

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.149 OF 2003**

The State of Maharashtra	Appellant/Complainant
Vs.	
Khemibai Ramu Rathod and Ors.	Respondents/ Accused nos.1 to 4

Ms. Jyoti Lohokare , APP for appellant-State.
None for respondents.

**CORAM : K.R.SHRIRAM, J.
DATE : 7th MAY 2019**

P.C.:

1 The State is impugning a judgment dated 18.07.2002 passed by the II Ad-hoc Additional Sessions Judge, Thane, acquitting four accused of offence under Section 316 read with Section 34 of IPC.

2 It is the case of the prosecution that the complainant one Kavita Mansing Chavan was at home on 07.04.2001. At about 4.00 p.m. somebody pelted stones at her house and she came out of the house and started hurling abuse at unknown stone pelters. The accused nos.1 to 4 assumed that the complainant was hurling abuse at their children, went to the complainant and started kicking her and punching her. At that time, the complainant was about 7 months pregnant. While this physical assault was happening, complainant's neighbours, one Gujibai, Sushilabai and Shantabai arrived at the spot and rescued the complainant. The complainant, it seems, started experiencing pain in her abdomen. There are lot of contradictions thereafter as to what happened because the complainant at one point stated

she went to the police station on the same day, i.e., 7.4.2001, lodged the complaint and came back, whereas in another place it appears the complaint was lodged on 10.04.2001. Again there is a confusion as to whether the complainant went to the police station and lodged the complaint or the police went to the hospital where she was admitted on 10.04.2001 and noted the FIR. The FIR is dated 11.04.2001.

3 It is the case of the prosecution that the neighbour Gujibai admitted the complainant in Civil Hospital, Thane on 11.04.2001 and the complainant delivered a dead child because of the abortion. On receipt of information, police went to the complainant in the hospital and recorded FIR based on which registered offence punishable under Section 316 read with Section 34 of the IPC against the four accused. Section 316 of the IPC reads as under :

316. Causing death of quick unborn child by act amounting to culpable homicide. — Whoever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Illustration A, knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured, but does not die; but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this section. CLASSIFICATION OF OFFENCE Punishment—Imprisonment for 10 years and fine—Cognizable—Non-bailable—Triable by Court of Session—Non-compoundable.

4 It is the case of the prosecution that because of the assault by the accused on 07.04.2001 at about 4.00 p.m., it caused death of a quick

unborn child.

5 The prosecution examined five witnesses, viz., Gujibai Prabhu Pawar (PW-1), Kavita Mansingh Chavan (PW-2) - the complainant, Shantabai Namdev Rathod (PW-3), Dr. Sudhakar S. Jadhav (PW-4) and Baburao Narayan Panpatte (PW-5) - Assistant Police Inspector. PW-1 and PW-3 are witnesses to the incident on 07.04.2001. PW-4 is a Doctor who had examined PW-2 - the complainant on 11.04.2001. The accused pleaded not guilty and accused no.4 - Nirmala Rathod also stepped into the witness box and was a defence witness. The acquittal judgment has proceeded on the basis of various inconsistencies on the date when the complainant is supposed to have lodged the FIR, who took her to the hospital etc. The complainant has stated that she went to the police station on 07.04.2001 and lodged the complaint. The complainant has stated that police gave her a medical examination note but she did not go immediately for medical examination because she was alone and she went back home. The complainant states that at about 1.00 p.m. her husband returned home from work but she did not tell him about the incident. It comes in the evidence that Gujibai (PW-1) informed the husband of the complainant about the incident. The Trial Court finds it rather strange that a women at an advanced stage of pregnancy has been assaulted by four neighbourers, all women, she has pain in her abdomen because of alleged kicks and blows and she does not consider it fit and necessary to inform her husband. The

Court also finds that the timing of the FIR also is suspect because incident happened on 07.04.2001 but the FIR is dated 11.04.2001. It is prosecution's case that they went to the hospital after hearing about the complainant having aborted her unborn child because of the assault on 07.04.2001 whereas complainant states that on 07.04.2001 itself she went to the police station and lodged FIR against the accused.

6 The Assistant Police Inspector (PW-5) in his deposition states that on 11.04.2001 the complainant came to the police station and lodged FIR but he also states that API Mr. Kadam of their police station on getting information went to Civil Hospital and chalked out the FIR of the complainant. The Trial Court has also found contradictions to the effect that the complainant stated that Gujibai admitted her to the hospital which also is corroborated by Gujibai (PW-1) but PW-4, the Doctor has stated that it is her husband who brought her to the hospital. The medical legal certificate, Exhibit 15, also states "brought by husband - alleged assault at about 4.00 to 4.30 p.m. on 07.04.2001". There is overwriting on the "7" and it has not been initialed by the Doctor. The gestation is also overwritten as 24 weeks and age of the injury is shown as within 96 hours. There is overwriting on 96 hours also. Date and time of examination is shown as 11.04.2001, 12.30 noon where again there is overwriting. None of the overwritings have been initialed by the Doctor. This certificate says the complainant was brought by her husband, whereas the complainant and PW-1 - Gujibai state

that it was Gujibai who took her to the hospital. At the same time, PW-1, PW-2 and PW-3 have been consistent about the assault on 07.04.2001, their testimonies are not suffering from any contradictions and omissions as far as the incident of 07.04.2001 is concerned.

7 What we have to keep in mind is the accused are charged with Section 316 of the IPC. There is no evidence on record to indicate that the complainant aborted the child due to the blows and kicks inflicted upon her by the accused. Even PW-4 has stated that he is not a gynaecologist and he has not opined on the cause of the abortion. No gynaecologist also has been examined, who is supposed to have examined the complainant. Infact the medical legal certificate does not even mention the name of the gynaecologist. PW-4 has in his evidence also stated that as per Exhibit 15 there were signs of natural delivery of the patient. At the same time, he also states that Exhibit 15 does not disclose that the patient delivered a child or not. PW-4 has also in his evidence also stated "it is true that I did not observe any injury on the whole person of the patient". At the time of arguments Public Prosecutor realised that the evidence of the gynaecologist was missing and the application for summoning and examining the gynaecologist was rejected. Therefore, there is nothing on record to indicate that the act of the accused caused the death to a quick unborn child. It has also come in evidence that there has been previous enmity between the complainant and her husband with accused no.4. Accused no.4 has also

lodged a complaint against the husband of complainant on 09.12.2000, about four months before the incident, of assault with kicks and fist blows and simultaneously snatching golden chain weighing 1/2 total from her neck. It is also stated that as the police did not act, the accused no.4 took up the matter upto the Commissioner of Police on whose instructions Police called the complainant and her husband to Rabale Police Station and cautioned them of action. The copy of the complaint moved by accused no.4 to the office of the Commissioner of Police is at Exhibit 26.

8 The Trial Court has also noticed similarity in the contents of the complaints, FIR (Exhibit - 10) and the application moved by the accused no.4 to the Commissioner of Police. The Trial Court has come to a conclusion that there has been a previous enmity which has been the cause for lodging the present complaint. Therefore, I agree with the Trial Court that even though the testimonies of the complainant and PW-1 and PW-3 do not suffer from any contradictions and omissions, so far as the assault of 07.04.2001 is concerned, the only charge of the prosecution against the accused is under Section 316 of IPC. That charge has not been proved. Therefore, I find no infirmity in the order passed by the Trial Court.

9 Appeal dismissed.

(K.R. SHRIRAM, J.)