

(2016) 02 DEL CK 0166

In the Delhi High Court

Case No : Crl. A. 571/2003

Zarina

APPELLANT

Vs

State of N.C.T. of Delhi

RESPONDENT

Date of Decision : 18-02-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164

Immoral Traffic (Prevention) Act, 1956 — Section 13, Section 3, Section 4, Section 5

Penal Code, 1860 (IPC) — Section 366, Section 368, Section 373

Citation : (2016) 02 DEL CK 0166

Hon'ble Judges : S.P. Garg, J.

Bench : Single Bench

Advocate : Astha, Advocate, for the Appellant; Vinod Diwakar, A.P.P. and Ramesh Chand, S.I., for the Respondent

Final Decision : Allowed

Judgement

S.P. Garg, J.—1. Aggrieved by a judgment dated 02.08.2003 of learned Additional Sessions Judge in Sessions Case No. 92/2001 arising out of FIR No. 236/2001 registered at Police Station Kamla Market by which the appellant - Zarina @ Razia was convicted under Section 366 IPC read with Section 368/373 IPC and Sections 3, 4 & 5 of the Immoral Traffic (Prevention) Act, 1956 (in short: ITP Act), she has preferred the present appeal. Vide order dated 14.08.2003, she was awarded various prison terms with fine. The substantive sentences were to operate concurrently.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that the appellant along with her associates Bhagti Ram Pandey and Hasina abducted/ seduced the prosecutrix "X" (assumed name) before 21.06.2001 with an intention to compel or force her to have illicit intercourse. The appellant and her associates used to run a brothel at Kotha No. 56, G.B. Road, Delhi and the prosecutrix "X" was recovered from the said Kotha on 21.06.2001 at around 8.50 p.m.

3. On receipt of a secret information, raid was conducted by the police at Kotha No. 56, G.B. Road and two girls "X" and "Y" (assumed name) were recovered from there. The Investigating Officer lodged First Information Report after recording statement of the victim "X" (Ex. P.W.-1/A). "X" and "Y" were medically examined; they recorded 164 Cr.P.C. statements. Statements of the witnesses conversant with the facts were recorded. In the complaint, the victim (X) disclosed as to how initially rape was committed upon her and her friend "Z" (assumed name) by Deep Karan @ Sonu and Umesh Kumar @ Tinkoo in different jhuggies at Madipur after abducting them on their way to the park. Thereafter, "X" was sent along with Zarina @ Razia at 56, G.B. Road for the purpose of prostitution by Deep-Karan. Subsequently both Deep-Karan and Umesh were also arrested. Upon completion of investigation, a charge-sheet was filed against all of them for commission of various offences. The prosecution examined twenty witnesses to establish its case. In 313 statement, the accused persons denied their involvement in the crime and pleaded false implication. The trial resulted in their conviction. Being aggrieved and dissatisfied, the convicts have filed various appeals; the present appeal pertains to the appellant - Zarina @ Razia. It is relevant to note that during the pendency of the appeal, it was informed by the appellant's counsel on 08.01.2015 that the appellant - Zarina @ Razia has since expired. State was directed to verify her death. However, till date the State could not verify the appellant's death.

4. I have heard the learned counsel for the parties and have examined the file. As per the victim "X"'s statement (Ex. P.W.-1/A), she was initially abducted and forcibly raped by Deep-Karan in a jhuggi for about a month. Subsequently, Deep-Karan sold her to the appellant (Zarina @ Razia) for Rs. 15,000/-. She promised to provide her a good job and brought her to Kotha No. 56, G.B. Road; she was pushed into prostitution against her wishes there. In her Court statement as P.W. 1, she reiterated her version and implicated Deep Karan and Umesh Kumar for abducting her and her friend "Z" and to have committed rape upon them in two different jhuggies at Madipur for about a month. Apparently the appellant was not in picture at that time and was not instrumental in their kidnapping or sexual assault. She had no nexus with Deep Karan to compel "X" to indulge in prostitution at the Kotha. Only allegation that emerged against her was that "X" was sold to her by Deep Karan and she brought her to kotha which belonged to the co-convict - Bhagti Ram Pandey. It is further alleged that she used to share income generated by the prosecutrix "X" and other sex-workers. Primarily, the allegations against the appellant pertain to the commission of offences punishable under Sections 3, 4 and 5 of the ITP Act. It is pertinent to mention that co-convict - Bhagti Ram Pandey with similar allegations has been acquitted by this Court by a detailed judgment dated 02.02.2016 in CrI. A. 791/2003.

5. Undeniably, Section 13 of the ITP Act mandates State government to appoint Special Police Officer for dealing with the offences under the Act. Vide Notification (Ex. P.W.-17/A) all ACPs, (SDPOs), SHOs and Assistant Commissioners of Police of Crime Branch, Palam Airport and Railways have been

designated as Special Police Officers for the purpose of enforcement of the Act. Apparently, Additional SHOs of the concerned police stations have not been designated as Special Police Officers in the said notification. Record reveals that various correspondences took place to confer similar powers upon Additional SHOs under Section 13 of the Act but the request was repeatedly not acceded to (Ex. P.W. 17/DA to Ex. P.W. 17/DE). By a letter (Ex. P.W. 17/DB), request was specifically made to designate Additional SHO, Kamla Market, to be the Special Police Officer as per the provision of the Act. Needless to say, Additional SHOs were not competent to carry out the investigation under the Act.

6. Admittedly, in the instant case raid was conducted at Kotha No. 56, G.B. Road on 21.06.2001 by P.W.-11 (Insp. Ashok Tyagi) posted as Additional SHO, P.S. Kamla Market. It was emphasized that concerned SHO had proceeded on leave and by oral/verbal directions/orders, Inspector Ashok Tyagi was directed to officiate as SHO of police station Kamla Market by P.W. 19 (Udhey Sahai), ACP, Central District on 19.06.2001. DD No. 38 (Ex. P.W.-18/A) was recorded on 19.06.2001 by Insp. Ashok Tyagi taking over charge as SHO of Police Station Kamla Market. Admitted case is that no order in writing was issued authorizing Insp. Ashok Tyagi, to work as officiating SHO for any specific period. P.W.-18 (HC Rajya Vardhan) admitted in the cross-examination that in DD No. 43 (Ex. P.W. 18/DA) recorded subsequent to DD No. 38 (Ex. P.W.-18/A), designation of Insp. Ashok Tyagi has been mentioned as Additional SHO, Police Station Kamla Market. In DD No. 37-B (Ex. P.W. 18/DB), recorded on 20.06.2001, Ms. Chhaya Sharma, IAS has been shown as officiating SHO of police station Kamla Market. P.W.-19 (Udhey Sahai) did not furnish any explanation as to why order in writing was not issued to authorize Insp. Ashok Tyagi to work as SHO of Police Station Kamla Market. The entire lot of documents on record disclose that investigation was carried out by Insp. Ashok Tyagi in his capacity as Additional SHO. No document on record pertaining to investigation reveals that he carried out the investigation in the capacity of an officiating SHO, police station Kamla Market. All applications moved before the court including application under Section 164 Cr.P.C.; application for medical examination of the victims and accused persons; personal search memos and other various documents reflect that the investigation was carried out by Insp. Ashok Tyagi as Additional SHO, Kamla Market. Subsequently, investigation was also carried out by SI Satbir. In some memos prepared by him, Insp. Ashok Tyagi has been depicted as Additional SHO as witness. DD No. 19/A dated 21.06.2001 has been written by Inspector Ashok Tyagi as Additional SHO, Kamla Market. It has not thus been established with certainty that the investigation was carried out by Insp. Ashok Tyagi as SHO of the concerned police station. Since Insp. Ashok Tyagi was not empowered under Section 13 of the Act to carry out the investigation, the entire proceedings conducted by him go to the very root, competence and jurisdiction and can't be sustained.

7. Appellant's conviction is primarily based upon the testimonies of P.W. 1 and P.W. 16. P.W. 1 ("X") was taken to a jhuggi by accused Deep Karan and allegedly confined there for about a month. Physical relations took place between the two

there. At no stage, "X" raised hue and cry to complain her forcible abduction or rape. After about a month, she was sent allegedly with the appellant (Zarina @ Razia) to the Kotha in question by Deep Karan after accepting Rs. 15,000/-. On the way to the Kotha, "X" did not raise any protest and accompanied on her own without demur. In the cross-examination, "X" admitted that there were number of other jhuggies around the jhuggi where she was kept for about a month. On the advice of ladies in the said Jhuggies, she had agreed to stay there. Admittedly, she was under no restraint and was free to move anywhere. During this period, she did not visit her parents and never bothered to contact them. Her parents also did not lodge any missing report to find her for so long. She further admitted that on the way to Kotha, she did not raise alarm. During her stay for about a month, in the said Kotha also, she did not complain. She did not elaborate in her evidence as to who used to get money from the customers and if so, when and how much. It is unclear as to how the "income" used to be shared by the appellant and her associates.

8. P.W. 16 ("Y"), another victim, a married lady, deposed that when she was having five months pregnancy, her husband abandoned her and married another woman. When she was employed in a carpet manufacturing company in Nepal, Etti, her acquaintance, brought her to Delhi on the pretext to provide her a better job. She was sold by her to the appellant (Zarina @ Razia) at Kotha No. 56, where she was compelled by the appellant - Zarina @ Razia, Hasina and Bhagti Ram Pandey to indulge in prostitution against her wishes. She further deposed that Hasina too was a sex worker at that Kotha and compelled the new girls brought there to indulge in prostitution. They used to send customers and share the money paid by them. She was not paid anything for two months during her stay there. Again, the appellant was not instrumental when "Y" was brought at the Kotha by one Etti. During investigation, Etti could not be arrested in this case. The victim aged 22 years had arrived at Delhi on her own along with Etti. Again, during her stay at Kotha, she did not protest any time. Only when a raid was conducted on 21.06.2001, she and P.W. 1 came forward to lodge complaint. In the cross-examination, she disclosed that there were 200-300 more girls in the Kotha. However, no such girl came forward to support her. She further admitted that before the raid, the police used to make inquiries and she had apprised the police about her forcible stay. She admitted that a quarrel had taken place between Kotha people and the police a few days before and she was taken by the police after a week. She has made vital improvements in her deposition and has been duly confronted with her previous statement (Ex. P.W. 6/DA). No cogent evidence has emerged to show as to, to what extent, the appellant and his associates used to share the "income" generated from prostitution.

9. Prosecutrix "Z", who was kidnapped and raped by the accused Umesh did not appear for examination before the Court. Adverse inference is to be drawn against the prosecution for withholding the crucial witness. In the MLC, no visible injuries were found on the body including private parts of the victims. As per ossification test, "X" was aged more than 15 years but less than 17 years; "Z"

was opined to be more than 16 years but less than 17 years. Exact dates of birth of the victims have not surfaced on record. It is unclear if both of them were below 16 years of age on the day of incident and their consent for physical relations (if any) had no relevance. No incriminating article was recovered from the spot; no customer was found present at the Kotha; no tainted money could be recovered either from the accused persons or the victims.

10. In the light of the above discussion, I am of the view that the prosecution has failed to prove its case beyond reasonable doubt. The appellant deserves benefit of doubt; the appeal is allowed. The conviction and sentence are accordingly set aside.

11. Bail bonds and surety bonds stand discharged. Trial Court record (if any) be sent back forthwith along with the copy of the order. Intimation be also sent to the Superintendent Jail.