

Abdul Rasheed Vs. State of Kerala

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Court : Kerala

Decided On : May-21-2008

Reported in : 2008CriLJ3480; 2008(3)KLT150

Judge : V. Ramkumar, J.

Acts : [Ancient Monuments and Archaeological Sites and Remains Act, 1958](#);
Indian Penal Code (IPC) - Sections 292 and 292(2); Code of Criminal Procedure -
Sections 313(1)

Appeal No. : Crl. Rev. Pet. No. 615 of 2000

Appellant : Abdul Rasheed

Respondent : State of Kerala

Advocate for Def. : Public Prosecutor

Advocate for Pet/Ap. : A.C. Devy, Adv.

Judgement :

ORDER

V. Ramkumar, J.

1. In this Revision filed under Section 397 read with Section 401 Cr.P.C. the petitioner who was the accused in S.T. No. 5437 of 1996 on the file of the

J.F.C.M., Kodungallur, challenges the conviction entered and the sentence passed against him concurrently by the courts below for an offence punishable under Section 292(2) (a) and (b) I.P.C.

2. The case of the prosecution can be summarised as follows:

On 22-09-1996 at about 5.15 p.m. in the shop run under the name and style of 'Ikkas Gents Corner', 'Ikkas Videos and Audios' bearing building No. 54/53 (B) of Methala Panchayat in T.K.S. Puram Desom within the limits of Kodungallur Police Station, the accused was found in possession for sale/hire/distribution of obscene blue film video cassette depicting a man and woman in a completely nude posture indulging in carnal intercourse appealing to the prurient interests of the viewers and arousing corrupt and sexual feelings of persons who chanced to view the video cassette. The accused has thereby committed offences punishable under Section 292(2) (a) and (b) I.P.C.

3. On the accused pleading not guilty to the charge framed against him by the learned Magistrate for the aforementioned offences, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined five witnesses as P.Ws 1 to 5 and got marked three documents as Exts.P1 to P3 and a video cassette as MO1.

4. After the close of the prosecution evidence the accused was questioned under Section 313(1)(b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence. The stand taken by him was one of total denial. He stated as follows:

He is not the owner of the shop in question. He had gone there for the purpose of cleaning a marriage cassette. While so he was falsely implicated in the case on the footing that he was the owner of the shop. That shop is not a video library. It is actually a service centre. He is innocent.

5. The accused did not adduce any defence evidence when called upon to do so. The learned Magistrate, after trial, as per judgment dated 28-8-1998 found the

revision petitioner guilty of the offences and sentenced him to simple imprisonment for three months and to pay a fine of Rs. 1,000/- and on default to pay the fine to suffer simple imprisonment for one month. Eventhough the revision petitioner preferred an appeal before the Sessions Court as Criminal Appeal No. 218 of 1998, the same was dismissed confirming the conviction entered and the sentence passed, as per judgment dated 31-5-2000. Hence, this Revision.

6. The learned Counsel appearing for the revision petitioner made the following submissions in support of the Revision:

The charge which does not specify the representation which is allegedly obscene and which therefore does not reveal the obscenity, is defective and groundless. The prosecution has failed to prove that the accused was either the owner or occupier of the shop room in question. The said fact could have been proved by producing the occupancy register kept by the Methala Panchayath. No attempt has been made to prove the same. There is no evidence to show that MO1 video cassette was meant for hire, public exhibition or distribution or circulation. P.W.5 the said Inspector has no case that time of detection the cassette was being exhibited or being circulated among the public. Mere possession of an obscene cassette cannot by itself attract the offence punishable under Clause (a) or (b) of Section 292(2) I.P.C. Vide Moidu v. State of Kerala 1989 (2) KLT 809. The object of the cassette is to eradicate the evils of prostitution and aids and is, therefore, of medical educational value for which video is a medium for expression. Hence, the cassette will not come within the purview of Section 292 I.P.C. Vide 1989 CrL. L.J. 1241. For judging the question of obscenity the judge in the first place who try to place himself in the position of the author and examine the matter from the perspective of the author after going through the entire work. Then only it can be decided whether the work in question is obscene or not. (Vide 1986 CrL. L.J. 24 SC). The conviction recorded by the courts below overlooking these vital aspects cannot be sustained.

7. I am afraid that I cannot agree with the above submissions. P.W.1 (Raveendran) is a person running a stationary stop hear 'Ikkas Videos' at T.K.S. Puram. He is an attester to Ext.P1 search list prepared by P.W.5. He, however,

turned hostile to the prosecution by deposing that he did not see the police seizing any blue film cassette from Ikkas Videos. P.W.2 (Siddhiq) is a person conducting a ready made shop near Ikkas Videos. He was cited as an eye witness to the search and seizure. However, he also turned hostile to the prosecution. P.W.3 (Subramonian) was cited as another witness to the search and seizure of the video cassette in question. He also turned hostile to the prosecution. P.W.4 (Raju) was a police constable who accompanied the Sub Inspector of Police, Kodungallur on law and order patrol duty on 22-9-1996. He supported the prosecution. P.W.5 (Renjan) was the Sub Inspector of Police, Kodungallur who detected the offence. He proved Ext.P1 search list, Ext.P2 search memorandum and Ext.P3 F.I.R. He also proved MO1 video casset seized under Ext.P1 search list.

8. It is true that P.Ws 1 to 3 who are the independent witnesses to the search and seizure of MO1 Video Cassette turned unfriendly to the prosecution. But then such independent witnesses turning disloyal to the prosecution is not a novel phenomenon. Courts are not unfamiliar with such such dishonest persons who are prepared to mortgage their conscience with a view to salvage their business compatriots. Courts very often come across such witness who turned out to be cunning performers in the witness box. The hostility exhibited by such witnesses cannot through overboard a prosecution which is otherwise true and genuine. If the testimony of the official witnesses is blemishless and free from suspicion, the attitude shown by ill-activated independent witnesses is of no consequence. Vide Sivaraman v. State of Kerala 1981 KLH SN.10.

9. Going by the credible testimony of P.Ws 4 and 5 it has been clearly established that the accused was conducting the business of letting on hire video and audio cassettes kept for hire in the shop by name 'Ikkas Videos'. P.W.5 took MO1 cassette name 'have a nice day' from the racks and played it on the cassette player and viewed the same in the T.V. Monitor to find a man and woman completely naked indulging in carnal intercourse in various postures in a manner appealing to the lascivious and prurient interest of the viewer and tending to deprive and corrupt persons who were likely to see the matter embodied in the video cassette. P.W.5 seized the cassette under Ext.P1 search list in which he has described what he has viewed.

10. To attract Section 292 I.P.C. 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 person, 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 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 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]

[Exception - 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 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]

10. Thus, in order to attract Sub section (2) of Section 292 it is enough if a person sells, lets for hire, distributes, publically exhibits or in any manner puts into circulation or has in his possession for the purpose of sale, hire distribution public exhibition or circulation in obscene representation or object. If such representation or object is lascivious or appeals to the prurient interest or its effect if taken as a whole is such as to tent to deprive or corrupt persons who are likely to see or hear the matter contained or embodied no such representation or object such a person need not necessarily be the owner or occupier according to the panchayath record. It is enough if such person is found in management of the business of hiring the cassette carried on in the premises. P.Ws 4 and 5 who had viewed MO1 cassette have vividly described what they saw on the T.V. screen when the cassette was played on the cassette player. The stand taken by the accused was one of total denial which in the circumstances of the case cannot be accepted. The learned Magistrate who tried the revision petitioner also observed in paragraph 9 of the judgment that she herself played the cassette. With the help of a video cassette recorder and a T.V. and was convinced about the obscene contents of

MO1 cassette.

11. It may be true that mere possession of an obscene cassette by itself amount to an offence punishable under Section 292(2) I.P.C. But it all depends upon the circumstances under which a person is found to be in possession of such obscene material. If from the facts and circumstances of a given case it could be presumed that the accused was in possession of the objectionable object out of his personal interest in sex and with a view to satisfy his fugitive passion for sex, and the circumstances do not suggest that he had no machinery interest in possessing such obscene material it could legitimately be presumed of such material does not amount to the offence. But here the accused was found managing a video shop wherein MO1 obscene cassette containing a blue film evidently kept for hire to the potential customers. In such circumstances, it cannot be said that the possession of the cassette was without the requisite mens rea and does not attract the ingredients of the offence punishable under Section 292 I.P.C.

12. By no stretch of imagination could it be said that the contents of MO1 cassette as narrated by P.Ws 4 and 5 and as recorded in Exts.P1 and P3 is a matter of medical educational value and was intended to eradicate the evils of prostitution and aids.

13. Eventhough the word 'obscene' has not been defined in the I.P.C., the said expression has been the subject judicial interpretation at the hands of the Apex court and other Courts. The word obscene means what is offensive to modesty or decency which gives rise to emotions, nudeness filthiness and repulsiveness. The real test of obscenity is whether the pendency of the matter charged as obscene is to deprive and correct those who minds are open to such immoral influences and to see whose hands the object of the sort may fall. Applying the tests laid down by the courts, I have no hesitation to conclude that MO1 video cassette contains obscene material sufficient to attract the offence punishable under Section 292 I.P.C. The conviction was thus rightly recorded against the revision petitioner and the same is confirmed.

14. What now survives for consideration is the question of adequacy or otherwise of the sentence imposed on the revision petitioner. Having regard to the activity of

hiring obscene cassetts containing blue films to the customers who are likely to be corrupted by viewing the same, the sentence of simple imprisonment for 3 months imposed and a fine of Rs. 1,000/- imposed by trial court and as confirmed by the lower appellate court cannot be said to be excessive or disproportionately harsh so as to warrant interference by this Court.

In the result, this Revision fails and is accordingly dismissed confirming the conviction entered and the sentence passed against the revision petitioner.

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