

05.08.19
Sl. No.5
As/akd & PA
[Rejected]

C. R. M. 5927 of 2019

In Re: An application for anticipatory bail under Section 438 of the Code of Criminal Procedure filed on 09.07.2019 in connection with Park Street Police Station/Detective Department (AHTU) Case No. 56 of 2019 dated 18.04.2019 under Sections 120B of the Indian Penal Code read with Section 3/4/5/7/18 of the Immoral Trafficking Act. (G.R. Case No. 477 of 2019)

And

Manoj Shaw @ Manoj Kumar Shaw

... Petitioner

Vs.

The State of West Bengal

....Respondent

Mr. Souvik Mitter .. Advocate
Mr. Satadru Lahiri .. Advocate
Md. Zeeshan Uddin .. Advocate
Ms. Amrin Khatoon .. Advocate

... .. for the petitioner

Mr. Abhratosh Majumder .. Ld. Addl. Advocate General
Mr. Rudradipta Nandy .. Advocate

... .. for the State

Pursuant to our earlier direction, Investigating Officer is personally present before this court. His presence is noted and dispensed with.

We have perused the report filed by the learned Chief Judge, City Sessions Court, Calcutta. He has stated in his report as follows:-

“I further beg to submit that on 13.06.2019 the Investigating Officer was not present before this court at the time of hearing and an adjournment application was filed and moved by the Ld. Public Prosecutor. In the said adjournment application, the Ld. Public Prosecutor mentioned ‘*that due to some unavoidable and inadvertence circumstances the investigating officer of the instant case could not comply u/s. 41A of the Cr.P.C.*’ and only prayed for further date for hearing.”

The report also encloses the order dated 13th June, 2019 and the application filed by the learned Public Prosecutor in the instant case on that day. The explanation given by the judicial officer, therefore, runs counter to the report submitted by the Investigating Officer to the Joint Commissioner of Police (Crime), Kolkata Police wherein it is stated that the learned Chief Judge verbally directed the Investigating Officer to issue notice under Section 41A of the Code of Criminal Procedure. Although the report of the judicial officer states that the Investigating Officer i.e. Inspector, Bhaskar Majumder was not present during hearing, it is contended before us that the said Investigating Officer was, in fact, present in court on that day. Hence, it appears that there are substantial variations with regard to the events which occurred before the learned Chief Judge, City Sessions Court, Calcutta on 13th June, 2019 at the time of hearing of the anticipatory bail application of the petitioner as per the report of the judicial officer on the one hand and that of the Investigating Officer on the other hand.

It is contended before us that the victims were major and the graver penalty under Sections 3 & 4 of the Immoral Traffic (Prevention) Act, 1956 are not attracted. It is also submitted that there is nothing on record to show that the victims were induced to prostitution against their will and therefore, the graver penalty under Section 5 of the said Act is not attracted.

It is trite law that in cases involving offences punishable up to seven years, Investigating Officer is duty bound to take an informed decision whether in the facts of the case it is in the interest of justice to

issue a notice under Section 41A of the Code of Criminal Procedure upon the accused in the course of investigation.

In ***Arnesh Kumar vs. State of Bihar & Anr.*** reported in **(2014) 8 SCC 273**, the Apex Court, *inter alia*, held that upon registration of FIR it is incumbent upon the Investigating Officer to decide within two weeks whether in the facts of the case particularly in the light of the parameters laid down in section 41(1)(b)(ii) of the Code of Criminal Procedure, whether notice under section 41A Cr.P.C ought to be issued on the accused or not and such opinion is to be forwarded to the jurisdictional Magistrate. Failure to do so, amounts to dereliction of duty and would expose the officer to disciplinary proceeding. Offences punishable under Immoral Traffic (Prevention) Act, 1956 particularly offence under Section 5 of the Act, i.e. inducing persons to carry on prostitution under the veneer of ostensibly lawful business activities like health spa etc. (as in the present case) require to be dealt with utmost sensitivity and the gravity and social impact of such offences involving exploitation of women from economically weaker sections of society ought to be borne in mind whenever investigation is undertaken in such cases. Resort to less intrusive mode of investigation through a notice under Section 41A of the Code of Criminal Procedure in such cases by ignoring the gravity and far reaching social consequences of such offences, vulnerability of the victims of sexual exploitation to threats, intimidation or inducement and the possibility of recurrence of such organized crimes amounts to complete negation of the restrictions contained in clauses (a) to (e) of section 41(1)(b)(ii) Cr.P.C. in exercise of such discretion.

Relevant portions of section 41 Cr.P.C. are as follows:-

“S.41. When police may arrest without warrant.- (1) Any police officer may, without an order from a Magistrate and without a warrant, arrest any person – (a) who commits, in the presence of a police officer, a cognizable offence; (b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely :-

- (i)
- (ii) the police officer is satisfied that such arrest is necessary –
 - (a) to prevent such person from committing any further offence;
 - (b) for proper investigation of the offence;
 - (c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or
 - (d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or
 - (e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured,

and the police officer shall record while making such arrest his reasons in writing;

[Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest].”

The instant case is one of the most glaring example of misuse of police power in this regard. While the Investigating Officer sought it fit to arrest the vulnerable witnesses namely, the sex workers who were forced to carry on prostitution under the guise of health spa, he resorted to an unusually lenient approach towards the owner of the said health spa i.e. the petitioner herein who appears to be the kinpin of the organised crime racket and issued notice under section 41A Cr.P.C. against him. That apart, one of the victims namely, Khusboo @ Khusi Halder appears to be a minor as it evident from her date of birth

recorded in the papers submitted on her behalf. Forcing a minor to prostitution attracts graver penalty punishable above seven years under the Immoral Traffic (Prevention) Act, 1956 which completely rules out the possibility of invocation of Section 41A of the Code of Criminal Procedure.

All these aspects of the case were ignored when the Public Prosecutor made an application before the learned Judge seeking adjournment of the case on the ground of issuing notice under Section 41A of the Code of Criminal Procedure to the petitioner. Although the police officer and the Judge presently appear to be shifting the onus of initiation of such wholly unacceptable mode of investigation on each other's shoulder, it can be concluded without an iota of doubt that all the stakeholders in the administration of justice in the present case appear to have forgotten the stringent provisions of law enacted to counter exploitation of women for prostitution as an organised crime and had mechanically condescended to the wholly unacceptable course of issuance of notice under Section 41A of the Code of Criminal Procedure upon the brothel owner while the poor girls who were exploited in the same brothel were incarcerated as accused persons in jail. It needs no assertion that in offences involving exploitation of women under Immoral Traffic (Prevention) Act, 1956 the sex workers who are exploited by brothel owners and others are not accused persons but the victims of crime.

It is a sad reflection on the quality of investigation conducted in the present case by a specialised agency namely, Anti-Human Trafficking Unit (AHTU) wherein its officers wholly ignored the

wholesome object of the law and unlawfully proceeded to effect arrest of the unfortunate victims of sexual exploitation while resorting to issuance of notice under Section 41A of the Code of Criminal Procedure upon the brothel owner during investigation.

Learned Judge who was in seisin of the anticipatory bail application of the brothel owner without application of mind whatsoever mechanically permitted adjournment to give effect to such illegal recourse to Section 41A of the Code of Criminal Procedure. Role of the Public Prosecutor in the present case is also not beyond reproach. It is the duty of the law officers of the State entrusted with handling criminal cases to advise police officers with regard to their lawful duties and responsibilities in the matter of investigation. Instead of providing sage advice, learned Public Prosecutor sought adjournment during the hearing of the anticipatory bail application of the principal accused on the ground that the Investigating Agency would take resort to Section 41A of the Code of Criminal Procedure against him although the materials on record show that the said accused had induced/forced various girls including a minor to prostitution attracting offences punishable imprisonment above seven (7) years . Such course of action was wholly unwarranted and uncalled for.

Having gone through the case diary in the instant case, we are aghast at the harrasive nature of investigation conducted by the police officers. They wholly ignored their bounden duty to protect the vulnerable witnesses i.e. the exploited sex workers and record their statements under Section 164 of the Code of Criminal Procedure, ensure their protection under Witness Protection Schemes and

recommend them for interim compensation as directed in ***State of West Bengal Vs. Sangita Sahu @ Shaw, (2018) 3 C Cr. LR (Cal) 459***. On the other hand, they treated them as accused persons and arrested and sought their remand to custody. Although, one of such sex worker namely, Khusboo @ Khusi Halder appears to be a minor, no steps were taken to forward her to the Child Welfare Committee (hereinafter referred to as 'CWC') for her necessary rehabilitation.

From the materials on record, we find that the petitioner was the owner of the health spa wherein women including a minor were sexually exploited for prostitution. Accordingly, we are of the opinion that in view of the gravity of the offence and for tracing out the ramifications of the crime and protection of vulnerable witnesses as aforesaid, custodial interrogation of the petitioner is necessary and this is not a fit case to grant anticipatory bail to the petitioner.

Hence, the prayer for anticipatory bail of the petitioner stands **rejected**.

We have been informed that a show cause notice has been issued upon the Investigating Officer and he has been divested of his duty to investigate the same. We direct the superior police officers to initiate appropriate disciplinary proceedings against him for dereliction of duty in the matter of investigation of the instant case and take the same to its logical conclusion within three months from date.

In view of the fact that the investigation has been wholly misdirected in the present case, we direct that the investigation in the case is to be conducted by a Deputy Commissioner of Police under the direct supervision of Additional Director General of Police, AHTU and

immediate steps be taken so that the exploited sex workers who were wrongfully implicated as accused persons are discharged and treated as witnesses in the instant case and their statements be promptly recorded under section 164 Cr.P.C. Investigating agency shall take necessary steps to protect the said exploited victims and recommend them, particularly the minor for interim compensation under the State Victim Compensation Scheme and for their proper rehabilitation in accordance with law.

In view of the lacklustre and indifferent manner in which investigation in cases involving sexual exploitation of women/children are being conducted, we consider it is necessary to issue certain directions with regard to the investigation of offences under Immoral Traffic (Prevention) Act, 1956 and other cognate offences under sections 363, 366, 366-A, 366-B, 370, 370-A, 372, 373 of the Indian Penal Code which are as follows :-

- (i) *while conducting the investigation in respect of offences under Immoral Traffic (Prevention) Act, 1956 and other cognate offences in the Indian Penal Code, the investigating agency shall not mechanically resort to Section 41A of the Code of Criminal Procedure without applying its mind to the parameters laid down in Section 41(1)(ii) of the Code. While arriving at such decision the investigating agency must bear in mind that these cases involve grave offences having widespread social ramifications and ordinarily affect the economically weak victims who are vulnerable to threats and/or inducement of various kinds. Possibility to repetition of such organized crimes are most likely if the offenders are not apprehended. Hence, resort to section 41A Cr.P.C. in these case is inadvisable*

unless extenuating circumstances emanating from the facts of a particular case justify a different course of action.

- (ii) When the victim is a minor, graver penalty involving sentence above seven years is attracted and recourse to Section 41A of the Code of Criminal Procedure is wholly prohibited;*
- (iii) No sex worker exploited for commercial sex shall be arrayed as an accused in the course of investigation/prosecution of offences under the Immoral Traffic (Prevention) Act, 1956 until and unless cogent materials come on record that she was also involved as a co-conspirator in the crime;*
- (iv) Investigating officers who are involved in investigating offences under the Immoral Traffic (Prevention) Act, 1956 and/or other cognate offences under the Indian Penal Code shall not arrest any sex worker in the course of investigation but shall treat them as victims of crime and extend to them all ameliorative measures available under the law including witnesses protection programmes, grant of interim compensation and/or other rehabilitative measures and protective custody. If the victim is a minor she shall be forthwith forwarded to CWC for her care, protection and rehabilitation. These directions are in addition to the directions given by this court in **State of West Bengal Vs. Sangita Sahu @ Shaw, (2018) 3 C Cr. LR (Cal) 459.***
- (v) In view of the gross insensitivity exhibited by the investigating and/or prosecuting agency in conducting investigation/prosecution in these cases, we recommend that appropriate training programmes for sensitization of police officers and/or Public Prosecutors in the matter of investigation, prosecution, preservation of evidence including protection of vulnerable witnesses be undertaken both by the State*

of West Bengal as well as the West Bengal State Legal Services Authority.

Department is directed to communicate a copy of this order to the Chief Secretary, Government of West Bengal, Director General of Police, West Bengal and Member Secretary, State Legal Services Authority for due compliance.

With regard to the role of the Public Prosecutor in the instant case, let a copy of this order be sent to the Home Secretary, Government of West Bengal, Legal Remembrancer as well as the Directorate of Prosecutions for due intimation.

We express our displeasure with regard to the casual indifference shown by the learned Chief Judge, City Sessions Court, Calcutta while dealing with the instant case involving a prostitution ring. It is expected that a senior judicial officer would show greater sensitivity and concern in such cases. While dealing with offences of this nature it is not expected that a judicial officer shall remain a mute spectator but must play a proactive role to ensure the offender is punished and prompt succour and redress are assured to the hapless victims of crime.

Register General is directed to communicate a copy of this order to the said judicial officer for his due intimation and improvement in future.

Let xerox certified copy of this order, if applied for, be given to the parties on usual undertaking.

(Manojit Mandal, J.)

(Joymalya Bagchi, J.)