A NIVRUTTI PANDURANG KOKATE AND ORS.

v.

STATE OF MAHARASHTRA

(Criminal Appeal No. 345 of 2008)

FEBRUARY 19, 2008

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[DR. ARIJIT PASAYAT AND P. SATHASIVAM, JJ.]

Penal Code, 1860 – ss.302 and 201 r/w s.34 – Murder – Child witness stating that she saw the killing of her father by C *her mother and others – Conviction of accused-appellants by Courts below on basis of evidence of said child witness – Justification of – Held, justified – Evidence of the child witness was concise, precise, specific and vivid – There was no embellishment therein – Evidence Act, 1872 – s.118.*

D *Evidence Act, 1872 – s.118 – Evidence of child witness – Admissibility – Scope – Held: A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto – Evidence of a child witness not required to be rejected* per se, *but Court as a* E *rule of prudence considers such evidence with close scrutiny.*

According to the prosecution, Appellant No.1 had extra-marital affairs with Appellant Nos.2 and 3 and since the husband of Appellant No.1 objected to the same, the said three Appellants alongwith Appellant No.4, murdered F **him and buried his body in a pit. Appellant No.4 is son of Appellant No.1 and the deceased.**

Placing reliance on the evidence of PW-13, daughter of the deceased who at the time of the incident was aged G **about 12 years, the Courts below convicted the Appellants under ss.302 and 201 r/w. s.34 IPC.**

The conviction of Appellants is challenged before this Court primarily on the ground that no credence should have been attached by the Courts below to the evidence

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of the child witness PW-13. A

Dismissing the appeal, the Court

HELD: 1.1. The Indian Evidence Act, 1872 does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, B Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, C disease - whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. [Para 8] [48-G; 49-A, B]

1.2. The evidence of a child witness is not required D to be rejected per se, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. [Para 8] [49-B, C]

1.3. The age of PW13 during examination was taken E to be about 12 years. Her evidence goes to show that the deceased was sleeping alone in his hut. PW 13 has deposed that her mother, appellant No.1, washed the blood of her father with a bucket of water and cloth. She poured it outside the house. The appellants spread shawl F on tiles. They put the dead body on the shawl and put gunny bag on the dead body. They lifted it by holding the shawl. They carried the body to their field. They buried it in the pit. Thereafter they returned home. Appellant Nos.2 & 3 went to their respective houses. Appellant No.1 locked G the house where the deceased was killed and she went to the hut to sleep. [Paras 6, 7, 8] [48-B, C, D, E, G]

1.4. The evidence of PW13 is as concise and precise and as specific and vivid. It is neither embellished nor H

A **embroidered. It is the evidence of a child who has seen through the unusual and cruel incidence. She was a girl of tender age who saw the killing of her father by her mother and others. [Para 7] [48-E, F]**

Suryanarayana v. State of Karnataka **(2001) 9 SCC 129;**
B *Datt Ramrao Sakhare v. State of Maharashtra* **(1997) 5 SCC 341 and** *Ratansingh Dalsukhbhai Nayak v. State of Gujarat* **(2004) 1 SCC 64 – relied on.**

Wheeler v. United States **159 US 523- referred to.**

C **2. Apart from the issue of acceptability of child witness PW13, there are certain other factors which also have relevance. The recovery of the weapon of the assault led to further investigation. PW 9 is shop keeper who sold the said weapon to the appellant No.3 on the date of**
D **incident. This was followed by another purchase by appellant No.4 from PW 11 of 9 kgs of salt. The Trial Court and the High Court noted that salt acts as a preservative. There was an extremely estranged relationship of the deceased with his wife and it was known to the relatives.**
E **The recovery of the dead body from the pit in the agricultural land at a short distance also has relevance. [Para 6] [48-A, B, C]**

3. Looked at from any angle the judgments of the Trial Court and the High Court do not suffer from any infirmity
F **to warrant interference. [Para 10] [50-D]**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 345 of 2008

From the Judgment and Order dated 22.11.2006 of the
G High Court of Judicature at Bombay in Criminal Appeal No. 621/ 2002.

Kanhaiya Priyadarshi, (A.C.) for the Appellants.

Chinmoy Khaladkar and Ravindra Keshavrao Adsure for
H the Respondent.

The Judgment of the Court was delivered by A

Dr. ARIJIT PASAYAT, J. 1. Leave granted.

2. Challenge in this appeal is to the judgment rendered by a Division Bench of the Bombay High Court. Each of the appellants was convicted for offence punishable under Sections B 302 and 201 read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC') for allegedly committing murder of one Baban Misal (hereinafter referred to as the 'deceased') in the night between 9th July, 1998 and 10th July 1998. It was further alleged that they had buried him in his agricultural land, a short C distance from his house. Ranjana Baban Misal who was the accused No. 1 and the appellant No. 1 before the High Court, had expired and therefore, the appeal was held to have abetted so far as she is concerned. Appellants 2 & 3 were claimed to be her paramours and appellant No. 4 is the son of appellant D No. 1 and the deceased. He had other siblings one of which was examined as an eye witness to the incident.

3. The prosecution version in a nutshell was that deceased appellant Ranjana had extra marital affairs with appellants 2 and 3 since the deceased objected to such activities. They E together with her son committed the murder of the deceased and disposed of the dead body by burying it in his own agricultural land near his house and by disposing of the blood, blood stained clothes and other articles.

4. The case of the accused persons was one of denial. F The trial court placing reliance on the evidence of the daughter of the deceased PW 13, who was aged about 12 or 13 years at the time of the incident, found the accused persons guilty.

5. In support of the appeal learned counsel for the G appellants submitted that no credence should have been attached to the evidence of PW 13. It was submitted that unexplained delay in making search for the deceased and ultimately missing report was given.

Learned counsel for the State on the other hand supported H

A the judgment.

6. We shall deal with the acceptability of child witness PW 13. There are certain other factors which also have relevance. The recovery of the weapon of the assault led to further investigation. PW 9 is shop keeper who sold the said weapon
B to the appellant No.3 on the date of incident. This was followed by another purchase by appellant No. 4 from PW 11 of 9 kgs of salt. The trial Court and High Court noted that salt acts as a preservative. So far as evidence of PW 13 is concerned it goes to show that the deceased was sleeping alone in his hut and
C eating in his brother's house. There was an extremely estranged relationship of the deceased with his wife and it was known to the relatives. The recovery of the dead body from the pit in the agricultural land at a short distance also has relevance.

D 7. PW 13 has deposed that her mother of the deceased appellant No. 1 washed the blood of the father with a bucket of water and cloth. She poured it outside the house. The appellants spread shawl on tiles. They put the dead body on the shawl and put gunny bag on the dead body. They lifted it by holding the
E shawl. They carried the body to their field. They buried it in the pit. Thereafter they returned home. Appellant Nos. 2 & 3 went to their respective houses. The appellant No. 1 locked the house where the deceased was killed and she went to the hut to sleep. She went near her brother who had continued to sleep through the incident and slept. Her evidence is as concise and precise
F and as it is specific and vivid. It is neither embellished nor embroidered. It is the evidence of a child who has seen through the unusual and cruel incidence. She was a girl of tender age who saw the killing of her father by her mother and others.

G 8. The age of the witness during examination was taken to be about 12 years. The Indian Evidence Act, 1872 (in short "the Evidence Act") does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that
H all persons shall be competent to testify, unless the court

considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease — whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer, J. in *Wheeler* v. *United States (159 US 523)*. The evidence of a child witness is not required to be rejected per se, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. [See *Suryanarayana* v. *State of Karnataka (2001 (9) SCC 129)*]

9. In *Dattu Ramrao Sakhare* v. *State of Maharashtra [(1997) 5 SCC 341]* it was held as follows: (SCC p. 343, para 5):

> "A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."
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> 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

A intelligence as well as his understanding of the obligation of an 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
B 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, shaken and moulded, but it is also an accepted norm that if after careful scrutiny
C 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.

10. The above position was highlighted in *Ratansingh Dalsukhbhai Nayak v. State of Gujarat* (2004(1) SCC 64).
D Looked at from any angle the judgments of the trial court and the High Court do not suffer from any infirmity to warrant interference.

11. Appeal is accordingly dismissed.

E B.B.B. Appeal dismissed.