

State of Maharashtra

Vs

Kondiba Tukaram Shirke

Criminal Appeal No. 254 of 1971

(R.S. Sarkaria, P.N. Shinghal JJ)

06.04.1976

JUDGMENT

SARKARIA, J. -

1. The respondent Kondiba, aged about 55 years, was tried and convicted for the murder of a boy, named Laxman aged about 2 years, by the Sessions Judge, Satara, and sentenced to imprisonment for life. On appeal, the High Court of Bombay acquitted him.
2. The State has now come in appeal by special leave under Article 136 of the Constitution against the order of acquittal.
3. The prosecution case was as follows :
 - 3A. Kondiba works as a barber. He was living in a hut in the hamlet of village Chaturbet. He was married to one Jaibai and had from her two daughters but no son. The daughters were married. In order to get a son, Kondiba decided to marry a second wife. Anjira, the mother of the deceased boy, Laxman, was earlier married to one Babu Shripati Pawar of village Devle. She, however, had developed illicit intimacy with one Shantaram Pawar of village Vakan, and became pregnant. As a result, her husband, Babu Shripati Pawar, drove her out of the matrimonial home for good and repudiated the marriage. Anjira thereupon returned to the house of her father, Dharma Babaji Sapkal in Vakan village. There, she gave birth to Laxman. Kondiba approached Anjira's father and requested him to remarry Anjira with him, but he was initially unwilling to take Laxman with him. Laxman was then 1 1/4 or 1 1/2 years of age. However, ultimately, the marriage was settled on the condition that the respondent would keep and bring up Laxman, also, in his house along with Anjira. At the time of this settlement, some writing was also executed between the parties. The marriage of the respondent and Anjira thus took place towards the end of March 1968. Thereafter, Anjira and Laxman started living with the respondent and his first wife, Jaibai in the Nhavyache Gaothan of village Chaturbet.
4. Despite the assurance given by the respondent to Anjira's father, the respondent started ill-treating the child, Laxman and giving him frequent beatings. Anjira complained about this conduct of the respondent to the villagers, including PWs 1 and 4, and also to her father.
5. On October 10, 1968, in the morning, Anjira went away from the hut to fetch water from a tank at a short distance, leaving behind the respondent, her son Laxman, and Jaibai in the hut. She

returned and went a second time to fetch more water from the tank. At this time also, Laxman and the respondent both were present at the hut. But when on the second occasion she returned with water, she found that both Laxman and the respondent were missing. She asked Jaibai regarding the whereabouts of Laxman. Jaibai told her that Kondiba had taken Laxman with him for leaving him with Leela and Kala, two neighbouring girls, who were out in the fields to graze cattle. Leela and Kala returned to the hut at about 9.30 a.m. Anjira asked them whether Kondiba had left Laxman with them. She learnt from those girls that the boy was never left with them. Anjira and Jaibai, accompanied by the two girls then set out in search of the boy but could not find him. The respondent returned home at about 5 or 5.30 in the evening from Manghar where he used to work. Anjira asked him regarding the whereabouts of Laxman. The respondent gave no reply. The respondent and his cousin Anusuya then went to the police patil of the village and reported about the disappearance of the boy. A desultory search was made during the night in the village. Next morning, the patil collected a large number of villagers and organized a search party which was divided into three batches. Each batch went to search for the boy in a different sector. One batch, which included the respondent and PWs Janu Lakhu Dhebe, and Ambaji Kondi Jadhav, proceeded towards the rocky terrain which is at a distance of about three or three and half furlongs from the hut of the respondent. This batch found the deadbody of Laxman at the foot of a cliff. Janu was the first to notice it there. All the three search batches then gathered at that spot. The patil, Janu and the respondent then went to police station Mahabaleshwar and lodged the report Ex. P-5, regarding the finding of the deadbody of Laxman. Head Constable Surve, who was then incharge of the police station, registered a case of accidental death. Thereafter he proceeded to Chaturbet along with other constables. He reached the hut of the respondent at about 11 p.m. Surve slept for the night at the hut. On the following morning, he went to the scene where the deadbody lay. He held the inquest. He noticed that the tongue of the deceased was protruding out. Bloody fluid was oozing out of the mouth and had fallen on the ground close by. There were black and bluish marks on the neck and chest. The fingers of the hands were found drawn inside. The Head Constable noted these in the inquest panchnama, Ex. 8. On the basis of this data, he suspected that this was not a case of accidental death but one resulting from the commission of an offence. He therefore sent the complaint, Ex. 26, to the police station for registration of a case of murder. The Head Constable recorded the statement of Anjira. He also made inquiries from the respondent. On October 13, 1968, the Police Sub-Inspector, Deshmukh, arrived and took over the investigation. Deshmukh recorded the statements of Jaibai, Janu, Laxman Sitaram and Yeshwant. He also recorded the statement of Anjira's father on October 21, 1968.

6. The post-mortem examination of the body of Laxman was performed by Dr. Ambutai Marulkar (PW 9) on October 13, 1968. The body was then in an advanced stage of decomposition. Consequently, the doctor was unable to give any opinion as to the cause of death.

7. The plea of the respondent (accused) was one of denial of the prosecution case. He alleged false implication at the instance of the villagers of Chaturbet, who, according to him, had a grievance against him.

8. The Sessions Judge, found that the child Laxman, had met a homicidal death. On the basis of the circumstantial evidence coupled with the extrajudicial confession alleged to have been made by the respondent, he reached the conclusion that it was the respondent who had murdered the boy by throttling him to death.

9. The High Court did not find it necessary to express any opinion with regard to the cause of Laxman's death because, in its opinion, the evidence on the record did not warrant a finding that the

respondent had caused the death of the boy.

10. The trial Judge had convicted the accused on the basis of four circumstances : (1) Motive. (2) The boy was last seen being taken away by the accused from the hut. (3) Extrajudicial confession made by the accused before Anjira on the night between October 11 and 12. (4) The callous conduct of the accused in not instituting a prompt and serious search for the missing child.

11. The High Court found that no adequate motive had been established which could impel the accused to murder the child because all that Anjira's evidence establishes is "that the accused was not well disposed towards Laxman". In regard to the second circumstance, the High Court reached a categorical finding that it had not been established. As regards the extrajudicial confession, the High Court recorded a finding, which appears to us to be somewhat inconsistent. Anjira was the sole witness of this extrajudicial confession.

12. It was contended before the High Court - and that argument has been repeated before us by Mr. Chhibber appearing as amicus curiae, for the accused-respondent - that it was not safe to accept Anjira's ipse dixit with regard to this confession because firstly, she was animated and prepossessed by a feeling of hostility and deepseated suspicion against the accused and secondly, the story of this confession did not find mention in her police statement, and was invented as an afterthought.

13. The High Court however, did not accept this argument, and observed :

Her evidence has impressed us and what she has stated is natural, probable and reasonable

We are unable to agree with the comment and criticism that she is an untrustworthy witness. However, even if Anjira be accepted as a fully trustworthy witness, the entire case against the accused in our opinion depends upon the extrajudicial confession which we hold as proved.

14. Having held earlier that Anjira was a trustworthy witness, the High Court refused to accept her word with regard to the confession on the ground that "in cases of homicide or other grave offences, the normal practice is not to convict the accused person only on such evidence without corroboration".

15. Mr. Wad, appearing for the appellant-State contends that having held that the extrajudicial confession had been proved by the trustworthy evidence of Anjira, it was not open to the High Court to refuse to act upon it, merely because it had not been corroborated from independent sources. It is urged that, the other circumstantial evidence was sufficient to lend assurance to this confession. Counsel further assails the proposition propounded by the High Court to the effect, that as a rule, and extrajudicial confession cannot be acted upon without corroboration.

16. While we do not fully endorse the reasoning of the High Court for not acting on the evidence of this extrajudicial confession, we think, for reasons of our own, that the version of Anjira in regard to this alleged confession, could not be safely accepted. Firstly, there is no mention of this vital fact in her statement recorded by the police on October 12, 1968. The story of this extrajudicial confession appears for the first time, in her deposition in court, which was recorded on May 29, 1969. Thus, it is obvious that this piece of evidence was subsequently engrafted on the prosecution case as an afterthought. The second suspicious circumstance which surrounds this piece of evidence and further undermines its credibility is that Sub-Inspector Deshmukh after taking over investigation on

October 13, 1968, did make an unsuccessful attempt to get the confession of the respondent recorded by a magistrate. He sent the respondent to a magistrate for this purpose, but it seems that the accused refused to make any confessional statement. Thus, there was an anxiety on the part of the investigating officer to procure this type of evidence. Since Anjira's statement had already been recorded by Head Constable Surve under Section 161, Cr. P.C. earlier, this extrajudicial confession could not find mention in that statement. The third suspicious circumstance to be noted in this connection, is that the Head Constable, according to his own showing, had, on reaching the hut of the accused at about 11.00 p.m. on the 11th, questioned the accused. Thereafter he stayed for the night at the hut of the accused. The Head Constable was on the ota of the hut when the accused is said to have come inside for a while to take water and there made a confession before Anjira. There was thus reason to suspect that the alleged confession, even if made, was made at a time when he was under surveillance of the Head Constable. Fourthly, if any such confession was really made by the respondent, as alleged, the natural reaction of Anjira, who was the unfortunate mother of the murdered child, should have been to pass on that information immediately to the Head Constable. But she did nothing of this kind. Nay, she did not mention about it even at any subsequent stage of the investigation to any person.

17. For these reasons we think the evidence of the extrajudicial confession could not be accepted.

18. We further agree with the High Court that the circumstance about the respondent having been seen taking away the child before its disappearance, had not been established. Jaibai made contradictory statements with regard to that fact. Her evidence was found wholly unreliable. The remaining circumstances by themselves, were not incompatible with the innocence of the respondent. Taken together, they were insufficient to unerringly fasten the respondent with guilt. At the most, they created a strong suspicion that the respondent might be the culprit. But suspicions are no substitute for proof.

19. All said and done, in this appeal against an order of acquittal, it cannot be said that the view of the evidence taken by the High Court was preverse or was such that no judicial tribunal could have reasonably taken.

20. We therefore refrain from interfering with the order of the High Court, and dismiss this appeal.

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