

Laws Concerning Commercial Sex and HIV/AIDS Prevention



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Commercial Sex and
HIV AIDS Prevention**

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Introduction

HIV/AIDS has been identified as a sexual transmitted disease due to unprotected sex. In addition to HIV/AIDS, there are other diseases such as Syphilis, Gonorrhoea and Herpes etc. At present, implementation of laws in respect of commercial sex and morality is not an easy task to Police because on one hand we should consider the measures that have been introduced to prevent spreading HIV and on the other hand we should respect the rights of wrong doers.

According to Sri Lankan Law, sex in private is not an offence. Adultery is also not a criminal offence whereas it is a marital offence. Adultery means the spouse practices sexual activities with another person besides his or her legal partner. But our law provides provisions to deal with offences of sex workers where money or a consideration is exchanged. New laws in respect of providing persons for sex were introduced by the amendments of Penal Code that were brought in 1995, 1998 and 2006. All these amendments were trilingual and anybody could access the contents.

Nevertheless before these amendments, the law related to sex was embodied in Brothels Ordinance and Vagrants Ordinance which were only in English and this article endeavors to explain the legal provisions and their applications accordingly.

Vagrants Ordinance

The ordinance was enacted in 1841 and it is one of the oldest ordinances that were introduced by the colonial rulers. The long title of the ordinance states “**an Ordinance to amend and consolidate the law relating to vagrancy**”.

In terms of the provisions of Vagrants Ordinance there are certain sections pertinent to commercial sex workers and connected offences.

Section 03

(1) Persons who are deemed idle and disorderly persons

- (a) Every person being able to maintain himself by work or other means, but who shall willfully refuse or neglect so to do, and shall wander abroad or place himself in any public place, street, highway, court, or passage to beg or gather alms, or cause, or procure, or encourage any of his family to do so, excepting priests and pilgrims in performance of their religious vows, not being mendicants of the description mentioned in the paragraph (d) of the next succeeding section
- (b) every common prostitute wandering in the public street or highway, or in any place of public resort, and behaving in a riotous or indecent manner;
- (c) every person wandering abroad or lodging in any verandah, outhouse, shed, or unoccupied building, or in any cart, vehicle,

or other receptacle, without leave of the owner thereof, and not having any visible means of subsistence, and not giving a good account of himself;

(d) every person, without leave of the owner, defacing the side of any house or building or wall by fixing any placard or notice, or by any indecent or insulting writing or drawing thereon;

(e) every person who in or upon any wharf, jetty, street, road, walk, passage, verandah, or other place situated within any proclaimed area and used by or accessible to the public, persistently and without lawful excuse follows, accosts, or addresses by words or signs any person against his will and to his annoyance, shall be deemed an idle and disorderly person within the true intent and meaning of this Ordinance, and shall be liable upon the first conviction to be imprisoned, with or without hard labour, for any term not exceeding fourteen days, or to a fine not exceeding ten rupees.

(2) A police officer may arrest without a warrant every person deemed to be an idle and disorderly person.

(3) In this section, " proclaimed area " means any area declared by the Minister by Order published in the Gazette, to be a proclaimed area for the purposes of this section. (*Primary Court has exclusive jurisdiction under section 33 of the Judicature Act read with Gazette Extry. No. 43/4 of 1979. 07. 02.)

Sisilihamy vs Zoiza 47 NLR 311 the court held that the prosecution should prove that the accused doesn't have any revenue to defend himself. Therefore if we arrest a person under this section, we should be capable of proving the facts.

Section 04

(c) every person willfully exposing his person in an indecent manner, or exhibiting any obscene print, picture, or other indecent exhibition, in any street, road, highway, or public place or elsewhere, to the annoyance and disgust of others;

Charls Appuhamy vs Seneviratne 65 NLR 455, the court held that elsewhere means any place except a public place. According to this interpretation no offence could be committed in any place even though it is not a public place.

Section 07

Soliciting and acts of indecency in public places

(1) The following persons, that is to say-

(a) any person in or about any public place soliciting any person for the purpose of the commission of any act of illicit sexual intercourse or indecency, whether with the person soliciting or with any other person, whether specified or not;

(b) any person found committing any act of gross indecency, or found behaving with gross indecency, in or about any public place ;

(c) any person found -

(i) in any public enclosure contrary to any local by-laws or regulations prescribing the use of such enclosures ; or

(ii) in any enclosure belonging to the State , without the permission of the person in charge thereof; or

(iii) within any private enclosure attached to any dwelling house, except upon the invitation of any inmate of the premises,

under such circumstances that it is reasonable to infer that he is there present for immoral purposes, unless he is able to explain his presence to the satisfaction of the court by which he is tried,

shall be guilty of an offence, and shall be liable on summary conviction to imprisonment of either description for a period not exceeding six months, or to a fine not exceeding one hundred rupees, or to both.

Dharmadasa vs Thiadoman 56 NLR 278, the Court gives very wide interpretation for the word of soliciting.

The court held that it is not required to solicit willingly or forcibly. But if someone indirectly solicits, it is sufficient for the commission of offence.

Accordingly, if a woman invites somebody to have sex at a public place expressly or impliedly, the legal ingredients are fulfilled.

Leembragan vs Silva 34 NLR 56, the court held that illicit sexual intercourse is subjected to indecency.

Section 09

Punishment of certain classes of incorrigible rogues

(1) Any person who -

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

(b) systematically procures persons for the purpose of illicit or unnatural intercourse, shall be deemed to be an incorrigible rogue within the true intent and meaning of this Ordinance, and shall be liable -

(i) on summary conviction to imprisonment of either description for a period not exceeding six months, or to a fine not exceeding one hundred rupees, or to both ; or

(ii) on conviction on indictment to imprisonment of either description for a period not exceeding two years, and if a

male, in addition to any such imprisonment, if the court in its discretion directs, to be whipped.

- (2) Every male person who is proved to live with, or to be habitually in the company of, a prostitute, and every person, whether male or female, who is proved to have exercised control, direction, or influence over the movements of a prostitute in such a manner as to show that he or she is aiding, abetting, or compelling the prostitution of such person with any other person or generally, shall, unless the court is satisfied by evidence to the contrary, be deemed to be knowingly living on the earnings of prostitution

Section 11

Causing, &c, the seduction or prostitution or unlawful carnal knowledge of a girl

- (1) Every person, having the custody, charge, or care of a girl, who causes or encourages the seduction or prostitution or unlawful carnal knowledge of the said girl, shall be guilty of an offence and shall be liable on summary conviction thereof to a fine not exceeding one hundred rupees, or to imprisonment of either description for any term not exceeding six months or to both such fine and imprisonment.
- (2) Without prejudice to the generality of subsection (1), a person shall, for the purposes of this section, be deemed to have caused or encouraged the seduction or prostitution or unlawful carnal

knowledge (as the case may be) of a girl who has been seduced or become a prostitute or been unlawfully carnally known, if he has knowingly allowed the girl to associate with, or to enter or continue in the employment of, any prostitute or person of known immoral character.

According to the contents of Vagrants Ordinance, the sections 3, 4, 7, 9 and 11 are relevant to the offences of commercial sex workers. If police conduct raids and operations on the provisions of the Ordinance, the arrest should be made in terms of the above sections. Especially the Sec. 3 (b) states that every common prostitute wondering in public street or highway could be arrested. However, the ordinance does not define 'every common prostitute'.

Therefore, if a prostitute is arrested, it should not be practiced on mere suspicion or belief and also the arresting officer should have specifics to prove that the woman is a prostitute.

Brothels Ordinance

Brothels Ordinance was introduced in 1889, 48 years after the enactment of Vagrant Ordinance.

Section 2

Any person who-

- (a) keeps or manages or acts or assists in the management of a brothel; or
- (b) being the tenant, lessee, occupier or owner of any premises, knowingly permits such premises or any part thereof to be used as a brothel, or for the purpose of habitual prostitution; or
- (c) being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same, or any part thereof, with the knowledge that such premises or some part thereof are or is to be used as a brothel, or is willfully a party to the continued use of such premises or any part thereof as a brothel,

shall be guilty of an offence

Kusen vs Sisilia 37 NLR 308 Justice Suits stated that the prosecution should prove that males visit the place constantly to have sexual intercourse with women.

The Ordinance does not interpret the word 'Brothel House'.
Nevertheless **Dhorati Silva vs OIC Vice Branch Pettah 78 NLR 433**

gave a definition on this issue. In this case, the place is a flower shop named 'Salma' which was in Wellawatta area. Despite the fact that it appeared to sell flowers, the Manageress Dhorati Silva did not sell flowers. Males had access to this place to select women by means of a photo album. Thereafter the fee for the woman and hire for the Taxi was paid and the room number of the hotel was informed to the Manageress by the customer. Then the selected woman is sent to the Hotel at the time requested by the customer.

Officer in Charge of Pettah Police conducted a successful raid. However, the lower court held that the raid did not cover the scope of the sec. 2 of the Brothels Ordinance, because the Manager did not provide women at the place while money was paid.

However in the appeal, the court held that the whole procedure elaborated the function of a Brothels house and it was further held that the manager has committed an offence within the scope of Brothels Ordinance.

Deny Vs. Sirimal Silva SC App. No. 488/98, the Supreme Court held that prosecution should prove with evidence that the particular place is managed by the person within the scope of Section 2 by providing women.

The fact of the case is as follows. A group of police officers conducted a raid in Dankotuwa on 23rd of July 1998 in respect of a guest house called Sirisevana. The petitioner of this case was arrested with her

partner along with four other couples and charges were leveled under Brothels Ordinance. The petitioner had filed a FR Application, challenging the arrest. The court held that a guest house or a Rest House cannot be included as a Brothels House.

In ***Abeykoon vs Kulatunga Justice Nagalingam*** stated that having sexual intercourse by a man and a woman in a place is not sufficient to prove an offence under the Brothels Ordinance. According to the Judgment, he further stated that the accused should have managed the place and it should be proven by the prosecution beyond reasonable doubt. Hence a person going to a guest house along with his fiancée or partner is not an offence.

Both of above mentioned ordinances were enacted in 19th century and subsequently various types of declarations conventions and protocols have been introduced in respect of arrest and detention which embodied in Chapter 3 of the Sri Lanka Constitution 1978. If police officers deal with Vagrants Ordinance and Brothels Ordinance, they should respect the Supreme Law, specially article 11, 13(1), and 13(2) of the Constitution.

Arrest of a woman in a public place with a condom will be an issue and it will be questionable. Therefore, possession of a condom does not illustrate in commission of any offence. Condoms are considered as a medical device and not a tool to prove prostitution.

What is HIV?

HIV stands for “Human Immunodeficiency Virus”. The virus attacks cells of the immune system of the human body. When the HIV enters the body, that person becomes “HIV infected”. As HIV progressively damages these cells, the body becomes more vulnerable to infections.

What is AIDS?

AIDS stands for “Acquired Immunodeficiency Syndrome” When the immune system weakens to a very low level, a person is said to have AIDS. It can be years before HIV has damaged the immune system enough for AIDS to develop.

Where is HIV found?

HIV is found in the body fluids of a person who has been infected - blood, semen, vaginal fluids and breast milk.

How is HIV transmitted?

Through:

- Unprotected sex (vaginal, anal and oral sex) with an infected person
- HIV infected blood and blood products
- Sharing contaminated syringes, needles or other sharp instruments
- From HIV infected mother to child - during pregnancy, childbirth or breast feeding

Can I tell whether someone has HIV just by looking at them?

No. A person living with HIV may look healthy and feel good just like you. A blood test is the only way a person can find out if he or she is infected with HIV.

Can I get HIV from shaking hands or through other forms of social contact?

No. HIV is not transmitted through non-sexual day-to-day contact. You cannot be infected by shaking someone's hand, by hugging someone, by using the same toilet or by drinking from the same glass as a person living with HIV. HIV is not transmitted through coughing or sneezing. There is no need to fear social interaction with people living with HIV.

Do mosquito bites carry a risk of infecting a person with HIV?

HIV is not spread by mosquitoes or other biting insects. Because it cannot reproduce in insects.

What is post-exposure prophylaxis?

Post-exposure prophylaxis is a course of antiretroviral drugs prescribed within 48 hours of exposure to HIV to protect against infection.

How can you limit your risk of getting HIV through sex?

- Delay sexual activities until marriage
- Limit your sexual activities to only one faithful partner
- Always use condoms correctly, when having sex with a person other than your faithful partner.

How effective are condoms in preventing HIV?

Condoms are highly effective in protecting against sexual transmitted infections including HIV. In order to achieve the maximum protective effect condoms must be used correctly all the time. Incorrect use can lead to condom slippage or breakage, thus diminishing their protective effect.

How can mother-to-child transmission be prevented?

Effective treatments are available during pregnancy to prevent HIV infection of the new born.

What is a HIV test?

A HIV test is a test that reveals whether HIV is present in the body. Commonly-used HIV tests detect the antibodies produced by the immune system in response to HIV. It takes six weeks to three months to detect antibodies. This period is called the “window period”. Although the HIV tests show negative results, during the window period, person having HIV infection can transmit.

Why should I get a HIV test?

Knowing your HIV status has three vital benefits.

If you are HIV positive,

- You can take necessary steps before symptoms appear to access treatment, care and support services, thereby potentially prolonging your life for many years and improve quality of life.
- You can take all the necessary precautions to prevent the spread of HIV to others.
- Can get necessary health advice to protect unborn child, if you are pregnant

Where can I get tested?

STI clinics which are attached to the government base and general hospitals. Referral system is not necessary to attend the sexual transmitted disease clinics.

Are my test results confidential?

The results of the HIV test are absolutely confidential.