

Munir Vs. King-emperor

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Court : Allahabad

Decided On : Aug-28-1925

Reported in : AIR1926All189

Appellant : Munir

Respondent : King-emperor

Judgement :

Kanhaiya Lal, J.

1. The accused Munir has been convicted of offences under Sections 494 and 497 of the Indian Penal Code and sentenced on each charge to rigorous imprisonment for one year. The sentences are concurrent. The case is somewhat unfortunate. Mt. Ganga Kuar was the wife of Har Gobind. She was married about 5 or 6 years ago, when she was a minor. She was brought by her husband to his house in Ghanshiampur. He did not thereafter allow her to go to the house of her parents, because it is said, her parents had not paid the dowry, which had been settled for the marriage. The accused was in the service of Har Gobind and his duty was to act as chaukidar and keep watch outside his house. On the night of the 30th of October 1922, Har Gobind was away from his house. When he came back he found his wife, Mt. Ganga Kuar, not in the house; and his servant Munir was also absent. He made a report at the Powayan police station next morning that his wife was missing and that she had been enticed away by Munir. Mt. Ganga Kuar states

that Munir told her that her brother was at the door and wanted her and that she went out with Munir but did not find her brother. She enquired where her brother was; and her story is that Munir and his brother Shahzade told her to go with them and that they would take her to the house of her mother. She goes on to say that she was taken from there to different places and ultimately to the house of Amir, a brother-in-law of Munir in Bilsanda, where Munir and she stayed for a month. Amir is stated to have afterwards turned out both of them. They then shifted to the garden of Tika Ram where Munir took employment. She was ultimately arrested at Bilsauda on the complaint of her brother Ganga Sahai on the 24th of December 1924. Meanwhile she had two children by Munir, one of whom died and the other a baby seven months old, is still alive. After her recovery a complaint was filed by Har Gobind on the 3rd of December 1921, stating that she had been kidnapped by Munir with the help of certain other persons and that Munir had done so with the object of having illicit intercourse with her and further stating that Munir had wrongfully kept and confined her and carried on sexual intercourse with her against her will.

2. Mt. Ganga Kuar was sent for medical examination and the opinion of the Sub-Assistant Surgeon who examined her was that she was about 16 years old. In the complaint filed by Har Gobind, Munir was charged with offences under Sections 366, 497 and 498 of the Indian Penal Code. During the enquiry before the committing Magistrate Munir stated that he found the girl roaming about in the Bilsanda Bazar about three years ago and that the girl said that she had been enticed away by some one from the house of her husband. He admitted that he had taken her to his house and celebrated his nikah with her and kept her as his wife. The learned Sessions Judge took further evidence about the age of the girl and examined Dr. Shambhari Lal, the Civil Surgeon of Shahjahanpur, who stated that the girl appeared to be about 17 years old and that her development was compatible with the age of 20 years. He accordingly acquitted the accused of an offence under Section 366 of the Indian Penal Code but convicted him under Sections 494 and 497, Indian Penal Code.

3. The question for consideration here is whether the charge under Section 494 of the Indian Penal Code can be maintained without an express complaint by the

husband to that effect and whether in the circumstances established Hargobind had not connived at the adultery of his wife with the accused. It is also urged that there was no proof of any lawful marriage between Munir and the girl inasmuch as the statement of the girl was that she had not consented to the re-marriage, and that the trial Court had no jurisdiction to entertain the complaint or to enquire into the charges of which the accused had been convicted.

4. Section 494 of the Indian Penal Code makes the offence of bigamy punishable both as regards a person, having a wife living, marrying another and as regards a wife, having her husband living, remarrying, in any case in which such remarriage would be void by reason of its taking place during the life of such wife or husband. The person to whom the woman is re-married cannot be punished under Section 494. He can only be charged with abetment of that offence. Section 109 of the Indian Penal Code indicates the punishment which is to be awarded for such abetment. Section 198 of the Code of Criminal Procedure prohibits a Court from taking cognizance of an offence under Section 494 of the Indian Penal Code except upon a complaint made by some person aggrieved by such an offence. A complaint was made by the husband in the present case; but it was not a complaint about re-marriage or bigamy within the meaning of Section 494 of the Indian Penal Code. A complaint is defined in 8. 4 of the Criminal P.C. as meaning the allegation made orally or in writing to a Magistrate with a view to his taking action under the Code that some person whether known or unknown has committed an offence. The offence complained of by Har Gobind in his application was that his wife had been kidnapped and kept in wrongful confinement by Munir and that he was having illicit connexion with her and against her will. There is nothing to show that he was till then aware that she had been re-married in the nikah form to Munir and no charge under Section 494 of the Indian Penal Code was, therefore, laid therein. It is noticeable however that the provisions of Section 198 of the Code of Criminal Procedure do not apply to a charge of abetment of a marital offence of the kind therein referred to. Section 195 of the Code of Criminal Procedure, which deals with cases in which a previous sanction or order is required for a prosecution under certain charges, provides in express terms that a similar sanction or order is needed for a prosecution for the abetment of those offences or for an attempt to commit them. No such provision is however

contained in Section 198 and it cannot therefore be said that the charge of abetment of a marital offence of the kind referred to therein is excluded from cognizance without a complaint made by some person aggrieved by such abetment. The section is limited in its operation to the offences mentioned therein. Section 109 of the Indian Penal Code is in a sense a separate provision for offences punishable with the same amount of punishment as is provided for the offences said to have been abetted. To constitute a charge of abetment the commission of the substantive offence has no doubt to be established, because there can be no abetment if the substantive offence has not been committed, but the person committing the substantive offence and the person abetting it may not be the same; and it is possible to imagine cases in which the person committing a substantive offence may remain untraced and the person abetting it may be traced and brought to book. In any case the language of Section 198 of the Code of Criminal Procedure does not justify the contention that even where a charge is one of abetment a complaint by the person aggrieved is necessary. In the present case a complaint of an offence under Section 494 of the Indian Penal Code having been committed could not have been made by the complainant because the fact of the remarriage was not till then known to him. The accused Munir admitted the remarriage in his statement before the committing Magistrate and he adhered to that statement in the Court of Session. It has been found, and rightly found, that he knew that Mt. Ganga Kuar was the married wife of Hargobind. The evidence of Hargobind, Mt. Ganga Kuar, her brother Ganga Sahai, and other witnesses proves that there had been a lawful marriage between Mt. Ganga Kuar and Hargobind, Munir was employed as a watchman at their house and his own statement shows that he was aware that she was the wife of Hargobind.

5. It is, however, asserted on his behalf that there was no adequate proof of the performance of the necessary formalities which constituted a marriage under the Muhammadan Law to render the charge of bigamy maintainable, but, as the learned Sessions Judge has rightly pointed out, the statement of Mt. Ganga Kuar that she did not know of her nikah with Munir till people came and told her about it, is not true. She had evidently consented to be married to Munir; for she says that there was a gathering of 10 or 12 persons at the time when the nikah took place about 10 or 15 days after she was abducted and that she was informed by those

persons that the nikah with Munir had been celebrated. The other charge against Munir relates to an offence under Section 497 of the Indian Penal Code. On the statement of the accused himself there can be no question that the appellant was living in adultery with Mt. Ganga Kuar knowing that she was the wife of Hargobind. The contention urged on his behalf is that Hargobind had connived at her adultery by taking no steps since October 1922, beyond making a report to the police, either to get her back or trace her whereabouts. It appears that after Munir and Mt. Ganga Kuar settled in Bilsanda the police got information that Munir, who was a previous convict, had arrived there and that he was living with a strange Hindu woman. Munir and Mt. Ganga Kuar went to the police station at Bilsanda to make their statements and an enquiry slip was thereupon sent by the Sub-Inspector in charge of the Bilsanda police station, district Pilibhit, to the Sub-Inspector in charge of the Powayan Police station, district Shahjahanpur, about their antecedents. The result of that enquiry was communicated by the Sub-Inspector of Powayan police station on the 3rd of January 1923, but it is not on the record. There is, however, the statement of Sub-Inspector Zahir Ahmad attached to the police lines at Pilibhit to the effect that the woman described herself as Mt. Kalawati, wife of Hargobind, and that on the enquiry slip being received back he told Munir to go wherever he liked. There is also the statement of Sub-Inspector Gobardhan Das, then second officer at Powayan, that he had sent for Hargobind and informed him that his wife was at Bilsanda and that Hargobind said that he would not have the woman back as she had lost her religion. Mt. Ganga Kuar also states that she was told by the Sub-Inspector something to that effect. There can be no doubt therefore that Hargobind had then received information that Mt. Ganga Kuar was at Bilsanda and that at that time he was not willing to take her back. That does not, however, dispose of the charge for the information which Hargobind is stated to have received did not indicate that she was living in adultery with Munir. It is indicated that she was in Bilsanda and if he had cared to go there and trace her whereabouts he might possibly have found her. His omission to do so is not evidence of his having connived at her living a life of adultery with Munir. She may have been living any kind of life; but the charge here relates to her adultery with Munir; and Munir cannot escape liability for it, unless there is proof of his specific connivance of her adultery with him. Hargobind was living in Powayan

and Mt. Ganga Kuar was living in another district at the time; and in order to establish connivance mere negligence or inactivity will not suffice. To constitute connivance the facts established must lead to a direct and necessary inference that adultery would be committed with the person charged. They must show that the husband acquiesced in by wilfully abstaining from taking any steps to prevent that adulterous intercourse which, from what passes before his eyes or within his knowledge, he cannot but believe or reasonably think, is likely to occur. They may not go to prove privity to the actual commission of the adultery. As pointed out by Lord Chelmsford in *Gibbs v. Gibbs* 11 H.L. 1 connivance is a figurative expression meaning a voluntary blindness to some present act or conduct, to something going on before the eyes, or something which is known to be going on, without any protest or desire to disturb or interfere with it. There is no such evidence of connivance in this case in regard to the specific acts of adultery with which the appellant is charged.

6. It is also urged that the re marriage took place in Bilsanda and the adultery also took place there, and that the Sessions Judge of Shahjahanpur had, therefore, no jurisdiction to try the case. But Section 179 of the Code of Criminal Procedure, lays down that where a person is accused of the commission of any offence by reason of anything which had been done and of any consequence which has ensued, such offence may be enquired into or tried by a Court within the local limits of whose jurisdiction any such thing had been done or any such consequence has ensued. The consequence of the re-marriage and adultery was that the complainant was kept deprived of his wife from the time she went into the keeping of the appellant.

7. There is no reason, therefore, for interfering with the conviction or sentence.

8. Mt. Ganga Kuar is living at present with her brother Ganga Sahai. Hargobind states that he is willing to take her back and keep her if she performs certain pilgrimages.

9. The appeal is dismissed except in so far that the conviction of the appellant under Section 494 of the Indian Penal Code is altered into one of abetment under Section 109 read with Section 494 of the Indian Penal Code. The other conviction

and the sentences passed will stand.

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