



**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

D.B. Criminal Appeal No. 65/2019

Salim S/o Abdul Wahid, Aged About 50 Years, B/c Sai Musalman
R/o Sitapur Tonk Road, Jaipur Presently Sardarpura J.k. Road
Gotan (Lodged In Central Jail, Ajmer)

----Appellant

Versus

State, Through PP

----Respondent



For Appellant(s) : Mr. Ashok Kumar (through VC)
For Respondent(s) : Mr. Anil Joshi, P.P.

**HON'BLE MR. JUSTICE SANDEEP MEHTA
HON'BLE MS. JUSTICE KUMARI PRABHA SHARMA**

Judgment

DATE OF RESERVE 22/10/2020

DATE OF PRONOUNCEMENT 02/11/2020

Reportable

BY THE COURT : (Per Hon'ble Mehta, J.)

The instant Jail appeal has been preferred by appellant Salim for assailing the judgment dated 13.12.2018 passed by the learned Additional Sessions Judge No.2, Parbatsar, District Nagaur in Sessions Case No.1/2018, whereby he has been convicted and sentenced as below:-

<i>Offence for which convicted</i>	<i>Sentence awarded</i>
Section 363 IPC	Seven years' rigorous imprisonment alongwith a fine of Rs.10,000/- and in default of payment of fine, further to undergo one year's simple imprisonment.
Section 363-A IPC	Ten years' rigorous imprisonment alongwith a fine of Rs.10,000/- and in default of



	payment of fine, further to undergo one year's simple imprisonment.
Section 365 IPC	Seven years' rigorous imprisonment alongwith a fine of Rs.10,000/- and in default of payment of fine, further to undergo one year's simple imprisonment.
Section 370(4) IPC	Life imprisonment alongwith a fine of Rs.20,000/-.
Section 23 of the Juvenile Justice (Care and Protection) Act, 2000	Six month's simple imprisonment alongwith a fine of Rs.5,000/- and in default of payment of fine, further to undergo one month's simple imprisonment.

All the sentences were ordered to run concurrently.

Shri Ashok Kumar, Advocate, was appointed as Amicus Curiae for arguing the appeal on behalf of the appellant.

We have heard and considered the submissions advanced by Shri Ashok Kumar, Amicus Curiae and the learned Public Prosecutor and have gone through the record.

Briefly stated facts relevant and essential for disposal of the appeal are noted hereinbelow:

Banshi Lal submitted a written report (Ex.P/7) to the Officer-in-charge, Police Station Nawa on 11.04.2010 alleging inter alia that on 30.03.2010, his daughter Mst. 'M', aged 9 years, (hereinafter referred to as 'the victim') had gone to Nawa for enjoying Hanuman Jayanti Fete with other children of the locality. The other children returned in the evening, but his daughter did not come back. He and his family members made a frantic search for the child, on which, they came to know that she was lastly seen near a toy-seller, who used to live on rent in the kiosk of Ajmal Khan (PW-2). They apprehended that the said toy-seller had kidnapped the victim. He also alleged that he had lodged a



missing report previously, which was being inquired into. On the basis of this report, an FIR No.47/2010 (Ex.P/8) was registered at the Police Station Nawa for the offences under Sections 363 and 365 IPC and the investigation was commenced.

After lodging of the report, the police tried its best to trace out the missing girl but without any success. Ultimately concluding

that neither the accused was traceable nor the victim could be found, a Closure Report was submitted on 27.07.2010 in the Court concerned. Five years later, the officers of the Police Station Gotan

collected information that the accused Salim was using children as beggars and for child labour, upon which, the police took action

and four children including Mst. 'M' (victim of the present case)

were traced out from the premises of the accused-appellant at JK Road, Gotan. The accused appellant Salim was arrested in

connection with FIR No.176/2015 (Ex.P/10) registered at Police Station Gotan, District Nagaur and upon being interrogated in the

said case, he admitted to have kidnapped the child victim (Mst. 'M') of the instant case for the purpose of engaging her in begging

etc. Upon this, investigation of FIR No.47/2010 was reopened.

Upon interrogation, the accused admitted to have kidnapped all these children at different points of time and also stated that he

used to force them to beg and also got them employed as child labourers and reaped the profits by using the victim children as

such. The child Mst.'M' was presented before the CWC, Nagaur.

On the basis of the leads given by the victim, her parents were traced out. Further investigation was undertaken and a fresh

report under Section 173 Cr.P.C. came to be filed by the Investigating Officer in the Court of Judicial Magistrate, Nawa

concluding that the appellant had been found involved in the case





for the offences under Sections 363, 363A, 365, 370 IPC and Section 23 of the Juvenile Justice (Care and Protection) Act, 2000. The learned Magistrate accepted the report submitted by the police. As some of the offences were Sessions triable, the case was committed to the Court of Additional Sessions Judge, Parbatsar for trial. The learned trial court framed charges against the appellant for the above offences. The prosecution examined as many as 14 witnesses and exhibited 17 documents to prove its case. The victim Mst. 'M' was examined as P.W.3. She gave unimpeachable evidence identifying the appellant as the person, who kidnaped her and then forced her into begging and also to do household job in the house of Munni Meghwal. The accused upon being questioned under Section 313 Cr.P.C. and when confronted with the circumstances appearing against him in the prosecution evidence, denied the same and claimed to be innocent but he did not choose to lead any evidence in defence.

Upon hearing the arguments of the learned Public Prosecutor and the learned Defence Counsel and appreciating the evidence available on record, the learned trial court proceeded to convict and sentence the appellant as above by the impugned judgment dated 13.12.2018. Hence this appeal.

It may be stated here that from the material prosecution witnesses, the most relevant evidence is of Ajmal Khan (PW-2), the victim Mst.'M' (PW-3), Sita Devi (PW-4), Ratan Devi (PW-5) Mahaveer Prasad (PW-12) and Ameen Khan (PW-13).

Ajmal Khan (PW-2) gave evidence to the effect that he handed over his shop to Salim (the accused herein) on rent as Salim told him that his house at Sitapura, Jaipur had been destroyed in an incident of fire and some of his family members



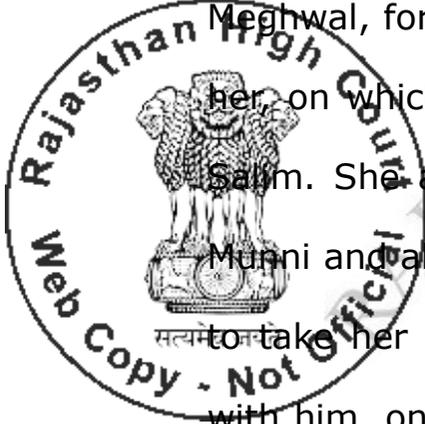
also got burnt and died in the accident. He also communicated that two of his children i.e. a son and a daughter, survived the accident and therefore he wanted to live and run his business in Nawa so as to sustain them. On this, Ajmal Khan gave his shop on rent to Salim so that he could operate a toys shop. A few days later, police came and made an inquiry from him about Salim. He realised that Salim had kidnapped the children. On going through the cross examination of this witness, it is clear that nothing significant was elicited which can diminish the evidentiary worth of his deposition.



The star prosecution witness is none other than Mst. 'M' (PW-3), the victim. She categorically alleged in her evidence that the incident took place about seven years ago. At that time, she was eight years old and used to study in second standard. She named her two siblings as Vimla and Mahesh stating that she was the youngest child of her parents i.e. mother Sita Devi and father Banshi Lal. Her father used to prepare Moccasins (Jutis). She had gone to visit Balaji Mela in Nawa and went to the toy shop. Two more children (one boy and a girl) were present in the shop with the shopkeeper who gave her some toys and enticed her and then asked her to accompany him. He introduced himself as Salim and took her to his house, collected his belongings, boarded a taxi and took her to Nawa Railway Station. At that time, the other two children were also accompanying them. She was taken to Mundwa where they stayed in the house of a washer-man (Dhobi). Salim forced her and the other two children to beg at Mundwa Railway Station. She was taken to Roon and then to Khajwana. The boy named Irfan was employed by Salim at a hotel. A girl named Farzana was brought by Salim from Bikaner. Irfan,



Farzana, Rehana and the victim were taken by Salim to various places, namely Bhopalgarh, Bikaner and Khatu, where they were forced to beg. Salim used to maltreat and beat all the children. They were taken to Merta, where they were forced to stay for two years. Then they were taken to Gotan. They stayed in the house of a Teli. Salim got her employed in the house of one Munni Meghwal, for doing household chores. Munni made enquiries from her, on which, she informed her that she had been kidnapped by Salim. She also shared the name of her father and mother with Munni and also told her the name of her village. When Salim came to take her back in the evening, Munni did not permit her to go with him, on which, Salim quarreled with Munni who informed the police. The Police Officers came and took the victim, Farzana, Rehana and Irfan to the police station. Salim had given her identity by the name of Zareena. She and the other girls were taken to Nari Niketan, Ajmer. Her mother came there and both of them could identify each other. The Investigating Officer took her to Nawa where she identified her school, her house, the place where her father used to work. She identified the accused Salim in the Court as her kidnapper and stated that he used to force her to beg and also that she was continuously tormented by the accused. The tenor of the cross examination conducted from the victim was to dispute her identity and to question her claim that she was the daughter of Banshi Lal and Sita Devi. However, the minor firmly withstood the cross examination conducted from her and could not be shaken even a bit. After analysing the entire statement of the victim, we are of the firm opinion that she has given unflinching evidence, implicating the accused for the grave allegations of kidnapping her and the other minors and then using them for

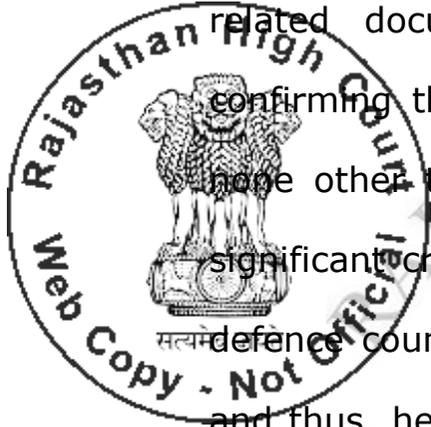




begging etc. Apparently, thus, the act of trafficking the child continued till she was saved from the clutches of the accused i.e. in the year 2015.

Mahaveer Prasad (PW-12) ASI, who conducted further investigation of the case after reopening of the file, gave positive evidence regarding the recovery of the child, procurement of age related documents etc. and the collection of evidence for confirming the fact that the recovered child victim Mst. 'M' was none other than the daughter of Banshi Lal and Sita Devi. No significant cross examination was made from this witness by the defence counsel. It may be stated here that Banshi Lal expired and thus, he could not be examined in evidence. Sita Devi, the mother of the child victim, was examined in evidence as PW-4. She gave convincing and cogent evidence regarding her child having gone missing from the Mela. The victim Mst.'M' was recovered and was lodged at the Ajmer Balika Gruh/Nari Niketan, where the witness and the child identified each other as mother and daughter. Initially, the child was not handed over to her. However, after the Investigating Officer confirmed the fact that the child was none other than her daughter Mst.'M', the child's custody was given to the witness. No significant cross examination was made from the witness regarding the assertions made by her in the examination-in-chief.

Thus, we are duly satisfied that the prosecution has proved by cogent and convincing evidence that the appellant herein, kidnapped the child Mst.'M' daughter of Smt. Sita Devi (PW-4) and the first informant Banshi Lal from the Mela at Nawa city after alluring her and thereafter she was continuously forced into begging and child labour. The offending acts of the accused





continued till the year 2015, by which time, the amended provisions of Section 370 IPC had come into force. However, the Investigating Officer filed the fresh report under Section 173 Cr.P.C. against the accused only for the offence under Section 370 IPC as it stood in the year 2010.

It may be stated here that the offence of "trafficking" was introduced in the IPC for the first time vide the Criminal Law Amendment dated 03.02.2013 and the following new provisions were incorporated in the Statute:



370. Trafficking of person. - (1) Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by-

First. - using threats, or

Secondly. - using force, or any other form of coercion, or

Thirdly. - by abduction, or

Fourthly. - by practising fraud, or deception, or

Fifthly. - by abuse of power, or

Sixthly. - by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.

Explanation 1. - The expression "exploitation" shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.

Explanation 2. - The consent of the victim is immaterial in determination of the offence of trafficking.

(2) Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine.

(3) Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(4) Where the offence involves the trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.



(5) Where the offence involves the trafficking of more than one minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years, but which may extend to imprisonment for life, and shall also be liable to fine.

(6) If a person is convicted of the offence of trafficking of minor on more than one occasion, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

(7) When a public servant or a police officer is involved in the trafficking of any person then, such public servant or police officer shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine."



We feel that no sooner had the child been traced and once she made pertinent allegations of trafficking her against the appellant continuing right upto the year 2015, the police should have applied the graver offence in the report under Section 173 Cr.P.C. i.e. Section 370(4) I.P.C. because by continuing to force the child into begging and as a child labourer, the accused definitely committed the offence of child trafficking as defined in Section 370(4) of the IPC.

However, it appears that the Investigating agency erred on this count and so did the Public Prosecutor as well as the trial court. Neither specific charge under Section 370(4) IPC was framed against the accused-appellant nor the charge was amended to this effect even after the statement of the victim had been recorded on oath.

We are of the firm view that the trial court committed a blunder while framing charge and in failing to amend the charge suitably and without doing so, the appellant has been convicted for the offence under Section 370(4) IPC and has been awarded life imprisonment on that count.

The sole argument of Shri Ashok Kumar, learned Amicus Curiae, is that the conviction of the appellant for the offence under

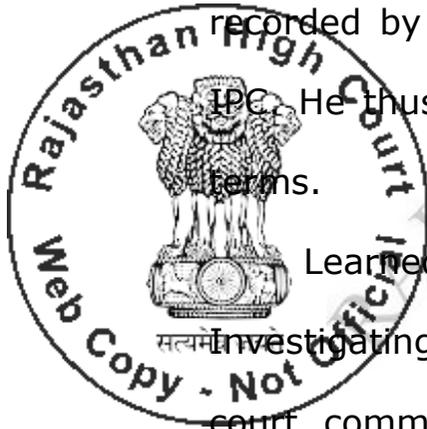


Section 370(4) IPC cannot be sustained because the offence is not retrospective in nature and only the charge under Section 370 IPC as it then stood was framed against the accused, for which the maximum punishment provided is seven years' rigorous imprisonment only. He contended that the impugned judgment has to be set aside to the extent of conviction of the appellant as

recorded by the trial court for the offence under Section 370(4) IPC. He thus prays for partial acceptance of the appeal in these terms.

Learned Public Prosecutor candidly conceded that the Investigating Officer and the learned Public Prosecutor in the trial court committed a blunder while filing the subsequent report under Section 173 Cr.P.C. Neither was the charge sheet filed for the offence under Section 370 (4) IPC nor was any prayer made by the prosecution to the trial court for framing a suitable charge under Section 370(4) IPC against the appellant and thus the trial court could not have convicted the accused for this offence without specific charge having been framed against him.

Be that as it may. Law is well settled that any penal statute which increases the rigor of punishment cannot be applied retrospectively. An accused facing trial cannot be convicted and sentenced for a graver offence of which no charge has been framed against him. It remains a fact that in the present case, the offence under Section 370 IPC was initially applied at the time of lodging of the FIR in the year 2010 and rightly so because the offence of trafficking was not in existence at that time. Trafficking of children in terms of Section 370(4) IPC was introduced in the Statute for the first time on 03.02.2013.





Superficially, we are convinced with the argument of Shri Ashok Kumar, learned Amicus Curiae that the conviction of the accused for the offence under Section 370 (4) IPC as recorded by the trial court cannot be sustained because no charge was framed against him for such offence. Nonetheless, this Court cannot be oblivious of the fact that from the evidence of the child Mst.'M'

(PW-3), it has been duly established that the accused continued to use her for begging and as a household labourer right till the time she was recovered on 02.08.2015 during the course of investigation of the FIR No.176/2015 registered at the Police Station Gotan. Manifestly, thus, the offence of 'child trafficking' continued from the date of introduction of Section 370(4) IPC i.e. 03.02.2013 till the child was recovered i.e. on 02.08.2015. Thus, it is a fit case wherein the powers under Section 217 Cr.P.C. should have been invoked by the trial court for the purpose of altering/amending the charge against the accused and putting him up for trial for the graver offence under Section 370(4) I.P.C.

We are conscious of the fact that the case involves the serious allegation of kidnapping children and subjecting them to "trafficking". These allegations are firmly established against the accused from the evidence of the prosecution witnesses which we have carefully analyzed (Supra).

By virtue of Section 386 (b) (i) Cr.P.C., which reads as below:-

386. Power of the Appellate Court. After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

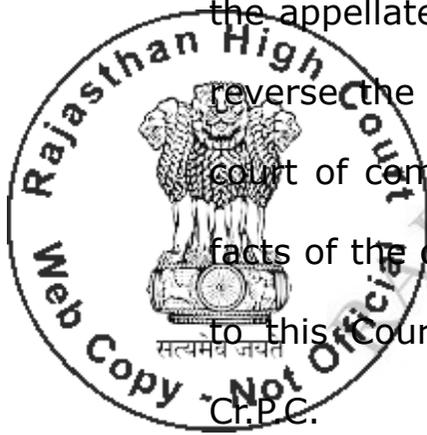


(a) in an appeal from an order or acquittal, reverse such order and direct that further inquiry be made, or that the accused be re- tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re- tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

the appellate court while hearing an appeal against conviction can reverse the finding of the trial court and order for retrial by a court of competent jurisdiction. We are of the firm view that the facts of the case at hand warrant exercise of the powers conferred to this Court under Section 386 (b) (i) read with Section 217



In view of the grave facts noted above, in order to do complete justice to the victim as well as the accused, we feel it imperative to direct a retrial of the accused by exercising these powers conferred upon the appellate court by Section 386 Cr.P.C.

Accordingly, we hereby set aside the impugned judgment dated 13.12.2018 passed by the learned Additional Sessions Judge No.2, Parbatsar District Nagaur and while exercising the powers under Section 386(b)(i) read with Section 217 Cr.P.C., the matter is remanded to the trial court for framing an amended charge under Section 370(4) I.P.C. against the appellant for conducting a *de novo* trial, whereafter, the prosecution as well as the accused shall be given opportunity of examining such witnesses (including recalling) as may be desired. However, the trial court will not be required to record evidence of all witnesses afresh. After concluding the process of recalling and examining the witnesses afresh in the above terms, the trial court shall, if so required, re-examine the accused under Section 313 Cr.P.C. and



give him an opportunity to lead evidence in defence and shall then decide the case afresh as per law. The entire exercise as directed above, shall be concluded within a period of six months' from the date of receipt of a copy of this judgment. Till then, the accused shall continue to remain in custody.

The appeal is disposed of accordingly.



(KUMARI PRABHA SHARMA),J

Tarun & Mamta/-

(SANDEEP MEHTA),J



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