
(1985) 11 KL CK 0031
In the High Court Of Kerala

Deepa and Others

APPELLANT

Vs

S.I. of Police, and Another

RESPONDENT

Date of Decision : 27-11-1985

Acts Referred:

Penal Code, 1860 (IPC) — Section 114, 294(a)

Citation : (1986) CriLJ 1120

Hon'ble Judges : S. Padmanabhan, J

Bench : Single Bench

Judgement

S. Padmanabhan, J.—Some of the petitioners are Cabaret dancers and others are managers of restaurants. Against them various cases were registered, investigated and charge-sheeted in different Courts by different investigating agencies for offences punishable under Sections 294(a) and 114 of the Indian Penal Code. The general allegation in all the cases is that inside posh hotels nude and obscene dances and other cabaret performances were conducted. All these petitions are to quash those proceedings invoking the inherent jurisdiction of this Court. I have heard counsel for petitioners and the Director of Public Prosecutions.

2. Courts holding inquiry or trial under the Criminal Procedure Code are invested with ample powers to dispense with the ordeal of full trial in appropriate cases. A Magistrate conducting an inquiry into a complaint u/s 202 can dismiss the complaint at the inquiry stage itself if he is of opinion that there is no sufficient ground for proceeding. The power of discharge u/s 227 and the provision for discharge u/s 245 are examples of identical instances. An investigating agency is also having the discretion to decide whether the materials collected are sufficient to place the accused for trial. Taking cognizance by Courts is also a judicial act. Refusal to take cognizance in appropriate cases, say for instance, for want of requisite sanction or non-disclosure of an offence, is within judicial discretion. Only when such authorities refuse to exercise their discretion properly or act illegally resulting in abuse of process of Court and failure of justice that this

Court intervenes in the exercise of inherent power to set matters right. Taking cognizance of an offence whether on a complaint or on a police charge which does not disclose any offence at all will be an abuse of the process of Court. Charge-sheeting an accused on the basis of an investigation which did not succeed in collecting materials to place the accused for trial will also be an illegality. In these cases the general allegation is that the materials supporting the concerned charge-sheets and the allegations contained therein do not constitute the ingredients of the offence u/s 294(a) but on the other hand they disprove the ingredients. If that contention is correct these are fit cases in which this Court will be justified in interfering in exercise of its inherent powers to quash the proceedings because it will be an abuse of the process of Court to ask the accused to stand the ordeal of harassment by trial in such proceedings. It will definitely cause miscarriage of justice and prejudice investigation is the field of the police. Taking cognizance and deciding to proceed with inquiry or trial is the province of the Courts. Normally in exercise of the inherent power this Court will be reluctant to interfere with those discretions unless and until the materials on which such discretions were exercised show that the actions are illegal and amount to abuse of process of Court resulting in prejudice or harassment. The inherent powers may not be ordinarily extended in such cases because investigating agencies are having the authority to assess the evidence and decide whether the accused are to be charge-sheeted and Courts are also having the powers to dismiss the complaint or discharge the accused even without trial in appropriate cases. Inherent powers are intended to be exercised in cases of grave and patent injustice.

3. Normally a charge must fail for want of mens rea but there may be offences where mens rea may not be required. But actus reus must always exist. Without it there cannot be any offence. Mens rea can exist without actus reus, but if there is no actus reus there can be no crime. Even if mens rea is there, no conviction could be had without actus reus without which there cannot be a crime. For example a man may intend to marry during the lifetime of his wife and enter into a marriage believing that he is committing the offence of bigamy. Mens rea is there. But if unknown to him his wife died before he married again, in spite of the mens rea there cannot be an offence of bigamy. Over and above the three ingredients u/s 294(a) of which I will be referring hereafter the above aspects are also factors normally to be considered in deciding whether commission of a crime is proved or the ingredients exist. But in these cases while exercising the inherent jurisdiction to quash the proceedings before trial it will be premature to consider those aspects which will have to be decided on evidence. The allegations by themselves are not capable of excluding the above ingredients even though it was argued that mens rea and actus reus cannot be read from the allegations.

4. In all the cases before me the accused are charge-sheeted after investigation on the ground that they did or abetted the doing of obscene acts in public places. The "public places" in all the cases are enclosed halls, rooms or other places in

posh hotels. The obscene acts alleged against the cabaret artists are that they exposed their breasts and other private parts of the body nakedly and danced to the annoyance of the audience causing gestures and movements of those organs according to the music in such a way as to arouse lust. The other participants and managers of the hotels are charge-sheeted for abetting.

5. There is nothing to indicate that the allegations in the respective first information reports or charge-sheets are not supported by materials collected during investigation. If so, for the purpose of deciding these petitions I will have to proceed only on the allegations in the charge-sheets and nothing else. Therefore, the only three questions arising for consideration at this stage are (1) whether the scenes of occurrence are public places; (2) whether acts alleged to have been performed are obscene acts and (3) whether these acts are capable of causing annoyance to others. Whether anybody was actually annoyed and whether complaints of such annoyance are available are matters to be decided on evidence after trial. The question of abetment may not arise at this stage because if the principal offence is found punishable the offence of abetment, if proved, must follow suit.

6. On the mere word "Cabaret" nothing is going to turn. There is no knowing what all things could be done under the cover of that name. If we go by *State of Maharashtra v. Miss Joyce* ILR (1976) Bom 1299 relied on by the petitioners:

Any reasonable and prudent person with average common sense knows or ought to know before entering a hotel like Blue Nile, where cabaret shows are run, that the cabaret artists, whether male or female or both, are bound to show acts and make sounds accompanied by cabaret music, sexual or erotic gestures and revelation and play of parts of male or human bodies normally not exposed to public view on account of modesty or current fashions in society. Any person who desires to avoid the alleged mental harm of annoyance or psychological shocks on seeing what to some may be secret, sacred or profane parts of the male or female body is at perfect liberty not to go to such hotels or buy tickets for such obscene or annoying shows.

That decision proceeds on the assumption that cabaret, though styled as an Article undoubtedly includes acts of obscenity which are capable of causing annoyance at least to some of the onlookers. Acquittal was sustained mainly for the reason that the persons who attended the show bargained for it and hence they cannot complain of annoyance. It was also doubted whether the scenes are public places. A Division Bench of this Court in *K.P. Mohammed Vs. State of Kerala and Others*, said that cabaret by itself is not in any way obnoxious, if understood in the correct sense in which it ought to be understood. Those were writ petitions concerning the right to perform cabaret dances in restaurants. The decision therein was only that there cannot be any objection so long as it does not become obscene performance or performance in nudity.

7. In *Encyclopaedia Britannica (Micropaedia)*, 15th Edition, Volume II, at page 20,

cabaret is defined:

Cabaret Restaurant that serves liquor and offers musical entertainment and often dancing. The cabaret originated in France in the 1880s as a small club in which the audience was grouped around an entertainment platform. The entertainment at first consisted of a series of amateur acts linked together by a master of ceremonies; its coarse humour was usually directed against the conventions of bourgeois society. Before long the French cabaret eventually came to resemble the English music hall with its emphasis on comic skits. The primary exponent of French cabaret entertainment was the Moulin Rouge, in Paris; established in 1889 as a dance hall, it features a cabaret and show in which most major stars of variety and music hall have since appeared. The world of the Moulin Rouge in its heyday was immortalised in the work of Toulouse-Lautrec.

Imported from France c. 1900, the first German Kabarett was established in Berlin by Baron Krust Von Wolzogen. It retained the intimate atmosphere, entertainment platform, and improvisational character of the French cabaret but developed its own characteristic gallows humour. By the late 1920s, the German cabaret gradually had come to feature mildly risqué musical entertainment for the middle class gentlemen as well as biting political and social satire. It was also a centre for underground political and literary movements. Patronized by artists, writers, political revolutionaries and intellectuals, the German cabarets were usually located in old cellars. They were the centres of leftist opposition to the rise of the German Nazi Party and often experienced Nazi retaliation for their criticism of the Government. The composers Paul Hindemith and Hene Eisler, unknown at the time, were active in the cabarets; the playwrights Bertolt Brecht and Kurt Weill collaborated on the highly successful Ballad Opera *Die Dreigroschenoper* (The Threepenny Opera 1928), that established the form of the topical opera, their reputations, and the cabaret stardom of the singer Lotte Lenya, who was Weill's wife. The cabaret survives in post-World War II Germany as a forum for topical satire, but it has lost most of its political significance.

The English cabaret has its roots in the taproom concerts given in city taverns during the 18th and 19th centuries. A popular form by the end of the 19th century it is often called a music hall, although music hall usually means variety entertainment in England.

In the United States where it is usually called a nightclub, the cabaret is one of the few remaining places where an entertainer, usually a comedian, singer, or musician, can establish rapport with an audience in an intimate atmosphere that encourages improvisation and freedom of material. Although music for dancing is often provided during the entertainers' intermissions, the primary attraction is the featured entertainer. In the post-world War II period a few performers were successful with sharp political and social satire, but commercial considerations were paramount, and nightclubs relied chiefly on established theatrical personalities who could attract a wide audience.

In Words and Phrases, Permanent Edition, Volume VI page 1, cabaret is defined thus:

A cabaret" is a restaurant or barroom with dancing and singing as entertainment...Licensed coffee, pastry and sandwich restaurant whereby proprietor sponsored free Sunday afternoon concerts of Chamber music was not a "cabaret" within licensing requirement.... A "cabaret" is a cafe or restaurant where patrons are entertained by performers who dance and sing after the practice of certain French taverns.

But no authoritative guidelines are produced to show that cabaret dances cannot exceed any particular limits of decency or morality or any standards are being maintained. ILR 1976 Bom 1299 shows that cabaret dances compulsorily include obscenity for which the audience bargain for their satisfaction. It is in this background that the allegations regarding the three ingredients will have to be considered.

8. One of the conditions is that the obscene act, in order to constitute the offence, must be done in a public place. The Indian Penal Code, under which the charges were laid, do not define "public place". Therefore, public place must be taken to have its meaning as understood in common parlance. Definition of "public place" in special statutes intended to achieve certain specified objects cannot be attributed to an offence punishable u/s 294 of the Indian Penal Code. ILR 1976 Bom 1299 has not in so many words said that an enclosed area in a posh hotel where cabaret dance is conducted limiting entry to persons who purchase tickets is not a public place. But there are indications in that decision to show that such places in hotels are not considered as public places. The supporting reasons given in that decision appear to be not convincing. The main reason given is that persons who attend such performances are adults between the age of 25 and 50 who on their own accord and for their own satisfaction with the full knowledge of what is happening come to attend the show at heavy expense of tickets and the costly food and drinks served. The decision said:

It may be a different matter if the places are public places to which anybody can go at any time without paying anything. It may be an offence if such cabaret shows are performed in the presence of persons below 18. It may also be a different matter if such cabaret shows are displayed on the screen in a cinema house where people do not necessarily know that there is a cabaret show in the cinema. But where in a posh hotel like Blue Nile cabaret show is prominently advertised and the adult persons who want to attend it have to book often in advance their seats by paying some amount and they have to further take some excessively priced drinks and eatables and attend those shows for nearly two hours with hundreds of men and women, who patronise such shows, I do not think that it would be possible to convict an artiste taking part in such a cabaret show merely because some people not attending such shows, perhaps rightly, equate cabaret shows with pornographic filth and obscenity which deserves to be removed from the market place in posh hotels or because some of the members

of the audience feel annoyed at seeing the exhibition or dallying of some parts of the female body, though such acts accompanied with sounds are normally expected by the spectators patronising a cabaret show.

The decision accepts and equates cabaret shows with pornographic filth and obscenity which deserved to be removed from the market place in posh hostels. The decision also accepts that it will amount to an offence u/s 294 if it is conducted in public places to which anybody can go at any time without paying anything. So also it is conceded to be an offence if it is performed in the presence of persons aged below 18. It is also conceded to be an offence if displayed on the screen in a cinema house. But the position is said to be different when it is performed in a hotel after advertisement and adult persons who want to attend book their tickets and see the same after previous intimation as to what is happening. In my opinion the reasonings are not acceptable to the cases before me. So far as the cases before me are concerned there is nothing at present to show that the cabaret dances were performed after due advertisement as to what was being performed. There is also nothing to show that entry by tickets was restricted to any category in point of age or otherwise. In my opinion A posh hotel is as much a public place as a cinema house. Entry to a hotel just like a cinema house cannot and is not being restricted to anybody. If "public place" is being determined on the amount of money one may have to shell out for securing admission the position will be pitiable and it will only tend to judicial recognition of corruption. If what is prohibited in a cinema house where people are admitted for charges within their reach is not taboo for the rich who could afford to witness such shows for higher tickets with additional amounts for drinks and food, the position is really ridiculous. The position will be that those who could afford enormous amounts could conduct or witness obscene acts with impunity. I do not think that this is the legal intent. If that principle is accepted the criterion for deciding a public place will be the amount that is expended for getting entry. If so a cinema house also will cease to be a public place if the ticket charges are enormously increased and it is provided that consumption of costly food and drinks on payment is also a must. I do not think that it is what the law intends as the criterion for deciding whether a place is public or not. If that is the criterion every public place could be converted into a private place by restricting entry to rich persons who alone could afford the luxury. The result will be that any obscenity which is prohibited to the poor will not be a prohibited Obscenity for the rich. That will lead us to a very unhappy position. So also previous advertisement of what is going to be performed cannot have the effect of converting a public place into a private place or obscenity into something which is not obscene.

9. The decision in State of Kerala Vs. Cherian Secariah and Others, though rendered under the provisions of Section 15 of the Kerala Gaming Act which enumerated the public places, held that in order to constitute a public place it is not necessary that the place should be a public property, but if it is a private property it must be proved that not only the public could have access to it, but it

is a place to which members of the public in fact resort. In (1884) 14 QBD 63 a place to which people have no legal right to go but to which place persons usually went and were never obstructed was held to be a public place. In 1947 (1) All ER 829 an enclosure at the rear of an inn at the side of which an open gate way gave access to the enclosure was held to be a place to which public had access and as such a public place. 1965(1) All ER 705 held that for the purpose of common law offence a public place is a place to which the public could and did have access and it is immaterial whether they came at the invitation of the occupier or with his permission or whether some payment or the performance of some formality such as signing of a visitor's book was required before access could be had. The further finding was that a club will be a private place if there was real restriction of access to members and their guests and that any other member of the public who got in was really a trespasser.

10. There is no meaning in saying that places where the public have free access without any payment alone could be public places. If so theatres, exhibition auditoriums and the like where the public have access without any restriction except payment of requisite fees cannot be public places. It is not the payment that determines the issue. Even if it be on payment if entry is not prohibited to anybody it must definitely be a public place. Otherwise the position will be that what is not obscenity for the rich will be obscenity for the poor. Law never contemplates such a situation. A hotel must definitely be a place accessible to all except perhaps subject to reasonable restrictions allowed by law. It continues to be public place. If any portion of the hotel is earmarked for persons who opt to pay a particular amount it does not cease to be a public place for that reason because without discrimination anybody will have access on such payment. Therefore, there is no point in contending that a portion of a hotel where the only restriction for entry is some payment is not a public place. Otherwise the result will be that any public place could be made a private place by enclosing the same and restricting entry to persons who can afford payment of huge amounts. In these cases as matters now stand there is no indication that there is any restriction for admission other than the price of tickets, food and drinks. To me it appears that there is no justification at this stage to assume that the apartments in posh hotels are not public places.

11. Then the question will be whether the acts alleged in the charge-sheets could be held not obscene. Even the petitioners did not argue for the position that left to themselves the acts alleged are not obscenities. The only contention was that the performance conducted, in places which are not public exclusively to cater the needs of those who willingly come to witness the same with the full knowledge of what is going to happen cannot be considered obscenities because they cannot complain of annoyance. I shall consider the question of annoyance separately.

12. As was found by the Magistrate who decided the case which was the subject matter of ILR 1976 Bom 1299, the breasts or other parts of a female body may

or may not be things of beauty or joy for ever from time immemorial depending upon the tastes of individuals. The test of obscenity may be flexible because Society can never be static. Conceptions of decency and morality may be different from place to place, from time to time or from people to people. But I feel that conceptions in our Society regarding morality and decency have not undergone that much of change to treat performances in nudity as obscene only when it goes to the extent of appealing to the carnal side of human nature. ILR 1976 Bom 1299 accepted nude performances as obscene. K.P. Mohammed Vs. State of Kerala and Others, only said that there could be no serious objection to the hotels and restaurants entertaining their customers with music and dance so long as it does not become obscene performance or a performance in nudity. That decision also said:

The court's concern and anxiety should only be to prevent the exhibition at public places of performances which are immodest and indecent judged by the standards of our country and our times.

So long as the Indian Penal Code has not defined obscenity it may be a difficult and delicate task to determine how to distinguish between that which is considered artistic and that which is considered obscene. The test must evidently be of a general character but the standards may change from case to case depending upon facts and circumstances. In the case of a literary work treating with sex and nudity in Article the literature may not be regarded as evidence of obscenity without something more. It may also have to be tested in the light of freedom of speech and expression guaranteed under the Constitution which is evidently subject to reasonable restrictions. In this case it may also have to be tested in the light of the fundamental right to practice any profession or to carry on any occupation, trade or business guaranteed by Article 19(g) of the Constitution. But it has to be remembered that those rights are subject to reasonable restrictions in the interests of the sovereignty and integrity of India, public order, decency or morality. The test of obscenity as laid down in Hicklin's case (1868) 3 QB 360 and followed in Ranjit D. Udeshi Vs. State of Maharashtra, is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences because it is quite clear that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character. The potentiality of the obscenity to deprave and corrupt by immoral influences should always be the question that has to be answered in each case. Judged by those standards and going by the allegations in the charge-sheets and connected papers this Court may not be at this stage justified in concluding that the allegations do not constitute obscene acts as envisaged by Section 294 of the Indian Penal Code. In considering that aspect courts should not be forgetful of the object of Section 294 which is promotion of public decency and morality. As observed in Raj Kapoor and Others Vs. State and Others, "Jurisprudentially speaking, law, in the sense of command to do or not to do, must be a reflection of the community's cultural norms, not the State's regimentation of aesthetic

expression or artistic creation."

13. "Annoyance to others" is an essential ingredient for constituting the offence u/s 294; whether there must be proof of actual annoyance to individuals or people in general or whether possibility of annoyance is sufficient are not matters to be considered at this stage. I have already found that hotels and restaurants are public places where entry is not limited to members or any particular category of people. They are places to which public in general have access irrespective of caste, creed, nationality, sex, age, or income. Places of cabaret dances in such hotels and restaurants are also no exception and nobody who pays for it could be restricted except for reasons of accommodation or the like. When the object of the section is taken into account there is no point in saying that persons who come to witness the show bargained for it with full knowledge of what is going to happen and even if annoyance is caused they have no right to complain. If the position is otherwise, ignoring the provisions of Section 294 an obscene performance could be had with impunity before an exclusively willing crowd even in a public place. That will not be conducive to public order, decency or morality.

14. Reasonable restrictions on consideration of public order, decency or morality are intended in the interest of the general public and as such in the interest of public decency and morality. If a particular performance is against that interest and is capable of depraving and corrupting those whose minds are open to such immoral influences it will be against public interest and as such objectionable. The interest of Society will have to tilt the scales in such cases. Considerations of possible damage to the Society and promotion of public decency and morality will have to outweigh considerations of the interests of those who are running the show for profit or those who conduct the performance for livelihood. So also the enjoyment and satisfaction of those who derive pleasure by seeing the performances willingly cannot outweigh the interest of the Society which should be of paramount consideration. The argument of Advocate Mr. P. N. Ramakrishnan Nair that there is no allegation of annoyance does not appear to be correct. It might not have been alleged that any particular individual was annoyed. The allegation that the acts are capable of annoyance is there. If annoyance actually caused to anybody has to be proved, on which question I am not expressing any definite opinion, it could be proved during trial. The allegations definitely cover possibility of depraving and corrupting those whose minds are open to such immoral influences and the consequent damage to the society. The gist of what has been laid down in *Ranjit D. Udeshi Vs. State of Maharashtra*, is that it is obscenity that is capable of depraving and corrupting those whose minds are open to such immoral influences. Standard of annoyance is that of an ordinary prudent man in the contemporary public life having regard to the standards of contemporary public life.

15. The arguments based on Sections 87 and 88 of the Indian Penal Code accepted in ILR 1976 Bom 1299 does not appear to lay down the law correctly.

Sections 87 and 88 read thus:

87. Act not intended and not known to be likely to cause death or grievous hurt done by consent. -- Nothing which is not intended to cause death or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen years of age, who has given consent, whether express or implied, to suffer that harm, or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.

88. Act not intended to cause death, done by consent in good faith for person's benefit. -- Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.

16. Those two sections evidently cannot come into the picture in these cases. Section 87 deals with cases where persons above 18 years of age agree to suffer the harm other than death or grievous hurt. Here the question of consent of individuals does not arise. What is paramount is the interest of the society. Section 88 also deals only with cases where consent is given for doing something which is considered and believed in good faith to be for the benefit of the person giving consent. In these cases what we are concerned with is the annoyance on the basis of the obscenity which is likely to corrupt those whose minds are open to such immoral influences and the consequent damage to public order, decency or morality which should be the concern of the State to prevent and which is the object behind Section 294. I do not agree with the view that Section 294 is not capable of dealing with such situations and some special legislation is necessary for that purpose. Of course it is better to have some comprehensive legislation in that respect which is fool-proof instead of leaving the discretion to the police either to resort to Section 294 or not and thereby afford chances of corruption leaving the concerned persons to the mercy of the police. I hope the Government will seriously think on that line without delay.

17. But anyhow Sections 87 and 88 of the Indian Penal Code do not come into play in these cases where interest of the Society is involved. There is no question of crime being obviated by consent. I do not think I will be able to accept the contention of Mr. P. N. Ramakrishnan Nair that in these cases even if there could be annoyance to anybody it will create only a tortious liability and not any crime. Whether it is possible to consent to a tort which is also a crime is doubtful. Some assaults are criminal whether or not there is consent. No person can license another to commit a crime. Even in tort if the transaction consented to is contrary to public policy consent may well be excluded as a defence. Ordinarily consent can act only as a waiver against civil action though there are acts which may not be crimes on account of consent. The cases in hand are not those which

could erase the crime by consent of anybody. In all crimes State is supposed to be the aggrieved party and the Prosecutor especially in those crimes in which the interest of the society is the prime consideration.

18. If the allegations in the charge-sheets and connected papers are considered it is not possible to conclude at this stage that the ingredients of Section 294 or 114 of the Indian Penal Code are not satisfied. As to whether the petitioners actually committed the offences or not are matters to be decided by the trial courts after taking evidence. The impugned cases do not project any abuse of the process of court or any possible miscarriage of justice or harassment. This court will not be justified in interfering under the inherent powers.

All the petitions are dismissed.