

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

**CRIMINAL APPLICATION NO.2434 OF 2020
IN
CRIMINAL APEAL NO.675 OF 2020**

ASHOK ANNA MORE
VERSUS
THE STATE OF MAHARASHTRA

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Advocate for Applicant : Mr. Pande Balraj P
APP for Respondent : Mr. S D Ghayal

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CORAM : V.K. JADHAV & S.G. DIGE, JJ.
Dated : July 12, 2021

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PER COURT :-

1. Pending the criminal appeal no.675 of 2020 preferred against the judgment and order of conviction passed by the Sessions Judge, Aurangabad dated 23.11.2020 in Sessions Case No.173 of 2016 convicting thereby the appellant/accused for the offence punishable under section 302 of the Indian Penal Code and sentencing him to suffer life imprisonment and to pay a fine of Rs.2,000/- (Rs. Two Thousand), in default to suffer R.I. for six months, the applicant/original accused has preferred this application for suspension of the substantive part of the sentence and bail.

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2. Learned counsel for the applicant/accused submits that the applicant was on bail during the course of the trial. Learned counsel submits that the prosecution case entirely rests upon the two dying declarations i.e. exhibit-23 and exhibit-20, respectively. PW-5 PSI Ajay Suryawanshi has recorded the complaint-cum-dying declaration exhibit-23 and the Executive Magistrate PW-3 Dattatraya Nilawad has recorded the dying declaration exhibit-20. Learned counsel submits that, there is a discrepancy of time in the dying declarations. Learned counsel has pointed out that as per the doctor's endorsement exhibit-23 was completed at about 06.48 p.m. on 26.1.2016. Learned counsel submits that, so far as complaint-cum-dying declaration exhibit 23 recorded by PW-5 PSI Ajay Suryawanshi is concerned, admittedly, PW-7 Dr. Abhishek Kumbhar has not made endorsement on the said dying declaration about mental fitness of the deceased for recording her statement prior to commencement of recording of her dying declaration exhibit 23. Learned counsel submits that exhibit 20 i.e.

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recorded by Executive Magistrate, time of starting of the statement is at about 7.00 p.m. Learned counsel submits that PW-7 Dr. Abhishek Kumbhar had hardly few minutes to examine the deceased again and before commencement of recording of the dying-declaration by PW-3 Dattatraya Nilawad (Executive Magistrate). Learned counsel submits that, even though, dying declaration exhibit-23 was recorded by the Executive Magistrate, deceased had not stated specifically as to who had set her on fire. She has made allegations only to the extent that the applicant/original accused had poured kerosene on her person while she was cooking. Except that, she has not made any allegations against the applicant/accused. Learned counsel submits that, thus, the dying declaration exhibit-23 and 20 are not consistent on material parts. Learned counsel submits that there are two daughters. At the time of alleged incident, elder daughter was two and half years and younger daughter is of only six months old. Learned counsel submits that, only aged mother of the applicant is in the house to look after the said daughters.

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3. Learned APP has strongly resisted the application on the ground that dying declaration exhibit-23 and exhibit-20 respectively are reliable, consistent and made voluntarily by the deceased. Learned APP submits that, there is a minor discrepancy about time on the dying declaration and that is not material even. Learned APP submits that, the prosecution has proved that the applicant/accused had poured kerosene on the person of his wife and set her on fire with the help of match stick. The applicant may not be released on bail.

4. On going through carefully the judgment and notes of evidence placed before us by the learned counsel for the applicant, it appears that on 26.1.2016 PW-5 PSI Ajay Suryawanshi has recorded the complaint-cum-dying declaration of the deceased, no time is mentioned on it. No starting time of the statement was mentioned, however, it appears from the endorsement made by PW-7 Dr. Abhishek Kumbhar that said statement was completed around 06.48 p.m. PW 5 PSI Ajay Suryawanshi has admitted in his cross-

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examination that, PW-7 Dr. Kumbhar has not made endorsement before he started recording the complaint-cum-dying declaration of the deceased exhibit-23. According to him, PW-7 Dr. Abhishek Kumbhar was present in the Ward and said ward is big in size. Even if we consider the time as 06.48 pm when the complaint-cum-dying declaration was completely recorded, however, immediately thereafter PW 3 Dattatraya Nilawad has recorded the dying-declaration of the deceased. As per endorsement made on exhibit-20 dying declaration, which is recorded by the Executive Magistrate PW-3 Dattatraya Nilawad, which is in question and answer form that, it was commenced at about 7 p.m. and it was completed at about 7.28 p.m. There is an endorsement of PW-7 Dr. Abhishek Kumbhar at about 6.50 p.m. So we find much substance in the submissions made on behalf of the applicant/accused that there is some discrepancy in recording of the time of commencement and completion of the dying declaration exhibit-20 and exhibit-23, respectively. So far as the dying declaration exhibit-23

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recorded by PW-5 PSI Ajay Suryawanshi is concerned, it is surprising that PW-5 PSI Suryawanshi has not obtained opinion of PW-7 Dr. Abhishek Kumbhar about mental state of mind of the deceased before recording her complaint-cum-dying declaration exhibit-23. The relatives of the deceased gathered in the hospital till that time. PW-2 Gopinath Shere, who happened to be the father of deceased Manisha, has admitted in his cross-examination that, voice of Manisha was low voice and for listening one had to go to close to Manisha. Under these circumstances, PW-5 PSI Suryawanshi should have taken care to record her dying declaration after PW 7 Dr. Abhishek Kumbhar certifies her conscious state of mind. Apart from this, we have also carefully gone through the dying declaration exhibit-20 recorded by PW 3 Naib Tahsildar Dattatraya Nilawad. Though, deceased had stated in her dying declaration recorded by him that applicant/accused had poured kerosene on her person, however, she has not disclosed to PW 3 Dattatraya Nilawad as to who has set her on fire. It is the case of the prosecution that

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applicant/accused returned to the house under the influence of liquor. Deceased Manisha had questioned to him about it and, thus quarrel had taken place between them. The applicant/accused started giving abuses to her and also extended beating by fist and kick blows. Under these circumstances, prima facie, we find this inconsistency in the statement/dying declaration exhibit 20 fatal to the prosecution. Thus, considering the entire aspect of the case and, since the applicant/accused was on bail during the trial, we are inclined to release him on bail. Further, we also consider that there is no male member in the family of the applicant and aged mother of the applicant/accused is looking after the minor daughters, who are aged about 2.5 years and six months respectively as on the date of incident. Hence, following order.

ORDER

- I. Criminal Application is hereby allowed.
- II. Pending the hearing and final disposal of the Criminal Appeal No.675 of 2020 [Ashok Anna

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More Vs. The State of Maharashtra], substantive part of the sentence passed by the Sessions Judge, Aurangabad by judgment and order dated 23.11.2020 in Sessions Case No.173 of 2016 is hereby suspended, and till then, the applicant/accused Ashok Anna More be released on bail on furnishing P.B. of Rs.20,000/- (Rs. Twenty Thousand) with one solvent surety of the like amount.

III. Application accordingly disposed off.

IV. Record and Proceeding be sent back to the trial court for preparation of the paper book.

(S. G. DIGE, J.)

(V.K. JADHAV, J.)

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