

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL NO. 94 OF 2008

Jhunabai, aged about 73 years, widow of Jailal Thakur, Resident of Village Kohee, Police Station Ranchirai, District Durg (CG).

... Appellant

Versus

State of Chhattisgarh through the Police Station Ranichirai, District Durg (CG).

... Respondent

For Appellant	:	Shri Viprasen Agrawal, Advocate.
For Respondent/State	:	Shri Vaibhav A Gowardhan, Panel Lawyer.

Hon'ble The Chief Justice

Hon'ble Shri Justice P. Sam Koshy

CAV JUDGMENT

Reserved on 17/08/2016

Delivered on 31/08/2016

Per, P.Sam Koshy, J.

1. The instant appeal has been preferred by the appellant challenging the judgment of conviction passed by the Second Additional Sessions Judge, Durg on 20.12.2007 in Sessions Trial No.139 of 2007 convicting the appellant for the offence under Sections 302 and 201 IPC and sentencing her to undergo life imprisonment with fine of Rs.500/- under Section 302 IPC and two years RI with fine of Rs.500/- under Section 201 IPC.
2. The prosecution case in brief is that, on 26.07.2006 the deceased namely Sameshwar Thakur, aged about only six months was left to be taken care by the grandmother-appellant herein while the parents and other family members of the deceased had gone out.

When they returned, the child was missing and the grandmother i.e. the appellant expressed her ignorance about the whereabouts of the child. Later on, the dead body of the child was found in the under construction kitchen of the house beneath the heap of sand. Thereafter, the matter was reported to the police station, who in turn, send the body for postmortem and during the course of postmortem it was found that death occurred due to antemortem head injury and fracture on the parietal bone, nasal bone, both maxilla bones with intra-cerebral hemorrhage clotted blood present caused by hard and blunt rough object

3. The matter was put to trial and in the course of trial, the prosecution examined as many as 10 witnesses whereas, the defence did not examine any witness. The trial court finally found the appellant guilty of having committed the offence under Section 302 IPC and has also found the appellant concealing the facts and convicted her for the offence under Section 201 IPC also.
4. Assailing the said judgment of conviction, counsel for the appellant submitted that the entire case of prosecution revolves around the circumstantial evidence. The circumstantial evidence which have been adduced by the prosecution during the course of evidence are not sufficient enough to complete the chain of links attached to the commission of offence by which it can be conclusively said that the appellant alone could have committed the offence. According to him, the prosecution has failed to adduce any independent witness in support of to establish the evidence on behalf of the prosecution.

All the witnesses who have been examined except for the departmental witness, somehow or other, are all relatives. The court below has further committed a grave error in not appreciating the fact that for the circumstantial evidence to become complete, one of the most vital factor required is the motive for the commission of offence. The prosecution has further not been able to seize any articles/weapons used in the commission of offence and that there is an allegation of the victim being killed by throttling but in the postmortem report no injury marks were found on the neck of the deceased. All these facts create a doubt on the prosecution story giving rise to doubt also on the aspect whether the appellant could have committed the offence, as alleged.

5. Learned counsel for the appellant further in support of his contention to create a doubt in the mind of the court has submitted that the evidence has come on record by which it can be established that the appellant herein, i.e. the grandmother of the deceased, used to take care of the child well and if this is the statement which has been adduced during the course of investigation as well as while recording of the evidence, there was no reason whatsoever for the appellant to have committed the said offence. It is next contended that there is sufficient evidence which have come on record that in the place of incident construction of kitchen was going on and if the construction was in progress then, there were all possibilities of many other labours present on the

spot and the possibility of one among those labours being the accused cannot be ruled out.

6. In addition, there are also evidence of the family members that some distant relatives had also come during the said time. It is also pointed out by the appellant that the appellant at the time of incident was aged about 73 years old and the body of deceased, admittedly as per the case diary, was found beneath the sand, therefore, it is hard to believe that the appellant aged about 73 years of old woman could have during the short span of time when PW-5, Durga had gone to pond, to have first killed and then buried the child beneath the sand. Lastly it is submitted that since there were other relatives available in the family on the said date, the theory of last seen cannot be accepted in the given factual background of the case. Thus, the prosecution case having not been established beyond all reasonable doubts, the benefit of the same ought to have been given to the appellant by acquitting from the charges levelled against her.
7. The State counsel however, on the contrary, opposing the appeal submits that there is sufficient material brought on record by the prosecution witnesses so as to establish the fact that it was the appellant alone who was present with the six months old child at the time of incident. In addition, the defence of the accused person stands falsified on the ground that the relatives who were present on the date of incident also have disproved the case of the defence that they were also available in the house at the time of incident

whereas, the prosecution witnesses particularly, PW-1, Buddhdev, PW-2, Baisakhu, PW-5, Durga and PW-7, Himanchal Thakur, have established the fact that when PW-5, Durga left the house for pond, it was only the appellant and the deceased alone in the house. According to State counsel, even under the provisions of Section 106 of the Evidence Act, the burden of proof stands shifted upon the appellant to produce evidence before the court below to show that when she had gone to the Pond, who all were present in the house after putting the deceased to sleep. In the absence of non discharging of such burden by the accused appellant, the safest inference which could be drawn is that of the appellant alone could have committed the offence. Thus, prayed for rejection of the appeal.

8. Having considered the rival contentions made on behalf of either side, a perusal of records clearly proves the fact that in the morning of fateful day all the family members one by one left the house for their daily course and lastly it was the PW-6, Kalindri Bai, who left the house. In addition, PW-5, Durga was also present in the home. There is evidence brought on record by the prosecution that when the family members i.e. parents of the deceased child came back home, the child was missing. PW-6, Kalindri Bai, has added the fact that it is only after about 3 days time, the dead body of child was found beneath the sand in an under construction kitchen inside the house. PW-6, Kalindri Bai, in her cross examination has stated that upon questioning the appellant, she had made extra judicial

confession of having committed the offence. This reference of extra judicial confession made by appellant before PW-6, Kalindri Bai also is available in 161 statement of PW-6, and there was no further effective cross examination made from the accused person in this regard. Further, PW-5, Durga, distant relative in the family also has deposed that she along with her brother was guest and they had just visited the house where the incident happened. She has further deposed that when she left the house for pond, she found the appellant alone in the company of the child. Later on, the appellant also reached to the pond after a while and on query being made, the appellant informed her that she put the child to sleep and had come to the pond for washing the soiled clothes of the child. When both of them returned home, the child was not found and it was only after a couple of days the body of child could have traced under the sand.

9. So far as circumstantial evidence available in the instant case is concerned, all the witnesses examined do not dispute this fact that the child and the appellant were the last seen alone in the house. It is also clear that the house does not have a door at the back side for some third party to enter into the house and commit the offence and whoever would come would have to come from the main gate only, which nobody had seen anyone else to enter into the disputed place of occurrence. The defence also have not been able to rebut the evidence or disprove by discharging the burden of proof establishing the fact that the appellant was not alone while she was

taking care of the child and in the absence of plausible justification and circumstances made out, it is hard to disbelieve the evidence of the prosecution led in this regard.

10. So far as the motive is concerned, the prosecution witness states that the appellant having made the confession before her that since the child was crying for a long time, she got annoyed and assaulted the child.
11. Thus, from the circumstantial evidence which have been adduced by the prosecution before the court below, the entire chain of events leads to the only conclusion of firstly the appellant alone being in the company of the deceased child at the time of incident and secondly; there is sufficient evidence by which it can be safely concluded that it was the appellant alone who could have committed the offence.
12. For the foregoing reasons, we are of the opinion that there is no illegality or infirmity committed by the court below in holding the appellant guilty of having committed the offence under Sections 302 and 201 IPC. Accordingly, we affirm the judgment of conviction and dismiss the present appeal. The appellant is stated to be on bail. Her bail bonds are cancelled and she is directed to surrender and/or be taken into custody forthwith for serving out remaining sentence.

Sd/-
(Deepak Gupta)
CHIEF JUSTICE

Sd/-
(P.Sam Koshy)
JUDGE