

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.743 OF 2012
WITH
CRIMINAL APPLICATION NO.1298 OF 2015
IN
CRIMINAL APPEAL NO.743 OF 2012**

NISHA SAYLA TAMANG)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Sandesh More, Advocate for the Appellant.

Mr.S.V.Gavand, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 13th FEBRUARY 2018

ORAL JUDGMENT :

1 The appellant/original accused no.1 by this appeal is challenging her conviction for the offence punishable under Section 4 of the Immoral Traffic (Prevention) Act, 1956, and the resultant sentence of rigorous imprisonment for 7 years,

imposition of fine of Rs.1,000/- and default sentence of rigorous imprisonment for 6 months imposed on her, vide judgment and order dated 14th June 2012 passed in Sessions Case No.798 of 2010 by the learned Ad-hoc Assistant Sessions Judge, Sewree, Mumbai.

2 Facts, in brief, leading to the prosecution of the appellant/accused along with six other co-accused, who are ultimately acquitted, are thus :

- (a) At 3.20 p.m. of 20th August 2010, PW3 Amrit Kaur – Liasoning Officer of NGO called as International Justice Mission approached the Social Service Branch of Mumbai Police and gave information that in Room No.2 of Bori Chawl No.53, Kamathipura, Nagpada area of Mumbai, some girls are forced into prostitution. PW7 Pramod Sail, Police Inspector, attached to Social Service Branch of Mumbai Police, then called a decoy customer PW5 Shalmon Khandagale. He summoned Police Officers who were to take part in the raid and also called two panch witnesses

including PW2 Vedchetan Patil. PW7 Pramod Sail, Police Inspector, then handed over five currency notes of Rs.100/- denomination to decoy customer PW5 Shalmon Khandagale for using the same for trapping the accused. He instructed the decoy customer to visit the brothel along with PW2 Vedchetan Patil and to choose the girl offered for prostitution by the accused and then to give signal by a miss call on the cell phone.

- (b) After completion of necessary formalities, police team accompanied by the decoy customer, panch witnesses and PW3 Amrit Kaur – the First Informant, proceeded to the spot. Decoy customer PW5 Shalmon Khandagale accompanied by panch witness PW2 Vedchetan Patil went to Bori Chawl in Kamathipura area, whereas rest of the members of the raiding team including PW7 Pramod Sail, Police Inspector, waited at M.T.Workshop near Nagpada Police Station, awaiting the signal.

(c) At about 5.25 p.m. of 20th August 2010, PW7 Pramod Sail, Police Inspector, received the prearranged signal on his cell phone. He, along with PW3 Amrit Kaur and other members of the raiding team including lady panch witness named Mrs.Vandana Shinde, went to the spot. PW2 Vedchetan Patil, panch witness, then pointed out the appellant/accused as a lady, who accepted the amount of Rs.300/- from decoy customer PW5 Shalmon Khandagale and provided him a woman. The appellant/accused was then apprehended on the spot and currency notes worth Rs.300/- accepted by her from PW5 Shalmon Khandagale, came to be recovered and seized. The premises were searched and apart from cash amounting to Rs.15,960/-, 22 condoms, a notebook etc. came to be seized. The decoy customer came out along with the girl, who disclosed her name as Neelam Devraj. Other two girls namely, Babita Venkatesh and Seema Jaisingh were also found on the spot. They were sent to the Shelter Home at Chembur. The appellant/accused was brought to the police station where the First Information Report (FIR)

Exhibit 30 came to be lodged by PW3 Amrit Kaur, which resulted in Crime No.00 of 2010 for the offence punishable under Section 3, 4, 5, 7(1)(b) of the Immoral Traffic (Prevention) Act. Necessary investigation followed and on conclusion thereof, the appellant/accused along with co-accused came to be charge-sheeted.

- (d) The Charge for offences punishable under Sections 372, 373, 344, 366, 366A read with 34 of the Indian Penal Code, so also under Sections 3, 4, 6, 7 and 8 of the Immoral Traffic (Prevention) Act came to be framed and explained to the accused persons. They abjured guilt and claimed trial.
- (e) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all seven witnesses. PW1 Neelam Devraj and PW6 Mangala @ Babita are the alleged victims of the crime in question. Panch witness Vedchetan Patil is examined as PW2. First Informant Amrit Kaur is examined as PW3. Dr.Pawan Sable, who medically examined

PW1 Neelam Devraj and issued certificate of her age is examined as PW4 Dr.Pawan Sable. Decoy customer Shalmon Khandagale is examined as PW5. Police Inspector Pramod Sail of the Social Service Branch of Mumbai Police is examined as PW7. He has investigated the crime in question. Upon hearing the parties, the learned trial court concluded that the appellant/accused has committed the offence punishable under Section 4 of the Immoral Traffic (Prevention) Act, and as victim/PW1 Neelam Devraj was below 18 years of age, has sentenced the appellant/accused to undergo rigorous imprisonment for 7 years for the said offence.

3 I have heard the learned advocate appearing for the appellant/accused Nisha Tamang. He submitted that, the appellant/ accused is languishing in jail from 14th June 2012, i.e. from the date of the judgment and order of her conviction and resultant sentence. He, further argued that, the appellant/accused is not at all challenging her conviction for the offence punishable

under Section 4 of the Immoral Traffic (Prevention) Act, but she is restricting her challenge to the sentence of 7 years imposed on her for the offence punishable under Section 4 of the Immoral Traffic (Prevention) Act. In submission of the learned advocate for the appellant/accused, undisputedly, PW6 Mangala @ Babita is a woman aged more than 18 years. However, the learned trial court has erroneously held that PW1 Neelam Devraj is a girl below 18 years of age, and therefore, sentenced the appellant/accused for rigorous imprisonment of 7 years. It is argued that evidence of PW1 Neelam Devraj coupled with evidence of PW4 Dr.Pawan Sable points out that PW1 Neelam Devraj was more than 18 years of age, at the time of the alleged incident, which took place on 20th August 2010.

4 The learned APP supported the impugned judgment and order of conviction by submitting that PW4 Dr.Pawan Sable has deposed about age of PW1 Neelam Devraj after conducting ossification test and by submitting his report Exhibit 34, and as such, it cannot be said that the prosecution has failed to prove age

of PW1 Neelam Devraj. As she was below 18 years of age, the learned trial court has rightly sentenced the appellant/accused to suffer rigorous imprisonment for 7 years.

5 I have carefully considered the rival submissions and also perused the record and proceedings including copies of deposition of prosecution witnesses as well as the documentary evidence adduced by the prosecution. The appellant/accused is acquitted of all offences with which she was charged except for the offence punishable under Section 4 of the Immoral Traffic (Prevention) Act. For proper appreciation of evidence on record, it is apposite to quote provisions of Section 4 of the Immoral Traffic (Prevention) Act which prescribes punishment for living on the earnings of the prostitution. It reads thus:

“4. Punishment for living on the earnings of prostitution.—

(1) Any person over the age of eighteen years who knowingly lives, wholly or in part, on the earnings of the prostitution of any other person shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend

to one thousand rupees, or with both and where such earnings relate to the prostitution of a child or a minor, shall be punishable with imprisonment for a term of not less than seven years and not more than ten years.

(2) Where any person over the age of eighteen years is proved —

(a) to be living with, or to be habitually in the company of, a prostitute; or

(b) to have exercised control, direction or influence over the movements of a prostitute in such a manner as to show that such person is aiding, abetting or compelling his prostitution; or

(c) to be acting as a tout or pimp on behalf of a prostitute, it shall be presumed, until the contrary is proved, that such person is knowingly living on the earnings of prostitution of another person within the meaning of sub-section (1).”

It is, thus, clear that, if a person is found to be living on earnings of the prostitution, where such earning relates to the prostitution of a child or a minor, then he is liable for imprisonment for a term not less than 7 years. In other cases, such person living on the earnings of the prostitution is liable for imprisonment for a term

which may extend to 2 years or with fine, which may extend to Rs.1,000/-, or with both. In other words, if the victim of such offence is neither a child nor a minor, then the punishment prescribed is imprisonment for a term which may extend to 2 years, or fine, which may extend to Rs.1,000/- or with both. Let us, therefore, put on record what is meant by the term “child” or “minor”. These terms are defined by Section 2(aa) and 2(cb). The definition of the term “child” and “minor” reads thus:

“**2(aa)** “child” means a person who has not completed the age of sixteen years;”

“**2(cb)** “minor” means a person who has completed the age of sixteen years but has not completed the age of eighteen years;”

Thus, “child” is a person, who has not completed the age of 16 years, whereas, “minor” means a person who has not completed the age of 18 years, but who is above the age of 16 years.

6 In the case in hand, as conviction of the appellant/accused for the offence punishable under Section 4 of the Immoral

Traffic (Prevention) Act is not at all challenged by the appellant/accused, it is not necessary to burden this judgment with the material in order to demonstrate that the said conviction is based on justifiable and sufficient evidence. Even otherwise, evidence of victims of the crime PW1 Neelam Devraj and PW6 Mangala @ Babita coupled with evidence of PW5 Shalmon Khandagale – decoy customer and PW2 Vedchetan Patil, is clear on this aspect. The question, which falls for consideration in this appeal, is whether PW1 Neelam Devraj – one of the victims of the crime in question, is proved to be a “minor” within the meaning of the said term under the Immoral Traffic (Prevention) Act. The learned trial court has concluded this issue in paragraph 34 of its judgment by relying on evidence of PW4 Dr.Pawan Sable and held that PW1 Neelam Devraj was below 18 years of age. However, in paragraph 33 of its judgment, the learned trial court categorically concluded that another victim of the crime in question, namely, PW6 Mangala @ Babita, was neither a “child” nor a “minor” at the time of the alleged offence.

7 The learned trial court, for concluding that PW1 Neelam Devraj was below 18 years of age, has relied on evidence of PW4 Dr.Pawan Sable. Prior to adverting to evidence of PW4 Dr.Pawan Sable, it would be necessary to appreciate what PW1 Neelam Devraj has stated about her age. While in the witness box, PW1 Neelam Devraj has stated her date of birth in the cross-examination. She has categorically deposed that her date of birth is 3rd June 1992 and she has disclosed this date of birth to the doctor, who had medically examined her. PW1 Neelam Devraj has further stated in her cross-examination that she studied up to 7th Standard in the school named as G.H.P.S.School at Nallali. This witness has stated her place of residence as Bangalore in State of Karnataka. She claimed to have come to Mumbai for better prospects in her life.

8 On this backdrop, it is in evidence of PW4 Dr.Pawan Sable that while working as an Assistant Professor at T.R.Medical College and Nair Hospital, Mumbai, on 24th August 2010, he

examined PW1 Neelam Devraj under directions of the Metropolitan Magistrate, Mumbai. This witness deposed that physical examination, dental examination and radiological examination of PW1 Neelam Devraj was conducted and he noted down his findings and gave opinion that PW1 Neelam Devraj is 16½ years to 17½ years old. The findings given by PW4 Dr.Pawan Sable are at Exhibit 34 reflecting the age of PW1 Neelam Devraj as 16½ years to 17½ years. This finding is based on ossification test conducted on PW1 Neelam Devraj. PW4 Dr.Pawan Sable in his report Exhibit 34 has observed that Iliac crest of PW1 Neelam Devraj appeared but has not fused and concluded that she was more than 14 years of age, but less than 20 years of age. This witness found upper end of femur with shaft of PW1 Neelam Devraj fused and gave a finding that she is more than 17 years of age. Upon finding that base of 1st metacarpal of PW1 Neelam Devraj fused, PW4 Dr.Pawan Sable gave his finding that she is more than 17 years of age. While examining X-Ray of elbow joint of PW1 Neelam Devraj, PW4 Dr.Pawan Sable gave a finding that she is more than 17 years of age because X-Ray shows that lateral

epicondyle of PW1 Neelam Devraj appeared and fused. In similar manner, other X-Rays of shoulder joint, elbow joint, wrist joint, etc. of PW1 Neelam Devraj were examined by PW4 Dr.Pawan Sable to conclude that she is between 16½ years of age to 17½ years of age.

9 Cross-examination of PW4 Dr.Pawan Sable shows that when PW1 Neelam Devraj was brought to him for ossification test, she had disclosed her date of birth as 3rd June 1992. This witness admitted that there is margin of error in ossification test, but submitted that he has considered the margin while determining the age of PW1 Neelam Devraj.

10 In the case in hand, the prosecution was very well aware about the fact that it is required to establish age of PW1 Neelam Devraj by clear and cogent evidence. Investigating Officer could have very well collected either Birth Certificate or School Leaving Certificate of PW1 Neelam Devraj by visiting her native place as she had undergone school education up to 8th Standard.

The prosecution has not explained as to why this exercise was not undertaken by it.

11 There are two sets of evidence so far as age of PW1 Neelam Devraj is concerned. One set comprises of oral evidence given by none else but PW1 Neelam Devraj. She has stated her date of birth as 3rd June 1992 in cross-examination and her this version is not at all challenged by the prosecution. The incident in question took place on 20th August 2010. As such, as on that day, age of PW1 Neelam Devraj was 18 years 2 months and 17 days.

12 The other set of evidence in respect of the age of PW1 Neelam Devraj is opinion of an expert regarding her bony age coming from the mouth of PW4 Dr.Pawan Sable. By examining X-Ray plates of various parts of body of PW1 Neelam Devraj, it appears that PW4 Dr.Pawan Sable had assessed her age to be 16½ to 17½ years by estimation. By examining the X-Ray plate of Iliac crest of PW1 Neelam Devraj, this witness has given finding to the effect that she can be below 20 years of age, as seen from the

report of the ossification test at Exhibit 34. At this juncture, it is relevant to note that in a celebrated judgment of the Honourable Apex Court on this issue in Jaya Mala vs. Home Secretary, Government of Jammu and Kashmir¹, the Honourable Apex Court has noted that one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side. Evidence of PW4 Dr.Pawan Sable shows that PW1 Neelam Devraj can be 16½ years of age, so also she can be 17½ years of age. If two years margin is added to 17½ years of age, then one can conclude that PW1 Neelam Devraj can also be aged about 19½ years. Similarly, it is well settled that ossification test is not conclusive evidence about age of a person. Owing to variations in climatic, dietetic, hereditary and other factors of the people of different places, it is not possible to formulate a uniform standard for determination of age of union of epiphysis for the whole of India. Note of this fact is taken in 23rd Edition of Modi's Jurisprudence and Toxicology by pointing out that even in India, different tables have been prepared in different parts and in case of radiological tests, heredity, diet and climatic etc. plays an

1 1982 (2) SCC 538

important role in the fusion of epiphysis. Fusion of epiphysis takes place early in the case of rich diet and hot climate and is usually delayed in the case of poor diet and cold climate, and therefore, ossification test can by no means be infallible and accurate test to indicate the correct age of a person.

13 In view of two sets of evidence found on record in respect of age of PW1 Neelam Devraj, one favouring the appellant/accused and the other which is not accurate but favouring the prosecution, benefit of doubt normally goes to the appellant/accused. With conflicting evidence regarding age of PW1 Neelam Devraj, it cannot be said with certainty that at the time of alleged offence, she was less than 18 years of age. PW1 Neelam Devraj has not deposed as to since when she was dragged in the flesh trade and her evidence on this aspect is as vague as it can be.

14 In this view of the matter, the learned trial court committed error in accepting the age of PW1 Neelam Devraj

determined by the ossification test by PW4 Dr.Pawan Sable to conclude that she was minor at the time of the alleged offence, in order to impose punishment of rigorous imprisonment for 7 years on the appellant/accused. The appellant/accused in the fact situation of the instant case is certainly entitled for the benefit of doubt in respect of the age of the victim.

15 The net result of foregoing discussion requires me to conclude that the learned trial court though correctly convicted the appellant/accused no.1 for the offence punishable under Section 4 of the Immoral Traffic (Prevention) Act, has committed error while imposing punishment for the said offence on her. In the result, the appeal is partly allowed with the following order :

ORDER

- i) The appeal is partly allowed.
- ii) Conviction of the appellant/accused no.1 for the offence punishable under Section 4 of the Immoral Traffic (Prevention) Act, 1956, is maintained, but sentence imposed on her is altered to rigorous imprisonment for 2 years apart

from payment of fine of Rs.1,000/- and in default of payment of fine, she is directed to undergo further rigorous imprisonment for 6 months.

iii) If the appellant/accused no.1 has undergone this sentence, she be set at liberty, if not required in any other case.

iv) With disposal of the appeal, Criminal Application No.1298 of 2015 filed therein stands disposed of.

(A. M. BADAR, J.)