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2024:CGHC:44716-DB

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HIGH COURT OF CHHATTISGARH AT BILASPUR

CRA No. 1087 of 2021

- Ganga Banjare W/o Gopal Banjare Aged About 33 Years R/o Village Nawagaon, Satnami Para, Police Station Mandi Hasaud, District Raipur Chhattisgarh., District : Raipur, Chhattisgarh.

... Appellant

versus

- State of Chhattisgarh Through Station House Officer, Police Station Mandir, Hasaud, District Raipur Chhattisgarh., District : Raipur, Chhattisgarh.

... Respondent

For Appellant	:	Mr. Shashi Kumar Kushwaha, Advocate.
For Respondent- State	:	Mr. Swajeet Ubeja, PL for the State.

(Division Bench)

**Hon'ble Shri Ramesh Sinha, Chief Justice and
Hon'ble Shri Amitendra Kishore Prasad, Judge**

Judgment On Board

(18.11.2024)

Per Amitendra Kishore Prasad, J.

1. This criminal appeal filed by the appellant under Section 374 (2) of Cr.P.C. is directed against the impugned judgment of conviction and order of sentence dated 27.08.2021, passed by the learned First Additional Sessions Judge, Raipur, District- Raipur, Chhattisgarh, in Sessions Trial No. 41/2020, by which, the appellant herein has been convicted as under:-

<u>Conviction</u>	<u>Sentence</u>
U/s 364 of Indian Penal Code (Two Times)	Imprisonment for 05 years and fine of Rs. 500/- and in default of payment of fine, additional R.I. for one month.
U/s 307 of Indian Penal Code	Imprisonment for 07 years and fine of Rs. 1,000/- and in default of payment of fine, additional R.I. for three months.
U/s 302 of Indian Penal Code	Imprisonment for life and fine of Rs. 1,000/- and in default of payment of fine, additional R.I. for three months.

All the sentences have been directed to run concurrently.

2. The case of the prosecution, in nutshell, is that on 23.09.2019 at about 12 noon, the appellant abducted the daughters of Nemdas Nirala, namely, Namrata Nirala aged about 2.5 years and Nigeeta Nirala aged about 04 years and took them to her home and killed Namrata Nirala and caused injury to Nigeeta Nirala. Therefore, committed the aforesaid offences.
3. The father of the deceased, namely, Nemdas Nirala (PW-1)

reported the matter to the police, pursuant to which, Merg Intimation was recorded vide Exs.P/15 & P/19 and FIR vide Ex. P/20 was registered. Spot Map was prepared vide Ex.P/01. Inquest proceeding was conducted vide Ex. P/13 and the dead body of the deceased was sent for postmortem. As per postmortem report vide Ex.P/10, proved by Dr. T.L. Todar (PW-09), cause of death of the deceased was due to asphyxia as a result of suffocation. Thereafter, appellant-accused was arrested vide Ex.P/18. Pursuant to memorandum statement of the appellant vide Ex.P/06 clothes of the deceased have been seized vide Ex.P/07.

4. After completion of investigation, the appellant was charge-sheeted for the aforesaid offences before the concerned jurisdictional Court from where the case was committed to the Court of Sessions for hearing and disposal in accordance with law, in which, the appellant abjured her guilt and entered into defence by stating that she has not committed any offence and she has been falsely implicated.
5. The prosecution in order to prove its case examined as many as 18. witnesses and exhibited 21 documents. In defence, neither any witness has been examined nor any document has been exhibited. Statement of the appellant was recorded under Section 313 of CrPC in which she denied the circumstances

appearing against her in the evidence brought on record by the prosecution, pleaded innocence and false implication.

6. The learned trial Court after appreciating the oral and documentary evidence available on record, convicted the appellant / accused for the offences as mentioned in the opening paragraph of the judgment, against which this appeal has been preferred by the appellant questioning the impugned judgment of conviction and order of sentence.
7. Learned counsel for the appellant would submit that the learned trial Court is absolutely unjustified in convicting the appellant herein for the aforesaid offences, as the prosecution has not been able to prove the same beyond reasonable doubt. He submits that the learned trial Court erred in holding the appellant guilty for offence U/s 302, without any evidence on record, as the prosecution had not collected any evidence that at the time of incident the appellant was with the victim. He further submits that the appellant without any basis has been falsely roped in the present case as the learned trial Court has failed to consider that the prosecution could not prove any motive of the appellant to murder the accused. He further submits that prosecution has produced one eye witness Nigita who is not only a minor but the sister of victim Nigita. He further submits that most of the witnesses of the prosecution are the relatives of the victim

Namrata Nigita. He further submits that there are contradictions in the statements of the witnesses regarding Namrata's body. He further submits that the learned trial Court has failed to consider that the prosecution had not produced a single witness who said at the time of incident the appellant did the crime. He further submits that the appellant is a mental patient. She is undergoing treatment at RIMS Hospital. Due to which she is completely unable to understand the nature of the said incident. Therefore, the case of the appellant comes under the exception of the Indian Penal Code. He further submits that the learned trial Court failed to mention any circumstances which of any definite tendency unerringly pointing towards guilt of the appellant. Therefore, considering the aforesaid infirmities, it must be held that the prosecution has utterly failed to prove its case beyond reasonable doubt. As such, the appellant herein is liable to be acquitted on the basis of benefit of doubt and prays to allow the appeal and set aside the impugned judgment.

8. On the other hand, learned counsel for the State vehemently opposes the appeal filed by the appellant and supports the impugned judgment and submit that the prosecution has been able to bring home the offence beyond reasonable doubt, the trial Court has correctly convicted the appellant for the offences mentioned hereinabove, as such, the appeal deserves to be dismissed.

9. We have heard learned counsel for the parties, considered their rival submissions made herein-above and have also gone through the records with utmost circumspection.
10. The first question for consideration is, whether the death of deceased was homicidal in nature?
11. Learned trial Court has recorded an affirmative finding in this regard relying upon the postmortem report Ex.P-10 proved by Dr. T.L. Todar (PW-10) that the death of the deceased was homicidal in nature, which is a finding of fact based on evidence available on record, it is neither perverse nor contrary to the record and we hereby affirm the said finding.
12. Now the next question is that whether the appellant is the author of the crime in question?
13. In the instant case, there is no direct evidence available on record and case of the prosecution is solely based on circumstantial evidence. The five golden principles which constitute the panchsheel of the proof of a case based on circumstantial evidence have been laid down by their Lordships of the Supreme Court in the matter of **Sharad Birdhichand Sarda v. State of Maharashtra**¹ which must be fulfilled for convicting an accused on the basis of circumstantial evidence.

1(1984) 4 SCC 116

The relevant paragraph 153 of the said judgment reads as under:

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“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 Sahabrao Bobade v. State of Maharashtra*² 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.”

- 14.** Ku. Nigita, PW-04, who is the elder sister of the deceased has stated that she and her younger sister, deceased were playing in the temple in the morning when the appellant called them and took them away. She further stated that the appellant took them to her house saying that she will give them food. Then the appellant took them and covered her face with a cloth. The appellant tied her up and made her sit in their house and threw a sand on her. She further stated that the younger sister was there at that time. She don't know what happened to the deceased after that. Later on, her uncle came and freed her and took her out from there. The appellant scratched her mouth and ears and assaulted her. She didn't see her sister after that day. In her cross-examination she stated that the appellant is called Bahim (mad) in the village.
- 15.** Dr. T.L. Todar, PW-09, who conducted postmortem of the deceased and gave his report vide Ex.P/10, according to which there was no external injuries on the body of the deceased and the internal injuries of the deceased was that the diaphragm, ribs, colon, large vessels, heart and both the lungs were intact. On cutting the lungs, frothy blood was visible in them and some sand particles were also visible. Both the lungs were congested. Some sand particles were visible in the mouth. He opined that the

death of the deceased was found to be due to asphyxia caused by suffocation.

16. Looking to the entire evidence available on record, it is clear that there is no direct evidence against the appellant to convict the appellant for the aforesaid offences. No one has seen the appellant taking away the deceased and the evidence of her sister, namely, Ku. Nigita (PW-04) and the evidence of Ku. Ragini Sonwani (PW-07) is not found trustworthy as whatsoever she has stated was not found in her statement under Section 161 of Cr.P.C. Ku Nigita (PW-04) has stated that her sister was there at the place of incident but she is not knowing what happened with her. It seems that the appellant has been made accused in this case only on the basis of suspicion as her home and the collected sands were nearby situated.
17. In conclusion, the prosecution has failed to prove its case beyond reasonable doubt by leading any direct or circumstantial evidence. As such, the prosecution has failed to establish the five golden principles, which constitute the panchsheel of proof of a case based on circumstantial evidence laid down by the Supreme Court in ***Sharad Birdhichand Sarda*** (supra) and only on the basis of suspicion conduct, the accused/appellant herein cannot be convicted in light of the decision rendered by the Supreme Court in *Subramanya* (supra).

18. Accordingly, the impugned judgment dated 27.08.2021 passed by the trial Court, convicting and sentencing the appellant herein for the offence punishable under Sections 364 (Two Times), 307 & 302 of IPC, is hereby set aside and the appellant is acquitted of the said charges on the basis of benefit of doubt. The appellant is stated to be in jail since 24.09.2019. The appellant be released from jail forthwith, if not required in any other matter/crime.
19. The criminal appeal is **allowed**.
20. Keeping in view the provisions of Section 437-A CrPC, the appellant is directed to forthwith furnish a personal bond in terms of Form No.45 prescribed in the Code of Criminal Procedure of sum of Rs. 25,000/- with one surety in the like amount before the Court concerned which shall be effective for a period of six months along with an undertaking that in the event of filing of Special Leave Petition against the instant judgment or for grant of leave, the aforesaid appellant on receipt of notice thereof shall appear before the Hon'ble Supreme Court.
21. Let a certified copy of this judgment along with the original record be transmitted forthwith to the concerned Trial Court and the copy of this judgment be supplied to the concerned Superintendent of Jail where the appellant is lodged and

suffering jail sentence, forthwith for information and necessary action, if any.

Sd/-

(Amitendra Kishore Prasad)
Judge

Sd/-

(Ramesh Sinha)
Chief Justice