

CASE COMMENTARY – JOSEPH SHINE VERSUS UNION OF INDIA

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Abstract

The case of Joseph Shine vs Union of India has sparked widespread discussions and garnered significant attention in India. This commentary explores the background of the case, analyzes its implications for gender equality and personal freedom, and discusses its potential to impact society. Adultery laws in India screamed paternalism and male chauvinism for ages. Adultery has always been considered immoral and illicit against the institution of marriage. Even in Manusmriti, Dharmashastras and Christianity, it is a sin and was punished with banishment. The 150-year-old law remained the same for a long time, even in independent India, until it was challenged in several cases. Under section 497-of the Penal Code, 1860 (IPC), 'Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to rape, is guilty of the offence of adultery.'⁸⁶⁶ The case commentary is about the latest precedent decided by the Hon'ble Supreme Court of India of Joseph Shine v. Union of India . It is about the Section 497 of the Penal Code, 1860. The commentary includes a brief understanding of the precedent and questions involved in the case and their analysis in detail.

Keywords- Supreme Court of India, Parliament, Union, Constitution, Adultery, Crime

Case Title	Joseph Shine v. Union of India
Case No.	Writ Petition (Crl.) No. 194 of 2017
Date of the order	27 th September, 2018
Jurisdiction	Supreme Court of India
Qourom	BEFORE DIPAK MISRA, C.J. AND R.F. NARIMAN, A.M. KHANWILKAR, DR D.Y. CHAND ACHUD AND INDU MALHOTRA, JJ
Petitioner	Joseph Shine
Respondent	Union of India
Author	Justice Deepak Mishra
Acts and Section involved	<ul style="list-style-type: none">Constitution Of India, 1950- Article 14, 15(1), 21Penal Code, 1860- Section 497

⁸⁶⁶ Case Commentary : Joseph Shine v. Union of India, 2.3 JCLJ (2022) 690

Introduction

Adultery as an offence is decriminalized but the outcomes of such an Act, have greater impact on the society at large. At the most the Act even when decriminalised still manages to retain the element of “mens rea” therefore an Act followed by “mens rea” is now going unpunished. The consequences of such a decision, is that a Criminal Act is no longer accounted for under the Penal Code, 1860. It is so that this research paper is an attempt to examine the deviation from the Supreme Court Judgement, how the present scenario can also have an adversarial affect. Further it is observant from the given paper that the idea and the outcome of this is to cover all the areas and legal possibilities that might arise in various circumstances.⁸⁶⁷

Facts

A writ petition was filed under Article 32 by Joseph Shine challenging the constitutionality of Section 497 of IPC read with Section 198 of Cr. P.C., being violative of Article 14, 15 and 21. This was at first a PIL filed against adultery. The petitioner claimed the provision for adultery to be arbitrary and discriminatory on the basis of gender. The petitioner claimed that such a law demolishes the dignity of a woman. The constitutional bench of 5 judges was set up to hear the petition.

Issues

- Whether the provision for adultery is arbitrary and discriminatory under Article 14?
- Whether the provision for adultery encourages the stereotype of women being the property of men and discriminates on gender basis under Article 15?
- Whether the dignity of a woman is compromised by denial of her sexual autonomy and right to self-determination?
- Whether criminalizing adultery is intrusion by law in the private realm of an individual?

Arguments Favour Of Petitioner

- The counsel for the petitioner contended that the provision criminalizes adultery on classification based on sex alone which has no rational nexus to object to being achieved. The consent of the wife is immaterial. Hence violative of Article 14 of the constitution.
- The petitioner contended that provision is based on the notion that a woman is property of the husband. The provision says if the husband gives consent or connive then adultery is not committed.
- The provision for adultery is discriminative on the basis of gender as it provides only men with the right to prosecute against adultery which is violative of Article 15.
- The petitioner contended that the provision is unconstitutional as it undermines the dignity of a woman by not respecting her sexual autonomy and self-determination. It is violative of Article 21.⁸⁶⁸

Arguments Favour of Respondent

- The respondents contended that adultery is an offence which breaks the family relations and deterrence should be there to protect the institution of marriage.
- The respondents claim that adultery affects the spouse, children and society as a whole. It is an offence committed by an outsider with full knowledge to destroy the sanctity of marriage.
- The discrimination by the provision is saved by Article 15(3), which provides state right to make special laws for women and children.⁸⁶⁹

Order of the Court

- The test of manifest arbitrariness should be applied to invalidate the legislation or any sub-legislation. Any law found arbitrary will be struck down.

⁸⁶⁷ Joseph Shine v. Union of India Citation: (2019) 3 SCC 39 Case Comment, CNLU LJ (9) [2020] 295

⁸⁶⁸ <https://blog.iplayers.in/case-analysis-joseph-shine-v-union-india/>
⁸⁶⁹ <https://blog.iplayers.in/case-analysis-joseph-shine-v-union-india/>

- The classification is found to be arbitrary in the sense that it treats only the husband as an aggrieved person given the right to prosecute for the offence and no such right is provided to the wife. The provision is not based on equality.
- The offence is based on the notion of women being a property of husband and adultery is considered to be a theft of his property because it says consent or connivance by the husband would not make it an offence.
- The provision does not treat the wife as an offender and punishes only the third party.
- This provision discriminates between a married man and a married woman to her detriment on the ground of sex.
- This provision is based on the stereotype that a man has control over his wife's sexuality and she is his property. It perpetuates the notion that women are passive and incapable of exercising their sexual freedom.
- Section 497 protects women from being punished as abettors. It is enunciated that this provision is beneficial for women, which is saved by Article 15(3). Article 15(3) was inserted to protect the women from patriarchy and pull them out of suppression. This article was aimed to bring them equal to men. But Section 497 is not protective discrimination but grounded in patriarchy and paternalism.
- The dignity of an individual and sexual privacy is protected by the constitution under Article 21. A woman has an equal right to privacy as a man. The autonomy of an individual is the ability to make decisions on vital matters of life.
- The provision allows adultery on the husband's consent or connivance, which gives a man control over her sexual autonomy. This makes her a puppet of the husband and takes away all her individuality.
- When the penal code was drafted the societal thinking regarding women was backward and she was treated as a chattel but after 158 years the status of women is equal to

that of men. Her dignity is of utmost importance which cannot be undermined by a provision which perpetuates such gender stereotypes.

- Treating women as victims also demeans her individuality and questions her identity without her husband.
- A crime is defined as an offence which affects society as a whole. Adultery, on the other hand, is an offence which tantamounts to entering into the private realm.
- Adultery may be committed by two consenting adults making it a victimless crime.
- This provision aims to protect the sanctity of marriage but we have to admit that because of a pre-existing disruption of marital tie adultery is committed.
- The other offences related to matrimonial realms such as Section 306, 498-A, 304-B, 494 or any violation of Protection of women from Domestic Violence Act, 2005 or violation of Section 125 CrPC are related to the extinction of the life of a married woman and punishes her husband and relatives.
- In adultery, a third party is punished for a criminal offence with a maximum 5 years imprisonment. This is not required in the opinion of the court.
- This provision makes a husband an aggrieved person and a woman a victim. Even if the law changes and provides equal rights to women against adultery, it is totally a private matter.
- Adultery is better left as a ground for divorce and not a crime.

Conclusion

According to the Court, not only the way the present law criminalised adultery is problematic, criminalising adultery in itself is problematic. In its opinion, adultery does not fit into the concept of crime even if the offence is made gender neutral. Hence, it cautioned not to do so even in the future by bringing a legislative amendment. The Court raised two concerns in this respect. First, any law which would attempt to criminalise it will have to punish those who are unhappy in their marriage

as it cannot distinguish between cases where adultery is the cause of a bad marriage and those where it is a consequence and thus becomes arbitrary. However, this segregation is possible by excluding de facto broken marriages as is the case under Section 376-B which criminalises marital rape in those cases where there is a de facto breakdown of marriage. Second, though a gender neutral provision may take care of equality and dignity, it would be an immense intrusion into the privacy of a matrimonial home. It means if the Government can devise techniques, a kind of forensic laparoscopy, which can ensure safety of privacy of a matrimonial home it can be a punishable offence. Gender justice is a constitutional commitment and the Court has shined on that front but it appeared to be swayed by that idea. It seems to be making an emotive appeal by referring to draconian provisions from sources as ancient as *Hammurabi's Code* and *Manusmriti*. It charged the atmosphere emotionally against adultery by citing examples like stoning to death and death by drowning, and many such other atrocious punishments prevalent in ancient and medieval times. On the other hand, the framers of the Code had taken a very humane approach and the Court should have analysed the constitutional validity of that suggestion only and not of *Hammurabi's Code* and *Manusmriti*. The resources relied upon are also quite one-sided. For example, the Court relied very heavily on an article by Martin Seigel, who argues in favour of a constitutionally protected freedom to commit adultery, but a very important work, *Fatherless America* by David Blankenhorn which could have counterbalanced Seigel's arguments, does not feature anywhere. It seems the Court was quite determined from the very beginning to deliver what it has finally and in the process did not even pause to analyse or verbalise many concerns and explore possibilities. The impugned law even if required to be changed now, was a progressive step when made. It was

not a pretence to protect the property right of a husband over his wife; rather was a law made with a human touch keeping in mind the social realities of the time and taking account of the fact that only woman can bear children. Otherwise it can be argued that in the present case gender justice is used as a pretence to protect men from the wrath of criminal law to give them a licence to licentious behaviour. By failing to see that the impugned provision was a progressive move in its time, by failing to see that there is a difference between adultery by a husband and adultery by a wife, and by failing to do a proper balancing between the sexual autonomy of a wife and the very legitimate primal interests of a husband, the verdict fails to shine ultimately.⁸⁷⁰

To conclude Adultery was an offence till this Precedent was decided by the Hon'ble Supreme Court and after this precedent was decided it is considered to be no more an offence. Under the (IPC) Penal Code, 1860 the Adultery is an Offence. The author feels that Adultery is an act and it should be considered as an offence. The study helped the author to understand the concept and he is of the opinion that Adultery must be considered as an Offence and now it is an act which is not punishable under the law which had prescribed the punishment for said offence and now it has been decriminalized by the Hon'ble Supreme Court in this case. Therefore, to conclude it can be said that Adultery is no more a punishable offence under the Section 497 of the Penal Code (IPC), 1860 and the same law had provided for the punishments for persons involving in such offences before passing of the precedent. The law is no more an offence and is discussed, response is given to the Precedent in detail.⁸⁷¹

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- Yusuf Abdul Aziz v. State of Bombay, 1954 SCR 930

⁸⁷⁰ Decriminalisation of Adultery, the Indian Experience and Experiment : How Much Shine in the Joseph Shine Verdict?, (2020) 5 SCC J-25

⁸⁷¹ Case Commentary : Joseph Shine v. Union of India, 2.3 JCLJ (2022) 690



- Sowmithri Vishnu v. Union of India, 1985 Supp SCC 137
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