
(2007) 03 GAU CK 0028
In the Gauhati High Court

Rajesh Paul Choudhury

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 19-03-2007

Acts Referred:

Evidence Act, 1872 — Section 50
Penal Code, 1860 (IPC) — Section 306, 497

Citation : (2007) 2 DMC 735 : (2007) 2 GLT 543

Hon'ble Judges : P.G. Agarwal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

P.G. Agarwal, J.—Heard Mr. J.M. Choudhury, learned Senior Counsel appearing on behalf of the accused appellant and Mr. P.C. Gayan, learned P.P.

This appeal is directed against the judgment and order dated 20.6.2001 passed by the Sessions Judge, Cachar, Silchar in Sessions Case No. 66/98 (GR Case No. 1730/95) whereby the accused appellant was convicted u/s 497, IPC and sentenced to imprisonment for three years.

2. In Sessions Case No. 66/98, the accused appellant Sri Rajesh Paul Choudhury was tried for commission of offence under Sections 306/497, IPC. During trial, the prosecution examined as many as 8 witnesses and on conclusion, the learned Trial Court acquitted the accused appellant from the charge u/s 306, IPC; but convicted him for the offence u/s 497, IPC and sentenced to imprisonment for three years and hence, the present appeal.

3. Smt. Reba Biswas (since deceased) was married to Dwiptendu Biswas, the informant, in the year 1985 and out of the said wedlock, a daughter was born to the couple in the year 1989. The couple used to reside in the first floor of the two storeyed building at Janiganj, Silchar and the ground floor was rented out to the accused appellant to run his printing press and a part of the first floor was also given on rent to the accused for residential purpose.

4. The case of the prosecution is that the accused appellant had developed some intimacy with Reba Biswas and illicit relationship grew between them and as a result, the wife started showing apathy to her husband. The husband left the place and started residing elsewhere. On the date of occurrence, the informant's wife was found hanging in the room whereupon information was lodged to police.

5. In this case, the fact that the accused had some relationship with the deceased Reba Biswas is not disputed or challenged by the appellant before us in view of the tell-tale evidence available on record about the fact that the husband used to reside somewhere else from the side of the maid servant who was working in the said house.

6. Learned Counsel for the appellant has submitted that the fact that Reba Biswas was married to the informant Dwiptendu Biswas was also known to the accused appellant; but for that no offence u/s 497, IPC has been made out.

7. Section 497, IPC reads as follows:

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.

8. We, thus, find that the essential ingredients of Section 497, IPC as regards a man having sexual intercourse with a woman, who is the wife of another man and the fact that the man knows the woman, to be the wife of another man, have been established in this case from the evidence led by the prosecution. However, in order to constitute an offence u/s 497, IPC, the prosecution is also required to establish that the husband has not consented or connived. The Dictionary meaning of the word "Connivance" as per Black's Law Dictionary is quoted below-

Connivance--The secret or indirect consent or permission of one person to the commission of an unlawful or criminal act by another. A winking at; voluntary blindness; an intentional failure to discover or prevent the wrong; forbearance or passive consent. *Pierce v. Crisp* 260 Ky. 519 : 86 S.W. 2d 293, 296.

As constituting defence in divorce action, is plaintiff's corrupt consent, express or implied, to offence charged against defendant. *Munir v. Munir* Del. Super 7 Terry 578 86 A. 2d 857, 858. This defense has been abolished by many States with the enactment of no-fault divorce laws.

9. Connivance is based on the principle of "volenti non fit injuria", an anticipatory consent/tolerance of adultery by the other spouse. Connivance or consent is also required to be anterior, i.e., before commission of the offence of adultery and it may be both active or passive acquiescence.

10. In the present case, we find that the informant husband was the owner of the building wherein he used to reside with the wife, deceased Reba Biswas. As stated above, the couple was blessed with a child. The informant had rented out a part of the house to the accused appellant. We find from the evidence on record that the husband had left his own house and started living elsewhere and thus allowing his own wife to live in the same house with the accused appellant. We also find that subsequently the informant husband had filed an application seeking divorce by mutual consent. The conduct of the informant/husband is very much relevant u/s 50 of the Evidence Act. The very conduct of the informant/husband is not that a prudent husband, instead of protecting his wife and kids from the attempted advances of the accused appellant, deserted his wife when he was needed most and allowed the accused, a free goat. It seems that the husband had deserted/abandoned his wife and as such, the act of sexual intercourse that took place between the accused appellant and the deceased, in our opinion, does not constitute an offence of adultery as there was consent/connivance of the informant/husband to whom the deceased was married lawfully.

11. In the result, we hold that the accused appellant is not guilty to the offence charged. The appeal is allowed. The impugned order of conviction and sentence is set aside and the accused appellant is acquitted. The accused appellant is on bail and as such, he need not surrender to his bail bond.

Send down the records.