

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.119 of 2003

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Tuntun Sah, Son of Chandradeep Sah, Resident of Village – Jagatpur Devi Rai ke Tola, P.S. Basantpur, District – Siwan.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Raghav Prasad, Adv.

For the Respondent/s : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 05-02-2018

Challenge in this appeal is of judgment of conviction and order of sentence dated 15.02.2003, passed by Shri Ashok Kumar Pathak, the then Additional District & Sessions Judge, Fast Track Court No. IV, Siwan in Sessions Trial No. 629 of 1996 / 397 of 2002, by which sole appellant Tuntun Sah stood convicted under Sections 497 and 498 of the Indian Penal Code (hereinafter referred to as the "IPC") and was sentenced to undergo R.I. for six months under each Section. However, he was acquitted from the charge under Sections 366, 368, 380 and 496 of the IPC. Both the sentences were directed to run concurrently. By the said judgment, the trial court has



acquitted all the other accused persons from the charge levelled against them.

2. Prosecution case as per the complaint petition filed by Kapi Nath Sah (P.W. 8) in short is that brother of informant died fifteen years back and his niece – Indu Devi was living with him and he solemnized the marriage of Indu Devi with one Harendra Sah, who left the said Indu Devi and she came back along with her five years old son to the house of his uncle (informant) and started living there. It is alleged that on 07.09.1995, appellant and other accused persons enticed away Indu Devi and her son and, thereafter, they became traceless.

3. The said complaint petition was transferred under Section 156(3) of the Cr.P.C for registration of F.I.R and on that basis Maharajganj P.S. Case No. 96/95 was registered against the appellant and other accused persons under Section 366, 368 and 380 of the IPC and later on Section 498, 496 and 497 of the IPC was added.

4. Police after investigation submitted charge-sheet against the appellant and other accused persons. Cognizance of the offence was taken and the case was committed to the court of Sessions, which ultimately came



to the file of Shri Ashok Kumar Pathak, the then Additional District & Sessions Judge, Fast Track Court No. IV, Siwan, for trial and disposal.

5. To bring home the charge, prosecution has examined altogether 13 witnesses. They are:-P.W. 1 – Thakur Pandit, P.W. 2- Ishwar Sah, P.W. 3- Narsingh Sah, P.W. 4- Parma Singh, P.W. 5 – Babulal Sah, P.W. 6 - Gorakh Sah, P.W. 7 – Manki Devi, P.W. 8 – Kapinath Sah (informant), P.W. 9 - Tarkeshwar Dubey, P.W. 10 - Narayan Sah, P.W. 11- Ramesh Pandit, P.W. 12 – Virendra Sah and P.W. 13 – Indu Devi, the alleged victim woman.

6. Apart from that following documents have been brought on record and marked as Ext. 1 – Signature on complaint petition, Ext. 2 – F.I.R. and Ext. 3 –Statement under Section 164 Cr.P.C. of Indu Devi.

7. On behalf of defence also one witness has been examined i.e. D.W. 1- Ram Ekbal Tiwary, a formal witness, who proved the statement of Indu Devi under Section 164 Cr.P.C as Ext. A. Apart from that Panchnama has been marked as Ext. B.

8. Defence of the accused persons as per the trend of cross examination and statement under Section 313 Cr.P.C



is that they are innocent and denied the allegation against them and further stated that victim lady had gone along with her son out of her own sweet will and got married with the appellant – Tuntun Sah and out of the said wedlock, they had two issues also.

9. Learned Trial Court after considering the evidence available on record, did not find the case true under Section 366, 368, 380 and 496 and acquitted all the accused persons from the charges levelled against them under the above mentioned Sections, however, the trial court convicted the appellant – Tuntun Sah under Section 497 and 498 of the IPC on the ground that in spite of knowing the fact that the woman was married from before and appellant himself admitted that he married with the victim and he had two issues as well and, therefore, a case under Section 497 and 498 is made out against the appellant. Learned Trial Court also held that the complainant is aggrieved person under Clause (a) of the proviso to subsection (1) of Section 198 Cr.P.C.

10. Contention of learned counsel for the appellant is that the Trial Court has failed to consider that the victim herself has not supported the case of prosecution and she had



stated in her cross-examination that she solemnized the marriage with appellant out of her own sweet will as she was deserted by her husband and the Trial Court has also acquitted the appellant under Section 366, 368, 380 and 496 of the IPC. Further, the Trial Court has also failed to consider that no case under Section 498 of the IPC is made out as there is nothing to show that the appellant enticed or took her away or detained her with criminal intent or taking away her knowing that she was wife of other person with an intention that she may have illicit intercourse with any person, or concealed or detained her with that intent and, therefore, no case under Section 498 of the IPC is made out. Similarly, so far conviction under Section 497 of the IPC is concerned, the Trial Court has failed to consider that under Clause (a) of the proviso to subsection (1) of Section 198 Cr.P.C., for institution of a case for the offence under Section 497, only husband is the competent person and even father and brother of the victim are not competent and the trial court without considering the embargo, convicted the appellant under Section 497 and 498 of the IPC, on the basis of complaint filed by uncle of victim, which is out and out perverse and not sustainable in the eye of



law.

11. On the other hand, learned counsel for the respondent – State defended the finding of guilt recorded by the learned Trial Court and submitted that the trial court has rightly convicted the appellants under Section 497 of the IPC as he himself has admitted that he was well aware that the victim was the wife of another person and in spite of that he married with the victim and established physical relationship and he had admitted that he had two issues also. Further submission of learned counsel for the appellant is that the Trial Court has also considered the application of Clause (a) of the proviso to subsection (1) of Section 198 Cr.P.C. and came to conclusion that at the relevant time the victim was under the guardianship of the informant and as provided under the above Section, 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 and, therefore, there is no infirmity in the impugned judgment and conviction of appellant under Section 497 and 498 of the IPC is just and proper.

12. Heard the rival contentions of the parties. It appears



that P.W. 8 is the complainant/informant of this case and he has supported the prosecution case in *toto* in his evidence and also stated that the appellant enticed the victim away and the evidence of this witness has also been corroborated by the evidence of other witnesses. However, in this case appellant and others have been acquitted from the charge under Section 366, 368, 380 and 496 of the IPC and at the time of occurrence the victim was also major, and, therefore, the evidence of witnesses with regard to abduction of victim girl has no significance. It appears that the appellant as per his own statement under Section 313 of Cr.P.C., has married with the victim girl and he has two issues and he was well aware that the victim was the wife of another person.

13. In the present case, the complaint was lodged by the uncle of the victim and there is admitted case that the victim was deserted by her husband and, thereafter, she was living with her son in the house of his uncle and from there, she was enticed away by the appellant and the Trial Court has found that the uncle being competent person to lodge a case for the offence under Clause (a) of the proviso to subsection (1) of Section 198 Cr.P.C. learned counsel has



vigorously contended that the aforesaid finding of Trial Court is not sustainable as uncle of the victim would not come under the purview of the aggrieved person as has been settled by various pronouncements of different High Courts.

14. For the sake of ready reference, Section 198 Cr.P.C. is enumerated herein below:-

198. Prosecution for offences against marriage.

(1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence: Provided that-

(a) Where such person is under the age of eighteen years or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf;

(b) where such person is the husband and he is serving in any of the Armed Forces of the Union under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised by the husband in accordance with the provisions of sub- section (4) may make a complaint on his behalf;

(c) where the person aggrieved by an offence punishable under¹ section 494 or section 495] of the Indian Penal Code (45 of 1860) is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father' s or mother' s brother or sister² , or, with the leave of the Court, by any other person related to her by blood, marriage or adoption].

(2) For the purposes of sub- section (1), 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 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 of the Court, make a complaint on his behalf.

(3) When in any case falling under clause (a) of the proviso to subsection (1), the complaint is sought to be made on behalf of a person under the age of eighteen years or of a lunatic by a person who has not been appointed or declared by a competent authority to be the guardian of the person of the minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, the Court shall, before granting the application for leave, cause notice to be given to such guardian and give him a reasonable opportunity of being heard.

(4) The authorisation referred to in clause (b) of the proviso to subsection (1), shall be in writing, shall be signed or otherwise attested by the husband, shall contain a statement to the effect that he has been informed of the allegations upon which the complaint is to be founded, shall be countersigned by his Commanding Officer, and shall be accompanied by a certificate signed by that Officer to the effect that leave of 1 Subs. by Act 45 of 1978 , s. 17, for" section 494" (w. e. f. 18- 12- 1978). 2 Ins. by s. 17, ibid. (w. e. f. 18- 12- 1978).

absence for the purpose of making a complaint in person cannot for the time being be granted to the husband.

(5) Any document purporting to be such an authorisation and complying with the provisions of sub- section (4), and any document purporting to be a certificate required by that sub- section shall, unless the contrary is proved, be presumed to be genuine and shall be received in evidence.

(6) No Court shall take cognizance of an offence under section 376 of the Indian Penal Code, where such offence consists of sexual intercourse the a man with his own wife, the wife being under fifteen years of age, if more than one year has elapsed from the date of the commission of the offence.

(7) The provisions of this section apply to the abetment of, or attempt to commit, an offence as they apply to the offence.

15. From perusal of the above Section, it appears that



complain can be lodged for an offence under Section 497 and 498 of the IPC, by an aggrieved person under Clause (a) of Proviso to sub-section (1) and sub Section (2) of Section 198 of the Cr.P.C. and generally it is the husband, who is aggrieved person and on his absence, any person, who is lawful guardian of the victim. The aforesaid question has been discussed in a decision of **Ramnarayan Baburao Kapur v. Emperor**, reported in **A.I.R. 1937 Bombay 186**, in which it has been held as follows:-

"The learned Government Pleader referred us to a case in 20 Cal. 483 as authority for the proposition that the Court has power to frame a charge of an offence under S. 497 or S. 498 even without a complain by the husband. The Calcutta High Court however took a different view in a later case, 29 Cal 415 and this High Court in 14 Bom. L R 141 and 31 Bom 218 has also taken the view that a complaint by the husband by the husband is an essential requirement which cannot be dispensed with. If a criminal charge of adultery is to be preferred a formal complaint of that offence must be instituted in the manner provided by law, and if it is not, the requirements of S. 199 of the Code will not have been satisfied. The point is also made clear by Cl. 3, S. 238. For these reasons the appeal must be allowed and the convictions and sentences of the accused set aside."

16. The aforesaid view also found favour in a decision of Division Bench of Sind High Court in the case of **Sahibrai v. Emperor** reported in **A.I.R 1926 Sind 159**, wherein it was observed that: *The words of S. 199 not imply that there should be any express delegation of trust by the*



husband to the person having care of the woman before the latter could be competent to file a valid complaint. It is sufficient if he had the care of the woman on the husband's behalf during the latter's absence, and in such a case the section does not require for a valid complaint that the leave of the court must expressly be given to the complainant. Where it was found that the Magistrate had in his mind that he must be satisfied that the nephew of the woman's husband was the proper person to file a complaint in the absence of the husband, and he interrogated him on this point and satisfied himself that in the absence of the husband the nephew was competent to file criminal proceedings.

17. The above view of the Courts also found favour from the decision of Orissa High Court in the case of **Pothi Gollari v. Ghanni Mondal** reported in **AIR 1963 Orissa 60**, in which the High Court held as under:-

It was held a complaint by the husband was an essential requirement which cannot be dispensed with. If a criminal charge of adultery is to be preferred a formal complaint of the offence must be instituted in the manner provided under Section 199 Cr. P. C. It was further observed that the words "on behalf" of the husband cannot be said to be without any meaning. The object of Section 498 is to protect the right of the husband and to maintain the sacred relations of marriage but in some cases the husband may connive or consent to a sexual intercourse of his wife by any other person. That



being the design of the law, the husband may as well choose not to file any complaint that would necessarily bring some amount of dishonour both for him and his wife, even though he may be aware of any instance of adultery of his wife. That being the position the provisions of Section 199, Cri. P. C. have to be strictly complied with. In this connection it may be noted that Section 345 Cr. P. C. (before the amendment of 1955) provided that husband alone can compound the offence under Section 497 or Section 498 and the authority was not given to any other person even though he might have filed a complaint with leave of the Court.

In view of this position it must be held that in the present case neither the husband was absent nor the father had the care of the woman on behalf of the husband. The provisions of Section 199, Cri. P. C. have thus not been complied with. Even if the offence of adultery may be said to be proved on evidence, no conviction of the accused can be made on the basis of such an invalid complaint.

18. In the present case, it is the uncle of the victim, who has lodged the complaint and in view of the settled law as discussed above, to my opinion, uncle of the victim, cannot be considered is an aggrieved person as no damage was caused to him nor he was in any manner aggrieved by the aforesaid act of appellant, however, it appears that the learned Trial Court has not considered the same in the right perspective, while finding that the uncle of the victim is an aggrieved person under Section 198 Cr.P.C.

19. Appellant has also been convicted under Section 498 of the IPC, which provides as follows: -

“Enticing or taking away or detaining with criminal intent a married woman.—Whoever takes or entices away any woman who is and whom he knows or has



reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

20. The wording of Section 498 of the IPC, itself shows that the ingredients of the above Section is as follows (i) whoever takes or entices away any woman (ii) who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man (iii) with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished. However, in the present case, the victim girl is the most competent witnesses and she has not been declared hostile by the prosecution and she had stated categorically that appellant had not enticed her away or she was compelled to have illicit intercourse with any other person rather it is her case that she married with the appellant out of her sweet will. In such a situation, conviction of appellant under Section 498 of the IPC, does not appear to be probable.

21. Further Section 497 of the IPC provides that:-



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.

22. In the present case, appellant has admitted that he was knowing that the victim was a married woman and he also admitted that he married with her and out of the wedlock two children were also born. No doubt, there is no direct evidence against the appellant of having sexual intercourse with the victim woman and P.W. 13, victim woman was the only competent witness to throw light on that particular aspect, however, considering the ingredients of Section 497 as also the fact that there is admission of appellant that he married with the victim woman and they were living together and out of the said marriage, two child had also born, which clearly led to an inevitable presumption that act of adultery must have been done as the evidence of sexual intercourse on charge of adultery need not be stronger than that of suit for divorce which points strength to an inference of guilt are sufficient to establish the fact of sexual intercourse. In such a situation,



the ingredients of Section 497 of the IPC, appears to be available in the present case.

23. However, the fact that the uncle of the victim was not competent to lodge a case in view of embargo under Clause (a) of proviso to Sub-Section (1) and Sub-Section (2) of Section 198 Cr.P.C. as observed above. Further, the complainant, in this case does not appear to be an aggrieved person as a person can be said to be aggrieved if apart from the general interest to such a person or public may have got a legal grievance or wrongfully deprives of anything to which, he is legally entitled and not merely the person, who suffers some sort of disappointment. The above question has also been settled by a catena of decisions of High Courts as well as of the Supreme Court.

24. Considering the entire discussions made above and also the fact that the victim in this case was deserted by his husband and was living in her *maike* with her son and, thereafter, she met another person and married with him out of her own sweet will and considering this aspect from humanitarian angle apart from legal point of view, the same goes in favour of the appellant and the victim.

25. Accordingly, this appeal is allowed. Judgment of



conviction and order of sentence dated 15.02.2003, passed by Shri Ashok Kumar Pathak, the then Additional District & Sessions Judge, Fast Track Court No. IV, Siwan in Sessions Trial No. 629 of 1996 / 397 of 2002, is set aside.

26. As the appellant is on bail, he is discharged from liability of bail bond.

(Vinod Kumar Sinha, J)

sunil/-

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	13.02.2018
Transmission Date	13.02.2018

