

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE JURISDICTION

CRIMINAL APPEAL NO.534 OF 2010

Smt.Firoja @ Puja Maihjur Shaikh,
Age.37 Years, Occu. Household,
Residing at Turbhe Stores,
K.K.R. Road, Navi Mumbai.

(Accused presently in Nashik Jail)

... **Appellant**

V/s.

The State of Maharashtra,
(At the instance of Turbhe Police
Station).

... **Respondent**

WITH

CRIMINAL APPEAL NO.597 OF 2010

Yellamma Durgappa Mehatre,
Age.35 Years,
Residing at House No.3168,
Opposite Navjivan Hindi High School,
K.K.R. Road, Turbhe Stores,
Navi Mumbai.(At present in judicial
custody and lodged at Nashik Road
Central Jail)

... **Appellant**

V/s.

The State of Maharashtra,
(At the instance of Turbhe Police
Station).

... **Respondent**

.....

Ms.Nasreen Ayubi, Appointed Advocate for the Appellant in
APEAL/534/2010.

Mr.Shshrut Jadhwar, Advocate for the Appellant in
APEAL/597/2010.

Mr.Vinod Chate, APP for the Respondent/State.

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CORAM : A.M.BADAR J.

DATED : 8th August 2017.

ORAL JUDGMENT :

1 Appellant/accused Smt.Firoja @ Puja Maihjur Shaikh came to be tried in Sessions Case No.210 of 2009, whereas Appellant/accused Yellamma Durgappa Mehatre came to be tried in Sessions Case No.28 of 2009 and ultimately by the impugned common Judgment and Order dated 30/06/2010 passed by the learned II Additional Sessions Judge, Thane, both of them came to be convicted of the offence punishable under Section 366A of the Indian Penal Code (“the IPC” for the sake of brevity) and both of them were sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs.2000/- and in default to undergo further imprisonment for six months while acquitting them of offences punishable under Section 3,4,5 and 6 of the Immoral Traffic (Prevention) Act, 1956 (“PITA” for the sake of brevity).

2 Brief facts leading to the institution of both these Appeals can be summarized thus :

(a) On 01/02/2008, police inspector Jagtap received information that minor are being detained and they are being compelled to indulge in prostitution at K.K.R. Road, Turbhe

Stores, Navi Mumbai. It was decided to lay a trap and accordingly, assistance of P.W.No.5 Somling Kamble were taken as decoy customer. The panch witnesses namely Ramji Yadav and Sainath Gavand were arranged. Two currency notes of Rs.200/- denominations were then handed over to P.W.No.5 Somling Kamble and he was sent to the room, where police apprehended that minors were compelled to indulge in prostitution. Then P.W.No.5 Somling Kamble left for the spot. After 15 minutes therefrom police team raided that spot of incident which is stated to be House No.3168 located in front of Navjivan Hindi High School, K.K.R. Road, Turbhe Stores, Navi Mumbai.

(b) According to the prosecution case, when the raiding team reached the spot of incident, both appellants/accused, who were standing outside that room, flee from the spot. Then, Police Inspector Jagtap asked the inmates of the room to open the door. P.W.No.3 Laxmi Maitri opened the door. The room was divided into cabins by curtain partitions. In one of the cabin, P.W.No.5 Somling Kamble found present with P.W.No.6 Nasima @ Kajal Shaikh. Currency notes with P.W.No.5 Somling Kamble were also found in the said room. Upon investigation, police found that P.W.No.3 Laxmi Maitri and P.W.No.6 Nasima @ Kajal Shaikh were enticed and induced by both appellants/accused for indulging them in prostitution and consequently, they were detained for prostitution in the said room bearing House No.3168 of Turbhe

area of Navi Mumbai. During investigation, it was transpired that the appellants/accused had kept brothel and live on earning of prostitution by enticing minor for prostitution and by detaining them for prostitution.

(c) The First Information Report of the crime in question came to be lodged by P.W.No.1 Pramod Bhosale, A.P.I., Turbhe Police Station resulting in registration of Crime No.49 of 2008 with Turbhe Police Station for offences punishable under Section 366A of the IPC and Sections 3,4,5 and 6 of the PITA. On completion of necessary investigation, both appellants/accused were charge-sheeted accordingly.

(d) After framing and explaining charge to both appellants/accused persons, they were put to trial as they abjured their guilt. In order to bring home the guilt to the appellants/accused, the prosecution has examined in all seven witnesses. Alleged victims of the crime in question namely Laxmi Maitri and Nasima @ Kajal Shaikh are examined as P.W.No.3 and P.W.No.6 respectively. First informant-Pramod Bhosale, A.P.I., Turbhe Police Station is examined as P.W.No.1 and FIR lodged by him is at Exh.14. Arjun Adagale is the brother of owner of the room in question. He is examined as P.W.No.2. However, he did not support the prosecution. P.W.No.4 is Dr.Anilkumar Gondhale, Medical Officer, working with Navi Mumbai Municipal

Corporation Hospital. He had conducted ossification test of P.W.No.3 Laxmi Maitri and P.W.No.6 Nasima @ Kajal Shaikh. Those reports are at Exhs.23 and 24. P.W.No.5 Somling Kamble, the decoy customer turned hostile to the prosecution. P.W.No.7 Arvind Patil, police inspector is the Investigating Officer of the crime in question.

(e) After hearing the parties, by the impugned Judgment and Order, the learned trial Court came to the conclusion that the alleged offences under PITA are not proved for want of compliance of mandatory provisions of Sections 13 and 15 of the said Act. However, both appellants/accused came to be convicted for the offence punishable under Section 366A of the IPC by holding that appellants/accused brought victim girls to Mumbai on the pretext of providing work and, thereafter, victims girls were indulged in prostitution by them. Evidence regarding ossification test adduced by the prosecution was accepted by the trial Court by holding that there is no reason to disbelieve the version of Dr.Gondhale that after carrying out the ossification test, he found both the girls to be below 18 years of age on the date of the incident. Accordingly, it is held that both appellants/accused had committed an offence punishable under Section 366A of the IPC.

3 I have heard Ms.Nasreen Ayubi, the learned counsel appearing for the Appellant Firoja @ Puja Shaikh. She argued that P.W.No.2 Arjun Adagale and P.W.No.5 Somling Kamble have

turned hostile to the prosecution. The learned Advocate further argued that P.W.No.3 Laxmi Maitri and P.W.No.6 Nasima @ Kajal Shaikh have accepted the fact that appellants/accused Yellamma and Firoja respectively are their relatives and as such, it cannot be said that appellants/accused had kidnapped both of them.

4 I have also heard the learned Advocate appearing for the appellant/accused Yellamma Mehatre. He argued that description of ladies who flee from the spot so also that of the spot is not proved by the prosecution. The raid is also not proved by the prosecution as appellants/accused have been acquitted of the offence punishable under PITA. He further argued that age of P.W.No.3 Laxmi Maitri is not proved and evidence of P.W.No.4 Anilkumar shows that his opinion is general in nature. There is margin of two years on either side in such test. The learned Advocate further argued that evidence of the victim girl shows that there was common toilet and they were using it. However, none of them had complained to anybody and, as such, it cannot be said that the offence alleged is proved against accused persons.

5 The learned Assistant Public Prosecutor contended that evidence of P.W.No.4 Anilkumar Gondhale is acceptable and the report of ossification test shows that both victims were below 18 years of age at the time of commission of offence.

6 I have carefully considered the rival submissions and also perused Record and Proceedings including depositions of witnesses and documentary evidence. Both appellants/accused are independently convicted for the offence punishable under Section 366A of the IPC without taking aid of Section 34 of the IPC by the learned trial Court. This appears to be so because, according to the prosecution case, appellant/accused Yellamma (Criminal Appeal No.597 of 2010) had induced P.W.No.3 Laxmi Maitri to come to Mumbai for taking up some work, whereas the appellant/accused Firoja (Criminal Appeal No.534 of 2010) induced minor female P.W.No.6 Nasima @ Kajal Shaikh to accompany her to Mumbai on the pretext of providing work. As such, it is apposite to quote provisions of Section 366A of the IPC, which reads thus :

“366-A. Procurement of minor girl. – Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.”

It is seen that this Section 366A of the IPC deals with procurement of minor girls by inducing them to go from any place

or to do any act with intent that such girls may be or knowing that it is likely that such minor girls will be forced or seduced to illicit intercourse with other persons. The aim of this Section is to prevent immorality and safeguarding the chastity of minor females. An offence punishable under Section 366A of the IPC complete when the accused becomes successful in inducing a minor girl to go from some place or to do an act with an intent that such girl may be forced or seduced to illicit intercourse with another. However, for making out this offence, the prosecution is obliged to prove beyond all reasonable doubts that the victim girl, at the time of commission of offence, was under the age of 18 years. Let us, therefore, scan evidence of prosecution witnesses in order to determine whether the offence alleged and held to be proved by the learned trial Court is, in fact, proved against both accused persons.

7 Considering the nature of offence alleged against both appellants, evidence of the victim girls is of utmost importance. P.W.No.3 Laxmi Maitri is one of the victim girl. While in the dock, she has stated her age as 17 years. Her evidence shows that she is studied up to 7th Standard at Rabakhari, Karnataka. P.W.No.3 Laxmi Maitri deposed that appellant/accused Yellamma, who is her relative, had come to her parental house in Karnataka State and told her parents that she is taking her for work and that is how she has been brought to Turbhe Stores area, Navi Mumbai by

appellant/accused-Yellamma. As per her version, when she reached the house at Navi Mumbai, another girl named P.W.No.6 Nasima @ Kajal Shaikh was already there with appellant/accused-Firoja @ Puja. P.W.No.3 Laxmi Maitri further deposed that on reaching the house, the appellant/accused indulged her in prostitution and Yellamma used to take money from the customer and was not paying anything to her. As per version of P.W.No.3 Laxmi Maitri, at the time of raid by police, her age was 15 years. In cross-examination, P.W.No.3 Laxmi Maitri has candidly accepted the fact that she did not remember her date of birth. She admitted that the house, where she was residing with appellant/accused-Yellamma, was surrounded by other houses and there was toilet outside the said house, which is common for all.

8 The next victim of this crime namely P.W.No.6 Nasima @ Kajal Shaikh has deposed that appellant/accused-Firoja @ Puja is her relative and on the pretext of providing work to her, she brought her to Mumbai and then said Firoja @ Puja indulged her in prostitution. This witness further deposed that P.W.No.3 Laxmi Maitri and appellant/accused Yellamma were also residing with her in the same room.

9 Evidence of P.W.No.3 Laxmi Maitri and P.W.No.6 Nasima @ Kajal Shaikh, as such, goes to show that appellant/accused had brought P.W.No.3 Laxmi Maitri from her

parental house to Mumbai by inducing her on the pretext of providing work and then she was forced and seduced to illicit intercourse with others. Similarly, P.W.No.6 Nasima @ Kajal Shaikh was induced by appellant/accused Firoja @ Puja to leave her parental house for getting work and subsequently she was forced and seduced to illicit intercourse with others by appellant/accused-Firoja @ Puja.

10 Now, let us examine whether the prosecution has proved that P.W.No.3 Laxmi Maitri and P.W.No.6 Nasima @ Kajal Shaikh were under 18 years of age at the time of commission of offence. It is well settled that oral evidence is hardly of any assistance while determining the age of a person. In the case in hand, P.W.No.3 Laxmi Maitri has deposed her age after entering into the witness box, as 17 years, whereas P.W.No.6 Nasima @ Kajal Shaikh has stated her age as 16 years. Both of them have not stated their date of birth during the course of deposition. Their evidence does not contain any detail as to how both these witnesses have estimated their age. P.W.No.3 Laxmi Maitri is stated to have studied up to 7th Standard. As such, there is every probability that her date of birth must be recorded in the school record. However, the prosecution has not taken any steps to collect her date of birth from the general register maintained by the school or by obtaining a copy of her School Leaving Certificate. The prosecution has not called or summoned Headmaster of the

school, where P.W.No.3 Laxmi Maitri had taken school education, in order to prove her date of birth or age. No steps were taken to examine her parents to depose about age of P.W.No.3 Laxmi Maitri. Similar is the case in respect of P.W.No.6 Nasima @ Kajal Shaikh. Her parents were not examined by the prosecution to depose about her age or date of birth in order to estimate whether she was under 18 years of age at the time of commission of offence.

11 In order to prove age of victim girls, the prosecution is satisfied by subjecting them to ossification test and by examining P.W.No.4 Anilkumar Gondhale, Medical Officer attached with Navi Mumbai Municipal Corporation Hospital. P.W.No.4 Anilkumar Gondhale has deposed that he carried out ossification test on P.W.No.3 Laxmi Maitri and P.W.No.6 Nasima @ Kajal Shaikh. For conducting ossification test, he took x-rays and carried out medical examination. P.W.No.4 Anilkumar Gondhale further deposed that then he opined that age of P.W.No.3 Laxmi Maitri was 16 to 17 years, whereas age of P.W.No.6 Nasima @ Kajal Shaikh was between 13 to 14 years and accordingly he issued certificates at Exhs.23 and 24 respectively. His cross-examination reveals that he has not mentioned numbers of x-ray plates on certificates at Exh.23 and 24 issued by him. This witness had not brought those x-ray places before the Court. He was not remembering x-ray plate numbers. Ultimately, this witness admitted in cross-

examination that his opinion about age is general in nature. This witness further admitted that the age ascertained may be plus or minus by two years. Thus, it is seen that evidence regarding assessment of age of victim girl is a very fragile premise. No attempt was made by the prosecution to procure birth certificates of both these victim girls or to call their parents for deposing about age of P.W.No.3 Laxmi Maitri or that of P.W.No.6 Nasima @ Kajal Shaikh. The evidence of P.W.No.4 Anilkumar Gondhale is very vague and scanty. He has not given any detail as to how he has formed opinion as to age of victim girls. In this context, excerpt from celebrated book by Dr.Modi needs reproduction. In 24th Edition of a 'Textbook of Medical Jurisprudence and Toxicology', Dr.Modi has dealt with ossification text in Chapter-X. Relevant portion thereof can be quoted with advantage and reads thus :

“Owing to the variations in climatic, dietetic, hereditary and other factors affecting the people of the different states of India, it cannot be reasonably expected to formulate a uniform standard for the determination of the age of the union of epiphysis for the whole of India. However, from investigations carried out in certain provinces, it has been concluded that the age at which the union of epiphysis takes place in Indians, particularly of persons belonging to Bengal, Punjab and South India, is about two to three years in advance of

the age incidence in Europeans, and that the epiphyseal union occurs in females somewhat earlier than in males. SM Das Gupta et al, has also reported that in the State of Uttar Pradesh, this fusion occurs somewhat earlier in girls than in boys, usually by one to two years. SD Loomba has shown that in the people of Uttar Pradesh, epiphyseal union occurs at a slightly later period than in other states of India. However, it is earlier than in English subjects, but slightly later than that occurring in America, Australia, Egypt and Burma. Dr.Kothari, working in the Marwar region of Rajasthan, also reported that the fusion occurs earlier in girls than in boys, although his actual figures vary a little from other states. In ascertaining the age of young persons, radiograms of several main joints of the upper or the lower extremity of one or both sides of the body should be taken, and an opinion should be given according to the following table. However, it must be remembered that too much reliance should not be placed on this table as it merely indicates an average and is likely to vary in individual cases even of the same province, owing to the eccentricities of development.”

12 If evidence of P.W.No.4 Anilkumar Gondhale is tested on the touchstone of these observations, it is seen that though this

witness has claimed to have assessed age by taking x-rays of right shoulders, right elbows and right wrists of P.W.No.3 Laxmi Maitri and P.W.No.6 Nasima @ Kajal Shaikh, his evidence is conspicuously silent about the fact whether there was fusion of clavicle (Stemal end), fusion of Distal end of radius and ulna. Necessary data for coming to the conclusion regarding the age is not reflected in Medical Certificates at Exhs.23 and 24 by P.W.No.4 Anilkumar Gondhale. Those Certificates only give conclusion of Dr.Anilkumar Gondhale without scientific data and material about examination of x-ray plates. Therefore, it appears that, as admitted by him, his opinion about estimation of age is general in nature rather than based on scientific examination. Even, the Honourable Apex Court in *Jaya Mala v. Home Secretary, Government of Jammu and Kashmir & Ors.*, reported in **AIR 1982 Supreme Court 1297** has criticized the evidence regarding ossification test in these words :

“However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.”

13 It is, thus, clear that ossification test is not sure test as to the age of a person. It gives only an approximate age which can vary as seen from opinion of Dr.Modi. In the case in hand, the prosecution could have produce evidence regarding age of victim girls in the form of birth certificates of P.W.No.3 Laxmi Maitri and

P.W.No.6 Nasima @ Kajal Shaikh. At this juncture, it is apposite to note that as per provisions of Registration of Birth and Deaths Act, 1969, registration of births in the family is made compulsory. Section 7 of the said Act deals with appointment of Registrar for each local area for registering births as well as deaths taken place in the said local area. Section 8 of the said Act mandates each Head of the house to report births in the family to the Registrar and the Registrar is enjoined with a duty to maintain register for recording births as well as deaths. There is no evidence on record to demonstrate that the Investigating Officer had taken any steps to collect such evidence regarding age of victim girls in order to bring home the guilt to appellant/accused, so far as offence punishable under Section 366A of the IPC is concerned. In absence of scientific data, which ought to have been reflected in evidence of P.W.No.4 Anilkumar Gondhale, and the fact that certificates issued by him assessing age of victim girls is also bereft of such data, it cannot be said that the prosecution has proved beyond reasonable doubt that the female girls namely P.W.No.3 Laxmi Maitri and P.W.No.6 Nasima @ Kajal Shaikh were under 18 years of age at the time of commission of offence alleged against appellant/accused persons. The appellant/accused are, therefore, certainly entitled for benefit of doubts in absence of clear and cogent evidence to show that P.W.No.3 Laxmi Maitri and P.W.No.6 Nasima @ Kajal Shaikh were under 18 years of age at the time of commission of offence.

14 In result, both Appeals are allowed with following order :

- (a) The impugned Judgment and Order dated 30/06/2010 passed by the II Additional Sessions Judge, Thane convicting both the appellants/accused of the offence punishable under Section 366A of the IPC is quashed and set aside.
- (b) Both appellants/accused are acquitted of the offence punishable under Section 366A of the IPC.
- (c) Bail bonds of appellant/accused Yellamma Mehatre stand cancelled.
- (d) Appellant/accused Firoja @ Puja Shaikh be released from the prison forthwith if not required in any other case.
- (e) The fine amount, if any, paid by appellant/accused be refunded to them.

(A.M.BADAR J.)