

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO. 47/2017**

Mr. Adawayya @ Swami Kuntainawar,
Son of Channavirayya Kuntainawar,
Major of age, male,
Indian National,
R/o.c/o Virginia D'Souza,
Near Vetat Temple, Chopdem,
Pernem, Goa.
Native of MaimKatti, Janta Plot,
Belgaum, Karnataka,
Presently lodged at Modern
Central Jail, Colvale,
Bardez, Goa.

... Appellant

Versus

1. State
(As represented by the
Officer in charge,
Pernem Police Station)
Pernem, Goa.

2. The Public Prosecutor,
High Court Building,
Altinho, Panaji, Goa.

... Respondents

Shri Ryan Menezes with Shri Nigel Fernandes, Advocates for the
Appellant.

Shri S. R. Rivankar, Public Prosecutor for the Respondents.

**Coram : M.S. Sonak &
Nutan D. Sardessai, JJ.**

Dated : 24th July, 2019.

JUDGMENT : (Per Nutan D. Sardessai, J.)

This is an appeal at the instance of the convict, who has challenged the judgment and sentence passed by the learned Additional Sessions Judge dated 23/03/2017 by virtue of which he was sentenced to undergo rigorous imprisonment for life for the offence punishable under Section 302 IPC and to pay a fine of ₹10,000/-, in default to undergo rigorous imprisonment for three years. The respondents State had initiated the proceedings against the convict, who shall hereinafter referred to as the accused and the State for brevity's sake.

2. It was the case of the prosecution against the accused that on 23/06/2013 between 20.30 hrs. to 20.45 hrs., the accused with the intention of killing his wife had poured diesel on her in a rented room situated near Vetat Temple at Chopdem, Pernem, Goa and thereby caused her grievous injury which resulted in her death on 26/06/2013 while she was undergoing treatment in the Goa Medical College at Bambolim. The learned Additional Sessions

Judge had framed charge against the accused to which he had pleaded not guilty and claimed to be tried. The State had examined 16 witnesses to bring forth its case against the accused on the solitary head of charge under Section 302 IPC and thereafter the case of the prosecution was put to the accused in his statement recorded under Section 313 of the Criminal Procedure Code which he denied taking a specific plea in defence that the deceased was not his wife though she was staying with him and admitted that there used to be frequent quarrels between them. He had accordingly examined himself and another witness in support of his defence plea. Be that as it may, the learned Additional Sessions Judge, Mapusa, found favour with the case of the State against the accused and convicted him giving rise to the present appeal assailing the said judgment and seeking its reversal to one of acquittal.

3. We have heard Shri Ryan Menezes, learned Advocate for the accused who submitted at the outset that the case of the State against him was based on circumstantial evidence and, therefore, it had to be seen on an examination of the testimony of various witnesses whether the charge could at all be said to have been brought home against the accused. Besides, the accused had

himself sustained injuries on his person in the course of assisting the deceased and which was apparent from the evidence of the Doctor, who had examined him. He adverted to the statement of the various witnesses on record including Nagraj to belie the prosecution case that the accused had purchased diesel at the petrol pump to douse the same on the deceased and to set her ablaze. There was otherwise a variance between the case of the prosecution as brought on record through the petrol pump attendant who had stated that the accused had purchased the can of diesel of 35 litres capacity unlike the attachment of the can at the residence which was barely 5 litres in capacity. There were material discrepancies in the case of the prosecution including the non attachment of the shirt of the accused and therefore it was a fit case to acquit the accused. He placed reliance in **Nallapati Sivaiah Vs. Sub Divisional Officer, Guntur, A.P.** [2007 (15) SCC 465], **Kanchy Komuramma; Kanchy Ramchander Vs. State of A.P.** [1996 SCC (Cri) 31], **K. Ramachandra Reddy Vs. Public Prosecutor** [1976 SCC (Cri) 473], **Sujit Biswas Vs. State of Assam** [(2013) 12 SCC 406], **M.Abbas Vs. State of Kerala** [2001 Cri.LJ.3965] and **Reena Hazarika** [2018 (4) Crimes (SC) 295].

4. Shri S.R. Rivankar, learned Public Prosecutor on behalf of the State submitted that the prosecution had brought clinching evidence on record and there was no reason to reverse the judgment of conviction to one of acquittal. On his part, he placed reliance in **Laxman V/s State of Maharashtra** [(2002) 5 Supreme 557] and adverting to the very same evidence on record submitted that the appeal had to be dismissed and the judgment of conviction had to be upheld.

5. We would consider their submissions in the light of the material on record and after discussing the same decide the fate of the appeal accordingly.

6. Virginia Pw2 had come on record that she was knowing the accused and the deceased since she had given a room on hire to them alongwith their minor daughter. He had disclosed his name as Swami upon being brought by another person, and then she had given a room on rent for ₹1,200/- per month. The wife of the accused had disclosed to her that they had three children who were at their native place at Belgaum. The accused had told her that he was driving a truck of another person and had a motor cycle which he used many times. The wife of the accused was at home, but only sometimes she used to go out and she was very good in

nature, though she was quarrelling on immaterial incidents. On 23.06.2013, while she was making her children to sleep in her room, she heard some noise saying "aunty, bhair sor". She immediately came out of the room and saw from the gallery that the shed of the accused was burning and saw flames and all the tenants had gathered and they were screaming and shouting that the fire should be extinguished with water and at that material time, she saw a woman burning in flames, come out of the room of the accused and in the meantime Dani and other roommates also reached there hearing the screams and shouts and they put water on the said lady and whom she recognised as the wife of the accused who was saying "Swami ko pakdo, Swami ko Pakdo".

7. Virgina Pw2 also stated that Swami could not be seen anywhere, but the string on which the clothes were hanging in the room was burning. The people had extinguished the fire in the room by pouring water. She was instrumental to phone 108 ambulance from her residential phone informing about the lady who was burnt in the fire and to send the ambulance and the wife of accused was put in the ambulance using stretcher and taken to GMC Bambolim. She was informed by the wife of the accused that he used to quarrel with her and also doubted her. Although she was

cross examined at length, there was no rebuttal of her testimony that the wife of the accused was in flames when she came out of the room and that she was asking her husband to be caught by saying "Swami ko pakdo, Swami ko Pakdo".

8. Dani Pw4, corroborated the version of Virginia PW2, that she was residing in a room at Chopdem in her house and she was knowing the accused who was residing in another room alongwith his wife Kamla. Besides, there were three other rooms, the first being that of Mukta who was staying alongwith her husband and children, the second room was occupied by the accused and the third was occupied by Shanti and the fourth by one Gangubai and her children. On 23.06.2013, she had left for work and came home and while the other occupants came at about 16.00 hrs. and 17.00 hrs. In the evening while she was cooking food at about 20.00 hrs. to 20.15 hrs, she heard screaming sound from the side of the room of the accused and immediately rushed out infront of her room. At that time she saw a lady burning in front of her room and the other occupants of the room started screaming saying "bachao, bachao". She could not recognise the lady who was in flames, nonetheless, the people gathered there poured water and extinguished the fire. It was only when she fell on the ground, she came to know that

she was the wife of the accused named Kamla.

9. Dani Pw4 stated that the accused was not seen and Virginia Pw2 requested them to extinguish the fire which had spread in the room of the accused and also the temporary shed in front of his room. Virginia Pw2 had called for an ambulance and thereafter, Kamala since deceased, was shifted to the hospital. She was informed by the husband of Mukta that the accused had fled away from the spot and he had seen the accused fleeing. She too was materially unshaken in her testimony that the wife of the accused had come screaming out of the room on fire and that all of them were instrumental in dousing off the fire by using water. She also corroborated the version of Virginia Pw2 on having procured the ambulance and shifting the deceased to the hospital and particularly on the accused fleeing from the spot, without rendering any assistance to Kamla, since deceased.

10. Shanti Pw5, another occupant of the same premises, stated that one room was occupied by Mukta alongwith his family, second by Kamla and her husband Swami, third by her and her brother and fourth by Gangubai and her family. On 23.06.2013, after returning to her room at 20.15 hrs., she started preparing food and

at that time, saw flames of fire near the partition of the room, coming from the room of Kamla, wife of the accused. She was frightened and called Aai i.e. Gangubai and she came out of the room and other neighbours also came there and they saw the accused rushing out of the room and the wife of the accused also came out of the room burning in flames and she was screaming and shouting for help and the boys from the neighbourhood poured water over her body despite which she fell on the ground. The accused did not help anybody in extinguishing the fire and fled away and Kamla was shouting saying "Swami ko pakdo, Swami ko pakdo".

11. Shanti Pw5 stated that she had used her presence of mind and switched off the electricity main switch and also her gas cylinder and in the meantime the ambulance came which took Kamla for treatment. She was unshaken in her testimony in material particulars that she had seen the accused outside the room wearing blue colour jean long pant and the room was very close to her room and he was hardly at a distance of one metre and when people gathered at the spot. He was available at the spot standing in the crowd and did not render any assistance in putting off the fire. She also shed light on the fact that the deceased and

the accused were quarrelling with each other and he was in the habit of drinking liquor. But for the suggestion that she had given false statements on oath, there was no rebuttal of her testimony which once again corroborates the testimony of Virginia Pw2 and Dani Pw4 that accused was at the spot, had not rendered any assistance and that he had run away from the scene of crime.

12. Mukta Pw6, another material witness to the case of prosecution stated that she knew the deceased and the accused as they were staying in a room where they were staying alongwith their family members. Sometime in June, 2013 while she was cooking food, she heard shouting noise of her husband and Shanti and came out of the room and asked her husband what had happened who then disclosed that fire took place in Kamla's room. The other roommates came out hearing the shouts and in the meantime Kamla came out shouting for help. The other roommates came and extinguished the fire by pouring water but the accused did not help in extinguishing the fire. After the fire was extinguished, Kamla fell on the ground at which time she was saying "Swami ko Pakdo, Swami ko Pakdo". The accused who was standing there only watched the incident and did not help in extinguishing the fire and fled away. She too corroborated the

version of the prosecution witnesses that accused was habituated to drinking alcohol though she conceded shortly that she personally had not seen him drinking liquor and she found the accused drunk and found his gait not proper.

13. Mukta Pw6 too confirmed that the accused was at a distance barely a metre from the place where she was standing and who had fled from the spot after the fire was extinguished and after Kamla fell down. The testimony of this material witness had amply stood the test of cross examination that the accused was in the room alongwith the deceased and was present when Kamla had caught fire and that she was in flames when she came out of the room after the accused and that although she shouted for help, the accused had not rendered any to douse off the fire. Quite on the contrary, he had watched her burning from some distance alongwith the other occupants of the rooms and then fled from the scene of crime, which conduct is not in consonance with his case in defence that he tried to put off the fire and himself suffered injuries in the course.

14. Dr. Chetan Kanekar Pw1, was the Police Surgeon who had examined the accused at the instance of the police and found

superficial deep burn injury on the cheek, nose, both upper and lower lips, chin to the extent of 5%, superficial to deep burn injury on his right hand to the extent of 3% and superficial to deep burn injury over right side chest nipple region to the extent of 4% apart from singeing of the right side eyebrow. On 27.06.2013, he had also received a request letter of the Pernem Police and conducted the post mortem examination on the body of a female namely Kamla i.e. wife of the accused, recorded the history regarding the cause of death being a case of sustaining burn injuries which were to the extent of 95% and recorded in the report appropriately. He had then narrated the location and the extent of injury on every part of the body apart from the internal findings and certified the cause of death due to septicaemia and shock consequent to infected flame burn injuries which were ante mortem in nature and fatal in the ordinary course of nature.

15. Dr. C. Kanekar Pw1 had also identified the blood group of the accused as AB Rh Positive upon a reference to the Blood Bank. No doubt Dr. Kanekar Pw1 did not rule out the possibility of the injuries on the accused being caused in case a person tries to rescue a person on fire and that the accused had given such a history nonetheless, it is a mere hypothesis looking to the evidence

as amply demonstrated in the testimony of Virginia Pw2, Dani Pw4, Shanti Pw5 and Mukta Pw6. Moreover, a vital statement was made by him that Kamla, since deceased was semi conscious on 24.06.2013 and that on 25.06.2013 her condition was drowsy and that she expired on 26.06.2013. This un rebutted testimony of the doctor amply establishes the fact that the death of Kamla, since deceased, was caused by burning resulting in septicaemia and that read with the other evidence established that it was a homicidal death and not an accidental death.

16. Nagraj Pw3, was an employee at Hindustan Petroleum petrol pump by name Raj Fuels situated at Kuchelim, Bardez, Goa. He had earlier been working at a petrol pump of M/s M. A. Swar at Malpem, Pernem. He knew the accused who used to come at the petrol pump at Kuchelim alongwith the Eicher Truck to fill fuel and bearing No. GA03 K 8668. The accused came to the petrol pump with a two wheeler carrying a plastic can having the capacity of 35 litres and told him that his vehicle required diesel and purchased diesel costing ₹1,000/- or ₹500/-. He sold the diesel to the accused since the accused used to come to the said petrol pump to purchase diesel for his vehicle. He could identify the accused and had otherwise been called to the office of the Mamlatdar for a test

identification parade. He was made to identify the accused from a group of seven persons and had identified him from other persons who had purchased diesel from the petrol pump. It is another matter that he had conceded during his cross examination that police had brought the accused to the petrol pump prior to the identification parade. Assuming at the highest that the identification of the accused is of no consequence when the witness had seen the accused prior to the identification parade nonetheless there is ample material on record to establish the complicity of the accused in the crime from the evidence discussed thus far and which would follow shortly hereinafter.

17. Rajesh Pw7, was a panch to the attachment panchanama of the clothes of the accused on 25.06.2013 at the instance of Pernem police alongwith another panch. The accused was produced before them, when he noticed that the accused was having burn marks on his face and right hand, wearing a blue colour jean pant and blue full sleeves shirt with white stripes and when removed, they noticed burn marks on his right side front portion. The police had given a spare set of clothes to the accused and he was asked to remove the pant which was attached and packed under the panchanama. There was a grey colour mobile of Lava make with

sim card of Vodafone and found in the pant pocket. They were told the IMEI number of the mobile and it was duly packed, sealed and attached under the panchanama. He duly identified the pant and mobile in the Court on being shown to him and otherwise, unaware of what was done by the police with the shirt removed by the accused in his presence.

18. Siddesh Pw8, was another panch to the scene of offence panchanama on 24.06.2013 at the instance of the police when they were taken to the house of Virginia Pw2, being the owner of the rooms given on rental basis. She told that she had given one room to Shanti, another to the accused and two to other persons on rent. The room of the accused was locked at that time. They were shown the space outside the room in the courtyard where they saw the burnt cloth pieces outside and the owner told them that when Kamla came running out of the room in flames, she fell down there and water was poured on her. The PSI had then packed the burnt cloth pieces in an envelope and sealed which were duly signed by the panchas apart from the PSI. He had also removed mud particles from the spot where the victim had fallen down and packed and sealed in an envelope on which the panchas and PSI had signed. A sample of mud was taken as the control sample from

the spot nearby and similarly packed, sealed and signed in their presence. Thereafter they were taken to the right side of the entrance of the room where a pair of gents chappals were found bearing No.7 which too were packed and sealed and signed by the panchas and PSI, followed by the attachment of a ladies pair of chappals.

19. The room of the accused was unlocked by using a key. On entering the room, they saw burnt pieces of clothes lying on the floor which were lifted from the floor and these were packed and sealed in an envelope and the panchas and PSI also signed the same. It was further borne out from his testimony that they were shown a table fan and an oil can of fortune make on a stool in the room with the cap of the can lying by its side. Liquid was present in the can of which the smell was taken and it was found to be diesel. The can alongwith the lid was then inserted in a polythene packet and wrapped in a white colour cloth on which a label was attached bearing relevant details and thereafter it was signed and duly sealed. A stove of green colour of trade mark National Goa was opened and it was found to contain some liquid which appeared to be diesel. The stove too was inserted in a polythene packet and then wrapped in white cloth and label was prepared with the

relevant details on which signatures were taken. Match sticks lying on the floor were inserted in a polythene packet, then in an envelope on which details were written which was duly signed by the panchas and PSI. They were also shown a Splendor motor cycle bearing No. KA-28-Q-8198 which was used by the accused. The motor cycle too was also attached under the panchanama and besides, photographs were taken of the scene of offence. He had duly identified each of the exhibits in the court upon the seals being opened while conceding that he was not seen in the photographs which were clicked during the course of the panchanama. His testimony seen as a whole, does not create any doubt on his presence at the relevant time thereby clinching the case of the prosecution on the position of the scene of crime and the attachment of the material items during its course.

20. The evidence of Bhagirath Pw9 is relevant only to the limited extent of bringing on record that he was running a bar and restaurant named Dhanraj Bar and Restaurant at Chopdem, and that he knew the accused since he used to come to his bar and take a peg of whisky. He disclosed that on 23.06.2013, the accused had come to his bar at about 5.00 or 5.30 p.m., took a peg of whisky and left his bar. At the highest, his testimony reveals that

the accused was habituated to alcohol and nothing further. P.C. Parab Pw10 had received information from PSI Gawas that on 24.06.2013 at about 14.00 hours one lady named Kamla had sustained burn injuries at Chopdem and he visited GMC Bambolim. He was directed by PSI Gawas alongwith another constable to guard the scene of crime near the bridge at Chopdem and on going there, he went to the rented room belonging to Virginia Pw2 in which Kamla, since deceased, used to reside. PSI Gawas had handed over to him the key of the main door and accordingly he guarded the scene of crime. During morning time PSI Gawas had come to the scene of crime and thereafter he had handed the keys to him who conducted the scene of offence panchanama and attached various exhibits apart from taking photographs at the scene of crime. He duly identified the photographs and was materially unshaken on his limited role of having guarded the scene of crime, the panchanama being conducted by PSI Gawas, various items being attached and photographs being taken at the scene of offence.

21. C. Shetkar Pw11, the Executive Magistrate and Mamlatdar attached to the office at Pernem came on record that he had conducted the T.I. Parade based on the request of the Sub

Divisional Magistrate, Pernem. He had conducted the T.I. Parade on 07.08.2013 with the help of two respectable persons being the Head Clerk and the UDC attached to his office and drawn the memorandum thereof which was accordingly admitted in evidence under Section 294 Cr.P.C. He fairly admitted that he could not identify the accused in respect of whom he had conducted the T.I. Parade due to the passage of three years. He also set at rest the fact that the witness Nagraj Pw3 had admitted to him that the police had brought the accused to the petrol pump at Cunchelim, Mapusa and at that time he had occasion to see the accused before the actual conduct of the T.I. Parade. Although it is apparent from the testimony of Nagraj Pw3 and that of Shetkar Pw11 that the accused was shown to Nagraj prior to the actual conduct of the T.I. Parade, thereby defeating the very purpose of the parade, nonetheless in the face of the clinching eye witnesses account, this flaw in the investigation case pales into insignificance.

22. In **Kanchy Komuramma** (supra), the Hon'ble Apex Court was dealing with the appeals by Special Leave directed against the common judgment of the High Court of Andhra Pradesh. In the facts of the case, K. Rajamma had died of burn injuries on 24.06.1988 in M.G.M. Hospital. According to the prosecution case,

the appellant Kanchy Komuramma, the mother-in-law of the deceased and the appellant, the father-in-law of the deceased had poured kerosene on her on 22.06.1988 at about 7.00 or 8.00 a.m. and set her ablaze in a house in Village Ellenda, Police Station Wardhanapet. She was removed to the hospital by her mother Elata Agamma and her husband Kanchy Kumara Swamy and some others, where she was initially treated by the casualty medical officer who found 54% superficial burns on her body on various parts. She was given initial primary treatment and was referred to the Duty Surgical Officer and admitted in Unit III of the M.G.M. Hospital Warrangal on 23.06.1988. An intimation was sent to the Judicial Magistrate and it was requested that the dying declaration of the deceased may be recorded, which came to be recorded on the same noon at 12.45 hours and she succumbed to her injuries on 24.06.1988.

23. In **Kanchy Komuramma** (supra), the Hon'ble Apex Court considered Section 32(1) of the Evidence Act being an exception to the general Rule that the hearsay evidence is not admissible to the said evidence and unless the evidence is tested by cross examination, it is not creditworthy. However, under Section 32, when a statement is made by a person, as to the cause of death,

or as to any of the circumstances which result in his death, in cases in which the cause of the persons death comes into question, such a statement, oral or in writing, made by the deceased to the witness is a relevant fact and is admissible in evidence. The Hon'ble Apex Court found in the facts at large that although an endorsement was made on the letter by the doctor that "the patient was in a fit state of mind to depose", no other witness was examined to prove the certificate of the doctor nor was the doctor himself examined. Their Lordships found that the non production of the doctor to prove his certificate and subject to said cross examination by the appellants when considered in the light of the testimony of the mother of the deceased who specifically stated that the condition of the patient was not good and she was not in a fit condition, created a doubt in their minds as to whether the patient was actually in a proper mental condition, to make a consciously truthful statement.

24. In **Kanchy Komuramma** (supra), the Hon'ble Apex Court in that view of the matter, held that this infirmity rendered it unsafe to rely on the dying declaration. As a matter of fact, the failure of the prosecution to establish that the deceased, before she made the dying declaration, was in a proper mental condition

to make the dying declaration detracts materially from the reliability of the dying declaration and it would not be safe to rely upon it. That the dying declaration had been recorded by a Judicial Magistrate by itself was not a proof of truthfulness of the dying declaration, which in order to earn acceptability had still to pass the test of scrutiny of the Court. This was however in the facts of the case and which does not find parity in the facts of the case at large, hence the respectful departure.

25. Jt. Mamlatdar, Rane Pw12 was in receipt of the letter of the PSI Pernem dated 24.06.2013 pursuant to which the PSI Pernem had requested the Deputy Collector and SDO to record the dying declaration of Kamla, since deceased. He was under the directions of the Dy. Director and accordingly had recorded the dying declaration of Kamla on 24.06.2013 at GMC Bambolim after obtaining the fitness certificate from the doctor. He had recorded the dying declaration of Kamla in a question and answer form which he produced in the Court and during such time, disclosed that Kamla had told him that she was 28 years old, residing at Chopdem, having married the accused since 10 years who was also known as Swami and that he was a truck driver. She was staying in the room with the accused. On being asked the pertinent question

as to what had happened to her, she had specifically answered that her husband had poured diesel on her body and after lighting a match stick had got her body on fire and thereafter he ran away. This incident which she had narrated to him had taken place in the room at 7.00 p.m. to 8.00 p.m. on 23.06.2013 and at that time nobody was present except the accused who was also otherwise beating her. Her neighbours were instrumental in bringing 108 ambulance though none of them came with her. He had duly identified her thumb impression on the dying declaration and which he had explained to her in Hindi after it was found to be correctly recorded as per her say.

26. Rane Pw12 was materially unshaken that he had taken the fitness certificate of the doctor before recording her dying declaration while conceding that the doctor was not present when he was recording the dying declaration. This evidence which is unrebutted also clinches the case of the prosecution against the accused, which otherwise found favour from the eye witness accounts of Virginia PW2, Dani Pw4, Shanti Pw5 and Mukta Pw6 respectively. Moreover, the unrebutted hurt certificate exhibit 84 drawn by the doctor at Asilo Hospital, Mapusa soon after Kamla, since deceased, was brought to the hospital indicates that she was

conscious at the time of her examination upon being brought by 108 ambulance from Chopdem and she had given the history by herself that her husband had spilled petrol on her and then lit her body on fire. This contemporaneous record too reinforces the case of the prosecution that the deceased was conscious when she was brought to the Asilo Hospital on 23.06.2013 at 21.55 hrs. i.e. within an hour or so of the incident of setting her ablaze.

27. Pednekar Pw14 was a photographer attached to the Finger Print Bureau, photography section at Verna who had received information telephonically on 24.06.2013 that an attempt to murder had occurred near the bridge at Chopdem where one lady was set ablaze on fire by pouring diesel on her body and was requested to come to the spot to click the photographs. On reaching the spot, he had met PSI Gawas with two panchas, where he was taken to a room where he clicked 16 photographs. He produced the certificate on record. P.I. T. Lotlikar Pw15 was the officer in charge attached to the Pernem police station in 2013 who took over the investigation from PSI Gawas in Crime No. 90/2013. An offence under Section 302 I.P.C. was registered against the accused instead of 307 of I.P.C. and thereupon, he had conducted the inquest panchanama on the body of the deceased, photographs

taken and statements recorded of the police constable Parab Pw10 and another.

28. PI Lotlikar Pw15 had gathered the information pertaining to the records of 108 ambulance, sought the ownership details of the Hero Honda Splendor motor cycle bearing registration No. KA-28-Q-8198 and recorded the statements of various witnesses including Nagraj Pw3 and Bhagirath Pw9. He was also instrumental in requesting the Sub Divisional Magistrate to conduct the T.I. Parade and after completion of the investigation had filed the chargesheet against the accused. The other clinching material available against the appellant/accused and which found favour with the learned Addl. Sessions Judge was the report of the CFSL Hyderabad. The CFSL report had confirmed that there was presence of diesel found on the clothes of the victim, that there was diesel in the stove and also in the can and on which there was no explanation forthcoming on behalf of the accused.

29. PSI S. Gawas Pw16 had contacted the GMC hospital Bambolim in connection with the medical fitness of the patient Kamla, since deceased, to give her statement. The doctor had declared that she was conscious oriented and fit to give her

statement. He had made inquiries with the said Kamla who told him that she wanted to file a complaint against her husband for setting fire to her person and accordingly recorded her complaint in the presence of the medical officer bearing her left hand thumb impression, apart, from the signature of the doctor. He had then narrated at length the tale of woe narrated by Kamla, since deceased, how the accused had set her ablaze by pouring diesel on her body and then ran away from the room after opening it followed by her running out of the room and shouting for help.

30. PSI Gawas Pw16 was also instrumental in guarding the scene of crime by keeping two police constables and keeping the room under lock and key, apart from moving the Deputy Collector to record her dying declaration. He had attached various articles from the room, the material being the burnt pieces of cloth, a green colour can of fortune, a stove, match sticks, match box and a motor cycle amongst others. He had also placed the accused under arrest attaching his pant, mobile with the two sim cards, referring him for medical examination and then adding Section 302 I.P.C. to the crime on learning of the demise of Kamla. It was materially borne out from his testimony that his inquiries with the accused on the burn injuries on his person revealed that they were sustained

by him while setting the victim on fire and had referred him for medical examination.

31. All these unrebutted testimonies simplicitor point out to the complicity of the accused in the crime of setting the deceased ablaze, amply demonstrating from the eye witness accounts apart from the version of the deceased herself and the medical evidence in that regard. The accused had broadly denied the case of the prosecution as put to him but had fairly conceded that he had 12% burn injuries on his person, while disclaiming the extent of burn injuries on the person of the deceased. He had otherwise, not denied the status that the deceased was semiconscious, when she was brought to the hospital, although he had substantially admitted the case of the prosecution on vital aspects, including his presence at the time of the incident and having purchased 5 litres diesel from Nagraj Pw3. He denied that the deceased had shouted "Swami ko pakdo, Swami ko pakdo" after she had come running out of the room insinuating that he was the perpetrator of the crime.

32. The accused had examined himself and insofar as the incident was concerned, on the night of 23.06.2013, he spelt out a

case that on coming to the room on the evening of 23.06.2013, he saw fire inside the room, took one vessel containing water and at that time Kamla had run and caught hold of him due to which the vessel of water fell from his hands. He had sustained burn injuries on his face and stomach and he pushed her away and from there followed by Kamla and falling on the verandah. The neighbours had thrown water on her. He was standing outside at some distance and soon thereafter he took to his heels. He had admitted that he had taken alcohol while coming home and besides purchased diesel on the plea that his vehicle was down in fuel. In any event, the tenor of his testimony supports the prosecution case to the hilt against him that it was he who was responsible for setting Kamla ablaze.

33. The learned Addl. Sessions Judge had on an assessment of the testimony of the witnesses and the law on the point, clearly concluded that the prosecution had proved its case against the accused, that he was staying in a rented room in the premises belonging to Virginia Pw2, alongwith Kamla, since deceased, that he was the only person in her proximity in the room on the ill fated night when she ran out of the room on fire and that the accused had taken the posture of a bystander, who had not rendered any

assistance to her and had instead run away from the scene of crime after noticing that the landlady and the other persons gathered at the spot had thrown water on Kamla and doused off the fire. The learned Addl. Sessions Judge for that matter, had found favour with the case of the prosecution on the eye witness account that the deceased herself had shouted saying "Swami ko pokdo, Swami ko pokdo" referring to the accused and who instead of rendering assistance to her had run away from the spot of crime.

34. The learned Addl. Sessions Judge had found favour with the testimony of the doctor who had confirmed that she had died on account of the flame burn injuries which were fatal in the ordinary course of nature and had materially found favour with the fact that the doctor who had examined her initially in the hospital had found her conscious and more over, the Executive Magistrate who had recorded her dying declaration had found her medically fit to record her dying declaration. The learned Addl. Sessions Judge rightly found favour with the case of the prosecution and on examining the law on the point, rightfully concluded that the prosecution had proved its case against the accused beyond all reasonable doubt and thereby convicted the accused for the

offence of murder punishable under Section 302 of I.P.C.

35. The flaws which have been tried to be projected on behalf of the accused, do not stand the test of scrutiny which are more attempts to indulge in nit picking and to create a doubt in the prosecution case. The presence of burn injuries on the person of the accused, reinforces the prosecution case that the deceased had tried to hold on to the accused and in that process he had sustained the said injuries on his person and who freed himself from her hands and rushed out, without rendering any assistance to her. The so called discrepancy pointed out on behalf of the defence that the purchase of diesel by the accused did not establish its use by him when he had purportedly purchased 35 litres of diesel and what was found in the room was a mere 5 litres can, does not undermine the prosecution case giving weightage also to the defence plea that diesel was used as a medium of cooking in the stove found in the room. If that be so, the accused would require a can of barely 5 litres capacity to refuel the stove and not a 35 litres can. Besides looking to the medical evidence and the dying declaration as recorded by the Executive Magistrate, apart from the history given by the deceased herself on her first admission to the Asilo Hospital Mapusa, confirms that she was

conscious at the relevant time and that she had clearly fastened the culpability of the incident on the accused himself. There is no reason to disbelieve the same.

36. In **Laxman** (supra), the Hon'ble Apex Court held that the need of ascertaining whether the deceased was in a fit mental condition and whether a certificate by a doctor to that effect was a must, held that where the injured was conscious but was not certified to be in a fit state of mind and the Magistrate stating that the injured was in a fit state of mind was sufficient. It went on to hold further that the juristic theory regarding acceptability of a dying declaration is that such a declaration is made in its extremity when the party is on the point of death and when every hope of this world is gone when every motive of falsehood is silenced and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on a death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason, the requirements of oath and cross examination are dispensed with. Since the accused

has no power of cross examination, the Court insist that the dying declaration should be of such a nature that it inspires full confidence of the Court in its truthfulness and correctness. The Court however has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination and the Court must also further decide that the deceased was in a fit state of mind and had an opportunity to observe and identify the assailant.

37. In **Nallpati Sivaiah** (Supra), the Hon'ble Apex Court held that it is always not necessary to obtain a certificate on the mental and physical condition of the victim and that the requirement and effect of doctor's certificate regarding fitness to make statement may not always be necessary. However the Magistrate must satisfy himself either by putting direct question to the injured or obtain the certificate of a doctor. The settled proposition of law is that whether the dying declaration bears a close scrutiny and passes the test of being trustworthy and reliable. In *K. Ramachandra Reddy* (supra), the Hon'ble Apex Court held that while considering the admissibility of the dying declaration, the necessity of strict scrutiny and closest circumspection by Court is necessary before acting upon the dying declaration, the court must be satisfied about the fit state of mind

of the deceased making the declaration before relying on the same. Omission of the Magistrate recording dying declaration to put direct question about the mental condition may render it unsafe to be relied upon.

38. In **M. Abbas** (supra), the Hon'ble Apex Court held that an accused is not required to prove his defence beyond reasonable doubt and may prove the same only by a preponderance of probabilities. There can be no dispute with this proposition and the earlier proposition particularly on the aspect of dying declaration but whether it applies to the fact of the case is what really matters. In *Sujit Wiswas* (supra), the Hon'ble Apex Court reiterated the settled proposition that there was a distinction between proof beyond reasonable doubt and suspicion and there was a duty on the Court to ensure that any conjectures or suspicion do not take the place of legal proof. There must be clear, cogent and unimpeachable evidence produced by the prosecution before an accused is condemned as a convict. What is reasonable doubt was held to be not an imaginary, trivial or probable doubt but a fair doubt which is based upon reason and common sense. This judgment was also relied upon to buttress the plea on behalf of the convict that mere abscondence of the accused would not be taken

as a circumstance against him.

39. **Reena Hazarika** (supra), was the wife of the deceased convicted under Section 302 I.P.C. and sentenced to life imprisonment with in default imprisonment for non payment of fine. The deceased was residing alongwith her and his minor daughter in the tenanted premises belonging to Manoj Kumar Deka, Dipen Deka and Bhrigumoni Deka being brothers. She was alleged to have assaulted the deceased in the intervening night of 10.05.2013 to 11.05.2013 and the three brothers were stated to have heard noises and on going there found the deceased with head injury attributed to a fall. The doctor who had examined the deceased had found chop injuries on his person and the injuries were anti-mortem and certified that all the injuries were caused by a moderately heavy sharp weapon and were homicidal in nature. The Trial Court and the High Court held that the case was based on circumstantial evidence. The last seen theory established the presence of the appellant with the deceased at night and her unnatural conduct because she was not crying, led to the conclusion that she was the assailant of the deceased.

40. In **Reena Hazarika** (supra), the Hon'ble Apex Court on an

examination of the evidence, in the light of the said fact that she was also not properly represented by a defence lawyer and that the case was based on circumstantial evidence, nonetheless observed that whether the defence was acceptable or not and whether it was compatible or incompatible with the evidence available is an entirely different matter. If there had been no consideration of the defence, taken under Section 313 Cr.P.C. in the given facts of the case, the conviction may well stand vitiated. To our mind, a solemn duty is cast on a Court in the dispensation of justice to adequately consider the defence of the accused taken under Section 313 Cr.P.C., and to either accept or reject the same for reasons specified in writing. Unfortunately in the facts at large, neither the Trial Court or the High Court considered it necessary to take notice of much less discussed or observed with regards to the defence by the appellant under Section 313 of Cr.P.C. to either accept or reject it. The defence taken could not be said to be irrelevant, illogical or fanciful in the entirety of the facts and the nature of the other evidence available and discussed earlier. The complete non consideration thereof had clearly caused prejudice to the appellant. In the facts therefore, it held that the nature of the evidence available coupled in the manner of its consideration indicated that the links in the chain of circumstances in the case of circumstantial

evidence could not be said to have been established leading to the inescapable conclusion that the appellant was the assailant of the deceased, incompatible with any possibility of the innocence of the appellant. The possibility that the appellants may have taken place in some other manner would not be completely ruled out and therefore gave the benefit of doubt and the order of acquittal in the appellant's favour.

41. In the facts of the present case, the accused had taken a plea that he had sustained burn injuries in the course of saving his wife from the fire and that running away from the spot had nothing to do with the guilty mind. However, from the evidence discussed, it is apparent that the accused had not rendered any assistance to the deceased and quite on the contrary he had taken the role of an idle bystander outside his room despite seeing Kamla in flames and her cry for help and to catch him. His running away from the spot soon thereafter was invariably pointing to his guilt to escape the consequences of his act and therefore, this judgment too does not come to his aid in giving him the benefit of doubt.

42. This is not a case simplicitor of the abscondence of the accused but his conduct and demeanour throughout. He comes out

of the room followed by the deceased crying out his name and asking him to be caught. He does not render any assistance to her to douse off the flames and instead takes a role of a bystander and then takes to his heels. The case available on record amply points to the complicity of the accused and there is no scope for any doubt that it was the accused who had caused the burn injuries to the deceased by pouring diesel on her and setting her ablaze. This is besides the accounts of the neighbours soon after the incident who had gathered outside the room of the accused and deceased and seen her raising an alarm "Swami ko pakdo, Swami ko pakdo" referring to the accused and the accused trying to mingle with the crowd and soon thereafter taking to his heels without providing any assistance to the deceased. The evidence on record had amply clinched the case of the prosecution against the accused and the learned Addl. Sessions Judge had found favour in that regard. No case whatsoever is made out for interference therewith. In the result, therefore, we do not find any merit in the appeal of the convict to interfere with the judgment under challenge and hence pass the following:

O R D E R

Appeal is dismissed confirming the conviction under

Section 302 of I.P.C. rendered by the learned Addl. Sessions Judge, Mapusa and sentencing him accordingly.

There shall be no orders as to costs.

NUTAN D. SARDESSAI, J.

M.S. SONAK, J.

MF/-