

Bal Kishan Vs. State

Bal Kishan Vs. State

SooperKanoon Citation : sooperkanoon.com/709376

Court : Delhi

Decided On : Jun-06-2008

Reported in : 2008(105)DRJ379

Judge : G.S. Sistani, J.

Acts : Evidence Act - Sections 33; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 311, 397 and 482; Indian Penal Code (IPC) - Sections 279 and 304A

Appeal No. : Crl. Rev. P. No. 8/2008

Appellant : Bal Kishan

Respondent : State

Advocate for Def. : Jaideep Malik Adv.

Advocate for Pet/Ap. : Shahid Ali, Adv

Judgement :

G.S. Sistani, J.

1. The present petition has been filed under Section 397 read with Section 482 of the Code of Criminal Procedure, 1973, assailing the judgment dated 17.12.2007 passed by learned Additional Sessions Judge, whereby the judgment dated 10.10.2007 and the order of sentence dated 27.10.2007 have been confirmed.

The petitioner herein has been convicted for Rigorous Imprisonment for a period of three months with fine of Rs. 1000/- under Section 279 IPC and Rigorous Imprisonment for a period of one year and fine of Rs. 3,000/- under Section 304A IPC.

2. The case set up by the prosecution is that on 13.9.1998 an accident had taken place at about 1:30 p.m. when the deceased along with his brother was going towards a mosque to offer prayer via Wazirabad Road, Loni Flyover. When they reached the Flyover one truck bearing No. HR26A-7256 driven at very fast speed came from behind and hit the deceased which resulted in his death. A report was lodged by the brother of the deceased, which culminated into FIR No. 93/1998 under Sections 279/304-A IPC.

3. It is contended by learned Counsel for the petitioner that the impugned judgments and order on sentence are ex facie illegal, unwarranted, unlawful, perverse and contrary to facts and law. It is submitted that both the Courts below have not appreciated the evidence on record in the right and just perspective. Learned Counsel further submits that there is material irregularity and illegality in the judgment which has resulted in miscarriage of justice. According to learned Counsel for the petitioner, the truck in question was loaded and was moving in the upward direction on the flyover and thus it is not possible for the truck to be in high speed. Learned Counsel further submits that there is material discrepancy in the evidence of the I.O., who had stated during cross-examination that the accident had occurred about 25-30 steps before the starting point of the flyover whereas according to the site plan the accident had taken place at point (A) which is 30 steps upward on the flyover. Learned Counsel for the petitioner has placed strong reliance on : 1997 CriLJ69 , wherein the Supreme Court has held:

Section 304A-Negligent driving along Public way - if a Pedestrian suddenly crosses a road without taking note of the approaching bus there is every possibility of his dashing against the bus without the driver becoming aware of it. The bus driver cannot save accident however slowly he may be driving and therefore he cannot be held to be negligent in such a case.

4. According to the petitioner, the site plan shows that the deceased was walking in the middle of the road and as per evidence of DW-1 the deceased had come in front of the truck all of a sudden from the right side of the truck therefore, accident had occurred. Merely, because there was an accident does not mean that the petitioner was driving in a rash and negligence way. Learned Counsel submits that learned Courts below have failed to appreciate the judgment of the High Court reported in 1996 JCC 677 wherein the High Court has held that if a passenger falls down and is crushed under the rear wheel and the bus is stopped at a distance 8 to 10 feet from the spot, it shows that the driver was driving the bus at a normal speed. In another decision reported in 2007 (4) JCC 3148 the High Court has also held that mere allegation of high speed does not speak either of the negligence or rash driving by itself. Lastly, learned Counsel for the petitioner submits that there is no evidence on record to show that the vehicle was being driven in rash and negligent manner.

5. Learned APP for the State on the other hand submits that in this case there is concurrent findings of two courts and the evidence of PW-5, who is real brother of the deceased had stated that that the truck was being driven in a very negligent manner and at a very fast speed and in a zig-zag manner and in view of the fact that there is no cross-examination of this witness the revision is liable to be dismissed.

6. I have heard learned Counsel for the parties. The basic facts are not in dispute. Both the Courts below have taken into consideration that in order to prove the case under Section 279/304-A IPC, the prosecution must prove the identity of the accused, that the accused was driving the offending vehicle in a rash and negligent manner, due to rash and negligent driving had caused the death of the deceased.

7. Learned trial court has taken into consideration the evidence of PW-5, the brother of the deceased, who has deposed that on the fateful day he along with his brother were going from his shop towards the mosque for the noon prayer. The truck in question in a negligent manner came at a very fast speed in a zig-zag manner and ran over his brother, who died at the spot and he was dragged at

some distance. This witness could not be cross-examined and thereafter on an application filed by the petitioner herein under Section 311 Cr.P.C. permission was granted for his cross-examination, subject to availability of the witness. The witness could not be cross-examined as meanwhile he had died. The learned Additional Sessions Judge has also placed reliance on the evidence of PW-5, the brother of the deceased. Petitioner had contended before learned Additional Sessions Judge that reliance cannot be placed on the evidence of PW-5 as he was not produced for further cross-examination. The learned Additional Sessions Judge has taken into consideration the facts that an opportunity was given to the petitioner to cross-examine which opportunity was not availed thereafter the application under Section 311 of the Cr.P.C. was filed, which was allowed but the witness had expired by then. Learned Additional Sessions Judge has held that standard enacted in Section 33 of the Evidence Act have been satisfied and the testimony of PW-5 is relevant for adjudication of the guilt of the appellant. The learned Additional Sessions Judge has taken into consideration a judgment of this Court reported in wherein it was held that for value and weight of testimony of witnesses, who had expired before cross-examination could be concluded, following features are to be taken into account: (a) nature of testimony, (b) its probative value, (c) status of witness, (d) his relationship or connection with parties, (e) likely animus or any other feature touching his credibility, (f) whether it was taken on record that, if cross-examined his testimony was likely to be seriously shaken, his good faith or credibility to be successfully impeached, and (g) Court may as a rule not to act upon such evidence, if uncorroborated. Based on this decision learned Additional Sessions Judge has taken view that testimony of a witness, who had died before his cross-examination, cannot be brushed aside abruptly. Learned Additional Sessions Judge while perusing the evidence of PW-5 has observed that no animus was attributed to PW-5 nor it is shown that he was not a man of veracity. Learned Additional Sessions Judge, further observed that the detailed events are in a cohesive and consistent manner and further the evidence of PW-5 is corroborated by circumstantial evidence.

8. In this case the prosecution has examined nine (9) witnesses and only one witness was examined by the defence. It would be useful to analyse the evidence of some of the material witnesses.

9. PW-1, Head Constable, Prem Chand, has proved the FIR. The evidence of PW-5, who is the star witness of the prosecution reads as under:

The incident of accident occurred on 13.2.98 at Gokalpuri Flyover which goes to Ghaziabad. I and my brother Mohd. Ayub were going from my shop towards the mosque for noon prayers as it was 1.30 pm. The number of the truck was HR26A-7256 and the accused present in Court today was driving the said truck. The truck was being drive in a very negligent manner at a very fast speed and in a zigzag manner and the truck was loaded. The truck ran over my brother and he died at the spot and he was also dragged for some distance. The police had arrived at the spot and got recorded my statement Ex.PW5/A, signed by me at Pt.A. The truck was seized vide Ex.PW5/B, signed by me at, Pt.A. Accused was arrested and personal search was carried out vide Ex.PW5/C, signed by me at Pt.A. Photographs were also taken in my presence. IO also recorded my supplementary statement.

10. As per evidence of PW-6, Constable Om Prakash, he along with I.O. SI Karam Chand went at the spot of the accident and found a truck No. HR 26A-7256 in semi burned condition and a lot of crowd had also gathered and one dead body was also lying at the spot. He arrested the petitioner herein and also conducted his search.

11. As per the evidence of PW-7, Mohd. Yakub, he was working at his shop and he came to know through public person that an accident had taken place by a truck at Loni flyover. He identified the number of truck. During cross-examination he could not tell where the accident had occurred.

12. PW-9, S.I. Karam Chand has also testified that he reached at the spot of the accident and found the truck No. HR 26A-7256 which was on fire and one injured person was lying on the road, who was shifted to G.T. Hospital. He prepared the site plan. During the cross-examination this witness has stated that the location of the accident was at a distance of 25-30 steps before the starting point of the flyover, near patri (divider).

13. DW-1, Radhey Shyam, has deposed that the petitioner-accused was working with him as a driver in the FCI Godam. He was in the truck sitting on the front seat with the petitioner. According to this witness when the truck reached at Loni flyover, a person suddenly came in front of the truck from right side of the truck and came under the front wheel of the truck. The truck was going by the side of divider on the flyover. According to him the truck, which was loaded, was going at the speed of 20 km.ph. During the cross-examination he had stated that the deceased was walking on the divider and there was no other person with him. He denied the suggestion that the deceased was accompanied by any other person. He denied the suggestion that the petitioner was driving the truck in rash and negligent manner and at a high speed.

14. From analyzing all the evidence of the witnesses it categorically emerges that on 13.2.1998 at about 1:30 the petitioner was driving truck bearing No. HR 26A-7256 and the deceased met his death in the accident near Loni Flyover. It is not in dispute that in order to sustain conviction for an offence under Sections 279/304-A IPC, the prosecution must prove : (i) the identity of the accused, (ii) the accused was driving the offending vehicle in a rash and negligent manner, (iii) due to such rash and negligent driving of the accused, the death of deceased Md. Ayub had occurred, as observed by the Metropolitan Magistrate.

15. According to prosecution, PW-5 was the only eye witness. None of the witnesses, besides PW-5, have testified that the petitioner was driving the truck in a high speed and in a rash and negligent manner. So to say the evidence of PW-5 has been corroborated by either witness as observed by the learned Additional Sessions Judge, is not borne out from the record. It has further been observed that no animus was attributed to PW-5 nor it is shown that it is not a man of veracity. Admittedly this witness was not cross-examined, no question could be put to him. The court can also not loose sight of the fact that PW-5 was the brother of the deceased. It has been observed that he detailed the evidence in a cohesive and consistent manner.

16. 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. The judgment of the Court below should disclose cogent and valid reasons. In my view present case falls in the category of mis-reading of evidence and failure to take into consideration and lack of any evidence and no finding that the petitioner was driving the truck in a rash and negligent manner. This resulted in miscarriage of justice. The Metropolitan Magistrate has formed his opinion that the accused was driving the truck in a rash and negligent manner on the basis of the evidence of PW-5 and DW-1 that the deceased was dragged for some distance. His observations are "Further, as confirmed by DW-1 and PW-5 that deceased was dragged for some distance and deceased came under the right front wheel of the truck, itself proves that the truck was being driven by accused in a rash and negligent manner." This in my view cannot be the only consideration for arriving at this conclusion. DW-1, who was sitting in the truck does not say so, that the truck was being driven in a rash and negligent manner. In fact DW-1 has stated that all of a sudden that the deceased came in front of the truck from the right side. He further says that the truck was loaded and was going in the speed of 20 km.ph.. The Courts below have completely ignored the vital evidence and site plan, which show that the deceased was walking in the middle of the road near the divider of the flyover. The evidence of PW-5, who is the brother of the deceased no doubt shows that the truck was being driven in negligent manner, in a fast speed and in a zig-zag manner. However, he also goes on to say that the truck was loaded. This witness, who is the only eye witness relied upon by the prosecution could not be cross-examined. Precisely these are vital aspects which required cross-examination. In fact DW-1 has even denied the presence of PW-5 at the time of the accident. Whatever has been stated by PW-5 finds no corroboration from any of the witnesses of the prosecution. While deciding the present matter, the Courts below should have come to a categorical finding and should have been found some corroboration on the aspect of rash and negligence driving. It is also noticed that PW-5 could not be cross-examined despite the application of the petitioner being allowed. The prosecution has failed to place any material on record to show the tyre marks on the road and any other material

which could have thrown light on the aspect of speed of this truck.

17. All this could only have been said in case the witness had passed the test in cross-examination. The spot of the accident in my opinion really holds key in the facts of this case. As per the site plan the accident occurred at point (A) which is near the divider of the flyover. In view of this it stands established that the deceased was walking in the middle of the flyover on the divider. PW-5, who is the brother of the deceased, whose evidence is sought to be strongly relied upon by the Courts below, has failed to give this vital evidence. However, in his evidence he has no doubt stated that the truck was loaded, but the possibility of a loaded truck going in a zig-zag manner in a high speed is not very probable. During the cross-examination of PW-9 S.I. Karam Chand, he has stated that the accident took place near patri (divider of the flyover). DW-1 has also stated that the truck was going by the side of the divider between the flyover and suddenly the deceased crossed the road. Even during the cross-examination, he has stated that it is correct that the deceased was walking on the divider in the same direction in which our truck was going. It is also the case of the prosecution that the deceased came under the right front wheel of the truck, which also lends support to the testimony of PW-9 as well as PW-1, together with location marked on the site plan that the deceased was walking on the divider or alongside the divider. I am in agreement with the counsel for the petitioner that the courts below have not appreciated this part of the evidence, which has resulted in material miscarriage of justice. The Supreme Court in Mahadeo Hari Lokre v. The State of Maharashtra : 1972 CriLJ49 has observed:

If a person suddenly crosses the road the Bus Driver, however, slowly he may be driving, may not be in a position to save the accident. Therefore, it will not be possible to hold that the Bus Driver was negligent.

18. It is also relevant to take into consideration the observations made by the learned Single Judge of this Court in Abdul Subhan v. State (NCT of Delhi) 2007 (4) JCC 3148, based on the decision of the Apex Court in State of Karnataka v. Satish that 'Merely because the truck was being driven at a 'high-speed' does not be speak of either 'negligence' or 'rashness' by itself.' Except the evidence of PW-

5, who was admittedly not cross-examined, there is no evidence on record to show that the vehicle was being driven at a high speed.

19. For the reasons stated above, the judgment and order of conviction 10.10.2007, 27.10.2007 and the judgment dated 17.12.2007 are set aside. Petitioner is acquitted and be released from custody forthwith, if not wanted in any other case. In case the fine has already been paid by the petitioner, the same shall not be recovered from the family of the deceased.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com