

CRIMINAL APPEAL NO.933 OF 2013

Appellant

Respondent

Ms.P.P.Shinde, APP, for State.

DATE : 29th July 2020

JUDGMENT : (Per - Prakash D. Naik, J.) :-

1. The appellant has preferred this appeal under Section 374 of Code of Criminal Procedure, 1973 challenging the judgment and order dated 16th February 2013 passed by learned Additional Sessions Judge, Sindhudurg, at Oros convicting him for the offence u/s 302 of Indian Penal Code and sentencing him to suffer rigorous imprisonment for life and to pay fine of Rs.10,000/-.
2. The brief facts of the prosecution case are as under :-

(a) The complaint was lodged by Sahadev Dattaram Chavan alleging that on 3rd September 2007 he had visited his agricultural land known as Savaricha Temba. At about 3.45 pm he heard some sound coming from the well situated in his land. He also heard shouts of person from that direction;

(b) The complainant proceeded towards place of incident and saw one person lying near the well. The accused was standing near him. On enquiry with the accused he stated that the person had fallen down. The accused then proceeded towards his house;

(c) The complainant went closer to the injured person and identified him as Mhapu Rane of Varachi Wadi. He also noticed that blood was oozing from his head;

(d) The complainant went to the locality of his wadi and informed others that Mhapu Rane is lying in pool of blood near the well situated in his field due to assault by accused. Thereafter complainant, Vinayak Rane, Madhukar Chavan, Vishnu Chavan, Dipak Rane and several other persons came near the place where the injured was lying. They noticed that Mhapu Rane had received injuries to his head, right ear and blood was oozing from injuries;

(e) Vinayak Rane inquired with the injured as to who had caused injuries to him. The injured stated that there was a fracas between him and the accused and the accused in anger assaulted him by means of Koyta (sickle);

(f) The injured was taken to hospital for providing medical treatment. The FIR was registered at the instance of Sahadev Chavan vide CR No.81 of 2007 for the offence u/s.326 of Indian Penal Code. Investigation proceeded. Statements of witnesses were recorded. The accused was arrested on 9th September 2007. The weapon was recovered at the instance of accused on 11th September 2007. The injured succumbed to the injuries on 8th September 2007. The offence was altered to Section 302 of IPC. On completing investigation charge sheet was filed.

3. The charge was framed for the offence u/s 302 of IPC vide order dated 1st September 2010. The prosecution examined ten witnesses to establish its case. The accused examined himself as defense witness. The statement of the accused was recorded u/s 313 of Cr.P.C.. On the basis of evidence the Trial Court gave a finding that prosecution has established its case beyond all reasonable doubts against accused u/s 302 of IPC.. The appellant was sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs.10,000/-, in default of payment of fine, he was directed to suffer simple imprisonment for four months. The appellant was given set off for the period from 9th September 2007 to 12th February 2008. The appellant was taken into custody. During the pendency of this appeal the appellant had preferred application for suspension of sentence which was rejected by order dated 8th July 2014. Thus, the appellant continued to be in custody.

4. With the assistance of learned counsel for appellant and learned APP for the State, we have perused the evidence adduced before the Trial Court.

5. Learned counsel for appellant submitted that even accepting the evidence of the witnesses examined by the prosecution, it cannot be said that offence u/s 302 of IPC has been established. In the facts of this case, the appellant could be convicted at the most u/s 304(II) of IPC.. The appellant is in custody for a period of about eight years which would be sufficient punishment for the alleged act.

6. Learned APP, however, submitted that there is overwhelming evidence against the appellant. The prosecution has proved its case beyond doubt. The injuries inflicted by the appellant were of serious nature and sufficient in the ordinary course to cause death. The appellant had used Koyta (Sickle) while assaulting the deceased. The injuries were on vital part of body. The nature of weapon, the nature of injuries and the fact that injuries were inflicted on head, it is sufficient to infer that the appellant had intention to cause death and, therefore, offence u/s 302 of IPC has been made out against the appellant. The medical evidence supports the prosecution case to establish the charge u/s 302 of IPC.

7. Considering the submissions of both the sides it would be appropriate to analyze the evidence adduced before the Trial Court.

8. PW-1 Sahadev Dattaram Chavan is the first informant. He has deposed that on 3rd September 2007 at about 3.30 pm, he had been to his agricultural field for cutting fodder. He heard some noise towards well situated in his agricultural field and went to that place. He saw accused standing near the well and the deceased Mhapu @ Krishna Rane was lying on the ground. The accused was having blood stained Sickle in his hand. He inquired with the accused as to

what had happened and he responded by stating that the deceased had fallen down and started walking towards his house. Blood was oozing from the head of the injured. PW-1 then informed about the same to the villagers and all of them came near the spot of incident. Vinayak Rane inquired with the injured as to who caused the injuries, to which he replied that due to domestic quarrel the accused in anger assaulted him by means of Koyta. The injured was then taken to hospital. PW-1 visited Kudal Police Station for lodging the complaint. The FIR was registered. This witness was cross examined by defense. During the course of examination the witness admitted that there is no mention in the FIR that he had seen Sickie in the hands of accused. The suggestions put to him qua his deposition, were denied by the witness. Except omission as stated above, we do not find that the evidence of this witness has been shaken in any manner in the extensive cross-examination conducted by defense. There is no reason to doubt the veracity of the evidence of this witness. It appears that during the course of investigation supplementary statement of PW-1 was recorded in which he had stated that accused was armed with Sickie. In the FIR the name of accused was referred to as Mahesh Rane which was clarified in the supplementary statement as Mayuresh @ Mahesh Rane. In any case, the defense has not been able to create doubt about the identify of appellant.

9. PW-2 Vijay Mukund Parab is a panch witness for spot panchanama, panchanama of recovery of clothes of deceased, the arrest panchanama/recovery of T-shirt of accused. These documents were exhibited in evidence vide Exhibit Nos.32, 33 and 34 respectively. The witness has deposed that he had visited the spot of

incident. The complainant was present. He noticed blood stains at the spot. Certain articles were recovered from the place of incident, such as, chappal (article-6), umbrella (article-5) which was seized in his presence. He identified the said articles. He accompanied the police to the house of deceased. The clothes of the deceased were seized from the house and panchanama was recorded in that regard. Thereafter the arrest panchanama of the accused was recorded, search was conducted in his presence. The accused was wearing T-shirt having blood stains. The said T-shirt was seized by recording panchanama. PW-2 was cross-examined by defense. Certain suggestions were put to the witness on the basis of his deposition in examination-in-chief which were denied by him. The cross-examination has not resulted in creating doubt about the version of this witness.

10. PW-3 Smt.Jayshree Rane is the wife of deceased. She deposed that Damodar Rane came to her house and informed her and other relatives that the appellant had assaulted her husband by means of Koyta in the field of Chavan. On receiving this information PW-3 and other relatives reached the place of incident. She inquired with her husband as to what had happened and he replied that accused had assaulted him by sickle and fled away along with sickle. The injured was taken to Rural Hospital, Kudal. Thereafter he was taken to Bambolim Hospital, at Goa. During treatment her husband had expired. She was cross-examined by learned counsel for accused. She stated that Narayan Rane, Damodar Rane, Bhisaji Rane are related to her. Their houses are situated at different places. The witness was also put to suggestion that five to six years ago the deceased had erected a bandh. She did not make any complaint to

anybody relating to death threat given by the accused to her husband. We have scrutinized the evidence of this witness and did not find that her version should be disbelieved.

11. PW-4 Narayan Rane had deposed that there was a quarrel between the accused and deceased Krishna Rane as bandh was erected by Krishna Rane on the foot path going to the house of accused. On 3rd September 2007 Sahadev Chavan (PW-1) informed him that the accused had assaulted Krishna Rane (deceased) by means of Sickle. Thereafter he made a phone call to Vinayak Rane and others and visited the place of incident. When inquiries were made with deceased Krishna Rane, he informed that the appellant-accused threatened him and assaulted him by means of sickle. Thereafter Vinayak Rane had sent Damodar Rane to the house of Krishna Rane to inform about the incident to his family members. On receiving the information, wife of Krishna Rane and others came to the spot. The injured disclosed to them that the accused had assaulted him. Thereafter the injured was taken to hospital. This witness was cross-examined. He deposed that he has no personal knowledge that there was quarrel between the accused and Krishna Rane on account of erection of bandh on the foot path. However, apart from the aforesaid fact, there is nothing to demolish the prosecution case qua evidence of this witness.

12. PW-5 Dr.Siddharth Shrikant Banavalikar conducted autopsy of deceased Krishna Rane. He was attached to Goa Medical College. He stated that the deceased was admitted in Neuro-Surgery Department of Goa Medical College. He further stated that there were external injuries on the body of deceased. He referred to

incised stitched wound with underlying fracture right frontal bone extending to right temporal bone measuring 4 cm x stitches present over the right frontal scalp obliquely placed, caused by sharp weapon. He referred to incised stitched wound with underlying fracture right occipital bone measuring 3 cm x stitches over the right occipital scalp obliquely placed. It was by sharp edge. He referred to incised healed wound with black scab measuring 1 cm x 0.1 x 0.1 cm over the right frontal scalp obliquely placed caused by sharp weapon, incised stitched wound 1 cm x stitches over the pinna, horizontal and its extension of one and half cm x stitches over the mastoid scalp obliquely placed caused by sharp weapon, craniotomy inverted U shaped flap healing with underlying craniotomy of right temporal bone 20 cm x stitches over the right temporal parietal scalp caused by sharp edge surgical in nature. This witness then referred to several abrasions over left parieto frontal scalp, left temporal scalp, right occipital scalp, right shoulder, right dorsum of foot, left ring finger and at the back of right forearm junction caused by blunt weapon. He also deposed that the cause of death of the deceased was due to cranio cerebral damage (head injury) as a result of sharp pointed cutting weapon vide injury nos.1, 2 and 4 which were sufficient to cause the death in ordinary course of nature. He was cross-examined by defense. In the cross-examination he stated that injuries mentioned in the inquest panchanama are very less compared to the injuries mentioned in his postmortem report. The case papers relating to admission and treatment of the deceased at Goa Medical College are completely different than the post mortem report. The deceased had expired on 8th September 2007. The index of the original case papers of the deceased to Station House Officer, Kudal Police Station, is at Exhibit-50. He has no concern with the

index. Apart from the documents referred to by him, he had also seen the hospital record. craniotomy means surgery of scalp, brain and skull. It is performed after taking C.T.scan and results of blood tests. The surgeon has to decide on the basis of C.T.scan whether to perform craniotomy. When the deceased was admitted in Goa Medical College Hospital, C.T.scan instrument was not in working condition there. Hence C.T.scan was done in private hospital at Goa. He has not brought the record of C.T.scan in the Court. The C.T.scan shows various images of all the parts of organs from different angles and sections. The post mortem report do not disclose as to how many times the craniotomy was performed to the patient. The craniotomy is performed to see as to what damage has been caused to the brain and as to whether operation is necessary to said damage. The post mortem report do not disclose as to which Doctor performed craniotomy on the deceased. He was aware that injury no.5 was caused by craniotomy operation. The said injury do not have connection with other injuries shown in the post mortem report. He do not have the record to ascertain as to what was actually done at the time of craniotomy. The bruises are caused by blunt force like stick, stone and fist. Abrasions are superficial injuries. As regards abrasions at sr.nos.7 to 15 and 18 to 20, the witness has not mentioned the category or the type of said abrasions. The abrasion has caused due to friction of the skin against some rough object. The abrasions can be caused by fall on the ground. The incised wound is caused by a weapon having sharp edge. The injury nos.1 to 4 are stitched injuries. There is no mention in the report that the said injuries at sr.nos.1 to 4 were opened by him. The injuries nos.1 to 4 are seen on bony surface. In order to see as to whether the bones below injury nos.1 to 4 have caused any damage

to the bone, the stitches are required to be opened. Injury nos.3 and 4 are not disclosing any cut injury to the bone. To decide as to whether any injury is incised wound, the depth of the said injury is material. He did not measure the depth of the injuries at sr. nos.1, 2 and 4. The post mortem report does not disclose that he had seen the features, such as, the tissues are usually divided more deeply than at its termination in the incised wound, the incision tails off to a superficial skin wound. As per Parikh Jurisprudence, in incised wounds made by curved weapons, such as sickle, the pointed end of the instrument may make a stab or puncture and the blade a cut wound, sometimes with untouched skin in between. He did not find any stabor punctured wound as per the proposition advanced by Parikh Jurisprudence. There is difference between chop wound and incise wound. Injury nos.6 and 17 are possible by fall.

13. The post mortem report indicate that cause of death was due to cranio cerebral damage (head injury) as a result of sharp pointed cutting weapon vide injury nos.1, 2 and 4 which were sufficient to cause the death in ordinary course of nature. We have also perused the inquest panchanama which states that wound is seen behind the skull of deceased. Injuries seen over left side skull of deceased. Also stitches are seen over right ear and over backside of ear of deceased. No other external injuries found. Bruises are seen over right shoulder and left hand elbow of deceased. No other external injuries were found on the legs. No external injuries were found except skull injury.

14. PW-6 Dr.Pandurang Dashrath Vajratkar was working at Medical Officer at Rural Hospital, Kudal. On 3rd September 2007 the injured

was brought to the hospital. He examined him. The history of assault was recorded. The injured was in semi-conscious condition. He found the following injuries on the person of Krishna Rane :

- (i) C.L.W. on right forehead 4x1x1 cm;
- (ii) C.L.W. on occipital region 3x ½ x1 cm. with palpable occipital bone fracture.

The nature of the said injury was grievous and the age of injuries was fresh. He deposed that injury nos.1 and 2 are possible by sickle (koyta). In the cross-examination he stated that the medical certificate do not disclose the history narrated by the relatives of patient. Injury nos.1 and 2 mentioned in the medical certificate Exhibit-56 are not stab injuries. Parikh Text Book of Medical Jurisprudence is the authority on medical jurisprudence. As stated on page 250 of the said book, an incised wound made by curve weapon such as sickle, the pointed end of the instrument may make a stab or puncture and the blade, a cut wound. The witness disputed the opinion as regards injuries caused to the patient in this case. Exhibits-56 and 57 do not disclose as to how he came to the conclusion that injury no.2 is a fracture injury. Contusions and lacerations of the brain are often seen from fall from eight as mentioned on page 309 of Modi's book of medical jurisprudence.

15. The medico legal certificate register of Rural Hospital, Kudal was produced. One page of the said register relates to the admission of injured and the nature of injuries sustained by him. The medical case papers relating to further treatment administered to the patient were not placed on record.

16. PW-7 Sujit Sawant had acted as panch witness. The accused had allegedly made statement with regards to discovery of sickle. The panchanama was exhibited in evidence. The sickle was recovered from the place that is kept under stone near Maruti temple. The witness was cross-examined by the defense. There is nothing to cast aspersions on the evidence of said witness. PW-8 Tatu Lambar was working as ASI and attached to Kudal Police Station at the relevant time. He tried to record the statement of injured. However, the medical officer has made endorsement on the letter requesting for recording of statement, that the patient is not in a position to give his statement. The witness has recorded supplementary statement of complainant on 3rd September 2007. He also visited the spot. He recorded statement of the witnesses. He was cross-examined by the advocate for accused.

17. PW-9 Vishnu Rathod was attached to Kudal Police Station as Police Naik. He was writer of R.D.Jadhav. Shirt of accused was seized under his panchanama. The panchanama was recorded by him. At the relevant time R.D.Jadhav was investigating officer. He reduced into writing the statement of accused in the presence of investigating officer and panchas. The sickle was recovered at the instance of accused. He carried the seized muddemal to Chemical Analyzer, at Pune. He was cross-examined. Nothing was brought on record to disbelieve his evidence.

18. PW-10 Umesh Hazare was Police Inspector attached to Kudal Police Station. He sent charge sheet to the Court. R.D.Jadhav who had partly carried out investigation, was ailing and unable to speak properly. He scrutinized the documents. In the cross-examination he

was questioned on the wireless message dated 9th May 2007. There is mention in the wireless message that there is attack on Krishna Rane at his house.

19. The prosecution also relied upon Chemical Analyzer's report with regards to earth particles collected from nail clippings and the result of analysis was that they had components of earth similar to earth in Exhibit-72 in respect of physical characteristics and spectro chemical composition. The C.A report Exhibit-78 is with regards to scalp hair, nail clippings of the deceased. No blood was detected on nail clippings or scalp hair and the blood group of blood stained gauze could not be determined as the results are inconclusive. The C.A report Exhibit-79 with regards to blood of the accused indicate that blood group was 'A'. The C.A report Exhibit-80 was in connection with earth, half pant, shirt, T-shirt and sickle described as Articles-1 to 6. The analysis indicated that Article-1 earth is mixed with blood. Articles-3 and 4 half pant and shirt are stained with blood at places. Article-5 T-shirt has two blood stains each of 1 cm in diameter situated at front upper portion. Article-6 sickle is stained with blood on blade and handle. No blood was detected on Article-2 (earth). The blood on Articles-1,3,5 and 6 was of human but the ABO grouping was inconclusive. The C.A.report Exhibit-81 relates to earth, half pant and shirt and the results of the analysis were that earth collected from the half pant and shirt tally with the earth Article-2 in respect to hue, physiochemical characteristics and spectro-chemical composition. The C.A report Exhibit-82 was in respect to nail clippings of the deceased and no blood is detected on it.

20. The accused had examined himself as defense witness no.1. He stated that on 3rd September 2007 he was at Mhapusa. He had no concern with the alleged crime. He denied making any statement before Police about weapon and that he had threatened the deceased on account of erection of bandh before the incident. He was cross-examined by prosecution. He could not produce any document showing that on the date of incident he was at Mhapusa.

21. Learned counsel for appellant had urged that PW-5 proceeds on the basis of probabilities. He did not know the dimensions of injuries. The evidence on record is not sufficient to infer that there was intention to commit murder. There was no enmity. It was a sudden quarrel. The case papers at hospital relating to treatment given to the deceased, were not produced. The deceased died on 8th September 2007 i.e. after a period of five days after the incident. The offence, therefore, at the most, would be under Section 304(II) of IPC. Learned counsel relied upon following decisions :

- (i) Harish Kumar Vs. The State (Delhi Admn.)¹;
- (ii) Ram Jattan and others Vs. State of U.P.²;
- (iii) Ashok Kumar Lallan Pande Vs. The State of Maharashtra and Nizamuddin Abdul Kadar Sayyed Vs. The State of Maharashtra³.

22. Learned APP, as stated above, has submitted that prosecution has established its case beyond all reasonable doubts. The judgment of Trial Court is based on cogent reasons. The defense has failed to disprove the evidence adduced by prosecution. The cross-examination is not effective enough to discard the evidence of

1 1994 Supp (1)-SCC-462

2 1995-SCC (Cri)-169

3 Criminal Appeal Nos.437/2005 and 104/2005, decided on 21-3-2014

witnesses. There is ocular and documentary evidence which proves the charge u/s 302 of IPC against appellant. The appellant was armed with sickle and inflicted the injuries on the head of the deceased. The incident had occurred on account of dispute over erection of bandh. The accused had intimidated the deceased prior to the incident. The doctor has opined the cause of death being injuries caused by the accused.

23. Having analyzed the evidence of the witnesses as above, we are of the considered opinion that the prosecution has indeed established that the applicant was instrumental in causing death of the deceased. The evidence of PW-1, PW-3, PW-4 is consistent. PW-1 has reported the incident to Police. He also intimated about the injured lying at the scene of offence to other villagers. The evidence of panch witnesses viz PW-2, PW-7 corroborates the prosecution case. We have also analyzed the evidence of PW-5 and PW-6 who are the medical officers, who conducted autopsy and examined the deceased.

24. Although it is established that appellant has caused death of the deceased, the question which arises for consideration is whether the offence u/s 302 of IPC is made out or the appellant could be convicted for offence u/s 304(II) of IPC. It is pertinent to note that the victim was assaulted on 3rd September 2007. Initially he was taken to Rural Hospital, at Kudal. Apparently he was immediately shifted to Goa Medical College Hospital at Goa. Further treatment was carried out at Goa Medical College, Goa. We have perused the inquest panchanama and the medical certificate Exhibit-56 issued by PW-6 who had examined the injured first in point of time when he

was taken to Rural Hospital, at Kudal. Exhibit-56 would reveal that the injured had sustained two injuries in the nature of CLW on right forehead which is simple in nature and CLW with palpable occipital bone on occipital region caused with sharp and blunt object, which is of grievous nature. In the post mortem report conducted by PW-5, however, reference of injuries in the nature of stitched wounds and abrasions is made. Thus, the opinion of PW-6 is apparently based on probabilities. From the evidence of witnesses it is apparent that accused was allegedly present at the scene of offence and the injured was lying near the well situated in the agricultural field of PW-1. The accused left the place on being questioned by PW-1. Undisputedly PW-1 had not seen the accused assaulting the deceased and thus the manner in which the alleged blows were inflicted upon him. There are no previous complaints. From the evidence of this witness it has appeared that the injured had disclosed to them that there was fracas between him and the accused and in anger he was assaulted by the accused. The accused and the deceased were agriculturists. Finding of weapon like sickle in the possession of accused cannot be inferred as a preplanned attack to cause murder of the deceased. Thus, there is substance in the submission advanced by learned counsel for appellant that incident had occurred suddenly and there was no intention to cause death, although the accused may have knowledge that the assault would result in death of the deceased. It is also relevant to note that the injured was undergoing treatment and he died subsequently. In the circumstances it was vital and important to put on record the nature of treatment given to the victim. The medical case papers with regards to the treatment given to him at Goa Medical College, Goa, were not exhibited in evidence. In the light of the circumstances, ratio laid down in the decisions

relied upon by learned counsel for appellant would squarely apply in the present case.

25. In the case of Harish Kumar (supra), it was observed that doctor conducting autopsy opined that the neck injury was sufficient in the ordinary course of nature to cause death. However, having regard to the nature of injuries, time gap between the time of infliction of the injury till time of death and lack of sufficient material as to nature of treatment given to deceased during that period, it cannot be conclusively said that the injury was sufficient in the ordinary course of nature to cause death; and hence the offence would fall u/s 304(II) of IPC and not u/s 302 of IPC. In the said case death was caused two days after infliction of injury and hence it was observed that evidence of witnesses although inspires confidence that the prosecution has established that the accused has inflicted the injury, which resulted in death of the deceased, however, the evidence cannot conclusively show that offence can be brought within clause thirdly of Section 300 of IPC. In paragraph 7 of the said decision it was observed that nature of injuries, time gap between infliction of injury till the date of death, which was two days after the injury was inflicted, there is no sufficient material to show as to what nature of treatment was given to the deceased during those two days. Under the circumstances, though injury has resulted in the death of deceased, it cannot be said conclusively that it was sufficient to cause his death. Hence, the offence would fall u/s 304(II) of IPC.

26. In the case of Ram Jattan and others (supra), the Hon'ble Supreme Court has considered similar issue as to whether the

injuries sufficient in the ordinary course of nature to cause death as enumerated u/s 300 thirdly. It was held that in the absence of proof by the prosecution in an objective manner that the injuries caused were sufficient in the ordinary course of nature to cause death, the same cannot be interfered with unless the injuries are so patent. The facts in the said decision would indicate that the accused were armed with sharp aged weapon. There were several injuries on the person of victim. The victim died due to shock and haemorrhage on the next day. There is no indication in the evidence of doctor or in the post mortem certificate that injuries were sufficient in the ordinary course of nature to cause death, although doctor have deposed in a general way that the injuries were sufficient to cause death in the ordinary course of nature. No doubt the injuries in the said case were not on vital parts but the ratio of the decision has to be considered.

27. This Court in the case of Ashok Kumar Lallan Pande and Nizamuddin Abdul Kadar Sayyed (supra) has also considered similar situation. After relying upon the decision of the Supreme Court in the case of Harish Kumar (supra), this Court had observed that the doctor had not distinguished which were the injuries sustained by the victim as a result of assault and which were surgical wounds. The medical officer does not refer to the treatment which was given to the victim after surgery. There is no description of injuries. The medical officer who conducted post mortem has made omnibus statement that all the injuries sustained by the victim were sustained in the ordinary course of nature to cause death. There is no segregation of the surgical wounds and the stab wounds. Therefore, the prosecution has failed to establish the nature of injuries which

the victim had sustained. There is no evidence that the injuries which were inflicted by the accused, were sufficient in the ordinary course of nature to cause death of the deceased. The conviction of the accused was, therefore, altered from Section 302 to Section 304(II) of IPC. The victim in the said case had died after eight days.

28. Applying the aforesaid ratio it is apparent that the present case would also be covered by section 304(II) of IPC. The deceased has died on 8th September 2007. The evidence of PW-5 and PW-6 medical officers, who conducted the autopsy and examined the victim, and the fact that medical case papers with regards to the treatment given to the victim were not forthcoming and were not adduced in evidence, and also considering the factual aspects evident from the prosecution witnesses, we are of the considered opinion that conviction u/s 302 of IPC is not maintainable and the accused can be convicted for the offence u/s 304(II) of IPC. Accordingly appeal is partly allowed and conviction and the sentence under Section 302 of IPC is set aside and instead the appellant is convicted for the offence punishable under Section 304(II) of IPC.

29. Learned counsel submitted that the appellant is in custody almost for a period of 7 years and 10 months. The appellant is in custody during the period between 9th September 2007 and 12th February 2008 and from the date of conviction i.e. from 16th February 2013 and hence he is in custody for a aforesaid period, which is sufficient sentence for conviction u/s 304(II) of IPC. The appellant is sentenced to imprisonment which is already undergone by him. The sentence of fine of Rs.10,000/-, however, stands maintained.

30. Hence, we pass following order :

ORDER

(a) Criminal Appeal is partly allowed;

(b) The conviction under Section 302 of IPC awarded by judgment and order dated 16-02-2013 passed by the Additional Sessions Judge, Sindhudurg at Oros, is altered to Section 304(II) of IPC and the Appellant is directed to be released on sentence undergone by him.

31. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(PRAKASH D. NAIK, J.)

(PRASANNA B. VARALE, J.)

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