

Mahesh Kumar Vs. State

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Court : Allahabad

Decided On : Aug-01-2001

Reported in : 2001CriLJ4417

Judge : G.P. Mathur and ;U.S. Tripathi, JJ.

Acts : Evidence Act - Sections 1, 8, 32, 32(1), 113-B and 114; Indian Penal Code (IPC) - Sections 201, 304-B and 498-A

Appeal No. : Criminal Appeal No. 336 of 1991

Appellant : Mahesh Kumar

Respondent : State

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : Shiv Nath Singh and ;V.S. Singh, Advs.

Disposition : Appeal dismissed

Judgement :

U.S. Tripathi, J.

1. Appellant Mahesh Kumar has preferred this appeal against the Judgment and order dated 8-2-1991 passed by 5th Additional Sessions Judge, Kanpur Dehat in S.T. No. 198 of 1988 convicting the appellant under Sections 498A, 304B and 201,

I.P.C. and sentencing him to undergo R.I. for a period of 3 years under Section 498A, imprisonment, for life under Section 304B and R.I. for a period of 7 years under Section 201, I.P.C. Further it. was directed that all the substantive sentences shall run concurrently.

2. The prosecution story, briefly stated, was that Brij Bihari Awasthi (P.W. 2) had married his daughter Smt. Sunita deceased (17) about 11 months before the occurrence of this case with the appellant Mahesh. Kumar. He had provided adequate dowry in the marriage. But when Sunita deceased started living with the appellant after marriage the appellant along with his sister Km. Shashi and brother-in-law Prem Shankar started demand of scooter in dowry from Brij Bihari (P.W. 2). The deceased when returned back to her parents house told to her father that in case scooter was not given to the appellant in dowry, she would be killed. Prior to a few days of the occurrence Brij Bihari (P.W. 2) had sent Upendra (P.W. 1) to the Sasural of the deceased for taking her back. The appellant and the other accused told Upendra that Sunita deceased would not be sent back to her parents' house unless scooter was provided to him.

3. On the night of 7/8-5-1988 Ganga Charan (P.W. 4) Pradhan of Village of the appellant got information that Smt. Sunita w/o appellant died inside her room by burning herself. He sent a written information (Ext. Ka-5) to this effect to the S.O., P.S. Bhoganipur, district Kanpur Dehat; which was received at P.S. Bhoganipur at 6.20 a.m. on 8-5-1988, the endorsement of which was made in G.D. report (Ext. Ka-3) by Constable Moharrir Mani Karnika Prasad (P.W. 3). On receipt of above information the S.D.M. Bhoganipur was informed and requested for conducting inquest of the dead body of the deceased who died within a year of her marriage. Sri Ansuman Singh the S.O.P.S. Bhoganipur also proceeded to the spot along with Police force and Inquest Book. Sri S.P. Singh S.D.M. Bhoganipur reached the spot and started inquest proceeding at 4.00 p.m. He prepared inquest report (Ext. Ka-6) and other relevant papers (Ext. Ka-7 to Ka-11). Brij Bihari (P.W. 2) the father of the deceased was also present at the time of inquest and he made an endorsement (Ext. Ka-2) on the inquest report that according to situation and condition of dead body the deceased was burnt after murdering her. The dead body was sealed and sent for post mortem through Constables Vikram Singh and

Chhotey Lal

4. The autopsy on the dead body of deceased was conducted on 9-5-1988 by a panel of two doctors consisting of Dr. B.P. Agarwal (P.W. 6) and Dr. P. Kumar and cause of death was found as asphyxia due to throttling and burn injuries on the person of deceased were found post mortem burns. The Doctor prepared post mortem report (Ext. Ka-14).

5. On 10-5-1988 Upendra Kumar (P.W. 1), the brother of the deceased, sent an application to the Superintendent of Police Kanpur Dehat, alleging that the marriage of his sister Sunita was performed with the appellant 11 months before the occurrence and thereafter the appellant started demanding scooter in dowry. He had also promised to provide scooter In some time. When he went to the house of appellant to take back his sister, the appellant, his sister and sister's husband Prem Shankar compelled the deceased to tell him (Upendra Kumar) that she would not be sent with him unless scooter was provided to the appellant. On the night of 7/8-5-1988 the appellant and other co-accused killed the deceased and burnt her body. He went to lodge the report at P.S. Bhoganipur but the Police did not lodge his report and told that it would be written after receipt of post mortem report. The Superintendent of Police, Kanpur Dehat ordered on 11-5-1988 to S.O.P.S, Bhoganipur for registering the case and investigation. The above application as well as post mortem report of the deceased were received at P.S. Bhoganipur on 15-5-1988 and on the basis of above documents a case at crime No. 138 of 1988 was registered against the appellant, Shashi and Prem Shankar under Sections 302 and 498A, I.P.C., the endorsement of which was made at G.D. report (Ext. Ka-4).

6. Initially the investigation was taken by Ansuman Singh, S.O. (P.W. 5) who visited the spot, inspected the place of occurrence, prepared site plan (ext. Ka-1) and interrogated other witnesses. When it was found that the case related to dowry death, investigation was transferred to Sri Rama Kant Misra (P.W. 7), Dy. S.P. Bhoganipur, who interrogated Upendra Kumar (P.W. 1) and Brij Bihari (P.W. 2) and others and on completion of investigation submitted charge-sheet (Ext. Ka-15) against, the appellant, Shashi and Prem Shankar under Sections 498A, 304B

and 210, I.P.C.

7. Cognizance of the case was taken by the C.J.M. Kanpur Dehat, who committed the case to the Court of Session. The learned Sessions Judge tried the appellant and other co-accused for the offences punishable under Sections 498A, 304B and 201, I.P.C. The accused pleaded not guilty and contended that they were falsely implicated. Appellant Mahesh Kumar further contended that the deceased Smt, Sunita was sister in-law of his maternal uncle Roop Narain who had settled her marriage with him without any dowry. He was living with his wife and keeping her properly. He was not knowing scooter driving nor he demanded scooter In dowry. His wife committed suicide by burning herself inside her room which was bolted from inside. The villagers tried to extinguish fire by cutting the roof of the room. In such attempt some earthen boulders also fell on the deceased. Dr. Srnt. Rarn Kishori and Dr. Brij Bhushan Dixit were sister and brother-in-law (Bahnoi) of the father of the deceased who were posted in Government Hospital at Kanpur City and under their pressure false post mortem report was prepared. He further contended that the deceased was mentally depressed as he was not in any job.

8. To prove its case the prosecution examined Upendra Kumar (P.W. 1), Brij Bihari (P.W. 2), Constable Moharrir Mani Karnika Prasad (P.W. 3), Ganga Charan, Pradhan (P.W. 4), S.I. Arisuman Singh (P.W. 5), Dr. B.P. Agarwal (P.W. 6) and Sri Rama Kant Misra, Dy. S.P. (P.W. 7).

9. The appellant examined Roop Narain Shukla (D.W. 1) in his defence.

10. The learned Additional Sessions Judge on considering the evidence of the parties held that offences punishable under Sections 498A, 304B and 201, I.P.C. were fully established against the appellant and Km. Shashi. However the above offences were not proved against Prem Shankar. Accordingly, he acquitted Prem Shankar and convicted the appellant and Shashi under Sections 498A, 304B and 201, I.P.C. But since Shashi was juvenile on the date of occurrence, she was not awarded any sentence and the appellant was sentenced on each count as mentioned above.

11. The appellant has challenged his above conviction and sentence in this appeal.

12. The hearing of appeal was expedited by the order of Hon'ble the Chief Justice dated 22-1-1997.

13. The appellant was granted bail by this Court during the pendency of appeal by order dated 21-2-1998. Thereafter, the case was passed over on the illness slip of the learned Counsel for the appellant till 10-5-2000. Thereafter, the appellant absented and none appeared from the side of the appellant to argue the appeal. Therefore, this Court by order dated 17-5-2000 cancelled the bail granted to the appellant and issued non-bailable warrant against him. The non-bailable warrant issued against the appellant returned unserved as according to Police report dated 3-7-2000 and report of the C.J.M. Kanpur Dehat dated 4-7-2000 the appellant was not traceable. In this way neither the appellant could be apprehended nor his counsel appeared and therefore we proceed to hear the appeal on merit as laid down by the Apex Court in the case of Bani Singh v. State of U.P. AIR 1996 SC 2439 : (1996 All LJ 1399).

14. We have heard the learned A.G.A. and have examined the entire evidence on record.

15. The offence punishable under Section 304B is attracted 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 any relative of her husband for, 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.

16. For attracting the above section the prosecution must prove the following essentials/ingredients :-

1. The death of a woman has been caused by burns or bodily injury or occurs otherwise than under normal circumstances;

2. Such death should have occurred within seven years of her marriage;
3. The deceased must have been subjected to cruelty or harassment by her husband or any relative of her husband.
4. Such cruelty or harassment should be for, or in connection with demand for dowry; and
5. Such cruelty or harassment to the deceased had been subjected to soon before her death vide *Kans Raj v. State of Punjab* (2000) 41 All Cri C 3.

17. In the instant case it is not disputed that appellant Mahesh Kumar was the husband of Smt. Sunita deceased. It is also admitted that her death was caused within 11 months (less than a year) of her marriage. Therefore, the prosecution has to establish the ingredients 1, 3, 4 and 5.

18. The case of the prosecution was that the death of the deceased has been caused otherwise than under normal circumstances, while the contention of the appellant was that Smt. Sunita deceased committed suicide by burning herself inside the room which was bolted from inside as she was depressed on account of the fact that the appellant, her husband, was not getting any job and her entire ornaments had been sold in this connection. Therefore, we have to consider whether the death of the deceased was otherwise than under normal circumstances or it was a case of pure and simple suicide.

19. Dr. B.P. Agarwal (P.W. 6) who conducted, post mortem on the dead body of the deceased stated that the deceased was aged about 17 years. She had average built body. Pugilistic attitude, eye protruded, tongue protruded, abdomen burnt, visera coming out from abdomen, breast protruded. There were post mortem burns on the dead body.

20. There was following ante mortem injury on the person of deceased :-

Multiple abraded contusions in an area of 12 cm x 5 cm in front of neck 3.5 cm below chin.

Post mortem burn all over body. 100% skin to muscle deep at places.

21. On internal examination he found brain liquified, larynx, bronchi, trachea and both lungs badly congested, but no carbon particles present in trachea and larynx, Hyoid bone fractured. Right cornua with congestion present all around the bone in the muscle deep and blood vessels. Abdominal walls, peritoneum and abdominal cavity were burnt. Stomach was empty. Small intestine was half full with gases and large intestine was half full with faecal matter and gases. Spleen and kidneys were congested. Uterus full, gravid, full form female child with placenta recovered from.

22. According to Dr. Agarwal the cause of death was asphyxia due to throttling.

23. In this way the medical evidence clearly indicates that death of the deceased was caused due to throttling and after her death she was burnt to give a shape of suicide.

24. The defence version that Smt. Sunita Devi deceased committed suicide is totally falsified by the above medical evidence. An attempt was made from the side of accused during trial to show that the injury on the neck of the deceased was caused due to fall of heavy earthen boulder as the roof of the room was cut by the villagers in order to secure entry for extinguishing fire and in this attempt an earthen boulder of the roof fell on the body of the deceased which caused ante mortem injury No. 1. A suggestion to this effect was given to Dr. B.P. Agarwal (P.W. 6) but he ruled out the above possibility. Moreover, the situation in which the dead body was found as mentioned in the inquest report (Ext. Ka-2) also ruled out self burning or suicide. The dead body of the deceased was found lying over a brass Parat. In case the deceased herself had set fire on her, she would have run here and there inside the room and dead body would not have been found in such situation. Further more the medical evidence shows that there was full grown female child in the womb of deceased and in such situation the deceased would have not preferred to commit suicide; In this way the theory of suicide by burning set up by the accused appellant is totally ruled out by the medical evidence and fact and circumstance of the case. Thus, it has been clearly established that the death of the deceased was caused otherwise than under normal circumstances.

25. Regarding cruelty or harassment by the husband or by the other relative of husband of the deceased for, or in connection with the demand of dowry, there is evidence of Upendra (P.W. 1) the brother of the deceased and Brij Bihari (P.W. 2) the father of the deceased.

26. Upendra (P.W. 1) stated that when his sister Smt. Sunita deceased came back to his house she told that Mahesh and other accused were demanding scooter. He had also gone to Sasural of his sister to take her back but he was returned and told that till scooter was not provided the deceased would not be permitted to go with him. That his sister told him that the scooter be arranged otherwise she would not be sent to her maika. The deceased was also treated with cruelty on account of demand of dowry. In his cross-examination, however, he admitted that the appellant was distantly related with him as his elder sister was married with Roop Narain who was real maternal uncle of the appellant and marriage was settled under pressure and on token dowry of Rs. 1/- only. He further stated that he was present at the time of inquest but had not told to the Investigating Officer or the Magistrate that scooter was demanded in dowry by the accused. That he had mentioned this fact in the application given to the Superintendent of Police. He denied the suggestion of the appellant that the appellant had never demanded scooter in dowry. He also stated that the ornaments of his sister were sold in connection with the job of the appellant but he could not get any job.

27. Brij Bihari (P.W. 2), father of the deceased, stated that marriage of the deceased with the appellant was settled by Roop Narain, his elder son-in-law and maternal uncle of the appellant. Scooter was demanded at the time of marriage but he had told that he had no financial status to provide scooter. When his daughter returned back from her Sasural she told that the appellant, his sister and brother-in-law were demanding scooter and in case scooter was not provided they would kill her. A few days before the death of the deceased he had sent his son to take back the deceased but she was not permitted to come with his son. On getting information on 8-5-1988 about the death of his daughter he had gone to her Sasural. At the time of inquest he made an endorsement on the inquest report that the condition of the body of the deceased indicated that she was murdered and then burnt. In his cross-examination he stated that his son had told that Sunita

deceased was not sent back with him because the demand of scooter was not fulfilled. He had not lodged any report to this effect. He had also not submitted any application before the S.D.M. or the Investigating Officer at the time of inquest. His son had sent application to the Superintendent of Police after 10-11 days after the post mortem of the dead body of the deceased. He denied the suggestion of the appellant that no demand was made for scooter in dowry.

28. The evidences of brother and father of the deceased clearly indicate that scooter was being demanded in dowry and Upendra (P.W. 1) has further stated that the appellant and other accused were treating the deceased with cruelty for and on account of demand of dowry. No doubt the father of the deceased has not specifically stated about the ill-treatment or cruelty, but he has stated that the deceased had told to him that scooter was being demanded from her and that his son also told that deceased was not permitted to come with him because the demand of scooter was not fulfilled. The above statement of the deceased to her father is admissible under Section 32(1) of the Indian Evidence Act as held by the Apex Court in the case of Kans Raj v. State of Punjab (2000) 41 All Cri C 3. After considering the other decisions it was held in the said case that in view of the legal position statements of Mrs. Sunita made to her parents, brother and other acquaintances, before her death are admissible under Section 32 of the Indian Evidence Act as Section 32 Indian Evidence Act is admittedly an exception to the general rule of exclusion to the hearsay evidence and the statements of a person, written or verbal, of relevant fact, after his death or admissible in evidence if they refer to the cause of his death or to any circumstances of the transaction which resulted in his death. To attract the provisions of Section 32 for the purposes of admissibility of the statement of a deceased the prosecution is required to prove that the statement was made by a person who is dead or who cannot be found or whose attendance cannot be procured without an amount of delay or expense or he is incapable of giving evidence and that such statement had been made under any of the circumstances specified in Sub-sections (1) to (8) of Section 32 of the Act. Section 32 does not require that the statement sought to be admitted in evidence should have been made in imminent expectation of death. The word 'as to any of the circumstances of the transaction which resulted in his death' appearing in Section 32 must have some proximate relations to the actual

occurrence. In other words the statement of the deceased resulting to the cause of death or the circumstances of the transaction which resulted in his death must be sufficiently or closely connected with the actual transaction. To make such statement as substantive evidence, the person or the agency relying upon it is under a legal obligation to prove the making of such statement as a fact. If it is in writing, the scribe must be produced in the Court and if it is verbal, it should be proved by examining the person who heard the deceased making the statement.

29. It was further held in the said case that the evidence of cruelty, ill-treatment and exhortation to end her life adduced in the case must be held admissible, together with the statement of person who committed suicide in that regard which related to circumstances terminating in suicide.

30. No doubt there is no direct evidence regarding beating or causing bodily injury or cruelty for or in connection with demand of dowry, but as held by the Apex Court in the case of Pawan Kumar v, State of Haryana, AIR 1998 SC 958, cruelty or harassment need not be physical. Mental torture in given case would be sufficient to treat cruelty within the explanation (b) of Section 498A, IPC.

31. No doubt Upendra (P.W. 1) and Brij Bihari (P.W. 2) are brother and father respectively of the deceased, but they are the only witnesses in this regard as a newly married bride tells such things only to her parents or near relatives and does not make it public and therefore, near relatives are the best person to give evidence regarding demand of dowry or cruelty for or in connection with the demand of dowry. The appellant had not showed any circumstances that the above two witnesses were deposing falsely and has simply stated in his statement under Section 313, Cr. P.C. that his brother-in-law and father-in-law were deposing falsely against him. It is true that no application was given to the S.D.M. or the Investigating Officer at the time of inquest of the dead body of the deceased, but on account of it, it cannot be said that demand of dowry and cruelty was an after-thought. In such circumstances, when the brother and father of the deceased observed the premature and cruel end of the deceased they would not have been in a position to make such application before the S.D.M. Moreover, father had the courage to make an endorsement on the inquest report that in his

opinion the deceased was first murdered and thereafter burnt.

32. In this way, the evidence of Upendra (P.W. 1) and Brij Bihari (P.W. 2) regarding demand of dowry and cruelty for or in connection with demand of dowry is quite reliable and the prosecution has also proved that the appellant and his other relatives were demanding dowry and had treated the deceased with cruelty for or in connection with demand of dowry.

33. It is also one of the requirements of the Section 304B, IPC that the cruelty or harassment of the deceased had been subjected to soon before her death.

34. It is admitted that the death of the deceased occurred within 11 months of her marriage. As held by the Apex Court in the case of Kans Raj (AIR 2000 SC 2324) (supra) the term 'soon before' is not synonymous with the term 'immediately before' and is opposite of the expression 'soon after' as used and understood in Section 114, Illustration (a) of the Evidence Act. These words would imply that the interval should not be too long between the time of making the statement and the death. It contemplates the reasonable time which, as earlier noticed, has to be understood and determined under the peculiar circumstances of each case. In relation to dowry death, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course of conduct. Such conduct may be spread over a period of time. If the cruelty or harassment or demand for dowry is shown to have persisted, it shall be deemed to be 'soon before death' if any other intervening circumstance showing the non-existence of such treatment is not brought on record, before the alleged such treatment and the date of death. It does not, however, mean that such time can be stretched to any period. Proximate and live link between the effect of cruelty based on dowry demand and the consequential death is required to be proved by the prosecution. The demand of dowry, cruelty or harassment based upon such demand and the date of death should not be too remote in time which, under the circumstances, be treated as having become stale enough.

35. However, it was further held in the said case that no presumption under Section 113B of the Evidence Act would be drawn against the accused if it is shown that after the alleged demand, cruelty or harassment the dispute stood

resolved and there was no evidence of cruelty, and harassment thereafter. Mere lapse of some time by itself would not provide to an accused a defence, if the course of conduct relating to cruelty or harassment in connection with the dowry demand is shown to have existed earlier in time not too late and not too stale before the date of death of the woman.

36. In the instant case there is evidence of Upendra (P.W. 1) and Brij Bihari (P.W. 2) the brother and father of the deceased that a few days before the death of the deceased Upendra (P.W. 1) had gone to the Sasural of the deceased but she was not sent back with him as the demand of scooter in dowry was not fulfilled. In his cross-examination Brij Bihari (P.W. 2) clarified that his son had gone to Sasural of the deceased 3 or 4 days before her death. Thus, it is clear that even 3 or 4 days before the death of the deceased demand of dowry and cruelty for, or in connection with demand of dowry existed and this period is not too late to be treated as having become stale enough and therefore, the demand of dowry or cruelty in the instant case was soon before the death of the deceased.

37. In the instant case the presumption under Section 113B of the Indian Evidence Act would also be drawn against the appellant, as the prosecution has successfully proved that the deceased died other than in normal circumstances within 7 years of her marriage and there was demand of dowry on the part of the appellant as well as cruelty for or in connection with demand of dowry soon before the death of the deceased. In these circumstances, the burden of proving that there was no demand of dowry and death of the deceased had taken place in normal circumstances was on the appellant but he utterly failed to discharge his above burden.

38. In view of above discussions and observations we are of the view that the offences punishable under Sections 498A, 304B and 201, IPC have been fully established against the appellant and no interference in the finding recorded by the trial Court in this regard is required.

39. The appellant has been sentenced to the maximum punishment i.e., imprisonment for life provided under Section 304B, IPC. No doubt initially the case was registered under Section 302, IPC but on investigation charge-sheet was

submitted under Section 304B, IPC and the appellant was tried for the said offences. It is also important to note that there is no charge under Section 302, PC and there was also no direct evidence and the case is based on circumstantial evidence as well as presumption under Section 113B of the Indian Evidence Act. Moreover, the occurrence took place in the year 1988. The trial concluded in the year 1991. The appellant has given his age as 24 years in his statement under Section 313, Cr. P.C. recorded on 15-9-1990. It shows that he was aged about 22 years at the time of occurrence. Taking into consideration the above circumstances we are of the view that sentence of life imprisonment under Section 304B, IPC was rather excessive. In view of the facts and circumstances of the case, in our opinion a sentence of 10 years R.I. under Section 304B, IPC would be appropriate sentence. So far as sentence under other counts under Sections 498A and 201, IPC are concerned they appear proper.

40. We accordingly, while confirming conviction of the appellant under Sections 498A, 304B and 201, IPC reduce the sentence of imprisonment for life to R.I. for a period of 10 years under Section 304B, IPC. The other sentences passed against the appellant are, however, confirmed. In the result that appeal is dismissed subject to the above modification of the sentence.

41. Since the bail granted to the appellant has been cancelled by this Court, the C.J.M. Kanpur Dehat is directed to secure arrest of the appellant by adopting processes under law and send him to jail to serve out the sentences.

42. The office is directed to send a copy of this order to C.J.M. Kanpur Dehat, within a week, who shall submit compliance report within a month.