

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 557 OF 2018

Nivrutti s/o Hariram Gaikwad,
Age; 33 years, Occ; Sub Divisional Officer,
Residing at house of Choughule,
Near Shiv Mandir, Naigaon, Tq. Naigaon,
Dist; Nanded.

...PETITIONER

V E R S U S

- 1) The State of Maharashtra,
Through Police Station Officer,
Naigaon Police Station, Tq. Naigaon,
Dist; Nanded.
- 2) Mrs. Pooja Nkivrutti Gaikwad,
Age; 25 years, Occ; Household,
Residing at; House; of Shankarshet
Harde-Patil, Behind S.P. Office,
Near Surya Hospital, Vajirabad,
Nanded, Tq. & Dist. Nanded.

...RESPONDENTS

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Shri. Shambhuraje V. Deshmukh, Advocate for the Petitioner
Shri R.D. Sanap, A.P.P. for the Respondent No.1/ State
Shri.Kiran Nagarkar Advocate h/f, Smt. Smita S. Kulkarni, Advocate for
Respondent No. 2
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**CORAM : T.V. NALAWADE &
M.G. SEWLIKAR, JJ.**

Date of reserving of judgment : 05.02.2020
Date of pronouncement of judgment : 11.03.2020

JUDGMENT : [PER : M.G. SEWLIKAR, J.]

This petition is filed under Article 226 and 227 of the Constitution of India and under Section 482 of the Code of Criminal Procedure for quashing of the F.I.R.

2. Facts giving rise to this petition are that the respondent No. 2 is the wife of the petitioner. She married petitioner on 14.5.2017. After marriage, the petitioner did not treat the respondent No. 2 well. He would beat her and would call her a prostitute and that she earns money by doing business of prostitution. It is further alleged that the petitioner married the respondent No. 2 for the sake of others as the petitioner is homosexual. On 1st January, 2018, the petitioner called her up and abused her in filthy language. Again on 27th and 28th February, 2018, he sent WhatsApp message to the respondent No. 2 calling her prostitute and that she earns money by doing business of prostitution. It is further alleged that the petitioner had made phone calls to his relatives also. Accordingly, she filed an F.I.R. on 5.3.2018 on the basis of which offence under Sections 294, 500, 506 and 507 of the Indian Penal Code has been registered against the petitioner.

3. Heard Shri. Shambhuraje V. Deshmukh, learned counsel for the Petitioner Shri R.D. Sanap, learned A.P.P. for the Respondent No.1/ State and Shri. Kiran Nagarkar Advocate h/f, Smt. Smita S. Kulkarni learned counsel for the Respondent No. 2.

4. Shri Deshmukh, the learned counsel for the petitioner submitted that offence under Section 294 of the I.P.C. will be attracted only if the obscene words are uttered in public place and that the obscene words should be of such a nature as to cause annoyance to others. He submitted that the WhatsApp messages are personal messages. Therefore sending of personal messages on personal account of WhatsApp will not amount to utterance of words at public place. He submitted that the alleged messages have not been sent on WhatsApp group.

5. Shri Sanap, the learned A.P.P. for respondent State submitted that the messages sent on personal account on WhatsApp, amounts to utterance of obscene words in public place. Therefore, offence under Section 294 of the I.P.C. is made out.

6. Section 500 and 506 of the I.P.C. are non cognizable offences.

7. **Section 294 of the Indian Penal Code** read as under :-

“Section 294 IPC - Whoever, to the annoyance of others - (a) does any obscene act in any public place, or (b) sings, recites or utters any obscene song, ballad words, in or near any public place, shall be punished with imprisonment of either description for a term

which may extend to three months, or with fine, or with both."

Section 294 of the I.P.C. requires that a) act done must be an obscene act and it must be done in any public place. Sub Section (b) of Section 294 of I.P.C. can be pressed into service if any one sings, recites or utters any word, song, ballad words, near any public place and Section 294 further requires that such obscene acts, song, ballad or utterance of words cause annoyance to others.

8. Thus, the essential ingredients of Section 294 of the I.P.C. are the commission of obscene act at public place. The public place has not been defined in the I.P.C. The Black's Law Dictionary defines public place as under :

"Any location that the local, state, or national government maintains for the use of public, such as a highway, park, or public building."

9. In the case at hand, there is no utterance of words in any public place but the alleged obscene messages are sent on social media i.e. WhatsApp. The respondent No. 2 has alleged that the messages are uploaded on Facebook. The compilation produced by the respondent No. 2 shows that those are the WhatsApp messages and are not the messages uploaded on Facebook. WhatsApp messages sent on personal accounts are strictly personal. Nobody has access to

those messages except the sender and the receiver. The literature in this regard is published on the WhatsApp Website i.e. **[Sttps://www.whatsapp.com/security/](https://www.whatsapp.com/security/)**, it reads as under :

“WhatsApp Security

Privacy and Security is in our DNA

From day one, we built WhatsApp to help you stay in touch with friends, share vital information during natural disasters, reconnect with separated families, or seek a better life. Some of your most personal moments are shared with WhatsApp, which is why we built end-to-end encryption into our app. When end-to-end encrypted, your messages, photos, videos, voice messages, documents, and calls are secured from falling into the wrong hands.

Security by Default

WhatsApp’s end-to-end encryption is available when you and the people you message use our app. Many messaging apps only encrypt messages between you and them, but WhatsApp’s end-to-end encryption ensures only you and the person you’re communicating with can read what is sent, and nobody in between, not even WhatsApp. This is because your messages are secured with a lock, and only the recipient and you have the special key needed to unlock and read them. For added protection, every message you send has its own unique lock and key. All of this happens automatically: no

need to turn on settings or set up special secret chats to secure your messages.

Speak Freely

WhatsApp Calling lets you talk to your friends and family, even if they're in another country. Just like your messages, WhatsApp calls are end-to-end encrypted so WhatsApp and third parties can't listen to them.

Messages that Stay with You

Your messages should be in your hands. That's why WhatsApp doesn't store your messages on our servers once we deliver them, and end-to-end encryption means that WhatsApp and third parties can't read them anyway.

See for Yourself

WhatsApp lets you check whether the calls you make and messages you send are end-to-end encrypted. Simply look for the indicator in contact info or group info."

10. Thus, the literature published on Website clearly indicates that the WhatsApp messages sent by one person to another are end-to-end encrypted which means, only the sender of the message and the recipient of the message can read the messages. It also claims that nobody in between, not even WhatsApp, can read these messages. These messages are secured with lock and only the recipient and sender have special key needed to unlock and read them. It further

claims that every message sent has its own unique lock and key. It also claims that the WhatsApp does not store the messages on server, once they are delivered. Thus, this literature available on the Website of the WhatsApp, makes it abundantly clearly that such types of messages are strictly personal messages and nobody even the WhatsApp can have access to these messages which means nobody except the sender and the recipient can read the messages. Thus, when these messages cannot be read by others, it ipso-facto goes to show that no third person nor even WhatsApp can have access to those messages. Therefore, WhatsApp cannot be a public place if messages are exchanged on personal accounts of two persons. If these messages had been posted on WhatsApp Group, in that case the same could have been called as public place because all the members of the group, will have access to those messages. It is not the prosecution case that the alleged obscene messages were posted on WhatsApp Group of which the petitioner and the respondent No. 2 and others are the members. Therefore, sending the personal messages on WhatsApp will not amount to utterance of obscene words in public place. Therefore, Section 294 of the I.P.C. cannot be invoked.

11. However, on reading all the messages alleged to have been sent by the petitioner to the respondent No. 2, it appears that the petitioner has called the respondent no. 2 a prostitute. To call a woman, even if she is one's own wife a prostitute and to call her that

she earns money by indulging in prostitution amounts to insulting the modesty of a woman. Therefore, there is prima-facie evidence to indicate that the offence falls under Section 509 of the I.P.C. In view of this, F.I.R. is quashed to the extent of Section 294 of I.P.C. However, the prosecution is at liberty to carry out investigation to ascertain whether the offence under Section 509 of the I.P.C. is made out.

12. With these observations, the application is disposed off.

(M.G. SEWLIKAR, J.)

(T.V. NALAWADE, J.)

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