

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

Criminal Petition No.9372 of 2018

ORDER:

The petitioner is A2 in C.C.No.19 of 2018 on the file of the learned Special Judicial First Class Magistrate for Excise Cases at Hyderabad and respondent No.1 is the *de facto* complainant. It is on the report of the *de facto* complainant covered by Crime No.259 of 2013 dated 26.12.2013 the said crime was registered for the offence punishable under Section 497 IPC. In fact, it is the private complaint and not the report, but for referred to the police for investigation inadvertently by the learned Magistrate invoking Section 156(3) Cr.P.C. unmindfully of the bar under Section 198 Cr.P.C. Section 198 Cr.P.C. reads as under:

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 under [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 sister [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 sub-section (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 sub-section (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 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 (45 of 1860), where such offence consists of sexual intercourse by a man with his own wife, the wife being under [eighteen 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.

So, it is a complaint that to be taken on cognizance and not on the police report for the learned Magistrate by virtue of the statutory bar under Section 198 Cr.P.C. Notice sent to respondent No.1 returned as

left is sufficient service. In fact, without any need of going into merits of the matter the Apex Court in Writ Petition (Criminal) No.194 of 2017 in **Joseph Shine v. Union of India** by the Constitution Bench judgment dated 27.09.2018 delivered by Justice Dipak Misra, the then Chief Justice of India and Justice A.M. Khanwilkar, signed by Justice R.F. Nariman, it is observed that the very Section 497 IPC is unconstitutional and adultery should not be treated as an offence, it is further observed that it is appropriate to declare Section 198 Cr.P.C. which deals with the procedure for filing a complaint in relation to the offence of adultery as unconstitutional.

2. No doubt, Section 198 Cr.P.C. is not dealt with the offence under Section 457 Cr.P.C., but for the entire offence under Chapter XX of the Indian Penal Code viz., right from Sections 493 to 498 IPC and Chapter XX-A and Section 498A IPC. Thus, the observation is only confined to Section 497 IPC for other sections are in the statute book and no so far declared as unconstitutional. It is thereby clear with further observation that when the substantive provision goes, the procedural provision has to pave the same path. There specifically overruled the earlier expressions in **Sowmithri Vishnu v. Union of India**¹ and **V.Revathi v. Union of India**².

3. Having regard to the above, when there is no very offence under Section 497 IPC in the statute book having been declared as

¹ (1985) Supp SCC 137 : AIR 1985 SC 1618

² (1988) 2 SCC 72

said provision unconstitutional as if it is not there in the statute book and not confined with any prospective operation of the unconstitutionality, the very proceedings are liable to be quashed.

4. Accordingly, this Criminal Petition is allowed and the proceedings in C.C. No.19 of 2018 on the file of the learned Special Judicial First Class Magistrate for Excise Cases, Hyderabad against the petitioner-A2 are hereby quashed. The bail bonds of the petitioner, if any, stand cancelled.

Miscellaneous petitions pending, if any, shall stand closed.

14.11.2018
MVA

Dr. B. SIVA SANKARA RAO, J

