

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

**CRIMINAL APPEAL NO. 122 OF 2016**

Mukund S/o Digambar Dixit,  
Age : 52 years, Occu. : Labour,  
R/o. Pande Galli, Tal. Selu,  
District Parbhani.

**... Appellant**

**Versus**

The State of Maharashtra

**... Respondent**

...  
Mr. R. A. Jaiswal, Advocate for Appellant.  
Mrs. V. S. Choudhari, APP for Respondent - State  
...

**CORAM : SMT. VIBHA KANKANWADI AND  
ABHAY S. WAGHWASE, JJ.**

**RESERVED ON : 23<sup>rd</sup> JUNE, 2023**

**PRONOUNCED ON : 07<sup>th</sup> JULY, 2023**

**JUDGMENT (PER ABHAY S. WAGHWASE, J.) :**

1. Appellant Mukund, is hereby taking exception to the judgment and order of conviction passed by learned Extra Joint Ad-hoc Additional Sessions Judge, Parbhani in Sessions Case No.120 of 2014, by which he is held guilty for commission of offence under section 302 of Indian Penal Code (IPC) and sentenced to suffer life imprisonment and to pay fine.

**FACTUAL MATRIX**

2. Prosecution conducted trial against the appellant on

the premise that, appellant/accused and informant Narayan are brothers. Their father Digambar owned house property and landed property. Informant Narayan occupied some part of the residential house, whereas appellant/accused Mukund occupied the other part. Appellant was a divorcee and thereby he resided alone. Entire property owned by late Digambar stood in the name of his wife. However, informant Narayan managed the entire property. Appellant accused Mukund earned for his livelihood by working in a hotel. As mother Laxmibai sold some portion of the land and did not share the sale proceeds with accused appellant, he was upset and therefore, relations between them were not cordial.

According to prosecution, on 23.07.2014, at around 8.00 to 9.00 p.m., appellant came drunk and demanded money for consuming liquor and on refusal he threatened to kill son of informant. According to prosecution, appellant/accused executed the threat by snatching the baby from the waist of wife of informant (PW-2) and holding the child by feet and he flung and struck the baby forcefully on the floor which was built up by cement concrete. The child suffered head injury and was shifted to hospital of Dr. Jadhav hospital, who advised the child to be taken to Parbhani and there on examination the child was declared dead. Hence, PW-1 Narayan informant lodged report (Exh.15) against his brother.

3. After investigation appellant was made to face trial before learned Extra Joint Ad-hoc Additional Sessions Judge. In support of its case prosecution examined in all 12 witnesses. Defence of appellant was denial and false implication. On appreciating the oral and documentary evidence, learned trial Judge held appellant guilty and sentenced him as stated above.

Feeling aggrieved by above judgment of conviction, appellant has preferred instant appeal under section 374 of the Code of Criminal Procedure.

### **SUBMISSIONS**

4. The sum and substance of the argument advanced before us by learned counsel for appellant is that, there is no clear cogent evidence in support of the charges framed against accused appellant. Admitting relations *inter se* between accused and witnesses, it is his submission that since beginning there were disputes in the family on account of share from the sale proceeds received out of sale transaction of agricultural land. Therefore, relations not being cordial, there was false implication to deliberately exclude appellant accused from the interest in the family property. Taking us through the evidence of brother, mother and the answers given by these witnesses in cross-

examination, learned counsel submitted that their testimonies are not consistent or inspiring confidence.

5. He would next submits that evidence on record suggested that accused was taking treatment for some mental disorder. That, prosecution's own witnesses admit to that extent. Consequently, it is submitted that a very different approach was expected from learned trial Judge while appreciating the prosecution evidence, but learned trial Judge failed to consider and appreciate the same and had arrived to erroneous conclusion. He also hastened to add that the possibility of child accidentally falling and suffering injuries has not been denied by medico legal expert. However, learned trial Judge overlooked such aspects of the evidence also.

6. It is strenuously submitted that, there were material omissions and contradictions in the evidence of prosecution, but the same is not properly appreciated and considered by learned trial Judge.

Concluding his argument, it is submitted that it is apparent case of false implication and case not being proved beyond reasonable doubt, he prays for allowing the appeal.

7. In answer to above, learned APP would point out that this is an unfortunate case where an innocent baby has been smashed to death in presence of parents of the child. Narrating the sequence of events as stated by informant, learned APP pointed out that, merely on failure to meet the demand of money, accused had snatched the child and forcibly struck the child on the ground which was made of hard surface i.e. cement concrete. That, the child sustained intracranial injuries and succumbed to the same. Very family members of accused have eye witnessed the gruesome act. Brother, mother have all deposed against accused. Their testimonies have remained unshaken and therefore when all required ingredients for attracting offence of murder were cogently established, learned trial Judge rightly appreciated such evidence and committed no error whatsoever in holding accused guilty. Consequently, it is prayed that there being no merits in the appeal, appeal be dismissed.

8. This being first Appellate Court and last fact finding court, as required by law, we have minutely and carefully re-examined and re-appreciated the available and documentary evidence.

#### **ORAL EVIDENCE ON BEHALF OF PROSECUTION**

The role and status of prosecution witnesses are as

under :-

**PW-1** Narayan informant; **PW-2** Swarna, wife of PW-1 Narayan and mother of child; **PW-3** Laxmibai, mother of PW-1 Narayan and accused; PW-4 Shyam, a neighbour; PW-5 Laxman, carrier of seizure; PW-6 Anil, photographer and also a panch to panchanama (Exh.30); PW-7 Shaikh Bari, panch to inquest; PW-8 Dr. Muddassir, autopsy doctor; PW-9 Baburao first I.O., PW-10 Bhagwan, panch to seizure of clothes; PW-11 Dr. Madhav, first doctor and private practitioner who examined child; PW-12 Kishor, Investigating Officer.

9. On carefully re-appreciating the available evidence on record, it seems to be a case of '**Paternal filicide**' i.e. killing of a child by paternal uncle. Accusation of prosecution is that, appellant demanded money for drinking on the night of 23.07.2014. When demand was refused, it is alleged that appellant accused snatched the child of one and half year old from his mother (PW-2) and forcefully struck the child on a cement floor causing internal head injury, resulting into death of the child. Thus, at the threshold it is to be seen whether death is on account of inflicting or causing head injury and thereby committing homicidal death. Therefore, it is imperative for us to visit and discuss autopsy doctor's evidence which assumes significance to decide the nature of death.

**PW-8** Dr. Muddassir is the doctor at Parbhani Civil Hospital, who had occasion to conduct post mortem on the dead body of child Shivam. Autopsy doctor gave evidence that, on 24.07.2014 body was referred to him along with inquest. Regarding external features noticed by him before he stated that there were blood stains on the T-shirt of the boy. Body was cold and thin. Rigor Mortis was present and blood was oozing from nostrils and mouth. According to him, there were two injuries, viz (i) a contusion over frontal region, right side measuring 5 cms x 3 cms x 2 cms with underline fracture of right frontal bone having linear fracture of the size of 4 cms; and (ii) contusion on left temporal region measuring 7 cms x 3 cms x 2 cms with underline fracture of left temporal bone of size 2 cms. Those injuries were antemortem. In paragraph 4 he stated that, it was his opinion that, cause of death was "terminal cardio pulmonary arrest due to intracranial bleeding due to head injury". He identified P.M. notice (Exh.38) authored by him.

In cross-examination doctor has answered that he did not carry previous medical treatment papers handed over by Constable Shaikh Bari nor he discussed with doctor at Siddhivinayak hospital prior to post mortem. He admitted that, he

did not notice any injuries to legs, stomach or back of the child. He answered that in case of thrashing the child on stone/hard object by holding legs, blood may or may not spread around the spot of contact point. He admitted that injuries on the child are possible due to fall on a hard and rough surface.

10. On analyzing the above medico legal expert evidence, it is seen that death is attributed to cardio pulmonary arrest due to intracranial bleeding due to head injury. Taking into account the nature of cross, it is seen that case is tried to be made out that the child must have suffered injuries on account of fall. However, there is no further detailed cross or suggestion as to from what height and from which place if the child falls, such injuries are possible. Taking into consideration the tender age of the deceased, and also taking into account the impact that has been caused to the internal parts of head, it is definitely not a case of injuries by mere due to fall. Admittedly, during trial prosecution has not solicited concrete opinion about death to be only and only homicidal and even doctor has admitted in cross-examination that injuries are also possible on account of fall also. However, death is definitely unnatural and there is no dispute to that extent. Therefore, now we are required to look into the other available evidence for accepting the case of prosecution as homicidal death.

11. As stated above, learned APP for State has strenuously submitted that, there is direct evidence in this case, i.e. in the form of testimony of father, mother, grandmother of deceased child and a neighbour, i.e. PW-1 Narayan, PW-2 Swarna, PW-3 Laxmibai and PW-4 Shyam. Therefore, we propose and proceed to scan their evidence carefully.

12. **PW-1** Narayan father informant stated that, his elder brother snatched his son from the waist of his wife and thrashed him causing injury to the head. Son was taken immediately to the Dr. Jadhav hospital at Selu and thereafter taken to Parbhani at Siddhivinayak hospital where he was declared dead.

In cross-examination, the informant has admitted that he personally did not see the incident. Thereafter, he is questioned on the family affairs. Witness has admitted that at the time of sale transaction of agricultural land by their mother accused was mentally retarded. He answered that his wife did not suffer any injury when his brother snatched the child from her. He answered that he had received information about the incident while he was on Selu- Moregaon road.

13. **PW-2** Swarna, mother of the child and wife of PW-1 gave evidence that she had two children by named Sakshi and Shivam. That, her mother-in-law, two brothers of her husband, her two children residing in the house. According to her, incident took place one year back. Brother-in-law Mukund had demanded money for drinks. Her husband was out of station. According to her, for the reason that money was not given to the accused, he gave threat that he would kill Shivam. She further stated that, accused held legs of her son Shivam and thrashed him on a cement-concrete slab. Then, he gave fist blow to his mother-in-law and again thrashed the child on washing stone and thereafter in the house. When shouts were raised and when Vasanta and Shyam rushed, accused threw Shivam out of the door. Shyam Shere caught the child in the mid-air and child was taken to the hospital. She claims to have informed everything to her husband on phone and took the child to hospital. According to her, her child died during the examination itself. According to her, brother-in-law had committed murder of her child Shivam.

14. Above witness is cross examined at length. We propose to deal with only material part as initial cross is on the point of family holdings. Witness has admitted that, there was effect on mental condition of accused Mukund, but she denied that he was

undergoing treatment at that time. She is questioned about divorce of accused and his wife. Omissions are brought about Mukund demanding money for drinks, raising shouts. There is cross about distance between her house and police station, whether she and her husband approached Selu police station. She answered that when accused was snatching her child, she attempted to resist it, but denied that she suffered any injuries. She answered that, there was no blood at the spot. She admitted that, accused did not demand money directly from her. Rest all suggestions are denied by her.

15. **PW-3** Laxmibai, mother of informant and appellant accused. The sum and substance of her substantive evidence is that, when they were all standing in the square of the house, accused came and demanded money from her. She informed that she did not have money. According to her, thereafter accused snatched Shivam from the waist of Swarna. He caught hold of his legs and thrashed him on a cement concrete slab in the courtyard. She claims that, she tried to rescue Shivam, at that time, accused hit her with fist blow on her face, as a result of which, her tooth fell down and there was swelling. She stated that he again thrashed Shivam by holding his legs on the washing stone, thereby striking his head against it. He again thrashed him on the platform of umra.

Shivam sustained head injury. Blood was oozing. Accused threw Shivam out, but was caught midway in the air by Shyam Shere. Shivam had become unconscious and was thereafter taken to hospital. She learnt that he died. According to her, Shivam was murdered by accused appellant.

16. While cross examining her, she is questioned whether appellant was mental affected. But, she categorically answered that not at present. But, she admitted in the past he was mentally affected and was subjected to treatment. She answered that when asked whether accused being mentally retarded, his wife not staying with him. She answered that Mukund was not mentally retarded. He has deserted his wife. She is questioned about wife of accused, partition, sale instances, about consent of accused. She answered that, at the time that sale, accused was not residing with her. She admitted that, prior to the day of incident there were no quarrel between her and accused appellant. She answered that, blood did not fall on her clothes as a result of fall of tooth due to fist blow given by accused. But, she answered that she had been injuries to her nose also. To a question whether there was scuffle between her daughter-in-law and accused, at the time of incident, she answered in negative. Omissions are brought in para No. 7 about herself, Swarna, Sakshi and Shivam standing in the square

of the house and about falling of her tooth, about accused catching hold of deceased Shivam's legs and thrashing him on umra and Shivam suffering head injury, and blood to be oozing. Rest is all denial about falsely narrating the incident.

17. **PW-4** Shyam claims that while he was collecting his tin containing flour, he heard uproars and so he went to the house of the child Shivam. When he reached there he stated mother of Shivam had come on road while Mukund was coming out of the big door of the house with the child. He stated that he caught hold of both legs of the child and grabbed the neck of the child with the other hand. According to him, 4 to 5 persons asked appellant accused to handover the child while he was standing on the platform. He stated that as he was keeping the child down, he swiftly put his both hands under the child and caught hold of him. The gestures made by witness are noted by learned trial Judge. Witness stated that the child was weeping, but it later on stopped. Motorcycle of Sunder Digraskar was brought. Sunder and Vasant took Shivam to the hospital. He stated that on the next day he learnt that child died.

18. On the point of actual incident, it has come in his cross that he had not disclosed before police in his statement that he had

been to a flour, thereafter hearing sounds of uproars coming from the house of child Shivam, on hearing cries of the child and mother of Shivam, reaching at the road, Mukund coming out of the big door with the child. Therefore, omissions to the above text has come in para 3 of this testimony. He admitted that, he did not state that accused caught hold of both legs of the child and grabbed his neck, about accused keeping the child down and this witness promptly holding it, hearing cries of the child which subsequently stopped. However, he denied falsely stating in his chief.

#### **ANALYSIS OF ABOVE OCULAR ACCOUNT**

19. On carefully analyzing the above direct evidence, it is emerging that, PW-1 Narayan informant is not a direct eye witness and he has categorically admitted in his cross-examination. Therefore, whatever he deposed was learnt by him. Similarly, even testimony of PW-4 Shyam is not worthy of credence as material omissions are brought in his cross-examination. Therefore, it is doubtful as to whether this witness also had occasion to directly see the alleged event. However, his testimony as regards to taking the child to the hospital can definitely taken aid of. His evidence about child initially crying and thereafter stopped crying also can be taken recourse to.

In our considered opinion, testimonies of mother of deceased Shivam i.e. PW-2 Swarna and PW-3 Laxmibai, grandmother of the child are only relevant. These two witnesses are found to be lending support to each other on the point of actual occurrence and their testimonies have remained unshaken on the point of event. Mother and grandmother are giving proper sequence about arrival of accused and putting up demand money for liquor and on refusal to meet the demand accused forcibly snatching the child from PW-2 Swarna mother of child. They both are consistent about child being caught by legs and banged and struck on the floor by the accused. The manner of suggestion to PW-2 Swarna about she suffering injuries during process of snatching and suggestion to PW-3 Laxmibai about scuffle between accused and PW-2 Swarna clearly show that presence of accused and occurrence is itself not disputed.

20. It is pertinent to note that the manner of cross-examination shows that an attempt has been made to show that accused was mentally retarded. However, such defence seems to have been taken before this appellate court for the first time. But, there is no supporting material in that regard. Defence of such nature has not been taken or probablized in the trial court at any point of time since commencement of trial. Appellant/accused had

availed the opportunity of answering questions regarding incriminating material that had cropped up in the evidence against him i.e. at the time of section 313 of Cr.P.C. No specific defence of insanity has been taken. Even otherwise for entitlement of protection of insanity, it has to be demonstrated that so called insanity was "legal insanity" and not mere mental insanity. There is difference between both. Law to that extent has been lucidly and succinctly dealt numerous times by the Hon'ble Apex Court in various cases including *Dahyabhai Chhaganbhai Thakkar Vs. State of Gujarat*, AIR 1964 SC 1563; *Ratan Lal Vs. State of Madhya Pradesh*, AIR 1971 SC 778; *Surendra Mishra Vs. State of Jharkhand*, (2011) 11 SCC 495; *Bapu @ Gujraj Singh Vs. State of Rajasthan*, (2007) 8 SCC 66, it has not been shown that at the time of incident accused was under the influence of any insanity or was at relevant time taking treatment for such ailment. Crucial time to ascertain state of mind is the time when the incident took place. Taking into account such requirements, here it is evident that accused who was already upset with his mother, specifically demanded money for liquor and on refusal, he issued threats to kill the baby and further indulged in the act of executing the threat. Therefore, the role played by him is sufficient to draw inference that he was not under influence of any insanity as claimed. Even, what was the exact nature of mental ailment is not brought on

record. No medical papers of previous treatment are brought to the trial Court or this Court. Therefore, we are afraid whether it is open for appellant to put-forth such plea in absence of any credible evidence.

21. We have considered the judgment passed by learned trial Judge. In para 13 learned trial Judge has observed that accused was rational in his conduct and talks. In para 15 learned trial Judge has discussed case put-forth by accused about his quarrels with his brother Narayan and wife of Narayan PW-2 Swarna. Evidence of prosecution suggest demand of money for liquor and on account of failure to receive money as demanded, accused seems to have caused injuries to the child Shivam. As stated above, there is nothing on record to accept the defence raised herein about so called unfit mental condition of accused at the time of incident so as to extend the benefit available under law. No material has been placed on record by accused during the entire trial which commenced from the stage of charge dated 29.01.2015 till conclusion of trial dated 29.08.2015 regarding legal insanity. In the light of such facts and circumstances, the attempt made before us for the first time is virtually futile.

**SUMMATIONS**

22. To sum up here evidence of PW-2 Swarna and PW-3 Laxmibai clearly and cogently brought on record about accused to be discontented on account of not receiving sale proceeds from his mother, he getting enraged on failure to receive money from her for drinking liquor that night and thereafter he initially issuing threats to kill Shivam and finally snatching him, holding the said child with both legs, flinging him and he struck the child on the cement floor and causing him intracranial injury with cardio pulmonary arrest. Resultantly, he is solely responsible for death of innocent child of one and half year old who met with homicidal death. Mother and grandmother are unanimous about gruesome act by accused. Therefore, guilt has been rightly fastened against him.

23. We have examined the entire judgment passed by learned trial Judge. It is noticed that, learned trial Judge has minutely and carefully conducted the trial from the initial stage. Efforts are done to note the demeanor of witnesses, accused during trial. Principles of law while appreciating oral evidence has been borne in mind while scrutinizing the oral accounts of all four direct eye witnesses. Findings reached at are supported with sound reasons. We unequivocally express our concurrence to the manner

of appreciation and conclusion reached at by learned trial Judge. Evidence on behalf of prosecution is inspiring confidence. No perversity or illegality is brought to our notice, so as to interfere in the judgment under challenge. Hence, finding no merits in the appeal, we proceed to pass following order:-

**ORDER**

- (i) The criminal appeal is hereby dismissed.

**(ABHAY S. WAGHWASE, J.)**

**(SMT. VIBHA KANKANWADI, J.)**