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

Reserved on: 24.01.2014
% Date of Decision: 27.01.2014

**+ CRL.A. 32/2013**

RIJAUL KARIM ..... Appellant
Through: Dr. (Mr.) M.K. Gahlaut & Ms. Anita Verma, Advs.

versus

STATE (GNCT OF DELHI) ..... Respondent
Through: Mr. Feroz Khan Ghazi, APP.

**+ CRL.A. 1134/2013**

RAFIQUL ..... Appellant
Through: Mr. Vikas Padora, Adv.

versus

STATE (GNCT OF DELHI) ..... Respondent
Through: Mr. Feroz Khan Ghazi, APP.

CORAM:
HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT

V.K.JAIN, J.

On 05th July, 2010, Cipher R. Gopal, who at that time was working in BSF as Head Constable, was brought to Safdarjung Hospital by a friend, with alleged history of poisoning, while travelling from Nizamuddin Railway Station in an auto rickshaw. He was drowsy at that

time though there was no sign of any external injury on his body. An information in this regard was given to Police Station Sangam Vihar on the same date and was recorded vide DD No. 25B which was given to SI Bharat Singh for investigation. On 12.07.2010, SI Bharat Singh brought Cipher R. Gopal to Police Station Hazrat Nizamuddin, where the statement of Head Constable Sipher R. Gopal was recorded. In his statement, the complainant Sipher R. Gopal stated that on 03.07.2010, he took an auto rickshaw in front of Hazrat Nizamuddin for going to BSF camp in Tigri. However, the number of the auto rickshaw was not noted by him. A boy also boarded the said auto rickshaw for going to Khanpur. After they have travelled about 50 yards, another boy boarded the auto rickshaw. After about 25 minutes, one of them brought a soft drink bottle and the said soft drink was consumed by all of them. On consuming the soft drink, he became unconscious and found himself in Safdarjung Hospital on 05.07.2010. He also noticed that his various articled detained in the statement were missing. On registration of FIR, the case was handed over to ASI of Police Station Hazrat Nizamuddin.

2. The case of the prosecution is that both the appellants were involved in robbing the complainant of his various articles after giving some intoxicating drug dissolved in the soft drink which he consumed in

the auto rickshaw. Accordingly, both of them were charged under Sections 328/379/411 of IPC read with Section 34 thereof. The prosecution examined as many as 15 witnesses. No witness was examined in defence.

3. The complainant Sipher R. Gopal came in the witness box as PW-4 and stated that on 03.07.2010, he, after coming out of Nizamuddin Railway Station at about 11.00 AM, hired an auto rickshaw for going to Tigri camp and boarded the said auto rickshaw. A boy, who had to go to Khanpur, also boarded the auto rickshaw with the permission of the driver. After about 50 yards, another boy made the auto rickshaw stop and sat with the driver. After about 25 minutes of travel, the auto rickshaw was stopped in front of a shop and a bottle of *Maza* cold drink was purchased by the driver along with disposal glasses and all of them shared the cold drink. According to the complainant, initially he refused to take cold drink, but later, they persuaded him to consume the soft drink, whereafter he became unconscious. When he gained consciousness, he found himself in Safdarjung Hospital. He further stated that his belongings, kept in a bag and a brief case as well as the gold chain and gold ring which he was wearing, cash amounting to Rs.1,000/- and his mobile phone were with him at that time. He further

stated that from the hospital, he was shifted to Tigri camp, where be being in depression, took rest. The police was then called and his statement was recorded. During the course of trial, the witness identified both the appellants as culprits and also identified his bag Ex.P-1, blanket Ex. P-2, Jeans Ex.P-3 and Titan Watch Ex. P-/4.

4. PW-5 SI Nand Kishore stated that the appellants Rijaul Karim and Rafikul were arrested by him in the case registered vide FIR No. 241/2011 under Section 328/379/411 of IPC and one bag, one blanket and wrist watch were recovered. According to him, four strips each containing 40 tablets of Ativan were revered from appellant Rajaul whereas, two such strips were recovered from appellant Rafiqul.

PW-6 Constable Parvinder Singh stated that one blanket, one bag and wrist watch were recovered from the possession of the appellants and were seized after sealing them with the seal of SS. He also deposed about recovery of Ativan tablets from the appellants.

PW-13 Head Constable Bhoop Singh also stated that one wrist watch was recovered from the appellant Rafiqul and was seized vide Ex.PW-6/D which bears his signature at point A and the signature of the appellant at point B. According to him, Rafiqul took them to his room

in A-343, J.J. Colony, Shakar Pur and produced the bag Ex.P-1 and blanket Ex.P-2

PW-9 Dr. Anupam Aggarwal proved the MLC of the complainant Ex.PW-9/A. During cross-examination, he denied the suggestion that the poisoning of this nature could be possible due to some gastric problem.

5. PW-12 Shri Sanjeev Kumar, Metropolitan Magistrate stated that the appellant Rafiqul had refused to join TIP before him on 24.12.2010 in Jail No. 3.

6. In their statements under Section 313 of Cr.P.C, the appellants denied the allegations against them. They also denied the recovery of bag, blanket and watch and claimed to be innocent.

7. The first question which comes up for consideration in this case is as to whether the appellants are the persons involved in the incident which took place with the complainant on 03.07.2012 or not. Admittedly, neither of the appellants was previously known to the complainant and no description of either of them was given in the FIR. The complainant, however, identified both the appellants, when he came in the witness box. He maintained that both of them were with him, in the auto rickshaw.

8. As far as the appellant Rafiqul is concerned, admittedly, he refused to join TIP before a Metropolitan Magistrate, in Jail No.3, on 24.12.2010. A perusal of the TIP proceedings conducted by the learned Metropolitan Magistrate would show that the aforesaid appellant refused to join TIP on the ground that his photographs had been taken by the police and he was shown to the witness when he was produced in Saket Courts on the previous day. However, there is absolutely no evidence of the photographs of the aforesaid appellant having been taken by the police or his having been shown to the complainant at Saket Courts either on 23.12.2010 or any other day before he refused to join the TIP. In fact, when the complainant came in the witness box, the aforesaid appellant even did not suggest to him that the witness had seen him at Saket Courts. The onus was upon the appellant Rafiqul to show that he had been shown to the complainant at Saket Courts and, therefore, he was justified in refusing to join TIP on 24.12.2010. 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 Saket Courts at any time prior to 24.12.2010.

9. 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 Rafiqul participated in the TIP, he would have been identified by the complainant.

10. It has come in the deposition of the complainant that he had travelled in the auto rickshaw for about 25 minutes before it was stopped in front of a shop and a bottle of Maza was purchased. It has also come in his deposition that initially he had refused to take cold drink, but later on he was persuaded to do so. It is, therefore, quite evident that the complainant had ample time and opportunity to retain in his mind the imprint of the persons with whom he had travelled in the auto rickshaw and had shared the soft drink. Not only did he travel with them over quite some time, he also had conversation with them as is evident from his initially refusing to take the cold drink, but later being persuaded to consume the same. The Court also has to keep in mind that the complainant was a trained police official, he being a Head

Constable in BSF at the relevant time. As soon as the complainant gained consciousness, he would have tried to recollect the chain of events which had led to his becoming unconscious, and, in the normal course of human conduct and mind, he would have recalled the face of the persons with whom he had travelled in the auto rickshaw and had shared the cold drink, on consuming which he became unconscious. Therefore, he could not have committed a mistake in identifying him during the course of trial. Therefore, identification of the appellant Rafiqul in Court, coupled with his refusal to join TIP before the Metropolitan Magistrate on 24.12.2010 is sufficient to establish his identity as the person who had travelled with the complainant and shared the cold drink with him.

11. As far as the Rijaul Karimis concerned, neither any Test Identification Parade was actually held for the purpose of his identification by the complainant nor did he at any point of time refuse to joint any such proceedings. However, he also was identified by the complainant, at the time he was examined in the Court. The question which comes up for consideration is as to whether the identification of the appellant Rijaul Karim in the Court for the first time, without identification in a previous Test Identification Parade and without

recovery of any stolen article from him, is sufficient to establish his identity as one of the persons involved in the incident which took place with the complainant on 03.07.2010 or not.

12. 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.

13. 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:

> "(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."

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.

14. 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.

15. In *Raman Bhai Naran Bhai Patel and others* versus *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 if 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.

In *Budhsen and another* versus *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.

16. It has come in evidence that 80 tablets of medicine Ativan - 2 mg were recovered from the possession of the appellant Rafiqul whereas 160 such tablets were recovered from the possession of the appellant Raijaul Karim on 12.11.2010 when they were arrested in the case registered vide FIR No.241/2010 of Police Station Dhula Kuan and were duly seized vide memos Ex.PW6/E and PW6/F respectively. Ativan is a trade name of the medicines Lorazepam, which 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.

17. In the case before this Court, considering that the complainant had travelled with the culprits in an auto rickshaw in broad day light for almost 25 minutes, had interacted with them and had also consumed the cold drink offered by them, and also taking into consideration the fact that he is a trained police official being a Head Constable, the identification of the appellant - Rijaul Karim for the first time in the Court, cannot be said to be no assistance to the prosecution.

As noted earlier, as many as 160 tablets of Ativan were recovered from the possession of the appellant - Rijaul Karim. He has not told the Court that as to why he was having so many tablets of the said medicine with him. It is quite possible to make a person temporarily unconcious or almost unconscious, by mixing the aforesaid medicine in a cold drink, in a large quantity. Therefore, recovery of the aforesaid medicines from the appellant - Rijaul Karim in large quantity, in my opinion, is a strong piece of evidence which can be used for the purpose of corroborating the deposition of the witness with respect to the identity of the appellant. The identification in the Court, coupled with the recovery of the

aforesaid medicine, in my view, is sufficient to establish that the appellant - Rijaul Karim was one of the persons involved in administering the stupefying substance to the complainant in a cold drink.

18. It has also come in evidence that the stolen bag, jeans and watch of the complainant were recovered from the possession of the appellant - Rijaul Karim. The alleged recovery was assailed by the learned counsel for the appellants on the ground that, as admitted by the complainant in his cross examination, the aforesaid articles were shown to him in the police station; and no attempt was made by the Investigating Officer to get the aforesaid articles identified from the complainant in the judicial TIP. As regards, jeans, its size was found to be 34 inch whereas according to the complainant his jean was of the waist of 32 inch. Considering the aforesaid discrepancies, I have excluded the aforesaid recovery from consideration, but, despite that, the identity of the appellants stand duly established on account of identification by the complainant coupled with the recovery of stupefying substance in the form of tablets Ativan in large quantity from them.

19. Section 328 of IPC to the extent it is relevant provides that whoever administers or causes to be taken by any person any stupefying

drug or other things with an intent to commit or facilitate the commission of the offence shall be liable to be punished. A perusal of the MLC of the complainant would show that when he was brought to the hospital on 5.7.2010, he was in a drowsy condition. It has come in the deposition of the complainant that he became unconscious on consuming the cold drink offered to him. Therefore, there can be no reasonable doubt that some stupefying drug or substance was mixed in the cold drink which the appellants made the complainant to consume. This obviously was done with intent to commit theft of the articles belonging to the complainant, 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 appellants, therefore, were rightly held guilty of the offence punishable under Seciton 328 and 379 of IPC read with section 34 thereof.

20. It was submitted by the learned counsel for the appellants that no viscera of the complainant was taken and in the absence of any viscera report, it cannot be said that any poison or any stupefying, intoxicating or unwholesome drug or other thing was administered to him. I, however, find no merit in this contention. The viscera report would have been necessary had the complainant with administered poison or any

poisonous substance. Nothing could have been found in the viscera, on account of the complainant taking a stupefying substance such as Ativan tablets mixed in a cold drink. Therefore, taking the viscera of the complainant was not really necessary.

21. For the reasons stated hereinabove, the conviction of the appellants under Section 328 and 379 of IPC read with section 34 thereof is confirmed.

22. The appellants have been sentenced to undergo RI for two years each and to pay fine of Rs.2,000/- each, in default to undergo SI for two months under Section 379 of IPC. No ground for reduction of the aforesaid sentence is made out. The appellants have also been sentenced to undergo imprisonment for five years each and to pay fine of Rs.5,000/- each or in default to undergo SI of three months each under Section 328 of IPC read with Section 34 thereof. In the facts and circumstances of the case, the sentence of rigorous imprisonment under Section 328 of IPC is reduced from five years each three years, but the amount of fine is increased from Rs.5,000/- each to Rs.25,000/- each. In default of payment of fine, the appellants shall undergo SI for six months each. Out of the fine realized from the appellants, Rs.40,000/- be paid as compensation to the complainant - Cipher R. Gopal.

The appeals stand disposed of accordingly.

One copy of this order be sent to the Jail Superintendent for being served upon the appellants, who are stated to be in judicial custody.

Trial court record be sent back along with a copy of this judgment.

JANUARY 27, 2014 V.K. JAIN, J.

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