

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.766 OF 1997

Govind Rambhau Lahange, Adult,
R/o.Narpoli, Adivasi Compound, Bhiwandi

Appellant
(Org.Accused)

versus

The State of Maharashtra

Respondent

Mr.Yashpal Thakur, Amicus Curaie, for appellant.
Mr.S.S.Pednekar, APP, for State.

CORAM : PRAKASH D. NAIK, J.

Date of reserving the Judgment : 3rd February 2018
Date of pronouncing the Judgment : 17th February 2018

JUDGMENT :

1. The appellant was convicted for offence under Section 307 of Indian Penal Code and sentenced to suffer rigorous imprisonment for four years and to pay fine of Rs.500/-. The appellant was, however, acquitted of the offence under Section 302 of Indian Penal Code.

2. The prosecution case is that the accused and the complainant Smt.Geeta Lahange solemnized their marriage on 23rd May 1991. The marriage was finalized two months prior to the performance of marriage. The complainant delivered a child on 6th December 1991 at her parental home. The appellant-accused visited the paternal home of the complainant to see the child and made accusations

against her that the child was not conceived from him and also assaulted her. On 15th December 1991, at about 4 p.m., the appellant-accused again visited the house of complainant and in the presence of witnesses, picked up the child from the lap of the complainant and after revolving the child, threw it again on the lap of the complainant and left the house. Subsequently the child died on the following day i.e. on 16th December 1991 at about 7.30 p.m. The complainant then informed about the incident to her brother and both of them lodged a complaint with Police on 17th December 1991. The offence was registered vide CR No.I-117/1991 under Section 302 of Indian Penal Code. On completing the investigation the charge sheet was filed.

3. The charge was framed under Section 302 of Indian Penal Code vide order dated 4th April 1997. The prosecution examined seven witnesses in support of its case. PW-1 Smt.Geeta Lahange is the complainant and wife of the appellant-accused. PW-2 Mr.Baliram Patil is the panch witness for inquest and spot panchanama. PW-3 Nago Mhase is the neighbour and eye witness to the incident. PW-4 Dagadu Thapad is the brother of complainant. PW-5 Gatlya Bajage is the panch to the arrest panchanama. PW-6 Dr.Khaliuddin Tumarandar is the medical officer, who conducted the post mortem; and PW-7 Sudam Gosavi is the investigating officer who conducted the investigation.

4. It is pertinent to note that the appellant-accused was charged for committing murder of the child. It is alleged that the appellant suspected the paternity of the child and therefore on the date of incident, he picked up the child from the lap of the wife and after

revolving the child, threw it on her lap. The Trial Court after analysing the evidence and more particularly the medical evidence, came to the conclusion that the prosecution has not proved the homicidal death of the child. It was also opined that the medical evidence and other circumstantial evidence laid by the prosecution, is not sufficient to conclusively opine that the child met with homicidal death, and the prosecution is required to prove homicidal death in case of murder, and that the accused cannot be said to have committed the murder of the child. The Court, however, then resorted to the option, whether any other offence is said to have been committed by the accused. The Court gave a finding that there is no evidence to connect the accused with the murder of child. The prosecution then submitted that the accused should be punished for attempt to commit murder. The Trial Court thereafter observed that there is no charge of attempt to commit murder. However, the Court can consider the offence of attempt to commit murder by invoking Section 219 of Code of Criminal Procedure, 1973. The Court thereby relied upon the evidence of the eye witness and convicted the appellant for the offence under Section 307 of Indian Penal Code. The Trial Court observed that the evidence of PW-1, PW-3 and PW-4 is sufficient to come to the conclusion that the accused had intention to commit the murder of the child, as he was suspecting the paternity of the child and considering the act committed by the accused, it can be concluded that there was intention to commit murder and hence, the appellant-accused was convicted for the offence under Section 307 of Indian Penal Code.

5. The evidence of PW-1 refers to the conduct of appellant-accused in the incident of 15th December 1991. She has deposed that

the accused had picked up the child and after revolving the child, he threw the child on her lap. She also deposed that the child received injury on account of the act committed by the accused and that subsequently the child died. PW-3 is another eye witness to the incident who has reiterated the version of the complainant and attributed similar act to the accused. PW-4 is the brother of the complainant. However, he is not the eye witness to the incident. From the evidence of the said witnesses it appears that the accused had picked up the child and after revolving, the child was thrown on the lap. However, the case of prosecution that the child had suffered injuries on account of said act and that has resulted in death of the child, is falsified by the evidence of medical officer PW-6. The Trial Court has also opined that the prosecution has not proved that the accused as committed murder of the child. The appellant has been acquitted for the offence under section 302 of Indian Penal Code. The State did not file any appeal against the order of acquittal.

6. From the evidence of PW-6 it is apparent that while conducting the post mortem, he noticed certain external injuries on the person of the child. He also found that there was congestion over both the lungs and the child died due to cardio respiratory failure due to bronchopneumonia. The medical officer further deposed that the external injury alone is not sufficient to cause death in the ordinary course of nature. However, the external injury may lead to bronchopneumonia in case of any complication in the internal organs. There is no resistance power in the child and since the organs are delicate, trauma may result in bronchopneumonia. The bronchopneumonia is sufficient to cause death of the small child. The medical officer also deposed that he cannot state the definite

cause of death of the child and the external injury did not correspond to congestion in the lungs. In the cross examination, however, he deposed that bronchopneumonia is pulmonary inflammation, which is caused due to viruses or bacteria. The scar is the result of healing of injury. Healing process starts after a few days from causing of injury. Normally formation of scars appear after a weeks time of injury. On the basis of said evidence, the Trial Court had arrived at the conclusion that the death of the child was not on account of the act committed by the accused.

7. The Trial Court, however, convicted the appellant under Section 307 of Indian Penal Code. Admittedly there was no charge under Section 307. The charge of attempt to commit murder and the charge of murder, are absolutely contradictory to each other. The Trial Court, however, took recourse to Section 219 of Code of Criminal Procedure and convicted the accused under Section 307 of Indian Penal Code. Apparently there is non application of mind on the part of the Trial Court.

8. Apart from the above, even to substantiate the charge under Section 307 of Indian Penal Code, there is no evidence. The alleged act would not amount to attempt to commit murder. It is also pertinent to note that the incident in question had arisen on 15th December 1991 and the complaint was lodged after the death of the child on 17th December 1991. There were no injuries on the person of the child on account of the alleged act committed by the accused. It appears that the version of the witnesses is exaggerated. In any case, to establish the charge under Section 307 of Indian Penal Code, the act must be done with intention or knowledge and under such

circumstances that if by that act the death is caused, the accused would be guilty of murder. Even accepting the version of the witnesses as it is, it cannot be said that the said evidence is sufficient to establish the charge under Section 307. However, there is consistency in the evidence of complainant and other eye witness about the act of picking up the child from the lap of complainant and revolving it and throwing the child on the lap of complainant. The accused had picked up the quarrel with the complainant on 6th December 1991 as well as again on 15th December 1991 as he suspected paternity of the child. The act would at the most fall under Section 323 of Indian Penal Code, which is voluntarily causing hurt. Considering the fact that the death of the child has no connection with the alleged act of the accused as per medical evidence and findings of the Trial Court, the appellant can be convicted for offence under Section 323 of Indian Penal Code being a lesser offence. The incident had occurred on 15th December 1991. The appellant was in custody from 18th December 1991 to 4th January 1992. The said period can be considered as sufficient punishment for conviction under Section 323 of Indian Penal Code.

9. Hence, I pass following order :

ORDER

- (i) Criminal Appeal No.766 of 1997 is partly allowed;
- (ii) The judgment and order dated 6th December 1997 passed by Additional Sessions Judge, Thane in Sessions Case No.314 of 1992 convicting the appellant for offence under Section 307 of Indian Penal Code, is quashed and set aside;

(iii) The appellant is, however, convicted for the offence under Section 323 of Indian Penal Code and sentenced to imprisonment already undergone by the appellant.

(PRAKASH D. NAIK, J.)