

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.418 of 2014

Arising Out of PS.Case No. -3 Year- 2013 Thana -KATIHAR GRP CASE District- KATIHAR

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Md. Mangala @ Mangla, son of Late Roshan Ali, resident of Village/Mohalla-Singaragachh, P.S.-Islampur, District-North Dinajpur, West Bengal

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant/s : Mr. Digvijay Pratap Singh, Advocate

For the Respondent/s : Mr. Binod Bihari Singh, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA
CAV JUDGMENT

Date: 20-09-2017

This appeal is directed against the judgment of conviction dated 20.6.2014 and order of sentence dated 25.6.2014 passed by Shri Radha Krishna, learned Sessions Judge-cum-Special Judge, Katihar in G.R.No. 11 of 2013, arising out of Kishanganj Rail P.S.Case No.3 of 2013 (State vs. Md. Mangala), by which the learned Sessions Judge has convicted the appellant under Section 328 of the Indian Penal Code as well as 307, 379, 411 IPC and Section 22 of the Narcotic Drugs and Psychotropic Substance Act and sentenced him to undergo rigorous imprisonment for 10 years under Section 328 IPC with a fine of Rs.5000/- and in default of payment of fine he was to undergo further imprisonment for six months and also sentenced to undergo R.I. for 10 years under Section 307 IPC with a fine of Rs.5000/- and in default of payment of fine he was to undergo further imprisonment for three months and also sentenced him to undergo R.I. for three years for the offence under Section 379 IPC with a fine of Rs.2000/-



and in default of payment of fine he was to undergo imprisonment for three months, sentenced him further R.I. for three years and a fine of Rs.2000/- and in default of payment of fine he was to undergo imprisonment for three months and lastly sentenced him to undergo rigorous imprisonment for 10 years for the offence under Section 22 of N.D.P.S. Act with a fine of Rs.50,000/- and in default of payment of fine he was to undergo six months imprisonment and all the sentences were directed to run concurrently.

2. Prosecution case, in short, on the basis of statement made by one Md. Rashid Alam (P.W.5) in which he has stated before S.H.O. of G.R.P., Kishanganj on 8.2.2013 at 2.30 hours near north booking counter of Kishanganj Railway Station alleging, inter alia, that on 7.2.2013 at about 9 P.M. he along with his friend Tauquir Alam had come to the Railway Station, Kishanganj to receive his younger brother Md. Rahid Alam. On 7.2.2013 at 10.30 P.M. the informant had talked to his younger brother Md. Rahid on his mobile and he had apprised of this that he was traveling by train No. 15645 UP L.T.T. Guahati Express in Sleeper Coach No.S-5 and coming to Kishanganj and that train had started from Katihar Railway Station and he had a small box and a bag with him. He has also stated that thereafter he contacted his brother after an hour on Mobile No. 08355880561 but received no reply. Further prosecution case is that at about 12.45 A.M. the train reached at Kishanganj Railway Station and informant started searching his brother at Platform No.1 but he could not meet and after five minutes the train proceeded from Kishanganj



Railway Station and in the meantime he informed about the same to police party and the police in turn informed G.R.Police Station of New Jalpaiguri. Further prosecution case is that thereafter police started searching him and in course of search near northern booking counter by the side of telephone booth, two persons were found in suspicious condition carrying a tin box and on seeing the police party, they started fleeing away but police apprehended them and they disclosed their names as appellant and one more accused person. Further prosecution case is that police after search prepared seizure list on recovery of tin box, SIM, I.D. card, Lemon Mobile, etc. and also 8 tablets of Alprazolam 0.25 mg and when accused persons were asked for key of the box they told they had no key and Mobile was recovered from the pocket of another accused Ranjeet Uraon (since dead). Further prosecution case is that police received information on mobile from New Jalpaiguri that brother of informant, who was found in unconscious condition, was being sent to the hospital and informant had belief that behind the occurrence there is hand of accused persons, including the appellant, who after administering intoxicated substance, looted the belongings of his brother and they had left his brother in dangerous condition.

3. On the basis of fardbeyan, Kishanganj Rail P.S.Case No.03 of 2013 was registered on 8.2.2013 under Sections 328, 307, 379, 411/34 of the Indian Penal Code and 20/22 of Narcotic Drugs and Psychotropic Substance Act and after completion of investigation charge sheet was submitted against the appellant and one more



accused person on 28.2.2013 under Section aforesaid Sections of the IPC and 20/22 of N.D.P.S. Act and cognizance of the offence was taken on 5.3.2013 and thereafter charges were framed on 11.4.2013 under Section 22 of N.D.P.S. Act and Sections 328/34, 307/34, 379 and 411 of the IPC, which was read over and explained to the accused persons in Hindi, to which they pleaded not guilty and claimed to be tried.

4. Altogether 11 prosecution witnesses have been examined in this case, they are Vivek Kumar, Drug Inspector, who had submitted report in respect of Alprazolam (P.W.1), Laxhman Purti, Sipahi, Kishanganj Rail P.S., who deposed on arrest of accused (P.W.2), Uday Krishna Yadav, Circle Officer, who conducted T.I.P. of recovered articles (P.W.3), Tauquir Alam, friend of informant, who had gone along with informant to Railway Station to receive the victim (P.W.4), Md. Rashid Alam, the informant and brother of victim Rahid Alam (P.W.5), Md. Rahid Alam, the victim (P.W.6), Havaladar Laxhman Singh (P.W.7), Raghunandan Sharma, seizure list witness (P.W.8), Amar Biswas, I.O. of the case (P.W.9), Sri Sanjay Priya, Judicial Magistrate, who conducted T.I.P. (P.W.10) and Dr. Vijay Thapa, who proved Bed Head Ticket of victim (P.W.11).

5. Apart from the oral evidence, the prosecution has also adduced documentary evidence and they are :

(1) Ext.1 is a report with signature of P.W.1, Drug Inspector, Vivek Kumar.

(2) Ext.2 is writing with signature of P.W.3 Uday Krishna



Yadav, C.O. in presence of whom TIP of articles was conducted.

(3) Ext.3 is signature of Tauquir Alam (P.W.4) on the seizure list.

(4) Ext.4 is signature of Md. Rashid Alam (P.W.5), informant of case on his fardbeyan.

(5) Ext.4/1 is signature of Tauquir Alam (P.W.4) on the fardbeyan.

(6) Ext.5 is signature of Rashid Alam (P.W.6) victim of the case on TIP chart (article).

(7) Ext.5/1 is signature of Rashid Alam (P.W.5) informant of the case on T.I.P. chart (article).

(8) Ext.6 is seizure list by Amar Biswas, I.O. of the case.

(9) Ext.6/1 is signature of Raghunandan Singh on the seizure list.

(10) Ext.6/2 is signature of accused Mangala on the seizure list.

(11) Ext.7 is signature of Amar Biswas, I.O. of the case on the seizure list.

(12) Ext.8 is writing on the fardbeyan by I.O. of the case Amar Biswas.

(13) Ext.9 is formal F.I.R. drawn by Amar Biswas.

(14) Ext.10 is T.I.P. chart (article).

(15) Ext.11 is Charge sheet by Amar Biswas, I.O. of the case.

(16) Ext.12 is T.I.P. chart (regarding identification).



(17) Ext.13 is signature of Deputy Superintendent Dr.Vijay Thapa on medical treatment receipt marked "X".

(18) Ext.13/1 is signature of Deputy Superintendent Dr. Vijay Thapa on medical treatment receipt marked "X/1" for identification.

(19) Ext.13/2 is signature of Deputy Superintendent Dr. Vijay Thapa on medical treatment receipt marked "X/2" for identification.

That apart, the prosecution has also brought seized articles as material exhibits and they are :

(1) Material Ext.1 is Strip of 8 tablets of Alprazolam.

(2) Material Ext .II is Voters' Identity Card of accused Mangla.

(3) Material Ext. III is Lemon Mobile, EMEI No. 911200201022021.

(4) Material Ext. IV is a Purse with Airtel SIM No. 8991510020201260783.

(5) Material Ext. V is box with lock, Pant, Toffee, Biscuit, Soap, etc.

6. There was no specific defence on behalf of appellant and other co-accused and their defence as per cross examination and statement made under Section 313 Cr.P.C. was that of false implication.

7. It appears that one co-accused, Ranjeet Uraon had died during pendency of the appeal and, as such, the appeal had proceeded



only against the appellant.

8. Learned Trial Court after concluding trial has convicted the appellant under Section 22 of N.D.P.S. Act as well as under Sections 307, 328, 379 and 411 of the IPC and sentenced him, as stated above.

9. Being aggrieved by the said judgment of conviction and sentence, the present appeal has been preferred by the appellant on various grounds.

10. Learned counsel for the appellant has assailed the judgment on the ground firstly that conviction of the appellant under Section 22 of NDPS Act is not proper as only 8 tablets of Alprazolam were found from the possession of the appellant that being daily used tablet can be found to any person, and secondly there is no finding on the record to show that victim has become unconscious due to consuming intoxicant tea supplied to him and there is no report of the Doctor, who has examined the victim has only proved Bed Head Ticket. Further submission is that offence under Section 328 IPC is not made out as there is no finding of the Doctor or report was available on the record as he became unconscious due to intoxicant which was consumed by him along with tea and on the oral evidence of victim that he was supplied tea and after consuming it he became unconscious, is not sufficient for conviction under Section 328 IPC. Further submission is that in the facts and circumstances of the case no case is made out under Section 307 IPC as prosecution evidence shows that there is no intention to kill the victim, rather intention was



to commit theft and hence no offence under Section 307 IPC is made out. Apart from that further submission of learned counsel for the appellant is that in this case learned trial court has convicted the appellant under Section 379 as well as 411 IPC, which is not just and proper in view of the fact that either a case under Section 379 or under Section 411 IPC is made out and as such he cannot be convicted under both the offences and on the basis of aforesaid submission he has submitted that the impugned judgment of conviction is not sustainable in the eye of law.

11. Learned counsel for the State, on the other hand, has submitted that there are ample evidence available on record, including the informant and his friend to show that appellant was apprehended in suspicious condition along with seized articles of the victim, which were recovered from him and were put on T.I.P. and identified by the victim (P.W.6) and apart from that victim has also identified the appellant in T.I.P. However, learned APP has fairly conceded that seized Narcotic drug is in small quantity but conviction under Section 22 of NDPS Act is just and proper. Learned counsel for the State has also fairly conceded that in this case no offence is made out under Section 307 IPC. However, offence under Section 328 IPC is made out as victim was administered drug, prohibited under NDPS Act. Hence, the conviction of appellant under Sections 328, 379 or 411 IPC and Section 22 of NDPS Act is quite just and proper and does not require any interference by this Court.

12. In the background of the case, let me examine the



evidences, adduced on behalf of prosecution. P.W.5 is the informant of this case and brother of the victim and his evidence in chief clearly shows that he came to receive his brother Md. Rahid Alam (P.W.6) at Kishanganj Railway Station on 7.2.2013, who was coming from Bombay in L.T.T. Guahati Express and his brother informed him that he reached Katihar and also informed him about berth number and coach number of the said train. His evidence further shows that at 12.45 A.M. on 8.2.2013, when he did not meet him, he started searching his brother, he was not found and train proceeded for Guahati. His evidence further discloses that in the meantime he met with police party and informed about the same to police, who apprehended one person who was carrying a tin box and another having Mobile. His evidence further shows that the apprehended accused persons had disclosed their names as appellant and other co-accused. His evidence further shows that Darogaji had informed the police of New Jalpaiguri Rail P.S. on telephone and thereafter return call was received from New Jalpaiguri, informing in coach No.S-5, one person was found in unconscious condition at berth number 70 and he was sent to the hospital. This witness has been cross examined by the defence also but there is nothing in his cross examination to doubt credibility of the witness, rather in paragraph-9 of his cross examination, he has stated that they along with Darogaji came out of Station and two persons were caught and tablets, box, etc. were found from his possession and he identified the tin box.

13. P.W.6 is victim and his evidence discloses that he was



coming from Bombay in LTT Guahati Express and in the train, he met with appellant along with other accused person, who had no ticket and thereafter he was provided tea and after taking tea he became unconscious and he regained his consciousness in Siliguri hospital and then identified his brother and friend of his brother. This witness has stated in his evidence that his box and other belongings were missing and his mobile was of Lemon company bearing No. 9022796267 of Reliance and one SIM was of Uninor. This witness has also identified the appellant in the dock. This witness has stated that thereafter he was brought back to Kishanganj and TIP of articles was made in the Police Station and he also identified the appellant in TIP conducted in Katihar jail. This witness was also cross examined at length but there is nothing in his cross examination to discredit his evidence.

14. P.W.4 is the friend of the informant, who according to prosecution case has come to receive the victim at Kishanganj Railway Station and he has also supported the prosecution version in chief about the arrest of the accused and recovery of tin box and mobile and in spite of his cross examination there is nothing in his cross examination to doubt credibility of this witness.

15. As such, so far prosecution evidence is concerned, the informant (P.W.5) has stated in his evidence about the arrest of the accused persons and also about recovery of articles as per FIR and his evidence has further been corroborated by evidence of victim (P.W.6) about the identification of articles and accused persons also and further this witness has stated that he was provided with tea to him



after taking it he became unconscious. His evidence has also been corroborated by evidence of P.W.4. Hence, there is consistent evidence available on record in support of prosecution case.

16. Apart from that, P.W.9 is the then Officer-in-charge of Kishanganj G.R.P.S. and he has stated in his evidence that on 8.2.2013 he was posted as Officer-in-charge of Railway Station, Kishanganj and on that day he had taken over the investigation of the case and after registering the case he had proved seizure list in front of Tauquir Alam (P.W.4) and Raghunandan Sharma (P.W.8) and also proved the recording of fardbeyan, on the basis of which a formal FIR was drawn. This witness has further stated that P.O. of the case is the north booking counter of Kishanganj Railway Station near telephone booth and both the accused persons, including the appellant were arrested and articles, including tin box and mobile were seized from them. He has also produced the sealed envelop in which 8 tablets of Alprazolam were there, which was marked as Material Ext.1, voters' identify card of appellant was marked as Material Ext.II and Lemon Mobile having IMEI No. 911200201022021 was marked as Material Ext.III and Airtel Sim No. 8991510020201260783 was marked as Material Ext.IV. He has also stated that he has recorded the statement of the informant and his friend as seizure list witnesses as well as Havaldar Laxhman Singh (P.W.7) and Sipahi Laxhman Purti (P.W.2), who were present at the spot and received medical report of Bengal Medical College and Hospital, Darjeeling. His evidence further shows that he had sent the Alprazolam tablets for examination to the Drug



Inspector, Kishanganj, who has submitted a report and conducted TIP of the seized articles under supervision of Circle Officer, Kishanganj (P.W.3) and TIP of the accused under supervision of Judicial Magistrate (P.W.10). This witness has also been cross examined but there is nothing in his cross examination, rather his cross examination shows that tin box was recovered from the appellant and when he demanded key of the box he could not produce the key and from the pocket of the appellant one identity card was recovered and he is also an accused in other case of administering intoxicant articles and the box was identified by the victim (P.W.6) also. His evidence further shows that before the victim reached at Kishanganj, accused persons had been forwarded to the jail.

17. The evidence of I.O. and the other witnesses has further been corroborated by evidence of P.W.7 Havaldar Laxhman Singh (P.W.7) and he has stated that on 7/8.2.2013 he was posted at Kishanganj Railway Station and when he reached near Platform No.1 one person came along with other person and told him that his brother was not got down from train and in the meantime accused persons along with tin box were arrested on the basis of suspicion, who disclosed their name as appellant and one other co-accused and from the appellant Alprazolam tablets were recovered. Thereafter the accused persons were brought on record. His evidence further shows that brother of victim was also present there. In spite of his cross examination of this witness nothing has come to doubt about his evidence and similarly the evidence of P.W.8, who is also a seizure



list witness, has stated that from the appellant one purse was recovered carrying identify card and from other accused one mobile was recovered. He has also stated that Darogaji has also sealed those articles.

18. P.W.10, who was the then Judicial Magistrate, has conducted TIP and he has supported the fact that in TIP victim Rahid Alam has identified the appellant as the person, who provided him tea and he has also stated that he has gone for TIP alone and only his clerk was present.

19. P.W.1 was the then Drug Inspector, who has conducted examination of Alprazolam tablets recovered from the appellant and has stated that the same is intoxicant article and by taking it a person becomes drowsy but in his cross examination he has stated that Alprazolam is a medicine.

20. P.W.2 is Sipahi Laxhman Purti of Kishanganj G.R.P, who has stated that Darogaji had arrested two persons in his presence but stated that in his presence nothing was recovered from their possession.

21. P.W.3 was the then Circle Officer, Kishanganj and in his presence TIP of the articles was held and he has stated that articles were identified by the informant.

22. P.W.11 is the Doctor of North Bengal Medical College and Hospital, Siliguri and it appears from his evidence that he has identified photo copy of Bed Head Ticket of the victim and was marked for identification and in his cross examination this witness has



admitted that he cannot say who has brought the patient to the hospital and he was not admitted in his presence.

23. In this case appellant has been convicted under Section 22 of Narcotic Drugs and Psychotropic Substance Act and he was sentenced to undergo R.I. for 10 years under Section 328 IPC. In this regard submission of learned counsel for the appellant is that even if prosecution evidence is presumed to be true recovery against the petitioner is only of 8 tablets of Alprazolam of 0.25 mg and as per provision and Notification under NDPS Act quantity up to 10 gms Alprazolam has to be considered as small quantity and Section 22 of NDPS provides that for small quantity the conviction at best can be awarded for one year. Further seizure of Alprazolam tablet is not in accordance with the provisions contained in Section 50 of NDPS Act as the procedure has not been followed. Hence the conviction of the appellant under Section 22 of NDPS Act is bad in law.

24. In this context, on perusal of the evidence it appears that prosecution case is that 8 tablets of Alprazolam 0.25 mg were recovered from the appellant and total quantity of 8 tablets will come to 2 mg. and that will come within the purview of small quantity. It will further appear that tablets were recovered from the possession of the appellant and report of Drug Inspector shows that the same causes drowsiness and if taken in much quantity it may cause the death and it has also been stated by the Drug Inspector (P.W.1) in his evidence that it is intoxicating drug. It appears that learned trial court has failed to notice this fact and convicted the appellant under Section 22 of



NDPS Act and sentenced the appellant to undergo RI for ten years and fine of Rs.50,000/- though conviction for recovery of small quantity of Alprazolam tablets is only one year. Hence, that does not appear to be just and proper.

25. So far conviction under Section 307 as well as 328 IPC is concerned, submission of learned counsel for the appellant is that even if prosecution case is believed, the motive for providing tea is only to commit theft of articles of the victim (P.W.6) and there was no intention to kill the victim. Furthermore it is also submitted that there is no report available on record to show that Alprazolam tablet was administered to the victim as though Doctor has been examined in this case as P.W.11 but he has only proved Bed Head Ticket and even the medical report was not brought on record. In such view of the matter, conviction under Section 307 as well as 328 IPC does not appear to be sustainable. On scrutiny of the whole prosecution evidence available on record, it appears that prosecution version as well as evidence available on record show that motive behind the occurrence or administering tablet in tea is only to commit theft of articles of the victim and there is no medical report available on record to show that condition of patient was so precarious that may be considered dangerous to life. Except the evidence of P.W.6, the victim, there is no other evidence available on record to show that there is no finding of Medical Expert is available on record to show that P.W.6 has been administered Alprazolam tablet for making him unconscious and further there is also nothing on record to show as to what quantity of



Alprazolam tablet administered to him. At best there is evidence of P.W.5 that tea was administered to him and thereafter he became unconscious. However, learned trial court has not considered the above aspect of the matter and convicted the appellant also under Section 307 as well as 328 IPC. In such view of the matter, the conviction and sentence of the appellant under Section 307 as well as 328 IPC does not appear to be proper.

26. So far conviction under Sections 379 and 411 IPC is concerned, it is well settled principle that a person cannot be held guilty both under Section 379 and 411 IPC as either he may be convicted under Section 379 for committing theft or under Section 411 IPC for recovery of stolen articles. It seems that learned trial court has not considered above aspect of the matter and convicted under Section 379 and 411 IPC both. In the present case, there is allegation against the appellant that he in order to commit theft of the articles of the victim administered tea to him due to which he became unconscious and later on he regained consciousness in the hospital. P.W.6, the victim has also identified the appellant in TIP conducted at the jail under the supervision of Judicial Magistrate (P.W.10) and articles recovered were also identified in TIP conducted by Circle Officer (P.W.3) and both the Circle Officer and Judicial Magistrate were examined in this case as P.W.3 and P.W.10 and there is nothing on record to create doubt about credibility of the TIP held under the supervision of P.W.3 and P.W.10. Furthermore, P.W.5 is the informant of the case and P.W.4 is his friend, who have stated in their



evidence that appellant was arrested at the Railway Station and from him recovery of articles, i.e., tin box, mobile were recovered and the same has also been corroborated by I.O. (P.W.9) and P.W.7, who is Havaldar of police has also supported the prosecution case that stolen articles were recovered from the possession of appellant.

27. In view of entire discussions made above, so far conviction of appellant under Section 307, 328 as well as under Section 411 IPC does not appear to be sustainable, at the same time, in the facts and circumstances, discussed above, the conviction of appellant under Section 379 IPC and Section 22 of NDPS Act appears to be just and proper.

28. In the result, convictions of appellant under Section 379 IPC and Section 22 of NDPS Act are affirmed and conviction and sentence under Sections 307, 328 and 411 IPC are set aside.

29. So far sentence is concerned, the appellant was sentenced to R.I. for three years under Section 379 IPC and further a fine of Rs.2000/- and in default for payment of fine he was sentenced for three months imprisonment, to my opinion, in the facts and circumstances of the case appears to be just and proper. So far sentence under Section 22 of NDPS Act is concerned, the sentence is R.I. for ten years and a fine of Rs.50,000/- appears to be excessive in the facts and circumstances as only small quantity of Alprazolam tablet was found and, as such, the sentence under the said Section is modified to the extent of R.I. for six months and fine of Rs.5000/- and in default of payment of fine he has to undergo imprisonment for six



months.

30. Accordingly, in view of discussions made above, this appeal is partly allowed with the modification in conviction and sentence, as stated above.

31. Learned counsel for the appellant has submitted that appellant is in custody for more than three years as the appeal was filed on 8.8.2014 and since then he is in custody and he was in custody earlier also during pendency of trial. As such, learned trial court is directed to verify the period of sentence already undergone by the appellant and if the appellant already undergone the modified period of sentence of imprisonment and fine, he shall release the appellant at once, if not required in any other case.

(Vinod Kumar Sinha, J)

spal/-

AFR/NAFR	
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