



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 614 OF 2018

Kailash S/o. Vithal Waghmare,
Age : 33 years, Occu. Labour,
R/o. Ekamba, Tq. Himayatnagar,
Dist. Nanded.

... Appellant

Versus

The State of Maharashtra

... Respondent

...

Mr. Gajanan G. Kadam, Advocate for Appellant.

Mr. A. M. Phule, APP for Respondent - State.

...

**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

RESERVED ON : 08th NOVEMBER, 2023

PRONOUNCED ON : 04th DECEMBER, 2023

JUDGMENT (PER ABHAY S. WAGHWASE, J.) :

1. Vide above appeal, convict Kailas Waghmare is assailing the judgment and order of conviction dated 26.10.2016 passed by the learned Additional Sessions Judge, Bhokar, District Nanded in Sessions Case No.38 of 2014, holding appellant guilty for offence punishable under section 302 of Indian Penal Code (IPC) and thereby sentencing him to suffer imprisonment for life and to pay fine.

FACTUAL MATRIX

2. Convict - appellant returned home and demanded food

from deceased wife. That time, PW8 Roshan, their child was present in the house. Deceased suggested appellant convict to eat food prepared in the morning, but assured to prepare fresh food after sometime. Appellant got enraged, went to another room, only to return with the axe. Initially, he gave blow with the handle of the axe on her back and thereafter gave blow on the back side of ear of his wife. She collapsed. Appellant took his son PW8 Roshan and attended police station and gave information. The Investigating Officer got the information verified by sending PW4 Bhimrao to the spot. He returned and gave FIR on behalf of State. On the basis of which, crime was registered and subsequently investigated and accused was duly charge-sheeted.

Learned Additional Sessions Judge, Bhokar, who, conducted the trial, appreciated the evidence adduced by the prosecution and held the charges proved and convicted appellant to suffer life imprisonment for the offence punishable under section 302 of IPC, which is now precisely assailed by filing instant appeal.

SUBMISSIONS

On behalf of appellant :

3. Learned counsel for appellant would point out that apparently implication is false. According to him, prosecution

claims that accused himself gave confession. That, if it so when accused himself allegedly went to police station and reported about cognizable offence, police machinery ought to have recorded FIR, but, such steps were not taken and rather PW4 Bhimrao was sent to verify and thereafter FIR has been lodged and so there is every possibility of false and concocted story set up by prosecution. He further pointed out that, even otherwise, FIR is lodged after delay. He further questioned the story of prosecution by submitting that there is no independent eye witness account, except testimony of child witness, who admittedly was in the custody of maternal uncle, and therefore, he was a tutored witness. That, there is no independent corroboration to the testimony of child witness, and therefore, it is his submission that law does not permit accepting and relying testimony of child witness in absence of corroboration. He further submitted that even statement of child is not recorded in spite of the child to be present and available in the police station for the entire night. There is no explanation for not recording his statement. He further submitted that there was no motive and the same has not been established by prosecution. He further pointed out that it is the case of prosecution that PW4 Bhimrao went and broke the lock, but no distinct panchanama was recorded to that extent. Even no neighbour has been examined by prosecution, but still with such weak evidence on record, it is his submission that,

learned trial Judge has accepted prosecution version and further recorded guilt. According to him, there is improper appreciation of available evidence as well as settled legal position while appreciating child witness account and hence according to him, findings reached at by learned trial Judge cannot be said to be legally sound and he prays for allowing the appeal.

On behalf of State :

4. While opposing above submissions, learned APP would submit that there is direct eye witness account of none other than child whose presence in the house has not been doubted. He would submit that, the child had seen the occurrence and has duly narrated the same in the witness box. The child has named his own father because right in front of him his mother was assaulted. Learned APP invited our attention to the cross faced by the child and would submit that the child withstood the entire cross including denying suggestion of being tutored. That, the child categorically stated about blow given by his father on the ear of his mother and medical evidence corroborates the same. Finding the evidence of child witness trustworthy, learned trial Judge has committed no error in accepting the case of prosecution. Thus, according to learned APP, there is no merit in the appeal and he consequently prays to dismiss the appeal.

5. In the light of above submissions, we proceed to re-appreciate, re-analyze and re-examine the entire evidence as is required while invoking section 374 of Cr.P.C.. On doing so, we have noticed that, in support of its case prosecution has examined as many as 10 witnesses.

PW1 Prayagbai, mother of accused; **PW2** Rangrao is the neighbour of accused; **PW3** Kailash, pancha to spot panchanama; **PW4** Bhimrao, a police head constable and informant; **PW5** Ramdas, pancha to seizure of clothes of deceased and accused; **PW6** Dr. Smita Pedgaonkar is the autopsy doctor, who conducted post mortem and issued P.M. report; **PW7** Dhammapal is the photographer; **PW8** Roshan, very child of accused and deceased, who was present in the house at the time of incident and he too had deposed to that extent; **PW9** Dy.S.P. Kamble is the Investigating Officer and **PW10** Madhukar, PSO who recorded the FIR and took entry in police station diary.

ANALYSIS

6. In our opinion, here there is crucial evidence of very child of accused and deceased. It is not at all disputed that accused himself approached police station along with child and gave information. There is nothing wrong, in our opinion, on the part of police to get the information checked and verified through **PW4** Bhimrao.

7. As stated above, evidence of child witness assumes importance as the child was very much available in the house when the alleged incident took place. His evidence is seriously challenged before us on two counts that, it is the testimony of a child witness, who is susceptible to tutoring and secondly there is no independent corroboration which law requires while accepting child testimony.

Resultantly, we turn to his evidence first. He is examined at Exh.30 in the capacity of PW8 Roshan. It transpires that the learned trial court has got itself satisfied about the capacity of the child to depose i.e. by posing preliminary questions to child witness. Answers given by him goes to show that he was capable for giving evidence.

Child seems to be 10 years old and was undertaking education at relevant time. He deposed that, currently he is residing with his uncle. He has two sisters and one of his sister was put up in residential hostel, whereas, other sister was residing with his uncle and currently he also joined her and they are all residing with uncle Deepak.

In paragraph 2, he has deposed about the occurrence by stating that, he was in 3rd standard at the time of incident, which

took place on 20.08.2014 at 20:30 hours. He claims to be in the house. According to him, his father came, asked his mother to prepare food for dinner. According to him, his mother informed accused to eat the food which was prepared in the morning and that later she would prepare fresh food. Child stated that this angered his father, who went inside, brought axe, tried to latch the door and while his mother was resisting, he assaulted her by means of handle of axe on her back and while she bend, her father assaulted her with axe behind the ear and then he kept the axe on the body of his mother. Blood was oozing. Then he pulled the saree on her face, came out of the house, locked the door and took the child to Himayatnagar police station and on the way also informed him that his mother is dead. He further deposed that his father said that there is no one to look after him and he told the child to disclose that deceased killed herself. His father took him to police station and informed that deceased had committed suicide. He further stated that, he slept in the police station for the entire night. In the morning, his uncle came and took him. He identified the axe as well as clothes on the person of deceased.

8. In cross he admitted that since the date of incident, he is residing with his uncle Deepak, who has a brother, namely Kiran. That, prior to the incident, his mother was meeting his

uncle. He is unable to state whether any crime was registered against his uncle, but he admitted that he was visiting uncle's house with his mother and even used to stay there. He stated that his sisters were also residing at the house of uncle as there were cordial relations between them. He admitted that his uncle treated him with love and affection and took him for outing. He admitted that uncle Deepak accompanied him when his statement was recorded under section 164 of Cr.P.C. and that police were also present when his statement was recorded under section 164 of Cr.P.C.. Further admitted that his uncle visited hospital on the day of incident. He is unable to state whether police summoned his uncle and recorded any information given by accused. He answered and admitted that he did not state to the police about his father directed him to disclose.

In para 6 following omissions are brought in the testimony of above child witness :-

- (i) That, accused assaulted with handle of axe on the back of deceased.
- (ii) That, accused went inside the house and brought axe.
- (iii) Accused tried to latch the door from the inside and his mother resisted the same.
- (iv) Accused informed him that deceased committed suicide.

(v) That, he was sleeping at the police station and that in the morning his uncle came and fetched him.

He admitted that there use to be quarrel between his parents. Rest are all denial.

9. On critical evaluation of child witness account, we have noticed that, he was studying in 3rd standard. In spite of extensive and lengthy cross, his presence in the house has not been rendered doubtful. Even the occurrence narrated by the child about father entering the house, seeking food, his mother suggesting his father to eat the food prepared in the morning and that later on she would prepare food and he getting annoyed and going inside the house and returning with the axe has remained absolutely unchallenged.

No doubt, omissions are brought, but in our opinion, they are not material because actual overt act of use of axe handle on the back first and subsequent blow behind the ear has remained intact. The omissions enumerated in para 6 in aforesaid para not being touching the actual occurrence, are trifle in nature and so can be easily ignored.

10. In our opinion, considering the tender age of the child, there are bound to be such omissions. The crucial aspect of assault

with the axe near the ear has also remained intact. At this point, we wish to also note that, the body part named by the child for being targeted by his father with the axe finds corroboration from autopsy doctor, who has noted injury no.1 on such part. Therefore, eye witness account is finding support from medical account also.

11. As regards to criticism regarding child witness testimony to be unworthy of credence, there are series of landmark cases, wherein it has been held that, child witness account can be relied and conviction too can be based, provided the testimony is found to be truthful and untutored. True it is that, there is note of caution that child witness account needs to be carefully appreciated and should not be directly relied unless there is other corroborating or incriminating material also. If the child witness account inspires confidence, the same can be acted upon. Law to this extent has been propounded in following judgments and the ratio laid down therein is also reproduced hereunder :-

In **Mangoo and another v. State of Madhya Pradesh**; AIR 1995 SC 959, the Hon'ble Apex Court while dealing with the 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 evidence and from the contents thereof as to whether there are any traces of tutoring.”

In the case of **Dattu Ramrao Sakhare v. State of Maharashtra**; 1997 (5) SCC 341, Hon’ble Apex Court held that;

“A child witness if found competent to depose to the facts and reliable on 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 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.”

In **Ratansinh Dalsukhabhai Nayak v. State of Gujarat**; (2004) 1 SCC 64, the Hon’ble Apex Court held that;

“Child witness – evidence of – conviction on the basis of – held, permissible if such witness is found to be competent to

testify and the court after careful scrutiny of its evidence is convinced about the quality and reliability of the same.”

The Hon’ble Apex Court in the case of ***Gagan Kanojia and another v. State of Punjab***; (2006) 13 SCC 516 has ruled that,

“Part of statement of child witness, even if tutored, can be relied upon, if the tutored part can be separated from the untutored part, in case such remaining untutored part inspires confidence.”

In ***Nivrutti Pandurang Kokate and ors. v. State of Maharashtra***; AIR 2008 SC 1460, the Hon’ble Court dealing with the child witness has observed as under;

“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, shaped 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.”

In a celebrated case of **Hari Om v. State of U.P.**; (2021) 4 SCC 345, very recently the Hon’ble Apex Court, in para 22 of this judgment, has spelt out legal principles, summarized the evidentiary value of child witness, effects of its discrepancies, and duty of court and corroboration when to be insisted upon, which we borrow and quote here:

“22. The evidence of the child witness cannot be rejected per se, but the court, as a rule of prudence, is require to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of the child witness. If the child witness is shown to have stood the test of cross-examination and there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored. In the absence

of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not. The evidence of the child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus an easy prey to tutoring. The evidence of the child witness must find adequate corroboration before it is relied upon, as the rule of corroboration is of practical wisdom than of law.”

12. Learned counsel also tried to submit that, child did not speak of other several blows on the dead body of deceased, but autopsy doctor has noted 6 injuries over the dead body. We discard such submission as it is to be borne in mind that the child witness was barely studying in third standard. He has unfortunately witnessed assault with deadly weapon on his mother by his father and child of tender age must be awestruck and spellbound on seeing the assault. He is not expected to count the number of blows or to reproduce the number of blows while deposing in a witness box. We have already found that the injury which turned out to be fatal was an injury caused behind the ear, the child spoke about assault on ear part. Therefore, we do not find any force in the above submission.

It is pertinent to note that child has flatly denied the suggestion that he has been tutored. Mere accompaniment of uncle to visit court for recording statement under section 164 of Cr.P.C. is not good ground or submission to hold that the child was tutored. Learned Magistrate might have taken due care while recording statement of the child. Therefore, even for above reasons, testimony of the child need not be discredited. On the contrary, we too are convinced that it is worth of credence as it is not a product of tutoring.

13. As required by law, let us see whether there is other corroboration to the testimony of child. Here, it is pertinent to note that there is no dispute that accused himself took the child to the police station and passed the information which was got verified through PW4 Bhimrao, who came and lodge report. The occurrence has taken place in the house is not refuted. Deceased wife met fatal injuries in the house. There is no other defence raised by appellant in the trial court nor any *plea of alibi* has been taken recourse to.

14. Under such circumstances, he being custodian of his wife and his own child confirming his presence, he has to offer an explanation for the fatal injuries suffered by his wife in his house. Except denial in section 313 of Cr.P.C. there is no explanation.

Therefore, here, his conduct of himself visiting police station and passing information and secondly failing to offer explanation for the unnatural death of his wife, provisions under section 8 as well as section 106 of Indian Evidence Act both come into play.

15. Therefore, there are strong incriminating circumstances coupled with child witness testimony confirming the culpability of appellant.

16. We have examined the impugned judgment under challenged. In our opinion, learned trial Court has appreciated the evidence, more importantly that of a child witness and has committed no error in accepting the child testimony and other circumstances sufficient to record the guilt. No perversity is brought to our notice in the appeal in the manner of appreciation and so we refrain from interfering in the judgment. Hence, findings no merits in the appeal, we proceed to pass following order :-

ORDER

The criminal appeal stands dismissed.

(ABHAY S. WAGHWASE, J.) (SMT. VIBHA KANKANWADI, J.)