IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 86 OF 2001

Syed Tajoddin S/o. Syed Rehman,
Age : 35 Years, Occ : Agriculture,
R/o Islampura, Pachod, Tq. Paithan,
Dist. Aurangabad.

...APPELLANT

VERSUS

The State of Maharashtra

...RESPONDENT

...

Mr.N.S. Ghanekar, Advocate for the appellant.
Mr.S.J. Salgare, APP for respondent/State.

...

CORAM: S.S. SHINDE AND
S.M. GAVHANE, JJ.

DATE OF RESERVING JUDGMENT : 29TH JUNE,2017.

DATE OF PRONOUNCING JUDGMENT: 17TH JULY, 2017.

JUDGMENT [PER S.S. SHINDE, J.]:

This appeal is directed against the judgment and order dated 22nd February, 2001, passed by the Sessions Judge, Aurangabad in

Sessions Case no. 298 of 2000, thereby convicting appellant (original accused no.1) for the offence punishable under Section 302 of the Indian Penal Code (for short "I.P. Code").

2. The prosecution case in nut-shell, is as under:-

(A) Sangita Madhukar Manmode (now deceased) was a resident of Kalyan Nagar, Pachod, Tq.Paithan. She had three daughters and was earning her livelihood by doing manual work. She had illicit relations with accused no.1 Tajoddin, who is resident of Islampura, Pachod, Tq.Paithan. About six months prior to her death, she had given an amount of Rs.8000/- to accused no.1 for purchase of land. At that time, accused no.1 assured her that he would purchase the land in her name, but accused no.1 spent that amount without purchasing any land.

(B) On the day of incident i.e. on 28th February, 2000 at about 8 or 8.30 a.m., Sangita went to the house of accused no.1 and demanded the amount of Rs.8000/-, which she had given to him for purchase of land. At that time accused no.1 abused and also threatened her that, if she would demand the money again, he would kill her by setting her on fire. Thereupon, she told him that she would not leave his house unless the amount was paid. Thereafter, he brought kerosene from the house and poured it on her person and set her on fire. masses

(C) At the time of incident, accused no.2 i.e. the wife of accused no.1 Tajbee was also present there and she also abused Sangita. When Sangita was burning, neighbours Salim Bagwan and others came there and extinguished the fire and took her to Government Hospital, Pachod for medical treatment.

(D) Dr. Rajput, the Medical officer (PW-5) working at Rural Hospital, Pachod, admitted Sangita in the Hospital and examined her. He found superficial deep burn injuries to the extent of 100%. He immediately started treatment and informed police at 8.30 a.m.

(E) P.S.I. Chakre (PW-9) went to the hospital and recorded statement of Sangita and obtained her toe impression, as she was totally burnt. He also obtained the signatures of the doctor on the said statement, which is treated as first information report. He thereafter registered the first information report bearing C.R.No.14 of 2000 under section 307 of I.P. Code against the accused. He then went to the place of incident and recorded statements of the witnesses. On the very same day at about 3 p.m. Dr. Rajput informed about the death of Sangita. Then he registered offence under section 302 of I.P. Code. The inquest panchnama was drawn and the dead body of Sangita

was sent for postmortem examination. Thereafter, Dr. Rajput, Medical Officer performed the postmortem on the dead body. The Medical Officer opined that Sangita's death was caused due to cardio respiratory arrest due to shock due to 100% superficial deep thermal burns.

(F) During the course of investigation, API Chakre recorded statements of the witnesses, including mother of the deceased. He arrested accused on 18th March, 2000. The pieces of burnt Sarees found at the place of incident were sent for chemical analysis. Search of house of deceased Sangita was taken in presence of panchas, but nothing useful was found. Chemical Analyzer in his report stated that kerosene residues were found on the earth along with synthetic molten hard masses of cloth pieces of the deceased. After completion of the investigation, the charge-sheet came to be filed before the Judicial Magistrate First Class, Paithan on 24th March, 2000.

(G) As the offence under section 302 of I.P. Code is exclusively triable by the Court of Session, the Judicial Magistrate First Class, Paithan committed the case to the Sessions Court.

(H) The learned trial Court framed the charge against both the accused under section 302 read with 34 of the I.P. Code The said charge was read over and explained to the accused. They pleaded not guilty and claimed to be tried.

(I) The prosecution in order to prove the guilt of the accused has examined in all eleven witnesses.

3. After recording the evidence and conducting full fledged trial, the trial Court convicted appellant (original accused no.1) for the offence punishable under Section 302 of the I.P. Code and sentenced him to suffer imprisonment

for life and to pay fine of Rs.500/-, in default of fine amount, to suffer rigorous imprisonment for three months. Hence this Appeal by the appellant/ original accused no.1.

4. Learned counsel appearing for the appellant submits that, the present case is only based upon the circumstantial evidence in the form of dying declaration and there is no direct evidence. It is submitted that, there are variance in the dying declaration, namely, at one place deceased Sangita alleged that the appellant poured kerosene and set her on fire, and in second breath she alleged that, the appellant and his wife both poured kerosene on her person and set her ablaze. Therefore, there are contradictions in her version in the dying declaration. It is submitted that, the contents of the dying declaration are required to be taken as a whole and the prosecution can not pick and choose some part of it to make out a case against the accused. It is submitted that, if

there are two dying declarations with some contradiction about pouring of kerosene and setting the deceased on fire, then dying declarations would have no value, however, in the present case, the contradictions are appearing in the same dying declaration and therefore, the same ought to have been discarded. It is submitted that, the Investigating Officer (P.W.9) in his deposition has stated that, he obtained the signature of doctor on the statement of deceased after he recorded her statement. Therefore, this shows that, no endorsement of doctor was obtained prior to recording of dying declaration. It is submitted that, the Medical Officer Dr. Rajput (PW-5) did not state in his deposition about giving endorsement and in such circumstances, the endorsement on the dying declaration is not proved. It is submitted that, the case of the prosecution is that, deceased Sangita sustained 100% burns and died on the same day, therefore, it is doubtful whether, deceased Sangita was in a

position to give the dying declaration. So also the toe impression on dying declaration (Exhibit-31) is not attested. It is also submitted that, the Investigating Officer (P.W. 9) has in his evidence does not state that, he read over the statement to Sangita and she admitted it to be true and correct, and therefore, his evidence cannot be believed and the same may be discarded.

5. Learned counsel appearing for the appellant submits that, the dying declaration is disbelieved to the extent of accused no.2, and therefore, there is no reason to accept the same in order to convict accused no.1/appellant. It is submitted that, as per the spot panchnama, there is no kerosene Can found on the spot and so also the spot of incident is a veranda of the house of the appellant, that means, it is in an open space. He further submitted that, there are houses surrounding the spot of incident, but there are no eye witnesses to the said incident, who have been

examined by the prosecution. It is submitted that, the relatives and neighbourers, who are examined as PW-2, PW-3, PW-4, PW-7 and PW-8, they did not support the case of the prosecution. It is submitted that, though Dr. Rajput (PW-5) has stated in his deposition about the history given by patient of homicidal burns, however, no such entry is taken by the said doctor and in absence of any such entry or noting about history, it is difficult to believe the oral testimony of doctor. Even in the M.L.C. forwarded to Police Station, there is no reference about any history or homicidal burns. It is submitted that, the accused immediately after the incident had tried to extinguish the fire and in that, he sustained 14% burns, and therefore, the conduct of accused in extinguishing the fire and admitting her in the hospital shows his innocence. It is submitted that, it is highly improbable that deceased will not shriek or run away from the spot when the accused brought kerosene Can, poured the kerosene

on her person and set her ablaze. The deceased had opportunity to run away, to shout and to save herself. Therefore, the story of prosecution that she stood still at one place, allowed accused to pour kerosene and set her on fire, is highly improbable. On the other hand, the story of the accused is that because of the quarrel when accused went inside his house and when he heard cries came out and saw deceased inflames is quite probable. It is submitted that, if the accused would have done act as alleged, definitely eye witnesses would have been there. It is submitted that, when the case is based upon circumstantial evidence, the motive is important circumstance and no evidence is produced on record by the prosecution stating that the deceased gave accused an amount of Rs.8000/- to purchase land and on the day of incident, she came to demand the said amount and due to anger, the appellant had committed act as alleged by the prosecution. Therefore, the motive alleged is also very weak.

6. Learned counsel appearing for the appellant in support of his contention that, if the dying declaration does not inspire confidence, and if there is no endorsement at the beginning of recording of the dying declaration, the same deserves to be discarded, has placed reliance on the reported judgment of the Supreme Court in the case of **Kashi Vishwanath V/s State of Karnataka**[1], reported judgment of Bombay High Court bench at Nagpur in the case of **Jitendra @ Balu Uttamrao Nagrale V/s State of Maharashtra**[2], Bombay High Court bench at Goa in the case of **Sunder Gounder S/o Sanmugam Gounder V/s State of Goa**[3], unreported judgment of Bombay High Court at Principal Seat in the case of **Ramija Ayyub Bagwan V/s State of Maharashtra (in Appeal No.860 of 2003, decided on 6th September, 2007)** and the unreported judgment of this Court in the case of **Vishnu S/o Asaram**

1 2013(4) Bom.C.R. (Cri.) (S.C.) 68
2 2017 All M.R. (Cri) 752
3 2015(1) Bom.C.R.(Cri.) 289

Kanade V/s State of Maharashtra (in Criminal Appeal No.422 of 2014, decided on 23rd August, 2016) and submits that, the appeal deserves to be allowed.

7. On the other hand, learned A.P.P. appearing for the respondent/State invites our attention to the findings recorded by the trial Court and submits that, Jaykumar Rajaram Chakre (PW-9) recorded the statement of Sangita Madhukar Manmode (now deceased). It is submitted that, he in his evidence has in detail stated the manner in which the statement of deceased Sangita was recorded and also his evidence in cross examination remained unshattered. It is submitted that, Dr. Ganeshsing Rupchand Rajput (PW-5) in his evidence has categorically stated that, the patient herself has stated history of alleged burnt that, the appellant poured kerosene on her person and set her ablaze. The Medical Officer is an independent witness and he had no reason to

falsely implicate the appellant in the alleged incident. He invites our attention to the evidence of Investigating Officer as well as the Medical Officer and submits that, their evidence inspire confidence. The prosecution successfully proved the dying declaration beyond reasonable doubt. Admittedly, the spot of incident was veranda in the house of the accused. The house of deceased Sangita is far away from the house of the accused. There was no question of having any kerosene Can with her at the relevant time. There are witnesses, who have stated that, they heard the cries of Sangita and went to the spot of incident. He further invites our attention to the incriminating articles recovered from the spot and also the inquest panchanama and submits that, the findings recorded by the trial Court deserve to be confirmed.

8. We have given careful consideration to the submissions of the learned counsel appearing

for the appellant and the learned A.P.P. appearing for the respondent/State. With their able assistance, we have perused the entire evidence on record, so as to find out whether the findings recorded by the trial Court are perverse or otherwise.

9. Upon careful perusal of the evidence brought on record by the prosecution, the spot of incident is proved by the prosecution beyond reasonable doubt. From perusal of the spot panchanama and also the seizure panchanama, it appears that, the incriminating articles were recovered from the veranda of house of appellant. We have carefully perused the spot panchanama. It is stated in the said spot panchanama that, the spot of incident is the veranda of the residential house and at the said place, Sangita W/o Madhukar Manmode was found lying in burnt condition. There was kerosene smell on the spot. The pieces of clothes in burnt condition, one small box (Tait)

of copper in burnt condition, a piece of broken bangle and one yellow colour bead, were found on the spot. It is true that, the witnesses PW-1 Anil Nathrao Jagtap, PW-2 Babasaheb Laxman Manmode, PW-3 Shaikh Salim Sk. Chand and PW-4 Shaikh Ayub Shaikh Hasan were declared as hostile, however, before they were declared hostile, they stated in examination-in-chief that, they saw Sangita lying on the road infront of the house of the appellant. Therefore, one thing is clear that, the incident had taken place at the house of appellant. It is true that, they have also stated that, they saw the accused/appellant while trying to extinguish the fire. During the cross-examination by the A.P.P., PW-2 has stated that, he has not stated portion marked A, B, C in his statement recorded under section 161 of Cr.P.C. PW-3 has stated that, he has not stated the portion marked `A' in his statement under section 161 of Cr.P.C. PW-4 has stated that, he did not state the portion marked A', in his statement recorded by the police under

161 of Cr.P.C., however, the Investigating Officer Shri Chakre (PW-9) has specifically stated that, he recorded their statements correctly and as narrated by them.

10. The Investigating Officer was confronted with the portion marked A, B, C from the statement of PW-2, the portion marked A from the statement of PW-3 and the portion marked A from the statement of PW-4. He stated that, the said portion marked has been stated by them while recording their statements under section 161 of Cr.P.C. and the said statements are as per their narration.

11. It has come on record that, the house of deceased Sangita was at a distance of 100 feet from the house of the accused. In a statement recorded under section 313 or Cr.P.C., the accused has admitted that, Sangita had come to his house and demanded Rs.5,000/- but when he expressed his

inability to give, she got annoyed and committed suicide by burning herself. Therefore, there is no slightest doubt that, the incident had taken place at the house of the appellant. There was no question of Sangita bringing kerosene to get herself burnt there at the spot of incident. It is also not the case of the accused that, on refusal of payment of money, Sangita got annoyed and went to her house, brought kerosene and committed suicide infront of his house. The prosecution has proved the site panchanama at Exh.10 through Investigating Officer. The place of incident has been shown on a veranda of house of the accused. The trial Court has rightly drawn the inference that, veranda forms a part of house.

12. We have carefully perused the statement of Sangita at Exhibit 31-C recorded by Jaykumar Rajaram Chakre (PW-9). In fact the said statement was treated as the first information report and subsequently the dying declaration. Upon careful

perusal of the endorsement of the Medical Officer, it is mentioned that, the patient is serious but in a condition to give the statement. Merely because the Medical Officer forgotten to state in his evidence that, such endorsement was given on the said dying declaration or that, the Investigating Officer stated that, the endorsement was given after recording the statement, would not nullify the contents of the dying declaration. Upon careful perusal of the contents of the dying declaration, there is no manner of doubt that, Sangita stated that, the appellant poured kerosene on her person and set her ablaze. Though it is tried to be contended by the learned counsel appearing for the appellant that, Jaykumar Rajaram Chakre (PW-9) has not stated in his evidence that, the contents of the dying declaration read over to Sangita and she stated that, the said contents are true, however, on careful perusal of the dying declaration, it is stated by Sangita that, the statement was read over to her and the

said is as per her narration. It has come in the evidence of PW-9 that hands of Sangita were burnt, and therefore, he obtained the toe impression of Sangita. At this juncture, it would be apt to make reference to the evidence of PW-9. Jaykumar Rajaram Chakre, I.O.(PW-9) in his deposition stated that, on 28th February, 2000, he was attached to Pachod Police Station as A.P.I. He received MLC at Exh.19 from Pachod hospital. After making entry in station diary, he went to the hospital for recording statement. He recorded the statement of Sangita and obtained toe-impression. He thereafter put his signature and also obtained signature of doctor, on the said statement. He registered offence in the Police Station bearing Crime No.14/2000 punishable under Section 307 I.P.Code. He thereafter went to the place of the incident and made panchnama. He stated that, he thereafter recorded the statements of witnesses. At 3 p.m. Doctor informed about death of Sangita. He thereafter registered the offence punishable

under Section 302 of I.P. Code, and then inquest panchnama was drawn. Thereafter the search of house of Sangita was made on 28th February, 2000. He stated that, on 5th March, 2000 he recorded the statement of mother of accused and others. He arrested the accused on 18th February, 2000 and submitted the charge sheet in the Court on 24th March, 2000. He sent pieces of burnt saree to the chemical analyzer under covering letters. Thereafter, he received C.A. Report on 6th October, 2000. He further stated that, Babasaheb Manmode (PW-2) has stated before him the portion marked A, B and C of his police statement at Exh.36, 37, 38. Shaikh Salim (PW-3) has stated before him the portion marked A of his police statement. Sk Kadu has stated before him the portion marked A of his statement. Syed (PW-7) has stated before him the portion marked A of his police statement. Mehoboobkhan (PW-8) has stated before him the portion marked A of his police statement. He also identify accused No.1, who was present before the

Court.

It is true that, during his cross-examination he stated that, he obtained the signature of doctor on the statement of deceased Sangita after he recorded her statement, nevertheless, upon perusal of evidence of PW-5 Dr. Ganeshsing Rupchand Rajput, he specifically stated that, when Sangita was brought to the hospital, she stated that, the appellant poured kerosene on her person and set her ablaze. Even during his cross-examination, he reiterated that, Sangita told him that, the appellant poured kerosene on her person and set her ablaze.

13. The prosecution examined Ganeshsing Rupchand Rajput (PW-5) and in his deposition he stated that, on 28th February, 2000, he was working as Medical Officer at Rural Hospital, Pachod. On that day at about 8 a.m. Sangita Madhukar Manmode was brought to the hospital for medical treatment.

She was admitted in the hospital. He examined her and found superficial to deep burn injuries 100%. There was evidence of kerosene smell. He started the treatment and informed the police at 8.30 a.m. He stated that, on the same day at about 8 a.m., Sangita had given history of alleged burn by Syed Tajoddin Syed Rehman. Patient was crying. She was conscious, and responding to question. Her B.P. was 90 systolic. Her pails was 100 per minute. There were signs of dying declaration. He stated that, during treatment, on the same day she died at about 1.30 p.m. Then he informed police about her death vide letter dated 28th February, 2000. Thereafter, the police made inquest panchnama and handed over the dead body at 6.15 p.m. for post-mortem. Thereafter, the post-mortem was performed on 29th February, 2000 at 11.30 a.m. She had 100% superficial to deep burns. He had mentioned all the injuries in column no.17 of the P.M. Report. He also stated that, on internal examination, he found injuries

under scalp burn, brain-covering congested, brain congest-ex. Thorax-walls, ribs cartilage – NAD, pleura-congested, Larynx, trachea and bronchi-congested. Right lung-oedematus and congested. Left lung congest and oedematus. Pericardium congested, heart congested contained blood at right side ventricle. Peritoneum-congested, bucal cavity, teeth, tongue were congested, blackish colored, tongue was swollen and inside the teeth. Teeth black stained. Stomach and its contains were dilated and congested, and contains food particles. Small intestine and contents congested and filed with gas. Large intestine contains congested, contents fiscal matter, liver and blade oedmatus and congested. Pancreas and supernals congested and oedematus. Spleen congested, kidneys congested, bladder congested and empty. Viscera was preserved for chemical analysis. He opined the cause of death was cardio respiratory arrest due to shock due to 100% superficial to deep thermal burns. He thereafter, sent viscera for chemical

analysis. Accordingly, he prepared P.M. Report. Dr. Khategaonkar also put his signature on the P.M. Report. He had also given provisional certificate regarding cause of death. He further stated that, on the same day Tajoddin Syed Ahmed was admitted in hospital at 8.30 a.m. for treatment of burn injuries. He examined him at 8.30 a.m. and found the following injuries :

(i) Evidence of superficial to deep burns to right upper extremity anteriorly and posteriorly. It is about 3%. The age of injury was within 6 hours.

(ii) Evidence of superficial to deep burn to left upper extremity, anteriorly to posteriorly 3%

(iii) Evidence of superficial to deep burns on right leg 6%. The age of injury was within 6 hours.

(iv) Evidence of superficial to deep burn on neck left side with blisters – 2%.

He stated that, total burn area was 14%. The age of the injuries was within 6 hours. He further stated that, the injuries were simple. The patient was admitted in the hospital for treatment. He was discharged on 18th March, 2000, after healing of injuries. He issued him a certificate. The original certificate was given to accused no.1 father on his request. He stated that, on the same day he informed about the admission of Tajoddin to police by letter.

During his cross-examination, his deposition in examination-in-chief is not shattered. On the contrary, he reiterated that, Sangita herself gave history of incident that, accused Tajoddin burnt her. He specifically stated that, he had not given any pain killers to deceased Sangita. Sangita was speaking in Marathi and he also spoke with her in Marathi. Therefore, there is no reason to doubt the evidence of PW-5

that, Sangita told him that, the accused Tajoddin burnt her. There is no reason for the Medical Officer to depose against the appellant. At the earliest opportunity when Sangita was taken to hospital, immediately she stated to PW-5 that, the appellant burnt her. In the peculiar facts of this case, when the spot of incident is proved beyond reasonable doubt and it is at the house of appellant and also dying declaration at Exh.31-C is voluntary and truthful, which is proved by the prosecution by recording the evidence of PW-9 and PW-5 and also the said dying declaration gets corroboration from attending circumstances and from medical history told by Sangita to PW-5 that, the appellant burnt her. We do not see any reason to interfere in the impugned judgment and order. The attending circumstances makes it clear that, none other than the appellant was instrumental in pouring the kerosene and setting ablaze Sangita and as a result Sangita was found in burnt condition at his house. In that view of the

matter, cumulative effect of proving the dying declaration by the prosecution in the light of attending circumstances, which in material particular corroborates the version in the dying declaration. Therefore, in our considered view, the trial Court has rightly believed the said dying declaration and convicted the appellant/accused.

14. The Supreme Court, while interpreting and explaining the scope of Section 32 of the Indian Evidence Act, in the case of **Laxman V/s State of Maharashtra**[4] held thus :-

> "The situation in which a man is on the deathbed is very solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason that the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the

4 (2002) 6 SCC 710

dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided

the indication is positive and definite. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore voluntary and truthful nature of the declaration can be established otherwise.

It is indeed a hyper technical view that the certification of the doctor was

> to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind especially when the Magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he had recorded the dying declaration."

15. Therefore, keeping in view the exposition of law by the Hon'ble Supreme Court in the case of **Laxman**, in the facts of the present case, merely because Ganeshsing Rupchand Rajput (PW-5) forgotten to specifically state in his deposition that, he gave the endorsement on the dying declaration or Investigating Officer stated that, such endorsement was taken after recording the statement, would not nullify the effect of version of Sangita in dying declaration that, the appellant poured kerosene on her person and set her ablaze. There cannot be a straight jacket

formula which can be applied in every criminal case, and always it will depend upon the facts and circumstances of each case and the evidence brought on record, whether the dying declaration is voluntary, truthful and inspires confidence or otherwise. As already observed, apart from proving the dying declaration, other evidence brought on record and attending circumstances makes us to believe that, the version stated in the dying declaration is voluntary and truthful. We do not wish to lengthen the judgment. Suffice it to say that, the findings recorded by the trial Court are not perverse and are in consonance with the evidence brought on record.

However, it appears that, there were altercations and quarrel between Sangita and the appellant and during such altercations, the appellant got annoyed and enraged and brought the kerosene Can from inside the house and poured kerosene on the person of Sangita and set her

ablaze. There was no premeditation as such on the part of the appellant. The appellant had knowledge that, his act in all probabilities would cause the death of Sangita. However, mitigating circumstance in favour of the appellant is that, immediately he tried to extinguish the fire and in that process he also sustained 14% burn injuries on his person, as it is evident from the evidence of Ganeshsing Rupchand Rajput (PW-5). Therefore, in the peculiar facts and circumstances of this case, though we confirm the findings of conviction recorded by the trial Court, however, we are of the view that Exception 4 to Section 300 of the I.P. Code applies to the facts of the present case. Therefore, we are inclined to consider the case of the appellant under Section 304 Part II of the I.P. Code. Hence the following order :-

O R D E R

(I) The conviction and sentence of the Appellant, for the offence punishable

under Section 302 of the Indian Penal Code, 1860 is set aside. Instead, the Appellant — Syed Tajoddin S/o Rehman Syyed is convicted under Section 304 Part II of the Indian Penal Code, 1860 and for the said offence, the Appellant-accused is sentenced to suffer rigorous imprisonment for ten years (10 years) and to pay a fine of Rs.2000/- (Rupees Two Thousand), and in default of payment of fine, to suffer further simple imprisonment for three months.

(II) The period of detention, if any, be given as set-off to the Appellant.

(III) Appellant- accused Syed Tajoddin S/o Syed Rehman shall surrender forthwith before the trial Court. The trial Court shall ensure that

immediately Appellant-accused is sent to the prison to suffer the sentence awarded to him.

(IV) Criminal Appeal is accordingly, partly allowed and stands disposed of.

[S.M. GAVHANE, J.] **[S.S. SHINDE, J.]**

sga/