

IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
APPELLATE SIDE

HON'BLE JUSTICE CHITTA RANJAN DASH
AND
HON'BLE JUSTICE PARTHA SARATHI SEN

C.R.A. No. 306 of 2009

BABLU CHANDRA DEY @ BABUL
-Versus-
THE STATE OF WEST BENGAL

For the Appellant : **Mr. Subir Banerjee, Adv.,**
Mr. Sandip Bandyopadhyay, Adv.,
Ms. Ruxmini Basu Roy, Adv.

For the State : **Mr. S.G. Mukherjee, Ld. PP.**
Ms. Faria Hossain, Adv.,
Mr. Ashok Das, Adv.

Heard on: : **29.06.2022, 25.07.2022,**
12.08.2022 and 05.09.2022.

Judgment on : **12.09.2022**

PARTHA SARATHI SEN, J. : –

1. The present appeal arises out of the judgment and order of conviction dated 17th February, 2009 and 20th February, 2009 passed by the learned Additional District and Sessions Judge, 2nd Fast Track Court, Dinhata, Coochbehar in Sessions Trial No.2 (2) of 2008 arising out of

Sessions Case No.384 of 2007, G.R Case No.143 of 2006, Dinhata Police Station Case No.136 of 2006 dated 7th May, 2006.

2. By the impugned judgment learned trial court found the accused guilty under Section 302 of Indian Penal Code and thus sentenced him to suffer rigorous imprisonment for life and also to pay fine of Rs.10,000/- and simple imprisonment for a further period of six (6) months. The accused felt aggrieved and thus preferred the instant appeal.

3. In order to dispose of the instant appeal, the facts leading to the initiation of Dinhata Police Station Case No. 136 of 2006 is required to be dealt with in a nutshell.

4. On 7th May, 2006, one Apurba Kumar Bose son of late Gyanendra Nath Bose, of Ward No. 1, Babupara, P.S Dinhata, District- Coochbehar lodged a written complaint with the I.C Dinhata P.S stating, inter alia, that on the said very day that is on 7th May, 2016 at about 7 A.M. his son-in-law Bablu Chandra Dey @ Bablu suddenly became excited and assaulted his wife (the daughter of the defacto complainant) by a wooden batam on her head at his own residential house at Mother Lane, Ward No.11 in Dinhata town. It is the further version of the defacto complainant that as a result of such severe blow, his said daughter sustained serious injuries on her head and she fell down on the earth and thereafter the accused sat on the chest of his wife and throttled her neck and as a result whereof his said daughter expired. It is the further version of defacto complainant that subsequently his grandchildren reported the entire incident to him and then and there he took his said daughter to hospital

where the attending doctor declared the victim as dead. It is further contended that since on the very fateful day, he was busy in his election duty, some delay has been caused in lodging the FIR.

5. As discussed above, on the basis of the said written complaint, the aforesaid P.S case was started. Investigation was taken up and on completion of the same charge-sheet under Section 302 of the IPC was submitted against the accused. Since ACJM, Dinhata found the case is triable by the Court of Sessions, the instant case was committed to the learned Sessions Judge, Coochbehar and thereafter the said case was transferred to the learned trial judge for disposal.

6. Lower court record reveals that on perusal of the entire materials, learned trial court by his order date 25th February, 2008 framed charges under Section 302 of the IPC as against the accused Bablu Chandra Dey @ Bablu and thereafter the trial proceeded since the accused pleaded his innocence. Lower court record reveals further that in order to bring home the charges, the prosecution has examined as many as 17 witnesses in all and 8 documents have been exhibited including one material exhibit. Lower court record reveals further that after considering the oral evidence of the prosecution witnesses and the documentary and material evidence and also after examining the accused under Section 313 of the Cr.P.C, learned trial court found that the charge as against the under Section 302 of the IPC has been duly proved by the prosecution and thus convicted the accused under Section 235 (1) of the Cr.P.C giving rise to instant appeal.

7. In support of the instant appeal learned Advocate for the appellant at the very outset draws attention of this Court to the impugned judgment. Attention of this Court is also drawn to the evidence of PW2. It is contended that while passing the impugned judgment, learned trial court has unnecessarily placed much reliance upon the evidence of PW2 who is the minor daughter of the appellant and the victim. It is contended that learned trial court while passing the impugned judgment ought to have considered that the statement of PW2 as recorded under Section 164 of the Cr.P.C was recorded after a long delay and that at the time of recording of such statement as well as during her deposition, she was in the custody of the defacto complainant that is PW1 and thus there is every possibility that her said statement and the deposition may be influenced at the behest of PW1. It is further contended that if the evidence of PW2 vis-a-vis the post mortem report of the victim is compared, it will reveal that there lies much contradiction in between such deposition and the post mortem report which has been exhibited before learned trial court as exhibit 5.

8. It is further contended on behalf of the appellant that the evidence of PW5 who is minor son of the appellant and the victim ought not be relied upon since in his cross-examination he categorically stated that he had deposed before the learned trial court as advised. It is further contended that evidence of Autopsy Surgeon that is PW-13 vis-a-vis his post mortem report that is exhibit 5 does not match with the evidence of the alleged ocular witnesses; namely PW2 and PW5 and therefore learned

trial court ought to have been given the benefit of doubt in favour of the present appellant. It is further contended that before the learned trial court, the prosecution has miserably failed to prove that the alleged weapon of evidence that is wooden batam bears any blood stain of the deceased. It is further contended that in absence of any Forensic Science Laboratory report in respect of the alleged seized blood soaked wearing apparels and bed sheet, it cannot be presumed beyond reasonable doubt that the alleged incident of murder at all took place at the place of occurrence. Drawing attention to the evidence of PW3, it is contended that from his examination in chief, it is crystal clear that on the basis of his complaint police arrived at the place of occurrence and if that be the so, to that effect neither any case diary nor any FIR has been proved before the learned trial court. It is further contended that from the evidence of the investigating officer that is PW16, it is found that according to him dead body was taken to Dinhata Divisional Hospital on the relevant day and hour. However from the mouth of the relative witnesses, it reveals that immediately after the alleged assault, the victim was taken to one Merina Nursing Home. It is contended that in view of such contradiction, learned trial court ought not to have passed the impugned judgment and accordingly it is submitted on behalf of the appellant that it is a fit case for allowing for instant appeal by setting aside the impugned judgment and order of conviction. It is further submitted that as an abundant precaution, even if it is found that there are sufficient materials as against the present appellant to uphold the impugned judgment, his conviction

may be altered from Section 302 of the IPC to Section 304 Part I IPC or 304 Part II IPC.

9. While opposing the contention of the learned Advocate of the appellant, learned Advocate for the State contended that learned trial court is very much justified in passing the impugned judgment and order. It is contended further that evidence of the prosecution witness do not contradict with each other and on the contrary it gets due corroboration from each other. It is thus argued that it is fit case for dismissal of the instant appeal.

10. This Court has given its anxious consideration over the submissions of the learned Advocates of both sides. This Court has also meticulously gone through the entire materials as available in the lower court record as well as the impugned judgment as passed by the learned trial judge. In this appeal this Court will discuss only the evidence of those prosecution witness which are relevant for the purpose of disposal of the instant appeal.

11. PW1 being the defacto complainant in course of his examination in chief stated that on 07.05.2006 at about 7 A.M, an altercation took place between his daughter Kuntala Dey, since deceased and the present appellant. It is his further version that his two grand-children viz; PW2 and PW4 rushed to his home and reported his family members that one incident occurred in their home. It is said by him that at that material time he was away from his home. It is his further version that as per direction of his wife (PW4), his son (PW15) went to the house of the

accused and his son, thereafter reported him that he noticed his sister (victim) was lying in a pool of blood on the floor of her matrimonial home and the accused was coming out from his room. It has been stated further that subsequently he came to learn from his grandchildren that his son-in-law (the appellant herein) assaulted his said daughter on the back of her head by a batam and subsequently pressed her throat by riding on her chest. He stated that thereafter he lodged a written complaint with the local police station.

12. According to the prosecution, PW2 being the minor daughter of the present appellant and the victim is an ocular witness of the alleged incident. In course of her examination in chief, PW-2 stated that on the relevant day and hour, a quarrel took place between her parents. It is her further version that at that time her mother asked her father to hand over a mobile set to her, to which the accused declined and thereafter her mother used a filthy language towards her father. She stated further that her father (the appellant herein) suddenly pull her mother by catching her hair and assaulted her on the back side of her head with a wooden batam, for which the hair clip of her mother pierce inside her head caused her head and thereafter her mother fell down on the earth facing her face on the ground side. It is her further version that her father thereafter climbed on her mother's chest and pressed her throat. She stated further that that she and her brother (PW5) requested the accused to leave her mother to which the accused asked them to leave the place otherwise he would kill them. She stated that thereafter she and her brother rushed to house of

PW1 and reported the matter and after hearing the entire incident her grandmother (PW4) asked her maternal uncle (PW15) to look into the matter. She stated that thereafter PW15 found her mother dead and accordingly he informed the entire incident to his father PW1. It is the further version of PW2 that when her mother was taken to a local Nursing Home, she was declared dead. In course her examination in chief, she hadduly proved the alleged offending weapon which has been marked as Mat exhibit I.

13. In course of her cross-examination she stated that her statement was recorded by the Magistrate after 23-24 days of her mother's death. It is pertinent of mention herein that PW2 in course of her cross-examination had given a vivid description of the alleged incident as given by her in her examination in chief. She stated specifically that on the relevant day and hour, a quarrel was going on between her father and mother over the issue of a mobile phone and such dispute continued for half an hour and at that time, the adjacent people assembled. It is her specific version in her cross-examination that on account of assault by her father, her mother fell down on the earth facing towards the ground and on seeing such incident she and her brother (PW5) rushed to her maternal home.

14. At this juncture the evidence of PW5 that is the minor son of the victim and appellant are equally relevant, since according to the prosecution he is another ocular witness to the alleged murder. In course of his examination in chief, PW5 categorically stated on 07.05.2002 in the

morning when his mother asked his father to hand over a mobile set, his father (the appellant herein) declined to which his mother rebuked his father by filthy language and then his father (the appellant herein) caught hold of her hair, dragged her into another room and assaulted her on the back side of her head with a batam to which his mother fell down on the ground and thereafter his father climbed on the chest of his mother and pressed her throat. It is the further version of PW5 that thereafter he and his elder sister (PW5) requested the accused to leave her mother but his father asked them to leave the place otherwise he would kill them. He stated thereafter he rushed to his maternal uncle's home and narrated the entire incident to her maternal grandmother (PW4). It is his further version that subsequently when he went back to his home he did not find his mother, however he noticed blood on the bed and also on the floor and also on the wooden batam at the place of occurrence. In course of his cross-examination PW-5 stated that he is not aware as to why 7th may is famous for. He is also not aware as to whether 7th may is the birth anniversary of Rabindranath Tagore or not. He further stated that since the day of incident he was residing with her maternal grandparents. He further stated that whatever he deposed before the learned trial court as he was advised.

15. This court considers that discussion of evidence of PW-4 (the mother of the victim), PW-6 (the sister of the victim) and PW-15 (the brother of the victim) are not much relevant since they echoed the version of the PW1 only. At this juncture, we proposed to look to the post-mortem

report of the victim that is exhibit 5 vis-a-vis the evidence of PW13 the Autopsy surgeon. From the examination in chief of PW13 vis-a-vis Exhibit-5, it reveals that during autopsy, the Autopsy Surgeon found the following injuries on the person of the victim and the same is reproduced he under in verbatim:-

“ 1. One haematoma sizing 6 c.m x 6 c.m. over right occipito partial region with removal skin.

2. Dipressed fracture of right partial bone with introit cerebral hemrrhage.

3. Linear curt wound at chin measuring 3 c.m x $\frac{1}{4}$ c.m x $\frac{1}{2}$ c.m.

4. Abrasion on throat. “

It revels further from the examination in chief of PW13 vis-a-vis exhibit 5 that cause of death of the victim is neurogenic and hemorrhage shock as a result of head injury due to trauma which is anti-mortem in nature. In his cross-examination PW13 further stated that in course of autopsy he did not recover any hair clip from the head of the accused and also found no hair clip injury. He further stated that if anybody pressed the throat of a person from the front side, there must be nail mark on the both side of neck. It is his further version in his cross-examination that in the event, if any weapon is shown to him, he could ascertain that the alleged death was caused by such weapon or not.

16. Admittedly before the trial court the prosecution has miserably failed to prove that the alleged offending weapon being the wooden batam

(MAT Exhibit I) bears the blood stain of the victim since for the reason best known to the investigating officer, the same has not been sent to FSL for forensic examination. It is equally pertinent to mention herein that though in course of investigation the alleged blood soaked wearing apparels of the victim and bedding materials were seized by the I.O but those were also not sent to FSL for forensic examination to ascertain as to whether those blood belonging to the victim or not. In view of such, a crucial question may arise as to whether the defect of such investigation how far affects the prosecution case. At this juncture we propose to look to a reported decision '**Akram Khan vs State of West Bengal**' reported in **(2012) 1 CCr1 (SC) 264** wherein the Hon'ble Supreme Court expressed the following view :-

"It is well nigh settled that even if the investigation is illegal or even suspicious, the rest of the evidence must be scrutinized independently of impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance and pre-eminence in criminal trials over the action taken by the investigating officers. Criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officer's suspicious role in the case."

The same in view was taken in another reported decision in '**State of Karnataka vs K. Yarappa Reddy**' reported in **AIR 2000 SC 185**.

17. Keeping it in mind the aforesaid principle of Law as enunciated by the Hon'ble Supreme Court of India, it thus reveals to us that a criminal trial must not be vitiated merely on ground of wrong or fault committed by the investigating officer, if the Court finds that the evidence of the prosecution witnesses are otherwise trustworthy for reaching a logical conclusion.

18. In course of his argument learned Advocate for the appellant remains very vocal about the evidence as adduced by the PW2 and PW5 being minor children of the victim and the present appellant. It has been argued that prior to taking deposition of those PWs, learned trial court has miserably failed to satisfy himself as to whether the said two witnesses being minor are competent enough to depose before the learned trial court or not. Admittedly learned trial court in course of trial, ought to have recorded the questions as put by him to PW2 and PW5 to testify their prudence and capability to understand the question as put to them. However on careful perusal of the depositions of PW2 and PW5, it transpires to us that at the time of giving their respective depositions, PW2 and PW5 are not at all capable to understand the questions as put to them and on the contrary it appears to us that they possess sufficient intelligence to understand the questions as put to them and they equally answered the question in a diligent manner.

19. On conjoint perusal of the respective examination in chiefs of PW2 and PW5 being the two ocular witnesses, it appears to this Court in course of their respective examination in chiefs they have given a vivid description as to how the accused assaulted their mother on her head with a wooden batam on relevant day and hour. It appears to us that the evidence of PW2 and PW5 are not at all contradictory and on the contrary they got due corroboration from each other and also from the evidence of PW13 (Autopsy Surgeon) and exhibit 5 (post mortem report).

20. In considered view of this Court the argument of learned Advocate for the appellant that the evidence PW2 and PW5 are to be discarded because at the time of their deposition they were in the custody of PW1 and PW4 does not appear to be convincing since it is well settled that if the eye witness is related to the deceased, his evidence has to be accepted if found to be reliable and believable because he would honestly be interested in ensuring that the real culprits are punished. This view was taken by the Hon'ble Supreme Court in a reported decision '**Indra Pal Singh Vs State of Uttar Pradesh**' reported in **(2008) 16 SCC 648**.

21. Admittedly before the learned trial court the alleged offending weapon (MAT Exhibit I) was not shown to the PW13 (Autopsy Surgeon) to ascertain as to whether the injury as found by him on the person of the deceased could happen by a blow thereof. However in considered view of this Court that is equally not fatal in view of coherent, consistent and corroborative evidence of PW-2, PW-5 and PW-13. Though in the case in hand, there is no much contradiction between medical evidence and

ocular evidence even if such contradiction arises, the ocular testimony of the witness gets greater importance than medical evidence unless medical evidence make the ocular testimony highly impracticable. In this regard this Court intends to place it reliance upon a reported decision '**Abdul Sayed vs Sate of Madhya Pradesh**' reported in **(2010) 10 SCC 259** wherein the Hon'ble Supreme Court expressed the following view :-

“Medical evidence versus ocular evidence

32. *In Ram Narain Singh v. State of Punjab [(1975) 4 SCC 497 : 1975 SCC (Cri) 571 : AIR 1975 SC 1727] this Court held that where the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistics expert, it amounts to a fundamental defect in the prosecution case and unless reasonably explained it is sufficient to discredit the entire case.*

33. *In State of Haryana v. Bhagirath [(1999) 5 SCC 96 : 1999 SCC (Cri) 658] it was held as follows : (SCC p. 101, para 15)*

“15. The opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts it is open to the Judge to adopt the view which is more objective or probable. Similarly if the opinion given by one doctor is not consistent with probability the court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject.”

34. Drawing on *Bhagirath case* [(1999) 5 SCC 96 : 1999 SCC (Cri) 658] , this Court has held that where the medical evidence is at variance with ocular evidence,

“it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which had to be tested independently and not treated as the ‘variable’ keeping the medical evidence as the ‘constant’ ”.

35. Where the eyewitnesses' account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as conclusive. The eyewitnesses' account requires a careful independent assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence, including medical evidence, as the sole touchstone for the test of such credibility.

“21. ... The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the ‘credit’ of the witnesses; their performance in the witness box; their power of observation, etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.”

36. In *Solanki Chimanbhai Ukabhai v. State of Gujarat* [(1983) 2 SCC 174 : 1983 SCC (Cri) 379 : AIR 1983 SC 484] this Court observed : (SCC p. 180, para 13)

“13. Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and

thereby discredit the eyewitnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eyewitnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence.”

37. *A similar view has been taken in Mani Ram v. State of U.P.] , Khambam Raja Reddy v. Public Prosecutor] and State of U.P. v. Dinesh*

38. *In State of U.P. v. Hari Chand [(2009) 13 SCC 542 : (2010) 1 SCC (Cri) 1112] this Court reiterated the aforementioned position of law and stated that : (SCC p. 545, para 13)*

“13. ... In any event unless the oral evidence is totally irreconcilable with the medical evidence, it has primacy.”

39. *Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.”*

22. The proposition of Law as discussed above, if applied in the case in hand, this Court has got no hesitation to hold that there is a little scope to disbelieve the testimony of PW2 and PW5 being the minor children of the victim as well as of the appellant. In view of such, this Court has got no hesitation to hold that learned trial court is perfectly correct in coming

to the conclusion that the accused assaulted the victim on the relevant day and hour which resulted to her death.

23. At this juncture we are duty bound to consider as to whether learned trial court is at all justified in sentencing the present appellant under Section 302 of IPC or not. As discussed herein above that the learned Advocate for appellant strongly contended in course of his argument that in the event this Court finds that the present appellant committed the crime of culpable homicide of her wife on the relevant day and hour, such act cannot come under the purview of Section 302 of the IPC and at best the same may come under the purview of Section 304 Part I or Part II. In course of his submission, learned Advocate for the appellant placed his reliance upon the following reported decisions namely; '**Devendra Nath Srivastava vs State of Uttar Pradesh**' reported in **(2017) 5 SCC 769** and '**State of Madhya Pradesh vs Abdul Latif**' reported in **(2018) 5 SCC 456**.

24. In order to assess whether the present case came under the purview of Section 302 IPC or under Section 304 Part I or Part II IPC. The findings of the Hon'ble Apex Court in the case **Devendranth** (supra) is reproduced hereunder in verbatim:-

"19. As to whether the act on the part of the appellant constitutes the offence punishable under Section 302 IPC or Section 304 Part I IPC, we are of the view that the incident has occurred after quarrel between the appellant and the deceased which is not a planned act. It is also established that the appellant was a drunkard. In our opinion, in the facts and

circumstances of the case, the view taken by the High Court, that the appellant has committed the offence punishable under Section 304 Part I IPC, requires no interference.

20. *In State of A.P. v. Rayavarapu Punnayya [(1976) 4 SCC 382 : 1976 SCC (Cri) 659 : (1977) 1 SCR 601] , SCR at p. 606, this Court, explaining the scheme of the Penal Code relating to culpable homicide, has laid down the law as under: (SCC p. 386, para 12)*

“12. In the scheme of the Penal Code, “culpable homicide” is genus and “murder” its specie. All “murder” is “culpable homicide” but not vice versa. Speaking generally, “culpable homicide” sans “special characteristics of murder”, is “culpable homicide not amounting to murder”. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, “culpable homicide of the first degree”. This is the greatest form of culpable homicide, which is defined in Section 300 as “murder”. The second may be termed as “culpable homicide of the second degree”. This is punishable under the first part of Section 304. Then, there is “culpable homicide of the third degree”. This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.”

25. *In the same case i.e. State of A.P. v. Rayavarapu Punnayya [(1976) 4 SCC 382 : 1976 SCC (Cri) 659 : (1977) 1 SCR 601] , this Court has further observed at SCR p. 608 as under: (SCC pp. 388-89, para 21)*

“21. ... whenever a court is confronted with the question whether the offence is “murder” or “culpable homicide not

amounting to murder”, on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to “culpable homicide” as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of “murder” contained in Section 300. If the answer to this question is in the negative the offence would be “culpable homicide not amounting to murder”, punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be “culpable homicide not amounting to murder”, punishable under the first part of Section 304, of the Penal Code.”

25. Keeping in my mind the proposition of law as enunciated by the Hon’ble Supreme Court, as discussed above and the factual aspects as involved in this appeal, if placed side by side, it appears to us that the evidence of PW2 and PW5 clearly and categorically indicate that the incident of culpable homicide at the instance of the present appellant had occurred all on a sudden and without any premeditation. It is evident to us that the present appellant had not taken any undue advantage or

acted in cruel or in any unusual manner while commission of the crime. It is also not the evidence of the prosecution witnesses that during their long marital life there was matrimonial discord between the accused and the victim and in view of such it appears to us that this case must come under the ambit of Section 304 Part II IPC instead of Section 302 IPC.

26. In view of such, the instant appeal is allowed in part.

27. The impugned judgement and order dated 17th February, 2009 and 20th February, 2009 passed by the learned Additional District and Sessions Judge, 2nd Fast Track Court, Dinhata, Coochbehar in Sessions Trial No.2 (II) of 2008 is thus modified to the extent indicated hereinabove.

28. It reveals to us that the appellant is still in custody and has already served the sentence as prescribed and accordingly he be set at liberty at once, if not wanted in connection with any other case.

29. Let a copy of this judgement along with LCR be sent down at once.

30. Urgent Photostat certified copy of this judgement, if applied for, be given to the parties on completion of usual formalities.

I agree.

(Chitta Ranjan Dash, J.)

(Partha Sarathi Sen, J.)