HIGH COURT OF MADHYA PRADESH

BENCH AT GWALIOR

SINGLE BENCH

BEFORE JUSTICE S.K.AWASTHI

Cri. Revision No.1034/2014

Narayan Singh

Versus

State of Madhya Pradesh

Shri D.S.Kushwaha, learned counsel for the applicant.
Ms. Sudha Shrivastava, learned Panel Lawyer for the respondent/State.

O R D E R
(04.11.2016)

The applicant has preferred this revision application on feeling aggrieved by the order dated 26.12.2014 pronounced by IXth Additional Sessions Judge, Gwalior in Criminal Appeal No.432/2014, whereby the order of conviction passed by the Court of Judicial Magistrate First Class (JMFC) Gwalior on 31.10.2014 in Criminal Case No. 16086/2009 has been upheld.

2. The applicant has been convicted for the commission of offence punishable under Sections 279, 337 and 338 of Indian Penal Code, 1860 (for brevity, the 'IPC') and has been sentenced to undergo rigorous imprisonment of six months under Section 338 of IPC and fine Rs.500/-, with default stipulation of three months simple imprisonment. Further for the commission of offence punishable

under Section 337 (two counts) of IPC the applicant has been sentenced to undergo simple imprisonment for one month. The sentences have been ordered to run concurrently.

3. The relevant facts necessary for adjudicating the present application are that on 16.7.2009 an incident was reported at the Police Station Padav, District Gwalior against the driver (although not named) of the offending vehicle bearing registration No. MP07-R-2239 by the complainant Lala Khatik. In furtherance thereof a FIR bearing Crime No.380/2009 was registered for the offence punishable under Sections 279 and 337 of IPC. The complainant was accompanied by two other persons, namely, Kamal and Manoj. According to the FIR, all three were travelling by the offending vehicle boarded by them at the railway station for returning back to their home. However, the auto driver was driving the vehicle very fast and negligently, therefore all of them cautioned the driver to drive slowly but the driver did not hear their request and the vehicle got collided on the divider and was overturned. According to the complainant, the driver turned back the vehicle and thereafter ran away leaving out three of them at the place of incident.

4. All three of them were referred for medical examination to assess the nature of injuries sustained by them. Their medical examination was performed by Dr. O.P.S. Chouhan and observing the nature of injury to be grievous the accused was saddled with the offence punishable under Section 338 of IPC. Accordingly, the charge sheet was submitted before the competent court and the trial was commenced against the present applicant as the offending vehicle was registered in his name. The prosecution examined as many as 10 witnesses in order to establish the commission of offence against the present applicant. The first witness examined by the prosecution was one Mr. Rajveer Singh (PW.1), who was the passer-by at the place of incident and was waiting for an auto and was hit by the offending vehicle from behind causing injuries due to which he was taken to Civil Dispensary for the first aid but PW.1 did not support the prosecution story and was consequently declared hostile by the prosecution as he did not identify the vehicle. Similarly, another prosecution witness Chhuttan (PW.5) did not support the prosecution story and was declared hostile. The complainant Lala Khatik @ Balchandra (PW.6) also did not identify the present applicant, accordingly the

prosecution sought permission from the trial court to pose leading questions to PW.6, in which he was strict to the statement that he does not remember who was the driver. Similarly another injured witness Manoj Khatik (PW.7) also did not identify the driver of the vehicle and was declared hostile. Apart from these witnesses, the statements of Investigating Officer Shivraj Singh (PW.8) and Dr. O.P.S. Chouhan (PW.9), who had performed the medical examination of injured, were recorded. The basis on which the offence punishable under Section 338 IPC was added is the injuries sustained by Kamal (PW.2), who had sustained fracture on both the legs.

5. It is borne out from the record that the trial court has convicted the present applicant primarily on the testimony of Kamal (PW.2), who had identified the applicant as the driver of the offending vehicle and had used phrase “rash and negligent” in respect of the conduct of the driver in his examination-in-chief. Accordingly, the trial court in its judgment dated 31.10.2014 has recorded conclusion in paragraph 11 that the prosecution has been able to prove that the injured witness sustained injuries on account of the accident which had occurred due to negligent act of the present

applicant while driving the offending vehicle.

6. The judgment dated 31.10.2014 was called in question by filing an appeal before the Court of IXth Additional Sessions Judge, Gwalior which was registered as Criminal Appeal No.432/2014. The Appellate Court did not interfere with the order of conviction and repelled the contention of the present applicant that his identity as a driver of the offending vehicle at the time of accident has not been established by the prosecution and in fact sole injured witness Kamal (PW.2), who had supported the prosecution version, has incorrectly named the present applicant at the time of recording of examination-in-chief. The Appellate Court was of the opinion that incorrect mentioning of name is not sufficient to conclude that the identity of the present applicant as a driver is not proved because further reading of the statement of Kamal (PW.2) clearly shows the identity by pointing out with the present accused/ applicant as the driver of the offending vehicle, this qualifies as the indoc identification of the accused.

7. The present revision arises out of rejection of the appeal vide judgment dated 26.12.2014 by Ninth Additional Sessions Judge, Gwalior.

8. It is contended on behalf of the applicant that

the trial court as well as appellate court ignored the fact that the prosecution has miserably failed in satisfying the ingredients of the offences charged against the present applicant under which conviction has been made. In order to substantiate this contention, learned counsel for the applicant has relied on the statement of Kamal (PW.2), which is silent about the degree of negligence by not clearly stating the approximate speed at which the vehicle was being plied. Further, learned counsel for the applicant relied on the judgment pronounced by the Apex Court in the case of **Sushil Ansal vs. State through Central Bureau of Investigation, (2014) 6 SCC 173,** wherein the Apex Court has highlighted the difference in degree of negligence to be established in civil law vis-a-vis criminal law and has held that in order to establish the charge of negligence in criminal law the degree of negligence has to be “gross” even though the parliament has not used the word “gross” under Sections 336 to 338 of IPC. However, the standard of proof as required is higher in magnitude than in civil law. Accordingly, it is submitted that the prosecution has not met out the standard of proof required for conduction of an offence charged against the applicant. Further, it is contended that the remaining injured witnesses Lala

Khatik (PW.6) and Manoj Khatik (PW.7) have not identified the present applicant as the driver of the offending vehicle. This omission on their part is significant because Lala Khatik (PW.6) was the complainant, based on which the FIR was registered and since Kamal (PW.2) was grievously injured having suffered fractures of both legs was not in fit state of mind to have identified the driver of the offending vehicle by face in the night at around 1.30 o'clock, whereas Lala Khatik (PW.6) and Manoj Khatik (PW.7) had sustained less injuries and could have identified the driver in comparison to Kamal (PW.2), therefore, the identification by PW.2 is not sufficient for convicting the present applicant.

9. Lastly, it has been contended that the present applicant has been named as an accused only due to the fact that the offending vehicle was registered in his name.

10. Learned Panel Lawyer for the State has supported the judgment pronounced by both the courts below and contended that the concurrent findings cannot be interfered in revisional jurisdiction in which the scope of conclusion is limited.

11. Considered the rival contentions made on behalf of both the parties.

12. I have given anxious consideration to the contentions raised by learned counsel for the applicant. The first contention of the applicant that the prosecution has failed to establish the conduct of the applicant to be “gross”, to some extent is worth consideration as the perusal of examination-in-chief of Kamal (PW.2) does not reveal extent of speed at which the offending vehicle was being plied. Further, the term “gross negligence” used by the Hon'ble Supreme Court in the case of **Sushil Ansal (supra)** does have applicability to the facts of the present case as merely by using the term “negligent” in the statement cannot be made basis for conviction. Moreso, the independent witnesses produced by the prosecution did not support the conclusion and did not point out that plying of vehicle was by the applicant and was at a high speed. Additionally the other two injured witnesses, Lala Khatik (PW.6) and Manoj Khatik (PW.7) have also put a dent in the prosecution story which, in my opinion, cannot be brushed aside.

13. This Court in the case of **Arvind Singh Rajput vs. State of MP, I.L.R. [2011] MP 2904,** observed in the following manner:-

> *"7. Before proceeding further I would like to mention here that in order to prove the speed of the alleged vehicle no technical and scientific investigation like the tyre*

> *makes or its photo graph were collected by the investigating agency otherwise in the light of such technical and scientific evidence considering the testimonies of aforesaid witnesses the exact or approximate speed and the factum of negligence on the part of the applicant could have been ascertained. In the lack of such evidence mere on the vague depositions of the above mentioned witnesses the speed of the vehicle could not be deemed to be rash and negligent. In fact in the lack of any specific evidence regarding speed in the deposition of said witnesses the same have lost their values and in such premises no inference could be drawn against the applicant to hold the alleged vehicle was driven by him in rash and negligent manner. My aforesaid view is also fortified by the principle laid down by the Apex Court in the matter of Nageshwar Shrikrishna Choubey vs. State of Maharashtra, reported in 1973 MPLJ 240."*

14. Now coming to consideration of the another question whether mere on the aforesaid deposition of the said witnesses, the speed of offending vehicle could be held to be high speed when none of the said examined witnesses has stated the exact or approximate speed of the auto.

15. On examining the case at hand, in view of the aforesaid principle laid down by the Apex Court, the same is applicable as in this case also the prosecution has not made any attempt to prove the exact speed from any of the witnesses. In such premises, mere on the basis of the version of the witnesses stating the high speed or the allegation of

negligent driving of the offending vehicle, the person like applicant cannot be convicted.

16. The above quoted portion of the judgment in **Arvind Singh Rajput (supra)**, pronounced by a Coordinate Bench of this Court is squarely applicable to the facts of the present case, as in this case also the prosecution has not even attempted to indicate the exact or approximate speed of the offending vehicle. Moreover, no attempt has been made to collect scientific or technical evidence in the light of observations recorded in the case of **Arvind Kumar Rajput (supra).**

17. Further the test which has been applied by the Apex Court to arrive at a conclusion that the conduct was negligent or not is a reasonable men-test, which means that in the opinion of independent person in the same circumstances the conduct or the act was negligent, however due to hostile independent witnesses the test is not fulfilled.

18. In the light of aforesaid discussion, I do not feel it necessary to discuss the other contentions raised by learned counsel for the applicant.

19. With respect to the submission of learned Panel Lawyer for the respondent-State, it is true observed that the Court in exercise of revisional jurisdiction is not drownded from its power to upset the wrong in the interest of justice.

20. Accordingly, I conclude that the courts below did

not examine the case in the light of discussion made above and the basic ingredients of the offence in which conviction has been made are not satisfied.

21. Consequently, the judgment dated 26.12.2014 passed in Criminal Appeal No.432/2014 by IXth Additional Sessions Judge, Gwalior and the judgment dated 31.10.2014 passed in Criminal Case No. 16086/2009 by the Judicial Magistrate First Class (JMFC) Gwalior are set aside. The applicant is acquitted from the charges levelled against him under Sections 279, 337 and 338, IPC. The bail bonds furnished by him stands discharged.

22. Revision is accordingly allowed.

(S.K.Awasthi)
Judge.

(yogesh)