
(2005) 04 MAD CK 0175
In the Madras High Court
Case No : Criminal Appeal No. 831 of 1997

V. Ponnusamy

APPELLANT

Vs

P. Thiruselvam

RESPONDENT

Date of Decision : 01-04-2005

Acts Referred:

Citation : (2005) 2 LW(Cri) 845

Hon'ble Judges : M. Thanikachalam, J

Bench : Single Bench

Advocate : V.K. Sathyamurthy, for Mr. C. Rajan, for the Appellant; T. Sudanthiram, for the Respondent

Final Decision : Dismissed

Judgement

M. Thanikachalam, J.—The unsuccessful complainant, before the IX Metropolitan Magistrate, in C.C.No.4317/1992, is the appellant before me.

2. The appellant/complainant, preferred a private complaint before the IX Metropolitan Magistrate, Saidapet, Chennai, against the respondent, arraying him as accused, seeking punishment under Sections 498, 323, 506 - Part II, I.P.C., alleging that the accused/respondent had sexual intercourse with his wife, repeatedly, that on 30.4.1992, the accused took away his wife and thereafter detained her, that when the same was questioned, the accused/respondent criminally intimidated and assaulted him, and therefore, he should be dealt with under Sections 498, 323, 506 part - II, I.P.C.

3. The learned IX Metropolitan Magistrate, Saidapet, Chennai, after recording the sworn statement of the complainant/appellant, felt, prima facie, offences under Sections 498 and 323, I.P.C, have been made out, and in this way, he took the case on file as C.C.No.4317/1992.

4. After the issue of summons to the respondent/accused, he appeared before the court, repudiated the allegations in the complaint, thereby challenged the accusation also. Because of the denial of the charge against the respondent/

accused, the trial went on before the trial court, wherein, on behalf of the complainant, six witnesses have been examined, seeking aid from four documents. To negate the evidentiary value of the above materials, on behalf of the respondent/accused, three documents were exhibited as D-1 to D-3.

5. The learned IX Metropolitan Magistrate, scanning the above materials, assessing the same, coupled with the legal position, as pointed out by either counsel on record, came to the conclusion that the complainant failed to prove, that Jayamay was the wife of the complainant, that the complainant miserably failed to prove the taking of the wife, as well as, the respondent/accused having sexual activities with her and that the wife of the complainant was living separately, because of the cruelty committed only by the complainant. Thus, deducing the conclusion on the basis of the evidence available, the accused was acquitted of all the charges against him, as per the judgment dated 13.8.1997, which is under challenge in this appeal, seeking punishment.

6. Heard Mr. V.K. Sathyamurthy Learned Counsel appearing for the appellant and Mr. T. Sudanthiram, Learned Counsel for the respondent.

7. Mr. V.K. Sathyamoorthy, Learned Counsel appearing for the appellant submitted that there are sufficient materials to attract the ingredients required for the offence u/s 498, I.P.C., which were not properly considered by the learned trial Judge, resulting injustice, that, even assuming that no offence has been made out u/s 498, I.P.C., the evidence available on record clearly indicates the offence u/s 497, I.P.C., for which, the accused should have been convicted, despite the fact, though he was not charged u/s 497, I.P.C., since it is permissible under Sections 221 and 222 of Cr.P.C., that the trial court has committed an error in not framing the charge properly, on the basis of the materials available on record, resulting injustice and that despite the fact, the accused was not charged u/s 497, I.P.C., on the basis of the evidence available on record, a conviction should be slapped u/s 497, I.P.C. In support of the above submissions, the Learned Counsel has relied on certain provisions of Cr.P.C., as well as, some judicial precedent also.

8. Mr. T. Sudanthiram, Learned Counsel appearing for the respondent, countering the above arguments, would contend, that except the interested oral testimony of P.W. 1, there is no evidence of any kind to attract the ingredients u/s 498, I.P.C., and even the little evidence of P.W. 1 is insufficient to prove the guilt, which was properly considered by the trial court, that the accused was not charged u/s 497, I.P.C., and therefore the question of slapping the conviction on the basis of the available evidence, is also not proper, since, opportunity was not given to the respondent/accused to defend the charge u/s 497, I.P.C., and that remanding the case for fresh disposal, is also not desirable, considering the fact that the appellant/complainant himself had sought the punishment only u/s 498, I.P.C., though he had narrated the previous incident and not seeking any punishment u/s 497, I.P.C. It is also the further submission of the Learned Counsel for the respondent that placing reliance upon the decision of this Court,

that non-examination of the wife of the appellant/complainant is fatal to bring an offence u/s 498, I.P.C, which was properly considered by the trial court, not warranting any interference by this Court.

9. From the submissions made by either counsel, in this appeal, the points that arise for consideration are:-

(1) Whether the appellant/complainant has made out a case beyond all reasonable doubt against the respondent/accused, warranting conviction u/s 498, I.P.C.?

(2) Whether the respondent/accused could be convicted u/s 497, I.P.C, though, he was not charged under the said Section, only on the basis of the materials available on record, by this Court at this stage?

(3) Whether the interest of justice requires that the matter should be remitted back to the trial court, for fresh disposal, according to law, on the basis of the materials available on record?

10. The appellant/complainant claims that he married one Jayamary on 1.7.1994, which is not challenged. The appellant/complainant and the respondent/accused were working in the same department and the accused is the superior officer. It appears, the respondent/accused had contact with the appellant/complainant's wife and it is alleged, they were having sexual activities also, despite the fact, the same was condemned and warned by the complainant/husband. The wife of the complainant, according to the complainant, went along with the respondent/accused, or he took away her, on 30.4.1992. To get redress, a complaint was preferred to the police, which ended in vain, either by the conduct of the respondent/accused or by the conduct of the appellant/complainant, as the case may be. Only thereafter, as adverted to above, the appellant/complainant preferred a private complaint, leading to the registration of the case, followed by trial, ending in acquittal of the respondent/accused.

11. The trial court, appears to have committed an error in concluding that the complainant had not proved that he married Jayamary, forgetting the fact, that the same was not in dispute. Therefore, taking it as an admitted fact, the case should have been proceeded with, which is not so, as seen from the judgment of the trial court. In this view, taking it as an admitted fact, that Jayamary is the wife of the appellant/complainant, it has to be seen, whether any offence has been made out u/s 498, I.P.C., at the first instance.

12. In order to attract Section 498, I.P.C., which gives cause of action and protection to a married man to secure the wife, it should be established that the respondent/accused took away or enticed the married woman, and detained with intention that she may have illicit intercourse with any person, thereby prima facie showing, if the married woman goes voluntarily along with another, that act, may not attract Section 498, I.P.C. In this case, assuming that the oral evidence of P.Ws.1 to 6 is acceptable to the entire extent, it is hard to say that

the respondent/accused took away the wife of P.W. 1, or he detained her by way of enticing. The averments in the complaint, as well as the oral evidence of P.Ws., establish unquestionably, in my considered opinion, that if at all, Jayamary would have left matrimonial home, on her own and if at all, she had any sexual intercourse with the respondent/accused, it, may be also, on her own, which will not attract Section 498, I.P.C., and if at all, the respondent/accused had sexual intercourse with the wife of P.W. 1, the said act, may attract Section 497, I.P.C., for which, as stated supra, the respondent/accused has not been charged. P.W. 1 himself has categorically stated, as seen from the deposition, that his wife, in spite of his objection, left the matrimonial home, along with the respondent/accused, in a motorbike, on 30.4.1992, which was also noticed by the other witnesses. Nowhere, P.W. 1 himself has categorically stated that the respondent/accused took his wife or enticed, then detained or by the act of the respondent/accused, the wife was compelled to stay along with him soli's to say, the ingredients available u/s 498, I.P.C., are available in this case. The submission of the Learned Counsel for the appellant based upon a decision of the Orissa High Court, in Adikanda Samal Vs. Madhabananda Naik, , that the detention mentioned in Section 498, I.P.C., means, keeping back the wife from her husband and in this view, since the respondent/accused was keeping or detaining the wife, Section 498, I.P.C., should be attracted. In the case involved in the above decision also, it appears, the detention was the result of persuasion, allurements, blandishments, which might have caused the willingness of the woman, or may have encouraged the wife with an inclination to leave her husband. That would mean, there was enticement, which is one of the essential ingredients for Section 498, I.P.C. In the case on hand, no such evidence is available, so as to say, that the respondent/accused, persuaded the complainant's wife or allured or used any other illegal method, to take away from the husband/complainant, then, by further persuasion detained her. In this view of the matter, the decision relied upon by the Learned Counsel for the appellant, to rope in the respondent/accused u/s 498, I.P.C., fails to come to the aid, which could be seen from the observation available in the said decision, which reads thus:-

"Detention" in Section 498 means keeping back a wife from her husband or any person having the care of her on behalf of her husband with the requisite intention. Such keeping back may be by force; but it need not be by force. It can be the result of persuasion, allurement or blandishments which may either have caused the willingness of the woman or may have encouraged her or co-operated with her increasing initial inclination to leave her husband. The object of the section is to protect the right of the husband and it cannot be any defence to the charge to say that though the husband has been deprived of his right, the wife is willing to injure the said right and so the person who is responsible for her willingness has not detained her. Wife's willingness or consent or disposition to stay away from the company, protection and care of her husband is totally immaterial to the guilt of the accused.

Though it is said, wife's willingness or consent is totally immaterial, unless it is proved, as observed previously in the same decision that the detention is the result of persuasion, etc., which are all absent in this case. Hence, on the basis of the above said decision, it is not desirable to convict the respondent/accused in this case.

13. Even on the basis of the evidence, it appears, no conviction could be slapped against the respondent/accused, since it is made out, that even before 30.4.1992, the appellant/complainant's wife was living in the same house and even after 30.4.1992, the wife was living in the same house, which is brought to surface from the evidence, which reads thus:-

The above evidence of P.W. 1 itself is sufficient to say positively, that the wife of the appellant/complainant was not detained or concealed by the respondent/accused, with intention to have illicit intercourse or something like that, and in this view also, sending the respondent/accused behind the bar, slapping the conviction u/s 498, I.P.C., is impossible one.

14. In *Alamgir and Another Vs. The State of Bihar*, the Apex Court had an occasion to consider the scope of Section 498, I.P.C., in which, it is held as follows:-

The provisions of S.498, like those of S.497, are intended to protect the rights of the husband and not those of the wife. The gist of the offence under S.498 appears to be the deprivation of the husband of his custody and his proper control over his wife with the object of having illicit intercourse with her. The consent of the wife to deprive her husband of his proper control over her would not be material. It is the infringement of the rights of the husband coupled with the intention of illicit intercourse that is the essential ingredient of the offence under S.498.

It is also the dictum of the Apex Court, that on the ground, the wife is willing to injure the right of the husband and the person, who is responsible for her willingness has not detained her, thereby showing the willingness of the wife is immaterial and it cannot be a defence in a case falling u/s 498, I.P.C. In this regard, it is observed by the Apex Court, thus:-

It is true that the word "detains" may denote detention of a person against his or her will; but in the context of the section it is impossible to give this meaning to the said word. If the object of the section had been to protect the wife such a construction would obviously have been appropriate; but, since the object of the section is to protect the rights of the husband, it cannot be any defence to the charge to say that, though the husband has been deprived of his rights, the wife is willing to injure the said rights and so the person who is responsible for her willingness has not detained her. Detention in the context must mean keeping back a wife from her husband or any other person having the care of her on behalf of her husband with the requisite intention. Such keeping back may be by force; but it need not be by force. It can be the result of persuasion, allurements

or blandishments which may either have caused the willingness of the woman, or may have encouraged, or co-operated with, her initial inclination, to leave her husband. If the willingness of the wife is immaterial and it cannot be a defence in cases falling under the first three categories mentioned in S.498, it cannot be treated as material factor in dealing with last category of case of detention mentioned in the said section. It may be that the wife was dissatisfied with her husband and wanted voluntarily to leave her husband; but where the evidence is that she must have been encouraged or induced not to go back to her husband because she knew that she would find ready shelter and protection with the accused and she must have looked forward to marry him and the accused in fact claimed to have married her, there can be no doubt that he intended to have illicit sexual intercourse with her. In having thus left the house of her husband she came to stay with the accused and he allowed her to stay with him, it can be said that he has "detained" her within the meaning of S.498.

To fit in the present case, within the above frame of the Apex Court ruling, as pointed out by me supra, the evidence of P.W. 1 is insufficient, and the oral evidence of P.W. 1 itself is sufficient to say that the wife was not detained, thereby showing the ingredients required u/s 498, I.P.C., are not at all available.

15. The proper person who can speak about the taking or enticing the wife, from the custody of the husband, must be the wife, being alive. In this case, the wife has not been examined. For the non-examination of the wife, it is the submission of the Learned Counsel for the respondent/accused, that an adverse inference has to be drawn, placing reliance upon the decision of this Court in Natarajan Vs. Ramanujam, wherein this Court had an occasion to consider the effect of section 498, I.P.C., in which it is observed, that the wife also should have been examined in the case, to prove the ingredients of the criminal intent on the part of the accused, while taking her and in this view, non-examination of the material witnesses would highly affect the case of the prosecution. This decision is also helpful to certain extent, though not entirely, to throw the case of the prosecution, since the affected person is not examined. In the present case, as rightly submitted by the Learned Counsel for the appellant, examination of the wife is not possible, since, it appears, she is siding the respondent/accused, probably supporting him. As observed by the Apex Court, the willingness of the wife is immaterial, and, therefore, even in the absence of examination of the wife, the prosecution can prove the offence, which is not properly done in this case. For the aforementioned reasons, I am of the opinion that no offence has been made out u/s 498, I.P.C., which was considered to some extent properly, by the trial Court, thereby acquitting the accused, which is not liable to be interfered with by this Court.

16. The submission of the Learned Counsel for the appellant/complainant, that the respondent/accused is liable to be convicted u/s 497, I.P.C., on the basis of the material available on record, is also not acceptable to me, though the said submission was made, on the basis of a ruling of the Calcutta High Court, in

Gobinda Chandra Singh Roy Vs. Haru Chandra Singha Roy, . Admittedly, the respondent/accused was not charged u/s 497, I.P.C., and he was not at all questioned also, regarding this offence. The accused had no chance to answer the charge, u/s 497, I.P.C. This being the position, in the appellate stage, without giving an opportunity to the respondent/accused, who was directed to face the offence u/s 498, I.P.C, is not liable to be dealt with u/s 497, I.P.C., since, certainly, it will cause prejudice. In the above decision, it is held thus:-

a man may be convicted of an offence although there may be no charge in respect of it, if the evidence such as to establish a charge that might have been made. Where, therefore, a person is charged with an offence under S.498 of Penal Code but the evidence failed to prove the charge, but disclosed an offence under S.497 of Penal Code, the accused can be convicted of that offence, even though no charge was made in respect of that offence, by applying the provisions of Ss.236 and 237.

17. In order to apply this ratio, we have to see amendments undergone, to Cr.P.C. Old Section 236 Cr.P.C., corresponds to New Section 221, sub-clause (1) and Old Section 237 Cr.P.C., corresponds to New Section 221(2) Cr.P.C. The present Section 221 Cr.P.C., which includes Old Sections 236 and 237 Cr.P.C., says, where it is doubtful what offence the accused has committed, he may be charged with having committed all or any of such offences, in the alternative, with having committed all or any one of the said offences. Section 221(2) Cr.P.C., says that if the accused is charged with one offence, and evidence discloses that he had committed a minor offence, for which he was not charged, then only under the provisions of sub-section (1), he may be convicted of the offence, which he is shown to have committed, although he was not charged with. To apply the above principle, the ingredients required for both the offences, and the procedure contemplated for both the offences, must be one and the same, if not, Section 222 Cr.P.C., cannot be invoked. Section 222(2) Cr.P.C., empowers the court, "when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it." Having the above provisions in mind, we have to see, the offence charged in this case, and the offence for which, at present, conviction is sought for.

18. The offence u/s 497, I.P.C., carries an imprisonment for five years or fine or both, whereas, the offence u/s 498, I.P.C. contemplates imprisonment for two years, thereby showing, first offence comes under warrant procedure, and the second offence comes under Summons Case, contemplating different procedure under the Code. As pointed out supra, Section 222 Cr.P.C., contemplates, when a person is charged with an offence, and facts proved, which reduces it to a minor offence, he may be convicted of the minor offence, although he is not charged with it. This being the position, the respondent/accused having been tried for minor offence, cannot be convicted for major offence, namely, in this case, 497, I.P.C., which carries imprisonment for five years. Therefore, the above ruling

relied on by the Learned Counsel for the appellant/complainant, is not applicable to the present case, and in this view, even assuming for the purpose of the case, that some evidence is available, for committing adultery, punishing the respondent/accused u/s 497, I.P.C., by this Court at this stage is not possible, since the same will not be in accordance with law, even causing prejudice to the accused.

19. The last submission of the Learned Counsel for the appellant/complainant was, that at least, the case may be remitted back to the trial court, to consider the case afresh, since material brought discloses the offence u/s 497, I.P.C. As rightly submitted by the Learned Counsel for the respondent/accused, though P.W. 1 had narrated the act of his wife, with the accused, he had not sought for punishment for the acts said to have been committed by the accused prior to 30.4.1992 and the main intention and aim of the appellant/complainant was to punish the accused for the act said to have been committed by him on 30.4.1992. Considering this fact alone, the case has been taken on file u/s 498, I.P.C., and therefore, at this distance of time, after a decade is over, remanding the case, in order to consider the offence u/s 497, I.P.C., may not be proper, and legally sound. Considering the facts and circumstances of the case, though this Court is competent to remit the matter, this case does not deserve for such consideration. All the points are answered accordingly.

20. For the foregoing reasons, I am of the considered opinion, that the appellant has not made out any case for the interference by this Court, to set aside the findings of the trial court, in acquitting the accused, thereby reversing and slapping the conviction either u/s 498 or 497, I.P.C., as the case may be.

21. Hence, this appeal is dismissed as devoid of merits. No costs.