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(2019) 07 BOM CK 0056

In the Bombay High Court

Case No : Criminal Writ Petition No. 4781 Of 2018

Nurjamman Lokman Lashkar — APPELLANT

Vs

State Of Maharashtra — RESPONDENT

Date of Decision : 15-07-2019

Acts Referred:

Indian Penal Code, 1860 — Section 370(1), 370(2), 370(3), 370(A)(2)
Immoral Traffic (Prevention) Act, 1956 — Section 3, 4, 5, 6
Constitution Of India, 1950 — Article 19, 19(1)

Citation : (2019) 07 BOM CK 0056

Hon'ble Judges : S. S. Shinde, J

Bench : Single Bench

Advocate : Prabhanjay R Dave, Rutuja Ambekar

Final Decision : Disposed Off

Judgement

1. At the outset it is required to be noted that since the crime registered by the Police is under the Immoral Traffic (Prevention) Act, 1956 so also

under the Indian Penal Code and Victim is alleged to have been compelled to involve herself in prostitution, the identity of the victim needs to be

concealed, and hence she is referred to as Petitioner No.2 - XYZ. The Registry is directed to maintain the record accordingly.

2. This Writ Petition takes an exception to the order dated 17/09/2018 passed by the Additional Sessions Judge, Solapur by which order Criminal

Appeal No.92 of 2018 filed by the Petitioner herein came to be rejected and the order dated 08/08/2018 passed by the Additional chief Judicial

Magistrate, Solapur in C R No.412 of 2018 sending the Victim XYZ in the aforesaid cirme for a period of one for her care, protection and

rehabilitation to Government sudhar Gruh, Maze Maher, Mundhawa, Pune from 08/08/2018 came to be confirmed.

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3. Brief facts leading to filing of the present Writ Petition are as under :-

The Petitioner herein claims to be the husband of Victim XYZ. It is the case of the Petitioner that a complaint came to be filed against Laxman Mane

and others with Foujdar Chawadi Police Station, Solapur under Sections 370(1) (2) and (3), 370(A)(2) of Indian Penal Code and under Sections 3, 4, 5

and 6 of Immoral Traffic (Prevention) Act. In pursuance of the said complaint, a raid was conducted on hotel Shri Vitthal Lodge, Murarji Peth,

Solapur, by the police, and the Police have taken the custody of Victim XYZ. It is the case of the Petitioner that immediately he has filed an

application seeking custody of Victim XYZ before the learned Chief Judicial Magistrate, Solapur.

4. It appears that the Trial Court recorded the statements of both the Petitioner as well as the Victim XYZ. However, the Trial Court found that there

is inconsistency in the statement of the victim and the applicant i.e. the Petitioner herein, about the marriage. It appears that the Applicant i.e. the

Petitioner herein did not produce any document about the marriage nor did he produce any document to show that the victim is his wife. The

applicant/Petitioner did not produce any document to support his case that he is residing at Dombiwali and working as security guard. The Trial Court

also called for the report of Probation Officer and the medical report to ascertain the age and also to ascertain sexually transmitted diseases to Victim

XYZ. The Probation officer in his report has raised doubt about the capability of the Petitioner to take care of the Victim, however, he has not given

any opinion about handing over custody of the victim to the Petitioner. The overall findings recorded in the medical report are consistent with sexual

intercourse. The Trial Court has observed that there is nothing on record to show the applicantâ??s relation with the victim, and the genuineness and

capacity to rehabilitate the Victim. It appears that the Applicant/Petitioner produced his aadhar card as well as the aadhar card of Victim. It is

recorded by the Trial Court that the aadhar card of the Applicant bears the address of West Bengal whereas the aadhar card of the Victim bears the

address of Nalasopara, Palghar. The Trial Court held that the aadhar card is not evidence of marriage. The Trial Court held that if custody of victim is

given to the applicant, she would again get involved in immoral trafficking. As indicated herein above, the said application of the Petitioner came to be

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rejected by the Trial Court by order dated 08/08/2018 and direction was given to send the Victim XYZ to Government Sudhar Gruh, Maze Maher,

Mundhawa, Pune (herein after referred to as the Corrective Institution)

5. Being aggrieved by the order of the Trial Court, the Petitioner preferred Appeal No.92 of 2018 before the learned Additional Sessions Judge,

Solapur. The Appellate Court recorded finding that though the applicant has stated that his earning is Rs.15,000/- per month, he has not produced any

evidence to that effect. In so far as the residential address of the Applicant is concerned, the Appellate Court recorded finding that except bare words

of the applicant, there is no evidence to show that the applicant is residing at Nalasopara. The Appellate Court observed that the Petitioner stated

before the Trial Court that he is residing at Dombiwali and working as Security Guard, but no evidence to that effect was produced by the Petitioner.

The Appellate Court therefore did not deem it appropriate to interfere with the order passed by the Trial Court. As indicated above, the Appellate

Court dismissed the Appeal filed by the Petitioner by impugned order dated 07/09/2018. It is the said order dated 07/09/2018 passed by the Appellate

Court which is taken exception to by way of the above Writ Petition.

6. Heard the learned counsel for the Parties. The learned counsel for the Petitioner submitted that though the report of the Probation Officer shows

that the Petitioner is the husband of the victim, the Courts below have failed to take into consideration said fact. Both the Courts below did not

consider the fact that the victim is pregnant and requires her husband i.e. the Petitioner to be with her. It is the case of the Petitioner that the victim

has not committed any offence but she is falsely implicated as someone had enticed the victim and took her to the place of incident when the applicant

was out of station for work. He submitted that the Petitioner is running a business of tailoring and gets Rs.15,000/- per month from the said business

and he is able to maintain the victim and he will take care of victim. He further submitted that the Petitioner is ready for taking custody of victim and

to rehabilitate her. The learned counsel for the Petitioner also submitted that under the Constitution of India, the Victim has a right to move from one

place to another place through out the territory of India and she has also the right to reside at the place of her choice. He further submitted that a

person, who has attained the age of majority, cannot be restricted or cannot be

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kept in protection home. He therefore submitted that the present

Petition may be allowed by quashing the impugned orders passed by both the Courts below and the custody of the Victim may be handed over to the

petitioner in the interest and welfare of the Victim.

7. The learned Additional Public Prosecutor relying upon the reasons assigned by both the Courts below submitted that both the Courts below upon

appreciation of the material placed on record and keeping in view of the interest of victim have passed the orders sending the victim to the said

Corrective Institution for her care, protection and rehabilitation for a period of one year. The learned APP further submitted that not only the victim

but also other females were also found on the spot of incident and the Police have arrested the accused. He further submitted that the victim was

taken in custody by the police from the spot of incident. He therefore submitted that the Petition may be rejected.

8. Having heard the learned counsel for the parties, I have bestowed my anxious consideration to the rival contentions. It is required to be noted that

the Petitioner did not produce any document on record to show that he is doing the tailoring business and that his earning is Rs.15,000/- per month.

Even the probation officer in his report has raised doubt about the capability of the Petitioner to take care of the victim. Regarding handing over

custody of the victim to the Petitioner, the probation officer did not give any opinion. The learned Additional Chief Judicial Magistrate therefore

deemed it appropriate to send the victim to the said Corrective Institution for her care, protection and rehabilitation. Upon careful perusal of the

reasons assigned by both the Courts below it can be safely stated that the learned Additional Chief Judicial Magistrate, keeping in view of the interest

of the Victim XYZ, has passed the order sending her to the said Corrective Institution for her care and protection with a hope of reformation of the

victim.

9. However, the important question that has been raised during the course of argument is that Victim â?" XYZ being major can be sent to the said

Corrective Institution against her wishes. The learned counsel for the Petitioner submits that Victim XYZ has a right to reside at the place of her

choice and move freely through out the territory of India. Perusal of the FIR discloses that the age of Victim XYZ is mentioned as 22 years.

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10. It is true that every citizen has right to move from one place to another through out the territory of India and other fundamental rights enshrined in

the Constitution of India. Under Clause (1) of Article 19 all citizens shall have the right ---

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form association or unions (or co-operative societies);

(d) to move freely through out the territory of India;

(e) to reside and settle in any part of the territory of India,

and

[****]

(g) to practise any profession, or to carry on any occupation, trade or business.

11. Indisputably Victim XYZ is major, therefore it is imperative to consider her wishes. There is no doubt that the State Government within its power

under the said Act, keeping in view of the interest of the victim, can seek appropriate directions from the Court to send the victim to Corrective

Institution. It is true that the fundamental rights conferred upon the citizen of India in Part III of the Constitution of India are with reasonable

restrictions mentioned in each Article. The fundamental rights of the citizen enshrined in Part III of the Constitution of India stand on higher pedestal

vis-a-vis statutory right or any other rights conferred by the general law. Therefore I find considerable force in the submission made by the learned

counsel for the Petitioner that the victim being major, her fundamental right to move from one place to another place and to reside at the place of her

choice has to be considered, and contrary to her wishes she cannot be asked to reside in the said Corrective Institution.

12. It is pertinent to mention at this stage that the police machinery has not brought on record any material suggesting that Victim XYZ is suffering

from disability or her case is covered by reasonable restrictions under Article 19 of the Constitution of India, and setting her free would cause danger

to the society. It is also required to be noted that nothing is placed on record by the police which would show that her right to move from one place to

another place or to reside at the place of her choice is hampered due to restrictions imposed in Article 19 of the Constitution of India.

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13. In the facts of the present case, Victim XYZ was sent and/or kept in the Corrective Institution for her care, protection and rehabilitation, by order

dated 08/08/2019 passed by the learned Additional Chief Judicial Magistrate, Solapur. Prior to passing the order by the learned Additional Chief

Judicial Magistrate, Solapur, pursuant to the complaint lodged with Foujdar Chawadi Police Station, Solapur, a raid was conducted on hotel Shri Vitthal

Lodge, Murarji Peth, Solapur, by the police, and the Police arrested the accused. The police have taken the custody of Victim XYZ. and, as alleged,

the Victim XYZ along with other victims was involved in the prostitution. The accused are being prosecuted by registering Crime being C.R.No.412 of

2018 under Sections 370(1), (2), (3) and 370(A)(2) of the Indian Penal Code and, under Sections 3, 4, 5, and 6 of the Immoral Traffic (Prevention)

Act, 1956, and in the said Crime the Victim XYZ sent in Corrective Institution for her care, protection and rehabilitation. Therefore, it can be said that

she was sent in the said Corrective Institution for her care, protection and rehabilitation.

14. By order dated 04/12/2018 this Court (Coram : Mrs. Mridula Bhatkar, as Her Ladyship then was) directed to shift the victim to Shasakiya Mahila

Rajgruha, Deonar, Mumbai, from Government Sudhar Gruh, Maze Maher, Mundhawa, Pune, and the Superintendent of Rehabilitation Centre was

directed to give her necessary medical help and also to provide her special diet as she is pregnant with twins. However the victim could not be shifted

as directed by the order dated 04/12/2018, again this Court (Coram : Mrs. Mridula Bhatkar, as Her Ladyship then was) by order dated 14/12/2018

directed the Superintendent of Police, Pune to make all necessary arrangements of shifting the victim from Government Sudhar Gruh, Maze Maher,

Mundhawa, Pune to Shasakiya Mahila Rajgruha, Deonar Mumbai on or before 21/12/2018. While admitting the Writ Petition, this Court (Coram : S S

Shinde, J) by order 13/06/2019 directed the Superintendent of Rehabilitation Centre and the concerned Police Officer to file a short affidavit. The

learned APP has placed on record a letter dated 04/07/2019 received by the office of the Public Prosecutor from the Superintendent of Navjeen

Mahila Vasatigriha Deonar, Mumbai No.88. It is stated in the said letter that victim XYZ has been transferred from Government Sudhar Gruh, Maze

Maher, Mundhawa, Pune to Shasakiya Navjeen Mahila Vasatigrih, Deonar, Mumbai. By the said letter the Superintendent of Navjeen Mahila

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Vasatigrih, Deonar also seeks instructions/directions as regards releasing Victim XYZ after completing the period of one year.

15. It is informed that the Victim XYZ has spent more than 11 months in the Corrective Institution. Therefore considering the report of probation

officer and also considering the fact that Victim XYZ has spent a period of more than 11 months in the Corrective Institution, the ends of justice

would be met in the present case, if the directions are given to release Victim XYZ from the Corrective Institution i.e. Navjeen Mahila Vasatigrih,

Deonar, Mumbai No.88 where at present the Victim is kept.

16. However, it needs to be mentioned at this stage that during inquiry by the learned Additional Chief Judicial Magistrate, Solapur, it is found that the

Petitioner, who claims to be the husband of victim XYZ, did not produce document showing the relation between him and victim XYZ as husband and

wife, and also there is inconsistency in the statement of victim XYZ and the Petitioner about marriage. Even before the Trial Court the Petitioner has

stated that he is residing at Dombivali and working as a security guard, whereas in his application filed for custody before the Trial Court, he has

mentioned his addressed as Nalasopara and he is doing tailoring business and/or his monthly income is Rs.15000/- from the said business. Victim XYZ

is major and therefore, no restrictions can be put upon the Victim by issuing direction to give her custody to the Petitioner. Since Victim XYZ is major

after her release she is free to move as per her wish.

17. In the light of the discussion in foregoing paragraphs, the ends of justice would be met, if the impugned orders passed by the Courts below are

modified to the extent mentioned herein below. Hence the the following order is passed :-

1] The direction issued by the learned Additional Chief Judicial Magistrate, Solapur sending/keeping the Victim XYZ in the Corrective Institution i.e.

Government sudhar Gruh, Maze Maher, Mundhawa, Pune for a period of one year from 08/08/2018 stands modified/curtailed to the period already

spent by Victim XYZ in the said Corrective Institution, however, subject to clause (2) mentioned herein under, and upon completion of usual

procedural formalities.

2] Victim XYZ should be set at liberty and to be released forthwith, however, after ascertaining her wish, whether she desires to continue her stay in

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the Corrective Institution i.e. Navjeevan Mahila Vasatigrih, Deonar, Mumbai No.88, where at present the Victim XYZ is kept, for remaining period or

wants to be set at liberty/freed from the said Corrective Institution.

3] The prayer of the Petitioner to handover the custody of the Victim XYZ to the Petitioner stands rejected, and as observed herein above after

Victim XYZ is released, she is free to move as per her wishes.

4] With the aforesaid directions, the Writ Petition is disposed of. Rule is made absolute to the aforesaid extent.

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