IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE

BEFORE

HON'BLE SHRI JUSTICE PREM NARAYAN SINGH

CRIMINAL APPEAL No. 1179 of 2019

BETWEEN:-

BALU S/O NATHU SINGH MONGIYA, AGED ABOUT 44 YEARS, BHAGAT SINGH SHANKARPUR, UJJAIN (MADHYA PRADESH)

.....APPELLANT

(BY SHRI INDU RAJGURU, ADVOCATE)

AND

THE STATE OF MADHYA PRADESH STATION HOUSE OFFICER THRU. P.S. CHIMANGANJ MANDI, UJJAIN (MADHYA PRADESH)

.....RESPONDENT

(BY SHRI SURENDRA GUPTA, GOVERNMENT ADVOCATE)

Reserved on : 06.09.2023

Delivered on : 13.09.2023

This appeal coming on for orders this day, with the consent of parties, heard finally and the Court passed the following:

JUDGMENT

With consent of the parties heard finally.

1. This criminal appeal under Section 374 of Cr.P.C. has been filed

by the appellant being aggrieved by the judgment dated 27.09.2017 passed by the learned Third Additional Sessions Judge, District-Ujjain in Sessions Trial No.535/2014, whereby the appellant has been convicted for offence under Section 307 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') for 07 years R.I. with fine of Rs.2000/- and default stipulation.

2. The prosecution story, in a nutshell is that on 07.08.2014, the complainant Kailash had lodged an FIR at police Station Chimanganj Mandi, District-Ujjain by submitting that on this day, at about 2:00 AM, when he switched off TV, he heard the noise of weeping of a little child (Reena) of accused Balu. He went out side of his house and saw the accused inside his room scolding his child to keep mum otherside he would kill her. She was crying continuously and accused was threatening her to keep mum otherwise he would kill her. In the morning, mother of the complainant asked accused Balu to come to their house. On coming of the accused, his mother inquired him why was he assaulting his minor daughter but he flatly refused the allegation and told her that he was not assaulting but only scolding his child. Thereafter, his daughter Reena was brought to the house of complainant, where she saw the burning signs and swelling all over the body of Reena. The mother of the complainant asked Balu to get the child medically treated at Hospital. But when he came back in the evening without treatment from the hospital, the complainant lodged FIR against the accused Balu. Hence, the police party, after following due procedure, arrested the accused person and registered the case against the appellant. After due investigation, charge-sheet was filed against the appellant/accused under Section 307 of IPC.

3. In turn, the case was committed to the Court of Session and

thereafter, appellant was charged for offence under Section Section 307 of IPC. He abjured his guilt and took a plea that he had been falsely implicated in the present crime and prayed for trial.

4. In support of the case, the prosecution has examined as many as 08 witnesses namely Kailash (PW-1), Geeta Bai (PW-2), Onkarlal (PW-3), Reena (PW-4), Dr. Sanjay Rana (PW-5), H.N. Verma (PW-6), G.S. Tiwari (PW-7) and Dr. N.K. Sharma (PW-8). On behalf of defence, Mangilal (DW-1) has been adduced by the appellant in his defence.

5. Learned trial Court, on appreciation of the evidence and arguments adduced by the parties, pronounced the impugned judgment on 27.09.12017 and finally concluded the case and convicted the appellant for commission of the said offence under the provisions of Section 307 of IPC.

6. The appellant has preferred the present appeal mainly on the ground that judgment and order of the trial Court is contrary to law and facts available on record. The learned trial Court committed error in not considering the material contradictions and omissions appeared in the statements of prosecution witnesses. The prosecution witnesses namely Kailash (PW-1) and Geeta Bai (PW-2) have admitted in their cross-examination that they heard the noise in the night of weeping child. However, in spite of that, they went to sleep and did not knock the door. Neither, they inquired about the screaming of child nor they tried to rescue her. There is no eye witness who has supported the prosecution case. The injured/Reena (PW-4) had been tutored by her mother. Hence, on the basis of her statement, accused cannot be convicted. The statement of defence witness Mangilal (DW-1) has

also not properly appreciated and the learned trial Court wrongly discarded the same.

7. It is also contended that the statement of Dr. Sanjay Rana (PW-5) has also not supported the prosecution case as well as no independent witness has fortified the prosecution story. That apart, learned counsel for the appellant has further submitted that the learned trial Court has not considered the statements of defence witness in its right perspective and wrongly discarded the same, which is clear violation of principle of natural justice. Learned counsel for the appellant has vehemently contended that the learned trial Court has not correctly discussed, analyzed and evaluated the prosecution evidence and the medical reports. Therefore, in such a situation, the approach of learned trial Court holding guilty to the appellant for the aforesaid offence being perverse, deserves to be set aside.

8. Learned counsel for the appellant has further submitted that out of 7 years, the appellant has suffered more than 6 years incarceration. Hence, in view of the nature of offence, he entreated for reduction of the jail sentence of the appellant to the period of already undergone or as the Court may deem fit.

9. Learned counsel for the State on the other hand bears out the impugned judgment and prays for dismissal of this appeal. It is further submitted that the learned trial Court has passed the impugned judgment after considering each and every circumstances of the case and convicted the appellant rightly.

10. In view of the rival submissions, arguments advanced by learned counsel for both parties and the evidence available on record, the point for consideration is as to whether the findings of learned trial Court convicting and sentencing the appellant under Section 307 of IPC is incorrect on the point of law and facts.

11. In order to evaluate the prosecution witness, at the outset, the statement of injured/Reena (PW-4) is required to be ruminated. The injured/Reena, a child witness who is daughter of appellant elucidated against the accused that he has assaulted her by electrocuting on her shoulder and head. She has also shown mark of visible injury on her head and due to injury, her hairs were wiped out and the same were ought to grow. She has clearly stated that she did not want to live with her father because his father used to beat her excessively. The testimony of this witness has not been controverted in her cross-examination. In this regard, in addition to that the statements of Kailash (PW-1) and Geeta Bai (PW-2) are also very vital. The witness Kailash (PW-1) has clearly stated that at about 1:00 AM, in the night, when he switch off TV, he heard screaming of child and also heard noise of weeping of child. Certainly, he had not interfere in the night, but it does not mean that witness Kailash (PW-1) was telling lie before the Court. The testimony of this witness finds supports from the statement of Geeta Bai (PW-2). The witness Geeta (PW-2) has also fortified the fact that she found that whole body of the child was having burning signs. The statements of Reena (PW-4), Kailash (PW-1) and Geeta (PW-2) have not been shaken in their cross-examination.

12. So far as the statement of child witness Reena (PW-4) is concerned, in this regard, the reliance can be placed on ***Prakash Vs. State of Madhya Pradesh, 1992 LawSuit (MP) 513,*** wherein Hon'ble the Apex Court has held that the testimony of child witness cannot be discarded on the ground that there is likelihood of her being tutored. In view of the above, it has also been endorsed in the case of ***State of Rajasthan Vs. Chandgiram, (2014) 14 SCC 596***, wherein Hon'ble the Apex Court has held that “the deposition of a child witness may

require corroboration, but in case her deposition inspires the confidence of the Court, there is no embellishment or improvement therein, the Court may rely upon her evidence."

13. Virtually, the evidence of child witness should be accepted with care and caution but no corroboration is required, if the testimony of child inspires confidence, specially when the testimony is of the daughter of the accused. Actually, she is the sole eye witness who was tried to be killed by her own father, but she could survive. Thus, her statement contains a special force therein. In this case, Reena (PW-4) is not only the daughter of the appellant but also grievously injured witness. Hence, her statement is accorded special status in law. On this aspect the law recently reiterated by Hon'ble the Apex Court in ***Pradeep Vs. State of Haryana, 2023 LawSuit (SC) 657*** is condign to quote here :-

> "It is a well-settled principle that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. A child witness of tender age is easily susceptible to tutoring. However, that by itself is no ground to reject the evidence of a child witness. The Court must make careful scrutiny of the evidence of a child witness. The Court must apply its mind to the question whether there is a possibility of the child witness being tutored."

14. Certainly, Dr. Sanjay Rana (PW-5) in his MLC report did not notice such major injuries in the MLC report. Since, the injury was noted by learned trial Court in presence of accused. On this point, the learned trial Court relied upon the law laid down by Hon'ble the Apex Court in the case of ***Krishna Mochi Vs. State of Bihar, AIR 2002 SC 1965***, which is relevant to quote here as under :-

> "It is most urfortunate that expert witnesses and investigating agencies which have an important role to play are also not immune from decline of values in public life. Their evidence sometimes become doubtful because they do not act sincerely, take everything in casual manner and are not able to devote proper attention and time."

15. In this regard, the view of Hon'ble Apex Court rendered in ***Mayur Panabhai Shah Vs. State of Gujrat, AIR 1983 SC 66***, is pertinent to produce here :-

> ".....Even where a doctor has deposed in Court, his evidence has got to be appreciated like the evidence of any other witness and there is no irrefutable presumption that a doctor is always a witness of truth....."

16. As such, the demurrer regarding doctor's evidence is also found not sustainable. So far as the arguments regarding non-availability of independent witnesses is concerned, it is well settled that no criminal case can be overboarded due to non-availability of independent prosecution witnesses. In this regard, the following verdict of landmark judgment of the Hon'ble Apex Court rendered in the case of ***Appa Bhai vs. State of Gujarat, AIR 1988 SC 696*** is worth referring here as under***:***

> "10.....Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between

> two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability if any, suggested by the accused....."

17. This incident happened in midnight. Hence, it cannot be expected from the prosecution to furnish eye witness in this regard specially when the father is beating his child, the presence of eye witness on the spot is next to impossible. In view of that the contentions regarding non-availability of independent eye witness is found bogus and fruitless.

18. So far as the statement of defence witness Mangilal (DW-1) is concerned, this witness has tried to show that the injured child/daughter of the appellant was suffering from skin disease which cause scratching on her. Now the question is, if the injured was suffering from skin disease, why the accused has not submitted anything in that regard in his accused-examination recorded under Section 313 of the Cr.P.C. Hence, the statement of defence witness found false.

19. The law is well settled that when the statement of the defence is not proved by the defence, chances of reliability of the prosecution case, increases because such type of falsity of defence is generally recorded as additional link of circumstances towards conviction.

20. Learned counsel for the appellant has also raised, although in

low voice, that act of appellant does not come under the purview of attempt to murder punishable under Section 307 of IPC. In this regard, the intention of the accused has to be unearthed from the circumstances and the nature of the injuries inflicted by the accused. In this regard, the following ratio of the ***Hon'ble Apex Court rendered in State of M.P. v. Kashiram, (2009) 4 SCC 26***, is pertinent to refer here:-

> "[9] To justify a conviction under this Section, it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be concluded from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The Section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this Section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof."

21. In support of this regard, the full bench of the Hon'ble Supreme Court in the case of ***Surendra Singh Vs. State, 2021 LawSuit (SC) 772*** adumbrated as under:-

> "20. It is by now a lucid dictum that for the purpose of constituting an offence under Section 307 IPC, there are two ingredients that a Court must consider, first, whether there was any intention or knowledge on the part of accused to cause death of the victim, and, second, such intent or knowledge was followed by some overt actus rea in execution thereof, irrespective of the consequential result as to whether or not any injury is inflicted upon the victim."

22. In the case at hand, the accused assaulted his child with electric wire. Hence, in ordinary course of nature, the said electrocuting may cause the death of the injured especially when the child was only 6 years old. Such type of injury is always sufficient to cause death. Certainly due to some interference of other children, she is rescued but it does not mean that the appellant had not attempted to kill his daughter child.

23. On the basis of discussion in entirety, and for the reasons assigned on behalf of the appellant, the act of appellant comes under the purview of offence punishable under Section 307 of IPC. The prosecution has successfully proved that the appellant has assaulted his child Reena (PW-3) with intention to cause her death, therefore, he attempted to cause murder. Accordingly, findings of the learned trial Court regarding conviction of the appellant under Section 307 of IPC is infallible.

24. Now, turning to the point of the sentence, looking to the fact that the appellant being father of injured brutally attempted to cause death of his daughter child, no mitigating circumstances can be used

in his favour. In my view, the learned trial Court has taken a lenient view in awarding the sentence of appellant, under Section 307 of IPC, for 7 years R.I. with fine of Rs.1,000/-. Therefore, it cannot be reduced in any way. Hence, punishment of seven years and fine does not warrant any interference.

25. With the aforesaid, the present appeal being sans merit is dismissed and the order of the learned trial Court is hereby affirmed. The appellant is in custody. After completion of aforesaid sentence, depositing the fine amount, he shall be released forthwith, if not required in any other case.

26. The judgment of the learned trial Court regarding disposal of the seized property, if any, stands affirmed.

27. Pending I.As. if any, stand closed.

28. A copy of this order be sent to the concerned trial Court for necessary compliance.

Certified copy as per rules.

(PREM NARAYAN SINGH)
JUDGE

vindesh