

\$~12 & 13

IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on:- 24th April, 2019

+ CRL.A. 928/2005

MOHD. AZIM

..... Appellant

Through: Mr. Yogesh Chhabra, Adv.

versus

STATE

..... Respondent

Through: Mr. Amit Ahlawat, APP for the
State.

+ CRL.A. 250/2006

RESHMA

..... Appellant

Through: Mr. Yogesh Chhabra, Adv.

versus

THE STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Amit Ahlawat, APP for the
State.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT (ORAL)

1. On 30.05.2004, on the basis of secret information, Inspector Ajit Singh (PW-19), the station house officer of police station Kamla Market, assisted by other police personnel, raided the premises of Kotha no. 59, second floor, left side, on GB Road, Delhi, where a girl aged about 17 years old was found wrongfully confined for the

purposes of she being forced into prostitution. The girl (PW-1) was found to be a native of a village in the State of Karnataka. She was sent for medical examination to Lak Nayak Hospital, New Delhi, where her medical examination vide medico legal certificate (Ex.PW-3/A) brought out indication that she had been sexually exploited. Her statement (Ex.PW-1/A) was recorded in which she levelled allegations against the first appellant Reshma (A-1) and second appellant Mohd. Azim (A-2), besides certain others. According to the said statement, she had been victim of offences punishable under Sections 363/365/368/376/342/323/109/34 of Indian Penal Code, 1860 (IPC) and Sections 3,4,5 and 6 of Immoral Traffic Prevention Act, 1956 (ITP Act, for short). The SHO, by his endorsement (PW-19/A), got first information report (FIR) no. 246/2004 (Ex.PW-7/A) registered and took up the case for investigation.

2. During the course of investigation, the victim (PW-1) was sent for age estimation to the Maulana Azad Medical College, the report (Ex. PW-8/A) issued by Dr. Anil Kumar (PW-8), professor of forensic medicine, opining that she was a girl aged between 17 and 18 years. Besides other steps, the statement of the victim (Ex. PW-1/J1) under Section 164 of the Code of Criminal Procedure, 1973 (Cr.P.C.) was also recorded by a Magistrate.

3. The appellants herein came to be arrested and were brought to trial on the basis of report (charge-sheet) under Section 173 Cr.P.C. submitted on 24.08.2004. It may be mentioned here that according to the evidence which had been gathered, premises described as Kotha was run as brothel house, it being in the tenancy of one Amina

Begum. Amina Begum, the evidence would show, had died. The name of Mohd. Talib son of Amina Begum also figured in the evidence, particularly in the testimony of the victim, she attributing he to be the person who would collect the earnings of prostitution. Mohd. Talib, however, absconded and was declared proclaimed offender.

4. The case (Sessions Case No. 24/2005) against the appellants was brought before the court of Sessions, charges having been framed under Sections 3, 4, 5 and 6 of ITP Act and for offences under Sections 342,323,109 read with Section 376 IPC against both the appellants. Separate charges were also framed for offences under Sections 365 and 366 IPC against A-1, while A-2 was additionally charged under Sections 368 and 376 IPC.

5. The prosecution led evidence by examining Reshma (PW-1), the prosecutrix; HC Tanfa (PW-2), who was member of the raiding party led by the SHO; Dr. Tripati Arora (PW-3), who had medically examined the prosecutrix immediately after recovery; HC Ciciliya (PW-4), who had taken the prosecutrix for age determination test; Vikas (PW-5), a clerk of an advocate involved in the investigation; Ravi Malhotra (PW-6), the landlord of the premises in question; HC Jatesh Kr. (PW-7), duty officer who register the FIR; Dr. Anil Kumar (PW-8), who gave opinion about the age of the prosecutrix; Constable Anil (PW-9), member of the raiding party who took the *rukka* for registration of case; W Constable Teressa (PW-10), another member of the raiding party led by SHO; Ct. Resham (PW-11), who accompanied the prosecutrix for medical examination; Ct. Bhuri

Singh (PW-12), who had joined the investigation at the time of interrogation of PW-6; Sant Ram (PW-13), an official of power distribution company whose evidence relates to the user of the premises by Amina Begum; ASI Balbir Singh (PW-14), duty officer who proved the departure entry made by the SHO before setting out for raid; SI Inder Pal Singh (PW-15), another member of the raiding party; A.K. Kohar (PW-16), the Metropolitan Magistrate who recorded the statement under Section 164 Cr.P.C.; Dr. Anil Aggarwal (PW-17), the forensic expert who gave opinion about the biological samples of the prosecutrix; Anil Kapoor (PW-18), who proved the notification under ITP Act; Inspector Ajit Singh (PW-19), the SHO who led the raid and ASI Devi Saran (PW-20), another member of the raiding party who took over investigation.

6. After the prosecution had concluded its evidence, statements under Section 313 Cr.P.C. of the appellants were recorded. Both of them denied the evidence of prosecution claiming to be innocent. While A-1 sought to explain in the said statement that she was a dancer at the said kotha and hence had no concern with the offences in question, A-2 simply pleaded innocence stating that he was a tailor by profession. Both declined to lead any evidence in defence.

7. The trial judge, having appreciated the evidence, rendered his judgment on 04.10.2005, holding both the appellants guilty, as charged. Both the appellants were awarded rigorous imprisonment for seven years each with fine of Rs. 1,000/- on charge for offences under Sections 4, 5 and 6 of ITP Act and also separately under Sections 109 read with Section 376 IPC. Additionally, on the charge for offences

under Section 3 ITP Act and section 342 IPC Act, the trial judge awarded one year rigorous imprisonment with fine of Rs. 100/- each. As against A-1, rigorous imprisonment for five years with fine of Rs.1,000/- was awarded for offence under Section 365 IPC with rigorous imprisonment for seven years with fine of Rs, 1,000/- under Section 366 IPC. A-2 has been awarded the punishment for ten years with fine of Rs 2,000/- each under Section 368 IPC and Section 376 IPC.

8. Feeling aggrieved, the present appeal was filed challenging the judgment and order on sentence passed by the trial court.

9. Having heard the learned counsel for the appellants at length and the learned additional public prosecutor for State in reply, and having gone through the record of the trial court carefully, this Court is of the opinion that there is no reason why the findings returned by the trial court, based essentially on the testimony of the victim (PW-1), as to the role of both the appellants in commission of the aforementioned offences should be displaced, except to the extent discussed hereinafter.

10. There is clear and consistent evidence available to show that A-1, also a native of the same village, as from where the victim hails allured her to come to Delhi on the pretext of getting her a gainful employment, she having been assured that she would get a monthly salary of Rs. 1,500/-, possibly as a maid servant. Instead, when PW-1 with A-1 reached Delhi, she was taken to the above-mentioned premises where she was wrongfully confined. There is also clear

evidence of PW-1 confirming that the premises were kept locked during the night and no one was allowed to go outside.

11. The fact that she had fallen into wrong hands dawned on the victim on the very first day of her arrival in Delhi immediately after she had been brought to the above-mentioned kotha. She questioned A-1 about this to which there was no satisfactory answer, the victim deposing that she was told that if real facts were known to her she would not have accompanied her (A-1) to Delhi. PW-1 has confirmed her statement affirming the contents of the FIR that, on the very first night, A-2 subjected her to forcible sexual intercourse, A-2 was not known to her before, nor she had any reason to agree to such physical intimacy with a total stranger.

12. PW-1 was cross-examined at length, such cross-examination having continued over at least three days. The lengthy cross-examination, however, could not bring out any material contradiction. She stuck to her version in the examination-in-chief affirming that A-1 had brought her from her native place on the false assurance of getting her a gainful employment has met in Delhi, she instead having been taken to the afore-mentioned place for being eventually pushed into prostitution. She elaborately described the life at the said place including the role of Amina Begum, an elderly woman who was called “Appa”, A-2 also being present throughout in the neighbourhood. She was questioned about the life, about the status of her parental family, the source of livelihood of her father, and the train journey from Karnataka to Delhi. There is nothing in her lengthy cross-examination which could render her version *vis-à-vis* the appellants incredible.

13. The learned counsel for the appellants argued that the evidence led by the prosecution showing that the victim was a minor is not worthy of reliance. According to his submission, benefit of doubts should have been granted to the appellants inasmuch as the radiological opinion (Ex.PW-8/A) indicates her age to be between 17 and 18 years. It is his argument that a margin of error should be added as a factor. This court rejects his argument for the reason that the radiological opinion does not fix a particular age. Instead, a range has been indicated, it being definitive opinion that the victim was less than 18 years. This conclusion clinches the fact that the victim was actually a minor at the relevant point of time.

14. The evidence shows that the prosecutrix was less than 18 years old at the relevant point of time and, therefore, her consent was inconsequential. The forcible sexual intercourse, as confirmed by the MLC (Ex.PW-3/A), renders it a case of rape of the victim by A-2. Since A-1 had brought the victim from her native village in State of Karnataka to Delhi on the false pretext of arranging a job for her and since she had been brought her to the premises where she was wrongfully confined and subjected to such offence of rape by A-2, he being with her all along, the abetment by A-1 of rape also stands established. These findings have been rightly returned by the trial court and are hereby affirmed.

15. From the above facts and circumstances, the guilt of A-1 for offences under Sections 365 and 366 IPC, and of A-2 for offences under Sections 368 and 376 IPC, has also been rightly concluded by

the trial court. Besides this, wrongful confinement of the victim at the afore-mentioned place constitutes offence under Section 342 IPC.

16. The counsel for the appellants argued that there is no evidence to show that the place where the victim was kept is a brothel as defined by Section 2(a) of ITP Act, for the reason that there is nothing in the evidence led to show that there was any other person functional as a prostitute. While his submission that the premises cannot be described as a brothel for the reason there is no evidence led about presence of any other prostitute in the premises is correct, it does not help the appellants in any manner in the appeal at hand. A-1, going by the evidence of PW-1, was assisting the owner of the premises in the management of the place. It was she who had brought the victim from her native place to Delhi and also had confined her with aid and assistance of A-2 at the said place. It was she who had instructed the victim as to how and on what terms the patrons to the place were to be entertained. These facts, by themselves, are sufficient to bring home the guilt against A-1 for the offences under Sections 3, 4, 5 and 6 of ITP Act.

17. But, since the procurement of the victim from her native place for purposes of prostitution was essentially by A-1, there being no evidence showing any role played by A-2 in that regard, he cannot be held guilty under Section 5 ITP Act. In this view, his conviction for the said offence under Section 5 ITP Act and the sentence awarded against him on such count are set aside. However, his conviction for offences under Sections 3, 4, and 6 ITP Act is affirmed.

18. The learned counsel for the appellants argued that they have suffered incarceration for long periods prior to the sentences having been suspended. He pointed out from the nominal roll that A-1 had undergone incarceration for three years, eleven months and twenty one days and had earned remission for eleven months and three days by the time she was released on bail pending hearing on the appeal. Further, he pointed out that, as per the nominal roll, A-2 had undergone incarceration for three years, eight months and seventeen days and had also earned remission for eleven months and twenty one days by the time he was released on bail pending hearing on the appeal. He submitted that long trial and the proceedings of over fifteen years have been faced by the appellants and that A-2, particularly, has had no other involvement in any crime. His submission was that these are special and adequate reasons why the punishment should be reduced to the period of detention already undergone.

19. The counsel for A-2 also argued that he has been held guilty under Section 368 IPC which attracts punishment similar to the offence under Section 366 IPC. It is his submission that there has been disparity in the approach of the trial court inasmuch as A-1 has been awarded rigorous imprisonment for seven years with fine under Section 366 IPC, while A-2 for a similar offence has been awarded for higher punishment of ten years with fine of Rs. 2,000/- . He urged that the rigour of the punishment for offence under Section 376 IPC, in the given facts and circumstances, also may be reduced.

20. The submissions of the learned counsel for A-2 insofar as they concern the punishment for offence under Section 368 IPC have merit. On parity with A-1, punishment for the said offence qua A-2 deserves to be reduced to rigorous imprisonment for seven years with fine of Rs. 1,000/-, in default, rigorous imprisonment for six months. In the given facts and circumstances, the offence under Section 4 ITP Act being against a minor, offence of rape having been committed against the will of the victim after her procurement within the meaning of Section 5 ITP Act and given the possible sentence provided under Section 6 ITP Act, there is no escape from the punishment that has been awarded by the trial court for the said offences, the same being minimum prescribed by the law.

21. It is noted that during the relevant period, the law prescribed imprisonment for seven years as the minimum sentence for offence under Section 376 IPC. Given the protracted proceedings, which have been faced by A-2, there is scope of reduction of the sentence on that account, from imprisonment for ten years to imprisonment for seven years. Ordered accordingly.

22. With the above modifications in the conclusions in the judgment, while acquitting A-2, Mohd. Azim of the charge under Section 5 ITP Act, the judgment of conviction of both the appellants on other counts is hereby affirmed and maintained. The sentences awarded to A-2 Mohd. Azim for offences under Sections 368 and 376 IPC are reduced to rigorous imprisonment for seven years with fine of Rs. 1,000/- each. Except for such modification, the punishment awarded to the two appellants for other offences is maintained.

23. The substantive sentences shall run concurrently and both the appellants shall be entitled to set off under Section 428 Cr.P.C. for the period of detention already undergone.

24. The appellants are directed to surrender to jail on or before 6th May, 2019 to serve the remaining sentences. The trial court will ensure due compliance, if necessary by issuing requisite process in accordance with law. The Station House officer of Police Station Kamla Market shall render all assistance.

R.K.GAUBA, J.

APRIL 24, 2019

nk



न्यायमेव जयते