

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.1030 OF 2017

Madhukar Vijay Mali	... Appellant
Versus	
State of Maharashtra	... Respondent

....

**WITH
CRIMINAL APPEAL NO.626 OF 2017**

Sanju @ Sanjay Motiram Suryawanshi	... Appellant
Versus	
State of Maharashtra	... Respondent

....

Mr. Abbas Z. Mookhtiar, Advocate (appointed) for the Appellant in Criminal Appeal No.1030/2017.

Mr. Manoj Harit, Advocate a/w. Akhil Kupade & Mohammed A. Shaikh i/b. Manoj Harit & Company, for the Appellant in Criminal Appeal No.626/2017.

Ms. G.P. Mulekar, APP, for the Respondent-State.

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**CORAM : S. S. SHINDE AND
SARANG V. KOTWAL, JJ.**

RESERVED ON : 24th MARCH, 2022

PRONOUNCED ON : 30th MARCH, 2022

JUDGMENT : [*PER SARANG V. KOTWAL, J.*]

1 Both these Appeals are decided by this common judgment because they arise out of the same trial and in both these appeals the same judgment and order are impugned.

2 Criminal Appeal No.626/2017 is filed by the original accused No.1 Sanju @ Sanjay Suryawanshi and Criminal Appeal No.1030/2017 is preferred by the original accused No.2 Madhukar Mali. Both of them were tried in Sessions Case No.55/2013 by the Additional Sessions Judge, Niphad, District-Nashik.

3 Vide judgment and order dated 7.1.2017, both the Appellants were convicted for commission of the offences punishable under Sections 302 and 324 of the Indian Penal Code read with Section 34 of IPC. For commission of the offence punishable under Section 302 of IPC, both of them were sentenced to suffer life imprisonment and to pay fine of Rs.1500/- each; and in default to suffer further RI for six months. For commission of the offence punishable under Section 324 of IPC, both of them were sentenced to suffer RI for one year and to pay fine of Rs.500/- each; and in default to suffer SI for three months. The sentences were directed to run concurrently. The Appellants were acquitted for commission of the offence punishable under Section 201 read with 34 of IPC. They were given set-off under Section 428 of Cr.P.C. for the period undergone by them as under-trial prisoners during

trial. In further discussion, both the Appellants are referred to by their original status as accused Nos.1 and 2 before the trial Court.

4 The prosecution case, in brief, is as follows:

On 5.7.2013 in the early hours, both the accused assaulted one Chacha @ Suresh @ Ashok Gupta with an iron hook and a knife. They wanted liquor from him. He had refused and, therefore, he was assaulted by both of them. This incident took place in Hotel Bhagyodaya on Mumbai-Agra Road, near village Pimpalgaon (B), Taluka-Niphad, District-Nashik. They concealed the dead body in a shed and then they went to Hotel Akash and demanded liquor from one Ganesh. On his refusal, accused No.1 assaulted him on the head with a glass-bottle causing injuries on his forehead and cheek. Ganesh woke up one Daulat at nearby tea-stall and told him about the assault. Daulat confronted the accused. On his enquiry, accused No.1 told them that they had committed murder of Ashok Gupta and they had concealed his body in a shed. Daulat telephonically informed Kiran, the owner of the Hotel Bhagyodaya, who came there and all of them went to the shed where the dead body was concealed. The police were

informed. The accused were handed over to the police. The FIR was lodged. Various panchnamas were conducted. The dead body was sent for postmortem examination. The accused were immediately arrested and the investigation was conducted. At the conclusion of the investigation, the charge-sheet was filed and then the case was committed to the Court of Sessions.

5 During trial, the prosecution examined nine witnesses.

- PW-1 Daulat Padvi was the first informant.
- PW-2 Ganesh Gavade was the injured who was assaulted by the accused.
- PW-3 Ayyub Pathan, PW-4 Kiran Jadhav, PW-5 Harshad Ambore and PW-7 Sudam Chavan were the panchas to various panchnamas but they did not support the prosecution case and were declared hostile.
- PW-6 Constable Dattatraya Jagtap had carried the articles to Forensic Laboratory for analysis.
- PW-8 Dr. Rekha Sonawane had conducted the postmortem on the dead body and had also examined the injured witness Ganesh.
- PW-9 Prashant Ahire was the investigating officer.

Besides this evidence, the prosecution produced C.A. report on record, which showed presence of 'B-Group' blood on the

clothes of the deceased as well as of both the accused. The same blood group was seen on the iron hook recovered at the instance of accused No.2. There was blood found on the knife but the blood-group was inconclusive. The knife was found near the spot where Ashok Gupta was assaulted.

6 The defence of the accused was of total denial. After recording the evidence and the statements of the accused under Section 313 of Cr.P.C. and after hearing the arguments, learned Judge convicted and sentenced the accused as mentioned earlier.

7 Heard Mr. Abbas Mookhtiar, learned counsel for the Appellant in Criminal Appeal No.1030/2017, Mr. Manoj Harit, learned counsel for the Appellant in Criminal Appeal No.626/2017 and Ms. G.P. Mulekar, learned APP for the State.

8 Before referring to the submissions of learned counsel and learned APP, reference can be made to the evidence on record.

9 PW-1 Daulat Padvī was the first informant. He has deposed that he has a 'tea stall' near Hotel Bhagyodaya. At about 4.00 a.m. to 5.00 a.m. on the day of the incident, he heard shouts.

He woke up and saw that PW-2 Ganesh who was working in Hotel Akash was shouting loudly. He had suffered bleeding injuries on the head. PW-1 asked him about his injuries. He told that accused No.1 had assaulted him by a bottle as PW-2 had refused to give liquor to both the accused. Accused No.1 had told him that they had assaulted one person known as 'Chacha' because even Chacha had not given them liquor. Chacha was assaulted with knife and iron hook. After that they came to Hotel Akash and demanded liquor from PW-2 Ganesh; and on his refusal assaulted him. PW-1 then called Kiran telephonically. Kiran came there and made enquiries with the accused. They told Kiran that after the assault they took Chacha to one shed. After giving this information, both the accused took these witnesses to that shed. PW-1 and others saw that Chacha was lying on his back. The blood was oozing from his mouth. He was not responding. There were no signs of breathing. PW-1 and others concluded that he had died. They took the accused to the police station. PW-1 filed his FIR against both the accused. The FIR is produced on record at Exhibit-38. The police also recorded his supplementary statement on the same day.

The accused had assaulted 'Chacha' in Hotel Bhagyodaya.

In his cross-examination, he has stated that Hotel Bhagyodaya and Hotel Akash are situated within a distance of 100 to 130 ft. They were situate near Bombay-Agra Road. Kiran had made a phone call to Pimpalgaon police station. The police came there at about 5.30 a.m. to 6.00 a.m.. PW-1 went to the police station at about 6.00 a.m. to 6.15 a.m. by private vehicle. He went there on the motorcycle. According to him, PW-2 Ganesh went to the police station in PW-4 Kiran's car. According to him, accused No.2 was working in the Market Yard. He could not explain why it was not mentioned in the FIR that they had taken the accused to the police station. He did not know the full names of the accused.

10 The FIR at Exhibit-38 shows that it was registered vide C.R. No.112/2013 under Sections 302, 201, 324 read with 34 of IPC at Pimpalgaon (B) police station. There is a mention that the crime was registered and a station diary entry was taken at about 5.00 a.m. on 5.7.2013. Thus, there was immediate reporting of the offence to the police station.

11 PW-2 Ganesh Gavade is an important witness. He has deposed that he was serving in Hotel Akash. He and one Ramesh were staying in the same hotel. At the time of incident, both the accused came to his hotel at about 4.00 a.m. and asked for liquor. PW-2 refused. They went away and came back and again asked for liquor. Accused No.1 held him and gave a blow with bottle on his head and face. PW-2 Ganesh shouted for help from Ramesh, but, he did not wake up. Ganesh then rushed outside and went to PW-1 Daulat. He was also sleeping, but, he woke up. PW-2 told him about the assault. PW-1 Daulat made enquiries with accused No.1. At that time accused No.1 told him that since PW-2 Ganesh had not given them liquor he was assaulted. He further told them that they had assaulted Chacha as he had also not given them liquor. He further told them that both of them assaulted Chacha at Bhagyodaya Hotel by knife and iron hook and then threw him in one shed. PW-2 Ganesh has further deposed that PW-1 Daulat then called Kiran by making a phone call. Kiran came there. He also made enquiries with accused No.1. Even at that time, accused No.1 repeated the same story. Kiran then went to the shed to verify that

story. Thereafter the police took them to the police station. They gave *yadi* for medical treatment of PW-2 Ganesh. Police then recorded his statement. His statement was also recorded under Section 164 of Cr.P.C. before the Judicial Magistrate First Class. PW-2 Ganesh identified clothes worn by the accused at the time of commission of the offence.

In his cross-examination, he has stated that both these hotels did not have permission for selling liquor. Accused No.1 was working in Hotel Bhagyodaya. Ramesh was sleeping at some distance in his hotel. Broken pieces of glass-bottle had fallen on the ground. According to PW-2, he went to the police station with Kiran and PW-1 Daulat in Daulat's car. According to him, he went to the police station at about 9.00 a.m. to 9.30 a.m. and then went to the Rural Hospital at about 10.00 a.m.. He had shown the spot of incident to the police.

12 PW-4 Kiran Jadhav is another important witness. PW-1 and PW-2 have referred to him in their depositions. He has deposed that Hotel Bhagyodaya was situated in front of the Market Yard at Pimpalgaon. Sudhakar Bakre, accused No.1 and the

deceased Ashok Gupta @ Chacha were serving in that Hotel. The deceased Chacha was staying there in the hotel. On the day of incident, in the early hours, PW-1 Daulat called him on mobile phone and told him that both the accused had assaulted Ashok @ Chacha and PW-2 Ganesh. He then went to the hotel immediately. In the hotel, PW-1 Daulat, PW-2 Ganesh and accused No.1 were present. He made enquiries with accused No.1. He told the same story to PW-4 Kiran. Accused No.1 took PW-4 Kiran and Daulat to that shed. They saw that Chacha was lying dead. He had sustained injuries on face, head and nose. Chacha did not respond to PW-4's calls. He was dead. After that PW-2 Ganesh, accused No.1 and PW-4 himself went to the police station and handed accused No.1 in the custody of the police.

In the cross-examination, he has admitted that his hotel did not have permit to sell liquor. Accused No.1 was knowing that liquor was not sold in that hotel. He came to the hotel between 5 a.m. to 6 a.m.. He went to the police station at about 6.30 a.m. The police did not come to the hotel till PW-4 and others had approached the police station. His statement was recorded on the

next day.

13 PW-8 Dr. Rekha Sonawane had conducted the postmortem examination on the deceased Ashok Gupta. She found following injuries :

- i. Stab injury over nose upper part right side circular 2 cm x 2 cm and 2/3 cm deep;
- ii. CLW over left parietal area of skull 2 cm x 2 cm x 3 cm;
- iii. Multiple abrasions all over back and buttocks;
- iv. Multiple abrasions over face.
- v. There was fracture of skull at nasal bones and left parietal area of the skull.

. The cause of death was due to shock due to head injury. She had opined that the injuries mentioned in the postmortem notes were possible due to stabbing by knife or by iron hook.

. She had examined PW-2 Ganesh on 5.7.2013. He had suffered following two injuries:

- i. Incise wound over forehead in mid line 2 cm x 0.02 cm.
- ii. Incise wound over left cheek near nose 3 x 0.02 cm.

Both the injuries were fresh and simple and they were possible by sharp cutting instrument.

In the cross examination, she deposed that the rigor mortis on the dead body was absent. The death could have been caused within 12 hours before the time of postmortem examination which was conducted between 1.00 p.m. to 3.00 p.m. on 5.7.2013. The postmortem notes were produced on record at Exhibit-50. This evidence shows that the deceased had died homicidal death and PW-2 Ganesh had suffered injuries as mentioned by him in his deposition.

14 PW-9 API Prashant Ahire was the investigating officer. He has stated that after the investigation was handed over to him, he recorded supplementary statement of the informant. He seized the clothes of accused No.1 under panchnama. He conducted the spot panchnama. From Hotel Bhagyodaya the knife was seized. He also drew panchnama of the place where PW-2 Ganesh was assaulted. Accused No.2 was arrested by him. His clothes were seized. At the instance of accused No.2, an iron hook was recovered from his house on 6.7.2013. The articles were sent for chemical analysis and at the conclusion of the investigation he filed the charge-sheet.

In the cross-examination, he has stated that in both these hotels the liquor was not sold. He had not seized the glass bottle from the spot. The weapons were not sent for finger-print examination.

15 Since the panchas had turned hostile, all these panchnamas were produced on record through the evidence PW-9 API Prashant Ahire. Accused No.1's clothes were seized under panchnama carried out between 5.00 a.m. to 5.20 a.m. on 5.7.2013, which is produced on record at Exhibit-55/C. The spot panchnama was carried out between 6.45 a.m. to 7.35 a.m. on 5.7.2013 and it is produced on record at Exhibit-56. The clothes of accused No.2 were seized under panchnama carried out between 7.15 a.m. to 7.20 a.m. on 5.7.2013, which is produced on record at Exhibit-57. The clothes of the deceased were seized under panchnama Exhibit-58. The recovery of iron hook was made under the panchnama at Exhibit-59. It was carried out between 5.55 p.m. to 6.25 p.m. on 6.7.2013.

16 The C.A. reports show that the blood group of both the accused was inconclusive. The blood group of the deceased

was “B-Group”. The blood on the knife was human, but, the blood-group was inconclusive. The blood on the iron hook was of “B-Group”. The blood on the clothes of the deceased as well as on the clothes of both the accused was of “B-Group”.

. This is the evidence produced by the prosecution.

17 Learned counsel for accused No.1 submitted that there are discrepancies in the evidence of PW-1 Daulat, PW-2 Ganesh and PW-4 Kiran, which go to the root of the matter. Those discrepancies show that all of them are telling false stories before the Court. There is no corroborative piece of evidence to substantiate their depositions. The call data record, showing that the call was made to the police station, is not produced on record. There are no independent witnesses examined in this case. The motive is not established.

18 Learned counsel further submitted that there is nothing to show that liquor was being sold in either of these hotels and, therefore, the very basis of the prosecution case is not proved; since allegedly the accused had assaulted the deceased and PW-2 Ganesh

because they did not give liquor to them. The blood group of the accused was not determined. According to the prosecution story, even PW-2 Ganesh had suffered bleeding injuries when both the accused were present and, therefore, it cannot be said with certainty that the blood found on the clothes of the accused was that of the deceased alone. The prosecution has not established the blood group of the injured PW-2 Ganesh.

19 Learned counsel submitted that the incident had taken place in the night and, therefore, it was not possible to see everything clearly and, therefore, the witnesses could have been mistaken. There is discrepancy in the medical evidence in respect of injury to PW-2. There are indications in the postmortem that the time of death may not be in the night. The timings of the FIR, panchnamas and the witnesses going to the police station did not match. There are discrepancies as to who exactly had gone to the police station.

20 Learned counsel for accused No.1 specifically submitted that the extrajudicial confession in this case is not reliable. There was no reason for accused No.1 to have made this extrajudicial

confession to any of the witnesses. There is no other independent witness or corroboration to this extrajudicial confession and, therefore, it cannot form basis of conviction.

21 Learned counsel for accused No.1 relied on various judgments to submit that the conviction could not be based on extrajudicial confession. He relied on the judgment of the Hon'ble Supreme Court in the case of **Vinod @ Manoj Vs. The State of Haryana¹**, wherein it was observed that merely because extra judicial confession was proved which was a weak type of circumstance, the accused could not be convicted for the offence of rape and murder.

22 Learned counsel then relied on the case of **Sahadevan and another Vs. State of Tamil Nadu²**. The Hon'ble Supreme Court in that case had observed that when the prosecution relied on a extra-judicial confession, the Court has to examine the same with a greater degree of care and caution. In paragraph-16 of that judgment, various propositions were mentioned. The observations made in paragraph-16 are as follows :

1 Passed in Criminal Appeal No.1822/2011 decided on 23.10.2019 (Hon'ble Supreme Court)

2 (2012) 6 SCC 403

“16. Upon a proper analysis of the above - referred judgments of this Court, it will be appropriate to state the principles which would make an extra judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra - judicial confession alleged to have been made by the accused:

- (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 discrepancies and inherent improbabilities.
- (vi) Such statement essentially has to be proved like any other fact and in accordance with law.”

23 Learned counsel for accused No.2 submitted that the evidence of recovery of iron hook at the instance of accused No.2 is not free from doubt. There is nothing to show that accused No.2 could have gone home and could have concealed the iron hook considering the sequence alleged in the prosecution case. There is

a discrepancy as to when was he exactly arrested. No further details are provided. There is no explanation why he could not be arrested or apprehended though he was present with accused No.1 when the witnesses were informed about the murder of deceased Gupta. The blood stains on the clothes of the accused No.2 do not show that it was the blood of the deceased alone. Therefore, the only circumstance against him, at the highest, is the extra-judicial confession made by accused No.1.

24 Learned counsel submitted that the law on this aspect is well settled that the conviction cannot be based solely on the confession made by the co-accused. Learned counsel for that purpose relied on the judgment of the Hon'ble Supreme Court in the case of **Pancho vs. State of Haryana**³.

25 Both learned counsel submitted that alternatively the offence will not fall within the meaning of 'murder' as defined under Section 300 of IPC. There was no premeditation and preparation to commit the offence. And, therefore, the offence would be of a much lesser degree.

3 (2011) 10 SCC 165

26 Learned APP opposed these submissions. According to her, there was sufficient evidence against both the accused. She submitted that the FIR was lodged immediately. The station diary entry was taken immediately. All the panchnamas were carried out one after the other immediately. There was no scope for concocting false story to involve the accused falsely.

27 She submitted that for some time accused No.2 was not present at the spot after the witnesses had arrived and, therefore, there was a possibility that he could have gone home and concealed the weapon.

28 She submitted that PW-2 Ganesh's evidence cannot be discarded lightly because he is an injured eye witness. All these witnesses i.e. PW-1, PW-2 and PW-4 corroborate each other on material aspects. She submitted that in a given case conviction can be based on the extrajudicial confession. She relied on the judgment of the Hon'ble Supreme Court in the case of **Jagroop Singh Vs. State of Punjab**⁴. In that case, in paragraph-29, it was observed that the evidence in the form of extra-judicial confession made by

4 (2012) 11 SCC 768

the accused before the witnesses cannot be always termed to be a tainted evidence. Corroboration of such evidence is required only by way of abundant caution. If the Court believes the witness before whom the confession is made and is satisfied that it was true and voluntarily made, then the conviction can be founded on such evidence alone. The aspects which could be considered are the nature of circumstances, the time when the confession was made and the credibility of the witnesses who speak for such a confession. That apart, before relying on the confession, the Court has to be satisfied that it is voluntary and is not the result of inducement, threat or promise.

29 She further submitted that in the present case, the extra-judicial confession is corroborated by the fact that the dead body was discovered at a place shown by accused No.1 after making the extra-judicial confession. The evidence of PW-2 Ganesh and his injuries also lend sufficient corroboration to this extra-judicial confession. She submitted that considering the nature of injuries, the offence will definitely fall within the meaning of 'murder' as defined under Section 300 of IPC.

Reasons :

30 We have considered these submissions. Before discussing the evidence against accused No.1, we propose to discuss the evidence against accused No.2. As mentioned earlier, there is one major circumstance against him i.e. recovery of blood stained iron hook at his instance from his house. The blood group was of “B-Group”, which was the blood group of the deceased.

In this context it is necessary to examine the prosecution case. According to PW-1 Daulat, both the accused had taken the witnesses to the shed where the dead body was found. He categorically stated that they had taken both the accused and PW-2 Ganesh to the police station. However, this does not appear to be correct because PW-4 Kiran has specifically deposed that he himself, accused No.1 and PW-2 had gone to the police station and accused No.1 was given in the custody of the police. He has not made reference to accused No.2. He has also deposed in his examination-in-chief that when he came to the hotel after being informed by PW-1 Daulat, he had seen PW-1 Daulat, PW-2 Ganesh and accused No.1 present there. He has not mentioned that accused No.2 was

present with them. He had made enquiries with accused No.1, and then accused No.1 had taken the witnesses to the shed where the deceased was lying. Thus, there is no consistency about the presence of accused No.2 when PW-4 Kiran had come to the spot. Accused No.2 was arrested separately. The prosecution case does not provide a vital link about the time when accused No.2 had accompanied accused No.1, and the time when he was actually arrested. He was arrested in the morning of 5.7.2013. The recovery was made at his instance from his house on the next day evening i.e. on 6.7.2013. The whereabouts of accused No.2 between 5.00 a.m. to 7.30 a.m. are not clearly established. In any case the conviction against him cannot be based only on the circumstance of this doubtful recovery.

31 The other circumstance against accused No.2 is recovery of blood stained clothes of “B-Group”. However, as rightly submitted by both learned counsel; the blood group of PW-2 Ganesh was not determined, the blood group of both the accused was not determined. Therefore, that circumstance cannot be held against either of the accused.

32 As rightly submitted by learned counsel for accused No.2, the confession of co-accused cannot be the basis of conviction of accused No.2. Learned counsel for accused No.2 has rightly relied on the judgment of the Hon'ble Supreme Court in the case of **Pancho** (supra), wherein from paragraphs-24 to 28, this particular aspect is discussed based on the cases of **Kashmira Singh Vs. State of M.P.**⁵ and **Harichanran Kurmi Vs. State of Bihar**⁶ and other judgments.

In paragraph-28 of **Pancho's** case (supra), it was held that in dealing with a case against an accused, the Court cannot start with the confession of a co-accused; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assertions to the conclusion of guilt which the judicial mind is about to reach on the said other evidence.

In the present case there is no sufficient material against

5 AIR 1952 SC 159

6 AIR 1964 SC 1184

accused No.2 to reach independent conclusion that he had committed murder and, therefore, the confession of the co-accused cannot be pressed into service to form basis of his conviction.

33 Thus, we find that the evidence against accused No.2 is not sufficient to base conviction against him and he deserves to be given benefit of doubt.

34 As far as accused No.1 is concerned, the strongest circumstance against him is the extra-judicial confession. The law on this subject is well settled, which is referred to in the judgments cited by both the sides which are referred to hereinabove. The Hon'ble Supreme Court in the case of **Velayuda Pulavar Vs. State by Sub-Inspector of Police**⁷ has held in paragraph-10 that it is well settled that the conviction can be recorded solely on the basis of the extra-judicial confession if it is found to be credible and worthy of acceptance.

35 In the case before us, the extra-judicial confession is made by accused No.1 before PW-1 Daulat, PW-2 Ganesh and PW-4 Kiran. There is no reason to disbelieve these witnesses. They had

⁷ (2009) 14 SCC 436

reported this fact to each other immediately, and more particularly, even the police were informed immediately as can be seen from the facts of the case discussed earlier. The extrajudicial confession finds corroboration from the fact that the accused No.1 himself had led the witnesses to the shed where the deceased was kept. Thus pursuant to the extra-judicial confession, in fact the dead body was discovered from the place which was known to accused No.1. This is a very strong circumstance and it lends strong corroboration to the extra-judicial confession.

36 Apart from that, the evidence of PW-2 Ganesh also strengthens the case against the accused No.1 and lends sufficient corroboration to his extra-judicial confession. He is an injured eye witness. As deposed by PW-8 Dr. Rekha Sonawane, PW-2 Ganesh had suffered incised wound over forehead and incised wound over left cheek. This corroborates his own evidence. There is no reason to disbelieve this injured witness. There are some discrepancies as to in which vehicle/s the witnesses went to the police station and which of the witnesses accompanied each other. However, these are the minor discrepancies because there are station diary entry,

spot panchnama, arrest panchnama, seizure of clothes panchnama recorded immediately one after the other in the early morning itself. All this lends sufficient corroboration to the extrajudicial confession. Therefore, we are satisfied that the prosecution has proved its case against the accused No.1 based on this evidence.

37 The next question would be whether accused No.1 can be said to have committed the offence of murder or is it a lesser offence. The evidence of PW-8 Dr. Rekha Sonawane shows that the deceased had suffered one stab injury over nose and one CLW over left parietal area. The other injuries were abrasions over back, buttocks and face. The abrasions could have been caused because the deceased was dragged upto the shed. They are not result of any assault. The only vital injury appears to be the one on the head. The cause of death was also mentioned as 'shock due to the head injury'. Therefore, this is a case where the death was caused because of one blow on the head.

38 Even as per the prosecution case, which is based on the extra-judicial confession given by accused No.1 himself that the incident had occurred on the spur of the moment. There was no

premeditation. It was a result of sudden quarrel. It is only when the deceased had refused to give liquor, this blow was given to him. Finding of a knife in a hotel is not an unusual circumstance. Thus, there was no premeditation and no preparation to commit this offence. The case will fall within *Exception-4* to Section 300 of IPC. The assailant had given only one blow on the head in a sudden fight. Therefore, at the highest the case would be that of culpable homicide not amounting to murder. Considering that the blow was given on the head with a sharp weapon, the intention can be attributed to the accused No.1. Therefore, it would be a case under Section 304 Part-I of IPC. Accused No.1 is in custody since 5.7.2013. Considering the overall circumstances the sentence of ten years RI to him would serve the ends of justice.

39 As far as conviction of accused No.1 under section 324 of IPC is concerned; since the prosecution has proved that accused No.1 had assaulted the injured witness PW-2 Ganesh, he is convicted under Section 324 of IPC instead of Section 324 read with Section 34 of IPC.

40 Hence, the following order :

:: O R D E R ::

- i. Criminal Appeal No.1030/2017 preferred by accused No.2 Madhukar Mali is allowed. He is acquitted of all the charges faced by him in Sessions Case No.55/2013 on the file of the Additional Sessions Judge, Niphad, District-Nashik. Accused No.2-Madhukar Mali shall be released forthwith, if not required in any other case.
- ii. The fine amount, if paid, shall be refunded to accused No.2-Madhukar Mali.
- iii. Accused No.2 Madhukar Mali shall execute a PR bond before the trial Court, under Section 437A of Cr.P.C., in the sum of Rs.30,000/- (Rupees Thirty Thousand Only) with one or two sureties, within a period of six weeks from today.
- iv. Criminal Appeal No.626/2017 preferred by accused No.1 Sanju @ Sanjay Suryawanshi is partly allowed. The conviction and consequent sentence awarded for commission of offence punishable under Section 302 of IPC read with 34 of IPC is set

aside and instead he is convicted for the offence punishable under Section 304(Part-I) of IPC. Accused No.1 Sanju @ Sanjay Suryawanshi is sentenced to suffer R.I. for ten years and to pay fine of Rs.1500/- (Rupees Fifteen Hundred Only); and in default of payment of fine to suffer further R.I. for six months.

- v. Instead of Section 324 read with 34 of IPC, the accused No.1 Sanju @ Sanjay Suryawanshi is convicted under Section 324 of IPC and is sentenced to suffer R.I. for one year and to pay fine of Rs.500/- (Rupees Five Hundred Only); and in default of payment of fine to suffer S.I. for three months.
- vi. Both the sentences are directed to run concurrently.
- vii. Accused No.1 Sanju @ Sanjay Suryawanshi is entitled to get set off for the period spent as under-trial prisoner as per Section 428 of Code of Criminal Procedure.
- viii. With these directions, both the Appeals are disposed of.

(SARANG V. KOTWAL, J.)

(S. S. SHINDE, J.)

PRADIPKUMAR
PRAKASHRAO
DESHMANE

Deshmane (PS)

Digitally signed by
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