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

CRIMINAL APPEAL NO.150 OF 2020

1. Munshi Mhating Jamunkar,
aged about 53 years, occupation : labour.

2. Nagay Munshi Jamunkar,
aged about 43 years, occupation : labour.
both r/o Chaurakund, taluka Dharni,
district Amravati. **Appellants.**

:: V E R S U S ::

The State of Maharashtra (through the
station officer, police station Dharni,
district Amravati. **Respondent.**

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Shri N.S.Khandewale, Counsel for Appellants.

Shri M.J.Khan, Additional Public Prosecutor for the State.

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CORAM : ROHIT B.DEO & URMILA JOSHI-PHALKE, JJ.

CLOSED ON : 12/12/2022

PRONOUNCED ON : 16/06/2023

JUDGMENT (Per : Urmila Joshi-Phalke, J.)

1. By this appeal, the appellants (the accused persons) have challenged judgment and order dated 2.1.2020 passed by learned Additional Sessions Judge-1, Achalpur in Sessions Trial No.16/2012 whereby learned Judge of the trial court convicted the accused persons for offence punishable under Section 302 of the Indian Penal Code and sentenced them to undergo imprisonment for life and to pay fine Rs.500/- by each of them.

2. Brief facts of the prosecution case are as under:

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Ashok Prabhudas Bethekar (the informant), is the son of Prabhudas (the deceased). He lodged a report on 1.8.2011 alleging that on 31.7.2011, due to festival of "Jiroti" he was at his house along with other family members. Accused No.1 Munshi, along with his wife accused No.2 Nagar, is residing in his neighbourhood. On that day, at about 3:30 pm, there was a quarrel between accused No.1 Munshi and his wife accused No.2 Nagay. His father Prabhudas went in the house of the accused persons to intervene in the quarrel. At the same time, he also proceeded at the house of his maternal uncle. The house of his maternal uncle was behind the house of the accused persons. He was sitting on the verandah along with his aunt Sunita Kishor Mawaskar. At the relevant time, his aunt disclosed him that both the accused persons are dragging his father from the verandah inside the house. He immediately rushed to the house of the accused persons and saw that his father was lying in an unconscious condition and sustained injury on the backside of his head. He immediately lifted his father and took at his house and called one Sunita Mendhe, who was nurse. Said Sunita gave first aid treatment and he immediately shifted his father at the Primary Health Centre,

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Harisal. His father was referred to the Sub District Hospital at Dharni. However, his father was declared dead and, therefore, he approached to the police station and lodged the report.

3. On the basis of the said report, the police have registered the offence against both the accused persons. During investigation, the investigating officer has visited the alleged spot of the incident and drawn spot panchanama. Inquest panchanama was drawn in the hospital. During spot panchanama, the investigating officer has collected blood stains from the spot of the incident. The accused persons were arrested. The blood stained clothes of accused No.1 Munshi and the blood stained clothes of the deceased were also seized. During investigation, the investigating officer recorded memorandum statements of the accused persons and at their instance, weapon of the offence "axe" was recovered. All the incriminating articles are forwarded to the chemical analyzer. After completion of the investigation, chargesheet was submitted against the accused persons.

4. Learned Judge of the trial court, after committal of the case, framed charge against the accused persons vide

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Exhibit-36. In support of the charge, the prosecution has examined following eight witnesses:

PW1 Ashok Prabhudas Bethekar, Exhibit-45, the informant;

PW2 Sunita Kishor Mawaskar, Exhibit-57;

PW3 Sundarlal Shripal Bhikar, Exhibit-69, panchanama on spot;

PW4 Ruprao Panduji Khadke, Exhibit-73;

PW5 Sakharam Manu Kasdekar, Exhibit-76;

PW6 Dr.Dayaram Babulal Jawarkar, Exhibit-80, the medical officer;

PW7 Babanrao Bapurao Solanke, Exhibit-86, the investigating officer;

PW8 Chandrapal Jagatsingh Thakur, Exhibit-108.

5. Besides the oral evidence, the prosecution placed reliance on inquest panchanama Exhibit-40, oral report Exhibit-46, FIR Exhibit-47, postmortem report Exhibit-81, letter to the medical officer Exhibit-82, opinion of the medical officer Exhibit-86, spot panchanama Exhibit-88, seizure of articles from the spot Exhibit-89, arrest panchanama of accused No.2 Exhibit-90, arrest panchanama of the accused No.1 Exhibit-91, memorandum statement Exhibit-92, discovery panchanama

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Exhibit-93, letter to the chemical analyzer Exhibit-94, chemical analyzer's reports Exhibit-97/1 to 97/3.

6. All the incriminating evidence is put to the accused persons by recording their statements under Section 313 of the Code of Criminal Procedure. The additional statements under Section 313 of the Code were recorded before this Court. The defence of the accused is of total denial and of false implication.

7. Heard learned counsel Shri N.S.Khandewale for the accused persons and learned Additional Public Prosecutor Shri M.J.Khan for the State.

8. Learned counsel Shri N.S.Khandewale for the accused persons submitted that admittedly there is no direct evidence against the accused persons. The entire prosecution case is relied upon the circumstantial evidence. The chain of the circumstances is not proved by the prosecution. The circumstances, on which the prosecution relied upon, are the deceased went at the house of the accused persons and is found injured, PW2 Sunita Kishor Mawaskar has seen the accused persons dragging the deceased from the verandah to inside the house of the accused, the blood stained clothes of the

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accused no.1, and recovery of the weapon at the instance of the accused persons. To prove the memorandum statement and discovery panchanama, the prosecution placed reliance on the pancha witnesses who have not supported the case of the prosecution. The independent witnesses PW8 Chandrapal Jagatsingh Thakur and PW4 Ruprao Panduji Khadke have also not supported the prosecution. The circumstance, that the recovery of the weapon of the offence, is not supported by the chemical analyzer's reports as no blood is found on the said articles. The circumstance, that the blood stained clothes of the accused are seized, is explained by the accused persons during their statements under Section 313 of the Code of Criminal Procedure. Thus, the prosecution failed to prove the chain of the circumstances. In support of his contentions, he placed reliance on the decision of the Honourable Apex Court in the case of **Nagendra Sah vs. State of Bihar, reported in (2021)10 SCC 725** wherein it is held that the applicability of Section 106 arises when chain of circumstances is established by the prosecution.

9. Learned Additional Public Prosecutor Shri M.J.Khan for the State supported the judgment and order impugned in

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the appeal and submitted that admittedly the deceased was found injured inside the house of the accused persons. The offence is committed in secrecy inside the house. In view of Section 106 of the Indian Evidence Act, there is corresponding burden on inmates of house to give a cogent explanation as to how crime was committed which is not explained by the accused persons. The blood stained clothes of the accused persons support the case of the prosecution. The explanations given by the accused persons are not satisfactory and liable to be discarded. The arrest panchanama nowhere shows that the accused persons have sustained injury and, therefore, the blood stains are occurring on the clothes of accused No.1 Munshi. Thus, the prosecution has proved that the death of the deceased is homicidal one and caused in the house when the deceased was in the company of the accused persons. The accused persons have not explained the facts which are within their knowledge. Thus, the prosecution succeeded in proving the charge and no interference is called for.

10. As regards the homicidal death of the deceased is concerned, the material evidence is of PW6 Dr.Dayaram Babulal Jawarkar, who testified that on 1.8.2011 he was attached to the

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Sub District Hospital at Dharni. The dead body of the deceased was received by him. On examination, he found following injuries on the person of the deceased:

- (1) incised with bony deep over occipital region of scalp of size 4.5 x 1x1 cm;
- (2) contusions with black left eye with rupture eye bowl with bloody fluid oozing from rupture side, and
- (3) blunt trauma with periorbital contusion of right eye.

On internal examination, he found compound fracture of occipital bone of the skull of size 3x0.5 cms and 2x0.5 cm. Brain was found lacerated and congested at the side of fracture. The injuries were antemortem in nature and are possible by hard and blunt object. The death of the deceased was caused due to haemorrhagic shock due to head injury. Accordingly, he prepared the postmortem notes Exhibit-81. On 6.8.2011, he also received the query letter Exhibit-82 from the police along with the weapon. He examined the weapon and opined that the injuries mentioned in column No.17 of the postmortem are possible by the "axe". Accordingly, he has given the opinion Exhibit-83.

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During his cross examination, he admitted that the size of the injury would be the same that of the blade or more than the size of the blade. He further explained that the size of injury can also be less than the size of blade. He further admitted that the deceased had only one wound on his head. The fracture of skull is possible due to the blunt object.

11. After appreciating the evidence of medical officer PW6 Dr.Dayaram Babulal Jawarkar as well as the inquest report Exhibit-40, it reveals that the deceased has sustained only one injury which was in the nature of incised wound. During the cross examination, no alternative possibility was brought on record by the defence. The medical officer has specifically stated during the cross examination that the size of injury can be less or more than the size of the blade. Admittedly, the medical officer had an opportunity to see the injuries while conducting the postmortem. Thus, he is a witness of fact though he also gives an opinion on certain aspects of the case. This proposition of law has been stated by the Honourable Apex Court in the case of Smt.Nagindra Bala Mitraand vs. Sunil Chandra Roy and another, reported at 1960 SCR (3) 1 wherein the Honourable Apex Court observed that the value of a medical

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witness is not merely a check upon the testimony of eyewitnesses; it is also independent testimony, because it may establish certain facts, quite apart from the other oral evidence. If a person is shot, at close range, the marks of tatooing found by the medical witness would show that the range was small, quite apart from any other opinion of his. Similarly, fractures of bones, depth and size of the wounds would show the nature of the weapon used. It is wrong to say that it is only opinion evidence; it is often direct evidence of the facts found upon the victim's person.

12. The evidence adduced by the medical officer and corroborated by the inquest panchanama shows that the deceased died homicidal death and no other cause came before the court. Thus, the prosecution has established that the death of the deceased was homicidal death.

13. The prosecution placed implicit reliance on the evidence of PW1 Ashok Bethekar and PW2 Sunita Mawaskar to prove the charge against the accused persons. The evidence of PW1 Ashok Bethekar shows that the deceased had been to the house of the accused persons to intervene in the quarrel of

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accused persons. The evidence further reveals that PW2 Sunita Mawaskar witnessed that both the accused persons are dragging the deceased inside their house and, therefore, PW1 Ashok Bethekar immediately rushed to the house of the accused persons and saw that his father was lying unconscious on the ground and sustained head injury. The evidence of PW2 Sunita Mawaskar also reveals that she had seen both the accused persons pulling and dragging the deceased. She has witnessed this fact from the verandah of the house and immediately disclosed to PW1 Ashok Bethekar. The cross examination of PW1 Ashok Bethekar disclosed that the house of the accused persons is in the neighbourhood of PW1 Ashok Bethekar. It further reveals that there was a quarrel between the accused persons and, therefore, the deceased went in their house. It further came on record that the house of the accused persons is East facing and the verandah is West facing as well as the Eastern side of the house.

14. Thus, it is attempted to bring on record that the events which took place inside the house are not visible from the verandah of PW2 Sunita Mawaskar.

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15. PW2 Sunita Mawaskar is also cross examined and she stated during her cross examination that the house of the accused persons and her house are in front of each other. There is verandah and thereafter two rooms are situated in the house of the accused persons. She further admitted that one can see from the road what is going on in the verandah of the accused persons. However, it is not possible to view what is going on in the two rooms which are rear to verandah in the house of the accused persons.

16. Thus, an attempt was made that PW2 Sunita Mawaskar was not able to see anything and, therefore, the narration that she witnessed the accused pulling and dragging the deceased is to be discarded.

17. There is no dispute that the death of the deceased was caused due to the head injury. The said head injury was caused when the deceased was in the house of the accused persons. To corroborate the said circumstances, the prosecution though examined PW3 Sundarlal Shripal Bhikar, who acted as a pancha on the spot panchanama, he has not supported the case of the prosecution.

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PW4 Ruprao Panduji Khadke and PW8 Chandrapal Jagatsingh Thakur, have also not supported the case of the prosecution.

18. To prove the panchanamas, the prosecution has adduced the evidence of PW7 Babanrao Bapurao Solanke who is the investigating officer. As per his evidence, he has visited the alleged spot of the incident and collected the blood stains. He found the blood stains on the one bamboo stick (tati). He seized the same. He also collected the blood stained soil and simple soil and drawn the panchanama Exhibit-88. Seizure memo is at Exhibit-89. His evidence further shows that in presence of the panchas, accused No.1 Munshi made a memorandum statement that he will show the place where he concealed the weapon of the offence and accordingly, he produced one axe concealed inside the room of the house. He also seized the blood stained clothes of the accused persons as well as the blood stained clothes of the deceased. All the articles are forwarded to the chemical analyzer. The chemical analyzer report is also filed on record. Thus, the evidence of investigating officer PW7 Babanrao Bapurao Solanke is regarding various panchanamas.

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19. As per the chemical analyzer's reports, no blood stain is found on the soil, piece of wooden stick, axe, and full pant of accused No.1 Munshi. The blood stains are found on full shirt of accused No.1 Munshi. The said incriminating circumstance was not put to accused No.1 Munshi during his statement recorded under Section 313 of the Code of Criminal Procedure before the trial court and, therefore, during hearing of the appeal, statements of the accused persons under Section 313 of the Code of Criminal Procedure were recorded and accused No.1 Munshi gave an explanation that he had sustained the injury to his little finger and, therefore, the blood stains are appearing. Admittedly, there is no suggestion to the investigating officer that accused No.1 Munshi has sustained the injuries observed by him at the time of arrest. The arrest panchanama also nowhere shows that accused No.1 Munshi has sustained the injury which was witnessed at the time of his arrest.

20. Admittedly, the present case is rested on the circumstantial evidence. The law is settled regarding the circumstantial evidence that the circumstances from which an inference of guilt is sought to be drawn must be cogently and

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firmly established. Those circumstances should be of definite tendency unerringly pointed towards the guilt of the accused. The strong circumstance in the present case against the accused persons is that the death of the deceased was caused in house of the accused persons when the deceased came to their house.

21. The Honourable Apex Court in the case of **Trimukh Maroti Kirkan v. State of Maharashtra**, reported in (2006) **ALL MR (Cri) 3510**, relied by learned Additional Public Prosecutor Shri M.J.Khan for the State, has held that if an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. It is further held that where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes placed in the dwelling home where the

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husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. Section 106 of the Evidence Act, in such circumstances, comes into play. When the prosecution proves the chain of circumstances, burden is shifted on the accused to explain or offer explanation regarding the death of the deceased. The said Section, lays down Rule that when the accused does not throw any light upon facts which are especially within his knowledge, and which could not support any theory or hypothesis compatible with innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain.

22. Here, in the present case, the evidence of PW1 Ashok shows that his father had been to the house of the accused persons. He was informed by PW2 Sunita Mawaskar that both the accused persons dragged his father inside the house which is witnessed by PW2 Sunita Mawaskar. He immediately rushed to the house of the accused persons and found his father in an injured condition. He shifted his father to

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the hospital and medical evidence shows that the death of the deceased is due to head injury which was caused to the deceased by weapon like axe. The injury sustained by the deceased is in the nature of incised wound with a bony deep over occipital region which is sufficient to show that the deceased has received the said injury when he was in the house of the accused persons. In such circumstances, burden is on the accused persons to explain the said injury. The said circumstances further corroborated by the fact that the blood stains are found on the shirt of accused No.1 Munshi which is not properly explained by accused No.1 Munshi.

23. Thus, the circumstances on record sufficiently show that the death of the deceased was caused in the house of the accused persons due to the injury sustained by the assault. Admittedly, blood group of the blood stains found on the articles is not ascertained.

24. Now, it is well settled that mere absence of the blood group is not sufficient to discard the evidence. It is observed by the Honourable Apex Court in the case of **Kishore Bhadke vs. State of Maharashtra**, reported in 2017 ALL MR (Cri)

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1316 that the presence of human blood on clothes recovered at the instance of the accused and mere absence of evidence regarding the blood group cannot be fatal to the prosecution.

25. The prosecution further placed reliance on the memorandum statements of the accused persons on the basis of which the incriminating article "axe" was recovered. Admittedly, the pancha witnesses have not supported the case of the prosecution. It is well settled that the evidence as to recovery need not be rejected on the ground that the prosecution witness did not support the prosecution version. Even the evidence of the investigating officer can be considered for proving recovery as official acts are regularly done.

26. The Honourable Apex Court in the case of **Modan Singh vs. State of Rajasthan, reported in 1978(4) SCC 435** has observed that where the evidence of the investigating officer who recovered the material object is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses did not support the prosecution version. The similar view was expressed in the case of **Mohd.Asiam vs. State of Maharashtra, reported in 2001(9) SCC 362**. In the case of

Anter Singh vs. State of Rajasthan, reported in (2004)10 SCC 657 it was further held that even if panch witnesses turn hostile, which happens very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated. This court also in catena of decisions held that merely because the pancha witnesses have turned hostile, is no ground to reject the evidence if the same is based on the testimony of investigating officer alone.

In the instant case, it is not the case of the defence that testimony of the investigating officer suffers from any infirmity or doubt.

27. Here, in the present case, admittedly, the deceased had sustained only one injury. The evidence on record also shows that there was no previous dispute or enmity between the deceased and the accused persons. The evidence on record shows that the deceased entered into the house of the accused persons to intervene in the quarrel between accused No.1 Munshi and accused No.2 Nagay. Learned counsel Shri N.S.Khandewale for the accused persons vehemently submitted that even assuming the case as it is, the offence is not

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committed under Section 302 of the Indian Penal Code. He submitted that at the most, the offence will cover under Section 304 Part-II of the Indian Penal Code. He submitted that the observations made by learned Judge of the trial court are not consistent with the evidence on record. Admittedly, there is no evidence that accused No.2 Nagay has given any blow on the deceased as there was no second injury. The blood stains are found on the clothes of accused No.1 Munshi. As such, only inference can be drawn is that whatever happened is between the deceased and accused No.1 Munshi and that is also in a sudden act. There was no preparation, premeditation on the part of accused No.1 Munshi. Accused No.1 Munshi was premeditated is not supported by any material on record. There was no repeated blow as single injury was found on the person of the deceased.

28. In view of submissions canvassed by learned counsel Shri N.S.Khandewale for the accused persons, we find substance in the submissions of learned counsel for the accused persons.

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29. Insofar as intention of accused No.1 Munshi is concerned, the nature of intention has to be gathered from surrounding circumstances like kind of weapon used, the amount of force used, the part of the body hit, and the circumstances attendant upon death. Admittedly, the direct evidence would not be available to gather the intention as the intention is inner compartment of that person's mind.

30. Whether the case of the accused persons covers under Exception 4 to Section 300 of the Indian Penal Code, a sudden fight and a sudden quarrel are to be seen from the circumstances. Admittedly, the deceased went to intervene in the quarrel between accused No.1 Munshi and accused No.2 Nagay. No direct evidence is available to show that what had happened exactly between them. However, an inference can be drawn that while intervening in the quarrel, something happens in a heat of passion and accused No.1 Munshi has lost his self control and gave a blow on the vital part of the body of the deceased. A sudden fight implies a mutual provocation and Exception 4 to Section 300 of the Indian Penal Code can be invoked if death is caused; (a) without premeditation, (b) in a sudden fight, (c) without the offender having taken undue

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advantage or acted in a cruel or unusual manner, and (d) fight must have been without the person killed.

31. Here, in the present case, the facts on record show that the deceased has sustained the injury on his vital part head which was a single injury. The evidence nowhere shows that accused No.1 Munshi acted in a cruel manner. The weapon like axe was used. The culpable homicide is defined in Section 299 of the Indian Penal Code. Whereas, murder is defined in Section 300 of the Indian Penal Code. Even, an act of homicide falls within the definition of culpable homicide in Section 299 of the Indian Penal Code. As per Section 300 of the Indian Penal Code, homicide is murder, however there are five exceptions which lay down the circumstances in which the act causing death is not murder even though it may have been done with an intention or knowledge specified in Section 300 of the Indian Penal Code.

32. The incident in question appears to be occurred when the deceased went inside the house to intervene the quarrel between accused No.1 Munshi and accused No.2 Nagay. As already observed that there is no evidence regarding the

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actual incident, the circumstances show that the deceased has sustained the single injury when he was in the house of the accused persons. The incriminating article axe was recovered at the instance of accused No.1 Munshi. The blood stained clothes of accused No.1 Munshi are also seized which connect accused No.1 Munshi with the alleged offence.

33. Admittedly, there is no evidence regarding the involvement of accused No.2 Nagay.

34. It appears that during intervention, accused No.1 Munshi got annoyed and the alleged incident has taken place.

35. We are, therefore, inclined to hold that accused No.1 Munshi can be held guilt for culpable homicide not amounting to murder and the case as regards accused No.1 Munshi covers under Section 304 Part-I of the Indian Penal Code.

36. In view of the above discussion, no case for acquittal is made out insofar accused No.1 Munshi is concerned. However, the case of accused No.1 Munshi would cover under Section 304 Part-I of the Indian Penal Code and, therefore, the

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sentence imposed upon accused No.1 Munshi deserves to be modified by sentencing him to undergo rigorous imprisonment for ten years. Accused No.2 Nagay is to be acquitted from the charges levelled against her.

37. In the light of the above, we proceed to pass following order:

ORDER

(1) The criminal appeal is **allowed partly**.

(2) The judgment and order dated 2.1.2020 passed by learned Additional Sessions Judge-1, Achalpur in Sessions Trial No.16/2012 convicting accused No.1 Munshi for offence punishable under Section 302 of the Indian Penal Code and sentencing him to undergo imprisonment for life is set aside. Instead, accused No.1 Munshi is convicted for offence punishable under Section 304 Part-I of the Indian Penal Code and sentenced to under rigorous imprisonment for ten years.

(3) The fine amount is confirmed.

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(4) The judgment and order dated 2.1.2020 passed by learned Additional Sessions Judge-1, Achalpur in Sessions Trial No.16/2012 convicting accused No.2 Nagay for offence punishable under Section 302 of the Indian Penal Code and sentencing her to undergo imprisonment for life is set aside.

(5) Accused No.2 Nagay is acquitted of the charges levelled against her. Her bail bonds stands cancelled.

(6) Accused No.2 Nagay be set at liberty forthwith, if she is not required in any other crime.

(URMILA JOSHI-PHALKE, J.)

(ROHIT B.DE0, J.)

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