

Keshav Kumar Vs. State

Keshav Kumar Vs. State

SooperKanoon Citation : sooperkanoon.com/1171215

Court : Delhi

Decided On : Sep-05-2014

Judge : S. Muralidhar

Appellant : Keshav Kumar

Respondent : State

Advocate for Def. : Ms. Isha Khanna

Advocate for Pet/Ap. : Mr. Sumit Kalra

Judgement :

IN THE HIGH COURT OF DELHI AT NEW DELHI CRL.A. No.155 of 2010
Reserved on:

28. h August 2014 Decision on:

5. h September 2014 KESHAV KUMAR Through: Appellant Mr.Dharmendra Vashisht and Mr. Sumit Kalra, Advocates Versus STATE Through: Respondent Ms. Isha Khanna, APP Inspector Yashwant, PS: Ambedkar Nagar, Delhi CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

509.2014 1. The Appellant challenges the judgment dated 12th December 2009 passed by the learned Additional Sessions Judge (ASJ) in SC No.21/2006

convicting the Appellant for the offences under Sections 306 and 498A IPC. The Appellant also challenges the order on sentence dated 21st December 2009 whereby for the offence under Section 306 IPC, the Appellant was sentenced to undergo rigorous imprisonment (RI) for five years along with a fine of Rs. 5,000 and in default to undergo simple imprisonment (SI) for three months. For the offence under Section 498A IPC, the Appellant was sentenced to undergo RI for one year along with a fine of Rs. 5,000 and in default to undergo SI for three months.

2. On 21st October 2005, a daily dairy (DD) entry No.24 was received by the Police Post (PP) Madangir, New Delhi under Police Station (PS) Ambedkar Nagar, New Delhi that a woman had committed suicide at House No.273, RPS Colony, Khanpur, New Delhi. On receiving the said DD entry, Assistant Sub-Inspector (ASI) Virender Singh (PW-11) along with Constable Brij Bhushan Tyagi (PW-10) reached the spot and found one woman hanging from the fan suspended by a chunni on the second floor of the building. A young girl, 21/2 years old, was found weeping there. Upon inquiry, PW-11 learnt that the name of the deceased was Mamta, wife of Keshav, the Appellant herein, and the name of the child was Gungun. PW-11 then informed the Station House Officer (SHO) and the senior officers. The crime team and the Sub Divisional Magistrate (SDM) were called.

3. Mr. Manish Garg (PW-12), who was the SDM of Hauz Khas, New Delhi on receiving the message from the police, proceeded to the spot. He prepared the unnatural death report (Ex. PW-12/A) and recorded the statement of Ms. Kiran (PW-1), mother of the deceased. Her statement was marked as PW-1/A. In the said statement, PW-1 stated that Mamta was working at Gandhi T.V. Shop, Madangir, New Delhi and that the Appellant was also working there. The Appellant was stated by PW-1 to have telephoned her and informed that her daughter, Mamta, had run away with someone. Thereafter, the Appellant took PW-1 to Arya Samaj Ashram at Bhogal, New Delhi. The pandit there showed them the register which revealed that no marriage had taken place of any person by the name of Mamta. After a few days, PW-1 received a call from Mamta informing her that she was staying with the Appellant who was regularly giving her beatings. He was also threatening her that he was a policeman and if she informed her mother about the

beatings, she would be killed. Thereafter, PW-1 learnt that Mamta was living at Pushp Vihar. When PW-1 went to meet Mamta at Pushp Vihar, she saw a child with her. Mamta was then brought with the child to her parents' place at Madangir. Mamta lived there for about eight months. Sometime later, the Appellant is stated to have met Mamta and begged for forgiveness and taken her back. After that PW-1 only heard about her daughter when she was asked to come to PS Ambedkar and was informed about the death of Mamta by hanging. PW-1 stated that she suspected that it was not a case of suicide and it was the Appellant who had murdered her daughter and that he should be punished.

4. The father of Mamta, Umeed Singh (PW-5), also gave a statement to the SDM (Ex.PW-5/A) in which he stated that Mamta used to tell him that the Appellant used to demand dowry from her. He also stated that Mamta told him that the Appellant was already married and had two children from his first marriage. In his statement, PW-5 stated that about 21/2 years back, the Appellant had shown him and PW-1, the marriage certificate of Mamta and Keshav. To verify the said certificate, PW-1 and PW-5 had gone to Arya Samaj Mandir, Bhogal. They found that no such marriage certificate had been issued. PW-5 further stated that Mamta was living with the Appellant, who used to constantly beat her and demand dowry. PW-5 stated that he learnt of the death of Mamta when he returned home on the night of 21 st October 2005.

5. The postmortem report (Ex.PW-8/A) opined that the death of Mamta was on account of asphyxia due to antemortem hanging.

6. In her statement to the police during investigation (Ex.PW-11/B), PW-1 stated that on 31st January 2003, at around 8 pm, the Appellant had telephoned her and called her to M.K. Electronics. When she reached there, the Appellant gave her a document and told her that it was given by her daughter Mamta who had run away with someone. From the said document, it appeared that Mamta had married one Rohit Sharma at the Arya Samaj Mandir, Jangpura. Subsequently, PW-1 gave a complaint at the Madangir PP and thereafter the police called the Appellant for questioning. Mamta arrived there and told the Police that she was 20 years old and had gone with the Appellant out of her own free will. In June 2003, PW-1 and

PW-5 learnt that Mamta had given birth to a baby girl. Mamta conveyed to PW-1 over the phone that thereafter the Appellant used to get drunk and subject Mamta to beatings and mental cruelty. PW-1 stated that Mamta was not being given any money for daily expenditure. PW-1 then brought Mamta back to her house and she stayed there for about 5-6 months. The Appellant then persuaded Mamta to come back by threatening that he would falsely implicate her father in some criminal cases. The Appellant continued giving threats to PW-1 over telephone. PW-1 finally heard of her daughter only when the police informed her of Mamtas death.

7. The Police arrested the Appellant who was residing in Pushp Vihar. By an order dated 12th April 2006 of the trial Court, charges were framed against the Appellant for the offences under Sections 306 and 498-A IPC.

8. The prosecution examined 15 witnesses. In his statement under Section 313 Cr PC, the Appellant admitted that he was, in the year 2002, working at Gandhi T.V. Shop in Madangir and that Mamta was working at the same shop for about a year. He denied having given any document/certificate to Mamtas parents regarding his marriage with Mamta at the Arya Samaj Mandir. He stated that The envelope was not given by me to the parents of Mamta but it was given by one Pritpal, who was also working at the shop of Gandhi. I was told the next day by mother of Mamta that envelope was found containing a Certificate of Marriage between Rohit Sharma and Mamta issued by the Arya Samaj Mandir, Jangpura, Bhogal. I was told the facts by the mother of Mamta. I had not seen them at the shop of Gandhi.

The Appellant denied having any relationship with Mamta. He denied residing at 273, RPS Colony, Khanpur. When asked whether he had anything else to say, the Appellant stated as under:

It is a false case. I am innocent. Mamta had married one Rohit Sharma. Before marriage of Mamta, her family was constructing their house and they had requested me for monetary help. I myself was not having the money but I got arranged a sum of Rs. 75,000 from Raj Kumar Wadhwa on interest. The money was not returned by the mother of Mamta when Mamta went to live with her husband after her marriage. I had been constantly reminding her mother to repay

the amount taken on interest from Raj Kumar Wadhwa but same was not paid by her. After death of Mamta, I was falsely implicated in the case to avoid paying the money. I am paying interest on the amount till date. I am married to one Renu and have three children. One daughter died while I was in jail. I was residing in the neighbourhood of Mamta.

9. The Appellant examined Sub-Inspector Kalu Ram (DW-1), who brought the copy of DD No.16 dated 16th February 2003 regarding Mamta going missing. The entry was marked as DW-1/D1. He also marked DD No.13 (DW-1/D2) dated 14th March 2003 at 7:55 pm which records the statement of PW-1 at PP Madangir stating that Mamta had returned. DW-1 added that Both Mamta and Rohit Sharma had come to the police post and told me that they are major. The accused present in the court was not the boy Rohit Sharma. On receiving missing report of Mamta I had visited the TV shop of the accused- Gandhi Electronics, Madangir. The person who had come with Mamta in the police post Madangir was a different person.

In his cross-examination by the learned APP, DW-1 stated that both the DD entries were not in his handwriting and that he had no personal knowledge of the case registered against the Appellant in FIR No.669 of 2005.

10. Subhash Chander, Sub-Registrar Births and Deaths, Mandir Marg, was examined as DW-2. He brought a copy of the birth certificate and register which showed that at entry No.5129 dated 30 th June 2003, a female child was shown to have been born with the fathers name shown as Rohit and the mothers name as Mamta. This document was marked as exhibit DW-2/A. There was no cross-examination of this witness by the learned APP.

11. Raj Kumar Wadhwa was examined as DW-3. He spoke about the fact that he had arranged a loan of Rs. 75,000 for being given to PW-1 at the instance of the Appellant. It had been agreed that PW-1 would pay interest to him at Rs. 1,000 per month. PW-1 paid him for two months and thereafter defaulted. In his cross-examination, he stated that he knew nothing about Mamta or whether she was married to the Appellant or that she had committed suicide because of harassment by him.

12. The learned trial Court, on an analysis of the evidence, came to the following conclusions: (i) The family of the deceased and the Appellant were known to each other well as they had been residing in the same street earlier. It was not disclosed who Rohit Sharma was. The Appellant was married to one Renu (PW-6) and it was perhaps because of that accused had assumed the name as Rohit for marrying with the deceased Mamta and it was so in the birth certificate of daughter of the deceased that fathers name is given as Rohit Sharma, otherwise, there is nothing to suggest that the accused Keshav Kumar and said Rohit Sharma were different persons.

(ii) The deposition of DW-3 that he had given a loan of Rs. 75,000 with no supporting document was not believable. (iii) The Appellant and the deceased Mamta had been cohabiting as husband and wife and also claimed to have married before the police, as was deposed by DW-1 and a child, Gungun, was born in the year 2003. Accordingly, The factum of the accused and the deceased having married each other has to be presumed. ..

. It was held that there was no substance in the stand of the Appellant that Mamta was not his wife. (iv) Under Section 113A of the Evidence Act, 1872 (EA'), since Mamta had died within seven years of marriage, the abetment of her suicide by her husband was to be presumed. The fact that the Appellant had married Mamta without disclosing his earlier marriage is an act of cruelty by itself against the deceased.

The Appellant was accordingly convicted for the offences under Sections 306 and 498-A IPC and sentenced as indicated hereinbefore.

13. This Court has heard the submissions of Mr. Dharmendra Vashisht, learned counsel for the Appellant and of Ms. Isha Khanna, learned APP.

14. The first and the foremost question is whether the prosecution had been able to prove that the Appellant and the deceased Mamta were married. The prosecution got marked through Kiran (PW-1) the copy of the marriage certificate given to her by the Appellant as 'Mark A'. The complaint given by PW-1 regarding her daughter going missing given to PP Madangir was marked as 'Mark B'. An

examination of Mark A shows that it is the certificate of the marriage of the Appellant with Renu (PW-6) and is dated 6th September 1996. This was purportedly signed by the pandit Satya Prakash Shashtri (PW-13). However, the marriage certificate which PW-1 speaks of was purportedly of the marriage between Rohit Sharma and Mamta. That marriage certificate has not been placed on record. Mark A, which is on the file, was in fact not shown to PW-13 when he was examined. He was asked about the marriage conducted on 16.3.2002 at Arya Samaj Mandir and he stated I did not issue any marriage certificate regarding the marriage of Rohit Sharma. 15. Ms. Isha Khanna, learned APP, stated that for some reason the copy of the certificate of marriage of Rohit Sharma with Mamta, which was in the police file, was not placed on the judicial record. Perhaps because PW-13 was clear that no such certificate was issued by him, the police did not place it on the judicial record. Further, it was in the evidence of both PWs 1 and 5 that when they went to the Arya Samaj Mandir at Bhogal to verify if such a marriage had taken place, they were told by PW-13 that there was no record of any such marriage.

16. The complaint by PW-1 in the first instance about her daughter going missing was made on 16th February 2003 at PP Madangir. This was nearly 16 days after her daughter went missing. In the said complaint, she stated that on 1st February 2003, Mamta had gone to her grandmothers place at Wazirpur, but had not returned. In the said complaint, she made no mention of the Appellant having come to them on 31st January 2003 and giving them a copy of a marriage certificate regarding the marriage of Mamta. In her cross-examination, she stated that she knew the Appellant from childhood, but claimed that she did not know whether he was married to PW-6. PW-1 came to know after the death of her daughter that the Appellant was having three children from wedlock with PW-6. That the above complaint was given by PW-1 at PP Madangir, 16 days after her daughter went missing was confirmed by the DD entry (DW-1/D1) brought by DW1. This entry dated 16th February 2003 notes that PW-1 only spoke of Mamta going to her Nanis place and not returning. The next relevant DD entry was dated 14th March 2003 (nearly a month after PW-1s initial complaint), with the time 7:55 pm, recording the statement of PW-1 that Mamta had returned; that she had married Rohit Sharma, s/o Gopal Sharma, r/o Rajasthan; that she was six months

pregnant and that she wished to go back with her husband out of her free will. It is significant that in the evidence of DW-1, he stated that both Mamta and the said Rohit Sharma had come to the PP. However, he was categorical that the accused person in the Court was not the boy Rohit.

There was hardly any cross-examination of DW-1 by the learned APP. His evidence that it was Rohit Sharma who had come with Mamta to PP Madangir and not the Appellant remained unchallenged. This part of the evidence has not been discussed by the learned trial Court at all.

17. Another significant aspect of the identity of Rohit Sharma came out in the evidence of Mr. Vishnu Dev Gaba (PW-3), the owner of house No.273, RPS Colony, Khanpur. He stated that he was the owner of the entire house, the second floor of which was where Mamta was residing and where she was found hanging from the ceiling fan. He stated that the second floor was given on rent to Rohit Sharma who was residing with his wife and child. He stated that the said Rohit Sharma was not present in the Court that day. Obviously, the witness had turned hostile and was permitted to be cross-examined by the learned APP. In his cross-examination, he claimed that I have seen Rohit Sharma once at the house itself. He was of blackish colour about 30 years and 5 feet 5 inches tall.

He then categorically stated that It is incorrect to suggest that the house was given on rent to the accused present in the Court today.

18. The next witness relevant in this context is Lalita Devi (PW-2), who was working as a maid servant at the house where the deceased was found hanging. She stated that she did not know the name of the husband but only knew the name of the child as Gungun. She stated that I only saw the wife/lady hanging and since I never saw her husband, so I cannot say whether the accused present in the court was her husband or not.

In her cross-examination by the learned APP, it was recorded that Accused Keshav is shown to the witness but witness was unable to identify him.

19. As a result, there was no evidence to show that the Appellant and Mamta were married or that the Appellant was residing with Mamta in the house where she was found hanging. The evidence of PWs 1 and 5 does not inspire confidence. The police had failed to investigate who Rohit Sharma was and to conclusively establish that Rohit and Keshav (the Appellant), were one and the same person. One possibility was for the prosecution to file an application praying that the Appellant should give a sample for DNA testing. This was not done for some reason. With there being no evidence of the marriage between Mamta and Rohit it was erroneous for the trial Court to have concluded to the contrary on account of their living as husband and wife to the knowledge of society or on account of long cohabitation between the two, both of which have also not been proved.

20. On the other hand, from the evidence of PW-6, it is clear that she and the Appellant have been married since 1996 and their marriage certificate is on record. In the Court, the landlord of the house (PW-3), i.e., 273, RPS Colony, Khanpur was recalled and further examined by the learned APP. PW-3 stated that Rohit Sharma had been introduced to his wife by Raj Rani, r/o 19/529, DDA Flats, Madan Giri. He denied his previous statement to the police. The said Raj Rani was not produced as a witness.

21. The existence of a valid marriage is a sine qua non for attracting the offence under Section 498-A IPC. In *Shivcharan Lal Verma v. State of Madhya Pradesh* JT2002(2) SC641 a three-Judge Bench of the Supreme Court set aside the conviction of the Appellant therein under Section 498-A IPC when it was shown that the marriage of the accused with the deceased had taken place during the subsistence of an earlier valid marriage of the husband. The subsequent marriage was therefore null and void. Subsequently in *Reema Aggarwal v. Anupam* (2004) 3 SCC199 a two-judge Bench of the Supreme Court without noticing the decision in *Shivcharan Lal Verma v. State of Madhya Pradesh* (supra), held that a person who contracts marriage ostensibly and cohabitates with such woman, in the purported exercise of his role and status as a husband' would fall within the expression husband under Section 498 A IPC.

22. However, even in terms of the decision in *Reema Aggarwal v. Anupam* (supra), there has to be some clear evidence to show that either there was a marriage between the Appellant and Mamta or that they did cohabit for a long time as husband and wife. Barring the unreliable testimonies of PWs 1 and 5, there is no clear evidence to prove this.

23. The evidence of PWs 1 and 5, as noticed earlier, does not inspire confidence. They have been making improvements at every stage of the case. As far as PW-1 is concerned, when she gave a statement to the PP Madangir on 16th February 2003, she made no mention of the Appellant having given her and PW-5 a copy of any marriage certificate on 31st January 2003. In her statement to the SDM, PW-1 did not mention that the Appellant and Mamta were married. She also made no mention of the fact that on 14th March 2003 at PP Madangir, Mamta had returned and had gone back with Rohit Sharma out of her free will and that she was married to the said Rohit Sharma. For the third time in her statement to the police (Ex. PW-11/B), PW-1 again made no mention about Mamta having married Rohit Sharma. Her statement in the Court about the Appellant having married Mamta is therefore a substantial improvement over her previous statements.

24. As far as PW-5 is concerned, he stated that the marriage certificate brought by the Appellant to them, showed the marriage of Keshav with Mamta, whereas, even according to the prosecution, it showed the marriage of Rohit Sharma with Mamta and in any event, that certificate was never placed on the judicial record. PW-13 stated that he never issued any such marriage certificate. PWs 1 and 5 have also been inconsistent about their statements concerning the demands of dowry or of cruelty.

25. For the above reasons, this Court is unable to concur with the finding of the learned trial Court that there was a marriage between the deceased and the Appellant; that they had been cohabiting as husband and wife or that they were living as husband and wife. Consequently, the question of convicting the Appellant for the offence under Section 498-A IPC does not arise.

26. Turning to the offence under Section 306 IPC, it would have to be shown that Mamta was subjected to cruelty by the Appellant in proximity to the date of her

death. In *Gangula Mohan Reddy v. State of Andhra Pradesh* JT2010(1) SC17 the Supreme Court cautioned as under:

20. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.

21. The intention of the Legislature and the ratio of the cases decided by this court is clear that in order to convict a person under section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he committed suicide.

27. The evidence of the maid servant (PW-2) does not support the case of the prosecution that there was any incident of harassment or cruelty towards Mamta by the Appellant. The Appellant has not been proved to have been residing at 273, RPS Colony, Khanpur, where Mamta was found hanging. The postmortem report showed no notice of external injuries (apart from the ligature mark on the neck due to hanging). The death report of the SDM did not as well. Therefore the question of Mamta being subject to any physical cruelty is ruled out. To prove mental cruelty, there has to be some clear and cogent evidence. It would be unsafe to proceed to draw any inference on the basis of the evidence of PWs 1 and 5 who are not reliable. In any event even according to them, after the alleged incidents of cruelty as told to them by Mamta, she resumed living with her husband, who on the record was Rohit Sharma and who was not shown to be the same person as the Appellant. The learned trial Court has observed that the cruelty resulted as a consequence of the Appellant not disclosing to Mamta that he was already married. However, that was not the case of the prosecution. This explains why the said circumstance was not put to the Appellant under Section 313 Cr PC. In terms of the judgment in *Sujit Biswas v. State of Assam* 2013 [3]. JCC1887 the failure to put such a circumstance to the accused would preclude it from being used against him. As explained in *Ramesh Kumar v. State of Chhattisgarh* (2001) 9 SCC618 for the presumption under Section 113A of the EA to be attracted, the foundation

thereof must exist, which in this case was to prove that the Appellant was the husband of Mamta. The prosecution failed to prove the said foundational fact.

28. For the aforementioned reasons, this Court sets aside the impugned judgment dated 12th December 2009 and the order on sentence dated 21st December 2009 of the learned trial Court. The appeal is allowed in the above terms. In terms of Section 437A Cr PC, the bail bond and the surety bond furnished by the Appellant will continue for a period of three months. S. MURALIDHAR, J.

SEPTEMBER5 2014 tp

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com