

(2005) 04 AHC CK 0121

In the Allahabad High Court

Case No : Government Appeal No. 1505 of 2003

State of U.P.

APPELLANT

Vs

Abdul Sharif Khan and Mulayam Khan

RESPONDENT

Date of Decision : 04-04-2005

Acts Referred:

Evidence Act, 1872 — Section 113B

Penal Code, 1860 (IPC) — Section 304B, 494, 498A

Citation : (2005) 3 ALT(Cri) 25 : (2005) 2 DMC 166

Hon'ble Judges : M.C. Jain, J;M. Chaudhary, J

Bench : Division Bench

Advocate : Jagdish Tiwari, for the Appellant; Rajul Bhargava, Amicus curiae and N.A. Moonis, A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

M.C. Jain, J.—The State has preferred this appeal against the judgment dated 10.6.1999 passed by Sri Puran Singh, the then Special Judge (E.C. Act), Etawah in Sessions Trial No. 395 of 1993, acquitting the accused respondents Abdul Sharif (husband) and his father Mulayam Khan (father-in-law) of the deceased Fahiman of the charges under Sections 304B, 498A and 494 I.P.C. The accused respondent Mulayam Khan died during the pendency of the appeal and the same abated respecting him under order dated 17.9.2003.

2. The facts may be stated briefly. The incident took place in between the night of 6/7.1.1990 in village Senganpur, P.S. Ajitmal, District Etawah and the report was lodged on 9.1.1990 at 2.30 P.M. by Suleman PW 2 (brother of the deceased). Fahiman was married with respondent No. 1. The accused respondents started treating her with cruelty, pressurising her to bring money from her parents. The informant and other members of his family tried at their level best to dissuade them but to no effect. Abdul Sharif went to Bombay and started selling biscuits But on her visits to her native place, he used to beat the victim. He even remarried with another lady at Bombay about a year before the

incident. On 7.1.1990, the informant and his uncle were coming to the Sasural of the victim for further efforts on getting information about the miseries of the victim. On their way, in village Bhikhepur, they learnt that in between the night of 6/7.1.1990 she has been done to death by burning. The informant and his uncle reached Senganpur. There, Awrez Khan and others informed them that the accused respondents had assaulted the victim and had burnt her alive. They went to the police station. The police, instead of taking down the F.I.R., obtained their signatures on the Panchayatnama and pressed them for compromise. On the application of the informant, the S.S.P. directed the S.H.O. to register the case. The case was then registered and the Circle Officer investigated the case. Ultimately, a charge sheet was submitted.

3. The post-mortem over the dead body of the deceased was conducted on 8.1.1990 at 3 P.M. by Dr. P. Swaroop PW 1. The deceased was aged about 24 years and about 1? day had passed since she died. There were burns of first third degree all over the body, excepting soles. The death had occurred due to shock as a result of ante-mortem burning.

4. The defence was of denial and of the victim having committed suicide as she wanted to live with him (Abdul Sharif) at Bombay and somebody had told her that he had married with another lady at Bombay. An information regarding her having committed suicide was said to have been given at the police station by accused respondent Mulayam Khan (father of Sharif Khan).

5. Since, on the state of evidence adduced at the trial, the trial judge recorded acquittal, the state has assailed the same through this appeal.

6. We have heard Miss N.A. Moonis, learned A.G.A. and Sri Rajul Bhargava, Amicus curiae for the surviving accused respondent Abdul Sharif. We have also gone through the evidence on record.

7. Learned A.G.A. argued that this case of dowry death was amply proved by the evidence produced by the prosecution, but the learned trial judge disbelieved the same on untenable grounds. On the other hand, the learned Amicus curiae has supported the finding of acquittal recorded by the trial court.

8. To begin with, we should note that essential ingredients of Section 304B I.P.C. are that the death of woman must have been caused by burns or bodily injury or otherwise than in normal circumstances. Such death should have occurred within seven years of marriage. Woman (deceased) must have been subjected to cruelty or harassment by husband or relative of husband. Such cruelty or harassment should be in connection with demand for dowry. Lastly, such cruelty or harassment should be shown to have been meted out to the deceased soon before her death. The effect of conjoint reading of Section 113B of the Evidence Act and Section 304B I.P.C. is that there must be material to show that soon before her death, the victim was subjected to cruelty or harassment. The prosecution has to rule out the possibility of natural or accidental death.

9. We find that in the instant case, the prosecution case was vague and wavering as to when the marriage of the deceased Fahiman took place with the accused respondent Abdul Sharif. The incident took place in between the night of 6/7.1.1990 and the prosecution failed to establish that the marriage had taken place within seven years preceding the incident. Suleman PW 2 (brother of the deceased) who lodged the F.I.R. was examined in the court on 11.3.1997/27.3.1997. At that time, he stated her age to be about 25 years. His version was that his sister Fahiman had been married with Abdul Sharif about 13 years back. He also stated that his father had died 11 years back and that he died 2 or 3 years after the marriage of Fahiman. He could not say as to what was his own age at the time of the marriage of his sister. If he was aged about 25 years while deposing as a witness in this case, he must have been aged about 12 years at the time of the marriage of his sister. He could not give out the year and month and marriage of his sister. When a pointed suggestion was made to him that she was married in the year 1982, he drew a blank saying that he did not know about it. It came down from his cross-examination that receipt had been written of the Nikah of his sister and his younger sister had also been married on the same day. He admitted that one copy of the receipt was given to bride's side and another to the bridegroom's side, However, no such receipt was produced to show as to when the marriage of Fahiman had taken place. He could not say as to whether 8 years had already passed when Fahiman died. He also admitted that since he was a child at the time of marriage of his sister, he could not say as to when she was married. He, however, insisted that he learnt from his brother (Islam Khan) that she had been married about 5-6 years before the incident. Islam, it should be pointed out, was not examined by the prosecution.

10. The deceased was the daughter of the maternal uncle of Yakub Khan PW 6. Fahiman's sister has also been married to this witness. In cross-examination, he stated that Fahiman was married to Sharif Khan in 1982.

11. On the state of the above evidence, it could not be held that the marriage of Fahiman with the surviving accused respondent had taken place within 7 years from the date of the incident. The fact is also there, as pointed out above, that the prosecution did not produce documentary evidence in the form of receipt about her marriage which could very well be put forth. The time of her marriage could be ascertained from the receipt of the marriage of her sister, too, who was also allegedly married the same day. Nothing of the kind was done by the prosecution.

12. Secondly, we find that Suleman PW 2 was himself a witness of the Panchayatnama of the deceased. At that time, nothing was said by him about the demand of dowry etc. Nor any complaint regarding demand of dowry, cruelty etc. was made from the side of the parents/brother of the deceased earlier to the present incident. Before the court, Suleman PW 2 stated that Sharif Khan had performed marriage with another lady at Bombay 5 or 6 months before the incident. Recital in the F.I.R. is that after performing marriage with another lady.

Sharif Khan started treating Fahiman with cruelty, mentally and physically. It is also there in testimony that he had learnt about the second marriage of Sharif Khan through his cousin brother Khalil residing in Bombay. Then he and his elder brother Islam went Bombay with certain other relatives and brought Sharif Khan to Senganpur. They questioned him as to what would happen to Fahiman as he had married with another lady. Sharif Khan replied that he would keep both the wives. It hurt and annoyed him and his other family members. He and his sister wanted Sharif Khan to desert his second wife for which he did not agree. He also stated that his sister was extremely saddened owing to the second marriage of Sharif Khan.

13. So, what appears to be the truth is that the whole problem started after Sharif Khan performed second marriage with another lady at Bombay some 5 or 6 months before the incident. The fact however, is that being a Muslim, he could have four wives at a time. No doubt, most selfish and insincere attitude of Sharif Khan was responsible for the extreme depression of Fahiman, but it cannot be held that he abetted the commission of suicide by her. The reason is that beings a Muslim he could perform second marriage during the life time of Fahiman.

14. It is also pertinent to state that the deceased accused respondent Mulayam Khan (father-in-law of the deceased) had himself lodged a report at the police station regarding the commission of suicide by his daughter-in-law. The evidence of Member Khan PW 3 was there that Mulayam Khan had come to him and collected him and 50-60 other villagers in whose presence the door of the Kotna was broken open. The burnt dead body of the deceased was found inside and the weeping child was taken out.

15. A careful consideration of the evidence and attending circumstances leads to the conclusion that the deceased committed suicide under acute mental depression because her husband had performed second marriage with another lady at Bombay and was residing there, leaving her in his native village. The performance of the second marriage by her husband, as pointed out above, was not illegal as per the personal law applicable to him. The incident was, of course, unfortunate where young lady lost her life by committing suicide, but her husband (surviving accused respondent) cannot be pronounced to have abetted commission of suicide by her or any other offence within the ambit of law. The appeal being devoid of substance is hereby dismissed.

16. Sri Rajul Bhargava, Amicus curiae who argued the appeal for respondent shall get Rs. 1000/- as his fee.

17. Judgment be certified to the lower court.