



BAIL SLIP

Gnanavel, S/o.Karachamy @ Karuppana Ambalam, Male, aged about 43 years (1st Accused is released on bail vide Court order dated 05/01/2015 made in MP(MD)No.1 of 2014 in Cr1.A(MD)No.299 of 2014.

WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 03.01.2020

CORAM:

THE HONOURABLE Mr.JUSTICE M.NIRMAL KUMAR

Cr1.A(MD)No.299 of 2014

Gnanavel ... Appellant/Accused No.1

Vs.

State through represented by
The Inspector of Police,
Oomachikulam Police Station,
Madurai,
In Cr.No.160 of 2007

... Respondent/Complainant

PRAYER: Petition is filed under Section 378 of Criminal Procedure Code, against the Judgment and Conviction passed by the Mahila Court, Madurai in S.C.No.256 of 2009, dated 20.10.2014.

For Appellant : Mr.C.M.Arumugam
For Respondent : Mr.K.Suyambulinga Bharathi
Govt.Advocate (crl.side)

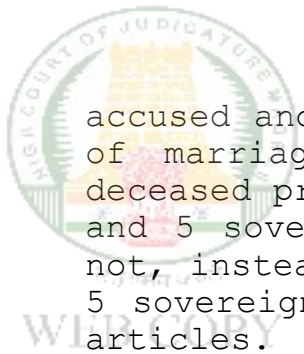
JUDGMENT

This Criminal Appeal is filed by the appellant / Accused No.1, against the Judgment and conviction passed by the Mahila Court, Madurai in S.C.No.256 of 2009, dated 20.10.2014, convicting the appellant under Section 498(A) of IPC., and sentenced him to undergo Rigorous Imprisonment for 3 years and to pay a fine of Rs.1000/-, in default, to undergo 3 months Rigorous Imprisonment and further convicting the appellant under Section 304(b) IPC., and sentenced him to undergo 10 years Rigorous Imprisonment and to pay a fine of Rs.2000/-, in default, to undergo 6 months Simple Imprisonment. The sentences were ordered to run concurrently.

2. The facts of the case are briefly stated hereunder:-

(i) The accused / Accused No.1 is the husband of the deceased. This case was one Gomathi. The marriage between the

<https://hcmr.judges.org.in/cases/>



accused and the deceased was solemnized on 13.06.2006. At the time of marriage, according to the prosecution, the parents of the deceased promised to give 15 sovereigns of golds jewels to the bride and 5 sovereigns of gold jewels to the bridegroom, but they could not, instead they gave 11 sovereigns of gold jewels to the bride and 5 sovereigns of gold jewels to bridegroom, besides other household articles. After the marriage, they were living happily, as husband and wife. Thereafter, on one occasion, the deceased came to the house of her parents and informed her father that by demanding 4 sovereigns of gold jewels, the husband / accused torturing her.

(ii) P.W.1 is the father of the deceased Gomathi. On 07.04.2007, at about 11.00 p.m., there was quarrel between the deceased Gomathi and her husband / A1 in respect of balance 4 sovereigns of gold jewels. The neighbours pacified them. Again at about 1.00 a.m., the accused throttled the neck of the deceased, by using a rope, as a result of which, the deceased died, thereby, the accused caused death of the deceased.

3. On receipt of final report by the prosecution, the learned Judicial Magistrate No.II, Madurai, has taken the case on file as PRC.No.58 of 2008, for the offences under Sections 498(A) and 302 of IPC.

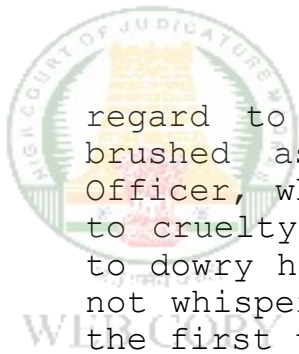
4. As the offence committed by the accused is triable by the Court of Sessions, the learned Judicial Magistrate No.II, Madurai, has committed the case along with the entire records to the Mahila Court, Madurai, which was taken on file as S.C.No.256 of 2009.

5. In order to prove the case of the prosecution, on the side of the prosecution as many as 17 witnesses were examined as P.Ws.1 to 17 and 13 documents were marked as Exs.P1 to P13 and M.Os.1 to 4 were marked. On the side of the accused, two witnesses were examined as D.W.1 and D.W.2 and no document was marked.

6. When the appellant was questioned under Section 313 Cr.P.C., about the incriminating circumstances appearing against him, he denied the same.

7. The trial Court, on the basis of the oral and documentary evidence, convicted and sentenced the accused as aforesaid and challenging the legality of the said conviction and sentence, the present appeal has ben filed by the appellant.

8. Mr.C.M.Arumugam, the learned counsel appearing for the appellant would submit that the trial Court failed to appreciate the allegations levelled in Ex.P1, with regard to the alleged demand of dowry. Absolutely, there is no evidence whether P.Ws.1, 2 and 3 reacted and responded on the alleged demand of dowry, one week prior to the date of death of occurrence. The trial Court miserably failed to consider the ambit of Section 113 (b) of Evidence Act, with



regard to rebuttal of presumption. The Court below completely brushed aside the evidence of P.W.12, the Revenue Divisional Officer, who deposed that he do not find the deceased was subjected to cruelty for demand of dowry. The evidence of P.W.1 with regard to dowry harassment of her daughter is an after thought and he does not whisper in FIR or during Investigation. On the other hand, for the first time, he improved and deposed before the trial Court. The trial Court is misconstrued on the evidence of P.W.8, with regard to wordy dual on the day of occurrence, as if it was taken place between the deceased and the appellant, instead it had taken place subsequent to the occurrence between the relatives of the deceased and the accused.

9. The learned counsel, in support of his contention, relied on a Judgment of Hon'ble Apex Court in **Shamnsaheb M.Mulattani Vs. State of Karnataka** reported in **(1995 SCC (Cri) 943)** wherein it has been held as follows:-

"15. Section 222(1) of the Code deals with a case "when a person is charged with an offence consisting of several particulars". The Section permits the court to convict the accused "of the minor offence, though he was not charged with it". Sub-section (2) deals with a similar, but slightly different, situation.

"222(2) 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.

16. What is meant by "a minor offence" for the purpose of Section 222 of the Code? 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. The two illustrations provided in the section would bring the above point home well. 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-à-vis the other offence.

17. The composition of the offence under Section 304-B 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-à-vis the latter. However, the position would be



different when the charge also contains the offence under Section 498-A IPC (Husband or relative of 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."

18. So when a person is charged with an offence under Sections 302 and 498-A IPC on the allegation that he caused the death of a bride after subjecting her to harassment with a demand for dowry, within a period of 7 years of marriage, a situation may arise, as in this case, that the offence of murder is not established as against the accused. Nonetheless all other ingredients necessary for the offence under Section 304-B IPC would stand established. Can the accused be convicted in such a case for the offence under Section 304-B IPC without the said offence forming part of the charge?"

10. The learned counsel, drew the attention of this Court to a Judgment of this Court in **Subramani Vs. State, Rep.by Deputy Superintendent of Police, Jeyapuram Sub Division, Trichirappalli District** reported in (2013 (3) MLJ (Cr1.) 236) and would submit that in the absence of charge under Section 304-B IPC., the accused cannot be later convicted under Section 304-B IPC., instead for Section 302 IPC., simply because during the trial, evidence has come into to prove the offence under Section 304-B IPC.

11. Per contra, Mr.K.Suyambulinga Bharathi, the learned Government Advocate (crl.side) appearing for the prosecution would submit that the finding of guilt recorded by the trial Court against the accused is based upon the cogent evidence of P.W.1, P.W.2, P.W.4, P.W.6, P.W.8. P.W.9 and P.W.10. The trial Court found the death occurred otherwise than under normal circumstances within seven years of marriage and soon before death, the victim was subjected to cruelty and harassment and found the appellant guilty under Section 304-B IPC., and the sentence awarded on him is supported by relevant considerations and hence, the judgment and conviction of the trial Court do not merit any interference by this Court. In support of his contention, the learned counsel relied on an unreported Judgment of the Allahabad High Court in **Gur Bachan Singh Vs. State** made in **Criminal Appeal No.892 of 1991**, wherein in paragraph 20, it has been held as follows:-



"20. Under Section 304B IPC, the Court has a statutory compulsion merely on the establishment of two factual positions enumerated above to presume that the accused had 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."

12. I have heard the submissions made by the learned counsel appearing on either side and perused the materials available on record.

13. In this case, P.W.1 father of the deceased; P.W.2 brother; P.W.6 villager; P.W.7 Village President have categorically stated about the appellant subjecting the deceased to cruelty and harassment and the death had occurred otherwise than under normal circumstances within seven years of marriage. P.W.12, the Revenue Divisional Officer, who had conducted the inquest and enquiry, in his reports, Exs.P9 and P10, had confirmed unnatural death and gave a categorical finding that there was demand of dowry, harassment, and cruelty, which lead to the death of the victim. Further, the other witnesses, VAO, Panchayat President have stated about the confession and the recovery. The death had taken place in the matrimonial house. Considering all these facts, the trial Court had convicted the appellant under Section 304-B IPC. At this juncture, it is relevant to refer the Judgment of the Hon'ble Apex Court in the case of **Shamnsaheb M.Multtani Vs. State of Karnataka** reported in **(2001 SCC (Cri) 358)** wherein it has been held as follows:-

" 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 304B 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 case, it is liable to be convicted under Section



304B 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."

14. Further, the Hon'ble Apex Court in the Judgment reported in **(2001 SCC (Cri) 358)** (cited supra) at paragraph 16, explained the cognate offenses and had further delved with regard to comparison of offence under Section 304-B and under Section 302 IPC. In paragraph Nos.17 & 18, it has been held as follows:-

"17. The composition of the offence under Section 304-B 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-à-vis the latter. However, the position would be different when the charge also contains the offence under Section 498-A IPC (Husband or relative of 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.".

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15. The trial Court, without affording an opportunity to the appellant, had convicted him for offence under Section 304-B IPC., Hence, this Court feels it necessary, in the interest of justice, to afford appellant that opportunity.



(*)16. Accordingly, the judgment and Conviction passed by the Mahila Court, Madurai, in S.C.No.256 of 2009, dated 20.10.2014, is set aside. The case is remitted back to the trial Court and the trial Court should proceed against the appellant and not against the other three accused whose acquittal remain unchallenged, from the stage of defence. The appellant was charged under Section 302 IPC and later the trial Court convicted him under Section 304(b) IPC. Since statutory presumption is against the appellant, he ought to have been given an opportunity to give explanation and to produce materials, if any, to dispel the presumption. In view of the same, this Court permitted the appellant to enter upon the defence and remitted the case to the trial Court, and the trial Court to proceed against the appellant from the stage of defence that is from the stage under Section 233 of Cr.P.C. The appellant should put to notice that, unless he disproves his innocence, he is liable to be convicted under Section 304-B IPC. It goes without saying that considering the fact that the case is of the year 2007, the trial Court shall make every possible endeavor to conclude the trial, as expeditiously as possible, without granting any unnecessary adjournments to either side, if possible, within a period of three months from the date of receipt of a copy of this Judgment.

17. Since the appellant / accused had already been enlarged on bail pending disposal of the appeal, he shall remain at liberty until the disposal of the case afresh by the Sessions Court. The bail bond furnished by him, shall not be discharged, until disposal of the case upon remand.

18. In the result, the Criminal Appeal is partly-allowed to the extent indicated above.

19. The Registry shall remit the entire lower Court records to the concern Court within a week from today.

Sd/-

Assistant Registrar (CO)

**(*) the para 16 which was modified by
order dated 21.02.2020 by the Hon'ble Court.**

Sd/-

Assistant Registrar (CO)

/True Copy/

Sub Assistant Registrar

To

(*) TO BE SUBSTITUTED THE ORDER ALREADY DESPATCHED ON 06/01/2020

1. The Judge, Mahila Court, Madurai.
<https://hcservices.ecourts.gov.in/hcservices/>



2. The Inspector of Police,
Oomachikulam Police Station,
Madurai.
3. The Superintendent,
Central Prison, Madurai.
4. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
5. The Record Clerk,
Criminal Section (Record)
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

MPK

TE : 06/01/2020 : 8P/7C

Judgment made in
Cr1.A(MD)No.299 of 2014
03.01.2020

TR(17/03/2020) 8P 7C