

IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO.44 OF 2016.

Shri Rushi @ Rushia Das,
Presented lodged in Central Jail
Colvale Bardez Goa.

..... Appellant.

Versus

State of Goa,
Bicholim P.S.

..... Respondent.

Mr. K. Poulekar with Ms. Prithvi Bandekar and Mr. Y. Kotkar, Advocates
for the Appellant.

Mr. S. R. Rivankar, Public Prosecutor for the Respondent.

***Coram : N.M. Jamdar &
Prithviraj K. Chavan, JJ.***

Reserved on :-21 August, 2018.

Pronounced on:- 1 September 2018.

JUDGMENT (Per Prithviraj K. Chavan, J.)

By this appeal, the Appellant challenges his conviction under Section 302 of Indian Penal Code, wherein he has been sentenced to undergo imprisonment for life and fine of ₹10,000/-, in default to undergo simple imprisonment for three months by the learned Additional Sessions Judge, Mapusa, for having committed murder of his wife in the

intervening night of 22 October 2012 and 23 October 2012.

2. The prosecution case in brief is as follows:-

The Appellant originally is a resident of Orrisa, who had migrated to the State of Goa. He was residing at Karapur, Tisk Bicholim Goa with his wife Sabitri, the deceased, their sons: PW5 Prashant Das and PW1 Sushant Das. The Appellant was unemployed person, and addicted to liquor. He was in habit of demanding money from his sons Prashant and Sushant and also from his wife deceased Sabitri. Whenever his family members were unable to provide him money, he used to pick up a quarrel with them and used to abuse. It is alleged that he used to assault his wife and extend threats of dire consequences.

3. According to first informant, PW1 Sushant Das, who works as a Painter on temporary basis at a Bus Body Building Factory, Honda, on 22 October 2012 he was on second shift duty from 15.00 hours to 23.30 hours. As usual, when left the house at about 14.30 hours, his mother and father were at home. His brother PW5 Prashant Das was working as a Waiter in Hotel Prasad at Karapur Tisk. Around 23.00 hours, he received a call on his mobile phone from Prashant who informed him that he came to

know from the owners of the house that the Appellant had assaulted Sabitri with a hammer due to which she sustained bleeding injuries to her head and was unconscious. It was also informed that an ambulance was called by dialing number 108.

4. When PW1 Sushant Das reached home around 01.05 hours, he saw some people including the owner of the house, his daughter, wife and Prashant etc., present at the spot. Thereafter, an ambulance reached the spot, however, the person in the said vehicle after examining her informed that the lady was dead. It has been specifically alleged in the complaint by PW1 Sushant Das that it was the Appellant, who assaulted his mother with a hammer as he was insisting for the money.

5. On the basis of said complaint, an offence came to be registered with Police Station, Bicholim, vide F.I.R. No.171/2012 under Section 302 of IPC against the Appellant (Exh.3).

6. PW16 PSI Razashad Ahemad Shaikh, PW17 Ramesh Gaonkar and PW18 Ganesh Deulkar appeared to have conducted investigation into the Crime. PW16 PSI Shaikh, under the guidance of PW17 Ramesh

Gaonkar reached on the spot along with the investigation kit. He arrested the Appellant in the presence of two panch witnesses namely PW8 Mugutsab Tambdi and one Sagar Chari. He had seized clothes on the person of the Appellant by drawing attachment panchanama. On the same day, he visited GMC hospital, Bambolim and conducted inquest panchanama over the dead body of the deceased Sabitri (Exh.64). He had also seized clothes of the deceased in the presence of the panch witnesses as well as collected the postmortem report, which was drawn by PW2 Dr. Sidharth Banaulikar. Autopsy Report is at Exh.15, which indicates that the cause of the death was cranio cerebral damage by injury nos.1, 2 and 3 which were necessarily fatal and fresh at the time of death. All the seized muddemal was forwarded to the Central Forensic Science Laboratory. PW16 also conducted scene of occurrence panchanama as well as sketch. He had also recorded the statement of the witnesses.

7. PW18 Ninad Deulkar, who was on leave, reported his duties on 27 October 2012, and conducted further investigation. He wrote a letter to Judicial Magistrate First Class for recording statement of PW1 Sushant Das and PW5 Prashant Das under Section 164 of Cr.P.C. The

call detail records of the mobile phone of the witnesses and others were collected. The Investigating Officer had also seized weapon of the offence i.e. a hammer from the spot. After the investigation, a Chargesheet is laid in the Court of Judicial Magistrate First Class, Bicholim against the Appellant under Section 302 of IPC.

8. The learned Judicial Magistrate First Class committed the case to the Court of Sessions by her order dated 22 February 2013. The Appellant was produced before the learned Additional Sessions Judge. After hearing the prosecution and the defence the Additional Sessions Judge, by his order dated 6 August 2013 framed a Charge against the Appellant under Section 302 of IPC. The Appellant, however, pleaded not guilty and claimed to be tried. His defence, as emerged from the line of cross-examination as well as from his statement under Section 313 of Cr.P.C is of a simple denial of the commission of the offence alleged. However, when he was asked during the course of his statement under Section 313 Cr.P.C. as to whether he wanted to say anything more upon which, he has stated that he was under the influence of alcohol on the night of the incident, there was fight between him and his wife behind the back door of his

house and Sabitri had fallen in the passage. He then asked the landlord to call for an ambulance. No defence evidence has been adduced on his behalf.

9. The prosecution examined 18 witnesses to substantiate the Charge against the Appellant. The learned Additional Sessions Judge, Mapusa, after hearing the prosecution and the defence held that the prosecution has proved beyond doubt that the Appellant had knowingly and intentionally caused death of his wife by inflicting blows of iron hammer on her head resulting into instantaneous death and, therefore, sentenced him to life imprisonment.

10. We heard the learned Counsel for the Appellant and the learned Public Prosecutor for the State. The learned Counsel for the Appellant assailed the judgment of the trial Court by contending that there is neither an eye witnesses nor testimony of PW4 Pratibha Hankare and PW9 Ramchandra Hankare are corroborated. So called extra-judicial confession by the Appellant before PW4 Pratibha Hankare, PW5 Prashant Das and PW9 Ramchandra Hankare are inadmissible. It is argued that the prosecution has failed to prove that it was the Appellant, who had

inflicted the injuries on the head of his wife as there is no report of fingers print expert and, therefore, there cannot be a presumption that the said hammer was used by the Appellant. There is no link establishing the use of said hammer by the Appellant in inflicting wound on the head of his wife. It is also argued that the prosecution has not explained the injuries on the person of the Appellant.

11. The learned counsel has strenuously argued that the mention of a hammer is by the police and not by the complainant in his statement under Section 164 of Cr.P.C. He also tried to distinguish the differences between “mara” and “mar dala” alleged to have been said by the Appellant. The learned Counsel, however, fairly admits that the relations between the Appellant and his wife were not cordial. According to the learned Counsel, 14 circumstances culled out by the learned trial Court are not of such a nature which would unerringly point towards the guilt of the Appellant. He has questioned the testimonies of PW3 Mahesh Anant Sawant- panch witness-who didn't say that blood was seen on the hammer. He also doubted the sketch map drawn by PW11 Pradeep Pokhare, a draftsman.

12. According to the learned Counsel, there was neither *mens rea*

nor intention on the part of the Appellant, which is evident from the testimony of PW6 Sunil Singh who testified that the Appellant had asked his wife to stop work and to go to sleep before the incident. However, in the alternative, it is argued that this would be a case, at the most, falling under Section 304 Part II of IPC.

13. On the other hand, learned Public Prosecutor supported the impugned judgment by stating that the Appellant had made an extra-judicial confession not only before his son PW5 Prashant Das but also before PW4 Pratibha Hankare and PW9 Ramchandra Hankare who are his landlords. It is also contended that the Appellant was last seen together with his wife who was in his custody and it is not the case of the defence that it is an act of third person and in such eventuality, it was incumbent on the part of the Appellant to explain as to how his wife sustained fatal injuries. The Appellant has taken a false defence and, therefore, the learned Public Prosecutor urged to maintain the sentence as the Appellant had inflicted three fatal blows on the head of his wife.

14. PW2 Dr. Siddharth Banaulim conducted an Autopsy of the dead body of deceased Sabitri on 24 October 2012. In his evidence, he

categorically testified about 14 external ante-mortem injuries, which are as follows:-

1. *Laceration, of 4X1X.08 cm, gaping anterior posterior direction, blood oozed out with underlying fracture depressed felt of left parietal bone of 2X1.8 cm oval in shape over the left side of parietal scalp near midline, anterior end 17 cm above left mastoid and posterior end 18 cm from left mastoid.*
2. *Laceration, of 3.5X1X0.8 cm, gaping anterior posterior direction, blood oozed out over the left side of parietal scalp near midline, anteriorly 16 cm above left mastoid and posterior end 17.5 cm from mastoid.*
3. *Laceration, of 3.8 X1X 0.8 cm, gaping, oblique in direction, blood oozed out over the left occipital scalp near midline, anteriorly 14 cm above and posteriorly 15 cm above left mastoid process.*
4. *Abrasion, brownish 1 X 0.8 cm over the lower back of neck, midline part.*
5. *Abrasion, brownish 1.5X1 cm over the lower back of neck, 2 cm lateral to injury no.4.*
6. *Bruise, bluish in colour 2X1 cm over the pinna of right ear.*
7. *Abrasion, brownish 1X0.3 cm over the medial part of left forehead.*
8. *Abrasion, brownish 1X0.8 cm over the lateral part of injury no.7 about 1.2 cm below and laterally on left forehead.*
9. *Abrasion, brownish 1.5X1 cm over the lateral part of left forehead @ 1.5 cm lateral to injury no.7.*
10. *Abrasion, brownish 1X0.5 cm over the midfront of right knee.*
11. *Abrasion, brownish 0.5X0.5 cm over the front of*

right knee, 2 cm above injury no.10.

12. Abrasion, brownish 1X0.8 cm over the midfront of left knee.

13. Abrasion, brownish 1X0.5cm over the upper back of right side body, 2 cm from midline.

14. Bruise, bluish in colour 3X2 cms over the back of right shoulder 4cm away from injury no.13.”

15. According to PW2 Dr. Sidharth Banaulikar, there was evidence of haemorrhage seen over the left temporal lobe and under surface of occipital lobes and on cerebellum. Multiple pinpoint hemorrhage were seen over the white matter of brain on cut sectioning.

16. The Expert further opined that the cause of death of the deceased was due to cranio cerebral damage vide injury nos. 1,2 and 3 which were necessarily fatal and fresh at the time of death. This witness has been working in the Department of Forensic Medicine GMC Bambolim for last 13 years. He has been posted as an Assistant Professor. According to him, the injuries were caused by a hard weapon. During cross-examination, he reiterates that if a hammer has struck on the head of the deceased in the room, it will give minimal sound within the room itself. He has also clarified that depending on the intensity of the blows of the hammer on the head of a person, damage to the tissues occur and there

may or may not be blood stains on the hammer. He denied the suggestion that injury nos.1 to 3 could have been resulted if head of the deceased had been banged by herself on the object such as edge of wall or the edge of the door.

17. Thus, nothing could be elicited in the cross-examination of this witness, which would render his testimony doubtful. The Medical Expert has made it quite clear that the deceased died due to all the three fatal blows resulting into injuries. Thus, there is no room for any doubt that the deceased died a homicidal death.

18. It is contended by the learned Counsel for the Appellant that there is no corroboration with respect to the extra-judicial confessions alleged to have been made by the Appellant, on the fateful night, before PW4 Pratibha Hankare and PW9 Ramchandra Hankare. The crucial evidence in the form of extra-judicial confession cannot be lightly brushed aside in the given set of facts and circumstances coupled with the nature, behaviour and the conduct of the Appellant with the deceased Sabitri and his two sons. PW4 Pratibha Hankare is the daughter of landlord of the Appellant namely PW9 Ramchandra Hankare. She testified that the

relations between the deceased Sabitri and the Appellant were not good as they used to quarrel frequently. It is testified that the Appellant is a habitual drunkard which fact has not been disputed by the Appellant. Rather, this fact has been buttressed not only by his sons PW1 Sushant Das and PW5 Prashant Das but also by the other independent witness namely PW7 Pinky Singh.

19. It has been categorically testified by PW4 Pratibha Hankare that around 22.30 hours on 22 October 2012 she was studying in her bedroom when she heard voice of the lady who was trying to scream but her voice was being suppressed. Screams were coming from the direction of the residence of the Appellant. She woke her mother up and went to the veranda of the house of the Appellant. She knocked the door, however, there was no response. When she pushed the door she saw the Appellant standing in the room. He said to her in Hindi “Tum police ko bulao maine usko mar dala” (you call the police I killed her). This witness, therefore, immediately rang up the police from her landline phone and informed about the incident. She categorically stated that at that time her father, mother and brother Pravin were also with her. After sometime

younger son of the Appellant(PW5 Prashant Das) came to the spot to whom PW9 Ramchandra Hankare informed that his father had killed his mother. PW5 Prashant Das thereafter talked to his father in Odiya language. He went inside, lifted his mother and kept her on the stair case.

20. Testimony of PW4 Pratibha Hankare is materially corroborated by PW9 Ramchandra Hankare. His evidence indicates that he had rendered a part of his house to the deceased Sabitri on rent who was residing in the said portion with her husband (Appellant) and her two sons. He testified that on 22 October 2012 after dinner, he went to sleep in his bed room. His daughter PW4 Pratibha Hankare heard sound and woke him up. They went to the room of the Appellant. When he inquired with the Appellant, he stated that “Tum police ko bulao maine usko mar dala”. A futile attempt has been made to rebut the testimonies of these two witnesses by the defence. There is nothing elicited in cross which would render their testimonies unbelievable, rather there is no reason for these two witnesses to testify against the Appellant. The extra-judicial confession by the Appellant before PW4 Pratibha Hankare and PW9 Ramchandra Hankare assumes importance, in the light of the evidence of

PW1 Sushant Das and PW5 Prashant Das sons of the deceased and the Appellant. No doubt, extra-judicial confession by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Generally the Courts will have to look for an independent reliable corroboration before placing any reliance upon such extra-judicial confession. There are various cases in which conviction has been based on extra-judicial confession only when such confession have been proved just like any other fact and value thereto depending upon veracity of the witnesses to whom it is made. The Supreme Court in the case of *Sahadevan and another Vs State of Tamil Nadu*¹ culled out a few principles on the basis of various pronouncements, which can be stated as follows:-

- i. *The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.*
- ii. *It should be made voluntarily and should be truthful.*
- iii. *It should inspire confidence.*
- iv. *An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.*
- v. *For an extra-judicial confession to be the basis of conviction, it should not suffer from any material*

¹ CDJ 2012 SC 394

discrepancies and inherent improbabilities.

- v. *Such statement essentially has to be proved like any other fact and in accordance with law.*

21. Turning back to the evidence of PW1 Sushant Das, who had categorically testified that his father was an unemployed who always used to demand money from his mother as well as from this witness. Whenever his mother refused to give money, the Appellant used to quarrel with her and also used to assault her by extending threats. According to him, he received a phone call of his brother on 22 October 2012, when he was on the second shift duty at ACGL, Honda, which is Bus Body Building Industry. When he left home his mother and father were only at home. His younger brother had already left the house for his work at hotel Prasad at Karapur Tisk. His brother informed him on phone around 12.30 a.m that he had left for dandiya programme at Karapur Tisk and that he would return by 1.00 a.m. when PW1 Sushant Das was returning home from the duty, he again received a call from PW5 Prashant Das who informed him that he was informed by their landlord about the fact that his father had assaulted his mother with a hammer due to which, she sustained bleeding injuries over her head and she was unconscious. He had also informed that

he had dialed 108 for the Ambulance. When PW1 Sushant Das reached home around 1.00 a.m, he noticed some people gathered around his house including the landlord and his family members. By that time, the ambulance had reached the house; inmates in the vehicle checked the deceased and declared her dead. This witness, though had not witnessed the incident, lodged a report with the Police wherein he has stated that his father had assaulted his mother who always used to assault and threaten her with dire consequences and since he was jobless he was insisting for money. In his cross examination, it has been reiterated that the Appellant was a habitual drunkard since more than 10 years prior to the incident who always used to create commotion by shouting. It is again reiterated in cross-examination that the Appellant used to quarrel with the deceased ever since the witness was a child. PW1 Sushant Das had to support the family by working at the age of 11 years due to the fact that the Appellant was jobless. It has also come in his evidence that he used to ask his father to stop assaulting the deceased but it fell on deaf ears. Family members were fed up with the attitude of the Appellant. Even PW5 Prshant Das another son of the Appellant and the deceased Sabitri spoke in tune with the

brother Sushant Das about the nature, conduct, propensity and behaviour of the Appellant with respect to the deceased Sabitri. His testimony fully supports and corroborates the testimony of PW1 Sushant Das.

22. It is interesting to note that when PW5 Prashant Das reached home, he noticed his mother lying on the ground and blood was oozing out from her head. He lifted his mother and kept on the front stair case of the house. His evidence further revealed that when he asked his father in Odiya language as to what had happened and why he assaulted his mother, the Appellant alleged to have stated that “as his work was done he had assaulted his mother”. There is no reason to disbelieve extra-judicial confession given by the Appellant to his son PW5 Prashant Das and there is no reason as to why PW5 Prashant Das would falsely implicate his father in the alleged assault on his mother. The presence of the Appellant near the deceased (Sabitri) just after the incident and his unequivocal admission in the form of extra-judicial confession before PW4 Praibha Hankare and PW9 Ramchandra Hankare stating “Tum police ko bulao maine usko mar dala” clearly indicates that he had accomplished act of killing his wife by specifically stating “Mar dala”. The Appellant very well

knew that his wife is already dead, else he would not have said “mar dala”. This finds support from the testimony of none other than his son Prashant Das to whom also he had stated as above. Thus, it can be seen that the Appellant had not only confessed about his acts before PW4 Pratibha Hankare, PW9 Ramchandra Hankare but also before his son PW5 Prashant Das.

23. Thus, the broad principles enunciated by the Supreme Court in the case of *Sahadevan* cited supra are precisely attracted in the sense that extra-judicial confession was voluntarily made by the Appellant before the landlord and his daughter without there being any coercion or threats; secondly, it is supported by a chain of other cogent circumstances and found to have been corroborated by the evidence of his son PW5 Prashant Das and, therefore, conviction can be based on the same as it does not suffer from any material discrepancies or inherent improbabilities.

24. The deceased and the Appellant were last seen together by PW1 Sushant Das who left the house on 22 October 2012 at about 2.30 p.m, as already stated herein above. It is not the case of the defence that some stranger or a third person entered into the house of the Appellant

and the deceased on that night except the presence of a small boy namely PW6 Sunil Singh aged about 10 to 11 years who is son of PW7 Pinky Singh. Since, PW7 - Pinky Singh and her husband had gone to Margao to her mother's place and, therefore, they had kept PW6 Sunil Singh with deceased Sabitri, as earlier, Pinky Singh was a neighbour of deceased Sabitri and they have homely relations.

25. The evidence of PW6 Sunil Singh reveals that after having dinner with deceased Sabitri around 22.30 hours the Appellant asked deceased to stop her work and sleep with him. He testified that the Appellant had asked deceased to make him sleep (witness). PW6 Sunil went to sleep in the main room. He did not know anything thereafter who came to know about the incident only when he was woken up by PW5 Prashant Das and when he saw body of Sabitri aunty (deceased) lying on the ground and blood was oozing from her head. He started crying. He being a small boy of 10 to 11 years old deposed about whatever he had witnessed on the said night. Only because he had heard the Appellant asking deceased to stop work and go to sleep would not ipso facto mean that the Appellant had not assaulted the deceased on the said night. Since

he was sleeping in the main room there was no occasion for him to hear any sound of the assault by the Appellant. However, his mother PW7 Pinky Singh clearly stated in her evidence that the Appellant to whom she used to call “bhaiya” was in habit of consuming liquor and was assaulting the deceased as he was unemployed. It has come in her evidence that whenever the Appellant used to consume liquor, he used to speak in abusive language with the deceased, his sons and also with neighbours. This witness had requested him on many occasions to give up the habit of drinking but the Appellant would not listen. The evidence of PW7 Pinky Singh is relevant and significant in the light of the testimonies of PW4 Pratibha Hankar, PW5 Prashant Das and PW9 Ramchandra Hankare.

26. As such, it can be seen that there was no one else except the Appellant and Sabitri (deceased) on the fateful night who could have committed the murder of the deceased. This is a very strong circumstance against the Appellant vis-a-vis the fact of extra-judicial confession made by him before the three witnesses. There is absolutely no room for doubt to conclude that it was only the Appellant who had committed the murder of Sabitri. The prosecution has discharged its burden of proving that the

Appellant had full knowledge and intention of causing such bodily injuries to his wife that it would result into her death.

27. Evidence of PW3 Mahesh Sawant, who acted as a panch witness on the spot as well as seizure of the clothes of the deceased and the hammer, has not been shattered in the cross examination. There is due seizure of the hammer by Investigating Officer which was found in the house of the Appellant at the time of drawing the panchanama.

28. PW10 Atmaram Gawas, Head Constable attached to Sanquelim outpost was the first person to reach the spot after receiving a phone call from PW4 Pratibha Hankare. He made a station diary entry at 00.50 hours. He noticed PW9 Ramchandra Hankare, PW4 Pratibha Hankare, PW5 Prashant Das on the spot and also the Appellant who was held by PW9 Ramchandra Hankare.

29. PW11 Pradeep Pokere is a draftsman of Public Works Department who prepared a sketch map and plan of scene of occurrence. He categorically testified that iron hammer was lying near the veranda which was taken into possession by the police and was sealed. The sketch

map is proved at Exh.46. The evidence of PW16 Shaikh, PW17 Ramesh Gaonkar and PW18 Ninad Deulkar is restricted to the manner in which they carried out the investigation by drawing panchanama, seized all the clothes of the deceased as well as the Appellant, collected Forensic Science Laboratory Report, taking of photographs etc. PW17 Ramesh Gaonkar and PW18 Ninad Deulkar appeared to have supervised the entire investigation. The Central Forensic Science Laboratory report is proved at Exh. 72. The prosecution has proved that blood group of the deceased was “O” Rh positive. Its stains were found not only on the weapon of the offence i.e. hammer but also on the pant of the Appellant and the clothes of the deceased which is a crucial circumstance in the light of the fact that blood group of the Appellant is proved to be “AB” Rh negative as per the report.

30. The learned Additional Sessions Judge Mapusa in the impugned judgment has correctly appreciated the evidence of the prosecution witnesses as well as extra-judicial confession made by the Appellant and so also conduct of the Appellant and other aspects of the prosecution case including the recovery of iron hammer lying near the door

of the house. The trial Court has rightly considered all circumstances resulting into a continuous chain pointing towards the complicity of the Appellant in commission of the offence alleged.

31. Considering the alternate argument of the Appellant on Section 304 part II, as already stated above, it is not a case of single blow nor it has been brought out on record that the case would fall under the exception I of Section 300 of IPC. It is not even the contention of the defence that there was grave or sudden provocation to the Appellant by the deceased. It is not even the case of sudden fight between the Appellant and the deceased. There were three forceful blows by a hammer on the head of the deceased by the Appellant which clearly exhibit *mens rea* and full intention of the Appellant to eliminate his wife which is evident even from the way he made his confession before PW4 Pratibha Hankare and PW9 Ramchandra Hankare asking them to call police instead of trying to help his wife by calling ambulance. This conduct of the Appellant speaks for itself. The nature of the weapon used, part of the body chosen and the force with which three blows were inflicted by the Appellant is itself sufficient to indicate his intention and knowledge to eliminate his wife.

32. In case of last seen together theory the prosecution is exempted to prove the exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per Section 106 of the Indian Evidence Act. The Supreme Court in the case of *Ashok Vs State of Maharashtra*² in paragraph 12 observed thus:-

“From the study of above stated judgments and many others delivered by this Court over a period of years, the rule can be summarized as that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per Section 106 of Indian Evidence Act. Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused etc., non-explanation of death of the deceased, may lead to a presumption of guilt.

33. The Appellant has raised a false defence for the first time in his statement under Section 313 of Cr.P.C. He has stated that he was

2 2015) 4 SCC 393

under the influence of alcohol. There was a fight between him and the deceased. She had a fall in the passage. As already stated herein above, PW2 Dr. Sidharth Banaulikar categorically ruled out that such injuries could be caused due to a fall. Thus, taking a false defence would itself tantamount to an incriminating circumstance against the Appellant. More particularly, in the light of the fact that he had immediately after the incident confessed before PW4 Pratibha Hankare and PW9 Ramchandra Hankare that he had killed his wife. The Appellant has, therefore, failed to discharge the burden as per Section 106 of the Evidence Act.

34. The learned Counsel for the Appellant has placed reliance on the judgment of this Court in case of *Mahesh Mahadev Tari Vs State of Goa*³ wherein the conviction of the Appellant under Section 302 of IPC came to be modified to one under Section 304 Part II of IPC in view of the fact that there was sudden quarrel between the deceased and the Appellant in a bar without premeditation or preplanned. It was not the case that accused had taken undue advantage or acted in cruel or unusual manner. The ratio can be distinguished so as to say that in the instant case

³ 2018 ALL MR. (Cri) 788

there was no sudden fight. The Appellant had inflicted three blows of the hammer on the head of the deceased which shows that he acted in an unusual manner. The deceased being a helpless lady and especially who was in custody of her husband is more crucial.

35. Similarly the learned Counsel placed reliance on an another judgment of this court in the case of *Naushad @ Jabbar Beig Vs State of Goa*⁴. In this case also conviction of the Appellant for the offence under Section 302 of IPC came to be modified to one under Section 304 part II of IPC, in view of the fact that there was a sudden fight between the wife of the deceased and the Appellant as the deceased objected the accused for shouting loudly. It was a case of single blow and, therefore, this case can be distinguished accordingly.

36. In the case of *Santilal Shrikisan Kutil @ Kaalia @ Mochi Vs State of Maharashtra*,⁵ the Supreme Court modified the conviction of the Section 302 IPC to one under Section 304 part II in view of the fact that the accused inflicted severe injuries on the deceased with stone on account of altercations between them on the issue of shouting loudly. There was

⁴ 2018 ALL MR(Cri) 767.

⁵ 2018 All MR(Cri) 908

occasional altercations between them and they used to unite afterwards. It is also a fact in the said case the victim did not immediately succumb to the injuries but died after 7 days. As already stated herein above, this judgment can be distinguished, in view of the fact that the nature, conduct, manner and the way in which the Appellant has eliminated his wife by using a deadly weapon like hammer inflicting three forceful blows on her head would clearly indicate his intention to commit murder. Therefore, he is not entitled to take benefit of Section 304 Part II of IPC.

37. Taking into consideration the entire circumstances on record and the discussion made herein above, we do not find any reason to interfere with the impugned judgment and order of conviction of the Appellant under section 302 of IPC. As such, there is no substance in the appeal which stands dismissed.

Prithviraj K. Chavan, J.

N.M. Jamdar, J.