

(1993) 12 KL CK 0025
In the High Court Of Kerala
Case No : Criminal R.P. No. 500/93

Rajan and Others

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 08-12-1993

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374, 374(3), 382, 384, 386

Evidence Act, 1872 — Section 113B

Penal Code, 1860 (IPC) — Section 107, 302, 304B, 306, 326

Citation : (1993) 12 KL CK 0025

Hon'ble Judges : K.T. Thomas, J

Bench : Single Bench

Advocate : K. Ramakumar, M.J. Johnson, P. Salheesan, Sherly S.A., Navaneethan K.V., Vani P. and Rohini K, for the Appellant; K.I. Abdul Rasheed, Public Prosecutor, for the Respondent

Judgement

K.T. Thomas, J.—Sujatha was the wife of one Mohan. Within a few days after their wedding, Mohan left India and went to Soudi Arabia where he was employed leaving Sujatha in his parental home. But within ten months he received the horrifying information that Sujatha committed suicide by jumping into a well. Three brothers of Mohan were arraigned in the Court of a judicial magistrate of first class on the allegation that they subjected Sujatha to such cruelty as to drive her to commit suicide. Learned Magistrate convicted those three persons of the offence u/s 498A of the Indian Penal Code and sentenced them to rigorous imprisonment for two years and to pay a fine of Rs. 2,000 each. When the convicted persons jointly filed an application before the Sessions Court, learned Sessions Judge, without going into the merits of the evidence, remanded the case to the trial Court directing the Magistrate to resort to committal proceedings on the premise that accused should have been tried for the offence u/s 306 of the Indian Penal Code. This revision petition is filed by the accused persons in challenge of the said order of remand.

2. In the meanwhile, suo motu revisional proceedings were also initiated on the

direction of the learned Judge of this Court in charge of the district concerned who perused the judgment during calendar review.

3. The gist of the ease against the three accused is that after Mohan went abroad Sujatha was staying in the house in which her brothers-in-law (the accused) and their wives were also residing and that Sujatha was subjected to regular harassment which eventually led her to commit suicide on 30th May 1985.

4. Learned Counsel for the accused contended that a remand to the trial Court, for subjecting the accused to a graver offence or for inflicting heavier punishment, cannot be ordered by the appellate Court on an appeal preferred by the accused. He relied on the decision of the Supreme Court in *The State of Andhra Pradesh Vs. Thadi Narayana*, and of this Court in *Poulose v. Food, Inspector 1992 (1) KLT 522*.

5. In *The State of Andhra Pradesh Vs. Thadi Narayana*, the question arose on the following facts: An accused person was tried for offences Under Sections 302 and 392 of the Penal Code. Trial Court acquitted him of the said offences, but convicted him u/s 411 of the Penal Code. In the appeal filed by the accused, the High Court felt that the order of acquittal of offences under Sections 302 and 392 of the Penal Code was wrong and hence the High Court remanded the whole ease for retrial. The State then went to the Supreme Court against the remand order. Supreme Court has observed that in an appeal preferred against the order of conviction and sentence, the High Court cannot use appellate powers for reviewing the acquittal passed in favour of a party.

6. In *Poulose v. Food Inspector 1992 (1) KLT 522* the situation was that a trial magistrate convicted an accused under two counts, one for selling adulterated food article and the other for dealing in food articles without obtaining a licence under Prevention of Food Adulteration Rules. Accused in that case went in appeal before the Sessions Court and the Sessions Judge remitted the case for imposing separate sentence under both counts. Padmanabhan, J. has held in the decision that Sessions Judge has no power to do so in an appeal filed by the accused in challenge of the conviction and sentence.

7. Section 374 of the Code of Criminal Procedure (for short "the Code") enables a convicted person to appeal against conviction and sentence. Sub-section (3) says that a person convicted by a magistrate can file the appeal before Court of sessions and Section 382 directs that every appeal shall be made in the form of a petition in writing.

If the appeal is not dismissed summarily as provided in Section 384, the appellate Court has to call for the records and hear the parties.

8. It is in the above backdrop that powers of the appellate Court, as envisaged in Section 386 of the Code (which corresponds to Section 423 of the Code of Criminal Procedure, 1898-the old Code) have to be understood. As per Section 386, after perusing the records and hearing the parties the appellate Court may

dismiss the appeal if it considers that there is no sufficient ground for interfering. Alternatively, it is provided that the appellate Court may:

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;

It is clear that when the appeal is against conviction, appellate powers would include power to order the accused to be retried or order him to be committed for trial. In other words, if the appellate Court finds that conviction was vitiated by want of jurisdiction or an other legal infirmity, the appellate Court has sufficient powers to order retrial by a competent Court and it has also powers to dit the lower Court to commit the case.

9. In *The State of Uttar Pradesh Vs. Shankar and Another*, the position had to be considered by the Supreme Court in a situation very similar to this case. In that case two persons were convicted u/s 326 of the I.P.C. and sentenced to rigorous imprisonment for eighteen months each for cutting the nose of a lady who refused to succumb to their overtures. When they filed appeal to the sessions Court, the Sessions Judge set aside the conviction and sentence and remanded the case with a direction to commit it to the Court of sessions. However, the High Court set aside the order holding that sessions Court has no such power in an appeal filed against conviction. But the Supreme Court restored the order of the Sessions Judge observing that "the Code expressly gives power to the appellate Court to dismiss the appeal or to acquit or discharge the accused or order him to be retried or committed for trial and therefore the section does empower the appellate Court to order commitment for trial to the Court of session". The said observation can be used as fully supporting the legal position that the appellate Court has such powers even though the appeal was at the instance of the accused in challenge of his conviction.

10. The more important question is whether learned Sessions Judge was right in holding that the offence to be tried is Section 306 of the I.P.C. Public Prosecutor in the sessions Court has argued that since Sujatha had committed suicide on account of the cruelty of the accused "there is no propriety or grace in having the charge u/s 498A I.P.C. alone". Learned Sessions Judge accepted the argument and held that in view of the admitted fact that the deceased had committed suicide, the Court below ought to have held that the offence revealed was Section 306 I.P.C. and not Section 498(A) alone.

11. u/s 306 of the Penal Code whoever abets the commission of suicide shall be punished with imprisonment which may extend to ten years, if suicide has been

committed. Section 498A was inserted in the Penal Code through Act 46 of 1983. It provides punishment to the husband and/or the relatives of the husband of a woman who was subjected to cruelty by them. What is meant by "cruelty" as per the section has been explained in the explanation to the section which reads thus:

Explanation.- For the purposes of this section, "cruelty" means-

(a) any willful conduct which is of such a nature as is likely to drive the woman to" commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing here or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

The above explanation consists of two alternative postulates and either of the alternatives would amount to "cruelty". In this context it is necessary to mention about two other provisions incorporated in the statutes through the same Amendment Act 46 of 1983. One of them is Section 304B of the Penal Code and the other is Section 113B of the Indian Evidence Act. Section 304B provides that when death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage such death shall be called "dowry death", if it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of the husband, for or in connection with any demand for dowry. Section 113B of the Evidence Act provides that the Court shall presume that such person has caused the dowry death.

12. A reading of the aforesaid three provisions incorporated in the statute books through Act 46 of 1983 would indicate that explanation (b) to Section 498A of the Penal Code is the associate of Section 304B of the Penal Code and in such a case Section 113B of the Indian Evidence Act would apply. But explanation (a) to Section 498A of the Penal Code has no such association with any other provision. It stands by itself. In other words, in the case to which Section 498A read with explanation (b) applies, it would automatically escalate to Section 304B if death of the woman has occurred within seven years of her marriage otherwise than under normal circumstances. Hence a Magistrate would be justified in converting the case in such a situation into, committal proceedings.

13. But such automatic escalation does not happen in a case to which explanation (a) of Section 498A applies. In order to constitute the offence u/s 306 of the Penal Code there should have been abetment of commission of suicide. Section 107 of the Penal Code says that a person abets the doing of a thing who either instigates any person to do that thing or engages in a conspiracy for the doing of that thing or intentionally aids the doing of that thing. It is only the third limb which needs examination in this case as the other two are out of scope here. What in this case as the other two are out of scope here.

What is meant by aiding? Explanation 2 in Section 107 reads thus:

Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

This Court has considered the implication of the aforesaid explanation in a decision reported in *Purushothaman v. State of Kerala* 1989 (1) KLT 521. The following passage in the decision is of advantage in this context:

An act which merely amounts to aiding the commission of an offence is not abetment. The aiding must snowball into "intentionally aiding" the doing of a thing. When can you say that a person has intentionally aided the commission of an offence? The commission of the act must be the dominant intention of the person who aids it. Then only it can be said that he "intentionally" aided it. If there is community of interest between the aiding person and the one who commits the offence, there is possibility to draw the inference that the dominant intention was to aid the doing of that particular act. If the person only knows or has only the reason to believe that his act would facilitate the commission of offence, it cannot be said that his dominant intention was that.

14. It is, therefore, clear that an accused against whom the offence u/s 498A I.P.C. is alleged with reference to clause (a) of the explanation would not automatically become guilty u/s 306 of the Penal Code merely because the victim committed suicide even assuming that she did so under the stress of such cruelty. The person who subjected her to cruelty cannot be deemed to have intentionally aided her to commit suicide. The most which could be found, perhaps, is that she decided to end her life on account of the unbearable cruel treatment meted out by such persons. Even then Section 306 of the I.P.C. cannot be rolled over them.

15. For the said reasons, I find that learned Sessions Judge was not correct in holding that the Magistrate should have taken cognizance of the offence u/s 306 of the I.P.C. Hence the appeal filed by the convicted persons before the Sessions Court has to be disposed of afresh.

In the result, I quash the impugned order and direct the learned Sessions Judge to dispose of the appeal afresh in accordance with law.