



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

CRIMINAL APPEAL NO. 130 OF 2022

Bhura Kautik Jogi
Age: 48 years, Occu.: Driver,
R/o Eklagna, Tq. Dharangaon, Dist. Jalgaon
At present R/o Dagadi Subgavhan,
Tq. Parola, Dist. Jalgaon

..APPELLANT

VERSUS

State of Maharashtra

..RESPONDENT

....
Mrs. S.G. Chincholkar, Advocate for appellant
Mr. S.V. Hange, A.P.P. for respondent - State
....

**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ
DATE : 28th AUGUST, 2024**

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

1. The present appellant was convicted for committing murder of his wife, and therefore, sentenced to suffer imprisonment for life and pay a fine of Rs.5,000/-, in default to undergo rigorous imprisonment for three years. The order of conviction and consequential sentence has been passed by the Court of Additional Sessions Judge, Amalner ('trial Court') on 09th February, 2016 in Sessions Case, No. 32 of 2013. The appellant is, therefore, before us in this appeal.

2. The facts giving rise to the present appeal are as follows :-

The appellant alongwith his wife – Akkabai (deceased) and their son (master Vijay) would reside together at village Dagadi Subgavhan, Tq.

Parola, Dist. Jalgaon. The incident took place on 2nd May, 2013 by 10:30 p.m. The appellant made a demand of money to his wife for consumption of liquor. She refused. He, therefore, went out of the house and returned with a stone (7/8 kgs.). He assaulted on her head with the said stone and fled. The incident was witnessed by their son, master Vijay (PW 4). He immediately rushed to the house of his maternal uncle, PW 1 – Sopan and related him the incident. Sopan, alongwith others rushed to the house of the appellant. They noticed Akkabai (deceased) to have suffered severe head injury. She was, therefore, immediately rushed to Civil Hospital, Parola. However, she died before admission. PW 1 – Sopan thereafter immediately lodged the F.I.R. (Exh.14) against the appellant.

3. Based on the F.I.R. (Exh.14), crime vide C.R. No. 77 of 2013 came to be registered against the appellant. Crime scene panchanama (Exh.21) was drawn. Inquest (Exh.16) and autopsy (Exh.30) on the mortal remains of the deceased were held. A stone was seized from the crime scene. The appellant was arrested. Statements of the persons acquainted with the facts and circumstances of the case were recorded. Upon completion of investigation, charge-sheet was filed.

4. The trial Court framed the charge (Exh.7). The appellant pleaded not guilty. His defence was of false implication. According to him, he was out of the village since 2-3 days before the incident. Someone else committed murder of his wife.

5. The prosecution, to bring home the charge, examined five witnesses and produced in evidence certain documents. The trial Court, on appreciation of the same, convicted the appellant and consequently sentenced as stated above.

6. Learned counsel for the appellant would submit that the case is based on the sole eye witness account. The said witness is none other than son of the appellant, PW 4 – master Vijay. He was just seven years of age at the relevant time. He, being an child witness, was prone to tutoring. According to her, he was under the influence of his maternal uncle – Sopan. She relied on the judgment of the Apex Court in case of ***Pradeep Vs. The State of Haryana, AIR 2023 SC 3245***, to submit that to ascertain competency of a child witness, the trial Court needs to put certain questions to such a witness. The record thereof has to be made wherefrom only it could be ascertained whether the child was a competent witness. She then adverted our attention to Section 4 of the Oaths Act, 1969. She would further submit that there was inconsistency between the evidence of PW1 – Sopan, who contended that he was asleep by 10:30 p.m. on the fateful day, while PW 5 – Bhaiyya testified that he was talking with Sopan at his (Sopan) residence. According to her, the investigating officer has not been examined. The same has caused material prejudice to the appellant in his defence. She, therefore, urged for allowing the appeal.

7. Learned A.P.P. would, on the other hand, submit that PW 4 – master Vijay was of seven years old at the relevant time. He had no reason

to speak against his own father. The time of incident was such by which it was but natural for the child to have been at his residence. The appellant did not make out his defence of alibi. A minor inconsistency between the evidence of the prosecution witnesses which do not go to the root of the case need to be ignored. According to him, witnesses gave evidence after two years of the incident. Memory of a person may not serve him well, with passage of time. Learned A.P.P. read out the impugned judgment to ultimately submit that there is no reason to interfere therewith.

8. Considered the submissions advanced. Perused the evidence on record and the judgment impugned herein. Let us now advert thereto and appreciate the same.

9. Exhibit 30 is the postmortem report. The same has been admitted by the appellant in no uncertain terms. The cause of death of Akkabai, wife of the appellant, was cardiopulmonary arrest due to hypovolumic shock due to haemorrhage from head injury.

10. The criminal law was set in motion against the appellant by none other than his real brother-in-law, PW 1 – Sopan, within hours of the incident. It is in his evidence that on 02nd May, 2013 he was at his residence. It was 10:30 p.m. His nephew, PW 4 – master Vijay came to his residence and related him, “माझे आईला माझे वडीलांनी डोक्यात दगड टाकून जखमी केले असून आईचे डोक्यातून रक्त निघत आहे. तरी तुम्ही लवकर चला”. He, therefore, alongwith Kantilal,

Sahebrao, Bhaiyya, Bhaidas went to the house of the appellant. He saw his sister lying in the court yard. She had suffered a head injury. A stone of about 7/8 kgs. was found by her side. The appellant was not there. He tied her head with a cloth piece and took her to Civil Hospital, Parola. The medical officer there declared her dead. He then went to the police station and lodged the report (Exh.14) against the appellant.

11. It was suggested to him in his cross-examination that the appellant was not at his residence. He denied. It was further suggested to him that the appellant had left the village 3-4 days before the incident for work. The same too has been denied. It was further suggested to him that he owed a sum of Rs.5,000/- to the appellant. To avoid repayment of the same, he registered the false report. Same too was denied by him.

12. PW 2 – Nana is a witness to the inquest panchanama (Exh.16). While PW 3 – Gopichand is a witness to the crime scene panchanama (Exh.21). It is in his evidence that police seized quilt and stone from the crime scene.

13. PW 5 – Bhaiyya was the one, who accompanied PW 1 – Sopan to the house of the appellant. It is in his evidence that he was present at the house of Sopan while the appellant's son (Vijay) had come to relate them about the incident.

14. All these witnesses were subjected to a searching cross-examination. It was brought on record that there was a marriage ceremony in the village. Participants therein were drunk and dancing to music.

15. The only eye witness in this case is PW 4 – master Vijay. He was seven years of age at the relevant time. It is in his evidence that on the given day he was at his residence. There was quarrel between his parents. He further testified that the appellant would ask his mother to pay him money for consumption of liquor. On the given day the appellant abused his mother and demanded money for liquor. The mother denied. The appellant then went out of the house. He (PW 4 – Vijay) was present in the court yard of the house. He thought that father has gone out for peeing (urinating). It is further in his evidence that his father (appellant) returned with a stone and assaulted on the head of his mother therewith. He immediately rushed to the house of his maternal uncle, PW 1 – Sopan. Sopan accompanied him back to his residence. His mother was taken to Civil Hospital, Parola for treatment. On the following day he realised his mother to have passed away.

16. It is in his cross-examination that he would leave his residence at 06:00 in the morning. He would beg to earn living. He admitted that someone in the village would provide him meal. Even sometime he took meal at the house of his maternal uncle, PW 1 – Sopan. He was, however categorical to state that he never left his house in the evening. He denied that at the relevant time he was at the house of his maternal uncle and slept

there. He also denied that there was quarrel between his father and his maternal uncle – Sopan. It was suggested to him that his maternal uncle disclosed to police about the incident and police recorded his statement. He admitted the same. He admitted that there was marriage ceremony in the village on the given day. On that day some of the villagers had consumed liquor and dancing was on. He, however denied that his father was not at the house while the incident took place. He denied to have given false evidence at the behest of his maternal uncle – Sopan. He, however admitted that he gave statement on say of his maternal uncle.

17. Appreciation of the aforesaid evidence would indicate that PW 4 – Vijay, son of the appellant, was seven years of age at the relevant time. He would never leave his house in the evening. The incident took place by 10:30 p.m. It was but natural for him to be at his residence. The trial Court before recording his evidence put certain questions to him to find him to be matured to understand sanctity of oath. True, the trial Court has not made record of the questions put to him and his answers thereto. It needs no mention that factual observations are presumed to be correct. The questions were put to him in open Court in the presence of defence advocate. The trial Court was satisfied itself that PW 4 – Vijay was competent to depose. True, considering age of master Vijay, being nine years at the time of recording of the evidence, the trial Court ought not to have administered him oath.

18. What has been observed in the judgment in the case of Pradeep (supra) is that :-

“7. We have carefully considered the submissions. The fate of the case depends on the testimony of the minor witness Ajay (PW-1). Under Section 118 of the Evidence Act, 1872 (for short, "the Evidence Act"), a child witness is competent to depose unless the Court considers that he is prevented from understanding the questions put to him, or from giving rational answers by the reason of his tender age. As regards the administration of oath to a child witness, Section 4 of the Oaths Act, 1969 (for short "Oaths Act") is relevant. Section 4 reads thus:

4. Oaths or affirmations to be made by witnesses, interpreters and jurors.-

(1) Oaths or affirmations shall be made by the following persons, namely:

(a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence;

(b) interpreters of questions put to, and evidence given by, witnesses; and

(c) jurors:

Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this Section and the provisions of Section 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.

(2).....

Under the proviso to Sub-section (1) of Section 4, it is laid down that in case of a child witness under 12 years of age, unless satisfaction as required by the said proviso is recorded, an oath cannot be administered to the child witness. In this case, in the deposition of PW-1 Ajay, it is mentioned that his age was 12 years at the time of the recording of evidence. Therefore, the proviso to Section 4 of the Oaths Act will not apply in this case. However, in view of the requirement of Section 118 of the Evidence Act, the learned Trial Judge was under a duty to record his opinion that the child is able to understand the questions put to him and that he is able to give rational answers to the

questions put to him. The Trial Judge must also record his opinion that the child witness understands the duty of speaking the truth and state why he is of the opinion that the child understands the duty of speaking the truth.”

19. It is true that a child witness is susceptible to tutoring. The same itself is not a ground to reject the evidence of a child witness. A careful scrutiny of a child witness is a must. It has been observed in paragraph no.9 in the judgment of Pradeep (supra) as under :-

“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. It has been specifically observed that it was advisable to record preliminary questions and answers thereof so that the appellate Court can come to the correctness of the order of the trial Court. On the facts and circumstances of the case before it, the Apex Court found the preliminary examination of the minor was very sketchy. In paragraph no.11 of its judgment, the deposition of the child witness in that case was referred to. The child witness was confronted with his statement wherein he had not stated the accused was drunk while he had testified before the Court

contrary to his police statement. According to the prosecution case, until 05:00 a.m. the child witness in the said case was hiding in his house and only when the milkman came at 05:00 a.m., he disclosed him the incident. In the facts and circumstances of the said case and on appreciation of the evidence therein the Hon'ble Apex Court had allowed the appeal.

21. In the case in hand, PW 4 – master Vijay admitted that his maternal uncle disclosed to police about the incident. His entire examination-in-chief undoubtedly indicates that he was home at the relevant time. His father (appellant) too was there. The appellant made a demand of money for consumption of liquor. Since the mother refused, he went out of the house and returned with a big stone. He assaulted on her head therewith. During his cross-examination, his entire evidence was tried to be denied. PW 4 – master Vijay stood the ground except the aforesaid stray admission. It is reiterated that nothing has been brought on record to suggest Vijay to have any animosity to speak against his own father or was tutored to depose against him. When financial position of appellant was weak, it was suggested that his brother-in-law owe appellant Rs.5,000/- and to have not been repaid, a false F.I.R. was lodged. The suggestion itself is unreliable.

22. Moreover, in case of ***Rameshwar s/o Kalyan Singh Vs. The State of Rajasthan, AIR 1952 SC 54***, it has been observed thus :-

“19.The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a

conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, and in jury cases, must find place in the charge, before a conviction without corroboration can be sustained. The tender years of the child, coupled with other circumstances appearing in the case, such, for example, as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law is that this rule of prudence must be present to the mind and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand.”

23. At the cost of repetition, the trial Court found PW 4 – master Vijay to be a competent witness. His presence at his house was natural. His conduct to rush to his maternal uncle’s house, PW 1 – Sopan and relate him the incident is relevant under Section 6 of the Evidence Act. He being an eye witness to the incident, has no reason to falsely implicate his own father in the crime in question. We find the trial Court to have rightly convicted and consequently sentenced the appellant for the offence of murder. The appeal is sans merit. Same deserves to be dismissed.

24. In the result, criminal appeal stands dismissed.

SSD (NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)