

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

INTERIM APPLICATION NO. 1125 OF 2019

IN

CRIMINAL APPEAL NO. 6 OF 2019

Umesh Ashok Dhumal
Age about 27 years, An adult,
Occupation : Business,
Residing Near Utsav Hotel,
Navhari, Sangramnagar,
Taluka – Malshiras, District – Solapur ... Applicant

Versus

The State of Maharashtra ... Respondent
(At the instance of Akluj Police Station)

Mr. Vijay Hiremath i/by Mr. Swaraj Jadhav for the Applicant.
Ms. S.S. Kaushik, APP for the Respondent–State.

**CORAM : REVATI MOHITE DERE &
SHARMILA U. DESHMUKH, JJ.**

DATE : APRIL 26, 2023

ORDER : (Per - Sharmila U. Deshmukh, J.)

1. By this application, preferred under Section 389 of the Code of Criminal Procedure, 1973 (for short, “**the Code**”), the Applicant seeks suspension of his sentence and enlargement on bail, pending the hearing and final disposal of the aforesaid appeal. Vide judgment and order dated 29th October, 2018 passed by the learned

Additional Sessions Judge, Malshiras, in Sessions Case No.2 of 2017, the Applicant has been convicted and sentenced as under:

- for offence punishable under Section 302 of the Indian Penal Code, to suffer imprisonment for life and to pay fine of Rs.5000/- in default of payment of fine amount, to suffer simple imprisonment for one year;
- for offence punishable under Section 323 of the Indian Penal Code, to suffer rigorous imprisonment for two months and to pay fine of Rs.1000/-, in default of payment of fine amount, to suffer simple imprisonment for 15 days;
- for offence punishable under Section 506 of the Indian Penal Code, to suffer rigorous imprisonment for two months and to pay fine of Rs.1000/-, in default of payment of fine amount, to suffer simple imprisonment for 15 days.

2. The case of the prosecution is that the deceased–Jabina Firoz Shaikh was residing with the Applicant–Umesh Ashok Dhumal since last one year; that Jabina had been divorced from her husband prior to two years; that eight days prior to the incident, there was a quarrel between Jabina and Umesh and since then Umesh was

having a grudge against Jabina; that on the day of the incident i.e. on 11th September, 2016, at around 5:00 p.m., Umesh came to the house of Jabina and there was a quarrel between Jabina and Umesh; that during the said quarrel, Umesh caught hold of her hair and assaulted her and thereafter, poured kerosene on Jabina in a fit of anger and set her on fire. There was scuffle between Umesh and Jabina and at that time Umesh pushed Jabina out of the house; that as a result of scuffle, Umesh received burn injuries on his hand and body and thereafter, Umesh took Jabina on his motorcycle and dropped her near Sai Mandir and thereafter, Jabina on her own got admitted to the Government Hospital at Akuj; that during the treatment, she narrated the incident to Dr.Avinash Ghorphade, who recorded her statement of the OPD papers; that Dr.Avinash Ghorphade, reported the incident to the Police Station; that PHC-Sunil Kashinath Gaikwad came to the Sub-District Hospital, Akuj and recorded the statement of Jabina between 6:10 p.m. to 6:35 p.m.

3. API Korke conducted the investigation and registered the FIR against the Applicant. In the meantime Jabina was referred for further treatment to the Civil Hospital at Solapur, where she

expired on 12th September, 2016. After completion of investigation, charges sheet was filed for offence under Section 302, 323, 504 and 506 of Indian Penal Code.

4. Heard Mr. Vijay Hiremath, learned counsel for the Applicant and Ms. S.S. Kaushik, learned APP for the Respondent–State.

5. Learned counsel appearing for the Applicant submits that the prosecution had examined 14 witnesses, out of which 7 witnesses, who are the relatives of the deceased and the neighbours, turned hostile and did not support the prosecution case. He would further submit that the case of the prosecution rests on the dying declaration of Jabina and the oral evidence of PW 5-Dr.Avinash Sripati Ghorphade and PW 10-PHC-Sunil Kashinath Gaikwad. He has further submitted that perusal of the dying declaration shows that the same has been recorded by Dr.Avinash Ghorphade on 11th September, 2016, however, in spite of sufficient time being available, the Executive Magistrate was not called for recording the statement of the deceased. He would further submit that the dying declaration bears the thumb impression of the deceased, however, there is no

attestation of the thumb impression. He would further submit that the Applicant had received burn injuries on his hands, which indicates that he tried to extinguish the fire. He has also pointed out the conduct of the Applicant that after the incident, he had brought the deceased on motorcycle to Ashwini hospital and she was dropped at that place. He would further submit that considering the deceased has suffered 82% burns on her upper body, it is doubtful that the dying declaration bears her thumb impression. He would further submit that the perusal of the deposition of the PW10– Sunil Gaikwad indicates that he had recorded the statement of the deceased on his mobile phone, however the recording was not produced during evidence. In support of his submissions, he relies on the following decisions:

- (i) **Meera Vs State of Rajasthan (2004) 11 Supreme Court Cases 231**
- (ii) **Hanumant Karbhari Karale vs. State of Maharashtra [2005 SCC OnLine Bom 1826];**
- (ii) **State of Maharashtra vs. Manohar Rambhau Dahibhajan [2005 All M.R. (Cri.) 849].**

6. Learned APP opposes the application and submits that

the conviction is correctly based on the dying declaration. She submits that the evidence of PW5- Dr. Avinash Ghorphade indicates that he had recorded the dying declaration and had also obtained the thumb impression on the OPD papers. She would further submit that it was the deceased's ex-husband who had taken her to the civil hospital.

7. Considered the submissions and perused the papers with the assistance of the learned counsel for the parties.

8. Out of 14 witnesses, who have examined, 7 witnesses have turned hostile and not supported the case of the prosecution, and as such, the case of the prosecution rests on the dying declaration and the evidence of PW5-Dr. Avinash Ghorphade, Medial Officer, and PW10 – Sunil Karbhari Gaikwad, PHC. Perusal of the dying declaration indicates that the deceased has affixed her thumb impression, however, same has not been attested. The Apex Court in the case of **Hanumant Karbhari Karale** (supra), had discarded the written dying declaration, which was not attested by the Executive Magistrate to identify that it was a thumb impression of the victim. This Court in the case of **Manohar Rambhau**

Dahibhajan (supra), had also not relied upon the dying declaration when faint thumb impression had been obtained without there being endorsement of identifying that it was a thumb impression of the victim.

9. In the present case, the thumb impression on the dying declaration was not attested by the Executive Magistrate. The deceased was admitted on 11th September, 2016, and inspite thereof, the Executive Magistrate was not called to record the dying declaration. *Prima facie*, we are of the opinion, that reliance cannot be placed on the dying declaration without sufficient corroboration. Pertinently, the evidence of PW5-Dr.Avinash Ghorphade reveals that the patient had suffered 82% burn injuries and there was partial burn injuries to the fingers. The Appeal is of the year 2019 and there is no likelihood of the Appeal being taken up for final hearing in the immediate future.

10. Having regard to the submissions made by the learned counsel for the Applicant and considering that the appeal is of the year 2019 and is not likely to be heard immediately in the near future, we are of the opinion, that the Applicant's sentence deserves

to be suspended and he should be enlarged on bail. The application is allowed on the following terms:

ORDER

(i) The sentence imposed on the Applicant in Sessions Case No.2 of 2017 by the learned Additional Sessions Judge, Malshiras, Solapur is hereby suspended, pending the hearing and final disposal of the appeal.

(ii) The applicant be enlarged on bail on furnishing P.R.Bond in the sum of **Rs.15,000/- (Rupees-Fifteen Thousand)** with **one** or **two** sureties in the like amount;

(iii) The applicant shall report to the trial Court, once in three months on the day/date specified by the trial Court, till the appeal is finally disposed of;

(iv) 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;

(v) 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.

11. All concerned to act on the authenticated copy of this order.

SHARMILA U. DESHMUKH, J.

REVATI MOHITE DERE, J.