

(2015) 11 GUJ CK 0041
In the Gujarat High Court
Case No : Criminal Appeal No. 1752 of 2012

Dineshbhai Bhurabhai Vasava

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 05-11-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374(2)
Penal Code, 1860 (IPC) — Section 302, 304, 304-I

Citation : (2015) 11 GUJ CK 0041

Hon'ble Judges : K.M. Thaker, J.

Bench : Single Bench

Advocate : Yogini H. Upadhyay, Advocate, for the Appellant; L.B. Dabhi, A.P.P., for the Respondent

Final Decision : Partly Allowed

Judgement

K.M. Thaker, J.—This appeal under Section 374(2) of the Code of Criminal Procedure, 1973 is directed against the judgment and order dated 5.11.2011 passed by the learned District and Sessions Judge, Narmada at Rajpipla in Sessions Case No. 26 of 2011.

2. By the said judgment and order dated 5.11.2011, which is challenged in present appeal, the learned trial Court has recorded conviction against present appellant for offence punishable under Section 304 (Part-I) of IPC and sentenced the appellant to undergo RI for 10 years and pay fine of Rs. 5,000/- and in default to undergo RI for 1 year. The appellant is acquitted from charge of offence punishable under Section 302 of the Code and instead he is convicted under Section 304 (Part-I) of IPC.

3. Briefly stated the case of the prosecution, as it emerged from the record, is that the deceased was married to the appellant. From the wedlock, the deceased gave birth to two children. According to the case of the prosecution, there were frequent matrimonial quarrels between the appellant and the deceased and during such matrimonial quarrels the appellant used to beat the deceased. So as

to get out of such environment the deceased used to frequently go to her maternal house and stay there, however, after some time the appellant would go back to persuade and convince her to return to matrimonial house and assure her that he would not physically abuse and beat her. On such promise the deceased would return but the accused - appellant would continue the same treatment to his wife - the deceased. It appears that few days before 23.4.2011 again there was a quarrel between the accused - appellant. Few days before the date of incidence the victim i.e. the deceased had left her matrimonial house and she had returned (few days before the date of incidence) to her parental house. On 23.4.2011 at about 11.00 a.m., when the deceased was at her parents' house and her parents had gone to attend agricultural work at their field, the accused - appellant had gone to the deceased's parental house. The appellant asked the deceased to return with him to the matrimonial house, however, the deceased refused to go. The appellant insisted that the deceased should return with him to the matrimonial house, but the deceased did not agree. Then the appellant picked up a log of wood which was in the kitchen/room and inflicted blows on the head of the deceased which caused serious injuries to the deceased. The appellant then fled from the place of incident. One 14-year girl saw the incident and called her parents. The parents of the girl and some neighbours gathered near the place of incident and the deceased was rushed to Government Hospital at Rajpipla where initial treatment was given by the doctor who was on duty and then she was referred to S.S.G. Hospital at Vadodara. The deceased succumbed to her injuries. The complaint/FIR was lodged with Rajpipla Police Station which was registered as I CR No. 16/2011 for offence punishable under Section 302 of IPC.

4. Thereafter the investigation was carried out. After investigation charge-sheet was submitted before the learned Magistrate. The case being triable by the Sessions Court, the learned Magistrate committed the case to the Sessions Court, Narmada district. The case was registered as Sessions Case No. 26 of 2011.

5. The learned trial Court recorded the statement of the appellant. The learned trial Court framed charge below Exh. 5. The appellant pleaded not guilty and claimed to be tried. So as to drive home and establish the charge against the appellant, the prosecution examined 12 witnesses and placed on record and relied on 14 documents.

6. After the stage of evidence was concluded and after informing the appellant all incriminating evidence and material against him, the learned trial Court recorded further statement of the appellant under Section 313 of the Code of Criminal Procedure. The appellant was also asked whether he wanted to lead any oral evidence. The appellant declined. He also did not offer any explanation and simply submitted that he had not committed the offence.

7. Learned trial Court heard the submissions and contentions by prosecution and defence and after considering the submissions and evidence on record, found the

appellant guilty of offence punishable under Section 304-I of Indian Penal Code, but not under Section 302 of Indian Penal Code. Learned trial Court accordingly recorded conviction of offence under section 304-I and sentenced him to undergo imprisonment as mentioned above.

8. Ms. Upadhyay, learned advocate for the appellant, submitted that learned trial Court has mainly relied on the evidence of PW No. 8, however, learned trial Court failed to appreciate that the PW No. 8 being child witness, her evidence ought not have been relied on for holding the appellant guilty of the offence. Learned advocate for the appellant submitted that most of the witnesses examined by the prosecution are either neighbours or relatives. Learned advocate for the appellant submitted that the allegation about the appellant's relation with other woman is not established and consequently, motive has not been established by the prosecution, however, learned trial Court failed to consider the said aspect. She also submitted that panch witnesses have not supported the case of the prosecution and the panch witnesses were declared hostile. Learned advocate for the appellant submitted that the judgment may be set aside and the appellant may be acquitted. As her last submission the learned advocate for the appellant submitted that if the court is not convinced to grant clean acquittal, then, the sentence may be reduced to the sentence undergone. Learned advocate for the appellant, so as to support the submission to reduce the sentence, relied on the decision in case of Shiva Karam Payaswami Tewari Vs. State of Maharashtra, and the decision in case of Muthu Vs. State by Inspector of Police, Tamil Nadu, .

9. Learned APP has opposed the appeal and also opposed the submission by learned advocate for the appellant to reduce the sentence to the sentence undergone or to the minimum. Learned APP submitted that appellant had given two blows on vital part of the body of the deceased, with intention and knowledge that such blow on vital part of the body will cause death. Learned APP submitted that after hitting the deceased the appellant left the house and ran away and did not avail or call for emergency medical service. The said conduct of the appellant is also relevant and should be taken into account. Learned APP submitted that the medical evidence and forensic/serology evidence proves that the injury caused by the blows given by the appellant is the cause of and resulted in death. Learned APP submitted that the wooden log with which the deceased was hit was found at the place of incident and was recovered by the IO and at the place of incident blood/blood stains were also found. Learned APP also submitted that the evidence by PW No. 8, PW No. 9, PW No. 10 and PW No. 11 establish the offence and guilt of the appellant beyond doubt and there are no contradictions in their evidence. Learned APP submitted that there is no error in the judgment and the appeal deserves to be rejected. Learned APP submitted that the judgment and the sentence may be confirmed and the appeal may be rejected.

10. I have heard learned advocate for the appellant and learned APP. I have also considered the decisions relied on by learned advocate for the appellant. I have

also considered the evidence and other material on record.

11. The prosecution examined the doctor of the hospital where the injured victim was taken after the incident. The doctor is examined as PW No. 1 and his evidence is recorded at Exh. 8. In his evidence the PW No. 1 has mentioned that the injured victim (since deceased) was identified as Sarojben and was brought at about 12.45 p.m. on 23.4.2011 to the Government Hospital where she was working as Medical Officer. The person who accompanied the injured victim Mr. B.B. Vasava gave the details/history of the incident and said that before about one hour she was hit by her husband with a log of wood on account of which the injured victim suffered the injuries. He has also mentioned in his evidence that when the injured victim was brought to the hospital and when he examined her the injured - victim was unconscious. The PW No. 1 described the injury in his evidence.

(a) 3 c.m. X 1 c.m. bone deep CLW in front of left ear;

(b) hem X 1 c.m. bone deep CLW Rt side of partial junction region;

(c) bleeding from nose and ears.

11.1 The PW No. 1 mentioned, and clarified in his cross-examination that the type of injury which the injured victim had suffered was such which would be caused by solid and blunt weapon. The PW No. 1 was shown the log of wood (article No. 3). After seeing the said mudamal - article No. 3, the PW No. 1 said that the type of injuries suffered by the injured person can be caused by the said substance-log of wood. In the certificate issued by PW No. 1, the doctor mentioned that the injury were caused within two hours before the victim was examined.

11.2 The prosecution also examined the doctor who conducted P.M. at the hospital at Baroda as PW No. 2. His evidence is recorded at Exh. 11. The PW No. 2 has mentioned in his deposition that the body of the deceased was identified as Sarojben. According to the evidence by the PW No. 2, the age of the deceased was about 22 years and the process of rigor mortis was present all over body and P.M. lividity was present. The PW No. 2 was also shown the log of wood i.e. mudamal article No. 3 and on examining the said mudamal article No. 3, the PW No. 2 mentioned in his evidence that the injuries suffered by the deceased - victim can be caused by the said substance. In cross-examination, the PW No. 2 mentioned that considering the injury it can be said that the injuries were caused within period of 24 hours.

11.3 The PW No. 2 has also mentioned in his evidence that the face of the deceased was smeared with blood and left side of her face was swollen. The PW No. 2 described three injuries viz. (a) 3 c.m. long wound over right parietal region - stitched wound, (b) 3 c.m. long wound over left side of face left part of face swollen near left ear - stitched wound, (c) 5 c.m. X 1 c.m. abrasion over back of abdomen on right side, bright red colour. The PW No. 2 also mentioned

that the said injuries were ante-mortem. The PW No. 2 also mentioned that (a) there were internal injuries as well which he described as haematoma below skull over right front of parietal region and right temporal parietal - occipital region, (b) sub-dural and subarachnoid haemorrhage in left cerebellar region, (c) fracture of skull over left frontal region, (d) fracture at both middle cranial fossa and (e) brain edema was present. The PW No. 2 also mentioned in his evidence that the cause of death was clear and apparent and the panel of doctors who conducted the post-mortem was certain about the cause of death which is mentioned in the post-mortem report i.e. severe and grievous injuries at vital part of the body. In his evidence, the PW No. 2 has also mentioned that the type of injuries suffered by the victim/deceased were such that even if immediate medical treatment is given to the injured person, then also, they would cause death and the possibility of survival would be nil.

11.4 The panch witnesses No. 3, 4 and 5 turned hostile.

11.5 Then the prosecution examined PW-6. The PW-6 mentioned in his deposition that he knows the accused and that the accused is husband of his niece, i.e. deceased victim. In his deposition, PW-6 mentioned that on 23.4.2011 at about 10.30 a.m. while he was in his farm, his daughter came and told that the husband (i.e. the accused) of Saroj (i.e. the deceased - victim) had hit her with a log of wood and killed her. He, therefore, rushed to the house of the deceased and on reaching at the victim's house, he saw that the victim was lying in the kitchen and the injury at her head was bleeding and that the victim was unconscious. The ambulance was called for and she was immediately rushed to the Government Hospital. The PW-6 also mentioned that he lodged the complaint. He identified the accused (i.e. husband of deceased victim) in the Court. The PW-6 also mentioned in his deposition that the victim succumbed to the injury. He also mentioned in his deposition that he was not aware about the reason why the accused killed the victim. He then mentioned that he was not aware about the reasons for the quarrels between the accused and the victim. He said that he was not aware that the accused had relation with some other woman. He then said that in the complaint he had not mentioned that the reason for quarrels between the accused and the victim was appellant's extra marital relations.

11.6 The learned Court declared PW-6 hostile. PW-6 was subjected to cross-examination on behalf of the prosecution and the defence. In his cross-examination on behalf of accused, PW-6 mentioned that when he reached the house, he saw that the victim was lying unconscious and thereafter ambulance was called for. He also mentioned in his cross-examination on behalf of the accused - appellant that when he reached at the place of incident where the deceased victim was lying unconscious he had seen the log of wood at the place of incident.

11.7 In the injury certificate issued by the General Hospital, Rajpipla (i.e. PW-1), the injury to the deceased is described thus:

"History: assault by Dinesh Bhurabhai Vasava alleged assault of "Lakdu" patient unconscious

1. Contused lacerated wound in front of Ear 3 c.m. X 1 c.m. bone deep
2. Contused lacerated wound over Right parietal region 4 c.m. x 1 c.m. bone deep
3. bleeding from both ears and nose patient referred to Surgeon, SSG Hospital, Baroda" Time of injury within 2 hours.

The details in the P.M. report are mentioned thus:

"In the postmortem report,

In column No. 11, that "rigor mortis present by all over body".

In column No. 13: "mouth semi open, eyes closed, face blood stained, Left side of face swollen".

In column No. 15: P.M. report mentioned that "no injury to ext. genitalia".

In column No. 16: P.M. report mentioned that "details of ext. injuries".

1. Stitch wound over Rt. parietal region 3 c.m. long.
2. Stitch wound over Lt. side of face near Lt. ear 3 c.m. long (left side of face swollen).
3. Abrasion over back of abdomen Rt. side 5 x 1 c.m., bright red.

In column No. 18: (with reference to internal injuries which ante-mortem) P.M. report mentioned that ears - ante-mortem."

P.M. report further mentioned that:

Hematoma below scalp over left frontoparietal region and Rt. temporal regions. Subdural for subarachnoid haemorrhage in left frontoparietal and Rt. temporal-parietal-occipital region & both Rt. and Lt. cerebellar regions. Fracture of skull over Lt. frontal region over Rt. temporoparietal region. Fracture in both middle Brain edema fossa present."

12. The prosecution then examined PW-8. The said witness is examined as minor/child witness. Her evidence is recorded at Exh. 24.

12.1 The opening remark by the Court (Exh. 24) clarifies that the Court had put initial questions to the PW-8 so as to ascertain the fitness of the said PW-8 to be witness and upon being satisfied that the said witness is competent and fit to testify the Court permitted the prosecution to examine her as witness. The Court has also recorded and clarified that her deposition was taken in form of questions and answers and deposition is recorded in ordinary and normal format as considered appropriate by the Court.

12.2 PW-8 mentioned in her deposition that she is studying in Std. 9. The PW-8 identified the accused - appellant in the Court. She also mentioned names of the two children of the deceased. She also mentioned details about other family relations connected with/associated with the deceased. In her deposition, PW-8 said that the incident occurred on 23.4.2011 at about 11.00 a.m. At that time, she was doing some household work. PW-8 further mentioned in her deposition that on 23.4.2011, the appellant had come at the house of the deceased's parents and was insisting with the deceased to return to their matrimonial house, however, the deceased refused to go with the accused. PW-8 further mentioned that since the deceased continued to refuse to return with him the accused held her by her hair and started to pull-drag her to go with him. PW-8 also mentioned that she saw this and went near them with a view to getting deceased free from hold of the deceased - appellant but the deceased managed to get free from the grip of the accused and went inside the house and the appellant followed her. PW-8 further mentioned that she also followed the appellant and she saw that the appellant picked up a log of wood and then he hit blows at the head of the deceased with that log of wood the deceased started bleeding from the injury at her head and she fell down and went unconscious. The appellant then ran away from the place of incident. She also mentioned that then she went to call her parents and the mother of the deceased. The PW-8 identified muddamal Article No. 3, i.e. log of wood with which the accused had hit the deceased. The PW-8 also said that her shouts drew Chimankaka and Vasantiben and some neighbours at the place of incident. In her deposition, PW-8 also mentioned that when the incident occurred, both her father and her mother had gone to the field. She also mentioned that at the time when the incident had occurred, mother of the deceased had also gone to the field to attend agriculture work. PW-8 was subjected to cross-examination. During her cross-examination, PW-8 denied the suggestion in cross-examination that the accused - appellant had taken the log of wood with him. She said that before fleeing from the place of incident, the accused had thrown the log of wood to the ground at the place of incident. She mentioned in her cross-examination that when the appellant and the victim started quarreling, at that time she had not called the neighbours. Her cross-examination by the defence has not brought out any contradictions from her deposition or has not shaken her deposition.

12.3 Though PW-8 is a child witness, she withstood the cross-examination and she is not shaken or any material or relevant or real or substantial contradiction are not brought out from her deposition or her deposition is not diluted during cross-examination. The deposition - evidence by PW-8 inspires confidence and does not create any doubt. It is pertinent that though PW-5 is declared hostile. PW-8 undeterred by the said fact and without being influenced by the deposition with PW-5 mentioned what she had seen and has not waived in her deposition.

13. The mother of the deceased is examined as P.W. No. 9. Her evidence is recorded at exh. 27. In her deposition mother of the deceased (P.W. No. 9) has mentioned that initially matrimonial life of the appellant and the deceased

continued smoothly however, after some time the accused - appellant started quarrels and he also resorted to hitting his wife i.e. deceased and that his daughter used to return to parental house because of the abuses and conduct of the accused - appellant. She also mentioned that the accused - appellant would thereafter come and persuade the deceased to return with him and promise that he will not repeat his conduct and will behave in proper manner however, after some time he would again repeat the same conduct. The P.W. No. 9 also mentioned that few days before the date of incident again some quarrel took place and the appellant had physically abused and beaten her daughter and had driven her out of the matrimonial home and therefore, the deceased had returned to their house (i.e. victim's parental house) and since last about 5 days before the incident, she was staying with them because of the appellant's conduct and ill-treatment. PW-9 also mentioned in her deposition that at the time of incident she had gone to the field to attend agriculture work and her sister-in-law was attending agriculture work in other field. She also mentioned in her deposition that the P.W. No. 8 came where she and her sister-in-law were attending agriculture work in the field and narrated what had happened i.e. that the accused appellant, husband of the deceased had come to take the deceased back to his home, however, the deceased denied to go back with him. Then the appellant held her by her hair and pulled - dragged her but the deceased managed to get free from the grip and went inside the house but the appellant followed her and the appellant hit the deceased with a log of wood. The appellant then ran away. She also mentioned that when P.W. No. 8 told the said details, she and her sister-in-law and her brother-in-law went back to the house and on going inside the house she saw that her daughter (i.e. the deceased) was lying in the kitchen near cooking place and she was soiled with blood and that her daughter was unconscious and that she also saw a log of wood in the kitchen/room near her daughter's unconscious body. At that time, other persons staying in the nearby houses had also gathered and one of the persons called the ambulance. Thereafter, they went to the Government Hospital at Rajpipla where the doctor examined her daughter and found that her condition was serious/critical and after giving some preliminary emergency treatment advised them to go to SSG Hospital, Vadodara and thereafter the injured victim was taken to Vadodara. At around 4.00 p.m. she received the message that the injured victim i.e. her daughter succumbed to the injury and died. During her deposition, the PW No. 9 identified the log of wood which she had seen in her kitchen near the place where her daughter lay unconscious. During her cross-examination she denied the suggestion that her daughter i.e. the deceased was in habit of consuming liquor. In her cross examination P.W. No. 9 denied the suggestion that on the date of incident the deceased had consumed liquor. She also denied the suggestion that actually P.W. No. 8 had not gone to inform her parents and her (i.e. P.W. No. 9) about the incident. In cross-examination any contradictions are not brought out and defence has not shaken the P.W. No. 9.

14. The prosecution examined another witness i.e. P.W. No. 10. The said witness

P.W. No. 10 has mentioned in her deposition that she had heard the P.W. No. 8 and also seen her running towards the field where her parents and P.W. No. 9 had gone and that she had asked the P.W. No. 8 as to why she was shouting and running towards the field and at that time the P.W. No. 8 told her that the accused - appellant had hit the deceased with a log of wood and therefore she was going to call her parents. During the cross examination the P.W. No. 10 accepted that before she saw P.W. No. 8 shouting and running towards the field she had not seen the quarrel or the scuffle between the appellant and the deceased. During her cross examination P.W. No. 10 has mentioned that around 9.00 a.m. and 10.00 a.m. she had seen the accused/appellant in the village going towards the parental house of the deceased.

15. I have heard Ms. Y.H. Upadhyay, learned advocate for the appellant and Mr. Dabhi, learned APP for the respondent and also considered the submissions and evidence available on record.

15.1 The incident occurred on 23.4.2011 at about 11.00 a.m. The medical evidence - deposition by PW-1 and PW-2 - has brought on record the nature and gravity of injury. The medical - injuries certificates issued by PW-1 and PW-2 have mentioned and described the injuries and wounds inflicted on the deceased. The P.M. note - report has brought on record the cause of the death and the P.M. note also mentions the injuries - blows found on the body of deceased. The P.M. note - report support and corroborate the injury - medical certificates issued by the doctors who examined the deceased i.e. PW-1 and PW-2. The PW-8 saw the incident. She is eyewitness.

15.2 It has come on record that panch witness was declared hostile. Now, so far as panch witnesses are concerned, the investigation officer, in his evidence, has mentioned that the panchnama was prepared in his presence as stated by panch witnesses and they bear his signature. On this count it is relevant to take into account observations by Apex Court in para 7 of the decision in case of Moh. Aslam vs. State of Maharashtra [(2009) 9 SCC 362], wherein the Apex Court observed that:

"7. Regarding A-1 - Mohmed Aslam (@ Sheru Mohd. Hasan), the only evidence for possession of the forbidden lethal weapon is the testimony of PW-34 (Nagesh Shivdas Lohar, Asstt. Commissioner of Police, CID Intelligence, Mumbai). Learned Counsel contended that two Panch witnesses who were cited to support the recovery turned hostile and therefore, the evidence of PW-34 became unsupported. We cannot agree with the said contention. If Panch witnesses turned hostile, which happens very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated. Nor do we agree with the contention that his testimony is unsupported or uncorroborated. The very fact that PW-34 produced in the court lethal weapons recovered is a very formidable circumstance to support his evidence. Learned Counsel made an attempt to show that the recovery in fact was not effected from the said flat in which A-1 - Mohmed Aslam (@ Sheru Mohd. Hasan) was residing. It is admitted

that A-1's wife and children were residing in that flat. If no such recovery was made from such flat why nobody was examined on the defence side at least to suggest that no police officer effected any recovery from there. As the trial court has chosen to believe the testimony of PW-34 and on a further scrutiny we too have no reason to reject the same, we are emboldened to accept the testimony of that witness."

15.3 Thus, merely because the panch witness turned hostile, the case of the prosecution cannot be thrown out and it does not get weakened, more so when there is evidence of eyewitness and other evidence to lend support and corroboration to the deposition - evidence by eyewitness.

16. The deposition of the P.W. No. 10 supports and corroborates evidence - deposition by P.W. No. 8 and P.W. No. 9. The deposition by P.W. No. 10 also corroborates the evidence about disturbed matrimonial relation between the appellant and the fact that on the date of incident the appellant had gone to the parental house of the deceased. With reference to the suggestion put to PW-9 that the victim had consumed liquor it would be appropriate to note at this stage that the doctor [who attended the injured victim (i.e. the deceased) when she was brought at the government hospital Rajpipla] has not mentioned in his deposition that the injured victim had consumed liquor or that she was under influence and effect of liquor. If the injured victim i.e. the deceased had actually consumed liquor before the incident or at the time when the incident occurred then the doctor who attended her and gave preliminary/emergency treatment would have noticed that and would have mentioned the fact in case papers or medical certificate or in his deposition. Blood samples were taken but even in FSL report also there is no reference of presence of liquor. Even in the P.M. report there is no mention about consumption of liquor by the deceased. At column No. 21 in P.M. report following remarks are mentioned:-

"Stomach empty-small intestine - gas and semi digested food L.I. (large intercept)-gas and faecal matter."

16.1 The P.S.I./I.O. is examined as P.W. No. 11 and his evidence is recorded at exh. 29. With reference to the panchnama, P.W. No. 11 has said that the panchnama were recorded in presence of panchas and as dictated by them and he had signed the panchnama. During his cross examination he denied the suggestion that he himself prepared the statements and concluded the investigation procedure in one day.

16.2 The FSL report is placed on record at Exh. 30 and serology report is placed on record at Exh. 31. The sketch/map of the place of incident are on record at exh. 33 and 34. The log of wood was forwarded for test to FSL as sample "C". The FSL report related to sample "C" mentions that upon FSL test of the log of wood (sample "C") presence of blood was found on sample "c" (i.e. log of wood) and serology report mentions that the blood on sample "c" (i.e. log of wood) was group "B" blood. The FSL report reflects that reddish brown stains were found on

sample "c" (log of wood) on sample D/1 and D/2 (T-shirt and trouser) sample "e" (saree), sample "f" (blouse), sample "g" (petticoat), sample "h" (undergarment). The serology report gives out that group of human blood on sample "c" (log of wood i.e. Art. 3)) on sample D/1 and D/2 (T-shirt and trouser) sample "e" (saree), sample "f" (blouse), sample "g" (petticoat), sample "h" (undergarment) was group "B". The FSL report clarifies that sample "I" was the blood sample of the deceased and the serology report gives out that sample "I" (blood sample) was of group "B" (i.e. the blood group of the deceased was group "B").

16.3 Thus, on conjoint reading of FSL report and serology report it emerges that presence of group "B" blood (which is the blood of the deceased) was found on the log of wood and also on sample D1 (Jersey of the accused) and sample D2 (his trouser). The said log of wood was recovered during investigation from the house/kitchen where the body of the deceased was found.

17. From the evidence on record, below mentioned factual aspects have emerged:

(a) Presence of accused at the place of incident is established in light of deposition of PW-8 and PW-10.

(b) The PW-8 has mentioned and described, in detail, entire incident which she had seen, being the eyewitness. Her evidence - deposition is supported and corroborated by the deposition of PW-10 who has, during her cross-examination, specifically mentioned that she (i.e. PW-10) had seen the accused - appellant at the house of the deceased at around 9.00 - 10.00 a.m. and that she had seen the PW-8 coming from the direction of deceased's house and going towards the fields and that PW-8 told her about the incident.

(b-1) Moreover, her deposition is supported and corroborated by the fact that the log of wood was found and recovered at the place of incident and was recovered by I.O./Police during investigation and that on the test conducted by the FSL, presence of blood was found on the said log of wood and the FSL has also reported that blood found on the log of wood was group B blood i.e. same group of blood of as deceased's. The same blood group was, during FSL test, also found on the sari and other clothes of the deceased. The evidence and deposition by PW-8 is also supported and corroborated by the FSL report and serology report, wherein it is also mentioned that blood of same blood group was found on the clothes of the appellant i.e. the jersey which the appellant had worn on the date of incident.

(c) From the deposition by PW-8, PW-9 and PW-10 it is also established that at the relevant time, the deceased left her matrimonial house and returned to the house of her parents and was staying with her parents.

(d) The occurrence of the incident is established by virtue of deposition - evidence of PW-8 as well as from the recovery of log of wood from the place of

incident and presence of group "B" blood on the log of wood and the clothes of the accused and the deceased.

On this count it is pertinent that at the time of recording further statement of the accused - appellant under section 313 , the deposition and the details stated by PW-8 in her deposition were specifically brought to the notice of the appellant, however, the appellant did not offer any reply or explanation with regard to the details stated by PW-8 in her deposition.

(e) The cause for the occurrence of incident and the motive is established by virtue of the evidence of PW-8, PW-9 and PW-10.

(f) The fact that the deceased had gone inside the house - in the kitchen area and that the appellant had followed her and there he had picked up the log of wood and hit the blows to the deceased, is also established in light of the deposition by PW-8. Consequently, presence of the deceased and the appellant at the exact place of the incident is established by virtue of deposition by PW-8.

(g) By virtue of deposition of PW-8 coupled with recovery of log of wood and FSL report, the fact that the appellant had hit the deceased with the log of wood recovered at and from the place of incident during the investigation, is established and the said part of evidence derives corroboration from the FSL report and serology report read with recovery panchnama.

(h) The deposition by PW-9 establishes and corroborates what PW-8 said that she had called her parents and mother of the deceased.

(i) The fact that the log of wood stained with blood was found - recovered at and from the place of incident - supports the deposition of PW-8 who mentioned in her deposition that the appellant - accused after hitting the accused with log of wood threw the said log of wood on the ground and ran away.

(j) FSL report has established presence of blood group B (which is the blood group of the deceased) on the log of wood (i.e. the substance with which the deceased was hit the blows which caused fatal injuries) and on the clothes of deceased and the accused (his jersey).

(k) The medical evidence/doctor's evidence and P.M. report have established that death was caused due to injuries which were caused by solid blunt substance i.e. the log of wood.

(l) The medical evidence/doctor's evidence also establish that the injuries received by the deceased were grievous, serious and on vital part of the body which would cause death and the P.M. report states that cause of death is those injuries.

(m) P.M. report also establishes that all the injuries found on the body of the deceased were ante-mortem.

(n) The presence of blood group B was found in "sample control" recovered/

collected from the place of incident.

(o) The clothes which the deceased had put on, on the date of incident, i.e. a jersey and trouser, were also recovered/seized during the investigation and were marked as sample D1 and sample D2 and were forwarded for test/examination by FSL.

(p) The FSL report/serology report has mentioned that presence of blood group B (i.e. the blood group of the deceased) was found on the sample D1 (jersey of the accused) and sample D2 (trouser) of the accused. The said fact supports and corroborates deposition by PW-8 and the conclusions by the learned trial Court which are based on said facts and evidence, cannot be faulted.

18. Besides this, while recording further statement under section 313 , the learned trial Court had specifically asked the accused about his reply - explanation with reference to the clothes - appellant for his reply - explanation, however except denial he has not offered any reply or explanation with regard to any aspect including his presence at the house of deceased's parents or about the clothes which he had put on, on the date of incident.

19. The above discussed evidence, more particularly the evidence by PW-8 and other aspects mentioned hereinabove support and justify the conclusion by the learned trial Court that the appellant is guilty of causing death of his wife and that the cause of the death is the injuries inflicted by the appellant by hitting the deceased with a log of wood is correct and the learned Court has not committed any error in recording said conclusion.

19.1 The learned trial Court has also recorded the conclusion that the prosecution has established beyond doubt the charge against the accused - appellant and the said conclusions by the learned trial Court are not erroneous and cannot be faulted and do not warrant interference.

19.2 Having regard to the facts and circumstances of the case and the evidence available on record, the learned trial Court has reached to the conclusion that the act committed by the appellant amounts to culpable homicide and not amounting to murder and that, therefore, the appellant is not guilty of offence punishable under section 302 of IPC.

19.3 The learned trial Court has also found that the act committed by the appellant amounts to committing culpable homicide but not amounting to murder and that, therefore, the act of the appellant amounts to offence punishable within the purview of section 304 of IPC.

19.4 Having reached to such conclusion, the learned trial Court acquitted the appellant from charge of offence under section 302 of IPC.

19.5 The said conclusions by the learned trial Court are not erroneous. The said conclusions cannot be faulted. The said findings and conclusions by the learned trial Court are based on evidence on record and do not warrant interference. The

said conclusion is confirmed.

20. The learned trial Court has, however, reached to the conclusion that the act committed by the appellant falls within the purview of Part-I of section 304 of IPC and the prosecution has proved beyond doubt that the appellant is guilty of offence punishable under Part-I of section 304 of IPC.

20.1 On this count, learned advocate for the appellant submitted that in view of the facts and circumstances of the case and evidence on record, if the Court confirms the findings and conclusions by the learned trial Court that the appellant is guilty of commission of the offence, then also relevant provision which would be attracted in present case would be Part-II of section 304 of IPC and not Part-I of section 304 of IPC since the offence would fall within purview of Part-II of section 304 and that having regard to the said aspect, the sentence awarded by the learned trial Court may be reduced.

20.2 Learned advocate for the appellant, so as to support the said submission and request, further submitted that the appellant had gone to the house of the parents of the deceased to ask the deceased to return with him to her matrimonial house and he had no intention to cause death of his wife and considering the said fact, the sentence awarded by the learned trial Court may be reduced.

21. In this context, it is appropriate to consider the provision under section 304 of IPC. The said section reads thus:

"304. Punishment for culpable homicide not amounting to murder.--Whoever commits culpable homicide not amounting to murder shall be punished with 1[imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

21.1 The said provision makes distinction between the act by which the death is caused is done with the intention to causing death or causing such bodily injury as is likely to cause death and the act which is done with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death.

21.2 Therefore, it is necessary to consider and ascertain as to whether the appellant acted with "intention" of causing death or such bodily injury as is likely to cause death. If the "intention" factor - element is established, then only Part-I of the section would be attracted.

21.3 In this context, it is relevant to note that the appellant had not gone to the

house of the deceased's parents with any weapon and that according to the evidence by PW-8 at the time and during the altercation between him and the deceased, the appellant was asking the victim to return with him to her matrimonial house.

21.4 Had it been the intention of the appellant to cause death or to cause such bodily injury which would cause death then the appellant would not have first tried to ask the deceased to return to the matrimonial house.

21.5 PW-8 has mentioned in her deposition that the appellant was asking the deceased to return with him to the matrimonial house but the deceased was declining. The deceased had refused to return with him which resulted into quarrel and during the quarrel the appellant hit the deceased with the log of wood. PW-8 has said in her deposition that she saw the incident. The said facts indicate that the appellant's intention was not to cause death. Therefore, the act of the accused - appellant (viz. hitting and inflicting blows with wooden log to the victim - deceased) cannot be said to be an act done with any intention to cause death.

22. Having regard to, and while keeping in focus, the said distinction and the said requirement which section 304 postulates and prescribes, it is necessary to recall, so as to consider the request by learned advocate for the appellant, that the learned trial Court has reached to the conclusion that the prosecution has failed to establish alleged extra marital relation of the appellant with other lady. The said findings and conclusions by the learned trial Court are based on evidence and satisfactory reasons are recorded by the learned trial Court in justification of the conclusion that the prosecution failed to establish alleged extra marital relations of the appellant with other lady. On examination and appreciation of the evidence, this Court is in agreement with the conclusion of the learned trial Court. There is no reason or justification to upturn the said conclusion.

22.1 Once the said conclusion recorded by the learned trial Court is accepted, then the possibility or probability to the effect that because of extra marital relation the appellant might have harboured or nurtured intention to cause death of his wife, gets eliminated and has to be ruled out. Moreover, the prosecution has failed to establish such intention.

22.2 Besides this, once the said conclusion by the learned trial Court is accepted, then it also emerges from the record that the prosecution has not established any reason on account of which the appellant might have any intention to cause death of his wife or to cause such bodily injury which would cause death.

23. Further, the evidence by PW-8 who said that before the victim - deceased entered the house and the appellant followed her, the appellant was actually asking the victim - deceased to return with him to the matrimonial house. The said evidence by PW-8 also does not justify or warrant the conclusion that the appellant acted with intention to cause his wife's death.

23.1 From the overall examination of the evidence, it has also emerged that there is nothing on record to establish that the appellant had gone to the house of the deceased's parents with any weapon or any other substance/material which can be used to cause assault/to hit someone and when the deposition of PW-8 is taken into consideration, it also comes out that when the altercation between the appellant and the deceased started the appellant was asking the victim to return with him to the matrimonial house and at that time also he had no weapon or substance/material (with which he can cause assault or he can inflict blows) with him. This aspect brings out that the appellant had not gone to the house of the deceased's parents to kill her or with an intention to cause her death. There is no material on record to establish that appellant's intention was to cause death of his wife and/or there is nothing on record to establish that the act by which the death was caused was done with intention to cause death or cause such bodily injury which is likely to cause death.

23.2 Actually, the evidence on record has brought that it was an act out of instant anger and occurred at the spur of moment and it was not premeditated action and the act was not done with the intention to kill. The assault was made and the appellant inflicted blows in course of sudden quarrel but without pre-meditation and the factor - element of "intention to cause death or such bodily injury as would cause death". Under the circumstances, appropriate provision which would be attracted and applicable is Part-II of Section 304 of IPC.

23.3 In this context, it is appropriate to refer to the decision by Hon''ble Apex Court in the case of Shiva Karam Payaswami Tewari Vs. State of Maharashtra, wherein, Hon''ble Apex Court has observed that:

"10. In the instant case the extra-judicial confession is believable as rightly done by the Trial Court and the High Court. The same not was made to a stranger but to a friend. Therefore, the Trial Court and the High Court have rightly acted upon the extra-judicial confession. At the same time the background in which the assault has been made clearly shows that section 302 IPC has no application. The assault was made in the course of sudden quarrel without pre-meditation. The accused was not armed at the relevant point of time. Even according to prosecution he picked up the wooden log which was lying there and made the assault.

11. That being the position, we alter the conviction to section 304 Part II IPC. Custodial sentence of 8 years would meet the ends of justice. The appeal is allowed to the aforesaid extent."

23.4 It would also be appropriate to take into account the observations by Hon''ble Apex Court in the case of Muthu Vs. State by Inspector of Police, Tamil Nadu, wherein, Hon''ble Apex Court has observed that:

"14. In our opinion, throwing waste and rubbish inside the house or shop of somebody is certainly a grave and sudden provocation. Everyone wishes to keep his premises neat and clean, and is likely to loose his self-control in such a

situation. The incident in question occurred in a sudden fight and a heat of passion by a sudden quarrel without the appellant having taken undue advantage or acted in a cruel or unusual manner. Hence the appellant is entitled to the benefit of Exceptions I and 4 and the case comes under section 304 IPC.

15. The next question is whether the case will come under the first part or the second part of section 304 IPC. In our opinion it will come under the second part in view of the decisions of this Court in Ramesh Vithalrao Thakre and another Vs. State of Maharashtra, , Sarup Singh Vs. State of Haryana represented by the Home Secretary, , Mavila Thamban Nambiar Vs. State of Kerala, , Sudhir Samanta Vs. State of W.B. and Another, , K. Ramakrishnan Unnithan Vs. State of Kerala, , Tholan Vs. State of Tamil Nadu, , Jagpati Vs. State of Madhya Pradesh, Tarsem Singh and Others Vs. State of Punjab, , Hari Ram Vs. State of Haryana, , Randhir Singh alias Dhire Vs. State of Punjab, , Kulwant Rai Vs. State of Punjab, and Shankar alias Kallu Vs. State of Madhya Pradesh, .

16. In our opinion on the facts of the case the act committed was done with the knowledge it is likely to cause death but without any intention to cause death or cause such bodily injury as is likely to cause death. Hence the offence comes under the Part II of section 304 IPC.

17. For the reasons given above, the sentence awarded by the courts below is substituted by the sentence of five years" simple imprisonment and any period of incarceration in jail which the accused has already undergone shall be deducted from the aforesaid period of five years. The judgments of the courts below are modified accordingly and the appeal stands disposed of."

24. From totality of the facts of the case and in light of the evidence on record and on overall consideration of entire matter it has emerged that the findings and conclusions by the learned trial Court holding the appellant guilty for commission of offence of causing death of his wife/deceased are correct and justified do not warrant any interference. This Court is in agreement with the said conclusions and that, therefore, the said conclusion is confirmed.

24.1 The decision by the learned trial Court of acquitting the appellant from offence under section 302 is also correct and justified and does not warrant any interference. This Court confirms the said conclusion and the decision as well.

24.2 However, in light of the above discussion and foregoing discussion and in light of the above quoted observations by Apex Court, this Court is satisfied that the conclusion by the learned trial Court of convicting the appellant for offence punishable under Part-I of section 304 is required to be, and deserves to be, modified/converted to conviction under Part-II of section 304 . Therefore, the appellant is convicted for commission of the offence punishable under section 304 (Part-II) instead of Part-I of section 304 as recorded by the learned trial Court.

24.3 So far as the sentence is concerned, it deserves to be modified having

regard to the facts of the case and more particularly the fact that the responsibility of two children who, at present and in absence of their father, are being brought up by their grand-parents, is on the appellant. However, this Court cannot overlook the fact that after inflicting the blows to the victim - deceased and the appellant did not take any steps or actions to stop the bleeding from the injuries suffered by the victim nor did he take steps to call emergency medical service and instead the appellant threw the log of wood on the floor and fled from the place of incident.

24.4 Therefore, having considered all facts and circumstances of the case, this Court is of the view that the appellant's request to reduce the sentence to the extent cannot be accepted, but ends of the justice will be met if the sentence is reduced to rigorous imprisonment for 8 years, instead of 10 years as awarded by the impugned judgment.

Consequently, in light of and for the foregoing reasons and in light of the above discussion, this Criminal Appeal No. 1752 of 2012 is partly allowed. The learned trial Court's conclusion recorded in the impugned judgment dated 5.11.2011 in Sessions Case No. 26 of 2011 passed by the learned Sessions Court at Narmada holding the appellant guilty for causing death of his wife is confirmed, however, the appellant's conviction under section 304-I recorded by the learned Sessions Court at Narmada in Sessions Case No. 26 of 2011 is partly modified and it is converted to conviction under section 304 (Part-II) and thereby the appellant in this Criminal Appeal No. 1752 of 2012 is convicted for commission of the offence punishable under section 304 (Part-II), instead of conviction under section 304 (Part-I) as recorded by the learned Sessions Court at Narmada in Sessions Case No. 26 of 2011, and so far as the sentence is concerned, having regard to the facts of the case, the sentence is modified and it is reduced to rigorous imprisonment for 8 years instead of 10 years as awarded by the learned trial Court. The rest of the judgment and directions including the directions issued by the learned trial Court with regard to the benefit of set off/remission as passed by the learned trial Court under the judgment dated 5.11.2011 is confirmed as it is and the same shall operate as per the directions by the learned trial Court.

This Court is informed that the appellant, i.e. original accused - convict is in Jail/ Custody, therefore, any other directions are not required to be passed. However, it is clarified that if the appellant is granted bail and if the appellant has not completed the sentence, then the bail and bail bond stand cancelled and the appellant shall immediately surrender to the Jail Authority and complete the sentence as directed by present judgment. If the appellant is on bail and he fails to surrender, the concerned learned trial Court shall issue non-bailable warrant to effect arrest of the appellant - convict. The Record & Proceedings to be sent to the concerned learned trial Court forthwith.