Mohd. Safiq vs.state

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Court : Delhi

Decided On : Jun-16-2017

Appellant : Mohd. Safiq

Respondent : State

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment reserved on : May 31, 2017 Judgment pronounced on: June 16, 2017 CRL.A. 291/2016 WASIM AHMED ..... Appellant Through : Mr. Habibur Rahman, Adv. versus (DHCLSC) * % + STATE Through : Mr. Amit Ahlawat, Addl. PP for ..... Respondent State. CRL.A. 300/2016 ..... Appellant Through : Mr. Harsh Prabhakar, Adv. versus (DHCLSC) Through : Mr. Amit Ahlawat, Addl. PP for ..... Respondent State. + MOHD. JAVED STATE + CRL.A. 581/2016 MOHD. ABID STATE ..... Appellant Through : Ms. Suman Chauhan, Adv. (DHCLSC) versus Through : Mr. Amit Ahlawat, Addl. PP for ..... Respondent State. Crl. A. Nos. 291/16, 300/16, 5
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Page 1 of 25 + CRL.A. 1143/2016 MOHD. SAFIQ ..... Appellant STATE Through : Ms. Saahila Lamba, Adv. (DHCLSC) versus ..... Respondent Through : Mr. Amit Ahlawat, Addl. PP for CORAM: HON'BLE MR. JUSTICE A. K. CHAWLA State.

JUDGMENT
A. K. CHAWLA, J.

Appellants - Wasim Ahmed, Mohd. Javed, Mohd Abid and Mohd. Shafiq were charged for the trial of the offences under Sections 328/3
IPC besides the offence under Section 411 IPC. Vide the impugned judgment dated 19.01.2016, all of them were convicted for the said offences and vide the impugned order on sentence dated 21.01.2016, all of them were sentenced to undergo 4 years RI for the offence under Section 3
IPC; 3 years RI for the offence under Section 3
IPC; and, 1 year RI for the offence under Section 411 IPC respectively. They were also sentenced to pay fine of Rs.3,000/- and Rs.2000/- respectively, Crl. A. Nos. 291/16, 300/16, 5
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Page 2 of 25 for the offences under Section 328/3
IPC. In default, they were to undergo 3 months and 2 months SI respectively. All of them have assailed the impugned judgment and the order on sentence by filing separate appeals. All the four appeals are being dealt with by this common judgment.

2. According to the prosecution, one 'Nabi Ulla', aged about 22 years, who was a painter by profession and residing with his mausi's son at Ram Vihar, Nangloi, had left Ram Vihar, to go to his native place at Hardoi, UP in a bus on 18.08.2012 at about 12 noon. In the bus, he met two boys, one of whom was of heavy built and other of a medium built aged about
years. They developed friendship and got down at Peeragarhi to reach the railway station early and for that, hired an auto. On the way, auto driver calls a person by his name 'Wasim' and makes him sit in the auto to be also taken to the railway station. As per the description given by 'Nabi Ulla', said 'Wasim' was aged about 40 years and of thin built. Then, according to prosecution, when they reached Inderlok Metro Station, the auto was stopped and 'Wasim' purchased bottles of Maza from a shop nearby and they all drank Maza. On this, 'Nabi Ulla', started feeling Crl. A. Nos. 291/16, 300/16, 5
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Page 3 of 25 intoxicated and sleepy. Thereafter, the accused-the appellants dropped 'Nabi Ulla' near Gurudwara, where 'Nabi Ulla' vomitted a lot. On regaining consciousness, 'Nabi Ulla' asked a passerby to call police and for the purpose,

gave his mobile. Passerby called the police on number 100. PCR vehicle reached in sometime and took 'Nabi Ulla' to the Hindu Rao Hospital. In the process, a bag of orange colour containing some clothes, an election I-card and about Rs.500/- of Rs.100/- currency notes from the pocket of victim, went missing. On the receipt of information by PS Sarai Rohilla at 2:40 PM that a person was lying unconscious near Usha Mata Mandir, Shazada Bagh near Gurudwara, HC Naresh went to the spot and getting to know that the person lying unconscious was taken to Hindu Rao Hospital, went there alongwith his staff. On reaching the hospital, he collected the MLC, which recorded the alleged history of drinking of some liquid half an hour before. The doctor declared the patient fit for statement at 5.30 p.m. and gave a sealed gastric lavage sample, which was seized. On the statement of 'Nabi Ulla' recorded by HC Naresh Pal, an FIR No.218 dated 18.08.2012 came to be registered at PS Sarai Rohilla at 6:50 PM. Investigation thereof was assigned to SI G.N. Tiwari. On that very day i.e. 18.08.2012 at about 7 PM, on the receipt of a secret information Crl. A. Nos. 291/16, 300/16, 5
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Page 4 of 25 by SI Ravinder Singh of AATS, in his office at Daya Basti, that a gang of
persons was involved in robbing of passengers administering poisonous substances and that, they had robbed a person in the similar fashion that day only, and, shall be again visiting Sarai Rohilla railway station between 10 PM to 12 midnight to commit a similar crime, SI Ravinder Singh recorded DD No.16 dated 18.08.2012 at 8:30 PM at AATS/North District, Delhi. SI Ravinder Singh, AATS then prepared a raiding team and left for apprehending such gang. There, the four appellants Wasim Ahmed, Mohd. Javed, Mohd Abid and Mohd. Shafiq, come to be apprehended by SI Ravinder Singh and his team, when they reach there in TSR DL-1RK-3024 at about 10:30. During the course of their interrogation, they make disclosure statement for having committed the crime in the earlier part of the day. Their personal search is conducted. From the personal search of 'Javed', stolen Rs.100/- currency note was recovered. On the personal search of 'Wasim', two packets containing white powder and stolen Rs.200/- were recovered. On the personal search of 'Mohd. Abid', stolen election I-card and Rs.100/- were recovered. On the personal search of Mohd. Shafiq, three packets containing

white power and stolen Rs.100/- were recovered. All of them Crl. A. Nos. 291/16, 300/16, 5
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Page 5 of 25 were arrested on 19.08.2012 at 12:30 AM. Case property was deposited with Malkhana of PS Sarai Rohilla. Next day i.e. 19.08.2012, new IO, namely, SI Parveen Maan came to be assigned the investigations. All of appellants are said to have refused T.I.P on 23.08.2012. Case property however came to be identified by 'Nabi Ulla' on 03.09.2012. Challan came to be filed on 08.11.2012 for the trial of offences under Sections 328/379/4
IPC citing 20 prosecution witnesses. Two sets of charges came to be framed against the four persons collectively. First charge was for the commission of the offences under Sections 328/3
IPC for having committed or facilitated the commission of theft of a bag belonging to 'Nabi Ulla' containing Rs.500/- and other documents and clothes, having administered him some stupefying thing mixed in a cold drink i.e. Maza. The second charge was for the offence punishable under Section 411 IPC for having been found in possession of one bag belonging to 'Nabi Ulla' containing his clothes and other articles and retaining the same, knowing it to be stolen one. All the accused denied such charges. Prosecution examined 13 witnesses out of 20 and PE was closed. In the statements of the accused recorded under Section 313 of Cr.P.C., they denied all the incriminating material put to them. They did not lead any Crl. A. Nos. 291/16, 300/16, 5
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Page 6 of 25 defence evidence. Vide the impugned judgment, they came to be convicted and handed over the similar punishment for all the offences vide the impugned order on sentence.

3. Ld. Legal Aid Counsel for the appellants strenuously contended that there were not only serious inconsistencies and contradictions in the depositions of the prosecution witnesses, the prosecution had equally failed to establish and prove the sequence of events by holding back the material available evidence and that, a new case was sought to be set up, which was distinct from the case, with which the prosecution approached the court. It came to be pointed out that the accused - appellants had come to be identified by the alleged victim 'Nabi Ulla' for their role

and identity for the first time before the court only and that, his such deposition itself was contradictory inasmuch as in his examination-in-chief, in the first instance, he had deposed that Javed and Shafiq were the persons who had initially met him, but, in the same breath, he deposed for Javed driving the TSR, which they hired to go to railway station. According to the ld. Counsel for the appellants, if, Javed was one of the persons, who met 'Nabi Ulla' in the bus and with whom he got down from the bus at Crl. A. Nos. 291/16, 300/16, 5
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Page 7 of 25 Peeragarhi, Javed could not be person driving auto/TSR. Another contradiction and inconsistency pointed out by them was with regard to the person, who purchased Maza bottles. It was pointed out that in his statement Ex-PW1/A, on which an FIR came to be registered, 'Nabi Ulla' had stated that the bottles of Maza were purchased by 'Wasim' getting down at Inderlok Metro Station, whereas, Nabi Ulla PW1, in his examination-in-chief before Court deposed for the Maza bottles somewhere near Peeragarhi, and, that, such place near Peeragarhi, by no means could be taken to be at Inderlok Metro Station. It was also contended that though the MLC of 'Nabi Ulla', which formed part of the charge sheet, was not proved, it could be read against and that, as per the said MLC, 'Nabi Ulla' was fit for recording of statement at 5:30 PM of 18.08.2012, but, in his deposition before Court, he has deposed for having regained consciousness at around 9 or 9:30 PM, and, therefore also, the deposition of the complainant Nabi Ulla - PW1 was not trustworthy and reliable. To discredit the trustworthiness of the deposition of PW1 'Nabi Ulla', it was also contended that it was not a natural human conduct that the four persons having administered stupefying substance, steal from his pocket some money and a bag containing articles including his election Id- Crl. A. Nos. 291/16, 300/16, 5
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Page 8 of 25 card, but, do not choose to take away his mobile phone, from which, he got a call made to the police. In their submission therefore, it was a circumstance which created serious doubt on the veracity of the statement of 'Nabi Ulla' on which the FIR came to be registered. As a sequel to such suspicious circumstances, it was also contended that it was strange that Nabi Ulla noted only last 4 digit number of the TSR, which are stated in his statement Ex-PW1/A, there

was no palpable reason to not to note down the complete registration number nor any explanation in that regard had come to be given. Assailing the impugned judgment, it was also strenuously contended that there was no evidence for any stupefying substance having been administered to Nabi Ulla inasmuch as, as per the FSL report, no drug or tranquilizer was detected in gastric lavage sample. Besides such contradictions, inconsistencies and the circumstances, which, according to the ld. counsel for the appellants, were sufficient to discredit the deposition of the prosecution witnesses and the prosecution story, the failure of the police to join any public witness in the entire process of apprehension and the recovery of the stolen articles and the other incriminating material, though, it happened at a public place, where the govt. residential quarters and the railway station were located nearby and Crl. A. Nos. 291/16, 300/16, 5
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Page 9 of 25 thereby, the govt. officials were easily available for being joined, it casts a serious doubt about the alleged apprehension and the recovery of any stolen property from the appellants. More so, when, according to the prosecution, it was not a chance search, but, a planned raid. It also came to be pointed out that the prosecution, for the reasons unexplained, had not examined the Malkhana Mohrir {MHC(M)}, PS Sarai Rohilla and no relevant extracts of the Malkhana register have come to be proved. Then, it was also contended that the currency notes recovered from the four accused-appellants were never identified by Nabi Ulla PW1. Last, but, not the least, another circumstance to cast a shadow of doubt on the prosecution case was that there was no strict compliance of the mandate of section 157 Cr.P.C inasmuch as, though, the FIR is said to have been registered on 18.08.2012 at about 6:50 PM, the copy of the FIR came to be received by the MM only on 21.08.2012. In addition, for appellant Abid, it also came to be contended that there was no evidence for any role played by Abid in totality of the crime and the necessary ingredients to prove his common intention for commission of any offence, were missing not only in the prosecution case, but, even in the evidence led. It was thus contended that the impugned judgment and the order on sentence were not Crl. A. Nos. 291/16, 300/16, 5
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Page 10 of 25 sustainable and liable to be quashed and set aside. In support of

their contentions, reliance was placed upon 219 (2015) DLT271Mohd. Masoom vs. State of NCT of Delhi; 2014 (146) DRJ629Ram Prakash vs. State; 2009 (3) JCC2399 Ikramuddin vs. The State; and, 2004 (2) Crimes 101 Lalla alias Raj Kumar Singh vs. State of UP.

4. Ld. Addl. PP on his part contended that the testimony of victim PW1 'Nabi Ulla' was un-rebutted, un-challenged and un-controverted and that, it inspired confidence. It was said that the PW1 Nabi Ulla had also correctly identified the accused before the Court and his refusal to join TIP, corroborated his deposition, which was unshaken. In his submissions, the accused - the appellants had not only also failed to prove any previous enmity of 'Nabi Ulla' with them, but, they had also failed to put forth any defence. As for the non-joining of any public witness in the proceedings conducted at the time of apprehension and the recovery of the stolen articles, it was contended that the depositions of I.Os. PW5 and PW13 are unshaken and the mere absence of any public witness at the time of apprehension, was not fatal to the prosecution case. In support thereof, reliance was placed upon (2015) 11 SCC52Jodhan vs. State of Crl. A. Nos. 291/16, 300/16, 5
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Page 11 of 25 M.P. As for the contradictions and the inconsistencies pointed out on behalf of the appellants, it was contended that the discrepancies or the contradictions were minor. In his submissions, the recovery of stolen property of the appellants besides the powder recovered from two of the appellants, which contained drug benzodizpine, duly supported the deposition of PW1 'Nabi Ulla' and proved the prosecution case, beyond reasonable doubt. It was thus submitted that the appeals had no merit and deserved dismissal.

5. Trial Court has returned the findings on all the charges in favour of the prosecution with the observations made in paras 5 to 7 of the impugned judgment, which are as follows :

"5. PW1 deposed categorically that on 18.08.2012 at about 12 noon he had sit in a bus at Rao Vihar, Nangloi for going to New Delhi Railway Station so that can board in a train for going to his native village. On the way, two persons met him

and they asked his name. They became friend because they all had made him believe that they were also going to Hardoi to celebrate Eid Festival. He further narrated the sequence of the event happened with him from stepping down from the bus and hiring an auto as well as consuming the Maza brought by one of the accused. He further deposed about the dizziness as well as found his bag missing. He found himself in the hospital. He also identified the accused persons in the court who had stolen his bag after giving stupefying substance in the Maza. Ld. Counsel for the accused had argued that the testimony of the PW1 Nabi Ullah is not reliable because he had deposed that he regained Crl. A. Nos. 291/16, 300/16,
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Page 12 of 25 conscious in the hospital at about 9-9.30 pm while the FIR has been registered in the present case at 6.50 pm. He further argued that the witness does not remember the exact place from where the Maza Bottle was purchased. He admitted that his mobile phone and purse were with him at that time. However, neither mobile phone had been taken by the accused persons. However, these arguments does not hold any water because the witness has categorically stated about the incident happened with him when he was robbed with his bag after the accused had given some intoxicating or stupefying substance. Not remembering the exact place where the Maza was given or the place where the another person sat on auto rikshaw does not discredit the testimony of this witness. The argument that he regained consciousness in the hospital at 9.30 pm does not mean that he was not in a position to give the statement earlier to the police. He deposed that he had given a mobile phone to some other person to call the police. He had identified his bag in the court which was stolen/taken by the accused persons. There is nothing to disbelieve the testimony of PW1 regarding the fact that he had been given the stupefying substance and thereafter his property was stolen. The argument of the Ld. Counsel of the accused that in the gastric lavage, no drug was found in the FSL does not mean that PW1 was not given stupefying substance. He was immediately taken by the PCR after receiving the call an the doctor had taken the gastric lavage means that accused was given something having intoxicating substance.

6. Moreover in the present case, the police acted swiftly and they had apprehended all the accused persons within half an hour registration of the case after receiving tip off. The PW1 in his statement had given the auto number in which he was made to sit as 3024. That auto was got stopped by the AATS. There were four police officers of AATS who had deposed categorically that they had apprehended the accused persons at about 9.20 pm in the auto bearing no.3024 coming from the side of Old Rohtak Road red light side. Testimonies of these witnesses has also proved the fact that it was the accused persons who had robbed the complainant with his bag after giving stupefying substance. From their possession, an amount of Rs.100/- each were recovered alongwith the articles contained in the said bag. That bag was identified by the complainant in the TIP conducted by Crl. A. Nos. 291/16, 300/16, 5
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Page 13 of 25 PW2 Sh. Viplav Dabas, Ld. MM. The testimony of PW2 remained unchallenged, unrebutted and uncontroverted. From the above it testimony on record 7. is established that it is the accused persons who had given the intoxicating substance in the Maza in order to commit theft. Prosecution has further proved that the accused persons were found in possession of the light cream powder having benzodizpine drugs. The prosecution has further proved that accused persons had stolen the property and the same had been found in their possession. Therefore the prosecution has proved its case under Sections 328/3
as well as Section 411 of IPC against all accused persons."

The conclusions arrived at by the trial Court with the observations made in the afore-going paragraphs, I have no hesitation to say, are without any due application of mind. It only reflects a casual and insensitive approach in dealing with a case, least expected of a Criminal Court, inasmuch as, any wrongful conclusion of conviction, results in vindicating the violation of much enshrined fundamental rights of life and liberty of a person, who is accused of a criminal offence. It is for this reason that in criminal jurisprudence, the concept of benefit of doubt is much recognized, lest, an innocent comes to be punished. It appears to be a classic case, where all norms of a fair and proper investigation are apparently violated and the un-corroborated, contradictory and inconsistent deposition of the prosecution prime witness PW1 'Nabi Ulla', has concluded into the impugned

conviction and the order on sentence. Crl. A. Nos. 291/16, 300/16, 5
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Page 14 of 25 Both the investigating agency and the trial Court have faulted with their insensitive approach in dealing with the matter. To say so, the reasons are abound.

6. Prosecution story unfolds with a purported DD No.62B dated 18.8.2012 recorded at PS Sarai Rohilla at 2.40 pm on an information given by wireless operator of PCR through telephone that a person was lying unconscious near Usha Mata Mandir. For the reasons unexplained, this crucial piece of evidence has not come to be proved before the Court nor the prosecution has come forward to examine anyone from PCR, for the source of such information. The advertance to this DD No.62B is made for the simple reason that it forms part of the report filed under Section 173 Cr.P.C. In other words, it forms part of the material to be used against the accused. That being so, it can very well be looked into. As per this DD No.62B, a person was lying unconscious at the spot. In his statement Ex.PW1/A, on the premise whereof, the FIR came to be registered, PW1 Nabi Ulla says that he had given his own mobile phone to a passerby to make a call to police and that passerby, made a phone call to No.100. If a person was lying unconscious, as recorded in DD No.62B, the statement Crl. A. Nos. 291/16, 300/16, 5
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Page 15 of 25 in Ex.PW1/A that 'Nabi Ulla' by himself called a passerby and handing over his mobile phone, asked him to call the police over No.100 and police so arrived, it is not only contradictory but difficult to believe. Had he been conscious to hand over his mobile to a passerby and ask him to call the police, there is no reason as to why he himself could not call police over No.100 for any purpose. Be that as it may, either of the two statements is false. Let us proceed further. The person lying unconscious, is then said to have been taken to Hindu Rao Hospital and an MLC is prepared, which, though forms part of the challan/report filed under Section 173 Cr.P.C., the prosecution, for the reasons unexplained, does not come forward to prove this MLC in any manner. Suffice to say, MLC is not a public document and it was required to be proved for its contents, alike any other document. For the purpose, neither the doctor, who

examined 'Nabi Ulla' and prepared the MLC is examined nor it has come to be proved in any other manner permissible under law. Since this MLC forms part of the report filed by the police under Section 173 Cr.P.C., its contents, if these support the accused, can be looked into. More so, when the prosecution, having relied upon it, chose not to prove it. As per this MLC, when the patient 'Nabi Ulla' was examined by the Doctor having Crl. A. Nos. 291/16, 300/16, 5
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Page 16 of 25 been brought by PCR at 3.10 pm, the patient was conscious and oriented and he gave the alleged history of drinking some liquid half an hour before, complaining of headache. In this MLC, there is not even an iota of a word, for anyone else having administered any stupefying substance or drug, which resulted in his condition, in which he was brought to the hospital by PCR. Prosecution failed to prove this MLC and the ld. ASJ, who conducted the trial, simply overlooked such vital material and relevant facts. It is not the end of such lapses and omissions by the prosecution or the trial Court. HC Naresh Pal, who, according to the prosecution, recorded the statement Ex.PW1/A of 'Nabi Ulla' and having recorded such statement, prepared Rukka and sent it for registration of the FIR, the prosecution equally failed to examine. HC Naresh Pal was a material witness of the prosecution to not only to corroborate the veracity of the statement Ex.PW1/A, but, the other attending circumstances inter alia of due registration of the FIR for the commission of the offences and the due deposit of the sample collected by him from the hospital. Even, the Rukka prepared by HC Naresh Pal and on the premise whereof, the FIR Ex.PW4/A was recorded, has not come to be proved. As if, such serious omissions were not sufficient to discredit or cast a serious shadow Crl. A. Nos. 291/16, 300/16, 5
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Page 17 of 25 of doubt on the prosecution case, the trial Court felt convinced to believe the uncorroborated deposition of PW1 'Nabi Ulla' drawing inferences from the other circumstances not sustainable under law. Suffice to say, it was the foremost duty of the trial Court, to assess the trustworthiness of the deposition of the only prime witness examined by the prosecution i.e. PW1 Nabi Ulla and only, if, it would have inspired its confidence to some extent, it should have then looked for the other corroborative evidence in support thereof, unless, the deposition was

such that it could be believed and trusted without any corroboration. Trial Court in the given case has just failed to follow this basic principle of criminal jurisprudence. On a bare perusal of the deposition of the prosecution prime witness PW1, it can be seen that it is not only contradictory in itself as regards the role attributed to one of the accused namely Javed, it does not support the case, with which the prosecution came to the Court, besides the fact that the material particulars of correct identity of all the accused and their roles in the commission of the distinct crimes are missing therefrom. As per the prosecution case, as rightly pointed out by the ld. Counsel for the appellants, two persons, who originally met 'Nabi Ulla' in the bus, were certainly not the persons, who brought the Maza bottles, consuming Crl. A. Nos. 291/16, 300/16, 5
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Page 18 of 25 which, 'Nabi Ulla' went unconscious. As per the prosecution story, the Maza bottles were bought by Wasim at Inderlok Metro Station and that, all of them had consumed Maza and after consuming that, 'Nabi Ulla' had fallen unconscious. In his deposition before Court, PW1 Nabi Ulla, has however, deposed as under :

"..... On 18.8.2012, at about 12.00 noon, I sat in a bus at Rao Vihar Nangloi to go to New Delhi Railway Station to go to my native village. On the way, two persons met me and they asked my name and where I had to go. I replied them that I am going to Hardoi, thereafter both of them told me that they were also going to Hardoi to celebrate Ed festival. Both of them were in the age group of 25-30 yrs. Thereafter both of them took me in a auto rickhsaw. I alongwith both of them sat in the auto rickshaw which was being driven by the auto driver. After travelling 2-3 km in the auto rickshaw one another person sat in a auto rickshaw. Somewhere near the Peera Garhi, one of two persons who initially met me brought a Maza bottle and they asked me to take the Maza. I refused to take Maza but on the asking of them I consumed Maza. ....."

This deposition of PW1 Nabi Ulla is totally silent for the role ascribed to Wasim. Though, during cross, the accused-the appellants did not confront PW1 Nabi Ulla with his previous statement Ex.PW1/A on the material aspects of the identify and

the roles attributable to the accused-the appellants, the fact remains, what is deposed to by PW1 before Court, is not only different from the prosecution case, but, contradictory in itself, as regards the role attributed of accused Javed and Wasim. The trial Court Crl. A. Nos. 291/16, 300/16, 5
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Page 19 of 25 overlooking such serious discrepancies, contradictions and the other omissions by the prosecution, has however, proceeded to believe the deposition of PW1 'Nabi Ulla' drawing some kind of strength from the other circumstances like some substance recovered from the accused-the appellants, at the time of their apprehension, which, as per the FSL report, was benzodizpine drug and the alleged recovery of stolen articles. In doing so, the impression comes to be given that the depositions of the recovery witnesses, were so trustworthy that the failure of the police officers of AATS in joining any independent witness, was not fatal to the prosecution case. In that context, when one adverts to the testimonies of the witnesses to the apprehension, recovery and the arrest, these equally do not inspire confidence for being believed. According to the prosecution, SI Ravinder Singh PW2, received secret information in his office at 8.30 pm for the accused-the appellants to be again coming to the Sarai Rohilla Railway Station for committing the similar offence in the night between 10 to 12. For the purpose, he records DD entry No.16 dated 18.8.2012 Ex.PW2/A, forms a team and reaches near Sarai Rohilla Railway Station at about 9.20 pm, but, undisputedly, does not make any effort to join any railway official from the nearby railway station or the Crl. A. Nos. 291/16, 300/16, 5
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Page 20 of 25 residential quarters. For the reasons explained, the DD register, the prosecution does not choose to produce and prove the correctness of such DD entry no.16. Though, there are many other omissions and discrepancies, to cut short, advertance to the alleged recoveries from the four accused-the appellants, would suffice to talk about the veracity of their depositions. HC Jitender PW11, who is one of the material prosecution witnesses to prove the apprehension and the recovery of the articles, has deposed for recovery of only one currency note of Rs.100 from Wasim and recovery of two stolen currency notes of Rs.100 from Shafiq. Recovery memos Ex.PW2/E of Wasim and Ex.PW2/G of Shafiq, however,

speak otherwise. As per the recovery memo of Wasim, recovery from him is of two currency notes of Rs.100/-, and, as per the recovery memo of Shafiq, recovery of stolen currency note is of only one Rs.100. These are the apparent material contradictions, which the trial Court, simply ignored or did not notice. Ld. Counsel for the appellants, on their part, though drew attention of this Court to the corrections for the date of arrest having been changed from 17.8.2012 to 19.8.2012 in the arrest memos Ex.PW2/J1 to Ex.PW2/J4, in the absence of the witness having been confronted with and his explanation sought, no adverse inference can Crl. A. Nos. 291/16, 300/16, 5
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Page 21 of 25 be drawn and the contention raised to the contrary, therefore, deserves to be rejected. In doing so, attention of the Court was however, attracted to the fact that as per the said arrest memos, all the four were arrested at 12.30 am. This factual aspect however contradicts the testimony of PW11, who has deposed during cross that it took around three hours in completing the writing work at the spot. If that was so, the time of arrest given in the arrest memos was incorrect inasmuch as, the accused had reached the spot at about 10.30 p.m and even if it is assumed that the writing work started immediately thereafter, it would have then finished at 1.30 not 12.30. All the writing work at the spot is said to have been done by HC Jitender PW11. HC Rajesh Kumar PW3 in his cross however deposed for the same having been done by the IO sitting on the footpath and for the purpose, he deposed for the IO having taken about 3 to 3
hours. In the case, there are two IOs. 1st IO named in the FIR is SI G.N. Tiwari. SI G.N. Tiwari PW5 in his brief deposition, has not deposed for having done any effective investigation but for visiting HRH Hospital and finding the victim admitted in the hospital, returning to the spot and then the PS, and, for the investigation thereafter, having been assigned to SI Praveen Mann. 2nd IO SI Praveen Mann, who appeared as PW13, has Crl. A. Nos. 291/16, 300/16, 5
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Page 22 of 25 deposed for the steps taken for T.I.P. of the accused and the case property, besides sending the exhibits to FSL. But for such acts, there is nothing in his deposition for joining the alleged victim Nabi Ulla for the purposes of due investigations. Though PW13 has deposed for the appellants having refused

T.I.P., the T.I.P. proceedings, the prosecution equally failed to prove on record and in the process, even such a corroborative piece of evidence was withheld. In his cross-examination, PW13 has equally admitted that he did not either prepare any site plan of the incident nor did he enquire from the complainant with regard to the incident. Nabi Ulla PW1 - the alleged victim in his cross-examination has also deposed that the police officials did not visit his house during investigations and that, they came to his house only to serve the summons of the case. In the given scenario, what inspired the confidence of the trial Court to believe the testimonies of IOs PW5 and PW13, it is difficult to understand. In the given conspectus of things, one will have no hesitation to say that non- joining of any independent witness at the time of apprehension and the recovery of the alleged stupefying substance or the stolen articles equally draws an adverse inference. The reliance placed upon Jodhan's case (supra) by the ld. Addl. PP is therefore, of no avail to the prosecution. In Crl. A. Nos. 291/16, 300/16, 5
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Page 23 of 25 Jodhan's case, the Hon'ble High Court and the Hon'ble Supreme Court had found that the witnesses examined by the prosecution were reliable and their depositions had remained unshaken. That is not at all the situation in the case in hand. As regards the aspect of any enmity having been not established for PW1 Nabi Ulla to falsely implicate the appellants, the reliance placed upon Lalla's case (supra) by the ld. Counsel for the appellants is well founded inasmuch as, if the testimony of a witness is not reliable, conviction cannot be based merely for the reason that the witnesses have no enmity or reason to implicate the accused falsely. In the end, it may only be noticed that though, the charges, as framed, are not specific and distinct for the respective offences, it would suffice to say, these do not cause any prejudice to the accused-the appellants. More so, when this Court does not find favour with the impugned judgment of conviction and the order on sentence.

7. In view of the foregoing, the impugned judgment of conviction dated 19.1.2016 in FIR No.280/12, PS Sarai Rohilla, under Sections 379/328/4
IPC and the consequent order on sentence dated 21.1.2016 against all the appellants are set aside. The appellants, who are Crl. A. Nos. 291/16, 300/16, 5
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 in custody, are ordered to be released forthwith, if, not required in any other case. Copy of this judgment be sent to the Commissioner of Police as also the Director of Prosecution for the necessary action(s) and corrective measure(s) at their end. A copy of the judgment be also sent to the concerned ASJ to ponder and ensure that the similar situation does not re-occur. Appeals stand disposed off accordingly. A. K. CHAWLA, J.