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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 619 OF 2021**

Smt. Sangita Vilas Kiwade

Age-51 years Occu-Nil

R/o: 408/12, Near Laxmi

Mangal Karyalaya, Near

Super Loundary, Mukund

Nagar, Pune at present in

Yerwada Central Prison, Pune.

....Appellant

Versus

The State of Maharashtra

at the instance of Swargate

Police Station

....Respondent

Mr. Aniket Vagal, Advocate for the Appellant

Mrs. P. P. Shinde, APP for the State

**CORAM : REVATI MOHITE DERE &
GAURI GODSE, JJ.**

DATE : 4th JULY 2023

JUDGMENT: (PER: GAURI GODSE, J.)

1. This is an appeal preferred by the accused challenging the Judgment and Order dated 1st March 2014 passed by the Additional Sessions Judge, Pune in Sessions Case No. 137/2011 by which the appellant is convicted and sentenced as under:

- i) for the offence punishable under section 302 of the Indian Penal Code, 1860, ('IPC') to suffer imprisonment for life and to pay a fine of Rs. 500/-, in default to pay the fine amount, suffer imprisonment for three months.
- ii) for the offence punishable under section 307 of the IPC, to suffer rigorous imprisonment for a period of 10 years and to pay a fine of Rs. 250/-, in default to pay the fine amount, suffer imprisonment for one month.
- iii) for the offence punishable under section 363 of the IPC, to suffer rigorous imprisonment for a period of 5 years and to pay a fine of Rs. 250/-, in default to pay the fine amount, suffer imprisonment for one month.
- iv) for the offence punishable under section 32-B(b) of Bombay Money Lender's Act, to pay a fine of Rs. 250/-, in default to pay the fine amount, suffer imprisonment for one month.

All the aforesaid sentences are directed to run concurrently.

2. According to the prosecution, the incident took place on 18th November 2010 between 7:00 pm to 7:15 pm at Mukundnagar, Dias plot Canal at Gultekdi, Pune. It is alleged that the Appellant was

carrying out the illegal business of money-lending and prior to two years of the incident had lent Rs. 50000/- at 10% interest to the complainant. Thus, keeping a grudge in mind regarding not repaying the loan amount, the Appellant kidnapped the complainant's grandchildren – Rohit aged 9 years, Rahul aged 7 years, Anmol aged 5 years and Tejas aged 3 years and took them in an auto-rickshaw to the canal and pushed Rohit, Rahul and Anmol in the canal and tried to kill them and pushed Tejas into the canal water, as a result of which he drowned and his body was found on 21st November 2010 in the canal at Shinde Vasti, Hadapsar, whereas Rohit, Rahul and Anmol came to be rescued.

3. It is the prosecution case that on 18th November 2010 at about 7:00 p.m., the grandsons of the complainant, namely Rohit, Rahul, Anmol and Tejas, had gone to the house of the appellant to watch television. After 5-10 minutes, Rohit came back and informed that the appellant was taking them to eat ice cream, and he left. As the said grandchildren of the complainant did not return home, she and her

family members started their search. At around 8:15 p.m. to 8:30 p.m., police reached the house of the complainant with Rohit, Rahul and Anmol. Rahul informed that the appellant had taken all of them in an auto-rickshaw to the canal at Dias plot and had pushed them into the canal and at that time, the appellant's daughter Ranji who was present, had objected to the appellant's act i.e. of pushing the children into the canal. According to Anmol he raised hue and cry, pursuant to which the people who had gathered at the spot, saved Rahul and Rohit; however, Tejas went missing. Hence, F.I.R. was lodged against the appellant alleging offences punishable under sections 363, 366 and 307 of the IPC.

4. After three days, the police recovered the body of Tejas, from the canal near Mahadev temple at Shinde Vasti, Hadapsar, Pune. Post-mortem of Tejas revealed the cause of death to be asphyxia as a result of antemortem drowning. Pursuant thereto, section 302 of IPC was added to the said C.R. The offence punishable under Section 32(b) of the Bombay Money Lenders Act 1946 was also added.

5. The prosecution examined total 8 witnesses in support of its case. However, prosecution case rests mainly on the evidence of 4 child witnesses and the evidence of the complainant-Nanda and P.W.9-Laxman Pavale. The evidence reveals that P.W. 5 - Rohit and P.W. 7- Rahul were thrown by the appellant in the canal alongwith Tejas; however, when the appellant attempted to push P.W.6-Anmol, he bit her and ran away and informed the people nearby, pursuant to which the people saved Rohit-P.W. 5 and Rahul-P.W.7 from drowning. However, the youngest child, Tejas, aged three years, could not be saved and got drowned. The fourth child witness, i.e. P.W. 8-Sunil, is also an eye witness. Amongst the other witnesses examined by the prosecution, P.W. 1-Nanda is the complainant, and the grandmother of Anmol, Rohit, Rahul and the deceased Tejas, and P.W.9-Laxman is the person who removed Rohit and Rahul from the canal. The appellant did not examine any defence witness. The learned Additional Sessions Judge, Pune after examining the evidence so adduced and after hearing the parties, convicted the appellant as stated hereinabove in paragraph 1.

6. We have heard Mr. Vagal, learned counsel for the appellant and

Mrs. Shinde, learned APP for the State.

7. Learned counsel for the appellant submitted that the prosecution case, essentially rests on the evidence of child witnesses. He submitted that a perusal of the evidence of the child witnesses would show that they were tutored hence, cannot be relied upon. Learned counsel, on going through the evidence of the three child witnesses, submitted that the version of the child witnesses would show that the facts narrated by them with respect to going to the house of the appellant and thereafter, for eating ice cream is very natural as the houses of the appellant and the complainant are situated nearby and in the same locality and that they were known to each other well. He submitted that the evidence of child witnesses and other witnesses was inconsistent and thus not reliable. He submitted that the narration of the incident by the child witnesses and the material facts in their statements raises some doubt regarding the veracity of the prosecution case. He thus submitted that it was only an unfortunate incident and that there was no intention on the part of the appellant to commit the murder of the minor child Tejas.

Learned counsel, thus, submitted that the prosecution has not duly proved the commission of the offence under section 302 of the Indian Penal Code. In the alternative, he submitted that having regard to the evidence on record, at the highest, the offence would be one under Section 304 part II of IPC.

8. Per contra, learned APP submitted that the evidence of child eye witnesses i.e. P.W. 5-Rohit, P.W. 6-Anmol, P.W. 7-Rahul and P.W. 8-Sunil is consistent and that there is no reason to disbelieve their testimony. She submitted that even the evidence of P.W. 1-Nanda is consistent with the narration of facts as stated by all the four child witnesses. According to the learned APP, the evidence on record clearly shows that the appellant with an intention to commit the murder of all the four minor children had taken them to the canal and pushed them in a canal, to cause their death, and as such, it was a pre-meditated act. She further submitted that a perusal of the evidence would show that the appellant's daughter was present at the spot of the incident and that she had stepped in to stop the appellant from throwing the children in the canal

and that this fact has also been consistently stated by all the child witnesses. She thus submitted that no interference was warranted in the impugned Judgment and Order.

9. We have considered the submissions. We have perused the record. To appreciate the submissions made on behalf of the Appellant, it is necessary to make reference to the evidence of the prosecution witnesses. It has come in the evidence of P.W. 1-Nanda-the complainant, that she, along with her family, resides in the Mukund Nagar area of Pune; that the appellant alongwith her family resides near her house; that she had taken a hand loan of Rs. 50000/- from the appellant which she had returned along with an additional amount, however, the appellant was demanding more money; that on the morning of 17th November 2010, the appellant had come to her house and demanded an amount towards the interest; and that she had told the appellant, that she had not received the amount of Bhishi and that she would give the same on the the next day; According to P.W. 1-Nanda, the incident took place on 18th November 2010; that on the said day; her four

grandchildren had gone to the appellants house to see television and Rohit came after 5 to 10 minutes and told her that the appellant was taking them out to eat ice-cream and he left. She further stated that since her grandsons did not return home despite sometime had passed, hence, they started searching them; thereafter, in between 8.00 p.m. to 8.30 p.m., the police came alongwith Rohit, Rahul and Anmol and at that time Rohit told her that the appellant had pushed them into the canal and Tejas had drowned in the water. P.W. 1 stated that at that time, Rohit had also told her that Ranji, who was the daughter of the appellant, was telling the appellant not to push the children (Taaku Nako). In cross-examination, P.W. 1-Nanda has denied the suggestions put to her i.e. that the appellant's husband was a witness of one Jituri, who had filed an eviction suit against her (complainant) husband in respect of the house where she is residing, and therefore, to avoid any eviction action against them; she was falsely implicating the appellant. There is nothing in the cross-examination that has come on record so as to discredit her testimony.

10. It has come in the evidence of P.W. 6-Anmol that he, along with Rahul, Rohit and Tejas, had gone to the house of the appellant to watch television in the evening on 18th November 2010. He has further stated that the appellant had taken them in an auto-rickshaw to give them ice-cream, that after reaching the canal, the appellant had thrown Rahul, Rohit and Tejas in the canal; however, Anmol bit her and ran from the spot and told the people around what had happened; Anmol further stated that the people who reached at the spot, removed Rohit and Rahul, however, Tejas could not be rescued and got swept into the canal. Anmol has further stated that the appellant's daughter Ranji was also present at that time. Anmol had also identified the clothes worn by him, Tejas, Rahul and Rohit, on the date of the incident.

11. According to P.W. 5-Rohit, he and Rahul-P.W. 7 were pushed by the appellant in the canal and that he had sustained injuries in the said incident. Rohit and Rahul have also stated the exact version of the incident as deposed by Anmol. Both, P.W. 5-Rohit and P.W.7-Rahul have stated that when they were thrown in the canal, Ranji (daughter of the appellant) told the appellant not to throw them. Both these witnesses

have identified their clothes worn by them and which were seized under a Panchanama.

12. The fourth witness is P.W. 8 - Sunil, is also child eyewitness; P.W.8-Sunil in his evidence, has stated that on the date of the incident at around 7.30 p.m., one woman, one girl and four boys went towards the canal; that the girl, along with that woman, started shouting and saying that "A Aai, Mula Feku Nako"; that one of the said boys went to him and told him that the said woman was throwing them in the canal; that on hearing the same, he raised an alarm, and the persons from the area (Vasti) came there and said persons held the said woman. P.W.8-Sunil has further stated that Sachin and Pavale removed two boys from the canal; after which the police also reached the spot. P.W.8-Sunil has identified the appellant in Court. Nothing material has been stated in the cross-examination by the said witness, so as to discredit his testimony.

13. The prosecution had examined Laxman Pavale as P.W. 9, who resides in the nearby area of the incident. He has deposed that he

noticed one woman, four children and one girl walking towards the canal on the date of the incident; that his nephew came shouting that one woman was throwing the children in the canal; hence, he and his nephew ran towards the canal, and saw one boy was standing near the canal and two boys were in the canal. According to P.W. 9-Laxman he and his associate Sachin Jagdhane removed two boys from the canal. P. W. 9-Laxman has identified the appellant who was present at the spot. He also identified Rohit and Rahul, who were present in the Court, as the two children who were removed by him and his associate from the canal.

14. After carefully perusing the evidence of all the aforesaid witnesses, we find that there are no material improvements, omissions or contradictions in their testimony. No plausible reason has been brought on record to show why the witnesses would falsely implicate the appellant. The evidence of the witnesses appears to be cogent, natural, trustworthy and inspires confidence. There is no reason to disbelieve their testimony.

15. The prosecution has examined the Medical Officer who conducted the post-mortem. He deposed that Tejas died due to “Asphyxia as a result of antemortem drowning”. The panch witness has identified the clothes of the four children, which they were wearing at the time of the incident and as such has confirmed the contents of the spot Panchanama.

16. One Suman Pawar, the neighbour of the appellant, was examined by the prosecution as P.W. 14. to prove the charge of money lending. She has stated that she resides two rooms away from the house of the appellant. She has stated that she had taken Rs. 25,000/- from the appellant 4-5 years prior to the incident and had paid Rs. 50,000/- to Subhash Kiwade. Nothing is elicited in the cross-examination of this witness to disbelieve her testimony with respect to the fact that the appellant was in the business of money lending.

17. At the time of the incident, P.W. 5-Rohit was 9 years old, P.W. 6-Anmol was 5 years old, and P.W. 7-Rahul was 7 years old, and the fourth victim child Tejas (deceased) was 3 years old. The fourth child

witness P.W. 8 – Sunil, was around 12 years old at the time of the incident. Their evidence was recorded after about two years of the incident. The learned Sessions Judge, before recording the evidence of the child witnesses, put preliminary questions to ascertain their understanding. The learned Judge has reproduced the answers to all the preliminary questions put to the child witnesses, and thereafter recorded his satisfaction that the child witnesses had a reasonable understanding and had properly answered the questions. The learned Judge also recorded that all the child witnesses were aware of the importance or the value of taking the oath. Law requires careful scrutiny of the evidence of minor witnesses to eliminate the possibility of tutoring. We have minutely gone through their evidence and after having carefully analysed their testimony, we rule out the possibility of them being tutored.

18. We have carefully examined the evidence of all the witnesses. Careful scrutiny of the evidence of all the child witnesses shows that all the three child witnesses who were victims were consistent in narrating the incident and that the evidence of the complainant, as well as other

witnesses, is also consistent and proves the sequence of events. The evidence indicates that all four minor children were taken by the appellant to the canal, and out of the four children, she threw Rohit, Rahul and Tejas into the canal, however, the fourth child-Anmol bit appellant and ran away, and gathered people, who removed Rohit and Rahul from the canal; however, the fourth child Tejas who was 3 years old, went missing and was found dead after three days. Evidence of the fourth eye witness - Sunil, also supports the version of Anmol, Rahul and Rohit.

19. The Hon'ble Supreme Court in the case of **Pradeep Vs. The State of Maharashtra**¹ in paragraph nos. 8 and 9 has observed as under:

“8. It is a well-settled principle that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. A child witness of tender age is easily susceptible to tutoring. However, that by itself is no ground to reject the evidence of a child witness. The Court must make careful scrutiny of the evidence of a child witness.

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The Court must apply its mind to the question whether there is a possibility of the child witness being tutored. Therefore, scrutiny of the evidence of a child witness is required to be made by the Court with care and caution.

9. Before recording evidence of a minor, it is the duty of a Judicial Officer to ask preliminary questions to him with a view to ascertain whether the minor can understand the questions put to him and is in a position to give rational answers. The Judge must be satisfied that the minor is able to understand the questions and respond to them and understands the importance of speaking the truth. Therefore, the role of the Judge who records the evidence is very crucial. He has to make a proper preliminary examination of the minor by putting appropriate questions to ascertain whether the minor is capable of understanding the questions put to him and is able to give rational answers. It is advisable to record the preliminary questions and answers so that the Appellate Court can go into the correctness of the opinion of the Trial Court.”

20. Keeping this well settled position of law in mind, we find that evidence of 3 child witnesses i.e. Rohit, Rahul and Anmol is truthful, consistent and natural. The said evidence of these 3 child witnesses is also corroborated by the 4th child witness Sunil and P.W. 9-Laxman who came to the spot as soon as Anmol raised hue and cry. Thus, the evidence of the three child witnesses who were the victims is duly corroborated even by the identification of clothes, finding of body of Tejas and evidence of P.W. 1-Nanda with respect to the motive.

21. The evidence on record clearly shows that the appellant, by luring the four minor children to eat ice cream, removed them from the lawful custody of the complainant without her consent and took them to the canal with the intention of committing the crime. Thus, the essential ingredients for the offence under Section 363 of IPC are clearly made out, and the appellant is rightly convicted for the said offence.

22. We further find that the evidence on record clearly indicates that the appellant, with a pre-determined mind with an intention and preparation to commit the crime, had taken the four minor children to

the canal, and she threw Rohit, Rahul and Tejas into the canal. Tejas being the youngest who was three years old, unfortunately drowned in the water. However, in view of the presence of mind shown by Anmol, he ran away by biting the appellant and thus gathered the nearby people who could, fortunately, save Rohit and Rahul. The act of throwing the two children who survived amounts to an attempt to commit their murder; in as much as, if the children had died, the appellant would be guilty of murder.

23. The evidence on record clearly reveals that the act of throwing three-year-old child Tejas into the canal was so imminently dangerous that the appellant had knowledge that, in all probabilities, it would cause his death. Thus, the death of Tejas squarely falls within the definition of murder under Section 300 of IPC, and it does not fall under any of the exceptions. Therefore, it amounts to culpable homicide amounting to murder, and Section 304 of IPC is not attracted. Thus the appellant is rightly convicted for the offence punishable under Section 302 of IPC.

24. As regards the conviction under Section 32-B (b) of the Bombay Money Lending Act is concerned, the evidence of P.W. 1 and P.W. 14 clearly shows that they had borrowed money from the appellant on interest. The appellant has not discharged her burden to show that she had any valid licence for lending money on interest. Hence, the prosecution has made out a case against the appellant for the offence punishable under Section 32-B (b) of the Bombay Money Lending Act, and thus the appellant is rightly convicted under the said provision of law.

25. We are therefore not inclined to accept the submissions made on behalf of the appellant that the appellant had not taken the children with the intention to commit the crime and that it was an unfortunate incident. We thus do not find any force in the submissions made on behalf of the appellant. Evidence on record shows that the prosecution has established the commission of the crime. Therefore, the prosecution has established its case against the appellant beyond a reasonable doubt.

26. Considering the direct evidence on record and for the reasons

recorded above, we do not find any substance in the alternative submission made by the learned counsel for the appellant, so as to convert the offence from Section 302 to one under Section 304 part II of IPC.

27. We do not find any merit in the Appeal. Hence, the following order is passed:

ORDER

I. Conviction and sentence of the appellant in the impugned Judgment and Order dated 1st March 2014 passed by Additional Sessions Judge, Pune in Sessions Case No. 137 of 2011 is hereby confirmed.

II. Appeal is accordingly dismissed.

III. Pending applications do not survive and hence, same are disposed of as infructuous.

GAURI GODSE, J.

REVATI MOHITE DERE, J.

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