

THE HON'BLE SRI JUSTICE K. SREENIVASA REDDY

**CRIMINAL PETITION NOS. 8675 OF 2022, 1190 OF
2023, 1806 OF 2023 & 1959 OF 2023**

COMMON ORDER :

Since common issue arises in all the Criminal Petitions, they are being taken up for disposal together by way of this common order.

2. (a) Criminal Petition No.8675 of 2022 is filed seeking to quash the proceedings in P.R.C. No.16 of 2022 on the file of the VI Metropolitan Magistrate, Vijayawada, by the petitioners/A.3 to A.6 respectively, for the offence punishable under Section 370A (2) of the Indian Penal Code, 1860 (IPC).

(b) Criminal Petition No.1190 of 2023 is filed seeking to quash the proceedings in crime No.855 of 2022 of Krishnalanka police station, Vijayawada, by the petitioners/A.2 and A.3, registered for the offences punishable under Sections 370 A (2) IPC and 3, 4, 5 and 7 of the Immoral Traffic (Prevention) Act, 1956 (for short, 'the Act, 1956').

(c) Criminal Petition No. 1806 of 2023 is filed seeking to quash the proceedings in S.C.No.181 of 2022 on the file of the V Additional Sessions Judge-cum-Special Court for trial of offences against Women, Eluru, registered for the offences punishable under Sections 370 IPC and 3 and 4 of the Act, 1956, by the petitioner/A.2.

(d) Criminal Petition No.1959 of 2023 is filed seeking to quash the proceedings in crime No.476 of 2021 of Arundalpet police station, Guntur district, by the petitioner/A.7, registered for the offences punishable under Sections 188, 269, 370, 370 A (2) IPC and 3 (1), 4 (1), 5(1) (a) of the Act, 1956.

3. In the aforesaid cases, customers are being prosecuted for the aforesaid offences. The present Criminal Petitions are filed by the respective petitioners, who are arrayed as accused in the respective crimes, as stated supra, to quash the aforesaid proceedings as against them on the ground that a customer would not

come within the purview of the offences under Sections 3, 4 and 5 of the Act, 1956 and 370 and 370A IPC and hence, cannot be prosecuted for the aforesaid offences.

4. On the other hand, the learned Special Assistant Public Prosecutor Sri Soora Venkata Sainath strenuously contended that *prima facie* a case for the offence under Section 370A IPC would be made out as against a customer, as in all the cases, more or less, the customer(s) were caught red-handed by the officials at the time of their raid, and whether the case is one of attempt, or to commit an offence or preparation, would be the subject matter of investigation or trial, as the case may be, and at this stage, this Court, in a petition under Section 482 CrPC, would not be in a position to conduct a roving enquiry to go into these details.

5. Originally, in cases of this nature, police were registering cases under Sections 3, 4 and 5 of the Act, 1956. Contention of the learned counsel for the petitioners is that the offences under Sections 3 and 5 of

the Act, 1956 would not be made out as against the customers, for the reason that the Act, 1956 is silent as to the offences committed by the customers, who visit the house of victim.

6. Section 3 of the Act, 1956 reads thus:

“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, 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.

(2A) For the purposes of sub-section (2), it shall be presumed, until the contrary is proved, that any person referred to in clause (a) or clause (b) of that sub-section, is knowingly allowing the premises or any part thereof to be used as a brothel or, as the case may be, has knowledge that the premises or any part thereof are being used as a brothel, if,—

- a. a report is published in a newspaper having circulation in the area in which such person resides to the effect that the premises or any part thereof have been found to be used for prostitution as a result of a search made under this Act; or
- b. a copy of the list of all things found during the search referred to in clause (a) is given to such person.

(3) Notwithstanding anything contained in any other law for the time being in force, on conviction of any person referred to in clause (a) or clause (b) of

sub- section (2) of any offence under that sub- section in respect of any premises or any part thereof, any lease or agreement under which such premises have been leased out or are held or occupied at the time of the commission of the offence, shall become void and inoperative with effect from the date of the said conviction.”

Section 4 of the Act, 1956 reads thus:

“4. Punishment for living on the earnings 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 2[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 subsection (1).”

7. Section 3 of the Act, 1956 deals with punishment for keeping a brothel or allowing premises to be used as a brothel. Section 4 of the Act, 1956 would attract only to a person who, knowingly lives on the earnings of prostitution of any other person. So, viewed from any angle, the offence punishable under Section 4 of the Act, 1956 would not attract as against a customer. This Section is meant to punish those persons who are living on the earnings of the prostitute. It cannot be invoked for prosecuting the persons who visit the said premises. Answering this question would not be difficult because the issue is no longer *res integra* for the reason that this

Court, in its Order dated 12.06.2013 in Criminal Petition No.408 of 2011, passed an order to the extent that the customer would not come within the purview of Sections 3 and 4 of the Act, 1956. Accordingly, the proceedings as against the petitioners in respect of offences under Sections 3 and 4 of the Act, 1956 are not maintainable.

8. Police are registering cases as against a customer for the offences punishable under Sections 3, 4 and 5 of the Act, 1956 along with Section 370 IPC.

“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 sub-section,—

1. 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
 2. 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;]
- (3) An offence under this section shall be triable—
- (a) in the place from which a 1[person] is procured, induced to go, taken or caused to be taken or from which an attempt to procure or take such 1[person] is made; or
 - (b) in the place to which he may have gone as a result of the inducement or to which he is taken or caused to be taken or an attempt to take him is made.”

9. Section 370 IPC reads thus:

“Section 370 of the Indian Penal Code

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 trafficking¹.

Explanations

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.

2. The consent of the victim is immaterial in determination of the offence of trafficking¹.

(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 trafficking¹ 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.”

A plain reading of the aforesaid provision goes to show that the main object of the provision is prevention of exploitation of a girl or a woman. It makes very clear that whoever, for the purpose of exploitation, recruits, transports, harbours, transfers or receives a person by using threats, or using force or any other form of coercion, or by abduction, or by practicing fraud or deception, or by abuse of power, commits the offence of trafficking. The Section has been enacted by the Legislature with the avowed object of preventing sexual exploitation of a girl or woman. The provision makes it very clear that whoever, for the purpose of exploitation, recruits, transports, harbours, transfers or receives any girl or woman for the purpose of sexual exploitation, such person is guilty of the offence under Section 370 IPC. The provision also makes it very clear that the consent of the victim is not material in determination of the offence of traffic. The expression ‘exploitation’

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.

10. In *Vinod @ Vijay Bhagubhai Patel v. State of Gujarat*,¹ it is held thus: (paragraphs 25, 26 and 27).

25. I find it extremely difficult to take the view that a customer at a brothel is not covered within the provision of Section 370 of the Penal Code, 1860. A customer at a brothel could be said to receive the victim. I see no good reason why the customer should be kept out of Section 370 of the Penal Code, 1860.

26. However, I should sound a note of caution at this stage. I am dealing with a very important issue and this judgment may have its own implication. At this stage, my attention is drawn by Mr. Nanavati, the learned counsel appearing for the applicant, to a clarification issued by Justice Verma Commission on the intent of Section 370 of the Penal Code, 1860.

27. The clarification was sought in the following words:

“Dear Ms. Seshu

¹ 2017 SCC OnLine Guj 446

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 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”*

11. A plain reading of the aforesaid provision goes to show that in case where a sex worker engages in prostitution out of her free will without there being any inducement, force or coercion, in such a case, there is any amount of ambiguity whether the customer would come within the purview of Section 370 IPC or not. This Court is of the view that it would still be a question of fact whether the woman is carrying on the said profession out of her free will or not. In generic, going by the traditions of the country, no woman would get into the said profession by choice unless and until she being forced to get into the said profession. Here, the view of this Court is whether it is out of free will or not, would

remain a question of fact and the same has to be decided in the course of trial.

12. Police are registering cases as against a customer for the offence punishable under Section 370 A IPC, which contemplates punishment for exploitation of a trafficked person. Section 370 A 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.”

A perusal of the aforesaid provision goes to show that under Section 370A (1) IPC, whoever knowingly

engages a minor for sexual exploitation in any manner, would be punishable. Sub-section (2) of Section 370A IPC categorically contemplates that if any person engages any other person for sexual exploitation, he would be punishable.

13. This Court feels that there is no ambiguity in sub-section (2) of Section 370 A IPC. My view has been observed in *S.Naveen Kumar @ Naveen v. State of Telangana*², wherein it is held thus:

“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.Varma, 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

² 2015 SCC OnLine Hyd 154= (2015) 2 ALD (Cri) 156

presumed for the moment that Legislators considered customer as an innocent victim in the flesh trade. Therefore, Section 370 A takes in its fold the customer also. So, despite the police charge sheeting petitioner/A.3 only for the offence 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 the charge under Section 370 A though not under Section 4 of the PIT Act with which he was charge sheeted.”

In the aforesaid decision, this Court has taken a view that ‘customer’ would come within the ambit of Section 370A IPC since the object of the committee under the Chairmanship of late Sri Justice J.S.Verma had interacted with cross sections of stake holders and after hearing them, suggested several amendments and introduction of various provisions in penal laws with an object of preventing the said nefarious activities. When the object of the committee is to prevent this kind of nefarious activities, there is no reason as to why a customer can be considered to an innocent victim in the flesh trade.

Another single Judge of this Court reiterated the same in its Order dated 27.06.2018 in Criminal Petition No.5803 of 2018 in *Mohammad Riyaz v. State of Telangana*, wherein the proceedings for the offences under Sections 3 to 5 of the Act, 1956 and Section 370 IPC were quashed, directing the Court below to proceed with the offence punishable under Section 370 A (2) IPC.

14. On the contrary, this Court in its Order dated 29.11.2021 in Criminal Petition No.6733 of 2021, relying upon a judgment in *Goenka Sajan Kumar v. State of A.P.* (2014 (2) ALD (Cri) 264), quashed the proceedings under Sections 3 to 5 of the Act, 1956 and 370 A (2) IPC. A learned single Judge of this Court in *Dinesh Kumar Chowdary v. State of A.P.* (Order dated 26.08.2022 in Criminal Petition No.6634 of 2022), relying upon the observations made in the aforesaid Order dated 29.11.2011 in Criminal Petition No.6733 of 2021 and decision in *Z.Lourdiah Naidu v. State of A.P.* (2013 (2) ALD (Cri) 393), quashed the proceedings under Sections

3 to 5 of the Act, 1956 and 370 A (2) IPC. The same has been reiterated by the learned single Judge in the Order dated 16.09.2022 in Criminal Petition No.4771 of 2022.

15. This Court, for the foregoing reasons, is in agreement with the views taken by the learned single Judges of this Court in *S.Naveen Kumar @ Naveen v. State of Telangana* and in the Order dated 27.06.2018 in Criminal Petition No.5803 of 2018 in *Mohammad Riyaz v. State of Telangana*, and holds that a customer comes within the purview of offence under Section 370A IPC.

16. Whereas, from the foregoing discussion, it is clear that conflicting decisions were rendered by other learned single Judges of this Court in the Order dated 29.11.2021 in Criminal Petition No.6733 of 2021, and in *Dinesh Kumar Chowdary v. State of A.P.* (Order dated 26.08.2022 in Criminal Petition No.6634 of 2022), and in the Order dated 16.09.2022 in Criminal Petition No.4771 of 2022, wherein it was held that customer will not be held liable for the offence under Section 370A IPC and

consequently the proceedings under Section 370A IPC were quashed. In view of the conflicting orders passed by the learned single Judges of this Court, to put a *quietus* to the issue, it is desirable to refer the matter to a Division Bench for an authoritative pronouncement and to attain finality as whether a customer can be brought into purview of Sections 370 and 370A IPC.

17. Registry is directed to place the matter before the Hon'ble the Chief Justice for constitution of an appropriate Bench for deciding the reference 'whether, in a case registered for the offences under Sections 3 to 7 of the Immoral Traffic (Prevention) Act, 1956, a customer can be prosecuted for the offences under Sections 370 or 370A of the Indian Penal Code, 1860 ?'

JUSTICE K. SREENIVASA REDDY

19 .4.2023.
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THE HON'BLE SRI JUSTICE K. SREENIVASA REDDY

**CRIMINAL PETITION NOs. 8675 OF 2022, 1190 OF
2023, 1806 OF 2023 & 1959 OF 2023**

19.04.2023

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