

HIGH COURT OF MADHYA PRADESH : JABALPUR.

(S.B.:Hon'ble Shri Justice Rajendra Kumar Srivastava)

CRIMINAL REVISION NO.789/2019

Vs.

State of Madhya Pradesh

Shri Satyam Agrawal, Advocate, for the petitioner.

Shri Gulab Singh, Panel Lawyer, for the respondent-State.

ORDER
(20.5.2020)

1: Accused/Petitioner has filed this Criminal Revision under Section 397 read with Section 401 of Cr.P.C. to set aside the order dated 3.12.2018, passed in Session Trial No.14/2018, by II Addl. Sessions Judge, Niwari, District Tikamgarh, whereby learned ASJ framed the charge against the accused/petitioner under Section 370 of Indian Penal Code (hereinafter referred to as IPC for short).

2: The facts of the case in brief are that on 2.6.2017, Sub Divisional Officer (P) Prithvipur, received information that the act of prostitution is going on in the Residency Hotel at Prithvipur. Thereafter, he reached on the spot with other police officials. He found that accused/petitioner was involved in prostitution activities with another co-accused. Thereafter, he seized the amount and other articles from the accused/petitioner and other co-accused. He found that accused/petitioner and other co-accused are involved in prostitution. Accused/petitioner and other co-accused were arrested, FIR was lodged under Section 370 read with Section 34 of IPC and Sections, 3, 4, 5, 6 of Immoral Trafficking (Prevention) Act, 1956. After investigation, charge sheet has been filed against the

accused/petitioner under Section 370 read with Section 34 of IPC. Learned Addl. Sessions Judge framed the charge against the accused/petitioner under Section 370(2) of IPC.

3 : Learned counsel for the accused/petitioner submits that learned Court below framed the charge under Section 370(2) of IPC is contrary to law. Learned Court below has committed gross error of law in framing charge against the accused/petitioner. As per the prosecution story, accused/petitioner was found to be involved in commission of offence and she was in a room of hotel with two other co-accused persons, namely, Govind and Gyan Chand. Accused/petitioner was caught in a suspicion condition while doing prostitution. Thus, as per the prosecution case itself present accused/petitioner was not involved in trafficking of person rather she has been subjected to the trafficking for the purpose enshrined under Section 370(1) of IPC. In such circumstance, no charge can be framed against the accused/petitioner under Section 370(2) of IPC. So, learned Court below committed a gross error of law in framing charge against the present accused/petitioner. So, he prays for setting aside the impugned order and discharging of accused/petitioner from the charge under Section 370(2) of IPC.

4 : Learned Panel Lawyer for the respondent-State submits that there is no illegality or perversity in the impugned order, therefore, the petition may be dismissed. He also submits that learned trial Court must also frame the charge against the accused/petitioners under Immoral Trafficking (Prevention) Act, 1956.

5 : Before embarking on the facts of the case, it would be necessary to consider the legal aspects first. Since the petitioners have challenged the charge framed by the trial Court, by way of filing this revision petition, therefore, I would prefer to deal with the provision of Section 227 of Code Of Criminal Procedure, 1973, the same reads as under:-

“227. Discharge. *If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.”*

6 : If the Court finds that sufficient material is available to connect the accused with the offence, then Section 228 of Code Of Criminal Procedure, 1973, comes into role, provision is also quoted as under:

“228. Framing of charge.(1) *If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-*

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for the trial of warrant- cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub- section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.”

7 : The Hon’ble Supreme Court in the case of **Niranjan Singh Karam Singh Punjabi, Advocate Vs. Jitendra Bhimraj Bijja and others (AIR 1990 SC 1962)** has held as under:-

“7. Again in Supdt. & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja, (1979) 4 SCC 274: (AIR 1980 SC 52) this Court observed in paragraph 18 of the Judgment as under:

“The standard of test, proof and judgment which is to be applied finally before finding, the accused guilty or otherwise, is not exactly to be applied at the stage of Section 227 or 228 of the

Code of Criminal Procedure, 1973. At this stage, even a very strong suspicion founded upon materials before the Magistrate which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged may justify the framing of charge against the accused in respect of the commission of that offence".

From the above discussion it seems well-settled that at the Sections 227-228 stage the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face-value disclose the existence of all the ingredients constituting the alleged offence. The Court may for this limited purpose sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case."

8 : Further, in the case of **Union of India Vs. Prafulla Kumar Samal and another (AIR 1979 SC 366)**, the Hon'ble Supreme Court again has held as under:-

"Thus, on a consideration of the authorities mentioned above, the following principles emerge:(1) That the Judge while considering the question of framing the charges under section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out:

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be, fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under section 227 of the Code the Judge which under

the present Code is a senior and experienced Judge cannot act merely as a Post office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

9 : Further, the Hon'ble Apex Court in the case of **State of Orissa Vs. Debendra Nath Padhi, (2005) 1 SCC 568** has held as under:-

"23. As a result of the aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material, Satish Mehra case, holding that the trial court has powers to consider even materials which the accused may produce at the stage of Section 227 of the Code has not been correctly decided."

10 : The Hon'ble Apex Court in the case of **State of M.P. Vs. S.B. Johari and others** reported in **2000(2) M.P.L.J (SC) 322**, has also held as under:-

"4.....It is settled law that at the stage of framing the charge, the Court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. If the Court is satisfied that a prima facie case is made out for proceeding further then a charge has to be framed. The charge can be quashed if the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross examination or rebutted by defence evidence, if any, cannot show that accused committed the particular offence. In such case, there would be no sufficient ground for proceeding with the trial. In Niranjani Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijayya and Others etc. reported in (1990) 4 SCC 76, after considering

the provisions of Sections 227 and 228, Cr.P.C., the Court posed a question, whether at the stage of framing the charge, the trial court should marshal the materials on the record of the case as he would do on the conclusion of the trial. The Court held that at the stage of framing the charge inquiry must necessarily be limited to deciding if the facts emerging from such materials constitute the offence with which the accused could be charged. The Court may peruse the records for that limited purpose, but it is not required to marshal it with a view to decide the reliability thereof. The Court referred to earlier decisions in State of Bihar v. Ramesh Singh (1977) 4 SCC 39, Union of India v. Prafulla Kumar Samal (1979) 3 SCC 4 and Supdt. & Remembrancer of Legal Affairs, West Bengal vs. Anil Kumar Bhunja (1979) 4 SCC 274 and held thus:

“From the above discussion it seems well settled that at the Sections 227-228 stage the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The court may for this limited purpose shift the evidence as it cannot be expected even at the initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. (emphasis supplied).

11 : Before embarking on the facts of the case, it would be appropriate to emphasize Section 370 of IPC, which reads as under :-

“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 -

- First.-* Using threats, or
- Secondly.-* Using force, or any other form of coercion,
or
- Thirdly.-* by abduction, or
- Fourthly.-* by practising fraud, or deception, or

Fifthly.- by abuse of power, or

Sixthly.- 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.

Explanation 1.- The expression “*exploitation*” shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.

Explanation 2.- The consent of the victim is immaterial in determination of the offence of trafficking.

(2) Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years but which may extend to ten years, and shall also be liable to fine.

(3) Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(4) Where the offence involves the trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

(5) Where the offence involves the trafficking of more than one minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years, but which may extend to imprisonment for life, and shall also be liable to fine.

(6) If a person is convicted of the offence of trafficking of minor on more than one occasion, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life, and shall also be liable to fine.

(7) When a public servant or a police officer is involved

in the trafficking of any person then, such public servant or police officer shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine."

12 : It is evident that the prosecution case is that Sub Divisional Officer (P) received an information that in Hotel Residency at Orchha, prostitution business is running. Thereafter, raid was conducted and accused/petitioner along with other two co-accused were found to be involved in commission of offence. Accused/petitioner is a lady. It is alleged that she was involved in prostitution. Section 370(1) of IPC provides exploitation of threats, using force or any other form of coercion, abduction or practising fraud or deception, abuse of power by inducement, 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. Admittedly, accused/petitioner is a lady and she cannot be considered to be exploiting herself, so as to bring her within the ambit of Section 370. In fact, she is the person who would be considered as being exploited under Section 370 of IPC. In **Vinod @ Vijay Bhagubhai Patel Vs. State of Gujrat [(2017 SCC Online Guj 446)]**, the Gujrat High Court has referred to clarification by Justice Verma Committee, as under :-

"27. The clarification was sought in the following words :

"Dear Ms.Seshu The Committee, in its report of January 23, 2013, proposed certain amendments to [Section 370, IPC](#), to introduce a definition of the offence of 'trafficking' into the [IPC](#) and the punishment thereof. The Committee also notes that the Ministry of Law and Justice, Government of India, by way of the Criminal Law (Amendment) Ordinance, 2013 ('Ordinance'), dated February 3, 2013, has amended [Section 370](#) of the IPC in terms of the Committee's recommendations.

The Committee, however, notes your representation on behalf of the National Network of Sex Workers to the effect that the [Section 370, IPC](#), after being amended by

the Ordinance, could be misused by police and other governmental authorities to harass (i) sex workers who engage in prostitution of their own volition, and not pursuant to inducement, force or coercion, as the amended [Section 370](#) provides, and (ii) the clients of such sex workers, by bringing the act of gratification for a sex worker's services under the scope of the amended [Section 370](#).

The members of the Committee wish to clarify that the thrust of their intention behind recommending the amendment to [Section 370](#) was to protect women and children from being trafficked. The Committee has not intended to bring within the ambit of the amended [Section 370](#) sex workers who practice of their own volition. It is also clarified that the recast [Section 370](#) ought not to be interpreted to permit law-enforcement agencies to harass sex workers who undertake activities HC-NIC Page 14 of 24 Created On Sat May 06 01:34:48 IST 2017 of their own free will, and their clients. The Committee hopes that law enforcement agencies will enforce the amended [Section 370](#), [IPC](#), in letter and in spirit.

Yours sincerely Abhishek Tewari Advocate Counsel to the Committee"

28. The clarification dated 8th February 2013 reads as under :

"This is to express our concern at the ambiguous manner in which the term "prostitution" has been used in [Section 370](#) IPC of the Verma Committee Report. In this section, which deals with the offence of Trafficking of Persons, the term "exploitation" includes "prostitution" itself. This in essence means that "prostitution" will now be interpreted as exploitation. This problematic formulation has now been incorporated into the recently passed Ordinance.

[Section 370](#) IPC criminalizes people in sex work since it does not differentiate between "coercive prostitution" and prostitution; nor does it talk about the "exploitation of prostitution".

[Section 370](#) IPC was introduced to criminalize trafficking in persons and by and large uses the language of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (2000). However, comparing the language under both reveals a highly significant difference in the definition of "exploitation".

- While The UN Protocol which India ratified in 2011 defines "exploitation: as: "Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced

labour or services, slavery or practices similar to slavery, servitude or the removal of organs;...":

- Under [Section 370](#) IPC "exploitation" is defined as: "The expression "exploitation" shall include, prostitution or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, HC-NIC Page 15 of 24 Created On Sat May 06 01:34:48 IST 2017 servitude, or the forced removal of organs."

This significant difference potentially criminalizes the practices around sex work. By introducing the language of prostitution itself as exploitation, the amendment endangers sex workers instead of protecting them from sexual exploitation.

The learned members of the Verma Committee will concur that legislative framework that criminalizes prostitution as exploitation, drives the practice underground and renders the already vulnerable sex worker more vulnerable to violence, exposure to HIV and deepens the lack of legal remedy to redress violence. We also draw your attention to the decision of the Hon'ble Supreme Court (Cr Ap. 135/ 2010, 14 February 2011), where the right to dignity of women in prostitution was upheld.

The formulation in the Ordinance is a setback to sex workers who are fighting for legal and societal recognition of their fundamental rights to dignity and pursuit of a livelihood. Instead, criminalization, which is the fallout of the Ordinance, will create conditions for increased abuse of sex workers, especially by the police and others in positions of power and authority.

We request you to clarify that your intention was not to criminalize the lives of sex-workers but rather to criminalize only those who 'exploit the prostitution of others' i.e. traffickers in persons. We hope that this crucial clarification by the Committee will aid Parliament in bringing about the necessary changes in the provision so that the vulnerable sex worker is protected and not made the subject of criminal sanctions."

In view of above, it is apparent that charge under Section 370 of IPC has been erroneously framed against the accused/petitioner since she is herself an exploited person as per Section 370 of IPC.

13: Learned counsel for the respondent/State submits that learned trial Court did not consider the allegation against the present accused/ petitioner under Immoral Trafficking Act, 1956. So,

prosecution is free to submit a petition before the trial Court in this regard and learned trial Court will consider and decide that petition in accordance with law.

14 : Accordingly, the Criminal Revision is allowed. The impugned order dated 3.12.2018, passed in Session Trial No.14/2018, by II Addl. Sessions Judge, Niwari, District Tikamgarh, is hereby set aside. The accused/petitioner be discharged forthwith.

(RAJENDRA KUMAR SRIVASTAVA)
JUDGE

A.Praj.