IN THE HIGH COURT OF CALCUTTA

Cr. A. No. 239 of 2003 with C.R.R. No. 2383 of 2002

Decided On: 20.11.2003

Appellants: **Foyam Sk. @ Fhoim Sk. @ Fine Sk. and Samina Bibi**
Vs.
Respondent: **State of West Bengal**

Hon'ble Judges:

Amit Talukdar and Pravendu Narayan Sinha, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Dilip Kumar Dutta, Md. Yamin Ali, Md. Sufi Kamal, Abhishek Sinha and Anusuya Dutta, Advs.

For Respondents/Defendant: Tapan Dutta Gupta, Adv., A. Goswami, A.P.P. and Ranjit Kumar Ghosal, State Defence

Acts/Rules/Orders:

Indian Penal Code, 1860 - Section 114, Indian Penal Code, 1860 - Section 363A, Indian Penal Code, 1860 - Section 366A; Probation of Offenders Act, 1958 - Section 4, Probation of Offenders Act, 1958 - Section 11(4)

Cases Referred:

Vishal Jeet v. Union of India and other States and Union Territories: 1990 Cr. L.R. (SC) 192; State of Maharashtra v. Chandraprakash Kewalch and Jain: 1990 (1) SCC 550; State of West Bengal v. Mir Mohammad Omar and Ors.: 2000 Cr. L.R. (SC) 469; R. Puthunainar Alhithan v. P.H. Panidan: AIR 1996 SC 1599; State of Karnataka v. Krishnappa: AIR 2000 SC 1470

JUDGMENT

Amit Talukdar, J.

1. Merchants of the flesh trade have sought to countermand their well-ordained fate suffered in the annals of the Sessions Trial No. 1 of September, 2001 before the learned Additional Sessions Judge, Kandi, Murshidabad where the appellant upon his conviction in respect of the charges of Sections 363A and 366A of the Indian Penal Code were sentenced to suffer Rigorous Imprisonment for eight (8) years each and to pay a fine of Rs. 2,000/- in default, to suffer Rigorous Imprisonment for further two (2) months with a sigh of relief that the sentences were to run concurrently; while another architect of the sinister design Mst. Samina Bibi was, although found guilty, let off on probation.

2. Indigent S.B.(PWl) forsaken by her husband in order to niche an existence for herself and her off springs had offered her daughter, M.(PW3) as a domestic help in the house of the accused persons while she just entered her teen age. Feigning compassion upon PW1 the accused took the pretension that they will make arrangements for the marriage of M.(PW3) and took her along with them for a tour to Saudi Arabia. Hapless S.B.(PW1) was induced to believe that the accused persons, who would spend money for her (PW3) marriage and she would be given gold ornaments.

3. Fate decided otherwise. PW1, S.B.received a rude shock when she had to take the custody of PW3, little M. from a Borstal Home in Berhampore.

4. Tale told by little M.(PW3) jolted the fanciful hope of S.B.(PW1) who, like all mothers, was delighted in the prospect of the matrimony of her daughter.

5. It was a tale told in tears and written in shame. It was a long trail from Berhampore to Saudi Arabia for little M.(PW3); prospects of a happy matrimony and the blooming roses of a blissful wedded life, which was otherwise beyond the reach of a destitute mother (here Suraiya Bibi, PW1) must have consoled the separation from her mother (PW1).

6. It is said that when you part - a part of you dies. With the parting of little M.(PW3) from her mother (PW1) for her ensuing voyage she did not realize that a part of her lay dead in Berhampore - the little flower that was M.before nightmare gulped her.

7. Alas! it was only thorns but no roses for her when she was forced to beg for alms and became the latest consumable article in the voluptuous meat market and satisfy the carnal lust of the vendors of the ancient profession in the world who feasted on tender flesh of the hapless little M.(PW3) until such time she retrieved herself and surrendered to the Saudi Arabian Police from where she was deported to Bombay and then found her place in the Borstal Home in Berhampore from where she was taken custody of by her mother, Suraiya Bibi(PW1).

8. Grisly details, gory facts, gaucus circumstances which throws a ring around the prosecution case.

9. In order to countenance the situation arising out of the post-conviction stage the appellant has preferred the appeal on several grounds.

10. While we have to assess his plea as a First Court of Appeal we, by necessary implication, have also to assess the evidence touching on co-accused Mst. Samina Bibi, who although was found guilty in respect of both the charges for which the appellant was convicted, was let off on probation. As a suo motu Rule was issued by a Division Bench of this Court, it, by necessary implication, requires that the case of Mst. Samina Bibi should have to be assessed as a whole along with that of her husband the present appellant, Foyam Sk.

11. We found that the Rule issued by the Division Bench was duly served upon the accused Mst. Samina Bibi; but, she did not choose to appear at the time of hearing of the Rule. For the greater interest of justice, lest she should not remain unheard we by our order dated 14.8.2003 engaged a Counsel from the State Panel - Shri Ranjit Ghosal to appear on her behalf in the said Rule (C.R.R. No. 2383 of 2002).

12. Shri Dilip Kumar Datta, learned Senior Advocate appearing with Mr. Md. Yamin Ali, Md. Sufi Kamal, Shri Abhishek Sinha and Smt. Anusuya Datta for the appellant in his usual meticulous fashion canvassed several points in support of the appeal, which broadly categorized as follows:

a) that PW3 went to Saudi Arabia, the prosecution could not adduce any evidence in support thereof. He referred to Section 3 of the Passports Act and submitted that it is a statutory requirement for any person leaving the country or returning to possess a valid passport and obtain requisite visa; since there was no evidence in this regard the prosecution case should be disbelieved.

b) that PW3 was working as a maid-servant in the house of the accused could not be established by the prosecution in any manner.

c) that the evidence of PW2 shows that he only heard about the incident concerning PW3, M.being taken to Saudi Arabia and barring the uncorroborated testimony of PW3, there was no evidence worth-while in this regard.

d) that the fact PW3 surrendered herself before the Police in Arabia and subsequently stayed with a Christian family in Bombay absolutely no evidence was collected by the prosecution in this regard. As such, according to Shri Datta, learned Senior Advocate the fact of PW3 being taken away to Saudi Arabia and subsequently being deported was totally unbelievable.

e) the evidence of PW1 with regard to locating PW3 in the Berhampore Borstal Home and her taking custody from the said Home of PW3 the prosecution could not produce a scrap of paper which renders the said version absolutely improbable.

13. Shri Datta, learned Senior Advocate by way of summing up submitted that the prosecution has hopelessly failed to bring home both the charges against the appellant and the conviction was liable to be set aside.

14. Shri Tapan Dutta Gupta, learned Counsel for the State and being led by the learned Additional Public Prosecutor argued the appeal on behalf of the State with utmost care and dedication. Shri Dutta Gupta took great pains in analyzing the evidence in relation to the charges framed against the appellant.

15. Shri Dutta Gupta submitted that if we leave aside all other evidence the deposition of PW3 was fully reliable and can be totally accepted for the purpose of arriving at a finding with regard to the guilt of the accused. He has submitted that PW3 was taking her honour and why should she falsely implicate the accused as no previous grudge could be established. Practically, Shri Dutta Gupta argued, the evidence of PW3 went unchallenged and there is no effective cross-examination of her evidence. Shri Dutta Gupta submitted that in a case of crime against woman, which is most heinous in nature, the evidence of the victim itself was the best evidence.

16. Expanding his argument Shri Dutta Gupta submitted further that in a case of this nature where a minor girl was taken for prostitution by her own employers on the false hope of marriage is itself a grave incriminating circumstance if read in conjunction with the evidence of PW7 - the then Medical Officer of Kandi Sub-Divisional Hospital and in his report (Ext. 4) was of the opinion that she was capable of sexual intercourse and her hymen was found absent and the conviction recorded against the accused was perfectly justified.

17. As a part of his submission Shri Dutta Gupta referred to the decision of the Supreme Court in Vishal Jeet v. Union of India and Ors. States and Union Territories: 1990 Cr. L.R. (SC) 192, and showed that such types of offences are a social malady. Deterrent punishment should be bestowed upon the accused in connection with this type of offences.

18. He also referred to the decision of State of Maharashtra v. Chandra Prakash Kewalch and Jain: 1990 Cri. LJ 889, in support of his stand that the evidence of a rape victim must receive the same weight as attached to an injured witness and the question of corroboration in such cases was immaterial.

19. Shri Dutta Gupta winding up the submission on behalf of the State pointed out that the victim - PW3 was a minor at the relevant point of time and as she was taken out for prostitution and begging the learned Trial Court ought to have framed a charge under Section 5 of the Immoral Traffic (Prevention) Act, 1956 (hereinafter referred to as the 1956 Act) and although the learned

Trial Court omitted to do so this Court was competent to remand the matter for the purpose of framing a fresh charge in this regard as there was sufficient evidence.

20. In reply, Shri Datta, learned Senior Advocate submitted that motive was furnished by the accused as Pearbox the estranged husband of PW1 was related to the accused persons which has been given by way of suggestion to PW1 there was every possibility of false implication of the accused. Shri Datta further submitted that the learned Trial Court ought to have drawn an adverse presumption against the Prosecution for its failure to prove the passport by which the victim - PW3 had travelled to Saudi Arabia and come back.

21. While replying Shri Datta showed that there is absolutely no evidence either touching on the recovery of PW3 from the Borstal Home at Berhampore or with regard to her residence in Saudi Arabia and so many loopholes remaining apparent in the chain of the prosecution case the legal requirements for convicting the accused was not made out and as the prosecution could not prove a case of Section 376 of the Indian Penal Code the argument of the learned Counsel for the State was not tenable and by no way the contents of Ext. 1/1 --the copy of passport of the appellant can go in evidence in the absence of formal proof and ruled out the application of the 1956 Act. Shri Datta submitted there is absolutely no evidence that PW3 was forced to take prostitution at the instance of the accused.

22. Although there cannot be a reply against reply, but, however, by way of corrigendum Shri Dutta Gupta, learned Counsel for the State submitted that this was a case concerning social justice and as there was no question put to the Investigating Officer (PWS) it does not lie in the mouth of the defence to wax eloquence in this regard.

23. To rebut the question of adverse presumption under Section 114(g) of the Evidence Act (for short, the said Act), Shri Dutta Gupta referred to the decision of the Supreme Court in State of West Bengal v. Mir Mohammad Omar and Ors.: 2000 Cr. L.R.(SC) 469, and showed when the prosecution has been able to establish its case the Court has to presume existence of certain facts and the burden of proof on the prosecution to prove the guilt of the accused should not be taken as a fossilized doctrine.

24. Having had the advantage of listening to the erudite submissions made at the Bar and with the experience gained therefrom we now proceed to evaluate the same in the light of the evidence and materials on record.

25. True, we have before us the principal evidence of PW3, M.that she -

"used to work in the house of the accused as maid-servant. They gave a proposal to me to take me to Saudi Arabia for a period of 3 months. Ultimately, they took me to Saudi Arabia and engaged me for begging at Saudi Arabia. The accused persons also engaged me for making sexual intercourse with other persons. I surrendered before the police of Saudi Arabia and

ultimately I was taken to Bombay. I stayed in the house of a Christian for some days at Bombay. Finally, I was taken to Borstal Jail of Berhampore. My mother, after receiving the notice of police, went to Borstal Jail at Berhampore and took me to her custody."

26. This is the sheet-anchor of the prosecution case with corroboration from PW1, Suraiya Bibi, her mother, who heard the same from her. Supporting the same is the evidence of PW2, Abbas Sk.

"M.was taken to Saudi Arabia for the purpose of hezz by the accused persons. The accused persons engaged M.for the purpose of begging there at Arabia."

27. However, we have to keep in mind that in evaluating the evidence of PW3 it has to be treated with great value in a sexual offence where the evidence of the prosecutrix does not suffer from any basic infirmity, the Court can accept the same in the absence of any corroboration since her evidence is at par with the evidence with an injured witness. This is the settled principle of law and we cannot depart by asking for corroboration. In this context we very much fall-back on the decision of State of Maharashtra v. Chandraprakash Kewalchand Jain (supra), cited by Shri Dutta Gupta, learned State Counsel.

28. Equally true is the fact that there is no evidence forthcoming with regard to her (PW3) stay in Saudi Arabia and her deportation to Bombay and finally her rescue from the Borstal School at Berhampore.

29. No doubt true, there are lacunae in the investigation and we only hoped that PW8--the Investigating Officer would have been a bit more vigilant in giving more teeth to the investigational process by plugging the said loopholes.

30. More equally true was the fact that the learned Trial Court played a reticent role and did not exert its judicial powers under Section 91 of the Code of Criminal Procedure (for brevity, hereinafter referred to as the said Code) to bring the records from the Borstal Home at Berhampore and deportation papers nor did it resort to the provisions of Section 311 of the said Code to examine such witnesses pertaining to deportation of the victim girl (PW3) and those connected with her safe custody in the Borstal Home.

31. These are pitfalls in the long journey of a Criminal Trial which initiates after registration of the First Information Report (Ext. 1) till it reaches its logical conclusion (pronouncement of the judgment), at best the Justice Delivery System suffers a roller coaster movement but cannot in any way debar the Court from reaching to the logical conclusion. After all, the endeavour should be to salvage the truth and cull out the nuggets being oblivious of such lacuna both in the investigation and in the course of the trial.

32. We are sorry that we cannot accept the submission of the learned Senior Advocate for the appellant that the above circumstances damage the prosecution case, which even if so, in our

humble view is not irreparable, and although according to Shri Datta PW2, Abbas Sk. is a hearsay witness the evidence of PW3 with regard to her working in the house of the accused as a domestic help and her journey to Saudi Arabia where she was forced into begging and prostitution which inspires sufficient confidence in our mind and we feel no reason to disbelieve the same as it is on the whole acceptable.

33. Accused were arraigned in the trial to answer twin charges of Sections 363A and 366A of the Indian Penal Code. Section 363A of the Indian Penal Code was inserted in the Statute Book way back in 1959; the purpose behind the same, which prompted the Parliament to enact the said provision, was to effectively put down the evil of kidnapping of children for exploiting them for the purpose of begging and made it an aggravated form of the parent offence of Section 363 of the Indian Penal Code.

34. The Court has to see in order to satisfy itself that as to whether Section 363A of the Indian Penal Code can be applicable that a minor is employed or used for begging. Here, we find the little M.was just 13 years in view of the unchallenged testimony of PW1, S.B.- and the testimony of PW7 the Gynaecologist of the Sub-Divisional Hospital, Kandi, who medically examined the little M.(PW3) on 27.4.98, and that the person, here the accused, who were the employers of little M.(PW3), using or employing the said minor is not the lawful guardian of the said minor.

35. Once we find that the above two tests are satisfied and PW3 being a minor as defined in clause(ii) of Sub-section (4) of Section 363A of the Indian Penal Code and that the accused persons, who in view of the evidence of PW1 and PW3 which we have no occasion to disbelieve, were not her guardian had obtained the custody of minor little M.in order that she may be employed and used for the purpose of begging the charge in respect of Section 363A of the Indian Penal Code stands suitably proved.

36. With regard to the charge in respect of Section 363A of the Indian Penal Code we find that in order to establish the same the prosecution has to prove first that the accused had induced a female and that she was under the age of 18 years and pursuant to such inducement she was made to move from one place to do any particular act with the intention that it was likely she would be forced or seduced to illicit intercourse with a person other than the accused who had originally given such inducement. This Section 366A was included in the Indian Penal Code during the zenith of the Colonial Era way-back in 1923 just after the post - World War I stage to curb the menace of trafficking and procurement of women and girls, who were under age for immoral purpose. This Section was inserted by the British in their anxiety to curb the menace of flesh trade and contain the activity of procurers. A plain reading of the evidence of PW3, who we find, gave a tell-tale version of her haranguing experience in the hands of the accused which we do not have any occasion to discount. It only buttresses the charge in respect of the offence of Section 366A of the Indian Penal Code as all the ingredients have sufficiently been established.

37. Once we have found that PW3 is a believable witness immediately both the charges against the accused persons have square application and stand proved; if that be so, the conviction recorded by the learned Trial Court against the accused Foyam Sk. and Mst. Samina Bibi needs no interference.

38. Now, we take up the another portion of the submission of Shri Datta, learned Senior Advocate that non-production of the original passport and the papers pertaining to the deportation of M.(PW3) and her release from Borstal Home entitles the Court to draw an adverse presumption under Section 114(g) of the said Act. It is necessary to reproduce the text of the said section –

"114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations.

The Court may presume

(a) * * * * * (b) * * * * * (c) * * * * * (d) * * * * * (e) * * * * * (f) * * * * *
(g) That evidence which could be and is not produced would if produced, be unfavourable to the person who withhold it;".

39. With great respect to Shri Datta we are unable to agree with him in this regard. Apart from the fact as pointed out hereinabove that there was a halting investigational process, which we do not take any delight to castigate, and only wish could have been more happy and made the task of the Court less onerous and a passive trial oblivious of its plenary powers under Sections 311 and 91 of the said Code and Section 165 of the said Act which if resorted to, would have perhaps given a clearer picture of the dark episode, there cannot be any mathematical formula for the Court to presume existence of certain facts and thereafter to draw an adverse presumption. We have the authority of the Supreme Court in this regard in the case of R. Puthunainar Alhithan v. P.H. Panidan: [1996] 3 SCR 932.

40. The factual matrix of the present case, which we have discussed in the foregoing paragraphs, is fortified by the evidence of PW3 and according to Shri Datta, learned Senior Advocate for the appellant is impoverished by the absence of examination of witnesses with regard to her stay in Saudi Arabia, deportation to Bombay and release from Borstal Home, in our considered view, such an adverse presumption can never be drawn in the fact situation of the instant case as the question of application of Sub-section (g) of Section 114 of the said Act arises only when a person by his common act withhold the evidence by which the nature of his case would be manifested then full presumption to his disadvantage can be adopted by the Court.

41. Here, with utmost respect to Shri Datta, learned Senior Advocate we find it otherwise. A battered, defenseless little M.who is barely in her teens, a prisoner of lust and lurid sex being curtailed from the barn house to the slaughter house till such time fortune smiles on her and she could retrieve herself from the dingy corridors of the ugly flesh trade and submit herself to the Saudi Arabian Police who deported her back to Bombay. Her evidence, which is by now well-settled, in a sex offence does not require any further corroboration and no adverse inference can be drawn as it cannot be said the items pointed out by Shri Datta, Learned Senior Advocate would be the best evidence to prove the case. We are very much emboldened by the decision cited by the learned State Advocate, Shri Tapan Dutta Gupta in State of West Bengal v. Mir Mohammad Omar and Ors. (supra) which we have the privilege to quote:

"31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilized doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the vendors in serious offences would be the major beneficiaries, and the society would be the casualty.

32. In this case, when prosecution succeeded in establishing the afore narrated circumstances, the Court has to presume the existence of certain facts. Presumption is a course recognized by the law for the Court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the Court exercises a process of reasoning and reach a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the Court to presume the existence of any fact which it thinks likely to have happened. In that process Court shall have regard to the common course of natural events, human conduct etc. in relations to the facts of the case."

42. If that be so, with full respect to Shri Datta, we cannot subscribe to his view.

43. The last part of the submission of Shri Datta that it has been elicited from the evidence of PW1 that she was given talak by Pearbox, her former husband, who happened to be the relative of the accused persons and as a result of which they have been falsely implicated in the instant case to teach them a lesson, in our opinion is too far stretched an argument for the Court to accept. First of all, even if the distraught wife (PW1) bore any grievance against her former husband (Pearbox), who was related to the accused persons we cannot imagine such a position where she (PW1) will go to such an extent to stake the goodwill of her daughter and spoil her prospects by involving her in a sex imbroglio.

44. Turning to the evidence of PW7 Medical Officer of Kandi Sub-Divisional Hospital, who examined little M.in his Report (Ext. 4) opined that her hymen was missing and she was habituated to sexual intercourse. She (PW3) was examined after she was taken custody by her Mother (PW1) and since the medical evidence of PW7 which was speaking for itself, shows the medico-legal position of PW3, the traumatic experience suffered by her while she was held hostage by her abductors (the accused) and subjected to such misery requires no further corroboration.

45. As a First Court of Appeal and Final Court of Facts which we are, after having assessed the evidence, if we now accept the submission of the learned Senior Advocate and look for corroboration to the tale of distraught pain, humiliation, agony and destruction suffered by little Meherunessa, it would only be adding iodised salt to her gaping wounds which, we are happy to note is perhaps having a healing touch in her new found matrimony in Berhampore where she has found a soul-mate.

46. Shri Datta, learned Senior Advocate for the appellant has referred to the Sections 3 and 5 of Passports Act, 1967 and had showed that those are the statutory requirement for a person to travel abroad and return to the country. Unless one possessed such document it was not possible for him or her to leave the country and coming back. Relying on the said provisions of the Passports Act, 1967 Shri Datta's argument can be taken care of from Ext. 1/1 the copy of passport of Foyam Sk. seized by PW8, is at best high technical nitty-gritties where once the Prosecution case has been able to prove the same need not arrest our attention.

47. The World Body in 1979 adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) followed by the Beijing Declaration which directed all State Parties to take appropriate measures to prevent discrimination on all forms of atrocities against women and taking steps to protect the honour and dignity of women.

48. Can it be said that the adoption of CEDAW and the Beijing Conference in 1979 for securing the rights of women and safeguarding their interest stands fully vindicated when still little Meherunessas are being consecrated to the slaughter house of lust from where Article 23 is a teasing mirage for the rights of hapless little Meherunessas and their siblings, who are forced into life of ignominy and despair on account of the poverty of their parents and the avarice of prowling wolves like the likes of accused.

49. The citation of Shri Dutta Gupta on behalf of the State in Vishal Jeet v. Union of India and Ors. States and Union Territories (supra), has wholesome impact on the fact situation of the instant case and we cannot desist from quoting the passage along with Shri Dutta Gupta:

"14. This devastating malady can be suppressed and eradicated only if the law enforcing authorities in that regard take very severe and speedy legal action against all the erring persons such as pimps, brokers and brothel keepers. The Court in such cases have to always take a

serious view of this matter and inflict condign punishment on proof of such offences. Apart from legal action, both the Central and the State Governments who have got an obligation to safeguard the interest and welfare of the children and girls of this country have to evaluate various measures and implement them in right direction."

50. Shri Dutta Gupta's argument touching on the provisions of Section 5 of the said Act is now taken up for consideration.

51. The evidence of PW 3, little M.on this point, in our view, is quite sketchy and it would not be wise to record a conviction on the basis of the said evidence as the same, we are of the view, is not quite clinching.

52. As such, we do not feel that any useful purpose would be served if we remand that matter before the learned Trial Court for the purpose of framing a charge in respect of the said offence by the learned Trial Court afresh.

53. Accordingly, we let it remain so. From an overall discussion and in the light of the evidence of PW3, M.we find the prosecution has been able to bring home both the charge against the accused. The discussion of the evidenced PW3 fortifies the case of Prosecution that the custody of PW3, Meherunessa, who was a minor at the relevant time, was obtained by the accused for the purpose of employing her for begging which squarely comes within the ambit of the charge in respect of Section 363A of the Indian Penal Code.

54. Rummaging through the evidence of PW3 M.in juxtaposition to the evidence of PW1, S.B.fully establishes the case of the prosecution that M.(PW3), a minor girl under age of 18 years was taken from one place to another with the sole intention that she would be forced or seduced to illicit intercourse with another person. The ingredients of both the charges against both the accused have been proved. The evidence on record is as solid as a rock.

55. While dealing with the case of this nature where a minor girl was seduced on the false pretext of marriage into the world of trafficking we remind ourselves of the hallowed passage from State of Karnataka v. Krishnappa: AIR 2000 SC 1470:-

"15. A socially sensitized Judge, in our opinion, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos."

56. For little Meherunessas the impact of Clause (3) of Article 15 covered under the majestic sweep of Article 39 are perhaps mere euphoria who are lost in the dark world dominated by flesh mongers and they are weighed in lust and measured by primal desire where the man in man becomes an animal bereft of any virtues which God had bestowed upon him.

57. In connection with the Rule, issued by the Division Bench asking the accused Mst. Samina Bibi, who was also found guilty of both the charges but released on probation, we have heard Shri Ghosal for Mst. Samina Bibi and the learned Additional Public Prosecutor assisted by Shri Dutta Gupta for the State. Shri Ghosal submitted that although the offence has been proved against accused Mst. Samina Bibi; but she was given benefit of probation for the reasons recorded by the learned Trial Court, although it was not legally permissible. On the other hand, it was submitted on behalf of the State that Mst. Samina Bibi was as much guilty as the other accused Foyam Sk. She was an accomplice in the crime and she deserved the same treatment as she stood on the same footing with Foyam Sk., her husband. For the State, it was submitted that the evidence is interlaced with common thread of allegation against both Foyam Sk. and Mst. Samina Bibi. In fact, according to the State it was inseparable: What was there for Foyam Sk. it was there for Mst. Samina Bibi and it cannot be distinguished.

58. It was further submitted on behalf of the State that although rightly she was convicted; but a grave error was committed by the learned Trial Court who allowed her probation, which was not at all justified.

59. Let us see the question in the backdrop of the legal position. Since already the learned Trial Court had found Mst. Samina Bibi, and rightly so, guilty of both the charges we have to see whether it was justified on its part to release her on probation. The provisions of Section 4 of the Probation of Offenders Act, 1958 reads as follows;

"4. Power of Court to release certain offenders on probation of good conduct.--(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the Court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the Court may direct, and in the meantime to keep the peace and be on good behaviour:

Provided that the Court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the Court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2) Before making any order under Sub-section (1), the Court shall take into consideration the report, if any of the Probation Officer concerned in relation to the case.

(3) When an order under Sub-section (1) is made, the Court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision

order directing that the offender shall remain under the supervision of a Probation Officer named in the order during such period, not being less than one year, as may be specified therein and may in such supervision order impose such conditions as it deems necessary for the due supervision of the offender.

(4) The Court making a supervision order under Sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the Court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The Court making a supervision order under Sub-section (3), shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the Probation Officer concerned."

60. From a plain reading we find that there is a specific rider in Sub-section (1) of Section 4 which reads—

".....and the Court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct."

61. It is quite queer to note that a person engaged in flesh trade and procuring minor girls for the purpose of illicit intercourse can be said to be of--(a) having any character, (b) such circumstance can evoke the sympathy of a Court and (c) the nature of such offence can persuade any Court to enlarge the accused on probation as

"Evidently, the offences of Section 363A and 366A IPC do not provide any punishment of death and imprisonment for life. Considering the future betterment and custody of the children of the accused and in view of the nature of the offence proved to have been committed by the female accused, I am of the opinion that it is expedient to release the female accused on probation of good conduct for a period of three years ....." and

"the said order would be justified with reference to the home life and personal liberty of the accused person as no previous conviction is either pleaded or proved against her."

62. To our mind the learned Trial Court entirely misread the provisions of Section 4 of the Probation of Offenders Act. In view of the depraved nature of the crime committed by the accused it was wholly unjustified to extend the benefit to such an accused. The learned Trial Court was swayed away and pondered much over the fate of two minor children of the accused and what would be their future in the event accused Mst. Samina Bibi has to undergo a substantive sentence being wholly oblivious of the fact that the mother in accused Mst. Samina

Bibi remained latent when little M.(PW3) was barely 13 at the time she was exposed to the flesh trade and was one of the architects of her misfortunes was none else but accused Mst. Samina Bibi -- a mother of two children. The reasoning of the learned Trial Court, in our view, is wholly incompatible with the fact situation as well as the legal position discussed by us.

63. Where was the mother in her? When she along with her husband Foyam Sk. dragged little M.-- a girl of barely 13 years of age to the most ugly and shameful life -- a woman can ever dread of. God has created a mother in every woman who teaches one to love and instills in the mind a sense of compassion and amnesty.

64. It is this virtue of a woman which makes her a Supreme Being; being a woman that too a mother of two children, it did not appeal to her that a member of her own sex is being carved for the butcher's meat trade where was her womanly instinct and how hidden were her emotions that she could be so cruel to be a party to little M.being dismembered by pack of hungry wolves who devoured the tender flesh of little M.till she could retrieve herself from her fate by surrendering to the Saudi Arabian Police?

65. Misplaced sympathy to an accused who has lost her womanly virtues and the demon in her has raised its ugly head would result in displaced justice to little Meherunessa, who after all like the accused Mst. Samina Bibi, is also a consumer of justice before the majestic portals of this Court. We cannot turn a Nelson's Eye to the plight of Meherunessa.

66. What is sauce for the gander is also sauce for the goose.

67. Before we decide what should be the substantive sentence as we have by now realized that the order of probation accorded in favour of the Mst. Samina Bibi has to be set aside without batting an eye-lid, we have to proceed a little ahead.

68. We are absolutely legally permitted to do so; apart from the clarion call of our judicial conscience, sub-section(4) of Section 11 of the Probation of the Offenders Act reads as follows:

"11. Courts competent to make order under the Act, appeal and revision and powers of Courts in appeal and revision.--

(1) * * * * * * * * * (2) * * * * * * * (3) * * * * *
(4) When an order has been made under Section 3 or Section 4 in respect of an offender, the Appellate Court or the High Court in the exercise of its power of revision may set aside such order and in lieu thereof pass sentence on such offender according to law."

69. The portion of the impugned judgment of the learned Trial Court enlarging the accused Mst. Samina Bibi on probation is forthwith set aside.

70. We found the appellant Foyam Sk. had been directed to undergo a sentence of 8 years and to pay a fine of Rs. 2,000/-; in default, to suffer further Rigorous Imprisonment for two months for

the charges in respect of Sections 363A of the Indian Penal Code and 366A of the Indian Penal Code but both the sentences were directed to run concurrently. Firstly, we find that both the sentences were visited with an imprisonment extending upto ten years, for reasons best known to the learned Trial Court lesser sentence was given, although the complexion of the crime postulated the highest sentence.

71. Now, we find that the learned Trial Court also directed that the sentences are to run concurrently; this, we find, is not in tune with the ugly nature of the crime. It is worthwhile to read Section 31 of the said Code. However, if at this juncture we alternate the concurrent term of imprisonment to a consecutive term, we are afraid, we will indirectly be enhancing the sentence of the appellant Foyam Sk. Since there was no Rule issued in this direction by the Division Bench which admitted the appeal we feel that at this stage without giving an opportunity to the appellant Foyam Sk. such modification should not be made as it would prejudice the appellant Foyam Sk. and in a way he will remain condemned unheard.

72. We, however, feel that the learned Trial Court ought to have been more sensitive and alive to the horrendous nature of the crime and should not have passed a more or less lenient sentence and thereafter directing the same would run concurrently without perhaps realizing the intrinsic impact it has on ultimate analysis. Some more circumspection would have been appreciated.

73. Thus far no further.

74. Taking into account the entire aspect of the matter we feel that as the order of probation has been set aside by us in the Suo Motu Rule issued by a Division Bench of this Court the accused Mst. Samina Bibi is directed to undergo a, substantive sentence of 8 years of both the head of charges; but, however, her sentence will run concurrently and to pay a fine of Rs. 2,000/-.

IT IS NOW ACCORDINGLY ORDERED:

In Re.: Criminal appeal No. 239 of 2003

A.

1. Criminal appeal filed by appellant Foyam Sk. is dismissed.

In Re.: C.R.R. No. 2383 of 2002

B. SUO MOTU RULE

1. Rule is made absolute.

2. Order of probation, given by the learned Trial Court, is set aside.

3. Accused Mst. Samina Bibi is directed to undergo Rigorous Imprisonment for eight (8) years and to pay a fine of Rs. 2,000/- as awarded by the learned Trial Court originally in respect of the appellant, Foyam Sk. for both the charges.

4. However, the sentence, in respect of the accused Mst. Samina Bibi, would run concurrently and not consecutively.

5. Accused Mst. Samina Bibi would forthwith surrender to serve out her sentence. Bond furnished stands cancelled.

6. Learned Trial Court would, at once issue Custody Warrant to carry out sentence.

C. With a further modification in both the sentences that the fine, if realized, would be paid to Meherunessa(PW3) entirely.

75. Before we move on, we feel what we have done is, what the Law mandates in the justice delivery system. We are, after all, none else but mere creatures of the law and have to live up to its expectations at times, however, harsh it may appear.

76. We have addressed ourselves with regard to the plight of the two male children of the accused which has prompted the learned Trial Court to extend the benefit of the Probation of Offenders Act in favour of the accused Mst. Samina Bibi which we have set aside and are quite conscious of the fact that if we direct accused Mst. Samina Bibi to undergo substantive period of eight years imprisonment the two male minor children, whose age we are not told, would be left uncared and exposed to the vagaries of life and would be punished for no fault of theirs.

77. In such situation, we would impress upon the State Government, that in the event there is no next of kin to take care of the two children of the accused--Foyam Sk. and Mst. Samina Bibi, necessary arrangements may be made by the District Administration so that they may be kept in a boarding school and their upbringing and education be looked after by the administration or, any non-Governmental organization working in the field, who may be kind enough to come forward and act as a Good Samaritan until such time their parents come out after serving the sentence.

78. We know our limits after all at best it would be our pious desire but our judicial conscience could stand satisfied if our concern has any impact and operates as a succour and shelter for these two unfortunate children.

79. As we are very cautious to the extent that while doing justice to little M.injustice is not done to these little children, who are a primary hidden agenda in the scheme of things, without them nothing can be complete.

80. After all, in all tears and in joy and in despair it is these two little children who form the spectra of dark episode where like little M.they are also expectorant of justice even if in a latent way.

Justice has always to be wholesome.
Justice has to be overwhelming.
Justice has to be far-reaching.
Justice has to be all pervasive.

81. It is this sense of complete justice while one has to shed tears for little Meherunessa, few drops have to be reserved for these two little unfortunate children, who for no fault of theirs would be denied the company of their mother for a long long term and perhaps will have to spend their childhood in her absence while she undergoes her prison term.

82. We have a silent prayer, before we part, that there is a silver lining in the dark cloud hanging over the volatile flesh market, little M.has found her peace in her matrimonial home, she would look forward to her brighter tomorrows and while she would be forgetting her ugly yesterdays like a nightmare, we only hope that we, or for that matter none of us have to come across the plight of a weeping M.in the Hall of Justice, torn, ravaged and devastated by the kites and vultures of the society who still stride on our social horizon like giant colossus.

83. We should not be understood to have transgressing our judicial boundaries and trend on a domain which is in its beyond. But the dream of the Founding Fathers and the ratio of the decision of Vishal Jeet v. Union of India and Ors. States and Union Territories (supra), would be interpreted in its letter and spirit if steps are taken to contain the retailers of the flesh trade and its hungry consumers so that little Meherunessas are not carved out as delectable dishes in the banquet of lust and laid out as table spread in the Dining Hall where dines the beast in man.

84. We are grateful to Shri Datta the learned Senior Advocate, who assisted us greatly, in arguing the appeal on behalf of the appellant; and record our deep appreciation of the pains and endeavour taken by Shri Tapan Dutta Gupta, learned Counsel for the State, who argued the appeal with much sincerity.

85. In the light of the discussion held hereinabove we dismiss the appeal with the modification in the sentence and make the Rule absolute.

86. Learned Registrar is requested to communicate the modification in the sentence to the Inspector General of Prisons, who, in turn, will communicate the same to the Superintendent of the concerned Correctional Home. He will also transmit a copy of this order to the Chief Secretary of Government of West Bengal for his appraisal and doing the needful in terms of the observations made by us in the body of the judgment.

87. Let a copy of this order be sent down to the learned Trial Court for necessary compliance.

88. Appeal dismissed.

89. Rule absolute.

Pravendu Narayan Sinha, J.

90. I agree.