



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.991 OF 2021
IN
CRIMINAL APPEAL NO.879 OF 2023

Raju s/o Raghunath Dabhade
Age: 40 years, Occu.: Labour,
R/o. Gharegaon,
Tq. and Dist. Aurangabad
(Presently in jail)

.. Appellant

Versus

The State of Maharashtra
Police Station Karmad, Aurangabad
Through A.G.P. Office,
High Court, Bench at Aurangabad.

.. Respondent

...

Mr. Sopan G. Bobde, Advocate for appellant.
Ms. Uma Bhosale, APP for the respondent – State.

...

CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.

DATE : 4th December, 2023

ORDER [Per Smt. Vibha Kankanwadi, J.] :-

. Present application has been filed for suspension of substantive sentence by original accused. Present applicant/original accused faced trial in Sessions Case No.231 of 2017 for the offence punishable under Section 302 of Indian Penal Code before the learned Additional Sessions Judge-7, Aurangabad. He came to be convicted for the offence punishable under

Section 302 of Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.5,000/- in default to suffer simple imprisonment for one month on 02.12.2022.

2. Heard learned Advocate Mr. Sopan G. Bobde for the applicant and learned APP Ms. Uma Bhosale for the respondent – State.

3. Learned Advocate for the appellant has taken us through the paper-book, which is now already prepared. He submits that the learned Trial Judge has not appreciated the evidence properly. The case is based on dying declaration Exhibit-17. There is endorsement by the medical officer wherein it has been stated that deceased Sunita had sustained 80% burns, however, if we consider the testimony of autopsy doctor P.W.3 Dr. Santosh Bhosale and the postmortem report Exhibit-34, then the percentage of burns has been stated as 42% only. It appears that the said dying declaration came to be recorded after 1.45 p.m. on 26.03.2017, whereas the incident has taken place on 25.03.2017 at night time. On the same day, she has been brought to Ghati Hospital, Aurangabad, yet the delay in recording dying declaration has not been explained. The possibility of dying declaration being tutored cannot be ruled out. She allegedly succumbed to the injuries on 19.04.2017. The history given at the time of admission has not been brought on record. Even if we consider the contents of dying declaration, it has been stated that there used to be quarrels

between husband and wife due to the habit of appellant of drinking liquor. On the day of incident the accused is stated to have come in drunken condition to the house and, therefore, deceased asked him as to why he consumes liquor. Accused replied that some other persons had offered him and, therefore, he has consumed and then he picked up kerosene can, poured it on wife and set her to fire. There were three children to the deceased and accused, who were in the house but none of them has been examined by the prosecution. Therefore, there is much scope for the appellant in appeal. Though he was not on bail throughout the trial, after the evidence, it can be certainly said that he deserves to be released on bail by suspending the sentence.

4. Per contra, learned APP supported the reasons given by the learned Trial Judge for convicting the appellant. She submitted that the dying declaration has been duly proved by examining the Police Naik as well as the medical officer, who has certified that the mental state of the deceased was good and fit to give the statement. Difference in the percentage of burns may not give benefit to the appellant. When kerosene was poured on the person of the deceased, it can be certainly said that the accused had intention to kill her and that was sufficient. The appellant was not on bail throughout the trial and, therefore, this cannot be said to be the fit case for suspension of sentence.

5. At the outset, when the application for suspension of sentence is filed; the evidence that has been adduced by the prosecution is required to be considered and coupled with that whether the accused was on bail throughout the trial or not is required to be considered. Even if an accused is not released on bail throughout the trial, yet the quality of evidence that has been adduced by the prosecution would matter.

6. Present case is based on dying declaration Exhibit-17 on which the endorsement by the doctor says that she had received 80% burns, whereas the postmortem report says that she had received 42% burns. There can be some difference in the percentage of burns, but it cannot be almost double. Only on the basis of postmortem report, it cannot be said that the death was homicidal.

7. The contents of Exhibit-17 taken as it is as proved would show that there used to be quarrel between the husband and wife and it is said that the said dispute was on account of the habit of accused of drinking liquor. After drinking liquor, he used to assault and abuse the deceased, however, she says that as she had hope that husband would improve his behaviour, she had not told that accused used to assault and abuse her under the influence of liquor to anybody. As regards the incident is concerned, she has stated that on 25.03.2017 accused had come by drinking liquor. She

asked as to why he has consumed liquor and then he told that as he was offered by other persons, he has consumed. Except this dialogues, she has not quoted that any other altercations took place, but then she says that thereafter accused had taken the kerosene can and poured the kerosene on her person and ablaze her. The best persons to prove the incident were the children who were in the house. Deceased and accused are having two sons and one daughter. Their age has not been stated in the dying declaration, but she says that the marriage had taken place in the year 2002. Therefore, the eldest son might be in a position to give evidence and he ought to have been then examined. She then says that after she raised hue and cry, children woke up and then the husband extinguished her fire, her mother-in-law then changed the Saree and she was taken to hospital. It is to be noted that the mother of the accused has not been made as an accused in this case. Under that circumstance, she could have also been examined. It appears that there was oral dying declaration to the mother of the deceased also. Definitely, it is required to be tested with the written dying declaration. There is some substance in the submission that recording of dying declaration appears to be belated and under the said circumstance, whether accused can get any benefit of the same is also required to be considered. Therefore, case is made out for grant of bail to the appellant – applicant by suspending his sentence. Hence, the following order :-

ORDER

- (I) Application stands allowed.
- (II) The substantive sentence imposed on the applicant in Sessions Case No.231 of 2017 by learned Additional Sessions Judge-7, Aurangabad on 19.03.2019 stands suspended till the final hearing and disposal of Criminal Appeal No.879 of 2023.
- (III) The applicant – **Raju s/o Raghunath Dabhade** be released on P.R. Bond of Rs.30,000/- (Rupees Thirty Thousand) with two solvent sureties of Rs.15,000/- (Rupees Fifteen Thousand) each.
- (IV) The applicant shall not commit any criminal activity.
- (V) The applicant shall remain present before the learned Trial Judge once in six months, till final hearing and disposal of the Appeal, commencing from the date he tenders bail papers and thereafter, the Trial Judge to fix dates for his subsequent appearances.
- (VI) In case of two consecutive defaults on the part of the applicant to remain present before the Trial Court, the Trial Court to inform this Court about the same and in that

eventuality, the prosecution would be at liberty to file an application for cancellation of the bail granted to the applicant.

(VII) Bail before the Trial Court.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm