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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Date of decision: August 01, 2023***

\+ CRL. A.229/2023

STATE ..... Appellant

Through: Ms. Shubhi Gupta, Additional Public Prosecutor for State

Versus

USHA DEVI & ANR. ..... Respondents

Through: Mr. Krishan Gopal, Advocate

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T ***(oral)***

1. The present appeal under the provisions of Section 378 Cr.P.C. has been filed against the judgment dated 20.08.2019 and order on sentence dated 21.08.2019 passed by the learned Court of Sessions, whereby accused has been acquitted for the offences under Section 302/2019, in FIR No. 103/2014, registered at police station Mansarovar Park, Delhi.

2. The crux of the prosecution case, as spelt out in the impugned judgment dated 20.08.2019, is that on 19.02.2014, a report regarding death of two years old baby girl was lodged at police station by her grandfather stating that at around 02:00 PM he received a call from his wife- Usha/respondent No.1 that their granddaughter/ victim-child felt giddiness and fell in the house and accordingly, she had taken her to

GTB Hospital, where the doctor declared her dead. Upon investigation of the dead body, many injury marks were found over her body, however, there was no fresh visible injury present.

3. Upon further investigation it was revealed that the mother of the victim child had registered an FIR No. 323/2013, under Sections 498A/406/34 IPC and under Section 4 of Dowry Prohibition Act, against her husband (father of the victim-deceased) and his family members. However, as per settlement between her parents, the father of the deceased child had to pay Rs.3,25,000/- to his wife/ mother of child and the custody of the child was handed over to him. The maternal grandfather of the child raised a suspicion that the victim was killed by her paternal grandparents. The post mortem of the child was conducted and the doctor in the Post Mortem Report observed that 24 ante mortem external injuries were noticed; and the cause of death was empty stomach and shock as a result of ante-mortem injury to head caused by blunt force impact.

4. On the basis of Post Mortem Report, FIR in question under the provisions of Section 302 IPC and Section 23 Juvenile Justice Act was got registered. On 25.02.2004, grandmother of the victim child, namely, Usha was arrested with the allegation of torturing the child by beating her and not giving her food. At the instance of Usha, one rod and stick were recovered and seized from the house.

5. On conclusion of investigation, trial commenced and charge under Section 302/120B IPC read with Section 23 of the Juvenile Justice Act, was framed against both the accused persons, to which they

pleaded not guilty and claimed trial.

6. To substantiate the prosecution case, thirteen witnesses were examined before the learned trial court, which included mother of the deceased (PW-1); maternal grandfather of deceased (PW-2); Dr. Priyal Jain (PW-10) who had conducted post mortem of the child and Constable Babita (PW-5) who had recorded confessional statement of accused-Usha and seized the immersion rod and danda.

7. Accused-Usha, in her statement recorded under Section 313 Cr.P.C. denied the charges leveled against her and stated that she had taken the child to the hospital where the child was declared dead. She also stated that the child had skin disease and was under treatment from Sagar Hospital. She stated that she is the only lady in the house to do household work and the child was weak and used to fall from bed on her own and so, she had injury marks on her body. The child had fallen three four days prior to her death and was taken to the doctor who had given medicine. Accused-Usha also stated that on the said day, she was present in the kitchen when she heard the sound of fall and she found that the child had fallen and become unconscious. Further stated that she was taking due care of the child and was innocent.

8. Accused- Deepak Panchal, father of the victim in his statement under Section 313 Cr.P.C. stated that he used to take care of the child and the child was suffering from skin problem and used to scratch her body and was under treatment. Both the accused persons got one witness examined in their defence.

9. The learned trial court vide impugned judgment dated 20.08.2019

acquitted the respondents/accused under Section 302 IPC by observing as under:-

> *"48) As per discussion in the foregoing paragraphs, prosecution has failed to establish that death of the child was caused with the danda and not possible by fall. Further the recovery of articles cannot lead to inference that they were within exclusive knowledge of the accused and hence recovered articles cannot be used against accused. Further as already discussed, alleged motive is too weak to raise any inference against accused. Therefore prosecution has failed to prove that both accused hatched conspiracy to commit offence and in pursuant to said conspiracy, they committed murder of the child beyond reasonable doubt. Therefore prosecution has failed to prove charge/case u/s 120B IPC and 302 IPCbeyond reasonable doubt. Accordingly both accused are acquitted of the charges 120 B IPG and 302/120 B IPG."*

10. Though the respondents-accused were acquitted of the charge for offence under Section 302 IPC, however, the learned trial court held them guilty of the offence under Section 23 of Juvenile Justice Act, 2000. Vide order on sentence dated 21.08.2019, the learned trial court convicted the respondents-accused holding as under:-

> *"11) Therefore, in the totality of the facts and circumstances of the case and no efforts made by convicts for treatment of 2 years old girl child, and nature of offence, I am of the opinion that convicts are not entitled to any leniency and they should be given maximum imprisonment provided for offence u/s 23 JJ Act.*
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> *12) In totality of facts and circumstances of the*

case, age of the deceased child and nature of offence, I am of the opinion that ends of justice would be met in sentencing both convicts namely Usha and Deepak Panchal to undergo rigorous imprisonment (RI) for a period of 6 months each [the period they had already undergone] and fine of Rs. 10,000/- each for offence punishable u/s 23 JJ Act. In default of payment of fine, convicts shall further undergo simple imprisonment (SI) for a period of 03 months each."

11. The challenge to the impugned acquittal under Section 302 IPC before this Court by appellant-State is on the ground that the learned trial court has erred in holding that the prosecution failed to prove its case against both the accused persons under Section 302 IPC beyond reasonable doubt. Learned Additional Public Prosecutor for State submitted that the judgment passed by the trial court is against the testimony of material witnesses examined by the prosecution, which amounts to miscarriage of justice and the impugned judgment is liable to be set aside and respondents-accused deserve to be punished for committing offence under Section 302 IPC.

12. On the other hand, learned counsel appearing on behalf of respondents-accused submitted that the present appeal is not maintainable, as the learned trial court after appreciating the evidence brought on record, has considered the innocence of the respondents-accused and has passed the impugned judgment, acquitting them for the offence punishable under Section 302 IPC, which calls for no interference by this Court. Further submits that the learned trial court has wrongly convicted the respondents-accused for the offence under

Section 23 of the Juvinile Justice Act, without any material on record, though the respondents have not filed any appeal because of poverty and sentence awarded was already undergone. However, in the interest of justice, the punishment awarded under Section 23 of the Juvinile Justice Act, deserves to be set aside.

13. The submissions advanced by both the sides were heard at length and the impugned judgment, testimony of witnesses recorded before the trial court and other material placed on record has been perused by this Court.

14. As held by the learned trial court, the victim child had fallen in the house and succumbed to the injuries sustained. As per the post mortem report (Ex. PW-10/A) 24, the child suffered ante mortem external injuries, **s**tomach empty and cause of death was *"shock as a result of ante-mortem injury to head caused by blunt force impact"*. Hence, charge under Section 302 IPC was framed against the accused persons.

15. Relevantly, Constable Joginder (PW-6), who is the initial Investigating Officer of this case, in his examination has stated that there were no fresh injury marks on the body of the victim child and there no signs of blood. This witness in his cross-examination has also stated that no objectionable article like *danda, lathi* etc. which could be linked to the incident, was found from the place of the incident.

16. Dr. Priyal Jain (PW-10) who had conducted the post mortem of the victim-child, also gave a report that there were no injuries on the

head of the deceased. The cause of death was shock as a result of ante mortem injuries caused with blunt force impact. This witness has also stated that the weight of a normal child of 2 years of age is 12 kg, whereas the victim child was weighing only 5 kg and it is not possible to reduce the weight merely in two months. Dr. Priyal Jain admitted during his cross-examination that injuries and scratch may be caused due to nail scratching also, which could also be possible if the child is suffering from eczema and dryness of skin.

17. Next, Inspector Jai Bhagwan (PW-13), in his cross-examination has stated that no public witness was served with the notice to join investigation nor joined when the danda and immersion rods were recovered from the house of respondent No.1.

18. This Court highly appreciates the wisdom of the learned trial court who minutely went through the testimony of these witnesses to acquit them for the offence under Section 302 IPC charged with. However, by overlooking the deposition of Dr. Priyal Jain (PW-10) who had conducted the post mortem report of the victim-child and stated that the weight of a normal child of 02 years of age is 12 kg, whereas the child was weighing 5 kg which is not possible to reduce the weight within two months; the learned trial court has held the accused persons guilty of the offence under Section 23 of the Juvenile Justice Act, 2000 and sentenced them to undergo rigorous imprisonment of six months each with fine of Rs.10,000/- each and in default of payment of fine, accused have been directed to undergo simple imprisonment for a period of 03 months.

19. The provisions of Section 23 of the Juvenile Justice Act, 2000 reads as under:-

> *"23. Punishment for cruelty to juvenile or child.— Whoever, having the actual charge of, or control over, a juvenile or the child, assaults, abandons, exposes or wilfully neglects the juvenile or causes or procures him to be assaulted, abandoned, exposed or neglected in a manner likely to cause such juvenile or the child unnecessary mental or physical suffering shall be punishable with imprisonment for a term which may extend to six months, or fine, or with both."*

20. The prosecution had registered the case against the accused persons on the complaint of maternal grandfather Rakesh Kumar (PW-7) of the victim child, who suspected that the child was killed by the accused persons, so that father of the child could perform second marriage. This witness in his examination has stated that the custody of the victim child was handed over to the respondents accused on 19.12.2013. He has deposed that the mother of the victim/ child had filed a case against her husband i.e. father of the victim-child, under the provisions of Section 498A/406/34 IPC and Dowry Prohibition Act, at Police Station Shahdara, Delhi, wherein a settlement was arrived at and his daughter i.e. mother of the victim child was paid alimony of Rs.3,25,000/- and custody of the child was handed over to the father. This witness has stated that at the time of handing over the custody of the victim child to her father, she was hale and hearty, though he has accepted that no medical examination was carried out. This witness in

his cross-examination has accepted that neither he nor his daughter i.e. mother of the child, claimed her dead body from the hospital nor attended the last rites of the victim child.

21. The fact remains that the mother of the victim child had filed a case under the provisions of Section 498A/406/34 IPC against the accused persons and their family. The mother of the victim-child was given alimony of Rs.3,25,00/- by her father and he was handed over custody of the victim child on 19.12.2013. However, the unfortunate incident had occurred on 19.02.2014 i.e. after almost two months of handing over the custody of the minor child to the father. The undisputed fact is that father of the child was not present at the place of incident, however, was on work place to earn his livelihood away to his work when the victim child fell and got unconscious, which turned out to be fatal. It is relevant to note here that at the said time, the victim child was in the care of her grandmother *(dadi)* who, being the only female member in the family and belonging to poor strata, was busy doing household chores.

22. In the considered opinion of this Court, the first and primary responsibility to take care of the child is of the parents and not grandparents, however, since mother had abandoned the victim child to the custody of father, who was away from the place of incident for work to earn his livelihood, the grandmother, was taking care of victim child. It would be misplaced to assume here that the respondent deliberately neglected the child when she fell down. The recovery of iron rod used for hot water and danda from the house of accused persons, does not in

any manner link the incident to prove that the injury or harm was caused to the victim child. Even Constable Joginder Singh (PW-6) in his cross examination has deposed before the Court that no objectionable article like danda, lathi etc were found from the place of incident. It seems the iron rod and danda were planted by lady Constable Babita (PW-13). Moreover, no blood stains or marks were present at the crime spot. On the other hand, the grandmother herself rushed to the hospital carrying the victim child after she fell and sustained injuries. The accused persons in support of their case had examined one witness i.e. Vinod Kumar (DW-1), who was their neighbor. This witness in his examination and cross-examination has stated that the deceased child looked weak but denied the suggestion that she was tortured or not properly fed by the family of the accused. It has also come in evidence that the victim child was being treated for her skin problems.

23. In the light of aforesaid observations, in our considered opinion the prosecution has failed to prove that accused are guilty of the offence under Section 23 of the Justice Juvenile Act, 2000 and the learned trial court has thereby erred in convicting them. Hence, in the interest of justice, the respondents /accused are acquitted of the offences under Section 23 of the Justice Juvenile Act, 2000 also.

24. Before parting with this judgment, this Court would like to note that the settled position of law, as held by Hon'ble Supreme Court as well as this Court in various decisions, is that the culprit may not be permitted to escape and innocent may not be roped and punished. The present case is a classic example of terrible investigation at the hands of

investigating agency of the prosecution, where despite lacking material substance against the respondents/accused, the prosecution floated the trial. The unfair investigation has made the accused suffer the ordeal of long trial and undergo the sentence for the crime which was never committed by them. This Court wishes to give a word of caution to the prosecution agencies to carry out investigation in a prudent manner and expects that the trial courts shall judiciously assess the material placed on record so that no innocent has to bear the torment of incarceration. We further caution the prosecution department to not file appeals in a casual manner wherein there is no material on record to establish that the trial court has acted in totally disarray. Such type of cases cause loss to the public ex-chequer, precious public time of the courts, energy and time of the prosecution which otherwise can be utilized for the good cause.

25. In the case under consideration, we find that no word can comfort the agony of respondents-accused; however, ends of justice would be met if respondents are compensated at the cost of prosecution. We hereby direct the appellant-State to pay compensation of Rs.50,000/- each to both the accused within four weeks.

26. With directions as aforesaid, the present appeal is accordingly disposed of.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

AUGUST 01, 2023/r