

(2022) 02 BOM CK 0093
In the Bombay High Court
Case No : Criminal Appeal No.101 Of 2015

Hemraj

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 26-02-2022

Acts Referred:

Indian Penal Code, 1860 — Section 302, 307, 323, 498A

Citation : (2022) 02 BOM CK 0093

Hon'ble Judges : V. K. Jadhav,J;Sandipkumar. C. More, J

Bench : Division Bench

Advocate : Satej S. Jadhav, D.S. Jape

Final Decision : Dismissed

Judgement

Sandipkumar C. More, J

1. This is an appeal preferred by the appellant/accused Hemraj Babu Rathod against his conviction recorded by the learned Sessions Judge, Aurangabad (hereinafter referred to as the "trial Court") in Sessions Case No. 144/2010 vide judgment and order dated 29.11.2014. Under the impugned judgment the learned trial Court has convicted the present appellant / accused under Section 302 of the Indian Penal Code (for short "I.P.C.") and sentenced him to suffer imprisonment for life and to pay fine of Rs. 500/- in default to suffer rigorous imprisonment for three months. Learned trial Court has also convicted the appellant / accused for the offence punishable under Section 307 of I.P.C. and sentenced him to suffer rigorous imprisonment for 7 years and to pay fine of Rs. 300/- in default to suffer rigorous imprisonment for one month.

2. The story of the prosecution in nutshell is as under :

(a) The appellant / accused Hemraj Babu Rathod is a resident of village Upalkheda, Taluka Soygaon, District Aurangabad. He got married with one Latabai i.e. the informant and PW-1 in the present case 12 years before the incident. Out of the said wedlock, Latabai gave birth to two sons Ajay and Viay.

At the time of the incident Ajay was aged about 11 years and Viay was aged about 5 years. The appellant was residing with Latabai and these two sons at village Upalkheda, Taluka Soygaon, District Aurangabad. However, he was addicted to liquor and also used to take doubt on the character of his wife Latabai. Since the accused was harassing and torturing Latabai for that reason and also beating her on that count, Latabai started residing at village of her parents at Liha Tanda, Taluka Jamner, District Jalgaon with her aforesaid two sons, from six months prior to the incident. Three brothers as well as mother of Latabai are also residing at village Liha Tanda. Latabai used to maintain herself and her children by doing labour job.

(b) Prior to two days of the incident i.e. on Monday morning, the appellant had come to the house of Latabai at village Liha Tanda. He stayed there with them for two days. On Tuesday appellant consumed liquor and took round in the village and in the evening he returned to the house at Latabai. The appellant was insisting Latabai to come with him for cohabitation and for that purpose he even made contact with his sister Yashodabai Kashinath chavan on mobile and asked Latabai to talk with his sister Yashodabai. However, Latabai refused to talk to his sister, and therefore, there was quarrel between the appellant and Latabai at the relevant time.

(c) On the day of the incident i.e. on Wednesday dated 17.10.2010 the appellant again had asked Latabai to come with him for cohabitation at Upalkheda, but Latabai refused for the same. Again there was quarrel between the appellant and Latabai on that count. Then at about 10.00 a.m. accused told Latabai that he wanted to go back to village Upalkheda and he would take his two sons to bus stand and give them some eatables and money and then send them back from the bus stand. Accordingly, accused took both his sons with him. However, since those sons did not return back for a long time, Latabai made enquiry about her sons in the village. At about 2.30 p.m. appellant informed from one coin box telephone installed at the shop of one Bhagchand Parasram Chavan that he was at Pachora with his two sons and they were going to Upalkheda. Then at about 10.00 p.m. villagers Raju Sitaram Chavan, Ramsing Shripat Patil and Shravan Sadu Rathod came to the house of Latabai and told her that both her sons were lying on the road in the vicinity of Palaskheda village. Accordingly, when she alongwith her brothers namely Yuvraj and Sukhdeo went there, it was found that throat of elder son Ajay was slit and there was also an attempt of cutting throat and private part of the younger son Viay. As such, Latabai and her relatives brought both the sons to Primary Health Centre of village Pahur for medical treatment in jeep. On examination, the Medical Officer who was present there, told them that son Ajay was dead. According to Latabai, both the sons were talking to her till they reached Pahur and they told her that the appellant / accused slit their throats. As Viay was under treatment, Latabai came to Soygaon Police Station at about 4.30 a.m. early in the morning of 18.02.2010 and lodged report against the appellant. The concerned police station accordingly registered crime against the appellant bearing Crime No.6/2010 for the offences punishable

under Sections 302 and 307 of the I.P.C.

3. A.P.I. Chatrabhuj Nagargoje i.e. PW-6 conducted the investigation of the said crime. During the course of investigation, he visited the Primary Health Centre, Pahur and prepared inquest panchnama over the dead body of Ajay in presence of two panchas. He also issued letter to Medical Officer for conducting postmortem. Accordingly, postmortem was conducted. One Dr. Sharad Choudhari examined the other injured son Viay and prepared injury certificate. Thereafter Investigating Officer Nagargoje also visited spot of the incident and prepared spot panchnama in presence of two panchas. At the relevant time the Investigating Officer found one shirt, one pant, white shirt, underpant, one charger, SIM Card packet of mobile No. 9624761037, other yellow SIM card, one black coloured bag, blood mixed soil and simple soil, ball pen, one chappal, twig of cotton plant on the spot which he seized in presence of panchas. Investigating Officer also seized clothes worn by deceased Ajay in presence of panchas comprising one pant, one shirt and one Kardora. Then Investigating Officer arrested appellant / accused on the same day i.e. on 18.02.2010 at about 7.05 p.m. as per arrest panchnama and also seized clothes worn by appellant / accused including shirt, pant and also one receipt of purchase of blade of saw (djor) and a rope from the shop i.e. Viay Loh Bhandar, Pahur. Investigating Officer accordingly prepared separate seizure panchanama. Then the Investigating officer recorded statements of witnesses.

4. Thereafter on 19.02.2010 appellant made disclosure statement in presence of panchas mentioning that he was ready to produce blade of saw and rope. Accordingly after recording of such memorandum, the Investigating Officer alongwith panchas, police staff and also with appellant went to village Liha Tanda in police jeep. There the appellant / accused produced one blade of saw and rope from one agricultural field wherein cotton crop was standing.

Those articles were hidden below twig of cotton plant in the said field and the same were seized under seizure panchnama by the Investigating Officer in presence of two panchas. The Investigating Officer then recorded statements of some witnesses. Seized articles were then sent by Investigating Officer in sealed condition alongwith viscera of deceased Ajay to Chemical Analyzer under covering letters. Then the Investigating Officer recorded statements of remaining witnesses and collected postmortem report of Ajay as well as injury certificate of Viay. Investigating Officer also collected 7/12 extract of the agricultural field where the incident had taken place. On completion of investigation, Investigating officer filed charge-sheet against the appellant as it was transpired that the appellant committed murder of his elder son Ajay and also tried to kill his younger son Viay.

5. The concerned Judicial Magistrate First Class, Soygaon committed the case to the Sessions Court, Aurangabad. On appearance of the appellant, the learned Sessions Judge framed charge against the appellant vide Exh.3 for the offences punishable under Sections 498-A, 323, 302 and 307 of the I.P.C. Since the

appellant denied the charge levelled against him and claimed for trial, the learned trial Court proceeded with trial and convicted the appellant as mentioned above. As per purshis fled by learned A.P.P. and learned Advocate for the appellant before the trial Court, charge already framed against the appellant was altered by deleting Sections 498-A and 323 of I.P.C.

6. We have carefully gone through the entire evidence on record and also heard rival submissions.

7. Learned Counsel for the appellant/accused vehemently argued that though the appellant is charged for murdering his own son Ajay and also for an attempt to commit murder of his second son Viay, but it is very difficult to believe that a father can murder his own son in such a brutal manner. He submits that the children were in fact close to the appellant. Learned counsel for the appellant has pointed out that the evidence of PW-2 Viay i.e. the younger son of the appellant, appears to be tutored since he was in custody of PW-1 Latabai i.e. his mother. He further submits that on the recovery of murder weapon i.e. Hacksaw Blade is doubtful since the prosecution did not examine concerned panchas. As such, he prayed for acquittal of the appellant by giving him benefit of doubt.

8. On the contrary, learned A.P.P. submits that the prosecution has proved guilt of the appellant / accused beyond all reasonable doubts. According to him, there is direct evidence against the appellant through his own son i.e. PW-2 Viay about commission of crime and his evidence appears trustworthy and reliable. He then pointed out that the other circumstantial evidence also goes against the appellant since the blood of Ajay has been found on the clothes of Ajay and on Hacksaw Blade, allegedly used by the appellant to kill him. Accordingly, the learned A.P.P. prayed for dismissal of the appeal.

9. On going through the evidence of prosecution, it appears that the prosecution has examined six witnesses, out of which PW-1 Latabai Hemraj Rathod is the informant, who is the wife of appellant / accused. On perusal of her evidence, it appears that she has stated that she was residing separately from appellant / accused along with her children as the appellant used to take doubt on her character. It is not disputed that at the time of incident, Latabai was residing at Liha Tanda alongwith her two sons separately from the appellant / accused, who used to reside at village Upalkheda. Further, the evidence of PW-1 Latabai also indicates that two days prior to the incident, appellant had come to her at village Upalkheda and persuaded her to go with him at Upalkheda for cohabitation. It is also evident that the appellant, after coming to village Liha Tanda, had resided there with his wife PW-1 Latabai and children for about two days. Further, it revealed that on the day of incident i.e. on 17.02.2010 the appellant was intending to go to village Upalkheda since Latabai refused to go with him for cohabitation. It has also come in the evidence of PW-1 Latabai that the appellant had in fact requested her to take their two sons to bus stand for giving them some eatables and money and also assured that he would send them back from the bus stand. The evidence of PW-1 informant Latabai further indicates that the

appellant thereafter took both his sons Ajay and Viay with him and since the sons did not return back for a long period, Latabai made enquiry about her sons in the village. However, at about 10.00 p.m. on the same day PW-4 Raju Hiralal Marmath, who is a Milkman, had seen both the boys lying unconscious towards the southern side of Gogadi river by the side of the road, when he was returning to village Liha Tanda on motorcycle with one Laxman Balchandra Mahere and then told about the same to Arun Patil, Ramsing Patil and others of Liha Tanda village.

10. Though it is submitted by the learned Counsel for the appellant that Raju Sitaram Chavan, Ramsing Shripati Patil and Shravan Sadhu Rathod, who told the incident to Latabai, were not examined. However, from the testimony of PW-4 Raju Marmath it is evident that he told the fact that both the sons lying in unconscious state atleast to Ramsing Shripati Patil who in turn had informed the said fact to PW-1 Latabai alongwith other persons. As such, we find no force in the submission of the learned Counsel for the appellant.

11. Further, it appears from the testimonies of PW-1 Latabai and PW-4 Raju Marmath that there were cut wounds on the necks of both the sons of the appellant, and therefore, both of them were taken to the Primary Health Centre, Pahur and on examination of them, it was found that Ajay was dead, whereas other son Viay was injured. It further appears that Viay was shifted to Jalgaon for further treatment. PW-1 Latabai has also specifically stated that since both her sons were in the company of the appellant / accused lastly, she lodged report against the appellant on 18.02.2010 at 4.30 a.m. i.e. early in the morning in Soygaon Police Station. From the evidence of PW-1 informant Latabai atleast it is proved that both her sons were seen lastly in the company of the accused.

12. Next witness of the prosecution is PW-2 Viay Hemraj Rathod i.e. the injured son of Latabai and the appellant / accused. Evidence of PW-2 Viay is direct against the appellant. He has specifically stated in his evidence that the appellant / accused was taking him and his brother Ajay to village Upalkheda from village Liha Tanda instead of sending them back to his mother. Further, PW-2 Viay has also deposed as to how the appellant killed his brother i.e. by slitting his neck with the help of blade. Not only this, but PW-2 Viay has also specifically stated that at the time of incident he was tied by rope by the appellant. On perusal of the evidence of PW-2 Viay, it is clearly evident that the learned trial Court, while recording his evidence, had confirmed that Viay was knowing the importance of taking oath. Merely the said child witness was not aware about the consequences of speaking lie after taking oath, the oath was not administered to him. PW-2 Viay has specifically state that the appellant killed Ajay by cutting his neck with the help of Hacksaw and he was also tied with the rope by the appellant.

13. Learned Counsel for the appellant vehemently argued that since PW-2 Viay was in the company of his mother PW-1 Latabai, the possibility of tutoring could not be ruled out. However, on perusal of cross-examination of PW-2 Viay, it is

apparent that his testimony remained unshattered even in the cross-examination. So far as the incident of killing Ajay by the appellant and in respect of assault on Viay by the appellant is concerned, normally while assessing the credibility and truthfulness of a child witness, the Court has to do the same with care and caution, but considering the answers given by this witness i.e. PW-2 Viay in the cross-examination, it appears that the said evidence is credible and believable. Nothing suspicious has brought on record in the cross-examination of PW-2 Viay from the side of the appellant / accused.

14. The version of PW-2 Viay is also well supported by the medical evidence on record. It is the case of the prosecution that the appellant not only killed his elder son Ajay, but also attempted to commit murder of his younger son Viay i.e. PW-2. In the backdrop of these allegations if we peruse the evidence of PW-5 Dr. Atul Sonar, who had conducted the postmortem over the dead body of Ajay, it is evident that PW-5 Dr. Atul Sonar had found the following injuries on the person of Ajay, which are also mentioned in postmortem notes at Exh. 36.

(i) Large clean cut wound over neck horizontally, anteriorly about 10 x 4 x 3 cm, extending from anterior border of sternocleidomastoid muscle on left side upto half breadth of sternocleidomastoid on right side at the level of thyroid cartilage.

(ii) Bilateral external jugular vein cut completely.

(iii) Left side internal carotid cut completely.

(iv) Half breadth of sternocleidomastoid cut on left side.

(v) All superficial neck muscles were cut anteriorly.

(vi) Superficial multiple abrasions seen over heel or feet. Further, the internal injuries mentioned below are also found corresponding to the external injuries :

(i) Trachea half cut open at thyroid level.

(ii) Bronchi filled with blood clot.

15. The evidence of PW-5 Dr. Atul Sonar has also revealed the fact that Ajay's death was caused due to haemorrhagic shock due to blood loss due to major vessel trauma in neck due to cut throat injury by sharp cutting weapon. Moreover, the injuries found on the person of deceased Ajay were in consonance with the evidence given by PW-2 Viay who was present on the spot of the incident at the relevant time. As such, there cannot be any doubt about the fact that Ajay died because of cut wound over his neck which were ante-mortem and possible by sharp edged weapon like Hacksaw. Further, it has also come in the evidence of PW-5 Dr. Atul Sonar that PW-2 Viay was examined by Dr. Sharad Choudhari who was present with him in Primary Health Centre, Pahur on emergency duty. The injury certificate issued by Dr. Choudhari which is at Exh. 34, which was signed by Dr. Sharad Choudhari in presence of PW-5 Dr. Sonar, indicates the following injuries sustained by PW-2 Viay :

- (i) Abrasion over the neck and strangulation.
- (ii) Mark around the neck.
- (iii) Abrasion over both ear.
- (iv) Abrasion over upper and lower limb.
- (v) Abrasion at penis site.

Though Dr. Choudhari is not examined by the prosecution before the learned trial Court, but the injury certificate at Exh 34 in respect of PW-2 Viay cannot be doubted as PW-5 Dr. Sonar has categorically stated that in his presence Dr. Sharad Choudhari had examined PW-2 Viay. The prosecution story speaks about the assault on PW-2 Viay. According to it, there was an attempt to cut throat of Viay also at the hands of appellant. Further, private part of Viay was also attacked by the appellant. The injuries mentioned in certificate Exh. 34 in respect of PW-2 Viay thus get support from the allegations made in the story of prosecution. Further, we do not find any reason as to why PW-2 Viay will depose against his own father. As such, the medical evidence on record is also in the consonance with the oral deposition of PW-1 Latabai and PW-2 Viay.

16. So far as other evidence on record is concerned, PW-6 A.P.I. Nagargoje, who was the Investigating Officer in this crime, has established recovery of weapon i.e. blade of saw and rope at the instance of appellant / accused. It has specifically come in his evidence that on 19.02.2010 the appellant / accused while in custody, made disclosure in the presence of two panchas and also produced blade of saw and rope which he had kept in the cotton crop in the agricultural field. Though the learned Counsel for the appellant / accused strenuously submitted that the panchas who were present at the time of the said disclosure statement and recovery, are not examined, but there is scientific evidence on record in the form of CA reports which supports the prosecution story as regards the guilt of the appellant/accused. Moreover, Investigating Officer PW-6 API Nagargoje cannot be said to be a person who would involve the appellant/accused falsely in the crime. It has specifically revealed from the spot panchnama (Exh.27) which has been proved by PW-3 Gopalsing Rajput, that the articles mentioned therein were seized by the Investigating Officer A.P.I. Nagargoje. Further, the seizure of clothes of appellant / accused also cannot be doubted. Further, it is evident that PW-6 API Nagargoje had sent the seized articles to the Chemical Analyzer alongwith covering letters (Exhs. 48 and 49) and from those letters it is evident that the seized articles were duly received by the Chemical Analyzer in sealed condition. CA reports in respect of those articles are at Exhs. 53 to 57. From the CA report (Exh.54), it was found that blood group of deceased Ajay was 'A' and as per CA report (Exh.55), blood group of Viay was 'AB'. The blood group of appellant / accused, as per CA report (Exh.56) was found to be of 'A' group. The CA report (Exh. 57) indicates that blood mixed soil seized from the spot of incident was having human blood and the twig of cotton plant was stained with human blood of 'A' group. Similarly, the blood group of 'A'

was found on the saw and shirt of deceased Ajay. Not only this, but the blade of saw allegedly used for killing Ajay was also found stained with blood group 'A'. It is most important to note that human blood of 'A' group was also found on the shirt of the appellant/accused. It is not the case of the appellant / accused that he had sustained injury, and therefore, his own blood which is of 'A' group was there on his shirt. Therefore, it can easily be inferred that it was the blood of deceased Ajay which was there on soil, cotton twig, clothes of Ajay, blade and the shirt of appellant / accused in view of the ocular evidence given by PW-2 Viay.

17. Further, from the testimony of PW-2 Viay it has revealed as to how the appellant / accused tried to kill him also, specially when certain injuries as mentioned above were found on the person of PW-2 Viay. Moreover, PW-4 Raju Marmath has also found Ajay and Viay lying in unconscious condition when he came near the village Liha Tanda and both of them were in injured condition. The testimony of PW-4 Raju Marmath has thus corroborated with all the evidence of other witnesses. Further, the evidence of PW-1 informant Latabai has also established the fact that Ajay and Viay were seen lastly in the company of appellant / accused. Further, the evidence of PW-2 Viay is of utmost importance since it is directly on the incriminating act of the appellant / accused.

18. Thus, considering all the aforesaid ocular, circumstantial and scientific evidence on record, it has been fully established by the prosecution that on the day of incident, the appellant / accused had taken his both the sons Ajay and Viay with him and due to his dispute with wife Latabai, as she refused to go with him, slit the neck of Ajay with blade of saw and also attempted to commit murder of Viay. As such, we find that the learned trial Court has rightly convicted the appellant / accused in the light of the aforesaid evidence. Thus, we are of the opinion that there is no need of any interference in the finding of the learned trial Court convicting the appellant as aforesaid. Hence, we find no merit in the appeal and accordingly the appeal stands dismissed.

19. We quantify the fees of the appointed learned Counsel for the appellant to the tune of of Rs. 7,000/-(Rupees Seven Thousand) to be paid by the High Court Legal Services Sub-Committee, Aurangabad.