

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

CRIMINAL APPEAL NO.800 OF 2015

1) Pandurang S/o Shankar Rajbhoj,
Age-33 years, Occu:Labour,

2) Shobhabai w/o Shankar Rajbhoj,
Age-54 years, Occu:Labour,

Both R/o-Bhogaon, Tq-Palan,
District-Parbhani.

...APPELLANTS

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr.A.M. Gaikwad Advocate for Appellants.
Mr.A.M. Phule, A.P.P. for Respondent – State.
...

**CORAM: SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE : 4th JANUARY, 2023

JUDGMENT [PER SMT. VIBHA KANKANWADI, J.] :

1. Present Appeal has been filed by the original accused persons challenging their conviction by the learned Additional Sessions Judge, Gangakhed, District-Parbhani on 7th September 2015 in Sessions Trial No.24 of 2012, by holding them guilty of

committing offence punishable under Section 302 read with Section 34 of the Indian Penal Code. Appellants – accused have been sentenced to undergo imprisonment for life and to pay fine of Rs.1,000/- (Rupees One Thousand) each, in default to suffer rigorous imprisonment for six months each.

2. The prosecution case is that deceased Sheelabai was married to one Nagorao Rajbhoj about a month prior to 16th May 2011. Appellant No.1 is her brother-in-law and appellant No.2 is her mother-in-law. The offence came to be registered on the basis of dying declaration given by deceased Sheelabai and it was recorded by Police Head Constable Shaikh, attached to Civil Hospital Police Chowki from Wajirabad Police Station, Nanded. Sheelabai was admitted around 4.30 p.m. on 16th May 2011 with 98% superficial to deep burns. It is the prosecution story that after her admission when Medico Legal Case was intimated to the Police Outpost situated at hospital itself; Police Head Constable Shaikh went to the burn ward, sought opinion from the doctor who was treating Sheelabai and after it was found that she was in a fit state to give statement, had recorded her dying declaration. In her dying declaration Sheelabai had told that after her marriage she resided for about fifteen days at Bhogaon, Taluka-Palam, District-Parbhani and at that time there

was quarrel between Sheelabai and her brother-in-law Pandurang i.e. appellant No.1. According to her, appellant No.1 had told her as well as her husband Nagorao that they should reside separately and then she says that she was assaulted by appellant No.1 and then her husband Nagorao had separated them. At that time, appellant No.2 had also insisted that Sheelabai and her husband should reside separately. Sheelabai states that since then both the appellants used to pick up quarrel with her and used to abuse. Her husband Nagorao as well as her father Narayan Chokhaji Kapure had gone for lunch (*Bhandara*) of Lord Maruti on 16th May 2011. Sheelabai was alone at home and at that time both the appellants suddenly poured kerosene on her person and set her on fire. She raised voice and thereafter, she was brought to Government Hospital, Nanded in a Jeep.

3. After such dying declaration was taken, offence on the basis of same was registered vide Crime No.34 of 2011 on 17th May 2011. However, it appears that by that time i.e. registration of the crime, Sheelabai had expired and therefore, the registration of the crime is under Section 498-A, 307, 302, 504 of the Indian Penal Code and investigation was undertaken.

4. During the course of investigation, panchnama of the spot, inquest panchnama were prepared. The dead body was sent for postmortem. Statements of the witnesses were recorded. Certain articles those were seized at the time of spot panchnama, were sent for chemical analysis. Postmortem report was collected and after completion of the investigation, charge-sheet was filed.

5. Accused persons were on bail. After securing their presence, learned Additional Sessions Judge has framed charge. When both the accused pleaded not guilty, trial has been conducted. The prosecution has examined in all 13 witnesses to bring home the guilt of the accused and after considering the evidence on record, learned Additional Sessions Judge held the appellants guilty of committing offence punishable under Section 302 of the Indian Penal Code, however, acquitted them from the offence punishable under Section 498-A read with Section 34 of the Indian Penal Code. The said conviction is under challenge in this Appeal.

6. Heard learned Advocate Mr. Gaikwad appearing for the appellants and learned APP Mr. Phule appearing for the respondent – State.

7. It has been vehemently submitted on behalf of the appellants that the learned trial Judge has not appreciated the evidence properly. It was not considered that the deceased and Nagorao got married only one month prior to the date of incident and out of that period, she was at the matrimonial home for fifteen days only. Why the appellants were allegedly insisting that deceased and her husband should reside separately, has not been said by any of the witness. Husband of the deceased i.e. Nagorao has not been examined at all. PW-1 Narayan, who is the father of the deceased, was in the same village on the date of incident. He is giving a different story which was not at all told by the deceased in the dying declaration. PW-1 Narayan says that he had gone to Maruti temple around 12.00 noon and thereafter, he says that he was informed about the fact of sustaining of burns by his daughter and therefore, he says that he came to house of Sheelabai. No doubt he has stated about the alleged oral dying declaration, but said oral dying declaration does not say the reason behind the act. Further, important point that Narayan met to police on two occasions since the time of admission of deceased to Civil Hospital, yet he had not lodged any report. Further, he has categorically stated that accused

No.2 was not present in the house at the relevant time. Even as regards accused No.1 is concerned, Narayan has initially stated that accused No.1 had gone to the field in the morning, but he again volunteers that accused No.1 has returned from the field before they had gone to Maruti temple. Narayan has stated that he is unable to remember that he has stated before the Police that two days prior to the incident accused No.2 was not at home and she had gone to Parbhani for Harinam Saptah. When presence of accused No.2 has not been told and nothing had happened in presence of witness Narayan between the accused persons and deceased in the morning, it is hard to believe that all of sudden such act would have been committed.

8. Learned Advocate appearing for the appellants has further stated that the dying declaration Exhibit-33 cannot be said to have been properly proved. Though PW-3 Dr. Vidya Zine, who gave the endorsement as stated, about the alleged consciousness of Sheelabai, her remark is so cryptic and it has been given in the margin of the first page only. There is no endorsement at the end of the dying declaration indicating that till the statement was recorded, Sheelabai was conscious and oriented. PW-4 Mohd. Ibrahim Shaikh is the then Police Head Constable who had recorded dying declaration Exhibit-33 and in

his cross-examination he has admitted that he has not attested the thumb impression of the patient either he himself or by the doctor on Exhibit-33. There was also no reason for not giving certificate below the statement i.e. dying declaration Exhibit-33 stating that the said statement was recorded as per her say, read over to her and she had admitted its correctness. PW-4 Shaikh admitted that Sheelabai had received burn injuries to her both hands. Most importantly, though in the examination-in-chief he has stated that he has recorded the statement, indicating thereby Exhibit-33 is in his handwriting, in the cross-examination he states that Exhibit-33 is in the handwriting of the writer and not in his handwriting. The said writer was never examined by the prosecution. Therefore, Exhibit-33 is the doubtful document. PW-5 Shivaji Diwate and PW-6 Sukhdeo Dhage are the panch to the spot panchnama and seizure panchnama, however, they have turned hostile. PW-7 Anil Kapure is the panch to the inquest panchnama. In his cross-examination, PW-7 Anil has admitted that hands of Sheelabai at the backside had received burn injuries but the portion of the palm was not burnt. This statement has some significance as no such distinguishing factor is noted in the inquest panchnama Exhibit-41, rather it says, as regards both the hands are concerned, that those had received

complete burn injuries. PW-8 Lalba Solanke is the neighbour of the accused, however his testimony is limited to the extent that he had rushed towards the temple after he found fire in the house of Nagorao and had informed Nagorao as well as father of the deceased about the incident. PW-9 Sheshrao Kapure has turned hostile. PW-10 Dr. Maroti Dake is the medical officer who conducted the autopsy and from his testimony, it can be seen that both the upper limbs had received injuries to the extent of 9% each. PW-11 Laxmibai is the mother of the deceased. She was admittedly not in the village where the matrimonial home of the deceased is situated. PW-12 Mangesh is the Police Naik who had taken the seized articles to Chemical Analyzer, which shows that there is delay in forwarding the seized articles for chemical analysis. PW-13, the then PSI Ramchandra Adkine, is the investigating officer. Therefore, there was no cogent evidence adduced by the prosecution which can be said to have proved the offence beyond reasonable doubt, still the learned Additional Sessions Judge has convicted the appellants. Learned Advocate submits that the said conviction deserves to be set aside.

9. Per contra, the learned APP vehemently submitted that the trial Judge has properly appreciated the evidence. At the time of recording dying declaration, PW-4 Shaikh had consulted

PW-3 Dr. Vidya Zine, the medical officer. After medical officer found Sheelabai in a fit state to give statement, the endorsement to that effect was given at about 5.20 p.m. on 16th May 2011 and thereafter the dying declaration Exhibit-33 was recorded. The testimony of PW-4 Mohd. Ibrahim Shaikh and PW-3 Dr. Vidya Zine corroborate each other and therefore, the said dying declaration was reliable. A person will not speak lie on the death bed and therefore, such statements have been made exception and are made admissible under Section 32 of the Indian Evidence Act. Apart from the said dying declaration which was in the writing, it has come in the testimony of PW-1 Narayan – father of the deceased that Sheelabai had given oral dying declaration to him when he went to the matrimonial home after getting the information. He was the person who had hired the Jeep and taken Sheelabai to Nanded for treatment. When PW-1 Narayan found that Sheelabai had received burn injuries but still alive, he asked her about the incident and then it was told by Sheelabai to him that her mother-in-law and brother-in-law set her on fire. That oral dying declaration is also admissible. Though the panch to the spot panchnama have turned hostile, yet the testimony of PW-7 Anil Kapure – panch to the inquest panchnama and PW-10 Dr. Maroti Dake, who conducted the

autopsy, would show that Sheelabai had received severe burn injuries. The percentage that has been given in postmortem report is 100% and the cause of death is 'shock due to burns'. Testimony of PW-11 Laxmibai Kapure - mother of the deceased would show that deceased was harassed and ill-treated. Therefore, there was sufficient evidence against the appellants which was considered and appreciated by the learned trial Judge before holding them guilty of committing murder of Sheelabai. The appeal deserves to be dismissed.

10. It is trite law that sole dying declaration can be made basis of conviction, if at all it qualifies the test of truthfulness, voluntariness and if it is free from suspicion and doubt. There are various rulings of Hon'ble Apex Court regarding evidentiary value of dying declaration. It has been held time and again that accused being deprived of cross-examination, Court has to be very careful and cautious while assessing dying declaration. It is expected that Court should be on guard that the statement of deceased was not a result of either tutoring, prompting or product of imagination. It is further expected of the Court to satisfy itself that the deceased was in a fit state of mind to give dying declaration. In the case of ***Paniben Vs. State of Gujarat; (1992) 2 SCC 474***, the Hon'ble Supreme Court has

laid down the principles governing dying declaration, which are as follows :-

- (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.
- (ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration.
- (iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration.
- (iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence.
- (v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected.
- (vi) A dying declaration which suffers from infirmity cannot form the basis of conviction.
- (vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected.
- (viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.
- (ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail.
- (x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon.

11. The above principles are affirmed, relied, summarized and applied in various other rulings, namely ***Surinder Kumar Vs. State of Punjab, (2012) 12 SCC 120, Madan Vs. State of Maharashtra; (2019) 13 SCC 464.***

12. Similarly, very recently Hon'ble Apex Court in the case of ***Ganpat Bakaramji Lad Vs. State of Maharashtra, 2018 ALL MR (Cri) 2249,*** has also reiterated certain tests to be put to use before accepting that dying declaration. It has been held thus:-

“ In respect of the dying declaration, the general principles to be kept in mind are

(i) that it is not a weaker kind of evidence and it stands on the same footing as other evidence, and (ii) that there is no absolute rule of law that it cannot form the sole basis of conviction, unless corroborated by other independent evidence. The first step required to be taken in every case, is to consider the three-fold questions as under :

(a) Whether a declarant had an opportunity to observe and identify the assailant or the accused?,

(b) Whether a declarant was in a conscious and fit condition at the time of recording the statement?, and

(c) Whether the Court is so convinced of the truthfulness and voluntary nature of the statement of the declarant that it inspires confidence to such an extent that it can be the sole basis of conviction?

The absence of an endorsement in the dying declaration - (a) by a doctor regarding the fitness of mind of the declarant, or (b) that the statement was read over and explained to the declarant, who found it to be correct, cannot be the reason for holding that the dying declaration is unacceptable, if the Court is otherwise satisfied that such a dying declaration inspires confidence.

The rejection of the dying declaration cannot be on the solitary instance of absence of endorsement of reading over and explaining the declaration and the declarant confirming it to be true. It will always depend upon the facts and circumstances of each case. We are clearly of the view that it will be a cumulative effect of the facts and circumstances of the case, which will determine such issues. The presence or absence of a particular fact or circumstance or a situation in a given case may become significant, whereas it may become insignificant in another case. The mode and manner of appreciation of evidence differs from case to case, though the principles of appreciation of evidence may be the same. The perception of the matter in each case and the manner of the appreciation of evidence differs

from person to person. Hence, there cannot be a strait-jacket formula or hard and fast rule which can be laid down.

Neither the provision of Section 32(1) of the Evidence Act nor any decision of the Apex Court prescribe any particular format in which a dying declaration is to be recorded. It can be oral as well as written. In case of oral dying declaration, the question of existence or insistence upon reading over and explaining the declaration to the deceased does not arise. If that be so, how can such insistence be in respect of written dying declaration? It is not the requirement of any statute or of the decision of the Apex Court that a written dying declaration must contain a column to be duly filled in that the statements of the declarant are read over and explained to him and that he found it to be true and correct. Such a requirement therefore cannot be held as mandatory.

The observations in the cases of ***Shaikh Bakshu 2007 ALL SCR 2407*** and ***Kantilal (2009) 12 SCC 498***, are based on the facts and would not, therefore, constitute a precedent or a *ratio decidendi* or even an *obiter dicta* to hold that bearing such an endorsement in the dying declaration is must. In our view, it would be unjust to reject the dying declaration only on such hyper technical view, which hardly of any help in the matter of criminal trials. ”

13. Now, it is required to be noted that the prosecution case is based on the dying declaration and therefore the evidence has to withstand the test. Even if apparently there appears to be corroboration in the testimony of PW-4 Shaikh and PW-3 Dr. Zine, we are required to consider their cross-examination along with other documents on record. PW-3 Dr. Zine states that Sheelabai was admitted in the hospital on 16th May 2011 at about 4.30 p.m. She examined the patient and gave emergency treatment. After registering the Medico Legal Case, it was referred to police outpost situated in the hospital itself. She has stated that Sheelabai had suffered 98% superficial to deep burns. Unfortunately, the prosecution has not produced and proved the bed-ticket which would have mentioned the progress since the admission of the patient till the end. However, Dr. Zine states that when police showed intention to record the statement of the patient, she examined Sheelabai, found her to be conscious and gave endorsement to that effect. In her cross-examination Dr. Zine has stated that she is unable to state as to why she had not endorsed that the patient was well oriented. What she has stated is only that the patient is conscious. Definitely, consciousness is different from orientation. After these questions were asked, PW-3 Dr. Zine has also stated that the

patient had sustained 98% burns, therefore, she was not physically fit to give her statement. But again this witness volunteered by saying that patient was conscious and was willing to make a statement. These answers rather create doubt, as to whether really Sheelabai was in a fit state to give the statement. Another glaring fact is that after the alleged dying declaration was reduced in writing, there is no endorsement at the end by the concerned doctor stating that the patient was conscious and in the fit state to give the statement throughout the time. PW-3 Dr. Zine in her cross-examination has stated that there was no reason for not giving the endorsement of consciousness of the patient on the conclusion of her statement.

14. At this stage itself, perusal of testimony of PW-4 Shaikh would reveal that after he had allegedly reduced the statement of patient as per her say, he says that he has read over the same to the patient and then obtained thumb impression of left thumb of the patient on the said dying declaration Exhibit-33. To the surprise, Exhibit-33 at the end below the thumb mark gives endorsement that it is the thumb mark of the right thumb of Sheelabai. So this is contrary to what he has stated in the examination-in-chief. The position of law as regards the dying declaration is concerned, it is not always necessary that there

should be an endorsement by a doctor regarding the mental state and the fitness of the patient to give the statement. Even the person who is recording it, can assess the same and in that connection PW-4 Shaikh, in his cross-examination, has stated that he had not put questions in respect of the facts prior to the incident. He has not put questions in respect of her maternal relatives. According to him, he had put certain questions to Sheelabai to see her ability to make statement, but Exhibit-33 does not say so. Further, in the cross-examination, he has admitted that there is no reason for not attesting the thumb impression of the patient by the doctor or by himself. This is in reference to the fact that the thumb mark on Exhibit-33 though stated to have been of whose it is, but it is not attested. That means there is no signature below the identification of the thumb mark. Further, he says that there was no reason for not giving certificate below the statement that it was recorded as per the say of Sheelabai, read over to her and she admitted its correctness. In fact this was the important aspect in the entire matter. Whatever has been recorded, ought to have been read over to the maker and approval ought to have been sought, then only there is question of taking the thumb mark. Why this has not been reflected in Exhibit-33, is not answered by him. Further,

he has not mentioned the time of commencement of the statement and conclusion of the statement. So also, as aforesaid, he has not obtained the endorsement about the fitness of Sheelabai at the end or conclusion of the statement.

15. Another aspect to be noted is that both these witnesses i.e. PW-3 Dr. Zine and PW-4 Shaikh have admitted that Sheelabai has sustained burns to both of her hands. Here itself, if we consider the testimony of the autopsy doctor PW-10 Dr. Maroti Dake and the postmortem report Exhibit-50, then it can be seen that both upper limbs of the deceased have received 9% burns. That means on all over her upper limbs there were burn marks. Then how the thumb mark would have been taken, is a question. Inquest panchnama also says the same thing. Even for the sake of arguments we take that Exhibit-33 was recorded somewhere around 5.20 p.m., at least it would have been taken 15 to 20 minutes to complete the recording and obtaining of the thumb mark. It appears that Sheelabai was declared dead around 19.30 hours i.e. 7.30 p.m. and the inquest panchnama appears to have been drawn between 21.30 to 22.15 hours on the same day. Still when the inquest panchnama Exhibit-41 was drawn, there is no mention of ink either to her right thumb or left thumb. So, it raises doubt.

16. As aforesaid, the bed-ticket was not produced and proved and therefore, whether prior to dying declaration Exhibit-33 any sedative was given or not has not been brought on record. In the cross-examination of both the doctors i.e. PW-3 Dr. Zine and PW-10 Dr. Dake, it has been brought on record as to what could be the general condition of the patient sustaining 98 to 100% burns. No doubt, no general statement can be made that it would have been impossible for a patient sustaining 100% burns, to speak immediately after the incident. But then the prosecution should in such cases rather bring on record a specific circumstance that though the patient had sustained 100% burns, he or she was in a position to speak and in a fit state to give statement. That could have been brought on record in this case, more particularly, if the bed-ticket would have been produced. In view of these reasons, we are of the opinion that dying declaration Exhibit-33 was not reliable and not giving true account of the happenings.

17. We have also considered the fact that for a period of about 15 days out of one month from the date of marriage, Sheelabai was at her father's place. She had come to stay again with the accused persons about 15 days prior to the incident. During that

period of 15 days, it is hard to believe that she would have been ill-treated to such an extent by the appellants that would have amounted to cruelty as contemplated under Section 498-A of the Indian Penal Code. The learned trial Judge has acquitted both the appellants from the offence punishable under Section 498-A of the Indian Penal Code and the State has not filed any appeal challenging that finding. Important point to be noted is that as per PW-1 Narayan, when Sheelabai had made complaint against the appellants stating that they were asking her as well as her husband to reside separately, he had gone to the house of Sheelabai i.e. her matrimonial home a day prior to the incident. He states that he made inquiry with the appellant as to why they had beaten Sheelabai. It was told by the accused to him that Sheelabai does not know how to perform work and she was suffering from fever. This reason is different from what was told by Sheelabai to him, that has caused him to come down to her matrimonial home. But he does not give further details. This shows that the circumstances were not such that both the appellants would think of eliminating Sheelabai. It has not come on record in the prosecution evidence that when the appellants were asking deceased and her husband to stay separately, it was resisted by them which had then resulted in quarrels. There

appears to be absolutely no reason at all which can be taken as a circumstance prompting the accused persons to think of eliminating deceased and surprisingly the husband of the deceased has been kept away from the witness box by the prosecution for the reasons best known to it. Merely asking the couple to reside separately, cannot be considered as cruelty as contemplated under Section 498-A of the Indian Penal Code and then it would have prompted the appellants to think of committing murder of deceased Sheelabai. Therefore, the reason given in dying declaration Exhibit-33 does not appear to be sound reason.

18. As regards oral dying declaration is concerned, which is further weak type of evidence, PW-1 Narayan says that when he found that Sheelabai was still alive though received burn injuries, when asked, she informed him that her mother-in-law and brother-in-law had set her to fire. The obvious question for PW-1 Narayan to ask further was about the reason, but he is silent on that point. He does not say that though he tried to ask Sheelabai about the reason, she could not speak or any other answer that was given. Such oral dying declaration cannot be said to be trustworthy at all.

19. One more glaring fact giving death blow to the prosecution case is the admissions given by PW-1 Narayan in his cross-examination. He has admitted that Sheelabai was ill, therefore, since marriage till the incident she had resided with them for maximum period. If this is so, why the appellants would think of committing her murder, would be a mystery and the evidence led by the prosecution does not solve the same. He has also stated that on the day of his deposition he has stated it for the first time that accused Nos.1 and 2 had set Sheelabai on fire. That means there was no oral dying declaration to him. Thereafter he claimed ignorance, as to whether he has stated before police that the mother-in-law of his daughter was not at home for about two days prior to the incident and she had gone to Parbhani for Harinam Saptah. But then PW-1 Narayan admitted that on the day of incident accused No.2 i.e. mother-in-law was not present in the house. If this is to be accepted, then oral as well as written dying declaration will have to be discarded. As regards accused No.1 is concerned, PW-1 Narayan has stated that when he was along with Nagorao i.e. husband of the deceased and then went to Maruti temple, at that time accused No.1 was not at home and he had gone to the field in the morning. Thereafter, may be after realizing the mistake, he has

volunteered that accused No.1 returned from the field before they left the house to go for meals. Thus, it can be seen that he was changing his version, just to suit his earlier statement. Testimony of such person is absolutely not believable and therefore, it is creating doubt over the written dying declaration Exhibit-33, which could not have been made the basis for conviction by the learned trial Judge.

20. The testimony of PW-2 Ujwala Khade - sister of deceased and PW-11, her mother Laxmibai need not be considered here in the appeal as they were testified to support the allegations in respect of ill-treatment, however, the trial Court has acquitted both the appellants from that offence. PW-8 Lalba Solanke is the neighbour of appellants – accused. He had noticed fire from the house of accused and therefore, rushed towards the temple to bring Nagorao and PW-1 Narayan. But then he has not stated as to whether Sheelabai was alive at that time and had given oral dying declaration to the father. Surprisingly, he was not declared hostile and there is no cross-examination by the learned APP. Other witnesses are the police witnesses and the hostile witnesses who were panch to the spot panchnama. Even if for the sake of arguments we take the spot panchnama as proved, it is to be noted that a stainless steel utensil i.e. "*Kalashi*" (which is

usually used for storing water), was found at the spot containing some quantity of kerosene. How and under which circumstances there could have been kerosene in a *Kalashi* has not been tried to be unearthed or discovered by the investigating officer.

21. Taking into consideration the reasons stated above, we are of the opinion that in fact there was nothing which can be said to have proved the offence beyond reasonable doubt before the learned trial Judge. It is not the case that merely because the second view is possible, this Court is taking second view. In fact, we have demonstrated as to how the learned trial Judge erred in appreciating the evidence and has not taken into consideration the legal requirements and therefore, we are constrained to interfere.

22. Under the said circumstance, the Appeal deserves to be allowed. Hence we pass the following order:-

ORDER

(I) Criminal Appeal stands allowed.

(II) The conviction awarded to the appellant No.1 - Pandurang S/o Shankar Rajbhoj and appellant No.2 - Shobhabai W/o

Shankar Rajbhoj by learned Additional Sessions Judge, Gangakhed, District-Parbhani in Sessions Trial No.24 of 2012 on 7th September 2015 under Section 302 read with Section 34 of the Indian Penal Code, stands set aside.

(III) Fine amount, if any, be refunded to the appellants after the statutory period.

(IV) Both the Appellants be set at liberty, if not required in any other case.

(V) It is clarified that there is no change in the order passed by the learned Additional Sessions Judge, Gangakhed, regarding disposal of Muddemal.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE