
(2012) 03 BOM CK 0184
In the Bombay High Court
Case No : Criminal Appeal No. 9 of 2011

Suresh Vadnur

APPELLANT

Vs

State of Goa

RESPONDENT

Date of Decision : 30-03-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 428
Penal Code, 1860 (IPC) — Section 302, 304

Citation : (2012) 03 BOM CK 0184

Hon'ble Judges : U.V. Bakre, J;S.C. Dharmadhikari, J

Bench : Division Bench

Advocate : J. Godinho, under Legal Aid Scheme, for the Appellant; C. A. Ferreira, Public Prosecutor, for the Respondent

Judgement

U.V. Bakre, J.—This is an appeal filed by the accused, in Sessions Case No. 12 of 2008, challenging the Judgment and order dated 17/12/2009, passed by the learned Sessions Judge- II, Margao (Trial Judge), by which he has been convicted of the offence punishable u/s 302 of the Indian Penal Code (I.P.C.) and sentenced to undergo life imprisonment and to pay a fine of Rs. 5000/- in default to undergo rigorous imprisonment for a period of two months, The accused was tried for the said offence of murder under the allegation that on 14/03/2008 at about 20.45 hours at Pawangal, Kumbarwada, Sacorda, Sanguem, he assaulted the deceased Vithal Zunzure with a wooden danda on his head, nose and other parts of the body, thereby causing serious injuries to him, as a result of which he died.

2. The prosecution, in order to prove the charge, examined altogether 16 witnesses. PW1, Dr. Andre V. Fernandes conducted the post mortem examination on the dead body of said Vithal Zunzure and also examined the accused. The report of post mortem examination is at Exhibit 14 whereas the report of examination of the accused is at Exhibit 18. PW2, Shamim Ibrahim Khan acted as one of the panch witnesses to the inquest panchanama (Exhibit 22) conducted

over the dead body of the deceased. PW3, Subhash Verekar acted as one of the panch witnesses to the panchanama of the arrest of accused and attachment of his clothes which is at Exhibit 24. PW4, Ramchandra Volvoikar acted as one of the panch witnesses to the panchanama of the scene of offence which is at Exhibit 28. PW5, Dr. Nutan Dev, the Medical Officer of I. D. Hospital at Ponda, examined Vithal Zunzure brought before her by GATES and found that he was dead. She gave a report which is at Exhibit 31. PW6, Kashinath Phadte is Civil Draughtsman attached to P.W.D., Ponda. He drew the sketch of the scene of offence which is a part of Exhibit 36(Colly). PW7, Gurudas Prabhu clicked the photographs at the scene of offence, which photographs are at Exhibit 38 (Colly) whereas the C.D. of the photographs is at Exhibit 52. PW8, Shamsunder Shivolkar and one Umesh Kaskar had detained the accused who was brought at bus stop by PW 9, Rajendra Desai, the owner of the farm in which the accused and the deceased were working as labourers. PW9, said Rajendra Desai lodged the complaint, Exhibit 42 with the Collem Police Station upon which the Crime no. 09 of 2008 came to be registered against the accused. PW10, Kondo Dadu Hegdo was then working as a constable at Collem Police Station and he had received information about the fight between the accused and the deceased which was going on at the farm of Rajendra Desai. PW11, Subhash Nagekar was working as Head Constable at Collem Police Station and he along with PW10 had gone to the scene of offence. PW12, Pradip Mardolkar is the driver of the jeep owned by said Rajendra Desai (PW9). PW13, Manjunath Dessai is the Police Inspector who was then attached to Ponda Police Station and holding additional charge of Collem Police Station. He conducted part of the investigation. PW14, Pravin Gawas, Police Sub- Inspector, PW15, Dynaneshwar Karmalkar the then Head Constable and PW16, Manoj Mardolkar, Police Inspector, all attached to Collem Police Station conducted the investigation in the present case.

3. Upon consideration of the entire evidence on record, the learned Trial Judge came to the conclusion that the prosecution has proved that the accused was last seen in the company of the deceased and there were blood stains found on the clothes of the accused for which no explanation has been given by the accused. The learned Trial Judge has held that the prosecution has proved that there was fight between the accused and the deceased in which the accused himself sustained injuries and gave danda blows on the head and nose of the deceased. The learned Trial Judge found that the extra-judicial confession made by the accused to the prosecution witnesses has been duly proved. According to the Trial Judge, all the links in the chain necessarily linking the accused with the offence, have been successfully proved by the prosecution. The accused therefore came to be held guilty of the offence of murder and convicted and sentenced as already stated earlier. The accused is aggrieved by the impugned judgment and sentence.

4. Mr. J. Godinho, learned advocate appointed under Free Legal Aid Scheme, argued on behalf of the accused whereas Mr. C. A. Ferreira, learned Public Prosecutor, argued on behalf of the State.

5. The learned counsel for the accused argued that according to PW9 he was called at the farm house by Mahableshwar Naik. He further pointed out that PW9 has spoken about the presence of one Tirupati. Both Mahableshwar Naik and Tirupati have not been examined by the prosecution. The learned counsel for the accused, therefore, would contend that the non-examination of these witnesses is fatal to the prosecution case. He further argued that identification of dead body is not been properly proved. The learned counsel for the accused also pointed out that injuries were sustained by the accused. In the circumstances above, according to Shri Godinho, this cannot be a case of murder and at the most the case may fall u/s 304, Part II of the I.P.C. He submitted that the accused is in custody from the date of his arrest i.e. from 14/03/2008 and more than three years have passed. According to the learned counsel, the said imprisonment should be sufficient punishment for the accused.

6. On the contrary, the learned Public Prosecutor, on behalf of the State, argued that admittedly there was a fight between the accused and the deceased and hence non-examination of the said two witnesses cannot be fatal. He argued that the nature of injuries sustained by the deceased reveals that the accused acted in a very cruel manner in the said fight. He pointed out that the accused had sustained simple minor injuries. As far as the evidence regarding the incident is concerned, he argued that there is extra-judicial confession made by the accused to PW8, PW9 and PW12; the hair of the deceased were found on the danda, with which the accused had assaulted him; blood was also found on the pant of the accused; and that there is convincing evidence of last seen together. The learned Public Prosecutor fairly concedes that Section 302 of I.P.C. may not be applicable, in the facts and circumstances of the present case, since there was a fight. He, however, vehemently contended that Section 304, Part I of the I.P.C., is applicable to the present case.

7. We have perused the entire record and proceedings.

8. The first point that arises for determination is whether the deceased died homicidal death.

9. The evidence of PW 9, Rajendra Desai, the owner of the farm house at Kumbar Wada, Sacorda, reveals that he alongwith Shamsunder had gone to the farm house and had seen the deceased, Vithal Zunzure, lying in the courtyard of the farm house, with his face badly smashed and full of blood. PW9 telephoned Collem Police Station. The police came and the deceased was taken to I. D. Hospital at Ponda in the GATES vehicle. This was on 14/03/2008 by about 8.45 pm.

10. PW5, Dr. Nutan Dev, the Medical Officer of I.D. Hospital at Ponda, has deposed that Vithal Zunzure was brought by GATES Vehicle and when she examined him, she found that he was dead and there was a wound on upper lip and right side of face and head, extending to the neck, probably caused due to hitting with some hard object. The report submitted by PW5 is at Exhibit 31.

11. PW1, Dr. Andre V. Fernandes conducted the post mortem examination on the dead body of the deceased on 15/03/2008 between 3.00 am to 4.50 am. He found following external injuries sustained by the deceased:

Injury no.1: Broad, V shaped lacerated wound, vertical superior arm, 7cms x 2 cms x 8 mm, inferior horizontally oblique arm, 5 cms x 1 cm x 8 mm, placed on left side back of head, outer aspect just posterior to left parietal eminence. Superior end of vertical superior arm is placed 9.5 cms above upper insertion of left ear and the pointed end of V is placed 10 cms from left mastoid prominence, reddish fresh with underlined and surrounding bruising of 7.5 cms x 6 cms with underlying sub-galeal haematoma of 7 cms x 6.5 cms x 1 cm thick. There is extravasation of blood in the underlying left temporalis muscle with a depressed comminuted fracture of 4 x 10 cms through the left side parietal, frontal and temporal bones, with central inward depression of 1 cm with a 18.5 cm coronal sutured fracture and separation extending to the opposite side.

Injury no.2: Bruise, 6 x 5 cms, reddish and fresh placed on central right side occipital region with underlying sub galeal haematoma of 5 cms x 4 cms with inward displacement of outer table of occipital bone into the inner table in an area of 5 cms x 3.5 cms and placed horizontally oblique with inward displacement of 4 mm along the central midline /axis with underlying fissure fracture to outer and inner table of 4 cms x linear.

Injury no.3: Grazed abrasion with underlying bruise of 2.5 cms x 1.5 cms, reddish fresh on right side front and outer aspect of right frontal eminence. There is extravasation of blood present within the right frontal scalp tissue. No evidence of underlying skull bone fracture.

Injury no.4: Bruise, 10 cms x 6cms, reddish fresh, placed on central front of face over lip and both ala of nose, upper lip and right side of lower lip with (a) laceration, 2 cms x 5 mm x 8mm, on right side upper lip; (b) laceration, 1.5cms x 4 mm x 6 mm, on right side lower lip.

Injury no.5: Grazed abrasion, 4 x 3 cms, reddish fresh on front aspect of right knee.

Injury no.6: Grazed abrasion, 3.5 x 2 cms, reddish fresh on back upper aspect of left shoulder.

Injury no.7: Rail road pattern bruise, 11 cms x 2 cms, reddish and fresh horizontally oblique, inner upper end is placed 4 cms away from mid line on back lower aspect left side chest.

Injury no. 8: Rail road pattern bruise, 10 cms x 2 cms deep, reddish and fresh, horizontally oblique, inner upper end is placed 4.5 cms from mid-line on upper aspect of left loin region, 3 cms below and parallel to injury no. 7.

12. Internally, as deposed by PW1, there were injuries to the scalp and fracture to the skull bone. The left side dura was lacerated at multiple places with a 14

cm x 10 cm x 2.5 cms thick sub dural Hematoma over the left temporo parietal occipital region with pressure effect causing flattening of sulci and gyri. There was a contra cout sub dural Hematoma over right temporo parietal region of 6 cms x 5 cms x 2mm thick. There was also contra cout sub dural Hematoma over the right occipital lobe 4cms x 3 cms x 4mm thick and also a 3 x 3 cms x 5 mm thick sub dural Hematoma over the right side of cerebellum with contra cout sub dural Hematoma over the left frontal lobe 4 cm x 3cm x 1cm thick. There were multiple pin point hemorrhages in the white matter of the brain. There was also bilateral nasal bone fracture.

13. PW1 has stated that the cause of death, to the best of his knowledge and belief was due to cranio cerebral damage vide injuries no. 1 and 2 caused by blunt, forceful impacts which are ante mortem, fresh and necessarily fatal. Exhibit 14 is the post mortem examination report prepared and signed by PW1.

14. There is some minor discrepancy in the name of the person who had identified the dead body. According to PW1, the body was identified by the friend of the deceased by name Mr. Bassappa, son of Lingappa Yallavva Gauder. As per PW2, Shamim Khan, who acted as one of the panch witnesses to the Inquest Panchanama (Exhibit22), one Bassappa had identified the dead body. The name mentioned in the Memorandum of Autopsy (Exhibit 14) and the Inquest Panchanama (Exhibit 22) is Basappa son of Nigamappa Yallappa Gauder. But according to the investigating officer (PW16), the deceased was identified by one Basavva Nigamapa Yellapa Gauda. In fact, there is no dispute that it was the dead body of Vithal Zunzure, which was taken to I. D. hospital, Ponda and from there to Goa Medical College, Bambolim and that the post mortem examination was conducted on the dead body of said Vithal. Hence, the minor discrepancy in the name of the person who identified the dead body, as pointed out by the learned counsel for the accused, cannot give any benefit to the accused to prove his innocence.

15. Considering the circumstances in which the dead body of the deceased was found and the nature of the injuries sustained by him, it can certainly be said that the deceased died a homicidal death.

16. The next point for determination is whether the accused 11 Cr.Appeal 9/11 caused the death of the deceased.

17. PW9, Rajendra Desai has deposed that he has an agricultural property at Kumbarwada in Sacorda wherein he has constructed a house for residence of his workers. He has stated that one portion of the said structure is used by his workers whereas the other portion is used by him as store room. PW9 has stated that the accused Suresh and the deceased Vithal Zunzure were both working for him as labourers and were residing in the said structure situated in his farm. PW 9 has deposed that on 14/03/2008 he was at home and at about 8.45 p.m. he received a phone call on his mobile from one Mahableshtar Naik who informed that there is a fight going on between the accused and said Vithal and the

accused was assaulting Vithal and he should rush to the spot. PW9 has stated that he immediately started to proceed to the spot in his Sumo Jeep bearing no. GA-02-J-7567 and on the way at the bus stop near the house of Ramchanadra Vaolvoikar at Volkarwado, he met the accused. According to PW9, he inquired with the accused who told him that he was assaulted by Vithal and in turn he assaulted Vithal with a danda and gave one blow on the head and other blow on the nose of said Vithal. PW9 states that two boys namely Shamsundar and Umesh Kaskar were coming that side and he kept the accused in their custody and proceeded to his farm where he saw Vithal lying in injured state in the courtyard of the farm house with his face badly smashed and full of blood. PW9 has stated that he immediately telephoned Collem Police Station who came there and put the body in PCR van and proceeded to I.D. Hospital at Ponda. PW9 stated that at Dharbondora the body was shifted in the GATES vehicle and taken to I.D. Hospital where the Doctor declared him dead. PW9 has stated that he then instructed the two boys (i.e. Shamsundar and Umesh) to hand over the accused to the police and requested his driver Pradip to take the accused to the police station.

18. PW9 has stated that prior to the incident he had taken the accused and deceased to his said farm at Kumbarwada for fertilizers and thereafter had kept the accused and one Tirupati at the farm and along with Vithal Zunzure, he had proceeded to his other farm at Nurgem to collect coconuts and both of them had come back with coconuts and thereafter he had sent his driver along with Vithal Zunzure to the farm at Kumbarwada for unloading the manure. According to PW9, thereafter his driver returned home whereas the accused remained in the farm.

19. PW9 had lodged the complaint with Collem Police Station and this complaint dated 14/3/2008 is at Exhibit 42. In this complaint, it is mentioned that the accused had told PW9 that Vithal assaulted him on his leg and that is why he also assaulted Vithal Zunzure with a wooden danda on his head and face. It is pertinent to note that in the cross-examination of PW9, the fact that the accused told him that Vithal had assaulted him and in turn he had assaulted Vithal with danda on the head and on the nose has not been denied. Further, the evidence of PW9 to the effect that the accused and the deceased were at the farm on the date and at the time of incident has also not been denied. PW9 has identified the blue coloured short pant (M.O. 15) and the cream coloured half sleeves shirt (M.O.15) of the accused and the danda (M.O.3).

20. PW8, Shamsundar Shivolkar has deposed that on 14/03/2008 at about 8.45 p.m. he and one Umesh Kaskar were at bus stop at Godkawado Sakorda when Rajendra Desai came in the sumo and one Suresh was with him and Rajendra requested them to detain Suresh. PW8 has further deposed that they asked Suresh that what had happened and Suresh told that he had assaulted his co-worker with danda on his head due to which the said co-worker had collapsed and that the name of co-worker is Vithal. PW8 has further stated that at about 9.45

p.m., a trax arrived near them which was driven by Pradip and which also belongs to Rajendra Desai. According to PW8, the said Pradip who works as driver of Rajendra asked him and Umesh to sit in the jeep along with the accused and then they proceeded to Collem Police Station and on the way they saw police jeep coming in opposite direction and the driver showed the hand and stopped the jeep. PW8 has stated that they told police as to what the accused had told him and then Pradip asked accused as to what has to be done with him when the accused started crying and stated that he should be hanged. Thereafter the accused was handed over to the police and the said police jeep proceeded to the farm of Rajendra Desai. PW8 stated that on that night the accused had worn cream coloured half pant and light green coloured short sleeves shirt. PW8 has identified both the said clothes of the accused.

21. PW12, Pradip Mardolkar is the driver of Rajendra Desai (PW9). PW12 has stated that said Rajendra owns a farm at Kumbharwada where Zunzure, Suresh and one Deepak Tirupati were the workers. PW12 has stated that the accused has murdered said Zunzure. According to him, the incident occurred on 14/03/2008. He has stated that at about 6.30 p.m., he had returned from Fomento mines and PW9 had told him and Zunzure to carry some bags of fertilizers to the farm. He has stated that he loaded the fertilizers in the jeep and alongwith Zunzure proceeded to the farm and found that Tirupati and the accused were present at the farm. He has stated that at the time of unloading the fertilizers and when the first bag was removed by the accused, there was some talk between the accused and Zunzure in Kanada and since he does not follow Kanada, he asked Tirupati as to what they were talking. According to PW12, Tirupati told him that it was nothing serious. PW 12 has further stated that after unloading the said jeep, he returned from the farm at about 8.30 p.m. and at about 9.30 p.m. when he was relaxing at home, one Suryakant came with a message that he was called by Rajendra Desai to the farm. Accordingly, PW12 proceeded with the jeep to the farm but on the way he met PW9 who told him to go to Collem Police Station along with the accused. PW12 has stated that Umesh and Shyamsundar were accompanying him in the jeep at that time and on the way the said two boys informed that there was fight between the accused and Zunzure in which the accused assaulted Zunzure. PW12 has deposed that the accused disclosed to him that he had assaulted Zunzure and started crying. According to PW12, at Satpali they saw the police jeep and therefore they stopped the jeep and the said two boys handed over the accused to the police. He has stated that the accused was wearing half sleeves shirt and half pant at that time and had suffered some injuries to his leg and that he was not wearing any chappals.

22. PW3, Subhash Verekar acted as one of the panch witnesses for the panchanama of the arrest of the accused, which was drawn on 14/3/2008 at 23.00 hours. The accused had no chance to change the clothes which he was wearing at the time of the incident. PW3 has described the clothes that were worn by the accused namely half sleeves, light green colour shirt having mark

"CREATIVE SHIRT" and half pant of cream colour with a logo "SMS SPORTS". PW3 has stated that the shirt was torn at some places and third, fifth and sixth button of the shirt were missing and there were reddish stains on the shirt. PW3 has stated that the accused was asked to remove the said clothes and was provided with other clothes and the clothes of the accused were packed and sealed. PW3 has also confirmed that there were bruises on the body and leg of accused. The Arrest/ attachment panchanama is at Exhibit 14.

23. As per the report of the Central Forensic Science Laboratory, Hyderabad (Exhibit 67), human blood of group "B" was detected on the short pant of the accused. "B" is the blood group of the accused himself.

24. In the statement u/s 313 of the Code of Criminal Procedure, the accused has stated that he was working for Rajendra and on the date of incident when he was working, Zunzure came to assault him with danda and he avoided the blow and Zunzure fell down with the danda and thereafter he went to water the sugarcane plantation where the police came and assaulted him with Danda. Thus, the fact that the accused and the deceased were at the farm of PW9 and there was fight between them, is an admitted fact.

25. PW4, Shamba Volvoikar has deposed that on 15/03/2008, after hearing the news of murder he had gone to the spot and the Police Inspector requested him to act as a panch witness. He has stated that there was a farm house of Rajendra Desai and that Rajendra Desai was also present. PW4 has stated that the said farm house had a courtyard and the house had two rooms. At the entrance of the farm house two black shoes of the size 7 make Ajack were found and Rajendra Desai told the panchas that the said shoes belongs to the accused. The same were packed in envelope and sealed. According to PW4, at a distance of about 4 to 5 meters, there was a danda of Akasha tree which had the length of 1.90 meters and there were some buds numbering about 18 on the said danda and there was blood on said danda with one long black hair and other gray hair attached to that danda. PW4 has stated that the said danda, at the place where the hair was found, was wrapped with plastic transparent tape and thereafter the danda was wrapped in a cloth tied with jute and sealed. PW4 has also stated that a pair of rubber slippers of make paragon were found and the complainant Rajendra stated that these slippers belongs to Tirupati. At a distance of 4.70 meters from the first right side corner of the spot, blood spot with size 40 x 40 cm was seen. The sample of the blood marks with mud was attached and also the some control sample of mud was attached. At a distance of about 3 meters from the said blood spot, a wet soiled towel which was partly torn and one cloth bag were found and they were also attached. A sketch of scene of offence was also drawn. In his cross-examination, PW4 has stated that this is a first time he acted as panch witness. Therefore, PW4 is not a stock panch witness of the police. There is nothing in the cross-examination of PW4 which can make his testimony unreliable.

26. As per the report of the Central Forensic Science Laboratory, Hyderabad,

which is at Exhibit 67, human blood was detected on the said wooden danda. The hair that was found adhering to the said danda were found to be human scalp hair and the morphometric characteristics were found consistent with that of scalp hair of deceased Vithal Zunzure.

27. The accused was examined by PW1, Dr. Andre Fernandes on 15/3/2008. Following injuries were found on the body of the accused:

(I) Bruise, dark blue, with underlying tenderness, 6 cm x 3.5 cm, on front outer aspect of lower third of right thigh.

(ii) In an area of 7 cm x 4 cm, on front outer aspect of upper third of right lower leg, there were 12 dark brown hard scab grazed abrasions roughly from 2mm x 2mm to 1cm x 8mm.

(iii) Grazed abrasion, light brown to dark brown, soft to hard scab, grazed abrasion, 4 cm x 2.5 cm, on medial lower aspect of left knee.

(iv) Grazed abrasion, light brown to dark brown, soft to hard scab, 2 cm x 1.5 cm on front outer aspect of upper third of left lower leg.

28. According to PW1, when asked as to how he sustained those injuries, the accused answered that the first injury was caused when the victim hit him with a long wooden danda whereas the other three injuries were caused when the victim pushed him to the ground.

29. As rightly contended by the learned Public Prosecutor, in the facts and circumstances of the present case, the non-examination of Mahableshwar Naik and Tirupati is not fatal to the case of the prosecution.

30. From the analysis of the above evidence on record, following established circumstances can be culled out:

(1) The accused and the deceased were last seen together at the farm house;

(2) The accused made extra judicial confession that he had assaulted the deceased with dan da to the prosecution witnesses;

(3) The hair of the deceased were found adhered to the danda which was attached from the scene of offence;

(4) There was blood seen on the short pant of the accused;

(5) The accused himself had sustained some injuries. He told the doctor that he sustained those injuries since the deceased had pushed him and hit him with a danda.

(6) As per the memorandum of autopsy, the deceased died due to craniocerebral damage vide injury no. 1 and 2 caused by blunt forceful impact which are ante mortem, fresh and necessarily fatal.

31. The extra judicial confession was made by the accused to employer namely

PW9, who was the first person who met the accused immediately after the incident. The complainant (PW9) being the employer of the accused was a person in whom the accused had confidence. On account of that, when PW9 had asked the accused what had happened, he confessed that he had assaulted the deceased with danda on the head and also on the nose. Then there is another witness namely Shamsundar Shivolkar (PW8) in whose custody the accused was handed over by PW9. When PW8 had inquired with the accused as to what happened, the accused told that he had hit danda on the head of co-worker namely Vithal. Lastly, the accused also made confession to PW12, Pradip Mardolkar. It is well settled that the extra judicial confession, when is voluntarily and true and made in a fit state of mind, it can be relied upon.

32. The evidence on record therefore sufficiently proves that the accused had caused the death of the deceased.

33. The last question which arises for determination is whether the act of the accused in causing the death of the deceased amounts to murder or to culpable homicide not amounting to murder and if it is culpable homicide not amounting to murder, then whether it falls under Part I or Part II of Section 304 of I.P.C.

34. The evidence on record reveals that there was a fight between the accused and the deceased. The accused was assaulted by the deceased and in retaliation, the accused assaulted the deceased with the danda on his head and on the nose. The deceased did not have any weapon with him. The accused had suffered some injuries which were mostly abrasions. There is nothing on record to establish that there was any enmity between the accused and the deceased. There is also nothing on record to prove that the accused had any motive to kill the deceased. In fact, both of them were residing in one room, in the farm house. It can therefore be understood that the incident occurred without premeditation, on the spur of moment, in a sudden fight and in the heat of passion, the accused assaulted the deceased with the wooden danda. However, the injuries no. 1 and 2 caused by the accused over the head of the deceased were grievous and serious in nature and were caused with the intention of causing such bodily injury as is likely to cause death. We are unable to agree with the contention of learned Shri Godinho that the act of the accused falls under Part II of section 304 of I.P.C. As has been submitted by the learned Public Prosecutor, the Section which is applicable to the present case is Section 304 Part I of the I.P.C. In the course of sudden quarrel, the accused had given danda blows to the deceased, on vital part of the body, which resulted into his death. It is therefore that the conviction of the accused is liable to be altered from Section 302 to Section 304 Part I of the I.P.C.

35. In the result, the impugned judgment and order in so far as it holds that the death of the deceased was caused by the accused is correct. However, the conclusion that the guilt of the accused is proved for the offence punishable u/s 302 of I.P.C. is not correct. The offence committed by the accused is under Part I of section 304 of I.P.C. The impugned judgment and order is therefore liable to

be modified to that extent. In the result, we pass the following:

ORDER

- (1) The Appeal is partly allowed.
- (2) The conviction and sentence against the accused for the offence punishable u/s 302 of I.P.C. is quashed and set aside.
- (3) The accused is held guilty and convicted for the offence punishable u/s 304, Part I of I.P.C. 23 Cr.Appeal 9/11
- (4) The accused is sentenced to undergo rigorous imprisonment for a period of ten years and also to pay fine of Rs. 5,000/-, in default to undergo further rigorous imprisonment for two months.
- (5) The period during which the accused remained in custody shall be set off in terms of section 428 of the Code of Criminal Procedure.
- (6) Muddemal properties shall be destroyed, after a period of 90 days from the date of this order.