BOMBAY HIGH COURT

Yusuf Abdul Aziz

Vs.

State (Bombay)

Criminal Appln. No. 345 of 1950

(Chagla, C.J. and Gajendragadkar, J.)

26.06.1951

JUDGMENT

Chagla, C.J.

1. This is an application by the petitioner under Article 228 of the Constitution. The petitioner is charged under Section 497 of the Indian Penal Code and he is being prosecuted for that offence. His contention is that Section 497 offends against the provisions of Articles 14 and 15 of the Constitution and therefore Section 497 is bad and he cannot be prosecuted under that section. He wants this question to be determined by the High Court, and, therefore, he desires that the case which is pending before the Presidency Magistrate should be sent up to us so that we should decide this point.

2. Now, Section 497 defines adultery and adultery is defined as sexual intercourse by a man with a woman who is the wife of another man and the intercourse must take place without his consent while the man knows or has reason to believe that the woman is the wife of another man. The section also provides that the wife shall not be punishable as an abettor. What is contended by Mr. Peerbhoy, on behalf of the petitioner is that this section contravenes Article 114 of the Constitution. That article provides that the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India. That article has often been construed, and in substance it means that every law that the State passes shall operate equally upon all persons, and the question is whether Section 497 does not operate equally upon all persons. It will be noticed that as far as Article 14 is concerned, the protection given under that article is not restricted to citizens but extends to all persons. What is argued by Mr. Peerbhoy is that under Section 497 only a man is to be punished for the offence of adultery and the woman goes scotfree, and, therefore, according to him, the law with regard to adultery does not operate equally upon all persons; it operates unequally as between men and women. In our opinion that is not a sound contention. What Section 497 does is, it constitutes a particular offence and the

offence is constituted when a man has sexual intercourse with a woman who is the wife of another man without his consent. The law did not create any offence when a woman has sexual intercourse with a man who is the husband of another woman. Whether the Legislature was right or wrong in doing so is entirely a different matter. But the nature of the offence itself is defined in Section 497 and that offence is restricted to a particular type of sexual intercourse. The question is whether this law operates unequally between different persons. Once the nature of the offence of adultery is understood and appreciated, it is clear that there could be no question of the law operating unequally, because the law was not intended to operate upon women at all. The mischief aimed at under Section 497 is only against men and not against women. It is then suggested that women are absolved from any punishment under this law by Section 497 declaring that the wife shall not be punishable as an abettor. Here, again, the law has so provided that for the purpose of this section the wife shall not be deemed to be an abettor at all. In the definition of who is an abettor an exception is carved out and that exception is in favour of women. Therefore the quarrel that Mr. Peerbhoy has is not really against the equality of law but against the policy of law which creates a particular kind of offence and restricts it to particular relationship and particular conduct. It is not for us to determine the wisdom or otherwise of the policy. But it is impossible to contend that as the section stands it does not operate equally upon all persons.

3. Reliance is also placed upon Article 15. Mr. Rahimtoola, on behalf of respondent No. 1, has taken a preliminary point and that point is that the petitioner is not a citizen, and not being a citizen, he cannot avail himself of the fundamental right embodied in art. 15 (1), which enures only for the benefit of citizens. Mr. Rahimtoola is right that as far as Article 15 (1) is concerned it is only a citizen who can come to this Court for the enforcement of the fundamental right guaranteed to him under Article 15 (1). A person who is not a citizen cannot come to this Court for assistance, invoking his right under Article 15 (1). But we do not think it right to say that Mr. Peerbhoy's client has come to this Court for enforcement of the fundamental right under Article 15 (1). Mr. Peerbhoy's contention is that inasmuch as the law discriminates against citizen and citizen on grounds only of sex, the law is void under Article 13, and as he is being prosecuted under a void law, his prosecution is bad and he cannot be convicted of an offence under a void law. To that extent even a non-citizen may rely on any of the fundamental rights, not indeed for the purpose of enforcing those rights, but merely in order to point put to the Court that a particular law being in violation of any of these fundamental rights is bad, inoperative and no penal consequence can follow, from the breach of such a law. If Mr. Peerbhoy could satisfy us that this particular piece of legislation does discriminate contrary to what is provided under Article 15 (1), then undoubtedly it would be our duty to say that Section 497 is bad, and as Mr. Peerbhoy's client is being prosecuted under a void law, the prosecution must be quashed. Therefore we have to consider on merits what the position of Section 497 is in relation to Article 15 (1).

4. Now, it is apt very often to be overlooked that Article 15 (1) speaks of discrimination on

grounds only of religion, race, caste, sex, place of birth or any of them. If religion, race, caste, sexs place of birth is merely one of the factors which the Legislature has taken into consideration, then it would not be discrimination only on ground of that fact, but if the Legislature has discriminated only on one of these grounds and no other factor could possibly have been present, then undoubtedly the law would offend against Article 15 (1). The narrow question that we have to consider is, can it be said that in enacting Section 497 the Legislature discriminated in favour of women and against men only on the ground of sex, or, to put it in different language, can it be said that men were made liable for punishment for adultery and women were exempted from any punishment only on the ground that men were men and women were women? The mere statement of this proposition carries its own answer. Anyone who is familiar with the history of the Indian Penal Code will realise that very good grounds were present why Section 497 was enacted in the form in which it finds a place in the Indian Penal Code. There is a very famous and a very brilliant passage in the introduction to the Indian Penal Code where the authors of the Code point out why they adopted this particular line in Section 497 contrary to principles of law known and understood by the great Hindu law-given Manu, by principles of law embodied in the Mahomedan law and even in many European systems of law, and the reasons given by the authors of the Code stand as a permanent tribute to the enlightenment and humane outlook of those who were responsible for the framing of the Code. The authors of the Code were oppressed by the fact that when they were enacting the Code the position of women in this country was in a shocking state. They point out that women were married when they were children, that they were married to men who could marry any number of wives, that they had to share the attention of the husband with several rivals. They might also have pointed out that Indian society believed in and upheld the system of seclusion of women, that women were deliberately put down, that there was a belief that women were not the equal of men in any walk of life, and that every possible consideration weighed with the authors in taking a liberal enlightened view in favour of women in this country; and therefore they point out that it would be weighing the scale against women which scale was already too much depressed by making women punishable for committing the offence of adultery. Women according to them were more often than not mere tools and passive tools in the hands of men and placed as they were it was impossible for them to resist the blandishments that men might hold out against them. It was with this background and it was in the context of this society that Section 497 was enacted. It may be that since the Code was framed, the position of women in our country has considerably improved. But even so today polygamy is permitted by the personal law amongst Muslims in the whole of the Union of India and amongst Hindus in most of the States; and divorce is not allowed amongst Hindus in most of the States. Whether in view of the altered conditions any change should be made in the section under consideration is a matter on which two views are possible; but that, we apprehend, is a question for the Legislature to consider.

5. Can it be said then that the only reason why discrimination was used in favour of women and against men was and is because women were women and nothing more? Women from the point of view of sex and femininity are the same all the world over, but surely it cannot be said that

women all the world over share the affection of their husbands with their rivals or that they are secluded or that they are married when they are in their cradle or when they are children. Therefore what led to this discrimination in this country is not the fact that women had a sex different from that of men, but that women in this country were so situated that special legislation was required in order to protect them, and it was from this point of view that one finds in Section 497 a position in law which takes a sympathetic and charitable view of the weakness of women in this country. Mr. Peerbhoy is right when he says that the underlying idea of Section 497 is that wives are properties of their husbands. The very fact that this offence is only cognizable with the consent of the husband emphasises that point of view. It may be argued that Section 497 should not find a place in any modern Code of law. Days are past, we hope, when women were looked upon as property by their husbands. But that is an argument more in favour of doing away with Section 497 altogether. That is not an argument in support of the contention that men have been unduly discriminated against. Therefore, in our opinion, there is no contravention of Article 15 (1) of the Constitution. In this connection we would like to add that it is possible to take the view that the alleged discrimination in favor of women is saved by the provisions of Article 15 (3).

6. The result, therefore, is that we must hold that Section 497 does not contravene any of the fundamental rights laid down in the Constitution and therefore it is not bad or void under Article 13. In this view of the mattter it is unnecessary to consider whether the whole of Section 497 would be void if the alleged discrimination in favor of women had been held to offend against the provisions of Article 15 (1).

7. The result is that the prosecution pending before the Magistrate must go on and the Magistrate must decide the case on merits. Rule discharged.
Rule discharged.