

* IN THE HIGH COURT OF DELHI AT NEW DELHI
Judgment delivered on : May 09, 2017

+ CRL.A. No.744/2001
MAHINDER KUMAR & ANR. Appellant
Through: Mr.Harish Khanna, Advocate.

versus

THE STATE Respondent
Through: Mr.Panna Lal Sharma, Additional
Public Prosecutor for the State

CORAM:
HON'BLE MR. JUSTICE P.S.TEJI

JUDGMENT

P.S.TEJI, J.

1. By this appeal filed under Section 374 of Cr. P.C., the appellants seek to challenge the impugned judgment dated 08.08.2001, passed in SC No.75/98 in a case registered as FIR No. 62/98 under Section 328/506/34 of IPC, at Police Station D.B. Gupta Road, New Delhi. The appellants also challenge the order on sentence dated 21.08.2001, whereby they have been ordered to undergo rigorous imprisonment for two years with fine of Rs.2,000/- each and in default of payment of fine, to further undergo simple imprisonment for a period of two months for the offence under Section 328/34 of IPC. The appellant – Rakesh was also awarded sentence of rigorous imprisonment for six months for the offence under Section 506 of IPC.

2. The present case had been registered on the statement of

Sushma (PW-5). She was working in the factory of the appellant – Mahender Kumar, who proposed her for marriage and when she agreed, he avoided her for one reason or the other. She had stated in her statement that on 14.02.1998, appellant – Mahender Kumar called her at Barf Khana, Subzi Mandi for some work and when she reached there, the appellant – Mahender took her to his factory on his two wheeler, where appellant – Rakesh was also present. It is further alleged by the complainant that during their stay at factory, appellant – Mahender suggested her to marry with appellant – Rakesh, to which she refused. Three cups of tea were called and all of them took tea. Thereafter, complainant – Sushma felt giddiness and fell unconscious. She also alleged that the appellants also gave something to the complainant to drink. After drinking that particular thing, she felt some sensation and started vomiting. Blood came out from her mouth and she fell unconscious. She was taken to Hindu Rao Hospital by appellant - Mahender and was admitted there. Accordingly, the case under Section 328/506/34 of IPC was registered against the appellants.

3. Investigation started, appellants were formally arrested as they were enlarged on anticipatory bail. After completion of the investigation, charge sheet under Section 328/34 and 506/34 of IPC were framed against the appellants and all the incriminating material was put before the accused persons to which they pleaded not guilty and claimed trial.

4. To prove the charges against the appellants, the prosecution examined 12 witnesses. They are Dharamvir (PW-1); Sant Ram (PW-

2); Joginder Gupta (PW-3); Constable Rattan Pal (PW-4); Sushma (PW-5); Head Constable Kamal Singh (PW-6); Head Constable Babu Khan (PW-7); Head Constable Jai Singh (PW-8); Constable Amarjeet Singh (PW-9); Sub-Inspector Ram Preet (PW-10); Jai Bhagwan Sharma, MRT, H.R. Hosptial (PW-11); and Sub-Inspector Mohd. Saleem (PW-12).

5. Appellants have brought two witnesses in their defence, i.e. Rajender (DW-1) and Vijay (DW-2). Upon considering the facts, evidence led and the material on record, the learned Additional Sessions Judge held the appellants guilty for an offence punishable under Sections 328/506/34 of IPC by impugned judgment dated 08.08.2001, and vide order on sentence dated 21.08.2001, the appellants were sentenced as indicated above. Hence, the appellants have filed the instant appeals against the judgment and order on sentence passed by learned Additional Sessions Judge. During pendency of the present appeal, the sentence imposed upon the appellants was suspended vide order dated 12.10.2001.

6. Learned counsel for the appellants contended that the prosecution has not been able to prove the fact of the alleged liquid or substance being poisonous, stupefying, intoxicating or unwholesome drug, given to Ms. Sushma. It was neither seized nor sent to the laboratory, therefore the ingredient of Section 328 of IPC is missing. It is further contended on behalf of the appellants that there was no motive of any of the appellants to administer any poisonous substance to the complainant, as the appellant - Mahender had good relations

with her. Apart from this, the appellants contended that there is delay of about one month in registration of FIR and there is no explanation given by the prosecution for such delay. More so, the complainant Sushma had made improvement in her statement in the court regarding visit of appellant Rakesh in the hospital and extended threats to her. Even otherwise, she has not stated the day and time of the alleged threat and the actual threatening words uttered by the appellant – Rakesh. It is further contended on behalf of the appellants that the learned Trial Court has wrongly observed in the judgment that the appellant - Mahender wrongly told the attending doctor that he was the husband of the complainant, however, the MLC (Ex.PW-11/A) does not mention anywhere that the appellant - Mahender was the husband of complainant – Sushma. While adverting the deposition of defence witness Vijay (DW-2), it is contended that the learned Trial Court did not give any weightage to the evidence of defence witness where he stated that the appellant - Rakesh at the relevant time i.e. on 14.02.1998 between 10.30 AM and 6.30 PM remained at his office at Pahar Ganj, which was also proved by the Duty Register (Ex. DW-2/A). Similarly, Rajender (DW-1) stated in his deposition that Ms. Sushma vomited at the factory of appellant - Mahender and at the time of vomiting, appellant - Mahender was not present there and he was called and thereafter he reached his factory at about 7 to 7.30 PM and took Sushma to the hospital. Therefore, it is contended that both the appellants were not present at the time of incident. It is further submitted that the prosecution witness PW-1 Dharamveer and PW-2 Sant Ram did not support the prosecution version and they were

declared hostile. It is contended that only because the appellant – Mahender got married with some other girl just about 15 days prior to the incident, the complainant has falsely implicated the appellants out of vengeance. Lastly, it is contended that the statement of Sushma has not been corroborated with any ocular evidence or with any medical evidence, therefore, the appellants are liable to be acquitted for the offence under which they are sentenced.

7. To substantiate the aforesaid contentions regarding medical evidence, learned counsel for the appellants relied upon the judgment reported in *Mukesh Chand & Ors vs. State (Govt. of NCT of Delhi)*, 2010 (1) JCC 750; and regarding the only deposition of the complainant not corroborated with any medical evidence, the judgment in *Santosh Kumar vs. State*, 2008 (4) JCC 2919 was relied upon.

8. Per contra, learned Additional Public Prosecutor for the State has opposed the aforesaid contentions raised on behalf of the appellants and submitted that there is no illegality or infirmity in the impugned judgment and order on sentence as passed by learned Trial Court as the complainant remained consistent with her statements and in the cases of this kind, the injured witness is sufficient to prove the guilt of the accused persons. Therefore, the appeals filed by the appellants are liable to be dismissed.

9. I have heard the submissions made on behalf of both the sides and also gone through the evidence as well as impugned judgment and

order on sentence passed by the learned Trial Court. This court observes that the learned Trial Court has convicted the appellants only on the testimony of the injured witness.

10. No doubt, the testimony of an injured witness should be given weightage. To understand the version of the complainant – Sushma, let her testimony be scrutinized. Sushma (PW-5) had deposed before the court that the accused Mahender runs his a factory and she had worked in that factory two years back. She stated that in the beginning the behavior and conduct of accused Mahender towards her was good and he proposed for marriage with her. She agreed for the marriage but the accused Mahender started putting off marriage with her on the pretext that condition of his mother was serious. He told her that his mother was not in favour of their marriage and after due course he will make his mother understand and marry her. She further deposed that the accused married with some other girl and asked her to marry with his friend Rakesh, who was not known to her. On the date of incident 14.02.1998, the accused Mahender called her to have conversation at Barafkhana. She reached there at about 1 PM, where accused Mahender was waiting for her on his two wheeler. She was taken to his factory. Accused Rakesh was sitting there. Accused Mahender asked her to marry accused Rakesh and she refused to do so. At about 5 PM, tea was ordered and all the three persons took tea. Accused Rakesh had brought the tea at the instance of accused Mahender. She deposed that after taking tea, she started feeling giddy and asked for water. Thereupon accused gave her something stating that on

consuming that, she will be all right. On drinking said liquid, she started feeling burning sensation in her throat and vomited blood. She was taken to H.R. Hospital. She did not know who took her to Hospital as she had lost her consciousness after consuming the said substance. In her examination, she further deposed that she remained admitted at hospital for about 7 days and accused Rakesh visited her at the hospital and had threatened her not to depose before the police as he had his musclemen.

11. This court also perused the deposition of Dharamvir (PW-1) and Sant Ram (PW-2). Both these witnesses have deposed and corroborated the fact of a girl being present in the factory of the accused Mahender and of her vomiting. However, in their cross examinations, both have denied in their testimonies that on the day of the incident i.e. 14.02.1998 they had seen both the accused persons present with the girl Baby alias Sushma. However, both the witnesses have deposed before the court that they had called the owner of the factory Mahender on phone and after half an hour appellant - Mahender came there and took the girl to hospital.

12. This court also observes that the learned Trial Court has based the conviction of the appellants on the deposition of Sub-Inspector Ram Preet (PW-10), who deposed that on the date of incident, on receipt of DD No.17A, he collected the MLC of the victim, however the victim was declared unfit for statement. He again visited the hospital on 15.02.1998 and 16.02.1998 but she was declared unfit. He deposed that she was declared fit for statement on 17.02.1998 and

recorded her statement exhibited as PW-1/A. In his cross examination he deposed that when he recorded the statement of Sushma, no other person met him at hospital.

13. This court has further gone through the statement of the appellants recorded under Section 313 of Cr. P.C. in which both the appellants have taken the plea of alibi. In support of their plea of alibi, they have examined Rajender (DW-1) and Vijay (DW-2). Rajender (DW-1) deposed in testimony that on the date of incident, at about 6 or 6.30 PM he alongwith Ram Bahadur and Jogender was present in the Karkhana. One girl namely Baby came and sat there and started vomiting after some time. He became perplexed and called other people. Those persons asked us to call Mahender. But they asked those persons to call Mahender themselves. Thereafter, they called Mahender, who arrived at about 7 or 7.30 PM and took that girl to hospital. In his cross-examination, he denied the suggestion that on the date of incident, accused Mahender served tea to Baby as well as the suggestion that Mahender brought Sushma at his office on a two wheeler where other accused Rakesh was already present. He also denied the suggestion that after taking tea she started feeling burning/sensation or vomiting and blood came from her throat.

14. Vijay (DW-2) deposed before the court that the accused Rakesh Verma was employed with him and had worked for two years and on 14.02.1998, he was working with him since 10.30 AM and left the office at 6.30 PM. He had also brought with him the attendance register for the said date. In his cross-examination he deposed that he

does not allow any employee to leave the office once he had reported his duty even for a short period, i.e. for 1 or 2 hours.

15. It is an admitted fact that the appellants have been convicted for the offence under Section 328 of IPC. For better appreciation of intent of section 328, the same is reproduced hereunder:-

328. Causing hurt by means of poison, etc., with intent to commit an offence.—Whoever administers to or causes to be taken by any person any poison or any stupefying, intoxicating or unwholesome drug, or other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

16. No doubt, the victim has specifically alleged that the appellant - Mahender had given tea due to which she felt giddiness and thereafter offered something to drink due to which she felt burning sensation and started vomiting. She has also remained consistent in her statement made before the police as well as before the court. This court also went through the MLC of the victim. On a careful perusal of the MLC, this court finds that the victim was brought to the hospital with the history of *Ingestion, Acid (unknown variety) in the evening; patient conscious, oriented, pulse – 92/m; BP-140/90 mm HS; Injury Note –*

Froth coming out from the mouth. However, the MLC nowhere mentions about any report regarding any poisonous substance being found in the body of the victim.

17. Upon scrutiny of the statement of the victim, this court is of the opinion that the prosecution must have some corroborating evidence to substantiate the allegation of the injured witness, which is lacking in the present case. More so, this court is astonished to observe that the prosecution has not seized anything nor sent to the laboratory for expert opinion to know as to whether the alleged liquid or substance was actually poisonous, stupefying, intoxicating or unwholesome drug.

18. There is another aspect that the testimonies either on behalf of the prosecution or the accused shall be given equal weightage. This court finds that Rajender (DW-1) and Vijay (DW-2) have specifically deposed before the court that appellant - Mahender was not present at the spot and he came at the spot only at about 7 or 7.30 PM and removed the victim to the hospital and regarding the appellant - Rakesh being present in factory from 10.30 AM to 6 PM. Even otherwise, nothing contrary has been established on behalf of the prosecution to show the presence of these appellants at the place of incident, as no eye-witness has been produced by the prosecution to substantiate or corroborate the deposition of the injured witness – Sushma.

19. It would be relevant to mention here the dictum of Hon'ble

Supreme Court in Joseph Kurian Phillip Jose vs. State of Kerala, AIR 1995 SC 4, in which the court observed as under:-

“In order to prove offence under Section 328 the prosecution is required to prove that the substance in question was a poison, or any stupefying, intoxicating or unwholesome drug, etc., that the accused administered the substance to the complainant or caused the complainant to take such substance, that he did so with intent to cause hurt or knowing it to be likely that he would thereby cause hurt, or with the intention to commit or facilitate the commission of an offence. It is, therefore, essential for the prosecution to prove that the accused was directly responsible for administering poison etc. or causing it to be taken by any person, through another. In other words, the accused may accomplish the act by himself or by means of another. In either situation direct, reliable and cogent evidence is necessary.”

20. In view of the aforesaid discussion, scrutiny of testimonies of prosecution as well as defence witnesses and the MLC of the victim, it is clear that the findings rendered by the learned Trial Court are based only on the testimony of injured witness. But in the absence of any medical evidence corroborating the allegation of the injured, convicting the appellants for the offence under Section 328 of IPC does not seem to be justified in the facts of the present case, especially when the prosecution has not seized any liquid/substance for taking

expert opinion so as to know the substance was poisonous, stupefying, intoxicating or unwholesome drug. Prosecution has also not produced any witness to rebut the plea of alibi on behalf of the appellants except that of the injured witness. However, the appellants have produced two witnesses in their defence and merely because they did not prove the presence of the appellants at the spot, therefore, they were declared hostile.

21. In the considered opinion of this court, depositions of witnesses, whether they are examined on the prosecution side or defence side or as court witnesses, are oral evidence in the case and hence the scrutiny thereof shall be without any predilection or bias. No witness is entitled to get better treatment merely because he was examined as a prosecution witness or even as a court witness. It is judicial scrutiny which is warranted in respect of the depositions of all witnesses for which different yardsticks cannot be prescribed as for those different categories of witnesses.

22. *This Court is of the considered opinion that in a case under Section 328 IPC mere oral assertions are not sufficient to hold an accused guilty of the offence. To hold an accused guilty for the offence, the oral assertions ought to be corroborated by other circumstances and evidence.*

23. A cumulative consideration of the overall evidence on the facts of the present case, this court has no hesitation in holding that the appeals filed by the appellants deserve to be allowed while giving

them the benefit of doubt. Accordingly, the appeal filed by the appellants are allowed and the impugned judgment dated 08.08.2001 as well as the order on sentence dated 21.08.2001 are set aside. Resultantly, while giving benefit of doubt, the appellants are acquitted from the offence with which they were charged and sentenced.

24. Appellants are on bail. Their bail bonds and the surety bonds are discharged. A copy of this order be sent to the Trial Court for information and necessary steps.

25. With aforesaid directions, the present appeal filed on behalf of the appellants are disposed of.

MAY 09, 2017
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(P.S.TEJI)
JUDGE

