

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Criminal Appeal 156/2000**

% **Reserved on: 22nd May, 2015**
Date of Decision: 28th May, 2015

SANJAY SINGH Appellant

Through Mr. Jayant Sood, Advocate.

versus

STATE Respondent

Through Mr. Varun Goswami, APP with
SI Vivek Sharma, PS- Gokalpuri.

Criminal Appeal 90/2000

SATBIR Appellant

Through Mr. Jayant Sood, Advocate.

versus

STATE Respondent

Through Mr. Varun Goswami, APP with
SI Vivek Sharma, PS- Gokalpuri.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

SANJIV KHANNA, J.

This judgment will dispose of the aforementioned appeals filed by Sanjay Singh and Satbir. These two appeals arise out of a common judgment dated 31st January, 2000 and order on sentence dated 8th February, 2000. Appellant Sanjay Singh, husband of the

deceased Suman has been convicted under Section 304-B and 498-A of the Indian Penal Code, 1860 (IPC, for short), whereas appellant Satbir has been convicted under Section 498-A IPC. By order on sentence dated 8th February, 2000, appellant Sanjay Singh has been sentenced to imprisonment for life for the offence under Section 304-B IPC and rigorous imprisonment of three years and fine of Rs.20,000/- under Section 498-A IPC. In default of payment of fine, he has to undergo rigorous imprisonment of eight months. Appellant Satbir has been sentenced to rigorous imprisonment for three years and fine of Rs.10,000/- and in default of payment of fine, to undergo rigorous imprisonment of six months for the offence under Section 498-A IPC.

2. For the sake of record, we mention that the conviction arises out of the charge sheet filed in FIR No.460/1997 (Ex.PW11/B) police station Gokalpuri, which was recorded under Sections 302, 498-A, 304-B and 34 IPC. We also note that Vijay Singh, father of appellant Sanjay Singh was also convicted by the impugned judgment for the offence under Section 498-A and sentenced to rigorous imprisonment of three years and fine of Rs.20,000/- with the stipulation that in case of failure to pay fine, he would undergo rigorous imprisonment of three months. However, Vijay Singh expired during the pendency of the present appeal.

Crl.A. 156/2000 – Sanjay Singh versus State

3. During the course of hearing of Sanjay Singh's appeal, our attention was drawn to the factual position that the charge framed by the trial court on 15th May, 1998 against appellants Sanjay Singh, Satbir and others was under Section 302 IPC and not under Section

304B IPC. The charge framed on 15th May, 1998 records that they (accused) had in furtherance of common intention committed murder of Suman and Kumari Shweta, wife and daughter of the appellant, respectively, by strangulating them and thereby they had committed murder under Section 302 read with Section 34 IPC. The contention raised is that the appellant Sanjay Singh has been convicted under Section 304-B IPC and not under Section 302 IPC, i.e. the section mentioned in the charge framed on 15th May, 1998.

4. The legal position in such cases is covered by the three-judge bench decision of the Supreme Court in *Shamnsaheb M. Multtani versus State of Karnataka* (2001) 2 SCC 577. The issue in question was earlier referred to a larger Bench by an order reported in (2000) 3 SCC 698, referring decision of the Supreme Court in *Lakhjit Singh and Anr. versus State of Punjab* (1994) Supp (1) SCC 173, wherein the accused, it was held, could be convicted for charge under Section 306 IPC, whereas he was originally charged under Section 302 IPC and *Sangaraboina Sreenu versus State of A.P.* (1997) 5 SCC 348, wherein the opposite view was preferred. Resolving the conflict, the three Judges Bench held as under:-

“29. At this stage, we may note the difference in the legal position between the said offence and Section 306 IPC which was merely an offence of abetment of suicide earlier. The section remained in the statute-book without any practical use till 1983. But by the introduction of Section 113-A in the Evidence Act the said offence under Section 306 IPC has acquired wider dimensions and has become a serious marriage-related offence. Section 113-A of the Evidence Act says that under certain conditions, almost similar to the conditions for dowry death the court *may presume* having regard to the circumstances of the case, that such suicide has been abetted by her husband etc. When the law says that the court may presume the fact, it is discretionary on the part of the court either to regard such fact as proved or not to do so, which depends upon all the other circumstances of the case. As there is no compulsion on

the court to act on the presumption the accused can persuade the court against drawing a presumption adverse to him.”

5. In the facts of *Shamnsaheb M. Multtani*’s case (supra), the accused had been convicted under Section 304-B, whereas the original charge was under Section 302 IPC. It was observed:-

“**30.** But the peculiar situation in respect of an offence under Section 304-B IPC, as discernible from the distinction pointed out above in respect of the offence under Section 306 IPC is this: Under the former the court has a statutory compulsion, merely on the establishment of two factual positions enumerated above, to presume that the accused has committed dowry death. If any accused wants to escape from the said catch the burden is on him to disprove it. If he fails to rebut the presumption the court is bound to act on it.

31. Now take the case of an accused who was called upon to defend only a charge under Section 302 IPC. The burden of proof never shifts onto him. It ever remains on the prosecution which has to prove the charge beyond all reasonable doubt. The said traditional legal concept remains unchanged even now. In such a case the accused can wait till the prosecution evidence is over and then to show that the prosecution has failed to make out the said offence against him. No compulsory presumption would go to the assistance of the prosecution in such a situation. If that be so, when an accused has no notice of the offence under Section 304-B IPC, as he was defending a charge under Section 302 IPC alone, would it not lead to a grave miscarriage of justice when he is alternatively convicted under Section 304-B IPC and sentenced to the serious punishment prescribed thereunder, which mandates a minimum sentence of imprisonment for seven years.

32. The serious consequence which may ensue to the accused in such a situation can be limned through an illustration: If a bride was murdered within seven years of her marriage and there was evidence to show that either on the previous day or a couple of days earlier she was subjected to harassment by her husband with demand for dowry, such husband would be guilty of the offence on the language of Section 304-B IPC read with Section 113-B of the Evidence Act. But if the murder of his wife was actually committed either by a dacoit or by a militant in a terrorist act the husband can lead evidence to show that he had no hand in her death at all. If he succeeds in discharging the burden of proof he is not liable to be convicted under Section 304-B IPC. But if the husband is charged only under Section 302 IPC he has no burden

to prove that his wife was murdered like that as he can have his traditional defence that the prosecution has failed to prove the charge of murder against him and claim an order of acquittal.

33. The above illustration would amplify the gravity of the consequence befalling an accused if he was only asked to defend a charge under Section 302 IPC and was alternatively convicted under Section 304-B IPC without any notice to him, because he is deprived of the opportunity to disprove the burden cast on him by law.”

6. What is discernible from the aforesaid paragraphs is that the Court has taken into consideration the legal effect of Section 113-B of the Indian Evidence Act, 1872 and the consequences thereof, as it relates to prosecution of a person under Section 304-B IPC. It was noticed that Section 304-B IPC earlier was not in the statute book and was enacted on 9th November, 1986 along with Section 113-B of the Indian Evidence Act, 1872.

7. In view of the aforesaid position, the impugned judgment convicting the appellant Sanjay Singh for the offence under Section 304-B IPC on account of unnatural death of his wife Suman when the original charge was only under Section 302 IPC, cannot be sustained and to this extent, the appeal of Sanjay Singh has to be allowed.

8. The next question is whether we should pass an order of remit and if we pass an order of remit, the stage from which the trial should begin.

9. Learned counsel for the appellant Sanjay Singh before us had relied upon a decision of a Division Bench of this Court in ***Dinesh Kumar and Ors. versus State, NCT of Delhi*** 213 (2014) DLT 709 (DB). In the said decision, after referring to the decision of the

Supreme Court in ***Shamnsaheb M. Multtani*** (supra), the Division Bench had held that Sections 304-B or 498-A, not being minor offences of Section 302 IPC, it was beyond the High Court's jurisdiction to convert the conviction under Section 302 IPC to one under Section 304-B or 498-A IPC. The said decision, to our mind, would not be applicable for several reasons. The question of conversion of conviction in the said case had only arisen before the High Court. In paragraph 33 of the decision in the case of ***Dinesh Kumar & Ors.*** (supra), the Division Bench of the High Court has recorded that the trial court had committed a serious error in convicting the appellants therein for the offence under Section 302 IPC. It was further noted that no leave to appeal petition had been filed by the State against acquittal of the appellants for the offence under Section 304-B or 498-A IPC. It may be noticed that in paragraph 10 of the said decision, it is specifically noted that that charges were framed against the appellants therein for the offence under Section 498-A/34 IPC, 304-B IPC and in alternative under Section 302 IPC.

10. More appropriate in this regard would be reference to paragraphs 34 and 35 of the decision in the case of ***Shamnsaheb M. Multtani*** (supra). The said paragraphs read:-

“34. In such a situation, if the trial court finds that the prosecution has failed to make out the case under Section 302 IPC, but the offence under Section 304-B IPC has been made out, the court has to call upon the accused to enter on his defence in respect of the said offence. Without affording such an opportunity to the accused, a conviction under Section 304-B IPC would lead to real and serious miscarriage of justice. Even if no such count was included in the charge, when the court affords him an opportunity to discharge his burden by putting him to notice regarding the prima facie view of the court that he is liable to be convicted under

Section 304-B IPC, unless he succeeds in disproving the presumption, it is possible for the court to enter upon a conviction of the said offence in the event of his failure to disprove the presumption.

35. As the appellant was convicted by the High Court under Section 304-B IPC, without such an opportunity being granted to him, we deem it necessary in the interest of justice to afford him that opportunity. The case in the trial court should proceed against the appellant (not against the other two accused whose acquittal remains unchallenged now) from the stage of defence evidence. He is put to notice that unless he disproves the presumption, he is liable to be convicted under Section 304-B IPC.”

11. Learned counsel for the appellant Sanjay Singh, however, submitted that this is an old case and, therefore, order of remit should not be passed. It was highlighted that appellant has already suffered incarceration of about six years, five months and seven days and has also earned remission of 11 month and 16 days as per the nominal roll dated 23rd January, 2004. The learned Addl. Public Prosecutor has, however, opposed the said submission referring to the facts, which he claims are gross and extreme. Our attention was specifically drawn to testimonies of several prosecution witnesses.

12. As we are inclined to pass an order of remand and any observations by a division bench of the High Court can be misunderstood, we are not referring to the evidence as well as the allegations of the prosecution and the contentions of the appellant-accused in detail. However, as the counsel for the appellant has argued that it is not a fit case for remand, we deem it appropriate to merely record the allegations briefly without any elucidation or opinion on merits:-

(i) The present case is one of unnatural death of the appellant's wife Suman and daughter Sweta. The deceased Suman was pregnant at the time of her death;

(ii) Deceased Suman had returned to her matrimonial home in the evening of 26th June, 1997, after nearly two months' stay at her paternal home. The occurrence took place in the intervening night of 26th and 27th June, 1997.

(iii) As per the prosecution, smoke could be seen from the room, where the dead body of Suman was located. Attempt was made to burn the clothes and other articles in the room. Cow dung cake with kerosene oil was found lying there. A hole had been made in the wall of the room, where the dead body of Suman was found.

(iv) In the post-mortem report marked Ex.PW19/A, Dr O.P. Murty (PW19) opined that death was due to asphyxia as a result of ante-mortem hanging, and had occurred around 33 hours prior to the preparation of the Report (ExPW19/A) on 12:45 PM on 28th June, 1997. PW19 found ligature material present in the form of thick rope with circumference of 27 cm on left side of the neck. Ligature marks were found obliquely placed in upper front region of the neck. On an internal examination, it was recorded that secretion or fluid with fishy-odour was found in the vaginal region along with bruising on lower and right side of the external orifice. PW19 deposed that the findings were consistent with sexual intercourse prior to death.

13. We reiterate that we have not made any pronouncement or expressed our findings on merits on the said allegations. It is noticeable that in the present case the charge-sheet was filed in the year 1997. The charge-sheet was under Sections 302, 304B and 498A IPC. However, the charge was framed only under Sections 498A and 302 IPC in terms of order dated 13th May, 1998, passed by the Additional Sessions Judge. Thus, there was a lapse on the part of the Additional Sessions Judge in not framing charge in alternative under Section 304-B IPC, though the charge-sheet had invoked the said section.

14. On the question, whether there should be fresh *de novo* trial or whether proceedings should begin from the stage of recording of statement of the appellant Sanjay under section 313 Cr.P.C. we are inclined to follow the dictum and the directions given by the Supreme Court in the case of ***Shamnsaheb M. Multtani*** (supra), wherein, it has been directed that the trial would begin from the stage of recording of statement under Section 313 Cr.P.C. One of the reasons why we have held and given the said direction, is that charge had also been framed under Section 498A IPC. No doubt, Section 498A is wider and includes mental cruelty in addition to demand for dowry, but when we read the evidence relied upon by the prosecution and the cross-examination, it is apparent that allegations with regard to demand of dowry was a subject matter of evidence-in-chief as well as cross-examination. It would not be appropriate to direct recording of fresh evidence in the said situation. As noticed above, in the case of ***Shamnsaheb M. Multtani*** (supra) also, the Supreme Court had not directed recording of entire evidence afresh.

15. In view of the aforesaid discussion, the Criminal Appeal No.156/2000, filed by appellant Sanjay has to be allowed but with an order of remit/remand of fresh proceedings from the stage of recording of statement of the appellant Sanjay under Section 313 Cr.P.C.

16. As we have set aside the impugned judgment against the appellant Sanjay Singh, his conviction under Section 498A IPC has to be also treated as set aside and the trial court will examine afresh, whether or not offence under Section 498A IPC has been committed. We find it necessary to set aside the conviction under section 498A IPC, in view of our directions in respect of offence under section 304B of the IPC, as otherwise it would cause confusion and ambiguity.

17. The appeal of Sanjay Singh, (Crl.A. 156/2000) is accordingly disposed of.

Crl.A. 90/2000 – Satbir versus State

18. Appellant Satbir has been convicted under Section 498A IPC. As per the statement of Satbir recorded under Section 313 Cr.P.C. and also as per the prosecution version, Satbir was not residing in the matrimonial home of the deceased Suman, i.e. with the immediate in-laws of the deceased Suman. Appellant Satbir, it is claimed, used to visit the matrimonial home of the deceased Suman and harass her. He has been described as maternal uncle, i.e. related to the mother of the appellant Sanjay, having smallpox marks on his face.

19. Nathu Singh (PW1) in his examination-in-chief has alleged that his daughter, the deceased Suman, had stated that Satbir, maternal

uncle of Sanjay, used to instigate her husband and in-laws, and whenever he would visit her matrimonial home, the severity of harassment would escalate. However, in his cross-examination, PW1 contradicted himself, stating that prior to the incident, i.e. before 27th June, 1997, he did not know Satbir either by name or by face. Yet, PW1 denied that none had ever complained to him against Satbir, claiming that his daughter had. On further cross-examination, PW1 accepted that he had not met Satbir at Khajuri. PW1 also accepted that he was not aware of the native village of the appellant Satbir before making statement to the SDM and had not visited the Village of Satbir. He accepted as correct that at the time of marriage, he came to know that the maternal uncle of the accused Sanjay hails from Village Achheja. PW1 affirmed that he had stated before the SDM that he had informed Satbir that they would be reaching Suman's matrimonial home within a short time.

20. On involvement and complicity of the appellant Satbir, another fact is important and relevant. As per the prosecution version, appellant Sanjay had made a telephone call at the residence of Nathu Singh (PW1) in the early hours of 27th June, 1997, which was attended by the mother (PW14). Thereafter, a second call was made by one Satbir. It is also alleged that Satbir was present and was seen throwing water to control the fire at the place of occurrence in the early morning hours of 27th June, 1997.

21. Satbir in his statement recorded under Section 313 Cr.P.C. has proclaimed that he was innocent and was falsely implicated. He was constructing his house on a plot of land in Village Khajuri Khas and used to sleep at the construction site. On the date of the occurrence,

he had not gone to the matrimonial home of the deceased Suman. He was falsely implicated, because he was present at the house of his brother-in-law and was related to Vijay Singh (since deceased). In other words, the appellant Satbir has been implicated because he was present and related to Vijay Singh (since deceased).

22. Rajiv (PW2), brother of the deceased, was serving in Indian Air Force, and being on annual leave, was present in the house. Like his father, PW2 claimed that when Satbir would visit Suman's matrimonial home, the in-laws of Suman would beat her ensuing a fight. However, he did not attribute any specific act or utterance to Satbir.

23. Rekha (PW4), the sister of deceased Suman, has stated that Vijay Singh, Sanjay, Kapil, Shashi and Nirmala used to harass and ill treat the deceased Suman. PW4 has also alleged that the appellant Satbir, maternal uncle of Sanjay, used to visit the matrimonial house of Suman and whenever he would visit, harassment and ill-treatment would increase. Satbir would suggest arranging a second marriage of Sanjay. In her cross-examination, PW4 accepted that she did not state these facts to the SDM. When confronted, she accepted that she had named the other accused who used to harass and ill-treat deceased Suman. Noticeably, she did not give the name of Satbir before the SDM in her statement marked Ex.PW4/D1. She had seen the appellant Satbir on 27th June, 1997. PW4 accepted as correct that she has not told the SDM that accused Satbir used to say that he would arrange a second marriage of Sanjay. In Ex.PW4/D-1, name of Satbir was missing from the names of persons, who used to beat the deceased Suman.

24. Arjun Singh (PW5), husband of Rekha, also did not name Satbir in his examination-in-chief as someone who used to harass and ask for dowry. Similarly, Ajit Singh (PW6), father-in-law of Rekha had not named Satbir as one of the persons who used to harass or ill-treat the deceased Suman. However, PW6 had seen Vijay Singh (since deceased) and Satbir throwing water on the clothes lying on the floor. Shakuntala (PW14), mother of deceased Suman has stated that she had received two telephone calls from Sanjay on the date of occurrence at about 5.00 A.M. In examination-in-chief, even she did not name the appellant Satbir.

25. While convicting the appellant Satbir under Section 498A IPC, the trial court has not dealt with and considered the case and evidence against Satbir separately and independently. The witnesses have not attributed or stated that any money or dowry gift was given to Satbir at the time of wedding or thereafter. No specific words/instances were attributed to him. Vague allegations have been made by some of the aforesaid witnesses. Satbir has accepted his presence at the place of occurrence and has given the reason for the same, i.e. he was constructing a house on the plot of land in Village Khajuri. However, otherwise and as per the prosecution version, he was resident of Village Ashree as deposed to by Nathu Singh (PW1). The said witness, i.e. PW1 has also accepted that before the incident he had not known or spoken to the appellant Satbir.

26. In light of the evidence and material on record, we do not think that conviction of the appellant Satbir under Section 498A IPC is justified and sustainable. There is hardly any good and cogent

evidence or material to show that the appellant Satbir had caused any mental cruelty or asked or was involved in dowry demands.

27. The conviction and sentence of the appellant Satbir is hence set aside.

28. The appeal of Satbir (Crl.A.90/2000) is accordingly allowed.

29. Appellant Sanjay Singh will appear before the trial court on 6th July, 2015, when a date for proceeding, as per directions given above, will be fixed. Appellant Sanjay Singh will also furnish bail bond with one surety bond of Rs.10,000/- to the satisfaction of the trial court on 6th July, 2015. Trial court record will be sent back.

(SANJIV KHANNA)
JUDGE

(ASHUTOSH KUMAR)
JUDGE

May 28th, 2015
NA/n