

State of Karnataka Vs. Basheer

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Court : Karnataka

Decided On : Mar-09-1979

Reported in : 1979CriLJ1183

Judge : M.S. Nesargi and ;R.G. Desai, JJ.

Appellant : State of Karnataka

Respondent : Basheer

Advocate for Def. : Shri. Munivenkat

Judgement :

M.S. Nesargi, J.

1. In this appeal filed by the State under Section 377 of the Criminal P.C. it is prayed that the sentence imposed by the Chief Metropolitan Magistrate, Bangalore City, on the respondent who was the accused in C. C. No. 3106 of 1977, is contrary to law and the same is to be enhanced.

2. At about 7-10 P. M. on 29-11-1977 the Sub-Inspector of Police, S.J. Park Police Station visited the petty shop of the respondent-accused along with pan-chas. He found that the respondent-accused had kept for sale certain books containing obscene (photos) books in Kannada, English, Tamil and Telugu language and certain books containing obscene literature. He seized the same under a

panchanama, completed the investigation and placed charge-sheet.

3. The learned Chief Metropolitan Magistrate framed a charge against the respondent-accused for the offence punishable under Section 292(2) of the I.P.C. and called upon him to give his plea. The respondent-accused pleaded guilty and the plea was accepted by the Chief Metropolitan Magistrate. On accepting the plea, the Chief Metropolitan Magistrate convicted the respondent-accused under Section 241 Cr. P.C. and sentenced him to pay a fine of Rs. 200/- in de-fault to simple imprisonment for one month.

4. The learned State Public Prosecutor argued that Section 292(2) I.P.C. as amended by Act 36 of 1969 does not allow any discretion in a Magistrate to sentence a person who commits an offence under Section 292(2) I.P.C. to pay fine only. It is obligatory on the Magistrate to sentence such a person for imprisonment also. He placed reliance on the decision of this Court in State of Mysore v. Lalu 1971 1 Mys LJ 422.

5. In the said decision this Court dealt with the penal provision in Section 32(2)(e) of the Mysore Excise Act, 1965. The original provision was amended by the Mysore Excise (Amendment) Act, 1970. The unamended provision reads as follows : -

Provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court, a fine of not less than one hundred rupees shall be imposed'. The amended provision reads as follows:

Provided that the punishment - (i) for the first offence shall be not less than three months' rigorous imprisonment and fine of not less than rupees one hundred; and (ii) for the second and subsequent offences shall be not less than six months' rigorous imprisonment and fine of not less than rupees one thousand for each such offence'. This Court laid down in view of the amendment of the penal provision, as narrated above, that no discretion was left with the Courts in regard to the minimum sentence to be passed on proof of the offence under Section 32(2) of the Act and the minimum sentence prescribed is rigorous imprisonment for not less than three months and fine of not less than Rs. 100/-.

6. Section 292(2) I.P.C. stood as follows before the amendment in 1969 so far as the penal provision is concerned:

shall be punished with imprisonment of either description for a term which may extend to three months or with fine or with both.

The amended provision reads as follows:

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.' It is to be noticed that in regard to the first offence, the sentence to be passed is 'for a term which may extend to two years, and with fine which may extend to two thousand rupees' while in regard to the second or subsequent conviction the sentence provided is 'imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees'. (underline is ours) The difference in the phraseology is also to be borne in mind. It is clear that the amendment by Act 36 of 1969 has been made with a clear object in mind in regard to the quantum of sentence and takes away the discretion that was allowed to vest in the Magistrate under the unamended provision. The principle laid down by this Court in (1971) 1 Mys. LJ 422 aptly applies. Hence it was obligatory on the Chief Metropolitan Magistrate to pass a sentence of imprisonment on the respondent-accused.

7. Shri Munivenkatappa, learned Counsel for the respondent-accused, argued that the charge framed by the Chief Metropolitan Magistrate is not in accordance with law as the same does not comply with the provisions of Section 292(1) of I.P.C. He argued that the charge ought to have narrated - instead of mentioning only obscene (photos) books in Kannada, English; Tamil and Telugu languages - the words '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 embodies in it.' He supported his argument on the basis of the language in Section 292(1) of the I.P.C, The same reads as follows:

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.

8. We are not impressed by this argument of Sri Munivenkatappa. Section 292(1) I.P.C. provides as to what is deemed to be obscene. It consists of two parts. One part is in regard to a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object which is lascivious or appeals to the prurient interest and the next part is, if it comprises of 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. Section 211(1) and (2) of the Criminal P.C. provide as follows:

(1) Every charge under this Code shall state the offence with which the accused is charged.

(2) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

The law uses specific name to the offence and that name is 'obscene'. In view of this provision, the argument of Shri Munivenkatappa has to fail. Moreover, the items seized from the shop of the respondent-accused were many. Items 1(a) to 1(d) consisted of book containing photos in nude and in compromise situations. This material satisfies the first part of what is described in Section 292(1) of the I.P.C. Therefore, the second part of Section 292(1) I.P.C. does not apply to these items.

9. Section 215 of the Cr. P.C. reads as follows:

No error in stating either the offence or the particulars required to be slated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice'. Shri Munivenkatappa was unable to show to us how the omission on which he relied had misled the respondent-accused and had occasioned a failure of justice. These ingredients of Section 215 Cr. P.C. have not been satisfied in view of the description found in regard to items 1 (a) to 1 (d) seized from the shop of the respondent-accused. Thus, we reject this argument also.

10. In view of the foregoing reasons, we are of opinion that this appeal is to succeed and the respondent-accused has to be sentenced to undergo imprisonment.

11. When asked about the quantum of sentence, Shri Munivenkatappa argued that the respondent-accused is a poor man primarily engaged in repairing fountain pens and as such a sentence of simple imprisonment till the rising of the Court would meet the ends of justice.

12. We cannot accede to this request. But, at the same time, the facts that the offence was committed on 29-11-1977 and the respondent-accused pleaded guilty to the charge, are to be taken notice of while considering the quantum of sentence. On taking notice of these facts and the further fact that nearly after one year and four months after the commission of the offence, we sentence the respondent-accused to undergo imprisonment, we hold that a sentence of simple imprisonment for one month meets the ends of justice adequately.

13. In the result, we allow the appeal and sentence the accused accordingly.