

S.S.Kilaje

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1021 OF 2019

Ganesh Bhagya Mandavkar

Age : 21 years, R/o. Jaswali Adivasiwadi,

Taluka : Shriwardhan, Dist. Raigad.

.. Appellant

Versus

The State of Maharashtra

(At the instance PI - Shriwardhan Police

Staion, Dist.: Raigad)

.. Respondent

-
- Mr. Aashish Satpute, Advocate for the Appellant (Appointed).
 - Mr. S.S. Hulke, APP for the Respondent - State.
-

**CORAM : S.S. SHINDE &
MILIND N. JADHAV, JJ.**

**RESERVED ON : DECEMBER 23, 2021.
PRONOUNCED ON : JANUARY 27, 2022.
(Through Video Conferencing)**

JUDGMENT: (PER : MILIND N. JADHAV, J.)

1. This is an appeal against conviction of the Appellant by the Trial Court. The learned Sessions Judge, Mangaon, District Raigad, by judgment and order dated 28.11.2018, has convicted Shri Ganesh Bhagya Mandavkar (**Appellant - originally Accused No. 1**) and Mangesh Pandu Jadhav (**originally Accused No. 2**) of the offence punishable under Section 302 of the Indian Penal Code, 1860, (for short: "**IPC**") read with Section 34 IPC. Under Section 235 (2) of the Code of Criminal Procedure, 1973, (for short: "**CrPC**"), the learned Sessions Judge has sentenced the accused to suffer life imprisonment

and to pay a fine of Rs. 15,000.00 and in the case of default in the payment of the fine, to suffer rigorous imprisonment for one year each.

2. We are informed across the bar by the learned Public Prosecutor that Accused No. 2 expired during the pendency of the appeal. The present appeal is preferred by the original Accused No. 1. For the sake of convenience, the original Accused No. 1 i.e., Ganesh Bhagya Mandavkar shall be referred to as "Appellant".

3. The incident took place on 07.02.2017. The case of the Prosecution is that on 07.02.2017 at about 3:30 PM, Shri Narayan Kisan Giri (P.W. 2), the Village Police Patil of Ranvali Village, received a phone call from a lady called Smt. Chitrangi Chandrakant Shirpurkar a resident of Ranvali Village. She informed him that an unknown person has killed Savitri Sagar Pawar (hereinafter referred to as the "**deceased**") by strangulation and her dead body was lying in the jungle area. She asked him to proceed to the spot of the incident. Shri Giri reached the spot and found the deceased, lying dead on barren land belonging to Shri Pravin Sundar Gogarkar, with a cotton towel entangled around her neck and dry blood oozing out from her mouth, neck, cheek, and head. The husband of the deceased i.e., Shri Sagar Pawar, Shri Chandrakant Shirpurkar and the Appellant were found

sitting near the body of the deceased. He thereafter informed the police authorities about the incident and filed the F.I.R. in the evening on 07.02.2017 (at about 8.48 p.m.) with Srivardhan Police Station, which has been marked as Exhibit "23".

4. The offence was registered initially against unknown persons by Shri Parshuram Narayan Kamble, Police Inspector (P.W. 4), who recorded the complaint, prepared the Inquest Panchanama in the presence of two panchas, and referred the body of the deceased for post-mortem. P.W. 4 visited the spot of the incident along with panchas, collected the evidence – items such as the towel entangled around the neck of the deceased, a pair of chappals and another pair of shoes and clothes of the deceased – and prepared a detailed panchanama which is marked as Exhibit "32". The seized items were sent to the Chemical Analyser on 11.02.2017; a certificate, marked as Exhibit "35" is placed on record. He then arrested the two accused i.e, the Appellant, and the Accused No. 2 on 16.03.2021 and 17.03.2021.

5. According to the Prosecution's case, the accused sought sexual favours from the deceased which she refused. Hence, the Appellant strangled the deceased with the towel while the Accused No. 2 held her legs.

6. On completion of the investigation, a charge-sheet dated 13.06.2017 was filed in the Court of the Judicial Magistrate, First Class, Shrivardhan, who then committed the case to the Court of Sessions under the provisions of Section 209 of the CrPC, as the case is triable exclusively by the Court of Sessions. Charges were framed against the two accused, which were read out and explained to them in vernacular language. The Appellant and the Accused No. 2 both denied their complicity in the offence by a total denial, stating that a false case was lodged against them. However, the Trial Court found that the Appellant and the Accused No. 2 were guilty of committing the offence punishable under Section 302 IPC read with Section 34 IPC and convicted them by the impugned judgment and order dated 28.11.2018.

7. By order dated 13.01.2021, Shri Aashish Satpute, Advocate, was appointed by this Court from the Legal Aid Panel to represent the Appellant in the present criminal appeal. He submits that the investigation by the police authorities to unearth the evidence pertaining to the incident was improper and inadequate. He submits that the impugned judgment and order dated 28.11.2018 is not only based on faulty investigation conducted by the police authorities but has been passed without appreciating the facts and circumstantial evidence on record, and has been passed based on mere conjectures

and surmises. He submits that the facts placed before the Trial Court are insufficient to establish the guilt of the Appellant beyond reasonable doubt in terms of Section 302 IPC.

7.1. Mr. S.S. Hulke, learned APP has made submissions in support of the judgment of the Trial Court.

7.2. We have perused the entire record with the help of both the learned counsel, considered the submissions and the evidence.

8. In the present case, the Prosecution has examined six witnesses. The defence has not examined any witness. We shall now outline the evidence given by each of the prosecution witnesses as the Trial Court judgment is based entirely on the evidence of these witnesses so as to indict and convict the Appellant.

8.1. Shri Balasaheb Chandrakant Lalage (P.W. 1), a pancha, has deposed about the preparation of Panchanama dated 24.03.2017 by the Police Inspector, Srivardhan Police Station (though the date on the Panchanama is incorrectly typed as 24.03.2016 in Marathi language). The deposition by P.W. 1 states that he was called to the Police Station and made to see video recordings of the witnesses giving evidence. The recordings were stored by the Investigating Officer on a pen drive

and he was asked to identify the pen drive. This witness action is not considered to be relevant.

8.2. First informant of the incident, Shri Narayan Kisan Giri (P.W 2), the Police Patil of Ranavali Village, Taluka Srivardhan, has deposed that:

- i. On 07.02.2017, Smt. Chitrangi Chandrakant Shirpurkar made a phone call to him and informed him that somebody has killed Savitri Pawar by strangulation and thereafter thrown her body in the jungle area;
- ii. on reaching the spot, he saw that blood was oozing out from the deceased's eyes and mouth, and that it was dried;
- iii. there were three persons, namely Sagar Pawar (husband of the deceased), Chandrakant Shirpurkar and the Appellant sitting beside the dead body of the deceased;
- iv. he therefore filed the complaint / F.I.R. dated 07.02.2017 that has been marked as Exhibit "23". In the F.I.R., he has stated that between 10:00 AM and 3:30 PM on 07.02.2017, some unknown person has, for some unknown reason, killed Savitri Pawar by strangulating her with her towel. Thereafter, the Inquest Panchanama was carried out in the presence of panchas between 5:40 PM and 6:30 PM.

8.3. Laxman Pawar (P.W. 3) is a six-year-old minor, whose statement was recorded by the Police on 01.03.2017 i.e. 23 days after the incident. He is unrelated to the deceased. His deposition before the Court has taken place on 28.08.2018, wherein he has deposed as under:

- i. In his examination-in-chief, Laxman Pawar has deposed that:
 - a. the Appellant and the Accused No. 2 killed Savitri Pawar by strangulating her with a towel;
 - b. at the time of the incident, he was playing with his younger sister Yogita Pawar and brother Ramesh Pawar;
 - c. on witnessing the incident, he immediately rushed to his mother, Smt. Laxmi Santosh Pawar, who was sitting nearby and informed her that the Appellant and the Accused No. 2 have killed Savitri Pawar;
- ii. In his cross-examination, however, he has deposed as under:
 - a. he, Yogita and Ramesh were playing next to their mother Laxmi at the time of the incident;
 - b. the spot where the incident took place is at a walking-distance of ten minutes and that the deceased was at a far-away distance when they saw her;
 - c. they did not see the Appellant, the Accused No. 2

and the deceased Savitri Pawar (alias Jamuna) together and that the deceased was not visible from the place where they were playing;

d. the deceased was the sister of the Appellant and the two of them did not have any dispute between them.

8.3.1. In conjunction with the deposition of the six-year-old minor child witness Laxman Pawar (P.W. 3), it would be pertinent to note that the statement of Smt. Laxmi Santosh Pawar, mother of P.W. 3, has been recorded by the Investigating Officer on 01.03.2017 wherein she states that she had visited the field in the evening along with her daughter Yogita. There is no reference to Laxman or Ramesh accompanying her. She further states that Yogita saw the Appellant and the Accused No. 2 killing the deceased by strangulation. Notably, she states that Yogita witnessed the incident five to six days prior to the recording of her statement, which is much later than 07.02.2017 – the date on which the dead body was discovered. Most importantly, in her statement, there is no reference to the presence of the minor child witness Laxman Pawar (P.W. 3) near the site of the incident on 07.02.2017.

8.3.2. Another piece of evidence that must be considered in

conjunction with the deposition of the six-year-old minor child witness Laxman Pawar (P.W. 3) is the statement of his sister Yogita Pawar, recorded by the Investigating Officer in question-and-answer form and marked as Exhibit "14". Contradicting her mother Smt. Laxmi Pawar's statement, she states that she was present at the field along with her mother as well as her brother Ramesh and Lakshya (presumably Laxman Pawar (P.W. 3)).

8.3.3. Though there appears to be contradiction in their statements recorded by the Investigating Officer, the most important aspect is that the evidence of Smt. Laxmi and her daughter Yogita has not been recorded by the prosecution before the Trial Court.

8.4. Shri Parshuram Narayan Kamble, Police Inspector (P.W. 4), has deposed as under:

- i. He states that he arrested the accused and carried out further investigation. He states that it was revealed during investigation that the Appellant sought a sexual favour from the deceased which she refused, and therefore the Appellant and the Accused No. 2 killed her;
- ii. In his cross-examination, however, he has deposed that none of the statements given by the witnesses reveal that the Appellant and the Accused No. 2 sought a sexual favor from the deceased.

8.5. Dr. Madhukar Digambar Dhavile (P.W. 5), Medical Officer, Sub-Divisional Hospital (SDH), Mangaon, has deposed as under:

- i. He states that he carried out the post-mortem of the body of the deceased and, on external examination, found pressure marks on the deceased's neck and bleeding from her mouth and eyes;
- ii. He concluded that the deceased died due to asphyxia caused by strangulation of her neck with the towel;
- iii. In his cross-examination, however, it is important to note that he states that there were no marks on the legs of the deceased.

8.5.1. In conjunction with the deposition of Dr. Madhukar Digambar Dhavile (P.W. 5), it would be opportune to outline the post-mortem report submitted by him and marked as Exhibit "38":

- i. In column no. 12, pertaining to the features of the body of the deceased, the report records as under:

“Eyes are not swollen by blood discharge from eyes and mouth. No bleeding from nostril. Oozing is present from nostril.”
- ii. In column no. 15, pertaining to injuries to external genitals of the deceased and indication of purging, it is stated that no injuries are observed;
- iii. In column nos. 17 and 18, pertaining to surface wounds and injuries discovered by external examination, save and except the pressure marks on the neck, no other injuries have been stated.

8.5.2. Another piece of documentary evidence i.e., the Inquest Photographs, assume critical importance in conjunction with Dr. Madhukar Digambar Dhavile's (P.W. 5) deposition. From the four photographs which are part of the Inquest Report, it appears that, *prima facie*, there are four serious injuries – the first being on the eyes, the second on the cheek, the third on the back side of the neck and the fourth on the back side of the skull of the deceased. In one of the four photographs taken at the site of the incident, the towel is found entangled around the neck of the deceased. The photographs of these injury marks have been taken by the Investigating Officer at the time of the Inquest Panchanama and placed on record. However, in the deposition of Dr. Madhukar Digambar (P.W. 5), and the post-mortem report, there is no mention about the four injury marks, though it is stated that dried blood was oozing out of the eyes, nostrils and mouth of the deceased.

8.6. Shri Mahendra Prabhakar Giri (P.W. 6), witness of the Inquest Panchanama of the body of the deceased, has deposed that:

- i. Shri Narayan Kisan Giri (P.W. 2) has shown the spot of the incident;
- ii. he has signed the Panchanama which states that a black colour pair of chappals and shoes were found at the spot of the incident;

- iii. the police had already written the Panchanama and thereafter obtained his signatures.

9. In any criminal appeal, while considering the evidence on record, we may remind ourselves of the observations of the Hon'ble Supreme Court in ***Rama vs. State of Rajasthan***.¹ An excerpt from Paragraph 4 of the said decision is relevant and reads thus:

"4. ... It is well settled that in a criminal appeal, a duty is enjoined upon the appellate court to reappraise the evidence itself and it cannot proceed to dispose of the appeal upon appraisal of evidence by the trial court alone especially when the appeal has been already admitted and placed for final hearing. Upholding such a procedure would amount to negation of valuable right of appeal of an accused, which cannot be permitted under law."

[emphasis supplied]

10. Keeping in mind the aforementioned principle of reappraising the evidence in the case of criminal appeals as laid down by the Apex Court, we shall now weigh the probative value and sufficiency of the evidence on record as outlined hereinabove. Our observations and findings are as under:

10.1. In relation to the evidence given by Shri Naranyan Kisan Giri (P.W 2), the first informant of the incident we find that:

- i. despite it being clear from this witness' deposition that it was

¹ (2002) 4 SCC 571 : 2002 SCC (Cri) 829

Smt. Chitrangi Chandrakant Shirpurkar who first reported the incident to him, the Investigating Officer has not recorded her statement, nor has investigated the source from where she received the information about the killing of Savitri Pawar;

- ii. although this witness deposed that he had seen Shri Chandrakant Shirpurkar beside the body of the deceased along with Shri Sagar Pawar and the Appellant, the Investigating Officer did not record the statements of Shri Sagar Pawar and Shri Chandrakant Shirpurkar;
- iii. save and except narrating the factual position, this witness, who is also the first informant, has not stated anything that implicates the Appellant and the Accused No. 2 of the crime in the F.I.R.;
- iv. the statements of Chitrangi Chandrakant Shirpurkar, Chandrakant Shirpurkar and Sagar Pawar ought to have been recorded and they should have been made prosecution witnesses.

10.2. Before we consider the evidence given by the six-year-old minor child witness Laxman Santosh Pawar (P.W. 3), principles laid down by the Apex Court in two decisions, namely *Bhagwan Singh vs. State of Madhya Pradesh*² and *Digamber Vaishnav vs. State of*

² (2003) 3 SCC 21

Chhattisgarh,³ must be kept in mind:

10.2.1. The Apex Court in *Bhagwan Singh (supra)*, also in relation to the evidence given by a six-year-old minor witness, held that the sole testimony of a child at such a tender age cannot be relied upon without careful evaluation and other corroborative evidence as the child can be an easy prey to tutoring. Paragraphs 19 and 20 of the decision are relevant and read thus:

“19. The law recognises the child as a competent witness but a child particularly at such a tender age of six years, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, is not considered by the court to be a witness whose sole testimony can be relied upon without other corroborative evidence. The evidence of a child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, always the court looks for adequate corroboration from other evidence to his testimony. (See Panchhi v. State of U.P. [(1998) 7 SCC 177 : 1998 SCC (Cri) 1561])

20. In the case before us, the trial Judge has recorded the demeanour of the child. The child was vacillating in the course of his deposition. From a child of six years of age, absolute consistency in deposition cannot be expected but if it appears that there was a possibility of his being tutored, the court should be careful in relying on his evidence. We have already noted above that Agyaram, maternal uncle of the child, who first met him after the incident and took him along with his younger brothers to his father's village, has not been produced by the prosecution as a witness in the court. It was most unlikely that if the child had seen the incident and identified the three accused, he would not have narrated it to Agyaram as the latter would have naturally inquired about the

3 (2019) 4 SCC 522

same. The conduct of his father Radheyshyam who was produced as a witness by the prosecution is also unnatural that before recording the statement of the child by the police, he made no enquiries from the child.”

10.2.2. The Apex Court in *Digamber Vaishnav (supra)* disregarded the evidence of a nine-year-old child witness as it was fraught with inconsistencies and held that the evidence of a child witness must, as a rule of practical wisdom, be reliable, adequately corroborated, and evaluated carefully. Paragraphs 21 to 24 of the decision are relevant and read thus:

“21. The case of the prosecution is mainly dependent on the testimony of Chandni, the child witness, who was examined as PW 8. Section 118 of the Evidence Act governs competence of the persons to testify which also includes a child witness. Evidence of the child witness and its credibility could depend upon the facts and circumstances of each case. There is no rule of practice that in every case the evidence of a child witness has to be corroborated by other evidence before a conviction can be allowed to stand but as a prudence, the court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that witness must be a reliable one.

22. This Court has consistently held that evidence of a child witness must be evaluated carefully as the child may be swayed by what others tell him and he is an easy prey to tutoring. Therefore, the evidence of a child witness must find adequate corroboration before it can be relied upon. It is more a rule of practical wisdom than law. [See Panchhi v. State of U.P. [Panchhi v. State of U.P., (1998) 7 SCC 177 : 1998 SCC (Cri) 1561] , State of U.P. v. Ashok Dixit [State of U.P. v. Ashok Dixit, (2000) 3 SCC 70 : 2000 SCC (Cri) 579] and State of Rajasthan v. Om Prakash [State of

Rajasthan v. Om Prakash, (2002) 5 SCC 745 : 2002 SCC (Cri) 1210] .]

23. *In Alagupandi v. State of T.N. [Alagupandi v. State of T.N., (2012) 10 SCC 451 : (2013) 1 SCC (Cri) 1027] , this Court has emphasised the need to accept the testimony of a child with caution after substantial corroboration before acting upon it. It was held that : (SCC p. 463, para 36)*

“36. It is a settled principle of law that a child witness can be a competent witness provided statement of such witness is reliable, truthful and is corroborated by other prosecution evidence. The court in such circumstances can safely rely upon the statement of a child witness and it can form the basis for conviction as well. Further, 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 that there exists no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated by other evidence before a conviction can be allowed to stand but as a rule of prudence the court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Further, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable.”

24. *It is clear from the testimony of PW 8 that she is not an eyewitness to the incident. She was aged about 9 years at the time of the incident. Her evidence is fraught with inconsistencies. None of the other witnesses have identified the appellants...”*

10.2.3. Keeping in mind the aforementioned judicial decisions and the principles enunciated therein, in respect of the evidence given by the six-year-old minor child witness Laxman Santosh Pawar (P.W. 3), we find that:

- i. even though this witness deposed that he had informed his mother, Smt. Laxmi Pawar, of witnessing the killing of Savitri Pawar, Smt. Laxmi Pawar has not been examined by the Prosecution in order to corroborate the statements of this witness. Though the statements of Smt. Laxmi Pawar and her daughter Yogita Pawar have been recorded by the Investigating Officer, the statement of the other child witness, Ramesh Pawar, who was purportedly playing with Laxman Pawar, has not been recorded;
- ii. the cross-examination of this witness is *prima facie* inconsistent with his examination-in-chief. This witness has stated that the spot of the incident is at a walking-distance of 'about 10 minutes,' which, if roughly translated into the distance as the crow flies, would be about 1 to 1.5 kilometers. From such a long distance, it would have been impossible for this minor six-year-old witness to have seen the alleged incident. This witness has specifically deposed that the deceased was at a far distance and that the site of the incident was not visible from that distance. This statement militates against the theory of this witness being an eyewitness to the incident. Furthermore, another deposition in his cross-examination that he, his brother, and his sister did not see the deceased, the Appellant and the Accused No. 2 together is one of the most important

inconsistencies between his statement and the finding of the Trial Court by which the Trial Court concluded that he was an eyewitness to the incident. Hence, the finding of the Trial Court that this witness was the best witness and the way in which he gave evidence before the Court appears to be worthy of trust stands completely demolished and falls to the ground. Another finding of the Trial Court to the effect that the evidence given by this witness is not shattered in his cross-examination on material particulars is also proved wrong in view of Paragraph No. 02 of the cross-examination of this witness as recorded on 28.08.2018. Paragraph No. 02 reads thus:

"02. My mother use to consume liquor. Ganesh and Mangesh are the labour. The plug mangos. Ranwali to spot of the incident is above 10 minutes walk. It is not true to say that, Mangesh and Ganesh were not there when Jamanu was lying. Jamanu was at far distance when we saw her. We were playing by the side of her mother. Jamuna was not visible there from. Manesh and Ganesh had come and ask us as to what happened to our mother. We did not saw Mangesh, Ganesh and Jamuna together. My mother was there till sunset. Thereafter, we did not tell anything to my mother and we went away."

- iii. it has come on record that the statement of this witness was recorded on 01.03.2017 whereas the incident occurred on 07.02.2017. As such, the possibility of the minor witness being tutored during the intervening 23 days cannot be ruled out;
- iv. this witness, though purportedly an eyewitness to the incident,

has not mentioned the time of the incident in his statements, which is also an important factor for consideration;

- v. in conjunction with this witness' deposition, it should be noted that the statement given by Smt. Laxmi Pawar (a major), in relation to who was present in the field where the dead body was found and on which date, completely contradicts the evidence given by this witness. Additionally, the statement of Smt. Laxmi Pawar as recorded is inconsistent with the facts of the present case insofar as the date of the incident is concerned;
- vi. both the Appellant and the Accused No. 2 are arrested and convicted on the basis of uncorroborated evidence given by a sole eyewitness, namely Laxman Pawar (P.W. 3), who is a minor. That apart, his statements are inconsistent with each other as well as his mother and his sister Yogita's, which casts a serious doubt on the credibility of the evidence given by him. Thus, the evidence of this minor witness must be treated with extreme caution as it involves the question of life and liberty of the Appellant. We may state at this juncture that barring this witness, no other eyewitness are examined, though it was open to the prosecution to examine Smt. Laxmi Pawar and Yogita Pawar to corroborate the evidence of this witness.

10.3. In relation to the evidence given by Shri Parshuram Narayan Kamble, Police Inspector (P.W. 4), we find that:

- i. the cross-examination of this witness has been conducted inappropriately and without keeping in mind the principles of the Law of Evidence; it is cryptic and *prima facie* unbelievable as no pointed questions are put to this witness about the details of the investigation carried out by him with respect to the incident and the persons involved therein;
- ii. save and except the pleading, there is nothing in the cross-examination that substantiates this witness' theory of the accused having asked the deceased for a sexual favour. Furthermore, this theory is not substantiated even by the statement of any other witness;
- iii. the finding of the Trial Court that the evidence given by Shri Narayan Giri (P.W. 2) has been corroborated by the evidence given by this witness is incorrect on the face of record;
- iv. Both Shri Narayan Giri (P.W. 2) and this witness have seen the body of the deceased Savitri Pawar ***after*** the incident. In the absence of any material evidence pertaining to the investigation carried out by this witness, it cannot be concluded that the evidence given by Shri Narayan Giri (P.W. 2), or for that matter, Laxman Pawar (P.W. 3), has been proven so as to implicate the Appellant and Accused No. 2 in the crime.

10.4. In relation to the evidence given by Dr. Madhukar Digambar Dhavile (P.W. 5) along with the post-mortem report, we find that:

- i. though it is the case of the Prosecution that the legs of the deceased were held with force, this witness in his deposition states that he observed no other injuries on the body of the deceased apart from pressure marks on the neck;
- ii. the evidence given by this witness in conjunction with the post-mortem is contradictory to the Inquest Photographs of the deceased that are placed on record at page nos. 103 to 107 of the Record and Proceedings before this Court. Looking at the photographs, it can never be said that save and except the strangulation of the deceased, there was no other cause leading to her death. There are four incisive injuries which can be seen clearly. These injuries appear to be grievous and caused by a sharp weapon. Even all the other witnesses have, while giving evidence, stated that blood was oozing out from the right eye and mouth of the deceased. Furthermore, the Inquest Photographs reveal the recovery of a pair of chappals and shoes. Considering this along with the four incisive injuries and the evidence given by other witnesses, a theory of struggle cannot be ruled out. The post-mortem report is also left blank in many places. It is also silent on the four incisive injuries which can be observed from the Inquest Photographs by the naked eye. The

only theory propounded by the post-mortem report is death by strangulation based on pressure marks on the neck, even though it makes a specific reference to the Inquest Photographs in clauses 7 and 16. On a proper consideration of the Inquest Photographs, the doctors could have never missed out the four incisive injuries on the right eye, below the right cheek, and the skull and neck regions on the right side, which are clearly visible in the said photographs;

- iii. the post-mortem report, as prepared and placed before us, more specifically with reference to the entries made in column nos. 15, 16, 17, 18 and most importantly, 19 (i) and (ii), does not inspire any confidence as the said entries are contrary to the evidence on record.

10.5. In relation to the evidence given by Dr. Madhukar Digambar Dhavile (P.W. 6), we find that the examination-in-chief as well as the cross-examination of this witness is insufficient, vague and incomplete.

11. We may state that the manner in which the investigation has been conducted by the police authorities is seriously questionable on the face of record. Our findings pertaining to the investigation conducted by the Investigating Officer as well as the examination of witnesses by the Prosecution are as under:

- i. It is seen that a pair of chappals and a pair of shoes were also found near the body of the deceased. However, there has been no investigation of any nature on this aspect;
- ii. The police authorities have not recorded the statements of persons that could have thrown light on the actual incident that occurred, namely Smt. Chitrangi Chandrakant Shirpurkar (the person who first informed Shri Narayan Giri (P.W. 2) of the dead body in the jungle area), Sagar Pawar (husband of the deceased) and Chandrakant Shirpurkar (husband of Chitrangi Shirpurkar who was found by Shri Narayan Giri next to the dead body). Chandrakant Shirpurkar's statement could have revealed the identity of the person who had informed him about the dead body and at what time. Similarly, Sagar Pawar's statement could have revealed as to how he got to know of the presence of his wife's dead body and as to how he reached the spot of the incident along with Chandrakant Shirpurkar and the Appellant. These findings go to show that the Investigating Officer has miserably failed in his duty while carrying out the investigation in the present case. Even the Prosecution ought to have examined the aforementioned persons, which they have failed to do so in the present case;
- iii. Despite the fact that the statements given by the child witnesses Laxman (P.W. 3) and Yogita Pawar are in complete

contradiction to the statement given by their mother, Smt. Laxmi Pawar, the Investigating Officer has not undertaken an investigation to ascertain who was actually present in the field and, out of those present, who had witnessed the incident. Furthermore, the Prosecution has failed to examine Smt. Laxmi Pawar and her daughter Yogita Pawar even though their statements were recorded and are crucial to the present case. This further weakens the Prosecution's case;

- iv. Most importantly, the nexus of the Appellant and the Accused No. 2 with the deceased and her family has not been investigated at all. The child witness, Laxman Santosh Pawar (P.W. 3), deposed that the Appellant was the brother of the deceased. Insofar as the Accused No. 2 is concerned, there is nothing on record to show his nexus with the deceased and/or the incident save and except the statement of the child witness;
- v. It is also pertinent to note that the First Information Report (F.I.R.) names unknown persons as accused;
- vi. There is clear absence of motive;
- vii. No defence witnesses are produced before the Trial Court.

12. In view of the above observations and findings, we find that there are serious shortcomings in the Prosecution's case to prove that the Appellant and the Accused No. 2 killed the deceased. The child

witness Laxman Pawar (P.W. 3), who is said to be the sole eyewitness to the incident and upon whose evidence the Prosecution relies highly, is vague, fraught with inconsistencies, has been contradicted by statements of other witnesses, and lacks adequate corroboration. The evidence given by the child witness is demonstrably unreliable, does not inspire any confidence, and is in any case insufficient for convicting the Appellant of the offence under Section 302 IPC. Furthermore, the Inquest Photographs of the deceased throw open a lot of questions in relation to the manner in which the investigation was conducted by the Investigating Officer. As observed by us, the Investigating Officer has not recorded the statements and/or brought forth the relevant parties as prosecution witnesses. Such investigation smacks of complete incompetence and therefore deserves to be reprimanded with strictures.

13. We are of the considered opinion that the Trial Court has erroneously arrived at a conclusion that the evidence given by P.W. 2 to P.W. 6 corroborate each other on material particulars and shows that the Appellant and the Accused No. 2 had killed Savitri Pawar by strangulating her with a towel. The Trial Court's finding that the evidence given by P.W. 2, 4, 5 and 6 is corroborated by the evidence of P.W. 3 (the child eyewitness to the incident) is the only bare finding in the entire judgement indicting and convicting the Appellant and

Accused No. 2 of the offence. We are afraid that this finding, in view of the unreliablensness of the evidence given by P.W. 3 as established hereinabove, is perverse and completely unreasonable. Furthermore, the evidence given by P.W. 2, 4, 5 and 6 is completely circumstantial and does not prove, in any manner whatsoever, that the Appellant and the Accused No. 2 had killed the deceased by strangulating her neck with a towel. Hence, we are not convinced that the evidence on record is sufficient to prove the guilt of the Appellant beyond reasonable doubt under the provisions of Section 302 IPC read with Section 34 IPC as concluded by the Trial Court.

14. Section 386 of the CrPC defines the powers of an appellate court in dealing with appeals. Section 386 reads thus:

“386. Powers of the Appellate Court.— After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

(a) in an appeal from an order or acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction—

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same—

(c) in an appeal for enhancement of sentence—

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or, the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper:

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.”

14.1. Under Section 386 (b) (i), the power of an appellate court in an appeal from conviction, with which we are concerned in the present case, is stated. It states that in an appeal from conviction, an appellate court can reverse the finding and sentence of the trial court and acquit or discharge the accused or order him to be re-tried. In view of our detailed findings alluded to hereinabove, we do not have the slightest doubt that the findings and sentence of the Trial Court is unsustainable.

15. In view of the above, we set aside the impugned judgment and order dated 28.11.2018 passed by the learned Sessions Judge, Mangaon, District Raigad. The findings and the sentence of the Trial Court convicting the Appellant of the offence under Section 302 IPC read with Section 34 IPC is reversed and the Appellant stands acquitted and discharged. The Appellant shall be released forthwith unless required in any case/cases. A copy of this judgment shall be placed before the Superintendent of Police, District Raigad, for taking appropriate action against the concerned police authorities involved in investigation of the present case in accordance with law.

16. We may record our appreciation for the assistance rendered to us by Mr. Aashish Satpute, learned Advocate appointed from the Legal Aid Panel to represent the Appellant. We direct the Legal Aid Authorities to pay legal fees of Rs.10,000/- to the learned Advocate within a period of four weeks from the date of pronouncement of this judgment.

17. Criminal Appeal stands allowed with the above directions.

[MILIND N. JADHAV, J.]

[S.S. SHINDE, J.]

SONALI
SATISH
KILAJE

Digitally signed
by SONALI
SATISH KILAJE
Date:
2022.01.27
16:03:25 +0530