

CASE COMMENT: JOSEPH SHINE VS UNION OF INDIA

Ayushi Arya
SOM Law College

Full Case Name – Joseph Shine v Union of India

Judges/Quorum – Dipak Mishra, R.F. Nariman, A.M. Khanwilkar, D.Y. Chandrachud, Indu Malhotra

Citation(s) – 2018 SC 1676

INTRODUCTION

Adultery law is defined in Section 497 of Indian penal code.

Section 497 IPC (Adultery):-

Whoever has sexual intercourse with a person who is and whom he knows and reason to believe to be the wife of another man, without the consent or connivance of that man. Such sexual intercourse does not amount to the offence of rape and is guilty of adultery.

A man found guilty of adultery should be punishable with imprisonment of either description for a term which may extend to the five years or with fine or both.

In such case the wife shall not be punishable as an abettor. Section 497 comes under the purview of the courts several times in the past but every time Supreme Court held Section 497 as valid. But the Supreme Court on 27th September 2018 in the case of Joseph Shine v Union of India has brought down the 158 year old Victorian Morality Law on Adultery.

The petition was filed by a non resident of Kerala named Joseph Shine who has raised question on the constitutionality of the Section 497 of the Indian penal code. The judgment has overruled all the past judgments which uphold the criminalization of adultery. Now, adultery has become legal but it is still not ethical with the society. The institution of marriage is based on the trust between both the partners i.e. husband and wife. Therefore, Honourable Supreme Court of India does not interfere in the personal and moral lives of the

people. Currently, adultery is only considered as a civil wrong and the remedy for the act of adultery is only divorce.

INGREDIENTS

The following ingredients are essential for this offence:

- Sexual intercourse by a man with a woman who is or who he knows or has reason to believe to be the wife of another man.
- Such sexual intercourse must be without the consent or connivance of the husband.
- Such sexual intercourse must not amount to rape.
- Woman must be married.
- Since, in an offence of adultery marriage is an ingredient; therefore the fact of marriage must be established fully.
- It must be established that the marriage as an event took place and the parties are not simply living together.
- The particular number of witnesses must be examined to prove the fact of marriage.
- The evidence of the husband and wife that marriage between them took place is not sufficient to prove it.
- Where a man and woman lived long together as a husband and wife, a presumption arises in favour of marriage which must be rebutted.

CONNIVANCE

Connivance is the willing consent to a conjugal offence or a culpable acquiescence in the course of conduct reasonably likely to lead to the offence being committed. It is an act of mind. It implies knowledge and acquiescence.

According to the Allahabad High Court, 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. Where the woman has been abandoned by her husband and inference of connivance cannot be drawn by a court of law.

In a case the husband was driven out from his house by his wife and the accused lived with her. The husband though saw this but filed complaint only after 18 months since cohabitation commencement. The delay in filing complaint was not explained by the husband, therefore, his act was held amounting to connivance. It was held that where there exists sexual relations between the accused and someone's wife and while she did not resist while being taken away by the accused to his house and voluntarily accompanied him to be a participant in the sexual intercourse with him, then the accused will not be convicted under section 497 or section 498 of IPC, but would be convicted for the offence of abduction under section 366 of IPC.

Wife is not punishable as abettor. Under Section 497, wife is not punishable as abettor because authors of the code were of the view that Indian society is of different kind which may well lead a man to pause before he determines to punish the infidelity of wives. But the reason given by the authors of the code for not punishing the wife has been criticized.

BACKGROUND OF THE SECTION 497 OF IPC

There were several times before where the question has been arisen on the constitutional validity of Section 497 of IPC and Section 198 of IPC.

- **Yusuf Abdul vs. State of Bombay case, 1954**

It has been argued that the section violates two articles of the Constitution of India i.e. Article 14 and Article 15. Supreme Court upheld the validity of Section 497 in Yusuf Abdul vs. State of Bombay case, by pointing out that neither a man nor a woman can prosecute their disloyal spouses. It is only the outsider to the relationship who can be prosecuted and that too by the aggrieved husband alone.

- **Sowmithri Vishnu v Union of India case, 1985**

In *Smt. Sowmithri Vishnu v Union of India case*, it was contended that Section 497 is violative of Article 14 and 15 of the constitution on the ground that it makes an irrational classification between men and women in that.

□ It confers upon the husband the right the adulterer but it doesn't confer any rights upon the wife to prosecute the woman with whom the husband has committed adultery.

□ It confers upon the husband the right the adulterer but it doesn't confer any rights upon the wife to prosecute the husband who has committed adultery with another woman.

□ It does not take in cases where the husband has sexual relations with an unmarried woman with the result that the husband has, as it were, a free license under the law to have extra marital relationship with unmarried woman.

But the Supreme Court rejected these arguments and held that it cannot be said that in defining the offence of adultery so as to restrict the class of offender to men, any constitutional provision is infringed. It is commonly accepted that it is the man who is the seducer and not the woman. The court further observed that this position may have undergone some change over the years that women may have started seducing men but it is for the legislature to take note of this transformation and amend Section 497 appropriately.

- **V. Revathi v Union of India, 1988**

The Supreme Court observed that adultery law was a “shield rather than a sword”. The court ruled that the existing adultery law did not infringe upon any constitutional provisions by restricting the ambit of Section 497 to men.

Your **JOSEPH SHINE VS UNION OF INDIA** Information

FACTS OF THE CASE

□ Joseph Shine the hotelier challenged the constitutionality of the Section 497 of Indian penal code.

The core reason behind their petition was to shield Indian men from being punished for extra marital relationships by vengeful women or their husbands.

Petitioner's close friend in Kerala committed suicide after a woman co-worker made malicious rape charges on him.

Further Section 497 is an egregious occurrence of sexuality unfairness, authoritative imperialism and male patriotism.

The traditional framework in which Section 497 was drafted is no longer applicable in modern society.

ISSUES

Whether Section 497 of Indian penal court is unconstitutional?

The petitioner wanted certain problems with Section 497 to be addressed.

Adultery law provides that man to be punished in case of adultery but no action is suggested for the woman. Hence, it made the gender neutral.

As per Section 497 there is no legal provisions that a woman can file a complaint of adultery against her husband.

According to Section 497, if the husband gives his consent for such an act then such act is no more considered as a crime. Therefore, women are treated as an object under adultery law.

PETITION **Your One Stop Legal Destination**

In December 2017, Joseph Shine has filed a petition raising the questions on constitutional validity of Section 497.

A three judge's bench headed by **CJI Dipak Mishra** has referred this petition to a five judge constitution bench which comprised of **CJI Dipak Mishra** and **Justices R.F. Nariman, A.M. Khanwilkar, D.Y. Chandrachud and Indu Malhotra.**

JUDGMENT

The court had observed that law is based on certain 'Societal presumption'.

In the four different judgments, the court has struck down the law and declared that husband cannot be master of his wife. The judgment held the following things:-

- Section 497 is archaic and is constitutionally invalid.
- Adultery is no longer a criminal offence.
- Section 497 is arbitrary.
- Freedom of an individual to make choices in respect of his/her sexuality is most intimate choice of life and thus should be protected from public censure and criminal sanction.
- Wrongs punishable from penal sanction must be public wrong not be merely act committed against individual victim.
- There can't be masculine dominance in community or patriarchal monarchy or husband monarchy over wife.
- Right to live with dignity also includes right not to be subjected to public censure and punishment by state when absolutely necessary. If there can be civil remedy to serve the purpose then that should be ought to force. If the purpose can be served by civil sanction, then why penal sanction.
- Criminal law should be in consonance of constitutional morality provision of adultery enforces construct of marriage where are partner has to surrender sexual autonomy to another.

Section does not pass test of constitutionality and it is opposed to constitutional guarantee of liberty and dignity. The Supreme Court by this judgment has discriminated adultery as an offence but the court added that adultery will still remain a ground for divorce. Undoubtedly this historic verdict of Supreme Court is based on securing dignity of people, obviating punishment when civil remedy like divorce is available to the aggrieved husband, thus

dispensing with the post millennial archaic law. The Supreme Court finally held that Section 497 is unconstitutional hence it is struck down as a penal provision of women and treated them as “chattel of husbands”.

CONCLUSION

- **What struck down:** Section 497 of Indian Penal code that said: “Whoever has sexual intercourse with a person who is the wife of another man, without the consent of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery”.
- **The problem:** It treated woman as victim of offence and as property of her husband. It was not an offence if a man had sexual intercourse with a woman after getting her husband’s consent.
- **After the Judgment:** Adultery can be ground for divorce but it is no more a criminal offence attracting up to 5 years’ jail term.
- **Govt’s problem:** Centre in the affidavit before the apex court had said that it would be against the sanctity of marriage to dilute the offence of adultery.
- **Keep in mind:** Though adultery per se is no longer a crime, if any aggrieved spouse commits suicide because of partner’s adultery, it could be treated as abetment to suicide - a crime.

“Adultery can take you to court, not to jail”

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