

appears reasonably true, it is really referring to a state of doubt, and, of course, the benefit of doubt has to be given to the accused. In this case it is not the position that the explanation of the accused in regard to pages 180 right onward of the cash book, exh. L, does not merely appear to be true. The position is that the explanation of the accused is definitely false. There cannot, therefore, be any reasonableness about it. There cannot be any question of the said explanation being even prima facie sensible or probable. In these circumstances none of the two cases cited by Mr. Amin for the appellants really helps the appellants.

Order accordingly.

K. B. S.

1951
STATE
v.
HARPRASAD
GHASHIRAM
GUPTA
Vyas J.

APPELLATE CRIMINAL

*Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Gajendragadkar.
Gajendragadkar.*

YUSUF ABDUL AJIZ (ORIGINAL ACCUSED), PETITIONER v. THE
STATE.*

1951
June 26

Penal Code (Act XLV of 1860), s. 497—Adultery—Wife not punishable as abettor—Whether discrimination on the ground of sex alone—Constitution of India, arts. 13, 14, 15, 228—Whether s. 497 contravenes a fundamental right—Whether a non-citizen can challenge the validity of any law as contravening a fundamental right.

The petitioner, who was being prosecuted in the Court of a Presidency Magistrate for adultery under s. 497 of the Indian Penal Code, 1860, approached the High Court under art. 228 of the Constitution. His contention was that as s. 497 makes the man who commits adultery punishable but declares that the wife shall not be punishable as an abettor, the section was in contravention of arts. 14 and 15 (1) of the Constitution.

Held, s. 497 of the Indian Penal Code, 1860, did not contravene arts. 14 and 15 (1) of the Constitution.

If religion, race, caste, sex, place of birth or any of them is merely one of the facts which the Legislature has taken into consideration, it would not be discrimination only on the ground of that fact; but if the Legislature has discriminated only on one of those grounds and no other factor could possibly have been present, then the law would offend against art. 15 (1). Looking to the historical background of s. 497, it is apparent that what led to the discrimination in this country, is not the

* Criminal Application No. 345 of 1951.

1951

YUSUF
ABDUL
AZIJ
v.
THE
STATE

Chagla C. J.

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.

Though it is only a citizen who can approach the Court for the enforcement of fundamental rights guaranteed to him under the Constitution, it is open to a non-citizen to contend that the law under which he is being prosecuted is void under art. 13 of the Constitution. 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 out to the Court that a particular law being in violation of any of those fundamental rights is bad, inoperative and no penal consequences can follow from the breach of such a law.

Application under art. 228 of the Constitution.

The petitioner was charged before the Presidency Magistrate, 20th Court, Bombay with adultery, an offence under s. 497 of the Indian Penal Code, 1860. During the pendency of the proceedings the petitioner applied to the High Court under art. 228 of the Constitution, contending that s. 497 of the Indian Penal Code, 1860, was void as offending against arts. 14 and 15 of the Constitution. The application was heard.

A. A. Peerbhoy, N. A. Palkhiwala, and M. M. Shaikh, for the petitioner.

A. I. Rahimtoola, R. K. Dadachanji, and Trilokekar for the respondent.

H. M. Choksi, Government pleader for the State.

CHAGLA C. J. This is an application by the petitioner under art. 228 of the Constitution. The petitioner is charged under s. 497 of the Indian Penal Code and he is being prosecuted for that offence. His contention is that s. 497 offends against the provisions of arts. 14 and 15 of the Constitution and therefore s. 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.

Now, s. 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 have taken 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 art. 14 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 s. 497 does not operate equally upon all persons. It will be noticed that as far as art. 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 s. 497 only a man is to be punished for the offence of adultery and the woman goes scot free, 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 s. 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 s. 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 s. 497 is only against men and not against women. It is then suggested that women are absolved from any punishment under this law by s. 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.

1951

ABDUL
YUSUF
AZIZ
v.
THE
STATE

Chagla C. J.

1951

ABDUL
YUSUF
AZIZ
v.
THE
STATE

Chagla C. J.

Reliance is also placed upon art. 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 art. 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 art. 15 (1). A person who is not a citizen cannot come to this Court for assistance, invoking his right under art. 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 art. 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 art. 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 out 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 art. 15 (1), then undoubtedly it would be our duty to say that s. 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 s. 497 is in relation to art. 15 (1).

Now, it is apt very often to be overlooked that art. 15 (1) speaks of discrimination on grounds only of religion, race, caste, sex, place of birth or any of them. If religion, race, caste, sex, 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 art. 15 (1). The narrow question that we have to consider is, can it be said that in enacting s. 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 s. 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 s. 497 contrary to principles of law known and understood by the great Hindu law-giver 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 s. 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.

1951

YUSUF
 ABDUL
 AZIZ
 v.
 THE
 STATE

Chagla C. J.

1951

ABDUL
YUSUF
AZIJ
v.
THE
STATE

Chagla C. J.

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 favour of women is saved by the provisions of art. 15 (3).

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 art. 13. In this view of the matter it is unnecessary to consider whether the whole of section 497 would be void if the alleged discrimination in favour of women had been held to offend against the provisions of art. 15 (1).

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.

K. B. S.