
(1991) 09 OHC CK 0005
In the Orissa High Court
Case No : Criminal Appeal No. 154 of 1984

Krushna Chandra Patra

APPELLANT

Vs

Tanu Patra

RESPONDENT

Date of Decision : 18-09-1991

Acts Referred:

Penal Code, 1860 (IPC) — Section 497

Citation : (1992) 1 OLR 397

Hon'ble Judges : L. Rath, J

Bench : Single Bench

Advocate : Akhil Mohapatra, for the Appellant; D.P. Dhal, for the Respondent

Final Decision : Dismissed

Judgement

L. Rath, J.—The respondent who stood trial under Sections 497 and 498 IPC along with one Sukadeb Patra who had been charged u/s 109 IPC at the instance of the appellant having been acquitted, this appeal has been preferred. The appellant filed the complaint alleging that he had married one Ichhabati Patra on 24-4-1977 and while they were living as husband and wife, she was brought by Sukadeb Patra, her father, on 2-10-1978 and was not sent thereafter to her marital home. The appellant attempted on some occasions to bring her back, but however she was not sent by her father and instead was given in marriage to the respondent on 15-2-1932. The appellant learning this took some time to collect evidence as to the marriage and filed the complaint on 11-3-1982. During the trial the appellant was examined as PW 1 and three other witnesses were also examined on his behalf. The learned Magistrate analysing the evidence came to hold that Ichhabati had indeed been married to the appellant but even though the respondent and Ichhabati were living as husband and wife, yet the offence u/s 497 IPC was not established as the gist of the offence being sexual intercourse with another's wife and is the respondent was having such intercourse with his own wife, he was not guilty of the offence. The learned Court did not give any finding as regards the offence u/s 498 IPC. Assailing the judgment, the learned

counsel for the appellant urges that since the learned Magistrate found Ichhabati to be the lawfully wedded wife of the appellant and the respondent to have married her with full knowledge that she was the wife of the appellant, and since they were living as husband and wife and the fact of their illicit intercourse was also accepted by the learned Magistrate, there was no escape from a conviction u/s 497 IPC. He however frankly concedes that there was no material to sustain the charge u/s 498 IPC. It is the submission of Mr. Dhal, learned counsel for the respondent, that even accepting such facts as are found by the learned Magistrate, yet the offence u/s 497 IPC is not made out since the appellant by his conduct must be held to be guilty of connivance as regards the relationship of the respondent and Ichhabati and hence in terms of the section the offence cannot be said to have been made out. It is his submission that in a case of prosecution for adultery, one of the essential ingredients to be proved by the prosecution is that the sexual intercourse of the spouse in question with another person is not with the consent or connivance of that person and since such factor has not been established, no culpability can be attached to the respondent. For an appreciation of the submission, Section 497 IPC is relevant to be extracted :

"497, Adultery--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, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor."

A plain reading of the section makes it clear that the offending sexual intercourse so as to become liable for conviction must have been made with the knowledge that the woman is the wife of another and that such intercourse has been made without the consent or connivance of that person. It is thus incumbent upon the prosecution to establish the fact of absence of connivance of the husband. The view is supported by *In Re: C.S. Subramaniam*, .

2. Because of such position of law, it is necessary to examine what is the meaning of the expression "connivance". While consent referred to u/s 497 IPC may be either express or implied, "connivance" may mean an active aiding or abetting or a conduct from which such aiding or abetting may be inferred and it would also take within its ambit such conduct which would amount to a passive acceptance of the lapse of the wife and the other man concerned. In other words, the condonation may also become connivance and if such condonation of lapse can be inferred from the conduct of the husband, the absence of connivance cannot be taken to have been established. In *Halsbury's Laws of England*, Third Edition. Vol. 12 under Articles 589 at page 298 the following passage may be noticed :

"The word "conniving" is not limited to active conduct. It includes the case where a spouse acquiesces in the adultery alleged, that is to say, where the spouse is

aware that a certain result will follow if he does nothing, and he desires that result to come about. On the principle of *volenti non fit injuria* a person cannot complain of act he passively assents to."

In Stroud's Judicial Dictionary, Fourth Edition, Vol. I, the word "connivance" has been shown to mean as the willing consent to a conjugal offence (in the sense of being an accessory before the fact), or a culpable acquiescence in a course of conduct reasonably likely to lead to the offence being committed.

The conduct of the appellant is necessary to be examined in this backdrop of law. It is the admitted case that his wife had left his home on 2-10-1978 and the complaint was filed on 11-3-1982. To make up for the delay, he has pleaded of the marriage of the respondent and Ichhabati to have taken place only on 15-2-1982 and the time in between till the filing of the complaint as having been taken by him for ascertaining the proof of the marriage. It however appears from his own evidence as PW 1 that PW 4 was the person who had given him the information regarding the marriage of the respondent with Ichhabati. PW 4 has stated that having been called by Rabi Patra he had accompanied him to the house of the respondent to call back Ichhabati but the respondent refused to leave her saying that he had accepted her as his wife. This visit to the house of the respondent was a month after Ichhabati had left the house of the appellant and since then Ichhabati has been living as the wife of the respondent. The said Rabi Patra is no other than the father of the appellant. This would make it clear that since after a month of leaving the appellant's house by Ichhabati he was aware of her living with the respondent as his wife and for all the time thereafter till 11-3-1982 he took no steps to bring the offending couple to book. His such conduct would amount to an apparent condonation of the culpable conduct of the respondent and Ichhabati. He wilfully did not take any action knowing full well that his inaction would certainly lead to sexual relationship between the two. It can thus be said that any culpable conduct of the respondent and Ichhabati was with the connivance and even with the implied consent of the appellant. The very In Re: C.S. Subramaniam, was a similar case where the husband had chosen to come before the Court only after a lapse of little more than one year and the Court on analysis of the facts came to the conclusion of the absence of connivance having not been established.

3. In that view of the matter this appeal has no merit and is dismissed.