

**Sali Vs. State of Kerala**

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**SooperKanoon Citation :** [sooperkanoon.com/729180](http://sooperkanoon.com/729180)

**Court :** Kerala

**Decided On :** Dec-21-2004

**Reported in :** 2005(1)KLT785

**Judge :** M. Sasidharan Nambiar, J.

**Acts :** [Indian Penal Code \(IPC\), 1860](#) - Sections 292 and 292(2); [Code of Criminal Procedure \(CrPC\), 1973](#) - Sections 216 and 216(1)

**Appeal No. :** Crl. R.P. No. 1111 of 1956

**Appellant :** Sali

**Respondent :** State of Kerala

**Advocate for Def. :** Harilal, Public Prosecutor

**Advocate for Pet/Ap. :** K.S. Madhusoodanan, Adv.

**Disposition :** Petition allowed

**Judgement :**

ORDER

**M. Sasidharan Nambiar, J.**

1. Accused in C.C.No. 546/91 on the file of Judicial First Class Magistrate II, Aluva has preferred the revision challenging dismissal of Crl.A.No. 137/94 by Additional

Sessions Judge, North Paravur confirming his conviction and sentence for the offence under Section 292(2)(b) of I.P.C. The case against the petitioner was that on 7.8.1991 at about 5.15 p.m. when PW5 Circle Inspector along with PWs.3 and 4 police constables, on getting information that petitioner is engaged in hiring of obscene cassettes, reached Shan Video housed in shop with No. V/69 on the road towards east to Edappally Toll junction petitioner was found possessing MOs. 1 and 2 obscene cassettes and thereby committed offence under Section 292(2b) of IPC. Petitioner pleaded not guilty to the charge. Prosecution examined five witnesses and marked Exts.P1 to P3 and got identified MOs.1 and 2. On the side of petitioner DW1 was examined. Learned Magistrate on the evidence found that petitioner was running Shan Videos and MOs. 1 and 2 cassettes which are obscene in nature were kept in the shop for hiring them and thereby committed offence under Section 292(2)(a) of IPC petitioner was convicted and sentenced to simple imprisonment for one year and to pay fine of Rs. 1,000/- and in default to simple imprisonment for three months for the said offence. Petitioner challenged the conviction and sentence before the Additional Sessions Judge, North Paravur. As per judgment dated 23.8.1996 learned Additional Sessions Judge after analysing the evidence confirmed the conviction and sentence and dismissed the appeal. It is being challenged in this revision.

2. Revision petitioner would contend that Courts below without altering the charge and without affording an opportunity to defend the new charge wrongly convicted him for the offence under Section 292(2)(a) of IPC when he was asked to answer only for the charge under Section 292(2)(b) of IPC. According to the petitioner it has caused prejudice to him and therefore conviction and sentence is unsustainable. Petitioner would also contend that Courts below failed to take note of the fact that there was violation of Section 100 of Cr.P.C. and there was no proper search and hence there is no evidence to prove that MOs. 1 and 2 were seized from the petitioner and hence his conviction and sentence is unsustainable.

3. Prosecution case was that on 7.8.1991 PW5 got information that accused was engaged in the business of hiring obscene cassettes in his shop, Shan Videos, Edappally Toll Junction. Case is that along with PWs.3 and 4, PW5 reached there and from the shop MOs. 1 and 2 were seized under Ext.P2 search list and

thereafter Ext.P3 FIR was prepared and case was registered. Though ingredients of the allegation would attract only an offence under Section 292(2)(a) of IPC, PW5 laid charge for the offence under Section 292(2)(b). The learned Magistrate read it over to the petitioner who denied the charge. As per charge petitioner was answerable to only an offence under Section 292(2)(b) of IPC.

4. Section 292(2)(b) of IPC provides that whoever 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 is punishable on first conviction with imprisonment for a term which may extend to two years and with fine. Punishment provided for an offence under Section 292(2)(a) is also same. But ingredients of the offence under Section 292(2)(a) is distinctly different. Section 292(2)(a) provides that whoever 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 would be punishable there under. Therefore, for an offence under Section 292(2)(a) of IPC mere making, producing or possessing of any obscene object would be sufficient. But in order to convict a person for the offence under Section 292(2)(b) of IPC there should be import or export or conveys of obscene object knowing or having reason to believe that the object would be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation. Therefore, ingredients of an offence under Section 292(2)(a) of IPC is entirely different from the ingredients of offence under Section 292(2)(b) of IPC. Latter offence cannot be said to be the minor offence of the former offence. In fact, both are punishable with same punishment and one cannot be said to be minor or major offence of the other. The question is whether in such a case it is legally permissible to convict an accused without altering the charge when the charge is for one offence and the evidence shows that another offence is made out. Judgment of learned Magistrate shows that he was aware of the fact that charge was only for the offence under Section 292(2)(b) of IPC. But without advertting to the question whether an accused could be convicted for an offence under Section 292(2)(a), without altering the charge when there is no charge for that offence and

charge was for an offence under Section 292(2)(b), learned Magistrate had convicted and sentenced the petitioner for the offence under Section 292(2)(a) of IPC.

5. This is a case where Magistrate after getting satisfied that the offence alleged and made out is not under Section 292(2)(b) but under Section 292(2)(a) of IPC should have altered the charge as provided under Section 216 of Cr.P.C. Under Sub-section (1) of Section 216 of Cr.P.C. Magistrate is competent to alter or add to any charge at any time before the judgment is pronounced and Sub-section 2 provides that such alteration or- addition shall be read and explained to the accused. Therefore, when it was brought to the notice of the Magistrate knowing that offence committed is not under Section 292(2)(b) but under Section 292(2)(a) of IPC, learned Magistrate should have altered the charge as provided under Section 216 of Cr.P.C. and should have read it over the altered charge to the accused and should have given an opportunity to the petitioner to recall the witnesses for cross examination. Without adopting that procedure learned Magistrate behind back of the petitioner while pronouncing judgment and convicted him for the offence under Section 292(2)(a) of IPC. Learned Public Prosecutor argued that even though the charge was not altered Section 464 of Cr.P.C. provides that merely on the ground that no charge was framed the conviction and sentence cannot be set aside and as the petitioner was aware that he was charged for the offence of possessing MOs. 1 and 2 obscene cassettes the conviction is to be upheld. I do not agree. When the petitioner was asked to answer the charge for the offence under Section 292(2)(b) and is convicted for the offence under Section 292(2)(a) without affording an opportunity to him to defend that case, especially when ingredients of both the offence are entirely different, it will definitely prejudice the petitioner and therefore Section 464 of Cr.P.C. will not help the prosecution in this case. It cannot be said that petitioner is not prejudiced by such conviction. Therefore, conviction of the petitioner for the offence under Section 292(2)(a) of IPC is illegal.

6. Revision is allowed. The conviction and sentence is set aside, as no offence under Section 292. The bond executed by the petitioner stand discharged.

