



Crl.O.P.(MD)No.2316 of 2020

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 14.12.2022

CORAM

THE HONOURABLE MR.JUSTICE SUNDER MOHAN

Crl.O.P.(MD).No.2316 of 2020

and

Crl.M.P.(MD).Nos.1194 and 1195 of 2020

Alex Sine

... Petitioner/Accused No.6

Vs.

1.The State Represented by
The Inspector of Police,
Nithiravilai Police Station,
Kanyakumari District.
(Crime No.99 of 2018).

...Respondent/Complainant

2.Malbin Sossai,
Parish Pastoral Council,
St.Lucas Church,
Erayumanthurai,
Kanyakumari District.

...Respondent/Defacto Complainant

Prayer: Criminal Original Petition is filed under Section 482 Cr.P.C., to call for the records pertaining to the Charge Sheet in C.C.No.552 of 2019 for offence U/s 505(1)(b) of IPC and 67 of The Information Technology Act, 2000 pending before the learned Judicial Magistrate No.II, Kuzhithurai, Kanyakumari District and quash the same as illegal.

For Petitioner : Mr.J.Pandi Dorai

For R-1 : Mr.R.Meenakshi Sundaram,
Additional Public Prosecutor.



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For R-2 : Mr.T.Kumar

ORDER

This Criminal Original Petition is filed challenging the charge sheet in C.C.No.552 of 2019 for the offences under Section 505(1)(b) of IPC and 67 of the Information Technology Act, 2000.

2. The case of the prosecution is that the defacto complainant is a parish priest and with intention to defame him, the first accused had published a message in the Facebook, which criticizes his acts and made certain observations which were not in good taste and the petitioner, who is shown as the sixth accused, had shared and commented on the said message. The impugned charge sheet alleges that the accused had published the following message:

“vjphpfs;> kf;fs; \$b ,iwtopghL elj;Jk; Myaj;jpy; nghJ mikjpid Fiyf;Fk; Nehf;FIDk;> rhl;rp-1d; ngaUf;F fsq;fk; Vw;gLj;Jk; tifapYk;> “mtd; xU nghl;l ga me;j gPlj;jpy; epd;D NgRjyhy mtd; jg;Gjhd; ,y;yd;dh mtd; nfhl;l rl;zp MfpapUf;Fk;”vdTk; kw;Wk; gy Nkhrkhd thrfq;fis cUthf;fp mij Face book %ykhf ntspapl;L mtkhdgLj;jpa Fw;wk;.”



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On the basis of the said allegation, the petitioner, who is arrayed as sixth accused, was charged for the offences under Section 505(1)(b) of IPC and 67 of the Information Technology Act, 2000.

3. Mr.J.Pandi Dorai, learned counsel for the petitioner submits that a reading of the impugned charge sheet would suggest that no offence under Section 67 of the Information Technology Act is made out. Further, the learned counsel would submit that for an offence under Section 505(1)(b) of IPC, sanction under Section 196(1)(a) of CrPC has to be obtained from the Central Government for taking cognizance. The learned counsel relied upon the judgment of the Hon'ble Apex Court in the case of ***Aveek Sarkar and another Vs. State of West Bengal and others*** reported in ***(2014) 4 SCC 257***, wherein, the Hon'ble Apex Court had occasion to consider the meaning of obscenity found in Section 292 of IPC. According to the learned counsel, Section 292 of IPC is in pari materia with Section 67 of the Information Technology Act and only the medium of publication is different. The learned counsel also relied upon a decision of this Court in ***Crl.O.P.(MD).No.18612 of 2021*** dated 19.01.2022 in the case of ***Herold Vs. the State of Tamil Nadu represented by the Inspector of Police and others***, wherein, this Court had quashed the complaint based on the judgment of the Hon'ble Apex Court in the case of ***Aveek Sarkar*** (cited supra).



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4. Mr.R.Meenakshi Sundaram, learned Additional Public Prosecutor appearing for the first respondent submitted that the accused had committed the offences alleged and the allegations made against them would constitute the offence under Section 67 of the Information Technology Act and so far as sanction is concerned, it is open for the prosecution to obtain sanction even at a later stage and therefore, the impugned charge sheet need not be quashed at this stage.

5. Mr.T.Kumar, learned counsel for the second respondent/defacto complainant reiterated the submissions made by the learned Additional Public Prosecutor and submitted that the impugned charge sheet is not liable to be quashed as the accused have acted in a motivated manner and deliberately indulged in such acts to defame the defacto complainant. That apart, the allegation would show that the accused have sent vulgar messages, which would constitute the offences alleged.

6. Heard the learned counsel for the petitioner, the learned Additional Public Prosecutor for the first respondent and the learned counsel for the second respondent.



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7(a). A reading of the impugned charge sheet would show that the accused/petitioner before this Court had forwarded the message published by the first accused in Facebook. He had also made certain comments on the said publication. The question is whether this would constitute an offence under Section 67 of the Information Technology Act. Section 67 of the Information Technology Act reads as follows:

*“67. **Punishment for publishing or transmitting obscene material in electronic form**—Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees.”*

A reading of the above provision would show that the said provision is almost the same as Section 292 of IPC.



(b) The Hon'ble Apex Court in the case of *Aveek Sarkar and another Vs.*

State of West Bengal and others reported in (2014) 4 SCC 257, while interpreting Section 292 IPC, had held that in order to determine whether a particular action or words is obscene, certain conditions have to be fulfilled.

The relevant portions of the judgment is extracted hereunder:

“23. We are also of the view that Hicklin test [R. v. Hicklin, (1868) LR 3 QB 360] is not the correct test to be applied to determine “what is obscenity”. Section 292 of the 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 the “Hicklin test” [R. v. Hicklin, (1868) LR 3 QB 360] 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. ”

(c) This Court in Crl.O.P.(MD).No.18612 of 2021 had considered the said judgment and had quashed an FIR, where certain defamatory statements were made by the accused therein against the defacto complainant.

(d) The allegation in the charge sheet in my view would show that the accused had made certain vulgar undesirable comments against the defacto complainant and his private part. However, that would not fall within the definition of the word lascivious or the expression “appeals to the prurient interest” of the readers. We cannot say that it tends to deprave and corrupt the persons as well. The act in order to be classified as obscene must arouse the sexual desire or provoke lustful thoughts of persons reading or seeing the publication. In the instant case, there is no such allegation. The allegations at



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best suggest that certain undesirable comments which are not in good taste has been made on the private part of the defacto complainant. Hence, this Court is of the view that offence under Section 67 of the Information Technology Act is not made out.

8. As regards the offence under Section 505(1)(b) of IPC, the prosecution is bound to obtain sanction under Section 196(1)(a) of CrPC which reads as follows:

"196. Prosecution for offences against the State and for criminal conspiracy to commit such offence.

*(1) No Court shall take cognizance of-
(a) any offence punishable under Chapter VI or under section 153A, of Indian Penal Code, or Section 295 A or sub section (1) of section 505 of the Indian Penal Code (45 of 1860) or"*

The above provision is clear and categorical and says that no Court shall take cognizance of any offence punishable under sub section (1) of section 505 of IPC except with the previous sanction of the Central Government or the State Government. Therefore, the language of Section is clear that the sanction is to precede the taking of cognizance. In the instant case, admittedly, no sanction has been obtained for prosecution of the accused under Section 505(1)(b) of IPC. The impugned charge sheet is therefore liable to be quashed.



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9. Hence, the Criminal Original Petition is allowed. It is open to the defacto complainant, if he is aggrieved by any of the acts of the accused, if it constitutes defamation, to proceed against him in accordance with law. There shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

14.12.2022

Index : Yes / No
Internet : Yes/ No
Lm

To

- 1.The Inspector of Police,
Nithiravilai Police Station,
Kanyakumari District.
- 2.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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SUNDER MOHAN, J.

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