

Delhi High Court Abdul Subhan vs State (Nct Of Delhi) on 27 September, 2006 Equivalent citations: 2007 CriLJ 1089, 133 (2006) DLT 562 Author: B D Ahmed Bench: B D Ahmed JUDGMENT Badar Durrez Ahmed, J. 1. This revision petition has been filed by the petitioner being aggrieved by the order dated 7.2.2006 passed by the additional Sessions Judge whereby he confirmed the conviction and sentence awarded by the learned Metropolitan Magistrate under Sections 279 and 304-A IPC. The learned Metropolitan Magistrate had passed an order of conviction on 4.9.2005 convicting the petitioner for the offences punishable under Section 279 IPC and 304A IPC. By a separate order dated 17.9.2005, the learned Metropolitan Magistrate sentenced the petitioner to undergo rigorous imprisonment for three months and also imposed a fine of Rs 500 in respect of the offence under Section 279 IPC. In default of the payment of the fine amount the petitioner was required to undergo simple imprisonment for 15 days. Insofar as the offence under Section 304A IPC was concerned, the learned Metropolitan Magistrate sentenced the petitioner to rigorous imprisonment for one year and also imposed a fine of Rs 2500. In default of the payment of fine, the petitioner was required to undergo simple imprisonment for two months. Both the sentences of imprisonment were directed to run concurrently. In appeal, the learned additional Sessions Judge upheld the conviction as well as the sentence. Being aggrieved by the said order/judgment dated 7.2.2006 the petitioner has filed this revision petition. 2. The case for the prosecution is that on 23.10.1995, at an unknown time, on Mathura Road near the T-point junction with Sher Shah road, the petitioner was driving a vehicle bearing registration number HR 29C 9552 in a rash and negligent manner and while so driving hit against a motorcycle bearing registration number UMS 2937 and caused fatal injury to one Gajendra Singh. 3. To establish its case the prosecution examined 12 witnesses. However only one witness, that is PW 3, head constable Munim Dutt, is listed as an eyewitness. In this case it is not in dispute that the petitioner was driving the vehicle bearing registration number HR 29C 9552 which was a Tata 608 tempo (also described as a truck). It is also not in dispute that this vehicle and the motorcycle bearing registration number UMS 2937 had a collision. It is also not in dispute that, as a result of the collision, Gajendra Singh, who was riding the motorcycle, died. The entire question in this case is as to whether, on the evidence on record, the offences under Section 279/304A IPC are made out or not? 4. An examination of the judgment of the learned Additional Sessions Judge as well as that of the learned Metropolitan Magistrate would clearly indicate that the petitioner has been convicted primarily on the testimony of PW 3 head constable Munim Dutt. According to Mr. Sufian Siddiqui, the learned Counsel for the petitioner, there is nothing in the testimony of PW 3 which conclusively indicates that the petitioner was driving the vehicle in a rash or negligent manner. He submitted that the only allegation is that the petitioner was driving the vehicle at a high speed. According to Mr. Siddiqui, "high speed" is an expression which is relative and subjective. He submitted that merely because a vehicle was being driven at a high-speed does not mean that the driver was driving rashly or negligently. He also submitted that there is no evidence with regard to the status

of the traffic lights at the T-junction. The investigating officer has not been produced as a witness. The site plan which was purportedly drawn up by the investigating officer has not been exhibited. There is no evidence with regard to tyre skid marks. No photographs were taken. There is also no evidence as to whether the deceased Gajendra Singh who was riding on the motorcycle was wearing a helmet or not. He also indicated that by examining the evidence of PW 3, even the location of the point of impact cannot be ascertained and that there is a great deal of ambiguity in his testimony. The learned Counsel for the petitioner then submitted that the petitioner is not shying away from the fact that a collision had occurred. He is also not denying the fact that the petitioner was driving the Tata tempo. He is also not denying the fact that the deceased Gajendra Singh lost his life as a result of the collision. Another circumstance pointed out by the learned Counsel for the petitioner is that the petitioner did not attempt to flee from the place of incident and stayed there. According to Mr. Siddiqui this is not a case of rash or negligent driving or the result of a rash or negligent act; it is a case of an accident which just happened to have taken place. 5. Mr. Siddiqui then took me through the impugned judgment and submitted that the same is based on presumptions and assumptions and there is nothing on record which could lead to the conclusion that the petitioner was driving rashly or negligently. The learned Counsel for the petitioner then referred to the decision of the Supreme Court in the case of *State of Karnataka v. Satish* 1998 SCC (CRI) 1508. He referred to this decision of the Supreme Court for the purposes of submitting that driving at a high-speed by itself does not imply negligence or rashness. Negligence or rashness would have to be established as a fact. The learned Counsel for the petitioner then referred to the decision of a learned single judge of the Orissa High Court (Arijit Passayat J., as he then was) to indicate as to what are the necessary and essential ingredients of the offences under Section 279 and 304A IPC. In this decision also, the learned judge had observed that high-speed by itself is not indicative of a rash and/or negligent act on the part of the driver. 6. Mr. Sharma who appeared on behalf of the State submitted that this was a clearcut case where the provisions of Section 279 and 304A IPC were clearly attracted. He submitted that PW 3 head constable Munim Dutt has clearly stated that the petitioner was driving the tempo at a very high-speed and while driving so hit against the motorcycle and that after the impact the tempo dragged the motorcycle and the motorcyclist fell down and succumbed to his injuries. He submitted that the head constable Munim Dutt (PW 3) was a natural witness inasmuch as he was posted in the PCR van and was on a round at Mathura Road at about 7:45 a.m. when he saw this incident from about 50 to 60 yards. The said witness, according to Mr Sharma, has clearly and categorically stated in his examination in chief that the accident took place due to the fault of the petitioner and that the petitioner was driving the truck at a very fast speed. In these circumstances, Mr Sharma submitted, the decisions of the learned Metropolitan Magistrate as well as the learned additional Sessions Judge convicting and sentencing the petitioner have been correctly rendered and no interference with either the conviction or the sentence is called for. 7. At the outset I would like

to observe that I am appalled by the investigation, or shall I say the lack of it, that was carried out in this particular case. I may also note that I am of the view that the testimony of PW 3 head constable Munim Dutt, even if taken to be entirely true only leads to the conclusion that the vehicle driven by the present petitioner was being driven at a high-speed. This in itself does not mean that the petitioner was driving the vehicle rashly or negligently. Furthermore, the testimony of PW 3 leads to ambiguities and doubts and, I am afraid, my conscience does not permit me to convict a person under Section 279/304A IPC on the nature and degree of evidence that is on record in this case. There are so many questions which remain unanswered. What is meant by high-speed? Were the traffic lights working or not? Why was the investigating officer not examined? Why were photographs not taken? Why is there no evidence with regard to tyre skid marks? Why was the site plan not exhibited? There are questions which remain unanswered pertaining to the motorcyclist who unfortunately lost his life in this incident. Was the motorcyclist on Mathura Road? What was his direction of movement? Was he coming from Sher Shah Road and turning towards Mathura road? Or, was he on Mathura Road turning towards Sher Shah road? What was the speed of the motorcyclist? Did the motorcyclist suddenly curve into the path of the petitioner's truck? A host of other questions remain unanswered purely because the degree of investigation carried out and the quality of investigation carried out is quite unsatisfactory. It is well known in criminal cases that it is for the prosecution to establish its case beyond reasonable doubt. Unfortunately, in the present case I find that the prosecution has failed to achieve this standard. On the other hand there are grave doubts that the petitioner is at all guilty of the offences for which he has been convicted and sentenced. 8. I, first of all, take up the testimony of PW 3 head constable Munim Dutt. His testimony indicates that at around 7:45 a.m. he was posted in the PCR van Victor 45 and was present at Mathura Road and was on rounds going towards NSCI club. The segment of Mathura Road with which we are concerned, runs practically from south to north if we travel towards NSCI club and away from Nizamuddin. The T-junction where the incident is alleged to have taken place is between Nizamuddin and NSCI club. In other words, if the testimony of PW 3 head constable Munim Dutt is to be believed then he was towards the north of the T-junction. Since he was purportedly going towards NSCI club, obviously the incident happened behind him. It is quite probable, as suggested by the learned Counsel for the petitioner, that PW 3 never saw the impact but, on hearing the sound, looked in that direction and saw the result of the same and came to conclusion that the truck must have been driven at a high-speed. 9. PW 3 has further stated that the motorcycle was also going on Mathura Road and was near the T-point. He said that the truck driven by the petitioner "was also on Mathura Road which was coming towards the side of Nizamuddin". This description could mean several things. It could mean that the motorcycle and the truck were driving in the same direction. It could also mean that the motorcycle was on Mathura Road but going towards Sher Shah Road, in other words, crossing the path of the truck which was traveling along Mathura Road itself. It could also mean that the truck was moving in

the opposite direction. It is further stated that while the truck was so being driven at “a very high-speed”, it hit the motorcycle “which was in the process of crossing the road towards the side of Sher Shah Road”. The question that arises now is whether the motorcycle was crossing the road from Mathura road to Sher Shah Road or was coming from Sher Shah Road onto Mathura Road. If it was the former case then the motorcyclist would be clearly crossing the path of the truck being driven by the petitioner. If it was the latter case then the petitioner would have been going in the same direction as that of the motorcyclist but the motorcyclist would be merging into the path of the truck being driven by the petitioner. In both these circumstances the question that has to be asked is whether the motorcyclist was taking a turn without straying into the straight line path of the petitioner or not? If it is a case of the motorcyclist taking a turn from Mathura Road towards Sher Shah Road, a further question would have to be asked as to whether the motorcyclist was taking a turn on a green light or a red light and so too whether the petitioner was driving the tempo/truck crossing a green light or a red light? These questions remain unanswered. In fact, even the location of the point of impact is not clear because the site plan which was purportedly drawn up by the investigating officer has not been exhibited. It has not been exhibited because the investigating officer himself has not been examined as a witness. Normally the non-examination of an investigating officer would not be of much consequence unless it works to the prejudice of the accused. In this case the rough sketch which was prepared by the investigating officer and which is marked ‘A’ has not been introduced in evidence. If one were to examine the document marked ‘A’, one would see that it is at variance with the testimony of PW 3. Perhaps this is the reason why this rough sketch was not exhibited. Perhaps this is the reason as to why the investigating officer was not examined. This much must be said that had the rough sketch marked ‘A’ been introduced as an exhibit then it would have been detrimental to the case for the prosecution. Therefore, the non-examination of the investigating officer has certainly resulted in prejudice being caused to the petitioner. This being the case, the factum of non-examination of the investigating officer would have to be to the detriment of the prosecution case and be regarded as a circumstance in favor of the defense. 10. I now take up examination of the question of convicting a person merely on the allegation that he was driving a vehicle at a high-speed. In *State of Karnataka v. Satish* (supra) the Supreme Court was faced with a similar situation. The Court observed as under: – 3. Both the trial court and the appellate court held the respondent guilty for offences under Section 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 is meant by “high-speed” in the facts and circumstances of the case. In a criminal trial, the burden of proving everything essential to the establishment of the charge against an accused always rests on the prosecution and there is a presumption of innocence in favor 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. 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. The aforesaid observations of the Supreme Court make it more than clear that a mere allegation of high-speed would not tantamount to rashness or negligence. In the present case also, I find that apart from the allegation that the truck was being driven at a very high-speed there is nothing to indicate that the petitioner acted in a manner which could be regarded as rash or negligent. In any event there is no description or approximation of what was the speed at which the truck was being driven. The expression “high-speed” could range from 30 km per hour to over 100 km per hour. It is not even known as to what the speed limit on Mathura Road was and whether the petitioner was exceeding that speed limit. Therefore, in the absence of material facts it cannot be said, merely because there is an allegation that the petitioner was driving the truck at a high-speed, that the petitioner is guilty of a rash or negligent act. Clearly the petitioner cannot be convicted on the sole testimony of PW 3 which itself suffers from various ambiguities. 11. As observed in Badri Prasad (supra) the essential ingredients of Section 279 IPC are that there must be rash and negligent driving or riding on a public way and the act must be such so as to endanger human life or be likely to cause hurt or injury to any person. As regards the offence punishable under Section 304A IPC, it was observed that the point to be established is that the act of the accused was responsible for the death and that such act of the accused must have been rash and negligent although it did not amount to culpable homicide. As observed in Badri Prasad (supra), to establish the offence either under Section 279 or Section 304A, the commission of a rash and negligent act has to be proved. The only distinction being that in Section 279, rash and negligent act relates to the manner of

driving or riding on a public way while the offence under Section 304A extends to any rash and negligent act falling short of culpable homicide. As correctly observed by the learned judge, the rashness or negligence which needs to be established is something more than a mere error of judgment. There is also a distinction between rashness and negligence in that, rashness conveys the idea of doing a reckless act without considering any of its consequences whereas negligence connotes want of proper care. The case in *Badri Prasad* (supra) was one, where, akin to the facts of the present case, apart from a bare statement made by a witness that the vehicle was being driven at a high-speed, there was no attempt made to establish that there was any rash and/or negligent act on the part of the driver of the vehicle. In these circumstances the court observed:

– 6. In the case at hand, I find that except a bare statement made by PW 2 that the vehicle was being driven in a high-speed, no attempt has been made to establish that there was any rash and/or negligent act on the part of the driver-accused. Therefore in my considered opinion prosecution has failed to establish that death was occasioned by either rash and/or negligent driving of the vehicle or any negligent act of accused so as to attract the provisions of Section 279 and/or 304A IPC. Accordingly, conviction and consequential sentences are set aside and the accused is acquitted of the charges. Bail bonds be discharged. The criminal revision is allowed. 12. The present case is on a similar footing. Apart from the allegation of having driven the truck at a high-speed, which itself is an unclear expression, there is nothing on record to establish that the petitioner drove the vehicle rashly and/or negligently or did any act which would amount to a rash and/or negligent act. Clearly, therefore, the petitioner is not liable to be convicted under the provisions of Section 279 and 304A IPC. The courts below have committed a grave error in convicting the petitioner and this error needs to be corrected in revision. The impugned order is, therefore, liable to be set aside and the petitioner is entitled to an order of acquittal. 13. Before I part with this case I would like to make it known that I have come across various cases of a similar nature involving allegations of rash and/or negligent driving in which I find that the investigations carried out are below par. It is a well-known fact that road accidents are on the rise and many of these accidents result in fatalities. It is also becoming more and more apparent that the investigating agencies are not investigating such accidents in a proper and scientific manner. The result and consequence of which is that even those persons who might have been guilty for having committed offences under Sections 279/304A IPC are being acquitted on the basis of benefit of doubt or lack of evidence. This is not a very happy situation. In cases of road accidents particularly those which result in fatalities, the investigation should be carried out in a swift and scientific manner. 13.1. In most cases I find that the site plans are not produced. Even the site plan that is produced is of a very unsatisfactory nature. It is, therefore, imperative that the investigating officer should be provided with maps of the roads drawn to scale so that accurate site plans can be produced in evidence for the appreciation of courts. The exact point of impact as well as tyre skid marks and the point at which the vehicles come to rest after the collision should be demarcated clearly. The observations with regard to the length of the tyre

skid marks of the vehicles involved in the impact go a long way in indicating the speeds at which the vehicles were traveling. This would enable the courts to examine the evidence in a much more objective manner and the courts would not be faced with vague and subjective expressions such as “high-speed”. 13.2. The mechanical inspection reports that are prepared are also, I find, in a majority of cases, of a very superficial and cursory nature. The inspection ought to be carried out by qualified personnel who are able to indicate in their reports the exact physical conditions of the vehicles. They should be able to point out with exactitude the damage suffered by the vehicles as a result of the impact. The mechanical inspection report should indicate all the tell-tale signs of the collision such as the paint of one vehicle rubbing off on the other. It should also indicate as to whether the vehicles were mechanically sound or not prior to the impact so as to enable the court to arrive at a conclusion as to whether the collision took place due to human rashness or negligence or mechanical failure beyond human control. 13.3. As a rule, photographs ought to be taken not only of the vehicles involved in the collision but also of the site and surrounding areas so that the exact topography can be easily discerned by courts. 13.4. The prevalent weather conditions must be noted by the investigating officer. This would go to establish as to whether the road was slippery due to rain; whether there was poor visibility due to fog or mist etc. 13.5. Furthermore, the path of movement of the vehicles must be sought to be established in the course of investigation and not be left open to ambiguity and doubt as in the present case. 13.6. The drivers of the vehicle involved must also be subjected to tests to reveal whether they had consumed any intoxicants. 13.7. Proper investigation of such accidents would go a long way in aiding the criminal justice system in convicting those who are guilty and acquitting those who are innocent. A shoddy investigation will only point in one direction and that is in the acquittal of all whether they are guilty or whether they are innocent. Because, no criminal court would (and ought not to) convict any person merely on the basis of conjectures, assumptions, probabilities. All elements of subjectivity need to be eliminated and the investigation should be such that, when a charge sheet is filed, the court is presented with a case which when taken objectively would lead to the inescapable conclusion that a conviction is maintainable. 14. In view of the discussion above, this revision petition is allowed. The impugned order is set aside and the petitioner is acquitted. Since the petitioner is in custody, he is directed to be released forthwith. 15. A copy of this judgment be sent to the Commissioner of Police and Joint Commissioner of Police (Traffic) for appropriate directions to the officers who conduct investigations into traffic accidents so that proper investigations are carried out henceforth in Delhi.