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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 131 OF 2014

Shrimant Bapu Barde
Age: 40 Years, R/o Korphale, Taluka
District: Solapur
Alternate address Vallabh Nagar,
Nehru Stadium- Pimpri, Dist-Pune,
presently lodged at Yerwada Central Prison,
Pune

..Appellant.
(Orig. Accused)

Versus

The State of Maharashtra
(at the instance of Vairag Police Station,
Solapur vide C.R. No.54 of 2008)

..Respondent.
(Orig. Complainant)

Miss. Apeksha Vora, Advocate appointed for the Appellant.
Mrs. Sangeeta D. Shinde, APP for the State.

**CORAM: P. V. HARDAS &
A.S. GADKARI, JJ.**

Date: 9th June 2015.

JUDGMENT (Per A.S. Gadkari, J.):

1 The appellant, original accused, has challenged the judgment
and order dated 20th July 2013 passed by the learned Additional Sessions

Judge-4, Solapur in Sessions Case No.178 of 2008 thereby convicting the appellant for the offence punishable under Section 302 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for life and to pay a fine of Rs.200/-, in default of the payment of fine to suffer further rigorous imprisonment of three months.

2 The facts which are necessary to decide the present appeal can briefly be stated thus:

(i) Shaila Barde (PW-1), wife of the appellant married to him five years before the date of incident. After the marriage, the appellant treated her with care for two to three years. Shaila Barde subsequently came to know that the appellant had already married to a lady by name Sumanbai, resident of Vithalwadi, Pune and has two children out of the said wedlock. The said fact was suppressed by the appellant from Shaila. In the meantime, PW-1 Shaila became pregnant out the wedlock with the appellant. The appellant and his mother pressurized Shaila and subjected her to harassment for aborting the said pregnancy. Shaila refused to do the same. Shaila gave birth to male child namely Balu. Subsequently Shaila went to cohabit with the appellant. The appellant started harassing her and therefore, Shaila left the house of the appellant along with her son and went

to live with her parents for about two to three months.

(ii) On 26.4.2008, the appellant and his mother came to the parents' house of Shaila and requested her to come with him to the matrimonial home. However, the father of Shaila denied the request of the appellant as it was late-night. On the next day i.e. on 27.4.2008, father of Shaila took her along with her son to her matrimonial house at about 2 p.m. Shaila prepared food for dinner. The appellant picked up quarrel with her father on the ground that her father did not send her on the earlier day. Because of quarrel, her father left the house. Shaila followed her father to see him. The appellant lifted Balu who was about 9 months old at the relevant time. When Shaila asked the appellant where he is taking the son, the appellant in turn replied that he would kill her son and threw the son Balu on road. As the child started crying, the appellant put his boot on the neck of her son. Her son died on the spot at about 10 p.m. on 27.4.2008. Shaila thereafter lodged a police complaint.

(iii) Raosaheb Bapurao Jadhav (PW-8) was then attached to Vairag Police station as Assistant Police Inspector. On 28.4.2008, Shaila (PW-1) lodged a report against her husband for committing murder of her child. The said complaint was registered as Crime No.54/2008 under Section 302 of the Indian Penal Code. Raosaheb Jadhav started investigation. He

conducted inquest panchanama and spot panchaname which are at Exhibit 44 and Exhibit 45 respectively. API Raosaheb Jadhav recorded statements of the witnesses. He arrested the appellant on 28.4.2008. During the investigation, he collected necessary and relevant documents. It was revealed to PW-8 during the course of investigation that the appellant did not want any heir/progeny from PW-1 Shaila to his estate and therefore he committed murder of the said child Balu. After completing investigation, he submitted chargesheet against the appellant in the Court of competent jurisdiction.

(vi) As the offence under Section 302 of the Indian Penal Code was exclusively triable by the Court of Sessions, the Judicial Magistrate First Class committed the said case to the Court of Sessions at Solapur. The Trial Court framed charge below Exhibit-3 against the appellant for the offence under Section 302 of the Indian Penal Code. The said charge was explained to the appellant in the language known to the appellant. The appellant denied the said charge and claimed to be tried. The defence of the appellant was of total denial. In support of his defence, he examined defence witness namely Anirudha Barde who was a driver and was plying a pick-up van on the fateful day carrying PW-1 Shaila and her son from the village Pangaon to Korphale.

(vii) The learned Trial Court recorded the evidence led by the prosecution and after hearing the parties to the sessions case, was pleased to convict the appellant for the offence punishable under Section 302 of the Indian Penal Code by its judgment and order dated 20th July 2013 in Sessions Case No.178 of 2008. The appellant has impugned the said judgment and order dated 20th July 2013 as stated hereinabove.

3 Heard Miss. Apeksha Vora, Advocate appointed from the Legal Aid Committee and Mrs. Shinde, the learned APP for the State at length. We have also perused the entire record made available before us.

4 The learned Counsel for the appellant submitted that the appellant has been falsely implicated in the present crime and as a matter of fact the said child fell down on earth from the hands of Shaila (PW-1) herself. She further submitted that there is no witness who is corroborating the version of PW-1. That the defence witness has categorically stated that he gave lift to Shaila with child and her father from Pangaon to Korphale on the fateful day. She, therefore, urged before us that the present appeal may be allowed and the conviction of the appellant may be set aside.

Per contra, the learned APP supported the impugned judgment and order and submitted that the evidence of PW-1 Shaila and PW-4 Shankar More, her father who are eye-witnesses of the incident is sufficient to base the conviction of the appellant. She submitted that PW-1 Shaila is a natural witness and no fault can be made out from her testimony. She further submitted that PW-1 Shaila had no reason to implicate the appellant falsely in the present crime. She lastly prayed before us that the present appeal may be dismissed and the conviction of the appellant may be sustained.

5 With a view to appreciate the submissions advanced before us by the learned Counsel appearing for the appellant and the learned APP, it is necessary to advert to the evidence on record in brief. At the outset, we must note that PW-2 Waman Ghemad is a panchwitness to the spot of incident and according to us he is a formal witness. It is also to be noted here that PW-3 Shabbir Attar, PW-5 Chandrabhaga Pasale and PW-6 Anjana Sutar, though cited and examined as an eye-witnesses by the prosecution, have re-siled from their original statements recorded under Section 161 of Cr. P.C. by the Police and their cross-examinations by the learned APP did not yield any fruitful result. In other words the said

witnesses namely PW-3, PW-5 and PW-6 have turned hostile as they did not support the prosecution case. The prosecution, therefore, revolves around the testimony of PW-1 Shaila, wife of the appellant and mother of deceased child Balu who was approximately 9 months old on the day of incident i.e. 28.4.2008, PW-4 Shankar More, father of Shaila, PW-7 Dr. Ganesh Jadhav who conducted autopsy on the dead body of deceased Balu and issued death certificate, PW-8 P.I. Raosaheb Jadhav and D.W. No.1 Anirudha Barde driver of pick-up vehicle who gave lift to PW-1 and PW-4 from Pangaon to Korphale on 27.4.2008.

6 PW-1 Shaila in her testimony has stated that she married to the appellant five years before the incident. That after the marriage the appellant maintained her nicely for the period of two to three years. The appellant had already married to a lady by name Sumanbai, resident of Vithalwadi, Pune and had two children from the said wedlock. The appellant had suppressed the said fact from her and her parents. She enquired with the appellant and her mother-in-law about former marriage and children of the appellant. That in the meanwhile, she got pregnant out of the wedlock with the appellant. The appellant and his mother subjected Shaila to harassment for causing abortion. Shaila refused to accept the said

instructions of the appellant and her mother-in-law to undergo abortion. She left for parental home for delivery when she was eight months pregnant. She gave birth to a male child by name Balu. After two days from the day of naming ceremony of the said child, she went to cohabit with the appellant. The appellant started harassing her. Thereafter she came to her parental house along her son due to harassment caused by the appellant. She stayed with her parents for about two to three months. On the occasion of village-fair, the appellant and his mother came to her parental house. PW-1 Shaila showed her readiness to accompany the appellant on the second day of the following night hours. On the same day, the appellant came to her house at about 9 p.m. to fetch Shaila to the matrimonial home. The father of Shaila denied the appellant to take Shaila back, as it was very late night. That on the next day her father took Shaila along with her son to the matrimonial house at about 2 p.m. The appellant was at home. She prepared food for dinner. The appellant picked up quarrel with her father on the count that her father did not send her back on the earlier day with the appellant. Her father left the house. Shaila followed her father to see him. The appellant lifted her son Balu who was nine months old and proceeded towards road. Shaila saw it near the house of a person by name Shabbir (PW-3). Shaila asked the appellant as to where he was

carrying her son. The appellant in turn replied that he would kill her son. The appellant thereafter threw the son on the road. The child started crying. The appellant put his foot on the neck of the son. Her son succumb to death at about 10 p.m. on 27.4.2008. On the next day, she lodged a report with the Police, against her husband which is at Exhibit 42.

This witness has been cross-examined at length. A suggestion was put to this witness, her husband had suffered paralysis on his left side of his body. It is to be noted here that the learned Judge while recording evidence has noted the demeanour of the appellant and has observed that the appellant attends Court without any escort and there is no deformity except laming. Except this, there is no other material which has been brought by the appellant on record which would discredit the testimony of PW-1 Shaila.

7 As stated in above paragraphs, PW-2 is a formal witness. PW-3 Shabbir Attar, PW-5 Chandrabhaga Pasale and PW-6 Anjana Sutar did not support the prosecution case. This brings us to the testimony of PW-4 Shankar More, father of PW-1 Shaila. PW-4 in his testimony has stated that the marriage of Shaila with appellant was performed five years before the date of incident. The appellant had a former wife by name Sumanbai and

had two children begotten out of the said wedlock. That neither PW-4 nor his daughter Shaila (PW-1) had knowledge of previous marriage of the appellant. After two to three years of marriage, the appellant and his mother started harassing his daughter. In the meantime, his daughter Shaila conceived from the wedlock with the appellant. The appellant asked his daughter to undergo abortion to which his daughter refused despite torture at the hands of the appellant. Due to harassment at the hands of the appellant, his daughter came to his home. The appellant came to his house to take his daughter. At that relevant time, PW-4 and his wife were in the field, when his daughter told the appellant that she would consult with her parents. It was at about 9 p.m. The appellant had come to home in the noon. The appellant again came to his house at 11 p.m. on the same day and picked up quarrel with him to send his daughter along with the appellant. PW-4 assured appellant that he would drop his daughter to his home on the next day morning. In the same night the appellant left for his native place. On the next day, PW-4 reached to the house of the appellant along with his daughter and her son at about 2 p.m. At that relevant time, the appellant was also at home. In the evening, his daughter prepared dinner. There were altercations between the appellant and his daughter Shaila. PW-4 and the appellant started taking dinner in the night. The

appellant picked up quarrel with PW-4 on the ground that as to why he did not send his daughter with him. The appellant gave two slaps to PW-4. PW-4 left house of the appellant. His daughter Shaila followed him. Thereafter, the appellant came running along with his son who was nine months old. The appellant shouted that he would not keep alive his son. The appellant threw his son on the road. Women from the nearby locality scuffled with the appellant. The appellant put his boot/foot on the chest and neck of the child. Women from nearby locality of the spot of occurrence brought the water and milk to the child. PW-4 himself, sister of the appellant and PW-1 Shaila took child Balu to the hospital at Barshi. The child succumb to death on the spot of occurrence. Thereafter, PW-1 Shaila lodged a report to the police.

In the cross-examination, this witness has flatly denied the suggestion that child Balu died due to fault of his daughter and PW-4 has falsely implicated the appellant in the present crime. In the lengthy cross-examination, the defence has failed to bring on record any material which would tend this Court to disbelieve the testimony of PW-4 Shankar More.

8 PW-7 is Dr.Ganesh Jadhav who conducted autopsy on the dead body of deceased child Balu. PW-7 Dr. Jadhav in his testimony has stated

that on 28.4.2008 Police Constable Barbole of Vairag Police station brought the dead body of an infant Balu at about 2.20 p.m. He clinically examined the dead body and found ante mortem injuries as noted in Clause 17 of the postmortem report. The said injuries are as under:

- “1. Superficial abrasion over left elbow measuring approximately 4 cm in length.
2. Abrasion over left wrist approximately about 2 cm in length.
3. Linear abrasion over left foot measuring approximately 1.5. cms.
4. Supra orbital swelling 3 x 2 cms with swelling over left anterior parietal region (contusion measuring 6 x 4 cms.).”

PW-7 Dr. Jadhav also found internal injuries of deceased as noted in clause-19 which are as under:

- “1. Pericranial hematoma over anterior parietal eminence extending downward towards left ear measuring approximate size 6 x 4 cms.
2. No evidence of fracture vault skull bones.
3. Evidence of cerebral edema and membranes were stretched. There was defused collection of blood underline dura over parietal bone, approximately 15 cc.”

PW-7 Dr. Jadhav, after completion of postmortem, was of the opinion that probable cause of death appeared to be death due to head

injury (cerebral concussion) with subdural hemorrhage. He has further opined that injuries noted in columns 17 and 19 may be possible if the child is thrown on the hard and rough surface.

In the cross-examination this witness has denied the suggestion stating that he do not agree that if a child fell from the arms of it's mother, it sustain injuries as noted in Column 17 and 19 of the postmortem report which is at Exhibit 53. He denied the suggestion that after fall of a child from height, it causes injuries like oozing of blood from mouth, ear and nose.

9 PW-8 is P.I. Raosaheb Jadhav was then attached to Vairag police station as Assistant Police Inspector in the year 2008. In his testimony, he has stated that on 28.4.2008, Shaila lodged a report against her husband or committing a murder of her child. The said report was registered as a Crime No.54 of 2008 under Section 302 of the Indian Penal Code against the appellant. PW-8 thereafter conducted inquest panchanama over the dead body of Balu Barde. The inquest panchanama is at Exhibit 43. He also effected spot panchanama in the presence of complainant and panchwitnesses which is at Exhibit 45. He arrested the appellant by effecting arrest panchanama which is at Exhibit 46 on 28.4.2008. During

the course of investigation, he recorded the statements of the witnesses including PW-3 Shabbir Attar, PW-5 Chandrabhaga Pasale and PW-6 Anjana Sutar. After completion of the investigation, he submitted chargesheet against the appellant. It was transpired during the course of investigation to him that the appellant committed murder of his son Balu by throwing him on the road as he did not want any heir/progeny from Shaila to his estate.

The cross-examination of this witness proceeds by putting him stock questions and no admission and/or omission has been brought on record which would discredit the testimony of this witness.

10 The appellant has examined defence witness in support of his case. The defence witness no.1 Anirudha Barde, is the driver of the pick-up vehicle who gave lift to PW-1 Shaila and PW-4 Shankar More from village Pangaon to Koraphale on 27.4.2008. D.W.-1 in his testimony has stated that the appellant is from his relation. His wife (PW-1) belongs to village Pangaon. That on the day of incident, he was plying his vehicle known as pick-up four wheeler vehicle from village Pangaon to village Koraphale. That on the way of village Pangaon, Shaila (PW-1), wife of the appellant, her son and Shankar More (PW-4) father-in-law of the appellant were

standing on the road. That Shaila was crying having her son on her shoulder. Shaila told him that her son died and requested him to drop her to village Korphale. That he give lift to Shaila and her father with dead body of child to Korphale. He dropped them at village Korphale. Thereafter he left for his work.

It appears to us that this witness is not an eye-witness to the incident and after the incident in question took place this witness has simply gave lift to PW-1 Shaila and PW-4 Shankar More from village Pangaon to village Korphale and therefore, the testimony of this witness in our considered opinion is of no help to the appellant.

11 After taking into consideration the entire evidence on record, we are of the firm opinion that the evidence of PW-1 Shaila, mother of a child by name Balu, and PW-4 Shankar More father of Shaila is reliable and trustworthy. PW-1 Shaila is a natural witness and has no reason to grind an axe against the appellant who was biological father of the deceased Balu. The prosecution has proved the motive behind the crime through PW-1 Shaila. Though the other eye-witnesses namely PW-2 Waman Ghemad, PW-5 Chandrabhaga Pasale and PW-6 Anjana Sutar did not support the prosecution case, in our considered opinion, the testimony of PW-1 Shaila

and PW-4 Shankar More is wholly reliable and trustworthy.

12 It is to be noted here that the appellant after uttering that he will kill the child, has immediately acted upon the said saying by throwing the child on the road and subsequently putting his foot on the chest and neck of the child. The said fact has been proved by PW-1 Shaila and corroborated by PW-4. PW-7 Dr. Jadhav who conducted autopsy on the dead body of the child Balu has also corroborated the version of PW-1 Shaila and PW-4. It is also to be noted here that as far as the defence which was tried to be taken by the appellant by putting the suggestion with respect to its infirmity due to paralysis, as stated hereinabove the learned Trial Court has observed the demeanour of the appellant and has noted that the appellant attends the Court without escort except laming. The record is absolutely silent about the fact that the appellant was not capable of committing the crime by firstly throwing the child on the road and secondly by pressing the foot on the chest and neck of the infant Balu thereby causing his death on the spot.

13 After taking into consideration the aforesaid facts and evidence on record, we are of the firm opinion that the Trial Court has not committed any error in convicting the appellant under Section 302 of the Indian Penal

Code. The appeal therefore does not have merit in it and it fails. The appeal is liable to be dismissed and is accordingly dismissed.

14 Fees of the learned Counsel appearing for the appellant is quantified at Rs.5000/-. Since the appellant is in jail, a copy of this judgment be sent to the appellant. Fees payable to Miss. Apeksha Vora, learned Counsel appointed for the appellant quantified at Rs.5000/-.

(A.S. GADKARI,J.)

(P. V. HARDAS,J.)