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30.11.10

HIGH COURT OF CHHATTISGARH, BILASPUR

CORAM: Hon'ble Shri Sunil Kumar Sinha &
Hon'ble Shri T.P. Sharma, JJ.

Criminal Appeal No. 124 of 2001

Raiwati Bai @ Budhi

Vs.

State of Chhattisgarh

JUDGMENT

For consideration

Sd/-
Sunil Kumar Sinha
Judge

HON'BLE SHRI JUSTICE T.P. SHARMA

Sd/-
T.P. Sharma
Judge

Post for Judgment : 30/11/2010

Sd/-
Sunil Kumar Sinha
Judge

(33)

APR

30.11.

HIGH COURT OF CHHATTISGARH, BILASPUR

CORAM: Hon'ble Shri Sunil Kumar Sinha & Hon'ble Shri T.P. SHARMA, JJ.

Criminal Appeal No. 124 of 2001

APPELLANT - Raiwati Bai alias Budhi (wrongly mentioned as Raipati Bai alias Booti) w/o Sadhuram, aged 32 years, resident of village Kokiyakhar, Police Station Bagbahar, Tehsil and District Jashpurnagar, Chhattisgarh

Versus

RESPONDENT - State of Chhattisgarh, through District Magistrate, Jashpurnagar

(Criminal Appeal under Section 374 (2) of The Code of Criminal Procedure)

Appearance:

Mr. H.S. Patel, Advocate for the appellant.

Mr. N.K. Mehta, Panel Lawyer for the State/respondent.

JUDGMENT
(30.11.2010)

Following judgment of the Court was delivered by **Sunil Kumar Sinha, J.**

(1) This appeal is directed against the judgment dated 12.12.2000 passed in Sessions Trial No. 167/99 by the Additional Sessions Judge, Jashpur.

(2) By the impugned judgment the appellant has been convicted u/ss 302 & 201 IPC and sentenced to undergo R.I. for life & fine of Rs.1,000/- and R.I. for 2 years & fine of Rs.500/- with default sentences of 5 years & 6 months respectively.

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(3) The facts, briefly stated, are as under:-

The matter relates to the death of a female child namely Kaushaliya Bai, aged about 2 years. She was daughter of appellant- Raiwati. On 4.7.99, the dead body of the deceased child was found in a well near the house of accused persons. Accused- Duleshwâri Bai is the sister of Raiwati and accused Rambha Bai is the mother of Raiwati. Chaurang Prasad (PW-2) is the husband of accused Duleshwari Bai. They were residing together in village Kokiyakhar. The merg intimation (Ex.-P/1) was lodged by Chaurang Prasad (PW-2). The Investigating Officer reached to the place of occurrence, gave notice to the *Panchas* and prepared inquest (Ex.-P/3) on the body of the deceased. The dead body was sent for post-mortem examination. The post-mortem examination was conducted by Dr. Chandel Ram Bhagat (PW-5), who prepared his report Ex.-P/4. He noticed swelling, congestion & redness on the right side of neck. The tongue was protruded and was between the teeth. He opined that the caused of death was asphyxia due to blockage of air passage by throttling. The death was homicidal in nature.

The prosecution came with the case that the death of the deceased was caused by throttling in the house of the accused persons, and thereafter the dead body was thrown in the well with an intention to show that it was a death by drowning. The accused persons came with the defence that the girl was missing since the evening of 3.7.99 as she had gone from the house saying that she is going to eat back-berry (*jamun*); when she did not return, a search was made and her dead body was found in the well.

The learned Sessions Judge held that it was a homicidal death. It was caused by throttling. The Sessions Judge further held that there was no evidence that the 2 other co-accused

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persons namely Duleshwari Bai and Rambha Bai participated in causing throttling of the deceased or throwing the dead body into the well. It was held that the throttling was caused by appellant- Raiwati Bai, therefore, the appellant was liable for punishment under the aforementioned Sections of the IPC. The other two co-accused persons were acquitted.

(4) Mr. H.S. Patel, learned counsel appearing on behalf of the appellant, has not disputed the homicidal death of the deceased. He submitted that there was absolutely no evidence on record to prove that the appellant has committed murder of the deceased. The judgment of the Sessions Court is based suspicion. Since the appellant is the mother of the deceased, therefore, the Sessions Court has held that she must have committed the murder of the deceased. The said finding is without any basis and without any material on record.

(5) On the other hand, Mr. N.K. Mehta, learned Panel Lawyer appearing on behalf of the State, opposed these arguments and supported the judgment passed by the Sessions Court.

(6) We have heard the learned counsel for the parties at length and have also perused the records of the sessions case.

(7) Admittedly, there is no eye-witness to the incident and the case of the prosecution is based on circumstantial evidence. Except the circumstance that the deceased was the daughter of the appellant and she was residing alongwith the accused persons in

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their house in village Kokiyakhar, there is absolutely no other evidence on record to connect the appellant with crime in question. The Sessions Judge has held vide Para-8 of the judgment that according to the defence version, the girls playing with deceased Kaushaliya Bai informed them that Kaushaliya Bai has fallen into well but none of the girls were examined as defence witness, therefore, a presumption can be drawn against the appellant. The Sessions Judge has recorded a positive finding that no witness was produced either by the prosecution or by the defence to show that when and with whom the deceased was lastly seen alive. Having recorded such finding it was held by the Sessions Judge that normally the small child remains with the mother, therefore, the mother has to explain that where the child had gone prior to her death, which doesn't come in this case. The above finding recorded by the Sessions Court on the basis of said circumstances does not appear to be reasonable. The finding appears to be based on presumptions and not on the proved facts on record. The defence came with the version that the child was missing since the evening of 3.7.99 and the dead body was found in the well in the late night. The child has gone from the house saying that she is going to eat black-berry. Therefore, in absence of any other evidence on record, it is difficult to sustain the finding recorded by Sessions Judge.

(8) In ***Dhananjoy Chhatterjee –Vs- State of W.B, (1994) 2 SCC 22*** the Supreme Court held "In a case based on circumstantial

evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof."

(9) In ***Bodh Raj alias Bodha and others –vs- State of Jammu and Kashmir, AIR 2002 SC 3164***, the Supreme Court laid down that there is no doubt that conviction can be based solely on circumstantial evidence but the conditions precedent before conviction could be based on circumstantial evidence, must be fully established. They are:

1) 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;
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;

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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.

(10) In case on hand, we do not find any circumstance which may be consistent only with the hypothesis of the guilt of the appellant. The above circumstances, which have been pressed into motion, are explainable. The circumstances are not of conclusive nature and tendency so as to exclude every possible hypothesis except the guilt of the appellant. The chain of above circumstances are not complete so as to hold that it was none else than the appellant who committed murder of the deceased. Even it was not established that the deceased was strangulated in the house of the appellant. As we have already stated that the judgment is based on presumptions, but the presumption howsoever strong cannot take the place of proof.

(11) We further note that the motive suggested by the prosecution was that the appellant was deserted by her husband and she was residing in her parents place along with her mother and sister and she was of the view that it would not be possible for her to maintain the child after the desertion, therefore, she committed murder of her child. Even alleged motive was not established by the prosecution. Whether the mother will kill her only child on account of desertion by

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the husband, with a view that she would not be able to maintain the child, in our opinion, does not appear to be reasonable. Though the existence of a strong or definite motive is not a *sine qua non* to hold an accused guilty of an offence in all cases, but when there is no direct evidence and the case is based on circumstantial evidence, the motive assumes importance. In the present case, the motive suggested by the prosecution against the accused persons has not at all been established.

(12) For the foregoing reasons, we are unable to sustained the conviction of the appellant and we are of the opinion that the learned Sessions Judge fell into error while convicting the appellant on the above set of circumstantial evidence.

(13) In the result, the appeal is allowed. The conviction and sentences awarded to the appellant u/ss 302 & 201 of IPC are set-aside. We find that the appellant is in jail in this matter since 13.7.99 till today, as even after passing an order of suspension of sentence and grant of bail by this Court on 23.4.2001, it appears that she could not furnish the bail bonds. We direct that she be released, forthwith, if not required in any other case.

Sd/-
Sunil Kumar Sinha
Judge

Sd/-
T.P. Sharma
Judge

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