

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. 965 OF 2015**

Sunil Dhanaji Kante

.. Appellant

v/s.

The State of Maharashtra

.. Respondents

Mr. Shantanu Phanse, Legal Aid Counsel for the appellant  
Mr. A.A. Palkar, APP for respondent State

**CORAM : PRITHVIRAJ K. CHAVAN, J.**

**DATED : 20<sup>th</sup> FEBRUARY, 2020**

**P.C.**

1. The appellant challenges a judgment and order of conviction passed by the Additional Sessions Judge, Kalyan in Sessions Case No. 278 of 2012 wherein he has been convicted of an offence punishable under Section 304 Part II of the Indian Penal Code and has been sentenced to undergo rigorous imprisonment for 10 years with fine of Rs. 2,000/- in default simple imprisonment for one month.

2. Before advertng to the facts of the case, it is pertinent to note that the appellant who is undergoing sentence has forwarded a handwritten application dated 20.01.2020 addressed to the Superintendent of Nashik Central Prison, Nashik stating therein that

UDAY  
SHIVAJI  
JAGTAP

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UDAY  
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JAGTAP  
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he does not wish to prefer any appeal against the conviction and sentence passed by the trial Court as his sentence is to be completed within 3 to 4 months. It seems that the appellant does not wish to prosecute the appeal, nevertheless the appeal has to be decided on merits and, therefore, this Court has appointed Advocate Shantanu Phanse as an amicus curiae to represent the appellant, who has fairly agreed to do so.

3. The complainant is the wife of the appellant. They were residing at Mahalaxmi Nagar in front of Someshwar Mandir, Ambernath. Their marriage was solemnized in 2009. The complainant delivered a girl child. The appellant was addicted to liquor and gambling and because of his bad habits he had sold gold ornaments of the complainant gifted by her parents. On that count, there were frequent quarrels between husband and wife and the appellant always used to ill-treat and harass the complainant. The complainant, therefore, started residing with her parents. However, the appellant took her back again for co-habitation on 20.05.2012 due to the mediation of her sister-in-law and her husband. However, there was no change in the behavior of the appellant and he

continued to insist upon the complainant to bring money from her parents.

4. On the fateful day of 15.06.2012 at about 12.00 noon the incident in question took place. The complainant was at her home along with the appellant and daughter Gauri, who was then 2 years old. Gauri was reluctant to go to the appellant due to fear. However, the appellant inflicted fist blows on her abdomen. Again on the same day, at about 5.00 p.m. the appellant wanted to take Gauri. However, Gauri was not ready to accompany with her father. Enraged by such response of his daughter, the appellant banged her head on the wall. He had again inflicted blows on her stomach. The small child of 2 years could not bear such blows on the vital part and fell down. She was motionless. The appellant again inflicted kicks and fist blows to the small child when she fell down. As the child was not making any movements, the complainant and the appellant took her to Ashwini Hospital, Ambernath in a rickshaw. The doctor in the said hospital advised to take her to the hospital of Dr. Lapsi. At the hospital of Dr. Lapsi, one compounder advised to take her to another hospital. On their way to the hospital, the complainant met

her sister-in-law's husband. Thereafter, Gauri was taken to the hospital of one Dr. Mahajan and as per the advise of said doctor, they again took Gauri to the Central Hospital, Ulhasnagar where the doctor on examination declared her dead.

5. The relatives of the complainant and the appellant were informed about the incident and a report came to be lodged with the police station. An Offence bearing No. I-72 /2012 came to be registered against the appellant under Section 302 of the Indian Penal Code. The Investigating Officer, after completing the investigation filed charge-sheet before the Judicial Magistrate First Class, Ulhasnagar.

6. After committal, the learned Sessions Judge framed a charge against the appellant under Section 302 of the Indian Penal Code vide Exhibit-4. The appellant pleaded not guilty and claimed a trial. In support of his case, he examined Dr. Mohanish More DW-1 as according to the appellant, Gauri died due to diarrhea and that he did not assault her either by kicks and fist blows or banging the head on the wall.

7. The prosecution examined 8 witnesses. The learned Additional Sessions Judge after going through the evidence of the prosecution witness and hearing the respective sides, held that due to grave and sudden provocation, so as to say, the daughter did not respond to the appellant when he tried to take her, he got enraged and in a fit of anger he lost his control and assaulted Gauri by kicks and fist blows on her abdomen and banged her head on wall. Thus, the learned Additional Sessions Judge in her wisdom, found the act of the appellant as one of the culpable homicide not amounting to murder, and, therefore convicted him under Section 304 part II of the Indian Penal Code.

8. The important witness is the complainant – mother of the child PW-1 Meenakshi Kante. Her evidence reveals that on 15.06.2012 at around 12.00 in the noon, Gauri was reluctant to go to the appellant as she had some apprehension which was quite obvious in view of the fact that the appellant was habituated in consuming liquor. She testified that due to the reluctance of Gauri to go to her father, the appellant started inflicting fist blows on her abdomen. He again inflicted blows at 5.00 p.m. when Gauri refused to go to him. It

seems that on the same day, on two occasions, the appellant had assaulted Gauri with fist blows on her abdomen which is a quite strange and unusual act of the appellant. The evidence of PW-1 Meenakshi reveals that he had banged her head on the wall due to which Gauri fell down on floor. The appellant did not stop there but again started inflicting fist blows on the person of Gauri, which ultimately resulted in stopping her movements and perhaps she might have become unconscious or probably could have succumbed to the fist blows on the vital part of her body.

9. By no stretch of imagination, it can be said to be an act resulted due to either grave or sudden provocation to the appellant by his 2 years old daughter Gauri. This is not a case less than 302 of the Indian Penal Code. There is absolutely no reason to disbelieve the unshattered testimony of PW-1 Meenakshi, who is the mother of Gauri and the only eye-witness. It is quite shocking and surprising as to how one after the other hospitals where Gauri was taken by the appellant and PW-1 Meenakshi, either refused to treat her or even for that matter, DW-1 Dr. More had gone to the extent in falsely deposing that Gauri had a history of diarrhea and vomiting as narrated by the

appellant. As a matter of fact, the falsity of the testimony of DW-1 Dr. More is apparent in view of the fact that neither he had treated Gauri for diarrhea or vomiting nor did he prepare any case paper or brought any record to substantiate his testimony that Gauri was suffering from diarrhea and vomiting. His clear admission during cross by the prosecution that he did not document any of the ailment as stated by him on oath, itself is sufficient to infer that he gave false evidence in support of the appellant.

10. The testimony of DW-1 Dr. Mohnish More has been totally falsified by PW-4 Dr. Harshal Gawayee, Medical Officer, attached to General Hospital, Ulhasnagar to conduct autopsy on the body of Gauri.

11. The evidence of PW-4 Dr. Harshal Gawayee reveals that on 16.06.2012 the dead body of Gauri Sunil Kante, aged 2 years was brought to that hospital with an inquest panchanama for postmortem. The relevant portion of his evidence reads thus :-

*“He has described the injury nos. 1 to 9 which were external injuries found on the dead body and the corresponding*

*internal injury nos. 1 to 4. Accordingly he has issued the post-mortem report which is produced on record at Exh.18. As per opinion of the witness, cause of death of the deceased i.e. of head injury and injury to the brain. He further deposed that, injury nos. 1 and 2 described in column no.17 and all internal injuries total six are sufficient to cause death of the girl. He further deposed that, the injury nos. 1 and 2 can be possible by banging against the wall, rest of the injuries are possible by fist and blows. He also found injury to the external genital organ and therefore he preserved vaginal swab but as per his opinion the same injury can be possible by fist and kick blows.”*

12. A careful examination of the testimony of PW-1 Meenakshi *vis-a-vis* the testimony of PW-4 Dr. Harshal Gawayee which corroborates each other, would clearly indicate that there were more than 9 external injuries and 4 internal injuries to the dead body. It has been clearly opined by PW-4 Dr. Harshal Gawayee that death of Gauri was caused due to injury to the brain and the same can be caused by banging the head on the wall. There is absolutely no reason to disbelieve the evidence of the Medical Officer which corroborates materially and substantially to that of the testimony of PW-1 Meenakshi.

13. A false defense has been raised that injury no. 1 and 2 can be caused if a child falls on the floor from a height. However, no such defense has been raised by the accused during cross that Gauri fell down and sustained injuries. Rather, it was the defense that Gauri died due to diarrhea and vomiting. It cannot be lost sight of the fact that Gauri died in the custody of the appellant and her mother. Her mother PW-1 Meenakshi, however, has narrated the truth on oath before the Court and there was no reason for her to implicate her husband falsely in view of the fact that the appellant had always been treating the victim and his wife with cruelty due to his habits of gambling and consuming liquor. It was for the appellant to explain as to how his daughter aged about 2 years died in such unnatural circumstances having found with as many as nine external injuries on her person. Non-explanation on the part of the appellant would indeed result in drawing an adverse inference against him. It is not the defense that there was someone else in the house. It has been proved beyond the reasonable doubts that it was the appellant and none other who is the author of all those injuries on the person of the victim. According to PW-4 Dr. Harshal Gawayee, the cause of death of the deceased was due to the head injury and corresponding injury

to the brain. According to him, injury no.1 and 2 described in column 17 and all internal injuries which were 6 in number, are sufficient to cause death of Gauri. He categorically opined that injury nos. 1 and 2 are possible by banging the head against wall and other injuries are possibly due to fist blows.

14. There is no effective cross-examination either of PW-1 Meenakshi and PW-4 Dr. Harshal Gawayee. There is no reason to disbelieve the well corroborated testimony of these two witnesses coupled with the inquest panchanama and testimony of other witnesses.

15. PW-5 Prashant Koyate has proved spot panchanama at Exh. 20. The photographs at Exh.24 to 31 taken by PW-6 Ajit Kumar Singh speaks volumes which needs no further explanation.

16. A delay of 6 to 7 hours in lodging the report with the police cannot be viewed with suspicion in view of the fact that Gauri had to be taken to various hospitals from one place to other and made to run from pillar to post, which had consumed considerable time and thereafter since it was the appellant who was the author of those

injuries, perhaps might be the reason to approach the police a bit late which is quite obvious in the peculiar facts and circumstances of the case. The case cannot be thrown overboard merely because there was a delay of few hours in lodging the report.

17. There is no question of any after thought or embellishment as the evidence adduced by the prosecution is quite cogent, trustworthy and inspires full confidence proving the complicity of the appellant in committing the offence of causing homicidal death of his daughter. It is quite obvious as is evident from the testimony of the Investigating Officer and other witnesses that it took time in carrying the victim from one hospital to other hospital and the treatment availed of and for completing the other formalities. As such, the so called delay is not fatal to the prosecution's case.

18. There are no material contradictions or omissions on record. The learned defense counsel tried to bring on record certain contradictions and omissions which are, *per se*, not connected with the incident in question but relate to the previous instances which had occurred prior to the incident. Thus, the contradictions and omissions are insignificant in so far as the present facts and

circumstances are concerned. Even the statement of PW-1 Meenakshi under Section 164 of Cr.P.C. corroborates her testimony before the trial Court.

19. The findings arrived at by the learned trial Court while giving the benefit of a lesser sentence on account of absence of motive on the part of the appellant is perverse as the learned trial Court has failed to appreciate the evidence of PW-1 Meenakshi and PW-4 Dr. Harshal Gawayee in its correct perspective. It cannot be said to be a case of grave and sudden provocation to her father twice in a day i.e. around 12.00 noon and 5.00 p.m. in the afternoon, which prompted him to assault his own blood with kick and fist blows and banging her head on the wall, resulting into the death of Gauri. The findings of the learned trial Court are contrary in the sense that on the one hand it is observed that refusal on the part of Gauri to go to her father had resulted into a provocation but on the other hand, the learned Judge observed that the appellant is a man of short temper and had expressed his anger by assaulting his daughter in a cruel manner by inflicting kicks and fist blows and banging her head on the wall. Such findings merits to be laughed at and wept over at one

and the same time.

20. Unfortunately, the State has not preferred any appeal against the judgment and order of conviction. Be that as it may, it is quite apparent from the facts, circumstances and the evidence on record that the appellant committed the act of inflicting kicks and fist blows and banging the head of Gauri on the wall with a knowledge that it was so eminently dangerous that, it must in all probability, cause death of Gauri or such injuries might result into her death.

21. Before parting with the judgment, the act and attitude of DW-1 Dr. Mohnish More deserves strong condemnation, as shockingly he had given false evidence on oath in support of the appellant that deceased Gauri was suffering from diarrhea and vomiting. Falsity of his evidence is apparent as already discussed hereinabove, he did not document any papers to that effect. Such an act on the part of DW-1 Dr. Mohnish More needs to be dealt with in accordance with law by the prosecution, who is directed to report about the conduct of Dr. Mohnish More to the Medical Council of India as well as the State Medical Council. The concern authorities shall promptly

initiate legal action in accordance with law and shall submit a status report before this Court within a period of six months from the date of pronouncement of this judgment. Such status report shall be on affidavit and the authority shall not unnecessarily seek further extention.

**22.** Having considered the entire circumstances and the facts on record as discussed supra, I am of the view that no interference is called for in the impugned judgment and order of conviction. Consequently, the appeal is devoid of merits and hence stand dismissed.

**(PRITHVIRAJ K. CHAVAN, J.)**