

K. Radhakrishnan Vs. State of Kerala

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Court : Kerala

Decided On : Apr-11-2008

Reported in : 2008(2)KLJ68; 2008(2)KLT521

Judge : V. Ramkumar, J.

Acts : Immoral Traffic Prevention Act, 1956 - Sections 7, 7(1), 7(2), 7(3), 8, 13, 13(1), 13(2), 13(3), 13(4) and 14; [Hotel Receipts Tax Act, 1980](#) - Sections 2; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 482; Indian Penal Code (IPC) - Sections 143, 147, 148, 149, 452, 294 and 324

Appeal No. : Crl. M.C. Nos. 1005 of 2007 and 294 of 2008

Appellant : K. Radhakrishnan

Respondent : State of Kerala

Advocate for Def. : K.S. Siyakumar, PP

Advocate for Pet/Ap. : T.A. Unnikrishnan and; P.P. Biju, Advs.

Disposition : Petition allowed

Judgement :

ORDER

V. Ramkumar, J.

1. The common petitioner (K. Radhakrishnan) in these petitions filed under Section 482 Cr.P.C. is the first accused in Crime No. 782 of 2006 of Taliparamba Police Station for offences punishable under Sections 7 and 8 of the Immoral Traffic (Prevention) Act) 1956 ('I.T.P, Act' for short). The petitioner is a Deputy Superintendent of Police (Dy.S.P.) under suspension and working as such in the District Crime Records Bureau (DCRB), Kannur. In CrI.M.C. No. 1005 of 2007 he seeks to quash the F.I.R. and all further proceedings in the above Crime. In CrI.M.C. No. 294 of 2008 he seeks to quash Annexure II final report and all further proceedings including C.C. No. 739 of 2007 on the file of the Court of the Judicial Magistrate of the First Class, Thaliparamba.

THE PROSECUTION CASE

2. On 15-12-2006 at 2.45 p.m. one Thaikandy Balakrishnan who was the Vice Chairman of Taliparamba Municipality gave a statement to Habeeb Rahman, Dy. S.P., Kannur who was holding additional charge of Taliparamba Sub Division. The statement reads as follows:

14-12-2006 was a hartal day. In the morning of that day he had started for attending the procession in connection with the hartal. At about 9 a.m. he noticed a police jeep proceeding to the house of one Padmanabhan, a bank employee and situated near the A.K.G. Stadium at Thoovodu. The local public were also at that time keeping a watch over the said house and its surroundings. He had also noticed the coming and going of a white Maruti Car and the black Car now parked in the porch of the said house and bearing Reg. No. KL 5-U 1879 and men and women who were strangers to him were coming and going. After about 9'o clock in the night he heard the screams of a woman. The noise became louder after some time. At that time one T. Rajendran and others who are neighbouring residents came near the house and peeped through the southern window lying open into the south western bedroom to find a woman and two males lying completely naked on the bed. The two men were lying on either side of the woman. The dark complexioned and fat man who was subsequently identified as the Dy.S.P. was seen indulging in sexual intercourse with the woman and the other man was seen fondling her. It was then 11 'o clock in the night. Realising that the above persons

were publicly having illegal carnal intercourse, the local public forced open the front door of the house. They got inside the house and found two persons lying asleep on the floor in the entrance room. They found 12 liquor bottles of various brands and glasses on the table which was lying towards southern wall of the room. The local public including the statement giver then held the four males and one female as captives in the said house and informed the police. One of the two persons found in the entrance room was later identified to be the driver of the Dy.S.P. The police who came from Taliparamba took the four persons and the woman to the hospital. The police jeep bearing Reg. No. KLOI X 9049 in which the Dy.S.P. had arrived there is lying in the car porch of the house.

After recording the said statement the Dy. Superintendent of Police, Kannur forwarded the same to the Station House Officer, Taliparamba for appropriate action. The Addl. Sub Inspector of Police, Taliparamba registered the above crime on 15-12-2006 at 2.45 p.m.

While the petitioner was at the house of occurrence which is a rented house of the 3rd accused (Rajesh) the local public had barged into the said house armed with motor cycle chains, iron rods etc. and had brutally assaulted the inmates of the house including the petitioner herein resulting in the police taking the injured including the petitioner to the Pariyaram Medical Hospital from where on the strength of the statement given by the petitioner herein the Taliparamba Police registered Crime No. 783 of 2006 for offences punishable under Sections 143, 147, 148, 452, 324 and 294(b) read with Section 149 I.P.C. against 15 identifiable persons.

The present case, namely, Crime No. 782 of 2006 was investigated by the Dy. S.P. (Administration), Kannur who filed a final report dated 18-8-2007.

The following are the allegations in the final report:

On 14-12-2006 at about 11'o clock in the night at Koovodu in Taliparamba Amsom in the residential building belonging to charge witness No. 12 and taken on rent by A3 (Rajesh) and A4 (Viiluthi) for their residence and bearing No. TMC XVII/58(A), in furtherance of the previous plan, A1 (Radhakrishnan) and A2 (Santhosh) came

as guests in the said house. After keeping open the windows of the south western bedroom of the said house and switching on the lights in such a way that the neighbours and members of the public could see their activities A1, A3 and A5 (Sosammo Chacko @ Ammini) publicly indulged in prostitution in a completely naked condition. The accused persons have thereby committed offences punishable under Sections 7 and 8 of the Immoral Traffic Prevention Act, 1956.

On 31-08-2007, the J.F.C.M. Thaliparamba took cognizance and registered the case as C.C. 739 of 2007. It is the said proceedings which are assailed in these petitions.

3. I heard Advocate Sri. T.A. Unnikrishnan, the learned Counsel appearing for the petitioner and Advocate Sri. K.S. Sivakumar, the learned Public Prosecutor who defended the State.

JUDICIAL ANALYSIS

4. Section 7 of the ITP Act reads as follows

7. Prostitution in or in the vicinity of public places: (1) Any person who carried 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 meters 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 commission of police or magistrate in the manner prescribed shall be punishable with imprisonment for a term which may extend to three months.

(1A) Where an offence committed under Sub-section (1) is in respect of a child or minor the person committing an offence shall be punishable with imprisonment of either description for a term which shall not be less than seven years but which 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, 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 and if the public place or premise happen to be a hotel the license 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 extent to one year.

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

Explanation: For the purposes of 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 their relevant considerations, by notification in the official gazette, direct that prostitution shall not be carried on in such area 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.

Thus, Sub-section (1) of the above Section makes the 'carrying on of prostitution' by any woman and the person with whom such prostitution is carried on, liable for punishment. The words 'carries on prostitution' have a definite meaning and import. It is only if plural and indiscriminate sexuality is proved, could it be said that a person is carrying on prostitution. Whether the activity amounts to the keeping of a brothel or using the premises as a brothel, there should be the activity of carrying on prostitution. The expression 'Prostitution' had been defined under Section 2(f) as follows:

Prostitution ' means the sexual exploitation or abuse of persons for commercial purposes and the expression 'prostitute ' shall be constructed accordingly:

In order to become prostitution there should be the offering of her body by a female for promiscuous sexual intercourse for hire, whether in money or in kind. The word 'promiscuous' means indiscriminate. The import of the word 'promiscuous' is that the woman or girl offering her body offers it for hire to anyone who desires it for sexual intercourse. In other words, the woman is available to be shared without any discrimination. It, therefore, excludes sexual intercourse which a person may have with a permanently kept concubine. (See State of Kerala v. Pathumma 1968 KLT 453).

5. Clause (a) of Section 7(1) is attracted only if any person 'carries on prostitution' within an area notified by the State Government in the official Gazette under Sub-section 3 of Section 7. Clause (b) of Section 7(1) is attracted if any person 'carries on prostitution' in a premises 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 that behalf either Commissioner of Police or by a Magistrate (evidently District Magistrate) in the manner prescribed. There is no allegation that the house of occurrence is within 200 metres of any of the enumerated public places under Clause (a) of Section 7(1) of the I.T.P. Act. It was admitted by the learned Public Prosecutor that no notification has been issued either by the State Government under Sub-section (3)

of Section 7 or by the Commissioner of Police or the District Magistrate under Clause (b) of Section 7(1). If so, the charge under Section 7 of the ITP Act is misconceived.

6. Even if the premises in question was situated in an area notified under Section 7(3) or within 200 metres of any of the enumerated public places or a public place notified under Clause (b) of Section 7(1) of the I.T.P. Act, a person becomes liable for punishment only if it is shown that the or she was 'carrying on prostitution'. The activity will amount to prostitution only if sexual abuse or exploitation of persons is done for commercial purpose. The expression 'commercial purpose' has not been defined under the ITP Act. In Strout's Judicial Dictionary, V Edition, the term 'Commercial' has been defined as traffic, trade, or merchandise in buying or selling or goods. See also New Delhi Municipal Council v. Sohan Sachdev : [2000]1SCR731 . In order that an activity can be called a commercial activity it should include any type of business or activity which is carried on for a profit. The activity must imply some investment of capital and must run the risk of profit or loss. The word 'traffic' means the business of buying and selling. It comprehends illegal or disreputable business or activity. 'Trafficking ' . means 'the carrying on of the trade of buying and selling, often with a sinister implication and is used in a disparaging sense. Thus, it is only if sexual abuse or exploitation is carried of for mercenary motives could it be said that it is prostitution. It is pertinent to note in this context that the prosecution has no case that there was any payment or receipt of money or money's worth, nor has the Police recovered and monty constituting the consideration for the lascivious venture alleged. Satiating one's lust or prurient desires for no monetary consideration between consenting partners cannot amount to trading in flesh which is an inevitable ingredient for the vice of prostitution. 'Prostitute ' means a female who offers her body for promiscuous sexual intercourse for hire whether for money or in kind. (See State of Uttar Pradesh v. Kaushaliya and Ors. : [1964]4SCR1002 and Gaurav Jain v. Union of India : AIR 1997 SC3021). A prostitute is also called a harlot, whore of a base hireling. When used as a verb, 'to prostitute' means to offer oneself or another for lewd purposes usually for hire.

7. Clauses (a) to (c) of Sub-section 2 of Section 7 of the I.T.P. Act also will be attracted only if the keeper, occupier, tenant or the person in charge of the premises knowingly permits prostitution in such premises. There is no such accusation against the petitioner herein. The prosecution has no case that the petitioner was keeping or possessing the premises in question and therefore, clauses a to c of Sub-section 2 of Section 7 of I.T.P. Act are not attracted.

8. The further question which survives for consideration is whether the detection, arrest and investigation was by a 'special police officer' appointed by or on behalf of the Government for the area in question under Section 13 of the I.T.P. Act. For a proper consideration of this question advertance to some of the provisions of the I.T.P. Act may be necessary, Section 2(i) defines a 'Special Police Officer' to mean a police officer appointed by or on behalf of the State Government to be in charge of police duties within a specified area for the purpose of the Act. We are not in this case concerned with 'trafficking police officers' since they are police officers appointed by the Central Government under Sub-section 4 of Section 13. Subsections 1 to 3 of Section 13 of the I.T.P. Act read as follows:

13. Special police officer and advisory body:- (1) There shall be for each area to be specified by the State Government in his behalf a special police officer appointed by or on behalf of that Government for dealing with offences under this Act in that area.

(a) The special police officer shall not be below the rank of an Inspector of Police.

(2A) The District Magistrate may, if he considers it necessary or expedient so to do, confer upon any retired police or military officer all or any of the powers conferred by or under this Act on a special police officer, with respect to particular cases or cases or to cases generally:

Provided that no such power shall be conferred on -

(a) a retired police officer unless such officer, at the time of his retirement, was holding a post not below the rank of an inspector.

(b) a retired military officer unless such officer, at the time of his retirement, was holding a post not below the rank of a commissioned officer).

3) For the efficient discharge of his functions in relation to offences under this Act -

(a) the special police officer of an area shall be assisted by such number of subordinate police officers (including women police officers wherever practicable) as the State Government may think fit; and

(b) the State Government may associate with the special police officer a non-official advisory body consisting of not more than five leading social welfare workers of that area (including women social welfare workers wherever practicable) to advise him on questions of general importance regarding the working of this Act.

Thus, an officer not below the rank of an Inspector of Police i.e. the Circle Inspector of Police alone can be appointed by the State Government as a Special Police Officer. Section 14 of the Act reads as follows:

14. Offences to be cognizable - Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of that Code:

Provided that, notwithstanding anything contained in that Code,-

(i) arrest without warrant may be made only by the special police officer or under his direction or guidance, or subject to his prior approval;

(ii) when the special police officer requires any officer subordinate to him to arrest without warrant otherwise than in his presence any person for an offence under this Act, he shall give the subordinate officer an order in writing, specifying the person to be arrested and the offence for which the arrest is being made; and the latter officer before arresting the person shall inform him of the substance of the order and, on being required by such person, show him the order;

(iii) any police officer not below the rank of (sub-inspector) specially authorised by the special police officer may, if he has reason to believe that no account of delay

involved in obtaining the order of the special police officer, any valuable evidence relating to any offence under this Act is likely to be destroyed or concealed, or the person who has committed or is suspected to have committed the offence is likely to escape, or if the name and address of such a person is unknown or there is reason to suspect that a false name or address has been given, arrest the person concerned without such order, but in such a case he shall report, as soon as may be, to the special police officer the arrest and the circumstances in which the arrest was made.

In exercise of the powers under Section 13 of the I.T.P. Act the Government of Kerala has issued the following notification published under G.O.MS No. 56/2002/Home. dt.24-04-2002 in Kerala Gasette Extra Ordinary No. 625 dated 10-5-2002:

Notifying Special Police Officer under Section 13(i) of the Immoral Traffic Prevention act.

S.R.O. No. 344/2002 - In exercise of the powers conferred by Sub-section (i) of Section 13 of the Immoral Traffic Prevention Act, 1956 (Central Act 104 of 1956) and in supersession of Notification issued under G.O.MS 131 /87/Home, dated the 28th October, 1987 and published as SRO 1451/87 in Kerala Gazette Extraordinary No. 897 dated the 9th November, 1987, the Government of Kerala hereby appoint the Circle Inspectors of Police attached to the following Police Stations in the State as Special Police Officers for dealing with offences under the said Act within their respective area of jurisdiction.

Thiruvananthapuram City1. Cantonment 2. Peroorkada 3. Museum4. Pettah5. Medical College6. Poonthura7. Fort8. Nemom9. Vizhinjam10. ThampanoorThiruvananthapuram Rural11. Attingal12. Varkala13. Kadakkavoor14. Kazhakuttom15. Venjaramoodu16. Kilimanoor17. Nedumangadu18. Aryanad19. Palode20. Kattakada21. Neyyattinkara22. Poovar23. ParassalaKollam24. Kollam East25. Kollaw West26. Paravoor27. Chathannur28. Kundara29. Karunagappally30. Sasthamcotta31. Chavara32. Punalur33. Kottarakkara34. Kadakkal35. Kulathupuzha36. AnchalPathanamthitta37. Pathanamthitta38. Kozhencherry39. Chittar40. Kakkad41. Adoor42. Pandalam43. Konny44.

Thiruvalla45. Mallapally46. Ranni47. VadasserikkaraAlappuzha48. Alappuzha North49. Alappuzha South50. Ambalapuzha51. Pulinkunnu52. Cherthala53. Kuthiathode54. Mararikulam55. Chengannur56. Mannar57. Mavelikkara58. Kayamkulam59. HaripadKottayam60 Kottayam East61. Kottayam West62. Changanassery63. Vakathanam64. Ettumanoor65. Kanjirappally66. Ponkunnam67. Manimal68. Pampady69. Pala70. Vaikom71. Kaduthuruthy72. Ramapuram73. Erattupettah Idukki74. Thodupuzha75. Kaliyar76. Karijar77. Idukki Headquarters Stn.78. Karimanal79. Munnar80. Devikulam81. Adimali82. Nedumkandam83. Kattappana84. Kumily85. PeerumeduKochi City86. Ernakulam Central87. Harbour88. Town South89. Mattancherry90. Fort Kochi91. Palluruthi92. Kalamassery93. Hill Palace(Thripunithura)Emakulam Rural94. Aluva95. Binanipuram96. North Paravoor97. Vadakkekara98. Kunnathunadu99. Njarakkal100. Angamali101. Kuruppampady102. Muvattupuzha103. Puthencruz104. Kallorkadu105. Kothamangalam106. Piravom107. PerumbavoorThrissur108. Thrissur East (HQ. Stn.)109. Town East110. Ollur111. Puthucadu112. Kunnamkulam113. Chavakkad114. Guruvayur115. Vadakkancherry116. Chelakkara117. Irinjalakuda118. Cherpu119. Chalakudy120. Mala121. ValappadPalakkad122. Town South123. Town South124. Palakkad Rural (Kasba)125. Chittur126. Hemarnbika Nagar127. Alathur128. Koyalmannam129. Vadakkancherry130. Kollangode131. Nemmara132. Ottapalam133. Pattambi134. Cherpulassery135. Mannarghat136. Agali.Malappuram137. Malappuram138. Kondotty139. Thirurangadi140. Manjeri141. Tirur142. Tanur143. Ponnani144. Valancherry145. Perinthalmanna146. Pandikkad147. Wandoor148. NilamburKozhikode City149. Kozhikode Town150. Cusba Kozhikode151. Cheruannor152. Medical College153. Nadakkavu154. ChevayurKozhikode Rural155. Badagara156. Payyoli157. Nadapuram158. Kuttiyadi159. Perambra160. Tamarassery161. Koduvally162. Koyilandy163. BalusseryWayanad164. Kalpetta165. Mennangadi166. Vythiri167. Mananthavady168. Sulthan Bathery169. PulpalliKannur170. Kannur Town171. Kannur City172. Valapattanam173. Iritty174. Thalassery175. Kooth uparamba176. Panoor177. Mattannur178. Peravoor179. Thaliparamba180. Payyannur181. Alacode182. SreekandapuramKasaragod183. Kasaragod184. Kumbala185. Adhut186. Hosdurg187. Vellarikkunnu188. NeeleswaramExplanatory Note:

(This does not form part of the notification, but is intended to indicate its general purport)

In order to effectively enforce the provision of Immoral Traffic (Prevention) Act, 1956 (Central Act 104 of 1956) it is essential that Circle Inspectors of Police are duly authorised as per Section 13 of the Act. Section 13(2) of this Act specifies that the Special Officer shall not be below the rank of Inspector of Police. This notification is intended to achieve the above purpose.

The house of occurrence in this case is located in Taliparamba Taluk of Kannur District. Thus, as against the Circle Inspector, Taliparamba, who is the Special Police Officer, competent to investigate the case, it was the Assistant Sub Inspector who registered the crime and it was the Dy.S.P. (Administration), Kannur who conducted the investigation and laid the charge before Court. The Dy. S.P. (Administration), Kannur may be an officer not below the rank of an Inspector of Police as provided under Section 13(2) of the Act. But what Section 13(2) has prescribed is the minimum rank for the State Government to appoint by a notification under Section 13(1) of the I.T.P. Act. Once an officer of a specified rank, namely the Circle Inspector of Police has been appointed by the State Government under Sub-section (1) of Section 13 of the I.T.P. Act, it is futile for the Public Prosecutor to contend that any officer higher in rank than the officer specified under Section 13(2) of the ITP Act can conduct the investigation. I am fortified in this connection by the decision of this Court in *Sinu sainudheen v. Sub Inspector of Police* 2002 (1) KLT 693. Thus, the officer (Assistant Sub Inspector) who registered the crime and the Officer - Dy.S.P. (Administration) who conducted the investigation and charge sheeted the petitioner herein, were not empowered to do so. It is well settled that Police Officers not specially appointed as Special Police Officers cannot investigate the offences under the ITP Act even though those offences are cognizable offences. (See *Delhi Administration v. Ram Singh* AIR 1962 SC 68).

9. In as much as the prosecution has no case that the petitioner has seduced or solicited for the purpose of prostitution, the charge against the petitioner under Section 8 of the I.T.P. Act is wholly misconceived.

10. The result of the foregoing discussion is that apart from the fact the investigation has been conducted not by an empowered officer as required by law, even going by the allegations in the first information report as well as the Police Report, the petitioner cannot be said to have committed sexual abuse or exploitation of persons for commercial purposes so as to attract Section 7 of the I.T.P. Act and even if it were to be assumed that the petitioner committed sexual abuse or exploitation for commercial purposes (for which also there is absolutely no allegation or proof) the area in question and the public place within the vicinity of which the house of occurrence is situated have not been notified under Section 7 of the I.T.P. Act so as to attract an offence punishable under Section 7 of the I.T.P. Act.

11. The registration of the crime as against the petitioner was ill-advised if not malicious. Annexure I.F.I.R., Annexure II charge-sheet and C.C. No. 739/2007 on the file of J.F.C.M., Thaliparamba, are quashed so far as they relate to the petitioner. Crl.M.C. Nos. 1005 of 2007 and 294 of 2008 are accordingly allowed.

12. A perusal of the filed leading to Annexure I.F.I. R. and Annexure II final report shows that the petitioner's contention that he was falsely and maliciously implicated in this case, is not far-fetched. This Court had occasion to observe the withdrawal of the petitioner from the position of the investigating officer while he was efficiently and without fear or favour discharging his duties as such in Crime No. 442 of 2006 of Thalassery Police Station.

What was the provocation for the local public to keep a watch over the house in question even before the arrival of the visitors? .

Why should the persons inside the house and who were allegedly indulging in satiating their lustful desires, make it a point to deliberately keep open all the windows of the particular room and switch on the lights, for the neighbours and local public to view a free show?

Was it not the unsolicited intrusion of the local busy-bodies which resulted in the petitioner herein and others being attacked and brutally assaulted culminating in the registration of Crime No. 783/2006 by the Taliparamba Police?

Were these developments mere co-incidence or were they calculated to denigrate the image and reputation of the petitioner who showed the rare courage of nearly apprehending the real culprits in the Fasal murder case, and was thereby incurring the wrath of the unseen power centres, as he would contend?

13. Well, the common man is not a fool to swallow every such incredible story as the gospel truth. The petitioner's grievance that false implication in a politically engineered trap case is the price which he paid for faithfully serving the Government, cannot be totally lost sight of, Rajesh (A3) who was also brutally manhandled by the inquisitive busy-bodies of the locality is stated to have breathed his last consequent on kidney failure developed by him.

What is it that has been achieved by registering this crime and humiliating a few individuals knowing fully well that it would be a futile adventure?

The revengeful Mr. Anonymous in as ask himself.

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