

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.604 OF 2004

Rajesh Parshuram Rajput

...Appellant

v/s.

The State of Maharashtra

...Respondents

Mr. Aniket Vagal for the Appellant.

Mr. Ajay S. Patil, APP for Respondent/State.

CORAM : DAMA SESHADRI NAIDU, J.
DATED : 17th October, 2019.

ORAL ORDER:

The appellant is the 4th accused in Sessions Case No.484 of 2000. The prosecution charged five accused under Sections 366 (A), 376, 372, 373, r/w 34 and 368 of I.P.C. After the trial, the Court of Sessions at Greater Mumbai, through its judgment dated 20.04.2004, convicted all the accused including the appellant. As the appeal concerns the 4th accused, that is the appellant; we will focus on his alleged role in the crime. In fact, the appellant was sentenced to undergo rigorous imprisonment for five years for the offence under Section 373 of I.P.C., and another five years under Section 368 of I.P.C. Both the sentences were to run concurrently,

though. Against his conviction, the appellant has filed this Criminal Appeal.

2. Let us touch upon the facts briefly. P.W.1 and P.W.2, the two women, are the victims. Poverty drove them to search for a source of livelihood. So they came from West Bengal to Mumbai, in search of job opportunities. They both were young, illiterate, and poor; thus, they possessed all the qualifications to be exploited. They know no other language than Bengali, to compound the misery.

3. The 1st accused is said to have brought the two victims to Mumbai with a promise to provide them employment. He took them to the 3rd accused, who is said to have taken the 2nd victim to the 4th accused—that is, the Appellant. Then, she remained in the custody of the appellant, who used to send her to other men, as part of the flesh trade. The prosecution maintained that initially Accused No.1 committed rape on P.W. 2, the second victim, and then sold her to Accused Nos.2 and 3. They in turn allegedly handed her over to the Appellant.

4. The prosecution has further maintained that the Appellant took the second victim to a hotel. There, another person took her to a room and had forcible sex with her. Eventually, after 11 or 12 days in the appellant's custody and after having been sexually exploited by different persons, the second victim left the place and came back to the first accused's brother. Thereafter, on 5th February 2000, she

lodged a complaint with Kandivali Police Station.

5. Initially, the police registered C.R. No.49 of 2000 and, later, filed the charge-sheet before the learned Metropolitan Magistrate, Borivali. Upon committal, the accused were charged with the offences under Sections 366 (A), 376, 372, 373, r/w 34 and 368 of I.P.C. The prosecution examined the following witnesses:

1. P.W. 1 : The first victim.
2. P.W. 2 : The second victim-cum-complainant.
3. P.W. 3 : Interpreter – Mohd. Babumiya Sardar.
4. P.W. 4 : Medical Officer – Dr. Shridhar M. Patil.
5. P.W. 5 : Panch – Vitthal K. Mesth.
6. P.W. 6 : First I.O. - PSI Umakant S. Adki.
7. P.W. 7 : Second I.O. - PI Dilip S. Gaikwad.

6. Indeed, the Trial Court convicted all the accused, including the appellant. The remaining four accused did not challenge the verdict; instead, they served it. Only the 4th accused, that is the appellant, challenged the conviction; pending this appeal, he secured the suspension of his sentence.

7. In the above factual backdrop, Shri Aniket Vagal, the learned Counsel for the Appellant, has submitted that all the witnesses have turned hostile. Even otherwise, the prosecution has

failed to bring home any charge of guilt against the appellant. He has taken me through the evidence of P.W. 1 and P.W. 2. He contends that P.W. 1, the first victim, does not know the appellant. Then, only P.W. 2, the second victim, who was allegedly in his custody for 10 to 12 days, spoke about certain events. According to him, the 1st accused raped P.W. 2 and, for that, he was convicted. But in this appeal, that is beside the point.

8. Shri Vagal further submits the appellant has faced the allegation that he held the second victim captive and commercially exploited her by sending her to other men as part of immoral traffic, the flesh trade. True, the second victim, as a witness, initially identified the appellant and deposed against him. But eventually, she realised her mistake, resiled from her earlier statements, and thus corrected herself. In other words, Shri Vagal submits that the second victim only spoke about the person who looked like the appellant, but not about the appellant himself. Despite having no evidence against the appellant, the Sessions Court, the learned counsel stresses, has convicted the appellant on a conjecture that he must have threatened or induced her. That was without any material support.

9. To elaborate, Shri Vagal submits that the second victim herself deposed that as her cross-examination stretched beyond one day, she had been kept in the custody of lady police. So it was

impossible for the appellant to access the second victim, leave alone his influencing her. Eventually, the learned counsel has taken me to the provisions the appellant has been charged with and contended that none of those provisions applies to the appellant. According to him, the benefit of doubt ought to have been given to the appellant because the prosecution has failed to prove the offence beyond a reasonable doubt.

10. On the other hand, Shri Ajay Patil, the learned APP, has submitted that merely because the witnesses turn hostile, it does not, and should not, result in an acquittal. In this context, he has submitted that the second victim, in her examination-in-chief, did depose in tune with her complaint in the FIR. Even during the cross-examination, according to Shri Patil, initially she stuck to her version. But the appellant's counsel in the trial Court took time to continue cross-examination on the next day. Then, on that day, she changed her version. To elaborate, Shri Patil submits that after her identifying the appellant in the first instance and deposing against him, the next day the witness stated that the person who had held her captive and exploited her looked like the appellant. At any rate, Shri Patil contends that the second victim's initial deposition coupled with the FIR is sufficient to convict the appellant. And that is what the Sessions Court did. Shri Patil has also pointed out that the victim was of tender age when the offence was committed, and

this crime, if goes unpunished, would have a harmful impact on the society as well. So he urges the Court to maintain the conviction.

11. Heard Shri Aniket Vagal, the learned counsel for the Appellant and Shri Ajay Patil, the learned APP for the State.

12. Indeed, all the witnesses have turned hostile. I, nevertheless, hasten to add that it cannot be the sole factor for the Court to acquit any accused, including the appellant. In this case, the evidence of P.W. 1 and P.W. 2, the two victims, seems important. First, even the prosecution did not allege that the first victim has anything to do with the appellant. The whole allegations concerned the second victim, that is P.W.2. Second, the prosecution maintained that Accused No.1 sexually exploited her and sold her to Accused Nos. 2 and 3, who handed over her to the appellant. Here, the prosecution could not establish that there was any commercial dealings between the Accused Nos.2 and 3 on the one hand and the appellant on the other. No selling, as such. The allegation the appellant has faced is that he held the second victim captive and used her in immoral trafficking.

13. The sole witness that spoke about all these events is the second victim herself. She deposed in her examination-in-chief in tune with the FIR. Even in the initial phase of cross-examination, she maintained that it was the appellant that held her captive; later, she deposed otherwise: the appellant resembled the person that held

her captive, but the appellant himself was not the offender.

14. In the light of these developments, the trial Court has observed:

“29. However although [...] identified accused no.4 in her examination in chief to be the person to whom accused nos.1, 2 and 3 had jointly sold her on the next day, after defence sought adjournment in her cross examination she deposed that they sold her to a person looking like accused no.4. Hence a doubt is sought to be created in the mind of this Court. However, the fact that accused no.4 purchased Amina from accused nos.1, 2 and 3 jointly is not challenged in cross examination.

30. I have to observe here that the overnight change in the demeanour of the witness speaks volumes. However, since the evidence in chief is corroborated by her FIR where she has named the accused no.4, her testimony in cross that, she has changed her version from accused no.4 to “a person like accused no.4” can be given a go-bye. *It is apparent that Amina was threatened by accused no.4 due to which she changed her stand overnight in favour of the accused no.4. Hence if she had to be threatened or “bribed” to depose to the liking of the accused no.4 before this Court, having observed the change in the demeanour of the witness*

Amina, is apalled by the manner and level to which accused no.4 has stopped. If the witness had taken a stand in her evidence in chief that the person who procured her for prostitution was “looking like accused no.4”, the benefit of doubt could be given to him. Hence this court is of the view that why should the corroboration of the evidence in chief by the FIR not be believed? It is an offence of trafficking of minor girls and a serious offence against the state and society. Therefore, in my view, the overnight change, in behaviour and deposition of P.W. No.2 Amina is highly condemnable and speaks volumes against accused no.4. In my view giving a light go-bye to such activities of the accused, which is a very common feature in the trial courts is unjust to the victim hence, the benefit of that can not be given to accused no.4. Therefore, I am of the view that the prosecution has proved the points nos.3, 4 and 6 hence I answer the same in the affirmative.” (italics supplied)

15. Indeed, the trial Court’s view reflects its righteous indignation and anguish at the detestable exploitation of destitute women. That said, mere indignation cannot inflict punishment; it must have an evidential basis. Here, as I see, what weighed with the trial Court was that the witness changed her version the next day. And that change must have been because the witness was

“threatened or bribed” by the appellant. The trial Court has also felt that the witness’s change of stance overnight is “highly condemnable” and “speaks volumes” against the appellant.

16. Indeed, the trial Court has concluded that in the intervening night, when the witness’s testimony spilled over to the next day, the appellant won her over or threatened her. But it has come on record that the second victim, that is P.W. 2, on the intervening night, was in the custody of lady police. There was no occasion for the appellant to have any access to her, nor has there been any suggestion given to the witness that she had either been threatened or misguided by the appellant or his men before her cross-examination resumed.

17. The crime may be reprehensible and may affect the society, deleteriously. But the heinousness of the crime cannot be a justification for the courts to give short shrift to evidentiary aspects or procedural safeguards. Nor is it permissible for us to assume a person’s guilt because the crime offends our morals or spells ill to the society. None of the witnesses has spoken about the appellant’s involvement; the second victim could not have spoken about her “sale” to the appellant. Nevertheless, she did change her version overnight, so to say. But that change, I reckon, cannot be attributed to the appellant, who admittedly had no access to the victim-witness. No amount of doubt equals an ounce of proof, and no nagging

suspicion substitutes a piece of reliable evidence.

18. Under these circumstances, I hold that the conviction against the appellant cannot be sustained. Accordingly, the judgment to the extent of its convicting the appellant is set aside. And the appellant is acquitted of all charges.

The appeal is, thus, allowed.

(DAMA SESHADRI NAIDU, J.)