

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

+ **CRL.REV.P. 76/2009**

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Reserved on: 30th April, 2012

Decided on: 11th July, 2012

ANIL KUMAR

..... Petitioner

Through: Mr. R.S. Malik and Mr. Shitez
Sharma, Advocate.

versus

THE STATE

..... Respondent

Through: Mr. Mukesh Gupta, APP with SI
Umed Singh, PS Nagloi.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present petition the Petitioner seeks setting aside of the order dated 5th February, 2009 passed by the learned Additional Sessions Judge upholding the order of conviction of the Petitioner passed by the learned Metropolitan Magistrate under Sections 304A and 279 IPC. The learned Metropolitan Magistrate vide order dated 12th September, 2007 had sentenced the Petitioner to pay a fine of Rs. 500/- and in default of payment of fine to undergo Simple Imprisonment for fifteen days for offence punishable under Section 279 IPC and Rigorous Imprisonment for one year and fine of Rs. 1,000/- under Section 304A IPC, in default of payment of fine to undergo Simple Imprisonment for thirty days.

2. Briefly the prosecution case is that on 2nd November, 1993 at about 10.00 a.m. in front of bus stand of Bhooton wali gali, the Petitioner was driving Bus bearing No. DL1P 2921 in rash and negligent manner so as to

endanger human life and personal safety of others and while doing so he caused death of one Rajan who was getting down from the Bus and the Petitioner suddenly drove his bus due to which he fell down. He was removed to the hospital where he succumbed to the injuries. FIR No. 474/1993 was registered against the Petitioner. The investigation was conducted and charge sheet was filed for offences punishable under Section 279/304A IPC against the Petitioner. After recording the statement of the prosecution witnesses and the accused under Section 313 Cr.P.C., learned trial court convicted and sentenced the Petitioner as mentioned above. Aggrieved by the judgment of conviction and order on sentence, the Petitioner preferred an appeal. Learned Additional Sessions Judge vide order dated 5th February, 2009 dismissed the said appeal.

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 the petitioner is not named in the first DD entry recorded by the police. The deceased was admitted in DDU hospital by one Jose, who has not been examined as a witness by the prosecution. There are contradictions in the testimony of witnesses. PW2, Gurmukh Singh and PW4, Bhola Nath the alleged eye witnesses have given contrary versions. PW2 has stated that the Petitioner accompanied him to Vimal Clinic and later on to the clinic of Dr. Dharamvir to get the injured treated. Whereas PW4 has deposed that the Petitioner accompanied him and took the injured to DDU hospital. There was no independent witness to corroborate that the Petitioner was responsible for the said accident. The injured died on 8th November, 1993 in hospital that is after five-six days of the alleged accident. Thus the alleged act has not resulted in the death of the deceased.

The prosecution has not been able to prove the identity of the petitioner. Further no TIP of the petitioner was conducted and the petitioner was identified by the witnesses on 27th February, 1997 that is after 3 ½ years of the incident. As the identity of the petitioner was shrouded in mystery, conducting test identification parade of the petitioner was mandatory. It is also stated that an offence under Section 304A the rash and negligent act must have a direct nexus with the accident which in the present case is missing. There is no evidence placed on record to prove that the injuries sustained by the deceased were due to the negligence of the petitioner due to which he succumbed to death. Reliance is placed upon *Niranjan Singh vs. State (Delhi Administration)*, 1996 JCC 677 to contend that in case where the deceased fell down from the bus and came under its rear wheel, the conviction is not sustainable merely on a bald allegation of rash and negligent driving. Reliance is also placed on *Dharam Pal vs. State*, 2010 (1) JCC 104 to contend that where the accused was unknown to the sole eye witness who has seen him for a passing moment, not conducting TIP in such a case is fatal for the prosecution and the benefit of doubt has to be extended to the accused. 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 contends that impugned judgments suffer from no illegality. The Petitioner was present at the hospital and on the statement of the deceased he was arrested by the police. PW2 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 testimonies 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. PW2 Gurmukh has stated that on 2nd November, 1993 he was waiting for deceased Rajan. Rajan was travelling in the offending bus. When he tried to get down from the bus, the bus driver of the bus negligently increased the speed of the bus. The registration number of the bus was DL-1P-2921 and route No. 944. Due to sudden speed of the bus Rajan fell down from the bus and received injuries on his head. The driver of the bus did not stop the bus and ran away from the spot. The bus was stopped by the public men. He and Bhola took the injured to the Bimal Hospital, Nangloi, Delhi, but the doctor of the nursing home demanded Rs. 2,000/- in advance. Due to the non-payment of Rs. 2,000/- they did not admit the injured Rajan in Bimal Hospital. They took the injured to Dr. Dharambir in Sultanpuri, Delhi and the injured remained there from 11.30 a.m. to 5.15 p.m. and thereafter the injured was taken to DDU Hospital. The injured remained in coma and the accused ran away from the clinic. From DDU Hospital the injured/deceased was referred to All India Institute of Medical Sciences and he reached at the house of injured Rajan to inform about the accident to his family members. Injured expired after few days, in the hospital. In his cross-examination this witness has stated that the accident occurred at about 10/10.15 a.m. The bus was coming from Punjabi Bagh and it was going to Sultan Puri. He was waiting at the bus stop for Rajan as we had to go to purchase old Kamanies.

The bus stopped there for about one minute and 10/15 passengers alighted from the said bus. This witness has voluntarily stated that one bus was also coming from behind and there was competition between the two buses. The bus stopped at Petrol Pump which was situated at a distance of 100 m from the spot. Accused started the bus suddenly at 20/30 Km/hour. Police met him at DDU hospital at about 9.00 P.M. and his statement was recorded by the police at AIIMS Hospital on 2-3.00 A.M. on 3rd December, 1991.

7. PW4 Bhola Nath has stated that on 2nd November, 1993 at about 10.00 A.M. at the bus stand of Bhooton Wali Gali, Near Munirka, Rohtak Road he was waiting for the deceased Rajan. The deceased had fallen down from the bus No. DL-1P-2921. The driver of the bus was Anil Kumar. The deceased was coming out from the front gate. While Rajan started to get down, suddenly the bus started in rash and negligent manner. It is further stated that he had taken the injured to one Vimal Nursing Home from where he had taken him to DDU hospital. The accused had taken the injured to Dr. Dharamvir Clinic at Sultanpuri but the injured Rajan was not conscious. The accused left him at the clinic without intimation. From DDU hospital, the injured was transferred to AIIMS. In his cross-examination this witness has stated that his statement was recorded by the police in the police station after two days of the incident. He has further stated that he did not know who was Jose and again mentioned that the brother of deceased was named Jose.

8. PW5 ASI Narayan Singh has deposed that on 2nd November, 1993 he was posted at PS Nangloi, Delhi. On that day he received DD No. 62-B pursuant to which he along with Constable Rajbir went to DDU Hospital where he obtained the MLC of injured Rajan, wherein the doctor opined that

injured was not fit for statement. No eye-witness was found in the hospital. Then he along with constable went to the spot where also no eye witness was found. On the next day one person came to the police station and told him that he was the eye witness of the incident, whose name he did not remember. Then at the instance of the said person he prepared the site plan and also served notice under section 133 MV act upon the owner of the vehicle. He again visited DDU hospital when he came to know that the injured was referred to AIIMS. On visiting AIIMS he came to know that the injured Rajan had expired and accordingly the body was sent for postmortem. This witness in his cross-examination has stated that it was correct that the accused was arrested on 18th January 1994 and no TIP of the accused had been conducted. The owner of the said vehicle was not examined as a witness in this case.

9. It may be noted that the doctor who conducted the post-mortem has not been examined by the prosecution so as to prove the nature of injuries or the cause of death of the deceased. The post mortem report has been exhibited by PW9 Dinesh Kumar, Record Clerk, AIIMS as the doctor had left the services. A post mortem report is not an opinion of an expert mentioned in Section 293 Cr.P.C. thus it should be proved by the doctor who prepared it except when the doctor is not available, the same should be proved by a doctor as a person who identifies his handwriting. However, it is well settled that the objection to the proof of the document has to be raised before the Trial Court itself at the time of it being exhibited as held in *Phool Kumar vs. Delhi Admn*, AIR 1975 SC 905. Further the most crucial aspect in the present case is that Ex. PW 9/A the post-mortem report has not been put

to the Petitioner in his statement under Section 313 Cr.P.C. and thus it cannot be used against him.

10. In the present case there is no clear evidence placed on record by the prosecution to prove the identity of the accused/ Petitioner. The Petitioner has been identified by the witnesses for the first time on 27th February, 1997, that is, after 3½ years of the incident. The accused/petitioner was not known to the prosecution witnesses and no effort has been made by the prosecution to conduct TIP of the Petitioner. PW5, ASI Narayan Singh has stated that he had not conducted any TIP of the accused nor any explanation by him has been given for non-conducting the judicial TIP of the accused. Notice under Section 133 was served upon the owner of the bus but the owner of the bus has not been made examined as a prosecution witness. This notice has been proved by PW5 himself and the owner has not come into the witness box and there is no explanation or answer as to why the owner was not examined as a witness to prove the reply to the notice. The Investigating Officer at best could have proved the notice. Thus, this omission on the part of prosecution to examine the owner of the vehicle coupled with the fact that no TIP had been conducted, the fact that the eye witnesses were not known to the accused and he was apprehended on 18th January, 1994 that is after almost 2½ months; identification of such an accused for the first time in the court casts a doubt on the prosecution case. Further Ex. PW9/A the post mortem report has not been put to the Petitioner and thus it cannot be used against him. The prosecution in the present case has failed to prove beyond reasonable doubt that the Petitioner was driving the offending vehicle in a rash or negligent manner causing the death of deceased Rajan.

11. keeping in view the fact of the present case, the impugned judgments convicting the Petitioner are set aside. The Petitioner is acquitted of the charges for offences punishable under Sections 279/304A IPC. The petition is accordingly allowed. The bail bond and surety bond of the Petitioner are discharged.

(MUKTA GUPTA)
JUDGE

JULY 11, 2012
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