

IN THE GAUHATI HIGH COURT

(THE HIGH COURT OF ASSAM, NAGALAND, MEGHALAYA, MANIPUR, TRIPURA,
MIZORAM AND ARUNACHAL PRADESH)

ITANAGAR PERMANENT BENCH**BEFORE****HON'BLE MR JUSTICE HRISHIKESH ROY****ORAL JUDGMENT IN****CRIMINAL PETITION NO. 3(AP)/2009****PETITIONER**

Mr. Simon Joseph.

VERSUS**RESPONDENTS**

The State of Arunachal Pradesh & others.

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NFR	


JUDGE

IN THE GAUHATI HIGH COURT
(The High Court of Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram and
Arunachal Pradesh)

ITANAGAR BENCH

Criminal Petition No.3 (AP)/2009

1. Mr. Simon Joseph,
C/o. St. Thomas School,
Nirjuli, District Papum Pare,
Arunachal Pradesh.

- Petitioner.

- Vs -

1. The State of Arunachal Pradesh.

2. Shri Nabam Tadik,
S/o. Nabam Roding,
R/o. Nirjuli, P.O. Nirjuli,
District Papum Pare, Arunachal Pradesh.

3. Shri Nabam Tadik,
S/o. Nabam Roding,
R/o. Nirjuli, P.O. Nirjuli,
District Papum Pare, Arunachal Pradesh.

- Respondents.

**BEFORE
HON'BLE MR. JUSTICE HRISHIKESH ROY**

For the Petitioner .	:	Mr. P K Tiwari, Advocate. Mr. T Pertin, Advocate, Mr. L Tenzing, Advocate & Mr. A K Singh, Advocate.
For the Respondent No.1	:	Mr. I Basar, Addl. P.P.
For the Respondent Nos.2	:	Mr. N Jollow, Advocate.
Date of hearing & delivery of judgment	:	19.01.2011.

JUDGMENT & ORDER (ORAL)

Heard Mr. PK Tiwari, learned counsel appearing for the petitioner. Also heard Mr. I Basar, learned Addl. Public Prosecutor who represents the State. Mr. N. Jollow, learned counsel appears for the respondent No.2 (informant).



2. The petitioner challenges the legality of the criminal proceeding in the GR Case No.38/2008 in the Court of the learned Additional Dy. Commissioner and ex-officio Judicial Magistrate, 1st Class, Naharlagun and seeks quashing of the order passed by the Magistrate on 3.8.2009, taking cognizance of the case against the accused petitioner under Section 497 and 498 of the Indian Penal Code (IPC).
3. Before proceeding to consider the legal arguments, it would be appropriate to take note of the relevant facts.
4. An information was lodged by the respondent Nos.2 and 3 with the Naharlagun Police on 9.3.2008 alleging that the petitioner had eloped with Smti. Nabam Santi, wife of Late Nabam Tata (hereinafter referred to as "*the deceased*") and the Naharlagun P.S. Case No.38/2008 was registered under Section 366/497/498 of the IPC. In course of the investigation, the statement of the victim lady was recorded where she flatly denied the charges made against the accused.
5. On 14.3.2008 an additional FIR was filed by the informants with the further allegation that the deceased Nabam Tata was killed on 12.11.2007 by the petitioner and the deceased's wife, who hatched a criminal conspiracy to kill the deceased and to marry each other. At the instance of the informants, the buried body of the deceased was exhumed on Court's order and the viscera collected from the exhumed body was sent for a report from the Central Forensic Science Laboratory (CFSL), Kolkata. In the report dated 31.10.2008 sent by the Junior Scientific Officer of the CFSL, it was opined that "*no common poisons could be detected in the contents of each of the exhibits marked here*" and accordingly charge under Section 120(B)/302 of the IPC was not found established in the case.
6. Confronted with the negative finding from the CFSL, the police in their report made on 3.2.2009 before the Magistrate requested for taking cognizance under Section

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497 and 498 of the IPC and considering the police report the Magistrate directed issuance of process against the petitioner.

7.1 It is argued by Mr. PK Tiwari, learned counsel for the petitioner that criminal process cannot be set in motion for an offence under Section 497 and 498 of the IPC except upon a complaint by a person *aggrieved* by the offence. Referring to the provisions of Section 198 of the CrPC, the learned counsel submits that no person other than the husband of the woman can be deemed to be *aggrieved* under Section 497 and 498 of the IPC and in the absence of the husband, criminal process can be issued only on the complaint of a person, who had care of the woman on behalf of the husband, at the time when the offence was committed and such complaint can be filed by a third party, only with leave of the Court to make such complaint.

7.2 It is pointed out by the learned counsel that the victim wife in the instant case is a Government servant and an independent person and was not under the care and protection of the two informants and the FIR filed by the respondent Nos.2 and 3 cannot be made the basis for taking cognizance of an offence punishable under Section 497 and 498 of the IPC.

7.3 By referring to the definition of a "*Complaint*" under Section 2(d) of the CrPC, the learned counsel contends that a complaint for taking action under the CrPC does not include a police report and therefore the FIR filed by the informants before the Naharlagun Police or the police report cannot be acted upon for taking cognizance of the case against the petitioner.

7.4 The learned counsel further submits that the police report dated 3.8.2009 cannot be a legal basis for taking cognizance by the Magistrate since the police cannot step into the shoes of an *aggrieved* for a complaint under Section 497 and 498 of the IPC.

7.5 Since the Magistrate had applied his mind to the police report and then ordered the process on 3.8.2009, the learned counsel submits that this amounts to taking

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cognizance of the case alleged under Section 497 and 498 of the IPC and accordingly the Magistrate's action is put to challenge by the petitioner as being based on an inactionable police report.

7.6 In order to support his contention that complaint of only of the *aggrieved* can be entertained for taking cognizance of an offence under Section 497 and 498 of the IPC and that neither the police nor the Magistrate could act on the complaint of a third party, who is not *aggrieved* in law, the learned counsel has referred to the following decisions of the Court:

(a) The first case cited by Mr. Tiwari is *AIR 1963 Orissa 60 (Pothi Gollari vs. Ghanni Mondal)*. In this case the Court held that when the father did not have the care of the woman on behalf of the husband, the complaint for an offence under Section 497 is invalid in law and criminal proceeding cannot be launched on the basis of such invalid complaint.

(b) *AIR 1946 Calcutta 493 (Sk. Hatem Ali vs. Emperor)* is cited by the learned counsel to point out that, prosecution cannot be launched in the absence of a complaint by husband of the victim woman. A third party, who can be considered to be an *aggrieved* is such a person, who had the care of the victim woman on behalf of the absentee husband.

(c) The decisions of the Bombay High Court in *Ramnarayan Baburao Kapur vs. Emperor* reported in *AIR 1937 Bombay 186* and that of the Allahabad High Court in the case of *Tej Singh vs. State* reported in *AIR 1965 Allahabad 508* are also relied upon by the petitioner to contend that cognizance in the present case on an FIR lodged by the brother-in-laws of the wife, could not have been taken under the provisions of Section 198(2) of the CrPC.

8. On behalf of the State, Mr. I Basar, learned Addl. Public Prosecutor does not dispute the legal proposition projected by the petitioner. However Mr. Basar submits that since the husband, who could have been the naturally *aggrieved* party on a charge of adultery of the wife, had died and the victim lady was an independent person, the

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prosecution had to proceed on the basis of the FIR lodged by a third party, who was closely related with the deceased.

9.1 On behalf of the informants, it is contended by Mr. N Jollow, learned counsel that although the report of the CFSL, Kolkata indicated absence of poison in the viscera of the deceased, the same was the result of inefficient police investigation and considering the mysterious circumstances, under which the deceased Nabam Tata died, fresh investigation of the case should be ordered by the Court.

9.2 The learned counsel further submits that an FIR by the brother-in-laws of the victim lady can be the basis for taking cognizance of offence under Section 497 and 498 of the IPC, in as much as, under the customary practice prevalent amongst the tribes of the Arunachal Pradesh, the surviving brother marrying the widowed sister-in-law, is very much prevalent.

9.3 As the submissions hinges on the interpretation of certain provisions of the CrPC, the relevant sections are extracted for ready reference:-

"2(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

198. Prosecution for offences against marriage.- (1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence:

Provided that-

(a)

(b)

(c)

(2) For the purpose of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code:

Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf."

9.4 Examination of the provisions of Section 198 of the CrPC makes it clear that cognizance of an offence under *Chapter XX* of the IPC cannot be taken except upon a

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complaint made by the person *aggrieved*. In the present case, the husband during his lifetime never made any such complaint, although informants alleged that adulterous relationship also existed during the deceased's lifetime.

10. Since the *aggrieved* husband had not filed any complaint, a complaint at the instance of a third person is permissible if only such person had the care of the woman on behalf of the husband, under the provision of Section 198(2) of the CrPC. But in the present case, the informants did not have care of their sister-in-law on behalf of her deceased husband. Nor they had filed any such complaint with the leave of the Court, as required under the Section. What they did was to file an FIR before the Naharlagun Police. But under Section 2(d) of the CrPC, a Police Report is specifically excluded from the definition of "*complaint*" for the purpose of the Code.

11. On the power of the Court to take cognizance of an offence against marriage under Section 497 and 498 of the IPC on the complaint of a third party (not the *aggrieved* husband), the complaint must emanate from a party who had the care of the victim woman and such care providing must be on behalf of the husband of the victim. Furthermore the complaint by such a third party can be filed only with leave of the Court and that too on behalf of the husband.

12. The provisions of Section 198(2) of the CrPC makes it clear that none other than the husband shall be deemed to be *aggrieved* by any offence punishable under Section 497 or 498 of the IPC and only exception envisaged is provided under the proviso to Section 198(2) of the CrPC. The exception applies only to a situation where the marriage offence victim was under the care of another and the proviso in my view, would not apply, where the victim was not dependent and had her own earnings.

13. The woman who is alleged to be the victim of a marriage offence in this case is a Government employee with her own life and earning and there is nothing on record to show that she was dependent in any way, on her brother-in-laws, who with their FIR,

had initiated the criminal process. Considering that the victim was not dependent on the private respondents, I hold that a complaint at their instance is incompetent in law, under the proviso to Section 198(2) of the CrPC.

14. It must also be noted that the complaint was not filed with the leave of the Court and on this score too, the complaint was not actionable. That apart, as per the definition given in Section 2(d) of the CrPC, a *complaint* for the purpose of the CrPC is allegation made to a Magistrate. Here since the respondent Nos.2 and 3 had only lodged an FIR before the police and not a *complaint* to a Magistrate, I am of the considered opinion, that the information given to the police by the respondent Nos.2 and 3, cannot be considered as a competent *complaint* under the CrPC, for taking cognizance under Section 497 and 498 of the IPC.

15. As regards the plea raised by Mr. N Jollow, learned counsel appearing for the informants for further investigation of the case, it is seen that neither the order of the Magistrate nor the police report dated 3.8.2009 have been challenged by the informants and here the Court is considering the quashing petition of the accused. Therefore a plea from the informants for further investigation on the accused's petition can hardly be entertained.

16. In so far as the submission made that since under the customary practice, the brother of a deceased husband usually marry the surviving widow and on this ground the complaint of the brother-in-law is cognizable, I am afraid that such submission cannot be accepted simply because, this special custom have not been statutorily recognised and no exception in the provisions of Section 198 of the CrPC has been made, to permit the brother-in-law, to step into the shoes of the *aggrieved*, without satisfying the conditions of Section 198(2) of the CrPC.

17. For the foregoing reasons, I find enough merit in this petition and accordingly the criminal proceeding in GR Case No.38/2008 pending in the Court of the learned Judicial

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Magistrate, 1st Class, Naharlagun is quashed. Consequently the Magistrate's order dated 3.8.2009 is also interfered with since criminal action under Section 497 and 498 IPC cannot start on a police report or a third party's complaint.

18. The petition stands allowed with the above order.


JUDGE

Barman