

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.254 OF 2014

Shamrao Govindrao Magar and others .. Petitioners

Versus

Sunita W/o. Atmaram Dalvi and another .. Respondents

Mr.Suresh D. Dhongade, Advocate for the petitioners
Mrs. R.K. Ladda, APP for the respondent/ State \
Mr.N.B.Patekar, Advocate h/f Mr.S.J.Salunke, respondent

CORAM : A.V.NIRGUDE, J

DATED : 02.03.2016

P.C. :-

1. The petitioners are challenging order dated 02.12.2013 passed by the learned Judicial Magistrate, First Class (Court No.II), Basmathnagar issuing process against them under various sections including Section No.316 r/w 149 of the Indian Penal Code.

2. In addition to this order, they also challenged the judgment and order dated 07.02.2014 passed by the learned Additional Sessions Judge, Basmathnagar confirming the impugned order of the learned Judicial Magistrate, First Class (Court No.II), Basmathnagar issuing process. The background facts are as under:-

. One Sunita filed a private complaint against the petitioners in the Court of Judicial Magistrate, First Class, Basmathnagar on or about 04.04.2013. She narrated about the incident that took place on 25.03.2013 at about 10.30 am. She alleged that at that time the petitioners formed unlawful assembly and assaulted her and her relatives. She also alleged that the petitioners tried to commit her murder. She further alleged that due to assault she lost her pregnancy. She, therefore, alleged that offence under Section 316 is also committed by the petitioners.

4. The learned Advocate for the petitioners states that the order to the extent of issuing process under Section 316 of Indian Penal Code is erroneous. According to him offence punishable under Section 316 was not made out, even if the entire evidence is taken as it is. Before the date of incident, on 23.02.2013 the complainant was examined by a Gynecologist utilizing sonography techniques. On that day it was observed that the fetus was only four weeks old. Prior to 30.03.2013 the complainant lost her child due to abortion. According to her abortion occurred because of assault etc. The question therefore was, whether the child in womb of the complainant on the day of incident was 'quick unborn child' as described in Section 316. The law on this

subject is quite settled. Quick unborn child is required to be at-least 14 weeks old. The child in complainant's womb was not more than 8 weeks old. This appears obvious from the police record, and yet both the learned Judges ignored it and guessed that such an issue can be decided only at the time of trial. This was utterly erroneous approach. What reveals from record must be taken as truthful and from that material one must find out as to which offence is made out by the complainant. In this case allegation for offence under Section 316 is rather exaggeration. Other offences including offence under Section 307 can continue. The petition is allowed in terms of following order:

5. The order of issuance of process for the offence under Section 316 r/w 149 of the Indian Penal Code issued against the petitioner is set aside.

Rest of the order shall remain undisturbed. The petition stands disposed of accordingly.

[A.V. NIRGUDE, J.]