

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

**CRIMINAL CONFIRMATION CASE NO. 2 OF 2016
AND
CRIMINAL APPEAL NO. 295 OF 2016
WITH
CRIMINAL APPLICATION NO. 2482 OF 2016**

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CRIMINAL CONFIRMATION CASE NO. 2 OF 2016

The State of Maharashtra .. Appellant

Versus

Islamuddin Saddid Ansari .. Respondent
[original
accused]

Mr. P.S. Patil, A.P.P. for respondent/State.
Mr. V.Y. Bhide, Advocate for the respondent.

**AND
CRIMINAL APPEAL NO. 295 OF 2016
WITH
CRIMINAL APPLICATION NO. 2482 OF 2016**

Islamuddin Saddit Ansari .. Appellant/
Applicant
Age. 65 years, Occ. Labour, [original
R/o. Lane No.3, Prasad Nagar, accused]
Rahuri Factory, Tal. Rahuri,
Dist. Ahmednagar.

Versus

The State of Maharashtra .. Respondent

Mr. V.Y. Bhide, Advocate for the appellant/applicant.
Mr. P.S. Patil, A.P.P. for respondent/State.

**CORAM : A.V.NIRGUDE &
V.L.ACHLIYA, JJ.
DATED : 18.07.2016**

ORAL JUDGMENT : [PER : A.V. NIRGUDE, J.] :-

1. All the above proceedings can be disposed of by this common judgment. The Criminal Appeal challenges judgment and order dated 16.04.2016 passed by the learned Sessions Judge, Ahmednagar, in Sessions Case No.193 of 2015 convicting the appellant/accused for offence punishable under section 302 of the Indian Penal Code awarding him death penalty. We will refer the appellant as the accused.

2. It is prosecution case that during the night of 30th April, 2015, the accused committed murder of his unmarried daughter-Gulaabsa because he suspected that she had illicit relations with someone.

3. The prosecution tried to prove its case through depositions of seven witnesses. The evidence that came on record in gist can be stated as under :-

4. P.W.3-Sunil Aher, Police Head Constable attached to Rahuri Police Station stated that on 1st May, 2015, he

was on duty in the police station. Another police constable informed him that there was telephonic message about a murder. On his instructions, he went to the spot. It was a hut like house belonging to the accused. Inside the hut, he found a girl's dead body lying on the floor. He noticed that there was one woman and a girl present near the dead body. He asked the woman as to what had happened and then she narrated him certain incident. Upon which, he lodged the complaint. An offence of murder was registered. Investigation started. The dead body was sent for post-mortem. On the same day at about 4.30 p.m., police arrested the accused and took in charge his clothes. These clothes were sent for chemical analysis.

5. P.W.6 is Dr. Rajendra Vairagar who was the autopsy surgeon stated that he found following injuries on the dead body.

"CLW left side of occipital region of size of 1 & $\frac{1}{2}$ inch x $\frac{1}{2}$ inch.

On internal examination of the head he found following injuries as per Column No.19 of the Post Mortem report :-

i) CLW occipital region left side 1 & $\frac{1}{2}$ inch x $\frac{1}{2}$ inch which was bone deep.

ii) There was subaponeurotic haematoma over the

occipital region of the size 2 inch x 2 inch.

iii) Brain was deeply congested with intra-cerebral bleeding present. Further, he found that both lungs were congested with blood stained froth. On examination of the Heart – left side of the heart was found empty and right side chamber contained blood clots."

. The Medical Officer also opined that probable cause of death was due to shock due to intra-cerebral bleeding due to Head injury.

6. P.W.1 is Saida is the victim's mother. She stated that during the night of 30th April, 2015, she and her other family members were sleeping outside the house whereas deceased Gulaabsa slept inside the house. In the morning at about 6.00 a.m. she woke up for getting water stored from the municipal water tap. She entered the house and found her daughter dead.

7. In addition to this witness P.W.5 is Nargis, sister of the deceased. She stated that she, her parents, brothers and sisters were staying in the house, but she did not disclose as to how Gulaabsa, her sister died. She thus did not support the prosecution case.

8. The prosecution declared both Saida (P.W.1) and Nargis (P.W.5) the material witnesses as hostile and

cross-examined them. They were shown portions of their statements made under S.161 of Cr.P.C. Incriminating the accused. They denied having made those statements. But P.W.7-Police Sub-Inspector Chavan during her deposition vouched for correctness of those parts of statements saying it was she who recorded their statements as per their narration during the investigation.

9. The learned Sessions Judge of the Trial Court on the basis of this evidence convicted the accused mainly on the ground that the P.W.1 & 5 had disclosed before the police that it was the accused who had committed this murder. The learned Sessions Judge placed reliance on parts of police statements which were proved through deposition of the Investigating Officer. P.W.7-Police Sub-Inspector Chavan vouched for correctness of those parts of statements. The learned Sessions Judge then went on to award death sentence to the accused.

10. The first question that requires to be decided is – whether the prosecution could prove its case against the accused? Our answer to this question is in negative.

11. All that the prosecution could bring on record is that during night of 30th April, 2015, all the family members except deceased Gulaabsa slept outside their hut

like house in the court-yard. Gulaabsa on the other hand slept inside the house. In the morning the family members found Gulaabsa dead. It was clearly a homicidal death. The prosecution could not prove even on probability as to who could have killed Gulaabsa. The prosecution could not show that it was accused who was also inside the house during the night. The prosecution has miserably failed to prove its case. The reason for failure of the prosecution is because main witnesses Saida and Nargis turned hostile to the prosecution. In their statement to police they had disclosed that they had seen the incident etc. But at the time of deposition, they kept mum on the same. What they have stated to police is not substantive evidence. What is stated to the Court on oath is substantive evidence. They have denied all suggestions given to them in cross-examination by learned A.P.P. The statements to police were sought to be proved. In-deed what has been stated on oath by P.W.7 in her deposition is substantive evidence only to the extent that she had occasion to record Saida's and Nargis's statements, where they disclosed as to how the incident had taken place. Whatever, the Police Sub-Inspector heard from the witnesses was hearsay and therefore, she could not have substantiated it through her deposition. She could only vouch for the statements under section 161 of Cr.P.C., which she recorded was

truthfully recorded. Her deposition thus would protect her position as Investigating Officer. But, such deposition of Investigating Officer would not take prosecution case further. The Investigating Officer's deposition is not substantive evidence on the incident because she was not an eye witness. The reason why the prosecution brings on record the marked portions of statement is to show that the investigation was in the correct line and that the prosecution witness who turned hostile had resiled from earlier statement. On the basis of such cross-examination, the prosecution can urge the Court to initiate perjury proceedings against the witness. But beyond that the prosecution cannot take any other advantage. Unfortunately, the learned Sessions Judge did not realize the difference between the substantive evidence and the statement made to police under section 161 of the Cr.P.C.

12. In many judgments the scope of sections 161 and 162 of Cr.P.C. is explained. In the case of **V.K. Mishra & Anr. Vs. State of Uttarakhand & Anr., (2015) 3 MLJ (Cri) 727 (SC)**, the Supreme Court reiterated the law on this subject. In order to further elaborate it, we would quote following passages from the judgment.

16. Court cannot *suo moto* make use of statements to police not proved and ask question

with reference to them which are inconsistent with the testimony of the witness in the court. The words in Section 162 Cr.P.C. "if duly proved" clearly show that the record of the statement of witnesses cannot be admitted in evidence straightway nor can be looked into but they must be duly proved for the purpose of contradiction by eliciting admission from the witness during cross-examination and also during the cross-examination of the investigating officer. Statement before the investigating officer can be used for contradiction but only after strict compliance with Section 145 of Evidence Act that is by drawing attention to the parts intended for contradiction.

17. Section 145 of the Evidence Act reads as under:

145. Cross-examination as to previous statements in writing.- A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

13. The prosecution should, therefore, fail. The appeal filed by the appellant/accused deserves to be allowed and the confirmation case filed by the State deserves to be answered in the negative. The reference is answered accordingly.

O R D E R

1. Criminal Confirmation Case No.2 of 2016 is dismissed.
2. The Criminal Appeal No. 295 of 2016 is allowed.
3. The judgment and order dated 16.04.2016 passed by learned Sessions Judge, Ahmednagar in Sessions Case No. 193 of 2015 is hereby quashed and set aside.
4. The appellant/accused is acquitted of the offences with which he was charged. Fine amount, if paid by the appellant/accused be refunded to him.
5. The appellant/accused be set at liberty if not required any other offence.
6. In view of disposal of Criminal Appeal No.295 of 2016, connected Criminal Application No. 2482 of 2016 for bail filed by the appellant/accused does not survive and stands disposed of.

[V.L.ACHLIYA, J.]**[A.V.NIRGUDE, J.]**