

(1957) 10 BOM CK 0008

In the Bombay High Court

Case No : Criminal Revision Application No. 750 of 1957

Malan and Others

APPELLANT

Vs

State of Bombay and Another

RESPONDENT

Date of Decision : 31-10-1957

Acts Referred:

Penal Code, 1860 (IPC) — Section 107, 494

Citation : AIR 1960 Bom 393 : (1958) 60 BOMLR 428 : (1960) CriLJ 1189

Hon'ble Judges : Miabhoy, J

Bench : Single Bench

Advocate : R.B. Kotwal, for the Appellant; V.S. Desai, Govt. Pleader and S.M. Hussein, for the Respondent

Judgement

(1) This is an application u/s 435 of the Criminal Procedure Code for revising the order, dated the 4th June 1957, passed by the learned Additional Sessions Judge, Satara, in Criminal Appeal No. 12 of 1957, by which he confirmed the conviction of the applicants for the offence u/s 494, read with Section 114 I. P. C., and the sentence on each of them for one day's rigorous imprisonment and a fine of Rs. 10/- in default to suffer rigorous imprisonment for one day more.

(2) The prosecution case was that the accused No. 1 had gone through the ceremony of marriage with one Krishnabai during the life-time of his wife Bayadabai. The accused No. 14 was alleged to be the priest who officiated at the performance of the aforesaid marriage. Accused No. 1 was charged u/s 494 I. P. C. and was convicted for the offence under Sec. 494. Accused No. 14 as convicted for the offence u/s 494 read with Section 114 I. P. C. I am not concerned with the convictions recorded against these two persons. They had preferred an appeal to the Sessions Court at Satara from the aforesaid convictions, and their convictions were upheld by the learned Additional Sessions Judge in appeal. Thereafter, they preferred a revision application to this Court, and that revision application has been dismissed by this Court. Therefore, the question about the validity or otherwise of the aforesaid convictions does not

survive of consideration. The present applicants were accused Nos. 2 to 9 and 11 to 13 in the trial Court. These accused were also charged with the offence u/s 494 read with Section 114 I. P. C. on the allegation that they had abetted accused No. 1 in the commission of the aforesaid offence u/s 494 I. C. P. The learned Magistrate held that the aforesaid offence was brought home against the aforesaid accused. The accused went in appeal to the Sessions Court at Satara, and , as already stated, the learned Additional Sessions Judges upheld the convictions and sentences passed against these accused persons.

(3) The aforesaid accused Nos. 2 to 9 and 11 to 13 have come to this Court in revision.

(4) The only point which was urged in support of the present revision application was that on the facts found by the learned Appellate judge, the offence of abetment cannot be said to have been established against all or any of the accused. Therefore, the principal question which arises for determination in the present revision application is whether, on the facts found by the learned appellate Judge, the offence of abetment u/s 494 has been established against all or any one of the accused persons.

(5) The facts which have been found against all the accused persons are as follows:

1. that these accused were present at the time of the celebration of the marriage which was performed at the house of accused No. 9;
2. that all these accused had knowledge of the fact that accused No. 1 was purporting to marry a second wife during the life-time of his first wife;
3. that these accused threw holy rice on the couple during the performance of the marriage.

In addition to this, the facts found against accused Nos. 3 and 9 are as follows: Accused No. 3 distributed pan after the marriage ceremony was over. Accused No. 9 held the "Antarpat" during the performance of the marriage ceremony and he permitted the use of his premises for the performance of the aforesaid marriage.

(6) The question for consideration is whether the aforesaid acts or any of them constituted an abetment of the offence of bigamy punishable u/s 494 I. P. C.

(7) Section 107 defines abetment. It is well known that an act of abetment may take place in one of three ways: (1) Instigation, (2) Conspiracy, or (3) Intentional aid. Having regard to the charge in the present case, there is no doubt whatsoever that the prosecution did not allege that any of the aforesaid accused had instigated the commission of the offence of bigamy. The was conceded by the learned Government Pleader. The learned Government Pleader, however, urged that, on the facts aforesaid the prosecution had established that there was a conspiracy by all the aforesaid accused persons to commit the

offence of bigamy. I do not think I can agree with this submission. In the first instance no conspiracy was alleged in the charge. The charge was that the aforesaid accused had abetted the void marriage, knowing it to be void, by celebrating the same. Therefore, the charge which the aforesaid accused person were called upon to meet was that they had taken part in the celebration of the marriage. There was no allegation whatsoever that, prior to the celebration of the marriage, these accused had entered into a conspiracy for the purpose of celebrating the marriage in question. From the judgments delivered by the learned trial Magistrate and the learned appellate Judge also, there is no doubt whatsoever that the charge which was pressed against the aforesaid accused was that they had participated in a void marriage. Moreover, the aforesaid facts, which I have mentioned and which have been found against the accused, do not leave any doubt that there was no conspiracy prior to the celebration of the marriage between the accused. Therefore, in my opinion, the charge which was levelled against the accused was not one that they had entered into a conspiracy for celebrating a void marriage. Under the circumstances, the principal question which required to be decided in the present case is whether the facts brought home against the accused as aforesaid constitute an intentional aid within the meaning of Section 107 I. P. C.

(8) For the purpose of determining this question, in my opinion, it is better, first of all, to concentrate on the first three general facts found against all the accused persons. Those general facts are that they knew that the accused No. 1 was celebrating a void marriage and was committing the offence of bigamy; that they remained present at the time of the celebration of that void marriage and, during the performance thereof, they threw holy rice on the couple. There is very good authority for the proposition that mere presence at the commission of a crime even with the awareness that a crime was being committed is not in itself an intentional aid. This proposition is not being disputed by the learned Government Pleader. In fact, this proposition was laid down by this Court as early as in *Empress v. Umi* ILR 6 Bom 126. The learned Government Pleader, however, contended that though this is so, there may be some cases in which persons may occupy a position of influence and rank so that their presence may mean encouragement to commit the crime and he contended that, when such is the case, persons holding the position of rank and influence should be regarded as abettors. For this purpose, the learned Government Pleader relied upon a passage from Messrs. Ratanlal and Dhirajlal's Law of Crimes 19th Edition, at page 230. The passage is as follows:

"Mere presence at the commission of a crime cannot amount to intentional aid, unless it was intended to have that effect. To be present and to be aware that an offence is about to be committed does not constitute abetment unless the person thus present holds some position of rank or influence such that his countenancing what takes place may, under the circumstances, be held a direct encouragement....."

This passage is based upon the case in *Queen-Empress v. Lakshmi*. Crim Rev. Appln. No. 51 of 1868: Rat Un Cri Cas 303. So far as this ruling is concerned, the aforesaid remarks are obiter. In this case, the learned Judges actually came to the conclusion that the woman who had been convicted of the offence of abetment did not hold a special position and her mere knowledge of what was done or was about to be done could not be held to be an abetment. Therefore, the observations which were made in this case do not give any help in deciding the present case. In my opinion even if one agrees with the submission of the learned Government Pleader that, under certain circumstance, where persons present hold position of influence or rank their presence should be construed as an encouragement of the criminal act, in the present case, it is impossible to hold that the aforesaid accused persons held such a position vis a vis accused No. 1 that their presence should be taken as having encouraged the accused No. 1 in committing the offence of bigamy. so far as some of the accused persons are concerned. the Learned Government Pleader had to concede that their acts do not come within the principle which is enunciated above. Accused No. is the brother of the bride. It is conceded by the Learned Government Pleader that so far as these accused persons are concerned, they cannot be said to be occupying a position of rank or influence. and their presence cannot be said to have encouraged accused No. 1 in the performance of the void marriage. The learned Government Pleader, however, contended that the acts of accused Nos. 1 to 4, 9, 11 and 12 stood on a different footing. the accused Nos. 2 and 3 are the parents of the bridegroom. and the accused No. 4 is his uncle. Accused No. 9 is the police patil of the village at which the marriage was celebrated and accused Nos. 11 and 12 are the parents of the bride. It was contended that these persons occupied a position of ranks and influence and, therefore, their presence must be taken to have encouraged accused No. 1 in the performance of the void marriage. This aspect of the case does not appear to have been discussed before any of the lower Courts, and none the lower Courts has applied its mind on this subject. The matter is one of presumption arising from certain relationship existing between the parties. In my opinion the matter is one which is dependent upon the evidence in each case. The admitted fact is that these persons are related as aforesaid and that they remained present at the aforesaid void marriage. There is nothing else on the record of the case which would show that their presence amounted to encouragement and that if these persons had not remained present at the time of the marriage, the offence of bigamy probably would not have taken place and the accused No. 1 would have acted in a manner different from what he did at the time of the performance of the aforesaid marriage. Sometimes elders do remain present even at marriages which they disapprove. they may do so out of sentiments or social considerations. Under the aforesaid circumstances, have regard to the fact that I am dealing with this matter in a revision application, and the fact that this aspect of the case has not been considered by the lower Courts. I am not prepared to hold that the aforesaid accused should be held to have encouraged the performance of the void marriage simply from the fact that they remained present at the marriage.

(9) The next point is whether the fact that the aforesaid accused person threw holy rice on the couple should be regarded as an act of abetment. The evidence discloses that this act of throwing rice was done by the aforesaid persons during the time when the "antarpot" was held and the "managalastakes" were being recited. The question as to whether this act amounts to an abetment or not depends upon a consideration of explanation 2 to Section 107 I. P. C. That Explanation says that whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and, thereby facilitates the commission thereof, is said to aid the doing of that act. Therefore, in order that the aforesaid act of throwing rice may be said to be an act of abetment, it is necessary to enquire whether the act of throwing rice as done in order to facilitate the commission of bigamy and, thereby bigamy and, thereby bigamy was facilitated. . It is not shown that this act is one of the necessary acts which has got to be performed in the celebration of a marriage. It is true that the ceremony which was undertaken by accused No. 1 was a void ceremony and anything which was done on the aforesaid day did not amount to marriage in law. But in order that an offence u/s 494 may be committed it is necessary, at least, that all the ceremonies which are necessary to be performed in order that a valid marriage may take place, ought to be performed and, ordinarily, all these ceremonies would amount to a valid marriage but for the fact that the marriage becomes void on account of the existence of a previous wife. It is not shown to me that the throwing of rice on the couple was a necessary part of the ceremony in the performance of a valid marriage. It appears that this thing is ordinarily done by all the spectators who remain present at a marriage, and the act is more consistent with the presence of the aforesaid persons at the time of the celebration of the marriage rather than actual participation in the acts which ultimately lead to the formation of the marriage contract. In my opinion, the aforesaid act in itself does not lead to the necessary conclusion that the act was done to facilitate the performance of the marriage, much less could it be said that thereby the performance of the marriage was facilitated. Under the aforesaid circumstances. I have come to the conclusion that the acts which have been brought home against all the accused persons, except accused No. 3 and 9, whose further case will be considered hereafter, do not necessarily amount to an act of abetment. In my opinion, the acts which have been brought home against the aforesaid accused No. 2, 4, 5 to 8, and 11 to 13 are not acts of abetment within the meaning of Section 107 I. P. C., and therefore, these persons were wrongly convicted u/s 114 I. P. C.

(10) Before I part with the case of the aforesaid accused Nos. 2, 4, 5 to 8 to 13, I may mention that the learned Government Pleader had submitted that, in any case, the parents of the bride. i.e. accused Nos. 11 and 12 should be convicted of the offence of abetment. He contended that the bride Krishnabai, being under 16 years of age, unless and until the aforesaid two parents had given the girl in marriage, the marriage ceremony could not have been performed. However, there is no prosecution evidence at all that these accused had played any such

part. The only witness does not say a word about any part having been played by accused Nos. 11 and 12 other than the acts which have been already mentioned as having been held proved by the learned trial Judge and the learned appellate Judge. Therefore, I do not think that I would be justified in upholding the convictions of accused Nos. 11 and 12 on the footing that these two persons had given "kanyadan" or done any other special acts which would bring them within the purview of Section 107 I. P. C.

(11) For the aforesaid reasons so far as accused Nos. 2, 4, 5 to 8 and 11 to 13 are concerned, the present revision application deserves to be allowed, and their convictions deserve to be set aside.

(12) As regards accused No.3, the only additional fact which had been found is that he distributed pan after the marriage was celebrated. This, in my opinion is in itself an innocuous act & it cannot be said that his act was done with the intention of facilitating the marriage, which had already taken place, nor can it be held that the marriage was performed in consequence of the distribution of the Pan.

(13) So far as accused No. 9 is concerned, the evidence discloses that not only he allowed his premises to be used for the performance of the marriage, but he also further held the antarpatt during the performance of the marriage. In ILR 6 Bom 126, which I have already, referred to, it was held that mere permission to allow one's premises to be used for the purposes of the marriage does not in itself lead to the intentional aid and, this act did come within the purview of Explanation 2 to section 107 aforesaid. To this, the reply of Mr. Kotwal was that even if this was so, the offence u/s 114 cannot be said to have been committed, because in order that an offence u/s 114 may be brought home, it is necessary, first of all that the offence must fall within the purview of Section 109 I. P. C., and in order that an offence u/s 109 may be said to be committed, it is not merely enough that there should be an act of abetment, but, in addition to that, the prosecution must prove that the offence was committed in consequence of the abetment. He contended that although accused No. 9 may have given the aforesaid intentional aid, it cannot be said that the offence of bigamy was committed in consequence of the act of holding the "antarpatt", Prime facie, this is so. However, the learned Government Pleader relied upon Explanation 2 to Section 107 I. P. C. That explanation, inter alia, states that an act is said to be committed in consequence of an abetment when it is committed with the aid which constitutes the abetment. The learned Government Pleader contended that the facts of the present case fall within the purview of the explanation aforesaid. The contention of Mr. Kotwal was that the test which was to be applied for the purpose of finding out whether a crime is committed in consequence of abetment or not is to determine whether the offence would or would not have been committed if the intentional aid had not been given. I do not think, that I can subscribe to this view. There is nothing in the explanation aforesaid which justifies the aforesaid submission. In my opinion, in order to determine whether

an act has resulted in the commission of a crime, the only important thing which has to be found is whether the act was committed with the aid of the abettor in question, and, if it was committed with the aid, then, the act of the abettor would fall with regard to the fact that the "antarpatri" was held by accused No. 9 and it was done with the full knowledge that the marriage was a void marriage, in my opinion, the act of accused No. 9 does fall within the purview of Explanation 2 to Sec. 107 I. P. C. Mr. kotwal contended that the act of holding the "antarpatri" was done prior to the performance of the marriage, and, therefore, it should not be regarded as an act of intentional aid. This argument ignores Explanation 2 to Section 107 I. P. C. That explanation states in specific terms that an act of abetment may take place prior to the commission of the offence. Therefore, I have no doubt whatsoever that the act of accused No. 9 falls within the definition of the word "abetment" in Section 107 I. P. C. In order that Explanation 2 to Section 107 may apply, it is and whether with that aid the act or the offence was committed. In my opinion, the aforesaid act, which has been brought home against accused No. 9 was an act of aid and, with that aid, accused No. 11 committed the offence of bigamy. Therefore, in my opinion, so far as accused No. 9 is concerned, the offence of abetment has been brought home against him and he was rightly convicted. Therefore, the revision application of accused No. 9, will be rejected, and so far as the revision application of the other accused is concerned, the same will be accepted.

(14) For the aforesaid reasons, I make the rule absolute so far as accused Nos. 2 to 8 and 11 to 13 are concerned, I set aside their convictions u/s 494 read with Section 114 I. P. C. and the sentences passed on them, and acquit them of the offence u/s 494 read with section 114 I. P. C. I further order that the fines if paid by the should be refunded. I discharge the rule so far as accused No. 9 is concerned.

(15) Rule made absolute.