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

+ CRL.A. 478/2015

ANIL

..... Appellant

Through: Ms. Naomi Chandra, Advocate.

versus

STATE

..... Respondent

Through: Ms. Manjeet Arya, APP for State with
ASI Rajeev Kumar, P.S. Moti Nagar.

CORAM:

HON'BLE MR. JUSTICE A.K. PATHAK

ORDER

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11.10.2018

1. The appellant was convicted under Sections 328/392/34 IPC vide judgment dated 27th November, 2014, and sentenced to undergo rigorous imprisonment of seven years with fine of ₹5,000/- and in default of payment of fine to undergo simple imprisonment for one month under Sections 328/34 IPC; rigorous imprisonment of seven years with fine of ₹5,000/- and in default of payment of fine to undergo simple imprisonment for one month under Sections 392/34 IPC.
2. Aggrieved by his conviction and order on sentence dated 29th November, 2014 of the trial court, appellant has preferred this appeal.
3. Prosecution story, as unfolded, is that complainant-Subodh Singh arrived in the police station Moti Nagar on 09.08.2013 and made a statement that on 26.07.2013 two passengers boarded his battery rickshaw from Kirti Nagar Metro Station for Punjabi Bagh at about 2:30 PM. On the way,

passengers offered him Maaza (soft drink) and after drinking the same he became unconscious as the cold drink was laced with some intoxicating substance. Thereafter, the passengers took away his battery operated rickshaw, mobile phone and purse. On his this statement, FIR No. 286/13 under Sections 392/328/34 IPC was registered. During the investigation, discharge summary of the complainant was obtained from the hospital. The gastric lavage was collected from the hospital.

4. On 11.08.2013 an information was received by the Investigating Officer that the appellant was arrested in FIR No. 263/13 under Sections 328/379/34 IPC of police station Kirti Nagar and had made confessional statement regarding his involvement in the present FIR, i.e., FIR No. 286/13. Accordingly, the accused (appellant) was formally arrested on 14.08.2013, in the case. Appellant refused to participate in the TIP proceedings. Accomplice of the appellant could not be apprehended. On 31.08.2013 battery rickshaw was taken in possession. On 15.09.2013 complainant-Subodh Singh arrived in the police station and identified his rickshaw. After completion of investigation, charge-sheet under Sections 392/328/34 IPC was filed.

5. On 13.11.2013, trial court framed charges under Sections 328/34 IPC and 392/34 IPC to which appellant pleaded not guilty and claimed trial.

6. Prosecution examined fourteen witnesses. Statement under Section 313 Cr.P.C of the appellant was recorded wherein he stated that he was innocent and was falsely implicated. He stated that nothing was recovered from him.

7. Complainant-Subodh Singh was examined as PW-2. He deposed that on 26.07.2013 he was standing outside Metro Station Kirti Nagar with his

battery rickshaw. At about 2:00/2:30 PM, two passengers came there and asked him to take them to Punjabi Bagh. They boarded the rickshaw. When rickshaw reached near fruit market of Karam Pura Nala, they asked him to stop the rickshaw. One of the passengers went in the *gali* and came back with one bottle of water and three disposal glasses. They offered him water but he refused. One passenger again went in the *gali* and brought one bottle of Maaza and offered him. After drinking the same, he became unconscious and said passengers took away his battery rickshaw, mobile phone and wallet containing ₹3,500/-. They also took away ₹400/- from his front pocket. Insurance papers of battery rickshaw were also taken away by them. He corroborated his statement Ex. PW2/A recorded by the police. He identified the appellant in court correctly. PW2 stated that appellant had taken away his battery rickshaw after giving him Maaza laced with intoxicating substance. PW2 identified his signatures on seizure memo of rickshaw Ex. PW2/C. PW2 deposed that battery rickshaw was released to him on Superdari vide superdarinama Ex. PW2/D. PW2 deposed that his wife and children searched him here and there and ultimately found him lying unconscious near Karam Pura market. They got him admitted in Acharya Bhikshu Hospital. Trial court has concluded that statement of PW2 has remained un-shattered in his cross examination.

8. PW3- Sh. Lalu S/o Pyare Lal deposed that on 26.07.2013, son of complainant called him on his mobile phone to find out the whereabouts of his father as his father had not returned home. Thereafter, they searched for him and found him lying unconscious near fruit market. They removed PW2 to Acharya Bhikshu Government Hospital. This witness has corroborated PW2.

9. PW-4 Dr. Uma proved discharge summary as Ex. PW-4/A. PW4 also proved Admission Ticket, OPD card and case sheet as PW-4/B collectively. PW-4 further deposed that gastric lavage of Subodh Singh was preserved. Other witnesses examined are formal in nature. PW-1 HC Manoj Kumar had deposited battery rickshaw in Malkhana and has deposed in this regard. He has proved photocopy of relevant page folio of Register No. 19 Ex. PW1/A. PW-5 Sh. Vishal Ahuja, learned Metropolitan Magistrate (West), Delhi has proved the TIP proceedings. PW-6 Ct. Pramod Kumar is witness to the arrest of appellant and has deposed in this regard. He has proved arrest memo of as Ex. PW-6/B. PW-7 Ct. Kamal Kumar is a witness to the pointing out memo which he has proved as Ex.PW-7/A. PW-8 Dr. Hirdesh Kumar, CMO, Incharge (Casualty), Acharya Bhikshu Hospital has proved the MLC as Ex.PW-8/A. PW-9 SI Rameshwar Oraon has proved the FIR as Ex.PW-9/B. PW-10 ASI Ram Pal has deposed regarding the investigation carried out by him in FIR No. 263/13 under Sections 328/379/34 IPC of police station Kirti Nagar. PW-11 ASI Sukhda had visited Acharya Bhikshu Hospital along with Ct. Jaswant and has deposed in this regard. PW-12 Ct. Mukesh has deposed that on 08.08.2013 he received an information that public had beaten one person; he reached there and met Baijoo Kumar who had caught hold of appellant. He deposed that he took the appellant to police station Kirti Nagar, after getting him medically examined at DDU hospital, where he was arrested by HC Ram Pal. PW-13 ASI Rajender Kumar is the second Investigation Officer. PW-14 HC Raghuraj is the Investigating Officer. He stated that on 09.08.2013 PW2-Subodh Singh came to the police station and gave his complaint Ex. PW-2/A. He deposed that he made endorsement Ex.PW-14A on the complaint of Subhodh Singh and produced

the same before the Duty Officer pursuant thereof, present FIR was registered by the Duty Officer. He further deposed that he prepared the site plan Ex. PW-2/B at the instance of complainant. He further deposed that on 11.08.2013 he received information from police station Kirti Nagar regarding arrest of appellant in the said police station in some other case wherein appellant had admitted his involvement in the present case. He went to police station Kirti Nagar and perused the disclosure statement of appellant. Appellant was produced before the concerned Metropolitan Magistrate, Delhi and was formally arrested in the present case with the permission of learned Metropolitan Magistrate on 14.08.2013. Appellant refused to participate in the TIP proceeding. Battery rickshaw was recovered pursuant to the disclosure of the appellant. On 15.09.2013 complainant came to the police station and indentified his battery rickshaw.

10. During the course of the hearing, learned counsel for the appellant has failed to point out any material discrepancy and inconsistency in the statement of star witnesses, that is PW-2 so as to make his testimony untrustworthy or unreliable. PW2 has fully corroborated the prosecution version. It is contended that no scientific evidence was lead to prove that any stupefying or intoxicating or unwholesome drug was administered to PW2 by the appellant, therefore, offence under Section 328 has remained unproved. I find force in this contention of the learned counsel. It is trite law that to prove offence under Section 328 IPC 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 a 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. In this case, gastric lavage was taken in the hospital but no scientific evidence is there to show that gastric lavage contained any intoxicating substance or unwholesome drug. Accordingly, I am of the view that offence under Sections 328/34 IPC has remained unproved. Accordingly, appellant is acquitted for the offence under Sections 328/34 IPC, but his conviction under Sections 392/34 IPC is confirmed. After arguing for some time, learned counsel for the appellant, on instructions of appellant present in Court, has given up challenge to the conviction of appellant under Sections 392/34 IPC on merits.

11. Learned counsel has prayed for reduction of sentence of appellant. It is contended that appellant is aged about 40 years. He has a family comprising of his wife and three minor children who are dependent upon him. Appellant's wife is illiterate and housewife. Studies of children of appellant are affected in absence of appellant, who is lodged in jail for more than five years. Appellant belongs to a poor family. Appellant's wife and children were living in Delhi. However, they had to leave Delhi because of the financial crises faced by them. Sentence of appellant was suspended vide order dated 19.10.2016, subject to furnishing a personal bond in the sum of ₹10,000/- with one surety of like amount. Appellant failed to furnish the surety bond of ₹10,000/- because of poor financial condition of his family. Accordingly, on an application filed by him, surety amount was reduced to ₹5,000/- vide order dated 04.01.2017. However, he could not even furnish surety bond of ₹5,000/-. This shows that appellant belongs to a poor family.

12. It is trite law that purpose of awarding sentence of imprisonment is

twofold; one is punitive and other is reformatory. It is not necessary that in each and every case the maximum sentence has to be awarded. In *State GNCT of Delhi vs. Mukesh*, 2011 (3) Crimes 111, a Division Bench of this Court has observed thus: “a proper sentence is amalgamation of many factors such as the nature of offence, the circumstances extenuating or aggravating of the offence, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental conditions of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence. These factors have to be taken into account by the court in deciding upon the appropriate sentence”.

13. Keeping in view that appellant belongs to lower strata of society; he has a family comprising of his wife and three minor children; the conduct of appellant in jail is satisfactory; he has completed sentence of more than five years out of total sentence of seven years; his sentence under Sections 392/34 IPC is reduced to the period already undergone by him. Since appellant has been acquitted for the offence under Sections 328/34 IPC sentence awarded under this provision also goes. Appellant be released from jail, if not required in any other case.

14. Appeal is disposed of in the above terms. Date fixed in the matter, that is, 26th November, 2018 is cancelled.

15. Copy of the order be sent to Superintendent Jail for serving it on the appellant and for compliance.

A.K. PATHAK, J.

OCTOBER 11, 2018

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