

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 147 OF 1999

Dattatraya Keshav Shelke.	..	Appellant/ Accused No.1.
Vs		
The State of Maharashtra.	..	Respondent.

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Shri U.R. Agandsurve for the Appellant.
Shri Arfan Sait, APP for the State.
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CORAM : A.S. OKA, J

DATED : 16TH MAY 2017

ORAL JUDGMENT :

1. The present Appeal is preferred by the Appellant/Original Accused, who has taken an exception to the judgment and order dated 25th February 1999 passed by the learned Additional Sessions Judge, Solapur in Sessions Case No.95 of 1997 by which the Appellant (Accused No.1) has been convicted for the offences punishable under Section 304 Part (II) as well as Section 201 of the Indian Penal Code. For the first offence, the Appellant Accused No.1 has been sentenced to suffer rigorous imprisonment for six years and for the second offence, he has been sentenced to suffer rigorous imprisonment for two years. The sentences have been ordered to be run concurrently.

2. The prosecution case in brief is that the Complainant Suman (Tai) Dattatraya Shelke was residing with the Appellant for about seven years. The Appellant had assured to marry with her. It is alleged that when she was pregnant for about five months, the Appellant's father performed the marriage of the Appellant with one Alka Bibhishan Doifode. Three months after the said marriage, the Complainant Suman gave birth to a son by name Parmeshwar. The Complainant lived in the house of the parents for 4 to 5 years. In the meanwhile, the Appellant developed illicit relations with one Jambavanti.

3. The Accused No.2 is the said Jambavanti. It is alleged that both the Appellant and Jambavanti came to the Complainant and took her to the place of residence of the Appellant. Initially, the Complainant's son was residing with her parents. About 1 and ½ months before the incident, the Appellant forcibly took away her son from her parents without her consent.

4. On 21st January 1997 at about 10.30 a.m., the Appellant brought the Complainant's son on motor-cycle and was taken him towards the place of residence of the Accused No.2 Jambavanti.

According to the case of the Complainant, the Appellant brought her son from the school while the son was having his lunch. Therefore, the Complainant told the Appellant to provide lunch to her son but he refused to do so. Though the Appellant assured the Complainant that he would not beat her son, the Complainant had a suspicion. Therefore, the Complainant followed the Appellant and reached the house of Jambavanti- Accused No.2. Her case is that at that time, the Accused No.2 gave a slap below the ear of her son and told that the said son will be an enemy and obstacle in the future life of the Appellant and the said Jambavanti and, therefore, the Appellant would finish him. The Complainant's son started weeping and coming towards her. At that time, the Appellant gave a blow by stick on the back and head of the son. The Appellant dragged her son and gave 5 to 6 fist blows on his stomach and chest. He caught hold of his collar and dashed his head to the wall about 3 to 4 times. The Complainant was protesting and shouting. The Complainant started proceeding towards her village when the Appellant gave her a threat that she should not go to the village and the place of residence otherwise, she will face the same consequences as suffered by her son. However, the Complainant reached her place of residence. Thereafter, the Appellant brought her son on his shoulder when she found her son to be unconscious. Thereafter, the Appellant with the help of a servant took the son on his

motor-cycle. The Complainant rushed to her parents and narrated the incident. Next day, the Complainant accompanied her parents and visited the hospital and noticed that her son was unconscious. The Appellant informed the doctor that the Complainant's son fell from a tree. It appears that after sometime, the son succumbed to the injuries. The Appellant threatened the Complainant not to tell about the said incident to anybody. She was threatened that if she discloses the truth, she would face the same fate as suffered by her son. After cremation on the next morning at about 10.30 to 11.00 a.m on 23rd January 1997, the Complainant lodged a complaint (Exhibit-42). A crime was registered on the basis of the said complaint.

5. The prosecution examined four witnesses. The first witness is one Shri Manmath Vairag, who is a panch witness to discovery panchanama which records discovery of a stick at the instance of the Appellant. The second witness is the Complainant Suman. The third witness is Shri Ashok Krishnaji Shejal, who was the Investigating Officer and the fourth witness is Shri Jagannath Ananda Kamale who recorded the information furnished by the Complainant on the basis of which the First Information Report was registered. We must note here that a charge was framed against both the Accused for the offences punishable under Sections 302 and 201 of the Indian Penal Code. By the impugned

judgment, the learned Sessions Judge held that the offence punishable under Section 304 Part (II) was proved against the Appellant. In addition, the offence punishable under Section 201 of the Indian Penal Code was proved. The Accused No.2 was acquitted.

6. The learned counsel appearing for the Appellant has taken the Court through the notes of evidence and the impugned judgment. The submission of the learned counsel appearing for the appellant is that even taking the evidence of the prosecution witnesses as correct, the offence punishable under Part-II of 304 of Indian Penal Code was not established. He pointed out from the evidence of the complainant that at the time of alleged incident, she stood calm and quite though she allegedly saw her son being beaten by the appellant. He pointed out that her evidence shows that she quietly walked away from the place of incident. Another aspect pointed out by him is that when the appellant took the deceased son to the hospital, she did not follow the appellant to the hospital. Instead of going to the hospital, she went to the place of residence of her parents. He submitted that this shows unnatural conduct of the complainant who is the mother of the child. The learned counsel appearing for the appellant submitted that considering the fact that the conduct of the complainant is unnatural, the learned Sessions Judge ought not to have believed her testimony.

He submitted that even the delay in lodging the FIR is very relevant in the context of unnatural conduct of the complainant as the same was lodged after the dead body of her son was cremated. He further submitted that it is not possible to believe the motive of the offence as alleged by the prosecution inasmuch as the deceased was an illegitimate son of the appellant. He submitted that the defence that the deceased fell from the tree and sustained injuries is certainly a plausible defence as the appellant himself took the deceased to the hospital for medical treatment. He also pointed out that the Medical Practitioner, who examined the deceased son, has not been produced as a witness and even the servant of the appellant, who carried the deceased son on motorcycle along with the appellant, has not been examined. He submitted that the guilt of the appellant- accused was not brought home by the prosecution. Learned APP supported the impugned judgment and order and submitted that no interference is called for.

7. I have consider the submissions. Firstly, it is necessary to refer to the evidence of the complainant (PW2- Suman) wherein she disclosed that the appellant was the father of the deceased son. She stated that after she gave birth to the son, the appellant married to one Alka. She stated that she was residing in the place of residence of the appellant at the time of incident. She stated that even the accused

No.2 was residing with him. The material part of the examination-in-chief of the complainant is in paragraph- 2, which reads thus:

“2/- My son Parmeshwar is dead. Incident took place on 21-1-97 at about 10-30 a.m. Accused Dattatraya brought Parmeshwar on the motorcycle from the school to my Vasti. Parmeshwar was taking his tiffin i.e. rice in the school when he was brought by the accused Dattatraya. Parmeshwar told me this fact. Parmeshwar told me that he wanted to take meal as he was brought while eating rice. Accused Dattatraya told that we would take the meal after visiting Vasti of Jambabai. Parmeshwar was weeping. I told accused Dattatraya to allow Parmeshwar to take meal, but accused Dattatraya told that after visiting Vasti of Jambabai meal would be taken. Dattatraya used to beat Parmeshwar hence I told that Parmeshwar should not be taken to Vasti of Jambabai. Accused Dattatraya Parmeshwar on motorcycle to the Vasti of Jambabai. I had a doubt in my mind that accused Dattatraya might beat Parmeshwar so I ran after the motor Cycle upto Vasti of Jambabai. Parmeshwar was taken in the Vasti of Jambabai by accused Dattatraya. Vasti consists of Chappar and shed of tin-sheets. As Parmeshwar got down from motorcycle on the Vasti of Jammbabai, she said to accused Dattatraya to kill Parmeshwar as Parmeshwar was their enemy in future. Accused Jambabai gave slap on ear of Parmeshwar. Accused Dattatraya gave fist blows and kick blows to Parmeshwar. This happened outside the Chappar. Accused Dattatraya also beat Parmeshwar with a stick (Tutichya Pok). Parmeshwar was beaten with the stick on his back side. As I tried to intervene, both accused Dattatraya and Jambabai pushed me away. Accused Dattatraya told that I should not intervene otherwise, I would be assaulted like Parmeshwar. I raised shouts. Accused Dattatraya caught head of Parmeshwar and hit against the wall. Parmeshwar became unconscious. Accused Dattatraya told me to return to my Vasti otherwise he would assault me like Parmeshwar. Accused

Dattatraya took Parmeshwar on his shoulder and handed over to servant Ahmed, who was doing agricultural work in the field. Accused Dattatraya brought motor cycle from Vasti of accused Jambabai. Accused Dattatraya and servant Ahmed took Parmeshwar on motor cycle to the dispensary. As I raised shouts brother in law Tukaram had come there. Parmeshwar was admitted in Wadia Hospital Solapur. I went to tell about the incident to my parents at their Vasti. On the next day I visited Wadia Hospital. Parmeshwar was on oxigen. On 22-1-97 Parmeshwar died, in hospital in the evening. Accused Dattatraya was with Parmeshwar in the hospital.....”

8. I have carefully perused the cross-examination. Paragraph-3 of the Cross-examination is mainly on relationship between the appellant and the complainant in which the complainant admitted that she continuously stayed with the appellant. She stated that initially her son was residing with her parents but the appellant and accused No.2 brought her son from the house of her parents. She denied the correctness of the suggestion that sometimes the appellant used to drop her son to school and used to bring her son from the school. She accepted that sometimes the appellant used to take Parmeshwar, the deceased son by his motorcycle. An omission was brought on record about the statement of the complainant that the appellant used to beat her son and hence, she felt that the appellant should not take her son to the place where the accused No.2 used to reside. Surprisingly, a

suggestion was given to the complainant that she did not intervene in the incident and that the appellant did not push her aside. She was also given a suggestion that she falsely deposed that the appellant carried her son on his shoulder and that she falsely deposed that the appellant brought motorcycle. It is brought on record that after the death of her son she herself along with appellant and her parents came back to the place of residence by a vehicle. Lastly, a suggestion is given that her parents and her brother Tukaram decided to file a false complaint. Surprisingly, there is no serious cross-examination made of the complainant about the main incident to which she deposed in paragraph-2 of her evidence. The version of the complainant about the main incident in paragraph- 2 is not at all shaken in the cross-examination of the complainant. In fact, there is hardly any cross-examination in that respect.

9. The learned Sessions Judge in paragraph- 18 of the judgment has referred to the post-mortem notes. In paragraph- 18, while referring to the post-mortem notes, the learned Sessions Judge observed thus:

“18. It reveals from the postmortem notes at Exh.17 from column Nos.17, 18, 18A, 19, 20, 21 and opinion. There are several injuries on the person of deceased Parmeshwar and those have been explained at length by the doctor in the aforesaid columns and this document has been

admitted. Under this situation, no adverse inference can be drawn than those mentioned in the document. I would also like to mention here that at Exh.17 in column Nos.17 and 18, there are injuries such as small abrasions on Rt.side of forehead, swelling, multiple small abrasions on Rt.side of face in front of ear over area 3" x 1/2", in front of ear, abrasion in front of left her, two abrasions on posterior aspect, abrasion of Rt.anterior iliac region, abrasion on Rt.side of chest, small abrasions on anterior aspect left knee, two scratches on medical aspect left knee, two scratches on medical aspect Rst.knee. In column No.19 injuries i.e. contusion of Lt.frontal region, left frontal region, haematoma at Rt.parietal region, are mentioned. In respect of brain, subdural haematoma all over brain more on Rt.cerebraum blood clots are mentioned. In Column No.20, injuries i.e. throax fracture, ribs 6th on lateral aspect, 7th on post. Aspect etc. are mentioned.

In Column No.21 small tear on Rt.lobe and regarding liver, border blood clot etc. are mentioned. The cause of death is mentioned in column No.27 of the postmortem notes. According to the doctor, the cause of death is head injury with subdural haematoma with blunt trauma to chest and abdomen, fracture to ribs and injury to liver. All these injuries have been occurred due to beating by accused Nos.1 and 2 respectively. There is no any other inference that can be drawn under the facts and circumstances of the present case that the beating by accused Nos.1 and 2. Moreover, it can very well be said that aforesaid injuries are antemortem injuries. These injuries fully support the version of the complainant Suman....."

10. I have perused the post-mortem notes. I find that the findings recorded by the leaned Session Judge are factually correct.

11. Apart from a bare suggestion that the deceased fell from the tree and sustained injuries, which was given in the cross-examination of the complainant, there is nothing brought on record in support of the said suggestion. Even the injuries sustained by the deceased as reflected from the post-mortem notes do not support the said defence. The omissions and contradictions, which are brought on record in the evidence of the complainant, do not affect the substratum of the prosecution case at all.

12. The learned Sessions Judge noted that admittedly the appellant took the deceased to a private hospital instead of taking him to the civil hospital at Solapur. He gave a false history regarding fall of the deceased from tree. The learned Judge rightly found that the said defence regarding fall from the tree was not established. That is why the appellant has been rightly convicted for the offence punishable under section 201 of the Indian Penal Code.

13. In my view, the absence of examination of the Medical Practitioner of the deceased is not at all fatal to the prosecution case. Moreover, absence of motive is not that relevant as the finding of the learned Sessions Judge is that there was no intention on the part of the appellant to kill the deceased.

14. Therefore, after having carefully perused the entire evidence on record, I am of the view that no error can be found with the judgment and order impugned in the appeal.

15. Accordingly, I pass the following order:

(i) The Criminal Appeal No.147 of 1999 is hereby dismissed;

(ii) The impugned Judgment and order dated 25th February, 1999 is hereby confirmed;

(iii) I grant time of three months from today to the Appellant to surrender before the learned 3rd Additional Sessions Judge, Solapur;

(iv) If the Appellant fails to surrender within stipulated time, the learned 3rd Additional Sessions Judge, Solapur shall issue arrest warrant to the Appellant and ensure that the same is served to the Appellant.

(A.S. OKA, J)