

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.291 OF 2015

Sunil Ganpati Jyoti,
Age-27 years, Occu:Agriculturist,
R/o-Aloor, Taluka-Omerga,
District-Osmanabad.

...APPELLANT

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mrs. Charuta S. Deshmukh Advocate for Appellant.
Mr.B.V. Virdhe, A.P.P. for Respondent-State.
...

**CORAM: SMT. VIBHA KANKANWADI AND
RAJESH S. PATIL, JJ.**

DATE OF RESERVING JUDGMENT : 15th SEPTEMBER 2022

DATE OF PRONOUNCING JUDGMENT : 14th OCTOBER 2022

JUDGMENT [PER SMT. VIBHA KANKANWADI, J.] :

1. Appellant – convict has been convicted by learned Additional Sessions Judge, Omerga, District-Osmanabad on 11th December 2014 in Sessions Case No.40 of 2013, after he was

held guilty of committing an offence under Section 302 of the Indian Penal Code.

2. Informant Sham Ambaji Jadhav is resident of village Aloor, Taluka-Omerga, District-Osmanabad. Deceased Suvarna was his daughter. Suvarna was married to one Raju Mane about seven years prior to the First Information Report (for short "FIR") i.e. 9th April 2013. After Suvarna became pregnant, differences arose between her and her husband and therefore informant Sham brought Suvarna to his house. She gave birth to son Shivraj and stayed with father for about two years. Thereafter, she erected a tin shed near the house of her father and started residing separately. She used to do labour work in the field of the appellant. According to the informant, Suvarna used to go to the field of the appellant daily and even appellant used to call her daily. When it was learnt by the informant Sham that Suvarna had developed love relationship with appellant, he and his wife had given advice to Suvarna about her behaviour, however Suvarna did not listen to them. According to the informant, the appellant started staying overnight in the house of Suvarna. He used to supply her the daily need articles. However, later on differences arose between appellant – accused and Suvarna. On that point also the informant and his wife had given

understanding to both of them. However, the appellant – accused used to say to Suvarna that she should not talk to her parents, not to meet them, not to visit their house, and on that count he used to harass her. He was preventing Suvarna from meeting informant and family members. It is the further prosecution story that there was a function of *Kanduri* in the house of brother of the informant by name Ram Ambaji Jadhav on 4th April 2013. In connection with the said function, they were supposed to go village Aland. On that day, Suvarna also came for that function around 7.00 a.m. She was crying at that time, but by pacifying her, she was taken to Aland. Suvarna was telling the parents that the accused was threatening her stating that if she goes to Aland, she will not be kept alive by him. After the function was over, all of them returned to Aloor around 9.30 p.m. Suvarna waited in the house of her father for a while and in the meantime as accused gave her phone call, she left the house of informant along with her son in annoyance. When the informant and her family members were at home, they heard loud noise of the people around 11.30 p.m. and therefore, they saw towards the house of Suvarna. They saw fire in her house and therefore, they went running. They found Suvarna in totally burnt condition by the side of the door of the house and her son,

aged 6 years, was crying by sitting on the cot. Informant's brother Ram gave information to Police and thereafter Suvarna's son told the informant and his wife that there was dispute between his mother and accused at night time and thereafter the accused had poured kerosene on the person of his mother and set ablaze her. Thereafter on 9th April 2013, the FIR came to be lodged.

3. After Ram – brother of the informant gave information to the Police, it was registered under Section 174 of the Code of Criminal Procedure and thereafter inquiry was started. Inquest panchnama was drawn and body was sent for postmortem. After the postmortem was carried out, panchnama of the spot has also been executed. After registration of the crime, statements of witnesses have been recorded, seized muddemal was sent for chemical analysis. Accused came to be arrested. After completion of the investigation, charge-sheet was filed.

4. After the committal of the case, learned Additional Sessions Judge, Omerga framed charge at Exhibit-6, for the offence punishable under Section 302 of the Indian Penal Code. Then trial has been conducted. It can be seen that in all seven witnesses have been examined by the prosecution to bring home

the guilt of the accused. After considering the evidence on record and hearing both sides, the learned Additional Sessions Judge has come to the conclusion that offence has been proved against the accused beyond reasonable doubt. Appellant has been sentenced to undergo imprisonment for life and pay fine of Rs.25,000/-, in default to suffer rigorous imprisonment for two years. The fine amount has been directed to be paid to the child, under Section 357-A of the Code of Criminal Procedure. This sentence is under challenge in this Appeal.

5. Heard learned Advocate Mrs. Charuta Deshmukh, appearing for the appellant and learned APP Mr. Virdhe appearing for the State.

6. It has been vehemently submitted on behalf of the appellant that the matter reached the Police by way of Accidental Death (for short "A.D.") under Section 174 of the Code of Criminal Procedure, lodged by Ram Ambaji Jadhav on 5th April 2013 at about 8.45 a.m. In fact when as per the prosecution story, Suvarna was set to fire around 11.30 p.m. on 4th April 2013 then why the matter was not informed to Police immediately, is a question. Even in the A.D. that was lodged by Ram, it was stated that Suvarna died on the spot due to burn

injuries and there is no whisper about the name of the accused. PW-4 Ram Ambaji Jadhav is the same person who has lodged the A.D., but he has not explained as to why no inquiry was made immediately by him or the informant with Shivraj – son of deceased Suvarna. Further, even if we consider the FIR and testimony of PW-2 Sham Jadhav, it can be seen that he alleged to have come to know from Shivraj that the appellant had set ablaze Suvarna on the same day, why he has lodged the FIR belatedly i.e. after five days, is not explained at all.

7. Learned Advocate for the appellant relied on the decision in ***Thulia Kali vs. the State of T.N., AIR 1973 SC 501***, wherein the importance of the FIR was highlighted. It has been observed thus:-

“First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained.”

. Learned Advocate for the appellant submitted that if we consider the testimony of PW-2 Sham, there is absolutely no explanation for the delay by the prosecution and therefore, when FIR itself is tainted and there was scope for concoction, such FIR and the evidence of the informant cannot be relied on.

8. Learned Advocate for the appellant has further submitted that the prosecution case is mainly resting on the testimony of PW-5 Shivraj who is child witness. He was very small, aged between 5 to 6 years. Oath was not administered to him and he was not even able to give his age. It can be seen from his testimony that he was tutored. He was under custody of the informant and his family members and therefore, from his cross-examination it can be seen that it would have been impossible for him to tell facts unless he would have been tutored. The learned trial Judge failed to appreciate the evidence of the child witness and also has not followed the directions of this Court while recording the evidence. Possibility of tutoring such child witness as they are prone for it, has not been considered. In order to buttress this submission, learned Advocate for the appellant has relied on the decision of this Court in **Narayan**

Kanu Datavale and others vs. the State of Maharashtra, 1997 ALL MR (Cri) 448, wherein it has been observed that:-

“Child witness being most susceptible to tutoring, his testimony should only be accepted after greatest caution and circumspection.”

. Further, learned Advocate for the appellant has relied on the decision in ***Chhagan Dame vs. the State of Gujarat, AIR 1994 SC 454***, wherein the Hon’ble Supreme Court, after considering the fact that the accused was having illicit relationship with other accused and causing death of his wife by stabbing, then in such case child witnesses under influence of tutoring, are not safe to rely. Further reliance has been placed on the decision of this Court in ***State of Maharashtra vs. Gajanan Baburao Phakatkar, 2005 ALL MR (Cri) 306***, wherein it has been held that while recording statement of child witness, satisfaction of Judge that child understands the duty of speaking truth is very important. Such satisfaction can be gathered from the circumstances when there is no formal certificate recorded by the Judge, however, child witness can easily be tutored and therefore, delay in recording statement of such child witness is very material. Learned Advocate submits

that the investigating officer has not tried to take the statement of the child witness even though his name was stated in the A.D. lodged by PW-4 Ram. Therefore, the entire prosecution story is based on some concocted theory, which ought to have been discarded by the learned trial Court.

9. It has been submitted on behalf of the appellant that PW-3 Suryabhan Bhandekar is said to be a witness who had allegedly seen accused running from deceased Suvarna's house. He has deposed that he was in his field till late night up to 11.00 p.m., on 4th April 2013 and while he was returning to house, he saw fire in the tin sheets shed of Suvarna. He also heard hue and cry and at that time he saw accused also running in burn condition on the road, but in his cross-examination he has stated that he has not chased Sunil i.e. accused while he was running. He had not gone to Police Station to lodge the report. He had the knowledge that Police had visited the house of Suvarna on the next day and had drawn the panchnama, yet even at that time also he has not disclosed it to the Police that accused had also sustained burn injuries. Therefore, his testimony is unbelievable.

10. Learned Advocate for the appellant submitted that PW-6 Dr. Prakash Ghatole has deposed that accused was admitted in

his hospital at about 3.30 p.m. on 5th April 2013 with the history of accidental burns due to fire in the farm around 8.00 p.m., on 4th April 2013. It is stated that he had 21% superficial to deep burns. In his cross-examination he has stated that brother of the accused had accompanied accused to the hospital. Merely because the accused had sustained burn injuries, it cannot be connected to the incident of burns sustained by Suvarna. Nobody had seen the accused receiving the burn injuries. PW-7 is the investigating officer, who has not collected the phone call data. There was no motive nor it was corroborated by the prosecution witnesses. Under such circumstance, the evidence led by the prosecution cannot be said to have been of such a nature that would prove the offence beyond reasonable doubt. The learned trial Court has wrongly sentenced the appellant after holding him guilty of committing offence punishable under Section 302 of the Indian Penal Code. Appellant deserves to be acquitted.

11. Per contra, the learned APP supported the reasons given by the trial Judge while convicting the appellant and submitted that it has come on record in the evidence of PW-2 Sham, PW-4 Ram and PW-5 Shivraj, the child witness, that deceased used to work with the accused. Father of the deceased has categorically stated that he had resisted the relationship between the accused and

the deceased, yet the deceased continued the said relationship, but later on the accused was objecting to the meeting of the deceased with the parents. It had annoyed him and it appears that when on the day of incident Suvarna had gone along with parents, the accused has eliminated her by pouring kerosene on her person and then ablazing her. PW-3 Suryabhan had seen the accused running near the house of the deceased and at that time his hands had received burn injuries. This fact will have to be connected to the incident and the burn injuries sustained by the accused have been proved by examining PW-6 Dr. Prakash. Accused has not given any explanation in respect of those burn injuries nor any witness has been examined by the accused to support his contention that he has sustained burn injuries in his field. The incident was seen by PW-5 Shivraj, who was the child witness and he has deposed about the same. The child witness was reliable and there were no indications that he was tutored by anybody. Under such circumstance, the conviction awarded to the appellant is perfectly correct.

12. Here the case of the prosecution is mainly resting on the testimony of PW-5, child witness Shivraj. Even as per the prosecution story, he was the only witness who had seen the

alleged incident. The ratio laid down in ***Narayan Kanu Datavale and others vs. the State of Maharashtra*** (supra), ***Chhagan Dame vs. the State of Gujarat*** (supra) and in ***State of Maharashtra vs. Gajanan Baburao Phakatkar*** (supra), will have to be borne in mind. It is the cardinal rule while appreciating evidence of a child witness, that it should be seen as to whether he or she can be believed and the testimony is trustworthy. Even a child witness is competent to depose, however, the competency will have to be assessed on the point whether the child is able to understand the question that has been put. Such understanding capacity of the child can be assessed by the concerned trial Judge upon asking certain basic questions. Here in this case the trial Judge has stated before starting to record the evidence of PW-5 Shivraj that certain formal questions were asked like his name, father, mother and grand-father's name etc., which were answered by the child properly and therefore, the trial Judge was of the opinion that the said child witness was competent to depose. However, it is also to be noted that since the child was around 5 to 6 years old, oath was not administered to him. Here the most important fact that is required to be considered is that the testimony of the child has been recorded on 9th July 2014 and the incident had

taken place on 4th April 2013. That means the boy was one year and three months younger at the time of incident than he was at the time when his deposition was recorded. In other words, he was 4 to 5 years old when the incident had taken place. Whether he was able to reproduce what he had seen about a year ago, was the question. Another fact that is required to be considered is though the incident had taken place on 4th April 2013, and A.D. was registered on 5th April 2013 in which name of the child witness was specifically stated to have seen the incident and again in FIR dated 9th April 2013 the same fact was reiterated, yet the investigating officer has recorded his statement on 18th April 2013. The investigating officer has tried to say that as the boy was frightened he could not record the statement of the boy immediately and after few days when boy become normal, he has recorded the statement. However, it is to be noted that except his words, the investigating officer has not supported his observations / findings regarding the condition of the child witness with any document. He has not taken the child to any doctor nor it was got assessed about the mental condition of the child witness from anybody else. Definitely, it is but natural that when the child had seen mother in burning condition, he would have been frightened, however, we will have to consider one fact

that when the child can speak and narrate what had happened to his grandfather, then definitely he could have told the said fact to the investigating officer also. It is not necessary that the investigating officer should record the statement of the child witness in uniform. By making such witness comfortable in any manner, keeping the near relative present or even taking statement of such witness in the house, is possible. Without any such attempt, the investigating officer cannot say that as the witness was frightened he has not recorded statement of the witness. The said delay will have to be counted in such serious offences.

13. The testimony of PW-5 Shivraj would show that the prosecution has asked minimal questions. It was asked, how his mother died, then he answered that the accused burnt his mother and he was sitting on the cot in his house. If those answers which he had given in cross-examination, almost in the 'yes and no manner', are required to be considered, then his cross-examination also will have to be considered. PW-5 Shivraj has stated that on the day of deposition he has come along with his grand parents and another grand-father Ram and since the death of his mother, he is staying with his grand parents. A question was asked on behalf of the defence, whether his grand-

mother and Ram uncle told him to say in the Court that accused has burnt his mother, it appears that the Court helped the child witness to understand the question. The learned trial Judge confirmed that the witness understands that question and then, after understanding the said question PW-5 Shivraj has given the answer in the affirmative. That means, the child witness made the said statement in his examination-in-chief as was told by his grand-mother and Ram uncle. Therefore, taking into consideration the delay in recording the statement of the child witness and also the entire testimony taken as it is, as well as the fact that the child would have been younger by one year and three months at the time of incident than the date of his deposition, possibility of tutoring him has not been ruled out by the prosecution. The evidence of the child witness does not inspire confidence. The learned trial Judge went wrong in believing him.

14. One more aspect to be noted is that, while assessing the testimony of PW-5, the child witness, we cannot gather any motive from the testimony of child witness. The child has not stated that accused used to reside in their house and he has seen so many times the accused in his house. It gives an impression that since the mother was working in the field of the

accused, the child was knowing the accused and then directly it comes that accused had set ablaze the deceased Suvarna. In these facts the motive is missing. Definitely, when there is direct evidence, motive plays least importance, however, again in this case we are required to take the evidence of the child witness with caution by ruling out the possibility of tutoring. Therefore, from that angle also if we consider his testimony, it cannot be said that through his testimony the prosecution could prove the offence beyond reasonable doubt.

15. The next inline is the testimony of PW-3 Suryabhan, who has allegedly seen accused running in burn condition on road. It is to be noted that he has not stated, which part of the body of accused had received burn injuries, from how much distance he has seen the accused and where the accused was at that point of time when he had seen the accused. These three things were very much important, which could have thrown light on the fact whether PW-3 Suryabhan had seen the accused running. Further, it is to be noted that this witness has neither reported the said fact to Police though he had the knowledge that the Police are coming for the investigation in his village. In his cross-examination, he has stated that Suvarna used to call him "*Kaka*"

(uncle) and he used to consider her as his daughter. In spite of this kind of relationship, if he had not disclosed, may be at that time suspicion against the accused, then it raises doubt about his veracity. This witness cannot be believed. His testimony is tried to be connected with PW-6 Dr. Prakash. However, it is to be noted that in his examination-in-chief itself he has stated that the accused was admitted to Government Hospital, Solapur before coming to his hospital. No-one from the Government Hospital, Solapur has been examined by the prosecution to show as to exactly when the accused was admitted in that hospital and what was the history that was given. Merely because of the coincidence of burn injuries, we cannot connect the two incidents and then point out finger to the accused as the author of the crime.

16. It was not at all necessary for the accused to give explanation about the injuries sustained by him, because the prosecution witness PW-6 Dr. Prakash has stated that the history that was given to him by the accused was the accidental burns due to fire in the farm around 8.00 p.m. At this stage itself, if we consider Question No.19 in the statement of the accused under Section 313 of the Code of Criminal Procedure, where the

question in respect of what has transpired in the testimony of PW-6 Dr. Prakash was asked, the answer to the said question was that accused received burn injuries in his farm on 4th April 2013 and he had become unconscious. He had no idea as to who had admitted him to hospital, but he accepted that he was admitted in the hospital of Dr. Prakash Ghatole. That much explanation was sufficient from the accused.

17. PW-1 Dr. Seema is the medical officer, who has conducted the autopsy. According to the postmortem report, Suvarna had sustained 94% burns and the cause of death that is given by her is "death due to shock because of about 94% burns". Two possibilities are then created, one is accidental death and another is homicidal. The evidence that has been led by the prosecution was not sufficient to rule out the possibility of accidental death. It is also to be noted that it is the prosecution case that before anybody could reach to the spot after seeing Suvarna in burning condition, she was not on talking terms; rather died instantaneously. It is not even the prosecution story that anybody had tried to extinguish the fire. Under such circumstance, some questions are unanswered. First of all, at what time Suvarna received burn injuries and secondly what was

the time gap when people noticed that Suvarna had caught fire. Again at the cost of repetition, it can be said that before anybody could reach to her house, she was already dead and nobody had tried to extract from her as to who had done the said act. Therefore, whether Suvarna died due to homicidal death, itself is a question. Even if we accept, for the sake of arguments, that it was homicidal death, yet the evidence does not prove the offence of the accused beyond reasonable doubt.

18. PW-2 Sham and PW-4 Ram, both are not eye witnesses nor they reached the spot immediately i.e. before or around the accused running away from the spot. Even after the inquiry was made with PW-5 Shivraj and he had allegedly stated that the accused has set ablaze his mother, why the FIR was not lodged immediately, has not been explained at all. As the delay in lodging the FIR has not been explained, the ratio laid down in ***Thulia Kali vs. the State of T.N.*** (supra) would be attracted. In his A.D., PW-4 Ram is silent on every aspect. When the FIR is not lodged immediately, the possibility of concoction cannot be ruled out. The investigating officer has not conducted the investigation in proper perspective. The call data has not been collected to show that just prior to the incident Suvarna had

received phone call from the accused and then she had gone to her house.

19. Thus, after re-appreciating the evidence, which is to be done by this Court while hearing the Appeal, this Court concludes that it is difficult to connect the accused with the crime. The evidence has not been properly appreciated by the trial Court and therefore, the appellant ought to have been acquitted and therefore, his Appeal deserves to be allowed. Hence following order:-

ORDER

(I) The Appeal stands allowed.

(II) The findings and conviction by the learned Additional Sessions Judge, Omerga in Sessions Case No.40 of 2013 dated 11th December 2014 holding the appellant - accused guilty of committing offence punishable under Section 302 of the Indian Penal Code, stands set aside.

(III) The Appellant be set at liberty, if not required in any case.

(IV) It is clarified that only the order of disposal of Muddemal is hereby maintained.

(V) Fine amount, if any, be refunded to the Appellant after the statutory period.

[RAJESH S. PATIL]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/OCT22