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**(2021) 09 BOM CK 0048**

**In the Bombay High Court**

**Case No : Criminal Appeal No.190 Of 2018**

Ankush Dharma Chavan

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

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**Date of Decision : 20-09-2021**

**Acts Referred:**

Indian Penal Code, 1860 — Section 34, 201, 302, 304B, 306, 498A

**Citation : (2021) 09 BOM CK 0048**

**Hon'ble Judges : V. M. Deshpande, J; Amit B. Borkar, J**

**Bench : Division Bench**

**Final Decision : Dismissed**

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## **Judgement**

V. M. Deshpande, J

1. Being aggrieved by judgment and order of conviction passed by learned Additional Sessions Judge, Pusa dated 30.01.2018 in Sessions Trial No.47/2015, the appellant has approached before this Court. By the impugned judgment and order of conviction, the appellant stands convicted for the offence punishable under Sections 302 and 201 of the Indian Penal Code. For his conviction under Section 302 of the IPC, the appellant is directed to suffer rigorous imprisonment for life and to pay a fine amount of Rs.1,000/- with default clause. Insofar as his conviction under Section 201 of the IPC is concerned, he is directed to suffer rigorous imprisonment for one year and to pay a fine amount of Rs.500/- with default clause. Learned Judge further ordered that both the sentences shall run concurrently.

2. Bhagwan Wadkar (PW7), who was Police Station Officer of Police Station, Khandala, when was present in Police Station, Rohidas Fattu Rathod (PW1) came to police station and lodged his oral report on 12.11.2014. In view of the allegations made in the oral report, Police Station Officer registered crime against the appellant and others namely; his parents, his brother, sister in law and married sister vide Crime No.121/2014 for the offence punishable under Sections

498-A, 306, 304-B read with Section 34 of the IPC. Oral report of Rohidas is at Exh.-44 whereas printed FIR is at Exh.-45.

3. In his report, Rohidas states that the marriage of his niece Laxmibai (deceased) was performed with appellant about 15 years ago. The couple was having two sons. She used to reside along with her husband and her in-laws were residing separately from this couple. According to the allegations in the report, after the marriage, accused persons used to demand dowry and on account of that, there used to be torture to her resulting into calling of panchas to give a word of advice to all accused persons. It is also stated in the report that Rohidas gave Rs.2,00,000/- to the appellant for purchasing tractor. Thereafter, for some days, there was proper treatment to Laxmibai. However, after lapse of two months again she was maltreated and ill treated.

Exh.-44 further recites that on 12.11.2014 at about 8.30 in the morning, when first informant was present in his house, Madhukar Fattu Pawar (PW2) came to his house and informed that Laxmibai is burning in her house. Therefore, he immediately rushed to house of Laxmibai along with Madhukar to notice that Laxmibai was completely burnt and was dead.

According to the report, all the accused persons including appellant, used to give extreme ill treatment. Therefore, Laxmibai has committed suicide.

4. After registration of the crime, API Bhagwan Wadatkar (PW7) visited the spot along with panchas by issuing summons, Exh.-86, to them. Spot of the incident is residential house of the appellant and the deceased. When door of the house was opened in presence of panchas, smoke started easing out from the room. They noticed that wife of accused, Laxmibai was burning. Then with the help of panchas, fire was extinguished. The investigating officer prepared spot panchanama (Exh.-54). Inquest was also conducted. Inquest panchanama is at Exh.-55. From the spot, the investigating officer seized ash, half burnt turati stumps, one container having some kerosene and also took the ash smeared with blood. These articles were seized by seizure panchanama Exh.-58. The investigating officer thereafter brought the dead body from village Pimpalgaon Ijara to Rural Hospital, Pusad for post mortem. Police Constable Vishal was deputed for carrying the dead body for post mortem. He also recorded statements of witnesses. The investigating officer received post mortem report, Exh.-80, on 13.11.2014. In view of the findings given in the post mortem report, the deceased died due to tight pressure applied around the neck. The investigating officer added provisions of Section 302 of the IPC. On 12.11.2014, the investigating officer also recorded statement of various witnesses. He arrested the appellant on 16.11.2014. His arrest form is at Exh.-60. The investigating officer also sent muddemal to Chemical Analyzer (CA) on 01.12.2014 under requisition Exh.-94. The investigating officer, thereafter filed charge-sheet in the Court of learned jurisdictional Magistrate.

5. The learned jurisdictional Magistrate found that the case is exclusively triable

by the Court of Sessions. Therefore, it was committed to the Sessions Court. Thereafter, it was registered as Sessions Trial No.47/2015.

Below Exh.-18, the learned Additional Sessions Judge, Pusad on 22.12.2015 framed charge against the appellant and other co-accused for the offence punishable under Sections 302, 498-A, 304-B, read with Section 34 of the IPC and under Section 201 of the IPC against the appellant. All the accused abjured their guilt and claimed for their trial.

6. During the trial, the prosecution has examined in all seven witnesses and also relied upon various documents duly proved during the course of trial. Defence of the appellant during the trial was that since he has embraced Sikhism, all the witnesses are against him. He also took a plea of alibi and to prove the said defence he examined one witness Vinod Rathod (DW1).

7. After a full dress trial, the learned Judge, though acquitted the appellant and all other accused persons of the offence punishable under Section 498-A of the IPC, convicted the appellant for the offence punishable under Section 302 and 201 of the IPC. Hence, this appeal.

8. We have heard Mr. A. B. Mirza, learned counsel for appellant and Mr. S. S. Doifode, A.P.P. for the State in extenso. We have also perused the record and proceedings with the able assistance of both the learned counsel.

9. The main plank of the submission of the learned counsel for the appellant is that the prosecution has not proved conclusively that the deceased met homicidal death. He submitted that in fact the prosecution case started with, that deceased has committed suicide. In order to buttress his submission, he invited our attention to the FIR, which states that Laxmibai committed suicide and also the post mortem report wherein it is not recorded by the autopsy surgeon that the injury was ante mortem. He also submitted that except the evidence of Lahu (PW5), there is no other evidence to implicate the appellant. He, therefore, submitted that benefit of doubt is required to be extended in favour of the appellant and prays for his acquittal.

10. Per contra, learned A.P.P. for the State submitted that if the evidence of Lahu is considered in the light of evidence of Dr.Kailash (PW6), there cannot be two opinions that the death of Laxmibai was homicidal. He, therefore prays for dismissal of the appeal.

11. According to prosecution case, the death of Laxmibai was due to respiratory failure because of asphyxia, which was caused in view of the tight pressure applied around her neck and after her death, in order to destroy the legal evidence, her body was burnt.

12. In this prosecution case there is no direct evidence to show that the appellant has applied tight pressure around neck of the deceased, resulting into asphyxia, resulting into her death. However, there is evidence of son of deceased, Lahu (PW5), who unequivocally and in clear terms depose before the

Court that his father i.e. the appellant burnt his mother.

13. In view of above, evidence of Dr. Kailash Vasram Rathod (PW6) and post mortem report has to be scrutinized minutely.

Evidence of Dr. Kailash Rathod would show that on 12.11.2014, when he was present on his duty as Medical Officer in Sub District Hospital of Pusad, Police Constable Vishal of Police Station, Khandala brought the dead body for post mortem. The body was identified by Baburao, uncle of the deceased Ramesh and maternal cousin of deceased. The post mortem was started on 3.30 p.m. and concluded at 4.30 p.m. The autopsy surgeon found that there were no clothes on her body. The body was 100% burnt. Rigor mortis were present all over the body. Her eyes were found closed with deep burns. Her tongue was bound protruding around 3 inches and Doctor noticed blood oozing from her nostrils.

The autopsy surgeon also found that there was a mark of rope around the neck with fractured cricoid cartilage. There is clear evidence of Dr. Kailash who deposed on oath that the cause of death is cardio respiratory arrest due to respiratory failure due to asphyxia due to tight pressure applied around neck with rope. He proved post mortem report Exh.-40.

His evidence would further show that on 13.11.2014, he received query from Police Station, Khandala that whether the death of Laxmibai was possible due to strangulation by throttling by applying tight pressure by both hands and whether fracture of cricoid cartilage can occur due to tight pressure applied by both hands. The query letter is at Exh.-81. He gave his reply Exh.-82. As per the opinion of the autopsy surgeon the cause of death was given as asphyxia due to tight pressure applied around neck with rope but this type of event can occur with tight pressure applied around neck with both hands i.e. thumb and fingers. He also opined that the fracture and cricoid cartilage can occur with the pressure applied with both thumbs around the neck. During his cross-examination, he replied to the learned cross-examiner that he could not mention the age of the neck fracture injury because it was not possible to judge the age of burn injury unless it is fresh. From his cross-examination, Dr. Kailash appears to be very seasoned Doctor since, as stated by him, he has conducted hundreds of post mortems and he has given his evidence in number of cases.

14. The contemporaneous document i.e. post mortem report Exh.-80 would show that at the time of conducting post mortem, the autopsy surgeon found fracture to the cricoid cartilage. True it is that the column no. 18-A is kept blank. It is for the doctor to fill the said column giving details as to whether the injury was ante mortem or post mortem.

15. Only because the said column is kept blank, we cannot jump to the conclusion that the fracture was a post mortem injury as tried to be argued before this Court by the learned counsel for the appellant. With respect to the learned counsel, we found no foundation for the same in the cross-examination of Dr. Kailash. Thus, according to us, the said submission made before this Court

was made just out of cuff.

16. According to the learned counsel for appellant, the deceased has committed suicide, as stated in the FIR.

FIR is not an encyclopedia of the prosecution case. It is not final word of the prosecution. By filing the FIR only, the wheels of criminal justice system are set into motion.

17. Rohidas (PW1) was not an eye witness. From the FIR it is clear that there were past instances of ill treatment to the deceased at the hands of the appellant and acquitted accused. In the said background, when he noticed the news of Laxmibai being died due to burn injuries, his first reaction was that his niece has committed suicide. In our view, no exception can be taken for the said reaction because it was most natural at that point of time.

18. During the course of investigation, the dead body was sent for post mortem and as we have noted in the preceding paragraphs, Dr. Kailash has found that the cause of death was not burn injuries but was asphyxia and respiratory failure. Post mortem report was received by the investigating officer on 13.11.2014. After receipt of the said post mortem report and expert's opinion about the cause of death, in our view, the investigating officer has rightly applied the provisions of Section 302 of the IPC. Therefore, merely because initially the offence was registered under Section 306 of the IPC, the prosecution was not barred from adding the offence punishable under Section 302 of the IPC.

19. Another submission of the learned counsel for the appellant was that if the evidence of Lahu (PW5) is perused, he did not state that he noticed that the appellant pressed the neck of his mother resulting into her death.

Evidence of Lahu (PW5), who is a child witness, is important in this prosecution case.

20. By catena of decisions, the Hon'ble Apex Court and various High Courts has settled the law that child witness is a competent witness to depose before the Court. Merely because a child is deposing from the witness box on that ground his evidence cannot be thrown away. Hon'ble Apex Court in Hari Om Alias Hero Vs. State of Uttar Pradesh; reported in (2021) 4 SCC 345, has ruled as under:

"The evidence of a 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 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 allegations 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."

21. Now let us evaluate evidence of Lahu (PW5). At the time of recording his evidence, he was 11 years of age. Learned Judge before whom his evidence was recorded found that he knows that after taking oath one has to speak truth.

His evidence would show that his mother was known by two names; Laxmibai and Vandana. He was taking education at Shivaji School, Pusad. His evidence would show that though earlier he was regularly attending the school but in Diwali, prior to the incident in question, his leg got injured by bicycle and therefore he was present in the house. Nothing could be brought on record by way of cross-examination of this witness to bring his particular statement under the shadow of doubt.

22. Once the prosecution has conclusively proved presence of Lahu (PW5) at his house and when he claims that burn injuries to his mother were caused by his father, the Court is required to see whether there were any chances of tutoring by anyone i.e. either police or by close relatives from his mother's side.

23. From the cross-examination of Lahu (PW5), it is brought on record that the police made inquiry with him on the spot. It is also brought on record during the course of cross-examination that his statement was not recorded in the presence of Nana i.e. mother's father. Thus, at the time of recording of statement of Lahu by police officers, it is clear that there was no tutoring to him from the relatives of his mother's side.

24. During the cross-examination, his evidence was tried to be challenged on the ground that his statement was read over to him by the learned A.P.P. From his cross-examination, it is clear that the learned A.P.P. who conducted the cross-examination was another Assistant Public Prosecutor. He stated that through the earlier A.P.P. called him for 2-3 times in the Court, he was not asked by any A.P.P. to memorize his statement nor the statement was read over to him by the learned A.P.P. Even from the cross-examination of investigating officer, nothing his brought on record to show that this child witness was under thumb of investigating officer. On a minute scrutiny of the evidence of Lahu (PW5), we are

of the view that though Lahu is a child witness there is no iota of evidence to show that he was puppet in the hands of the relatives from his mother's side or of the investigating officer. We found that his evidence is trustworthy.

25. In view of the cross-examination of Lahu (PW5) in its entirety, we are of the view that the law laid down by the Hon'ble Apex Court in the case of Hari Om supra, in respect of the evaluation of the child witness, as stated in the earlier paragraph, applies to this case with its full force and it is safe to rely upon the evidence of Lahu (PW5).

26. As per the evidence of Lahu (PW5), on the date of incident there was a quarrel between the appellant and his mother and cause of the quarrel was that his mother took Soyabean and Jowar of his grandmother. Evidence of Lahu (PW5) would show that at the time of incident, he was eating rice on a platform (Otta) in front of his house and his mother was sitting on the sand and his father was inside the house. Thereafter his father came outside and took his mother inside the house and set her on fire and thereafter he ran away from the house.

27. The testimony of Lahu (PW5) that his father ran away from his house is duly corroborated by Madhukar (PW2) who gave information to the first informant about the burning. His evidence would show that he was returning to his house after fetching water from well and when he reached in front of the house of the appellant, he noticed him coming out of his house and running towards high portion of the village.

From the above evidence of Lahu (PW5), it is clear that he noticed second part of act committed by the appellant i.e. destruction of the evidence.

28. So far as the first part that deceased died due to asphyxia, the evidence is post mortem report. A close look to the post mortem report Exh.-80 would show that when the dead body was opened the autopsy surgeon did not notice any carbon particles inside the lungs, trachea, etc. In our view, this is a most important piece of evidence because if during her lifetime she has burnt, noticing of carbon particles in her lungs and trachea will be mandatory. On the contrary, the autopsy surgeon found that both the lungs were found to be congested. In our view, that shows that there was asphyxia which resulted into the respiratory failure coupled with the fact that the Doctor has noticed cricoid cartilage fracture. Therefore, merely because the doctor has not mentioned that the said fracture was ante mortem, we, as a Court, cannot keep blind eye and can record a finding of granting benefit of doubt as tried to be argued by the learned counsel for the appellant.

29. There is no hesitation in our mind, after appreciating the evidence of Dr. Kailash Rathod (PW6) and findings noted in post mortem report Exh.-80 that the death of Laxmibai alias Vandana was homicidal one and to destroy the legal evidence and to screen himself from the legal punishment, the appellant tried to destroy the dead body by putting the dead body on fire.

30. The spot panchanama Exh.-54, would show that the dead body was found burning in other room. From the spot of incident, Kerosene can was seized. Not only that Turati stumps were also found. Blood mixed ash was also seized under seizure panchanama Exh.-58.

31. The immediate conduct of the appellant running away from the spot also has its own relevance. The appellant was not found in village when the police reached to the village. He was arrested after four days. Though, the appellant has examined Vinod Rathod as his defence witness, his evidence was rightly discarded by the learned Judge before whom the trial was conducted.

32. The appellant was arrested on 16.11.2014 under arrest form Exh.-60. His clothes were seized on 17.11.2014 under Exh.- 57 and there was a proper sealing. When his clothes were sent to the CA under Exh.-30, the CA found Kerosene residues were there for which no explanation is offered by the appellant. That shows that in our view defence of alibi was nothing but a falsehood. Otherwise, there was no occasion of Kerosene residues finding place on the clothes.

33. The appellant, his wife and son were only living in the house. The other accused persons were residing separately. The dead body was found inside the house of the appellant. No explanation is offered as to how there were burn injuries on her body especially when it was not the suggestion on the part of the appellant that she met burn injuries accidentally.

34. On reappreciation of the entire prosecution case, we concur with the finding recorded by the learned Judge before whom the trial was conducted, as observed in the paragraph 69 of the judgment. Resultantly, we pass the following order.

#### ORDER

(i) The appeal is dismissed.