THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

Heard on : 11.05.2017
Pronounced on : 29.05.2017

Single Bench: HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl. A. No.23 of 2015

Appellant : Thutob Namgyal Bhutia,
Aged about 30 years,
Son of S. T. Bhutia,
Resident of Old Mangan Bazar,
North Sikkim.

versus

Respondent : State of Sikkim

Appeal under Section 374(2) of the
Code of Criminal Procedure, 1973

Appearance

Mr. B. R. Pradhan, Senior Advocate with Ms. Tshering Palmoo Bhutia, Advocate for the Appellant.

Mr. Karma Thinlay Namgyal, Additional Public Prosecutor with Mrs. Pollin Rai, Assistant Public Prosecutor for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. Aggrieved by the Judgment dated 27-06-2016 and the Order on Sentence dated 28-06-2016, passed by the Learned Sessions Judge, North Sikkim, at Mangan, in Sessions Trial Case No.01 of 2015, State of Sikkim vs. Thutob Namgyal Bhutia, convicting the Appellant under Section 498A of the Indian Penal

Code, 1860 (for short "IPC"), and sentencing him to undergo simple imprisonment for one year and to pay a fine of Rs.5,000/- (Rupees five thousand) only, with a default stipulation, the instant Appeal assails both.

2. Prosecution was launched on an FIR, Exhibit 35, filed on 10.10.2014, by the Victim wife against her husband, the Accused (hereinafter the "Appellant"), informing that he was a habitual drug abuser, had attempted to kill her thrice prior to the lodging of Exhibit 35 and on 10-10-2014, at around 1100 hours, when she was entering her bedroom, he opened the door and without cause assaulted her, as he often did. It was thus unsafe for her and her minor son to live with the Appellant and in the event of any untoward incident, the Appellant should be held responsible. Besides, he had also stolen money from her Account in the State Bank of India, Mangan Branch, by forging her signature.

3. On receipt of the information, Mangan P.S. Case No.35/2014, dated 10-10-2014, was registered against the Appellant under Sections 498A/420 of the IPC and endorsed for investigation. When investigation into the matter was nearing completion, the Victim on 07-12-2014, jumped fatally off the Rang-Rang Bringbong Suspension Bridge, allegedly due to harassment meted out by the Appellant. This resulted in Mangan P.S. U.D. (Unnatural Death) Case No.15/2014, dated 07-12-2014 being registered, under Section 174 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C."), which revealed a *prima facie* case against the Appellant under Section 306 of the IPC. Investigations of both

the cases were amalgamated by the Investigating Officer (for short "I.O.") and on completion of investigation, a single Charge-Sheet was submitted against the Appellant under Sections 306/498A/380/468/471 of the IPC.

4. The Learned Trial Court after hearing the parties and considering the materials on record framed Charge against the Appellant under Sections 498A, 306, 379, 420, 468 and 471 of the IPC. On the Appellant entering a plea of "not guilty", the trial commenced, during which the Prosecution examined thirty-three witnesses, including the I.O. of the case. On consideration of the entire evidence on record, the Learned Trial Court convicted the Appellant under Section 498A of the IPC and sentenced him, as enumerated hereinabove, while acquitting him of the other Charges including the Charge under Section 306 IPC.

5. Fervidly assailing the Judgment, Learned Senior Counsel first raised the argument before this Court that investigation of FIR No.35/2014 dated 10-10-2014 and FIR/UD No.15/2014 dated 07-12-2014, ought not to have been clubbed together in contravention of the mandate of the Code of Criminal Procedure, 1973, which thereby caused prejudice to the Appellant. That, the Charge under Section 498A of the IPC arose out of the former FIR, while the Charge under Section 306 of the IPC arose from the FIR of the UD case, consequently, the evidence collected for the purpose of Section 306 of the IPC has been used for convicting the Appellant under Section 498A of the IPC. On this count, reliance was placed

on ***Vijender*** vs. ***State of Delhi*** : ***(1997) 6 SCC 171*** and ***Heeralal and Others vs. State of Rajasthan : 2017 SCC online SC 495***.

6. It was next contended by the learned Senior Counsel that the Charge framed under Section 498A of the IPC, was in violation of the provisions of Section 211 to Section 213 of the Cr.P.C, as the learned Trial Court besides using the term "cruelty" failed to place the requisite information of the offence before the Appellant thereby causing him prejudice. That, cruelty, torture and harassment cannot be interpreted as being synonymous with 'quarrel', as the ambit of cruelty under Section 498A includes willful conduct of such a nature as to drive a woman to suicide, which has remained unproved herein. On this count the evidence of PW 24 and PW 16 were discussed at length.

7. The third point next canvassed by learned Senior Counsel for the Appellant was that the Court ought to have been circumspect in accepting the evidence of PW-10, the Victim's 10 year old child living as he was with his maternal grandparents and therefore, amenable to tutoring. Support was drawn from the decisions in ***K. Venkateshwarlu vs. State of Andhra Pradesh : 2012 8 SCC 73*** and ***Hamza vs. Muhammed Kutty alias Mani: (2013) 11 SCC 150.***

8. Peripheral to the above arguments was the contention of the Appellant that the Inquest report Exhibit-9 remained unproved by the Prosecution, the mandate of law having been overlooked. That, the Post Mortem Report Exhibit-34, had also met the same fate, as the Medical Officer who prepared it remained unexamined

and the document was exhibited only by the I.O. That, lacking in evidence against the Appellant, he deserves an acquittal.

9. Repelling the first argument, Learned Additional Public Prosecutor contended that as the I.O. by investigation found that the death of the Victim was due to the constant mental and physical torture meted out by the Appellant and formed the chain of events leading to her suicide, hence the incorporation of both the investigations in one single Charge-Sheet. Relying on ***Mohan Baitha and Others*** vs. ***State of Bihar and Another*** : ***(2001) 4 SCC 350,*** it was canvassed that under Section 220 of the Cr.P.C. more than one offence committed by the same person could be taken up at one trial, if they can be held to be in a series of acts so as to form the same transaction. That, this was applicable in the circumstances of the case at hand.

10. Countering the second contention, the learned Additional Public Prosecutor urged that there was no violation of the provisions of Section 211 to Section 213 of the Cr.P.C. and in any event, the omission, if any, cannot be said to have caused any prejudice to the Appellant. Attention on this aspect was drawn to the provisions of Section 215 and Section 464 of the Cr.P.C. Reliance was also placed on the decisions of the Hon'ble Apex Court in ***K. Prema S. Rao and Another*** vs. ***Yadla Srinivasa Rao and Others*** : ***(2003) 1 SCC 217***, ***Dinesh Seth*** vs. ***State of NCT of Delhi*** : ***(2008) 14 SCC 94*** and ***Narwinder Singh*** vs. ***State of Punjab*** : ***(2011) 2 SCC 47***, wherein it was, *inter alia*, held that it is to be gauged whether the accused had fair trial, knew what he was being tried for and the main facts sought to be established

against him explained to him fairly, giving him a chance of defence. If all the aforesaid elements existed, no prejudice is shown, whatever the irregularities. It was urged that when suicide was preceded by cruelty, as contemplated in Section 498A, within a period of seven years of marriage, a presumption could be drawn under Section 113A of the Indian Evidence Act, 1872, that the husband of the Victim or his relations had abetted the suicide. It was urged that "intention" differentiates the two Sections *viz;* 306 and 498A IPC. That, the evidence of PW 1 to PW 4 and PW 9 to PW 11, PW 14 to PW 16 and PW 24 establish assault on the deceased prior to lodging of Exhibit 35, thereby, leading to the conclusion that the Appellant meted out cruelty.

11. On the argument of the child witness's susceptibility, it was urged that PW 10 had categorically given details of assault by the Appellant on the deceased in Siliguri, corroborating the stand taken by his grandparents and his evidence being consistent throughout could not be doubted.

12. Meeting the argument on Exhibit 9, the State-Respondent contended that PW-13, being a witness to the Inquest, conducted after the body was recovered on the bank of the river Teesta has proved the contents of Exhibit 9, apart from the evidence of PW 31. Exhibit 34, the Post Mortem Report has been proved by PW31, the I.O., the document having been exhibited without any objection from the Appellant which therefore may be read as substantive evidence. That, as the Judgment of the learned Trial

Court is based on the evidence furnished before it, no interference thereof is warranted.

13. The opposing arguments advanced by learned Counsel were heard at length and given careful consideration. I have also carefully examined the evidence and documents on record and perused the impugned Judgment and Order on Sentence.

14. What arises for determination by this Court is whether the evidence on record suffices to sustain the conviction of the Appellant under Section 498A of the IPC?

15. The facts do not need reiteration, suffice it to recapitulate that as per the Prosecution, the Appellant and the Victim were married in the month of December 2007. Alleging frequent assaults and three attempts by the Appellant to kill her, the Victim lodged Exhibit 35 on 10.10.2014. On 7.12.2014, almost two months thereafter, she took her own life by jumping off a bridge leading to registration of the FIR for an unnatural death. Consequently, investigation of the two cases were taken up simultaneously and one Charge-Sheet submitted for both FIR's, as already reflected hereinabove.

16. Addressing the first argument pertaining to amalgamation of both FIRs and submission of one common Charge-Sheet by the I.O., the first offence arose in the month of October 2014, while the second one pertained to an incident in the month of December 2014. These appear to be completely unrelated incidents,

inasmuch as no evidence has been furnished to establish that the Victim's suicide was the culmination of the alleged assaults by the appellant or that assaults continued after the filing of Exhibit 35 and could therefore be said to comprise of the same transaction. That, having been said, in this context, we may refer to ***State of A.P.*** vs. ***Cheemalapti Ganeswara Rao and Another*** : ***(1964) 3 SCR 297***, wherein the Hon'ble Apex Court, *inter alia*, on the question of "same transaction" observed thus :

> **"**10. Whether a transaction can be regarded as the same would necessarily depend upon the particular facts of each case and it seems to us to be a difficult task to undertake a definition of that which the Legislature has deliberately left undefined. We have not come across a single decision of any Court which the Legislature has embarked upon the difficult task of defining the expression. But it is generally thought that where there is proximity of time or place or unity of purpose and design or continuity of action in respect of a series of acts, it may be possible to infer that they form part of the same transaction. It is, however, not necessary that every one of these elements should co-exist for a transaction to be regarded as the same."
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> Further, it was held that:
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> "Where, however, several offences are alleged to have been committed by several accused persons it may be more reasonable to follow the normal rule of separate trials. But here, again, if those offences are alleged not be wholly unconnected but as forming part of the same transaction the only consideration that will justify separate trials would be the embarrassment or difficulty caused to the accused persons in defending themselves.**"** (Emphasis supplied)

17. In ***State of Bombay*** vs. ***S. L. Apte*** : (1961) 3 SCR 107 wherein it was observed that;

> **"**In the present case, applying the test laid down by this Court, the two conspiracies are not the same offence: the Jupiter conspiracy came to an end when its funds were misappropriated. The Empire conspiracy as hatched subsequently, though its object had an intimate connection with the Jupiter in that the fraud of the Empire was conceived and executed to cover up the fraud of the Jupiter. The two conspiracies are distinct offences. It cannot even be said that some of the ingredients of both the conspiracies are the same. The facts constituting the Jupiter conspiracy are not the ingredients of the offence of the Empire conspiracy, but only afford a motive for the latter offence. Motive is not an ingredient of an offence. The proof of motive helps a Court in coming to a correct conclusion when there is no direct evidence. Where there is direct offence for

> implicating an accused in an offence, the absence of proof of motive is not material. The ingredients of both the offences are totally different and they do not form the same offence within the meaning of Art.20(2) of the Constitution and, therefore, that Article has no relevance to the present case.**"**

18. It thus emerges that in order to bring a case under Section 220 of the IPC, the first element that is to be established is that there must be one series of acts, which would imply that the acts are connected together. There must be a continuous thread of a common purpose through the acts, as also proof of same intention, knowledge or community of purpose. The argument of learned Additional Public Prosecutor stating that the incident of 7.12.2014 was the result of a chain of events from 10.10.2014, cannot be countenanced in the absence of any evidence to establish the said allegation. Hence, it was erroneous on the part of the I.O. to have taken up the investigation of the aforesaid FIR's together and submitted a common Charge-Sheet without sufficient proof of unity of purpose, design or continuity of action as extracted above.

19. Dealing with the argument that the Charge framed under Section 498A of the IPC is in violation of Sections 211 to 213 of the Cr.P.C. Section 211 of the Cr.P.C. deals with contents of Charge. Section 212 of the Cr.P.C. is with regard to particulars as of time, place and person and Section 213 of the Cr.P.C. lays down "When manner of committing offence must be stated". The Charge against the accused under Section 498A of the IPC reads as follows;

> **"Firstly**: — That you in between the tenure of year 2008 till the date of the incident i.e., 2014 you subjected Smt. Penzy Lepcha your wife to cruelty to wit a wilful conduct which was of such a nature as it likely to drive her to commit suicide or to cause grave injury or danger to life, limb or health (*whether mental or physical*) to her and you thereby committed an offence punishable under Section

498A of the Indian Penal Code, 1860 which is within my cognizance.**"**

20. In the first instance, it would do well to point out that when the Charge provides the words "to wit" the terms means "namely" or "that is to say". In such a situation, the Learned Trial Court is required to explain the specific act of the Appellant, *inasmuch* as after the words "to wit …..", the Court could have inserted the precise acts comprising cruelty. However, although the Learned Trial Court has failed to give the details, nevertheless, Section 215 comes to its aid, as it provides that no error in stating either the offence or the particulars, required to be stated in the Charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission and it has occasioned a failure of justice. Apart from Section 215 of the Cr.P.C., Section 464 of the Cr.P.C. also mandates 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 charge, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby. Besides, the aforesaid two Sections, Section 216 of the Cr.P.C. clothes the Court with powers to alter or add to any charge at any time before judgment is pronounced. It is not disputed that the Appellant had a counsel throughout trial. Thus, if he so desired he could have brought the shortcomings to the notice of the learned Trial Court, which could have taken necessary

steps but no such steps were initiated. Nevertheless, despite the alleged shortcomings, on going through the cross-examination of the Prosecution Witness conducted by the learned Counsel for the Appellant before the learned Trial Court, it is evident that the Appellant was indeed aware of the Charge required to be met under Section 498A of the IPC, as revealed by the gruelling cross-examination that witnesses were subjected to on this count, therefore, revealing that no failure of justice has occasioned.

21. Now addressing the argument pertaining to non-reliability of the evidence of the minor witness PW 10, the records reveal that the learned Trial Court had examined the witness as required under Section 118 of the Indian Evidence Act, 1872, to test his competence to depose. According to the witness, on the evening of 6th (month not mentioned), his father had assaulted his mother with a mobile handset on her forehead. His statement is falsified by that of PW 30, who in her evidence has revealed that when the Victim and PW 10 met her in her room, she noticed a bump on the Victim's forehead. On inquiry as to its cause, the Victim replied that she had had a verbal altercation with the Accused on the previous evening, who in a fit of rage had thrown the mobile phone on the window, which hit the grille, reversed back and hit her on the forehead. Further, PW 10 alike PW 9, his grandmother, and PW 11, his grandfather, has stated that they had all gone to a hotel in Siliguri, where the Victim had a quarrel with the Appellant and the Appellant assaulted her. This evidence cannot be relied on by this Court for the fact that none of the three witnesses have specified

the body part on which the Victim had been assaulted, nor had they seen the telltale signs of the assault. No complaint to any police station or for that matter no documents of medical examination or treatment were furnished as proof. Even assuming that because it was a matter between the Appellant and the Victim, no further steps were taken, the three witnesses ought to have been able to enlighten the Court as to the nature of injury received by the Victim on account of the Appellant's assault. Thus, this evidence appears to have been concocted between PW 9, PW 10 and PW 11. Reverting back to the evidence of PW 10, that on 5th (month not mentioned), his father assaulted his mother on her hand and both her thighs with the scabbard of a "Bamphok" (Machete). However, if we are to look at his statement under Section 164 Cr.P.C., only for the purposes of corroboration, he has stated that the assault was with a "Bamphok" and not a Scabbard besides bereft of date. Also, no mention of the Siliguri incident finds place in his 164 Cr.P.C. Statement. Therefore, I am constrained to observe that the child, living as he was with the grandparents, has been subjected to tutoring and consequently, no weight can be attached to his evidence.

22. Coming to the question of Inquest Report, Exhibit 9, we may examine the provision of Section 174 of the Cr.P.C. which requires that, when the Officer in charge of a police station or some other police officer so empowered receives information that a person committed suicide or has died under circumstances raising a reasonable suspicion that some other person has committed an

offence, he shall give intimation thereof immediately to the nearest Executive Magistrate empowered to hold inquest and shall proceed to the place where the body of such deceased is, and there, in the presence of two or more respectable inhabitants of the neighbourhood make an investigation and draw up a report of the apparent cause of death, describing the wounds, fractures, etc., found on the body. The report is to be signed by the police officer and other persons who concur and shall be forwarded forthwith to the District Magistrate or Sub-Divisional Magistrate. In the case at hand, the distance from the Police Station to the place of occurrence is 30 kms. approximately. If such be the case, then the witnesses are said to be Thutob Namgyal Bhutia, the Appellant himself and one Rinzing Namgyal (PW 13), both from Mangan and evidently not from the immediate vicinity. Therefore, the above requirement of Law has been circumvented, apart from which P.W.13 has stated that he was unaware of the contents of Exhibit 9. Although the evidence of P.W.31 indicates that she conducted the inquest in the presence of witnesses, in the absence of compliance of the mandate of Law, it cannot be said that the inquest was proved.

23. An argument was raised with regard to the Post-Mortem Report, not being proved, however, in view of the fact that the Appellant has already been acquitted under Section 306 of the IPC, no further discussions need ensue on this point. Apart from which the Magisterial Report, Exhibit 41, rather haphazardly dated 05-2-2014 states that, "*in observing the sequence of event (sic) and incident and my personal presence during the inquest it*

appears to be a case of suicide by jumping off the bridge and do not appear to be any foul play in the death of the lady (sic)."

24. Coming to the allegation that the evidence collected under Section 306 was utilized in convicting the Appellant under Section 498A of the IPC, we may briefly refer to these provisions. Section 306 of the IPC refers to abetment of suicide and the Prosecution in order to establish an offence thereof has to prove beyond reasonable doubt that the deceased committed suicide and the accused abetted the commission of the act. Section 498A deals with cruelty towards a woman by her husband or his relatives. The provisions of Section 498 A are extracted herein below for convenience;

> **"498A. Husband or relative of husband of a woman subjecting her to cruelty**.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.
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> *Explanation*.—For the purpose of this section, "cruelty" means—
> (a) any wilful 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
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> (b) harassment of the woman where such harassment is with a view to coercing her 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.**"**

25. There is no allegation of unlawful demand for property, therefore, we are concerned with Cruelty as dealt with in explanation (a) of the Section *viz;* (i) to drive the woman to commit suicide (ii) to cause grave injury (iii) danger to life, limb or health both mental and physical. A close scrutiny of the evidence of the

witnesses relied on to establish Cruelty merely indicates that the Victim and appellant were prone to frequent quarrelling. The Black's Law Dictionary, 10th edition defines *"Quarrel"* as *"An altercation or angry dispute; an exchange of recriminations, taunts, threats, or accusations between two persons."* Thus, when it is a verbal duel between the parties and not merely from the side of the Appellant, it cannot be said to be cruelty as the Victim was undoubtedly an equal opponent. PW 16, the Doctor, who examined the Victim on 10.10.2014, the date on which Exhibit 35 was lodged, found a mild swelling on the left index finger and superficial injuries on the right side of the neck and left wrist. The injury was graded as "Simple". PW 24, another Doctor, examined the Victim on 28.11.2014 having been brought with alleged history of physical assault with a serving spoon on her forehead but this assault was by one Pema Wangyal and not attributed to the Appellant. In the face of evidence of only one alleged physical assault (the second assailant not having been established), which was found to be simple and in the absence of any evidence of continuous physical assault on the Victim by the Appellant, the finding of the learned Trial Court under Section 498A of the IPC defies logic. Besides, the mere fact that a married woman commits suicide within a period of seven years of her marriage would not automatically attract the provisions of Section 113A of the Evidence Act, as the legislative mandate is that where a woman commits suicide within seven years of her marriage, it must be proved that her husband or any of his relatives had subjected her to cruelty. Only on such attendant circumstances can the presumption be drawn for an offence under Section 498A of the IPC to be

attracted. Thus, the evidence on record has failed to meet the requirements for an offence under Section 498A of the IPC.

26. Abetment as reflected in Section 306 of the IPC would undoubtedly have to be understood in terms of the definition as given in Section 107 of the IPC inasmuch as firstly the accused must instigate any person to do that thing, secondly there must be cooperation of one or more persons in any conspiracy for the doing of the thing, pursuant to which an act or illegal omission takes place and thirdly intentionally aids by any act or illegal omission the doing of that thing. It is true that Section 306 of the IPC does not include the above definitions but it is also clear that the suicide should have been committed in consequence of the abetment, hence the requirement for explaining what abetment comprises of. Thus, when the learned Trial Court did not find the Appellant guilty of any instigation or of commission or omission of illegal act to drive the Victim to suicide, there is no basis for the Trial Court to reach the finding of cruelty under Section 498A.

27. In conclusion, on consideration of the entire gamut of facts and circumstances, no evidence whatsoever emanates from the witnesses to point to the fact of cruelty by the Appellant as envisaged under Section 498A of the IPC. Accordingly, I am of the considered opinion that the finding of the learned Trial Court deserves to be and is accordingly set aside.

28. Appeal allowed.

29. The Appellant is acquitted of the Charge under Section 498A of the IPC and discharged from his Bail Bonds.

30. Fine, if any, deposited by the Appellant in terms of the impugned Order on Sentence, be reimbursed to him.

31. Copy of this Judgment be forwarded to the Learned Court below for information and compliance.

32. Records of the Learned Trial Court be remitted forthwith.

Sd/-

(Meenakshi Madan Rai)
Judge
29-05-2017

Approved for reporting : **Yes**
Internet : **Yes**

ds/bp