

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

Judgment Reserved on: May 17, 2016

% *Judgment Delivered on: June 01, 2016*

+ **CRL.A. 723/2014**

REKHA

..... Appellant

Represented by: Mr.Rajesh Bakshi, Advocate.

versus

STATE

..... Respondent

Represented by: Ms.Rajni Gupta, APP for the
State with SI Padam Singh, PS
Kamla Market.

+ **CRL.A. 724/2014**

SHEETAL

..... Appellant

Represented by: Mr. Rajat Bali, Advocate.

versus

STATE

..... Respondent

Represented by: Ms.Rajni Gupta, APP for the
State with SI Padam Singh, PS
Kamla Market.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Rekha and Sheetal challenge the impugned judgment dated April 25, 2014 convicting them for offences punishable under Sections 373/34, 366A/34, 342/34 IPC and Sections 3/4/5/6 of the Immoral Traffic (Prevention) Act, 1956 (in short 'ITP Act') and the order on sentence dated May 01, 2014 by which they have been directed to undergo rigorous imprisonment for a period of ten years and to pay a fine of ₹10,000/- each

for offence punishable under Section 373/34 IPC; rigorous imprisonment for a period of ten years and a fine of ₹10,000/- each for offence punishable under Section 366A/34 IPC; rigorous imprisonment for a period of one year and a fine of ₹5,000/- each for offence punishable under Sections 34/34 IPC; rigorous imprisonment for a period of two years and a fine of ₹2,000/- each for offence punishable under Section 3 ITP Act; rigorous imprisonment for a period of two years and a fine of ₹1,000/- for offence punishable under Section 4 ITP Act, rigorous imprisonment for a period of seven years and a fine of ₹2,000/- for offence punishable under Section 5(d) proviso (ii) and rigorous imprisonment for a period of seven years and a fine of ₹5,000/- each for offence punishable under Section 6 ITP Act.

2. FIR No.20/2012 was registered under Section 23 Juvenile Justice (Care and Protection of Children) Act, 2000 (in short 'JJ Act'), Sections 366A/372/373/376/342/109/34 IPC and Sections 3/4/5 of the ITP Act at PS Kamla Market on the complaint of the prosecutrix 'S' after she was rescued pursuant to the raid conducted at Kotha No.70, Third Floor, left side, G.B. Road by the local police in association with the NGO Shakti Vahini.

3. 'S' stated that she was a resident of West Bengal, studied upto 9th standard in the year 2011. Her father was a contractor of making bus stands. In the village she became friendly with a boy. That boy allured her to go to Delhi and that on reaching Delhi he would marry her. Impressed by his words, she left for Delhi along with him around 5-6 months ago. The boy brought her to Sialdah Railway Station where she was introduced to a lady whose name she does not know and the boy stated that she should accompany that lady to Delhi and he would come to Delhi after 3-4 days. 'S' came to Delhi along with that lady who took her to Majnu Ka Tila.

That lady kept her for seven days at Majnu Ka Tila and then brought her to Kotha No.70, G.B.Road where she sold her to a lady named Sheetal for a sum of ₹30,000/-. The amount of ₹30,000/- was given by Sheetal to that lady in her presence. Thereafter Sheetal told her that the prosecutrix had reached Kotha and that she will now have to do prostitution. When 'S' refused to do prostitution, Sheetal along with another lady, who was present at the Kotha, namely Rekha threatened her stating that she could not go anywhere now, she will have to live at the Kotha and sell her body for earning money. Thereafter Sheetal and Rekha forcibly put her into prostitution and contrary to her wishes she was forced to have sexual intercourse with the customers. Whatever money was given to her by the customers, was taken away by Sheetal and Rekha, who did not permit her to leave the Kotha. Thus action be taken against them.

4. After registration of FIR, MLC of the prosecutrix 'S' was conducted which showed that she was subjected to sexual intercourse. Her statement was recorded by learned Metropolitan Magistrate under Section 164 Cr.P.C vide Ex.PW-9/B. During the course of trial her date of birth certificate was proved as Ex.P1 by PW-12 Dr.Anirban Roy, Health Officer and Registrar (Births and Death), Panihati Municipality, Calcutta which noted her date of birth as 22 April, 1995. Thus six months prior to the date of registration of FIR, that is, in September, 2011, when she was sold to Sheetal and forced into prostitution by Sheetal and Rekha, she was aged 16 years and 5 months.

5. Learned counsel for the appellants contends that uncorroborated testimony of the prosecutrix was insufficient to convict the appellants for the offences as noted above. The appellants have been acquitted for the offence punishable under Sections 376/109 IPC and Sections 23/26 JJ Act, thus they

could not have been convicted for the offences punishable under Section 373 or 366 IPC. The prosecutrix 'S' stated that she was forced to have sexual intercourse with the customers however, no customer has been convicted along with the appellants. There is no evidence on record to show that the premises was being used for prostitution. Once there was no material to show that the premises was being used for prostitution, the appellants cannot be convicted for the offences punishable under the ITP Act. Further the offences punishable under the Indian Penal Code being ancillary to the provisions of ITP Act, the appellants are entitled to be acquitted for the offences punishable under Indian Penal Code as well. Though Shri Subir Roy, PW-8, the Director of NGO Shakti Vahini stated that he received an information on 27th February, 2012 however he gave the information to the police belatedly on 28th February, 2012. If the premises was being used for prostitution, there would have been other inmates however, no other inmate has been joined in the search. The conduct of the prosecutrix is unnatural and she was a consenting party to the acts. No investigation has been conducted against Ajay who allured her and sent her to Delhi with another lady who in turn sold her. Father of the prosecutrix was deliberately not made a witness though he was informed by Shakti Vahini NGO. Both Shri Subir Roy and Saie Shetye have been cited in the other case of the Kamla Market and thus they were stock witnesses. No public person was made to join the raiding party and thus the safeguards provided under the Indian Penal Code and the ITP Act have not been maintained. When the appellants were arrested, they were not informed that they were entitled to legal aid and that they could not be arrested after the sun set. Though the area is thickly populated with shopkeepers on the ground floor however, no shopkeeper

was joined in the raid. The MLC of the prosecutrix shows no injuries and thus sexual intercourse, if any, was consensual. The prosecutrix being above 16 years of age she could have validly given her consent. The testimony of the prosecutrix does not inspire confidence. The defence evidence has been wrongly discarded. Reliance is placed on the decisions reported as JT 2010 (1) Aftab Ahmad Ansari vs. State of Uttranchal, 1962 AIR Madras 31 Re: Ratanmala and another, 1981 Cri.L.J 618 Dudh Nath Pandey vs. State of U.P., 1965 (1) Cri.L.J 605 Avtar vs. State of Punjab, 2002 (2) JCR 512 (Jhr) A.K.Sen Gupta @ Alok Kumar Sen Gupta vs. The State of Jharkhand, Manu/JH/1169/2008 Shyam Lal Sahu, Surender Gope vs. State of Jharkhand, 2016 (1) JCC 584 Bhagti Ram Pandey vs. State of NCT of Delhi and JT 2015 (3) SC 35 Md.Ali @ Guddu vs. State of U.P.

6. Learned APP for the State on the other hand contends that when raids are conducted at the instance of NGOs and they participate in number of raids, the witnesses from the NGO cannot be termed as stock witnesses. Besides a lady constable, the raiding team comprised of one more lady hence the provisions of search as mandated under Section 100 Cr.P.C. and Section 15 of the ITP Act were duly complied with. Rekha was arrested at the spot from Kotha No.70. From the testimony of the prosecutrix it has been proved beyond reasonable doubt that both Rekha and Sheetal were living on the earnings of the prostitution. Even though Neelam, PW-13 did not support the prosecution case and stated that she was voluntarily doing the acts, the evidence of the prosecutrix cannot be discarded. The defence evidence cannot be relied upon. Since the prosecutrix was a minor at the time when she was forced into prostitution presumption under Section 6 (2A) of ITP Act is required to be raised which has not been rebutted by the

Appellants. The offences punishable under Sections 366A and 373 IPC are independent of offence punishable under Section 376 IPC. The ITP Act was enacted in the year 1956 whereas the Indian Penal Code in the year 1860. Hence the provisions of Indian Penal Code cannot be said to be ancillary to the provisions of ITP Act. The defence raised by the appellants is an afterthought as no such suggestion has been given to the prosecution witnesses and no such plea has been taken in the statement under Section 313 Cr.P.C. Reliance is placed on the decision reported as 1970 Cri.L.J. 1279 Bai Radha vs. State of Gujarat which holds that non-compliance of Sub-section (1) and (2) of Section 15 while making a search is mere irregularity and the same does not vitiate the trial.

7. The prosecutrix 'S' deposed in sync with the statement on the basis of which FIR was registered and her statement under Section 164 Cr.P.C. was recorded. The crux of the cross-examination is how she was brought back from her home so that she could get her statement recorded in the Court. The rest of the cross-examination is with regard to Ajay threatening her and bringing her to Sialdah and her onward journey to Majnu Ka Tila and Kotha No.70. She has stated in her deposition that one another girl had informed her family however, she could not take the courage to inform her family. However, after two days 'S' informed her family through the mobile phone of one customer whereafter her family members came to PS Kamla Market and she was rescued on February 28, 2012. She stated that a police officer called out her name and she came out, though no person from outside gathered at Kotha No.70 when the police came to rescue. Despite elaborate cross-examination nothing material could be elicited with regard to the non-involvement of Rekha and Sheetal or to show that the ingredients for

offences convicted of were not made out. She clarified that though the police used to visit the Kotha twice or thrice every week however she could not make complaint due to fear as other girls had told her that in case she complained to the police she would never be able to go back to her house. She denied that she had voluntarily come to Delhi or that she was living at Kotha No.70 of her own free will. Thus there is an admission that the prosecutrix was living at Kotha No.70 as noted above.

8. The age of the prosecutrix has been proved to be below 18 years as on the date when the offence took place and her MLC proves being subjected to sexual intercourse. In view of these facts presumption under Section 6 (2A) ITP Act is required to be drawn and the appellants have failed to rebut the said presumption. Even if the email/information was received on 27th February, 2012 and the police was informed on 28th February, 2012 the same would not be fatal as the raids are required to be conducted in a planned manner and not haphazardly making the exercise futile one. Shri Subir Roy, PW-8 is the Director of NGO Shakti Vahini who runs Programme and Project. Thus working in the field of rescue and rehabilitation of the sex workers at G.B. Road, if Shri Subir Roy was associated with number of the search and seizures, it cannot be said that Shri Subir Roy was a stock witness. From the statement of the prosecutrix it has been proved beyond reasonable doubt that the appellants committed the offences as noted above.

9. The contention that the provisions of IPC are ancillary to the provisions of ITP Act ignores the settled principle that same set of facts may constitute offences both under the IPC and a special enactment. The Supreme Court in the decision reported as (1988) 4 SCC 655 State of Bihar

Vs. Murad Ali Khan & others held –

“31. The same set of facts, in conceivable cases, can constitute offences under two different laws. An act or an omission can amount to and constitute an offence under the IPC and at the same time constitute an offence under any other law. The observations of this Court made in the context of Section 2(3) of Contempt of Courts Act might usefully be recalled. In *Bathina Ramakrishna Reddy v. State of Madras* [AIR 1952 SC 149 : 1952 SCR 425 : 1952 Cri LJ 832] this Court examined the contention that the publication of an article attributing corruption to a judicial officer was not cognizable in contempt jurisdiction by virtue of Section 2(3) of the Contempts of Courts Act, 1953, which provided that:

“No High Court shall take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the Indian Penal Code.”

32. The contention before this Court was that the allegations made in the article constituted an offence under Section 499 IPC and, that therefore, cognizance of such offence under the Contempts of Courts Act was barred. Repelling the contention, Mukherjea, J. said: (SCR p. 429)

“In our opinion, the sub-section referred to above excludes the jurisdiction of High Court only in cases where the acts alleged to constitute contempt of a subordinate court are punishable as contempt under specific provisions of the Indian Penal Code but not where these acts merely amount to offences of other description for which punishment has been provided for in the Indian Penal Code. This would be clear from the language of the sub-section which uses the words ‘where such contempt is an offence’ and does not say ‘where the act alleged to constitute such contempt is an offence’.”

10. The explanations of both Rekha and Sheetal in their statements under sec 313Cr.PC are that they are innocent and have been falsely implicated. Sheetal has taken a specific plea that she had gone to her native village in Maharashtra about three months ago and returned on 5th March, 2012. Before going to Maharashtra she was living at Kotha No.70, G.B. Road. Rekha and Sheetal examined as many as eight defence witnesses.

11. Sushil Kumar, DW-1 has been produced to prove that the prosecutrix visited his office B-3, Hans Bhawan, Bahadur Shah Zafar Marg to get prepared her PAN card, copy of which is exhibited as Ex.PW-9/DA. He could neither produce the receipt from the company from where the so called PAN Card was prepared nor did he take any acknowledgment.

12. Raju, DW-2 stated that he was working as a cook at House No.70, Shradhanand Marg and he was preparing the food for Sheetal, Rekha and other girls. He identified Rekha and Sheetal and that he had given his SIM card to Sheetal in the year 2011 on her request as she had no ID proof. Sheetal was using her mobile phone. Saleem, DW-3, TSR Driver has been produced to show that the prosecutrix was going for shopping to various markets and used to hire his scooter. Mohd.Shahid DW-5 who was running the shop in front of House No.70, G.B.Road, Delhi stated that the prosecutrix used to go to make purchases and he used to send paranthas from his shop to House No.70 through the rickshaw wala or servants. Pradeep Kumar, DW-6 who was working as a cook stated that no food was brought from outside. Thus he belied the version of DW-5 who stated that eatables and paranthas from his shop were sent to House No.70. The version of Saleem, TSR Driver, even if accepted, would show that the prosecutrix was permitted to go with restricted number of people and thus a

watchful eye was kept on her every time and she was in the clutches of the appellants. Thus the defence of the appellants does not merit any consideration.

13. I find no merit in the appeals. The judgment of conviction and the order on sentence are upheld.

14. Appeals are dismissed. Appellants will undergo the remaining sentence.

15. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

16. TCR be returned.

(MUKTA GUPTA)
JUDGE

JUNE 01, 2016

‘vn’