

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

+ CRL.REV.P. 580/2008

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Reserved on: 26th March, 2012

Decided on: 20th April, 2011

SUMAIR KHAN

..... Appellant

Through: Mr. I.S. Kapur, Advocate

versus

STATE

..... Respondent

Through: Mr. Manoj Ohri, APP for the State
with SI Giriraj Singh, PS Badarpur.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present petition the Petitioner seeks setting aside of the order dated 23rd September, 2008 passed by the learned Additional Sessions Judge upholding the order of conviction of the Petitioner passed by the learned Metropolitan Magistrate convicting the Petitioner for offences punishable under Sections 304A and 279 IPC. The learned Metropolitan Magistrate vide order dated 4th February, 2008 had sentenced the Petitioner to undergo Simple Imprisonment for 6 months under Section 279 IPC and Rigorous Imprisonment for 1 year and 3 months and a fine of Rs.10,000/- under Section 304A IPC, in default of payment of fine to undergo Rigorous Imprisonment for six months.

2. Briefly the prosecution case is that on 11st September, 1998 at about 09:30 p.m. near Bharat Petroleum Pump, Mathura Road, Badarpur the Petitioner while driving the truck bearing No. HR-29-C-3949 in a rash and negligent manner so as to endanger human life and personal safety of others

hit his truck against scooter bearing No. HR-30 A-8065 from behind and thereby caused death of pillion rider Babita. On the statement of the husband of deceased FIR No. 635/1998 was registered under Section 279/304A IPC. After completion of investigation, charge sheet was filed. Learned Metropolitan Magistrate after recording the prosecution evidence and statement of the accused, convicted the Petitioner and sentenced him as mentioned above. Aggrieved by the judgment and order on sentence, the Petitioner preferred an appeal. The learned Additional Sessions Judge vide judgment dated 23rd September, 2008 dismissed the appeal and upheld the judgment passed by the learned Metropolitan Magistrate.

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 there was no evidence on record that the truck took a turn towards right. The learned Trial Court as well as the learned Appellate Court on their own presumed from the site plan that the truck took a right turn which is contrary to the facts on record. Reliance is placed on *Rajesh @ Vimal Kumar & Anr. vs. State(Delhi Admn.)*, 1995 JCC 148 and *P.C. Poulose vs. State of Kerala*, 1996 CrL. L.J. 203 to contend that since the post-mortem report of the deceased was proved by the record clerk and the doctor, who conducted the postmortem examination, has not been examined, the same cannot be read in evidence. Reliance is placed upon *Abdul Subhan vs. State(NCT of Delhi)* 2006 (3) JCC 1797 to contend that there were no skid marks at the point where the vehicle came to the rest after the collusion. The possibility of high speed is ruled out in the present case as there is no evidence that the scooter of the Complainant was thrown by the

Petitioner at a considerable distance. It is stated that the eye-witness PW2/complainant Mukesh has admitted the fact that there was heavy flow of the traffic at the time of the accident. Hence, the truck could not have been driven at a fast speed. This witness has also stated that the rear left wheel of the truck had not crushed the body of his wife. It only pressed the body of his wife. The rear wheel of the truck had not crossed over the body. Hence, the findings of the learned Courts are perverse and based on no evidence. Learned Courts below have failed to take into consideration that in the post mortem report/MLC, there is no mention of any crush injuries especially in the circumstances where the prosecution has claimed that the deceased was run over under rear wheel of the offending vehicle. The statement of PW1 has not been put to the Petitioner under Section 313 Cr.P.C. and thus the same cannot be used against him. Thus, in the absence of any evidence to support the prosecution story, 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 testimony of PW2 Mukesh, the husband of the deceased has clearly deposed in regard to the incident. Despite lengthy cross-examination, nothing material could be elicited from the testimony of this witness. Furthermore, the Medical Attendent has proved the post mortem report Ex. PW1/A of the deceased. Also the MLC of the deceased Ex. PW4/A stands proved by PW4 the record clerk of Holy family hospital. The prosecution witnesses have fully supported the prosecution story. Hence, present petition has no merit and is liable to be dismissed.

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

6. PW2 Mukesh, the Complainant/husband of deceased has deposed that on 11th September, 1998 he along with his wife Babita were going by Scooter No. HR 30-A-80656 to Nizammudin Station. At about 9:30 p.m. when they reached at Bharat Petrol pump Badarpur, one truck bearing No. HR 29C-3949 was coming from their back side and hit against them. He has stated that he was going on the correct side. Due to the accident, he fell down on the road and his wife fell on the right side and came under the truck. He removed his wife to the hospital with the help of police. His pregnant wife sustained injuries on many part of the body including her stomach. Rear wheel of the truck had passed over his wife. This witness has further stated that the said offending vehicle was driven by the accused in a rough manner and at a very fast speed. Due to fault of accused, the accident took place. In his cross examination, he has stated that the road was divided by a middle pavement and one side of the road was 30 ft and other trucks were also moving on the road at the time of the accident by the side of the truck of the accused. There was heavy flow of traffic at the time of accident. He also stated that the accident took place at a distance 15 feet from the central verge. The body of his wife was crushed near the shoulder and the rear left wheel of the truck had not crushed the body of his wife, it only pressed the body of his wife and thereafter it was removed after taking the truck in reverse gear. The truck had stopped after pressing his wife's body but before passing it over. He has deposed that in his statement to the police he had stated that the driver was driving the truck in a rough manner. Learned Trial Court has observed that PW2 in his statement to police Ex. PW2/A has used the words like "Gaflat, Laaparwahi Va Khatarnak".

7. PW7 ASI Sabbir Ahmed has stated that on the relevant date he was posted at PS Badarpur as Head Const. On receipt of DD No. 56B regarding an accident he along with Const. Billu reached at Bharat Petrol pump Mathura Road, Badarpur where a scooter and half body truck were found in accidental condition. On enquiry, he came to know that the injured has been removed to the hospital by the PCR. They enquired at AIIMS and Safdarjung hospital but no injured from Badarpur was found at these two hospitals. They reached holy family hospital where a lady namely Babita, wife of Mukesh was found admitted. Mukesh, the husband of deceased Babita was present in the hospital, whose statement was recorded and on the basis of his statement, FIR was registered. Further, the other contemporaneous documents were filled and a notice under Section 133 Motor Vehicles Act was issued to M.K. Lakhani, the owner of offending vehicle. A reply was given by M.K. Lakhani that on the day of incident, the Petitioner was driving the vehicle at the particular time. This witness in his cross-examination has deposed that the road on which the accident had taken place is divided by middle pavement. The width of one side of the road was such that three to four vehicles could go side by side at one time. This witness has stated that it is correct that the truck stopped at the place of impact itself and scooter was lying near the spot. He has further stated that he did not cite or examine any witness from Bharat Petrol pump though the accident had taken place in front of Bharat Petrol pump. He has admitted that there were no speed marks on the road and therefore those were not shown in the site plan.

8. It is stated that the deceased was run over by the truck and her body was crushed. There is no evidence placed on record to substantiate this statement of the prosecution witness. The doctor who conducted the autopsy has not been examined so as to prove the nature of injuries or the cause of death of the deceased. It may be noted that the post mortem report has been exhibited by PW1 Rewat Ram Medical Attendant, AIIMS as the doctor had left the services and PW1 identified his hand writing. 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 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. But the most crucial aspect in the present case is that Ex. PW 1/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. No photographs of the spot or the truck to show any skid marks on the road have been taken.

9. 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 IPC, the act of accused must be rash and negligent, which should be responsible for the death which does not amount to culpable homicide.

10. In the present case there is no clear evidence placed on record by the prosecution to prove the manner of driving the offending vehicle. The

only statement in this regard is the testimony of PW2 who has stated that the truck was being driven at a fast speed. This is a bald statement and finds no corroboration from any other document or testimony of any witness. Further Ex. PW1/A the post mortem report has not been put to the Petitioner and thus cannot be used against him. Thus, 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 Babita. Hence committing the offences punishable under Sections 279/304A IPC.

11. Hence 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.

12. Petition stands disposed of.

(MUKTA GUPTA)
JUDGE

APRIL 20, 2012
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