2024:KER:80744

C.R

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE SOPHY THOMAS

FRIDAY, THE 1ST DAY OF NOVEMBER 2024 / 10TH KARTHIKA, 1946

CRL.A NO. 850 OF 2007

AGAINST THE JUDGMENT DATED 07.05.2007 IN SC NO.136 OF 2006 OF ADDL.SESSIONS JUDGE/SPECIAL JUDGE FOR NDPS ACT CASES, THODUPUZHA

APPELLANT/ACCUSED No.1:

SURESH, S/O.GOPALAN,
POOKKULAM ESTATE, ANAVILASAM VILLAGE, CHAPPATHU KARA.

BY ADVS.
SRI.RENJITH B.MARAR
SRI.PRABHU VIJAYAKUMAR

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY SRI.M.C ASHI, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 22.10.2024, THE COURT ON 01.11.2024 DELIVERED THE FOLLOWING:

2024:KER:80744

C.R

J U D G M E N T

This appeal is at the instance of the accused in SC No.136 of 2006 on the file of Additional Sessions Judge/Special Judge for NDPS Act cases, Thodupuzha, challenging his conviction and sentence under Section 498A of IPC, as per judgment dated 07.05.2007.

2. The appellant/accused was originally charge sheeted by SI of Police, Upputhara for an offence punishable under Section 306 of IPC. The prosecution allegation was that, the accused, who was in a live-in relationship with the deceased Smt.Jancy, abetted her suicide on 10.03.2005 at 3 p.m.

3. On committal, and on appearance of the accused before the trial court, charge was framed against him under Section 306 of IPC. He pleaded not guilty to the charge and claimed to be tried.

4. PWs 1 to 8 were examined, Exts.P1 to P6 were marked and MO1 was identified from the side of the prosecution.

5. On closure of prosecution evidence, accused was questioned under Section 313 of Cr.P.C. He denied all the

2024:KER:80744

incriminating circumstances brought on record and submitted that, himself and Smt.Jancy fell in love and they were living together harmoniously, and two children were born to them. Since she had made some derogatory remarks against a neighbour lady named Rajakumari, he had scolded her. On 10.03.2005, he went out for work and when he returned from his workplace, he came to know, that his wife committed suicide by consuming poison. DWs 1 and 2 were examined from defence side.

6. On analysing the facts and evidence and on hearing the rival contentions from either side, the trial court found that, there was no sufficient evidence to find that the accused abetted suicide of Smt.Jancy and so he was acquitted of the offence alleged under Section 306 of IPC. But, from the testimony of prosecution witnesses, the trial court found that the accused had subjected his wife to cruelty both mentally and physically, which will attract an offence punishable under Section 498A of IPC. So, he was convicted under Section 498A of IPC and was sentenced to undergo simple imprisonment for two years and to pay fine of Rs.15,000/-, with a default sentence of simple imprisonment for three months, and to pay Rs.10,000/- to PW2-the mother of the

deceased as compensation under Section 357(1) of Cr.P.C, out of the fine amount, if realised. Aggrieved by the conviction and sentence under Section 498A of IPC, the accused has come up with this appeal.

7. Heard learned counsel for the appellant/accused and learned Public Prosecutor for the respondent/State.

8. The appellant was originally charged under Section 306 of IPC, but the trial court found that, prosecution could not prove that, he had abetted suicide of Smt.Jancy, and so he was acquitted of that offence. But no appeal has been preferred by the prosecution against his acquittal, under Section 306 of IPC, and so it has become final.

9. The appellant was convicted and sentenced for an offence punishable under Section 498A of IPC, without framing a charge against him under that section. Learned counsel for the appellant would contend that Section 306 and 498A of IPC are distinct offences, for which separate charges are necessary, and great prejudice has been caused to the appellant, as he was not called upon to answer a charge under Section 498A of IPC, whereby he was denied of an opportunity to defend his case.

10. Learned counsel for the appellant would contend that, there was no marriage at all between the appellant and deceased Jancy, and they were in a live-in relationship though two children were born out of their cohabitation. PW2-the mother of the deceased was not in good terms with the appellant, but learned trial court relied on the improvised and exaggerated testimony of PW2, to find that the appellant subjected the deceased to physical and mental cruelties. So, he would argue that, the conviction and sentence of the appellant under Section 498A of IPC are not maintainable either in law or on facts.

11. Learned Public Prosecutor would argue that, the marital relationship between the appellant and deceased Jancy was admitted by the appellant even in his 313 questioning as he was addressing the deceased as his wife. Moreover, the testimony of PWs 2 to 4 also would show that, the appellant was the husband of deceased Jancy. All of them deposed that the appellant used to ill-treat her mentally and physically. So, sufficient materials were there to bring home, an offence punishable under Section 498A of IPC against the appellant, and hence he was liable to be punished for that offence, irrespective of the fact, that no separate charge

2024:KER:80744

was framed for that offence.

12. In criminal jurisprudence, the general rule is that, for every distinct offence, there shall be a separate charge. Section 218 of Cr.P.C says that for every distinct offence, there shall be separate charge and every such charge shall be tried separately, subject to the exceptions in Sections 219, 220, 221 and 223 of Cr.P.C.

13. Section 218 of Cr.P.C reads thus:

> **"218. Separate charges for distinct offences.-**(1) For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately :
>
> Provided that where the accused person, by an application in writing, so desires and the Magistrate is of opinion that such person is not likely to be prejudiced thereby, the Magistrate may try together all or any number of the charges framed against such person.
>
> (2) Nothing in sub-section (1) shall affect the operation of the provisions of Sections 219, 220, 221 and 223".

14. Relying on Section 218 of Cr.P.C, learned counsel for the appellant would argue that, the trial court went wrong in convicting the appellant under Section 498A of IPC, when he was

2024:KER:80744

called upon to answer a charge, only under Section 306 of IPC.

15. Learned Public Prosecutor would rely on Section 222 of Cr.P.C to say that, when an offence proved, included in offence charged, the accused can be convicted for the offence proved, even if there was no separate charge for that offence.

16. It is worth quoting Section 222 of Cr.P.C which reads thus:

> "**222. When offence proved included in offence charged**.- (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.
>
> (2) When a person is charged with an offence and facts are proved which reduce it to minor offence, he may be convicted of the minor offence, although he is not charged with it.
>
> (3) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.
>
> (4) Nothing in this section shall be deemed to authorise a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied".

2024:KER:80744

17. Learned Public Prosecutor would argue that, punishment for an offence under Section 306 of IPC is imprisonment of either description for a term which may extend to ten years and fine, whereas an offence under Section 498A of IPC is punishable with imprisonment for a term which may extend to three years and fine. According to him, an offence under Section 498A of IPC is included, in an offence under Section 306 of IPC, and moreover an offence under Section 498A of IPC is a minor offence when compared to an offence under Section 306 of IPC. So, going by Section 222(2) of Cr.P.C, there was no illegality or impropriety in convicting the appellant for a minor offence under Section 498A of IPC, on proof of commission of such offence, though no separate charge was framed against him, for that offence.

18. Now let us see whether the offences under Sections 306 and 498A of IPC are distinct offences, for which separate charges are necessary or whether Section 498A of IPC is a minor offence to Section 306 of IPC, so that conviction was possible under Section 498A of IPC, even without a charge, on proof of commission of such offence, in spite of his acquittal under Section 306 of IPC.

19. Sections 306 and 498A of IPC are extracted below for ready reference.

> "**306. Abetment of Suicide**.- If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine."
>
> **"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.
>
> 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
>
> (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".

20. Going by Section 498A of IPC, we get the key elements as follows:

(1) Cruelty (physical, mental or emotional)
(2) By husband or his relatives
(3) Towards a married woman
(4) Likely to drive the woman to commit suicide or to cause grave injury to life, limb or health.
(5) Harassment to meet any unlawful demand for property or valuable security.

Whereas the key elements under Section 306 of IPC are as follows:

(1) Abetment
(2) Of suicide
(3) Intentional act or omission

21. When a woman is subjected to cruelty by her husband or his relative, which is likely to drive that woman to commit suicide, it is an offence punishable under Section 498A of IPC, and Section 306 of IPC is about suicidal death and abetment thereof. Marriage is sine qua non, to attract an offence punishable under Section 498A of IPC. But, for an offence under Section 306 of IPC, there need not be any relationship between the accused and the victim. Where the cruelty or harassment as envisaged under Section 498A of IPC is proved to have contributed to the suicide, and the intention of the accused to abet that suicide can be

inferred, from his cruel or harassing behaviour, then the accused can be charged both under Section 498A and 306 of IPC. The basic ingredients of an offence under Section 498A of IPC can be said to be there, in a charge under Section 306 of IPC, where the cruelties meted out to the wife, by her husband or his relatives were of such a nature, to drive her to commit suicide. Section 498A has a wider spectrum, and it covers all cases, in which the wife is subjected to cruelty by her husband or relative of the husband, which may result in death by way of suicide or cause grave injury or danger to life, limb or health (whether mental or physical), or even harassment caused with a view to coerce the woman or any person related to her, to meet the unlawful demand for property or valuable security. The first thing to prove an offence under Section 306 of IPC is the fact of suicide. Abetment is a separate and distinct offence, provided the thing abetted is an offence.

22. In **Ramesh Kumar v. State of Chattisgarh** [2002 KHC 346], Hon'ble Apex Court held that, "S.498A and 306 IPC are independent and constitute different offences. Though, depending on the facts and circumstances of an individual case, subjecting a

woman to cruelty may amount to an offence under S.498A and may also, if a course of conduct amounting to cruelty is established, leaving no other option for the woman except to commit suicide, amount to abetment to commit suicide. However, merely because an accused has been held liable to be punished under S.498A IPC, it does not follow that, on the same evidence he must also and necessarily be held guilty of having abetted the commission of suicide by the woman concerned". So, obviously even if a man is acquitted under Section 306 of IPC, he need not be necessarily acquitted for an offence punishable under Section 498A of IPC or vice versa. Since an offence under Section 306 of IPC and 498A of IPC are distinct and different, there has to be a charge under both sections, and conviction and sentence also can be imposed under both the sections separately.

23. In **Paranagouda v. State of Karnataka** [2023 KHC 6941], Hon'ble Apex Court held that omission to frame charge does not disable the court from convicting the accused for the offence which is found to have been proved on the evidence on record.

24. In **K. Prema S. Rao & anr v. Yadla Srinivasa Rao and others** [(2003) 1 SCC 217], Hon'ble Apex Court held that, mere omission or defect in framing of charge would not be fatal if from the statement of charge under S.304B and in the alternative S.498A, it is clear that all facts and ingredients, for framing of charge under S.306 existed in the case, same would suffice. It was further held that, mere omission or defect in framing charge does not disable the criminal court, from convicting the accused for the offence which is found to have been proved, on the evidence on record. The Code of Criminal Procedure has ample provisions to meet a situation like the one before us. From the statement of charge framed under Section 304-B and *in the alternative* Section 498-A IPC, it is clear that all facts and ingredients for framing charge for offence under Section 306 IPC existed in the case. The mere omission on the part of the trial Judge to mention Section 306 IPC with Section 498-A IPC does not preclude the court from convicting the accused for the said offence, when found proved. In the alternate charge framed under Section 498-A IPC, it has been clearly mentioned that the accused subjected the deceased to such cruelty and harassment, as to

2024:KER:80744

drive her to commit suicide. The provisions of Section 221 CrPC take care of such a situation and safeguard the powers of the criminal court, to convict an accused for an offence with which he is not charged, although on facts found in evidence, he could have been charged for such offence".

25. Now let us see whether Section 498A can be treated as a minor offence to Section 306. In **Dalbir Singh v. State of U.P** [2004 KHC 1028], Hon'ble Apex Court observed that, "sub-section (1) of S.222 lays down that when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it. Sub-section (2) of the same section lays down that 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. S.222 CrPC is in the nature of a general provision which empowers the court to convict for a minor offence even though charge has been framed for a major offence".

26. In **Shamnsaheb M. Multtani v. State of Karnataka** [(2001) 2 SCC 577], Hon'ble Apex Court explained what is meant by 'a minor offence' for the purpose of Section 222 of the Code. It was observed that although the said expression is not defined in the Code, it can be discerned from the context that the test of minor offence is not merely that, the prescribed punishment is less than the major offence. Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-a-vis the other offence. In paragraph 17 of that judgment, we read thus:

> "17. The composition of the offence under Section 304B IPC is vastly different from the formation of the offence of murder under Section 302 IPC and hence the former cannot be regarded as minor offence vis-a-vis the latter. However, the position would be different when the charge also contains the offence under Section 498-A IPC (husband or relative husband of a woman subjecting her to cruelty). As the word "cruelty" is explained as including, inter alia,
>
> "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".

2024:KER:80744

27. Paragraphs 29 to 31 of Shamnsaheb's decision cited supra, is worth quoting which read thus:

> "29. At this stage, we may note, the difference in the legal position between the said offence and S.306 IPC which was merely an offence of abetment of suicide earlier. The section remained in the statute-book without any practical use till 1983. But by the introduction of S.113A in the Evidence Act the said offence under S.306 IPC has acquired wider dimensions and has become a serious marriage-related offence. S.113A of the Evidence Act says that under certain conditions, almost similar to the conditions for dowry death the court may presume having regard to the circumstances of the case, that such suicide has been abetted by her husband etc. When the law says that the court may presume the fact, it is discretionary on the part of the court either to regard such fact as proved or not to do so, which depends upon all the other circumstances of the case. As there is no compulsion on the court to act on the presumption, the accused can persuade the court, against drawing a presumption adverse to him.
>
> 30. But the peculiar situation in respect of an offence under S.304B IPC, as discernible from the distinction pointed out above in respect of the offence under S.306 IPC is this : Under the former the court has a statutory compulsion, merely on the establishment of two factual positions enumerated

above, to presume that the accused has committed dowry death. If any accused wants to escape from the said catch, the burden is on him to disprove it. If he fails to rebut the presumption the court is bound to act on it.

31. Now take the case of an accused who was called upon to defend only a charge under S.302 IPC. The burden of proof never shifts onto him. It ever remains on the prosecution which has to prove the charge beyond all reasonable doubt. The said traditional legal concept remains unchanged even now. In such a case the accused can wait till the prosecution evidence is over and then to show that the prosecution has failed to make out the said offence against him. No compulsory presumption would go to the assistance of the prosecution in such a situation. If that be so, when an accused has no notice of the offence under S.304B IPC, as he was defending a charge under S.302 IPC alone, would it not lead to a grave miscarriage of justice, when he is alternatively convicted under S.304B IPC and sentenced to the serious punishment prescribed thereunder, which mandates a minimum sentence of imprisonment for seven years".

28. Going by Section 498A of IPC, marriage is a condition precedent for attracting that offence; whereas there is no such condition in an offence under Section 306 of IPC. In **Shivcharan Lal Verma and another v. State of Madhya Pradesh** [2002 (2)

Crimes 177 (SC): (2007) 15 SCC 369], a three Judge Bench of the Apex Court held that, the mental or physical harassment of a lady who had not been legally married by the accused, will not attract a prosecution under Section 498A of IPC. There must be a valid marital relationship between the accused and the victim in order to attract that offence.

29. In **Narayanan v. State of Kerala** [2023 (6) KHC 427], this Court held that, only a legally wedded wife can claim the protection under Section 498A of IPC, and in the absence of such a legal relationship as husband and wife, there cannot be a conviction under Section 498A. But, for a conviction under Section 306 of IPC, no such condition is there. Whoever abets the commission of suicide by any person, is liable to be punished for that offence.

30. Learned counsel for the appellant would argue that, Section 498A of IPC cannot be treated as a minor offence to Section 306 of IPC, simply because the punishment is less under Section 498A. Marriage is sine qua non to attract the penal provision under Section 498A of IPC. In the case on hand, the appellant was asked to defend a charge under Section 306 of IPC

alone, and he was acquitted for that offence, but convicted under Section 498A of IPC. Learned counsel for the appellant would submit that, the appellant had no notice of an offence under Section 498A of IPC against him, and if he had notice of such an offence also, in the charge framed against him under Section 306 of IPC, he could have taken a defence, that there was no marriage at all between himself and the deceased. The prosecution witnesses stated before court that, the appellant and deceased Jancy were in a live in relationship, though two children were born to them. In the 313 questioning of the appellant, not even a single question was put to him regarding the marital relationship between himself and the deceased. So, according to the appellant, great prejudice has been caused to him by convicting him under Section 498A of IPC.

31. Learned Public Prosecutor would argue that, if at all the court omitted to frame a charge under Section 498A of IPC also against the appellant, it will not invalidate the conviction and sentence, as there was no failure of justice occasioned thereby.

32. Section 464 of Cr.P.C is relevant in this context which can be quoted below:

> "**464. Effect of omission to frame, or absence of, or error in, charge.**- 1) 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 charges, unless, in the opinion of the court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.
>
> (2) If the court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-
>
> (a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge.
>
> (b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:
>
> Provided that if the court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction".

33. Learned Public Prosecutor would submit that, Section 306 of IPC is with respect to suicidal death and abetment thereof, and Section 498A of IPC also is about wilful conduct of a husband or relative of the husband of a woman, 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 harassment of a woman with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security etc. etc. So, while answering the charge under Section 306 of IPC, he had sufficient notice of an offence under Section 498A of IPC also, and hence no prejudice has been caused to him.

34. In **Rafiq Ahmed @ Rafi v. State of U.P** [2011 KHC 4683], Hon'ble Apex Court examined the nature and scope of plea of prejudice to the accused and held that, only when the accused is able to show that there is serious prejudice, and that the same has defeated the rights available to him under the criminal jurisprudence, then only he can seek benefit under the orders of the court.

35. One of the cardinal principles of natural justice is that no man should be condemned without being heard (audi alteram partem). Here the appellant was not heard regarding an offence committed under Section 498A of IPC and he was not given an opportunity to defend his case under that section, which resulted in

penalising him. So, obviously, there occurred failure of justice.

36. In the light of the above discussion and also from the decisions cited supra, we could say with clarity, that offences under Sections 306 and 498A of IPC are distinct offences, for which separate charges are necessary. There can be a charge under Section 306 and 498A of IPC together, and conviction and sentence also can be imposed under both sections separately. Acquittal under Section 306 IPC will not necessarily lead to an acquittal under Section 498A of IPC or vice-versa. Even if the accused was charged only under Section 306 of IPC, and he was found not guilty of that offence, there is nothing improper in convicting him for an offence under Section 498A of IPC, on proof of commission of such offence, if from the statement of charge under Section 306, it was clear that all the ingredients for framing a charge under Section 498A existed in the case. If so, that was sufficient to convict the accused under Section 498A of IPC, on proof of commission of such offence, though no specific charge was framed for that offence.

37. From the evidence on record, it could be seen that there was no specific allegations of matrimonial cruelties, which

prompted the deceased to commit suicide, except some general statement of harassment against the appellant. Though PW2 stated that, the accused used to assault the deceased, no complaints were ever preferred by her, alleging that she was subjected to cruelty by the appellant. PW3, her paternal uncle, is having only hearsay information about the cruelties meted out to the deceased by the appellant. PW4-a neighbour has never seen any assault, though he stated that the appellant and the deceased used to quarrel. DW1-the mother of the appellant would say that, the quarrel between the appellant and the deceased were only normal, as the quarrel in any other house. So, prosecution could not prove that Smt.Jancy was subjected to cruelties or harassment by the appellant.

38. There is clear admission from the part of prosecution witnesses that, there was no marriage at all between the appellant and the deceased and they were in a live-in relationship. So, the penal provision under Section 498A of IPC cannot be extended towards the appellant. If the appellant had an opportunity to meet the ingredients of a charge under Section 498A of IPC also, in the charge framed against him under Section 306 of IPC, no injustice

2024:KER:80744

could have been caused to him, even if he was convicted under Section 498A of IPC, without a separate charge for that offence. But the facts of the case would reveal that there occurred failure of justice in convicting the appellant under Section 498A of IPC, as he had no notice of that offence, and he did not get an opportunity to defend the same.

In the result, the conviction and sentence of the appellant under Section 498A of IPC is set aside and he is acquitted thereunder. His bail bond is cancelled and he is set at liberty forthwith.

Accordingly, the appeal stands allowed.

Sd/-
SOPHY THOMAS
JUDGE

smp