
(1963) 02 PAT CK 0004
In the Patna High Court

Dr. Sunil Kanto Nandy

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 20-02-1963

Acts Referred:

Evidence Act, 1872 — Section 114
Penal Code, 1860 (IPC) — Section 497

Citation : (1964) CriLJ 250

Hon'ble Judges : G.N. Prasad, J

Bench : Single Bench

Judgement

G.N. Prasad, J.—The appellant has been convicted u/s 497, Indian Penal Code, and -sentenced to undergo rigorous imprisonment for five years. It is alleged that he committed adultery with Prakriti Chakravarty, who was the tingly wedded wife of the complainant, Narain "Chandra Chakravarty (P. W. 12) between January and December, 1959, as mentioned in the charge framed against the appellant, though in his judgment the learned Assistant Sessions Judge has wrongly mentioned the period of the charge as "between June 1958 and January, 1960.

2. It is admitted that the parties were the -original residents of Rajsahi, which is now in East Pakistan. The complainant was residing in his ;ancestral house and the appellant -was a medical jpractitioner there. It is also not in dispute now that Prakriti, also known as Bulbul, was married to the complainant in Asarh of the year 1939 and two daughters were born of the marriage to the complainant, one is 1940 and the other in 1945. The appellant was the family physician of the complainant at Rajsahi.

In 1948 after the partition of the Indian Sub-continent, the parties shifted to Bhagalpur where "they lived in a, rented house to mohalla Bhikanpur. The appellant also lived in the same house at Bhagalpur. The complainant was carrying on, some business in connection with which he used to be mostly away from Bhagalpur during the years 1948 to 1953 and he used to leave his family

under the care of the appellant.

3. The prosecution case is that sometime in 1953, the complainant came to Bhagalpur but he did not find his wife and daughters there. He searched for them but could not get any trace of them. He entertained some suspicion against the appellant, but for fear of scandal in the society, he did not pursue the matter. In January, 1959, however, he instituted a suit in the City Civil Court at Calcutta for a declaration that his marriage with Prakriti was dissolved and null and void. Prakriti on being served with a notice of the suit, appeared and filed a written statement claiming alimony from the complainant.

The complainant, however, withdrew the suit in August 1959 with liberty to sue afresh. But he had seen Prakriti in the company of the appellant on the 23rd July, 1959 when she had filed her written statement in the suit. His suspicion against the appellant was confirmed and so in September, 1959, he came to Dumka where he had learnt that the appellant had shifted from Bhagalpur. The complainant made certain inquiries at Dumka from some officials and peons of the District Board of which the appellant was a Medical Officer. As a result of his inquiries, the complainant learnt that the appellant and Prakriti were living at Dumka as husband and wife. The complainant then went back to Calcutta. Subsequently he came to Dumka and filed a complaint before the Sub-divisional Magistrate on the 20th February, 1960. In due course, the appellant was summoned and put on trial. The charge framed against him was that between January 1959 and December, 1959 at Dumka town he

committed "adultery by having sexual intercourse with Prakriti Chakravarty the legally married wife of Narain Chandra Chakravarty the complainant, knowing or having reasons to believe her to be the lawful wife of Sri Narain Chandra Chakravarty, without the consent or connivance of the said Narain Chandra Chakravarty.

4. The appellant denied the charge and pleaded not guilty. His case is that the complainant had deserted his wife, and the appellant as a friend and well-wisher of the complainant's family had all the while been maintaining the complainant's wife and his two daughters and also bearing the expenses of the education of the two girls. The further case of the appellant is that in September, 1953, he was transferred to Bettiah from where he was transferred to Monghyr in 1954, where the complainant used to write letters to his wife from time to time.

In June, 1958, the appellant was transferred to Dumka where he had continued to maintain the wife and the two children of the complainant at his own cost. The further case of the appellant is that from January, 1959 onwards some dispute had arisen between him and certain officers of the District Board of which the appellant was the Medical Officer. The officers of the District Board, who were annoyed with the appellant, got the appellant falsely implicated in the present case which had been instituted against him with entirely false allegation after he had been transferred from Dumka to Jamalpur in the month of January, 1960.

5. At the trial, evidence was adduced from both sides in support of their respective cases. Upon a consideration of the materials on the record, the learned Assistant Sessions Judge has found the charge against the appellant to have been brought home to him. The appellant having been convicted and sentenced as already mentioned, has preferred this appeal.

6. To sustain the conviction of the appellant, three facts must be established; (i) that Prakriti was at the relevant time the lawfully married wife of the complainant to the knowledge of the appellant, (ii) that the appellant had sexual intercourse with her between January and December, 1959, and (iii) that such sexual intercourse was without the consent or connivance of the complainant. The learned Assistant Sessions Judge has found the prosecution case on the point of marriage of Prakriti with the complainant to be true, and this finding has not been challenged before me by the learned Counsel for the appellant.

The principal contention of the learned Counsel for the appellant is that the evidence on the record is insufficient to lead to the conclusion that the appellant had sexual intercourse with Prakriti as alleged by the prosecution. Direct evidence of sexual intercourse is difficult to obtain in the majority of cases, but this can be inferred from circumstances relating to the way of life of the man and the woman, such as the fact of their living alone in a bungalow for a considerable length of time or sleeping together on the same bed or at least in the same room. This is clear from an old legal Scottish maxim which has been quoted by Young, J. in *Cyril Rowland Gibbs Vs. Mrs. Ellen Mabel Gibbs and Another*, and which runs as follows:

Solus cum sola in suspecto loco non-premature dissipaters noster.

Young, J. has translated this maxim to mean that when a man and a woman are found together in suspicious circumstances, it cannot be presumed that they are saying their prayers. The learned Judge has referred to Section 114 of the Evidence Act which enacts that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events and human conduct.

7. The principle of English law on this point is to be found in the following observations of Sir William Scott in *Loveden v. Loveden* (1810) 161 ER 648:

It is a fundamental rule that it is not necessary to prove the direct fact of adultery; because if it were otherwise, there is not one case in a hundred in which that proof would be attainable. It is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion; and unless this were the case, and unless this was held, no protection whatever can be given to marital rights.... The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead- the guarded discretion of a reasonable and just mind to the conclusion; for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally

capable of two interpretations, neither is it to be a matter of irrational reasoning, which do not suggest things differently from what strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature; they are facts determinate upon common account of reason; and Courts of justice would wander very much from their proper office of giving protection to the rights of mankind, if they let themselves loose to subtleties and remote and irrational reasonings upon such subjects. Upon such subjects, the rational and the legal interpretation must be the same.

8. Keeping the above principles in mind, I proceed to consider the circumstances relied upon by the prosecution for the purpose of proving that the appellant had sexual intercourse with Prakriti when they were admittedly living together in the same bungalow at Dumka in the year 1959.

(Paras 9 to 16) (After discussing the evidence on record his Lordship proceeded;)

17. This is all the evidence upon which I am asked to hold that there was sexual intercourse between the appellant and the complainant's wife. But I am unable to rely upon any circumstance appearing on the record from which an inference of sexual intercourse can reasonably be drawn. From the long association of the appellant with Prakriti, one can only suspect that the woman may have been guilty of lapses in her virtue at sometime or the other, but this is not a reasonable inference which can necessarily be drawn in the absence of any material to show that Prakriti was a woman of loose morals. At any rate, suspicion cannot take the place of proof, and proof is wanting in this case.

18. The learned Standing Counsel appearing for the State referred me to the case of Sita Devi Vs. Maharaja Kumar Gopal Saran Narayan Singh, , in which one of the issues which arose for decision was whether there had been any misbehaviour or misconduct on the part of the lady who was "a Hindu woman and against whom there was an allegation of unchastity. The trial Court had found that the husband who was the defendant in the suit had succeeded in proving adultery and other misconduct on the part of the plaintiff Sita Devi. But the judgment of Macpherson, J., who was one of the Judges constituting the Division Bench in that case, shows that there was an acceptable evidence of a witness named Newman which showed that Sita Devi and Culliford, with whom she was alleged to have miscondacted herself, addressed each other in endearing terms, and what is more, that

Culliford used to go up to her bed room with the plaintiff about midday and stay then with her for half an hour or an hour; after 5 p.m. they always sat in, the sitting-loom, with the door locked and with the curtain drawn though it was summer, and at night after dinner they went upstairs to the bedroom about 9 p.m. and Culliford stayed there with plaintiff until 10 or 10-30 when he left the room....

It was really upon these facts that it was held that there could be only one inference, namely that of adultery between the plaintiff and Culliford. In the

instant case, however, we have no such evidence of the appellant and Prakrit having stayed together for any length of time alone in one room . or of having been found in the bed room of the appellant with the door bolted from within. No inference of adultery can, therefore, be drawn in the present case as was done in Sita Devi Vs. Maharaja Kumar Gopal Saran Narayan Singh, . In that case there was also an allegation of adultery against Sita Devi during her stay at Calcutta, in regard to which reliance was sought to be placed upon the evidence of one Mrs. Williams, who spoke about certain callers visiting the lady in her flat at Calcutta whom the witnesses described as Moslem dressed in English clothes. But Macpherson, considered that the evidence of Mrs. Williams was

not inconsistent with the innocence of the plaintiff in Calcutta of the highest marital offence" and that he

would not they any special stress on the visit of the "Moslem dressed in English clothes" to a lady who had been accustomed Juring her married life to meet Indians of the better classes". No doubt, Kulwant Saliay, J., who was the other member of the Division Bench, was inclined to take the view that the evidence of Mrs. Williams "goes to establish the fact of adultery in Calcutta also", but his Lordship has not referred to any particular fact deposed to by Mrs. Williams and observed as follows:

Although the generality of the evidence given by the Calcutta witnesses does not go far enough to prove the actual fact of adultery in Calcutta, the evidence leaves no doubt in my mind that her conduct in Calcutta was not such as one would expect from a Hindu wife.

Sita Devi's case, however, is hardly of any value in determining the guilt of the appellant in the present case because, as I have already observed, not a single circumstance has been proved from the materials on the record from which any inference of adultery can reasonably be drawn against the appellant. All that has been established is that Prakriti was living with her two daughters in the house of the appellant at Dumka, but no decided case has been brought to my notice in which an inference of adultery was drawn from the mere fact of residence of the woman with her children in the house of the man with whom she is alleged to have committed adultery. Such an inference could have been, drawn if it had been established that the man and the woman used to occupy the same room, if not the same bed, but such is not the evidence in the present case.

19. Having given an anxious consideration to the materials on the record, I have come to the conclusion that the guilt of the appellant has not been proved beyond reasonable doubts. It has not been shown that the appellant had sexual intercourse with Prakariti, as alleged by the prosecution, and in such circumstances, no question of want of consent or connivance of the complainant arises for consideration, although it appears to me somewhat strange that even after entertaining some suspicion against the conduct of his wife when he saw her in the company of the appellant at Calcutta, when she came to file her

written statement in the Civil Suit, the complainant waited for over six months before filing his complaint.

20. The result is that the conviction of the appellant cannot be sustained. I, therefore, set aside the conviction and the sentence, and allow the appeal.