

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

**APPLICATION FOR LEAVE TO APPEAL BY STATE NO.120 OF 2020**

The State of Maharashtra,  
Through Police Station Officer,  
Police Station, Ambajogai City,  
Ambajogai, Tq. Ambajogai,  
Dist. Beed.

.. Applicant

**Versus**

1. Shaikh Aasef Shaikh Khalek  
Age: 28 years, Occu.: Tailor,  
R/o. Maniyar Galli, Ravivar Peth,  
Ambajogai, Tq. Ambajogai,  
Dist. Beed.

2. Shaikh Arbiya Alias  
Asagari d/o Shaikh Altaf Husen,  
Occu.: Household, Age: 21 years,  
R/o. As above.

.. Respondents

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Mrs. V. S. Choudhari, APP for the applicant – State.

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

**DATE : 12<sup>th</sup> October, 2023**

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

. Present application has been filed under Section 378(1)(b) of the Code of Criminal Procedure seeking leave to file an appeal challenging the judgment and order dated 27.07.2020 passed by the learned Additional

Sessions Court in Sessions Case No.05 of 2017; thereby acquitting the respondents from the offence punishable under Sections 498-A and 302 read with Section 34 of Indian Penal Code.

2. Heard learned APP Mrs. V. S. Choudhari for the applicant – State. With the able assistance of learned APP, we have gone through the record, which was before the learned Trial Judge.

3. The prosecution story is that deceased Farhana was married to accused No.1. It is alleged that accused No.2 is the second wife of accused No.1 and just prior to the incident i.e. 07.10.2016, accused No.1 had taken accused No.2 to the house and it was objected by deceased Farhana. Farhana received burn injuries and she was admitted to S.R.T.R. Medical College and Hospital, Ambajogai around 1.45 p.m. on 08.10.2016. Her statement was recorded by Executive Magistrate at the first point of time wherein she had stated that around 9.30 p.m. on 07.10.2016 she was preparing tea on stove, but suddenly it bursted and her Dupatta and Kurta caught fire. When she raised shouts, accused No.1 came and extinguished the fire and admitted her to Government Hospital at Ambajogai on motorcycle for treatment. However, when Police Head Constable Manoj Kulkarni visited the spot and drawn spot panchanama, he made certain seizures at the spot. Thereafter on 10.10.2016, Farhana gave another statement while she was still taking treatment in burn ward stating that her

earlier statement was recorded when she was not in a fit state of mind. In the said second statement she disclosed that when accused No.1 brought accused No.2 to home on 07.10.2016, there were altercations. She had prepared tea for the husband and kept it on the sewing machine, at that time, accused No.2 poured kerosene from the lamp on her person and accused No.1 set her to fire. She had stated that her children were sleeping at that time. She extinguished fire by water and then her husband brought her to Ambajogai hospital. On the basis of said second dying declaration offence vide Crime No.466 of 2016 came to be registered for the offence punishable under Sections 498-A, 307 read with Section 34 of Indian Penal Code, however, Farhana succumbed to the injuries on 13.10.2016 and then Section 302 came to be added.

4. After the completion of the investigation, charge-sheet was filed and after the committal of the case, prosecution examined in all eight witnesses to bring home the guilt of the accused.

5. At the outset, from the entire evidence it appears that prosecution has not taken pains to prove the first dying declaration recorded by the Special Executive Magistrate, but it appears that it has been produced and then admitted by the accused, which is at Exhibit-64. There is no dispute as regards death of Farhana due to burn injuries. The question is whether the accused persons are the perpetrators of the crime. Certainly the FIR, which

is the second dying declaration recorded by the Head Constable, is contrary to the first dying declaration recorded by the Executive Magistrate. When in the second dying declaration it was tried to be stated that the first dying declaration was given when she was not in a fit state to give statement, then this fact ought to have been proved by the prosecution. If we consider the second dying declaration Exhibit-64, there is endorsement regarding the mental state of Farhana and the doctor endorsed the same. P.W.5 Dr. Mahesh Mahajan has been examined to prove the endorsement on FIR dated 10.10.2016, but it appears that he was the same doctor, who had also given certificate on Exhibit-64 and therefore, it came to be exhibited in the cross-examination. When Farhana was conscious and oriented throughout the recording of statement dated 08.10.2016, there is absolutely no substance in the statement in the FIR that her mental condition was not proper when she was admitted and Exhibit-64 was taken. The possibility of tutoring when her FIR Exhibit-42 was recorded cannot be ruled out. As per the testimony of P.W.3 Shaikh Mahemood, who is the father of deceased Farhana, he met Farhana in hospital on 08.10.2016. He then says that Farhana told that she had given the statement before the Executive Magistrate due to the pressure from accused No.1. He says that he had informed the said fact to police and then the statement was recorded on 10.10.2016, still the question remains why there is then delay of two days. The fact that possibility of tutoring and second dying declaration being

prepared has been brought on record in the cross-examination. Therefore, the learned Trial Judge has rightly disbelieved the second dying declaration. The possibility of accidental death has been created and, therefore, acquittal of both the accused was justified. We do not find that this is a fit case where we should re-appreciate and revisit the evidence. The application stands rejected.

**[ ABHAY S. WAGHWASE ]**  
**JUDGE**

scm

**[ SMT. VIBHA KANKANWADI ]**  
**JUDGE**