

Form J(2)

In the High Court at Calcutta
Criminal Appellate Jurisdiction
Appellate Side

Present : **The Hon'ble Mr. Justice Bibek Chaudhuri**

CRA 531 of 2017

Kamalesh Mondal & Anr.

-Vs.-

State of West Bengal

For the appellants : Mr. Apurba Kumar Dutta, Adv.,
Mr. Kuntal Banerjee, Adv.

For the respondent : Mr. Abhra Mukherjee, Adv.,
Mr. Gautam Banerjee, Adv.

Heard & Judgment on: 30.11.2021.

Bibek Chaudhuri, J.:

It is the cardinal axiom of criminal administration of justice that prosecution must prove its own case beyond any shadow of doubt.

In ***State -Vs.- Krishna*** reported in ***(2011) 1 SCC (Cri) 381*** it was held by the Supreme Court: -

"In a criminal case, the prosecution case may suffer from inconsistencies here and discrepancies there, but that is a short coming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may

be justified in seeking advantage of incongruities appearing in the evidence. In the latter, however, no such benefit may be available to it. Therefore, it is the duty of the Court to separate false from the truth as in the deposition of witnesses there are always normal discrepancies, howsoever honest and truthful they may be and these discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition, shock and horror at the time of occurrence and threat to the life. In sifting the evidence, the Court has to attempt to separate chaff from the grains in every case and this attempt cannot be abandoned on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot reasonably be carried out."

Bearing the above age old and time tested principle of criminal jurisprudence, let us now examine the evidence on record afresh to come to a finding as to whether the learned Additional Sessions Judge, 1st Court at Asansol was justified in convicting the accused persons/appellants for committing offence under Sections 328/379/411 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for a period of three years with fine and default clause each for the offence under the above-stated penal provisions with a direction that the substantive punishment of imprisonment would run concurrently.

The case in hand is the revelation of an incident that is very common to the passengers and travellers by train. In a particular area starting from southern part of Bihar to Asansol and Durgapur in the State of West Bengal.

On 31st August, 2009, one Bikash Singh was travelling by 8181 UP Tata Chapra Express in general compartment. After he boarded the train, 3/ 4 passengers made arrangement for him to sit in the train. While he was travelling sitting by the side of the said passengers, they insisted him to take some water. First, he refused. However, on repeated insistence, he drank water from the bottle of one of the said passengers at Purulia Station and became senseless. He regained his senses at Asansol Station and found his bag missing. He could understand that his co-passengers who insisted him to drink water mixed some intoxicated drug with the water and after taking such water, he became senseless. When he was unconscious, the miscreants fled away taking his bag. He also stated that his bag contained a sum of Rs.30,000/- and his wearing apparels and medical receipts and documents. When the train stopped Asansol Station, the victim rushed to Asansol GRPS and informed the matter to on duty Police Officer. His complaint was reduced to writing by a Police Officer and he put his signature thereon. The said complaint was treated as FIR and Asansol GRPS Case No. 20/2009 dated 01.09.2009 under

Sections 328/307/379/411 of the Indian Penal Code was registered against three unknown offenders.

After registration of the case, the on duty Police Officer immediately informed the matter to the RPF Officers posted at Asansol Railway Station. A raid was conducted inside the general compartment of the said train as well as on the platform jointly by the RPF and Police personnel. During raid, Kamalesh Mondal, appellant no. 1 was apprehended by Police with a black coloured bag in his possession. The said bag was seized and on search a sum of Rs.5,000/-, some wearing apparels and one identity card of Bikash Singh, the *de facto* complainant and some other materials were recovered.

Subsequently, on the basis of statement made by Kamalesh Mondal, two other persons, namely Prabhu Mondal and Dinesh Mondal were arrested from a hotel at Asansol. From the possession of Prabhu Mondal, one yellow coloured bag was seized. In the said bag there were a sum of Rs.5,000/-, some wearing apparels and other articles. From the possession of Dinesh Mondal, a sum of Rs.5,000/- and a strip of medicines under the brand name of 'Ativan 2 mg' were recovered. The accused persons were placed in T.I. Parade during investigation. They were identified by two witnesses, namely Bikash Singh, the *de facto* complainant herein and one Birendra Sahani whose bag was also

stolen allegedly by the accused persons. The materials were seized and charge-sheet was filed.

It is pertinent to mention here that during trial Dinesh Mondal absconded and the case was filed against him. Accused Kamalesh Mondal and Prabhu Mondal faced trial.

During trial, prosecution examined as many as nine witnesses. Amongst them, P.W. 3, Bikash Singh is the *de facto* complainant of this case, P.W. 2, Dr. Satinath Banerjee examined a pack of seized tablets and opined that the said tablets were 'Ativan 2mg' used as medicine to induce sleep to the patients suffering from insomnia and depression. P.W. 1, a hawker of Asansol Railway Station and P.W. 4, Suman Banerjee, an employee of Asansol Hotel were declared hostile by the prosecution. It is ascertained from the evidence of P.W. 5, Anupam Kumar who was posted as Inspector of RPF, on the date of occurrence that on 01.09.2009 at 2.30 a.m. he received an information that one bag of a person was stolen from the train by the miscreants after administering intoxicated drug to him and making him unconscious. He immediately worked out the said information with Sub-Inspector, D. Dutta of Asansol GRPS and arrested Kamalesh Mondal from Asansol platform with a bag. The said bag was seized under a seizure list where he put his signature as a witness. Then, on the basis of the statement of Kamalesh, he conducted raid in a hotel at

Asansol and arrested appellant, Prabhu Mondal and Dinesh Mondal from the said hotel. A bag containing Rs. 5,000/- and some wearing apparels was seized from Prabhu Mondal and a sum of Rs.5,000/- and a strip of 'Ativan' tablets were seized from the possession of accused Dinesh Mondal. Apart from the said witnesses, P.W. 9 was the Investigating Officer of this case.

It is submitted by the learned Advocate for the appellants that according to the prosecution case, one bag was stolen from the possession of the *de facto* complainant. Though seizure list was produced and marked exhibits in respect of a bag allegedly seized from the possession of Kamalesh Mondal, the said seized bag was not produced during trial of the case. The bag of Birendra Sahani which was allegedly recovered from accused Prabhu Mondal was also not produced before the Court during trial. The owners of the said bags did not have the opportunity to identify during trial that the said bags as the stolen booty. Therefore, as the prosecution failed to prove the seized bags with the witnesses, recovery of stolen bags, money and other articles were doubtful. Secondly, it is submitted by the learned Advocate for the appellant that in the written complaint as well as deposition, the *de facto* complainant stated that he was insisted to take water from the bottle of the accused persons. On the other hand, Birendra Sahani was stated that the accused persons gave him a

biscuit to take and after taking the said biscuit, he became senseless. The Investigating Officer failed to recover the water bottle or the biscuit unless the said water and biscuit were scientifically examined, it ought not to have been held that the water bottle and the biscuit contained intoxicated drugs.

In other words, prosecution failed to prove that 'Ativan' was mixed with water.

Learned Advocate for the appellant has urged that there was another way to prove the fact that the *de facto* complainant became unconscious after drinking water was by way of medical examination of the said *de facto* complainant. However, the Investigating Officer did not take any attempt to get the *de facto* complainant examined medically.

According to the learned Advocate for the appellant, the seizure lists of this case are extremely doubtful in the event of non-production of the seized materials.

Learned Public Prosecutor-in-Charge, on the other hand, argues that there is no infirmity in the Trial Court's judgment and the Trial Court convicted the appellants on proper appreciation on evidence. It is further submitted by the learned Public Prosecutor-in-Charge that during investigation, the accused persons were placed in T.I. Parade. They were duly identified by the *de facto* complainant and Birendra

Sahani in T.I. Parade. Therefore, no question can be raised on the identity of the accused persons as the perpetrator of the offence. The accused persons were also identified by the victim witnesses in Court. Identification in Court is of course substantive evidence and when the identification matches with identification in T.I. Parade, involvement of the accused cannot be questioned.

Learned Public Prosecutor-in-Charge frankly admits that the prosecution failed to produce the stolen articles in Court during trial. But for the failure of the prosecution, trial of the case cannot be said to be vitiated. The prosecution has been able to prove at least that the bag of Bikash Kumar Singh was stolen because after the seizure of the said bag, the same was handed over to him by an order passed by the learned Magistrate during trial of the case. Thus, he invites this Court to concur with the judgment made by the Trial Court and pass necessary order.

Section 328 of the Indian Penal Code is a penal provision for causing hurt by means of poison etc. with intent to commit an offence. The ingredients of offence are as follows: -

- (1) accused administered poison –
 - (a) with the intention of causing hurt;
 - (b) with knowledge that it is likely to cause hurt and
 - (c) to facilitate the commission of an offence.

In the instant case, the prosecution came up with a case of administration of sedative drug to make the *de facto* complainant and another person unconscious to facilitate the commission of theft of the bags of the *de facto* complainant and one Birendra Sahani. It appears from the evidence of P.W.2, Dr. Satinath Banerjee that the strip of medicines recovered from Dinesh Mondal contained 5/8 'Ativan 2 mg' tablets. The said tablets are used to induce sleep to the persons suffering from insomnia and depression. Therefore, the said medicines is not a poison. Whether the said medicines had poisonous effect upon a person or not would only be considered after medical examination of the *de facto* complainant and Birendra Sahani. But they were not examined. Therefore, prosecution failed to prove that the water or the biscuit which the *de facto* complainant and the said Birendra Shani were insisted to take were poisonous or not. In the absence of proof of the ingredient of offence under Section 328 of the Indian Penal Code, this Court cannot but hold that the prosecution failed to bring home the charge under Section 328 of the Indian Penal Code.

The purpose of holding T.I. Parade is to enable the witnesses to identify the suspects who are involved in commission of offence. Its object is to satisfy the Investigating Authority that a certain person not previously known to the witnesses was involved in the commission of crime and also to furnish evidence to corroborate the testimony, which

the witnesses tendered before the Court. Therefore, identification in T.I. Parade has the corroborative value and it is not a substantive piece of evidence. It is an undenying fact that the accused persons were identified in T.I. Parade as well as in Court. But without production of the stolen articles, the accused persons cannot be tagged with the stolen materials because different items and articles were recovered from the possession of three different accused persons. Under such circumstances, this Court is also not in a position to hold that the prosecution was able to establish the charge under Section 379 of the Indian Penal Code.

With regard to charge under Section 411 of the Indian Penal Code, it was necessary for the prosecution again to hold T.I. Parade of the stolen Indian currency notes, wearing apparels and other articles. A sum of Rs.5,000/- can be in possession of any passenger now a days. But to bring home the charge under Section 411 of the Indian Penal Code in the instant case, prosecution was under obligation to prove that the money which was recovered from the accused persons belonged to Bikash Kumar Singh. The only way to prove the said fact was by way of holding T.I. Parade of the properties allegedly recovered from the accused persons. In the instant case, the Investigating Officer did not take any attempt to hold T.I. Parade of the recovered properties.

The learned Trial Judge did not make any observation with regard to the aforesaid fact and without considering the basic ingredients of offence held the accused persons guilty for committing offence under Section 411 of the Indian Penal Code.

For the reasons stated above, the impugned judgment and order of conviction and sentence is liable to be set aside.

Accordingly, the instant appeal is **allowed**.

The judgment and order of conviction and sentence passed against the appellants is set aside.

The appellants are discharged from the bail bonds.

A copy of the judgment be sent to the learned Court below forthwith along with the lower court record.

The parties are at liberty to act on the server copy of this order.

Urgent photostat certified copy of this order, if applied for, be given to the learned advocates for the parties on usual undertakings.

(Bibek Chaudhuri, J.)

Srimanta/Mithun
A.Rs. (Court)