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

CRIMINAL APPEAL NO.822 OF 2005

The State of Maharashtra,
Through Gandhi Chowk
Police Station Latur

... Appellant

Versus

1. Govind S/o. Badrinarayan Pallod
Age: 38 years, Occu. : Medical Practitioner,
R/o. Tirupati Hospital, Near Tahsil Office,
Latur, District Latur.

2. Jugalkishore S/o. Bhagwandas Toshniwal,
Age: 44 years, Occu.: Medical Practitioner,
R/o. Toshniwal Hospital, Hattenaga,
Latur, Dist. Latur.

[As per Court's order date 15.04.2005,
Appeal is abated as against Respondent No.2]

3. Sow. Kamaladevi W/o. Jugalkishore Toshniwal,
Age: 42 years, Occu.: Medical Practitioner,
Toshniwal Hospital, Hattenaga,
latur, Dist. Latur.

... Respondents

.....
Mrs. D.S. Jape, APP for Appellant-State

Mr. Ambar Barlota, Advocate for Respondents No.1 and 3

.....

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 12 JUNE, 2025

PRONOUNCED ON : 07 JULY, 2025

JUDGMENT :-

1. Appellant-State is hereby assailing the judgment and order of acquittal dated 29.07.2005 passed by the learned Chief Judicial Magistrate, Latur in S.T.C. No.508 of 1987, thereby acquitting the present respondents from charge under Section 304-A r/w 34 of the Indian Penal Code (IPC).

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FACTUAL MATRIX GIVING RISE TO THE APPEAL

2. On report by Police Head Constable Pardeshi, Sadar Bazar Police Station, Solapur, A.D. Inquiry bearing no.22/1986 was conducted on account of death of deceased Jamirabee, wife of PW-3. On the strength of the report, investigating officer-PW9 lodged crime bearing No.248/1986 under Section 304-A of IPC against the present respondents on the premise that, they all treated the wife of PW-3, who was admitted for cesarean and unfortunately succumbed on 12.10.1986 while undergoing treatment. It was revealed at the time of postmortem that, there was surgical mop in the left iliac fossa resulting in septicemia, toxemia with faced peritonitis secondary to intestinal fistula with pneumonitis and encephalitis. Due to the above negligent act of the respondents resulting into the death of deceased Jamirabee (wife of PW-3), they were chargesheeted for commission of offence under Section 304-A of IPC.

3. After framing charge, learned Chief Judicial Magistrate was pleased to explain the same. On denial of the charge, learned Chief Judicial Magistrate, by order dated 29.07.2005, reached to a finding that prosecution has failed to prove the charge, and accordingly acquitted accused from charge under Section 304-A r/w 34 of IPC.

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Feeling aggrieved by the same, the State has come up in appeal on various grounds enumerated in the appeal memo.

SUBMISSIONS

On behalf of appellant - State :

4. Apprising this Court about factual background; about the deceased being admitted on account of delivery in the hospital run by respondents; she being operated twice and on their advice, when the condition of the deceased deteriorated, she to be taken to Civil Hospital, Solapur, where she succumbed, learned APP pointed out that, after A.D. inquiry and inquest panchanama followed by postmortem, it was revealed that deceased Jamirabee succumbed due to medical negligence. That, there is no refusal or denial about the deceased being treated and operated by respondents in their hospital. That, there was total negligence in providing treatment. That, postmortem report revealed that surgical mop was found in the left iliac fossa that resulted in septicemia, toxemia with faced peritonitis secondary to intestinal fistula with pneumonitis and encephalitis, which was reported as the cause of death. Learned APP took this Court through the testimony of PW-5 autopsy surgeon and would submit that, he is an expert, who has opined

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about autopsy findings and has candidly and categorically attributed the negligence to the present respondents. Learned APP pointed out that, the said doctor PW-5 was accompanied by other surgeon and they both are consistent about opinion regarding the death of deceased apparently due to medical negligence. The medical papers and clinical notes related to the treatment of the deceased have been brought on record.

5. Learned APP took this Court through the observations of learned trial Court in paragraph no. 18. It is submitted that, learned trial Court has come to a conclusion that surgical mop was found in the left iliac fossa during autopsy. However, surprisingly by giving benefit of doubt, learned trial Court has acquitted the accused. Therefore, learned APP urges to set aside the impugned judgment by allowing the appeal.

On behalf of respondents

6. Per contra, supporting the judgment passed by the learned trial Court, the learned counsel for the respondents-accused submitted that, the prosecution has miserably failed to establish a direct connection between the death and medical negligence. He also took this Court through the cross-

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examination of PW-5 and submitted that, the answers given by this so-called expert in the witness box clearly show that there is no nexus between the cause of death and the alleged negligent act. He pointed out that, deceased was treated for over a period of more than seven days at another hospital, i.e. Civil Hospital, Solapur, where she finally succumbed. Therefore, it is his submission that, medical negligence cannot be attributed to the present respondents. According to him, learned Trial Court has correctly appreciated and applied the law, and has committed no error in acquitting the accused. He further submits that, the law is well settled that when two views are possible, the view taken by the trial Court cannot be interfered with by substituting another opinion. According to him, the benefit of doubt has been extended here, because the prosecution failed to discharge its burden of proving the case beyond reasonable doubt. For all above reasons, learned counsel for respondents-accused, prays to dismiss the appeal.

7. In support of its case, though prosecution has examined as many as nine witnesses, amongst them, PW-5 who is stated to be an expert in autopsy, and PW-7 Civil Surgeon who was also present during autopsy, are crucial witnesses and their opinion prompted to launching of prosecution case against the

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present respondents under Section 304-A of the IPC. The sum and substance of their evidence is as under :

PW5 Dr. S. S. Sardar, autopsy surgeon has deposed at Exhibit 97 as under:

“1. On 12.10.86 I was Lecturer in Forensic Medical college attached to the General hospital, Solapur. on 12.10.86 conducted postmortem of dead body of Jamirabegum w/o Abdul Kadir Shaikh. As per police inquest the above deceased was belonging to the Latur town. The body was brought by one H.C. Sadarbazar Police Station Solapur namely Pardeshi B. Ho. 1788. Abdul Khadir the husband of deceased Jamirabegum identified the body. Around 9.00 a.m. in morning myself and Dr. Kanki started postmortem of dead body, and finished it around 9.45 a.m.

2. Dead body was of female aged 25 years Follow postmortem I prepared report and the same is on record. It is in my handwriting and under my signature, the contents are true and correct, it is at Exh. 98. During postmortem I observed Mid line infers umbilical scar 4/2 inches healthy Faced fistula 2 inches above the pubic symphysis in the line with surroundings skin shows chances of ex-coration 192 x 12 inches, we further observed that -

<i>Abdomen</i>	<i>:</i>	
<i>Wells Peritoneum</i>	<i>:</i>	<i>Inflamed</i>
<i>Cavity</i>	<i>:</i>	<i>Full of yellowish coloured</i>

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<i>material</i>	<i>with Fecal matter, foul smelling</i>
<i>Stomach intestine and its contents</i>	<i>: Empty</i>
<i>Small intestine and its contents</i>	<i>: Adhesion of coils of small intestine after separation of adhesion, fistula found in the distal part of ilium fistula 1 x 1 inch.</i>
<i>Liver with weight and call bladder</i>	<i>: </i>
<i>Pancreas and suprarenal</i>	<i>: Congested</i>
<i>Spleen with weight kidneys with weight</i>	
<i>Bladder organs of generation</i>	<i>: Uterus-size normal</i>
<i>Additional remarks: with where possible medical officers deduction : from the state of the contents of the: stomach as to time: of death and last : meal.</i>	<i>Transverse scar at lower segment of uterus, inflamed, coil of intestine adborut to uterus</i>
	<i>surgical mop 8 x 7 inches was found in the left iliac fossa foul smelling, studded with pus.</i>

3. Surgical Mop was noticed by me in the abdomen cavity i.e. left iliac fossa, I took photograph of said surgical mop. There are in all 4 photographs and their negatives on record. They are at Exh.99 to 102 (positive copies), the decatives are at Exh.103 to 106. Later on the surgical mop found in the abdomen cavity of deceased was handed over to the police. In my opinion opinion as to the cause, and probable cause of

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death is as under -

"Septicemia, Toxemia with fecal peritonitis secondary to intestinal fistula with pneumonitis and encephalitis"

4. *Septicemia a means infection and inflammation were Toxemia with fecal peritonitis means there were swelling i.e. inflammation over to peritonitis. Toxemia means bacteria liberating toxin. Pneumonitis means inflammation to lung plus infection. Encephalitis means infection and inflation to brain. Septicemia and Toxemia might have caused by surgical mop found in the abdomen cavity. Infection and inflammation to Lungs and brain plus fistula to intestine are the cumulative cause to cause death of deceased. Because of presence of surgical mop in the abdominal cavity there might be fistula to intestine and infection and inflammation to the lungs and brain. Because of crack (fistula) to intestinal region there were septicemia & toxemia. I issued death certificate which is at Exh.56. Surgical mop if left in the body is dangerous to life. The article no.1 before the court, is the surgical mop found in the abdomen of deceased and the same was handed over to the police after postmortem.*

Cross for the accused by Mr. Mohanrao B. Jadhav Adv.

I can not answer that in the event of delivery if the pulses are low, B.P. is 76 systolic and the lady is in severe bleeding, that the patient is treated as emergency case. I again say that in the case of above event came in emergency one. 40 minutes time was consumed for opening and closing the body of deceased Jamirabee. Lower ileum is distance part of ileum. If the patient is serious and having abdominal disease and is under going operation fecal fistula may occur, to intestine. Septicemia, toxemia, pneumonitis, encephalitis and peritonitis may cause by various

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reasons and causes. In case of incontinences causes may be unknown. Septicemia and Toxemia occur because of bacteria and virus infections. Fecal fistula is terminal part of ileum, Distal part of ileum is fixed to posteriorly value and cecum Distal part of ileum is on the right side of the body, i.e. abdomen. Right ileum does not go to left iliac fossa. I can not say that right and left iliac fossa are 7 to 8 inches away from each other.

6. when a patient is in shock peripheral vessels may constrict. I can not say that the blood supply reduces if the vessel constricts. I do not agree that in case of less blood supply gangrene may cause. I am expert in Forensic science and I am not expert in surgical and clinical (medical) science.

7. I agree that most prominent and major complications which may lead out of typhoid fever are intestinal hemorrhage and perforation. Enteric fever means typhoid fever. Small and big intestine are to other known bowl. It is possible that intestine perforation leads fistula. I do not agree that fistula can be detected only by histopathological test. Foreign body may or may not cause any infection in the human body, There is possibility o of irritation if the foreign body remains in human body. Soft object causes irritation and any complications in the body (human) surgical mop can not be termed as soft object because it is prepared by cotton. Surgical mop bears tale. Surgical mops are used to control profuse bleeding during operation. I can not say that ordinary mops are used for covering external wound, Fecal fistula and surgical scar were in one line but the fistula was not on surgical scar. I do not say whether the surgical scar was in vertical or horizontal position. Fistula in round in shape. It is not true that at the time of report I was not sure that the death was caused because of

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existence of surgical mop in human body and therefore, it was not so mentioned in the concluding part of the postmortem report. Dimensions of surgical mop in question are mentioned in report possessed by me but the same do not appear in the report filed in the court. At the time of postmortem we do not allow anybody except medical students. Even on the above day I did not allow any third person to remain present at the time of the postmortem. Abdul Khadir and H.C. Pardeshi were not inside the postmortem room at the time of postmortem. Only receipt was obtained and the surgical mop was handover to the police and no panchanama to that effect was drawn. It is not true that no surgical mop was found as stated above.

8. I am facing one trial regarding offence of accepting bribe but it is a false case.”

PW7 Dr. Murlidhar Kulkarni, who was working as civil surgeon and was present with PW Dr. Sardar, autopsy surgeon, has deposed at Exhibit 138 as under:

“1. My qualification is M.5. General Surgeon, I was working as civil surgeon, General Hospital. Solapur on 1.10.86. I retired on 30th September, 1995. I was administrator as well as Doctor then I was working as C.S. at Solapur. when the patient was admitted in my ward he was being examined and treated and supervised by me,

2. On 30.9.1986 one Jameera begum w/o Kadir Shaikh was admitted at civil hospital, Solapur, she was referred by Dr. Toshniwal of Latur. There is a reference letter from Dr. Toshniwal hospital to that effect. I have brought the original letter with me today and I am Kaducing conducted alongwith list exh. 139.

There were two Doctors accompanying the patient, one was Dr. Toshniwal, I do not remember the name of other Doctor. I may be able to identify the said Doctor if shown to me today. Accused Dr. Pallod was accompanying the patient. The investigation papers were given with the patient when she was admitted in civil hospital. Solapur.

3. She was admitted in civil hospital, Solapur for fecal fistula. It in an opening in the intestine discharging fecal matters communicating with abdominal wall. We had given conservative line of treatment to patient. Conservative line of treatment means of administration of intravenous fluid blood transfusion then antibiotics and local dressing. Patient was in a condition of shock at the time of her admission. The operated part of the patient was showing fecal discharge. We have not conducted any surgery at general hospital, Solapur. Abdomen was not opened.

4. The patient was admitted in our civil hospital since 30.9.86 to 12.10.1986. On 12.10.86 the patient expired. We have informed the police after the patient expired. As the patient was expired in our hospital and for giving cause of death the postmortem was ordered and hence we contacted police. Postmortem was conducted on 12.10.1986, postmortem was conducted by the medical officers who posted in forensic department namely Dr. Sardar. I was also called by Dr. Sardar in the postmortem room while conducting the postmortem. That while conducting the postmortem Dr. Sardar noticed a foreign body in the form of cotton swab in the abdomen of the patient. I have seen that cotton swab/surgical mob. I saw it part inside the abdomen and part outside the abdomen. At that time, we called the police of then police came with

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photographer. Police has taken the photograph with the help of photographer. Later on further postmortem was conducted by Dr. Sardar. The foreign body which was found in the abdomen of the patient was handed over to the police. I have seen that foreign body its size was 3" x 7". According to postmortem report the cause of death of the patient was septicemia, toxemia with fecal peritonitis secondary to intestinal fistula with pneumonitis and encephalitis. It is as a result of accumulation of toxic products released by multiplication of bacteria. Septicemia is occurred as a result of fecal fistula which is secondary to foreign body in the abdomen. Foreign body was cotton mob in the abdomen. Any foreign body in the basin abdomen is injurious human life. A cotton mob is also injurious to the life of human. The letter which was given by Dr. Toshniwal as a reference and I have not verified the truthness or falseness of the contents of that reference by letter given Dr. Toshniwal.

CHARGE UNDER SECTION 304-A

8. Here, first it would be desirable to spell out the essential ingredients for attracting the said charge, which are as follows :

- (1) Death of a person was caused;*
- (2) Such death was caused by any rash or negligent act;*
- (3) That the death of such human being has been caused by the act of the accused.*
- (4) such act does not amount to culpable homicide"*

9. Before advertng to the merits of the appeal, it would be fruitful to discuss in brief the settled legal position on charge under Section 304-A of IPC, more specifically, in the background of medical negligence. The landmark case on this issue is ***Jacob Matheu V. State of Punjab and Another, (2005) 6 SCC 1***, which is a instructive judgment on the test to be applied while fixing liability due to negligence of doctors. In the said case, by referring previous decision in ***Suresh Gupta (Dr.) v. Govt. of NCT of Delhi*** (2004) 6 SCC 422, ***John Oni Akerele v. R.*** AIR 1943 PC 72, ***Kurban Hussein Mohammuedali Rangwall v. State of Maharashtra*** (1965) 2 SCR 622, ***Kishan Chand v. State of Haryana*** (1970) 3 SCC 904, ***Juggankhan v. State of M.P*** (1965) 1 SCR 14 and ***Emperor v. Omkar Rampratap*** (1902) 4 Bom., it is observed and held that, though the phrase “rash and negligent act” is finding place in the provision of Section 304-A, it is to be read as qualified by word “grossly”. The doctrines of *causa causans* and *casus omissus* are also touched upon and it is finally held that, to attract the above charge, it is incumbent upon prosecution to show or substantiate that death in question so occurred is only and only the direct result of a rash and negligent act of the accused, and it is further incumbent on the

part of prosecution to show the so-called negligent act in question and that act must be the proximate and efficient cause, without the intervention of other's contributory negligence.

10. In the above judgment, separate discussion is made on criminal medical negligence.

11. In paragraph 15 of the above judgment, the Hon'ble Apex Court has noted with approval the observations in another ruling of the Hon'ble Apex Court in the case of ***Syad Akbar v. State of Karnataka*** (1980) 1 SCC 30, wherein distinction between negligence in criminal law and civil law has been dealt and it is observed that, "*In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man, beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment*".

12. After taking the review of evidence in the case in hand on criminal negligence, as well as the law dealt by the Hon'ble Apex Court in case of ***Kurban Hussein Mohammedali Rangwalla v. State of Maharashtra*** (1965) 2 SCR 622 while dealing with Section 304 of IPC, this Court borrows and quotes observations in ***Emperor v. Omkar Rampratap*** (1902) 4 Bom LR 679, which are as under:

"To impose criminal liability under Section 304A, Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the causa causans; it is not enough that it may have been the causa sine qua non."

[Emphasis supplied]

13. Having briefly dealt with the essentials for attracting charge of Section 304-A of IPC, the factual matrix in the case in hand is dealt.

14. There is no doubt that deceased Jamirabee (wife of PW-3) was admitted in the hospital of respondents for delivery. There is no dispute that she had undergone cesarean on 01.09.1986, but while she was still being admitted, she made complaints of pain in stomach and her husband PW-3 claims to have duly

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reported about it to the doctors, who initially informed him that it could be because of cesarean operation and pain would be subsided, however, when the complaint persisted and continued, she was operated again by respondents in that very hospital, but in spite of that, when deceased did not get relief, on their advice, she was referred to Civil Hospital, Solapur on 30.09.1986. Further, there is also no dispute that since that day, till her demise on 12.10.1986, she was under the treatment and care of doctors at Civil Hospital, Solapur.

15. After the death, autopsy was conducted by PW-5 and it is he who has opined and attributed death to be due to “surgical mop 8 x 7 inches found in the left iliac fossa, foul smelling, studded with pus.

16. On receipt of postmortem opinion and on report of PW-3 husband, above crime has been registered. Investigation was carried out and trial was faced by present respondents-accused. Learned trial Judge, though held act to be negligent, did not accept the case of prosecution for bringing home charge under Section 304-A IPC, and based on the citations of this Court, extended benefit of doubt, which is now taken exception to, by the State.

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17. This Court has already dealt with and reproduced the examination-in-chief of PW-5 in paragraph 7. Therefore, it is also necessary to reproduce the answers given by him while facing cross in his evidence at Exhibit 97. Relevant cross is as under:

“.... Septicemia, toxemia, pneumonitis, encephalitis and peritonitis may cause by various reasons and causes. In case of inceptions causes may be unknown. Septicemia and Toxemia occur because of bacteria and virus infections. Fecal fistula is terminal part of ileum, Distal part of ileum is fixed to posteriorly value and caecum. Distal part of ileum is on the right side of the body, i.e. abdomen. Right ileum does not go to left iliac fossa.

6. I am expert in Forensic science and I am not expert in surgical and clinical (medical) science.

7. I agree that most prominent and major complications which may lead out of typhoid fever are intestinal hemorrhage and perforation. Enteric fever means typhoid fever. Small and big intestine are to other known bowl. It is possible that intestine perforation leads fistula. There is possibility o of irritation if the foreign body remains in human body. Soft object causes irritation and any complications in the body (human) surgical mop can not be termed as soft object because it is prepared by cotton. Surgical mop bears tale. Surgical mops are used to control profuse bleeding during operation. Only receipt was obtained and the surgical mop was handover to the police and no panchanama to that effect was drawn.”

18. Thus, two experts are examined, i.e. PW-5, who is autopsy expert and PW-7, who is a civil surgeon who was present at the time of autopsy during which surgical mop was detected in the left iliac fossa. The evidence of photographer PW-6 lends credence to the prosecution's story. PW-7 doctor, in his examination-in-chief, has categorically denied that deceased Jamirabee was operated at Civil Hospital, Solapur. Therefore, there is material suggesting surgical mop left out in the surgery of abdomen. Though there was a complaint of fecal fistula, she was treated only with IV fluids and antibiotics.

19. Therefore, there is material suggesting surgical mop left out while deceased underwent the surgery in the hospital of respondents. This definitely amounts to negligence. But again, question arises that, at the instance of which of the respondents, i.e. whether it was accused Govind Pallod, deceased accused Jugalkishor Toshniwal or accused Kamaladevi Toshniwal. Here, on going through the charge at Exhibit 33, unfortunately Section 34 has not been invoked.

20. As stated above, law is explicit and it is fairly settled legal position that, to attribute criminal negligence resulting into death, it is expected by prosecution to demonstrate and substantiate that, death was the direct result of rash and

negligent act of accused and the act must be proximate, immediate and efficient cause, without intervention of other factors or negligence. It has to be the *causa causans*, and not merely a *causa sine qua non*. PW-5 has candidly admitted that septicemia, toxemia, pneumonitis, encephalitis and peritonitis may be caused by various factors. Equally, PW-7 in his examination-in-chief has stated that, septicemia, toxemia had occurred as a result of bacteria and virus, which is secondary to the foreign body in abdomen, and while facing cross, he admitted about he stating it in the postmortem report. On going through the same, one does not come across any such remark. It has also come on record from the evidence of prosecution witnesses, i.e. PW-6 and PW-7, that there was no denial by the prosecution regarding the deceased being diagnosed with typhoid fever. Defence witnesses, including expert doctor DW-2 Dr. Baheti, also admitted that the deceased was suffering from typhoid. So also, none other than the prosecution witness PW-5 has admitted that most prominent and major complications, which may occur could be as a result of typhoid fever, i.e. in the form of intestinal hemorrhage and perforation leading to fistula. Therefore, there are other factors and causes stated by the medical experts including prosecution's own witness PW-5.

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Therefore, as submitted by the learned counsel for respondents, there is no positive or legally acceptable evidence suggesting surgical mop to be the sole reason for death of Jamirabee. For above reasons, it is a fit case for extending benefit of doubt.

21. It is brought to the notice of this Court that, husband of deceased Jamirabee had instituted suit for damages bearing No.87 of 1997, and even succeeded in getting damages.

22. Perused the judgment under challenge. Learned trial Judge has dealt each and every aspect of the prosecution case as well as defence raised by accused. Expert evidence is scrupulously appreciated and analyzed and by taking recourse to the settled legal position, benefit of doubt has been extended, which need not be disturbed. Equally, settled legal position while dealing with appeals against acquittal also are to be borne in mind, and after going through the same, this Court finds no merit so as to interfere in the acquittal. Hence, I proceed to pass following order :

ORDER

Criminal Appeal stands dismissed.

ABHAY S. WAGHWASE
JUDGE