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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 62 OF 2014**

1. Ashok S/o Ruplal Pawar	]
Age 40 years, Occ: Labour	]
	]
2. Nirmalabai W/o Ashok Pawar,	]
Age 24 years, Occ: Household	]
Both residing at Padalade,	]
Tal. Malegaon, Dist. Nasik	]
(At present lodged in Central Jail	]
Nashik)	]
	]..Appellants
	[Ori. Accused Nos.1 & 2]
Vs.	

The State of Maharashtra	]
Through Police Inspector,	]
Malegaon Taluka Police Station,	]
Dist. Nashik	]
	]..Respondent
	[Ori. Complainant)

....

Shri. Pankaj Pande Advocate i/b Shri. Sachin Pawar and Shri.
Jitendra Gaikwad Advocates for the Appellants

Smt. G.P.Mulekar, A.P.P. for the State

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**CORAM : SMT.V.K.TAHILRAMANI AND
SHRI.B.P.COLABAWALLA, JJ.**

DATED : MARCH 18, 2015

ORAL JUDGMENT: [PER SMT. V.K. TAHILRAMANI, J.]

1 This appeal is preferred by the appellants-original

accused nos.1 and 2 against the judgment and order dated 19.12.2013 passed by the learned Ad-hoc District Judge-2 and Additional Sessions Judge, Malegaon in Sessions Case No. 31 of 2012. By the said judgment and order, the learned Sessions Judge convicted both the appellants under Sections 302 and 504 r.w. Section 34 of IPC. For the offence under Section 302 read with Section 34, each of the appellants has been sentenced to life imprisonment and fine of Rs. 1000/- i/d R.I. for one month. For the offence under Section 504 read with Section 34, each of the appellants has been sentenced to S.I. for one month. The learned Judge directed that both the substantive sentences of imprisonment shall run concurrently.

2 The prosecution case, briefly stated, is as under:

Deceased Thagubai was the mother of appellant no.1 Ashok Pawar. Appellant no.2 Nirmalabai is the wife of appellant no.1 Ashok Pawar. Nirmalabai is the second wife of Ashok. His first wife had expired. He has two daughters from his first wife, one of them is P.W. 6 Sushila. Both the appellants were residing in the house adjoining the house of deceased Thagubai. They were residing in village Padalade in Nashik

District. The appellants were addicted to liquor and on 22.12.2011 i.e. on the day of the incident, appellant no.1 Ashok Pawar went to the house of his mother Thagubai and demanded money to bring liquor. Thagubai told him that every time he used to ask her for money to bring liquor and from where she should get money to give him. Then appellant no.1 Ashok abused his mother. In the meanwhile, appellant no.2 Nirmalabai also came to the spot. She also abused Thagubai and started assaulting her. Then appellant no.2 Nirmalabai poured kerosene on Thagubai and appellant no.1 Ashok set his mother Thagubai on fire. Police were informed. Then P.W. 9 Police Constable Avhad along with A.S.I. Vasant Pawar went to village Padalade. They went to the house of Thagubai in village Padalade. They saw Thagubai lying there with burn injuries on her person. On making enquiry with Thagubai about how she had sustained burn injuries, Thagubai stated that on 22.12.2011 at about 12 noon her son demanded money to bring liquor. Thagubai told her son that every time he used to ask her for money to bring liquor and from where she should get money to give him. Then appellant no.1 Ashok abused his mother. In the meanwhile, appellant no.2 Nirmalabai also

came to the spot. She also abused Thagubai and started assaulting her. Then appellant no.2 Nirmalabai poured kerosene on Thagubai and appellant no.1 Ashok set his mother Thagubai on fire. The statement was written down by P.W. 9 Police Constable Avhad. Thereafter it was read over to Thagubai. Thumb impression of Thagubai was taken on the said dying declaration. The said dying declaration is at Exh. 43. It was treated as F.I.R. Thereafter Police Constable Avhad and A.S.I. Pawar took Thagubai to Civil Hospital Malegaon for medical treatment. Police Constable Avhad then wrote a letter (Exh. 99) to the Tahsildar-cum-Executive Magistrate, Malegaon for recording dying declaration of Thagubai. It was signed by A.S.I. Pawar. Pursuant to the said letter, P.W. 8 Executive Magistrate Shri. Wakhare came to the hospital and recorded dying declaration of Thagubai. The said dying declaration is at Exh. 32. In the said dying declaration also, Thagubai stated that her son and daughter-in-law set her on fire. Thereafter another dying declaration (Exh. 34) was recorded by A.S.I. Pawar. Police Constable Avhad was the scribe of the said dying declaration. Thagubai expired on 29.12.2011 on account of "cardio respiratory arrest due to 90% burns". Thereafter

the offence was converted from Section 307 of IPC to Section 302 of IPC. After completion of investigation, the charge sheet came to be filed.

3 Charge came to be framed against both the appellants under Sections 302 and 504 read with Section 34 of IPC. The appellants pleaded not guilty to the said charge and claimed to be tried. The defence of the appellants is that of total denial and false implication. After going through the evidence adduced in the present case, the learned Judge convicted and sentenced the appellants as stated in para 1 above, hence, this appeal.

4 We have heard the learned counsel for the appellants and the learned A.P.P. for the State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned counsel for the parties, the judgment delivered by the learned Judge and the evidence on record, for the below mentioned reasons, we are of the opinion that both the appellants set Thagubai on fire and caused her death.

5 In the present case, all the relations and the neighbours of Thagubai have turned hostile and have not supported the prosecution. P.W. 6 Sushma who was the grand daughter of Thagubai has also turned hostile and has not supported the prosecution case. Thus, the case is only dependent on the three dying declarations made by Thagubai which are at Exhs. 32, 34 and 43. Dying declaration Exh. 43 was recorded first in point of time. It was recorded by A.S.I. Pawar. The Scribe of the said dying declaration was P.W.9 Police Constable Avhad. As A.S.I. Pawar had expired, he could not be examined as a witness, however, P.W. 9 Police Constable Avhad who scribed the said dying declaration has been examined. Police Constable Avhad has stated that on 22.12.2011 he was attached to Malegaon Taluka Police Station. On that day, he and A.S.I. Pawar had gone to village Hiswal for office work. At about 12.30 p.m. A.S.I. Pawar received message on telephone that at village Padalade, one woman namely Thagubai Pawar had sustained burn injuries and A.S.I. Pawar was directed to visit the place. Then both A.S.I. Pawar and Police Constable Avhad went to Padalade village. They

saw Thagubai had sustained burn injuries. A.S.I. Pawar made enquiry with Thagubai about how she had sustained burn injuries. Then Thagubai narrated how she sustained burn injuries. Police Constable Avhad has stated that he recorded the information given by Thagubai in his own handwriting. After recording it, he read over the contents to Thagubai. Thereafter he obtained thumb impression of Thagubai on the said statement. The said statement is at Exh. 43. The evidence on record shows that Thagubai stated in presence of Police Constable Avhad that her son Ashok came and demanded money for liquor. As she did not give him money, her son abused her. Meanwhile her daughter in law Nirmalabai came there and also started abusing Thagubai. Then her daughter in law Nirmalabai poured kerosene on her and her son Ashok set her on fire with a matchstick.

6 Police Constable Avhad has further stated that thereafter he and A.S.I. Pawar called one auto-rickshaw and they took Thagubai to civil hospital Malegaon for medical treatment. Then Police Constable Avhad wrote a letter in his own handwriting to the Tahsildar-cum-Executive Magistrate,

Malegaon for recording dying declaration of Thagubai. It was signed by A.S.I. Pawar. The said letter is at Exh. 39. P.W. 8 Shri. Wakhare was posted as Executive Magistrate at Malegaon. He has stated that on 22.12.2011 he received a letter from Assistant Sub-Inspector Shri. V.S. Pawar of Malegaon Taluka Police Station at 4.00 p.m. In the said letter, it was stated that one woman by name Thagubai Pawar aged about 70 years, resident of Padalade, Taluka Malegaon, was admitted in civil hospital with 90% burn injuries and Shri. Wakhare was requested to record her dying declaration. The said letter is at Exh. 39. He then went to the Civil Hospital Malegaon. He informed the Medical Officer (P.W. 7 Dr. Ranbhor) that he is an Executive Magistrate and he had come there to record the dying declaration. Shri. Wakhare requested the Doctor to examine patient Thagubai Pawar and to state whether she was conscious and in a condition to give a statement. Medical Officer examined the said woman. The doctor also asked some questions to her and thereafter he issued certificate to the effect that the patient was conscious and in a position to give a statement. The Doctor then signed the said endorsement. Thereafter, Shri. Wakhare has stated

that he went near the patient and asked the relatives present there to go out of the Ward as he had to record the dying declaration of the patient. Accordingly, all the persons went out. Then only Medical Officer, Shri. Wakhare and the patient remained there in the Ward. Shri. Wakhare then introduced himself to the patient and informed her that he had come there to record her dying declaration. Shri. Wakhare also put few questions to Thagubai to confirm whether Thagubai was in a position to speak. Thagubai answered the questions. As Shri. Wakhare was satisfied that Thagubai was in a position to speak, he then recorded dying declaration of Thagubai. In the said dying declaration, Thagubai stated that her son and her daughter-in-law set her on fire. After recording the dying declaration, Shri. Wakhare read over the dying declaration to Thagubai and she admitted that the statement made by her is true and correct. Thereafter, Shri. Wakhare signed the dying declaration and also obtained thumb impression of Thagubai. Then Shri. Wakhare asked Medical Officer (P.W.7 Dr. Ranbhor) to again examine the patient and certify about her condition. Then Medical Officer again examined the patient and issued Certificate that during the recording of the statement,

Thagubai was conscious. The Medical Officer signed endorsement made by him. The said dying declaration is at Exh. 32.

7 The third dying declaration is at Exh. 34. P.W. 9 Police Constable Avhad has deposed about it. He has stated that he along with A.S.I. Pawar took Thagubai to the civil hospital Malegaon for treatment. A.S.I. Pawar gave one letter Exh. 33 to the Medical Officer for giving his opinion after examining the patient Thagubai Pawar whether she was in a condition to give a statement. As A.S.I. Pawar had expired, he could not be examined, however, police constable Avhad has stated that he scribed the said letter Exh. 33. The Medical Officer (P.W.7 Dr. Ranbhor) examined the said patient and gave a certificate on the letter (Exh. 33) to the effect that the patient was in a condition to give a statement. The Doctor signed his endorsement. Thereafter Police Constable Avhad has stated that in his presence, A.S.I. Pawar asked questions to Thagubai about how she sustained burn injuries. Police Constable Avhad has categorically stated that he recorded statement of Thagubai in his writing as per her narration.

Thereafter, thumb impression of Thagubai was obtained on the statement and A.S.I. Pawar also signed it. The Medical Officer who was also present at that time, also signed the statement in the margin and mentioned that it was recorded in his presence. This statement was recorded on 22.12.2011 at about 5 p.m. This dying declaration is at Exh. 34.

8 The fact that Special Executive Magistrate Shri. Wakhare and A.S.I. Pawar asked the Doctor to examine the patient Thagubai and to state whether she was in a condition to give a statement and thereafter, the Doctor examined the patient and stated that she was in a condition to give a statement, is corroborated by the evidence of P.W. 7 Dr. Ranbhor. Dr. Ranbhor has stated that on 22.12.2011 a little after 2.00 p.m. patient Thagubai was admitted in the civil hospital at Malegaon where he was on duty. At about 4.30 p.m. the Executive Magistrate came to the hospital. He requested Dr. Ranbhor to examine the patient and certify whether or not she was in a condition to give her statement. Dr. Ranbhor has stated that he examined the patient and found that she was fully conscious and was in a position to give a

statement. He gave certificate to that effect and put his signature thereunder. Then in his presence, the Executive Magistrate recorded the dying declaration of the patient. After recording the dying declaration, the Executive Magistrate requested Dr. Ranbhor to again examine the patient and certify about her condition. Accordingly Dr. Ranbhor again examined the patient and found that she was conscious and in a fit condition to give a statement. He again gave endorsement to that effect on the dying declaration. He has identified the dying declaration Exh. 32 as the one recorded by the Special Executive Magistrate. Dr. Ranbhor has further stated that thereafter when he was leaving the ward, he saw that police had arrived outside the ward. They informed him that they also wanted to record the statement of the patient. The Police Officer gave one letter Exh. 33 to him and requested him to examine the patient and certify whether or not, the said patient was in a condition to give a statement. Dr. Ranbhor then examined the patient and gave endorsement thereon that she was in a fit condition to give a statement. Thereafter the police officer recorded the statement of the said patient. After recording the dying declaration, the police officer obtained

endorsement of Dr. Ranbhor under his signature on the dying declaration to the effect that it was recorded in his presence. Dr. Ranbhor has identified the dying declaration Exh. 34 as the one recorded by the police.

9 The learned counsel for the appellants submitted that the evidence of Dr. Ranbhor wherein he has stated that the patient was in a condition to give a statement, cannot be relied upon because the Doctor has not stated what tests he had conducted on the patient to come to the conclusion that the patient was conscious and in a fit condition to give a statement. He has further submitted that once the Doctor has categorically stated that he examined the patient and found that the patient was conscious and in a fit condition to give a statement, it was necessary for the Doctor to state all the tests conducted by him on the patient to find out whether the patient was conscious and in a fit condition to give a statement. Dr. Ranbhor has clearly stated that he examined the patient and found that she was conscious and in a position to give her statement, we do not find it necessary for the doctor to state what tests were carried out by him to

ascertain that the patient was in a position to give a statement. We see no reason to disbelieve the averment of Dr. Ranbhor that the patient Thagubai was in a condition to give a statement.

10 Thereafter the learned counsel for the appellants submitted that there is no rubber stamp of the hospital below the endorsement of the Doctor. On careful perusal of the dying declaration as well as Exh. 33 which bears the endorsement of P.W. 7 Dr. Ranbhor that the patient was conscious and in a fit condition to give her statement, we find that the Doctor has signed under the endorsement given by him. The Doctor has categorically stated to that effect. Dr. Ranbhor has clearly stated that he was attached to civil hospital Malegaon as a Medical Officer at the relevant time and this averment has not been challenged in the cross-examination. Thus, in such case, the contention that the rubber stamp of the hospital is not found on the endorsement of the doctor, in our opinion, would not be a reason to disbelieve the evidence of P.W. 7 Dr. Ranbhor.

11 The learned counsel for the appellants thereafter submitted that vital witnesses have not been examined by the prosecution and this would fatally affect the prosecution case. He pointed out that the dying declaration Exh. 32 shows that at the time of the incident, both the appellants as well as the mother of the appellant no.2 was present. He submitted that in such case, the mother of appellant no.2 ought to have been examined and non-examination of this witness fatally affects the prosecution case. In the present case, we have already observed that all the witnesses including the grand-daughter of the deceased, have turned hostile. Though the grand daughter was an eye witness to the incident, she has not supported the prosecution. P.W. 4 Zulal Pawar who is the cousin of appellant no.1, has also not supported the prosecution. Other witnesses have also not supported the prosecution. In such case, it is not expected that mother of appellant no.2 would support the prosecution. In our opinion in the facts and circumstances of this case, non-examination of mother of appellant no.2 would not affect the prosecution case.

12 Thereafter it was submitted on behalf of the

appellants that Thagubai accidentally caught fire as border of her `sari' touched the fire when she was cooking. In support of this contention, reliance is placed on the evidence of P.W. 6 Sushila who is the grand daughter of deceased Thagubai. It is to be noted that Sushila like all the other relatives, has not supported the prosecution and has been declared hostile. Sushila is the daughter of appellant no.1. In such case, it is not expected that Sushila would support the prosecution and it is obvious that Sushila would support her father. Sushila has clearly made this statement to help her father. Looking to the fact that such an averment has been made by a hostile witness, in our view, no reliance can be placed on the same.

13 Thereafter Shri. Pande, the learned counsel for the appellants submitted that Thagubai had a grudge against her daughter in law i.e. appellant no.2 which is seen from the dying declaration Exh. 32. He pointed out that in the said dying declaration, Thagubai has stated that she wanted grand daughters of the first wife of her son Ashok and she did not want the daughter-in-law i.e. appellant no.2 Nirmalabai. No doubt, Thagubai may have a grudge against her daughter-in-

law but it is seen that in all the three dying declarations, Thagubai has implicated not only her daughter-in-law Nirmalabai but also her son Ashok. Thus, we find no merit in this submission.

14 Shri. Pande thereafter submitted that none of the three dying declarations can be relied on because they bear the thumb impression of Thagubai. He pointed out that post-mortem notes Exh. 58 show that Thagubai had sustained 90% burn injuries. He pointed out the evidence of P.W. 7 Dr. Ranbhor who has stated that both the hands of Thagubai were burnt from fingers to the shoulder. As far as this submission is concerned, it is seen that normally when a patient sustains burn injuries, they are superficial to deep burn injuries. When a person sustains superficial burn injuries on the fingers, it is possible to take the thumb impression. Moreover, it would be pertinent to take note of the evidence of P.W. 8 Special Executive Magistrate Wakhare who has stated that the left hand thumb of Thagubai was not burnt. This has been elicited in the cross-examination of Shri. Wakhare. It is further seen that the dying declarations Exhs. 32 and 34 have been

recorded in the presence of the Doctor i.e. P.W. 7 Dr. Ranbhor. He has also deposed about recording of the dying declaration in his presence. In such case, we see no reason to disbelieve any of these dying declarations.

15 Thereafter it was submitted that the dying declarations are inconsistent because in the dying declaration Exh. 43 which is recorded first in point of time, Thagubai has stated that her son and daughter-in-law were abusing her. Thereafter, her daughter-in-law poured kerosene on her which was in the house whereas in the dying declaration Exh. 34 Thagubai has stated that Nirmalabai poured kerosene on her from a can taken from her house i.e. house of Nirmalabai. Both the houses are adjacent to each other which is seen from the evidence of P.W. 6 Sushila. In the first dying declaration Exh. 43 Thagubai has only stated that Nirmalabai poured kerosene on her from the kerosene which was available in the house but she does not state whose house it was, hence, we do not find any such major discrepancy in the two dying declarations so as to cause us to discard the same.

16 It is well settled that a dying declaration can be the sole basis for conviction. The situation when a person is on death bed is solemn and serene. When he is dying the situation is grave and solemn, given the situation in which he is placed, he is expected to state the true facts. This is the reason in law to accept the veracity of his statement. It is for this reason, the requirement of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded from consideration, it will result in miscarriage of justice because the victim being generally the only eye witness in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence. It is worthwhile to note that the accused has no power of cross examination, therefore, this is a reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court. The Court has to be on guard that the statement of deceased was not as a result of either tutoring or prompting or product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind to state the facts and had a clear opportunity to observe and

identify the assailants. When the Court is satisfied that the dying declaration was voluntary and truthful it can base its conviction on it without any further corroboration. Therefore it is clear that a dying declaration can form the sole basis of conviction. In the present case, in our opinion, all the dying declarations are consistent and trustworthy, hence, we have no hesitation in relying on the same.

17 Mr. Pande placed reliance on the decision of this Court in the case of **Sharifabi Sabirshah Vs. State of Maharashtra**, reported in **2013 (2) Bom.C.R. (Cri.) page 137** to show that the deceased therein had sustained 85% burns and in such case, it was held that the dying declaration was not reliable. He contended that as in the present case, Thagubai had sustained 90% burns, her dying declarations cannot be relied upon. On further perusal of the said decision, we find that it is observed therein that "There was no convincing evidence to impute criminal liability positively to accused in absence of wholly reliable and acceptable evidence, hence, accused-appellant was entitled to benefit of doubt." In the said decision, it is noticed that P.W. 4 who was the sister-in-

law, has deposed that the deceased was unconscious from the moment she was taken to the hospital till about 9.30 p.m. Moreover, the husband of the deceased had mentioned in his evidence that his wife was totally burnt except her hair and she was not talking properly. It was in the peculiar facts of the case that this observation was made and the dying declaration was not relied upon. Such is not a case in the present matter. In the present case, we find that dying declarations are consistent and trustworthy, hence, we have no hesitation in relying on the same.

18 Thereafter reliance was placed by the learned counsel for the appellants on the decision of the Supreme Court in the case of **Surinder Kumar Vs. State of Haryana**, reported in **(2011) 10 SCC 173**. He pointed out that in the said case also, the patient had sustained similar burn injuries and it was held that the dying declaration could not be relied upon. On perusal of the said decision, it is seen that the deceased therein had sustained 95 to 97% burn injuries and the Executive Magistrate who recorded the dying declaration, stated that the deceased put her thumb impression on the dying declaration. It was

observed that when the whole body was burnt and bandaged, it is not possible to obtain thumb impression of the deceased. Moreover, in the said case, as per the prosecution, the incident took place at 2 a.m. on 26.6.1991 and as per the dying declaration, the occurrence of burning took place in the evening of 25.6.1991, that is, the previous day, further the dying declaration was not even attested by the doctor, it was in these circumstances that the dying declaration was not relied upon. At the cost of repetition, we may state that in the present case, the dying declarations are totally consistent and reliable and they can safely be relied upon.

19 On going through the record, we find that there is sufficient evidence to prove the case of the prosecution against the appellants. Thus, we find no merit in the appeal. Appeal is dismissed.

[SHRI.B.P.COLABAWALLA,J.] [SMT. V.K.TAHILRAMANI, J.]