

- for the offence punishable under Section 304 of the Indian Penal Code, to suffer rigorous imprisonment for 15 years and to pay fine of Rs.5,000/-, in default of payment, to undergo simple imprisonment for 6 months.

4 Learned counsel for the applicant submitted that the prosecution had failed to prove that the deceased was in a position to make the dying declaration and that she was in a mentally and physically fit condition, at the relevant time. Learned counsel relied on the evidence of PW 7-Dr. Ruchir Kesariya in support of his submission. He submitted that the evidence of Dr. Kesariya (PW 7) is not consistent with the evidence of Dr. Simon Abraham (PW 2). He further submitted that although an alleged oral dying declaration was made by the deceased to her sister on 23rd November 2015, no complaint/FIR was registered by the said witness i.e. PW 1-Surekha Jadhav. He submitted that if the evidence of PW 7-Dr. Kesariya is seen, it reveals that the deceased was serious and in a critical condition when she was admitted and that her condition was deteriorating during her hospitalization. He submitted that in this light of the matter, dying declarations allegedly made by the deceased to her sister on 23rd November 2015, to the Police Officer on 24th November 2015 and to the Special Executive Magistrate on 25th November 2015, cannot be believed.

5 Learned A.P.P vehemently opposed the bail application. He submitted that all the 3 dying declarations i.e. the oral dying declaration made by the deceased to her sister (PW 1) on 23rd November 2015, the written dying declarations recorded by the police on 24th November 2015 as well as the dying declaration made to the Special Executive Magistrate on 25th November 2015, are consistent.

6 Perused the papers, in particular, the evidence. A perusal of the evidence of Dr. Ruchir Kesariya (PW 7) reveals that deceased-Anita was brought to Shatabdi Hospital on 21st November 2015 by the appellant and that history of accidental burns was given by the appellant. PW 7-Dr. Kesariya, in his evidence, has stated that the victim had sustained 85-90% burn injuries all over her body and that her physical condition was critical and it was deteriorating during hospitalization. The victim expired on 29th November 2015. The said witness i.e. PW 7 in his cross-examination has stated that the day on which the victim was admitted, she was not in a position to give her statement and that her condition was not improving but was deteriorating till her demise. He has stated that during her hospitalization, he had not recorded the history from the victim due to her serious health condition. He has also in his cross-examination admitted

that the papers regarding entries of 24th November and 25th November 2015 do not disclose that the victim was in a medically fit condition to give her statement to the police.

7 From a perusal of evidence of Dr. Simon (PW 2), it appears that he was allegedly present at the time when victim gave her dying declarations to the Police Officer and the Special Executive Magistrate. The said doctor has not spoken about what was the physical condition of the victim and whether she was mentally fit to make the said statements. Being in a position to speak and being mentally fit to make a statement, are two different things. From the cross-examination, it appears that there is no endorsement made by the doctor on the said alleged dying declarations i.e. Exhibits 10 and 11 with respect to the mental and physical condition of the victim.

8 The appeal has been admitted vide order dated 26th September 2019. Considering the aforesaid evidence, the appellant has *prima facie* made out a case for suspension of his sentence and his enlargement on bail.

9 Accordingly, the application is allowed and the applicant's sentence is suspended and he is enlarged on bail, pending the hearing and final disposal of his appeal, on the following terms and conditions :-

ORDER

- i) The applicant be enlarged on bail on furnishing P.R. Bond in the sum of Rs.30,000/- with one or two local solvent sureties in the like amount;
- ii) The applicant shall report to the trial Court, once in two months on the day/date specified by the trial Court, till his appeal is finally disposed of;
- iii) The applicant shall keep the trial Court informed of his current address and mobile contact number and/or change of residence or mobile details, if any, from time to time;
- iv) If there are two consecutive defaults in appearing before the trial Court, the learned Judge shall make a report to the High Court and the prosecution would be at liberty to file an application seeking cancellation of bail.

- 10 The application is accordingly disposed of.
- 11 All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.