
(2010) 09 BOM CK 0160
In the Bombay High Court
Case No : Criminal Appeal No. 1434 of 2003

Dilip Dnyanoba Ghaware

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 17-09-2010

Acts Referred:

Evidence Act, 1872 — Section 27, 3
Penal Code, 1860 (IPC) — Section 302

Citation : (2010) 09 BOM CK 0160

Hon'ble Judges : D.D. Sinha, J;A.R. Joshi, J

Bench : Division Bench

Advocate : Revati Mohite-Dere, for the Appellant; S.S. Pednekar, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

A.R. Joshi, J.—Present Criminal Appeal is preferred by the sole accused/appellant taking exception to the judgment and order passed in Sessions Case No. 132 of 1999. The said impugned judgment and order was passed by the learned Additional Sessions Judge, Pune on 29th September, 2003. Present appellant/accused was convicted for the offence punishable u/s 302 of Indian Penal Code and was sentenced to suffer imprisonment for life. Being aggrieved by the judgment and order of conviction, the present appeal was filed on 3rd December, 2003.

2. Heard the arguments of learned Advocate Mrs. Revati Mohite-Dere for the appellant and learned A.P.P. Mr. Pednekar for the State.

3. At the threshold it must be mentioned that the case of the prosecution is based on the testimony of the eye-witness and also on cognate circumstantial evidence. Peculiarity of the present case lies in the fact that the sole eye-witness to the incident of assault is a tender age girl by name Kajol. Said witness was then aged about 5 years, a kindergarten (Balwadi), child, and is daughter of the present appellant/accused and the victim woman. Admittedly, the entire case of

prosecution revolves around the statement of said child witness (PW 3). Coupled with her ocular evidence, there are overwhelming circumstances pointing towards the guilt of the present appellant/accused.

4. Prior to discussing the arguments, certain factual position as to the case of the prosecution and different stages of the investigation can be narrated as under:

Present appellant was residing in the rented room on the ground floor along with his wife - Savita (the victim, since deceased) and also along with his daughter Kajol (aged about 5 years) and son Kiran (aged about 2 and 1/2 years). The incident of assault, causing the death of Savita, occurred in the afternoon of 15th December, 1998, in the same room. The landlady Rakhmabai Chavan (PW 2) was residing at the first floor of the same building and on the day of the incident she had an occasion to hear the quarrel between the appellant and his wife-Savita. It happened in the afternoon of the fateful day after about 12:30 p.m.. Rakhmabai (the landlady) initially noticed that the door of the house of accused and deceased was closed however she heard the noise of quarrel. From outside the room, she censored the appellant and went to her room on the first floor. However, again she came down as called by another tenant of the Chawl. This time, she knocked the door and when it was opened by the appellant, she saw the victim Savita lying on the floor and there was blood around her head. Said Rakhmabai directed the appellant to take his wife to hospital for treatment. Appellant agreed to do so and left the house along with his two children i.e. Kajol (PW 3) and son Kiran.

5. It is also the case of the prosecution that the appellant along with his two children attended the police chowky in the area and intimated one police official on duty (Kishor Kapare PW13). Certain entry was made by said police personnel and allegedly that time appellant made a confession about assaulting his wife with the help of grinding-stone and causing her death in the house. Intimation was given to the police station from the said police chowky. Police Inspector Mr. Shinde (PW19) went to the spot and conducted the panchnama after calling the panch witnesses and collected the blood samples and grinding-stone having blood stains. One Mr. Sunil Renuse (PW 4), brother of the deceased, was called. He lodged the First Information Report. On the basis of his report, offence was registered against the appellant/accused at C.R. No. 272/1998 at Sahakarnagar police station, Pune for the offence punishable u/s 302 of Indian Penal Code.

6. During the investigation, on the same day of the incident, the appellant/accused was put under arrest and under the panchnama the clothes, he was wearing and having blood stains, were seized and taken charge of. Dead body of the victim-Savita was sent for postmortem after inquest panchnama was conducted. Postmortem report was received during the investigation. Various injuries found on the dead body, detailed in the postmortem report, can be reproduced hereunder in order to ascertain the factual position and nature of the injuries so as to appreciate the arguments advanced on behalf of the appellant. The injuries are as under:

(A) External Injuries:

1. Cruciate CLW in right upper posterior parietal region near parietal eminence of size 7x5 cms. bone deep darked.
2. CLW latera part of left upper eye-lid, vertically oblique, size 3x1 cms. bone deep dark red.
3. abraded contusion on left zygomatic region 3x1 cms, dark red.
4. CLW on left part of upper lip 2 x 1.5 cms. through and through dark red swelling present.
5. abrasion on base of the neck posterior aspect 3x2 cms. dark-red.
6. abrasion on right upper scapula 2x1 cms. dark-red.

(B) Internal Injuries:

1. hematoma in left fronto temporal and right parietal tempo region, contused, dark-red.
2. compound and comminuted fracture of right parietal bone, extending to left parieto temporal region through sphenoid bone, dark-red.
3. parietal and temporal lobes contused with evidence of bilateral subdural haemorrhage.

7. Statements of various witnesses were recorded including the neighbours of the appellant/accused. The accused was sent for medical examination and his blood sample was taken for blood grouping and it was determined as of "O" group.

8. At this juncture, it must be mentioned that the blood group of the deceased was "A", so also the blood found on the clothes of the appellant/accused is of "A" group. It is also case of the prosecution that u/s 27 of the Evidence Act, there is discovery of one stamp paper at the instance of the accused having certain writing as to illicit relations between deceased Savita and one person by name Ramesh. After completion of investigation, charge-sheet was filed. After framing of the charge and after recording of the evidence of witnesses, learned Additional Sessions Judge, Pune convicted the present appellant for the offence punishable u/s 302 of Indian Penal Code.

9. Again, prior to appreciating the rival arguments, it must be said that the present case is based on circumstantial evidence and also assisted by the direct evidence of child witness (PW 3). So far as the motive to kill the victim, there is ample material on record by way of substantive evidence of PW 1 Vishnu and PW 4 Sunil (first informant). Substantive evidence of PW-1 is of much significance. According to him, at one time the appellant had visited the house of the said witness and complained regarding illicit relations of his wife with one Ramesh Katurde. On this count there used to be frequent quarrels between the appellant

and his wife. Appellant requested said witness to intervene and censor his wife. However PW-1 refused to intervene, mentioning that it was family dispute between the appellant and his wife. According to said witness, 2-3 days after the above meeting, again the appellant visited his house and there was a sort of meeting arranged at the native village of the appellant so as to persuade Savita not to indulge in such type of illicit relations. That time, a meeting was held and it was attended by the parents of the accused and also his brother. Ramesh was also present and it was decided that Ramesh and Savita should stop such illicit relations. Thereafter PW1 came to know regarding murder of Savita at her house. This witness has been cross-examined on behalf of the defence. However, his testimony does reflect that Savita had illicit relations with Ramesh and on that count there used to be quarrel between husband and wife.

10. On the same aspect of motive, there is substantive evidence of PW-4 Sunil (first informant). He is the brother of deceased Savita. Marriage between Savita and present appellant took place in the year 1992 and after marriage, Savita and the appellant stayed at the native place and then shifted to Dhankavadi, Pune. According to this witness, earlier also Savita had illicit relations with one Chandrakant Renuse of their village who was in distant relation with Savita. Appellant/accused in view of such conduct of Savita used to quarrel with her. It was also the reason for the appellant beating Savita at times. Said PW-4 also narrated the incident when he had been to his native village along with his father and appellant in the auto rickshaw of the appellant. On their way, they met Ramesh Kathurde who is a friend of the appellant. On that night, said witness and accused returned to Dhankawadi at the house of the appellant. It was at about 10:30 p.m. and the door was closed. Said witness knocked the door. His sister Savita opened it and that time it was revealed that Ramesh Kathurde was sleeping in the house. Noticing his presence, the appellant accosted said Ramesh and asked the explanation of his presence in the house at that late hours. There was quarrel ensued, in which appellant tried to assault his wife Savita by means of a grinding-stone. In fact, appellant took up the grinding-stone however PW-4 intervened and pacified the situation. After this incident, PW-4 took his sister Savita to his native place to her parents. However, after 15 days, appellant brought her back to their house at Dhankawade. According to PW-4 there was some earlier meeting held in which Ramesh Kathurde and Savita were censored not to indulge in illicit relationship. Thereafter on the fateful day i.e. on 15th December, 1998 at about 2:30 p.m. police came to his house and took him to the house of his sister and appellant where the dead body of Savita was lying in the room in the pool of blood. Noticing the situation and sensing that Savita had sustained severe bleeding injury to her head and noticing the grinding-stone having blood stains, PW 4 gave his detailed complaint to the police alleging that his brother-in-law i.e. present appellant committed murder of Savita. Though this witness is also cross-examined on behalf of the defence and though certain variance is brought on record as to presence or otherwise of landlady Rakhmabai, what is unshaken is the factum of illicit relations between Savita and

Ramesh Kathurde and on this count appellant was greatly enraged and at earlier occasion had tried to assault his wife Savita by lifting a grinding-stone.

11. So far as the substantive evidence of these above referred two witnesses is concerned, it must be said that it has been rightly appreciated by the Additional Sessions Judge, Pune holding that there was definitely motive for the appellant to do away with his wife.

12. The following are the circumstances, which are incriminating against the appellant.

[1] Evidence of PW2 Rakhmabai. Though this witness has been declared as hostile, part of her testimony is accepted by the learned Additional Sessions Judge and rightly so in our view. So far as this witness is concerned, at least there is substantive evidence that she had heard the noise of quarrel from the house of the accused and it is a factual position that Savita was found in severely injured condition in the house on that afternoon and appellant along with his two children was also present.

[2] There is substantive evidence of PW13 police official Kishor Kapare. According to this witness, accused had visited the police station along with his two children immediately after the incident. The visit of the appellant to the police station is an admitted circumstance. However, what is denied by the appellant is that he had made any confession. According to the appellant, he went to the police station in order to lodge some complaint as to finding his wife in the house after he came from outside. According to the appellant, when he came on the fateful afternoon from outside he found his son aged about 2 and ? years weeping. He also noticed that his wife was lying on the ground in severely injured condition and there was pool of blood around her head. According to the appellant, he then take his small child and went to the school of his daughter Kajol and collected her from there and went to the police station to lodge complaint. It is curious to note that instead of taking immediate steps to get possible medical help to his wife, who was lying at the home, he went to the police station to lodge complaint. In our opinion even on preponderance of probabilities such defence of the appellant that somebody else had committed murder of his wife cannot be accepted. In other words the substantive evidence of PW 13 (police official) is acceptable and definitely it is a circumstance incriminating against the appellant.

[3] There are blood stained clothes found on the person of the appellant and the blood detected on the clothes is of "A" group, whereas admittedly the blood group of his wife Savita was "A" and blood group of the appellant was of "O". On this aspect, panch PW14 Dashrath Mali is examined by the prosecution. Again in our view this is one more incriminating circumstance against the appellant.

13. Now the substantive evidence of the child witness PW3 Kum. Kajol can be discussed in the light of various pronouncements on the aspect of appreciation of the evidence of child witness.

14. On behalf of the defence shelter of the following authority is taken:

Narayan Kanu Datavale and others Vs. State of Maharashtra,

In the realm of the appreciation of the evidence considering Section 3 of the Evidence Act, the testimony of the child witness must be considered with great caution and circumspection. The rationale for this is that it is common experience that a child witness is most susceptible to tutoring. Both on account of fear and inducement, he can be made to depose about things which he has not seen, and once having tutored, he goes on repeating in a parrot like manner what he has been tutored to state. By pointing out this, it is strongly submitted on behalf of the appellant/accused that possibility of PW3 Kajol been tutored by her relations to depose against her own father, cannot be ruled out.

The ratio propounded by the above referred authority cannot be disputed however while scrutinizing the evidence of said child witness in the present case, it is found out that said evidence is quite natural and is independently corroborated by the circumstances. At the cost of repetition, it is required to be mentioned that admittedly the deceased was in her house and when at least her small son aged about 2 and ? year was present in the house. Admittedly, present appellant/accused had visited the police station immediately after the incident and that time he was accompanied by his both the children. It is also an admitted position that the grinding-stone smeared with blood was found in the house by the side of the dead body of deceased Savita. Otherwise also, independently the substantive evidence of said child witness (PW3) inspire confidence in as much as her examination-in-chief and also the cross-examination is recorded in question and answer format and after ascertaining her ability of understanding. Apparently at the time of incident, Kajol was aged about 5 years and was school going and had returned from her school. She had categorically answered and given the names of her father and mother i.e. present appellant and deceased. She specifically stated that her father beat her mother with the help of a grinding-stone (pata). Though during the cross-examination she could not answer as to what was her age at the time of incident, but, she still answered that she was a student of Balwadi. On this aspect the factual position cannot be overlooked by us, in as much as the incident occurred in the year 1998 when said witness was hardly about 5 years of age and her evidence was recorded after a span of about 4 years sometime on 14.11.2002. We have also gone through the note recorded by the learned Additional Sessions Judge prior to recording the evidence of said child witness. Learned Additional Sessions Judge had satisfied himself after putting some questions to her to test her understanding as to ability of the said witness to give evidence. However, considering the tender age of the said child oath was not administered to her.

15. During the arguments, it is tried to argue on behalf of the defence that the child was school going and studying in Balwadi and was having a morning school. So by the time of incident, she must not have been at the house and as such could not have witnessed the incident. To substantiate this argument, shelter of

the answer given by the child witness is taken on behalf of the appellant in as much as in the beginning of the cross-examination said Kum. Kajol had answered that she used to go school in the morning and used to return in the evening. Infact it was the answer given by her as the timings were suggested during the cross-examination. The specific answer recorded and appearing in the notes of evidence can be reproduced to ascertain the way in which the answer was extracted from the child (then aged about 9 years). Said answer is "It is correct to say that I used to go to school in the morning and used to return in evening." Still after extraction of this answer, still it cannot be overlooked that then the girl was hardly 5 years of age and was a balwadi going child and as such a judicial notice can be taken that Balwadi classes could not have been conducted from morning to evening. This is more so when the another answer given by the child saying that the school was near to the house. To the next question in the cross-examination as to whether she could tell the school timings, the answer is as under "I do not remember". Considering the tender age of the girl and specifically considering her relation with the appellant as her own father, hardly it can be said that the said child Kajol was a got-up witness. We are in agreement with the observations of the learned Additional Sessions Judge to hold that the substantive evidence of said child PW3 is definitely incriminating against the appellant/accused. This is more so when during further cross-examination said girl had denied all the suggestions as to tutoring.

16. On this above aspect of appreciation of a child witness, learned A.P.P. placed reliance on the observations of the Hon"ble Apex Court in the following authority:

Himmat Sukhadeo Wahurwagh and Others Vs. State of Maharashtra, .

In the judgment, cited above on behalf of the State, the Hon"ble Apex Court has quoted para-10 in Nivrutti Pandurang Kokate and Others Vs. State of Maharashtra, . Said para-10 therein is reproduced hereunder for the sake of ready reference and in order to have advantage in the present case so far as acceptance of the evidence of the child witness in the present matter.

Nivrutti case para-10:

10. ...7... 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 on 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 molded ,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.

17. Considering the factual position as detailed above, it must be said that the evidence of child witness in the present matter is acceptable and has been rightly taken shelter by the learned Additional Sessions Judge while convicting the present appellant for the offence of murder of his wife.

18. Before parting with the present appeal, it must be mentioned that though as argued there is a factual position as to hostility shown by some of the witnesses, neighbours and also some panch witnesses, the main matrix of the case of the prosecution is in no way shaken so far as the motive, circumstances appearing against the appellant and the direct evidence of child witness. In the result, there is no merit in the present appeal and the same is disposed of with following order:

::ORDER::

[i] Criminal Appeal No. 1434 of 2003 stands dismissed.