

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPEAL NO.181/2018

Ashok s/o Maniram Wadde,
Aged about 32 years, Occ. Labour,
R/o Aloni, Tq. Gadchiroli,
Dist. Gadchiroli.

.....APPELLANT

...V E R S U S...

State of Maharashtra, through
Police Station Officer,
Police Station, Gadchiroli,
Dist. Gadchiroli.

...RESPONDENT

Mr. N. B. Rathod, Advocate for appellant.
Mr. T. A. Mirza, A.P.P. for respondent.

CORAM:- V. M. DESHPANDE AND
AMIT B. BORKAR, JJ.

DATE:- SEPTEMBER 3, 2021

J U D G M E N T (Per: V. M. Deshpande, J.)

1. Being aggrieved by the judgment and order of conviction passed by learned Sessions Judge, Gadchiroli in Sessions Trial No.77/2015 dated 13.07.2016, the appellant has approached to this court to challenge his conviction and sentence imposed upon him by the impugned judgment.

2. The appellant was convicted for the offence punishable under Section 302 of the Indian Penal Code for committing murder of his wife Babita. He was directed to suffer imprisonment for life and to pay a fine of Rs.2,000/-. API Umesh Besarkar (PW17) was attached to Police Station, Gadchiroli. On 04.04.2015, he received a telephonic call from village Aloni about the death of Babita. Thereafter, he went to the spot and found dead body of Babita. He called two panchas and prepared spot panchanama in their presence. Spot panchanama is at Exh.-43. The spot panchanama was proved by pancha witness Vishal Kurudkar (PW15). Inquest was done over the dead body. Inquest panchanama is at Exh.-44. Thereafter, he sent dead body to General Hospital, Gadchiroli for post mortem. After conducting post mortem, clothes of Babita were produced by WPC Jyoti. Those were seized under seizure panchanama, Exh.-38.

3. In the meanwhile, Madhukar Kirange (PW1), came to Police Station, Gadchiroli and lodged his oral report Exh.-10. On the basis of report, a crime was registered vide Crime No.47/2015.

As per the oral report, marriage of Babita was performed with appellant nine years ago and she was having one son Shubham, aged about 5-6 years. According to the FIR, the appellant was habituated to drinks and used to take suspicion over the character of deceased and used to pick up quarrel under the influence of liquor. Due to his ill treatment, Babita came to reside at his house at Lekha and stayed there for about two years. On 27.01.2014, the appellant came and in presence of panchas, he gave written assurance and took Babita at his place.

The FIR further states that on 04.04.2015 at about 01.00 O'clock in night, the sister of the appellant informed Madhukar's son, Vijay (PW8) and intimated about death of Babita. Therefore, he and his family members and other relatives came to Mouja Aloni at about 07.00 O'clock. That time he noticed that dead body of Babita was kept in varandha. There was an injury on her neck. The FIR further states that Madhukar made inquiry with Shubham (PW11) as to who assaulted on his mother. Upon that, it was revealed to him by Shubham that the appellant assaulted by means of axe near the house of Dada and thereafter brought the dead body. These are the statements made in the FIR.

4. According to the prosecution case, during the course of investigation, the appellant made disclosure statement on 06.04.2015 and agreed to show the place where he concealed the axe. Admissible portion from his memorandum statement is at Exh.-39. Accordingly, the police party reached to the spot, which is the cattle shed near the house of one Deorao and from one container (Dholi), he took out the axe which was seized on the spot. His recovery panchanama is at Exh.-40. Prior to that, on 04.04.2015, clothes of the appellant were also seized under seizure panchanama Exh.-27.

The investigating officer recorded statement of various witnesses and also sent Muddemal to Chemical Analyser (CA) vide CA requisition, Exh.-48. The C.A. reports are placed on record. Those are Exhs.54 and 55. After completion of usual investigation, charge-sheet was filed.

The learned Magistrate, in whose Court charge-sheet was filed, found that the offence is exclusively triable by the Court of Sessions. He therefore committed the case to the Sessions Court and thereafter it was registered as Sessions Case No.77/2015.

5. The learned Sessions Judge on 14.08.2011 below Exh.-4 framed charge against the appellant. The appellant denied the same and claimed for his trial. In order to bring home guilt of the appellant, the prosecution examined in all 17 witnesses and also relied on memorandum statement, seizure panchanama showing seizure of clothes of the appellant, C.A. report and other proved documents.

Madhukar (PW1), Kusum (PW3) are the parents of the deceased. Shamrao (PW4) is uncle of the deceased. Vijay (PW8) is her brother.

Gajanan (PW2), a pancha of spot panchanama has turned hostile. Kiran (PW6), Deorao (PW10) are the sister and uncle of the appellant. They did not support the prosecution case at all and they were declared hostile. Suresh (PW7) has proved the seizure panchanam Exh.-18 under which the chit is recovered. Prashant (PW9) is a police constable who took muddemal to C.A. Dr. Nilkanth Masram (PW12) has conducted post mortem and proved the post mortem report which is at Exh.-32. Manik Wadde (PW13) was Sarpancha of village to whom Deorao Wadde told that the wife of Babita has sustained injury over her neck. He

gave information to Police Station, Gadchiroli by telephone. Nandkishor (PW14) is a pancha witness, who has proved seizure panchanama of clothes of accused as well as him memornadum statement. Vishal (PW15) has proved spot panchanama, Dhanraj Zade (PW16) has proved seizure panchanama, Exh.-18. Umesh (PW17) is the investigating officer. Shubham (PW11) is the son of the deceased as well as the appellant and he has supported the prosecution case inasmuch as according to the prosecution, he has given eye witness account of assault made by his father upon his mother.

6. During the course of hearing before this Court, Mr.Rathod, learned counsel for appellant, straneously urged that the eye witness account of Shubham is introduced in the prosecution case at the behest of his grandparents. He submitted that there is no corroboration to Shubham's version. Therefore, the Court should be reluctant to accept his version. He submitted that if the evidence of Shubham is placed out of consideration then the prosecution has utterly failed to prove its case against the appellant beyond reasonable doubt. He placed reliance on the Division Bench judgment of Patna High Court in J. Lodhin Vs.

State; reported in 1953 XXXII 217; State of Madhya Pradesh Vs. Ramesh and anr.; reported in (2011) 4 SCC 786, P. Ramesh Vs. State represented by Inspector of Police; reported in (2019) 20 SCC 593, and lastly Hari Om Alias Hero Vs. State of Utter Pradesh; reported in (2021) 4 SCC 345 to show that without there being any corroboration, the testimony of child witness may not be accepted.

7. Per contra, Mr.Mirza, learned A.P.P. for respondent-State, submitted that Shubham (PW11) is the most natural witness. His mother was assaulted therefore there is least chance that he will state falsehood before the Court. He also submitted that the corroborative piece of evidence namely; C.A. report shows the finger of guilt towards the appellant. He, therefore, prays for dismissal of the appeal.

8. From the evidence of Umesh Besarkar (PW17) and the evidence of Manik Wadde (PW13), it is clear that factually the telephonic information was received at Police Station about the death of Babita and it was given by Manik (PW13).

Vijay (PW8), deposed before the Court that he received telephone call from sister of the appellant intimating that accused has killed his sister. Though Madhukar (PW1) did state that he received telephonic call from sister of the accused, his evidence is conspicuously silent that the sister of the appellant intimated that the appellant has killed Babita as claimed by Vijay (PW8). As per the evidence of Madhukar (PW1), he immediately along with his relatives reached to mouja Aloni. Though in the evidence, he is not disclosing at what time he reached to mouja Aloni, in the FIR he did state that they reached to mouja Aloni at 07.00 O'clock.

9. Form the evidence of relatives of Babita, it is very clear that firstly they reached to mouja Aloni at the matrimonial house of Babita. There they noticed the dead body of Babita. Thereafter, they made inquiry with Shubham who disclosed them about the incident and thereafter Madhukar (PW1) reached to Police Station, Gadchiorli and lodged oral report against the appellant. The printed FIR is at Exh.-11. Column no.3 (b) is in respect of the information received at Police Station. It shows that it was received on 04.04.2015. However, there is an overwriting in

respect of the time. Two timings are appearing. It is counter signed by PSI Jayant Mullewar. This Jayant Mullewar is not examined by prosecution. The offence was registered at 10:30.

10. From the evidence of Manik (PW13), the Sarpancha it is clear that though intimation of death was given to him by Deorao. Manik's evidence is silent that Deorao informed him that the appellant is the assailant. This Deorao was examined by the prosecution to substantiate the prosecution claim that Shubham informed to him that his father has killed him. He resiled from his earlier statement to that effect. However, at the earliest, when he met Manik. From Manik's evidence, it is clear that the said fact was not disclosed to him by Deorao. From the evidence of the grandparents and maternal uncle of Shubham, it is clear that he was in their company from 07:00 O'clock on 04.04.2015 onward. Police statement of Shubham was recorded on the very same day. However, at what time his statement was recorded is not brought on record by the prosecution. However, since the prosecution has not examined the person who has recorded FIR i.e. PSI Jayant Mullewar, it is really at guesswork as to whether Shubham was along with his grandmother in police station at the

time of recording of the FIR and thereafter his statement was recorded. In any case, as we have seen that Shubham was in company of his parents and maternal uncle.

11. In J. Lodhin Vs. State, (supra), the Patna High Court observed as under:

“...but it has just been laid down in 'Darpara Potdarin v. Emperor', (1938) AIR (Pat.) 153, 158 (A), that the evidence of children is notoriously dangerous unless immediately available and unless received before any possibility of coaching is eliminated...”

The Court further observed as under:

“..Kenny has observed in his Outlines of Criminal Law at page 420 (1952 edition) that children are a most untrustworthy class of witnesses, and it is found from common experience that they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others, although intelligent children are very often acutely observant of facts and events external to themselves and remember them with great accuracy.”

The Hon'ble Apex Court in State of M. P. Vs. Ramesh and anr.; supra, has observed thus:

“8. *Mangoo & Anr. Vs. State of Madhya Pradesh, in AIR 1995 sc 959, this Court while dealing with the evidence of a child witness observed that there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The Court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.*

9. *In Panchhi & Ors. v. State of U.P., AIR 1998 SC 2726, this Court while placing reliance upon a large number of its earlier judgments observed that the testimony of a child witness must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law. It cannot be held that "the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring."*

Similarly, in *Hari Om alias Hero Vs. State of Utter Pradesh*, (supra), the Hon'ble Apex Court rules as under:

“22.The evidence of the child witness cannot be rejected per se, but the court, as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of the child witness. The evidence of PW 2 cannot be discarded only on the ground of her being of tender age. The fact of PW 2 being a child witness would require the court to scrutinise her evidence with care and caution. If she is shown to have stood the test of cross-examination and there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix-up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored...”

12. From the law laid down by the Hon'ble Apex Court, it is clear that evidence of child witness cannot be rejected per se but settled law is that such evidence is required to be considered with close scrutiny and only on being convinced about the quality of statement or its reliability, base the conviction by accepting the statement of the such witness.

13. As per the FIR, the age of Shubham was between 5 to 6 years. Shubham was examined as PW11. His date of birth is not brought on record anywhere. The learned Judge before whom the trial was conducted put some preliminary questions and was satisfied and thereafter he administered oath to him. His evidence was recorded on 10.06.2016 and the incident in question was occurred on 04.04.2015. Thus, the evidence recorded is after lapse of one year. At the time of recording of evidence, his age is recorded as six years and therefore on the day of the incident, he was just 5 years old body. In his evidence, he did state that he and his mother used to reside at Aloni at their house. His father was doing agriculture work. He did state that the incident took place

in the night time in his house at Aloni. That time, he and his mother were present. According to this witness, there was a quarrel between his parents as his mother did not go to sleep with the accused in his bedroom. He further states that when his mother went near the place where the bullocks were tied, the appellant killed her by blade of axe. He claims that at that time, he was standing near the cattle-shed of Deorao Wadde, to whom he called as Dada. He, thereafter states that he went to the house of his aunt Kiran (PW6), who was examined and who has turned hostile and Goliakka who was not examined. He had stated that the appellant used to quarrel with the deceased usually. From his evidence, it is clear that the incident has occurred in the night hours and as per the prosecution, between 23.00 hrs. to 01.00 hrs. From the evidence of Deorao (PW10), before he was declared as hostile, it is clear that there was no source of light and therefore he used the torch.

14. Evidence of Shubham (PW11), if closely scrutinized, his presence where the incident of assault has occurred became suspicious because in first part of his evidence he did state that the incident took place in the night time in his house at Aloni. In the

second part, as per his evidence, after the quarrel, his mother went close to the cattle-shed of Dadarao where she was assaulted.

15. Exh.43 is the spot of incident. It is recorded in the spot panchanama that when the work of recording spot of incident was going on, that time Shubham (PW11) came there and told the panchas and the investigating officer that he will show the place where his mother was assaulted and thereafter he took them near the place. From the said, it is clear that the spot of occurrence was about 20 Mtrs. away from the residential house of the appellant.

16. In the evidence, Shubham is not claiming that when his mother went near cattle-shed, he also followed and/or she took him along with her. Looking to the distance and the night hours, it is difficult to accept that a boy aged about 5 years on his own, in the pitch dark, will venture to step outside the house and will travel the said distance and could see the incident.

In the cross-examination, it is brought on record that he is residing with his grandmother at village Lekha and at the time of attending the Court for giving his evidence he came along with them. Of course, he has denied that he was told to state by them. As we have observed, the version of this boy cannot be digested by

any prudent person that in the dead hours of night in pitch dark, he will go near place of incident.

17. In view of the above, though Shubham may be a child witness, he is a competent witness to depose before the Court. The Court will have to scrutinize as to whether there is any other corroborative piece of evidence which could stand to the scrutiny of law to support his version.

18. The appellant was arrested on 04.04.2015 itself. His arrest panchanama is at Exh.-47. His arrest panchanama would show that he was arrested at 17.25 hrs.

On 04.04.2015 itself, after his arrest, his clothes were seized under seizure panchama Exh.-37 in presence of pancha witness Nandkishor Kumbhare (PW14).

19. Exh.-37 shows that the clothes which were on the person of the appellant, they were having blood stains. It is not the prosecution case that after the incident till his arrest, the appellant was absconding. We have seen that as per the arrest panchanama he was arrested at 17:25 hrs. It is hard to believe that

right from the morning till his arrest, he will be putting very same clothes on his person having blood stains on the same. Further, the contemporaneous document i.e. Exh.-37 as well as evidence of Nandkishore (PW14) and Umesh (PW17), the investigating officer are conspicuously silent that after the clothes were seized, they were “sealed”.

20. Nandkishore (PW14) has proved the admissible portion from memorandum statement of appellant which was recorded on 06.04.2015. It is at Exh.-39. His evidence would show that thereafter the appellant led police party to the said place near his house and took out the axe, which was kept below the storage of food grains in the cattle shed and prepared recovery panchanama at Exh.-40. Apart from the fact that even this panchanama is silent as well as substantive evidence of pancha is silent about sealing.

What is important to note is that at the time of seizure, blood of axe was found to be washed. Though it is stated that near the wooden part there were faint bloods stains.

21. The investigating officer has sent muddemal on 12.04.2015 to C.A. under Exh.-48. The C.A. report is at Exh.-54. This Court on numerous occasion has reiterated the law laid down

by various courts. In order to put reliance on the corroborative piece of evidence, it is obligatory on the part of the prosecution to show that when muddemal was seized that time itself it was properly sealed in order to rule out the tampering with the same.

In this case, it is clear that the prosecution case is completely short of that aspect. Therefore, it will not be proper on the part of this Court to keep reliance on the said piece of corroborative evidence.

22. According to the prosecution, the deceased was subjected to cruelty at the hands of the appellant. Due to his torture she was required to reside along with her in the parent's house and she stayed there for a period of two years. The appellant was also addicted to liquor and used to take suspicion over her character. These were the facts which were asserted by Babita's father Madhukar (PW1) in his oral report Exh.-10.

FIR is not a substantive piece of evidence. It could be used either for corroboration or for contradiction of the maker. Though these facts were asserted by the first informant in the FIR, Madhukar did not speak a single word about the same in his substantive evidence.

23. Other relatives of Babita claimed that the matter was compromised and the appellant gave assurance in writing. Though the said writing was seized under seizure panchanama Exh.-18, its contents were not proved. Therefore, the said was not exhibited. If the document was not exhibited and the contents were not proved, this Court will be precluded from reading the said document. Further, it is really hard to believe that no action was taken against the appellant by Babita's parents or her brother though she was subjected to cruelty resulting into she staying there for a period of two years.

24. In that view of the matter, we have no hesitation to reject the claim about the motive as submitted by the learned prosecutor.

25. In view of the aforesaid, we are of the view that the prosecution has not proved its case beyond reasonable doubt against the appellant inasmuch as it is the defence of the accused that the deceased accidentally fell on the axe, which is normally there in the cattle shed as stated by Manik (PW13), resulting into her death and this possibility is not completely ruled out.

Resultantly, we pass the following order.

ORDER

- (i) The appeal is allowed.
- (ii) Judgment and order of conviction passed by learned Sessions Judge, Gadchiroli dated 13.07.2016 in Sessions Case No.77/2015 is hereby quashed and set aside.
- (iii) The appellant is acquitted of the offence punishable under Section 302 of the Indian Penal Code.
- (iv) The appellant, who is in jail shall be released forthwith, if not required in any other offence.

JUDGE

JUDGE

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