

* HIGH COURT OF DELHI : NEW DELHI

Crl. Appeal No.20/2002

% Judgment reserved on: **21st January, 2010**
Judgment delivered on: **1st February, 2010**

1. Mukesh Chand,
S/o. Sh. Gokul Chand,
R/o Lal Gadi,
PS Chhahri, Bulundshar,
U. P.
2. Horam Singh,
S/o Lekhraj,
R/o Vill. Lal Gadi,
PS Chhahri, Bulundshar,
U.P.
3. Mahender Singh,
S/o Bihari Singh,
R/o Budda, Village, PS Dhadhiri Chhara,
District-Aligargh,
U. P.

...Appellants

Through: Mr. R. G. Srivastava, Adv.

Versus

State (Govt. of N.C.T. of Delhi)

...Respondent.

Through: Mr. Arvind Kumar Gupta,
APP for the State.

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

1. Whether the Reporters of local papers may
be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported
in the Digest? Yes

V.B.Gupta, J.

Present appeal filed by appellants is against judgment dated 14th December, 2001 and Order on Sentence dated 15th December, 2001, passed by Additional Sessions Judge, Delhi.

2. Present case was registered on complaint Ex. PW 1/B, made by complainant Mata Prasad stating that he is working as Home Guard and posted at P. S. Parliament Street, Delhi. On 16th May, 1994, he was going to his native Village at Etawah by Sealdah Express from Old Delhi Railway Station. Three persons were sitting opposite him in the train and when train stopped at Shahdara Railway Station, he got down from the train to bring water. He took some water with him in the kettle which appellant Mukesh Chand asked for drinking. He gave the kettle of water to appellant Mukesh Chand upon which appellant Mahender Singh offered him a biscuit. He showed his reluctance initially but on insistent of the appellant, he took the biscuit, ate only half a biscuit and fell unconscious, within 2-3 minutes after feeling lazy and drowsy. After regaining consciousness, he found himself in the hospital and found his belongings i.e one suit case containing three sarees, three blouse pieces, one tiffin, some papers, a blue coloured pant, a check shirt and a sum of Rs. 6300-6400/- were missing, apart from the wrist watch and Rs. 200/- in the purse of the back pocket of his pant. The two constables told him that he was removed from the train by a person at Fatehpur Railway Station in unconscious state and no luggage was with him at that time.

3. Investigation of the case was entrusted to SI Roshan Lal. On 23.5.1994, complainant Mata Prasad caught hold of appellant Mukesh Chand from platform no. 13, Old Delhi Railway Station near Sealdah Express and produced him before SI Roshan Lal, who arrested him. Appellant Mukesh Chand made a disclosure statement that he along with his co-accused Mahender Singh and Horam Singh (other appellants) committed theft of the belongings of the complainant and flee at Aligarh Junction. At the pointing out of appellant Mukesh Chand, from a tenanted house bearing No. 19/141, Gambhir Pur, Aligarh of appellant Mahender Singh some belongings of the complainant were recovered. Appellant Mukesh Chand also got recovered the suitcase containing some belongings of the complainant. The same were taken into possession after preparing the pulanda and sealed with the seal of RLS. Appellants Mahender Singh and Horam Singh surrendered themselves before the court on 3.6.94 and confessed that they had committed the theft on the complainant Mata Prasad with appellant Mukesh Chand. Both these appellants were arrested, who pointed out the place of occurrence but nothing else was recovered from them. After completion of all other formalities, challan was filed in the Court.

4. Charge under Section 328 and 379 read with Section 34 IPC was framed against all the appellants.

5. It is contended by learned counsel for the appellants that case of prosecution is full of contradictions. There is no eye-witness to the occurrence of the alleged incident, though incident is stated to have taken place in a running train.

6. Other contention is that, prosecution has not examined the person who has removed the complainant from the train at Fatehpur Railway Station in unconscious condition. The complaint in the present case was not written by the complainant but it was written PW-7 Inder Singh, under the threat of the police.

7. Other material contradiction pointed out by counsel for the appellants is that on the one hand complainant states that after eating the poisonous biscuit he immediately fell unconscious while on the other hand PW-5 doctor, who examined the complainant states that complainant lost his consciousness after few hours of consuming the biscuit.

8. Another contention is that though as per case of prosecution, it is a case of poisoning but no chemical report has been proved on record. Thus offence under Section 328 IPC is not proved at all.

9. On the other hand, it is contented by learned counsel for the State that complainant was not known to any of the appellants and there could be no reason for the complainant to falsely implicate the appellants in this case. Recovery of two sarees have been effected from the appellants. All the appellants were apprehended at the identification of the complainant and there is no reason to disbelieve the evidence of the complainant. There is no infirmity or ambiguity in the impugned judgment.

10. The case of prosecution is full of contradictions. First question which arises for consideration is as to whether complainant was travelling in the train at the time of alleged incident or not. If the complainant had been travelling in the

train then he must have purchased a ticket and the Investigating Officer ought to have taken that ticket in possession to show that on the date of incident the complainant was travelling as a passenger in Sealdah Express. There is nothing on record to show that complainant was travelling in the train on the date of alleged incident.

11. Second important point to be noted is as to which person has removed the complainant from the train at Fatepur Railway Station in unconscious condition and got him admitted in the hospital. Identity of that person who has removed the complainant to the hospital and got him admitted, has not been established at all.

12. Thirdly, none of the appellants were apprehended from the scene of crime. As per complainant's statement, on 20th or 21st May, 1994 he along with Railway Police had gone to Old Delhi Railway Station, there he saw appellant Mukesh Chand and identified him as the person who had asked for water from him. It is not complainant's case that appellant Mukesh Chand offered him the biscuit. The biscuit was offered by appellant Mahender Singh.

13. On the other hand as per statement of PW-4 Ct. Brij Bhushan on 23rd May, 1994, he was posted as PP Railway Shahdara. At around 8.30 P.M. Sealdah Express was to start from platform no. 13 SI Roshan Lal, Ct. Jagdish and complainant were present at the platform. In the crowd, appellant Mukesh Chand was standing, whom complainant identified. At the pointing out of complainant, appellant Mukesh Chand was apprehended.

14. Thus, there is very material contradiction with regard to date, place and time of apprehension of appellant Mukesh Chand.

15. Now, coming to the arrest of other two appellants namely, Horam Singh and Mahender Singh. As per statement of PW-4, on 3rd June, 1994, he along with SI Roshan Lal, Ct. Jagdish and complainant Mata Parsad had come to the Tis Hazari Courts, Delhi and in the crowd, complainant identified appellants Horam Singh and Mahender Singh who were apprehended at the pointing out of the complainant.

16. On the other hand, complainant nowhere states that appellants Horam Singh and Mahender Singh were apprehended at his pointing out. The complainant in his statement has stated that he saw other accused persons only in the court and nowhere in between after the incident.

17. One fact is patently clear that none of the culprits was apprehended at the spot. There is nothing on record to show as to whether any test identification parade was held in this case or not, which was mandatory under the law.

18. Another feature in this case is that complaint Ex. PW 1/B was not written by the complainant but the same written by PW-7 Inder Singh, resident of Fatepur, U. P. PW-7 in his statement has stated that on 18th May, 1994, one person came to his shop and asked him to write a complaint, which he wrote on his dictation. The same is Ex. PW 1/B, which is in his hand. This witness further stated that he does not remember whether he signed the report at point A or not. In cross-examination, this witness stated that he was called by a police official

who asked him to write the application for the said person but he refused. The said police officials threatened him on which he wrote report Ex. PW 1/B, while sitting in the police station.

19. On the other hand, complainant in cross-examination has stated that he made report to the police after he was brought to GRP Police Station by the Constable who was deputed in the hospital. The complaint was reduced into writing by Constable who accompanied him and he put his signature on it. Complainant has further stated that he was called in the police station and his supplementary statement was recorded. At that time he was informed that accused was arrested. Thus, the case of prosecution with regard to the alleged incident, lodging of complaint, arrest of appellants and recovery etc. is full of contradictions.

20. As far as poisoning is concerned, PW-5 Dr. B. K. Sharma, who had medically examined the complainant, has stated that it was the case of suspected poisoning. The stomach was got washed and washed out contents of stomach were preserved for chemical examination. His report regarding examination of Mata Parsad is Ex. PW 5/A.

21. Surprisingly, no chemical report about the “stomach wash” has been proved on record. It is well settled that in order to prove Section 328 IPC, the prosecution is required to prove that the substance in question was a poison.

22. In **Joseph Kurian Philip Jose Vs. State of Kerala (AIR 1995 SC 4)**, the Court observed;

“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”

23. After scanning through the entire evidence and facts of the present case, I have no hesitation in holding that case of prosecution is full of contradictions and it has miserably failed to prove its case against any of the appellants. The impugned judgment of Additional Sessions Judge is set aside and present appeal stands allowed. All the appellants stand acquitted.

24. Bail bonds and surety bonds of the appellants are discharged.

25. Trial court record be sent back.

1st February, 2010
ab

V.B.Gupta, J.