



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 19.01.2022

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

Crl.O.P. (MD)No. 18612 of 2021 and

CRL.M.P. (MD)No.10302 of 2021

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... Petitioner / Sole Accused

Vs.

1. The State of Tamil Nadu,
Rep. By the Inspector of Police,
Thuckalay police station,
Kanyakumari District.
(Crime No.331 of 2021)

... 1st Respondent / Complainant

2. Jega Dev,
Advocate,
Manali, Thuckalay Post,
Kanyakumari District.

...2nd Respondent/Defacto Complainant

3. The Inspector of Police,
Cyber Cell,
Nagercoil,
Kanyakumari District.

... 3rd Respondent

(R-3 is suo motu impleaded
vide Order dated 26.11.2021)

Prayer: Criminal Original petition is filed under Section 482 of Cr.P.C, to call for the records relating to the FIR in Crime No.331 of 2021 on the file of the first respondent police and quash the same as illegal.

For Petitioner	:	Mr.Ajmal Khan, Senior Counsel, for M/s.Ajmal Associates.
For R-1 & R-3	:	Mr.T.Senthil Kumar, Additional Public Prosecutor.
For R-2	:	Mr.G.Aravinthan

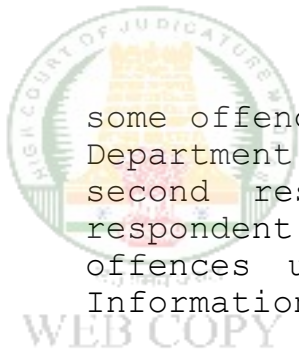
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O R D E R

Heard the learned Senior counsel appearing for the petitioner and the learned Additional Public Prosecutor appearing for the State and the learned counsel appearing for the defacto complainant.

2. The petitioner is having a Facebook account. On 21.05.2021, a morphed photograph of the Hon'ble Chief Minister of Tamil Nadu and

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some offending messages against the Hon'ble Minister of Public Works Department were found in the Facebook page of the petitioner. The second respondent herein lodged a complaint before the first respondent leading to registration of Crime No.331 of 2021 for the offences under Section 505(2) of I.P.C. and Section 67 of the Information Technology Act 2000.

3. To quash the same, this criminal original petition came to be filed.

4. When the matter was taken up for hearing, the learned Additional Public Prosecutor submitted that the investigation has since been transferred to Cyber Cell. Therefore, the third respondent was also *suo motu* impleaded by this Court.

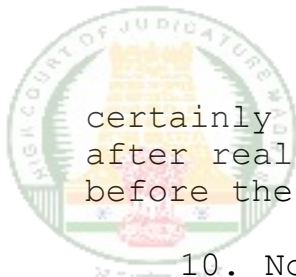
5. Even before commencing the arguments, the learned Senior counsel appearing for the petitioner / accused submitted that he would not endorse the act committed by the petitioner and that he had instructed the petitioner to file an affidavit of unconditional apology. Pursuant to the advice given by the learned Senior counsel, the petitioner has filed an affidavit dated 03.12.2021 in which he had not only expressed his deep sense of regret but also had stated that he has highest respect for the Hon'ble Chief Minister of Tamil Nadu and the Hon'ble Minister concerned. He had also clarified that he does not belong to any political party or movement. The petitioner wants this Court to accept the affidavit of apology and quash the impugned prosecution.

6. The learned Additional Public Prosecutor as well as the learned counsel appearing for the defacto complainant submitted that no case for quashing has been made out. It is specifically contended that the investigation conducted so far reveals that the petitioner not only shared the meme in question but also uploaded the offending images. Since the mobile phone in question has been seized by the Cyber Cell police and sent for Forensic Analysis, he submitted that it is too early to entertain the petitioner's request.

7. On the other hand, the learned Senior counsel appearing for the petitioner submitted that even if the entire prosecution case is taken to be true, still no offence is made out.

8. I carefully considered the rival contentions and also went through the materials on record.

9. The petitioner in his Facebook post had made highly offensive remarks against the Hon'ble Chief Minister of Tamil Nadu and the Hon'ble Minister for Public Works Department. The offending post contains a morphed photograph of the Hon'ble Chief Minister. While the offending text against the Hon'ble Minister of Public Works Department may not really attract any offence as such, the morphed photograph of the Hon'ble Chief Minister of Tamil Nadu is



certainly in very bad taste and it cannot be condoned. Probably after realising it, the petitioner himself had deleted the same even before the registration of the impugned First Information Report.

10. Now the question is whether the act originally committed by the petitioner attracts the offences in question. According to the prosecution, the act committed by the petitioner attracts the offences under Section 505(2) of I.P.C. and Section 67 of the Information Technology Act, 2000. Section 505(2) of I.P.C. reads as follows:-

" 505. Statements conducing to public mischief -

(1) ...

(2) Statements creating or promoting enmity, hatred or ill-will between classes.-Whoever makes, publishes or circulates any statement or report containing rumour or alarming news with intent to create or promote, or which is likely to create or promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, feelings of enmity, hatred or illwill between different religious, racial, language or regional groups or castes or communities, shall be punished with imprisonment which may extend to three years, or with fine, or with both. "

The said provision can be pressed into service only if the offending act has been committed with an intent to create or promote, or which is likely to create or promote enmity, hatred or ill-will between groups, on grounds of religion, race, place of birth, residence, language, caste or community. Such elements are absent in this case. Portraying a political leader without reference to any of the aspects mentioned above will not attract Section 505(2) of I.P.C.

11. Section 67 of the Information Technology Act, 2000 is 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 a 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 two lakh rupees. "



12. A careful reading of the aforesaid provision would indicate that what was in the mind of the law maker was only to prevent the publishing or transmitting of pornographic material. The above provision was considered by the Hon'ble Supreme Court in AVEEK SARKAR V. STATE OF W.B. ((2014) 4 SCC 257. In the said decision, it has been held as follows:-

" TEST OF OBSCENITY AND COMMUNITY STANDARDS

13. Constitution Bench of this Court in the year 1965 in Ranjit D. Udeshi (supra) 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. The Judgment refers to several examples of changing notion of obscenity and ultimately the Court observed as follows :-(AIR p.888, para 18).

"18. ... The world, is now able to tolerate much more than formerly, having become indurated by literature of different sorts. The attitude is not yet settled. ..."

This is what this Court has said in the year 1965.

14. Again in the year 1969, in Chandrakant Kalyandas Kakodkar (supra), this Court reiterated the principle as follows:- (SCC p.694, para 12)

"12. ... The standards of contemporary society in India are also fast changing."

The abovementioned principle has been reiterated in Samaresh Bose v. Amal Mitra by laying emphasis on contemporary social values and general attitude of ordinary reader. Again in 2010, the principle of contemporary community standards and social values have been reiterated in S. Khushboo V. Kanniammal.

COMMUNITY STANDARD TEST:

23. 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 of 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."

13. Applying the aforesaid test, the offending picture cannot be said to arouse any feeling of lust in any one. Therefore, the aforesaid offence is also not attracted. The impugned First Information Report is quashed. This criminal original petition is allowed. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (T&P)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

PMU

Note:In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1. The Inspector of Police,
Thuckalay police station,
Kanyakumari District.
2. The Inspector of Police,
Cyber Cell, Nagercoil,
Kanyakumari District.

<https://hcservices.ecourts.gov.in/hcservices/>



3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.AJMAL KHAN (AJMAL ASSOCIATES), SENIOR COUNSEL (SR-1853
[F] dated 20/01/2022)

CrI.O.P.(MD)No.18612 of 2021
19.01.2022

GM(CO)

GC(15.02.2022) 6P 5C