

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

+ **CRIMINAL APPEAL NO. 12 OF 2000**

% Date of Decision: 7th November, 2008

SANTOSH KUMAR ...Appellant

! Through: Mr.Sumeet Verma, Advocate.

versus

\$ **STATE** ...Respondent

^ Through: Mr. O.P. Saxena, APP

CORAM:

* **HON'BLE MR. JUSTICE P.K.BHASIN**

1. Whether Reporters of local papers may be allowed to see the Judgment?(No)
2. To be referred to the Reporter or not?(Yes)
3. Whether the judgment should be reported in the digest?(Yes)

JUDGMENT

P.K.BHASIN, J(ORAL)

This appeal arises out of the judgment dated 16.9.1999 passed by the Court of Additional Sessions Judge, Delhi in Sessions Case No.155/1998 whereby the appellant was convicted under Sections 328 and 379 IPC and the appellant has assailed his conviction as well as the sentences awarded to him for the commission of these offences.

2. The prosecution case, in brief, is that on the night of 7/8-03 98 PW-5 Surender Kumar Singh, a resident of Rai Bareilly and who had gone to Faridabad, was sitting in the passenger hall at New Delhi Railway Station waiting for some train for going back to Bareilly. He was having one attaché-case and one bag with him. The appellant (hereinafter to be referred to as 'the accused') also came there at about 1 a.m. along with two attache-cases and sat near PW-5 and started talking to him generally and after he came to know from PW-5 during their talks that he was to go to Rai Bareilly the accused told him that he was also going to Rai Bareilly. While talking to PW-5 the accused offered three cups of tea also to PW-5 and when third cup was offered a cream-biscuit was also offered to PW-5 which he ate. After eating the biscuit PW-5 became unconscious and thereafter the accused took the attaché-case and the bag of PW-5 and started running away from there with the attaché and bag leaving his own attachees there. At that time one coolie (PW-6 Chaudhary Ram) was also present in the passenger hall and he had been watching these two persons gossiping and taking tea and when he saw that after eating the biscuit offered by the accused to PW-5 with the third cup of tea PW-5 had lied down and the accused had hurriedly taken the attaché-case and the bag, which as per the prosecution case belonged to PW-5, and started going from there he became suspicious

and asked the accused to stop but he did not stop and instead started running more speedily. PW-6 chased him upto some distance and managed to apprehend him. In the meantime one Head Constable Shri Krishan (PW-4) who was on routine duty at the railway station at that time along with two home guards also reached there and the accused was handed over to the Head Constable who interrogated the accused but he could not give any satisfactory answers. PW-5 Surender Kumar Singh was then taken to the Lady Harding Hospital by one home-guard while Head Constable Shri Krishan remained there with the accused. PW-5 Surender Kumar Singh was got admitted in hospital in unconscious state where he was examined and the doctor suspected it to be a case of drug intoxication(although as per the prosecution case no certain opinion about that could be given since stomach wash aspirates could not be prepared). Information that one Surender was brought from railway station and got admitted there in unconscious state was passed on to the Police Station at New Delhi Railway Station by the Constable on duty in the hospital and the same was recorded as DD No.9-B. Copy of that DD entry was handed over to ASI Arun Kumar(PW-7) for enquiry who then went to the hospital where he found PW-6 Surender Kumar admitted but was declared unfit for making a statement. PW-7 then came to the railway station where he met Head

Constable Shri Krishan and PW-6 Chaudhary Ram. The accused was also there. PW-6 then gave his statement to ASI Arun Kumar in which he disclosed the aforesaid facts leading to the apprehension of the accused by him. In view of the statement of PW-6 the accused was arrested and the attaché-case and the bag which the accused was taking away with him, were taken into police possession vide seizure memo Ex.PW-4/B. The two attaché cases left behind by the accused were also seized vide memo Ex. PW-4/C. Thereafter, ASI Arun Kumar prepared a ruqqa and got the FIR under Sections 328/379/411 IPC registered. From the railway station PW-7 took the accused to Lady Harding Hospital where by that time PW-5 Surender Kumar Singh had regained consciousness and immediately on seeing the accused recognized him to be the person who had offered him biscuit on eating which he had become unconscious. He also gave his statement to the investigating officer in which he also narrated the aforesaid facts and circumstances under which he came to be drugged by the accused.

3. On the completion of usual investigation formalities charge-sheet was filed in Court against the accused under Sections 328/379/411 IPC and in due course his case came to be committed to the Court of Sessions where

charges under Sections 328/379 IPC were framed against him. The prosecution in order to establish its case examined seven witnesses in all including the victim Surender Kumar(PW-5) and the other eye-witnesses of the incident, PW-6 Chaudhary Ram. The accused when examined under Section 313 Cr.P.C. pleaded false implication.

4. The learned trial Judge after examining the evidence adduced concluded that the accused had committed the charged offences and convicted him accordingly vide judgment dated 16.9.1999 and vide order 20.9.99 directed him to undergo rigorous imprisonment for five years and also to pay fine of Rs.1000/- for his conviction under Section 328 IPC and to undergo six months rigorous imprisonment under Section 379 IPC. In this appeal the accused has assailed the said judgment and order of the trial Court.

5. It was contended by Shri Sumeet Verma, learned counsel for the appellant(*amicus curiae*), at the outset that the accused had not been afforded a fair trial inasmuch as the accused was not represented by any counsel because of poverty and no legal aid was given to him by the trial Court and all the witnesses were cross-examined by the trial Judge himself. It was also submitted that conviction of the appellant in any event on the

basis of whatever evidence was adduced by the prosecution is not sustainable since it is based on conjectures and surmises and not on any legal evidence. It was argued that the prosecution had adduced no medical evidence to establish that PW-5 had consumed some intoxicating substance and so offence under Section 328 IPC is not made out and further submission was that even for establishing the offence under Section 379 IPC there was no evidence to show that anything belonging to PW-5 was recovered from the custody of the accused.

6. Mr.O.P. Saxena, learned Additional Public Prosecutor, on the other hand, supported the judgment of the trial court and submitted that there is no infirmity in the appreciation of evidence by the trial Court and the findings arrived at in the impugned judgment and so this appeal deserves to be dismissed.

7. After examining the entire prosecution evidence and giving thoughtful consideration to the submissions made by the learned amicus curiae and the learned Addl. Public Prosecutor I have no hesitation in concluding that the impugned judgment cannot be sustained since the prosecution cannot be said to have been successful in establishing the

charges under Sections 328 and 379 IPC beyond reasonable doubt. Section

328 I.P.C. reads as under :-

“Whoever administers to or causes to be taken by any person any poison or any stupefying, intoxicating, or unwholesome drug, or other thing with intent to cause hurt to such person, or with intent or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

A perusal of this Section would show that the following elements are essential to constitute an offence under Section 328, I.P.C. :-

(i) Some person or persons should administer or cause to be taken by any person any poison or stupefying, intoxicating or unwholesome drug, or other thing; and

(ii) The intention of the person or persons mentioned in (i) should be to cause hurt to the person concerned, or should be to commit or to facilitate commission of an offence or there should be knowledge on the part of the person or persons that the result of his act or their act was likely to cause hurt to the concerned persons.

Both these elements should exist conjunctively, then and then alone would the offence be complete and the person or persons, as the case may be, would be guilty of the offence contained in Section 328 IPC.

8. In the present case the prosecution had sought to establish its case relying upon the evidence of the coolie PW-6 Chaudhary Ram and the victim PW-5 Surender Kumar Singh himself as well as the recovery of the attaché-case and one bag which allegedly contained certain items belonging to the victim Surender Kumar Singh. I shall first deal with the evidence of the complainant coolie PW-6 Chaudhary Ram. On going through his examination-in-chief I find that he did not claim that the accused had offered three cups of tea to the victim PW-5 Surender Kumar Singh and further that along with the third cup of tea the accused had offered biscuit also to PW-5 or after eating that biscuit PW-5 had become unconscious. He had simply deposed that he had seen the accused and two other persons indulging in talks and having tea and biscuits/snacks at about 4/4.30 a.m. on 8-3-98 and further that the accused was apprehended at the spot with the attaché-case of the passenger. He was not cross-examined by the APP and in reply to one of the many questions put to him in the nature of cross-examination by the trial Judge PW-6 came out with a different

version that there was one other boy also with the accused who had brought tea and one biscuit was taken by the accused. He further stated that that boy had offered biscuits. PW-6, however, did not claim that even the other boy had offered biscuit to the passenger(PW-5) or that the passenger ate biscuit at all although he had stated that the passenger had become unconscious after ten minutes. The learned amicus curiae had submitted that when this witness himself had not claimed in his chief-examination that the accused had offered tea and biscuits to PW-5 the learned trial Judge was not justified in asking the witness whether tea and biscuits were offered to the victim or not and putting such a question, which could have been put only by the prosecutor after getting the witness declared hostile, shows that the trial Judge wanted to make the testimony of this witness in conformity with the prosecution and thus the accused had not got a fair trial. On this point the learned Addl. Public Prosecutor's submission was that the learned trial Judge must have thought that the APP conducting the trial was not doing his job as was expected of him and so there was nothing wrong or improper if the witness was put certain questions to find out the truth even though those questions should have

been asked from the witness by the prosecutor. The accused himself had never asked for legal aid and so in appeal he cannot raise any grievance on this account. On this aspect, I find that in the impugned judgment itself the learned trial Judge has stated that since the accused was not represented by any counsel at the time of recording of prosecution evidence the Court itself had cross-examined the witnesses relying upon one judgment of Allahabad High Court reported in **1974 CrI.L.J. 247** and one judgment of Andhra Pradesh High Court reported in **1972 CrI.L.J. 1485**. In my view, considering the fact that PW-6 had not claimed even when he was cross-examined by the trial Judge that the accused had offered tea and biscuit to the victim and from the other evidence also the guilt of the accused does not stand established despite the fact that there was no cross-examination of witnesses by any counsel on behalf of the accused I need not go into the question whether in the facts of the present case the learned trial Judge was justified in himself cross-examining the witnesses.

9. Having found that the evidence of PW-6 does not implicate the accused I come to the evidence of the victim(PW-5) himself. He deposed that on the night of 7/8-3-98 he had come to New Delhi Railway Station

from Haryana and was to go to his native place Rai Bareilly by train from that station. He was having one attaché and one bag at that time with him. He sat in the passenger hall waiting for the train. He further deposed that the accused came to him at about 1 a.m. and at that time the accused was having two attaché cases with him and asked him as to where he was going. He told the accused that he was going to Rai Bareilly and then the accused started talking to him and accused also offered him tea thrice and when he was offered tea for the third time at about 4/4.30 a.m. the accused had offered him a cream biscuit also and after taking that biscuit he had become unconscious. Referring to this part of the statement of the victim learned APP had submitted that this person had no enmity with the accused and so had no reason to depose falsely against the accused and his evidence has been rightly relied upon by the trial Court for this reason even in the absence of a definite medical opinion that this witness had actually consumed any intoxicating substance mixed in the tea or the biscuit. The submission of the learned amicus curiae was that even though an argument had been advanced before the learned trial Court that there was no medical evidence adduced by the prosecution to show that PW-6 had actually

consumed any intoxicating substance but that argument had been rejected on totally unsustainable reasoning. My attention was drawn to the following observations made by the learned trial Judge in para nos. 7 and 9 of the impugned judgment:

“7. The next plea taken by Id. Counsel for the accused is that doctor has not given any conclusive finding in his testimony as to what was the nature of the drug given to him. Doctor has been examined as PW-1. He has stated that patient was brought to him in semi conscious condition and patient was cause of suspected drug intoxicant. It is also there in the examination-in-chief of the doctor that patient regained consciousness after 3/4 hours and then he was discharged..... PW5 Surender Kumar Singh who is victim in this case has clearly stated that accused facing the trial came to him at 1 am night and accused offered him tea three times. When the accused offered him biscuit at about 4.30 a.m. the victim became unconscious. It is apparent that something spurious material was there in the biscuit. That also shows that it was given intentionally by the accused because accused also took the biscuit but he did not become unconscious. The accused must have placed some trick..... PW6 Chaudhary Ram and PW5 Surender Kumar Singh have no reason to falsely involve the accused in such a serious case. when a person states on oath presumption is that he must have been deposed truly.”

8.

9. It is also argued by Id. Counsel that it is not clear from the material on the record as to who

gave drug and in what shape it was. It is clear from the statement of victim Surender Kumar that accused gave him biscuit and after taking the biscuit he became unconscious. It shows that drug clotted biscuit was given by the accused to the victim. When the evidence on the record is consistent and natural that immediately after taking the biscuit victim Surender became unconscious it is not material if the nature of the drug could not be determined. Direct evidence on the record has to be believed.”

10. From the above quoted observations of the learned trial Judge it is very much clear that the findings rendered are not sustainable at all because of being conjectural. Simply on the basis of the statement of PW-5 alone it could not be concluded that he had become unconscious because of eating the biscuit or drinking tea offered to him by the accused. There had to be medical evidence to the effect that PW-5 had, in fact, become unconscious because of consuming any drug or intoxicating substance etc. mixed in tea or biscuit.

11. Learned Additional Public Prosecutor had also submitted that even in the absence of medical evidence the accused could be convicted for the offences under Section 328 as well as 379 IPC since at the time of his apprehension goods belonging to the victim Surender Kumar Singh were

recovered from his possession and that piece of circumstantial evidence was sufficient to record a finding against the accused to the effect that he must have administered something to PW-5 because of which he had become unconscious as otherwise the goods belonging to the victim could not have been with the accused. In my view, this submission also cannot be accepted since the prosecution has failed miserably to establish even this part of its case regarding recovery of goods belonging to the victim from the possession of the accused. The prosecution case was that some valuables belonging to the victim Surender Kumar were being taken away by the accused when the victim was lying unconscious and those valuables were recovered from him when he was apprehended at the railway station itself. There is, however, no evidence adduced by the prosecution to show as to what actually was recovered from the possession of the accused at the time of his apprehension by PW-6 Chaudhary Ram and that the recovered goods actually belonged to PW-5 Surender Kumar Singh. The only witness to the alleged recovery of the stolen property from the possession of the accused was PW-6 Chaudhary Ram, the coolie. However, when he was examined in Court he simply claimed that the accused was apprehended along with one bag and attaché case which he had handed over to the police and the same were seized vide memo Ex. PW-4/B. No police witness has claimed that the

accused was apprehended in his presence or that anything was recovered from his possession. A perusal of the seizure memo Ex. PW-4/B shows that besides one attaché case and one bag the police had also seized clothes, some papers etc. which were lying in the attaché and the bag. PW-6 has, however, not claimed that besides the attaché case and the bag anything else was also seized by the police or that the items mentioned in the seizure memo Ex. PW-4/B were there in the attaché case and the bag. In any case, when this coolie was examined in Court the case property as shown in the seizure memo Ex. PW-4/B, which as per the prosecution case was recovered from the possession of the accused, was not produced in Court by the prosecution for getting the same identified from him as the victim had already got the same released on superdari and the prosecution had not ensured the production of those goods by the victim in Court when PW-6 was to be examined. When the victim himself was examined he had no doubt brought with him in Court some goods which he claimed to have been stolen on the date of the incident and those goods were exhibited also but since PW-6 was not present at the time of recovery of those goods allegedly from the possession of the accused it cannot be said that whatever goods PW-6 had produced in Court were actually recovered from the

possession of the accused. So, even the recovery of any stolen property from the possession of the accused is also not established.

12. For the fore-going reasons, this appeal deserves to be allowed and is accordingly allowed. The judgment dated 16/09/99 and the order on sentence dated 20/09/99 passed by the trial Court are hereby set aside. Consequently, the appellant-accused stands acquitted of both the charges for which he was convicted. As a result of his acquittal, his bail bonds stand discharged.

P.K.BHASIN, J

November 7, 2008
gm/sh