned Metropolitan Magistrate after recording the prosecution evidence and statement of the accused convicted and sentenced him as mentioned above. Aggrieved by the judgment and order on sentence, the Petitioner preferred an appeal wherein the sentence was modified by the learned Additional Sessions Judge vide order dated 17th July, 2007.

3. Learned Counsel for the Petitioner contends that the impugned judgments are based on conjectures and surmises. Learned courts below failed to appreciate the fact that neither the deceased nor his brother Shahjad, the complainant had informed the driver that they intended to get down from the bus, where the deceased allegedly got down was not the bus stop and no passenger was supposed to get down from the bus. As per the admission of the complainant himself the deceased and the complainant were guilty of violating the traffic rules. Learned Counsel contended that no negligence or rashness has been proved by the prosecution. Learned Courts below have failed to take into consideration that in the post mortem report/MLC there is no mention of any crush injuries specially in the circumstances where the prosecution has claimed that the deceased was run over under rear wheel of

the offending vehicle. The MLC was not proved by the prosecution nor any expert opinion was taken with respect to the injuries. The testimony of PW4 that is Shahjad is not trustworthy since he is an interested witness being the brother of the deceased and has lodged the complaint with an ulterior motive of claiming compensation. No passenger of the bus has been examined by the prosecution to prove its case though it is stated that there were other passengers present in the bus when the alleged accident took place. Thus, in the absence of any evidence to support the Prosecution story and the fact that the injuries sustained by the deceased were because of his own negligence and fault, the impugned judgments are liable to be set aside.

4. Per contra learned APP for the State submits that impugned judgments suffer from no illegality. The Petitioner was arrested at the spot of the incident by the police. PW4, who was present along with the deceased, has completely supported the prosecution case and has duly identified the Petitioner. There are no contradictions in the testimony of witnesses and evidence placed on record clearly implicates the Petitioner. Hence the revision petition is liable to be dismissed.

5. I have heard the learned Counsels for parties and perused the record.

6. PW4 Shahjad the brother of the deceased has deposed that on 28th January, 2000 he along with his younger brother Naushad boarded Bus No.4579 from Sagar Pur from Old Delhi Railway Station. He sat on the seat behind the driver and the deceased was also on the same seat. At about 5.30 p.m. when the bus reached Chhatta Chowk both of them told the driver to de-board them at red light, he deboarded from the bus but when his brother tried to deboard from the bus the bus driver in a very high speed drove the bus due to which his brother fell on the road and came under the rear wheels of the bus. On this he raised an alarm to stop the bus and the bus was stopped there. The driver was apprehended by the police. He took his brother to Hindu Rao hospital where he died. This witness in his cross-examination has admitted that near about 20 passengers were present in the bus and the police did not record the statement of any other passenger before him.

7. PW2 HC Harnam Singh has deposed that on the relevant date he was posted at PS Kotwali and at about 5.00 p.m. on receipt of a call about the accident, he reached the spot. This witness in his cross-examination has stated that the accident did not happen in his presence and admitted that when they reached the spot the injured had already being removed to the Hospital. This witness has further stated that the spot is a busy place, having

a traffic flow. The petitioner in his statement under section 313 CrPC has stated that when he stopped the bus at the red light signal as soon as he stopped the bus the signal turned to green. Consequently he drove the bus. At that time the speed of the bus was about 10 km/h. the deceased and his brother had not informed him before getting down at the red light signal. He has deposed that the deceased was carrying something in both his hands and fell down from the bus as he jumped from the moving bus.

8. The essential ingredients to constitute an offence punishable under Section 279 IPC are that there must be rash and negligent driving or riding on a public way and the act must be so as to endanger human life or be likely to cause hurt or injury to any person. For an offence under Section 304A, the act of accused must be rash and negligent, which should be responsible for the death which does not amount to culpable homicide. The prosecution in the present case has failed to prove how the act of the Petitioner was rash or negligent to bring the same under the purview of Sections 279/304A IPC specially when the deceased was getting down at red light and not the regular bus stop.

9. The Hon'ble Supreme Court in *Mohammed Aynuddin vs. State of Andhra Pradesh*, (2000) 7 SCC 72 held that:

“ 5. A passenger might fall down from a moving vehicle due to one of the following causes: It could be accidental; it could be due to the negligence of the passenger himself; it could be due to the negligent taking off of the bus by the driver. However, to fasten the liability with the driver for negligent driving in such a situation there should be the evidence that he moved the bus suddenly before the passenger could get into the vehicle or that the driver moved the vehicle even before getting any signal from the rear side.

6. A driver who moves the bus forward can be expected to keep his eyes ahead and possibly on the sides also. A driver can take the reverse motion when that driver assures himself that the vehicle can safely be taken backward.

7. It is a wrong proposition that for any motor accident negligence of the driver should be presumed. An accident of such a nature as would prima facie show that it cannot be accounted to anything other than the negligence of the driver of the vehicle may create a presumption and in such a case the driver has to explain how the accident happened without negligence on his part. Merely because a passenger fell down from the bus while boarding the bus no presumption of negligence can be drawn against the driver of the bus.

8. The principle of *res ipsa loquitur* is only a rule of evidence to determine the onus of proof in actions relating to negligence. The said principle has application only when the nature of the accident and the attending circumstances would reasonably lead to the belief that in the absence of negligence, the accident would not have occurred and that the thing which caused injury is shown to have been under the management and control of the alleged wrong doer.

9. A rash act is primarily an over hasty act. It is opposed to a deliberate act. Still, a rash act can be a deliberate act in the sense that it was done without due care and caution. Culpable rashness lies in running the risk of doing an act with recklessness and with indifference as to the consequences. Criminal negligence is the failure to exercise duty with reasonable and proper care and precaution guarding against injury to the public generally or to any

individual in particular. It is the imperative duty of the driver of a vehicle to adopt such reasonable and proper care and precaution.

10. Hence keeping in view the circumstances of the present case, the impugned order convicting the Petitioner is set aside. The Petitioner is acquitted of the charges punishable under Section 279/304A IPC. The petition is accordingly allowed. The bail bond and surety bond of the Petitioner are discharged.

Petition stands disposed of.

(MUKTA GUPTA)
JUDGE

OCTOBER 18, 2011

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