

Brother John Antony Vs. the State

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Court : Chennai

Decided On : Dec-04-1990

Reported in : 1992CriLJ1352

Judge : Janarthanam, J.

Appeal No. : Criminal Misc. Petns. Nos. 2334, 2337 and 2340 of 1988

Appellant : Brother John Antony

Respondent : The State

Advocate for Def. : A. Shanmugham, Addl. Public Prosecutor

Advocate for Pet/Ap. : T. Arulraj, Adv.

Judgement :

ORDER

1. The petitioner in all these petitions is one and the same and he is the Sub-Warden of the Boarding Home attached to St. Mary's Higher Secondary School Tuticorin.

2. During the period from September, 1986 to 16th February, 1987, an impression was gaining momentum in the said School that he voluntarily had carnal intercourse against the orders of nature with the inmates of the Boarding Home.

3. One M. Mohan was studying in the VIX Standard in the School. He was an inmate of the Boarding Home. His brother is by name M. Thiagarajan. He was stated to have informed his brother about the perverted sexual assaults of the Sub-Warden on the inmates of the Home, inclusive of himself.

4. Consequently, on 21-2-1987 the said Thiagarajan lodged a report before the Sub-Inspector of Police Tuticorin South Police Station - the respondent herein about such illegal activities being committed with impunity. He further revealed in the report that despite complaints having been made to all concerned in the administration of the institution, no action was taken against the culprits. But, on the other hand, they emanated for removal of the students, who complained of such activities, from the school, apart from causing imminent threat to their lives.

5. On receipt of the report, the respondent registered the case in Crime No. 279/87 for an alleged offence under section 377, I.P.C. against the petitioner and took up further investigation. During the course of investigation, the sexual perverted acts of the petitioner on certain inmates of the Boarding Home came to light and all those inmates connected with those incidents were examined and their statement recorded. After completing the formalities of the investigation, he laid three reports under section 173(2) Cri.P.C. - first two reports covering six incidents and the third report covering two incidents, for the alleged offence under section 377, I.P.C. against the petitioner, which was taken on file as C.C. Nos. 25 to 27 of 1988 by the Sub-Divisional Judicial Magistrate, Tuticorin.

6. On receipt of process, the petitioner came forward with the present actions, invoking the inherent jurisdiction of this Court to quash the criminal proceedings initiated against him in those three cases.

7. Learned Counsel appearing for the petitioner would submit that the facts covering the various transactions or incidents in all these cases and now available in the shape of Section 161, Cr.P.C. statements of victims of sexual assault, if perused with a little bit of care, caution and circumspection would point out that no offence under Section 377, IPC could ever be stated to have been committed by the petitioner. He would further amplify by stating that the acts attributed to have been committed by him getting revealed by Section 161, Cr.P.C. statements can,

by no stretch of imagination, be stated to fall within the four corners of Section 377, IPC, if a proper construction of interpretation of the various words used in describing the offence under that section is made.

8. Learned Additional Public Prosecutor would however repel such a submission.

9. The point posed for consideration is of some paramount importance and significance, as the case law available on the subject reflected by the superior Courts is not much. The sexual perversion takes shape in manifold forms going by different names such as,

'SODOMY : Non coital carnal copulation with a member of the same or opposite sex, e.g., per anus or per os (mouth). BUGGERY : Intercourse per anus by a man with a man or woman; or intercourse per anus or per vaginam by a man or a woman with an animal. BESTIALITY : Sexual intercourse by a human being with a lower animal. TRIBADISM : Friction of the external genital organs by one woman on another by mutual bodily contact for the gratification of the sexual desire. SADISM : A form of sexual perversion in which the infliction of pain and torture act as sexual stimulants. MASOCHISM : Opposite of sadism and sexual gratification is sought from the desire to be beaten, tormented or humiliated by one's sexual partner. FETICHISM : Experiencing sexual excitement leading to orgasm from some part of the body of a woman or some article belonging to her. EXHIBITIONISM : Exposure of genital organs in Public.'

10. The question that arises for consideration is as to whether Section 377, I.P.C. describing 'UNNATURAL OFFENCES' would take, in its fold and sweep and amplitude all the sexual perverse acts as catalogued above. This has to be examined with reference to the language of Section 377, IPC, which runs as under :-

'377. UNNATURAL OFFENCES : Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation : Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.'

11. Certain guidelines had been given by various High Courts of Judicature and Supreme Court as respects the interpretative approach to be adopted in construing the penal provisions of the statutes and some of them may be referred to here.

'(1) AIR 1941 Lah 301 : (1941 (42) Cri LJ 765) (High Court Bar Association v. Emperor). It was observed at page 303 (of AIR) : (at p. 767 of Cri LJ) thus :

'It is a well-established canon of interpretation of statutes that a penal provision of law must be strictly construed and that no act should be penalised unless it clearly falls within the ambit of the penal provision.'

: AIR1943 All379 (Madho Saran Singh v. Emperor). It was observed at page 388 (of AIR) : (at p. 500 of Cri LJ) thus :

'All penal enactments, as a rule, are interpreted in an atmosphere free from all bias and, if necessary, where there is an ambiguity, in favour of the subject.'

(3) : [1961]3SCR986 (M. V. Joshi v. M. U. Shimpi). It was observed at page 1498 (of AIR) : (at p. 700 of Cri LJ) thus :

'When it is said that all penal statutes are to be construed strictly, it only means that the Court must see that the thing charged is an offence within the plain meaning of the words used and must not strain the words. To put it in other words, the rule of strict construction required that the language of a statute should be so construed that no case shall be held to fall within it which does not come within the reasonable interpretation of the statute. It has also been held that in construing a penal statute it is a cardinal principle that in case of doubt, the construction favourable to the subject should be preferred. But these rules do not in any way affect the fundamental principles of interpretation, namely, that the primary test is the language employed in the Act and when the words are clear and plain the Court is bound to accept the expressed intention of the legislature.'

(4) The passage occurring at pages 170 and 171 of the book 'principles of Statutory Interpretation' by G. P. Singh, Third Edition regarding the construction of an 'explanation' appended to the provisions of a statute may usefully be referred to here :

'An explanation is at times appended to a section to explain the meaning of words contained in the section. It becomes a part and parcel of the enactment. The meaning to be given to an 'Explanation' must depend upon its terms, and 'no theory of its purpose can be entertained unless it is to be inferred from the language used.' But if the language of the Explanation shows a purpose and a construction consistent with that purpose can be reasonably placed upon it, that construction will be preferred as against any other construction which does not fit in with the description or the avowed purpose. In the Bengal Immunity Co.'s Bengal Immunity Co., Ltd. v. State of Bihar, : [1955]2SCR603 .

'An Explanation may be added to include something within or to exclude something from the ambit of the main enactment or the connotation of some word occurring in it. Even a negative Explanation which excludes certain types of a category from the ambit of the enactment may have the effect of showing that the category leaving aside the excepted types is included within it. An Explanation, normally, should be so read as to harmonise with and clear up any ambiguity in the main section and should not be so construed as to widen the ambit of the section. It is also possible that an Explanation may have been added ex abundanti cautela to allay groundless apprehensions.'

12. Section 377, IPC de hors the Explanation appended to it consists of the following ingredients :-

'(1) A person accused of this offence had carnal intercourse with man, woman or animal;

(2) Such intercourse was against the order of nature; and

(3) Such act by the person accused of the offence was done voluntarily.'

13. The word 'voluntarily' is defined under section 39 of the Indian Penal Code, which runs as under :-

'39. VOLUNTARILY - A person is said to cause an effect 'voluntarily' when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.'

14. The meaning of the two words in the phraseology 'carnal intercourse' may be understood by reference to certain Dictionaries.

Butterworths Medical Dictionary, Section Edition furnishes the meaning of the words, intercourse' 'coitus' and 'carnal knowledge' at pages 896, 386 and 302 respectively thus :

INTERCOURSE : Coitus, Carnal Intercourse, Sexual Intercourse, Coitus (L. Intercursus interposition). COITUS : Sexual union Coitus, Incompletus Coitus, Interruptus Coitus in which the male organ is withdrawn from the vagina before ejaculation takes place. : Coitus Reservatus, Sexual intercourse in which the male withholds his orgasm until the female climaxes as a means of contraception, or sometimes as a morbid condition associated with inability to ejaculate. Coitus A x LA Vache Coitus from behind with the female partner in the knee-chest position (L. Coire to come together). CARNAL KNOWLEDGE : Sexual connection or partial sexual connection with some degree of penetration. (L. cargo flesh, knowledge).'

15. In understanding the phraseology, 'carnal intercourse', the Explanation appended to the section assumes signal importance. According to the Explanation, penetration is sufficient to constitute the carnal intercourse necessary to the offence described in the section. For the offence to be committed under the section, apart from the other three ingredients referred to earlier, the ingredient of penetration, however minimal it may be is necessary.

16. The Shorter Oxford English Dictionary, Volume IX, Third Edition at page 1464, the meaning for the words 'penetrate' and 'penetration' are given thus :

17. Now, very few decisions available throwing light on the words and phrases used in the section may be referred to, for understanding the import, content and the meaning of the section.

'PENETRATE : .v. 1530 (f. L. penetrate, penetrare to place within, enter within etc., related to penitus interior, etc., see ATE). I. trans, to make or find its (or one's) way into or right through (something) usu. implying force or effort to gain access within, to pierce, b. to permeate, also with personal subj; to cause to be permeated; to imbue (with something) 1680.

2. intr. To make its (or one's) way into or through something, or to some point or place implying remoteness or difficulty of access); to gain entrance or access 1530.
3 fig. (trans.) to pierce the ear, heart, or feelings of; : to touch' 1591 b. intr. To touch the heart SHAKS.

4. trans. To gain intellectual access into the inner content or meaning of, to see into or through or through; to find out, discover, discern 1560. b. intr. To see into or through 1589.

1. A could which it was almost impossible to p. 1860. b. The reader .. should have penetrated himself .. with the stemosphere of the times 1887.

2. Born where Heav'n's influence scarce can p. POFE,

3. A Man penetrated with. Grief 1720 b. Cymb. II iii. 14.

4. Clive penetrated and disappointed his designs 1818. Hence penetrating ppl. a .. ly adv. -ness. PENETRATION : 1623. (at. late L. Penetrationem :: f. penetrate PENETRATE)

1. The action, or an act, of penetrating; also mutual permeation as of two fluids. b. Nat. Phil. The occupation of the same space by two bodies at the same time; formerly p. of dimensions, 1661.

2. Power of penetrating, as a measurable quantity or quality. a. Gunnery. The depth to which a bullet etc., will penetrate any material against which it is fired. 1807. b. Optics. The power of an optical instrument to enable an observer to

see into space, or into an object, 1799.

3. fig. Insight acuteness discernment, 1605.

1. His Magnetic beam .. to each inward part with gentle p Shoots invisible vertue even to the deep MILT.

2. a. The more p. shells have the better 1901.

3. You can pretend to be a Man of P. STEELE.' '(1) 1969 Cri LJ 818 (State of Kerala v. K. Govindan) :

In this case, the question that came up for consideration was as to whether the act of committing intercourse between the things is carnal intercourse against the order of nature. A learned Judge of Kerala High Court, who decided the case, held that committing intercourse by inserting the male organ between the thighs of another is an unnatural offence under section 377 of the Indian Penal Code. While so holding, learned Judge had the occasion to explain the meaning of the words 'intercourse' and also the word 'penetrate' in a graphic fashion. Such portion of the discussion is traceable from paragraphs 19 and 20 of the judgment at page 823, which is as under :-

'(19) The word 'intercourse' means 'sexual connection' (Concise Oxford Dictionary). In Kannu v. Emperor, AIR 1925 Sin 286 : 1925 (26) Cri LJ 945 the meaning of the word 'intercourse' has been considered :

'Intercourse may be defined as mutual frequent action by members of independent organisation.'

The commercial intercourse, social intercourse etc., have been considered and then appears :

'By a metaphor the word intercourse, like the word commerce, is applied to the relations of the sexes. Here also, there is the temporary visitation of the organism by a member of the other organisation, for certain clearly defined and limited objects. The primary object of the visiting organisation is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis But there is no

intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity.'

Therefore, to decide whether there is intercourse or not, what is to be considered is whether the visiting organ is enveloped at least partially by the visited organism. In intercourse between the thighs, the visiting male organ is enveloped at least partially by the organism visited, the thighs, the thighs are kept together and tight.

'(20) Then about penetration. The word 'penetrate' means in the Concise Oxford Dictionary, 'find access into or through, pass through.' When the male organ is inserted between the thighs kept together and tight, is there no penetration. The word 'insert' means place, fit, thrust'. Therefore, if the male organ is 'inserted' or thrust' between the thighs, there is 'penetration' to constitute unnatural offence.'

(2) AIR 1925 Sin 286 : 1925 (26) Cri LJ 945 (Khanu v. Emperor) : The question which was posed for consideration in this case was whether the accused (who is clearly guilty of having committed the sin of Gomorrah coitus per os) with a certain little child, the innocent accomplice of his abomination, has thereby committed an offence under Section 377, IPC. It was observed :

'Is the act here committed one of carnal intercourse If so, it is clearly against the order of nature, because the natural object of carnal intercourse is that there should be the possibility of conception of human beings, which in the case of coitus per os is impossible By a metaphor the word intercourse, like the word commerce, is applied to the relations of the sexes. Here also there is that temporary visitation of one organism by a member of the other organisation, for certain clearly defined and limited objects. The primary object of the visiting organisation is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. But there is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity. Looking at the question in this way, it would seem that the sin of Gomorrah is no less carnal intercourse than the sin of Sodom.'

(3) AIR 1934 Lah 261 : (1934 (Cri LJ 1096))(Khandu v. Emperor) : Sexual intercourse per nose with a bullock is an unnatural offence within the meaning of

Section 377, IPC.

(4) : AIR1968 Guj252 (Lohana Vasantlal Devchand v. The State). In this case, there were three accused. Accused 1 and 2 had already committed the offence, in question, which was carnal intercourse per anus, of the victim boy. The boy began to get a lot of pain and consequently, accused 2 could not succeed having that act. He therefore voluntarily did the act in question by putting his male organ in the mouth of the boy and there was also seminal discharge and the boy had to vomit it out. The question that arose for consideration therein was as to whether the insertion of the male organ by the second accused into the orifice of the mouth of the boy amounted to an offence under section 377, IPC. It was held : The act was the actual replacement of desire of coitus and would amount to an offence punishable under section 377. There was an entry of male penis in the orifice of the mouth of the victim. There was the enveloping of a visiting member by the visited organism. There was thus reciprocity; intercourse connotes reciprocity. It could, therefore, be said that the act in question amounted to an offence punishable under section 377.

What was sought to be conveyed by the explanation was that even mere penetration would be sufficient to constitute carnal intercourse, necessary to the offence referred to in Section 377. Seminal discharge, i.e., the full act of intercourse was not the essential ingredient to constitute an offence in question.

It may be true that the theory that the sexual intercourse is only meant for the purpose of conception is an out-dated theory. But at the same time it could be said without any hesitation that the orifice of mouth is not, according to nature, meant for sexual or carnal intercourse. Viewing from that aspect, it could be said that this act of putting a male-organ in the mouth of a victim for the purposes of satisfying sexual appetite would be an act of carnal intercourse against the order of nature.'

18. The foregoing discussions would point out that if a person accused of this offence, voluntarily had carnal intercourse with any man, woman or animal with a little bit of penetration against the order of nature such an act would fall within the clutches of the section in committing the unnatural offence liable to be punished thereunder. In this view of the matter, except the sexual perversions of sodomy,

buggery and bestiality, all other sexual perversions, as catalogued above, would not fall within the sweep of this section.

19. In the backdrop and setting of the discussions as above, let me delve deep to decide the question as to whether the various acts attributed to the petitioner would fall within the ambit of Section 377, IPC requiring the petitioner to undergo the ordeal of trial.

20. The alleged over acts attributed to the petitioner in all the three cases would fall under two categories, namely, -

(1) insertion of the penis of the petitioner into the mouth of the victim boy and doing the act of incarnal intercourse up to the point of ejaculation of semen into the mouth; and (2) manipulation and movement of the penis of the petitioner whilst being held by the victim boys in such a way as to create an orifice like thing for making the manipulated movements of insertion and withdrawal up to the point of ejaculation of semen.

21. As regards the alleged act of the petitioner falling under the first category, prima facie there can be no manner of doubt whatever as to such an alleged act of his falling within the ambit of Section 377, I.P.C. as laid down by the decision reported in : AIR1968 Guj252 (Lohana Vasanthal Devchand v. The State) to which, I respectfully agree.

22. As respects the alleged acts of the petitioner falling under the second category learned Counsel for the petitioner would, of course, contend that such alleged acts of his may not amount to an offence under Section 377, IPC as there was no penetration of the male organ of the petitioner in any of the orifice of the victim boys, such as anus or mouth. To this submission of learned Counsel, I am unable to affix my seal of approval.

23. In this connection, it may be recapitulated that a learned Judge of the Kerala High Court in the decision reported in (State of Kerala v. K. Govindan) held that committing of intercourse by inserting the male organ between the thighs of another is an unnatural offence punishable under section 377. IPC. The reasoning

given therein by learned Judge was that when the male organ was inserted between the thighs kept together and tight, there was penetration to constitute the unnatural offence. This decision throws light that for committing an unnatural offence, it is not necessary to penetrate into the orifice of mouth or anus of another by interpreting the word 'penetrate' to mean 'find access into or through, pass through.'

24. As already referred to, in the case on hand, the male organ of the petitioner is said to be held tight by the hands of the victims, creating an orifice like thing for manipulation and movement of the penis by way of insertion and withdrawal. In the process of such manipulation, the visiting male organ is enveloped at least partially by the organism visited, namely, the hands which held tight the penis. The sexual appetite was thus quenched by the ejaculation of semen into the hands of the victims, as prima facie revealed by the statements of various victim boys.

25. In this view of the matter, the alleged over acts of the petitioner falling under the second category also have to be construed as falling within the ambit and sweep of Section 377, IPC requiring him to face the ordeal of trial.

26. As such, all these petitions deserve to be dismissed and are accordingly dismissed.

27. Petitions dismissed.

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