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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL No. 57 OF 2016

Salauddin Abdul Wahid Khan	)
Age – 34 years, Occupation Nil,	)
Residing at Bhaisayya, Post Digha,	)
Taluka – Khalidabad, Dist. Sant Kabeer	)
Nagar, Khalidabad, State U.P.	)
(At present lodged in Nashik Road	)
Central Jail)	)...Appellant

Versus

The State of Maharashtra	)
(At the instance of Nagpada Police	)
Statin, Mumbai)	)...Respondent

WITH

CRIMINAL APPEAL No. 145 OF 2018

Smt. Asma Salauddin Khan	)
Age 31 years, Resident of Bhaisayya,	)
Post Digha, Taluka Khalilabad,	)
Dist. Sant Kabeer Nagar,	)
Khalilabad, Uttar Pradesh,	)
(At present Yerawada Central Prison,	)
Pune)	)...Appellant

Versus

The State of Maharashtra	)
(through Nagpada Police Station,	)
Mumbai)	)...Respondent

Ms. Nasreen S.K. Ayubi, appointed Advocate for Appellants
Mr. S.S. Pednekar -APP for the State

CORAM : SMT.SADHANA S. JADHAV, J.

DATE : FEBRUARY 26, 2019

JUDGMENT:

1. The Appellants herein are convicted vide judgment and order dated 3rd February, 2015 passed by the Additional Sessions Judge, Greater Bombay in Sessions Case No. 317 of 2014 for the offence punishable under Section 370 of the Indian Penal Code and sentenced to suffer R.I. for seven years and to pay fine of Rs.500/- each, in default, to further undergo R.I. for one month.

2. It is the case of the prosecution that the present Appellants were acquainted with the victim Ms. X - PW2. They are all original residents of the State of Uttar Pradesh. Accused No.2 happens to be the wife of Original Accused No.1. It is the case of the prosecution that Appellant No.1 – Salauddin had proposed marriage with the victim Ms. X. The proposal was turned down by her mother. That in the month of February, 2014 i.e. on 5th February, 2014, the Appellants had asked the victim to accompany them to Mumbai for attending Hajimalang Baba Urus. The victim was staying with them at Mumbai. In the Urus, Appellant No.1 – Salauddin was working as a cook. On 18th February, 2014, Appellant No.1- Salauddin was missing for the whole day. On 19th February, 2014, he had asked the victim to sit near a temple. He

had brought one child, which was about three months' old. The victim -PW2 was not aware as to whose child it was. The Appellants had informed the victim that they were visiting the doctor for treatment as the child was not keeping well. Within a short while, the police had been to the spot. The Appellants were taken in the custody by the police. They were also accompanied by some other people. Upon seeing the police, PW2, the victim was scared. She was hardly 19 years' old. The police had taken her to the police station. Due to fear of police, she had disclosed to the police that she happens to be the second wife of Accused No.1 -Salauddin. She was seeing the police assaulting the accused, she felt sympathy for them as she had been not been harassed by the accused person during her stay at Mumbai. In order to save the Appellants from police torture she had also gone to the extent of claiming that she happens to be the mother of the said child. Thereafter, victim-PW2 was taken to the shelter home at Deonar. She had contacted her family members telephonically.

3. It is the case of the prosecution that the victim has learnt from the police that the accused Salauddin had wanted to sell her to PW4 – Seema Ghosh and PW5- Mumtaz Shamim Ansari. The

profession of PW4 and PW5 was prostitution.

4. It is the case of the prosecution that on 19th February, 2014 when PW4 and PW5 were having tea in Hotel Nagori, Appellant No.1- Salauddin, who knew the profession of PW5, had approached her and had asked her as to whether anybody would purchase the victim. Thereafter, PW4- PW5 had realized that Appellant No.1 has defrauded a young girl and was attempting to sell her and, therefore, had approached the police station without the knowledge of the Appellants. The police had apprehended accused No.1 Salauddin and his wife -accused No.2 and, thereafter, they had learnt that the victim girl was sitting near the temple. The victim girl was rescued at the earliest point of time. On the basis of the information given by PW4 and PW5, PW1 Haripal Modak had lodged a report at the police station. On the basis of which, Crime No. 70 of 2014 was registered at Nagpada Police Station against the Accused for the offences punishable under Section 370 r/w. 34 of the Indian Penal Code. The prosecution examination eight witnesses to bring home the guilt of the accused.

5. PW1 Haripal Modak was attached to Nagpada Police Station

as Head Constable. He was informed by PW4 Pooja Ghosh and PW5- Mumtaz Shamim Ansari about the attempt being made by the accused Salauddin and his wife to sell the girl. The FIR is at Exhibit 10. PW1 has proved the contents of the FIR.

6. PW2 has categorically deposed before the Court that she was surprised to find herself in a situation of this kind and, therefore, she was flabbergasted. She was not prepared for the said situation. However, she had sympathy for the couple. She has seen the police beating them and, therefore, she was constrained to lie to the police that she was second wife of Accused No.1-Salauddin. To save the Appellants, she had gone to the extent of saying that the complaint is false and that she personally has no grievance against the accused persons. An inference can be drawn that in fact, she had no inkling about the intention of the Appellants to sell her. They had behaved properly with her and kept her safe and finally wanted to sell her. She was not prepared to accept that they were indulging in trafficking, but, unfortunately, the evidence was otherwise.

7. It is the presence of mind and the courage of PW4 and

PW5 due to which the victim was rescued. The deposition of PW4 and PW5 inspires confidence for the simple reason that they had no reason to implicate the accused persons falsely. In fact, they have candidly admitted that they were indulging in prostitution and that they were staying at Kamathipura. They had admitted/that trafficking is rampant in the said area and they never expected that the girl in distress, should be trafficked in such a manner. It is unfortunate that the police has not inquired about the parentage of the child. The possibility that the said child was stolen, cannot be ruled out. But, there is no inquiry on that point at all. Hence it would not be necessary to delve into that issue.

8. It is pertinent to note that PW7 Ahmed Usman Pathan, who happens to be the investigating officer of Crime No. 70 of 2014, has candidly deposed before the Court that he had not inquired, as to, from where the child had come with the victim. There are serious laches in investigation as well as in the prosecution.

9. It is, in these circumstances, that implicit reliance can be placed upon the truthful evidence of PW4 and PW5. There is material to show that the Appellants herein have committed an

offence punishable under Section 370 *Fourthly* of the Indian Penal Code. The Section 370 *Fourthly* reads as follows:

“370. Trafficking of person. - (1) Whoever, for the purpose of exploitation (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons by -

First. - --

Secondly -

Thirdly -

Fourthly - by practising fraud, or deception”.

10. The learned counsel has submitted that in fact, the Appellants had not actually indulged into trafficking but had attempted for traffick and, therefore, the charge ought to have been framed under section 370 r/w. 511 of IPC. It is submitted that failure to frame the charge accordingly has caused grave prejudice to the Appellants. The trial was conducted by providing legal aid to the Appellants.

11. In view of this, the conviction of the Appellants for the offence punishable under Section 370 of the Indian Penal Code is maintained. However, since there is no record of antecedents of the Appellants and that the victim has specifically urged that she

has no grievance against the accused persons, there is no exploitation of the victim at the hands of the Appellants and they had made an attempt to indulge into trafficking by trying to sell her, the offence committed by the Appellants would fall under Section 370 r/w. 511 of the Indian Penal Code. The maximum sentence contemplated under section 370 in the present case would be upto 10 years. In view of the provisions under Section 511 of the Indian Penal Code, the Appellants are sentenced to the period already undergone since they have undergone more than half of the sentence awarded to them.

Section 511 of the Indian Penal Code reads as under:

“511. Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment – Whoever attempts to commit an offence punishable by this Code with ¹ [imprisonment for life] or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with ²[imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence], or with such fine as is provided for the offence, or with both.”

12. The learned APP submits that the Appellants have indulged into a serious offence by attempting to sell of PW2 and moreover, since there is no charge under Section 370 r/w. 511 of the Indian Penal Code, the Appellant cannot be convicted with the said charge at it contemplates a lesser sentence.

Section 386 sub-clauses (b), (d) and (e) of the Code of Criminal Procedure, 1973 reads as under:-

“386. Powers of the Appellate Court- *After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may -*

(b) in an appeal from a conviction -

- (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court or competent jurisdiction subordinate to such Appellate Court or committed for trial, or*
- (ii) alter the finding, maintaining the sentence, or*
- (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;*

(d) *in an appeal from any other order, alter or reverse such order;*

(e) *make any amendment or any consequential or incidental order that may be just or proper:*

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.”

13. The Learned counsel appointed for the Appellant has put in the best of her efforts to espouse the cause of the Appellant, hence, she is entitled for her professional fees as per Rules, to be paid by High Court Legal Aid Committee.

14. The following order is passed:

ORDER

- (i) Appeal is partly allowed.
- (ii) The conviction of the Appellants is altered to Section 370 r/w. 511 of the Indian Penal Code. The Appellants are sentenced to the period already undergone.
- (iv) The sentence of fine is maintained.
- (v) Bail bonds shall stand cancelled.

[SMT.SADHANA S. JADHAV, J.]

