

JPP

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

CRIMINAL APPEAL NO. 1150 OF 2013

1. Latif Hasan Madari

Age: 24 years.

2. Salim Hasan Madari

Age: 32 Years

Both resident of Navibez, Indiranagar

Taluka: Kalwan, District: Nashik.

(At present in jail)

.. Appellants

v/s.

The State of Maharashtra

Through Kalwan Police Station,

Taluka Kalwan, District : Nashik.

.. Respondent

....

Ms. Aisha Mohammed Zubair Ansari & Nasreen S. Ayubi for the
Appellants.

Ms. M. M. Deshmukh, APP for the Respondent.

....

**CORAM: NITIN JAMDAR &
G. A. SANAP, JJ.**

DATE : 21 SEPTEMBER 2021.

JUDGMENT: (Per Nitin Jamdar, J.)

The Appellants have challenged the judgment and order passed by the Additional Sessions Judge, Nashik in Sessions Case No.58 of 2012 dated 27 September 2013, whereby the Appellants are convicted under Section 302 r/w. 34 of the Indian Penal Code and are sentenced to suffer imprisonment for life and to pay a fine of Rs.1000/-, in default to suffer rigorous imprisonment for six months and also for the offence punishable under Section 452 r/w. 34 of the Indian Penal Code. For this offence, the learned Sessions Judge sentenced the Appellants to suffer rigorous imprisonment for three years and pay a fine of Rs.500/- in default of payment of fine, to suffer further rigorous imprisonment for three months.

2. Four accused were tried in the Sessions Case No. 58 of 2012. Accused No.3- Mumtaz Hasan Madari and Accused No.4- Sandalbi Hasan Madari have been acquitted of the offences charged. Accused No.1- Latif Hasan Madari and Accused No. 2- Salim Hasan Madari are convicted and are the Appellants. No appeal against acquittal is filed.

3. Haridas Balu Pawar is the brother of the deceased Ranjita. He lodged the report with the police as follows. He at the relevant time, his family consisting of himself, his parents, five sisters and niece Preety, was residing at Navibej, Baramati, Tal. Kalwan, Dist. Nashik. On the day of 22 November 2011, when he had gone out of the house, he received a phone call at about 2.35 p.m asking him to return. When he reached home, he saw a crowd of people including his relatives, in front of his house. He saw the dead body of his sister Ranjita lying entirely in burnt condition. His niece Preety told him that in the noon, when she and her aunt Ranjita were in front of their home, original Accused No.3- Mumtaj and Accused No.4- Sandalbi tried collecting cow dung from their home. Ranjita objected. Accused Nos. 3 and 4 abused Ranjita and Preety. Appellant No.1 Latif and Appellant No.2 Salim came there. Appellants told the deceased that she has become powerful she should be killed by setting her on fire. Thereafter, Appellant No.1 brought a kerosene can from his home, and then both entered the house, dragged Preety out of, and poured kerosene on Ranjita and set her on fire. Appellant No.1 came out of the house, closed the latches of the home from the outer side and then Appellants ran away. Preety went to her grandfather's home, the father of Ranjita, and brought him to the spot. On this information given by Preety, Haridas lodged a report with the Police.

4. Upon receipt of the information, the Police authorities

started the investigation. Inquest panchanama Exh.34. of the dead body of was prepared. The dead body was sent for post mortem. Spot panchanama vide Exh.32 was prepared. A plastic can containing kerosene about three litres, one match-box and pieces of clothes of the deceased were seized. Statements of witnesses were recorded. The Accused were arrested on 23 November 2011. Viscera and the clothes of the deceased were sent for chemical analysis. After receipt of post mortem report and CA reports, charge sheet was filed. The case was committed to Sessions Court, Nashik. Charges under Sections 302, 452, 352, 504 and 506 read with Section 34 of the Indian Penal Code was framed. The accused pleaded not guilty and claimed to be tried.

5. The learned Sessions Judge, after considering the evidence on record, held that the prosecution has proved that the death of Ranjita was homicidal. The learned Sessions Judge concluded that the prosecution has established that with the common intention and with knowledge, the Appellant Nos.1 and 2 committed murder of Ranjita. The learned Sessions Judge also held that Accused Nos. 1 and 2 committed criminal house-trespass by entering the house of the informant. Accused No.3 Mumtaz Hasan Madari and Accused No.4 Sandalbi Hasan Madari were held not guilty and acquitted. With these conclusions, the learned Sessions Judge recorded conviction under Section 302 r/w. 34 of the Indian Penal Code and sentenced the Appellants to suffer imprisonment for

life and to pay a fine of Rs.1000/- in default to suffer rigorous imprisonment for six months and for offence punishable under Section 452 r/w. 34 of the Indian Penal Code, the learned Sessions Judge sentenced the Appellants to suffer rigorous imprisonment for three years and to pay a fine of Rs.500/- in default of payment of fine, to suffer further rigorous imprisonment for three months.

6. Being aggrieved, the Appellants are before us with this Appeal.

7. We have heard Ms. Aisha Zubair Ansari, learned Counsel for the Appellants and Ms. M.M. Deshmukh, APP for the State.

8. The prosecution has examined seven witnesses. PW-1- Haridas Balu Pawar- brother of the deceased; PW-2- Priti Walmik Pawar- niece of the deceased (Eye-witness); PW-3- Sitaram Fakir Pawar- panch witness of spot and inquest panchnama; PW-4- Balu Hari Pawar- father of the deceased; PW-5- Gorakh Baburao Panpatil, neighbour, who tried to extinguish the fire; PW-6- Dr.Kashinath Vishwanath Malbhage, doctor, who conducted the postmortem; and PW-7- Ishwar Tapsing Vasave, the Investigating Officer.

9. The learned Counsel for the Appellants submitted that evidence of only one eye witness i.e. PW-2 Preety, a child witness

aged nine years, who has not been administered oath, is not believable. It is not corroborated by the evidence of other witnesses. The learned Counsel submitted that to rely on the sole evidence of a child witness, corroboration is necessary, and in support of the submission, relied on the decisions of the Supreme Court in the cases of *Yogesh Singh v/s. Mahabeer Singh and Ors.*¹ and *State of Uttar Pradesh v/s. Ashok Dixit and Anr.*². The learned Counsel submitted that there is a total variance between the narration by PW-2 - child witness and PW-4 Balu Pawar, father of the deceased. PW-2- child witness has admitted that the school timing was 10.00 a.m. to 5.00 p.m. The incident took place on Tuesday. Further, the Investigating Officer took no efforts to ascertain whether the school of PW-2 child witness was opened or closed on that date. The learned Counsel submitted that PW-2 has admitted that the relations between the accused and the deceased neighbours were very good, and the motive that a fight over collection of the cow-dung from the place which led to setting Ranjita on fire is not believable. The Appellants have no criminal antecedents. The learned Counsel submitted that the evidence on record would show that the room in which the incident took place was locked from inside, and PW-5 Gorakh Panpatil, who extinguished the fire entered the room by removing the roof. The learned Counsel submitted that the prosecution evidence on record suggests that deceased Ranjita could have committed suicide as the room was locked from inside, and the cross-

1 (2017)11 SCC 195

2 (2000) 3 SCC 70

examination of PW-2 – child witness will show that the deceased Ranjita was depressed. The learned Counsel submitted that in the inquest panchnama, it was seen that the hands of the deceased were not burnt. The defence taken by the Appellants, that at the behest of one Dr. Mohite the Appellants were implicated, finds credence from the evidence of the prosecution itself. The learned Counsel submitted that the evidence brought on record is entirely untrustworthy, and on the basis of such evidence, the Appellants cannot be convicted.

10. The learned APP submitted that the case is of direct evidence. The Sessions Court was satisfied with the evidence of child witness. It was submitted that the PW-4 - father immediately arrived on the spot and that PW-5 - neighbour extinguished the fire. The learned APP submitted that there is no reason to disbelieve the evidence of PW-2 – child witness as she has truthfully narrated even the good relations between the accused and the deceased Ranjita.

11. PW-6 - Dr. Kashinath Malbhage was working in the District Hospital at Kalyan. He conducted the autopsy on the dead body of Ranjita. He opined that Ranjita suffered 99% ante mortem burn injuries. The inquest panchnama at Exhibit 34 is admitted by the defence. Therefore, the fact that the deceased Ranjita succumbed to burn injuries is established.

12. The inquest panchnama at Exhibit 34 and the spot panchnama at Exhibit 32 for which PW-3 – Sitaram Pawar was examined, have not been disputed in the cross-examination and also in the arguments before us. In fact, the Appellants have relied on Exhibits 32 and 34 to advance the arguments. Therefore, Ranjita succumbed to burn injuries at the spot of the incident is established. The question, therefore, is the manner in which she suffered the burn injuries.

13. PW-2– Preety, the child witness is the main witness examined by the prosecution. As laid down in the decision of *Ashok Dixit* and *Yogesh Singh*, the should must evaluate the evidence of child witness carefully. The evidence of child witness must find adequate corroboration before it can be relied on. It is of course not the position of law that the evidence of the child witness is to be rejected only on the count of age, but the Supreme Court has cautioned that it must be evaluated more carefully with greater circumspection because the mind of the child is malleable, prone to imagination and easily influenced. With that caution, we now examine the evidence of PW-2.

14. PW-2- Preety stated that the incident took place on Tuesday at 12.00 noon. That time, she was sitting in the verandah of the house. She stated that two women from the Madari community (Accused Nos.3 and 4) came home and were taking

cow-dung from home. When her aunt Ranjita objected, the women started abusing. She deposed that when the women started abusing Ranjita, the Appellant Nos.1 and 2 came there. Both of them asked why Ranjita had so much pride, and it was necessary to kill her by setting her on fire. She deposed that Appellant No.2 - Salim asked Appellant No.1 - Latif to bring kerosene. The Appellant No.1 - Latif brought kerosene. Both of them entered the house by pushing her out of the house. She deposed that, then they poured kerosene on Ranjita and set her on fire. Appellant No.2 – Salim closed the door of the house, and both of them escaped. P.W.2 went to call PW-4, her grandfather, who then entered the house and tried to extinguish the fire by covering Ranjita with a cloth.

15. PW-4 – the grandfather of PW-2 deposed that at 11.00 a.m. on that day, Mumtaz and Sandalbi (original Accused Nos.3 and 4) came for taking cow-dung, Ranjita objected, and Mumtaz and Sandalbi beat Ranjita and abused her. Then, when he was sleeping, at around 2.00 p.m., Preeti came and told him that the house was on fire. He went there. The door of the house was closed from outside. He removed the latches, opened the door, entered the home and saw Ranjita in burnt condition.

16. PW-5 – Gorakh Panpatil deposed that at around 1.00 to 1.30 p.m. on that day, there was a crowd in front of the house of PW-4 which was burning and he and one Nandu Borse removed the part

of the roof of the house which was burning, entered inside the house from the top and found that deceased Ranjita was entirely burnt, and they tried to extinguish the fire by using water. He deposed that the door was locked from inside. He was cross-examined by the learned Public Prosecutor when he denied that he removed the outer latch and reiterated that the house was locked from inside.

17. Therefore, according to PW-2 – the child witness, the entire incident took place around 12 noon and as part of one transaction. There was a quarrel and abusing when the Appellant Nos. 1 and 2 came there and set Ranjita on fire. She stated that Appellant No.2 locked the door of the room, which grandfather opened and covered Ranjita by cloth to extinguish the fire. PW-4 stated that there were two different incidents. Quarrel and abusing at 11.30 am then at 2.00 p.m., the PW-2 came to call him. Therefore, it is clear that PW-2 and PW-4 have given completely different stories. PW-4 also admitted in his cross-examination that PW-5– Gorakh Panpatil entered the house by removing part of the roof. Also, PW-4 Balu Pawar deposed that PW-2 Preeti informed that the house was on fire and not that Ranjita was set on fire. The evidence of PW-4 that when he was sleeping at 2.00 p.m., PW-2 came home and told him that his house was on fire, was not stated by him before the police. His evidence that he opened the door and entered the house is also not to be found in the statement before the police. PW-7- Ishwar Vasave, Investigating Officer stated in the cross-examination

that PW-4 had not stated that the door was closed from outside and he opened the door. Therefore, the manner in which the incident took place, as stated by PW-2, is not corroborated by the evidence of PW-4 and PW-5.

18. In the cross-examination, PW-2 Preeti has admitted that her school hours are from 10.00 a.m. to 5.00 p.m., and the incident took place on a Tuesday. The PW-7- Investigating Officer Ishwar Vasave admitted that he did not collect proof of whether the school of PW-2 was open or closed on the date of the incident. The prosecution has not explained the presence of PW-2 at home during school hours on that date.

19. The learned Counsel for the Appellant is right in contending that the entire story on motive by PW-2 and PW-4 is not believable. PW-2 has admitted that there is a television in the house of the accused. Sons of the Appellants used to come and play with PW-2, who also used to go to their house. She admitted that the grandmother of PW-2 and the women in the Appellants' family used to chat in the veerandah in the night. She also admitted that before the incident, the grandmother of PW-2 and her other two aunts used to watch television in the Appellants' house, and there was no quarrel between the aunts of PW-2, her grandmother and the Appellants. The spot panchanama does not refer to any cow dung. PW-3 Sitaram Pawar, Panch to the spot panchnama, admitted that

the floor of the room was not cleaned by cow dung. He also admitted that the house is situated in a thickly populated locality.

20. Relying on the decision in the case of the *State of Haryana V/s. Ram Singh*³, the learned Counsel for the Appellants submitted that though the postmortem report by itself is not a substantive piece of evidence, the evidence of the doctor is not insignificant. It was contended that PW-6- Dr. Malbhage had opined that the injuries were possible by suicide. The burn injuries found on the body of Ranjita were on the torso, both lower and upper limbs and the head, but not on the hands. According to the learned Counsel for the Appellants, this indicates the possibility that Ranjita poured kerosene on herself, and therefore hands did not have kerosene and were not burnt.

21. The learned Counsel for the Appellants has also drawn our attention to the cross-examination of PW-2 wherein PW-2 admitted that Ranjita was the eldest amongst the aunts. She was unmarried. All other aunts were married. Ranjita had white patches on her face, neck and back. PW-2 stated that Ranjita's hands used to turn red, and her legs and feet used to be swollen and therefore, she used to remain at home and would not go to work. According to the learned Counsel for the Appellants, this would indicate that Ranjita was suffering from severe depression as the cause for the suicide.

3 (2002) AIR SCW 219

22. As a defence, the Appellants had stated that they had been falsely implicated at the instance of Dr. Mohite and that all the witnesses are the relatives of Dr. Mohite, who is an influential person. PW-4 admitted in his evidence that Dr. Mohite is his relative who was working in Kalwan hospital. He also admitted that Police Officer Mohite is his relative, who was working at Kalwan Police Station and that Police Officer Mohite and Dr. Mohite were present in the hospital at that time. PW-7- Investigating Officer Vasave admitted that Police Constable Mohite was working in his Police Station. He also admitted that he has heard that Dr. Mohite and his wife pressurize people. He stated that he does not know whether Dr. Mohite is related to the deceased, however, that Dr. Mohite is related is admitted by PW-4. PW-4 has also admitted that the accused were of the Madari community and they used to sell their goods in the village fair. PW-4 and PW-7- Investigating Officer admitted that on that date there was a fair in the village.

23. PW-7- Investigating Officer admitted that the burnt match sticks were not found on the spot. There were other persons residing adjacent to the wall of the spot. He did not take the statement of the other neighbours. He also admitted that the kerosene can was not sent to identify the fingerprints to the Fingerprint Expert. He also admitted that though the spot had soil, the sample of soil was not taken.

24. Therefore, considering the totality of the evidence, we find that in various areas, due to omissions, improvements of the evidence of PW-4 and PW-2, a serious doubt emerges regarding the prosecution case. The genesis of the crime itself is in doubt. PW-2, the child witness though had narrated the incident, it is entirely different than the deposition of PW-4, there is a doubt as to how the house was opened, whether it was locked from inside or outside. The defence has indicated various factors to suggest the theory of suicide by Ranjita by locking the door from inside.

25. Considering these aspects, it will be unsafe to rest the conviction only on the deposition of the PW-2 – the child witness, which is not corroborated by any material particulars. According to us, the learned Sessions Judge was in error in not considering the evidence of PW-2- the child witness in detail and has not applied the caution laid down by the Supreme Court in the above cited decisions to analyze the evidence of PW-2 with care. The learned Sessions Judge has accepted the evidence of PW-2 – the child witness as it is, without noticing that it is not only not corroborated but differs in material particulars. As a result, the conviction of the Appellants will have to be set aside, and the Appellants will have to be acquitted of the offences punishable under Section 302 and Section 452 read with Section 34 of the Indian Penal Code.

26. Accordingly, the following order:
- a. The Appeal is allowed.
 - b. The conviction of the Appellants for the offence punishable under Sections 302 and 452 read with 34 of the Indian Penal Code is hereby set aside.
 - c. The Appellants are acquitted of the offence as charged.
 - d. The Appellants be set at liberty forthwith, if not required in any other offence.
 - e. Fine if paid, be refunded.
 - f. The order regarding disposal of muddemal property is hereby maintained.

G.A. SANAP, J.

NITIN JAMDAR, J.

JYOTI
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PAWAR

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by JYOTI
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