IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.306 OF 2015
ALONGWITH
CRIMINAL APPLICATION NO.1168 OF 2018

Barkaya Navashya Gaikwad
Age: 35 years, residing at: Dhundal Wadi, Khadkipad, Tal: Dahanu, Dist: Palghar presently undergoing sentence at Nashik Road, Central Prison, Nashik **..Appellant/Applicant**

Versus

The State of Maharashtra
(At the instance of Talasari Police Station). **..Respondent**

Mr. Aniket Vagal, Advocate for the Appellant/Applicant.
Ms. M. H. Mhatre, APP for the Respondent.

CORAM : B. R. GAVAI &
SARANG V. KOTWAL, JJ.
DATE : 13th AUGUST, 2018

ORAL JUDGMENT (Per B. R. Gavai, J)

1] Being aggrieved by the judgment and order 3rd February 2010 passed by the learned Additional Sessions Judge, Palghar in Sessions Case No.75 of 2008, thereby convicting the Appellant for the offence punishable under Section 302 of Indian Penal Code ("IPC" for short) and sentencing him to suffer imprisonment for life

and to pay fine of Rs.2000/- and in default to suffer rigorous imprisonment for six months, the Appellant has approached this Court.

2] The prosecution case in brief as could be gathered from the material placed on record is thus :-

The deceased was married to the Appellant before nine years. They were blessed with three children. It is the prosecution case that the Appellant had suspicion on the character of the deceased and on account of the same, he used to ill-treat her. On 17th May 2008 at around 8:00 p.m., when the deceased was at her house, the accused, who was working as mason came home and asked her as to where she had gone and who was accompanying her. He abused the deceased, made her fall on the ground and forced himself upon her. Thereafter he took out a brick and assaulted with the said brick. Then he dragged her out of the house on the platform in front of the door. He again assaulted her. It appears that immediately PW-1 – Mainabai Bhirare, mother of the deceased, PW-2 – Ravi Bhirare, brother of the deceased came to

know about the same. They came to the spot, arranged rickshaw and took the deceased to Talasari Hospital. However, since condition of the deceased was serious, she was asked to be taken to Cottage Hospital, Dahanu. Again thereafter she was shifted to KEM Hospital, Mumbai. It appears that on 23rd May 2018, her dying declaration came to be recorded by PW-4 - Police Head Constable Jashwant Valavi. On the basis of the said dying declaration, an FIR came to be registered for the offence punishable under Section 306 of IPC. The deceased succumbed to injuries on 26th May 2008 and as such, the offence was converted to one under Section 302 of IPC. Postmortem was conducted at KEM Hospital. At the conclusion of investigation, a charge-sheet came to be filed in the Court of JMFC, Dahanu. However, since the case was exclusively triable by the learned Sessions Judge, the same came to be committed to the learned Additional Sessions Judge, Palghar. The learned Trial Judge framed the charges for the offence punishable under Section 302 of IPC. The accused pleaded not guilty and claimed to be tried. At the conclusion of the trial, learned Trial Judge passed the order of conviction and sentence as aforesaid. Being aggrieved thereby, the present Appeal.

3] Learned counsel for the Appellant submits that the learned Trial Jude has grossly erred in relying on the evidence of PW-1 – Mainabai Bhirare, PW-2 – Ravi Bhirare and PW-3 – Vikas Gaikwad. He submits that even reliance placed by the learned Trial Judge on the so called dying declaration is without merit.

4] Learned APP on the contrary submits that there are three eye witnesses i.e. mother, brother and son of the deceased. She submits that their evidence is cogent, consistent and trustworthy. She further submits that, evidence of these witnesses is corroborated by the dying declaration below Exh.12 recorded by PW-4 – Jashwant Valavi. She further submits that, dying declaration is endorsed by PW-11 – Dr. Hemant Bhoye. She therefore submits that, no case is made out to interfere in the judgment and order passed by the learned Trial Judge and Appeal is liable to be dismissed.

5] With the assistance of learned APP and learned counsel for the Appellant, we have scrutinized the evidence on record.

6] The prosecution case basically based on evidence of PW-1 – Mainabai Bhirare, mother of the deceased, PW-2 – Ravi Bhirare, brother of the deceased and PW-3 – Vikas Gaikwad, son of the deceased and the Appellant. Perusal of evidence of PW-1 – Mainabai Bhirare would reveal, that one Shewantibai came to her in the evening and stated that Gulab was being assaulted by her husband. Thereafter she rushed to the house of Gulab. She saw that accused was beating Gulab. Accused was assaulting Gulab with pestle. The blows were on her head, legs, stomach etc. Gulab was lying on the ground. It could thus be seen, that in examination-in-chief, she implicates the Appellant. However, it will be relevant to refer to the following version of her cross-examination :-

> "It is true that I am having grudge against the accused due to demise of my daughter. It is true that therefore I state about the incident as Gulab assaulted by the accused."

It could thus be seen that whatever has been stated by her in examination-in-chief is watered down in her cross-examination.

7] In so far as PW-2 – Ravi Bhirare is concerned, his

evidence would show that his wife had told him that Gulab was being assaulted by the accused. He went to the house of Gulab. He found that Gulab was lying on the platform of house having injuries on the person. She was unconscious and thereafter he took her to the hospital at Talasari. Thus, from his examination-in-chief itself, it would reveal that he has not seen the incident. He has also admitted in his cross-examination that he has grudge against the accused because of death of his sister.

8] That leaves us with the evidence of PW-3 – Vikas Gaikwad, minor son of the deceased and the Appellant. Learned Trial Judge upon putting some questions to this witness and upon considering answers given by this witness, found that witness did not understand veracity of oath and no oath was administered to him. In his examination-in-chief he has stated that his father has caused death of his mother. His mother was assaulted by pestle and the mortar. He was present when his father assaulted his mother. It will be relevant to refer to his cross-examination, wherein he has stated thus :-

"It is true that I stated the facts as stated to me by the

> wife of my maternal uncle. It is true that as she stated me to depose accordingly I state that my father assaulted my mother."

It could thus clearly be seen that he has admitted that he was deposing as tutored by the wife of his maternal uncle. He further admits that, he was asked to depose that his father assaulted his mother and therefore he was deposing. As such, the evidence of this witness also does not support the prosecution case.

9] That leaves us with the dying declaration recorded by PW-4 – Jashwant Valavi. The evidence of PW-4 – Jashwant Valavi would reveal that on 22nd May 2008, he received a telephone call from Talasari Police Station to go to KEM Hospital informing admission of patient and to arrange for the statement. In dying declaration the deceased has given entire history from 17th May 2008 regarding the Appellant/accused committing rape on the deceased and thereafter assaulting her and thereafter taking her to Talasari Hospital, thereafter taking her to Cottage Hospital, thereafter taking her to KEM Hospital and thereafter she being operated. No doubt that PW-11 – Dr. Hemant Bhoye has stated that

he had operated the deceased on 22nd May 2008 and on the date of recording her statement he had given his opinion with regard to her fitness to make the dying declaration. However, it is to be noted that he himself has admitted that patient was not under his supervision, but was under the supervision of Dr. Abhay Dalvi. He has further admitted, that surgery was carried out for three hours. He has further admitted, that from patient history sheet Exh.27, it reveals that the patient was examined by Dr. Mansi Parikh and Dr. Archana Shinde at about 3 p.m. and according to said Exhibit, she was unable to speak due to fracture of mandible. It is further to be noted that even according to PW-1 – Mainabai Bhirare, right from the time she was taken from her house to Talasari Hospital upto her death, she was unconscious. Apart from that there are various over-writings in the said dying declaration.

10] We are therefore of the considered view that the dying declaration below Exh.12 cannot be said to be one which is trustworthy, reliable and cogent and which inspires confidence in the mind of the Court. We are of the considered view, that it will not be safe to rest conviction on the basis of dying declaration

without there being any corroboration. We find that the order of conviction and sentence is not sustainable and the Appeal deserves to be allowed.

11] In the result, we pass the following order :-

ORDER

I) Criminal Appeal No.306 of 2015 is allowed

II) The order of conviction and sentence as recorded by learned Additional Sessions, Judge, Palghar vide order dated 3rd February 2010 is quashed and set aside.

III) The Appellant is acquitted of the charges, charged with.

IV) The Appellant is directed to be set at liberty forthwith, if not required in any other case.

V) In view of disposal of Criminal Appeal, Criminal Application No.1168 of 2018 does not survive and accordingly stands disposed of.

Balaji Govindrao Panchal

Digitally signed by Balaji Govindrao Panchal
Date: 2018.08.20 14:10:18 +0530

[SARANG V. KOTWAL, J.] **[B. R. GAVAI, J.]**