

Sukhdev Vs. State of Maharashtra

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Court : Mumbai

Decided On : Mar-27-2002

Reported in : II(2003)DMC72

Judge : R.G. Deshpande and ;V.M. Kanade, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 228; [Indian Penal Code \(IPC\), 1860](#) - Sections 302 and 304B; [Evidence Act, 1872](#) - Sections 113B

Appeal No. : Criminal Appeal No. 21 of 1997

Appellant : Sukhdev

Respondent : State of Maharashtra

Advocate for Def. : Dangre, A.P.P.

Advocate for Pet/Ap. : M.R. Daga, Adv.

Judgement :

V.M. Kanade, J.

1. The appellant/accused, in this appeal, is challenging the judgment and order passed by the Second Additional Sessions Judge, Yavatmal, in Sessions Trial No. 18/1995, on 6.1.1997 whereby the Additional Sessions Judge, convicted the accused Under Section 302 of the Indian Penal Code and sentenced him to suffer

imprisonment for life and to pay a fine of Rs. 5,000/- and in default to suffer further R.I. for one year. The accused is also convicted for the offence punishable Under Section 498A of the Indian Penal Code and was sentenced to suffer R.I. for 3 years and to pay a fine of Rs. 2,000/- and in default to suffer further R.I. for 6 months. It was further directed that both the sentences should run concurrently.

FACTS

The case of the prosecution, in brief, is as follows :

The appellant/accused married Nirmala who was the daughter of Shripat Bapurao Raut, on 1.5.1992. The marriage was performed as per the customary rites at Abaji Maharaj Devasthan, Babhulgaon and after marriage Nirmala went with her husband and they started residing in the matrimonial house at Warkhed. After 5-6 months they shifted to village Mangsawangi.

3. It is a case of the prosecution that the accused was paid dowry of Rs. 15,000/- at the time of marriage and even after marriage the accused used to demand money from the father of Nirmala and if the said amount was not paid, the accused used to severally beat and ill-treat her. It is their case that after marriage, on 2-3 occasions when Nirmala visited her maternal place at Khangaon, she had disclosed this fact to her father. She had also disclosed that the accused had threatened her that if the amount which was demanded by him was not paid by her father, she would be killed,.

4. It is alleged that on 18.11.1994 at about 2.00 p.m., the accused mercilessly assaulted Nirmala by giving fist and kicks blows and also assaulted her with a stick and throttled her, as a result of which she died.

5. It is further alleged that prior to this incident when Nirmala had gone to her maternal house for delivery of her first child, the accused had demanded Rs. 7,000/- from his father-in-law and out of the said amount which was demanded, an amount of Rs. 6,500/- was paid to the accused by the father of Nirmala.

6. It is further alleged that the accused had demanded Rs. 3,000/- more at that time. However, the father of Nirmala had expressed his inability to the said

demand. Since the demand made by the accused was not fulfilled by his father-in-law, the accused had taken his wife Nirmala to the matrimonial house. The prosecution has further alleged that after Nirmala was murdered by the accused, the prosecution had taken search of the house of the accused and had recovered certain articles. It is further alleged that the father of deceased Nirmala had also given two letters which were sent by the accused to him demanding dowry. In one letter, he had demanded Rs. 500/- as dowry and in the other letter he had demanded a ceiling fan,

7. The prosecution filed its charge sheet and on the basis of the charge sheet, the charge was framed against the accused Under Section 302 read with Section 498A of the Indian Penal Code. The accused pleaded not guilty to the charge.

8. The prosecution examined 8 witnesses. The entire evidence adduced by the prosecution was in the nature of circumstantial evidence. Out of the 8 witnesses which were examined by the prosecution, P.W. 1 Madhukar Bapurao Raut is the maternal uncle of deceased Nirmala, who had filed the complaint to the Police Station at 11.00 a.m. on 18.11.1994. P.W. 2 Shripat Bapuraoji Raut is the father of the deceased, who has produced two letters which were sent by the accused demanding dowry and he has further stated that deceased Nirmala had on 2-3 occasions informed him that the accused used to assault her and ill-treat her and used to demand money from her. P.W. 3 Suman is an aunt of deceased Nirmala. She has been examined to prove that deceased Nirmala had met her on the morning of 18.11.1994. P.W. 4 Bandu is the brother of the deceased who is residing at Poona. He has also stated that one letter was written by the accused to him in which he demanded a ceiling fan. P.W. 4 Bandu also stated that the accused used to ill-treat his sister and that his sister had mentioned this fact to him. P.W. 5 Smt. Yamutai and P.W. 7 Abdul Mumtaj are the Panch witnesses. P.W. 5 has been examined as a Panch in respect of the inquest Panchnama and P.W. 7 has been examined as a Panch for the seizure of the letters and lastly the prosecution has examined P.W. 8 Bhende who is an Investigating Officer. Apart from this, the prosecution has examined P.W. 6 Dr. Ravikant who is the Medical Officer who has performed the post mortem on the body of the deceased and has submitted post mortem report. The perusal of the post mortem report shows that

the cause of death is asphyxia due to throttling. Column 17 in the post mortem discloses the nature of anti mortem injuries on the person of the deceased which are as follows :

- (1) Contusion below right ear-pins 2 cm. x 2 cm. antere laterally.
- (2) Contusion below both eyes 1/2 X 1/2 each.
- (3) Contusion over right thigh' in upper l/3rd portion anteriorly, size 1 cm. x 1 cm.
- (4) Contusion over right foot, 2 cm. x 1 cm.
- (5) Contusion over left foot, 1 cm. x 1 cm.
- (6) Contusion over left leg upper l/3rd portion 2 cm. x 1 cm.
- (7) Contusion over left side of back below left scapular area, 4 cm. x 2 cm. obliquely placed.
- (8) Contusion over both elbows 1 cm. x 1 cm.
- (9) Contusion over right forearm lower l/3rd portion, 4 cm. x 2 cm.
- (10) Contusion over buttocks both 4 cm. x 2 cm. each.

9. It is the case of the prosecution that the death was homicidal and that the death was caused due to the brutal assault made by the accused, which culminated in causing death of the deceased by throttling her. The appellant/accused put up the defence of denial. However, in the statement which was recorded Under Section 313 of Cr.P.C, he has merely stated that he was not at his residence from 17th to 19th November, 1994 and had gone to Yavatmal. Apart from the said fact, he has not offered any other explanation as to how his wife had suffered all these injuries.

10. The Trial Court after perusing the evidence, came to the conclusion, that the prosecution had proved its case beyond reasonable doubt and, therefore, convicted the accused Under Section 302 read with Section 498-A of the Indian Penal Code.

11. We have heard the learned the Counsel appearing on behalf of the appellant/accused and learned A.P.P. appearing on behalf of the State at length. We have perused the judgment of the Trial Court and also evidence adduced by the prosecution. We have perused the post mortem report as also the letters which were sent by the accused to the father and brother of the deceased.

12. The learned Counsel appearing on behalf of the appellant submitted that though it could not be disputed that the death of the deceased Nirmala was homicidal, the prosecution had failed to prove that the appellant had committed murder of the deceased. He submitted that the prosecution has not adduced any evidence to prove the presence of the accused at the time of the incident. He submitted that though the death of Nirmala had taken place in the matrimonial house i.e. at the house of the parents of the appellant /accused, no evidence has been adduced of any neighbour or any other person to show the circumstance under which the dead body was found. He submitted that there was clearly a missing link and no evidence has been adduced to show as to what really happened between 17th and 18th November, 1994 when the complaint was filed in the Police Station, He submitted that under these circumstances, though at the best, assuming without admitting that the prosecution had, to some extent, proved the case of ill-treatment and demand of dowry, the accused could have been convicted under Section 498-A of the Indian Penal Code. However, there was no evidence to show that the accused had committed offence of murder Under Section 302 of the Indian Penal Code.

13. Mrs. Dangre, learned A.P.P. appearing on behalf of the State, has submitted that the prosecution has clearly established through the circumstantial evidence which proved beyond doubt that the appellant/accused had committed the murder of deceased Nirmala. She submitted that the case of demand of dowry has been conclusively proved by the father and the brother of deceased Nirmala. She submitted that the letters which were produced by the father of the deceased clearly established that the demand was made from time to time by the accused. She further submitted that deceased Nirmala had also informed her father about the demand made by her husband and the frequent ill-treatment given to her on account of non-payment of money by her father, She submitted that since it is an

admitted position that the body of deceased Nirmala was found in the matrimonial house, it was the duty of the accused to offer explanation as to how the said body was found. She submitted that Under Section 106 of the Evidence Act, these are the facts within the knowledge of the accused and as such the burden was on the accused to explain these facts. She submitted that in fact the accused had merely made a statement, in his statement recorded Under Section 313 of Cr. P.C, that he had gone to Yavatmal from 17th to 19th November, 1994. She submitted that the defence of alibi was not taken by him. She submitted that, therefore, the findings of the Trial Court should be confirmed by this Court.

14. Mrs. Dangre, learned A.P.P. relied on the various judgments of the Apex Court in the case of dowry death where the Apex Court has held that the burden of explaining the facts which are within the knowledge of the accused, is squarely on the accused himself and in the absence of any explanation it could be taken as a circumstance against the accused. The learned A.P.P. placed reliance on the case of Vishwa Nath v. State of Haryana (Punjab and Haryana High Court), reported in The learned A.P.P. further placed reliance on the case of State of Rajasthan v. Mahavir @ Mahavir Prasad, (Supreme Court), reported in II : 1998 CriLJ4064 The learned A.P.P. also placed reliance on the case of Bhoora Singh v. State (Allahabad High Court), reported in so also relied on the judgment of the Madras High Court in the case of Shunmugasundaram v. State, reported in I

15. From the evidence of P.W. 6 Dr. Ravikant, it is very apparent that the deceased was killed in a brutal manner. There were about 10 injuries on her person and these injuries indicated that the deceased was systematically tortured and the after she was throttled to death. She was assaulted by hands, kicks and stick. From the injuries which are noticed by Dr. Ravikant (P.W. 6) it is clear that the deceased was severally beaten on toes and on her hands. There were injuries on the elbows of the deceased. There were injuries on her back and on her hips. Further injuries were found on her thighs. The injuries were also found on her face, below her ears and below her eyes. The colour of the nails was found to be bluish which clearly suggests that she was assaulted with stick at her hands and nails, till they turned black and blue. After all these injuries were caused on her person, she was throttled to death which is evident from the fact that thyroid cartilage had

ruptured.

16. However, though the deceased had died in such a brutal manner, it appears that the investigation has not been carried out in the manner in which it ought to have been carried out. It is apparent that the investigation has been carried out in most casual and callous manner. Though the statements of 19 witnesses were recorded, only 8 witnesses are examined out of which one is an Investigating Officer. P.W. 1 Madhukar Raut, who is a paternal uncle of deceased Nirmala, has stated that he was informed by one Anil that the accused had assaulted deceased by fists, kicks and stick and that she had died as a result of the said assault and thereupon he immediately went to the Police Station, Manswangi and lodged the First Information Report. In the First Information Report, he has mentioned that he came to know about the death and, therefore, he had lodged the First Information Report. It is very difficult to believe that if the death had taken place on 18.11.1994, the prosecution was unable to find a single witness to report the said death. In ordinary course, Anil who had informed the P.W. 1 about the death and whose statement was also recorded ought to have been examined by the prosecution. However, though his statement was recorded, the prosecution has not examined him as a witness. The evidence of P.W. 1 Madhukar Raut does not support the prosecution case in proving that the appellant was in any way responsible for the death of the deceased Nirmala. P.W, 2 Shripat who is the father of the deceased also has merely narrated the various demands of dowry made by the accused. He has produced two letters which were sent by the accused. He has also narrated that deceased Nirmala used to tell him about the ill-treatment meted out to her by the accused. However, though this witness does establish the previous behaviour of the accused in respect of the demand of dowry, he does not establish or prove that the accused was responsible for the death of deceased. Similarly, P.W. 4, who is the brother of the deceased, has only proved one letter which was written by the accused to him demanding a ceiling fan. He is residing at Poona and his statement was recorded almost after 20 days after the date of the incident. He also has no knowledge about the circumstance under which the death of Nirmala was caused. P.W. 3 Suman who is a sister of P.W. 1 and P.W. 2, and aunt of the deceased, has merely deposed that she met deceased Nirmala on the morning of 18.11.1994. This evidence at the most

establishes the fact that deceased Nirmala was alive on the morning of 18.11.1994. Apart from these four witnesses, the prosecution has not examined any other witness to prove the presence of the accused at the scene of the offence.

17. In the present case, the charge which is framed against the accused is Under Section 302 read, with Section 498A of the Indian Penal Code. Though there is a separate section which has been added to the Indian Penal Code in 1986 by way of amendment viz. Section 304B, which has been described as dowry death, the said charge has not been framed. Section 304B of the Indian Penal Code reads as under :

'304-B. Dowry death-(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or in connection with, any demand for dowry, such death shall be called 'dowry death', and such husband or relative shall be deemed to have caused her death.

Explanation-For the purposes of this sub-section dowry shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.'

Perusal of Section 304-B clearly shows that in a case where wife dies under suspicious circumstance and if it is a homicidal death which takes place within 7 years of the marriage, then there is a presumption that the accused and his relatives are responsible for the death of the wife and the burden is cast on the accused to rebut the said presumption. Unfortunately though now it is a settled position in law that the charge of murder Under Section 302 of the Indian Penal Code and dowry death Under Section 304B can be framed in respect of the same offence, the said charge has not been framed. With the result, that in the absence of such a charge being framed, the Court cannot presume that the accused had

committed the crimes as mentioned Under Section 304-B as also Under Section 113B of Evidence Act. Section 113B of the Indian [Evidence Act, 1872](#) reads as follows :

'113B. Presumption as to dowry death-When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.'

It was submitted by Mrs. Dangre, learned A.P.P. appearing on behalf of the prosecution that in view of the Section 221(2), if the facts of the case disclose that a lesser offence was committed by the accused, in that case, he could be convicted of the lesser offence even if the said charge was not framed. She submitted that Section 302 of the Indian Penal Code was graver offence of murder whereas Section 304-B has been categorised as lesser offence, in view of the fact the conviction for the offence Under Section 304-B is prescribed as minimum period to 7 years and extending up to life imprisonment. She submitted that in view of this fact, this Court could draw an inference and presume that the accused has committed the murder of deceased Nirmala and on the basis of the said presumption which has not been rebutted by the accused by adducing any evidence whatsoever, confirm the judgment and order of the Trial Court. She relied on the Judgment of the Allahabad High Court reported in Bhoora Singh v. State (Supra). She submitted that it has been held by the Allahabad High Court that the charge Under Sections 302 and 304-B can co-exist. The Allahabad High Court has held as follows :

'However, in Soni Devrabhai Babubhai v. State of Gujarat : 1991 CriLJ3135 on which Mr. P.N. Misra learned Counsel for the appellants had placed reliance, there is an important observation in paragraph 4 which may be quoted in verbatim (at page 3136; of Cri. LJ) :

'The reason given by the High Court to support its view is that the offence was committed prior to the date of insertion of Section 304-B, in the Indian Penal Code on account of which the section can have no application to the present case. None

of the Courts below has examined the applicability of any other pre-existing more stringent provision even if Section 304-B does not apply. As such affirmation of the view that Section 304-B does not apply, will not preclude the appellant from contending that any other more stringent provision is attracted on the accusation made., If that point is raised, the Courts will have to decide the same on merits on the basis of accusation made. It is in this background that the point raised by the appellant regarding applicability of Section 304-B is decided by us.'The lines underlined above by this Court would lend support to the view that in a case, charge Under Section 304-B as well as Under Section 302, I.P.C. may co-exist. This ruling fortifies the view that on the facts of the present case Section 304-B, I.P.C. will not be attracted because the section had come into existence quite sometime after the death of Smt. Urmila.'

18. The submission of Mrs. Dangre, learned A.P.P. appearing on behalf of the prosecution, cannot be accepted because in the present case the charge Under Section 304-B was not framed by the Trial Court. The charge Under Section 304-B if not framed, then the presumption cannot be drawn against the accused. The contention of Mr. Daga, learned Counsel appearing on behalf of the appellant will have to be accepted that in the absence of specific charge being framed against the accused, he cannot be convicted for the said offence, because prejudice will be caused to the accused, if he is convicted for an offence of which no specific charge is framed, especially in a case where by that charge the presumption is drawn against the accused by framing the said charge. Under the circumstances, therefore, in the absence of a charge being framed Under Section 304-B, the presumption of accused having committed murder of the deceased cannot be said to be proved.

19. It is no doubt true that the charge Under Section 498-A has been proved against the accused in view of the evidence given by the father and brother of the deceased, as also from the letters which are written by the accused to the father and brother which established beyond doubt that there was a demand of dowry made by the accused from time to time and that he had assaulted the deceased from time to time. However, that by itself does not prove the charge of murder Under Section 302. It is no doubt true that the deceased has been found murdered

and that the case of homicidal death is made out by the prosecution. It is also true that the deceased was murdered in the most brutal manner. The evidence on record, thus, creates suspicion against the accused. However, the accused cannot be convicted merely on suspicion. It is the duty of the prosecution to adduce evidence in such a manner as to leave no doubt that the accused and the accused alone was responsible for the death of the deceased.

20. Mrs. Dangre, learned A.P.P. appearing on behalf of the State relied upon the judgment of Punjab and Haryana High Court in the case of Vishwa Nath v. State of Haryana (supra), and submitted that the Punjab and Haryana High Court has held in the said case that since the accused had not satisfactorily explained certain facts which were within his own knowledge and had, in fact, disbelieved whatever explanation which was given by the accused and had dismissed the appeal.

We are unable to accept the submission of the learned A.P.P. In the present case in the absence of any evidence on the part of the prosecution to prove the presence of the accused even in the village on the said day, the question of offering explanation by the accused does not arise. It is a well settled principle in criminal law that the case of the prosecution must be established on its own merits and not on the weakness of the defence. Unfortunately, in this case, much to our dismay we find that there is an absolute apathy shown by the prosecution and by the Investigating Officer in conducting the investigation and as a result there is no evidence before us on the basis of which we can come to the conclusion that the accused alone is responsible for having committed offence of murder of deceased Nirmala. Mrs. Dangre, learned A.P.P. appearing on behalf of the State further relied upon the judgment of the Apex Court in the case of State of Rajasthan v. Mahavir (supra), and submitted that the Apex Court had held that in a case where the accused had taken a plea of alibi and had not proved his case of alibi then in such a case it would be an additional circumstance which can be used against him for holding that he is responsible for having committed the said offence.

There cannot be any doubt regarding the said proposition and ratio which has been laid down by the Apex Court. However, in the facts of the present case the accused has not taken specific plea of alibi by adducing any evidence. He has

merely stated in the statement Under Section 313 of Cr. P.C, when he was asked by the Trial Court as to what was his explanation about the said murder of his wife to which he had given reply in the form of denial and further stated there he was not in the town from 17th to 19th November, 1994. The said statement in the form of denial Under Section 313 of Cr. P.C. cannot be treated on the same footing as plea of alibi which is to be specifically raised in the form of evidence by the accused. Under the normal circumstance, if the prosecution had proved the fact of the presence of the accused in the village or in the house where the offence was committed then under such circumstances an inference could be drawn from the false statement which is made by the accused in his statement Under Section 313 of Cr. P.C. However, in this case, the prosecution not having proved that the accused was present in the house or in the village at the time when offence was committed, such an adverse inference cannot be drawn from the statement made in his statement Under Section 313 of Cr. P.C. Mrs. Dangre, learned A.P.P. further relied on the judgment of the Madras High Court in the case of Shunmugasundaram v. State by Deputy Superintendent of Police, Erode Town (supra), and submitted that in the said case the Madras High Court had held that once the motive of dowry was proved and it was also proved that the death was caused due to manual strangulation which was proved by the medical evidence, coupled with the fact that the accused and deceased were present alone in their house at the time of incident, such evidence would be sufficient for convicting the accused Under Section 302 of the Indian Penal Code. The said judgment, in our view, will not be of any assistance to the prosecution in this case because the prosecution has not at all adduced any evidence to show the presence of the accused either in the house or even in the village. We would like to note here that if such a evidence had been adduced by the prosecution then this Court would undoubtedly have confirmed the order of the Sessions Court. However in the absence of this crucial evidence, the benefit of doubt will have to be given to the accused. The accused was arrested on 19.11.1994 and is in jail since then. He was neither released on bail by the Trial Court during the pendency of the trial nor he was released during the pendency of the appeal in this Court.

21. In the result, the conviction Under Section 498-A of the Indian Penal Code, is confirmed. However, the appellant/accused is acquitted from the charges levelled

against him Under Section 302 of I.P.C. The judgment and order of the Addl, Sessions Judge is set aside to that extent. The appellant/accused be released if he has already undergone the sentence Under Section 498-A of the Indian Penal Code and not required in any other case.

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