



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

**CRIMINAL APPLICATION NO.3967 OF 2023
IN
CRIMINAL APPEAL NO.1028 OF 2023**

1) Avinash @ Aavdya Sadish Kale,
Age-26 years, Occu:Agri.,

2) Sadish S/o Jakit Kale,
Age-52 years, Occu:Labour,

Both R/o- Walunj Pargaon, Tq-Nagar,
Dist-Ahmednagar.

**...APPLICANTS
(Ori. Accused)**

VERSUS

The State of Maharashtra,
For Parner Police Station,
Tq-Parner, Dist-Ahmednagar.

...RESPONDENT

...
Mr.Amol S. Gandhi Advocate for Applicants.
Mr.S.D. Ghayal, Additional P.P. for Respondent – State.
...

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

DATE : 14th DECEMBER, 2023

ORDER :

1. Present application has been filed by the original
accused for suspension of substantive sentence imposed on

them. Applicants- original accused Nos. 1 and 2 came to be prosecuted in Sessions Case No.26 of 2020, for the offence punishable under Sections 302, 201, read with Section 34 of the Indian Penal Code, before the learned Additional Sessions Judge, Ahmednagar. By Judgment and order dated 16th September 2023, both the applicants have been held guilty and sentenced to suffer imprisonment for life and to pay fine of Rs.5000/-, in default to suffer further rigorous imprisonment for six months, for the offence punishable under Section 302 of the Indian Penal Code. Further, both the applicants - appellants have been held guilty and sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.1000/-, in default to suffer further simple imprisonment for two months, for the offence punishable under Section 201 read with Section 34 of the Indian Penal Code. All the sentences have been directed to run concurrently.

2. Heard learned Advocate Mr. Amol Gandhi for the applicants - appellants and learned Additional P.P. Mr. S.D. Ghayal for respondent – State.

3. As the paper-book is ready, learned Advocate for the applicants has made submissions with the help of paper-book. It is his main contention that the learned trial Judge has not

appreciated the evidence properly. The contradictions, omissions and the hostility of the witnesses have not been considered. Though it is stated that there are two dying declarations, those are not consistent enough. One is recorded by the Police Officer while another is by the Special Judicial Magistrate. The dying declaration which has been treated as the First Information Report is very much descriptive, whereas the dying declaration recorded by the Special Judicial Magistrate is cryptic. The oral dying declarations are not consistent with the written dying declarations. Why deceased Karishma had gone to the house / hut (locally for the community, it is called as "Pal") of the accused, has not been stated by deceased Karishma. The alleged eye witness, her own brother, PW-11 Pravin Kale has turned hostile. Even if we take the dying declarations as it is, there is no active role attributed to applicant No.2 – Sadish Jakit Kale and therefore both the applicants – appellants deserve to be released on bail till their Appeal is heard. The Appeal has been admitted and it will take long time to hear their Appeal.

4. Learned APP supported the reasons given by the learned trial Judge and submitted that the hostility of the brother of the deceased will not affect the prosecution story. Both the dying

declarations have been proved, so also there are two oral dying declarations, one is to the husband and another is to the sister-in-law. There is no dispute as regards Karishma sustaining burn injuries and then succumbing to those injuries. Therefore, the prosecution had proved that death of Karishma was homicidal in nature. Suspension of sentence cannot be granted merely on asking by the applicants.

5. At the outset, we would like to say that we are not supposed to take a detailed probe into the merits of the case at this stage. Whether the case has been proved beyond reasonable doubt, can be considered only after the full-fledged hearing. Definitely, it will take time to hear the Appeal filed by the appellants. However, it is to be noted that applicant No.1 was never on bail throughout the trial though it appears that applicant No.2 was on bail. After the evidence, it has been held by a competent Court that applicant No.2 was sharing common intention with applicant No.1. PW-1 Ritesh is the husband of deceased Karishma and PW-3 Nanda is the sister of husband of Karishma. They have contended that there is oral dying declaration to them. Further, the prosecution has examined PW-5 Babasaheb Gunjal, the Police Head Constable, who recorded

dying declaration Exhibit-33, and PW-6 Jaywant Joshi, Special Judicial Magistrate, who recorded dying declaration Exhibit-39. Apparent comparison appears to be that specific role was attributed to applicant No.1 of pouring kerosene and setting Karishma to fire, and as regards applicant No.2 is concerned, it is stated that he was also present and abused her. However, it appears from the perusal of dying declaration Exhibit-39 recorded by the Special Judicial Magistrate that Karishma has stated that both the accused have poured kerosene on her person.

6. Dying declaration Exhibit-33 is in detail and states, why Karishma had gone to the said place of incident. Unfortunately, it appears that her real brother PW-11 Pravin, who is stated to be an eye witness, has turned hostile. However, in his examination-in-chief itself he has stated that since three years prior to his deposition, he was in jail at Yerwada and it appears that he was brought from jail for deposition. It is then required to be seen, under which circumstance he turned hostile and whether his testimony affects the two written dying declarations and two oral dying declarations. Thus, there appears to be evidence against both the applicants and therefore, this cannot be considered as a

fit case, where the applicants should be released on bail by suspending their sentence. The Application, therefore, deserves to be rejected.

7. The Application stands rejected.

8. The oral request of learned Advocate for the appellants – applicants to expedite the matter is also rejected, taking into consideration the fact that this Court is dealing with the jail appeals of the year 2017, 2018 and 2019.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/DEC23