

(2016) 12 MAD CK 0038
In the Madras High Court
Case No : Crl.A. No. 930 of 2007

Gunasekaran

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 02-12-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, Section 174, Section 176
Evidence Act, 1872 — Section 32(1)
Penal Code, 1860 (IPC) — Section 498A

Citation : (2017) 1 LW(Crl) 88 : (2016) 3 MadWNCri 481 : (2017) 1 MLJCriminal 114

Hon'ble Judges : Dr. P. Devadass, J.

Bench : Single Bench

Advocate : Mr. N.R. Elango, Senior Counsel for Mr. R. Vivekanandan, Advocate, for the Appellant; Mr. R. Sekar, G.A.(Crl.side), for the Respondent

Final Decision : Allowed

Judgement

Dr. P. Devadass, J. - A-1 in the Sessions case in S.C.No.66 of 2006 on the file of the learned Additional Sessions Judge, Mahalir Needhimandram, Perambalur is the appellant.

2. A-1's mother is A-2. They were tried for charges under Section 498-A and 304-B IPC.

3. After trial, the Trial Court acquitted both from the charge under Section 304-B IPC. The Trial Court also acquitted A-2 from the charge under Section 498-A IPC. However, convicted A-1 under Section 498-A IPC. and sentenced him to 3 years R.I. and fined him Rs.2000/- in default to undergo 5 months R.I. A-1 has paid the fine amount.

4. The case of the prosecution briefly runs as under:

(1) On 6.12.1998, A-1 married Vetriselvi, the elder daughter of PWs-1 and 2. Her brother and sister are PWs-3 and 4. At the time of marriage, several dowry items

were given to A-1. It was acknowledged by his uncle/P.W.5 under Ex.P1.

(2) Vetriselvi started her marital life in her husband's house in Perambalur. A-1 harassed his wife for more dowry. A-2 also tortured her. She became pregnant. On 2.5.1999, PWs-1 and 4 came to A-1's house to take Vetriselvi to their home. A-1 told them that he will send her later. Secretly Vetriselvi handed over Ex.P-2 letter to her sister/PW-4. In Ex.P-2 cruelties to which she was subjected to at the hands of A-1 and A-2 have been mentioned. On return home, PW-4 and the whole family read Ex.P-2 and came to know about the cruelty to which Vetriselvi was subjected to in her matrimonial home.

(3) In this backdrop of the matter, on 27.5.1999, in her matrimonial home, Vetriselvi self immolated herself. She died. On 27.5.1999, midnight, at the Perambalur Police Station, A-1 reported (Ex.P-20) this to PW-12/S.I. of Police. He registered a case of suspicious death under Section 174 Cr.P.C. (Ex.P-21 F.I.R.). He sent the original F.I.R. to PW-11 Revenue Divisional Officer (R.D.O.), Perambalur. PW-11 conducted enquiry and examined PWs-1 to 4 and also the accused and recorded their statement (Exs.P-3, P-6, P-7, P-14 to P-18). PW-11 reported (Ex.P-19) police that she committed suicide due to dowry harassment.

(4) Janagaraj, the then Deputy Superintendent of Police, Perambalur Sub-Division took up his investigation. He visited the scene place. In the presence of witnesses, he prepared Ex.P8 Observation Mahazar. He examined the material witnesses and recorded their statement under Section 161 Cr.P.C. At the Government hospital, Perambalur PW-9 conducted post-mortem on the dead body of the deceased. He opined that she died due to extensive burn injuries (Ex.P-11 post-mortem certificate).

(5) Concluding his investigation, the D.S.P. filed the final report before the committal Magistrate for offences under Section 498-A and 304-B I.P.C. as against A-1 and A-2.

5. The learned Magistrate furnished them copies of documents under Section 207 Cr.P.C. Committed the case to the Court of Principal Sessions Judge, Perambalur. The learned Principal Sessions Judge, made over the case to the learned Additional Sessions Judge, Mahalir Needhimandram, Perambalur for trial.

6. The learned Additional Sessions Judge after hearing both sides and on consideration of the case-records framed charges under Section 498-A and 304-B I.P.C. as against A-1 and A-2 and explained to them. They denied the charges.

7. To substantiate the charges, prosecution examined PWs-1 to 13 and marked Exs.P-1 to P-21.

8. The Trial Court examined the accused under Section 313 Cr.P.C. on the incriminating aspects appearing in the prosecution evidence. They denied their complicity. They did not let in defence evidence.

9. Upon hearing both sides and on consideration of the evidence adduced, the

trial Court acquitted A-1 and A-2 from the charge under Section 304-B IPC. The trial Court also acquitted A-2 from the charge under Section 498-A IPC. However, relying on Ex.P- 2, the trial Court convicted A-1 under Section 498-A IPC and sentenced him to 3 years R.I with fine and with default sentence.

10. The learned Senior Counsel for A-1 contended that the prosecution has thoroughly failed to establish the charge under Section 498-A IPC as against A-1.

11. The learned Senior counsel further contended that the trial Court having disbelieved Ex.P-2, relying on it ought not to have convicted A-1 under Section 498-A IPC.

12. The learned Senior counsel further contended that the genuineness of Ex.P-2 has not been established.

13. The learned Senior counsel further contended that after the death of the deceased, Ex.P-2 becomes a dead woman's statement falling under Section 32(1) of the Evidence Act. With regard to the charge under Section 498-A IPC, death of a person will not be an issue. In such circumstances, Ex.P-2 cannot be relied on to convict A-1 under section 498-A IPC.

14. In this connection, the learned Senior Counsel cited *Inderpal v. State of M.P.* [(2001) 10 SCC 736].

15. The learned Senior counsel further contended that Exs.P-3, 6, 7, 14 to 18 statement recorded by R.D.O./PW-11 ought not to have been relied on.

16. On the other hand, the learned Government Advocate (Crl. side) would contend that Ex.P-2 is a solemn statement made by the deceased while she was alive. It speaks about the various cruelties perpetrated upon the deceased at her matrimonial home. In such circumstances, the Trial Court has rightly convicted him.

17. I have anxiously considered the rival submissions, perused the impugned judgment, the entire materials on record and the decision cited.

18. Now, the question is whether the charge under Section 498-A IPC has been proved by the prosecution beyond all reasonable doubts as against A-1 ?

19. A-1's wife Vetriselvi is the daughter of PWs-1 and 2. On 27.5.1999, in her matrimonial home, in Perambalur, she committed suicide. On the same day, her death was reported to police by A-1. However, after investigation, A-1 and his mother/A-2 were fixed as accused and were prosecuted for offences under Section 498- A and 304-B IPC. A-2 was acquitted from both the charges.

20. The prosecution version of the case is that A-1 used to demand dowry and torture his wife and unable to bear his cruelty, she committed suicide on 27.5.1999. A-1 was tried for charges under Section 498-A and 304-B IPC. The Trial Court acquitted him from the charge under Section 304-B IPC. However, based on Ex.P-2, the Trial Court convicted him under Section 498-A IPC.

Reference also has been made to the statement recorded from PWs-1 to 4 by PW-11 R.D.O.

21. Ex.P-2 is stated to be written by the deceased containing cruelties committed upon her by A-1. It is stated to have been handed over to her sister/PW-4 by the deceased on 2.5.1999 at Perambalur. Subsequently, on 27.5.1999, the deceased committed suicide.

22. Ex.P2 is a xerox copy. At its last page it contains a signature. It is stated to be of the deceased. However, the original of Ex.P-2 does not contain any signature at all. This has also been admitted by PW-1.

23. According to P.W.4, Ex.P2 it was handed over to her on 2.5.1999 by the deceased. It is also stated by her that after returning home, PWs-1 to 4 have read it and came to know about the cruelties to which the deceased was subjected to at her matrimonial home. Subsequently only on 27.5.1999, the deceased committed suicide. When PW-11/R.D.O. conducted enquiry, none of the prosecution witnesses stated about Ex.P-2. In their cross examination, PWs-1 to 4 have also admitted this. PW-4 frankly admitted that she did not tell PW-11 about Ex.P-2. If really prior to her commission of suicide, the deceased had given Ex.P-2 to PW-4 definitely she would have told about Ex.P-2 to her parents and as it is an important incriminating document in this case, they would have revealed about it to PW-11. However, none of them stated about Ex.P-2 to PW-11. Thus, the genuineness of Ex.P-2 is doubtful. In the circumstances, the Trial Court also rightly doubted Ex.P-2. In such circumstances, the Trial Court having placed reliance on Ex.P-2 is not correct.

24. With regard to Ex.P2 there is one more aspect.

25. Ex.P-2 is stated to have been written by the deceased while she was alive. After her death on 27.5.1999, it becomes statement of a dead person. It will fall under Section 32(1) of the Evidence Act. When a person's death is in question, it becomes relevant, in other words, it will act as a dying declaration under section 32(1) of the Evidence Act.

26. Section 32 (1) of the Evidence Act, runs as under:

"32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc, is relevant. - Statements, written or verbal, or relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expenses which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-

(1) When it relates to cause of death - When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

27. In *Inderpal v. State of M.P* [(2001) 10 SCC 736], the wife of the accused died after leaving Exs.P-7 and P-8 letters wherein she had stated that her husband had subjected her to beating (in our case, Ex.P-2 also contains similar information). The husband was tried for charges under Sections 498-A and 306 IPC. He was acquitted from the charge under Section 306 IPC. However, he was convicted under Section 498-A IPC mainly based on the said Exs.P-7 and P-8 letters.

28. The Hon'ble Supreme Court held that in an offence under Section 498-A IPC, death of the woman will not be in question. In such circumstances, Exs.P-7 and P-8 dying declarations ought not to have been pressed into service to convict the accused under Section 498-A IPC.

29. In *Inderpal* (supra), the Hon'ble Supreme Court held as under:

"7. Unless the statement of a dead person would fall within the purview of Section 32(1) of the Indian Evidence Act there is no other provision under which the same can be admitted in evidence. In order to make the statement of a dead person admissible in law (written or verbal) the statement must be as to the cause of her death or as to any of the circumstance of the transactions which resulted in her death, in cases in which the cause of death comes into question. By no stretch of imagination can the statements of Damyanti contained in Exhibit P-7 or Exhibit P-8 and those quoted by the witnesses be connected with any circumstance of the transaction which resulted in her death. Even that apart, when we are dealing with an offence under Section 498-A, IPC dis-juncted from the offence under Section 306, IPC the question of her death is not an issue for consideration and on that premise also Section 32 (1) of the Evidence Act will stand at bay so far as these materials are concerned."

(Emphasis supplied by me)

30. In *Bhairaon Singh v. State of Madhya Pradesh* [AIR 2009 SC 2603] in connection with the suicide committed by his wife, the accused was tried under Sections 306 and 498-A IPC. The Trial Court acquitted him from the charge under Section 306 IPC, however, convicted under Section 498-A IPC based on the oral dying declaration of the relatives of the deceased.

31. The Honourable Supreme Court held that since under Section 498-A IPC, the question of death of the woman is not relevant, the dying declaration cannot be relied on to convict the accused under Section 498-A IPC.

32. In *Bhairaon Singh* (supra), the Hon'ble Supreme Court observed as under:

"2. The question that arises for consideration in this appeal by special leave is :

in a case where accused has been acquitted of the offence punishable under Sections 304- B and 306 IPC, and the death of wife is neither homicidal nor suicidal but accidental, whether the oral evidence of witnesses about what the deceased had told them against the accused about the treatment meted out to her is admissible under Section 32 (1) of the Evidence Act to sustain conviction under Section 498A, IPC? ""

33. In Bhairon Singh (supra), the Hon"ble Supreme Court referred to Section 32 (1) of the Indian Evidence Act, 1872 and the concerned law on the subject and after referring to the evidence of the brothers of the victim, in para 11 of its judgment, the Court observed as under:

"11. The moot question is: whether the statements attributed to the deceased could be used as evidence for entering upon a finding that the accused subjected Ranjana Rani @ Raj Kumari to cruelty as contemplated under Section 498A, IPC. In our considered view, the evidence of PW-4 and PW-5 about what the deceased Ranjana Rani @ Raj Kumari had told them against the accused about the torture and harassment is inadmissible under Section 32(1) of the Evidence Act and such evidence cannot be looked into for any purpose. Except Section 32(1) of the Indian Evidence Act, there is no other provision under which the statement of a dead person can be looked into in evidence. The statement of a dead person is admissible in law if the statement is as to the cause of death or as to any of the circumstance of the transactions which resulted in her death, in a case in which the cause of death comes into question. What has been deposed by PW-4 and PW-5 has no connection with any circumstance of transaction which resulted in her death. The death of Smt. Ranjana Rani @ Raj Kumari was neither homicidal nor suicidal; it was accidental. Since for an offence under Section 498A simpliciter, the question of death is not and cannot be an issue for consideration, we are afraid the evidence of PW-4 and PW-5 is hardly an evidence in law to establish such offence. In that situation Section 32(1) of the Evidence Act does not get attracted."

34. Recently, in Subhash v. State of Maharashtra [Criminal Appeal No.93 of 2003 dated 15.6.2016, under similar circumstances, the accused was acquitted under Section 306 IPC, however, he was convicted under Section 498-A IPC relying on the dying declaration. The Bombay High Court referring to Bhairon Singh case (supra) acquitted the accused holding that in such circumstances relying on the dying declaration to convict the accused under Section 498-A IPC does not arise.

35. In the case before us, the Trial Court acquitted A-1 from the charge under Section 304-B IPC. However, it convicted him under Section 498-A IPC based on certain incriminating information in Ex.P-2 that he has cruelly treated his wife.

36. For an offence under Section 498-A IPC, question of her death will not be an issue. In such circumstances, the Trial Court cannot refer to Ex.P-2. Thus, the Trial Court having relied on Ex.P-2 to convict A-1 under Section 498-A is not correct. The principles laid down in the above decisions squarely apply to the

facts of this case.

37. A glaring legal flaw committed by the Trial Court also has been brought to our notice.

38. Within 7 years of her marriage, the deceased has committed suicide. In such circumstances, investigation has been conducted by a D.S.P. The police sent the original F.I.R. to PW-11 R.D.O. In the presence of Panchayatdars, the R.D.O. conducted inquest on the dead body of the deceased. He enquired P.Ws.1 to 4 viz., father, mother, brother and sister of the deceased. He also recorded their statement (Exs.P-3, P-13, P-7 and P-6). His task is to find out the apparent cause of her death [see Section 174(3)(i) & (ii) and Section 176(1) Cr.P.C].

39. After registering the F.I.R. under Section 154 Cr.P.C., a Police Officer gets power of investigation in cognisable cases under Section 156 Cr.P.C. and the procedure he has to follow has been prescribed in Section 157 Cr.P.C. He collects evidence; oral, documentary, material and scientific. He collects the oral evidence by examining the witnesses and recording their statement under Section 161 Cr.P.C. In view of the embargo in Section 162 Cr.P.C. such statement cannot be relied on, unless it becomes a dying declaration under Section 32 (1) of Evidence Act r/w Section 162(2) Cr.P.C.

40. A statement recorded by a police officer during investigation falls under Section 161 Cr.P.C. It is also called "police statement" because it has been given to a Police Officer. It is also called a "previous statement". It can be used by the defence to contradict the author/maker of the statement and also to impeach his credibility. But it cannot be used by the prosecution because of the embargo in section 162 Cr.P.C.

41. A statement given by a witness to a Revenue Divisional officer under Section 176 r/w Section 174 Cr.P.C. is also a "previous statement". It is not a "Substantive piece of evidence". Because it is not recorded before the Trial Court on oath. It is recorded "elsewhere". It is recorded outside the Court, namely, before the R.D.O. It is also like a statement given to a Police Officer during inquest under Section 174 Cr.P.C. The only difference is instead of a Police Officer a Revenue Official conducts the inquest and the inquiry thereon. After his enquiry, the R.D.O submits his (inquest) report.

42. In *Kuldip Singh v. State of Punjab* [AIR 1992 SC 1944 = 1992 CrLJ 3592] the Hon'ble Supreme Court held that although the contents of the inquest report cannot be treated as evidence, it can be looked into to test the veracity of the witnesses.

43. Statement given to R.D.O. can be used by the defence to contradict the witness because it is also a previous statement. The Court cannot mark a police statement recorded under Section 161 Cr.P.C. equally, the Court cannot mark a statement given to the R.D.O. Under certain circumstances, they can be marked as defence exhibit.

44. The danger of marking, admitting statement given to a R.D.O. in evidence is that the mind of the Court will be prejudiced. And a statement not given before the Court being introduced in the evidence. A statement given to police during investigation under Section 161 Cr.P.C. is not marked. Likewise, a statement given to R.D.O. also should not be marked.

45. Now, in the case before us, what remains is "suspicion and surmises" as against A-1.

46. We are deeply wedded to the Anglo-Saxsonic Criminal Jurisprudence. Prosecution is bound to establish the charge under Section 498-A IPC as against A-1 beyond all reasonable doubts.

47. Prosecution is bound to prove that A-1 has committed an offence under Section 498-A IPC. It cannot be held that the accused "might have committed" the offence. But, it should be held that the accused "has committed" the offence. There is wide gap between he "has committed" and he "might have committed" the offence. Thus, suspicion and surmises however strong they may be, they cannot take the place of legal proof [Also see Woolmington v. Director of Public Prosecutions (1935 AC 462)].

48. In this case, the prosecution has thoroughly failed to establish the charge under Section 498-A I.P.C. as against A-1.

49. In view of the foregoing, it is held as under:

(1) This Criminal appeal is allowed.

(2) The conviction recorded and the sentence imposed by the Trial Court under Section 498-A I.P.C. against A-1 are set aside.

(3) A-1 is acquitted under Section 498-A I.P.C.

(4) The fine amount paid by him shall be refunded to him.