

RESERVED

Court No. 1

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW**

T.A. No. 75 of 2016

Thursday, this the 07th day of February, 2019

Hon'ble Mr. Justice SVS Rathore, Member (J)
Hon'ble Air Marshal BBP Sinha, Member (A)

No. 14578411-K Ex Cfn Rajesh Kumar (Ex 26 Inf Div SIG Regt),
son of Laxman Prasad, Village- Selapur, P.O. Madhoganj
(Presently lodged in Varanasi Central Jail) District Varanasi.

.... Petitioner/Appellant

Ld. Counsel for the: Shri Rohit Kumar, Advocate.

Petitioner/ Appellant

Versus

1. Chief of the Army Staff, through OIC Legal Cell (Army) Sub Area, Allahabad.
2. GOC, 26 Inf. Div through 26 Inf Div SIG Regt C/o 56 APO.
3. Superintendent, Central Jail, Varanasi.
4. Union of India, through Secretary, Ministry of Defence, New Delhi.

....Respondents

Ld. Counsel for the: Dr S.N. Pandey, Advocate.
Respondents.

ORDER**“(Per Hon’ble Mr Justice SVS Rathore, Member (J))”**

1. By means of this T.A. the petitioner/ appellant has challenged the punishment of imprisonment for life and dismissal from service awarded to him by the General Court Martial (GCM).

2. In the instant case the wife of the petitioner/appellant, namely, Smt Asha Devi suffered burn injuries on 04.05.1988 in the night at about 09.00 - 09.15 P.M. The facts as emerged from the record shows that the appellant was on guard duty on that date. After completing his duty hours at about 09.00 P.M. he asked his Guard Commander to go to toilet as his stomach was upset. Thereafter he went towards his house. The wife of the appellant Smt Asha Devi suffered burn injuries. Seeing the flames of the fire some other persons living in the nearby quarters reached there, opened the door after pushing and kicking the door and found that the wife of the appellant was sitting near the stove in a naked position. They wrapped a blanket around her body. Thereafter she was taken to the 166 Military Hospital, where ultimately she succumbed to the injuries on 05.05.1988 at 1630 hours. The allegation against the appellant is that he poured kerosene oil on the head of the victim and set her ablaze due to which she caught fire and because of the burn injuries she ultimately died. The GCM was conducted for the said charge of murder against the appellant. During the course of GCM

proceedings the prosecution examined as many as 17 witnesses.

The brief detail of the prosecution witnesses is as under:-

3. PW1 is Signalman Patel Prakash, who after the death of victim prepared the sketch map of the quarter of the appellant. He has proved the sketch map of the quarter wherein this incident had taken place. PW2 is Hav Lakshman Pathak Guard Commander, who has stated that the appellant was on Guard duty on 04.05.1988 and he had asked for his permission to go home due to his stomach disorder and went for toilet to his house at 2100 hrs. He had directed him to come back at the earliest. He has proved the duty Register. He has also stated that his duty tenure was from 1900 hrs to 2100 hrs and he went back on completion of his Sentry duty. PW3 is Maj M Mukhtar Ahmed. He was on DMO duty in the Hospital. His duty was from 1330 hrs on 04.05.1988 till 0830 hrs on 05.05.1988. At about 2200 hrs on 04.05.1988 Mrs Asha Devi wife of appellant was brought to the Hospital. He medically examined her. He has also stated that she was in a state of delirium and was not responsive to any query and no statement was given by her. PW4 LNK Jaganathan has stated in his statement that he was staying with his family in quarter No.45/5 in the vicinity where the appellant was living with his family. He has stated that when he heard the people shouting "Aag Aag", he picked up a blanket from his house and ran in that direction. When he reached at the spot he noticed that the flames and smoke were coming from the appellant's house. The door of

his house was closed. He shouted to open the door but there was no response from inside the house. He then pushed the door with his hands/kick and it opened. He and Signalman Ram Chandran, who had come with him running, entered the house, on entering the house he saw that the appellant's wife was sitting at a distance of about 3 feet from the entrance door. She was completely naked and was sitting in a kneeling position with her knees closer to her chest and her hairs were on fire and her body from the back was badly burnt. This witness also noticed some of her clothes burning at some distance. He immediately put the folded blanket over her head to put off the fire. The blanket also got fire. Seeing the blanket burning, he removed the blanket from her body and left it on one side. Accused/ appellant's wife then immediately got up and came out of the house. As she came out of the house, men/ ladies who had gathered in front of the house by that time started moving there after seeing her burn injuries. The victim also started moving restlessly. She was caught by CHM BT Nair, who asked her the cause of fire but she did not reply to his query. Thereafter she was taken to the Hospital. PW5 is Nb Sub BT Nair. He has stated that on 04.05.1988 between 2115 hrs and 2120 hrs he heard shouting of "Aag, Aag" from the direction of NI Lines quarters, which was mixed voice of male and female and on reaching there he saw a naked lady in burnt condition in front of quarter No. 45/5 NI Lines. She was surrounded by several ladies. He came to know that she is the wife of present appellant. She was carying in pain. When he

asked her twice or thrice what happened then she replied “Puchho Mat” (do not ask anything). Seeing her critical condition, he asked to bring a blanket and covered her body and thereafter called the ambulance and sent her to Hospital. PW6 is Sub Maj (Hony Lt) Des Raj. This witness also after getting information about the fire in one of the family quarters of block No.45 immediately reached quarter No.45/5 of the appellant. He has given a similar statement. Appellant has made extra judicial confession before this witness also. PW7 is Nk (MP) SN Singh. This witness has stated that when he learnt about the incident he went to the place of incident but at that time the appellant’s quarter was found locked from outside. He got information that the lady has been evacuated to the Military Hospital. Accordingly he went to 166 Military Hospital, but he could not take the statement of the victim as she was unfit to make any statement. Next day again he went to the Regiment and met the Commanding Officer. He then went to the appellant’s quarter alongwith the Commanding Officer and Sub Mohan Singh. Sub Mohan Singh opened the house and he observed that a kerosene oil stove was kept in the Varandah of the house and there were some spots of kerosene oil around it. He also observed a few burnt pieces of Sari lying in the court yard of the house. After visiting the house, he came back to the Unit and recorded the statements of various witnesses. Accused/appellant also gave a statement before him. The accused/appellant stated to him that after completing his duty from 1900 hrs to 2100 hrs he came to his house with the

permission of the Guard Commander to have his food. On reaching home, his wife started cooking the food and he went inside the room. In the room he removed his belt and cap. While opening the buttons of his shirt, he suddenly heard "Aag Aag". Immediately he ran to save his wife but she ran out of the house and he could not catch her. PW8 is BR Choudhary, SHO Police Station Nowabad, Jammu. He is the subsequent Investigating Officer of this case. Before that the case was investigated by Head Constable Mohammad Yousuf. He recorded statements of some witnesses and on 24.06.1988 he took into possession one black coloured blanket, one pair of jungle boots and one OG 'pant'. These items were already sealed and he sent these articles for forensic science laboratory. PW9 is Constable (Photographer) Girdhari Lal, who had taken photograph of the place of incident, which he has proved. PW10 is Head Constable Mohammed Yusuf, who had initially investigated this case. He has stated that on 05.05.1988 on receiving the information of the incident of 04.05.1988 and that she has been admitted in Military Hospital, Jammu he went to the said Hospital. On reaching there he learnt that the victim has died. He after completing the formalities sent the body for post-mortem. He after inspecting the house of the appellant had taken into custody one plastic can, having about 250 ml of kerosene oil, one aluminium container (dollar type) from the bath room of the house and pieces of burnt cloth with some flesh attached to it from the court yard of the house. PW11 is Harbans Lal, Sub Inspector, Crime Branch Jammu. He has stated

that during his investigation he received three reports from the forensic science laboratory, Jammu, which he has proved. PW12 is Sub Mohan Singh, who has stated that on 04.05.1988 Nk RV Pawar came to his house and informed that wife of Cfn Rajesh Kumar caught fire while cooking 'Chapati' on a kerosene oil stove and she has been evacuated to 166 Military Hospital, Jammu in the ambulance vehicle. He immediately went to the Military Hospital on a bicycle and when he reached the Hospital he saw that several persons of his Unit were already present there. Appellant was also present there. At that time the victim was in ICU. When the accused/appellant came back, he was brought to the office of Adjutant. Maj AK Bali, the Adjutant told him that he would speak to the accused alone and asked him to go out of his office. He came out of the office. After some time Maj AK Bali called him in his office where the accused was still present. This witness has also stated that Adjutant told him that the accused has confessed to him that he has burnt his wife by pouring kerosene oil on her while she was busy in cooking food. PW13 is Maj (Mrs) Nina Dutta Roy, who was the Medical Duty Officer in the Military Hospital. PW14 is Lt Col GS Saluja, who was the Doctor in the Military Hospital. He has attended the victim while she was fighting for her life. PW15 is Dr CS Gupta. He has conducted post-mortem on the body of the deceased, which he has proved. As per his evidence deceased sustained 90% burn injuries and the smell of kerosene oil was present on scalp. PW16 is Maj AK Bali. He got information of the incident on 04.05.1988.

He has stated that Sub Maj Des Raj told him that the wife of the accused/appellant sustained 40% burns and subsequently stated that she has received 80% burns injury. This witness went to the Hospital. Accused/appellant was also present there. On 05.05.1988 he went to his office. He was told that the accused/appellant wanted to see him. On 05.05.1988 around 1000 hrs Sub Mohan Singh brought the accused/appellant to his office. The accused/appellant insisted that he wants to speak to him alone and nobody else should be present there. Therefore, he asked Sub Mohan Singh to go out of his office. This witness has stated that accused/appellant told him that he had committed a mistake and wanted to tell him about it. The accused/appellant told him as under:-

“I had arranged some kerosene oil and had kept it in the room. On 04 May 88, I came to the house and asked my wife to prepare food. As she started cooking the food, I came from behind and started pouring kerosene oil over her head. She objected to it. On this, I stopped further pouring of kerosene oil over her head and picked a match box. I lighted a match stick and there after I do not remember anything except that I saw her in flames. She had asked for help, when she was in flames but I did not render any help to her. When she was fully engulfed in flames, I came to the room and lay down in the bed.”

4. PW17 the last witness of the prosecution is Nk Mansa Ram Pal. This witness has stated about some earlier incident of 24.04.1988 at about 1200 hrs i.e. only ten days prior to this incident. He saw an old man and a lady sitting under a 'Pipal' tree. He asked them about their identity. Then the old man said that he is the father of appellant and the lady is wife of appellant. Then he

took them to his house and thereafter called appellant who took his wife to his house leaving his father in the house of this witness. On 25.04.1988 accused/appellant came to the house of this witness and returned his blanket and requested him for a stove. A kerosene pump stove was given by this witness to the accused/appellant. Thereafter the accused/appellant was asked to enter in his defence. Before entering in his defence every incriminating circumstance coming against accused was put to him, which were replied by him and thereafter he entered into his defence. He took the plea of no case against him in his defence and stated that there is no evidence that the appellant was present inside the house and on the contrary there is evidence that persons who went inside the said house have nowhere stated that they have seen appellant inside the quarter where the incident has taken place.

5. Brief description of defence evidence is as follows. DW1 is Smt Bimlesh Kumari. She is the wife of Nk Mansa Ram Pal (PW17). She has stated that once appellant's wife had come to her house alongwith the father of the accused. During that visit she did not talk to this witness though she tried to speak to the victim. She has also stated that the accused had taken kerosene oil stove from her house after the arrival of his wife. DW2 is Maj RK Mukherjee, who was the Medical Officer in 26 Inf Division. He has stated that on 27.04.1988 i.e. after 3 days of her arrival in the appellant's quarter, he had examined the wife of the

accused/appellant. She was diagnosed as a case of "Acute Entritis" and he had prescribed her necessary medical treatment. He has also stated that on the said date he had examined 30 patients. Out of 30 patients, he diagnosed 5 patients as a case of "Acute Entritis", which could be because of consumption of stale food. DW3 is LNK RK Pal, who has stated that he was on Sentry duty on the date of incident. Accused/appellant was on duty in the night at the main gate. The appellant was relieved from the duty at 2100 hrs by him. Thereafter he went to the Guard Commander. He was present with him for about 4-5 minutes. DW4 is Laxman Prasad. This witness has stated that he is the father of the accused/appellant. This witness has stated that the accused/appellant was married to Asha Devi during the year 1987. Smt Asha Devi was his maternal uncle's daughter. Immediately after her marriage she had stayed with him for about one month before he brought her to Jammu on 24.04.1988. For rest of the period, she had stayed with her parents. She used to come to his place as and when they called her. She was taking medicines for some mental ailment at her parents' place. Her parents used to live in Village Iswarpur- Shai, which was about 2 Km away from his village. He has also stated that he used to defray the expenditure for her medicine. GCM has also noted the demeanour of this witness during his cross examination. He tried to avoid some answers and could reply some question after a silence of sometime only. Prosecution counsel cross examined the witnesses produced by the Accused/appellant. Thereafter

DW5 is Dr V Kumar, who has stated that on 24.02.1987 one Kumari Asha Devi came to his Clinic. Complained to him that she was not obeying command and was not talkative. She also stated that generally she remains calm. However, there is nothing in the evidence of this witness as to who brought the patient before the witness. Based on her complaint, he tentatively diagnosed her a case of "Melencholia" a type "depressive psychosis" and accordingly prescribed her medicine for a period of three weeks although he did not mention about the period on the prescription slip.

6. The General Court Martial after perusal of the entire evidence on record held the appellant to be guilty and punished him with sentence of imprisonment for life and also with dismissal from service. It is pertinent to mention here that **during the hearing of the case it was told by the learned counsel for the accused/appellant that during the pendency of this appeal the appellant has served out his sentence and has been released from Jail.**

7. Learned counsel for the appellant has argued that there is no direct evidence in this case. The prosecution has placed reliance on the circumstantial evidence and the chain of said circumstances is not complete in itself to hold the appellant guilty. Apart from it there are material contradictions in the testimony of witnesses. One Sub Maj (Hony Lt) Des Raj had informed that the victim Smt Asha Devi sustained 40% burn injury, however, he

subsequently said it was 80% but in fact the deceased sustained 90% burn injuries according to the post-mortem. Apart from this none of the witnesses examined by the prosecution has stated that they had seen the accused/appellant at the time of incident inside the house. It has also been argued that in this case the prosecution has relied upon the extra judicial confession, which has been made before Maj AK Bali and also before Sub Maj Des Raj. It is argued that the said extra judicial confession is the outcome of coercion and threat. It has also been argued that in the forensic examination no kerosene oil was found on the 'pant' of the accused/appellant, which the accused/appellant was putting on at the time of incident.

8. Learned counsel for the appellant has further argued that the conduct of the victim to make no hue and cry to save her from fire is highly unnatural and unbelievable and it raises serious doubts about the alleged story of the prosecution. He has argued that the accused/appellant was on duty till 2100 hrs and actually the victim has committed suicide before that.

9. On behalf of the respondents it has been argued that it is a case of circumstantial evidence. The victim was residing in the same quarter where the incident has taken place with the accused/appellant, therefore, it was for the accused/appellant to explain as to how the victim died in spite of his being in the house at the time of incident. It has also been argued that during the trial the accused/appellant has raised the plea that his wife caught fire

while she was cooking food but the evidence shows that the kerosene stove was in intact position even after the incident and a half cooked 'Chapati' was also lying on the 'Tawa', which shows that there was no question of catching fire by the victim from the stove. He has also taken the plea that the deceased committed suicide. It has also been argued that in the bath room an aluminium container, in which kerosene oil was taken by the accused and poured on the victim was found. It has also been argued that the accused has made a confessional statement regarding the incident before Maj AK Bali, Sub Maj (Hony Lt) Des Raj and Sub Mohan Singh. Learned counsel for the respondents has also argued that the evidence of DW5 that the victim was suffering from "Melancholia" a type "depressive psychosis" was a diagnosis of more than one year old from the date of incident and therefore it cannot be presumed to have been continuing while no such complaint was made by the victim on 27.04.1988 when she went to treatment before DW2 Dr Mukherjee.

10. Since this case is based on circumstantial evidence, therefore, before proceeding further we would like to first consider as to what are the standards of proof in such cases. Hon'ble Apex Court in the cases of **C. Chenga Reddy and others vs. State of Andhra Pradesh** (1996) 10 SCC 193, **G. Parshwanath vs. State of Karnataka (2010) 8 SCC 593** and also in Criminal Appeal No. 2400 of 2010 **Sanjay Kumar Jai vs. State of Delhi** has considered the standard of proof required in cases of

circumstantial evidence. Relevant portion of the judgment of Hon'ble Apex Court in the case of **C.Chenga Reddy** (supra) is reproduced as under:-

“In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilty of the accused and totally inconsistent with his innocence.....”

Relevant portion of the judgment of Hon'ble Apex Court in the case of **G. Parshwanath** (supra) is also reproduced as under:-

“In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court.”

Thus, case of prosecution has to be examined in the perspective of aforementioned standards of proof.

11. In the instant case there is no dispute to the fact situation that the quarter in which the incident has taken place was allotted to the appellant and the appellant and the victim were the only occupants of the said quarter on the fateful date. The appellant had done his Guard duty on 04.05.1988 till 2100 hrs and thereafter he asked the Guard Commander that he is having stomach problem and wants to go to toilet and thereafter he was permitted to go to his house. The contradiction on which learned defence counsel relies is that one of the witnesses has said that the appellant had gone to his house to take food while the other has said that the appellant had gone to his house as he was having some stomach problem. At this stage we would like to consider as to what value should be attached to the contradiction emerging out from the evidence and whether each and every contradiction is material or not. Hon'ble Apex Court in a recent judgment in the case of **Latesh alias Dadu Baburao Karlekar vs. State of Maharashtra** (2018) 3 SCC 66 has considered this aspect in Para-49 and we consider it appropriate to reproduce the relevant part of the paragraph as under:-

“44.In every criminal trial, normally discrepancies are bound to occur due to long lapse of time between the date of incident and deposition of witnesses before the Court. When the contradictions are so serious and create doubt in the mind of the court about the truthfulness of the statement, then such evidence is not safe to rely upon. We feel that the contradictions in the evidence concerning this case are very trivial in nature and will not affect the case of the prosecution.

Thus, only material contradiction that goes to the root of the case is given weightage while evidence is appreciated.

12. Now in the aforesaid light, we will examine the said contradiction which has been raised by the learned counsel for the appellant during the course of argument. Admittedly, the appellant was on duty upto 2100 hrs on the fateful day of incident. As per the evidence of the Guard Commander the accused/appellant told him that he is having some stomach disorder so he went to toilet and he was directed to come back at the earliest. While other witness says the accused told him that he is going to his house to take food. But the fact remains that the appellant had gone to his house after completing his duty till 2100 hrs. Virtually there is no substantial difference between the two statements because it was the time for dinner. So even if the appellant had gone to his house for toilet it was open to him to take dinner. Apart from it these two witnesses are saying as to what accused himself told to each of them. So the accused wants to take advantage of his own contradictory reasons stated by him to the two different witnesses. Therefore, if he has said to one person that he is going to take dinner and to the Guard Commander that he is going for toilet does not make any difference in the facts of the case because it is the presence of the appellant at his house at the time of incident, which is to be proved. The appellant has himself sought permission of the Guard Commander and so his evidence is important on this point. So in these circumstances Section 106

of the Indian Evidence Act comes into play. Section 106 of the Indian Evidence Act is reproduced as under:-

“106. Burden of proving fact especially within knowledge.— When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

13. The appellant was the only person who was living in the house alongwith his wife and he came to his house at 09.00 PM after duty. The distance of place of duty from the quarter of the appellant is only 100 mtr. Therefore, the appellant has to explain as to under what circumstances his wife died and failure to furnish such explanation would give rise to an adverse inference against him. This provision of Indian Evidence Act is the result of the legislative wisdom. Because had there been no such provision the person committing an offence in a house would have gone unpunished as it was impossible for the prosecution to prove its case because the crime has taken place inside of a house. Law is settled that the prosecution cannot be compelled to prove facts which are impossible for it to prove. Inside the house of the appellant if anything has happened it was for the accused/appellant to explain and not for the prosecution. During course of arguments accused/appellant has come up with the defence that the victim has committed suicide as she was having some mental problem. Had she committed suicide then the empty kerosene oil container must have been found by the side of the victim and not from the bath room. Apart from it plastic cane of kerosene oil was also found which was having 250 ml of kerosene

oil. Thus, it shows that the said kerosene oil was not used for causing this incident by the victim as the same was found intact even after incident. One aluminium container (dollar type) was recovered from the bath room of the quarter and as per the case of the prosecution this vessel was used for pouring the kerosene on the deceased. In these circumstances the extra judicial confession of the appellant has to be considered.

14. Before proceeding further we would like to discuss the correct interpretation of Section 106 of the Indian Evidence Act. Section 106 of the Indian Evidence Act evolves a principle which is an exception to the General rule governing the burden of proof and applies to such matters of defence which are supposed especially within the knowledge of the accused. It cannot apply when the fact is of a such nature which is capable of being known also by the persons other than the accused. In the case of **State of West Bengal vs. Mir Mohammad Umar** 2000 SCC(Cr) 1516 Hon'ble Apex Court has held as under:-

"36. In this context we may profitably utilise the legal principle embodied in Section 106 of the Evidence Act which reads as follows: "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

37. The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference.

38. Vivian Bose, J., had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. In *Shambu Nath Mehra vs. The State of Ajmer* 1956 SCR 199: (AIR 1956 SC 404: 1956 Cri LJ 794) the learned Judge has stated the legal principle thus (para 11 of AIR):

"This lays down the general rule that in a criminal case the burden of proof is on the prosecution and section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word 'especially' stresses that. It means facts that are pre-eminently or exceptionally within his knowledge."

15. In the facts of the instant case the victim was inside the quarter. The allegation against the appellant is that he was also present inside the quarter and he poured kerosene on his wife and set her on fire so inside the room only appellant was present alongwith his wife. It is simply impossible for any other person to depose as to what happened there inside the quarter. Therefore, in this situation Section 106 of the Indian Evidence Act applies in full force and it is for the appellant to explain as to under what circumstances his wife died inside the quarter.

16. Learned counsel for the appellant has challenged the admissibility of extra judicial confession on the ground of Section 24 of the Indian Evidence Act. Section 24 is reproduced as under:-

"24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.—A confession made

by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

17. In the instant case the appellant has argued that such an extra judicial confession cannot be relied upon. It is no where the case of the appellant that the said confessional statement was given by him under any threat, inducement or coercion. The Adjutant Maj AK Bali has proved the said confessional statement which has been quoted in the earlier part of the judgment. The said statement also finds support from the statement of Sub Mohan Singh and Sub Des Raj that Adjutant Maj AK Bali asked him to go out of his office as he wanted to take the statement of appellant in isolation. It is argued that Maj AK Bali said that he asked the persons accompanying the appellant to go out of the room because the accused has requested to give his statement in isolation while these persons have stated that on reaching there Adjutant AK Bali asked them to go out. But virtually this is no contradiction when on this point we consider the statement given by the accused. From both the statements it is clear that the statement of appellant was given in isolation to Maj AK Bali. It is expression of the same fact by different persons in different words and there is no contradiction. Learned counsel for the appellant has placed reliance on this contradiction of the two witnesses.

This difference is not significant. The practice reminds us even if several persons are asked same question then they will explain the same thing after a gap of time in their own words and there cannot be word by word similarity in the description of each and every person because each person expresses a given fact subject to his own power of understanding and the power of expressing the same. Therefore we do not find any substance in this submission that there is contradiction in the two statements. It has also been argued that extra judicial confession is a weak type of evidence and cannot be acted upon. Whether extra judicial confession should be discarded on this score alone ? On this point we would like to cite the law settled by Hon'ble Supreme Court in the case of **Gopal Sah vs. State of Bihar** 2008(17) SCC 128 wherein it has been held that extra judicial confession is, on the face of it, a weak evidence and the Court is reluctant in the absence of a chain cogent circumstances, to rely on it, for the purpose of recording the conviction. Thus, it cannot be said that such extra judicial confession cannot be acted upon even if there is corroborative substantive evidence to support the same.

18. Here it is pertinent to mention that in the cross examination of PW16 Maj AK Bali there is not even a suggestion given by the appellant that the appellant has not given any such confessional statement voluntarily. The Court also satisfied itself that no inducement or threat was exercised on the appellant. When no such suggestion was given by the appellant to this witness then

on the basis of a bald submission of the appellant at this stage that such statement was given under coercion, has absolutely no substance and the appellant cannot take any benefit of Section 24 of the Indian Evidence Act and therefore the plea raised on behalf of the appellant to discard the extra judicial confession on this score alone has no substance. The conviction has been recorded against the appellant on the basis of his confession of guilt in accordance with the provisions of law and also keeping in view other substantive evidence available on record.

19. Next argument of the learned counsel for the appellant is that PW6 Des Raj has stated that there were 40% burn injuries and subsequently he has stated that there were 80% burn injuries while the percentage of burn injuries was found to be 90% in the post-mortem. Virtually it is neither a contradictory statement nor by any stretch of imagination it has any adverse affect on the prosecution case because this is the assessment of a witness who was not medically educated and has no knowledge to assess the percentage of burn injuries and therefore it was his own assessment and shall not prevail over the medical opinion. The main thrust of the learned counsel for the appellant is that there is no evidence that the appellant was present inside the quarter and the persons who went inside the quarter have nowhere stated that they have seen the appellant inside the quarter.

20. Law is settled on the point that the evidence of the prosecution has to be taken as a whole and if there is a ring of

truth in the case of the prosecution, then minor inconsistencies and minor contradictions should be over looked. In a criminal trial the burden to prove its case beyond reasonable doubt is always on the prosecution while the accused is entitled to benefit of doubt if he proves the preponderance of possibilities of his defence case. In the instant case the appellant has taken a specific defence that his wife committed suicide as she was suffering from mental disorder and his relations with his wife were good. A Court presides over the trial not only to ensure that no innocent is punished but also to ensure that guilty does not escape. On this point we may refer to the pronouncement of Hon'ble Apex Court in the case of **Bhagwan Jagannath Markad and others vs. State of Maharashtra** (2016) 10 SCC 537 wherein Hon'ble Apex Court in Para-2- has held as under :-

“Exaggerated devotion to the rule of benefit of doubt can result in miscarriage of justice. Letting the guilty escape is not doing justice. A Judge presides over the trial not only to ensure that no innocent is punished but also to see that guilty does not escape.”

21. The main thrust of the appellant's defence is that no one has stated that he saw the appellant inside the quarter at the time of incident. It is true that there is no witness on this point to state that he saw the accused inside the house at the time incident. This argument has been raised mainly on the ground that after seeing the flames and smoke PW4 has stated that the door of the quarter was closed, but this witness has nowhere stated that it was bolted

from inside. He has stated that the door was opened by him with his pushes by hands and kick. The experience reminds us that some time doors require heavy push to open them, it is because of some defect in the proper alignment. Therefore keeping in view the statement of this witness it cannot be said that the room was bolted from inside. Law is settled on the point that while appreciating the evidence of a witness his entire statement has to be considered. When we go through the entire evidence of this witness then it is clear that this witness had seen burning the clothes of the victim at a distance of 3 feet away and so this witness immediately put the folded blanket over her to put off the fire. Till the arrival of this witness the victim was sitting in a kneeling position with her knees near her chest without raising any hue and cry. When she found that other persons have come to her rescue only then she reacted and ran outside the quarter. Thus, when we examine the chain of event which are emerging through evidence then it is clear that there was no occasion to this witness to observe whether the accused was also present there in the quarter because in such a situation his entire concentration was to rescue the victim and to sub side the fire flames. Therefore the evidence of this witness and other witnesses who have accompanied alongwith this witness cannot be taken to establish that the accused was not present inside the house. When in this perspective we examine the extra judicial confession of the appellant then the chain of evidence stands absolutely complete. At that point of time the appellant was inside

the bath room when this witness entered the house and the moment these persons and victim came out of quarter this witness also came out because it has also come in evidence that the appellant was present there. It has also come in evidence that the appellant had taken leave after completing his duty to use toilet as he was having some stomach disorder. So he must have gone inside the house to use toilet. So his presence in toilet cannot be denied. Apart from it "dollu" by which kerosene oil was poured by appellant on the victim was also found in the bathroom.

22. The next argument of the learned counsel for the appellant that the appellant had cordial relations with his wife has also no substance as on the one hand the appellant is claiming that his relations with his wife were cordial but if that was so then there was no occasion for his wife to take any aggressive step to commit suicide and on the other hand it has come in evidence that his wife was suffering from mental disorder and therefore she has committed suicide or accidentally she caught fire while cooking the food. It has also come in the extra judicial confession made to Des Raj that his relations with his wife were not cordial as she never permitted the appellant to come near her. The position of the victim as stated by the witness shows that she was naked. Her clothes were lying at a distance of about 3 ft from him shows that the accused was trying to come close to her but in order to save herself she sat in a position with her knees near her chest. This cannot be the position of a lady while cooking food to sit naked in

such a posture. Smell of kerosene was found present during post-mortem in scalp. Now first we would like to examine whether the relationship between the accused and his wife was cordial ? On this point the accused has led evidence of defence witnesses. DW1 is Smt Bimlesh Kumar, who has stated that once wife of the accused had come to her house alongwith the father of the accused i.e. Laxman Prasad DW4. DW1 is the wife of one witness, namely, Nk Mansa Ram Pal. PW17 Nk Mansa Ram Pal has stated that prior to incident on 24.04.1988 while he was returning to his house after completing his duty he saw an old man and a lady sitting under a 'Pipal' tree. He asked them about their identity, then the old man told him that he is father of the appellant and the lady is the wife of the appellant. They told him that they have come from the village. He asked them to come and sit in his house. Thereafter he informed the appellant/accused that his wife and father had come from his village and they are sitting in his house. Then the appellant came to his house and met his wife and father and went away to bring the keys of his house. After the accused had left his house, his wife served lunch to the father of accused and his wife. After sometime the accused came back to his house and took away his wife leaving behind his father. While leaving, the accused also took one army blanket from him. On 25.04.1988 the accused returned his blanket and requested him for a stove. The evidence of this witness shows that his father disappeared from his quarter and thereafter none of the witnesses has stated about the whereabouts of his father. At

this point evidenced of DW2 Maj RK Mukherjee is also important who has stated that on 27.04.1988 he examined the wife of the appellant, she was suffering from "Acute Enteritis" which was due to stale food. So the appellant treated his wife with stale food while she came for the first time to his place of posting after about one year of marriage. It is also important that the appellant was allotted a family quarter but even thereafter he avoided to live with his wife in the said family quarter. The accused came to the house of this witness PW17 Mansa Ram Pal and returned his blanket and took away the stove, which has been proved by the appellant, which after the incident was recovered from his quarter. DW1 is the wife of this PW17, who has corroborated the evidence of this witness and has stated that when the wife of the appellant stayed in her house she remained silent and was not talkative with her. It is pertinent to mention here that victim met with this witness for the first time that too in the presence of her father in law. So if in such circumstances she has remained silent it cannot, by itself, can be said to be unnatural. Father of the appellant has also been examined as DW4. His evidence is important to ascertain the relationship between appellant and his deceased wife. Therefore we consider it appropriate to consider his examination-in-chief, which reads as under:-

"I am the father of Cfn Rajesh Kumar. I identify Cfn Rajesh Kumar, as the accused sitting in the court.

The accused was married to Miss Asha Devi during 1987. Smt Asha Devi was my cousin sister (maternal uncle's daughter). Immediately, after her marriage she had stayed

with me for about two months. She had also stayed at my place for about one month before I brought her to Jammu on 24 Apr 88. For rest of the period, she had stayed with her parents. She used to come to our place as and when we called her.

She was taking medicine for some mental ailment at her parent's place. Her parents used to live in Village Iswarpur- Shai, which was about 2 km away from my village.

Smt Asha Devi used to remain quite. I used to defray the expenditure for her medicine.

When I came to leave Smt Asha Devi with the accused at Jammu, I also visited Vaishno Devi alongwith her and the accused. I do not remember the date of our visit to Vaishno Devi. In the evening, we reached Vaishno Devi. We started our back journey around mid night. We reached Jammu in the morning. Next day, I left for my native place.

Smt Asha Devi used to complain of stomach ache and loose motion to me.

As and when she tried to cook the food on a Chula, she suffered fits. As a result of the fits, she used to fall down on the ground. Because of this, I asked her not to cook the food in future.

I left her with the accused at Jammu with a view that she will become alright due to the change of the climate and also that the accused will get her treated in Military Hospital at Jammu. When I came to Jammu, I also brought her medical papers given to me by her mother. I gave those medical papers to the accused.

During the period Smt Asha Devi stayed at my place, she had fainted for about 10-15 times. She used to get fits at the time cooking and during loose motions. She used to have loose motions for 6-7 times in a month.

The accused and Smt Asha Devi had never quarrelled in my presence.”

It is no where the case of the appellant that he alongwith his wife and father went to Vaishno Devi. On the contrary there is

evidence that victim was suffering from “Acute Enteritis” of 27.04.1988 so she was not in a position to go to Vaishno Devi.

23. The Court has also noted the behaviour of this witness in the cross examination that this witness is not giving answer put to him. The Court further observed that the witness keeps on changing his statement. The statement given by this witness in the cross examination shows that he concealed true facts and virtually made effort to save his son from the punishment. But the entire evidence of this witness shows that the marriage of the appellant had taken place in the year 1987 i.e. the marriage between the two was only about one year old. It has also come in the evidence that the appellant in his last visit to his village was asked to take his wife with him but he declined and said that he will take her with him when he next visits the village. But it has come in the prosecution evidence and also in defence evidence that the father of the appellant took the victim to the house of the appellant to Jammu without waiting for his next visit. This conduct of the father of the appellant shows that the relations between the victim and the appellant were not cordial and therefore the appellant was avoiding to take his wife to his place of posting and when she reached here on 24.04.1988 only few days thereafter she became the victim of this offence and prior to it she fell ill due to stale food. The evidence of the Doctor has absolutely no significance as the said medical evidence of DW5 Dr V Kumar is of more than one year old from the date of incident and the fact

which has emerged out from his statement is that the victim was not having any aggressive suicidal tendency. Even if it is presumed that the victim was suffering from any ailment then it does not mean that she will commit suicide. It is pertinent to mention that even after one year of her marriage she was either living in her parents' house or at the house of father of the appellant and there is no evidence that she has made any attempt to commit suicide or her behaviour was abnormal. This by itself shows that she had no tendency to commit suicide. Simply because she was not talkative it does not mean that she had any suicidal tendency. From the statement of DW1 only this much comes out that the victim was not talkative with her. On this basis only it can be said that it was her behaviour prior to incident with the accused and as stated earlier it is not a case of the appellant that she had ever tried to commit suicide.

24. Apart from the arguments raised on behalf of the appellant when we look the entire evidence as whole, it is clear that the PW4 LNk V. Jaganathan was the first person to reach the quarter of the appellant after hearing the alarm "Aag Aag". He has stated that he shouted to open the door. There was no response from inside the house. He then pushed the door with his hands/kicks and it got opened. Thereafter he went inside the house and found that the wife of the appellant was sitting naked in burnt condition and her clothes were lying at a distance of about 3 feet away from her. He has also stated that since he was busy in extinguishing

the fire to save the life of victim he did not notice presence of any other person or thing inside the house. Apart from it he remained at the entrance of the door and did not go inside the quarter. He has also stated in his cross examination that the time of incident was 2115 hrs. He has also stated that he did not care to see the description of clothes of the victim which were burning near him. Those could be her 'petticoat', 'saree' and 'blouse' etc but I am not sure of their description. He has specifically stated in his cross examination that he did not care to see if the accused was present inside the house as he remained at the entrance of the door and was busy in saving the life of the victim. He saw the appellant when his wife was coming out of the house. He saw him outside the main door of his house at a distance of about 1 yard. It has also come in the evidence that the quarter of this witness is only at a distance of about 100 feet from the quarter of the appellant.

25. PW5 Nb Sub BT Nair has also stated that when he reached the place of incident the appellant was standing there and shouting. However he did not make any effort to save his wife and to extinguish the fire. The accused had also told to this witness as to how the incident happened. He has also stated that " On seeing the accused I immediately asked him the cause of fire. The accused told me that he had come to have his food in the house after his duty and as his wife was making the food on the kerosene oil stove, she caught fire from the said stove." Thus it establishes that appellant was present inside the quarter at the

time of incident. Had it been a case of accidental fire then there was absolutely no reason for the appellant to confess his guilt before Maj AK Bali. In this case the appellant has made an extra judicial confession before Maj AK Bali that he committed this offence and set his wife at fire after pouring kerosene oil on her. The defence taken by the appellant during trial was that it was a case of accidental fire while the victim was cooking food. An alternative defence was taken that the victim committed suicide as she was suffering from some mental disorder. We have considered all these defences in the earlier part of the judgment but the fact remains that the appellant is taking false defences during trial and Hon'ble Apex Court in the case of **Anthony D'Souza vs. State of Karnataka** (2003) 1 SCC 259 has held that where the accused offers a false defence then the same can be counted as providing a missing link for completing the chain.

26. PW6 Sub Maj Des Raj is also an important witness. This witness met the victim when she had come outside the house. He enquired from her the cause of fire but she did not reply. He also enquired about the whereabouts of the accused. Then somebody pointed towards the accused. Thus, it shows that the appellant was present there. He has also stated that the appellant was not making any effort to save his wife nor was asking her the cause of fire. This witness has given a statement that LNK Jaganathan told him that the accused was present in his house but the accused did not make any effort to save his wife. The accused has also

made a confession before this witness. This witness after giving evidence to Adjutant AK Bali took the accused with him to his office. Sub Mohan Singh and LNk Jaganathan were also present there. He asked the accused to tell him truth about the incident. The accused told that “ Hamare hasband wife ke relation theek nahi tha. Who mujhe pas mei nahi ane deti aur maine pichhe se kerosene oil dal kar, matish se Aag laga di.” It transpires from the record that the Court ensured that there was no inducement or coercion on the appellant to give such a statement. Apart from it there is not even a single suggestion that no such confessional statement was given by the appellant to this witness.

27. In the light of the aforementioned evidence certain points are fully proved and have been established beyond reasonable doubt, which are mentioned as under:-

- (1) The quarter in which the incident has taken place was allotted to the appellant and the appellant and the deceased were the only occupants of the said house.
- (2) The appellant was on the Guard duty till 2100 hrs and after completing his duty he asked his Guard Commander to go to toilet as he had some stomach ailment.
- (3) The appellant has accepted before witnesses that he was present in the house and he was seen at a distance of 1 yard from the door of his house after the victim came out.
- (4) It has also come in evidence that the door of the house was opened with a few push and kick and the first person who went inside has made an effort to save the wife of the appellant, who had not made any effort to notice there other things or went inside the quarter to ensure whether appellant was present there.
- (5) The victim was found sitting naked at the place of incident and her clothes were lying at a distance of 3 feet from her.

- (6) In the post-mortem kerosene oil smell was found on the head and scalp of the deceased.
- (7) The appellant made no efforts to save his burning wife.
- (8) The relations of the appellant with his wife as told by the appellant were not cordial.
- (9) The arrival of the victim/wife few days prior to the incident is an admitted fact and it is also proved that the appellant was not in a position to keep his wife with him as he was not having a stove or blanket at that point of time.
- (10) The victim died because of severe burn injuries.
- (11) The presence of one 'dollar type' container in the bath room whereby the kerosene oil was poured on the victim.
- (12) Appellant made extra judicial confession before Adjutant Maj AK Bali and thereafter before Sub Maj Das Raj.
- (13) False defence of suicide taken by the appellant.

28. The only argument raised on behalf of the appellant is that the accused has demolished the case of the prosecution on the ground that he was not seen inside the house. But it is rule of appreciation of evidence that a witness may tell a lie but not the circumstances.

29. The position which was found inside the house was that a half cooked 'Chapati' was lying on the stove, which does not establish that any accidental fire had taken place because in that position the said 'Chapati' must have burnt. Apart from it in such condition there was absolutely no occasion for the victim to keep her clothes away from her. It shows that before the clothes of the victim were removed the stove was switched off that is why the 'Chapati' remained half cooked.

30. The other circumstances have already been considered in earlier part of this judgment. Thus, from the evidence it is clear that the appellant was present in his house at the time of incident. The appellant in his confessional statement before Maj AK Bali has accepted that he came out of house just behind the victim. This part stands corroborated by the evidence of witnesses that he was seen at a distance of 1 yard from the entrance door of his quarter. It has also come in the statements of the prosecution witnesses that their intention was to save the victim by extinguishing fire and they have not noticed other things at the time of incident. Simply because the door was pushed it cannot be said that it was bolted from inside. Had it been bolted from inside then it could have been opened only by breaking the same. There is no evidence or even suggestion that the door was broken. When we consider all these circumstances together the cumulative effect of all these circumstances is that it was the appellant only who has committed this offence. The argument of the learned counsel for the appellant that the conduct of the victim was unnatural as she was not talkative has no substances. On the other hand the conduct of the appellant was unnatural as he has not made any effort to save his wife who was burning inside his house. He has not even asked his wife in the presence of several persons as to how she caught fire, which leads to an inference of his guilty mind that had he asked about the cause of fire then he would have been exposed before all the persons present over

there. So this unnatural conduct of the appellant also completes missing link if any.

31. In view of the discussions made above, the prosecution has successfully established all the circumstances of the prosecution case and the only conclusion that can be derived from all these circumstances is that the appellant has set the victim at fire. Hence the finding of the GCM that the appellant is guilty of the offence was absolutely in accordance with law which need not be interfered with. So far as the punishment is concerned, the appellant has been found guilty of murder and the minimum sentence provided for the said offence is imprisonment for life. Dismissal from service is also logical punishment. Therefore, we do not find any justification to interfere with the finding recorded by the GCM and punishment awarded to the appellant. It is informed by the learned counsel for the parties that appellant has been released from custody after serving out his sentence hence he need not surrender.

32. This appeal lacks merit, deserves to be dismissed and is hereby **dismissed**.

No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

Dated: February 07, 2019

JPT

(Justice SVS Rathore)
Member (J)

