

Dawood vs State of Kerala

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Court : Kerala

Decided On : Sep-25-2023

Judge : Honourable Mr.Justice C.S.Dias

Appeal No. : Crl.Rev.Pet/3/2011

Appellant : Dawood

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE C.S.DIAS MONDAY, THE 25TH DAY OF SEPTEMBER 2023 / 3RD ASWINA, 1945 CRL.REV.PET NO. 3 OF 2011

AGAINST THE JUDGMENT CRA 206/2009 OF THE SESSIONS COURT,PALAKKAD IN ST NO.1921/2007 OF JUDICIAL MAGISTRATE OF FIRST CLASS - III,PALAKKAD REVISION PETITIONER/APPELLANT/ACCUSED: DAWOOD, S/O. KABEER ROWTHER, NEHRU COLONY, KALMANDAPAM, PALAKKAD. BY ADV SRI.VINOD KUMAR.C RESPONDENT/RESPONDENT/COMPLAINANT: STATE OF KERALA REP. BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA. OTHER PRESENT: SR PP SEETHA S THIS CRIMINAL

REVISION PETITION HAVING COME UP FOR ADMISSION ON 25.09.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: -:2:- C.R Dated this the 25 day of September,2023 th

ORDER

The revision petition is filed challenging the legality and the propriety of the judgments of the Court of Session Palakkad Division, in Crl.A. No.206/2009, and the Judicial First Class Magistrate-III, Palakkad, in S.T.No.1921/2007, convicting and sentencing the revision petitioner for the offence punishable under Section 292 (2) (e) of the Indian Penal Code, 1860. Relevant facts:

2. The prosecution case is that, on 17.03.2007,

at about 9.00 p.m., the Sub Inspector of Police (PW4) of the Palakkad Town South Police Station conducted a search in the shop room of the revision petitioner (accused) and found him displaying obscene books (MOs 1 to 5) for sale. The Police seized the books and registered the crime. PW4, after investigation, filed the final report before the Trial -:3:- Court alleging the revision petitioner to have committed the offence under Section 292(2)(a) of the Indian Penal Code (IPC). Trial:

3. The prosecution examined PWs.1 to 4 and

marked Exts P1 to P3 and MOs.1 to 5 in evidence. The revision petitioner denied the incriminating circumstances put against him by the prosecution under Section 313 of the Code of Criminal Procedure, 1973 (Cr PC). Trial Court judgment:

4. The Trial Court found the revision petitioner guilty and convicted him for the offence under Section 292(2)(a) of the IPC, and sentenced him to undergo simple imprisonment for three months.

5. Aggrieved by the conviction and sentence, the revision petitioner preferred Crl.A. No.206/2009 before the Appellate Court. -:4:- Appellate Court judgment:

6. The Appellate Court, after re-appreciating the

materials placed on record, by the impugned judgment, confirmed the conviction but reduced the sentence to simple imprisonment for a period of 15 days and directed the revision petitioner to pay a fine of Rs.2,000/-, and in default to undergo imprisonment for a further period of 15 days.

7. It is assailing the above judgments that the revision petition is filed.

8. Heard; Sri. C. Vinod Kumar, the learned counsel appearing for the revision petitioner and Smt. Seetha. S, the learned Senior Public Prosecutor appearing for the respondent - State.

9. The learned Counsel for the petitioner argued

that the courts below have gone wrong in holding the revision petitioner guilty for the offence under Section -:5:- 292(2)(a) of the IPC mainly on two grounds: (i) the prosecution has failed to prove that the shop room from where Mos.1 to 5 books were allegedly seized was in the possession of the revision petitioner; and (ii) the prosecution has also not proved that MOs.1 to 5 books are obscene. The learned counsel relied on the decision of this Court in *Konnadan Abdul Gafoor v. State of Kerala* [2016(3) KHC 478] to bolster his submission on the first ground. He urged that the revision petition be allowed.

10. The learned Public Prosecutor defended the

impugned judgments and submitted that even though PWs.1 to 4 have not testified that MOs.1 to 5 books are obscene, the courts below have examined and found them to be obscene. Therefore, this Court may not interfere with the impugned judgments by exercising its revisional power.

11. The points are: -:6:-

(i) Is not the onus of proof on the prosecution to prove that MOs.1 to 5 books are obscene?

(ii) Is not the prosecution bound to prove that the accused was in possession of the shop room from where MOs.1 to 5 books were seized?

12. It is trite that the revisional jurisdiction of this

Court is to be exercised sparingly to correct orders which are manifestly perverse and wholly unreasonable or when there is non-consideration of relevant material or there is a palpable misreading of the records. The power is in the nature of supervisory jurisdiction. Merely because another plausible view is possible, the revisional power under Sections 397 to 401 Cr PC shall not be exercised. Point No.1:

13. The prosecution allegation is that the Sub

Inspector of Police and the Head Constable PWs.1 and 4 on getting information that the accused was selling obscene books, went over to his shop room and -:7:- seized MOs.1 to 5 books, which were found to be obscene and, thus, the accused committed the offence under Section 292 (2)(a) of the IPC.

14. Section 292 of the Indian Penal Code reads as follows:

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, reduces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure 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 -:8:- 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, (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.]

Exceptions This section does not extend to - (a)any book, pamphlet, paper, writing, drawing, painting, representation or figure-

(i) the publication of which is proved to be justified as

being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general -:9:- concern, or

(ii) which is kept or used bona fide for religious purposes; (b)any representation sculptured, engraved, painted or otherwise represented on or in (i)any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958), or (ii)any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.]]

15. The word obscenity is not defined in the IPC.

16. In *Shri Chandrakant Kalyandas Kakodkar v. The State of Maharashtra & Ors* [(1969) 2 SCC 687], the Hon'ble Supreme Court in one of its earliest judgments on

Section 292 IPC, observed as follows:

5. What is obscenity has not been defined either in Section 292, I. P. C. or in any of the statutes prohibiting and penalising mailing, importing, exporting, publishing and selling of obscene matters. The test that has been generally applied in this country was that laid down by Cockburn, C. J., in Hicklins case and even after the inauguration of the Constitution and considered in relation to the fundamental rights of freedom of speech and expression this test, it has been held, should not be discarded. In Hicklin case while construing Statutes 20 and 21, Victoria, a measure enacted against obscene books, Cockburn, C. J., formulated the test in these words:

-:10:-

I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands publication of this sort may fall. It is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thought of most impure and libidinous character.

This Court has in *Udeshi v. State of Maharashtra* [AIR 1965 SC 881] considered the above test and also the test laid down in certain other American cases. Hidayatullah, J... as he then was, at the outset pointed out that it is not easy to lay down a true test because art has such varied facets and such individualistic appeals that in the same object the insensitive sees only obscenity because his attention is arrested, not by the general or artistic appeal or message which he cannot comprehend, but by what he can see, and the intellectual sees beauty and art but nothing gross. It was also pointed out in that decision at p. 74: None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be

looked for. It may, however, be said at once that treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. It is not necessary that the angels and saints of Michaelangelo should be made to wear breeches before they can be viewed. If the rigid test of treating with sex as the minimum ingredient were accepted hardly any writer of fiction today would escape the fate Lawrence had in his days. Half the book shops would close and the other half would deal in nothing but moral and religious books which Lord Campbell boasted was the effect of his Act.

It is, therefore, the duty of the court to consider the obscene :-11:-

matter by taking an overall view of the entire work and to determine whether the obscene passages are so likely to deprave and corrupt those whose minds are open to such influences and in whose hands the book is likely to fall and in doing so one must not overlook the influence of the book on, the social morality of our contemporary society. We can do no better than to refer to this aspect in the language of Hidayatullah, J., at p. 76: An overall view of the obscene matter in the setting of the whole work would, of course, be necessary, but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall. (emphasis given)

17. More recently, in *Aveek Sarkar & Anr. v. State of West Bengal & Ors.* [(2014) 4 SCC 257], the Honble Supreme Court, after a complete survey of the

precedents on the law of obscenity under the IPC, held

thus: 23. We are also of the view that Hicklin test is not the correct test to be applied to determine what is obscenity. S.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 :-12:-

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 S.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 the 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.

18. Thus, to attract the offence under Section 292

-:13:- of the IPC, it is imperative that the following ingredients are proved namely:

(i) the book is lascivious, (ii) it appeals to the prurient interest, (iii) it tends to deprive and corrupt persons who are likely to read/see/hear the matter (iv) the matter does not fall within the exceptions provided in the section and (v) the

obscenity is judged from the point of view of an average person, by applying contemporary community standards.

19. In the case at hand, undisputedly, PWs 1 and

4 - the material witnesses - have not whispered a word that the books are obscene or have they proved the ingredients of the offence as per mandate of law. The material witnesses have only testified that the books were seized from the shop room of the accused.

20. It is elementary in criminal jurisprudence that the onus of proof is on the prosecution to prove that the accused has committed the offence. -:14:-

21. In Dr. S. L. Goswami v. State of M. P. [1972

KHC 544], the Honble Supreme Court has held thus: 5.xxx xxx xxx This approach both of the Special Judge as well as the High Court is not altogether correct one. In our view, the onus of proving all the ingredients of an offence is always upon the prosecution and at no stage does it shift to the accused. It is no part of the prosecution duty to somehow hook the crook. Even in cases where the defence of the accused does not appear to be credible or is palpably false that burden does not become any the less. It is only when this burden is discharged that it will be for the accused to explain or controvert the essential elements in the prosecution case which would negative it. It is not however for the accused even at the initial stage to prove something which has to be eliminated by the prosecution to establish the ingredients of the offence with which he is charged, and even if the onus shifts upon the accused and the accused has to establish his plea, the standard of proof is not the same as that which rests upon the same as that which rests upon the prosecution. Where the onus shifts to the accused, and the evidence on his behalf probabilises the plea he will be entitled to the benefit of reasonable doubt.

22. Notwithstanding the stony silence on the part

-:15:- of PWs.1 and 4 on the contents of the books, quite surprisingly, the courts below ventured to read the books and conclude that the books are obscene and,

thereby, the revision petitioner has committed the offence.

23. According to this Court, the exercise carried

out by the courts below is improper, unreasonable and on a misreading of the records. The exercise would have been permissible, had PWs.1 and 4 spoken anything on the contents of the books and the accused denying the same.

24. The prosecution having failed to state

anything on the contents in the books and no incriminating circumstances being put to the accused under Section 313 Cr.P.C., the action of the courts below in scrolling through the books and then concluding that they are obscene is erroneous and unjustifiable. The action of the courts below has caused -:16:- prejudice to the accused, because he has been denied an opportunity to explain the exercise carried out by the courts below. Hence, this Court is of the view, there is a total failure of justice in the courts below holding that the books are obscene and, therefore, the accused is guilty of committing the offence. Accordingly, I answer point No. (1) against the prosecution. Point No.2:

25. The prosecution examined the Superintendent of the Municipal Office, Palakkad (PW3), to prove Ext P2 ownership certificate.

26. PW.3 deposed that, as per Ext P2 certificate,

the shop room belonged to one C.N. Saraswathy. Admittedly, C. N. Saraswathy was not examined as a witness. PW2 an independent witness turned hostile to the prosecution. There is nothing on record to substantiate that the accused was the owner or in possession of the shop room. -:17:-

27. In Konnadan Abdul Gafoors (supra), this Court has observed as under:

10. However, while considering the offence under S.292(2)(a), the prosecution has to prove that the accused sold, distributed and publicly exhibited the obscene materials. Simply certain CDs were seized from a shop on the basis of information, it cannot be taken for granted that the

revision petitioner was guilty of such crime. It is the primary responsibility of the prosecution to prove that the accused was in possession of the shop and the seized articles are obscene articles. In a case for offence under S.292 of the IPC, prosecution has to prove that the accused sells, let to hire, distribute, 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, presentation or figure or any other obscene object whatsoever as alleged by the prosecution. There must be direct evidence with regard to the possession or sale of the obscene books or articles. There is no presumption with regard to possession, mere fact that some books were seized from a particular shop by a Police Officer. There may be exceptional cases, where the rule of presumption applies. In such cases, the proved facts and circumstances may speak for themselves and Court may be justified in reaching a conclusion in the light of available evidence.

28. Indisputably, no material is placed on record

to corroborate that C. N. Saraswathy had given the -:18:- shop room to the accused. His mere presence in the shop room on the uneventful evening is insufficient to hold that he was in possession of MOs 1 to 5 books. The onus of proof was on the prosecution to establish the link between the accused and the shop owner. Having failed to do so, the irresistible conclusion is that the prosecution has failed to prove a vital aspect, which is detrimental to the prosecution. Hence, I answer Point No:2 also against the prosecution.

29. Given the findings on points (1) and (2)

against the prosecution, I conclude that the courts below have fallen in error in holding the revision petitioner guilty, and for convicting and sentencing him for the above offence. In the result,

(i) The revision petition is allowed;

(ii) The conviction and sentence of the courts below are set aside; -:19:-

(iii) The bail bonds executed by the accused and sureties are hereby cancelled;

(iv) The fine amount if any deposited by the revision petitioner/accused, to suspend the execution of the sentence, shall be refunded to him, in accordance with law.

(v) The Registry shall forward a copy of the

order to the Trial Court for compliance.

Sd/- C.S.DIAS,JUDGE DST/25.09.23 //True copy// P.A.To Judge

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