

**IN THE ARMED FORCES TRIBUNAL REGIONAL BENCH,
GUWAHATI.**

OA 04/2014

P R E S E N T

**HON'BLE MR. JUSTICE B.P. KATAKEY, MEMBER (J)
HON'BLE VICE ADMIRAL A.G. THAPLIYAL, MEMBER (A)**

Ex-Rfn Tophan Kr Mangaraj

S/o Satrughna Mangaraj

Village- Kathua Aredi

PO- Apithy

PS- Brahmagiri,

Dist-Puri, Orissa

..... **Applicant**

Legal practitioner for the applicant

Mr. R. Mazumdar

Mr. JH Khan

Mr. H. Bezbaruah

- Versus -

1. Union of India
Through its Secretary
Govt of India,
Ministry of Home Affairs,
New Delhi
2. Director General,
Assam Rifles, Shillong
Meghalaya-10
3. Inspector General
Assam Rifles (North)
Shillong, Meghalaya

4. Commandants, 1 Assam Rifles,
Through the Inspector General,
Assam Rifles (North), Shillong, Meghalaya

..... **Respondents**

Legal practitioner for the
Respondents

Mr. N Baruah, CGSC

Date of Hearing : 31.03.2016

Date of Judgment & Order : 28.04.2016

JUDGMENT & ORDER

(Justice B.P. Katakey)

1. This Appeal, under Section 15 of the Armed Forces Tribunal Act, 2007, is directed against the findings recorded by the General Court Martial (in short GCM) on 10.04.2012 and the sentence passed by it against the applicant on 11.04.2012, whereby and whereunder the applicant has been sentenced to suffer imprisonment for life and has been dismissed from service, upon holding the applicant guilty of the charge framed against him. The applicant has also challenged the order dated 23.05.2012 passed by the Inspector General, Assam Rifles (North), Shillong, confirming the proceeding of GCM and the sentence imposed upon him with a further prayer to acquit the applicant from the charge levelled against him on 14.11.2010 with a further direction to reinstate him in service with all consequential benefits.

2. The applicant, who was a Rifleman/Water Carrier in 37 Assam Rifles attached to 1 Assam Rifles and was subject to the Army Act, 1950 (in short 1950 Act) was charged by the Commanding Officer, 1 Assam Rifles, under Section 69 of the said Act for commission of a civil offence of murder under Section 302 of the Indian Penal Code, on the intervening night of 22.04.2008 and 23.04.2008, while on active service, by intentionally causing death of his wife, Smti Sakhi Rani, a civilian. The Inspector General, Assam Rifles (North), on 23.11.2010 decided to try the appellant by the GCM, which was assembled on 5th April 2011 for trial of the applicant. In the GCM, the applicant was defended by a defence officer as well as by the defence counsel. The charge framed against the applicant when read over and explained to him, he pleaded not guilty and hence trial commenced. During the trial, 16 PWs, viz, Rfn/GD Pradip Talukdar of 37 Assam Rifles (PW 1), Maj Navneet Garg of 19 Garhwal Rifles (PW 2), Rfn/GD Krishan Lal of 37 Assam Rifles (PW 3), Staff Nurse Bency John of 6 Assam Rifles (PW 4), Dr. B R Deori (PW 5), Dr. Subha Jyoti Deka, Asst. Professor, Dept of Forensic Medicine, Assam Medical College & Hospital, Dibrugarh (PW 6), Ex-Sub Maj Ram Prakash Rawat (PW 7) Rfn/GD Mahendra Rabha of 37 Assam Rifles (PW 8), Rfn/GD Shyam Singh of 37 Assam Rifles (PW 9), Miss Payal Rani Mangaraj (PW 10), Miss Koyal Rani Mangaraj (PW 11), Maj S M Riyaz of 54 Armoured Regiment (PW 12), Rfn/GD Subish K Mohan of 37 Assam Rifles (PW 13), Col Vijay Pathania HQ 91 Sub-Area (PW 14), Hav/GD Bhabendra Nath Sarkar of 37 Assam Rifles (PW 15) and Rfn/GD Hemanta Singh of 37 Assam Rifles (PW 16)

were examined. The defence has also examined one witness, viz, Sri Akshay Kumar Lenka as DW 1. The witnesses were cross-examined by the respective parties. The prosecution proved 63 Nos of documents which were marked as Exhibit 1 to Exhibit 63. On being volunteered, the statement of appellant has also been recorded.

3. The GCM upon appreciation of the evidence on record, has recorded the finding of "not guilty" on 05.12.2011, subject to confirmation, as it was found that the charge framed against the applicant could not be proved beyond all reasonable doubts. The GCM has found that there was no eye witness to the occurrence and the chain of circumstances is also not complete.

4. The confirming authority, however, vide order dated 05.03.2012 refused to confirm the finding of the GCM on the ground that the finding of "not guilty" recorded by the GCM appears to be perverse being against the evidence on records for which it need to be reconsidered by the GCM in terms of the provision contained in Section 160 of the 1950 Act read with Rule 68 of the Army Rules 1954. The confirming authority has found that the following *"circumstantial evidence existing in the form of videos and photographs of the scene of incident taken immediately after the incident ought to have been corroborated the sequence of events narrated at Para 7"* of the said order.

(a) *Maximum deposit of carbon, soot and blackening of walls and damage to wooden door due to fire should have been in the latrine.*

(b) *There should have been no soot, blacking and deposit of carbon in the corridor because as per the above version the accused had extinguished the fire on Smt Sakhi Rani by pouring three buckets of water inside the latrine. After the fire was extinguished Smt Sakhi Rani tried to sit inside the latrine*

and that time the accused got to hold of her and carried her towards the bathroom, through the corridor.

- (c) Water should have been present on the body of Smt Sakhi Rani when PW-3 and the accused shifted her to the guest room and there should have been blisters on her body due to water having been poured on her to extinguish the fire.*
- (d) The buckets kept in the bathroom should have been empty because as per the accused he had poured three buckets of water on Smt Sakhi Rani to extinguish the fire and additionally poured water on the 'orni' in the corridor to extinguish fire on it.*
- (e) Miss Koyal Rani Mangaraj (PW-11) would not have implicated her father in her first statement given immediately after the incident."*

5. The confirming authority was also of the opinion that the following circumstantial evidence existing on record supports the case of the prosecution that Smt Sakhi Rani did not set herself on fire in the latrine and was set on fire by the accused in the corridor and later on when the fire extinguished, he shifted her from corridor to the bathroom on hearing the sound of knocking at the door.

- (a) Photos-24 and 31 of Exhibit-40 show no sign of fire which could have caused 98% burns to a human body having taken place in the latrine. The condition of latrine pan was white with no soot deposits, walls had no blackening, latch of the door was intact and water present in the tin can and the protruding overhead cistern in the latrine had no blacking/soot deposit at all.*
- (b) Photo No. 14 of Exhibit-40 shows burnt wire casing fallen on the floor and burn curtain on the door connecting bedroom and corridor.*
- (c) Photo No. 15 of Exhibit 40 shows burnt curtain on the door connecting bedroom and corridor.*
- (d) Photo 16 of Exhibit- 40 shows burnt curtain on the corridor window.*
- (e) Photo 17 of Exhibit-40 shows burnt curtain on the corridor window and the door connecting bedroom-guestroom and the burnt orni overhead across the corridor.*
- (f) Photo 19 of Exhibit-40 shows burnt bulb on the corridor wall, soot deposit on the wire casing and walls and part of the burnt curtain.*
- (g) Photo 20 of Exhibit 40 is same as photo 17 except the burnt bulb as shown in photo-19.*
- (h) Photo 21 of Exhibit-40 shows the burnt bulb on the corridor wall and the soot deposits on the walls.*
- (j) Photo-22 of the Exhibit-40 shows the burnt orni, in the corridor.*
- (k) Photo 23 of Exhibit 40 shows maximum burnt remainants of cloth on the floor of the corridor and the kerosene oil tin in the corridor.*
- (l) Photo 26 of Exhibit-40 shows the condition of bathroom filled buckets kept in a sequential and orderly manner, which shows that the accused did not use any of the buckets for extinguishing the fire on Smt Sakhi Rani.*
- (m) PW 3 testified that when he was helping in shifting Smt Sakhi Rani to the guestroom, he felt that her body was hot, but there was neither water on the body nor any smoke was evaporating of the body.*
- (n) Photo 28 of Exhibit 40 shows the burnt wire casing hanging from the corridor wall in between the bathroom and kitchen.*

- (o) PW 14 and PW 13 also identified and explained the video recording contained in Ext. 44. The video recording of the house shows remainants of burnt cloth all over the corridor floor and bathroom floor (as burnt body of Smt Sakhi Rani, still alive was kept by the accused on the bathroom floor). The walls as well as the windows of both the bathroom and latrine are devoid of soot deposits or blackening, meaning thereby that Smt Sakhi Rani was not burnt inside the latrine and by the time she was brought in side the bathroom the fire had extinguished.
- (p) Dr BR Deori (PW 5) who had treated the accused for burn injuries has brought out that the accused had superficial burns on dorsal side of his hands, chest, shoulder and face, in fact the position of burn injuries found on the person of the accused also does not suggest that he tried to extinguish the fire because in that case, while helping the person in fire, the probability of palms getting burnt is more than the dorsal side of the hands.
- (q) As per the post mortem report (Exhibit 22) in the Column No. 2 having the heading 'Wounds position and character' two injuries other than the burn injuries in the form of contusions were found over the right elbow and over lower 1/3rd of right arm which were antemortem in nature. These contusions could have been caused due to hitting with blunt object or due to the deceased being held by her arm with a strong grip forcibly not allowing her to move in any particular direction while burning. The superficial burns sustained by the accused on dorsal side of his hands, chest, shoulder and face might have caused in the process.
- (r) Dr. S J Deka (PW 6) who conducted post-mortem of the body of Smt Sakhi Rani had also deposed that Smt Sakhi Rani did not have any other injury on her body which could suggest that she might have fallen down while burning or fallen down after jumping in the same place. Thus, the deceased lady had not fallen down while burning because had she fallen down then her body would have had contusion and/or abrasion on the side, back and/or lower parts of the body including the knee which were not present."

6. The confirming authority, therefore, was of the opinion that the GCM should re-consider its finding on the Charge in the light of the entire evidence on record and if the GCM after its careful consideration of the whole proceeding of the observation made in the order passed by the confirming authority, revoke its earlier finding in respect of the charge, then it should arrive at a fresh finding with fresh reasons in support of the same. The confirming authority also directed the GCM to reassemble on 09.04.2012 for the purpose of reconsideration of the finding of 'not guilty' of the charge. The GCM accordingly reassembled on 09.04.2012 as directed by the confirming authority, for the purpose of reconsideration of its finding of 'not guilty' earlier recorded. The GCM, on revision, on 10.04.2012

has recorded the finding of 'guilty' of the charge framed against the applicant and sentenced him to suffer imprisonment for life and dismissal from service vide order dated 11.04.2012, subject to confirmation. The applicant, thereafter, on 12.04.2014 submitted his pre-confirmation representation before the confirming authority stating therein the reasons for which the finding of 'guilty' recorded by the GCM on revision and sentence passed should not be confirmed. The confirming authority, however, vide order dated 23.05.2012 confirmed the findings and sentence imposed by the GCM on revision.

7. The GCM on revision vide order dated 10.04.2012 has recorded the finding that the deposition of Miss Payal Rani Mangaraj and Miss Koyal Rani Mangaraj, PW 10 and PW 11, respectively, daughters of the applicant cannot be believed as Koyal Rani Mangaraj has retracted from her earlier statement given immediately after the incident and though she has answered most of the questions as "*I do not remember*", she, however, has vividly described how her father (applicant) tried to save her mother on the fateful day by breaking open the door of the latrine. It has further been held that both the witnesses (PW 10 & PW 11) were under influence of their maternal uncle viz. Akshay Kumar Lenka (DW 1) and were tutored. It has, therefore, been held that the evidence of the two child witnesses cannot be relied upon. The GCM on the basis of the testimony of the witnesses as well as the photographs proved by the prosecution has held that the place of occurrence was

not inside the latrine but in the corridor of the house, where the applicant with his wife and children stayed. The dying declaration made by the deceased, which was videographed and marked as Exhibit 43, was also rejected by the GCM on the ground that Col Vijay Pathania (PW 14) has recorded the same against medical advice and the deceased was not in a position to make dying declaration as she was under influence of Pethidine drug and was at that point of time perhaps under shock/hallucination. The GCM having held that there being strong circumstantial evidence against the applicant, the circumstance being the presence of the applicant in the house, maximum damage caused by the fire in the corridor by way of melting of plastic casing, burning of window and door curtains and even the melting of plastic rings connected to the curtains, and the chain of aforesaid circumstances being complete, recorded the finding of 'guilty' and sentenced the applicant accordingly.

8. We have heard Mr. R. Mazumdar, learned counsel for the applicant and Mr. N. Baruah, learned CGSC appearing for the respondents.

9. Learned counsel for the applicant referring to the testimony of the witnesses has submitted that the prosecution having failed to bring home the charge levelled against the applicant beyond all reasonable doubt, the finding recorded by the GCM on 10.04.2012 holding the applicant 'guilty' of the charge cannot be sustained in

law, more so, when there was no circumstances appearing against the applicant pointing to his guilt only. Learned counsel submits that the GCM upon appreciation of the evidence adduced by the prosecution in support of the charge as well as the defence evidence had rightly recorded the finding of 'not guilty' on 05.12.2011, which ought not to be revised by the GCM on 10.04.2012, which was done only because the confirming authority vide order dated 05.02.2012 directed revision of the finding of the GCM. It has also been submitted that the GCM has revised the earlier finding of 'not guilty' based on the observations made by the confirming authority in its order dated 05.03.2012 and not on independent appreciation of the evidence on record. The learned counsel further submits that there was no reason to disbelieve Payal Rani Mangaraj and Koyal Rani Mangaraj, PW 10 and PW 11 respectively, though they are child witnesses, their evidence having been recorded by the GCM being satisfied that they can understand the question and answer the same rationally. Referring to the video recorded dying declaration (Exhibit. 43), it has been submitted that it is evident therefrom that the deceased was in a state of mind and health to answer the question put by Col Vijay Pathania (PW 14) and has clearly indicated by moving her head sideways that the applicant did not set her on fire and she committed suicide by burning herself by nodding her head up and down, which according to the learned counsel has also been corroborated by Dr. B.R. Deori (PW 5) who was present at the time of video recording of the dying declaration of the deceased. The learned counsel further submits that the GCM on revision was not

justified to rejecting the dying declaration of the deceased on the ground that she was not in fit state of mind to make such statement as she was administered Pethidine, as the PW 5 in his deposition has categorically stated that the deceased was in a fit state of mind to give a statement and/or understand the question put to her. That apart, Dr. Subha Jyoti Deka (PW 6) has stated that whether a person sustaining 98% burn injury and administering Pethidine will be in a fit state of mind to give a statement or not can only be ascertained by the treating Doctor. It has also been submitted by the learned counsel that the GCM was not correct in rejecting dying declaration on the ground that the deceased having been administered Pethidine was not in the fit state of mind to make a statement, as Dr. B.R. Deori (PW 5) during his re-examination has specifically stated that though prescribed dose of Pathidine in a case of 98% burn injury is 50 mg, he administered Pethidine dose 25 mg for the reason that he has already injected Voveron of 50 mg dose and despite administering 25 mg dose of Pethidine and 100% burn injury the deceased was in a fit state of mind to give statement.

10. Learned counsel referring to the photographs and the video recording, based on which GCM on revision has recorded the finding of 'guilty', has submitted that those were not taken/recorded on the night of occurrence and were taken/recorded much thereafter, having cleaned the latrine i.e. the place of occurrence, which amounts to tampering the evidence. Learned counsel referring to the deposition of Rfn/GD Subish K Mohan (PW 13), who was summoned

to take photographs, has submitted that according to him he has taken the photographs inside the quarter of the applicant on the night of occurrence only and for once as directed by the Commandant, who personally video recorded inside the quarter by means of the Handy-Cam and the photographs and video recorded were downloaded into the laptop by him and thereafter personally delivered the same to the Commandant in his residence, which signifies that this witness had taken the photographs only once and thereafter had downloaded the same into laptop and kept in the custody of the Commandant. Referring to the deposition of the said witness PW 13 it has been submitted that the PW 13 admitted that the photographs which have been proved have neither been taken by him nor he remember clicking the same. The learned counsel submits that PW 13 who took the photographs having denied taking the photographs, the prosecution has failed to prove those photographs to prove the sequence of evidence and chain of circumstances. The learned counsel further submits that it is in evidence that Commandant also went to the place of occurrence one day after i.e. 23rd April, 08 and has taken photographs which supports the defence plea of tampering with the scene of the occurrence and taking photographs by altering the scene only with a view to punish the applicant though he did not commit the crime as alleged.

11. Learned counsel referring to the photographs, which have been marked as Exhibit 40, has submitted that it is evident

therefrom that while in some photographs, taken from the same angle, the curtain in the window of the latrine was shown to be inside, in other photographs it was shown to be outside and also changed position of different articles in the photographs and video, which proves that some video recordings were made after the initial video recording when PW 13 was present. Learned counsel, therefore, submits that no reliance could be placed on those photographs and video recording to record the finding of 'guilty' against the applicant. Learned counsel referring to the deposition of Akshay Kumar Lenka (DW 1) also submits that the applicant and the deceased were in good terms and the deceased had the tendency to commit suicide and attempted the same on a number of occasions even before the marriage and there was no complaint whatsoever from any one about the behaviour of the applicant towards the deceased. Referring to the deposition of the said witness, it has also been submitted that PW 10 and PW 11, the daughters of the applicant and the deceased, have informed the said witness that the applicant was not responsible for the death of the deceased, who herself set on fire in the latrine. Learned counsel having referred to the testimony of the witnesses examined by the prosecution, has submitted that the prosecution having failed to prove, beyond all reasonable doubt, that the applicant has committed the offence for which he was charged, the GCM ought not to have recorded the finding of 'guilty' and ought to have maintain its earlier finding of 'not guilty' of the charge levelled against the applicant. It has, therefore, been submitted that the finding recorded

by the GCM on 10.4.2012 and the sentence passed by it against the applicant on 11.04.2012 as well as the order dated 23.05.2012 passed by the Inspector General, Assam Rifles (North), Shillong, need to be set aside and the applicant may be directed to be reinstated in service.

12. The learned counsel appearing for the respondents, on the other hand, supporting the findings recorded by the GCM on revision as well as the sentence imposed, apart from the order confirming the finding and the sentence, has submitted that though there is no direct evidence, meaning thereby eye witness to the occurrence, there being strong circumstantial evidence against the applicant, which could not be explained by the applicant and the chain of the circumstances being complete, which points to the guilt of the applicant only and no one else, the GCM on revision has rightly recorded the finding of 'guilty' of the charge framed against him. Learned counsel submits that the applicant alone, apart from his minor children, namely, Payal Rani Mangaraj (PW 10) and Koyal Rani Mangaraj (PW 11), were present in the house at the time of occurrence and there was no other person in the house at the time of occurrence which is one of the strong circumstances appearing against the applicant. That apart, according to the learned counsel the story put forwarded by the applicant that the deceased had set herself on fire inside the latrine is not believable and on the other hand, the prosecution story of setting the deceased on fire by the applicant in the corridor leading to the latrine is believable from the

fact that maximum damage was found to be caused by fire in the corridor, which includes melting of plastic casing, burning of window and door curtains and even melting of plastic rings connected to the curtains apart from maximum soot/carbon deposit and blackening of walls in the corridor and on the other hand, there was no visible signs of any such fire having occurred inside the latrine of size 3 ft in length x 2 ft in breath and 7 ½ ft in height at the door end and 6 ½ ft height at the rear end. According to the learned counsel had the incident, which occurred for more than 10 minutes, been occurred inside the latrine, there would have been maximum damage caused to the walls and ceiling of the latrine by fire. It has also been submitted that the latrine pan was also not blacken and the bulb inside the latrine was also found intact.

13. The learned counsel also submits that though the applicant has taken stand that he tried to douse the fire by sprinkling water on the deceased, who was burning in the latrine, such explanation cannot be accepted in view of the evidence on record that the buckets in the bathroom are neatly arranged, two of which are closest to the bathroom door are full of water and not been utilized. It has also been contended that the applicant's explanation that he with a view to save his wife, who herself on fire inside the latrine, broke open the door of the latrine, cannot also be accepted as on such a blazing fire inside the latrine on opening the door of the latrine, the applicant would have incurred substantial burn injuries on his person. The learned counsel referring to the deposition of Dr.

B.R. Deori (PW 5) has submitted that had the applicant tried to save his wife, he would have sustained burn injuries on his palm, who has sustained superficial burn injury on the dorsal side of his hands, chest, shoulder and face with no substantial burn injuries anywhere else on his body. Referring to the evidence on record, it has also been submitted that the prosecution story of setting the deceased on fire in the corridor also gets support from the fact that the orni hanging inside the corridor was in the burning condition and the bulb in the corridor was also found to be broken, perhaps due to high heat generation because of setting the deceased on fire in the corridor.

14. Referring to the dying declaration, which has been recorded by Col Vijay Pathania (PW 14), it has been submitted by the learned counsel that the same is not admissible in evidence having regard to deposition of Dr. B.R. Deori (PW 5) that he has injected the drug Pethidine apart from Voveron injection and hence she cannot be in a position to make such a statement. That apart dying declaration was recorded by means of videography against the medical advice. Learned counsel submits that having regard to the degree of burn, which was between 98% to 100% and also the fact that the deceased at that point of time was on oxygen, definitely was not in a state of mind to make any dying declaration and nodding of her head sideways in reply to the question as to whether her husband set her on fire, cannot be taken as answer in negative having regard to the extent of the burn injury as well as pain and agony and shock

suffered by the deceased. Referring to the deposition of Payal Rani Mangaraj and Koyal Rani Mangaraj, PW 10 and PW 11 respectively, it has also been submitted by the learned counsel for the respondents that it is apparent from their testimony, who were under custody of their maternal uncle viz Akshay Kumar Lenka (DW 1) from the date of occurrence till the date of their deposition, i.e. for more than 3 ½ years, that they were tutored by the DW 1 and hence their deposition cannot be relied upon for the purpose of recording any finding, which, therefore, has rightly been rejected by the GCM on revision. Learned counsel further submits though the applicant has tried to portray that his wife was suffering from epilepsy, depression, sleep disorder and had old suicidal tendency, such version in absence of any medical document for the treatment, cannot be accepted. Learned counsel also submits that the deposition of Akshay Kumar Lenka (DW 1), brother of the deceased, also cannot be accepted for the simple reason that he along with the minor children are depending to a large extent in the income of the applicant, as the DW 1 has no independent source of income.

15. Learned counsel referring to the argument advanced by the applicant, relating to the photographs (Exhibit-40), has submitted that those photographs having been proved and admitted in evidence, the GCM on revision has rightly placed reliance on those photographs for recording the finding of 'guilty' of the charge levelled against the applicant. The discrepancies, pointed out by the applicant to the aforesaid photographs, according to the learned

counsel for the respondents, are minor discrepancies and would not dislodge the strong circumstantial evidence appearing against the applicant, which could not be explained by him and hence the GCM on revision has rightly recorded the finding and awarded the sentence. Learned counsel, therefore, submits that the findings recorded by the GCM on revision, sentence and the order passed by the confirming authority need no interference.

16. The arguments advanced by the learned counsel for the parties have received our due consideration. We have also perused the evidence on record, both oral and documentary, recorded by the GCM, apart from the aforesaid orders dated 05.12.2011, 05.03.2012, 10.04.2012 and 11.04.2012. We have also viewed the video recording of the dying declaration which was marked as Exhibit. 43.

17. The prosecution story in brief is that on the night of 22.04.2008, the applicant on return to his house set his wife on fire in the corridor of the quarter allotted to him and thereafter pushed her to the latrine. The prosecution in order to bring home the charge framed examined altogether 16 witnesses. The defence has also examined one witness. The witnesses were cross-examined by the respective parties. Dr. Subha Jyoti Deka (PW 6), Assistant Professor in the Dept. of Forensic Medicine, Assam Medical College, Dibrugarh, in his deposition has stated that he conducted autopsy on the dead body of Sakhirani Mangaraj, wife of Tophan Kr Mangaraj in connection with Borbori OP GDE No. 590 dtd 23.04.08

and has proved the Post Mortem Examination Report (Ext. 22) wherefrom it appears that the following injuries were found on the person of the deceased -

- (i) *Contusion over her right elbow of 3cm x 3cm, reddish in colour.*
- (ii) *Contusion over lower 1/3rd of arm of 4cm x 2cm reddish in colour*
- (iii) *Epidermal to dermo epidermal flame burn present over whole body in the face, neck, front and back of chest, abdomen buttocks, upper limbs, lower limbs, palms and soles except in the perineum and inguinal region on both sides. Burn area is red hyperemia, blackening present. Total area of burn is approx 98% of body surface area 1 degree and 2 degree."*

In the opinion of the PW 6, the death was due to shock as a result of ante mortem flame burn comprising 98% of body surface area. Injury No. (i) and (ii) were found to be ante mortem and caused by blunt force.

The defence did not cross-examine PW 6 on the nature of injuries found on the body of the deceased as well as the cause of the death. Hence the same remains unrebutted. The prosecution, therefore, could prove the nature of injury found on the body of the deceased as well as cause of death. There being no direct evidence i.e. eye witness to the occurrence, the prosecution story is based on the circumstantial evidence.

18. It is a settled position of law that when a case rests upon circumstantial evidence, such evidence must cogently and firmly be established and it must point inescapably towards the guilt of the accused, and the accused only, forming an unbroken chain of evidence ruling out reasonable likelihood of innocence of the accused. When any link in the chain is missing, the accused is entitled to benefit of doubt. The prosecution must also establish different

circumstances beyond reasonable doubt and all those circumstances should not only be consistent with the guilt of the accused, but should be inconsistent with his innocence (*Padala Veera Reddy Vs. State of Andhra Pradesh and others* reported in *AIR 1990 SC 79*). The Hon'ble Apex Court in *Subramaniam Vs. State of Tamil Nadu and another* reported in *(2009) 14 SCC 415* while considering the case of a dowry death has observed that the fact of living together though is a strong circumstance, but by alone in the absence of any evidence of violence on the deceased cannot be held to be conclusive and there must be some evidence to arrive at a conclusion that the husband and the husband alone was responsible therefor. It has further been held that the evidence produced by the prosecution should not be of such a nature that may make a conviction of the accused unsustainable. In *State of Uttar Pradesh Vs. Kishanpal and others*, reported in *(2008) 16 SCC 73*, the Apex Court while examining the importance of motive in a case of circumstantial evidence has observed that the motive is a thing which is primarily known to the accused themselves and it is not possible for the prosecution to explain what actually promoted or excited them to commit a particular crime. It has further been observed that the motive may be considered as circumstances which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. The Apex Court further observed that the motive loses all its importance in a case where direct evidence of eyewitnesses is available, because even if there may be a very strong motive for the

accused person to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction.

19. In ***Trimukh Maroti Kirkan Vs. State of Maharashtra***, reported in **(2006) 10 SCC 681**, the Hon'ble Apex Court has opined that *"where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of [Section 106](#) of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."*

20. It is, therefore, settled position of law that when a case is based on circumstantial evidence, the prosecution must cogently and firmly establish the circumstances, which should be of a definite tendency unerringly pointed towards the guilt of the accused and the circumstances, taken cumulatively, form a chain so complete that there was no escape from the conclusion that within all human probability the crime was committed by the accused and no one else. The circumstantial evidence, in order to establish conviction, must

exclude explanation of any other hypothesis than that of the guilt of the accused. When an offence is committed inside the house, inmates of the house have to offer explanation how the incident occurred. They cannot remain silent without any explanation. It is always a danger that conjecture or suspicion lingering on mind may take place of proof in dealing with the circumstantial evidence. Suspicion, however strong, cannot take place of proof and hence the Court is required to judge watchfully and ensure that the conjecture and suspicion do not take place of proof.

21. In the instant case, as discussed above, the prosecution case is based on circumstantial evidence. From the testimony of Payal Rani Mangaraj (PW10) and Koyal Rani Mangaraj (PW 11), who are the daughters of the applicant and the deceased, Rfn/GD Pradip Talukdar (PW1) as well as Akshay Kumar Lenka (DW 1) apart from the statement of the applicant made voluntarily it appears that applicant along with his deceased wife and four minor children were in the quarter at the time of occurrence and no one else. The applicant was the only adult member, apart from the deceased, present in the house at the time of occurrence. Hence it is a strong circumstance against the applicant, who, is therefore, required to explain how the incident of burning of his wife has occurred. Mere presence of the husband in the house at the time of occurrence, though itself is a strong circumstance may not be sufficient to prove the guilt of the applicant unless of course other circumstances exist.

22. The prosecution in order to bring home the charge has examined the daughters of the applicant PW 10 and PW 11 apart from Rfn/GD Pradip Talukdar (PW 1) who came to the place of occurrence on hearing the noise and Rfn GD Krishan Lal (PW 3) who also came to the place of occurrence on hearing the call of PW 1 Pradip Talukdar. PW 10 and PW 11, at the time of occurrence were 7 and 6 years old respectively. At the time of deposition they were 10 and 09 years old respectively. Their depositions were recorded almost 3 ½ years after the date of occurrence.

23. Before proceeding further we shall deal with the evidentiary value of a child witness. The deposition of a child witness cannot be brushed aside only on the ground that he/she is a child witness. The Apex Court in **Ratansinh Dalsukhbhai Nayak Vs. State of Gujarat**, reported in **(2004) 1 SCC 64** while considering the value of the testimony of the child witness has observed as under

“ The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.”

24. The evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is

susceptible to be swayed by what others tell him and, thus, a child witness is an easy prey to tutoring. Such evidence must find adequate corroboration before it is relied upon, which is more a rule of practical wisdom than of law. The evidence of a child witness must be subjected to close scrutiny to rule out the possibility of tutoring. It can be relied upon if the court finds that the child witness has sufficient intelligence and understanding of the obligation of an oath. As a matter of caution, the court must find adequate corroboration to the child witness's evidence. If found, reliable and truthful and corroborated by other evidence on record, it can be accepted without hesitation. Before recording the deposition of a child witness, the Court is required to satisfy itself that the child witness is competent to depose and is not prevented from understanding the question put to him or prevented from giving rational answer by reason of tender age.

25. In the instant case, the GCM before recording the deposition of Payal Rani Mangaraj and Koyal Rani Mangaraj (PW 10 and PW 11 respectively) who are child witnesses, satisfied itself about the capability of those witnesses to give rational answer to the question put to them. The GCM having found that they were capable to give rational answer upon understanding the question put to them and they are not prevented from giving rational answer by reason of their tender age, proceeded to record their testimony. Payal Rani Mangaraj, (PW 10), eldest daughter of the applicant and the deceased, who was 7 years old at the time of occurrence, i.e. on

22.04.2008, and was 10 years old at the time of recording her deposition, in her testimony has stated that after she took her dinner along with her sister and brothers, her mother started having dinner when her father (applicant) came back home and thereafter she went inside the bedroom and slept beside her brothers. She has further deposed that she woke up from her sleep with the noise of her father trying to break open the door who also shouted that I should save my mother. According to this witness her father broke open the door of the latrine and then she saw her mother was burning, when her father brought water in the bucket and threw on her mother. She has further deposed that her father tried to pull her mother out of the latrine and while her mother was shifted to bathroom, Rfn/GD Pradip Talukdar (PW 1) knocked the door, which she could not open because of the height. According to this witness her father laying her mother in the bathroom came and opened the door and then PW 1 came inside and both her father and PW 1 helped shifting her mother to the guest room and thereafter her mother was shifted to the hospital by her father as well as PW 1. This witness further deposed that there was nobody else who helped shifting of her mother to the hospital. This witness also deposed that along with PW 1, Rfn/GD Krishan Lal (PW 3) also came inside the house. This witness also deposed that on the next day i.e. on 23.04.2008, Col RR Singh took her statement as well as the statement of her sister Koyal Rani Mangaraj (PW 11) and when he told them to sign the statements, they refused to do so without being read over the contents of the statements written by him. According

to this witness, Col RR Singh then slapped them for not signing the statements. During cross-examination this witness stated that when they refused to sign the statements, Col RR Singh slapped them and thereafter obtained signature in the statement. It has further been stated that when her father broke open the latrine door, fire spread outside and the curtains beside the latrine caught fire.

26. Koyal Rani Mangaraj (PW 11), who was at the time of recording her statement was 9 years old and was 6 years old at the time of occurrence, in her deposition has stated that when she woke up from sleep she saw her mother being carried to the hospital by her father and she does not remember anything thereafter. This witness, therefore, did not see what happened prior to taking her mother to the hospital by her father.

27. Rfn/GD Pradip Talukdar (PW 1) in his deposition has stated that on the night of occurrence i.e. on 22.04.2008 at around 6 p.m., the applicant, his wife and his children were walking in front of the quarter/residence, when the applicant asked him whether he has any alcohol or not and when replied in the affirmative he wanted to have some. He has further deposed that the applicant then came inside his quarter (PW 1) along with his two children and after having liquor, the applicant left his house and then joined his wife and their other children outside. This witness further deposed that after finishing dinner when he was preparing to go to bed, he heard cry of some child and then hearing loud sounds of crying, he started

walking towards the applicant's quarter. It has further been stated that when he reached the applicant's quarter, he could realize that the children were crying from just behind the door and then he called the applicant asking him why he was beating his children. He has further deposed that though he tried to open the door, he could not do so because the door was locked from inside. He banged the door for about 1-1 ½ minutes and at that time Rfn/GD Krishan Lal (PW 3) also came and joined him in banging the door and finally the door was opened by the applicant. This witness further stated that once the door was opened all the four children of the applicant immediately came outside crying and he found the applicant inside the quarter. On being inquired, the applicant has told him that his wife got burnt. When led by the applicant, they saw the applicant's wife lying inside the bathroom and then he covered the victim with cloth and with the help of PW 3 and the applicant, they brought her to the room nearby the door, which was the guest room. This witness further stated that he ran to the MI room and fetched a stretcher and shifted the applicant's wife to the MI Room. This witness further deposed that he did not hear the cries of anyone other than the children of the applicant. During cross-examination, this witness has stated that the relationship between the applicant and his wife appeared to be cordial at the relevant time and he never heard or seen the applicant beating or misbehaving with his wife and the children. He further deposed that there is no complaint from the line of Regimental Police against the applicant about misbehaving or beating or fighting with his wife. He has further

deposed that the applicant's wife did not tell him that the applicant had tried to kill her. That apart, this witness further stated that the applicant's children did not tell him that the applicant was responsible for the death of their mother. This witness during cross-examination has also stated that on the next day i.e. on 23.04.2008, a person from the unit along with the Commandant of 37 Assam Rifles had come to the applicant's quarter to take photographs and record video.

28. PW 3, Rfn/GD Krishan Lal, who according to PW 1 went inside the applicant's quarter on 22.04.2008 along with him, in his deposition has corroborated the version of PW 1 stating that he joined the PW 1 in banging the door and asked the applicant to open the door. Corroborating the statement of PW 1, this witness has also stated that the moment the door was opened, the applicant's children came running out of the quarter crying and then the applicant informed them that his wife put herself on fire. It has also been stated that with the help of PW 1 and the applicant, they then shifted the wife of the applicant to MI Room. During cross-examination, this witness has also stated that the applicant's wife was alive but she did not say anything alleging that the applicant tried to kill her.

29. The evidence of PW 1, PW 3, PW 10 and PW 11 assume importance as PW 10 and PW 11 were inside the quarter of the applicant at the time of occurrence and PW 1 and PW 3 reached the place of occurrence immediately thereafter who had seen the

deceased lying in the bathroom of the quarter of the applicant. No other witness was present at the place of occurrence at that point of time. The deposition of PW 11 is of no use as she did not see anything till her mother was being shifted to the hospital as she has deposed that she woke up only when her mother was being taken to the hospital. PW 10 who is a child witness and whose age was 7 years at the time of occurrence, has given vivid description of everything that occurred on the night of 22.04.2008. She was admittedly under the care and protection of her maternal uncle Akshay Kumar Lenka (DW 1) for about 3 years before recording her deposition. The manner, in which the PW 10 has described every details of the incident that occurred on 22.08.2008, creates doubt about her trustworthiness as she appears to be tutored, while she was in care and protection of DW 1 who deposed in favour of the applicant. It is difficult to accept that a 6 ½ years old child would remember in details, what happened on the day of occurrence, after 3 ½ years, which creates doubt in the mind of the Tribunal about truthfulness of the witness, though she was found to be capable of giving rational answers to the questions put by the GCM. The deposition of PW 10, therefore, cannot be relied upon.

30. PW 1 and PW 3 in their deposition have categorically stated that the applicant did not have any quarrel or fight with his wife at any point of time. They have also stated that though the applicant's wife was alive when they entered the house of the applicant, she did not disclose anything relating to the cause of the fire. They have

stated that they have found the applicant's wife in the bathroom. These witnesses have also stated that inside the quarter of the applicant they had noticed lots of smoke. They have not stated that at that point of time also the applicant's wife was burning. It is, therefore, evident from the deposition of these 2 witnesses that somebody had put off the fire. The applicant in his statement has stated that it was he who poured water on his wife. PW 1 and PW 3 did not say anything about setting the applicant's wife on fire in the corridor, which is the prosecution case.

31. PW 4, Staff Nurse Bency John, who was on duty at the Unit Hospital of 37 Assam Rifles and gave first aid to the applicant's wife, cleaned the burnt wounds and applied medicine, has deposed that after sometime of bringing the applicant's wife to the hospital, Commandant, Adj. and other officers reached the hospital and Commandant asked the applicant's wife whether she had burnt herself or whether applicant had set her on fire. This witness has also stated that the applicant's wife has replied to the Commandant's query as to whether the applicant had set her on fire, by moving her head sideways. This witness also stated that at the time the deceased was brought to the hospital she was in semiconscious state. When she was being questioned she did not reply promptly but after some time she said that she cannot reply now and thereafter she communicated only by nodding/moving her head. During cross-examination, this witness has also stated that she herself saw the deceased nodding her head in reply to the

question put by the Commandant about the reason of her burning. It has also been stated that though the applicant also suffered certain burn injuries, he was not admitted in MI Room on the day of occurrence who, however, was admitted in hospital later and remained there for 30 days for treating the burn injuries received by him.

32. PW 5, Dr. B.R Deori, who came to the hospital on receiving the call from PW 4 and attended the deceased for the burn injuries, has deposed that before shifting the patient to Dibrugarh, Commandant took video of the patient and asked the deceased whether her husband set her on fire, to which she replied by moving her head sideways. He has further deposed that when the deceased was brought to the hospital she was restless due to severe pain and after administering the drug she became stable. This witness has further deposed that the Commandant put questions to the deceased after she became stable and during that time the video recording was on. It has also been stated that the deceased was conscious when the video recording was done in the Unit of Hospital and also at the time when the Commandant asked her questions. This witness further stated that during the journey from Naginimora to Dibrugarh, the deceased was stable and was communicating with her husband, who was also travelling in the Ambulance in their mother tongue which though was audible to him but was not understandable as he does not know the language in which she was speaking to her husband. During cross-examination, this witness

has stated that he was physically present when the Commandant put question to the deceased and the actions of the deceased were visible to him. It has also been stated that the Commandant took permission from him to take video recording and also to record the dying declaration of the deceased. This witness has categorically stated in reply to the question put by the GCM that the deceased was in fit state of mind to give the statement and/or understand the questions put to her. He has also stated that apart from the Commandant, the Staff Nurse Bency John (PW 4), Asstt. Commandant R Kumar (who has not been examined by the prosecution) were also present when the Commandant put questions to the deceased. This witness has stated that apart from the burn injuries, he did not find any other injury on the body of the deceased. During cross examination this witness has further stated that on their way to Dibrugarh, the Ambulance carrying the injured Sakhi Rani and also her husband was hit by a private vehicle which, however, did not cause any injuries to any person inside the ambulance. He also stated that when the deceased was brought to the hospital he asked her whether she could recognize him to which she replied in positive by nodding her head. This witness also deposed that Pathedine as a medicine is a sedative and a tranquilizer and if Pethedine is administered in high dose, keeping in mind the age, weight and body structure of the person, then sedation will be high and the person will sleep. It has categorically been stated by this witness that though, having regard to the deceased age, weight and body structure, 50 mg of Pethedine ought

to have been given, he, however, pushed only 25 mg of Pethedine, which is a low dose, because Voveron injection of 50 mg was administered to her which is a pain killer. He has reiterated his earlier statement that the deceased was in a fit state of mind to give statement even after being administered 25 mg dose of Pethedine and with 100% burn injuries.

33. PW 6, Dr. Subha Jyoti Deka, Asstt. Professor in the Dept. of Forensic Medicine, who conducted Post Mortem Examination on the body of the deceased, in his deposition, apart from proving the Post Mortem Examination Report (Ext. 22), has stated that whether a person sustaining 98% burn injuries and being administered Pethedine, will be in a fit state of mind to give a statement can only be ascertained by the treating doctor. During cross-examination, this witness has stated that the injury No. 1 and 2 found on the body of the deceased can be caused if the body of the deceased got hit with the inner body of the vehicle. He has further deposed that the injury of contusion found on the body of the deceased might have also been caused during transportation. Answering the question put by the GCM, this witness has also stated that it is not possible to say as to whether the contusion injuries found on the arm of the deceased lady was before or during or after sustaining burn injuries. This witness has also deposed that the palm of hands and sole of feet of the deceased lady were less burnt i.e. they were of 1st degree burn. He has further deposed that it is possible to carry a human body immediately after it was in fire and the fire can be put

off by water. This witness, relating to the normal human behavior, has also stated when fire spreads all over a person who is not dumb there will be pain which in turn leads to screaming and shouting by that person. There cannot be any chance of the person becoming or being speechless. Even if the person is dumb, he/she will emit some kind of sound.

34. As discussed, we have viewed the video recording of the dying declaration i.e. (Ext. 43), relating to the answer given to the question put by the Commandant as to whether she was set on fire by her husband. Nodding the head sideways by the deceased can vividly be seen in the said video recording which is also corroborated by PW 4 and PW 5. Col Vijay Pathania (PW 14), who on 22.04.08 was performing the duty of Commandant, 37 Assam Rifles, admitted putting questions to the deceased and also video recording of her dying declaration.

35. Normal behavior of a person who receives burn injuries though is to scream or shout seeking help, it may not be so when a person tries to commit suicide, may be because he/she is determined to die, unlike when he/she is set on fire by somebody else. In the instant case, PW 1 and PW 3 who came immediately after the occurrence and found the deceased in the bathroom have deposed that they did not hear any scream or shout or cry of anyone other than the children who were also present in the quarter of the applicant. They have also stated that except groaning in pain the

deceased did not shout even after their arrival and she also did not say anything about the reason of the fire. The patient of severe burn injury and having first degree of burning on the palm of hands and sole of feet, according to the Medical Jurisprudence includes the possibility of suicide, as normally a person set himself/herself on fire in standing position, which in turn affect much less in the palm and sole of such person.

36. Dying declaration, in view of Sub Section 1 of Section 32 of the Indian Evidence Act, 1872, is admissible in evidence, when a statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question. Such dying declaration can be by words in writing or in the form of gesture or signs. If the person is unable to speak, he/she could make the dying declaration by signs and gestures in respect of such person who is unable to speak either because of the injury caused or dumbness. The dying declaration is considered credible and trustworthy as most people who know that they are about to die normally do not lie. Before acceptance of the dying declaration, it is, however, to be proved that the person was in a fit state of mind to make such declaration. The dying declaration stands in the same

footing as other pieces of evidence and has to be judged in the light of the surrounding circumstances and with reference to the governing the weight of evidence. The statements made by dying persons are not admissible in evidence, apart from others, if that person was not in a position to make such dying declaration and such declaration was inconsistent.

37. In the instant case, the PW 5, Dr. B.R. Deori has stated that the deceased was in a condition to make her statement and accordingly she made her dying declaration by nodding her head, which was video recorded by the Commandant. The said witness also deposed that her condition had improved after she was administered drug as a part of the treatment for the burn injuries. PW 4, Staff Nurse Bency John, has also supported the version of the PW 5. The ground which has been cited by the GCM i.e. such video recording of dying declaration was made against advice of the Doctor (PW 5) and she was not in a position to make such statement, she having been administered drug Pethedine, has no support in the evidence, as PW 5 never in his deposition has stated that he declined permission to allow the Commandant to video record the dying declaration or to put question to the deceased. He, on the other hand, has stated that the deceased was capable of answering the questions as she was administered 25 mg of Pethedine in place of 50 mg of Pethedine. That being the position, we are of the considered opinion that the dying declaration made by the deceased in the form of gesture or sign, is admissible in evidence. The

deceased in her dying declaration has stated that she was not set on fire by her husband.

38. Another ground on which the GCM on revision has altered its earlier finding of 'not guilty' i.e. the circumstantial evidence based on the photographs (Ext. 40), also cannot be sustained, in view of absence of continuity in the photographs, loss of sequence and also the deposition of Rfn/GD Subish K Mohan (PW 13), who has taken the photographs as per order of the Commandant, to the effect that he did not take all the photographs and he does not know about missing of photo files in the sequence after photo file No. DSC01318, which are not in sequence as some of the photo files are missing from the serial. PW 13 has further deposed that he along with the Commandant went to the applicant's quarter, with Handy-Cam in the intervening night of 22.04.08 and 23.04.08 while video clips were done through the Handy-Cam and the video recording shown in the first three video clips was done by him through the Handy-Cam and he does not know who recorded the other video clips. This witness also deposed that he subsequently downloaded the contents of the video recording and photographs in the laptop taken from the office and thereafter personally delivered to the Commandant in his residence which he did in the intervening night of 22/23 April 2008 itself. It is also in the evidence of PW 13 that the Commandant also went to the place of occurrence on 23.04.2008. PW 13 has also pointed out the discrepancies in the photographs, so also in the video clipping in relation to the existence of the handles in the

bathroom, the position of burnt curtains in the latrine, position of burnt cloths in the spring. The prosecution has not examined any other person, other than PW 13, to prove those photographs, all of which according to the PW 13 were not taken by him. This creates doubts in the mind of the Tribunal about the photographs as well as the video clippings, which, therefore, cannot be relied upon in support of the prosecution case.

39. DW 1, Akshay Kumar Lenka, in his deposition has stated about the suicidal tendency of the deceased even prior to her marriage. The testimony of DW 1 has been rejected by the GCM on revision on the ground the he is a blood relation and he having no independent source of income and being dependent on the income of the applicant, there is all possibility of giving false evidence in support of the applicant.

40. It is a settled position of law that if the testimony of an interested witness is cogent, reliable and inspires confidence, it cannot be discarded merely on the ground that the witness happened to be the relative either of the deceased or of the accused. The Court, however, has to be more careful in the matter of scrutiny of the testimony of an interested witness and if on scrutiny it is found that the evidence on record of such interested witness is worth credence, the same would not be discarded merely on the ground that the witness is an interested witness. It is the quality of evidence and not quantity of the evidence which is required to be

judged by the Court to place credence on the statement. Relationship is not a factor to affect the credibility of a witness.

41. In the instant case, DW 1 is the brother of the deceased and hence he will definitely not try to protect the person who caused harm to his sister. The Tribunal does not find any ground to reject the testimony of DW 1, though he is related to the deceased and also of the applicant, which lends support to the defence.

42. The only circumstance which appears against the applicant is his presence at the time of occurrence, which, as discussed above, though is a strong circumstance, cannot alone be the ground for conviction in the absence of any other reliable circumstantial evidence. The time of incident being in the night, the presence of the applicant in his quarter is natural. The applicant has also explained the reason of the incident. The dying declaration of the wife of the applicant, which has been video graphed is also found to be admissible in the evidence and trustworthy, which supports the defence version instead of supporting the prosecution version. The explanation given by the applicant relating to the presence of the burst bulb in the corridor, which according to the applicant got bursted because of the heat generated after opening of the door of the latrine is found to be acceptable. The photographs and video as discussed above, of the place of occurrence, is not found to be trustworthy, which indicates presence of more soot or blackening in

the corridor than inside the latrine and also presence of unused bucketful of water inside the latrine.

43. From the aforesaid discussions of the evidence on record, we are of the view that the prosecution has failed to bring home the charge levelled against the applicant beyond all reasonable doubt, benefit of which must go to the applicant. Hence the finding of guilt recorded by the GCM on revision on 10.04.2012 and the sentence passed by it on 11.04.2012 as well as the order of the confirming authority dated 23.05.2012 need to be interfered with, the same being not sustainable in law, which we accordingly do. The finding, sentence and the confirmation of the finding and the sentence are accordingly set aside. The applicant would, therefore, be entitled to reinstatement in service, who shall not be paid salary for the period from the date of finding guilty till the date of this order. The applicant, however, shall be entitled to all other service benefits including seniority, continuation of service, and benefit of increment except the salary of the aforesaid period.

44. The OA is accordingly allowed as indicated above.

45. No costs.

MEMBER (A)

MEMBER (J)

Kalita