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

CRIMINAL APPEAL NO.1248 OF 2007

The State of Maharashtra

...Appellant

Versus

1) Kum. Mukta Nivruti Jadhav,
N-X-11, 12, Sant Dnyaneshwar Chawl,
Ambewadi No.1, Behind Vitrum Glass Company,
L.B.S. Marg, Surya Nagar,
Vikhroli (W), Mumbai 400 -83.

2) Tukaram Nivruti Jadhav,
N-X-11, 12, Sant Dnyaneshwar Chawl,
Ambewadi No.1, Behind Vitrum Glass Company,
L.B.S. Marg, Surya Nagar,
Vikhroli (W), Mumbai 400 -83.

3) Dnyaneshwar Nivruti Jadhav (Abated),
N-X-11, 12, Sant Dnyaneshwar Chawl,
Ambewadi No.1, Behind Vitrum Glass Company,
L.B.S. Marg, Surya Nagar,
Vikhroli (W), Mumbai 400 -83.

4) Nivruti Sopan Jadhav,
N-X-11, 12, Sant Dnyaneshwar Chawl,
Ambewadi No.1, Behind Vitrum Glass Company,
L.B.S. Marg, Surya Nagar,
Vikhroli (W), Mumbai 400 -83.

...Respondents

Mrs. M.M. Deshmukh, APP for the Appellant - State.
None for the Respondents.

CORAM : PRAKASH D. NAIK, J.
DATE : 13th JANUARY, 2022.

ORAL JUDGMENT :

1. The State of Maharashtra has preferred this appeal
under section 378(3) of Code of Criminal Procedure, 1973

challenging the judgment and order dated 25th November 2005 passed by the learned Sessions Judge for Greater Bombay in Sessions Case No.480 of 2001. Accused Nos.1, 2 and 4 were acquitted for the offences punishable under section 323, 316 r/w 34 of Indian Penal Code.

2. The case of the prosecution is as follows :-

(a) The complainant (PW.1) Nazra Banoo Mohd. Hyder Ali was residing with her husband at Bihar after marriage. For delivery she came to stay in the house of her mother at Ambewadi, Vikhroli, Mumbai. At the time of incident, she was carrying 7 months pregnancy.

(b) On 13th October 2000, the complainant had visited the Municipal Hospital for check-up and registering her name for delivery. After returning from the hospital, she was at home. At about 4.30 pm, she visited the common water tap for fetching water alongwith her mother (PW.3). At about 4.30 pm, she took water from the tap. Thereafter, other people from the vicinity visited common water tap for fetching water. The mother of the complainant opened key of the other tap and allowed the people to take water from their house as well as from other tap. There were many persons present at the place of incident. They were shouting.

The mother of complainant advised them to take water.

(c) Accused No.1 – Mukta Jadhav came to the spot alongwith another lady and proceeded towards other tap of which the key was with the complainant and her mother. Accused No.1 and the lady accompanying her started throwing pots of other persons saying that they cannot take water from the said tap. The mother of the complainant told accused no.1 to collect water by standing in queue. Accused no.1 refused to do so.

(d) The lady accompanying accused no.1 went to the house of accused no.1 and called her parents and brother. Accused No.2 and 3 are brothers are the accused No.1 and accused No.4 is their father. Accused No.4 was having lock in his hand. Accused no.1 caught hair of the complainant's mother. Accused No.2 pushed the complainant and accused no.1 kicked on her stomach. As a result, she fell down. She had pain in her stomach. Accused No.2 was having wooden log in his hand. He tried to give blow of wooden log on her mother but she bent down and the blow landed on his father who was behind complainant's mother. He suffered injury on his forehead. The complainant was taken to Rajawadi Hospital. She was treated at Rajawadi Hospital and sent back. Since there was pain she went to M.S. Hospital. Sonography was conducted. Doctor

advised her to get admitted in the Hospital. Accordingly, she was admitted in the hospital. The child had expired in womb. Surgery was conducted, foetus was taken out. After 3 to 4 days, the complainant was discharged from the hospital.

(e) On 6th November 2000, the complainant's mother visited Police Station for lodging the complaint. Her complaint was recorded. Investigation proceeded. On completing investigation charge-sheet was filed.

3. Dnyaneshwar N. Jadhav (Accused No.3) was reported dead. The case against him had abated before framing charge. Charge was framed against accused Nos.1, 2 and 4 vide order dated 29th September 2004. As per charge, accused Nos.1, 2 and 4 assaulted mother of complainant in furtherance of common intention with fist and kick blows and thereby committed an offence punishable under section 323 r/w 34 IPC. Secondly, all the accused in furtherance of common intention while assaulting mother of complainant, accused No.2 and 1 gave kick on abdomen of complainant when she was seven months pregnant and caused death of unborn child and committed offence under section 316 r/w 34 IPC.

4. Evidence of witnesses was recorded. PW.1 Nazra Banu

Mohd. Ali is the complainant. P.W.2 – Sarita Vishwakarma is the eye-witnesses to the incident. P.W.3 – Zubeda Banu Mohd. Bashrat is the mother of P.W.1. P.W.4 – Dr. Subhash Badrinath Bhatia is the Medical Officer. P.W.5 – Shenaz Bano Salim Shaikh is the sister of P.W.1. P.W.6 – Dr. Shekhar Waman Phulpagare is the Medical Officer attached to M.T. Agarwal Hospital. P.W.7 – Manoj Pawar is a Panch. P.W.8 – Ramchandra Detke is the Investigating Officer.

5. The statement of the accused was recorded under section 313 of Cr.P.C. The defence examined Sudam Midgule as D.W.1.

6. On examining the evidence on record, the trial Court acquitted the accused of both the charges.

7. The State of Maharashtra is aggrieved by the impugned judgment and order passed by the Sessions Court.

8. The learned APP has submitted that the order of the trial Court is contrary to evidence. There was reliable evidence before the trial Court to prove the charge against the accused. The prosecution witnesses have clearly deposed that the complainant was assaulted by the accused. The offence of assault as well as miscarriage has been proved. P.W.1 – victim was assaulted by kick on her abdomen which has resulted in death of quick unborn child.

The ocular evidence and the documentary evidence supports the prosecution case. The trial Court has given finding of acquittal by overlooking the evidence on record. The evidence of P.W.1, P.W.3 and P.W.5 have been ignored by the trial Court on the ground that it creates suspicion. However, their evidence was cogent. Merely, on account of delay which was not inordinate the trial Court ought not to have discarded the evidence of the witnesses. The assault was pre-planned. The quarrel was on account of filling of water from the tap. The accused came to the spot of incident with an intention to assault P.W.1 and P.W.2. The learned trial Judge has not appreciated the evidence in proper perspective. The Medical Officer has stated that the foetus was dead in womb. The death is possible by kick on abdomen. The findings are perverse. There is miscarriage of justice. Hence, acquittal of respondents be set aside and they may be convicted for the offences under section 323, 316 of the IPC.

9. The prosecution had examined two witnesses as stated hereinabove. The trial Court has considered the evidence on record. The trial Court has assigned reasons for acquittal.

10. While acquitting the respondent – accused the Court had observed that the prosecution has failed to prove that all the

accused in furtherance of their common intention voluntarily caused hurt to complainant's mother. The prosecution has also failed to prove that in furtherance of their common intention the accused nos.1 and 2 gave a kick on the complainant's abdomen while she was pregnant and caused death of unborn child. In paragraph 15 of the impugned judgment, it was observed that considering the evidence of all the prosecution witnesses, the prosecution is mainly relying on the evidence of PW.1, PW.2, PW.3 and PW.5. From their evidence, it can be seen that there was quarrel between the complainant and her mother at one hand and the accused no.1 on the other hand. There was no supply of water in the area. There was rush of residents to fetch water and everyone was anxious to get the water as early as possible. There was long queue for fetching water. According to PW.1, PW.2, PW.3 and PW.5, quarrel took place since accused no.1 prevented public from fetching water in front of the house of one Buva. He was not present in his house. He was owner of one of the tap. It was not the public water tap. The defence of the accused is that accused no.4 was staying with the owner of the tap and there were cordial relationship between them. The key of water tap had always remained in custody of accused no.4 in the absence of Buva. Accused No.4 used to fill up water in the house of Buva for his use.

The accused have examined D.W.1 - Sudam Midgule @ Buva, who was the owner of the water tap which was the cause of quarrel between the parties. D.W.1 supported the defence of the accused and deposed that whenever he was away from the house, he used to give keys of his residential house and also water tap to accused no.4 with an intention that they should look after his house and fill up the water in his house. According to D.W.1, accused no.4 was staying with him in the upper room of his house and on the day of incident he was not present. He stated that key of water tap was never given to P.W.3 and she was never allowed to fill up water from his water tap. The defence of the accused is that they have filed complaint against P.W.3 for assaulting accused no.4. The complaint against accused was afterthought. It is the case of P.W.1, P.W.3 and P.W.5 that accused no.2 was having wooden log in his hand and he tried to give a blow of wooden log to P.W.3 which was evaded by P.W.3 resulting in blow to accused no.4. Hence, he suffered injury on his forehead.

11. It was further observed that accused no.4 lodged a complaint against prosecution witnesses and offence was registered against them. However, no complaint was lodged by the witnesses on the same day though according to them on the day of incident

accused nos.1 and 2 pushed P.W.1 and accused no.1 kicked P.W.1 on her stomach as a result of which she fell down and there was pain in her abdomen. She was treated in the hospital and sent back. Again there was pain and hence, she was taken to hospital. The child had expired in the womb on 26th October 2000. She was discharged after 3 to 4 days. FIR was lodged on 6th November 2000, although the incident took place on 13th October 2000, there is a delay of 23 days in lodging the complaint.

12. P.W.1 has stated that on 13th October 2000 people had gathered for filling water at water tap. Tap belongs to someone else. Her mother opened the key of other tap and allowed people to take water. Accused No.1 came with another lady and went to other tap of which key was with complainant's mother. Accused No.1 was not allowing others to take water from that tap. Mother of P.W.1 shouted at accused No.1. The lady accompanying her went to the house of accused No.1 and called mother, father and brother of accused No.1. Accused No.2 pushed P.W.1 and Accused No.1 kicked her on stomach. Thereafter, all the accused came to her house. Accused No.2 was having wooden log. Accused No.2 tried to give blow of wooden log on mother of P.W.1. She bent down and blow landed on father of accused No.1 who was behind her mother.

She was treated at Rajawadi Hospital. Thereafter, she visited M.S. Hospital. Foetus was dead. On 6th November 2000, her mother went to Police Station. She learnt that accused had filed complaint. Police recorded her complaint. On 13th October 2000 tap of Buva was not locked.

13. The FIR was recorded on 9th November 2000. Statement of complainant is dated 6th November 2000. The proforma mention that information was received by Police on 9th November 2000. The FIR was registered vide C.R.No.195/2000 for offences under section 316, 326, 323, 34 IPC. It is marked as Exh.10.

14. P.W.2 – Sarita Vishwakarma has stated that she knows complainant, her mother and accused. On 13th October 2000 residents were filling water. Mother of P.W.1 was giving water by affixing pipe to her tap. She was also giving water from another tap of Buva which is in front of tap of mother of P.W.1. Accused No.1 told the public that she will not allow them to fill water. Accused No.1 was trying to put lock to the tap. Mother of P.W.1 tried to prevent locking the tap. Accused No.1 gave kick on stomach of P.W.1. She was pregnant. Accused No.2 pushed P.W.1. She fell down. P.W.1 was taken to Hospital. She was operated. Foetus was

dead. Tap of Buva is locked. On the day of incident, Buva was not present. She did not state while recording her statement that mother of accused no.1 and 2 was present at the spot. For 16 years, she is filling water from tap of Zubeda.

15. P.W.3 is the mother of P.W.1. According to her, incident took place on 13th October 2000. There was no water in the area. She had filled up the water from her tap. Many people were waiting for water. She started giving water to them from her tap. In front of her house there is one tap belonging to Buva. There was one tenant in the house of Buva and she told him to provide water to all. She told the people not to quarrel and wait in queue. Accused No.1 and one lady came at about 8.30 pm. She started taking water. She was told to stand in queue. Accused no.1 called her family members. Father, mother and brothers of accused no.1 came to the spot. Accused no.2 is brother of accused no.1. Accused no.4 is their father. Accused no.1 went to lock the tap of Buva. All of them assaulted them. She did not allow accused no.1 to put the lock at the tap. Accused no.1 gave a kick blow on the waist of P.W.1. She was pregnant of 7 months. She was taken to hospital. The condition of child in the womb was not good. P.W.1 suffered pain. Thereafter, she was taken to a private hospital. There was no

movement of child in the womb. On 25th October 2000, Doctor declared the child in the womb as dead. On 26th October 2000, operation was done and the child was removed. On account of health she did not go to the Police Station. On 9th November 2000, she went to the Police Station. Accused No.2 tried to assault her with wooden log. The blow landed on his father at his forehead who was behind her. As a result, he suffered injury. Buva was not available at his residence. She did not lodge complaint when the Police called her.

16. P.W.4 is the Medical Officer at M.S. Maternity and General Hospital. He had treated P.W.1. He deposed that P.W.1 was hospitalized on 14th October 2000. She gave history of assault and also stated that police case has been registered at Rajawadi Hospital. He examined the patient. She was pregnant. She conducted sonography. The movement of child was slow. She was discharged on 23rd October 2000. She was again admitted in the hospital 24th October 2000. Sonography was performed. The foetal heart showed beating. Thereafter foetal death was diagnosed. Dead child was delivered. This was a case of intrauterine foetal death. On 26th October 2000, the patient was discharged in good health. If person receives kick blow on the abdomen while pregnant such

foetal death can occur. The patient was earlier admitted at Rajawadi Hospital. First sonography was done on 14th October 2000 and again on 23rd October 2000. Foetus activities were normal. It is possible that such type of foetal death is possible if patient falls on the ground while pregnant.

17. P.W.5 is the sister of P.W.1. According to her, the incident took place on 13th October 2000. There was quarrel between her mother, accused no.1 and Sunita. The family members of accused no.1 came to the spot. Accused No.2 pushed P.W.1. Accused No.1 gave a kick on the stomach of P.W.1. As a result of kick, P.W.1 fell down and she had pain in her stomach. She was pregnant. She was taken to Rajawadi Hospital. She was treated and sent back. She was then taken to Private Hospital. On 26th October 2000, the baby died at Private Hospital. At the time of quarrel accused No.2 had brought a plank. He also assaulted her mother with plank. She bent down, the blow landed on accused No.4 who was standing behind her mother. Accused No.4 sustained injury to forehead due to blow. There is another tap of Buva. Accused No.4 is on visiting terms at the house of Buva. Key was kept with her mother. Her statement was recorded by the Police on 9th November 2000. From 13th October 2000 to 9th November 2000 she was

residing at the same place. They went to the Police. Police did not come to her house.

18. P.W.6 – Dr. Shekhar Phulpagare was attached to Rajawadi Hospital. He deposed that P.W.1 came to hospital on 13th October 2000. She was brought by her relative at 11.45 pm. He examined her. The patient gave history of assault kick over abdomen. There was no external injury. She was referred to gynecologist. She was advised admission but the patient refused and went against the medical advise. The purpose of admission was for observation for 24 hours to know the outcome. He examined the patient when she came to Rajawadi Hospital. He found her condition to be normal. The relative gave history of assault.

19. P.W.7 – Manoj Pawar acted as Panch to Panchanama dated 9th November 2000. He resiled from contents of Panchanama. He was declared hostile and cross-examined by prosecutor. He denied suggestions.

20. P.W.8 – Ramchandra Detke is the Investigating Officer. On 6th November 2000, he was at Vikhroli Chowki as beat officer. On 6th November 2000 Zubeda Khan (P.W.3) and her daughter came to the Police Station and lodged a complaint in respect of incident that took place on 13th October 2000 on account of tap

water. He recorded complaint of Nazra (P.W.1). C.R. No.195/2000 was registered under section 316, 326, 323 r/w 34 IPC. He conducted investigation. The accused were arrested on 11th November 2000. Accused No.3 had injury on forehead. Accused No.3 had gone to Rajawadi Hospital. He registered offence under section 324 IPC on behalf of accused No.3 against P.W.1, P.W.3 and P.W.5. He arrested them. Tap was of one Buva by name Sudam Mirgule. He was residing in the room.

21. The statement of the accused was recorded under section 313 of Cr.P.C. Accused No.1 is the housewife. Her explanation in the statement under section 313 of Cr.P.C. is that they had filed a case against Zubeda and her daughters. P.W.8 were pressurizing them to withdraw the case. Her father did not agree and they filed a false case against them. She has been falsely implicated. Officer Detke threatened them that they will be implicated in the case filed by Zubeda. Even while they were released on bail, Officer Detke had threatened them to withdraw the case against Zubeda. Similar defence was urged by the other accused.

22. The defence had examined Sudam Mirgule as Defence Witness. He deposed that he owned room at Ambewadi, Vikhroli.

There is water tap at ground level. On 13th October 2000 he was not there. He had lodged complaint with Parksite Police Station. He gave key of his house and water tap to accused No.4. He was told to look after, to use and fill water in house. Accused No.4 was staying with him. After his return accused told him that Zubeda Shaikh picked up quarrel and claimed that water tap belongs to her. Therefore, he lodged complaint against her at police station. He never gave key of water tap to Zubeda. He was cross-examined by APP. He stated that he is acquainted with accused five years prior to incident.

23. On scrutiny of evidence and the judgment of the trial Court, I do not find any reason to take the contrary view. The trial Court has assigned reasons for acquitting the accused. It is in the evidence of PW.1 to 3 and 5 that, there was no supply of water in the area due to strike by BMC employees. On the day of water supply there was rush of residents to fetch water. Buva was not present in house who is the owner of tap. It was private water tap. According to PW.1 to 3 and 5, Buva used to give key of lock of water tap to PW.3 so that she can use that water tap for fetching water. The defence of the accused is that accused No.4 was staying with owner of tap, who was known in that area by name Buva and

relation between Buva and accused No.4 were cordial. The key of tap always remained in custody of accused No.4, in the absence of Buva. Accused No.4 used to fill up the water in the house of Buva. In support of this defence, the accused have examined D.W.1. He is the owner of water tap which was the cause of quarrel between the parties. D.W.1 supported the defence of the accused. He stated that he used to give keys of his residence and water tap to accused No.4 when he is away from house. Accused No.4 was staying with him. On day of incident he was not present in house. After return he lodged complaint against P.W.3. He stated that he never gave water tap key to P.W.3 and never allowed her to fill up the water from his water tap. His evidence falsify the version of P.W.1 to 3 and 5 that P.W.3 was allowed to use the water tap by D.W.1 in his absence. D.W.1 is Buva, who is the owner of tap. The question is how P.W.3 opened water tap without key. The defence of accused is that, P.W.3 assaulted accused No.4 and complaint is filed against her immediately after the incident. The FIR against accused herein is afterthought. In the evidence P.W.1 to 3 and 5 stated that accused No.2 was having wooden log and he tried to give blow on P.W.3, which she evaded and it was landed on forehead of Accused No.4 and he suffered injury. This explanation was created by witnesses after accused No.4 had lodged complaint. Thus, injury on accused

No.4 is admitted by witnesses. P.W.1 has admitted that, Police were aware about incident as accused have complained. P.W.2 admitted that accused had lodged complaint against P.W.3. The defence of accused is that P.W.3 went inside the house and brought wooden log and assaulted accused No.4 on his head. P.W.3 admitted that Police came to call her at the Police Station.

24. P.W.8 has admitted that accused no.3 had injury on his forehead and on his complaint, FIR was registered for the offence under section 324 of IPC against P.W.1, P.W.3 and P.W.5. P.W.1, P.W.3 and P.W.5 were arrested. No complaint was lodged by the witnesses on the same day though according to them on the day of incident accused No.1 kicked P.W.1 on stomach, and she fell down causing pain. She was taken to Rajawadi Hospital. Sonography was conducted at M.S. Hospital. P.W.1 was advised to take admission in the Hospital. On 23rd October 2000 she was told that child has expired in womb. She was discharged from the Hospital 3 to 4 days after 26th October 2000. Complaint was lodged on 6th November 2000. There is delay of 23 days. The delay speaks volumes of doubt. P.W.6 stated that he had examined P.W.1 at Rajawadi Hospital. On 13th October 2000 at 11.45 pm. He did not notice any external injury. P.W.1 refused to get admitted and left the hospital.

This creates doubt about version of witnesses that P.W.1 had severe pain. P.W.6 admitted that when the patient came to Rajawadi Hospital he found her condition normal. P.W.4 had operated P.W.1. She was admitted to hospital on 14th October 2000. She stated to doctor that police case has been registered at Rajawadi Hospital. She was pregnant. Doctor conducted sonography. She was discharged from the hospital on the same day and again admitted on 24th October 2000. Foetal death was diagnosed. P.W.1 delivered dead foetus on 26th October 2000. Doctor admitted that when P.W.1 was admitted on 24th October 2000, foetus was alive. Thus, from the evidence of P.W.4, it is seen that the child in the womb of P.W.1 was alive till 24th October 2000. The incident took place on 13th October 2000, and though she was suffering from pain, the foetus was alive for 10 days in the womb of P.W.1. P.W.4 admitted that such type of foetal death is possible if patient falls on the ground while pregnant. The trial Court has observed that, thus, there are two views of the doctor. The foetus can die in the womb if somebody kicks on abdomen of 7 month pregnant lady and foetus can die if pregnant women falls down. The prosecution had examined interested witnesses. The accused are the members of one family. The trial Court had observed that the defence is probable. According to them, water tap is owned by D.W.1 which

appears to be probable story. P.W.3 has no connection with water tap. She intervened and there was quarrel. Offence under section 316 of IPC is not made out. The trial Court has observed that the intention of the accused is important. The offence in reality is modified format of homicide. There should be direct nexus between the act and the death of unborn child. Admittedly, the child was alive for 10 days. Thus, the trial Court had given benefit of doubt to the accused.

25. The judgment of acquittal is well reasoned. I do not find any reason to take a different view. The appeal must fail.

ORDER

(i) Criminal Appeal No.1248 of 2007 is dismissed and stands disposed of.

(PRAKASH D. NAIK, J.)