

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION NO.5803 OF 2018

ORDER:

This criminal petition is filed by petitioner/accused No.3 under Section 482 of Criminal Procedure Code (for short "Cr.P.C.") to quash the proceedings against him in Crime No.221 of 2017 (PRC No.36 of 2017 on the file of XXIV Metropolitan Magistrate, Kukatpally at Miyapur, Cyberabad), Sanath Nagar Police Station, registered for the offences punishable under Sections 370, 370(A) (2) of Indian Penal Code (for short "I.P.C.") and under Sections 3, 4 and 5 of Prevention of Immoral Traffic Act (for short "the Act")

The case of the prosecution in brief is that on 18.05.2017, the Sub-Inspector of Police received credible information about running of brothel in the house bearing No.12-10-92/1/A, Bharathnagar colony, Sanathnagar; immediately he along with his staff conducted raid and found one male person and female person in one room, one male person and one female person in the bed room, and took all the four persons into custody. On interrogation, they disclosed their identity and accused No.2 confessed that recently he came into contact with one Raju, who is running brothel, who offered Rs.10,000/- per month to assist him in organizing brothel house. He further confessed that the said Raju has been procuring sex workers from different areas and inviting customers for sexual exploitation. In the said process, they brought two sex workers Jerupula Jayamma and Shakkera Abdul Shaik for prostitution in the brothel house being run by him. On interrogation, accused No.2 further stated that the person, who was found in the house, came into contact with Raju in Bar and Raju informed about running of brothel house at

Bharathnagar and showed the photographs of some sex workers, who are available with him. On 18.05.2017 the said Raju informed accused No.3 about the availability of sex workers and invited him for prostitution. The said statement of accused No.2 was reduced into writing in the presence of mediators and seized certain articles under the cover of panchanama and basing on the confessional statement of accused No.2, the S.I. of police registered the crime and arrested the accused. Thus, the petitioner is only a customer, who participated in the prostitution and the Raju and accused No.2 are pimps. On the strength of mediators report, a crime was registered for the offences referred above.

The Sub-Inspector of Police took up investigation. During investigation, he examined as many as 9 witnesses and recorded their statements under Section 161 (3) of Cr.P.C. After completion of investigation, on coming to conclusion that there is sufficient material to proceed against the petitioner and other accused, filed final report under Section 173 of Cr.P.C. As the investigation done by the Sub-Inspector of Police disclosed that the petitioner is a customer, who came to brothel to enjoy sex with the sex worker (prostitution), he is also liable to be proceeded for the offences referred above.

On 29.11.2017 the Magistrate has taken the case on file for the offence punishable under Sections 370 and 370(A) (2) of I.P.C. and under Sections 3 to 5 of Prevention of Immoral Traffic Act. Having concluded that the case is exclusively triable by a Court of Sessions, registered the same as P.R.C.No.36 of 2017 to follow the procedure under Sections 207 and 209 of Cr.P.C.

While the matter pending at the stage of P.R.C., the petitioner approached this Court under Section 482 of Cr.P.C. to quash the proceedings against him alleging that he was falsely implicated in this case and he has been figured as customer and arrayed as accused No.3, in the absence of any allegation against him in the statements recorded under Section 161 (3) of Cr.P.C. about his participation in prostitution, the petitioner cannot be proceeded for any of the offences. The petitioner being the customer, he is not liable to be convicted for the offences punishable under Sections 3 to 5 of Prevention of Immoral Traffic Act, and he is also not liable for prosecution for the offence punishable under Sections 370, 370 (A) (2) of I.P.C. Thus, there is absolutely no material against the petitioner in the charge sheet to proceed further against him and when the charge sheet did not disclose commission of any offence, the proceedings against the petitioner are liable to be quashed.

During hearing, Sri K.G.Krishna Murthy, learned Senior Counsel, appearing for the petitioner, contended that the petitioner/accused No.3, who is described as customer of brothel, is not liable to be prosecuted for the offence punishable under Sections 3 to 5 of Prevention of Immoral Traffic Act and at the same time, he is also not liable to be prosecuted for the offence punishable under Sections 370, 370 (A) (2) of I.P.C. for the reason that Section 370 of I.P.C. deals with Trafficking of person, Section 370 A of I.P.C. deals with exploitation of a trafficked person. Therefore, ingredients of any of these two penal provisions are not satisfied, consequently, the proceedings against the petitioner are liable to be quashed for the offences punishable under Sections 3 to 5 of Prevention of Immoral Traffic Act and under Sections 370, 370 (A) (2) of I.P.C.

Learned Public Prosecutor for the State of Telangana supported the case while contending that in view of the judgment of this Court rendered in “**S.Naveen Kumar @ Naveen v. State of Telangana**”¹ the customer is also liable to be prosecuted for the offences punishable under Sections 370, 370 (A) (2) of I.P.C. and under Sections 3 to 5 of Prevention of Immoral Traffic Act.

Considering rival contentions and perusing the material on record, the point that arises for consideration is:

Whether the petitioner/accused No.3 is liable to be prosecuted for the offences punishable under Sections 370, 370 (A) (2) of I.P.C. and under Sections 3 to 5 of Prevention of Immoral Traffic Act? If not, whether the proceedings at the stage of P.R.C. be quashed against the petitioner/accused No.3?

P O I N T:

Undisputedly, the petitioner is arrayed as accused No.3 describing him as customer, who participated in the prostitution, but the petitioner totally denied the same. However, the disputed fact cannot be decided at this stage.

Section 3 of the Act deals with punishment for keeping a brothel or allowing premises to be used as a brothel. Section 4 of the Act deals with punishment for living on the earnings of prostitution. Section 5 of the Act deals with procuring, inducing or taking [person] for the sake of prostitution. Section 6 of the Act deal with detaining a [person] in premises where prostitution is carried on.

¹ 2015 (2) ALD (Crl.) 156

This Court and other Courts consistently held that a customer is not liable for punishable under Section 3 to 5 of the Act. This issue is also covered by the Judgment in “**S.Naveen Kumar @ Naveen v. State of Telangana**” (referred supra), in paragraph No.6 of the said judgment the Court held that Section 4 basically deals with the persons who lives on the earnings of the prostitution. Therefore, there is any amount of force in the submission of learned counsel for petitioner that a customer to flesh trade cannot be treated as offender under Section 4 of the Prevention of Immoral Traffic Act. This aspect is no more res integra since atleast two judgments of this High Court i.e. “**Goenka Sajan Kumar v. The State of A.P.**”² and “**Z. Lourdiah Naidu vs. State of Andhra Pradesh**”³ establish the same. Therefore, criminal proceedings against the petitioner/A3 for the offence under Sections 4 to 6 of the Act are liable to be quashed.

In “**Sahil Patel v. The State of A.P.**”⁴ the Single Judge of this Court had an occasion to deal with criminal liability of a customer for the offence punishable under Sections 3 to 5 of the Act and concluded that the customer is not liable for any punishment for the offence punishable under Sections 3 to 5 of the Act. However, upheld the contention of the State that the customer is liable to be prosecuted for the offence punishable under Section 370-A of I.P.C., dismissed the petition giving liberty to file appropriate application before the Judicial First Class Magistrate for discharge.

Similarly, in “**Vinod v. State of Gujarat**”⁵ the High Court of Gujarat at Ahmedabad held that the customer is not liable to be

² 2014 (2) ALD (Cri.) 264

³ 2013 (2) ALD (Cri.) 393 (AP)

⁴ 2017 (1) ALD (CrI.) 336 (AP)

⁵ (2017) 4 GLR 2804

prosecuted for the offence punishable under Sections 3 to 5 of the Act.

In view of the law declared by this Court, the proceedings against the petitioner, who is described as customer, are liable to be quashed for the offences punishable under Sections 3 to 5 of the Act.

Learned counsel for the petitioner contended that in “**S.Naveen Kumar @ Naveen v. State of Telangana**” (referred supra), the learned single Judge of this Court did not consider the true purport of Section 370 A of I.P.C. and the customer is not liable to be prosecuted even for the offence punishable under Section 370 A of I.P.C. As per the allegations made in the charge sheet, the petitioner who is arrayed as accused No.3 is a customer, who came to the brothel house for prostitution and found in participation in sexual act in a room. The petitioner and sex worker found in a room and the confessional statement of accused No.2 disclosed that the petitioner was invited for prostitution by Raju and accused No.2 with the sex workers found in the two rooms. Therefore, the statements recorded under Section 161 (3) of Cr.P.C. by the police and the allegations made in the charge sheet directly pointing out that the petitioner herein is a customer of brothel, who was found in a room with another woman for prostitution.

Section 370 A (2) of I.P.C. deals with punishment for exploitation of a trafficked person, which reads thus:

“whoever, knowingly by or having reason to believe that a person has been trafficked, engages such person for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than three years, but which may extend to five years, and shall also be liable to fine.”

In view of Section 370 A (2) of I.P.C., the petitioner, who was found along with a sex worker in a room, is liable to be prosecuted for the offence punishable under Section 370 (A) (2) of I.P.C.

This Court in “**S.Naveen Kumar @ Naveen v. State of Telangana**” and “**Sahil Patel v. The State of A.P.**” (referred supra), consistently held that the customer is also liable to be prosecuted for the offence punishable under Section 370-A of I.P.C.

The same view is also expressed by the High Court of Gujarat at Ahmedabad in “**Vinod v. State of Gujarat**” (referred supra), which is as follows:

“b) However, that is not end of the matter. A perusal of the charge sheet would show that the police while charge sheeting A1 and A2 for the offences under Sections 3, 4, 5 and 6 of PIT Act and under Section 370A IPC, HC-NIC Page 22 of 24 Created On Sat May 06 01:34:48 IST 2017 surprisingly charge sheeted petitioner/A3 only under Section 4 of PIT Act, but not under Section 370A IPC. Section 370A IPC reads thus:

Section 370A - Exploitation of a trafficked person (1) Whoever, knowingly or having reason to believe that a minor has been trafficked, engages such minor for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than five years, but which may extend to seven years, and shall also be liable to fine. (2) Whoever, knowingly by or having reason to believe that a person has been trafficked, engages such person for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than three years, but which may extend to five years, and shall also be liable to fine.

c) The phraseology engages such minor/such person for sexual exploitation in any manner employed in sub- sections (1) and (2) of Section 370A IPC in clear terms indicates that the flesh customer who hires the victim woman for sexual exploitation also falls within the fold of Section 370A as an offender.

d) It shall be noted that in the wake of gang rape of Nirbhaya in Delhi which arose an unprecedented public furore, Government

considered it fit to drastically amend several provisions of IPC and in that direction appointed a Committee under the Chairmanship of late Justice J.S.Verma, the former Chief Justice of India. The Committee after interacting cross sections of stake holders submitted its detailed report suggesting amendments and introduction of various provisions in penal laws like IPC, Cr.P.C., Evidence Act etc. Consequent upon the said report sub-clause (2) of Section 370 IPC was amended and Section 370A IPC was introduced. Having regard to the avowed object with which report was submitted and amendments and new provisions were introduced in several acts, it cannot be presumed for the moment that Legislators considered customer as an innocent victim in the flesh trade. Therefore, Section 370A takes in its fold the customer also. So, despite the police charge sheeting petitioner/A3 only for the offence HC-NIC Page 23 of 24 Created On Sat May 06 01:34:48 IST 2017 under Section 4 of PIT Act and the Committal Court accepting the same, it is evident from the charge sheet that the petitioner/A3 is prima facie liable for charge under Section 370A though not under Section 4 of PIT Act with which he was charge sheeted."

In an unreported judgment rendered by the High Court of Karnataka in "Jeevan v. State of Karnataka (criminal petition No.3026 of 2017)", it was held as follows:

"Under the similar facts and circumstances pertaining to some other case in C.C.No.28501/2015 this Court had occasion to deal with the said aspects where offences under Sections 188, 370(3), 370(A), 294 r/w 109 of IPC are invoked so far as the customers are concerned. This Court in the said case in Criminal Petition No.7935/2016 dated 28.11.2016 has categorically in detail discussed the above said provisions and held that those provisions are not attracted so far as the customers are concerned. In this case also similar facts and legal aspects are involved. There is no reason to deviate from the above said observation made by this Court. Apart from that, Section 188 of IPC cannot be invoked against the petitioners by the police, as there is a specific bar under Section 195 of Cr.P.C. Section 370(3) of IPC defines, whoever for the purpose of exploitation recruits, transports, harbours, transfers or receives a person or persons for the purpose of trafficking, such person is punishable under Section 370 of IPC and if the involvement of more than one victim, then sub-section (3) of Section 370 of IPC is attracted. No where it is stated that the petitioners have indulged in exploitation, recruiting, transporting, harbouring, transferring or

receiving any person. In this regard, Section 370(A) of IPC is also referable to exploitation of trafficking any person. There is no allegation whatsoever that these petitioners have exploited for wrongful gain.”

In view of the law declared by the Single Judge of this Court and reiterated by the other Courts and the judgments referred supra, the customer is liable to be prosecuted for the offence punishable under Section 370 A (2) of I.P.C.

Though the learned senior counsel for the petitioner contended that the judgment of this Court in “**S.Naveen Kumar @ Naveen v. State of Telangana**” (referred supra)” did not lay down the correct law, but on analysis of provisions under Section 370 A (2) of I.P.C., it is clear that the petitioner allegedly came to brothel house and found in a room along with Sex worker, but the purpose is only to participate in sexual intercourse (prostitution) with sex worker. Such person is said to have engaged in sexual exploitation and the said sex worker is trafficked person. Therefore, the petitioner is liable to be proceeded in trial for the offence punishable under Section 370 A (2) of I.P.C.

Even on reanalysis of the provisions, I find no other interpretation to sub-section (2) to Section 370 A of I.P.C. to refer the matter to any larger bench for authoritative pronouncement.

Yet another offence allegedly committed by the petitioner is punishable under Section 370 of I.P.C. Section 370 of I.P.C. deals with trafficking of person., which reads thus:

Section 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—

1. using threats, or
2. using force, or any other form of coercion, or
3. by abduction, or
4. by practising fraud, or deception, or
5. by abuse of power, or
6. 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.

The word “exploitation” is explained in explanation (1) of same section, which includes any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs and such person is liable to be prosecuted under the provisions of Section 370 of I.P.C.

Here, the petitioner/accused No.3 was not the person, who trafficked any person for any of the purposes referred above, but he was only customer. Therefore, he was not liable for prosecution for the offence punishable under Section 370 of I.P.C.

In an unreported judgment rendered by the High Court of Karnataka at Bengaluru in “Chandru.S v. The State by Malleshwaram P.S., Bengaluru (Criminal Petition No.5059 of 2017), it was held that the customer is not liable to be prosecuted for the offence punishable under Section 370 of I.P.C. and similar view was also expressed by the High Court of Gujarat at Ahmedabad in “**Vinod v. State of Gujarat**” (referred supra).

Thus, persuaded by the law declared by different High Courts including this Court the customer is not liable to be prosecuted for the offence punishable under Sections 3 to 5 of the Act and under Section 370 of I.P.C., but he is liable to be prosecuted for the offence punishable under Section 370 A (2) of I.P.C.

In view of my foregoing discussion, the proceedings against the petitioner for the offence punishable under Sections 3 to 5 of the Immoral Traffic (Prevention) Act and under Section 370 of I.P.C. are liable to be quashed while permitting the Magistrate concerned to proceed further for the offence punishable under Section 370 A (2) of I.P.C.

In the result, the criminal petition is allowed in part. The proceedings against the petitioner/accused No.3v in Crime No.221 of 2017 (PRC No.36 of 2017 on the file of XXIV Metropolitan Magistrate, Kukatpally at Miyapur, Cyberabad), Sanath Nagar Police Station, registered for the offences punishable under Sections 370 of I.P.C. and under Sections 3 to 5 of the Immoral Traffic (Prevention) Act only are hereby quashed while permitting the Magistrate concerned to proceed further for the offence punishable under Section 370 A (2) of I.P.C. No costs.

The miscellaneous petitions pending, if any, shall also stand closed.

JUSTICE M. SATYANARAYANA MURTHY

27.06.2018
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