

Form J(2)

**IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side**

**Present :
The Hon'ble Justice Bibek Chaudhuri**

C.R.A. 79 of 2016

***Johorul Haque
Vs.
The State of West Bengal***

For the Appellant : Mr. Somenath Banerjee, Adv.
Mr. Pronojit Roy, Adv.

For the State : Mr. Navanil De, Adv.

Heard & Judgment on : 17.12.2021.

Bibek Chaudhuri, J.

The question that is involved in the instant appeal is as to whether one of the accused persons, i.e., the husband of the *de facto* complainant can be convicted under Section 498A and Section 323 of the Indian Penal Code when allegation in the FIR by the *de facto* complainant/wife was physically and mentally tortured on illegal demand of money conjointly by all the matrimonial relations including the husband and accordingly charge was framed against all the accused persons taking aid of Section 34 of the Indian Penal Code.

The instant appeal is directed against the judgment and order of conviction and sentence dated 20th January, 2016 passed by the learned Additional Sessions Judge, Fast Track Court, Rampurhat in Sessions Trial No. 08/February/2013 arising out of Sessions Case No. 23/2013 convicting the appellant only under Sections 498A/323 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for one year with fine and default clause for the offence punishable under Section 498A of the Indian Penal Code and fine of Rs.500/-, in default, to suffer simple imprisonment for offence punishable under Section 323 of the Indian Penal Code.

It is not disputed that marriage of the *de facto* complainant was held with the appellant on 22nd June, 2011 as per Mohammedan rites and ceremonies and after marriage they started to live together as husband and wife. After few days of marriage, the accused persons being the husband, father-in-law, mother-in-law, brother-in-law and married sisters-in-law started treating him with cruelty in many ways and forced her to bring a sum of Rs.2,00,000/- from her father. The FIR discloses some undated incidents when accused persons assaulted her pulling her hair and by fists and blows on several parts of her body. In the meantime, she became pregnant and on 14th July, 2012 when she was in her father's house during her pregnancy for six months her sisters-in-law came to her paternal home and insisted her

to terminate the fetus. When she refused all the accused persons assaulted her by fists, blows and kicks. She narrated the incident to her father. He came to her matrimonial home on 17th July, 2012 and took her to her paternal home. Thereafter on 28th August, 2012, her father went to her matrimonial home for amicable settlement of the dispute but all the accused persons denied to accept the *de facto* complainant in their house until and unless an amount of Rs.2,00,000/- would be paid to them. All these incidents compelled the *de facto* complainant to lodge a written complaint against the accused persons before the Officer-in-Charge, Rampurhat Police Station.

On the basis of the said complaint Police registered Rampurhat Police Station Case No. 211/2012 dated 30th August, 2012 against six accused persons and took up the case for investigation. On completion of investigation, charge-sheet was submitted against all the accused persons under Sections 498A/323/313/511/406/34 of the Indian Penal Code read with Section 4 of the Dowry Prohibition Act.

Since the offence under Section 313 of the Indian Penal Code is triable by the Court of Sessions, the learned Sessions Judge, Birbhum after commitment of the case transferred the same to the Fast Track Court of the learned Additional Sessions Judge at Rampurhat for trial and disposal.

During trial, prosecution examined as many as 12 witnesses. Amongst them, the *de facto* complainant deposed as P.W. 1. P.W. 2, Alamgir Sk. and P.W. 3, Kalimuddin Sk. and P.W. 5, Maidul Islam are the neighbours of the matrimonial home of the *de facto* complainant and they did not support the prosecution case. They were declared hostile by the prosecution. P.W. 4, Nazir Hossain is the friend of the father of the *de facto* complainant. P.W. 6, Md. Moniruddin Ali is the father of the *de facto* complainant. P.W. 8, Rahatun Jannat Mukta is the sister of the victim. P.W. 9, Abdul Mujib @ Bablu is the brother-in-law of the victim. P.W. 10, Dr. Mrinal Kanti Ghosh is the scribe. P.W. 11, Dr. Udayan Choudhuri medically treated the *de facto* complainant and P.W. 12, Assistant Sub-Inspector, Mainirul Islam is the Investigating Officer of the case.

I have carefully perused the evidence on record independently as the first Court of appeal to ascertain the fact. It is not disputed that the *de facto* complainant is the legally married wife of the appellant. From the evidence on record it is also found that both the *de facto* complainant as well as the accused are school teachers. From the evidence of the *de facto* complainant (P.W. 1), it is ascertained that she was tortured physically by all the accused persons. Subsequently, on 15th July, 2012 she was forced to terminate her pregnancy by her two sisters-in-law. On 17th July,

2012, P.W. 1 informed her father over telephone about torture. She also alleged that the accused persons snatched all gold ornaments from P.W. 1. On 28th August, 2012, the father of the P.W. 1, i.e., P.W. 6, Moniruddin Ali came to her matrimonial home and tried to settle the dispute but failed. Since then the *de facto* complainant is staying at her paternal home. It appears from the evidence of P.W. 6, Maniruddin Ali that her daughter (P.W. 1) was tortured by her two sisters-in-law and younger brother-in-law, namely, Jahir Abbas. It is also stated by him that the parents of the appellant also tortured her physically and mentally. It is not disputed that since 28th August, 2012 the *de facto* complainant has been staying at her paternal home.

From the evidence of P.W. 7, Dr. Manas Roy who was posted as Medical Officer at Rampurhat Sub-Divisional Hospital, it is found that he medically treated the *de facto* complainant during the period from 29th May, 2012 to 15th November, 2012. On medical examination, he found that P.W. 1 was pregnant. He advised some medicines on 15th November, 2012 and his prescriptions are marked exhibit 3 collectively. It is important to note here that neither the *de facto* complainant complained of any torture on her abdomen nor the Medical Officer (P.W. 7) noticed any mark of injury on her abdomen as alleged by the *de facto* complainant in the FIR.

P.W. 11, Dr. Udayan Choudhuri medically examined P.W. 1 on 18th July, 2012. She visited the Doctor for medical treatment with a history of trauma of chest and back pain. P.W. 11 medically treated her and prescribed some medicines. The said prescription is marked as exhibit 4. It is important to note that P.W. 1 did not state the history of having chest and back pain to Dr. Chowdhuri (P.W.11). There is absolutely no record that she was physically assaulted by the accused persons.

Thus, from close scrutiny of the evidence on record this Court finds that all the witnesses stated that all the accused persons physically assaulted and tortured P.W. 1 on demand of a sum of Rs.2,00,000/-. I do not find any reason as to how the learned Trial Judge convicted the husband of the *de facto* complainant alone and other accused persons were acquitted. Secondly, all the witnesses who supported the prosecution case are close relatives of the *de facto* complainant. Obviously, they are interested witnesses. It is, of course, not the law of appreciation of evidence that the evidence of interested witnesses shall be discarded outright. On the other hand, the Courts are cautioned to accept the evidence of the interested and related witnesses after close scrutiny separating the shaft from grains.

In the instant case, the witnesses who supported the prosecution case are the relatives of the *de facto* complainant. I am

in agreement with the learned Trial Judge that the relatives are the best witnesses when the incident takes place inside four corners of a close house or room. When someone's daughter or sister is physically tortured on illegal demand of dowry, the relatives are the best witnesses to state about the incident that happened between the parties.

However, I am astonished to note that when the evidence of torture was against all the accused persons jointly how the appellant was separated and convicted under Sections 498A/323 of the Indian Penal Code.

There is another aspect of the matter which cannot be lost sight of. It is needless to say that as per the explanation to Section 498A any type of physical torture does not come within the meaning of Section 498A of the Indian Penal Code. Explanation to Section 498A defines cruelty in the following words: -

"Explanation – for the purpose of this Section 'cruelty' means

- (a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or torture 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 demand.”

The case before the learned trial Court was not under Explanation- (a) of Section 498A of the Indian Penal Code. The prosecution tried to establish its case within the meaning of clause (b) of Section 498A.

Therefore, the prosecution was under obligation to prove that the accused/appellant demanded dowry and on her failure she was harassed, assaulted and tortured. In the Court of trial charge was framed under Section 4 of the Dowry Prohibition Act. However, the learned trial Judge held that the said charge under Dowry Prohibition Act failed and the accused persons were acquitted from the said charge. When the charge under Section 4 of the Dowry Prohibition Act fails, charge of physical harassment on illegal demand of dowry shall automatically fail. It is not the case of the de facto complainant that the appellant alone made illegal demand of dowry. It is the case of the de facto complainant that the appellant and the other accused persons jointly demanded Rs.2,00,000/- (Rupees Two Lakhs) from her father. If the said amount was not part of dowry, charge under Section 4 of the Dowry Prohibition Act ought not to have been framed.

As the said charge was not proved and the appellant was acquitted from the charge under Section 4 of the Dowry Prohibition Act, he ought to have been also acquitted under Section 498A of the Indian Penal Code. However, there is sufficient evidence that the accused/appellant used to cause physical hurt to the de facto complainant on various occasions.

Considering consistent evidence on record on the charge under Section 323 of the Indian Penal Code, conviction of the appellant under Section 323 of the Indian Penal Code is maintained.

Accordingly, the instant appeal is partly **allowed**.

The order of conviction and sentence under Section 498A of the Indian Penal Code passed against the appellant by the learned trial Judge in Sessions Trial No 08/February/2013 set aside but the conviction under Section 323 of the Indian Penal Code against the appellant is affirmed. So far as the sentence is concerned, this Court is of the view that fine amount of Rs.500/- only is not sufficient considering the extent of offence under Section 323 of the Indian Penal Code. Therefore, the order of sentence under Section 323 of the Indian Penal Code is modified.

The appellant is sentenced to pay fine of Rs.1,000/- (Rupees One Thousand) only, in default, to suffer simple imprisonment for

three months for committing offence under Section 323 of the Indian Penal Code.

The appeal is, accordingly, **disposed of** on contest.

In view of the disposal of the instant appeal, the order dated 14.12.2021 be recalled.

The learned advocate for the appellant is at liberty to communicate the recalling order dated 14.12.2021 by a letter to the Court below.

Let a copy of this judgment be sent to the learned trial Court along with Lower Court record forthwith.

The parties are at liberty to act on the server copy of the judgment.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the learned advocates for the parties on usual undertakings.

(Bibek Chaudhuri, J.)

*Srimanta/Suman
A.Rs. (Court)*