

Amar @ Bahadur Vs. State

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Court : Delhi

Decided On : Apr-08-2005

Reported in : 120(2005)DLT267; 2005(82)DRJ197

Judge : R.C. Jain, J.

Acts : Indian Penal Code (IPC) - Sections 34, 120B, 344, 363, 366, 366A, 368, 372, 373, 376 and 506; Code of Criminal Procedure (CrPC) - Sections 161, 164 and 428

Appeal No. : Crl. A. No. 827/2004

Appellant : Amar @ Bahadur

Respondent : State

Advocate for Def. : Sunil K. Kapoor, Additional Public Prosecutor

Advocate for Pet/Ap. : K.K. Sud, Sr. Adv. and; Neeraj Jain, Adv

Disposition : Appeal allowed

Judgement :

R.C. Jain, J.

1. This appeal is directed against the judgment dated 8th October, 2004 and order dated 15th October, 2004 passed by the learned Additional Sessions Judge, Delhi,

whereby the appellant herein Amar @ Bahadur has been convicted of the offences punishable under Section 368 read with Section 366 IPC, under Section 344 IPC and under Section 506 IPC and sentenced to undergo Rigorous Imprisonment for a period of 5 years and fine of Rs. 1,000/- for the offence under Section 368 read with Section 366 IPC, Rigorous Imprisonment for the period of two years and a fine of Rs. 1,000/- for the offence punishable under Section 344 IPC and also sentence of two years and fine of Rs. 1,000/- for the offence punishable under Section 506 IPC. All the substantive sentences of imprisonment have however been ordered to run concurrently, subject to benefit of Section 428 Cr.P.C.

2. The appellant along with two women Mumtaz and Lata was prosecuted for the offences punishable under Sections 363/366A/368/372/373/376/344/506/120B IPC on the allegations that the appellant was in-charge of/managing the affairs of Kotha No. 57, G.B Road, Delhi, which was used as a brothel where girls from remote villages of the country were brought and forced into illegal prostitution. One such girl, a 15 year old Mamta @ Seema @ Tukai, was rescued from the said Kotha on 15th December, 1998 at 4.15 p.m. pursuant to a raid organized by the Sub Inspector Harinder Singh of Police Station Kamla Market, pursuant to a secret information received in that behalf. Mala @ Seema @ Tukai made a statement to the police that about 8-9 months prior to the date of her rescue, when he was going to bazar in her village Gauriya (West Bengal), one person named Ramesh @ Ranjit met her along with one lady whom he identified as his wife. They enticed her on the pretext of getting her a job in Delhi and brought her to Delhi and kept in a hotel overnight. On the next day, they handed her over to one lady who took her to Kotha No. 57, G.B. Road, Delhi and in turn handed her over to the appellant Amar @ Bahadur, Manager of the said Kotha. Thereafter, the appellant Amar @ Bahadur used to force her to prostitution with the customers and threatened and beat her whenever she refused. The lady who had brought her to the kotha also used to visit the kotha and tell her that she (prosecutrix) had to continue the prostitution till such time the money paid by her was re-paid to her. Mala was not allowed to meet any one and go outside the said Kotha. The appellant and the co-accused Mumtaz and Lata were arrested at the spot. Mala was medically examined and her statement under Section 164 Cr.P.C. was got recorded through a Magistrate on the same day. After usual investigation all the three were sent by

the police for trial.

3. On the basis of allegations and the material brought on record, charges under Section 366A/373/368/344/34 IPC were framed against accused Mumtaz, while charges under Sections 373/368/344/506/34 IPC were framed against appellant Amar @ Bahadur and charges under Sections 368/344/34 IPC were framed against Lata separately, to which they pleaded not guilty and claimed trial.

4. In order to substantiate its case, the prosecution examined 10 witnesses in all including Mala as PW-1. The defense put forth by the appellant and other co-accused was that of total denial. The learned Trial Court on a consideration of the facts and circumstances and material brought on record returned the finding of acquittal in favor of accused Mumtaz and Lata by according them benefit of doubt but convicted and sentenced the appellant Amar @ Bahadur as above.

5. I have heard Mr. K K Sud, learned senior counsel representing the appellant and Mr. Sunil K Kapoor, APP for the State at length and have given my thoughtful consideration to their respective submissions. Though in the Memorandum of Appeal, the conviction and sentence of the appellant was sought to be assailed on several grounds, but during the course of hearing, learned counsel for the appellant has confined his attack largely to the aspect that the prosecution has failed to substantiate its case by means of cogent and reliable evidence and the learned Trial Court has erred in treating the testimony of PW-1- Mala as substantive piece of evidence and relying and acting upon the same and recording conviction against the appellant. This contention of the learned senior counsel is based on the submission that the prosecutrix Mala (PW-1) has not supported the prosecution case at all before the Trial Court and, consequently was declared a hostile witness and cross-examined by the Additional Public Prosecutor and even after her cross-examination, the witness did not support the prosecution case in material particulars. The next argument is that the testimony of the prosecutrix recorded in the Court even if taken on its face value was contrary/inconsistent to her earlier statements made by her under Section 161 Cr. P C and 164 Cr P C before the police and Magistrate respectively. Mr. Sud, learned counsel for the appellant has extensively referred to the said three statements of the prosecutrix-

Mala made by her at different stages of the investigation and trial.

6. First of all a reference may be made to the testimony of PW1 prosecutrix Mala recorded in the Court. In the examination-in-chief of her deposition, Mala did not support the prosecution case in any material facts/particulars in as much as she did not identify the appellant as the person who was in charge of or managing the affairs of Kotha No.57, G.B.Road. Rather she stated that nothing had happened to her in the Kotha. She even failed to identify the other co-accused - Mumtaj and Lata but admitted her signatures on the complaining statement Ex.PW1/A and the statement Ex.PW1/B recorded by the Metropolitan Magistrate under Section 164 Cr.P.C. She supported the prosecution case only to the extent that she was enticed away by a certain lady from the market of her village on the pretext of site seeing and she brought her to Delhi and left her at the Kotha of Mumtaj. On a request being made by the Additional Public Prosecutor on behalf of the State, the witness was allowed to be cross-examined. The cross-examination of the witness, so recorded, would show that the learned APP simply sought affirmation/confirmation from the witness about she having made the statement contained in the complaining statement Ex.PW1/A and she confirmed having stated various facts as find mentioned in the complaining statement Ex.PW1/A. In her statement before the Metropolitan Magistrate (under Section 164 Cr.P.C.) she stated that the three accused used to beat and threat her and also forced her to indulge in sexual abuse and earn money by producing her before customers for sexual abuse. The witness at this stage had identified the three accused. She also claimed to have given above history to the doctor. She, however, tried to explain that she had forgotten certain facts due to the lapse of time of about two years since her rescue from the said Kotha.

7. The witness was then cross-examined by the defense counsel on behalf of the accused persons and admitted that neither Ramesh nor the other lady who brought her from her village Goriya were not present in Court and they were never shown to her by the police. She admitted that she was about 22 years of age as per the information given to her by her mother. She stated that she had given her age as 15-16 years before the police out of ignorance and in fear. She was confronted with her previous statements Ex.PW1/A and PW1/B in regard to certain

facts. Although she claimed to have stated before the police that Lata was the lady of the Kotha, this fact does not find mention in Ex.PW1/A. Even Lata's name and role does not figure in the statement Ex.PW1/A. Similarly, the fact about the lady aged about 40-45 years having come to hotel to whom she was handed over, does not find mention in the statement. She claims to have stated before the Metropolitan Magistrate that the three accused used to beat her and force her to indulge in sexual abuse but these facts do not appear in the statement Ex.PW1/B, though she claimed that there were many ladies at the Kotha but could not give their number. According to her, she remained at the Kotha for about 9 months to one year and during that period she had fallen ill and taken to doctor and to a nursing home for her X-ray but did not complain to them about her plight. She, however, denied this position that she was a dancer and musician. She also admitted that many hawkers and vendors used to visit the Kotha but she did not complain to any one of them about her forcible detention by the accused person. She admitted that she was under the fear of police when her statement was recorded but was not scared of the police when her statement was recorded by the Metropolitan Magistrate.

8. Now coming to her statement recorded under Section 164 Cr.P.C. by the Metropolitan Magistrate. It is pertinent to note that though the said statement was recorded by the Metropolitan Magistrate on the same day as the complaining statement Ex.PW1/A before the police but surprisingly in her statement before the Metropolitan Magistrate she simply stated that after she was brought to Kotha No.57, G.B.Road Delhi, the other girls present there made her to take a bath and made her to sit on a patta and those girls forced her to indulge into illicit prostitution and forced her into prostitution for eight/nine months. That whenever she refused to indulge in the illegal activities, they used to threaten and beat her. That she sent her request for her rescue from the Kotha through a boy who used to often visit her at the Kotha, a raid was organized and she was rescued. She did not state that the present appellant Amar @ Bahadur was the Manager of the Kotha or had forced her to indulge in illicit prostitution.

9. It is to be seen if the said testimony of the witness, more particularly that part of the testimony which is recorded pursuant to the questions put by the prosecutor in

cross-examination pursuant to the permission granted by the Court to do so, can be treated as substantive evidence. In the opinion of this Court, the answer should be no because taking that part of the testimony of the witness on its face value, it would at best show that the witness had simply confirmed to have made a statement to the police which was reduced into writing in Ex.PW1/A, which in turn, formed the basis of the registration of the FIR. Law of Evidence in India enjoins that the facts stated in such complaining statement must be re-stated/proved by the witness again so as to make the same as an admissible piece of substantive evidence. Any departure from this basic requirement would mean that it is permissible for a complainant/witness whose statement has been recorded by the police to simply make a one line statement before the Court that he/she gave a statement to the police which has been reduced into writing and the same should be read as his/her evidence. Such a course is not permissible. In order to constitute substantive piece of evidence the witness must prove the facts sought to be proved or disproved.

10. It is otherwise an established proposition of law that the previous statement made by the witness under Sections 161 or 164 Cr.P.C. can only be used for the purpose of discrediting the witness or for contradicting a witness in order to discredit his/her testimony and not for the purpose of corroboration. In the case in hand the prosecution though sought permission of the court to cross-examine the witness for the purpose of discrediting the witness, did not choose to put a single question to confront her with her earlier statement and rather chose an unusual easy path of getting confirmation / affirmation of the previous statement made by the witness. It would not imply that contents of complaining statement PW1/A would, ipso facto, become admissible as substantive piece of evidence without the witness supporting the same. This Court is, therefore, of the considered opinion that the statement made by PW1 in her deposition during the course of cross-examination by the public prosecutor cannot be considered as a substantive piece of evidence and could not have been relied and acted upon by the trial court for recording conviction against the accused.

11. Assuming for the sake of arguments that the statement of the witness as contained in Ex.PW1/A has been substantiated by the witness, still the said

statement is not worthy of credence in view of several material contradictions appearing, inter se, her statement in examination-in-chief and the cross-examination by the accused. In fact, it appears that the witness has tried to blow hot and cold in the same breath. Not only this, the deposition of the witness is glaringly inconsistent and contradictory to her earlier statement made under Sections 161 and 164 Cr.P.C.

12. Mr.Kapoor, learned APP for the State has strongly urged that testimony of a hostile witness, who is permitted to be cross-examined by the prosecution, is not effaced from the record and can be considered on its intrinsic value. The question has been considered by the Apex Court and various High Courts in a catena of decisions. A few to mention are the cases of Bhagwan Singh v. State of Haryana : 1976 CriLJ203 ; and Rabindra Kumar Dey v. State of Orissa : 1977 CriLJ173 . In the later case, the Supreme Court more fully considered the question of placing reliance on a witness which is declared hostile by observing that by giving permission to cross-examine nothing adverse to the credit of the witness is decided and the witness does not become unreliable only by his declaration as hostile. Merely on this ground his whole testimony cannot be excluded from consideration. It further observed that in a criminal trial where the prosecution witness is cross-examined and contradicted with the leave of the court by the party calling him for evidence cannot, as a matter of general rule, be treated as washed off the record altogether. The court laid down that it is for the court of fact to consider in such case whether as a result of such cross-examination and contradiction the witness stands discredited or can still be believed in regard to any part of his testimony. In appropriate cases, the court can rely upon the part of testimony of such witness if that part of the deposition is found to be credit-worthy.

13. There cannot possibly be any quarrel with the legal proposition that the testimony of a hostile witness is not effaced totally only for the reason that the party producing the witness seeks permission to cross-examine and is cross-examine him. The Court can rely and act upon that part of the testimony of the witness which inspires confidence. In the case in hand even that course does not seem to be possible because no part of the testimony of the witness of PW1 can be said to be reliable and trustworthy. thereforee, it would appear that the learned

trial court has erred in relying and acting upon the testimony of the prosecutrix on the material aspects in regard to the appellant being the owner or manager of the kotha or he having forced the prosecutrix to indulge into sexual abuse against her wishes. Rather there are ample circumstances which would show that though the prosecutrix might have been kidnapped by a certain person named Ramesh @Ranjit and a lady who brought her to Delhi and thereafter handed her over to either Mumtaz or Lata but in turn handed her over to the appellant. After that it would appear that the prosecutrix had fallen into prostitution voluntarily. We say voluntarily because it has been brought on record that though the prosecutrix lived at Kotha No.57 for several months before she was rescued but still she made no complaint to anyone though had opportunities when she had gone out of Kotha for medical check up and treatment etc. The prosecution has not been able to establish the age of the prosecutrix with certainty because in her statement before the police she gave her age as 15/16 years but in the Court she claimed herself to be about 20 years of age at the time she was brought to the Kotha, meaning thereby that she was above 18 years of age and was capable of giving a valid consent to have sexual intercourse with any person. There is also no cogent and reliable evidence on record to establish that the appellant has, in fact, forced the prosecutrix to indulge in sexual intercourse with the customers and was receiving money from the customers. It would, therefore, appear that the finding of conviction recorded by the learned trial court is largely based on surmises and conjunctures rather than on cogent and reliable evidence produced by the prosecution. This Court is not oblivious of the situation and can take judicial notice of the incidence of illegal prostitution is prevalent in the society and young girls from the remote parts of the country are lured and brought to cities for prostitution. It is also true that the incidence of prostitution is on increase. The court can also not undermine the role of various NGOs engaged in the onerous task of rescuing such hapless girls and ladies from the clutches of hardened pimps etc., who force those girls to indulge in prostitution. The appellant may perhaps be one such person having regard to the facts and circumstances of the case, but still the important question is as to whether he can be convicted on such presumptions. In the opinion of this Court the answer is an emphatic 'no' because unless the guilt of a person is established by means of cogent and reliable evidence, he has to be

presumed innocent. It would lay down a very unhealthy precedent if the finding of guilt is returned without cogent and reliable evidence and only on conjunctures and surmises.

14. Having regard to the totality of facts and circumstances of the case; the material brought on record and for the foregoing reasons, this Court is of the considered opinion that the conviction of the appellant is legally unsustainable and has, therefore, to be set aside. Accordingly, the appeal is allowed and the conviction and sentence of the appellant is hereby set aside. The appellant is in custody and shall be released forthwith, if his presence in jail is not required in connection with any other case.

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