

Present : Jayewardene A.J.

SAIBO v. CHELLAM *et al.*

413—P. C. Jaffna, 22,591.

Prostitution—Women earning a living by prostitution—Ordinance No. 4 of 1841, as amended by Ordinance No. 21 of 1919, s. 9 (1) (a).

Prostitution is not an offence *per se* under our law.

Section 9, sub-section 1 (a), of Ordinance No. 4 of 1841, as amended by Ordinance No. 21 of 1919, does not penalize prostitutes living on their own earnings.

THE facts are set out in the judgment.

Arulanandam, for the appellants.—The accused was charged under section 9 of Ordinance No. 4 of 1841 as amended by Ordinance No. 21 of 1919. The facts show that she was leading the life of a prostitute. That is not an offence under the Ordinance. See *Police Sergeant, Tangalla, v. Porthenis*,¹ *Appuhamy v. Emanis*.²

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In this case two women who are said to be prostitutes have been convicted under section 9, sub-section (1) (a), of Ordinance No. 4 of 1841, as amended by Ordinance No. 21 of 1919, of having knowingly lived on the earnings of prostitution and sentenced to pay a fine of Rs. 50 each. They appeal on the ground that the section under which they have been convicted does not apply to them, as it does not penalize prostitutes living on their own earnings.

Section 9, sub-section (1) (a), runs as follows :—

“ The following persons, that is to say—

(a) Any person who knowingly lives wholly or in part on the earnings of prostitution ;

(b)

shall be deemed to be incorrigible rogues within the true intent and meaning of the Ordinance and shall be liable, &c”

This section has been borrowed from the English Vagrancy Act, 1898 (*61 and 62 Vict., ch. 39*), as amended by the Criminal Law Amendment Act, 1912 (*2 and 3 Geo. V., ch. 20*), with a slight but important alteration. The English Act enacts that—

“ Every male person who knowingly lives wholly or in part on the earnings of prostitution is to be deemed to be a rogue or vagabond within the meaning of the Vagrancy Act, 1824, and may be dealt with accordingly.”

¹ (1920) 22 N. L. R. 163.

² (1921) 23 N. L. R. 160.

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The important alteration is that while the English Act refers only to male persons, the local Ordinance refers to "any persons," which would include "female" as well as "male persons" (see section 23 of the principal Ordinance, No. 4 of 1841). This alteration has made the present conviction possible. But the question still remains, whether, even where the term "any person" includes female persons, prostitutes come within the meaning of the sub-section of our Ordinance. The sections of the amending Ordinance, No. 21 of 1919, have been explained by Bertram C.J. in his judgment in *Coore v. James Appu*¹ :—

"Speaking generally," said the learned Chief Justice, "the Ordinance and the Ordinances which it amends do not penalize illicit sexual intercourse, except where the act takes place under circumstances which are a public scandal, or on outrageous offence to individual rights, or where it takes place with a girl under the prescribed age. Similarly, the procurement of women for an act of sexual intercourse is not punishable, except in the case of a woman under twenty years of age (see section 6). But what the Ordinance does penalize is the making a living out of the corruption and degradation of others. It does this in three ways :—

- (a) It enhances the penalties for brothel-keeping (section 4) ;
- (b) It punishes persons who live on the earnings of prostitution (section 9 (1) (a)) ; and
- (c) It further punishes persons who systematically procure persons of whatever age for the purpose of illicit intercourse.

With regard to (b), the person here aimed at is the type of character known in Europe as the bully, that is to say, a person who has a woman under his control, and who by the use of his influence or authority compels or induces her to offer herself for prostitution, and lives wholly or in part on earnings so realized."

But owing to the omission of the word "male" from our section, not only "male bullies" but also "female bullies" would come within the operation of the sub-section. Later in the same judgment he says :—

"If a person is charged with living on the earnings of prostitution, it is not right to give general evidence that he does this ; the name of the alleged person on whose earnings he is said to live must be specified."

¹ (1920) 22 N. L. R. 206 (215).

Prostitution is not an offence *per se* under our law, and if the learned Magistrate's conclusion is right, the Ordinance would have the effect of making a very important alteration in our law, and prostitution would stand penalized. But, as Bertram C.J. points out in his judgment, what the sub-section penalizes is "the making of a living out of the corruption and degradation of others." The words of the sub-section themselves make this clear. I refer in particular to the word "knowingly." If the sub-section was intended to refer to prostitutes, the use of the word "knowingly" is highly inappropriate; for if a prostitute earns money and lives on such earnings, there can be no mistake as to what her earnings are, and there can be no question of her doing so "knowingly." There could be no possibility of her doing so "unknowingly" under a misapprehension, or mistake. The use of the word "knowingly" throws on the prosecution the burden of proving that the accused had the requisite knowledge, and the accused may prove that such knowledge was absent. This would apply in a case when another person is charged with the living on the earnings of a prostitute, but in the case of the prostitute herself it would be meaningless. Both according to the intention of the Ordinance and the words of the sub-section itself, the latter has no application to prostitutes who live on their own earnings or prostitution. The words of the English Act too support this construction. There is also, in my opinion, in this case a joinder of accused persons which is not permitted by law and which is fatal to the convictions. Persons could only be charged together if they are accused of jointly committing the same offence or of different offences committed in the same transaction (section 184 of the Criminal Procedure Code). The accused no doubt occupied the same house, but each was living on her own earnings.

I therefore set aside the convictions and acquit the accused.

Set aside.

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