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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 14th October, 2014

+CRL.A. 610/2013

SUNIL MASHI@ SILLY Appellant
Through: Mr. K. Singhal, Advocate

versus

STATE NCT OF DELHI Respondent
Through: Mr. M.N. Dudeja, Additional Public
Prosecutor for the State

**CORAM:
HON'BLE MS. JUSTICE SUNITA GUPTA**

J U D G M E N T

: SUNITA GUPTA, J.

1. The challenge in this appeal is to the judgement dated 19th January, 2013 and order on sentence dated 21st January, 2013 arising out of FIR No.824/06 u/s 379/328/411 of Indian Penal Code, 1860 whereby the appellant was convicted u/s 328/379/411 IPC and was sentenced as under:

i) For offence u/s 328 IPC, he was sentenced to undergo Rigorous Imprisonment for a period of ten years and to pay a fine of

Rs.10,000/- in default thereof to further undergo RI for a period of 2 years.

ii) For offence u/s 379 IPC, he was sentenced to undergo R.I. for a period of 3 years and to pay a fine of Rs.5000/- in default thereof to undergo RI for a period of 1 year.

iii) For offence u/s 411 IPC, he was sentenced to undergo R.I. for a period of 3 years and to pay a fine of Rs.5000/- in default thereof to further undergo R.I. for a period of 1 year.

2. Briefly stated the case of prosecution as unfolded by the report u/s 173 Cr.P.C. is as under:-

That on 15th September, 2006, on receipt of DD No.27A, ASI Ombir Singh along with Constable Satish reached at Central Market, Punjabi Bagh, Police Booth, where Head Constable Karambir produced one person before ASI Ombir Singh, whose name was revealed as Sunil Mashi @ Silly S/o Sh. Madan Mashi, R/o C-108, Indira Vikas Colony, Mukerjee Nagar, Delhi and Head Constable Karambir got recorded the statement to the effect that he was on duty as Beat Constable at Central Market, Punjabi Bagh and on that day during the course of patrolling he was present at Central Market, Punjabi Bagh and

at about 7:25 PM he saw one person coming from the side of City Bank towards Police Booth having a black colour bag in his right hand. On suspicion he was caught and the reasons for his presence at that place was asked but he could not give any satisfactory reply on which he (HC Karambir) took a formal search of his bag which was found to contain one passport in the name of Sandeep Kumar, s/o Om Prakash and mother's name as Rajbala and having one passport size photograph affixed on it and the said photograph did not match with the person who was stopped. He enquired about his name and address and also what is contained in the bag to which that person stated that the bag is containing some dollars, gold chain, mobile and wrist watch etc. for which he could not give any satisfactory reply and such articles were suspected to be stolen property. The statement made by HC Karambir was read over to him. He admitted it to be correct. ASI Ombir on checking the bag found to contain passport and other articles which were seized by keeping them in the same bag by a seizure memo by converting into a pullanda sealed with the seal of 'OSP' and seal after use was handed over to HC Karambir.

ASI Ombir prepared the tehrir and got registered the case u/s 411 IPC by sending the rukka through Ct. Satish and carried out the further investigation. During the course of further investigation, the site plan was prepared and the statements of the witnesses were recorded and accused Sunil Mashi @ Silly was arrested. Search for complainant Sandeep Kumar was made. On 16th September, 2005, HC Krishan Kumar produced the MLC 231 MA Hospital, Punjabi Bagh of Sandeep, s/o Om Prakash, r/o Rohtak, Haryana to ASI Ombir Singh and also produced Sandeep before him and told ASI Ombir Singh that this is the person whom he got admitted in Maharaja Agrasen Hospital, Punjabi Bagh, Delhi in an unconscious condition on 15th September, 2006 and was unfit for statement the previous day. Sandeep had come on that day from the hospital and stated that on the previous day, one person after making him unconscious by offering him poison laced biscuits which he had consumed had committed theft of his articles. ASI Ombir Singh recorded the statement of Sandeep. On the basis of statement of Sandeep, Section 328/379 IPC were added. TIP Proceedings got conducted and the accused refused to join the TIP

Proceedings. ASI Ombir Singh obtained the copy of the TIP Proceedings. HC Krishan Kumar obtained the stomach wash of complainant Sandeep from the doctor. Upon completion of the necessary further investigation, challan was prepared for the offence u/s 379/328/411 IPC against accused Sunil Mashi @ Silly and was sent to the Court for trial.

3. In order to substantiate its case, the prosecution examined ten witnesses. On culmination of prosecution evidence, statement of accused under Section 313 Cr. P.C. was recorded wherein he denied all the incriminating evidence put forth by the prosecution and submitted that he has been falsely implicated in this case. No witness was examined in defence.

4. After considering the evidence led by the parties, learned Trial Court arrived at the conclusion that the prosecution has proved its case beyond shadow of doubt that on 15.09.2006 between 12:30 PM and 1:40 PM in the running bus from Bahadurgarh to Delhi, accused Sunil Mashi@Silly administered stupefying/intoxicating substance by way of offering biscuit to PW8 Sandeep Kumar with intent to facilitate the commission of offence of theft and got him deboarded from the bus near Agrasen Hospital, Punjabi Bagh and committed

theft of one wrist watch make citizen, one gold chain, one black bag containing other articles. On the same day at about 7:25 PM at Central Market, Punjabi Bagh, he was found in dishonest possession of the said articles, which he retained knowing or having reasons to believe the same to be stolen property and obtained during the commission of the said theft. Accordingly, appellant was convicted u/s 328/379/411 IPC and sentenced as stated above.

5. Feeling aggrieved, the present appeal has been filed by the appellant.

6. The findings of the learned Trial Court have basically been assailed by Sh. K. Singhal, Advocate, learned counsel for the appellant for his conviction under Section 328 IPC. It was submitted by learned counsel for the appellant that the appellant can not be convicted on the basis of ocular evidence since the same was not corroborated by the medical evidence. PW2 Dr. Anil Jindal who had advised gastric lavage of Sandeep, does not say that the same was taken. Further, there is no entry/record in the Malkhana regarding the deposit of the sample of the stomach wash. The stomach wash was sent to FSL only after a delay of 40 days. Therefore, possibility of tampering with the same cannot be ruled out. Accused is accordingly

entitled to benefit of doubt and he be acquitted of the offence alleged against him.

7. Per contra, Sh. M.N. Dudeja learned Public Prosecutor for the State submitted that PW5 Head Constable Krishan Kumar, on receipt of DD No. 15A went to LG Godown in front of Maharaja Agrasen Hospital where he found the victim in semi conscious condition. As such, he admitted him in the hospital where he was examined by PW2 Dr. Anil Jindal who advised his gastric lavage to be taken. Same was taken from the hospital and deposited by PW5 Head Constable Krishan Kumar. During the course of investigation, the sample was sent to FSL and as per the report of FSL, the same was found to contain *Lorazepam* which is a sedative. It was further submitted that delay in deposit of sample in FSL does not lead to any inference that it was tampered with as no suggestion to this effect was given to any of the prosecution witnesses. Hence the accused was rightly convicted and the appeal is liable to be dismissed.

8. I have given my considerable thoughts to the respective submissions of the learned counsel for the parties and have perused the record.

9. Before dealing with rival submissions of learned counsel for the

parties, it will be in the fitness of things to narrate in brief the relevant evidence adduced by the prosecution during the trial of the case.

10. PW8-Sandeep Kumar is the victim in the present case. He stated that the incident was of 15th September, 2006 and on that day, he had left Rohtak at about 10:00 AM for Delhi and first reached Bahadurgarh and from there at about 12:30 PM, he boarded in the DTC bus for Delhi. The accused whose name he came to know later on had occupied his adjacent seat in the DTC bus and started talking to him. When the bus reached near Nangloi, accused started eating biscuit and offered the same to him. Initially he refused but on the repeated request of the accused, he took one biscuit offered by him and consumed the same. After consuming the biscuit, he felt giddiness and after some time of consumption of the biscuit, he was unable to speak although he could see and observe the things happening before him. He started following the instructions given to him by the accused wherein the accused alighted him from the said bus near Agrasan Hospital, Punjabi Bagh and took him near a wall. He further stated that he was able to walk slowly with the help of the accused. The accused then made him sit near the wall and thereafter took his wrist watch make citizen of black dial and a steel chain from his wrist. The

accused also removed his gold chain which he was wearing on his neck and put the same in his black colour bag. He further stated that he was helpless and was unable to do anything or raise alarm. The accused thereafter took his black colour bag with his wrist watch and gold chain. In his black colour bag, there was one black purse containing 14 currency notes of 500 denominations, 2 currency notes of 100 denominations, 3 US dollars of 1 denomination and 3 US dollars of 5 denomination. Besides the said currency notes, there was one passport, three visa, one DL, one I-card, three diaries, two mobile phones make Motorola and nokia, one recorder of sony, one NIT card, one Motorola CD, one mobile phone charger, one goggles and two ICICI bank ATM cards. Thereafter, the victim became totally unconscious and regained consciousness on the next day i.e. 16th September, 2006 at Agrasen Hospital.

11. On receipt of telephonic message, PW4 W/Head Constable Pushpa recorded DD15A. On receipt of this DD, PW5-Head Constable Krishan Kumar went to the LG godown in front of Maharaja Agrasen Hospital where he found one person aged about 30-35 years in semi conscious condition. He admitted him in Maharaja Agrasen Hospital as the patient was not fully conscious and

on his repeated asking he gave his name as Sandeep, s/o Om Prakash, r/o Rohtak. He enquired about the fitness of the patient to make the statement but he was declared unfit for statement at 3:00 PM and again at 9:55 PM. On 16th September, 2006, he again went to the hospital, however, he was informed by the doctor that the patient has been discharged from the hospital. The patient was however available in the hospital, as such, he enquired from the patient who informed him that on 15th September, 2006, he boarded a DTC bus from Bahadurgarh for coming to Delhi. From Nangloi, one boy boarded in his bus. He was made to eat biscuit by that boy. After eating the same, he became unconscious and further told that he was taken near the wall and thereafter that boy committed theft of his belongings. He further deposed that he handed over the MLC to ASI Ombir Singh who recorded the statement of Sandeep. He collected the parcel of stomach wash of the patient Sandeep from the hospital and deposited the same with MHCM, Police Station Punjabi Bagh vide memo Ex.PW5/A.

12. PW2-Dr. Anil Jindal was working as CMO in Maharaja Agrasen Hospital on 15th July, 2006. He deposed that at about 2:00 PM, patient Sandeep, S/o Om Prakash, aged 35 years was brought by

HC Krishan Kumar with alleged history of ingestion of some poison by someone. He examined the patient vide MLC Ex.PW2/A. Patient was drowsy, sluggish of speech, his vitals were stable with both pupils pin pointed. He advised gastric lavage and admission of patient in ICU.

13. PW1 Head Constable Karambir Singh has deposed that on 15th September, 2006, at about 7:25 PM, while he was present in Central Market, Punjabi Bagh, he apprehended accused Sunil Mashri on the basis of suspicion. On checking his belongings, the bag was found containing four passports, one wrist watch, one gold chain, some documents, one diary and other articles. The passports were not having the photographs of the accused. The accused could not give any satisfactory reply regarding possession of the articles. As such, he informed Police Station Punjabi Bagh. Thereafter ASI Ombir Singh with Ct. Satish reached there. Accused was handed over along with the documents. His statement Ex.PW1/A was recorded by ASI Ombir Singh who also checked the articles contained in the bag and prepared a seizure memo Ex.PW1/B. The accused was arrested vide memo Ex.PW1/C and his personal search was taken. On interrogation, the accused made a disclosure statement Ex.PW1/E and also pointed

out the place where the biscuits laced with stupefying substance was given to the victim vide pointing out memo Ex.PW1/F.

14. PW9 SI Ombir Singh corroborated the version of PW1 Head Constable Karambir Singh regarding handing over of accused along with belongings, his arrest and disclosure statement made by him. He further deposed that he collected the MLC of victim Sandeep through Head Constable Krishan Kumar. Statement of Sandeep was also recorded and thereafter Section 328 IPC was added. He produced the accused for conducting his Test Identification Parade. However, he refused to participate in the same. During the course of investigation, he sent the pullanda, i.e., stomach wash to FSL Rohini and collected the report Ex.PW9/X.

15. PW6 Sh. Rakesh Kumar, MM has proved TIP Proceedings Ex.PW6/A and has deposed that the proceedings were conducted at Central Jail, Tihar on 28th September, 2006. The accused, however, refused to join TIP Proceedings.

16. PW10, Ms. Kavita Goyal, Sr. Scientific Officer, FSL, Rohini has proved her report Ex.PW9/X.

17. Statement of accused recorded under Section 313 Cr.P.C. reflects that the same is one of denial simplicitor wherein he claimed

his innocence and alleged false implication in the case. Although, as per the deposition of the witnesses, the articles were recovered from his possession for which he failed to give any satisfactory reply. However, he gave an evasive answer by stating “I do not know”.

18. The first question which comes up for consideration in this case is whether the appellant is the person involved in the incident which took place with the complainant on 15th September, 2006. Admittedly, the appellant was not previously known to the complainant. The complainant, however, identified the appellant in the witness box.

19. Admittedly, the appellant has refused to join TIP before the Metropolitan Magistrate in Tihar Jail on 28th September, 2006. A perusal of TIP Proceedings conducted by the Metropolitan Magistrate goes to show that he refused to join TIP on the ground that his face was shown to the witness in the Police Station Punjabi Bagh and his three photographs were also taken. However, there is absolutely no evidence of the photographs of the appellant having been taken by the police or his having been shown to the witness in the police station Punjabi Bagh. In fact, when the complainant came in the witness box, the appellant did not even suggest to him that the witness has seen

him in Police Station Punjabi Bagh. Even no suggestion was given to the Investigating Officer of the case that the accused was shown to the witness at Police Station Punjabi Bagh or his photographs were taken. The onus was upon the appellant to show that he had been shown to the complainant and, therefore, he was justified in refusing to join TIP Proceedings. However, he has failed to discharge the aforesaid onus placed on him and there are no circumstances to even suggest that he was shown to the complainant at Police Station Punjabi Bagh at any time prior to 28th September, 2006. In fact, in his statement recorded under Section 313 Cr.P.C., he has not even denied the proceedings and has simply stated “I do not know”.

20. If the accused refuses Test Identification Parade without any justifiable cause, he does at his own peril and the Court will, in such circumstances, be justified in drawing an inference that had the appellant participated in Test Identification Parade he would have been identified by the witnesses and that precisely was the reason why he refused to join the TIP. Similar view was taken by the Hon'ble Supreme Court in *Suraj Pal vs. State of Haryana*, (1995) 2 SCC 64. Therefore, the Court would be justified in inferring that had the appellant participated in the TIP, he would have been identified by the

complainant.

21. It has come in the deposition of the complainant that he boarded a DTC bus from Bahadurgarh for Delhi. The accused also boarded the same bus and occupied his adjacent seat in the DTC bus and started talking to him. When the bus reached near Nangloi, accused offered biscuits to the complainant. Initially, the complainant refused but on his repeated request, he took the biscuit offered by him and consumed the same. After consuming the biscuit, he felt giddiness and after some time, he was unable to speak though he could see and observe the things happening before him. He started following the instructions given to him by the accused. Accused alighted him from the said bus near Agrasen Hospital, Punjabi Bagh and took him near a wall. Accused made him sit near the wall and put off his wrist watch from his wrist. Thereafter he removed his gold chain and put the same in his black colour bag. He was helpless and unable to do anything or to raise alarm. He took the black colour bag along with his wrist watch and gold chain and the bag contained passport, currency for various denominations and various other documents. It is, therefore, quite evident that the complainant had ample time and opportunity to retain in his mind the imprint of the

person with whom he had travelled in the bus and had shared the biscuit. Not only did he travel with him for quite some time but also had conversation with him. The complainant was a Class II officer in Merchant Navy in USA. As per his deposition, although he was noticing the removal of his gold chain, wrist watch and taking of the black colour bag containing various articles but due to administration of stupefying substance, he was helpless and unable to raise alarm or to do anything. Under the circumstances, he could not have committed mistake in identifying the accused during the course of trial. Therefore, identification of the accused in Court coupled with his refusal to join TIP before the Metropolitan Magistrate is sufficient to establish his identity as the person who had travelled with the complainant and shared the biscuit with him.

22. The purpose of prior test identification in the presence of a Magistrate is primarily to test and strengthen the trustworthiness of an eye witness during the course of investigation. The test identification enables the eye witness to identify the persons involved in the offence who are not previously known to them or the case property, subject matter of the crime. Such identification also satisfies the Investigating Officer of the bonafide of the witness besides corroborating his

testimony during the course of trial. The identification during the course of such proceeding also serves the purpose of reassuring the investigating agency that the investigation proceedings are in the right direction and an innocent person is not being falsely implicated.

23. The legal position with respect to identification of an accused was summarized by the Hon'ble Supreme Court in ***Dana Yadav @ Dahu and Ors. vs. State of Bihar***, (2002) 7 SCC 295 inter alia as under:

“37...(c) Evidence of identification of an accused in court by a witness is substantive evidence whereas that of identification in test identification parade is, though a primary evidence but not substantive one, and the same can be used only to corroborate identification of accused by a witness in court.

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(e) Failure to hold test identification parade does not make the evidence of identification in court inadmissible rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check value to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law.

(f) In exceptional circumstances only, as discussed above, evidence of identification for the first time in court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction.

(g) Ordinarily, if an accused is not named in the first information report, his identification by witnesses in court, should not be relied upon, especially when they did not disclose name of the accused before the police, but to this general rule there may be exceptions as enumerated above.”

24. This judgment was followed by this Court in *Rijaul Khan vs. State*, 2014 (1) JCC 670 and it was observed as under:-

“As a legal principle, the substantive evidence of a witness is the statement made by him in the Court. The identification for the first time in the Court, by its very nature, is of a weak character and, therefore, the Court normally looks for corroboration of such evidence by way of some other evidence which may, inter alia, include identification in a Test Identification Proceeding. Identification in a Test Identification Parade is not a substantive piece of evidence, though it can be used as a piece of corroborative evidence if the witness identifies the accused while deposing in the Court.”

25. The power to identify also varies in terms of power of observation and memory of the identifying person. Another relevant circumstance in this regard is as to for how much time the witness had seen the accused. If, for instance, he had only a glimpse of the accused, he may not be in a position to firmly recall his identity, but if he had interacted the accused for a substantial time and had ample opportunity to observe him, he may face no difficulty in identifying him at a later date.

26. In *Raman Bhai Naran Bhai Patel & others vs. State of Gujarat*, (2000) 1 SCC 358, the two injured eye witnesses PW2 and PW14 tried to identify the accused only in the Court and they were not knowing them earlier. No identification parade was held during the course of investigation. It was held by the Apex Court that though

their evidence is to be treated to be one of a weak nature, but it cannot be said to be totally irrelevant or inadmissible. The Court was of the view that since the aforesaid witnesses were seriously injured in the incident and could have easily seen the faces of the persons assaulting them and their appearance and identity would well remain imprinted in their minds especially when they were assaulted in broad day light, they could not be said to be interested in roping any innocent person by shielding the real accused who had assaulted them.

27. In *Budhsen & Anr. vs. State of U.P.*, 1970, CrL. L.J. 1149, the Apex Court, inter alia, observed that though as a general rule, identification of the accused for the first time in the Court without there being any corroboration whatsoever cannot form the sole basis for conviction, there may be exceptions to the said general rule when for example the Court is impressed by a particular witness, on whose testimony it can safely rely, without corroboration.

28. What can be culled out from the aforesaid decision is that the identification of the accused by the complainant in Court coupled with his refusal to join TIP establishes the identity of the accused as the assailant of the crime.

29. The basic thrust of the arguments of learned counsel for the appellant is on the point that prosecution has not been able to establish its case as regards offence under Section 328 IPC.

30. Section 328 I.P.C. reads thus :-

"Causing hurt by means of poison etc, with intent to commit an offence. 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."

31. A perusal of the aforesaid section would show that the following elements are essential to constitute an offence under Section 328 IPC:-

- 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.

32. 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 this section.

33. Adverting to the case in hand, it has come in the statement of PW5 Head Constable Krishan Kumar that on receipt of DD No.15A, he went to the spot, i.e., L.G. Godown in front of Maharaja Agrasen Hospital where he found a person aged 30/35 years in a semi-conscious condition and he got him admitted in Maharaja Agrasen Hospital vide MLC No.231. The patient on repeated asking could only state his name as Sandeep, s/o Omprakash R/o Rohtak. The doctor declared him unfit for statement. On 16th September, 2006, although the victim was discharged from the hospital, however, he was still present at the hospital and told him that he boarded a DTC bus on 15th September, 2006 from Bahadurgarh to come to Delhi. From Nangloi, one boy boarded the bus and he was then made to eat biscuit by that boy. After eating the same, he became semi unconscious and was taken near the wall where the boy committed theft of his belongings.

34. PW2 Dr Anil Jindal who examined the patient vide MLC No.231 Ex.PW2/A, also found the patient drowsy and sluggish of speech. He advised gastric lavage and admission of patient in ICU.

PW5 HC Krishan Kumar collected the parcel of stomach wash of the patient Sandeep from the hospital and deposited the same with MHCM, PS Punjabi Bagh vide memo Ex.PW5/A.

35. PW9 SI Ombir Singh sent the sealed pullanda containing stomach wash of Sandeep which was examined by Ms. Kavita. As per FSL report, Ex. PW9/X, one parcel with the seal of Punjabi Bagh-Maharaja Agrasen Hospital-Delhi labelled as MLC No.231 dated 15th September, 2006 stated to be the “gastric lavage of Sandeep Kumar” and marked ‘1’ which was sealed and tallied with specimen seal impression was received. The parcel was found to contain Exhibit1-a pinkish orange turbid liquid volume approx. 15ml. On chemical, thin layer Chromatography and HPTCL examination, Exhibit 1 was found to contain *Lorazepam*.

36. This Court in ***Rijaul Khan*** (supra) has observed that *Lorazepam* is a highly potent intermediate duration drug often used to treat the anxiety disorder. It is normally used for short term treatment of anxiety, insomnia, acute seizures and sedation of the hospitalized

patients as well as sedation of aggressive patients. The effects of the medicine are of intermediate duration and it is known to be sometimes used for criminal purposes.

37. The submission of learned counsel for the appellant that there is nothing on record to show that gastric lavage of the victim was actually taken in the hospital as there is no record of its being deposited in the Malkhana and the sample was sent after a considerable delay to FSL has no force, inasmuch as, although there is some delay in collecting the sample from the hospital by the police officials as the same was collected by Head Constable Krishan Kumar vide seizure memo Ex.PW5/A, dated 25th October, 2006 and deposited with MHCM PS Punjabi Bagh on the same day. Thereafter, it was sent to FSL and received on 30th November, 2006. The report Ex.PW9/X was given on 12th February, 2007 opining the contents to contain *Lorazepam*. It is pertinent to note that no suggestion was given to any of the prosecution witnesses that the gastric lavage was not taken in the hospital or the same was tampered with.

38. Dealing with the effect of non cross-examination, Supreme Court in ***Laxmibai (dead) Thr. LRs and Anr. v. Bhagwantbuva (dead) Thr. LRs and Ors.***, AIR 2013 SC 1204 observed as under:-

“40. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses. (See: ***Khem Chand v. State of Himachal Pradesh***, AIR 1994 SC 226; ***State of U.P. v. Nahar Singh (dead) and Ors.***, AIR 1998 SC 1328; ***Rajinder Pershad (Dead) by L.Rs. v. Darshana Devi (Smt.)*** AIR 2001 SC 3207; and ***Sunil Kumar and Anr. v. State of Rajasthan***, AIR 2005 SC 1096).”

39. Similar view was taken in the recent judgment of ***Mahavir Singh vs. State of Haryana***, (2014) 6 SCC 716 where it was observed that it is settled legal proposition that in case the question is not put to the witness in cross-examination who could furnish

explanation on a particular issue, the correctness or legality of the said fact/issue could not be raised.

40. In the instant case, I have gone through the cross-examination of the witnesses who could furnish the explanation for the discrepancies pointed out by learned counsel for the appellant. However, the same revealed that the defence has never put any question in these regards to the material witness who could furnish the explanation for the same.

41. Under the circumstances, in view of the testimony of the complainant himself that after eating the biscuit offered by the accused, he felt giddiness and thereafter became unconscious. He was removed to hospital by PW5 Head Constable Krishan Kumar in unconscious condition and he was declared unfit for statement twice. On that date, Dr. Anil Jindal who examined the patient also found him drowsy, sluggish of speech, his gastric lavage was advised to be taken which was collected by Head Constable Krishan Kumar and the same was sent to FSL. As per the report, the same was found to contain *Lorazepam* which is a sedative. Therefore, there is no reasonable doubt that biscuit was containing some sedative drug or substance which the appellant made the victim to consume and this

was done with the intention to commit theft of the articles belonging to the victim which he was having on his person and was carrying with him. A number of articles belonging to the complainant were thereafter actually stolen. The same was recovered from the possession of the appellant on the same day. Under the circumstances, no fault can be found in regard to the conviction of the appellant under Section 328 IPC.

42. Even as regards offence under Section 379 IPC, the appellant was rightly convicted inasmuch as he was found in possession of the stolen articles immediately after the commission of theft and, therefore, the presumption under Section 114A of Indian Evidence Act, 1872 arises against him.

43. Hon'ble Supreme Court in *Ganesh Lal v. State of Rajasthan*, (2002) 1 SCC 731 elaborately discussed regarding the presumption laid down under Section 114 Evidence Act:

"12. Section 114 of the Evidence Act provides that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public private business, in their relation to facts of the particular case. Illustration (a) provides that a man who is in possession of stolen goods soon after the theft may be presumed by the Court to be either the thief or one who has received the goods knowing them to be stolen, unless he can account for his possession. The presumption so raised is one of fact rather than of law. In the facts and circumstances of a given case

relying on the strength of the presumption the Court may dispense with direct proof of certain such facts as can be safely presumed to be necessarily existing by applying the logic and wisdom underlying Section 114. Where offences, more than one, have taken place as part of one transaction, recent and unexplained possession of property belonging to deceased may enable a presumption being raised against the accused that he is guilty not only of the offence of theft or dacoity but also of other offences forming part of that transaction.”

44. As such, the appellant was rightly convicted under Section 379 IPC, however, the learned Trial Court has convicted the appellant for offence under Section 411 IPC as well. Keeping in view the fact that he has been convicted under Section 379 IPC, there was no justification for convicting him for offence under Section 411 IPC. As such, his conviction under Section 411 is set aside.

45. Coming to the quantum of sentence, the appellant has been convicted for offence under Section 379 for a period of three years and fine of Rs.5000/-, in default to undergo RI for one year and for offence under Section 328 IPC for a period of 10 years and fine of Rs.10,000/- in default to undergo RI for a period of two years. Learned counsel for the appellant submitted that the sentence imposed upon the appellant is very harsh. He is in custody for more

than 5 years. As such, a liberal view be taken and he be released on the period already undergone.

46. On the other hand, learned Public Prosecutor for the State relied upon *Sumer Singh vs. Surajbhan Singh & Ors.*, (2014) 7 SCC 323 for submitting that too much leniency in awarding sentence is not warranted. He also referred to the antecedents of the appellant for submitting that he was involved in as many as 13 cases out of which few cases were of similar nature.

47. In *Sumer Singh* (Supra), it was observed by the Hon'ble Supreme Court as under:-

"36. It is the duty of the court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the society and a legitimate response to the collective conscience. The paramount principle that should be the guiding laser beam is that the punishment should be proportionate. It is the answer of law to the social conscience. In a way, it is an obligation to the society which has reposed faith in the court of law to curtail the evil. While imposing the sentence it is the Court's accountability to remind itself about its role and the reverence for rule of law. It must evince the rationalized judicial discretion and not an individual perception or a moral propensity. But, if in the ultimate eventuate the proper sentence is not awarded, the fundamental grammar of sentencing is guillotined. Law cannot tolerate it; society does not withstand it; and sanctity of conscience abhors it. The old saying "the law can hunt one's past" cannot be allowed to be buried in an indecent manner and the rainbow of mercy, for no fathomable reason, should be allowed to rule. True it is, it has its own room, but, in all circumstances, it cannot be allowed to occupy the whole accommodation. The victim, in this case, still cries for justice. We do not think that increase in fine amount or grant of compensation under the Code would be a justified answer in law. Money cannot be the oasis. It cannot assume the centre stage for all redemption. Interference

in manifestly inadequate and unduly lenient sentence is the justifiable warrant, for the Court cannot close its eyes to the agony and anguish of the victim and, eventually, to the cry of the society.”

48. As per the status report filed by the State, the appellant was involved in as many as 13 cases and he was convicted in following five cases:-

- | | | | |
|------|------------------|-----------------|--------------------------|
| i) | FIR No. 240/2001 | u/s 308/34 IPC | PS Mukherji Nagar, Delhi |
| ii) | FIR No. 465/2005 | u/s 328/379 IPC | PS Darya Ganj, Delhi |
| iii) | FIR No. 603/2005 | u/s 328/379 IPC | PS Kamla Market, Delhi |
| iv) | FIR No. 824/2006 | u/s 411 IPC | PS Punjabi Bagh, Delhi |
| v) | FIR No. 362/2001 | u/s 25 Arms Act | PS Mukherji Nagar, Delhi |

49. A perusal of this status report reflects the *modus operandi* of the appellant as in two similar cases he has been convicted.

50. Under the circumstances, the appellant cannot be released on the period already undergone, however, his substantive sentence is modified to the period of 7 years and he is directed to pay a fine of Rs.10,000/- in default to undergo SI for a period of 6 months. The substantive sentence of 3 years awarded for offence under Section 379 IPC is maintained and while maintaining the fine of Rs.5000/- the default period is reduced to 4 months. In case of realization of fine, a sum of Rs.10,000/- be paid to the victim Sandeep. Needless

to say he shall be entitled to benefit of Section 428 of Code of Criminal Procedure.

51. The appeal stands disposed of accordingly.

Appellant be informed through the Superintendent Jail.

A copy of this judgment along with the Trial Court record be sent back.

SUNITA GUPTA, J

OCTOBER 14, 2014

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