



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 296 OF 2017

Harischandra s/o. Damu Baldhye,
Age : 35 years, Occu. Agriculture,
R/o. Mahatma-Phule Nagar, Zopadpatti,
Housing Society, Ambajogai.

... Appellant.

Versus

The State of Maharashtra,
Through Police Inspector,
Police Station, Ambajogai-City Police Station.

... Respondent

...
Mr. S. A. Gaikwad, Advocate for Appellant (Appointed Through
Legal Aid)
Mr. S. D. Ghayal, APP for Respondent – State
...

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

DATED : 21 AUGUST, 2023

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

1. Feeling aggrieved by the judgment and order of conviction dated 02.11.2016 passed by learned Additional Sessions Judge, Ambajogai, Dist Beed in Sessions Case No.72 of 2015, thereby holding appellant guilty for offence under section 302 of Indian Penal Code (IPC), accused has filed instant appeal by invoking section 374(2) of the Code of Criminal Procedure (Cr.P.C.).

PROSECUTION CASE IN TRIAL COURT

2. Appellant son of PW3-Damu had three daughters, namely Nikita, Nakula, Sangita and a son, namely Sunil. He did not work for his living and was rather addicted to liquor. As a result, there used to be quarrels between him and his wife and she resultantly left the children and went to stay with her parents with daughters, namely Nakula and Sangita, whereas deceased Nikita and son Sunil were put up with PW3 Damu – grandfather.

3. According to prosecution, on 10.07.2015, accused went to fetch his wife back, but she did not return. As a result of which, accused was frustrated and annoyed. On 10.07.2015, after dinner appellant went to PW3 Damu and declared that he would finish one by one. He thereafter took Sunil and Nikita to his house. According to prosecution, in night in his room he sat on the chest of his daughter Nikita and manually strangled her to death.

4. PW3 Damu approached police, who arrived at the house of accused and shifted Nikita to hospital. However, on examination she was declared dead. On the basis of report lodged by PW3-Damu, Ambajogai (City) police station registered crime bearing no.123 of 2015.

On completion of investigation, appellant was charge-sheeted and charge (Exh.4) was explained. On denial of charge trial was undertaken, during which prosecution has examined in all 9 witnesses and relied on documentary evidence.

After hearing both sides, learned trial court appreciated the oral and documentary evidence and reached to a conclusion that prosecution has established the charges and accordingly awarded life imprisonment, which is now questioned before us by virtue of present appeal.

SUBMISSIONS

5. According to learned counsel for appellant, implication and conviction is in absence of cogent and reliable evidence. According to him, there is no independent evidence in support of accusations. That, nobody had seen accused in the house so as to invoke section 106 of Evidence Act. He pointed out that entire case of prosecution is based on child testimony, but it being tutored, ought not to have been relied. He submitted that, at the outset, prosecution has failed to establish motive. Learned counsel pointed out that prosecution witnesses have en-bloc turned hostile. Therefore, when there was no evidence, he questioned as to how conclusion of guilt of accused has been reached at by learned trial Judge. He would submit that, apparently there is non application of

mind and apart from non appreciation of evidence in its proper perspective, there is failure on the part of learned trial Judge in applying the settled law. Resultantly, according to him, such judgment of conviction in absence of sound reasons deserves to be set aside, by allowing the appeal.

6. While refuting the above submissions, learned APP would submit that though most of the witnesses including informant have not supported the prosecution case, he would point out that, so much part of their testimonies which corroborates and supports the case of prosecution can definitely be relied. He pointed out that such witnesses have partly supported prosecution, and therefore, it is open for the prosecution to take recourse to the same.

He next submitted that, testimony of child witness is intact and is worthy of credence. It is not shown to be tutored. Therefore, on the strength of child witness account, who was very much present at the time of alleged incident, the only conclusion was that accused is responsible for the homicidal death and is thereby rightly convicted and he prays for dismissal of the appeal.

7. In the light of above submissions, we have examined the evidence on record. It is seen that in support of its case,

prosecution has examined as many as 9 witnesses and their role and status summarized as under :-

PW1 Vimal is the pancha to inquest panchanama.

PW2 Shivaji is the pancha to the spot panchanama (Exh.14).

PW3 Damu is the informant – father of accused and grandfather of deceased. He was declared hostile and cross-examined by learned APP.

PW4 Rama Baladhye is the wife of accused also did not support the prosecution.

PW5 Sunil is the child witness.

PW6 Ramchandra and **PW7** Kalubai are the brother and sister of accused, respectively.

PW8 PSI Khanderao is the Investigating Officer.

PW9 Dr. Vishwajeet Pawar is the autopsy doctor.

ANALYSIS

8. On carefully re-appreciating the available evidence on record, it seems to be a case of 'felicide' i.e. killing of a child by parent.

At the outset, there being charge under section 302 of IPC, it is to be seen whether prosecution has established the death of Nikita is homicidal one. On going through the inquest

panchanama and on going through the testimony of PW9 Dr. Pawar, we are convinced that deceased Nikita aged 11 years, has died due to manual strangulation. PW9 Dr. Pawar has noted external injuries as well as impact of internal injuries on autopsy. Though doctor is cross examined, there does not seem to be serious challenge to the manner of death. There is virtually no effective cross to disbelieve opinion of doctor. Autopsy doctor is very categorical about the manner of death to be homicidal. Coupled with the evidence of PW1 Vimal on the point of inquest and autopsy findings, there is no hesitation to hold that death of Nikita is shown to be due to strangulation.

9. Now, it is to be seen whether appellant is responsible for the strangulation.

PW3 Damu, father of appellant and grandfather of deceased, who has set law into motion, after informing about his family, deposed about occurrence to have taken place 9 to 10 months back. According to him, at such time, wife of appellant was residing with two daughters, whereas son Sunil and Nikita were staying with appellant. However, this witness after stating so much, has not supported prosecution and was therefore required to be declared hostile and is subjected to cross. But, in para 2 of the cross, he is found to be stating that, three days prior to the

incidence, appellant had gone to bring his wife, but she had not returned. According to him, in the evening, he along with his wife, son and daughter of appellant were taking meals at around 9:30 p.m. Thereafter, he has denied about appellant approaching him and declaring that he would kill them one by one, about appellant latching the door of his house from outside, but he stated that, after sometime, he heard cries of Nikita and Sunil from the house of Harischandra. He again denied PW5 Sunil coming to inform him about neck of Nikita being pressed by father, but witness stated that he himself went towards the house of appellant and saw Nikita lying on the bed in dead condition. He denied having stated portion mark 'A' in his statement to police, but further admitted that on 11.07.2015 police had been to his house for drawing panchanama and he had shown the same. He fairly answered that he did not want his son to be convicted.

Therefore, **PW3** Damu is the flip-flop witness. At one point he supports the prosecution and in the next moment he does not support prosecution. Therefore, though this witness is declared hostile for not supporting prosecution, that much part of his evidence which lends support to the prosecution can definitely be taken into account.

10. Law in that regard has been reiterated in numerous pronouncements and settled proposition is that evidence of prosecution witness cannot be rejected in toto, merely because the prosecution chooses in treating him hostile. The evidence of such witnesses cannot be treated as effaced altogether, rather it can be accepted to the extent that their version is found to be dependable. Such law is spelt out and reiterating in the cases of **Bhagwan Singh v. State of Haryana** (1976) 1 SCC 389; **Rabindra Kumar Dey v. State of Orissa** (1976) 4 SCC 233; **Syad Akbar v. State of Karnataka**, (1980) 1 SCC 30; **Khujji v. State of M.P.** (1991) 3 SCC 627, finally in the case of **C. Muniappan v. State of Tamilnadu** (2010) 9 SCC 567, after discussing the earlier decisions, summarized and recapitulated the law applicable to the case of hostile witnesses as under :-

“83. the evident of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.”

Similarly, though evidence of **PW4** Rama is partly beyond consideration, that much part which supports prosecution can taken into consideration. Even, in the evidence of **PW4** Rama-wife of accused, she has admitted that at the time of incident deceased Nikita was staying with appellant. **PW4** Rama has also not supported the prosecution.

11. It seems that star witness for prosecution is **PW5** Sunil, who is admittedly a child of 6-7 years of age and hence a child witness. His evidence at Exh.22 shows that his testimony is recorded by putting questions. Therefore, we propose to reproduce the answers given by him in toto. During question - answers, he gave his name as Sunil and about currently residing with his mother and he gave names of his sisters that Nikita, Nandini and Anjali. He also gave the nick name of his deceased sister. To a question where they were staying previously, he has answered that they were residing at Phule Nagar, Ambajogai. To a question who were residing with him, he has answered that he was residing with Baidy (i.e. Nikita). Then on a question whether sister Baidy is alive, he answered 'No'. Then he is questioned how and in what way Baidy died, he has answered that **"Pappa has came, sat on chest and pressed the neck"**. He is again asked on whose chest Pappa was sitting and whose neck was being pressed, he answered that **Pappa sat on chest of Baidy and pressed her neck**. Then he is asked what happened to her sister due to said act, he has answered that froth was coming out from her mouth. He is asked whether he was present when Pappa sat on the chest of Baidy and pressed her mouth, he answered that he ran towards 'Anna', i.e. grandfather (PW3 Damu). He is questioned whether his statement was

recorded before court and he answered in affirmative. Then a question is posed to him whether, information given before the court is as per the say of police and he has answered in negative and stated that he himself has given the information. He is asked whether he is deposing as has been asked to depose by APP, he has answered in affirmative. At such point of time, it seems that learned APP has sought permission to cross examine the witness, but learned trial Judge has refused such permission.

12. **PW6** Ramchandra, though brother resided somewhere else and on receipt of information has reached there. He has confirmed about seeing niece having suffered marks on the neck. He claims about hearing from his own father i.e. **PW3** Damu about threats issued by accused to his own children and further taking them along with him in his room for sleeping and also father informing him about hearing cries of his daughter. So much of the part can definitely be taken aid of by prosecution.

PW7 Kalubai is the sister of accused has not supported the prosecution, but has admitted about appellant and daughter were residing in the same house.

From evidence of informant **PW3** Damu, **PW4** Rama and

PW6 Ramchandra, it can safely be held that prosecution has established deceased was in the custody of appellant at relevant time. **PW5** Sunil, who is a sheet anchor, though a child, was very much in the company of his father-appellant as well as his deceased sister. No doubt, he is a child witness. However, merely on such count, his evidence cannot be doubted. Law is fairly settled that if his testimony is shown to be truthful, inspiring confidence and is not tutored one, the same can be not only accepted, but even relied to record the guilt of accused.

There are umpteen judgments on the credibility and evidentiary value of child witness, which we propose to state as under :-

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.”

13. Bearing above legal position in mind, if we scrutinize the evidence of **PW5** Sunil, in our opinion, though he is a child of 6 - 7 years old, the manner of answers clearly suggests that he understood the purport of the questions. He has very categorically answered about seeing his father sitting on the chest of his sister Nikita and pressing her neck. He has stated that he ran to inform his grandfather PW3 Damu. Nothing damaging is elicited in spite of being cross examination. A mere answer of the child that he is deposing as per the say of prosecution itself would not be a ground to doubt his testimony. There is nothing unusual in prosecutor appraising the witness prior to his evidence, more particularly, when the witness is of such tender age. We have carefully gone through the nature of questions posed to him and the manner of answers given by him. His evidence and answers do inspire confidence. He has stood steadfast on the aspect of father sitting on the chest of his sister and strangulating her. His presence has not been doubted or brought under the cloud. Even dead body was found in the very room occupied by the accused. His father has confirmed his presence that night in the house along with both children including deceased Nikita.

14. Consequently, evidence of PW5 Sunil deserves to be accepted without a hitch. His evidence has hit the final nail in the coffin and fate of the case has been sealed by registering the guilt. There is no reason to discard the evidence of PW3 Damu-informant in toto for above said reasons. Therefore, evidence of informant coupled with evidence of child witness, is sufficient to tie down the accused for charge.

15. We have gone through the judgment under challenge. Learned trial court has correctly appreciated the available evidence, more particularly, that of the child witness. Settled law on the evidentiary value of child witness and manner of appreciation has been taken due care while reaching to the finding of guilt. No perversity has been pointed out in the judgment and the reasons arrived at. No case being made out on merits, we proceed to pass following order :-

ORDER

The criminal appeal stands dismissed.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)