

HIGH COURT OF CHHATTISGARH BILASPUR

Judgment reserved on 04/08/2018

Judgment delivered on 10/08/2018

Criminal Appeal No. 1238 OF 2013

Phulo Bai W/o Sukru, aged 28 years, R/o village Alba Padrupara, P.S. Kodenr, District Bastar, Chhattisgarh.

---- Appellant

Versus

State of Chhattisgarh, through District Magistrate, Bastar, Police Station Kodenr, District Bastar, Chhattisgarh.

---- Respondents

For Appellant	:	Mr. B. N. Nande, Advocate.
For Respondent/State	:	Ms. Madhunisha Singh, Panel Lawyer.

Hon'ble Shri Goutam Bhaduri and
Hon'ble Shri Parth Prateem Sahu, JJ

C A V JUDGMENT

Per Parth Prateem Sahu, Judge

1. This appeal is against the judgment of conviction and order of sentence dated 30/10/2013 passed by the learned First Additional Sessions Judge, Bastar at Jagdalpur, Chhattisgarh in Sessions Trial No.92/2012, thereby convicting and sentencing the appellant for causing death of her daughter and son, namely Arti and Anil, as under :-

<u>Conviction</u>		<u>Sentence</u>
Under Section 302 of IPC	:	Imprisonment for life with fine of Rs.100/-, in default of payment of fine amount, additional imprisonment for one year.
Under Section 302 of IPC	:	Imprisonment for life with fine of Rs.100/-, in default of payment of fine amount, additional imprisonment for one year.
Both the sentences have been ordered to run concurrently.		

2. Brief facts of the case, are that, on 26/05/2012 when Sukru Kashyap was sleeping under Tamarind tree in front of his house, in afternoon at about 3:00 pm, his wife Phulo Bai (appellant), son Anil, and daughter Arti started vomiting. On account of this, Sukru Kashyap (PW-1) took his son to one Bhursu (*Baiga*) and daughter Arti to the house of Dhansingh (*Baiga*) of his village for purpose of exorcism (झाड़फूंक). After some time, at about 4:00 pm, both children died and his elder daughter Anita due to complaint of vomiting, was taken to Community Health Centre, Tokapal by Ambulance in night at about 9:00 pm, from where, she was referred to Maharani Hospital, Jagdalpur. *Merg* intimation vide Exs. P-15 and P-16 was made by Sukru Kashyap (PW-1) on next day i.e. 27/05/2012. During course of investigation, *Dehatinalishi* was prepared on 27/05/2012 at about 1:40 pm vide Ex. P-18. Thereafter, dead bodies were sent for postmortem vide Exs. P-11-A and P-12-A. As per postmortem reports vide Exs. P-11 and P-12, cause of death was due to cardio pulmonary dysfunction due to intake consumption of unknown poison. After completion of the investigation, on the basis of *merg* intimation and *Dehatinalishi*, First Information Report was registered on 27/05/2012 vide Ex. P-19, at about 7:30 pm by Sukru Kashyap (PW-1).

3. During course of investigation, memorandum of appellant was recorded vide Ex. P-4, in which, she stated that she gave poison to her children. On the basis of memorandum, one metal pot (लोटा), in which, some mixture with foul smell was lying in dry condition and piece of polythene with some foul smell powder was recovered at the instance of appellant vide Ex. P-5. One cloth kept near deceased Arti with some vomit material was also recovered vide Ex. P-6.

4. Initially, offences under Sections 328 and 309 of IPC was registered against the appellant, but after conclusion of investigation, final report for

offence under Sections 328, 309, 302 and 307 of IPC was submitted before the Judicial Magistrate First Class, Jagdalpur. The Learned Trial Court on the basis of material available in charge-sheet has framed charges under Sections 302, 309 and 307 of IPC. During the course of trial, the appellant abjured her guilt and claimed to be tried. The prosecution on her behalf examined as many as 9 witnesses to prove the documents from Exs. P/1 to P/25. In the statement under Section 313 of Cr.P.C, the appellant contended that she has been falsely implicated.

5. Learned Trial Court after evaluating the evidence on record, convicted and sentenced the appellant as above. Hence, this appeal. The appellant was acquitted from the charges under Sections 307 and 309 of IPC.

6. Learned counsel appearing for the appellant submitted that there was no intention and motive of appellant to murder her own children and along with children, she also consumed poisonous substance. He further submitted that as per evidence of Anita (PW-2), one of her daughters who fortunately saved through medical treatment, deposed that at the time of incident, her mother (appellant) was not behaving normally. He further submitted that other independent witness Somaru (PW-4) also stated on asking appellant specifically stated that on account of intoxicated condition, appellant gave her children poisonous substance treating it to be medicine. He lastly submitted that looking to the facts and circumstances of the case, learned Trial Court committed illegality in convicting and sentencing the appellant as above, which may be set aside.

7. Per contra, learned State counsel supported the impugned judgment of conviction and submitted that conviction of appellant is based on statements of witnesses, particularly, statements of witness-cum-victim Anita (PW-2), daughter of appellant, Chaituram (PW-3) and Somaru (PW-

4). She further submitted that postmortem reports show that death was due to consumption of poisonous substance. On the basis of aforementioned submissions, learned State counsel lastly submitted that conviction of the appellant is well merited and does not call for any interference.

8. We have heard learned counsel appearing for the parties and perused the records carefully.

9. Anita (PW-2), daughter of appellant and victim of consuming poison given by appellant, deposed in her evidence that at about 12:00 pm when all the children along with mother were present in their house, at that time, her mother stated that someone is coming to kill them, they may drink medicine and given all three children liquid mixture. She further deposed that at that time, activity of her mother was like abnormal person. The liquid which was given to them was having foul smell. She further deposed that immediately thereafter, she felt uncomfortable, uneasy and she started vomiting. She further deposed that her brother and sister died in her presence and subsequently, she was taken to Hospital by her father. She specifically deposed that due to consumption of medicine given by her mother, her brother and sister died.

10. Another witness Sukru Kashyap (PW-1), husband of appellant and father of deceased children deposed in his evidence that when he came to his house after taking bath at about 4:30 pm, appellant/accused was providing tea to her children and immediately thereafter, all the three children started vomiting and some white froth was coming out from their mouth and nose. He further deposed that after half an hour, his son Anil died in the house of Bhursu (*Baiga*) and after some time, her daughter Arti also died in the house of Dhansingh (*Baiga*). He further deposed that when another child Anita also started vomiting, then he immediately called

Ambulance and took her to Hospital, where he came to know that the patient has consumed poison. He lastly deposed that on asking by villagers, appellant told them that she gave poison to her children.

11. Another witness Somaru (PW-4), one of the resident of village and independent witness, deposed in his evidence that on receiving information from Budru, he immediately rushed to the house of appellant and saw that two children lying dead and third child was taken to Hospital by Sukru Kashyap (PW-1). He further deposed that on being asked why she gave poison to children, on which, she stated that she was in intoxicated condition and does not know as to how the poisonous substance was given by her to children. This witness in his cross-examination submitted that liquid mixture which was kept in metal pot (लोटा), was given to children and further stated that due to intoxicated condition of the appellant by consuming liquor, she gave mixture to her children treating it to be a medicine.

12. Sadaram (PW-5) who is witness of seizure deposed in his evidence that appellant has given memorandum before the Police vide Ex. P-4 and on her instance, seizure of metal pot (लोटा) was made vide Exs. P-5 and P-6 and the appellant was arrested by Police vide Ex. P-7.

13. Dr. S.S. Raj (PW-8) was examined by the prosecution, who has specifically deposed in his evidence that he conducted postmortem and submitted reports vide Exs. P-11 and P-12, in which, he found that death was due to consumption of unknown poisonous substance. He also opined that cause of death was non-functioning of lungs and heart due to consumption of unidentified poison.

14. Rupak Sharma (PW-9), Investigating Officer was examined by the prosecution, who proved seizure (Ex. P-9), First Information Report (Ex. P-

19), spot map (Ex. P-20) and a letter dated 27/06/2012, which was sent to the FSL Raipur vide Ex. P-21. He also proved other documents.

15. From scrutinizing all the documents exhibited by prosecution and the evidence of prosecution witnesses, it is clear that the death of two children took place due to consumption of poison and it has been proved that the poisonous substance was given by appellant to her children. But from aforementioned evidence and materials, it reflects that at the time of giving mixture of poisonous substance to her children, appellant was not in a fit mental condition, but she was under influence of liquor. As per specific statement of Somaru (PW-4), before whom appellant made statement and statement of Anita (PW-2) daughter of appellant, it is clear that at the time of giving mixture of poisonous substance, appellant was not in her sense.

16. The FSL report was not received and marked as exhibit to prove and ascertain type of poison consumed by the deceased children or the child saved in incident. Even the material seized vide Ex. P-5 mentioning it to be poison could not be identified as poison of any particular denomination/characteristic or whether the material said to be seized was poison or not without there being any proof of particular type of poison used, it cannot be said that appellant made preparation for causing death. There can be several forms of poison and sometimes the pesticides normally used in agricultural activities in the form of powder and liquid are also dangerous to life, especially, for small children which are kept in home. By not producing the FSL report, prosecution failed to prove the preparation of appellant in causing death.

17. The material evidence available on record would show that at the time of incident when appellant has provided poisonous substance to her children and asked them to drink it, she was not in a fit mental condition, therefore, the question for consideration before this Court in the facts and

circumstances of the case is that whether the conviction of appellant under Section 302 of IPC would be proper or not and she is required to be convicted for some other offence under the provisions of IPC.

18. In the matter of ***Bivash Chandra Debnath & Others v. State of West Bengal*** reported in **(2015) 11 SCC 283**, the Supreme Court has reiterated the law laid down in case of ***Pulicherla Nagaraju v. State of A.P.*** reported in **(2006) 11 SCC 444** and has discussed the issue when the conviction can be converted from an offence punishable under Section 302 of IPC to Section 304-I or Section 304-II of IPC, which is reproduced herein below:-

“29. Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters – plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (i) nature of the weapon used; (ii) whether the weapon

was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. Be that as it may.”

19. Admittedly, the children are real children of appellant, there is no evidence and material to show that there was any motive or intention for killing or murdering them. In fact, the circumstances and evidence shows that the incident took place when appellant was not in a fit mental condition or it can be said that at that relevant time, she was under influence of liquor, therefore, she was not having prudent mental status to identify that whether mixture which she is giving to her children, was medicine or poison. The evidence available on record reflects that mixture given by her on the pretext that she is giving medicine to her children, but in fact that was poisonous mixture, which she cannot realize or recognize that the said mixture was poisonous mixture.

20. The material and evidence available on record do not show that appellant used to ill-treat her children or husband and further that there is no evidence on record to show that there was dispute of any nature

between appellant and her husband to show that she was having any motive for commission of offence of murder of her own children.

21. In the light of aforementioned law laid down by Hon'ble Supreme Court, if we consider the facts and circumstances of the case in hand, the evidence of Sukru Kashyap (PW-1), Anita (PW-2) and Somaru (PW-4) would clearly show that there was no quarrel, enmity, motive or even intention to cause murder of her own children, namely, Arti and Anil, but the reasons which emerges from the material available on record for involvement of appellant in offence is only that she whilst deprived of the power of self-control by consuming liquor as per evidence of Somaru (PW-4) at the particular time of incident, but overall circumstances would show that she lost her sense, which was specifically deposed by Anita (PW-2), her daughter. The appellant being mother and looking to her unblemished past conduct could not have committed such an offence in a prudent mental condition. Further, there is no evidence of forceful administration of poisonous substance by appellant to draw inference that the act of appellant was cruel and having intention to cause death of her own children. But the fact remains that two children of appellant herself died due to liquid mixture given to them for drinking by appellant.

22. Therefore, looking to entire facts and circumstances of the case, the offence committed by the appellant will not come within the definition of culpable homicide as provided under Section 299 of IPC in fact, the act of appellant comes within the purview of Section 304 Part I of IPC.

23. In the result, the appeal is allowed in part. Conviction and sentence of the appellant under Section 302 of IPC (on two counts) is altered to Section 304 Part I of IPC (on two counts) for causing death of her daughter and son, namely, Arti and Anil and she is sentenced to undergo rigorous imprisonment for 10 years with fine of Rs.1,000/-, on each counts

and in default of payment of fine amount, additional rigorous imprisonment for one year on each counts. Both the sentences shall run concurrently.

Sd/-
(Goutam Bhaduri)
Judge

Sd/-
(Parth Prateem Sahu)
Judge

Yogesh