

(2012) 02 BOM CK 0006
In the Bombay High Court
Case No : Criminal Appeal No. 969 of 2005

Kanchan Vilas Kumbhar

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 23-02-2012

Acts Referred:

Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 201, 302

Citation : (2012) BomCR(Cri) 555 : (2012) CriLJ 3807

Hon'ble Judges : Lavande A.P., J;Davare Shrihari P., J

Bench : Division Bench

Advocate : Rebecca Gonsalves, for the Appellant; D.P. Adsule, Assistant Public Prosecutor, for The State, for the Respondent

Judgement

Davare Shrihari P., J.—Heard Ms. Gonsalves, Learned Counsel for the appellant and Mr. Adsule, learned A.P.P. for the respondent. The challenge in this appeal is to the conviction and sentence imposed upon the appellant i.e. the original accused (hereinafter referred to as "the accused" for the sake of brevity), by way of judgment and order dated 21.9.2004 rendered by the learned III Additional Sessions Judge, Baramati, in Sessions Case No. 96 of 2003 thereby convicting her for the offences punishable under sections 302 and 201 of the Indian Penal Code and sentencing her to suffer imprisonment for life and to pay fine of Rs. 1000/-, in default of payment of fine to undergo further simple imprisonment for one year and also sentencing her to undergo simple imprisonment for three years and to pay a fine of Rs. 200/-, and in default of payment of fine to undergo further simple imprisonment for two months, respectively and also directing that both the substantial sentences to run concurrently.

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

PW-12 P.S.I. Yashwant Phulwade was attached to Baramati City Police Station at the relevant time i.e. in the year 2003 and on information received from one Shri Ajit Shah that a small female child was found floating in his well at Jalochi, A.D.

was registered at A.D.R. No. 27 of 2003 on 19.7.2003 in that respect and initial investigation was carried on by A.S.I. Gaikwad and thereafter P.I. Baramati City Police Station handed over further investigation to PW-12 P.S.I. Phulwade. Accordingly, he visited the place of the occurrence of the incident at about 7.40 p.m. on the same day and recorded statement of PW-3 Balu Khandale who had firstly spotted the child. Thereafter, he drew the spot panchnama in presence of PW-6 Suresh Madane Exh. 21 and seized the cloth bundle thereunder which was found in the well. He also recorded the statement of the land owner and labourers. The dead body of the said female child was sent for postmortem. PW-9 Dr. Sambhaji Kokare, Chief Medical Officer conducted the post-mortem on the said dead body of the female child of 2 to 3 months old, namely, of one Didi alias Neeta Vilas Kumbhar @ Neeta Namdeo Kalabore on 19.7.2003. He prepared the postmortem notes which are produced at Exh. 27. Moreover, on the request of PW-12 P.S.I. Phulwade the death certificate was issued which is produced at Exh. 46 and the cause of the death was stated as asphyxia due to drowning. Accordingly, PW-12 P.S.I. lodged the report at the Baramati City Police Station which is at Exh. 47, and crime was registered under C.R. No. 91 of 2003 for the offence punishable u/s 302 of the Indian Penal Code.

3. Moreover, PW-12 P.S.I. Phulwade also made enquiry in the vicinity as well as made proclamation in village and conveyed the information to other Police Stations. Accordingly, he received the information that one lady from Kharad, who was residing at Rui, was having a child but the said child was not seen since 5 to 6 days as well as the description of the said lady was received and while doing patrolling he saw the said lady and accosted her but she hesitated, and reluctantly she stated that she had given birth to the daughter before three months and hence PW-12 P.S.I. Phulwade arrested her under the arrest panchnama Exh. 10 and handed over her to Baramati City Police Station.

4. It is the case of the prosecution that PW-10 Vitthal Harihar, P.I. Was attached to Baramati City Police Station in the year 2003 and investigation of the aforesaid C.R. No. 91 of 2003 was handed over to him by PW-12 P.S.I. Phulwade. Accordingly he visited to the place of occurrence of the incident and inspected the well in the land from where the child was found and recorded the statement of witnesses. Moreover, he also sent the accused for medical examination to Silver Jubilee Hospital, Baramati on 24.7.2003. He again sent the accused for medical examination on 29.7.2003 and PW-11 Dr. (Sou.) Manik Suryawanshi examined her and issued medical certificate to that effect which is produced at Exh. 44. Her blood sample was collected for chemical analysis. Moreover, blood sample of victim female child was also collected. Thereafter on 29.7.2003, the accused made disclosure statement which was recorded in presence of panch witness PW-8 Deepak Kamble under the memorandum panchnama Exh. 24. Thereafter the accused led the panchas and police personnel to the house of Vishnu Choudhar and produced the bag containing her delivery papers and her hospital papers and same were seized under the discovery panchnama Exh. 25 and the said documents are marked as Exhs. 15 and 16 respectively.

5. Further, it is also the case of the prosecution that PW-1 Dr. Aniruddha Deshpande, who is carrying on the Sanjivani Hospital at Karad, performed the delivery of one Kanchan Namdeo Kale on 19.4.2003 who delivered a female child on the said day, and the said case papers are produced at Exh. 13. Moreover, before delivery PW-1 Dr. Aniruddha Deshpande referred the said patient, namely, Kanchan Namdeo Kale to PW-2 Dr. Satish Joshi who examined her and performed cardiopathy on her and issued a certificate to that effect.

6. It is further the case of the prosecution that during the investigation it was revealed that the accused Kanchan had illicit relations with one Namdeo Kale and she delivered the victim i.e. a female child, namely, Didi alias Neeta at the hospital of PW-1 Dr. Aniruddha Deshpande and threw the said child in the well in the land of Shri Ajit Shah, and accordingly, committed her murder. After completion of investigation, PW-10 P.I. Vitthal Harihar filed the charge-sheet against the accused before the learned J.M.F.C, Baramati. However, since the present case was exclusively triable by the Court of Sessions, it was committed to the said Court. Accordingly, the Additional Sessions Judge, Baramati, Dist. Pune, framed the charge against the accused on 4.3.2004 under Exh. 2 for the offences punishable under sections 302 and 201 of the Indian Penal Code. However, the accused pleaded not guilty to the said charges and claimed to be tried.

7. To substantiate the charges levelled against the accused, the prosecution examined as many as 12 witnesses. PW-1 Dr. Aniruddha Deshpande - belonging to Sanjivani Hospital, Baramati, who carried out delivery of one Kanchan Namdeo Kale on 19.4.2003 who delivered a female child on the same day. PW-2 Dr. Satish Joshi, who examined Kanchan Namdeo Kale and performed cardiopathy upon her on 10.4.2003. PW-3 Balu Khandale who spotted the female child in the well of Shri Ajit Shah. PW-4 Dilip Padalkar, owner of the mess where accused as well as Namdeo Kale were working as cooks, who turned hostile, PW-5 Vishnu Choudar who let out the room to the accused, who also turned hostile. PW-6 Suresh Madane, a panch to the spot panchnama and recovery of cloth bundle from well which is at Exh. 21. PW-7 Shakti Agarwal, who was working as a helper to the cook at Padalkar mess also turned hostile. PW-8 Deepak Kamble, a panch to the memorandum of panchnama Exh. 24 and discovery panchnama Exh. 25, dated 29.7.2003. PW-9 Dr. Sambhaji Kokare, who produced postmortem notes at Exh. 27. PW-10 P.I. Vitthal Harihar is the second Investigating Officer. PW-11 Dr. (Sou.) Manik Suryawanshi who examined the accused and issued certificate at Exh. 44. PW-12 P.S.I. Yashwant Phulwade is first Investigating Officer.

8. The defence of the accused is of total denial and he claimed to be innocent. However, the accused neither examined himself on oath nor examined any defence witnesses. After scrutinizing and assessing the evidence on record and after considering rival submissions advanced by Learned Counsel of both parties, the learned trial Court convicted and sentenced the accused as aforesaid by way of impugned judgment and order dated 21.9.2004. Being aggrieved and

dissatisfied by the said conviction and sentence, the accused has assailed the same in the present appeal and prayed for quashment thereof.

9. The Learned Counsel for the accused canvassed that there is absolutely no evidence on record in respect of alleged illicit relationship between the accused and Namdeo Kale and even there is no cogent evidence that accused delivered any female child since PW-1 Dr. Aniruddha Deshpande has not identified the accused in the Court as the same lady whose delivery he performed on 19.4.2003. Pertinently, the prosecution has not conducted the D.N.A. test and, therefore, there is no evidence on record in respect of parentage of the victim child. Moreover, it is also submitted that there is no direct evidence in respect of alleged murder of the said female child and the entire prosecution case is resting upon the circumstantial evidence which has loopholes. It is also submitted by Learned Counsel for the appellant that even the prosecution has not examined Namdeo Kale as well as no efforts were made to collect the blood sample of the said person Namdeo Kale to link him with the victim female child and consequently to connect the accused with the alleged crime.

10. Moreover, it was also submitted by the Learned Counsel for the accused that although the prosecution has examined in all 12 witnesses to support its case, but out of the said witnesses, 3 witnesses i.e. PW-4, PW-5 and PW-7 turned hostile and did not support the case of the prosecution and the chain of circumstantial evidence has not been completed through the other witnesses. Moreover, it was further submitted that the prosecution has miserably failed to prove and establish the motive behind the alleged crime and it was canvassed that since the prosecution case is rested upon the circumstantial evidence, the motive plays the pivotal role and it has got special significance and assumes the importance but there is no evidence adduced or produced by the prosecution in that respect.

11. As regards the alleged recovery/discovery of the papers i.e. Exhs. 15 and 16 in presence of panch witness PW-8 Deepak Kamble is concerned, according to the Learned Counsel for the accused, considering the testimony of PW-8 Deepak Kamble recovery of one suitcase containing documents i.e. Exhs. 15 and 16 cannot be construed as discovery u/s 27 of the Evidence Act. It is also stated that even the said documents Exhs. 15 and 16 cannot be of any aid or assistance to the case of the prosecution. Exh. 15 is the card of Shri Datta Clinic belonging to Dr. Satish Joshi PW-2 who allegedly performed cardiopathy upon the accused and Exh. 16 is the letter issued by Dr. Satish Joshi to PW-1 Dr. Aniruddha Deshpande and the said documents do not connect the accused with the alleged crime. Besides, it is submitted that though the accused was arrested on 24.7.2003, the aforesaid recovery/discovery was made after the lapse of 5 days i.e. on 29.7.2003 and, therefore, the said delay also creates suspicion about the recovery/discovery and hampers the case of the prosecution in that respect. To substantiate the said contention, the Learned Counsel for the accused relied upon the judicial pronouncement of this Court in the case of Ahmad Alias Ahmad

Chakri and others Vs. The State of Maharashtra, , wherein it is observed that :-

10. There are only two other heads that we need to go into. The first of them is the question of the discovery of the weapons at the instance of the three accused. As far as this aspect is concerned, the evidence in question appears to be reasonably reliable, but the difficulty posed is that there is some degree of delay as far as the discoveries are concerned. The Investigating Officer has not indicated as to why, even though the accused were in custody, it took the police so much time to effect the discoveries in question. Here again, there is a total vacuum in the prosecution case. Shri Nalawade did strenuously contend that the delay is insignificant insofar as it is hardly of four or five days. In a criminal trial of the present type, this amount of delay could have fatal consequences. The totality of the evidentiary value of the evidence of discovery, therefore, gets considerably weakened because of the delay factor.

The Learned Counsel for appellant also relied upon the judicial pronouncement of Panaji Bench of this Court in the case of (Sarvanand @ Soiru Gaonkar Purso Gaonkar Vs. State of Goa)², reported in 2007(1) Bom.C.R.(Cri.) 234, wherein it is observed that:-

16.....This has also to be seen in the back ground of the fact that according to the prosecution the accused carried the sickle to his house walking a distance of about 10 kms. This recovery appears to be of doubtful character, apart from the fact that it was allegedly made after six days of the arrest of the accused. The delay in recovery certainly diminishes the value to be attached to it This has been held by two Division Benches of this Court. First, in the case of Ahmad Alias Ahmad Chakri and others Vs. The State of Maharashtra, , which was followed in the unreported decision of this Court dated 7.8.2006, in (Shiri @ Shrikant Gaonkar Vs. State of Goa)³, reported in 2006(2) Bom.C.R.(Cri.) (P.B.)353, Cri.A. No. 26/ 2005.

12. Accordingly, the Learned Counsel for the accused submitted that there is absolutely no incriminating evidence against the accused and the prosecution has miserably failed to prove and establish the charges levelled against the accused beyond reasonable doubt, and hence, urged that present appeal be allowed and conviction and sentence inflicted upon the accused be set aside and accused be acquitted.

13. The learned A.P.P. countered the said arguments and opposed the present appeal vehemently and stated that PW-7 Shakti Agarwal did not support the case of the prosecution and turned hostile. However, the learned A.P.P. put the questions to him in the form of cross-examination wherein he stated that he had seen the accused with her daughter and, therefore, the statement made by the said witness is incriminating against the accused. It was also submitted by the learned A.P.P. that PW-1 Dr. Aniruddha Deshpande had categorically stated that one Kanchan Namdeo Kale was admitted in the Sanjivani Hospital and she delivered a female child on 19.4.2003 which was the normal delivery of the said

lady and produced the case papers at Exh. 13 and he also submitted that before delivery he had referred the said woman to PW-2 Dr. Satish Joshi, Physician and PW-2 also stated that he examined the said lady, namely, Kanchan Namdeo Kale on 10.4.2003 and performed cardiopathy upon her and produced report along with the cardiogram at Exh. 15 and the certificate at Exh. 16. It was submitted that the said evidence is also incriminating piece of evidence against the accused since it reflects that the accused herein was examined by Dr. Satish Joshi who performed cardiopathy upon her. The evidence of PW-1 discloses that he performed delivery of the said lady wherein a female child was born on 19.4.2003 which establishes that the accused herein delivered a female child on 19.4.2003 and the said evidence establishes nexus between the accused and the victim female child and her consequent murder committed by the accused herein.

14. Moreover, it was also canvassed by learned A.P.P. that the further questions were put in the form of cross-examination to PW-7 Shakti Agarwal wherein he stated that accused had kept her suitcase at his place which was discovered under the memorandum/discovery panchnama Exh. 24 and 25 respectively in presence of PW-8 Deepak Kamble and the said suitcase contained the documents i.e. the hospital Card and "Janmakundali" which were seized thereunder, and accordingly, the said discovery also connects the accused with the crime. Moreover, in the said context it is also submitted that the said hospital document and "Janmakundali" recovered from the suitcase at the instance of the accused under the memorandum and discovery panchnama Exhs. 24 and 25 respectively, were not put to PW-5 Vishnu Choudhar who had let out his room to the accused and the said inaction on the part of the accused speaks volumes for itself. Accordingly, the learned A.P.P. supported the impugned judgment and order of conviction and submitted that the accused who was the mother of a small child of three months, namely, Didi alias Neeta, committed its cold blooded murder by throwing her into the well to conceal her illicit relations with Namdeo Kale and further submitted that the learned trial Court has scrutinized and assessed the evidence on record in proper perspective, and there is no glaring mistake in the impugned judgment and order of conviction, and hence, no interference therein is warranted in the present appeal, and therefore, urged that present appeal be dismissed.

15. In order to deal with the aforesaid submissions advanced by Learned Counsel for the parties effectively, it would be useful to refer to the material evidence adduced/produced by the prosecution and in the said context, at the outset, coming to the evidence of PW-2 Dr. Satish Joshi, Physician, wherein he has stated that as per the reference of PW-1 Dr. Aniruddha Deshpande, one Kanchan Namdeo Kale from Baramati approached him on 10.4.2003 and he examined her on the said date and she had anemia, dysploe and chest pain and, therefore, her cardiopathy was done which was normal. Her cardiogram and report is produced at Exhs. 15 and 16 respectively. In cross-examination he has stated that he was a cardiologist and examines about 10 indoor patients and 34 O.P.D. patients per day. He also stated that while obtaining cardiogram he does not obtain signature

or thumb impression of the patient and further stated that the patient was with him for about 15 minutes only.

16. That takes us to the deposition of PW-1 Dr. Aniruddha Deshpande who stated that he is running Sanjivani Hospital at Karad and on 19.4.2003 one Kanchan Namdeo Kale was admitted in his hospital for delivery and he examined her and she delivered a female child at 10.47 a.m. on the same day which was a normal delivery. The said child was healthy and it was weighing about 3 kgs. He produced photo-state copies of the case papers at Exh. 13. He stated that the said woman was in his hospital from 19.4.2003 till 22.4.2003. He also stated that, before delivery, he also referred the woman to PW-2 Dr. Satish Joshi of Shri Datta Clinic, Karad. In the cross-examination he stated that he did not note down any identification mark of the patient after she was admitted in his maternity hospital. Moreover, he has further stated that he cannot say whether the accused present before the Court is the same lady Kanchan.

17. Coming to the testimony of PW-11 Dr. (Sou.) Manik Suryawanshi, Medical Officer, who examined the accused Kanchan Vilas Kumbhar as per the reference letter given by the police personnel belonging to Baramati Police Station on 24.7.2003 and the said patient was physically fit in all respects, and accordingly, she issued certificate to that effect which is produced at Exh. 44 and she also identified the accused in the Court. During the cross-examination, she stated that she came to know that the accused was to be examined because she was arrested. A Court question was put to her as to what symptoms would be noticed in a woman about three months after her delivery in respect of delivery externally as well as internally, to which she replied that, There will not be such symptoms except breast feeding of woman. Even the uterus will be of normal size after three months.

18. As regards the death of the victim, PW-9 Dr. Sambhaji Kokare has stated that he conducted the post-mortem examination on the dead body of one Didi alias Neeta. Namdeo Kale on 19.7.2003 and her age was about 2 to 3 months and her death was due to asphyxia due to drowning and he issued postmortem notes which are produced at Exh. 27. He also stated that the name of the said girl was not known initially but subsequently the police informed the name by letter dated 4.8.2003 Exh. 29. He also stated that the police personnel made certain queries about the girl and he replied by reply Exh. 30. In the cross-examination, he stated that the dead body of the said girl was brought by P.S.I. Gaikwad but the name of the said girl was informed subsequently by the police personnel. He also stated that for D.N.A. test blood from heart and thigh muscles of the girl was extracted and post-mortem notes Exh. 27 disclose the cause of death due to 36/12(3) asphyxia due to drowning and the said evidence confirms that the victim met with homicidal death (unnatural).

19. The backbone of the prosecution case is the testimony of PW-8 Deepak Kamble who is the panch of the recovery/discovery panchanamas Exhs. 24 and 25 respectively, who stated that he was called to Baramati City Police Station on

29.7.2003 along with co-panch and accused was also present there who made the disclosure statement and expressed her willingness to show the room where she had delivered the child, and accordingly, memorandum thereof was prepared but subsequently she improved her version and showed willingness to show the room where she had kept the documents about her delivery and the said memorandum is produced at Exh. 24. Thereafter the accused lady led the panch as and police personnel to village Rui towards the room of one Shri Choudhar and there was one suitcase in that room and there were papers of the hospital in that suitcase and the said papers were seized under the recovery panchnama Exh. 25. The said documents are produced at Exhs. 15 and 16 which are the hospital card and "Janmakundali", respectively. He also identified the accused in the Court. In the cross-examination, he stated that he is working as a Homeguard and he goes to the Police Station whenever duty is allotted to him and he does the work allotted by P.S.I. And he stated that he acted as a panch on 2 to 3 occasions. He further stated that the suitcase was taken from the room of Shri Choudhar but no name was written on the said suitcase. He also stated that he could not state to whom the said suitcase belonged. A suggestion was given to him that no panchnama was done there and no documents were attached but the same was denied by him.

20. That takes us to the testimony of PW-7 Shakti Agarwal who was working as a helper to cook PW-4 Dilip Padalkar who identified the accused in the Court and also stated that he knew Namdeo Kale who was working as a cook in the mess. However, the said witness did not support the case of the prosecution and was declared hostile and, therefore, the learned A.P.P. put him questions in the form of cross-examination wherein he stated that his statement was recorded by police personnel and denied the contents of portions marked "A" and "B". He further stated that he had seen the daughter of the accused with her and the accused had kept her suitcase at her place. He further stated in the cross-examination conducted by the Learned Counsel for the accused that he has no idea whether the daughter with the accused was her own daughter.

21. We have perused the oral, documentary as well as medical evidence adduced/ produced by the prosecution and also perused the impugned judgment and order dated 21.9.2004 as well as the submissions advanced by Learned Counsel for the parties anxiously, and also perused the judicial pronouncements cited by the Learned Counsel for the accused carefully, and at the outset, the main attack of the accused is on the alleged relationship of the accused with the victim i.e. a female child of three months and in the said context PW-1 Dr. Aniruddha Deshpande although stated that one Kanchan Namdev Kale was admitted in his hospital on 19.4.2003 who delivered a female child on the said day at about 10.47 a.m., he has categorically stated in the cross 20 examination that he did not note-down the identification marks of the patient after the patient was admitted in the hospital and further stated he could not say whether the accused present before the Court was the same lady Kanchan. Hence, the said testimony of PW-1 Dr. Aniruddha Deshpande does not reflect connectivity

between the accused and the lady viz. Kanchan admitted in hospital who delivered a female child on 19.4.2003 since PW-1 did not know any identification mark on the patient and further was unable to state that the accused present before the Court was the same lady Kanchan, and hence, the identity of the person who allegedly delivered a child on 19.4.2003 in the hospital of PW-1 is not established.

22. Moreover, the testimony of PW-2 Dr. Satish Joshi also cannot be of any aid and assistance to the case of the prosecution since as per the reference of Dr. Aniruddha Deshpande he examined the patient, namely, Kanchan on 10.4.2003 and performed cardiopathy upon her, and produced cardiogram and report at Exhs. 15 and 16 and he had stated that he examines about 10 indoor patients and 30 to 35 O.P.D. patients per day and while obtaining cardiogram he has not obtained signature or thumb impression of the patient and as stated by him, the patient was with him for about 15 minutes only and, therefore, it cannot be expected from him to identify the accused after the lapse of about one year and two months, and therefore, the identity of the accused herself is in doubt.

23. Admittedly, the prosecution has not adduced any evidence on record in respect of alleged illicit relationship/ affair between the accused and Namdeo Kale. Moreover, admittedly, the prosecution has not examined said Namdeo Kale for the reasons best known to the prosecution who in fact would have thrown light on the said aspect. As regards the parentage of the victim child, even the blood sample of Namdeo Kale was not collected and in the said context PW-10 P.I. Vitthal Harihar has admitted in his cross-examination that he did not obtain blood sample of Namdeo Kale. Moreover, admittedly, D.N.A. test in the present case was not conducted, especially as regards to the parentage of the said victim child. In the said context PW-10 P.I. Vitthal Harihar has categorically stated that he had concluded that since the accused confessed her guilt, D.N.A. test was not required and the said statement of PW-10 P.I. Vitthal Harihar is shocking. It appears from the testimony of PW-10 P.I. Vitthal Harihar that his age was about 49 years and, therefore, it is apparent that he is quite senior officer in the police department but still he had courage to state in his testimony that since the accused confessed her guilt before him, he had concluded that D.N.A. test was not required. The said statement reflects firstly, that PW-10 P.I. Vitthal Harihar has no basic knowledge of law since the confession made before the police personnel is not admissible in evidence and secondly, it is apparent from the evidence that blood sample of the said victim child was collected and even accused was examined by PW-11 Dr. (Sou.) Manik Suryawanshi on 24.7.2003 and, therefore, her blood sample could have been collected and could have been sent for the D.N.A. test which would have been prime and crucial evidence in the present matter, which could have established the nexus between the victim child and the accused but PW-10 P.I. Vitthal Harihar failed to collect the said vital evidence, and apparently, kept the loopholes in the prosecution case, for the reasons best known to him and such conduct of the police officer that too at senior level in the police department cannot be tolerated and same is required to

be deprecated.

24. Apart from that, the fact remains that there is no cogent evidence on record to establish the parentage of the said victim child and there is no incriminating evidence against the accused regarding the murder of the said victim child, by the accused, and accordingly, prosecution has failed to establish nexus between the murder of victim child and the accused herein.

25. As regards the circumstantial evidence adduced/produced by the prosecution, the motive plays pivotal role but the prosecution has failed to prove and establish the motive behind the alleged murder of the victim child since, as mentioned hereinabove, there is no cogent evidence on record to establish any illicit relationship between the accused and Namdeo Kale as well as the evidence adduced/produced by the prosecution through PW-1 Dr. Aniruddha Deshpande and PW-2 Dr. Satish Joshi is short of establishing the fact that the accused and accused only delivered the said female child.

26. Moreover, from the evidence of memorandum/recovery panchnama Exhs. 24 and 25 respectively adduced/produced by the prosecution through PW-8 Deepak Kamble, it is seen that the accused led ponchos and police personnel, after making the disclosure statement, to the room of Shri Choudhar in Rui village and there was one suitcase in that room and there were papers of delivery in that suitcase and the said papers were attached under the discovery panchnama which are exhibited at Exhs. 15 and 16, respectively. Pertinently, the said alleged discovery of the suitcase cannot be construed as the one u/s 27 of the Evidence Act since the accused did not point out/ produce the said suitcase but accused led to the room of Shri Choudhar in Rui village only. The alleged suitcase containing papers was in that room which was not pointed out/produced by the accused. Apart from that, even the documents recovered from the said suitcase at Exh. 15 is the hospital card of one Kanchan Namdeo Kale issued by Shri Datta Clinic by PW-2 Dr. Satish Joshi and Exh. 16 is the report dated 10.4.2003 issued by PW-2 Dr. Satish Joshi to PW-1 Dr. Aniruddha Deshpande in respect of clinical examination of Mrs. Kanchan Kale and even the said documents do not establish that the accused delivered the female child i.e. the victim. Moreover, it is pertinent to note that even PW.-8 admitted in the cross-examination that the said suitcase was taken from the room of Shri Choudhar and no name was written on the said suitcase and he could not tell to whom the said suitcase belonged. In this scenario, the said recovery of the suitcase and even the documents found therein which are at Exhs. 15 and 16, do not connect the accused with the victim in the present case and consequently, do not connect the accused with the alleged crime. Moreover, it is apparent from testimony of PW-8 Deepak Kamble that he is susceptible to police personnel since he works as homeguard and goes to Police Station as per allotment of duty and also acted for 2/3 times earlier, and hence, his testimony cannot be accepted as gospel truth.

27. Besides, although the accused was arrested on 24.7.2003, the alleged recovery/ discovery of the suitcase containing documents at Exhs. 15 and 16, by

the memorandum panchnama and discovery panchnama were made on 29.7.2003 i.e. after the delay of about 5 days, but PW-10 P.I. Vitthal Harihar as well as PW-12 P.S.I. Yashwant Phulwade, have not given any convincing explanation for the said delay in their respective depositions, and accordingly, the said delay diminishes the credibility of the said recovery, in view of the judicial pronouncements cited by the Learned Counsel for the accused which have been referred to hereinabove.

28. Undisputedly, the death of the victim child is homicidal death since the medical evidence to that effect is self-explicit and PW-9 Dr. Sambhaji Kokare has stated in his deposition that he performed the postmortem on the said female child on 19.7.2003 and her age was between 3 to 6 months and death was due to asphyxia due to drowning and issued the post-mortem notes which are produced at Exh. 27 and the said testimony of PW-9 and post-mortem notes Exh, 27 conform with each other, which disclose the cause of death due to asphyxia due to drowning, which is unnatural. Pertinently, PW-9 Dr. Sambhaji Kokare also stated in his deposition that the name of the said girl was not known initially and the police personnel informed the name subsequently vide letter dated 4.8.2003, Exh. 29. He also stated that, for D.N.A. test, blood from heart and thigh muscles of the girl were extracted. Thus, the testimony of PW-9 Dr. Sambhaji Kokare also surfaces that although dead body of victim child was sent for post-mortem purpose, her name was not informed to PW-9 Dr. Sambhaji Kokare at that time, which was informed later on i.e. almost 15 days on 4.8.2003. Moreover, it appears that the investigation agency has not made any efforts to get the said female child identified although as stated by PW-9 Dr. Sambhaji Kokare, blood from the heart and thigh muscles from the victim child was collected for the D.N.A. test but still the said test was not performed to establish the parentage and the paternity of the female child as discussed hereinabove. Accordingly, although the death of victim child is homicidal, the prosecution has miserably failed to establish nexus between the accused and the homicidal death of victim female child by legal evidence.

29. Having the comprehensive view of the matter and taking the survey of totality of the evidence, we are of the considered view that there is no legal evidence against the accused to connect her with the victim female child and there is no incriminating evidence against the accused to connect her with the alleged crime and, therefore, the complicity of the accused in the crime is not established and, hence, the conviction recorded and sentences inflicted upon her are unsustainable in law and hence, present appeal deserves to be allowed.

30. In the result, present appeal is allowed, and the convictions and sentences imposed upon the accused by judgment and order dated 21.9.2004 stand quashed and set aside and the accused is acquitted of the offences for which she was charged and convicted. The accused is ordered to be set at liberty forthwith if not required in any other case.

31. Before departing, we deem it appropriate to send a copy of the present

judgment to the Secretary, Home Department, Mantralaya, Mumbai, to take the appropriate and suitable action against PW-10 P.I. Vitthal Vishwanath Harihar, in view of the observations made in paragraph 24 hereinabove. Registry to comply with this direction. Present appeal is disposed of accordingly.