

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

CRIMINAL APPEAL NO.693 OF 2018

Ganesh s/o Shivaji Wabale
age 33 years, Occu. Agri.,
R/o Suregaon Road, Suregaon,
Tq. Kopargaon, Dist. Ahmednagar ... **APPELLANT**

VERSUS

The State of Maharashtra
Through Police Inspector
Kopargaon Police Station,
Tq. Kopargaon, Dist. Ahmednagar
(Copy to be served on
Public Prosecutor, High Court of
Bombay, Bench at Aurangabad) ... **RESPONDENT**

.....
Miss Pournima A. Salve, Advocate holding for
Mr. S.J. Salunke, Advocate for appellant
Mr. P.G. Borade, A.P.P. for respondent – State
.....

**CORAM : R. G. AVACHAT, AND
 R. M. JOSHI, JJ.**

DATED : 14th DECEMBER, 2022.

JUDGMENT (PER : R.G. AVACHAT, J.):

The challenge in this appeal is mainly to the quantum of sentence imposed against the appellant for offences punishable under Sections 307 and 309 of the Indian Penal Code. The appellant was prosecuted for having slit

throat of Master Ashitosh Pradeep Wabale with a knife in the afternoon of 13/5/2013 and thereafter attempted to commit suicide. The learned Additional Sessions Judge, Kopergaon (trial Court), vide impugned judgment and order dated 21/9/2018, passed in Sessions Case No.88/2013, convicted the appellant for the offence punishable under Section 307 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.5000/-, in default to suffer rigorous imprisonment for six months, and further convicted the appellant for the offence punishable under Section 309 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.1000/-, in default to suffer rigorous imprisonment for 2 months.

2. Learned counsel for the appellant would submit that, the victim has been recovered of his injuries within a few days of the incidence. The appellant attempted to commit suicide as a remorse for the incidence, should have been considered by the trial Court as a mitigating circumstance. The sentence of life imprisonment is grossly disproportionate. The learned counsel, on his own, offered to pay the victim compensation for the injuries and consequential medical expenditure. According to him, the appellant has been in jail

for little over four years. He has a wife and children to look after. The appellant was relation of the victim. He, therefore, urged for converting the sentence of life imprisonment to the sentence already undergone so far.

3. Learned A.P.P. would, on the other hand, submit that, it was a serious offence. An innocent child of 10 years of age had to be a victim of the appellant's rage. The victim was survived with the grace of God. As a result of assault, the victim has suffered a permanent disability. According to learned A.P.P., no case is made out for reduction in sentence of life imprisonment.

4. Considered the submissions advanced. Perused the evidence relied on. Section 309 of the Indian Penal Code stands eclipsed in the Statute Book. Section 115(1) of the Mental Healthcare Act, 2017 reads :-

“115. Presumption of severe stress in case of attempt to commit suicide :-

(1) Notwithstanding anything contained in Section 309 of the Indian Penal Code (45 of 1860) any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the said Code.”

We, therefore, at the first instance, set aside the appellant's conviction for the offence punishable under Section 309 of the Indian Penal Code.

5. The incident took place in the afternoon of 13/5/2013. Victim Ashitosh along with his two cousins was playing near onion storage (कांदा चाळ). The appellant was engaged in cutting of grass. He had with him a sickle. He, all of a sudden, went close to Master Ashitosh. The appellant held the head of Master Ashitosh and cut his throat with a sickle. Master Ashitosh raised cries. On hearing the same, his mother – Sau. Vidya (P.W.1) rushed out of the house to find the appellant running away with a sickle in his hand. It is she who lodged the F.I.R. (Exh.14). On close scrutiny of her evidence, we do not find any reason to disbelieve her.

6. Master Ashitosh (P.W.14) gave evidence. He was a child of little over 10 years at the relevant time. We do not find his evidence to be a product of tutoring. His evidence would suggest that he was playing with his two cousins. It was afternoon. The appellant was armed with a sickle. The appellant, all of a sudden, slit his throat and put one hand on

his mouth till he could raise cries. The appellant, therefore, took to his heels. From the cross-examination of Master Ashitosh (P.W.14), we do not find anything to disbelieve his evidence. He was immediately rushed to a hospital of Dr. Phadke at Kopargaon.

7. The injury certificate (Exh.41) records history of assault. The same was made at the earliest point of time soon after the incident took place. It has, therefore, much relevance and evidentiary value as well. P.W.1 Vidya too informed her husband Pradip (P.W.3) about the incident. He reiterated the same in his evidence. The conduct of Vidya (P.W.1) in informing her husband is relevant under Section 6 of the Evidence Act. The injury certificate suggests Master Ashitosh to have suffered following four injuries :-

- (1) Slashing wound on anterior to neck cutting strap muscle, veins and trachea just below larynx.
- (2) Right hand index finger terminal phalanx amputation.
- (3) Minor abrasion on right hand.
- (4) Right ear post auricular incise wound major in 3 inch x ½ inch x ½ inch.

8. In spite of the appellant to have only urged for reduction in sentence of imprisonment, we have referred to the material evidence on record, only with a view to ascertain whether the impugned judgment of conviction was sustainable in law. We find no reason to disagree with the findings recorded by the trial Court, holding the appellant guilty for the offence punishable under Section 307 of the Indian Penal Code. True, the appellant has examined Dhiraj (D.W.1) in his defence. Dhiraj was none other than one of the cousins who was playing with Master Ashitosh at the material time. Dhiraj testified that, Ashitosh fell on iron sheet and thereby suffered neck injury. It appears that, this witness has disclosed this fact for the first time when he was examined in his defence. If we consider his evidence in the face of the evidence of the victim, the victim's mother and medical evidence, we have reason to observe the evidence of D.W.1 Dhiraj to be afterthought. It is not known as to why the investigating officer did not record statement of D.W.1 Dhiraj.

Quantum of sentence :

9. Admittedly, soon after the incident, the appellant jumped into a well in an attempt to commit suicide. Victim Ashitosh gave his oral evidence before the Court. The same

suggests him to have almost recovered of injury suffered. Sentence of life imprisonment, in the facts and circumstances of the case, and the nature of injury suffered by the victim, is found to be grossly disproportionate. The appellant is behind the bars for little over four years and three months. He himself has come forward to pay a sum of Rs.1,00,000/- to the victim. In our view, the sentence of imprisonment of little over four years would meet the ends of justice in the peculiar facts and circumstances of the case. We, therefore, allow the appeal in terms of the following order :

ORDER

(i) The Criminal Appeal is partly allowed.

(ii) The impugned order of conviction and sentence dated 21/9/2018, passed by learned Additional Sessions Judge, Kopergaon in Sessions Case No.88/2013, convicting and sentencing the appellant for the offence punishable under Section 309 of the Indian Penal Code is set aside. The appellant is acquitted of the offence punishable under Section 309 of the Indian Penal Code. Fine amount, if paid, be refunded to the appellant.

(iii) Conviction of the appellant for the offence punishable under Section 307 of the Indian Penal Code, by learned Additional Sessions Judge, Kopargaon in Sessions Case No.88/2013, by order dated 21/9/2018 is maintained. The sentence of life imprisonment is, however, converted to rigorous imprisonment for four years and four months. The sentence of payment of fine to stand unaltered.

(iv) The appellant shall deposit a sum of Rs.1,00,000/- (Rupees One Lakh) with this Court within a period of ten days from the date of this order, towards compensation to be paid to the victim Ashitosh. No sooner the appellant deposits a sum of Rs.1,00,000/- with this Court, than it be paid to the victim Ashitosh Pradeep Wabale.

(R. M. JOSHI, J.)

(R. G. AVACHAT, J.)

fmp/-