THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.
APPELLATE SIDE JURISDICTION

CRIMINAL APPEAL NO. 579 OF 2003

State of Maharashtra,
Through Public Prosecutor,
High Court Bench at Aurangabad. ... **APPELLANT**
(Ori. Complainant)

V E R S U S

Vasant Narayan Rathod,
Age 65 yrs, Occu. Nil,
R/o Plot No.38, Sudarshan Colony,
Dhule. ... **RESPONDENT**
(Ori. Accused)

…

Mr. A. R. Borulkar, APP for Appellant / State.

Mr. A. P. Yenegure, Advocate for Respondent.

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W I T H

CRIMINAL REVISION APPLICATION NO. 248 OF 2003

Dhule Motor Owners Cooperative
Consumers Society, Dhule,
Through its Secretary,
Rajkumar Omprakash Bhasin,
Age: Yrs, Occu : As a Secretary,
Agra Road Near, Old Malegaon Naka,
Dhule, Dist : Dhule. ... **APPLICANT**

(Ori. Complainant)

V E R S U S

1) Vasant Narayan Rathod (Rana)
Age 63 yrs, Occu. Nil,
R/o. Hudco, Chitod Road,
Dhule, Tq. & Dist. Dhule.

2) The State of Maharashtra. ... **RESPONDENTS**

…

None for Applicant.

Mr. A. P. Yenegure, Advocate for Respondent No.1

Mr. A. R. Borulkar, APP for Respondent No.2 / State.

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CORAM : **INDIRA K. JAIN, J.**

DATE : 30th October, 2015.

JUDGMENT:

. Being aggrieved by the judgment and order dated 19th November, 2002 passed by the learned II Additional Sessions Judge, Dhule in Criminal Appeal No.10 of 1999 Appellant / State has preferred Criminal Appeal No.579 of 2003. Criminal Revision

Application No.248 of 2003 is preferred by original Complainant Dhule Motor Owners Cooperative Consumers Society. By the said judgment and order learned Additional Sessions Judge acquitted Accused No.1 of the offence punishable under Section 408 of the Indian Penal Code.

2 For the sake of convenience Respondent is referred in his original status as Accused as he was referred before the Trial Court.

3 Facts as are necessary for deciding the present appeal and revision application may be stated as follows:

i. On 16th January, 1994 Complainant Rajkumar Bhasin, Secretary of Dhule Motor Owners' Co-operative Consumer Society lodged report with Azadnagar Police Station, Dhule alleging therein that audit of Society for the period from 1st April, 1992 to 31st March, 1993 was carried by Auditor Dalal and Company. On receipt of audit report it was revealed that an amount of Rs.34,938.10 ps was shown as debited in the name of Bharat Petroleum Corporation on 30th August, 1992 and an amount of Rs.22,572.58 ps was shown as debited on 31st March, 1993 in the name of said Corporation without any voucher or document showing payment as per the entries. It was revealed that Corporation did not receive the amount and Accused No.1 Vasant Manager and Accused No.2 Gajanan Assistant Manager of Society prepared fake account and misappropriated the amount for their personal benefit.

ii. Pursuant to FIR Crime No.23 of 1994 was registered under Section 408 read with 34 of the Indian Penal Code. During investigation audit report was collected, statements of witnesses were recorded and on completing investigation charge-sheet was submitted before the Chief Judicial Magistrate, Dhule.

iii. Charge was framed against the Accused vide Exhibit 4. Accused pleaded not guilty and claimed to be tried. It was the defence of Accused Vasant that cash amount was given to the driver of tanker for payment of octroi and octroi receipt was sent to Bharat Petroleum Corporation. Accused claimed innocence and alleged false implication.

iv. During trial prosecution examined in all 5 witnesses. PW-1 Rajkumar Bhasin was the Complainant, PW-2 Bhimrao Mhasane was salesman of Society, PW-3 Keshav Deshpande was the Chartered Accountant, who carried the audit, PW-4 Vasant Badgujar was Secretary and PW-5 Mohanlal Bafna was Chairman of the Society. Considering the evidence of prosecution witnesses Trial Court held Accused No.1 Vasant guilty of the offence punishable under Section 408 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for two years and fine of Rs.3000/- in default rigorous imprisonment for three month. Accused No.2 Gajanan was acquitted of the charge.

v. Against the order of conviction Criminal Appeal No.10 of 1999 was preferred before the Sessions Court by original Accused No.1 Vasant. On hearing the parties and appreciating the evidence adduced by prosecution, Sessions Court came to the conclusion that no offence was made out against the Accused and consequently reversed the order of conviction and acquitted the Accused. It is this judgment and order which is under challenge before this Court.

4 Heard the learned counsel for parties. Perused record. On the basis of facts and evidence on record this Court for the below mentioned reasons is of the opinion that prosecution could not legally prove the charge against Accused and no fault can be found in the reasonings and findings recorded by the Sessions Court.

5 Prosecution case is mainly based on audit report. PW-3 Keshav Deshpande was Chartered Accountant who carried audit of Society for the period from 1st April, 1992 to 31st March, 1993. During audit it was found that in cash book debit entries for Rs.34,938.10 ps dated 30th August, 1992 and Rs.22,572.58 ps dated 31st March, 1993 were made without any receipt, voucher or supporting record. It was revealed that amount was not received by Bharat Petroleum Corporation, Manmad and inference of misappropriation was drawn fastening the liability on Accused No.1 being Manager and acquitted Accused No.2 Assistant Manager of Society.

6 PW-3 Keshav Deshpande has proved audit report dated 29th December, 1993 at Exhibit 29. It is not in dispute that original audit report was not brought before the Court. Exhibit 29 report is a photostat copy. In this background Sessions Court observed in paragraph No.16 of the judgment as follows:

> "(16) It vivid that, report prepared by the auditor is neither produced nor proved as prescribed by law. Xerox copy can not be appreciated for want of legal sanctity. Prosecution has not made efforts to bring original audit report to establish the charges against accused."

7 It is a settled law that where a case rests on documentary evidence it shall be by production of primary evidence. In the absence of primary evidence explanation to tender secondary evidence, has to be offered by the party tendering such secondary evidence, in evidence.

8 In the present case it appears that without any justification primary evidence was kept away from the record and straightway photostat copy of audit report was admitted in evidence, which is contrary to the legal principles under the Indian Evidence Act. In this view of the matter rejection of photostat copy of audit report by the Sessions Court was legal and proper.

9 Another significant factor in the present case is that during audit it was found that account books were found maintained regularly. Day-to-day opening and closing balance was tallied. Secretary of Society used to check the account. Managing Committee was approving the expenses incurred by Society from time to time during the relevant period and no objection was raised for entries in question.

10 The next drawback which was noticed by Sessions Court was in respect of non-examination of material witnesses i.e. representative of the Corporation to clarify payment of octroi as stated by the Accused. Copy of statement of transaction was produced but it was not duly proved by examining the competent witness from the Corporation.

11 It appears from the judgment of Trial Court that conviction was based on oral version of the office bearers of Society. Needless to state that in a case based on documentary evidence it was incumbent on prosecution to prove the documents as per law and in absence of proof of material documents, oral evidence of witnesses was to be excluded. Trial Court missed the important provisions of the Indian Evidence Act relating to documentary evidence and the Sessions Court has rightly rectified the errors committed by Trial Court. This Court finds no reason to take a view different than taken by the Sessions Court. No perversity, illegality or incorrectness could be noticed in the reasonings recorded by the Sessions Court. This Court is therefore not inclined to interfere in the judgment and order of acquittal. Hence the following order:

<u>O R D E R</u>

I. Criminal Appeal No.579 of 2003 and Criminal Revision Application No.248 of 2003 are dismissed.

II. Bail bonds of Accused stand cancelled.

[INDIRA K. JAIN, J.]

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