

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 342 of 2014

- Smt. Gouri W/o Ashish Raj, aged 19 years, R/o Village Mayapur, P.S. Ambikapur, District Surguja (C.G.)

---- Appellant

Versus

- State of Chhattisgarh through Police Station Ambikapur, District Surguja (C.G.)

---- Respondent

For Appellant : Shri Krishna Kumar Khatri, Advocate

For Respondent/State : Smt. Madhunisha Singh, Panel Lawyer

Hon'ble Shri Justice Prashant Kumar Mishra, J
Hon'ble Shri Justice Gautam Chourdiya, J

Judgment on Board by Justice Gautam Chourdiya

28.01.2020

1. Challenge in this appeal is to the judgment of conviction and order of sentence dated 27.11.2013 passed by learned Additional Sessions Judge, F.T.C., Ambikapur, District Surguja (C.G.) in Sessions Trial No. 219 of 2011, whereby the appellant stands convicted under Section 302 of IPC for committing murder of Guddu aged about six months, on 17.04.2011 and sentenced to undergo life imprisonment and fine of Rs.1,000/-, in default of payment of fine to undergo additional rigorous imprisonment for one month. The appellant has been further convicted under Section 201 of IPC and sentenced to undergo rigorous imprisonment for five years and fine of Rs.500/-, in default of payment of fine to undergo additional rigorous imprisonment for fifteen days. Both the sentences were directed to run concurrently.

2. Case of the prosecutions is that marriage of Santosh Rajak (PW-1) resident of Surajpur was solemnized with Savita Rajak (PW-5) prior to 3-4 years from the date of incident i.e. on 17.04.2011 at Mayapur, Ambikapur. After marriage one daughter aged about three years and one boy Guddu aged about six months were born out of their wedlock. On the date of incident i.e. 17.04.2011, Savita (PW-5) with her son Guddu was at Mayapur, Ambikapur. On 18.04.2011 at about 08:30 am, on information being given by Riazuddin, Ward Boy, District Hospital Ambikapur in Police Station Kotwali, Ambikapur regarding death of Guddu aged about six months due to drowning, merg intimation Ex.-P/5 was registered by Sub-Inspector S.C. Minj (PW-6). On the basis of merg intimation Ex.-P/5, F.I.R. Ex.-P/8 was registered on 18.04.2011 against unknown person under Section 302 & 201 of IPC.
3. During investigation, the Investigating officer gave notice to the *panchas* vide vide Ex.-P/6 and prepared the spot map vide Ex.-P/2 which is part of crime detail form. Inquest of the dead body was prepared vide Ex.-P/7. Dead body of Guddu was sent for postmortem examination to District Hospital, Ambikapur vide Ex.-P10, where the postmortem examination was conducted by PW-8 Dr. K.R. Tekam and he gave his report Ex.-P/14. According to his report Ex.-P/14, the mode of death of deceased Guddu was asphyxia caused by smothering leading to cardiopulmonary arrest. Duration of death was found to be within 36 hours.
4. However, no memorandum statement of the accused was recorded, nor any article was recovered from her. During investigation, case diary statements of witnesses namely Santosh Rajak, Nandu Raj, Smt. Leela Devi, Ashish Kumar, Savita Devi and Pooja were recorded. As per case diary statements, the appellant was having some dispute with Savita, mother of deceased Guddu, due to jealousy and she (appellant) committed murder of her (Savita's) son.

5. After completion of investigation, charge-sheet was filed by the police for the offence under Sections 302 & 201 of IPC. The trial Court framed the charge against the accused/appellant under Sections 302 & 201 of IPC which was denied by her and she prayed for trial.
6. So as to hold the accused/appellant guilty, prosecution has examined 09 witnesses in support of its case. Statement of the accused/appellant was also recorded under Section 313 of Cr.P.C. in which she denied the incriminating circumstances appearing against her in the prosecution case and pleaded her innocence and false implication in the case. No defence witness has been examined on behalf of the appellant.
7. The trial Court after hearing the counsel for the parties and considering the material available on record, by the impugned judgment convicted and sentenced the accused/appellant as mentioned in para-1 of this judgment, hence this appeal.
8. Shri Krishna Kumar Khatri, learned counsel appearing on behalf of the appellant, submits that there is no eyewitness to the incident, nor any circumstantial evidence proved against the appellant to connect her with the crime in question. He further submits that there used to be only usual dispute between the appellant and the mother of deceased and no any enmity was there between them, therefore, there is no cogent, clinching and reliable evidence against the appellant for sustaining her conviction. He also submits that looking to the material contradictions and omissions in the statements of PW-5 Savita Rajak and her husband PW-1 Santosh Rajak, the learned trial Court has wrongly convicted the appellant without any evidence against her and as such, the appellant deserves to be acquitted.
9. Per contra, Smt. Madhunisha Singh, learned Panel Lawyer appearing on behalf of the State, supports the impugned judgment and submits that on the date of incident i.e. on 17.04.2011, appellant Gouri was at her parental home

and some dispute arose between the appellant and the mother of the deceased, the appellant committed murder of her (PW-5) son Guddu, therefore, the impugned judgment of the trial Court needs no interference by this Court.

10. Having heard rival contentions of the parties, we have perused the record of Sessions Trial No. 219/2011.

11. PW-8 Dr. K.R. Tekam has proved the postmortem report Ex.-P/14. According to his report Ex.-P/14, he found that death of deceased Guddu aged about six month, a male child, was due to asphyxia caused by smothering leading to cardiopulmonary arrest. Duration of death was found to be within 36 hours. There is no challenge in cross examination to evidence of PW-8 regarding death of child due to smothering of mouth and nose.

12. In this case, no memorandum statement of accused/appellant Gouri was recorded, nor any article was recovered from her. The trial Court only on the basis of presumption has convicted the appellant. To bring home the charge for committing murder on the basis of circumstantial evidence, the prosecution has to prove chain of circumstantial evidence which only proves the guilt of the accused to the exclusion of any other person who might have committed the crime. The principle has been succinctly laid down by the Supreme Court in ***Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116***, wherein it has underlined the conditions, which must be fulfilled for convicting an accused on the basis of circumstantial evidence and held in para-153 as under:

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established :

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be'

established. There is not only a grammatical but a legal distinction between 'may be proved' and "must be or should be proved" as was held by this Court in *Shivaji Sahebrao Bobade v. State of Maharashtra*, (1973) 2 SCC 793 : (AIR 1973 SC 2622) where the following observations were made:

'Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.'

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

13.In this case, it is not possible for a six month child to move from house to well where the dead body was found as mentioned in Ex.-P/2. Therefore, it is proved by the prosecution that death of deceased Guddu is homicidal in nature. It is true that PW-8 Dr. K.R. Tekam has not mentioned the nature of death, but looking to the facts and circumstances of the case, the dead body was found into the well and cause of death was asphyxia caused by smothering leading to cardiopulmonary arrest which is proved by PW-8 Dr. K.R. Tekam through postmortem report Ex.-P/14, the death can safely be considered as homicidal.

14.PW-1 Santosh Rajak is the father of deceased Guddu, but he is not an

eyewitness of the case. He reached after call was made by his wife PW-5 Savita Rajak and she was making allegation against him (PW-1) that he took her child. Thereafter, he (PW-1) went to Ambikapur and his wife was also making allegation against her brother-in-law (*Bahnoi*), at that time her son was not found and they were searching for Guddu. PW-1 has stated that on the next day i.e. 18.4.2011, his wife told Pooja to fetch water from the well, then Pooja went to well for fetching water and immediately returned from well and informed them that Guddu was in the well. Then he went to well, took out Guddu from well and took Guddu to hospital where the Doctor declared that Guddu has died. PW-1 is not a person who took his child from home and he only made allegation against the appellant that there was some dispute between the appellant and his wife. As per Ex.-D/1, police case diary statement of PW-1, he is making different and contradictory statement as mentioned in Ex.-D/1 and has made improvement, but he is not eyewitness.

15. PW-2 Nandu Raj has stated that the police had arrested appellant Gouri. He has stated that the police officer had inquired the matter, then in the presence of police, the appellant stated that she had committed murder of Guddu by pressing and throwing him into the well. But no memorandum statement of appellant Gouri was recorded by the police and if any confessional statement was made before police, it is hit by the provisions of Sections 25 & 26 of the Evidence Act. No any discovery of fact or article is made from the appellant, therefore, looking to the statement of PW-2, he is not eyewitness to the incident, nor the appellant was last seen with the deceased.

16. PW-3 Leela Devi is the mother-in-law of accused/appellant and mother of deceased's mother PW-5 Savita. But, PW-3 has not supported the prosecution case and she has been declared hostile and in her court

evidence, she denied that any confessional statement was made by the appellant before her or she made any such statement before the police under Ex.-P/4. PW-3 only stated that on account of cooking food, some usual dispute used to arise between the appellant and her daughter Savita (PW-5). PW-3 has only stated that her daughter (PW-5) told her (PW-3) that the appellant committed murder of her son Guddu and after murder of Guddu, the appellant has thrown Guddu into the well. But, PW-3 is not eyewitness and nor the witness of last seen of the appellant with the deceased.

17. PW-4 Ashish Kumar is the husband of the appellant and the brother of Savita (PW-5) and he has also not supported the prosecution case. PW-4 stated that he was informed by Pooja that the dead body of Guddu was found in the well which was situated in courtyard. His case diary statement is marked as Ex.-P/4 given before the police and he has not supported the prosecution case and he was not eyewitness in the present case.

18. Only PW-5 Savita has stated against the appellant, who is her (PW-5) sister-in-law (*Bhabhi*). PW-5 has stated that the appellant had thrown her child Guddu into the well, therefore, Guddu died, but she is not eyewitness to the incident, only suspicion was raised by PW-5 against the appellant. In para-1 of her court evidence, PW-5 has stated that in the same house, she was sleeping with her child Guddu, thereafter, her brother Ashish came there and requested to his wife (appellant) to tie the mosquito net, then the appellant told Pooja to tie the mosquito net. Thereafter, when Pooja was tying the Mosquito net, she saw that Guddu was not found in the place where he was sleeping. They were searching for Guddu, but he could not be traced. PW-5 also stated that in the same night i.e. 17.04.2011 about 08:00 pm, some domestic dispute arose regarding cooking of food between the appellant and PW-5 and thereafter, after taking the meal, the appellant had gone towards

well. She also stated that the appellant was having jealousy with her, therefore, the appellant had thrown her child into the well.

19. PW-6 S.C. Minj, Assistant Sub-Inspector, has registered and proved Ex.-P/5 merger intimation. PW-7 R.J. Kerketta, Assistant Sub-Inspector has proved Ex.-P/6 notice to *panchas*; Ex.-P/7 inquest and Ex.-P/8 FIR.

20. Looking to the statement of PW-4 Ashish, brother of Savita (PW-5), he has stated that when he reached his home and asked his wife (appellant) to serve the meal, her wife went for serving the meal. Thereafter, his sister was requesting him for tying the Mosquito net and on this his wife told Pooja to tie the mosquito net and thereafter, when PW-4 heard cries of her sisters (Savita & Pooja), he went and asked them what happened, then Pooja told him that Guddu was not in the home and they were searching for Guddu. In the present case, nobody has seen the appellant with Guddu in the night, nor discovery of fact or article was proved by the prosecution, nor memorandum statement of the appellant was recorded by the police as stated by PW-2 Nandu Raj. When the police inquired from the appellant, the appellant has stated that she has thrown Guddu into the well, that statement or confessional statement is not admissible evidence under the law. There was no evidence, direct or indirect to connect the appellant with the crime of commission of murder. Therefore, there is no cogent and clinching evidence against the appellant adduced by the prosecution and the trial Court has wrongly convicted and sentenced the appellant for the offence under Sections 302 & 201 of IPC.

21. In view of the above, we are not convinced that the prosecution has proved its case beyond reasonable doubt against the accused/appellant. She deserves to be acquitted by giving her benefit of doubt. Accordingly, we set aside the impugned judgment of conviction and acquit the accused/appellant of the charges under Sections 302 & 201 IPC. The appellant is in jail. She be

released forthwith if not required in any other case, on her furnishing a personal bond for a sum of Rs.25,000/- with one surety in the like sum to the satisfaction of the trial Court. The bail bond shall remain in operation for a period of six months from today as required under the provisions of Section 437-A of the Cr.P.C. The appellant shall appear before the higher Court as and when directed.

22. In the result, the instant criminal appeal is allowed.

Sd/-
(Prashant Kumar Mishra)
Judge

Sd/-
(Gautam Chourdiya)
Judge