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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 13.03.2023

Pronounced on: 06.04.2023

+ **CRL.A. 153/2009**

ASHA AND ORS.

..... Appellants

Through: Mr. Archit Upadhyay, Advocate
(DHCLSC) with Ms. Charu
Sharma, Advocate alongwith
appellant no.1

versus

STATE

..... Respondent

Through: Mr. Naresh Kumar Chahar, APP
for the State with SI Pushpa, P.S.
Jama Masjid.

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The present appeal has been filed by the appellants namely Asha and Rakesh, under Section 374 of the Code of Criminal Procedure, 1973 ('Cr.P.C') challenging the impugned judgment dated 28.01.2009 and order on sentence dated 29.01.2009 passed by learned Additional Sessions Judge-01, Central, Tis Hazari Courts, Delhi ('Trial Court') in Sessions Case 260/07, arising out of FIR No. 384/2004, registered at Police Station Jama Masjid under Sections 366/376/368/120B/34 of Indian Penal Code, 1860 ('IPC') and Sections 3/4/5/6 of The Immoral Traffic (Prevention) Act, 1956 ('ITP Act'), whereby learned Trial Court

convicted both the appellants for offences punishable under Sections 3, 4 and 5 of ITP Act. By virtue of order on sentence dated 29.01.2009, the appellants were sentenced to undergo rigorous imprisonment for three years and pay fine of Rs.2000/- each, and in default, to undergo simple imprisonment for two months, for the offence punishable under Section 3 of ITP Act; to undergo rigorous imprisonment for two years and pay fine of Rs.1,000/- each, and in default, to undergo simple imprisonment for one month, for the offence punishable under Section 4 of ITP Act. They were further sentenced to undergo rigorous imprisonment for three years and pay fine of Rs.2,000/-, and in default, to undergo simple imprisonment for two months, for the offence punishable under Section 5 of ITP Act.

2. It is pertinent to mention here that appellant no. 2, during the pendency of the present appeal, had unfortunately passed away and accordingly the proceedings against him stood abated *vide* order dated 13.02.2023.

3. The case of prosecution is that appellants were living on the earnings of prostitution and were running a 'brothel' at their residence with a number of girls indulging in prostitution.

4. Briefly stated, facts of the present case are that the victim 'X', a 19 years old girl, used to work as a nurse in Calcutta. It was alleged that on 06.12.2004, her neighbor Deepak had promised to get her a respectable job in Delhi and she had accompanied him to Delhi where he had kept her at a guest house in old Delhi area and had repeatedly raped her. When she had insisted on getting a job as nurse, he had taken her to appellant no. 2 i.e. Rakesh at Sector 7, Rohini, Delhi, where she was

forced to indulge in prostitution by Rakesh and his wife/appellant no. 1 i.e. Asha. Upon resistance, objection and refusal of victim to indulge in such activities, the appellants had told her that they had purchased her and she would have to follow their command. On 14.12.2004 at about 10 AM, the victim had run away from the house of appellants and had requested one auto driver to drop her at Railway Station, but instead, he had dropped her at some Gurudwara, and the Gurudwara officials had handed over her to the police. On the basis of her statement, present FIR was registered against the appellants and they were arrested. After completion of investigation, charge-sheet was filed under Sections 366/376/368/120B/34 of IPC and Section 3/4/5/6 of ITP Act, and charges were framed for offences punishable under Sections 366/368/34 of IPC and Sections 3/4/5/6 of ITP Act.

5. During the course of trial, the prosecution examined 12 witnesses. After completion of trial, the appellants were convicted *vide* impugned judgment as mentioned in the preceding paragraphs, leading to the filing of present appeal.

6. Learned counsel for the appellants states that fair investigation has not been carried out by the Investigating Officer in the present case. The attention of this Court has been drawn to the fact that when statement of victim was recorded under Section 164 Cr.P.C, an official interpreter had to be brought to the Court which took 20 days, therefore, it is stated that suspicion arises as to how the police was able to arrange any interpreter when they were investigating the matter on the same day, when the statement of victim was recorded by police. It is also contended by learned counsel for appellants that residential address

where the victim had been allegedly kept by the appellants does not even exist in reality. It was further submitted that there was subsequent interpolation in the FIR and attention of this Court was also drawn to the statement of PW-7 i.e. Head Constable Vinod Kumar in this regard, who had admitted in his statement that Sections 3/4/5/6 of ITP Act were added later on.

7. Learned APP for the State, on the other hand, has drawn attention of this Court to question number 3, 6 and 17 of the statement of accused under Section 313 Cr.P.C. and states that the accused, in answer to question no. 17, has admitted that the victim had stayed in her house and as to how police had reached there. He also draws attention of this Court to statement of PW-2 regarding manner of arrest of the appellants. It is stated that impugned judgment and order does not suffer from any infirmity or illegality.

8. This Court has heard arguments addressed by both the sides at length, and has gone through the entire material available on record.

9. The impugned judgment dated 28.01.2009 has also been perused and the operative portion of it is reproduced as under:

“28. In view of the above discussion, I am of the opinion that prosecution has been able to prove its case against the accused persons that accused persons had been allowing their premises i.e. F-19/18, Sector 15, Rohini, as brothel and were also living on the earning of prostitution by charging from the customers for having sex with the complainant and retaining the money with them and had procured the complainant after she was brought to Delhi from Kolkata by one Deepak who left her with them. Since there is no evidence against these accused persons that they had abducted the complainant with intention that she

may be forced or seduced to illicit intercourse or that they had concealed or confined her with the knowledge that she had been abducted by Deepak nor requirements of Sec.6 of IP Act are satisfied, both the accused are acquitted of the charge for the offence punishable under Section 366/368 IPC and under Sec.6 of ITP Act.

29. Thus, both the accused persons are held guilty for the offence punishable under Sec 3, 4, and 5 of ITP Act and convicted accordingly.”

10. In the present case, learned Trial Court, on the basis of the statement of witnesses, has convicted both the appellants for offences punishable under Sections 3/4/5 of ITP Act on the ground that prosecution had been able to prove its case against the appellants beyond reasonable doubt, as there were no discrepancies in the statements of the witnesses or their possibility of false implication by the victim. It was also held that since the statement of victim was found trustworthy, no corroboration was required for the purpose of convicting the appellants.

11. The contention of learned counsel for the appellants that case of the prosecution is untrustworthy since victim did not understand Hindi, therefore, how could the Investigating Officer have recorded her statement on the first day when she had come to the police station, needs consideration in the facts and circumstances of the case.

12. As per the prosecution story, the victim did not know Hindi and knew only Bangla and for that reason, for recording her statement under Section 164 Cr.P.C, a translator/interpreter was called by the concerned Magistrate. It is also not disputed that Investigating Officer did not know

Bangla and there is no explanation as to how could the Investigating Officer record the statement of the victim.

13. When the victim was produced before the learned Magistrate for the purpose of recording her statement under Section 164 Cr.P.C for the first time on 17.12.2004 by Investigating Officer, it was observed that the victim could understand only Bangla and did not understand Hindi. Therefore, the Investigating Officer was directed to arrange an interpreter. When her statement under Section 164 Cr.P.C was recorded, the same was recorded through PW-1 Ms. Nandita Basu, who was the interpreter. Thereafter, when the victim had appeared before the learned Trial Court for the purpose of recording her testimony on 01.10.2005, she had informed the Court that she could understand and speak Hindi and therefore, the Court had dispensed with requirement of services of the interpreter. It is not mentioned by the Investigating Officer in his statement as to how he had recorded the statement of victim on the very first day if she could not have understood or was unable to convey herself in Hindi.

14. Further, as per the prosecution, the victim had run away from the house of appellants and had been dropped at Gurudwara Sis Ganj Sahib and two *sewadars* of the Gurudwara had brought her to the Police Station. This indicates that the victim must have narrated her story to *sewadars* of Gurudwara, who in turn, must have informed the police. However, the investigation is silent as to how she was able to communicate with the *sewadars* about the complaint or the offence in question. The investigation is also silent regarding non-examination of two *sewadars* of the Gurudwara, even when the name and location of the

Gurudwara was already known to the investigating agency. They would have been crucial witnesses to depose in this case as to how and what was communicated by the victim to them about the present case.

15. It is not disputed that the victim, when she was produced before learned Magistrate for the purpose of recording her statement under Section 164 Cr.P.C was not conversant with Hindi and it is so recorded in the proceedings when the application for recording her statement under Section 164 Cr.P.C was moved. The statement of learned Magistrate, examined as PW-12, reveals that he had stated in his examination-in-chief that on the day when the victim was produced before him, it was revealed that she did not understand Hindi and could understand only Bangla and therefore, Investigating Officer was directed to arrange for an interpreter and her statement was finally recorded on 04.01.2005, when IO could arrange an interpreter. PW-1, who is the interpreter also supported the statement of PW-12 i.e. learned Magistrate, that the victim could understand only Bangla language and she could not speak or understand Hindi or English and therefore, PW-1 had interpreted her statement, and that whatever the victim had stated when her statement under Section 164 Cr.P.C was recorded, she had translated it from Bangla to Hindi. Similarly, another doubt in the prosecution story is as to how on 22.12.2004, the statement of victim had allegedly been recorded in Hindi under Section 161 Cr.P.C by PW-8, though she did not know how to speak or write Hindi.

16. PW-9 i.e. Sub-Inspector Abdul Kaleem, in his cross-examination, had deposed that the victim was speaking in Hindi when he had taken her to arrest appellant Asha on 15.12.2004. It is strange that on

15.12.2004, victim was speaking in Hindi with PW-9, but when she was produced before learned Magistrate on 16.12.2004 for recording her statement under Section 164 Cr.P.C, it was observed by learned Magistrate that she neither understood Hindi nor English and it was pointed out by Investigating Officer himself.

17. Thus, *it is clear from the record* that on the date when the victim was produced before the police for the first time and before learned Magistrate for the first time, she did not understand Hindi, however, it is not clear as to how she could communicate her complaint either to the *sewadars* of the Gurudwara who have not been examined, or to the police officials.

18. This Court also takes note of several other discrepancies visible on record, which makes the story of prosecution doubtful.

19. The statement of victim in her cross-examination also reveals that she had narrated all the facts of the present case and her confinement etc. completely to the auto driver. It is not clear as to when she did not know Hindi at all, how she was able to convey everything to the auto driver, or later on to the *sewadars* of the Gurudwara. It is also not clear that though she stated that she had taken nothing from the house of the appellants and they had not paid her the money that they were charging from the customers who were having sex with her against her consent despite her requesting them to give the money to her, how she was in possession of money that she had given to the auto driver. She admits in her cross-examination that she had taken nothing from the house of the appellants and was in her normal clothes when she had run away from their home.

20. The statement of PW-8 i.e. Inspector Giri Raj Singh could not have been read in evidence who was a crucial witness, being one who connected the chain of events, since his cross-examination was deferred on 02.02.2006 but he did not appear before the Court for the purpose of cross-examination, and there is no noting on record regarding closing of his evidence. It is also not clear from the testimony of PW-9 i.e. Sub-Inspector Abdul Kaleem as to how the victim led them to the house of the appellants or identified it, since she did not know the address of their house and only knew the sector. PW-2 i.e. Constable Champa stated that they had gone to *Sector 17, Rohini* probably where the victim identified the house and the appellant Asha. The other witnesses state that it was *Sector 7, Rohini*. However, nobody knew the address of the house in question or the existence of that house in the said sector. The victim also stated that she did not know about the location of the house or its vicinity since she was never allowed to come out of the house and she only slept in a room in the house, and thus, it is not clear as to how she was able to lead the police to the house in question.

21. It is also strange that when appellant Asha was arrested at the pointing out of the house by the victim, her husband Rakesh who stays in the same house, was arrested on secret information of a secret informer from a road at Rohini, as stated in the statement of the witnesses. The witnesses who had arrested appellant Asha did not remember who else was present inside the house of Asha at the time of her arrest. It is also very strange for the reason since her personal search and arrest memo were also prepared at the spot itself, inside her house, and her three children also lived with her. She lived in a thickly

populated area of Delhi, but, neither there is any witness to the same nor the police witnesses remember anything in this regard.

22. In the present FIR, Section 3, 4, 5 and 6 of ITP Act had been added with a pencil and this addition was not found in the carbon copy of the FIR which had been observed by the learned Trial Court, and the concerned witness stated that he had no knowledge as to who had made these entries and had added these sections in the FIR. He stated that the sections mentioned in the *rukka* were only mentioned at the time of preparation of FIR. This interpolation has not been explained by the prosecution.

23. There are discrepancies in the statement of PW-2 and other witnesses as she on one hand stated that children of the appellant Asha were present inside the house when she was arrested, but PW-9 stated to the contrary. However, PW-2 was unable to inform the Court as to whether signatures of the relatives or neighbours of appellant Asha were taken on the arrest memo or not.

24. To the contrary, case of appellants is that the victim had been dropped at their house by one Deepak with whom the victim had come to Delhi since she had no other place to live and she was looking for a house. As per victim herself, she had stayed in the house of appellants only from 11.12.2004 to 13.12.2004 as she had run away from their home on 14.12.2004. It is also the story, as per complaint of the victim, that the appellants were husband and wife and had three school going children and also had two other girls living in their house who were also being used for the purpose of prostitution. However, there is no mention regarding any investigation being conducted in this regard. Further,

though the victim knew about the number of children and the standard in which they were studying, she could give no description of those two girls or their names in any of her statement. The investigation is completely silent on this aspect as well. The defence of the appellants is that they had only permitted the victim to stay in their house for two days and when she had asked for some financial help and they could not help her, they had been falsely implicated in this case. It is also their case that victim knew them in Delhi and therefore, she had given their names and phone numbers to police and thereafter, the police had called them on their phone, had reached them and had falsely implicated them in the present case.

25. The discrepancies in the prosecution story and the inconsistencies and the gaps in the investigation as well as the statements of the witnesses points out that the *prosecution has not been able to explain, beyond reasonable doubt*, as to how a person who did not know Hindi was able to make a detailed statement to them which was recorded under Section 161 Cr.P.C, or as to how the complainant was able to communicate herself to the auto driver or *sewadars* of the Gurudwara and to the other subsequent police officials without the aid of any interpreter, especially so, as when she was produced before learned Magistrate, she did not understand Hindi or English at all and knew only Bangla as clearly mentioned in the statement of PW-1 and PW-12. The other discrepancies and gaps in the story of the prosecution have already been discussed in detail in the preceding paragraphs which persuade this Court to give *benefit of doubt* to the appellants.

26. Also, the appellants were convicted under Section 3 i.e. punishment for keeping a brothel or allowing premises to be used as a brothel, Section 4 i.e. punishment for living on the earnings of prostitution and Section 5 i.e. procuring, inducing or taking person for the sake of prostitution, of ITP Act. To make things fall in place, it would also be appropriate to consider the definition of the terms “brothel” and “prostitution” as defined under Section 2 of ITP Act, which read as under:

“2. (a) "**brothel**" includes any house, room, conveyance or place or any portion of any house, room, conveyance or place, which is used for purposes of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes;

(f) "**prostitution**" means the sexual exploitation or abuse of persons for commercial purposes, and the expression "prostitute" shall be construed accordingly;”

27. For the charge of prostitution to sustain, the prosecution was to prove the acts of ‘sexual exploitation’, committed by the accused persons for ‘commercial purposes’. It was also to be proved that the house in question fell under the meaning of ‘brothel’ and was being used for sexual exploitation or abuse for some ‘gain’.

28. In the present case, there is no evidence on record, in the form of any money trail, to show that appellants had sexually exploited the victim for any commercial purpose or that they had gained out of the alleged use of house as brothel so as to sustain the charge of living on the earnings of prostitution or of running a brothel. As already observed

in preceding discussion, the sexual exploitation or abuse of the victim could also not be proved beyond reasonable doubt by the prosecution. Moreover, identity of the two other girls who were allegedly being kept in the house of the appellants for the purpose of prostitution as alleged by the victim in the present case could neither be established and nor even finds mention in the entire investigation or chargesheet filed by the prosecution.

29. Thus, considering the overall facts and circumstances of the case as discussed in the preceding paragraphs, this Court is of the view that the appellants are entitled to benefit of doubt since the evidence brought on record was insufficient to return a finding of guilt against them for offences punishable under Sections 3, 4 and 5 of ITP Act.

30. In view thereof, the impugned judgment dated 28.01.2009 and order on sentence dated 29.01.2009 passed by learned Additional Sessions Judge 01, (Central), Tis Hazari Courts, Delhi are set aside and the appellant no. 1 is acquitted of the charged offences. Since appellant no. 2 has passed away, proceedings against him stand abated.

31. Bail bond, if any, stands cancelled. Surety stands discharged.

32. Accordingly, the present appeal is allowed.

SWARANA KANTA SHARMA, J

APRIL 06, 2023/kss