

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.88 OF 2018

The State of Maharashtra
Through Pachora Police Station,
Pachora, Dist. Jalgaon.

.. Applicant

Versus

Farjanabi Mard Mastan @ Kalu Mevati
Age: 22 years, R/o. Bamrud Raniche,
Tq. Pachora, Dist. Jalgaon.

.. Respondent

...

Mrs. V. S. Choudhary, APP for the applicant – State.

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**CORAM : SMT. VIBHA KANKANWADI AND
Y. G. KHOBRAGADE, JJ.**

DATE : 10th April, 2023.

ORDER :-

. Present application has been filed by the prosecution under Section 378(1)(b) seeking leave to file criminal appeal challenging the order dated 08.01.2018 passed by the learned Additional Sessions Judge, Jalgaon in Sessions Case No.89 of 2011, thereby acquitting the respondent/original accused from the offences punishable under Sections 302 and 307 of Indian Penal Code.

2. Heard learned APP for the purpose of admission and perused the evidence, which was before the Trial Court.

3. The prosecution case is that accused got married to one Mastan @ Kalu and it was his second marriage. The said marriage had taken place about a year prior to the incident. Mastan had three children from his first wife. Son Rais was aged 7, daughters Muskan and Afrin were aged 5 and 3 respectively on the day of incident. Mastan used to reside along with his parents, four brothers and their family members at Raniche Bamrud, Tq. Pachora, Dist. Jalgaon. The incident is stated to have occurred on 27.12.2010. Akhtar and his wife Sharifa had gone to do labour work in field. Present accused took Muskan (stepdaughter) and Najo @ Najiya (daughter of Akhtar) around 11.00 a.m. towards field. This fact was witnessed by Sayara daughter of Majid, who is niece of informant. After about one to one and half hours accused returned alone. Upon inquiry by Akhtar, Muskan revealed that accused had taken her and Najo in the fields for eating jujubes. They were taken near the well stating that there is elephant in the well and when Muskan and Najo peeped in the well to see the elephant, accused had pulled Muskan in the well. Muskan shouted while falling and managed to catch rope, which was already thrown in the well. Thereafter, the field owner Shantaram Salunkhe and one Kishor Chaudhari came there. Sharifabi also came there from the adjoining field along with other labours. With the help of villagers Muskan was taken out, however, Najo could not be traced out and,

therefore, Akhtar lodged missing report on the same day. However, on the next day, father-in-law i.e. Sandu Chandkha Mevati lodged report against the accused alleging that she has attempted to commit murder of Muskan. At that time, the offence came to be registered only under Section 307 of Indian Penal Code. The dead body of Najo was found around 7.00 a.m. on 29.12.2010 in the same well from which Muskan was rescued. Thereafter, police conducted the spot as well as inquest panchanama and sent the body for postmortem. Supplementary statement of the informant was recorded in which he made allegation that the accused had committed murder of Najo by pushing her in the well. Further investigation was conducted. Statement of the witnesses were recorded. The postmortem report was collected and after completion of the investigation, charge-sheet was filed.

4. After the committal of the case, trial was conducted. Prosecution examined in all ten witnesses to bring home the guilt of the accused. After hearing both sides and perusing the evidence on record, the learned Trial Judge has acquitted the accused. Hence, this application to challenge the said acquittal.

5. The chronology of events as revealed from the evidence has been rightly considered by the learned Trial Judge. It is stated that

initially missing report was lodged by Akhtar on 27.12.2010. In the said missing report Exhibit-26, it was stated by the informant that when he returned from the field in evening, he was informed by Muskan that she and Najo had gone along with mother in the field. She returned with mother, but Najo did not return. Now, this explanation has been given that mother referred in missing report is accused. The evidence that has been led in the form of testimony of the girl Muskan as well as the persons, who had reached the spot immediately after she raise shouts, would disclose that when Muskan was taken out of the well, Sharifabi i.e. Muskan's paternal aunt and Najo's mother was there and she made inquiry with Muskan. Muskan then told that she was pushed by the accused. If we consider the testimony of the girl, then it would be revealed that she had also disclosed it to Sharifa that Najo was also pushed in the well. If this is so, then Akhtar would not have told in the missing report that Muskan did not disclose about pushing of Najo in the well by the accused. It has rather come in the cross-examination of Akhtar that he had made inquiry with his wife Sharifa before lodging the missing report. Therefore, if those things which had alleged to have been happened were really happened, then this discrepancy would not have arisen. Prosecution has not tried to explain the said discrepancy. Further, if the said fact was disclosed immediately after

taking her out by Muskan to Sharifa and Sharifa would have told the said fact to her family members, then with the help of divers and/or police, search operation for Najo could have been taken in the well on the same day itself. Her dead body was found on 29.12.2010. Neither P.W.3 Sandekha @ Sandu, nor P.W.5 Akhtar have stated about undertaking search operation for Najo. In his cross-examination P.W.5 Akhtar has stated that he had not searched for Najo in any other well or the well from which Muskan was taken out. One more fact to be noted is that if everything would have been revealed on the same day i.e. 27.12.2010, why none of the family members had given FIR at-least in respect of attempting to commit murder of Muskan on that day itself. The FIR that was lodged on 28.12.2010 is also belated and there is absolutely no explanation for the delay. The entire behavior of the family members is suspicious.

6. P.W.6 Muskan is the girl who has been examined when she was aged 12 and the incident had taken place when she was aged around 5 years. She has directly deposed about the happening on the day of incident and nothing has been told in respect of behavior or relationship between the accused and herself. The behavior of the accused with other family members has also not been told by the family members. P.W.5 Akhtar, in his cross-examination, has stated that there was no quarrel between accused and himself prior to the

incident and, therefore, relations were cordial. From the cross-examination of P.W.3 Sandekha, it would be revealed that there was no dispute between accused and her husband so also there was no dispute between the accused and the other family members. The first wife of his son Mastan @ Kalu had expired and after 14 months of her death, Mastan @ Kalu performed second marriage with the accused. The question therefore arises as to what could have been the motive if everything was all right in the family. It is not the theory put forward by these witnesses that since after the marriage, the accused was harassing the stepchildren. It is not the case that she had no knowledge about the fact that Mastan @ Kalu had children from the first marriage. Coming back to the testimony of the girl when she is not disclosing that there was any ill will at even earlier point of time, the prosecution therefore failed to bring the motive. Rather the cross-examination of the informant P.W.3 Sandekha would further show that he is then intentionally claiming ignorance of the fact that accused was pregnant at the time of incident, but then he says that he came to know that daughter was born to the accused later. He therefore claims ignorance as to when he got the said information. If the accused was pregnant at that time, i.e. would be the mother and she had no ill will or grudge against the stepchildren, then it is hard to believe that she would have thought of eliminating

Muskan. Further, Najo was her niece (daughter of husband's brother). Why she would have been murdered. Prosecution is not coming with the clear case that after Muskan was pushed into the well, Najo would have been the eye witness and, therefore, she would have also been pushed in the well. There was absolutely no reason given by the prosecution for the alleged act of pushing Najo in the well by the accused.

7. One more fact that has been rightly considered by the learned Trial Judge is that in her cross-examination, P.W.6 Muskan has stated that accused used to treat her lovingly and she never used to beat her. She was calling the accused *Maa* or *Amma*. P.W.4 Shantaram Salunkhe is the person who had gone immediately to the spot after the shouts were heard and saw small girl hanging by catching a rope in the well. After Muskan was taken out, her aunt, as he wanted to say Sharifa as her aunt, identified the girl. Though in her examination-in-chief he is saying that after Aunt asked her, the girl told that her mother had asked her to see elephant in the well and then pushed her in the well. In his cross-examination, he has stated that Muskan told that she was pushed in the well by her mother i.e. "*Mummine*". Now there is no further clarification by the prosecution that at any point of time Muskan was addressing accused as Mummy. When a child is in frightened condition, then he or she would speak

in his own language and would reveal the relationships with his family members by name he or she calls. Therefore, to whom she referred as Mummy is a question, which has been left unanswered by the prosecution. Rather it has come on record that Muskan used to address accused as *Maa* or *Amma*.

8. The learned Trial Court has correctly held that the prosecution has intentionally not examined Sharifa. Rather the reasons for not examining her have not been given. The fact had come on record that when Muskan's testimony was recorded, she had accompanied with Sharifa and Sayara to the Court, still prosecution preferred not to examine both of them. Sayara is the lady who had allegedly seen accused taking both the girls along with her. Under such circumstance, the sole testimony of Muskan appears to be tutored and, therefore, rightly disbelieved by the learned Trial Judge.

9. Another interesting point to be noted is that five to six months after the incident, husband of the accused has performed third marriage. That means when the accused was in jail, he preferred to perform third marriage and even the family members appear to be happy with that. Therefore, the learned Trial Judge has rightly raised a doubt that as the family members of the informant wanted to get rid of accused, they would have been searching for the opportunity.

Possibility that the girls going near the well while playing and then for some reason falling in the well, but Muskan managed to catch hold of the rope appears to have been utilized by the informant and the family members. Suggestions have been given to P.W.3 Sandekha in this respect. Sharifa was envying accused, as she had the desire that her younger sister should perform marriage with Mastan @ Kalu taken as the probable defence of the accused. Therefore, taking into consideration the other evidence, it can at the most be said that Najo died due to drowning, but prosecution failed to prove that it was a homicidal death by eliminating the accidental death. A well reasoned judgment and order has been passed. Merely because the second view might be possible, it cannot be so taken in appellate stage and, therefore, no reasonable ground can be seen for granting leave to appeal. The impugned judgment cannot be said to be perverse and bad in law. Hence, the application stands rejected.

[Y. G. KHOBRAGADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm