

Thakurdas Kimatrai and ors. Vs. the State

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Court : Mumbai

Decided On : Jan-11-1956

Reported in : AIR1956Bom430; 1956CriLJ729

Judge : Gajendragadkar and ;Gokhale, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 215; [Indian Penal Code \(IPC\), 1860](#) - Sections 109, 376, 406 and 495; Bigamous Marriages Act - Sections 5 and 6; Criminal Law

Appeal No. : Criminal Appln. No. 1304 of 1955

Appellant : Thakurdas Kimatrai and ors.

Respondent : The State

Advocate for Def. : Govt. Pleader

Advocate for Pet/Ap. : K.H. Nagrani and ;C.T. Valecha, Advs.

Judgement :

Gajendragadkar, J.

1. This is an application made under Section 215, Cr. P. C. and on behalf of the petitioners Mr. Nagranj has contended that the order of commitment passed against the petitioners by the Judicial Magistrate, First Class, Kalyan Camp,

should be quashed at least in respect of the offence under Section 376, I. P. C.

It appears that commitment proceedings were started against the two petitioners and others and the allegation made against them was that offences under Section 5, Bigamous Marriages Act and Sections 376 and 406, I. P. C. had been committed by them.

As a result of the enquiry held by the learned Magistrate, he came to the conclusion that a prima facie, case had been made out against accused No. 1 under Section 376 read with Section 406, and against accused No. 3 under Section 376 read with Section 109.

The learned Magistrate took the view that not even a prima facie case had been made out against accused Nos. 2 and 4. That is why he has committed the two petitioners to stand their trial in the Court of Session for the offences under Sections 376 and 406, I. P. C. and under Section 6, Bigamous Marriages Act.

2. Shortly stated, the case for the prosecution is that petitioner No. 1 married the complainant Jethibai though he had previously married and his first wife was alive. Subsequent to his marriage with the complainant Jethibai, he was entrusted by Jethibai with her ornaments and he has committed a breach of trust in respect of these ornaments.

For proving the charge under Section 5, the prosecution would have to establish that petitioner No. 1 had been previously married and that his wife was alive at the date of his marriage with the complainant Jethibai. The allegation about this previous marriage is denied by petitioner No. 1. In support of the charge under Section 370. I. P. C., the prosecution appears to contend that petitioner No. 1 fraudulently represented to Jethibai that he was eligible for marriage and that his first wife was not alive.

In other words that case appears to be not that petitioner No. 1 was guilty of fraud in a passive form, but that he actively misrepresented to Jethibai his eligibility for marriage with her. It is not merely suppressio veri which is alleged against petitioner No. 1: active fraudulent misrepresentation is attributed to him and the

charge is that as a result of this active fraudulent misrepresentation petitioner No. 1 committed the offence under Section 376 when he induced Jethibai to have sexual intercourse with him.

Petitioner No. 1 denies the factual allegations made against him and also contends that, even if these allegations are proved, he would not be guilty of the offence under S, 376, I. P. C. In regard to the charge under Section 406, petitioner No. 1 disputes the allegations of fact and denied that ho has committed any such offence.

3. Mr. Nagrani for the petitioner has argued that, whatever may be the position in respect of the charge framed against petitioner No. 1 under Section 5, Bigamous Marriages Act or under Section 403, I. P. C., the charge framed against him under Section 376 is patently untenable, and so Mr. Nagrani wants us to exercise our jurisdiction under Section 215, Cr. P. C. and quash the commitment order in respect of this charge.

The argument presented, by Mr. Nagrani in support of his plea is based on the assumption that fraud which can effectively and legitimately be invoked against his client in support of the charge of rape must be either in respect of the identity of the individual or in respect of the nature of the act.

Fraud in respect of the identity of the individual is covered by the fourth case mentioned under Section 375, I. P. C.: a person is said to commit rape where he has sexual intercourse with a woman with her consent, but the consent is given by the woman in circumstances from which it appears that the man knew that he was not her husband and that her consent was given because she believed that he was another man to whom she was or believed herself to be lawfully married.

According to Mr. Nagrani, even if fraudulent misrepresentation was proved as alleged by the prosecution against his client that would not be enough to sustain a charge of rape. In support of his argument, Mr. Nagrani has referred us to the decision in -- 'The Queen v. Clarence' (1888) 22 QBD 23 (A). In this case the prisoner had been convicted upon an indictment charging him with 'unlawfully and maliciously inflicting grievous bodily harm' upon his wife and with 'an assault' upon

her 'occasioning actual bodily harm' under Ss. 20 and 47 respectively of 24 and 25 Vict. Clause 100.

Evidence showed that at a time when the prisoner knew, but his wife did not know, that he was suffering from gonorrhea, he had connection with her, that the result was that the disease was communicated to her, & that, had she been aware of his condition, she would not have submitted to the intercourse. The majority view in this case was that the conduct of the prisoner did not constitute an offence under either section of the Statute and that the conviction of the prisoner must, therefore, be quashed.

Four learned Judges dissented from this view because in their opinion the conviction was properly recorded and should not be quashed. Mr. Nagrani has laid considerable emphasis on the observations made by Stephen J. According to Stephen J.,

'the only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself or as to the identity of the person who does the act.'

On the other hand, Mr. Valecha for the complainant has argued that even the majority decision in this case would not be applicable and relevant in considering the point which arises before us in the present proceedings.

Mr. Valecha points out that it was a case between husband and wife in which the only allegation made against the husband was that he had suppressed the truth from his wife; on the other hand, in the present proceedings, the allegation made against petitioner No. 1 is that he was guilty of making active, positive, definite fraudulent misrepresentations. Our attention has also been invited by Mr. Valecha to the observations made by Mayno in his Criminal Law, where the learned Author has stated that

'rape is an act of sexual intercourse done without the consent of the woman when from any cause she is incapable of knowing what is being done, or supposes that something different is being done, or, being aware of the nature of the act,

supposes that it is being done under circumstances, which make it an innocent act' (p. 593).

The argument is that the complainant was told by petitioner No. 1 that he was eligible under the law to marry her, and that the marriage would be a lawful and valid marriage; and believing in this representation she consented to the act of sexual intercourse with the petitioner No. 1 on the assumption that the same would be an innocent act. Besides the learned Government Pleader has invited our attention to another aspect of the matter which is relevant and material.

The learned Government Pleader contends that, even if Mr. Nagrani was right in his argument that- the offence of rape could not be proved-against petitioner No. 1, petitioner No. 1 would nevertheless be guilty under Section 495, I. P. C. and that the offence under this section is exclusively triable by a Court of Session like the offence under Section 376, so that the argument of convenience and the interests of justice on which Mr. Nagrani has relied is really ineffective. If the offence of rape cannot be proved, the alternative offence under Section 495 can be alleged and would have to be tried by the Court of Session.

4. We do not propose to express any opinion on the points thus urged before us by Mr. Nagrani, Mr. Valecha and the learned Government Pleader. We have indicated the rival contentions urged before us in order to decide whether an application under Section 215 in these circumstances should be considered on the merits in respect of the charge under Section 376.

The question about the competence of the charge and its effectiveness under Section 376 must today be regarded as a merely hypothetical question. The prosecution may first establish the charge of bigamy. If the prosecution is unable to establish the charge of bigamy, the charge under Section 376 would not have to be considered, the proof of the charge of bigamy would necessarily involve the proof of the earlier marriage with Sitabai.

Even if the charge of bigamy is proved, the prosecution would have to establish the fraud alleged by the prosecution against petitioner No. 1. It would be then that the learned Judge who tries the case' of the petitioners will have to give

appropriate directions to the Jury in respect of the point of law which Mr. Nagrani's client may raise before him.

It would also be necessary, we think for the prosecution to consider whether an alternative charge under Section 493 can and should be framed against the petitioners. It is not as if the point of law which is raised before us under Section 376 is raised on facts proved. Even if we were to decide the point of law against Mr. Nagrani, the prosecution would still have to establish the essential preliminary facts before they secure a conviction against his client under Section 376.

On the other hand, if we decide the point as an abstract proposition of law in favour of Mr. Nagrani, it would still be open to the prosecution to move the learned Judge for an alternative charge under Section 495. Whether or not such an application would and should be granted is a matter on which we express no opinion.

But having regard to these circumstances, we do not think it would be expedient in the interests of justice that we should allow Mr. Nagrani to raise an academic point at the present stage and to press us to decide this hypothetical academic point. We must therefore, hold that no case has been made out for quashing the charge under Section 376.

5. In the result, the application fails and the rule is discharged.

6. Rule discharged.

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