

(1976) 01 BOM CK 0029
In the Bombay High Court
Case No : Criminal Appeal No. 403 of 1973

Tatoba Rama Gawada

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 15-01-1976

Acts Referred:

Evidence Act, 1872 — Section 118
Oaths Act, 1873 — Section 13, 5
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (1976) 01 BOM CK 0029

Hon'ble Judges : G.N. Vaidya, J; D.M. Rege, J

Bench : Division Bench

Advocate : A.H. Vaishnav, for the Appellant; V.N. Damle, Public Prosecutor, for the Respondent

Judgement

G.N. Vaidya, J.—The appellant, Tatoba, was convicted by the Additional Sessions Judge, Kolhapur, on January, 17, 1973, u/s 302, read with section 34 of the Indian Penal Code, on a charge that he and one Dattu Ganu Patil, committed murder of one Devaji Tatoba Patil.

2. All of them belong to village Mhalunge, Taluka Chandgad. The incident is alleged to have taken place in the land, bearing R.S. No. 22, popularly known as Tagache Sheth, at about 5-00 P.M. on June 4, 1972. The prosecution case rested entirely on the previous history of quarrels and enmities between the deceased Devaji and the accused, and the evidence of a girl aged 16 when she gave evidence in Court, P.W. No. 8, Sundara Appa Gavada.

3. The conviction is challenged before us mainly on the ground that this child witness could not be believed by the learned Judge having regard to her conduct in not telling anyone anything about the incident, not even to father till her father was taken to the Police Station, in connection with the investigation of the murder of Devaji.

4. The murder, as stated above, is alleged to have taken place on June 4, 1972,

she was giving evidence in January 3, 1973. She was administered on oath before the learned Judge, without making a note, which he ought to have made, with regard to her capacity to understand the question, and her ability to tell the truth. Though it is laid down as far back as in 1952, in *Rameshwar s/o Rameshwar Vs. The State of Rajasthan*, that---

"It is, however, desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected so much so, that in some cases it may be necessary to reject the evidence altogether."

5. Based on the proviso to section 5 of the Indian Oaths Act, 1873, read with section 118 of the Evidence Act and section 13 of the Oaths Act, it is true that, as the girl was described as 16 years of age, the learned Magistrate was not bound to make a note as required by *Rameshwar* case. Even, However, with regard to a child-witness, the rule of prudence is well established that corroboration is essential before there can be a conviction. This rule which according to the cases has hardened into one of law, is not that corroboration is essential, but that the necessity of corroboration, as a matter of prudence, except where circumstances make it safe to dispense with it must be present to the mind of the Judge, and in jury cases, must find place in the charge, before a conviction without corroboration can be sustained. The tender years of the child, coupled with other circumstances appearing in the case, such, for example, as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law is that this rule of prudence must be present to the mind of the Judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand. See *Rameshwar v. The State of Rajasthan*

6. The learned Counsel, Mr. Vaishnav, appointed for the accused, has drawn our attention to *Bharvad Bhikha Valu and others v. The State of Gujarat* AIR 1971 S.C. 1954, where the Gujarat High Court, did not act on the evidence of a young boy of 14 years of age, without corroboration, and the Supreme Court observed at page 1067, in paragraph 17 :---

"The High Court adopted the correct in finding that though there were no infirmities of *Khengar*'s evidence as it stood but in view of the fact that he was a young boy it would be prudent to seek corroboration of *Khengar*'s evidence."

7. The prosecution has built up its case entirely on the previous incident which took place between the accused and the deceased, and the story given by *Sundra*, uncorroborated by any other evidence. What happened the day of the incident, is described by her as follows :---

"On that Sunday, I worked at the mines till 12 noon. I took my salary at about 1.30 noon. Thereafter, myself and *Shanti* started walking home on foot reaching

Mhalunge at about 4 p.m. After reaching home, I took my meals and dressed the hairs of Sungandha. Thereafter, I went to the land at "Tagache Shet" to watch the crop of paddy from the cattle and so also, to collect mangoes and jack fruits which are ripe and which fall down from the trees.

I went to the field walking by the Gavase Road. In the "Tagache Shet", I first went to the mango tree and I got one ripe mango. I started eating the mango and while eating the mango, I started walking towards our paddy field. While I was standing on the back of our paddy field, I saw three persons in the grassy land. They were the accused Tatoba, deceased-accused Dattu and deceased Devaji. When I first saw, both the accused Tatoba and deceased-accused Dattu were giving first blows to deceased Devaji. Thereafter, they both fall down Devaji and they started dragging him. While this was going on, Devaji shouted twice saying "Balu run, I am betrayed." When I saw, both the accused Tatoba and Dattu had held Devaji by his arm-pits and they were dragging him. I saw them carrying Devaji in this fashions towards the southward side viz. Nalla side. On seeing this, I got frightened and I went home running. It was about the sun-set time when this was going on. While this was going on, I did not see any other person in the fields in the vicinity.

When I reached home, I stood in the backyard of my house. It was evening time and the sun had just set in then. While I was so standing in the backyard, I saw the accused Tatoba driving the he-buffaloes of deceased Devaji towards his house. At that time, the accused Tatoba was at the downward side of the village. I did not see anybody else then. I again say that while accused Tatoba was so driving the he-buffaloes, the deceased-accused Dattu was following him.

Thereafter, I entered my house. Both of my parents were not present in the house. My mother returned to Mhalunge on Monday night. My father Appa returned back from Belgaum at about 7 p.m. on the very Sunday. On that Sunday night, I did not know whether Devaji was still alive or whether he was dead. Nobody came to my house that night inquiring whether Devaji returned home or not. Out of fright, I did not speak to anybody about the quarrel between Devaji and the accused which I had seen. Similarly, I did not speak about the quarrel to anybody that night as nobody asked me about it. At that time, I thought that it was a quarrel of the usual types as they used to quarrel in the past."

She claims to have known that Devaji was dead at 11.00 a.m. on the next day and his body was lying in a ditch near the "Umber" tree near "Tagache Shet". She says that she did not go to see the dead body out of fright. Her father had gone to the site. She went to sleep after evening food and did not know when her father returned home. On Monday she thought that Devaji had died due to the beatings which he received on the earlier Sunday at the hands of the two accused. But she did not speak to anybody about what she has seen due to the fear of the accused Tatoba and Dattu; she felt that this may again give rise to the quarrels between the females.

8. She admitted, however, that even Tuesday morning, when the police came and took her father with them to the temple of Ningoba, and her father did not return home on that day, she did not speak to anybody about what she had seen. It was only Wednesday, when, one police constable came to her house in the morning, and enquired about her father, that she told the police Constable that her father had gone out yesterday and had not returned. Similarly, she told the Constable that she knew about the incident of murder, that she would make a statement and that they should not harass her father. She then narrated the things to him. The police constable thereafter took her to the temple of Ningoba when she made the statement. Thereafter, her statement was made before the Prant Officer at Chandgad, two three days later. In the cross-examination, she was not able to say why she was standing in the backyard when the incident had taken place. She admitted that she could not overhear the sound of quarrelling, though she did not actually see the quarrel. She denied the suggestion that she was telling lie, when she said that she was all alone present in the house, and was able to see the incident, or that the words uttered from the spot of fight could not be heard from the Bandh where she was standing. She denied that there was any quarrel between her mother and the wife of the accused Tatoba. She also denied the suggestion that she was tutored by Laxmibai to make a false statement. She reiterated in the cross-examination that she did not make a statement to anybody till her statement was recorded, though she had not met Tatoba or Dattu, after the incident and hence they had not given any threats to her, nor had she seen them after the incident.

9. The learned Judge thought that Sundra was supported by medical evidence, though the medical evidence should no visible marks of injury, and Dr. Patil, Medical Officer at Chandgad, who did postmortem examination, said in cross-examination, that the internal haemorrhage and the rupture of the three vital organs might be due to a fall from a height, and added immediately, that in that case some external injuries should be present, and none were noticed by him. It is difficult to see how the learned Judge could corroborate in the evidence of Sundra, who even admitted in the cross-examination that she had not seen the incident, and she merely heard the quarrel from the medical evidence in that case. The learned Judge, in our opinion, relied on the imagination coming to the conclusion that the accused Tatoba and Dattu, who died during the pendency of the case on June 11, 1972, in furtherance their common intention, assailed Devaji in the land known as "Tagache Shet" with fists and probably with sticks, and thus pummelled him death, and though, in paragraph 68, he has observed that Devaji disappeared from the field under some mysterious circumstances.

10. The learned Judge, in our opinion, has not given adequate reasons to explain away the fatal infirmities in the evidence given by the witness in not telling anybody anything about the incident till her father was taken by the police, and even hear father was taken away by the police till the next morning when the constable came to her and enquired about the father. Her mother was in the house and it is strange that she did not tell her mother. She could have told her

father. It is difficult to understand what kind of fright she had, when she had not seen the accused after the incident, and it is her case that they did not give any threats of any kind.

11. Mr. Vaishnav submitted that the decision of the Supreme Court, in Charan Singh v. State of Haryana, AIR 1971 S.C. 1964, was wrongly distinguished by the learned Judge in the facts of the present case on the ground that no principles were laid down in the case. As such, this submission also must be accepted because the ratio in Charan Singh's case sparsely set out in paragraph 13, and summarised correctly in Head Note as follows :

"The conduct of the witness in running away from the place of occurrence even though he was not chased or threatened by any one of the assailants and his not reporting the incident even to the relatives of either of the two deceased persons was treated as abnormal."

It was observed at the end of paragraph 13 :---

"The first thing that would occur to Shangara Singh would be to go to the Police Station. He did not do that. His father also followed suit. The reason given by Shangara Singh was that his father did not move out of fear of the accused. The aspect is without any foundation and is not supported by any evidence of act or conduct. These features indicate the infirmities as to truthful evidence of Shangara Singh."

Even in the present case the aspect of fear made out by Sundra in her evidence is without any foundation, and is not supported by evidence of act or conduct, and constituted fetter infirmities in the evidence given by her.

12. As already stated above, she had no reason to keep back, what she had seen, if she had seen it, from her father and mother. Her father returned from Belgaon and the mother returned next day i.e. Monday. The explanation given by her that there would be some further quarrel between the females, or that the quarrel which she had heard was a quarrel similar to the previous quarrel, cannot explain away her silence after dead body of Devaji was discovered.

13. The learned Judge imagined that there was something in the explanation given by the girl and her father, which would what he described as the psychology of the girl, as follows :---

"In the instant case, the solitary eyewitness is a young girl who is on the verge of youthfulness, but yet there seemed to be some remains of childhood in her. A witness of this type, though acolescent, is in a way a child witness and the probabilities of such witness being tutored have got to be taken into consideration. In the instant case, her father Appa has stated categorically that his daughter, who happens to be the eldest child, more than often used to fight shy of him and she never used to stand in his presence. This may be perhaps true in the family life in a village where the father is the head of the family. Thus, whatever, conversation or exchange of confidence would take place between her

and her mother and this is how she must not have dared to narrate the things to her father who had arrived in the village on that particular Monday back from Belgaum. Secondly, as stated by Appa himself, after the finding of the dead body on Monday morning, he had busied himself in keeping a watch on the dead body in the absence of Devaji's widow Laxmibai who had gone to Chandgad to a complaint."

We do not think that these are sufficient reasons to hold that Sundra could be believed without corroboration bringing aside rule of prudence which has matured into rule of law, which requires corroboration, particularly in view of the serious infirmities in her testimony, which is referred to above.

14. The learned Judge has next relied on the evidence of witness Shankar Gavada, as supporting, to some extent, the evidence of Sundrabai, as he saw on Sunday in the evening Tatoba driving the he-buffaloes of Devaji towards the side of the village, but he had no talk with the accused how this as he was in a hurry to go to the field. It is difficult to understand how this can be considered as corroborate to the evidence of Sundrabai.

15. We have carefully considered the evidence of Sundrabai, and reasons and finding recorded by the learned Judge. We find it hazardous to rely on a so called testimony of Sundrabai, the young girl of 16 years, without satisfactory view. We, therefore, give the benefit of doubt to the accused, and set aside the sentence.

16. The appeal is allowed. The conviction and sentence passed against the accused Tabota Rama Gavada, u/s 302 read with section 34 of the Indian Penal Code are set aside, and the accused is ordered to be released forthwith and set at liberty.