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(2016) 04 GUJ CK 0058

GUJARAT HIGH COURT

Case No: Criminal Appeal No. 800 of 2011

Jaganbhai Shankarbhai Patil	APPELLANT
Vs	
State of Gujarat	RESPONDENT

Date of Decision: April 11, 2016

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 374
- Evidence Act, 1872 - Section 32
- Penal Code, 1860 (IPC) - Section 302

Citation: (2016) 3 GCD 2416 : (2016) 3 GLR 2150

Hon'ble Judges: Mr. K.S. Jhaveri and Mr. Biren Vaishnav, JJ.

Bench: Division Bench

Advocate: Mr. Mrudul M. Barot, Advocate, for the Appellant; Ms. C.M. Shah, Addl. Public Prosecutor, for the Respondent

Final Decision: Partly Allowed

Judgement

Mr. Biren Vaishnav, J.(Oral)—The appellant-original accused in Sessions Case No.73/2008 has approached this Court by way of the present Appeal under Section 374 of the Code of Criminal Procedure, 1973 against the Judgment and Order dated 28.02.2011 passed by the Sessions Judge, Bharuch in the aforesaid Sessions Case. By the judgment under challenge, the Appellant-Original Accused has been convicted of offence under Section 302 of IPC and has been sentenced to undergo Life Imprisonment. The original accused has, however, been acquitted for the offence under Section 498(A) of Indian Penal Code.

2. Heard Mr. Mrudul Barot for the Appellant and Ms. C.M. Shah, learned APP for the State of Gujarat. Before we appreciate the contentions raised by the respective Advocates for the parties it will be in the fitness of things to discuss the facts which led to conviction of the appellant.

3. It is the case of the prosecution that the appellant, Jaganbhai Shankarbhai Patil is the husband of the deceased Kamlaben and were staying in a rented premises at Vadadala Taluka, District Bharuch. The prosecution case is that on 19.2.2008 at 00.30 hrs the appellant entered the house in a drunken state and was therefore reprimanded by his wife, deceased Kamlaben that he comes home in a drunken condition and does not work. As a result of this comment of the deceased Kamlaben there was an altercation between the two and, Jaganbhai Patil, the husband of deceased brought out a tin of kerosene lying in his residence and sprinkled kerosene on Kamlaben's head and her body and lighted a matchstick and with an intention to kill her, threw the lighted matchstick on her. As a result thereof the wife of the accused was set on fire and suffered severe burn injuries on her face, chest, back and her hands and she was admitted to the Bharuch Civil Hospital by her relatives and neighbours and from there she was taken to Jalgaon Civil Hospital for further treatment where on 23.3.2008 at 7.00 A.M. she succumbed to her injuries. The accused Jaganbhai Patil was therefore charged of having committed offences under Section 302 & 498(A) of the Indian Penal Code. A charge was accordingly framed by the Fast Track Judge, Court No.6, Bharuch.

3.1 The Learned Sessions Judge Bharuch in bringing home the charge has relied upon the following oral and documentary evidences:

P.W. No.	Name of Witness	Exhibit No.
1	Mahendrabhai Patel	8
2	Valibhai Noormohamadbhai	18
3	Parsuram Patil	19
4	Uttam Patil	21
5	Mahendra Vasava	22
6	Chimanbhai Patel	24
7	Manekbhai Patil	26
8	Lataben Patil	27
9	Arvindbhai Talati	28
10	Parvatiben Patil	31
11	Dr. Nitin Dhande	32
12	Dr. Vijaykumar Parmar	35
13	Rameshbhai Parmar	38
14	Prakash Patil	41
15	Pitamber Jesle	43
16	Pareshbhai Hansoti	45
17	Nanubhai Vechanbhai	47
18	Arjunrao Maile	49
19	Jagdishbhai Palat	50

20	Ajay Shukla	62
21	Jagannath Gaikwad	63

3.2 The prosecution has also relied upon certain documentary evidence such as panchnama of scene of offence at Ex. 09, slips bearing signatures of panchas at Ex. 10 to 17, inquest panchnama at Ex. 20, body condition panchnama of accused at Ex. 23, post mortem report at Ex. 33, cause of death certificate at Ex. 34, map of scene of offence at Ex. 40, complaint at Ex. 44, dispatch note at Ex. 52, FSL forwarding letter at Ex. 57, biological report by FSL at Ex. 58, chemical analysis report by FSL at Ex. 60 dyding declaration at Ex. 30 etc.

3.3 The deceased, Kamlaben, in her complaint on the same date Exh.44 has narrated that at night her husband came home in a drunken condition and was reprimanded by her and therefore an altercation occurred. The complainant further narrates the fact that being annoyed, the accused Jagan brought out the tin lying in the house, opened the container's lid and as a result the kerosene fell on her body and thereafter the accused Jagan picked a matchbox lying close by, took out a matchstick and threw a lighted matchstick on her body as a result of which she suffered burn injuries on the body above her waist, chest and back. She further narrates that she shouted as a result of this and tried to douse the fire with the water bucket lying nearby. Lataben, her neighbour came and called the deceased's sister-in-law and Lataben narrated the incident to Premilaben and was subsequently carried in the car to the Civil Hospital and is under treatment. The complaint was reduced in writing as narrated by the deceased, by the Writer who accompanied the Police Official who was on duty at the Police Station, Pitamber Ramrao Jesle who, in turn went to the Hospital on being informed by Shri Amarsinh Dilipsinh on-duty Head Constable at the Hospital. Shri Pitamber Jesle whose deposition is at Exh.43 categorically states that he has recorded the incident in question as narrated by Kamlaben after he put questions to her. It is further stated by Pitamber Ramrao Jesle that Kamlaben understands Gujarati and the complaint was given by her in presence of her husband Jagan and Premilaben and after the complaint was reduced in writing it was explained to her and accordingly she signed the complaint and thereafter he signed the complaint and the investigation was set into motion.

3.4 In terms of Medical Evidence produced on record three vital pieces of evidence i.e. the P.M.Note, the deposition of the Doctor who carried out the post-mortem at Jalgaon and the deposition of the Doctor/Medical Officer Bharuch Civil Hospital where the deceased went first in point of time show complete unanimity of the chain of events which caused the death of Kamlaben. A perusal of the PM note, Exh.33 particularly column no.17 shows that the deceased had received 38% burn injuries and the cause of death was " due to cardio respiratory failure due to septicemia shock due to 38% (Thirty eight) burns". Dr. Vijaykumar Parmar Medical Officer Bharuch Civil Hospital in his deposition recorded at Exh.35 has stated that on

being brought to the hospital by her sister-in-law and on being questioned on the circumstances and the cause of burns the deceased confirms that she had sustained burn injuries due to her husband's act of pouring kerosene after an altercation and subsequently throwing a lighted match stick. The Medical Officer Shri Parmar in his cross also confirms that the statements of fact narrated by the deceased was on her own and not by her sister-in-law and that the deceased was alert and in a position to give the case history. Further Dr. Nitin Arunbhai Dhande, the Medical Officer at the Jalgaon Hospital, where the victim Kamlaben died has in his deposition at Exh.32 in detail narrated the cause of death and nature of injuries caused and has categorically stated in his cross that 38% burn injuries is a fatal injury. Medical Certificate produced at Exh.34 signed by Dr Nitin Dhande also reiterates the contents of the PM Note. The Medical evidence on record therefore brings out categorically that the death has occurred due to Septicemia caused by 38% burns.

3.5 The precursor to the unfortunate events which caused 38% burns and the resultant septicemia which resulted in the death of the deceased as narrated in the complaint are well supported by the most crucial evidence, i.e. the Dying Declaration which sets at rest any doubts of the chain of events which led to the death of the deceased Kamlaben (cause of death being septicemia due to 38% burns), which is at Exh.30. In the aforesaid dying declaration the deceased Kamlaben, to a question as to how the injury has occurred, has specifically stated that her husband Jaganbhai Patil came home in a drunken condition and poured kerosene on her body and threw a lighted a match stick on her body as a result of which she suffered burn injuries behind her head, chest. To a question whether this was done with a view to commit suicide she denies this and she further specifically states that it is the husband who carried out the act. The Dying Declaration was recorded by a Mamlatdar Shri Arvindbhai Naginlal Talati who has deposed on oath at Exh.28. The Officer, who recorded the Dying Declaration confirms the narrative of the deceased as recorded in the dying declaration. That the dying declaration is independent stands out from the cross of the deponent at Exh.28 who categorically states that the narrative is by Kamlaben and not by her sister-in-law Premilaben.

3.6 From the sequence of events made out by the deceased, and as narrated to the Police, in her complaint, to the Medical Officer, the next link in the chain, where she was immediately rushed for her treatment, in the dying declaration made before the Mamlatdar, Executive Magistrate who recorded the Dying Declaration and the P.M.Note recording the cause of death and as also confirmed by the Medical Officer Dr Nitin Dhande who carried out the PM it stands proved beyond any doubt that death of the deceased Kamlaben was caused by the act of the accused Jaganbhai Patil in pouring kerosene on her body and throwing a lighted matchstick resulting in her suffering 38% burns and consequential septicemia.

4. The Learned Sessions Judge after discussing the evidences, oral as well as documentary, has observed that on assessment of evidence in terms of the three

statements i.e. the complaint, the narration of cause of injury before the Medical Officer and the Dying Declaration which are given first in point of time before the independent and reliable officers/individuals goes to prove that the accused had poured kerosene on the body and lighted matchstick causing 38% burns and therefore the Learned Judge held that the accused had carried out the purported act with a view to cause death and this act amounts to committing an offence punishable under Section 302 of the Indian Penal Code. The Learned Judge has however held that, on assessment of evidence, offence under Section 498 A has not been made out. The accused has been held guilty of an offence under Section 302 and has been awarded a sentence of Life Imprisonment.

5. Mr. Mrudul Barot Learned Advocate has taken us through the statements of witnesses and documentary evidence on records of the case. It is submitted by Shri Barot that the prosecution has failed to prove that there was any independent witness and nobody has seen the appellant killing the deceased and in absence of any motive and enmity it cannot be said to be a case where the appellant can be said to be guilty of having committed any offence. Shri Barot has further submitted that the Court below has committed an error in appreciating the evidence on record. In the submission of the Learned Advocate in view of the fact that several witnesses have turned hostile and in view of the evidence of the prosecution witnesses having not been properly appreciated and there being contradictions in the discovery and recovery panchnama, there has been a serious error of law committed by the Learned Sessions Judge and therefore no offence under Section 302 of the Indian Penal Code has been made out.

6. Learned APP, Ms. C.M. Shah has taken us through the charge, the contents of the complaint, the Post Mortem Note, particularly column no.17 where the cause of death is septicemia due to 38% burns. Learned APP has also taken us through the Dying Declarations and the corroborative medical evidence of the Medical Officer, Dr. Parmar of the Civil Hospital Bharuch to whom the deceased had narrated her cause of injuries. According the Learned APP the narrative before the Medical Officer are in complete confirmation with the narrative of the incident and sequence of events as mad out before the Police Officer in her complaint. It is further argued by the Learned APP that the Dying Declaration also recorded before the Executive Magistrate is sufficient to hold the accused guilty of an offence under Section 302 of the IPC. The deceased Kamlaben in her narratives before all the three agencies/mediums i.e. the Police in her complaint, the Medical Officer and in her dying declaration is consistent in her stand that she has suffered burn injuries due to the act of the accused pouring kerosene and throwing a lighted match stick. That the death has occurred due to septicemia caused due to 38% burn injuries has been borne out from the P.M Note and the corroborative Medical Certificates. Even the deposition of the Medical Officer Dr Parmar at Exh.35 and Dr. Nitin Dhande Exh 32,according to the Learned APP leave no room for doubt that the burn injuries suffered by the deceased Kamlaben were as a result of the act of the accused of

pouring kerosene and lighting a matchstick and that the death was the direct result of such a dastardly act by the husband who did so with an intention to cause death. In the submission of the Learned APP the Dying Declaration in itself was sufficient to base a conviction, particularly when in the facts of the case the state of mind of the deceased has been recorded to be satisfactory before the person such a statement has been made. In the submission of the Learned APP there need be no corroboration of dying declaration before it can be accepted.

7. Having given our anxious consideration to the facts on record we hold that there is sufficient evidence in the form of Medical Evidence on record in conjunction with the complaint and the dying declaration, veracity of which has been sufficiently put to test by examining the Medical Officer on duty, at the first instance i.e. Shri Parmar and the Medical Officer Shri Dhande who carried out the PM that the cause of death has been 38% burn injuries resulting in septicemia which burn injuries were caused due to the act of the accused Shri Jaganbhai Patil which has been narrated by the deceased in her complaint and in the dying declaration.

7.1 The Honourable Supreme Court in the case of Atbir v. Government of NCT of Delhi (AIR 2010 SC 3477) has extensively dealt with the law on the subject of the evidentiary value of the dying declaration and the relevant paras are as under:

....This Court in a series of decisions enumerated and analysed that while recording the dying declaration, factors such as mental condition of the maker, alertness of mind and memory, evidentiary value etc. have to be taken into account.

9. In Munnu Raja and another v. The State of Madhya Pradesh, (1976) 3 SCC 104 : (AIR 1976 SC 2199), this Court held:-

"....It is well settled that though a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subject to cross-examination, there is neither a rule of law nor a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated...."

It is true that in the same decision, it was held, since the Investigating Officers are naturally interested in the success of the investigation and the practise of the Investigating Officer himself recording a dying declaration during the course of an investigation ought not to have been encouraged.

10. In Paras Yadav and Ors. v. State of Bihar, (1999) 2 SCC 126 : (AIR 1999 SC 644 : 1999 AIR SCW 296), this Court held that lapse on the part of the Investigation Officer in not bringing the Magistrate to record the statement of the deceased should not be taken in favour of the accused. This Court further held that a statement of the deceased recorded by a police officer in a routine manner as a complaint and not as a dying declaration can also be treated as dying declaration after the death of the injured and relied upon if the evidence of the prosecution witnesses clearly

establishes that the deceased was conscious and was in a fit state of health to make the statement.

11. The effect of dying declaration not recorded by the Magistrate was considered and reiterated in Balbir Singh and Anr. v. State of Punjab, (2006) 12 SCC 283 : (AIR 2006 SC 3221 : 2006 AIR SCW 4950). Paragraph 23 of the said judgment is relevant which reads as under:

"23. However, in State of Karnataka v. Shariff, (2003) 2 SCC 473 : (AIR 2003 SC 1074 : 2003 AIR SCW 600), this Court categorically held that there was no requirement of law that a dying declaration must necessarily be made before a Magistrate. This Court therein noted its earlier decision in Ram Bihari Yadav v. State of Bihar, (1998) 4 SCC 517 : (AIR 1998 SC 1850 : 1998 AIR SCW 1647), wherein it was also held that the dying declaration need not be in the form of questions and answers. (See also Laxman v. State of Maharashtra, (2002) 6 SCC 710) : (AIR 2002 SC 2973 : 2002 AIR SCW 3479)." It is clear that merely because the dying declaration was not recorded by the Magistrate, by itself cannot be a ground to reject the whole prosecution case. It also clarified that where the declaration is wholly inconsistent or contradictory statements are made or if it appears from the records that the dying declaration is not reliable, a question may arise as to why the Magistrate was not called for, but ordinarily the same may not be insisted upon. This Court further held that the statement of the injured, in event of her death may also be treated as FIR.

12. In State of Rajasthan v. Wakteng, (2007) 14 SCC 550 : (AIR 2007 SC 2020 : 2007 AIR SCW 3802), the view in Balbir Singh''s case (AIR 2006 SC 3221 : 2006 AIR SCW 4950) (supra) has been reiterated. The following conclusions are relevant which read as under:

"14. Though conviction can be based solely on the dying declaration, without any corroboration the same should not be suffering from any infirmity.

15. While great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lie or to concoct a case so as to implicate an innocent person but the court has to be careful to ensure that the statement was not the result of either tutoring, prompting or a product of the imagination. It is, therefore, essential that the court must be satisfied that the deceased was in a fit state of mind to make the statement, had clear capacity to observe and identify the assailant and that he was making the statement without any influence or rancour. Once the court is satisfied that the dying declaration is true and voluntary it is sufficient for the purpose of conviction."

13. In Bijoy Das v. State of West Bengal, (2008) 4 SCC 511 : (AIR 2008 SC (Supp) 1353 : 2008 AIR SCW 1034), this Court after quoting various earlier decisions, reiterated the same position.

14. In Muthu Kutty and Anr. v. State By Inspector of Police, T.N., (2005) 9 SCC 113 : (AIR 2005 SC 1473 : 2004 AIR SCW 7396), the following discussion and the ultimate conclusion are relevant which read as under:

"14. This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on the deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason that the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eye-witness in a serious crime, the exclusion of the statement would leave the court without a scrap of evidence.

15. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence."

15. The same view has been reiterated by a three-Judge Bench decision of this Court in Panneerselvam v. State of Tamil Nadu, (2008) 17 SCC 190 : (AIR 2009 SC 508 : 2008 AIR SCW 4787) and also the principles governing the dying declaration as summed up in Paniben v. State of Gujarat (1992) 2 SCC 474 : (AIR 1992 SC 1817 : 1992 AIR SCW 2050.

16. The analysis of the above decisions clearly shows that,

(i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the Court.

(ii) The Court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

(iii) Where the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

(iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring

corroboration is merely a rule of prudence.

(v) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii) Even if it is a brief statement, it is not to be discarded.

(ix) When the eye-witness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) If after careful scrutiny, the Court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration."

7.2 The dying declaration recorded by the deceased before the Executive Magistrate, the complaint and the history given before the doctor do not give out any variations and they seem to be credible. The accused has not given any plausible explanation as to how the deceased had sustained burns other than the fact the deceased had committed suicide. In fact in the case of Trimukh Maroti Kirkan v. State of Maharashtra reported in (2006) 10 SCC 681, the Apex Court has held in para 15 as under :

"15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

7.3 In fact, in the case of Krishan v. State of Haryana reported in (2013) 3 SCC 280, the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard

to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.

8. As far as the veracity of the dying declaration before the Executive Magistrate is concerned, it is required to be noted that the Executive Magistrate in his deposition has clearly mentioned that the deceased was conscious while recording the declaration and the endorsement of the doctor regarding the fitness of the patient was also mentioned in the yadi before recording of the statement. He stated that the deceased answered his questions and also appended her signature after the procedure was over.

8.1 The complaint given by the deceased and the dying declaration recorded by the Executive Magistrate is duly corroborated with the oral evidence and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the accused setting her ablaze. It shall not be out of place to mention that it is a settled position of law that the courts have to be on guard to see that the Dying Declaration is not the result of either tutoring or prompting or a product of imagination and that due care and caution must be exercised in considering weight to be given to the Dying Declaration. In the instant case, we do find that the Dying Declaration is trust worthy.

9. However, we have also not lost sight of the fact that the deceased had sustained around 38% burns and that she had died after around 5 days of the incident. From the medical reports, it is clear that the deceased suffered from complications which happened due to burns. It is also pertinent to note that the deceased had survived for around 5 days after sustaining around 38% burns.

10. In the case of Maniben v. State of Gujarat reported in (2009) 8 SCC 796, the Apex Court has observed as under:

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was

wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

11. In the present case, we have come to the irresistible conclusion that the role of the accused is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 5 days in the hospital and that her condition worsened after around 5 days and ultimately died of complications following burns. In fact she had sustained about 38% burns. In that view of the matter, we are of the opinion that the accused is guilty of the offence under Section 304 (Part II) of Indian Penal Code.

12 Accordingly, appeal is partly allowed. The conviction of the appellant - original accused under Section 302 of Indian Penal Code vide judgment and order dated 28.02.2011 arising from Sessions Case No. 73 of 2008 passed by the Sessions Judge, Bharuch is altered to conviction under Section 304 (Part II) of Indian Penal Code. The appellant - original accused is ordered to undergo rigorous imprisonment for a period of five years under section 304 (Part II) of Indian Penal Code instead of life imprisonment as awarded by the trial court under section 302 IPC. The amount of fine and sentence in default of fine is maintained. The judgement and order dated 28.02.2011 is modified accordingly. The period of sentence already undergone shall be considered for set off qua appellant - original accused. R & P to be sent back to the trial court forthwith.