

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved on: 13th January, 2015
Judgment Pronounced on: 30th January, 2015

CRL.REV.P. 828/2002

SUBHASH CHAND

..... Petitioner

Through: Mr. Siddharth Aggarwal and
Mr. Utkarsh Saxena, Advocates

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Mr. P.K.Mishra, APP for State.

CORAM:
HON'BLE MR. JUSTICE P.S.TEJI

P.S.TEJI, J.

1. Aggrieved by the judgment of conviction dated 05.05.2001 and order on sentence dated 04.06.2001 passed by the learned Metropolitan Magistrate, awarding the sentence to the petitioner to undergo rigorous imprisonment for a period of one year and fine of Rs.3,000/- under Section 304A IPC, in default of payment of fine to further undergo rigorous imprisonment for a period of four months; sentence to undergo rigorous imprisonment for a period of three months and fine of Rs.1,000/- under Section 279 IPC, in default to

further undergo rigorous imprisonment for a period of one month and upholding the same by the learned Additional Sessions Judge vide judgment dated 05.07.2002, the present revision petition has been filed by the petitioner.

2. Factual matrix, as emerges from the record, is that on the fateful day of 27.06.1994 at about 07.45 p.m., an accident had taken place at Rani Jhansi Road, Azad Market. The vehicle involved in the accident was a Bus bearing registration No.DL 1P 3704. In the accident, one Ram Saran died. The case of the prosecution was that at the time of accident, the petitioner was deputed as driver of the bus and was driving the bus rashly and negligently which resulted into accident which snatched a life. An FIR of the case was recorded. On completion of investigation, report under Section 173 Cr.P.C. was filed.
3. Notice under Section 251 Cr.P.C. was served upon the petitioner for commission of offence punishable under Section 304A and 279 IPC. The petitioner pleaded not guilty to the notice served.
4. To prove its case, the prosecution examined 8 witnesses. After conclusion of prosecution evidence, the statement of the petitioner was recorded under Section 313 Cr.P.C. in which he had claimed innocence. The petitioner examined 3 defence witnesses to prove his defence. The learned Metropolitan Magistrate vide judgment dated 05.05.2001 held the petitioner guilty for the offence punishable under Section 279 and 304A IPC and convicted him for

the said offences. The order on sentence was passed on 04.06.2001.

5. Thereafter, the petitioner filed an appeal bearing Criminal Appeal No.65/2001. The learned Additional Sessions Judge vide judgment dated 05.07.2002, confirmed the conviction of the petitioner as well as sentence of imprisonment awarded to him.
6. Feeling aggrieved by the same, the petitioner has preferred the present revision petition to set aside the judgments rendered by the courts below and claiming acquittal.
7. At the outset, it has been argued by the learned counsel for the petitioner that the conviction of the petitioner is based on the testimony of PW5 Ct. A.K. Khan. PW5 Ct. A.K. Khan was not available at the spot, so his testimony ought to be discarded. Even he was not the eye witness to the incident.
8. In support of the contentions raised, learned counsel for the petitioner has referred to reported judgments in case of *Paul George vs. State ILR (2006) II Delhi 487*; *Ravinder Singh vs. State (NCT) of Delhi 197 (2013) DLT 99 (DB)*; *Mohammed Aynuddin Alias Miyam vs. State of A.P. (2000) 7 SCC 72* and *Jayendra Vishnu Thakur vs. State of Maharashtra and Another (2007) 7 SCC 104*.
9. In the present case, the prosecution basically relied upon PW5 Ct. A.K. Khan. The plea taken by the petitioner is that as per the

charge sheet, it was Constable Ashok Kumar who took the victim to the hospital but while examining the witnesses, Ct. A.K. Khan was examined. On specific enquiry by the Court, even the counsel for the petitioner could not explain whether 'A.K.' stand for Ashok Kumar or not. It is not disputed that in the charge sheet Ct. Ashok Kumar has stated to have played same role which was narrated by Ct. A.K. Khan. The cross-examination by the learned defence counsel of Ct. A.K. Khan (PW5) does not suggest that Ct. A.K. Khan was not the same person who witnessed the petitioner driving the bus near the earlier red light at a little distance from the place of incident with high speed of 40-45 kilometre in a crowded area. So, the argument advanced that witness Ct. A.K. Khan is not the person who saw the petitioner near the place of incident, has come out of blue and does not found any substance in the evidence before the learned MM or from any record available before the learned trial Court.

10. By his next argument, the learned counsel for the petitioner questioned the admissibility of testimony of PW7 Ram Nath being hearsay. It has been submitted that the testimony of PW7 Ram Nath says "*yeh mujhe accident ke baad pata chala*" (he came to know about the same after taking place of accident).
11. In ***Ravinder Singh's*** case (supra), it was observed that the right to cross examine a witness is not only a statutory right but in view of the pronouncement of the Supreme Court is a natural right which

would inhere in every party to the litigation. An accused must be granted an opportunity to cross-examine every witness, unless statutorily excepted. Such opportunity cannot be notionally granted but must be ensured meaningfully.

In *Jayendra Vishnu Thakur's* case (supra), it was observed that a right to cross-examine a witness, apart from being a natural right is a statutory right. Section 137 of the Evidence Act provides for examination-in-chief, cross-examination and re-examination. Section 138 of the Evidence Act confers a right on the adverse party to cross-examine a witness who had been examined in chief, subject of course to expression of his desire to the said effect. But indisputably such an opportunity is to be granted. An accused has not only a valuable right to represent himself, he has also the right to be informed thereabout. If an exception is to be carved out, the statute must say so expressly or the same must be capable of being inferred by necessary implication.

12. The argument itself is without any basis as PW7 Ram Nath is the owner of the bus and he had categorically stated on oath that on that day, bus No.DL 1P 3704 was being driven by the petitioner Subhash and he was given a notice under Section 133 of the Motor Vehicles Act which he had replied vide reply Ex.PW7/A to this effect. The contention of the petitioner that he was not given opportunity to cross-examine PW7, is contrary to the record.

Rather opportunity was given, but it was the petitioner who preferred not to cross-examine the witness. More the reason, the testimony of PW7 is based upon document Ex.PW7/A which is the reply given by this witness to the notice under Section 133 of the Motor Vehicles Act.

13. The judgments referred above in case of ***Ravinder Singh's*** case (supra) and ***Jayendra Vishnu Thakur's*** case (supra) does not render any help to the case of the petitioner in view of reply Ex.PW7/A to the notice under Section 133 of the Motor Vehicles Act by PW7 who happened to be owner of the bus concerned. In the entire trial, appeal or in the present revision petition, it has not been suggested that PW7 was not the owner of the bus bearing No.DL 1P 3704 and non-cross examination of PW7 has caused any prejudice to the case of the petitioner, particularly when the ownership of PW7 is established. The petitioner had not questioned the issuance of notice to PW7 under Section 133 of the Motor Vehicles Act and his reply Ex.PW7/A.
14. The next argument advanced by the learned counsel for the petitioner is that learned Courts below had overlooked the testimony of DW3 in which he deposed that he was working as conductor on 27.06.1994 on bus No.DL 1P 3704 and the accident taken place at 07.45 p.m. at Azad Market Chowk. He was cross-examined in which he categorically stated that the name of owner of the bus was Ram Nath and he had worked from 1993 to

December 1994. He did not have any batch number. He admitted that he had no written document to the effect that he had been serving as conductor with Ram Nath. He further admitted that he was not subjected to any examination. It was suggested to him that he was not working as conductor on that day or deposing falsely to help the petitioner.

15. The incident of the present case had taken place on 27.06.1994 at about 07.45 p.m. and the case of the prosecution came at the stage of recording of statement of petitioner under Section 313 Cr.P.C. on 14.03.2000 and thereafter, after about seven years DW3 was produced. He miserably failed to show that he was working as conductor on that day, particularly when he had not participated in any proceedings at the time of incident such as removing the victim or involving in any other act and also not having any document in support of his testimony.
16. The learned MM in his judgment has dealt with the testimony of DW3 and found that it was interesting to note that DW3 Sukhbeer had deposed that the bus was not driven by accused/petitioner Subhash, but he did not come forth with the name of the driver and ultimately did not find him trustworthy. Similarly, the testimony of DW3 has been dealt with by the learned Additional Sessions Judge in para 3 of the judgment and found that Sukhbeer entered the witness box with the oblique motive and his testimony was not found reliable, which resulted the argument advanced about the

ignoring the testimony of DW3 as baseless.

17. Next argument advanced by the learned counsel for the petitioner is that the identity of the driver was not established.

The argument advanced does not found the basis on the face of record of the evidence. PW5 Ct. A.K. Khan had categorically stated that he had seen the petitioner driving the bus bearing No.DL 1P 3704 near the earlier red light at a little distance from the place of incident with high speed of 40-45 kilometre in a crowded area and his testimony has been duly supported with documentary evidence i.e. reply Ex.PW7/A of PW7 Ram Nath, owner of the offending bus to the effect that the petitioner was driving the vehicle on the fateful day of the accident i.e. 27.06.1994.

18. The next argument advanced by the learned counsel for the petitioner is the plea of alibi that on the day of alleged incident, the petitioner was not present at the place of incident, rather he was in Baghpat.

The petitioner had produced three witnesses in support of his contention i.e. DW1 Rashid, DW2 Dukhran and DW3 Sukhbeer. DW1 was examined on 11.07.2000 who stated that on 27.06.1994 at about 07.30, the petitioner was at Baghpat. Similar statement has been made by DW2. DW3 stated that the petitioner was not driving the bus on the day of incident. The trial court has

dealt with this aspect and these defence witnesses examined by the petitioner were not found trustworthy.

19. The plea of alibi flows from Section 11 of the Indian Evidence Act and is demonstrated by illustration (a). The word “alibi” is a latin word and means “elsewhere”. It is a common term used by an accused that when the occurrence took place, he was so far away from the place of occurrence and it was highly improbable for him to participate in the crime. When the prosecution succeeds in proving the commission of offence by the accused, then it is incumbent on the accused taking the plea of alibi to prove it with certainty so as to exclude the possibility of his presence at the place and time of occurrence.
20. In order to prove the plea of alibi, accused has to prove that he was elsewhere and not present at the scene of crime. In the present case, the petitioner has taken the plea of alibi that he was in Baghpat on the day of incident and not at the spot. The defence witnesses produced by the petitioner were found to be not reliable and trustworthy.
21. A similar situation arose before Hon'ble Supreme Court in case reported in ***Dudh Nath Pandey vs State of UP 1981 AIR SC 911***. Facts of the said case were that accused had taken alibi that he was not present at the place of occurrence where murder had taken place rather he was on his duty at his usual place of work. In the said

case, the trial Court as well as Hon'ble High Court had not accepted the alibi set up by the accused. Hon'ble Supreme Court was also of the view that accused had failed to establish the plea of alibi. Relevant para 19 of the judgment reads as under :-

“Counsel for the appellant pressed hard upon us that the defence evidence establishes the alibi of the appellant. We think not. The evidence led by the appellant to show that at the relevant time, he was on duty at his usual place of work at Naini has a certain amount of plausibility but that is about all. The High Court and the Sessions Court have pointed out many a reason why that evidence cannot be accepted as true. The appellant's colleagues at the Indian Telephone Industries- made a brave bid to save his life by giving suggesting that he was at his desk at or about the time when the murder took place and further, that he was arrested from within the factory. We do not want to attribute motives to them merely because they were examined by the defence. Defence witnesses are entitled to equal treatment with those of the prosecution. And Court ought to overcome their traditional instinctive disbelief in defence witnesses. Quite often they tell lies but so do the prosecution witnesses. Granting that DWs 1 to 5 are right, their evidence, particularly in the light of evidence of two court witnesses, is insufficient to prove that the appellant could not have been present near the Hathi Park at about 9.00 A.M. when the murder of Pappoo was committed. The plea of alibi postulates the physical impossibility of presence of accused at the scene of offence by reason of his presence at another place. The plea can therefore succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the

crime was committed. The evidence of the defence witnesses, accepting it at its face value is consistent with appellant's presence at the Naini Factory at 8.30 A.M. and at the scene of offence at 9.00 A.M. So short is the distance between the two points. The workers punch their cards when they enter the factory but when they leave the factory they do not have to punch the time of their exit. The appellant, in all probability, went to the factory at the appointed hour, left it immediately and went in search of his prey. He knew when, precisely, Pappoo would return after dropping Ranjana at the school. The appellant appears to have attempted to go back to his work but that involved the risk of the time of his re-entry being punched again. That is how he was arrested at about 2.30 p.m. while he was loitering near the Pan-shop in front of the factory. There is no truth in the claim that he was arrested from inside the factory.”

22. In view of the ratio of authoritative pronouncement in *Dudh Nath Pandey's* case (supra), the petitioner has failed to show that he had not committed the crime charged against him or that he was not at the place of occurrence at the time of incident. The plea of alibi taken by the petitioner appears to be false one.
23. In the present case, the incident had taken place on 27.06.1994. The challan was filed on 12.08.1994. The statement of the petitioner under Section 313 Cr.P.C. was recorded on 14.03.2000. It was at the time of adducing defence evidence, the petitioner disclosed for the first time that on the day of incident he was in Baghpat. Such a plea of the petitioner that he was not driving the

offending bus on the day of incident rather he was in Baghpat on that day, does not found any basis and does not render any help to the petitioner in view of the pronouncement in case of ***Subhash Maruti Avasare vs State Of Maharashtra MANU/SC/8571/2006*** in which it was held as under :

“If he was not present at the time of occurrence or was suffering from a compound fracture, it was expected that the questions to the same effect would be put to the Investigating Officer. It was not done. *Such a plea should have been taken at the first instance before the Court of Chief Judicial Magistrate when he was produced before him for the first time.* If he had already been suffering from a compound fracture on the date of occurrence, i.e., 30.10.1996, we fail to understand why he had procured the certificate of an earlier date, i.e., 27.4.1996. Even the purported admission of P.W.1 taken in its entirety would go to show that Appellant was in a position to walk. Six months' time, even otherwise, is sufficient for healing up of an ordinary fracture, if any. By mere filing of a document, its contents are not proved. A certificate issued by an expert should be brought on record by examining him.”

24. The last argument advanced by the counsel for the petitioner is that the petitioner was not found driving the vehicle in rash and negligent manner by any witness and the onus to prove is on the prosecution. In the absence of any eye witness, the petitioner cannot be said to be liable for rash and negligent driving and the prosecution has miserably failed to prove the same. He relied upon

judgment in case of *Syad Akbar Vs. State of Karnataka (1980) 1 SCC 30* and further relied upon judgments in case of *Paul Goerge* (supra) and *Mohammed Aynuddin* (supra).

25. In the present case, it has been established by the prosecution that PW5 Ct. A.K. Khan was doing the duty of the transport constable at Azad Market Chowk at some distance from the place of accident towards which side the offending bus was going. The bus was being driven by the petitioner on the fateful day i.e. 27.06.1994 and he was seen driving the vehicle at a little distance before causing the accident, driving the vehicle at the speed of 40-45 kilometres in a congested area which met with an accident near Gurudwara. The people raised alarm about the accident and the driver of the bus ran away from the spot. PW5 took the victim to the hospital. Thereafter, in response to notice under Section 133 of the Motor Vehicles Act, PW7 Ram Nath furnished Ex.PW7/A i.e. information with regard to driving of the offending bus by the petitioner on the fateful day. On conclusion of the trial, the petitioner produced defence witnesses with regard to his alibi. In the above mentioned set of evidence, the circumstances were sufficient enough to establish that the petitioner had been driving the bus no.DL 1P 3704 in a rash and negligent manner, particularly at the speed of 40-45 kilometres in a crowded area.
26. The counsel for the petitioner relied upon judgment in case of *Paul George* (supra) in which it was found that the passenger was

boarding the bus and she fell down and argued that it could be the victim who was responsible for the death and the petitioner cannot be said to be rash and negligent while driving and causing the death of the victim. This argument is just out of blue. There is no material on the record or the case of the petitioner that the victim died due to his own fault and not because of rash and negligent driving of the petitioner. The petitioner denied his presence at the time of incident and rather came forward on a belated plea of alibi. So, the judgments relied upon by the petitioner in *Syad Akbar's* case (supra), *Paul Goerge's* case (supra) and *Mohammed Aynuddin's* case (supra) do not render any help to the petitioner.

27. I do not agree with the argument advanced by the learned counsel for the petitioner that it would necessary to have eye witness to give the version of the accident. There can be sufficient circumstantial evidence which would culminate into the death of the victim due to rash and negligent driving of the driver. In the present case, the testimony of PW5 Ct. A.K. Khan, PW7 Ram Nath, skipping of the petitioner from the spot and taking the false plea of alibi would be sufficient to establish the guilt of the petitioner under Section 279 and 304A IPC. On this proposition of law, I have gone through the ratio of pronouncement of Hon'ble Apex Court in case of *Balwinder Singh alias Dalbir Singh vs. State of Punjab MANU/SC/0160/1986* in which it was held that false plea of alibi by an accused is an incriminating circumstance which gives rise to an inference of guilt.

In the present case also, as discussed above, the plea of alibi taken by the petitioner has been found to be a false one which is an additional circumstance which further establishes the case of the prosecution that the petitioner was driving the offending bus on the day of incident rashly and negligently which resulted into the death of the victim.

28. Thus, I do not found any merit in the contentions made by the learned counsel for the petitioner to the effect that the petitioner was not guilty of the commission of crime mentioned above.
29. Apart from the arguments advanced on merits, learned counsel has submitted that the alleged accident had taken place on 27.06.1994, the charge sheet was filed on 12.08.1994 and presently we are in the year 2015. He further submitted that the petitioner has suffered the agony of the proceedings for more than 20 and half years and prayed for taking a lenient view on the quantum of sentence.
30. I am of the considered opinion that it would not serve any purpose to send the petitioner behind the bar. So, the sentence of imprisonment is modified to the period already undergone by the petitioner and the fine is enhanced from Rs.1,000/- to Rs.10,000/- for offence under Section 279 IPC, in default of payment of fine, the petitioner shall undergo simple imprisonment for two months and from Rs.3,000/- to Rs.30,000/- for offence under Section 304A IPC, in default of payment of fine, he shall undergo simple imprisonment for four months.

Fine if so realised, be paid to the family members of the victim.

31. The petitioner shall appear before the Chief Metropolitan Magistrate (North) within the period of one month from the date of order to pay the remaining fine, failing to which surrender to serve the sentence in default of payment of fine.
32. The present revision petition is disposed of accordingly.

P.S.TEJI, J.

January 30th, 2015
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