



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

CRIMINAL APPEAL NO.401 OF 2022

Meheboob Husain Mulje

Age: 35 years, Occu: Labour

R/o: Tungi, Tq. Ausa,

District Latur

.... Appellant

Versus

The State of Maharashtra

Thr. P.P., High Court Bench,

at Aurangabad

.... Respondent

Appearance :-

Mr. G. N. Chincholkar [Appointed through Legal Aid]

Mrs. Uma S. Bhosale, APP for Respondent No.1 – State

Mr. N. J. Patil, Advocate for Respondent Nos.2 to 4 [Absent]

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

Reserved On : 11/12/2024

Pronounced On : 17/12/2024

JUDGMENT : [PER NEERAJ P. DHOTE, J.]

1. The Appellant has challenged the Judgment and Order dated 24/03/2022, passed by the learned Sessions Judge, Latur, in Sessions Case No.63/2019, convicting the Appellant for the offence punishable under Section 302 of the Indian Penal Code, 1860 [hereinafter referred to as 'IPC'] and sentencing him to suffer Rigorous Imprisonment for life and to pay fine of Rs.10,000/-, in default, to suffer Imprisonment for ten [10] months.

2. The Prosecution's case as revealed from the Police Report is as under :-

[I] The Appellant was married to Sabiya [hereinafter referred to as 'the Deceased'] in the year 2008. They were having two [2] minor sons and one [1] minor daughter. They were residing at Village Tungi, Taluka Ausa, District Latur. The Appellant was working as a Cook at one Dhaba. The Appellant was a drunkard. The Appellant doubted the character of Deceased. The parents and relatives of the Deceased gave understanding to the Appellant. The father of Deceased provided financial assistance to the tune of Rs.20,000/ to the Appellant for work. There was no change in the behaviour of the Appellant. In the morning of 01/11/2018, the Appellant committed Murder of Deceased by cutting her throat with knife and absconded. The Ausa Police learnt about the incident. The Police, after taking necessary entry in the Session Diary, reached on the spot of incident. The father and relatives of Deceased were informed of the incident and they reached on the spot. The father of Deceased lodged the report against the Appellant and Crime No.209/2018 came to be registered for the offence punishable under Section 302 of IPC with the Ausa Police Station.

[II] The Inquest and Spot Panchnama were drawn and the body was referred for Postmortem. The cause of death was revealed as '*due to cut throat injury*'. The Police conducted the investigation. The statement of child of Appellant came to be recorded. The statement of witnesses were recorded. The Appellant came to be arrested from Pune on 04/04/2019. The knife and clothes of the Appellant came to be seized pursuant to disclosure under Section 27 of the Indian Evidence Act, 1872

[hereinafter referred to as 'the Evidence Act']. The articles seized during the course of investigation were referred for Chemical Analysis. The CA reports were received on completion of investigation. The Appellant came to be Charge-sheeted.

[III] On committal, the learned Sessions Court framed the Charge against the Appellant for the offence punishable under Section 302 of IPC vide Exhibit - 25, to which, the Appellant pleaded not guilty and claimed to be tried. To establish the Charge, the Prosecution examined in all ten [10] witnesses and brought on record the relevant documents. After the Prosecution closed their evidence, the statement of the Appellant came to be recorded by the learned Trial Court under Section 313[1][b] of the Code of Criminal Procedure, 1973 [hereinafter referred to as 'Cr.PC']. The Appellant denied the case and evidence of Prosecution. After hearing both the sides and appreciating the evidence on record, the learned Trial Court passed the impugned Judgment and Order.

3. It is submitted by the learned Advocate for the Appellant that, the case is based on the testimony of child witness and his testimony is not trustworthy. After the incident, the child did not call his grandparents and he went to the maternal grandparents. The child witness was tutored by his maternal grandparents. The Appellant had gone to answer the nature's call and when he came home, he saw his wife dead and he got frightened and therefore ran away. The evidence on record do not establish the Charge and the learned Trial Court has

wrongly convicted the Appellant. The Appeal be allowed by setting aside the conviction and sentence of the Appellant. He cited the Judgment in **Hari Om Alias Hero Vs. State of Uttar Pradesh; [2021] 4 SCC 345**.

4. It is submitted by the learned APP that, the child witness is the natural witness and there is no reason to discard his testimony. The Appellant, being the husband of Deceased, was very much present at home and therefore, the burden shifts on him under Section 106 of the Evidence Act. The Appellant had the motive to commit the Crime, as he was suspecting the character of Deceased. The defence is not probable and if accepted, the Appellant's conduct of fleeing was completely unnatural. The natural conduct would have been to take the Deceased to the Hospital. The learned Trial Court has rightly convicted the Appellant and there is no merit in the Appeal and the same be dismissed.

5. Scrutinized the evidence on record. There is no dispute on the following aspects :-

- [a] The Deceased was the wife of Appellant ;
- [b] The Appellant, Deceased and their children were residing together at Village Tungi, Taluka Ausa, District Latur ;
- [c] Appellant's wife died unnatural death at their residence ;

6. PW - 1 [Kartik Dnyanoba Kshirsagar] was the Gramsevak of Village Tungi on 01/11/2018. He was directed by the Superior to go to the spot as the panch. Another panch was Sanjay Jadhav. They went to the house of Accused, where the Police inspected the spot. The dead body of female was lying on the spot. The Inquest at Exhibit - 51 and Spot Panchnama at Exhibit - 50 were prepared. The blood stained clothes of the Deceased were seized under the Panchnama at Exhibit - 52.

7. PW - 2 [Yusuf Mainoddin Sayyed] was the father of Deceased. In the morning of 01/11/2018 around 7.00 a.m., his brother-in-law Yunus [PW - 5] informed him that, his daughter - Sabiya died at Tungi. He went to the house of his daughter, where he saw his daughter lying dead with injuries. He lodged the report at Exhibit - 55.

8. PW - 10 [Sukeshree Dilip Jadhav] was attached to the AUSA Police Station as the Assistant Police Inspector from 2016 to 2019. On 01/11/2018 when she was on duty, she received the information that, one woman was murdered at Village Tungi. After making the Station Diary Entry, she proceeded to the spot of incident. She saw the dead body of woman. She carried the Inquest and Spot Panchnama and seized the articles from the spot. She referred the body for Postmortem at Rural Hospital,

Ausa. She recorded the report lodged by PW - 2 [Yusuf Mainoddin Sayyed].

9. The evidence of PW - 5 [Yunus Hamid Shaikh] shows that, Deceased was his niece. On 01/11/2018, he received the information about the death of his niece - Deceased. He informed PW - 2 [Yusuf Mainoddin Sayyed] accordingly and went to the spot of incident. He saw Deceased in a pool of blood. The minor son of Deceased, by named Mustakin Maheboob Mulje [PW - 4] was weeping.

10. The evidence of PW - 6 [Dr. Pathan Amjadjkhan Ibrahimkhan] shows that, he was the Medical Officer at PHC Belkund. On 01/11/2018 after getting information that, one dead body of woman was referred to Rural Hospital, Ausa, he went to Ausa Rural Hospital. He performed the Postmortem and noted the following external injuries :-

- “[1] Incised wound of size length 9 cm x breadth 4 cm x depth 6 cm, - reddish in colour, sharp margins, present over the right upper side of throat from hyoide bone up to near the medial end of right clavicle, oblique in direction, cut end of oesophagus, cut end of trachea, and both carotid artaries cut. Wound track is directed downward and latrally.
- [2] Incised wound about 2.5 cm x 1 c.m. x 1 c.m. over middle of right clavicle above horizontal in direction, reddish in colour, sharp margins, muscle is seen.
- [3] Incised wound over lateral end of right clavicle about 1 c.m.x 0.5 c.m. x 0.5 c.m. vertical in direction, reddish, sharp margins.”

11. The further evidence of PW - 6 [Dr. Pathan Amjadkhan Ibrahimkhan] shows that, he found the cause of death as '*cut throat injury*'. He preserved the viscera and blood. He prepared the Postmortem Report at Exhibit - 71. According to him, the said injuries were possible by sharp edged knife.

12. The above evidence remained unshaken in the cross-examination. There is consistent evidence that, the Appellant's wife was found dead in her residence. The cause of death was cut throat injury. The cross-examination shows that, the Homicidal Death of his wife is not seriously disputed by the Appellant. On the basis of evidence available on record, the Prosecution successfully established that, the Appellant's wife died Homicidal Death at the residence.

13. The Prosecution examined the minor child of the Appellant and Deceased as PW - 4 [Mustakin Maheboob Mulje]. His evidence was recorded in October - 2021 when he was nine [9] years old and the incident is of November - 2018. Therefore, he might be six [6] years old at the time of incident. In the above referred Judgment relied upon by the learned Advocate for the Appellant, it is observed that, the evidence of the child witness cannot be rejected *per se*, but the court, as a rule of prudence, is required 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 evidence of the child witness. Corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. If the child witness is shown to have stood the test of cross-examination and there is no infirmity in the evidence, the Prosecution can conviction based upon the testimony of child witness. While appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored. The evidence of the child witness must be evaluated more carefully and with greater circumspection.

14. The evidence of PW - 4 [Mustakin Maheboob Mulje] shows that, he was residing with the Appellant and Deceased. In the evening, the Deceased served food to all of them and cleaned the utensils. Thereafter, they all went to sleep. He woke up after hearing the cry of Deceased. He and his brother were sleeping on the bed and the Appellant, Deceased and his younger sister were sleeping on the ground. He saw the Appellant cutting throat of his mother by knife. His evidence shows that, his grandparents, uncle and aunt were residing in the neighbouring room. There is nothing to show that, he informed them what he witnessed. His evidence shows that, he stated about the

incident firstly to the Police. It is highly unnatural that, the child witness will not tell anyone in the family and will state for the first time to the Police. The 164 statement of Cr.PC of this witness is brought on record at Exhibit - 65, which was recorded on 19/12/2018 i.e. after a period of more than one and half month [1 ½]. His evidence indicates that, he was residing with his maternal grandparents. Though the evidence of PW - 5 [Yunus Hamid Shaikh] shows that, the child witness i.e. PW - 4 informed him as to what he witnessed, PW - 4 [Mustakin Maheboob Mulje] nowhere deposed that, he informed PW - 5 [Yunus Hamid Shaikh] as to what he witnessed. Even the evidence of PW - 2 [Yusuf Mainoddin Sayyed], who was the father of Deceased and consequently, the maternal grandfather of PW - 4 [Mustakin Maheboob Mulje] nowhere shows that, PW - 4 [Mustakin Maheboob Mulje] informed him that, he witnessed the Appellant cutting the throat of his mother. As discussed earlier, this PW - 2 [Yusuf Mainoddin Sayyed] had went to the spot of incident. In the light of the above evidence, the possibility of tutoring PW - 4 [Mustakin Maheboob Mulje] cannot be ruled out. Thus, we discard the testimony of child witness i.e. PW - 4 [Mustakin Maheboob Mulje].

15. As discussed above, there is clear evidence on record to establish that, the Appellant's wife died Homicidal Death in

their residence. It is the general presumption that, the person is present in his residence during the night time, unless it is shown that, he was present elsewhere. It is the case of Appellant, as can be seen from his statement under Section 313 of Cr.PC that, in the morning, he went to answer the nature's call and when he returned back, he saw his wife lying dead and so due to fear, he ran away. According to him, his house had no door and anybody can enter easily. This established that, the Appellant was at home during the night. Even if it is presumed that, he went to answer the nature's call and after coming back saw his wife dead, his natural conduct would have been to raise hue and cry and seek help and shift Deceased for medical treatment. However, nothing of that sort was done by him. On the other hand, he chose to run away.

16. The evidence of PW - 9 [Jitendra Vitthal Kadam], who was the Investigating Officer, shows that, the Appellant was taken in custody on 09/04/2019 i.e. after a period of five [5] months and four [4] days from the date of incident. This clearly shows that, the Appellant absconded. The conduct of the Appellant becomes relevant under Section 8 of the Evidence Act. Reliance is placed by the learned APP on the Judgment in the case of **Trimukh Maroti Kirkan Vs. State of Maharashtra ; [2006] 10 SCC 681**, wherein, it is observed as under :-

“22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstances which indicates that he is responsible for commission of the crime.”

17. The evidence of PW – 2 [Yusuf Mainoddin Sayyed], who was the father of Deceased and PW – 5 [Yunus Hamid Shaikh], who was the uncle of Deceased show that, the Deceased had told them about the harassment by the Appellant by doubting her Character. They had given understanding to the Appellant in that regard. Though the said evidence that, Deceased informed them about the harassment to her by the Appellant, was hearsay evidence, it becomes relevant pursuant to Second Part of Section 32[1] of the Evidence Act. It was the tell-tale story, which was told by the Deceased to these witnesses. Useful reference can be made on this point on the Judgment in **Sharad Birdhichand Sarda Vs. State of Maharashtra**, which is further referred in several Judgments. In **Amar Singh Vs. State of Rajasthan; [2010] 9 SCC 64**, the said pronouncement is considered and held as under in Paragraph Nos.19 and 20.

*“19. In **Pakala Narayana Swami v. King Emperor** [AIR 1939 PC 47] Lord Atkin held that circumstances of the transaction which resulted in the death of the declarant will be admissible if such circumstances have some proximate relation to the actual occurrence. The test laid down by Lord Atkin has been quoted in the judgment of*

*Fazal Ali, J. in **Sharad Birdhichand Sarda v. State of Maharashtra** (supra) and His Lordship has held that Section 32 of the Indian Evidence Act is an exception to the rule of hearsay evidence and in view of the peculiar conditions in the Indian Society has widen the sphere to avoid injustice. His Lordship has held that where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statements would clearly fall within the four corners of Section 32 and, therefore, admissible and the distance of time alone in such cases would not make the statements irrelevant.*

*20. The difference in the English Law and the Indian Law has been reiterated in **Rattan Singh v. State of H. P.** (supra) and it has been held therein that even if the deceased was nowhere near expectation of death, still her statement would become admissible under Section 32 (1) of the Indian Evidence Act, though not as a dying declaration as such, provided it satisfies one of the two conditions set forth in this sub-section. The argument of Mr. Sharma, therefore, that the evidence of PW-4 and PW-5 regarding the statements made by the deceased before them are hearsay and are not admissible is misconceived.”*

18. The above evidence clearly shows that, the Appellant was doubting the Character of Deceased. He had the motive to commit the Crime. The explanation given by the Appellant in his statement is not at all plausible. We see no ring of truth in the said explanation. The established circumstance that, the Appellant's wife died Homicidal Death at the place of their residence and subsequent conduct of the Appellant and implausible explanation offered by the Appellant, clearly point towards the involvement of the Appellant in Homicidal Death of his wife. We discard the discovery and seizure of the knife for want of evidence to link the said discovery with the Crime as the CA report do not show any blood stains on the knife and

the clothes of Appellant. Despite this, the proved circumstances are consistent with the hypothesis of the guilt of the Appellant alone and totally inconsistent with his innocence. We do not see that, the learned Trial Court has committed any error in convicting the Appellant for committing Murder of his wife. The Appeal fails. Hence, we proceed to pass the following order :-

ORDER

- [I] Criminal Appeal is dismissed.
- [II] The Record and Proceedings be sent back to the learned Trial Court.
- [III] The fees of learned Advocate Mr. G. N. Chincholkar appointed for the Appellant is quantified at Rs.10,000/- [Rupees Ten Thousand Only] to be paid by the High Court Legal Services Sub - Committee, Aurangabad.

[NEERAJ P. DHOTE, J.]

[R. G. AVACHAT, J.]

Sameer