IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Cr. Appeal No. 342 of 2009
Decided on: June 21, 2019

State of H.P. .....Appellant

Versus

Jai Chand ...Respondent

Coram
Hon'ble Mr. Justice Sandeep Sharma, Judge.
Whether approved for reporting?[1] Yes.

For the appellant: Mr. Ashwani Sharma, Additional Advocate General.

For the respondent: Mr. G.R. Palsra, Advocate.

Sandeep Sharma, J. (oral)

Instant criminal appeal having been filed by the appellant-State, lays challenge to the judgment dated 31.3.2009 passed by learned Judicial Magistrate 1st Class, Court No. 2, Palampur, District Kangra, Himachal Pradesh in Criminal Case No. 366-11/2004/2002, whereby learned Court below held respondent-accused (hereinafter, 'accused'), not guilty of having committed offences punishable under Ss. 279 and 304-A IPC and Ss. 191, 192-A and 196 of the Motor Vehicles Act and accordingly acquitted him.

2. In nutshell, case of the prosecution as emerges from the record is that on 31.1.1999, at about 3.45 pm, at place 78 Miles (Aberi), accused was driving truck bearing

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Whether reporters of the Local papers are allowed to see the judgment? .

registration No. HPK-1073. It is alleged that on the date of alleged accident, complainant Manoj Kumar alongwith his cousin Satish Kumar was going to Aberi to purchase vegetables. It is alleged that the accused was driving the vehicle in question on public way in a rash and negligent manner and hit the same against Satish Kumar, who came beneath the front tyre of the vehicle. Statement of PW-5 Manoj Kumar (complainant)(Ext. PW-5/A) was got recorded and on the basis of same, FIR (Ext. PW-1/A) was registered under the aforesaid provisions of law at Police Station Palampur. After completion of investigation, Police presented *Challan* in the court of learned Judicial Magistrate 1st Class-II, Palampur, District Kangra, Himachal Pradesh, who, being satisfied that prima facie case exists against the accused, served notice of accusation upon him for the commission of aforesaid offences, to which the accused pleaded not guilty and claimed trial.

3. Prosecution, with a view to prove its case against the accused, examined as many as eight witnesses, whereas, accused in his statement recorded under S.313 CrPC, denied the case of the prosecution *in toto* and claimed that at the time of alleged incident, he was not driving the truck in question and he has been falsely implicated. However, the fact remains that he did not lead any evidence in his defence.

4. Having heard learned counsel for the parties and perused the material available on record, this court finds no illegality, infirmity or irregularity in the impugned judgment of acquittal passed by learned trial Court, because, admittedly, in the case at hand, prosecution has not been able to prove beyond reasonable doubt that on the date of alleged incident, accused was driving the truck in question. Apart from above, it clearly emerges from the record that the Investigating Officer, PW-7, never conducted identification parade, if any, after lodging of complaint and it is only during trial that the complainant PW-5 Manoj Kumar as well as PW-3 Ashwani Kumar identified the accused in the court. Apart from above, there is no specific evidence led on record with regard to rash and negligent driving on the part of accused, who at the time of alleged incident, was allegedly driving the offending vehicle.

5. PW-5 Manoj Kumar, deposed that he alongwith deceased was going to Aberi to purchase vegetables on 31.1.1999. He deposed that the offending vehicle came in a high speed from Aberi side and truck driver suddenly turned the truck. He deposed that on seeing truck, he jumped for his safety but his cousin was run over by front tyre of the truck. He stated that truck was being driven by accused, who was present in the court and accused as well as cleaner fled away from the spot. He further deposed that the people gathered on

the spot and pulled Satish Kumar out. In his cross-examination, this witness admitted that the Police did not get the identification parade conducted from him and further admitted that he identified the accused in the court, as he thought that he would be the driver. He further admitted that he had not got written the name of the truck driver in his statement, Ext. PW-5/A. This witness also admitted that he had not given any statement to the Police that he identified the driver and could recognize him.

6. PW-3 Ashwani Kumar was working at 78 Miles on the relevant date and time. This witness deposed that his younger brother as well as deceased Satish Kumar were walking on the side of the road. He deposed that the offending truck struck against wall and then front tyre of the truck ran over deceased Satish Kumar. He stated that he pulled out Satish Kumar from beneath the truck and took him to the hospital, where he died. This witness stated that the accident occurred on account of rash and negligent driving on the part of accused. It has also come in his evidence that accused is driver of the truck. In his cross-examination, he admitted that he did not witness the accident himself, rather he was told by PW-5 Manoj Kumar that driver of the truck had fled away.

7. PW-4 Randhir Singh runs a shop at 78 Miles. This witness deposed that on the relevant date, time and place,

truck bearing registration No. HPK-1073 came from Baijnath side and suddenly turned towards right side and struck with the wall on the right side. He deposed that one boy was shouting that his brother had come beneath the truck. He also deposed that the truck driver and cleaner fled away from the spot.

8. PW-8, Dulo Ram is the owner of the offending truck. This witness deposed that he had given papers of the truck to the Police. He further deposed that he had employed one driver, who was from Nurpur and his name was Jai Mal son of Mangat Ram. He stated that the log book was taken at that time by the Police. He stated that he does not know the accused. This witness deposed that on the day of accident, Jai Mal son of Mangat Ram, resident of Nurpur was the driver, who was employed only 3-4 months back. During cross-examination he admitted that the document, Ext. PW-8/A was not written by him nor number of vehicle was written on the same.

9. PW-7 HC Nardev Singh is the Investigating Officer. He deposed that on 31.1.1999, he got recorded statement of complainant, PW-5 Manoj Kumar under S.154 CrPC, on the basis of which formal FIR, Ext. PW-1/A came to be registered. He stated that it has come in the investigation that accident took place due to rash and negligent driving on the part of the

accused. In his cross-examination, this witness admitted that Manoj Kumar had not disclosed anything regarding identity of the truck driver.

10. Thus, the statements having been made by material prosecution witnesses, if read in entirety, certainly compel this court to draw an inference that there are material contradictions and inconsistencies, as such, not much reliance could be placed upon the same by the learned trial Court, while ascertaining guilt, if any of the accused. If statement of PW-5, complainant, is read juxtaposing statements of other prosecution witnesses, it completely demolishes the case of prosecution, because, it has nowhere come in the statement of PW-5 that, on first instance, truck driver or accused struck the vehicle against the wall, rather, this witness deposed that truck from Aberi side came in high speed and he, after seeing truck, jumped for safety, whereas Satish Kumar was run over by the offending truck. On the other hand, PW-3 Ashwani Kumar and PW-4 Randhir Singh have stated that, at the first instance, truck struck against wall. Similarly, if statements of these witnesses are read, they certainly suggest that no identification parade was ever got conducted by the Investigating Officer, after lodging of the FIR. Similarly, statement of PW-5 itself suggests that he, at no point of time, disclosed the particulars, if any, with regard to identify of the

accused. This witness categorically admitted in his cross-examination that no identification parade was got conducted by the Investigating Officer and he identified the accused in the court only, after four months.

11. Version of PW-3 otherwise could not be taken into consideration because as per own statement of the aforesaid witness, accident did not take place in his presence, rather, he was told by PW-5 Manoj Kumar that the truck being driven by accused had crushed deceased Satish Kumar, whereafter, both, truck driver and cleaner fled away. Interestingly, in the case at hand, record reveals that after the alleged accident, Police got vehicle mechanically examined from the mechanic, who reported that there was no defect in the vehicle, but this person was never examined as a witness by the prosecution.

12. PW-7, Investigating Officer, in his statement admitted that PW-5 Manoj Kumar did not give statement with regard to identity of the accused. PW-5 Manoj Kumar, in his cross-examination categorically denied the suggestion put to him that he was deposing falsely in the court to the effect that the accused was the driver of the vehicle, but it stands duly proved on record that after lodging of complaint, no identification parade was got conducted, rather, for the first time, PW-5 identified the accused in the court. It has specifically come in the cross-examination of the PW-5 that he

did not disclose the age, height and colour etc. of the driver of the vehicle. Prosecution has placed strong reliance upon Ext. PW-8/A, abstract of log book, which contains signatures of Jai Chand, but careful perusal of same depicts that it is upto 20.7.1998, whereas, accident had taken place on 31.1.1999, as such, no reliance could be placed upon the same to determine the guilt, if any, of the accused.

13. PW-8 Dulo Ram in his statement stated that he had employed one driver, who was from Nurpur and his name was Jai Mal son of Mangat Ram. It has come in his statement that on the date of alleged incident, Jai Mal son of Mangat Ram resident of Nurpur was driver in the aforesaid vehicle.

14. Though, the omission on the part of Investigating Officer to conduct identification parade of accused immediately after alleged accident is sufficient to conclude that the prosecution was unable to prove its case beyond reasonable doubt against the accused, but even otherwise, there is no specific evidence led on record by investigating agency that on the date of alleged accident, offending vehicle was being driven in a rash and negligent manner by the accused. Mere statements, if any, of prosecution witnesses are not sufficient to conclude rash and negligent driving on the part of accused, rather prosecution in this regard was under obligation to prove rash and negligent driving by leading specific evidence in this

regard. Needless to say, rashness/negligence cannot be presumed rather onus in this regard is heavy upon the prosecution.

15. By now, it is well settled that specific evidence is required to be adduced on record by the prosecution to prove rash and negligent driving, if any, on the part of the accused. Mere allegations are not sufficient to hold accused guilty of having committed offence punishable under Section 279 IPC.

16. In the instant case, this Court was unable to lay its hand to specific evidence, if any, led on record by the prosecution suggestive of the fact that the vehicle at that relevant time was being driven rashly and negligently that too at high speed. In this regard, reliance is placed on judgment rendered by the Hon'ble Apex Court in **Braham Dass** v. **State of Himachal Pradesh,** (2009) 3 SCC (Cri) 406, which reads as under:-

> "6. In support of the appeal, learned counsel for the appellant submitted that there was no evidence on record to show any negligence. It has not been brought on record as to how the accused- appellant was negligent in any way. On the contrary what has been stated is that one person had gone to the roof top and driver started the vehicle while he was there. There was no evidence to show that the driver had knowledge that any passenger was on the roof top of the bus. Learned counsel for the respondent on the other hand submitted that PW1 had stated that the conductor had told the driver that one passenger was still on the roof of the bus and the driver started the bus.

> 8. Section 279 deals with rash driving or riding on a public way. A bare reading of the provision makes it clear that it must be established that the accused was driving any vehicle on a public way in a manner which endangered human life or was likely to cause hurt or injury to any other person. Obviously the foundation in accusations under Section 279IPC is not negligence. Similarly in Section 304 A the stress is on causing death by negligence or rashness. Therefore, for bringing in application of either Section 279 or 304 A it must be established that there was an element of rashness or negligence. Even if the prosecution version is accepted in toto, there was no evidence led to show that any negligence was involved."

17. The Hon'ble Apex Court in case titled **State of Karnataka** v. **Satish**, 1998 (8) SCC 493, has also observed as under:-

> "1. Truck No. MYE-3236 being driven by the respondent turned turtle while crossing a "nalla" on 25-11-1982 at about 8.30 a.m. The accident resulted in the death of 15 persons and receipt of injuries by about 18 persons, who were travelling in the fully loaded truck. The respondent was charge-sheeted and tried. The learned trial court held that the respondent drove the vehicle at a high speed and it was on that account that the accident took place. The respondent was convicted for offences under Sections 279, 337, 338and 304A IPC and sentenced to various terms of imprisonment. The respondent challenged his conviction and sentence before the Second Additional Sessions Judge, Belgaum. While the conviction and sentence imposed upon the respondent for the offence under Section 279 IPC was set aside, the appellate court confirmed the conviction and sentenced the respondent for offences under Sections 304A, 337 and 338 IPC. On a criminal revision petition being filed by the respondent before the

High Court of Karnataka, the conviction and sentence of the respondent for all the offences were set aside and the respondent was acquitted. This appeal by special leave is directed against the said judgment of acquittal passed by the High Court of Karnataka.

2. We have examined the record and heard learned counsel for the parties.

3. Both the trial court and the appellate court held the respondent guilty for offences under Sections 337, 338 and 304A IPC after recording a finding that the respondent was driving the truck at a "high speed". No specific finding has been recorded either by the trial court or by the first appellate court to the effect that the respondent was driving the truck either negligently or rashly. After holding that the respondent was driving the truck at a "high speed", both the courts pressed into aid the doctrine of res ipsa loquitur to hold the respondent guilty.

4. Merely because the truck was being driven at a "high speed" does not bespeak of either "negligence" or "rashness" by itself. None of the witnesses examined by the prosecution could give any indication, even approximately, as to what they meant by "high speed". "High speed" is a relative term. It was for the prosecution to bring on record material to establish as to what it meant by "high speed" in the facts and circumstances of the case. In a criminal trial, the burden of providing everything essential to the establishment of the charge against an accused always rests on the prosecution and there is a presumption of innocence in favour of the accused until the contrary is proved. Criminality is not to be presumed, subject of course to some statutory exceptions. There is no such statutory exception pleaded in the present case. In the absence of any material on the record, no presumption of "rashness" or "negligence" could be drawn by invoking the maxim "res ipsa loquitur". There is evidence to show that immediately before the truck turned turtle, there was a big jerk. It is not explained as to whether the jerk was because of the uneven road or

> mechanical failure. The Motor Vehicle Inspector who inspected the vehicle had submitted his report. That report is not forthcoming from the record and the Inspector was not examined for reasons best known to the prosecution. This is a serious infirmity and lacuna in the prosecution case.
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> 5. There being no evidence on the record to establish "negligence" or "rashness" in driving the truck on the part of the respondent, it cannot be said that the view taken by the High Court in acquitting the respondent is a perverse view. To us it appears that the view of the High Court, in the facts and circumstances of this case, is a reasonably possible view. We, therefore, do not find any reason to interfere with the order of acquittal. The appeal fails and is dismissed. The respondent is on bail. His bail bonds shall stand discharged. Appeal dismissed."

18. Careful perusal of aforesaid judgment clearly suggests that there cannot be any presumption of rashness or negligence, rather, onus is always upon the prosecution to prove beyond reasonable doubt that vehicle in question was being driven rashly and negligently. In the aforesaid judgment, it has been specifically held that in the absence of any material on record, no presumption of rashness or negligence can be drawn by invoking maxim *res ipsa loquitur*.

19. Reliance is also placed on judgment this Court in **State of H.P.** Vs. **Manpreet Singh**, 2008 (HP) 538, relevant para whereof is as under:

> "4. Legally, in a case of rash and negligent act, if the prosecution is able to prove the essential ingredients of

the offence, the onus to disprove it shifts upon the respondent to show that he had taken due care and caution to avoid the accident. It is an admitted fact that said Shri Daya Ram had died in the accident caused by the respondent but still it is incumbent upon the prosecution to prove that it was the rash and negligent act of driving to conclude the rash and negligent driving of the respondent. In other words, it must be proved that the rash or negligent act of the accused was causa causans and not causa sin qua non (cause of the proximate cause). There must be some nexus between the death of a person with rash or negligent act ofthe accused. According to Rupinder Parkash (PW4) deceased was hit by the motor cycle which was in a high speed but the speed is not criteria to hold the act as rash or negligent. The respondent in his statement under Section 313 of the Code of Criminal Procedure has explained that on seeing the deceased, he had blown the horn and he (deceased) stopped on the road. As soon as he reached near him, he immediately tried to cross the road and got hit. His version has been duly corroborated by Hardeep Singh (DW1) who was a pillion rider with him. Ajay Kumar (PW-1) has admitted this version that the respondent had blown the horn and Daya Ram on hearing it, had stopped for a while. In these circumstances, if a person suddenly crosses the road, without taking note of the approaching vehicle and its driver may not be in a position to save the accident, it will not be possible to hold the Driver guilty of the offence. In the instant case, the deceased knowing fully well at least the approaching vehicle stopped on hearing the horn while crossing the road but when the motor cycle reached near him, he darted before it and the accident took place. Thus in my opinion the prosecution could not prove the offence charged against the respondent beyond reasonable doubt that the respondent was driving the vehicle rashly or negligently. Therefore, in these circumstances, the learned trial Court had rightly

> acquitted the respondent of the charges framed against him. As such, no interference in the impugned judgment of acquittal is called for. Accordingly the appeal is dismissed. The respondent is discharged of his bail bounds entered upon by him at any stage of the trial."

20. This Court is also fully conscious of judgment of Hon'ble Apex Court in ***State of Punjab*** *versus* ***Saurabh Bakshi 2015 (5) SCC 182,*** wherein it has been held that no leniency should be shown to reckless drivers. The Hon'ble Apex Court has observed as follows:-

> "25. Before parting with the case we are compelled to observe that India has a disreputable record of road accidents. There is a nonchalant attitude among the drivers. They feel that they are the "Emperors of all they survey". Drunkenness contributes to careless driving where the other people become their prey. The poor feel that their lives are not safe, the pedestrians think of uncertainty and the civilized persons drive in constant fear but still apprehensive about the obnoxious attitude of the people who project themselves as "larger than life". In such obtaining circumstances, we are bound to observe that the law-makers should scrutinize, relook and revisit the sentencing policy in Section 304-A IPC, so with immense anguish."

21. There can not be any disagreement with the concern expressed by the Hon'ble Apex Court in the aforesaid judgment with regard to carelessness /recklessness of the drivers especially under the influence of alcohol. But in the instant case, as has been discussed above, prosecution was

not able to prove beyond reasonable doubt that the ill fated vehicle was being driven by accused rashly and negligently, rather, version put forth by prosecution appears to be untrustworthy in view of material contradictions in the statements of the alleged eye witnesses, and as such, this Court sees no application of aforesaid law laid down by the Apex Court in the instant case.

22. This court in **State of Himachal Pradesh** vs. **Dilwar Singh** 2017(3) Him. L.R. 1938, has held as under:

> "11. After having carefully perused statements of PW-4 and PW-7, conclusion can be safely drawn by this Court that even PW-6 and PW-8, had no occasion to witness the accident with their eyes, rather, they came at the spot after noise made by PW-7. It is not understood when PW-6 and PW-8 had not witnessed the accident, with their eyes, how they could chase offending vehicle allegedly being driven by respondent, because, at the relevant time, none of the prosecution witnesses have stated that they had disclosed registration number of offending vehicle to PW-6 and PW-8. Even PW-1 and PW-5 nowhere stated that PW-6 and PW-8 were informed by them with regard to accident especially about registration number of offending vehicle, as such, story put forth by the prosecution does not appear to be trustworthy.
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> 12. At the cost of repetition, it may be stated that it has nowhere come in the statement of any of the prosecution witnesses, who had an occasion to see the

accident with their eyes, that immediately after accident, they informed PW-6 and PW-8 with regard to registration number of offending vehicle as well as accused, as such, story of accused being apprehended by PW-6 and PW-8, is not worth lending any credence, because, admittedly, they had no prior knowledge with regard to involvement of offending vehicle as well as accused in the accident.

13. Leaving everything aside, this Court was unable to find anything in the statements of prosecution witnesses, from where it could be inferred that vehicle was being driven rashly and negligently that too at high speed, by the respondent, as such, this Court sees substantial force in the defence taken by the accused in his statement recorded under Section 313 CrPC that he had not struck vehicle against Shri Milkhi Ram and Kurpal Ram.

14. Evidence discussed herein above is sufficient to hold that in given facts and circumstances, two views are possible in the present case and as such present, accused is entitled to the benefit of doubt. In the present case, prosecution story does not appear to be plausible/ trustworthy and as such same cannot be relied upon. In this regard, I may refer to the judgment passed by the Hon'ble Apex Court reported in State of UP versus Ghambhir Singh, AIR 2005 (92) SCC 2440, where Hon'ble Apex Court has held that if on the same evidence, two views are reasonably possible, the one in favour of the accused must be preferred. The relevant paragraph is reproduced as under:-

> "6. So far as Hori Lal, PW-1 is concerned, he had been sent to fetch a basket from the village and it was only a matter of coincidence that while he was

> returning he witnessed the entire incident. The High Court did not consider it safe to rely on his testimony because he evidence clearly shows that he had an animus against the appellants. Moreover, he evidence was not corroborated by objective circumstances. Though it was his categorical case that all of them fired, no injury caused by rifle was found, and, only two wounds were found on the person of the deceased. Apart from this PW-3 did not mention the presence of either PW-1 or PW-2 at the time of occurrence. All these circumstances do create doubt about the truthfulness of the prosecution case. The presence of these three witnesses becomes doubtful if their evidence is critically scrutinized. May be it is also possible to take a view in favour of the prosecution, but since the High Court, on an appreciation of the evidence on record, has recorded a finding in favour of the accused, we do not feel persuaded to interfere with the order of the High Court in an appeal against acquittal. It is well settled that if on the same evidence two views are reasonably possible, the one in favour of the accused must be preferred.""

23. Thus, in view of the above judgment, if on the same evidence two views are reasonably possible, the one in favour of the accused must be preferred. In the case at hand, when identity of the accused as driver of the offending vehicle at the time of accident has not been established, he deserves to be extended benefit of doubt.

24. Close scrutiny of statements of the material prosecution witnesses compels this court to conclude that no reliance, if any, could be placed by the learned Court below on the statements made by prosecution witnesses, being contradictory and inconsistent with each other, as such,

learned Court below rightly did not place reliance upon the same, while ascertaining guilt, if any, of the accused.

25. By now it is well settled that in a criminal trial evidence of eye-witness requires careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since fundamental aspect of criminal jurisprudence rests upon well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on the touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in **C. Magesh and others** versus **State of Karnataka** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> "45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be

noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:-(SCC p.704, para 14)

> "14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy; ..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses."

26. This Court also finds that all the witnesses associated by the Police in support of its case are interested witnesses, as such, version put forth by the complainant and prosecution witnesses is required to be scrutinized with utmost care and the same cannot be made basis for conviction especially when no cogent and convincing evidence has been led on record in support of the versions put forth by the

complainant and other prosecution witnesses, most of whom are interested witnesses.

27. In view of above, this Court finds no reason to interfere with judgment passed by the learned trial Court, which is accordingly upheld. In result, appeal fails and is accordingly dismissed. Bail bonds furnished by accused are discharged. Pending applications, if any, are disposed of.

(Sandeep Sharma)
Judge

June 21, 2019
(vikrant)