IN THE HIGH COURT OF MADHYA PRADESH

AT JABALPUR

BEFORE

SHRI JUSTICE SUJOY PAUL

&

SHRI JUSTICE PRAKASH CHANDRA GUPTA

CRIMINAL APPEAL NO.831 of 1996

Between :-

PRAKASH KUMAR MEWARI S/O SHRI PREM SHANKER MEWARI, AGED ABOUT 30 YEARS, BY OCCUPATION SERVICE, R/O KHITOLA, P.S. SIHORA, DISTRICT-JABALPUR (M.P.)

….**APPELLANT**

(BY SHRI ABHINAV DUBEY AND SHRI SHIVAM CHHALOTRE, ADVOCATE)

AND

THE STATE OF MADHYA PRADESH, THROUGH STATION HOUSE OFFICER DISTRICT JABALPUR (MADHYA PRADESH)

….**RESPONDENT**

(BY SHRI YOGESH DHANDE, GOVERNMENT ADVOCATE)

` Reserved on : 10/11/2022

Delivered on : 14 /11/2022

J U D G M E N T

Per : Sujoy Paul, J. :-

This appeal filed under Section 374 (2) of the Code of Criminal Procedure, 1973 (In short "Cr.P.C") calls in question the legality, validity

and propriety of judgment dated 30.04.1996 passed in Sessions Case No.609/1994 passed by learned Additional Sessions Judge, Sihora, whereby, the appellant is held guilty for committing offence under Section 302 of the IPC and is directed to undergo sentence of life imprisonment with fine of Rs.500/- with default stipulation.

2. As per the prosecution story, deceased Sumanbai was a keep of appellant and was residing with the appellant. On 04.12.1993, Sumanbai was unwell. The appellant came to his house at 2 O' clock and demanded food from Sumanbai. Sumanbai told him that food is ready and he can take and serve the food on his own. The appellant got annoyed and in order to kill the deceased, poured Kerosene oil on her and set her ablaze. Sumanbai made an effort to save herself by leaving the place of incident but appellant forcibly caught hold of her because of which, certain burn injuries were caused to the appellant as well.

3. Because of said incident, certain portion of the body of the deceased were badly burnt. B.D.Jaishwara, Sub-Inspector, Police Chowki, Khitola received an information on telephone and in turn, reached the place of incident. He recorded the *Dehati Nalishi* (Ex.P/11) on the same day. Sumanbai was taken to Dr. A.K. Rai in Government Hospital, Sihora pursuant to memorandum Ex.P/2-A. Dr. Rai examined the injuries of Sumanbai and prepared his report Ex.P/2. After providing first aid to Sumanbai, she was shifted to Victoria Hospital, Jabalpur. The appellant was also medically examined and for this purpose, a memorandum Ex/P.1-A was prepared and he was sent to Government Hospital, Sihora. Dr. A.K. Rai, examined the injuries of deceased and prepared the report Ex.P/1.

4. Dr. A.K. Rai, examined the physical and mental state of Sumanbai and recorded it in the dying declaration (Ex.P/3) that she is in the fit state

of mind. The Executive Magistrate Shri S.S. Kamale (PW-7) recorded the dying declaration of Sumanbai. Sumanbai was sent to Victoria Hospital, Jabalpur for further treatment. In Victoria Hospital, Sumanbai died. On the same day, information thereof was given to Police Station Omti, Jabalpur and accordingly 'Merg' Intimation (Ex.P/19) was prepared. The *Panchnama* of dead body (Ex.P/10) was prepared. The body of Sumanbai was sent for Post Mortem through Ex.P/18-A.

5. Dr. A.K. Jain, (PW-12) conducted the autopsy and prepared P.M. report through Ex.P/18. During the course of investigation, the statement of witnesses were recorded. After investigation, charge-sheet was filed and in due course, matter came to the Sessions Court. The appellant abjured the guilt. Learned Court below framed seven questions for its determination. After recording the statement of prosecution witnesses and hearing the parties, the impugned judgment was passed, conclusion thereof is already mentioned in the first para of this judgment.

Submission of the appellant's Counsel.

6. Learned counsel for the appellant submits that the appellant is attacking the impugned judgment solely on the ground that conviction of appellant is based on dying declaration. The dying declaration alone is not sufficient to hold the appellant as guilty. The other prosecution witnesses did not support the prosecution story. There is no eye-witness to the incident.

7. To elaborate, learned counsel for the appellant has placed heavy reliance on the dying declaration recorded by Executive Magistrate on 04.12.1993 (Ex.P/3).

8. It is submitted that in the dying declaration deceased, Suman Bai had categorically mentioned that she was set on fire by 'Newari' whereas name of present appellant is Prakash Kumar 'Mewari'. It is strenuously

contended by Shri Abhinav Dubey, learned counsel for the appellant that in absence of mentioning the complete name of the accused person alongwith his address, the appellant cannot be held guilty on the basis of an incorrect name i.e. 'Newari'. Thus, the dying declaration deserves to be disbelieved. The conviction is solely based on dying declaration deserves to be interfered with.

9. A Division Bench Judgment of Gauhati High Court reported in **1993 Cr.L.J. 3869 (Sri Kajal Sarkar and another Vs. State of Assam and others)** was relied upon to bolster the submission that in absence of clear name of the accused in the dying declaration, the dying declaration cannot form basis for conviction.

10. The second reliance is on a Supreme Court judgment reported in **AIR 2008 SC 19 (Nallapati Sivaiah Vs. Sub Divisional Officer, Guntur, A.P.)** In this judgment also, submits Shri Dubey, learned counsel for the appellant that the dying declaration was disbelieved despite the fact that it was recorded by an Executive Magistrate. In this view of the matter, the court below has committed an error in relying on the dying declaration.

11. During the course of arguments, Shri Dubey, Advocate further placed reliance on the statement of Laxmibai (PW-3). She did not support the prosecution story. Similarly, statement of father of deceased, i.e. Korayi (PW-9) is relied upon to show that this witness also did not support the prosecution story.

12. Lastly, Shri Dubey learned counsel for the appellant submits that at the time of incident, the appellant was about 30 years of age and at present he is aged about 59 years. Considering his age also, the court may take a lenient view.

Prosecution's Submission :

13. Sounding a *contra* note, Shri Yogesh Dhande, learned Government Advocate for the State submits that the dying declaration, (Ex.P-3), dated 4.12.1993 is not the singular dying declaration. In fact, Sumanbai herself lodged a '*Dehati Nalishi'* on 4.12.1993 (Ex. P-11). This '*Dehati Nalishi'* was duly recorded by B.D. Jaishwara (PW-10). The said witness exhibited and proved the said document in his court statement. In this statement, he has mentioned the complete name of the appellant as Prakash Kumar 'Mewari'. This '*Dehati Nalishi'* was reduced in writing in the shape of an FIR on 4.12.1993 (Ex.P-14), which was proved by PW-10. In addition, the statement of Sumanbai was also recorded under Section 161 of Cr.P.C. on the same date, i.e. on 4.12.1993, which was marked as Ex.P-12 and was proved in the doc statement by PW-10. In this statement, she had taken the complete name of the appellant as Prakash Kumar 'Mewari'.

14. Learned Government Advocate for respondent-State further submits that the appellant himself got injured while trying to stop the deceased, who was trying to flee away from the place of incident. The appellant was subjected to a medical examination and his MLC report is Ex.P-1, which was duly proved by Dr. A.K. Rai (PW-1). The appellant has not given any explanation about his injuries in his statements recorded under Section 313 of the Cr.P.C. The 'site map' of appellant's house was prepared. The other prosecution witnesses made it clear that incident had taken place at the residence of the appellant. A conjoint reading of these factual points leaves no room for any doubt that Sumanbai sustained severe burn injuries at the residence of appellant. The appellant himself got injured during the incident. The chain of events clearly show that Sumanbai recorded *Dehati Nalishi* which became FIR in due course. Apart from this, her statement under Section 161 of Cr.P.C.

and dying declaration were recorded. The court below has taken pains to consider the aforesaid anomaly in the surname of the appellant, i.e. 'Mewari' or 'Newari' in sufficient detail in the impugned judgment. The court below has taken a plausible view. In this view of the matter, no interference be made.

15. Learned counsel for the parties confined their arguments to the extent indicated above.

16. We have bestowed our anxious consideration on the rival contentions and perused the record.

Findings:

17. As noticed above, learned counsel for the appellant urged that conviction of appellant is solely based on the dying declaration dated 04.12.1993. Before dealing with other aspects, it is apt to carefully examine this dying declaration (Ex.P/3). On the forehead of this document, Dr. Rai has certified that the Sumanbai is in a fit state of mind to give the statement. Thereafter, Executive Magistrate has recorded the statement. The deceased Sumanbai clearly deposed that she was residing with 'Nawari' and she is keep of Nawari. At the time of incident, there was nobody in the house. Nawari came to house at around 2:00 PM and after a quarrel poured kerosene oil on her and set her ablaze.

18. Shri Abhinav Dubey, Advocate raised eyebrows on this dying declaration by contending that name of appellant is Prakash Kumar Mawari whereas Suman Bai has mentioned the name of some 'Nawari' in the dying declaration which creates serious doubt on this document. This argument in the first glance appears to be attractive but lost much of its shine when examined with other relevant documents.

19. The Court below has considered other documents as well while dealing with similar contention raised by appellant before Court below.

20. Similar argument of appellant was reduced in writing in para-18 of the impugned judgment. Thereafter, from para 19 to 26, the Court below has devoted time and applied its mind on this argument and assigned detailed reasons.

21. The reasons so assigned by the Court below are subject matter of scrutiny before this Court. The Court below opined that Dr. A.K. Rai (PW-1) has mentioned the name of appellant as Prakash Kumar Mawari. The word 'Mawari' and 'Newari' when pronounced, to a great extent sounds similar. The deceased was in an injured condition and she was a domestic servant. Her pronunciation may not be perfect like an educated person. Thus, in our view, this argument was rightly disbelieved by the Court below.

22. A minute reading of impugned judgment shows that Court below has considered the other relevant documents namely *'Dehati Nalisi*' (Ex. P/11) and statement recorded under Section 161 of Cr.P.C. Pertinently, in the '*Dehati Nalishi'* (Ex.P/3) the deceased had taken the complete name of appellant as Prakash Kumar 'Mawari'. Similarly, in her statement recorded under Section 161 (Ex. P/12), she had taken appellant's name in the same fashion.

23. The other incriminating material conclusively indicates that it was appellant and appellant alone in whose house the incident had taken place. No iota of explanation was given by appellant as to how he sustained burn injuries when MLC report (Ex. P-1A and Ex. P/1) was brought to his notice by court below. In other words, in his statement recorded under Section 313 of Cr.P.C., the appellant was obliged to give

some explanation about the burn injuries on his hand. The spot map of his house was also prepared.

24. The spot map, (Ex. P-15) was proved by B.D. Jaishwara (PW-10). This 'spot map' is indipsutedly of appellant's house. Similarly a black plastic can containing kerosene oil and clothes of deceased were recovered from the house of the appellant and were sent to FSL laboratory by letter of Superintendent of Police, dated 30.12.1993, (Ex. P-17). All these material clearly establish that deceased was set ablaze by none other than the appellant. The Executive Magistrate, (PW-7) S.S. Kamale entered the witness box and proved the dying declaration.

25. Similarly, Laxmibai (PW-3) deposes that the appellant is her brother-in-law. After the incident neither she went to the house of appellant nor he visited her house. Ramdeen (PW-5) deposed that a servant used to live in the house of appellant. An year ago, she sustained burn injuries in the house of appellant.

26. Korai (PW-9), father of deceased deposed that deceased was *'Gharwali'* of appellant. In cross examination, he clarified that by *'Gharwali'* he means to say that she was a domestic servant.

27. This is trite that dying declaration can be used as substantive evidence. See:- **2012 Cr.LJ 3411 (Gudda @ Sultan Singh Vs. State of M.P.).** Similar view is taken by this court in **ILR (2011) MP 1026 (Babulal Vs. State).** It is equally settled that dying declaration alone can form basis for conviction but in the instant case, there are multiple dying declarations which are in same line.

28. So far as judgment of **Sri Kajal Sarkar and another** (supra) is concerned, it is apt to mention relevant paragraphs on which Shri Dubey placed reliance:-

> "12. From the evidence so extracted it is clear that the conviction was based only on the dying declaration of the deceased. Dying declaration by itself is not sufficient to convict a person unless said dying declaration is absolutely clear and there cannot be any doubt about the dying declaration. We may state that from the above evidence it is clear that the dying declaration was not recorded by any doctor though deceased was in the hospital for about 8 hours.
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> 16. Therefore, on going through the oral evidence, we find that the occurrence took place at night around 9 p.m., and deceased was hospitalised and thereafter he was operated upon. Next morning at about 10 a.m. on being asked he uttered two words viz. "Kajal" and "Naru". We again repeat that P.W. 2 could not get full names of the above 2 persons from the deceased. From the evidence of P.W. 3 to whose house according to prosecution all the miscreants came first has categorically stated that the faces of all the miscreants were covered with cloth. On the top of that as stated before there is no evidence to show that there was sufficient light. Therefore, we have got doubt as to whether deceased could recognise the two persons. At the most he might have recognised the voices. But recognition by voice is a very week piece of evidence.
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> **17.** Law is well settled that a dying declaration is not complete unless complete names and addresses of the person are given in the dying declaration (see AIR 1972 SC 1557 : (1972 Cri LJ 1045). Therefore, only because deceased before his death uttered two names viz "Kajal" and "Naru" we are unable to accept the prosecution version of the story that present accused-appellants were the culprits who caused injury to the deceased or to any other person as alleged by the prosecution. We, therefore, hold that the prosecution has failed to prove the case against the accused-appellants beyond reasonable doubt.
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> **[Ephasis supplied]**

29. A microscopic reading of these paragraphs makes it clear that the Gawhati High Court clearly held that dying declaration can form basis for conviction, if it is absolutely clear and there is no doubt about dying declaration. In said case, dying declaration was not recorded by any

Doctor whereas in the instant case Dr. A.K. Rai (PW-1) certified the fitness of deceased and thereafter the Executive Magistrate has recorded the dying declaration. In the said case, full name of persons responsible for the incident could not be mentioned. In the instant case the name, identity and address of appellant is beyond pale of doubt. Thus, this judgment cannot be pressed into service in the instant case.

30. In the case of **Nallapati Sivaiah** (supra), in the peculiar facts of that case, the dying declaration was disbelieved. The court was not satisfied that the person making the dying declaration was conscious and fit to make the statement. In the instant case, neither the court below nor this court has any doubt about fitness of Sumanbai at the time of recording of her dying declaration. No amount of argument was advanced by learned counsel for the appellant questioning the aspect of fitness of Sumanbai whie recording dying declaration during the course of argument.

31. This Court being an Appellate Court thought it proper to examine the question of conviction and sentence for committing offence under Section 302 of the I.P.C. The evidence so led and discussed herein above shows that there was no iota of premeditation in putting the deceased ablaze by the present appellant. The incident had taken place suddenly and because of sudden impulse, the appellant poured kerosene on Suman Bai and set her on fire. Thus, question is whether appellant can be held guilty for committing offence under Section 302 of the I.P.C. It is apposite to consider certain judgments on this aspect.

32. The Apex Court in the case of **Sayaji Hanmant Bankar v. State of Maharashtra, (2011) 14 SCC 477** has held as under :-

> **"7.** Exception 4 to Section 300 IPC reads as under:
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> "Exception 4.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and

without the offender's having taken undue advantage or acted in a cruel or unusual manner."

8. It is clear from the reading of aforesaid Exception 4 that if the act is done without premeditation in a sudden fight or in the heat of passion upon a sudden quarrel and if the offender does not take any undue advantage or act in a cruel or unusual manner, then Exception 4 will be attracted.

9. We have gone through the evidence carefully. It seems that as soon as the accused entered the house, there appeared to be some quarrel with his wife and in that fight first, he threw a water-pot and thereafter a kerosene lamp. The burning seems to be more out of the fact that unfortunately at that time, the lady was wearing a nylon sari. Had she not been wearing a nylon sari, it is difficult to imagine how she could have been burnt to the extent of 70%. In our view this was a case which clearly falls under Exception 4 to Section 300 IPC since there was a sudden fight. There was no premeditation either. Therefore the appellant-accused is liable to be convicted for the offence punishable under Section 304 Part I.

[Emphasis Supplied]

33. The Apex Court in the case of **K. Ravi Kumar V. State of Karnataka, (2015) 2 SCC 638** has opined as under :-

"11. In Surinder Kumar v. UT, Chandigarh[(1989) 2 SCC 217 : 1989 SCC (Cri) 348 : (1989) 1 SCR 941] , this Court on the same issue held that if on a sudden quarrel a person in the heat of the moment picks up a weapon which is handy and causes injuries out of which only one proves fatal, he would be entitled to the benefit of the Exception provided he has not acted cruelly. This Court held that the number of wounds caused during the occurrence in such a situation was not the decisive factor. What was important was that the occurrence had taken place on account of a sudden and unpremeditated fight and the offender must have acted in a fit of anger. Dealing with the provision of Exception 4 to Section 300, this Court observed : (SCC p. 220, para 7).

"7. To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly."

12. In Ghapoo Yadav v. State of M.P.[(2003) 3 SCC 528 : 2003 SCC (Cri) 765] , this Court held that in a heat of passion there must be no time for the passion to cool down and that the parties had in that case before the Court worked themselves into a fury on account of the verbal altercation in the beginning. Apart from the incident being the result of a sudden quarrel without premeditation, the law requires that the offender should not have taken undue advantage or acted in a cruel or unusual manner to be able to claim the benefit of Exception 4 to Section 300 IPC. Whether or not the fight was sudden, was declared by the Court to be decided in the facts and circumstances of each case. The following passage from the decision is apposite : (SCC p. 532, paras 10-11)

> "10. … The help of Exception 4 can be invoked if death is caused : (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 IPC is not defined in the Penal Code. It takes two to

make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4 it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

11. …After the injuries were inflicted the injured had fallen down, but there is no material to show that thereafter any injury was inflicted when he was in a helpless condition. The assaults were made at random. Even the previous altercations were verbal and not physical. It is not the case of the prosecution that the appellant-accused had come prepared and armed for attacking the deceased. … This goes to show that in the heat of passion upon a sudden quarrel followed by a fight the accused persons had caused injuries on the deceased, but had not acted in a cruel or unusual manner. That being so, Exception 4 to Section 300 IPC is clearly applicable."

13. In Sukhbir Singh v. State of Haryana [(2002) 3 SCC 327 : 2002 SCC (Cri) 616] , the appellant caused two bhala-blows on the vital part of the body of the deceased that was sufficient in the ordinary course of nature to cause death. The High Court held that the appellant had acted in a cruel and unusual manner. Reversing the view taken by the High Court this Court held that all fatal injuries resulting in death cannot be termed as cruel or unusual for the purposes of Exception 4 to

Section 300 IPC. In cases where after the injured had fallen down, the appellant-accused did not inflict any further injury when he was in a helpless position, it may indicate that he had not acted in a cruel or unusual manner. This Court observed : (SCC p. 340, para 19)

16. Keeping in view the approach of this Court for giving benefit of Exception 4 to Section 300 IPC in cases mentioned above and applying the same to the facts of this case, we are inclined to give benefit of Exception 4 to Section 300 IPC to the appellant by altering his sentence awarded to the appellant punishable under Section 304 Part II IPC. This we say so in the facts of this case for more than one reason. Firstly, even according to the prosecution, there was no premeditation in the commission of crime. Secondly, there is not even a suggestion or we may say conclusive evidence that the appellant had any predetermined motive or enmity to commit the offence against the deceased leave alone a serious offence like murder. Thirdly, incident that occurred was due to sudden quarrel which ensued between the appellant-accused and the deceased Padma on the issue of going to Village Mandya to see the appellant's ailing father. The appellant, on receiving this news, had become upset and, therefore, his insistence to see his ailing father immediately was natural and at the same time, Padma's refusal to leave could lead to heated exchange of words between them. True, it is that it reached to its extreme inasmuch as the appellant in heated exchange of words lost his mental balance and poured kerosene on Padma setting her to burn. However, the fact remains that it was an outcome of sudden outburst and heated exchange with no predetermined motive per se to kill her. Fourthly, no conclusive evidence was adduced by the prosecution to prove any kind of constant quarrel ever ensued in the last 9 long years between the couple and that too for a cause known to others which could lead to killing Padma or whether any unsuccessful attempt was ever made by the appellant to kill her in past and lastly, we have not been able to see from the post-mortem report that any stab injury on Padma's body was caused nor was prosecution able to prove that any bloodstained knife from the place of occurrence was

> recovered at the instance of the appellant or of any witness".
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> **[Emphasis Supplied]**

34. A Division Bench of this Court in the case of **Vinod Kumar V. State of M.P., ILR 2009 MP 1160** has held as under **:-**

> **"18.** It is true that by the evidence of dying declaration, it has been established that accused caused the death of Panchshila by setting her on fire, but from the contents of Ex.P/6 as well as of Ex.P/20, it seems to us that the incident occurred suddenly when accused admonished deceased saying that she had gone to the house of Vijay Thakur and had indulged in sinful act. It was mentioned by her that accused told her that he had received information that she had gone to the house of Vijay Thakur. **On appreciating the mental condition of the accused, as reflected by his conduct at the time of commission of the offence, it can be gathered that he acted on a sudden impulse, in a sudden quarrel and without premeditation. In these circumstances, we are unable to hold that accused intended to commit murder of the deceased, but his act of setting fire to deceased must be held to have been done with the intention of causing her death or causing such bodily injury as was likely to cause death, in which case the offence would be one punishable under section 304 Part-I of the Penal Code, 1860.**
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> **19.** In the result, the conviction of the appellant under section 302 of the Penal Code, 1860 and the sentence of life imprisonment awarded to him by the trial Court are set aside and instead, he is convicted under section 304 Part-I of the Penal Code, 1860 and sentenced to rigorous imprisonment for 10 years. The appellant is in custody since 4.5.1999. If he has completed his sentence of 10 years, he shall be released forthwith if not required in any other case.
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> **[Emphasis Supplied]**

35. If the factual matrix of present case is examined on the anvil of principles laid down in the aforesaid judgments, it will be crystal clear that appellant cannot be held guilty for committing offence under Section 302 of the I.P.C. Indeed, he can be held guilty for committing offence under Section 304

(Part-I) of the I.P.C. for which, in our opinion, adequate sentence would be rigorous imprisonment for 10 years. Hence, if he has completed his sentence of 10 years, he shall be treated to have undergone the sentence. If he has not undergone actual sentence of 10 years, he shall undergo the remaining sentence. The impugned judgment dated 30.4.1996 passed by the Additional Sessions Judge, Sihora, District Jabalpur in Sessions Trial No.609/1994 is accordingly modified to the extent indicated above.

36. Resultantly, the appeal is partly **allowed.**

(SUJOY PAUL)
JUDGE

(PRAKASH CHANDRA GUPTA)
JUDGE

vai