

(2017) 03 CAL CK 0035
In the Calcutta High Court
Case No : 65 of 1995

Minu Tamang @ Mala

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 14-03-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#), [Section 428](#) - Power to examine the accused - Period of detention undergone by the accused to be set off against the sentence of imprisonment

Citation : (2017) 03 CAL CK 0035

Hon'ble Judges : Debasish Kar Gupta, Md. Mumtaz Khan

Bench : DIVISION BENCH

Advocate : Jayanta Narayan Chatterjee, Ranabir Roy Chowdhury

Judgement

1. This appeal has been preferred by the appellant assailing the judgment, order of conviction and sentence dated March 30, 1995 and March 31, 1995 respectively passed by the learned Sessions Judge, 2nd Bench, City Sessions Court, Calcutta in Sessions Trial No. 1 of August 1993 arising out of Sessions Case No. 12 of 1993. By virtue of the impugned judgment appellant was convicted for commissioning of the offence punishable under section 373 of the Indian Penal Code (hereinafter referred to as I.P.C.) and was sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 2000/- in default to undergo further rigorous imprisonment for six months and accused Ramesh Tamang was convicted for commissioning of the offence punishable under Sections 366A/366B and 372 I.P.C. and was sentenced to undergo rigorous imprisonment for 10 years and to pay a fine or Rs. 2000/- for each of the sections (or on each count), in default to undergo further rigorous imprisonment for six months on each count with a direction that substantive sentences for the above three sections will run concurrently with further direction of set off the periods of detention undergone by the convicts Minu Tamang and Ramesh Tamang during investigation, enquiry or trial as per provision of Section

428 of the Code of Criminal Procedure (hereinafter referred to as Cr.P.C.) but the accused Sabir Sha @ Raju was acquitted from the charges under Sections 366A/366B/372 I.P.C.

2. The Prosecution case, in brief, is as follows:-

3. On February 20, 1993, P.W.11 alongwith other police personnel in pursuance of the statements of accused Ramesh Tamang and being led by him conducted raid in between 14.30 hrs. and 16.00 hrs. and recovered the victim girl, a resident of Nepal from the first floor southern side room of appellant of premises no. 15F, Durga Charan Mitra Street, Kolkata-6 where she was found running a brothel. On interrogation of the victim girl with the help of interpreter it revealed that about 2/3 months back she was kidnapped from her native village of Nepal by the accused Ramesh Tamang and Md. Sabir Shah @ Raju with the promise of giving her money, food and shelter in Kolkata and sold her to the appellant for engaging her in prostitution against her will.

4. Accordingly, a G.D.E. being no. 1592 dated February 20, 1992 was made at the Burtola P.S. and on the basis of the same, P.W.11 started Burtola P.S. Case no. 61 dated February 20, 1993 against Ramesh Tamang, Md. Sabir Shah @ Raju and Minu Tamang @ Mala, the appellant, under Section 366A/366B/372/373/120B I.P.C. and took up investigation of this case and thereafter on completion of investigation submitted charge sheet on March 26, 1993 against them under Section 366A/366B/372/373/120B I.P.C.

5. On August 2, 1993 charge was framed under Section 373 I.P.C. against the appellant and under Sections 366A/366B/372A I.P.C. against the rest accused persons. Subsequently, a fresh charge was framed on March 29, 1994 against the appellant under Section 373 I.P.C. and against the rest accused persons under Sections 366A/366B/372 I.P.C. and after they denied their involvement in the crime, trial commenced.

6. Prosecution examined 11 witnesses as also produced and proved the GDE, seizure list, ossification test report, FSL report, site plan, rough sketch map etc. and, thereafter, on completion of trial and after examination of the appellant and other accused persons under section 313 Cr.P.C. learned Court below passed the impugned judgement.

7. Mr. Jayanta Narayan Chatterjee, learned Amicus Curie appearing on behalf of the appellant submitted that the impugned judgment, order of conviction and sentence cannot be sustained in law due to failure on the part of the prosecution to prove that appellant obtained possession of victim girl with the intent that she shall be used for the purpose of prostitution against her will and/or that she was recovered from the custody of the appellant, omission to put incriminating evidence to the appellant during her examination under section 313 Cr.P.C. amongst others. According to Mr. Chatterjee, charge framed under Section 373 IPC was not proved against the appellant beyond reasonable doubt.

8. Mr. Ranabir Roy Chowdhury, learned advocate representing the state submitted that the instant case against the appellant was proved beyond all reasonable doubt and that any omission on the part of the court to put questions under section 313 Cr.P.C. can not ensure to the benefit of the accused.

9. We have considered the submissions advanced by learned counsels appearing for the respective parties and have given our thoughtful consideration to the evidence of the prosecution witnesses and the materials on record for examining the propriety of the impugned judgement.

10. Learned court below took into consideration the evidences of P.W.2, the victim girl, P.W.5, P.W.9, P.W.10 and P.W.11 besides the evidence of the doctor, P.W.6, to arrive at a conclusion that the appellant, a prostitute, obtained possession of minor victim girl with the intent that she shall be used for the purpose of prostitution and thereby committed an offence punishable under section 373 I.P.C.

11. The issues which need our consideration is whether victim girl was recovered from the possession of the appellant and whether the appellant obtained possession of victim girl with the intent that she shall be used for the purpose of prostitution and whether the case falls under the provisions of Section 373 of IPC, as raised by the learned Advocate for the appellant. Now before entering into the merit of the case, let us go through the provision of law under which appellant had been charged.

12. The provisions of Section 373 I.P.C., are set below. "373. Buying minor for purposes of prostitution etc. ? Whoever buys, hires or otherwise obtains possession of any person under the age of eighteen years with intent that such person, shall, at any age, be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age, be employed or used for any such purpose, shall be punished with imprisonment or either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation I. ? Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years, shall until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.

Explanation II. ? "Illicit intercourse" has the same meaning as in Section 372."

13. In the instant case victim girl was examined as P.W.2 and the doctor who conducted ossification test of the victim to ascertain her age was examined as P.W.6. On May 18, 1994 P.W.2, on the day of her examination before court, victim girl disclosed her age as 14 years old. She was not challenged by the defence on that score. The victim girl was a minor at the relevant time was also very much evident from the evidence of the doctor, P.W.6, who examined her on

February 23, 1993 and found her age in between 12 and 13 years on the date of her examination. His evidence remained unshaken during cross-examination.

14. From the evidence of the victim girl, P.W.2, it was evident that she had narrated the entire incident as to how she was brought from Nepal by the accused Ramesh Tamang and Md. Sabir Shah and was handed over to the appellant in Sonagachi area wherefrom she was recovered by police. She had specifically stated during her examination before court that her mother is dead and she used to reside with her elder brother and father in a bustee of Telachang, Nepal where her father used to cultivate land. According to her one day while she was cutting grass in the forest accused Ramesh Tamang met her and told her that he will take her to market to which she agreed because of his insistence. He also told her not to disclose this to any inmates of her house and as such she did not disclose to anyone. Thereafter, on the way while proceeding from Nepal accompanied by Ramesh Tamang she met with accused Md. Sabir Shah and they took her to the house of appellant situated in Sonagachi area and handed over her to the appellant for which appellant paid them money. She, then came to know that the house of appellant was a pros quarter. Thereafter appellant forcibly sent two male persons to her room for which she raised alarm and began to cry. She stayed there in the house of appellant for a period of 3 months and therefrom police rescued her and arrested the appellant. She identified the appellant and also those accused persons in course of her examination before court. She was cross-examined on behalf of the appellant and other accused persons at length but her evidence remained unshaken and nothing was brought on record to show as to why her evidence made on oath be not believed. It was true that victim initially remained silent and only when she was declared hostile by the prosecution she narrated the entire incident but she had duly explained the reason of her initial silence before court as due to fear and also that this was the first occasion for her to depose before a court. The evidence of this witness appeared to be trustworthy.

15. The above statements of the victim girl also found corroboration from P.W.11. According to P.W.11, on the relevant date in the morning he interrogated accused Ramesh Tamang, who was detained in connection with Beniapukur P.S. Case No. 66 dated February 11, 1993, in presence of P.W.10 and on being led by accused Ramesh Tamang, he along with P.W.10, P.W.5, lady constable, Smt. Mita Das and others went to premises No.15F, Durga Charan Mitra Street, Calcutta and thereafter in presence of P.W.9, the owner of that premises and his manager, P.W.4, went to the first floor room of that premises, and after entering into the said room they found the victim girl, the appellant and other women sitting there and therefrom rescued the victim girl and arrested the appellant and after returning back to the P.S. lodged a G.D.E. (Ext.8) and started the case. He identified the victim girl as also the appellant in course of his examination before court. He was also cross-examined by the defence at length but his evidence too remained unshaken.

16. According to P.W.10 also, on the relevant date after recording the statement of accused Ramesh Tamang he along with P.W.11 and force went to Sonagachi where accused Ramesh Tamang led them into the first floor room of Premises No. 15F, Durga Charan Street, Calcutta-6 and identified the appellant and the victim girl in presence of the landlord of the house and his employee and therefrom victim was rescued and taken into safe custody and the appellant was apprehended. He also identified the victim girl as also the appellant before court. According to him premises No. 15F, Durga Charan Mitra Street is a brothel house. He was also cross-examined by the defence but nothing came out contrary to his statements made in-chief.

17. P.W.5 who acted as interpreter during interrogation of the victim girl also corroborated the statements of both P.W.10 and P.W.11 with regard to the recovery of the victim girl from the room of the appellant at 15F, Durga Charan Mitra Street on being led by the accused Ramesh Tamang. He too identified the victim as also the appellant before court. He was also cross-examined at length on behalf of the appellant but his evidence also remained unshaken. It was evident from the evidence of P.W.9 that initially he did not support the case of the prosecution with regard to the recovery of the victim girl from the room of the appellant but when he was declared hostile and was cross-examined by the prosecution he admitted that prostitutes reside at the entire premises of 15F, Durga Charan Mitra Street and appellant is a prostitute residing there on the first floor room as a tenant and running brothel. According to him the area including the premises no. 15F, Durga Charan Mitra Street is a prostitute area. He also admitted that Lakshmi Tamang (P.W.7) and Gnaga Tamang (P.W.8) are prostitutes and they reside in the room of Minu Tamang and P.W.4 used to realise rent from the prostitutes of the premises No. 15F, Durga Charan Mitra Street. He also admitted that on March 20, 1993 police officers came to his residence with Ramesh Tamang who identified the room of Minu Tamang and in their presence room of appellant was searched and victim girl was rescued therefrom by the police officers. He also deposed that police officers prepared a seizure list in his presence and he put his signature (Exbt. 3/2) in the seizure list in the room of appellant. He also admitted that police officers examined him as also Shyama Prosad, the victim girl and other local people and recorded their statements. He identified the appellant as also the victim girl in course of his examination before court. He also assigned the reason why he did not disclose the truth initially. According to him local people threatened him not to disclose the truth before the court so he suppressed the truth earlier due to fear. He was cross-examined by the defence at length but his evidence remained unshaken.

18. From the evidence of P.W.4, it was evident that though he admitted that appellant is residing at the first floor of premises no. 15F, Durga Charan Mitra Street and on February 20, 1993 he saw police at premises no. 15F, Durga Charan Mitra Street where Minu Tamang is residing and also admitted that he and his employer (P.W.9) put their signatures (Exts.3, 3/1) on a seizure list when police arrested Minu Tamang but when he did not support the prosecution case

he was declared hostile by the prosecution and was cross-examined by the prosecution and during cross-examination he admitted that as per requisition of the police he became witness in respect of search of a room at premises no. 15F, Durga Charan Mitra Street and both he and Pasupati Sn Singh (P.W.9) signed on the seizure list. He also admitted that he stated to the I.O. that a room was let out by his employer to one Nepali prostitute name Minu Tamang about 6 years ago. He denied that he stated to the I.O. that appellant was running a brothel in that premises and that he saw one fair looking Nepali young boy in the custody of the police who led them to the room of the appellant and on being shown by him victim girl was recovered from the room of the appellant but from the evidence of P.W.11 it was apparent that he stated all these to him during investigation. However, from the evidence of witness it was apparent that on the relevant date police conducted raid at the tenanted room of Minu Tamang situated on the floor of premises No. 15F, Durga Charan Street and arrested her and a seizure list was prepared on which he and his employer signed and that room was let out by his employer to appellant, a prostitute. From the evidence of P.W.7, Lakshmi Tamang and P.W.8, Ganga Tamang, it was evident that they too admitted that they reside at premises No. 15F, Durga Charan Mitra Street where appellant is residing but as they did not support the prosecution case with regard to the recovery of the victim girl from the room of the appellant by police on February 20, 1993 they were declared hostile by the prosecution and were cross-examined by the prosecution. Interestingly, P.W.7 did not deny that the victim girl was not rescued by the police from the room of the appellant or appellant was not arrested by the police by simply stated that she does not know about this. Both of them denied that they or the appellant are engaged in prostitution and/or that they stated to the investigating officer that they are engaged in prostitution. They also denied that they stated to the I.O. during investigation that Ramesh Tamang and another dark complexion man brought a minor girl from Nepal and kept her in the custody of appellant and the appellant gave bundle of currency notes to Ramesh Tamang. They also denied that they stated to the I.O. that appellant kept the minor girl for engaging her in prostitution in future and/or that they stated to the I.O. that on February 20, 1993 police came to their room with Ramesh Tamang in custody and rescued the victim girl from their room and arrested the appellant. They also denied that they stated to the I.O. that appellant is running a brothel at the premises no. 15F, Durga Charan Mitra Street. But from the evidence of the investigating officer, P.W.11, it was evident that they stated all these to him during investigation. In view of the above and in the light of the evidence adduced by the victim girl as also the owner to the premises, their evidence do not appear to be believable. Moreover, it is also not expected from them that they being resident of the same premises and engaged in the same profession with the appellant will tell the truth and depose against the appellant. P.W.1, prepared the rough sketch map (Ext.1) as also the plan (Ext.1/1) of the premises in question wherefrom victim was rescued.

19. So, the claim of P.W.2 with regard to her recovery from the possession of the

appellant found corroboration from P.W.10 and P.W.11, the police officers who conducted raid, P.W.5 who accompanied them and P.W.9, the owner of the premises no. 15F, Durga Charan Mitra Street, Calcutta⁶ where raid was conducted. The claim of P.W.2 that the place where she was kept was a pros quarter also found corroboration from the owner of the premises who clearly stated that prostitutes reside at the entire premises of 15F, Durga Charan Mitra Street and appellant is a prostitute residing there on the first floor room as a tenant and running brothel and the area is a prostitute area. P.W.10 also specifically stated that premises of 15F, Durga Charan Mitra Street is a brothel house. P.W.4 though denied before court but admitted that during investigation he stated to the I.O. that the room was let out about 6 years ago by his employer(P.W.9) to the Nepali prostitute Minu Tamang, the appellant. It had also Ramesh Tamang she met with accused Md. Sabir Shah and they took her to the house of appellant situated in Sonagachi area and handed over her to the appellant for which appellant paid them money. She, then came to know that the house of appellant was a pros quarter.

20. Thus, we find from the above that the appellant, a prostitute running brothel at premises no. 15F, Durga Charan Mitra Street, Calcutta⁶ obtained possession of the victim girl, a minor, from her accomplice and the victim girl was finally rescued by police from the custody of the appellant only after detention, interrogation and on being led by the accomplice Ramesh Tamang. P.W.6, doctor during examination of the victim girl also found one injury on her private part and came to the finding that question of forcible sexual intercourse cannot be ruled out. Explanation I to section 373 IPC clearly states that any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years, shall until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution. Nothing was brought on record from the side of the appellant to prove to the contrary. Therefore, our interference with the impugned judgment is not required on the above grounds.

21. With regard to the submission as to the omission to put incriminating evidence during examination under Section 313 of the Cr.P.C., it is settled law that as part of fair trial, section 313 of the Code of Criminal Procedure requires giving opportunity to the accused to give his explanation regarding the circumstance appearing against him in the evidence adduced by the prosecution. It is not necessary to put the entire prosecution evidence and elicit answer but only those circumstances which are adverse to the accused and his explanation would help the court in evaluating the evidence properly. Reference may be made to the decision of Dharampal Singh vs. State of Punjab, reported in (2010) 9 SCC 608 and the relevant portion of the above decision is quoted below:- "21. As part of fair trial, Section 313 of the Code of Criminal Procedure requires giving opportunity to the accused to give his explanation regarding the circumstance appearing against him in the evidence adduced by the prosecution. The purpose behind it is to enable the accused to explain those circumstances. It is not

necessary to put the entire prosecution evidence and elicit answer but only those circumstances which are adverse to the accused and his explanation would help the court in evaluating the evidence properly. The circumstances are to be put and not the conclusion. It is not an idle formality and questioning must be fair and couched in a form intelligible to the accused. But it does not follow that omission will necessarily vitiate the trial. The trial would be vitiated on this score only when on fact it is found that it had occasioned a failure of justice."

(Emphasis supplied)

22. From the questions put to the appellant during her examination under section 313 Cr.P.C., we find that the circumstances which were adverse to the appellant were duly put to her and she gave replies thereto and also set up her defence. In view of the above the contention of the appellant does not lead us to interfere with the impugned judgment on this score. After scrutinizing the entire evidence on record, we do not find any illegality in appreciation of evidence, or in arriving at the conclusion as to the guilt of the appellant by the learned Trial Court.

23. Therefore, there was no impropriety on the part of the learned Court below to pass the order of conviction and sentence under section 373 IPC against the appellant.

24. We, therefore, dismiss the appeal and affirm the conviction and sentence imposed on the appellant. Appellant be taken into custody to make her serve the sentence awarded by the trial court.

25. Copy of this judgement along with the lower court records be sent down to the trial court immediately for taking necessary action.

26. Urgent photostat certified copy of this judgement, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.