

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

CRIMINAL APPEAL NO.844 OF 2018

Vishwas S/o Pitambar Patil,
Age-47 years, Occu:Labour,
R/o-Dongaon, Tq-Dharangaon,
District-Jalgaon.

**...APPELLANT
(Ori. Accused)**

VERSUS

The State of Maharashtra,
Through P.S.I., Police Station,
Dharangaon, Tq-Dharangaon,
District-Jalgaon.

...RESPONDENT

...
Mr. P.B. Patil Advocate for Appellant.
Ms. V.S. Choudhari, A.P.P. for Respondent-State.
...

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

DATE : 7th NOVEMBER, 2023

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

1. Original accused takes exception to challenge his conviction by the learned Additional Sessions Judge, Jalgaon, District-Jalgaon in Sessions Case No. 105 of 2017 on 30th

October 2018 after holding him guilty of committing offence under Section 302 of the Indian Penal Code. The accused was charged for committing murder of his own daughter Deepali by strangulation.

2. It is the prosecution story that the present appellant is resident of Dongaon Budruk, Taluka-Dharangaon, District-Jalgaon. He was residing with his wife Bhikubai, son Deepak and daughter Deepali. He is an agriculture labour. Deepali was married to one Parmeshwar Patil about a year prior to the First Information Report (for short "FIR") i.e. 27th July 2017, however, since her age was less she used to reside with parents. Deepali had developed love relations with one Manohar @ Bala residing in the same lane where the accused is residing. Said Manohar had kidnapped Deepali on 8th May 2017 and therefore, Bhikubai had lodged report against Manohar. Police had searched Deepali and after about fifteen days when she was brought to Paldhi Police Station, she was saying that since she has love for Manohar she would perform marriage with him only. After persuading her the informant – appellant had brought her home but since thereafter Deepali had become adamant. She used to pick up quarrels. Informant felt that he has been defamed in the

village and therefore was planning to leave Dongaon with his family and shift to Vadgaon, Taluka-Pachora. When Deepali got knowledge about the same, she picked up quarrel with the father and told that she would behave in the same way even at the said place. It is the further prosecution story that the accused-informant had then decided to eliminate Deepali and he strangled her in the intervening night of 26th and 27th July 2017 and went along with his wife to Police Patil's residence to inform the said fact, however Police Patil was not there. His son was there in the house who called Police Patil and thereafter along with Police Patil the accused went to the Police Station and lodged the confessional FIR.

3. After the said FIR was lodged, offence was registered against the accused-informant and investigation was started. Panchnama of the spot was carried out. The dead body was sent for postmortem after executing the inquest panchnama. Statements of witnesses were recorded. The seized muddemal was sent for chemical analysis. After completion of the investigation, charge-sheet was filed.

4. After committal of the case, charge was framed. Accused pleaded not guilty. Trial has been conducted. Prosecution has examined in all seventeen witnesses to bring home the guilt of the accused. After considering the evidence on record and hearing both sides, the learned trial Judge has held that the prosecution has proved that accused has committed murder of his daughter and therefore, sentenced him to suffer imprisonment for life and to pay fine of Rs.500/-, in default to suffer simple imprisonment for one month for the offence punishable under Section 302 of the Indian Penal Code. Set off under Section 428 of the Code of Criminal Procedure has been granted.

5. Learned Advocate Mr. Patil representing the appellant vehemently submitted that the learned trial Judge has not appreciated the evidence properly. He submits that certain facts were presumed by the learned trial Judge. Learned trial Judge failed to consider that PW-8 Bhikubai, who is the mother of the deceased and wife of the appellant, was admittedly inside the house when the alleged incident took place. She has not supported the prosecution in entirety. The illiteracy of the appellant and PW-8 Bhikubai ought to have been considered by

the learned trial Judge. The FIR in question i.e. Exhibit-56 was taken down by PW-16 API Vijay Deshmukh attached to Paldhi Outpost, but the basic nature of the said FIR was the confession given before the Police and therefore, there was clear bar under Section 25 of the Indian Evidence Act. It cannot be read in evidence for any purpose. He relied on the decision in ***Aghnoo Nagesia vs. State of Bihar, (1966) AIR (SC) 119 : (1966) Cri.LJ 100***, wherein it has been observed that:-

"A statement or confession made in the course of an investigation may be recorded by a Magistrate under Section 164 of the Code of Criminal Procedure subject to the safeguards imposed by the section. Thus, except as provided by Section 27 of the Evidence Act, a confession by an accused to a police officer is absolutely protected under Section 25 of the Evidence Act, and if it is made in the course of an investigation, it is also protected by Section 162 of the Code of Criminal Procedure, and a confession to any other persons made by him while in the custody of a police officer is protected by Section 26, unless it is made in the immediate presence of a Magistrate."

6. Learned Advocate further placed reliance on the observations in ***Aghnoo Nagesia*** (supra), wherein it is observed that confessional statement containing other details about motive, preparation, opportunity etc. of the crime are inadmissible and first information amounting to confessional statement is not receivable in evidence. Learned Advocate for

the appellant has then relied on the decision in ***Vistari Narayan Shebe vs. the State of Maharashtra, (1978) Cri.L.J. 891***, wherein it has been held that a confession made to a Police Patil is inadmissible in evidence. Learned Advocate for the appellant has also placed reliance on the decision of the Division Bench of this Court in ***Ram Singh vs. State of Maharashtra and another, (1999) Cri.L.J. 3763***, wherein it has been held that Police Patil is a police officer and therefore confession made to him is not admissible in evidence. Therefore, if we consider that the said FIR Exhibit-56 cannot be read in evidence then there is only evidence in the form of extra judicial confession given to PW-5 Mukesh Machindra Patil. His evidence also cannot be considered as he says that he had then went to call the Police Patil of Dongaon Khurd. PW-4 Bharat Baviskar is the said Police Patil. In the cross-examination he gives a different story as to what he had done after the Police had arrived. Prosecution had examined PW-6 Deepak Patil, who is son of the appellant and was supposed to be in the house at the night time but he has also not supported the prosecution. When the material witnesses were not supporting the prosecution, the learned trial Judge ought to have given benefit of doubt. Further, even Bhikubai was sleeping near deceased Deepali as per the story of the

prosecution. How she could not have got up when the accused was allegedly strangulating Deepali, is a question. All those persons inside the house would then be under the array of suspicion but only the appellant has been prosecuted and convicted. Learned Advocate relied on the Single Bench decision of this Court in ***Criminal Appeal No. 120 of 2000 (Shaikh Mahemood Sk. Osman vs. The State of Maharashtra)***, ***decided on 19th March 2014*** and submitted that on the similar set of facts when out of two accused one was convicted only on the basis of the alleged confessional statement to the Police, the said conviction was set aside. He, therefore, submitted that the conviction awarded to the appellant is illegal and deserves to be set aside.

7. Per contra, the learned APP supported the reasons given by the learned trial Judge while convicting the appellant. He submitted that though PW-8 Bhikubai had turned hostile, yet when permission was sought to put questions in the nature of cross-examination, she has given certain admissions. She has stated that after dinner on 26th July 2017 they all had slept by closing all the doors of the house. She then admits that she herself and accused had gone to the house of the Police Patil of

the village at night time and at that time Mukesh, son of Police Patil was present. She also states that they narrated the incident to Mukesh. Mukesh then gave phone call to his father – Police Patil and then Police came to the village. She has admitted that she has given statement under Section 164 of the Code of Criminal Procedure before the Magistrate. There was no reason to disbelieve the testimony of PW-5 Mukesh. He has stated that his father is Police Patil of village Dongaon Budruk and his father was not present in the house when the accused had come to their house along with wife. PW-5 Mukesh has categorically stated that the accused had confessed before him that he has killed his daughter by strangulating with a cord. Therefore, PW-5 Mukesh gave phone call to his father, who then asked to call Bharat Baviskar i.e. PW-4, who was the Police Patil of village Dongaon Khurd. PW-4 Bharat and PW-5 Mukesh had then gone to the house of the accused and saw that the girl was killed. She was on the cot and the cord was around her neck and therefore, they had taken to accused to Paldhi Police Outpost. Testimony of PW-5 Mukesh stood corroborated by PW-4 Bharat. The medical evidence i.e. PW-11 Dr. Kapileshwar Choudhari who conducted the autopsy, has concluded that the death of Deepali was due to strangulation. The dead body was found inside the house of the

accused and therefore, taking into consideration these pieces of evidence, certainly only one conclusion can be drawn that the accused is the perpetrator of the crime. Learned APP, therefore, prayed for dismissal of the Appeal.

8. There is no much dispute as regards the death of Deepali to be homicidal in nature. PW-11 Dr. Kapileshwar Choudhari has proved postmortem report Exhibit-40. He found ligature mark, of which dimensions are given in Column No.17 and even the cord with which the strangulation has been made, was also referred to him and after taking into consideration both, he has opined that the probable cause of death of Deepali was 'strangulation'. The accused challenges the allegation that he is the author of the crime and therefore, the evidence is required to be scanned.

9. At the outset, it is to be noted that the prosecution itself had come with the case that the appellant had gone to Police Patil of Dongaon Budruk at night time but he was not present in the house and therefore, accused met his son, PW-5 Mukesh. As per the prosecution story, accused had confessed before PW-5 Mukesh, who then made phone call to his father who was out of station and then as per the direction of his father, PW-5 Mukesh

called Police Patil of Dongaon Khurd i.e. PW-4 Bharat, before whom also the accused confessed. Then PW-4 Bharat as well as PW-5 Mukesh taken the accused to the Police Station whereupon FIR Exhibit-56 came to be lodged. Certainly we agree with the submission on behalf of the appellant that the confession which was given or confessional FIR which was given by the accused to the Police Officer PW-16 API Deshmukh is hit by the bar under Section 25 of the Evidence Act and to that extent the ratio laid down in ***Aghnoo Nagesia*** (supra) is applicable. However, in the said decision itself it has been held that the information given by the accused at the time of FIR is admissible against him as evidence of conduct under Section 8 of the Evidence Act. This legal position has been recently reiterated in ***Digambar vs. State of Maharashtra, AIR 2023 S.C. 2827***. Therefore, Exhibit-56 will have to be considered under Section 8 of the Evidence Act regarding the conduct of the appellant.

10. If we consider the line of evidence which the prosecution intended to lay, was that the confession was given first in time by the accused to his wife, PW-8 Bhikubai, but she has turned hostile. After the permission to put questions in the nature of cross-examination, she would agree to the fact that on 26th July

2017 after dinner all of them slept and before that all the doors of the house were closed. She denied the suggestion that accused woke her up around 1.00 a.m. and told that he has killed Deepali by strangulating with a cord. But she then admits that she herself and accused had gone to the house of the Police Patil at night time and met PW-5 Mukesh, son of the Police Patil. She also admits that they narrated the incident to Mukesh and Mukesh gave phone call to another Police Patil and then Police came to the village. Thus, to a next stage PW-8 Bhikubai is supporting the prosecution that she was accompanying the accused when he went to the house of PW-5 Mukesh after the incident. Thus, it can be seen that with ulterior motive she was trying to save her husband and therefore, had not supported the prosecution story.

11. The testimony of PW-4 Bharat and PW-5 Mukesh stood corroborated and it has been reflected as to what they have said in their examination-in-chief. The cross-examination of PW-5 Mukesh would show, rather it was extracted from him, as to what he had done after the information was given by the accused. The said cross-examination has rather filled up the lacuna that was left by the prosecution. There is nothing in the

cross-examination of PW-5 Mukesh or PW-4 Bharat to indicate that they had intention to implicate the accused. Therefore, the testimony of these two witnesses is believable. It certainly further indicates that when they went to the house of the accused after the accused had disclosed them the fact, the dead body of Deepali was inside the house of the accused. It is to be noted that there is absolutely no other suggestion to these witnesses which would try to indicate that though the girl was killed outside, the accused and PW-8 Bhikubai had brought the dead body inside their house. It is tried to be then suggested that father of PW-5 Mukesh had directed them to keep the dead body of the girl inside the house of the accused and accordingly they had done it. There was absolutely no reason why father of PW-5 Mukesh would ask PW-4 Bharat and PW-5 Mukesh to act in such a manner.

12. It has been tried to brought on record through the cross-examination of PW-8 Bhikubai, by the accused that one Subhash Patil who was Sarpanch of the village, was angry with Deepali and he is the relative of Manohar @ Bala and then the Police were acting under the influence of Sarpanch and Police Patil. It has been tried to be projected that the dead body of Deepali was

lying near a school and when PW-8 Bhikubai and accused went to Police Patil to inform the said fact, the Police Patil asked them to keep the dead body in their house and accordingly they kept the same. Though this witness and also the accused appeared to be illiterate, it cannot be that they would be illiterate to such an extent that they would do anything which is told by the Police Patil. Under the said circumstance, whatever admissions have been extracted from the cross-examination of PW-8 Bhikubai, by the accused cannot be considered at all, as it appears to be an after thought defence.

13. The testimony of PW-6 Deepak, the son of the accused would try to give a different picture as if he was not aware about anything which was going on in his house. He has claimed ignorance for almost everything. Now in the cross-examination by the accused, he says that in the night of incident, he had gone to the house of one Namdeo Patil as Namdeo's family had gone out of station and he says that in the morning of 27th July 2017 he was in the house of Namdeo. If that is so, then how in the examination-in-chief he has made a statement that Deepali was lying dead behind the school and she was brought by his

father inside the house. This shows that he has purposely turned hostile and was interested in suppressing the facts.

14. The testimony of PW-4 Bharat has been attacked by the learned Advocate for the appellant taking help of the decision in ***Ram Singh vs. State of Maharashtra and another***, (supra), wherein it was held that the Police Patil is a Police Officer and therefore, confession made before him is not admissible in evidence. In fact it was expected from an Advocate that he should possess up-to-date knowledge of law and should not cite any decision which is no longer a good law. The Full Bench of this Court in ***Rajeshwar s/o Hiranman Mohurle (in jail) vs. State of Maharashtra, 2009 (4) Mh.L.J. 483*** has held that Police Patil appointed under the Maharashtra Village Police Act, 1967 is not a "Police Officer" for the purpose of Section 25 of the Evidence Act. It was specifically observed that officer other than a police officer, invested with powers of an officer-in-charge of a police station is not entitled to exercise all the powers under Chapter XII of the Code including the power to submit a report or charge-sheet / challan under Section 173 of the Code. The Police Patil under the Village Police Act is also not a Police Officer on the deeming fiction of law as there is no provision in the

Statute which specifically or even otherwise requires the Police Patil to be treated as a Police Officer for all intent and purpose and therefore confession made before him would not attract the bar of Section 25 of the Evidence Act. Under the said circumstance, the confession made before PW-4 Bharat was admissible and not at all hit by any of the provisions of law. The confession was made by the accused before PW-5 Mukesh also and that was prior in time. PW-5 Mukesh was not the Police Patil and therefore, his testimony is trustworthy and acceptable.

15. The position therefore, stands that the dead body was found inside the house of the accused and the incident has admittedly taken place at night time. The accused has failed to prove even by preponderance of probabilities that Deepali was found dead at a different place. Therefore, on this count also Section 106 of the Evidence Act would come into play. Though everything was tried to be extracted in the cross-examination of PW-8 Bhikubai by the accused to take the case out of the purview of Section 106 of the Evidence Act, but in his statement under Section 313 of the Code of Criminal Procedure the accused is totally silent as to why he allegedly believed or obeyed the direction of the Police Patil. Answer to Question No.5 would show

that his daughter was lying behind a school and Police Patil and his son asked him to bring her in the house. He is thus indicating that Machindra Patil and his son, PW-5 Mukesh had asked him to bring the dead body of his daughter inside the house. PW-3 Machindra Patil has been examined and he has clearly stated that on the day of incident he had gone to Saver. His son had then given a phone call around 2.00 a.m. on 27th July 2017 and told about the incident. There is nothing in his cross-examination which will cast doubt over his veracity or would indicate that he had any reason to implicate the accused.

16. PW-1 Mangalmurti Shirsath is the panch to the spot panchnama and seizure of clothes of the deceased. PW-2 Vidyabai Chitte is the panch to the inquest panchnama. In their testimony, they have supported the prosecution. It has been tried to be brought on record through PW-2 Vidyabai that since Manohar and Police Patil are from the same caste, the accused has been tried to be implicated. Such admissions cannot be considered at all. PW-12 is Manohar @ Bala and he has turned hostile. He has even denied that he was arrested after he had allegedly kidnapped deceased. But his testimony is of no value, in a sense that it is neither favourable to the prosecution nor

favourable to the accused. The other witnesses are the Police Officers including the Investigating Officer.

17. Thus on revisiting and re-appreciating the evidence, we found that the prosecution has proved that the accused has killed his daughter by strangulation and therefore, his conviction for the offence punishable under Section 302 of the Indian Penal Code by the learned trial Judge is perfectly legal. It requires no interference and therefore the Appeal deserves to be dismissed.

18. Accordingly, the Appeal stands dismissed.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE