
(2011) 08 CHH CK 0012
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 601 of 2006

Anand @ Gudva Nageshiya

APPELLANT

Vs

The State of C.G.

RESPONDENT

Date of Decision : 30-08-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 201, 302

Citation : (2011) 1 CGBCLJ 470

Hon'ble Judges : T.P. Sharma, J; Rangnath Chandrakar, J

Bench : Full Bench

Advocate : R.K. Jain, for the Appellant; Madhunisha Singh, for the Respondent

Final Decision : Dismissed

Judgement

T.P. Sharma, J.—Challenge in this appeal is to the judgment of conviction & order of sentence dated 3-8-2006 passed by the 3rd Additional Sessions Judge (FTC), Ambikapur, in Session Trial No. 168/2005, whereby & whereunder learned Additional Sessions Judge, after holding the appellant guilty for commission of culpable homicide amounting the murder of 4 years" aged child Aakash and concealing the evidence of criminal case, convicted the appellant under Sections 302 & 201 of the IPC and sentenced him to undergo imprisonment for life & pay fine of Rs. 500/-, in default of payment of fine to further undergo RI for one month and to undergo RI for three years & pay fine of Rs. 300/-, in default of payment of fine to further undergo RI for twenty days, respectively. Conviction is impugned on the ground that without any iota of evidence, the trial Court has convicted & sentenced the appellant, and thereby committed illegality.

2. As per case of the prosecution, on the fateful day of 26-3-2005 between 7 p.m. and 8 p.m. at village Aamadarha, Police Station Darima, Distt. Surguja, the unfortunate 4 years" aged deceased child Aakash was sitting on the lap of his maternal grand mother Kendi (PW-12), the appellant went to the house of Kendi

(PW-12) and on the pretext of providing sweets to the child Aakash, the appellant took the child Aakash with him, thereafter, the appellant did not return back the child or the child has not returned back to his maternal grand mother's house where mother of the child Ghurni Bai (PW-1) was temporarily residing in her maternal home. Mother of the child Ghurni Bai (PW-1), maternal grand mother of the child Kendi (PW-12) & husband of Kendi namely Kendal asked the appellant and also searched for the child Aakash to whom the appellant told that the child is sleeping and he will go back to his house. Finally, the child did not return to his maternal grand mother's house then they informed to Sarpanch & other villagers and finally the factum of missing of the child was intimated to Police Out Post Darima and missing report was lodged vide Ex. P-8. During the course of investigation/enquiry on the missing report, the Investigating Officer Dheeraj Markam (PW-13) interrogated the appellant who made disclosure statement of the dead body of deceased Aakash and informed that the dead body was buried in the field of Swayamvar Rajwade which was recorded as Ex. P-

1. The Investigating Officer along with villagers and witnesses summoned vide Ex. P-2 accompanied the appellant who took them to the field of Swayamvar Rajwade form where the appellant exhumed the buried dead body from the said field which was identified by the witnesses as the dead body of Aakash. After mentioning such facts, inquest over the dead body of the deceased was prepared vide Ex. P-3. During the same period, Sarpanch & Panch recorded panchnama vide Ex. P-4 of the same facts. Spot map was prepared vide Ex. P-7. Dehati merge was recorded vide Ex. P-13 and merge was recorded vide Ex. P-11. FIR was lodged vide Ex. P-10. Dead body was sent for autopsy to Assistant Surgeon, Darima vide Ex. P-14. Dr. B. L. Kaushal (PW-5) conducted autopsy vide Ex. P-5 and found following symptoms/injuries:-

*Foul Smelling (odour) decomposition stated.

*Maggots found over the body.

*Nostril, face, nose and lips were swollen, tongue was also swollen.

*Marks of bruise found below chin and right side of neck.

*Multiple bruises one above other on left side of neck (of finger's).

*Finger nail marks on throat and cheek.

*Faecal matter came out from anus.

*Scalp joint was loose.

*Trachea was congested.

*Sharpening of brain matter.

*Petechial hemorrhage and congestion of both lungs.

Cause of death of the deceased was asphyxia as a resulting of throttling and

death was homicidal in nature.

3. Statements of the witnesses were recorded u/s 161 of the Cr.P.C. After completion of investigation, charge sheet was filed before the Court of Judicial Magistrate First Class, Ambikapur who committed the case to the Court of Sessions, Ambikapur, from where learned Additional Sessions Judge received the case on transfer for trial.

4. In order to prove the guilt of the accused, the prosecution has examined as many as thirteen witnesses. The accused was examined u/s 313 of the Cr.P.C. in which he denied the circumstances appearing against him, pleaded innocence and false implication in the crime in question.

5. After affording opportunity of hearing to the parties, learned Additional Sessions Judge convicted & sentenced the appellant in the aforesaid manner.

6. We have heard learned counsel for the parties, perused the judgment impugned and record of the trial Court.

7. Learned counsel for the appellant vehemently argued that conviction of the appellant is based on circumstantial evidence. In order to convict accused on the basis of circumstantial evidence, as held by the Supreme Court in the matter of Kusuma Ankama Rao Vs. State of Andhra Pradesh, , in case of conviction based on circumstantial evidence, the prosecution is required to satisfy the following circumstances and required to prove the complete chain of circumstances pointing only towards the guilt of the accused excluding the possibility of guilt of other persons and including the guilt of the accused,

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may be" established;

(ii) 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 accused is guilty;

(iii) the circumstances should be of a conclusive nature and tendency;

(iv) they should exclude every possible hypothesis except the one to be proved; and

(v) 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.

In case of circumstantial evidence, motive plays great role in commission of offence but the prosecution has utterly failed to prove motive for commission of offence. As per evidence of Ghurni Bai (PW-1) - mother of the deceased child and Kendi (PW-12) - maternal grand mother of the deceased child, the appellant informed them that the deceased was sleeping in the house of uncle of Ghurni

Bai (PW-1) namely Sanghali. As per evidence of Kendi (PW-12), the appellant came along with another person namely Anil and took the child. Sanghali & Anil are material witnesses to unfold the story but for the reasons best known to the prosecution, the prosecution has not examined them to unfold the story. Therefore, evidence adduced on behalf of the prosecution may be sufficient for creating suspicion, but not sufficient for conviction of the appellant. Learned counsel further submits the dead body of the deceased has not been recovered at the instance of the appellant. Alleged panchnama Ex. P-4 and inquest Ex. P-3 do not find the signature of the appellant and in absence of signature of the appellant on the said documents it cannot be treated as recovery memo of dead body that too at the instance of the appellant. In absence of such recovery, virtually, there is no evidence that the appellant has committed homicidal death of the deceased.

8. On the other hand, learned State counsel opposes the criminal appeal and submits that the appellant has made discloser statement of dead body vide Ex. P-1 before the witnesses and same has been recovered at the instance of the appellant. The factum of recovery of dead body has been specially mentioned in Ex. P-3, inquest report, which has been duly proved by evidence Bechan Ram (PW-2), Vikas Singh (PW-3) & Dheeraj Markam (PW-13). Taking signature on the document of recovery is not sine qua non and is not a precondition under the law, but is a rule of prudence, if recovery is otherwise established by cogent evidence, absence of signature of the accused over such document is not fatal to the prosecution. In the present case, the prosecution by adducing evidence has proved the complete chain of circumstances. Virtually, this is a case of custodial death in which deceased Aakash was laying in the custody of the appellant and, therefore, the appellant was under obligation to explain how Aakash died. In absence of such explanation, only inference would be possible that the appellant has committed homicidal death of Aakash amounting to murder.

9. In order to appreciate the arguments advanced on behalf of the parties, we have examined the evidence adduced on behalf of the prosecution.

10. In the present case, homicidal death of deceased Aakash, 4 years" aged child, as a result of fatal injuries and burying of dead body of Aakash in the field of Swayamvar Rajwade i.e. concealing the evidence of criminal case, have not been substantially disputed on behalf of the appellant, even otherwise, same is established by evidence of Dr. B. L. Kaushal (PW-5), autopsy report Ex. P-5, inquest Ex. P-3 and evidence of other prosecution witnesses who have clearly deposed that the dead body has been recovered form the field of Swayamvar Rajwade and it was in buried condition, though some part of the body was visible at the time of exhuming it. In normal circumstances, deceased Aakash was required to present in his maternal grand mother"s house namely Kendi (PW-12) or with his mother, but not under the soil in buried condition. Therefore, aforesaid circumstances are sufficient to establish the fact that the death of the deceased was homicidal in nature and that the evidence of criminal case has

been concealed.

11. As regards complicity of the appellant in the crime in question, conviction of the appellant is substantially based on evidence of Ghurni Bai (PW-1), Bechan Ram (PW-2), Vikas Singh (PW-3), Kendi (PW-12) & Dheeraj Markam (PW-13). The prosecution has tried to prove the following circumstances:-

(a) Aakash was sitting on the lap of Kendi (PW-12), his maternal grand mother.

(b) The appellant came to the house of Kendi (PW-12) and took Aakash with him on the pretext of providing sweets to Aakash.

(c) The appellant did not return the child to Kendi (PW-12) or to Ghurni Bai (PW-1).

(d) Aakash also did not return back to his house and his dead body was found buried in the field of Swayamvar Rajwade in hidden position.

(e) The appellant made discloser statement of the dead body vide Ex. P-1 and the dead body was exhumed at the instance of the appellant vide Ex. P-3.

12. As per evidence of Kendi (PW-12), on the fateful day deceased child Aakash was sitting on her lap, at about 7 p.m. the appellant came and took Aakash with him on the pretext of providing sweets to Aakash, the appellant also told her that they are not required to search for the child and he will return back the child. However, the appellant did not return back the child. The appellant was sleeping in her house, on being asked he told that Aakash is sleeping in the house of Sanghali on which she went to the house of Sanghali, but she did not find the child, again she asked the appellant about the child whereupon the appellant himself went to search Aakash, but the appellant did not return back then she told the incident to sarpanch and finally she intimated the police. The police came and interrogated the appellant on which he informed the police that the dead body of Aakash was buried.

13. Ghurni Bai (PW-1) - mother of the deceased, has substantially corroborated the evidence of Kendi (PW-12). As per evidence of Investigating Officer Dheeraj Markam (PW-13), he recorded the discloser statement of dead body made by the appellant before the witnesses, thereafter he recorded memorandum and inquest. He has denied the suggestion that at the time of discloser statement, he was having knowledge of the dead body buried in the field of Swayamvar Rajwade.

14. Bechan Ram (PW-2) & Vikas Singh (PW-3), witnesses of Ex. P-1 - discloser statement, had clearly deposed that the appellant made discloser statement of dead body and informed that the dead body is buried in the field of Swayamvar Rajwade then the police took the appellant and other witnesses to the field of Swayamvar Rajwade. The place where the dead body was buried was shown by the appellant and after removing the soil, the dead body was exhumed. Baijnath (PW-4), Dhansia (PW-7) & Doojenath (PW-8) have supported the factum of

inquest report Ex. P-3.

15. As per evidence of Kendi (PW-12), the appellant came along with one Anil and after taking deceased Aakash, again he came to her house and stayed at night. She has further deposed that on being asked, the appellant informed that Aakash is sleeping in the house of Sanghali Ghurni Bai (PW-1) has corroborated the aforesaid facts. But the prosecution agency has not examined Sanghali & Anil, defence has confronted the statement of Kendi (PW-12) recorded u/s 161 of the CrPC as Ex. D-3. This witness has clearly deposed in her evidence that she has stated before the police that the appellant took Aakash with him and she has interrogated the appellant and that same facts have been mentioned in Ex. D-3. We are unable to understand why the trial Court has recorded the same as omission.

16. Defence has cross-examined Ghurni Bai (PW-1), Bechan Ram (PW-2), Vikas Singh (PW-3), Kendi (PW-12) & Dheeraj Markam (PW-13) at length, but has not been able to elicit anything in their cross-examination relating to the facts that the appellant has not taken the deceased with him from the lap of Kendi (PW-12), thereafter he returned back Aakash to Kendi (PW-12) or to his mother Ghurni Bai (PW-1), the appellant has not made discloser statement of dead body and that the dead body has not been recovered at the instance of the appellant from the field of Swayamvar Rajwade.

17. As regards the question of signature of the accused/appellant over Ex. P-3 - inquest report and evidentiary value of Ex. P-4 - panchnama, it appears from the evidence that Ex. P-4 - panchnama has been recorded at the time of recovery of dead body and the appellant has made discloser statement vide Ex. P-1 before such preparation of panchnama. Therefore, we do not find any evidentiary value of Ex. P-4 panchnama. Inquest report Ex. P-4 does not find the signature of the appellant. But only on the ground of absence of signature of the appellant on the inquest report (Ex. P-4), well founded evidence of recovery of dead body at the instance of the appellant cannot be discarded. Even otherwise, the investigating Officer is not obliged to obtain the signature of an accused in any statement attributed to him while preparing seizure memo for the recover of any article covered by Section 27 of the Evidence Act. While dealing with same question in the matter of State of Rajasthan Vs. Teja Ram and Others, the Supreme Court has observed in para 30 of its judgment as follows:-

The resultant position is that the Investigating Officer is not obliged to obtain the signature of an accused in any statement attributed to him while preparing seizure memo for the recovery of any article covered by Section 27 of the Evidence Act. But, if any signature has been obtained by an investigating officer, there is nothing wrong or illegal about it. Hence, we cannot find any force in the contention of the learned counsel for the accused that the signatures of the accused in Exs. P-3 and P-4 seizure memo would vitiate the evidence regarding recovery of the axes.

18. As per evidence of Kendi (PW-12), the appellant took Aakash with him and he did not return back Aakash to Kendi or to mother of Akash namely Ghurni Bai (PW-1), thereafter the dead body of Akash was recovered at the instance of the appellant which was buried in the field of Swayamvar Rajwade. The appellant has not offered any explanation as to when he released/set Akash free from his custody. This is a case of custodial death. As held by the Supreme Court in the matter of Dalip Singh and others Vs. State of Haryana, , the person in whose custody the deceased was taken and died is under obligation to offer explanation how he died, in absence of such explanation the only presumption would be possible that the appellant has caused homicidal death of the deceased.

19. The prosecution has not examined alleged Sanghali & Anil. The appellant was also having opportunity to examine them in support of this defence. Mere non-examination of Sanghali & Anil is not fatal to the prosecution. The aforesaid evidence is sufficient to prove the following circumstances:-

- (a) Aakash was sitting on the lap of Kendi (PW-12), his maternal grand mother.
- (b) The appellant came to the house of Kendi (PW-12) and took Aakash with him on the pretext of providing sweets to Aakash.
- (c) The appellant did not return the child to Kendi (PW-12) or to Ghurni Bai (PW-1).
- (d) Aakash also did not return back to his house and his dead body was found buried in the field of Swayamvar Rajwade in hidden position.
- (e) The appellant made discloser statement of the dead body vide Ex. P-1 and the dead body was exhumed at the instance of the appellant vide Ex. P-3.

20. As held by the Supreme Court in the matter of Kusuma (supra), if the aforesaid circumstances are considered together only inference would be possible that only the appellant has caused homicidal death of deceased Aakash, none other than the appellant has caused the death of deceased Aakash and also exclude the possibility of innocence of the appellant in the crime in question.

21. As regards the question of motive, only aids in criminality and in case of direct evidence it loses its importance. Motive can be inferred on the basis of the weapon used, part of the body effected, nature of injury and other similar circumstances. Definitely, motive has great role in case of circumstantial evidence. In the present case, the deceased was aged about 4 years and cause of death of the deceased was asphyxia as a result of throttling. Motive is hidden in the mind of the person, but it can be gathered on the basis of the weapon used, part of the body effected, nature of injury and other similar circumstances.

22. The circumstances adduced against the appellant, the injuries found over the body of 4 years" aged child Aakash and the fact of throttling are sufficient to prove that the appellant has caused homicidal death of the deceased with intent to cause his death and was having motive to commit the offence.

23. After appreciating the evidence available on record, learned Additional Sessions Judge convicted and sentenced the appellant as aforementioned. Conviction & sentences imposed upon the appellant are based on credible and clinching evidence sustainable under the law. On close scrutiny of evidence, we do not find any illegality or infirmity in the judgment impugned. Consequently, the appeal is devoid of merit, same is liable to be dismissed and it is hereby dismissed.