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

% ***Reserved on: 27.03.2023***
Pronounced on: 05.04.2023

\+ **CRL.A. 275/2009**

KRISHNA KANT ..... Appellant

Through: Mr. Giri Raj Singh, Advocate

versus

STATE ..... Respondent

Through: Mr. Naresh Kumar Chahar, APP for the State

CORAM:
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The instant appeal filed under Section 374 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') arises out of the impugned judgment dated 21.03.2009 and order on sentence dated 24.03.2009 passed by learned Additional Sessions Judge, Fast Track Court, Central, Delhi ('Trial Court') whereby the appellant was convicted in case FIR bearing number 590/1998 under Sections 328/379/411 of Indian Penal Code, 1860, ('IPC') registered at Police Station I.P. Estate.

2. To summarise briefly the facts of the case, the present FIR was lodged on 11.11.1998, on the complaint of one Sh. Tek Chand who was driver by profession. The complainant had stated that his car was hired

by the accused from Ballabhgarh to Delhi on 07.11.1998, and they had reached I.T.O, Delhi at about 1:00 pm. Upon reaching there, the accused had told the complainant to stop the car near a *rehri* and he had allegedly administered certain stupefying drug to the complainant by mixing the same in juice and had told the complainant to take the car behind Hans Bhawan by the side of a Hotel/Dhaba. The complainant stated that thereafter, he had lost consciousness and had regained consciousness only at about 10:00 am and he could not find the alleged person and his car was also missing. The complainant kept on searching his car and being unable to find the same, he lodged a report on 11.11.1998 at Police Station I.P. Estate, upon which present FIR was registered under Sections 328/379 IPC. During the course of investigation, the police was unable to either apprehend the accused or recover the stolen car and on 17.02.99 an untraced report was filed in the case. However, on 22.03.1999, information was received from Police Station Hari Nagar about recovery of stolen car no. DNA 6200 from possession of the appellant and arrest of the appellant pursuant to registration of case FIR no. 216/1999 under Section 411 IPC at Police Station Hari Nagar. Subsequently, the said FIR was clubbed with the present FIR registered with Police Station I.P. Estate.

3. After completion of investigation, charge sheet was filed for offences punishable under Sections 411/379 IPC and initially, charge under Section 379 IPC was framed against the appellant by the learned Metropolitan Magistrate on 11.05.2001 with the alternative charge for offence punishable under Section 411 IPC and the appellant was put to trial.

4. A perusal of record shows that the complainant was examined as PW-2 before the learned Metropolitan Magistrate and on the basis of his deposition, the file was sent to Court of Sessions as the learned Metropolitan Magistrate was of the view that the appellant was to be tried for offence punishable under Section 328 IPC. After the committal of the file to the Court of Sessions/Trial Court, a charge under Sections 328/34 IPC was framed against the appellant on 26.10.2006 and the trial was conducted.

5. The prosecution examined inasmuch as eight witnesses including the complainant and after the closure of the prosecution evidence, the statement of the accused/appellant was recorded under Section 313 Cr.P.C.

6. Upon hearing arguments by the State as well as the learned counsel for the accused, the learned Trial Court was pleased to convict the appellant for offence punishable under Section 328 I.P.C. *vide* impugned order dated 21.03.2009. Subsequently upon hearing the arguments on point of sentence, the learned Trial Court *vide* order dated 24.03.2009 was pleased to direct the appellant to undergo rigorous imprisonment for a period of six months, for offence punishable under Section 328 IPC with fine of Rs.20,000/- out of which Rs.10,000/- was to be paid to the complainant, and in default of payment of fine, he was further directed to undergo simple imprisonment for a period of three months.

7. The appellant in compliance of order dated 24.03.2009 has already deposited fine amount of Rs.20,000/- with the learned Trial Court on 25.03.2009. The appellant being aggrieved by the impugned

judgment dated 21.03.2009 and order on sentence dated 24.03.2009 passed by the learned Trial Court has preferred the present appeal.

8. Learned counsel for the appellant states that the impugned judgment and order on sentence is liable to be set aside since the prosecution has not been able to connect the appellant with the commission of the present offence. It is argued that the learned Trial Court failed to appreciate that there was no medical evidence to prove that the complainant was ever administered any stupefying or intoxicating drug to cause hurt to him. It is also argued that the complainant had stated in his examination that he had regained consciousness in front of his house at Ballabhgarh on the next day of the incident and he got himself medically examined in Ballabhgarh. However, no medical evidence has been placed on record and his wife and mother who had found him in front of the house have also not been examined. It is also argued that the learned Trial Court has failed to appreciate that the complainant in his statement before the police had simply stated that he has regained consciousness at 10:00 am, whereas in his examination, he stated that he had regained consciousness at his house at Ballabhgarh. It is further stated that learned Trial Court also failed to appreciate that the vehicle was allegedly stolen in broad day light and the complainant was administered intoxicating substance at a juice shop, but the juice shop owner has not been examined. It is also argued that the actual owner of the car in question has not been examined. It is, therefore, stated that the appellant be acquitted.

9. Learned APP for the State has argued to the contrary. It is stated that learned Trial Court has meticulously dealt with the entire evidence

placed on record and has rightly convicted the appellant in the present case.

10. This Court has heard the rival contentions and has gone through the material on record.

11. After hearing arguments and going through the records of the case as well as the impugned judgment, it appears that in this case, charge was framed only for offence punishable under Section 328 IPC against the appellant and he was convicted under this section only by learned Trial Court. In view of the same, this Court will concentrate on the findings qua Section 328 IPC on the basis of which, accused has been convicted.

12. For the sake of reference, Section 328 IPC is reproduced herein-under:

> "328. Causing hurt by means of poison, etc., with intent to commit an offence. — Whoever administers to or causes to be taken by any person any poison or any stupefying, intoxicating or unwholesome drug, or other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

13. The ingredients of Section 328 IPC and the nature of evidence required to establish an offence under the said provision was explained by the Hon'ble Supreme Court in ***Joseph Kurian Philip Jose v. State of Kerala*** *(1994) 6 SCC 535*. The relevant portion of the decision is reproduced herein-under:

> "10. **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**."
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> (Emphasis supplied)

14. In the present case, since initially the accused was not arrested and the car in question, which was allegedly stolen by administering the stupefying substance to the accused, was not recovered, the police had filed an untraced report before the learned Magistrate. The present appellant, however, was found in possession of the car in question later on, which became subject matter of another FIR lodged at another police station. On receipt of such information, the investigation in the present case was reopened, charge was framed against the appellant, and trial was conducted, pursuant to which, the appellant was found guilty under Section 328 IPC.

15. This Court has gone through the testimonies of the witnesses. A perusal of the testimony of material witness i.e. the complainant/PW-1 reveals that he had deposed that that the appellant had brought two glasses of juice and had offered one to him. After consuming the same, PW-1 had resumed driving the car but the appellant had asked him to stop the car near Ganda Nala. It was stated that when the appellant had got down on the pretext of bringing another person with him, PW-1 had become unconscious and later when he had regained consciousness, he

had found himself at his house, but his car was not found anywhere. He had thereafter lodged his complaint on 11.11.1998. In his cross-examination, PW-1 had stated that his car was hired by the appellant at Ballabhgarh, and upon reaching ITO, he had stopped his car near Hans Bhawan and the appellant had given him a glass of juice by buying the same from a *rehri*. It was stated that thereafter, the appellant had asked him to take the car to the rear side of Hans Bhawan, besides a dhaba, where the appellant had got down from the car to bring one person. After the appellant had left his car, PW-1 had become unconscious, and later on, he had found himself at Ballabhgarh, outside his house. In his cross-examination, he has failed to give any information as to how he had reached his house at Ballabhgarh while he was unconscious. He merely stated that his mother and wife had informed him that they had found him outside their house vomiting, however, he stated that neither his family nor he knows as to how he had reached Ballabhgarh. Since it is the case of the prosecution and the complainant himself that the car was hired from Ballabhgarh and the house of the complainant is at Ballabhgarh, the address of his house could not have been known to the appellant, neither he would have brought him and left him outside his house before committing theft of his car as alleged by the prosecution. Thus, the fact as to how the complainant/PW-1 had reached Ballabhgarh from Delhi remains unexplained and is entirely missing from the testimonies of all the witnesses.

16. Learned Trial Court also overlooked the fact that there was no medical evidence in this case to support the story of prosecution that any intoxicating substance had been administered to the complainant,

except his sole testimony that he was administered some stupefying substance. This fact should have been taken note of, in view of the settled law on this point. Attention regarding this can drawn to the decision of Hon'ble Apex Court in ***Joseph Kurian Philip Jose*** *(supra)* whereby it was held that the ingredients of Section 328 IPC are to be established by way of direct, reliable and cogent evidence.

17. Further, in ***Prashant Bharti v. State (NCT of Delhi)*** *(2013) 9 SCC 293*, the Hon'ble Apex Court had quashed the charge under Section 328 IPC observing that allegations levelled by the prosecutrix of having been administered some intoxicant in a cold drink could not be established by the cogent evidence. The relevant observations read as under:

> "23.9. *Ninthly,* as per the medical report recorded by the AIIMS dated 16.2.2007, the examination of the complainant did not evidence her having been poisoned. The instant allegation made by the complainant cannot now be established because even in the medical report dated 16.2.2007 it was observed that blood samples could not be sent for examination because of the intervening delay. **For the same reason even the allegations levelled by the accused of having been administered some intoxicant in a cold drink (Pepsi) cannot now be established by cogent evidence**."
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> (Emphasis supplied)

18. A co-ordinate Bench of this Court in ***Mahinder Kumar v. State*** *2017 SCC OnLine Del 8327*, in an appeal, had expressed that it was difficult to uphold the conviction under Section 328 IPC merely on the basis of oral evidence. The relevant portion of the decision is extracted as under:

> "20. In view of the aforesaid discussion, scrutiny of testimonies of prosecution as well as defence witnesses and the MLC of the victim, it is clear that the findings rendered by the learned Trial Court are based only on the testimony of injured witness. **But in the absence of any medical evidence corroborating the allegation of the injured, convicting the appellants for the offence under Section 328 of IPC does not seem to be justified in the facts of the present case, especially when the prosecution has not seized any liquid/substance for taking expert opinion so as to know the substance was poisonous, stupefying, intoxicating or unwholesome drug. Prosecution has also not produced any witness to rebut the plea of alibi on behalf of the appellants except that of the injured witness.** However, the appellants have produced two witnesses in their defence and merely because they did not prove the presence of the appellants at the spot, therefore, they were declared hostile.
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> 21. In the considered opinion of this court, depositions of witnesses, whether they are examined on the prosecution side or defence side or as court witnesses, are oral evidence in the case and hence the scrutiny thereof shall be without any predilection or bias. No witness is entitled to get better treatment merely because he was examined as a prosecution witness or even as a court witness. It is judicial scrutiny which is warranted in respect of the depositions of all witnesses for which different yardsticks cannot be prescribed as for those different categories of witnesses.
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> 22. **This Court is of the considered opinion that in a case under Section 328 IPC mere oral assertions are not sufficient to hold an accused guilty of the offence. To hold an accused guilty for the offence, the oral assertions ought to be corroborated by other circumstances and evidence**."
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> (Emphasis supplied)

19. Similar view was adopted earlier by this Court in ***Mukesh Chand v. State (Govt. of NCT of Delhi)*** *2010 SCC OnLine Del 379*, whereby it was held that:

> "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**."
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> (Emphasis supplied)

20. In ***Santosh Kumar v. State*** *2008 (4) JCC 2919* also, this Court while stressing upon the importance and relevancy of medical evidence to establish guilt under Section 328 IPC, had held as under:

> "...From the above quoted observations of the learned trial Judge it is very much clear that the **findings rendered are not sustainable at all because of being conjectural. Simply on the basis of the statement of PW-5 alone it could not be concluded that he had become unconscious** because of eating the biscuit or drinking tea offered to him by the accused. **There had to be medical evidence to the effect** that PW-5 had, in fact, become unconscious because of consuming any drug or intoxicating substance etc. mixed in tea or biscuit..."
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> (Emphasis supplied)

21. In the present case, the situation of lack of evidence is even more glaring as there is no medical evidence or MLC is on record, though victim states that he was medically examined on the same day at Ballabhgarh.

22. Though the learned Trial Court before holding the appellant guilty under Section 328 IPC took note of the serious lapses in the investigation, it did not hold that those serious lapses resulted in the prosecution failing to connect the appellant to the offence in question since there was nothing on record to prove that any stupefying substance was administered to the complaint in this case, except his sole testimony.

23. To sum up, in the present case, (i) there is no medical evidence to prove that complainant was administered any stupefying, intoxicating

or unwholesome drug; (ii) the statements of the wife and the mother of complainant were not recorded who had allegedly found the complainant vomiting outside the house at Ballabhgarh; (iii) the concerned doctor was not examined who had medically examined the complainant in Ballabhgarh as he was taken to the hospital for treatment since he was vomiting and he had thought that he had been administered some stupefying substance; (iv) the statement of the owner of juice shop was also not recorded; and (v) it is also not proved as to how the complainant reached his house at Ballabhgarh from Delhi in state of unconsciousness. In such circumstances, the case against the appellant cannot be said to have been proven beyond reasonable doubt.

24. There is no indication in the impugned judgment as to whether the appellant was let off or convicted under Section 411 IPC as there is no finding on the same and since the appeal has been filed and the appellant has been convicted only under Section 328 IPC, this Court holds the view that the essential ingredients to prove commission of offence under Section 328 IPC were glaringly missing in the present case. Despite there being nothing on record for proving the ingredients of Section 328 IPC, the learned Trial Court, though observing lacunae in the investigation, had convicted the appellant under Section 328 IPC and the said conviction is not sustainable in the eyes of law.

25. Since the evidence placed on record is insufficient to return a finding of guilt under Section 328 IPC, the present appeal is thereby allowed and the impugned judgment dated 21.03.2009 and order on sentence dated 24.03.2009 passed by learned Trial Court are set aside.

26. Bail bonds stands cancelled. Surety stands discharged.

27. The judgment be uploaded on the website forthwith

SWARANA KANTA SHARMA, J

APRIL 05, 2023/ns