

Bajjappa Vs. State of Karnataka

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Court : Karnataka

Decided On : Mar-18-1998

Reported in : 1999CriLJ958

Judge : M.F. Saldanha and ;B.N. Mallikarjuna, JJ.

Acts : Evidence Act, 1860 - Sections 114; [Indian Penal Code \(IPC\), 1860](#) - Sections 302 and 304II; Code of Criminal Procedure (CrPC) , 1974 - Sections 428

Appeal No. : Criminal Appeal No. 9/1998

Appellant : Bajjappa

Respondent : State of Karnataka

Advocate for Def. : S.S. Koti, Addl. SPP

Advocate for Pet/Ap. : M.T. Nanaiah, Adv. for ;Jairaj and ;Dhanraj, Advs.

Judgement :

M.F. Saldanha, J.

1. The appellant before us was charged with having committed the murder of one Venkataswamy with a pickaxe at about 2.15 p.m. on 7-1-1993 at Hippaneralekeri village. It is alleged that the deceased Venkataswamy who owned the adjoining field to that of the accused was accompanied by PW-1 on that afternoon and that

the electricity which fed the water pump tripped. Venkataswamy suspected that the accused was responsible for this and therefore, went to his field near the pump house of the accused ostensibly to investigate into the matter. The version of PW-1 is that he heard a cry from Venkataswamy and therefore, rushed there when he saw the accused inflicting a blow with the pickaxe on the head of the deceased. The accused is supposed to have immediately thrown the weapon there, got on to his TVS moped and left the place. PW-1 states that the deceased struggled for a brief period of time and died on the spot. PW-2 states that he was passing by that side and that the cry of PW-1 attracted his attention and on going to the spot, he saw the accused leaving on his TVS moped. According to the prosecution, the brother of the deceased Rajappa who was cited as CW-4 was also present there, but the prosecution has not examined this witness. The matter was reported to the Police Station and the time recorded in the FIR indicates that it was after about two hours that the complaint was lodged. The P.S.I, states that he came to the spot at about 5.45 p.m. and it is his contention that since it was getting dark, he kept a Constable there for the night and that it was early the next morning that the inquest Panchanama was drawn up. The weapon which was lying close to the body was seized and it is M.O. 5 and the Investigating Officer states that it was blood stained. The intimation was sent to the Doctor and the Post Mortem was done which revealed three injuries on the body, two of them on the head and one on the shoulder. We are basically concerned with injury No. 3 because this is the one which has not only fractured the skull but it has also damaged the brain and was the cause of death. The Doctor has opined that such an injury could have been caused by M.O.5. The accused is supposed to have been arrested on 19-1 - 1993. On completion of the investigation, the accused was charge-sheeted for having committed an offence punishable under Section 302 IPC. The learned trial Judge held the accused guilty of the offence of murder and awarded a life sentence to him. This appeal is directed against that sentence.

2. At the hearing of the appeal, Mr. Nanaiah, learned counsel who represents the appellant has advanced two broad lines of submissions. In the first instance he contended that the prosecution evidence is weak and inconclusive and secondly, his contention was that the investigation had not only been extremely perfunctory but more importantly that the credibility or the manner in which the case has been

investigated is seriously suspect. We shall carefully deal with both heads of arguments apart from his third contention namely that the eight defence witnesses who have been examined cumulatively established that the accused has wrongly been implicated because he was not present at that spot on the day in question. Dealing with the first submission, learned counsel pointed out that PW-1 being the brother is closely related to the deceased and that he has stated about the animus which the deceased has against the accused as there were constant problems and quarrels over the electric supply. Learned counsel has pointed out to us that the electric line first went to the field of the accused and then to that of the deceased and that whenever the power was interrupted that the deceased and his family suspected that the accused had tripped the line. He submits that it is very clear that this was the cause for friction because even on the date of the incident immediately on the power tripping, the deceased went to the power house of the accused. The next point made by the learned counsel was that PW-1 himself is silent with regard to what exactly happened at that place and that it is his own case that he went there on hearing the distress cry of his brother. Learned counsel points out to us that it is, therefore, self-evident that PW-1 could not have witnessed the actual assault because even if it took him a little time to get there that he started moving only after hearing the cry and making allowance for the time that it would take him to reach the point, that the incident would have been over by then. With regard to his evidence that he saw the accused leaving the spot, the submission is that having seen his brother in a fatally injured condition that the immediate suspicion fell on the accused and that this is why the accused has been implicated. The last submission and (is) one of again some seriousness which covers both PWs-1 and 2 is that according to the learned counsel if it was the accused who had attacked the deceased, PWs-1 and 2 would certainly have gone after him, tried to intercept him and raised an alarm in order to prevent his escape and according to the learned counsel, the Court must take notice of the fact that PW-2 is an ex-member of the Police Force and he submits that the non-action on the part of these two witnesses very clearly indicates that even if they arrived at the scene that incident was over, the assailant had also disappeared and that this is the reason why no attempts were made to stop the assailant. We need to mention here that PW-2 has admitted that he did not see the assault but

he has stated very clearly that he saw the accused leaving the spot on his TVS moped. Neither of the witnesses mention the presence of any other person at that spot other than CW-4 Rajappa who has not been examined. We need to observe here that if the witnesses desire to falsely implicate the accused that there is no reason why they would have truthfully admitted that they came to the spot at the late point of time as claimed by them. Furthermore, having regard to the medical evidence, it is clear to us that three injuries were inflicted on the deceased; one of them is on the shoulder and two of them on the head. All the three injuries are on the left side as recorded by the Doctor. Even though the witnesses are unable to give us the sequence, there can be no dispute about the fact that the injury No. 3 which is the one that has virtually splattered the skull must have been the last in the order of assault. Having regard to the seriousness of this injury there could be no question of the deceased being able to shout when this injury was inflicted nor for that matter when the other injury which also landed on the head and which must have stunned him on the spot. It is therefore clear to us that when injury No. 1 which was a blow on the shoulder was inflicted that he would have naturally cried out either in pain or for help that this has immediately brought the PW-1 to that spot. The distance is very close and we see no reason to disbelieve PW-1 when he states that he saw the last blow being inflicted on the deceased. PW-2 is an independent witness in so far as he is not a relative nor has anything been brought on record as to why he would falsely implicate the accused in a murder case. Conversely, nothing has been brought on record by the defence to suggest that PW-2 is so closely connected that he would identify himself with PW-1 in falsely implicating the accused. We have also taken note of the fact that the field of the accused is adjoining to that of the deceased and it is perfectly possible for the accused to have been found there. Under these circumstances and particularly having regard to the fact that the essential credibility of these two witnesses has hardly been shaken even in cross-examination, we must accept the findings of the learned trial Judge that these two persons did see the incident but to the extent that PW-1 arrived when the last blow was being inflicted and PW-2 came there immediately thereafter. The incident has happened at 2.15 p.m. on a bright afternoon and there is no ground on which one can disbelieve the evidence of the witnesses who state that they saw the accused at close quarters and they left from

there. It is true that neither of them tried to intercept or stop the accused or to raise an alarm but this could possibly be explained by the fact that they would have been more concerned with what had happened to Venkataswamy who was in a grievously injured condition than in running after the accused and leaving Venkataswamy there. This fact cannot really be regarded as unnatural to the extent of discrediting the witnesses.

3. As far as the non-examination of CW-4 Rajappa who is the brother is concerned, the appellant's learned counsel submitted that this is fatal to the prosecution case. He relied heavily on the decision of the Supreme Court reported in : 1976 CriLJ1883 wherein the Supreme Court set aside a conviction principally on the ground that the material witness had not been examined by the prosecution. Mr. Nanaiah submitted that this is virtually a one witness case in so far as the prosecution seeks to base the conviction essentially on the evidence of PW-1 and that it was therefore absolutely essential to have examined CW-4 Rajappa who is the brother and he submits that in not examining CW-4, an adverse inference under Section 114 of the Evidence Act must follow. He has drawn our attention to the record of the case and he points out that there is nothing to indicate that Rajappa was not available as there is a bald statement in the order sheet that the Public Prosecutor has dropped the CW-4. There is nothing to indicate as to how and why this has happened and Mr. Nanaiah submits that this creates serious doubts to the extent of establishing that had Rajappa been examined, his evidence would not have corroborated the version of PW-1. Mr. Nanaiah also submits that if for whatever reason Rajappa was not likely to support the prosecution case that he should have been examined and treated as hostile and in the absence of even this situation, that the non-examination of Rajappa would be destructive to the prosecution. The learned Additional SPP has tried to defend the situation by pointing out that since the record is silent as to why Rajappa was not examined that one can only assume that the learned Prosecutor in the trial Court was of the view that his evidence would only be repetitive and that therefore examining him was superfluous. We are not willing to accept these excuses and explanations and the grievance made by Mr. Nanaiah is more than fully justified. This is not a case in which there is a string of witnesses reciting the same version and if that were to be the position, then perhaps the last of them

could have been rendered redundant but where the prosecution heavily depends on PW-1 and where it is contended that Rajappa was an eye witness, his non-examination was most certainly wrong. The only question is as to whether this factor can be treated as being absolutely fatal to the prosecution. In the case before the Supreme Court the non-examination of the material witness left a gap and a void in the prosecution case and because of this lacuna, the Court set aside the conviction. In the present case, the position is different in so far as the prosecution has examined PWs-1 and 2 and Rajappa would have at the highest lent support to that evidence, there is nothing on record for us to conclude that Rajappa's evidence would have been unfavourable to the prosecution and in this background all we can say is that while we deprecate in the strongest terms, this practice each on the part of the Prosecutor as also in some instances, unfortunately, the Presiding Officers, to short-circuit the prosecution by pruning the number of witnesses that it is very wrong and impermissible. We have come across instances where this sort of unhealthy procedure is taking place in the trial Courts and we would like to point out in no uncertain terms that the consequences are extremely damaging; invariably the accused getting the benefit of doubt. In this case had the evidence of PWs-1 and 2 been unsatisfactory or had it been weak, it would have required heavy support from the evidence of Rajappa and in the absence thereof the prosecution could have failed. However, since we find that the evidence of PWs-1 and 2 is good enough, all that we can hold is that the non-examination of Rajappa who could have strengthened the prosecution case, but that this factor is not sufficient to either undo or destroy the evidence of PWs-1 and 2.

4. Coming to the quality of the investigation, learned counsel Mr. Nanaiah was extremely strong in his attack in so far as he pointed out that it is now well settled law that if there are serious infirmities or discrepancies in the investigation that the Court will have to set aside the conviction. He placed heavy reliance on the decision of Supreme Court reported in : 1976 CriLJ1521 where the Court held that the series of serious infirmities in the course of the investigation created so much of doubt in the mind of the Court that it was impossible to sustain the conviction. Mr. Nanaiah pointed out to us that even assuming that the FIR was lodged with the Police after a delay of two hours for which there is no explanation even though

the Police Station is hardly 3 kilometers away from that spot that the I.O. does not put forward any ground on which he can defend himself for not having gone to the spot which was hardly 10 minutes away for as long as 2 hours. He submits that this itself indicates the totally casual manner in which the officer has functioned and he reinforces his argument very strongly by pointing out to us that this is a case where a man was lying dead and the prosecution alleges that the crucial evidence, namely, the murder weapon was lying beside him and despite this, the Police do not seize the weapon in question nor had they completed the inquest formalities on that evening, teamed counsel points out to us that in addition to this though the I.O. contends that he had kept a Police Constable to watch over the body on that night that the P. C. is neither examined nor are the details of the P.C. furnished by the I.O. His submission therefore is that there is nothing to absolve the interested parties from having tampered with the evidence. In support of his submission, Mr. Nanaiah has relied on one factor which, he contends, establishes the validity of his criticism.

5. Mr. Nanaiah has drawn our attention to the inquest panchanama which indicates that the dead body was lying at a spot which is 55 feet away from the electric pole. The defence theory is that the deceased had gone up the pole for purposes of ascertaining as to what precisely had caused the power failure and that he sustained the fall from the pole which resulted in the fatal injuries. Mr. Nanaiah supports the defence theory very heavily by relying on the evidence of PW-3 who is the attesting witness to this panchanama and to the admission by this witness that the body was lying 4 feet away from the electric pole. Mr. Nanaiah submits that in the first instance this evidence is compatible with the defence theory that the deceased had fallen down from the pole and sustained the injuries. What he submits is that this could have happened through one of many ways possibly the fact that the deceased could have come in contact with a live wire and was violently thrown down from that spot. On the other hand, what he submits is that the mahazar totally contradicts the evidence of PW-3 in so far as it places the body at a spot 55 feet away from the electric pole. According to the learned counsel what compounds the matter is the fact that the I.O. supports the version as set out in the mahazar and we therefore have to reconcile the contradictory versions before the Court. His submission, therefore, is that the state of this

evidence casts serious doubt on the prosecution case, that it supports the defence version but more importantly that it completely establishes that the I.O. has not bothered to do his duties as he should have on the evening of 7-1-1993. Various explanations and theories have been put forward by the learned Additional SPP who essentially contends that the Court will have to go by the documentary evidence, namely', the inquest panchanama and not by the oral versions of either PW-3 or the I.O. who are obviously drawing on their memory. Also, the learned Addl. SPP submits that the manner in which PW-3 has given evidence will have to be taken cognizance of because it clearly establishes that he was not at all sure about anything that he is stating.

6. It is undoubtedly true that there is some infirmity as far as this head of evidence is concerned. The real question is as to whether the infirmities were so serious that it would be destructive of the prosecution case or whether it is reconcilable. We do find from the quality of evidence tendered by PW-3 that he is not at all certain about anything that he has stated and that he was virtually accepting and admitting whatever was put to him. It is in this background, that there is considerable substance in the plea that the Court must rely on the documentary evidence in preference to what witnesses are stating on the basis of their memory. For purposes of ascertaining as to whether the spot where the body was lying is in fact the one as indicated in the mahazar, we have carefully scrutinized the evidence and we do find that there is one clinching factor, namely, the fact that the earth around the spot where the body was lying and which has been attached was heavily blood soaked. Mr. Nanaiah's contention was that irrespective of whether there is any truth in the fact that a Police Constable was left there for the night, that during the long period that intervened between .2.15 p.m. on 7-1-1993 when the incident took place and 5.45 p.m. when the Police turned up but more importantly, during the night up to 8.00 a.m. the next morning when the Police returned, that many things could have happened particularly with regard to shifting the body and even planting the weapon. Those possibilities cannot be ruled out but on the facts of the present case that is improbable because persons have collected at that spot immediately after the incident and we do not believe that the body would have been left unattended. In a serious situation where a murder has taken place in a village, it would be too far-fetched to even assume that the body

would thereafter have either been moved or that a weapon would have been secured and planted at that spot and that too a blood stained weapon. The weapon corresponding to what PWs-1 and 2 had referred to, the bleeding from the injuries must have been extremely heavy and the fact that the blood was collected on the next day by the Police from the spot around where the body was found, are sufficient to establish that the contents of the mahazar in fact represent the true situation. We need to also observe in passing that the defence theory of the deceased having climbed the pole to investigate the problem and in having sustained a fall from the pole, are too far-fetched and they are not at all compatible with the location, the nature and number of the injuries which could never had taken place due to such a fall. It is true that PW-4 the Doctor has given all sorts of admissions. We have had occasion to repeatedly observe that there is a total lack of application of mind, and total lack of professionalism demonstrated by the majority of these Doctors and this is one more instance where even the Post Mortem reports are cryptic and in our considered view, this type of half-baked approach should not be tolerated as the consequences to the justice dispensation system are extremely grave because of such misbehaviour.

7. We need to also deal with the submission canvassed by Mr. Nanaiah that even assuming that the Police arrived at that spot at 5.45 p.m. that the explanation that it was getting dark and that therefore the formalities were put off to the next day is absolutely unpardonable. In the decision of the Supreme Court referred to by us earlier, this was one of the grounds on which the Court came down heavily on the prosecution, namely, the fact that the dead body was left unattended for the whole night. Learned counsel is perfectly right when he points out that such a situation should never had (have) occurred in so far as the serious damage can be done not only to the prosecution but to the defence case as a result of such negligence. We are conscious of the fact that the body was lying in a field, we shall also assume that there were no lights at that spot. This however is hardly any ground because a light source could always have been obtained by the Police and it was very necessary that M.O. 5 should have been attached immediately, it was equally necessary that the inquest panchanama should have been done at the earliest point of time and the body thereafter removed from that spot and we do not see any physical limitation in the way of the Police having completed these small

formalities. This Would certainly have lent greater credibility to the investigation and the defence is therefore justified in having pointed this out and having made a grievance of it. Even though we have already held that there is nothing on record to support the view that the body was either moved or tampered with or for that matter M.O. 5 was planted there that it has led to some degree of debate and caused unnecessary suspicion over the matter which ought to have been eliminated. It would be difficult to condone the inaction on the part of the Police as far as this part of the investigation is concerned. Again, what we need to point out is that if the inaction or negligence is of the order whereby grave doubt is cast in the mind of the Court then the defence would inevitably get the benefit thereof. On the other hand, in a situation where it is demonstrated that despite such conduct on the part of the Police that no damage has in fact been done, either to the prosecution or the defence, it would not be proper for the Court to treat this circumstance as a serious infirmity that is destructive to the prosecution case.

8. Mr. Nanaiah did take us through the defence evidence that has been led in this case. Quite apart from denying his involvement, the accused had contended that he was not present at that spot when the incident occurred and he has examined as many as 8 witnesses in support of his contention that he was at some other spot. The learned trial Judge has discussed the evidence of these witnesses in detail and he has pointed out that this evidence is neither convincing nor is it conclusive. Mr. Nanaiah submitted that the Court has to be realistic with regard to the situation and to ask the all important question as to what precisely is the best evidence that the accused could have produced in support of his plea of alibi. It is to some extent right, as pointed out by the learned counsel, that this is a rural scene and the witnesses who can be produced if the accused was somewhere else or if he was accompanied or was seen by them at that point of time, would necessarily be unsophisticated persons whose evidence may not be that clinching. The real difficulty in the way of the defence is that the law with regard to the plea of alibi is now well crystallized and that law postulates that where such a plea is taken up that the onus of proof shifts to the party setting up the plea of alibi and that such evidence must be 100% conclusive. Some loose evidence to the effect that somebody saw the accused at some other spot and the like, irrespective of whether it is repeated by two or ten witnesses will not conclusively establish that

the Court must accept this evidence in preference to the prosecution evidence which establishes otherwise. We do not need to recount in detail the depositions of the eight defence witnesses but what we need to point out is that the entire plea that is taken up with regard to the movements of the accused on that day to the effect that he went to pay certain bills in connection with his ration shop and he thereafter went to have his scooter attended to and the like are all in the nature of evidence from witnesses who have very loosely and casually stated that they saw the accused at different places around noon on that day. The prosecution alleges that the incident took place at 2.15 p.m. at a spot that was not far away and it is up to the accused to establish beyond reasonable doubt that he was in fact physically present at the places where he contends he had gone to and that conversely, it was impossible for him to have been at the scene of offence when the incident took place. The defence evidence is so loose that it establishes neither of these two, on the contrary the witnesses are not precise with regard to the all important aspect of the time, and under these circumstances, it would not at all be possible to uphold the defence theory that the accused was not at the spot when the incident took place and that he was somewhere else.

9. A subsidiary argument was canvassed by Mr. Nanaiah who submitted that even if the plea of alibi failed that the Court should look to the evidence of these 8 witnesses for purposes of discrediting the evidence of PWs-1 and 2 casting some doubt on their evidence. This is the contention that is not only impermissible but totally foreign to the rules of appreciation of evidence. The credibility of PWs-1 and 2 is in a separate compartment altogether and the fact that eight of the defence witnesses have not been able to conclusively establish the presence of the accused at places other than the scene of offence at the time when the incident took place, cannot be used as a lever to discredit the evidence of PWs-1 and 2.

10. Mr. Nanaiah relied on a decision of the Supreme Court reported in : 1984 CriLJ1738 wherein the Supreme Court had occasion to observe that while assessing the evidence of close witnesses, the Court must always be guarded against the tendency to exaggerate the facts. We have borne these guiding principles in mind while assessing the evidence of PW-1 and we do find that his evidence does not suffer from either of these infirmities. Also, Mr. Nanaiah pointed

out to us that the Supreme Court had occasion to deal with another aspect of the law namely that even if a false defence is taken up, that it cannot cure defects in the prosecution case. This proposition has also been borne in mind by us and we have already had occasion to observe that irrespective of whether the accused was justified in taking of plea of alibi or not, that we have kept that issue independent and separate and have assessed the prosecution case on the basis of its own credibility. Lastly, Mr. Nanaiah relied on the decision of the Orissa High Court reported in 1985 Cri LJ 580 wherein the Orissa High Court in the head note while pointing out in a case where there is an absence of motive, that the Court must be very much on guard. We do agree that the prosecution has hardly been able to establish any motive in the present case but at the same time, we have relied on the well settled principle of law that even in cases where motive has not been established, if the evidence conclusively establishes the guilt of the accused then the aspect of motive becomes secondary or even irrelevant.

11. Learned Additional SPP on the other hand placed heavy reliance on the decision of the Supreme Court reported in : 1981 CriLJ325 wherein the Supreme Court while dealing with the case of circumstantial evidence held that where an attempt is made even to mislead the investigating authorities more importantly where a false plea of defence is set up, that the Court can certainly take this up as an additional circumstance at the most. This is undoubtedly true and in a case where the defence plea is established to be false, it would certainly have a reverse effect while assessing the overall circumstances against the accused. The learned Additional SPP also relied on the decision of the Supreme Court reported in : 1976 CriLJ1541 in support of his contention that the probabilities and possibilities of the prosecution case are aspects which the Court must take into account and he submitted that every aspect of the prosecution case falls into place. That submission of the learned Additional SPP is justified except for the fact that we have had occasion to point out very strongly about the quality of the investigation as also the medical evidence. On the question of reliance on a sole eye witnesses, Mr. Koti relied on two decisions of the Supreme Court, : [1983]2SCR45 wherein the apex Court has emphasized that it is not really the number of witnesses but the quality of evidence that matter and the decision reported in : AIR 1989 SC236 wherein the Supreme Court observed that a sole witness can certainly be relied,

provided the evidence is cogent and trustworthy. On the question of alibi evidence, Mr. Koti relied on the decision of the Supreme Court reported in : 1984 CriLJ4 where in the Supreme Court rejected the alibi evidence after reiterating the proposition in law that it is very essential in such cases that the alibi evidence must totally rule out all other possibilities.

12. It is in the aforesaid circumstances, that we see no ground to interfere with the findings recorded by the learned Sessions Judge except for the fact that we do have certain reservations with regard to the ultimate conclusion that has been arrived at. While dealing with the alleged incident, one of the strong argument advanced by Mr. Nanaiah particularly in the background of the fact that the defence was able to establish that the tripping of the electric power was not something unusual, that it was very clear that the power failure triggered of the entire incident. He was quick to point out to us that there is no background of hostility that is established and he therefore contended that it can never be held that this is a premeditated attack or that it was a planned murder. Secondly, he relied on the duration of the incident which was extremely short and on one very important fact namely that it was the deceased who had gone into the field of the accused and he submitted that if all these facts are cumulatively taken, that the learned trial Judge ought to have examined the all important questions as to whether the conviction under Section 302 IPC was sustainable. His contention was that even if the prosecution cases is accepted at the highest that it would indicate that the incident was a sudden one that an agricultural implement of daily use was the weapon and under these circumstances, that the offence could only be categorized as culpable homicide not amounting to murder. This position has been seriously refuted by the learned Addl. SPP who contended that irrespective of whether there was premeditation or not that if more than one blow is aimed at a vital part of the body with a heavy agricultural implement that there can be no defence to the position in law that the accused knew and had reason to believe that his act would cause death. His submission therefore is that the conviction under Section 302 IPC is perfectly valid. We have carefully examined the record of this case, the submissions canvassed on both sides and more importantly, the provisions of law. The contention that has been put forward by Mr. Nanaiah on behalf of the appellant is not only justified but is also perfectly correct in law, that

on the proved facts and circumstances, the offence can only be categorized as one coming under Section 304(II) IPC.

13. Having regard to the aforesaid situation, the conviction and sentence awarded by the trial Court under Section 302 IPC is set aside. Mr. Nanaiah points out that the accused is an agriculturist, that he has an absolutely clean record, that he is the father of three children and also that he has been in custody for consideration period of time. He also submits that this was clearly an altercation that resulted in a violent assault on the spur of the moment and having regard to the special facts and circumstances of the case, in our considered view a sentence of 5 years R. I. would meet the ends of justice. While we do uphold the strong plea for leniency that has been put forward by Mr. Nanaiah on behalf of the appellant, we also take cognizance of the status of the appellant and we are of the view that apart from the sentence of 5 years R. I. that he should also be made liable to pay a fine quantified at Rs. 1,000/- in default S. I. for six months.

14. The appeal partially succeeds. The conviction and sentence recorded by the trial Court under Section 302 IPC is set aside. The appellant stands convicted of the offence punishable under Section 304 Part II IPC and it is directed that he shall undergo R. I. for a period of five years and pay a fine quantified at Rs. 1,000/- in default S. I. for six months. We are informed that the accused is in custody. He shall accordingly be entitled to the period of set off that he would be eligible for under Section 428 Cr. P.C.

15. The appeal partially succeeds and stands disposed of.