

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL REVISION APPLICATION NO.236 OF 2005

Hemraj s/o. Kautik Patil,
 Age 66 years, Occu. Agriculturist,
 R/o. Valwadi (Khurde), Taluka Bhadgaon,
 District Jalgaon.

.. Petitioner

Versus

1. Bhagwan s/o. Pitambar Patil,
Age 32 years, Occu. Agriculturist,
2. Kailas s/o. Pitambar Patil,
Age 36 years, Occu. Agriculturist,
3. Pitambar s/o. Namdev Patil,
Age 68 years, Occu. Agriculturist,
4. Shrawan s/o. Namdev Patil,
Age 50 years, Occu. Agriculturist,
5. Damu s/o. Namdev Patil,
Age 63 years, Occu. Agriculturist,
6. Bhimrao s/o. Namdev Patil,
Age 53 years, Occu. Agriculturist,
7. Raosaheb s/o. Damu Patil,
Age 24 years, Occu. Agriculturist,
8. Hansraj s/o. Bhimrao Patil,
Age 25 years, Occu. Agriculturist,
9. Sambhaji s/o. Bhimrao Patil,
Age 27 years, Occu. Agriculturist,

All Residents of Walwadi Kd.,
 Taluka Bhadgaon, District Jalgaon.

10. The State of Maharashtra .. Respondents

Mr. Shaikh Ashraf Patel, Advocate for Applicant (Appointed);
 Mr. N. R. Shaikh, Advocate for Respondent Nos. 1, 4, 8 and 9;
 Mr. S. B. Narwade, A.P.P. for Respondent No.10/State

Revision Application is dismissed against original accused Nos. 2, 3, 5, 6 and 7 as per order dated 28.08.2006

CORAM : S. G. MEHARE, J.

DATE : 24-11-2022

ORAL JUDGMENT

1. Heard the learned counsel for the applicant, the learned counsel for the respondents/accused, and the learned A.P.P. for respondent No.10/State.

2. The present revision has been preferred against the Judgment and order of acquittal dated 04.05.2005, passed by the learned 2nd Additional Sessions Judge, Jalgaon, in Sessions Case No. 120 of 2004.

3. The prosecution case, in a nutshell, was that the incident happened on 27.03.2004 at about 10.00 a.m. Accused No.3 had a field adjoining the field of the complainant. They had a dispute over the embankment (*bandh*). The prosecution case rests solely on the testimony of P.W.No.3 a minor girl child examined as an eye witness. The learned Additional Sessions Judge discarded her testimony for the reason that she was an interested witness, and her statement was recorded belatedly.

4. The learned Additional Sessions Judge has recorded the finding of an enmity between the deceased and the accused.

Either side has not challenged this finding. However, enmity is a double-edged weapon that can be used for either purpose. The incident happened in the field of the deceased. It has been alleged that the accused has tied his hands and legs, put him in the heap of sugarcane leaves and set him on fire.

5. The learned counsel appointed for the applicant has vehemently argued that the learned Additional Sessions Judge erred in law in disbelieving the child witness for the reason that she was the relative of the deceased. Relying on the case of *Alagupandi Alias Alagupandian Versus Stae of Tamil Nadu, (2012) 10 Supreme Court Cases 451*; he has vehemently argued that the law is well settled that the statement of every related witness cannot, as a matter of rule, be rejected by the courts. He has also referred to the testimony of P.W.No.3 and would argue that there is no reason to disbelieve her. Therefore, the learned Additional Sessions Judge has erroneously concluded that her evidence does not inspire confidence.

6. To corroborate the testimony of P.W.No.3, the prosecution has recovered aluminium wire from the spot of the incident to which P.W.No.3 had testified. He has also argued that there were sound reasons for P.W.No.3 to maintain the silence. P.W.No.3 was around 8 to 9 years old at the time of the incident. So, she would have naturally frightened. As a matter of natural effect on the

mind, after seeing such a brutal murder, she must be in shock. So, it would take time to come out of the shock. Hence, it would be wrong to say that her statement is recorded belatedly. The learned Additional Sessions Judge did not evaluate the evidence from the right perspective of the law. Strong evidence has been discarded, and the culprits have been set free. Therefore, the revision application deserves to be allowed.

7. Per contra, the learned counsel for respondent No.1/ accused has vehemently argued that though the prosecution introduced P.W.No.3 as a sole eyewitness, she has admitted in her cross-examination that at the relevant time, other women were working in the field. There were 20 to 25 hutments of the Bhilla community on the northern side of the spot of the incident. After witnessing the incident, she was shivering and afraid. She was on the spot for about one and a half hours. Therefore, her conduct that she went away and again entered the field from the backside appears unnatural. She also did not feel it appropriate to call the nearby person after witnessing the incident. Her admission that the police visited her house four to five times is also significant. It was the best opportunity for her to narrate the incident to the police. But, she explained that the accused threatened her; hence, she did not narrate the incident to the police. He would also argue that P.W.No.3 is a child witness.

8. To buttress the arguments, the learned counsel for respondent No.1 relied on the case of *Radhey Shyam Versus State of Rajasthan, A.I.R. 2014 SC (Supp) 773*. Further, he relied on the case of *Thankappan Nadar and others Versus Gopala Krishnan and another, 2002(9) SCC 393*, to point the scope of revision and powers of the High Court under Section 401 of the Code of Criminal Procedure to deal with the matter against the acquittal. In the said Judgment, the Honourable Apex Court has given some illustrations indicating the categories of cases that justified the High Court in interfering with a finding of acquittal in revision. The material categories mentioned in the said statement were as follows:-

- (i) Where the trial court has no jurisdiction to try the case but has still acquitted the accused;*
- (ii) Where the trial court has wrongly shut out evidence which the prosecution wished to produce;*
- (iii) Where the appellate Court has wrongly held the evidence which was admitted by the trial court to be inadmissible;*
- (iv) Where the material evidence has been overlooked only (either) by the trial court or by the appellate Court; and*
- (v) Where the acquittal is based on the compounding of the offence which is invalid under the law.*

9. The learned counsel for respondent No.1 also added that recording the statement belatedly also loses the credibility that there may be a possibility of tutoring a child witness. The learned Sessions Judge has correctly disbelieved the testimony of P.W.No.3 that the ratio laid down by the Honourable Apex Court, the order of acquittal, is legally correct, and there is no scope to interfere with

it.

10. The evidence of a child witness must be subjected to close scrutiny to rule out the possibility of tutoring. It can be relied upon if the Court finds that the child witness has sufficient intelligence and understanding of the obligation of an oath. As a matter of caution, the Court must find adequate corroboration to the child witness evidence.

11. No doubt, the evidence of the relative witness can not, of course, be discarded as a rule. However, while appreciating the evidence of an interested witness, great caution should have been taken to avoid the false implication. The Hon'ble Supreme Court in the case of State of Punjab v Jit Singh, A.I.R. 1994,SC 549, has held that when the interested witnesses are examined, the evidence has to be tested in the light of probabilities and the previous statements and the surrounding circumstances. In Anil Pukhan v State of Assam, AiR1993 SC 1462, it has been held that where the sole eyewitness was a close relative of the deceased and his conduct is unnatural, and his evidence is contradictory to medical evidence, his testimony could not be relied upon without some independent corroboration.

12. P.W.No.3 was around 8 to 9 years old at the time of the incident. Admittedly, her statement was recorded around two months and ten days after the incident. She narrates the incident

that when she came home, she asked her maternal grandmother to have food. The food was not ready. Her grandmother asked her to prepare bread and bring green chilly from the field. she went to the field and witnessed the incident happened. Firstly, she witnessed the incident where all the accused were coming out from the hut. They had tied the leg of the deceased with an aluminium wire. The accused threatened her not to disclose the incident. Hence, she did not disclose it. In the second part, the deceased was taken to the heap of sugarcane leaves, and then they set him on fire and fled away.

13. Considering the age of P.W.No.3, it may be natural that she must have been frightened witnessing such a cruel incident. If her age is considered, she might have taken some time to come out from shock, but the prosecution must bring the material to that point. Police recorded her statement after about two months and ten days. In this period she was under shock and behaving abnormally is not the evidence on record. The police went to her four to five times. It was a good opportunity for her to narrate the incident. It has come in her evidence that few women were working in the field when the incident happened. The reason was best known to the prosecution why those independent witnesses were not examined. Further evidence reveals that the report was immediately lodged. Hutments of the Bhilla community people surrounded the spot of the incident. The incident happened in the

daylight. Since P.W.No.3 went to bring chillies from the field, it must be presumed that the field was adjoining the village. When a fire occurs in the fields, people from the village normally gather to extinguish the fire. This is the normal course of the villager's life. The prosecution did not lead the reliable evidence that women working in the field rushed to extinguish the fire and was P.W.3 present there. In these circumstances, the admission that some women were also working in the field is significant. In a normal case of rural life, the labourers work in the field. Therefore, the presence of other persons in the field at the time of the alleged incident cannot be ruled out. That apart she did not state anything about presence of any person on the spot of the incident. In a natural course, witnessing an incident of murder, a child must scream. If the explanation of the prosecution that the child witness went into the shock is believed, but before going into the shock, she must have reacted something. On the contrary, she returned home. There is also no evidence that after returning her home, the family members looked at her face and observed that she was frightened and shocked. Her conduct appears not normal. The so-called aluminium wire was also recovered belatedly from the field. Normally, almost all agriculturists use such types of wires. It is an article of common use. No residues of such wire were also detected in the fire heap. So, it can safely be said that the complainant and other persons interested in the matter had

sufficient time to think over and cook a story. Evaluating the material produced by the prosecution, the Court believes that the learned Sessions Judge has correctly disbelieved the testimony of P.W.No.3 minor child, who was introduced as an eye witness.

14. After having gone through the impugned order, there are no grounds to believe that the learned trial Judge has overlooked the material evidence. In view of the powers of the High Court, under Section 401 of the Code of Criminal Procedure, as enumerated by the Honourable Apex Court, in the case of *Thankappan Nadar and others (supra)*, the Court is of the view that there are no grounds to interfere with the impugned order.

15. The Revision Application fails and stands dismissed.

16. R & P be returned to the concerned trial Court.

17. The fee of the learned counsel appointed for the applicant is quantified at Rs.5,000/-.

**(S. G. MEHARE)
JUDGE**

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