

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

+ **Crl. Rev.P. 187/2009**

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Reserved on: 19th December, 2011
Decided on: 5th January, 2012

JAI BHAGWAN @ KALE

..... Petitioner

Through: Mr. S.C. Sharma & Mr. R.P.
Bhardwaj, Advocate

versus

STATE

..... Respondents

Through: Mr. Manoj Ohri, APP for the State.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By this petition, the Petitioner lays a challenge to the judgment of the learned Metropolitan Magistrate dated 23rd January, 2009 convicting him for offences under Sections 279/304A IPC, the order on sentence dated 28th January, 2009 directing him to undergo Rigorous Imprisonment for a period of one year and to pay a fine of Rs.2000/- and in default of payment of fine to further undergo Simple Imprisonment for one month and the judgment of the learned Additional Sessions Judge dated 4th April, 2009 upholding the conviction and the order on sentence.

2. Learned counsel for the Petitioner contends that the learned Trial Court considered inadmissible evidence for convicting the Petitioner. There is no evidence on record to prove the rash and negligent act of the Petitioner. Further, the evidence of rash and negligent act has to be inferred from the entire evidence on record and not merely from the statement of a witness. Reliance is placed on *Abdul Subhan vs. State, 2007 (1) Chandigarh Criminal*

Cases (HC) 414. Despite the fact that PW4 was present at the spot and took the injured to the hospital however no FIR was lodged by him. Further, this version of PW4 is contrary to that of the Investigating Officer who stated that when he reached the spot, he found the injured on the road. Thereafter, he took him to the police station and from there to the hospital. The evidence regarding the identity of the Petitioner was insufficient before the courts below. The Petitioner was for the first time identified in the Court by PW3 and PW4. The incident was of night. It has not been proved that there was sufficient light and thus the witness could have seen the Petitioner. Reliance is placed on *Bollavaram Pedda Narsi Reddy Vs. State of Andhra Pradesh, AIR 1991 SC 1468* to contend that at night the presence of light at the place of incident assumes importance. No adverse view can be taken against the Petitioner for refusal of the TIP as the Petitioner was produced in unmuffled face. Reliance is placed upon *Ten Singh vs. State of Delhi Admn. (Delhi) (DB), 1995(3) Chandigarh Criminal Cases 29(HC) 7*. It is contended that in such a situation the accused was justified in refusing the test identification parade. The learned Trial Court has heavily relied upon the suggestion of the defence that the witnesses were drunk inferring thereby that the Petitioner's presence has been admitted. It is contended that the defence counsel's suggestions are no evidence against the accused. Further, no statement of the counsel can implicate an accused. Reliance is placed on *Vijay Kumar vs. State, 1995 JCC 307 (Delhi)*.

3. Learned APP for the State, on the other hand contends that as per the site plan Ex. PW10/B the deceased was on the left side of the lane. Further the site plan clearly shows the street light at Mark 'D' and the place of incident at Mark 'A'. Thus there was ample light at the spot for the witnesses

to have identified the Petitioner. The Petitioner looked at the deceased and thereafter left the spot. Reliance is placed upon *State of Karnataka vs. Murlidhar 2009 (4) SCC page 143*. It is contended that driving on the wrong side itself shows that there was sufficient criminal negligence. Even in reply to the notice under Section 133 of the Motor Vehicles Act it was admitted that the Petitioner was driving the vehicle. Hence, there is no infirmity in the impugned judgments and the petition is liable to be dismissed.

4. I have heard learned counsels for the parties. Briefly, the case of the prosecution is that the Petitioner was driving a Tempo bearing No. HR 26-8435 in a rash and negligent manner in front of Grasim Company, Roop Nagar, Delhi on 1st February, 1998 at about 3:40 a.m. when he hit one Shailender resulting in his death. On a notice being issued to the owner of the vehicle under Section 133 of the Motor Vehicles Act, it was informed that the Petitioner was driving the vehicle at that time. PW3 and PW4 are the eye-witnesses to the incident. PW3 in his statement has stated that on 31st January, 1998 he had gone to a marriage at Gur Mandi along with Shailender (deceased) and Balram PW4. While they were coming back on foot towards Roop Nagar at about 2:30 to 3:00 a.m. on 1st February, 1998 a tempo came from the side of Roop Nagar and hit Shailender. Thereafter, the tempo driver stopped at some distance, looked at them and drove away the tempo. This witness has identified the Petitioner as driver of the tempo and has stated that the tempo was being driven in a negligent manner at a very high speed. He further stated that the family members of the deceased were called as the house of the deceased was about 50 yards away from the place of incident.

5. PW4 has also stated to the same effect. However, he has resiled from

his previous statement about the arrest of the Petitioner and that he had never seen the Petitioner present in the Court except on that date. In the cross-examination PW4 admitted that the Petitioner was driving tempo on the date of incident and the accident happened due to the fault of the Petitioner. PW6 the owner of the vehicle admitted that he had taken the a tempo on superdari and the said vehicle was being driven by the Petitioner, however, he stated that the same was plied in day time and not in the night. From the perusal of the testimony of PW3 and the site plan Ex. PW10/B it is evident that the Petitioner was driving the vehicle on the wrong side and in a rash and negligent manner. In terms of the decision of the Hon'ble Supreme Court in *State of Karnataka* (supra) it is evident that if the vehicle is being driven on a wrong side it can be said that the same was being driven by criminal rashness with the knowledge that it can cause injury but without an intention to cause an injury.

6. The Petitioner refused to undergo test identification parade. However, no adverse inference can be drawn from the same as the Petitioner was justified in refusing the TIP. A perusal of Ex.P-3, that is, the application for TIP and the order of the learned Metropolitan Magistrate dated 23rd February, 1998 thereon shows that the Petitioner was produced in unmuffled face. Further vide Ex. P-2, the Petitioner's reply was that he was shown to a number of people and his driving license was with the police. However, as regards TIP it is well settled that the valid identification is the one which takes place in the dock. TIP is only an aid in investigation. The Court after considering the fact that if the witness had sufficient opportunity to see the accused at the time of incident, for the first time identifies him in the Court, it is a valid identification. Reliance is placed on *Malkhan Singh and others*

vs. State of M.P., 2003 (5) SCC 746:

“6. The principal submission urged before the courts below as also before us is whether the conviction of the appellants can be sustained on the basis of the identification of the appellants by the prosecutrix in court without holding a test identification parade in the course of investigation. While the appellants contend that the identification in court not preceded by a test identification parade is of no evidentiary value, the prosecution contends that the substantive evidence is the evidence of identification on court and, therefore, the value to be attached to such identification must depend on facts and circumstances of each case. No general rule could be laid that such identification in the court is of no value.”

7. In *Ten Singh* (supra) the reason why the Appellant therein was acquitted was not merely on account of the fact that he was kept in unmuffled face leading to the irresistible conclusion that he was shown to the eye-witnesses but also because there was inordinate delay in sending the sealed property for expert opinion besides suspicious features showing doubts on the bona-fides of the investigation. No doubt in *Abdul Subhan* (supra) this Court held that mere allegation of the truck being driven at a high speed does not establish that the Petitioner drove the vehicle rashly or negligently. However, in the present case it has been clearly stated that besides high speed the Petitioner was driving negligently and also on the wrong side as is evident from the site plan.

8. However, the most material aspect in the present case is the way the Petitioner has been examined in his statement recorded under Section 313 Cr.P.C. A perusal of the same shows that in one sentence it is recorded that all incriminating evidence has been put to the accused and thereafter his denial has been recorded. From the perusal of the statement of the accused it

is not evident whether the entire incriminating evidence has been put to the Petitioner. As a matter of fact the purported statement of the Petitioner recorded under Section 313 Cr.P.C. is non est and illegal as the same does not bear the signature of the learned Metropolitan Magistrate who recorded it.

9. Thus the manner in which the statement of the Petitioner is recorded is perverse and since no incriminating evidence/circumstance has been put to the accused as per the record, the same cannot be used against him. The opportunity granted under Section 313 Cr.P.C. must be real and not illusory. The questions must be so framed to give the accused a clear notice of the circumstances relied upon by the prosecution and an opportunity to render such explanation as he can for those circumstances. Each question must be so framed that the accused can understand it and appreciate as to what use the prosecution desires to make of the same against him. The manner in which the trial is conducted in the present case is not a mere irregularity but an illegality as the Petitioner had no opportunity to explain the circumstances against him.

10. No doubt the appellate or revisional Court in such a situation can remand back the matter for examination of the accused under Section 313 Cr.P.C., however, in the present case the Petitioner has already faced an ordeal of trial, appeal and revision for nearly thirteen years. In such a situation this Court does not deem it fit to send the matter back for recording of the statement of the Petitioner under Section 313 Cr.P.C.

11. In view of the facts and circumstances of the facts, the petition deserves to be allowed. The impugned judgments convicting and sentencing

the Petitioner and the judgment of the learned Additional Sessions Judge upholding the conviction and sentence of the Petitioner are set aside. The Petitioner is acquitted of the charges framed. The bail bond and surety bond are discharged.

12. Petition is disposed of accordingly.

(MUKTA GUPTA)
JUDGE

JANUARY 05, 2012
vkm