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

Reserved on: 17th May, 2025
Pronounced on: 1st August, 2025

\+ CRL.REV.P. 763/2016

NUTAN TYAGI .....Petitioner
Through: Mr. Pawan Kumar Sharma, Adv.

Versus

STATE .....Respondent
Through: Mr. Pardeep Gahlot, APP for the State.
ASI Om Prakash, P.S. Sarai Rohilla.

CORAM:
HON'BLE MR. JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA, J.

1. The present petition under Sections 397 and 401 read with Section 482 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.') seeks the following prayers:-

> "1. Set Aside The Impugned Judgment And Order Dated 30.9.2016 & 08.11.2016 Passed By Ms. Poonam Chaudhary, Ld. Special Judge-07 (Central) (PC Act Cases of ACB, GNCTD) , Tis Hazari Courts, Delhi in appeal bearing no. 08/2016 against the judgment and order of conviction passed by Ld. Metropolitan Magistrate-04, (Central-District) Tis Hazari, Delhi On 23.09.2015 and 14.08.2016, in Case FIR No. 499/2004 U/S 279/304a IPC, P.S. Sarai Rohilla, Delhi Whereby Ld. Appellate Court Confirm The Order Of The Conviction And Convicted The Petitioner For The Offence Under

Section 279/304A IPC and modified the sentence of S.I. Of 2 month for the offence U/S 279 IPC and S.I. Of 2 month for the offence U/S 304A IPC;
ii. The petitioner be acquitted from the Charges U/s 279/304A IPC.
iii. Any other relief or direction, which your lordships may deem fit and proper be also passed in favour of the petitioner in the facts and circumstances of the present case."

BACKGROUND

2. The case of the prosecution in brief is as follows:-

2.1 On 26.09.2004, upon receiving DD No. 18 PP Inderlok, ASI Mohd. Rajiq along with Constable Ashok Kumar reached at the spot, *i.e.,* Red Light near Zakhira Flyover Chowk and found that one Bus bearing registration No. DL1P7563 and scooter No. DL8SM7545 were lying in an accidental condition and the injured person namely, Raisuddin, was already taken to the Maharaja Agrasen Hospital, Punjabi Bagh. Thereafter, ASI Mohd. Rajiq left Constable Ashok Kumar at the spot and procured the MLC No. 816/2004 (Ex. PW8/A) *qua* the injured Raisuddin, S/o Sh. Inayat Ali, wherein, the doctor had made his observation regarding the injured as "Brought Dead". In the Maharaja Agrasen Hospital itself, one person, namely, Tej Bahadur S/o Sh. Mahavir was stated to be the eye witness of the accident. The Investigating Officer/ASI Mohd. Rajiq recorded the statement of the complainant Tej Bahadur, who stated that on the date of the incident at about 05:25 P.M. when he was going towards *Bhusa Mandi* from his house, at about 05:40 P.M. he reached at red light under Zakhira *Pul*, and one bus bearing No. DL1P7563 was coming from high speed and suddenly took a turn from left side and after crossing the red light, it had hit one scooter due to which the driver of scooter

came under the bus. The complainant took out the scooter and scooter rider and saw that the injured was his neighbour and his name is Raisuddin. The complainant immediately put the injured in three wheeler and reached at the Maharaja Agrasen Hospital where the doctor observed that the injured person was "brought dead". The accident has been caused due to driving of bus with high speed and negligence by the present petitioner. On the statement of the complainant, a *ruqqa* (Ex. PW/9-B) was prepared by the Investigating Officer and the case under Sections 279/304A of the Indian Penal Code, 1860 (for short, 'IPC') was registered. Thereafter, the Investigating Officer prepared the site plan bearing Ex. PW9/C. Subsequently, the offending bus bearing registration No. DL1P7563 and the two wheeler scooter bearing registration No. DL8SM7545 were seized. Further, the Postmortem No. 1577 of the deceased Raisuddin was conducted on 27.09.2004 at Aruna Asaf Ali Hospital, Delhi *vide* Ex. PW1/A. Statement of witnesses in the present case were recorded and the accidental vehicles were mechanically inspected. After the investigation was complete in the present case, the chargesheet was filed before the Court of competent jurisdiction for the offences punishable under Sections 279/304A of the IPC.

2.2 After summoning of the petitioner/accused, and after compliance of the provisions under Section 207 of Cr.P.C., notice was framed against the petitioner on 06.02.2006 under Sections 279/304A of the IPC to which the petitioner/accused did not plead guilty and claimed trial.

2.3 After examining the statements as well as the evidence placed on record, the learned Metropolitan Magistrate (Central)-04, Tis Hazari Courts, Delhi passed the impugned judgment of conviction dated 23.09.2015 and order on sentence dated 14.05.2016, thereby convicting the present petitioner for the offences punishable under Sections 279/304A of the IPC. *Vide* the order on sentence dated 14.05.2016, the petitioner was sentenced to undergo simple imprisonment for a period of six months for the offence punishable under Section 279 of the IPC and he was further sentenced to undergo simple imprisonment for a period of two years for the offence punishable under Section 304A of the IPC.

2.4 By way of Criminal Appeal No. 08/2016, the aforesaid judgment of conviction dated 23.09.2015 and order on sentence dated 14.05.2016 passed by the learned Trial Court were assailed by the present petitioner before the Court of learned Special Judge-07 (Central), (PC Act Cases of ACB, GNCTD), Delhi which was dismissed *vide* the impugned judgement dated 30.09.2016. Hence, the present petition has been filed.

SUBMSSIONS ON BEHALF OF THE PETITONER

3. Learned counsel appearing on behalf of the petitioner submitted that learned Trial Court as well as Appellate Court did not appreciate the fact that the complainant in the present case who is stated to be the eye-witness, namely Tej Bahadur was never examined. Thus, according to the learned counsel appearing on behalf of the petitioner the fact of rash and negligent

driving by act was never proved by the prosecution. It is further submitted that Dinesh Kumar (PW-11), who had taken the photographs has also resiled from his statement and denied the fact that he had taken any photographs of the spot at the instance of the Investigating Officer. It is submitted that various discrepancies in the testimonies of PW-9 (ASI Mohd. Rajiq) and PW-5 (Ct. Ashok Kumar) as well as PW-3 (ASI Rajinder Singh) were not appreciated by the learned Trial Court as well as the learned Appellate Court.

3.1 It is submitted that learned Trial Court as well as Appellate Court relied upon the evidence of witnesses, who were not present at the spot and only on the basis of mechanical inspection of the offending bus as well the photographs of the incident, the guilt of the present petitioner was assumed.

SUBMISSIONS ON BEHALF OF THE PROSECUTION

4. Learned APP on behalf of the State submitted that by way of the present petition, the petitioner is challenging two concurrent findings of the learned Trial Court and the learned Appellate Court. It is pointed out that to exercise the jurisdiction of this Court under these circumstances is very limited and the petitioner has to show illegality or perversity in the judgment in order to interfere with the concurrent findings. It is submitted that the owner of the offending bus, *i.e.,* PW-2 (Sh. Surender Singh) had given a statement that on the date and time of the accident the petitioner was driving the bus. Coupled with his testimony, the mechanical inspection report (Ex.PW-7/B) also shows that the accident had occurred and, therefore, the

learned Trial Court and learned Appellate Court have rightly found the petitioner guilty for the offences for which he has been convicted.

ANALYSIS AND FINDINGS

5. Admittedly, the complainant of the present FIR, Tej Bahadur, who was also the eye witness and had given the statement that the offending bus was coming at a high speed and suddenly took a turn from left side and after crossing the red light, it had hit the scooter of the deceased on which he was riding after which he came under the bus. The learned Trial Court while recording the fact that the eye witness has not been examined observed as under:-

> "25. It is observed by this court that eye witness/Tej Bahadur already got expired on 01.12.2006 at Dr. Baba Saheb Ambedkar Hospital vide death certificate registered on 06.12.2006 so complainant Tej Bahadur was not produced by the prosecution as a witness in the witness box. As PW9 was/Si Mohd. Rajiq was the police official who received DD No. 18A dated .26.09.2004 and reached at the spot of offence. This PW9 met the eye witness/complainant Tej Bahadur and recorded his oral statement/complaint in his own handwriting and has also obtained the signature of complainant Tej Bahadur Mishra on the complaint and further attested the signature of complainant Tej Bahdadur Mishra by putting his own signature adjacent to signature of complainant Tej Bahadur Mishra so it cannot be said that there is nothing on record as a complaint which cannot be proved by the prosecution.
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> **Section 60 of the Indian Evidence Act 1872 says that oral evidence must be direct.**

Section 61 of the Indian Evidence Act 1872 says that the contents of document may be proved either by primary or secondary evidence.

Section 63 (5) of the Indian Evidence Act 1872 read as under:-
The Secondary evidence means and include (5) Oral accounts of the contents of the document given by / some person who has himself seen it.

Section 67 of the Indian Evidence Act 1872 read as under:-
Proof of signature and handwriting of person alleged to have signed or written document produced. - If a document is alleged to be signed or to have been written wholly or in pan by any person, the signature or the handwriting of so much of the document as is alleged to be in that persons handwriting must be proved to be in his handwriting.

In the case titled as "Janki Narayan Bhoir Vs. Narayan Namdeo Kadam" AIR 2003 SC 761 it was held by Hon'ble Apex Court that if the attesting witness is alive and capable of giving the evidence and subject to process of court the documents attested by him can be used in evidence.

In view of conjoint reading of aforementioned section, it is clear that the contents of document can be proved by the witness who has attested the document or signature of the executant and can prove that much part which contain the signature or writing in the document which was made in front of attesting witness. As PW9 himself has heard and recorded the statement of complainant Tej Bahadur and has attested the signature of complainant Tej Bahadur by counter putting his signatures at Point A, hence, PW9 has successfully proved the complaint of complainant Tej Bahadur as EX.PW9/A.

26. It is observed by this court that owner of offending bus i.e. Sh. Surender Singh has specifically deposed that at the time of accident accused - Nootan Tyagi was driving the offending bus

bearing registration No. DL1P7563 and PW2 has also correctly identified the accused in the court. It is also observed that PW3 has specified that he handed over the copy of DD No. 18 to ASI Mohd. Rajiq for the investigation and when PW5/Ct. Ashok Kumar also reached at the spot along with PW9/ASI Mohd. Rajiq he found the offending bus in accidental condition for which the private photographer clicked the photographs of. the site and the victim was declared brought dead by the hospital and eye witness namely Lekh Bahadur was examined at the spot. PW9 has also specifically deposed that he went to spot along with complainant where he prepared rukka on the statement of complainant at which Ct. Ashok got the FIR registered so it is clear that the accident took place while accused was driving the offending bus and accused was caught by the public at the spot and IO along with Ct. Ashok also saw the aftermaths of accident when they reached at the spot. Complainant Tej Bahadur narrated the entire incident to PW9 and on the basis of same narration, PW9 prepared the rukka but Ld. Defence Counsel not cross examined the PW9 on the point of narration by eye witness Tej Bahadur, whereas, the prosecution has successfully proved that statement Ex./PW9/A is of complainant Tej Bahadur recorded by PW9.

27. Complainant - Tej Bahadur has mentioned the factum of accident in his complaint which has been proved by PW9 as EX.PW9/A. The nature of injuries was well described by the doctor-in the MLC thereby stating that all the injuries were ante mortem in nature caused by blunt force impact due to being involved in vehicular accident and death was due to craneo cerebral injuries and also in view of postmortem report and MLC, it is established that the injuries to person of deceased were caused at the time when person was alive and due to those ante mortem injuries caused by blunt forced due to vehicular accident the person got expired.

28. It is also observed that the 10 has seized the offending vehicle and two wheeler scooter vide seizure memo Ex.PW5/A and Ex.PW5/B respectively at the spot of accident and both the vehicles were in accidental condition. The same fact can also be observed from the photographs of the offending bus in which the-two wheeler scooter bearing registration No. DL8SM7545 is lying under the front side of offending bu. The mechanical inspection of offending bus

> and accidental two wheeler scooter was conducted by PW7 and PW7 has successfully proved the mechanical inspection report as Ex.PW7/A and Ex. PW7/B where PW7 has given the observation and opinion for offending bus DL1P7563 that the fresh damages has been seen, front bumber dented and scratched from lower side.
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> 29. It is also observed that PW1 has proved the postmortem postmortem report the doctor has opined that all the injures are ante mortem in nature caused by blunt force impact due to being involved in vehicular accident. The death is due to cranio cerebral injuries which happen at about 18 & 1/2 hours before conducting postmortem. In view of above, it is beyond reasonable doubt that accused Nootan Tyagi was driving the offending Bus bearing registration NO. DL1P7563 and due to his rash and negligent act the accused has caused the accident consequently deceased received injuries and succumbed due to those injuries and accused - Nootan Tyagi has caused the death of deceased Rahisuddin".

5.1 It is thus, noted that learned Trial Court has relied upon the provisions of secondary evidence of the Indian Evidence Act, 1872 in order to prove the complaint written by the said witness, Tej Bahadur, who was never examined in the Court. It is further noted that the learned Trial Court while convicting the present petitioner has relied upon other circumstances, which showed that the petitioner was driving the offending bus on the date and time of the incident, which caused the death of the deceased.

5.2 The learned Appellate Court while dismissing the appeal on behalf of the petitioner, wherein, the same arguments were addressed to the effect that the main eye witness in the case who had to prove that the petitioner was driving the bus in a rash and negligent manner was not examined, observed and held as under:-

"23. The submissions of Ld. counsel for appellant was that the factum of rash and negligent driving by the appellant causing death of the deceased had not been proved by the prosecution as the eye witness was not examined.

24. However, Ld. Addl. PP submitted that in this regard 10 PW- 9 had deposed that he had met an eye witness Sh. Tej Bahadur in the hospital and recorded his statement Ex. PW9/A wherein the complainant had stated that while he was going towards Bhusa Mandi at about 5.40 pm, he saw bus No. DLIP7563 which was being driven in rash and negligent manner crossing the red light and hitting a scooter No. DL8SM7545 as a result of which the scooter rider went under the bus. The complainant had also stated that when the injured was removed, it was revealed that he was his neighbour. Complainant also stated that he and one Kamruddin removed the injured to the hospital where he was declared brought dead. Ld. Addl. PP further contended that Ld. Trial Court relying on ***AIR 2003 SC 761 Janki Narayan Bhoir Vs Narender Namdev Kadam*** held that a document could be proved by the witness who attested the document or signatures of the executant. It was contended that as IO had heard and recorded the statement of complainant as well as attested the signatures of complainant, IO had successfully proved the complaint.

25. The thrust of the arguments of the Ld. counsel for the appellant was that as the complainant was not examined, the complaint cannot be said to have been proved in accordance with provisions of Evidence Act. It was further submitted that Ld. trial court wrongly appreciated Section 60, 61, 63 and 67 of the Indian evidence Act regarding proof of secondary evidence relying upon ***Janki Narayan Bhoir Vs Narender Namdev Kadam AIR 2003 SC 761*** wherein it has been held that if attesting witness is alive and is examined, the documents attested by him can be used in evidence.

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27. However, I am of the view that the judgment relied upon by Ld. Trial Court related to how a document required by law to be attested could be proved. The case relied upon related to due execution of a Will and it was held the person propounding that the Will had to

prove that the will was validly executed and at least one attesting witness had to be examined for proving the due execution of the will. In my view the above judgment is not squarely applicable to the facts and circumstances of the present case.

28. It is to be noted that the rukka was prepared on the statement of the complainant Tej Bahadur on 26.09.2004 and FIR was registered on the same day without any delay. The alleged history of injured recorded in the MLC Ex. PW8/A was that he had sustained injuries in an accident with bus while he was going on his two wheeler scooter under Zakhira fly over and was declared brought dead. Thus, the version of prosecution being concocted has been ruled out.

29. It was next contended by Ld. counsel for appellant that statement made to a police officer during investigation cannot be used to corroborate the testimony of a witness because of the clear interdict contained in section 162 Cr. P. C and placed reliance upon ***Ramprasad Vs. State of Maharashtra AIR 1999 SC 1969*** wherein it has been held as under:-

> ***Section 157 of the Evidence Act permits proof of any former statement made by a witness relating to the same fact before " any authority legally competent to investigate the fact" but its use is limited to corroboration of the testimony of such witness. Though a police officer is legally competent to investigate, any statement made to him during such investigation cannot be used to corroborate the testimony of a witness because of the clear interdict contained in Section 162 of the Code.***

30. Section 162 Cr. P. C which is relevant is as under:-

> ***Section 162 Cr. P. C - Statements to police not to be signed - Use of statements in evidence. - (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry***

or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act. Explanation. - An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.

31. Ld. counsel for the accused/appellant contended that since the eye witness Tej Bahadur was not examined as he had died, his statement made to 10 PW-9 during investigation could not be used for corroboration in view of the section 162 Cr. P. C. It was further submitted that Ld. Trial Court erred in holding that as IO/PW-9 had proved the complaint Ex. PW9/A relying upon the decision of ***Janki Narayan Bhoir Vs Narender Namdev Kadam AIR 2003 SC 761.***

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43. It is to be noted that on the basis of the mechanical inspection report it has been proved that scooter was ahead of the offending bus when the accident occurred. It is also pertinent to note that no question was put in the cross examination of 10 as regards the fact

that the offending vehicle was behind the two wheeler scooter. In the said facts and circumstances and the mechanical inspection report according to which front side bumper of bus was found dented and there were scratches on the front lower side of the bus whereas the scooter was found damaged from the right side its front plastic body, number plate damaged, tail lights damaged and rear wheel of scooter were broken. The negligence of the accused is apparent and rash and negligent driving can be gathered from the attendant circumstances of the present case.

44. The condition necessary to attract section 279 IPC are that vehicle was being driven in rash and negligent manner on a public way and such rash and negligent driving should be such as to endanger human life. Negligence means omissions to do something which a reasonable and prudent person guided by the considerations which ordinarily regulate human affairs would do or doing something which a prudent and reasonable persons guided by similar considerations would not do.

45. It is to be noted that the courts have applied the principle of res ipsa loquitur in cases where no direct evidence was brought on record. In such a case, the mere fact of the accident is prima-facie evidence of such negligible. Section 304-A IPC applies to cases where there is no intention to cause death and no knowledge that the act done in all probability will cause death. Section 304A thus applies only to such acts which are rash and negligent and are directly the cause of death of another person. Ld. Addl. PP in support of his contention that res ipsa loquitur be invoked to presume rashness and negligence placed reliance on ***Criminal Appeal No.1838/09 SC Ravi Kapoor Vs State of Rajasthan decided on 16.08.2012.*** In this case it was held that the accident must be proved by proper and cogent evidence or it should be an admitted fact before the principle of res-ipsa loquitur can be applied. In this regard, it is to be noted that the appellant did not challenge the testimony of PW-5 who stated that when he reached the spot he found a bus and scooter lying in accidental condition at the spot and that accused was handed over to him at the spot by one Javed, as the person who was driver of the offending bus. The appellant did not dispute the factum of accident having been caused by the offending bus in the cross examination of the 10, neither did appellant cross

examine the 10 regarding the fact that the appellant was apprehended by public persons at the spot when the 10 reached the spot. Thus, the factum of accident having been established with the aid of the mechanical inspection report, the dictum of res-ipsa loquitur is applicable. Thus, it has been established by the prosecution that it was the offending bus which was behind the scooter and hit the two wheeler scooter from behind while being driving rashly and negligently so as to endanger to human life."

6. The learned Appellate Court relied upon the judgment of Hon'ble Supreme Court in **Ravi Kapur v. State of Rajasthan, (2012) 9 SCC 284,** to apply the principle of *res ipsa loquitur* to the facts of the present case. In the said judgment it was observed and held as under: -

"(A) Rash and negligent driving

12. Rash and negligent driving has to be examined in the light of the facts and circumstances of a given case. It is a fact incapable of being construed or seen in isolation. It must be examined in light of the attendant circumstances. A person who drives a vehicle on the road is liable to be held responsible for the act as well as for the result. It may not be always possible to determine with reference to the speed of a vehicle whether a person was driving rashly and negligently. Both these acts presuppose an abnormal conduct. Even when one is driving a vehicle at a slow speed but recklessly and negligently, it would amount to "rash and negligent driving" within the meaning of the language of Section 279 IPC. That is why the legislature in its wisdom has used the words "manner so rash or negligent as to endanger human life". The preliminary conditions, thus, are that (*a*) it is the manner in which the vehicle is driven; (*b*) it be driven either rashly or negligently; and (*c*) such rash or negligent driving should be such as to endanger human life. Once these ingredients are satisfied, the penalty contemplated under Section 279 IPC is attracted.

13. "Negligence" means omission to do something which a reasonable and prudent person guided by the considerations which

ordinarily regulate human affairs would do or doing something which a prudent and reasonable person guided by similar considerations would not do. Negligence is not an absolute term but is a relative one; it is rather a comparative term. It is difficult to state with precision any mathematically exact formula by which negligence or lack of it can be infallibly measured in a given case. Whether there exists negligence per se or the course of conduct amounts to negligence will normally depend upon the attending and surrounding facts and circumstances which have to be taken into consideration by the court. In a given case, even not doing what one was ought to do can constitute negligence.

14. The court has to adopt another parameter i.e. "reasonable care" in determining the question of negligence or contributory negligence. The doctrine of reasonable care imposes an obligation or a duty upon a person (for example a driver) to care for the pedestrian on the road and this duty attains a higher degree when the pedestrians happen to be children of tender years. It is axiomatic to say that while driving a vehicle on a public way, there is an implicit duty cast on the drivers to see that their driving does not endanger the life of the right users of the road, may be either vehicular users or pedestrians. They are expected to take sufficient care to avoid danger to others.

15. The other principle that is pressed in aid by the courts in such cases is the doctrine of *res ipsa loquitur*. This doctrine serves two purposes — one that an accident may by its nature be more consistent with its being caused by negligence for which the opposite party is responsible than by any other causes and that in such a case, the mere fact of the accident is prima facie evidence of such negligence. Secondly, it is to avoid hardship in cases where the claimant is able to prove the accident but cannot prove how the accident occurred. The courts have also applied the principle of res ipsa loquitur in cases where no direct evidence was brought on record. The Act itself contains a provision which concerns with the consequences of driving dangerously alike the provision in IPC that the vehicle is driven in a manner dangerous to public life. Where a person does such an offence he is punished as per the provisions of Section 184 of the Act. The courts have also taken the concept of "culpable rashness" and "culpable negligence" into consideration in cases of road accidents. "Culpable rashness" is acting with the consciousness that mischievous and illegal consequences may

follow but with the hope that they will not and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite consciousness (luxuria). "Culpable negligence" is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him and that if he had, he would have had the consciousness. The imputability arises from the neglect of civic duty of circumspection. In such a case the mere fact of accident is prima facie evidence of such negligence. This maxim suggests that on the circumstances of a given case the res speaks and is eloquent because the facts stand unexplained, with the result that the natural and reasonable inference from the facts, not a conjectural inference, shows that the act is attributable to some person's negligent conduct. [Ref. Justice Rajesh Tandon's *An Exhaustive Commentary on Motor Vehicles Act, 1988* (1st Edn., 2010).]

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(B) Attendant circumstances and inference of rash and negligent driving

20 [Ed.: Para 20 corrected vide Official Corrigendum No. F.3/Ed.B.J./53/2012 dated 5-9-2012.] . In light of the above, now we have to examine if negligence in the case of an accident can be gathered from the attendant circumstances. We have already held that the doctrine of res ipsa loquitur is equally applicable to the cases of accident and not merely to the civil jurisprudence. Thus, these principles can equally be extended to criminal cases provided the attendant circumstances and basic facts are proved. It may also be noticed that either the accident must be proved by proper and cogent evidence or it should be an admitted fact before this principle can be applied. This doctrine comes to aid at a subsequent stage where it is not clear as to how and due to whose negligence the accident occurred. The factum of accident having been established, the court with the aid of proper evidence may take assistance of the attendant circumstances and apply the doctrine of res ipsa loquitur. The mere fact of occurrence of an accident does not necessarily imply that it must be owed to someone's negligence. In cases where negligence is the primary cause, it may not always be that direct evidence to prove it exists. In such cases, the circumstantial evidence may be adduced to prove negligence. Circumstantial evidence consists of facts that necessarily point to negligence as a logical conclusion rather than

providing an outright demonstration thereof. Elements of this doctrine may be stated as:

- The event would not have occurred but for someone's negligence.
- The evidence on record rules out the possibility that actions of the victim or some third party could be the reason behind the event.
- The accused was negligent and owed a duty of care towards the victim.

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28. According to the learned counsel appearing for the appellant, there are contradictions in the statements of these witnesses and the site plan, Ext. P-29/P-3 does not exhibit any negligence on behalf of the appellant. The appellant was not driving the vehicle involved in the accident and as such he is entitled to acquittal.

29. We are not impressed with this contention. Firstly, the bus was seized vide seizure memo, Ext. P-31 and was later on given on superdari to the owner of the bus i.e. the accused. This bus was certainly involved in the accident, in fact, there is no serious dispute before us that the accident between jeep No. RNA 638 and bus No. RNA 339 took place at the place of occurrence. If one examines Ext. P-29/P-3, it is clear that it was a narrow road which was about 18 ft in width and the accident had occurred at a turning point of the road. The accident took place at Point 8. The jeep in which a number of people died remained stationed at or around Point XA while Point 8 shows a mud divider (dam-bandh), the accident had taken place at Point 1 and Point 8, where the bus was parked, was at a distance which clearly show that the bus had been moved after the accident. Applying the principle of res ipsa loquitur, it can safely be inferred that it was a serious accident that occurred at a turning point in which a number of people had died. After the accident, the bus driver moved the bus away to a different point. If what is submitted on behalf of the appellant had even an iota of truth in it, the most appropriate conduct of the bus driver would have been to leave the vehicle at the place of accident to show that he was on the extreme left side of the road (his proper side for driving) and the jeep which was trying to overtake the other vehicle had come on the wrong side of the road resulting in the accident. This would have been a very material circumstance and relevant conduct of the driver.

> **30.** All the witnesses, PW 1, PW 2 and PW 4, have so stated. There is consistency in the statements of the witnesses that the accused was driving the vehicle and after parking the vehicle at a place away from the place of occurrence, he had run away. We have no reason to disbelieve the statements of these witnesses which are fully supported by the documentary evidence, Ext. P-2, to which there was hardly any challenge during the cross-examination of PW 11. We are unable to notice any serious or material contradiction in the statements of the prosecution witnesses much less in Ext. P-2, the parcha statement of PW 2. Minor variations are bound to occur in the statements of the witnesses when their statements are recorded after a considerable lapse from the date of occurrence. The Court can also not ignore the fact that these witnesses are not very educated persons. The truthfulness of the witnesses is also demonstrated from the fact that PW 1, even in her examination-in-chief, stated that she was unconscious and did not see the driver. Nothing prevented her from making a statement that she had actually seen the accused. Thus, we have no hesitation in holding that the three witnesses i.e. PW 1, PW 2 and PW 4 have given a correct eye account of the accident. We find their statements worthy of credence and there is no occasion for the Court to disbelieve these witnesses."

7. In the aforesaid judgment, as has been observed, there were statements of witnesses who had witnessed the accident and defence of the driver therein was that he was not driving the offending vehicle. In the facts of the present case, there is no such witness, who has stated that the vehicle being driven by the petitioner was in a rash and negligent manner. For the purposes of Section 304A of the IPC, the prosecution has to establish both rashness and negligence on the part of the accused. To bring the accident under the category of culpable rashness, the prosecution has to discharge initial burden that the accident was caused on account of rash and negligent conduct of the petitioner. As noted hereinbefore, the prosecution case against the petitioner

was that he was driving the bus at a high speed and suddenly it took a turn from left side and after crossing the red light, it hit the scooter, due to which the deceased who was driving the scooter came under the bus. This was witnessed by the complainant, Tej Bahadur, who was never examined by the prosecution.

8. At this stage, it is apposite to refer to Sections 32 and 33 of the Indian Evidence Act, 1872, (for short, 'IEA') which read as under: -

"STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES

32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant. — Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases: —

(1) When it relates to cause of death.—When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

(2) or is made in course of business.—When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.

(3) or against interest of maker.—When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

(4) or gives opinion as to public right or custom, or matters of general interest.—When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.

(5) or relates to existence of relationship.—When the statement relates to the existence of any relationship [1] [by blood, marriage or adoption] between persons as to whose relationship [1] [by blood, marriage or adoption] the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

(6) or is made in will or deed relating to family affairs.—When the statement relates to the existence of any relationship [1] [by blood, marriage or adoption] between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

(7) or in document relating to transaction mentioned in section 13, clause (a).—When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (a).

(8) or is made by several persons and expresses feelings relevant to matter in question.—When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

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33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.—Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial

proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided —

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

9. The aforesaid provisions relate to admission of a statement made by persons who cannot be called as a witness. Section 32(1) of the IEA, generally, referred to as "dying declaration", provides for the relevancy of a statement made by a person as to the cause of his death. The statement given by the complainant in the present case cannot be termed as dying declaration and nor will it come under any other clauses of Section 32 of the IEA*, i.e.,* Section 32(2) to 32(8) of the IEA. Similarly, the statement of the complainant is not covered under provisions of Section 33 of the IEA as the pre-conditions provided in the said section are not fulfilled. The complainant was never examined as a witness during the course of trial.

10. In the judgment relied upon by the learned Appellate Court in **Ravi Kapur (*supra*)**, the case of the prosecution with regard to the accident was based on eye witnesses of the incident *i.e.,* PW-1, PW-2 and PW-4 which

were corroborated by other evidence on record. In the present case, in absence of statement of the complainant before the learned Trial Court, the fact that bus was being driven by the petitioner in a rash and negligent manner cannot be simply presumed by applying principle of '*Res ipsa loquitor*'. The statement of the complainant recorded by PW-4, ASI Rajinder Singh, cannot be substituted for evidence recorded by the learned Trial Court giving opportunity to the petitioner/accused for cross-examination.

11. In **Rathnashalvan v. State of Karnataka, (2007) 3 SCC 474,** the Hon'ble Supreme Court held as under:

> "**7.** Section 304-A applies to cases where there is no intention to cause death and no knowledge that the act done in all probability will cause death. The provision is directed at offences outside the range of Sections 299 and 300 IPC. The provision applies only to such acts which are rash and negligent and are directly cause of death of another person. Negligence and rashness are essential elements under Section 304-A. Culpable negligence lies in the failure to exercise reasonable and proper care and the extent of its reasonableness will always depend upon the circumstances of each case. Rashness means doing an act with the consciousness of a risk that evil consequences will follow but with the hope that it will not. Negligence is a breach of duty imposed by law. In criminal cases, the amount and degree of negligence are determining factors. A question whether the accused's conduct amounted to culpable rashness or negligence depends directly on the question as to what is the amount of care and circumspection which a prudent and reasonable man would consider it to be sufficient considering all the circumstances of the case. Criminal rashness means hazarding a dangerous or wanton act with the knowledge that it is dangerous or wanton and the further knowledge that it may cause injury but done without any intention to cause injury or knowledge that it would probably be caused.
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> **8.** As noted above, "rashness" consists in hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury. The criminality lies in such a case in running the risk of doing

such an act with recklessness or indifference as to the consequences. Criminal negligence on the other hand, is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen it was the imperative duty of the accused person to have adopted."

12. In **Syed Akbar v. State of Karnataka, (1980) 1 SCC 30,** the Hon'ble Supreme Court analysed the applicability of the doctrine of *res ipsa loquitur* in criminal trials observed and held as under: -

"**28.** In our opinion, for reasons that follow, the first line of approach which tends to give the maxim a larger effect than that of a merely permissive inference, by laying down that the application of the maxim shifts or casts, even in the first instance, the burden on the defendant who in order to exculpate himself must rebut the presumption of negligence against him, cannot, as such, be invoked in the trial of criminal cases where the accused stands charged for causing injury or death by negligent or rash act. **The primary reasons for non-application of this abstract doctrine of res ipsa loquitur to criminal trials are: Firstly, in a criminal trial, the burden of proving everything essential to the establishment of the charge against the accused always rests on the prosecution, as every man is presumed to be innocent until the contrary is proved, and criminality is never to be presumed subject to statutory exception. No such statutory exception has been made by requiring the drawing of a mandatory presumption of negligence against the accused where the accident "tells its own story" of negligence of somebody. Secondly, there is a marked difference as to the *effect* of evidence viz. the proof, in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence**

merely based upon an error of judgment. As pointed out by Lord Atkin in *Andrews* v. *Director of Public Prosecutions* [(1937) 2 All ER 552 : 1937 AC 576] , "simple lack of care such as will constitute civil liability, is not enough"; for liability under the criminal law "a very high degree of negligence is required to be proved. Probably, of all the epithets that can be applied 'reckless' most nearly covers the case".

29. However, shorn of its doctrinaire features, understood in the broad, general sense, as by the other line of decisions, only as a convenient ratiocinative aid in assessment of evidence, in drawing permissive inferences under Section 114 of the Evidence Act, from the circumstances of the particular case, including the constituent circumstances of the accident, established in evidence, with a view to come to a conclusion at the time of judgment, whether or not, in favour of the alleged negligence (among other ingredients of the offence with which the accused stands charged), such a high degree of probability, as distinguished from a mere possibility has been established which will convince reasonable men with regard to the existence of that fact beyond reason able doubt. Such harnessed, functional use of the maxim will not conflict with the provisions and the principles of the Evidence Act relating to the burden of proof and other cognate matters peculiar to criminal jurisprudence.

30. Such simplified and pragmatic application of the notion of res ipsa loquitur, as a part of the general mode of inferring a fact in issue from another circumstantial fact, is subject to all the principles, the satisfaction of which is essential before an accused can be convicted on the basis of circumstantial evidence alone. These are: *Firstly*, all the circumstances, including the objective circumstances constituting the accident, from which the inference of guilt is to be drawn, must be firmly established. *Secondly*, those circumstances must be of a determinative tendency pointing unerringly towards the guilt of the accused. *Thirdly*, the circumstances shown make a chain so complete that they cannot reasonably raise any other hypothesis save that of the accused's guilt. That is to say, they should be incompatible with his innocence, and inferentially exclude all reasonable doubt about his guilt."

(emphasis supplied)

13. In the present case as already noted hereinabove, in the absence of the evidence of the complainant, which was the bedrock of the prosecution case to establish rash and negligent driving by the petitioner at the time of the accident, the circumstances placed on record by the prosecution are not sufficient to infer guilt of the petitioner with respect to the alleged accident. The circumstances at best show that there was an accident, however, the essential ingredient of the offence under Section 304A of the IPC that the same had occurred on account of rash and negligent act of the petitioner has not been proved beyond reasonable doubt. Both the learned Trial Court as well as the learned Appellate Court while relying upon the circumstances of the case in absence of the evidence of the complainant proceeded to convict the petitioner for offences punishable under Sections 279/304A of the IPC. The case of prosecution was based on an alleged eye-witness account.

14. This Court is conscious of the fact that the scope for revision petition in case where there are two consecutive findings by the Courts below is limited. In such a situation, this Court in its power under Section 397 of the Cr.P.C. will only interfere if there is any illegality or perversity in the order passed by the Courts below. This Court has gone through the records as pointed out hereinabove and is of the considered opinion that both the learned Trial Court as well as the learned Appellate Court have in the absence of the evidence of the complainant simply presumed that the petitioner was rash and negligent and, therefore, liable to be punished under Sections 279 and 304A of the IPC. Both the Courts have arrived at a finding that the bus was being driven in a rash and negligent manner on account of the fact that the accident had taken

place and that the offending vehicle was behind the two-wheeler scooter on which the deceased was driving. In view of the aforesaid discussion, this Court is of the considered opinion that both the learned Trial Court as well as the learned Appellate Court fell into error in giving the aforesaid finding and convicting the present petitioner.

15. In view of the above, the impugned judgment dated 30.09.2016 and order on sentence dated 08.11.2016 passed by Ms. Poonam Chaudhry, Special Judge-07 (Central), (PC Act Cases of ACB, GNCTD), Delhi, Tis Hazari Courts in Crl. Appeal No. 08/2016 is hereby set aside. Consequently, the judgment of conviction dated 23.09.2015 and order on sentence dated 14.05.2016 passed by the learned Metropolitan Magistrate (Central)-04, Tis Hazari Courts, Delhi in case FIR No. 499/2004 under Sections 279 and 304A of the IPC, registered at P.S. Sarai Rohilla is hereby set aside.

16. Resultantly, the appellant is acquitted for the offences punishable under Sections 279 and 304A of the IPC in case FIR No. 499/2004 registered at P.S. Sarai Rohilla.

17. The petition is allowed and disposed of accordingly.

18. Pending application(s), if any, also stand disposed of.

19. Bail Bonds stand discharged.

20. Copy of the judgment be communicated to the learned Trial Court as well as concerned Jail Superintendent for necessary information and compliance.

21. Judgment be uploaded on the website of this Court *forthwith*.

AMIT SHARMA, J.

AUGUST 01, 2025*/nk/kr/sc/ns*