

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH**

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CRIMINAL PETITION No.4193 of 2015

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Between:

Saleh Mahfooz, S/o.Abood Mehfooz & 4 others
.. Petitioners/ accused Nos.6 to 9 and 11

And

The State of Telangana, through Public Prosecutor of
High Court at Hyderabad & another
.. Respondents

DATE OF JUDGMENT PRONOUNCED: 20-07-2015

SUBMITTED FOR APPROVAL:

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

1. Whether Reporters of Local newspapers
Yes/No
may be allowed to see the Judgment?

2. Whether the copies of judgment may be
marked to Law Reporters/Journals

Yes/No

3. Whether Their Lordship wish to
see the fair copy of the Judgment?

Yes/No

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL PETITION No.4193 of 2015

ORDER :

The petitioners are accused Nos.6 to 9 and 11 in C.C
No.830 of 2012 pending on the file of the VII Metropolitan

Magistrate, Cyberabad at Hayathnagar. The Inspector of Police, Hayathnagar filed charge sheet after investigation in Crime No.385 of 2012 registered against the petitioners and others for the offences punishable under Sections 3, 4 and 5 of the Immoral Traffic Prevention Act, 1956 (for short 'ITP Act') and Section 34 (e) of the A.P Excise Act. It is impugning the taking of cognizance for the offences supra pursuant to the police final report by the learned Magistrate; the petitioners/ accused Nos.6 to 9 and 11 maintained the present Criminal petition under Section 482 Cr.P.C.

2) Heard learned counsel for the petitioners and learned Additional Public Prosecutor representing the respondents.

3) The factual back ground in the nutshell is that, the 2nd respondent—Inspector of police on so called credible information, after taking permission from the Assistant Commissioner of Police, Vanasthalipuram Division, Cyberabad over phone, on 22.06.2012 at 11.00 pm, along with Sub-Inspector of Police and other staff raided Swagruha Venture Resorts in survey No.12 of Piglipur Village of Hathanagar Mandal, Ranga Reddy District and they found women in semi-nude dresses were dancing to the music with obscene acts and on enquiry, the women in 20 number disclosed their addresses and identity and revealed that one Akthar Mamoo who is not among the petitioners herein, of the resort brought them on payment

basis and there were also 14 male persons, who are brought by one Devireddy Veerananarayana Reddy of Vijayawada to the resort of Akthar mamoo for sexual enjoyment and said male persons consumed liquor and some of them were sexually enjoying with some of the women in the rooms. It is from the crime registered, investigated by examination of 30 witnesses including the panch witnesses (LWs.27 to 30 are panch witnesses for scene of offence and LWs.8 to 26 are said to be the victims and also there is seizure and disclosure statement of one of the accused No.3 respectively). LW.31 is the expert, who analysed the samples contained that was seized by police and found traces of Ethyl Alcohol in item Nos.2 and 3 and Nicotine Alkaline obtained from dry leaves of Tobacco plant in item No.7; the police filed charge sheet and the learned Magistrate taken cognizance of the offences referred supra.

5) It is the contention of the learned counsel for the petitioners that even from the prosecution case, petitioners/ accused Nos.3 to 6 and 8 are shown as customers and guests of the party and thus no offence is made out under ITP Act and even for the other offence under Section 34 (e) of the A.P Excise Act concerned, no specific allegations are made against the petitioners as to how they are liable for mere consumption of liquor by persons at the party may not make them responsible for the petitioners not in possession of material or utensils, which are being used for the purpose of manufacturing intoxicated material to attract Section 34

(e) of the A.P. Excise Act. In support of the contention learned counsel for petitioners placed reliance upon the expression of this Court in ***Goenka Sajan Kumar vs The State of A.P.***^[1], wherein it was held that customers cannot be prosecuted for the offence under Sections 3 to 5 of the ITP Act. It is the submission made by the learned counsel for the petitioners that earlier they have filed CrI.P.M.P. No.746 of 2013 seeking discharge from the offences, which was dismissed by the learned VII Metropolitan Magistrate, at Hayathnagar by order dated 01.10.2014 which made them to seek the present recourse before the Court.

6) A perusal of the order passed by the learned Magistrate in CrI.P.M.P. No.746 of 2013 dated 01.10.2014 on the application of accused Nos.7 to 10 and 12 shows the observations at para Nos.8 and 9 that the petitioners/ accused 7 to 10 and 12 found in Swagruha Resorts wherein they were watching Semi-nude dance of some ladies and some of the accused with girls in sexual intercourse wherein the scene of offence having food and alcohol bottles, flowers, Nirodh packets etc and there are confessional statements of A1 and A4 and FSL reports pursuant to seizure showing at the ground floor there is hair-dressing room and empty glasses, food, speaker, clothes including innerwears, flowers, condoms, lipstick, air-gun etc., and the material prima facie shows the offences against the accused.

7) It is further observed that in the expression of the AP High Court in ***Lourdiah Naidu and another vs State of Andhra Pradesh***^[2] placed reliance in quashing the petition it was held that the customers neither come under Section 3 of the ITP Act nor under Section 34 (e) of the AP Excise Act, which facts are different to the present facts, as the alleged offence is not only under Sections 3 & 4 of the ITP Act but also under Section 5 of the ITP Act and Section 34 (e) of the AP Excise Act and thereby held it is not a fit case to discharge.

8) Whereas it is the contention of the learned public prosecutor representing the respondents 1 and 2 including the Investigating Officer that the learned Magistrate having considered the material held no grounds to discharge, for this Court while sitting against or even otherwise invoking Section 482 Cr.P.C, there is no abuse of process in continuing the proceedings nor quashing is required to serve the ends of justice and hence sought to dismiss the quash petition.

9) Heard at length as referred supra and also perused the material on record.

10) Though the learned public prosecutor brought to the notice of the Court under Sections 370 and 370-A IPC covered by IPC Amendment Act 13/ 2013 with effect from 03.12.2013 which is no way shown having retrospective

effect apart from bar of Ex-post facto law for the alleged offence occurred on 22.06.2012 (at about 11.00 pm) which is prior to the Amendment came into force, thus the penal law which was not in subsistence by then has no application in view of the bar under Article 20 (1) of the Constitution of India, insofar as the offences under Section 370-A and amended Section 370 by Act 13/ 2013 concerned. No doubt, in the expression placed reliance by the counsel for the petitioners of Goenka Sajan Kumar (*supra*), it was observed that from the submission by the learned counsel for the petitioners/ accused therein who was one of the alleged customers of brothel house and not a person running or not acting as a pimp but also not punishable and this Court held that Section 4 of the ITP Act meant to punish the people living on the earnings of the prostitution and that a person who is visiting the brothel house would not be covered by the Act and further in ***Lourdiah Naidu (supra)*** also taken a similar view that Section 3 of the ITP Act imposes punishment for maintaining the brothel house or allowing the premises to be used as a brothel, Section 4 of the ITP Act imposes penalty for living on the earnings of the prostitution, Section 5 of the ITP Act imposes that procurement, inducing or taking person for the sake of prostitution and Section 6 of the ITP Act speaks about detaining a person in premises where prostitution is carried on and none of the Sections speak about the punishment of the customer and the petitioners do not fall thereby under

Sections 3 to 7 of ITP Act, the petitioners secured for not the persons, who are running the brothel house nor allowed to sell or use nor living on the earnings of prostitution.

11) Wheareas coming to the present facts, the observation of the Magistrate is Section 5 of the ITP Act applies. Section 5 of the ITP Act, read as follows:

Section 5-Procuring, inducing or taking [persons] for the sake of prostitution – 1) Any persons who –

- a) Procures or attempts to procure a [person], whether with or without [his] consent, for the purpose of prostitution; or***
- b) Induces a [person] to go from any place; with the intent that [he] may for the purpose of prostitution become the inmate of, or frequent, a brothel; or***
- c) Takes or attempts to take a [person] or causes a [person] to be taken, from one place to another with a view to [his] carrying on, or being brought up to carry on prostitution; or***
- d) Causes or induces a [person] to carry on prostitution;***
[shall be punishable on conviction with rigorous imprisonment for a term of not less than three years and not more than seven years and also with fine which may extend to two thousand rupees, and if any offence under this Sub-section is committed against the will of any person, the punishment of imprisonment for a term of seven years shall extend to imprisonment for a term of fourteen years.

Provided that if the person in respect of whom an offence committed under this sub-section—

- (i) *is a child, the punishment provided under this sub-section shall extend to rigorous imprisonment for a term of not less than seven years but may extend to life; and*
 - (ii) *is a minor, the punishment provided under this sub-section shall extend to rigorous imprisonment for a term of not less than seven years and not more than fourteen years;]*
- 3) *An offence under this Section shall be triable-*
 - (a) *in the place from which a [person] is procured, induced to go, taken or caused to be taken or from which an attempt to procure or take such [person] is made; or*
 - (b) *in the place to which he may have gone as a result of the inducement or to which he is taken or caused to be taken or an attempt to take him is made.*

Section 7 of the ITP Act also reads as follows:

Section 7: Prostitution in or in the vicinity of public places – [(1) Any [person], who carries on prostitution and the person with whom such prostitution is carried on, in any premises, --

(a) which are within the area or areas, notified under sub-section (3) or

(b) which are within a distance of two hundred metres of any place of public religious worship, educational institution, hostel, hospital, nursing home or such other public place of any kind as may be notified in this behalf by the Commissioner of Police or Magistrate in the manner prescribed, shall be punishable with imprisonment for a term which may extend to three months.]

[(1-A) Where an offence committed under sub-section (1) is in respect of a child or minor, the person committing the offence shall be punishable with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine.

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.]

(2) Any person who -

(a) being the keeper of any public place knowingly permits prostitutes for purposes of their trade to resort to or remain in such place; or

(b) being the tenant, lessee, occupier or person in charge of any premises referred to in sub-section (1) knowingly permits the same or any part thereof to be used for prostitution; or

(c) being the owner, lessor or landlord, of any premises referred to in sub-section (1) or the agent of such owner, lessor or landlord, lets the same or any part thereof with the knowledge that the same or any part thereof may be used for prostitution, is or is willfully a party to such use,

shall be punishable on first conviction with imprisonment for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both, and in the event of a second or subsequent conviction with imprisonment for a term which may extend to six months and also with fine [which may extend to two hundred rupees, and if the public place or premises happen to be a hotel, the licence for carrying on the business of such hotel under any law for the time being in force shall also be liable to be suspended for a period of not less than three months

but which may extend to one year.

Provided that if an offence committed under this sub-section is in respect of a child or minor in a hotel, such licence shall also be liable to be cancelled.

Explanation:- For the purposes of this sub-section, 'hotel' shall have the meaning as in clause (6) of section 2 of the Hotel Receipts Tax Act, 1980 (54 of 1980)].

[(3) The State Government may, having regard to the kinds of persons frequenting any area or areas in the State, the nature and the density of population therein and other relevant considerations, by notification in the Official Gazette, direct that prostitution shall not be carried on in such area or areas as may be specified in the notification.

(4) Where a notification is issued under sub-section (3) in respect of any area or areas, the State Government shall define the limits of such area or areas in the notification with reasonable certainty.

(5) No such notification shall be issued so as to have effect from a date earlier than the expiry of a period of ninety days after the date on which it is issued.]

12. The expression placed reliance for the observations did not reproduce Sections 5 and 7 of the ITP Act. In fact in that factual matrix of mere customers on the facts held could not be made liable. Thus, same is not the precedent laying down the principle of law with reference to the discussion of the entire provisions of Section 5 and 7 of the ITP Act. To some extent the learned Magistrate is right in so far as that observation is concerned. Even further, Section 371 IPC also to some extent applies from its reading, subject to the material in the final report and part-II

Case diary support of it.

13) So far as Section 34 (e) of the A.P Excise Act concerned it speaks as follows:

“34.Penalties for illegal import, export etc- Whoever, in contravention of this Act or of any rule, notification or order made, issued or passed there under of any licence or permit granted or issued under this Act.

(e) uses, keeps or has in his possession any materials, stills, utensils, implements or apparatus whatsoever for the purpose of manufacturing any intoxicant other than toddy;

Thus, Section 34 has no application to the facts for mere consumption of alcohol or mere finding of liquor consumable by the side of the persons in relation to the petitioners.

14) Having regard to the above, the matter requires a fresh consideration by the learned magistrate with reference to what is discussed supra by further hearing of all accused persons and the Assistant public prosecutor concerned either to discharge any of the accused persons from any of the offences or to frame additional charges or alter, modify or delete any of the existing charges, for any of the relevant provisions in reference to particular accused from the perusal of the police final report and the investigation material covered by Part-II CD in support of it. It is needless to say if any charges already framed, for nothing to show

framing of charges from the impugned order of the learned Magistrate, the learned Magistrate can invoke by virtue of this Order under Section 216 Cr.P.C and hear afresh including under Section 239 Cr.P.C and pass appropriate orders either under Section 239 or Section 240 or Section 216 r/w 239 or 240 Cr.P.C as the case may be.

15) Accordingly, the Criminal Petition is disposed of, by setting aside the impugned order of the learned Magistrate and the matter is restored back to the stage of hearing afresh under Sections 239 Cr.P.C r/w 240 Cr.P.C with a direction to pass fresh orders /either to discharge or frame charges as the case may be. It is needless to say, the learned Magistrate can also consider if any of the provisions of the ITP Act applies, which need not to confine to those provisions mentioned in the final report; but for only from the entire reading of the prosecution case material as laid down by the Apex Court in ***Devendra Nath Padhi vs State of Orissa***^[3] and with reference to the penal provisions of the ITP Act or the Excise Act or Indian Penal Code as the case may be. It is further needless to say even those accused persons who did not approach this Court covered by this application, the power of Magistrate to add or delete or modify the charge is always available within the scope of Section 216 Cr.P.C, apart from by virtue of this order, to serve the ends of justice.

16) Miscellaneous petitions, if any pending, shall stand

closed.

Dr. B. SIVA SANKARA RAO, J

Dt.20.07.2015
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HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

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CRIMINAL PETITION No.4193 of 2015

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Date: .06.2015

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[\[1\]](#) 2015 (1) ALT (CrI) 85 AP

[\[2\]](#) 2013 (2) ALD CrI 393

[\[3\]](#) AIR 2005 SC 359