

SHAIKH RAFIQ & ANR.

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v.

STATE OF MAHARASHTRA
(Criminal Appeal No. 169 of 2006)

JANUARY 22, 2008

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(P.P. NAOLEKAR AND MARKANDEY KATJU, JJ.)

Penal Code, 1860:

ss. 302/34 – Death of a man caused by burn injuries – Dying declaration implicating two of the accused accompanying his daughter-in-law, the third accused to his house, having poured kerosene on him and setting him ablaze – Motive stated to be refusal by deceased to keep the said daughter-in-law in his house – Dying declaration recorded by police officer containing no fitness certificate from Medical Officer – Conviction of two accused and acquittal of daughter-in-law by trial court – Affirmed by High Court – HELD: Considering the dying declaration and the manner in which it was recorded, the same cannot be relied upon – Besides, the prosecution case does not seem to be believable – The Two convicted accused had no direct relationship with daughter-in-law of deceased – Accused-appellants acquitted – Evidence Act, 1872 – Dying declaration.

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CRIMINALAPPELLATE JURISDICTION : Criminal Appeal No. 169 of 2006.

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From the final Judgment and Order dated 19.09.2005 of the High Court of Judicature of Bombay, Bench at Aurangabad in Criminal Appeal No. 509 of 2004.

Bina Madhvan (for M/s. Lawyer's Knit & Co.) for the Appellants.

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Sushil Karanjkar (for Ravindra K. Adsure) for the Respondent.

A The following Order of the Court was delivered :

ORDER

- B Appellants-accused No.1 Shaikh Rafiq, No. 2 Fatimbee along with accused No. 3 Jaibunisa were prosecuted for committing the murder of Noor Miya Mohd. Hussain. Appellant-accused Nos. 1 and 2 were convicted by the Sessions Court under Section 302 read with Section 34 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay a fine of Rs. 5000/- each; in default, to suffer R.I. for six months.
- C Accused No. 3 Jaibunisa was acquitted by the Sessions Court. The order of the Sessions Court was affirmed by the High Court in appeal. Aggrieved by the judgment passed by the High Court, the present appeal by way of special leave petition, has been preferred by the appellants.
- D 2. As per the prosecution case, on 3.11.2002 at about 12 noon, on receipt of intimation from the Medical Officer of Civil Hospital, P.W. 1 ASI Maroti proceeded to Burn Ward of hospital where he found that Noor Miya Mohd. Hussain had suffered burn injuries. PW.1 enquired from Noor Miya Mohd. Hussain (since deceased) about the incident to which he narrated that the appellant-accused Nos. 1 and 2 along with accused No. 3 Jaibunisa (daughter-in-law of deceased) had come to his house where appellant Nos. 1 and 2 insisted upon him to keep accused no.3 with him which was refused by him. Some altercations took place between Noor Miya Mohd. Hussain and the appellants and, thereafter, appellant No. 2 poured kerosene on the person of Noor Miya Mohd. Hussain and the appellant No. 1 set Noor Miya Mohd. Hussain on fire by igniting a match stick. The conviction of the appellants was solely based on the dying declaration recorded by P.W. 1 who deposed in his examination-in-chief that he recorded the dying declaration of Noor Miya Mohd. Hussain (since deceased) wherein the deceased told him that appellant Nos. 1 & 2 had come to his house along with his daughter-in-law accused No. 3 Jaibunisa and insisted upon him to keep accused No. 3 in his house. Upon his refusal, some
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altercations took place between the appellants and deceased and after that appellant No. 2 poured kerosene on the person of Noor Miya Mohd. Hussain (since deceased) and appellant No. 1 set him ablaze. He obtained the signature of Noor Miya Mohd. Hussain (since deceased) on the dying declaration after reading over the statement to him. The dying declaration also bears the signature of Medical Officer. In his cross-examination, he stated that he was serving in the Department for the last 30 years and was aware about the procedure of recording dying declaration and was aware of the fact that Special Executive Magistrates were also available for recording the dying declaration but he did not call any of them. It was further admitted by him that he was accompanied by the Medical Officer to the Burn Ward to identify Noor Miya Mohd. Hussain (since deceased) and he did not take the certificate of fitness from the Doctor whether Noor Miya Mohd. Hussain (since deceased) was in a position to give statement or not. He further admitted that he did not obtain endorsement of the Medical Officer about consciousness of Noor Miya Mohd. Hussain (since deceased) and he did not record the time of the dying declaration being recorded.

3. Considering the dying declaration and the manner in which it was recorded, we cannot rely upon the dying declaration recorded by PW 1. Apart from this fact, there is no other evidence on record to implicate the appellants in the incident.

4. Further, the story of the prosecution appears to be improbable. It is the case of the prosecution that the daughter-in-law of the deceased accompanied by the appellants came to his house and some altercations took place and thereafter appellant No. 2 poured kerosene on his person and appellant No. 1 set him ablaze by igniting match stick. We fail to understand as to why the appellants will carry kerosene to the house of the deceased when they had gone there to patch up the quarrel. We also fail to understand as to why the extreme step of setting Noor Miya Mohd. Hussain (since deceased) on fire would be taken by the appellants who had no direct relations with the daughter-in-law of Noor Miya Mohd. Hussain (since deceased).

A From the story put up by the prosecution, the whole incident, as is being alleged to have happened, is wholly improbable and cannot be relied upon.

B 5. For the aforesaid reasons, we are of the view that no case is made out by the prosecution and the appellants-accused are entitled for acquittal. The appeal is, accordingly, allowed. The orders of the courts below i.e. High Court and Sessions Court are set-aside. The appellants-accused shall be set at liberty if they are not required in any other case.

C R.P. Appeal allowed.