

PETITIONER:
DATTU RAMRAO SAKHARE AND ORS.

Vs.

RESPONDENT:
STATE OF MAHARASHTRA

DATE OF JUDGMENT: 08/05/1997

BENCH:
G.T. NANAVATI, S.P. KURDUKAR

ACT:

HEADNOTE:

JUDGMENT:

Present:

Hon'ble Mr. Justice G.T. Nanavati

Hon'ble Mr. Justice S.P. Kurdukar

Umesh Bhagwat, Adv. for the appellant No.1

C.N. Sree Kumar, Adv for the appellant Nos.2-3

G.B. Sathe, Adv. for S.M. Jadhav, Adv. for the Respondent

The following Judgment of the Court was delivered:

JU D G M E N T

S.P. KURDUKAR, J.

The appellants/accused have filed this Criminal Appeal challenging the Judgment and order of conviction and sentence passed against them under Section 302 read with Section 34 IPC by the Bombay High Court Bench at Aurangabad on September 5, 1990. The first appellant is the husband of third appellant and the second appellant is their son. The prosecution case in brief is as under:

(2) Appa (since deceased) was the brother of A-1 and Chandrakant. In a partition between these three brothers by metes and bounds each one was cultivating the land fallen to his share. Their lands are situated at village Khudawadi, Taluka Tuljapur in District Osmanabad. There was, however a dispute between Appa and A-1 in respect of the location of foot track. On September 25, 1987 at about 5.00 p.m., Appa was working in this field whereas his daughter, Sarubai (P.W.2) was grazing the cattle near about the place of incident. The appellants were also doing their agricultural work in their own land. According to the prosecution the appellants came to the land of Appa and started assaulting him with axes and sickle. Sarubai (P.W.2) seeing the assault caused by appellants came near the place of incident and requested them not to assault her father. A-1 and A-2 were assaulting with axes whereas A-3 was assaulting with a sickle. Due to this assault Appa fell down and made a signal to his daughter Sarubai to go to the abadi and call her mother Ambubai (P.W.1). Sarubai (P.W.2) went to the house but finding that her mother was not there, she left the message with her aunt Muktabai, wife of Chandrakant that she be informed to come to the field with a bullock cart as Appa was assaulted by the appellants. She then came back to the place of incident. Ambubai (P.W.1) when returned home from

work, Muktabaiconveyed the message to her and thereafter she requested Shivaji (P.W.4) to get a cart. Shivaji then brought the cart from Maruti and then they reached at the place of incident. At that time Appa was bleeding profusely and was unable to speak. Sarubai (P.W.2) told her mother that the appellants had assaulted him. Ambubai and Shivaji then put Appa into the cart and lift for the dispensary at Naldurg. Doctor on duty declared him dead. Ambubai (P.W.1) then went to the police station and lodged the first Information Report (Ex.31) at about 10.15 p.m. After registering the FIR the investigating officer proceeded to the hospital and thereafter to the place of incident. During the course of investigation, statements of various persons came to be recorded. The accused came to be arrested on 26.9.1987 and in pursuance of their statements the incriminated articles were seized. After completing the investigation the appellants were put up for trial for an offence punishable under Section 302/34 IPC.

(3) The appellants denied the charge and claimed to be tried. According to them they have been falsely implicated in present crime. They had neither gone to the field of Appa nor they had assaulted him. They pleaded that they are innocent and be acquitted.

(4) The prosecution in support of its case principally relied upon the evidence of eye witness Sarubai (P.W.2) (minor) aged about 10 year. Ambubai (P.W.1) Shivaji (P.W.4) and Shanker (P.W.5) were the main witnesses to corroborate the evidence of Sarubai. The prosecution also relied upon the various panchamas including the panchamas relating to the recovery of incriminating articles. Dr. Onkar Swami (P.W.3) performed the autopsy on the dead body of Appellants did not lead any evidence in defence.

(5) The Learned Sessions Judge Osmanabad on appraisal of oral and documentary evidence on record by his judgment and order dated 1.7.1988 convicted the first appellant under Section 302 IPC for committing the murder of Appa. The appellants Nos. 2 and 3, however were given the benefit of doubt and came to be acquitted. Aggrieved by the judgment and order of conviction and sentence the first appellant Dattu preferred Criminal Appeal No. 352 of 1989 whereas State of Maharashtra preferred Criminal Appeal No. 319 of 1988 challenging the order of acquittal of A-2 and A-3. Both the appeals were heard together and the Division Bench of the High Court by its judgment and order dated September 5, 1990 dismissed Criminal Appeal No. 352 of 1989 and allowed the Criminal Appeal No. 319 of 1988 filed by the state and convicted A-2 and A-3 under Section 302/34 IPC. It is the judgment and order passed by the High Court which is the subject matter of challenge in this appeal.

(6) The entire prosecution case rested upon the evidence of Sarubai (P.W.2) a child witness aged about 10 years. It is, therefore, necessary to find out as to whether her evidence is corroborated from other evidence on record. A child 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 question 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. There is no practice that in every case the evidence of such a witness be corroborated

before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the corroboration to such evidence from other dependable evidence on record. In the light of this well settled principle we may proceed to consider the evidence of Sarubai (P.W.2).

(7) The learned trial judge recorded his reasons and found that Sarubai was a competent witness and her evidence is unblemished. The High Court also accepted the evidence of Sarubai as a reliable one. We, therefore, do not see any reason to disagree with the observations of the learned courts below as regards the evidence of Sarubai. We were taken through the judgments of the courts below as regards the evidence of Sarubai. We were taken through the judgments of the courts below as well as the evidence of Sarubai. She had stated in her evidence that when she was grazing the cattle in the field at about 5.00 p.m., all the three appellants came in her land and started assaulting Appa (her father). A-1 and A-2 had axes in their hands while A-3 was having a sickle in her hand. On seeing a ghastly attack on her father she was very much scared, Appa then made a signal to her to go to the abadi and inform the mother Ambubai (P.W.1). She then immediately proceeded towards abadi and on the way she saw Shanker (P.W.5) who was working in his field. After reaching home she found that her mother had not returned from the work and, therefore, left the message with Mukta, the aunt, about the assault on Appa and requested her to ask her mother Ambubai (P.W.1) to reach the field with a bullock cart. Sarubai (P.W.2) then returned to the place of incident. In the mean time Ambubai (P.W.1) who returned from the work got the message and requested Shivaji (P.W.4) to get the cart. Shivaji (P.W.4) then brought the cart of Maruti in which they reached at the place of incident. Sarubai (P.W.2) narrated the entire incident to Ambubai (P.W.1). Appa was then kept in the cart and was taken to the dispensary at Naldurg. Doctor on duty, however declared him dead. We have carefully examined the evidence of this witness and we find that it is totally unblemished. There is no challenge to her evidence that she was in the field at the time of incident. Her evidence finds corroboration from Shanker (P.W.5) who had stated that when he was in his field he heard commotion in the field of Appa and after going there he saw Sarubai also in the field. Ambubai (P.W.1) in her evidence stated that her daughter Sarubai (P.W.2) had gone to the field along with her father and she herself had gone to work in another field. When she returned home in the evening she got a message from Muktabai about the assault and to get a bullock cart in the field. Shivaji (P.W.4) has also stated on oath that when he received a message from Ambubai to get a cart he got the same from Maruti and thereafter he and Ambubai went to the field. Sarubai (P.W.2) then narrated the incident to her mother. Appa was then taken to the dispensary at Naldurg in the bullock cart where he was declared dead by the Medical officer. From the evidence of these witnesses it is clear that all these movements took place in a very short span of time because they reached the dispensary at Naldurg which is at a distance of 15 kms., from Khudawadi at about 9.30 p.m. or 10.00 p.m. We, therefore, see no hesitation in confirming the findings of the courts below that Sarubai was present in the field along with her father at the time of incident.

(8) The second circumstance which lends corroboration to the evidence of Sarubai (P.W.2) is that Ambubai (P.W.1) in her First Information Report lodged at 10.15 p.m. had given out the names of all the three appellants as assailants of

Appa. Although it was contended on behalf of the appellants that the evidence of Sarubai (P.W.2) is concocted and unreliable but we see no substance in this contention. Dr. Onkar Swami (P.W.3) who held the autopsy on the dead body of Appa noted 16 injuries on the dead body of Appa. He stated that these injuries were possible by three different weapons and not by one weapon. It is needless to set out the evidence of Dr. Onkar in detail since there is no challenge to the fact that Appa met with a homicidal death due to injuries on his person. The evidence of Dr. Onkar (P.W.3) corroborates the evidence of Sarubai (P.W.2) when she stated that A-1 and A-2 had assaulted her father with axes and A-3 with a sickle. Out of these 16 injuries as many as 10 were incised wounds and injury No.3 was a curved lacerated wound which was attributable to A-3. Having regard to the nature and the size of these injuries we have no manner of doubt that this ghastly attack could not be caused by one person. The High Court in our considered view rightly held that the medical evidence corroborates the evidence of Sarubai (P.W.2).

(9) In addition to the above substantive evidence the prosecution also relied upon the circumstantial evidence, namely, recovery of certain incriminating articles. Clothes of the accused were seized under panchnama Ex.55 and this panchnama is proved by panch witnesses Ajmoddin (P.W.10). Dhoti and cap of A-1 were sent to the chemical analyser and his report is at Ex.28, wherein it is stated that the cap had human bloodstains of blood group A which was the same blood group of the deceased. The blood group of A-1 is AB. These weapons like axes and a sickle were claimed to have been recovered at the instance of appellants pursuant to the statement made under Section 27 of the Evidence Act but this evidence was not accepted by the trial court and we do not propose to accept the same.

(10) After going through the judgments of the courts below we are satisfied that the High Court was fully justified in reversing the order of acquittal passed by the trial court as regards A-2 and A-3. The High Court was also right in upholding the conviction of A-1.

(11) In the result there is no substance in the criminal appeal and it is accordingly dismissed. From the office report dated 25th January, 1997 it appears that the appellants are in jail and, therefore, no further order in that behalf is called for.