

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.603 OF 2021

Ganesh Anmappa @ Hanmantappa
Talwar

... Appellant

Versus

The State of Maharashtra

... Respondent

....

**WITH
INTERIM APPLICATION NO.589 OF 2021
IN
CRIMINAL APPEAL NO.603 OF 2021**

....

Mr. Swaraj S. Jadhav, Appointed Advocate for the Appellant.
Ms. G.P. Mulekar, APP, for the Respondent-State.

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**CORAM : S. S. SHINDE AND
SARANG V. KOTWAL, JJ.**

RESERVED ON : 19th APRIL, 2022

PRONOUNCED ON : 29th APRIL, 2022

JUDGMENT : [PER SARANG V. KOTWAL, J.]

1 The Appellant has challenged the judgment and order dated 9.12.2019 passed by the District Judge-2 and Additional Sessions Judge, Sangli in Sessions Case No.188/2018. By the impugned judgment and order, the Appellant was convicted for commission of offence punishable under Section 302 of IPC and was sentenced to suffer life imprisonment and to pay a fine of

Rs.1,000/-; and in default to suffer R.I. for three months. He was given benefit of set off under Section 428 of Cr.PC.

2 Heard Shri Swaraj Jadhav, learned counsel appointed for the Appellant and Smt. G.P. Mulekar, learned APP for the State.

3 The prosecution case, in brief, is that the Appellant was cousin of mother of Ganesh (the deceased in this case). He was residing next to the house of the deceased. The deceased was nine years old boy. On 15.7.2018, the Appellant went to the deceased's house and asked him to get liquor for him. At that time, the deceased was having his food. He replied that he would get liquor after he finished his food. The Appellant got enraged. He sent Ganesh's sister, who was present in the house to get some articles. After she left the house, the Appellant committed murder of Ganesh by hanging him with a rope. When Ganesh's sister returned, she saw the shocking scene. She was slapped and threatened by the Appellant. The Appellant told her not to disclose the incident to anybody. Ganesh's sister, instead, went to her neighbours and told them about the incident. They came on the spot. They saw that the deceased was hanging from the ceiling. They informed the

police. The mother of the deceased, who was not present and who had gone to a different city, was also informed. She came back at around 3.00 p.m. and then her FIR was registered. The Appellant was arrested in the night. The investigation was carried out. The statements of the witnesses were recorded. The statement of the child witness i.e. sister of the deceased Ganesh was also recorded. At the conclusion of investigation, the charge-sheet was filed and the case was committed to the Court of Sessions.

4 During trial, the prosecution examined seven witnesses. The defence of the Appellant was of total denial. After recording the Appellant's statement under Section 313 of Cr.P.C. and after hearing the parties, learned Judge convicted and sentenced the Appellant, as mentioned earlier.

5 The name of the Appellant is Ganesh Anmappa Talwar and the name of the deceased is Ganesh Yallappa Walmiki. The prosecution case revolves around the evidence of child witness PW-2 Laxmi Walmiki. She was sister of the deceased. Her version is corroborated by two neighbours. The mother had lodged the FIR.

6 Learned counsel for the Appellant submitted that it is a case of circumstantial evidence. Nobody had seen the incident. The evidence of PW-2 was not reliable. She was a tutored witness. The FIR was not lodged immediately. The delay in lodging the FIR is not explained. Even the statements of the witnesses are not recorded immediately. This delay shows that the Appellant is falsely implicated. There is no corroborative pieces of evidence to support the version given by PW-2. Learned counsel for the Appellant also relied on some judgments. Those judgments will be referred to in the following discussion.

7 On the other hand, learned APP submitted that the spot panchnama shows that there was no chair or anything else around the spot, on which the deceased could stand and commit suicide. Suggestion given to the witnesses about possible suicide of the boy, is not correct. That theory is not acceptable. The Appellant was found at the spot. His conduct was unnatural. There was no reason for the witnesses to implicate him falsely. The Appellant has not explained the circumstances against him which were within his exclusive knowledge. The circumstantial evidence forms a

complete chain of circumstances. There is no reason to disbelieve PW-2 and she was a truthful witness. Learned Judge has rightly relied on her evidence.

Reasons :

8 We have considered these submissions. PW-6 Dr. Rohan Shirodkar has conducted the postmortem examination. He has stated that on 15.7.2018 he received the dead body of the deceased Ganesh aged about nine years. This witness conducted the postmortem examination between 6.15 p.m. to 7.30 p.m. on 15.7.2018. He noted the following injuries :

Ligature mark patterned grooved abrasion situated on the upper and middle part of the neck, above the level of thyroid cartilage. It was dark, dried and parchment like. It was obliquely oriented on anterior, posterior and lateral aspects of the neck. There was congestion around the ligature mark. There was imprint abrasion of the knot on the left submandibular region. There was periligature abrasion of the size 0.7 cm x 0.5 cm and 0.5 x 0.5 cm on the left submandibular region 1 cm apart. There was

ligature mark on the left side of the neck ascending superiorly, posteriorly 2 cm below the posterior hairline to completely encircle the back of neck and cross over to the right side from where it was descending inferiorly and crossing over to the left side to meet at a point 1 cm from the point of origin forming inverted V shaped impression at left submandibular region.

The injuries were ante-mortem. There was 50 ml. semi solid partially digested food particles in the stomach. According to this witness, the cause of death was due to “hanging”. According to him “hanging” appeared to be homicidal unless proved otherwise. He gave explanation that ligature material found constricted in the neck. It was because of running noose with simple knot. According to him, usually in case of suicidal death, noose is fixed and normally in the case of homicidal death running noose is used in conjunction with the fact that non availability of stool or chair like heightened object in vicinity of crime scene.

9 We have carefully perused the medical evidence and we do not find any reason to take a different view. We agree with the opinion of this expert witness i.e. PW-6 Dr. Rohan Shirodkar that it

was a homicidal death.

10 PW-1 Shivshankar Shegunshe was well conversant with Kannada and Marathi languages. He was an Advocate practicing in Sangli District Court since 2007. His services were taken as an interpreter while recording the deposition of witnesses who knew only Kannada.

11 PW-2 Laxmi Walmiki is the most important witness in this case. At the time of recording of her evidence on 4.4.2019, she was six years of age. She has deposed that name of her mother was Jyoti. She herself, Hanmant and the deceased Ganesh along with Jyoti used to reside together. Her mother used to earn their living by begging. About the incident, she has deposed that the Appellant, to whom she referred as 'Ganesh Mama', asked the deceased, to whom she referred as 'Ganesh Anna', to bring liquor. The deceased told him that he after finishing his meals, would bring liquor. The Appellant got enraged and hanged the deceased. The offence was committed when PW-2 was not in the house. The Appellant gave her Rs.3/- to bring *bidi* and Re.1/- to get a chocolate for herself. When she left to buy *bidi* and chocolate, at

that time the deceased, Hanmant and the Appellant were in the house. When she came back, the Appellant opened the door. He told her not to disclose this incident to anybody otherwise she would also be hanged like the deceased. He then slapped her. She went to the neighbours whom she called 'Ramjan mama and mami' and told them that the deceased was killed. The neighbour, to whom she referred to as 'Ramjan mami' came there. She raised hue and cry. PW-2's mother came after police had already reached there. She identified the Appellant in the Court.

In the cross-examination, she gave clear answers. Her father had left them since past many days. Her father resided at Jaysingpur with PW-2's grandmother and aunt. In the cross-examination, she was asked about one 'Raja mama'. She admitted that 'Raja mama' and her mother used to quarrel frequently; and that, he used to beat her mother. The deceased used to accompany their mother when she used to go for begging. The deceased used to obstruct 'Raja mama' when he used to beat their mother. She further deposed that the Appellant was residing in the house which was adjacent to their house. He was a mason. This witness was

asked as to whether her mother or police told her about hanging of the deceased. To this pointed question, she has given a categorical answer that she told them. In the next question, she was asked whether her mother told her about what was to be told to the police. She answered that question in the affirmative, but, when she was asked whether her mother told her what to depose before the Court on that date, she stated that her mother did not tell her what to depose before the Court. She was also asked whether the police had told her to depose that the Appellant asked the deceased to bring liquor. Even to this question, she emphatically said “no”. When some suggestions were put to her doubting her deposition, she denied all such suggestions and she reiterated that the Appellant had hanged the deceased and that the police had not tutored her.

12 Before discussing the impact of this witness’s evidence, it is necessary to refer to the depositions of two neighbours who are examined by the prosecution. PW-3 Geeta Ramjan Mulla was the neighbour, to whom, PW-2 had rushed after she was slapped by the Appellant. PW-3 was neighbour of both - the deceased as well as

the Appellant. On the day of the incident, she was washing clothes. PW-2 approached her. PW-2 called them to her house. PW-3 and her husband went there and saw that the deceased was hanged. The Appellant was sitting there itself. On watching the scene, PW-3 raised shouts. People in the area gathered there. After that the police came there. Jyoti, mother of the deceased, had gone to work. She came back. In the presence of these witnesses, PW-2 told her mother Jyoti that the deceased was hanged. The police took Jyoti to police station.

In the cross-examination PW-3 stated that she gave her statement before the police in Kannada. She did not know anything about Jyoti's husband. She denied any knowledge about the man by name 'Raja'. When she raised shouts on reaching the spot, the Appellant was sitting there. In her police statement, she has not stated that she and her husband had gone to the spot of incident together.

13 PW-5 Tara Desai was another neighbour. On the day of the incident, when she heard shouts, she looked through her window and noticed that people had gathered in front of Jyoti's

house. She went there. She saw that the deceased was in hanging position. The police came there. At that time, the Appellant was sitting on a platform near the door. This witness, then took PW-2 aside and enquired with her. PW-2 told her that the Appellant had given her Rs.2/- and had asked her to bring *bidi*. When she came back, the Appellant again gave her money and asked her to bring sweets. She again went to bring sweets and when she returned, the Appellant opened the door and PW-2 saw that Ganesh was hanged. The Appellant slapped her twice and threatened her that he would kill her if she disclosed that to anyone.

Thus, PW-5 Tara Desai has corroborated the version of PW-2. PW-2's mother Jyoti came around 4.30 p.m. PW-5 also acted as a pancha for the inquest panchnama and spot panchnama, which are produced on record at Exhibits-23 and 24. She identified the Appellant before the Court.

In the cross-examination, she has deposed that she went to the spot at around 11.30 a.m.. Around 25 to 30 people had gathered there. The police reached there within ten to fifteen minutes after that. She was there till around 7.00 p.m.. On that

day, the police did not record her statement. The dead body was in hanging condition for four to five hours.

14 PW-4 Jyoti Walmiki was the mother of the deceased. She has deposed that on the day of the incident, she had left her house at around 8.30 a.m. and had gone to Jaysingpur by a passenger train. She received a phone call that her son was injured so she returned home. She saw that the deceased was hanging by means of a rope. The Appellant was sitting on the platform outside the house in a frightened condition. PW-2 and Hanmant were sitting next to him. When she asked the Appellant about the incident, he did not speak. When Jyoti asked PW-2, she told the same story which she has told before the Court. After that Jyoti went to the police station. She was in a shock and, therefore, was sent to hospital. She was admitted in the hospital and there the police recorded her statement, which was treated as FIR. It is produced on record at Exhibit-16. After discharge from the hospital, she returned home and then the body of the deceased was removed. The Appellant was her cousin. Her statement was also recorded under Section 164 of Cr.PC..

In the cross-examination, she was asked about her discord with her husband. Hanmant was her son who was younger than PW-2. She could not explain as to why in her police statement it was not mentioned that the Appellant was found sitting in a frightened state on the platform in front of her house. When she reached her house after hearing the news of her son's injury, the police were already present there. She was there for about half an hour before going to the hospital; and that, at that time the police did not make any enquiry with her. She denied the suggestion that one 'Raja mama' was on visiting terms to her house. She denied all the suggestions about Raja Mama.

The FIR mentions that it was registered at 4.36 p.m. In her FIR she has mentioned that the Appellant was sitting in the house. The omission is only in respect of his being in frightened state but his presence in the house was mentioned in the FIR.

15 PW-7 API Pravinkumar Kamble had conducted the investigation. The police were informed about the incident at 12.35 p.m. on 15.7.2018. P.S.O. sent police staff at the spot. PW-4 Jyoti came to the police station. She was not feeling well. She was

admitted to civil hospital, Miraj and there this witness had recorded her FIR. After that, he went to the spot, conducted inquest panchnama and spot panchnama. Photographs were taken. Near the spot one plate, one knife and three pieces of rope were found. There were two plates with half finished food. He requested for postmortem examination. Crime Detection Branch arrested the Appellant and produced him before this witness. He then arrested the Appellant under arrest panchnama at Exhibit-42. His clothes were seized. On the next day i.e. on 16.7.2018, he recorded the statements of the witnesses. He sent request letters to the Headmaster of the Kannada Secondary School at Miraj for providing an interpreter. He also sent another letter to B.D.O., Panchayat Samiti, Miraj requiring presence of Child Welfare Officer for recording the statement of PW-2. Both these letters are produced on record at Exhibits-45 and 46. He then recorded the statement of PW-2 on 18.7.2018 in the presence of her mother and a Child Welfare Officer with the help of an interpreter. He also recorded the statement of the interpreter and that officer. He sent articles to Forensic Science Laboratory and after completion of

investigation filed the charge-sheet.

16 The defence of the Appellant was of total denial, but, suggestion was given to PW-4 that one 'Raja mama' was harassing her. The deceased was opposing Raja, who used to beat him. Therefore, the deceased was under depression and hanged himself. This suggestion was denied.

17 The analysis of the evidence shows that the prosecution case revolves around the evidence of the child witness. Learned counsel for the Appellant relied on the settled principles of law in respect of appreciation of evidence of a child witness. He invited our attention to the observations of the Hon'ble Supreme Court in the judgment dated 19.2.2008 in the case of **Nivrutti Pandurang Kokate and others Vs. State of Maharashtra** passed in Appeal (Crl.) No.345/2008. Paragraphs-8 and 9 referred to the principles in that behalf. Those paragraphs are as under :

“8. The age of the witness during examination was taken to be about 12 years. The Indian Evidence Act, 1872 (in short "the Evidence Act") does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages

that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer, J. in *Wheeler v. United States* 159 US 523. The evidence of a child witness is not required to be rejected per se, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. [See *Suryanarayana v. State of Karnataka* (2000 (9) SCC 129)]

9. In *Dattu Ramrao Sakhare v. State of Maharashtra*, (1997) 5 SCC 341, it was held as follows: (SCC p. 343, para 5):

“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.”

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.”

18 These principles are followed in many judgments and, therefore, we are also testing the evidence of the child witness based on these principles. The trial Judge has believed the child witness. He had recorded her statement. In paragraph-36 of the impugned judgment, learned trial Judge has specifically recorded that he saw no reason to doubt truthfulness and veracity of the

child. The evidence of the child witness inspires confidence.

19 We have also perused her deposition carefully and we find that she has given answers to all the questions with clarity and after understanding the questions. She was very empathetic in stating that she had narrated what she had experienced and the police had not tutored her to say anything before the Court. Though, she told that her mother had told her what to say before the police, she denied the suggestion that her mother told her what to depose before the Court or that the police had tutored her. She has been consistent in narrating her story not only before the Court and before the police, but, also to the neighbours PW-3 and in particular to PW-5. Her immediate disclosure and the narration of the facts to these witnesses lends sufficient corroboration to the truthfulness of this witness. The incident was dated 15.7.2018 and her evidence was recorded on 4.4.2019. There is not much gap between the incident and recording of her evidence before the Court. Her narration is also supported by the spot and inquest panchnamas. Though she was not an eye witness to the incident but she has given sufficient details to show involvement of the

Appellant. She has given reason for the Appellant's annoyance which led to commission of murder. When she returned, the Appellant slapped her. He threatened her and had told her that she would also be hanged if she disclosed the incident to anybody. This witness was asked to go out of the house on some pretext. She was asked to buy *bidi* and chocolate and when she was not in the house, this offence is committed. Her younger brother Hanmant was too young to notice or understand anything. She herself was around five years of age and the entire incident was a great shock to her, but yet, she kept her courage and went to the neighbours to tell them about the incident. Both these neighbours PW-3 Geeta Mulla and PW-5 Tara Desai have corroborated her version to that extent which is also an important aspect in this case.

20 The Appellant's conduct is also important. He was found at the spot by PW-3 Geeta, who had immediately rushed there. The Appellant himself had not called any neighbour. If he had not committed the offence, it would have been natural conduct on his part, to raise hue and cry and call people on seeing the deceased in that state. He was merely standing there taking no steps.

21 Learned counsel for the Appellant argued that he was a neighbour and, therefore, his presence at the spot was not unnatural. That may be true, but, his subsequent conduct was definitely unnatural. He has neither informed anybody about the incident nor has taken any steps to pull down the deceased to see whether he was alive nor has he explained anything when PW-4 enquired with him. He did not even deny his involvement when PW-2 told about the incident to everybody else. We find this conduct very unnatural and no explanation is offered by the Appellant. In his statement under Section 313 of Cr.P.C. he has merely denied his involvement. Suggestions were given to PW-4 Jyoti that the deceased had hanged himself. That theory is, of course, ruled out on the basis of the evidence of the Medical Officer and also on the basis of the spot panchnama as there was nothing to suggest that the deceased could stand on something to commit suicide.

22 Learned counsel for the Appellant submitted that the FIR was not lodged immediately. He relied on the judgment of the Hon'ble Supreme Court in the case of **Thulia Kali Vs. The State of**

Tamil Nadu as reported in (1972) 3 SCC 393, wherein it was held that delay in lodging the FIR 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 of concocted story as a result of deliberation and consultation.

23 In the present case, we do not find that there is any delay in lodging the FIR. In any case it is explained that when the mother returned she was in a shock and she was admitted to hospital and there her FIR was registered. We do not find any fault with the police in not recording the FIR earlier because PW-4 had returned home soon enough and the police could record her FIR after she had enquired with her daughter PW-2 who was the best witness in this case.

24 Learned counsel for the Appellant then submitted that the statements of other witnesses were not recorded on the same day and the statement of the child witness was recorded on 18.7.2018. Learned counsel relied on the judgment of the Hon'ble Supreme Court in the case of **Ganesh Bhavan Patel and another Vs. State of**

Maharashtra as reported in (1978) 4 SCC 371. He relied on the proposition that delay in recording the statement affects the prosecution case. It was observed in that judgment that delay of a few hours, *simpliciter* in recording the statements of eye witnesses may not, be itself, amount to a serious infirmity in the prosecution case. But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eye-witnesses to be introduced. Normally, in a case where the commission of the crime is alleged to have been seen by witnesses who are easily available, a prudent investigator would give to the examination of such witnesses precedence over the evidence of other witnesses.

25 In the present case, there was no eye witness. The prosecution story was immediately reflected in the FIR itself and, therefore, this was not a case where the investigator was deliberately marking time to decide about the shape to be given to the case and the eye-witnesses to be introduced. The decision in **Ganesh Patel's** case, therefore, will not help the submissions of

learned counsel for the Appellant.

26 As far as the delay in recording of the statement of PW-2 is concerned, the investigating officer has sufficiently explained that he had requested the services of an interpreter and a Child Welfare Officer when her statement was recorded. This, in fact, was a step in right direction. Therefore, we do not find any fault with the investigating officer in that behalf.

27 Thus, it can be seen that PW-2's evidence is quite reliable. It is supported by the evidence of the neighbours. The Appellant was found at the spot. His conduct was unnatural. After commission of murder, the Appellant had threatened PW-2. The conduct of the Appellant before and after the incident is clearly stated by PW-2. Even after arrival of neighbours and others at the spot, the Appellant did not explain the incident. He did not explain the facts which were within his exclusive knowledge. There are strong circumstances against him. There is corroboration to the evidence of PW-2 in the form of the evidence of PW-3 Geeta and PW-5 Tara. Her evidence is also corroborated by the spot panchnama. Two plates of half finished food were found at the

spot. She has deposed that the boy was hanged when he was having his food. There was semi digested food particles found in his stomach.

28 All these circumstances are sufficiently proved by the prosecution. They form a complete chain against the Appellant ruling out possibility of anyone else committing that offence. The offence is extremely heinous to say the least. The deceased was a nine year old boy. The child witness PW-2 has shown courage in disclosing the incident to others and in deposing about the incident before the Court. Learned trial Judge has properly appreciated the evidence on record. There is no reason to interfere with the impugned judgment and order. The Appeal is dismissed. In view of disposal of the main Appeal, nothing survives in Interim Application No.589/2021 and same also stands disposed of.

(SARANG V. KOTWAL, J.)

(S.S. SHINDE, J.)

Deshmane (PS)

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