IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A. 535 of 2008

MOHD. ISAF (IN J.C.) ..... Appellant
Through: Mr. Sheikh Imran Alam and
Mr. Usman Chaudhary, Advocates.

versus

STATE (GOVT. OF NCT OF DELHI) ..... Respondent
Through: Mr. Rajat Katyal, Advocate

With

CRL.A. 691 of 2008

MAKISU ..... Appellant

Through: Mr. Sheikh Imran Alam and
Mr. Usman Chaudhary, Advocates
versus

STATE (GOVT. OF NCT OF DELHI) ..... Respondent
Through: Mr. Rajat Katyal, Advocate

With

CRL.A. 576 of 2008

IRFAN ALI ..... Appellant
Through: Mr. Sheikh Imran Alam and
Mr. Usman Chaudhary, Advocates
versus

STATE (GOVT. OF NCT OF DELHI) ..... Respondent
Through: Mr. Rajat Katyal, Advocate

CORAM: JUSTICE S. MURALIDHAR

O R D E R

13.11.2014

1. These appeals are directed against the judgment dated 21st May 2008, passed by the learned Additional Sessions Judge ('ASJ') convicting the Appellants for the offence under Sections 328/354/380/506/34 IPC, and additionally convicting the Appellant in Criminal Appeal No. ('Crl.A.No'). 691/2008, for the offence under Section 411of the Indian Penal Code, 1889 ('IPC'), and the order on sentence dated 22nd May 2008, whereby under Section 328/34 IPC they were sentenced to undergo rigorous imprisonment ('RI') for four years and to pay a fine of Rs.500 each and in default of payment of fine, to undergo simple imprisonment ('SI') for one year. For the offence under Section 354/34 IPC, the Appellants were sentenced to undergo RI for one year and for the offence under Section 380/34 IPC they were sentenced to undergo RI for two years and to pay a fine of Rs.300 each and in default of payment of fine, to further undergo SI for six months. For the offence under Section 506, Part II/34 IPC, they were further sentenced to undergo RI for three years. The Appellant Makisu was sentenced to undergo RI for 18 months for the offence under Section 411 IPC. All the sentences were directed to run concurrently.

2. The case of the prosecution is that the Complainant (PW-2), a young married woman, on 5th November 2002 was crossing the ring road at Maharani Bagh when she read a hoarding on which it was written "*Sabhi samasyon ka samadhan*" and the name of 'Baba Sahil' was also written. According to PW-2 she was in difficulty since her husband was facing financial problems in his business. She decided to enter the place on which the hoarding was put up, which was on the first floor of a building in Kilokari Chowk. According to PW-2, a girl was sitting at the counter and she made payment of Rs. 51/-. When PW-2 went inside, there were other persons also present. She found Makisu (A-1) and confided in him her problems. A-1 assured her that she would recover and that he would treat her. He then called the other two accused Mohd. Isaf (A-2) and Irfar Ali (A-3). On being asked by A-1, A-2 and A-3 brought out a paper on which something was written in saffron colour. Thereafter, they brought a glass of water and that piece of paper was put in the glass of water. PW-2 was asked to drink that water. When she hesitated, they caught her hand and threatened her that in case she refused to drink, her family members would falsely be implicated. According to PW-2, after drinking the water she felt giddiness. The three accused removed her gold ear rings (*jhumkas)*. PW-2 claimed that

she somehow managed to escape from the accused. She is supposed to have got treatment at three places thereafter. She stated that she did not immediately disclose to her family members about the incident as she was afraid of the accused and was terrified. After three days PW-2 gathered courage and confided in her husband . They went to the police on 9th November 2002 and gave a written complaint (Ex.PW2/A).

3. Sub-Inspector Jagmal Singh (PW-4) who was posted at Police Post (PP) Sunlight Colony, Police Station ('PS') S.N. Puri stated that PW-2 had given her statement before him on 9th November 2002 on which he made an endorsement and sent the complaint through Constable Dev Lagan (PW-1) to PS S.N. Puri for registration of the FIR. Thereafter PW-4 went to the spot on 10th November 2002 at around 12.15 at night and found it closed. Thereafter, on the same day, at about 1 pm, he again went to the spot along with PW-2 and PW-1 and found all the three accused present in the office. On making enquiries, A-1 produced the *jhumkas* himself from under a mattress in the office room. The accused were arrested and thereafter charged with the offences to which they pleaded not guilty and were tried.

4. Only four witnesses were examined by the prosecution. The accused

in their statements under Section 313 Cr PC claimed to be falsely implicated. A-1 stated that he was arrested by the police from Maharani Bagh Chowk. A-3 Irfan Ali stated that at the time of arrest he was with A-1 and A-2. He had only come to meet A-1 who was his *bahnoi* (brother-in-law). The accused examined Chunwa (DW-1), a friend of A-3, in their defence. DW-1 confirmed that A-3 and A-1 were related.

5. The trial court relied essentially on the evidence of PW-2 to return a finding of guilt against the accused. A significant aspect of the case is that there was no forensic evidence to show that any stupefying substance was added to the water which PW-2 was allegedly made to drink by the accused. Nonetheless, the trial court was of the view that as long as the version of the victim was trustworthy, they could be convicted for the offence under Section 328/34 IPC since no suggestion was given to PW-2 by the counsel for the accused that she was deposing falsely for some ulterior purpose. As regards the recovery of the *jhumkas* from A-1, the trial Court negatived the plea of the accused that the evidence was unreliable since the receipt for the purchase of the said jewellery item (Ex.P-3) was dated 5th November 2002, which was the date of the incident itself. The trial court was of the view that the receipt

had ‘little weight’ and could not dislodge the credibility of the deposition of PW-2. The conviction of the accused for the other offences was also entirely based on the evidence of PW-2.

6. This Court has heard the submissions of learned counsel for the Appellants and the learned APP for the State and also perused the trial court record.

7. In the first place, it requires to be noticed that in the complaint Ex. PW2/A, there was no mention by PW-2 that she went to the first floor of the office of the accused at Kilokari, and that there was a girl sitting at the counter who collected Rs.51 from her. This was stated by her for the first time when she deposed in the Court. The second factor is that although PW-2 stated that she read a hoarding “*Sabhi Samasyon ka Samadhan*” which was visible from the road, PW-4 who investigated the case did not notice any such hoarding. In fact there was no site plan of the place. No photographs of the premises were taken. Strangely, during the examination-in-chief of PW-2, for the first time, the APP produced some photographs from the police file, which did not form part of the documents filed with the charge sheet, purported to be of the

room from where the *jhumkas* were recovered. Although, this was objected to by the counsel for the accused, it was allowed to be taken on record. The negatives of these photographs, if any, were not produced before the trial court. In other words, there was no document to enable the trial court to understand where the alleged incident took place. This is a serious lacuna in the investigation.

8. The second lacuna in the investigation is the failure to place on record any credible evidence regarding PW-2 having been given a drink which had a stupefying substance. This was one of the essential ingredients of Section 328 IPC. The narration of the events by PW-2 in this regard does not lend assurance to the Court that it is a credible version. She did not state that she became unconscious after drinking the water. She only stated that "after drinking that water I started feeling giddiness". Whether the drink that she was compelled by the accused to have consumed, contained any poisonous substance could have been proved only by analysing the stomach wash, if any, of PW-2. The strange part of the case is that according to PW-2 after managing to escape from the place she received treatment from three places. There was no investigation into this aspect.

9. The explanation for PW-2 not immediately informing her husband about the incident is also not convincing. The fact remains that the complaint was given only after the four days of the incident i.e., on 9th November 2002.

10. The trial court has brushed aside a glaring inconsistency in the evidence of PW-2. This relates to the receipt (Ex. P3) produced by PW-2 to show that the *jhumkas* which were recovered from the accused belonged to her. The said receipt issued by P.S. Jeweller in the name of PW-2 was dated 5th November 2002, which was the very date of the incident itself. In her cross-examination PW-2 stated that the "*jhumkas* were gifted to me by my husband and I cannot say when they were purchased. I do not have any idea as to how many days prior to that incident the *jhumkas* were purchased. When the *jhumkas* were given to me at that time he was not having financial problems". The above answer raises serious doubts about the credibility of PW-2. The receipt Ex.P-3 contradicts her version and makes her an unreliable witness. It is surprising that the trial court chose to observe that the above receipt had 'little effect' on the credibility of the evidence of PW-2.

11. The other strange aspect of the case is that PW-2 herself stated that

she found 4-5 persons present in the place when she went inside the office on the first floor at Kilokari and met the three accused. The said building was located near a bus stop. And yet, not a single witness from the public was examined by the police. In fact, there are no independent witnesses even to the seizures and arrests as well. On the other hand, PW-4 in his cross-examination glibly states that "in my opinion I felt that there was no necessity of joining public witnesses in the investigation even at the time of recovery of *jhumkis*". The evidence of recovery of *jhumkas* from the premises at the instance of A-1, does not inspire confidence.

12. PW-2 does not appear to be a reliable witness. There are unexplained gaps in the investigation which have considerably weakened the case of the prosecution. The net result is that this Court is not satisfied that the prosecution has been able to substantiate the case against the three accused for the offences under Section 328, 380/34 IPC or even 411 IPC.

13. Consequently, the Court sets aside the impugned judgment dated 21st May 2008 and the order on sentence dated 22nd May 2008 of the trial Court and acquits the Appellants of the aforementioned offences.

14. The appeals are allowed. The trial Court record be sent back to the learned trial Court forthwith along with a certified copy of this judgment. In terms of Section 437A Cr PC, the bail and surety bonds of the Appellants will continue for a period of three months from today.

S. MURALIDHAR, J

NOVEMBER 13, 2014
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