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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.514 OF 1995

Rahim Shaikh Chand Pinjari] .. Appellant

vs.

State of Maharashtra] .. Respondent

Ms.Anita Agarwal a/w Ashwini Jadhav for the Appellant.

Mr.Y.M. Nakhwa, APP for the State.

CORAM : BHARATI DANGRE, J

RESERVED ON : 27th October, 2023

PRONOUNCED ON : 1st November, 2023

JUDGMENT :-

1] Being aggrieved by the Judgment delivered by the learned Joint District Judge and Additional Sessions Judge, Pune, on 18.09.1995 in Sessions Case No.446 of 1994 the Accused No.2 has preferred the present Appeal, calling in question his conviction under Section 292 read with 34 of the Indian Penal Code, and the sentence imposed upon him to suffer Rigorous Imprisonment for one year and to pay fine of Rs.1000/-, in default to suffer Rigorous Imprisonment for 3 months.

The Appeal was admitted on 18.10.1995 and during its pendency, the Appellant was directed to be released on bail and till date, he continue to enjoy the relief.

2] Heard Mrs.Anita Agarwal, the learned counsel for the Appellant and Mr.Y. M. Nakhwa, the learned APP for the State.

The originating source of the case of the prosecution is a letter dated 03.11.1993 (Exh.121) addressed to the Superintendent of Police, D.S.P. Jalgaon, requesting to conduct an inquiry against criminal miscreants who are alleged to have been indulging themselves in act of sexual exploitation of young girls by putting them under threats, in Hotel Tirupati.

The said letter made reference to five persons viz. One Raju, second, Sayyed Malik Rahim and their three associates.

The letter addressed by an anonymous college student narrated that when she went to watch a movie, a stranger stood next to her and made certain inquiries with her. After two days, one person approached her and confronted her with a photograph in the company of the person who had approached her two days back and she was threatened that he would disclose the said picture to members of her family and if she wanted to avoid this, she should meet him in Tirupati Lodge. Being afraid of the consequences, she went to the lodge as directed, where she was raped and her pictures in nude position were clicked and by showing the said photographs, she was repeatedly called there and was raped.

The letter, informed that various college girls are falling prey to the prank and are being sexually exploited and therefore, it is necessary to raid the hotel to catch the culprits redhanded.

3] The above letter resulted in the filing of complaint by PSI Sambhaji Patil (PW 11). The complaint at Exh. 133 record that on receipt of the anonymous letter, the superiors directed to form teams and ascertain the veracity of the allegations. Upon carrying out the necessary procedure by calling the Panchas, the team tracked Rahim Shaikh Chand, the present Appellant in his house and when house search was conducted, three obscene photographs were seized.

Similar exercise was carried out at the house of one Raju Tadvi in Dinanathwadi, from where 28 nude Photographs and 27 negatives of the nude photographs were seized.

On inquiry with the two accused persons, the names of 6 other persons surfaced since it was confessed by the two accused that they had formed a team and by misleading the young girls and beautiful women, their photographs are clicked and they are blackmailed.

The offence was, therefore, registered under Section 292 read with 34 and 506 of the IPC.

On the investigation having been conducted in the CR, charge sheet was filed against 8 accused persons and on it being presented

before the Joint District Judge and Additional Sessions Judge, Pune, on 24.08.1995, charge was framed.

4] All the 8 accused persons including the present Appellant, are charged of committing illegal acts of taking, producing, exhibiting and circulating obscene photographs of men and women and thus committing an offence under Section 120-B of the IPC.

The Accused are also charged for committing offence under Section 292 of the IPC, as it is alleged that in furtherance of their common intention, before 20.06.1994 and thereafter at Jalgaon, they were found in possession of obscene photographs of men and women for the purpose of distribution, exhibition, circulation, knowing or having reason to believe that the photographs thus exhibited or circulated would amount to offence. The accused persons were also charged with criminal intimidation, as it was alleged that they had threatened young girls, with intent to cause alarm to them and asking them to commit an act which they were not legally bound to do.

The accused also faced the charge of putting the girls in the photographs and their relatives in fear of injury and defamation and humiliation, in order to commit extortion and thus they were accused of committing an offence punishable under Section 385 and/or 385 read

with 120B of the IPC and/or Section 385 read with Section 34 of the IPC.

As all the accused pleaded not guilty and preferred to be tried, they were tried in Sessions Case No.446/1994.

5] In order to prove its case, the prosecution examined 12 witnesses and since the present Appeal before me is confined only to accused No.2, though I would be referring to the evidence of the prosecution in totality to establish the commission of offence, but I would focus upon the evidence brought on record, by the prosecution, to prove the guilt of the present Appellant.

The prosecution case against the present Appellant, is as regards recovery of three photographs (Exh.50, 51 and 52) from his possession, which were seized by conducting a Panchanama and PW 1, is the Panch to the seizure of these photographs from the Appellant. On being led to the house of the Appellant at the instance of Zilla Peth Police Station, the Panch was informed that the Panchanama was to be carried out pertaining to some photographs, if found.

The Police Officer who gave instructions, according to PW 1 was Mr.Patil, who was accompanied by three other police officials. The house of the Appellant was searched in his presence and three photographs were found, upon the Appellant opening a drawer of a

cupboard in the house. Amongst the three photographs, one was of a girl in nude position and in other two photographs, the present Appellant was seen with that girl in compromising position and both are naked. The photographs were coloured one and they came to be seized by the police under Panchanama and the panchas signed on the reverse side of the photographs.

During examination of PW 1, the photographs were marked as Exh.50, 51 and 52. The Panchanama prepared by PW 1 is exhibited through the said witness as Exh.53 and the Panchanama record that in two photographs, which are seized, the Appellant is seen in compromising position with a girl.

Similar search was carried out in the house of Accused No.1 in order to find out whether any obscene photographs could be found and for this Panchanama, PW 2 Sanjay Shekhar has acted as a Panch. This search was carried out under the supervision of PSI Kulat, who was accompanied with 3 to 4 persons, from the concerned Police Station.

6] I need not engage myself, about the seizure from accused No.1 as suffice it to note that the accused was a councilor with Municipality, Jalgaon and in his house a locker was found, which was opened by the keys provided by Accused No.1 and the locker had one plastic bag,

with some articles in it. This led to recovery of 5 photographs and in three photographs one male and one female were seen, whereas two photographs were of one female and in all the photographs the figures were in nude position and in three photographs the male and female were captured in compromising position.

Further search led to a key and this led the investigating team to Peoples Bank, where with the help of the Bank Manager, a strong room /locker was operated. The search lead to two plastic folders consisting negatives were found and there were 14 negatives in one plastic folder and 13 in other. The said plastic folders came to be marked as Exh.61 and 62 respectively.

Thus, the search of accused No.1 led to 23 photographs of post card size and description of the photographs is highlighted in the Panchanama as well it has been brought before the Court through the testimony of PW 2. The photographs were marked and signed on the reverse side by the Panch as well as PSI Kulat.

The witness was extensively subjected to cross-examination, revolving around the involvement of Accused No.1 and except recovery of three photographs i.e. the replica of the photographs, which recovered from the house of Accused No.2, I need not refer to the evidence of PW 2.

7] PW 3, Hemant Bhokardole, an Accountant clerk in Wonder-colour lab, give reference of one Jobby KV and Sanjay Patil. This witness speak of the camera rolls being developed and allotment of tag numbers. He deposed that the processor book kept in lab recorded the details of rolls. The examination of this witness is also not of much relevance as far as the Appellant before me is concerned.

PSI Abasaheb Kulat who conducted the raid/search in the house of Accused No.1 is examined as PW 4 and even this witness has not thrown any light on the case of the Appellant since the search was conducted in the house by PSI Patil alongwith Panch i.e. PW 1.

PSI Patil is examined by the prosecution as PW 11 and he deposed of the procedure followed before conducting the search, on receipt of the information by Additional SP in terms of the application-letter dated 03.11.1993.

PW 11 deposed that they had premonition that some photographs would be recovered from the house of Accused No.2 and therefore he secured the Panchas to carry out search of the house and in detail he has spoken about the procedure adopted during the search Panchanama.

He corroborate PW 1, when he deposed that three photographs were seized from the drawer of the cupboard in the house of Accused No.2. PSI Patil also deposed about another facet of the investigation

carried out by him, which include respective entries in the Station Diary.

Another officer, who is involved in the investigation process is examined as PW 12 Narayan Shinde, PI State CID. This witness refers to the statement of the girl who was found in the photograph.

The prosecution has thus, allegedly relied upon the procedure followed by it in conducting the investigation and relied upon the evidence of police personnel, apart from the evidence of PW 10 Ramesh Deshpande, Manager of Peoples Co-operative Bank, where safe deposit vault in the name of Accused No.1 was tracked and on its search, several obscene photographs are alleged to have been recovered. However, even PW 10 has no concern, as far as role attributed to the present Appellant is concerned.

8] The case of the prosecution against the present Appellant is of search of his house and seizure of three photographs Ex.50, 51 and 52.

Pertinent to note that these very photographs are also found in the locker of Accused No.1 and they are marked as Exh.71, 78 and 75. The other photographs from Exh. 73 to 85 are the photographs of accused No.1 with one woman.

It is this evidence presented before the Court, by the prosecution in order to establish the offence under Section 292 of the IPC which

relate to sell etc, of obscene books. The Appellant stand convicted for committing the offence and I must, therefore, ascertain whether merely being in possession of three photographs, even if obscene, and with a finding being rendered, that the Appellant is the male person in the photographs, whether an offence under Section 292 of the IPC is made out ?

Section 292 of the IPC reads thus :-

292. Sale, etc., of obscene books, etc. (1) For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, 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.

[(2)] Whoever -

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figures or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person; or

(e) offers or attempts to do any act which is an offence under this section,

shall be punished [on first conviction with imprisonment of either description for a term which may extend to two years,

and with fine which may extend to two thousand 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 five thousand rupees].

Sub Section (1) of Section 292 cull out the stipulations when any book, pamphlet, paper, writing, drawing, painting shall be deemed to be obscene though the said provision do not define obscenity.

9] What would constitute 'Obscenity' is a distinct question for determination as the concept of obscenity often changes 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.

Apart from this, the concept of 'obscenity' may also vary depending upon the distinct strata of society and since the Penal Code do not define the word 'obscenity', at times, this delicate task of how to distinguish between that which is artistic and that which is 'obscene' are best left to the Courts. The test to be applied may be of a general character, but it must admit just application from case to case by indicating a line of demarcation, not necessarily a sharp, but sufficiently distinct to distinguish between that which is 'obscene' and that which is not.

A fair test of 'obscenity' to be applied may be, whether the tendency of the matter charged as 'obscene' is to deprave and corrupt

those whose minds are open to such immoral influences and into whose hands the publication or the material which is alleged to be obscene would fall. At times, the necessary test to be applied to ascertain 'obscenity' may be "community standards problems test".

10] As far as case of the Appellant before me is concerned, his involvement revolve around three photographs, which are seized from his possession. Amongst the three photographs, one is of a woman lying on a bed in nude condition, whereas one photographs has captured one man and one woman in comprising position, with the man on top position. The third photograph is close photograph of the same man and woman clicked in closure, though not depicting their bodies fully, but apparently capable of concluding that they are in a compromising position.

11] I need not go in to the issue, whether the photographs are obscene as assuming them to be so, the question is what is the involvement of the Appellant. In both the photographs where the man is seen in compromising position with a woman, his face is not at all visible, as he is over the woman's body and only his head and his back is seen. It cannot be said with certainty that the man in this photograph is Accused No.2/Appellant.

In coming to conclusion that the man is the Appellant, the learned Sessions Judge has made certain pertinent observations and I must now turn my attention to the conclusion derived in the impugned Judgment, while finding the Appellant guilty under Section 292 of the IPC.

12] The learned Judge, while analysing the photographs which were found in the house of Accused No.2 i.e. Exh.50, 51 and 52, record that they are the same photographs which are found in the locker of Accused No.1 at Exh.71, 78 and 75. The pertinent observation of the learned trial Judge record thus :

“In two photographs, which were found with accused no.2, it is true that the face of the male person is not visible as the photographs were taken from backside. However, those 2 photographs are the same photographs found with accused no.1 in the locker. The photographs Exhs.73 to 85, the bunch of 12 photographs reveals that these photographs no doubt were taken at one time from very near distance in different poses and therefore, though in the photographs, which were found with accused No.2, the face of the male person is not visible, it can be safely inferred that the person, who is seen in those two photographs is nobody but accused no.2. I was argued by the defence advocates Mr.Gund and Mr.Mohite that these photographs were admittedly of accused no.2. However, they might have taken without his knowledge by some other persons. It is not the question whether they were taken without his knowledge or with his knowledge. It is the point that they are the obscene photographs and they were found in possession of accused no.2 and accused no.1.”

13] When I have perused the photographs at Exh.50, 51 and 52, no such inference, that the man in the photographs is the accused No.2 i.e. the Appellant, can be drawn, as the two photographs do not reveal his face and it is not possible to identify a male naked body, merely by looking at the rear side. The learned Judge has derived a conclusion that it is the Appellant in the photographs, as the counsel representing him has admitted so. In any case, the statement coming from the counsel of the accused, if it is inculpatory, that deserve no credence and it cannot form the basis of conviction. Hence, though one may conclude that the photographs are obscene, but the prosecution has not proved that it is the Appellant who was the man in the photographs, found in comprising position with a woman.

14] The most important aspect of the impugned Judgment is the basis of conviction under Section 292 of the IPC and the observations of the learned Judge on that count deserve reproduction :

“Sec.292 of the I.P. Code demands possession with intention to sell, circulate or possess for the purpose of sale, circulation, exhibition etc. These photographs, which were found with accused No.2 and also accused No.1, as are same, they establish unmistakable chain that those photographs were circulated by these accused and exhibited by these accused. How they were circulated and through whom, that is altogether a different question. The recovery of the same photographs with two persons necessarily amounts circulation and exhibition of the photographs.”

The above observation, in my considered opinion is totally flawed, as in order to establish the offence under Section 292 of the IPC, it is necessary to establish that there is a sell, hire, distribution or public exhibition or circulation of any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object which is mailed, produced or is found in possession, for the purpose of its sale, hire, distribution, exhibition or circulation.

Another facet covered under clause (b) provide for import, export or conveys any obscene object, for any of the aforesaid purposes, or knowing or having reason to believe that such object will be sold, let to hire, distribute or publicly exhibited or in any manner put into circulation. It is only upon the satisfying necessary ingredients of sub section (2) of section 292, the act became punishable.

Merely because an obscene photograph/picture or object is kept in one's house, will not attract an offence under sub section (2) of Section 292 of the IPC. It is only when such an obscene object is made, produced or is possessed by a person which is produced for the purpose of sale, hire, distribution, public exhibition or circulation, then it would amount to an offence or when a person who simply sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation any obscene material covered under the said section, then definitely is an offence.

Merely because, the photograph is seized from the house of the Appellant, i.e. accused No.2 and the very same photograph is seized from the locker belonging to Accused No.1, in absence of any material that it was circulated or distributed, the ingredients of sub section (2) of Section 292, by no stretch of imagination are made out.

Not having found an answer, the trial Judge has framed a question as to "how they were circulated and through whom that is altogether a different question". The inference drawn that the recovery of the same photographs with two persons necessarily amount to circulation and exhibition, is a completely erroneous finding, which is not based on any evidence.

15] The term 'circulation' no doubt convey, passing of something from one person or place to another, but since the prosecution has not brought on record any evidence of the photograph being circulated by accused No.1 to accused No.2 or from Accused No.2 to Accused No.1, it definitely would not attract a charge of circulation.

Similarly, the term 'exhibition' would also necessarily have a public involvement and in this case, the photographs are found in the house of Accused No.2, in a drawer of a cupboard, which was locked and even as far as accused No.1 is concerned, they are seized from his safe deposit vault and hence it is wrong to assume that the

photographs are exhibited.

The finding in the Judgment that the recovery of photographs from Accused Nos.1 and 2, is the clinching evidence and considering the number of photographs and negatives, it cannot be said that the accused was having certain mania and, therefore, he kept the photographs just for his personal use, is the finding based on assumption. Further finding that there were 23 photographs, do not apply to the present Appellant, as what was seized from his house was only 3 photographs, and it is not conclusively established that the male person in the photograph is the present Appellant or that they were intended for exhibition and circulation.

16] The essence of Section 292 lies in publicly exhibiting, circulating, distributing, selling, letting to hire any obscene representation, painting drawing etc. and since the prosecution has failed to bring out this essential element in the present case, the finding of conviction recorded against the present Appellant under Section 292, need to be overruled.

Worth it to note that all other accused persons except accused Nos.1 and 2 have been found guilty of committing offence under Section 292 read with 34 of the IPC.

The finding in the impugned Judgment cannot be sustained, the

same being perverse as the learned Judge has failed to consider the essential ingredients, which would constitute an offence under Section 292 of the IPC. Necessarily the conviction as well as sentence imposed upon the Appellant is liable to be quashed and set aside by setting aside the impugned Judgment dated 18.09.1995 delivered by the Additional Sessions Judge, Pune in Sessions Case No.446/1994.

By setting aside the impugned judgment, the Appellant stand acquitted of the charge levelled against him. Since he was released on bail his bail bond stands cancelled.

Appeal stands allowed in the aforesaid terms.

[BHARATI DANGRE, J]