



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 472 OF 2016

Nijam S/o. Chindhu Tadvi,
Age – 33 years, Occ – Labour,
R/o – Fattepur, Tq. Jamner,
District Jalgaon

... Appellant

Versus

The State of Maharashtra

... Respondent

.....
Ms. Seema Gaikwad, Advocate h/f Mr. A. G. Talhar, Advocate for the
Appellant.

Mr. A. V. Deshmukh, APP for Respondent-State.

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

Reserved on : 28.07.2023

Pronounced on : 10.08.2023

JUDGMENT [ABHAY S. WAGHWASE, J.] :

1. By invoking Section 374 of the Code of Criminal Procedure [Cr.P.C.], appellant Nijam Chindhu Tadvi is hereby questioning the correctness, legality and sustainability of the judgment and order of conviction dated 13.06.2016 passed by learned Sessions Judge, Jalgaon in Sessions Case No. 37 of 2015.

BRIEF CASE OF PROSECUTION IN TRIAL COURT IS AS UNDER:

2. Deceased Chayabai resided with her husband [informant] and family at Fattepur. Her one son resided at Jamner for education, whereas remaining son and daughter resided at Fattepur itself. Both children used to go to school.

3. On 10.12.2014, informant's daughter went ahead to attend school and thereafter, informant left for work keeping behind his son Rohit and wife Chayabai. It is the case of prosecution that between 7.00 a.m. to 7.30 a.m., appellant-convict entered the house of informant. He abused informant's wife Chayabai and after giving her fist blows, he used a crowbar kept behind cupboard, for hitting it on her head and thereafter whisked out knife from his pocket and stabbed deceased Chayabai.

4. The above incident was reported by PW2 informant Ramlal, on the strength of which, police registered crime. Investigation was entrusted to PW8 API Ganesh Kadam, who after completing the same, chargesheeted accused. On assignment of sessions case before learned Sessions Judge, Jalgaon, trial was conducted and on appreciating the

oral and documentary evidence on record, learned trial Judge held the case of prosecution as proved and thereby convicted and sentenced appellant to suffer life imprisonment for commission of offence punishable under Section 302 of the Indian Penal Code [IPC].

It is the above judgment and order of conviction, which is now assailed before us on various grounds mentioned in the appeal memo.

SUBMISSIONS

On behalf of the appellant:

5. Learned counsel for the appellant would submit that prosecution had miserably failed to prove the charges. According to learned counsel, except the sole testimony of a child witness, there is no other evidence on record about seeing appellant entering the house of deceased, beating her, stabbing her and committing her murder. Learned counsel emphasized that PW4 Rohit, a child witness, had no occasion to see the incident as he had already left the house. Taking us through the testimony of child witness, he submitted that it is abundantly clear that the child was not available in the house and rather, had been to school and therefore he had no occasion to see the incident.

6. It is further submitted that the child has been subsequently tutored to depose and accordingly, the child has deposed and the same is unfortunately taken into consideration and even relied by learned trial Judge. He would point out that law is fairly settled that testimony of child witness ought not to be accepted without sufficient corroboration and here, there was no corroboration, but still learned trial Judge has relied on the testimony of child witness and has held appellant guilty.

7. It is further pointed out that even evidence of prosecution does not remotely suggest as to on what count appellant allegedly killed deceased. It is submitted that, therefore, motive has not been established by prosecution.

8. It is further submitted that even so-called recovery is not free from doubt as weapon knife is allegedly recovered from other's property and at the behest of other person and therefore, same cannot be applied to the appellant. Learned counsel would submit that evidence of prosecution was very weak and insufficient to implicate or held appellant guilty. Learned trial Judge failed to consider and appreciate the settled legal position and having erred by recording

guilt, he prays to allow the appeal by setting aside the judgment under challenge.

On behalf of the State:

9. In answer to above, learned APP would submit that no doubt, case of prosecution is based on testimony of child witness, but according to him, the child has narrated whatever he saw. Child's evidence indicates that he merely left the house to go to school, but seeing appellant entering his house, the child had returned back and he had seen his mother being assaulted. That, child reported his father, who was informed by one person about the incident and prompt report has been lodged. The testimony of child witness has remained unshaken and the child has denied that he was tutored. Therefore, there is no hurdle to accept such evidence and hence, according to learned APP, learned trial court has correctly relied on the said testimony.

10. It is further pointed out that there is recovery and discovery at the instance of accused. Scientific evidence also connects appellant. That, there being strong evidence, it is submitted that no error whatsoever has been committed by learned trial Judge in accepting

the case of prosecution as proved and hence, he prays that appeal be dismissed.

11. Here, we are dealing with first appeal wherein we are, in the capacity of last fact finding court, expected to re-appreciate, re-analyze and re-examine the entire evidence. Resultantly, on doing so, we have found that prosecution has rested its case on the testimonies of eight witnesses.

EVIDENCE ON BEHALF OF PROSECUTION IN TRIAL COURT

Role, status and sum and substance of their evidence is summarized as under:

PW1 Tanaji Ganpat Dhande, Pancha to recovery of knife vide Exhibit 14. He spoke about the spot being pointed out by one Sarvar, where, according to Sarvar, accused had concealed the knife and about knife being recovered from a heap of ash and seized vide panchanama Exhibit 14.

PW2 Informant Ramlal Ganbas stated that deceased was his wife. Out of his two sons, one son stayed at Jamner while other son and a daughter stayed with him and his wife. On 10.12.2014,

his daughter Pooja left for school and this witness went to Takali for driving tractor. When he left, his wife Chayabai and son Rohit were in the house. Around 7.00 a.m. to 7.30 a.m., he received information from his employer about untoward incident taking place in his house and so he returned back and found his wife lying in pool of blood in injured condition, with an injury on the right side of her abdomen. According to him, his son Rohit told that accused had come, initially dealt fist blows on the nose and thereafter, stabbed her by knife and had ran away from the backside door and therefore, he lodged report.

PW3 Maksood Gafur Deshpande, pancha to spot panchanama Exhibit 20, deposed to the extent of drawing spot panchanama which he identified to be at Exhibit 20.

PW4 Child witness Rohit Ganbas, aged 13 years, stated that the incident took place on 10.12.2014 around 7.00 a.m. He got ready to go to school, went towards Hanuman temple and stood there. He saw accused entering their house and so, he claims that, he followed accused. According to him, accused sat on a cement bag in the house. His mother was cooking

food. Accused abused her in filthy language and when his mother went out of back door, accused picked up a crowbar from behind the cupboard, dealt a blow on the head of his mother and thereafter gave fist blows on her nose, took out a knife from his pant pocket and stabbed his mother in stomach and ran away. He stated that he raised hue and cry but nobody came and so he ran to school and came back with sister Pooja. He identified both, accused and weapons i.e. knife as well as crowbar.

PW5 Mukesh Chaudhari, pancha to seizure of clothes of deceased Exhibit 25, also pancha to memorandum of disclosure Exhibit 27 and recovery and discovery by accused vide Exhibits 28 and 29.

PW6 Police Constable Ramdas Kumbhar is carrier of *muddemal*.

PW7 Dr. Ravindra Patil, autopsy doctor, who on conducting postmortem, issued report Exhibit 38 recording death due to hemorrhagic shock due to multiple injuries. He also opined that injuries are possible by sharp edged weapon as well as pointed weapon like articles "A" and "B".

PW8 API Ganesh Kadam is the Investigating Officer.

12. On hearing learned counsel for the appellant, the following grounds are raised for questioning the judgment and order of conviction;

- i] Firstly, there is no motive,
- ii] Secondly, except testimony of child witness, which cannot be relied in absence of other corroborative piece of evidence, there is no other independent corroborative evidence.
- iii] Thirdly, recovery is doubtful, being not at the instance of accused and even from abandoned place and from other's property.

13. In the light of above grounds raised before us, we undertake the exercise of re-appreciating the entire evidence adduced by prosecution.

14. As regards homicidal death of Chayabai is concerned, taking into account the substantive evidence of autopsy doctor PW7 Dr. Ravindra Patil, who narrated about external and internal injuries noticed by him, nature of injuries, site of injuries and even taking into account the nature of his cross, we are also of the opinion that death

of Chayabai is shown to be not only unnatural, but homicidal one. The manner of questioning and suggestions put to autopsy doctor goes to show that a defence about accidental fall on a sharp object while standing on stool is tried to be put forth for suffering the above injuries, however, scene of occurrence panchanama belies such defence and therefore, there is no hesitation to hold that deceased met only and only homicidal death.

15. In view of above, now it becomes incumbent upon us to get satisfied beyond reasonable doubt that accused is the author of fatal injuries suffered by Chayabai.

16. As stated above, informant **PW2** Ramlal has received details of the occurrence from his son PW4 Rohit, a child witness. Therefore, there being no other independent witness, case of prosecution hinges entirely on the testimony of child witness PW4 Rohit. Evidence of informant PW2 Ramlal shows that said child witness was studying in school and was accompanying his sister Pooja at around 7.00 a.m. However, informant PW2 Ramlal in his substantive evidence is very categorical that initially, his daughter Pooja left the house to go to school and thereafter he left and his wife Chayabai and son Rohit i.e. PW4 only remained back in the house.

17. Before proceeding to test 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.”

18. Bearing in mind above settled legal position, we have undertaken the exercise of re-analyzing the testimony of PW4 Rohit.

In para 11 of our judgment, we have already reproduced the entire examination-in-chief of the said child witness.

The child in **cross** answered that his school timing is from 7.00 a.m. to 12.00 noon. He answered that he used to go regularly to school. He gave the strength of his class as 60 students and his roll number to be 34. After answering about the interval time, he gave name of his class teacher. In para 7 of his cross, he stated that he is able to understand direction and thereafter he faced cross and

answered that to the west of his house, there is a road; to the south there is house of Subhash Mistry. He admitted that surrounding their house, there are houses from all sides. He flatly denied that on the day his brother Vaibhav was also in the house. He admitted that he, his sister Pooja and their friends used to go to school at 7.00 a.m. and return at 12.00 noon. Then he is questioned about vices of his father and quarrels between his parents which he had candidly admitted it. However, he flatly denied that after his father went, number of persons visited his mother. He admitted that he knew accused because his house is just in front of their house. He is unable to state whether accused was a mason and that he used to stay out of house for days together. He admitted that he has accompanied his father on the previous date to the court when his father gave evidence. He again flatly denied that his father tutored him as to how evidence is to be given. He also denied that his father frequently read over his statement and asked him to give evidence before the court as per such statement. In further cross, he answered that on the day of incident, he was getting ready to go to school, but he denied that on that day, early in the morning, there was any heated exchange between his parents. He denied that during quarrel, some persons used to threaten his mother. He also denied that after he left for school, somebody stabbed his mother. The rest is all denial.

19. It is tried to be submitted by learned counsel for appellant that even evidence of **PW4** child witness shows that he had gone out of house. In our view, his testimony is required to be examined in entirety, which shows that though the child went out of the house, he further claims that he was near the Hanuman temple, which is just in front of their house, and then he saw accused entering his house and therefore, he claims to have come back and seen his mother being abused, initially hit with a crowbar on head and thereafter stabbed and accused running away. Child also states that he raised hue and cry but nobody came to his rescue.

20. We have also noticed that he confirmed that he understood the directions and thereafter gave geographical directions of his house. In para 8 he is found to be candidly admitting that his father frequently consumed liquor, but he flatly denied that due to consumption, he did not go out for work. Though he admitted that there were quarrels between his parents on account of demand of money for liquor, he denied that after his father went, number of persons used to visit his mother. He answered that he knew accused because he stayed in front of their house. To a suggestion he has flatly denied that he has been tutored as to how to give evidence and that in the house, his father frequently read over statement and directed him to give

evidence accordingly. He has flatly denied that on the day of the incident, in the morning, there was any heated quarrel between his parents and his father questioning his mother about visits of outsiders and that there used to be quarrel between his mother and such persons. He flatly denied that he was in the class and his attendance has been marked by teacher and he denied that he is falsely deposing.

Consequently, in our considered opinion, taking into consideration the age of the child, the manner of answering the questions raised in cross, his testimony cannot be discarded. For above reasons, his testimony instills confidence. Possibility of tutoring has been completely ruled out by the very child. Therefore, there is no hesitation to take recourse to the same.

21. We find it pertinent to note that the child has testified about assault on head and stabbing in abdomen. For getting assurance to that extent, we have carefully gone through the medico legal expert's evidence and the PM report. The injuries noticed and noted by autopsy doctor are as under:

19. Head-

- | | | |
|-------|---|--|
| (i) | Injuries under the scalp, their nature. | Haematoma 4x4 cm, just above left eye |
| (ii) | Skull – Vault and base describe fractures, their sites, dimensions, directions etc. | Fracture of frontal bone on left side. |
| (iii) | Brain- The appearance of its coverings, size, weight and general condition of the organ itself and any abnormality found in its examination to be carefully Noted | Extradural as well as intradural haematoma about 100 gram just below above-fracture site.
- Brain pale. |

21. Abdomen-

- | | |
|-----------------------|--|
| Walls - | Spindle shape, sharp edges with 2 cm length perforating injury at right lumber region anteriorly horizontal in position with fat and intestine coming from it. |
| Peritoneus - | Round shape, perforating injury, 1 cm in dimension at lateral abdominal wall, just above left iliac crest. |
| Cavity - | Peritoneal cavity full of blood, 2-3 litre which is draining from left sided wound. |
| Kidneys with - weight | Injuries seen to both renal vessels, shows intra peritoneal hemorrhage on right side and extra peritoneal on left side. |

Therefore, here ocular account finds support from the medical evidence. Therefore, there is no reason to doubt version of prosecution.

22. It is true that recovery evidence is not completely free from doubt as, by examining PW1 Tanaji, knife has been shown to be recovered however, testimony of this witness shows that he had learnt about the spot of hiding knife from one Sarvar. Such person is not examined. But, by examining PW5 Mukesh, memorandum of disclosure at the instance of accused regarding his readiness to show spot of hiding crowbar, clothes and the spot of hiding knife, is brought on record by prosecution. The article crowbar is recovered from a specific spot like *dargah* and it is not mere open spot or a no man's land. Knife was recovered with blood stains as well as ash remains. But still, though the recovery of knife is coming under shadow of doubt, there is recovery of other article crowbar and clothes on the person of accused on the day of incident recovered at his instance. Scientific evidence at Exhibit 52 shows that knife and ash were subjected to analysis and results showed that ash adhered to the knife tallied with the ash kept in a polythene bag packet Exhibit 8. Blood is also analyzed and found to be of human. Therefore, though little, there is some evidence in that regard.

24. Even otherwise, if recovery evidence is kept out of consideration, still, in the light of availability of trustworthy ocular account of child witness, which is finding support from the medico

legal expert's evidence on the point of site of injuries, case of prosecution can still be accepted and relied.

25. It has been vehemently submitted before us that prosecution has failed to establish motive. In our opinion, when a case is based on direct eye witness account, motive becomes insignificant.

26. It is also tried to be posed before us that material witnesses like Pooja i.e. sister of PW4 Rohit to be not examined. On this count, if we visit testimony of father PW2 Ramlal, we find him categorically stating about his daughter Pooja to have left the house in the morning and after her, he claims that he went to Takali and at that time, his wife Chayabai and son Rohit were present in the house. Even child states that after seeing the occurrence, he ran to school and brought his sister from school. Therefore, no purpose would have been served by examining Pooja.

SUMMATION

27. To sum up, here, case of prosecution hinges on the sole testimony of child witness PW4 Rohit. We have carefully and with abundant caution re-examined the entire examination-in-chief of the child witness. We are finding it to be free from tutoring. The child has

withstood cross without getting shaken. He has confidently answered the questions and has refuted suggestions put to him. Resultantly, we are convinced that prosecution has established the charges.

28. We have carefully gone through the impugned judgment. Learned trial Judge has correctly appreciated child witness account and has relied on the same for accepting the case of prosecution. Law on appreciation of child witness evidence is taken into consideration. Consequently, we do not find any reason to interfere in the findings reached at by learned trial Judge. Hence, we proceed to pass the following order:

ORDER

The appeal is hereby rejected.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]

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