

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

62 CRIMINAL APPLICATION NO. 3336 OF 2021
IN APEAL/699/2021

1. SULABAI HANMANT KALE
2. VAISHALI DNYANESHWAR KALE
3. MAHADEVI NANDU SHINDE
VERSUS
THE STATE OF MAHARASHTRA

.....
Advocate for Applicants : Mr. Naiknavare Ramesh V.
APP for Respondent-State : Mr. R. D. Sanap
.....

**CORAM : V. K. JADHAV AND
SANDIPKUMAR. C. MORE, JJ.
DATED : 21st FEBRUARY, 2022**

PER COURT:-

1. Pending criminal appeal no. 699/2021, preferred against the judgment and order of conviction dated 15.12.2021 passed the Sessions Judge, Osmanabad in Sessions Case No. 37/2017, convicting thereby each of the applicants for the offence punishable under Sections 302 r/w 34 of IPC and sentencing them to suffer imprisonment for life and to pay fine of Rs.500/- each, in default to suffer simple imprisonment for one month each, the applicants-original accused nos. 1 to 3 have preferred this application for suspension of the substantive part of the sentence and bail.

2. Learned counsel for the applicants-original accused submits that the prosecution case entirely rests upon circumstantial evidence and there is no direct evidence in this case. Learned counsel submits that the prosecution case entirely rests upon the dying declarations Exhibits 48 and 58 respectively. Learned counsel submits that the dying declarations are not consistent on material part. On the other hand, in the second dying declaration, deceased had added one more name i.e. her own brother, who allegedly poured kerosene on her person along with other co-accused persons. Learned counsel submits that there is no satisfactory evidence about motive. There is a vague reference in the prosecution story that long back at some time, deceased had allegedly set the *jawar* crop on fire and therefore, the accused persons were quarreling with her. However, there are no details about it. Learned counsel submits that even though the husband of deceased Mamta had arrived at the spot during the course of incident or immediately after the incident, the prosecution has not examined him. Learned counsel submits that there is a reference in the evidence of PW 6 Sudarshan Late that husband of deceased Mamta was not allowing the persons gathered there to extinguish the fire and he was reportedly annoyed and therefore giving such directions. Learned counsel submits that the husband of deceased Mamta would have been the best evidence to disclose as to what

happened to deceased Mamta at the relevant time and what was the reason for sustaining burns. Learned counsel submits that the dying declaration Exhibit 48 is recorded by the Police Constable whereas, dying declaration Exhibit 58 allegedly recorded by the Naib Tahsildar. In both the dying declarations, there is a reference that the original accused nos.1 and 3 i.e. mother and real sister of the deceased, poured kerosene on the person of deceased Mamta in the house and thereafter, deceased Mamta ran away up to the temple, where applicant no.2, who is her sister-in-law, allegedly thrown a match stick on her person. However, there is no evidence as to whether applicant no.2 has chased her from the house to the said temple. Even no role is ascribed to applicant no.2 Vaishali so far as the incident allegedly took place in the house. Even though there is evidence that some devotees at the temple extinguished the fire, however, in their evidence there is no reference as to how deceased Mamta sustained burn injuries.

3. Learned counsel for the applicants further submits that applicant no.3 is carrying pregnancy and as per the report submitted by the Chief Medical Officer, Aurangabad Central Prison, the expected date of delivery is 2.8.2022. Learned counsel submits that all the applicants were on bail during trial.

4. Learned APP has strongly resisted the application. Learned APP submits that though there is no direct evidence in this case, however, both the dying declarations Exhibits 48 and 58 are consistent on material part. The prosecution has proved that applicant nos. 1 and 3 poured kerosene on the person of deceased Mamta in her house and thereafter, applicant no.2 ignited the match stick and set her on fire on road near the temple. The applicants are not entitled to be released on bail.

5. We have carefully perused the dying declarations Exhibits 48 and 58 respectively. The motive appears to be very weak. There is no reference in the dying declarations, nor in the evidence of the prosecution witnesses as to when the earlier incident about setting on fire the *jawar* crop had taken place and what led the accused persons, who are none else but mother, sister and sister-in-law of the deceased, to set deceased Mamta on fire. It is very difficult to believe that the applicants before us got annoyed to such an extent because of the said incident of setting on fire the *jawar* crop, for which vague reference is given in the dying declarations, that they set on fire deceased Mamta for that reason. Furthermore, there is a reference about the presence of husband of deceased Mamta in front of the temple with the devotees gathered at the temple who tried to

extinguish the fire, however, the prosecution has not examined him as prosecution witness to explain about the motive and so also about the possibility of oral dying declaration, if at all, given by the deceased. On the other hand, it appears that deceased Mamta died in Sassoon Hospital, Pune four days after the incident and her second dying declaration Exhibit 58 came to be recorded by the Naib Tahsildar at Sassoon Hospital, Pune. It appears that learned Judge of the trial court has not considered the possibility of tutoring. Even though on earlier occasion, deceased Mamta had not taken name of her brother, however, in the second dying declaration Exhibit 58 recorded by the Naib Tahsildar, she has also ascribed a role to her real brother Dnyaneshwar, who allegedly poured kerosene on her person. It is surprising that even if the incident allegedly took place in the day time, there is nothing in the evidence of the prosecution witnesses that as to how applicant no.2 went towards the temple and ignited the match stick and set deceased Mamta on fire. Furthermore, PW 6 Sudarshan Late and PW 5 Anand Kadam have only deposed that one woman from Pardhi community, namely, Mamta came there in burning condition and they extinguished the fire on her person with the help of a quilt. They have not deposed that in front of the temple deceased Mamta was set on fire by someone.

6. The applicants-accused were on bail during the trial. Furthermore, applicant no.1 Sulabai is 64 years of age. Applicant no.2 is having one minor son and a husband. Applicant no.3 is having two daughters and one son and now she is carrying pregnancy for the fourth child and her expected date of delivery is 2.8.2022. In view of the discussion above, we are inclined to release all the applicants on bail. Hence, the following order:

ORDER

I. Pending Criminal Appeal No. 699 of 2021, the substantive part of the sentence passed against the applicants by the Sessions Judge, Osmanabad vide judgment and order of conviction dated 15.12.2021 in Sessions Case No. 37/2017, convicting them for the offence punishable under Sections 302 r/w 34 of IPC and sentencing them to suffer imprisonment for life each and to pay fine of Rs.500/- each, in default to suffer simple imprisonment for one month each, is hereby suspended and till then, applicant no.1 Sulabai Hanmant Kale, applicant no.2 Vaishali Dnyaneshwar Kale and applicant no.3 Mahadevi Nandu Shinde be released on bail on furnishing P.B. of Rs.20,000/- each with one solvent surety each of the like amount.

II. The Criminal Application is accordingly disposed off.

(SANDIPKUMAR C. MORE, J.)

(V. K. JADHAV, J.)