



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

CRIMINAL APPEAL NO.744 OF 2016

Husenkhan Nurkhan Pathan
Age: 36 years, Occu.: Driver,
r/o. Patelnagar, Chikalthana,
Aurangabad.

..Appellant

Versus

The State of Maharashtra

..Respondent

...
Advocate for Appellant : Mr.Shaikh Kayyum Najir
APP for Respondent : Mr.A.M.Phule

...

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

**RESERVED ON : 10 OCTOBER, 2023
PRONOUNCED ON : 17 OCTOBER, 2023**

JUDGMENT (PER ABHAY S. WAGHWASE, J.) :

1. By invoking Section 374 of the Code of Criminal Procedure Code, convict appellant is hereby assailing the judgment and order of conviction passed by the learned Additional Sessions Judge-6, Aurangabad in Sessions Case No.341 of 2014 holding him guilty and sentencing him to suffer imprisonment for life for commission of offence under Section 302 of the Indian Penal Code (IPC).

CASE OF PROSECUTION IN NUTSHELL

2. Appellant resided with his wife and children. On 21-08-2014, M.I.D.C.

Police Station, Cidco, Aurangabad, received wireless information about murder of a woman in the backside of Babanrao Dhakne High School. PW1 Tadvī (PSI) when reached the spot, appellant told that he had slept with his family in his house, some unknown persons entered in the house to commit theft and assaulted his wife with stone. On such information, crime was registered against unknown person. Police suspected that appellant was misleading Police and was hiding the truth. Therefore, detailed enquiry was made with him during which he confessed that on 21-08-2014 he said to his wife that he has to maintain his old aged parents. That his wife reacted by saying that after marriage, his parents are as good as dead for her and she further said that “तुम्ही मरा किंवा मला मारून टाका” (you die or you kill me). In anger, he brought a stone and thrust it forcibly on the head of his wife. Seeing her injured, he switched off the light and raised hue and cry to woke up the neighbours and informed them that thieves have entered his house. On receipt of such information, Police arrested him. Investigation was undertaken during which it was revealed that accused had committed murder of his wife that night and hence, he was chargesheeted and tried. Learned trial Judge had appreciated the evidence and on hearing both the sides held accused guilty and sentenced him to suffer imprisonment for life, which is now questioned before us.

SUBMISSIONS

On behalf of appellant :

3. In support of relief, learned Counsel for the appellant would point out that there is apparently false implication. Alleged disclosure being confession to Police, is inadmissible. According to him, there is no eye witness. He further submitted that there is only evidence of child witness but child was tutored and therefore, his evidence ought not to have been relied and accepted by the learned trial Court. On this point, he invited our attention to the various citations and would submit that taking into account the written arguments, learned trial Court ought to have accepted defence. There is non-application of mind and improper appreciation of evidence resulting into wrongful conviction and for above reasons, he submitted that appeal deserves to be allowed. In support of his submissions, learned Counsel for the appellant has relied on the following citations:

- (a) *Bhausahab Maruti Kalane and Others v. State of Maharashtra; 2006(1) Bom.C.R. (Cri) 317.*
- (b) *Hanuman Kisanrao Kadam v. State of Maharashtra; 2006(1) Bom.C.R. (Cri) 281.*
- (c) *Zafar v. State of U.P. ; (2003) 3 SCC 51.*
- (d) *Bhagwan Singh and Others v. State of M.P.; AIR 2003 Supreme Court 1088*
- (e) *Sangili Alias Sanganathan v. State of Tamil Nadu Represented by Inspector of Police; (2014)10 SCC 264*
- (f) *Sukhjot Singh v. State of Punjab; (2014) AIR SCW 2803.*

- (g) *Laxman Bapurao Ghaiwane v. State of Maharashtra; 2012(4) Bom.C.R. (Cri) 580.*
- (h) *Vandana wd/o Yogesh Mankar v. State of Maharashtra; 2015(4) Mh.L.J. (Cri) 165.*
- (i) *Murlidhar and others v. State of Rajasthan; AIR 2005 Supreme Court 2345.*
- (j) *Piyarul Sk. v. State of West Bengal; 2022 SCC Online Cal 1319.*
- (k) *Hari Om Alias Hero v. State of Uttar Pradesh; (2021) 4 SCC 345.*

On behalf of State :

4. Learned APP, in support of the impugned judgment, would submit that there is no dispute that accused was in the company of deceased wife. Their children were also present in the house. **PW5** Abujarkhan, child witness, who has seen his father committing the act, has deposed before the Court. His evidence has remained unshaken. Evidence of child witness is rightly accepted by the learned trial Court. Death is homicidal one and therefore, it is his submission that no fault can be found in the impugned judgment of conviction.

5. In light of above submissions, we have carefully gone through the evidence on record. Following are the witnesses on behalf of the prosecution :

EVIDENCE ON BEHALF OF PROSECUTION

PW1 Dagdu Balu Tadvī is Police Officer / informant who lodged report on

receiving information from the accused. His evidence is at Exh.14.

PW2 Kayyumbaig Haidarbaig Mirza is Pancha to spot panchanama. His evidence is at Exh.16. Spot panchanama is at Exh.17.

PW3 Taslim Banu Shaikh Shakil is Pancha to inquest panchanama. Her evidence is at Exh.20. Inquest panchanama is at Exh.21.

PW4 Sharad Machindra Manal is Pancha to seizure of clothes of accused. His evidence is at Exh.22. Seizure panchanama is at Exh.24.

PW5 Abujarkhan Husenkhan Pathan is son of deceased and accused. He is child witness. His evidence is at Exh.33.

PW6 Sk. Shakil Sk. Tajmohmad is neighbour of deceased and accused. His evidence is at Exh.37.

PW7 Sachin Nanasaheb Darandale is Autopsy Doctor. His evidence is at Exh.39.

PW8 Nirmala Mansing Pardeshi (PI) is the Investigating Officer. Her evidence is at Exh.51.

6. Here admittedly death of deceased Shaminabee has taken place in the house which is occupied by even appellant husband that too at night time. Here in our opinion, evidence of **PW5** Abujarkhan, child witness and **PW6** Sk.Shakil is crucial. Case of the prosecution is relied on the evidence of these two witnesses.

7. As **PW5** Abujarkhan is a child witness, before proceeding to analyze the child witness evidence, it would be useful to first give a brief account regarding law on the manner of appreciation of evidence of child witness and its evidentiary value. There are various landmark pronouncements on above aspect and a few could be named as under:

In *Mangoo and another v. State of Madhya Pradesh*; AIR 1995 SC 959, 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.”

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.”

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.”

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.”

In ***Nivrutti Pandurang Kokate and ors. 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.”

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 this 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 require 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.”

8. Bearing in mind above settled legal position, we have undertaken the exercise of re-analyzing the testimony of **PW5** Abujarkhan, child witness.

On minutely and meticulously going through the evidence of **PW5** Abujarkhan, child witness, it is noticed that child has deposed in his evidence at Exh.33 that on that day he returned from School. His father was ill and was

sleeping on the cot whereas his mother was doing the household work. That night his mother did not allow his father to take dinner properly saying that since eight days he was not doing the work. On such count, there were quarrels between his parents. In the night, his mother, two brothers slept in on one quilt on the ground whereas he and his father watched T.V. programme by sleeping on the cot. Then they both slept. Child deposed that he and his father shared one quilt for sleeping. His father woke up and that because of dragging of the quilt, he also woke up. Here he claims that he asked his father where he was going to which appellant replied that he was going for urination and he asked this child to go back to sleep. Child witness stated that after some time, his father brought stone and assaulted on the head of his mother and he threatened the child to sleep silently. His father also switched off the light and thereafter raised shouts “चोर आले चोर आले” (thieves have come thieves have come). By that time, neighbours gathered. Shakilmamu and Taslimanti also came there and they asked his father to switch on the light. His father banged his head on the cot saying that thieves have come and beaten Shamina. He stated that while he was going out of house, he saw mother has sustained head injury. He stated that his father falsely stated about arrival of thieves.

Above witness is subjected to extensive **cross-examination** during which he initially stated about the Standard in which he took education. He gave names of neighbours and their family members. In paragraph no.4 of the

cross-examination, he stated that when he went from the place of incident to the house of PW5 Sk.Shakil and PW3 Sk.Taslim, he was awake. He is asked who all were present in the house of Sk.Shakil. He answered that his relatives came from Aurangabad and that he was in the house of Sk.Shakil till Sun rise. He answered that when he was present in the house of Sk.Shakil, uncles of his mother asked him about the incident of his mother. Police also made inquiry about the incident and Police took him in the Police Station in the morning. He denied that relatives of his mother were accompanying him. He is questioned where the funeral ceremony took place. He flatly denied that his relatives told him what to tell to Police. He answered that Police recorded his statement only once. In paragraph no.6 following omissions are brought :

- (i) After returning from School, accused was sleeping on the cot and his mother was doing household work.
- (ii) Accused was not allowed by his wife to take dinner properly.
- (iii) He was lying on cot and watching T.V. programme.
- (iv) He and accused were using one quilt.
- (v) His father telling him that he was going for urination.
- (vi) That Police had brought sniffer dog and his father was banging his head on the cot.

He flatly denied that whatever he deposed is false.

9. **PW6** Sk.Shakil is also an important witness and he seems to be the

neighbour. It has come in his evidence that on 21-08-2014 in the night he heard shouts of accused at 01:30 a.m. and so he came out of the house and saw accused knocking the door of Sk.Musa Patel and accused informed that two thieves have come and pelted stones and run away. Witness stated that he saw bleeding injury on head of Shaminabee and stone lying there. He also stated that children were present in the house. He stated that his wife took the children of Shamina to his house. After 5 to 10 minutes, Police came there. He identified the stone shown to him in the Court.

Above witness in **cross-examination** answered that deceased was his relative. He is questioned as to when he first time entered the house of accused whether Jadhavbai accompanied him and he denied the same. He admitted that two children of deceased had slept on the cot and they were taken away with the help of Jadhavbai after waking them out. He answered that children were taken to his house. He stated that Police were present at the spot till 08:00 a.m. His statement was recorded on both 22-08-2014 and 23-08-2014. He stated that children were taken by Police. He denied accompanying them to Police Station.

10. On carefully going through the above evidence of **PW5** Abujarkhan, child witness and **PW6** Sk.Shakil, in our opinion, firstly evidence **PW5** Abujarkhan, child witness can safely be relied because child has categorically stated that when he returned from the School, there was quarrel between his

parents. Child has also stated this his mother refused to give dinner to accused. Therefore, there is reason for accused to be in anger. Child has further categorically stated that he slept with his father. PW5 Abujarkhan has categorically stated that when his father woke up, he also woke up and he saw his father going outside on the pretext of urination and coming with stone and hitting it on the head of his mother. So much part of his testimony virtually remained undisturbed and unshaken. Circumstances at scene of occurrence rules out entry of thieves in house. Child has deposed that his father falsely told others about thieves entering the house. In spite of repeated suggestions, child has denied that he was tutored to deposed.

11. No doubt it is settled law that evidence of child witness should not be readily accepted and relied as there is possibility of tutoring. Even rulings relied by the learned Advocate are on such point, but in our opinion, in the case in hand, the manner of cross-examination and answers given by child completely rules out the possibility of he being tutored. This child was shocked on seeing his father assaulting his mother with stone. Therefore, his statement was not recorded immediately. Further, even his statement is recorded under Section 164 of the Code of Criminal Procedure and he has reiterated whatever he has deposed earlier. As stated above, repeated attempts to impeach his testimony went futile. Therefore, here there is no reason to disbelieve or discard said testimony.

12. Apart from child witness account, **PW6** Sk.Shakil, immediate neighbour has also lend support to evidence of child witness. He stated that he woke up on shout being made by accused. He had visited scene of occurrence. He had seen deceased with injury and other children in deep sleep and children being taken by Jadhavbai. He has deposed about PW5 Abujarkhan being taken to his house and thereafter, relatives of deceased arriving and children being taken by Police to Police Station. There was no reason for this witness to falsely implicate the accused. Infact this witness has merely stated about PW5 Abujarkhan being taken to his house and thereafter, being taken by Police. Therefore, on conjoint reading of testimonies of **PW5** Abujarkhan and **PW6** Sk.Shakil as ring of truth, there is no reason to doubt or disbelieve versions of PW5 Abujarkhan and PW6 Sk.Shakil. **PW7** Dr.Darandale, Autopsy Doctor has also opined about death of Shaminabee to be homicidal one.

13. Learned Counsel for the appellant would strenuously submit that this is not at all a case attracting offence under Section 302 of the IPC as according to him, the alleged incident is fall out of sudden quarrel and it was not premeditated murder and even there was no intention or motive. According to him, at the most, the case would attract offence under Section 304 Part II of the IPC.

We are not impressed with the above submission for the simple reason

that, going by the evidence of PW5 Abujarkhan, child witness, it appears that quarrel had taken place before bed time. Infact it cannot be said to be a quarrel as merely deceased had refused to serve dinner for not earning. Alleged incident has occurred after considerable lapse of time after midnight. The quarrel ended at the time of dinner and subsequently, they all had gone to sleep. Thereafter, appellant woke up, went outside and came back with a stone and thereafter, forcibly hit it on the head of deceased, which was watched by PW5 Abujarkhan. Therefore, his intention is explicit, he has knowledge about degree of damage that would be caused by forcibly thrusting stone on a vital part like head. Therefore, in our considered opinion, the case will not attract charge under Section 304 Part II i.e. culpable homicide not amounting to murder.

14. We have gone through the impugned judgment. The learned trial Court has correctly appreciated the evidence and has committed no error whatsoever in holding accused guilty for charge of murder. No case being made out, we proceed to pass following order :

ORDER

Criminal Appeal No.744 of 2016 stands dismissed.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)