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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 396 OF 2010

Mahadu @ Mahadeo Narayan Kale,)
Age: 24 years, Occ: Service)
Residing at Gamne Chawl, Morwadi,)
Nashik) Appellant
 (Original Accused)

V/s

The State of Maharashtra) Respondent.

Ms. Trisha Bhattacharya, Advocate appointed by the Court, for the Appellant.

Mrs. M.M. Deshmukh, APP for the Respondent/State.

**CORAM: B. R. GAVAI &
SARANG V. KOTWAL, JJ.**

DATE: 5th JUNE, 2018

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

1] Appeal takes exception to the Judgment and Order passed by the learned Sessions Judge, Nashik, in Sessions Case No.189 of 2009 dated 23/04/2010, thereby convicting the Appellant for the offence punishable under Section 302 of the Indian Penal Code and sentencing him to suffer life imprisonment and to pay fine of Rs 1000/- and in

default thereof, suffer rigorous imprisonment for one month.

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

3] The deceased Taslima Shaikh was a divorcee. She was in live in relationship with the Appellant. She was staying as a tenant in the house of P.W.3 – Sau Asha Kale.

4] It is the prosecution case that, on 14/06/2009, at about 11.30 P.M., the accused had come to the house of Taslima and had some quarrel with her. It is the further prosecution case that, as a result of the said quarrel, the accused poured kerosene on the person of Taslima and set her on fire. P.W. 3 - Sau Asha Kale, after hearing the noise, came down alongwith her son Sachin and knocked the door of the house of Taslima. The accused opened the door and went away. P.W.3 found that, Taslima was lying in burnt condition. She was crying and there was smell of kerosene. The landlady - P.W.3 informed about the incident to P.W. 1 – Kayyum Shaikh. She was taken to Civil Hospital. On the basis of the statement of the deceased,

an offence at Cr No.326 of 2009 was registered initially under Sections 307, 323 and 504 of the Indian Penal Code. However, during treatment, deceased succumbed to the injuries on 19/06/2009. As such, the offence was converted to one under Section 302 of the Indian Penal Code.

5] After completion of the investigation, charge-sheet came to be filed in the Court of learned J.M.F.C., Nashik. However, since the case was exclusively triable by the learned Sessions Judge, the same came to be committed to the Sessions Court. Charges came to be framed below Exhibit-5. The accused denied the charges and claimed to be tried. At the conclusion of the trial, learned Sessions Judge passed the order of conviction and sentence, as aforesaid. Being aggrieved thereby, the present appeal.

6] Ms. Trisha Bhattacharya, learned Counsel appointed to appear on behalf of the Appellant, submitted that the learned Trial Judge has grossly erred in convicting the Appellant. She submitted that, there are material contradictions in the two dying declarations; one recorded by P.W. 4 – Shivaji Wagh, Nayab Tahsildar and the other

recorded by P.W. 5 – Arvind Kale, Investigating Officer. She further submitted that, the alleged oral dying declaration given to P.W. 1 – Kayyum Shaikh and P.W. 3 – Asha Kale also cannot be said to be trustworthy and reliable. She therefore submitted that the appeal deserves to be allowed.

7] Smt. Deshmukh, learned APP, on the contrary, submitted that merely because there are minor inconsistencies in the written dying declarations, that by itself cannot be a ground to discard the written dying declarations. She submitted that, so far as material aspects are concerned, there is no inconsistency in the dying declarations. It is submitted that, both the dying declarations clearly implicated the present Appellant and as such, no interference is warranted in the present appeal.

8] In the present case, the prosecution mainly relies on two dying declarations. The first dying declaration is below Exhibits 25 and 26. Though there is an endorsement in the beginning by one Medical Officer that the patient was in a condition of giving statement on 15/06/2009, there is no such endorsement after the dying declaration

that the patient was conscious, both physically and mentally while recording the statement. Apart from that, the Medical Officer who had examined the deceased was also not examined. The deceased has stated in her dying declaration that, for six years she is acquainted with the Appellant and has physical relation with him. She has stated that on 14/6/2009, she herself and the Appellant came home after completing the labour work. When she was cooking, at 11.30 P.M. Accused came there, drunk. She has stated that, the Accused started quarreling with her. He thereafter took a Kerosene Can and poured the Kerosene on her, ignited the fire with match-stick and ran away. The said statement is recorded by P.W. 5 – A.R. Kale, PSI. It is to be noted that, the time of registration of offence is stated as 4.15 A.M. Undisputedly, the FIR is registered on the basis of the said statement of the deceased, which was recorded by P.W.5. However, it has been admitted by P.W.5 that, the requisition for medical opinion is at 4.20 A.M. The Investigating Officer has clearly admitted that, time of the registration of the offence is 4.15 A.M., whereas requisition mentions the time of 4.20 A.M. All these aspects create doubt with regard to genuineness of the said dying declaration.

9] The another dying declaration is below Exhibit-21 and 22. The said dying declaration is in a printed format. There is an ednorsement below Exhibit-21 by P.W. 7 – Dr. Vasant Karande to the effect that, “patient is able to state statement”. At the end of dying declaration, there is endorsement to the effect that, “Jabab Gheyee Paryant Shuddhivar Aahe”. However, the dying declaration does not show that there is an endorsement that, doctor has found her to be in mentally and physically fit condition to make statement. Even at the end of dying declaration, there is no endorsement by the doctor to the effect that the maker of the statement was physically and mentally fit while she made the declaration. It is further to be noted that P.W. 7 – Dr. Vasant Karande has clearly stated that he had not treated the deceased. In this situation, it cannot be said that the said dying declaration below Exhibit-21 and 22 is also the one which is free from doubt.

10] That leads us to oral dying declaration, alleged to have been given to P.W.3 – Sau Asha Kale. No doubt that, in her examination-in chief, she has stated about dying declaration given to her by the deceased. However, her cross-examination would reveal that, the

same is by way of omission. There is no reference to it in her statement recorded under Section 164 of Cr.P.C. Apart from that, there are various other contradictions in her evidence. In that view of the matter, we are of the considered view that the same also would not be reliable. Inasmuch as the oral dying declaration given to P.W. 1 - Kayyum Shaikh is concerned, admittedly, he is a highly interested witness. It would not be therefore safe to rest the Order of conviction solely on the basis of oral dying declaration given to such witness.

11] In the result, we find that it cannot be held that the prosecution has proved the case beyond reasonable doubt and the Appellant is entitled to benefit of doubt.

12] We therefore pass the following order :-

ORDER

- (1)** The Appeal is allowed.
- (2)** The Judgment and Order dated 23/04/2010 of conviction and sentence is set aside.
- (3)** The accused is acquitted of all the charges,

charged with.

(4) The Appellant is directed to be released forthwith, if not required in any other case.

(5) The charges of learned Counsel Ms. Trisha Bhattacharya, appointed to appear for the Appellant, are quantified at Rs. 5,000/-.

(SARANG V. KOTWAL, J.)

(B. R. GAVAI, J.)