

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.174 OF 2016

Pawa Ashok Malche,
Age 24 yrs., Occ. Labour,
R/o Javkheda, Tq. Amalner,
Dist. Jalgaon.

... Appellant

... Versus ...

The State of Maharashtra
Through Police Station, Amalner,
Tq. Amalner, Dist. Jalgaon.

... Respondent

...

Mr. R.K. Ashtekar, Advocate (appointed) for appellant

Mr. S.J. Salgare, APP for respondent

...

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

DATE : 24th APRIL, 2023

JUDGMENT : (PER : SMT. VIBHA KANKANWADI, J.)

1 Present appeal has been filed by the original accused challenging
his conviction in Sessions Case No.65/2012 by learned Additional Sessions

Judge, Amalner, Dist. Jalgaon on 16.06.2015, thereby holding him guilty for the offence punishable under Section 302, 323, 506 of the Indian Penal Code, 1860.

2 Prosecution story, in short, is that PW 3 Alkabai Dadabhau Sonwane was resident of Mehunbare, Tq. Chalisgaon. She lodged report with Amalner Police Station on 18.10.2012 stating that her marriage was performed with Dadabhau Sonawane about two years prior to the First Information Report. Thereafter she was residing with her husband and mother-in-law. Her husband had four brothers, who were residing separately along with their family. Alkabai had daughter by name Komal from Dadabhau and at the time of First Information Report Komal was around 09 months old. Accused is the brother of co-sister of PW 3 Alkabai. He was resident of village Javkheda, Tq. Amalner. He used to visit the house of co-sister of Alkabai and such way they were acquainted with one another. In 2012 around Akshay Tritiya accused had come to his sister and stayed there for about 15-20 days. Alkabai states that she developed love relations for the accused and when her husband and mother-in-law came to know about it, the husband assaulted her and drove her out of the house with daughter Komal. Then, Alkabai went along with accused at Javkheda and was residing with him since about four months prior to the First Information Report. She

was also doing labour work with accused, but accused had habit of drinking liquor. Accused treated Alkabai and Komal properly for about one and half months, but thereafter he started assaulting and abusing Alkabai under the influence of liquor. He was saying that he will not accept Komal and Alkabai should leave Komal. Alkabai had kept the daughter with her as she was sucking child. But accused has hatred against Komal. He was also asking that Komal should be left at the place of Dadabhau, otherwise he would kill her. Alkabai was not feeling well on 16.10.2012 and, therefore, she went to Hospital at Javkheda. Doctor had given injection to her and then she paid fees of Rs.100/- to the Doctor. After she came the home, accused started asking her, as to why she has given money to Doctor and he would have given the amount to the Doctor later on. After abusing her, he assaulted her with stick and harassed her whole night. Komal was playing on the ground in house around 9.00 a.m. on 17.10.2012. Accused told Alkabai that she should prepare swing outside the house with the help of roof for Komal and then Komal should be kept in the swing. Therefore, Alkabai went outside and started preparing for erecting swing. At that time, accused took Komal and by holding her legs she was forcibly thrown on the ground. There was cement koba, where the girl was thrown. Alkabai asked accused as to why he has done that and then he answered that as he does not like her, he has done it. Neighbouring persons Shivaji Rajaram Wadar and Walmik Budha Malche

had seen accused throwing the girl on the ground. Komal had received covert injury to the back side of her head and became unconscious. Alkabai and Rajasbai – grandmother of accused took Komal to Doctor at Javkheda. Said Doctor asked them to take her to Amalner, then she had no money, therefore, she took her to Government Hospital, Dhule. The persons at Government Hospital, Dhule asked her to show yellow ration card, but she was not having the same, therefore, she came to Dhule Bus Stand. Around 3.00 p.m. one Chhotu Wanjari from Javkheda came to the Bus Stand and also told entire incident to him. He then asked Alkabai to come to Javkheda. They kept Komal in the house and the grandmother of accused was also present. Around 3.00 a.m. of 18.10.2012 Komal was not moving and, therefore, Alkabai told the said fact to Rajasbai. Rajasbai saw the girl and told that she is dead. But then told that this fact should not be told to accused, otherwise he would ran away and asked Alkabai to take Komal with her and to go to Rajasbai's house. Thereafter in the morning Alkabai told the incident to Police Patil and Sarpanch as well as people from her community and then they brought her to Police Station, where she lodged the First Information Report.

3 On the basis of said First Information Report offence vide Crime No.194/2012 was registered with Amalner Police Station for the offence

punishable under Section 302, 323, 504 of the Indian Penal Code and investigation was taken up. Inquest panchnama was drawn and then dead body was sent for postmortem. Panchnama of the spot was carried out, statements of witnesses were recorded, even the informant was got medically examined. Postmortem Report as well as other reports were collected and accused came to be arrested. After the completion of the investigation charge sheet came to be filed.

4 After the committal of the case, charge was framed at Exh.4 and accused pleaded not guilty, hence, trial has been conducted. Prosecution has examined in all nine witnesses to bring home the guilt of the accused, and after the hearing of both sides and perusing the record the learned Additional Sessions Judge, Amalner convicted the accused. For the offence punishable under Section 302 of the Indian Penal Code he has been sentenced to suffer imprisonment for life and pay fine of Rs.10,000/- (Rupees Ten Thousand only), in default to suffer rigorous imprisonment for three years. For the offence punishable under Section 323 of the Indian Penal Code he has been sentenced to suffer rigorous imprisonment for one year. For the offence punishable under Section 506 of the Indian Penal Code he has been sentenced to suffer rigorous imprisonment for two years. All the sentences have been directed to run concurrently. Since the accused was in jail, set off

under Section 428 of the Code of Criminal Procedure has been given. This conviction is under challenge in this appeal.

5 Heard learned Advocate Mr. R.K. Ashtekar for the appellant and learned APP Mr. S.J. Salgare for the respondent.

6 Learned Advocate for the appellant has vehemently submitted that PW 3 Alkabai is the informant. In her examination-in-chief she has deposed as per First Information Report. However, in the cross-examination the omissions have been brought on record, which are material. She admitted that at village Javkheda she was maintained by the accused, so also he was maintaining the deceased. She has then stated that she used to make her daughter sleep in the swing in varanda and the said swing was at the height of 3-4 feet from the earth. That swing was made of polyester sari. The ground floor in the varanda was daubed by cow dung. Therefore, this situation would lead to people that the possibility of fall of the child when she was putting her in the swing cannot be ruled out. This witness has further stated that when accused had assaulted her prior to the incident she had made complaints to the Amalner Police Station, but those complaints have not been entertained by the Investigating Officer and not produced. The medical evidence i.e. PW 6 Dr. Prakash Tade, who conducted the autopsy,

in his cross-examination has stated that the injury No.1 on the person of the deceased may be possible due to sudden rise in blood pressure and rupture of brain vessel. Further, due to the fracture to the spine death may occur within few minutes. The head of nine months old child would be soft and under such circumstance, if the child is forcibly dashed on the hard surface, then possibility of fracture to the skull and then causing of internal as well as external injuries would be inevitable. In clear words, he has admitted that if a child of nine months falls from the swing from a height of 4-5 feet, then the injury No.1 is possible. Therefore, taking into consideration the testimony of these two witnesses, it can be certainly said that the accused is not the author of the crime, but it might be the case that it would accidental slip of the girl when PW 3 Alkabai was putting her in the swing. Prosecution has not examined important witnesses. The grandmother Rajasbai as well as Chhotu Wanjari have not been examined. It is also unbelievable that treatment was not given to the child in Government Hospital, but she was then asked to bring yellow ration card. From Javkheda, Amalner is at a shorter distance than Dhule. Instead of going to Amalner she went to Dhule. She was then responsible for not giving timely treatment to the girl. PW 5 Walmik Bhil has been posed as eye witness, but then the situation of the house of accused is not such that he could see the incident from the road. The said situation has been brought on record by way of spot panchnama and PW 5 Walmik in his

cross-examination has admitted that at the time of incident the minor was in the swing. The evidence led by the prosecution was not beyond reasonable doubt and, therefore, the learned Trial Judge has given perverse findings and wrongly convicted the accused of committing offence punishable under Section 302 of the Indian Penal Code. The said Judgment and order deserves to be set aside.

7 Per contra, the learned APP supported the reasons given by the learned Trial Judge and submitted that the evidence on record was sufficient to hold the accused guilty of committing offence under Section 302 of the Indian Penal Code as well as under Section 323 and 506 of the Indian Penal Code in respect of the assault and criminal intimidation given to PW 3 Alkabai. PW 3 had come along with the accused, though she was married and then the accused has given her such treatment, there was no reason for her to implicate the accused. So also, there was no reason for PW 5 Walmik to depose against the accused. The testimony of PW 3 and PW 5 corroborates each other and it is also corroborative to the medical evidence. The situation at the spot has also been proved. Rajasbai as well as Chhotu Wanjari were not the eye witnesses and, therefore, their non examination was not fatal to the prosecution. There is absolutely no perversity in the findings given by the learned Trial Judge.

8 Before appreciating the medical evidence, we will have to consider the ocular evidence and then test it with the medical evidence. PW 3 Alkabai has supported the First Information Report Exh.16. It is to be noted that she is from a tribal area and she was only 20 years old, when her testimony was recorded. No doubt, at the time of her First Information Report also she has stated her age as 20, which was lodged in 2012 and, therefore, in 2014 when her evidence was recorded she may not be of the same age, but still she was young and she had stated that she was married about two years prior to the First Information Report. Therefore, it appears that she got married around 18 years of age and even had daughter around nine months at the time of First Information Report. Still she has stated that the accused, who was the relative of her co-sister, used to visit the house of co-sister and that is how they fell in love with each other. She was bold enough in saying that though she was married, she fell in love with accused and when her husband as well as mother-in-law got the knowledge, they drove her out of the house with daughter. She along with accused as well as daughter came to the house of accused. There is no denial to this story by the accused. That means, the accused is accepting that he fell in love with informant, who was already married and had daughter, and then he brought them to his house and it appears that they started residing as husband and wife. She has also stated that they both used to do labour work to earn. She

had no problem for the said situation and appears to have accepted the same, and then she says that after maintaining herself and her daughter for about 1-2 months, accused started beating her under the influence of liquor and started saying that the girl should not reside in his house as people will laugh. This shows that accused wanted to get the rid of the daughter of Alkabai. There is no denial to the same in the cross of PW 3 Alkabai. PW 3 Alkabai then says that when she went in varanda to the swing in the morning time, the accused by holding the legs of her daughter thrown her on cement concrete, as a result of which Komal sustained injuries on the back side of her head. Now, this portion of the fact is tried to be encashed by the accused by saying that the swing was made up of polyester sari and it was at a height of 3-4 feet from the earth. The girl might have slipped from the hands of Alkabai when she was about to put Komal in the swing. The first and the foremost fact is that in her First Information Report Exh.16 it is stated that accused told her that she should prepare swing in the varanda for her daughter and, therefore, she went to prepare the swing. Now, it is not clear from the First Information Report, as to whether she had completely prepared it or not. But then in the cross-examination it has been extracted that Alkabai used to put her daughter in the swing in the varanda, which is at the height of 3-4 feet from the earth, and the same swing was of polyester sari. In the spot panchnama Exh.12 there is absolutely no mention of any

swing. The accused has not come with a case that somebody has damaged/removed the said swing. As per the testimony of Alkabai, after her daughter sustained injuries, she took her to hospital, meaning thereby accused was in the house. It has not been suggested to any witness, especially PW 5 Walmik and PW 8 PI Mr. Ramdas Patil that somebody had taken out the said swing in the absence of accused. In fact, accused has not stated where he was after the alleged incident. Accused is not denying the incident, but then he says that it was because of PW 3 Alkabai the incident has taken place. It is also not suggested to her that he had accompanied her to the hospitals. It is also not suggested to her that accused was not in the house at the relevant time. Then if it is so, that he was in the house, saw the alleged slipping of the daughter from the hands of Alkabai and sustaining injury; yet, why he did not accompany her to hospitals and had not given medical treatment, is a question. Therefore, there is no substance in the defence tried to be raised. A specific suggestion was given to Alkabai that due to polyester sari of the swing, daughter slipped from her hands, fell down and expired, has been denied by her.

9 There is corroboration to the testimony of PW 3 Alkabai by PW 5 Walmik, whose name has been mentioned in the First Information Report. Further, PW 4 Pankaj Patil is also an eye witness. Except denial there is

nothing in the cross-examination of both these witnesses. No doubt, PW 4 Pankaj Patil's name was not told by PW 3 Alkabai in her First Information Report. PW 4 and PW 5 are consistent in saying that the accused had caught hold of the legs of Komal and dropped her forcibly on the ground, where ground was made up in cement concrete. In the cross-examination of both these witnesses there is nothing to indicate that they had any reason to implicate the accused. It was not asked to them, where exactly they were when the incident had taken place. Since the accused is now trying to take defence that the situation of his house is such that a person standing on the road cannot see what is happening inside the house, that situation ought to have put to these witnesses. In absence of any questions put to them in that respect now, the defence cannot be taken that these two persons cannot be the eye witnesses, taking into consideration the situation of the house of the accused. Thus, it is to be noted that there is no reason to disbelieve the testimony of PW 3 Alkabai, PW 4 Pankaj Patil and PW 5 Walmik Bhil.

10 The testimony of these three witnesses is further supported by medical evidence. PW 6 Dr. Prakash has noted two external injuries; first was – occipital hemorrhage about 30 ml present and second was – fracture first and second cervical vertebrae present. If a person is forcibly thrown on the floor, then such injuries are possible and death may occur. Accordingly, he

has given cause of death in Postmortem Report Exh.23. Though in the cross-examination he has admitted that injury No.1 is possible if a nine months old child falls from the height of 4-5 feet from a swing. This admission in isolation cannot be relied upon, when the ocular evidence is strong and does not support the said situation. Therefore, the cumulative effect of the testimonies of PW 3 to PW 5 supported by PW 6 medical expert, we hold that death of Komal was homicidal in nature and the accused was the author of the crime. PW 1 Pramod Patil is the panch to the inquest panchnama Exh.10, PW 2 Chhotu Ahire is the panch to the spot panchnama and the testimony of these two witnesses is rather supporting the other witnesses, whose evidence has been discussed above.

11 PW 7 Indubai Pawar is the mother of PW 3 Alkabai, but her testimony appears to be hearsay as regards the offence of murder is concerned. PW 8 PI Mr. Ramdas Patil is the Investigating Officer, who carried out the part investigation and PW 9 then Sub Divisional Police Officer Mrs. Anita Patil is also the Investigating Officer, who carried out the further investigation.

12 Non examination of Rajasbai and Chhotu Wanjari was not at all fatal to the prosecution as they were not the eye witnesses. Though they

might have added to the prosecution story; yet, they came in picture at a later point of time and, therefore, non examination is not at all fatal.

13 The testimony of PW 3 Alkabai was sufficient to prove that she was assaulted and criminally intimidated, as except denial there is nothing in her cross and there is no reason to disbelieve her. It is unfortunate that the young girl left her husband and went along with accused by taking her nine months daughter, but then it appears that the accused under the impression that people will say something when they are with the daughter, who is begotten to PW 3 Alkabai from another person, he was thereafter not liking the girl and, therefore, wanted to get rid of her, therefore, there was motive for him to commit the murder. The prosecution had proved the guilt of the accused beyond reasonable doubt.

14 We do not find the findings and conclusion by the learned Trial Judge to be perverse or illegal.

15 Before concluding, as there was reference that the accused had faced another trial for the offence punishable under Section 302 of the Indian Penal Code, we had asked learned APP to get instructions as to what had happened to the said case. A computerized copy of the Judgment in Sessions Case No.158/2011 decided by learned Sessions Judge, Dhule on 30.04.2012

has been shown to us. Present accused is accused No.2 in that case. He stood prosecuted for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code, but then by the said Judgment and order he was acquitted of the said charges. But it further appears that within a period of six months then this offence has been committed. The accused does not deserve any kind of sympathy. The minimum sentence has been awarded. Hence, following order.

ORDER

The Criminal Appeal stands dismissed.

(Y.G. Khobragade, J.)

(Smt. Vibha Kankanwadi, J.)

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