

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

CRIMINAL APPEAL NO.410 OF 2015

Momin Mazhar alias Babbu s/o
Momin Majjid, Age: 23 years,
Occu.: Labourer, R/o: Mominpura,
Beed, Taluka and District: Beed.

(At present the Appellant is in
Aurangabad Central Prison, Harsool,
Aurangabad, Taluka and District,
Aurangabad) ..APPELLANT

VERSUS

The State of Maharashtra,
through the Police Station Officer,
Dharur Police Station, Dharur,
Taluka: Dharur, District: Beed. ..RESPONDENT

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Mr. Govind Kulkarni h/f Mr. Devang Deshmukh,
Advocate for the Appellant.
Mr. A. V. Deshmukh, APP for Respondents-State.

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**CORAM : S. V. GANGAPURWALA &
M. G. SEWLIKAR, JJ.**

DATED : 7th AUGUST, 2020.

JUDGMENT (Per: S. V. Gangapurwala, J.):-

1. The present appellant/accused no.1 is prosecuted and convicted for an offences punishable under Section 302 and 201 of Indian Penal Code alongwith other accused. The other accused are acquitted. The Juvenile accused is tried before the Juvenile Court.

2. The case of the prosecution is that the present appellant had illicit relationship with the juvenile offender Sana. A female child was born from the illicit relationship. The present accused and the juvenile offender Sana d/o Mohammad Taher Momin committed murder of the female neonate and accused nos.2 and 3 assisted them.

3. To prove the charge against the accused, the prosecution heavily relied on the evidence of PW-10. According to PW-10, while making enquiry about the Crime No.155/2013 he got the knowledge that the accused no.1 had illicit relationship with juvenile offender Sana and from the said illicit relationship juvenile offender was pregnant and she delivered one child in Gholve Hospital, Beed, on 12.11.2013. He further states that on the next day of delivery viz. 13.11.2013 the accused persons took discharge from the Gholve Hospital of juvenile offender alongwith female child and went to Upali tank by private rickshaw. The female foetus was kept in one red colour bag and left the said bag at Upali tank.

4. The learned counsel for the appellant contends that the case is based on circumstantial evidence. The appellant is not involved in the alleged crime. The chain of circumstances is not complete. The appellant was not with the other accused and the juvenile offender at the time discharge was given to the juvenile offender alongwith neonate. The learned counsel relied on

the statement of Doctor to prove the same. According to the learned counsel, the juvenile offender and her mother were last seen together with the neonate. The present appellant did not have any motive. As the chain of circumstances is not complete, the appellant could not have been convicted for the offences punishable under Section 302 and 201 of the Indian Penal Code. The learned counsel for the appellant relied on the case of **Bodhraj Alias Bodha and Others Vs. State of Jammu and Kashmir** reported in (2002) 8 Supreme Court Cases 45.

5. Mr. Deshmukh, learned A.P.P. submits that it has been proved by the scientific evidence that the appellant is the father of the unfortunate neonate. The chain of events is complete and it leads to the guilt of the present accused. The juvenile offender Sana has given a statement that the present appellant was instrumental in murdering the neonate. PW-10 has proved the said fact. The motive to murder the neonate is writ large as the neonate was born from the illicit relationship of the appellant with the juvenile offender Sana. The only irresistible conclusion that can be drawn from the facts and evidence on record is that the appellant is guilty of committing the crime alleged against him.

6. We have considered the submissions canvassed by the learned counsel for the parties. We have gone through the evidence and also record.

7. The Courts are obligated to scan the evidence gingerly of the case based solely on circumstantial evidence. The Apex Court in catena of judgments has laid down the principles to be followed in case based on circumstantial evidence, the same can be culled out as under:

- 1.The circumstances from where the conclusion of the guilt is to be drawn ought to be established.
- 2.The circumstances should be conclusive in nature.
- 3.The circumstances ought to, to an ethical certainty, exclude each hypothesis except one projected to be evidenced.
- 4.There should be a complete sequence of proof so as to not leave any affordable ground for the conclusion in line with the innocence of the accused and should positively and irresistibly lead to show that the act must have been done by the accused.
- 5.The evidence should prove the guilt of the accused beyond reasonable doubt.

8. In a case based on circumstantial evidence the heavy burden is on the prosecution not only to prove the guilt of the accused beyond reasonable doubt but the evidence has to be so strong that the innocence of the accused is ruled out.

9. In the present case, it has been proved that the murdered neonate is a child of the juvenile Sana and the present appellant. Neonate is the result of their illicit relationship. The present appellant, it appears, is convicted for an offences punishable under Section 7 r/w Section 8 of the POCSO Act and sentenced to suffer Rigorous Imprisonment for five years and to pay fine of Rs.500/- in default to suffer further RI for 15 days and further convicted for the offence punishable under Section 9 r/w. Section 10 of POCSO Act and sentenced to suffer Rigorous Imprisonment for seven years and to pay fine of Rs.1000/- in default to suffer further RI for 30 days. The appeal filed before the High Court is also dismissed. In view of that, it is not open for the appellant to dispute the paternity of the murdered neonate.

10. It is also a matter of record that the juvenile Sana was admitted in the Gholve Hospital, Beed. Around 12.11.2013 she gave birth to the neonate. On 14.11.2013 she was discharged. The evidence of the Doctor would be relevant. Dr. Vijay Ramchandra Gholve has deposed that juvenile Sana gave birth to the neonate on 12.11.2013 at 05.00 am. On 14.11.2013 she was discharged with her baby. At the time of discharge, the mother of Sana was also with her. From the evidence of the Doctor it is abundantly clear that at the time of discharge of Sana from

the hospital alongwith the neonate only mother of Sana was present. The present appellant was not present when the discharge was given to Sana from the hospital. After the discharge was given to Sana alongwith the neonate from the hospital on 14.11.2013 till the body of the neonate was found, the presence of the present appellant is nowhere spelt out by any witnesses. The appellant was not last seen with the juvenile offender Sana or neonate according to the evidence on record. Unless the presence of the present appellant is shown during the close proximity of the act alleged it would be difficult to rely upon the case of the prosecution. The chain of events would not be complete so as to bring clear guilt of the present appellant. There is no iota of evidence to remotely suggest that the present appellant at any material point of time from 14.11.2013 i.e. discharge of Sana with neonate from hospital till 15.11.2013 i.e. the date the body of the neonate was found had access to the neonate. In absence of such an evidence, it would not be possible to accept the case of the prosecution qua the present appellant. It cannot be said that the prosecution has proved the case beyond all reasonable doubt to convict the present appellant under Section 302 of the Indian Penal Code for murdering neonate. The appellant would be entitled for the benefit of doubt.

11. In the absence of positive evidence to conclude that the present appellant was last seen with the neonate or juvenile Sana the appellant deserves to be given benefit of doubt.

12. In light of the above, we pass the following order:

ORDER

- A. Appeal is allowed.
- B. The judgment of the Sessions Court convicting the appellant for the offences punishable under Section 302 and 201 of the Indian Penal Code is quashed and set aside.
- C. The appellant is acquitted of the offences punishable under Section 302 and 201 of the Indian Penal Code.
- D. The appellant be set free immediately, if not required in any other case.

(M. G. SEWLIKAR)
JUDGE

(S. V. GANGAPURWALA)
JUDGE