

(2011) 09 CAL CK 0086
In the Calcutta High Court
Case No : C.R.A. No. 398 of 2008

Asha Tamang

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 28-09-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 212(2), 221, 313
Evidence Act, 1872 — Section 114
Juvenile Justice (Care and Protection of Children) Act, 2000 — Section 49(1)
Penal Code, 1860 (IPC) — Section 362, 366, 366B, 373

Citation : (2012) 1 CHN 465

Hon'ble Judges : Raghunath Ray, J; Girish Chandra Gupta, J

Bench : Division Bench

Advocate : Saswata Gopal Mukherjee, for the Appellant; Siladitya Sanyal and Soumik Ganguly for the State, for the Respondent

Final Decision : Dismissed

Judgement

Raghunath Ray, J.—This appeal is directed against the judgment dated 12.5.2008 passed by the learned Additional Sessions Judge, VIth Fast Track Court, Bichar Bhawan, Calcutta in Sessions Trial No. 3 of September, 2007 arising out of Sessions case No. 75 of 2005. By the said impugned Judgment, the learned Trial Court convicted the appellant Asha Tamang u/s 373 IPC. She was sentenced to suffer R.I. for 8 years and to pay a fine of Rs. 3000/- in default whereof to suffer rigorous imprisonment for one year more vide order dated 13.5.2008. She was, however, acquitted of the charge u/s 366B of the Indian Penal Code. Factual matrix leading to filing of this appeal may be capsulised as under:

Maya Tamang, a minor girl was brought to Calcutta from Nepal and was forced to prostitution at the instance of the appellant Asha Tamang in her brothel at 5/2, Durga Charan Mitra Street, Calcutta. The Immoral Traffic section of the Detective Department, Lalbazar, Kolkata conducted a raid to work out its source information on the premises in question and the minor victim Maya Tamang was rescued from a room of the brothel in the presence of Asha Tamang, the

appellant. On the basis of the victim Maya's statement recorded by the Police Bartala P.S. Case No. 98 dated 15.6.2007 u/s 366B/373 IPC was registered against the appellant Asha Tamang for investigation. In course of investigation, the minor victim was medically examined and it was opined by the doctor that the victim was habituated to sexual intercourses. On her ossification test, the doctor opined that she was aged about 15 years but below 17 years on the date of radiological examination.

2. Several witnesses were examined and their statements were recorded u/s 161 Cr. PC by the Investigating Agency. It transpired from the Municipal record in course of investigation that premises wherefrom the victim girl was recovered was 5/2, D. C. Mitra Street, Calcutta. However, at the preliminary stage when the raid was conducted the premises was identified as 5, D. C. Mitra Street which was also reflected in the victim's statement as also in the seizure list. Accordingly, the relevant P.S. Case was registered indicating that the victim was rescued from a brothel at 5, D. C. Mitra Street, Calcutta. On completion of the investigation, the appellant, Asha Tamang was chargesheeted u/s 366B/373 IPC.

3. Upon consideration of the ocular evidence adduced by as many as 10 prosecution witnesses including Maya Tamang, the victim girl and also other relevant papers produced in the shape of Exhibits (Ext. 1-series, 2-series, 3-series, 4-series, 5 and 6) as also the defence case of denial and false implication gathered through the trend of cross-examination and accused's examination u/s 313 Cr. PC, the learned Trial Judge convicted the appellant for commission of an offence u/s 373 IPC and also imposed the sentence as already indicated. She was, however, not found guilty of the charge u/s 366B IPC and was, accordingly, acquitted of the said charge.

4. The convict appellant felt aggrieved and preferred the present appeal assailing the judgment and order mainly on the ground that the prosecution failed to establish the alleged place of occurrence as also the place of recovery of the alleged victim vis-à-vis presence of the appellant at the P.O. having obtained possession of the victim.

5. Appearing in support of the appeal, it is argued by Mr. Saswata Gopal Mukherjee, learned Counsel that there was no evidence on record to show that the victim was procured by the appellant and she forced her for prostitution. That apart, since no seizure witness has come forward to support the case of the prosecution, the entire search and seizure is extremely doubtful and also belies the prosecution claim that the appellant was present at the alleged P.O. at the material point of time. According to him, whenever PWs 9 and 10 have clearly stated that the search was conducted at 5, Durga Charan Mitra Street, Calcutta, the entire prosecution case is doubtful and in such circumstances, it would enure to the benefit of the defence.

6. Mr. Mukherjee has also challenged the legality and/or admissibility of the report of the ossification test in evidence since the age of the victim cannot be

determined conclusively from the said report of the ossification test. In this context, he has also invited our attention to the victim's statement wherein she herself has divulged her age as 17 years. According to him, the determination of age by the Police is not legal and section 49 of Child Care Protection Act would come into play. Referring to various portions of the victim's testimony as PW 1, it is submitted by Mr. Mukherjee that her credibility can easily be impeached because of intrinsic inconsistencies in her evidence before the Court.

7. Relying upon the paragraph 91 of the ruling reported in 2010(3) SCC (Cri) 1 [Selvi vs. State of Andhra Pradesh], it is argued by Mr. Mukherjee that even though the circumstances leading to recovery of the victim from the premises in question have not been explained by the appellant during her examination u/s 313 Cr. PC, no adverse inference can be drawn for her silence on that score for the simple reason that as per the scheme of section 313 Cr. PC as also Proviso (b) to section 315(1) Cr. PC adverse inference cannot be drawn on account of the accused person's silence during trial. According to him, in fact, the accused has the right to refuse to answer any question that may render him liable for punishment. It is, therefore, forcefully submitted by him that the Court should not draw any adverse inference from the fact of accused person's silence.

8. It is next argued by him that even though the father of the victim was available in Calcutta, he was not examined to prove the age of the victim. It is, therefore, contended by him that failure to tender such a material witness by the prosecution, in fact, tantamounts to withholding the best evidence from the judicial scrutiny. In support of its contention he has referred to a ruling of the Apex Court reported in 2010(1) SCC (Cri) 1445 [Musaiddin Ahmed vs. State of Assam] wherein it is held that it is the duty of the party to lead the best evidence in its possession which can throw light on the issue in controversy. It is, therefore, submitted by him that whenever examination of the father of the victim, a material witness especially on the question of determination of his daughter's age which is the issue in controversy here has been withheld by the prosecution, this Court should draw adverse inference u/s 114 Illustration (g) of the Evidence Act, 1872.

9. It is further argued by him that since the learned Trial Judge did not find any evidence worth the name to warrant a conviction u/s 366B IPC against the appellant, she was acquitted of the charge u/s 366B IPC. In such view of the matter, this Appellate Court cannot convict the appellant on the self-same charge since the State has not preferred any appeal against such an order of acquittal. In order to strengthen his argument in this regard, Mr. Mukherjee has referred to a ruling of the Apex Court reported in 2007(3) SCC (Cri) 468 [Appa Saheb vs. State of Maharashtra]. It is held therein that power of the Appellate Court u/s 386(b)(i) of the Criminal Procedure Code is confined to cases of appeals against orders of conviction and sentence and cannot be exercised for reversing an order of acquittal passed in respect of an offence charged, while dealing with an appeal preferred by the appellant against the order of conviction in respect of another

offence charged and found proved. It is forcefully submitted by him that on the basis of the available evidence on record as the acquittal of the appellant in respect of the charge u/s 366B IPC had attained finality, the same can not be reversed in the appeal filed by the appellant challenging her conviction u/s 373 IPC.

10. It is also argued by him that the ossification test report, in fact, gives an approximate age of the victim. It would be unsafe to base conviction on her approximate age. In this context, he has sought to rely upon paragraph 6 of a ruling of the Apex Court reported in 2010(1) SCC (Cri) 917 [Gangula Mohan Reddy vs. State of Andhra Pradesh]. It appears, therefrom, that the father of the prosecutrix was not able to give the correct date of birth and it was clearly stated by the father that he was giving an approximate date without having any data. In such circumstances, it is held by the Apex Court that in a criminal case, the conviction of the appellant cannot be based on an approximate date of birth which is not supported by any record.

11. Mr. Mukherjee has, thereafter, concluded his argument by saying that in a criminal trial, the P.O. is of supreme importance and from the statement of the witnesses including the I.O., it can be said that the prosecution case since its registration is on the premise that the P.O. was located at 5, D. C. Mitra Street, Calcutta and the FIR which is the basic document in a criminal trial also speaks so. Even the seizure list too evinces that the place of recovery of the victim was inside the room on second floor of premises No. 5, D. C. Mitra Street, Calcutta-6. Formal FIR (Ext. 6) also indicates the P.O. is at 5, D. C. Mitra Street, Calcutta-6.

12. In such a situation, it is forcefully argued by him that the prosecution has miserably failed to identify the exact location of the P.O. and on this ground alone the prosecution case should be disbelieved and the appellant is entitled to an order of acquittal on the benefit of doubt.

13. Per contra such submission is strongly disputed by Mr. Sanyal, learned Counsel for the State. It is submitted by him that there are overwhelmingly strong and sufficient materials on record to establish conclusively that the appellant obtained possession of Maya Tamang, a minor girl for the purpose of prostitution on the plea of providing her with a job. She was brought to red-light area and was forced to have sexual intercourse with several persons till she was rescued from the premises of 5/2, D. C. Mitra Street, Calcutta. In fact, there is cogent and credible evidence of the victim which is also supported by her statement recorded u/s 164 Cr. PC by the learned Magistrate. According to him, minor discrepancy as to the description of the premises wherefrom the victim was rescued as 5 instead of 5/2, D. C. Mitra Street is of no consequence since the initial unintentional mistake was subsequently rectified on proper verification from the Municipal records. In such view of the matter, there is no scope to raise any controversy on the issue of identification of the P.O. in question. By referring to the testimony of a good number of PWs including the victim, it is forcefully contended by him that the identity of the place of recovery has properly been

established to the full satisfaction of the learned Trial Court as also the appellate Court and as such, he is of the view that there is no cogent ground to disturb the ultimate finding of the conviction and sentence as imposed by the learned Trial Court for commission of an offence u/s 373 IPC. In this context, he has also referred to a ruling of the Division Bench of this Court reported in 2010(2) CHN (Cal) 570 [Sudarshan Nandi & Anr. vs. State of West Bengal], wherein it is held that the discrepancy with regard to the holding No. 20, D. C. Mitra Street of the premises and 20A, D. C. Mitra Street wherefrom the search and recovery were made is of no consequence since such discrepancy does not cast any doubt on the veracity of the prosecution case.

14. Now advertent to the judgment impugned, it appears that the learned Trial Court has mainly relied on the victim's ocular testimony which stands corroborated by her statement recorded u/s 164 Cr. PC (Ext. 4). She has analysed the materials on record in its proper perspective and it is found that the victim's evidence also finds corroboration from the testimony of the members of the raiding party i.e. PWs 8, 9 and 10. Even though the seizure witnesses have not supported the case of the prosecution, she is of the view that the prosecution case has not seriously been affected since there is otherwise acceptable evidence in support of the prosecution case. In her opinion, nonexamination of the father of the victim is also not fatal for the prosecution "because the evidence of the victim is sufficient to establish the offence" and further any irregularity in investigation cannot be a cogent ground to discard the evidence of the victim. The learned Trial Court also did not attach much importance to the alleged discrepancy in describing the premises in some of the documents or in the testimony of some of the witnesses as 5, D. C. Mitra Street instead of 5/2, D. C. Mitra Street on the ground that there is specific evidence to establish that 5/2, D. C. Mitra Street is a brothel.

15. She is also of the further opinion that initial mistake has subsequently been rectified after obtaining municipal record and the relevant premises has subsequently been described as 5/2, D. C. Mitra Street instead of 5, D. C. Mitra Street. On the question of age of the victim the learned Trial Court has opined as under:

.....In this case doctor has not opined a probable age of the victim but she has specifically stated that the victim was above 15 years but she was below 17 years, which is perhaps been given keeping in view the variation of two years. No cross-examination is done to PW 5 the doctor whether she had considered regarding the variation or the margin of two years as per the medical jurisprudence. The defence has not cross examined the doctor PW 5 as to whether the victim could be above 17 years of age. So since there is no cross examination to the doctor PW 5 with regard to margin of two years as argued by the learned defence counsel, his contention that the victim is above 18 years of age keeping in view the doctor's report cannot be accepted. So from the evidence of the doctor coupled with the findings of the radiologist, prosecution

case that the victim girl is under 18 years of age cannot be disbelieved.

16. She has also invoked the presumption available in terms of Explanation-I to section 373 IPC and has observed as follows:

.....The evidence of PW 4 that 5/2, D. C. Mitra St. is a brothel remained undisputed and unchallenged. If that be the position then though the accused Asha Tamang is not a owner of the said premises but she was residing there in a room and she kept and confined the victim girl who has stated that accused used to take the money from the customers who used to have sexual intercourse with her, raises a presumption in terms of the said explanation 1 to section 373 IPC that the possession of the victim was obtained only with the intention that she would be used for the purpose of prostitution. No contrary evidence in this regard is adduced by the defence to rebut the presumption.

17. Since the basic requirement of an offence u/s 366B IPC is that the prosecution is to prove that the victim was imported into India from any country outside India, the prosecution has failed to prove the said ingredient in the present case, the learned Trial Judge has, accordingly, acquitted the appellant of the charge u/s 366B IPC. In this context, she has opined as under:

.....So in the absence of any document that the victim is a resident of Nepal and she was brought to India by the accused from Nepal and also in the absence of any oral evidence as to how and when specifically she has been brought, I find that there is no sufficient evidence to prove the charge u/s. 366B IPC because the very basic requirement as highlighted above is the victim should be brought from a country outside India.

18. Against the backdrop of rival contention of the parties, we are now to assess the afore-quoted findings of the learned Trial Judge in the light of legal evidence adduced on behalf of the prosecution. Turning to ocular evidence on record, it appears that the victim Maya Tamang herself has deposed that her house was in Nepal and she was brought in Calcutta by Asha Tamang on the plea of giving her a job. She also identifies Asha Tamang in Court and testifies that during the day time, Asha Tamang used to ask her to cook food and during night the victim was asked to do "gandha kam" against her will and further that Asha Tamang used to take the money for the said "kharap kam". She further testifies that Asha Tamang used to take money from those boys who used to have "gandha kam". She also states that when Police came and interrogated her she told that she was compelled to do "kharap kam". She also made a statement before the learned Magistrate in terms of section 164 Cr. PC. It transpires in her cross-examination that she was in the room in question for one month before the Police rescued her. Her father also met her during this period after she was rescued by the Police.

19. It is, however, admitted by her in cross-examination that there was a common bathroom for the occupants of the rooms in the floor wherefrom she was rescued. She has categorically denied the defence suggestion that she was

not brought by Asha Tamang from Nepal or that she has falsely deposed at the instruction of the I.O. Her testimony taken as a whole, therefore, inspires confidence in us. There is nothing on record even in the form of defence suggestion that this Nepali girl had any previous grudge against Asha Tamang. We do not find any cogent or convincing ground to discard her consistent testimony. As a simple minded and straight forward Nepali girl she gave her statement before the learned Magistrate recorded u/s 164 Cr. PC. In her deposition before the Court her earlier statement u/s 164 Cr. PC also stands corroborated. We, therefore, feel inclined to place implicit trust on her unimpeachable testimony.

20. Babli Banoo, PW 2 and her husband Afaq Hussain, PW 6 who were witnesses to the recovery of the victim girl from the brothel premises as also the seizure of wearing apparels of the victim have not supported the case of the prosecution and have thus retracted from their earlier statement made before the I.O. But PW 2 has admitted in her cross-examination by the prosecution that when she along with her husband came out of her room, she found some Police Officer in civil dress. Both of them have also admitted their respective signature appearing on the seizure list. It is gathered from the testimony of PW 6 that he is a resident of 5, D. C. Mitra Street in the 3rd floor and on 15.6.2007, Police called him from his room at 5, D. C. Mitra Street. It is also admitted by him in his cross-examination by the prosecution that it is correct that when the Police knocked the door of the room he and his wife came out of the room. They have, however, denied that they made any statement before the I.O. On the other hand, the I.O. has categorically stated in his evidence that both of them gave statement before him. Be that as it may, the fact remains that they have resiled from their earlier statement made before the I.O. for the reasons best known to them.

21. Jagadish Pathak, PW 3, a priest is also another witness in whose presence the appellant was taken into custody. Even though he has been declared hostile by the prosecution, he has admitted his signature appearing on the Memo of Arrest with date. It is also in his evidence that he disclosed to the Police that he was a priest and he used to do puja. He has, however, denied that he was interrogated by the Police. On the other hand, it appears from the evidence of I.O. that this witness was also examined by him at the time of recovery of the victim as also arrest of the accused from the premises in question. In such circumstances, the presence of all these three hostile witnesses that is PWs 2, 3 and 6 cannot be doubted.

22. Surya Kanto Jha, PW 4 deposes that he used to reside at 5, D. C. Mitra Street for about 40 years and 5/2, D. C. Mitra Street is behind his house and it is a brothel. His specific evidence is that the Police came and arrested a lady from 5/2, D. C. Mitra Street about two/three months before. His cross-examination has been declined by the defence. His evidence that 5/2, D. C. Mitra Street is a brothel, thus, remains unassailed during cross-examination.

23. Dr. Nabanita Adhikari, PW 5 who was posted as Demonstrator in the

Department of Forensic & State Medicine at the material point of time testifies that she examined Maya Tamang on 18.6.07 and she found that Maya Tamang was habituated to sexual intercourse. Considering the physical findings, dental data and data of radiological examination together, she is of opinion that the girl identified as Maya Tamang was aged about 15 years but below 17 years on the date of her radiological examination that is on 21.6.07. She has proved the radiological report (Ext. 3) together with x-ray plates etc. (Ext. 1-series). She has denied the defence suggestion that her report is not correct or that she has submitted the report as per request of the I.O. of this case.

24. Ramesh Kumar Pradhan, the then learned Metropolitan Magistrate, Xth Court, Calcutta, PW 7 deposes that he recorded the statement of the victim girl Maya Tamang who was identified by a lady constable No. 218. It is available from his testimony that the victim made her statement in Nepali language which was recorded in English and after recording of the statement, he read over and explained the contents in her language that is in Nepali and on hearing the same she admitted the contents to be correct and satisfactory. He further deposes that the statement was made by the victim voluntarily and it was without any coercion. The statement of the victim girl recorded u/s 164 Cr. PC has been marked as Ext. 4. He has denied the defence suggestion that the statement u/s 164 Cr. PC has not been recorded according to the law.

25. Dolly Goswami, a lady constable attached to the Immoral Traffic section, Detective Department deposes that on 15.6.2007, she accompanied the O.C. and other Police Officers in Force of the I. T. section who went for raid at 5/2, D. C. Mitra Street. It is a three-storied building. They went to the room of Asha Tamang. Within that room there was a bathroom and in that bathroom two/three girls were having bath. They rescued one girl viz. Maya Tamang from the room of Asha Tamang. The Officer interrogated her and she disclosed that she was confined by Asha for the purpose of prostitution. She further deposes that Asha was also in the room and she was arrested by the Police. The deponent has been cross-examined at length but nothing has been elicited from her cross-examination to show that she has deposed falsely before the Court. She gives out in cross-examination that the O.C., Debasree Chatterjee accompanied by herself had entered into that room first.

26. Her evidence stands corroborated by Debasree Chatterjee, PW 9, the then O.C., Immoral Traffic section, Detective Department, Lalbazar. She deposes that she had been to 5, D. C. Mitra Street to work out the information that a minor Nepali girl was detained at 5, D. C. Mitra Street for the purpose of prostitution. She being accompanied by Sri Dilip Kumar Ghoshal, the I.O. of this case, PW 10 together with other Officers and constables in two vehicles reached 5, D. C. Mitra Street. Immediately, thereafter, they ran to the first floor and the Force identified a room in the first floor where the minor girl was detained. She along with the lady constable had first knocked the door of that room which was partly opened. After entering into the room, they saw that a Nepali girl was having her bath in

the left corner inside the room. They found in the middle of the room, there was a bed and a lady was smoking sitting on the bed. She, however, handed over the case for investigation at the spot to Sri Ghoshal, PW 10. In her presence, seizure witnesses signed the seizure list and the statement of the minor victim was also recorded by the I.O. who was not conversant with the Hindi language properly. She assisted him in making the translation of the victim's statement. Thereafter, the accused was arrested and the case was registered subsequently.

27. She has been extensively cross-examined but her credibility could not be impeached. True, she could not give the minute details of the building and its surroundings during grueling cross-examination but the fact remains that she visited the premises only for once in her official course of action. Since she is to get involved with so many such cases, it is, therefore, quite natural that she cannot be expected to give a vivid picture of the surroundings of the building wherefrom the recovery of the minor girl was made. In such a situation, her trustworthiness cannot be doubted on that score.

28. Sri Dilip Kumar Ghoshal, S.I., PW 10, the I.O. of this case deposes that they reached the P.O. that is 5, D. C. Mitra Street in the second floor and went to the 4th room in the left side on the staircase. The O.C. and one lady constable entered into the room asking him and other members of the Force to wait outside the room. After sometime, the O.C. called him inside the room. One of the girls appeared to be Nepali and minor disclosed her name as Maya Tamang and she was interrogated. As she could not speak in Bengali she spoke in broken Hindi. The O.C. helped her in translating the same while he was recording her statement. On being interrogated, Maya, the minor Nepali girl disclosed that she was confined by the accused, Asha Tamang who was also present in the room and was sitting on a bed. The I.O., thereafter, called the people residing in the adjoining room viz. Babli Banoo and her husband Afaq Hussain at the time of rescue of the victim girl Maya Tamang.

29. Babli Banoo and her husband Afaq Hussain were present there and the seizure list was prepared in the presence of the victim and the appellant. Both the seizure witnesses signed the said rescue/seizure list. The I.O. also sent a requisition to the Forensic & State Medicine Department in the Calcutta Medical College Hospital for medical examination of the victim girl including determination of her age. He also collected the medical report and ossification test report from the Hospital. It appears from the said test report that the victim was above 15 years but below 17 years while the medical report evinces that she was subjected to sexual intercourse.

30. The I.O. has categorically stated in his evidence that during investigation by him it was learnt that said house in question which was known to its inmates and others as 5, D. C. Mitra Street was actually 5/2, D. C. Mitra Street. He, accordingly, made a prayer before the learned Chief Metropolitan Magistrate, Calcutta for rectification of the said address of the house wherein the victim was confined and such prayer was allowed by the Court. It transpires from his

evidence that during the period of investigation, he also made a requisition before the Municipal Corporation to ascertain the ownership of 5, D. C. Mitra Street. Although he was subjected to rigorous cross-examination, he successfully stood the test of cross-examination.

31. It reveals from the I.O.'s examination on recall that Babli Banoo, one of the seizure witnesses told him that one lady viz. Asha Tamang used to run the brothel and in that room one minor girl was detained and was forced to prostitution. Her husband Afaq Hussain also made similar statements before the I.O. It has, however, already been indicated earlier that both the seizure witnesses retracted from their earlier statements. It is well settled position of law that the evidence of a hostile witness cannot be discarded intoto and the testimony of such a witness can be used to corroborate other reliable evidence available on record. The Court can accept whatever is acceptable from that evidence. In fact, when the witness has been won over by the accused, the part of his evidence which is creditworthy and believable can be acted upon. In such view of the matter, we have placed reliance upon some portions of the evidence of all these hostile witnesses which find corroboration from the testimony of other witnesses as indicated in preceding paragraphs.

32. On a meticulous dissection of evidence and circumstances on record made hereinbefore, it is quite evident that there are clinching materials and unimpeachable evidence on record to establish conclusively that the victim was abducted by none else but the appellant herself Asha Tamang. The victim girl was also forced for prostitution and/or to illicit intercourse at her instance. Mr. Mukherjee's argument on that score, therefore, does not appear to be a meritorious one. He has also assailed search and seizure in question on the ground that hostile witnesses have not supported the case of the prosecution and, furthermore, there is discrepancy regarding the No. of premises in question wherein the search was conducted as also seizure of wearing apparels of the victim was made in the presence of the appellant and other witnesses. As already indicated, the Police Party raided the particular room of the building identified by the source who is not supposed to have any access to documents pertaining to the premises in question. In such circumstances, it is quite natural for the Seizing Officer to put such wrong No. of the premises in the FIR and Seizure List on the basis of incomplete and incorrect information about the exact number of the premises wherein the raid was conducted.

33. Be that as it may, the fact remains that the room wherefrom the appellant was taken into custody and the victim was rescued has, in fact, been properly identified by its boundaries, surroundings and other relevant details which are available in the testimony of the victim, PW 1 as also the members of the raiding Party, PWs 8, 9 and 10. That apart, PW 8, one of the members of the raiding party has unequivocally deposed before the Court that the appellant was taken into custody from the premises No. 5/2, D. C. Mitra Street while both the appellant and the victim were found in the same room. PW 10, the I.O. has also

clarified in his evidence that during investigation it has been ascertained from the municipal records that the correct number of the premises in question is 5/2, D. C. Mitra Street. If the entire matter is taken in its right perspective on the basis of corroborative evidence and circumstances on record, there is hardly any scope to doubt the veracity of the prosecution case in respect of rescue of the victim girl and the detention of the appellant simultaneously from the same room within the premises of 5/2, D. C. Mitra Street.

34. By no stretch of imagination, it can be said that because of wrong mentioning of the premises No. in the FIR, search Memo and seizure list, the entire prosecution case is liable to be brushed aside. It was merely a bonafide mistake on the part of the raiding team. The prosecution has, in fact, established and firmly established the factum of rescue of the victim as also detention of the appellant from the same room within the premises of 5/2, D. C. Mitra Street without any shadow of doubt. We are, therefore, of the opinion that even though the premises in question has been described wrongly as 5, D. C. Mitra Street instead of 5/2, D. C. Mitra Street in the seizure list, formal FIR, seizure Memo and other relevant documents prepared on the very day of search and seizure of premises in question, such unintentional mistake is of no consequence. More so, whenever such mistake has also been rectified at the earliest opportunity with the leave of the Court.

35. That apart, whether the building is No. 5 or 5/2, D. C. Mitra Street is not of much significance when the seizure witnesses did not dispute that from the building where they resided the victim was recovered; that building was raided by the Police in plain clothes. It would be apt to reproduce the evidence of Babli Banoo, PW 2, one of the seizure witnesses who deposes as under:

It is correct that when myself and my husband came out from the room, we found Police officer in civil dress.

Another seizure witness, Surya Kanto Jha, PW 3 deposes as follows:

5/2, Durga Charan Mitra Street is behind my house. 5/2, Durga Charan Mitra Street is a brothel. 2/3 months before the Police had come to our place." Babli Banoo's husband Afaq Hussain, one of the seizure witnesses, PW 6 also deposes as under:

On 15.6.07 Police called me from my room at 5, D. C. Mitra Street and police told me that there was a raid in the house in one room at 5, D. C. Mitra Street and asked me my name and asked me to sign one paper. There was a lady Police Officer also.

36. The number is not of much significance because the owner of the building or the person in control thereof could not be located. When was the building bifurcated from premises No. 5 is also not known. The number 5/2 itself suggests that originally the premises was No. 5 and subsequently there may have been sub-division.

37. Against such factual scenario, we must hold that such bonafide mistake cannot be termed as discrepancy. We are, therefore, not prepared to disbelieve the prosecution case merely on that score. Since the case has been proved to the hilt by the prosecution, we do not find any merit in Mr. Mukherjee's submission that because of such purported discrepancy the benefit of doubt should be given to the appellant.

38. Regarding Mr. Mukherjee's next contention that the appellant had right to remain silent during her examination u/s 313 Cr. PC, it is to be noted that there is no dispute in respect of the proposition of law that the accused has the right to refuse to answer the question that may incriminate him in offence alleged against him and no adverse inference can also be drawn on account of his silence during trial. But the fact remains that the object of section 313 Cr. PC is to give the accused an opportunity to explain a case made out against him. In fact, this section is intended for the benefit of the accused and not to find out materials to support the prosecution case. Therefore, the Court cannot use the power under this section for eliciting an admission from the accused nor for filling the lacuna in the prosecution case. It is also equally important to note that this section is meant to give the accused an opportunity to explain the incriminating circumstances brought on record by the prosecution against him and a duty is cast upon the Court to question him clearly and properly in clear and simple language in order to make him understand the exact case he has to meet in order to afford him a chance to explain the incriminating circumstance appearing against him, if he can and so desires.

39. There is no doubt that the burden of proof lies on the prosecution to prove its case and no adverse inference can now be drawn under the present Act. Since the provision for drawing an adverse inference under the old Act was not in consonance with the other provision of the section, it has consequently been dropped. Even though, it is open to the accused to refuse to answer the questions put to him, the Court is duty bound to give a chance to the accused to explain the circumstances whenever the prosecution has satisfactorily proved its case. It, however, entirely depends upon the accused as to whether he would avail of the opportunity or not. In the present case, the appellant has thought it fit not to explain the circumstances and for such silence this Court is obviously not in a position to draw adverse inference against her. The learned Court below has also arrived at a conclusion that the appellant is guilty of the charge u/s 373 IPC and she has not taken into account the accused's silence during trial and/or her failure to explain the incriminating circumstances put to her during examination u/s 313 Cr. PC and no adverse inference was also drawn against the appellant on that count.

40. This Appellate Court is also of the view that the legal requirement of placing every incriminating circumstance to the accused separately has been complied with and on the basis of clinching evidence and circumstances on record she has been convicted accordingly. In this context it is importantly important to note

that the salutary provision u/s 313 Cr. PC is not intended merely to the benefit of the accused but is the part of a system for the discovery of truth. More so, as it fixes what the Court deems to be incriminating circumstance which the accused should answer. If all such incriminating circumstances are not put to the accused in course of trial, the Court cannot rely upon them later. As already discussed earlier while assessing the guilt, both the learned Trial Court as also the Appellate Court have excluded from their consideration the appellant's conduct in not explaining the incriminating circumstances put to her during her examination u/s 313 Cr. PC. In that context of the matter, Mr. Mukherjee's argument that the appellant has a right to remain silent during trial as per proviso (b) to section 315(i) Cr. PC is of no importance.

41. On the question of drawing adverse presumption against the prosecution on the plea of non-examination of a material witness, i.e., the father of the victim in order to prove her daughter's age, it is to be borne in mind that the presumption as to adverse inference for non-production of available evidence is always optional and such fact depends upon the whole set of facts and not obligatory (vide Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another, and Harnath Malhotra and Another Vs. Dhanoo Devi Agarwala, . It has been held inter alia in the said Calcutta case that whether adverse inference ought or ought not to be drawn will depend upon the facts and circumstances of each case. There is no compulsive element in the provision to draw an adverse inference against a party whenever or wherever it fails to produce available document/evidence. In other words, the presumption u/s 114(g) of Evidence Act is not obligatory, because notwithstanding intentional/unintentional non-production, other circumstances may be present upon which such non-production may be justifiable on some reasonable grounds.

42. That apart, it is also pertinent to mention in this context that the prosecution case is not adversely affected when no prejudice is caused to the accused on account of non-examination of a particular witness or when there is other acceptable evidence available from the relevant documents or ocular testimony. There is no doubt that non-examination of a material witness sometimes throws some doubt over the prosecution case. But it is also equally important to note that such non-examination of a material witness cannot be found fatal if other credible evidence comes to the fore to prove the case of the prosecution to the satisfaction of the Court. More so, whenever sufficient explanation has also been put forward justifying non-examination of the material witness. In the instant case, we are of the view that the examination of the father of the victim has not been deliberately withheld or unfairly kept back. Rather, it is quite evident from the materials on record that the father of the victim came from Nepal to meet the victim after her rescue but it was an uphill task for the prosecution to bring him from Nepal and to get him examined as a prosecution witness in this case.

43. In the case before us the age of the victim has been determined by her ossification test. The doctor is of categorical and definite opinion that the girl

identified as Maya Tamang was aged about 15 years but below 17 years on the date of her radiological test that is on 21.6.2007. Such medical evidence remains unshaken during her cross-examination. That apart, even though it is available from her cross-examination that her father met her after she was rescued by the Police, there is nothing on record to indicate that her father started to live in India without going back to Nepal during trial. In the absence of any positive evidence in this regard, we are unable to opine that the prosecution has withheld the best evidence deliberately and it is a fit case to draw adverse presumption u/s 114 (g) of the Indian Evidence Act against the prosecution in the facts and circumstances of the present case. Therefore, Mr. Mukherjee's contention in this regard appears to be devoid of any merit.

44. Mr. Mukherjee's further argument that the charge relates to offence at 5/2, D. C. Mitra Street whereas all the witnesses deposed or referred the premises as 5, D. C. Mitra Street. In fact, 5 and 5/2 are different premises. Their topography is different. Therefore, the prosecution failed to prove the charge framed against the appellant. According to him, none was arrested from 5/2, D. C. Mitra Street since PW 9 deposed that the entire operation was carried out at 5, D. C. Mitra Street. It is, therefore, contended by him that the place of occurrence has been shifted from the place shown in the charge. In this context, he has referred to section 212(2) Cr. P.c wherein it is laid down that the charge shall contain such particulars as to the time and place of the alleged offence in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter.

45. This aspect of the matter has been dealt with adequately in paragraph No. 35 of this judgment. There is no doubt that the charge framed against the accused depicts the exact P.O. and some of the witnesses have referred to the premises No. as 5, D. C. Mitra Street under a mistaken belief. In his evidence, however, the I.O. has depicted the background facts of such a mistake and with the leave of the Court such mistake has also been rectified on the basis of relevant documents furnished by the Municipal Corporation.

46. That apart, section 221(ii) Cr. P.C permits the conviction without any separate charge where the substance of the accusations stood explained to the accused in clear terms. In the instant case, the accused was asked to answer the following charge which reads as follows:

..... That you, on or about the 15th day of June, 2007 at 5/2, D. C. Mitra Street, Calcutta-5 obtained possession of one Maya Tamang a female under the age of 18 years with intent that the said Maya Tamang be employed for the purpose of prostitution and thereby committed an offence punishable u/s 373 of the Indian Penal Code, and within the cognizance" of the Court of Sessions.....

47. The accused pleaded not guilty to the charge and he claimed to be tried. A plain reading of the charge itself tends to show that the appellant had reasonably

sufficient notice about the correct premises No. wherein the alleged offence took place. She had notice in clear and unequivocal language that the offence allegedly committed by her took place in premises No. 5/2, D. C. Mitra Street. In such view of the matter, Mr. Mukherjee's contention in this regard stands overruled.

48. There is no hard and fast rule that the evidence of Police witnesses is to be viewed with suspicion. Rather it is to be taken into account that these Police Officers of the Immoral Traffic section, Detective Department, Lalbazar, Kolkata conducted raid and prepared the seizure list and other relevant documents in discharge of their official duties. More so, whenever there is nothing on record even in the form of defence suggestion that Debasree Chatterjee, the then O.C. of Immoral Traffic section, Detective Department, Lalbazar, Kolkata, PW 9, Dolly Goswami, the lady constable, PW 8 and D. K. Ghoshal, the I.O., PW 10 had any outstanding grudge against the appellant Asha. In the absence of any such specific suggestion to them from the defence or specific plea taken by the appellant herself during her examination u/s 313 Cr. PC, it can safely be concluded that all these Police Personnel/Officers being a responsible member of a Disciplined Force had no rhyme or reason to implicate Asha, the appellant in this criminal case falsely. In such view of the matter, we are not prepared to discard their corroborative testimony establishing the guilt of the appellant.

49. On the question of applicability of section 49(1) of the Juvenile Justice (Care & Protection) Act, 2000 (hereinafter referred to as the said Act), we are unable to accept the submission of Mr. Mukherjee for the simple reason that it is open to the prosecution either to avail of the provisions of section 49(1) of the said Act or to invoke the penal provision u/s 373 IPC wherein the status of the victim girl would be of a mere witness. A bare perusal of section 49(1) of the said Act reveals that a duty is cast upon the competent authority to make due enquiry as to the age of the person brought before it under any of the provisions of the said Act (otherwise than for the purpose of evidence). It is, therefore, needless to mention that in the present case the prosecution has proceeded against the accused u/s 373 IPC and the victim girl has been rescued from the clutches of the appellant who engaged her for prostitution and/or to illicit intercourse and produced her before the learned Metropolitan Magistrate, Calcutta. None of the parties either before the learned Trial Court or before this Court has also agitated the point that the victim girl needs care and protection under the provisions of the said Act. (Emphasis supplied)

50. Furthermore, there is nothing on record to indicate that the victim girl was ever produced before the competent authority "under the provisions of the said Act". The materials on record do not indicate that the victim girl has come in conflict with the law. Considering all these, we are of the opinion that the provisions of the said Act are neither relevant nor applicable to the facts and circumstances of the instant case. Another Division Bench of this Court has also taken a similar view in the case of Sudarshan Nandy & Anr. (supra) wherein the

facts and circumstances of the case were also almost identical.

51. The learned Trial Court has placed reliance upon the ossification test of the victim girl in the absence of any age proving document. She has further observed that the variation of two years in determining the age of the victim as per the medical jurisprudence is also not available to the prosecution since there is no cross-examination to the doctor on that aspect of the matter.

52. However, we have grave doubt whether variation of two years in case of ossification test as per medical jurisprudence can be denied to the defence on its failure to cross-examine the radiologist on this point. Be that as it may, the fact remains that even if it is found that because of such variation of two years, her exact age cannot be determined conclusively and she cannot be held to be below 18 years as per requirement of section 373 IPC, appellant's culpability can very well be brought under the first part of the Penal section 366 IPC. It is well settled that the charge can be recast even at the Appellate Stage if it is established from the materials on record that the essential requirements of the proposed Penal section have been satisfied from corroborative evidence on record without causing any prejudice to the appellant.

53. Now, turning to the ingredients of section 366 IPC, it appears that the prosecution is to prove (a) that the accused induced the victim by deceitful means, (b) such abduction took place with the intent that the victim may be seduced to illicit intercourse and (c) the accused knew it to be likely that the victim may be seduced to illicit intercourse as a result of her abduction.

54. As elaborated in the preceding paragraphs there is clinching and credible evidence on record to establish conclusively that the appellant Asha Tamang induced the victim to come to her place on the plea of providing her with a job. It is to be borne in mind that the intention of the accused is the basis and the gravamen of the offence under this section. In the present case, the appellant abducted the prosecutrix, confined her in a room and she forced her to illicit intercourse in her brothel. Maya, the victim was thus subjected to forcible illicit intercourse continuously in Asha's brothel at least for a month.

55. The cogent, consistent and convincing testimony of the Police Officers on the point of recovery of the victim from the custody of the appellant who was sitting on the bed in the same room as discussed in paragraph 26 to 29 tends to show that it was none else but Asha who abducted the victim as understood in section 362 IPC. It is also crystal clear therefrom that the accused during abduction had intent that woman would be forced to illicit intercourse. The seizure witness, although hostile have to admit that the Police Officers had been to the room in question and the couple who stayed in the adjacent room were interrogated by the Police. They also signed some documents/papers. Another seizure witness who was a priest, although hostile, has deposed in the similar vein. Therefore, we have no hesitation to hold that all the essential ingredients of section 366 IPC have been established and clearly established.

56. On a wholesome appreciation of the legal evidence coupled with other relevant materials and attending circumstances on record, we are of the considered view that the prosecution has succeeded and fairly succeeded to prove that the victim girl Maya was brought in red-light area through inducement by deceitful means and forced to illicit intercourse as a result of her abduction. We are satisfied from the evidence on record that when the appellant abducted the woman, she did so with intent to compel her to illicit intercourse. The appellant kept her confined in the room of a building premises No. 5/2, D. C. Mitra Street for at least a month till the search was conducted by the Police and she was rescued from the brothel and the appellant was arrested. The learned Trial Court's finding in this regard is absolutely justified. But as already indicated, her finding that the age of the victim was below 18 years is not acceptable. Therefore, the Appellant is liable to be convicted u/s 366 IPC instead of section 373 IPC. Accordingly, her conviction u/s 373 IPC and sentence passed therefor is hereby set aside. In such view of the matter, the appellant Asha Tamang is found guilty of the charge under the first part of section 366 IPC and she is convicted thereunder and sentenced to suffer R.I. for eight years and also to pay a fine of Rs. 3,000/- in default to suffer R.I. for one year for commission of an offence under the first part of section 366 IPC.

57. On evaluation of the evidence and circumstances on record, we also do not find sufficient materials on record warranting conviction of the appellant u/s 366B IPC. It has correctly been held by the learned Trial Court that the basic requirement of section 366B IPC that the victim was imported into India from Nepal has not been established either by ocular or documentary evidence. In such a situation, we do not think it fit and proper to reopen and reexamine the issue of acquittal by this Court of appeal. More so, whenever the State Government has not preferred any appeal against such an order of acquittal. Therefore, we are not called upon to assess the merit of the order of acquittal in this appeal preferred by the appellant.

58. In that view of the matter, Rule issued in connection with CRR No. 2449 of 2008 arising out of the present criminal appeal asking the appellant to show cause as to why substantive sentence of imprisonment for 8 years and a fine of Rs. 3,000/- together with stipulated default clause shall not be enhanced and also acquittal recorded u/s 366B IPC should not be set aside, stands discharged.

59. In the result, the appeal being devoid of merit, stands dismissed with the modifications as above. The learned Trial Court is directed to issue modified Jail Warrant accordingly.

60. The sole appellant is directed to surrender within a fortnight to serve out the sentence subject to set off u/s 428 of the Code of Criminal Procedure. The learned Trial Court is further directed to take coercive measure in the event she does not surrender within the stipulated period of time. Let a copy of this judgment together with the LCR be sent down to the learned Trial Court below forthwith. Urgent Xerox certified copy, if applied for, be supplied to the parties on

priority basis on compliance of all requisite formalities.

Girish Chandra Gupta, J.

I agree.