

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.38 OF 1997

The State of Maharashtra.

....Appellant.
(Ori. Complainant)

Versus

1. Raju S/o Naseer shaikh
Age: 24 yers., Occu.Fruit vendor
R/o Kopargaon, Dist. Ahmednagar.
2. Raushanbi W/o Naseer Shaikh
Age: 50 yers., Occu. Fruit vendor
R/o Kopargaon, Dist. Ahmednagar.

....Respondents.
(Ori. accused)

.....
Shri B.L. Dhas, APP for appellant.
Shri Mujtaba Giam Mustafa, Advocate for respondent nos.1
& 2.

.....

**CORAM: A.B. CHAUDHARI &
INDIRA K. JAIN, JJ.**

DATE: 08.10.2015

ORAL JUDGMENT (Per A.B. Chaudhari, J.) :

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1] Being aggrieved by the judgment and order dated 29.10.1996 passed by the learned Additional Sessions Judge, Ahmednagar, in Sessions Case No.24/1996 by which the learned trial Judge acquitted both the accused for the offence u/s 302 r/w 34 of the Indian Penal Code, the present appeal was preferred by the State in this Court.

2] In support of the appeal, the learned APP submitted that the reasons recorded by the learned Judge in the impugned judgment are contrary to record and, therefore, perverse findings are recorded and hence interference with the order of acquittal is required at the hands of this Court.

3] Per contra, the learned counsel for the respondents supported the impugned judgment and order and submitted that the trial Judge has recorded cogent and convincing reasons for recording the order of acquittal, with which no fault can be found nor any perversity can be attached to the judgment and reasons recorded by the learned trial Judge. He, therefore, prayed for dismissal of the appeal.

4] We have perused the impugned judgment and order so also the reasons recorded by the learned trial Judge.

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There are two written dying declarations and three oral. PW3 Mahemood Isak Pathan, father of the deceased Saira, in clear terms stated before the Court the theory of accidental burning of the deceased Saira as told to him by her by way of oral dying declarations. Though PW1 Baby stated about the act of the accused persons for commission of homicidal death of the deceased, the trial Judge found that there was no reason as to why father of the deceased could state on oath about the accidental fire and consequent death of Saira – his daughter. As to the three dying declarations, the learned trial Judge has recorded the reasons, which we have seen. Those reasons are to be seen from paragraph no.31, which we quote hereunder:

“The position referred in the incriminating dying declaration Exh.No.34 is hit by another dying declaration of Saira recorded by Police Head Constable Tukaram Kahar as per Exh.No.40. It is clear that in the dying declaration Exh.No.34 Saira had not stated the cause behind the alleged burning. It appears that when this dying declaration was seen by A.P.P. Kopargaon it was found that the reason behind the incident was not recorded in it. He appears to have directed Police Head Constable Tukaram Kahar from Police

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Station Loni for recording another dying declaration of Saira including therein the cause behind the incident. It appears that in the night of 27/10/95 Police Head Constable Tukaram Kahar had recorded another dying declaration of Saira as per Exh.No.40. With regard to this dying declaration, it is pertinent to note that the time of the commencement of its writing and the time when its writing was over are not mentioned in the dying declaration Exh.No.40. No endorsement of the doctor attending on Saira was obtained at the top of this dying declaration before commencing its recording or at its end when the recording was over. However in the margin of this dying declaration there is an endorsement of the doctor marked as Exh.No.40-B. This endorsement appears to have been made by doctor Kishor Wani. But he was not examined by the prosecution. P.W.No.9 Dr.Atul Khalkar had referred this endorsement and had proved it. However, it was needed of the Police head constable Tukaram Kahar to consult Dr.Atul Khalkar attending on Saira and see if she was conscious and in a position to make a statement. He had not done this. These things go against the prosecution."

It is clear that the two dying declarations recorded have been found to be contradictory, vague and without any specific details and that is why in the wake of the

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evidence of father PW3 Mahemood, the trial Judge thought it to be risky to convict the accused persons. We find that since the father of the deceased stated about the oral dying declarations about which there is discussion in paragraph no.27 of the judgment, which we quote below, there is no reason to take a different view from the one taken by the learned trial Court :

"27. P.W.No.3 Mahemood s/o Isak Pathan had further spoiled the prosecution case and had rendered it unbelievable. As noted above, it was the case of the prosecution that when Saira had given out incriminating dying declaration in the evening of 26/10/95 in Municipal hospital Kopargaon he was also there. But in his deposition recorded at Exh.No.32, he had sworn that on asking Saira had told him that she got burnt because of bursting of stove flames. He had not deposed that her mother-in-law and her husband had poured kerosene on her and had set her on fire."

5] We, therefore, find that the learned trial Judge has applied the settled principles in the matter by allowing the benefit of doubt to the accused persons. In the above fact situation, we do not find any error or perversity in the impugned judgment. In the result, we

pass the following order.

ORDER

Criminal Appeal No.38/1997 is dismissed.

(INDIRA K. JAIN, J.)

(A.B. CHAUDHARI, J.)