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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on: 05th October, 2018

+ CRL.A. 530/2005

BABITA

..... Appellant

Through: Mr. Gautam Khazanchi, Advocate
with appellant in person

versus

STATE

..... Respondent

Through: Mr. Amit Ahlawat, APP for the
State

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER (ORAL)

1. The appellant was sent up for trial in Sessions case no.158/03 registered on the basis of report under Section 173 of the Code of Criminal Procedure, 1973 (Cr. PC) submitted on conclusion of investigation into first information report (FIR) no.356/02 of police station Kamla Market, involving offences punishable under Sections 363, 368, 373, 376, 342, 323, 109, 34 of the Indian Penal Code, 1860 (IPC) and Sections 3, 4, 5 and 6 of Immoral Traffic (Prevention) Act, 1956 (ITP Act). Besides her, there were two other persons who were sent up for trial, they being Bhagti Ram Pandey and Shama, the latter having been declared a proclaimed offender.

2. The trial concluded with judgment dated 15.01.2005 of the Additional Sessions Judge whereby, *inter alia*, the appellant herein was held guilty for offences punishable under Sections 342, 368, 373, 323, 109, 34 IPC and under Sections 3, 4, 5 and 6 of the ITP Act. By order of sentence passed on 20.01.2005, the trial Judge awarded rigorous imprisonment for five years with fine of Rs.5,000/- for offence under Sections 373, 368, 109, 34 IPC; rigorous imprisonment for one year with fine of Rs.500/- for offence under Sections 342 IPC; rigorous imprisonment for one month with fine of Rs.500/- for offence under Section 323 IPC; rigorous imprisonment for two years with fine of Rs.1,000/- under Section 3 ITP Act; and rigorous imprisonment for seven years each for offences under Sections 4, 5 and 6 of ITP Act against the appellant, the fine of Rs.1,000/- and Rs.5,000/- respectively having been added for offences under Section 5 and 6 of ITP Act.

3. The present appeal was filed in July 2005 seeking to assail the judgment and order on sentence of the trial court. The remainder of the sentence was suspended and the appellant was enlarged on bail in terms of order dated 29.08.2006 on her application – CrI. M (B) 1297/2005 – subject to certain conditions including deposit of fine. It is stated that the fine was duly deposited before the appellant was released on interim bail pending the hearing on the appeal.

4. The previous proceedings would show that the trial court record which had been requisitioned and added to the record of the appeal as per noting below the proceedings recorded on 22.07.2010 came to be

mislaidd and lost being rendered not traceable. Pursuant to certain directions on the administrative side, the assistance of the trial court was taken and the record has been reconstructed. The same has been submitted by the trial court for consideration of the appeal. The learned counsel appearing for the appellant and the learned Additional Public Prosecutor submitted that since the reconstructed record to the extent required by them for making their submissions is sufficient, they would have no objection if the appeal is heard and decided on its basis.

5. The submission of both sides have been heard and with their assistance, the record has been perused.

6. It has been the case for the prosecution that the victim (PW-1) was a native of district 24 – North Pargana, West Bengal. She was a married woman whose husband having abandoned her, she had been constrained to live with her parents. It is alleged that she was allured by two persons named Rubi and Raveena to come to Delhi, she having been initially accommodated in a hotel from where she was sold to Shama (proclaimed offender) and brought to Kotha no.56 at G.B. Road within the jurisdiction of police station Kamla Market. It is alleged by the prosecution that the victim (PW-1) was wrongfully confined, against her wishes and without her consent, in the said premises, and forced into prostitution, earnings made therefrom were shared by the said person Shama (proclaimed offender) and by the appellant herein who was also living in the same premises running a brothel house with 10-12 other females also being similarly forced

into the flesh trade. It is alleged that PW-1 was subjected to ill treatment and physical assault in case of her refusal to cooperate. It is further the case of the prosecution that on the basis of input by a social worker (PW-9), the local SHO (PW-24) having constituted a team in which he had joined the said PW-9 and certain other police officials (PW-6 and PW-22), a rescue operation was carried out on 01.09.2002 whereunder the victim (PW-1) was recovered. It is stated that she was medically examined on the same date and, thereafter, kept in the Observation Home (*Nirmal Chhaya*). It is also the case of the prosecution that on 12.10.2002, statement of PW-1 was recorded on which basis FIR of the present case was registered. Eventually, after completion of investigation, during which PW-1 identified the appellant as the person who was involved in the aforementioned crimes, the charge-sheet was submitted.

7. The evidence of PW-1, as indeed the testimony of the witnesses of the raiding party (PW-9, PW-6, PW-22 and PW-24) leaves no room for doubt that the victim was confined in Kotha no.56, GB Road, for a prolonged period before she was rescued by the police. It is also clear that during such wrongful confinement against her wishes, she was forced to engage in sexual intercourse with certain persons who would visit the premises and who would pay money as consideration which was collected by Shama (proclaimed offender) and the appellant herein. From these facts, there can be no room for doubt that the appellant was aiding and abetting in the commission of offences of wrongful confinement (punishable under Section 342 IPC), knowing

that the victim was an abducted person – this rendering it a case of wrongful confinement of an abducted person punishable under Section 368 IPC, she having been subjected to physical assault and hurt (punishable under Section 323 IPC).

8. It is also clearly established from the above nature of evidence that the premises described as Kotha no.56 of G.B. Road was being used for purposes of sexual exploitation for the gain of certain persons that included the appellant and for which purpose, 10-12 females of young age including PW-1 were confined there. In this view, having regard to the evidence, the complicity of the appellant in the crime punishable under Section 3 of ITP Act has also been properly brought home. Since there is evidence to show that the appellant was living on the earning of prostitution, her guilt vis-à-vis the penal clause under Section 4 of ITP Act has also been proved beyond all manner of doubt. Similarly, since the evidence shows that the custody of the victim (PW-1) was procured, she being confined at the aforementioned place for the purpose of prostitution, guilt of the appellant under Section 5 of ITP Act was also duly established. Further, the fact that the victim was detained in such premises where prostitution was being carried out, the prosecution has brought home its case under Section 6 of ITP Act as well.

9. Fairly conceding to the above position of evidence, the learned counsel for the appellant, however, argued that the trial court has fallen into error by assuming that the appellant was a minor at the relevant point of time. It was his submission that the evidence has not

been properly construed and the finding returned by the trial court about the minority of the prosecutrix at the time of she being abducted, sold, trafficked or forced into prostitution, is erroneous and needs correction.

10. The learned counsel for the appellant and the Additional Public Prosecutor have been heard at length on the above mentioned narrow issue that has been raised.

11. It does appear that on 01.09.2002 after she had been rescued by the police from the brothel house, the prosecutrix was taken for medical examination to Lok Nayak Hospital, New Delhi, her medical examination having been reduced into writing as Medico Legal Certificate (Ex. PW10/A) prepared by Leena Wadhwa (PW-10), Senior Resident, Gynecology Department. The MLC clearly shows the prosecutrix had given her age at the time of such medical examination to be 22 years. The examining medical officer found no discrepancy in the said description and noted it without casting any doubts.

12. As mentioned earlier, the prosecutrix was a married woman at the time of she coming from West Bengal to Delhi on account of allurement by the two mentioned persons (who were never traced or brought to trial). During her court deposition, she (PW-1) declared her age to be 18 years. It is this description given at that time, which has weighed with the trial court in concluding that she would have been a minor at the relevant point of time. In the considered view of this court, such inferences were way off the mark.

13. PW-1 herself had testified that she had been married for four years prior to she being abandoned by her husband. After her husband had left her company, she had shifted to her parental home where she had lived for sometime. It is only thereafter that she came to Delhi upon being allured on the promise of better job prospects here. There is no record of any school education of the prosecutrix. Her declaration before the medical officer at the time of her examination on 02.09.2002 has gone unimpeached and unchallenged. Adding to this is the radiological opinion which was given by Mr. Gaurav Pradhan (PW-16), a professor of Radiology in Maulana Azad Medical College, where the prosecutrix had been taken for age determination on 04.10.2002. In the opinion of the Radiologist, the bony age of the prosecutrix could be anywhere between 17 to 20 years. If so, it is not fair to assume that she was a minor at the relevant point of time, there being no clarity in the evidence as to the date of her abduction or being sold into prostitution.

14. For the aforementioned reasons, the finding returned by the trial court that the prosecutrix was a minor at all relevant times needs to be vacated. The case for the prosecution, thus, has to be accepted about the offences committed against PW-1 on the basis of conclusion that she was an adult during the relevant period.

15. The above modified conclusion will undoubtedly result in the conviction and sentence for the offence under Section 373 IPC being set aside in as much as it is a *sine qua non* for the said penal clause for the victim to be under the age of eighteen years. Ordered accordingly.

16. As a sequel to the above conclusion, the punishment meted out to the appellant for offences under the ITP Act on the assumption of the victim being a minor will also need to be reconsidered in as much as she cannot be subjected to the more rigorous punishment than that is attracted in case of minors being the victims of such offences.

17. In the considered view of this court, having regard to the prolonged proceedings that have been faced by the appellant, there is a case made out for reduction of the sentences. Thus, while setting aside the punishment for the offence under Section 373 IPC and maintaining the punishments, as awarded by the trial court for offences under Section 368, 109, 34 IPC and Section 342 IPC, Section 323 IPC and Section 3 of ITP Act, the punishments for offences under Sections 4, 5 and 6 of ITP Act are reduced to the rigorous imprisonment for four years each with fine as imposed by the trial court. All the substantive sentences are ordered to run concurrently with the benefit of set off under Section 428 Cr. PC for the period of detention already undergone as directed by the trial court. The trial court shall call for nominal roll of the appellant and enforce the modified order on sentence, securing the presence of the appellant by appropriate process for such purposes.

18. It has been submitted on behalf of the appellant that she had paid the amount of fine imposed by the trial court at the time of release on interim bail pending hearing on the appeal in terms of order dated 29.08.2006. The trial court shall verify this fact and, in case of

any default, shall enforce recovery or ensure that the appellant undergoes the period of sentence awarded in default.

19. The appeal is disposed of in above terms.

R.K.GAUBA, J.

October 05, 2018

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