

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

%

Reserved on: 8th July, 2019
Decided on: 19th August, 2019

+

CRL.A. 226/2017

DEVANAND @ DEVA

..... Appellant

Represented by: Ms. Saahila Lamba, Advocate,
DHCLSC

versus

STATE

..... Respondent

Represented by: Mr. Ashok Kr. Garg, APP for
the State

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. By the present appeal, Devanand @ Deva challenges the impugned judgment dated 31st August 2016 convicting him for the offences punishable under Sections 452/328/376 IPC in FIR No. 62/2015 registered at PS Karawal Nagar and the order on sentence dated 29th September 2016 directing him to undergo rigorous imprisonment for a period of seven years and to pay a fine of ₹10,000/- and in default whereof to undergo simple imprisonment for a period of two months for the offence punishable under Section 376 IPC , undergo rigorous imprisonment for a period of two years and to pay a fine of ₹2,500/- and in default whereof to undergo simple imprisonment for a period of thirty days for the offence punishable under Section 328 IPC and undergo rigorous imprisonment for a period of two years and to pay a fine of ₹2,500/- and in default whereof to undergo simple

imprisonment for a period of thirty days for the offence punishable under Section 452 IPC.

2. Assailing the conviction, learned counsel for the appellant has taken defence of false implication as the complainant and her husband demanded loan from the appellant which he refused. It is contended that before lodging the complaint to the police, husband of the complainant made a call to the appellant and the said fact has been accepted by the complainant and her husband in their cross-examinations. It is further contended that DD No. 59B dated 16th January 2015 records that a man with his family is lying in unconscious condition. However, the husband of the complainant admitted that he went to his place of work on 16th January 2015 and that he made a call to the appellant on the same night. It is further contended that as of 27th January 2015 eight samples were sent to FSL for examination and five samples were sent back by FSL under objection. The objection raised has not been put on record. The investigating officer stated that she does not remember anything about the said objections. Therefore, the possibility of tampering cannot be ruled out.

3. Per contra, Learned APP for the State submits that during the cross-examination of husband of the complainant, suggestion was made on behalf of the appellant that the appellant established physical relation with the complainant with her free will and consent and the consent of her husband. Therefore, the fact that the appellant had sexual intercourse with the complainant is not disputed. He further contended that semen was detected on the samples and clothes of the complainant that were sent for examination to FSL. He stated that on examination the gastric lavage of the complainant, her husband and the Frooti bottle were found to contain Ethyl

Alcohol. There being sufficient evidence to corroborate the statement of the prosecutrix, the appeal be dismissed.

4. Process of law was set into motion on 16th January 2016 at around 10:41 P.M. an information was received regarding one man with family in unconscious condition near G- Block, Phase-8, Gali No. 5, Shiv Vihar, K. Nagar. Aforesaid information was recorded vide DD No.59B (Ex. PW-9/C) and was assigned to W/SI Nazma. She along with L/Ct. Reshma reached at the spot where she met the prosecutrix 'M', her husband, child and mother. She recorded the statement of the prosecutrix wherein she stated that on 15th January 2015 around 8:00 P.M., the appellant who is friend of her husband came to her house. He brought a bottle of Frooti and served it to her and her husband. She refused to drink the Frooti as the weather was cold, however the appellant insisted her to drink the same. She and her husband consumed the Frooti and she gave some Frooti to her child from her glass as well. After her husband had Frooti he started vomiting and fell unconscious. She went to her bed and at midnight when she opened her eyes, she saw that the appellant was standing near her bed, since she was unconscious, she was unable to speak anything. The appellant then climbed her bed and forcibly made sexual relations with her. Due to her unconscious state she was unable to resist his advances. After committing rape upon her, the appellant took her to toilet and brought her back to her bed. She could not wake up in the morning and remained in bed the whole day. When her mother came to her house, she narrated the said incident to her. Her mother made a call to 100 number. On the basis of the aforesaid statement (Ex.PW-1/A), FIR No. 1441/2016 (Ex.PW-9/A) was registered for offence punishable under Sections 328/376 IPC at PS Karawal Nagar

5. Thereafter, the crime team was called at the spot. They took photographs of the spot. The plastic bottle of Frooti having some drops of Frooti in it was seized at the instance of the complainant vide seizure memo Ex. PW-1/B. The complainant, her husband and their child were taken to GTB Hospital for medical examination. The doctor handed over three sealed pullandas along with sample seals and the MLC of the complainant to W/Ct. Reshma and one sealed pullanda along with sample seal and the MLCs of her husband and her child to Ct. Sangram. Thereafter, W/SI Nagma she along with complainant and her family reached at the spot where she prepared site plan Ex. PW-16/B at the instance of the complainant. Statements of prosecution witnesses were recorded under Section 161 Cr.P.C. Thereafter, she along with Ct. Reshma and Ct. Sangram reached at the police station where W/Ct. Reshma handed over three sealed pullands along with two sample seals and MLC to her which were seized vide seizure memo Ex. PW-13/A. Ct. Sangram handed over one sealed pullanda along with sample seals which were seized vide seizure memo Ex. PW-14/A. She recorded the statements of Ct. Reshma and SI Pratik and deposited the case property in malkhana.

6. On 27th January 2015, a secret information was received that the appellant was present at his father's house in Karawal Nagar. Upon receiving this information, she telephonically informed the husband of the complainant and she along with Ct. Harish reached at the house of the father of the appellant where they met husband of the complainant. The appellant was found in the said house and the husband of the complainant identified him. Appellant was arrested vide arrest memo Ex. PW-4/A and his personal search was conducted vide memo Ex. PW-10/A. His disclosure statement

was recorded vide Ex. PW-10/A. On 28th January 2015, the appellant was interrogated who disclosed name of one person namely Puneet Dubey who was interrogated vide interrogation report Ex. PW-16/C wherein he revealed that the appellant enquired from him about sleeping pills.

7. On 31st January 2015, three sealed pullands and on 2nd January 2015, five sealed pullandas along with sample seals were sent to FSL, Rohini. She collected eight photographs from the concerned photographer which were exhibited as Ex. X1 to Ex. X8. On completion of investigation, charge sheet was filed. Charge was framed vide order dated 28th May 2015 for offences punishable under Sections 376 IPC against the appellant.

8. Prosecutrix (PW-1), complainant deposed in sync with her statement made before the police. In her cross examination, she stated that the appellant had taken loan of ₹50,000 from the one man namely Vikram Master and her husband had deposited property documents with him as a security for loan amount taken by the appellant. She further stated that her husband left for duty in the morning on 16th January 2015 and returned in the evening and that the entire day her husband felt intoxicated. She further stated that during night time her husband spoke to the appellant on the mobile phone.

9. Husband of the prosecutrix (PW-4) deposed in sync with the statement of the prosecutrix. He added that prosecutrix disclosed to her mother that she was raped by the appellant the previous night. In his cross-examination he stated that he along with the appellant went to the house of one Master Vikram for taking a loan of ₹50,000. He stated that on the next morning when he got up the appellant was present in his room and he accompanied him to his *gali* from where he left.

10. Mother of the prosecutrix (PW-5) corroborated to the testimonies of PW-1 and PW-4.

11. Gopal (PW-6), friend of the husband of the complainant stated that on 16th January 2015 the husband of the complainant met him and informed him that in the night of 15th January 2015 the appellant brought a bottle of Frooti and served it to them. He further told him that after consuming the drink he started feeling giddy and then he slept. He stated that he then informed the husband of the complainant that about three-four months ago, the appellant had brought a bottle of frooti to his house also and after consuming that drink he and his family became unconscious but had not complained about the said incident as the appellant was his childhood friend.

12. SI Nazma, stated that on 10th August 2015, the FSL report was filed which was exhibited as Ex. PW-16/E. On examination it was noted that

- i. *The D.N.A profile generated from the source of exhibit '3' (blood sample of the accused) was found to be accounted in the mixed DNA profile generated from the source of exhibits '1j' (cervical mucus collection of victim), '1k-1', '1k-2a' and '1k-2b' (vaginal cotton wool swab and microslides of victim), '1n-1', '1n-2a', '1n-2b' (rectal cotton wool swab and microslides of victim and '2b' (pajami of victim).*

13. Dr. Shivesh Pandey (PW-8), CMO, GTB Hospital, Delhi stated that the complainant was medically examined by Dr. Akash whose whereabouts are not available. The MLC of the complainant was prepared. As per the MLC (Ex.PW-2/A) following observations were made:

- i. *No fresh external injury seen*

14. Dr. Vikas Kumar Tiwari (PW-3), Junior Resident, GTB Hospital,

Delhi stated that on 17th January 2015 'S' husband of the complainant was brought to the hospital for medical examination with alleged history of unknown intoxication (by ingestion of frooti) on 15th January 2015 at around 9:00 P.M. He conducted the medical examination of Sachin vide MLC Ex.PW-3/A. On examination,

- i. *No external injury seen at the time of examination.*
- ii. *Gastric lavage sample to be sent for examination.*

15. Dr. Subhash (PW-12), Senior Resident, GTB Hospital, Delhi stated that on 17th January 2015 'S' was brought before him from casualty department for medical examination with alleged history of unknown intoxication (by ingestion of frooti) on 15th January 2015 at around 9:00 P.M. On examination, he was found conscious and well oriented to time place and person. He exhibited his report as Ex. PW-12/A. He further stated that on same day the complainant was presented before him for medical and gynaecological examination with alleged history of loss of consciousness after consuming soft drink *mazza* given by the appellant on 15th January 2015 at around 9:00 P.M. On examination, she was found conscious and well oriented to time place and person. He exhibited his report as Ex. PW-12/B. In his cross-examination he stated that on examination of the husband of the complainant there was no sign or symptom of poisoning and he did not disclose name of his friend.

16. Dr. Vinay Bhushan (PW-18), Senior Resident, GTB Hospital, Delhi stated that on 17th January 2015 at about 3:15 A.M. the son of the complainant was brought to the hospital for medical examination with alleged history of intoxication on previous day and the increase of sleepiness the previous night. He conducted the medical examination of son of the

complainant vide MLC Ex.PW-18/A. On examination, it was noted that there was no fever, no vomiting and the general condition was found to be fair. He stated that he only clinically examined the son of the complainant and did not carry out upper gastro intestinal endoscopy as the said equipment was not available. In his cross-examination he stated that on examination of the son of the complainant there was no symptom of intoxication and therefore he did not take any sample in this regard.

17. Dr. Adesh Kumar, Senior Scientific Officer (Chemistry), FSL, Rohini stated that on 30th January 2015 three sealed parcels were received at his office. Parcels no.1 and 2 were sealed with the seal of 'MLC GTB HOSPITAL SHO DELHI 05' and parcel no.3 was with seal of NK. Parcel no.1 was opened which contained light green liquid approximately 40 ml kept in a vacutainer, stated to be gastric lavage of the complainant and same was marked by him as Ex.1. Parcel no.2 was also opened which contained light brown coloured liquid with sediments approximately 60 ml kept in a vacutainer, stated to be gastric lavage of the husband of the complainant and same was marked by him as Ex.2. Parcel no.3 was also opened which contained yellowish orange coloured liquid approximately 0.5 ml kept in a plastic bottle printed as Frooti and same was marked by him as Ex.3. He examined the abovementioned three exhibits and his detailed report as on Chemical Microscopic, TLC, GC-HS and GC-MS examination were found to contain Ethyl Alcohol, which is a sedative group of drugs. After the chemical examination the remnants of the exhibits were sealed with the seal of 'AY FSL DELHI'. The detailed report is Ex.PW21/A.

18. Devanand @ Deva in his statement recorded under Section 313 Cr.P.C. stated that he was arrested from the house of the mother of the

complainant. Husband and mother of the complainant called him in the night on 16th January 2015 and demanded ₹3 lakhs from him and also threatened that if he doesn't pay, they would implicate him in a false case. He denied having taken any bottle of Frooti to the house of the complainant. He stated that the case against him was false and that on 15th January 2015, he along with husband of the complainant went to the house of Vikram Master for mortgaging his house in return for receiving Rs. 50,000 which sum he took from Vikram Master and went to his house. At 7:15 P.M. the husband of the complainant called him telephonically and invited him for some party at his house but he refused. At about 8.00 P.M. the husband of the complainant again called him and he went to the house of the complainant where she served him tea and snacks. After consuming the same, he claimed to have slept and woke up the next morning after which he went to his own house. On 16th January 2015 at about 8.30 P.M. husband of the complainant made a call to him and demanded ₹3 lakhs from him and threatened him that if he did not fulfil this demand, they would implicate him in a false rape case. He also stated that all the PWs are false and are interested witnesses.

19. Vikram Singh (DW-1), stated that he knew the husband of the complainant and the appellant for more than 5 years as they lived near his house. On 15th January 2015 at about 12.00 P.M. the appellant and the husband of the complainant came to his shop at Gali No.3, A Block, Ambika Vihar, Shiv Vihar, Karawal Nagar and the appellant demanded ₹50,000 from him. Thereafter he called one Sh. Daya Ram who later came to his shop. Thereafter he along with the appellant, husband of the complainant and Daya Ram went to the office of Sh. L.B. Mishra, Advocate where he purchased stamp paper and got prepared the mortgage deed and receipt in

respect of property situated in C Block, Sangam Vihar which are exhibited as Ex.DW1/A and Ex.DW1/B respectively. The appellant handed over original documents of property pertaining to him situated in Sangam Vihar, Loni Ghaziabad, UP. He then gave ₹50,000 cash to the appellant in presence of the husband of the complainant and Daya Ram. The appellant assured him that he would pay an amount of ₹80,000 if the said amount is not paid back within one year, therefore in the documents ₹80,000 got mentioned. He stated that father of the accused paid sum of ₹50,000 to him after 3 months. He stated that the said documents were notarized on 16th January 2015 in presence of the husband of the complainant and Daya Ram.

20. Version of the prosecutrix that she was raped by the appellant is duly corroborated by the FSL report of DNA analysis Ex.PW-16/E as per which DNA profile generated from the blood samples of the appellant were accounted for in the mixed DNA profile generated from the cervical mucus collection, vaginal swab, rectal swabs, microslides and pajami of the victim. Further that an intoxicant was administered to the prosecutrix and her husband which was mixed in the frooti has also been proved from the FSL report of gastric lavage of the prosecutrix and her husband as well as the plastic bottle recovered which all contained ethyl alcohol. Version of the appellant that the contents of DD No. 59B dated 16th January, 2015 recording that a man with his family was lying in unconscious condition is falsified by the fact that the husband of the prosecutrix went to work on the 16th January, 2015 does not serve any purpose to the appellant for the reason the husband of the prosecutrix has admitted having gone to the work on 16th January, 2015 but on coming to know in the evening about the condition of his wife and that she was raped, justifiably the call was made which was

recorded as DD No.59B on 16th January, 2015. The objection raised by the FSL report seeking clarification from the investigating officer does not in any way make the FSL reports suspect, particularly because Dr. Adesh Kumar who appeared in the witness box stated that the seals on the parcels received were intact and tallied as per the forwarding specimen seals. Further this witness has not been cross-examined on the point of the objection of the FSL.

21. Considering the evidence led by the prosecution which proves beyond reasonable doubt, commission of offences punishable under Section 376/328/452 IPC committed by the appellant, this Court finds no error in the impugned judgment of conviction and order on sentence. Appeal is dismissed.

22. Copy of this order be sent to Superintendent Central Jail Mandoli for updation of the Jail record and intimation to the appellant.

23. TCR be returned.

(MUKTA GUPTA)
JUDGE

AUGUST 19, 2019
'sk'