1969 SCR 2 692 . 1970 AIR SC 1876 . 1968 KERLT 904 . 1950 AIR TC 38 . 1969 SCC 1 37 . 1970 CAR 210 . 1970 CRLJ 0 1651 . 1970 CRI LJ 1651 .

M. C. Verghese v. T.J Poonan And Another

Supreme Court Of India (13 Nov, 1968)

CASE NO.
Criminal Appeal No. 46 Of 1967

ADVOCATES

Lily Thomas, Advocate for Appellant

Dr W.S Bharlingay, Senior Advocate (Ganpat Rai, Advocate with him) for Respondent 1

A. C. Puddissery, Advocate .. for Respondent 2.

JUDGES

J.C Shah

V. Ramaswami

A.N Grover, JJ.

Summary

1. He ordered that Poonan be discharged under Section 253(2) of the Code of Criminal Procedure.

2. The High Court set aside the order of the Court of Session and restored the order of the District Magistrate.

3. Against the order passed by the High Court discharging Poonan, this appeal is preferred with certificate granted by the High Court.

4. 9. In Abdul Khadar v. Taib Begum AIR 1957 Mad 339 the Madras High Court again held that there is no presumption of law in India that a wife and husband constitute one person for the purpose of criminal law,

and the English common law doctrine of absolute privilege cannot prevail in India.

5. There is authority for the proposition that in determining the criminality of an act under the Indian Penal Code the Courts will not extend the scope of special exceptions by resorting to the rule peculiar to English common law that the husband and wife are regarded as one.

6. Section 122 of the Evidence Act only prevents disclosure in evidence in Court of the communication made by the husband to the wife.

7. Except where the spouse to whom the communication is made is a witness and claims privilege from disclosure under the Criminal Evidence Act, 1898 (of which the terms are similar to Section 122 of the Indian Evidence Act though not identical), evidence as to communications between husband and wife during marriage is admissible in criminal proceedings.

8. 22. We are of the view that the appeal must be allowed and the order passed by the High Court set aside.

JUDGMENT

J.C Shah, J. Rathi, daughter of M.C Verghese, was married to T.J Poonan. On July 18, 1964, July 25, 1964 and July 30, 1964, Poonan wrote from Bombay letters to Rathi who was then residing with her parents at Trivandrum which it is claimed contained defamatory imputations concerning Verghese. Verghese then filed a complaint in the Court of the District Magistrate, Trivandrum, against Poonan charging him with offence of defamation. Poonan submitted an application raising two preliminary contentions (1) that the letters which formed the sole basis of the complaint were inadmissible in evidence as they were barred by law or expressly prohibited by law from disclosure; and (2) that uttering of a libel by a husband to his wife was not publication under the law of India and hence cannot support a charge for defamation, and prayed for an order of discharge, and applied that he may be discharged.

2. The District Magistrate held that a communication by a husband to his wife or by a wife to her husband of a matter defamatory of another person does not amount in law to publication, since the husband and wife are one in the eye of the law. In so holding, he relied upon the judgment in Wennhak v. Morgan and Wife.1 He also held that the communication was privileged, and no evidence could be given in court in

relation to that communication. He accordingly ordered that Poonan be discharged under Section 253(2) of the Code of Criminal Procedure.

3. In a revision application filed by Verghese before the Court of Session, the order was set aside and further enquiry into the complaint was directed. In the view of the learned Sessions Judge the doctrine of the common law of England that a communication by one spouse to another of a matter defamatory of another person does not amount to publication has no application in India, and Section 122 of the Indian Evidence Act does not prohibit proof in the Court by the complaint of the letters written by Poonan to his wife.

4. The case was then carried to the High Court of Kerala in revision. The High Court set aside the order of the Court of Session and restored the order of the District Magistrate. The High Court held that from the averments made in paras 9 to 11 of the complaint it was clear that the writing of defamatory matter by Poonan to his wife Rathi was not in law publication, and that if the letters written by Poonan to his wife cannot be proved in court either by herself directly or through her father, in whose hands she had voluntarily placed them, the imputations therein fell outside the court's cognizance and no charge under Section 500 of the Indian Penal Code could be deemed to be made out. Against the order passed by the High Court discharging Poonan, this appeal is preferred with certificate granted by the High Court.

5. It was assumed throughout these proceedings that the letters are defamatory of the complainant. Under the Indian Penal Code in order that an offence of defamation may be committed there must be making or publication of any imputation concerning any person by words either spoken or intended to be read, or by signs or by visible representations, intending to harm, or knowing or having reason to believe that such imputation will, harm, the reputation of such person. To constitute the offence of defamation there must therefore be making or publication of an imputation concerning any person and the making or publication must be with intent to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person. Unless there is publication there can be no offence of defamation committed.

6. In England the rule appears to be well settle- that except in certain well defined matters, the husband and wife are regarded as one and in an action for libel disclosure by the husband of the libel to his wife is not publication. In Wennhak case Manistry, J., observed:

the maxim and principle acted on for centuries is still in existence viz. that as regards this case, husband

and wife are in point of that as law one person.

The learned Judge examined the foundation of the rule and stated that it was, after all, a question of public policy or, social policy.

7. But the rule that husband and wife are one in the eye of law has not been adopted in its full force under our system of law and certainly not in our criminal jurisprudence.

8. In Queen Express v. Butchi ILR 17 Mad 401 it was held that there is no presumption of law that the wife and husband constitute one person in India for the purpose of the criminal law. If the wife, removing the husband's property from his house, does so with dishonest intention, she is guilty of theft.

9. In Abdul Khadar v. Taib Begum AIR 1957 Mad 339 the Madras High Court again held that there is no presumption of law in India that a wife and husband constitute one person for the purpose of criminal law, and therefore the English common law doctrine of absolute privilege cannot prevail in India.

10. It must be remembered that the Indian Penal Code exhaustively codifies the law relating to offences with which it deals and the rules of the common law cannot be resorted to for inventing exemptions which are not expressly enacted.

11. In Tiruvengadda Mudali v. Tripurasundari Ammal ILR 49 Mad 728 a Full Bench of the Madras High Court observed that the exceptions to Section 499 IPC, must be regarded as exhaustive as to the cases which they purport to cover and recourse can be had to the English common law to add new grounds of exception to those contained in the statute. A person making libellous statements in his complaint filed in Court is not absolutely protected in a criminal proceeding for defamation, for under the Eighth Exception and the illustration to Section 499 the statements are privileged only when they are made in good faith. There is therefore authority for the proposition that in determining the criminality of an act under the Indian Penal Code the Courts will not extend the scope of special exceptions by resorting to the rule peculiar to English common law that the husband and wife are regarded as one.

12. But we do not, deem it necessary to record any final opinion on this question, because, in our judgment, this enquiry has to be made when the complaint is tried before the Magistrate.

13. Verghese has complained that he was defamed by the three letters which Poonan wrote to Rathi. Poonan, however, says that the letters addressed by him to his wife are not except with his consent

admissible in evidence by virtue of Section 122 of the Indian Evidence Act, and since the only publication pleaded is publication to his wife, and she is prohibited by law from disclosing those letters, no offence of defamation could be made out. So stated, the proposition is, in our judgment, not sustainable. Section 122 of the Indian Evidence Act falls in Chapter IX which deals with evidence of witnesses in proceeding before the Court. That section provides

> No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

14. The section consists of two branches (1) that a married person shall not be compelled to disclose any communication made to him during marriage by his spouse; and (2) that the married person shall not except in two special classes of proceedings be permitted to disclose by giving evidence in Court the communication, unless the person who made it, or his representative in interest, consents thereto.

15. A prima facie case was set up in the complaint by Verghese. That complaint has not been tried and we do not see how, without recording any evidence, the learned District Magistrate could pass any order discharging Poonan. Section 122 of the Evidence Act only prevents disclosure in evidence in Court of the communication made by the husband to the wife. If Rathi appears in the witness box to giving evidence about the communications made to her husband, prima facie the communications may not be permitted to be deposed to or disclosed unless Poonan consents. That does not, however, mean that no other evidence which is not barred under Section 122 of the Evidence Act or other provisions of the Act can be given.

16. In a recent judgment of the House of Lords Rumping v. Director of Public Prosecutions 1962 3 All ER 256 Rumping the in mate of a Dutch ship was tried for murder committed on board the ship. Part of the evidence for the prosecution admitted at the trial consisted of a letter that Rumping had written to his wife in Holland which amounted to a confession. Rumping had written the letter on the day of the killing, and had handed the letter in a closed envelope to a member of the crew requesting him to post it as soon as the ship arrived at the port outside England. After the appellant was arrested, the member of the crew handed the envelope to the captain of the ship who handed it over to the police. The member of the crew,

the captain and the translator of the letter gave evidence at the trial, but the wife was not called as witness. It was held that the letter was admissible in evidence. Lord Reid, Lord Morris of Borth-Y-Gest, Lord Hodson and Lord Pearce were of the view that at common law there had never been a separate principle or rule that communications between a husband and wife during marriage were inadmissible in evidence on the ground of public policy. Accordingly except where the spouse to whom the communication is made is a witness and claims privilege from disclosure under the Criminal Evidence Act, 1898 (of which the terms are similar to Section 122 of the Indian Evidence Act though not identical), evidence as to communications between husband and wife during marriage is admissible in criminal proceedings.

17. The question whether the complainant in this case is an agent of the wife because he has received the letters from the wife and may be permitted to give evidence is a matter on which no opinion at this stage can be expressed. The complainant claims that he has been defamed by the writing of the letters. The letters are in his possession and are available for being tendered in evidence. We see no reason why inquiry into that complaint should, on the preliminary contentions raised, be prohibited. If the complainant seeks to support his case only upon the evidence of the wife of the accused, he may be met with the bar of Section 122 of the Indian Evidence Act. Whether he will be able to prove the letters in any other manner is a matter which must be left to be determined at the trial and cannot be made the subject-matter of an enquiry at this stage.

18. One more question which was raised by counsel for the appellant may be briefly referred to. It was urged that since the matter reached this Court, Rathi has obtained a decree for nullity of marriage against Poonan on the ground of his impotency, and whatever bar existed during the subsistence of the marriage cannot now operate to render Rathi an incompetent witness. But the argument is plainly contrary to the terms of Section 122. If the marriage was subsisting at the time when the communications were made, the bar prescribed by Section 122 will operate. In Moss v. Moss 1963 2 QBD 829 it was held that in criminal cases, subject to certain common law and statutory exceptions, a spouse is incompetent to give evidence against the other, and that incompetence continues after a decree absolute for divorce or a decree of nullity (where the marriage was annulled was merely voidable) in respect of matters arising during covertime.

19. Counsel for the appellant however urged that the rule enunciated in Moss case has no application in

India, because under Sections 18 and 19 of the Divorce Act no distinction is made between marriage void and voidable. By Section 18 a husband or wife may present a petition for nullity of marriage to the appropriate Court and the Court has under Section 19 power to make the decree on the following grounds:

(1) that the respondent was important at the time of the marriage and at the time of the institution of the suit;

(2) that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity;

(3) that either party was a lunatic or idiot at the time of the marriage;

(4) that the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force.

Nothing in this section shall effect the jurisdiction of the High Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud.

20. Marriage with the respondent who was impotent at the time of the marriage or at the time of the institution of the suit is not ab initio void: it is voidable. As stated in Latey on Divorce, 14th Edn., at p. 194, Article 353:

Where impotence is proved the ceremony of marriage is void only on the decree absolute of nullity, but then it is void ab initio to all intents and purposes. Such a marriage is valid for all purposes, unless a decree of nullity is pronounced during the life-time of the parties.

21. When the letters were written by Poonan to Rathi, they were husband and wife. The bar to the admissibility in evidence of communications made during marriage attaches at the time when the communication is made, and its admissibility will be adjudged in the light of the status at that date and not the status at the date when evidence is sought to be given in Court.

22. We are, therefore, of the view that the appeal must be allowed and the order passed by the High Court set aside. The proceedings will be remanded for trial to the District Magistrate according to law.