



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

CRIMINAL APPEAL NO.576 OF 2023

Ritesh s/o Abhay Nade
Age 36 years, Occ. Labour,
R/o Rajnagar, Beyond Railway Track,
Aurangabad

... APPELLANT

VERSUS

The State of Maharashtra
through Police Inspector
Police Station, Mukundwadi,
Aurangabad

(Copy to be served on A.P.P.,
High Court of Judicature of Bombay,
Bench at Aurangabad)

... RESPONDENT

.....
Mr. V.B. Garud, Advocate for appellant
Dr. Mrs. Kalpalata Patil Bharaswadkar, A.P.P. for respondent
.....

**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ.**

Date of reserving judgment : 10th October, 2024.

Date of pronouncing judgment : 15th October, 2024.

JUDGMENT (PER R.G. AVACHAT, J.) :

The challenge in this appeal is to a judgment and
order of conviction and consequential sentence recorded by

Additional Sessions Judge, Aurangabad (Trial Court) in Sessions Case, No.295/2014, on 12/3/2018.

By the impugned order, the appellant has been convicted for the offence punishable under section 302 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.10,000/-, in default to suffer R.I. for one year. The appellant has also been convicted for the offence punishable under Section 377 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs.5000/-, in default to suffer R.I. for one year. The appellant is also convicted for the offence punishable under section 4 r/w 3 and Section 8 r/w 7 of the Protection of Children from Sexual Offences Act, 2012, however, no separate sentence is awarded as the appellant is convicted for the major offence, i.e. under Section 377 of the Indian Penal Code. The substantive sentences have been directed to run concurrently. The appellant has been acquitted of the offence punishable under Section 201 of the Indian Penal Code.

The appellant is, therefore, before us in this appeal.

3. The facts of the prosecution case in brief are as follows :

The appellant would reside as a tenant in one of the rooms owned by P.W.7 "S". P.W.7 had 3 children, 2 sons and a daughter. Amongst them, the daughter was elder. She was 7 years of age at the time of incident. The next child was 5 years old. While the victim child was of 3 years age at the relevant time. P.W.7 had gone to her mother's house, leaving behind her children with her mother-in-law.

4. On 13/7/2014, by little past 12.00 noon, the elder daughter along with her 2 younger brothers, went to the room of the appellant for getting pictures drawn/ drawing from the appellant. The appellant allegedly asked the daughter and elder son to leave his room, leaving behind the victim. They left. The appellant then allegedly committed sodomy (carnal intercourse) with the 3 year old child and then killed him with smothering. He then left the room.

5. P.W.7 returned home to find her younger child was not around. She took search for him and ultimately lodged F.I.R. (Exh.55), alleging that some unknown person has kidnapped her child.

6. A crime vide C.R. No. I-273/2014 was registered for offence punishable under Section 363 of the Indian Penal Code. The investigation commenced. The room of the appellant was searched. In one of the corners of the room, a child covered in a quilt was found. The child was unconscious. It was, therefore, rushed to the hospital. The doctor declared it dead before admission. The post mortem examination was, therefore, conducted. The Medical officer concluded that the child died of smothering. Some injuries at the anus of the child were also noticed. A crime for the offence punishable under Sections 302 and 377 of the Indian Penal Code were, therefore, additionally invoked. On the following day, the appellant was arrested. He made a disclosure statement, pursuant to which chits written by him disclosing to have confessed to the crime were seized under the panchanama. During his room search, some note books were seized. His specimen handwriting was obtained. The same was sent to the handwriting expert. The handwriting expert opined that the writing in the nature of confession were in the handwriting of the appellant. The statements of the persons acquainted with the facts and circumstances of the case were recorded.

7. On completion of the investigation, a charge sheet was filed against the appellant. The Trial Court framed the Charge (Exh.7). The appellant pleaded not guilty. His defence was of false implication. Before the Trial Court, the prosecution examined 8 witnesses and produced in evidence certain documents. On appreciation of the same, the Trial Court convicted and sentenced the appellant as stated above.

8. The learned Advocate for the appellant would submit that, the appellant has been falsely implicated. The offence allegedly took place during a day time. If such a heinous crime is committed, would the appellant be in a mental frame to write down confession on number of pages. The appellant was out of his room. Somebody else has committed the crime and placed the child in his room. According to him, the case was based on circumstantial evidence. He, therefore, relied on the case of **Sharad Birdichand Sarda Vs. State of Maharashtra (1984 CJ (SC) 262)**, According to him, the neighbours were not examined. According to him, the report of the handwriting expert is a got up evidence. The F.I.R. was registered against unknown person. He, therefore, urged for allowing the appeal.

9. Learned A.P.P. would, on the other hand, submit it to be an open and shut case. She took us through the evidence on record and urged for dismissal of the appeal.

10. Let us turn to the evidence on record and appreciate the same. P.W.5 Dr. Manoj conducted the post mortem. He gave his report (Exh.45). In his opinion, the child died of smothering. In his further opinion, there was possibility of occurrence of unnatural sexual offence (sodomy). Clause 15 in the post mortem report was, therefore, adverted to, which reads as under :

15.	Injuries to external genitals indication of purging	No injuries to external genitals, however, anal sphincter is dilated and patulous. Purging present.
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11. The question, whether the appellant is the author of the crime in question. P.W.7 would reside along with her husband and 3 children. The deceased was her younger child. On the fateful day i.e. on 13/7/2014, she was away from home, leaving behind the children. On her return, she found the younger child was not around. A search was made for locating the child. She ultimately lodged F.I.R. (Exh.55), alleging

therein her younger child to have been kidnapped by some unknown person.

12. On the same lines is her oral evidence. P.W.2 "M" was 11 years of age while she gave evidence before the Court. It is in her evidence that, on the given day, she along with her 2 younger brothers had been to the room of the appellant for drawing of the pictures. The appellant asked her and her next younger brother to leave the house. the appellant gave her a blank paper. She, therefore, along with her next younger brother, left the room. The victim child remained in the room of the appellant.

13. During her cross-examination, she testified that her house was open. She denied to have not visited the room of the appellant.

14. P.W.1 Vyankatesh is a witness to the house search panchanama of the appellant. It is in his evidence that a panchanama was prepared in his presence. It was a room belonging to one Kamble. One note book, black sketch pen and blue colour half pant were seized from the appellant. It is further in his evidence that the victim child was found in unconscious condition. The child was wrapped in a quilt. The

child was immediately rushed to Ghati Hospital. The mother of the victim identified the half pant of the victim. He referred to the panchanamas (Exhs.32 and 33). It was suggested to him that the appellant was residing in one of the rooms. We have closely perused the cross-examination of this witness to find nothing to disbelieve him.

15. P.W.3 Nitin is a witness to the panchanama. According to him, police seized some documents in his presence from the room of the appellant. He referred to those panchanamas (Exhs.36) and the seized papers (Exh.37). Close reading of his cross-examination too lead us to infer there is nothing not to rely on his evidence. Exhs.36 and 37 are in the nature of a bunch of papers.

16. P.W.4 Santosh is another witness. According to him, the appellant made a disclosure statement that he has repentance over the incident and therefore, he made a confession in writing on some paper. He would take them to his room and take out those papers. Accordingly, the appellant took the police and panchas to his room and took out those papers. The papers were seized under panchanama (Exh.40). Those papers were collectively marked Exh.41.

17. P.W.8 was the investigating officer. He arrested the appellant on the next day at Mukundwadi Railway Station. He claimed to have obtained his specimen handwriting and sent the same along with seized documents to handwriting expert.

18. P.W.6 Sanjay is the handwriting expert. His evidence indicates that he examined all the documents to find that the specimen handwriting matched with the disputed handwriting. Meaning thereby, the appellant made a confession in writing. We have perused those documents indicating the appellant to have confessed to the crime of committing murder of the child.

19. Aforesaid is the evidence in the case. We are not relying on the documents in the nature of confession. No person would write so many pages post commission of crime within a very short time. He cannot be in such a mental frame to write down the same. Admittedly, the appellant was residing in one of the rooms. The evidence of P.W.2 "M" indicates that she was a child of 7 years at the relevant time. That she along with her 2 younger brothers had been to the room of the appellant. The appellant gave her one paper and asked to leave the room along with her next younger brother. She accordingly left. The mother of the victim was not home. On

her return, she found the child was not around. The F.I.R. was, therefore, lodged against an unknown person. The room of the appellant was found open. Admittedly, the appellant was residing alone in the said room. When he was not around, it would have been but natural for him to leave the room after locking it from the outside. The house search panchanama which was drawn in presence of P.W.1 Vyankatesh indicates that the victim child was found in the room of the appellant. The post mortem report indicates the child died of smothering. The appellant was arrested on the following day at the Railway Station. The same indicates he was absconding. As such, his conduct was inconsistent with his innocence. He did not explain the circumstance as to why did he leave the house leaving it open and did not return home at least in the evening. The same goes a long way to lead us to infer it is he and none else to have committed the crime. Based on the medical report coupled with the evidence of P.W.2 and P.W.3, we reach to the conclusion that the appellant committed murder of the child by smothering it. The question is about unnatural offence. Clause 15 of the post mortem report has already been referred to above. The Medical Officer did not give age of the injury found at the anus. In his opinion, the offence of sodomy might have been committed. The Medical Officer is

not firm about his opinion as regards unnatural offence is concerned. There is no other evidence to indicate or corroborate his opinion expressed as possibility of sodomy could not be ruled out. In view of the same, it cannot be said that, the appellant, before committing murder of the child, subjected it to sodomy. We have one more reason to observe so that had he such a lust, there were two elder children with the victim. He might have preferred one of the elder than the younger one. Be that as it may. The evidence on record did not lead us to inescapable conclusion that the appellant has committed unnatural (carnal) intercourse with the child before it was killed. Interference to that extent i.e. conviction for the offence punishable under Section 377 of the Indian Penal Code read with Section 4 r/w 3 and 8 r/w 7 of the Protection of Children from Sexual Offences Act is, therefore, warranted.

20. In the result, the appeal partly succeeds. Hence the order:-

ORDER

- (i) The Criminal Appeal is partly allowed.
- (ii) Conviction of the appellant for the offence punishable under Section 302 of the Indian Penal Code and the

sentenced imposed against him by learned Additional Sessions Judge, Aurangabad in Sessions Case No.295/2014 vide judgment and order dated 12/3/2018 is maintained. However, the amount of fine is reduced to Rs.1000/- (Rupees one thousand), in default of payment of fine, the appellant shall undergo S.I. for 2 months.

(iii) Conviction of the appellant for the offence punishable under Section 377 of the Indian Penal Code read with Section 4 r/w 3 and 8 r/w 7 of the Protection of Children from Sexual Offences Act is set aside. The appellant is acquitted thereof. Fine amount, on that count, if paid, be refunded to the appellant.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

fmp/-