(1987) 07 MP CK 0016

Madhya Pradesh High Court (Indore Bench)

Case No: None

Sammun		APPELLANT
	Vs	
State of M.P.		RESPONDENT

Date of Decision: July 1, 1987

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 228, 398
- Penal Code, 1860 (IPC) - Section 366, 375, 493

Citation: (1988) CriLJ 498

Hon'ble Judges: K.L. Shrivastava, J

Bench: Single Bench

Judgement

K.L. Shrivastava, J.
This appeal is directed against the judgment dt. 10-1-87 passed by the Additional Sessions Judge Jhabua in Sessions Trial No. 321 of 1985 convicting the petitioner u/s 493, IPC.

2. According to the prosecution, from some months prior to 21-3-85 there were negotiations for marriage between the petitioner and Ku. Rehana, aged 20 years. The petitioner had even been to her residence once or twice. On being told by the co-accused Mahendra and Moise that the petitioner would marry her, she had on 22-3-85 left her village and had gone to Thandla and had met the petitioner there. She was told that they would go to Ujjain on the following day for site seeing. Thereafter on 23-3-85 she again left her village for Thandla and from there the petitioner had taken her to Dohad where they stayed in Natraj Hotel. Assuring her that she would live with him as his wife, the petitioner committed sexual intercourse with her. To the hotel management he had disclosed that she was his wife. Subsequently the petitioner refused to marry Rehana and, therefore, a report was lodged by her with the police on 31-3-85 whereupon a crime was registered and investigation was set afoot.

3. At the conclusion of the investigation, the police prosecuted the petitioner and others in respect of offences under Sections 366 and 493. IPC and other offences. The case was committed to the Court of Session and ultimately charge only u/s 493, IPC was framed against the petitioner. He was tried with the result already stated.

4. The contention of Shri Pradhan the petitioner''s learned Counsel is that the offence u/s 493, IPC is triable by a Magistrate of First Class and the learned Sessions Court transgressed its jurisdiction in proceeding with the trial In this connection he has invited my attention to the provision embodied in Section 228(l)(a) of the Cr. P.C. 1973 (for short ''the Code''). It is next contended that on the material on record one of the two ingredients of the offence in question has not been established and, therefore, the appellant deserves to be acquitted.

5. The point for consideration is whether the appeal deserves to be allowed.

6. In regard to the first contention it is apposite to reproduce the provision u/s 228(1)(a) of the Code. It reads thus:

228. Framing of charge : (1) If after such consideration and hearing as aforesaid the Judge is of opinion that there is ground for presuming that the accused has committed an offence which -

(a) is not exclusively triable by the Court of Session, he may frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, and t hereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report.

7. From a perusal of the provision extracted above it is clear that the word used is ''may'' and there is no reason why it should, in the context, be construed as ''shall''. Once the case is committed to the Court of Session, it certainly becomes clothed with the jurisdiction to try it and the mere fact that the offence disclosed is not one exclusively triable by Court of Session does not divest it of that jurisdiction. The provision aforesaid has, therefore, to be interpreted as clothing the Court with a discretion to transfer the case for trial to the Chief Judicial Magistrate. In this connection the decision in Abani Chowdhury Vs. The State, is pertinent. The contention of the appellant''s learned Counsel that the trial of the case by the Court of Session resulted in prejudice to the accused as he stands deprived of his right of appeal to the Court of Session, cannot be permitted to be successfully urged to place a different construction on the provision which leaves the question of trial in the domain of the discretion of the Court of Session.

8. The question whether trial of the case so transferred not by the Chief Judicial Magistrate himself but by some other competent Magistrate to whom the case is transferred by the Chief Judicial Magistrate would be vitiated or not does not fall for consideration in this appeal. However, keeping in view the different phraseology in Section 398 of the Code it is, however, desirable that looking to the legislative

intendment behind the provision the case is tried by the C.J.M. himself, because the case is at one stage considered to be one involving an offence exclusively triable by the Court of Session. It may be noted that the law mandatorily enjoins that the trial is by the procedure therein specified.

9. This brings us to the other contention of the learned Counsel for the appellant that deceit of the kind contemplated u/s 493, IPC not having been established, the conclusion of guilt cannot be sustained.

10. On a careful consideration, I find that there is force in the contention aforesaid.

11. Section 493 ibid is in these terms:

Section 493. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage -

Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also, be liable to fine.

It is clear from a plain perusal of the section extracted above, that it has two ingredients:

(1) Deceit causing a false belief in the existence of a lawful marriage, and

(2) Habitation or sexual intercourse under that belief with the person causing such belief.

As pointed out in Kartick Kundu Vs. The State, offence under this section may also be punished as rape under Clause (4) of Section 375, IPC.

12. In the instant case on a perusal of the record I find that there is not an iota of evidence to prove that the appellant did anything to cause Rehana (P.W. 1) to believe that she is lawfully married to him. The evidence that he had promised her that he would marry her or that he had given out to others that she is his wife, does not constitute proof of the first ingredient referred to above.

13. In the result, the appeal succeeds and is allowed. The conviction of the appellant u/s 493 of the Penal Code and the sentence passed thereunder are both set aside. He is acquitted of the said offence. His bail bonds shall stand discharged.