

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

WEDNESDAY, THE 23RD DAY OF FEBRUARY 2022 / 4TH PHALGUNA, 1943

CRL.MC NO. 3654 OF 2021

AGAINST SC 61/2021 OF ADDITIONAL SESSIONS (CASES RELATING TO
ATROCITIES AND SEXUAL VIOLENCE AGAINST WOMEN & CHILDREN),

COURT ERNAKULAM

PETITIONER/2nd ACCUSED:

MANUAL
AGED 22 YEARS
S/O. BOBAN, PUTHENPURAKKAL HOUSE, ARTHUNGAL,
CHERTHALA, ALAPPUZHA.

BY ADVS.
ANIL KUMAR M.SIVARAMAN
C.CHANDRASEKHARAN

RESPONDENT:

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT
OF KERALA, ERNAKULAM, KOCHI - 682031.
- 2 THE INSPECTOR OF POLICE,
CENTRAL POLICE STATION, ERNAKULAM -682031.

SMT M K PUSHPALATHA -SR PP

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION
ON 16.02.2022, THE COURT ON 23.02.2022 PASSED THE FOLLOWING:

“C.R.”

ORDER

Dated this the 23rd day of February, 2022

Is the Creator or Administrator of a WhatsApp group criminally liable for offensive content posted by a group member?

2. Gone are the days, when we used short message service or a formal website chat-box to communicate with our kith and kin. They were replaced by personalised messaging apps like WhatsApp, Facebook Messenger, Viber etc. Launched in 2009, WhatsApp is a relatively latecomer to social media. Yet, it is reported to be growing faster than other social media platforms especially in recent years. According to the official note of WhatsApp, it serves more than 2 billion people in over 180 countries, with over a billion daily active users. Recent data shows WhatsApp topped the list of the most popular global mobile messaging apps in 2021. Currently, more than 100 billion messages are sent each day on WhatsApp, making it the most active messaging app in the world. This Android based multi-platform messaging app lets its users to make video and voice

calls, send text messages, share their status, photos, videos and more — with no fees or subscriptions.

3. WhatsApp has proved its relevance in exchange of information very fast. One of the unique features of this application is that it also enables formation of groups of people to chat and call thereon. WhatsApp groups bring together several people on a common platform, thereby enabling easier communication amongst them. The person who creates WhatsApp group is called Administrator (Admin) of the group. He may also make other members of group as Group Admin. These Admin/s have certain powers bestowed upon i.e., adding/removing a member etc. Due to lack of moderation of these groups, the members therein are at almost free reign to post/share any kind of data that they wish in terms of messages, voice notes, videos, songs etc. Many members of a WhatsApp group may put objectionable contents. The legal consequences and potential liability of the Administrator, stemming from such an objectionable post has come up for consideration in this Criminal Miscellaneous Case.

4. The petitioner herein created a WhatsApp group by

name FRIENDS. Being the creator, he was the Admin. There were two more Admins; the accused No.1 and CW4. On 29/03/2020 at 08.37 p.m., the accused No.1 posted in the group a porn video depicting children engaged in sexually explicit act. On 15/06/2020, the Ernakulam City police registered crime against the accused No.1 as Crime No. 864/2020 for the offences under Sections 67B (a)(b) and (d) of the Information Technology Act, 2000 (for short, 'the IT Act') and Sections 13, 14 and 15 of the Protection of Children from Sexual Offence Act, 2012 (for short, 'the POCSO Act'). Later on, the petitioner was arrayed as the accused No.2 being the Creator of the group and Co-Administrator. After investigation, final report was filed and the case is now pending as SC No.61/2021 at the Additional Sessions (Cases Relating to Atrocities and Sexual Violence Against Women and Children) Court, Ernakulam. According to the petitioner, even if the entire allegations in the FI statement or final report together with all the materials collected during the investigation are taken together at their face value, they do not constitute the offences alleged. It was in these circumstances this CrI.M.C has been filed invoking Section 482 of Cr.P.C to quash all further

proceedings against the petitioner.

5. I have heard Sri.Anil Kumar M.Sivaraman, the learned Counsel for the petitioner and Smt. Pushpalatha, the learned Senior Public Prosecutor.

6. Admittedly the objectionable post in question was posted by the accused No.1 and the petitioner was arrayed as the co-accused merely in his capacity as the Creator/Administrator of the group. The question is, whether the petitioner could be vicariously held liable for the act of the accused No.1?

7. Vicarious liability is a form of a strict, secondary liability that arises under the common law doctrine of agency; respondent superior – the responsibility of the superior for the acts of their subordinate, or, in a broader sense, the responsibility imposed on one person for the wrongful actions of another person. Such a liability arises usually because of some or the other legal relationship between the two. This often occurs in the context of civil law—for example, in employment cases. In a criminal context, vicarious liability assigns guilt, or criminal liability, to a person for wrongful acts committed by someone else.

8. Generally, person can be criminally liable for the acts of another if they are a party to the offence. Now, strict vicarious criminal liability is somewhat of an exception to the general rule of direct personal culpability and is a modern development through statutory provisions. Such criminal vicarious liability can be attributed only if it is provided under a particular Statute. Indian Penal Code (for short, 'the IPC') makes a departure from the general rule in few cases, on the principle of respondent superior. In such a case, a master is held liable under various Sections of the IPC for acts committed by his agents or servants. Section 149 of IPC provides for vicarious liability. It states that if an offence is committed by any member of an unlawful assembly in prosecution of a common object thereof, or such as the members of that assembly knew that the offence to be likely to be committed in prosecution of that object, every person who, at the time of committing that offence, was member, would be guilty of the offence committed. Section 154 of IPC holds owners or occupiers of land, or persons having or claiming an interest in land, criminally liable for intentional failure of their servants or managers in giving information to the public authorities, or in

taking adequate measures to stop the occurrence of an unlawful assembly or riot on their land. The liability on the owners or occupiers of land has been fixed on the assumption that such persons, by virtue of their position as landholders, possess the power of controlling and regulating such type of gatherings on their property, and to disperse if the object of such gatherings becomes illegal. Section 155 of IPC fixes vicarious liability on the owners or occupiers of land or persons claiming interest in land, for the acts or omissions of their managers or agents, if a riot takes place or an unlawful assembly is held in the interest of such class of persons. Section 156 of IPC imposes personal liability on the managers or the agents of such owners or occupiers of property on whose land a riot or an unlawful assembly is committed. Section 268 of IPC explicitly deals with public nuisance. Under this Section, a master is made vicariously liable for the public nuisance committed by the servant. Section 499 of IPC makes a master vicariously liable for publication of a libel by his servant. Defamation is an offence under this Section. The doctrine of vicarious liability is more frequently invoked under special enactments, such as Defence of India Rules 1962, the

Indian Army Act, 1911, the Prevention of Food Adulteration Act, 1954 etc.

A master is held criminally liable for the violation of rules contained under the aforesaid statutes, provided that his agent or servant, during the course of employment, committed such act. The Income Tax Act, 1961, the Drugs and Cosmetics Act, 1940 and the Negotiable Instruments Act, 1881 contain specific provisions which make the person running the affairs of a company vicariously liable for the offences committed by the company (See Priya Ashwini, *Vicarious Liability Under Criminal Law in India*, International Journal of Law and Legal Jurisprudence Studies: ISS:2348-8212: Volume 3 Issue 3)

9. The Apex Court has dealt with the issue of criminal vicarious liability many a time. In ***Sham Sunder v. State of Haryana*** [(1989) 4 SCC 630], it was held thus:

"9. But we are concerned with a criminal liability under penal provision and not a civil liability. The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold. Section 10 does not provide for such liability. It does not make all the partners liable for the offence whether they do business or not."

In ***Hira Lal Hari Lal Bhagwati v. CBI, New Delhi*** [(2003) 5

SCC 257], it was observed thus:

"30. In our view, under the penal law, there is no concept of vicarious liability unless the said statute covers the same within its ambit. In the instant case, the -said law which prevails in the field i.e. the Customs Act, 1962 the appellants have been thereinunder wholly discharged and the GCS granted immunity from prosecution."

In **R. Kalyani v. Janak C. Mehta and Others** [(2009) 1 SCC 516], it was

held thus:

"32. Allegations contained in the FIR are for commission of offences under a general statute. A vicarious liability can be fastened only by reason of a provision of a statute and not otherwise. For the said purpose, a legal fiction has to be created. Even under a special statute when the vicarious criminal liability is fastened on a person on the premise that he was in charge of the affairs of the company and responsible to it, all the ingredients laid down under the statute must be fulfilled. A legal fiction must be confined to the object and purport for which it has been created."

10. Thus, a vicarious criminal liability can be fastened only by reason of a provision of a statute and not otherwise. In the absence of a special penal law creating vicarious liability, an Admin of a WhatsApp group cannot be held liable for the objectionable post by a group member. The petitioner has been charged with Sections 67B (a), (b), and (d) of the IT Act and Sections 13, 14 and 15 of the POCSO Act. None of these

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provisions provide for such liability. There is no law by which an Admin of any messaging service can be held liable for a post made by a member in the group. A WhatsApp Admin cannot be an intermediary under the IT Act. He does not receive or transmit any record or provide any service with respect to such record. There is no master-servant or a principal-agent relationship between the Admin of a WhatsApp group and its members. It goes against basic principles of criminal law to hold an Admin liable for a post published by someone else in the group. It is the basic principle of criminal jurisprudence that *mens rea* must be an ingredient of an offence and both the act and intent must concur to constitute a crime.

11. In ***Kishor Chintaman Tarone v. State of Maharashtra & Another*** (2021 ICO 1285), the High Court of Bombay dealt with similar issue in terms of the liability of the Admin resulting from an indecent post shared by another member on the WhatsApp group. It was held that '*a Group Administrator cannot be held vicariously liable for an act of a member of the Group, who posts objectionable content, unless it is shown that there was common intention or pre-arranged plan*

acting in concert pursuant to such plan by such member of a WhatsApp Group and the Administrator.' In **Ashish Bhalla v. Suresh Chawdhary & Ors** (2016 SCC OnLine Del 6329), the Delhi High Court observed that defamation and defamatory statements made by any member of the group cannot make the Administrator liable therefor. Recently, the Madras High Court in **R.Rajendran v. the Inspector of Police and Another** (CrI.O.P. (MD) No. 8010/2021 decided on 15/12/2021), following Bombay High Court's Judgment directed the investigating officer to delete the name of the WhatsApp group Administrator while filing final report if his role is merely of an Administrator and nothing else.

12. As has been held by both the Bombay and Delhi High Courts, the only privilege enjoyed by the Admin of a WhatsApp group over other members is that, he can either add or delete any of the members from the group. He does not have physical or any control otherwise over what a member of a group is posting thereon. He cannot moderate or censor messages in a group. Thus, Creator or Administrator of a WhatsApp group, merely acting in that capacity, cannot be vicariously held liable for any objectionable content posted by a member of the group.

13. Coming to the facts, there is no specific allegations as to how and on what basis the petitioner has committed the alleged offences. CWs 2 to 8, who were members of the group, in their statement to the police, did not say anything against the petitioner. According to them, they were added in the group by the accused No.1. They specifically stated that the post in question was posted by the accused No.1. They did not attribute anything against the petitioner with regard to the said post. None of the case diary witnesses has any case that there was a pre- arranged plan by the accused No.1 and the petitioner and they acted in concert pursuant to such plan. There is nothing on record to suggest that the petitioner has published or transmitted or caused to be published or transmitted in any electronic form the alleged obscene material or he browsed or downloaded the said material or, in any way, facilitated abusing children online so as to attract Sections 67B (a), (b) or (d) of the IT Act. Similarly, the prosecution has no case that the petitioner used children in any form of media for his sexual gratification or used them for pornographic purpose or stored, for commercial purpose, any child pornographic material in order to attract Sections 13, 14 or

15 of the POCSO Act. Since the basic ingredients of the offences alleged are altogether absent as against the petitioner, I am of the view that it is a fit case where the extra ordinary jurisdiction vested with this Court under Section 482 of Cr.P.C could be invoked.

For the reasons stated above, the entire proceedings in SC No.61/2021 at the Additional Sessions (Cases Relating to Atrocities and Sexual Violence Against Women and Children) Court, Ernakulam as against the petitioner is hereby quashed. CrI.M.C., accordingly, stands allowed.

sd/-

DR. KAUSER EDAPPAGATH

JUDGE

Rp

APPENDIX OF CRL.MC

3654/2021 PETITIONER ANNEXURES

- Annexure A1 THE CERTIFIED COPY OF THE F.I.R NO.
864/2020 DATED 15.06.2020 REGISTERED BY
CENTRAL POLICE STATION, ERNAKULAM.
- Annexure A2 TRUE COPY OF THE STATEMENT OF CW -6.
- Annexure A3 TRUE COPY OF THE CDR ANALYSIS REPORT IN
CR. NO. 964/2020 SUBMITTED BY
INVESTIGATION OFFICER BEFORE THE HON'BLE
COURT.
- Annexure A4 THE CERTIFIED COPY OF THE FINAL
REPORT/CHARGE SUBMITTED BY THE
INVESTIGATION OFFICER BEFORE THE
HON'BLE COURT.
- Annexure A5 TRUE COPY OF THE STATEMENT OF CW-4.
- Annexure A6 TRUE COPY OF THE REPORT PUBLISHED BY
LEXOLOGY LEGAL NEWSFEED SERVICE.