

Subramani Vs. State, Rep. by

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SooperKanoon Citation : sooperkanoon.com/964936

Court : Chennai

Decided On : Jan-11-2013

Judge : M.Jaichandren

Appellant : Subramani

Respondent : State, Rep. by

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED:

11. 01/2013 CORAM THE HONOURABLE MR.JUSTICE M.JAICHANDREN AND THE HONOURABLE MR.JUSTICE S.NAGAMUTHU Criminal Appeal(MD).No.78 of 2011 Subramani .. Appellant/Sole accused Vs. State, rep. by Deputy Superintendent of Police Station, Jeeyapuram Sub Division, Ramji Nagar Police Station, Trichirappalli District. .. Respondent (Crime No.250 of 2008) PRAYER This criminal appeal has been preferred under Section 374 Cr.P.C against the judgment dated 22.02.2011 made in S.C.No.118 of 2009 by the learned Sessions Judge, Mahila Court, Trichirappalli. !For Appellant ... Mr.T.Senthil Kumar ^For Respondent... Mr.C.Ramesh Additional Public Prosecutor :JUDGMENT (The judgment of the court was delivered by S.NAGAMUTHU,J.) The appellant is the sole accused in S.C.No.118 of 2009 on the file of the learned Sessions Judge, Mahila Court, Tiruchirappalli. He stood charged for the offences under Section 498(A) and 302 IPC.,. The learned Sessions Judge, by judgment dated 22.2.2011 convicted him under both the charges and sentenced him to undergo rigorous imprisonment for two years and to pay a fine of Rs.1,000/-, in default, to undergo

simple imprisonment for 3 months for the offence under Section 498(A) IPC and to undergo imprisonment for life and to pay a fine of Rs.2,000/-, in default, to undergo imprisonment for 6 months for the offence under Section 302 IPC. Challenging the said conviction and sentence, the appellant is before this Court with this appeal.

2. The case of the prosecution in brief is as follows:- The accused/appellant is the husband of the deceased. The deceased in this case was one Mrs.Meena. The marriage between the accused and the deceased was celebrated in the year 2007. At the time of marriage, according to the prosecution, the parents of the deceased presented 10 sovereigns of gold jewels to the bride and two sovereigns of gold jewels to the bridegroom besides other household articles. After the marriage, they were happily living together as husband and wife at the house of the accused for six months. Thereafter, on one occasion, the deceased came to the house of her parents and told PW.1 (the brother of the deceased) that the accused forced her out of her matrimonial home demanding motor cycle from her parents as dowry. PW.1 and her family members told her that they could not even reimburse the marriage debts and therefore, it was not possible for them to purchase a motor cycle. Thereafter, they persuaded the accused and left the deceased at the matrimonial home. After two months, again, the deceased came to the house of PW.1 and told him that this time also the accused had sent her out of matrimonial home demanding a motor cycle. After some time, the father of the deceased spoke to PW.1 over phone and informed that the accused had met with a minor accident and requested PW.1 to send the deceased to his house. Accordingly, on 28.6.2008, PW.1's brother took the deceased and left her at the house of the accused. Thereafter, on 1.7.2008, around 6.00 a.m., PW.1 was informed that the deceased had died at the house of the accused. Immediately, PW.1 and the relatives rushed to the house of the accused. They found the dead body of the deceased lying on a steel cot. Froth was oozing from her mouth and nose. There were contusions around her neck. PW.1 suspected foul play in the death of the deceased and therefore, he proceeded to the Police Station and made a complaint.

3. PW.11 was the Sub-Inspector of Police, attached to Ramji Nagar Police Station. On 1.7.2008, at 10.00 a.m., PW.1 presented Ex.P1 written complaint and based

on the same, PW.11 registered a case in Crime No.205 of 2008 under Section 174 Cr.P.C.,. Ex.P12 is the F.I.R.,. Then, he forwarded Exs.P1 and P12 to the Court. Since the death of the deceased was within 7 years of her marriage and since it apparently seemed to be an unnatural death, PW.11 referred the matter to the Executive Magistrate-cum-Revenue Divisional Officer for holding inquest.

4. PW.10 was the then Revenue Divisional Officer of the Thiruchirapalli. She conducted inquest on the body of the deceased on 1.7.2008, during which, she examined PWs.1 and 2, and the father of the deceased and prepared Ex.P8 Inquest Report. In the said report, PW.10 opined that there was dowry demand by the accused. Then, the body was sent for post-mortem.

5. PW.9, Dr.Karthikeyan, and one Dr.R.Vasantharaman, conducted autopsy on the body of the deceased on 1.7.2008. They found the following injuries:- 1.Dark brown colour abrasions; on the front of lower part of neck, 3 cm x 0.5 cm front of upper part of left side of chest, 4 cm x 2 cms. 2.Bruising of right parietal region of scalp - dark red. On bloodless dissection of neck. 3.Bruising of soft tissues of neck in a diffused manner - dark red. 4.Diffusion of blood into the soft tissues of neck. 5.Fracture of lower laryngeal cartilages present. 6.Bruising of esophageal wall - dark red. 7.Haemorrhagic spots in mucous membranes of wind pipe and food pipe. 8.Bruising of neck muscles on the left side present - dark red. Ex.P4 is the Post-Mortem Certificate. They opined that the deceased would appear to have died of manual strangulation.

6. The investigation in this case was taken up by PW.12. On 01.7.2008 at 11.30 a.m., PW.12 prepared an Observation Mahazar and a Rough Sketch in the presence of PW.3 and another witness. Then, he examined PWs.1 to 3 and a few more witnesses and recorded their statements. On 5.7.2008, he received the Inquest Report from PW.10. Based on the same, he altered the case into one under Section 302 and 498(A) IPC and Sections 3 and 4 of the Dowry Prohibition Act. Ex.P14 is the alteration report. In the mean while, according to the case of the prosecution, the accused appeared before PW.6, the Village Administrative Officer of Mathur Village and made a voluntary confession. PW.6 reduced the same into writing and obtained his signature. Ex.P3 is the said extra judicial confession. He

produced the accused along with Ex.P3 to PW.12. On 05.7.2008 at 4.00 p.m., when the accused was produced before him by PW.6, PW.12 arrested him. On such arrest, the accused gave yet another voluntary confession to the police. Then, he sent the accused to the Court for judicial remand. Then, he collected medical records and examined the Doctor and other witnesses. On completing the investigation, finally, on 12.07.2008, he laid charge sheet against the accused under Sections 498(A) and 302 IPC.

7. Based on the above material, the trial court framed charges. The accused pleaded innocence. In order to prove the charges, on the side of the prosecution, as many as 12 witnesses were examined and 14 documents were exhibited. On the side of the defence, one document was marked as Ex.D1.

8. Out of the said witnesses, PWs.1 and 2, the brother and mother, respectively of the deceased, have spoken to about the dowry demand viz., demand for a motor cycle from PW-1. PW-3 is a cousin of the deceased. He has been a witness to the Observation Mahazar. PWs.4 and 5 have turned hostile and they have not supported the case of the prosecution in any manner. PW-6, the Village Administrative Officer, has stated that the extra judicial confession viz., Ex.P3 was voluntarily given by the accused to him. PW-9 is the Doctor, who conducted autopsy and PW-10 is the Revenue Divisional Officer, who held inquest on the body of the deceased. PW-11 has spoken to about the registration of the First Information Report and PW-12 has deposed about the investigation done by him.

9. When the above incriminating evidences were put to the accused under Section 313 Cr.P.C., he denied the same as false. On his side, a lone document (Ex.D1) was marked.

10. The plea of the accused before the trial Court was that on the crucial date, he was not at home. When he returned to his house, he found his wife lying dead. He has further stated that he went to the Police Station, but he had been detained in the police station for a long time. He has further stated that he did not give any voluntarily confession to the Village Administrative Officer (PW-6) at all and Ex.P3 was obtained under coercion from him only in the Police Station. He has further stated that he did not demand for dowry also. Rejecting the plea of the accused,

the trial Court has convicted him under Section 498(A) as well as 302 IPC. That is how, the appellant is before this Court with this appeal.

11. We have heard the learned counsel appearing for the appellant and the learned Additional Public Prosecutor and we have also perused the records carefully.

12. For the sake of convenience, let us first take up the conviction under Section 302 IPC.

13. Admittedly, there is no eye witness account. According to the medical evidence, the deceased died due to manual strangulation. In order to prove that the death of the deceased was caused by strangulation by the accused, the prosecution relies only on Ex.P3, the extra judicial confession said to have been given by the accused on 05.07.2008 to PW-6. The trial Court itself has disbelieved the same. It is in the evidence of PWs.1 and 2 that on the date of occurrence, even when they had gone to the Police Station for preferring complaint, the accused was already kept in the Police Station along with his family members. They have further stated that the accused continued to be in the Police Station for a few more days. This would go to show that till 05.07.2008, the accused was in the custody of the Police. Therefore, it would not have been possible for the accused to have gone to the office of PW-6 to give such a voluntary confession. Thus, the confession is a suspicious one. Therefore, the same is unbelievable. Assuming that it is believable, in our considered opinion, since the same had been made while he was in police custody, it is not admissible in evidence, in view of the bar contained in Section 25 of the Evidence Act. Assuming that the accused was not actually in the custody of the police on 05.07.2008, it is highly unbelievable that the accused would have made the confession voluntarily. At any rate, Ex.P3 confession cannot be considered at all and the same cannot be a foundation to hold that it was this accused, who caused the death of the deceased.

14. At this juncture, we would like to reiterate that an extra judicial confession is a weak piece of evidence. But it does not mean that extra judicial confession cannot be the sole foundation for conviction. It is the law that, in appropriate cases, where the extra judicial confession is beyond any doubt and the same inspires the fullest

confidence of the Court, then it may be the sole foundation for conviction. But when it does not inspire the fullest confidence of the Court, either it should be rejected in toto or the same can be taken into account provided the same draws corroboration from independent sources. In this case, we are not prepared to believe Ex.P3 confession statement and therefore, as rightly done by the lower Court, we reject the same. If once Ex.P3 is rejected, there is no other evidence available on record to link the accused with the death of the deceased.

15. It is the contention of the learned Additional Public Prosecutor that in such an event, if there are materials to raise the presumption under Section 304-B IPC and Section 113-B of the Evidence Act, then the accused can be convicted under Section 304-B IPC, instead of 302 IPC. In this regard, it is the contention of the learned Additional Public Prosecutor that the lower Court has believed the evidences of PWs.1 and 2 to hold that the accused had committed offence under Section 498(A) IPC. According to the learned Additional Public Prosecutor, once there has been conviction under Section 498(A) IPC, then it should follow that there has to be conviction under Section 304-B IPC by raising the presumption under Section 304-B IPC and Section 113-B of Evidence Act.

16. But, the learned counsel appearing for the appellant would submit that the evidences of PWs.1 and 2 cannot be believed, even to hold the accused guilty under Section 498(A) IPC. The learned counsel for the appellant would rely on Ex.D1, the list of articles taken back by PW-1. Relying on the same, the learned counsel would submit, had it been true that the accused had caused cruelty to the deceased, then Ex.D1 would not have come into being.

17. It is the contention of the learned Additional Public Prosecutor that by re-appreciating the evidence in respect of the offence under Section 498(A) IPC, if the Court comes to the conclusion that there was cruelty and the said cruelty or harassment was soon before her death, then instead of remanding the case back to the trial Court, this Court itself could convict the accused under Section 304-B IPC by setting aside the conviction under Section 302 IPC.

18. But, the learned counsel for the appellant would oppose the said contention. According to him, the offence under Section 302 and 304-B IPC are two distinct

offences and the offence under Section 304-B IPC is not a minor offence in terms of Section 222 of the Cr.P.C.,. In this regard the learned counsel for the appellant would rely on a Full Bench Judgment of the Hon'ble Supreme Court in SHAMNSAHED M.MULTTANI v. STATE OF KARNATAKA reported in 2001 SCC (Cri) 358. That was a case, where the accused stood charged for an offence under Section 302 IPC. But the trial Court convicted him under Section 304-B IPC instead of 302 IPC. When the matter came up before the Hon'ble Supreme Court, a Division Bench, found that there were conflicting Judgments from the Supreme Court in LAKHJIT SINGH v. STATE OF PUNJAB reported in 1994 SCC (Cri) 235 and another Division Bench Judgment in SANGARABOINA SREENU v. STATE OF ANDHRA PRADESH reported in 1997 SCC (Cri) 690. In one case, the Division Bench had taken the view that even in the absence of charge under Section 304-B IPC, there can be conviction u/s.304-B IPC, instead of 302 IPC. But, the other Bench took a contrary view holding that in the absence of a charge u/s.304-B IPC, there cannot be conviction. Therefore, the matter was referred to larger Bench in 2001 SCC (Cri) 358 (cited supra). The said question was extensively examined by the Full Bench of the Hon'ble Supreme Court and in paragraph Nos.32 to 34, the Hon'ble Supreme Court has answered the same as follows:- "32. The serious consequence which may ensue to the accused in such a situation can be limned through an illustration: If a bride was murdered within seven years of her marriage and there was evidence to show that either on the previous day or a couple of days earlier she was subjected to harassment by her husband with demand for dowry, such husband would be guilty of the offence on the language of Section 304-B IPC read with Section 113-B of the Evidence Act. But if the murder of his wife was actually committed either by a dacoit or by a militant in a terrorist act the husband can lead evidence to show that he had no hand in her death at all. If he succeeds in discharging the burden of proof he is not liable to be convicted under Section 304-B IPC. But if the husband is charged only under Section 302 IPC he has no burden to prove that his wife was murdered like that as he can have his traditional defence that the prosecution has failed to prove the charge of murder against him and claim an order of acquittal.

33. The above illustration would amplify the gravity of the consequence befalling an accused if he was only asked to defend a charge under Section 302 IPC and

was alternatively convicted under Section 304-B IPC without any notice to him, because he is deprived of the opportunity to disprove the burden cast on him by law.

34. In such a situation, if the trial Court finds that the prosecution has failed to make out the case under Section 302 IPC, but the offence under Section 304-B IPC has been made out, the Court has to call upon the accused to enter on his defence in respect of the said offence. Without affording such an opportunity to the accused, a conviction under Section 304-B IPC would lead to real and serious miscarriage of justice. Even if no such count was included in the charge, when the Court affords him an opportunity to discharge his burden by putting him to notice regarding the prima facie view of the Court that he is liable to be convicted under Section 304-B IPC, unless he succeeds in disproving the presumption, it is possible for the court to enter upon a conviction of the said offence in the event of his failure to disprove the presumption." 19. Thus, it is crystal clear that for want of charge under Section 304-B IPC, though there was a charge under Section 302 IPC, there cannot be a conviction under Section 304-B IPC, even though the Court finds that there is evidence to convict under Section 304-B IPC.

20. But, the learned Additional Public Prosecutor has brought to the notice of this Court three other Judgments of Division Benches of the Hon'ble Supreme Court. The first Judgment on which, the learned Additional Public Prosecutor makes reliance is the case in **BALBIR SINGH AND ANOTHER v. STATE OF PUNJAB** reported in 2007 (1) SCC (CrI) 715. In that case, in paragraph No.35, the Hon'ble Supreme Court has held as follows:- "35. This leaves us the alternative question as to whether framing of charge was permissible in law. The said question has not been raised even in the special leave petition. No such point was also taken before the learned trial Judge or the High Court. The appellants have not shown any prejudice even in their statements under Section 313 of the Code of Criminal Procedure." 21. But, in our considered view, the said Judgment has no application to the facts of the present case. That was a case, where the trial Court had framed charge under Section 302 IPC and in the alternative under Section 304-B r/w 34 IPC. The learned Sessions Judge convicted the appellants under Section 302 and 498(A) IPC. The appeal preferred to the High Court was dismissed. As against the

same, further appeal was made to the Hon'ble Supreme Court. The Hon'ble Supreme Court, on appreciating the evidence, found that the accused should have been convicted under Section 304-B IPC instead of 302 IPC. In those circumstances, the Hon'ble Supreme Court held that the effect of framing alternative charges varies from case to case. The Supreme Court further held that having not raised any grievance regarding the alternative charge, the accused cannot be allowed to do so at the appeal stage. Thus, the Hon'ble Supreme Court in the said case had no occasion to consider as to whether there can be conviction under Section 304- B IPC, in the absence of any specific charge under Section 304-B IPC. The question before the Hon'ble Supreme Court in the said case was as to whether the alternative charge framed by the trial Court was right? Therefore, the said case has no application to the facts of the present case.

22. The next Judgment relied on by the learned Additional Public Prosecutor is the case in RAJBIR @ RAJU AND ANOTHER v. STATE OF HARYANA reported in AIR 201.SC 568. In that case, the Hon'ble Supreme Court has issued a general direction to all trial Courts in India to ordinarily add Section 302 IPC to the charge of Section 304-B IPC so that death sentence can be imposed in heinous and barbaric crimes against women. In the said Judgment, as a matter of fact, the Supreme Court impressed upon only the need to frame an alternative charge u/s. 302 IPC in addition to the charge u/s. 304-B IPC. Thus, the said Judgment is no answer to the question as to whether there can be conviction, though there is no charge under the said provision.

23. The next Judgment relied on by the learned Additional Public Prosecutor is the case in SANJAY KUMAR JAIN v. STATE OF DELHI reported in 2011 (11) SCC 733. In that case, the Judgment of the Full Bench of the Hon'ble Supreme in SHAMNSAHED M. MULTTANI v. STATE OF KARNATAKA'S case (cited supra) had not been brought to the notice of the Division Bench. Though some view, contrary to the view expressed in SHAMNSAHED M. MULTTANI v. STATE OF KARNATAKA'S case, has been made in this case, since it is a judgment from a Division Bench, we hold that we are bound by the Full Bench decision of SHAMNSAHED M. MULTTANI v. STATE OF KARNATAKA'S case.

24. In view of the above Judgments, we find that the settled position of law is that in the absence of a charge under Section 304-B IPC, the accused cannot be later on convicted under Section 304-B IPC, instead of Section 302 IPC, simply because during the trial evidence has come into being to prove the offence under Section 304-B IPC. In order to avoid such peculiar situation as has been directed by the Supreme Court in RAJBIR @ RAJU AND ANOTHER v. STATE OF HARYANA's case, it is safe to frame alternative charges in appropriate cases.

25. With the above settled position of law in mind, we have carefully looked into the facts of the present case. We have found that there is evidence which requires appreciation to find as to whether offence Section 304-B IPC and 498(A) IPC has been made out. But, we do not want to further express any opinion in respect of the said evidence, as any such opinion may influence the mind of the trial Court as we are inclined to remand the case to the trial Court.

26. Again turning to SHAMNSAHED M.MULTTANI v. STATE OF KARNATAKA'S case, in paragraph No.35 and 36, the Hon'ble Supreme Court has held as follows:- "35. As the appellant was convicted by the High Court under Section 304-B IPC, without such an opportunity being granted to him, we deem it necessary in the interest of justice to afford him that opportunity. The case in the trial Court should proceed against the appellant (not against the other two accused whose acquittal remains unchallenged now) from the stage of defence evidence. He is put to notice that unless he disproves the presumption, he is liable to be convicted under Section 304-B IPC.

36. To facilitate the trial Court to dispose of the case afresh against the appellant in the manner indicated above, we set aside the conviction and sentence passed on him by the High Court and remand the case to the trial Court." 27. In the instant case, following the above Judgment of the Hon'ble Supreme Court, we are inclined to set aside the conviction of the appellant both under Section 498(A) and 302 IPC and we are inclined to remand the matter back to the trial Court with a direction to the trial Court to proceed against the appellant from the stage of defence evidence. The trial Court is required to give full opportunity for the accused either to recall any witness already examined or to examine any defence witness or to

prove any document in his favour.

28. In the result, the Criminal Appeal is allowed, the conviction and sentence imposed on the appellant/accused both under Sections 498(A) and 302 IPC, by the lower Court, in its Judgement dated 22.02.2011 in S.C.No.118 of 2009, are set aside and the case is remitted back to the file of the trial Court with a direction to the trial Court to frame an alternative charge under Section 304-B IPC and to proceed further from the stage of defence witness. It is further directed that the accused shall be given full opportunity to recall any witness examined already or to let in any defence evidence and also to prove any document in his favour. The trial Court is further directed to dispose of the appeal within a period of six months from the date of receipt of a copy of this order.

29. It is reported that appellant/accused is in jail. He shall be set at liberty, unless his detention is required in connection with any other case. On such release, the accused shall execute a fresh bail bond for a sum of Rs.25,000/- (Rupees twenty five thousand only) with two sureties each for a like sum to the satisfaction of the trial Court. The accused shall appear before the trial Court on 04.02.2013. asvm/rj2 To (asvm/rj2) 1.The Deputy Superintendent of Police Station, Jeeyapuram Sub Division, Ramji Nagar Police Station, Trichirappalli District. 2.The Sessions Judge (Mahila Court), Trichirappalli. 3.The Public Prosecutor, Madurai Bench of Madras High Court, Madurai.

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