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

+ **CRL.M.C. 1950/2016 and Crl. M.A. No. 8278/2016 (Stay)**

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Decided on: September 22, 2016

RAGHBIR SINGH

..... Petitioner

Represented by: Mr. Arvind Chaudhary,
Advocate.

versus

STATE

..... Respondent

Represented by: Ms. Meenakshi Chauhan, APP
for the State.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. Case FIR No. 480/2007 under Sections 279/304A IPC was registered at PS Moti Nagar in which it was reported that son of the petitioner namely Kuljeet Singh died.

2. During the course of investigation statement of Ajay Kumar who claimed himself to be an eye witness was recorded who stated that on 7th August, 2007 at about 7.40 AM while his child was boarding the bus bearing No. DL-1PB-2453 for the school, he noticed that a traffic police crane bearing No. DL-1L-0611 was going towards Moti Nagar from Punjabi Bagh at a speed of 60-70 Km per hour and was at a distance of 30 feet from the bus. He also noticed that one motorcycle bearing No. DL-4SBJ-2805 was also coming in the said direction ahead of the crane. The motorcycle was hit from behind by the crane due to which the motorcycle rider fell down and the motorcycle dragged and hit the right backside of the DTC bus due to

which damage was caused to the DTC bus. It was alleged that the accident took place due to rash, negligent and speedy driving of the driver of the crane ASI Ombir Singh. Crime team from the FSL Rohini was called at the spot which collected the sample of earth control and paint from the motorcycle, DTC bus and the crane. The place was photographed. As per the crime team's scene report received on 14th August, 2007 the experts opined that on examination of the vehicles, the collision had taken place with great impact by the left front side of the motorcycle to the rear right corner of the bus and greenish striated marks were found on the left side of the fuel tank of the motorcycle. It also opined that the height of the dent formation on the metallic sheet of the bus was found consistent with the height of the corresponding parts of the damaged motorcycle. No damage was found on the rear or right side of the motorcycle. Further there was no sign of impact on the front side body of the crane. The eye witness noticed the rider of the motorcycle lying 20-25 paces away from the bus.

3. During the course of investigation a further statement of Ajay Kumar was recorded wherein he did not reiterate his earlier version.

4. An untraced report was filed on the basis of the subsequent statement of Ajay Kumar and the crime scene report opining that the bus was stationary and the motorcycle had not been hit by crane as there were no impact marks either on the back of the motorcycle or the front of the crane and the motorcycle hit the bus merely because it was being driven at a high speed. It was also noted that though the crane was coming from the backside however, it did not come in contact with the motorcycle.

5. On this untraced report which was treated as a cancellation report, the petitioner filed a protest petition. The petitioner stated that the second

statement of Ajay Kumar was taken under pressure of the police and the Court ought to have taken cognizance on the facts brought out in the charge sheet ignoring the second statement of Ajay Kumar. The learned Metropolitan Magistrate noted that though the first statement of Ajay Kumar implicates ASI Ombir Singh however, the mechanical inspection did not show that the accident took place as stated by Ajay Kumar and it was for the reason that the bus was stationary and the motorcycle came at a high speed. Accepting the cancellation report the learned Trial Court treated the protest petition as a complaint case and listed the matter for examination of Ajay Kumar, the eye witness for pre-summoning evidence on 6th July, 2007.

6. In a revision petition filed by the petitioner, the learned Additional Sessions Judge vide impugned order dated 9th February, 2016 held:

“9. After hearing the arguments and going through the record, I found that in this case there is a cancellation report filed on the ground that FSL result does not support the prosecution case and also the version of the eye witness Ajay Kumar that crane hit the motorcycle from behind, due to which motorcycle fell down and hit on the rear of the DTC bus. The vehicle were got examined from FSL. The samples were taken which according to prosecution clearly show that there is no contact between the crane and the motorcycle but it shows that the motorcycle collided with the DTC bus and hence the trial court reached to the inference that no accident was caused by the crane which is further strengthened, perhaps due to the subsequent statement of Ajay Kumar. But it is surprising to note that statement of Ajay has been recorded after more than one year, though, the FSL result was available with them at very early stage. It is also important to note that no request was sent by the IO for FSL, for inspection as alleged. But not going into the details and also the damage found on the DTC bus and the motorcycle, trial court should have called

the eye witness before accepting the cancellation report and reaching to the conclusion that the version of the eye witness on the basis of FIR is not correct. Hence order of trial court is set aside with the direction to call the eye witness and decided afresh. Revision is accordingly disposed off. Copy of order along with TCR be sent back. Revision be consigned to R/R.”

7. By directing to examine Ajay Kumar before accepting the cancellation report the learned Additional Sessions Judge adopted a procedure not provided by the Code of Criminal Procedure, 1973. In case the order of the learned Metropolitan Magistrate accepting the cancellation report was to be set aside by the learned Additional Sessions Judge it ought to have remanded the matter back for reconsideration. Examination of Ajay Kumar could have taken place only if the protest petition of the petitioner was being treated as a complaint case or the Magistrate had issued summons to the accused having not accepted the cancellation report, that too after framing charge. By setting aside the acceptance of the cancellation report pursuant to investigation set into motion on registration of FIR, the learned Additional Sessions Judge could not have directed examination of the witness before taking cognizance on the police report.

8. The Supreme Court in the decision reported as 1980 (4) SCC 631 H.S. Bains, Director, Small Saving-cum-Deputy Secretary Finance, Punjab, Chandigarh vs. State (Union Territory of Chandigarh) laid down the various options available with the Magistrate on receipt of the complaint as under:

“6. It is seen from the provisions to which we have referred in the preceding paragraphs that on receipt of a complaint a Magistrate has several courses open to him. He may take cognizance of the offence and proceed to record

the statements of the complainant and the witnesses present under Section 200. Thereafter, if in his opinion there is no sufficient ground for proceeding he may dismiss the complaint under Section 203. If in his opinion there is sufficient ground for proceeding he may issue process under Section 204. However, if he thinks fit, he may postpone the issue of process and either enquire into the case himself or direct an investigation to be made by a Police Officer or such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. He may then issue process if in his opinion there is sufficient ground for proceeding or dismiss the complaint if there is no sufficient ground for proceeding. On the other hand, in the first instance, on receipt of a complaint, the Magistrate may, instead of taking cognizance of the offence, order an investigation under Section 156(3). The police will then investigate and submit a report under Section 173(1). On receiving the police report the Magistrate may take cognizance of the offence under Section 190(1)(b) and straightaway issue process. This he may do irrespective of the view expressed by the police in their report whether an offence has been made out or not. The Police report under Section 173 will contain the facts discovered or unearthed by the police and the conclusion drawn by the police therefrom. The Magistrate is not bound by the conclusions drawn by the Police and he may decide to issue process even if the Police recommend that there is no sufficient ground for proceeding further. The Magistrate after receiving the Police report, may, without issuing process or dropping the proceeding decide to take cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statements upon oath of the complainant and the witnesses present under Section 200 Criminal Procedure Code and thereafter decide whether to dismiss the complaint or issue process. The mere fact that he had earlier ordered an investigation under Section 156(3) and received a report under Section 173 will not have the effect of total effacement

of the complaint and therefore the Magistrate will not be barred from proceeding under Sections 200, 203 and 204. Thus, a Magistrate who on receipt of a complaint, orders an investigation under Section 156(3) and receives a police report under Section 173(1), may, thereafter, do one of three things : (1) he may decide that there is no sufficient ground for proceeding further and drop action; (2) he may take cognizance of the offence under Section 190(1)(b) on the basis of the police report and issue process; this he may do without being bound in any manner by the conclusion arrived at by the police in their report : (3) he may take cognizance of the offence under Section 190(1)(a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Section 200. If he adopts the third alternative, he may hold or direct an inquiry under Section 202 if he thinks fit. Thereafter he may dismiss the complaint or issue process, as the case may be.”

9. Consequently, the impugned order dated 9th February, 2016 passed by the learned Additional Sessions Judge is set aside.

10. The sole ground on which learned counsel for the petitioner challenges the order of the learned Metropolitan Magistrate dated 28th April, 2015 is that the second statement of witness Ajay Kumar had wrongly been recorded belatedly by the Investigating Officer and the same could not be considered by the learned Metropolitan Magistrate. It is trite law that investigation is conducted to bring out complete facts of the case before Court. If during the course of investigation, the FSL reports and mechanical inspections did not support the version of the alleged eye-witness, the Investigating Officer was duty bound to re-examine him, which he did. Merely because the second statement of Ajay Kumar was recorded belatedly is no ground to discard it.

In view of the facts hereinbefore, I find no error in the order of the learned Metropolitan Magistrate accepting the untraced report filed. The learned Metropolitan Magistrate has already proceeded in the protest petition of the petitioner treating it as a complaint case wherein he would examine the necessary witnesses.

11. Thus the impugned order dated 9th February, 2016 is set aside.

12. Petition and the application are disposed of.

(MUKTA GUPTA)
JUDGE

SEPTEMBER 22, 2016/‘vn’