

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

CRIMINAL APPLICATION NO.1010 OF 2020
IN
CRIMINAL APPEAL NO.318 OF 2020
WITH
CRIMINAL APPEAL NO.318 OF 2020

DEELIP HANUMANT KHODVE
VERSUS
THE STATE OF MAHARASHTRA

WITH
A.L.S. NO.79 OF 2020
(Application for leave to appeal by the State)

THE STATE OF MAHARASHTRA
VERSUS
DEELIP HANUMANT KHODVE

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Advocate for the Applicant/ appellant in Application No.1010/2020 and
for the respondent in ALS No.79/2020 : Shri Salunke Sudarshan J.

APP for the State : Shri R.B.Bagul

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**CORAM : RAVINDRA V. GHUGE
&
B. U. DEBADWAR, JJ.**

DATE :- 16th October, 2020

Per Court :-

(a) Criminal Application No.1010/2020 :-

1 By Criminal Appeal No.318/2020, the applicant/ appellant
seeks to challenge the judgment and order dated 02.03.2020 delivered by

the learned Additional Sessions Judge, Ambajogai in Special (POCSO) Case No.2/2017. Relevant portion of the order of conviction reads as under :-

- "1. Accused Deelip s/o Hanumant Khodve, age 25 years, occu. agriculture, R/o Yelda, Tq.Ambajogai, District Beed is acquitted as per Section 235(1) of Cr.P.C. of committing offences punishable under section 376(2), 309, 302 (i.e. committing murder of victim) of Indian Penal Code, section 6 of the Protection of Children from Sexual Offences Act, 2012 and 3(w)(i), 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.
2. Accused Deelip s/o Hanumant Khodve, age 25 yuears, occu. agriculture, R/o Yelda, Tq.Ambajogai, Dist. Beed is convicted u/s 235(2) of Cr.P.C. for the offence punishable u/s 302 (i.e. committing murder of Preeti) of the Indian Penal Code and is sentenced to undergo rigorous imprisonment for life and to pay fine of Rs.20,000/- (Rs. twenty thousand only), in default to pay the fine he shall undergo rigorous imprisonment for 2 (two) months."

2 The appeal is admitted on 10.07.2020.

3 We have extensively heard the learned advocate for the applicant/ appellant in connection with his prayer that the sentence may be suspended and he may be granted bail during the pendency of the appeal.

4 The learned advocate for the applicant has referred to the testimony of 15 witnesses, threadbare and his testimony at exhibit-137 as he had stepped into the witness box. A plea of alibi was also taken by the applicant before the Trial Court. The 21 grounds raised in the appeal,

which have been relied upon while seeking suspension of sentence, are reproduced verbatim as under :-

- "I) *The judgment and order under challenge is bad in law and liable to be quashed and set aside.*
- II) *The judgment and order of conviction of the appellant is based on surmises, conjunctures and hearsay evidence. The learned Court below utterly failed to appreciate the evidence on record. The appreciation of evidence is perverse and illegal.*
- III) *The learned Court below committed grave error while reading the evidence on record.*
- IV) *The charge below Exh.8 framed against the appellant was not proved by the prosecution. The learned Court utterly failed to appreciate that in the Criminal Case, the nature of evidence required to be adduced by the prosecution is beyond reasonable doubt and shall not be based on probabilities.*
- V) *The charge framed against the appellant/ accused is badly worded and wrongly drafted. Defect in framing of charge caused prejudice to the accused.*
- VI) *The incriminating circumstances used against the appellant/ accused in the judgment are not put for explanation to the accused while recording the statement u/sec. 313 of Cr.P.C.. It caused prejudice to the accused. Had all the circumstances were put for explanation to the accused, he would have explained the same and the fate of the matter would be otherwise.*
- VII) *The learned Trial Court ought to have acquitted the appellant. Practically, the separation of grain from chaff i.e. the separation of false and truth is not possible in the present case. The prosecution case is inherently improbable in nature.*
- VIII) *The prosecution case is based on circumstantial evidence. It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they*

should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. The learned Trial Court overlooked these rules of appreciation of evidence in a case where the evidence is of a circumstantial nature.

- IX) The circumstances relied upon by the Court to convict the appellant were not fully established. The relevant witnesses against the appellant are PW3 Ashok Sonnar- the father of deceased Preeti, PW-8 Laxman Sonnar - the brother of deceased, PW-9 Subhash Khodve- Panch witness, PW-10 Babasaheb Misal- Panch Witness, PW-11 Sanjay Kathar- Handwriting Expert, PW-12 Dr.Vishwajeet Pawar- carried out the post mortems, PW-15 API Ashok Latkar- Investigating Officer, PW-16 Vishal Anand- Investigating Officer and PW-17 Dr.Rameshwar Kothule- treated the appellant.
- X) The oral evidence lead by the prosecution as well the documentary evidence do not prove the charge against the appellant beyond reasonable doubt. There are several infirmities and lacunas in prosecution case, benefit of doubt can be granted to accused.
- XI) PW-3 Ashok and PW-8 Laxman are the related witnesses. The depositions of these witnesses are full of contradictions and omissions. The conduct of both being unnatural, they ought to have discarded. The evidence of these witnesses is hearsay. PW-3 has admitted that Preeti did not tell him about the relationship between the accused and the deceased.
- XII) The report of Handwriting Expert at Exh.86 ought not have considered against the appellant. The specimen handwriting of the accused were not collected in legal and proper manner. The specimen handwriting (Exh.75, Exh.83-1 to Exh.83-6) collected in the presence of PW-9 and PW-10 respectively was without following the due procedure of law. PW-9 is the son-in-law of PW-1. The specimen handwriting of the accused collected by PW-16 was without permission of the Magistrate. It ought to have collected in the presence of Magistrate.

- XIII) *The deposition of PW-11 Sanjay Kathar and his opinion at Exh.86 is not a circumstance to be used to convict the appellant. The evidence of the expert is not a substantive evidence, but it is only a corroborative piece of evidence. PW-11 has not submitted the reasons along with the report at Exh.86. Moreover, a chit seized while drawing a spot panchanama at Exh.123 does not clinchingly and unerringly point out the nexus of the appellant with the offence. No opinion is sought about the handwriting on the person of the deceased.*
- XIV) *There is delay in sending the specimen handwriting and chit to the Handwriting Expert.*
- XV) *The prosecution failed to prove that appellant was lying on the spot at the time of incident. Prosecution is silent about who has taken the appellant in the hospital. The evidence of PW-17 Dr.Rameshwar Kothule is short and insufficient to prove the charge of attempt to commit suicide. He has admitted that gastric lavage of the appellant was not sent for Chemical Analysis. He could not opine about the consumption of poison by the appellant. He deposed that the symptoms, observations and tests of the appellant were Normal.*
- XVI) *The appellant entered into the witness box and deposed as Defence Witness. The deposition of the appellant ought to have considered. The Defence Witness needs to be treated at part with the prosecution witness. The appellant has deposed that he had been at another village namely Soni Hivra in the intervening night of 04.10.2016 and 05.10.2016.*
- XVII) *In a criminal case, it is for the prosecution to prove the involvement of an accused beyond all reasonable doubt. It was not a case where both, appellant and deceased Preeti were last seen together at the place of incident. Section 106 of the Indian Evidence Act, 1872 has no application.*
- XVIII) *The observation of the learned Trial Court that the accused was present inside the house in the intervening night of 04.10.2016 and 05.10.2016 is contrary to evidence on record. The Trial Court also observed that appellant failed to prove the plea of alibi. Assuming but not admitting that the appellant failed to prove the plea of alibi, it has not absolved the prosecution from proving the charge beyond reasonable doubt. In a criminal case, the*

prosecution has to stand or fail on its own legs. In any way, weakness of the defence is not helpful to the prosecution to prove its case. Mere suspicion does not take the place of proof.

XIX) The depositions of the witnesses are full of contradictions and omissions. The prosecution did not prove the motive for commission of the offence. The depositions of the witnesses are not in conformity. The defence of the accused is more probable.

XX) There is delay in lodging the report. There is delay in recording the statements of the witnesses. The conduct of the witnesses are unnatural and their depositions are full of contradictions and omissions.

XXI) The judgment under challenge is liable to be quashed and set aside by acquitting the accused."

5 We have considered the submissions of the learned APP, who has pointed out that the State has also preferred an application seeking leave to file an appeal for challenging the acquittal of the applicant with reference to the charge of raping a minor and killing her, punishable under Sections 376(2), 302, 309 of the Indian Penal Code r/w Section 6 of the Protection of Children from Sexual Offences Act, 2012 and Section 3(1)(w)(i) and Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

6 The learned APP has also referred to the testimony of witnesses and has drawn our attention to the conclusions deduced by the Trial Court in the impugned judgment of conviction. He submits that the prosecution has preferred an application seeking leave to appeal as it finds that credible evidence with regard to the offences against the minor was

discarded and was not properly appreciated by the Trial Court and if the prosecution succeeds before this Court, it would attract conviction even with reference to the said offences.

7 In the light of the submissions of the learned advocates, material placed before us and the impugned judgment, we find that there is evidence to indicate that the applicant, who was married to the deceased wife Preeti, just three years prior to the incident at issue, had developed love relationship with a minor belonging to the Scheduled Caste category. She used to graze her goats near the agricultural field of the applicant and on account of his lurement, the deceased minor was tempted and they began relationship which included physical relations.

8 On 05.10.2016, Hanumant Khodve, the father of the applicant, approached the Police Station, Ambajogai Rural with a specific report that his son and his daughter-in-law (deceased Preeti) were residing in Gat No.458, which is an agricultural field having a small house with roof of tin-sheets. Hanumant, his wife Sunita and an unmarried daughter Vandana were residing in their house in the Yelda village. On 05.10.2016 at about 12:30 pm, Sunita had gone towards their agricultural field. At around 1:30 pm, a villager Maruti Prabhu Khodve called Hanumant on his cellphone and informed him that he had heard Sunita screaming loudly near the farm house in which the accused used to reside. Maruti had rushed in the direction of the sound that he had heard and

had found that Preeti was lying on the wooden cot in a lifeless state.

9 Hanumant, therefore, rushed to the farm house along with his daughter Vandana and a villager Manja Hari. When they reached the farm house, they noticed that Preeti was in a lifeless condition on the wooden cot. There were marks on her neck. After Maruti and his wife started screaming, the villagers came to the spot. The uncle of Maruti, namely, Shankar Tukaram Khodve came from the direction of the river and said that the son of Maruti i.e. the accused/ appellant Deelip and another girl were found in an unconscious state below the Neem tree adjacent to the *bandh*. The villagers, therefore, rushed to the said place and noticed that the deceased minor, the daughter of Ranveer Kamble, was lying motionless. Next to her, lay the applicant. He was found to be alive. The applicant was, therefore, taken by Mauli Dagdu Khodve, Ramdas Khandu Shedve and some other villagers to the Government Medical College and Hospital, Ambajogai. Maruti and his wife Sunita and other relatives stayed back near the body of Preeti. After the police were informed, the two bodies were carried to the Government Medical College and Hospital, Ambajogai. Maruti has further stated in his report that the applicant and the minor deceased may have consumed poison.

10 The postmortem report of the minor indicates that she was strangled and killed. The cause of death of the minor establishes "*death due to manual strangulation with e/o old rupture of hymen with e/o*

pregnancy" It is stated that the DNA test with regard to the fetus in the womb did not match with the DNA profile of the appellant. The postmortem report of Preeti (deceased wife of the applicant) also indicates that she was also strangulated and killed. The cause of death was due to the manual strangulation associated with head injury.

11 Having perused the testimony of witnesses and especially of the Investigating Officer Ashok Tukaram Latkar, the chain of circumstantial evidence was completed. The deceased minor was undisputedly pregnant. Evidence indicates that the applicant had developed love relationship and had established physical relations with her. The deceased wife Preeti was objecting to such extramarital relations. Evidence establishes before the Trial Court that the applicant had murdered Preeti with an intention of eliminating her obstruction/resistance to his extramarital relations.

12 The applicant/ appellant had taken the plea of alibi contending that he was away from the village. The said plea was demolished by the evidence on record and the prosecution proved that the applicant was admitted at the Government Medical College and Hospital, Ambajogai since he was found unconscious owing to consumption of poison at the same place where the minor was found dead.

13 The learned APP has invited our attention to the testimony of PW-8 (Laxman Ashok Sonnar), brother of the deceased Preeti, who has

deposed at exhibit-60 that the deceased Preeti had informed him that the accused/ appellant was maintaining illicit relations with the minor deceased, daughter of Kamble. He had rushed to the village after getting news from a friend and on reaching, found that his sister Preeti's dead body has strangulation marks on the neck, injury marks on the forehead and eyebrow. He also found the dead body of the minor, daughter of Kamble, lying there. His testimony is unshaken in the cross-examination.

13 Considering the above factors we find that, at this prima facie stage, the impugned sentence does not deserve to be suspended. As such, this Criminal Application No.1010/2020 stands rejected.

(b) A.L.S. No.79/2020 :-

14 This application is filed by the State seeking leave to file an appeal for challenging the acquittal of the applicant with reference to the charge of raping a minor and killing her, punishable under Sections 376(2), 302, 309 of the Indian Penal Code r/w Section 6 of the Protection of Children from Sexual Offences Act, 2012 and Section 3(1)(w)(i) and Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

15 Issue notice. Shri Salunke, learned advocate, waives service of notice on behalf of the respondent/ convict.

16 We have heard the learned advocates for the respective sides.

The appeal preferred by the convict has been admitted. We find that the cause set out in the application by the State needs to be considered. As such, this Application No.79/2020 is allowed.

kps

(B. U. DEBADWAR, J.)

(RAVINDRA V. GHUGE, J.)