

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

[1] CRIMINAL APPEAL NO.173 OF 2020

ABC and anotherAppellants
Versus
The State of Maharashtra
and anotherRespondents

....
WITH

[2] CRIMINAL APPEAL NO.124 OF 2020

Vijay Shivaji GundAppellant
Versus
The State of MaharashtraRespondent

.....
WITH
INTERIM APPLICATION NO.463 OF 2020
IN
CRIMINAL APPEAL NO.124 OF 2020

....
WITH

[3] CRIMINAL APPEAL NO.521 OF 2021

Pravin Vijay GundAppellant
Versus
The State of Maharashtra & AnrRespondents

....
WITH
INTERIM APPLICATION NO.1645 OF 2021
IN
CRIMINAL APPEAL NO.521 OF 2021

Ms Tahera Abdul Rashid Qureshi, Advocate for the Appellants in APEAL/173/2020.

Mr. Samay Pawar, Advocate a/w. Yash Fadtare i/b. Jaydeep D. Mane for the Appellant in APEAL/124/2020 and APEAL/521/2021.

Mr. Shrikant H. Yadav, APP for the Respondent No.1-State.

Ms. Chaitrali Deshmukh, Advocate (appointed) for the Respondent No.2 in all Appeals.

CORAM : SARANG V. KOTWAL, J.

DATE : 12th JULY, 2024

ORAL JUDGMENT :

1. Leave to amend to remove the name of the Appellants in Criminal Appeal No.173/2020 is granted. The Appellants therein shall be described as “ABC” and “DEF” as they are the parents of the victim. Amendment shall be carried out immediately.

2. All these Appeals are decided by this common judgment because they arise from the same judgment and order dated 9.1.2020 passed by the Additional Sessions Judge, Solapur in Sessions Case No.163/2016. For the sake of convenience, the Appellants are referred to by their status

in the trial as the Accused. Accused No.1 is the son of the accused No.2. Accused No.3 is the wife of the Accused No.4. The Accused Nos.3 and 4 were the parents of the victim.

3. At the conclusion of trial, the learned Judge convicted and sentenced the Appellants as follows :

[i] The Accused No.1 was convicted for the offence punishable under Section 5(l) read with 6 of the Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO Act') and was sentenced to suffer imprisonment for ten years and to pay a fine of Rs.5,000/- and in default of payment of fine to suffer further imprisonment for three months. In view of section 42 of the POCSO Act, no separate sentence was imposed on accused No.1 for the offence punishable under Section 376(2)(i) and Section 376(2)(n) of IPC.

[ii] The Accused No.2, the Accused No.3 and the Accused No.4 were convicted for the offence punishable under Section 304(II) read with 34 of IPC and were sentenced to suffer imprisonment for seven years and to pay fine of Rs.5,000/- each and in default to suffer imprisonment for three months.

[iii] The accused No.2 and the Accused No.3 were

convicted for the offence punishable under Section 201 read with Section 34 of IPC and were sentenced to suffer imprisonment for three years and to pay a fine of Rs.2,000/- and in default to suffer imprisonment for two months.

The Accused No.1 was acquitted of the offence punishable under Section 376(D), 376(2)(h), 506 of IPC and Sections 5(g) and 12 of the POCSO Act. The Accused No.2 was acquitted of the offence punishable under Sections 376(2)(h), 376(2)(i), 376(2)(n), 354 and Section 506 read with 34 of IPC and under Sections 5(g), 5(l) and 12 of the POCSO Act. The substantive sentences were directed to run concurrently. All the accused were given set off under Section 428 of Cr.P.C. for the period they had already undergone as under-trial prisoners. The victim was awarded compensation of Rs.25,000/- towards her rehabilitation out of the “Victim Compensation Fund” constituted under Section 357(A) of Cr.P.C.

4. Heard Ms Tahera Abdul Rashid Qureshi, learned counsel for the Appellants in Appeal No.173/2020, Mr.

Samay Pawar, learned counsel for the Appellants in Appeal Nos.124/2020 & 521/2021, Mr. Shrikant Yadav, learned APP for the Respondent No.1-State and Ms. Chaitrali Deshmukh, learned appointed counsel for the Respondent No.2 in all the Appeals. Advocate Ms. Chaitrali Deshmukh is appointed for the Respondent No.2 in Criminal Appeal Nos.173/2020 & 521/2021. Since she is aware of the facts and she is representing the victim in this case, she is heard in Criminal Appeal No.124/2020 as well on behalf of Respondent No.2.

5. The prosecution story is that, the victim was the daughter of the Accused Nos.3 & 4. The date of birth of the victim is 8.1.2000. It is the case of the prosecution that in the year 2013, the Accused No.2 established forcible sexual relations with the victim. He thereafter forced the victim to have physical relations with the Accused No.1, who was his son. This was repeated on a few occasions, ultimately resulting in her pregnancy. It is alleged that the Accused No.2 then convinced the Accused Nos.3 & 4 to get the victim

married to one Gaikwad. Accordingly, the marriage was performed, but, within three days of the marriage, the victim delivered her child. It is case of the prosecution that the Accused Nos.2, 3 & 4 took away the child. It was a premature baby and they took the baby out of the hospital against medical advice resulting in death of the new-born baby. It is the prosecution case that the Accused Nos.2 & 3 buried the dead body in a river-bed and caused disappearance of the dead body. After a few months, the victim got married to another person. It is alleged that the Accused No.2 told the victim's husband's family about the past instances; because of which the victim was harassed. In the meantime, she delivered her child from that marriage, but, because of the harassment she left the child in the house of her husband and left his house. She went back to reside with her parents. One Sanjay Patil was her relative. He came to know about the events. He suggested to the victim that she should lodge a complaint. Accordingly the victim approached the police station and lodged her FIR on

12.2.2016. The investigation was carried out and all the Accused faced the trial as mentioned earlier.

6. During the trial, the prosecution examined eleven witnesses including the victim, her brother, the aforementioned Sanjay Patil, their relative Jayashree, the Medical Officer in respect of birth of the victim's first child, the Medical Officer examining her after registration of the FIR, the Headmaster of the victim's school to prove her date of birth, the panchas and the investigating officer.

7. The defence of the accused was of total denial. The Accused No.2 took a specific defence that there was a land dispute concerning the witness Sanjay Patil and at his behest this false case is lodged against the Accused.

8. The important evidence in this case is that of the victim, who is examined as PW-1. She has stated that at the time of incident, she was residing with her parents, sister and brother. She was 13 years of age at that time . Her date of birth was 8.1.2000. She was studying in school in the

seventh standard. The Accused Nos.1 & 2 were residing near her house. The Accused No.2's daughter was her friend. The Accused No.2 was to go to Solapur to meet his daughter. He asked the victim to accompany him to meet his daughter. The victim went with the Accused No.2 on his motorcycle to meet his daughter. While taking her to Solapur, the Accused No.2 misbehaved with her and touched her inappropriately. PW-1 resisted and told him that she would inform her parents. He threatened her that he would kill her. After that they went to Solapur and met the Accused No.2's daughter. On the next day, the Accused No.2 came to her house when she was alone. It is her case that he committed forcible sexual intercourse with her. It is her further deposition that the Accused No.1, who was son of the Accused No.2, was passing from her house. He saw the incident. After 3-4 days, the Accused Nos.1 & 2 both came to her house. The Accused No.2 forced her to keep physical relations with his son i.e. Accused No.1. PW-1 refused but because of the threats of the Accused No.2, the Accused No.1

committed forcible sexual intercourse with her. Then both the accused left the house. Thereafter, on various occasions, the Accused No.1 repeated the act. She became pregnant. She informed that fact to the Accused Nos.1 & 2. It is her case that the Accused No.2 approached her parents with a proposal for her marriage. Accordingly, her marriage was performed with her first husband on 23.4.2014. At that time, she was already into the seventh month of her pregnancy, but, it was not known to anybody else. On 25.4.2014, PW-1, her husband and in-laws were travelling to visit a temple. In between she started having stomach pain. Her husband took her to a hospital at Sangola. She delivered a male child. Her husband and in-laws left her alone there. On the next day, her parents came to the hospital. PW-1 told them about the act committed by the accused Nos.1 & 2. Her parents i.e. Accused Nos.3 & 4 then called the Accused No.2 to the hospital. Thereafter, the Accused Nos.3 & 4 went back to their village. PW-1 was discharged at around 3.00 p.m.. At that time, the Accused

No.2 was with her. He took her to a house of one Nikam but the baby was not taken with them. When PW-1 asked him about the baby, he kept silent. PW-1 stayed in the house of said Nikam for about 2-3 days. She was working in his house. After 2-4 days, the Accused No.2 took her to another person's house at Solapur and then on 5.5.2014 the Accused No.2 took her to one Mane and forced her to marry said person. After that, the Accused No.2 left from there. She cohabited with her second husband and gave birth to a female child on 26.1.2015. During Diwali festival, the Accused No.2 came to her house and then left. He then called her mother-in-law and told about the past incidents. Because of that, her mother-in-law started ill-treating her. She drove the victim out of the house. PW-1 then went to reside with her parents. At that time, Sanjay Patil met them. PW-1 narrated the entire incident to him. She told him that in that situation she was not left with any alternative but to commit suicide. After that, she went to her matrimonial house with her daughter. On 29.1.2016, she again left her

matrimonial house but this time she did not take her child with her. She went to Solapur with her brother. Both of them contacted Sanjay Patil who called them to Pune. She went to his house at Pune. On the next day, she went to Solapur police station along with Sanjay Patil. She called the Accused Nos.3 & 4 there. Then she lodged her FIR in the police station on 12.2.2016. Said FIR is produced on record at Exhibit-53. It is her case that because of the threats given by the Accused No.2, she did not lodge a complaint earlier. During investigation, her supplementary statement and her statement under Section 164 of Cr.PC. were recorded.

In the cross-examination, she deposed that one Kalavati was the mother-in-law of Sanjay Patil. This question was in reference to the defence case that there was a land dispute involving said Kalavati and the Accused No.2. She admitted that at the time of her deposition, she was residing with Sanjay Patil, his wife and three daughters. She had not lodged any complaint against the in-laws for causing

harassment. She denied knowledge of any quarrel between the Accused No.3 and the Accused No.2 in respect of a land transaction. She denied having any knowledge about the two political groups in her village. She denied knowledge about the land transaction in which Kalavati had mortgaged the land to one Annasaheb Jagtap, who in turn had sold the said land to the Accused No.2; and thus there was a dispute. She denied any knowledge about the quarrel between the Accused No.2 and Sanjay Patil. She denied the suggestion that Sanjay Patil had lodged a police complaint through her.

9. PW-9 Yeldare was a Headmaster of her school. He has produced her school leaving certificate showing her date of birth 8.1.2000. There is no serious challenge to her date of birth. The certificate is at Exhibit-82. Therefore, the prosecution has established that at the time of delivery of her child and at the time of commission of offences, she was a minor.

10. PW-4 is the brother of the victim. He does not

have any knowledge about the facts personally but he has deposed that the Accused Nos.3 & 4, who were his parents informed him in April, 2014 that PW-1 had delivered a child out of the sexual relationship with the Accused Nos.1 & 2. Since it was not to his knowledge; the facts about such act would be hearsay as far as he is concerned. His deposition is restricted to the fact involving himself when he had gone to the house of PW-1's second husband.

11. PW-4 brought the victim to their house during Diwali festival. He had called Sanjay Patil and had narrated the instances of ill-treatment given to his sister by her mother-in-law. At that time, PW-1 narrated the incident of rape involving the Accused Nos.1 & 2. Sanjay Patil convinced PW-1 and sent her back to her matrimonial house. PW-4 then took her to her matrimonial house. On one day he received a phone call from PW-1 saying that she had left her matrimonial house by leaving her daughter behind and that she was in Solapur. He came to Solapur and both of

them went to the house of Sanjay Patil at Pune. After 8-10 days, Sanjay Patil and PW-1 came to Solapur and then lodged the FIR.

In the cross-examination, he admitted that their mother was elected as a Member of village panchayat. He denied the suggestion about quarrel between the Accused No.2 and his own family and regarding transaction of land. In the deposition he stated that PW-1 was having one child from the wedlock with her first husband. This admission is not supported by PW-1's evidence. He denied the suggestion that Sanjay Patil was the brain behind lodging of the complaint.

12. Said Sanjay Patil is examined as PW-5. He has deposed that he knew PW-1's family. In 2015, during Diwali time, PW-1 had told him about all the incidents and as to how the offence was committed. According to him, PW-1 told him that she had conceived out of the sexual relationship with the Accused No.1. But at the same time

she also narrated the offence committed by the Accused No.2. PW-1 further told him that because of the pressure of the Accused No.2 nobody was helping her. This witness assured to help her legally. Accordingly on 12.2.2016, PW-1 lodged the complaint with the North Solapur Taluka Police Station.

In the cross-examination he admitted that Kalavati was his mother-in-law. She had a landed property. She took loan from one Annasaheb Jagtap and in that connection she sold her land to Jagtap on the condition of repurchase of the land after repayment. He admitted that the said land was sold by Annasaheb Jagtap to the Accused No.2. Kalavati had borrowed amount of Rs.6,50,000/-. He denied the suggestion that because of this dispute, the false complaint was lodged.

13. PW-10 Jayashree was another important witness in this connection. She was a relative of PW-1's second husband. She has deposed that PW-1 delivered a female

child. PW-1 told her about the offence committed by the Accused Nos.1 & 2. In the cross-examination, she accepted that she had told the police in her statement that PW-1 had disclosed to her that PW-1 was having illicit relations with the Accused No.1. PW-10 has further accepted that she had told the police in her statement recorded by them that PW-1's mother had told her that marriage of PW-1 was planned with one boy from Mandrup and out of that relationship, PW-1 had got pregnant and that the Accused No.1 had no concern with the offence. Significantly she accepted that PW-1 had told her that Sanjay Patil was to help her in obtaining money and that PW-1 had told her that Sanjay Patil had told PW-1 that if she filed a complaint against the accused, he would help her in obtaining money. This admission is very important in the context of the case.

14. PW-2 Janaki was a pancha for spot panchnama wherein the investigating agency conducted the spot panchnama of the spot where the offence of rape was

committed in the house of PW-1.

15. PW-3 Choudhari was a pancha. According to the prosecution case, the Accused No.2 gave a memorandum statement to show the place where the dead body of the newly born child was disposed of. He had taken this pancha and the police party to a river with flowing water, but, the dead body was not found at the spot shown by the Accused.

16. PW-8 Dr. Vijaysingh Sathe had examined the victim in Civil Hospital, Solapur after the FIR was lodged. But since the examination was carried out after PW-1 had delivered her babies on two occasions, this evidence did not throw light on the alleged offence.

17. PW-6 Dr. Suhas Jadhav is an important witness. He was having a hospital at village Sangola. On 25.4.2014 at about 5.45 p.m., he received a call from his staff. He went to his hospital and found that PW-1 had delivered a premature baby. He, therefore, sent that baby with the relatives of PW-1 to the other hospital along with his staff.

They provided treatment to the victim. PW-1 – victim was accompanied by her husband. There were two other persons with them, but, this witness did not know their names. He claimed that because of the workload he forgot to inform the police. At about 10 a.m. to 11.00 a.m. the victim's parents came to the hospital. They told him that they would take the victim to a hospital at Solapur with the baby. He was not made to identify the Accused Nos.3 & 4 who were the parents of PW-1, in the court.

In the cross-examination, he deposed that he had never informed the police about the delivery of the child. He himself was in jail for about four months in connection with some other case. He produced the register entry mentioning the delivery of a child by PW-1.

18. PW-7 Dr. Rajiv Jankar had a hospital for children. On 25.4.2014 at about 6.15 p.m., PW-6 referred one baby to his hospital. PW-7 found that the baby was premature. He was having breathing problems. One lady

was accompanying that baby. He suggested immediate admission in ICU. After 2-3 hours, the grand-parents of the baby came to the hospital. They gave their names as the Accused Nos.3 & 4's names. They told him that they would take the baby to the civil hospital, Solapur. They were reluctant to take Ambulance services. They took discharge of the baby against the medical opinion on their own by executing a letter in that behalf. He produced that letter at Exhibit-72. According to him it was signed by both the grand-parents. He has deposed that he could identify the grand-parents of the baby if they were shown to him. But, importantly they were not shown to him in the Court and therefore, there is nothing to show that the Accused Nos.3 & 4 are the persons who claimed to be the grand-parents and that they had taken away the baby. The letter bearing their purported signatures was not sent for any handwriting expert's opinion. He admitted that he had not intimated about this fact to the police station. He admitted that he did not make inquiries with the grand-parents and that he did

not get their names confirmed.

19. PW-11 is API Naik, who had conducted the investigation. He has deposed as to how he took over the investigation, sent the victim for medical examination, conducted the spot panchnama, went to the spot shown by the Accused No.2, collected the consent letter purportedly signed by the Accused Nos.3 & 4 from the doctor, collected the birth certificate, caused the statements of witnesses recorded under Section 164 of Cr.P.C. and that he completed the investigation.

In the cross-examination, he accepted that it was revealed that except taking the consent letter, no other precaution was taken by PW-7 while handing over the newly born baby to those two persons. He also admitted that he had not verified the handwriting on the consent letter with the handwriting of the Accused Nos.3 & 4.

. This, in short, is the evidence led by the prosecution.

20. Learned trial Judge accepted the evidence of PW-1 as far as the offence of rape is concerned. However, she referred to the medical history given by the victim to the doctor in which there were some contradictions in respect of the role played by the Accused No.2 and, therefore, benefit was given to the Accused No.2. She disbelieved PW-1's evidence that the Accused No.2 had committed the sexual assault on her. She referred to the evidence of PW-8 mentioning that the Accused No.1 and PW-1 were having love affair and out of that, she gave birth to the child. However, learned Judge relied on the disclosure statement made by the Accused No.2 to conclude that he had disposed of the dead body. She observed that the whereabouts of the baby were within the special knowledge of the Accused Nos.2 to 4 and, therefore, the onus was on them to point out the dead body. Their conduct of keeping silent on this aspect was held against them and on these main reasons she recorded her finding of guilt in respect of the conviction.

21. Learned counsel for the Accused Nos.1 & 2 submitted that the evidence of PW-1 is not reliable at all. The FIR was lodged after more than two years. No acceptable explanation is offered. The delay is inordinate. In between there were two marriages and PW-1 had delivered babies on two occasions. He submitted that the role played by the witness Sanjay Patil is very important. The defence has sufficiently brought on record the reason for false implication. The defence needs to prove its case only on the preponderance of probabilities. In this case the defence has successfully done the same and therefore benefit of doubt should be given to the Accused Nos.1 & 2.

22. Learned counsel submitted that the learned Judge has partially disbelieved the version of PW-1 as far as the offence of rape against the Accused No.2 is concerned and, therefore, the same benefit of doubt should be extended to the Accused No.1. He submitted that there is no corroborative piece of evidence at all. There is nothing to

show that the Accused No.2 disposed of the dead body. Since pursuant to his memorandum statement, nothing was recovered, that memorandum was inadmissible. The prosecution evidence does not show that the baby was taken away by Accused No.2 from any of the hospitals.

23. Learned counsel for the Accused Nos.3 & 4 submitted that there is absolutely no evidence against them. They are the parents of the victim. The only allegations against them are based on the evidence of PW-7 Dr. Jankar. His deposition mentions that the child's grand-parents had come to his hospital and had taken away the baby after signing the consent letter. However, he had not identified the Accused Nos.3 & 4 as the persons who had come to his hospital to take away the baby. The handwriting on the consent letter is not established by the prosecution to show that it was signed by the Accused Nos.3 & 4. He submitted that the evidence of PW-6 Dr. Suhas Jadhav shows that the Accused Nos.3 & 4 had come to that hospital at around

10.00 a.m. to 11.00 a.m. when the child was already delivered at around 6.00 a.m.. After that there is no connection between the Accused Nos.3 & 4 with the child's disappearance. Therefore, the conclusion reached by the learned Judge about commission of the offence under Section 304 Part-II of IPC against the Accused Nos.3 & 4 is not correct.

24. Learned APP as well as learned counsel for the Respondent No.2 opposed these submissions. They relied heavily on the evidence of PW-1. They submitted that considering the young age of the victim PW-1, the delay in lodging the FIR will not make any difference to the prosecution case in favour of the accused. They submitted that considering the situation in which PW-1 found herself, it was not possible for her to approach the police and lodge the FIR. They further submitted that there is no reason to disbelieve her version at all. Apart from that, both of them also relied on the evidence of Dr. Jankar to show that the

Accused Nos.3 & 4 had taken away the baby and had caused disappearance of the child. They supported the impugned judgment and order.

25. I have considered these submissions. The allegations of rape are entirely dependent on the deposition of PW-1. Therefore, it is necessary to scrutinize her evidence carefully. It is a fact that the FIR is lodged much belatedly and it is lodged after more than two years from the alleged date of incident. In that context, the evidence of PW-1 will have to be tested. Her deposition is that the Accused No.2, at the first instance, took her to Solapur and on the way outraged her modesty. On the next date he came to her house and committed rape. It is her case that at that time the Accused No.1 saw that incident. After a few days, both the Accused Nos.1 & 2 came to her house and Accused No.2 forced her to keep physical relations with the Accused No.1. All these sequences appear to be extremely doubtful. It is very difficult to believe that the Accused No.2 allegedly

committed rape inside the house of PW-1 and at that exact time while passing through the road, the Accused No.1 could witness the incident and the victim could notice that. Apart from that, it is even more difficult to believe the Accused No.2 bringing the Accused No.1 to her house and forcing her to have physical relations with Accused No.1. This has to be looked in the background of the admission given by PW-8 Dr. Sathe wherein he has admitted that while narrating the history PW-1 had stated that she was having love affair with the Accused No.1. This fact is definitely against the serious allegations made by PW-1 against both the Accused Nos.1& 2. This is glaring inconsistency which has remained unexplained.

26. PW-1's contention that she did not narrate this incident out of fear to anybody is not supported by the facts because she had got married to her first husband in April, 2014 and immediately within three days she had delivered a premature baby. The prosecution has not examined her first

husband, his family or any other person who had attended the marriage. They could have thrown some light on this aspect. Even after that delivery, the victim left the hospital allegedly with the Accused No.2 leaving her baby behind. She did not return to either of the hospitals of PW-6 or PW-7 to make inquiries about her baby. She did not even make efforts to search for her baby. That conduct appears to be unnatural. Her brother PW-4 was always there to support her. It appears that PW-1 is not telling the complete truth. Even after this episode, in April, 2014 she got married the second time and started cohabitating with her husband. She delivered her second child. Even during that period, there were no allegations at all against the Accused Nos.1 & 2. It is only after her mother-in-law started harassing her, she left the matrimonial house, went back to her parents' house, met PW-5 Sanjay Patil then again came back to her matrimonial house, again went back to her parent's house, then went to Sanjay Patil's house and then lodged her FIR. Therefore, in this situation the role played by Sanjay Patil assumes

importance. At time of deposition also she was residing with said Sanjay Patil. The accused have taken a specific defence that Sanjay Patil's mother-in-law Kalavati had taken a loan of Rs.6,50,000/- from one Annasaheb Jagtap by mortgaging her land. The condition was repurchase of the land on repayment of the said amount. In the meantime, Annasaheb Jagtap sold the same land to the Accused No.2. The defence has brought all these facts on record which are accepted by the witnesses, referred to hereinabove. Therefore, there was a land dispute involving the Accused No.2 and the mother-in-law of said Sanjay Patil.

27. PW-10 Jayashree Mane has categorically admitted that PW-6 Sanjay Patil had assured the victim that he would help her in obtaining money. He had told PW-1 that if she filed complaint against the Accused he would help her in obtaining money. This shows that there is a possible reason for false implication of the Accused and in particular of the Accused Nos.1 & 2. The defence needs to put their

case to pass the test of preponderance of probabilities and in this case the defence has successfully done that. In this view of the matter, there is a strong possibility of false implication. The learned Judge has already partly disbelieved PW-1. Therefore, it is not safe to rely on her evidence to conclude that the Accused Nos1 and 2 had committed the penetrative sexual assault on her or had caused any harassment fulfilling the ingredients of the offences for which they are convicted.

28. That leaves the other conviction under Section 304 Part II of IPC to be discussed. It is the prosecution case that after the delivery of the child, the Accused Nos.3 & 4 had gone to the hospital of PW-7 and had collected the baby to take to a hospital in Solapur, but, on the way the baby did not survive and the body was disposed of by the Accused Nos.2 & 3 by burying it in the river-bed. As far as the Accused No.2 is concerned, the prosecution has tried to show his involvement by relying on the evidence of PW-3 Choudhari and the memorandum statement allegedly given

by the Accused No.2. The memorandum panchnama is produced on record at Exhibit-58. He had stated that the Accused No.2 was willing to show the spot where the child was buried. The police and the pancha were taken to that spot but nothing was found. Since only the statement which leads to recovery or discovery of fact is admissible and since in this case nothing was discovered or recovered, the memorandum statement is inadmissible and the evidence of PW-3 pancha Choudhari is of no assistance to the prosecution. Therefore, the charge of commission of offence punishable under Section 304 Part II of IPC and under Section 201 of IPC is not established against the Accused No.2.

29. As far as the Accused nos.3 & 4 are concerned, the prosecution case is that they had gone to the hospital of PW-7, had collected the child, had signed the form and had left. As mentioned earlier, PW-7 Dr. Jankar was not asked to identify the Accused Nos.3 & 4. Therefore, his evidence remains that two persons had come to his hospital and had

taken away the baby. That does not conclusively establish that the Accused Nos.3 & 4 had taken away the baby from the hospital. The other circumstance is about signing that consent form that the baby was taken out of the hospital against medical advice. In that case the I.O. has admitted that no steps were taken to match the handwriting of the Accused Nos.3 & 4 with the handwriting on the said form. Apart from that there is absolutely no other evidence against any of the Accused to connect them with the alleged offence under Section 304 Part II of IPC.

30. The learned Judge has not considered all these aspects, as discussed hereinabove. She had erroneously relied on the evidence of memorandum given by the Accused No.2, which led the police party to the river-bed.

31. Considering all this discussion, it is not possible to uphold the conviction recorded by the learned Judge. The benefit in this case must go to the Accused. With the result, the Appeal succeeds and the Accused deserve to be acquitted

from the case.

32. Hence, the following order :

:: O R D E R ::

- i. The Appeals are allowed.
- ii. The judgment and order dated 9.1.2020 passed by the Additional Sessions Judge, Solapur in Sessions Case No.163/2016, is set aside.
- iii. The Appellants who are in custody shall execute a bond in the sum of Rs.30,000/- each for their appearance in case Appeal is preferred by the State against their acquittal. On execution of such bond, the Appellants, if they are in custody, shall be released forthwith, if not required in any other case.
- iv. Criminal Appeals are disposed of accordingly. With disposal of the Appeal, the companion Interim Applications are also disposed of.

(SARANG V. KOTWAL, J.)

Deshmane(PS)