

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

CRIMINAL APPEAL NO.477 OF 2013

Niwas s/o. Madhukar Dhiwar,
Age : 24 years, r/o. Kalegaon,
Tq. Kaij, Dist. Beed ..Appellant

Vs.

The State of Maharashtra ..Respondent

Mr. N.B.Khandare, Advocate for appellant

Mr. A.B.Girase, Public Prosecutor for respondent

**CORAM : S.S. SHINDE AND
R.G. AVACHAT, JJ.**

**RESERVED ON : FEBRUARY 02, 2019
PRONOUNCED ON :**

JUDGMENT (PER R.G. AVACHAT, J.) :

The challenge in this appeal is to the judgment and order dated 22.11.2013 passed by learned Additional Sessions Judge, Ambajogai, in Sessions Case No.25 of 2008. By the impugned judgment and order, the appellant herein has been convicted for the offence punishable under Section 302 r/w. Section 34 of the

Indian Penal Code ("I.P.C.", for short) and sentenced to suffer life imprisonment and to pay a fine of Rs.2,000 /-. In default of payment of fine, he has been directed to undergo rigorous imprisonment for two months.

Two more persons were charged and prosecuted along with the appellant herein for the same offence. Both of them have been acquitted. The State has not preferred appeal against their acquittal. In fact, one more accused was there. Since he was found to be a juvenile in conflict with law, has been dealt with by the Juvenile Justice Board.

2. The facts, in brief, giving rise to the present appeal are as follows :-

Poonam (deceased) was a 16 year old girl studying in Class 10th. She hailed from village Sabla, Tq. Kaij, Dist. Beed. She had, however, been staying at her maternal grand-parents' home at village Kalegaon for schooling. She did not have maternal

uncle. The parents of Poonam had migrated to Pune to eke out their living.

The appellant — Niwas hailed from village Kalegaon. He would love Poonam. She had, however, spurned his advances. On 26.12.2007, Poonam was alone home. It was between 01.00 p.m. and 02.00 p.m. The appellant with his two/three friends (Sangharsh and Suresh) came Poonam's home. They questioned her as to why she did not love the appellant. The appellant on her reply, sprinkled kerosene on her person. One of the others accompanying the appellant, lighted match-stick and set Poonam ablaze. She raised cries. The appellant and others, therefore, ran away. Before leaving, they closed the door (not bolted).

On hearing the cries, neighbors gathered. The grand-mother of Poonam (PW 4 — Avida) was away in the field. She too rushed home. On her enquiry with Poonam, she told to have been set ablaze by four boys. Poonam's grand-father was out of the village. The neighbors rushed Poonam to the Primary Health

Centre, Kaij and then she was shifted to Swami Ramanand Tirth Rural College and Hospital, at Ambajogai (hereinafter referred to as "S.R.T.R. Hospital"). There is a police outpost at the premises of S.R.T.R. Hospital, at Ambajogai. Police Constable (PW 7 - Jyotiram) on duty, was informed. PW 7 - Jyotiram went to the ward wherein Poonam was admitted. On his request, the Medical Officer on duty examined Poonam and certified her to be fit and conscious to make a statement. PW 7 - Jyotiram recorded Poonam's statement (Exh.82). She told PW 7 - Jyotiram to have been set ablaze by the appellant and his two friends Sangharsh and Suresh. Poonam's statement was treated as first information report. Based on the same, crime for the offence under Section 307 of I.P.C. came to be registered. On the same day, the Taluka Executive Magistrate recorded Poonam's statement (Exh.93). Both the FIR and the statement became Poonam's dying declarations. The parents of Poonam came to the hospital. They were

accompanied by Poonam's maternal aunt. On enquiry, Poonam stated them to have been set ablaze by the appellant, the acquitted accused and one Sangharsh (who has been dealt with by Juvenile Justice Board).

3. Investigation of the crime was taken up by PW 12 – P.S.I., Premnath. He visited the scene of offence and drew the scene of offence panchnama (Exh.65). Kerosene can and half burnt clothes came to be seized under Muddemal Pavati (Exh.2). On the next day, Poonam succumbed to burn injuries. Her dead body was subjected to post mortem, report whereof indicates that Poonam died of “shock due to burns”. Offence of murder came to be registered replacing the offence under Section 307 of the I.P.C. PW 12 – A.S.I. Premnath, Investigating Officer, recorded statement of the persons connected with the facts and circumstances of the case. The articles taken charge of were forwarded to Regional Forensic Science Laboratory, Aurangabad, for analysis and

report.

On completion of investigation, charge-sheet was filed before the Court of learned Judicial Magistrate, First Class, Kaij, Dist. Beed. Learned Magistrate committed the case to the Court of the Additional Sessions Judge, Ambajogai. Learned Additional Sessions Judge, Ambajogai, framed Charge. The appellant and others pleaded not guilty. Their defence was of false implication. According to the appellant, Poonam might have committed suicide.

4. To sustain the Charge, the prosecution examined thirteen witnesses and tendered in evidence some documents. On appreciation of the evidence in the case, learned trial Judge was pleased to pass the judgment and order, impugned herein. The case was based on the dying declarations i.e. four oral and two written.

5. Heard Mr.Khandare, learned Counsel for the appellant and Mr.Girase, learned Public Prosecutor

for the respondent – State.

6. According to learned Counsel appearing for the appellant, there is no evidence to indicate that Poonam was mentally fit and conscious oriented to make the dying declarations. Mental fitness and consciousness are two different things. There are also glaring inconsistencies interse the evidence of PW 3 – Santabai and PW 4 – Avida. Admittedly, Poonam had first been taken to Primary Health Centre, Kaij. PW 4 – Avida stated that there, Doctor had recorded Poonam's statement. That statement is not forthcoming. Suresh, cousin of Poonam, would go to school with Poonam. He has not been examined. One Jitendra was present at the crime scene. He too has not been examined. None of the neighbors, who had gathered and rushed Poonam to the hospital, has been examined as prosecution witness. Learned Counsel placed on record the notes of arguments and has relied upon the following decisions :-

(i) Surinder Kumar Vs. State of Haryana, (2011)10 SCC 173;

(ii) Laxman Vs. State of Maharashtra, (2002)6 SCC 710;

(iii) Govind Narain and anr. Vs. State of Rajasthan, 1993 Supp (3) SCC 343;

(iv) Sudhakar and anr. Vs. State of Maharashtra, (2000)6 SCC 671;

(v) State of Gujarat Vs. Jayrajibhai Punjabhai Varu, (2016)14 SCC 151;

(vi) Muralidhar Alias Gidda and anr. Vs. State of Karnataka, (2014)5 SCC 730;

(vii) Panchanand Mandal alias Pachan Mandal and anr. Vs. State of Jharkhand, (2013)9 SCC 800;

(viii) Ashok Dadarao Sable Vs. State of Maharashtra, 2016 DGLS (Bom.) 601;

(ix) Suresh s/o. Arjun Dodorkar (Sonar)
Vs. State of Maharashtra, 2005 BCI 232;

(x) Subhash s/o. Ratan Chavan and anr.
Vs. The State of Maharashtra, Criminal
Appeal No.519 of 2012;

(xi) Rajendra Madhukar Kadam Vs. The
State of Maharashtra, Criminal Appeal No.512
of 2007.

7. Learned Public Prosecutor, on the other hand, gave a chart containing the evidence of the witnesses relating to the dying declarations. According to learned Public Prosecutor, there are no material inconsistencies among the dying declarations. He took us through the relevant evidence on record to ultimately submit that the Trial Court was justified in convicting the appellant herein.

8. Instead of detaining ourselves to the

submissions advanced on either side, suffice it to say that those have been on our mind and are addressed while reappreciating the evidence in the case. The observations in the aforementioned citations are being relied upon in the process of appreciation of the evidence.

9. It needs no mention that each criminal trial is an individual aspect. It may differ from other trial in same or other aspect. Each case has to be decided on its facts and evidence let in.

10. Before advertizing the evidence in the case, it would be useful to refer the legal position. In the case of **Khushal Rao Vs. State of Bombay, AIR 1958 SC 22**, the Hon'ble Supreme Court made following observations :-

"16. On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the

opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human, memory and human character, and (6) that in order to test the reliability of a dying declaration, the

Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

17. *Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the, death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the court, after examining*

the dying declaration in all its aspects, and testing its veracity has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the court, in a given case, has come to the conclusion that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case."

In the case of **State of Gujarat Vs. Jayrajbhai Punjabhai Varu, AIR 2016 SC 3218**, it has been observed thus :-

" Courts have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the

accused person. A mechanical approach in relying upon a dying declaration just because it is there, is extremely dangerous. The Court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration. The Court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful. Once the Court is convinced that the dying declaration is so recorded, it may be acted upon and can be made a basis of conviction. The Courts must bear in mind that each criminal trial is an individual aspect. It may differ from the other trials in some or the other respect and, therefore, a

mechanical approach to the law of dying declaration has to be shunned."

In case of more than one dying declaration, plurality thereof does not add weight to the prosecution case but it is their qualitative worth. The dying declaration, which are mutually exclusive or grossly inconsistent with each other, would not form basis of conviction.

The inconsistency or incompatibility can be said to arise if the assertions in one dying declaration are so diametrically opposed to the statements in the other that both cannot stand together. Mere non-mention of identical details does not make dying declaration incompatible. [Sandeep and Anr. Vs. State of Haryana, (2015)11 SCC 154].

11. Let us now advert to the evidence in the present case. Admittedly, in the afternoon of 26.12.2007, Poonam suffered extensive burns. She succumbed. The post mortem report (Exh.76) states

that Poonam died of "shock due to burns". Poonam was residing at her maternal grand-parents' home at village Kalegaon for schooling. She was in class 10th. Her parents were away in Pune.

12. PW 1 - Rajesh is a witness to the scene of offence panchnama (Exh.65). It is in his evidence that on 27.12.2007, the Police Officer drew the scene of offence panchnama in his presence. This witness further stated that one *Odhani*, kerosene can, match-box were seized by the police. It is further in his evidence that the home wherein the incident took place, is centrally located in the village. The home is comprised of two rooms. In response to the questions put to this witness during cross-examination, nothing could be elicited so as to doubt his version. Although, on that day, he gave evidence in the present case, he was summoned to give evidence as panch witness in one more case.

13. As stated earlier, the case is based on six dying declarations, four oral and two written.

ORAL DYING DECLARATIONS :

14. PW 4 – Avida is the maternal grand-mother of Poonam. It is in her evidence that on the fateful day, she was away in the field. Her husband was out of village. As someone told her about the fire incident at her home, she rushed home. She found Poonam lying in burnt condition. It is further in her evidence that Poonam told her that four boys set her ablaze. One of them was son of one Madhukar. She, however, could not recollect names. PW 4 – Avida further testified that the reason behind setting her ablaze, was that they wanted Poonam to love the appellant.

15. During cross-examination of PW 4 – Avida, it has come on record that Suresh, her grand-son (son of another daughter) was also residing at her home for schooling. He would accompany Poonam to and fro the

school. It is further in her evidence that one Jitendra and one Raghunath were present at her home when she came from the field. There is evidence to indicate that Suresh was in 5th standard. When PW 4 reached home, Suresh was nowhere at the scene. Poonam has also stated in her dying declarations that she was alone home. Suresh's non-examination as witness in the case could, therefore, not be said to be adverse to the prosecution. The same is the case about non-examination of Jitendra, as, the evidence in the case, undoubtedly, indicates that he had rushed to the scene after the incident. It is not the case that the Investigating Officer has not recorded the statements of neighbors, who had gathered at the scene and rushed Poonam to the hospital. Non-examination of one of them as prosecution witness, could not be held to be fatal in view of the other evidence on record. We also cannot lose sight of the fact that Poonam was staying at her maternal grand-parents' home, at village Kalegaon.

She was not native of that village. The appellant was native of Kalegaon. The prosecution has examined the driver of tempo (PW 8 - Bajarang), in which Poonam was rushed to the hospital. This witness did not stand by the prosecution on material aspect of Poonam stating him and others, as to by whom and how she was set ablaze. We mean to say that learned A.P.P. in-charge of the case before the Trial Court, has not examined any of such witnesses for good reason.

16. PW 2 - Babasaheb and PW 6 - Lata are parents of Poonam, while PW 3 - Santabai is the maternal aunt. All these witnesses were at Pune. On having been informed about the incident, they rushed to S.R.T.R. Hospital, at Ambajogai, wherein Poonam was admitted.

PW 2 - Babasaheb testified to have been told by Poonam that the appellant, Sangharsh, Sumeet and one more boy came to her home along with kerosene can. She was taking meal. It was 02.00 p.m. One of

the four, poured kerosene on her person. Sumeet lighted match-stick and set her ablaze. Then they ran away. The accused persons locked the door from outside and ran away. As smoke was emitting from the home, the neighbors gathered there. They hired a jeep and shifted Poonam to the hospital.

17. PW 3 – Santabai testified to have been told by Poonam that the appellant poured kerosene on her person. Sangharsh set her ablaze by lighting a match-stick. Sumeet and Suresh were helping them.

18. It is in the evidence of PW 6 – Lata that Poonam told her that the appellant, Suresh, Sangharsh and Sumeet burnt her by pouring kerosene. The reason behind setting her ablaze was her refusal to love the appellant.

WRITTEN DYING DECLARATIONS :

19. PW 9 – Dr.Pankaj was Medical Officer on duty at the hospital, on 26.12.2007. It is in his

evidence that Poonam was admitted to the hospital by 05.00 p.m. She had suffered 97% burns. It is further in his evidence that Poonam gave him history of the incident. She told him that three persons burnt her by pouring kerosene on her person. The witness referred to the medical papers (Exh.90). He specifically referred to the history given by Poonam. According to him, he took down the history as narrated by Poonam.

20. It is further in his evidence that he had examined Poonam before and after recording of her dying declaration by PW 7 – Jyotiram, and PW 10 – Sujit. It is in his evidence that he found Poonam conscious oriented to make statement. He specifically referred to the endorsement given by him on the dying declarations (Exhs.82 and 93). His evidence further indicates that Poonam was first brought to Casualty (Ward). It was about 05.00 p.m. Then, she was shifted to Ward No.14 by 06.45 p.m. She was consistent in ability to speak.

21. PW 7 – Jyotiram was Police Head Constable on duty at the police outpost located on the premises of the S.R.T.R. Hospital, Ambajogai. It is in his evidence that he was informed about admission of Poonam to the hospital. He, therefore, went to Ward No.14, wherein she was. The Medical Officer examined Poonam on his request and certified her to be fit to make statement. He then inquired with Poonam as to how she suffered burns. Poonam told him that it was 02.00 p.m. She was alone home. Niwas (appellant), Suresh and Sangharsh came her home. Sangharsh and Suresh asked her why she did not love the appellant. The appellant poured kerosene on her person. Sangharsh lighted a match-stick and set her ablaze. She raised hue and cry. The four ran away. Neighbors gathered and extinguished the fire. Her grand-parents shifted her to the hospital. It is further in his evidence that he read over the statement to Poonam. She verified it. He then obtained her right toe impression below her statement.

In response to the questions put to him in cross-examination, PW 7 – Jyotiram testified that Poonam was in side-room. She had suffered 100% burns. She was under treatment. He recorded her treatment after dressing was over.

22. PW 10 – Sujit was Naib-Tahsildar-cum-Executive Magistrate. He had rushed to the hospital in response to the police requisition. It is in his evidence that on his request, the Medical Officer examined Poonam and certified her to be fit to give statement. Thereafter, he recorded Poonam's statement as narrated by her. It is further in his evidence that the statement was taken down by his Writer. After writing was over, he read over it to Poonam. She certified its correctness. Then he obtained her right toe impression below her statement. It is further in his evidence that the Medical Officer again examined and certified her to be fit to make statement.

23. In the case of **Bharwada Bhogin Bhai Hirjibhai Vs. State of Gujarat, (1983)3 SCC 217**, it has been observed as under :

"5.We do not consider it appropriate or permissible to enter upon a reappraisal or reappreciation of the evidence in the context of the minor discrepancies painstakingly highlighted by learned Counsel for the appellant. Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious :

(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprised. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess-work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed

up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him – Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."

In the case of **Appabhai Vs. State of Gujarat, 1988**

Supp SCC 241, it has been observed as under :-

13.The court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors

of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy. Jaganmoha Reddy, J. speaking for this Court in Shorab Vs. State of Madhya Pradesh, (1972) 3 SCC 751, observed:-

"8. This Court has held that falsus in uno falsus in omnibus is not a sound rule for the reason that hardly one comes across a witness

whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishments. In most cases, the witnesses when asked about details venture to give some answer, not necessarily true or relevant for fear that their evidence may not be accepted in respect of the main incident which they have witnessed but that is not to say that their evidence as to the salient features of the case after cautious scrutiny cannot be considered."

In the case of State of **Haryana Vs. Bhagirath**, (1999)5 SCC 96, it been has observed as under :

8. It is nearly impossible in any criminal trial to prove all the elements with a scientific precision. A criminal court could be convinced of the guilt only beyond the range of a reasonable doubt. Of course, the expression "reasonable doubt" is incapable of definition. Modern thinking is in favour of the view that proof beyond a reasonable doubt is the same as proof which affords

moral certainty to the Judge.

9. Francis Wharton, a celebrated writer on criminal law in the United States has quoted from judicial pronouncements in his book Wharton's Criminal Evidence (at p. 31, Vol. 1 of the 12th Edn.) as follows:

"It is difficult to define the phrase 'reasonable doubt'. However, in all criminal cases a careful explanation of the term ought to be given. A definition often quoted or followed is that given by Chief Justice Shaw in the Webster case. He says: 'It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that consideration that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

In the case of **Leela Ram Vs. State of Haryana,**
(1999)9 SCC 525, it has been observed as under :

"9. Be it noted that the High Court is within its jurisdiction being the first appellate court to reappraise the evidence, but the discrepancies found in the ocular account of two witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence.

APPRECIATION OF EVIDENCE :

24. Poonam had received extensive burns at 02.00 p.m. on 26.12.2007 at her maternal grand-parents' home at Kalegaon. She had no maternal uncle. Poonam's grand-mother (PW 4) was away in the field for grazing cattle. On hearing about the fire incident, she rushed home. It is in her evidence that her another grand-son namely, Suresh (son of another daughter) was not home. Suresh was a 5th standard student. His non-examination as witness is not prejudicial to the prosecution. The charge-sheet indicates the Investigating Officer to have recorded his statement. On arrival of the grand-mother (PW 4), neighbors rushed Poonam first to hospital at Kaij and then within half an hour, she was shifted to S.R.T.R. Hospital, Ambajogai. PW 4 - Avida claimed to have had accompanied Poonam all along. It is true that PW4 - Avida testified that the Doctor of hospital at Kaij recorded Poonam's statement. We found PW 4 - Avida to have so stated out of her illiteracy. It

appears that the defence consciously did not put any question to the Investigating Officer to elicit whether Poonam's statement was really recorded at hospital at Kaij.

25. Poonam was admitted to S.R.T.R. Hospital, Ambajogai by 05.00 p.m. Same is evident from the case papers (page 2 Exh.90). It is common knowledge that a patient is first taken to Casualty and then admitted in a ward. PW 9 – Dr.Pankaj was on duty. He recorded history given by Poonam. His evidence indicates that Poonam told him to have been immolated by three persons. The case papers (Exh.90) also indicate the history as “homicidal burns”. The medical papers were prepared at the hospital. The parents and other close relations of Poonam were away in Pune. They reached the hospital about 20 hours after the incident. This indicates that there was no one around to tutor or prompt Poonam to make a statement implicating the appellant. PW 9 – Dr.Pankaj is an independent witness. His evidence

indicates that he examined Poonam on the request of PW 7 - Jyotiram and certified her to be fit to make statement. It is true, Dr.Pankaj did not state in so many words that Poonam was mentally fit and conscious oriented to make statement. There is, however, no reason to doubt his version. He has given an endorsement on Exh.82, first information report-cum-dying declaration.

26. PW 7 - Jyotiram was Head Constable on duty at the police out-post at S.R.T.R. Hospital at Ambajogai. On admission of Poonam to the hospital, he was initially informed as it being a medico-legal case (M.L.C.). He, therefore, rushed to the ward where Poonam was admitted. His evidence indicates that he went to ward no.14. The defence tried to make much capital of inconsistencies in timing about Poonam's not being in ward no.14 by little past 5.00 p.m. It is true that the medical papers indicate Poonam to have been admitted to ward no.14 by 06.15 p.m. The fact that PW 7 - Jyotiram and other

witnesses gave evidence before the Court five and half years after the incident, cannot be lost sight of. We found minor discrepancies in the evidence of the witnesses as a result of a long time gap between the incident and recording of their evidence before the Court. In case of conflict between oral and documentary evidence, the document prevails. Since the case papers indicate Poonam to have been admitted to the hospital by 05.00 p.m. and the fact that the first information report-cum-dying declaration bears time of recording between 05.10 p.m. and 05.40 p.m., it can, in no way, be said to be inconsistent with the factual matrix. PW 7 - Jyotiram was categorical to state that the Medical Officer on duty, examined Poonam on his request and certified her to be fit to make a statement. PW 7 - Jyotiram's evidence also indicates Poonam to have been mentally fit to make a statement, since his evidence suggest that he put some questions and satisfied himself that Poonam was in a position to make statement. The first

information report-cum-dying declaration is at Exh.82. It bears certification given by the Doctor that Poonam was co-operative while giving statement. The statement (Exh.82) was recorded in is presence.

27. The First Information Report - cum - dying declaration (Exh.82) reads - for the last two months, the appellant was after her. The appellant wanted her to love him. She was not inclined. By 02.00 p.m., on 26.12.2007, she was alone home. The appellant along with his two friends - Sangharsh Changdeo Shinde and Sudesh Pralhad Dhiwre came home. Both Sudesh and Sangharsh asked her why she did not love the appellant. The appellant doused her with kerosene. Sangharsh set her ablaze with match-stick. On hearing her cries, neighbors gathered. Then, the appellant and those two ran away. On arrival of her grandparents, she was rushed to S.R.T.R. Hospital, at Ambajogai.

28. PW 7 - Jyotiram claimed to have obtained Poonam's right toe impression below her statement (Exh.82). The First Information Report - cum - dying declaration and the history given by Poonam have been recorded within three hours of the incident. It has already been observed that there was no one around to tutor or prompt Poonam to give statement (Exh.82). There is also nothing to indicate Poonam to have had any axe-to-grind against the appellant and others named.

29. On the same day, the Executive Magistrate (PW - Sujit) recorded Poonam's dying declaration pursuant to the requisition given by the police. The dying declaration is at Exh.93. It bears Doctor's (PW9) endorsement certifying Poonam to be conscious and co-operative while taking her statement. The Doctor also certified her to be in same condition soon after recording of the dying declaration (Exh.93) was over. It is true that the Doctor claimed

to have been present while the dying declaration was being recorded, whereas, the Executive Magistrate testified that he had asked, the persons present along with Poonam including the Doctor, to leave before he recorded the dying declaration. This inconsistency in the evidence of both these witnesses is only due to the reason of recording of their evidence five and half years after the incident. There can be no criminal case, in the evidence of which there is no inconsistency.

Poonam stated in the dying declaration (Exh.93) that it was about 01.00 p.m. She was alone home. The appellant along with his two friends, Sumeet and Sangharsh came home. The appellant was insisting her to love him. She was not interested in him. She, therefore, spurned his advances. Being annoyed therewith, the trio doused her with kerosene and immolated her. Thereafter, they ran away after closing the door. On hearing her cries, the neighbors gathered. On arrival of her grand-parents, she was

first taken to the hospital at Kaij and then, to the S.R.T.R. Hospital, at Ambajogai.

30. The evidence of the Executive Magistrate indicates that after recording of the dying declaration (Exh.93), he read it over to Poonam. She confirmed the same. He then obtained her right toe impression, below the statement. It is true, the Writer of the Executive Magistrate had accompanied him. It is the Writer, who took down the statement. This evidence indicates that Poonam gave her statement which, in turn, was dictated by the Executive Magistrate (PW 10) to his Writer. It is true that the Writer has not been examined. After recording of the statement, the same was read over to Poonam and she affirmed the same. We find no reason to discard the same, merely because it was taken down by the Writer and he has not been examined as witness. Exh.93 bears the Doctor's endorsement to the effect that it was recorded in his presence. This adds assurance to the authenticity of the same

having been recorded as narrated by Poonam. We do not see any material inconsistency between the three dying declarations namely, the history given by Poonam and recorded in the medical papers (Exh.90), the first information report-cum-dying declaration (Exh.82) and the dying declaration (Exh.93) recorded by the Executive Magistrate. In all the three, she was categorical in stating that the culprits were three in number. They set her ablaze. In the first information report-cum-dying declaration, Poonam has specifically stated the appellant to have doused her with kerosene and Sangharsh (a juvenile in conflict with law) set her ablaze. Whereas, in the dying declaration (Exh.93), she stated that the appellant, Sumeet and Sangharsh set her ablaze. True, the role attributed to each of them is general in nature without specifically attributing each of them incriminating role. The same, however, could not be said to be inconsistent with the first information report-cum-dying declaration.

31. Let us now appreciate the evidence regarding the oral dying declarations.

First such statement is said to have been made to PW 4 – Avida, grand-mother of Poonam. Her evidence indicates that she was in the field. On hearing of the incident, she rushed home to find Suresh was not around. Poonam was lying in burnt condition. Poonam told PW 4 – Avida the names of four persons. One of them was son of Madhukar. It cannot be said to be co-incident that the name of father of the appellant is Madhukar. This witness identified accused before the Court as one whose name was stated by Poonam. According to her, the four poured kerosene on her person and immolated her for the reason that, she refused to love one of them.

It is true that the evidence of PW 4 – Avida indicates that her husband was out of village. Whereas, in the written dying declaration, it has been stated that on arrival of PW 4 – Avida and her

husband, she was rushed to the hospital. The last part of this statement is found to be not correct. The same, however, does not go to the root of the case to altogether disbelieve the written dying declarations.

32. PW 2 – Babasaheb, father of Poonam, testified that Poonam told him that the appellant, Sangharsh, Sumeet and one more person came her home with kerosene can. It was about 02.00 p.m. One of them poured kerosene upon her. Sumeet lighted match-stick and set her ablaze. Then they ran away after locking the door from outside.

This evidence of PW 2 – Babasaheb was stated to be grossly inconsistent with the written dying declarations. We are not at one with the submission, as the statement of this witness was recorded three and half days after the incident. The defence itself invited this witness's attention to his police statement to bring on record that he had not stated

therein that the culprits ran away after closing (bolting) door from outside. This fact itself indicates that this witness first time stated before the Court that the door was locked from outside. Poonam has stated in her dying declaration that the trio had closed the door. She does not mean to say that it was locked. This witness also does not state accordingly in his police statement. Same is the case about this witness's evidence regarding the four having come with kerosene can. No such matter is found in the police statement of this witness recorded within four days of the incident. True, attention of this witness was not brought to his police statement. True, this witness stated that Sumeet lighted match-stick, whereas in his police statement, he has stated that it was Sangharsh. If such inconsistencies, which are result of the time gap, are allowed to be appreciated creating doubt over the case of the prosecution, it would amount to miscarriage of justice.

33. PW 3 – maternal aunt of Poonam testified to have been told by Poonam that the appellant, Sangharsh, Sumeet and Suresh came her home. The appellant poured kerosene. Sangharsh lighted match-stick and others two helped them, while PW 6 – Lata, mother of Poonam, testified to have been told by Poonam that the appellant, Sumeet, Suresh, and Sangharsh burnt her by pouring kerosene for the reason of her refusal to love the appellant.

34. The evidence of the aforesaid four witnesses indicate that Poonam had stated them one more name – Sumeet, as the person involved along with others three, to set her ablaze. The Trial Court has rightly acquitted Sumeet. As stated herein above, the written dying declarations would prevail over the oral dying declarations stated to have been made to these four witnesses. The dying declarations are consistent so far as regards the reason for setting Poonam ablaze and the culprits being three i.e. the appellant,

Sangharsh and Suresh, except introduction of the fourth accused – Sumeet. Here again, it is stated that the statements of these witnesses have been recorded by the Investigating Officer little over three days after the incident. Mere fact of implicating Sumeet in the offence would not materially affect the evidence that was available against the remaining three.

35. So far as regards non-examination of Jitendra and other neighbors is concerned, there is purshis (Exh.71) passed by Special Public Prosecutor, in-charge of the case, which suggest that they were not going to support the prosecution. The reason thereof is obvious. Deceased Poonam, in fact, was not native of village Kalegaon. She was staying with her grand-parents for schooling. She had no maternal uncle. The evidence indicate that the grand-father of Poonam passed away, pending trial. PW 8 - Bajrang, who had driven Poonam to hospital, testified that on way, she did not make any statement. He was declared

to be not supporting the prosecution. It, therefore, cannot be said that no independent witness has been examined. The charge-sheet indicates the Investigating Officer has recorded statements of the neighbors. He was categorical to state that no one had witnessed the appellant and his companions entered Poonam's home and then exited. True, in one of the statements, Poonam has stated that the neighbors came and then the appellant and his companions ran away. We are afraid as to how this inconsistency would lead to disbelieve the prosecution case in its entirety. It was also submitted by learned Counsel for the appellant that the C.A. report (Exh.61) is silent to indicate existence of carbon particles, so as to attribute the case to be of setting Poonam ablaze with kerosene. It appears that it was a faint submission. Though carbon particles were not detected, C.A. Report (Exh.61) undoubtedly, indicates that kerosene residues were detected with Poonam's hair.

36. The offshoot of the aforesaid reasoning is that deceased Poonam was alone home in the afternoon of 26.12.2007. The appellant along with Sangharsh (dealt with by the Juvenile Justice Board) and Suresh came her home. The appellant wanted Poonam to love him. She spurned. He, therefore, doused her with kerosene. Sangharsh set her ablaze. She was admitted to S.R.T.R. Hospital, Ambajogai by 05.00 p.m. PW 7 - Jyotiram recorded the first information report-cum-dying declaration (Exh.82). Before that, Poonam gave history of having been immolated by the three. That history was recorded by PW 9 - Dr.Pankaj. On the same day, the Executive Magistrate recorded Poonam's dying declaration (Exh.93). Before recording both the dying declarations, the Doctor on duty (PW 9 - Pankaj) had examined Poonam and certified her to be fit to make statement. The oral dying declarations are also found to be not so inconsistent with the written dying declarations. There is a common thread to suggest involvement of the appellant, Sangharsh and Sumeet.

We found the written dying declarations to be voluntary, untutored and made during conscious state of mind. The Trial Court has rightly convicted the appellant. We do not find any reason to disagree with the findings recorded by the trial Court.

37. In the result, the appeal fails. The appeal is dismissed.

[R.G. AVACHAT, J.]

[S.S. SHINDE, J.]

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