

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

908 CRIMINAL APPEAL NO.452 OF 2015

Vasant Motiram Bhil (C-9513),
Age 40 yrs., R/o Hiwarkheda,
Tq. Jamner, Dist. Jalgaon.
At present r/o Dapori, Tq. Erandol,
Dist. Jalgaon.
(Presently in Nashik Road Central Prison,
Nashik, Dist. Nashi.)

... Appellant

... **Versus** ...

The State of Maharashtra,
Through the Police Inspector,
Erandol Police Station,
Tq. Erandol, Dist. Jalgaon.

... Respondent

...

Mr. A.B. Jadhav, Advocate (appointed) Advocate for the appellant

Mr. A.M. Phule, APP for the respondent

...

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

DATE : 22th SEPTEMBER, 2022

JUDGMENT : (PER : SMT. VIBHA KANKANWADI, J.)

1 Present appeal has been filed by the original accused challenging his conviction by learned Additional Sessions Judge, Jalgaon in Sessions Case No.262/2012 on 27.10.2014, thereby after holding him guilty; the learned Judge has sentenced him to undergo imprisonment for life and pay fine of Rs.11,000/-, in default of payment of fine to undergo further simple imprisonment of six months, for the offence punishable under Section 302 of the Indian Penal Code. Directions have been given for payment of amount of Rs.10,000/-, out of fine amount, to the victim i.e. daughter of the deceased under Section 357(1) of the Code of Criminal Procedure, 1973.

2 The appellant was charged for committing murder of one Ushabai Kailas Bhil around 11.15 p.m. on 26.09.2012 by assaulting her with wooden log and throttling.

3 One Sakharam Sonawane, who was the Police Patil of village Dapori, Tq. Erandol, Dist. Jalgaon, lodged First Information Report on 27.09.2012 at about 2.00 a.m. It was stated in his First Information Report that at 11.15 p.m. he was informed by one Prakash Bhil that one Vasant Motiram Bhil i.e. the present appellant has killed his concubine in his hut. Then, the informant went to the hut, confirmed the fact. He found that there was injury to the head of deceased Ushabai and her daughter Bharti Kailas

Bhil aged 11 was present near the hut. Informant Police Patil made inquiry with the girl and she had then told him the story about the quarrel that had taken place between Usha and the present appellant and then the appellant had given blow of wooden log on the head of her mother. On the basis of the said First Information Report offence vide Crime No.84/2012 under Section 302 of the Indian Penal Code came to be lodged and the investigation was undertaken.

4 The inquest panchnama was prepared and the dead body was sent for postmortem. After the postmortem was over the clothes on the person of the deceased were seized. Accused came to be arrested, statements of witnesses were recorded. The postmortem report was collected. The wooden log and other articles which were seized were sent for chemical analysis and after the completion of investigation charge sheet was filed with Judicial Magistrate First Class, Jalgaon.

5 After the committal of the case, charge was framed at Exh.5 for the offence punishable under Section 302 of the Indian Penal Code. Appellant pleaded not guilty. Under such circumstances, the prosecution examined in all eight witnesses to bring home the guilt of the accused. Taking into consideration the evidence on record and hearing both sides, the

learned Additional Sessions Judge has held the accused guilty of committing murder of Usha and has awarded conviction which is under challenge in this appeal.

6 Heard learned appointed Advocate Mr. S.B. Jadhav for the appellant and learned APP Mr. A.M. Phule for the respondent.

7 It has been vehemently submitted on behalf of the appellant that the deceased was the concubine of the accused and it is stated that recently they had started residing together. The case of the prosecution is relying mainly on the testimony of the child witness i.e. daughter of the deceased and, therefore, the possibility of tutoring cannot be ruled out. So also, the fact that is required to be considered is that the father of the child i.e. PW 6 was not looking after the deceased as well as child. But then it is stated that deceased started residing with the appellant and, therefore, the child was interested in deposing against the appellant. It is further a surprising fact from the testimony of PW 1 Ramsing Sonawane, who is the panch to the spot panchnama-cum-witness-cum-neighbour that he and other persons had caught the accused immediately at a distance and then handed him over to the police. He then says that he called the daughter of the deceased and tried to gather the story. His cross-examination would show that how he has

improved the story rendering it to be unbelievable. PW 2 Sakhubai Yashwant Pawar is the neighbour and according to the child PW 6, she had gone to this Sakhubai first and informed the incident. PW 2 Sakhubai has deposed those facts which were allegedly told to her by PW 6 and, therefore, it being hearsay cannot be accepted. PW 3 Sakharam Sonawane is the Police Patil. He also states that he had made inquiry of the girl and then the girl had told him the story. PW 4 Prakash is also the neighbour and he says that he was told by PW 2 Sakhubai that accused has killed Ushabai and then he says that he had gone to Police Patil and narrated the incident. However, PW 2 Sakhubai does not corroborate this fact. PW 5 Dr. Ajit Pathak is the person who had conducted autopsy. He has stated that they had not found any injury to the external genitals but they had found three external injuries; 1) multiple abrasions over right lateral side of neck, 2) abrasion present over left lateral side of neck and 3) contusion present over right side of mastoid process of skull. There was no internal injury under the scalp. However, on the internal examination of the neck they found four haemotoma at different places. The viscera was preserved, however, the opinion that has been given about the cause of death by this witness is - asphyxia due to throttling. A thorough cross-examination has been made, which would definitely show that there was no support to the conclusions arrived at by the medical officer regarding throttling. PW 6, as aforesaid, appears to be a tutored witness and

further she was brought to the Court thrice. She was accompanied by her sister and brother-in-law and, therefore, the said sister and brother-in-law appears to be interested in convicting the appellant. PW 7 and PW 8 are the police witnesses. The C.A. reports are not supporting the prosecution story. It is hard to believe that when a person is pressing the neck of another, then, the person whose neck is being pressed will not retaliate. There was absolutely no injury on the person of the accused. There are material contradictions and, therefore, conviction solely based on the testimony of the child ought not to have been accepted by the learned Additional Sessions Judge. The conviction deserves to be set aside.

8 Learned APP strongly opposed the appeal and submitted that the testimony of PW 6 child witness is wholly reliable. The accused has not denied that he was residing with the deceased and the PW 6 at the relevant time. PW 6 says that appellant was not doing any work to earn. The girl is frankly admitted that her mother was also drinking liquor and on the day of incident her mother as well as appellant had come to house in the evening by consuming liquor. Thereafter, again the accused asked deceased to give him amount of Rs.20/-. Deceased was, in fact, doing work and supporting. She refused to give amount of Rs.20/- to the accused and in annoyance accused went outside. He came at night time and then he had given the blow of

wooden log to the deceased and then he has throttled the deceased. There is no material contradiction that has been brought in the cross-examination of PW 6. She stood corroborated by medical evidence. PW 5 the Medical Officer has given explanations to whatever question was put to him. Nothing contrary was suggested on behalf of the accused to show that the death would have been caused due to some other reason. PW 6 - the child witness had informed the incident to PW 2 Sakhubai and, therefore, PW 2 Sakhubai is deposing. It was, in fact, the natural conduct on the part of the girl aged 11 years. PW 3 Sakharam and PW 1 Ramsing both have stated that the accused was caught at a distance from the hut. This can be considered as a conduct on the part of the accused because he ran away from the spot and while running he was caught hold of. It is the conduct which can be said to be relevant under Section 8 of the Indian Evidence Act. The other witnesses have also corroborated the prosecution story and, therefore, the offence was proved beyond reasonable doubt by the prosecution. The appellant has been rightly convicted by the Court below.

9 At the outset, we would like to say that as regards the appreciation of evidence of a child witness is concerned, the law is crystal clear and it states that if the testimony inspires confidence, then, it can be accepted. No doubt, for this purpose the possibility of tutoring of the child

should be ruled out. Here, in this case, the poor girl aged 11 was the only eye witness. Her father was no more. If we consider the testimony of PW 6, it is to be noted that the concerned Judge had asked certain questions to assess her competency and when it was found that she understands the sanctity of oath, oath was administered to her. Therefore, whatever she has stated is after the oath was administered to her and, therefore, it has a good evidentiary value. She has stated that she knew the appellant, who is also resident of village Hiwarkhed, Tq. Jamner and the native place of the girl was the same village. She says that six months prior to the incident she shifted along with her mother, two elder sisters and accused to village Dapori, Tq. Erandol. They occupied hut owned by Prakash. On the day of incident her mother as well as accused had gone to village Garkheda for leaving her two elder sisters. They returned around 5.00 p.m. and they both were drunk. They again consumed liquor thereafter and then she says that accused had demanded Rs.20/- to her mother for bringing liquor. Her mother refused and then the accused had hurled abuses, left house and went towards market area. Important point to be noted is that this fact that the accused was staying with them is not seriously disputed by the accused, and the said fact is also stated by the other witnesses who are residing in the neighbourhood. Thus, what has come on record is that prior to the incident deceased was staying along with the accused as well as this witness and the two sisters of

the witness were left to another village by the accused as well as deceased on the same day.

10 PW 6 further deposes that after taking meals, she as well as her mother went to sleep. The mother was sleeping inside the hut, whereas she was sleeping at the door of the hut outside. Accused came around 10.30 p.m. and started abusing her mother, because of which she woke up. Accused lifted wooden log which was kept in the hut and gave a blow of it on the left side eye of her mother. Thereafter he gave fist blow on the mouth of her mother and then he sat on the chest of the mother and started pressing her neck with both hands. Accused came out of the hut after leaving the mother and threatened the witness not to disclose the incident to anybody otherwise he would kill her. Accused then left the home. The girl went near mother and saw that mother was not talking or responding to her talk, therefore, she went to the house of PW 2 Sakhubai. Sakhubai also came along with the child and saw deceased and then went to inform it to Prakash, who was the landlord of the hut and residing in the same vicinity. The girl has undergone the ordeal of cross-examination and we can see that her basic story has not been shaken. She has given answers boldly to all those questions. The main thing is that she says that the hut had no electric connection. But when she was outside the hut and could see that the

accused had gone inside the hut, we cannot give advantage of the darkness to the accused. It has been extracted in the cross as to what accused used to do and she has answered that he used to remain idle whole day, that means, he was not doing any such activity which could give him money. But then she also states that her mother used to go for agricultural labour work. When this has been extracted in the cross, we will have to give importance to the same. As the accused was not having money, he had asked amount of Rs.20/- to Ushabai and then upon refusal of the same the accused has acted in such a manner. When there is direct evidence in the form of eye witness, we may not give much importance to the motive. But still we can get the motive in this case in respect of annoyance due to refusal to give money. The conduct on the part of the girl in calling the neighbouring elderly lady appears to be quite natural. Definitely, the testimony of PW 6 Bharti inspires confidence.

11 It will be useful to refer the observations in **Dattu Ramrao Sakhare and others vs. State of Maharashtra, (1997) 5 SCC 341** wherein it has been observed that -

“5. The entire prosecution case rested upon the evidence of Sarubai (PW 2) a child witness aged about 10 years. It is, therefore, necessary to find out as to whether her evidence is corroborated from

other evidence on record. A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the corroboration to such evidence from other dependable evidence on record. In the light of this well settled principle we may proceed to consider the evidence of Sarubai (PW 2).”

11.1 In **Mangoo and another vs. State of Madhya Pradesh, AIR 1995 SC 959** while dealing with 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 witness and from the contents thereof as to whether there are any traces of tutoring.

11.2 In **K. Venkateshwarlu vs. State of Andhra Pradesh, (2012) 8 SCC**

73 it has been observed that -

“9. Several child witnesses have been relied upon in this case. The evidence of a child witness has to be subjected to closest scrutiny and can be accepted only if the court comes to the conclusion that the child understands the question put to him and he is capable of giving rational answers (see Section 118 of the Evidence Act). A child witness, by reason of his tender age, is a pliable witness. He can be tutored easily either by threat, coercion or inducement. Therefore, the court must be satisfied that the attendant circumstances do not show that the child was acting under the influence of someone or was under a threat or coercion. Evidence of a child witness can be relied upon if the court, with its expertise and ability to evaluate the evidence, comes to the conclusion that the child is not tutored and his evidence has a ring of truth. It is safe and prudent to look for corroboration for the evidence of a child witness from the other evidence on record, because while giving evidence a child may give scope to his imagination and exaggerate his version or may develop cold feet and not tell the truth or may repeat what he has been asked to say not knowing the consequences of his deposition in the court. Careful evaluation of the evidence of a child witness in the background and context of other evidence on record is a must before the court decides to rely upon it.”

On the basis of tests in the aforesaid authorities the testimony of PW 6 Bharti is believable.

12 The testimony of PW 6 Bharti stood corroborated with the

medical evidence. Testimony of PW 5 Dr. Ajit Pathak, who had conducted the autopsy would show that there were external injuries as well as internal injuries. The internal injuries of the neck had resulted in the conclusion that Usha died due to asphyxia due to throttling. There was no necessity to wait till the result of the viscera test. Questions in general appear to have been asked depending on the medical jurisprudence offered by various Doctors, but for that purpose this witness has given explanations. It is especially in respect of signs of throttling and the expert had stated that it is not always the same criterion in each case. No doubt, he has stated that he did not find any defence injuries on the dead body. Merely because there was no damage to the clothes on the person of the deceased in any manner or even to her mangalsutra that does not mean that no such incident had taken place. When the medical as well as oral evidence support each other, it has to be concluded that death of Ushabai was homicidal in nature. Firstly the accused had given blow of wooden log near the eye. This may be because of the position in which she was sleeping and then it appears that he had not even given chance to her to get up. Pressing of neck till death would definitely ensure that the person pressing neck of another person has the knowledge that such act on his part may cause death. It is not the case of the accused that due to the grave and sudden provocation the accused has acted in such manner.

13 The testimony of the other witness i.e. PW 1 Ramsing, who has acted as panch to the spot panchnama and also on the point of catching of the accused at a distance has not been shaken in the cross. PW 2 Sakhubai and PW 3 Sakharam as well as PW 4 Prakash corroborate each other on the point that upon the information received they went to the hut of the deceased and saw her dead body. PW 1 Ramsing says that the accused was caught at a distance of 1 k.m. ahead of village Shirsoli from the hut. There was no enmity between the PW 1 Ramsing and the accused, so that he could implicate the accused. This fact is also submitted by PW 3 Sakharam. He was also amongst those persons, who had gone to search the accused. The Investigating Officer has stated as to how the investigation progressed. Therefore, taking into consideration the entire evidence it can be said that the child witness has been properly, legally and correctly believed by the learned Additional Sessions Judge. The evidence has been properly appreciated and the conclusion has been correctly drawn that the accused is the author of the crime of murder of Ushabai. Therefore, there is no merit in the present appeal. Hence, following order.

ORDER

1 Criminal Appeal stands rejected.

2 The fees of the appointed Advocate is quantified at Rs.10,000/- (Rupees Ten Thousand only), to be paid by High Court Legal Services Sub-Committee, Aurangabad.

(Rajesh S. Patil, J.)

(Smt. Vibha Kankanwadi, J.)

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