

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO.398 OF 2009

1. The State of Maharashtra
Through Police Station Officer,
Nandgaon Khandeshwar,
Amravati, Distt. Amravati. **APPELLANT**

// VERSUS //

1. Arun Gabhaji Pakade,
Aged about 50 years,
2. Ankush Arun Pakade,
Aged about 21 years,
3. Panchfula Arun Pakade,
Aged about 47 years,
4. Chandrabhan Ganpat Petkar,
Aged about 73 years,
All R/o. Nandgaon Khandeshwar,
Distt. Amravati

All R/o Nandgaon Khandeshwar,
Distt. Amravati

....

Shri M.J. Khan, APP for the appellant.
Shri P.R. Agrawal, Advocate for the respondents/State.

WITH

CRIMINAL APPEAL NO.237 OF 2009

1. Arun Gabhaji Pakade,
Aged about 50 years

2. Ankush Arun Pakade,
Aged about 21 years,
 3. Panchfula Arun Pakade,
Aged about 47 years,
 4. Chandrabhan Ganpat Petkar,
Aged about 73 years,
All R/o. Nandgaon Khandeshwar,
Distt. Amravati
- All R/o Nandgaon Khandeshwar,
Distt. Amravati

// VERSUS //

1. The State of Maharashtra,
Through Police Station Officer,
Nandgaon Khandeshwar,
Amravati, Distt. Amravati.

.... RESPONDENT

Shri P. R. Agrawal, Advocate for the appellants.
Shri M.J. Khan, APP for the respondent/State.

CORAM : SUNIL B. SHUKRE AND G. A. SANAP, JJ.
RESERVED ON:- 15/06/2022
PRONOUNCED ON:- 08/07/2022

JUDGMENT: (Per: G.A. Sanap, J.)

1. These two appeals arise out of judgment and order dated 16.03.2009 in a Sessions Case No.06/2007. Criminal Appeal No.237/2009 has been filed by the appellants against the conviction and sentence. The Criminal Appeal No.398/2009

has been filed by the State against the order of the acquittal of the accused for the offences punishable under Section 302 read with Section 34 of the Indian Penal Code.

2. The appellants in Appeal No.237/2009 and the respondent Nos.1 to 4 in Criminal Appeal No.398/2009 were accused Nos.1 to 4 in the Sessions Trial. Learned Additional Sessions Judge convicted the accused Nos.1 and 4 for the offence punishable under Section 304 Part II read with Section 34 of the Indian Penal Code and sentenced them to suffer rigorous imprisonment for seven years and to pay a fine of Rs.1,000/- each and in default of payment of fine to suffer simple imprisonment for one month. Learned Additional Sessions Judge convicted the accused Nos.1 and 4 for the offences punishable under Section 342 read with Section 34 of the Indian Penal Code and sentenced them to suffer rigorous imprisonment for three months and to pay a fine of Rs.500/- each and in default of payment of fine to further suffer simple imprisonment for 15 days. Learned Additional Sessions Judge convicted the accused Nos.2 and 3 for offence punishable under Section 325 read with Section 34 of the Indian Penal Code and sentenced them to suffer rigorous imprisonment for

one year and to pay a fine of Rs.1,000/- each and in default of payment of fine to further suffer simple imprisonment for one month. The substantive sentence awarded to the accused Nos. 1 and 4 were directed to run concurrently.

3. For the purpose of convenience, the appellants would be referred by their nomenclature in the Sessions trial. The First Information Report was registered on the report of informant-Dipak, who is the son of deceased Ramdas Pingale. The accused and the deceased are the residents of Onkarkheda, Taluka Nandgaon Khandeshwar, District Amravati. The deceased was residing alongwith his wife Kamla and son Dipak. The accused No.2 is the son of the accused No.1 and accused No.3 is the wife of accused No.1. The accused No.4, at the relevant time, was working as agricultural labourer with the accused No.1. The incident as can be seen from the First Information Report occurred on 24/07/2006 at about 4.00 a.m. The accused as per the case of the prosecution were alleging that the deceased had an evil eye upon the accused No.3- Panchfula.

4. Informant-Dipak on 24.07.2006 at about 4.00 a.m. woke up hearing commotion and the cries of his mother

Kamla, who was outside the house. Informant-Dipak, therefore, came out of the house. He saw that the deceased was tied to an almond tree by the accused Nos.1 to 4 with a rope. The accused Nos.1, 2 and 4 were armed with sticks. The accused No.3 Panchfula was armed with a sandal (Chappal). All the accused were assaulting the deceased by means of weapons carried by them. The mother of the informant-Dipak (Kamla) requested the accused not to assault the deceased. The accused did not pay heed to her request. On the suggestion of his mother, Dipak went to call Haridas Wamanrao Bhoyar (PW-6). He and Shri Bhoyar came to the spot of the incident. The accused by that time had fled from the spot. The Dipak-informant and Haridas Bhoyar went to the police station. They narrated the incident to the Police. The Police visited the spot. They found that the deceased succumbed to the injuries sustained at the hands of the accused.

5. On the basis of the report, crime bearing No.78/2006 came to be registered against the accused. Dilip Subhedar Gawde (PW-9) Police Inspector carried out the investigation. He visited the scene of offence and drew the

Panchanama. He held the inquest on the dead body of the deceased and prepared the inquest Panchanama. The articles were seized from the spot. He obtained the postmortem report. He arrested the accused. During interrogation, the accused No.1 made a statement with regard to the concealment of the stick and which led to the discovery of the same.

6. On committal of case to the Sessions Court by the Judicial Magistrate First Class, Nandgaon Khandeshwar, learned Additional Sessions Judge framed the charge against the appellants. It was read over and explained to them. They pleaded not guilty to the charge. The prosecution in order to bring home the guilt against the accused examined nine witnesses. Number of documents were exhibited during the course of the trial. The defence of the accused persons disclosed during the recording of the evidence of the witnesses and at the time of their statements recorded under Section 313 Cr.P.C. is that they have been falsely implicated because they had initiated action against the deceased for harassing the accused No.3 and even on the day of incident, the deceased had tried to molest accused No.3 by entering into house of the accused No.1 in the night hours.

7. Learned Additional Sessions Judge on appreciation, analysis and scrutiny of the evidence found the accused guilty of the offences as mentioned above, and sentenced them as above. Being aggrieved by this order, the accused have preferred the appeal. The State is aggrieved by the acquittal of accused Nos.1 to 4 for principal offence of murder under Section 302 of the Indian Penal Code and therefore, the State has also preferred the appeal.

8. We have heard learned Advocate for the accused and learned APP for the State. We have gone through the record and proceedings.

9. Shri P. R. Agrawal, learned Advocate for the accused Nos.1 to 4 submitted that the evidence adduced by the prosecution is not sufficient to bring home guilt of all the accused. Learned Advocate by drawing our attention to the evidence of Dr. Dilip Bilolikar, Medical Officer(PW-8) submitted that the cause of death was asphyxia due to strangulation and therefore, without concrete evidence that the accused had strangled the deceased, learned Additional Sessions Judge ought to have given them the benefit of doubt. Learned Advocate on the basis of evidence of eye witnesses and

evidence of the Medical Officer submitted that the offence proved against the accused was neither murder nor culpable homicide not amounting to murder. Learned Advocate therefore, submitted that the conviction of the accused Nos.1 and 4 for an offence punishable under Section 304 part II of the Indian Penal Code is not sustainable. While assailing the evidence of the eye witnesses, learned Advocate for the accused submitted that the evidence of the eye witnesses as to the actual occurrence of the incident is full of omissions and contradictions and as such not worthy of credence. As far as the accused Nos.1 and 4 are concerned, learned Advocate submitted that at the most they could have been convicted for causing grievous hurt to the deceased and ought to have been awarded the sentence awarded to the accused Nos.2 and 3 for the offence punishable under Section 325 of the Indian Penal Code.

10. Shri M.J. Khan, learned APP submitted that learned Additional Sessions Judge has not properly appreciated the evidence and therefore, committed a mistake in acquitting the accused of the major charge for an offence punishable under Section 302 of the Indian Penal Code.

Learned APP submitted that the oral, documentary and circumstantial evidence is sufficient to prove that in furtherance of their common intention the accused Nos.1 to 4 strangled the deceased and therefore, they are liable to be convicted and sentenced under Section 302 of the Indian Penal Code. Learned APP submitted that even on the point of awarding the conviction to the accused Nos.1 and 4 for the lesser offence of a culpable homicide not amounting to murder punishable under Section 304 Part II of the Indian Penal Code, learned Judge has not recorded appealable reasons. In the submission of the learned APP, the charge of murder punishable under Section 302 of the Indian Penal Code has been proved on the basis of the evidence. The learned APP took us through the evidence of eye witnesses and the observations made by the learned trial Judge on the point of their credibility and submitted that learned trial Judge has accepted their evidence being worthy of credence to record the conviction for the lesser offences against the accused Nos.1 to 4. Learned APP therefore, submitted that this is a fit case where the accused Nos.1 to 4 are liable to be punished for the offence punishable under Section 302 of the Indian Penal Code.

11. We have minutely perused the oral and documentary evidence as well as the judgment and order passed by the learned Additional Sessions Judge. It is undisputed that learned trial Judge has believed and accepted the evidence of eye witnesses. Learned trial Judge has recorded the finding that the death of the deceased was homicidal and the accused Nos.1 and 4 were responsible for causing his death. It is further seen from perusal of the judgment of the trial Court that based on the evidence and circumstances, learned trial Judge has drawn the inference of the complicity of the accused Nos.1 and 4 in strangulating the deceased with the rope. Before we proceed to appreciate the evidence of the eye witnesses to the incident and the evidence of medical Officer, it would be necessary to state certain relevant facts. The incident occurred in the courtyard of house of the accused Nos.1, 2 and 3. It has been stated in the report lodged by Dipak (PW-3) that the accused had a grudge against the deceased because according to them, the deceased was keeping an evil eye upon the accused No.3 Panchfula. The incident occurred at 4.00 a.m. The house of the accused Nos.1 to 3 is at a short distance from the house of deceased. The accused have taken the defence that deceased had an evil eye

upon the Panchfula. In the past, deceased had molested her. The complaint was lodged against the deceased. It is their defence that on the given date and time, the deceased entered their house and molested Panchfula. When Panchfula made hue and cry the deceased was caught hold. Kamla (PW-4) the wife of the deceased has stated that at 4.00 a.m. the deceased had gone to attend the natures call. It is therefore, crystal clear that deceased on his own went towards the house of the accused Nos.1 to 3 and by entering the house molested the modesty of accused No.3- Panchafula. In our view, the above facts would be very relevant and required to be borne in mind while appreciating the evidence and the submissions advanced on behalf of the accused Nos.1 to 4 as well as by learned APP

12. Dr. Dilip Bilolikar (PW-8) conducted the postmortem of the body of the deceased. On examination of the dead body Dr. Dilip Bilolikar (PW-8) found following external injuries:-

- “1. Left hand forearm fracture at lower end.*
- 2. Contusion over left arm with greenish discolouration size 8 cm to 6 cm.*
- 3. Superficial abrasion with redish colouration of size 3 cm. X 3 cm. Over left arm laterally.*
- 4. Ligature marks shallow size 2 cm x 8 cm*

over middle of neck which is shallow not deep not extending up to nape of neck.

5. Contusion over right shoulder of 3 x 2 cm three in numbers

6. Contusion with stripped mark over right side near neck extending from neck laterally to base side of size 2 cm x 6 cm

7. Contusion over left arm

8. Multiple contusion over back.

9. Swelling with haetoma over middle of back of size 10 cm x 10 cm.

10. Multiple contusion with blackish discolouration.”

13. Dr. Dilip Bilolikar (PW-8) has stated that all the above injuries were ante mortem. The cause of death was asphyxia due to strangulation. He has stated that injury No.4 i.e ligature mark over the neck was possible if the nylon rope was tied around the neck. The sum and substance of his evidence is that the death was due to strangulation and not due to other injuries namely injury Nos.1 to 3 and 5 to 9. The evidence of Medical Officer (PW-8) does not clearly indicate whether the death was homicidal, suicidal or accidental. At this stage, it would be necessary to mention an important answer given to the pointed question by Medical Officer

(PW-8) in his cross-examination. Medical Officer (PW-8) has admitted that in this case force was used but too much force was not used. He has further stated that strangulation in this case could be possible on account of accident also. While answering the next question Medical Officer (PW-8) has stated that the strangulation on the neck of the deceased found by him is possible in case the hands of a person are tied and he is dragged by the rope and the rope comes into contact with the neck.

14. In the backdrop of this, evidence of the Medical Officer, it would be necessary to see whether the evidence on record is sufficient to establish that the accused Nos.1 to 4 had tied the rope around the body and particularly around the neck of the deceased and thereby strangled him. In other words, whether the said evidence is sufficient to prove the authorship of the strangulation. At this stage, it is necessary to mention that learned Additional Sessions Judge found the evidence cogent, reliable and acceptable. Additional Sessions Judge on testing the said evidence on the touch stone of the credibility believed the same and recorded the conviction as above. This finding of a fact has been challenged by the accused Nos.1 to 4

for recording the conviction and by the State for acquitting the accused under Section 302 of the Indian Penal Code.

15. On perusal of the judgment and order passed by learned Additional Sessions Judge, we agree with his finding on the point that the evidence of the eye witnesses namely Dipak (PW-3), Kamla (PW-4), Ramdas (PW-5), Haridas (PW-6) and Wasudeo (PW-7) is credible and acceptable. However, according to us, though the evidence is credible and acceptable, the same would not be sufficient either to prove the charge under Section 302 of the Indian Penal Code or even of a lesser offence punishable under Section 304 Part II of the Indian Penal Code.

16. We have minutely perused the evidence of the eye witnesses Dipak (PW-3), Kamla (PW-4), Ramdas (PW-5), Haridas (PW-6) and Wasudeo (PW-7). In our opinion, the evidence of these witnesses is not sufficient to establish with certainty and positively that the accused Nos.1 to 4 either strangled the deceased with nylon rope or tied the deceased with the rope on his neck. Before proceeding to appreciate the evidence, we may mention that the accused in their statement recorded under Section 313 Cr.P.C. have disclosed their

defence. The accused No.1 has stated that the deceased entered his house while he was asleep. His wife Panchfula raised alarm and he woke up. The deceased ran away from his house and fell in the drain. The accused No.4 came there and accused Nos.1 and 4 tied hands of deceased by means of rope and tied him to the almond tree. Same is the statement of accused No.4. It is pertinent to mention that even in their statements they have not admitted that the deceased was tied to the trunk of the almond tree by wrapping the rope around his body and trunk of the tree.

17. We may now, consider the evidence of eye witnesses. Dipak (PW-3) son of the deceased is the informant. He has stated that on the day of occurrence at about 4.00 a.m. while he was asleep, he heard alarm raised by his mother Kamla (PW-4). He therefore, came out of the house and saw that the deceased was tied with rope to an almond tree near the house of one Bhimrao More. He has stated that accused Nos.1, 2 and 4 had sticks in their hands and the accused No.3 Panchfula had sandal in her hand. They were assaulting the deceased with the weapons in their hands. He tried to intervene but the accused threatened to beat him. He has

further stated that at the request of his mother, he went to the house of Haridas (PW-6) to call him. He has further stated that by the time, he and Haridas came to the spot, the accused had fled away. He alongwith Haridas went to the police station and lodged the First Information Report. It is at Exh. 61. Dipak (PW-3) has admitted in his cross-examination that accused No.3 Panchafula had lodged report against deceased for harassing her over a period of three to four years. The action was initiated against the deceased on number of occasions and the last such action was three to four months prior to the incident.

18. He has further stated in his cross examination that on hearing the alarm of his mother, he woke in bewildered state and when he came out of the house, he saw his mother weeping. He has denied the suggestion that when he went towards the courtyard, he found that his father was lying on the ground. It is seen that this fact was indeed mentioned in the First Information Report. The same has been proved to have been stated by him in his report to the Investigating Officer. In his evidence before the Court, he has stated that he saw that his father was tied with rope to an almond tree

located near the house of Bhimrao More. In our opinion, even if it is assumed that this statement has ring of truth, it fails to prove the manner in which the deceased was tied to the almond tree. He has stated that when he returned to the scene of offence accompanied by Haridas, the accused persons had by then, fled away. In his evidence, in all fairness, he has admitted that on the report of the accused No.3-Panchfula the action was initiated against his father on more than one occasion. The admissions given by Dipak (PW-3), Kamla (PW-4) and other witnesses clearly indicate that the deceased had an evil eye upon accused Panchfula and therefore, he was after Panchfula. This in our view would explain as to why the deceased on the given date and time had gone to house of accused Nos.1 to 3. A perusal of the evidence of Dipak (PW-3) does not categorically help us to record any finding as to the manner in which the deceased was tied to the almond tree with rope. It is not possible on perusal of his evidence to draw a inferential conclusion that rope was tightly tied around the neck of the deceased by the accused persons. Dipak (PW-3) has stated in his First Information Report that when he went to courtyard, he found that his father was lying on the ground. In our opinion, on this point, his evidence is of no help. On the

point of beating with the sticks by the accused Nos.1, 2 and 4 and with sandal by accused No.3 we do not find any reason to disbelieve his evidence.

19. Kamla (PW-4) wife of the deceased has stated that at about 4.00 a.m. deceased had gone to answer the call of nature. As he did not come up for a while, she came out of her house. She heard the commotion. She went ahead and found that the deceased was tied to an almond tree located in the courtyard of the house of one Shri Bhimrao More by a nylon rope. She has stated that accused Nos.1, 2 and 4 were inflicting the blows on the deceased by means of sticks and the accused No. 3 with sandal. She has stated that she raised the alarm and called her son Dipak (PW-3). She sent her son to call Haridas Bhoyar. She has stated that since her son did not return for a while, she went towards Nandgaon Khandeshwar, Police Station. She has further stated that when she returned back to the scene of offence, she found that deceased was untied from an almond tree. His hands were still tied and he was lying on the ground motionless. In her cross examination, certain omissions, from the statements made before the Police have been brought on record. The omissions if considered in

proper perspective would show that on some points there are inconsistencies in her evidence and the evidence of Dipak (PW-3) and Ramdas (PW-5). However, despite the inconsistencies, the evidence is sufficient to prove the incident. The question is whether the evidence is sufficient to prove the authorship of strangulation to the accused Nos.1, 2 and 4. She claims to have seen that the deceased was tied to the tree by means of rope and deceased had sustained 2-3 bleeding injuries. She has not stated that the deceased was tied to the trunk of the almond tree in standing position and the rope was tied around his body. She has also not stated that any part of the rope was tied around the neck of the deceased.

20. At this stage, to crystallize the issue we may usefully refer the facts recorded in the spot panchanama. It is necessary to mention that if the deceased was tied in a standing position to the trunk of the almond tree with the nylon rope around his body, there ought to have been evidence as to who untied him. There ought to have been evidence as to the manner of tying deceased to trunk of tree in the standing position with nylon rope. Exh.56 is the spot panchanama. In the spot panchanama, the situation prevailing

on the spot was recorded. In this panchanama, it was recorded that the rope was loosely tied to the trunk of the almond tree and both hands of the deceased were also tied with the same rope. It was recorded in the panchanama that from the loosely tied end of the rope to the almond tree and the tied hands of the deceased, the length of the rope was three feet. The inquest panchanam was drawn on the same date between 7.00 am and 7.45 am. The inquest panchama records the condition of the dead body. It was found lying under the almond tree and nylon rope was found tied to the almond tree. The hands of the deceased were found tied with the nylon rope. It is to be noted that if the deceased was tied to the trunk of the almond tree in the standing position with the nylon rope around his body then there ought to have been evidence as to who untied the deceased from the trunk of the almond tree. The evidence of important eye witnesses Dipak (PW-3) and Kamla (PW-4) fall short to record any positive finding on this point. So, it is not possible on the basis of evidence of Dipak (PW-3) and Kamla (PW-4) to hold that the deceased was tied in a standing position to the trunk of the almond tree with the nylon rope around his body. It is also not possible to reach a conclusion that rope was tied around his neck to the trunk of the tree. The

evidence at the most can prove that his both hands were tied with the nylon rope and one end of the rope was loosely tied to the trunk of the almond tree.

21. Ramdas (PW-5) and Wasudeo (PW-7) are residents of the same locality. Ramdas (PW-5) has stated that on the date of incident he woke up early in the morning. At that time he heard the outside commotion. He saw that number of persons had gathered on the spot. He has stated that Kamla (PW-4) was crying for help. He therefore, went to the house of Wasudeo and informed about it to Wasudeo (PW-7). They both came on the scene of the occurrence and saw that the deceased was tied to the almond tree and the accused were inflicting blows on his body with their weapons. Haridas (PW-6) has deposed in unison with Dipak (PW-3). He has stated that Dipak (PW-3) son of deceased came to his house and informed him about the incident. He has stated that he therefore, accompanied the informant to the scene of occurrence and found that the deceased was tied to the almond tree and the accused were beating him. In his cross examination, sufficient material has been brought on record to indicate that in the past, he and his wife stood surety to the

deceased. All the witnesses have admitted the continuous eve-teasing of accused No.3 Panchfula by the deceased. It was suggested to the witnesses that the deceased was in the habit of eve-teasing the women from locality and therefore, number of women had complained about it and even had taken out a procession in protest. The witnesses have denied the suggestion. However, the fact remains that the deceased was after accused No.3 Panchafula. He had indulged in molesting her modesty. On the date of the incident, it has been proved that he had entered the house of the accused Nos.1 to 3 with this intention.

22. Learned Additional Sessions Judge has accepted the evidence of all these witnesses. On the point of credibility of the witnesses or rather their satisfying the test of truthfulness, we have no different opinion. However, in our opinion, this evidence is not sufficient to prove that the deceased was tied in a standing positing to the trunk of the almond tree, with the nylon rope around his body. The evidence is not sufficient to prove that the rope was tied around the neck of the deceased to the almond tree and which led to strangulation. It is to be noted that unless and until the

authorship of the strangulation is proved beyond reasonable doubt and attributed to the accused Nos.1 to 4, they could not be held guilty either of the offence of murder under Section 302 of the Indian Penal Code or the lesser offence under Section 304 Part II of the Indian Penal Code.

23. In order to satisfy ourselves, we have perused the relevant part of the judgment and order passed by learned Additional Sessions Judge. In para No.17 of the judgment learned Additional Sessions Judge has observed that the authorship of tying the deceased to an almond tree can be fastened to accused Nos.1 to 4 because the witnesses have consistently deposed that accused assaulted the deceased when he was tied to an almond tree. A perusal of the judgment would further reveal that based on the evidence of the eye witnesses and the circumstantial evidence inference was drawn by learned trial Judge that the death took place due to strangulation by the accused Nos.1 and 4.

24. On perusal of the evidence minutely, we do not agree with this conclusion arrived at by learned Additional Sessions Judge. In the absence of the direct evidence to accept the case of the prosecution, the inference would have to be

drawn. In the case in hand to prove the guilt of the accused Nos.1 to 4 under Section 302 of the Indian Penal Code, it would not be justifiable, in the teeth of the evidence, to draw such an inference. Therefore, in our opinion, the authorship of strangulation of the deceased cannot be attributed to the accused Nos.1 to 4. Asphyxia due to strangulation is the cause of death. The injuries sustained by the deceased proved to have been caused by the sticks were not found by Medical Officer to be the cause of death. Unless and until the authorship of strangulation is attributed to the accused, they cannot be held guilty of a charge under Section 302 of the Indian Penal Code or lesser offence of the same under Section 304 of the part I and II of the Indian Penal Code. We therefore, conclude that on the point of incident, the evidence of eye witnesses is credible and acceptable. The same evidence, in our opinion, is sufficient to prove the assault on the deceased by the accused Nos.1 to 4 with the weapons possessed by them. The accused Nos.1 to 4 cannot be held guilty of a charge under Section 302 of the Indian Penal Code and also of the offence punishable under Section 304 part I and II.

25. In this context, we may now consider the

evidence of the Medical Officer. The answers given by the Medical Officer to the two questions therefore, substantiate the defence of the accused. Learned Judge has found the accused Nos.2 and 3 guilty of the offence punishable under Section 325 of the Indian Penal Code. Learned Sessions Judge found the accused Nos.1 and 4 guilty of the offence punishable under Section 304 part II of the Indian Penal Code. In the backdrop of the above conclusion, it is not possible to maintain the conviction of the accused Nos.1 and 4 for the offence punishable under Section 304 part II of the Indian Penal Code. If this is so, then the position of the accused Nos.1 and 4 would be at par with the accused Nos.2 and 3. We therefore, conclude that the offence proved against the appellant Nos.1 and 4 would be under Section 325 of the Indian Penal Code. The accused Nos.2 and 3 have been sentenced to suffer rigorous imprisonment of one year. The State has challenged the judgment of their acquittal under Section 302 of Indian Penal Code. This indicates that State is aggrieved by their conviction under Section 325 read with Section 34 of the Indian Penal Code and sentence awarded to them. It would therefore be, necessary to consider the quantum of sentence to be awarded to the accused Nos.1 to 4.

26. Before proceeding to deal with the issue of quantum of sentence, it would be necessary to consider the applicability of the reported decisions relied upon by learned APP for the State and learned Advocate for the appellants in support of their respective submissions. Learned APP relied upon decisions in the cases of ***Hate Singh Bhagat Singh Vs. State of Madhya Bharat*** reported in ***AIR 1953 SC 468*** and ***State of Uttar Pradesh Vs. Lakhmi (1998) 4 SCC 336*** and submitted that the accused Nos.1 and 4 have admitted in their 313 of the Cr.P.C. statement that they had tied the hands of the deceased with nylon rope and the deceased was tied to the almond tree. Learned APP further submitted that this statement of the accused Nos.1 and 4 in their 313 Cr.P.C. statement has to be taken into consideration and based on the same a conclusion is required to be drawn that the accused persons strangled the deceased with nylon rope and as such they would be guilty of the offence punishable under Section 302 of the Indian Penal Code. In the case of ***Hate Singh Bhagat Singh Vs. State of Madhya Bharat*** (supra) it is held that the statements of the accused are among the most important matters to be considered at a trial. The version of the accused deserves acceptance, if it is reasonable and accords

with probability. In the case of *State of Uttar Pradesh Vs. Lakhmi* (supra), it is held that statement of accused under Section 313 of the Cr.P.C. cannot altogether be ignored merely because they are advanced as a defence strategy. The Court has to give weight to the answers given by the accused. It is held that they cannot be made sole basis for arriving at a finding of guilt of the accused.

27. Learned Advocate for the accused Nos.1 to 4 relying upon the decisions in the cases of *Mohan Singh-Appellant Vs. Prem Singh and another- Respondents* reported in *AIR 2002 SC 3582* and *Sanatan Naskar and Another Vs. State of West Bengal* reported in *2010 CriLJ 3871* submitted that the statement of the accused recorded under Section 313 of the Cr.P.C. can be taken into consideration. However, the same cannot be accepted as a substantive piece of evidence. In the case of *Mohan Singh Vs. Prem Singh and another*, it is held that statement of the accused under Section 313 Cr.P.C. is not a substantive piece of evidence. It can be used for appreciating the evidence led by the prosecution to accept or reject it. In the case of *Sanatan Naskar and another Vs. State of West Bengal* (supra), it is held that statement of the accused can be

used to test the veracity of the exculpatory of the admission, if any, made by the accused. It is held that the conviction of the accused cannot be based merely on the statement made under Section 313 of the Cr.P.C., as it cannot be regarded as a substantive piece of evidence.

28. We have already observed that on the basis of the evidence adduced by the prosecution, it is not possible to reach a conclusion that the accused persons strangled the deceased by means of nylon rope. The evidence on record is silent about the mood and manner of tying the deceased with the rope to almond tree. The evidence is not sufficient to prove that the deceased was tied to almond tree in a standing position with the nylon rope. Therefore, in our view, the statement made by the accused Nos.1 and 4 in their 313 of the Cr.P.C. statement is not sufficient to draw even an inference of the manner of tying the deceased with the nylon rope to the almond tree. Even the same cannot be used as a substantive piece of evidence. We are therefore, not prepared to accept the submissions advanced by learned APP relying upon the judgment cited (*supra*).

29. This would take us to the quantum of sentence to

be awarded. Learned Additional Sessions Judge has convicted the accused Nos.2 and 3 for the offence punishable under Section 325 read with Section 34 of the Indian Penal Code and sentenced them to suffer rigorous imprisonment for one year and to pay a fine of Rs.1,000/- each. The reasons have been recorded for awarding the sentence. The accused Nos.1 and 4 have been convicted for the offence punishable under Section 304 part-II and Section 342 read with Section 34 of the Indian Penal Code and awarded substantive sentence of seven years and three months respectively. On consideration of the evidence on record, we are not convinced to hold the appellants guilty for the offence punishable under Section 304 Part II read with Section 34 of the Indian Penal Code. According to us, on the basis of the evidence the offence made out against the accused Nos.1 and 4 would be under Section 325 read with Section 34 of the Indian Penal Code. In this factual situation, the question of awarding the sentence needs consideration.

30. Learned Advocate for the accused submitted that accused No.4 is 90 years old. He has submitted that accused No.1 is about 62 years of old. Learned Advocate submitted

that considering their age, the lenient view is required to be taken. After given thoughtful consideration to the nature of the offence and the circumstances in which the incident occurred and the age of the accused Nos.1 and 4 in our opinion, the sentence of imprisonment similar to the one awarded to the accused Nos.2 and 3 would be required to be awarded to the accused Nos.1 and 4.

31. In our opinion, the sentence of imprisonment similar to the one awarded to the accused Nos.2 and 3, if awarded to the accused Nos.1 and 4 would serve the ends of justice. On re-appreciation of the evidence, we are not convinced with the submissions advanced by learned APP for the State either for modification or enhancement of the sentence awarded to the accused Nos.2 and 3.

32. In view of this, we proceed to pass the following order:-

O R D E R

(i) The conviction and sentence awarded to the accused Nos.2 and 3 by learned Additional Sessions Judge, Amravati under Section 325 read with Section 34 of the Indian

Penal Code is maintained. Their appeal is dismissed.

(ii) The conviction and sentence awarded to the accused Nos.1 and 4 for the offence punishable under Section 304 part II read with Section 34 of the Indian Penal Code is set aside. They are acquitted of the said offence.

(iii) The accused Nos.1 and 4 are convicted for the offence punishable under Section 325 read with Section 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.1,000/- each. In default of payment of fine, they shall suffer further simple imprisonment for one month.

(iv) The conviction and sentence awarded to accused Nos.1 and 4 for the offence punishable under Section 342 read with Section 34 of the Indian Penal Code is maintained.

(v) Their substantive sentences on both counts shall run concurrently. They are entitled to get a set off against this sentence for the period of their detention during the pendency of the trial and pendency of the appeal.

33. The Criminal Appeal filed by the State bearing No.398/2009 stands dismissed.

34. Both the Criminal Appeals are disposed of accordingly.

JUDGE

JUDGE

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