

(2019) 11 CAL CK 0098

In the Calcutta High Court

Case No : Criminal Appeal (CRA) No. 194 Of 2009

Salam Sk @ Abdus Salam

APPELLANT

Vs

State Of West Bengal

RESPONDENT

Date of Decision : 29-11-2019

Acts Referred:

Indian Penal Code, 1860 — Section 299, 300, 300(1), 301, 302, 302II, 303, 303II, 304, 304II, 323

Code Of Criminal Procedure, 1973 — Section 161, 164, 313

Citation : (2019) 11 CAL CK 0098

Hon'ble Judges : Sahidullah Munshi, J; Subhasis Dasgupta, J

Bench : Division Bench

Advocate : Partha Sarathi Bhattacharyya, Sukla Das Chandra, Arun Kumar Maiti, Sanjay Bardhan, Narayan Prasad Agarwala

Final Decision : Allowed/Disposed Of

Judgement

Sahidullah Munshi, J

This appeal is against the judgment and order of conviction dated 29.05.2008 and sentence dated 30.05.2008 passed by the learned Additional Sessions Judge Jangipur, Murshidabad, in Sessions Trial No. 5 of May 2003 convicting the appellant under Section 323/302 of Indian Penal Code and thereby sentencing the appellant to pay a fine of Rs.2000/- in default simple imprisonment for three months for committing offence under Section 323 of the Indian Penal Code and further sentencing the appellant to suffer rigorous imprisonment for life and to pay therewith a fine of Rs.5000/- in default rigorous imprisonment for one year for committing the offence under Section 302 of the Indian Penal Code.

The above mentioned Sessions Trial case arose from Suti P.S. Case no. 8/2003 dated 17.01.2003 (G.R. 26 of 2003) which was initiated on the basis of a written complaint lodged by one Angura Bibi against her husband /accused appellant, Salam Sk, complaining inter alia that her husband committed murder of her minor son, aged about 11 months only. Police filed charge-sheet under Sections

323/302 IPC. Charge against the appellant Salam Sk was framed by the learned Court below under Sections 323/302 of Indian Penal Code. Contents of the charge were read over and explained to the appellant in Bengali to which he pleaded not guilty and claimed to be tried. However, the defence case, as it appears from the cross-examination of the prosecution's witnesses as well as from the examination of the accused under Section 313 of the Code of Criminal Procedure it can be ascertained that the accused claim to have been falsely implicated and that the victim child was suffering from illness and in course of massaging well the de facto complainant herself twisted her neck, thereby the victim died.

In a nutshell the prosecution case is that the wife of the appellant Angura Bibi had a quarrel with her husband on 16.01.2003 at about 7.00 pm when he came to her place and she complained of her husband of not maintaining her by providing food and clothing and that she refused to stay with her. On such narration the appellant assaulted Angura, snatched away eleven months old son from her custody at about 10.00 pm in that night and she was forced to go out to pass urine leaving her son in the custody of her husband. After Angura returned five-seven minutes later, she found that Asikul was groaning and blood was oozing out from his mouth and the appellant ran away from the room. Later PW2 disclosed to her mother (PW1) that the appellant throttled Asikul. PW1 thereafter, took the child to PW10 Dr. Monu (hostile) to prescribe medicine. The appellant ran away from the room, her elder daughter Mastura Khatoon told her that the appellant throttled Asikul. On Angura's crying some para people rushed at the spot and she took Asikul to Manu doctor with their help. Doctor prescribed medicine but expired at 5.00 am. Prosecution examined fifteen witnesses to prove the case.

From the Memo of Arrest it is evident that the appellant was arrested on 17.01.2003 at about 18.35 hours and since then he is in custody meaning thereby he has suffered 16 years in jail. Inquest was conducted by PW15 (Investigating Officer) in presence of PW1 (de facto complainant), PW8 (brother of PW1) and PW11 (scribe). Inquest report was marked as Exbt.2.

Out of the fifteen witnesses de facto complainant (PW1) is the mother of the victim, PW2 is eye witness; PW5, PW6, PW8, PW9, PW12 and PW14 are the relatives of PW1. PW3 who is a neighbor was not examined by the Investigating Officer; PW4 (resident of nearby village) and PW10 (Dr. Monu) were declared hostile. PW7 (Autopsy Surgeon) while examined, deposed "On P.M. examination I found following facts :-

- 1) Bruised mark over anterior surface of neck.
- 2) Fracture - 2nd cervical vertebrae with collection of blood in the surrounding tissues.

In my opinion the death was caused due to shock and haemorrhage from above injuries which were ante mortem and homicidal in nature. This is the carbon copy

of the said post mortem report, prepared and signed by me in the same mechanical process with its original. This carbon copy of post mortem report is marked as Ext.1.

To Court:- These type of injuries can be caused by manual twisting of the neck."

On being cross-examined this witness deposed "The bone, skin of a child of 11 months are generally tender and soft. Bruise mark on the neck may be caused, if somebody administers massage of the child on the neck. (Witness volunteers if the massage be made with heavy pressure). Fracture of bone of this type of child cannot be caused due to massage only. But the same may be caused if the massage is caused with heavy pressure. (Witness volunteers - the fracture of vertebrae cannot be caused by heavy pressure, but the collar bone may be fractured if a massage is done with heavy pressure). This type of fracture can be caused to this type of child if he falls from a high place associated with other injuries of the body.

It is not a fact that the injuries which I found in the dead body of the child were accidental in nature"

Mr. Bhattacharyya submitted that the appellant is entitled to be acquitted inasmuch as the prosecution has failed to prove its case beyond reasonable doubt. Mr. Bhattacharyya has relied on the following decisions in support of acquittal of the appellant:

? Arun Nivalaji More -Vs. - State of Maharashtra reported in (2007) 2 SCC (Cri) 221 &

? Jai Prakash -Vs. - State (Delhi Administration) reported in 1991 SCC (Cri) 299

Mr. Partha Sarathi Bhattacharyya, appearing for the appellant, has however, made out an alternative case that the offence alleged to have been committed is not a case of murder and punishment has not been legally inflicted upon the appellant. He submits that the ingredients of Section 302 of Indian Penal Code have not been proved to the hilt and the appellant is entitled to get benefit of Part-II of Section 304 IPC. Therefore, according to him the sentence should be scaled down to a lesser term.

Mr. Maity, learned advocate, appearing for the State vehemently raised objection to the submission made by Mr. Bhattacharyya that the appellant has not committed murder rather it was a case of culpable homicide not amounting to murder. He has also vehemently opposed the contention of Mr. Bhattacharyya that even if Court finds the appellant guilty he is entitled to get certain benefit and term of sentence should be scaled down in commensurate with Part-II of Section 304 of the Indian Penal Code.

Mr. Maiti submitted that on the one hand the accused in his examination under Section 313 of Cr.P.C. claims that he has been falsely implicated, at the same time he has also raised his defence to the extent of taking a plea that victim

Asikul had been suffering from illness and due to application of massage by the de facto complainant the neck of the child got twisted which caused his death.

He submitted that the child is of eleven months of age and therefore, the amount of force applied to the victim by his father/appellant when he was given temporary custody of the child by his mother before she went to urinate and this was done by the appellant deliberately and knowing fully well that such an abnormal act of assault upon a small kid would culminate into death; the appellant cannot take a plea that he did not have knowledge of any such things which might cause death of the child or that he had no intention to cause murder of the said child. Mr. Maiti submitted that even if there was no motive to cause murder of the child but his unnatural behaviour towards the child and the amount of force applied by twisting his neck and as a man of ordinary prudence should know that such amount of force would be a cause for death. Mr. Maiti submitted that if the appellant takes the alibi of innocence he has to prove that his conduct is excepted under the exceptions provided under Section 300 of the Indian Penal Code and none of such exceptions being not attracted in the present case, Mr. Maiti submitted, the appellant has rightly been convicted by the learned Court below and the sentence so imposed is in commensurate with the provisions of Sections 300 and 302 of the Indian Penal Code. It is the specific argument advanced by Mr. Maiti that the child sustained severe injury which caused his death and the attending circumstances does not show that the time when the child was given by PW1 to the appellant and when she came back after urination, during which period the child sustained severe injury and when the child was taken back by PW1, there was no third person in between who can be doubted to have had some hand in causing the severe injury to the victim which resulted in his unfortunate death. Mr. Maiti submitted that Mastura (PW2) who is the star witness in whose presence the entire incident of cruelty applied by the appellant to the victim, PW2 narrated the incident to PW1 immediately after the occurrence and when PW1 and PW2 with the victim went to PW1's paternal house they narrated the incident to other witnesses. The evidence of post-occurrence witnesses also corroborated the evidence of PW1 and PW2. Therefore, the evidence of PW1 supported by PW2 cannot be disbelieved at all and we do not disbelieve such evidence of PW1 and PW2. Now the question remains whether the act of abnormal behaviour of the appellant towards the victim is the only cause for the death of victim or not or is there any other incident which might have caused death of the appellant. Mr. Maiti is right in saying that if an alternative plea is taken by the defence they have to prove it because burden lies on them. As the prosecution discharged its initial burden, onus shifts upon the defence to prove that death was caused due to application of heavy massage by PW1 for which the neck got twisted; vertebrae got fractured; and ultimately, the victim succumbed to death.

Summing up the evidence of witnesses we find that there was a quarrel between the appellant and his wife/de facto complainant and the victim sustained injury at a point of time when the de facto complainant went to urinate leaving her

child Asikul in the custody of her husband where PW2 Mastura was alone present and nobody else. Mastura seems to be a star witness in this case who narrated entire episode to her mother/the de facto complainant, who subsequently narrated it to other witnesses. The post-occurrence witnesses does not appear to have contradicted the evidence of PW1/the de facto complainant and also PW2 Mastura. No statement of PW2, however, was recorded either under Section 161 or Section 164 of the Code of Criminal Procedure. Therefore, it appears that PW2 stated for the first time in the Court about the incident of injury caused by the appellant to which the victim succumbed ultimately. Defence during cross-examination gave suggestion that the death of the victim was not due to the injury which might have caused due to twisting of the neck by appellant on the fateful night when his mother went for urination leaving PW2 alone and leaving the victim in the custody of the appellant, but because of the heavy pressure given by the mother towards massage given to the child after the injury was caused by the appellant. Fact remains that the victim did not die immediately when the alleged incident of neck twisting was done by the appellant but the child survived throughout the night and died early morning on the next day and the defence tried to take a plea that the death is not caused because of the abnormal behaviour of the appellant but because of the pressure given during massaging to make the child okay but ultimately, it caused death. Although, such a plea was taken by the defence but no effort could be advanced to prove this. The evidence adduced on behalf of the prosecution proves the incident of initial injury caused to the victim that the appellant twisted the neck in such a manner it might have been the cause of death, as Mr. Maiti argues, and according to him since plea has been taken of exerting pressure upon the tender aged victim and it could not be substantiated by evidence, the appellant should be held guilty of committing murder of the victim. According to Mr. Maiti the ingredients of Section 300 of Indian Penal Code directly comes into play. In this case provisions of Sections 299 to 304 are important and those are set out below:

S. 299:- Culpable homicide.-Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Illustrations

(a) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

(b) A knows Z to be behind a bush. B does not know it A, intending to cause, or knowing it to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

(c) A, by shooting at a fowl with intent to kill and steal it, kills B who is behind a bush; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or to cause death by doing an act that he knew was likely to cause death.

Explanation 1.-A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.-Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3.-The causing of the death of child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

S. 300:- Murder.-Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

Secondly -If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-

Thirdly -If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

Fourthly -If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Illustrations

(a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

(b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.

(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here, A is guilty of murder, although he may not have intended to cause Z's death.

(d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

Exception 1.-When culpable homicide is not murder.- Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:-

First -That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly -That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly -That the provocation is not given by anything done in the lawful exercise of the right of private defence. Explanation.-Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Illustrations

(a) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, in as much as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, in as much as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) A appears as witness before Z, a Magistrate, Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(e) A attempts to pull Z's nose, Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z. This is murder, in as much as the provocation was given by a thing done in the exercise of the right of private

defence.

(f) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

Exception 2.-Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence. Illustration Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

Exception 3.-Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.-Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. Explanation.-It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.-Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

Illustration

A, by instigation, voluntarily causes, Z, a person under eighteen years of age to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder.

S. 301:- Culpable homicide by causing death of person other than person whose death was intended.-If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause.

S. 302:- Punishment for murder.-Whoever commits murder shall be punished with death, or 1[imprisonment for life], and shall also be liable to fine.

S. 303:- Punishment for murder by life-convict.-Whoever, being under sentence of 1[imprisonment for life], commits murder, shall be punished with death.

S. 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."

Mr. Maiti submitted that the appellant has been rightly convicted under Section 323 read with Section 302 of IPC. Relying on the evidence of doctor (PW7) trial Court came to a finding that when the doctor said that fracture of vertebrae cannot be caused by heavy pressure but he opined that collarbone may be fractured if massage applied with heavy pressure. This statement of the doctor to the suggestion given on behalf of the defence clearly suggests that the death might have been caused by the twisting of neck caused by the appellant and the suggestion that vertebrae could be fractured due to heavy pressure due to massage, has been flatly denied by the doctor and could not be substantiated as suggested by the defence.

Therefore, it proves that the incident of neck twisting and fracture of vertebrae might be the cause of death. When the doctors' evidence is taken into consideration particularly that 2nd cervical vertebrae with collection of blood in the surrounding tissues and bruised mark over anterior surface of neck was found.

Contradicting the submission made by Mr. Bhattacharyya that prosecution relied on PW2 to be the star witness alleging that she was the eye-witness of the entire incident cannot be relied on in view of the fact that she was never interrogated by the investigating Officer meaning thereby, there was no recording of her statement under Section 161 of Cr.P.C. by the police officer and that for the first time she deposed before the Court and therefore, her testimony cannot be admitted into evidence and further that her statement was never recorded under Section 164 of the Code of Criminal Procedure. But the other post-occurrence witnesses whom the PW1 narrated the fact corroborated the evidence of PW1. Therefore, according to Mr. Maiti if the doctor's evidence is considered with that of the evidence of PW1 and the other corroborating evidence available on record and taken into consideration that suggestion of application of massage by PW1 having not been established by the defence, by way of alternative plea, the

conviction given by the trial Court cannot be disturbed.

Mr. Bhattacharyya, initially submitted that the appellant is entitled to acquittal because the witness PW2 for the first time deposed before the Court and her evidence is not admissible under the Evidence Act and further that her statement under Section 164 was not recorded by the Investigating Officer. He also submitted that the evidence of the Doctor has not specified that the twisting of neck is the direct cause for death and that there was no other cause like massaging and other things. And he further submitted that all other witnesses said to have corroborated the evidence of PW1, are interested witnesses being relatives of PW1. Mr. Bhattacharyya also made an alternative argument to the effect that the appellant has been already in custody for about last 16 years and if it commends to the Court that the appellant is not guilty of murder and if the Court comes to a conclusion that it was a culpable homicide not amounting to murder then the Court can scale down the sentence keeping in view of the provisions of Section 304 of the Indian Penal Code.

We have already mentioned the evidence of the Autopsy Surgeon which is not at all suggestive of fracture of vertebrae at the instance of appellant's unnatural act. Even if we presume neck was twisted by appellant but we are unable to hold that the appellant twisted the neck of the victim to cause death nor had he any knowledge that such an act would be imminently dangerous so as to cause death. The injury due to twisting of neck attracts the punishment under Section 323 IPC and the trial Court has rightly dealt with the charge under said section.

To contradict the submission of Mr. Bhattacharyya that the act committed by the appellant may not amount to murder but it is culpable homicide not amounting to murder within the meaning of Section 304 of the Indian Penal Code, Mr. Maiti relies on the following decision in State of Rajasthan -Vs. - Kanhaiya Lal reported in (2019) 2 SCC (Cri) 674. The decision has been relied on by Mr. Maiti to argue that when accused gives an assault to a vital part of the body he should know that this might caused death. In the present case medical report shows fracture on vertebrae and while opining about the cause of such fracture doctor said it might be because of twisting of neck. Therefore, it is difficult to come to a conclusion that the assault was of such a high degree that it might cause imminent death or injury leading to death, is not evidently clear from the evidence adduced by the witness. In this decision the Hon'ble Apex Court held that there was an intention of the accused to cause death of the deceased unlike the fact of the present case. The fact in the cited decision was that the accused gave a blow to the deceased with an axe on his head and while modifying the sentence from Section 302 to Section 304 of IPC, the High Court observed that since it was a single blow the accused was entitled to get such reduction of sentence which could not be agreed to by the Hon'ble Apex Court having regard to the fact that although, it was a single blow but the injury was caused by a weapon like axe which would be sufficient even to cause death, in particular when such a blow by such a weapon has been made on the head of a person.

Therefore, the Hon'ble Apex Court held the conversion is not justified. The fact of this case is also distinguishable from the present one on fact and ratio thereof cannot be applied to hold that the sentence cannot be converted from Section 302 to Section 304 Part II IPC. In our considered view the appellant herein is entitled to conversion of sentence from Section 302 to Section 304 Part II IPC.

Mr. Maiti contending inter alia that the appellant's case does not come within the fold of any of the exceptions of Section 300 IPC, He relies on the decision in State of Uttar Pradesh -Vs. - Faqurey reported in (2019) 2 SCC (Cri) 657. Mr. Maiti submitted that there is no scope for the appellant to get lesser punishment than what has been sentenced by the Trial Court inasmuch as it will be evident from the evidence that nature of assault made by the appellant on a vital part of the body has resulted thereby a fracture of 2nd cervical vertebrae of the victim. Being a man of ordinary prudence the appellant ought to have had knowledge that such an assault might cause death to anyone in particular a child of 11 months. He submits that intention is immaterial in this case and if it is proved that he has assaulted on a vital part of the victim, provisions of 302 read with Section 300 Exception 'four' would be attracted. It says: "Fourthly:- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

Mr. Maiti in his submission repeatedly pointed out that the word "any excuse" could not be substantiated from the record nor any plea was taken by the accused under Section 313 Cr.P.C. nor is there any suggestion given to the witnesses. He submitted that if the said decision is taken into consideration it will be apparent that submission of Mr. Bhattacharyya that this case is covered under the second exception to Section 300 IPC cannot be accepted. However, it may be mentioned that Mr. Bhattacharya submitted that his case is covered by the exception "fourthly" under Section 300 IPC. This decision is distinguishable, however, on fact. In the cited decision there was a fact where respondent took out a pistol and fired to kill deceased. Respondent convicted under Section 302 IPC and sentenced to undergo life imprisonment with a fine of Rs.5,000/- by the trial Court. High Court converted the conviction to Section 304 Part-II IPC with 10 years rigorous imprisonment. The Hon'ble Apex Court held that High Court's order is liable to be set aside and judgment of the trial Court has been restored holding inter alia that there was no dispute that accused shot fire from pistol due to grudge that he had against the deceased and immediately after deceased arrived at place of incident. In such circumstances the Hon'ble Apex Court held there was wrong on the part of the High Court to convert Section 302 IPC to Section 304 of IPC because neither there was no excuse for the respondent who shot fire from his pistol and preceded by previous grudge. Hon'ble Apex Court held that this prominent part of the evidence ought not to have been overlooked by the High Court in converting the sentence. Therefore, this judgment has no manner of application in the present case where the intention of the accused is

still to be hunt out in killing his son backed by a fact that the victim survived till next morning of the day following.

Mr. Bhattacharyya, relying on the decision in Arun Navalaji More (supra) drew our attention to paragraph 24 to contradict Mr. Maiti's submission of imputing knowledge of the appellant over the incident of injury caused at the instance of the appellant. Mr. Bhattacharyya referred this decision to show the observations of the Hon'ble Apex Court on the distinction made between knowledge and intention. It can thus be seen that the 'knowledge' as contrasted with 'intention' signify a state of mental realization with the bare state of conscious awareness of certain facts in which human mind remains supine or inactive. On the other hand, 'intention' is a conscious state in which mental faculties are aroused into activity and summoned into action for the purpose of achieving a conceived end. The intention as used in this Section can be proceeded with a pre-conceived idea of causing death and with that intention only the accused or the offender causes the hurt. If the intention is proved then the offence must be held to be under Section 302 but when in the present case no intention is proved. We find that the accused while causing hurt to the victim even cannot remotely prove that he had knowledge that the hurt would cause death. The decision has been placed by Mr. Bhattacharyya to correctly appreciate the appellant's case of not committing murder but to be an accident out of an act without having knowledge to commit murder. The motive behind a crime is a relevant fact of which evidence can be given. The absence of a motive is also a circumstance which is relevant for assessing the evidence as held by Hon'ble Apex Court in Rajinder Kumar -Vs. - State of Punjab reported in AIR 1966 SC 1322.

Mr. Bhattacharyya, relying on Jai Prakash (supra) submitted that this is a case which has similarity with the present case and the appellant is entitled to get benefit of the ratio of the judgment. Although, the appeal by the Hon'ble Supreme Court preferred by the accused convicted under Section 302 IPC and sentencing imprisonment for life by the High Court, was dismissed. Mr. Bhattacharyya relies on various observations made in the said judgment contending paragraph 8 and paragraph 9 thereof. He therefore, submitted that if the intention of the accused cannot be found then other attending circumstances must be taken into consideration to assess whether the appellant had knowledge of the severity of the injury which might cause death or not or whether the appellant is covered by the exceptions under Section 300 of Indian Penal Code, so that it can be held that he has not committed an offence under Section 302 but an offence under Section 304 Part II IPC.

Relying on Jai Prakash (supra) Mr. Bhattacharyya argued that convicting an accused in an offence under Section 302 where scope is available to consider the exceptions under Section 300 of IPC Court is also to consider the intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death. He submitted that certain exceptions have been provided under Section 300 of the Indian Penal Code and according to him if the Act is not done with the

intention of causing such bodily injury as the offender knows to be likely to cause death of a person whom the harm is caused then it comes within the exception "secondly" under Section 300 but in the instant case prosecution has failed to prove the intention of the appellant of the bodily injury caused by him which could have caused death of the victim under the exception "secondly" if the offence is committed with the intention causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death is also not applicable in the present case inasmuch as no intention can be proved causing such bodily injury effectively to cause death. The exception "thirdly" is also preceded by an intention and therefore is also not applicable in the present case. The only possible exception is applicable in this case may be the "fourthly" under Section 300 which says that if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such an act without any excuse for incurring the risk for causing death or such injury as aforesaid. On the applicability of the clause to the fact of the present case we find that no doubt that some injury has been caused to the victim but whether or not this was imminently dangerous or whether the accused had a perceived knowledge of the probable cause of death of such bodily injury as is likely to cause death, has not really been proved but fact remains bodily injury was caused which might not be imminently dangerous to cause death. According to Mr. Maiti the appellant committed such act without any excuse for incurring the risk of causing death or the injury as aforesaid. Therefore, to hold that the appellant caused murder of the victim punishable under Section 302 of Indian Penal Code does not come within the exception "fourthly" enumerated under Section 300 of the Indian Penal Code in the present case. Now our analysis is to the extent whether was there any excuse for committing such an act by the appellant or not. Evidence discloses that there was an altercation between PW1 and the appellant on the fateful night when the victim sustained injury by the act of appellant and it might be so that such injury occurred at the hit of passion because of the quarrel between PW1 and the appellant. According to Mr. Bhattacharyya this allegation and/or quarrel between PW1 and the appellant should be considered to a provocation within the meaning of Exception (1) to Section 300 of Indian Penal Code which says that "if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident, shall be culpable homicide not amounting to murder."

In this case as provocation caused by the PW1 to the appellant who lost self-control and injured the victim sustained injury caused by the appellant, Mr. Bhattacharyya argued that since the third person has sustained injury because of the provocation it was a mistake or an accident. If "fourthly" of Section 300 is read with the Exception (1) of Section 300 IPC together it comes out that although the death has a nexus with the act caused by the appellant on the victim but it was not done to cause death nor was it done within the knowledge

of the appellant that such an act would be so imminently dangerous that it would cause death. The accused thus caused an offence under Section 323 IPC and also caused death of the victim. Therefore, the accused can be held to have committed an offence of not murder within the meaning of Section 302 but an offence of culpable homicide not amounting to murder for which punishment may be imprisonment of either description for a term which may extend to 10 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.

We thus hold that the appellant is liable to be punished under Section 323 of the Indian Penal Code and he has already served out sentence therefor. The conviction and sentence under Section 302 IPC is liable to be modified in the facts and circumstances discussed earlier.

We thus modify the conviction holding that the appellant is liable to be punished under Part-II of Section 304 of the Indian Penal Code and he thus, is sentenced with an imprisonment for a period of 10 years with fine of Rs.20,000/- (Rupees Twenty Thousand) only, in default to suffer rigorous imprisonment for two years more.

Upon taking note that the appellant has already served out the aforesaid period of 10 years and the period of 2 years in default of fine in jail, no such fine is to be paid by the accused/appellant and he is, therefore, entitled to be released from the Correctional Home. It goes without mention that the appellant has also undergone the sentence period and fine in respect of the charge under Section 323 of the Indian Penal Code which stands confirmed. The sentence as modified shall be deemed to have run concurrently.

The appellant is therefore, entitled to be released from the Correctional Home. Let a copy of the order be communicated to the Superintendent of the Correctional Home where the Appellant is detained.

With this modification, the appeal is allowed in part and stands disposed of.

The Criminal Section is directed to send down the lower Court records together with a copy of the judgment forthwith to the concerned learned trial Court.

Urgent Photostat certified copy, if applied for, be delivered to the learned counsel for the parties, upon compliance with all usual formalities.

I agree.