



2025:DHC:727



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Pronounced on: 04th February, 2025

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CRL.A. 329/2009

1. **ISLAM** Appellant No. 1
2. **BHURA** Appellant No. 2
3. **RIZWAN** Appellant No. 3

**All S/o Shri Qayyum
R/o Village & Post Qaji Wala,
Distt. Bijnor, U.P.**

Through: Mr. R.S. Juneja, Mr. Shiv Kumar &
Mr. J.S. Juneja, Advocates with
Appellants in person.

versus

STATE

..... Respondent

Through: Mr. Satinder Singh Bawa, APP for
State.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

1. The present Appeal under Section 374 of the Code of Criminal Procedure, 1973 (*hereinafter referred to as "Cr.P.C., 1973"*) has been filed on behalf of the Appellants against the Judgment dated 01.04.2009 *vide* which the Appellants have been convicted for the offences punishable under Section 304 Part-II read with Section 34 of the *Indian Penal Code, 1860*



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(hereinafter referred to as “IPC, 1860”) for culpable homicide of Shri Hari Singh (hereinafter referred to as the “deceased”) and Order on Sentence dated 21.04.2009, vide which Appellant No. 3/Rizwan has been sentenced to undergo three years of rigorous imprisonment under Section 304 Part-II of IPC, 1860, while Appellant No. 1/Islam and Appellant No. 2/Bhura have been sentenced to undergo four years of rigorous imprisonment under Section 304 Part-II of IPC, 1860.

2. The Appellants have challenged the impugned Judgment dated 01.04.2009 and Order on Sentence dated 21.04.2009 on the grounds that the learned Trial Court has failed to appreciate the facts of the case in the right perspective. There was no evidence on record to prove the offence under Section 304 Part-II of IPC, 1860, despite which the Appellants have been wrongly convicted.

3. First and foremost, there is no motive or previous enmity of the deceased with the Appellants that has been proved by the prosecution.

4. It is argued on behalf of the Appellants that the testimony of PW1/Bimla Devi and PW2/Pinki, who were allegedly the eyewitnesses, was completely shattered in the cross-examination. Moreover, there is no other supporting witness to the testimony of PW1/Bimla Devi and PW2/Pinki. The witnesses examined by the Appellants in their defence evidence have fully supported the version of the Appellants. The impugned Judgment suffers from illegality and is based on conjectures and surmises. No offence beyond reasonable doubt has been proved against the Appellants.

5. It is submitted that the initial information about the alleged offence was recorded *vide* D.D. Entry No. 65-B on 26.07.2005 at 08:27 P.M., but



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there was no name of any accused mentioned therein.

6. According to the prosecution, the quarrel took place at 08:00 P.M. on the 26.07.2005 and the deceased was taken to the hospital by the Police. PW14/ASI Prem Singh obtained the MLC No. B-2725, Ex.PW9/A. The Doctor had declared the patient/deceased *fit for statement*, but without giving any reason, the Investigating Officer did not record the statement of the deceased. Further, the FIR No. 420/2005 under Sections 341/452/304/34 of IPC, 1860 registered at Police Station Seelampur, Delhi, was not registered on the same day. No explanation is forthcoming as to why the FIR was no registered and D.D. was kept pending, especially when PW1/Bimla Devi and PW2/Pinki, wife and daughter of the deceased respectively were the eye-witnesses.

7. Further, initially, the FIR was recorded on 27.07.2005 at 10:00 A.M. under Sections 323/341/34 of IPC, 1860 on the statement of PW1/Bimla Devi, wife of the deceased. According to her statement, a quarrel had taken place outside the house, but subsequently PW1/Bimla Devi and PW2/Pinki introduced a fabricated, concocted, manipulated and afterthought story that the Appellants had forcibly entered their house and dragged the deceased outside. During the scuffle, the latch (*'kundi'*) of the door was broken and the Appellant No. 1/Islam hit the deceased with the stone. There was no head injury of the deceased, as per the FIR. It is submitted that the statement of PW2/Pinki under Section 161 of Cr.P.C., 1973 is contrary to her testimony in the Court, wherein she has improved and changed the story. Therefore, the story of PW1/Bimla Devi and PW2/Pinki is not believable and the statements are not reliable and could not have been made a basis for



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the conviction of the Appellants.

8. Furthermore, PW2/Pinki had stated in her cross-examination that the statement of her father was recorded by the Police when they visited for the first time, but the said statement has not been placed on record.

9. It is claimed that the deceased had stated to the Police that he had sustained injuries because of his own conduct and behaviour, for which, none is liable. However, when the condition of the deceased deteriorated and he was about to die, the Police swung into action and changed the entire story in order to safeguard themselves, procuring false and fabricated statement from PW1/Bimla Devi.

10. It is further submitted that the Site plan, Ex. PW16/A clearly indicates that the quarrel had taken place outside the house at Point 'A'. The alleged recovery of stone had been effected from an open space on the next day. There is no public witness to the seizure of the alleged weapon of offence, for which there is no cogent explanation. The Arrest Memo, Personal Search Memo and also the Disclosure Statement only bears the signatures of the Police and no public person.

11. The Appellants were not known to the deceased or his family, despite which it is not explained as to how the names of the Appellants got mentioned in the FIR.

12. It is also submitted that *no Test Identification Parade (TIP)* has been conducted of the Appellants which was essential, especially because there was no description regarding the age, height, measurement, colour, etc., of the Appellants given in the FIR.

13. Moreover, Appellant No. 2/Bhura and Appellant No. 3/Rizwan have



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been implicated subsequently on the supplementary statement of PW1/Bimla Devi without there being any explanation as to how and on whose identification were the two named, especially when they were not known to PW1/Bimla Devi and PW2/Pinki.

14. According to the prosecution, PW1/Bimla Devi had identified the accused persons, Appellants herein, on her visit to the Police Station, but she has denied either visiting the Police Station or identifying the accused therein. PW1/Bimla Devi and PW2/Pinki have admitted in their cross-examination that they never visited the Police Station and hospital and saw the Appellants for the first time in the Court. The circumstances therefore, create a doubt about the Appellants being involved in the crime in any manner.

15. It is submitted that PW14/ASI Prem Singh had visited the crime spot for the first time on 26.07.2005, but he failed to record the statement of PW1/Bimla Devi and PW2/Pinki, the wife and daughter of the deceased respectively. However, the name of the Appellant No. 1/Islam was taken after about 14 hours of the incident, when it was realised by PW1/Bimla Devi that her husband would surely die. The circumstances and time gap gave enough space for the Police and the Complainant-Bimla Devi to implicate the Appellants falsely in this case.

16. PW1/Bimla Devi further deposed that she was sick and did not even visit her husband in the hospital. It is beyond comprehension that the wife and the daughter of the deceased would not visit the hospital when the deceased had been hurt so grievously.



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17. Moreover, the alleged incident took place in thickly populated area, despite which no public/independent public witness has joined in the investigations. The name of one person, namely, Saleem has appeared in the testimony of PW1/Bimla Devi and PW2/Pinki as a witness to the incident. Saleem had also been named as one of the prosecution witnesses in the Chargesheet, but he failed to appear and depose about the true facts in the Court.

18. Furthermore, PW1/Bimla Devi and PW2/Pinki had deposed that the deceased had chased the Appellants with a *lathi* in his hand, which fact is also supported from the testimony of the defence witnesses. A person if injured so seriously could not have chased the Appellants by holding a *lathi* in his hand. While PW1/Bimla Devi was uncertain about the deceased being drunk at the time of incident, but PW2/Pinki has admitted that the deceased was drunk. The deceased was in the habit of drinking and creating nuisance in the locality as has been admitted by both PW1/Bimla Devi and PW2/Pinki. This lends credence to the defence of the Appellants that the injuries were sustained by the deceased because of his own conduct and behaviour.

19. PW5/Constable Dinesh, who took the '*rukka*' to the Police Station for registration of FIR, has denied that PW14/ASI Prem Singh had recorded the statements of any witness in his presence, which raises a doubt about the presence of PW14/ASI Prem Singh on the scene of crime.

20. Likewise, PW11/Constable Sunil Kumar, who was on PCR duty, deposed in his cross-examination that he was not in a position to either affirm or deny that PW1/Bimla Devi along with two or three public persons



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of the locality, had accompanied him in the PCR Van to the hospital. Moreover, the testimony of PW11/Constable Sunil Kumar, who had accompanied PW14/ASI Prem Singh, is also contradictory to the statement of the Investigating Officer. He has stated that the injured was unfit to make a statement which is contrary to the endorsement made in the MLC of the deceased.

21. Furthermore, the further investigations were conducted by PW16/SI Satender Mohan, who deposed that he seized the shirt of the deceased which was handed over to him by his wife and sealed it with the seal of 'SM'. However, as per the FSL Report, the shirt of the deceased was found with the seal of 'SL' i.e., of Dr. S. Lal, Senior Demonstrator of U.C.M.S., who had conducted the post mortem of the deceased. It reflects that the parcel had been tampered by the Investigating Officer in order to substantiate the prosecution story.

22. It is submitted that as per the MLC, Ex.PW9/A, there were only two injuries on the body of the deceased, one being a CLW of length 4x0.5 cm present over the forehead and the second being abrasion and tenderness over the chest, as mentioned in the Post Mortem Report, Ex.PW17/A.

23. Furthermore, from the *Post Mortem Report*, it is clear that the deceased had suffered only one injury which was *ante mortem* injury i.e., lacerated wound 1.5x0.3 cm present left side of the forehead vertically placed 3.0 cm *above the eyebrow* and 1.0 cm left to middle margin of wound it reddish. No apparent visible external injury is shown on the body of the deceased. The Doctor had opined that the cause of death can be given only on receipt of Internal Chemical Report Analysis.



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24. It is submitted that the Investigating Officer subsequently had given an Application along with the weapon of offence i.e., stone and piece of brick for seeking subsequent opinion. The Doctor opined that *“after examination of weapon of offence produced before me and P.M. report, I am of the opinion that the injury mentioned in P.M. report page No. 2 was possible to cause by piece of brick (parcel No. 2) and unlikely to cause by stone (parcel No. 1)”*. It is clear from the Forensic Science Laboratory Biology Division that the stone piece, brick piece and blood gauze piece, that the cause of demise was inconclusive. The medical evidence is totally contrary to ocular evidence.

25. Further, it is claimed that the Appellant No. 1/Islam was Juvenile at the time of alleged incident. He claimed himself to be 15 years of age and was examined by Doctor Anil Kohli who had given a subsequent opinion that the Appellant No. 1/Islam was 18 to 20 years at the time of the incident. The Juvenile Justice Board after getting the statement of Doctor Anil Kohli as CW-1 remanded back the Appellant No. 1/Islam to the Trial Court, stating that even if the age of the Appellant No. 1/Islam was considered on the lower side, he would still be 18 years of age on the date of incident and therefore, he be tried by the regular Court of Law.

26. It is claimed that the learned Trial Court/Juvenile Justice Board failed to appreciate that the margin of two years was in favour of the Appellant no. 1/Islam thereby establishing that the Appellant No. 1/Islam was juvenile at that time and the entire trial was contrary to the law.

27. It is further claimed that Section 34 of IPC, 1860 was not attracted in the facts and circumstances of the case as allegedly the injury had been



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caused by the Appellant No. 1/Islam only and not by the Appellant Nos. 2 and 3. Section 34 of IPC, 1860 has been wrongly invoked to convict the other two Appellants i.e., Appellant Nos. 2 and 3, despite there being no common intention.

28. The statement of the Appellants under Section 313 of Cr.P.C., 1973 has not been correctly recorded as all the incriminating facts had not been put to them.

29. It is, therefore, submitted that it is evident that the entire story of the prosecution has been totally fabricated. The impugned Judgment convicting the Appellants is not sustainable in law and that the impugned Judgment dated 01.04.2009 and Order on Sentence dated 21.04.2009 are liable to be set aside.

30. *Learned Additional Public Prosecutor on behalf of the State* has vehemently refuted all the arguments addressed on behalf of the Appellants.

31. It is asserted on behalf of the State that the testimony of PW1/Bimla Devi and PW2/Pinki, who were the eye-witnesses to the incident, fully corroborates and proves that it is the Appellants who had inflicted injuries with a brick and a brick and a stone slab which had resulted demise of the deceased.

32. It has been explained that though in the MLC it had been recorded that the deceased was fit for statement, but when the Investigating Officer tried to record his statement, by then his condition had deteriorated and he was unfit for giving a statement. Merely because at the time when the deceased was initially admitted in the hospital, he was found fit for giving statement, cannot be in itself a ground to disbelieve the testimony of



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Investigating Officer. When an endeavour was made to record his statement, he was unable to do so because of his deteriorated health.

33. Learned Additional Public Prosecutor on behalf of the State has further argued that not only is the ocular evidence of PW1/Bimla Devi and PW2/Pinki fully supporting the commission of the offence, but it is also supported by the corroborative evidence by way of site plan, wherein the scene of incident has been indicated as in the *gali*. The photographs of the scene of crime further show that the weapon of crime i.e., stone slab and the brick lying in the *gali* near the house of the deceased. There is a blood stain clearly visible on the slab which is in consonance with the testimony of PW1/Bimla Devi and PW2/Pinki.

34. Furthermore, the Post Mortem Report also reflects that the likely cause of death was deceased being hit by a stone slab on his chest.

35. It is further explained on behalf of the State that the clothes of the deceased has been seized and were handed over to the Investigating Officer in the hospital and had been sealed by the Doctor with his own seal and the sealed packet had been handed over to the Constable which was subsequently seized by the Investigating Officer. The clothes of the deceased had not been sealed by the Investigating Officer by his seal as has been argued on behalf of the Appellants. There is no discrepancy in this regard about the sealing of the clothes of the deceased.

36. Learned Additional Public Prosecutor on behalf of the State has further explained that the Appellants had been duly identified by PW1/Bimla Devi in the Police Station. Merely because no formal TIP was conducted, it cannot be taken as a sole ground for acquittal of the



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Appellants.

37. It was claimed by Appellant No. 1/Islam that he was juvenile at the time of commission of offence, but a due *Age Enquiry* had been conducted by the Juvenile Justice Board and a finding was given that he was adult and must face a regular trial. No Appeal or Revision against the said *Age enquiry* of the Appellant No. 1/Islam was filed on behalf of the Appellant No. 1 and now subsequently at the stage of Appeal, he cannot be challenging the findings of the Juvenile Justice Board and his trial before the learned Trial Court.

38. In the end, it is argued on behalf of the State that the learned Trial Court has rightly appreciated the entire prosecution evidence and has duly considered the defence of the Appellants to hold them guilty of the offence under Section 304 Part-II of IPC, 1860 and sentence them accordingly.

39. It is thus, submitted that the Appeal is bereft of any merit and is liable to be dismissed.

40. **Submissions heard and the documents as well as the evidence of the witnesses perused.**

41. The challenge in the present Appeal is to the impugned Judgment dated 01.04.2009 and Order on sentence dated 21.04.2009 whereby the Appellants have been held guilty and convicted for the offence under Section 304 Part-II read with Section 34 IPC. It is alleged by the Prosecution that the Appellants in furtherance of their common intention, had thrown a stone slab at the chest of late Sh. Hari Singh because of which he died.

42. FIR was recorded on the statement of PW1/ Smt. Bimla Devi, wife of deceased Hari Singh, who had given the statement to the Police on



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27.07.2005 that on the previous day, i.e. 26.05.2005, at about 08:00 PM while she was working inside her kitchen, there was commotion in the *gali* which made her come out. She found that three-four persons had caught her husband while one person named Islam, whose name she came to know subsequently, picked up a stone slab lying in the lane and hit on the chest of her husband, because of which her husband fell. Her daughter Ms. Pinki (PW-2) made a call to the Police and gave a statement on the next day, which became the basis of the registration of the FIR.

43. In this backdrop, it is pertinent to refer to the testimony of PW1, wherein she deposed that on 26.07.2005 at about 08:00 PM, she was washing utensils in the kitchen, when accused Islam along with two other accused present in the Court, along with one more person, came into her house. After hearing the noise, she paid her attention towards the accused persons who were dragging her husband out of the house and they picked up the stone slab and assaulted her husband on the chest with that stone.

44. While in her complaint, PW1 deposed that there was some commotion outside and the incident had happened in the *gali*, whereas in her testimony she has given an improved version of her husband having been dragged out of the house by the three accused along with one another person.

45. In this context, it is pertinent to refer to the testimony of PW2/Pinki who was also present in the house at the time of the incident. She also deposed that on 26.07.2005, at about 08:00 PM she along with her mother, sister and younger brother was present in the house. She was sitting in her room and her father was also present inside the house. All of the four



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accused person, whose names she came to know subsequently, came into their house and dragged their father and struck his head on the handle of the door. All the three accused persons dragged him out of the house where Islam picked up a stone lying on the road, while the other two accused held her father and thereafter, Islam hit the stone on the chest of her father. He was also hit by a brick piece on his head.

46. Pertinently, PW2/Pinki was confronted with her statement recorded under Section 161 Cr.P.C. (Ex. PW2/A) where the version given by her was different. She had stated in her statement recorded under Section 161 Cr.P.C. that on hearing a commotion outside the house, she came out and found her father being stopped by three-four persons and that Islam, picked up the stone slab and hit at the chest of her father, because of which he fell. She further stated that thereafter, they brought the father inside the house, on which two persons outside started banging the door and broke the Latch/*kunda* of the door. She further stated that as she was inside the house, she could not see the persons who had broken the *kunda* of the door of their house.

47. From the testimony of PW1/ Bimla Devi and PW2/ Pinki, on whose complaint FIR was registered, it emerges that on the date of the incident, Hari Singh was present in the *gali* when he was allegedly attacked by the three accused. On hearing the commotion, both PW1 and PW2 came out of the house and found Hari Singh had been hit by the stone slab, because of which he fell. They brought Hari Singh inside the house.

48. The improvement in the testimony of these two witnesses is writ large. Both PW1 and PW2 improved their statements by saying that the



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accused persons had forcibly entered into their house and dragged Hari Singh outside the house, which is absolutely contrary to their statements made before the Police.

49. The manner in which the two witnesses PW1 and PW2 have deposed about the incident clearly creates a doubt of their being eye witness to the incident. Rather, they both as per their statements, were present inside the house when the deceased was in the lane and the incident actually happened. It also emerges from their statements and testimony that by the time they came out of their house, the incident had already taken place and there are contradictions in their statement and testimony with regard to happening of the incident.

50. Their testimony also become significant in light of their own deposition in cross-examination, wherein they admitted that Hari Singh used to consume alcohol occasionally. Though at the first instance, they denied the suggestion initially that Hari Singh had consumed alcohol on the day of the incident, but subsequently, in their own cross-examination, it admitted that he had consumed a little alcohol.

51. A suggestion was also given to PW-2/Pinki in her cross-examination that her father, deceased Hari Singh, had a fight with the handcart vendor and had brought a *lathi* in his hand, but this suggestion was denied by her. However, she admitted that after the accused persons had left the spot, her father had brought out *lathi* from the house and moved it around himself. Similarly, PW1/Kamla Devi has also admitted that her husband had chased the accuse persons with a *lathi* in his hands.

52. The admissions made by both PW1/ Kamla Devi and PW2/ Pinki,



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confirm that the deceased- Hari Singh, after the incident had carried a *lathi* to chase the accused persons. What thus, emerges is that after the alleged assault by the accused persons, he was not found lying on the floor but had in fact got up and brought a *lathi* from inside his house.

53. Further, PW-1/ Bimla had stated in her statement Ex. PW1/A as well as in her testimony recorded before the Court, that Islam had thrown the slab on the chest of her husband. PW-2 interestingly has also improved her testimony to claim that other two accused had caught hold of her father while Islam had hit him on the chest with the stone slab. She has further deposed that her father was also hit by a brick piece on his head. While PW1 has not spoken about any role of the other two accused and has only named Islam as the person who had thrown the stone; PW2 has improved her statement under Section 161 Cr.P.C. and for the first time has deposed about the role of the other two accused, as having held her father.

54. The *next aspect* which is of significance is that the stone slab, which was seen by this Court at the time of hearing final arguments, was about 1X2 ft. and weighed 8 kg and it cannot be lifted by one person and even if lifted, it cannot be thrown by one person and that too, in the manner that it hits a person on his chest by its broad side.

55. The Post Mortem Report (Ex. 17/B) mentions that the deceased had suffered “*ante mortem injury, lacerated wound 1.5X0.3 cm present Lt. Side of forehead, vertically placed, 3.0 cm above the eyebrow and 1.0 cm Left side to midline, margin of wound also is reddish*”, which eventually led to collapse of both the lungs resulting in respiratory arrest.

56. There is a serious doubt created from the testimony of PW1 and PW2



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that the deceased was hit by the stone slab in the manner as has been projected by them. These material contradictions in the testimony of PW1 and PW/2, become significant in light of the Post Mortem Report and subsequent opinion of the Doctor.

57. This inference is further corroborated by the prosecution witness PW17/ Dr. Arvind, who has given the cause of death as *“respiratory arrest due to bilateral collapse of lungs produced by blunt trauma impact to chest. Injuries mentioned in post mortem report were ante mortem, which were caused by the assault in the manner as alleged”*.

58. It is significant to observe that *firstly*, the manner in which the deceased was allegedly hit by the accused, is not proved. *Secondly*, in light of the Post Mortem Report and the testimony of PW/1 and PW/2, it is the possibility that the deceased might have himself fallen flat on the slab on his chest and sustained injuries, which cannot be ruled out.

59. There is much argument on behalf of the Appellants that the incident allegedly happened on 26.07.2005 while the FIR has been registered on the next day. Moreover, the injured when taken to the hospital, was found fit and according to PW-16/Investigating Officer, he had recorded the statement of the deceased, though the same has not been placed on record.

60. It is pertinent to observe that as per testimony of PW1 and PW2, after the deceased was injured in the alleged incident, they had simply brought him inside the house but after some time when they realized that his condition was deteriorating, they called the Police and he was taken to the hospital.

61. In the *Rukka PW14/B*, it is mentioned that initially when the



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Investigating Officer sought to record the statement of the deceased, he denied on the ground that he was suffering from pain and stated that he would make a statement subsequently. Even if it is accepted that the injured was fit to make a statement initially, but it is evident that the deceased himself was not inclined to give statement and thereafter, his condition deteriorated and he was subsequently declared *Unfit for Statement*. Merely because his statement could not be recorded, it cannot be said that his statement was intentionally not recorded or that there was any dereliction on the part of the Investigating Officer.

62. With regard to role assigned to the other two accused, namely, Bhura and Rizwan and further, the manner in which the deceased was hit by the stone slab which evidently became the cause of death; there are serious contradictions and it cannot be held that the Prosecution has succeeded in proving its case beyond reasonable doubts.

63. The entire prosecution evidence is rife with contradictions and improbabilities and the testimony of the eye-witnesses coupled with the Medical evidence, fails to establish the case of the Prosecution beyond reasonable doubt.

Conclusion:

64. In view of the above, the impugned conviction dated 01.04.2009 and Order on Sentence dated 21.04.2009 is set aside and the Appellants /accused are acquitted of the offence under Section 304-II/34 IPC. Their bail bonds/ personal bonds and surety bonds stand accordingly discharged.

65. The Appeal along with pending Application(s), if any stand disposed of, accordingly.



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(NEENA BANSAL KRISHNA)
JUDGE

FEBRUARY 04, 2025
S.Sharma/r