

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.19 OF 2014

Dropada D/o Mariba Sabane,
Age-28 years, Occu:Nil,
Presently residing in Aurangabad
Central Prison, Aurangabad.

...APPELLANT
(Orig. Accused)

VERSUS

The State of Maharashtra,
Through Police Station Officer,
Pimpaldari Police Station,
Tq-Gangakhed, Dist-Parbhani

...RESPONDENT

...
Mr. P.S. Paranjape Advocate appointed for
Appellant.
Mr. A.S. Shinde, A.P.P. for Respondent - State.
...

CORAM: A.B. CHAUDHARI AND
INDIRA K. JAIN, JJ.

DATE : 5TH OCTOBER, 2015

JUDGMENT [PER A.B. CHAUDHARI, J.] :

1. Being aggrieved by the Judgment and order

dated 31st January 2013 passed by Ad-hoc Additional Sessions Judge, Gangakhed in Sessions Trial No.57 of 2010, by which the Appellant/Accused – Dropada d/o Mariba Sabne was convicted for the offence punishable under Section 302 of the Indian Penal Code and was sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.5,00/- (Rs. Five Hundred), in default to suffer further rigorous imprisonment for two months, and for the offence punishable under Section 318 of the Indian Penal Code sentenced to suffer rigorous Imprisonment for one year, and to pay fine of Rs.500/- (Rs. Five Hundred) and in default to suffer further rigorous imprisonment for two months, the present Appeal was preferred by the Appellant in this Court.

FACTS:-

2. In brief, it is the case of prosecution that at Primary Health Center Ranisawargaon, Tq-

Gangakhed, Appellant Smt. Dropada had delivered a child and ran away from the hospital thereafter and as dead body of newly born female child was found lying near the postmortem room of Primary Health Center, report was made to the Police Station on which police registered Crime No.19 of 2007. On registration of F.I.R., investigation was undertaken, Spot Panchnama, Inquest Panchnama etc. were prepared, postmortem was done. Appellant was arrested, sent for medical examination. After recording of statements of witnesses etc. investigation was completed. Charge-sheet was filed. The trial was held. Learned trial Judge after hearing the evidence, convicted the Appellant/ accused Dropada for committing murder of newly born child delivered by her and thus was held guilty of murder as well as infanticide, hence this Appeal.

3. This Appeal was taken up for final hearing in view of the request made by the learned

counsel for the Appellant that the Appellant was arrested on the day of offence and had undergone sentence and the offence is related to the year 2007 and there was hardly any evidence in this case and that the Appellant was infirm and sick, and therefore we took the Appeal for final hearing.

ARGUMENTS :-

4. In support of the Appellant Dropada, Mr. Paranjape, learned appointed counsel for the Appellant vehemently argued that prosecution did not at all prove the case of murder or infanticide and trial Judge convicted the Appellant merely on suspicion. The learned counsel for the Appellant took us through the evidence tendered by the prosecution so also the findings recorded by the learned trial Judge and submitted that admittedly there is no eye witness, direct evidence and order of conviction is based on the suspicion. However,

according to the counsel, suspicion cannot take place of proof and therefore Appellant is required to be acquitted.

5. Per contra, the learned A.P.P. for State supported the impugned Judgment and Order and submitted that the trial Judge has given the reasons and reasons for convicting the Appellant which are based on record and evidence. The learned A.P.P. therefore prayed for dismissal of the Appeal.

CONSIDERATION:-

6. We have heard learned counsel for the rival parties at length. We have perused the entire evidence with the assistance of the learned counsel for the parties. We have seen the reasons recorded by the trial Judge convicting and sentencing the Appellant for the offence of murder and infanticide. At the outset, we have no

hesitation in agreeing with the learned trial Judge that Appellant had delivered a child in the hospital, that there was homicidal death of newly born child. However we find that the authorship of the crime of murder fastened by the learned trial Judge on the Appellant, is totally unjustified. There is absolutely no evidence, though there is suspicion, the Appellant must have committed the murder of the child. Even the trial Judge at one stage held that there is reason to hold that the Appellant must have committed the murder. The trial Judge did not taken into consideration the settled legal position that there is a gap between 'may have committed the murder' and 'had committed the murder. The gap between the 'may have committed the murder' and 'had committed the murder' has not been bridged in the instant case.

7. We, having agreed with the learned trial Judge about delivery of new born child by the Appellant and homicidal death of the child,

proceed to examine the reasons given by the learned trial Judge. We quote the following extracted portion from Para 22 of the Judgment:

"Further it is brought on record in the cross examination of PW.1 Muktabai, that the campus of hospital situated in 20-R area and PHC contained 10 to 12 rooms. All these facts are brought on record in the cross examination and on the basis of these facts, it can be said the accused might be in one room or labour room and hospital area was large of 20 Ares. So, there is least possibility of observing her by other persons, while killing the child or while running away from the hospital. There seems to be no possibility of any eye witness who had seen the actual incident of murder but the circumstantial evidence produced on record, is sufficient to establish that, accused delivered female child at about 1.10 p.m. and after throttling its neck, she had thrown the child in the premises of hospital. Thereafter, she ran away from the hospital without giving any intimation or taking any medical advice, as reported by

PW.7 Dr. Maniyar, in his report vide Exh.42. After that, within few hours the dead body of child was found as mentioned in report vide Exh.43. All these facts have been brought on record by the evidence adduced by prosecution witnesses."

8. It is clear from the above that the trial Judge stated that there is circumstantial evidence that accused had delivered female child and after throttling her neck, thrown the child in hospital premises and that she had ran away. The trial Court further says that these facts were proved by the prosecution by adducing evidence. In fact, we do not find any evidence that the Appellant had throttled the neck of the child and thrown child in the premises of the hospital and that she had ran away. In our opinion, the trial Judge clearly based its reasons only on the suspicion, which is clear from the reasons given by the trial Judge in Para 24 of the Judgment, which we quote hereunder:-

"24. It is clear from evidence on record that, the accused was not married, might have conceived child, out of illicit relationship. So when she delivered the child, with intention to save herself and members of her family from the defamation as stigma in society, she had killed that newly born child. It shows, she had no other intention except to kill the child. Absence of motive in case based on circumstantial evidence, is not fatal to the prosecution."

9. The trial Judge also stated that there is evidence of eye witnesses and therefore the offence of murder was proved. We do not find any evidence of eye witnesses that the Appellant had throttled the neck of the child and thrown the child in the hospital premises, as stated. It appears that the trial Judge was having strong suspicion in mind and was of the view to some how convict the Appellant. But that is not according to law. The trial Judge could not have recorded

the conviction merely on suspicion, since suspicion cannot take place of proof.

10. We also find an interesting reason given by the trial Court in Para 21 of the Judgment, that according to PW-1 the face of dead child and the child that was delivered by the Appellant Dropadabai was similar and therefore the trial Judge was convinced. On the contrary, we find that the following reasons from the Judgment of the trial Judge in Para 19 themselves contradict the findings of conviction. We quote Para 19 as under:

"19. It is clear case of infanticide and according to prosecution the accused had caused death of her child with intention to conceal its birth, for avoiding herself from being stamped as an "unmarried mother". The defence side denied flatly all these allegation and according to the defence counsel, there is no evidence to prove maternity of child, which is shown to

be found lying in the dead condition in the premises of hospital. Admittedly, the sample of blood of mother as well as child are shown to be taken and sent for C.A. According to PW-6 P.I. Mundhe, he was entrusted the sample of blood and immediately seized in connection with Crime No.26/2007 and he forwarded the same towards C.A., Aurangabad, along with police constable Rathod. The forwarding letter placed on record vide Exh.34 and reports of C.A. are at Exhs. 35 and 36. It is clear from Exh.35, that blood group of accused Dropada was "O", however the result of C.A. of blood group of unknown newly born child vide Exh.1 was inconclusive. Record shows the DNA test was not conducted and it is admitted by PW.7 Dr. Maniyar, PW.8 P.I. Khandekar, and PW.6 P.I. Mundhe, that no tests were conducted for ascertaining maternity of child. In the light of these facts, defence counsel submitted the case is not proved beyond reasonable doubt, the maternity of child was not ascertained, and there is no link to connect the accused with the alleged crime."

11. The net result of the above discussion is that benefit of doubt must be given to the Appellant accused. Hence we make the following order:-

O R D E R

I. Criminal Appeal No.19 of 2014 is allowed.

II. The Judgment and order dated 31st January 2013, passed by the learned Ad-hoc Additional Sessions Judge, Gangakhed, in Sessions Trial No.57 of 2010, convicting the Appellant – Dropada d/o Mariba Sabane for the offence punishable under Section 302 of the Indian Penal Code and sentencing to suffer rigorous imprisonment for life and to pay fine of Rs.5,00/- (Rupees Five Hundred only), in default to suffer rigorous imprisonment for two months and

also under Section 318 of the Indian Penal Code and sentencing to suffer rigorous imprisonment for one year and also to pay fine of Rs.500/- (Rupees Five Hundred only), in default to suffer rigorous imprisonment for two months, is set aside and the Appellant — Dropada d/o Mariba Sabane is acquitted of the charge under Sections 302 and 318 of the Indian Penal Code.

III. Appellant — Dropada d/o Mariba Sabane shall be released forthwith if not required in any other offence.

[INDIRA K. JAIN, J.]

[A.B CHAUDHARI, J.]