

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 1162 OF 2019

Munnabi d/o Shaikh Chand,
Age : 55 Years, Occu. : Agri.,
R/o. : Ardhamasala, Tq. Georai,
At present, Sathe Nagar, Georai,
Tq. Georai, Dist. Beed.

... Appellant.

Versus

1. The State of Maharashtra,
Through P.S.O. Talwada P.S.
Tq. Georai, Dist. Beed.
2. Amin Abdul Pathan,
Age : 64 Years, Occu. : Agri.,
R/o. Hirapur, Tq. Georai, Dist. Beed.
3. Gaffar Amin Pathan,
Age : 40 Years, Occu. : Agri.,
R/o Hirapur, Tq. Georai, Dist. Beed.
4. Ayubkhan Gulmohammad Pathan,
Age : 54 Years, Occu. : Business,
R/o. Dilavar Nagar, Beed, Tq. & Dist. Beed.

} *Appeal abated as
against Resp. No.4
vide order dated 08.11.2019*

... Respondents

(Resp. Nos.2 to 4 Orig.
Accused)

WITH

APPLICATION FOR LEAVE TO APPEAL BY STATE NO. 255 OF 2019

The State of Maharashtra
Through Police Station Officer,
Talwada Police Station,
Tq. Georai, Dist. Beed.

... Applicant
(Original Complainant)

Versus

1. Amin Abdul Pathan,
Age : 60 Years, Occu. : Agriculture,
R/o. Hirapur, Tq. Georai,
Dist. Beed.
2. Gaffar Amin Pathan,
Age : 36 Years, Occu. : Agriculture,
R/o Hirapur, Tq. Georai,
Dist. Beed.
3. Ayubkhan Gulmohammad Pathan,
Age : 50 Years, Occu. Business,
R/o. Dilavar Nagar, Beed.
Tq. Beed Dist. Beed.

... Respondents
(Orig. Accused)

...

Mr. Vilas P. Sawant, Advocate for Appellant in Criminal Appeal 1162/2019.

Mr. R. V. Dasalkar, APP for Respondent No.1 in Criminal Appeal 1162/2019
and for Applicant in ALS/255/2019.

Mr. A. R. Hange, Advocate for Respondent Nos.2 and 3 in Criminal Appeal
1162/2019 and Respondent Nos. 1 and 2 in ALS/255/2019.

...

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

DATE : 25.01.2023

ORDER (PER ABHAY S. WAGHWASE, J.) :

1. Both State as well as real sister of deceased Taherabi are hereby questioning the judgment and order of acquittal dated 30.06.2017 passed by learned Sessions Judge, Beed in Sessions Case No. 153 of 2013, thereby seeking setting aside the same. Since the appeal preferred by real sister of

deceased is directed against order of acquittal, and the application for leave to file appeal by State also being arising out of the same judgment and order of acquittal, both the proceedings are dealt with jointly and decided by way of the common order.

2. Deceased Taherabi was admitted in hospital on account of severe burns. While undergoing treatment, her statement was recorded and on the strength of the same, police registered crime. After deceased succumbed to the burns, crime was converted into Section 302 r/w 34 of the Indian Penal Code (IPC) and after completion of investigation, charge sheet seems to have been filed followed by trial and by judgment and order dated 30.06.2017, learned Sessions Judge, Beed was pleased to acquit all the three accused i.e. accused no.1 Amin, accused no.2 Gaffar and accused no.3 Ayubkhan. In the above backdrop, present proceedings are instituted.

3. Learned Advocate for the appellant would take us through the record and point out that deceased Taherabi was the real sister of the appellant and she was residing at the house of appellant at village Ardhamasala. That, on 14.04.2013 respondents-accused asserted claim over the land behind the house of appellant. Deceased resisted being caretaker of the landed property and prevented entry of accused persons in the said land. That, deceased was lifted by accused no.1 Amin and after taking her into the house, kerosene was

sprinkled over her. At such time, accused no.3 Ayubkhan instigated the co-accused. Accused no.2 Gaffar ignited match stick and set Taherabi on fire, as a result of which she suffered burns.

4. Learned Advocate for the appellant pointed out that there was ample oral and documentary evidence about accused being responsible for setting deceased on fire and medical expert had confirmed death to be caused by homicidal burns, but the same has not been appreciated. It is further pointed out that there were two dying declarations at the instance of Taherabi wherein role of each of the accused was clearly spelt out. However, learned Sessions Judge failed to consider the same. It is pointed out that cogent evidence of PW4 Munnabi, PW5 Rahenabi and PW6 Nisar was not correctly appreciated even when these witnesses have narrated about quarrel and motive behind the incident. That, evidence adduced by prosecution has not been scrutinized in view of legal requirement and because of non-application of mind and erroneous appreciation of evidence, all accused stood acquitted and hence the prayers.

5. As stated above, State also has preferred application for leave to file appeal bearing no. 255 of 2019. Learned APP also took us through the evidence as well as the judgment passed by learned trial court and tried to impress upon us that in spite of availability of strong evidence coupled with

dying declarations, the judgment of acquittal ought not to have been recorded. Learned APP submitted that settled legal position has also not been correctly applied while appreciating the dying declarations. There are erroneous findings in spite of strong evidence in that regard and therefore, it is submitted that, State intends to file appeal and prays for leave to do so.

6. We have extensively heard learned Advocate for the appellant as well as learned APP representing the State. At the same time, we have also visited the oral and documentary evidence before the learned trial Judge. Thereupon it is emerging that deceased herself has given statement which was made the basis of registration of crime on 14.04.2013. As many as 12 witnesses seem to have been relied by prosecution in support of their charge and case. **PW1** Nandu, **PW2** Prasad and **PW3** Shantilal seem to be *panchas* to seizure panchanama and spot panchanama. **PW4** Munnabi, **PW5** Rahenabi and **PW6** Nisar appear to be relatives of deceased. **PW8** Dr. Praveen issued certification of fitness to give dying declaration upon which **PW7** Police Head Constable Rathod recorded dying declaration **Exhibit 58**. **PW9** Naib Tahsildar Maske also seems to have recorded dying declaration **Exhibit 68**. **PW10** Dr. Dhoot is the autopsy doctor and **PW11** API Doiphode and **PW12** API Dhumal are the Investigating Officers.

7. First dying declaration Exhibit 58 shows that on 14.04.2013 at around 11.30 a.m. accused came to the deceased and claimed that they are owners of the land behind the house and there they commenced construction which was allegedly opposed by deceased. It is stated that at that time accused no.1 Amin, by uttering that old lady is causing interruption and she should be taken in the house and should be set on fire, poured kerosene on her person which was kept in the house in a liquor bottle. Accused no.3 Ayubkhan instigated to set her on fire and said that he will take care of the incident, whereas, it is alleged that, accused no.2 Gaffar ignited match stick and set her on fire. That, neighbours came and extinguished the fire. Sister of deceased, namely, Rehanabi, also came there and deceased was shifted to hospital where she gave statement and thereupon crime under Section 307 r/w 34 of IPC was registered by Talwada Police Station. This dying declaration seems to be recorded by PW7 Police Head Constable Rathod.

8. Now let us visit the second dying declaration Exhibit 72. It also seems to be recorded on 14.04.2013 wherein deceased allegedly informed that her sister owns 3½ acres land. One building is constructed over it and deceased was the caretaker of the land and said land has good market value. It is stated that accused had also asserted ownership in spite of having no registered document. It is stated in this dying declaration that victim was in the house at about 12.00 hours. All three accused came in the land for erecting partition.

Victim asked them to let her sister come first and sought registered documents. That, accused ignored her such request and they undertook construction work. It is stated that victim came back in the building. Thereupon, accused no.2 Gaffar entered the building and injured her by throwing stone. All three accused came in the building. There was a small bottle containing kerosene. Accused no.1 Amin poured kerosene on her person, accused no.2 Gaffar lighted the match stick and set her on fire. As people started gathering, accused persons ran away. In such statement, she has named all three accused to be responsible for the incident.

9. Therefore, on placing first dying declaration **Exhibit 58** and second dying declaration **Exhibit 72** in juxtaposition and on comparing it, there are variances in the same. On close scrutiny, it is revealed that in the first dying declaration it is stated about accused no.1 Amin uttering that old lady is unnecessarily causing interruption and that she should be taken in the house and should be set on fire. However, such utterance is completely missing from the second dying declaration recorded on the same day. Secondly, the alleged episode of accused no.2 Gaffar hurling stone is not narrated in the first dying declaration. It is also revealed that in the first dying declaration deceased had blamed accused no.3 Ayubkhan for instigating about setting her on fire and that he would take care of it. Such version is not stated in the second dying declaration. Even demand of registered document by deceased, as stated in the

second dying declaration, is also patently missing from the first dying declaration. It is also revealed that the version in the first dying declaration is that she was lifted by accused no.1 Amin and taken into the house. However, in the second dying declaration she speaks about she herself returning back to the house. Therefore, it is obvious that both dying declarations are not consistent with each other.

10. Now, if we turn to the oral evidence, it is also revealed that the first relative to reach the spot is PW5 Rahenabi. She seems to have given a very distinct version as she stated in her statement that accused nos. 1 to 3 came to the land along with their workers and asserted ownership. She appears to have improvised the version. Her version about extinguishment of fire is also in different format. PW4 Munnabi and PW6 Nisar seem to have reached after the occurrence. Timings given by them regarding the occurrence are also distinct. Presence of PW6 Nisar is not confirmed by PW5 Rahenabi. Therefore, even relatives are also not lending support to each other or corroborating on the actual occurrence. Therefore, with such quality of evidence, learned trial court seems to have concluded that the version of prosecution is doubtful and thereby accused came to be acquitted.

11. Before us, learned Advocate for the appellant could not point out any patent error or illegality committed by learned Sessions Judge while

appreciating the evidence on record. Even learned APP could not point out as to why there is need for preferring appeal at the instance of the State. Resultantly, finding no merit in the appeal as well as the application for leave to file appeal, both the proceedings are hereby rejected.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

VRE