

error of procedure. In the present case the accused had no opportunity of explaining the evidence against them. They had no opportunity of explaining how they came to be arrested or of stating whether the house was or was not a "common gaming house". They might have given some explanation of the small sum of money which was said to constitute the *nal* for the benefit of the occupier of the house. In the circumstances I think it must be held that the accused were prejudiced and the failure to examine them under section 342 was sufficient to vitiate the trial.

The question arises whether it is advisable to order a retrial. In my opinion no retrial is required as the case is, after all, of a petty nature and the accused persons have been put to much trouble and expense in applying to the learned Sessions Judge and to this Court.

I accordingly accept the reference and set aside the convictions and sentences. The fines, if paid, will be refunded.

Reference accepted.

APPELLATE CRIMINAL

Before Mr. Justice Bisheshwar Nath Srivastava

W. J. PHILLIPS (APPELLANT) *v.* KING-EMPEROR
(COMPLAINANT-RESPONDENT)*

1935
August, 20

Indian Penal Code (Act XLV of 1860), section 497—Divorce Act (IV of 1869), section 61—Adultery—Charge of adultery definite about place—Specification of date, how far necessary—Section 61, Divorce Act, whether bars criminal proceedings for adultery.

Where a charge of adultery is sufficiently definite as regards the places where the offence is said to have been committed and as regards the date, it is impossible to assign particular dates on which sexual intercourse took place, it is enough to specify the period within which the offence is alleged to have

*Criminal Appeal No. 274 of 1935, against the order of Babu Gopendra Bhushan Chatterji, Sessions Judge of Gonda, dated the 4th of May, 1935.

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been committed. *Bhola Nath Mitter v. Emperor* (1), and *Hunter, E. G. v. Emperor* (2), referred to.

Section 61 of the Indian Divorce Act does not forbid the Crown to prosecute and punish an alleged adulterer under section 497 of the Indian Penal Code when moved to do so by an injured husband who is entitled to relief under the Divorce Act. *Bwee, F. v. Kirk* (3), relied on.

Evidence of acts of adultery subsequent to the date of the act charged and at places other than those in the charge is admissible for the purpose of showing the character of previous acts of improper familiarity.

Messrs. *Moti Lal Saksena and Muhammad Hafeez*, for the appellants.

The Government Advocate (Mr. *H. S. Gupta*), for the Crown.

SRIVASTAVA, J. :—This is an appeal by W. J. Phillips against the order, dated the 4th of May, 1935, of the learned Sessions Judge of Gonda convicting him of the offence of adultery under section 497 of the Indian Penal Code and sentencing him to six months' rigorous imprisonment. The charge framed against the appellant as subsequently amended in the Sessions Court was as follows:

"That you from March last to the beginning of September last (1934) had been having sexual intercourse with Mrs Beatrix May Roots, at Gonda in the bungalow of the complainant and also between Colonelganj and Chowkaghat railway stations, whom you knew or had reason to believe to be the lawfully wedded wife of Mr. S. J. Roots, a guard in B. N. W. Railway without the connivance or consent of her husband."

The facts of the case are briefly these:

Mr. Roots (aged 49 years) married Mrs. B. M. Roots (aged 31) on the 28th of February, 1922. As a result of this union five children have been born to them, the eldest of whom is Lona a girl of eleven years and the youngest is a child of two years. Mr. Roots is attached

(1) (1924) 81 I.C., 709.

(2) (1920) 22 Cr. L.J., 382.

(3) (1927) 108 I.C., 381.

to the office of the D. T. S., Gonda of the B. N. W. Railway but has to work at times in the Local Control office. He has to perform night duty either from 4 p.m. to midnight or from midnight to 8 a.m. when he works in the Local Control office. The accused Phillips is a bachelor and his age as given by his counsel is about twenty-three years which judged by his appearance might well be correct. The learned Sessions Judge has estimated his age to be about twenty-five. Since December, 1933, the accused had been residing in a house next door to Mr. Roots. He also began to board with Mr. and Mrs. Roots since March, 1934, although he continued to live in his own quarters. About the middle of the same month Lona and her younger brother and sister were sent to Mussoorie for education. Since then the only persons in the house were Mr. and Mrs. Roots and their infant baby about 11 months old. In June, 1934, Miss H. Ross, the sister of Mrs. Roots, also began living with them.

According to the case for the prosecution in June, 1934, Mrs. Roots went to Mussoorie to fetch Lona who was suffering from eczema. The accused Phillips also accompanied Mrs. Roots without her husband's knowledge. In the first week of July, 1934, Mr. Roots went to Bombay and a day or two after it, on the 3rd of July, Mrs. Roots went to Lucknow with Lona by the afternoon train which reaches Lucknow about 5.30 p.m. with a view to get Lona treated by some doctor there for eczema. They passed the night in the ladies waiting room at the Lucknow Junction station of the B. N. W. Railway. Mrs. Roots and Lona returned to Gonda by the 8.30 a.m. train the next morning. Phillips was the guard of the train by which Mrs. Roots went to Lucknow as well as of the train by which she returned to Gonda. In the same month of July, it is alleged that on one occasion Lona, when she was sleeping on the same bed with her mother in the bed-room, woke up after midnight and saw Phillips accused lying by her mother's

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side with his head on the latter's bosom. On being questioned by Lona the mother replied that he was a ghost. It is also alleged that when Mr. Roots used to be in his office during the day time Phillips was in the habit of going to the house and he and Mrs. Roots used to lock themselves up in the bed-room from 12 to about 3 p.m. In September, 1934, there were quarrels between the husband and the wife which resulted in Mrs. Roots leaving her husband's protection and taking up residence in Mewati mohalla in Gonda. Phillips either resigned or was dismissed from his service in November, 1934, and it is alleged that Phillips has since then been living with Mrs. Roots. Lona was sent back to Mussoorie a few days before her mother left her husband's protection in September and was brought back to Gonda by her father in the middle of November. It is said that when Mr. Roots was returning from Mussoorie on the way between Lucknow and Gonda Lona for the first time told her father everything about the misconduct of his wife.

On the 5th of November, 1934, Mr. Roots filed a complaint against Phillips under section 497 of the Indian Penal Code in the Court of the District Magistrate, Gonda. Five days later he also filed a petition for divorce in the Court of the District Judge, Gonda, making Phillips a co-respondent on the charge of adultery and claiming Rs.7,000 as damages against him. The same day Mrs. Roots also filed an application for judicial separation and alimony against her husband.

The learned Sessions Judge has classified the acts of misconduct of the accused Phillips, as sought to be proved by the prosecution evidence, under the following seven heads :

- (A) Dehra Dun incident.
- (B) The incident of Lucknow junction, dated the 3rd/4th July.
- (C) The up journey to Lucknow on the 3rd July.
- (D) Down journey, dated the 4th July.

(E) Midday visits to Mr. Root's bungalow.

(F) Ghost story.

(G) Residence of Phillips with Mrs. Roots after she left her husband's protection.

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Of these C, D, E and F relate to offences committed within the jurisdiction of the learned Sessions Judge and are covered by the charge framed against the accused. The other three namely A, B and G, though outside the charge have been sought to be used by way of corroborative evidence. Out of the first mentioned four heads the learned Sessions Judge held the acts of adultery dealt with under C and F to be proved. As regards D and E he gave the accused the benefit of doubt. As regards the remaining three, his findings were against the accused in respect of all of them.

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J.

The first contention urged on behalf of the appellant is that the charge framed against him is defective inasmuch as it did not definitely specify the dates of the alleged commission of the offence and did not give sufficient particulars. In my opinion the contention is without force. The charge is sufficiently definite as regards the places where the offence is said to have been committed, namely, (1) the bungalow of the complainant, and (2) between Colonelganj and Chowkaghat railway stations. As regards the date it was impossible to assign particular dates on which sexual intercourse took place in the bungalow. In the circumstances it was in my opinion enough to specify the period within which the offence was alleged to have been committed. A similar view was taken in *Bhola Nath Mitter v. Emperor* (1) and in *E. G. Hunter v. Emperor* (2). I am satisfied that the omission of the precise dates has not in any way prejudiced the accused. I therefore overrule the contention.

Next it was argued that section 61 of the Divorce Act was a bar to the prosecution of the appellant. This

(1) (1924) 81 I.C., 709.

(2) (1920) 22 Cr. L.J., 382.

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section provides that no person competent to present a petition under sections 2 and 10 of the Act shall maintain a suit for criminal conversation with his wife. It is argued that the policy of the legislature in enacting this section was that in the case of persons governed by the Act no criminal prosecution should be maintained at the instance of the husband on the charge of the adultery of the wife and that the only remedy allowed to the husband in such cases should be by means of a proceeding for dissolution of marriage under the Act on the ground of adultery. I find myself unable to accede to the argument. Section 497 of the Indian Penal Code makes no such exception. If the legislature intended that a husband who is entitled to relief under the Indian Divorce Act should be prevented from maintaining a prosecution under section 497 of the Indian Penal Code, it was to be expected that it should have made distinct provision to that effect, more particularly as adultery is not regarded a criminal offence under the English law. It may be noted that formerly an action to recover damages for criminal conversation was maintainable under the English Common law at the instance of the husband against the adulterer, but this form of action has now been abolished by section 59 of the Matrimonial Causes Act, 1859. The words used in section 61 of the Indian Divorce Act are "suit for criminal conversation with his wife". To my mind the use of the word "suit" indicates that what the section forbids is a civil suit for damages. The word "suit" seems hardly appropriate to a criminal prosecution. The learned counsel for the appellant has been unable to cite any authority in support of his argument. On the contrary a similar argument was advanced in *F. Bwye v. Kirk* (1) and it was held by a learned Judge of the Lahore High Court that section 61 of the Indian Divorce Act does not forbid the Crown to prosecute and punish an alleged adulterer under section

(1) (1927) 108 I.C., 381.

497 of the Indian Penal Code when moved to do so by an injured husband who is entitled to relief under the Divorce Act. I entirely agree with this opinion.

Some arguments were also addressed as regards the admissibility of evidence with regard to alleged acts of misconduct not included within the charge. It was further argued that in any case the findings of the learned Sessions Judge in respect of the incidents dealt with under the heads A, B and G were not correct. The learned Sessions Judge was of opinion that "evidence of acts of adultery subsequent to the date of the act charged and at places other than Gonda would be admissible for the purpose of showing the character of previous acts of improper familiarity". I am inclined to agree with this opinion. But in view of the fact that proceedings under the Indian Divorce Act in which the appellant figures as a co-respondent are pending between Mr. and Mrs. Roots I am anxious not to express any opinion or to record any finding beyond what is absolutely necessary for the decision of the appeal. I therefore propose to confine myself to the acts of misconduct included within the charge and to deal with them on the assumption that the corroborative evidence is admissible and establishes certain acts of adultery other than those forming the subject of the charge.

Turning now to the two counts on which the learned Sessions Judge has held the charge established against the accused, the first of them is the up-journey from Gonda to Lucknow on the 3rd July. The evidence in respect of this incident consists of the statements of Lona, P. W. 2, Wasdell, P. W. 5 and Khwaja Sultana, P. W. 10: The whole of the statement of Lona as made in examination-in-chief is as follows:

"We started from here by the 1 p.m. train. We travelled in a 2nd class compartment. After we had proceeded some 2 or 3 stations from Gonda Phillips removed me to the ice-vendor's compartment saying I

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might have some ice and lemonade, etc, there. When the train started from that station I saw Phillips get into that very compartment in which my mother was travelling. When I came away from my mother's carriage to the ice-vendor's compartment, there was none else in my mother's compartment except my mother. I stayed in the ice-vendor's compartment up to 4 or 5 stations and then Phillips came and took me back in my mother's carriage."

Waddell P. W. 5, who was the driver of the train, has deposed that he saw Phillips taking the girl to some other compartment but did not see where she was kept. Khwaja Sultan, P. W. 10, who was the Travelling Ticket Checker of that train, has stated that he saw the little girl in the ice-vendor's compartment between Maijapur and Chaukaghat railway stations. This is the entire relevant evidence on this part of the case. There is absolutely no evidence to show how long Phillips remained in the second class compartment after Lona had been removed from it. Nor is there any evidence at all as to whether any other passenger entered the compartment or not during the time that Lona was in the ice-vendor's compartment. P. W. 5 Waddell admits in cross-examination that the guard of the train has to give exchange signals at each station. He further stated as follows:

"During the up journey the driver remains on the right side and the fireman remains on the left side. So during the up journey the exchange signals given by Phillips must have been received at all the stations by the fireman, so I could not say from where those signals were given whether from the brake van or from anywhere else. If exchange signals were given in the up train from any carriage other than the brake van, the fireman could see the same. If there is any irregularity in this matter the fireman is supposed to bring it to my notice. During the up journey that day the fireman did not report any such irregularity to me."

It is true that direct evidence of the fact of adultery can rarely be possible. It has to be inferred from circumstances, but the circumstances must be such as to fairly justify the inference that sexual intercourse took place. In the present case the act of the appellant in removing Lona from the second class compartment might at best be regarded as a preparation for the commission of the offence but this is not enough. The question is whether the facts proved justify a reasonable inference of sexual intercourse having actually taken place. Considering the fact that it was day time and the train was stopping at short intervals at each station and the appellant had to attend to his duties as guard of giving signals, etc. at each station, and in the absence of evidence as to the period of time during which the appellant was in the compartment of Mrs. Roots, it seems that even assuming that criminal intimacy had existed between them, it appears very doubtful if the offence of adultery was actually committed on this occasion. It may be noted that sexual intercourse is a necessary ingredient of the offence under section 497 of the Indian Penal Code. Nothing short of it would justify a conviction under that section. Even though the conduct of the appellant in removing Lona to another compartment is not free from suspicion yet taking all the circumstances into consideration I am of opinion that the appellant is entitled to get the benefit of doubt. I accordingly hold that the fact of his having committed adultery on this occasion has not been established.

Next we have to deal with the ghost story. The only evidence in support of it is the statement of Lona. I have already mentioned what the girl has said on this point. There is one part of the girl's statement in cross-examination which seems to have been overlooked by the learned Sessions Judge. She stated that the occurrence took place 10 or 12 days after she came from Mussoorie. She further stated that from the day she came to Gonda her father attended night duty from midnight to morning

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for seven days and that he attended office from 4 p.m. to midnight in the next week. Thus it is clear that on the night of the occurrence Mr. Roots was on duty only up to midnight. Lona has further stated that when her father was relieved from his duty at midnight he used to return home at once and used to reach home by 12.15 a.m. She further stated that on such nights her aunt used to sleep in the bed-room. If these statements are coupled with the statement that the occurrence took place after midnight, some 3 or 4 hours after she had retired to bed at about 10 p.m. it follows that Mr. Roots was, at the time of the occurrence, in the house sleeping in the dining room and that Miss Ross, the sister of Mrs. Roots, was in the very room in which the occurrence took place. It is in the highest degree improbable that the appellant as well as Mrs. Roots should both be so daring as to share the bed together under such circumstances. I am therefore unable to believe this fanciful story. Admittedly the girl Lona is living with her father ever since her return from Mussoorie. There can be no doubt that she is under her father's influence. She seems to have been tutored in respect of the story. I therefore disbelieve this part of her statement and hold that this occurrence also has not been proved.

This disposes of the two incidents which have been held proved by the learned Sessions Judge. The learned Government Advocate also tried to support the conviction by impugning the finding of the learned Sessions Judge in respect of the midday visits of Phillips to the bungalow of Mr. Roots. The prosecution evidence in respect of this matter is to the effect that Phillips used frequently to go to Mrs. Roots about midday and to stay with her till about 3 p.m. on those dates when Mr. Roots happened to be in the office during the day. It is also said that they used to be closetted in the bed-room which was bolted from inside. The witnesses admit that the said bed-room has transparent glass panes without any curtain behind them. None of the witnesses says that

he ever saw them in any compromising position. Admittedly there is no sitting room in the house and they could therefore sit only either in the bed-room or in the dining room. It is also admitted that Miss Ross and Lona used to be present at the time of these visits, but it is said that Miss Ross used to be sent out to the verandah to watch the tailor's work and Lona to the ante-room with the little baby. In the circumstances although it is not impossible that an act of adultery might have taken place at some of these visits yet I think that in view of the lack of privacy in the room and the presence of other inmates in the house the learned Sessions Judge was fully justified in giving the accused the benefit of doubt. I cannot therefore see my way to disagree with the finding of the learned Sessions Judge on this point.

The result therefore is that I allow the appeal, set aside the conviction and sentence of the accused under section 497 of the Indian Penal Code and direct that the bail bond of the appellant, who is on bail, be discharged.

Appeal allowed.

REVISIONAL CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava and
Mr. Justice Ziaul Hasan*

JAGMOHAN (DEFENDANT-APPLICANT) *v.* SURAJ NARAIN
(PLAINTIFF OPPOSITE-PARTY)*

1935
August, 22

Civil Procedure Code (Act V of 1908), Schedule II, paragraph 1—Agreement to refer to arbitration recorded in Court proceedings and signed by parties, validity of—Arbitration—Award based on such reference, whether valid and binding.

The record of an agreement to refer to arbitration in the Court's proceedings and bearing the signature of the parties constitutes sufficient compliance with the requirements of paragraph 1 of the Second Schedule of the Code of Civil Procedure and the award given on such reference is valid and binding.

*Section 113, Application No. 17 of 1934, against the order of Babu Kali Charan Agarwal, Munsif of Partabgarh, dated the 21st of December, 1933.

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