

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

+ **CRL.REV.P. 39/2009**

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Reserved on: 12th April, 2012

Decided on: 5th July, 2012

VINOD SHAH

..... Petitioner

Through: Mr. Pramod Ahuja, Adv.

versus

STATE N.C.T. OF DELHI

..... Respondent

Through: Mr. Mukesh Gupta, APP for State
with SI Anil Kumar PS Jahangir Puri.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By this petition, the Petitioner lays a challenge to the judgment dated 16th January, 2009 passed by the Learned Additional Sessions Judge upholding the conviction of the Petitioner for offences punishable under Sections 279/304A IPC passed by the Learned Metropolitan Magistrate vide judgment dated 13th March, 2008 and the order on sentence dated 17th March, 2008 whereby the petitioner was sentenced to undergo RI for two months along with fine of Rs. 200/- and in default of payment of fine two days SI for offence u/s 279 IPC and one year RI along with fine of Rs. 500/- in default of payment of fine, five days SI u/s 304A IPC.

2. Learned Counsel for the Petitioner contends that the Learned Additional Sessions Judge while passing the impugned order has not appreciated the evidence on record and wrongly upheld the conviction and sentence awarded to the Petitioner. Learned Courts below have failed to appreciate that the Investigating Officer of the case was not examined and

his non-examination is fatal to the prosecution's case. In the absence of the Investigating Officer being examined, the case stands not proved. It is further stated that the truck was not being driven at a high speed and even if it was being driven at a high speed, it cannot be said that the same amounted to rash and negligent driving. The oil pipe of the brake of his truck broke, thus he could not control the truck. Learned counsel in the alternative prays that the Petitioner be released on probation.

3. Per contra, learned APP for the State submits that the Investigating Officer could not be examined as he died during the pendency of the trial and no prejudice has been caused to the Petitioner by the non-examination of the Investigating Officer. The testimony of PW5 and PW6 reveal the manner and mode in which the accident was caused by the Petitioner. It is further contended that although the mechanical inspection report Ex. PW1/A shows that the brake system was not O.K. but the same cannot help the Petitioner because there is nothing on record to show that the brakes were not working prior to the accident and even if it was not working properly whether the Petitioner was not aware of such a failure prior to accident. Lastly, the Learned APP contends that there was no emergency brake in the offending vehicle.

4. I have heard learned Counsel for the parties and perused the records.

5. Briefly the prosecution case is that on 28th January, 1997 at about 10:20 a.m. at T Point Mukerba Crossing, Jahangir Puri, the Petitioner while driving the truck bearing No. DEL 7751 in a rash and a negligent manner so as to endanger human life and personal safety of others caused death of one Harpal. FIR No.52/1997 was registered under Sections 279/304A IPC. After completion of investigation, charge sheet was filed. Learned Metropolitan

Magistrate after recording the statement of prosecution witnesses and the Petitioner, convicted the Petitioner and sentenced him as mentioned above. Aggrieved by the judgement of conviction and order on sentence, the Petitioner preferred an appeal. The learned Additional Sessions Judge vide judgement of conviction dated 16th January, 2009 dismissed the appeal.

6. PW5 Sunil Kumar deposed that he was running a Chola Raidy at Mukerba Chowk By Pass. He does not remember the exact month but it was in the year 1997 and probably the date was 28th. At about 10:20 a.m. Harpal who too used to sell chole kulchai on a raidy was coming from the side of Rohini alongwith his raidy. When Harpal Singh reached near Mukerba Chowk one Nissan Truck, number of which he was unaware of, driven by the Petitioner came from Rohini side and struck against Harpal from behind. After hitting Harpal as well as raidy of Harpal, the truck ran over the patri and halted after striking the wall built behind the patri. The accused was driving the truck at a very fast speed. He deposed that as a result of accident, Harpal received grievous injuries and was taken to Hindu Rao Hospital by a PCR van. The Petitioner was apprehended and handed over to the Police by him along with the public. He further deposed that the accident was caused as a result of rash and negligent driving of the Petitioner and that the accident was also witnessed by Raja Ram, PW6 herein. Police recorded his statement on the spot and took into possession the raidy vide seizure memo Ex. PW5/B which bears his signature at point A. Photographs of the spot and also seizure memo of truck Ex. PW5/C also bear his signature.

7. PW6 Raja Ram has deposed that although he could tell the exact date, month and year of incident, however, it took place about 6 years ago. During those days one Sunil used to sell chole kulche on rehri at the bypass. On the

day of occurrence, one rehri wala who used to sell Chola Kulcha, was coming from the side of Rohini. He stopped at the red light signal. At about 10:30 a.m. or 11:00 a.m. all of a sudden, one truck Nissan number of which he does not know came from Rohini side and despite red signal did not stop on the signal and hit against rehri and ran over the Rehriwala. He further deposed that the driver stopped his truck at some distance and ran away from the spot leaving away his truck. He stated that he could not see the driver. One Police Constable took the injured rehriwala to some hospital. He further stated that the police had arrived after about half an hour and noted down his particulars and did not record his statement.

8. PW1 J.S. Pawar deposed that he has conducted the mechanical inspection of the truck and prepared his inspection report Ex. PW1/A. PW2 Anil Kumar Photographer took the photographs of the spot at the instance of Investigating Officer and has proved the same as Ex. PW2/A to C.

9. From perusal of the testimony of PW5 and photographs of the spot, the fact that the Petitioner was driving at a very fast speed stands proved. PW5 in his testimony has stated that the truck was driven at a very fast speed and only came to stop after it had crushed the deceased and his rehri , ran over the patri and halted after striking the wall built behind the patri on the other hand. On the perusal of photographs of the spot and especially Ex. PW 2/B one can easily infer the speed of the truck and the impact with which it hit the said rehri to leave it completely crushed. Further, although PW6 has failed to identify the Petitioner as the driver of the truck on the date of incident, he has described the incident. He has also deposed that the driver of the truck did not stop at the signal and hit the rehri and ran over the rehri wala and stopped after some distance .

10. It is the case of the Petitioner that the brake oil pipe of his truck broke so he could not control the truck and as a result of which the accident occurred. From the perusal of the mechanical inspection report of the truck Ex. PW1/A the fact that the 'Brake system-not O.K.' and that the 'Brake oil pipe leak, not emergency brake in the truck' stands proved. However, it cannot be inferred whether such a damage to the brake oil pipe occurred prior or post the accident. The Petitioner has not led any evidence to prove that such a damage occurred prior to the accident and that the said damage was to such an extent that he could not control his vehicle. These facts were in the special knowledge of the Petitioner under Section 106 Evidence Act; the onus was on the Petitioner to prove the same. The Petitioner has, in his statement under Section 313 CrPC stated that the accident took place because the oil pipe of the brake of his truck had broken so he could not control his vehicle. He further deposed that the Brake oil pipe broke when he was on the Haider Pur Bridge and broke prior to the accident. Even if this statement is believed to be correct it is his own case that the damage to the brake oil pipe had occurred at Haider Pur Bridge, prior to the said accident. Despite that the Petitioner took no steps to bring the said vehicle to a halt and he continued driving the same on busy roads. As the Petitioner continued to drive his vehicle despite damage to brake oil pipe, the gross negligence and rashness on his part is evident. Also, according to the mechanical inspection report there was no emergency brake in the vehicle of the Petitioner. In *State v. Maneklal Roognath* (1972) 13 Guj.LR 309 it was observed:

“17. In the instant case, I have found that it is the inefficiency of the brakes which was responsible for the vehicle coming into

contact with the body of Bai Kadu. If necessary, I would differ from this decision of the Oudh Chief Court in Akbar Ali's Case (Supra) and hold that every person who takes out a faulty vehicle, faulty in the sense of inefficient mechanism and causes any injury to any person on the road and the impact takes place by the reason of the fact that his vehicle was mechanically defective, is per se liable for rash and negligent driving. If his vehicle is defective, he should drive his vehicle with all the more greater care and consciousness and in such a manner that it does not cause any accident. It has been well observed in some of the recent decisions that every motor driver owes a duty to other users of the road and by his action of driving on his part they are not to be jeopardised or any harm is to be caused to others....”

11. Although, the IO has not been examined as he expired during pendency of the trial, all the documents except the site plan stand proved. Seizure memo of the rehri of the deceased has been proved as Ex. Pw5/B, seizure memo of the truck proved as Ex. PW5/C, Photographs as Ex. PW2/A to C, mechanical inspection report as Ex. PW1/a, MLC proved as Ex. PW4/A, post mortem report as Ex. PW7/A and lastly rukka as Ex. PW5/A. So the only document that is not proved is the site plan. This would not be fatal to the prosecution case as the other documents stand proved from the testimony of other witnesses.

12. Lastly the Learned counsel in the alternative prays for the release of Petitioner on probation. The benefit of probation can not be extended to the Petitioner considering the seriousness of the offence committed by him. Their lordships in *Dalbir Singh v. State Haryana*, 2000 CriLJ 2283 held ,

“13. Bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, criminal courts cannot treat the nature of the

offence under Section 304-A IPC as attracting the benevolent provisions of Section 4 of the PO Act. While considering the quantum of sentence, to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving need not necessarily cause any accident; or even if any accident occurs it need not necessarily result in the death of any human being; or even if such death ensues he might not be convicted of the offence and lastly that even if he is convicted he would be dealt with leniently by the court. He must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of vehicle he cannot escape from jail sentence. This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles.”

13. In view of the aforesaid discussion the petition is dismissed. The bail bond and the surety bond are cancelled.

(MUKTA GUPTA)
JUDGE

JULY 05, 2012
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