

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

CRIMINAL APPEAL NO. 414 OF 2002

Bhagwan S/o Digambar Patil,
Age : 25 years, Occu. Nil,
R/o. Chabhra, Tq. Hadgaon,
Dist. Nanded.

...Appellant

VERSUS

1. The State of Maharashtra,
Through Police Station,
Manatha, Tq. Hadgaon,
Dist. Nanded.
2. Mahananda D/o Laxman Deshmane,
Age : 20 years, Occu. Household & Labour,
R/o. Chabhra, Tq. Hadgaon,
Dist. Nanded.

...Respondents

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Mr S. B. Bhapkar, Advocate for the appellant
Mr S. D. Ghayal, APP for respondent No. 1
Respondent No. 2 is deleted as per Court's leave dated 29.8.2007
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**CORAM : T. V. NALAWADE &
A. M. DHAVALA, JJ.**

DATE : 14.11.2017.

ORAL JUDGMENT (PER A. M. DHAVALA, J.) :

1. This is an appeal by the accused from Sessions Case No. 25/98, who was convicted by the Special Judge (SC & ST Act) and

Addl. Sessions Judge, Nanded for offence u/s 302 of the IPC and sentenced to suffer imprisonment for life and to pay fine of Rs.10,000/-, in default, to suffer RI for two months. He was also convicted u/s 201 & 506 r/w 34 of IPC but no separate sentence has been passed therefor. He was acquitted of offences u/s 376, 417 of IPC and u/s 3(1)(xii) of SC & ST (Prevention of Atrocities) Act. Aggrieved by the said Judgment dt.25.7.2002, he has preferred this appeal.

2. The facts relevant for deciding this appeal may be stated as under :

On 20.11.97, PW12 Mahananda lodged FIR Exh. 40 at Police Station, Manatha, Tq. Bhokar, Dist. Nanded. As per her FIR, she belongs to Chambhar community and was aged 20 years & residing at Chabhra. About four years earlier, she developed love affair and sex relations with the accused Bhagwan. According to her, the accused had promised her that he would marry to her and would provide her a separate house in his field and by making such assurance, he used to enjoy sex with her. About one year before the date of FIR, she conceived from the accused and one month thereafter she disclosed this fact to the accused. The accused promised to manage and maintain her. As the pregnancy had developed, apprehending defamation in the society, her sister's husband Changuji Hatagale contracted her marriage

with one Maruti Gaikwad about 10 months before the date of FIR. She cohabited with him at Umari (Malegaon), Dist. Parbhani. The accused came to her at Umari 2-3 times and called upon her to come to Chabhra and assured her to maintain her. He was asking her to undergo abortion stating that they were not in need of child at that time. When she was in third month of pregnancy, her mother-in-law suspected and told her husband that she was pregnant before marriage and asked him to send her back to her maternal place. That time, the accused sent her an inland letter stating therein that her husband was of unsound mind and she should leave him and he would maintain her & child throughout her life. She tore that letter and came to Chabhra. Her sex relations with the accused were restored. The accused was asking her to undergo abortion but she refused. About four months before the date of FIR, she delivered a male child. Her delivery was performed by Bhagirathabai and Gitabai. About eight days thereafter, the accused visited their house at 12:00 midnight, he took the child with him and asked her to prepare tea for him. When she came back with cup of tea, he told her that he had throttled her son to death and they were not in need of any child, he would maintain her and she should not disclose this fact to anybody. If she would disclose this fact to police, he would not maintain her and he would kill her. Then he told her that, the dead body of the child would be buried in the same

house and by means of sickle he dug a ditch and buried the dead body. PW12 was weeping. On the next day, he took her to Nanded and thereafter to Hingoli and kept her in rented house of Sunderabai. He introduced her to the landlady as his wife. They cohabited together for two months. The Accused used to visit her house once in 4-8 days and was making the promises to maintain her. About 1½ months before the date of FIR, he did not come to PW12. When she went to his house at Chabhra to make inquiry, he told her that she should not come to him as he wanted to marry to somebody else. If she would go there, he would kill her.

3. On the basis of the FIR, crime was registered at C.R. No. 85/97 u/s 302, 376, 420, 201, 506 IPC and Section 3(i)(x) of SC & ST (Prevention of Atrocities) Act and was investigated into. PW13 PI Pardeshi visited the spot and some skulls, bones and one cloth was exhumed by digging a pit in the house of the informant in the presence of Tahsildar. The accused and the informant were sent for medical examination. The medical evidence showed that, PW12 was habituated to sex, was pregnant and had undergone delivery. No forensic report could be obtained to show that the bones found were of a child of the accused. After recording the statement of material witnesses, the charge-sheet was submitted in the court.

4. In due course, the case was committed to the Court of sessions. The charge was framed by Addl. Sessions Judge, Nanded at Exh. 7. The accused pleaded not guilty. The prosecution examined 14 witnesses. The defence of the accused is of total denial.

5. The ld. Addl. Sessions Judge, Nanded held the accused guilty only for offences u/s 302, 201 and 506 and acquitted of the other charges.

6. Shri. S. B. Bhapkar, learned counsel for the appellant submitted that, there is only evidence of PW12 against the accused. PW3 Gitabai and PW6 Kausalyabai have denied that they have performed the delivery of PW12 Mahananda. There is no DNA report to connect the accused with the crime. There is no evidence to show that PW12 Mahananda had given a birth to an alive child. The child was not seen by anybody. There is no material to show that it was a case of homicide. The medical evidence does not show whether the child was male or female. The FIR is lodged after a period of four months. The evidence of PW12 Mahanda is totally unreliable and untrustworthy. She had married to one Maruti before the incident and again married after the incident. The dead body was found buried in

her house and not in the house of the accused. Therefore, the conviction of the accused u/s 302, 201, 506 of the IPC is not sustainable. The appeal be allowed and conviction be set aside.

7. Per contra, ld. APP Shri. Ghayal argued that, PW12 has no reason to depose falsely against the accused. The dead body was recovered from the house. There is evidence to show that Mahananda had undergone delivery. Hence, the evidence should be believed and the appeal should be dismissed.

8. The points for our consideration with findings thereon are as follows :

Sr. No.	Points	Findings
1	Whether the child met with homicidal death?	Not proved.
2	Whether the accused has committed murder of accused?	Not proved.
3	Whether the accused has caused disappearance of the evidence of murder?	Not proved.
4	Whether the accused has criminally intimidated PW12?	Not proved.

5	What order?	The appeal is allowed. The accused is acquitted of the charges.
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REASONS

9. The prosecution has relied on following witnesses:
- (i) PW12 – Mahananda, the informant (FIR Exh. 40).
 - (ii) PW3 – Gitabai and PW6 – Kausalyabai allegedly performed the delivery of Mahananda, both turned hostile.
 - (iii) PW1 - Bhaurao, panch to the panchanama exhumation, turned hostile.
 - (iv) PW2 – Sk. Salim, panch to the arrest panchanama, turned hostile.
 - (v) PW4 – Piraji, cousin of Mahananda, turned hostile.
 - (vi) PW6 – Hiranman, panch to the exhumation and taking out the dead body bones, turned hostile.
 - (vii) PW7 – Sunderabai, the landlady of PW12, turned hostile.
 - (viii) PW8 – Shobhabai, sister of Mahananda. She deposed that, Mahanada conceived from accused and therefore she arranged her marriage with Maruti Gaikwad but, when he came to know about the pregnancy, he drove her out.

Mahananda had given a birth to child after nine months. The said child was killed by Bhagwan by throttling. She has no personal knowledge of most of the incidents against the accused.

- (ix) PW9 – Dr. Venkat Dhage, in his presence, the dead body was taken out by digging a ditch from one house. Pieces of clothes and 23 bones were collected. He conducted post-mortem. He referred the bones to Anatomy Department, Ambajogai. He has received letter Exh. 29 and his PM report Exh. 30.
- (x) PW10 – Dr. Bhikulal Baheti was MS in Anatomy. He has received the bones sent by police. Those were bones of human being and age of the bones of a child just begotten. He could not form his opinion as regards sex or about the death of the child. His certificate is at Exh. 33.
- (xi) PW11 – Balaji is the brother of Mahananda. He has also turned hostile and not supported the prosecution.
- (xii) PW14 – Dr. Supriya has examined PW12 Mahananda on 23.11.97 at Government Hospital at Nanded. After clinical examination of breast and private parts, she gave opinion that the patient was pregnant and had undergone delivery and was habituated to sexual intercourse. Her report is at Exh. 69.

10. Thus, the evidence discussed herein above shows that most of the prosecution witnesses have not supported PW12 Mahananda. The landlady as well as brother of the Mahanada have also not supported her. The evidence of Mahananda will have to be appreciated in the light of the above facts. She deposed that, her parents were dead and she was residing at Chabhra. Her sisters were married. She was residing with her brother and used to do labour work on daily wages. She was knowing accused Bhagwan from last 11 years and the incident took place 5-6 years before her evidence. She developed intimacy and sex relations with Bhagwan and got pregnant. As per her FIR, she deposed that, she had conceived from the accused and then her marriage was arranged by her sister's husband in order to avoid defamation but, after marriage her mother-in-law realized that she was pregnant and then she was sent back. She again resided with Bhagwan. The accused was in contact with her even after her marriage. She again developed sex relations with him and she stated that, she had delivered a child at her house. PW3 & PW6 had helped her in her delivery. On the next Sunday, the accused visited her house and killed her child by throttling. He had intimidated her so that she should not disclose this fact to anybody and the child was buried in her house by the accused. The accused was paying rent of the said room for 1 or 2 months and thereafter he stopped going to PW12.

11. She lodged FIR after a period of four months. She admitted that there was no divorce between she and Maruti and subsequently she performed marriage with one Nagnath Pawar, Police Inspector and had begotten a son from him.

12. All material witnesses have turned hostile. PW3 & PW6 turned hostile and, therefore, delivery of alive child by Mahananda has not been proved. There is absolutely no evidence establishing that she had given birth to an alive child. PW7 Sunderabai, the landlady has also turned hostile. Therefore, it is not proved that the said house was rented by her to the accused. The skeleton of the child was found in the house occupied by PW12 Mahananda. She has lodged FIR after a period of four months.

13. The facts indicate that if the accused had committed any crime, she would have been co-accused at least with regard to causing disappearance of the evidence. The police attempted to collect DNA report but could not collect the same to connect the accused with the crime. We find that, PW12 Mahananda was having illicit relations with the accused even after her marriage. She claims to have continued sex relations with the accused. She did not report about the birth of the

child to anybody. She did not report anybody about the alleged murder of child by the accused. The FIR is also lodged after a period of four months. PW12 Mahananda had every reason to falsely implicate the accused. In the circumstances, when there is no reliable evidence about the birth of alive child and its homicide by the accused, the evidence of PW12 cannot be relied upon. We find that the Id. Addl. Sessions Judge has not taken into consideration the material *lacunae* in the evidence of the prosecution case and large amount of witnesses turning hostile and the character of PW12 Mahananda before placing reliance upon her evidence. The evidence that, Mahananda had a delivery is not enough. Not a single witness has seen the child alive except Mahananda. We find it unsafe to rely upon her sole testimony which is not corroborated by any evidence. Hence the conviction of the appellant is unsustainable. Hence, we answer the points in the negative. Hence the order.

ORDER

- (i) The Criminal Appeal is allowed.
- (ii) The judgment and order dated 25.7.2002 passed by Special Judge (S.C. and S.T. Act) and Additional Sessions Judge, Nanded in Special Case no.25/1998 convicting the appellant for offences punishable under Section 302, 201 and 506 of Indian Penal Code is hereby set aside.

- (iii) The appellant stands acquitted. Fine amount, if any deposited by the appellant be returned to him.

[A. M. DHAVALE]
JUDGE

[T. V. NALAWADE]
JUDGE

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