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Court : Delhi

Decided On : Sep-16-1970

Reported in : 1974CriLJ1182; 7(1971)DLT152

Judge : P.S. Safeer, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 292; [Constitution of India](#)

Appeal No. : Criminal Revision Appeal No. 359 of 1967

Appellant : Durlab Singh and ors.

Respondent : State

Advocate for Pet/Ap. : V.K. Krishna Menon,; D.P. Singh and; D.C. Mathur, Advs

Judgement :

Pritam Singh Safeer, J.

(1) This petition has been preferred under sections 439 and 561-A of the Code of Criminal Procedure against the judgment of the Additional Sessions Judge, Delhi, dated the 31st of August, 1967. By that judgment the conviction of the petitioners under section 292 of the Indian Penal Code and sentences imposed on them by the trial court in terms of its judgment dated 7th of March, 1967 were confirmed.

(2) I have heard Mr. V.K. Krishna Menon for over three days and Mr. Vir Sen Sahni has also addressed me in one of this set of seven similar petitions. Durlab Singh is the common petitioner in all of them. He is accompanied by either of his sons in each case.

(3) While taking its strides towards civilization the human race has through different ages and climes been developing certain standards of decency and morality. Those standards are the anchor sheets of decent existence. The framers of the [Constitution of India](#) were not forgetful of that aspect while enacting clause (a) of Article 19(1) of the Constitution. By that clause all citizens were granted right to freedom of speech and expression. Sub-article (2) of Article 19, however, regulated it by providing:

'NOTHING in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.'

(4) It is clear that while conferring the right in terms of Article 19(1)(a) the operation of any existing law protecting decency or morality or of any law to be enacted for that purpose was saved.

(5) Clause (a) of section 292 of the Indian Penal Code, as it stood at the time of the petitioners' prosecution, with which I am concerned is:

'292. 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 figure or any other obscene object whatsoever, or

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

EXCEPTION : This section does not extend to any book, pamphlet, writing, drawing or painting kept or used bona-fide for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.'

(6) Clause (a) is in two parts. The first is:

'SELLS, lets to hire, distributes, publicly exhibits or in any manner puts into circulation. . '

(7) The second says:

'OR for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession. . . .'

(8) Both these parts go with 'any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever.'

(9) The accusation against the petitioners was in respect of an article published in the issue of the Indian Observer dated 3/09/1965. It stands admittedly established that Durlab Singh, petitioner, was its editor and Kulbir Singh, his son, the copetitioner, was the printer and publisher of the paper.

(10) The article runs under the caption: 'Grown up woman teaches the lesson of sex to a teenager'. After stating their reasons the two courts below, have found that the article contains obscene matter. Mr. V. K. Krishna Menon, counsel for the petitioners, raised several contentions. He submitted that the values of decency and morality have been undergoing a fast change and even in terms of the law laid down in *Ranjit D. Udeshi v. The State of Maharashtra*, : 1965 CriLJ 8, the petitioner cannot be held to have committed any offence punishable under section 292 of the Indian Penal Code. He has also cited *Shri Chandrakant Kalyandas Kokodkar v. The State of Maharashtra and others*, : 1970 CriLJ 1273. He has

placed his reliance upon Regina v. Clayton and Halsey, (1963) 1 Qb 1963 to urge that the case under section 292 has to be proved like any other case and sufficient evidence should have been produced to prove the guilt of the petitioners.

(11) At one stage he argued that clause (a) of section 292 was ultra vires of Article 14 of the Constitution because the Exception contained in that section provided discriminatory escape from the rigors of the provision. I told the learned counsel that in the state in which section 292 existed (this provision has been amended in 1969) at the time when the petitioners were put on trial, it was available to all accused persons to set up any plea covered by the Exception as a defense to their prosecution. If a provision applies equally to persons similarly situated, then it cannot be held as being discriminatory.

(12) Before the Supreme Court the plea raised in Ranjit D. Udeshi's case was that the section was ultra vires of Article 19(1)(a) of the Constitution. The Supreme Court did not accept it.

(13) These arguments were not pressed. Obscenity as such was not defined anywhere and that was why Hidayatullah, J. (as he then was), while dealing with the question as to what would be obscene, after taking into consideration the observations made by Cockburn C.J. in Queen v. Hicklin (1868) 4 B 360, laid down that as to what is 'obscene' has to be determined by the courts. He observed in : 1965 CriLJ 8 :-

'THE Indian Penal Code does not define The word 'obscene' and this delicate task of how to distinguish between that which is artistic and that which is obscene has to be performed by courts and in the last resort by us.'

(14) It was noticed in that judgment that the book 'Lady Chatterley's Lover' contained over a dozen descriptions of sexual intimacies. It was also noticed that the sexual intercourse each time was described with great candidness and in prose as tense as it was intense and of which Lawrence was always a consummate master. In order to consider as to whether what was said in Lady Chatterley's Lover was obscene or not the Supreme Court concerned itself with the distinction between that which may be sex and nudity in art and literature and that which may

be obscene.

(15) The learned counsel for the petitioners relied upon the case reported as *Shri Chandrakant Kalyandas Kakcdkar v. The State of Maharashtra and others*, (1969) 2 Sc 687. That was a case in which the court was concerned with certain descriptions of the meetings between Neela and Nishikant and with the passages on pages lii, 112, 114, 116, 118-121, 127, 128, 131, and 134, which had been found obscene by the High Court. The view taken by the Supreme Court was that, after going through the impugned passages, there was nothing in them which could be said to deprave or corrupt those in whose hands they were likely to fall: nor could it be said that any of these passages advocated lasciviousness depraving and corrupting the morals and adolescent youth. The test which persuaded their Lordships to take the view in that case was, therefore, that if the material with which the court may be concerned is such which may be advocating licentious behavior depraving and corrupting the morals of the reader, then that would be obscene. In that particular case it was held that the material was not such. It is clear after perusing that judgment that in every case it is the particular material which is to be gone into carefully for coming to the conclusion whether an offence under section 292 of the Indian Penal Code has been committed or not.

(16) The learned counsel relied upon *United States Supreme Court Reports (Lawyers' Edition) Vol. 1*, (Published in 1956-57) and referred to head-notes 8 and 9 occurring in *Samuel Roth v. United States of America*, at p. 1508[^]). The case starts on page 1498. The learned counsel laid emphasis on the following:

'HOWEVER, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern'.

(17) It was submitted that there being a constitutional right in respect of freedom of speech and expression, the protection extended to portrayal of sex. The argument

forgets sub-Article (2) of Article 19 of the [Constitution of India](#). Obscenity enjoys no constitutional protection.

(18) The learned counsel then relied upon *R. v. Martin* *Seeker Warburg Ltd.*, and others, reported as 1954 2 All.E.R.. 6830. It was held in that case that 'in applying the test of obscenity laid down in *R. v. Hicklin*, (1868) L.R. 3 Qb 371, the jury must decide whether the tendency of any publication alleged to be obscene is to corrupt and deprave those whose minds are open to immoral influence and into whose hands the publication may fall at the time when it is published or in the future.'

(19) I will go a step further and say that obscenity may be adjudged in the light of the influence which the impugned matter may have not only on the minds of persons already depraved or abnormal, but also on the minds of the persons who may be completely uninitiated to sex and may be innocent. Human mind has an inherent attraction for sex. If any material incites extreme immoral perversities in respect of sexual indulgence then it incites the impulses to depravity and degeneration. Such material would be undoubtedly obscene.

(20) It was submitted on the basis of *Regina v. Clayton and Huhey*, reported as 1963 1 Qb 1630, that there should not only be the opinion of the officers concerned but there should also be other evidence in the case. This submission is firstly erroneous on facts. The evidence is there apart from the opinion expressed by the police officers. That evidence has been subjected to cross-examination. No defense has been produced. In the aforementioned case it was noticed on page 167 that the publication in that case had been made to experienced police officers employed in the Obscene Publications Department at New Scotland Yard. It was their job to make test purchases such as those in question. In this case the publication is to the world at large and not to any experienced, police officers. It is remarkable that at p. 168 it was observed that 'the degree of inherent obscenity is, of course, very relevant, but it must be related to the susceptibility of the viewer'. The observations in that case do not aid the argument that the material in this case is not obscene. The courts below were under an obligation in terms of the law laid down in : 1965 CriLJ 8 to judge whether the materials placed before them through the sworn testimony of the witnesses, subjected to cross-examination, were

obscene or not. The courts were also to judge for themselves whether the requirements of section 292 were satisfied or not for recording conviction. On examining the materials concerned and after considering every aspect as well as the reasons advanced by the courts below, I find that the impugned conviction is well founded.

(21) It has been submitted that nudity should not have been the influencing factor for concluding that the petitioners were guilty.

(22) Nudity in itself cannot under all circumstances be classified as obscene. As the Supreme Court judgment fixes the responsibility of the court to adjudge obscenity in the context of the prevailing values in respect of decency and morals, Mr. Menon said that what was indecent or immoral forty years ago when he was young was longer indecent now. His contention, however, fades out in the face of the article itself with which I am concerned. The test of obscenity is whether it excites or not the average person enjoying a normal state of mind to have recourse to depravity as a matter of degenerate pleasure. If the material inviting section 292 is such that it would excite such minds which are uninitiated to immorality to incur carnal desires seeking immoral satisfaction, then such material would beyond any doubt be obscene. The very caption of the impugned article would catch the eye of an average-minded reader and even of a person who has never known what sex is. I am not at all concerned with the effect of this article on the mind of a depraved person. A degenerate person, according to his circumstances, may already be having sufficient knowledge of that aspect of human degradation of which the average reader may have no knowledge. The caption of the article will attract any innocent teenager to a curiosity of intimately reading the article as to how a grown-up woman teaches sex to a young innocent person. Any married woman yet not dreaming of a teenager may be persuaded to such a future as incited to by the article.

(23) Human nature is to copy things. Those who do not know are curious to know. Obscenity operates through human nature.

(24) Men and women are born of sex. Sex is their instinctive attraction. Its sanctity has been regulated by the system of marriage. Sexual intimacy is essential to the

procreation of human genii. What is immoral then To carry it a little further : What would be obscene The short answer is that any material exciting to perversion and degradation in matters of sexual behavior would be obscene.

(25) Public depiction of sexual perversities crosses the norm of morality and containing an incentive to similar performances, such depiction in certain circumstances may surely be obscene.

(26) Obscenity is no advance of civilization. It is its negation. It puts the mind into reverse gear. It incites, not inspires, men and women to cross back not to the bird and beast age, but also to travel much beyond. The resulting degeneration incites rashness and perversity and tends to destroy the faculty to distinguish between what is moral and what is immoral and what is decent and what is indecent.

(27) SUB-ARTICLE (2) of Article 19 of the Constitution of India did not preserve only protection to the operation of existing laws relating to decency and morality but also contemplated the necessity of such protection in respect of similar laws to be made thereafter. Section 292 of the Indian Penal Code, before and after the amendment of 1969, is covered by that protection. The concern and anxiety of the framers of the [Constitution of India](#) expressed through the concerned phraseology employed in Sub-Article (2) of Article 19 provides in itself a background in the context whereof obscenity is to be determined in the prevailing age in this country.

(28) Even if the extremities, to which human indulgence may be extending in any other country, are given full latitude, the concerned material still remains hopelessly lewd and unforgivably obscene. There is no educative or artistic material in it. There is not even any distant relationship between art and obscenity.

(29) The production which has ultimately to be classified under either of them emanates from the functioning of mind and intellect which functioning in the psychic process completely parts company before it finds expression into poetry, prose, painting or dancing. The performance is first in thought. Before they ripen into their expressive forms, art and obscenity part company in the psychic region. Art can never be obscene. Cosmic care is observed at its source. Obscenity,

contrary to that, is born out of perversity and has a degenerate purpose in it.

(30) Nudity as such has nothing to do with it.

(31) In case of obscene productions purposeful perversity and criminal immorality in complete disregard of any decency are decided upon firstly in a particular mental state to deliberately bring into existence the materials which may incite those who may come across them to practice the suggested experiences.

(32) Obscenity is the product of a fertile mind gone narrow and perverse. The author while sleeping at night or dreaming through the day starts getting hallucinations through immoral impulses. Like other expressions, which first evolve their shapes in the mind, the obscene matter has necessarily to pass through that process. Its extreme forms are preconceived. The mind prepares to venture on them after deliberate consideration. What kind of it (obsenity) will produce the maximum effect to obtain money or reputation or both of them. is the consideration. There is experimentation in the mental laboratory and then obscenity is planned out.

(33) Art is born out of sublimity. Not all art is original.

(34) Where it is original, it is born out of a unique combination in which the mind functions subdued by intellect and both are dominated by a contact of the soul with the Invisible Supreme.

(35) How were the first strains of music born? Leave aside words. How were the Ragas born? How was it revealed to man that with every changing moment in the day and the night the musical strains conforming to the unseen and unknown keep on changing in infinite variations in their expressions. It is well-known that particular Ragas and Raganies pertain to different fractions of time.

(36) Why is it that the Ragas and Raganies produced different effects. Those effects are received both by the mind as well as the body. Why is it that when the ears are listening the body goes on passing through different feelings? Why in different countries there are different compositions of music?

(37) Turning to painting, no one paints without imagining what is going to be painted or unless there is compelling inspiration dawning upon the person. Where from that inspiration comes except from the Invisible? The same is true of poetry.

(38) Nothing is born in original art which is not immediately traceable to a purified state of brain cells operated by cosmic contact with the universal and supremepower which alone reveals through them, that which is still then unknown. All original art may provide guidance to various copied patterns. The invisible contact is continuous. The techniques in music, painting and poetry may go on changing, but the breath continues to come into them from the same source. In the latest phase, poetry, not only painting, has become dimensional.

(39) Art and obscenity part company before they are expressed.

(40) The learned counsel for the petitioners has submitted that the impugned material has educative value and it imparts knowledge. Obscenity is the perversity of existing knowledge. It has no educative value.

(41) In the cases cited before me, it has been rightly emphasised that it will not be the intention of the author of the material which may have to be looked into to conclude whether the offence under section 292 has been committed or not because it would be a matter for judicial determination to find as to whether the impact of the impugned material on the average human mind is such or not as to create human degradation and an urge to sexual immorality where it may have never existed before. The concerned article is seething with passages which are clearly obscene. The stand taken on behalf of the petitioners that the article was written as a warning and was educative in its nature could be justified by the counsel only on the submission that he was performing his duty.

(42) The article describes a young man, a teenager, as having been entrapped by a grown up married woman. Petitioner No. 3, the editor, who filed a written statement in his defense before the trial court, never dared to state as to who was the author of the article. His statement recorded under section 342 of the Code of Criminal Procedure contains admissions which fasten him with editorial responsibility for circulating the article. Why did he circulate the article if not for the purpose of

gaining ground with such readers who could be caught in the net of contributing their funds to future publications of similar articles? Such persons could necessarily not be persons with depraved minds. Persons innocent and uninformed to sex could have been excited by such writing to look for its like in future. The author of the article, whose name petitioner No. 1 has never been able to disclose, but whose material petitioner No. 1, the editor, and his son, petitioner No. 2 the printer and publisher, have published, describes in sensational words used by the young man the experience which he went through. It is said in the article:-

'SHE was a very lovable woman. She dragged me gently on her bed, embraced me, kissed me and asked me. 'Don't you know how the babies are born? Kukoo (this was my pet name). 'You are so silly a boy', she said. Then she removed her blouse and taking my hand to her belly she said 'here is the place from where babies come out'. She moved my hand gently on her breasts and again kissed me. I was impressed by the deep affection that she showed.....'

(43) How dangerously obscene is this passage occurring in one of the most excitingly obscene articles, has to be imagined in terms of the reaction which it may create in an average mind. Let us take the case of a young man, a teenager, uninformed to sex. He must be seeing very many lovable women of grown up age. After having read this article as soon as he happens to see such a lovable woman, he will imagine that he also can be embraced by her, kissed and dragged to bed. That may still fall short of obscenity, but then the experience provided by the description, how the woman removed her blouse and took the hand of the young man down to the place showing from where the babies come out, is certainly one which would excite such a young man as described above to throw all morals and decency contemplated by sub-Article (2) of Article 19 of the Constitution to the winds. He will be saturated by a carnal desire to somehow seek some grown up woman, whose virginity may not be in the way and who may give him the experience of moving his hands on her breasts for taking then down to the spot of sexual indulgence. The concerned Article does not finish with the passage reproduced above, and commented upon. The said passage records the first experience given to the teenager by the grown up woman. During the course of that very first experience the teenager expressed his curiosity by asking her :-

'BUT where does the seed come from'? The article then proceeds to record as under:-

'SHE again laughed and embraced me warmly. In this manner she pointed out the whole procedure of child bearing and child producing process, and while explaining it was only natural that she unbuttoned my garments as she did her own. I felt quite fascinated.'

(44) In the passage quoted in the first instance, it is recorded that she had removed her blouse. In the passage now reproduced from the article, it is described how, while impressing the teenager, a woman is described as having unbuttoned his garments as well as her own. The reader is given a picture where surely the teenager is introduced to the world of immoral sexual perversity. This is clear. From the following passage in the article:

'I was attracted now to go to her home every evening. Every evening she served me with dainty sweets and food and made me to sleep with her in her bed and under one pretext or the other took off her own clothes as also mine. The continued provocation for a week enlivened in me a spark which today I feel was what is called sex. But one week's course perhaps was not enough to arouse a teenager to an action. It was a fairly long process. Even after her husband returned, I was called secretly by her and we slept together till a time came when she was able to arouse my hidden instincts and mature my sex feelings and she was able to get what she actually wanted.'

(45) The article is manifestly lewd. Teen-aged boys and married grown up women are both drawn into a net of incitement to carnal desires. The petitioners have preached chastity and rank immorality. The counsel had to say that he was performing his duty while addressing me. He urged that the petitioners deserve to be acquitted. That also was his duty.

(46) In a situation where they were to adjudge the commission or non-commission of an offence under section 292 of the Indian Penal Code, with the definition of obscenity being absent, the courts below were of necessity charged with the duty of adjudging the matter by themselves. The Supreme Court's observation in :

1965 CriLJ8 was -

'THE question does not altogether depend on oral evidence because the offending novel and the portions which are the subject of the charge must be judged by the court in the light of section 292, Indian Penal Code, and the provisions of the Constitution.'

(47) I hold that the courts below recorded correct findings in the discharge of the duty enjoined by the law as laid down by the Supreme Court by which they were governed in terms of Article 141 of the [Constitution of India](#). The publication in question excites carnal lust and is lewd. It is apparently obscene and the conviction calls for no interference.

(48) The question still remains as to whether the guilt deserves to be sorted out between the petitioners or not. It has been overlooked that petitioner No. 2 is the son of petitioner No. 1. In that tie of relationship the father had the hold upon his young son. The lure of wealth which the sale of the obscene matter was bringing in was there. Still the guilt, though established for maintaining the conviction of petitioner No. 2, calls for interference with the sentence imposed on him. He was not an altogether independent agent of his actions. His sentence is reduced to a fine of Rs. fifty only. The petition otherwise fails and is dismissed, in default of payment of fine he will undergo 10 days R. I.

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