

IN THE HIGH COURT OF TRIPURA
AGARTALA

CRL.REV.P. No.62 of 2011

Sri Gopal Saha,
son of Sri Chandan Saha, resident of
East Pratapgarh, Loknath Chowmuhani,
P.O. East Pratapgarh, P.S. East Agartala,
District – West Tripura

..... Petitioner

V e r s u s

The State of Tripura

..... Respondent

BEFORE
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the petitioner : Mr. Samarjit Bhattacharji, amicus curiae

For the respondent : Mr. A. Ghosh, P.P.

Date of hearing & : **11.06.2015**
delivery of judgment
and order

Whether fit for reporting:

YES	NO
	✓

JUDGMENT & ORDER (ORAL)

Heard Mr. Samarjit Bhattacharji, learned counsel who appears for the petitioner as amicus curiae as none of the counsel engaged by the petitioner appears for consecutive dates. Mr. A. Ghosh, learned P.P. appears for the State.

[2] This petition under Section 397 read with Section 401 of the Cr.P.C has been filed questioning the judgment and order dated 11.07.2011 delivered in Criminal Appeal No.18(3) of 2010 by the Sessions Judge, South Tripura, Udaipur, now

Gomati Judicial District. By that judgment dated 11.07.2011, the appellate court has affirmed the judgment of conviction dated 21.06.2010 delivered in case No.GR 116 of 2008 by the Sub-Divisional Judicial Magistrate, Amarpur, South Tripura under Section 292 of the I.P.C. In terms of the said judgment of conviction, the petitioner was sentenced to suffer one year simple imprisonment with a fine of Rs.1,000/-, in default of payment of fine, to suffer further simple imprisonment for 1(one) month. Even though the appellate court did not interfere with the judgment of conviction but modified the sentence by reducing it to one month simple imprisonment and to pay fine of Rs.1,000/-, in default of payment of fine to suffer further simple imprisonment for 7(seven) days.

[3] It appears from the records that at the instance of one Kamal Mohan Tripura, an Assistant Sub-Inspector (ASI) of the Police (PW-1), a written Ejahar was filed to the Officer-in-Charge of Karbook police station on 16.09.2008 disclosing that the petitioner was selling some gas lighters with obscene materials and in pursuant to the general diary entry, he seized 140 Nos. of gas lighters of different colours under Section 102 of the Cr.P.C.in presence of the witnesses from the locality. Even the petitioner signed in the seizure list. On the basis of the said disclosure, Karbook P.S. case No.03 of 2008 was registered under Section 292 of the I.P.C. and was taken up for

investigation. On completion of the investigation, the final police report under Section 173 of the Cr.P.C. chargesheeting the petitioner was filed. Thereafter, the statement of accusation was read to the petitioner under Section 251 of the Cr.P.C. when the petitioner denied those accusations and claimed to face the trial.

[4] In order to substantiate the charge of accusation, the prosecution adduced as many as 5 witnesses including the informant (PW-1) and the investigation officer (PW-5). In addition, the prosecution adduced documentary evidence including the written ejahar, seizure list etc. On recording the prosecution evidence, the petitioner was examined under Section 313 of the Cr.P.C when he reiterated his innocence.

[5] Mr. Samarjit Bhattacharji, learned amicus curiae representing the case of the petitioner has submitted that there is no material to accuse the petitioner under Section 292 of the I.P.C. He has further submitted that the 'materials' must be of that nature, to be obscene lascivious, and it should affect or tend to deprave or corrupt person. In that event only, if those materials are sold publicly then someone can be accused of committing the offence punishable under Section 292 of the I.P.C. On appreciation of the evidence, so led by the prosecution, it would appear that such ingredient has not surfaced.

[6] From the other side, Mr. A. Ghosh, learned P.P. appearing for the State has fairly submitted that even though on the first blush, it appears that on the body of the gas lighters some obscene pictures were there or while the gas lighters inflamed some obscene figures appeared there but by leading the evidence, the prosecution could not satisfy the requirements of Section 292 of the I.P.C. Mr. Ghosh, learned P.P. has submitted further that the evidence of the prosecution are so sketchy, based thereon, the conviction under Section 292 of the I.P.C. cannot be defended.

[7] Having regard to the submission made by the learned counsel for the parties, this Court would take a short survey of the prosecution evidence.

[8] PW-1, Sri Kamal Mohan Tripura who lodged the written ejahar to the Officer-in-Charge, Karbook P.S. has stated that while he was performing the mobile duty, he found that the petitioner was selling gas lighters having 'obscene pictures over it' and he seized 140 numbers of gas lighters and the petitioner signed over the seizure list. He identified those gas lighters as Exbt.M.O. 1 series. He has further submitted that immediately the petitioner was 'arrested' and thereafter he filed the written ejahar on the same date. He identified his written ejahar.

In the cross-examination, he has admitted that there was 6/7 persons on the spot and out of them, two were the witness of the seizure list.

[9] PW-2, Sri Sajal Miah is a constable who was a member of the mobile duty contingent along with PW-1 when those gas lighters were seized from possession of the petitioner. He is also one of the seizure witnesses and identified those gas lighters.

[10] PW-3, Mithun Saha though he was the seizure witness has categorically stated that the seized materials (alamat) as placed in the trial, were not the same as those were seized from the petitioner. But he was not declared hostile and as such, no cross-examination was carried out by the defence.

[11] PW-4, Sri Jatindra Reang is a small businessman at Karbook market. Being another seizure witness he has identified his signature on the seizure list. In the cross-examination, he has categorically stated that the gas lighters were not shown to him.

[12] PW-5, Sri Tikendrajit Mog is the investigating officer who was posted as the Sub-Inspector of Police at the relevant point of time at Karbook Police Station. He has stated how he conducted the investigation and re-seized the gas

lighters in presence of the witnesses and on completion of the investigation, according to him, since he found strong *prima-facie* case against the petitioner, he filed the final police report. He has admitted in the trial that the relevant GD entry under which the case was registered was not made part of the final police report nor has been placed in the trial. Even the number of the GD entry has nowhere been noted. After going through the entire evidence as recorded including the reading of the contents of the seizure list, this Court does not find any description of the obscene materials to arrive at a finding that depiction on those would come under the purview of Section 292 of the I.P.C.

[13] The concept of obscenity differs from country to country. Nudity alone is not enough to make a material legally obscene. Too much rigidity with an idea to shield innocence may turn out burning the house to roast the pig. The test of judging a work should be that of an ordinary man of commonsense and prudence not an 'out of the ordinary or hypersensitive man'. Where art and obscenity are mixed, what must be seen is whether artistic, literary or social merit of the work in question outweighs its 'obscene' content. The apex court in **Ajoy Goswami vs. Union of India and others**, reported in **(2007) 1 SCC 143** after referring to the celebrated case in the field namely, **Ranjit D. Udeshi vs State of**

Maharashtra, reported in **AIR 1965 SC 881** and **Samresh Bose v. Amal Mitra**, reported in **(1985) 4 SCC 289** has revisited the precedents including that the famous case of Lady Chatterly's Lover in the United Kingdom for laying down some broad principles how to determine the obscenity. It has been observed there as under:

The American Courts, from time to time, have dealt with the issues of obscenity and laid down parameters to test obscenity. It was further submitted that while determining whether a picture is obscene or not it is essential to first determine as to quality and nature of material published and the category of readers. In 50 Am Jur 2 d, para 22 at p. 23 reads as under:

'Articles and pictures in a newspaper must meet the Miller test's constitutional standard of obscenity in order for the publisher or distributor to be prosecuted for obscenity. Nudity alone is not enough to make material legally obscene.

The possession in the home of obscene newspaper is constitutionally protected, except where such materials constitute child pornography.'

[14] After perusing the impugned judgment and also the judgment of the trial court, this Court does not find such test or similar other tests were ever applied to determine whether the materials so seized are 'legally obscene'. What has surprised this Court that the appellate court has imported the definition of 'obscenity' from the new *Oxford Illustrated Dictionary*, instead of going down to the precedents available for purpose of having the definition of the legal obscenity. It is to be observed that if the provisions as embodied in the statute can

be understood by its ordinary meaning and it is a question of determining the ingredients of the offence, the legal test has to be followed. The ambit and the scope of penal provision cannot be expanded or constricted by etymological derivatives, when the apex court has laid certain procedures or tests for that purpose. After assessing the materials on records, this Court is of the view that the prosecution has utterly failed to establish the accusation against the petitioner that he has committed offence punishable under Section 292 of the I.P.C. Hence, the petitioner is liable to be acquitted from the accusation and accordingly, it is ordered.

In the result, the impugned judgment and order is set aside and quashed and this revision petition stands allowed.

Mr. Bhattacharji, learned amicus curiae has volunteered that he would not charge any fee for this case.

JUDGE

Sujay/Dipesh