

(2016) 03 KL CK 0167
In the High Court Of Kerala
Case No : Crl. Rev. Pet. No. 1220 of 2007

Sivadasan

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 30-03-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 198(2)
Penal Code, 1860 (IPC) — Section 497

Citation : (2016) 165 AIC 334 : (2016) 3 CriCC 489 : (2016) CriLJ 3306 :
(2016) 3 ILRKerala 81 : (2016) 2 KerLJ 781 : (2016) 3 KHC 186 : (2016) 2 KLT
855 : (2016) 3 RCRCriminal 805

Hon'ble Judges : B. Sudheendra Kumar, J.

Bench : Single Bench

Advocate : P.T. Mohankumar and A. Ahzar, Advocates, for the Appellant; V.S. Sreejith, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

B. Sudheendra Kumar, J.—The accused in C.C. No. 158/2003 on the files of the Court of the Judicial Magistrate of First Class-II, (Mobile) Kozhikode, filed this Revision petition challenging the concurrent finding of conviction and sentence passed by the courts below under Section 497 IPC. The above case arose out of a private complaint filed by the second respondent herein before the trial court alleging offence under section 497 IPC.

2. The prosecution case can be briefly stated as follows :-

The second respondent herein married Shelvi on 8.12.1989 as per the customary rites and ceremonies of the parties. Thereafter, they lived together as husband and wife. Two children were born in the said wedlock. The revision petitioner was an auto rickshaw driver. He used to take the children of the second respondent to the school in his auto rickshaw. The second respondent was a fisherman. He used to go for his work at about 8.00 a.m., and come back to his house only at about 5.00 p.m. The wife of the second respondent, namely, Shelvi alone used to

be in the house when the children were sent to the school. While so, the wife of the second respondent developed intimacy with the revision petitioner. It was noticed by PW2 that the revision petitioner spent much time in the house of the second respondent on 5.12.1998. On getting suspicion, PW2 peeped through the half wall of the said house. Then PW2 found the wife of the revision petitioner namely, Shelvi, indulging in sexual relationship with the revision petitioner. PW2 warned him not to repeat the same. On 27.12.1998 also, PW2 and another person witnessed sexual relationship between the wife of the second respondent and the revision petitioner. On seeing PW2 and the other person, the revision petitioner ran away from there. The matter was informed to the second respondent herein by PW2 and the other person. The revision petitioner was well aware that Shelvi was the legally wedded wife of the second respondent. The above said act of the revision petitioner was without the consent or connivance of the second respondent herein.

3. Before the trial court, PW1 and PW2 were examined and Ext.P1 was marked for the complainant. No evidence was adduced on the side of the revision petitioner.

4. The trial court, after considering the evidence on record, found the revision petitioner guilty under Section 497 of I.P.C., and convicted him thereunder and sentenced him to rigorous imprisonment for one year and a fine of Rs. 2000/- with a default clause for simple imprisonment for two months. The appeal filed against the said conviction and sentence was dismissed by the appellate court.

5. Service is complete on the second respondent. However, there is no appearance for the second respondent.

6. Heard the learned counsel for the revision petitioner and the learned Public Prosecutor.

7. The learned counsel for the revision petitioner has argued that since the complaint was filed by the second respondent after obtaining divorce, the second respondent ceased to be the husband of Shelvi at the time of filing the complaint and consequently, the trial court ought not to have taken cognizance of the offence on the basis of the complaint filed by the second respondent herein. The learned Public Prosecutor has also fairly submitted that since the second respondent was not having the status of the husband of Shelvi at the time of filing the complaint, the trial court ought not to have taken cognizance of the offence on the basis of the said complaint.

8. Section 497 defines the offence of adultery. The said section falls under Chapter XX of the Indian Penal Code. Chapter XX deals with offences relating to marriage. Section 198 of the Criminal Procedure Code (for short "the Code") imposes certain restrictions in launching prosecution for offences against marriage. As per the said provision, no court shall take cognizance of any of the offences punishable under the aforesaid Chapter XX except upon a complaint by some person "aggrieved by the offence". Sub-section (2) of Section 198 of the

Code provides that no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under Section 497 or Section 498 IPC. The proviso to sub-section (2) of Section 198 of the Code provides that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the court, make a complaint on his behalf. In this context, it is profitable to read sub-section (2) of section 198 of the Code, which is extracted as follows:-

"198. Prosecution for offences against marriage-

(1).....

"(2) For the purpose of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence under section 497 or section 498 of the said Code.

Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave on the Court, make a complaint on his behalf.

(3).....

(4).....

(5).....

(6).....

(7)....."

9. The above said section makes it clear that the husband concerned alone is having the legal right to file a complaint if the offence is adultery. Of course, in the absence of such husband, some other person can make complaint in respect of the said offence under the conditions provided in the proviso to sub-section (2) of Section 198 of the Code. When a person is having the status as a husband, he is aggrieved by the offence under section 497 of IPC and hence he is having every right to be a complainant. However, once he obtains divorce from his wife, his status as the husband stands lost. The word used in sub-section (2) of Section 198 is "husband" and not "the former husband". It is implicit from the section that the husband alone and not the former husband is having the right to file the complaint alleging the offence under section 497 of IPC against the adulterer.

10. In *Sowmithri Vishnu v. Union of India* and Another AIR 1985 SC 1618), the complaint was filed by the husband against the accused therein under Section 497 of IPC during the pendency of divorce petition against the wife, alleging that the accused had adulterous relationship with his wife. Thereafter, the husband obtained divorce during the pendency of the complaint on the ground of desertion. In the said circumstances, the Apex Court quashed the complaint and further proceedings against the accused in the said case holding thus:-

" There was general agreement before us that since the petitioner's husband has already obtained divorce against her on the ground of desertion, no useful purpose will be served by enquiring into the allegation whether she had adulterous relationship with Dharma Ebenezer, against whom the husband has lodged a complaint under section 497 of IPC. Accordingly, we quash that complaint and direct that no further proceedings will be taken therein".

11. In Sowmithri Vishnu (supra), the complaint was filed at the time when the complainant was having the status as husband. In this case, Ext.P1 would show that the divorce was obtained by the second respondent on 29.4.2000. It was an ex- parte order. However, the said order became final and conclusive, as is evident from the judgment of the trial court. It is also borne out from the evidence of PW1 that PW1, who is the second respondent herein, married another lady after the divorce and a child was also born in the said wedlock. The stability of marriage is not an ideal to be scorned. The offence of adultery, as defined in section 497, is considered by the Legislature as an offence against the sanctity of the matrimonial home. The interest of society requires that the adulterous relationship must be punishable by law. So far as a person is having the status as a husband, he is aggrieved by the adulterous relationship of his wife with another person. However, after he ceased to be a husband, he cannot be said to be an aggrieved person as his interest is not to redress his grievance, but to harass his eschewed wife. In view of the above reasons, the husband alone and not the former husband can be an aggrieved person entitled to file complaint alleging offence under Section 497 IPC against the accused alleging adulterous relationship with his wife. From a bare reading of sub-section 2 of Section 198 IPC also, it is clear that the husband of the woman alone shall be deemed to be aggrieved by the offence under Section 497 IPC and not the former husband.

12. In this case, it is borne out from the evidence of PW1 that a petition for maintenance to the children was filed before the Court by Shelvi. Thereafter only, the present complaint was filed. The present complaint was filed after more than 5? months of obtaining divorce as per Ext.P1. Therefore, there is no reason for the petitioner to be aggrieved after having obtained divorce and re-married. For the said reason, I am of the view that the complaint filed in this case was only to persecute the eschewed wife of the petitioner. Since the complaint was filed not by the husband of the woman, the court ought not have taken cognizance of the offence on the basis of the said complaint. For the aforesaid reason, the conviction and sentence passed by the courts below cannot be sustained and consequently, I set aside the same.

13. In the result, this Revision Petition stands allowed, setting aside the conviction and sentence passed by the courts below under Section 497 IPC and the revision petitioner stands discharged for lack of jurisdiction in taking cognizance of the offence by the Magistrate in the absence of a complaint made by the husband. The bail bond of the revision petitioner stands cancelled and the

revision petitioner is set at liberty.