APR

THE HIGH COURT OF SIKKIM : GANGTOK

CRIMINAL APPEAL NO.18 OF 2003

In the matter of an appeal against conviction.

1. Rocky Benedict
2. Jiji Rocky
3. Biju Henry
   All residents of Diesel
   Power House Road
   P.O. & P.S. Gangtok,
   East Sikkim
   (Appellants 1 & 2 at
   present in Rongyek Jail) .... **Appellants**

VERSUS

State of Sikkim .... **Respondent**

For the appellants : M/s N. Rai and Miss Jyoti Kharga, Advocates.

For the respondent : J. B. Pradhan, Additional Public Prosecutor.

PRESENT: ***THE HON'BLE SHRI JUSTICE R. K. PATRA, CHIEF JUSTICE***
THE HON'BLE SHRI JUSTICE N. SURJAMANI SINGH, JUDGE

Date of judgment: 7th May, 2004.

J U D G M E N T

R. K. PATRA, C.J.

This appeal filed on behalf of the three appellants is directed against the judgment dated 25.11.2003 and order dated 28.11.2003 passed by S. W. Lepcha, Sessions Judge (E & N) Sikkim at Gangtok in Criminal Case No. 11 of 2002, convicting appellants 1 and 2 under sections 302/34 IPC and sentencing each of them to undergo imprisonment for

life and to a fine of Rs.5,000/- with a defaulting clause of sentence. Both the appellants along with appellant No. 3 have further been convicted under sections 201/34 IPC and each of them has been sentenced to undergo simple imprisonment for six months with a fine of Rs.4,000/- with a defaulting clause of sentence.

2. The prosecution case briefly stated is as follows:

Appellant No. 1 is the husband of appellant No. 2. Appellant No. 3 is the brother of appellant No. 2. Both appellants 1 and 2 are the residents of Diesel Power House Area, Gangtok and were running a private school for children. Their neighbours are Mina Pradhan (PW1) and her husband Kumar Pradhan (PW7). About six to seven months before the incident, appellants 1 and 2 expressed their desire to Mina Pradhan (PW1) that they were in need of a child who could play with their own child. On their request, Mina Pradhan (PW1) brought Bina Pradhan, a girl aged about 8 to 9 years (hereinafter referred to as the deceased) from her village Kumrek and left her in the custody of the appellants. The deceased was accordingly staying with them. On 18.2.2002 at about 9.30 a.m. appellants 1 and 2 told Mina Pradhan (PW1) that the deceased had expired due to diarrhoea and vomiting. She asked them to inform her husband PW7 who was then in his office. On arrival of PW7 it was decided that the parents of the deceased at Kumrek

should be informed about the death. Accordingly appellants 1, 2 and PW7 proceeded to Kumrek and informed about the death to Gokul Narayan Pradhan (PW3) father of the deceased. Thereafter all of them came back to Gangtok where appellant No. 3 was found guarding the deadbody which was wrapped in a quilt. The deadbody was taken to Kumrek. When the co-villagers of PW3 removed the quilt they noticed marks of injuries on the deadbody. They suspected that the deceased died on account of assault sustained by her and not due to diarrhoea or vomiting. The deadbody was handed over to the police at Rangpo Police Station. Initially a case of unnatural death was registered. The police sent the deadbody of the deceased to STNM Hospital, Gangtok for post-mortem examination which revealed that the deceased died due to ante-mortem injuries and not due to diarrhoea or vomiting. The case was accordingly converted to one under sections 302/201/34 IPC. After completion of investigation the appellants were placed on trial which ended in their conviction as indicated above.

Appellant No. 2 (wife of appellant No.1) was specifically charged under section 302 IPC for having committed murder by intentionally causing the death of the deceased. She and her husband appellant No. 1 were also charged under sections 302/34 IPC for having intentionally caused the

death of the deceased in furtherance of their common intention. All the three appellants were charged under sections 201/34 IPC on the allegation that in furtherance of their common intention they intentionally gave false information to the effect that the deceased died due to diarrhoea and vomiting, with a view to screen themselves from legal punishment.

3. The appellants pleaded not guilty and claimed trial.

4. The prosecution in support of its case examined eleven witnesses. There is no eye-witness to the occurrence. The learned Sessions Judge found the appellants guilty of the charges on the following chain of circumstances.

(i) The deceased died in the custody of the appellants.

(ii) The deceased had several injury marks on her body.

(iii) There is no explanation from the appellants as to how she had sustained bodily injuries other than the head injury.

(iv) All the injuries were ante-mortem in nature as per the medical evidence.

(v) As appellant No. 1 was the custodian of the deceased and the incident took place in his house, he is responsible for not preventing his wife appellant No. 2 from committing the crime and he is equally liable under sections 302/34 IPC.

(vi) After committing the crime, the appellants covered the dead body with a quilt so that no one could see the marks of injuries on her body and gave false information to the effect that the death of the deceased was due to diarrhoea and vomiting. They thus tried to screen themselves from legal punishment and accordingly committed an offence punishable under sections 201/34 IPC.

5. Shri N. Rai, learned counsel for the appellants submitted that the prosecution has not been able to prove motive in the case. He further submitted that the appellants 1 and 2 in fact kept the deceased in their house as their own child and wanted to give her education and had no intention to cause her death nor had they any intention to cause such bodily injuries which were likely to cause death and the injuries being of not grievous nature, at the worst they can be held to have committed offence punishable under section 324 IPC. With regard to appellant No. 3 his submission is that there is nothing on record to show that he tried to cause the evidence of the commission of the offence to disappear. Shri Pradhan, learned Public Prosecutor on the other hand submitted that the prosecution has been able to prove its case beyond reasonable doubt and the conviction of the appellants is well-founded.

6. It is an admitted fact that the deceased was staying with the appellants 1 and 2 at their residence and was in their custody. The doctor PW10 conducted post-mortem examination on the body of the deceased on 19.2.2002 and his report is exhibit 6. By referring to his report the doctor deposed that he detected the following ante-mortem injuries on the body.

1. brownish blue colour extravasation of blood in both the eyelids of both eyes with swelling.
2. multiple healing abrasions with hard brown scab of varying sizes over the forehead and both sides of the face.
3. multiple healing abrasions with hard brown scab of varying sizes over the left side of the neck.
4. extravasation of blood over the right side of the face and neck in an area of 15 x 7cms. bluish red in colour.
5. multiple contused abrasions with soft brown scab with bluish red in colour over the left arm and forearm with swelling of the left arm and forearm.
6. multiple parallel rail road type of contusions of varying lengths ½ c.m. apart over the left thigh and left arm and forearm bluish red in colour.
7. multiple healing abrasions of varying sizes with hard brown scab over both legs and feet with swelling of the left foot.
8. healing abrasion with soft brown scab over the right labia majora.

The age of the injuries varied between one to four days prior to death. They were not caused in a single day. The cause of death was on account of the ante-mortem head injury and haemorrhage produced by blunt force. According to the doctor the injuries were sufficient to cause death of a person belonging to the age group of the deceased. He stated that

the injuries were many and the sizes varied from mm to cm in different cases and were congregated together with overlappings and it was not possible to segregate individual injury and record their actual dimensions. He also stated that the injuries mentioned in his report could collectively cause death. The haemorrhages mentioned in his report were all subcutaneous haemorrhages which were aged about one to four days prior to death.

From the above evidence we have no hesitation to hold that the deceased was subjected to assault for several days prior to her death. She died due to the cumulative effect of assault inflicted on her and not on account of diarrhoea or vomiting as suggested by the defence.

7. The moot question is: Who inflicted such injuries on her? As already stated, there is no ocular evidence in the case. Let us therefore scrutinise the evidence of all the witnesses examined by the prosecution and find out if the chain of circumstances, as itemised by the learned Sessions Judge has been established.

PW1 is Mina Pradhan who was staying in the neighbourhood of the appellants 1 & 2. She stated that on being requested by them she brought the deceased from her village Kumrek and kept her in their custody. On the day of the incident at about 9.30 a.m. both the appellants came and told her that the deceased died due to diarrhoea and

vomiting. This was informed to her husband PW7 who was then in his office. After his arrival, they all decided that this fact should be brought to the notice of the parents of the deceased. Accordingly appellants 1 and 2 and PW7 proceeded to Kumrek. In her cross-examination PW1 stated that the appellant No. 2 used to tell her that the deceased had the habit of passing stool here and there including in her own clothes. She further stated that the deceased was being treated by the appellants as their own daughter. The next witness is PW2, the taxi driver who took the dead body of the deceased to Kumrek and brought it back to STNM Hospital, Gangtok. PW3, Gokul Narayan Pradhan is the father of the deceased. His evidence is that on 18.2.2002 at about noon, appellants 1 and 2 along with PW7 came to his house at Kumrek and told him that his daughter (deceased) who suffered diarrhoea and vomiting in the previous evening had died. He accordingly came to Gangtok along with the appellants in the taxi and took the dead body of the deceased which was wrapped in a quilt to his village. The co-villagers who had gathered near his house removed the quilt from the dead body and noticed blue marks on the face, head and on the chest. They all suspected that the deceased did not die a natural death but she died due to severe assault on her. On the suggestion of the villagers, the dead body was taken to the Rangpo Police Station and after post-mortem

examination was done at STNM Hospital, Gangtok it was handed over to him for cremation. PW4 is a co-villager of PW3. His evidence is of no assistance to the prosecution. PW5 is another co-villager of PW3. He deposed that when the quilt was unwrapped from the deadbody, he noticed number of injuries on the body of the deceased. PW6 is the second officer in-charge of Rangpo Police Station. He stated that when the deadbody of the deceased was brought to the police station, he initially registered a UD case. On examination of the deadbody he found several injuries on it. He prepared the inquest report exhibit P3 and forwarded the deadbody to the district hospital at Singtam and thereafter to STNM Hospital, Gangtok for post-mortem examination. After receipt of the post-mortem examination report he filed FIR exhibit P7. PW7, as already noted, is the husband of PW1 who had accompanied appellants 1 and 2 to Kumrek to inform the father of the deceased about the incident. PWs 8 and 9 are the witnesses who deposed that appellant No. 1 made statement to the police that his wife assaulted the deceased with chappal and plastic pipe which would be available in their residence. PW10 is the doctor who conducted autopsy on the deadbody of the deceased. PW11 is the Investigating Officer.

From an analysis of the above evidence it would appear that the deceased did not die a natural death. She died on

account of the physical assault inflicted on her. The evidence of PWs 8 and 9 is to the effect that the appellant No. 1 disclosed to the police that his wife assaulted the deceased with chappal and plastic pipe which would be available at their residence. The prosecution seems to have adduced this evidence by way of "disclosure statement" under section 27 of the Evidence Act. There is no independent evidence that appellant No. 2 ever assaulted the deceased with chappal or plastic pipe. The evidence of PWs 8 & 9 therefore is of no help.

8. It is well-known that the prosecution is not bound to prove motive of any offence in a criminal case because it is known only to the perpetrator of the crime. In a case depending on circumstantial evidence, however existence or absence of motive is an important factor which may be taken into account. The deceased was aged about 8 to 9 years and died when she was in the custody of appellants 1 and 2. As is evident from the evidence of the doctor PW10, she had multiple injuries on her body and those injuries were not inflicted in a day. The age of the injuries was between one to four days prior to the death. This goes to show that she was being assaulted regularly for several days which ultimately led to her death. The doctor is specific in his evidence that the ultimate cause of her death was haemorrhage both in the head and body. To cover up

the case of assault appellants 1 and 2 came with the false plea that she died on account of diarrhoea and vomiting. This plea is belied by the medical evidence. The evidence of PWs 3, 5, 6 and 7 shows that they all noticed bodily injuries on the body of the deceased. It is in evidence that the deceased was passing stool here and there in the house. This might have enraged the appellants 1 and 2 to assault her. The deceased was in their custody. There is no evidence to suggest that any other third person could have assaulted the deceased. In the circumstances, the accusing finger points to the appellants 1 and 2 only and to none else.

9. The appellants 1 and 2 had not assaulted the deceased with intention to cause her death. They had also no intention to cause such bodily injuries as were likely to cause death. The deceased was a child aged about 8 to 9 years. Therefore the knowledge that such bodily injuries were likely to cause death can be safely imputed to them. We accordingly hold appellants 1 and 2 guilty of the offence under section 304 Part II read with section 34 IPC. Their conviction under section 201 read with section 34 IPC is well-founded as they tried to cause disappearance of evidence with the intention of screening themselves from legal punishment.

10. So far as appellant No. 3 Biju Henry is concerned, we do not find any evidence that he did any act

of causing disappearance of evidence or gave false information to any one with the intention of screening the offender from legal punishment. He is therefore entitled to the benefit of doubt. The conviction and sentence imposed on him under section 201 IPC are hereby set aside and he is acquitted of the charge. If he is still in custody in connection with this case he may be released forthwith.

11. In view of what has been stated above, while setting aside the conviction of appellants 1 and 2 under sections 302/34 IPC, we convict them under section 304 Part II read with section 34 IPC and sentence each of them to undergo rigorous imprisonment for five years. Each of them is also sentenced to pay fine of Rs. 10,000/- (ten thousand) in default to undergo rigorous imprisonment for three more years. The fine, if realised, shall be payable to PW3, Gokul Narayan Pradhan, father of the deceased.

12. In the result, the appeal is allowed in part.

(R.K. Patra)
Chief Justice
07.05.2004

I agree.

(N. Surjamani Singh)
Judge
07.05.2004

Dictation taken
&
typed by me
Tshering Dolkar