

Maria S.

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.23 OF 2017

Smt. Shanta Chodankar
W/o Anand Chodankar
Presently 53 years of age
Occ: House wife
Residing behind Kantem Baina, Vasco,
N/o Khadigao, Hubli,
Presently in judicial custody
Colvale Jail, Bardez-Goa
Through her next friend
Shankar Anand Chondakar
Son of Anand Chodankar
25 years of age,
R/o 88/3, Near Ambedkar Sports Club
Kantem, Baina, Vasco-da-Gama
Mormugao

...Appellant

Versus

1. STATE
(Through CID Crime Branch)
Dona Paula, Tiswadi-Goa.

... Respondent

Mr Galileo Teles, Advocate for Appellant.

Mr Pravin N. Faldessai, Additional Public Prosecutor, for the Respondent.

CORAM: BHARAT P. DESHPANDE,J.

Reserved on : 19th January, 2023

Pronounced on: 23rd January, 2023

JUDGMENT:

1. By way of present appeal filed under under Section 374 Cr.P.C. Appellant/accused no.1 is thereby challenging judgement and sentence dated 06.04.2017 and 27.04.2017 passed by the Children's Court at Panaji in Special Case No.44/2011 whereby appellant was charged for the offences punishable under Section 109 read with 376 of IPC, Section 4 and 5 of the Immoral Traffic (Prevention) Act, 1956, under Section 2(m), punishable under Section 8(2) and Section 9(4) of Goa Children's Act, and was found guilty for the offence punishable under Section 4 and 5 of Immoral Traffic (Prevention) Act, 1956 and Section 2(m) punishable under Section 8(2) and Section 9(4) of Goa Children's Act. The appellant was acquitted for the offence punishable under Section 109 read with 376 of IPC. No appeal has been filed on behalf of the State thereby challenging acquittal of the appellant under Section 109 read with 376 of IPC. Thus, the present appeal is restricted to the challenge raised by the appellant/accused no.1 for which she was found guilty and awarded sentence as disclosed in the judgment.

2. Matter was admitted on 04.05.2017. Records and Proceedings were called. Private paper-book has been furnished and, accordingly, the matter was taken up for final disposal.

3. Heard learned counsel Shri Galileo Teles, for the appellant and Shri Pravin Faldessai, learned Additional Public Prosecutor for the

State. With the assistance of both the counsel, I have perused the entire record and more specifically evidence of the relevant witnesses.

4. Shri Galileo Teles submitted that charge-sheet was filed only against accused no.1 as accused no. 2 and 3 were shown as absconding. He would submit that case of the prosecution is in connection with a raid conducted on the premises wherein alleged activities of sexual exploitation of the victim child was being carried out by the accused no.1 and in support of accused no.2 and 3. He submitted that decoy customer was sent along with cash amount and a deal was allegedly clinched. Thereafter, the decoy customer along with victim girl went out and they came near the vehicle wherein other team members were stationed. Thereafter, the victim child was rescued and the house where the deal was made was raided. Accused no.1 was found in possession of the cash which the decoy had handed over to her. The panchanama was recorded.

5. Shri Teles then pointed out that neither the victim girl nor the decoy customer are examined before the trial Court to substantiate above aspects. According to him, the raiding team members being police officers deposed only on the basis of hearsay material, which has been accepted by the trial Court. He then submitted that it is also the case of the prosecution that conversation between the complainant and one lady was initially recorded. Similarly, the conversation between the decoy customer and accused no.1 was also recorded.

Both these cassettes were played before the trial Court and found as not audible. Though the sample voice of the accused no.1 was collected during investigation, said sample voice along with alleged tape recorded conversation were not forwarded to the expert. No one identified the voice appearing on such tapes as that of the accused, the complainant or the decoy customer. Only producing some script allegedly prepared, is not going to prove such recording. Learned counsel Shri Galileo Teles then would submit that the panch witnesses examined before the Court are not at all disclosing any material which would prove charges against accused no.1. Even police officers deposed only on the basis of hearsay material. The case had no support since the decoy customer, the victim and other material witnesses are not examined during trial. There is absolutely no material to show that accused no.1 was living on the earnings derived from any immoral trafficking.

6. Learned counsel Shri Teles then would submit that medical examination of the victim is also not supporting the case of prosecution. Similarly, the age of the victim is not established to consider her as a child. The doctor examined by the prosecution did not confirm the age of the victim. Apart from this, the trial Court disbelieved so-called birth certificate produced by prosecution claiming to be of the victim.

7. Shri Teles would then submit that the entire raid has been vitiated since the raid and the investigation has been carried out by the officers of C.I.D. without any authorisation to them under Section 13 of Immoral Traffic (Prevention) Act, and, therefore, conviction of the appellant/accused no.1 requires interference.

8. Mr Faldessai, learned Additional Public Prosecutor while dealing with the last arguments of Advocate Teles regarding authority of the C.I.D to investigate matters under the Immoral Traffic (Prevention) Act, produced Notifications dated 12.03.1996 and 12.10.1998 issued by the Home Department of Government of Goa. By these Notifications and specifically the one dated 12.10.1998, the Superintendent of Police, C.I.D., Panaji, Deputy Superintendent of Police, C.I.D., Crime Branch, Panaji and Police Inspector, C.I.D., Crime Branch, Panaji are authorised and notified as special police officers for dealing with the offences under Immoral Traffic (Prevention) Act, 1956.

9. Mr Faldessai on merit would submit that though victim was not examined, a specific reason has been disclosed for not examining her which is a genuine reason and therefore on that count no prejudice is caused to the accused. However, he fairly submitted that no examination of decoy customer without giving any specific reason cannot be defended. However, he submitted that learned Children's Court on the basis of material placed before it, arrived at a conclusion

and though any other view is possible, the findings ought not to be disturbed. According to him, learned Children's Court had benefit of recording testimonies of witnesses and observing their demeanour as well as that of the accused. On this ground, reasons or observations of the learned trial Court could be justified as the offence is quite serious in nature. The discrepancies could not come in the way so as to overthrow the findings of the trial Court.

10. Rival contentions fall for determination.

11. The points are as under:-

- i) Whether the appellant/accused no.1 induced and forced the minor victim into prostitution;*
- ii) Whether accused no.1 was living wholly or partly on the earnings of the prostitution of the victim girl;*
- iii) Whether accused no.1 committed any child sexual abuse or child sexual exploitation thereby forcing her into commercial sexual exploitation.*

12. The offences alleged against accused no.1 are under Section 4 and 5 of Immoral Traffic (Prevention) Act, 1956. First of all, it is the duty of prosecution to prove that the person/accused above the age of 18 years is living with or to be habitually in the company of a prostitute. Secondly, such person/accused exercises control, direction or influence over the movements of the prostitute in such a manner as to show that such person is aiding, abetting or compelling his

prostitution. Thirdly, such person/accused is proved to be acting as a tout or pimp on behalf of a prostitute. Finally, if all the above 3 are established, it shall be presumed unless the contrary is proved, that such person is knowingly living on the earnings of prostitution of other person within the meaning of sub-section (1).

13. Section 5 of Immoral Traffic (Prevention) Act deals with procurement, inducing or taking a person for the sake of prostitution. Such procurement, attempt to procure is with or without consent for the purpose of prostitution. Secondly, the inducement to go from any place with the intent that such person may for the prostitution become the inmate of or frequent, a brothel. Thirdly, who also takes or attempt to take a person from one place to another with a view to carry on or being brought up to carry on prostitution. Lastly, causes or induces a person to carry on prostitution. The proviso postulates that if a person in respect of whom an offence committed under sub-section (1), is a child, the punishment provided under said section shall extend to rigorous imprisonment for a term of not less than seven years but may extend to life.

14. Section 8(2) of Goa Children's Act provides punishment in connection with child abuse or sexual assault. Section 9(4) of Goa Children's Act deals with any person who exploit a child for commercial sexual exploitation shall be liable to pay a penalty which

may extend to ₹1,00,000/- and imprisonment for a term which may extend to seven years.

15. Section 2(m) of Goa Children's Act defines child abuse and reads thus:-

'(m) "Child abuse" refers to the maltreatment, whether habitual or not, of the child which includes any of the following:-

- (i) psychological and physical abuse, neglect, cruelty, sexual abuse and emotional maltreatment;*
- (ii) any act by deeds or words which debases, degrades or demeans the intrinsic worth and dignity of a child as a human being;*
- (iii) unreasonable deprivation of his basic needs for survival such as food and shelter; or failure to immediately give medical treatment to an injured child resulting in serious impairment of his growth and development or in his permanent incapacity or death;*

16. Keeping in mind above provisions of law, evidence adduced before the trial Court by prosecution witnesses needs to be reassessed as various challenges have been thrown to the findings of the learned trial Court in the grounds set out in the memo of appeal.

17. Firstly, the amended grounds raising authority of Crime Branch Police to investigate and file charge-sheet, require to be dealt with as such authority has been challenged on the ground that the

Investigating Officer was not a special police officer notified under Section 13 of Immoral Traffic (Prevention) Act, 1956.

18. Mr Faldessai has produced Notification dated 12.10.1998 issued by Home Department, Government of Goa which clearly shows that in exercise of the powers conferred by sub-section (1) of Section 13 of Immoral Traffic (Prevention) Act, 1956, Government of Goa hereby appoint Superintendent of Police, C.I.D., Panaji, Deputy Superintendent of Police, C.I.D., Crime Branch, Panaji and Police Inspector, C.I.D. Crime Branch, Panaji as special police officers for dealing with offences under the said Act throughout the State of Goa with immediate effect.

19. The present investigations started in 2011 on the basis of complaint registered at C.I.D. Crime Branch, Panaji and therefore objections raised in this regard are of no substance. The Investigating Officer including PW7-Pravinkumar Vast was duly authorised being the Police Inspector, C.I.D., Crime Branch. No doubt PW7/Pravinkumar Vast deposed that in the year 2004 he was attached to C.I.D. Crime Branch as Sub-Inspector. However, when he took over investigations from PI Ezilda D'Souza, examined as PW10, he was working as Police Inspector of Crime Branch. Mr Faldessai pointed out that PW7-Pravinkumar Vast was promoted to the post of Police Inspector on 18.03.2005 and only thereafter he took over the investigation in this matter. With this clarification and the

Notification produced on record, objections raised with regard to investigation carried out by these officers without any authority, has no substance. The Notification dated 12.10.1998 clearly shows that Police Inspector, C.I.D. Crime Branch was designated as special police officer under Section 13(1) of Immoral Traffic (Prevention) Act, 1956.

20. Prosecution examined, in all, eleven witnesses during trial. PW1 is Arunedra Kumar Pandey who is the complainant in the present matter. He deposed that he is running a NGO by name ARZ and specifically dealing with anti-human trafficking and exploitation on commercial basis. He was informed by one lady that one minor girl(victim) is being dedicated to Goddess Yallama and was forced into prostitution, by her own mother Shanta Chodankar, i.e. appellant herein. PW1 received this information on 29.09.2004. He recorded the conversation with an audio recorder. He then made written complaint to SP, Crime on 30.09.2004 and handed over the cassette containing such recording. On the day of complaint, he along with one Santosh who worked as motorcycle pilot, went to the Crime Branch and introduced him to a person by name Sagar in order to show the house of accused no.1 to said Sagar. The Crime Branch asked him to give transcription of the recorded conversation in English. Accordingly, he transcribed it in Hindi and also in English and handed it over to Crime Branch. When so-called cassette was played during recording of deposition of PW1, it was found that the audio was not clear and conversation recorded therein was not audible

as there was lot of disturbance. The complaint is at Exhibit 25 and so-called transcription is in Hindi and English. Admittedly, these transcriptions are of no use when the audio cassette is not audible and no conversation recorded therein could be heard when it was played in the open Court. Similarly, this cassette was not forwarded to CFSL to find out whether such cassette is genuine and to find out the contents therein. Similarly, voice specimen of the complainant and the so-called lady was not collected by the prosecution for sending it to expert for opinion. Thus, such conversation and the so-called transcripts produced by PW1 are of no use in the present matter.

21. PW2-Maria Angelica D'Souza claimed that she acted as panch witness on 21.12.2004 at the request of PW10-PI Ezilda D'Souza. Apart from other police officers, the victim girl was present at Katem Baina. The said victim girl showed one room as the place of offence wherein she was sexually assaulted by one person named Shiv and that too at the instance of her own mother in the month of July. This evidence of PW2 is of no assistance for the simple reason that, no sketch is attached along with panchanama of the said room and further, the victim girl was not examined before the trial Court to confirm her presence at the said panchanama and showing the place of alleged incident.

22. PW3-Dr Andre Fernandes deposed that he examined the victim at the request of C.I.D., Crime Branch and opined that:- 1. *There is*

no evidence of recent forcible sexual intercourse. 2. The victim is habituated for sexual intercourse.

23. PW3-Dr Andre then claimed that he examined the victim for assessment of her age and opined that based on her physical, dental and radiological examination, the age of victim was 15 years +/- 6 months as on 01.10.2004.

24. This evidence of Dr Andre is not at all helpful to the prosecution as he clearly opined that there is no evidence of recent forceful sexual intercourse. Similarly, the age of the victim, according to him, is around 15 years +/- 6 months as on 01.10.2004. First of all, the report regarding age assessment by a medical practitioner has to be considered keeping in mind the period of two years +/- on both sides as it is well settled that definite age of the victim only on the basis of physical, dental and radiological examination cannot be assessed.

25. It is well settled that this is neither feasible nor admissible to lay down an abstract formula to determine the age of a person. The date of birth is to be determined on the basis of material on record and on appreciation of evidence adduced by the authorities. The medical evidence as to the age of person, though a very useful guiding factor, but not conclusive and is to be considered along with other cogent and convincing evidence.

26. Admittedly, the learned trial Court disbelieved and discarded the birth certificate produced by the prosecution to show her actual date of birth. Thus, there is no other material on record to support the medical opinion about the age of the victim. If such opinion is with a rider of 2 years +/- on either side, the opinion given by the doctor that the victim was about 15 years old could be considered with +2 years which goes up to 17 years. It is well settled that the benefit of such opinion has to be construed as favourable to the accused and therefore if it is considered as around 17 years, the provisions of Goa Children's Act would not attract for the simple reason that the definition of child under Section 2(d) reads thus:-

'(d)"Child" means any person who has not completed eighteen years of age unless any other law in force specifies otherwise or unless otherwise indicated in specific provisions in this Act:

– Provided that in so far as a victim in an offence of rape is concerned, "child" shall mean any person who has not completed sixteen years of age.'

27. Thus, where the offence of rape is concerned, age of child, as defined above, is a person who has not completed 16 years of age.

28. If the opinion of PW3-Dr Andre regarding age of the child is considered as 15 years and by adding two years to it which normally requires to be considered, the age of the victim is certainly crossing 16 years as on the date of alleged offence and, thus, she cannot be considered as child as far as the offence of rape is concerned.

Consequently, the offence alleged against accused no.1/appellant herein for child abuse, sexual exploitation under the Goa Children's Act including sexual abuse or sexual exploitation, falls flat.

29. PW4-Anita Haladi acted as panch witness in 2 panchanamas along with one Sagar Raikar on 30.09.2004. First panchanama was conducted in the office Crime Branch where the complainant along with filing of the complaint, produced a photograph and a cassette along with the transcription. During her evidence as found on page no.3, the audio cassette was played in the Court and found not audible and there was lot of disturbance. Thus, such panchanama along with so-called audio cassette has not been proved at all.

30. PW4-Anita then claimed that she acted as panch witness in the second panchanama on the same day which started at 5:00PM. They were explained that they will have to proceed to Katem Baina, where Sagar who was acting as a decoy would be taken by Santosh Redkar on a motorcycle to clinch the deal. 10 notes of ₹500/- were handed over to Sagar in order to give it to accused no.1. One audio recorder was also placed with Sagar to record conversation between him and accused no.1. Accordingly, the decoy customer Sagar along with motorcycle pilot Santosh left office of Crime Branch, Dona Paula in a Maruti Van whereas the other team members along with Anita/PW4 proceeded in a police jeep.

31. PW4 then deposed that she along with other police officers were waiting near Housing Board Colony in Baina. After some time the Maruti van came and stopped. Sagar (decoy) along with one girl came to them. The said girl/victim was handed over to Juliana Lohar, who was the Social Worker from NGO 'ARZ', for the purpose of counselling.

32. PW4 then deposed that Sagar (decoy) informed that he succeeded in making a deal with accused no.1 and procured the victim for ₹5000/-. Thereafter, she along with police officers proceeded to the resident of accused no.1. Sagar (decoy customer) showed the directions. They reached near the house but found it locked. After waiting for some time one lady approached and unlocked the door. On asking her name she identified herself as the accused no.1. The police then disclosed their purpose of visit and thereafter accused no.1 produced 10 notes of ₹500/- each which were found matching with the serial numbers handed over to Sagar.

33. PW4 then deposed that Sagar then produced a cassette on which conversation between him and accused no.1 was recorded. This cassette was packed and sealed. The currency notes were also separately packed and sealed under the panchanama.

34. It is also interesting to note that when this second cassette containing so-called conversation between Sagar (decoy) and accused

no.1 was allegedly recorded, was found to be not audible when played in the Court. Thus, it shows that so-called conversation recorded between Sagar (decoy) and accused no.1 has not been proved at all. Admittedly, Sagar (decoy) was not examined before the Court. Only the recovery of some cash amount from the possession of accused is not sufficient to establish that such cash was handed over to her for the purpose of providing the victim for prostitution.

35. PW5-Julianna Lohar only deposed that she was present near the Housing Board Colony at Baina and she was introduced to the victim girl and thereafter she counselled the victim. Her evidence is of no help to the prosecution in the present matter. PW6 is Sub-Registrar of the office of Registrar of Births and Deaths, Mormugao who produced a copy of birth certificate. However, it was discarded by the trial Court which has not been challenged.

36. PW7-Pravinkumar Vast, P.I. Crime, C.I.D, PW9-Omprakash Kudtarkar, DySP, C.I.D. Crime Branch, PW10-Ezilda D'Souza, PI at Crime Branch, and the Investigating Officer at the initial stage, and finally, PW11-Bossuet Silva, PI at Crime Branch were examined. However, testimonies of these witnesses are only on the basis of alleged disclosures made to them by the decoy customer Sagar and the victim who are not examined in the present matter. Admittedly, none of these officers were present along with Sagar-decoy when the so-called deal for procuring victim child for prostitution was going on. The

tape-recorder conversation of so-called conversation has not been established at all. The cross-examination of these witnesses clearly goes to show that what they deposed before the Court is only on the basis of information received either from the complainant or from the decoy customer. The material witnesses were not examined by the prosecution. The reason for not examining the victim could be justified as by that time she was already married and by calling her to depose would have created problems in her married life. However, there is no justification for not examining Sagar (decoy) who was the main person for the deal. There is absolutely no other evidence produced on record to show first of all that, accused no.1 was dealing in any prostitution and that she was living on the income derived from prostitution. The victim was not examined before the Court and therefore, the best possible evidence is kept away from the Court. The intention of the prosecution by not examining victim could be more convincing. However, it has to be kept in mind that the present matter is a criminal prosecution and the offences alleged against accused no.1 are serious in nature. On conviction, the imprisonment could go up to life. In such circumstances, non-examination of two important witnesses would certainly hamper the entire prosecution case. The police officers though disclosed in detail, their information is only hearsay and such material cannot form basis for conviction.

37. Learned trial Court has completely missed out the basic ingredients of the criminal jurisprudence which require prosecution to

produce primary evidence before the Court. Similarly, evidence on the basis of hearsay could not have been accepted to prove such serious charges. Thus, the observations of the learned trial Court are not only perverse, but need to be discarded as there is no evidence to establish guilt of accused no.1. Only recovery of cash amount from the possession of accused no.1 would not presume or prove that she was living on the income from prostitution.

38. The material brought on record during trial is, therefore, not at all convincing and sufficient enough to prove charges under Section 4 and 5 of Immoral Traffic (Prevention) Act as well as Section 8(2) and 9(4) of the Goa Children's Act.

39. In the result, the appeal succeeds and, hence, order:

ORDER

- i) Appeal stands allowed.
- ii) The judgment and conviction passed by the learned trial Court dated 06.04.2017 in Special Case No.44/2011 is hereby quashed and set aside.
- iii) The appellant/accused no.1 stands acquitted for the offences punishable under Section 4 and 5 of Immoral Traffic (Prevention) Act and Section 2(m) punishable under Section 8(2) and Section 9(4) of Goa Children's Act.

BHARAT P. DESHPANDE, J.