

(1952) 10 MAD CK 0012

In the Madras High Court

Case No : Criminal Revision Case No. 217 and Cri. Revision Petition No. 216 of 1951

In Re: C.S. Subramaniam

Date of Decision : 28-10-1952

Acts Referred:

Evidence Act, 1872 — Section 101, 102, 103
Penal Code, 1860 (IPC) — Section 497

Citation : AIR 1953 Mad 422 : (1953) 66 LW 80 : (1953) 1 MLJ 236

Hon'ble Judges : Govinda Menon, J; Basheer Ahmed Sayeed, J

Bench : Division Bench

Advocate : M.K. Nambiar, for V. Rajagopalachari and N.C. Srinivasan, for the Appellant; Asst. Public Prosecutor, for the Respondent

Judgement

Govinda Menon, J.—The Charge against the petitioner before the Court of the Additional First Class Magistrate of Erode was that he,

between October 1943 and 16-5-1949, at Gobichettipalayam. committed adultery with one Dr. Suguna Bai, knowing that she is the wife of one

Dr. P. V. Ramchandra Reddi, the complainant, and without the consent of the said Ramchandra Reddi, and thereby committed an offence

punishable u/s 497, I. P. C. He was found guilty of the offence and sentenced to rigorous imprisonment for six months. On appeal, the learned

Additional sessions Judge of Coimbatore confirmed the conviction and sentence. Hence this revision.

2. Mr. Panchapakesa Aiyar J. before whom the revision came on for hearing on 13-3-1951, directed the case to be posted before a Bench of two

Judges as according to the learned Judge, Section 497, I. P. C. perpetuates a discrimination solely on ground of sex and as such is repugnant to

the provisions of the Indian Constitution, viz., Article 13(1) read with Article 15(1). It was for the purpose of deciding the validity of Section 497,

I. P. C. and its repugnancy in relation to the Articles of the Constitution that the reference was made. The learned Judge overlooked the fact that

the offence complained of had been committed before the coming into operation of the Indian Constitution. Both the learned counsel for the

petitioner and the learned Public Prosecutor conceded that no question of fundamental rights arises in this case, as the alleged offence took place

before 26-1-1950.

3. u/s 497, I. P. C. whoever has sexual intercourse with a person who is, and whom he knows, or has reason to believe, to be, the wife of another

man, without the consent or connivance of that man, commits the offence of adultery, if such sexual intercourse does not amount to rape.

4. The complainant had been married to one Dr. Suguna Bai on 26-1-1940 under the Special Marriage Act (3 of 1872) at Madras. From the

evidence of P. W. 1, the complainant, it appears that the wedded life of the parties had not been a happy one. It is in evidence that both the

husband and wife were members of the Communist Party and that they are interested in the activities of that party. The petitioner who was a friend

of both the spouses, was also a member of the Communist party and knew them very intimately. The relations between the married couple

became very much estranged from 1942 onwards and the inference that can be drawn from the prosecution case is that the husband allowed the

wife to lead her own life without much interference on his part. From 1946 the wife was in different places on private as well as on Government

service. It is further alleged that in the second week of October 1946 the wife went away from the house of the complainant at Madras without his

knowledge and in spite of diligent enquiries made by the complainant he could not know her whereabouts till the end of December 1946.

In May 1948 it is alleged that the differences between both of them were patched up in the presence of a respectable mediator; but even after that,

the estrangement continued. Ex. p. 2 is a copy of the petition in O. M. S. No. 22 of 1948 filed by the complainant on the Original Side of this

Court u/s 17, Special Marriage Act and Section 10, Indian Divorce Act for a dissolution of the marriage on the ground of the wife's adultery with

one Mr. G. p. That petition was withdrawn sometime in July 1949. P. W. 1 says that though he had sufficient evidence that his wife committed

adultery with Mr. G. P. He withdrew the suit at the advice of his lawyer. The complaint in the present case was filed on 16-5-1949 before the

withdrawal of that application. Both the lower Courts have found that the accused and Dr. Suguna Bai were living together In house No. 13

Cutchery Street, Gobichettipalayam, that no other person lived in that house that both of them had one and the same mess and that both of them

used to sleep in one and the same room. On this evidence it was found that the only inference is that the accused committed an offence u/s 497, I.

P. C.

5. We Have been taken through the evidence of the various witnesses examined on behalf of the complainant as well as the testimony of the

defence witnesses and it seems to us that the finding of the lower Court on the question of fact that the complainant's wife and the accused were

living together in the same house and under the conditions described in the judgment of the lower Court cannot be disputed. But the argument that

is put forward by the learned counsel for the petitioner is that assuming without conceding that the accused had sexual intercourse with Dr. Suguna

Bai. knowing that she was the lawfully wedded wife of the complainant, still the necessary prerequisite for a conviction u/s 497. I. P. C. viz., that

such sexual intercourse was without the consent or connivance of the husband, should be proved. It is urged that the evidence in this case does not

show that there was no connivance. It is argued that from the conduct of the husband the Court has to presume that though he did not positively

consent to his wife living apart and living with others, he must have tacitly connived at such a life. The learned counsel for the appellant invited our

attention to the observations of Edge C. J. and Aikman J. of the Allahabad High Court in -- "Brij Basi v. Queen-Empress 19 All 74. That was a

case where the accused person was found guilty by the lower Courts of an offence u/s 451, I. P. C. for having committed house trespass with

intent to commit an offence, the prospective offence being adultery. During the course of the discussion the learned Judges observe as follows :

It is the first principle of criminal law that where a statute creates a criminal offence the ingredients of that criminal offence must be strictly proved,

and that where the doing of an act without consent or without authority is made a criminal offence, and the statute does not expressly put upon the

accused the proof of such consent or authority, it is a necessary part of the case for the prosecution to negative by evidence such consent or

authority. In this case, if Brij Easi had actually been caught in the act of sexual intercourse with the wife of Ramgopal, assuming that he knew to be

Ramgopal's wife, the offence of criminal adultery would not have been made out without proof that such sexual intercourse was without the

consent and without the connivance of Ramgopal.

Granting that the prosecution has proved that the accused has committed adultery with the complainant's wife, still is there anything in the evidence

to show that it was without his consent or connivance? It is not sufficient for the complainant to prove the act of adultery. He must also prove that

he did not connive at it. Paragraph 20 of Ex. P.2 is clear that the complainant knew that his wife was committing adultery with persons other than

the accused on 13-4-1948 and on other occasions during April and December 1947 and between 10th April and 12-4-1948 and also between

14-4-1948 and 16-4-1948. There is not a word in the deposition of P. W. 1 that subsequent to his having known about his wife's adultery with

other persons, he had done anything to prevent her committing adultery with anyone else. In fact the inference is irresistible that after he was

convinced that his wife had adulterous intercourse with the co-respondent in O. M. S. No. 22 of 1948, he tacitly acquiesced in the conduct of his

wife. His filing an application for divorce and later on withdrawing it is proof that he did not take any steps to wean away his wife from the alleged

evil conduct into which she has fallen. We are therefore satisfied that the necessary pre-requisite for a finding that an offence u/s 497, I. P. C. has

been committed is absent in this case. It is absolutely essential as stated in -- "Brij Basi v. Queen-Empress", 19 All 74 that being a criminal

offence, one of the two ingredients to be proved is that the husband did not connive at the adultery.

6. What ""connivance"" means in cases under the English Matrimonial Causes Act has been the subject of discussion in -- "Lloyd v. Lloyd &

Leggari", (1938) 2 All E. R. 480. Langton J. after discussing all the earlier cases on the subject holds that when the husband having been fully

apprised of what was going on, viz., that his wife was committing adultery with other persons, took no active steps to prevent it, and therefore

acquiesced in it, it should be presumed that there has been connivance on the part of the husband and therefore a petition for divorce should be

dismissed. The learned Judge discussed the earlier cases on the point such as -- "Rogers v. Rogers", (1830) 3 Hag Eec. 57: 27 Digest. 327, and

other cases.

7. But it is argued by the learned Public Prosecutor that this decision has not been approved in England in the subsequent cases. He invites our

attention to -- "Churchman v. Churchman", (1945) 2 All E. B. 190. In that case the Court of Appeal dissented from certain observations of

Langton J. in -- "Lloyd v. Lloyd & Leggari", (1938; 2 All E. B. 480, but lays down that it is the essence of connivance that it preceded the event

and, generally, the material event was the inception of the adultery. and not its repetition, although the facts might be such that connivance at the

continuance of an adulterous association showed that the petitioner must be taken to have connived at it from the first. The same view has been

taken in--"Manning v. Manning", (1950) 1 All ER 602 again a judgment of the Court of Appeal. It may therefore be taken that unless there has

been connivance at the inception, the English law would not accept subsequent condonation of adultery as connivance.

8. We are satisfied from the evidence that after the filing of O. M. S. No. 22 of 1948, the complainant was no longer interested in his wife leading

a chaste life. In fact he was anxious to get a divorce and for some reason, which is not clearly explained, he withdrew the suit on the advice of his

counsel. It is alleged by the accused in this case that the complainant abducted his wife from Gobichettipalayam with the Intention that she should

not give evidence in the divorce suit. Whatever that might be, on a careful reading of P. W. 1's evidence, we are driven to the conclusion that it

mattered to him nothing as to what his wife did after he had filed the divorce suit. He allowed her to have her own mode of living without any kind

of let or hindrance on his part. That was the reason why there was no evidence let in on behalf of the prosecution that there was no connivance on

the part of the husband. As the necessary ingredients of the offence have not? been proved we find that the petitioner is not guilty of the offence

with which he is charged and we acquit him and set him at liberty.

Basheer Ahmed Sayeed, J.

9. I agree with my learned brother in the conclusions he has arrived at and the reasoning which he has put forth for allowing the revision petition

filed by the petitioner. I would like to add a few words of mine. Section 497, I. P. C. requires that the complainant should prove that the accused

had sexual intercourse with the complainant's wife without the complainant's consent or connivance. That means the burden is cast upon the

prosecution to prove that the sexual intercourse had been without the consent or connivance of the complainant himself. My learned brother has

rightly held that this onus which is cast upon the complainant has not been discharged by the complainant. All that has been proved by the

complainant in the case is that the accused must have had or actually had sexual intercourse with the wife of the complainant. This cannot be full

compliance with the requirements of the section. On the other hand, it was incumbent upon the complainant to prove that the said sexual

intercourse which the accused had with the wife of the complainant was without his consent or connivance.

As has been pointed out, there has been no evidence whatsoever that such want of consent or connivance has been proved by the complainant

though averments have been made by the complainant to that effect in his complaint. A reference to paragraph 5 of the complaint will make this

clear. So also his sworn statement at the time, he filed the complaint makes reference to the fact that he did not consent to the sexual intercourse of

the accused with his wife. But it does not really meet the requirements of the section. The complainant who gave evidence as P. W. 1 has not

shown that he did not give his consent or that he did not connive at the accused having sexual intercourse with his wife. In order to show this he

should have spoken to the steps which he took to prevent the accused or his wife from having intercourse with each other from the moment he

came to know of the intimacy between the wife and the accused and from the time he began to suspect that the accused was having sexual

intercourse with his wife. Far from speaking to any such facts, or steps taken by him, it appears from the evidence that he actually took no steps

whatever, though he was fully aware from August 1946 uptill 16-5-1949 when he actually filed the complaint that the accused and his wife were

on intimate terms with each other. Paragraph 7 of Ex. P. 4 and also Ex. P. 3 counter affidavit filed by the wife make this position very clear. In

spite of this knowledge if the complainant had failed to take steps to prevent sexual intercourse between the accused and his wife, such conduct on

the part of the complainant would give rise, it is claimed, to the presumption that he had connived at the accused having sexual intercourse with his

wife, though, in my opinion, such presumption does not seem to be necessary at all in a criminal case where the onus is laid on the complainant to

prove the ingredients of the offence against the accused.

10. Mr. Nambiar has referred to a number of events which have preceded the filing of the complaint by the complainant to show that the

complainant had connived at the sexual intercourse of his wife with other persons like Mr. G. P. during a long period of time and to the various

proceedings which were instituted by and against the complainant in connection with the conduct of his wife and that of the complainant himself

respectively. These facts might be quite relevant and necessary in a case where the complainant sought to have a divorce between himself and his

wife. But in a criminal case I do not think that the connivance by the complainant at acts of sexual intercourse which the wife of the complainant

might have had with persons other than the accused would be material or relevant to the particular complaint with which the complainant goes to

the criminal Court for vindicating his so called rights. In my opinion, it is essential that the complainant should show against the particular person

who is made the accused that his sexual intercourse with the complainant's wife was without the complainant's consent or connivance,

notwithstanding the fact that the complainant might or might not have consented or connived at the sexual intercourse which other persons might

have had with the complainant's wife earlier or later than the complaint. In order to make the accused liable to punishment, the complainant must

show that that particular accused had sexual intercourse with his wife without his consent or connivance. All the English cases cited by the learned

counsel on both sides have relevance only to the civil proceedings in matrimonial cases and they do not have much bearing on the requirements laid

down by the express language of Section 497, I. P. C. In the present case as has been observed by my learned brother while the complainant has

failed to discharge the onus laid down on him to prove the absence of consent or connivance at the sexual intercourse of the accused with the

complainant's wife, the petitioner-accused has shown by evidence on record that the complainant had connived at the sexual intercourse of the

accused with the complainant's wife though it was absolutely unnecessary on his part to prove such consent or connivance. In this view the petition

must be allowed and the conviction will have to be set aside, as has been rightly held by my learned brother.