

CHANDRAKANT KALYANDAS KAKODAR

v.

THE STATE OF MAHARASHTRA AND ORS.

August 25, 1969

[S. M. SIKRI, G. K. MITTER AND P. JAGANMOHAN REDDY, JJ.]

Obscenity—Tests for determining—Penal Code Sec. 292.

The appellant, the author of a short story and the printer and publisher of the story were convicted under section 292 I.P.C. on a charge of obscenity. Setting aside the conviction this Court,

HELD : It is the duty of the Court to consider the article, story or book 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 the influence of the book on the social morality of our contemporary society cannot be overlooked. Even so, as the question of obscenity may have to be judged in the light of the claim that the work has a pre-dominant literary merit, it may be necessary if it is at all required, to rely to a certain extent on the evidence and views of leading *litterateurs* on that aspect. [82 D; 83 E—G]

To insist that the standard would always be for the writer to see that the adolescent ought not to be brought into contact with sex or that if they read any references to sex in what is written, whether that is the dominant theme or not, they would be affected, would be to require the authors to write books only for the adolescent and not for the adults. What has to be seen is that whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure or lecherous thoughts aroused in their minds. The charge of obscenity must, therefore, be judged from this aspect. [88 D, G—H]

Ranjit D. Udeshi v. State of Maharashtra [1965] 1 S.C.R., 65 followed.

Applying the above tests the story read as a whole did not amount to its being pornography nor did it pander to the prurient interest. [87 A—B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 170 of 1967.

Appeal by special leave from the judgment and order dated October 25, 1966 of the Bombay High Court in Criminal Appeal No. 805 of 1965.

S. S. Kavalekar, K. Rajendra Chaudhuri and K. R. Chaudhuri, for the appellant.

H. R. Khanna, B. D. Sharma and S. P. Nayar, for respondent No. 1.

The Judgment of the Court was delivered by

P. Jaganmohan Reddy, J. This appeal is by special leave directed against the judgment of the Bombay High Court.

A The appellant is the author of a short story entitled Shama published in the 1962 Diwali Issue of Rambha, a monthly Marathi Magazine, which story is said to be obscene. Criminal proceedings were, therefore, initiated before the first class Magistrate, Poona by the complainant Bhide under s. 292 I.P.C. against the Printer and Publisher accused 1, the writer of the story accused 2 and the selling agent accused 3. The complainant stated that he had read the aforesaid Diwali issue of Rambha and found many articles and pictures in it to be obscene which are calculated to corrupt and deprave the minds of the readers in general and the young readers in particular. The Complainant further referred to several other articles in the same issue such as the story of Savitri and certain cartoons but we are not now concerned with these because both the Magistrate as well the High Court did not think that they offended the provisions of s. 292 I.P.C. **C** the magistrate after an exhaustive consideration did not find the accused guilty of the offence with which they were charged and, therefore, acquitted them. The complainant and the State filed appeals against this judgment of acquittal. Before the High Court **D** it was conceded that there was no evidence that accused No. 3 had sold any copies of the issues of Rambha and accordingly the order of acquittal in his favour was confirmed. In so far as the other two accused are concerned it reversed the order of acquittal and convicted the printer and publisher accused 1 and the writer accused 2 under s. 292 I.P.C. but taking into consideration the degree of obscenity in the passages complained of a fine of Rs. 25/- only was imposed on each of the accused and in default they were directed to suffer simple imprisonment for a week. It was also directed that copies of the magazine Rambha in which the offending story was published and which may be in possession and power of the two accused be destroyed. **E**

F The allegation against the accused is that certain passages in the story of Shama at pp. 111-112, 114, 116, 118-121, 127, 128, 131, and 134 are said to be obscene. In support of this the complainant examined himself and led the evidence of Dr. P. G. Sahstrabudhe and Dr. G. V. Purohit in support of his allegation that the novel is obscene and that the writer and publisher contravened the provisions of s. 292 I.P.C. **G** Accused No. 1 stated that the story of Shama was written by an able writer which depicted the frustration in the life of a poet and denied that it was obscene. The writer Kakodar, accused No. 2 claims to have written about 60 such stories which are published in different periodicals by reputed publishers. He also denies that **H** Shama is obscene and states that he has introduced certain characters in order to condemn the worst and glorify the best and it was never his intention to titillate the sex feelings of the

readers, but on the other hand his attempt was to achieve the literary and artistic standard which was in keeping with the style of some of the able and successful writers of Marathi literature. In support of his defence, he examined Shri Keluskar and Prof. Madho Manohar D.Ws. 1 and 2 respectively. The Court on its own summoned and examined Prof. N. S. Phadke and Acharya P. K. Atre. Both the magistrate as well as the learned Judge of the High Court were conversant with Marathi and they seem to have read the story of Shania in the original, an advantage which we have not got. However, on a consideration of the offending passages in the story to which we shall refer presently, they came to different and opposite conclusions.

It is apparent that the question whether a particular article or story or book is obscene or not does not altogether depend on oral evidence because it is the duty of the court to ascertain whether the book or story or any passage or passages therein offend the provisions of s. 292. Even so as the question of obscenity may have to be judged in the light of the claim that the work has a predominant literary merit, it may be necessary if it is at all required, to rely to a certain extent on the evidence and views of leading *litterateurs* on that aspect particularly when the work is in a language with which the Court is not conversant. Often a translation may not bring out the delicate nuances of the literary art in the story as it does in the language in which it is written and in those circumstances what is said about its literary quality and worth by persons competent to speak may be of value, though as was said in an earlier decision, the verdict as to whether the book or article or story considered as a whole panders to the prurient and is obscene must be judged by the courts and ultimately by this Court.

What is obscenity has not been defined either in s. 292 IPC 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 *Hicklin's case*⁽¹⁾ and even after the inauguration of the Constitution and considered in relation to the fundamental right of freedom of speech and expression this test, it has been held, should not be discarded. In *Hicklin's case*⁽¹⁾ while construing statutes 20 and 21 Victoria, a measure enacted against obscene books, Cockburn, C.J. formulated the test in these words :

"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

(1) [1868] L.R. 3 Q.B. 360.

- A 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."

B This Court has in *Udeshi v. State of Maharashtra*⁽¹⁾ 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,

D "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."

F It is, therefore, the duty of the court to consider the obscene 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 influences 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 :

H "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."

(1) [1965] 1 S.C.R. 65.

Referring to the attempt which our national and regional languages are making to strengthen themselves by new literary standards after a deadening period under the impact of English, it was further observed at p. 77,

"that where obscenity and art are mixed, art must so preponderate as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked. In other words, treating with sex in a manner offensive to public decency and morality (and these are the words of our Fundamental Law), judged of by our national standards and considered likely to pander to lascivious, prurient or sexually precocious minds, must determine the result. We need not attempt to bowdlerize all literature and thus rob speech and expression of freedom. A balance should be maintained between freedom of speech and expression and public decency and morality but when the latter is substantially transgressed the former must give way."

Bearing in mind these observations and the tests laid down in *Udeshi's case*,⁽¹⁾ we propose to examine, having regard to our national standards, the passages in *Shama* to ascertain in the light of the work as a whole whether the treat with sex in such a way as to be offensive to public decency and morality as can be considered likely to pander to lascivious, prurient or sexually precocious minds.

The second appellant writes about the life of a poet Nishikant who left school in the days of freedom struggle, wrote revolutionary poems, but as the freedom struggle waned he did not join school as others had done notwithstanding his brother's advice that he should pass the matric so that he could be employed in service. As he was mostly unemployed, he was living on his brother and on the bounty of his sister-in-law who was kind and considerate to him. Nishikant, it will appear, is emotional, sensitive and has the power to discern right from wrong. The story starts with his being employed as a teacher and his meeting *Shama*, the Music teacher in the school. His attraction for her and the opportunity she gives him to meet her alone in her room fills him with a sense of foreboding lest he may have to endure the pangs of suffering which he had to undergo in his two earlier affairs with *Neela* and *Vanita*. The poet recalls these two affairs individually and we get the impression that the pain which he underwent should not be repeated. It is more as a repellant to any further involvement with *Shama* that these experiences are related.

(1) [1965] 1 S.C.R. 65.

- A Neela who is about 17 years of age is the daughter of a distant maternal cousin of his mother. As she had reached the marriageable age, her father in Goa, Wasudeo who always treated Nishikant's mother like his own sister is anxious to get her married to some eligible youngman, but evidently the opportunity for choosing the right person was remote. So he suggests to
- B Nishikant's mother that Nishikant should come and bring Neela to Bombay to live with them where they would have better opportunity of choosing a youngman for her to be married. Nishikant who was appointed in a newspaper office was at first reluctant but his sister-in-law persuades him and so he goes to Goa. When he meets Neela, she had changed and was not as ugly as when he had seen her earlier. The author then depicts
- C the slow but steady maturing of the love between them, the seeking of and getting of opportunities to be near to each other, their having to sleep in the same bed while on the boat coming to Bombay and ultimately falling in love with each other which developed during Neela's stay in Bombay. During Neela's stay with Nishikant's family the love between her and Nishikant
- D became intense as a result Nishikant proposes to marry her and writes to her father for his consent. They wait for a reply but unknown to Nishikant, Neela receives a reply from her father rejecting the proposal on the ground that Nishikant is unemployed and would not join Government service even though he had suggested it to him. He says in that letter that poetry may bring
- E him fame but would not give him a livelihood. As he was entirely dependant on his brother for his maintenance, the father refused to give his consent in the interest of Neela's happiness and told her that he was coming back to fetch her. As Neela was in love with Nishikant but she knew that she would not be married to him, she encourages him to bring their love to culmination.
- F This state of affairs lasted for a few days before her father took her away. About two months later Nishikant receives an invitation card for Neela's marriage and thereafter he received another letter written by Wasudeo to his daughter to which we have earlier referred and which also contained at the back of it Neela's message to Nishikant asking him to forget her.
- G Even after four years he was unable to forget Neela and had taken to drinking and coming home late. He was idle for long spells and whenever he thought of Neela he wrote a poem. Then one day he was introduced to Varita who was a graduate and a married woman who had left her husband. She was a critic of stories and novels. When they met, she had praised his poems and had invited him to come to her room ostensibly to
- H discuss his poetry. Vanita is shown as an oversaxed woman, experienced and forward, making advances and suggestions. Ultimately she and Nishikant have several affairs till one morning

he finds that the person who had introduced her to him was coming out of her room and when he went in he found Vanita sleeping naked. His spirit revolted seeing her in that condition. He was greatly upset at her recalcitrance when he asked her how many more men she had. She replied that it had nothing to do with him, that he had got what he wanted and she does not want to be a slave to any person. He retorted with indignation that he did not wish to see her face and walked out. He had then made up his mind not to have any relations with any woman.

It was with such unpleasant experiences that when he met Shama and was attracted to her he was hesitating and avoiding meeting her alone but circumstances conspired to bring them together and again another affair developed between them. He encourages Shama to sing, writes lyrics for her songs and when she gives a performance in school he arranges for a radio and gramophone representatives to be present there. Her music was appreciated and she began to get audition from these sources. It appears one of the school teacher Kale had earlier attempted to make love to Shama and she had slapped him. When Kale informs Nishikant that he knows about his affairs with Shama, Nishikant gets angry and tells him that he knows how he was slapped by Shama for making advances to her. This enraged Kale and he seems to have taken his revenge by maligning the character of Shama to the Principal. As a result of this, the Principal dismissed her. Hearing this, Nishikant gets angry, goes to the Headmaster and accuses him of being an accomplice of Kale and leaves the service. He then persuades Shama to start a music school, later gets her engagements in films as a playback singer for which he was asked to write lyrics. Shama's reputation as a singer grows rapidly in the Marathi public. It was then that her uncle knowing of it comes to see her and makes insinuations against Nishikant who is offended and hurt because Shama does not prevent her uncle but listens to him without a demur. Periodical quarrels are witnessed because Shama becomes more status minded, begins to think of her wealth and position and moves into wealthy quarters all of which are against Nishikant's outlook and temperament. Both began to fall apart and the visits of Nishikant to Shama became rare. Even though Nishikant lives in poverty, he is too proud to ask her money and is not willing to live with her on her conditions. He stays away from her, showing that he has pride, self respect and spirit of sacrifice. Suddenly a realisation comes to Shama that she had wronged Nishikant and that she owed everything to him, and therefore has an intense desire for reconciliation. In this state of affairs when she hears that he is taking part in the Kavi Samelan on the radio she gets into the car and asks her driver to drive fast

- A to the radio station. On this pitch of expectant reconciliation and ultimate reunion the story ends.

The story read as a whole does not, in our view, amount to its being a pornography nor does it pander to the prurient interest. It may not be of a very high literary quality and may show immaturity and insufficient experience of the writer, but in none of the passages referred to by the complainant do we find anything offending public order or morality. The High Court itself did not consider the description of Neela when Nishikant meets her in Goa (at p. 107) objectionable, nor the narration and the description of the situation which is created for Nishikant and Neela on the way back to Bombay from Goa when for want of room they had to sleep on a single bed (p. 112) as obscene. The passages at pp. 112, 114, 119-120 and 131 have been found by the High Court to come within the mischief of s. 292 I.P.C. We have been taken through the corresponding passages in the English translation and even allowing for the translation not bringing out the literary or artistic refinement of the original language, we find little in these passages which could be said to deprave or corrupt those in whose hands the book is likely to fall, nor can it be said that any of the passages advocates, as the High Court seems to think, a licentious behaviour depraving and corrupting the morals of adolescent youth. We do not think that it can be said with any assurance that merely because adolescent youth read situations of the type presented in the book, they would become depraved, debased and encouraged to lasciviousness. It is possible that they may come across such situations in life and may have to face them. But if a narration or description of similar situations is given in a setting emphasising a strong moral to be drawn from it and condemns the conduct of the erring party as wrong and loathsome it cannot be said that they have a likelihood of corrupting the morals of those in whose hands it is likely to fall—particularly the adolescent.

In the passage at pp. 113-114 Nishikant takes Neela out to show the sights of the city of Bombay but instead takes her to a picture where after the lights go off, seeing a soldier and his girl friend in front kissing, they also indulge in kissing. Then as we said earlier, when the love between them develops Nishikant wanted to marry but the father of the girl was unwilling. Neela realising that their love could never be consummated encourages him to bring it to a culmination. In this way they enjoy unmarried bliss for a few days until Neela's father takes her away.

H We agree with the learned Judge of the High Court that there is nothing in this or in the subsequent passages relating to Neela, Vanita and Shama which amounts to poronography nor has the author indulged in a description of the sex act or used any

language which can be classed as vulgar. Whatever has been done is done in a restrained manner though in some places there may have been an exhibition of bad taste, leaving it to the more experienced to draw the inferences, but certainly not sufficient to suggest to the adolescent anything which is depraving or lascivious. To the literate public there are available both to the adults and the adolescents innumerable books which contain references to sex. Their purpose is not, and they have not the effect of stimulating sex impulses in the reader but may form part of a work of art or are intended to propagate ideas or to instil a moral.

The concept of obscenity would differ from country to country depending on the standards of morals of contemporary society. What is considered as a piece of literature in France may be obscene in England and what is considered in both countries as not harmful to public order and morals may be obscene in our country. But to insist that the standard should always be for the writer to see that the adolescent ought not to be brought into contact with sex or that if they read any references to sex in what is written whether that is the dominant theme or not they would be affected, would be to require authors to write books only for the adolescent and not for the adults. In early English writings authors wrote only with unmarried girls in view but society has changed since then to allow *litterateurs* and artists to give expression to their ideas, emotions and objectives with full freedom except that it should not fall within the definition of 'obscene' having regard to the standards of contemporary society in which it is read. The standards of contemporary society in India are also fast changing. The adults and adolescents have available to them a large number of classics, novels, stories and pieces of literature which have a content of sex, love and romance. As observed in *Udeshi's*⁽¹⁾ case if a reference to sex by itself is considered obscene, no books can be sold except those which are purely religious. In the field of art and cinema also the adolescent is shown situations which even a quarter of a century ago would be considered derogatory to public morality, but having regard to changed conditions are more taken for granted without in anyway tending to debase or debauch the mind. What we have to see is that whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thought aroused in their minds. The charge of obscenity must, therefore, be judged from this aspect.

We do not think that any of the impugned passages which have been held by the High Court as offending s. 292 I.P.C. can

(1) [1965] 1 S.C.R. 65.

- A** be said to pervert the morals of the adolescent or be considered to be obscene. In this view, we allow the appeal, set aside the conviction and fine. The fine if paid is directed to be refunded.

R.K.P.S.

Appeal allowed.

B