# Mani C. Vs State of Karnataka

## Cr.R.P. No. 380/1985

**Court:** Karnataka High Court

**Date of Decision:** July 8, 1987

**Acts Referred:**
Criminal Procedure Code, 1973 (CrPC) â€" Section 2(H)

**Citation:** (1987) 2 KarLJ 404

**Hon'ble Judges:** K. B. Navadgi, J

## Judgement

@JUDGMENTTAG-ORDER

Navadgi, J.-This is a revision petition under Sections 397 and 401 of the Code of Criminal Procedure (the Code for short) and is directed against

the judgment of conviction and sentence dated 17-3-1982, passed by the Chief Metropolitan Magistrate, Bangalore in C.C. No. 609/1980 on his

file, maintained and affirmed by the learned XI Additional City Civil and Sessions Judge, Metropolitan Area, Bangalore City in Criminal Appeal

No. 62 of 1982.

2. Under the judgment of conviction and sentence challenged in this revision petition, C. Mani s/o. Chowriswamy-the petitioner has been convicted

of the offence punishable under Section 292 IPC, and has been sentenced to suffer simple imprisonment for a period of 6 months and to pay a fine

of Rs. 1000/- with a direction to suffer simple imprisonment for a period of one month in default of payment of fine.

3. The petitioner who would hereinafter be referred to as the accused and one Suresh C. Shah were tried of the offence punishable under Sec.

292 IPC. on the allegation that on 17-7-1980, Suresh C. Shah the proprietor of "Sapna Book Stall", Gupta Market, Bangalore had kept many

obscene books containing photographs of men and women in different sexual acts both natural and unnatural for sale, and that that the accused as

a salesman in "Sapna Book Stall" ("the book stall" for short), used to sell such obscene books and on 17-7-1980 the accused sold two books

marked as Exhibits P1 and P2 titled "Color Orgie" and "Party Love" respectively.

4. The accused denied the offence charged and claimed trial.

5. The prosecution examined at the trial 4 witnesses and depended upon 16 documents and 2 material objects in support of the charge.

6. The accused during the course of his statutory examination while admitting that he was working as a salesman in the book stall owned by Suresh

C. Shah, denied the prosecution case that he had sold Exhibits P1 and P2.

7. The learned trial Magistrate on assessing the evidence reached the conclusion that the offence alleged against the accused had been brought

home beyond reasonable doubt. In the view he took he convicted and sentenced the accused as aforesaid.

8. The accused carried the matter in appeal to the Appellate Court. The learned XI Additional City Civil and Sessions Judge heard the appeal and

by the order made on 28-5-1985 dismissed it. The learned Additional Sessions Judge while dismissing the appeal made an independent

assessment of the evidence let in by the prosecution.

9. I have heard the learned counsel for the petitioner and the learned High Court Government Pleader for the State. I have perused the record.

10. It was urged on behalf of the petitioner, that the search and the seizure proceedings taken by P.W. 1 K.S. Raviraj without obtaining a search

warrant, having been held in non-compliance with the provisions of law were illegal, that the prosecution launched on the basis of such illegal

proceedings is vitiated, that there was no sale by the accused to P.W. 2 of Exhibits P1 and P2, that the sale was an arranged one which would

indicate even accepting the prosecution case in its entirety that it was an unvoluntary and forced sale, and that even if the prosecution case is

accepted it would not take the case of the accused within the ambit and scope of Section 292 IPC. since Exts. P1 and P2 cannot be said by any

stretch of imagination as books, containing obscene matters. It was also contended on behalf of the petitioner that the punishment meted out to the

petitioner is unduly severe and disproportionate, that the owner of the Book Stall has been acquitted and only the salesman is convicted and

punished, that the trial Court has not taken into consideration this matter while exercising the discretion in the matter of punishment and that the

Appellate Court has failed to examine whether the Trial Court had exercised the discretion in the proper manner.

11. The learned counsel for the petitioner urged very strenuously that the Trial Court proceeding on the assumption that Exts. P1 and P2 alleged to

have been sold to P.W. 2 by the accused and Exts. P3 to P11 stated to have been found in the book stall were obscene and that therefore it fell

into a serious error in holding that the guilt of the accused has been established. It was stated that the method and manner of assessment the

evidence made by the trial Court leaves much to be desired.

12. It was urged on behalf of the petitioner that the judgment of the Appellate Court is vitiated since the learned Additional Sessions Judge came to

dispose of the appeal without giving an opportunity to the learned counsel for the accused to address submissions and without hearing the learned

counsel and this circumstance alone is sufficient to reverse the judgment of the Appellate Court.

13. As against this the learned High Court Government Pleader for the State submitted that the steps taken by P.W. 1 to ascertain the truthfulness

or otherwise of the information he had received, were within the powers of the Circle inspector of Police and that the search and seizure

proceedings taken by him cannot be characterised as illegal that the evidence would indicate that there was a sale of Exhibits P1 and P2 by the

accused to P.W. 2, that Exts. P1 and P2 and Exts. P3 to P11 are obscene and that the facts proved by the prosecution could render, the accused

liable for the offence stated in Sec. 292 IPC.

14. The learned High Court Government Pleader further submitted that the learned Trial Magistrate has appreciated the evidence correctly and

properly, that he has not proceeded on the assumption that Exts. P1 and P2 and P3 to P11 are the books containing obscene matters, but has

reached such a conclusion on observing exhibits P1 to P11. According to him the judgment of the learned Trial Magistrate is a well reasoned one

calling for no interference. It was stated by him (and it is borne out by the judgment of the Appellate Court) that inspite of the opportunities given to

the accused and his learned counsel they did not address the submissions and that the appellate Court left with no other alternative had to hear the

learned Public Prosecutor and dispose of the appeal. The Appellate Court in paragraph 4 of its judgment has observed:

It may be noted at this stage that inspite of providing several opportunities, the appellant and his counsel remained absent. The Court had

inevitably to close the matter after hearing P.P. for the State.

According to the learned High Court Government Pleader, the evidence adduced by the prosecution to establish the nexus between the crime and

the accused is cogent, sufficient and adequate, that it is free from any infirmities and flawless and that both the learned trial Magistrate and the

Appellate Court reading the evidence in the proper perspective in the light of back drop of the probabilities involved in the case have reached the

conclusion holding the accused guilty.

15. On the question of sentence, he submitted that the offence under Sec. 292 IPC. if proved always needs deterrent punishment and that in the

absence of mitigating or extenuating, circumstances in favour of the accused, the punishment awarded to the accused which rightly expresses the

disapprobation of the Court, of the offence committed by the accused and therefore calls for no interference.

16. It is necessary to refer to the facts in brief to appreciate the contentions raised at the Bar. The facts are these:

K.S. Raviraj, examined as P.W. 1 at the material time was the Circle Inspector of Police, Chickpet Sub. Division. On 17-7-1980 at about 5 P.M.

he received credible information that obscene books were being sold in the Bookstall. He secured P.W. 2-Venkatesh, a cashier in Kamath Hotel

situated near Sangam Theatre on Tankbund Road, and P.W. 3 Basavaraju, the proprietor of Sri Laxmi Lodge, Bangalore. P.W. 1 gave a currency

note of Rs. 50/- denomination marked as M.O. 2 to P.W. 2 after obtaining the signature of P.W. 2 on it and putting his signature also on it. P.W. 1

instructed P.W. 2 to go to the book stall and purchase 2 obscene books.

As instructed by P.W. 1, P.W. 2 went to the book stall and asked the accused for the obscene books. In the first instance, the accused stated that

there were no obscene books for sale. Then P.W. 2 renewed the request, and the accused said that the cost of the book could be Rs. 25/- each.

When P.W. 2 stated that he would not mind paying that amount, the accused gave exhibits-P1 and P2. P.W. 2 gave Rs. 50/- M.O. 2 towards the

price.

After the purchase of Exts. P1 and P2, P.W. 2 gave the signal. P.W. 1 who had gone with B.W. 3 and the members of his staff was at some

distance from the book stall observing the transaction. P.W. 1 observed P.W. 2 purchasing 2 books from the accused and giving M.O. 2 towards

the price. After receiving the signal P.W. 1 went to the book stall with P.W. 3 and the members of the raiding party.

At the behest of P.W. 1, the accused opened the cash counter, M.O. 2 was there, P.W. 2 collected M.O. 2 and thereafter he searched the

premises of the book stall. Exts. P3 to P11 were found P.W. 1 seized M.O. 1 the rubber stamp seal of the book stall and exhibits P1 to P11

under the panchanama Ex. P12. He put the accused under arrest, took him to the upparpet Police Station and there he lodged a complaint as per

Ext. P13 against the accused and the proprietor of the book stall Sri Suresh.

P.W. 4, the Sub-Inspector of Police who had accompanied P.W. 1, on the strength of Ext. P13 registered a case against the accused and the

proprietor of the book stall in Crime No. 605 of 1980, issued FIR. to the Court and recorded the seizure of the property in Form Ext. P15. He

arrested the accused and Suresh and released them on bail. On completion of due and necessary investigation he placed a charge sheet against the

accused and Suresh. The learned Trial Magistrate acquitted Suresh arraigned as A2 of the offence charged, on the ground that though Suresh was

the proprietor of the book stall, he was not present there at the time of sale and on the ground that the prosecution had not adduced any evidence

to suggest that Exts. P1 to P11 had been stocked in the bookstall for sale with the knowledge of Suresh.

17. The offence under Sec. 292 IPC is a cognizable offence end P.W. 1 as Circle Inspector of Police of a Sub-Division was competent to

investigate into it.

18. It is in the evidence of P.W. 1 that he took the steps and made arrangements for the purchase of the books from, the book stall through P.W.

2 on receipt of credible information. It is also in his evidence that only after the accused sold Exts. P1 and P2 to P.W. 2 for a price, he took out

the search and seizure proceedings.

19. Under the scheme of the Code, Investigation consists generally of the following steps: (i) Proceeding to the spot, (ii) ascertainment of the facts

and circumstances of the case by questioning the witnesses acquainted with the facts and by reducing their statements into writing if necessary, (iii)

Arrest of the offender/s suspected to be involved, if available and if not, to institute efforts to trace out the offender/s (iv) Collection of evidence

relating to the commission of the offence including the search of places and/or seizure of things considered necessary for the investigation to be

produced at the trial and (v) Formation of the opinion as to whether on the evidence collected there is a case to forward the accused for trial and in

the event of the opinion being in the affirmative taking of necessary steps for forwarding the accused for trial by submitting the Final Report.

20. Investigation usually starts on the information relating to the commission of the offence given to the officer in charge of the police station and

duly recorded under Sec. 154 of the Code.

21. Having regard to the aforesaid well settled position with regard to the question as to when investigation commences and what the investigation

consists of, it can be said that all that P.W.1 did till he lodged the complaint Exhibit P. 13 was not in the course of investigation but in the process

of ascertaining the correctness or otherwise of the credible information he had. Section 2(h) of the Code gives the extensional definition of the

expression ""investigation"" and reads:

2(h)-"investigation" includes all the proceedings under this code for the collection of evidence and conducted by a police officer or by any person

(other than a Magistrate) who is authorised by a Magistrate in this behalf.

For the purpose of investigation the offences are divided into two categories-cognizable and non-cognizable. In cognizable offences, the police

have statutory powers to investigate without the permission of the Magistrate. Section 154 of the Code prescribes the mode of recording the

information received orally or in writing by an officer in charge of the police station, in respect of a cognizable offence. Section 156 authorises such

an officer to investigate.

22. There is preponderance of authority in favour of the view that a police officer can enter the investigation in respect of a cognizable offence even

in the absence of the receipt of information. The receipt of information is not the condition precedent for entering the Investigation.

23.In Emperor Appellant v. Khwaja Nazir Ahmed Respondent AIR (1932) 1945 P.C. 18, the Privy Council held that, in the case of cognizable

offences receipt and recording of first information report is not a condition precedent to the setting in motion of criminal investigation.

In State of Uttar Pradesh Appellant v. Bhaswant Kishore Joshi Respondent (AIR 1964 SC 221) the Supreme Court referring to the definition of

expression "investigation" in Section 4(1) of the Code of Criminal Procedure, 1898 which corresponds to Sec. 2(h) of the Code and referring to

the observations of the Supreme Court in H.N. Rishbud v. State of Delhi (1955-1 SCR 1150: AIR 1955 S.C. 196) describing the procedure

prescribed for investigation under Chapter XIV of the Code of Criminal Procedure, 1898, by a majority decision of Two to one held, that though

ordinarily investigation is undertaken on information received by the Police Officer, the receipt of information is not a condition precedent for

investigation. It has been further observed that Sec. 157 prescribes the procedure in the matter of such an investigation which can be initiated either

on information or otherwise and that the provision would show that an officer incharge of a police station can start investigation either on

information or otherwise.

24. In view of this well established position in law with regard to the powers of a police officer to enter investigation in respect of a cognizable

offence, it be said that P.W.1, on receipt of credible information with regard to the sale of obscene books in the bookstall, entered upon the

investigation and he took steps to secure the presence of P.Ws. 2 and 3 to arrange for the purchase of obscene books from the bookstall.

25. The seizure of Ex. P1 and P2 from the possession of P.W. 2, who according to the prosecution had purchased them from the accused for a

price of Rs. 50/-, it appears, would fall under Sec. 102 of the Code. This section empowers any police officer to seize any property which may be

alleged or suspected to have been stolen or which may be found under circumstances which create suspicion of the commission of any offence.

26. Search under the code are of three kinds: 1) Under Sec 93 or 94; 2) By a Magistrate under Sec. 103 and 3) By a police officer under Sec

165. Search warrants can also be issued under special laws to which the provisions in the code relating to the searches are made applicable.

27. Section 165, under which P.W.1 took the search of the bookstall and seized Ex. P3 to P11 under the panchanama Ex. P12, empowers the

police officer specified to make a search without the search warrant subject to certain safeguards. The principal requisites for a search are: 1) the

search must be necessary for investigation, 2) the offence must be such as a police officer is empowered to investigate (i.e. cognizable offence) 3)

reasonable grounds must exist for believing that the thing required would be found in a place, and that there would be undue delay in getting the

thing in any other way or manner, 4) grounds of believing, as to necessity of search must be previously recorded, and 5) the article for which

search is to be taken must be specified as far as possible in the record. These conditions have to be fulfilled and the searches have to be conducted

strictly in accordance with the formalities and within the four corners of law prescribed in the Code.

28. In the case on hand P.W.1 was the Police Officer authorised to investigate into the offence in respect of the commission of which he had

received credible information. The power to search is incidental to investigation of an offence which the officer is authorised to investigate. P.W.1

himself had observed the purchase of Ex. P1 and P2 by P.W.2 from the accused for price. It was to verify the credible information he had

arranged for the purchase of obscene books from the bookstall Necessarily having found Exts. P1 and P2 (according to him) were matters

containing obscene pictures, he must have thought, for the purpose of investigation, to take the search of the bookstall. The evidence would show

that at the point of time when P.W. 1 decided to take search of the bookstall, there were reasonable grounds for him to believe that obscene

matters were likely to be found in the bookstall. If he were to rush to the Magistrate for search warrant having regard to the facts of the case, there

would have been undue delay in getting the obscene matters. Nothing has been asked to P.W.1 about he having recorded grounds to believe as to

necessity of search and about the obscene matters for search having been specified in the record so prepared. P.W.1, the Circle Inspector of

Police, it has to be presumed, must have obeyed the command of law in this regard.

29. Under Section 165(4) the provisions as to search warrants and the general provisions as to searches contained in Sec. 100, have been made

applicable to searches made under Sec. 165 so far as they may be applicable.

30. In this case the two witnesses selected by P.W.1 were P.Ws.2 and 3. Both appear to be residents of the locality in which the bookstall is

situated. Nothing has been elicited from their mouth as to their respectability and disinterestedness. P.W. 2 is a cashier in Kamat Hotel, P.W. 3 is

the owner of a lodge Of course the evidence of P.W. 2 is attacked as an interested witness, whereas P.W. 3 has not supported the prosecution

case.

31. It was stated at the Bar as part of the contention that the prosecution launched on the basis of illegal search and seizure proceedings is vitiated;

that there has been non-compliance with the provisions contained in Sec. 165 of the Code, inasmuch as the copy of the seizure panchanama was

not furnished to the accused and that the signature of the panch witnesses were not obtained to Exts. P1 to P11 leaving room or scope for

manipulation and planting of Exts. P1 to P11 in the case and that these infirmities in the proceedings taken by P.W. 1 would throw cloud of doubt

on the proof of this part of the prosecution case. In 1979 Madras Law Weekly (Criminal 134, referred to on behalf of the petitioner, it has been

held that where no copy of rnahazar is given at the time of seizure, the seizure would not be legal for noncompliance of the mandatory provisions of

Sec. 102 of the Code.

32. A careful reading of the evidence would disclose that the search and seizure proceedings were held by P.W. 1 without contravening the

provisions contained in Sec. 165 of the Code. In Radha Kishan Appellant v. State of Uttar Pradesh Respondent (AIR 1963 SC 822) the

Supreme Court has held that where the search is conducted in contravention of the provisions of Sec. 103 and 165 of the Code of Criminal

Procedure 1898 the search can be resisted by the person whose premises are sought to be searched, that it may also be that because of the

illegality of the search, the Court may be inclined to examine carefully the evidence regarding the seizure, that beyond these two consequences no

further consequence ensue and seizure of the articles would not be vitiated. In Bai Radha Appellant v. State of Gujarat Respondent (AIR 1970 SC

1396), the Supreme Court dealing with the power to search conferred on a police officer under Sec. 15(1) of the Suppression of Immoral Traffic

in Women and Girls Act, 1956 and the effect of omission to record reasons either before or after search has held that noncompliance with sub-

Sections (1) and (2) of Sec. 15 of the said. Act would be a mere irregularity and would not vitiate the trial unless it is shown that the prejudice is

caused by its non-compliance.

33. In the case on hand as observed by me earlier, the search and seizure proceedings were conducted by P.W. 1 in conformity with the

provisions contained in Sec. 165 Cr.P.C.

34. The only question that needs consideration in this context is whether the non-furnishing of copy of Ex P12 to the accused has rendered, the

seizure of Exts. P1 and P2, and Exts. P3 to P11 under the panchanama Ex. P12, invalid and illegal.

35. There is no provision under Sec. 102 of the Code, which requires the police officer seizing the property to furnish the copy of the document

under which it is seized, though such a provision exists in Sec. 100(6) of the Code. There is no material elicited from the mouth of the accused that

copy of Ex. P12 was not given to him. Even assuming for the sake of arguments without deciding so, that P.W. 1 did not furnish copy of Ex. P12,

the search and seizure could not be said to be illegal. I find not much force in the contention that there was no voluntary sale of Ex. P1 and P2 to

P.W. 2. A careful reading of the evidence of P.W. 2 would make it amply clear that the accused sold Exts. P1 and P2 for a sum of Rs. 25/- each

as price. There are absolutely no reasons to disbelieve the evidence of P.Ws. 1 and 2 in this regard.

36. It was contended on behalf of the accused that Exts. P1 and P2 and Exts. P3 to P11 cannot be said to be things containing obscene matters,

and that the learned Trial Magistrate proceeded on the basis that they were obscene and that the Appellate Court did not devote its attention to

this aspect of the matter.

37. Sec. 292(1) of the IPC. reads:

(1) For the purpose of sub-Section (2), book, pamplet, 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 of its items, is, if taken as a whole such as to tend to deprave and corrupt persons who are likely, having regard to all relevant

circumstances, to read, see or hear the matter contained or embodied in it.

The word ''obscene'' has not been defined in the IPC, but Section 292(1) says that a book, pamplet, 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

persons who are likely; having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

38. In Black''s Law Dictionary, 5th Edition page 971 it is stated in respect of the expression ''Obscene'' as under:

Obscene. Objectionable or offensive to accepted standards of decency. Basic guidelines for trier of fact in determining whether a work which

depicts or describes sexual conduct is obscene is whether the average person, applying contemporary community standards would find that the

work, taken as a whole, appeals to the prurient interest, whether the work depicts or describes, in a patently offensive way, sexual conduct

specifically defined by the applicable state law, and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The expression ""lascivious"" is defined Black''s Law Dictionary as:

lascivious. Tending to excite lust; lewd; indecent; obscene; sexual impurity; tending to deprave the morals in respect of sexual relations;

licentious.....Conduct which is wanton, lewd, and lustful, and tending to produce voluptuous or lewd emotions.

39. A perusal of Exts. P1 and P2 would show that they contain pictures of man and woman in different sexual positions and in ugly taste exposing

the private organs. Some of the pictures would show the man and woman being engaged in the actual act of cohabition. The pictures in Exts. P1

and P2 are indecent. They tend to excite lust, and have a tendency to deprave the morals in respect of sexual relations. There are pictures in Exts.

P1 and P2 which appeal to the prurient interest. The pictures ensue marbid interest in nudity and sex and are offensive to the accepted standards of

decency.

40. In Uttam Singh Appellant v. The State (Delhi Administration) Respondent (AIR 1974 SC 1230), the accused-appellant had a shop at Delhi

and had sold a packet of playing cards pertraying on the reverse luridly obscene naked pictures of men and women in pornographic sexual

postures to P.W. 1 in that case. It was on these facts, the accused had been convicted under Sec. 292 of the Indian Penal Code.

41. In the two decisions of the Supreme Court in Ranjit D Udeshi Appellant v. The State of Maharashtra Respondent (AIR 1965 SC 881) and in

Chandrakant Kalyandas Kakodkar Appellant v. The State of Maharashtra & others Respondents (AIR 1970 SC 1390), the Supreme Court has

laid down the legal principles to be observed in deciding the question of obscenity within the meaning of Sec. 292 of the IPC. The Supreme Court

in Samaresh Bose and another Appellants v. Amal Mitra and another Respondents (AIR 1986 SC 967) has held that the above two decisions

settle the legal principles involved and has indicated the mode of deciding the question of obscenity by the Court.

42. If Exts. P1 and P2 are seen in the light of the law laid down by the Supreme Court in the above three decisions it needs not much exercise to

hold that the effect of Exts. P1 and P2 individually and collectively is such that they tend to deprave and corrupt the morals of the persons who are

likely to see the pictures contained in them. The pictures are such that they have a definite tendency to deprave and corrupt the morals of those

whose minds are open to such immoral influences.

43. The learned trial Magistrate has referred to the decision of the Supreme Court in Ranjit D. Udeshi Appellant v. The State of Maharashtra

Respondent, and has observed that if Exts. P1 to P11 are viewed in the light of the principles laid down by the Supreme Court in the above case,

there cannot be any doubt that Exts P1 to P11 contain obscene pictures coming within the meaning of Sec 292 IPC. The Appellate Court has also

referred to Exts. P1 to P11. It appears from the observations made in paragraph 7 of the judgment that the Appellate Court perused Exts. P1 to

P11 and after referring to the law laid down by the Supreme Court held that Exts. P1 to P11 contained obscene materials within the meaning of

Sec. 292 IPC.

44. Exts. P4, P6, P7 and P8 are the booklets containing the obscene pictures of men and women in different sexual positions exposing the male

organs in bad taste. Less said the better about the obscenity contained in those books. Ex. P9 is a card-board. The pictures appearing on it also

show that it is obscene. Ex. P10 is in Tamil. The prosecution has not proved that Ex. P10 contains obscene matter. The evidence of P.W. 1 would

not be sufficient to hold in favour of the prosecution. Ex. P11 is an English book, Titled "Arabian Sex Techniques". A reading of the book would

show that it deals with praiseworthy women, women deserved to be praised, man to be held in contempt, women to be held in contempt etc., etc.,

It may not be necessary to go into the question as to whether Ex P10 and P11 contain obscene matters since the prosecution case is that the

accused sold Ex. P1 and P2 to P.W. 2 and as there is no charge against the accused for having in his possession Exts P3 to P11. But the finding of

Ex. P3 to P11 in the Bookstall, probabilities the Sale of Ex. P1 & P2 by the accused to P.W. 2. The owner of the bookstall who too had been

charged for the offence under Sec. 292 of the IPC. has been acquitted.

45. The evidence of P.Ws. 1, 2 and 4, on careful analysis, comprehensive consideration and close scrutiny would show that the accused sold Exts.

P1 and P2 each for Rs. 25/- to P.W.2 on 17-7-1980 at 5-30 P.M. A close reading of the evidence of P.W.2 would not indicate in the least that

he is either a police witness or a stock witness or a witness pliable or amenable to the influence of the police. The mere fact that he had been

examined in a case other than the case on hand as a prosecution witness would not make him a police witness. The evidence of P.W.2 has

emerged creditworthy. The evidence of P.Ws. 1 and 4 rings to be true. It is of some significance to note that on Exts. P1, P2, P4 and P6 the seal

of "Sapna Bookstall" owned by Suresh is put. It is inconceivable to think and there is no material to probabalise the suggestion that the police

would (sic.) the seal taken from the possession of the accused, earlier while accused was found selling lottery tickets of other States. The

suggestion is too far fetched and goes beyond the comprehension.

46. The fact that signatures of P.Ws. 2 and 3 were not obtained to Exts. P1 to P11 cannot be a circumstance to view the testimony with regard to

the seizure of Exts. P1 to P11 under Ex. P12 with doubt. The evidence regarding the identification of Exts. P1 to P11 and M.O. 1 is clear and

cogent. Both the Trial Court and the Appellate Court, on careful consideration of the evidence have concluded that the prosecution story is

established. I have not been able to see any circumstance affecting the decision of the Trial Court and the Appellate Court on the finding of fact

that is, holding the accused guilty of the offence punishable under Sec. 292 IPC. There are absolutely no reasons to interference with the

concurrent findings of fact with regard to the guilt of the accused recorded by the Courts below based on proper appreciation of evidence.

47. The only contention that needs to be referred to is about the absence of opportunity to the accused to address submissions before the

Appellate Court. As observed earlier the petitioner having availed of the remedy should have been diligent in pursuing the remedy. The Appellate

Court in the circumstances stated by it could not have kept the appeal pending waiting for the arrival of the accused. It disposed of the appeal with

the assistance of the Public Prosecutor on merits. It (sic.) right course adopted by it. The Appellate Court has gone into the matter very carefully

and has disposed of the appeal adverting to the contentions raised by the accused in the memorandum of appeal.

48. For all the aforesaid reasons I hold that the conviction of the accused for the offence punishable under S. 292 of the IPC is well founded calling

for no interference.

49. The learned counsel for the accused submitted that the accused is a married man with three children, that the case pertains to the year of 1980,

that the accused was only a salesman of the bookstall and that he has sold Exts. P1 and P2 to P.W. 2 kept in the bookstall for sale by Suresh, the

proprietor and that having regard to the aforesaid facts and circumstances the sentence of imprisonment for a period of six months may be set

aside and the sentence of fine may be enhanced to serve the ends of justice.

50. The punishment provided for the offence punishable under Sec. 292 of the IPC on first conviction is imprisonment of either description for a

term which may extend to two years and fine which may extend to two thousand rupees. In the event of second or subsequent conviction the

punishment provided is imprisonment of either description for a term which may extend to five years and fine which may extend to five thousand

rupees.

51. In State of Maharashtra, Appellant v. Jugmander Lal, Respondent (AIR 1966 SC 940) the Supreme Court has held that the mere use of the

word "punished" or the word "punishable" is not determinative of the intention of the legislature, to empower the Court to select one or more kinds

of sentences prescribed by it for an offence or to making it obligatory upon it to pass a particular sentence or sentences so prescribed. One thing

follows with certainty from the use of either of these expressions and that is that upon the conviction of a person for the particular offence the Court

is bound to award punishment. What the nature and extent of punishment to be awarded has to be ascertained by a consideration of the entire

penal provision.

52. The sentence is a matter of discretion. Normally the discretion ought not to be overruled unless there is satisfaction that the Court acted on

some wrong consideration or committed some error of law or failed to consider the matter on proper consideration.

53. It is clear from the judgment of the trial Court and the appellate Court that they failed to consider the fact that accused was merely a salesman

in the bookstall and as a salesman he has sold Exs. P1 and P2 to P.W.2. On the facts and in the circumstances of the case and having regard to

the facts; that the case is of the year 1980; that the accused who is 37 years old is a married man with family to look after, I feel the ends of justice

would be met if the accused is sentenced to pay fine only. I sentence the accused to pay a fine of Rs. 2000/- with a direction to suffer simple

imprisonment for three months in default of payment of fine. The accused is given time till 20-7-1987 to deposit the fine in the trial Court.

54. The revision petition is dismissed with the above stated modification in the sentence.

(K.B. NAVADGI)

Judge

Dated: 30-7-1987.

55. The learned High Court Government Pleader for the State, after the judgment was dictated in open Court but before it was signed, brought to

the notice of the Court the decision of this Court in State of Karnataka, Appellant v. Basheer, Respondent (1979(2) Criminal Law Journal P.

1183). This Court in the said decision considered the effect of amendment brought to Section 292(2) of the Indian Penal Code by Act 36 of 1969,

and held that discretion of Magistrate to pass sentence of fine only has been taken away by the amendment and that after amendment it is

obligatory on the Magistrate to pass a sentence of imprisonment on the accused.

56. In view of the mention of the decision of this Court by the State, the matter was posted for being spoken to further and this day I have heard

both the learned Counsel for the petitioner and learned Additional State Public Prosecutor.

57. Section 292(2) of the Indian Penal Code stood as under before it was amended by Act 36 of 1969 so far as the penal provision is concerned.

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

Section 292(2) as amended in so far as it relates to the penal provision reads as follows:

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.

58.In State of Maharashtra, Appellant v. Jugmander Lal, Respondent, (AIR 1966 S.C.P. 940) referred to earlier the provisions that were under

consideration before the Supreme Court were of Section 3(1) of the Suppression of Immoral Traffic in Women and Girls Act, 1956. The

provisions of Section 3(1) of the said Act reads thus:

Any person who keeps or manages, or acts or assists in the keeping or management of, a brothel shall be punishable on first conviction with

rigorous imprisonment for a term of not less than one year and not more than three years and also with fine which may extend to two thousand

rupees and in the event of a second or subsequent conviction, with rigorous imprisonment for a term of not less than two years and not more than

five years and also with fine which may extend to two thousand rupees"".

The Supreme Court dealing with the interpretation of the word "punishable" as used in Section 3(1) of the Suppression of Immoral Traffic in

Women and Girls Act, 1956, held, the fact that the word "punishable" is used and not word "punished" does not imply that Court is given

discretion to determine nature of sentences to be passed and that expression "shall be punishable with imprisonment and also with fine" mean that

the Court is bound to award sentence consisting both of imprisonment and fine.

59. In Basheer"s case, a Division Bench of this Court has held that after the amendment to Section 292(2) of the Indian Penal Code, it is

obligatory on the Magistrate to pass a sentence of imprisonment on the accused. For the first offence the punishments are imprisonment of either

description for a term which may extend to two years and line which may extend to two thousand rupees. In the event of second or subsequent

conviction, the punishments provided are imprisonment of either description for a term which may extend to five years and fine which may extend

to five thousand rupees.

60. The command of the Legislature is to award a sentence of imprisonment in every case of conviction under Section 292. The clear language

employed in the provision makes it clear the command of the Legislature.

61. I therefore hold that when a person accused of an offence under Section 292 of the Indian Penal Code is convicted, he has to be punished

with both sentence of imprisonment and sentence of fine. Learned Counsel for the petitioner reading the decision in Dhanna and others. Appellants

v. State of Rajasthan, Respondents (A.I.R. 1963, Rajasthan P. 104) submitted that the judgment of this Court delivered orally in open Court

cannot be reviewed or altered even before it is signed. In Mohan Singh, Appellant v. Emperor. (AIR (31) 1944 Patna, P. 209) section 369 of the

Code of Criminal Procedure, 1898, with which Section 362 of the Code corresponds was under consideration. It has been held in the said

decision that there is nothing in Section 369 of the Code of Criminal Procedure, 1898, or any other section of the Code to bar a Court from

altering a Judgement which has not been signed. The signature of the judgment completes the judgment; but before the signature has been

appended to it the judgment is not complete. The decision further lays down that the High Court is competent to re-hear the appeal and to pass

such judgment as is thought proper despite the pronouncement of the former judgment which was the result of an inaccurate copy of the District

Magistrate"s Notification being referred to but which was not signed by the Judges concerned.

62. Section 362 of the Code provides that save as otherwise provided by the Court or by any other law for the time being in force, no Court,

when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.

Having regard to the provisions contained in Section 362 of the Code, I am clear in my mind that a judgment pronounced but not signed can be

reviewed.

63. Learned Counsel for the petitioner then submitted that having regard to the facts of the case the benefit of the provisions contained in Sections

3 or 4 of the Probation of Offenders Act, 1958, may be extended to the petitioner. Having regard to the facts and circumstances of the case,

nature of the offence charged against the petitioner and gravity of the charge proved against him though there is nothing to show that the petitioner

is a person loaded with criminal antecedents, I do not feel it expedient to extend the benefit of either Section 3 or Section 4 of the Probation of

Offenders Act. But, I have reached the conclusion, on the facts submitted before me with regard to the punishment that the petitioner has to be

dealt with leniently in the matter of punishment and that at this distance of time it may not be in the ends of justice to send the petitioner to jail.

64. In view of the said conclusion of mine and having felt that the ends of justice would be met if the petitioner is sentenced to pay a fine only, the

petitioner was sentenced to pay a fine of Rs. 2000/- with a default clause. I am informed that the petitioner has paid the fine in the lower Court.

65. Having regard to the facts and circumstances of the case and the conclusion reached by this Court in the matter of punishment to be inflicted on

the petitioner, I feel it would be in the ends of justice if the petitioner is sentenced to suffer imprisonment till the rising of the Court and is sentenced

to a fine of Rs. 2000/- with a direction to suffer simple imprisonment for three months in default of payment of fine. It is ordered accordingly.

66. The revision petition stands disposed of with the above stated modification in the sentence.