

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

Criminal Appeal No. 0713 of 2014

District : Beed

Rajaram s/o. Baburao Dhotre,
Age : 46 years,
Occupation : Labour,
R/o. Dharur,
Taluka Dharur,
District Beed.

.. Appellant
(Original
accused
no.02)

versus

The State of Maharashtra.

.. Respondent

.....

Mr. S.J. Salunke, Advocate, for the appellant.

*Mr. M.M. Nerlikar, Additional Public Prosecutor,
for the respondent.*

.....

With

Criminal Appeal No. 001 of 2015

District : Beed

Ashabai d/o. Rajaram Bansode,
Age : 24 years,
Occupation : Household,
R/o. Dharur,
Taluka Dharur,
District Beed.

.. Appellant
(Original
accused no.01)

versus

The State of Maharashtra.

.. Respondent

.....

Mr. S.J. Salunke, Advocate, for the appellant.

*Mr. M.M. Nerlikar, Additional Public Prosecutor,
for the respondent.*

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**CORAM : T.V. NALWADE &
SMT. VIBHA KANKANWADI, JJ.**

DATE : 29TH AUGUST 2018

JUDGMENT [Per Smt. Vibha Kankanwadi, J.] :

01. Appeal No. 713 of 2014 has been filed under Sec. 374 of Code of Criminal Procedure, by original accused No. 2 challenging his conviction for the offence punishable under Sec. 302, 201 r/w. 34 of Indian Penal Code and Appeal No. 1 of 2015 has also been filed under Sec. 374 of Code of Criminal Procedure, by original accused No. 1 challenging her conviction for the offence punishable under Sec. 302, 201 r/w. 34 of Indian Penal Code by learned Additional Sessions Judge, Majalgaon, Dist. Beed in Sessions Case No. 33 of 2013 on 05-11-2014. Since both the appeals are arising out of same judgment, they are proposed to be disposed of by this common judgment.

02. The brief facts of the prosecution case was that one Angad Dyanoba Sudke was the Police Inspector of Dharur Police Station. He received secret information on 07-02-2013 that accused No. 1 has buried a female fetus, aged three days, behind her

house in *Zopadpatti*, in front of Rural Hospital, Dharur. Therefore, he took Tahsildar Shri. Mahesh Parandekar and two *panchs* with him. The dead body of the fetus was exhumed and was sent for *post mortem*. It was opined by the Medical Officer that the death has occurred due to strangulation. Hence, P. I. Sudke made inquiry. It was revealed that there was illicit relation between accused Nos. 1 and 2. Accused No. 1 became pregnant from accused No. 2 and gave birth to the female child. The girl was alive for three days. Thereafter, accused Nos. 1 and 2 had killed the child, in furtherance of their common intention, between 14.00 to 15.00 hours of 06-02-2013 by strangulation and then by digging a pit, behind the house of accused No. 1, the dead body was buried in order to make the evidence of murder disappear, in order to screen themselves. Hence, after the inquiry P. I. Sudke himself has lodged First Information Report (FIR) on behalf of State against accused. Offence was registered vide C. R. No. 17 of 2013 and investigation was undertaken.

03. The *panchanama* was already prepared in respect of exhumation. Accused persons came to be arrested. Evidence in respect of delivery of accused No. 1 was collected. Statements of witnesses were recorded. Inquest *panchanama* and *post mortem* report were collected. Both the accused persons were referred to doctor for taking samples for DNA. The samples were

sent and DNA report was collected. After the completion of investigation, charge-sheet was filed.

04. Both the accused appeared before the Trial Court. Charge was framed against them. Both of them have pleaded not guilty. Trial has been conducted. Prosecution has examined in all 12 witnesses to prove the guilt of the accused. After considering evidence and hearing both sides, learned Additional Sessions Judge, Majalgaon, has held both the accused guilty of committing offence. Both the accused have been sentenced to rigorous imprisonment for life and to pay fine of Rs.500/-, in default of payment of fine, to suffer simple imprisonment for 5 months for the offence punishable under Section 302 r/w 34 of Indian Penal Code. Further both the accused have been sentenced to rigorous imprisonment for three years and to pay fine of Rs.500/-, in default of payment of fine, to suffer simple imprisonment for 5 months for the offence punishable under Section 201 r/w 34 of Indian Penal Code. Both the accused persons are challenging their conviction in respective appeals.

05. Heard learned Advocate Shri. S. J. Salunke for appellants and learned A. P. P. Shri. M. M. Nerlikar for Prosecution. Perused the record.

06. It has been submitted on behalf of appellants that the learned Trial Court has not appreciated the

evidence properly. PW 1 Baburao Gaikwad was the *panch* to the spot *panchanama*. He has turned hostile. It is stated that the spot was shown by PW 11 PI Sudke. This reflects that the police persons were already having knowledge about the spot. PW 2 Kamalbai is the neighbour of accused No. 1. She has also turned hostile. In fact, mother of the accused No. 1 is also residing in the same locality. She has been examined as PW 9 Sushila. She has turned hostile. PW 3 Shamim, PW 4 Shaikh Dilawar – on the point of illicit relation between accused Nos. 1 and 2; and PW 5 Ratnamala – *panch* to the inquest *panchanama* have also turned hostile. PW 6 Mahesh Parandekar is the Executive Magistrate. He has stated that accused No. 1 dug a pit and took out the dead body of a child. Said *panchanama*, which is allegedly executed by Executive Magistrate, is not admissible at all. PW 7 Ashruba and PW 8 Sanjay are the police personnel, who had taken the samples to laboratory. PW 10 Dr. Amit Lomte is the Medical Officer who had conducted *post mortem* and gave report Exhibit 45. Though it is proved that the baby died due to strangulation, burden was on the prosecution to prove that the accused persons were the author of the crime. PW 11 PI Sudke is the Investigating Officer. DNA report has been filed at Exhibit 55. It states that accused Nos. 1 and 2 are the parents of baby. Discharge Card issued by Hospital Exhibit 53 and testimony of PW 12 Dr. Sanjay Bansode would show that accused No. 1 had given birth to a

female child. That does not mean that she has killed the baby. Prosecution has not adduced any evidence to show that accused No. 2 was residing with accused No. 1. Nobody has seen them together prior to the incident. Role of the accused No. 2 has not been stated. Merely because now it has been transpired that he is the father of the child, it can not be concluded that he had a common intention with accused No. 1 to kill the child. He has been morally convicted, which can not be sustained. Even as regards accused No. 1, the conviction is not sustainable merely because she is the mother of the child. Learned Advocate for appellants has therefore, prayed for setting aside the conviction of both the accused persons by allowing their appeals.

07. Per contra, learned A. P. P. has submitted that there was sufficient evidence against accused No. 1. She had led the discovery, though she was not an accused at that time. The entire exercise has been undertaken on the basis of secret information received by PW 11 Sudke. Only because accused No. 1 had the knowledge where she had buried the dead body, she has shown the place. Thereafter the dead body has been exhumed by adopting proper procedure. Executive Magistrate has prepared the *panchanama*. Hostility of spot *panch* is of no importance. So also the hostility of neighbours and mother of accused No. 1 has any effect on the prosecution case. Prosecution has

brought on record that accused No. 1 had delivered female child, the delivery was proved through PW 12 Dr. Sanjay Bansode. DNA report Exhibit 55 concludes that accused Nos. 1 and 2 are the parents of deceased child. This circumstance is sufficient to infer that even accused No. 2 had taken part in eliminating the unwanted child. Learned Trial Court has rightly convicted both the accused. Learned A. P. P. therefore, prayed for the dismissal of both the appeals.

08. Prosecution has come with a case that there was illicit relation between accused Nos. 1 and 2 and the deceased girl was born to accused No. 1 from accused No. 2. In order to prove the fact of illicit relations, prosecution has examined the mother of accused No. 1, PW 9 Sushila and neighbour PW 2 Kamalbai. Both of them have turned hostile. However their hostility has not affected the prosecution case because the fact has been brought on record through other evidence, which is more conclusive. PW 12 Dr. Sanjay, who works as Medical Officer as Assistant Professor with SRTR Medical College and Hospital, Ambajogai, was on duty from 7.00 a. m. Of 4-2-2013 till 7.00 a.m. Of 5-2-2013. He is M. D. Gynecology. One Dr. Nilesh Gore had conducted delivery of Asha Rajaram Dhotre around 12.45 p. m. On 4-2-2013, under his supervision. A female child was born by normal delivery. The child was alive. Ashabai was discharged

on 6-2-2013. The discharge card is at Exhibit 53. He has identified accused No. 1 as the same lady by name Asha whose delivery was made on 4-2-2013 and female child was born to her. Except denial, there is nothing in the cross. Though the address on the card is different and it does not specify the identification mark of lady, his own identification of accused No. 1 before Court was sufficient. There was no reason for this witness to depose against accused No. 1. Evidence of this witness is required to be considered with DNA report Exhibit 56. The result of the analysis has been given that "For all the 15 different generic systems analyzed with the PCR ex2 Rajaram in F.S.L.M.L. Case No. DNA-187/13 matched the obligate paternal alleles present in ex1 B/o Ashabai R. Dhotre at all loci, similarly ex1 in F.S.L.M.L. Case No. 187/13 matched the oblique maternal alleles present in ex2 B/o Ashabai R. Dhotre at all loci". Therefore, opinion is given that Rajaram and Ashabai in F.S.L.M.L. Case No. 187/13 are concluded to be the biological parents of ex1 B/o Ashabai Dhotre. DNA report is the conclusive evidence. There is no explanation by both the accused regarding the DNA report. No other circumstance is brought on record to show that the said report can not be believed. The carriers of sample for DNA test have been examined as PW 7 PHC Ashruba Rajgire and PW 8 ASI Sanjay Sutnase. Their evidence shows that the samples were taken in proper condition to the laboratory.

09. We may rely on the decision in the case of *Nandlal Wasudeo Badwaik v/s. Lata Nandlal Badwaik and another* [(2014) 2 SCC 576], wherein it is held that, "Before we proceed to consider the rival submissions, we deem it necessary to understand what exactly DNA test is and ultimately its accuracy. All living beings are composed of cells which are the smallest and basic unit of life. An average human body has trillions of cells of different sizes. DNA (Deoxyribonucleic Acid), which is found in the chromosomes of the cells of living beings, is the blueprint of an individual. Human cells contain 46 chromosomes and those 46 chromosomes contain a total of six billion base pairs in 46 duplex threads of DNA. DNA consists of four nitrogenous bases -- adenine, thymine, cytosine, guanine and phosphoric acid arranged in a regular structure. When two unrelated people possessing the same DNA pattern have been compared, the chances of complete similarity are 1 in 30 billion to 300 billion. Given that the Earth's population is about 5 billion, this test shall have accurate result. It has been recognised by this Court in *Kamti Devi v/s. Poshi Ram* [(2001) 5 SCC 311 : 2001 SCC (Cri) 892] that the result of a genuine DNA test is scientifically accurate....."

10. Further in the case of *Anil alias Anthony Arikswamy Joseph v/s. State of Maharashtra* [(2014) 4 SCC 69], it is held that, " Deoxyribonucleic acid, or DNA, is a molecule

that encodes the genetic information in all living organisms. DNA genotype can be obtained from any biological material such as bone, blood, semen, saliva, hair, skin, etc. Now, for several years, DNA profile has also shown a tremendous impact on forensic investigation. Generally, when DNA profile of a sample found at the scene of crime matches with the DNA profile of the suspect, it can generally be concluded that both the samples have the same biological origin. DNA profile is valid and reliable, but variance in a particular result depends on the quality control and quality procedure in the laboratory."

11. Thus DNA mapping and its result is almost near perfect scientific tool in criminal investigation to establish the identity of a deceased. In the case on hand, DNA test report has conclusively proved that the deceased is biological daughter of accused Nos. 1 and 2. Both the accused have not come with a case that they are married. Therefore, unless there would have been illicit relations between accused Nos. 1 and 2, the daughter would not have been born. Under such circumstance, hostility of mother and neighbour has not affected prosecution case.

12. PW 12 Dr. Sanjay has clearly stated that at the time of discharge of accused No. 1, the child was alive. The dead body of the child was exhumed and then

post mortem was done. *Post mortem* report Exhibit 45 gives probable cause of death of the child as "Manual Strangulation". PW 10 Dr. Amit had conducted the *post mortem*. He has been cross examined at length. However, it was only on the basis of some exerts from Modi's Jurisprudence. Those technicalities are not at all required here. The cross-examination of this expert witness does not lead us to any other conclusion that the fact that the death of child was homicidal in nature.

13. Prosecution has then come with a case that accused Nos. 1 and 2, in furtherance of their common intention had killed the child, who was only 3 days and buried her dead body behind the hut of accused No. 1, by digging a pit. PW 11 PI Sudke has deposed that he had received the secret information about the act done by accused No. 1. He had therefore, taken *panchas* as well as PW 6 Mahesh, the Executive Magistrate to accused No. 1 and then she was asked to show the spot. She had pointed out the spot and body was exhumed. *Panchas* to the spot, inquest and Exhibit 36 have turned hostile. Now this *panchanama* Exhibit 36 and the testimony of two witnesses PW 6 Mahesh and PW 11 Sudke has been attacked on the ground that the *panchanama* can not be said to be under Section 27 of Indian Evidence Act as accused No. 1 was not arrested till then. We do not agree with the said submission.

Panchanama Exhibit 36 is definitely covered under the provisions of section 27 of Evidence Act as well as under Section 8 of the Evidence Act, as it can be taken as conduct of the accused No. 1. PW 11 Sudke has deposed that he had received secret information, but actual showing of the exact place by accused No. 1 only after inquiry with her. Reliance can be placed on the decision in *State [N.C.T. of Delhi] Vs. Navjot Sandhu @ Afsan Guru*, AIR 2005 SC 3820. Section 27 does not restrict to the things discovered, but it relates to the facts discovered. In the above said case, the law laid down in *Pulukuri Kotyya Vs. Emperor*, AIR 1947, PC 67 has been discussed and affirmed it, wherein it has been held thus :-

“ We have noticed above that the confessions made to a police officer and a confession made by any person while he or she is in police custody cannot be proved against that person accused of an offence. Of course, a confession made in the immediate presence of a Magistrate can be proved against him. So also Section 162 Cr.P.C. bars the reception of any statements made to a police officer in the course of an investigation as evidence against the accused person at any enquiry or trial except to the extent that such statements can be made use of by the accused to contradict the witnesses. Such confessions are excluded for the reason that there is a grave risk of their statements being involuntary and false. Section 27, which unusually starts with a proviso, lifts the ban against the admissibility of the confession / statement made to the police to a limited extent by allowing proof of information of specified nature furnished by the accused in police custody”.

It has been further observed in the said case
thus :-

“The first requisite condition for utilizing Section 27 in support of the prosecution case is that the investigating police officer should depose that he discovered a fact in consequence of the information received from an accused person in police custody. Thus, there must be a discovery of fact not within the knowledge of police officer as a consequence of information received. Of course, it is axiomatic that the information or disclosure should be free from any element of compulsion. The next component of Section 27 relates to the nature and extent of information that can be proved. It is only so much of the information as relates distinctly to the fact thereby discovered that can be proved and nothing more. It is explicitly clarified in the Section that there is no taboo against receiving such information in evidence merely because it amounts to a confession. At the same time, the last clause makes it clear that it is not the confessional part that is admissible but it is only such information or part of it, which relates distinctly to the fact discovered by means of the information furnished. Thus, the information conveyed in the statement to police ought to be dissected if necessary so as to admit only the information of the nature mentioned in the Section. The rationale behind this provision is that, if a fact is actually discovered in consequence of the information supplied, it affords some guarantee that the information is true and can therefore be safely allowed to be admitted in evidence as an incriminating factor against the accused”.

Lastly, it has been observed thus :-

“ We are of the view that Kotayya’s case is an authority for the proposition that ‘discovery of fact’ cannot be equated to the object produced or found. It is more than that. The discovery of fact arises by reason of the fact that the information given by the accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place”.

14. Therefore, taking into consideration this ratio, the testimony of these two witnesses clearly show and prove that the place where the dead body was buried was within the knowledge of the accused No. 1 and therefore, that is a fact discovered by her, covered under the provisions of section 27 of Evidence Act. Similar ratio has also been held in *Vikram Singh & Ors. V/s. State of Punjab [AIR 2010 SC 1007]*. The law has been further explained that, “The words in S.27 “accused of any offence” are descriptive of the person making the statement, the submission that this Section would be operable only after formal arrest U/s. 46 (1) of the Code, can not be accepted”. Therefore, the disclosure made by the accused before informant, PW 11 Sudke, PW 6 Mahesh is definitely covered u/s. 27 of the Evidence Act. In *Vikram Singh's* case also such disclosure was made before the formal arrest of the accused. It was not even asked to all these witnesses that the alleged disclosure by the accused No. 1 was not voluntarily made. In her statement under Section 313 of Code of Criminal Procedure, accused No. 1 has not stated that her conduct at the time of panchnama Exhibit 36 was

under duress.

15. Even if for the sake of arguments, it is held that the said discovery is not admissible under Section 27 of Evidence Act, it can be held admissible under Section 8 of Evidence Act as conduct of the accused No. 1 in this case. For this proposition reliance can be placed on the observations in *Harivandan Babubhai Patel v/s. State of Gujrat* [2013 CRI. L. J. 3977]; wherein it has been observed that, "The next limb of attack relates to the confessions made by the accused persons and the issue of leading to discovery of articles. It is submitted that the confession part is absolutely inadmissible and that apart, when the panch witnesses had not supported the panchnama, the recovery or discovery of the seized articles cannot be utilized against the appellant. There can be no shadow of doubt that the confession part is inadmissible in evidence. It is also not in dispute that the panch witnesses have turned hostile but the fact remains that the place from where the dead body of the deceased and other items were recovered was within the special knowledge of the appellant." In this context, we may usefully refer to *A. N. Venkatesh and another v/s. State of Karnataka* [AIR 2005 SC 3809] wherein it has been ruled that, "by virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the

circumstance, simpliciter, that the accused pointed out to the police officer the place where the dead body of the kidnapped person was found would be admissible as conduct under Section 8 of Indian Evidence Act irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act or not." In the said decision, reliance was placed on the principle laid down in *Prakash Chand v/s. State (Delhi Admin.)*[AIR 2011 SC 1064]. It is worth noting that in the said case, "there was material on record that the accused had taken the Investigating Officer to the spot and pointed out the place where the dead body was buried and this Court treated the same as admissible piece of evidence under Section 8 as the conduct of the accused". Thus, even though other facts in the case are different here, the fact which is common and which has been held admissible is that the discovery of dead body by accused prior to the arrest. The said piece of evidence has been held admissible as conduct of the accused under Section 8 of Evidence Act.

16. Thus, the scanning of evidence has led to the conclusion that the dead body of a female child was exhumed at the instance of accused No. 1. The death of the said child was homicidal. DNA test concluded that accused Nos. 1 and 2 are the parents of the deceased child. Child was born because of the

illicit relation between accused Nos. 1 and 2. The child lived for only 3 days. Therefore, it can be presumed that the child was with the mother. It was absolutely not necessary for the prosecution to have examined any eye witness or led any other circumstantial evidence. The place where the dead body was buried, was within the knowledge of accused No. 1 and therefore, her conduct under Section 8 of the Evidence Act, is sufficient to fasten guilt against her. She was the author of the crime. She had buried the dead body of the child with an intention to screen herself. Hence, offence punishable under Section 302, 201 of Indian Penal Code has been proved against her by the prosecution beyond reasonable doubt.

17. Now, it is required to be seen as to whether there was any piece of evidence against accused No. 2. Merely because he has been concluded as father of the child, whether he can be convicted along with accused No. 1 ? Answer is certainly not. There is no evidence on record to show that accused No. 2 was residing with accused No. 1. PW 12 Dr. Sanjay has stated in cross examination that accused No. 1 was admitted by one Madhavi Parve. That means, accused No. 2 had not admitted accused No. 1 for delivery. At no point of time from delivery till dead body was exhumed, accused No. 2 was seen in the company of accused No. 1 by anybody. Under such circumstance, only on the count of paternity of the child, accused No. 2 can not be

convicted. He can not be said to have common intention with accused No. 1 to commit murder of the child. Hence, his conviction appears to be based on morality, which can not be sustained. His appeal deserves to be allowed. Hence, following order.

ORDER

1. Criminal Appeal No. 713 of 2014 is hereby allowed.
2. The judgment and order of the Trial Court given against the appellant Rajaram Baburao Dhotre for the offences punishable under Sections 302, 201 and 34 of Indian Penal Code is hereby set aside.
3. He stands acquitted of those offences.
4. He is to be set at liberty, if not required in any other case.
5. Bail Bonds are to be obtained from him under Section 437-A of Code of Criminal Procedure, duration of which shall be of six months, of the amount of Rs. 15,000/-.
6. Criminal Appeal No. 1 of 2015 stands dismissed.

(Smt. Vibha Kankanwadi)
JUDGE

(T.V. Nalawade)
JUDGE

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**Bhagwan
Govindrao**

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