

(2015) 08 KAR CK 0345
In the Karnataka High Court
Case No : Criminal Appeal No. 768 of 2011

Thaheer Nissar

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 31-08-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 357(3), 428
Evidence Act, 1872 — Section 114(a)
Penal Code, 1860 (IPC) — Section 299, 300, 302, 304 II, 304-II

Citation : (2015) 6 KarLJ 162

Hon'ble Judges : Mohan M. Shantana Goudar, J; Budihal R.B., J

Bench : Division Bench

Advocate : Hashmath Pasha, for the Appellant; K.R. Keshavamurthy, SPP-2,
Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

Budihal R.B., J—The appellant-accused has questioned the judgment and order of conviction dated 21.06.2011 passed by the I Addl. Sessions Judge, Mysuru in S.C. No. 139/2010. Under the said judgment, accused has been convicted for the offences punishable under Section 392 read with Sections 397 and 302 of IPC; the accused has challenged the correctness and validity of the said judgment on the grounds as mentioned in the appeal memorandum.

2. Brief facts of the prosecution case are that PW-1-Rajamma, who is the daughter-in-law of deceased Shivamma, has lodged the complaint on 29.11.2009 before Mandi Police Station, Mysuru, alleging that herself, her husband, her two children namely Hemanth and Veerabhadraswamy and her mother-in-law Shivamma were staying together in the house situated at B.N. Road, Mandi Mohalla. Her mother-in-law Shivamma took one old house in Akbar Road long back on rental basis and during the day time deceased Shivamma was doing coconut business and coin-booth. On 28.11.2009, Shivamma after completing her day's business, came to their house at 6.30 p.m. and had meals and slept

there. In the early morning she woke up, had coffee and at about 6.45 a.m. she went to the old house in Akbar Road. At 8.30 a.m. complainant prepared the breakfast for the deceased and sent it through her son Hemanth, who came back and informed the complainant that grand-mother might had been to somewhere and hence, he kept the tiffin box in the house and without verifying properly about the presence of Shivamma, he came back.

At about 9.00 a.m. one Leelavathi (PW-3) came and informed that Shivamma is not being seen and the salt coated groundnut seeds are scattered on the floor in the house and asked the complainant to come and see. The complainant and one Prashant, who was the worker in the Shamiyan shop of the complainant, went to the old house and noticed that Shivamma was lying in the kitchen unconscious and there were bleeding injuries on her head and immediately, they got the autorikshaw and shifted her to Mission Hospital and admitted. At that time the gold neck chain, four bangles, the ear stud and one ring were not present on her person, and some miscreants had assaulted her mother-in-law on her head and had taken away the ornaments weighing 140 gram worth Rs. 1,40,000/-. Hence, she requested to trace the accused and to take appropriate action against them.

3. On the basis of the said compliant, Mandi Police, Mysuru City registered the FIR in Crime No. 358/2009 against unknown person for the offence punishable under Section 394 of IPC and issued the FIR as per Ex. P-34.

Subsequently, accused was apprehended and the IO after completing the investigation filed the charge sheet against the accused for the offence punishable under Section 302 of IPC.

4. On the basis of the said material, the Trial Court initially framed the charge for an offence punishable under Section 302 of IPC, subsequently the charge was amended, and it was for the offence under Section 392 read with Section 397 of IPC and also under Section 302 of IPC.

5. During the course of the trial, the prosecution, in all, examined 16 witnesses and got marked the documents Exs. P-1 to P-43 and material objects MOs. 1 to 11. On behalf of the defence, neither any witness has been examined nor got any document marked.

6. Heard the arguments of the learned counsel appearing for the appellant-accused and also the learned SPP-II for the respondent-State.

7. Sri Hasmath Pasha, learned counsel for the appellant, has submitted that the death of deceased Shivamma took place exactly after one month of the alleged incident. It is his submission that looking to the medical evidence i.e., the Post Mortem report so also the oral evidence of the doctors, who have been examined in the case, there is no satisfactory material placed by the prosecution to show that the injury caused on the head was sufficient in the ordinary course of nature to cause the death. He has also submitted that in the PM report, the doctor, who conducted PM examination has noticed that they were sutured wounds, while

referring to skull and vertebrae, it is mentioned as injuries left parietal bone surgically removed and regarding peritoneum, it is mentioned by the doctor as intact contained surgically placed cranial bone infected with pus. He has further submitted that though it has come in the evidence of the prosecution witness that this injured was also shifted to Kaveri Hospital and the doctor at Kaveri Hospital treated for the maximum period of 10 to 11 days, even then, no such doctor has been examined or the case sheet pertaining to the said period was produced before the Trial Court. Hence, he has submitted that all these materials clearly show that there was no intention on the part of the accused person to commit the murder of Shivamma. He has also took us to the provisions under Sections 300 and 299 of IPC and submitted that the offence at the most may fall under Section 304 II of IPC and it cannot be an offence of murder under Section 300 of IPC.

Regarding the seizure of MO.10-Iron rod and MO.11-Shirt, said to be of the accused, he has submitted that the case of the prosecution that accused gave the voluntary statement and led the IO and panch witnesses to his house and produced MOs-10 and 11 appears to be most artificial and unnatural. He has submitted that normally, the robbers/thieves try to screen the evidence and how this accused after the lapse of more than two months took the Police and panchas, and produced the said material objects. He has further submitted that, even if it is the case of the prosecution that MOs. 10 and 11 were having blood stains and as per the FSL report also it is confirmed that blood stains were of human blood, but the origin of the blood was not established by the prosecution, which is the missing link in the chain of circumstances in the prosecution case. He has also submitted that regarding the blood stains on MOs. 10 and 11, which are the incriminating materials as against the accused, same was not put to the accused while he was examined under Section 313 of Cr.P.C and hence, there was no opportunity for the accused to explain about the blood stains.

Regarding the recovery of the gold ornaments, evidence of jewelry shop owners and the panch witnesses is also not worth believable, the prosecution has not established that accused was having the possession of gold ornaments and then he pledged those ornaments into the jewelry shop. He has submitted that unless and until the possession of gold ornaments by the accused is established, mere showing the recovery of gold ornaments is not important. It is also his contention that the jewelry shop owners have admitted in their cross-examination that they have not issued any receipts or documents for taking the gold ornaments on pledge by the accused. Hence, he has submitted that these aspects were not considered by the Trial Court and it has wrongly convicted the accused and hence, submitted to allow the appeal and to set-aside the judgment and order of conviction.

8. Per contra, Sri Keshava Murthy, learned SPP-II, has submitted that the evidence of doctors and the postmortem reports clearly show that it was a case of murder. It is his submission that with regard to the cause of death of the

deceased, the doctor, who conducted the autopsy, has clearly opined that the death is due to Coma as a result of head injury sustained. He has submitted that the doctor has also spoken about the possibility that, if a person is assaulted with an object like MO.10-iron rod, such injury can be caused.

Regarding the seizure of gold ornaments at the instance of accused, from the evidence of PW-8-Anil Kumar, the owner of the jewelry shop and the evidence of IO (PW-16), prosecution has satisfactorily established the recovery of gold ornaments MOs. 6, 8 and 9. The oral evidence of PW-9-Lingaraju coupled with evidence of PW-14 and 16 also show the recovery of gold bangles at the instance of the accused person. Hence, he has submitted that when the ornaments were identified by the family members of the deceased including the complainant Rajamma and when the jewelry shop owners have consistently deposed that accused pledged the ornaments MOs. 6, 8 and 9 and taken Rs. 37,000/- and the accused has also sold the bangles to the jewelry shop, which were recovered and same were produced before the IO, amply made it clear that prosecution proved the recovery to the satisfaction of the Court.

With regard to the contention of the learned counsel for the accused that blood groups on MOs. 10 and 11 were not established by the prosecution, he has submitted that as per the serology report, it is opined that MOs. 10 and 11 were having the human blood stains. Hence, he submitted that only on the ground that blood grouping was not ascertained by the serologist, the other materials on record, which satisfactorily establishes the case of the prosecution, cannot be rejected.

Lastly, he has submitted that the Trial Court considered all these aspects of the matter properly and rightly convicted the accused for the said offences and there are no grounds for this Court to interfere into the judgment and order of conviction and submitted to dismiss the appeal.

9. Out of 16 witnesses examined on behalf of prosecution, PW-1-Rajamma is the complainant, who lodged the complaint as per Ex. P-1; she is also the witness for spot mahazar Ex. P-2 and mahazar Ex. P-3 for the seizure of the clothes MOs. 3 to 5 of the deceased and she has identified jewelries MOs. 6 to 9. PW-2 is the son of deceased, who has also identified MOs. 6 to 9 ornaments. PW-3 is the neighbour of the deceased shop, who came and informed PW-1 that salt coated groundnuts were scattered on the floor and she has also identified MOs. 6 to 9. PW-4 is the worker under PW-2, who shifted the injured to the hospital. PW-5 is the grand-son of the deceased, who carried breakfast to the deceased; as per his evidence Shivamma was not present and he kept the tiffin box and returned back; he has also identified the ornaments MOs. 6 to 9. PW-6, who used to keep his tools in the shop of the deceased, has deposed that on the date of incident at about 8.30 a.m. PW-1-Rajamma went inside the shop and came out screaming. PW-7 is the recovery pancha for the seizure of MO.10-iron rod and MO.11-Shirt at the instance of the accused under mahazar Ex. P-5; he has also spoken about the photographs as per Exs. P-6 to P-13 and negatives Ex. P-14. PW-8 is the

pawn broker at Mysuru, he has spoken that accused pledged MOs. 6, 8 and 9 in his shop and he produced them before the Police under the mahazar Ex. P. 15. PW-9 is also the recovery pancha, he has spoken that Police have recovered four bangles from the shop of PW-14 under the mahazar Ex. P-21; he has also spoken about another recovery from the shop of PW-8-Anil Kumar under Ex. P-15. PW-10 is the doctor of Appollo Hospital, Mysuru, who has first seen the injured Shivamma and referred to Neurologist and issued the injury certificate as per Ex. P-25. PW-11 is the doctor of K.R. Hospital at Mysuru, who has deposed that deceased Shivamma was brought to K.R. Hospital with the history of assault and injured was unconscious and she issued the certificate as per Ex. P-26. PW-12 is also the doctor, who conducted the autopsy over the dead body of Shivamma and issued PM report as per Ex. P-27. PW-13 is the doctor of the Mission Hospital, Mysuru, who informed the Police as per Ex. P-31 and issued the medical certificate as per Ex. P-32. PW-14 is the owner of the jewelry shop in Mysuru, who deposed that accused sold four bangles and he has purchased the same for Rs. 24,000/- and later Police came with accused and seized the said bangles under ExP-21. PW-15 is the PSI of Mandi Police Station, Mysuru, who recorded the oral complaint of PW-1 as per Ex. P-1, registered the case and issued the FIR as per Ex. P-34; he has also conducted spot mahazar under Ex. P-2 and seized MOs. 1 and 2, and also seized the clothes of the deceased as per MOs. 3 to 5 under the mahazar Ex. P-3. PW-16 is the Investigating Officer, who completed the investigation and filed the charge sheet in the case.

10. We have perused the oral and documentary evidence produced by the prosecution during the course of trial; the case of the prosecution rests on circumstantial evidence and there are no direct witnesses to the incident. With regard to the recovery of gold ornaments i.e., MOs-6 to 9, prosecution has examined PW-1-Rajamma, who is the complainant in the case, who has deposed in her evidence in the examination-in-chief that deceased Shivamma used to wear the gold neck chain, one pair of ear stud, four bangles and one ring. About one year back, she sent breakfast to her mother-in-law Shivamma, with her son at 8.00 a.m; when her son went to the shop Shivamma was not there and he came back keeping the breakfast there only; on the same day at about 8.30 or 9.00 a.m. PW-3-Leelavathi came to her house and told that Shivamma is not seen and the salt coated groundnut seeds are scattered on the floor, then she went to the said shop along with C.W.4-Prashant and her mother-in-law was not in the shop, and when they pushed the door of the house, they saw her mother-in-law lying in a pool of blood unconsciously; she informed about the same to her husband and son; and while taking Shivamma to the hospital, she saw that the gold ornaments were not on the person of Shivamma and because of the gold ornaments, somebody assaulted her mother-in-law and robbed the gold ornaments and she has already lodged the complaint before Mandi Police as per Ex. P-1 and P-1(a) is her signature. She has further deposed that one month after the incident, Mandi Police asked her to come to the Police Station; herself and Mahadevappa (CW-2) went to the Police Station; Police after showing the

accused told that he has robbed the gold ornaments of Shivamma and the gold ornaments were traced, the gold ornaments were shown to her are one chain, pair of ear stud, four bangles and one ring; she identified those ornaments as belonging to her mother-in-law. She has also deposed that her husband by filing an application before the Court, has taken back those ornaments to his interim custody and she produced those ornaments before the Court on the day of her deposition and again she identified the chain as MOs. 6, four bangles as MO.7, pair of ear stud as MO-8 and a ring as MO.9.

During the course of cross-examination, she has deposed that her mother-in-law got prepared those gold ornaments about 7-8 years back and often she used to get the ornaments polished; three days earlier to the incident also she got the gold ornaments polished. She denied the suggestion that her mother-in-law did not get the ornaments polished and the Police gave her gold ingots and asked her to make the ornaments stated to be worn by her mother-in-law, accordingly, she got prepared MOs. 6 to 9. She has further deposed that she has clearly mentioned in her complaint regarding the ornaments, which were worn by her mother-in-law Shivamma.

PW-2, who is the son of deceased Shivamma, has also identified those ornaments before the Court. He has deposed in his cross-examination that the accused person was staying in a rented house by the side of the shop of Shivamma. He has deposed that till the accused was shown to him, he was not having any suspicion against anybody. Police have recorded his statement on 30.11.2009; in his statement he has stated that because of the ornaments on the person of Shivamma, the crime has been committed.

PW-3 Leelavathi, who is an independent witness, has deposed that she knows Shivamma, Mahadevappa, who is the son of Shivamma, and Rajamma, who is the daughter-in-law of Shivamma; Shivamma was selling coconuts and salt coated groundnut seeds. Her house is on the back side of the house of Shivamma. She knows Shivamma since long. She has further deposed that everyday Shivamma used to wear a chain, four bangles, one pair of ear stud and one ring. She has also identified MOs. 6 to 9 ornaments before the Court.

PW-4 Prashanth, who is an independent witness, has deposed that he knew deceased Shivamma. When Shivamma was shifted to the hospital, the gold ornaments were not seen on the person of Shivamma; immediately, he informed Mahadevappa (PW-2) over phone that somebody robbed the gold ornaments after assaulting Shivamma and asked PW-2 to come early. He has further deposed that Shivamma used to wear one chain, bangles, ear stud and the ring.

PW-5 Hemanth, who is the grandson of deceased Shivamma, has deposed in his examination-in-chief that his grandmother used to wear chain, four bangles, a pair of ear stud and one ring. He has also identified gold ornaments MOs. 6 to 9 before the Court.

So looking to the evidence of PW-1, it is established by the prosecution that the

ornaments MOs. 6 to 9 were belonging to deceased Shivamma and said Shivamma had worn those ornaments even on the date of the incident also.

Not only the family members of Shivamma, but also the independent witnesses have deposed that the ornaments MOs. 6 to 9 belongs to Shivamma and the said Shivamma used to wear those ornaments everyday. Even the evidence of prosecution witnesses also show that three days earlier to the incident Shivamma got the gold ornaments polished. Therefore, the contention of the defence that the ornaments seized in the case as per MOs. 6 to 9 are new ornaments and prosecution planted those ornaments for the purpose of this case, cannot be accepted at all.

11. Regarding the recovery of the gold ornaments from the jewelry shops, prosecution has examined one Anil kumar as PW-8, who has deposed that he is working in the pawn shop of his father; himself and his father were looking after the said shop; earlier also he has seen the accused, as accused used to come to his shop since 4-5 years and used to pledge the gold ornaments. About one year back accused came along with Police to his shop. He has further deposed that accused pledged the gold chain, one ring and a pair of ear stud in his shop, one month prior to the date of accused coming with Police to his shop. After receiving the gold ornaments under pledge, they gave a sum of Rs. 37,000/- to the accused. Accused told them that the pledged ornaments are the stolen articles and asked him to produce those ornaments before the Police, and accordingly, he produced those ornaments before the Police and Police have seized them under the mahazar Ex. P-15 and P-15(a) is his signature. He has also identified the gold chain, one pair of ear stud and one ring, which are marked as per MOs. 6, 8 and 9, before the Court and he has also identified the photographs taken at the time of mahazar, which are marked as per Exs. P-16 to P-18 and negatives as Ex. P-19.

In the cross-examination, he has deposed that whenever he receives the articles under pledge, he issues the receipt mentioning the description of the ornaments, its design and weight; when accused pledged MOs. 6, 8 and 9, he has not mentioned the details in the pawn receipt book because the book was exhausted. He has further deposed and admitted as true that, in case the pawn receipt book is exhausted, he will mention the description of the ornaments in the paper and ask the pawners to come on the next day and to take the receipt. Even in this case also he kept one such chit ready mentioning the details and asked the accused to come on the next day to take the receipt, but the accused did not come back; he has also not produced the chit having the details before the police. In his shop, he will not prepare new ornaments. He has denied the suggestion that accused had not pledged MOs. 6, 8 and 9 in his shop and he is deposing falsely. He has denied the further suggestion that Police gave the gold ingot and got prepared such type of gold ornaments and for that reason he is not having receipt relating to mortgage.

PW-9 Lingaraju has deposed in his evidence that about one year back Mandi

Police issued him notice asking him to come to the police station and accordingly, he went to the Police Station. The said notice is marked as Ex. P-20. He went to the Police Station at 5.00 p.m. and at that time the accused before the Court was with the Police. The accused took themselves and the Police to one jewelry shop nearby Mission Hospital and informed that he has sold four bangles in the said shop; the said shop owner produced four gold bangles and Police have seized those bangles under the mahazar, which is marked as Ex. P-21 and P-21(a) is his signature and he identified those bangles, which are marked as MO.7 and two photographs marked as Exs. P-22 and P-23 and he is seen in those two photographs. He has further deposed that Police asked him to come to the Police Station on the next day morning and accordingly, he went to the Police station at 10.00 a.m. The accused took the Panchas and the Police to one jewelry shop situated at Small Market at Mandi Mohalla and after going there, accused told that he has pledged one gold chain, one pair of ear stud and one ring and requested the owner of the shop to return those ornaments and Police have seized those ornaments under mahazar as per Ex. P-15 and those ornaments are MOs. 6, 8 and 9.

In the cross-examination, he has deposed that he has not seen any document regarding the sale and pledge of the gold ornaments. Police have told him that they have to get the statement of the accused. He does not know as to whom MOs. 6 to 9 belonged, but he denied the suggestion that the ornaments MOs. 6 to 9 were in the Police Station. He denied the further suggestion that the ornaments were taken from the Police Station to the shop of Sait (jeweler) and that there, the accused was made to stand and photo was taken.

PW-14 Rathanchand, who is the owner of the jewelry shop at Mysuru, has deposed that since 20 years he is running the jewelry shop under the name and style of Heera Jewelers nearby Mission Hospital, Mysuru; in his shop, he sells and purchases gold ornaments; he knows the accused present before the Court. In the month of February 2010 accused brought four gold bangles to his shop and told that he wanted to sell the bangles. He purchased them by paying Rs. 24,000/-; 2-3 days thereafter, the accused came along with Mandi Mohalla Police to his shop, Police asked him whether he has purchased gold ornaments from the accused, for which he agreed and produced four bangles before the Police; Police have seized the bangles under seizure mahazar Ex. P-21 and also have taken the photographs; Ex. P-21(b) is his signature. He identified four bangles, which are marked as MO.7 and the photographs Exs. P-22 and P-23.

In the cross-examination, he has deposed that 6-7 Police came along with the accused to his shop, as the Police asked him whether he has purchased gold ornaments from the accused and to give them, accordingly, he gave MO.7 bangles to the Police. It was the first time he has purchased the stolen articles. When accused sold MO.7 to him, at that time, he was not having any suspicion against the accused. He admitted as true that the gold bangles are looking like new ornaments. For purchase of MO.7 bangles, neither he has given any receipt

nor written anywhere. He has denied the suggestion that accused has not sold MO.7 and due to the pressure of Police, he himself has prepared MO.7 bangles and given to Police.

PW-16 C. Kiran Kumar, who is the Investigating Officer, has deposed in his evidence that on 21.12.2009 he received the memo for shifting Shivamma from Kaveri Hospital to K.R. Hospital. Then he visited the hospital and enquired with the doctor, who informed him that the injured is not in a position to give any statement. On 29.12.2009 he was informed that Shivamma, who was getting treatment in K.R. Hospital has expired at 6.00 p.m., hence, he visited the hospital; the memo, which he received in this regard, is marked as Ex. P-35. He has recorded the further statement of PW-1 Rajamma and on that basis, made a requisition to the Court to include the offence punishable under Section 302 of IPC in the case. He has further deposed that as Shreekanta and Suresh, who are the panch witnesses to Ex. P-5, have informed that they are having some other work and they have to go, hence, he issued notice and secured Guruswamy and Lingaraju (PW-9). The accused took them to Heera Jewellery shop and asked Ratan Chand Jain (PW-14) to produce four gold bangles, which he has sold in their shop for a sum Rs. 24,000/-; PW-14 admitting the same, produced four bangles before him and he seized the same under Ex. P-21 and photographs Exs. P-22 and P-23 were also taken; the gold bangles are marked as MO.7. He has further deposed that on 04.02.2010 he secured Guruswamy and PW-9 to the Police Station and the accused took himself and the panchas in their departmental jeep to the pawn broker shop of Keval Chand and identified Anil Kumar, who was in the shop and told that he has given one gold chain, one pair of ear stud and one ring for Rs. 37,000/-. Said Anil Kumar admitted the same and produced those ornaments, which were seized under Ex. P-15 in the presence of panch witnesses, the ornaments are marked as MOs. 6, 8 and 9 and photos are marked as Exs. P-16 and P-18. He has recorded the statement of Anil Kumar, Guruswamy and Lingaraju and also shown the seized gold ornaments to Rajamma and Mahadevappa and recorded their further statement.

In the cross-examination, he has deposed that in Ex. P-1 there is a mention about MOs. 6 to 9, but there is no mention about the design. He has not seized any documents from the Ghewarchand pawn brokers and Heera jewelers for the sale of MOs. 6 to 9. He has denied the suggestion that PW-2 Mahadevappa got prepared MOs. 6 to 9 newly and brought and produced before him in the Police Station.

12. We have perused the oral evidence of prosecution witnesses with regard to seizure of gold ornaments MOs. 6 to 9, Exs. P-15 and P-21 the seizure mahazars and Ex. P-36 the voluntary statement of the accused. We have also perused the decision relied upon by the learned counsel for the appellant-accused reported in Sirajuddin alias Siraj Vs. State of Karnataka, AIR 1981 SC 113 : (1980) CriLJ 1498 : (1980) 4 SCC 375 : (1980) SCC(Cri) 964 and considered the submission of the learned counsel for the appellant that the witnesses i.e., jewelry shop

owners, have not issued any receipt while pledging the gold ornaments into their shops. But looking to the materials on record so far as MO.7 bangles are concerned, it is the evidence of the prosecution witnesses that accused sold MO.7 bangles for Rs. 24,000/- and it is not a transaction of pledge. So far as ornaments MOs. 6, 8 and 9 are concerned, though it is a transaction of pledge, but the owner of the jewelry shop, who has been examined in this regard, has deposed in his evidence that as the receipt book was exhausted he has not issued the receipt and he has further clarified before the Court regarding the said transaction, he had mentioned in a piece of paper and asked accused to come on the next day of pledging to receive the same, but the accused did not turn up.

13. We also find that the evidence of owners of the jewelry shops was not seriously challenged during the course of cross-examination to show that they are deposing falsely. The evidence of jewelry shop owners i.e., PWs-8 and 14 is also supported by independent panch witness PW-9, and the evidence of the Investigating Officer (PW-16). Even looking to the cross-examination of all these witnesses, except making few suggestions that accused has not led them and the panchas to the jewelry shops and the gold ornaments were not produced at the instance of the accused, which suggestions have been denied by the witnesses, there is nothing on record to disbelieve the evidence of PWs-8, 9, 14 and 16 coupled with the documents Exs. P-36, P-15 and P-21.

14. We have perused the decision of the Hon'ble Supreme Court relied upon by the learned counsel for the appellant-accused. The facts and circumstances of the said case are not similar to the facts and circumstances of the case on hand; in the said reported decision it was not the evidence of owner of the jewelry shop that the receipt book was exhausted and that was the reason for not issuing the receipt in connection with pledge of ornaments, but in the case on hand, it is not so and there is a clear evidence of the prosecution witness that the receipt book was exhausted, so the receipt was not issued and in another transaction in respect of MO.7 bangles, it has come on record that it is a transaction of sale and not pledge. Therefore, these materials clearly show that it is the accused, who pledged MOs. 6, 8 and 9 in the shop of PW-8 for Rs. 37,000/- and sold MO.7 bangles into the shop of PW-14 for Rs. 24,000/-, hence, the contention of learned counsel for the appellant-accused that prosecution was not able to establish that accused at any time came into the possession of MOs. 6 to 9 gold ornaments, cannot be accepted at all, when PWs-8 and 14 have clearly deposed that it is the accused, who had been to their shops and pledged/sold the ornaments and in their cross-examination, nothing has been elicited from their mouth so as to disbelieve their evidence, which clearly shows that accused was in possession of these ornaments before pledging/selling into the jewelry shops.

The oral evidence of PWs-8 and 14 (the owners of jewelry shops), PW-9 the panch witness to both the mahazars under Exs. P-15 and P-21 and the evidence of IO clearly show that after the incident, the accused came into the possession of gold ornaments MOs. 6 to 9 and were pledged and sold into the shops of

PWs-8 and 14 respectively. It is not the defence of the accused that he was affluent enough so as to possess gold ornaments MOs. 6 to 9 and those ornaments belong to him. In the absence of such explanation from the accused, presumption will have to be raised that he came into the possession of those ornaments after robbing them by causing injuries to the deceased and after making her unconscious.

In this regard, we are also referring to the decision of the Apex Court reported Baiju alias Bharosa Vs. State of Madhya Pradesh, AIR 1978 SC 522 : (1978) CriLJ 646 : (1978) 1 SCC 588 : (1978) SCC(Cri) 142 : (1978) 2 SCR 594 : (1978) 10 UJ 93 , wherein their Lordships have laid down the proposition as under :

"Penal Code (1860), S. 300 - Murder and robbery - Unexplained possession of stolen property by accused - Presumption that accused committed the offences can be raised. (Evidence Act (1872), S. 114(a))."

15. The Trial Court has extensively considered the oral and documentary evidence regarding the recovery of gold ornaments at the instance of the accused and has rightly come to the conclusion that prosecution has established the offence punishable under Section 392 read with Section 397 of IPC. We don't find any illegality in the judgment and order of conviction with regard to the aspect of recovery of the ornaments and committing the offence punishable under Section 392 read with Section 397 of IPC.

16. With regard to circumstances relied upon by the prosecution for the recovery of MO.10-Iron rod and MO. 11-blood stained shirt of the accused is concerned, let us examine the oral and documentary evidence produced by the prosecution.

PW-7 G.S. Suresh has deposed in his evidence that on 03.02.2010 he was proceeding nearby Mandi Police Station, the Police called him and requested to act as panch witness. At that time, the accused before the Court was in the Police Station; said accused took them in the Police jeep to his house at Akbar road and with the help of the key, which he was having, opened the door and went inside the house, there was a heap of mud, old utensils, mats and from the heap of mud, accused took out one iron rod having blood stains and produced the same. In the corner of the said house there was one blood stained blue colour shirt, accused produced that shirt also, Police have seized them separately and seizure mahazar was drawn as per Ex. P-5, P-5(a) is his signature. One Shreekanta was also present with him. At that time photographs were also taken, which are marked as per Exs. P-6 and P-7. Six photos were taken inside the house of the accused as per Exs. P-8 to P-13, the negatives are at Ex. P-14. The iron rod is MO.10 and shirt is MO.11.

In the cross-examination, he has deposed that in Ex. P-10-photo iron rod (MO.10) was seen on the heap of mud and the accused was taking it out; in Ex. P-9, MO.10 is not seen. In the sharp edged portion of MO. 10, blood stains were seen. But he has deposed that, in his statement recorded by the Police, he has not stated that on the sharp edged portion of MO. 10 there are blood stains. He

has denied the suggestion that Police themselves have kept MOs. 10 and 11 in the said place and then they have taken the photographs. He has also denied the suggestion that at the instance of Police he is giving false evidence.

PW-16, the Investigating Officer, has deposed in his evidence in the examination-in-chief that on 03.02.2010 that when he was on beat duty along with his staff and as per the information furnished by the informer they were waiting at Race-Course, Mysuru, at about 2.00 p.m., at that time, the informer shown the person, who was coming towards the race-course, they apprehended him and enquired him about his name; he was in a perplexed mood and told his name as Thaheer Nissar; the accused before the Court is the same person. The accused was taken to the Police Station for interrogation; accused has admitted that he has committed the offence and given the voluntary statement as per Ex. P-36. He secured panch witnesses i.e., G.S. Suresh (PW7) and one P. Shreekanta and informed them about the voluntary statement given by the accused. PW-16 has further deposed in consonance with the evidence of PW-7. The mahazar is marked as Ex. P-5 and his signature is P-5(b), the photographs were already marked as per Exs. P-6 to P-13, iron rod is MO.10 and shirt is MO.11. In his cross-examination, he has denied the suggestion that he himself has planted MOs. 10 and 11 in the residential house of the accused.

MOs. 10 and 11 were referred to FSL for examination and prosecution has produced document Ex. P-37 wherein the serology report dated 18.05.2009 show that item Nos. 1 and 2 i.e., MOs. 10 and 11 are stained with human blood. The blood group of the bloodstains in items 1 and 2 could not be determined since the results of the test were inconclusive, so even looking to the serology report also blood group is not ascertained. This is a case based on circumstantial evidence and there are no witnesses, who have seen the accused using the iron rod (MO.10) while committing the offence and was wearing the shirt (MO.11). The evidence regarding the seizure of MOs. 10 and 11, incriminating materials, as against the accused, the Trial Court ought to have put this material regarding MOs. 10 and 11 to the accused while examining him under Section 313 of Cr.P.C, but no such specific questions were put to the accused about MOs. 10 and 11. In view of all these materials on record, we are of the opinion that prosecution has not satisfactorily established the seizure of MOs. 10 and 11 at the instance of accused. Therefore, the said materials cannot be relied upon.

17. With regard to the contention of the defence that, materials on record show that the offence committed is not punishable under Section 302 of IPC, but at the most it may be under Section 304-II of IPC is concerned, we refer to the evidence of doctors, who have attended the deceased.

P.W.10-Dr. Venkatesh Murthy has deposed in his evidence that on 29.11.2009 at about 3.45 p.m one Shivamma aged about 70 years was admitted to their hospital with the history of assault, earlier she was treated in the Mission Hospital at Mysuru. He noticed sutured wound measuring 4 to 5cm in length on the left side portion of the head, another sutured wound measuring 5 to 6cm on

the left side portion of the head, sutured wound measuring 4 to 5cm length on the back side of the head. With regard to the admission of said injured in their hospital, they issued intimation to Ashokpuram Police Station as per Ex. P-25.

In the cross-examination, he has deposed that, in the records, which he has maintained, he has not mentioned about the fracture of skull. If a woman aged about 70 years is assaulted forcefully with an object like MO. 10, definitely there will be fracture of skull bone. He has admitted that the injuries on the head portion of Shivamma are only injuries appears to be on the scalp. He also admitted the suggestion that, if an age-old woman's head came in contact with the wall and fell down, there is a possibility of sustaining the injuries as mentioned.

PW-11 Dr. B.S. Jayanti of K.R. Hospital has deposed in her evidence that on 21.12.2009 at 3.10 p.m. one Shivamma aged 70 years was admitted to their hospital with a history of assault; she was brought to their hospital from Kaveri Hospital and she was unconscious. PW-11 noticed the injuries on the head portion, which were already attended. They issued intimation to the Police as per Ex. P-26. In her cross-examination, she has deposed that she has not received any documents to show that Shivamma was subjected to surgery and she is not having any information that whether Shivamma was subjected to surgery or not. She has not issued any injury certificate. She has received only the discharge certificate of injured from Kaveri Hospital. On 7.12.2009 injured was admitted to Kaveri Hospital and there, on 10.12.2009 tricostomy was done to her.

PW-13 Dr. Vishwanath Kumar has deposed in his evidence that he was serving in Mission Hospital, Emergency Unit. On 29.11.2009 at 9.30 a.m. one Shivamma was admitted to their hospital with the history of assault; she was given first aid treatment and on the same day she got discharged from the hospital against the medical advice. She was having injuries on the head portion. He noticed that there was fracture of the skull bone on the left side of the head and there was internal bleeding and he has also noticed the swelling of brain matter. Ex. P.31 is the intimation letter issued from their hospital to the Police and Ex. P-32 is the document regarding the discharge of said Shivamma against the medical advice. In the cross-examination, he has deposed that, when he examined the injured, she was not responding to the treatment and she was not in a position to give any statement.

PW-12 Dr. Ravi N. has deposed in his evidence that on 30.12.2009 at 10.00 a.m. he received the dead body of Shivamma, aged 70 years, from Mandi Police Station for PM Examination; he conducted the PM examination and issued the PM Report as per Ex. P-27. He has further deposed that the cause of death of the deceased is due to Coma as a result of head injury sustained.

In the cross-examination, he has deposed that the injuries, which he has mentioned, are the bone deep injuries. He denied the suggestion that injury Nos. 1 and 2 cannot be caused by using MO.10. In Ex. P-27 at column No. 2, there is

no mention about the fracture on the skull portion of the deceased, it is because the bone in the said portion was taken out by conducting surgery, except the said portion from where the bone was taken out with surgery, in the remaining portion of the head, there was no fracture of the skull bone. He has deposed that the chances are very rare to suffer the similar type of injuries if a person's head is hit to the wall and falls down. He denied further suggestion that, the injuries, which he has mentioned in Ex. P-27 can be caused if a woman of age 70 years falls on the ground having hard surface.

18. We have also perused the decisions relied upon by the learned counsel for the accused. The materials clearly show that the death has taken place exactly after one month from the date of sustaining such injuries, materials also show that during the said period of one month, deceased Shivamma got treatment in different hospitals. To show the treatment taken from Kaveri Hospital, neither the Medical Officer from that hospital has been examined nor the documents like case sheet have been produced before the Court to show the nature of the treatment given to her, during which period she got treatment from the said hospital. The materials also show that there was formation of pus in the injuries. The PM report also shows that the larynx and trachea were intact and congested surgically made tracheostomy wound infected.

19. Considering these aspects of the matter and as the death has taken place after the prolonged period of one month after the incident, the learned counsel for the accused is justified in his submission that the offence comes under Section 304-II of IPC and not under Section 302 of IPC. In view of the oral and documentary evidence on record and the legal position clarified by the Apex Court in the decisions relied upon by the learned counsel for the accused, we conclude that the offence in question is punishable under Section 304-II of the IPC.

Hence, we proceed to pass the following:

ORDER

"a. The judgment and order of conviction dated 21.06.2011 passed by the I Addl. Sessions Judge, Mysuru in S.C. No. 139/2010 for the offence punishable under Section 302 of IPC is hereby set-aside.

b. Appellant-accused is convicted for the offence punishable under Section 304-II of IPC and he is sentenced to undergo imprisonment for a period of ten (10) years and also to pay a fine of Rs. 20,000/- and in default of payment of fine amount he has to further undergo imprisonment for a period of two (2) years for the said offence.

In case, if the fine amount is realized, Rs. 15,000/- is to be paid to P.W.2-Mahadevappa, the son of the deceased, by way of compensation under Section 357(3) of Cr.P.C

c. The judgment and order of conviction dated 21.06.2011 passed by the I Addl.

Sessions Judge, Mysuru in S.C. No. 139/2010 for the offence punishable under Section 392 read with Section 397 of IPC and sentencing the accused to undergo rigorous imprisonment for a period of seven (7) and to pay a fine of Rs. 5,000/- and in default of payment of fine amount accused has to undergo further rigorous imprisonment for a period of one year stands confirmed and remains unaltered.

d. The above sentences shall run concurrently.

e. The accused is entitled to benefit of set-off of the custody period which he has already undergone, as per Section 428 of CR.P.C."

Accordingly, the appeal is allowed-in-part and the judgment and order of conviction of the Court below is modified.