

## A Comment on *Bhupinder Singh v. U.T. of Chandigarh*<sup>1</sup>

Kunal Shah\*

Andrew Ashworth and Jeremy Horder in *Principles of Criminal Law* have pointed that it is the duty of the legislature to see that the offences are sub-divided and labeled so as to represent fairly the nature and magnitude of law breaking. Fairness demands that the offenders be labeled and punished in proportion to their wrongdoing. The label is important both for public communication and, within the criminal justice system, for deciding appropriate maximum penalties, for evaluating previous convictions, classification in prison and so on.<sup>2</sup>

If a society draws distinction between two criminal acts then it is the duty of the legislature to see that same distinction is also provided by the statute. Everyone who causes death is not a murderer and the law must recognise the difference between 'intentional killing' and 'killing by accident'.

Labelling would be unfair if it exaggerates or misleads others about the gravity of the act in which the person was involved. The strength of the principle is to ensure that arguments of proportionality, fairness to individuals, and the proper confinement of executive and judicial discretion are taken seriously when offences with broad definition and high maximum penalties are under consideration.

Undoubtedly, the object of the court is to see that the crime does not go unpunished and the victim of the crime and the society have satisfaction that justice has been done to them<sup>3</sup>, but a person should be punished for the act which he has done and not for anything else.

The courts have generally seen their task as one of fitting the penalty to the particular degree of iniquity and dangerousness of the offender's conduct on that particular occasion.<sup>4</sup> A sentence is viewed not only as punishment but also as a public denunciation of the conduct in question.<sup>5</sup>

Only when the court finds that the act in question squarely fits in the concerned relevant provision of the Statute, the Court propounds its judgment. If a judgment is awarded contrary to this, it would cause gross injustice to the person against whom the judgment has been awarded.

The case under comment, *Bhupinder Singh v. U.T. of Chandigarh*,<sup>6</sup> portrays this gross injustice which is meted out to a person who is convicted of rape because of extra-ordinary interpretation of Clause "Fourthly" of Section 375 of the Indian Penal Code by the Division Bench of the Honourable Supreme Court, which has the ultimate result of labeling a person with an offence which he never committed.

Its general rule of the law that when the language of the provision has a natural meaning we cannot depart from that meaning unless, reading the statute as a whole, the content directs us to do so<sup>7</sup>. The intention of the legislature in the concerned provision was quite clear but the court miserably failed to interpret it. As a result it labeled the accused and awarded the punishment for an offence which he had never committed.

What causes even more pain is that no reliance was placed on judicial interpretations which were available although they were persuasive in nature.

The last lethal stroke on this case is given by the daggers of the High Court and the Supreme Court pertaining to an important question of fact. The High Court accepted the existence of fact which

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<sup>1</sup> (2008) 8 SCC 531.

\* 3rd year law student of Dr. Ram Manohar Lohiya National Law University, Mob No.: 7505548575

<sup>2</sup> Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 77.

<sup>3</sup> *Dhanajoy Chatterjee v State of West Bengal* 1995 AIR SCW 510.

<sup>4</sup> J.C.Smith and Hogan, *Criminal Law* (7th edn, Butterworths 1992).

<sup>5</sup> *Ibid.*

<sup>6</sup> (2008) 8 SCC 531.

<sup>7</sup> *Attorney General v Milne* (1914) ALL ER 1061.

compelled it to reduce the punishment but the same fact was also capable of negating the applicability of the relevant section, and the High Court failed to appreciate it. When the same question rose before the Supreme Court it also neglected the potential of the fact to negate the applicability of the provision and on the other hand it appreciated the reasoning of the High Court in reducing the sentence.

## **FACTS OF THE PRESENT CASE**

The Complainant in the present case was filed by Manjit Kaur who was employed as a Clerk in All Bank Employees Urban Salary Earners Thrift Credit Society Ltd. and worked as such till September, 1991. Accused-Bhupinder Singh was employed as Data Entry Operator in the State Bank of Patiala, Sector 17-C, Chandigarh. He often used to visit her office and developed intimacy with her. One day he proposed her for marriage disclosing himself as unmarried person. The accused insisted upon her to get married at the earliest through simple ceremony and also told her that they could take permission from their parents later on and that thereafter marriage would be solemnized with great pomp and show. The complainant agreed to the proposal of the accused and on 4.12.1990, Manjit Kaur and Bhupinder Singh got solemnized their marriage.

There were many instances which showed that the accused and the complainant were a married couple. After their honeymoon they shifted to H. No. 1110, Sector 42-B, Chandigarh and stayed in a rented accommodation owned by one Pritam Singh. Even landlord had lodged a report in Police Station, Sector 36, Chandigarh, showing them as husband and wife and prior to that a form was duly filled by Bhupinder Singh and same was handed over to the landlord to establish the fact of their being husband and wife. Accused had also taken a loan of Rs. 5000/- from a society at Panchkula in May 1991, where he had nominated her as his wife.

During this time period the complainant became pregnant but due to the insistence of the accused, she against her will underwent abortion. She again became pregnant in July 1993 and their relations remained cordial till March, 1994.

On 6.3.1994 when she had gone to Rose Garden, she met Devinder Kumar Bansal and Vinod Sharma, who were friends of her husband, Bhupinder Singh. They told her that Bhupinder Singh was already married with one Gurinder Kaur and was having children from her. She was shocked to learn this and after reaching the residence, she asked about Bhupinder Singh, who on the same day had left for Patiala on the pretext of attending some training course and did not return till 13.3.1994. She went to the house of Devinder Bansal to know whereabouts of accused-Bhupinder Singh and there Bhupinder Singh along with his wife Gurinder Kaur came and started fighting and then Manjit Kaur tried to inform the police. But Daljit, husband of sister of Bhupinder Singh brought her and left her in her house. On 16.4.1994, she was admitted in General Hospital and gave birth to a female child. She informed Bhupinder Singh about this as he was father of the child. But Bhupinder Singh did not turn up. On this complaint, case was registered for the offence punishable under Sections 420/376/498A of IPC.

In his statement under Section 313 of the CrPC the appellant took the stand that he started knowing the appellant after his marriage with Gurinder Kaur. The complainant was known to his wife before her marriage with him and she had come along with her mother to their place in Sector 23, Chandigarh where her mother requested him to get her a job as she had finished the studies and wanted to get a job. The complainant stayed in their house for six months. Thereafter, he arranged a job for her. However, she had shifted and being of loose morals, entertained many people. When he learnt that she was of loose morals and was going out with different persons at odd hours, he objected and told the complainant to mend her ways. But she started fighting with him and demanded money which he did not pay and, after delivery of the child, she filed a false complaint. Gurinder Kaur stated that she knew the complainant prior to her marriage. Documents were also produced to show that in official documents, accused-appellant had shown the complainant as his wife and nominee.

Investigating Officer, during investigation, collected many documents showing the accused and prosecutrix Manjit Kaur as husband and wife. After investigation, challan was presented. Accused-appellant faced trial.

### **The judgment of the trial Court**

After trial, the learned Additional Session Judge, Chandigarh, gave the judgment convicting the accused for offences punishable under Section 376 and 417 of the Indian Penal Code. He was sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs.10,000/- with default stipulations for the first offence and rigorous imprisonment for nine months in respect of the second offence. He filed an appeal before the High Court.

### **The judgment of the Honourable High Court**

The High Court found that Bhupinder Singh and Manjit Kaur were living as husband and wife together for pretty long time at different places. There had been sexual intercourse and Manjit Kaur had become pregnant. For that sexual intercourse consent was given by Manjit Kaur treating Bhupinder Singh as her husband. Bhupinder Singh very well knew that he was not her husband and was already married to Gurinder Kaur. Present case will squarely be covered under the description “fourthly” of Section 375 IPC and therefore, the accused was guilty of the offence and was liable for punishment under Section 376 IPC. Accordingly, the conviction, as done, was upheld.

The High Court also found that by the statements of Gurinder Kaur and other defence witnesses it cannot be said that Manjit Kaur did not know about the fact that Bhupinder Singh was already married with Gurinder Kaur and held that the case was a fit one for reduction of sentence and award of adequate compensation. Therefore, case for the offence under Section 417 IPC was not made out and the appellant was acquitted of that offence. Accordingly, custodial sentence of three years rigorous imprisonment was imposed in place of seven years rigorous imprisonment as was done by the trial court. The compensation was fixed at Rs. 1,00,000/- which was directed to be paid within three months. It was indicated that in case the compensation amount was not paid, the reduction in sentence would not be given effect to.

An appeal challenging the judgment of a learned Single judge of the Punjab and Haryana High Court was brought to the Honourable Supreme Court. The case was presided over by the Division Bench of the Honourable Supreme Court.

The Counsel for the appellant submitted that when the complainant knew that he was a married man and yet consented for sexual intercourse with him, Clause “Fourthly” of Section 375 IPC would have no application. It was also submitted that the fact that the complainant knew about his being a married man, is clearly established from the averments made in a suit filed by her where she had sought for a declaration that she is the wife of the accused.

The Counsel for the State submitted that it is a clear case where Clause “Fourthly” of Section 375 IPC is applicable. Learned counsel for the complainant submitted that this was a case where no reduction in sentence was uncalled for. The High Court proceeded on an erroneous impression that the complainant knew that the accused was a married man.

### **The Judgment of the Honourable Supreme Court**

The Honourable Apex Court held that ‘Though it is urged with some amount of vehemence that when complainant knew that he was a married man, Clause “Fourthly” of Section 375 IPC has no application, the stand is clearly without substance’<sup>8</sup>.

Even though, the complainant claimed to have married the accused, which fact is established from several documents, that does not improve the situation so far as the accused-appellant is concerned. Since, he was already married, the subsequent marriage, if any, has no sanctity in law and is void ab-initio. In any event, the accused-appellant could not have lawfully married the complainant. A bare reading of Clause “Fourthly” of Section 375 IPC makes this position clear.

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<sup>8</sup> Supra, 5.

The Supreme Court also appreciated the reasoning of the High Court in reducing the sentence of imprisonment awarded by the Addition Session Judge. The Court said that the High Court has reduced the sentence taking note of the peculiar facts of the case, more particularly, the knowledge of the complainant about the accused being a married man. The High Court has given sufficient and adequate reasons for reducing the sentence and awarding compensation of Rs.1,00,000/-

## INFIRMITIES OF THE JUDGMENT: AN ANALYSIS

### a) Extra-Ordinary Interpretation of the provision.

#### Clause "Fourthly" of Section 375 IPC reads as follows:

375- A man is said to commit "rape", who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

Fourthly - With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is *another man* to whom she is or believes herself to be lawfully married.

The Supreme Court and the High Court skipped the word "*another man*" from the clause and thereby drove altogether to a different conclusion. This is evident from the judgment of the High Court where it held that Bhupinder Singh and Manjit Kaur were living as husband and wife together for pretty long time at different places. There had been sexual intercourse and Manjit Kaur had become pregnant. For that sexual intercourse consent was given by Manjit Kaur treating Bhupinder Singh as *her husband*. Bhupinder Singh very well knew that he was not her husband and was already married to Gurinder Kaur. Present case will squarely be covered under the description "fourthly" of Section 375 IPC.<sup>9</sup>

As soon as we read the words "*another man*" with reference to the whole clause we are made to believe that the word *involves two identities*. The woman gives the consent because she is *mistaken by the identity* of the person and considers that person to be her husband. Now, the very obvious question that comes up is that how come this mistake of identity is caused? The answer is that there is *Impersonation*.

The legislature through this section intends to punish those culprits who impersonate themselves as the husband of the woman, in order to receive her consent, and there by commit the forbidden acts.

The position above would be best explained by reference to a mythological incident. Lord Indra attracted by the beauty of Ahilya impersonated himself as sage Gautam, who was the real husband of Ahilya, and when he was out Indra had a sexual intercourse with her. Ahilya gave the consent because she considered Indra to be another man, Sage Gautam, her husband<sup>10</sup>.

Impersonation can be done in any form. An example of such crime is still very much possible in backward areas of India where the girls before their marriage have never seen their husbands. X, a male approaches such girl on her marriage night as her husband and commits those forbidden acts the permission of which has been given by the girl believing him to be another man to whom she is married clause "Fourthly" of Section 375 IPC would be attracted and X would be liable for the same.

If we look at the facts of Bhupinder Singh case we find there was no impersonation. Since, there was no impersonation there would be no applicability of the provision. The court labeled the accused of a crime which he did not commit and thereby grave injustice was done to the accused. This doesn't mean that the accused was not liable of any offence.

If we apply Section 493 and 494 of Indian Penal Code we would find that these provisions criminalize the acts of Bhupinder Singh.

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<sup>9</sup> 2006(4) RCR (Criminal) 692.

<sup>10</sup> Söhnen-Thieme, Renate (1996). "The Ahalya Story Through the Ages". In Leslie, Julia. *Myth and Mythmaking: Continuous Evolution in Indian Tradition*. Curzon Press. ISBN 978-0-7007-0303-6

Section 493 of IPC reads as under:

Cohabitation caused by a man deceitfully inducing a belief of lawful marriage- Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Bhupinder Singh was not lawfully married to Manjit Kaur as he was already married to Gurinder Kaur and therefore his marriage with Manjit Kaur was void. He never conceded about his previous marriage to Manjit and had sexual intercourse with her making her believe that he was her husband. Thus, he would be punished under the above offence.

Bhupinder Singh would also be liable under Section 494 of IPC which punishes the act of bigamy.

**b) No reliance on judicial interpretation of the clause in question**

Another major infirmity of the judgment is that nowhere has the court relied on any judicial interpretations of the clause in question even though it was available. In *Sunil Vishnu Salve and Another v. State of Maharashtra*<sup>11</sup> the Aurangabad bench of Bombay High Court interpreted Clause “Fourthly” of Section 375 and held that Clause Fourthly of Section 375 of the Indian Penal Code applies when a man induces a married woman to have sexual intercourse with him by impersonating her husband. When consent by a woman to a man under misconception of fact that he was her husband, it amounts to rape by a person to whom the woman believes to be her husband.<sup>12</sup>

Although it was having a persuasive value it would have been of immense help to the Supreme Court in arriving at the correct conclusion.

**c) Non appreciation of a critical and relevant fact which could have turned the case upside down.**

The High Court accepted the fact that the victim had knowledge of the previous marriage of the accused which prompted it to reduce the sentence of punishment awarded by the Additional Session judge. The court held that it cannot be said that Manjit Kaur did not know about the fact that Bhupinder Singh was already married with Gurinder Kaur.<sup>13</sup> The High Court relying on this fact acquitted him of the offence of cheating under Section 417 of IPC.

When a very valid question was raised by the learned Council for the appellant in the Honorable Supreme Court, the Court ignored to answer it by only mentioning that even if she knew that he was a married person it would not improve the position and he would be liable. It also went on to appreciate the reasoning of the High Court in reducing the sentence. In this way we can conclude that the Supreme Court was also of the opinion that the complainant knew about the marital status of the accused.

Let us again see what Clause Fourthly of Section 375 says:

Fourthly - With her consent, when the man knows that he is not her husband, and that her consent is given *because she believes* that he is another man *to whom she is or believes herself to be lawfully married*.

If we pay attention to the italicized words “because she believes” and “to whom she is or believes herself to be lawfully married” the question that comes in our mind is that why is the consent given by the woman? The answer is, because she believes that he is another man to whom she is lawfully married. The position in our case is different, here the court has found that the complainant knew that

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<sup>11</sup> 2006 CriLJ 587.

<sup>12</sup> *ibid.*

<sup>13</sup> 2006 (4) RCR (Criminal) 692.

the accused was already married hence she is in no position to say that she believed him to be married to her.

Again this highlights that the Supreme Court and the High Court failed to interpret another aspect of the provision and thereby sailed to a wrong conclusion. The above italicized words had the potential to negate the application of the provision.

#### **HOW CAN THE POSITION BE IMPROVED?**

I am of the opinion that it is now high times that the words in the Clause "Fourthly" of Section 375 be amended in a way that it clearly spells out the essentiality of impersonation so that no future mistake is committed by the courts on the same issue. If at this juncture of time we leave the provision as it is then there would always be an apprehension of miscarriage of justice which would bring bad names to the judicial system. If we take a glance at the infirmities of the judgment we are made to believe that there was lack of care on the part of the Supreme Court. This negligence resulted in miscarriage of justice. Thus we can say beyond any doubt that the Judgment of the Supreme Court and the High Court is per incuriam and would have no value as judicial precedents in cases to come.

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