(21) It may be mentioned that the learned counsel for the appellants could not cite even a single decision of any Court in which in circumstances similar to those of the present one, the award was ever held to be without jurisdiction and a nullity.

(22) It is unfortunate that the loan was taken in April, 1956 and the award was made in 1961 and until now the Bank has not been able to recover this large amount either from the Society or the executants of the deed, who have been evading payment on one ground or the other for the last 15-16 years.

(23) In view of what has been said above, this appeal fails and is dismissed. In the circumstances of this case, however, the parties are left to bear their own costs.

DHILLON, J.—I agree.

B. S. G.

APPELLATE CRIMINAL.

Before P. S. Pattar, J.

JOGINDER SINGH,—*Appellant.*

versus

THE STATE OF HARYANA,—*Respondent.*

Cr. A. No. 1111 *of* 1972.

January 25, 1973.

Indian Penal Code (Act XLV of 1860)—Section 497—Code of Criminal Procedure (Act V of 1898)—Sections 4(1)(h) and 199—Husband lodging report with the police regarding the commission of offence of rape against his wife—Accused tried for the offence, but found not to have committed the same—Such accused—Whether can be convicted for offence of adultery under section 497, Penal Code, without a complaint by the husband—Statement of the husband in court in support of the police case—Whether can be treated as complaint.

Held, that according to section 199 of the Code of Criminal Procedure, no court can take cognizance of an offence under section 497, Indian Penal Code, except upon a complaint made by the

husband of the woman. The section prescribed a statutory bar, prohibiting, the Court from taking cognizance of offence under section 497, Indian Penal Code, except upon a complaint made by the husband of the woman. The word 'Complaint' in section 199 is limited to the complaint as defined in section 4(1)(h) of the Code. When a husband lodges a report with the police regarding the commission of rape against his wife, but at the trial the offence was not found to be proved, the accused person cannot be convicted under section 497, Penal Code without a specific complaint by the husband. The statement of the husband in support of the police case cannot be treated as such a complaint.

(Para 14).

Appeal from the order of Shri J. M. Tandon, Sessions Judge, Ambala, dated 19th October, 1972, convicting the appellant.

Kirpal Singh, Advocate, *for the appellant.*

Rani Vachher, Advocate, *for the State respondent.*

JUDGMENT

PATTAR, J.—This is an appeal filed by Joginder Singh, son of Pritam Singh, resident of village Mohra, tehsil and district, Ambala against the judgment, dated 19th October, 1972, of the Sessions Judge, Ambala, by which he convicted him under section 376, Indian Penal Code, and sentenced him to three years' rigorous imprisonment. He also convicted him under section 452, Indian Penal Code, and sentenced him to two years' rigorous imprisonment. Both the sentences were ordered to run concurrently.

(2) The facts of this case are that Smt. Daya prosecutrix is the wife of Amar Nath (P.W. 4), who is a resident of village Mohra, district Ambala. Smt. Daya is mentally deranged. Amar Nath is running a shop at village Mohra, which adjoins his house. The prosecution story is that on 5th April, 1972, at about 2.00 p.m. Amar Nath, P.W., went to Shahbad, to make purchases leaving his wife Smt. Daya at the house. He returned from Shahbad at about 6.00 p.m. and found the door of the compound of the house bolted from inside. The boundary wall of the compound of his house is only 4 feet high and while standing in the street he saw Joginder Singh committing sexual intercourse with his wife on a *charpai* in the verandah On seeing this he went to the flour mill of Yasin, P.W., which adjoins his house where he found Yasin, P.W. and his nephew, Ved Parkash (P.W. 2). He told the aforesaid facts to them and then all the three persons came to the house of Amar Nath

and saw, the accused committing the sexual intercourse with Smt. Daya, over the boundary wall. They jumped over the wall in the compound of the house and on seeing them the accused went on the roof of the house through a wooden stair-case and then jumped on the other side of the house in a *khola*.

(3) Amar Nath lodged a report with the police at 8.00 p.m. Daryai Lal, Assistant Sub-Inspector, who was then posted at Police Station, Sadar Ambala went to the village reaching there at 9.30 or 10.00 p.m. and recorded the statements of the witnesses. After completion of investigation the accused was challaned and he was committed to stand his trial in the Court of Sessions and was convicted and sentenced as mentioned above. Feeling aggrieved, Joginder Singh has filed this appeal alleging that the decision of the lower Court is wrong and incorrect and it may be set aside and he may be acquitted.

(4) Dr. B. D. Goyal, Medical Officer, Civil Hospital, Ambala City, examined Joginder Singh, accused on 10th April, 1972, at 12.20 p.m. at the request of the police and he found that his genital organ was fully developed and healthy and there was nothing to disable him from committing sexual intercourse with a girl or a woman.

(5) Dr. (Mrs.) Kamlesh Datta, Civil Hospital, Ambala (P.W. 3), examined Smt. Daya prosecutrix on 6th April, 1972, at 12.45 p.m. and she found no external injury on her person. In her opinion Smt. Daya was a married woman for the last about 8 years and she was habitual to sexual intercourse. She could not say whether rape had been committed on her or not. The two vaginal swabs were taken and were sent for semen examination to the Chemical Examiner, Karnal. After seeing the report of the Chemical Examiner the Lady Doctor, opined that Smt. Daya had intercourse.

(6) Dr. Sita Ram Goyal (P.W. 3), Civil Hospital, Ambala City, examined Smt. Daya on 20th July, 1972, at the request of the police and he found that she was suffering from chronic schizophrenia which is a form a unsoundness of mind. According to him she had no reasoning power and could not understand the consequences of acts. She could not make a statement properly. His report are Exhibits P.W. 6/A/1, and P.W. 6/A/2.

(7) In the instant case the prosecution examined only two witnesses to prove its case and they are Amar Nath P.W., the

husband of the prosecutrix and Yasin (P.W. 5), who are the eye-witnesses of the occurrence. Ved Parkash (P.W. 6), who was the third eye-witness of the occurrence was simply tendered for cross-examination and he did not make any statement in examination-in-chief. No question was put to him in cross-examination by the counsel for the accused. The law regarding the examination of witnesses is contained in sections 137 and 138 of the Evidence Act. There is no provision in that Act for permitting a witness to be tendered for cross-examination without his being examined-in-chief and this practice is opposed to section 138, of that Act. A witness cannot be tendered for cross-examination without his being examined-in-chief,—*vide Kesar Singh and another* v. *The State* (1). Therefore, the Sessions Judge should not have allowed Ved Parkash to be tendered for cross-examination.

(8) The aforesaid prosecution story was narrated on oath by Amar Nath (P.W: 4) and Yasin (P.W. 5): Similar was the statement Exhibit (P.W. 5). Similar was the statement Exhibit P.C. made by Amar Nath to the police after the occurrence on the basis of which this case was registered against the accused and it corroborates his statement made in the Court. The statements of these witnesses are consistent and there is no discrepancy on any point whatsoever. They withstood the test of cross-examination very well. The flour mill of Yasin (P.W. 5) adjoins the house of Amar Nath (P.W. 4): After seeing the accused committing sexual intercourse with his wife, Amar Nath (P.W. 4) went to the adjoining flour mill of Yasin (P.W. 5) where the latter was present besides Ved Parkash and he told the aforesaid facts to them and then all the three came to the house of Amar Nath and saw the accused committing sexual intercourse with Smt. Daya. They scaled over the wall and entered the court-yard of the house of Amar Nath when the accused went on the roof of his house through the stair case and he could not be apprehended by them. It is admitted that the street opposite the house of Amar Nath and the flour mill of Yasin is a thoroughfare and the outer wall of the court-yard of the house of Amar Nath is only four feet high and a person going in the street can see the verandah of Amar Nath, where the accused was committing rape with Smt. Daya. Amar Nath and Yasin had no enmity with the accused and there was no motive to falsely implicate him in this case. Amar Nath would be the last person to falsely implicate the accused in a case involving the honour of his wife.

(1) A.I.R. 1954 Pb. 286:

(9) It was contended that there was enmity between Yasin and the family of the accused because they had taken possession of the house of the family of Yasin after the partition of India in 1947. A suggestion was put to Yasin, P.W. in cross-examination whether their house had been taken possession of by the family members of the accused and that they had made an application for the return of the house, but he expressed ignorance. The age of Yasin on 18th October, 1972, as given by him when his statement was recorded in the Court of Sessions Judge, Ambala was 28 years, and, therefore, at the time of the partition of the country in 1947, he was aged about three years only and, therefore, he could not have any personal knowledge about the facts mentioned in the above-said suggestion. There is no evidence on the file to prove this alleged enmity. For the above reasons it is held that the statements of these two witnesses are consistent and truthful.

(10) The learned counsel for the appellant contended that it is not proved that the sexual intercourse was committed by the accused with Smt. Daya without her consent. Both the prosecution witnesses have stated that the accused at the time of the commission of the offence has put his hand on the month of Smt. Daya, and that she was offering resistance. According to Yasin (P.W. 5) Smt. Daya was moving her hands and feet and was offering resistance If it was so, then she must have received some injuries on her person. But the Lady Doctor Kamlesh Dutta (P.W: 3) stated that she did not find any external injury on any part of her body. She also stated that when the prosecutrix Smt. Daya was examined by her, her husband Amar Nath was also accompanying her and that some particulars had been given to her by the prosecutrix and some by her husband. According to Dr. B. D. Goyal P.W:, Smt: Daya could speak and she was found to be normal from her looks and such like patients are capable of performing normal routine duties except when they are affected by acute attack.

(11) The Sessions Judge remarked in para No. 11 of his judgment that he was of the opinion that it was wrong that the prosecutrix gave her consent to the accused for committing sexual intercourse with her and that the prosecutrix, who was a patient of chronic schizophrenia was incapable of giving her consent. The onus to prove that the accused committed sexual intercourse with Smt. Daya without her consent and against her will as laid down in section 375, Indian Penal Code, is on the prosecution. But there is no direct evidence on the file to prove this fact. The above opinion of the

lower Court is not correct and is based on conjectures and surmises. It is well-settled that conjectures and surmises cannot take the place of positive proof. The prosecutrix Smt. Daya was the best witness to prove whether the accused committed sexual intercourse with her without her consent or against her will. But she has not been produced for the reasons best known to the prosecution. If she could appear before the doctors and give rational answers, she could have also been examined in the Court. She was the best witness to prove the offence.

(12) The counsel for the appellant contended that the boundary wall of the court-yard of the house of Amar Nath was only four feet high and persons walking in the street could see the varendah where the alleged offence was committed and, therefore, the accused could not have committed the offence without the consent of Smt. Daya, otherwise several persons would have been attracted to the place on hearing the alarm raised by Smt. Daya. However, great the suspicion against the accused and however strong the moral belief and conviction of the Judge, unless the offence of the accused is established beyond the possibility of reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. Considered as a whole the prosecution story may be true, but between "may be true" and "must be true", there is a long distance to travel and the whole of this distance must be convered by the prosecution by legal, reliable and unimpeachable evidence before the accused can be convicted. There is an initial presumption of innocence of the accused and the prosecution has to bring the offence home to the accused by reliable evidence. Further the accused is entitled to the benefit of every rasonable doubt. For all these reasons, it is held that it is not established beyond any reasonable doubt, that the sexual intercourse was committed by the accused with Smt. Daya without her consent or against her will. Consequently, the offence under section 376. Indian Penal Code, is not established against the accused beyond any reasonable doubt. However, it is proved that the accused is guilty of offence under section 452, Indian Penal Code, and he is also guilty of the offence under section 497, Indian Penal Code.

(13) The learned counsel for the appellant contended that cognizance of the offence under section 497, Indian Penal Code, can only be taken if a complaint is made by the husband of the woman as required by section 199 of the Code of Criminal Procedure, and

that no complaint was made by the husband and, consequently, the appellant cannot be convicted in this case under section 497. Indian Penal Code. In support of this contention he relied on a Division Bench authority of the Allahabad High Court, reported as *Tej Singh* v. *State* (2), wherein the facts were that the accused was charged under section 366 and 376, Indian Penal Code and the Sessions Judge found that the case under sections 366 and 376, Indian Penal Code, was not established, but found that the minor offence under section 497, Indian Penal Code, was made out at the trial. In that case the husband had lodged the report with the police against the accused and a case under sections 366 and 376, Indian Penal Code, was registered. The following point was referred to the Division Bench for decision:—

> "Whether in a case where the husband has lodged a report with the police, but has not filed a complaint before the Magistrate for action being taken under section 497, Indian Penal Code, the accused can be punished for that offence, if a case under section 497, Indian Penal Code, is made out against him at the trial."

The learned Judges answered this question in the negative. It was held as under:—

> "The word 'complaint' in section 199, Criminal Procedure Code is limited to a complaint as defined in section 4 of that Code and was not capable of a more liberal interpretation. When the word 'complaint' has been defined in clause (b) of sub-section (1) of section 4, Criminal Procedure Code, it must be interpreted throughout that Code as bearing that meaning and, therefore, both in section 199 and sub-section (3) of section 238, Criminal Procedure Code, the word 'complaint' can only mean a complaint made to a Magistrate. There can be no doubt that it is always open to a Court to give a more liberal interpretation to the definition of 'complaint' as contained in section 4(1)(h), Criminal Procedure Code, where the context or subject so warrants. The qualifying clause occurring in that section 'unless a different intention appears from the subject or context' makes that interpretation possible. However, in the case there was nothing which might warrant a more

(2) A.I.R. 1965 All. 508:

liberal interpretation of the definition of the term 'complaint'.

"The essential ingredients of a 'complaint' under section 4(1)(h), unless a different intention appears from the subject or context, are (1) the allegation made orally or in writing to a Magistrate, (2) with a view to his taking action under the Code, and (3) stating that some person whether known or unkown has committed an offence."

(14) I am in respectful agreement with the law laid down in this ruling. According to section 199 of the Code of Criminal Procedure, no Court can take cognizance of an offence under section 497, Indian Penal Code, except upon a complaint made by the husband of the woman. This section prescribes a statutory bar, prohibiting the Court from taking cognizance of offence under section 497, Indian Penal Code, except upon a complaint made by the husband of the woman. The word 'complaint' in section 199, Criminal Procedure Code, is limited to the complaint as defined in section 4(1)(h) of the Code of Criminal Procedure. The essential ingredients of a complaint under section 4(1)(h) are—

(1) that the allegations are made orally or in writing to a Magistrate; with a view to his taking action under the Code of Criminal Procedure;

(2) stating that some person, whether known or unknown has committed an offence; and

(3) it does not include the report of a Police Officer.

In the instant case Amar Nath, the husband of the prosecutrix Smt. Daya had lodged a report with the police against Joginder Singh, Appellant and a case under section 376 Indian Penal Code, was registered against him, and he, (that is, Amar Nath) made a statement in the Court during the trial in support of the police case, but this cannot be treated as a complaint as defined in section 4(1)(h), Criminal Procedure Code before the Magistrate for action being taken under section 497, Indian Penal Code, and the accused cannot be punished for that offence, if a case under section 497, Indian Penal Code, is made out against him at the trial. Therefore, the conviction and sentence of Joginder Singh appellant under section 376, Indian Penal Code, are set aside and he is acquitted of that offence.

However, his conviction under section 452, Indian Penal Code, is well-based and is maintained. The sentence awarded to him under section 452, Indian Penal Code, is not excessive and the same is maintained.

N. K. S.

APPELLATE CIVIL.

Before Harbans Singh, C. J. and Bal Raj Tuli, J.

KEWAL KRISHAN MEHRA, ETC.,—*Appellants.*

versus

THE STATE OF PUNJAB, ETC.,—*Respondents.*

Letters Patent Appeal No. 259 of 1972.

January 31, 1973.

Prevention of Food Adulteration Act (XXXVII of 1954)—Sections 2(vi), 9, 10 and 20—Prevention of Food Adulteration Rules (1955)—Rules 8 and 9—Food Inspectors conferred all the powers under section 10 and rule 9—Food (Health) Authority—Whether can freeze such powers and direct the Inspectors to confine their activities to conduct cases in Courts—Such freezing of powers—Whether amounts to withdrawal by the State Government of the power conferred by a Central statute.

Held, that powers under section 10 of the Prevention of Food Adulteration Act, 1954 read with rule 9 of the Prevention of Food Adulteration Rules, 1955 are conferred on the Food Inspectors, who are public servants, not for their personal benefit, but in the interest of carrying out the objects of the Act. Some of these powers are exercisable only with the prior approval or consent of the supervising authority, namely, the Food (Health) Authority. Under rule 9, this authority can direct the Food Inspectors to perform a duty assigned to them. The only restriction being that the duty so assigned must be within the ambit of the powers conferred by the Act. If a Food Inspector can insist that he must necessarily exercise all the powers conferred on him by the Act and his powers can not be regulated by the supervising authority, that will create chaos in the work. There can be more than one Food Inspectors within the same local area and, therefore, the necessity arises of regulating their work *inter se* for the purpose of facilitating administration of the Act and to avoid over-lapping and conflict. In directing that the Government