

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

CRIMINAL APPEAL NO.275 OF 2017

Ramkisan S/o Vishnu Nagare,
Age-29 years, Occu:Agriculture,
R/o-Near Darade Vasti, Kekat Jalgaon,
Taluka-Paithan, District-Aurangabad.

...APPELLANT

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr. D.K. Kulkarni Advocate for Appellant.
Mr. S.J. Salgare, A.P.P. for Respondent – State.
...

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

DATE : 24th AUGUST 2023

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

1. Present Appeal has been filed by original accused who has been held guilty of committing offence punishable under Section 302 of the Indian Penal Code by learned Additional Sessions Judge, Aurangabad in Sessions Case No.17 of 2015 on 19th May

2017. The appellant - accused has been convicted for committing murder of his wife.

2. Before we proceed, the facts which are admitted on record, are that the present appellant - accused got married to Sunita who was the sister of informant PW-1 Bhaurao Baban Khedkar and daughter of PW-3 Baban Nana Khedkar. Their marriage had taken place in 2006. They are blessed with two sons and one daughter, namely, Tirtharaj - aged 7 years, Adarsh - aged 5 years and Tanuja - aged 1 year. Informant PW-1 Bhaurao and father PW-3 Baban are resident of Kekat-Jalgaon, whereas appellant is resident of Darade Vasti, Kekat Jalgaon, Taluka-Paithan, District-Jalgaon.

3. The prosecution has come with the case that informant PW-1 Bhaurao lodged report on 24th September 2014 stating that after the marriage of Sunita with accused in 2006, till their eldest son Tirathraj became seven years, there was no dispute in the marital life of Sunita. Thereafter the dispute started on some domestic counts. Sunita used to tell about the harassment to her parents and brothers. Though the husband and his relatives were requested not to harass Sunita, as there was no change in their behaviour, Sunita lodged a complaint with Women's

Grievance Redressal Forum attached to the Office of District Superintendent of Police (Rural), Aurangabad. The authority thereof called Sunita and her parents and also the husband's side for taking statements. Since the date of said complaint, Sunita was residing with her father for about 5 to 6 months. The authority then resolved the dispute by giving advise. After the compromise, Sunita went to cohabit with her husband but Sunita and her husband started residing in the house in their field, separately from the parents-in-law. In the meantime, Adarsh and Tanuja were born. However, later on Sunita disclosed that the accused has become addicted to liquor and was blaming her on the count that she has separated him from his parents and as to why she has made complaint with the Police. He used to give her threat to kill and used to assault her. Thereafter again the husband was advised but there was no change in the behaviour. Accused gave phone call to elder brother of deceased on 23rd September 2014 stating that there was snake bite to Sunita and she has become serious, and they were in the process of shifting Sunita to the hospital at Aurangabad in the vehicle belonging to one Datta Horshil. Accused asked elder brother of the deceased to arrange an amount of Rs.10,000/- and be ready. After they had collected the amount, when younger brother Dnyaneshwar

gave phone call to the accused and asked how Sunita was, he told that she has expired and they are returning. Hearing that, three brothers of the deceased, their other relatives went to Government Hospital, Pachod around 11.00 p.m. on 23rd September 2014. When inquiry was made, they came to know that Sunita was taken to Aurangabad. As accused was returning from Aurangabad, they waited near the Petrol Pump at Pachod. When vehicle came there, the accused did not stop the vehicle at Pachod and started to go ahead. At that time informant Bhaurao and others chased the said vehicle from the vehicle belonging to one Dhananjay Magar. They stopped that vehicle around 1.30 a.m. of 24th September 2014. They found accused, his father and uncle in the vehicle. When they watched the dead body of Sunita, they found that blood had come out of her mouth and dried. They asked accused as to how Sunita has expired. Accused told that snake has taken bite. But they could not see the bite marks of the snake on the body of Sunita and therefore, Bhaurao gave intimation to Police on phone and informed the incident. Thereupon Pachod Police came to the spot and took the vehicle with dead body in their custody and brought the dead body to Government Hospital. After the inquest panchnama was drawn and postmortem was performed, it was revealed that

Sunita expired due to head injury and therefore, Bhaurao lodged First Information Report (for short "FIR") vide Crime No.160 of 2014 for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code against in all five persons including the present appellant.

4. Investigation was taken up. On the basis of the telephonic information, accidental death was reported and the inquest panchnama was drawn. Postmortem was done. Spot panchnama was also got executed. Statements of witnesses were recorded. Certain articles came to be seized from the spot. The seized articles were sent for chemical analysis. A wooden log was also seized from the spot. Accused came to be arrested. After completion of the investigation, charge-sheet was filed only against the husband.

5. After the committal of the case, the learned Additional Sessions Judge has framed charge for the offence punishable under Section 302 of the Indian Penal Code. As the accused pleaded not guilty, trial has been conducted. The prosecution has examined in all seven witnesses to bring home guilt of the accused. After considering the evidence on record and hearing both the sides, the accused has been held guilty and sentenced

to suffer imprisonment for life and to pay fine of Rs.5,000/-, in default to suffer simple imprisonment for two months, for committing offence punishable under Section 302 of the Indian Penal Code. The set off has been granted for the detention of the accused. This is the order under challenge in this Appeal.

6. Heard learned Advocate Mr. Kulkarni appearing for the appellant and learned APP Mr. Salgare appearing for the State.

7. It has been vehemently submitted on behalf of the appellant that the learned trial Judge has not appreciated the evidence properly. The testimony of PW-1 Bhaurao and PW-3 Baban would show that the accused had immediately informed the fact of sustaining injury by Sunita. He had told that it was the snake bite and had even taken Sunita to Aurangabad to give medical treatment. Unfortunately Sunita succumbed in the journey and therefore, he was required to return. The learned trial Judge appears to have been got carried away with the testimony of PW-2 Tirtharaj – the child witness. It was not considered by the trial Court that he was under the custody of PW-3 Baban and PW-1 Bhaurao. His cross-examination would show that accused had bought sweets, they all had consumed the sweets, everything had gone happily and after consumption

of sweets, they had gone to play and when they returned home they saw that people had gathered near their house and Sunita was taken to hospital. That means, whatever he had deposed in the examination-in-chief that he has seen father assaulting Sunita, was not a true fact. He was not present at all in the house when the alleged incident had taken place. In clear terms, Tirtharaj has admitted that he has deposed about the incident and beating as per the say of his maternal uncle. Therefore, the testimony of PW-2 Tiratharaj was tutored. Further, it has also come in the cross-examination of PW-1 Bhaurao that after the incident, the father of the accused had transferred landed property in the name of Sunita's children and Baban has been shown to be the guardian of all the kids. An affidavit was also presented before the Court of the Judicial Magistrate First Class at Paithan on 29th October 2014 in which it was mentioned that Bhaurao had filed the report against all the accused under misconception. This indicates that the accused – appellant has been falsely involved to grab the property.

8. It has been further submitted on behalf of the appellant that as per the prosecution case the accused had pulled the hair of Sunita and struck her head to a cement pole (locally

addressed as "*Medh*") and then it is alleged that he had assaulted her on her head with the wooden log. But there were no blood stains on the wooden log. The said wooden log was not shown to PW-5 Dr. Prashant Kondekar, who had conducted the autopsy. Though the doctor has denied the suggestion, but it appears that Sunita would have come in contact with the cement pole forcefully, may be due to giddiness. Therefore, it was an accidental death but the learned trial Judge wrongly convicted the appellant. The Appeal, therefore, deserves to be allowed.

9. Per contra, the learned APP supported the reasons given by the learned trial Judge in convicting the appellant. He submitted that the testimony of the child witness inspires confidence. It cannot be said that he was tutored. The kids were of tender age and therefore, there is no option for them to take shelter with the grand father. Accused had intention to kill Sunita and then in the past he used to harass her. He had the *mens-rea* to kill her as he was under the impression and belief that she was the cause for separating him from his parents. He was addicted to liquor and after banging her head to the cement pole, he took out the wooden log attached to tin roof and had given blow of the same on her head. The medical evidence i.e. testimony of

PW-5 Doctor Prashant Kondekar supports the prosecution story. The probable cause of death is "Cardio-respiratory arrest due to head injury". The blood has oozed out of the mouth and the postmortem report shows that there were corresponding internal injuries to head. Therefore, the prosecution had proved the guilt of the accused beyond reasonable doubt.

10. Here the case of the prosecution is based on direct evidence i.e. testimony of PW-2 Tirtharaj. It can be seen that at the time of incident he appears to be aged seven years and on the day of recording his deposition he was nine years old. The learned trial Judge had asked certain questions to assess the competency of the witness to depose and taking into consideration the rational answers given to the questions put, the learned trial Judge was satisfied that the boy understands the sanctity of oath and therefore his testimony is recorded by administering oath to him. As regards the evidence of child witness is concerned, we may lay our hands on the decision in ***Mangoo and another v. State of Madhya Pradesh; AIR 1995 SC 959***, wherein 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.”

11. 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.”

12. 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.”

13. 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."

14. In **Nivrutti Pandurang Kokate and others. 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."

15. 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 the 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 required 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."

16. Bearing above legal position in mind, if we scrutinize the evidence of PW-2 Tirathraj, in our opinion, though he is a child of nine years old, the manner of answers clearly suggests that he understood the purport of the questions. In his examination-in-chief, he has categorically stated that there used to be quarrels between his mother and father. His father used to beat his mother under the influence of liquor. He has further stated that on the day of incident, his father had gone to weekly market, bought sweets and vegetables. The accused consumed the liquor and was quarreling with Sunita. Thereafter accused started beating Sunita, pulled her hair and struck her head on cement pole (*Medh*). Thereafter accused pulled out wooden log attached to tin roof and assaulted Sunita with the same on her head, as a result of which she fell down and was vomiting. Thereafter some people gathered and took Sunita to hospital. He says, in clear words that it is his father only who had beaten his mother and then his mother died.

17. At this stage itself we would consider the spot panchnama, which has been in fact admitted by the accused himself. It shows

that there is a cement pole in the house. There was a quilt and cot nearby. They found one wooden log nearby. There were marks of wiping the vomit, but there were still some marks to show that the deceased had vomited there. The earth containing the vomit particles appears to have been collected. This supports the examination-in-chief of the child witness PW-2 Tirtharaj. It appears that the learned Advocate representing the appellant is stressing upon the cross-examination. The purpose of cross-examination of a witness is to bring the truth on record, but that does not mean that some stray admissions are only to be relied. The entire evidence is required to be considered and then the effect is required to be drawn. The child witness admits that all of them consumed sweets, everything was going happily. He says that after consuming sweets, they went to play. Here there is no clarification sought from him as to who were those who went to play. Whether it was he himself and his brother, because Tanuja appears to be only one year old when the FIR was lodged. He then says that when they returned home, they saw people had gathered near the house and mother was taken to hospital. There is absolutely no suggestion to this witness in clear words that he has not seen the incident. The child witness cannot be put in confusion and without asking it directly,

inference cannot be allowed to be drawn on the basis of some indirect questions. He has admitted that he has deposed about the incident and beating as per the say of his uncle. Taking into consideration his tender age and the atmosphere in the Court if he was made aware about as to what would be the probable questions that would be put to him, then there is nothing wrong. It does not amount to tutoring. The maternal uncle i.e. PW-1 Bhaurao himself was not the witness to the incident, therefore, he could not have given the details as to what had happened at the relevant time. Therefore, we do not find the testimony of PW-2 Tiratharaj as doubtful or unworthy of credence.

18. The testimony of PW-1 Bhaurao and PW-3 Baban would show that even in the past also Sunita had made complaint against the husband and in-laws and therefore, a complaint was lodged by her with the Women's Grievance Redressal Forum. Copy of the said application was collected and has been placed on record. There appears to be compromise and then the accused and Sunita started residing separately from the in-laws. Here it is to be noted that after the said compromise the other two children were born to Sunita. Under the said circumstance, it appears that she had no complaint against the in-laws, but the

complaint was against the husband who used to beat Sunita under the influence of liquor. PW-2 Tirtharaj has also stated in the examination-in-chief that there used to be quarrels between his father and mother. In the cross-examination it was not tried to be got explained as to what was the nature of the quarrels. Of course, that has not been told by him in his examination-in-chief also, but then he was categorical in stating that his father is addicted to liquor. That fact has not been denied in his cross-examination. Therefore, what had happened on that day has been clearly brought on record.

19. PW-1 Bhaurao and PW-3 Baban have stated that around 10.15 p.m. on 23rd September 2014 accused informed to Vitthal, who is eldest brother of Sunita, that Sunita sustained snake bite and he would be taking her to Aurangabad. The brothers and father of Sunita were asked to arrange for amount of Rs.10,000/-. After arranging the amount when they again contacted, it was told by the accused that Sunita expired and they were returning back. The conduct of the accused has then been told by both of these witnesses. They both had gone to Pachod Government Hospital but came to know that Sunita was taken to Aurangabad, therefore, they were waiting for the

vehicle in which Sunita was taken, to arrive near Pachod for going towards her matrimonial home. But at that place the vehicle in which Sunita and accused were there, did not stop and was being taken further. These two witnesses chased the said vehicle and caused the vehicle of the accused to stop. They could not see the snake bite mark though they had seen the blood in the mount of Sunita and it had dried. Here PW-3 Baban says about the extra judicial confession given by the accused, but the said extra judicial confession is not told by PW-1 Bhausahab, therefore, it cannot be taken into consideration. Except total denial and suggestion that Sunita had lost balance and accidentally fell on the cement pole, there is nothing in their cross-examination. Here it will not be out of place to mention that the theory of snake bite does not stand supported in the testimony of PW-5 Dr. Prashant Kondekar. There was no suggestion to him in the cross-examination that there was a snake bite to Sunita. It was also not suggested that there was change in the colour of the skin of Sunita due to snake bite.

20. PW-6 ASI Ramdas Bhardwaj was examined to prove the complaint filed by Sunita with Women's Grievance Redressal Forum. He has stated that on 21st May 2009 Sunita had given the said complaint about harassment and demand of Rs.80,000/-

for purchase of a land. That complaint is at Exhibit-41 and he has stated that there was settlement deed which was arrived at. Accused had given in writing that he will not harass Sunita. Of course it was not stated in the said settlement deed that Sunita and her husband would reside separately from in-laws. But there is substance in the prosecution story that it was the triggering point for the dispute though it was tried to be settled.

21. Here the facts as those have been emerged shows that accused had come under the influence of liquor. Thereafter there was quarrel between him and Sunita, in which he had pulled her hair and banged her head to the cement pole. It appears that the said act resulted in the internal fracture of the skull, but it was not the end. The accused had taken the wooden log and given blow of the same on the head of Sunita, which would have aggravated the fracture and therefore, those injuries have been caused as noted in the postmortem report by PW-5 Dr. Prashant Kondekar. The intention was very clear. Further, if we see the wooden log that was seized from the spot, it can be certainly said that it was capable of causing injuries noted in the postmortem report. Thus, with one act i.e. banging head on the cement pole the accused did not stop but further assault was

made with another weapon. It shows intention to kill, therefore, this is clear case of murder. It was not the result of any sudden fight and therefore, the conviction of the appellant under Section 302 of the Indian Penal Code by the learned trial Judge is perfectly legal. The Appeal is devoid of merits and therefore, it deserves to be dismissed.

22. The Appeal stands dismissed.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/SEP23