

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRR No. 830 of 2015 (O&M)
DECIDED ON: MAY 25, 2016

JASSI @ BABBY & OTHERS

.....PETITIONERS

VERSUS

STATE OF PUNJAB

.....RESPONDENT

AND

CRR No. 1185 of 2015

RAKESH KUMAR

.....PETITIONER

VERSUS

STATE OF PUNJAB

.....RESPONDENT

CORAM: HON'BLE MR. JUSTICE JASPAL SINGH

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

Present: Mr. Hardeep Singh, Advocate
for the petitioners in CRR No. 830 of 2015.

Mr. Ravi K. Mattoo, Advocate
for the petitioner in CRR No. 1185 of 2015.

Mr. K.S. Pannu, DAG, Punjab.

JASPAL SINGH, J

Vide this common judgment I intend to dispose of two revision petitions as both are outcome of the same occurrence and FIR.

Both the revision petitions have been preferred by the petitioner(s) feeling dis-satisfied against the judgment dated May 08, 2014 passed by learned Judicial Magistrate 1st Class, Nabha, District Patiala in case FIR No. 115, October 08, 2009, under Sections 3, 4, 5 and 7 of Immoral Traffic (Prevention) Act, 1956 (for brevity 'Act'), Police Station Kotwali, Nabha, vide which petitioners have been convicted under Sections 3 and 5 of the Act, which has been subsequently upheld by lower Appellate Court vide its judgment dated February 23, 2015.

2. The first and foremost contention of learned counsel for the petitioner(s) is that learned trial Court as well as lower Appellate Court have ignored the legal mandate of the Legislation as provided under Section 15 of the Act wherein it is mandatory for the police officer to call upon two or more inhabitants atleast one shall be a woman of the locality of the place of search and non compliance of above-said provision shatters its basic version. In other words the non-compliance of the afore-said mandate vitiate the entire proceedings.

3. The second contention put forth by learned counsel for the petitioner(s) is that though prosecution has tried to shift his burden by joining Bhajan Kaur as PW-2 but the joining of Bhajan Kaur at the time of alleged raid and arrest of the petitioner(s) is not sufficient for the compliance of the afore-said mandate. Even, the presence of Bhajan Kaur at the spot is not established. During her cross-examination she has clearly stated that she did not accompany the police party whereas she reached at the spot at her own, which is suggestive

of the fact that she was not present at the spot. As per her version all the three ladies accused were recovered from one room only. If all the ladies accused were present in one room then no sexual activity as alleged by the prosecution can be carried out. Moreover, prosecution has also failed to examine Inspector Harbhajan Singh, who was the sole eye witness of the alleged immoral traffic act of the accused which cast a serious doubt on the prosecution story and no explanation has been furnished by the prosecution as to why the said witness has been withheld.

4. Similarly, learned trial Court as well as lower Appellate Court have failed to taken into consideration that the only lady Constable Sukhvir Kaur who is alleged to have been associated the raiding party, has also not been examined by the prosecution. Thus non-examination of Sukhvir Kaur is also fatal to the prosecution. It has been next argued by learned counsel for the petitioners that one of the star witness namely ASI Harjit Singh has been examined as PW-4 by the prosecution and in his cross-examination he has categorically admitted that he had not seen any of the accused in a compromising position. Therefore, it can be safely concluded that there is no evidence to prove that illegal trafficking was taking place at the time of alleged raid.

5. Similarly, it is also highly improbable that accused were performing illegal trafficking flesh inside the room without bolting the same. Thus the prosecution has also failed to prove that the house in question was used as brothel by the accused. While, concluding his arguments, it has been further submitted by learned counsel for the petitioners that in view of all the facts and circumstances narrated above; judgment rendered by learned trial Court and

affirmed by lower Appellate Court are not sustainable in the eyes of law and are liable to be set aside by way of acceptance of instant revision petitions.

6. On the other hand learned State counsel has supported the impugned judgment(s) and order of conviction and submitted that there is cogent and convincing evidence adduced by the prosecution to establish that the petitioners were indulging in flesh trade and on receipt of information, a raid was conducted on the house owned by the petitioner-Jassi @ Babby from where the males and females were found in compromising position who are immediately arrested and taken into custody. Petitioners have been rightly convicted and sentenced by courts below. Impugned judgement(s) being well reasoned and based upon the substantive evidence calls for no interference by this Court and deserve to be dismissed.

7. Before proceeding further to decide the above-said revision petitions, it would be apt and proper to refer the relevant provision contained in Section 15(2) of the Act, which deals with the procedure for conducting the search without warranting by a police officer.

“15 Search without warrant:-

1. *XXXXXX*

2. *Before making a search under sub-section (1), the special police officer or the trafficking police officer, as the case may be, shall call upon two or more respectable inhabitants (at least one of whom shall be a woman) of the locality in which the place to be searched is situate, to attend and witness the search, and may issue an order in writing to them or any of them so to do.”*

8. A glance at the aforesaid provision makes it crystal clear that it is obligatory on the part of the police officer before making a search to call upon

two or more respectable inhabitants at least one of whom shall be a woman of the locality in which the place to be searched is situate, to attend and witness the search, and may issue an order in writing to them or any of them to do so. But in the case in hand no such procedure is adopted. Even a police officer while acting under the afore-said provision is also authorised to take an action against any person who refused or neglected to attend or witness the search when he has been called upon to do so. The non-compliance of aforesaid provision which is mandatory in nature completely vitiates the whole proceedings. Rather it can be said that proceedings vitiated or carried out are void. On this score alone the entire case of prosecution falls to the ground.

9. Here it would also be pertinent to mention that inspite of adopting the afore-said provision, which is mandatory prosecution has tried to shift its burden upon Bhajan Kaur-PW-2 by joining her in the raiding party but the presence of Bhajan Kaur at the spot is also highly doubtful and is not at all established. Her entire version unfolded in the examination-in-chief stood belied when she was subjected to cross-examination wherein she has categorically stated that she did not accompany the police party and reached at the spot on her own. It is not the case of prosecution that she was either called at the spot or associated by the police. Similarly, from her cross-examination it has also emerged that all the three ladies accused were recovered from one room only and if that was the situation, it is highly impossible to infer that any sexual activity was being carried out at the spot. Moreover, Bhajan Kaur can be termed to be an interested witness, which is otherwise a stock witness of the police as has been admitted by her during her cross-examination. She has categorically admitted that she has been cited as police witness in a number of

similar cases earlier registered by the police. Otherwise the statement of Bhajan Kaur does not inspire confidence. Moreover, it has also been stated by her that she could not identify the accused in the Court. Even, she could not point out as to which accused appended his/her signatures and who thumb marked the papers at the spot. Even, she did not deny the suggestion that entire writing work was done while sitting in the police station itself. So, taking into consideration all these facts and circumstances, presence of Bhajan Kaur at the alleged place of occurrence becomes highly doubtful and her testimony cannot be made the basis of conviction of any of the petitioners.

10. The non-examination of Sukhvir Kaur, who was allegedly a member of raiding party as well as that of Harbhajan Singh who was the sole eye witness regarding immediately arrest of the accused also cast a serious doubt upon the prosecution. Similarly, there is no cogent and convincing evidence adduced by the investigating agency in Court that house in question which is stated to have been used as a brothel belongs to petitioner-Jassi @ Babby. No efforts has been made by the investigating agency during the course of investigation to collect that she was possessing the afore-said house either in the capacity of owner or as a tenant. The absence of proof of ownership or possession over the disputed house is also one of the glaring circumstances, which is fatal to the case of prosecution.

11. Moreover, it is highly improbable that accused were performing illegal act without bolting the room. It is not the case of prosecution that room was got unlocked or unbolted by the members of police party at the time of alleged raid and it was only thereafter, the accused were found in compromising position or that they were indulging in immoral trafficking. Thus, taking the

case of prosecution from any of the angles , this court is of the considered view that prosecution has miserably failed to establish the ingredient which constitute offence under Section 3 and 5 of the Act, of which petitioners have been convicted and sentenced.

12. As an upshot of the afore-said discussion, this Court is of the considered view that conviction and sentence imposed upon the petitioners by learned trial Court and upheld by lower Appellate Court are against the evidence available on file and settled cannons of law. Since, the prosecution has failed to establish the charges framed against the petitioners, their conviction and sentence is not sustainable.

13. Accordingly, the afore-said revision petitions are allowed, in consequence of which impugned judgments are set aside. Resultantly, petitioners are acquitted of the charge.

MAY 25, 2016
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(JASPAL SINGH)
JUDGE