

(2009) 08 MAD CK 0136

In the Madras High Court

Case No : Criminal Appeal No. 235 of 2002

S.A. Hussainy alias Syed Ameerullah Hussainy and Syed
Azhmathullah Hussainy

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 10-08-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 174, 313
Dowry Prohibition Act, 1961 — Section 3, 4
Evidence Act, 1872 — Section 32, 32(1)
Penal Code, 1860 (IPC) — Section 304B, 354, 384, 454, 498A

Citation : (2009) 08 MAD CK 0136

Hon'ble Judges : M. Jeyapaul, J

Bench : Single Bench

**Advocate : A. Thiagarajan for S.R. Sundaram and Balamurugan, for the
Appellant; N. Kumanan, Government Advocate, for the Respondent**

Final Decision : Dismissed

Judgement

M. Jeyapaul, J.—Aggrieved by the judgment of conviction recorded and the sentence imposed by the trial court, the first and third accused

in S.C. No. 542 of 1999 on the file of the learned IV Additional Sessions Judge, Chennai have preferred the present criminal appeal.

2. The first accused was convicted for an offence u/s 3 of the Dowry Prohibition Act and was sentenced to undergo two years rigorous

imprisonment and to pay a fine of Rs. 70,000/= in default to undergo 6 months rigorous imprisonment. He was also convicted for an offence u/s 4

of the Dowry Prohibition Act and was also sentenced to undergo six months rigorous imprisonment. The first and third accused were convicted for

an offence u/s 498A of the Indian Penal Code and were sentenced to undergo two years rigorous imprisonment and to pay a fine of Rs. 2000/- in

default to undergo three months rigorous imprisonment. The first accused was convicted for an offence u/s 354 of the Indian Penal Code and was

sentenced to undergo one year rigorous imprisonment and to pay a fine of Rs. 1000/= in default to undergo two months rigorous imprisonment.

3. The second accused, who is none other than the wife of the first accused and the mother of the third accused was acquitted of all the charges

framed against her. Further A1 and A3 were acquitted of the charge u/s 304B of the Indian Penal Code.

4. On the side of the prosecution, 16 witnesses were examined and 20 documents and one material object were marked. Neither oral nor

documentary evidence was let in on the side of the defence.

5. The case in brief of the prosecution as reflected from the evidence let in by them reads as follows:

(i) PW1 Basheer Ahmed is the father of Shamina Berdose, who was married to the third accused, who is the second appellant herein. The first

appellant is none other than the father of the second appellant. In the month of May, 1997, betrothal ceremony was conducted as a precursor for

the marriage to be conducted by the third accused with the victim Shamina Berdose. Even at the time of betrothal ceremony, the accused

demanding a ring of one sovereign for the accused. PW1 gave the ring weighing one sovereign to the accused at the time of betrothal.

(ii) Thereafter, the accused family came to the house of PW1 for seeing the bridegroom. The accused demanded Rs. 50,000/= as cash and 40

sovereigns of gold jewels and one Hero Honda Motor Cycle. PW1, having refused to part with such a huge demand, paid only Rs. 25,000/= as

cash, 25 sovereigns of gold jewels and a motor cycle worth Rs. 30,000/= for the marriage, which took place on 28.7.1997 at Ashok Nagar,

Chennai. Every Friday for four weeks immediately after the marriage, as per the custom in vogue, the new couple were invited to the house of

PW1. When they came for the third Friday, a Silver Tumbler was presented as per the custom. But, the victim informed PW1 and her family

members that the accused demanded a ring embedded with stone. A sum of Rs. 10,000/= was demanded instead of inviting the couple for the

fourth Friday by the accused.

(iii) On 6.1.1997, the victim lady was brought by the accused to the house of

PW1. She informed PW1 and her family members that the third accused asked her to persuade her family members to sell away the plot at Minjur, which stands in the name of PW2 and pay a sum of Rs.

10,000/= to the accused.

(iv) On 28.11.1997, the victim lady was brought by the brother of the victim to the house of PW1. The victim lady informed her parents and her

sister that the first accused caught hold of her from behind and kissed her. He started kissing her often. Therefore, she refused to live with her

husband in the matrimonial house.

(v) On 11.12.1997, when the third accused came alongwith the second accused and his sister, PW1 informed them about the misbehaviour of the

first accused with his daughter. The third accused promised that he would take care of the victim lady. The victim lady was sent alongwith the third

accused to the matrimonial home. On 15.12.1997, during telephonic conversation, the third accused informed PW1 that the victim lady would

become alright if the amount demanded by the first accused was paid to him after selling the plot. But, quite unfortunately, information was passed

on to the family members of PW1 that the victim lady committed suicide during the night of 15.12.1997.

6. PW2 is the mother of the victim lady. PW3 is her sister. Both of them have spoken to the demand of dowry and the misbehaviour of the first

accused with the victim lady.

7. PW4 Shajahan, the neighbour of PW1 has deposed that 25 sovereigns of gold jewels, cash of Rs. 25,000/= and a scooter worth Rs. 30,000/=

were given to the third accused at the time of marriage. He also spoke to the misbehaviour of the first accused with the victim lady. PW5 Subbiah,

retired Special Officer attached to the Tamil Nadu Slum Clearance Board would depose that the victim lady informed him about the sexual

advances made by her father-in-law, the first accused herein with her.

8. The second accused Salimuneesa, the wife of the first accused proceeded to R7 Police Station at about 1.00 am on 16.12.1997 and lodged a

report, Ex.P2 alleging that her daughter-in-law committed suicide due to some family problem to the Sub Inspector of Police Mr. Nelson, PW10,

who registered a case in Crime No. 3416 of 1997 u/s 174 of the Code of Criminal Procedure. He prepared printed First Information Report,

Ex.P3 and despatched the same to the Executive Magistrate for inquest to note the cause of death.

9. PW13 Mr. Kannan, having received the First Information Report from PW10, sent the dead body of the victim for post mortem examination.

PW12 Dr.Baskar, having conducted autopsy on the dead body of Shamina Berdose, issued post mortem certificate, Ex.P6 that the deceased

appeared to have died of Asphyxia due to hanging. After the post mortem examination was over, PW13 conducted inquest and examined the

witnesses on the victim side and also on the accused side and came to a decision that there was no demand of dowry in his inquest report, Ex.P11.

10. PW15, R.S. Venugopal, Deputy Superintendent of Police, attached to Saidapet Circle, took up the case for investigation and prepared

Observation Mahazar, Ex.P17 in the presence of Ramesh and Sardar Khan. He also prepared Rough Sketch, Ex.P18 reflecting the scene of

occurrence. He seized Nylon Saree, M.O.1 from the scene of occurrence. He examined the witnesses and recorded their statements. On receipt

of the Inquest Report, Ex.P20 from the Executive Magistrate, he converted the case into one under the Indian Penal Code. PW16, Mr. P.K.

Senthil Kumar, the Deputy Superintendent of Police took up the case for investigation and examined the witnesses and recorded their statements.

Having obtained the post mortem report, Ex.P6, he filed final report on 31.8.1999 under Sections 498A, 304B and 384 of the Indian Penal Code

and Section 4 of the Dowry Prohibition Act.

11. The accused have come with a total denial of the incriminating circumstances spoken to by the witnesses on the side of the prosecution, when

they were examined u/s 313 of the Code of Criminal Procedure.

12. The learned Senior Counsel appearing for the appellants/A1 and A3 would submit that the Executive Magistrate has returned a finding that

there was no dowry demand and the death was not on account thereof. PW1 was categorical that the deceased daughter was happy in the

matrimonial home after she was sent back over there. PW6 also has spoken to the fact that both the third accused and the victim lady lived

together happily. It is his legal submission that when the accused were acquitted of the offence u/s 304B of the Indian Penal Code, the charge

under Sections 3 and 4 of the Dowry Prohibition Act would not stand the legal

scrutiny. It is his further submission that the statement alleged to have been given by the deceased to PW1 to PW3 is not admissible with respect to the charge under Sections 354, 384, 498A of the Indian Penal Code and Sections 3 and 4 of the Dowry Prohibition Act. He would further submit that the victim did not choose to inform the second and third accused about the misbehaviour of the first accused, which appears to be an abnormal conduct of the victim. Referring to the age of the first accused, who had crossed 65 years at the time of the occurrence, he would submit that a false case was weaved by the prosecution as against the first accused as though his sexual advances led to the suicide by the victim. Therefore, he would submit that the first and third accused are also entitled to acquittal.

13. Per contra, the learned Government Advocate (Criminal Side) would submit that within a span of about five months from the date of marriage, the victim lady has committed suicide. The demand of dowry on three occasions was established through the evidence of PW1 to PW5. Their testimony with respect to the demand of dowry is also supported by PW4 and PW5. The sexual advances made by the first accused also stood established by the prosecution. Therefore, he would submit that the trial court has rightly convicted accused 1 and 3 under the aforesaid penal provisions of law.

14. PW1 is none other than the father of the victim lady. He has categorically deposed that the accused even at the time when the betrothal ceremony was conducted in the month of May 1997 demanded one sovereign of gold ring for the third accused. PW1 acceded to such a demand and gave one sovereign of gold ring. At the time when the accused came to see the bride, they demanded cash of Rs. 50,000/= and 40 sovereigns of gold ornaments and a Hero Honda motorcycle. But, PW1 refused to accede to such a whopping demand of dowry. It is his version that he paid only cash of Rs. 25,000/=, 25 sovereigns of gold ornaments and motorcycle worth Rs. 30,000/=.

15. PW2, mother and PW3, the sister of the deceased have also lent corroboration to the version of PW1. The aforesaid demands were made by A1 just prior to the marriage and the date of marriage. There is no reason to disbelieve the evidence of PW1 which is amply corroborated by

PW2 and PW3. PW4, an independent witness in this case though not spoken about the demand made by the accused, he has deposed to the fact

that at the time of marriage, 25 sovereigns of gold ornaments, cash of Rs. 25,000/= and a motorcycle worth Rs. 30,000/= were given to the third

accused. PW6, yet another independent witness in this case would corroborate the case of the prosecution that a list containing 20 sovereigns of

gold jewels, cash Rs. 25,000/= and a Hero Honda motorcycle worth Rs. 30,000/= agreed to be paid was prepared and handed over to the first

accused, who verified the same and accepted the list. There is no voluntariness in giving those articles at the time of marriage by PW1 to the third

accused. Though PW1 to PW3 have spoken in general about the demand of dowry made by the accused, PW6 has categorically spoken that the

list was prepared containing those dowry articles and handed over to the first accused who verified the same and accepted it. The evidence of

PW1 to PW3 receives support from the independent witnesses PW4 and PW6. Therefore, there is no reason to disbelieve the evidence of the

prosecution witnesses who speak to the fact that the first accused being the father of the third accused demanded not only at the time of marriage

but also at the time when betrothal ceremony was conducted and received the aforesaid articles as dowry. The Trial Court has rightly rendered a

verdict that the prosecution has established that the first accused committed offences under Sections 3 and 4 of the Dowry Prohibition Act as he

had not only demanded dowry but also received the same on those two occasions.

16. Let us now come to the charge u/s 498A of the Indian Penal Code. PW1 has deposed that immediately after the marriage, every Friday for

four weeks there would be a function as per the custom in vogue in his community. Every Friday during the said period, some gift used to be

presented to the bridegroom. But, during the third Friday, the accused demanded a ring studded with a stone. During the fourth Friday, the

accused demanded a sum of Rs. 10,000/= instead of organising the customary function. The deceased victim lady informed the parents and her

sister that the third accused demanded a sum of Rs. 10,000/= out of the sale proceeds of the plot at Minjur standing in the name of PW2. It is

further deposed that PW1 could provide only a sum of Rs. 5000/=. PW2 would also state that the third accused demanded a ring studded with

stone during the customary function organised on Friday immediately after the marriage. Instead of organising the fourth Friday customary function,

the third accused demanded a sum of Rs. 10,000/=, but, she refused to part with a sum of Rs. 10,000/=. The third accused came down to their

house and asked PW1 and PW2 whether the amount of Rs. 10,000/= demanded by him was ready. But, PW1 could part with only a sum of Rs.

5000/= and a stabilizer for the air conditioner plant. She would also depose that the third accused asked PW1 and PW2 to sell away the plot at

Minjur standing in the name of PW2 and pay a sum of Rs. 10,000/=. In the alternative, he demanded that the said plot be registered in his name.

PW2 would further depose that she informed A3 that the said property would not fetch the expected consideration. Instead, she suggested that the

said property might be registered in his name at his own expenses. PW3, the sister of the deceased also categorically deposed before the court

that a sum of Rs. 10,000/= was demanded when A3 came down to attend the customary Friday function. But, PW1 agreed to pay a sum of Rs.

5000/=. On 9.9.1997, A3 came along with the deceased victim lady and enquired whether the amount of Rs. 10,000/= demanded by him was

ready. But, a sum of Rs. 5000/= alone was paid along with a stabilizer. She would also corroborate the version of PW1 and PW2 that the third

accused insisted for selling the plot at Minjur and pay the consideration to him, but, PW1 and PW2 informed him that the said property be

registered in the name of A3 as it would not fetch the expected consideration on sale.

17. The evidence of PW1 to PW3 establishes without any room for doubt that the third accused made a persistent demand for a ring studded with

stone, a sum of Rs. 10,000/= instead of holding the customary Friday function and also the price of the plot at Minjur standing in the name of

PW2. The aforesaid demand made by A3 is found to be an unlawful demand. The conduct of A3 would clinchingly disclose that by making such

an unlawful demand after the marriage, he started harassing the victim lady. With the above evidence on record, the prosecution has established

beyond reasonable doubt that the third accused committed an offence punishable u/s 498A of the Indian Penal Code.

18. Coming to the charge as against the first accused u/s 498A and 454 of the Indian Penal Code, it is found that PW1 has categorically deposed

that the victim lady, a few days before the occurrence, came down to his house and informed in the presence of his wife, PW2, his daughter PW3

and himself that the first accused, who was none other than the father-in-law of the victim lady caught hold of her from behind and kissed her not

once, but many an occasion. Therefore, the victim lady very firmly informed the family members that she would not go and live in the matrimonial

home. In fact, PW1 and PW2 consoled her and said that there was no necessity to proceed to the matrimonial house. It is his further version that

when the third accused along with his mother and sister came down to the house at the request of PW1, the latter appraised them of the

misbehaviour exhibited and sexual advances made by the first accused to the victim lady. It is his version that when the third accused took the

victim lady to his home after promising to take care of the victim lady, PW1 was in deep sorrow. In fact, the victim lady consoled the family

members saying that she would come back to the parental home with her baggage if at all any untoward incident took place in the matrimonial

home. PW2, mother of the victim lady, PW3, sister of the victim lady have also lent corroboration to the above version of PW1.

19. PW4, an independent witness in this case also would depose that the victim lady informed him when she came down to her parental home that

her father-in-law misbehaved with her. So saying, she uncontrollably cried. She also informed him that her father-in-law caught hold of her and

kissed her. PW5, yet another independent witness also would state that the deceased informed him when she came down to the parental home that

her father-in-law approached her with sexual urge. But, PW5, aged 60 years old, consoled her saying that she should not come out with such a

version against her in-laws. But, she had stated that she disclosed those informations by the name of the God Almighty. There is no reason for

PW4 and PW5, the independent witnesses in this case to depose about the misbehaviour of the first accused, who had already crossed 65 years if

at all no such revelation was made by the victim lady to them. The independent version of P.Ws.4 and 5 reinforces the testimony of PW1 to PW3

that the first accused who had crossed 65 years had made sexual advances and misbehaved with the victim lady. Such an act of the first accused

clearly amounts to cruelty committed to a married woman.

20. The learned Senior Counsel appearing for the appellants submitted a ratio in Sakhi Mandalani Vs. State of Bihar and Others,

wherein it has been held as follows:

These Sections (Sections 3 and 4 of the Dowry Prohibition Act) make out independent offences, but in the instant case it was the demand for

dowry coupled with harassment which constitutes the basis of the prosecution case. Once the main part of the charge u/s 304-B was not found

established, it was not possible to record conviction under Sections 3 and 4 of the Dowry Prohibition Act.

21. As far as the third accused is concerned, the demand of dowry and the cruelty committed by him had started immediately after the marriage.

The Trial Court had acquitted the accused for the offence u/s 304B of the Indian Penal Code as there was no close nexus between the cruelty

committed on the victim lady and the suicide she committed. But, the cruelty committed by the first accused stands completely independent of the

dowry death of the victim lady. If it is the case of the prosecution that soon before the death of the victim lady, she was subjected to cruelty only

by demanding dowry and the said charge was not established, then in that case, the offences under Sections 3 and 4 of the Dowry Prohibition Act

would not have any independent legs to stand upon, though the offences under Sections 3 and 4 of the Dowry Prohibition Act make out

independent offences. In the instant case, A1 had made a demand of dowry and received it prior to the marriage and on the date of marriage.

Further, the Dowry Harassment as far as the third accused is concerned, had started immediately after the marriage. Such a demand of dowry

coupled with harassment made by the third accused immediately after the marriage do not have direct impact on the dowry death. That was the

reason why the Trial Court chose to acquit all the accused for the offence u/s 304B of the Indian Penal Code. Therefore, the above ratio will not

apply to a situation where there was demand of dowry prior to the marriage, on the date of marriage and immediately after the marriage which

have no direct and proximate nexus with the dowry death.

22. In Gananath Pattnaik Vs. State of Orissa, , it has been observed as follows:

Another circumstance of cruelty is with respect to taking away of the child from the deceased. To arrive at such a conclusion, the trial court has

referred to the statement of PW5, who is the sister of the deceased. In her deposition recorded in the court on 4.5.1990 PW5 had stated

Whenever I had gone to my sister, all the times she was complaining that she is not well treated by her husband and in-laws for non-fulfilment of

balance dowry amount of a scooter and a two-in-one.

and added:

On 3.6.1987 for the last time I had been to the house of the deceased i.e., to her separate residence. Sworna, Snigdha, Sima Apa, Baby Apa

accompanied me to her house on that day. At that time the deceased complained before us as usual and added to that she said that she is being

assaulted by the accused nowadays. She further complained before us that the accused is taking away the child from her, and that her mother-in-

law has come and some conspiracy is going against her (the deceased). She further told that "mate au banchei debenahin".

Such a statement appears to have been taken on record with the aid of Section 32 of the Indian Evidence Act at a time when the appellant was

being tried for the offence u/s 304B and such statement was admissible under Clause (1) of the said section as it related to the cause of death of

the deceased and the circumstances of the transaction which resulted in her death. Such a statement is not admissible in evidence for the offence

punishable u/s 498-A of the Indian Penal Code and has to be termed as being only a hearsay evidence. Section 32 is an exception to the hearsay

rule and deals with the statements or declarations by a person, since dead, relating to the cause of his or her death or the circumstances leading to

such death. If a statement which otherwise is covered by the hearsay rule does not fall within the exceptions of Section 32 of the Evidence Act, the

same cannot be relied upon for finding the guilt of the accused.

23. It is relevant to refer to the provision u/s 32(1) of the Indian Evidence Act. Section 32(1) of the Indian Evidence Act reads as follows:

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 nature of the proceeding in which the cause of his death

comes into question.

24. It appears that in the aforesaid case, some petty complaints had been articulated by the deceased to her sister. The case of the prosecution that

there was cruelty committed by the husband and in-laws of the victim lady was not at all established in that case. In such circumstances, the

Supreme Court had come to a decision that the deposition of the sister of the victim lady about the information shared by the victim lady would

amount to hearsay evidence. Only if the prosecution could establish that the victim lady was subjected to cruelty or harassment by her husband or

any relative of her husband soon before her death, such persons would be punished u/s 304B of the Indian Penal Code for causing dowry death.

Certain circumstances of the transaction which resulted in the death of the victim lady may not have proximate intimacy with the death of the victim

lady. In such circumstances, we cannot hold that the informations relating to the circumstances of the transaction long before the death of the victim

girl resulted in her death would only amount to hearsay evidence. Any statement made by the victim relating to the cause of her death or about

certain circumstances of the transaction which ultimately resulted in her death would not amount to hearsay evidence as per Section 32(1) of the

Indian Evidence Act, 1872. Therefore, it is held that the statement of a victim lady about the cruelty or harassment meted out to her long before her

death not soon before death as contemplated under the penal provision u/s 304B of the Indian Penal Code is definitely admissible in evidence as it

is exempted from the hearsay category.

25. In the aforesaid case dealt by the Supreme Court, the harassment alleged was only demand of dowry soon before the death of the victim lady.

That was the charge both for the offences u/s 498A of the Indian Penal Code and Section 304-B of the Indian Penal Code in the said case.

Therefore, it was held therein that when the foundation of the charge u/s 304B of the Indian Penal Code to the effect that there was demand of

dowry which resulted in cruelty soon before the death of the victim lady was not established, the charge u/s 498A of the Indian Penal Code also

fell to the ground. In view of the above facts and circumstances, it is held that Section 32(1) of the Indian Evidence Act would apply to the

information shared by the victim lady as it was not a hearsay evidence and that

though the accused were acquitted of the charges u/s 304B of the Indian Penal Code, the accused 1 and 3 can be punished u/s 498A of the Indian Penal Code.

26. As rightly pointed out by the learned appearing for the appellants, the Executive Magistrate, PW13 has arrived at a conclusion that there was

no demand of dowry which culminated in suicide of the victim lady. It is a well settled position of law that the proceedings conducted by the

Executive Magistrate invoking the provision u/s 174 of the Code of Criminal Procedure has only a very limited scope. It is his primary duty to

ascertain the apparent cause of death of the person, who died in suspicious circumstances. He is not supposed to delve deep into the minute details

as to how the deceased was put to death or who actually authored the crime or under what circumstances the crime was committed. Those details

fall outside the ambit and scope of the proceedings u/s 174 of the Code of Criminal Procedure embarked upon by the Executive Magistrate.

27. Immediately after the occurrence, the family members of the victim might not have come out with a real circumstance, which culminated in the

suicide of the victim lady. If the family members of the victim lady have come out with real reason for the death during the course of investigation

u/s 161 of the Code of Criminal Procedure before the investigating agency and deposed before this Court without much contradiction to the stand

they have taken during the course of investigation, the court will have to place reliance upon their evidence, ignoring the stand, if any, taken by the

family members of the victim during the course of proceedings conducted by the Executive Magistrate u/s 174 of the Code of Criminal Procedure.

At best, the version unfolded before the Executive Magistrate during the proceedings of the inquest could be used by the accused for the purpose

of contradicting the stand taken by the witness during the inquest. The statement given by the relatives of the victim and the other witnesses before

the Executive Magistrate as well as the Inquest Report prepared by him are not at all substantive piece of evidence.

28. In view of the above facts and circumstances, the court finds that the Trial Court has rightly recorded the conviction as against A1 for offences

under Sections 3 and 4 of the Dowry Prohibition Act and u/s 498A and 354 of the Indian Penal Code and as against A3 for offence u/s 498A of

the Indian Penal Code. The sentence imposed on the first accused and the third accused for the aforesaid offences are also found to be

proportionate to the gravity thereof. There is no warrant for interference with the judgment and conviction recorded and sentence imposed on the

first and third accused.

29. Therefore, the conviction recorded and sentence imposed on the first and third accused stand confirmed and the appeal is dismissed. The first

and the third accused shall surrender before the Trial Court within fifteen days from the date of receipt of this order failing which the learned Trial

Judge is directed to issue non bailable warrant and send them to jail to undergo the unexpired period of sentence.