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

+ CRL.A. 567/2003

RUPESH KUMAR @ MUKESH KUMAR Appellant

Through: Mr. Sana-Ul-Haq, Mrs. Gitanjali Malviya, Mrs. Kusum Pandey, Mr. Tabish Rajput, Mr. Abhishek, Ms. Deepu Chaudhary, & Mr. Mohd. Javed, Advocates.

versus

STATE

..... Respondent

Through: Mr. Sunil Kumar Gautam, APP for the State with Insp. Yakub Khan, P.S. NDRS.

CORAM:
HON'BLE MR. JUSTICE AMIT SHARMA

% **ORDER**
22.03.2024

1. The present appeal challenges the judgment of conviction and order on sentence dated 21.07.2003 and 24.07.2003, respectively passed by the learned Additional Sessions Judge, Delhi in SC No. 46/02 arising out of FIR No. 710/01 under Sections 328/379/411/34 of the IPC. The learned ASJ convicted the appellant for offences under Sections 328/379/34 of the IPC. The appellant was sentenced to undergo rigorous imprisonment for 3.5 years and a fine of Rs. 1,000/- for offence under Section 328/34 of the IPC, and in



default of payment of fine, further simple imprisonment for 02 months. No separate sentence was awarded for offence under Section 379/34 of the IPC.

2. The case of the prosecution is that on 11.10.2001, while on patrol duty, SI Pyare Lal (PW-7) spotted two boys running toward him. They were being followed by the complainant/Amjad Ansari (PW-1), who was shouting '*chor-chor, pakro-pakro*'. SI Pyare Lal (PW-7) apprehended the boys and they revealed their names as Rupesh Kumar @ Mukesh Kumar (the appellant) and Vijay @ Chotu. The complainant/Amjad Ansari (PW-1) gave a statement to SI Pyare Lal (PW-7) stating that the said boys offered him biscuits. When he refused, they persisted and therefore, he ate two biscuits. He further stated that thereafter, he felt giddy and drowsy. The boys told him to lie down and took away his bag. Based on his statement, the present FIR was registered.

3. Learned counsel for the appellant submits that in his statement recorded under Section 161 of the CrPC, the appellants states that the biscuit was administered to him by co-accused Vijay @ Chotu and not the appellant. It is submitted that the FIR was registered wherein it was alleged that co-accused Vijay @ Chotu asked the appellant for a biscuit, which he then gave to the complainant (PW-1). It is submitted that the MLC of the complainant (Ex. PW-8/A) contradicts the same, inasmuch as in the MLC, it has been recorded that there was "*consumption of tea from a stranger*". It is submitted that even in his testimony recorded before the learned Trial Court, the complainant (PW-1) stated that his watch, cash etc. were stolen, which is contradictory to the seizure memos (Ex. PW-1/B and 1/C) wherein it is stated that a black bag was recovered from co-accused Vijay @ Chotu.

4. It is further submitted that no evidence has been brought on record to



submit that any substance in terms of Section 328 of the IPC was administered to the complainant (PW-1) by the appellant.

5. *Per contra*, learned APP for the State submits that the alleged contradictions in the statements of the complainant are minor in nature and have no bearing on the merits of the case of the prosecution. It is submitted that after duly appreciating the material placed on record and examining the testimonies of the witnesses, the learned ASJ has rightly convicted the appellant.

6. Heard learned counsel for the parties and perused the record.

7. While convicting the appellant and co-accused Vijay @ Chotu, the learned ASJ observed and held as under:

“6. The accused have taken a defence of false implications and have not led any evidence in defence in this regard. On behalf of accd. Rupesh it has been contended by the Id. Counsel appearing on his behalf that he had been wrongly identified by the complainant. He has contended that the cross-examination of the complainant shows that most of the talking had been done by the other accused who had offered biscuits to the Complainant. The Ld. Counsel contends that accused Rupesh was not with accd. Vijay Singh and had been wrongly identified by the Complainant. I have considered this contention which appears to be misconceived. The testimony of Amjad Ansari amply proves that accused Rupesh was present along with accused Vijay Singh at the time of the crime and was an accomplice of him. Amjad Ansari had talked to both the accused for sufficient time and both the accused had run away after taking away his cloth bag etc. They were apprehended at a distance of 10/15 yards immediately after Amjad Ansari had raised a noise. There appears no doubt. With regard to the identity of accd. Rupesh Even otherwise PW 7 SI Pyare Lai and PW 2 const. Brij Pal have confirmed the participation of accused Rupesh in the crime as they had recovered a match box from the possession of this accused which contained puriyas of white powder. There is no doubt in my mind that accd. Rupesh was an accomplice of accd. Vijay Singh in the present crime. The testimony of Amjad Ansari coupled with the statements of PW 2 const. Brij Pal and PW 7 SI Pyare Lai prove the



case of the prosecution beyond all shadow of doubt. It has been proved on record that both the accused had administered some stupefying thing to Amjad Ansari with intention to commit theft and had in furtherance of their common intention committed the theft of his belongings. Both the accused are accordingly convicted U/s 328/379/34 IPC. Let them be heard on the question of sentence.”

8. A perusal of the record reflects that the learned ASJ, while convicting the appellant for offence under Section 328 of the IPC, has not taken note of the fact that there is no scientific evidence to show that any substance, as required to make out an offence under the said provision, was administered by the appellant to the complainant (PW-1).

9. As far as the offence under Section 379 of the IPC is concerned, the appellant was apprehended at the spot alongwith co-accused Vijay @ Chotu and the stolen articles were recovered. Sufficient evidence has been brought on record to establish that the appellant alongwith his co-accused had stolen the articles from the possession of the complainant (PW-1). Therefore, offence under Section 379/34 of the IPC is made out and the conviction under the said provision is upheld.

10. The appellant was sentenced to undergo rigorous imprisonment for 3.5 years and a fine of Rs. 1,000/- for offence under Section 328/34 of the IPC, and in default of payment of fine, further simple imprisonment for 02 months. No separate sentence was awarded for offence under Section 379/34 of the IPC. Nominal roll dated 14.03.2024 reflects that the appellant has undergone 01 month and 23 days of the sentence awarded to him.

11. The FIR related to the year 2001. No useful purpose will be served by making the appellant undergo any further incarceration. Though no separate



sentence was awarded, the period undergone by the appellant is directed to be treated as the sentence under Section 379/34 of the IPC.

12. In view of the above, the present appeal is partly allowed. The judgment of conviction is set aside insofar as it relates to conviction for offence under Section 328/34 of the IPC. The conviction of the appellant for offence under Section 379/34 of the IPC is upheld. The order on sentence is modified to the aforesaid extent. The fine imposed by the learned ASJ is also maintained. The appellant is sentenced to the period already undergone, subject to payment of fine of Rs. 1,000/- imposed by the learned ASJ, if not paid, to be deposited before the learned Registrar General of this Court, within fifteen days.

13. The appeal is partly allowed disposed of accordingly.

14. Pending applications, if any, also stand disposed of.

AMIT SHARMA, J

MARCH 22, 2024/bsr