

(2018) 06 CHH CK 0071

In the Chhattisgarh High Court

Case No : Criminal Appeal (CRA) No. 724 Of 2013

Milan Ram Khande And Ors

APPELLANT

Vs

State Of Chhattisgarh

RESPONDENT

Date of Decision : 19-06-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 141, 149, 302, 304, 324, 328
Tonhi Pratadna Nivaran Adhiniyam, 2005 — Section 6
Code Of Criminal Procedure, 1973 — Section 313

Citation : (2018) 06 CHH CK 0071

Hon'ble Judges : Pritinker Diwaker, J;Gautam Choradiya, J

Bench : Division Bench

Advocate : R.K. Gupta, Rajneesh Shrivastava, Adil Minhaj

Final Decision : Partly Allowed

Judgement

P. Diwaker, J

1. This appeal arises out of the judgment of conviction and order of sentence dated 23.3.2013 passed by the learned Sessions Judge, Korba in S.T. No.51/11 convicting the accused/appellants under Sections 302/149, 324/149 & 328/149 of the Indian Penal Code (for short 'the IPC') and sentencing each of them to undergo RI for life & fine of Rs.1,000/-, RI for 3 years & fine of Rs.1000/-; RI for 3 years & fine of Rs.2,000/-, with usual default clauses, respectively. Accused/appellant Milan Ram & Daras Ram have also been convicted under Section 6 of the Tonhi Pratadna Nivaran Adhiniyam, 2005 and sentenced to undergo RI for 2 years and fine of Rs.1,000/- with usual default clause.

2. The prosecution story, in brief, is that on or about 30.3.2011 Kachra Bai (deceased) along with her husband Babulal had gone to the house of accused/appellant Chhatram & Badra Bai, sister of Kachra Bai, situated at village Bamnidin to see their ailing son namely Manmohan. On that day itself, Kachra Bai, Badra Bai, Chatram & Sampat took said Manmohan to the house of accused Ganesh Anant, situated at village Rungara, for his treatment through exorcism.

Exorcists i.e. accused Daras & Milan, were called in the house of Ganesh Anant to cure said Manmohan. When accused Daras & Milan were performing the act of exorcism in the house of accused Ganesh Anant, accused/appellant Bhagwati sat on the chest of Kachra Bai and caused injuries to her. At that time, some of the accused persons were holding hands & legs of Kachra Bai whereas some have also caused injuries to her. In the course of performing the act of exorcism, said Manmohan, Omprakash (PW-2), Indu Anant (PW-4) have also received injuries. It is further case of the prosecution that feeling suspicious about the activities of accused persons, the villagers informed the police pursuant to which the police arrived at the spot and when the police entered the house of accused Ganesh Anant after breaking open the doors, Kachra Bai was found lying in injured condition. Accused persons have also burnt the face of injured Madhu & Indu with incense stick. Kachra Bai was immediately taken to the hospital where he was declared brought dead by the doctor. Injured Manmohan was medically examined vide Ex.P-11. On 31.3.2011 FIR (Ex.P-2) was registered against accused/appellant Nos.1 to 4, 6, & others under Section 302/34 of IPC. Inquest on the body of deceased Kachra Bai was prepared vide Ex.P-17 on 31.3.2011. Body of deceased was sent for post-mortem examination vide Ex.P-7A which was conducted by Dr. M.P. Rathore (PW-5) vide Ex.P- 7 and he noticed following injuries;-

- ? Bleeding from both nostrils.
- ? Burns wound linear shape at right side of neck.
- ? two burns marks of 1.5x 1cm & 1x1cm in size at abdomen.

The autopsy surgeon has opined that the cause of death was asphyxia due to suffocation. Statements of witnesses were recorded in the course of investigation.

3. After investigation, charge sheet against the accused/appellants was filed. The Court below framed the charges under Sections 302/149, 324/149, 328/149 of the IPC & Section 6 of the Tonhi Pratadna Nivaran Adhiniyam, 2005 against the accused persons. The prosecution in order to bring home the charges levelled against the accused persons examined 12 witnesses in all. Statements of accused persons were recorded under Section 313 of Cr.P.C. in which they abjured their guilt and pleaded innocence & false implication.

4. After hearing counsel for the parties and considering the material available on record, the trial Court convicted & sentenced the accused/appellants herein vide impugned judgment in the manner as described above.

5. Learned counsel for the accused/appellants submit that there was no intention of any of the appellants to cause death or such bodily injury as is likely to cause death of the deceased in the ordinary course of nature. The only intention of the appellants was to treat said Manmohan through exorcism and in the process of performing the act of exorcism, unfortunately the deceased received injuries and died. Thus, if the entire prosecution case is taken as it is, at best the appellants

can be convicted under Section 304 Part II of the IPC and not under Section 302/149 of IPC as has been done by the trial Court. He further submits that the appellants are in jail for the last more than seven years and therefore after converting their conviction under Section 304 Part II of IPC, they be sentenced to the period already undergone by them.

6. On the other hand, learned counsel appearing for the State has supported the impugned judgment and submitted that conviction of the accused/appellants is strictly in accordance with law. The sentence awarded by the trial Court is commensurate with the proved guilt of the accused/appellants. It is neither harsh nor excessive and therefore no interference is called for.

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

8. Kishan Kumar Bhardwaj (PW-1) is the son of deceased Kachrabai and also the lodger of FIR. He has deposed that on 29.3.2011 his father & mother (deceased) had gone to village Bamnidih to see ailing son of his aunt i.e. accused Badrabai. On the same day, though his father returned home but his mother (deceased) stay back in the house of accused Badrabai. On 30.3.2011 the accused persons informed his father on telephone that they along with his mother (deceased) had come to village Rungada for treatment of Manmohan through exorcism. On being asked by his father, he visited the house of accused Ganeshram to see his mother and when he enquired from accused Ganeshram about his mother, he started hurling abuses at him and asked him to go away by saying that his mother has not come to his house. He has further stated that on seeing the clothes of his mother outside the house of Ganesh, he came to know that his mother had come there and when he told this fact to Ganesh, he said that door is not going to be opened before 12.00 noon. He has further stated that he was informed by the neighbours that the police is about to arrive. According to this witness, he was informed by the residents of locality that the sound was coming from the house of Ganeshram throughout the night. Thereafter the police arrived there, broke open the door of the house of accused Ganeshram after preparing panchnama in this regard and brought out all the accused from the house. On being asked by the police, he went inside the house and saw his mother lying dead near the door of house. He noticed injury on the head of his mother. There was a stab injury near her eye. He also noticed burn marks caused by incense stick on the face of Indu and Madhu. In the cross-examination this witness had admitted that as he himself had not seen the incident, therefore, he is not in a position to tell which of the accused played what role in the incident.

9. Om Prakash Bhardwaj (PW-2) is a child witness. Though this witness had not supported the prosecution case and turned hostile, but he has stated that on the fateful day when he visited the house of accused Ganesh Ram along with Indu, he saw that accused Bhagwati Bai was sitting on the chest of Badra Bai and pressing her neck. He has further deposed that accused Bhagwati was beating her daughter Indu.

10. Smt. Shakuntala Bai (PW-3) is the person who assisted in the investigation. Indu Anant (PW-4), daughter of accused Ganesh Anant, did not support the prosecution and turned hostile. Dr. M.P. Rathore (PW-5) is the doctor who conducted post-mortem examination over the body of deceased. According to him, the cause of death was due to asphyxia on account of suffocation about less than 24 hours duration prior to the post-mortem examination. This witness had also examined injured Miss Madhu, Smt. Roshan Harbansh, Manmohan & Omprakash vide Ex.P-8, P-10, P-11 & P-12 respectively. Kaushal Kumar Singh (PW-6) is the seizure witness. He has not supported the recovery and therefore he has been declared hostile by the prosecution. J.P. Thakur (PW-7) is the police person who assisted in the investigation. Lakheshwar (PW-8) is the Patwari who prepared the spot map (Ex.P-19). Roshan Harvansh (PW-9) did not support the prosecution and turned hostile. Shivbalak Singh (PW-10) did not support the prosecution and turned hostile. Ghanshyam Singh (PW-11) is the police person who assisted in the investigation. M.B. Patel (PW-12) is the investigating officer who has duly supported the prosecution case.

11. In the present case, conviction is based on the ground of formation of unlawful assembly having its common object of commission of culpable homicide amounting to murder of Kachra Bai and injuries to other persons.

12. As far as complicity of accused/appellants is concerned, after careful perusal of the material on record, we are of the considered view that the prosecution has established its case beyond doubt that in order to cure son of accused Badra Bai & Chhatram, by way of exorcism (>kaM Qwad), the deceased and accused Badra Bai, Chhatram & Bhagwati Bai came to the house of accused Ganeshram and in the course of procedure of exorcism, which was performed by accused Milan Ram & Daras Ram, the deceased was caught hold by co-accused persons, accused Bhagwati sat on the chest of deceased and pressed her neck as a result of which she died. It has also been established and proved from the statement of injured Omprakash Bhardawaj (PW-2) & Dr. M.P. Rathore (PW-5). According to Omprakash Bhardawaj (PW-2), when he reached the house of accused Ganeshram, he saw that accused Bhagwati Bai was sitting on the chest of deceased and pressing her neck. In the cross-examination this witness has stated that accused Sampat had caught hold of legs of deceased Kachrabai, whereas accused Chhatram had caught hold of her hands. According to PW-5, who conducted post-mortem examination on 31.3.2011 at 5.00 p.m. of deceased Kachrabai, he found superficial burn injuries on her body. He opined that deceased died due to asphyxia as a result of suffocation within 24 hours prior to the post-mortem. It is true that Omprakash Bharadwaj (PW-2) did not support the prosecution case and turned hostile, but it well settled that the evidence of a hostile witness can be relied upon to the extent the hostile witness's evidence supports the prosecution case or favours the defence.

Apart from above, feeling suspicious about the activities of accused persons, the villagers informed the police pursuant to which the police arrived at the spot and

broke open the door of the house of accused Ganeshram whereupon it was found that the deceased was lying dead and other accused/appellants were also present inside the house. As per Section 106 of the Indian Evidence Act, it was for the accused/appellants to explain as to how the deceased died. However, the accused/appellants did not care to convincingly explain as to how the death of deceased occurred. Though, according to some accused, they were implicated falsely by the son of deceased but have not been able to substantiate their defence by leading cogent and clinching evidence and it appears to be only an afterthought.

13. Accused/appellants have been sentenced for life under Section 302 of IPC with the aid of Section 149 of IPC. Section 149 of IPC says that every member of an unlawful assembly at the time of committing the offence is guilty of that offence. This section creates a specific and distinct offence by creating constructive or obligatory liability of the members of unlawful assembly for the unlawful acts committed pursuant to the common object. For proving common object the prosecution has to establish that the accused persons were having common object as laid down under Section 141 of IPC. The prosecution must show that the illegal act was committed by a member of assembly which had common object. In the case in hand, the common object for which the accused/appellants have been convicted is of murdering Kachrabai.

14. From the entire facts of the case, it appears that the common object of the appellants was to treat Manmohan, son of accused Badrabai & Chhatram, through exorcism. No evidence has come that they were having common object of murdering the deceased. Post-mortem report of the deceased reveals that she died due to asphyxia as a result of suffocation. Had there been any common object to cause murder of the deceased, there would have been many injuries on deceased on the vital parts of her body. Evidence on record further goes to show that there is no evidence of motive or previous enmity between the deceased and the accused persons. In these circumstances, in our opinion, the charge under Section 302/149 of IPC against the accused/appellants is not proved, however, in the given facts and circumstances of the case, it can safely be held that the accused had no intention to cause death of deceased but while pressing the neck of the deceased etc., certainly had the knowledge that their act may result in her death and being so, the accused/appellants cannot escape their conviction under Section 304 Part II read with Section 149 of IPC. In these circumstances, the accused/appellants could, at the most, can be held guilty under Section 304 Part-I r/w Section 149 of IPC and not under Section 302/149 of IPC as has been done by the trial Court.

15. The evidence on record though points out towards assault on Omprakash (PW-2), Indu (PW-4), Roshan Harvansh (PW-9) & Manmohan (not examined), but the injuries said to be sustained by the aforesaid persons were only simply in nature and as such do not attract the ingredients of Section 324 of IPC. Even the aforesaid witnesses turned hostile during their deposition and did not render any

incriminating evidence against any of the accused. In that view of the matter, the conviction and sentence under Section 324/149 of IPC is bad in law and only fit to be set aside.

16. Likewise, the essential element of Section 328 of IPC is that the victim should be administered poison with the intention of causing hurt; with the knowledge that it is likely to cause hurt; and to facilitate the commission of an offence. In the present case, FSL report (Ex.P-38) disclosed that chemical testing of the viscera of deceased does not reveal poison and thus it is clear that no poison was detected in the viscera which was sent to the Chemical Analyser for examination purpose. As there is no medical evidence on record that any poisonous substance was administered to the deceased, no prima facie case under Section 328 of IPC can be said to be made out against the accused/appellants.

In the given facts and circumstances of case, particularly in absence of any explanation regarding presence of accused/appellant Daras Ram & Milan, who are residents of another village, in the house of accused Ganeshram Anant, it can be safely presumed that they had come to the house of accused Ganesh Ram to treat ailing son of accused Badrabai & Chhatram through exorcism and as such, their conviction under Section 6 of the CG Tonhi Pratadana Adhiniyam, 2005 does not call for any interference.

17. Resultantly, the appeal is partly allowed. Impugned judgment so far as it relates to convicting and sentencing the appellants under Sections 323/149 & 328/149 of IPC, is hereby set aside. They are acquitted of those charges. However, their conviction under Section 302/149 is altered to Section 304 Part-II r/w Section 149 of IPC and they are sentenced to the period already undergone by them. Sentence of fine is, however, maintained along with its default clause. Conviction and sentence of accused/appellant Milan Ram & Daras Ram under Section 6 of the CG Tonhi Pratadana Adhiniyam, 2005 are hereby maintained.

18. The appellants be set at liberty forthwith if not required to be detained in connection with any other offence.