Ashwin Nanubhai Vyas vs State Of Maharashtra & Anr on 10 October, 1966

Equivalent citations: 1967 AIR 983, 1967 SCR (1) 807, AIR 1967 SUPREME COURT 983, 1967 (1) SCR 807, 1967 2 SCJ 419, 1967 2 SCWR 207, 1967 ALLCRIR 197, 1967 MPLJ 312, 1967 MADLW (CRI) 78, 1967 SCD 653, 1967 MAH LJ 312

Author: M. Hidayatullah

Bench: M. Hidayatullah, S.M. Sikri

PETITIONER:
ASHWIN NANUBHAI VYAS

Vs.

RESPONDENT:
STATE OF MAHARASHTRA & ANR.

DATE OF JUDGMENT:
10/10/1966

BENCH:
HIDAYATULLAH, M.
BENCH:
HIDAYATULLAH, M.
SIKRI, S.M.
DAYAL, RAGHUBAR

CITATION:
1967 AIR 983 1967 SCR (1) 807

ACT:
Code of Criminal Procedure (5 of 1898), ss. 198 and 495-Inquiry under Chapter XVIII requiring complaint by person aggreived-Death of complainant after filing complaint-Effect-Power to substitute another prosecution agency.

HEADNOTE:
During the inquiry under Chapter XVIII in respect of offences requiring a person aggrieved, the complainant died after the complaint had been field under s. 198 Cr. P.C. The application for substitution of the complaint was resisted by the accused- appllant, on the ground that only

the aggreived person could be the complaint and on the complaint's death , the complaint must be treated as abated. The Magistrate rejected the objection , and the High Court
HELD : The objection must be rejected.
Section 198 Cr. P.C. creates a bar which has to be removed before cognisance is taken. Once the bar is removed because the proper person has filed a complaint, the section works itself out. If any other restriction was also there the Code would have said so. ' Not having said so, one must treat the section as fulfilled and worked out. [811 D-E]
Unless the Code itself said what was to happen, the power of the Court to substitute another prosecution agency (subject to such restrictions as may be found) under s. 495 of the Code was always available. (812 D-E)
Case law discussed.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 268 of 1964.

Appeal by special leave from the judgment and order dated' August 25, 1964 of the Bombay High Court in Criminal Revision. Application No. 333 of 1964.

N. N. Keswani,if or the appellant.

K. L. Hathi andrr. H. Dhebar, for respondent No. 1. K. Rajendra Chaudhuri and K. R. Choudhuri, for respondent No. 2.

The Judgment of the Court was delivered by Hidayatullah, J. In this appeal, by special leave, against the judgment and order of the High Court of Bombay, August 25, 1965, the appellant Ashwin Nanubhai Vyas is an accused before the Presidency Magistrate's 4th Court at Girgaon, Bombay. The case was started on the complaint under S. 198, Code of Criminal Procedure of one Kusum Vithal Abhyankar, who charged him with offences under ss. 417, 493 and 496 of the Indian Penal Code. Kusum's complaint was that Vyas went through a sham marriage with her, before a person who posed as an Officer from the office .of the Registrar for Marriages. Subsequently, Vyas abandoned her and married another. On being questioned Vyas told her ,(Kusum) that he had never married her, as the whole affair was a sham. Kusum alleged that she had become pregnant as a result of the cohabitation but in view of her serious heart ailment Vyas took her to a clinic where under medical advice and on certificate .granted by Vyas an abortion was caused to save Kusum's life.

The complaint was filed on November 1, 1963 and Kusum was examined by the Presidency Magistrate. Vyas was then summoned to Court. On November 29, Kusum unfortunately died of a heart attack. Kusum's mother, who is the 2nd respond- ,dent in this appeal, then applied to the Court for substitution as, a fit and proper complainant in the case. She expressed her Willingness to act as a complainant and to continue the proceedings. This application was strongly resisted by Vyas

who contended that the trial of offences under as. 493 and 496 of the Indian Penal Code was governed by s. 198 of the Code of Criminal Procedure and only the aggrieved person could be the complainant and on Kusum's death the complaint must be treated as abated. The Presidency Magistrate by his order, April 3, 1964, rejected the objection and decided to proceed with the complaint with Kusum's mother as the complainant. Vyas then filed an application for revision in the High Court at Bombay and by the judgment and order now impugned his petition for revision was rejected. The question that arises in this appeal is whether on the death of Kusum the proceedings ipso facto came to an end or could be continued in the manner ordered by the Presidency Magistrate.

The Code of Criminal Procedure provides only for the death of an accused or an appellant but does not expressly provide for the death of a complainant. The Code also does not provide for the abatement of inquiries and trials although it provides for the abatement of appeals on the death of the accused, in respect of appeals under ss. 411 A(2) and 417 and on the death of an appellant in all appeals except an appeal from a sentence of fine. Therefore, what happens on the death of a complainant in a case started on a complaint has to be inferred generally from the provisions of the Code.

The Code by Chapter XV, which is to be found in Part VI (Proceedings in Prosecutions), provides for the jurisdiction of a criminal court in inquiries and trials. This Chapter is divided into two Parts-A (Place of Inquiry of Trial) and B (Conditions requisite for initiation of Proceedings). Part B consists of as. 190 to 199B. Section 190 lays down, inter alia, that any Presidency Magistrate may take cognizance of any offence upon receiving a complaint 'of fact which constitutes such offence. Sections 195 to 199B, however, place certain restrictions upon the power of the Chief Presidency Magistrate and other courts to take cognizance of cases. One such restriction is to be found in s. 198. It provides :

> " 198. Prosecution for breach of contract, defamation and offences against marriage.
>
> No Court shall take cognizance of an offence falling under Chapter XIX or Chapter XXI of the Indian Penal Code or under sections 493 to 496 (both inclusive) of the same Code, except upon a complaint made by some person aggrieved by such offence:
>
> Provided that, where the person so aggrieved is a woman who, according to the customs and manners of the country, ought not to be compelled to appear in public, or where such person is under the age of eighteen years or is an idiot or lunatic, or is from sickness or infirmity unable to make a complaint, some other person may, with the leave of the Court, make a complaint on his or her behalf : Provided further that The complaint of Kusum was filed to remove the bar contained in this section although for the offence under s. 417 no such bar existed. The offences under ss. 493 (a man by decit causing a woman not lawfully married to him to believe that she is lawfully married to him and to cohabit with him in that belief) and 496 (a preson with fraudulent intention going through the ceremony of being married, knowing

that he is not thereby lawfully married) are non-cognizable, not compoundable and exclusively triable by Court of Session. They are serious offences, being punishable with imprisonment extending to 10 and 7 years respectively. The Presidency Magistrate, was not trying the case but only inquiring into it with a view to its committal to the Court of Session if the facts justified a committal. During this inquiry Kusum died. We have to determine what is the effect of the death of a complainant on an inquiry under Chapter XVIII in respect of offences requiring a complaint by the person aggrieved, after the complaint has been filed. Mr. Keswani for Vyas, in support of the abatement of the case, relied upon the analogy of s. 431 under which appeals abate and ss. 247 and 259 under which on the complainant remaining M17Sup.C.I./66-7 absent, the court can acquit or discharge the accused. These analogies do not avail him because they provide for special situations. Inquiries and trials before the court are of several kinds. Section 2.47 occurs in Chapter XX which deals with the trial of summons cases by a Magistrate and s. 259 in Chapter XXI which deals with trial of warrant cases before Magistrates. Under the former, if summon is issued on a complaint and the complainant on any day remains absent from the court,unless it decides to proceed with the trial, must acquit the accused. This can only happen in the trial of cases, which are punishable with imprisonment of less than one year. This not being the trial of a summons case but a committal inquiry, s. 247 neither applies nor can it furnish any valid analogy. Similarly, s. 259, which occurs in the Chapter on the trial of warrant cases, that is to say, cases triable by a Magistrate and punishable with imprisonment exceeding one year can furnish no analogy. Under s. 259, if the offence being tried as a warrant case is compoundable or is not cognizable the Magistrate may discharge the accused before the charge is framed if the complainant remains absent. Once again this section cannot apply because the Presidency Magistrate was not trying the case under Chapter XXI.

This case was being heard under Chapter XVIII which divides committal cases into two classes (a) those commenced on a police report and (b) other cases. The first kind is tried under the procedure laid down in s. 207A. With that procedure we are not concerned. The other cases are tried under the procedure as laid down in the other provisions of Chapter XVIII. Section 208 of this Chapter provides that in any proceeding instituted otherwise than on police report the Magistrate shall "when the accused appears or is brought before him, proceed to hear the complainant (if any) and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or on behalf of the accused, or as may be called for by the Magistrate." The Magistrate then hears evidence for the prosecution unless he makes an order of commitment and after recording the evidence and examining the accused (if necessary) frames a charge. He may, after hearing further evidence, which the accused may wish to produce (unless for reasons to be recorded, the Magistrate deems it unnecessary to do so) either discharge the accused cancelling the charge or commit him to stand his trial before the Court of Session. There is no provision about the acquittal or discharge of the accused on the failure of the complainant to attend

the court. This is not an omission but a deliberate departure from the Chapters on the trial of summons and warrant cases. In such trials, on the absence of the complainant, the accused is either acquitted or discharged. The intention appears to be that the Magistrate should proceed with the inquiry because had it not been so intended, the Code would have said what would happen if the complainant remains absent.

Mr. Keswani, however, contends that S. 198 provides that the cognizance of the case can only be taken on the complaint of a person aggrieved and the only exception to this general rule is where the complainant is a woman, who according to the customs and manners of the country, ought not to be compelled to appear in public, or where such person is under the age of eighteen years or is an idiot or lunatic, or is from sickness or infirmity unable to make a complaint. He contends that what applies to the initiation of the proceeding must also apply to the continuance of the proceeding. He submits that if cognizance could not be taken unless a complaint was made in the manner provided in the section, the court cannot proceed with the inquiry unless the same condition continues to exist. In other words, because the section insists on a complaint of a person aggrieved, Mr. Keswani contends that continued presence of the person aggrieved throughout the trial is also necessary to keep the court invested with its jurisdiction except in the circumstances mentioned in the proviso and summarised above. We do not agree. The section creates a bar which has to be removed before cognizance is taken. Once the bar is removed, because the proper person has filed a complaint, the section works itself out. If any other restriction was also there the Code would have said so. Not having said so, one must treat the section as fulfilled and worked out. There is nothing in the Code or in Chapter XVIII which says what, if any, consequence would follow if the complainant remains absent at any subsequent hearing after filing the complaint. In this respect Chapter XVIII is distinctly dissimilar to the Chapters dealing with the trial of summons and warrant cases where it is specifically provided what consequence follows on the absence of the complainant.

Mr. Keswani contends that the Presidency Magistrate has made a "substitution" of a new complainant and there is nothing in the Code which warrants the substitution of one complainant for another. It is true that the Presidency Magistrate has used the word "substitute" but that is not the effect of the order. What the Presidency Magistrate has done is to allow the mother to act as the complainant to continue the prosecution. This power was undoubtedly possessed by the Presidency Magistrate because of s. 495 of the Code by which courts are empowered (with some exceptions) to authorise the conduct of prosecution by any person. The words 'any person' would indubitably include the mother of the complainant in a case such as this. Section 198 itself contemplates that a complaint may be made by a person other than the person aggrieved and there seems to us no valid reason why in such a serious case we should hold that the death of the complainant puts an end to the prosecution.

> In support of his contention Mr. Keswani has cited some cases of the High Courts in which on the death of the complainant the prosecution was held to have abated. Chief among them are Ishwardas v. Emperor, (1) Ramanand v. Crown (2) and Labhu v. Crown (3). The first of these cases was a prosecution for defamation and the second a trial for an offence under s. 323, Indian Penal Code. The third followed the second. The first two cases here mentioned were overruled by the Lahore High Court in Hazara Singh v.

Crown(4) wherein it was laid down that such cases do not necessarily abate. Mr. Keswani also relied upon several cases which arose under s. 417(3) and 476 B of the Code of Criminal Procedure in which appeals were held to have abated. We need not refer to these cases because they arose under different circumstances and were certainly not inquiries with a view to committal under Chapter XVIII of the Code. Mr. Hathi, who appeared on behalf of the State of Maharashtra, drew our attention to many later cases in which it has been held (dissenting from the cases relied upon by Mr. Keswani) that a criminal complaint does not necessarily abate on the death of the complainant even in those cases where the making of the complaint by the person aggrieved is made a condition precedent by the Code. We need not analyse those cases because, in our opinion, unless the Code itself says what is to happen, the power of the court to substitute another prosecution agency (subject to such restrictions as may be found) under s. 495 of the Code of Criminal Procedure is always available. Reference may, however, be made to the following: Emperor v. Nurmohammed,(5) Emperor v. Mauj Din,(6) U Tin Maung and another V. The King, (7) Mohammed Azam v. Emperor (8) and In re Ramasamier(9). None of the cases cited either for the one side or the other directly arose under s. 198 first part in a committal proceeding. The later view is distinctly in favour of allowing the prosecution to continue except in those cases where the Code it sled says that on the absence of the complainant the accused must be either acquitted or discharged. The present is not one of those cases and in our judgment the Presidency Magistrate was right in proceeding with the inquiry by allowing the mother to carry on the prosecution, and under s. 495 the mother may continue the prosecution herself or through a pleader. We see no reason why we should be astute to find a lacunas in the procedural law by which the trial of such important cases would be stultified by the death of a complainant when all that the s. 198 requires is the removal of the bar. The appeal fails and it will be dismissed.

Y. P. Appeal dismissed.

(1)7 Cr.L.J. 290. 40 I.C. 1008.

(3) 52 I.C. 797. (4) I.L.R. 2 Lah. 27.

(5) 8 Cr.L.J. 190. (6) A.I.R. 1924 Lah. 72-4 Lah. 7. (7) A.I.R. 1941 Rang. 202.

(8) A.I.R. 1926 Bom. 178.

(9) A.I.R.'16 Cr. L.J. 713.