

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 2303 OF 2018

- 1) Dnyanoba s/o Nivrutti Thormote,
Age 62 years, Occupation Retired Engineer,
R/o Hamu Narendra Dham Housing
Society,
Kathpur Road, Dhanegaon
Tq. Dist. Latur.
 - 2) Archana alias Munna w/o Dnyanoba
Thormote,
Age 35 years, Occupation Housewife,
R/o Hamu Narendra Dham Housing
Society,
Kathpur Road, Dhanegaon
Tq. Dist. Latur.
-Applicants.

Versus

- 1) The State of Maharashtra,
through its Police Inspector,
Police Station, Latur (Rural)
Tq. Latur Dist. Latur.
 - 2) Venutai w/o Dnyanoba Mare,
Age 50 years, Occupation Housewife,
R/o Sonvati, Latur (Rural),
Maharashtra.
- ...Respondents

Mr. P. D. Jarare, Advocate for applicants.
Ms. D. S. Jape, Addl. Public Prosecutor, for respondent No.1/
State.
Mr. S. P. Katneshwarkar, Advocate for respondent No.2.

**CORAM : T. V. NALAWADE &
SMT.VIBHA KANKANWADI. JJ.**

DATE : 19-10-2018.

ORAL JUDGMENT : (Per SMT. VIBHA KANKANWADI, J.)

1. Rule. Rule made returnable forthwith. By consent, heard both the sides for final disposal.

2. Present application has been filed by the original accused persons by invoking powers of this Court under Section 482 of Code of Criminal Procedure to quash the First Information Report vide Crime No. 51 of 2018, registered with Latur (Rural) Police Station, for the offences punishable under Section 294, 504, 506 read with 34 of the Indian Penal Code and the charge-sheet bearing No. 05 of 2018 pending before learned Judicial Magistrate First Class, Latur.

3. The prosecution had come with a case that, informant – present respondent No.2 resides with her husband, son and daughter. Her agricultural land is situated in Sonvati Shivar. The agricultural land is situated behind her house. She was in front of her house at about 6.30 a.m. on 13-05-2018 at that time her distant relative Narayan Mare and Manohar Mare were proceeding from her land. At that time she obstructed them and told that why they are taking the road from her field, they both should go from that road which is available for their land. She also told that, henceforth they should not go from her land. At that time her brother-in-law Tukaram and nephew Mahadeo were present. At that time itself

present applicants came there and abused to the informant, brother-in-law and nephew of the informant by saying, " तुमच्या आयला झवतो ". They also uttered that, " मुंडीवर पाय देवुन खलास करतो ". Applicant No.1 took sickle in his hand and by holding the neck of Tukaram threatened that he would be killed. On the basis of said information, the First Information Report was lodged around 13.43 hours of 13-05-2018.

4. The applicants have contended that, applicant No.1 is a retired engineer. There are disputes in respect of property between members of Mare family. They have their lands Gut No. 178 and 180 at Sonvati. It is stated that the said dispute is in respect of a path use by the parties since their forefathers. Application is filed by one of the party before Mamlatdar Court and the said proceeding is pending. The applicants are not residing in the said village. They reside at Latur. They are relatives of Narayan Mare with whom the dispute regarding the property is. The applicants do not have any agricultural land in Sonvati Shivar. Their lands are located at Umarga and Shivani Khurd. There was absolutely no reason for the applicants to remain present at the said time on that the alleged day of incident. There was a dispute between Narayan and Nathrao Mare with the informant on 13-05-2018. A letter was written to the Superintendent of Police, Latur regarding the incident but no

cognizance was taken, and therefore, Nathrao has lodged report with Police on 18-06-2018. The applicants have contended that, they have been falsely implicated just because they are the relatives of Narayan. They therefore, prayed for quashment of First Information Report and Summary Criminal Case No. 09 of 2018 pending before 04th Joint Judicial Magistrate First Class, Latur.

5. Affidavit-in-reply has been filed by respondent No.2 which is nothing but the reiteration of the contents of her complaint and therefore they are not reproduced again.

6. Heard learned advocate Mr. P. D. Jarare for applicants, learned Addl. Public Prosecutor Ms. D. S. Jape for respondent No.1 – State and learned Advocate Mr. S. P. Katneshwarkar for respondent No.2. Perused the copy of the charge-sheet.

7. It appears that, statement of only two witnesses have been recorded i.e. Tukaram and Mahadeo which is inconsonance with the First information Report. The first and the foremost fact is that, the charge-sheet is filed alleging that the applicants have committed offence punishable under Section 294, 504, 506 read with 34 of the Indian Penal Code. Contents of the FIR as well as the statement of both the witnesses would show that, in FIR it is alleged that both the applicants in chorus abused informant, her brother-in-law and nephew as "तुमच्या आयला झवतो". However, in the statement of both

the witnesses it is stated that those utterances in respect of "तुमच्या आयला झवतो", is by applicant No.1 only. Thus apparently there is contradiction. Further if we considered the abuse "तुमच्या आयला झवतो", that could have been uttered only by a male person and not by a female. Another fact is that, in presence of the wife whether such utterance could have been made, is also a question. Now it is required to be seen as to whether this abuse "तुमच्या आयला झवतो", can attract offence under Section 294 of Indian Penal Code. For proving offence under Section 294 of Indian Penal Code it has to be proved that, (i) offender has done any obscene act in any public place or has sung, recited or uttered any obscene songs or words in or near any public place; and (ii) has so caused annoyance to others. It can be said that, the legal test of obscenity is satisfied only when the impugned utterance can be said to appear to an unhealthy, inordinate person having perverted interest in sexual matters or having tendency to morally corrupt and debase persons likely to come in contact with the impugned act. Every utterance of abuse cannot be said to be obscene. In ***Aveek Sarkar and Another Versus State of West Bengal and Others***, reported in ***2014 STPL (Web) 72 SC***, it has been held that,

"12. Constitution bench of this Court in the year 1965 in *Ranjit D. Udeshi V. State of Maharashtra*, AIR 1965 SC 881, indicated that the concept of obscenity would

change with the passage of time and what might have been "obscene" at one point of time would not be considered as obscene at a later period."

8. Here it is to be noted that, the word "obscene" is not defined under Indian Penal Code. No doubt the above said case was under Section 292 of Indian Penal Code, however in this case it can be seen that, till then the test that was applied to test the obscenity was the test which was the Hicklin test in ***Regina V. Hicklin, (1868 L.R.2 Q.B. 360)***, which was in the State of United Kingdom, it was held that,

"The test of obscenity is whether the tendency of the matter charged as obscenity is to deprive and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."

But thereafter it was held that the said Hicklin test is not correct test to judge what is "obscenity".

Therefore, in ***Aveek Sarkar's case (Supra)*** it has been held that,

"24. We are also of the view that Hicklin test is not the correct test to be applied to determine "what is obscenity". Section 292 of the Indian Penal Code, of course, uses the expression 'lascivious and prurient interests' or its effect. Later, it has also been indicated in the said Section of the applicability of the effect and the necessity of taking the items as a whole and on that foundation where such items would tend to deprave and

corrupt persons who are likely, having regard to all the relevant circumstances, to read, see or hear the matter contained or embodied in it. We have, therefore, to apply the "community standard test" rather than "Hicklin test" to determine what is "obscenity". A bare reading of Sub-section (1) of Section 292, makes clear that a picture or article shall be deemed to be obscene (I) if it is lascivious; (ii) it appeals to the prurient interest, and (iii) it tends to deprave and corrupt persons who are likely to read, see or hear the matter, alleged to be obscene. Once the matter is found to be obscene, the question may arise as to whether the impugned matter falls within any of the exceptions contained in Section. A picture of a nude/semi-nude woman, as such, cannot per se be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire. The picture should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted. Only those sex-related materials which have a tendency of "exciting lustful thoughts" can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards."

9. Thus the basics are required to be kept in mind even while assessing whether a song recital or utterance is obscene or not. Another fact that is required to be seen from the facts of this case itself that, as per the FIR Narayan and Manohar were proceeding

from the road which was in the field of informant. It cannot be said to be a public place. Even if for the sake of arguments it can be said that, the said place can be a private place but within public view yet further ingredients that is required to be proved under Section 294 of Indian Penal code is that, such act which is said to be an obscene act should annoy others. In ***Narendra H. Khurana Versus Commissioner (2004 CrLJ 3393 [Bom])***, the Division Bench of this Court examined the question,

"Whether the nude cabaret dances which are per se indecent and obscene, held in a restaurant on purchase of tickets would warrant prosecution under Section 294 of the Indian Penal Code in the absence of express evidence of annoyance by any of the persons who attend such shows ?"

It was held that,

"cabaret dances where indecent and obscene act per se is involved, would not attract the provision of Section 294 of the Indian Penal Code without fulfillment of its essential ingredients namely evidence pertaining to 'annoyance to others' ."

10. Here as per the informant the utterance was to her, her brother-in-law and nephew. Nobody else was present there and therefore there is absolutely no statement of any other independent witness also. Further as regards the other two sections i.e. 504 and 506 of IPC are concerned, though all the three persons are making same statement but it is to be noted that, except these three

persons there is no statement of any other person. Further it has also come by way of an application before Mamlatdar Court that, there is dispute between the Mare families in respect of way to their land. An application has been filed to clear the said road which has been allegedly restrained by the informant. Therefore, taking into consideration this fact and also the fact that the applicants have no concerned with the family, it appears that, they have been involved only with a fact that they are related to the person with whom the dispute is going on. The FIR and based upon the same the charge-sheet appears to be filed with malafied intention, and therefore, it is squarely coming within the guidelines issued in ***State of Haryana and others Vs. Ch. Bhajan Lal and others***, reported in ***AIR 1992 Supreme Court 604***, in order to quash the entire proceeding. Hence, following order.

ORDER

- 1) Application is allowed.
- 2) Relief is granted to the applicants only and Fir bearing No. 55 of 2018 registered with the Police Station, Latur (Rural) and the charge-sheet bearing No. 05 of 2018 (Summary Criminal Case No. 923 of 2018) pending in the Court of 04th Joint Judicial Magistrate First Class, Latur is hereby quashed and set aside.
- 3) Rule is made absolute in those terms.

(SMT. VIBHA KANKANWADI)
JUDGE

(T. V. NALAWADE)
JUDGE

vjg/-.