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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 19th March, 2015

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CRL.A. 260/2014

MOHD ZUBER & ANR.

..... Appellants

Through: Mr.Aditya Aggarwal and Mr.Rahul
Kumar, Advocates

versus

STATE

..... Respondent

Through: Mr.O.P. Saxena, APP for the State
along with SI Praveen, PS Preet
Vihar.

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. This appeal u/s 374 of the Code of Criminal Procedure, 1973 has been filed by the appellant challenging the judgment dated 18th January, 2014 and order on sentence dated 22nd January, 2014 vide which the appellants were convicted under Section 328/379/34 IPC, 1860 and sentenced to undergo rigorous imprisonment for a period of 4 years along with fine of Rs.10,000/- u/s 328/34 IPC in default to undergo 6 months simple imprisonment and 3 years rigorous imprisonment u/s 379/34 IPC with fine of Rs.5000/- each in default to undergo simple imprisonment for 3 months passed by the learned Additional Sessions Judge in Sessions Case No.44/11 arising out of

FIR 03/11 u/s 328/379/411/34 IPC registered with Police Station Preet Vihar.

2. Prosecution case emanates from the fact that on 9th September, 2011 an information was received at Police Station Preet Vihar vide DD No.15A that a person was lying unconscious at E-96, East Laxmi Market in Gali No.6. On receipt of this information, HC Virender Singh along with Constable Sandeep reached at the spot where they came to know that victim had already rushed to Hedgewar Hospital by the PCR Van. They then reached at Hedgewar Hospital. The victim was unfit for statement. The call was kept pending. On 5th January, 2011, the victim Amit regained his consciousness and became fit for statement. His statement Ex.PW6/A was recorded wherein he stated that he was a salesman at Spice Hot Spot and that he was having a mobile phone Nokia E-63. He told about the phone to a customer on his store. The customer took his phone number and on 3rd January, 2011 at about 12:30 pm he received a call on his mobile phone from the said customer. The customer expressed his desire to buy his mobile phone and for the said purpose he called him at East Laxmi Market near Sai Baba Temple. He told him that he would meet him after closure of the shop. At about 10:30 pm he went on his motorcycle at Sai Baba Temple. The customer met him there. The customer offered him to come to his house for negotiating the deal. He then went to the house of the customer with him. A lady was already present there in the room. She was introduced by the customer as his wife. After some time the lady brought tea. After taking tea he became unconscious and on regaining consciousness, he

found himself in the hospital. His gold chain, two HDFC credit cards, one debit card of SBI, one debit card of HDFC Bank, some cash, ear bali of gold, Nokia Mobile Phone E-63 bearing No. 9911601609, a new Samsung black colour mobile phone bearing No. 9999663316 were missing. He was also unaware about his motorcycle which was parked outside the house of the customer. On the statement of Amit Kumar, an FIR was registered u/s 328/379/34 IPC. During investigation the ATM Card, credit card, driving license, some documents and the bag of the complainant were recovered from the rented house of the accused. Accused Zuber was arrested. He disclosed that the golden chain, golden ear ring and mobile phone were in possession of accused Neha. Accused Neha was then arrested. The golden chain and ear-ring were recovered at her instance. The recovered articles were identified in TIP by the complainant. On completion of investigation, charge sheet was filed against both the accused u/s 328/379/34 IPC.

3. Both the accused pleaded not guilty to the charge u/s 328/379/34 IPC and 411 IPC and claimed trial.

4. In order to substantiate its case, prosecution examined 17 witnesses. Both the accused alleged their false implication and claimed innocence in their statement recorded u/s 313 Cr.P.C. They denied that any recovery has been affected from their possession or at their instance.

5. After meticulously examining the evidence led by the prosecution, vide impugned judgment the appellants were convicted and sentenced as mentioned above. Feeling dissatisfied, present appeal has been preferred.

6. It was submitted by the learned counsel for the appellants that the appellants were convicted under Section 328 IPC, however, there is no scientific evidence to prove that any stupefying or intoxicant substance was administered to the complainant. Moreover, no independent witness has been examined by the prosecution. There is contradiction in the testimony of prosecution witnesses regarding the identity of the bag alleged to have been recovered. The complainant was having relation with the appellant Neha which ultimately broke and, as such, the complainant has falsely implicated the accused persons in this case. The impugned judgment is liable to be set aside. Moreover, the appellants have two minor children to look after, as such, even otherwise, a liberal view be taken.

7. Per contra, it was submitted by learned Additional Public Prosecutor for the State that the gastric lavage could not be taken because as per the testimony of the doctor, the victim was very irritable, however, there is ample evidence on record to prove that some stupefying substance was administered in the tea after taking which the victim became unconscious and gained consciousness in the hospital only after two days of the incident. No animosity has been alleged against the victim for which reason he would falsely implicate the accused in this case. Moreover, the recovery of stolen

articles from the possession of the accused amply proves their complicity in the crime. The impugned judgment does not suffer from any infirmity which calls for interference. As such, the appeal is liable to be dismissed.

8. The star witness of the prosecution is PW6-Amit Kumar who is the victim. He deposed that he had a mobile phone make Nokia E-63 which he wanted to sell and that on 2nd November, 2011, accused Zuber came to his shop for purchase of mobile phone. He offered to sell his mobile phone to him. Accused Zuber took his phone number and that on 3rd January, 2011, he received a call from Zuber at about 12:00-12:30 pm asking him to meet him near Sai Baba Mandir, near Radhu Palace near Khureji. He told him that he can meet him after the closure of the shop. At about 10:30 pm after closing the shop, he went on his motorcycle and met accused Zuber near Sai Baba Mandir. Accused Zuber invited him to his house. Both of them then went to the house of accused Zuber situated in a gali near Sai Baba Mandir. Accused Neha, wife of accused Zuber was present in the house. He asked Zuber to see his mobile phone but he said that they would have tea and then see the phone. Accused Neha brought tea and after taking tea he became unconscious. He deposed that on 5th January, 2011, he regained his consciousness. He found himself in Hedgewar Hospital and also found that his gold chain weighing about 1.75 tolas, his ear bali, his purse containing SBI Debit Card, two HDFC Bank Credit Cards, an HDFC Debit Card, cash, mobile phone make Nokia E-63, a Samsung mobile phone, one more mobile phone, his driving license and some other documents were missing. His

motorcycle was also not there. He stated that he gave statement Ex.PW6/A to the police.

9. The witness was subjected to cross-examination where he categorically deposed that accused Mohd. Zuber was not known to him prior to the time when he came to his shop. He also denied that he talked to accused Neha seventeen times on telephone on different occasions. He further deposed that when accused Zuber came to his shop, many other customers and salesmen of the store were present. Further that at the request of the customers, he goes to their house to show the mobile sets after closure of the shop. When he was taken by accused Zuber to his house, accused Neha opened the door of the room. He denied that he was drunk at that time.

10. The witness has withstood the test of cross-examination. Nothing material could be elicited to discredit his testimony. Moreover, although it was submitted during the course of arguments that the complainant was having relation with accused Neha, however, neither any such suggestion was given to the witness in his cross-examination nor proved. It has come in his cross-examination that after taking tea offered by accused Neha, he became unconscious and when he regained consciousness, he found his belongings missing including his chain, ear bali, mobile phone, debit/credit cards, purse and cash. None of the accused has alleged any ill will, grudge or animosity with the complainant for which reason he would falsely implicate them in this case.

11. Since the incident had taken place within four corners of the house of the accused, therefore, there can be no other eye-witness to the occurrence. However, there are other circumstances which amply corroborate the testimony of PW6.

12. PW5-Smt. Kestri is the landlady of the house bearing No. E-96, East Laxmi Market, Delhi where the accused persons were residing as a tenant on the ground floor. This witness has unfolded that the accused started residing in a room in her house on the ground floor in November, 2010. They had a daughter. After residing there for about a month, they went to their village in Bihar to leave their daughter in the village. On 28th December, 2010, they returned back from Bihar and informed her that they would vacate her house on 3rd/4th January, 2011. On 1st January, 2011, accused shifted their goods from the room. In the evening of 3rd January, 2011, when she asked the accused as to when they would vacate her house, they informed that they would vacate the room on 4th January, 2011. On 4th January, 2011 at about 11:30 a.m., she went to the room of the accused and found the room opened. On entering the room, she found one unknown person lying. She tried to make him get him up but he was unconscious. She brought him out and made him sit in the *gali*. Both the accused were not present in the room. People gathered in the *gali*. The PCR van came and took Amit to hospital.

13. PW14-Head Constable Brahm Pal, who was working as in-charge, PCR on 3rd/4th January, 2014 has deposed that on receipt of a call, he reached at E-96, Gali No. 6, East Laxmi Nagar Market where

he saw a person lying unconscious. He took him in PCR van to Dr. Hedgewar hospital and admitted him there.

14. PW1-Dr. A. Saha, Casualty Medical Officer, Dr. Hedgewar Hospital, Delhi examined an unknown patient brought by Head Constable Brahm Pal of PCR with alleged history of being found lying roadside in a state of unconsciousness. He prepared his MLC Ex.PW1/A. As per the MLC Ex.PW1/A, the gastric lavage could not be taken as the patient was irritable.

15. It has further come in the evidence that on the basis of information received on 28th February, 2011 that Zuber would be coming at Metro Station, Laxmi Nagar, complainant along with PW15-SI Murtaza Khan and Constable Sikandar went to Laxmi Nagar Metro Station. On the identification of the complainant, accused Zuber was arrested and on his personal search, a purse containing visiting card-Ex.P4 was recovered. Subsequently on 6th April, 2011, on the pointing out of complainant, accused Neha was arrested at T Point Madhuban Chowk. Pursuant to the disclosure statement-Ex.PW6/H made by her, a golden chain and golden earring, Ex.P2 and P3 respectively were recovered from house No. A-449, Gali No. 3, Chauhan Bangar Old Seelampur from a box from the room at First floor on 7th April, 2011. The complainant identified the articles belonging to him in the Test Identification Proceedings conducted by PW12-Sh. J.P. Nahar, Metropolitan Magistrate.

16. The first question which comes up for consideration is as to whether the appellants were the persons involved in the incident which took place with the complainant on 3rd November, 2011.

17. It has come in the deposition of the complainant that on 2nd November, 2011, accused Zuber came to his shop for purchase of mobile phone. At that time, he informed him that he wanted to sell his mobile phone. Accused took his mobile number. On 3rd November, 2011, complainant received a call from Zuber asking him to meet him near Sai Baba Mandir. After closing his shop at about 10:30 pm, complainant went on his motorcycle and met Zuber near Sai Baba Mandir who took him to his house where his wife Neha brought tea and after taking tea, the complainant became unconscious. It is, therefore, quite evident that complainant had ample time and opportunity to retain in his mind the imprint of the person with whom he had met at his shop on 2nd November, 2011 and thereafter on 3rd November, 2011 where besides Zuber he also met his wife and talked to them. As such, he not only met the two accused persons but also had sufficient time and opportunity to talk to them and, therefore, he could not have committed a mistake in identifying them. Moreover, both the accused were apprehended on the identification of the accused. Further pursuant to their arrest, from accused Zuber, purse containing articles of Amit Kumar were recovered and at the instance of accused Neha, the gold chain and ear-ring belonging to the complainant were recovered.

18. 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 thing with intent to commit or to facilitate the commission of an offence shall be liable to be punished.

19. A perusal of the MLC goes to show that when the complainant was brought to the hospital on 4th January, 2011 at 1:55 PM, he was in a state of unconsciousness at that time and it was only on 5th November, 2011 that he became conscious and then his statement was recorded by PW15-SI Murtaza.

20. It has come in the statement of complainant that he became unconscious on consuming tea offered to him, therefore, there can be no reasonable doubt that some stupefying drug or substance was mixed in the tea which the appellants made the complainant to consume. This obviously was done with the intent of committing 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 Section 328 and 379 of IPC r/w Section 34 thereof.

21. It was submitted by the learned counsel for the appellant that gastric lavage of the complainant was not taken and in the absence of the same, 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 substance in this contention. The viscera

would have been necessary had the complainant been administered poison or any poisonous substance. Nothing could have been found in the viscera on account of complainant taking a stupefying substance mixed in tea.

22. For the reasons stated hereinabove, the conviction of the appellant under Section 328 and 379 of IPC r/w Section 34 thereof is confirmed. The appellants have been sentenced to undergo rigorous imprisonment for 3 years each and to pay fine of Rs.5000/- each in default of payment on which they were to undergo 3 months simple imprisonment each. No ground for reduction of aforesaid sentence is made out. The appellants have also been sentenced to undergo imprisonment for 4 years u/s 328/34 IPC and fine of Rs.10,000/- each in default to undergo simple imprisonment for 6 months each. In the facts and circumstances of the case coupled with the fact that the appellants have two minor children, the substantive sentence of rigorous imprisonment u/s 328 IPC is reduced from 4 years to 3 years while maintaining the quantum of fine. Both the sentences to run concurrently. Out of fine realized from the appellants, a sum of Rs.35000/- be paid as compensation to the complainant-PW6-Amit Kumar.

23. With this modification, the appeal stands dismissed. Appellant Neha was granted interim bail on 22.04.2014 which was being extended from time to time. She is directed to surrender before Superintendent Jail on 21.03.2015 to serve the remaining part of sentence.

24. Copy of the judgment along with Trial Court record be sent back. Copy of the judgment be also sent to Superintendent Jail for information to appellant Mohd. Zuber.

(SUNITA GUPTA)
JUDGE

MARCH 19, 2015

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