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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON : JULY 14, 2015

DECIDED ON : SEPTEMBER 08, 2015

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CRL.REV.P.615/2014

AMIT AGGARWAL

..... Petitioner

Through : Mr.Aseem Mehrotra, Advocate.

versus

STATE

..... Respondent

Through : Mr.Navin K.Jha, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Present revision petition has been preferred by the petitioner Amit Aggarwal to challenge the legality and propriety of a judgment dated 22.09.2014 of learned Additional Sessions Judge in Crl.A.No.43/14 arising out of FIR No.1178/96 under Section 279/337/304A IPC registered at Police Station Connaught Place by which conviction and sentence recorded by the Trial Court vide orders dated 22.02.2011 and

1.12.2012 were upheld. The petitioner was sentenced to undergo SI for nine months with fine ₹3,000 under Section 304A IPC; SI for three months each under Section 279/337 IPC. The sentences were to operate concurrently.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that on 22.11.96 at about 12.05 a.m. at Outer Circle Crossing, Janpath, Amit Aggarwal while driving Maruti car No.AS 13 2851 in a rash and negligent manner struck it against car No.DIC 6737 as a result of which its occupants Vinod Kumar and K.C.Sharma sustained injuries. They were taken to hospital where K.C.Sharma expired on 23.11.96. The Investigating Officer after recording Vinod Kumar's statement (Ex.PW2/A) lodged First Information Report. Statements of witnesses conversant with facts were recorded. The petitioner was arrested at the spot. Post-mortem examination on the body was conducted during investigation. Upon completion of investigation, a charge-sheet was filed in the Court. The prosecution examined ten witnesses to substantiate its case. In 313 statement, pleading false implication, the petitioner examined DW-1 (Ankur Modi) in defence. The trial resulted in conviction as aforesaid. The appeal preferred by the petitioner to

challenge the conviction and sentence was dismissed. Being aggrieved and dissatisfied, the instant revision petition has been filed.

3. I have heard the learned counsel for the parties and have examined the file. In the occurrence that took place on 22.11.1996 Vinod Kumar sustained injuries 'simple' in nature whereas K.C.Sharma succumbed to the injuries in the hospital. Both the vehicles were badly damaged. The Trial Court took around 15 years to record conviction.

4. Burden to prove rash and negligent driving was heavily upon the prosecution. PW-1 (Damyanti Gandharva), victim's daughter in her Court statement recorded on 10.01.2001, implicated the petitioner for driving car no. AS 13 2851 in a very 'high speed'. She did not testify if besides 'high speed', the vehicle was being driven in a rash and negligent manner. Since petitioner's counsel was not available that day, opportunity to cross-examine the witness was recorded 'nil'. On the next date i.e.26.04.2001, application moved by the petitioner to recall her for cross-examination was allowed subject to payment of costs of ₹400/-. She, however, did not present herself for cross-examination despite availing number of opportunities. Her husband PW-2 (Vinod Kumar) informed the Court on 24.10.2005 about her inability to appear as she had suffered fracture. Even thereafter, the prosecution was unable to produce her; she

could not be cross-examined. Trial Court in the impugned judgment noted that her evidence recorded by way of examination-in-chief could not be read in evidence in view of provisions of Section 138 and 142 of Indian Evidence Act. The prosecution did not give plausible explanation as to why the material witness PW-1 did not present herself for examination to bring the real culprit to book.

5. On that day i.e.10.01.2001, the Trial Court had also recorded the statement of PW-2 (Vinod Kumar) victim's son-in-law. He deposed that the offending vehicle was being driven by the petitioner in a very high speed, in a rash and negligent manner. Since the petitioner's counsel was not available, he could not cross-examine him. On the next date, application to recall PW-2 Vinod Kumar was allowed and he appeared on 24.10.2005 for cross-examination; he was duly cross-examined. In the cross-examination, he categorically stated that he had not seen the accused driving the vehicle at the time of occurrence. He further stated that it was an accident and he was not in a position to say as to who was at fault.

The testimony of PW-2 read as a whole does not connect the petitioner with the commission of crime in affirmative terms. He did not elaborate in examination-in-chief as to how the driving by the accused was rash or negligent. Merely because the offending vehicle was being

driven at a high-speed does not speak of either negligence or rashness by itself.

The Trial Court did not believe the changed version narrated by the witness in the cross-examination as there was time gap of about five years in recording the cross-examination and there was every possibility of the witness to have been won over. Trial Court's appreciation of evidence on this aspect cannot be sustained considering peculiar facts and circumstances of the case. PW-2 was examined in the absence of the petitioner's counsel on 10.01.2001 and the next date of hearing was 26.04.2001. The petitioner moved the application under Section 311 Cr.P.C. to recall PW-2 for cross-examination without inordinate delay and it was allowed subject to cost of ₹400/-. He was permitted to be recalled for cross-examination on the next date i.e.16.07.2001. The process issued to him was received back 'unexecuted' and the case was adjourned for 01.03.2002. On that day PW-2 though present but could not be cross-examined due to absence of the counsel and the matter was adjourned subject to cost of ₹300/- for 12.09.2002. On that day, the accused was absent, so was PW-2. On 20.05.2003 the learned Presiding Officer was on leave. On subsequent dates i.e.07.11.2003, 19.05.2004, 13.01.2005, 1.6.2005 and 12.07.2005, PW-2 (Vinod Kumar)

was not present. Only on 24.10.2005, he appeared and was cross-examined. Apparently, the petitioner was not at fault for delay in recording his cross-examination. No adverse inference can be drawn against the petitioner for recording the cross-examination after considerable delay of five years. In the cross-examination, he opted to resile from the statement given by him earlier. It is relevant to note that PW-2 is the real son-in-law of the victim and had sustained injuries in the occurrence. He had no ulterior motive to favour the accused. His wavering statement alone cannot be the basis for conviction. It was not prosecution version that the application to recall this witness was moved at a belated stage or that the witness was won over by the accused. The learned Assistant Public Prosecutor did not re-examine him.

6. The prosecution also relied upon the testimony of PW-5 (Ct.Surender) who claimed to have witnessed the accident. He deposed that on 22.11.96 during night patrolling at Outer Circle, at about 12 midnight, at Outer Circle Janpath crossing, he saw a Maruti car No.DIC 6737 coming from the side of Janpath and going towards Outer Circle. Another Maruti car No. AS 13 2851 was crossing the Outer Circle, Barakhamba Road. It was being driven by the petitioner in a rash and negligent manner at a fast speed. It struck against car No.DIC 6737. Due

to its impact, Maruti car No. DIC 6737 turned 'around'. He took out the injured from inside the car and sent the message to Control Room through wireless.

Presence of the witness at the spot is highly suspect as Investigating Officer did not file on record any Daily Diary entry to prove if he was on patrolling duty in the area and had made departure entry at the Police Station. The wireless message allegedly sent by him was not placed on record. There is no DD entry on record showing receipt of any such wireless message from him. Admittedly, he did not lodge any report with the Investigating Officer in writing; he did not get the injured admitted to the hospital and did not put signatures on any memo or site plan prepared at the spot. FIR was lodged on the statement of PW-2 (Vinod Kumar); PW-5 (Ct.Surender) did not come forward to lodge any such report. PW-3 (Ct.Raj Kumar) who had rushed to the spot along with Investigating Officer after receipt of DD regarding the accident did not speak about his presence at the spot. Similarly, PW-2 (Vinod Kumar) in examination-in-chief did not claim his presence at the spot. PW-8 (SI Kesar Singh), the Investigating Officer recorded examination-in-chief on 31.07.2006 and deposed that he along with Ct.Raj Kumar on receipt of DD No.23A had gone to the spot where two Maruti cars were standing in

accidental condition. He came to know that the injured persons had already been taken to RML Hospital. Deputing Ct.Raj Kumar to safeguard the spot, he went to RML Hospital and obtained MLCs of injured K.C.Sharma and Vinod Kumar. PW-8 did not claim if PW-5(Ct.Surender) was seen at the spot that time or he had offered himself to have witnessed the occurrence. The Home Guard allegedly present along with PW-5 (Ct.Surender) was not examined to substantiate his plea.

The prosecution failed to produce PW-8 (SI Kesar Singh), Investigating Officer subsequently for cross-examination. Adverse inference is to be drawn against the prosecution for withholding the material witness. His testimony was relevant to ascertain as to how and under what circumstances, the accident had taken place. He was to prove the site plan prepared by him; he was to be questioned as to what was the speed of the vehicle of the victim at the relevant time and precisely who was at fault. Non-examination of Investigating Officer has caused serious prejudice to the accused.

7. It was pointed out rightly by the learned counsel for the petitioner that the appellate court fell in grave error to observe that the incident had taken place in the month of January. In para 9, the appellate court observed that ‘the act of appellant of driving his car at a very high

speed at around midnight in the month of January when there is a dense fog and visibility on the road is quite low is a rash and negligent act'. The observations are contrary to the record as the incident had happened undisputedly during night intervening 21/22.11.1996 around 12 night.

8. While dealing with the revision and especially when there are two concurrent findings against the petitioner, the High Court must satisfy itself that the order and Judgment passed have resulted in failure of justice. It has been repeatedly held that the High Court while dealing with a revision petition will only exercise its power where there is material error or defect in law or procedure, misconception or mis-reading of evidence. In my view, the present case falls in the category of mis-reading of evidence and failure to take into consideration all the relevant facts.

9. In view of the infirmities and discrepancies referred above, conviction and sentence recorded by the Courts below cannot be sustained. The revision petition is allowed and the petitioner is acquitted of the charges granting benefit of doubt. Bail bonds and surety bonds stand discharged

10. Trial Court record (if any) along with a copy of this order be sent back forthwith. A copy of the order be sent to Jail Superintendent, Tihar Jail for intimation.

(S.P.GARG)
JUDGE

SEPTEMBER 08, 2015/sa