

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

% Reserved on: 28th November, 2016
Decided on: 22nd March, 2017

+ **CRL.A. 154/2016**

SONI @ MEHTAB Appellant
Represented by: Mr. Dhan Mohan and Ms. Tanu
B. Mishra, Advocates.
versus

THE STATE GNCT OF DELHI Respondent
Represented by: Mr. Hirein Sharma, APP for the
State with SI Hukam Chand, PS
GTB Enclave.

+ **CRL.A. 329/2016**

JAHID @ BANTI Appellant
Represented by: Mr. Ajay Verma, Advocate.
versus

STATE Respondent
Represented by: Mr. Ravi Nayak, APP for the
State with SI Hukam Chand, PS
GTB Enclave

+ **CRL.A. 424/2016**

SALEEM @ MENDAK Appellant
Represented by: Mr. Saurabh Kansal, Advocate
for Ms. Pallavi S. Kansal,
Advocate.
versus

STATE Respondent
Represented by: Ms. Meenakshi Chauhan, APP
for the State with SI Hukam
Chand, PS GTB Enclave

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Vide impugned judgment dated 17th November, 2015 Soni @ Mehtab, Jahid @ Banti, and Saleem @ Mendak were convicted for offence punishable under Sections 366/34 IPC. Soni @ Mehtab and Saleem @ Mendak were also convicted for the offence punishable under Sections 354/34 IPC. Soni @ Mehtab was also convicted under Section 506(1) IPC. Vide order on sentence dated 21st November, 2015, Soni @ Mehtab, Jahid @ Banti and Saleem @ Mendak were sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of ₹5,000/- each for offence punishable under Sections 366/34IPC. Soni @ Mehtab and Saleem @ Mendak were also sentenced to undergo rigorous imprisonment for period of three years and to pay a fine of ₹5,000/- for offence punishable under Sections 354/34 IPC. Soni @ Mehtab was also sentenced to undergo rigorous imprisonment for period of two years for offence punishable under Section 506(1) IPC.

2. Learned counsel for Soni @ Mehtab contends that the learned Trial Court failed to consider that the apprehension of Soni @ Mehtab was solely based on the disclosure statement of one of the co-accused and name of Soni @ Mehtab was disclosed on interrogation. While placing reliance upon the decision reported as 1964 SCR (6) 623 Hari Charan Kurmi and Jogia Hajam v. State of Bihar, it is submitted that the disclosure statement of the co-accused cannot be used as incriminating evidence. There are contradictions in the testimony of police officials. The manner of arrest of Soni @ Mehtab itself casts a doubt on the prosecution case. There is no evidence on record to corroborate the testimony of PW-1 prosecutrix that

Soni @ Mehtab misbehaved with her.

3. Learned counsel for Saleem @ Mendak in addition to the above also submits that the identification of the appellants by the prosecutrix was highly improbable as she states in her deposition before the Court that she identified the appellants in Karkardooma Court when she had gone there. The site plan exhibited as Ex. PW-1/D, though prepared at the instance of the prosecutrix, has not been signed by her. There is no site plan of the place from where the prosecutrix was recovered.

4. Learned counsel for Jahid @ Banti contends that Jahid @ Banti was not involved in the offence as he was merely driving the vehicle. The prosecution has failed to prove that he shared a common intention with the other appellants. While placing reliance on the decisions reported as (2009) CriLJ 335 Rajesh Kumar v. State of H.P. and (2001) 3 SCC 673 Suresh and Anr. v. State of U.P., it is submitted that a person cannot be convicted with the aid of Section 34 IPC when no overt act is attributed to Jahid @ Banti.

5. Per contra learned APP for the State submits that common intention can be formed at the spur of moment to attract Section 34 IPC. Appellant Jahid @ Banti was also an accomplice to the crime. The version of PW-1 prosecutrix is duly supported by PW-3 Constable Sunil Kumar and the same is further corroborated by the testimony of PW-2 Constable Lokesh Singh, PW-7 Constable Satish and PW-8 SI Ratnesh Kumar. Jahid @ Banti was apprehended at the spot, whereas Soni @ Mehtab and Saleem @ Mendak, thought arrested later were identified by the prosecutrix.

6. FIR No. 63/2011 was registered under Sections 365/366/354/506/34 IPC at PS G.T.B. Enclave, Delhi on the complaint of PW-1 prosecutrix who stated that on 24th March, 2011, at about 1:00 A.M., when she was waiting

for an auto at the red light near GTB Hospital, a TSR came from Nand Nagari side and stopped near her. The boys sitting in the TSR forcefully pulled her inside. They said that she was a prostitute they will enjoy with her and warned her not to raise alarm otherwise the consequences won't be good. Apart from the driver, there were three other boys. All of them were fondling with her body parts. When the auto turned from Tahirpur to Nand Nagari, she saw the police van. Upon seeing the van, she started shouting "*bachao bachao*". On hearing her voice, the police van started following them. They took the auto in the lanes of Kodi Colony, however, the police, while chasing the auto, stopped it at 64 Foota Road. All the four boys got down from the auto and started running. However, the police caught hold of two boys. On enquiry, the name of one of the boys who was driving the TSR was revealed as Jahid @ Banti and the name of the other boy was revealed as 'S' (juvenile). The name of the boys who managed to escape were revealed as Saleem @ Mendak and Sadab @ Soni. On 26th March, 2011, PW-8 SI Ratnesh Kumar Singh, on the basis of secret information received, arrested Soni @ Mehtab. Saleem @ Mendak was arrested on 28th March, 2011.

7. PW-1 prosecutrix deposed in sync with her statement made before the police. She also stated that the convict persons had threatened her that if she will depose against them, they will kill her. During her cross-examination, she stated that she does not work anywhere. On the day of the incident, she had gone to GTB Hospital for her check-up as she was on the family way. The prescription papers, which were given to her in the hospital, were lost during the incident. The registration paper at the hospital was issued to her at about 12 o'clock in the night. She further stated that Jahid @ Banti did not misbehave with her, however, voluntarily stated that if Jahid wanted, he

could have stopped the auto at the barriers on the road.

8. The main crux of arguments of the appellants is that the husband of the prosecutrix was in jail and the prosecutrix was also involved in cases hence no reliance can be placed on her testimony and the appellants have falsely been implicated. In the cross-examination of the prosecutrix though suggestion was given that her husband was involved in many cases she denied the same and stated that her husband was not involved in any criminal offence and has never been to jail. No suggestion of personal enmity was given to the prosecutrix. In her examination-in-chief the prosecutrix clarified that her husband was working in a factory located at Muzaffarnagar, U.P. and thus he was not at home. Since she was having stomach ache and was on the family way she was required to go to the hospital and her prescription was lost in the incident.

9. Jahid @ Banti was apprehended at spot. The plea taken on behalf of Soni @ Mehtab and Saleem @ Mendak are that the presence of the prosecutrix in the Court and the identification by her immediately on their refusal to participate in the TIP, was unnatural. The Investigating Officer pursuant to the arrest of Soni @ Mehtab and Saleem @ Mendak filed applications for conducting the test identification parade which they refused. No explanation was given for refusal of the TIP proceedings except that Saleem @ Mendak stated that he did not want to join TIP proceedings as the complainant knew him personally and Soni @ Mehtab refused test identification parade on the ground that he has been shown to the complainant in the Police Station GTB Enclave. The suggestion given to the complainant PW-1 that Soni @ Mehtab was shown to her in the Police Station was denied by her. She stated that she had seen Soni @ Mehtab on

the date of incident for the first time and thereafter in the Court after six months of the incident. Not even a suggestion was given on behalf of Saleem @ Mendak to the complainant that she knew him, much less leading evidence on this count.

10. Contention of learned counsel for the appellants that since it was mid night PW-1 and the police officials could not identified them, deserves to be rejected. PW-1 in her cross-examination clarified that the place was well lit with the street lights. Moreover the present was not a case of fleeting glimpse but it is a case where for around twenty minutes the appellants drove the complainant in the TSR in various lanes. Jahid @ Banti was apprehended at the spot and the complainant was pulled on the backside by Soni @ Mehtab, Saleem @ Mendak and the juvenile. Since she was in the TSR with the appellants for twenty minutes and Jahid @ Banti was driving the TSR and other three were misbehaving with her by touching all parts of the body, she had sufficient time to recognize the appellants. Further merely because co-accused Jahid named Soni @ Mehtab as Sadab @ Soni in his disclosure statement the same would not mean that Soni @ Mehtab has been falsely implicated when he has been properly identified in the Court by the complainant.

11. Version of the prosecutrix is duly corroborated by PW-3 Constable Sunil Kumar who was posted at PCR North East Zone, Delhi on 20th March, 2011 and was driving PCR Van baker 30 at the relevant time. At around 1.15 AM when his PCR was stationed at T point Tahirpur, he noticed a TSR coming from the side of GTB Hospital and heard cries of a girl '*bachao bachao*'. He responded to the same and rushed towards the TSR and signaled to stop but the TSR did not stop and proceeded towards Korhi

Colony. Constable Sunil Kumar followed the TSR upto road No.64 near DLF and managed to stop the TSR. He noticed four person sitting in the TSR along with girl. Though two person managed to escape, two person were overpowered by them. It cannot be held that person who was following the TSR for some time and after intercepting the same caught hold of two persons, would not be able to recognize them.

12. As noted above the plea of Soni @ Mehtab and Saleem @ Mendak is of false implication however, no defence evidence has been led by them and even from the cross-examination of the material witnesses nothing could be elicited to infer that they were falsely implicated. Explanation of Jahid @ Banti who was apprehended at the spot in his statement under Section 313 Cr.P.C. was that he was driving TSR and the complainant with her friends were sitting in pillion seat and one of them had put knife upon him and asked him to give the money but when he rushed the TSR the complainant shouted loudly, the PCR van came and stopped them. It is stated that on the false complaint of the complainant he and the juvenile were falsely arrested.

13. If Jahid @ Banti was merely driving the TSR with no complicity with the other accused, on seeing the PCR van he ought to have informed the PCR van about the incident and not run away from the spot. The explanation rendered by Jahid @ Banti is not plausible. From the conduct of Jahid @ Banti in running away with the TSR despite Constable Sunil Kumar signaling him to stop, it is apparent that he shared the common intention with the other accused.

14. In view of the discussion aforesaid the prosecution has proved its case beyond reasonable doubt against the appellants. Finding no merit in the appeals, the same are dismissed. Appellants will undergo the remaining

sentence

15. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

16. Trial Court record be returned.

(MUKTA GUPTA)
JUDGE

MARCH 22, 2017

‘vn’

