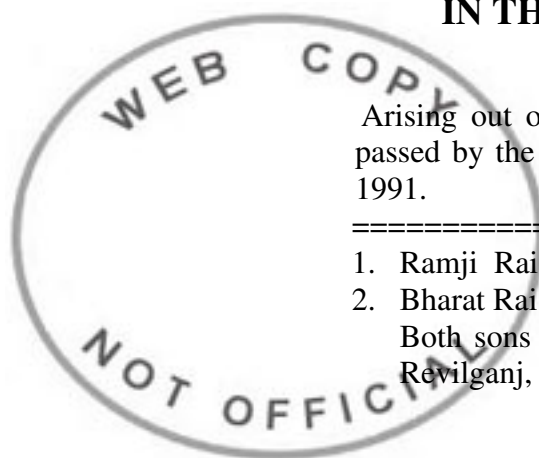




IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No. 308 of 1992

Arising out of judgment of conviction and order of sentence dated 25.06.1992 passed by the learned Sessions Judge, Saran, Chapra in Sessions Trial No. 69 of 1991.

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- 1. Ramji Rai
 - 2. Bharat Rai (Appeal abated as against appellant no. 2 vide order dt. 19.12.2014)
Both sons of Ram Eashure Rai, R/o Village Newajee Tolla Dharmshala, P.S. Revilganj, District Saran

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance:

For the Appellant/s: Mr. Gyan Prakash and
Mr. Sharwan Kumar, Advocates.

For the Respondent/s: Dr. Mayanand Jha, A.P.P.

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CORAM: HONOURABLE SRI JUSTICE DHARNIDHAR JHA
and
HONOURABLE SRI JUSTICE AMARESH KUMAR LAL

ORAL JUDGMENT

(Per: HONOURABLE SRI JUSTICE DHARNIDHAR JHA)

Date: 05-01-2015

The appeal was initially presented by two appellants - Ramji Rai and Bharat Rai. The latter appellant was reported dead and we, by our dated 19.12.2014, found that the appeal of Bharat Rai, on account of his death, has abated. Thus, the present appeal survives only on behalf of appellant no. 1 Ramji Rai.

2. The two appellants were put on trial by the learned Sessions Judge, Saran at Chapra after being indicted of committing



offence under Sections 302/34 of the Indian Penal Code in Sessions Trial No. 69/1991. In view of joint charge, the deceased-appellant Bharat Rai has also been charged under Section 302 read with Section 109 of the Indian Penal Code, but appears not held guilty of committing that offence as the learned Sessions Judge handed out the judgment of conviction and order of sentence to the two original appellants on 25.06.1992 holding both of them guilty of committing the offence, they had been charged with, and after hearing them on sentence, on the same day, i.e., 25.06.1992, each of the two appellants was directed to suffer rigorous imprisonment for life.

3. As we pointed out at the very outset of the present judgment, the two convicted accused preferred this appeal before this Court to challenge the judgment of conviction and order of sentence which was passed against them.

4. The prosecution narration emanates from Ext.1, Fardbeyan of P.W.1, Raj Kumari, who happened to be the wife of Vikrama Rai, the deceased of the case. The statement of P.W.1 was recorded at Town Police Station by an officer of Revilganj Police Station within whose jurisdiction the occurrence had taken place. The narration was that PW1 along with the deceased Vikrama Rai, her son Binod Rai (PW2) and the younger brother of the deceased named Bhola Rai (PW3) had set out from their houses to go to Chapra, to



some market place, for purchasing vegetables. Saryu river intervenes the way to Chapra from Village Newajee Tola Dharmshala and it required a boat for crossing the river. It appears undisputed that the boat was being run from one bank to the other bank of the river on charges by the two accused persons. The deceased had boarded the boat when the two accused persons came there and forbade the deceased to board it. The deceased questioned as to why he be forbidden to board the boat, which led to an altercation between the accused persons and the deceased, upon which, it was alleged, the deceased accused Bharat Rai caught the deceased and put him down into the boat, whereafter the present appellant Ramji Rai is said to have pulled out a Chhura and to have given a blow with it, just below the neck on the back of Bikrama Rai. The informant stated that she raised a hue and cry, and persons, who had already boarded the boat, by and by, started coming out of it.

The deceased died in the very boat itself, who was brought to Chapra Town Police Station, but because, as noted above, the occurrence had taken place within the jurisdiction of Revilganj Police Station, the Officer-in-charge of Town Police Station, Chapra informed his counterpart in Revilganj Police Station, as a result of which, an officer from Revilganj Police Station came and recorded Ext.1, the Fardbeyan of PW1.

5. It appears stated in the Fardbeyan that the occurrence had taken place on account of some brotherly dispute or ill-will which was existing between the deceased and the accused persons.

6. On the basis of Ext.1, the FIR of the case (Ext.4) was drawn up by the Officer-in-charge of Revilganj Police Station and it also appears from Ext.3 (inquest report) that inquest proceedings was also held by one of the officers in the premises of Town Police Station, Chapra as appears from paragraph 3 of the inquest report. No doubt in it that the corpse, after completion of the inquest proceedings, was dispatched to the hospital for facilitating autopsy on the dead body, and that appears held by P.W.4, Dr. Arvind Kumar Gupta, who found the following ante-mortem injuries on the dead body of the deceased Vikrama Rai:

(i) One penetrating wound about 1.1/4" x 1/2" x chest cavity deep on upper part of the back, just below neck towards left side passing downward and forward.

(ii) After cutting open the thoracic-abdominal cavity, the thoracic cavity was filled with blood and further found the left lung punctured on its left side and ascending aorta was also found cut.

In the opinion of PW4, the above injuries were caused by some sharp cutting pointed weapon, might be a dagger, and were sufficient in the ordinary course of nature to cause death. PW4 further

opined that the death would have resulted in 12 - 24 hours of holding post-mortem examination by the doctor.

7. The Investigating Officer has not been examined and, as such, we do not have evidence available to us as to how the investigation was carried out. But, what appears is that the two accused persons were sent up for trial as the police had found sufficient material appearing against them in that behalf and the trial had resulted in the impugned judgment.

8. The accused persons did not take any specific defence. It appears that they were probably still brooding over as to how to set up their defence and were merely suggesting to the informant (PW1) that no occurrence in the manner, as was stated by her, had taken place and further that the accused persons had falsely and wrongly been implicated in commission of the offence. While cross-examining PW3, who happens to be the brother of the deceased, it appears that the defence was contemplating a different story to be set up, but was probably not mustering sufficient courage to suggest a forthright story to PW3 and was merely making a reference to one Gopi Rai of Karinga and was putting a question to PW3 as to whether he was an accused in a trial for his murder and thereafter could not proceed further as to what could be an alternative defence story.

9. However, while hearing the present appeal, Sri Gyan



Prakash, learned counsel appearing on behalf of the appellants, was mainly taking us to the oft-addressed submissions of witnesses having contradicted each other on material parts of the prosecution story. Submission also was that even accepting the prosecution evidence to be trustworthy, no motive was alleged by the witnesses in their evidence and no evidence was led by the prosecution to suggest that it could be a pre-planned murder, committed by the accused persons. The other submission, in the above connection, was that initially there was an altercation, which led to a scuffle, as a result of which, the deceased was put into the boat and was stabbed by appellant Ramji Rai, but that story also does not indicate that any one was instigating accused Ramji Rai to kill the deceased. It was, as such, suggested to us that the facts of the case may not constitute an offence under Section 302 of the Indian Penal Code and they might constitute an offence under Section 304, Part-II of the Indian Penal Code.

10. Dr. Mayanand Jha, learned Additional Public Prosecutor, was replying to the submissions of the learned counsel for the appellants as regards situation of the houses and placing of the dead body and was submitting that the evidence of witnesses was so clear as to not leave any doubt that it was exactly the house, either of Ramji Rai or of Bharat Rai, where the dead body had been placed; rather it could be somewhere near the house where the same had been



placed on a cot, later to be carried out to Chapra and, as such, it could not be creating a material contradiction or a substantive defect in the prosecution case, meriting the rejection of the prosecution evidence. Dr. Jha submitted that the evidence was consistent and there was no contradiction brought on the record, which could materially affect the evidence of the three witnesses, and further stated that the substance of contradiction or the improvement in the evidence of the witnesses does not weaken the prosecution case on account of non-examination of the Investigating Officer.

11. While addressing his arguments, the learned counsel appearing for the appellants was bringing into our notice some minor details which crept in the evidence of the witnesses. PW1, the informant of the case, had stated that the dead body of her husband Vikrama Rai was placed at the Darwaja of Bharat Rai, whereas her son, PW2 Binod Rai, who was a child merely of eight years on the date of occurrence, had pointed out to the court that the dead body was placed near the house of Ramji Rai. It was contended by the learned counsel for the appellants that it was a material contradiction, warranting rejection of the evidence of the two witnesses as they might not have been present at the scene of the occurrence. The other fact, which was submitted by the learned counsel for the appellants, was that the lady informant (PW1) stated that she did not see as to in

which direction the accused persons ran away; whereas PW2, her son had stated that the two accused persons had run away with the boat towards East. These are two aspects of the evidence of PWs 1 and 2, upon which, the learned counsel for the appellants had been very stringent and had requested us to reject the evidence of the two witnesses.

12. We refer to some of the observations of the Supreme Court as regards appreciation of the evidence, especially when it comes from witnesses, who hail from rural background. The Apex Court speaking through Hon'ble Sri Justice V.R. Krishna Iyer in **Shivaji Sahebrao Bobade and another Vs. State of Maharashtra**, reported in AIR 1973 SC 2622, observed as follows:

“8. Now to the facts. The scene of murder is rural, the witnesses to the case are rustics and so their behavioural pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. When scanning the evidence of the various witnesses we have to inform ourselves that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony provided there is the impress of truth and



conformity to probability in the substantial fabric of testimony delivered. The learned Sessions Judge has at some length dissected the evidence, spun out contradictions and unnatural conduct, and tested with precision the time and sequence of the events connected with the crime, all on the touchstone of the medical evidence and the post-mortem certificate. Certainly, the court which has seen the witnesses depose, has a great advantage over the appellate Judge who reads the recorded evidence in cold print, and regard must be had to this advantage enjoyed by the trial Judge of observing the demeanour and delivery, of reading the straight forwardness and doubtful candour, rustic naivete and clever equivocation, manipulated conformity and ingenious untruthfulness, of persons who swear to the facts before him. Nevertheless, where a judge draws his conclusions not so much on the directness or dubiety of the witness while on oath but upon general probabilities and on expert evidence the court of appeal is in as good a position to assess or arrive at legitimate conclusions as the court of first instance. Nor can we make a fetish of the trial Judge's psychic insight."

The above judgment in **Shivaji Sahebrao Bobade** was referred to in yet another decision of the Apex Court in **State of U.P. Vs. Krishna Gopal and another**, reported in AIR 1988 SC 2154, and we are tempted to quote the following part of Paragraph 13 of the

judgment, which are germane and relevant for the present purposes.

“It is trite that where the eye-witnesses’ account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bantham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eye witnesses’ account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts the ‘credit’ of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.

A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to ‘proof’ is an exercise particular to each case. Referring to of probability amounts to ‘proof’ is an exercise the inter-dependence

of evidence and the confirmation of one piece of evidence by another a learned author says: (See “The Mathematics of Proof II” : Glanville Williams : Criminal Law Review, 1979, by Sweet and Maxwell, p. 340 (342).

“The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A juror may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions, and guilty rather than innocent people who run away, the two doubts are not to be multiplied together. The one piece of evidence may confirm the other.

“Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable

doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common-sense. It must grow out of the evidence in the case.

The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimisation of trivialities would make a mockery of administration of criminal justice.”

13. Thus, merely because there could be some difference in the evidence of witnesses, the probability has yet to be searched as may be appearing from the evidence of witnesses, divorcing the hang over that the prosecution case suffers from any material doubt. The courts have to appreciate the evidence on the scale of probability and reasonableness and, if it appears that the evidence was as reasonable as to making it highly probable so much so that it is free from all reasonable doubt, the prosecution case has to be held proved and

charges established.

The evidence of PW1, of course, was that the dead body of her husband was recovered from the boat and it was put on a cot and was placed at the Darwaja, i.e., at the house of Bharat Rai, as against the above evidence, PW2 (son of PW1) stated that the dead body of his father was placed near the house of Ramji Rai. The details of houses were not given by PW1. In fact, the defence did not put any question so as to elicit the details as regards the situation of houses of Ramji Rai and Bharat Rai and it was put only to PW2 Binod Rai, as may appear from his evidence at paragraph 3 of his deposition, that the two Marais (jhoparis or huts) were situated side by side and both were facing East. The Marai, which was situated near the Marai of Bharat Rai, was in occupation of Ramji Rai. The place where the altercation had started was also very near. It was only at a distance of four steps, i.e., at about 12 feet that the accused had altercated with the deceased. The distance between the two Marais, which were in occupation of the two accused, was also only five steps. The description of the place, as appears from paragraph 3 of the evidence of PW2, makes it unquestionably clear that it was the river bank and the houses were situated just by the side of the river so much so that the house of the deceased was also in the same line of the houses or the Marais, which were in occupation of the accused persons. A river



bank is not a demarcated or hedged place where one could describe about one particular Marai exclusively belonging to one particular person. The very evidence of PW2 also indicates that in spite of the houses or Marais being situated at the river bank, it was an open place and, if one could have perceived that the dead body had been placed at the Darwaza of Bharat Rai, the other witnesses had perceived it to be kept near the house of Ramji Rai. Keeping the dead body on a cot near the house or Marai of Ramji Rai does not in unqualified terms indicate that it was at his Darwaza or at his house; it was merely near the house of Ramji Rai, may be, that it could be also or almost at the house of Bharat Rai or near his house. Criminal trials are not decided by such trivial / small contradictions; which are to be accounted - only when they are materially affecting the material part of the prosecution story. Contradictions also are those which show an improvement purposefully introduced by the prosecution in the most material part of its story so as to taking advantage of the improved evidence. It does not appear a case of that class. It was merely an expression of perception of a particular set of things or existence of a structure or placing of the dead body on or around that place and we cannot make hair-splitting so as to rejecting the prosecution story by considering these trivial matters.

Likewise, the submission was also on the span of time

stated by the witnesses as regards the shifting of the dead body from Saryu river to Chapra. PW1 stated that it was after three hours that the dead body of her husband was shifted to Chapra whereas PWs 2 & 3 both stated that it was after two hours of the murder of Vikrama Rai that the dead body was shifted to Chapra.

14. We again refer to **Shivaji Sahebrao Bobade** (Supra) to point out, as was held by the Apex Court in paragraph 11, at page 2629 of the report, that **even urban folk make mistakes about time when no particular reason to observe and remember the hour of minor event like taking a morning meal existed.** We have already noted in context to the evidence regarding placing of the dead body that personal perceptions may vary as regards time, as regards place and even as regards the distance from witness to witness. Criminal trial is not measured in centimeters and feet. They are measured in probability, and when we measure the probability, we measure probability of the manner of occurrence and not the matter on the fringes, as was noted and highlighted by the Supreme Court in **Shivaji Sahebrao Bobade** (Supra).

15. As regards the material part of the prosecution case, the witnesses appear consistent, except one criticism, which was targeted against PW3. Both PWs 1 & 2, mother and son amongst themselves, stated that they had embarked from their house with the



deceased Vikrama Rai for going to Chapra for purchasing vegetables and a few needed clothes. What was stated by PW 3 was that by the time he had reached the river bank, neither PWs 1 & 2 nor the deceased was there; it was only some time after that the three arrived there. It was attempted to make out that the prosecution story that the deceased, PWs 1, 2 and 3 had started from their houses for Chapra was not corroborated by PW 3. We again do not see any reason to accept the submission because the very prosecution story, which was contained in Ext. 1, the Fardbeyan of PW 1, was not stating as to who had started from which place – whether PWs 1 and 2 and the deceased had started by taking into their company PW 3. This is not the prosecution story. If this is not the prosecution story then could we reach to or bring in some other story, which was never stated by the informant? We cannot. The consideration of the evidence for appreciating the probability convinces us that PW 3 was not telling a lie and, on that account, we cannot hold PWs 1 and 2 liars, because the three witnesses do not state that they had started from one particular place. It is evident from the very evidence of PW3, which goes unchallenged, that the deceased, who was the full brother of PW 3 had long been separated from him and the two had their separate establishments and houses. They were people of a very humble background, not having even an inch of land cultivable or otherwise



of their own. They probably were dependant on some other means of livelihood. Life itself is a chance. The witnesses were, as appears from their evidence, going to Chapra on that day and they had reached the bank of river almost at one point of time, also appears per chance. As such, the individual story of PW3 could not be taken into account to reject the evidence of PWs 1 and 2; rather what we find, after considering the evidence of the three witnesses side by side, is that the probability is not unusual that the deceased and PWs 1 and 2, who were members of their respective one-unit-family had come together while PW3 had come ahead of them. The purpose of their coming was the same, that is to say, to go to Chapra for making some purchase of vegetables or of some clothes. On a consideration of the evidence of PWs 1, 2 and 3, what we could find was that a thread of truth ran consistently through their evidence and not a single fact could be brought on record through cross-examinations of these three witnesses which could make their evidence not meritorious. They appear to be trustworthy, especially when PW3 had stated that they were descendants of common stalk. They did not have any ill-will nor was there any reason for the three witnesses, i.e. PWs 1, 2 and 3 to settle a score. They appear to us narrating the truth. We are accepting them, as was accepted by the trial court, as trustworthy witnesses.

16. One of the most important arguments, which was



addressed to us, was that the evidence of PW4 Dr. Arbind Kumar Gupta, who held post-mortem examination, indicating as if the injury which had been found by him on the dead body might be possible only when the deceased was standing and the blow was given to him in that position. In this context, the evidence of PWs 1, 2 and 3 was also referred to us, who were consistent in stating that after the altercation, a scuffle ensued between the two accused and the deceased, and co-accused Bharat Rai put the deceased down into the boat when appellant Ramji Rai gave a blow with a knife or a Chhura, as the case may be, on the back part of the neck as a result of which he started bleeding and subsequently died. Submission was that the very oral testimony of the three witnesses was completely belied by the opinion of the PW 4 Dr. Arbind Kumar Gupta. We have already extracted above the relevant part of the judgment in **Shivaji Sahebrao Bobade** (Supra) *in extenso*. We want to point out by referring to the extracted part of paragraph 11 of the report that the Supreme Court was cautioning the courts not to abandon a scientific attitude to medical science if it is not to be guilty of judicial superstition. What we want further to add to the above report of the Apex Court is that in appreciating the evidence, it could not be cut and dried formula as a mechanical approach to such appreciation may result in taking a view which could be subverting the course of justice. We have to imagine a



situation which emerges out of the oral evidence and, thus, to appreciate the medical opinion regarding the manner in which the injury could have been inflicted. It is true as appears from the evidence of PWs 1, 2 and 3 that the deceased had definitely been put down into the boat when the solitary fatal blow was given to him in the back of his neck. If a man was lying in the boat and the other man, his assailant, was giving a blow with a knife or a dagger, as the case may be, then the assailant must not be in a standing position to succeed in giving the blow. He shall have to bend down and bring him in such a position as to ensure that the blow fructifies into the desired result. In such a position, which could have existed between the deceased and his assailant, appellant Ramji Rai, the court has always to have a view that Ramji Rai must have been in a bending-position so as to ensure landing of the blow at the place he was intending to land it. He must not have remained in standing position because the man, whom he was trying to assault, was down on the surface of the boat. If we imagine the situation of the deceased lying in the boat and appellant Ramji Rai bending down to give the blow, we could better appreciate as to why only two injuries, which were found by PW 4, were going downward and forward. That particular opinion of PW 4 indicates the direction of the blow, which was given, and the further direction of the weapon when it pierced into the body of the deceased,



which was the reason that not only the top part, that's, the apex of the lung on the left side was cut, rather the main aorta was also cut, leading both to respiratory failure and cardiac arrest due to excessive bleeding, which was caused by cutting of the aorta. The opinion of Dr. Arbind Kumar Gupta, PW 4, in our opinion, does not falsify the oral evidence, rather it appears in consonance with the oral evidence that the blow had been given to Vikrama Rai when he had fallen down into the boat after being put down by the deceased accused Bharat Rai.

17. After having said the above, we come to consider the contention of the learned counsel for the appellants as regards the constitution of the offence under the facts of the case. It is true that the motive, if alleged, has to be proved like any other fact so as to satisfying the judicial conscience that the accused was indeed impelled by a particular reason to commit the offence, but while considering the evidence of the three witnesses, we found that there was no motive stated as to why the deceased had been assaulted and killed. There was a fracas or altercation between the deceased and the two accused on the issue of not allowing the deceased to sail through the river on the boat, which was owned and possessed by the accused persons. The deceased might have been justified in asking the accused persons to take him across the river to the other bank of it by



accepting whatever payment they required the deceased to pay and it might have been unjustified on the part of the accused persons to refuse to take the deceased across the river. But, that in itself could not be emerging as a serious motive to the accused persons for committing the offence. Not only the above, it does not appear that the accused persons had prepared themselves due to any particular reason to assault the deceased or to commit his murder. At the point of repetition, we want to recall and note that only because the accused did not to take the deceased across the river had turned into an altercation and subsequently into a scuffle that it had flared up to such an extent that the deceased was caught by Bharat Rai and was put down on the floor of the boat when appellant Ramji Rai had given the blow. It was a solitary blow. There is no evidence that anyone was remonstrating or had remonstrated appellant Ramji Rai to kill the deceased. Thus, what we find is that there appears lack of intention to commit murder. However, there might still be the knowledge to the appellant, who has to be presumed to be a reasonable man, that the act, which he was committing, must be as dangerous as to cause death of the deceased as the act was definitely voluntary. There is lack of evidence that the blow could have been known to the accused to be as serious as, in all probabilities, to have caused death of the deceased. In other words, what we mean to note is that the evidence does not

indicate that the assailant had either intended to cause the death of Vikrama Rai or had known his act to be as dangerous as in most probability was to cause death of the deceased. In our view, it was not a case which could be covered by Section 302 of the Indian Penal Code, rather the facts may constitute an offence under Section 304 Part II of the Indian Penal Code.

18. We, accordingly, convict appellant Ramji Rai under Section 304 Part II of the Indian Penal Code, and considering the facts and circumstances of the case, direct him to suffer rigorous imprisonment for ten years. Appellant Ramji Rai is on bail. He shall surrender to his bond before the court below to serve out the sentence awarded to him.

19. The appeal, with the above modification in the judgment of conviction and order of sentence, is dismissed.

(Dharnidhar Jha, J.)

(Amaresh Kumar Lal, J.)

Dilip / V.K.Pandey.

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