

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 29th September, 2014

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CRL. A. 1531/2013

STATE

..... Appellant

Through: Mr. M.N. Dudeja, Additional Public
Prosecutor for the State with SI Ram
Chandra Police Station Maurice Nagar

versus

BAL KISHEN

..... Respondent

Through: Mr. M.L. Yadav, Adv.

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CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Feeling aggrieved by acquittal of the respondent – Bal Kishen for offences under Sections 279/304A of Indian Penal Code in case FIR No.174/99 registered at Police Station Maurice Nagar, the present appeal under Section 378(1) of Code of Criminal Procedure has been preferred by the State.

2. The prosecution case emanates from the fact that on 16.10.1999, PW3 – Mohan Mandal along with his brother Pankaj Mandal were returning back from Sadar Bazar on cycle via Mall Road which was driven by his brother Pankaj and he was sitting on the pillion seat. When they reached at Mall Road Chowk crossing at about 8 pm and his brother had started going towards Timarpur, a DTC bus bearing registration number DEP-9741 route number 258 (from Mori Gate to Sonia Vihar) came being driven by its driver in a very rash and negligent manner and hit the cycle from behind, as a result of which he as well as his brother fell down along with the cycle. His brother was dragged alongwith the

cycle by the DTC bus driver for quite a distance and as a result of which his brother sustained grievous injuries. In the meantime, the police came and removed his brother to the hospital who died on the way. This statement made by Mohan Mandal became bedrock of investigation and resulted in registration of an FIR under Section 279/304A of IPC.

3. It is further the case of the prosecution that an information was received by HC – Surender Singh, in-charge PCR Van that a DTC bus bearing registration number DEP-9741 route number 258 after causing an accident had left the spot towards Timarpur. After about 15-20 minutes, the bus came at Sonia Vihar Pusta, near Jal Board Pump. HC Surender Singh went to the bus stop and inquired from the driver and the passengers. The passengers informed him that the DTC bus dragged a cyclist. The message was flashed to control room. SI Rajinder Singh came to the spot. The accused alongwith the bus was handed over to the investigating officer of the case.

4. It is further the case of the prosecution that on receipt of DD No.14A, SI Rajinder Singh went to Mall Road Chowk where he found a cycle in an accidental condition and was informed that the injured have been shifted to the hospital. After leaving constable Rajesh at the spot, SI Rajinder went to HRH, collected the MLC of Pankaj on which doctor has written '*patient was brought dead by PCR*'. The brother of the deceased Mohan Mandal met him at the hospital and his statement Ex.PW3/A was recorded. Thereafter, SI Rajinder Singh along with Mohan Mandal came back at the spot where he met the eye witness namely Sudershan. On receipt of information from PCR that the offending DTC bus number DEP-9741 has been apprehended by PCR Van Baker 43 at Sonia Vihar Pusta, he along with the eye witness Sudershan went there where HC Surender in charge of Van Baker-43 met him and the bus no.DEP 9741 and its driver Bal Kishan were also present. Sudershan, the eye witness identified the accused as the driver of the vehicle. SI Rajinder brought the bus at

the spot alongwith the accused and the eye witness. The complainant Mohan Manda also identified the accused. During the course of investigation, duty slip of accused Bal Kishan was seized from ATI Bhagirath of Nandnagri Depot. After completion of investigation charge-sheet was submitted against the accused/respondent.

5. The accused pleaded not guilty to the charge framed against him. In order to substantiate its case, the prosecution has examined ten witnesses. The case of the accused was one of denial simplicitor.

6. Vide impugned judgment dated 29.09.2012, the respondent-accused has been acquitted of the offences primarily on the ground that PW1 Sudershan Kumar had deposed that he had seen the driver slightly and, therefore, a reasonable doubt is created as to whether he could see the driver fully. PW3 – Mohan Mandal was sitting behind the deceased on the cycle and, therefore, it was not possible for him to see the driver from behind. Moreover, the accident had taken place in dark at about 8 pm. The duty slip of the driver was containing two different writings, as such the prosecution could not prove beyond reasonable doubt that the accused was driving the bus at the time of accident.

7. Feeling aggrieved, the present appeal has been preferred by the State.

8. I have heard Mr. M.N. Dudeja, Additional Public Prosecutor for the State and Mr. M.L. Yadav, advocate *amicus curiae* of the respondent –accused.

9. It was submitted by Mr. M.N. Dudeja, Additional Public Prosecutor for the State that the factum of accused driving the vehicle in question was proved beyond reasonable doubt from the testimony of PW1 – Sudershan who gave an eye witness account of the incident and also identified the accused. Similarly PW3 – Mohan Mandal has also identified the accused as the driver of the offending vehicle. Moreover, the accused was working as a driver in DTC. His duty slip was duly proved by PW6 – ATI Bhagirath and his testimony goes unchallenged and, therefore, there was no reason for the learned Magistrate to

discard the duty slip on a wrong presumption that it was containing two different writings and, therefore, created a doubt. It is further submitted by him that the learned Trial Court has not considered the other aspects of the matter. The factum of rash and negligent driving by the accused which resulted in the death of Pankaj Mandal and injuries to Mohan Mandal stands proved and hence the impugned judgment deserves to be set aside and the accused be convicted for the offences alleged against him.

10. Rebutting the submissions of learned Additional Public Prosecutor for the State, learned counsel for the respondent –accused has supported the findings of the learned Trial Court and referred to the reasoning given by the learned Trial Court for granting benefit of doubt to the accused. It was further submitted that the cycle has not been produced; the site plan does not show the place from where the witnesses witnessed the accident. The view taken by the learned Trial Court is the probable one and, therefore, no interference is called for and as such the appeal is liable to be dismissed.

11. I have given my considered thought to the rival submissions of learned counsel for the parties and have perused the record.

12. Section 304A of the Indian Penal Code makes any act causing death by a rash or negligent act not amounting to culpable homicide, punishable with imprisonment of either description for a term which may extend to two years or with fine or with both. It reads:

“304A. Causing death by negligence.-- Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

13. The following requirements must be satisfied before applying Section 304A IPC:

- (i) Death must have been caused by the accused;

- (ii) Death caused by rash or negligent act;
- (iii) The act is the proximate and immediate cause of death.

14. PW1 – Sudershan was a rickshaw puller, who on the fateful day was standing with his rickshaw at Mall Road Chowk at about 8 pm and saw a cyclist going towards Timarpur on green signal and one another boy was sitting on the carrier. When the cyclist started to move towards Timarpur, one DTC Bus No.DEP 9741 came from Civil Line side at a very fast and negligent manner and going towards Timarpur side after crossing the red light signal and hit the cyclist at his back due to which the person sitting on the back of cycle fell on the road and the cyclist was carried for some distance alongwith cycle by the bus. However, the driver did not stop the bus and ran away from there alongwith the bus. Injured were removed to the hospital by PCR Van. The police officers came to whom he narrated about the accident. He alongwith police officials went to Sonia Vihar where the bus and the driver were found present and he identified the accused to be same driver who caused the accident while driving negligently. He was taken from Sonia Vihar to the spot by the police officers alongwith offending bus.

15. PW3 – Mohan Mandal is one of the injured and is the brother of the deceased – Pankaj Mandal. This witness has also unfolded that on 16.10.1999, he alongwith his brother Pankaj Mandal was coming from Sadar Bazar and was going to Sonia Vihar on a cycle being driven by his brother Pankaj and he was sitting on the pillion seat. At about 8 pm when they reached Mall Road Chowk, the DTC bus number DEP 9741 came from behind at a very fast speed and hit the cycle as a result of which they both fell on the road. His brother Pankaj was dragged by the bus alongwith cycle upto some paces. He received injuries on his forehead. His brother was seriously injured and he died at the spot. The police came at the spot and took him and his brother to the hospital. The driver of the bus fled away from the spot. He gave his statement Ex.PW3/A to the police.

According to him, the accident had taken place due to the fault of bus driver as the bus driver was driving the vehicle at a very fast speed and in a negligent manner and rashly. He identified the accused to be its driver because of whose rashness and negligence the accident had taken place.

16. PW8 HC Surender Singh stated that on 16.10.1999, he was posted with PCR North East Zone and was incharge of PCR Van Baker-43. An information was received at about 8:05 pm that a DTC bus bearing registration number DEP 9741 after causing accident has left the spot towards Timarpur. After about 15-20 minutes, the offending bus came at Sonia Vihar Pusta near Jal Board Pump. He inquired from the driver and the passengers who although did not disclose their names but stated that while on turning the bus dragged the cyclist. He flashed the message to control room. SI Rajinder Singh came and the accused and the bus was handed over to him.

17. PW6 – ATI Bhaghirath was working as ATI with Nand Nagri Depot in the year 1999 and has deposed that on 17.10.1999 he handed over the duty slip Ex.PW6/A regarding Bal Kishan bearing batch number 16880 to the effect that bus bearing DCP No.9741 was being driven by him between 1505 to 2320 hours.

18. PW9 – SI Rajinder Singh was the Investigating Officer of the case whereas PW10 – Constable Rajesh Kumar joined investigation of the case with him. However, as per record, part cross examination of SI Rajinder Singh was recorded on 11.01.2005 and examination in chief of PW10 – Constable Rajesh Kumar was partly recorded on 05.07.2010. However, both these witnesses appeared thereafter several times for the purpose of completing their statements, but record reveals that on every date, adjournments were sought by the accused with the result that their statements could not be completed and ultimately the prosecution evidence was closed by the learned Metropolitan Magistrate. An application under Section 311 of Code of Criminal Procedure was moved by the Public Prosecutor for recalling these witnesses for completing their statements

which was dismissed. However, that itself does not cause any dent on the prosecution version inasmuch as both PW1 – Sudershan and PW3 – Mohan Mandal have not only given details of the offending vehicle which had caused the accident, but they had also identified the accused to be the driver of the DTC bus with which the accident had taken place. It is pertinent to note that no suggestion was given to PW1 – Sudershan that no such accident had taken place between the DTC bus bearing registration number DEP-9741 or the cycle or that that the accused was not driving the offending vehicle. The learned Trial Court, however, did not rely upon his statement on the ground that the witness had deposed that he had slightly seen the driver while he was present at the spot. The Trial Court has overlooked the subsequent suggestion given to the witness which was denied by him that he did not see the accused on the spot. In fact, the witness has gone a step further by deposing that when the bus was stopped by the police officials, he accompanied them to Sonia Vihar and at that time also he had identified the accused to be the person who was driving the vehicle negligently.

19. Similarly, the witness PW3 Mohan Mandal had also given complete particulars of the offending vehicle at the very first opportunity when his statement Ex.PW3/A was recorded by the police which culminated into registration of FIR. In this statement also, the injured had stated that after causing the accident, the bus driver fled away from the spot. However, he can identify him if shown to him. He also prayed for action against the driver of DTC bus bearing number DEP 9741. Thereafter, although as per the testimony of SI Rajinder Singh when the accused alongwith the bus and the eye witness Sudershan was brought to spot at that time also Mohan Mandal had identified the accused. Even if it is taken that testimony of this witness being complete is not to be read in evidence, the injured had identified the accused in the Court as well. The learned Trial Court, however, did not believe the testimony of this witness on the ground that the bus hit the cycle from behind and, therefore, it was not

possible for him to see the driver from behind. The witness has gone a step further by deposing that after hitting the cycle, the bus dragged his brother and took him for quite a distance alongwith the cycle. Therefore, at that point of time the possibility of his seeing the driver cannot be ruled out. Moreover, the record reveals that this witness was not cross examined by the accused when he was examined on 14.01.2003. Thereafter he moved an application for recalling this witness for the purpose of cross examination. The application was allowed vide order dated 28.05.2007 subject to cost of Rs.500/- and subject to further condition that in case the witness is not available, his evidence already recorded shall be read in evidence. The record reveals that this cost was not deposited by the accused which was the condition precedent for recalling the witness for cross examination. Yet another opportunity was given to him vide order dated 19.09.2009 for payment of cost, but it seems that even this order was not complied with. Under the circumstances, the testimony of the witness regarding the accused being the driver of the offending vehicle remained unchallenged and unrebutted.

20. Moreover, it is not in dispute that the accused was working as a driver in DTC. His duty slip Ex.PW6/A was produced by PW6 – ATI Bhagirath which was seized by the Investigating Officer of the case vide memo Ex.PW6/B. As per this duty slip, the accused Bal Kishan was performing his duty with the bus bearing number DEP 9741 from 1505 to 2320 hours on 16.10.1999. The learned Trial Court did not rely upon his duty slip on the ground that the same is containing two different writings. The testimony of ATI – Bhagirath was not challenged by the accused at any point of time inasmuch as he was not cross examined by the accused and, therefore, there was no occasion for the learned Trial Court to discard this duty slip which was a clinching piece of evidence to prove the factum of accused being the driver of the offending vehicle at the time of the accident. The evidence available on record proves beyond reasonable

doubt that it was the accused/respondent who was driving the vehicle in question i.e. DTC bus no.9741 which was taken into possession vide seizure memo Ex.PW9/C on the same date. Not only that, even the accused was arrested on the same date and his driving license was also seized vide memo Ex.PW9/G.

21. Things would have been more clearer had the statement of accused under Section 313 of Code of Criminal Procedure been recorded properly. A perusal of his statement recorded under Section 313 of Code of Criminal Procedure goes to show that a consolidated question was put to the accused as under:

“Q. It is in evidence against you that on 16.10.1999 at about 8 pm you were found driving the DTC Bus No.DEP-9741 on very fast speed and negligent manner and the aforesaid bus came from Civil Line side towards Timarpur and at Mall Road Chowk after crossing the red light signal hit the cyclist by which the person sitting on the back seat of the cycle fell on the road and the cyclist was dragged for some distance by the bus but you did not stop the bus. PW – Sudershan Kumar with his rickshaw was present at the spot who later on with police officials went to Sonia Vihar where bus was found standing and you were also present and was identified by PW Sudershan Kumar. What you have to say?”

Ans. It is incorrect

Similarly, another consolidated question was put to the accused as under:

“Q. It is in evidence against you that on 16.10.1999 MLC No. 14652/99 of Pankaj was prepared by the Dr. B.S. Kushwaha Ex.PW7/A and post-mortem was conducted by Dr. Keshav Sharma and report of the same is Ex.PW7/B. During investigation IO recorded the statement of Shri Mohan Mandal Ex.PW3/A and prepared tehereer Ex.PW9/A and prepared site plan Ex.PW9/B and got FIR registered Ex.PW5/B and seized the bus vide memo Ex.PW9/C and cycle vide memo Ex.PW9/D and arrested you and your personal search vide memo Ex.PW9/G and obtained the duty

slip Ex.PW6/A and took the same into police possession vide memo Ex.PW6/B and bus was released on superdari vide superdarinama Ex.PW6/D. What you have to say?

Ans. I do not know.

The answer of the accused to this question was “*I do not know*”.

Since the consolidated question was put to the accused regarding factum of driving of the bus in a rash and negligent manner, he very conveniently replied the answer in negative, but when a question regarding his arrest at the spot and taking his duty slip in possession was put to him, he gave an evasive answer by stating, “*I do not know*”. However, the aforesaid discussion and more particularly the duty slip proved by ATI – Bhagirath establishes beyond reasonable doubt that it was none else but the accused who was driving the offending DTC bus on the fateful day.

22. The other essential ingredients of Section 304A of Indian Penal Code were not at all taken into account by learned Trial Court. The accident had taken place in the year 1999 and, therefore, it would be an exercise in futility to remand the case back to the Trial Court inasmuch as the entire evidence is available on record which establishes beyond reasonable doubt that the accused was driving the bus in a rash and negligent manner and hit the cycle from behind as a result of which, the cyclist as well as the pillion rider fell down. The negligence and rashness on the part the accused/respondent is reflected from the fact that after hitting the cyclist, the bus dragged the cyclist along with the cycle upto certain paces and the injured died on the way to the hospital. The post-mortem report of the deceased Ex.PW7/B goes to show that the death was due to haemorrhage consequent to the injuries. All the injuries were caused by blunt force impact against hard body. The injuries were ante-mortem in nature. Therefore, it is established that the death was the direct result of rash and negligent act of the

accused and it was the proximate and efficient cause without the intervention of any other negligence that resulted in the death of deceased – Pankaj. It was *causa causans* and not only the *causa sine qua non*.

23. Under the circumstances, the prosecution had succeeded in establishing the guilt of the accused beyond reasonable doubt. The mere fact that the cycle was not produced in the Court does not cast any dent on the prosecution version as it was seized by the Investigating Officer of the case immediately after the accident. The finding of learned Trial Court in view of the circumstances narrated above cannot be sustained and is accordingly set aside.

24. Accordingly, the appeal is allowed and the impugned judgment dated 29.09.2012 passed by learned Trial Court is hereby set aside. The respondent/accused is convicted for offence under Section 279/304A of Indian Penal Code and is sentenced to undergo rigorous imprisonment for a period of two years and is also directed to pay a fine of Rs.15,000/-. In default of payment of fine, the respondent-accused to undergo simple imprisonment for a period of four months. He shall be entitled to benefit of Section 428 Cr.P.C. The respondent is directed to surrender forthwith, failing which, the learned trial court is directed to take necessary steps to get him arrested for serving the sentence.

The appeal stands disposed of accordingly. Trial Court record be returned back along with a copy of this judgment.

(SUNITA GUPTA)
JUDGE

SEPTEMBER 29, 2014/ *rd*