

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

CRIMINAL APPLICATION NO. 1741 OF 2012

THE STATE OF MAHARASHTRA. **..APPLICANT.**

VERSUS

JAGDISH VISHWANATH GAIKWAD
AND ANR. **..RESPONDENTS.**

...
APP for Applicant/State : Mr.V.D. Godbharle.
Advocate for Respondents : Mr.G.D. Kale.
...

CORAM : S.S. SHINDE & A. I. S. CHEEMA, JJ.

Dated: June 09, 2015.

PER COURT :-

1. This application has been filed by the State seeking leave to appeal under Section 378(1)(3) of the Code of Criminal Procedure challenging the judgment and order dated 28.12.2011 in Sessions Case No.11/2009 passed by the Ad-hoc Additional Sessions Judge-1, Udgir, Dist. Latur acquitting the respondents / accused of the offences punishable under Sections 302, 498-A r.w. 34 of IPC.

2. The learned APP appearing for the State invited our attention to the contents of two written dying declarations at Exhs.31 and 44 and also the evidence of the P.W.5 Annapurna w/o Shantaram Jadhav to whom the deceased made oral dying declaration. According to the learned APP, all the dying declarations are consistent in material particulars inasmuch as, in all the dying declarations husband and mother-in-law are implicated. It is submitted that the deceased Mandakini was in a fit mental and physical condition to make the dying declarations since there were only 48% burn injuries sustained by her. The learned APP also invited our attention to the oral evidence and submitted that the application deserves to be allowed.

3. On the other hand, learned Counsel for the for the original accused, relying upon the findings recorded by the trial Court and also contents of the dying declarations, submitted that all the three dying declarations are inconsistent with each other and the Medical Officers who put the endorsement on the dying declarations at Exhs.31 and 44 had not been examined. Therefore, benefit of doubt has rightly been given to the accused by the trial Court.

Therefore, he submits that this Court may not interfere in the order of acquittal.

4. We have given careful consideration to the submissions of the learned APP appearing for the applicant – State and the learned Counsel for the respondents – original accused. With their able assistance, perused the record & proceedings and in particular, dying declarations at Exhs.31 and 44 and the evidence of the P.W.5 Annapurna to whom oral dying declaration was made by the victim. Upon careful perusal of the contents of all the dying declarations, so far as actual incident is concerned, there are material contradictions inasmuch as, in the first dying declaration at Exh.31, the role assigned to the husband is only to the extent of giving fist and kick blows and so far as actual incident of pouring kerosene and setting the victim ablaze is concerned, role is attributed to the mother-in-law. In the dying declaration at Exh.44, it is stated that mother-in-law poured kerosene and husband set her on fire. Though the oral dying declaration is consistent with the dying declaration at Exh.44, it is inconsistent with the contents of the first dying declaration at Exh.31. Upon

perusal of the dying declarations at Exhs.31 and 44, it appears that there is mismatch in timing of recording dying declaration and the endorsement of the doctor. So far as Exh.44 is concerned, P.W.7 PI Mundhe - writer of the said dying declaration in his deposition before the Court stated that he received MLC letter from medical officer for recording statement of the victim Mandakini on 14.10.2008 at 2 p.m; whereas, the endorsement of the doctor was at 11 a.m. on 14.10.2008. However, it appears that the dying declaration was recorded at 9 p.m. on 14th October, 2008. Admittedly, the medical officer who put the endorsement on both the dying declarations was not examined by the prosecution. Since the entire case of the prosecution is based upon three dying declarations and the accused had no opportunity to cross-examine the victim, the different versions stated in the dying declarations cannot be construed as minor discrepancies. Therefore, upon considering the evidence in its entirety, the trial Court found that the dying declarations cannot be believed so as to base the conviction on the same. We have independently considered the evidence and upon careful scrutiny of the evidence, we are of the opinion that the view taken by the

trial Court was a possible view and therefore, interference in the said view in appeal against acquittal is not warranted.

5. In that view of the matter, leave refused. Resultantly, application stands rejected.

(A.I.S. CHEEMA,J.)

(S.S. SHINDE,J.)

Kadam/*