

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.363 OF 1995

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| Kamlabai Tukaram Gharat | ...Appellant |
| Versus | |
| The State of Maharashtra | ...Respondent |

Mr. Kishor Dattaram Walanju, Appointed Advocate for the Appellant.
Mrs. M.M. Deshmukh, APP for the Respondent-State.

CORAM : R.D. DHANUKA AND SURENDRA P.TAVADE, JJ.
DATE ON WHICH JUDGMENT IS RESERVED : 12th MARCH, 2020
DATE ON WHICH JUDGMENT IS PRONOUNCED:11th AUGUST, 2020.

(PER S.P.TAVADE,J.)

1. The appellant-original accused has preferred this appeal against the Judgment and Order passed against her by the learned Additional Sessions Judge, Raigad-Alibaug in Sessions Case No.83 of 1994. The appellant is convicted for the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.1000/- in default to suffer rigorous imprisonment for three months. The appellant is acquitted for the offence punishable under Section 317 of the IPC. The State has not preferred appeal against the said order of acquittal.

2. The facts giving rise to the present appeal can be summarized as under:-

The informant (PW-10) is resident of New Sheva, Tal. Uran. On 10.11.1993 at about 7.15 a.m. he left his house to attend the duty. He

reached near Sheva ST stand. He saw a mob of men and women near the ST stand. He saw one newly born female child lying beside the road. She was alive. He along with Sanjay Mhatre went to Uran police station and lodged a report (Exhibit 21). Meantime, Anant Gharat (PW-11) also reached at the spot. He saw infant lying besides the road. He asked others to help him, but nobody helped him. Hence, he took the said female child to his house. His mother Hirabai (PW-6) gave bath to the child. She also gave milk to the child. Hirabai (PW-6) reported the matter to police-patil of the village. Meantime, police as well as police-patil came to the house of Anant Gharat. Police made enquiry with Hirabai and others. Hirabai informed that she saw the appellant/accused as pregnant. Therefore, police called the appellant/accused.

3. The police took Hirabai, child and appellant/accused to Uran police station. All of them were referred to Rural Hospital, Uran. As there were no proper facilities to treat the child, the child was referred to the Civil Hospital, Alibaug. Police Constable Anagha Hukeri (PW-4) and Nazir Sharif (PW-7) brought the appellant/accused and child to the Civil Hospital at 8.00 p.m. Medical Officer Dr. Archana Prabhu (PW-8) examined the child as well as appellant/accused and admitted them to maternity ward. The appellant/accused and child was allotted Cot No.4. Medical Officer directed Anagha Hukeri (PW4) to keep watch on the appellant/accused and child. She took permission of her head nurse and went to the washroom. At about 9.00 p.m. nurse attached to maternity ward found that the child was movementless. Hence, Dr. Ajit Gawali (PW-12) was called, who examined the child and declared her dead. Dr. Baby Gawappa Patil (PW-9)

performed postmortem on the child. She opined that the child died due to strangulation. Hence, crime bearing No.89/1993 was registered against the appellant/accused.

4. The appellant/accused was put under arrest. The statements of witnesses were recorded. The Investigating Officer took blood samples of appellant/accused as well as the child and sent for chemical analysis. After completion of investigation, charge-sheet came to be filed against the appellant/accused under Sections 317 and 302 of the IPC before the learned Magistrate, Uran. As the offence was exclusively triable by the Court of Session, it was committed to the Court of Sessions at Alibaug. Charge (Exhibit 3) came to be filed against the appellant/accused under Section 317 and 302 of the IPC. The appellant/accused pleaded not guilty and claimed to be tried. The prosecution has relied on the evidence of as many as 14 witnesses. The appellant/accused did not lead any oral evidence.

5. On going through the evidence on record, the Trial Court, acquitted the appellant under Section 317 of the IPC, but convicted her for the offence punishable under Section 302 of the IPC and sentenced her to suffer life imprisonment and also imposed fine of Rs.1000/- and in default directed her to undergo rigorous imprisonment for three months. The said impugned judgment is under challenge.

6. Heard Mr. Kishor Walanju, appointed advocate for the appellant/accused. He submits that there is no evidence on record to hold that the appellant/accused delivered the child prior to 09.11.1993 and she

abandoned her near the Sheva ST Stand. He also submits that there is no evidence on record to establish that the appellant/accused pressed the neck of child and murdered her. Negligence of medical staff to provide treatment to infant is ignored by the trial judge. The prosecution has failed to prove that infant belongs to accused or accused delivered the same infant. There is no eye witness to the alleged incident. The prosecution has not examined in-charge of the hospital Dr Wage. The prosecution did not examine crucial witness nurse Gulab Thakur, who gave information of infant to head nurse Pramila Pathare (PW3). He also submits that there were many patients admitted in the maternity ward. Many matrons and nurses were posted at the said ward, but nobody is examined to establish the alleged act of the appellant/accused. He submits that the prosecution has to prove that accused had delivered child out of illicit relationship. He also submits that the judgment of the learned Trial Court is based on just surmises and conjunctures. Hence, he prays for acquittal of the appellant/accused.

7. Mrs. Deshmukh, learned APP appearing on behalf of the State submits that the witness Hirabai had seen appellant/accused pregnant. Similarly, the appellant/accused had given history of her delivery, which was prior to the incident, before the Medical Officer. Similarly, the Medical Officer has opined that the appellant/accused had delivered child about 2-3 days prior to the incident. The appellant/accused and child were kept on one cot in maternity ward. There was nobody nearby the child except the appellant/accused. Therefore, the appellant/accused and no one else had killed the child. She also submits that the learned Trial Court has rightly appreciated the evidence on record and there is no need to interfere with

the findings of the learned Trial Court.

8. The entire prosecution case is based on the circumstantial evidence. The prosecution has relied upon the following circumstances to prove the charge against the appellant/accused:-

- (i) Child found beside the road.
- (ii) The child was in possession of the appellant/accused.
- (iii) The condition of child was good till her admission in the Civil Hospital, Alibaug.
- (iv) Homicidal death of child.
- (v) Motive.

9. **Child found beside the road** :-

It is the case of prosecution that Sanjay Gharat (PW-10) noticed the child abandoned on the side of the road. Hence, he reported the said fact to the Uran police station. According to him, on 10.11.1993 at about 7.15 a.m. he reached ST bus stand at New Sheva. He saw large gathering on the side of the road and thus rushed there. He saw a newly born child on the road. He immediately rushed to Uran police station along with his friend Sanjay Mhatre and gave report (Exhibit 21). His evidence is not denied by the defence. On going through the evidence of Sanjay Gharat (PW-10) it is established that by seeing the child on road he set criminal law in motion.

10. The evidence of Anant Gharat (PW-11) and Hirabai Gharat (PW-6) is also crucial on the point of abandonment of child. According to Anant Gharat (PW-11) on 10.11.1993 he saw child lying beside the road. Hence, he picked up the child and carried her to his house. He gave child to his mother. His mother gave bath to the child and provided her milk. His mother gave information of child to police-patil. The above evidence is

substantiated by Hirabai (PW-6). According to her, her son Anant Gharat (PW-11) brought one newly born child to the house. On enquiry, Anant Gharat disclosed her that, he found newly born child near the ST stand. She asked her son why he brought child to the house. Her son disclosed that he was very kind to the child, therefore, he brought the child to the house. It is established that Anant Gharat saw the infant on the road, hence, he brought her to the house and gave it to his mother.

11. According to Hirabai (PW-6) she gave bath to the child and also provided milk to the child. Meantime, police came to her house along with police-patil. She deposed that police went to the house of appellant/accused and brought her. Thereafter, police took her to the Government Hospital, Uran along with child and appellant/accused. She disclosed to police that appellant/accused was pregnant prior to the incident. Evidence of Anagha Hukeri (PW-4) shows that she was directed to visit Rural Hospital, Uran where one lady with child was admitted. Accordingly, she went to the Rural Hospital, Uran. Doctor examined the said child and opined that condition of the said child was good.

12. Dr. Ganesh Naryankar (PW-13) examined the appellant/accused as well as the child at Rural Hospital, Uran. He was asked to give report whether appellant/accused delivered the child and if yes, when? He was also asked to opine whether the child belongs to the appellant/accused or not. Dr. Ganesh (PW-13) deposed that there were no scientific facilities available in Rural Hospital to give report whether the said child was delivered by the appellant/accused. Hence, he referred the

appellant/accused and the said child to Civil Hospital, Alibaug. He however deposed that at the time of admission, general condition of the said child was fair. Her nod was found tied with grass. Her body was reddish. He deposed that at the time of admission in the Rural Hospital, Uran, the condition of the said child was fair and good. The medical officer directed her to take the appellant and the said child either to Sion Hospital, J.J.Hospital or Civil Hospital, Alibaug. Accordingly, she took the appellant/accused and the said child to the Civil Hospital, Alibaug.

13. The similar evidence is given by Nazir Sharif (PW-7). He deposed that he accompanied Anagha (PW-4) to Civil Hospital, Alibaug and admitted the appellant/accused and the said child in the hospital. From the above evidence, it is established that the said child was found on the street near the Sheva ST stand. The said child was brought to the Rural Hospital, Uran, but medical officer referred the said child and appellant/accused to the Civil Hospital. Accordingly, the child and the appellant/accused were brought to the Civil Hospital, Alibaug.

14. It is the case of prosecution that Dr. Archana Prabhu (PW-8) examined the appellant/accused and child and admitted both of them in Civil Hospital, Alibaug. According to her, on 10.11.1993 at about 8.00 p.m. the appellant/accused was referred to the Civil Hospital, Alibaug by medical officer, Uran. One lady constable had accompanied her. She was admitted in Hospital at about 8.30 p.m. along with the said child. Dr. Archana deposed that the said female child was a day old. General condition of the said female child was normal. She was weighing about 2 kg. The child was

crying. She had conjunctal malformation. Witness noticed abrasion on back of child in interscapular region ½” x ½” x skin deep. Except this, the witness did not find any other injury on the said child during her life time. She further deposed that she examined the appellant/accused. The appellant/accused gave history of delivery of female child on 09.11.1993. On general examination, she found tipia within normal limit, milk discharged were already found from both nipples of breasts. Uterus was 16 weeks size. On vaginal examination cervical was found opened, it was admitting 2 fingers and examination was non-tender. Her respiratory system, cardio vascular and central nervous system were found normal. She examined the appellant/accused between 8.00 p.m. to 9.00 p.m. The health of the child was good when she was admitted in Alibaug Hospital. It is proved on record that the child was found on road, it was brought to the hospital by the police. The health of the child was good. She was admitted in the hospital at Alibaug.

15. The above evidence is not denied by the defence. It is thus proved that Dr. Archana Prabha (PW-8) had examined the said child when the said child was alive as well as the appellant/accused. The general condition of child was well. On examination of appellant/accused, the medical officer has opined that the appellant/accused had delivered the child. Except denial nothing is brought in the cross examination of Dr. Archana Prabhu by the defence to disbelieve her evidence.

16. **Homicidal death of child** :-

According to Pramila Pathare (PW-3), she was working as a

nurse in the maternity ward of Civil Hospital, Alibaug. On 10.11.1993 the appellant/accused was brought by lady constable in the maternity ward along with female child aged about a day. The appellant/accused was admitted on the basis of admission papers. She admitted the appellant/accused with child and allotted Cot No.4 at about 8.10 p.m. Dr. Waje was present in the ward. She further deposed that she requested lady constable to keep watch on the appellant/accused as two patients were already in the labour room. Hence, she went to the labour room. She was busy in labour room for about two hours. After two hours, Aaya Gulab informed her that the child brought by the appellant/accused was not doing any movement. She rushed near the cot, where child was lying. She did not find pulse reading in child. She called Dr. Gawali who examined her and declared the child as dead.

17. The prosecution has also examined Dr. Ajit Gawali (PW-12). According to him, on 10.11.1993 at about 10.30 p.m. he was called in maternity ward. He took child for treatment through staff. He found that the child was in dying stage. There was synopsis, blue colouration of nails and anterior chest walls. On examination, he declared the said child dead at about 10.50 p.m. He informed the said fact to police by a separate letter (Exhibit 16). The evidence of Pramila Pathare and Dr. Ajit Gawali on the point of death of child is not disputed by the defence. It is thus clear that around 10.50 p.m. the said child found dead.

18. Due to sudden death of the child, the dead-body of the said child was sent for post-mortem. Dr. Baby Gawappa Patil (PW-9) performed the

post-mortem on the dead-body of the said child. According to her, on 11.11.1993 she performed post-mortem examination on the dead-body of child between 2.00 p.m. and 3.00 p.m. The age of the child was of 2-3 days. She found following external injuries on the dead-body of the child:-

- (i) Pressure mark over anterior aspect of neck right side 1"x ¼" and left side 1" x 1" below thyroid cartilage horizontal and about 1" from mid line both sides present, big subcutaneous hemorrhage below injury present.
- (ii) Abrasion over back in the inter scapular region present ¼" x ½" x skin deep.
- (iii) Bruises over the tip of nose ½" x ½".
- (iv) Synopsis of ear, nose, hand, face, lip below eyes, face, above pressure marks of neck.

19. The said witness deposed that all injuries were antemortem. Brain was found congested. Bronchi and tranches were found congested. Rt. Lung and left lung were found oedematous, congested and haemorrhagic, liver was congested, kidney was congested. On the basis of these observations, she prepared post-mortem report (Exhibit 19). On the basis of post-mortem examination and CA report, she opined that death of a child was due to injury No.1 which was sufficient to cause death. Injury Nos.3 and 4 could be possible due to result of pressure used while causing injury no.1. It was suggested to the witness by the defence that death of a child could be possible while taking birth due to entangling of umbilical cord around the neck, but the said suggestion is refuted by the witness. Dr. Baby Patil (PW-9) has categorically deposed that there is no possibility of causing injury on neck during the process of birth. The evidence of Dr. Baby Patil established the homicidal death of the said child. There was no cross-examination on this crucial evidence of this witness by the defence.

20. The prosecution has established the homicidal death of child in the maternity ward of Civil Hospital, Alibaug. The investigating officer has prepared map of maternity ward with the help of Sadanand Patil (PW-2). According to Sadanand Patil, on 21.10.1994 he visited the maternity ward of Civil Hospital, Alibaug and prepared the map (Exhibit 9). In the map, the witness has shown position of 12 cot in the maternity ward. On this point, the evidence of Pramila (PW-3) is also crucial. She admitted that the maternity ward was having 12 cots. The sitting arrangement of nurse was in middle of 2 rows of the cots. The distance between two rows was about 2 ft. She has admitted that the appellant/accused and child was admitted on Cot No.4. There were about 10 patients in the ward at the time of the alleged incident. Similarly, Aaya and 2-3 nurses were also on duty. The police constable Anagha Hukeri was directed to watch the appellant/accused, but she had left the ward for washroom. So, at the time of the alleged incident, Anagha was not present in the maternity ward.

21. The prosecution has not examined any Aaya or patient to establish the alleged acts of the appellant/accused, but the fact remains on record that the appellant/accused and child were sleeping on Cot No.4. It is categorically deposed by Pramila that she was informed by Aaya Gulab that child was not doing any movement. At that time, the appellant/accused was present on the cot. At that time, the appellant/accused was present on the cot. On this point, the learned counsel appearing on behalf of the appellant/accused submitted that the prosecution has not examined Aaya Gulab, who allegedly saw the child having no movement. It is true that Aaya Gulab is not examined by the prosecution, but the said Aaya Gulab immediately

informed the status of the child to sister Pramila Pathare (PW-3), who observed the child. She immediately called Medical Officer Dr. Gavli, who examined the child and declared as dead. So the prosecution has proved that the child and the appellant/accused were allotted Cot No.4. So except the appellant/accused, nobody was close to the child. Thus, it can be safely inferred that the appellant/accused and nobody else was responsible for the death of the child. The medical officer Patil has categorically deposed that the death of child is homicidal.

22. At the time of admission, except injury no.2 in the post-mortem report, no other injury had been sustained by the child. The injury on the neck of child could be caused only by human intervention. The learned counsel appearing on behalf of the appellant/accused vehemently submitted that death of the child might have caused due to medical negligence. On the other hand, the learned APP submitted that at the time of admission the child was examined by the Medical Officer and opined that there was injury on the back of the child, which was minor in nature. In the post-mortem report, it was noted that there was injury on the neck of the child, which could be caused only by human intervention. On perusal of post-mortem report, it could be said that there were in all four injuries found on the person of the child, out of that Injury No.2 was noticed by the Medical Officer at the time of admission. Injury Nos.3 and 4 were caused after admission of the child in the Alibaug Hospital. The said injuries could be caused only by human intervention. The appellant/accused was sitting close to the child and nobody else had access to the child, therefore, there is no substance in the submissions of the defence counsel that death of the child could be

possible by medical negligence. Injury No.1 is responsible for the death of the said child. The prosecution has rightly proved the nexus between the appellant/accused and the death of child.

23. The learned counsel appearing for the appellant/accused submits that the child was barely one day old at the time of death. There is possibility of a death due to entanglement of cord around the neck, but the said possibility is ruled out by the medical officer Dr. Baby Patil (PW-9) and Dr Archana Prabhu(PW-8)

24. **Motive** :-

When the case is based on circumstantial evidence, the motive plays a vital role. Generally, motive remains in the mind of the culprit, so it is difficult to prove it. The motive can be proved by circumstances of the case and the acts of the culprit. In the present case, the prosecution has rightly established that child was found beside the road and it was abandoned by the mother of the child. The appellant/accused was apprehended by the police on the statement made by Hirabai. The appellant/accused was taken to the Rural Hospital, Uran along with the child, but doctor referred the child to the Civil Hospital, Alibaug. Hence, the police handed over the child to the appellant/accused in the Uran Hospital and since then, the child was in possession of the appellant/accused till it was passed away. The said circumstance shows that the custody of the child was with the appellant/accused at the time of the death of the child.

25. As far as acts of the appellant/accused are concerned, she has

given history of her delivery day prior to her examination by Medical Officer Dr. Archana Prabhu. In addition to the history given by the appellant/accused, Dr. Archana Prabhu examined appellant/accused and found that she had recently delivered a child and she noted down the symptoms of delivery in the case paper.

26. The learned Trial Court has acquitted the appellant/accused of the offence punishable under Section 317 of the Indian Penal Code. The said acquittal was not challenged by the prosecution, but the said acquittal order may not come in the way of prosecution because the appellant/accused was called by police in the house of Hirabai. The child was handed over to the appellant/accused and thereafter, the appellant/accused and the child were taken to Uran Hospital. Both of them were brought to Alibaug Hospital. On examination of the appellant/accused and the child, both of them were admitted in maternity ward. Cot No.4 was allotted to the appellant/accused and the child, so it can be said that the appellant/accused and the child were together since child was taken to the Uran Hospital. The crucial circumstance against the appellant/accused is that she was having custody of the child in the hospital and ultimately child found dead on Cot No.4; so the effect of acquittal of appellant/accused under Section 317 of the Indian Penal Code would not come in the way of prosecution to held her guilty under Section 302 of the Indian Penal Code.

27. The evidence of Dr. Prabhu has clearly established that the appellant/accused had delivered child 2-3 days prior to the issuance of certificate dated 11.11.1993. Admittedly, the appellant/accused is widow.

Her husband died about 8 years prior to the incident. She had already five children. In such circumstances, if the fact of delivery would have been disclosed to the neighbors and the villagers, it would have created problem for the appellant/accused. It would have been shame for the appellant/accused and the delivery of child would have affected her character. Hence, the appellant/accused had motive to done away with the life of the child. In our view the prosecution has clearly proved that the appellant/accused had motive to commit the said offence.

28. The learned counsel for the appellant/accused relied on the ratio of the Apex Court in the case of Manju V/s. State of Delhi in Criminal Appeal No.1268 of 2013 wherein the appellant/accused was admitted in maternity ward of Lady Hardinge Medical College Hospital and delivered a baby girl around 12.30 in the afternoon on 24.08.2007. The prosecution alleged that the appellant/accused caused death of child by strangulation. In the said case, it was an admitted position that after the birth the baby was kept under observation in incubator. Thereafter, the baby was handed over to the appellant by taking her out of incubator. The baby was found sick. The baby was on oxygen mask in incubator. It was also the case of prosecution that as the appellant gave birth to female child, she strangulated the child. But the evidence of her husband showed that the couple had a son, therefore, the possibility of killing child by the appellant/accused was not probable. Body of the child was sent for post-mortem after two days of her death, Supreme Court held that there was possibility of natural death. It was proved that the accused was sleepy and drowsy after the delivery. The Supreme Court held that if the totality of evidence on record is considered,

motive was not established and it was totally unnatural for appellant woman to kill her own baby by strangulation. Hence, the Supreme Court has set aside the judgment and order of the High Court and acquitted the appellant therein.

29. In the present case, the child was found on the road. The appellant/accused was taken to the hospital. The custody of child was given to the appellant/accused. The appellant/accused admitted that she delivered child prior to the incident, but the Medical Officer has not given opinion about the paternity of child, but fact remains on record that the custody of the child was with the appellant/accused at the time of incident. The physical condition of child was good. The child had injury on its back, but there was no injury on the neck of the child when it was found on the road. The medical officer has categorically opined that the death of the child was caused due to strangulation of neck and that could be possible only due to the intervention of human being. As the appellant/accused was closed to the child, there was only possibility that the strangulation of neck of child was done by the appellant/accused only. The judgment relied upon by the learned counsel for the appellant/accused is not applicable to the facts of the present case and it is clearly distinguishable in facts of this case.

30. The prosecution has proved all the circumstances namely the abandonment of child, the good physical condition of child prior to the death, the child was in possession of appellant/accused since child was referred to the Rural Hospital, Uran. The prosecution has proved the homicidal death of the child. The prosecution has also proved the motive of the appellant for

the crime. Therefore, the prosecution has proved the chain of circumstances against the appellant/accused beyond the shadow of reasonable doubt. There was nobody else except the appellant/accused to commit murder of the said child.

31. The Trial Court has rightly held the appellant/accused guilty for the offence punishable under Section 302 of the IPC. We do not find any infirmity in the judgment of the learned Trial Court. The appeal is devoid of merits and the same is dismissed.

32. Hence, we proceed to pass the following order:-

ORDER

(i) The appeal is dismissed.

(ii) The appellant/accused to surrender bail.

(iii) The trial Court is directed to secure presence of appellant/accused and commit her to the jail for undergoing remaining sentence.

[SURENDRA P.TAVADE, J.]

[R.D. DHANUKA, J.]