

(2015) 04 MAD CK 0269
In the Madras High Court
Case No : Criminal R.C. (MD) No. 822 of 2007

Adi and Others

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 16-04-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 218, 313, 428
Dowry Prohibition Act, 1961 — Section 4
Evidence Act, 1872 — Section 24
Penal Code, 1860 (IPC) — Section 24, 25, 376, 464, 493

Citation : (2015) 3 MLJ(Cri) 191

Hon'ble Judges : S. Nagamuthu, J

Bench : Single Bench

Advocate : V. Kathirvelu, Senior Counsel and K. Prabhu, for the Appellant; P. Kannithevan, Govt. Advocate, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

S. Nagamuthu, J—The petitioners are the accused in C.C. No. 513 of 2000 on the file of the learned Judicial Magistrate, Valliyoor in Tirunelveli District. The first petitioner stood charged for the offences under Sections 493 and 496 of Indian Penal Code and the second petitioner stood charged for the offence under Section 4 of Dowry Prohibition Act. By judgment dated 09.06.2006, the trial Court convicted the first petitioner under Sections 493 and 496 of Indian Penal Code and sentenced him to undergo rigorous imprisonment for three years and to pay a fine of Rs. 1,000/- for each offence, and in default to undergo rigorous imprisonment for three months. The trial Court ordered the first accused to undergo both the sentences concurrently. The trial Court convicted the second accused under Section 4 of the Dowry Prohibition Act and sentenced him to undergo simple imprisonment for six months and to pay a fine of Rs. 5,000/- and in default to undergo one month simple imprisonment.

2. Challenging the said conviction and sentence, the petitioners filed an appeal in C.A. No. 141 of 2006 on the file of the learned Additional Sessions Judge (Fast

Track Court No. 2), Tirunelveli. The learned Additional Sessions Judge by judgment dated 21.07.2007 dismissed the appeal and confirmed the conviction and sentence imposed by the trial Court. As against the same, the petitioners are before this Court with this Criminal Revision Case.

3. The case of the prosecution in brief is as follows:

(i) P.W. 1, in this case is the victim. At the time of occurrence, she was hardly 17 years old. She was a resident of Seelathikulam Village in Tirunelveli District. P.W. 2, P.W. 3 and P.W. 5 are her father, mother and sister respectively. P.W. 5 is her sister. The first petitioner herein is the son of the second petitioner. They are distantly related to the family of P.W. 1. On account of the said distant relationship, the first petitioner used to visit the house of P.W. 1. In due course, they became very close to each other. On many occasions, the first petitioner visited the house of P.W. 1 and met her in seclusion. On those occasions, according to P.W. 1, the first accused attempted to lure her to agree for sexual intercourse. But P.W. 1 was refusing for the same. But the first accused began saying that he had decided to marry P.W. 1 and therefore, there was nothing wrong for her in having sexual intercourse with him. Even then, P.W. 1 did not relent for the same.

(ii) Whiles, on 20.02.1999, P.W. 1's parents had gone to Thanjavur District on account of their avocation. P.W. 1 and P.W. 5 were alone in their house. For some time, on that day, P.W. 5, had gone out. At that time, the accused came to the house of P.W. 1 and promised P.W. 1 that he would marry her. He made such promise on Lord Muruga's portrait. He also told P.W. 1 that the marriage should be conducted secretly, because his parents were not agreeable for the such proposal for marriage. The first accused then told P.W. 1 that he would come on the next day i.e. on 21.02.1999 readily with thali and take her for marriage. Accordingly, on 21.02.1999 at about 10.00 a.m., the first accused came to the house of P.W. 1 with a "garland" and also with "thali". He took P.W. 1 to a Shiva Temple in the same village. Before the deity, the first accused garlanded her and tied thali around her neck to make it appear as though it were a marriage. He made her to believe that the marriage was valid and she had become his wife from that moment onwards. Keeping her under the said belief, according to P.W. 1, on the same day, the first accused forced her to have sexual intercourse. Accordingly, there occurred sexual intercourse between P.W. 1 and the first accused. This continued for few more days, that followed. After three months, P.W. 1 realised that she had become pregnant on account of the sexual intercourse she had with the first accused. By the time, P.W. 1's parents had returned home, P.W. 1 was already 7 months pregnant. Until then, it was a secret affair between her and first accused. She informed the same to her parents on their return. On hearing the same, they could not control their tears rolling down from their eyes. She narrated the sexual exploitation committed by the first accused in detail. The parents of P.W. 1 consoled her not to worry and they told that they would approach the village Panchayat to persuade the first

accused to ceremoniously marry her. Thereafter, the parents of the first accused informed the village panchayat members namely P.Ws. 4 and 6 and accordingly, a panchayat was convened. In the panchayat, the first accused admitted the marriage ceremonies they had undergone in the temple and the sexual intercourse, he had with P.W. 1. The first accused agreed to marry her as per the rites and customs. But, later on, the second accused started demanding dowry to the tune of Rs. 20,000/- and 20 sovereigns of gold jewels. Since the said dowry could not be given by the parents of P.W. 1, both the accused broke the marriage proposal between P.W. 1 and the first accused. Thereafter, P.W. 1 made a complaint to the Police and since there was no prompt action taken on the same, she made a private complaint before the learned Judicial Magistrate, Valliyoor, who in turn referred the said complaint under Section 156(3) of the Code of Criminal Procedure. Based on the same, P.W. 15, the then Inspector of Police, attached to Valliyoor Police Station registered a case in Cr. No. 40 of 1999, under Sections 376 and 493 of the Indian Penal Code. Ex. P. 10 is the complaint and Ex. P. 9 is the printed copy of the F.I.R.

4. Thereafter, investigation was taken up by P.W. 16, Mr. Ravisundar, the then Inspector of Police, attached to Radhapuram Police Station. He examined P.W. 1, her parents, her sister and the panchayat members and recorded their statements. When the investigation was in progress, P.W. 1 had given birth to a female child. On a request made by the Inspector of Police, P.W. 10, Dr. Jeyapaul examined P.W. 1, her child as well as the first accused and gave opinion that the child would have been born to the first accused. P.W. 11-radiologist-has spoken about the age of P.W. 1., P.W. 13, Dr. Balakrishnan has opined that the first accused was not impotent. P.W. 12, Kanniappan, the then Inspector of Police, Radhapuram took up the case for further investigation. On completing the investigation, the Deputy Superintendent of Police, Valliyoor filed the final report in this case.

5. Based on the materials available on record, the trial Court framed charges, as detailed in the first paragraph of this judgment. On the side of the prosecution, in order to prove its case, as many as 16 witnesses were examined and 10 documents were exhibited. One material object-X-Ray-report of P.W. 1 - was marked.

6. Out of the said witnesses, P.W. 1 is the victim girl, who has spoken vividly about the occurrence. P.Ws. 2 and 3 are her parents, who had gone out of the occurrence village, at the time of occurrence. They have spoken about the narration made by P.W. 1. P.W. 4 is the neighbour of P.W. 1, who is one of the persons who participated in the panchayat. P.W. 5 is the sister of P.W. 1, who was staying with her in the house. P.Ws. 4 and 6 are the panchayat members, who have spoken about the panchayat held, the agreement reached and dowry demand made by the second respondent. P.W. 9 - the Village Administrative Officer-who has given certificate in respect of the birth of the child to P.W. 1, has spoken about the same. P.W. 10 is the doctor, who examined P.W. 1, the accused and her

child and he has given opinion that the child would have been born to the first accused. P.W. 11 is the radiologist, who took X-Ray on P.W. 1 in order to ascertain her age. According to the medical opinion, her age at the time of taking X-Ray, was more than 18 years. P.W. 12 is the Inspector of Police, who continued the investigation after P.W. 16. P.W. 13 is the doctor, who gave opinion that the first accused was not an impotent. P.W. 14 is the doctor, who examined P.W. 1 on 11.04.2000. She found that P.W. 1 was pregnant. P.W. 16 is the Officer, who held investigation immediately after the registration of the case.

7. When the above incriminating evidences were put to the accused, they denied the same. However, they did not examine any witness on their side.

8. Having considered all the above materials, the trial Court found both the accused guilty of all the charges and accordingly punished them and the lower appellate Court has also confirmed the same. That is how, these petitioners are before this Court with this Criminal Revision.

9. I have heard the learned Senior counsel Mr. V. Kathirvelu, appearing for the petitioners and the learned Government Advocate (Crl. Side), appearing for the respondent and also perused the records carefully.

10. The learned Senior Counsel, by referring to the grounds of revision would raise the following points:

i) P.W. 1 herself has admitted in her evidence that only after the marriage between her and the first accused, in the capacity of husband and wife, they willingly had sexual intercourse. The learned Senior Counsel would submit that in view of the said tacit admission of P.W. 1, the offence under Sections 493 and 496 of I.P.C. would not be made out.

ii) After the birth of the child, the name of the father of the child has not been mentioned anywhere in the records, which would go to show that the first accused is not the father of the child.

iii) Charge No. 1 reads that the offence under Section 493 of I.P.C. was committed on 20.02.1999, whereas according to charge No. 2, the offence under Section 496 of I.P.C. was committed only on 21.02.1999. The learned Senior Counsel would point out that according to the evidence, both the alleged occurrences took place on one and the same day. Thus, according to him, the charges are highly defective and so, the conviction of the first accused under Sections 493 and 496 of I.P.C. is not sustainable, in view of the specific provision contained in Section 218 of Cr.P.C.

iv) The penal provisions contained in Sections 493 and 496 of I.P.C. are mutually exclusive and there cannot be any conviction simultaneously under both the provisions.

v) After the occurrence, now, the first accused has married another woman and P.W. 1 has also married and she has settled down with her husband and thus, in

the matter of quantum of punishment, at this length of time, some leniency may be shown.

11. The learned Government Advocate (Crl. Side) would stoutly oppose this petition. According to him, the minor discrepancies in the charges would not vitiate the conviction. He would further submit that the first accused has taken a specific plea during trial that there was no marriage and therefore, it should be held that the so-called marriage held between P.W. 1 and first accused is not valid. But knowing fully well, according to him, that there was no valid marriage, he conducted the same, which makes out an offence under Section 496 of I.P.C. Thereafter, he had sexual intercourse making out an offence under Section 493 of I.P.C. Because of the sexual intercourse, he had with P.W. 1, P.W. 1 had become pregnant. Thus, according to the learned Government Advocate (Crl. Side), the prosecution has proved the charges against the first accused.

12. Insofar as the second accused is concerned, the learned senior counsel would submit that absolutely, there is no offence made out warranting conviction under Section 4 of the Dowry prohibition Act. But the learned Government Advocate (Crl. Side) would submit that though in the panchayat, they agreed to celebrate the marriage between P.W. 1 and first accused, it was broken because of the demand of dowry made by the second petitioner. Thus, according to the learned Government Advocate (Crl. Side), the conviction and sentence imposed on the second accused is also liable to be confirmed.

13. I have considered the above submissions.

14. The undisputed fact remains that P.W. 1 had become pregnant and she has given birth to a female child. According to P.W. 1, the cause for the pregnancy is the sexual intercourse she had with the first accused. I have no reason to disbelieve the evidence of P.W. 1 on this aspect. Apart from that, the first accused has confessed to the panchayatars that he had sexual intercourse with P.W. 1. Now, under what circumstances, the first accused had sexual relationship with P.W. 1, is the crucial point to be considered.

15. According to the learned Senior counsel appearing for the petitioners, even according to P.W. 1, there was a valid marriage and hence, neither the offence under Section 496 I.P.C. nor the offence under Section 493 of I.P.C. would be made out. This argument, though attractive, does not persuade me at all. The reasons are many. It is in evidence that before the panchayatars namely P.Ws. 4 and 6, the first accused admitted that there was a marriage celebrated between him and P.W. 1 in the Shiva temple, which was not witnessed by anybody. The learned senior counsel relies much on this evidence to say that the said marriage is true and that they had sexual intercourse. This confession made by the first accused before the panchayatars is admissible under Section 24 of the Evidence Act as extra judicial confession. This confession was made by the first accused voluntarily. This fact is not disputed by the defence. P.W. 1 - victim girl herself has stated about the said marriage. This evidence would clearly go to show that

there was a formal marriage between P.W. 1 and first accused in the Shiva Temple on 21.02.1999.

16. Now, the next question is the animus of the parties, at the time when the garlands were exchanged and thali was tied. It is not every exchange of garlands between a man and a woman that makes out a marriage between them. The mere physical act of exchange of garlands is not sufficient. What is more important is the intention of the parties. While performing certain acts symbolizing a marriage, the parties should have consensus ad idem that they accept each other as husband and wife and that what is performed is a valid marriage. This alone makes out a marriage. For illustration, in a drama, if a hero garlands the heroin and ties thali, that will not amount to marriage between them, because they had no animus to celebrate a marriage by symbolically exchanging garlands and by tying thali. Therefore, the animus of the parties is the vital fact, which will be decisive.

17. The next question is, in the instant case, what was the animus of the first accused, when he performed certain rituals in the Shiva Temple. If really he had the animus to celebrate the marriage, tying of thali around the neck of P.W. 1 in the Shiva Temple would amount to a valid marriage. Of course, if the said marriage is a valid marriage, no offence under Section 493 of I.P.C. would be made out. But, in this case, though the first accused had confessed to the panchayatars about the happenings in the Shiva Temple, and though he had agreed to marry P.W. 1, in the defence, he has taken before the Court, he has diametrically denied everything. He has disputed the very fact of exchange of garlands, besides tying up of thali. Similarly, when he was questioned under Section 313 of the Code of Criminal Procedure in respect of the incriminating circumstances, he has specifically denied the marriage. This stand of the first accused would go to prove that he never intended to have a valid marriage and what was done in the Shiva Temple by the mere physical act of garlanding and tying of thali was nothing but a mere show of marriage. The animus of the first accused at that time was not to celebrate a valid marriage. To the contrary, the show of marriage was only with the intention to lure P.W. 1 for having sexual intercourse. As already narrated, quite some time prior to the marriage, the first accused tried to persuade P.W. 1 for having sexual intercourse with a promise to marry her. But P.W. 1 did not agree for the same. Thus, it is crystal clear that with a view to have sexual intercourse with P.W. 1, the first accused had taken her to the temple, conducted certain ceremonies, as though he was celebrating a valid the marriage and then, he succeeded in persuading P.W. 1 in having sexual intercourse with her. Thus, from the evidence of the prosecution and from the stand taken by the first accused, during trial, it has been clearly established that the first accused had no animus to marry P.W. 1 at the time of exchanging of garlands and tying of thali and there was no consensus of ad idem for a valid marriage. To repeat, though P.W. 1 sincerely believed that it was a valid marriage and though there was necessary animus on the part of P.W. 1, the first accused did not have such animus. He had only deceived P.W. 1. Therefore, the

ceremonies like exchanging of garlands and tying of thali held on 21.02.1999 between P.W. 1 and first accused would not amount to a valid marriage.

18. Now, turning to Section 496 of I.P.C., it speaks of ceremony of a marriage conducted either dishonestly or with fraudulent intention. Section 496 of I.P.C. reads as follows:

"496: Marriage ceremony fraudulently gone through without lawful marriage-Whoever, dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

19. The terms "dishonestly" or "fraudulently" are defined in Section 24 and 25 of I.P.C. as follows.

"24. "Dishonestly" - Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly".

25. "Fraudulently" - A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise."

20. In the instant case, from the narration of facts, it is crystal clear that the intention of the first accused was never a honest intention. He had played fraud upon P.W. 1, made dishonest representation to her to make her believe that what was undergone was a valid marriage. Thus, finally he had succeeded in persuading P.W. 1 to agree for sexual intercourse and had sexually exploited her. The means adopted by him is certainly fraudulent and deceitful. Therefore, I hold that from the evidence of the prosecution witnesses that the prosecution has clearly established that the first accused has committed the offence, punishable under Section 496 I.P.C. and the same has been proved beyond any reasonable doubt.

21. In this case, it is also noticeable that in the panchayat, according to the prosecution witnesses, it was agreed to celebrate a valid marriage between P.W. 1 and the first accused. If really the marriage which was allegedly celebrated on 21.02.1999 was a valid marriage, there would have been no need to propose for a fresh marriage. This itself would go to show that the so-called marriage celebrated on 21.02.1999 was only a bogus one.

22. If the first accused had stopped with such a formal marriage, making out an offence under Section 496 of I.P.C., without proceeding further to have sexual intercourse with her, the offence under Section 493 of I.P.C. would not have been made out. The first accused had kept P.W. 1 under the belief that there was valid marriage, though he had no intention to make it lawful. It is the clear evidence of P.W. 1 that she agreed for sexual intercourse, because, the first accused made her to believe that there was a valid marriage and that he was her husband. P.W. 1 had stated in her evidence that all along prior to the marriage, the first

accused tried to lure her to agree for sexual intercourse, but she did not agree. Coupled with this evidence, if the fact that P.W. 1 agreed for sexual intercourse as she was kept under the belief that he had become her husband is taken into account, it is crystal clear that the offence under Section 493 of I.P.C. has been committed by the first accused and the same has been proved beyond any reasonable doubt.

23. The learned senior counsel for the accused would submit that the offence under Sections 493 and 496 I.P.C. are mutually exclusive. The distinction between Sections 493 and 496 of I.P.C. is easily perceivable. If a man commits an offence under Section 496 of I.P.C. and stops with that, without going further for sexual intercourse with the victim, then the offence under Section 496 I.P.C. would be made out. Not stopping with the commission of offence under Section 496 I.P.C., if the accused proceeds to have sexual intercourse with the victim girl, by keeping her under the impression that he is her husband, then, the offence under Section 493 I.P.C. is clearly made out. Thus, Sections 493 and Section 496 are not mutually exclusive.

24. The learned Senior Counsel would further submit that for the child, that was born to P.W. 1, the first accused is not the father. According to him, on the side of the prosecution, there was no evidence to prove the paternity of the child. The evidence of the doctor, who conducted examination on P.W. 1, first accused and the child cannot be acted upon for want of DNA test, to ascertain the parentage of the child, the learned counsel contended. In my considered view, DNA test, in the instant case, is not at all necessary for the simple reason that before the panchayatars, the first accused had himself confessed by way of extra-judicial confession that he was the father of the child. Hence, this argument is rejected.

25. Nextly, the learned senior counsel would contend that in the hospital records and in the Birth Register, P.W. 1 did not give the name of the first accused as the father of the child. Assuming that the same is true, that is immaterial.

16. The last argument, advanced by the learned senior counsel for the petitioners is that the charges were misleading. According to him, charge No. 1 under Section 493 of I.P.C. states that the occurrence was on 20.02.1999 and charge No. 2 under Section 496 of I.P.C. states that the offence was committed on 21.02.1999. According to the learned senior counsel, as seen from the evidence of P.W. 1, both the alleged occurrences were on the same day. Hence, the charges are misleading. In this regard, I may refer to Section 464 of Cr.P.C., which says that no finding sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

27. In the instant case, therefore, the test is whether the above discrepancy in the charges has caused any prejudice to the first accused and whether any

miscarriage of justice has occasioned. In my considered view, it is not so. The accused has never raised any objection at any point of time about the above discrepancy in the charges all along. Only now, this point is raised, for the first time. There is nothing on record even to remotely infer that there was miscarriage of justice. Hence, I hold that because of the above discrepancies in the charge Nos. 1 and 2, there is no prejudice caused to the accused. Therefore, this argument is also rejected.

28. Now, turning to the quantum of punishment, as already stated, the alleged occurrence happened in the year 1999. According to the learned senior counsel, at this juncture, directing the first accused to undergo rigorous imprisonment for three years would not be in the interest of justice. According to him, the first accused was already married and he has got children also. I have considered the said submissions. In any criminal trial, sentencing is an important task of the Court. Imposing appropriate punishment alone would amount to doing justice. There are many theories of sentencing and so far as the present case is concerned, I deem it appropriate to adopt the "Theory of Deterrence" since the gravity of the offence is enormous. Even today, the first accused does not own the parentage of the child born to P.W. 1. The trauma, the child is going to experience in future as a fatherless child in the eye of public, cannot be lightly viewed. It will really be a nightmarish experience for P.W. 1 and her child. The ridicule, humiliations and disrespect that are going to be faced by P.W. 1 will be beyond human tolerance. While deciding about the quantum of punishment, a balance between the mitigating circumstances and aggravating circumstances should be struck. In the instant case, if the mitigating circumstances placed by the learned senior counsel and the aggravating circumstances narrated hereinabove are balanced, it would emerge that the first accused is liable for punishment with the maximum sentence that could be imposed. The Trial Court has, however, imposed a sentence of rigorous imprisonment for three years for each offence and a fine of Rs. 1,000/- each. This, in my considered opinion cannot be stated to be on the higher side. Therefore, I am inclined to confirm the same.

29. Now, turning to the case of the second accused, as rightly submitted by the learned senior counsel, there is no convincing evidence against him. In the presence of panchayatars, the second accused had agreed to celebrate a marriage between P.W. 1 and the first accused. For some reason or the other, it was broken. But it is highly doubtful that the said agreement was broken because of some demand made by the second accused. From the facts narrated, the evidence of P.W. 1, the evidences of her parents and the panchayatars, it is difficult to believe the case of the prosecution so far as it relates to the second petitioner/2nd accused is concerned. The second accused is an old man and he has nothing to do with the alleged so-called marriage and the sexual intercourse that the first accused had with P.W. 1. Therefore, giving the benefit of doubt arising out of the above circumstances, I am inclined to acquit the second petitioner/2nd accused. In the result, this Criminal Revision Case is partly

allowed in the following terms:

- i) The conviction and sentence, imposed on the first petitioner by the trial court and confirmed by the first appellate court, is confirmed and this criminal revision case, so far as it relates to the first petitioner is concerned, is dismissed.
- ii) The conviction and sentence imposed on the second petitioner is set aside and he is acquitted from the charges. Fine amount, if any, paid by the second petitioner shall be refunded to him.
- iii) The trial Court is directed to take steps to secure the presence of the first accused to commit him to prison to serve the sentence. The period of imprisonment already undergone by him shall be set off under Section 428 Cr.P.C.