

(2022) 02 BOM CK 0092
In the Bombay High Court
Case No : Criminal Appeal No. 33 Of 2015

Jiwan @ Devendra Nathu Chalse

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 26-02-2022

Acts Referred:

Indian Penal Code, 1860 — Section 302
Code Of Criminal Procedure, 1973 — Section 163, 164, 235(2), 313
Evidence Act, 1872 — Section 24

Citation : (2022) 02 BOM CK 0092

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

Bench : Division Bench

Advocate : A. M. Gaikwad, D. S. Jape

Final Decision : Dismissed

Judgement

V. J. Jadhav, J

1. This appeal is directed against the judgment and order of conviction passed by the Additional Sessions Judge, Bhusawal dated 04.10.2014 in Session Case No. 69 of 2014.

2. The prosecution case in brief is as follows:

a. On 04.04.2010, at about 2.00 p.m., PW 4 Kajal aged 13 years, deceased Nayana aged 10 years and one more girl Nikita almost of the same age, had gone to answer nature's call at Rangaon-Raipur road. All the girls are relatives amongst each other. At that time, the appellant-accused went there on his black motorcycle. He had parked his motorcycle at some distance and went near the girls. He had questioned them as to whether they stand after some one comes there. The girls had replied in the affirmative. The appellant-accused caught hold hand of Nikita. However, Nikita gave jerk. Thereupon, deceased Nayana had asked him the reason for catching hand of Nikita. Therefore, appellant-accused went towards deceased Nayana and pressed her mouth by one hand and gave

stab blows with the help of knife in the stomach of deceased Nayana. The said knife was kept near his waist. He stabbed deceased Nayana in her abdomen by using knife for three times. Deceased Nayana fell down on the ground in the pool of blood. Thus, PW 4 Kajal and other girl Nikita ran towards S.T. stand. On reaching there, they saw father of Nikita and one Madhukar. They narrated them the incident. All of them rushed towards the spot. Deceased Nayana was lying there in dead condition. She was immediately carried to her house. The said girls had given description of the said accused. According to them, he was wearing a banian and a shirt was tied to his waist. He had also put on ash colour pant.

b. On the same day, PW 3 Sunil Sampat Koli (father of Nikita) has lodged complaint Exhibit 49 in the concerned police station. On the basis of his complaint, crime no. 29/2010 for the offence punishable under Section 302 of IPC came to be registered. PW 7 API Nilesh Mainkar (Investigating Officer) took over the investigation. He went to the spot of incident along with the police staff. On reaching there, he noted the blood spread over the road. In presence of two panchas he collected the sample of plain soil and blood stained soil by drawing spot panchanama Exhibit 24. The informant and the villagers informed him that the dead-body of Nayana is kept in a house of her relative which is at a distance of two minutes. In presence of two panchas, he has drawn inquest panchanama Exhibit 52 and forwarded the dead body of Nayana along with a Police Constable to the Rural Hospital, Raver for postmortem examination. On the same day, he has recorded statements of the eye witnesses Nikita and PW 4 Kajal. He has also recorded the statement of the persons of the locality.

c. It further appears from the prosecution story that on 06.04.2010, one news was published in newspaper Daily Lokmat, Jalgaon, that the appellant-accused has committed murder of one Amol Deepak Kolapkar suspecting that said Amol was having illicit relations with his wife. It was also published in the said news that the offence came to be registered at police station Shindkheda, District Dhule against the appellant-accused. In the said newspaper, the photograph of the knife used in commission of crime was published and name of motorcycle i.e. 'Rajdoot' was mentioned. It is also revealed that the appellant-accused Jivan is resident of Faizpur. Village Savda and village Faizpur are connected villages. PW 7 API Mainkar (IO) has thus suspected about involvement of the appellant-accused in this crime also. PW 7 API Mainkar (IO) had also talked to PI Pradhan of Police Station Shindkheda assigned with the investigation of the said crime. He has also filed transfer petition to interrogate the accused in connection with the present crime before J.M.F.C. Raver. On 12.04.2010, he has carried the transfer warrant of the accused to Shindkheda. On the same day, the concerned Magistrate of Shindkheda has informed that the confession of the appellant-accused is to be recorded in connection with the crime. Furthermore, PW 7 API Mainkar (IO) has also requested PI Pradhan in writing to give him the brief of history of the said case while sending the seized knife in that case to the office of C.A. Nashik for analysis. On 13.04.2010, he took custody of the appellant-accused on the basis of transfer warrant and further shown him as arrested in

connection with the present crime. On 14.04.2010 the appellant-accused has made a disclosure statement for production of his clothes which were on his person at the time of the incident. The said memorandum statement is marked at Exhibit 66. Accordingly, the accused led the police staff and the panchas to the house of his brother at Faizpur. The house was locked. The brother of the accused gave the keys. The appellant-accused opened the lock of the house in presence of the panchas and the police staff and produced his clothes wrapped in a paper kept in cupboard. The clothes of the accused were white full sleeves shirt with lining, white full sleeves banian and black pant. Out of those clothes, the shirt and the banian of the accused were stained with blood. Recovery panchanama of the said clothes is at Exhibit 67. On 16.04.2010, PW 7 API Mainkar (IO) has recorded the statement of the wife of the accused and a relative of deceased Amol.

d. On 17.04.2010, by a letter, PW 7 API Mainkar (IO) has requested the J.M.F.C., Raver to hold test identification parade of appellant-accused Jivan. He has also issued another letter dated 18.04.2010 requesting therein the J.M.F.C. Raver to record confessional statement of the accused under Section 164 of Cr.P.C. On 17.04.2010, the accused was taken in MCR. On 19.04.2010, PW 7 API Mainkar (IO) has received the confessional statement of the accused recorded by the J.M.F.C., Raver on 19.04.2010 itself. Further, the test identification parade was also conducted by the J.M.F.C., Raver on 23.04.2010. He has also collected a certified copy of the spot panchanama conducted by Shindkheda Police Station in connection with crime no. 28 of 2010, whereby the weapon knife and the motorcycle used in the same crime came to be seized. He has also collected a copy of the confessional statement of the accused recorded by the J.M.F.C. Shindkheda in connection with crime no. 28 of 2010 registered at Shindkheda Police Station. In the confessional statement of the appellant-accused in connection with crime no. 28 of 2010, the accused has admitted his guilt. On completion of investigation, PW 7 API Mainkar (IO) has submitted the charge-sheet against the accused. The learned Additional Sessions Judge has framed charge against the appellant-accused for the offence punishable under Section 302 of IPC. The appellant-accused pleaded not guilty to the charge and claimed to be tried. The prosecution has examined in all 7 witnesses to substantiate the charge levelled against the accused. The defence of the accused is of total denial. The appellant-accused has retracted his confession in his examination under Section 313 of Cr.P.C.

e. The learned Additional Sessions Judge, by the impugned judgment and order of conviction dated 04.10.2014 in Session Case No. 69 of 2014, passed the following order against the appellant-accused:

"Accused Jivan @ Devendra Natthu Chalase is hereby convicted under Section 235(2) of the Criminal Procedure Code for the offence punishable under section 302 of the Indian Penal Code.

Accused in an under-trial prisoner.

For having committed offence punishable under Section 302 of the Indian Penal Code, accused shall suffer imprisonment for life and shall pay fine of Rs.5000/- in default shall suffer Rigorous imprisonment for six months.

Muddemal articles no. 1 to 7 being worthless be destroyed after appeal period."

f. Hence this Appeal.

3. Learned counsel for the appellant-accused submits that as per the prosecution story, three girls namely, Kajal, Nikita and Nayana had been to the Rangaon-Raipur road for answering nature's call. However, the prosecution has examined only PW 4 Kajal. PW 4 Kajal is a child witness. The prosecution has not examined any independent witness. Admittedly, PW 4 Kajal and the other girl Nikita were not knowing the accused. They have simply given information regarding stabbing to deceased Nayana by one person who came there on black motorcycle and nothing more than that. Even though the incident allegedly took place by the side of the road, however the prosecution has not examined any independent witness. Learned counsel submits that the evidence of the child witness is required to be appreciated and scrutinized very carefully. There is every possibility of tutoring the child witness in order to support the prosecution story.

4. Learned counsel submits that the Judicial Magistrate, First Class, Raver has not conducted the identification parade as per the procedure laid down. The identification parade was conducted in the court hall of the Judicial Magistrate, First Class, Raver. However, there is no endorsement that the learned Magistrate has taken all the precautions for conducting identification parade in the court premises. Learned counsel submits that in connection with crime no. 28 of 2010 registered at Shindkheda Police Station, the news was published and the identify of the appellant-accused was disclosed. Therefore, conducting the identification parade in connection with the present crime was having no significance. Further, the identification parade was conducted after 19 days of the incident.

5. Learned counsel for the appellant-accused submits that the Judicial Magistrate, First Class, Raver has also not recorded the confessional statement as per the guidelines framed in the Criminal Manual. Learned Judicial Magistrate, First Class has failed to give a certificate that the confessional statement of the appellant-accused was made voluntarily without any pressure. Learned counsel submits that at the time of the alleged confession, the accused was in the police custody and he was not represented by the Advocate. Learned counsel further submits that the appellant-accused has retracted the confessional statement. There is no corroboration to the said confessional statement. Learned counsel submits that the confession was not voluntary and it is not true. In view of the same, it is very unsafe to act on the retracted confession.

6. Learned counsel for the appellant-accused submits that so far as the weapon knife allegedly used in commission of the crime is concerned, the same has not been seized in connection with the present crime. PW 7 API Mainkar (IO) has simply produced the certified copy of the seizure panchanama of the said knife in

connection with the present crime. However, such recovery of the weapon in connection with the present crime is not in accordance with the law and the same cannot be relied upon.

7. Learned counsel for the appellant-accused submits that there was no reason for the appellant-accused to go to the another village and commit murder of an unknown girl. There is no motive to commit the alleged crime. Learned counsel submits that the Investigating Officer has unnecessarily suspected involvement of the appellant-accused in connection with the present crime by reading about the news of registration of crime no. 28 of 2010 at Shindkheda Police Station. On the basis of the photograph of the black motorcycle published in connection with the said crime registered at Shindkheda Police Station, the Investigating Officer by stretching of imagination, suspected about involvement of the appellant-accused in connection with the present crime. Learned counsel for the appellant-accused submits that the identification parade was a farce. The appellant-accused is entitled for the benefit of doubt.

8. Learned counsel for the appellant-accused, in order to substantiate his submissions, has placed his reliance on the following cases:

1. Subramania Goundan f. The state of Madras, reported in AIR 1958 SC 66.
2. Pyare Lal Bhargava v. The State of Rajasthan, reported in AIR 1963 SC 1094.
3. Bhagwan Singh v. State of M.P., reported in AIR 2003 SC 1088.
4. State of Punjab v. Harjagdev Singh, reported in 2009 AIR SCW 4133.
5. Manoharan v. State by Inspector of Police, Variety Hall Police Station, Coimbatore, reported in AIR 2020 SC 3521.

9. Learned APP submits that the prosecution case rests upon the ocular evidence so also the confessional statement of the appellant-accused. PW 4 Kajal had given description of the accused to her father immediately after the incident. PW 4 Kajal has thus identified the appellant-accused in the identification parade so also in the court. The evidence of PW 4 Kajal is consistent, reliable and trustworthy. The prosecution has also proved the homicidal death of deceased Nayana. PW 5 Dr. Nilkanth Mahajan has given description of the injuries in detail in the postmortem report (Exhibit 55) and in his opinion, the injuries are possible due to sharp cutting weapon like knife and the stab injuries are fatal injuries.

10. Learned APP submits that PW 2 Yashdip Meshram, JMFC, Raver has recorded the confessional statement of the appellant-accused on 19.04.2010 after following the due procedure. He has also conducted the test identification parade in three rounds in presence of two independent witnesses on 23.04.2010 after following due procedure. PW 4 Kajal and the other girl Nikita have correctly identified the appellant-accused. Further, the clothes of the appellant-accused on his person at the time of the alleged incident came to be seized at his instance by drawing memorandum panchanama in presence of the pancha witnesses.

Learned APP submits that as per the C.A. reports Exhibits 71 to 74, the blood in the phial labelled 'Nayana Pralhad Koli' is of blood group 'A' and the blood group of the appellant-accused is 'O'. The blood on the clothes of the appellant-accused was found to be human blood. Learned APP submits that the prosecution has proved the case beyond reasonable doubt against the appellant-accused. There is no substance in this criminal appeal and the same is liable to be dismissed.

11. We have perused the material exhibits tendered by the prosecution, the evidence of the prosecution witnesses, the statement of the appellant-accused recorded under Section 313 of the Criminal Procedure Code and the impugned judgment.

12. So far as the homicidal death of Nayana Pralhad Koli is concerned, the same is not seriously disputed by the counsel for the appellant-accused. The prosecution has examined PW 5 Dr. Nilkanth Mahajan to prove the contents of the postmortem report Exhibit 55. PW 5 Dr. Nilkanth Mahajan has noticed the following external injuries on the person of deceased Nayana:

1. Two penetrating wounds placed vertically in umbilical area of abdomen separated by intact skin of 1 cm width. First wound is of dimension 3 cm x 1.5 cm with intestinal loops protruding.

Second wound is of dimension 3 cm x 2 cm placed on the left side of first wound with loops in intestines protruding through it.

2. Chop wound of dimension 4 x 2.5 cm bone deep on dorsal aspect of left hand placed obliquely with medial end placed upwards with fracture of underlying 4th and 5th metacarpal.

According to him, the above injuries were ante-mortem in nature. In his opinion, the cause of death is hemorrhage and shock due to the above injuries. He has further opined that both the injuries are possible due to sharp cutting weapon and are possible by knife. Stab injuries are fatal injuries. The defence has not suggested any other possibility. The prosecution has proved the homicidal death of deceased Nayana.

13. The prosecution evidence is twofold. The prosecution case rests upon the evidence of the eye witness PW 4 Kajal and secondly, the confessional statement of the appellant-accused recorded by the Judicial Magistrate, First Class, Raver.

14. PW 4 Kajal has deposed that on the date of incident at about 2.00 p.m., she herself with Nikita and deceased Nayana had gone to answer call of nature to Rangaon-Raipur road. They were sitting there to ease themselves. At that time, one person came there on black motorcycle and he had parked his motorcycle at some distance. He went near them and questioned them as to whether they stand after observing some person coming towards them. The girls had replied in the affirmative. However, the said person caught hold hand of Nikita. Nikita gave jerk. Thereupon deceased Nayana had questioned him for catching hand of Nikita. Thus, the said person went towards Nayana, pressed her mouth by one

hand and gave three stab blows on her abdomen. Deceased Nikita fell down in the pool of blood. PW 4 Kajal and Nikita rushed towards S.T. stand. PW 3 Sunil Koli (father of Nikita) was present there at the S.T. stand. They immediately narrated him the incident. They all rushed to the spot. However, deceased Nayana was lying dead on the ground. PW 4 Kajal had seen the assailant. According to her, the assailant wore banian on his person and the shirt was tied to his waist. He had put on ash coloured pant. She was called in the court at Raver for identification parade along with Nikita. According to her, eight or more persons were standing there and they had identified the appellant-accused twice. Firstly, they identified the accused standing at serial number 3 and secondly, at serial number 5. She had also identified the clothes of deceased Nayana marked as article A-1 and A-2. PW 4 Kajal has also identified the clothes of accused i.e. the shirt article A-3, banian article A-4 and pant article A-5.

15(a). PW 2 Yashdip Meshram, JMFC, Raver has conducted the identification parade. On 18.04.2010, he has received a letter from Police Station Savda for conducting identification parade of the accused, as the Tahsildar has refused to conduct identification parade. Accordingly, he has given directions to hold identification parade in his presence on 23.04.2010 in court. He has also issued a letter to the Jailor, Jalgaon to produce the accused with his face covered with black cloth. The letter is marked at Exhibit 30. He has also issued directions to produce witnesses Nikita and Kajal. The said letter is marked at Exhibit 31. He has also issued a letter to the Tahsildar, Raver to produce six dummy persons and two panchas at the time of the identification parade. The said letter is marked at Exhibit 32.

15(b). On 23.04.2010, the Superintendent of Jail has produced the accused with his face covered with black cloth at about 10.00 a.m. The two identifying witnesses also came to the court. PW 2 Yashdip Meshram, JMFC, Raver made them to sit in his chamber. According to him, he took enough care that the said girls should not see the accused before conducting the identification parade. In terms of the letter, the concerned Tahsildar had sent six dummy and two panchas. He made them to sit in the court hall. He has also obtained their names and signatures and thumb impressions. He had asked the dummy persons to go to the civil section of the court room and the two panchas to stay in the court hall. Thereafter he made the appellant- accused and the six dummy to stand in south-north line and also mentioned their serial number in the queue and their name. He called the accused and asked him to stand in the queue. PW 4 Kajal was taken there from his chamber. PW 2 Yashdip Meshram, JMFC, Raver has further deposed that PW 4 Kajal has seen all the persons and she has pointed out towards the person at serial no.3 i.e. the appellant-accused as the person who has committed crime. Thereafter, PW 4 Kajal went away and other witness Nikita was called there. She was a tender age girl. She was frightened. However, even in that condition, she has pointed finger towards the person at serial no.3 and said that he was the person who committed crime.

15(c). PW 2 Yashdip Meshram, JMFC, Raver further asked the accused and the dummy to exchange the clothes in his civil room. They exchanged the clothes and came to the court hall. Again they were made to stand. PW 2 Yashdip Meshram, JMFC, Raver has further mentioned their names and serial numbers in the line and obtained their signatures or thumb impressions against their names. He had asked PW 4 Kajal to come there but she was not ready and she was weeping. He has given certain understanding to her. Thereafter, PW 4 Kajal came to the court hall and at that time, she has rightly identified the appellant-accused at serial no.5 in the line. Witness Nikita has also identified him. Even PW 2 Yashdip Meshram, JMFC, Raver has also conducted third round of identification by adopting same procedure and both the witnesses have identified the appellant-accused standing at serial no.6 at the third round. The entire parade panchanama bears signatures of the accused, thumb impression and signatures of the dummy, signatures of the panchas and also the signature of PW 2 Yashdip Meshram, JMFC, Raver and the same is marked at Exhibit 33. There is nothing in the cross-examination to disbelieve the entire process of identification parade. There is no reason for PW 2 Yashdip Meshram, JMFC, Raver to depose falsely before the court. He has correctly followed the procedural aspect as per the guidelines in the Criminal Manual. PW4 Kajal has not only identified the appellant-accused in the identification parade in all the rounds, but she has also unmistakably identified him before the court.

16(a). PW 2 Yashdip Meshram, JMFC, Raver has further deposed that on 17.04.2010, he had received a letter from S. A. Nikam, P.S.I., Police Station Savda for recording confessional statement of the appellant-accused. The said letter is at Exhibit 26. The accused was produced before him. He had removed all the concerned persons and the police from the court. He had also disclosed his identity to the accused. PW 2 Yashdip Meshram, JMFC, Raver had thereafter asked the appellant-accused whether police had pressurized him or made any promise for giving confession. The appellant-accused replied that he had no pressure and he was willing to give confession. Even PW 2 Yashdip Meshram, JMFC, Raver had given understanding to the accused that if the accused gives such confession before him, it may be used against the accused in evidence. In spite of giving such understanding to the appellant-accused, he expressed his willingness and desire to give confession. PW 2 Yashdip Meshram, JMFC, Raver decided to give 24 hours time for reflection. As there was holiday on 18.04.2010, he gave reflection time of 48 hours. He has recorded all the above facts in writing. The said writing is marked at Exhibit 27 which bears his signature and the signature of the appellant-accused.

16(b). PW 2 Yashdip Meshram, JMFC, Raver has further deposed that on 19.04.2010, the accused was produced before him at about 3.45 p.m. from the Central Jail, Jalgaon. He had then asked the other persons and the police to go out from the court. He had also given understanding to the accused that he was given reflection time of 48 hours and asked him as to whether he is willing to give his confession. The appellant-accused answered in affirmative.

16(c). PW 2 Yashdip Meshram, JMFC, Raver has further deposed that the appellant-accused has thereafter given his confession and the sum and substance of his confession is that on 02.04.2010 the appellant-accused had received a phone call of one Amol at about 9.30 p.m. Said Amol uttered some bad words about the wife of appellant-accused. He told the appellant-accused that he was the father of the fetus in the womb of the wife of the appellant-accused. The appellant-accused was shocked after hearing it and he could not sleep for two successive nights. He had also started drinking liquor for two days. The appellant-accused had brought the weapon from the Gurudwara of Nanded. He had decided to kill said Amol by means of the said weapon. The appellant-accused disclosed before the Magistrate that he could not get peace and he was in search of peace. Thus he went to Rangaon shivar in search of peace on his two wheeler. However, the vehicle was giving trouble. At that time there were three girls proceeding from that spot for answering call of nature. The appellant-accused stopped the vehicle and was watching the carburetor of the motorcycle. However, one out of the three girls said that 'kolati people going from here only'. He was alone there and he was annoyed because of the said comment. Thus, he went near them but they laughed at him. He got angry and he took out the big knife (sura) and gave blows and he ran away. He returned to his house and washed the weapon.

16(d). PW 2 Yashdip Meshram, JMFC, Raver further deposed that the appellant-accused felt repentance because he wanted to kill Amol but he had killed one innocent girl. Thus, he decided to kill Amol. He has filled his motorcycle by purchasing three liters petrol and got up early in the morning at about 3.00 a.m. He took bath and proceeded towards Shindkheda. He met with one Muslim person at Shindkheda. He went to Grampanchayat office, but Amol was not found there. He had breakfast at about 7.30 a.m. and thereafter he consumed beer. He came to know that Amol used to sit in the shop of utensils, however, he could not find him out. Then, the appellant-accused went near the house of Amol and stopped there. He saw his sister-in-law in front of the house of Amol. However, the appellant-accused had covered his face by means of a handkerchief and therefore, his sister-in-law could not identify him. He could not find Amol there and therefore, he came near the square and stopped there. Two marriage ceremonies were going on in that locality and he saw Amol proceeding on a two wheeler as a pillion rider. The appellant-accused followed him. However, because of the crowd in the marriage ceremony, said Amol could not notice the appellant-accused. It was afternoon and therefore, he had meal and beer. At that time, he saw Amol eating kulfi on one shop. Thus, the appellant-accused went near him and tried to give a blow of weapon on the hand of Amol, but the brother of Amol caught his hand. Therefore, the knife was pierced into the chest of Amol. There was crowd of 60 to 70 persons and the said mob severely beat him. The appellant-accused has further disclosed to PW 2 Yashdip Meshram, JMFC, Raver that if the police would not have reached to the spot, he would have been killed by the mob.

16(f). PW 2 Yashdip Meshram, JMFC, Raver has prepared the confessional statement with the endorsement and also issued certificate. The said confessional statement is marked at Exhibits 27 to 28 respectively which bear his signature and the signature of the accused.

16(g). We have carefully perused the confessional statement Exhibits 27 and 28 respectively. We are of the considered opinion that the appellant-accused has made the confessional statement voluntarily without any threat or fear. It contains a full confession of the crime and also discloses the manner in which the crime has been committed. We are satisfied that PW 2 Yashdip Meshram, JMFC, Raver had taken all necessary precautions to ensure that the appellant-accused had sufficient time to reflect before making his confessional statement. He has also ensured that the appellant-accused was not under fear or threat or allurements before making the confessional statement. Learned counsel for the appellant-accused is unable to point out any circumstance so as to draw inference that the confessional statement is not voluntary one. Learned counsel has not pointed out any infirmity in recording the confessional statement Exhibit 28.

17. It is well settled that a confession cannot be used against an accused person unless the court is satisfied that it was voluntary and the question whether it is true or false does not arise. If the facts and circumstances surrounding the making of the confession appear to cast doubt about veracity or voluntariness of the confession, the court may refuse to act upon the confession even if it is admissible in evidence. Thus, considering the facts and circumstances surrounding the making of the confession in the present case, we are of the opinion that the appellant-accused has made the confession voluntarily disclosing all the facts.

18. Learned counsel for the appellant-accused has placed reliance on various cases to buttress his submission that the confessional statement of the appellant-accused is not made voluntarily and that it is unsafe to rely on the testimony of the child witness. In *Subramania Goundan f. The State of Madras*, (supra), relied upon by learned counsel for the appellant-accused, in para 14 of the judgment, the Supreme Court has made the following observations:

"14. The next question is whether there is corroboration of the confession since it has been retracted. A confession of a crime by a person, who has perpetrated it, is usually the outcome of penitence and remorse and in normal circumstances is the best evidence against the maker. The question has very often arisen whether a retracted confession may form the basis of conviction if believed to be true and voluntarily made. For the purpose of arriving at this conclusion the court has to take into consideration not only the reasons given for making the confession or retracting it but the attending facts and circumstances surrounding the same. It may be remarked that there can be no absolute rule that a retracted confession cannot be acted upon unless the same is corroborated materially. It was laid down in certain cases one such being *In re Kesava Pillai* ILR 53 Mad 160 : (AIR

1929 Mad 837) (B) that if the reasons given by an accused person for retracting a confession are on the face of them false, the confession may be acted upon as it stands and without any corroboration. But the view taken by this court on more occasions than one is that as a matter of prudence and caution which has sanctified itself into a rule of law, a retracted confession cannot be made solely the basis of conviction unless the same is corroborated one of the latest cases being 'Balbir Singh Versus State of Punjab (S AIR 1957 SC 216) (C), but it does not necessarily mean that each and every circumstance mentioned in the confession regarding the complicity of the accused must be separately and independently corroborated, nor is it essential that the corroboration must come from facts and circumstances discovered after the confession was made. It would be sufficient, in our opinion, that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession. In this connection it would be profitable to contrast a retracted confession with the evidence of an approver or an accomplice. Though under s. 133 of the Evidence Act a conviction is not illegal merely because it proceeds on the uncorroborated testimony of witnesses, illustration (b) to s. 114 lays down that a court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. In the case of such a person on his own showing he is a depraved and debased individual who having taken part in the crime tries to exculpate himself and wants to fasten the liability on another. In such circumstances it is absolutely necessary that what he has deposed must be corroborated in material particulars. In contrasting this with the statement of a person making a confession who stands on a better footing, one need only find out when there is a retraction whether the earlier statement, which was the result of remorse, repentance and contrition, was voluntary and true or not and it is with that object that corroboration is sought for. Not infrequently one is apt to fall in error in equating a retracted confession with the evidence of an accomplice and, therefore, it is advisable to clearly understand the distinction between the two. The standards of corroboration in the two are quite different. In the case of the person confessing who has resiled from his statement, general corroboration is sufficient while an accomplice's evidence should be corroborated in material particulars. In addition the court must feel that the reasons given for the retraction in the case of a confession are untrue."

19. In the case of Pyare Lal Bhargava v. The State of Rajasthan (supra), relied upon by learned counsel for the appellant-accused, in para 7, the Supreme Court has made the following observations:

"7. The second argument also has no merits. A retracted confession may form the legal basis of a conviction if the court is satisfied that it was true and was voluntarily made. But it has been held that a court shall not base a conviction on such a confession without corroboration. It is not a rule of law, but is only a rule of prudence. It cannot even be laid down as an flexible rule of practice or prudence that under no circumstances such a conviction can be made without corroboration, for a court may, in a particular case, be convinced or the absolute

truth of a confession and prepared to act upon it without corroboration; but it may be laid down as a general rule of practice that it is unsafe to rely upon a confession, much less on a retracted confession, unless the court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in material particulars. The High Court having regard to the said principles looked for corroboration and found it in the evidence of Bishan Swarooop, P.W.7, and the entry in the Dak Book, Ex. PA. 4, and accepted the confession in view of the said pieces of corroboration. The finding is one of fact and there is no permissible ground for disturbing it in this appeal."

20. In the case of *Manoharan v. State By Inspector of Police, Variety Hall Police Station, Coimbatore* (supra), relied upon by learned counsel for the appellant-accused, the Supreme Court in para 22 of the judgment has also considered the issue of voluntariness of confession and the effect of retraction. Para 22 reads as under:

"22. The arguments for the Petitioner begun with challenge to reliance by this Court on confessional statement of the accused. Mr. Luthra strenuously contended that strict compliance with the safeguards for recording a confessional statement as mandated under Section 164 are mandatory, as ruled in *Shivappa v. State of Karnataka* [(1995) 2 SCC 76. He strongly disputed the admissibility of the confessional statement made by the petitioner before a Magistrate on 20.11.2010 on the premise that:

(a) Confession was coerced and involuntary, and in contravention of Section 163 CrPC and Section 24, IEA for first, the petitioner had been physically assaulted by the police whilst in custody, as evidenced through answer to Question 8 posed by the Magistrate during preliminary examination on 19.11.2010. Second, the petitioner was under severe psychological stress owing to the in-custody killing of the co-accused Mohanakrishnan on 09.11.2010; and third, circumstances surrounding confession were suspicious, for the IO (PW-47) moved an application stating that the petitioner was ready to volunteer a confession when he was in judicial and not police custody.

(b) The Magistrate failed to comply with the mandatory procedure as prescribed under Section 164, CrPC since he did not inform the petitioner that he would not be sent to police custody after recording of the confessional statement."

21. As to the issue regarding evidence of child witness, learned counsel for the appellant-accused has relied on the case of *Bhagwan Singh v. State of M.P.* (supra). In the said case, the Supreme Court in para 19 has made the following observations:

"19. The law recognises the child as a competent witness but a child particularly at such a tender age of six years, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, is not considered by the Court to be a witness whose sole testimony can be relied without other corroborative evidence. The evidence of child is required to be

evaluated carefully because he is an easy prey to tutoring. Therefore, always the Court looks for adequate corroboration from other evidence to his testimony. See *Panchhi and others v. State of U.P.*, (1998) 7 SCC 177."

22. It is well settled that a retracted confession cannot be made solely the basis of conviction unless the same is corroborated. However, it does not mean that each and every circumstance mentioned in the confession regarding the complicity of the accused must be separately and independently corroborated. It is sufficient that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession.

23. The legal position as pointed out by learned counsel for the appellant-accused from the above cited case is well settled and there is no confusion about the same. However, in the facts of the present case, though the appellant-accused has belatedly retracted his confession only in his examination under Section 313 of Cr.P.C., there is sufficient corroboration to the confessional statement Exhibit 28.

24. The evidence of the eye witness PW 4 Kajal is consistent, reliable and trustworthy. She has not only deposed about the manner in which the appellant-accused has given three blows of knife on the abdomen of deceased Nayana, but also given description of the appellant accused and the clothes on his person immediately after the incident to her father PW 3 Sunil. PW 4 Kajal has identified the appellant-accused in the test identification parade so also before the Court.

25. The learned Judge of the trial court has taken decision on the question as to whether PW 4 Kajal has sufficient intelligence. We find nothing in the cross-examination to infer that the conclusion drawn by the trial court about the intelligence of PW 4 Kajal was erroneous. We are aware that there is always possibility of tutoring a child witness. However, it is also an accepted norm that the evidence of such witness can be accepted after careful scrutiny. The evidence of PW 4 Kajal is corroborated by the medical evidence. PW 4 Kajal has deposed that the said accused has given three stab blows on the abdomen of deceased Nayana. The external injuries as mentioned in the postmortem report by PW 5 Dr. Nilkanth Mahajan fully corroborate her evidence. Further, PW 4 Kajal has identified the clothes of the accused shown to her in the court.

26. At the instance of the appellant-accused, his blood stained clothes came to be seized from the locked house of his brother. There is nothing to doubt the said recovery at the instance of the appellant-accused. PW 4 Kajal has given description of the other clothes in her evidence and that fully matches to the subsequent recovery of the clothes at the instance of the accused. It appears from the CA report Exhibit 73 that human blood was found on the full shirt and the banyan of the appellant-accused.

27. In view of the above discussion, we find no fault in the judgment and order passed by the trial court convicting thereby the appellant-accused for the offence punishable under Section 302 of Cr.P.C. and sentencing him to suffer

imprisonment for life. There is no merit in this appeal. The appeal is thus liable to be dismissed. Hence, we proceed to pass the following order:

ORDER

The criminal appeal is hereby dismissed.

28. We quantify the fees for the appointed counsel at Rs.20,000/-(Rupees Twenty Thousand only) to be paid by the High Court Legal Services, Sub-committee, Aurangabad.