State Vs. Bhanwaria

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Court : Rajasthan

Decided On : Feb-25-1965

Reported in : AIR1965Raj191; 1965CriLJ673

Judge : L.N. Chhangani, J.

Acts : Indian Penal Code (IPC), 1860 - Sections 441, 448, 451 and 497

Appeal No. : Criminal Appeal No. 393 of 1963

Appellant : State

Respondent : Bhanwaria

Advocate for Def. : Ganpat Singh, Adv.

Advocate for Pet/Ap. : Govt. Adv.

Disposition : Appeal allowed

Judgement :

L.N. Chhangani, J.

1. This is an appeal by the State against the order of Sub-Divisional Magistrate Begu (Chittorgarh) dated 19th March, 1963 acquitting the respondent Bhanwaria Bhil of Sukhpura of an offence under Section 448, Indian Penal Code.

2. The prosecution case was that just before midnight intervening 11th December, 1962 and 12th December, 1962 the accused respondent entered the house of Jetia with an intent to commit the offence of theft. On account of his entry the oxen in the house of Jetia made some movements causing noise and there was also some noise on account of the rattling of the utensils. Balu, the nephew of Jetia heard the noise and he closed the door of Jetia's house from outside by bolting. It may be mentioned here that Jetia was not at his house, he having gone to some other place for kirtan, leaving behind his wife Sevu alone. Balu after closing the door went to inform Jetia. Jetia came to his house and opened the door from outside and found the accused inside the house. The accused wanted to get out from the house but he was not allowed to do so. He was shut up in the house, and a Police Constable from a nearing Out Post Dhangramhow was called and the accused was arrested. The matter was eventually reported to the police and after investigation the accused was challaned for an offence under Section 457 Indian Penal Code. The Magistrate heard the preliminary arguments and recorded the statement of the accused. The accused admitted that he had entered the house of Jetia but he denied that he had the intention to commit theft. He admitted that he was arrested on the spot. He, however, added that he had been invited by Jetia's wife and on her invitation he entered the house of Jetia. He further added that he had been carrying on illicit intercourse with Jetia's wife for the last twelve months.

3. The Magistrate framed a charge under Section 457 Indian Penal Code. After the evidence was recorded the Magistrate altered the charge to one under Section 448 Indian Penal Code only. The prosecution examined seven witnesses to prove its case. The accused when examined under Section 342, Criminal Procedure Code, took the same stand. The Magistrate after discussing the evidence accepted the defence version and held that the accused entered the house with the tacit permission of Jetia's wife. He held that there was no proof that the accused had intended to commit the offence of theft. On this finding the Magistrate recorded a conclusion that the accused respondent 'did not intend to annoy the husband of the woman who had invited him. He on the contrary tried to avoid the husband'. Relying on the Full Bench decision in Abdul Majid v. Emperor, AIR 1938 Lah 534 (FB), he acquitted the respondent.

4. Aggrieved by this decision the State has filed this appeal. I kave heard learned counsel for the State and Mr. Ganpatsingh for the accused respondent. On the facts there is no serious controversy. It is common ground that the accused entered the house of Jetia in the midnight intervening 11th December, 1982 and 12th December, 1962. The prosecution and the defence differ as to the intention with which the accused entered the house of Jetia. The prosecution argued that the accused respondent had intended to commit theft. The, accused respondent on the other hand pleaded that he had entered the house on the invitation of Mst. Sevu, the wife of Jetia. There is no evidence whatsoever to establish the accused respondent's intention to commit the offence of theft. On the other hand the circumstances of the case clearly negative any such intention. However, considering the fact that the accused entered the house of Jetia at about midnight in the absence of Jetia and further the admission of the accused that he had been carrying on intrigue with Mst. Sevu, the wife of Jetia for the last twelve months it could safely be held that the accused entered the house of Jetia with intent to commit sexual intercourse with Mst. Sevu.

5. The question, therefore, calling for determination is whether a person entering upon the house of a person on the invitation of a married woman can be said to commit the offence of trespass. The answer to this question depends upon whether the commission of sexual intercourse with a married woman will amount to an offence or not. If it amounts to an offence as it certainly will, if the sexual intercourse is without the consent or connivance of the husband, then the act of the accused will certainly amount to an offence of trespass with reference to his intention to commit an offence. If such a sexual intercourse cannot amount to an offence for lack of proof of the absence of the husband's consent or connivance, then the act of the person entering the house of another person may not amount to an offence in the absence of proof of the alternative intention to intimidate, insult or annoy.

In the present case it is not the case of the State that the accused should be held guilty with reference to his intention of insulting, intimidating or annoying Jetia. The State's simple case is that the accused respondent entered the house to commit sexual intercourse with Jetia's wife without Jetia's consent or connivance and thus

had intention to commit an offence. In this view of the matter there can be no doubt that the decision in AIR 1938 Lah 534 (FB) relied upon by the Magistrate is not at all applicable. A plain reading of Section 441 which defines criminal trespass shows that the prosecution may prove any of the alternative intentions specified therein to make an entry upon the property in the possession of another a trespass. It may prove that the intention was either to commit an offence or in the alternative it may prove that the intention was to intimidate, insult or annoy. The Full Bench in AIR 1938 Lah 534 (FB) was dealing with a case where the accused had an intention of committing sexual intercourse with an unmarried woman with her consent which did not amount to an offence. The question of an intention to commit an offence did not arise for consideration in that case. The Full Bench was therefore only considering whether an intent to annoy was established or not. The following observations from the order of reference of Blacker J, bear out the above position :

'The offence of criminal trespass has to be done with the intent either of committing an offence or of intimidating, insulting or annoying. As Mst. Razia was not a married girl there was clearly no offence to be committed, and the only possible criminal intent which could be attributed to the petitioner was that of annoying the inmates by having an illicit connexion with their female relation.'

In the judgment of Full Bench also the position has been made clear in the following words :

'It was conceded for the Crown that the girl being unmarried and sui juris, it was not a criminal offence to have intercourse with her with her consent and therefore the case did not fall within the first part of paragraph 1 of the section. It was however contended that the second part of the paragraph applied, as in entering the house in the possession of Abdul Raoof and Nawab Din, the petitioner had the intent to 'annoy' the persons in possession of the property entered upon.'

In the present case, as stated earlier, the question of an intent to annoy does not arise at all and the only question for consideration is that whether the accused intending to commit sexual intercourse with the wife of Jetia was intending to commit an offence or not. Clearly therefore, the magistrate committed a serious

error of law in relying upon Abdul Majid's case, AIR 1938 Lah 534 (FB). For the correct principles governing such cases I may refer to a decision of the same Full Bench of Lahore High Court delivered on the same day in Mohammad Yar v. Emperor, AIR 1938 Lah 514 (FB). The law on the point was laid down as follows :

'Where a person one night passes stealthily through the court-yard of one house with the intention of committing adultery in another adjoining house, such person is not guilty of trespass in respect of the former house under second alternative of Section 441..... Such person is, however, guilty of trespass in respect of the former house under first alternative of Section 441 because Section 441 means that if a person enters upon the property with intent to commit an offence on that property or on any other property or with respect to a person who is or is not in possession of the property entered upon he is guilty under it.'

The two earlier decisions of the Lahore High Court in Emperor v. Jarnali, AIR 1925 Lah 464 and Kalaram v. Emperor, AIR 1925 Lah 635 have taken the same view. The Full Bench decision of the Lahore High Court in AIR 1938 Lah 514 (FB) has been followed in Jhallar v. State, AIR 1954 All 17. In the light of the principles laid down in the cases discussed above the question emerging for consideration is whether the sexual intercourse which the accused was intending to commit with Jetia's wife will be an offence or not. If Jetia's consent or connivance to the accused's sexual intercourse with his wife cannot be reasonably inferred, the sexual intercourse of the accused with Jetia's wife would certainly be an offence under Section 497 of the Indian Penal Code. At this stage it was contended by Mr. Ganpatsingh that it is for the prosecution to establish the absence of consent or connivance on the part of Jetia to bring the guilt home to the accused. He relied upon Brij Basi v. Queen Empress, ILR 19 All 74 and stressed the following observations:

"It is the first principle of criminal law that where a statute creates a criminal offence the ingredients of that criminal offence must be strictly proved, and that where the doing of an act without consent or without authority is made a criminal offence, and the statute does not expressly put upon the accused the proof of such consent or authority, it is necessary part :of the case for the prosecution to

negative by evidence such consent or authority.' 6. It was further observed : 'to sustain a conviction under Section 451 of the Indian Penal Code, it is necessary to prove that if the accused had sexual intercourse with the wife of Ramgopal it was without Ramgopal's consent or connivance.'

One may have no quarrel with the opinion expressed in Brijbasi's case, ILR 19 All 74. At the same time it must be pointed out whether the prosecution succeeds in proving the absence of consent or connivance must, in the ultimate analysis, be a question of fact to be answered in the context of facts and circumstances of individual cases. In Khanoon Ram v. Emperor, (AIR 1920 Lah 62) the Lahore High Court without expressing any opinion as to the correctness or otherwise of the decision in Brijbasi's case ILR 19 All 74 inferred absence of consent or connivance from the fact that the husband was absent from the house in the legitimate pursuit of his occupation. The learned Judges safely presumed that the husband neither consented to nor connived at adultery or immorality on the part of his wife. In AIR 1925 Lah 635 the Lahore High Court again inferred absence of consent or connivance from the fact that the husband was living in another village and was wholly ignorant of what was going on in his father-in-law's house. It was held that he could neither consent nor connive at the adultery of his wife. In Balaram v. Emperor, AIR 1925 Cal 160 the accused was prosecuted for an offence under Section 457, Indian Penal Code on an allegation that he committed house trespass with an intent to commit adultery. The husband himself was not the complainant and the complaint was lodged by a constable. The husband, however, was examined in the course of the trial as a Court witness and he answered one question put to him by the Court in these terms :

'I want redress for the wrong done to me and to my wife.'

On the basis of this statement it was held that there was evidence on record that the husband did not consent to or connive at the attempt of the accused to commit adultery with his wife.

It is clear from a review of the above cases that the finding as to the absence of consent or connivance on the part of the husband has to be arrived at on the facts and the circumstances of individual cases and there should not be undue

strictness in arriving at a finding. In the present case at the time when the accused respondent entered the house of Jetia he was absent from the house, he having gone for a kirtan. The accused respondent entered the house at about mid-night. Immediately when Jetia was informed of the entry and trespass by the accused he returned to his house, beat his wife and also beat the accused and then reported the matter to the police and got the accused respondent arrested. He appeared as a witness and there is nothing in his statement which can lend support to inference of his consent or connivance. After going through the statement of Jetia and considering circumstances of the case I have no doubt whatsoever that the accused respondent had intended to commit sexual intercourse with Jetia's wife without the consent or connivance of Jetia. It follows that the intention of the accused respondent while entering the house of Jetia was to commit an offence of adultery. The act of the accused, therefore, amounts to offence under Section 451, Indian Penal Code. As the accused was charged only with the minor offence under Section 448 it will not be proper to record conviction of the accused respondent under Section 451, Indian Penal Code. He must, therefore, be convicted under Section 448, Indian Penal Code.

7. The appeal is accepted, acquittal of the respondent is set aside and he is convicted under Section 448, Indian Penal Code. Learned counsel for the respondent at this stage contended that the accused should be dealt leniently in the matter of his sentence. He invited my attention to various cases where lenient sentences were awarded in similar cases. In two cases the accused were let off with sentences already undergone. In the present case the accused having been acquitted it is not a case of the accused having undergone any sentence. The learned counsel therefore suggests that the accused respondent should be dealt under the Probationer of Offenders Act. He emphasised the class of the society to which the parties belong and the subsequent conduct of Jetia and his wife. Considering that the offence was committed in the year 1962 and in view of the facts and circumstances of the case I do not feel inclined to award a sentence against the respondent and propose to treat him under the Probationer of Offenders Act. The respondent shall stand released, provided he executes a personal bond in the amount of Rs. 1,000/- (One thousand only) and produces one surety in the like amount to the satisfaction of the Sub-Divisional Magistrate, Begu

(Chittorgarh) agreeing to appear and receive sentence as and when called upon during a period of two years, and in the meantime, to keep p3ace and be of good behaviour. The respondent shall furnish the personal and security bonds in the Court of the Sub-Divisional Magistrate within one month from today. If he fails to furnish the bonds the S. D M. will take steps to get an appropriate sentence passed against him.