

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.464 OF 2023

Shri Digambar S/o Goma Pawar,
Age-38 years, Occu:Sevice as driver
on road roller, R/o-Jambhi Tanda,
Post-Pandurna, District-Nanded.

...APPELLANT

VERSUS

- 1) The State of Maharashtra,
Through Assistant Police Inspector,
Police Station, Bhokar, Tq-Bhokar,
District-Nanded,
- 2) Shri Madhav S/o Digambar More,
Age-28 years, Occu:Labourer,
R/o-Mukhed Road, Nanded by-pass,
Sevalal Gad, Bhokar, Tq-Bhokar,
District-Nanded, Pincode: 431 801.

...RESPONDENTS

...
Mr. A.A. Mukhedkar Advocate for Appellant.
Mrs. V.S. Choudhari, A.P.P. for Respondent No.1 – State.
...

**CORAM: SMT. VIBHA KANKANWADI AND
S.G. CHAPALGAONKAR, JJ.**

DATE : 3rd JULY, 2023

ORDER [PER SMT. VIBHA KANKANWADI, J.] :

1. Present Appeal has been filed under Section 372 of the

Code of Criminal Procedure by the victim challenging the acquittal of respondent No.2 by the learned Additional Sessions Judge, Bhokar, District Nanded from the offence punishable under Section 302 of the Indian Penal Code in Sessions Case No.44 of 2020 by the Judgment and order dated 28th April 2023.

2. Heard learned Advocate Mr. A.A. Mukhedkar for the appellant and learned APP Mrs. V.S. Choudhari for respondent No.1 – State. We have heard the matter at the stage of admission. We have considered the material which was before the trial Court as it has been supplied by the appellant.

3. Appellant is the husband of deceased Sunita. They have daughter by name Arohi, aged 5 years at the time of incident. They were residing in rented premises owned by one Bharat Champatrao Birkalwad at Pawar Colony, Bhokar. Appellant Digambar was a driver on road roller.

4. Police Naik Sanjay Bhujangrao Shinde lodged report with Police Station, Bhokar on 4th September 2020 stating that Bharat Birkalwad lodged report with him stating that appellant Digambar, his wife Sunita and minor daughter Arohi were

residing in his house on rent and around 6.30 a.m. on that day Digambar had made phone call to Bharat and stated that Digambar's daughter Arohi @ Guddu told Digambar that mother was not waking up. Digambar, therefore, asked Bharat to go to the house and see what has happened. Bharat accordingly went to the house of Digambar and saw that Sunita was lying dead in the kitchen. Bharat had then taken Arohi with him and then left her with relatives and had come to the police station to lodge the said Accidental Death. That Accidental Death was lodged under Section 174 of the Code of Criminal Procedure and inquiry was started. The informant police naik went to the spot, carried out the spot panchnama and inquest panchnama in presence of panchas and made arrangement for sending the dead body to Rural Hospital, Bhokar for postmortem. The postmortem was carried out. In the meanwhile an inquiry was made with Arohi, who told that one Madhya i.e. accused had come to their house at night time. Accused had dinner with them and slept in the house and then accused had killed her mother with the help of saree which was tied in the house as a swing (*zoka*). Accused had cut the saree with the help of iron chopper (*Lokhandi Vili*), made strip of it and with the help of the same the murder was committed and thereafter accused left the house. On the basis of

said statement, the police caught the accused and brought him to the police station, made inquiry with accused and when it was found that he is the same person, informant lodged the First Information Report (for short "the FIR"), which came to be registered vide Crime No.372 of 2020 under Section 302 of the Indian Penal Code and the investigation was undertaken.

5. During the course of investigation, statements of witnesses were recorded, necessary documents were collected, seized articles were sent for chemical analysis and after completion of the investigation, charge-sheet came to be filed with the Judicial Magistrate First Class, Bhokar.

6. After committal of the case, the trial was conducted. The prosecution has examined in all eight witnesses to bring home the guilt of the accused. After considering the evidence on record and hearing both sides, the learned trial Judge has come to the conclusion that prosecution has failed to prove the offence beyond reasonable doubt and therefore acquitted the accused. Hence the present Appeal by the husband i.e. victim as defined under Section 2(wa) of the Code of Criminal Procedure.

7. It has been vehemently submitted on behalf of the appellant that the learned trial Judge has not appreciated the evidence properly. The evidence of the child witness has not been considered, who is the eye witness to the incident. Further, it has been deposed by the present appellant that there was financial transaction between his wife and the accused and there were quarrels between them on account of said transaction. The appellant had asked the accused not to come to his house but still the accused used to visit the house of appellant. Even the landlord PW-6 Bharat has stated that accused used to come to the house of the appellant. The murder has been committed on account of said financial transaction. The testimony of PW-1 Dr. Dilip Fugare would show that there was ligature mark over the neck and therefore, he had arrived at a conclusion that the probable cause of death is 'cardio-respiratory arrest due to asphyxia due to strangulation'. The death was homicidal. There was evidence in the form of child witness who had seen the accused cutting the saree with the help of iron sickle, making it into pieces, giving twist to the piece with which strangulation can be made. On the iron sickle presence of fiber were detected and they tallied with the piece of saree in the forensic test. Therefore, when there was ample evidence, the learned trial

Judge ought to have convicted respondent No.2 – accused, but for some flimsy reasons the accused has been acquitted. Hence re-appreciation of the evidence is necessary.

8. At the cost of repetition we are stating that we have scanned the evidence just to see whether matter deserves admission and no deep scanning is done here. Perusal of the evidence on record would show that PW-1 Dr. Dilip Fugare has stated that he had seen ligature mark over neck at sub mental region extending over backwards and upwards on neck. He has given further details of the said ligature mark and stated that it was ante mortem. He opined that the probable cause of death is 'cardio-respiratory arrest due to asphyxia due to strangulation'. Important point to be noted is that in the cross-examination except denial there is nothing. If for the sake of argument we accept that death is homicidal in nature, yet the prosecution is not relieved from proving that the accused is the author of the said crime.

9. The prosecution case rests on the testimony of PW-3 Arohi, the child witness. If we consider her examination-in-chief, she has stated that her father is a truck driver and therefore

used to reside out of the house and when father used to go out of the house, she used to reside with her mother and accused. She has identified the accused by name, Madhya. She then says that on the day of incident there was quarrel between her mother and accused at the night time and her mother expired. She then says that accused had cut the piece of saree and with the help of that saree her mother was murdered. She gives further details stating that at the night time accused and her mother slept on one cot and she slept on another cot. She was under fear that she would be assaulted and therefore, she slept. When she got up at that time accused took the saree from the neck of her mother and threw the dead body in the next room and then accused left the house. She called her mother (tried to wake her up) but mother did not respond and therefore she gave a phone call to father. Then the father had given phone call to the landlord and then landlord came and she went to her uncle's house.

10. Important point to be noted is that in order to believe a child witness, it has to be shown by the prosecution that she is not tutored. This has been considered by the learned trial Judge. Herein this case the girl had no knowledge as to what was the

subject of quarrel. In general, she has made statement that whenever her father was to remain out of the house, then she herself, mother and accused used to be in the house. We have, therefore, specifically asked the learned Advocate for the appellant that when the appellant has not come with the case that there were illicit relations between the deceased and the accused, then in what capacity accused used to stay in his house. The learned Advocate for the appellant replied that if we consider the testimony of the appellant, then it can be said that the wife was having financial transactions with the accused and therefore accused used to come to his house. Appellant had also asked the accused as to how he came to his house, at that time accused told that he had come for collecting money. Thereafter, quarrel took place between appellant and his wife for the reason of giving money to accused. Perusal of the evidence of the appellant does not show as to what was the source of income for the wife and how much amount she had lend to the accused. We had then made inquiry with the learned Advocate for the appellant but he could not throw any light on this aspect. Under the said circumstance, when the details are not given and the evidence is suggesting something different than the child is saying, it will not be safe to rely on the testimony of child.

Nobody else had seen the accused in the house of the deceased on the day of incident. PW-6 Bharat says about witnessing accused in the house of the deceased but it is not on that day. From the testimony of the child we are unable to get when the incident would have taken place. The girl is too small to tell about the time. She says that after the alleged strangulation by the accused of the deceased, she got frightened and under the fear that she would also be killed, she slept.

11. As per the testimony of PW-5 Digambar i.e. appellant, he had received phone call from the daughter around 5.30 a.m. of 4th September 2020. Of course there is no CDR in respect of the phone which deceased was using and which the appellant was using. In her testimony, the girl is stating that she had contacted from her mobile phone. Whether a girl, aged five years, was having a mobile phone, is a question and then she says that after the dead body of the mother was checked by the police in the house, the police had seized her mobile phone. The investigating officer does not say so. For the same grounds the learned trial Judge has come to the conclusion that the offence has not been proved beyond reasonable doubt and therefore, we are of the opinion that there is no perversity or illegality

committed by the learned trial Court. No further appreciation of the evidence is required. No case is made out to admit the Appeal and the Appeal deserves to be dismissed.

12. The Appeal stands dismissed.

[S.G. CHAPALGAONKAR]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/JUL23