

Mr. X Vs. State of Kerala

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Court : Kerala

Decided On : Mar-11-2009

Reported in : 2009CriLJ2321

Judge : V. Ramkumar, J.

Acts : Immoral Traffic (Prevention) Act, 1956 - Sections 2, 3, 3(1), 3(2), 4, 5 and 5(1); Code of Criminal Procedure (CrPC) - Sections 397 and 401

Appeal No. : Crl. R.P. No. 653 of 2009

Appellant : Mr. X

Respondent : State of Kerala

Advocate for Def. : Jayakrishnan, P.P.

Advocate for Pet/Ap. : P. Vijaya Bhanu and; M. Revikrishnan, Adv.

Disposition : Petition allowed

Judgement :

ORDER

V. Ramkumar, J.

1. In this Revision filed under Section 397 read with Section 401 Cr.P.C. the 1st accused in Crime No. 227 of 2008 of Museum Police Station, Thiruvananthapuram

registered for offences punishable under Sections 4 and 5 of the Immoral Traffic (Prevention) Act, 1956 ('the Act' for short) challenges the order dated 9-2-2009 passed by the Chief Judicial Magistrate, Thiruvananthapuram, taking cognizance of the offences punishable under Sections 3 and 4 of the Act after assigning a number to the case as C.C. No. 268 of 2008 and issuing process against accused Nos. 1 and 2. To avoid embarrassment for the parties concerned their real names have been disguised in this order.

2. The case of the prosecution can be summarised as follows:

On 27-6-2008 the 1st accused (A1 for short) who is a retired Rear Admiral by name Mr. X, aged 65 years and hailing from Central Kerala, called Miss. A, the 2nd accused (A2 for short) aged 21 years, hailing from Chirayinkeezhu into his rented premises, namely, Room No. 108 of the Government Guest House, Thycaud. At about 12.20 p.m. on that day A1 and A2 were found indulging in illicit sexual intercourse. On a tip off by the Administrator of the Guest House, the Circle Inspector of Police, Museum and his Police party consisting of women police constables proceeded to the Guest House and apprehended A1 and A2 after secretly peeping into Room No. 108 through the partly open window beside the balcony. Currency notes totalling to Rs. 10,000/- and two pornographic magazines were seized from beneath the pillow in the said room. Since A1 induced and took A2 for the sake of prostitution and since A2 indulged in the act of offering her body for sexual intercourse for hire, both the accused persons have committed offences punishable under Sections 4 and 5 of the Act.

3. On 9-12-2008, the learned Chief Judicial Magistrate, Thiruvananthapuram took cognizance of offences punishable under Sections 3 and 4 of the Act and issued summons to both A1 and A2. Hence, this Revision.

4. I heard the learned Counsel for the revision petitioner as well as the learned Public Prosecutor.

5. While the F.I.R. was registered for offences punishable under Sections 3 and 4 of the Act, the final report says that the accused persons committed offences punishable under Sections 4 and 5 of the Act. Cognizance has been taken by the

Magistrate for offences punishable under Sections 3 and 4 of the Act.

6. Section 3 of the Act has absolutely no application because even according to the prosecution, Room No. 108 of the Government Guest House was used only once for sexual exploitation and if so, such a place cannot be called a brothel. (See Krishnamurthy v. Public Prosecutor 1967 Cri LJ 544 : AIR 1967 SC 5567). It is only if a person keeps a brothel or allows the premises under his control to be used as a brothel that he commits an offence under Section 3 of the Act. Section 2(a) defines a 'brothel' as follows:

'Brothel' includes any house, room, conveyance or place or any portion of any house, room, conveyance or place, which is used for purposes of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes'.

In the light of the interpretation placed by the Apex Court, the room in the Government Guest House 'will not answer the definition of 'brothel' if it was used for sexual exploitation only once.

Sub-sections 1 and 2 of Section 3 of the said Act reads as follows:

3. Punishment for keeping a brothel or allowing premises to be used as a brothel -
(1) Any person who keeps or manages, or acts or assists in the keeping or management of, a brothel shall be punishable on first conviction with rigorous imprisonment for a term of not less than one year and not more than three years and also with fine which may extend to two thousand rupees and in the event of a second or subsequent conviction, with rigorous imprisonment for a term of not less than two years and not more than five years and also with fine which may extend to two thousand rupees.

(2) Any person who:

(a) being the tenant, lessee, occupier or person in charge of any premises, uses or knowingly allows any other person to use, such premises or any part thereof as a brothel, or

(b) being the owner, lessor or landlord of any premises or the agent of such owner, the lessor or landlord, lets the same or any part thereof with the knowledge that the same or any part thereof is intended to be used as a brothel, or is wilfully a party to the use of such premises or any part thereof as a brothel,

shall be punishable on first conviction with imprisonment for a term which may extend to two years and with fine which may extend to two thousand rupees and in the event of a second or subsequent conviction, with rigorous imprisonment for a term which may extend to five years and also with fine.

7. Section 4 of the Act will be attracted only if a person knowingly lives on the earnings of 'prostitution'. The said Section reads as follows:

4. Punishment for living on the earning of prostitution: (1) Any person over the age of eighteen years who knowingly lives, wholly or in part, on the earnings of the prostitution of any other person shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both [and where such earnings relate to the prostitution of a child or a minor, shall be punishable with imprisonment for a term of not less than seven years and not more than ten years.]

(2) Where any person over the age of eighteen years is proved:

(a) to be living with, or to be habitually in the company of, a prostitute or

(b) to have exercised control, direction or influence over the movements of a prostitute in such a manner as to show that such person is aiding, abetting or compelling her prostitution; or

(c) to be acting as a tout or pimp on behalf of a prostitute,

it shall be presumed until the contrary is proved, that such person is knowingly living on the earnings of prostitution of another person within the meaning of Sub-section (1)'The activity carried on in a given premises will amount to 'prostitution' within the meaning of Section 2(f) of the Act only if sexual abuse or exploitation of a person is done for a commercial purpose. For the activity to become one with a

commercial purpose, it should partake the character of a business or one carried on for profit. (Vide Radhakrishnan v. State of Kerala 2008 (2) KLT 521.) In the absence of any material to indicate that the 2nd accused is a 'prostitute' within the meaning of Section 2(f) of the Act and A1 is living on the earnings of prostitution by A2, invocation of Section 4 of the Act is also wholly misconceived.

8. Section 5 of the Act also cannot obviously apply to the case on hand because the act of procuring, inducing or taking a person should be for the sake of prostitution. Sub -section (1) of Section 5 of the Act reads as follows:

5. Procuring, inducing or taking person for the sake of prostitution - (1) Any person 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 subsection:

(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,

In order to become prostitute there should be the offering of her body by a female for promiscuous sexual intercourse for hire. The word 'promiscuous' means indiscriminate which means that a woman or girl offering her body, should do so for hire to anyone who desires her body for sexual intercourse. In other words, such a female has no choice regarding the persons who are to have sexual intercourse with her. To put it differently, such a female should be available to any person who desires to have sexual intercourse with her (See Radhakrishnan v. State of Kerala (Supra). The learned Magistrate has taken cognizance of the offences punishable under Sections 3 and 4 of the Act which are not at all attracted in this case. Even Section 5 of the Act is not attracted for the reasons already mentioned.

9. There is yet another reason as to why the impugned order should not be allowed to stand. Soon after the arrest of A1 and A2 from Room No. 108 of Government Guest House, Thycaud by the Circle Inspector of Police, Museum Police Station, both of them were subjected to medical examination. In the statement given by A2 to Dr. A. Sunitha, Asst. Surgeon, Government Women and Children Hospital, Thycaud A2 has stated that she had sexual intercourse with A1 once. The Circle Inspector who allegedly detected the offence claims to have caught both A1 and A2 in flagrante delicto i.e. in the very act of indulging in the illicit sexual intercourse. If A1 already had sexual intercourse with A2 as was stated by A2 to the doctor, then in the vaginal smears, vaginal swabs, pubic hair and panties of A2 there should have been semen or spermatozoa. But strangely enough, the certificate of chemical analysis shows that semen and spermatozoa were not detected in the vaginal smears, vaginal swabs, pubic hair and panties of A2. All the three chemical tests as well as microscopic examination conducted on those materials showed the results as 'negative'.

10. The above discussion would probabalise the revision petitioner's contention that he was booked by the police at the behest of certain persons who are on

inimical terms with him for political reasons and he is a respectable person whose image and reputation were being tarnished. The cognizance taken and the process issued by the learned Magistrate overlooking the above vital aspects of the matter cannot be sustained. The order dated 9-12-2008 taking cognizance of the aforesaid offences and issuing process against the revision petitioner is set aside.

In the result, this Revision is allowed as above.

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