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

Reserved on: 17th May, 2017
Pronounced on: 03rd July, 2017

+ Crl.A. 1084/2016

SHABANA

..... Appellant

Through: Mr. K. Singhal, Advocate

versus

STATE

.... Respondent

Through: Mr. Tarang Srivastava, APP with
SI Omveer Singh, PS Nand Nagri.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

1. The appellant, with her husband Mohd. Shafiq, stood trial in sessions case no.51/2013 registered on the basis of report under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.) submitted on conclusion of investigation into First Information Report (FIR) No.469/2012 of Police Station Nand Nagri, on the charge for offence punishable under Section 304 read with Section 34 of Indian Penal Code, 1860 (IPC), the gravamen whereof was that both of them in furtherance of their common intention had brought about death of a girl child Alisha, aged about 2½ years, by subjecting her to constant beatings on or before 26.08.2012. It may be mentioned here that Alisha, the victim child, was daughter of Mohd. Shafiq (the husband of the appellant) from his first marriage with Nazreen (PW-1), the first informant of the case, they having separated from each other about 1½ years prior to the incident.

2. The trial court, by judgment dated 26.07.2016, acquitted Mohd. Shafiq but held the appellant guilty, as charged, by convicting her under Section 304 Part-II IPC. By subsequent order dated 29.07.2016 while recommending compensation to be awarded by Legal Services Authority under Section 357-A Cr.P.C. to PW-1 (mother of the deceased child), the trial court awarded rigorous imprisonment for five years with fine of Rs.2,000/- as punishment to the appellant directing that she would undergo further simple imprisonment for three months in the event of default in payment of fine holding her entitled to the benefit of set off under Section 428 Cr.P.C. The said judgment and order on sentence have been assailed through the appeal at hand.

3. The evidence presented before the trial court unmistakably reveals that the deceased child was taken to GTB hospital Delhi (the hospital) by the appellant on 28.08.2012 in critical state. The child died on the night intervening on 28.05.2012 and 26.08.2012 at about 01:25 hours during the treatment, the initial cause of death having been noted as “*septicemia*”. On the death being brought to the notice of local police, inquest was conducted and a request made for postmortem examination to be conducted to establish the cause of death. The inquest papers would show that, amongst others, the statement of PW-1, the mother of the deceased child was also recorded in which she revealed that she had been informed by the neighbours of the husband on 26.08.2012 that her child had been killed by the appellant, the step-mother.

4. The dead body was subjected to post mortem examination by Dr. Arun Kumar (PW-2) who proved his report (Ex.PW-2/A) in the

course of trial. After the postmortem report dated 27.08.2012 (Ex.PW-2/A) had been issued, Sub-Inspector Shashi Kant (PW-5) moved an application Ex.PW-2/B for further opinion which was given by the autopsy doctor (PW-2) on 08.12.2012 (vide Ex.PW-2/C). The postmortem examination report (Ex.PW-2/A), the subsequent opinion (Ex.PW-2/C) and the oral testimony of the autopsy doctor (PW-2) have not been challenged by the defence during the trial. The same reveal that during autopsy it was found that the child was suffering from greenish discolouration, on account of decomposition, on lower chest and abdomen. He noticed multiple bed sores present in midline on back in various stages of healing.

5. The child was found to have suffered the following external antemortem injuries:-

“1. Partially healed abrasion with pinkish base measuring 1.5 cm x 1.5 cm present on right frontal area 3 cm from midline and 2 cm above right eyebrow.

2. Brownish scabbed abrasion measuring 0.5 cm x 0.5 cm present on left side forehead 3 cm from midline and 1.5 cm above left eyebrow.

3. Reddish scratch scabbed abrasion measuring 1 cm x 0.2 cm present horizontally on left side face 2 cm from midline and 0.7 cm below left lower eyelid.

4. Reddish brown scabbed abrasion measuring 0.3 cm x 0.3 cm present on left side face 6 cm from midline and 3 cm above left angle of mandible.

5. Brownish scabbed abrasion measuring 0.5 cm x 0.5 cm present in midline just below the chin.

6. Partially healed abrasion with pinkish base measuring 2 cm x 1.5 cm present on left side neck 1.5 cm from midline and 2.5 cm below the left angle of mandible.
7. Partially healed abrasion with pinkish base measuring 0.5 cm x 0.5 cm present in midline of neck 4 cm below chin.
8. Partially healed abrasion with pinkish base measuring 0.7 cm x 0.3 cm present on right side of neck 3 cm from midline and 1 cm below right angle of mandible.
9. Partially healed abrasion with pinkish base measuring 0.6 cm x 0.6 cm present on right side of neck 2.5 cm from midline and 3.5 cm below right angle of mandible.
10. Multiple brownish scabbed abrasions in an area of 2.5 cm x 2.5 cm present in midline chest 5 cm below suprasternal notch, three in number with size varying from 0.2 cm x 0.2 cm to 0.3 cm x 0.3 cm.
11. Brownish scabbed scratch abrasion measuring 0.8 cm x 0.1 cm crescentic in shape obliquely placed on lateral aspect of right arm 2 cm above elbow joint.
12. Brownish scabbed scratch abrasion measuring 0.8 cm x 0.1 cm crescentic in shape vertically placed on lateral aspect of right elbow joint.
13. Multiple brownish scabbed scratch abrasions in an area of 2 cm x 2 cm crescentic in shape, three in number present on front of left forearm 2 cm above the wrist joint. Size varies between 0.6 cm x 0.1 cm to 0.8 cm x 0.1 cm.
14. Brownish scabbed scratch abrasion measuring 0.8 cm x 0.2 cm crescentic in shape present vertically on right side back 1 cm from midline and 5 cm above the inferior angle of scapula.
15. Brownish scabbed abrasion measuring 0.3 cm x 0.3 cm present on right side back 2 cm from midline and 1.5 cm below the inferior angle of scapula.

16. Brownish scabbed abrasion measuring 0.4 cm x 0.4 cm present on left side back 3 cm from midline and 3.5 cm below the inferior angle of scapula.

17. Brownish scabbed abrasion measuring 0.5 cm x 0.5 cm present on anteriolateral aspect of right leg 5 cm below knee joint with underlying fracture of upper 1/3 of tibia with extra vacation of blood into the surrounding tissue.”

6. The internal examination reveals that the child had suffered fracture in midclavicular line of the second left rib. There was pus formation in both the lungs. The 17th external injury and the injury to the second left rib were grievous in nature, which had been produced, in the opinion of the autopsy doctor, due to blunt force impact likely to be caused in the case of child neglect and abuse. The cause of death was stated to be indicated as septicemic shock on account of ante mortem infection of multiple bed sores. The autopsy doctor was unable to conclusively say if septicemia being due to natural disease process or as a result of injuries suffered. In his opinion, the injuries noted by him were not sufficient in ordinary course of nature to cause death but would have attributed to the death. He did not offer any clear opinion whether or not the death was homicidal.

7. After the subsequent opinion (Ex.PW-2/C) had been given by the autopsy doctor on 08.12.2012, the matter saw police action. Statement (Ex.PW-1/A) of Nazreen (PW-1) mother of the deceased child was recorded on 17.12.2012 by Sub Inspector Shashi Kant (PW-5). In the said statement, PW-1 reiterated that she had been told by the neighbours of her estranged husband that his second

wife (the appellant) was ill-treating the child, often subjecting her to beatings and that the death had occurred due to these reasons as also on account of need for treatment of the child having been neglected. She explained that she had been married to Mohd. Shafiq about eight years ago and had delivered three children from out of said wedlock, the deceased child being the junior most. According to her, she had started living separately from her husband leaving her three children, including the deceased child, then aged about 2½ years, for about 1½ years prior to the death. According to her, the husband Mohd. Shafiq had started living with the appellant declaring her to be his wife, even prior to her separation. She stated that information about ill treatment of the child and she being physically assaulted often by the appellant was brought to her knowledge by Rahisan (PW-3). She stated it was PW-3 who had told her about death of the child and that when she had gone to see the dead body she was not allowed to do so. She stated that she was shown the dead body on 27.08.2012 after postmortem examination whereafter she had taken the same for last rites.

8. PW-5 made an endorsement (Ex.PW-5/A) on the statement thus made by PW-1 and on that basis got the FIR (Ex.PW-5) registered, the same having been recorded on 17.12.2012 for offence under Section 304/34 IPC and Section 34 of Juvenile Justice (Care and Protection of Children) Act, 2000.

9. During the investigation that followed, statement (Ex.PW-11/A) of Rahisan (PW-3) was recorded under Section 164 Cr.P.C. by Metropolitan Magistrate (PW-11).

10. After completion of investigation, during which both the appellant and her husband Mohd. Shafiq were arrested, a charge sheet was laid, seeking prosecution for offences under Section 304/34 IPC and Section 23 of the Juvenile Justice (Care and Protection of Children) Act, 2000 on which the Magistrate took cognizance and issued process.

11. After the case had been committed, the sessions court considered the question on charge. It put the appellant and her husband Mohd. Shafiq on trial on the charge under Section 304/34 IPC, to which both pleaded not guilty.

12. The prosecution led evidence by examining twelve witnesses they being Nazreen (PW-1); Dr. Arun Kumar (PW-2); Rahisan (PW-3); Shahnaz (PW-4); SI Shashi Kant (PW-5); HC Sunil Kumar (PW-6); HC Tilak Raj (PW-7); Sapna (PW-8); W/Ct. Hem Lata (PW-9); Ct. Ravinder (PW-10); Sunil Gupta (PW-11) and Insp. Devender Kumar (PW-12).

13. Statements under Section 313 Cr.P.C. of both the appellant and her husband were recorded in which they claimed to be innocent and falsely implicated. Noticeably, in the said statements, it was claimed that PW-1 had left the victim child in “*unwell condition*” at the house of the accused persons with the remarks “*apne bachon ko khud sambhalo*”. It was claimed that after the death of the child in the hospital during treatment, PW-1 had threatened to falsely implicate the appellant and Mohd. Shafiq demanding money. It was claimed that PW-3 had grabbed the household articles of the accused persons in which regard complaint was lodged by Mohd. Shafiq with Police Station Nand Nagri on

17.09.2012. It was stated that PW-3 and other witnesses had deposited falsely on this account.

14. Three witnesses in defence were examined they including Smt. Varisha wife of Zulfiqar, (DW-1); Mohd. Shafiq (DW-2) the husband of the appellant (he himself being co-accused at that stage) and Head Constable Har Mohan (DW-3).

15. It may be mentioned here that the evidence of DW-2 and DW-3 does confirm that Mohd. Shafiq, the husband of the appellant, had lodged a complaint on 17.09.2012 (vide Ex.DW-2/A and DW-3/A) with regard to his household goods having been taken away by, amongst others, Rahisan (PW-3) and her husband Zakir at the instance of PW-1, his tenanted room (in the property of PW-3) having been locked and he having been denied entry against the backdrop of allegedly a false report having been lodged about his involvement in the death of the child. It is clear from this material that PW-1 and others, including PW-3, had been leveling allegations against the appellant and her husband Mohd. Shafiq as early as September, 2012 about their involvement in the events leading to the death of the child.

16. The learned trial court found the evidence to be deficient so as to hold Mohd. Shafiq guilty. He, however, found the evidence worthy of reliance to return finding of guilty against the appellant holding her responsible for the death of the child, in the facts and circumstances, in his opinion, indicative of it being a case of culpable homicide not amounting to murder punishable under Part-II of Section 304 IPC.

17. Pleading innocence, the appellant has come up in appeal questioning the view taken by the learned trial court.

18. Having heard the learned counsel for the appellant and the learned Additional Public Prosecutor for the State in the light of evidence adduced before the trial court, this court is of the opinion that the judgment of the trial court does not call for any interference. The reasons are set out hereinafter.

19. It is clear from the evidence that PW-1 had separated from Mohd. Shafiq about 1½ years prior to the incident. Her three children had remained with the husband, the deceased child being the youngest. According to PW-1 the victim child was about 2½ years old when she separated from the husband. Yet, she looked like one year old. This is how PW-8, another resident of the same property would describe her. It is clear from the evidence of PW-1, as indeed other witnesses of the locality, they being the landlady PW-3 and neighbours PW-8 and DW-1 that the deceased child was maintaining poor health and required medical attention. This also vivid from the observations in the autopsy report. But then, the defence theory that the child had remained with PW-1 who had left her at the place of Mohd. Shafiq and the appellant on 23-24.08.2012, as is the version given by DW-2 in his testimony, is not believable. The word of PW-1 that the child had remained in the custody and care of Mohd. Shafiq and the appellant throughout the period of her separation from the husband is supported by the evidence of PW-3, PW-4 and PW-8. These witnesses confirm that the child was ill treated by the appellant during the period of 1½ years.

20. The above mentioned witnesses described the ordeal of the child to the effect that the appellant would beat her up often and deprive her of medical treatment whenever required. Each of them supported the prosecution case that whenever they would object to such conduct, the appellant and her husband would respond by warding them off saying that it was their personal matter. Pertinent to add here, according to PW-4, the child had been beaten up by the appellant on 25.08.2012 which rendered her condition serious only whereafter the hospital was approached. PW-8 stated that the appellant had thrown the child as a result of which she had suffered from fits.

21. The learned counsel for the appellant argued that there is unexplained delay in reporting of the case to the police. Indeed, the death having occurred on 26.08.2012, the registration of the FIR on 17.12.2012 was quite belated. But, as the evidence clearly shows that there was no delay on the part of PW-1. Inaction was wholly that of the police. Unnatural death, the circumstances possibly constituting a cognizable offence, had come to its notice on 26.08.2012. As mentioned earlier, even during inquest proceedings, PW-1 had made allegations about the child having died due to physical assaults. The autopsy report had been issued on 27.08.2012. Conspicuously, PW-5 in his testimony would claim that the said report came in his hands on 04.12.2012. He would attribute this to the *moharrar* record of the Police Station. There is no witness examined by the prosecution to explain as to why the postmortem examination report dated 27.08.2012 did not see the light of the day till 04.12.2012. PW-5 acknowledges having

received it from *moharrar* record but this delay does not mean the word of PW-1, or for that matter of other witnesses from the neighbourhood, should be disbelieved. If at all, delay calls for some internal probe by the police department so that responsibility can be fixed and such delays do not recur in future.

22. The evidence of neighbours (PW-3, PW-4 and PW-8) about routine assault on the person of the infant child by the appellant is corroborated by extensive external as well as internal injuries suffered by her as noticed during autopsy. In these circumstances, this court has no hesitation in upholding the finding of the trial court that the appellant was the author of the said injuries.

23. It is possible that the ill health of the child may have added to the cause of the death. Unfortunately, no investigation was carried out as to the nature of ailments suffered by the child. There is some reference to the child suffering from fits. But the cause for fits may by itself not even be the one leading to fatality. The bed sores noted on the dead body do indicate the child would have suffered utter neglect. This, coupled with the fractures suffered, as indeed the other injuries, does confirm physical assaults. The death in these circumstances cannot be related to any existing ailment.

24. It does appear that the autopsy doctor (PW-2) has not been very clear in his opinion as to the cause of death. It may be that the injuries noticed by him individually may not be sufficient to cause death. But, it has to be remembered that the deceased child was an infant, who seemingly was mal-nourished and keeping poor health. Denial of medical treatment to a child of such tender age and, instead, intentionally subjecting her to routine physical assaults, the

assaults being so vigorous as to result in she suffering fractures are acts which collectively present a scenario from which knowledge that the intended bodily injuries were likely to bring about death can be inferred. In such fact situation, this court unhesitatingly upholds the conclusion that the death of baby Alisha was a case of culpable homicide within the meaning of the expression defined in Section 299 IPC. But, since the acts committed would not fit in within the four corners of the definition of the offence of murder, as given in Section 300 IPC, the case has to be held covered by the penal clause contained in Part-II of Section 304 IPC.

25. For the foregoing reasons, the finding returned by the learned trial court holding the appellant guilty and convicting her under Section 304 Part-II IPC is upheld. Given the nature of the offence committed, in the opinion of this court, the trial Judge having already been quite lenient in the matter of punishment, there is no case made out for any reduction in the sentence.

26. The appeal, therefore, fails and is dismissed.

27. The appellant shall be informed by a copy of this judgment, to be served on her through Superintendent Jail.

28. A copy of this judgment shall also be sent to the Commissioner of Police for inquiry into the delay in registration of the FIR in the case at hand and for such administrative action as may be deemed necessary in accordance with law.

(R.K. GAUBA)
JUDGE

JULY 03, 2017/vk