

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 201 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE M.H.KADRI
and
HON'BLE MR.JUSTICE H.H.MEHTA

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals?

SARDARBHAI KANTILAL MAVI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 201 of 1997
MR MJ BUDDHBHATTI for Appellant
MR KT DAVE, APP for Respondent

CORAM : HON'BLE MR.JUSTICE M.H.KADRI
and
HON'BLE MR.JUSTICE H.H.MEHTA

Date of decision: 29/08/2003

C.A.V. JUDGEMENT

(Per : HON'BLE MR.JUSTICE H.H.MEHTA)

1. The appellant has, by filing this Criminal Appeal under Section 374(2) of the Criminal Procedure Code, 1973 (for short the "Cr.P.C.") challenged the correctness, legality and validity of the judgment Ex.59 dated 20.04.1995 rendered by the learned Additional Sessions Judge, Panchmahals, at Godhra, Camp at Dahod (who will be referred to hereinafter as the "learned Judge of the trial Court") in Sessions Case No.30 of 1994, by which the appellant has been convicted for the offences punishable under Sections 302 and 324 of Indian Penal Code, 1860 (for short the "I.P.C.") and is sentenced to undergo life imprisonment and to pay a fine of Rs.500/-and in default of payment of fine, to undergo further simple imprisonment (S.I.) for 10 days for an offence punishable under Section 302 of I.P.C. and no separate sentence has been inflicted for an offence punishable under Section 324 of I.P.C. The appellant has been acquitted for an offence punishable under Section 135 of the Bombay Police Act, 1951 (for short the "B.P.Act"), for which the State Government has not filed any acquittal appeal against the present appellant (accused).

2. The facts leading to this present criminal appeal can be summarized in a nutshell as follows.

The complainant, P.W.3 Kasamben d/o. Somabhai Desingbhai Pasaya, is resident of village Gumali in Limkheda Taluka. As per the complaint, she is residing with her parents at village Gumali in Limkheda Taluka and studying in Standard 12th in Higher Secondary School at village Kanjeta. The complainant Kasamben has five brothers and one sister and amongst them; eldest is Laxman, second is Maniben, who is married with Sardarbhai Kantibhai Mavi (appellant/accused) of village Kanjeta, third is brother Maganbhai, fourth is Himmatbhai (victim deceased), fifth is P.W.3 Kasamben herself, sixth is Parvatbhai and seventh youngest is Kanubhai.

Himmatbhai (deceased) was also studying in the School at village Kanjeta. On or about 11.10.1993 in the morning at about 8.00 A.M. Kasamben in company of Himmtbhai, P.W.10 Tejaliben and other 6 to 7 students, by travelling in a Bus, had gone to Kanjeta to appear at the examination in the Higher Secondary School at Kanjeta. They reached the school at Kanjeta at about 9.30 A.M. Maniben, who is sister of the complainant and Himmtbhai (deceased) is serving as an employee to fetch water for the school. The said Maniben is the wife of the present

appellant. Before 09.10.1993, the appellant had sent one letter (chit) Ex.41 to the complainant in which abuses were stated. In reply to that letter, complainant had written one letter, Ex.40 dated 09.10.1993 addressed to the accused. The complainant handed over that letter Ex.40, which she had addressed to the appellant, to her sister Maniben asking her to give that letter to the appellant. Thereafter, the complainant and the Himmrbhai (deceased) and other students went inside the examination hall for appearing at the examination. After appearing at the examination, Kasamben in company of Himmrbhai (deceased) other students P.W.8 Sumitraben, P.W.10 Tejaliben, P.W.9 Shankarbhai, and P.W.6 Navalsingbhai proceeded on foot to reach Bus-Stand for their return journey to village Gumali. It is the case of the prosecution that when they were going on foot and reached near the Police Thana, suddenly, the appellant, who is husband of the sister of the complainant came there on the way and asked the complainant as to what she had written in the letter sent to him. Thereupon, she replied in question form to the appellant as to what she had written in the letter. Thereupon, the appellant got excited and inflicted a knife blow at the back portion near the waist of the complainant. Meanwhile, Himmrbhai (deceased) brother of the complainant intervened and asked the appellant as to why he was beating his sister. Thereupon, the appellant inflicted a knife blow on the chest of Himmrbhai (deceased) and that knife blow was landed on the left portion of the chest, and Himmrbhai (deceased) started to suffer from giddiness and then he fell down on the road. The complainant shouted addressing her brother "Himmat Himmat", but Himmat could not speak. Thereafter, complainant went to one shop of Samadbhai situated nearby the place and brought water and Himmrbhai (deceased) was made to drink the water. The Himmrbhai (deceased) drank a little water and caused some voice "ARRR" from within his throat and died at the place. Thereafter, complainant went running to Police Thana for informing about the incident. Meanwhile, the appellant ran away towards his house. One police man Pravinsinh took complainant on his scooter and brought her to Dhanpur Police Station. After reaching Dhanpur, as she was injured, P.W.11 P.S.I. Rathod sent her to Primary Health Centre of Dhanpur for treatment. After coming back from Primary Health Centre to Dhanpur Police Station, she lodged her complaint against the appellant at 16.15 hours on 11.10.1993. That complaint came to be registered as C.R.No.I-136/93 for the offences punishable under Sections 302 and 324 of I.P.C. and also under Section 135 of B.P.Act.

P.W.11 P.S.I. Udesinh Ratansinh Rathod, took down the complaint of P.W.3 Kasamben and, thereafter, crime was registered. He took over the investigation of the case. First he went to the place of the incident and in the presence of panch witnesses, he held inquest of the deceased Himmatbhai Somabhai Pasaya for which he drew an inquest panchnama. Thereafter, he along with his report, a copy of inquest panchnama and death report sent deadbody of the deceased Himmtbhai, to Primary Health Centre at Dhanpur for autopsy. Thereafter, he went to the place of the incident and drew a panchnama of the scene of an offence, which was shown by witness Somabhai Desingbhai (father of the deceased Himmtbhai). From that place, he attached and seized a sample of control earth, blood stained earth for the purpose of examination and analysis under a panchnama. Thereafter, on 11/10/1993, the accused was arrested under an arrest panchnama. While arresting the accused, one knife and one letter (chit) were found from the left pocket of his pantaloons. These articles were also attached and seized by P.S.I. Rathod. Thereafter, on 12.10.1993, police constable Kalichadan Gisuram, brought articles like ; wrist watch, S.T.Bus pass, question paper, pair of slippers, haircomb etc., which were found from the deadbody of the deceased Himmtbhai, and that articles were attached and seized under a panchnama. He recorded the police statements of witnesses who were conversant with the facts of the present case.

On 13.10.1993, P.W.11 P.S.I. Rathod went to Government Hospital at Devgadh-Baria, where complainant was admitted as an indoor patient and he recorded her further statement. A panchnama with regard to physical condition of Kasamben was drawn. At the time of drawing panchnama of physical condition of Kasamben, P.S.I. Rathod attached and seized clothes worn by her and one chit in pieces found from the pocket of her skirt. Thereafter, P.S.I. Rathod under a forwarding letter sent all incriminating articles, clothes of the accused and clothes of Kasamben to Forensic Science Laboratory, Surat (for short the "F.S.L.") for examination and analysis. Thereafter, on receipt of injury certificate and post-mortem notes and on completion of investigation, P.S.I. Rathod filed a charge-sheet against the accused in the Court of the learned J.M.F.C., Devgadh-Baria, Camp at Limkheda on 04.01.1994. That charge-sheet came to be registered as Criminal Case No.1 of 1994. As one of the offences viz. an offence punishable under Sections 302 of I.P.C. is exclusively triable by the Court of Sessions, the learned J.M.F.C., Devgadh-Baria, Camp at Limkheda, by passing a committal order under Section 209

of Cr.P.C. committed the said case to the Court of Sessions, Panchmahals at Godhra. On receipt of the case papers, that case came to be registered as Sessions Case No.30 of 1994 in the Court of Sessions, Panchmahals at Godhra.

3. The said Sessions Case No.30 of 1994 was assigned to the learned Judge of the trial Court, who conducted the trial, at Dahod. On the basis of material on record, the learned Judge of the trial Court framed a charge Ex.2 on 14.10.1994. That charge was read over and explained to the accused. On recording his plea, he pleaded not guilty to the charge and claimed to be tried.

4. In order to bring home the charge against the accused for which the charge Ex.2 was framed, the prosecution examined the following witnesses :-

P.W.1 Dr.Kailashchandra Ramlalji Devada, Ex.31
Medical Officer, Shri J.S.Chauhan
Hospital, Devgadh-Baria.

P.W.2 Dr.Keshubhai Sengharam Prajapati, Ex.33
Medical Officer, Primary Health
Centre, Dhanpur.

P.W.3 Kasamben Somabhai Pasaya, Ex.38
(Complainant)

P.W.4 Hitendrasinh Omkarsinh, (Sarpanch) Ex.42

P.W.5 Kalukhan Majidkhan Pathan, Ex.43
(Panch witness)

P.W.6 Navalsinh Chhaganbhai Damor, Ex.48
(Student of Kanjeta High School)

P.W.7 Budhsing Jaysing, Ex.50
(Police constable of Kanjeta Police
Out Post)

P.W.8 Sumitraben Chhaganbhai, Ex.51
(Student of Kanjeta School)

P.W.9 Shankarbhai Bachubhai, Ex.52
(Student of Kanjeta High School)

P.W.10 Tejaliben Gopsing, (Student of Ex.53
Kanjeta High School)

P.W.11 Udesing Ratansing Rathod, Ex.54

(P.S.I. Dhanpura Police Station)

5. The prosecution also produced and proved the documents such as

1. Injury certificate of Kasamben Ex.32
2. P.M. Notes Ex.34
3. Inquest panchnama Ex.35
4. Panchnama of the scene of offence Ex.36
5. Panchnama of clothes put on by the deceased and produced by the police constable Kalichadan. Ex.37
6. Complaint Ex.39
7. Letter dated 09.10.93 written by Kasamben to the accused. Ex.40
8. Letter in pieces addressed by accused to Kasamben. Ex.41
9. Arrest panchnama Ex.44
10. Panchnama of physical condition of Kasamben. Ex.45
11. Map prepared by Revenue Circle Inspector, Dhanpur. Ex.46
12. Report of F.S.L. together with report of serologist. Ex.47
13. Vakalatnama of advocate Mr.Sajora Ex.49
14. Copy of F.I.R. sent to learned J.M.F.C. Devgadh-Baria. Ex.56
15. Office copy of police yadi along with it Kasamben was sent to Medical Officer of Primary Health Centre, Dhanpur for giving her medical treatment - Ex.57

- to prove the case against the accused.

6. On recording the evidence of the prosecution witnesses was over, the circumstances appearing against the appellant were brought to the notice of and explained to him and whatever the replies were given by him, were recorded below his plea Ex.3 as a result of which further statement was recorded under Section 313 of Cr.P.C. The accused has admitted that he had married with Maniben sister of Kasamben and his wife Maniben is serving as employee to fetch water in Kanjeta Higher Secondary School. He has admitted that he had addressed a letter Ex.41 to which reply by letter Ex.40 was given to him by Kasamben and that letter Ex.40 was given to the sister of Kasamben for handing over it to him. From his further statement recorded under Section 313 of Cr.P.C., it appears that the defence of the accused is of complete denial of the prosecution case. He has stated that a false case has been lodged against him and he has been

implicated falsely in the case. The accused has, neither examined himself nor any witness in his defence. He has not produced any documentary evidence, in his defence.

7. Thereafter, after hearing the arguments of the learned advocates for both the parties and after making examination, scrutiny and appreciation of the evidence, the learned Judge of the trial Court came to a conclusion that the accused by inflicting a knife blow on the chest of the deceased Himmtbhai committed a murder of deceased Himmtbhai. He has also come to a conclusion that accused voluntarily caused injury to the witness Kasamben by inflicting a knife blow in her waist portion. He has further come to a conclusion that the prosecution has not proved a case that the accused by keeping with him a prohibited weapon namely knife in public place committed a breach of the notification issued by the District Magistrate. On the basis of the aforesaid conclusions, he by rendering his judgment Ex.59 dated 20.04.1995 convicted the accused for the offences punishable under Sections 302 and 324 of I.P.C. and acquitted him for an offence punishable under Section 135 of B.P.Act. After hearing the accused, on the point of quantum of sentence, he inflicted sentence of life imprisonment and fine of Rs.500/- and in default of payment of fine, to undergo further S.I. for ten days for an offence punishable under Section 302 of I.P.C. Though, the learned Judge of the trial Court has convicted the accused for an offence punishable under Section 324 of I.P.C., he did not inflict a separate sentence for an offence punishable under Section 324 of I.P.C.

8. Being aggrieved against and dissatisfied with the said judgment of conviction and sentence, the accused has preferred this present Criminal Appeal. It be noted that though the learned Judge of the trial Court has acquitted the accused for an offence punishable under Section 135 of B.P. Act, the State Government has not filed any acquittal appeal for that offence.

9. We have heard Mr.J.M.Budhbhatti, the learned advocate for the appellant/accused and Mr.K.T.Dave, learned APP for the respondent - State in detail at length. Mr.Budhbhatti has taken us through the entire evidence on record and Mr.Dave has taken us through the impugned judgment.

10. At the outset of his arguments, Mr.Budhbhatti has fairly conceded and submitted that complicity of the appellant is established. He has further argued that P.W.10 Tejaliben has deposed in her examination-in-chief

that on examination in the school was over, P.W.8 Sumitraben and she herself both proceeded on foot for reaching their residence and when they reached near Government fair price shop, Kasamben was following them and at that time, Sardar husband of the sister of Kasamben came from behind of Kasamben and he caught hold of the hand of Kasamben. She has deposed that when accused was beating Kasamben, the brother of Kasamben came to her for her rescue. She has further deposed that as "Maramari" (scuffle) took place, she was frightened and, therefore, she ran away from that place. By reading this evidence, Mr.Budhbhatti has argued that this witness Tejaliben has not been declared as hostile witness and, therefore, her evidence given in examination-in-chief cannot be lightly ignored. He has further argued that from the deposition of P.W.10 Tejaliben, it appears that some scuffle had taken place before actual incident took place and for that scuffle "something" must have happened. He has further argued that in view of this evidence of P.W.10 Tejaliben, the prosecution has suppressed the material facts leading to scuffle and, therefore, the facts regarding genesis of the case are withheld by the prosecution for which an adverse inference should be drawn against the prosecution. He has further argued that looking to the evidence on record, it is admitted on the part of the prosecution as well as accused that Kasamben wrote a letter Ex.40 which was a nasty letter and taste and tenor of the contents of the letter Ex.40 were so provocative that a man of reasonable prudence would certainly get excited and provoke. He has argued that looking to this admitted fact that the incident took place, as a result of letter Ex.40 received by the accused from Kasamben, accused got excited and under provocation, he committed misdeeds and, therefore, it cannot be said that it was an intention of the accused to commit a murder of deceased Himmtbhai. He has further argued that looking to the facts and circumstances of the case and more particularly, the evidence of letter Ex.40, this is a case in which the defence of accused squarely falls under Exception 4 of Section 300 of I.P.C. and, therefore, at the best the case of the prosecution can be said to have been proved for an offence punishable under Part I of Section 304 of I.P.C. In support of his submissions, Mr.Budhbhatti has cited the following two decisions.

[1] Akhil Alijehangir Ali Sayyed Vs. State of Maharashtra, reported in (2003) 2 S.C.C. 708, wherein on facts and circumstances of that case, the Hon'ble Supreme Court held that the case of the prosecution was falling under Part-I of

Section 304 of I.P.C. instead of Section 302 of I.P.C.

[2] Hem Raj Vs. The State (Delhi Administration), reported in AIR 1990 S.C. 2252, wherein occurrence happened in a spur of moment and in heat of passion upon sudden quarrel and there was no pre-meditation. On the facts and in the circumstances of the case, the Hon'ble Supreme Court held that intention to cause death or to cause fatal injury could not be imputed against accused and ultimately accused was convicted for an offence punishable under Part II of Section 304 of I.P.C.

Lastly, he has argued that the conviction of accused under Section 302 of I.P.C. requires to be altered and modified and by convicting him for an offence punishable under Part I of Section 304 of I.P.C., suitable sentence be inflicted on accused in accordance with law. He has also argued that the accused has, practically, undergone the sentence of about ten years and, therefore, he be acquitted by treating a sentence already undergone as sufficient sentence for the said offence punishable under Part I of Section 304 of I.P.C.

11. Mr.K.T.Dave, learned APP for the respondent State has supported the judgment, through out. He has argued that looking to the number of infliction of knife blows and situs of the injuries, case falls under Clause (3) of Section 300 of I.P.C. He has further argued that looking to the facts and circumstances of the case, the alleged provocation was not given by the deceased or the injured, but from the record, it appears that he provoked Kasamben by addressing letter Ex.41 to her and that is why in reply to that letter Ex.41, Kasamben wrote a letter Ex.42 to the accused. He has further argued that looking to the facts and circumstances of the case, this is not a case in which the incident occurred all of sudden. He has argued that on the contrary, the evidence speaks that there was a pre-meditation on the part of the accused, who came along with a knife to the school and he was waiting for arrival of Kasamben and Himmtbhai from the school and, therefore, necessary ingredients required to be established for bringing the case under Exception 4 of Section 300 of I.P.C. are not established on the basis of principle of ponderance of probability. In view of this, Mr.Dave has argued that the contention of Mr.Budhbhatti for bringing the case under Exception 4 of Section 300 of I.P.C. is devoid of merits and it requires to be rejected straightway. Lastly, he has

argued that this appeal lacks of merits and it requires to be dismissed.

12. We have dispassionately considered the submissions of the learned advocates for both the parties. We have carefully and minutely examined the evidence on record. We have made thorough scrutiny and re-appreciation of the evidence on record to come to our own conclusions to decide this appeal. We have perused the impugned judgment, which is challenged in this appeal. We have also gone through the record and proceedings of the case, which have been called for from the trial Court.

13. As said earlier, Mr.J.M.Budhbhatti, learned advocate for the appellant has fairly conceded the facts with regard to complicity of the accused in the case. He has strenuously argued in the appeal so as to bring the case under Exception 4 of Section 300 of I.P.C. and thereby, it is his submission that the accused be convicted for an offence punishable under Part I of Section 304 of I.P.C. by treating the sentence, which has already been undergone as sufficient sentence for the said offence.

14. There is no dispute with regard to the fact that the Himmtbhai son of Somabhai Pasaya died homicidal death on 11.10.1993. Though, the learned Judge of the trial Court has not framed a specific point with regard to the nature of the death of Himmtbhai, he has discussed and dealt with the evidence of an inquest panchnama, Ex.35, medical evidence of P.W.2 Dr.Keshubhai Sengharam Prajapati, who performed the postmortem of deadbody of the deceased Himmtbhai, and prepared a P.M. Notes Ex.34. As per the evidence of P.W.2 Dr.Prajapati on 11.10.1993, when he was on duty as Medical Officer, in Primary Health Centre, Dhanpur at about 11.45 P.M., one Police Constable Pande, B-39, brought to him a deadbody of deceased Himmatbhai Somabhai Pasaya for the purpose of autopsy. He has further deposed that along with the said deadbody, a copy of inquest panchnama and police death report were also submitted to him. He has further deposed that he started to perform postmortem at 7.00 A.M. and completed it at 9.30 A.M. As per his evidence, he noticed the following external injuries, which he noted down in column No.17 of P.M. Notes Ex.34.

"Single incised wound on left side of the chest
just medial to left nipple. Direction - vertical
in the 4th intercostal space.

Size : 1 1/4" length x 1/2" breath x 2" deep
upto lung (by probing).

Clean cut margin oval in shape tapering both
encls.

As per his evidence, he noticed the following
internal injuries, which he noted down in column No.20 of
P.M.Notes Ex.34.

THORAX :-

1. Walls, Ribs, Cartilages : Single incised wound on
left side of the chest
just medial to nipple in
the 4th ICS. Ribs &
Cartilages - Normal -
right side - Normal.
2. Pleura : Punctures on left side.
Right side - Normal.
3. Larynx, Trachea and : N.A.D.
Bronchi.
4. Right Lung : Rt. Lung : N.A.D. wt. 1.1
oz.
5. Left Lung : Lt. Lung : Middle Lobe
injured 1" X 1/4" x deep
lung left peural cavity
hemothorax wt. 11.5 oz.
6. Pericardium : Congested.
7. Heart : Wt.5 oz. (Chamber-Empty).

Dr.Prajapati has deposed in his evidence that the
aforesaid injuries were antemortem. He has also deposed,
in para-10 of his deposition that the injuries sustained
by the deceased Himmtbhai were, on the vital parts of the
deceased Himmatbhai, as a result of which the said
injuries were sufficient in ordinary course of nature to
cause the death. He has opined for cause of death in
para-23 of P.M.Notes, Ex.34 as follows :-

"The cause of death in my opinion is -

SHOCK DUE TO INTRATHORACIC HAEMORRHAGE DUE TO

INCISED WOUND ON LEFT LUNG."

In the cross-examination, he has deposed that it appears to him that the deceased Himmtbhai was not given any medical treatment prior to his death. He has also deposed that deceased Himmtbhai would have survived with immediate and urgent treatment, if it could be available to him. In the cross-examination, he has also deposed that a human being, who has received injuries, similar to injuries sustained by the deceased Himmtbhai, could survive for maximum period of 30 minutes. It be noted that the incident took place in the village Kanjeta. As per the evidence of P.W.5 Kasamben, immediately after the occurrence of incident, she called for water from nearby fair price shop and she made her brother to drink water, but that water came out from the portion where the deceased Himmtbhai had sustained injuries and there was a voice "ARRR" from within the throat of Himmtbhai and Himmtbhai died on the spot at the place. In view of this, there was no possibility to remove the deceased Himmtbhai from the place of the incident to the nearby Hospital to render him immediate and urgent medical treatment. From the cross-examination of P.W.2 Dr.Prajapati, no material has come out to come to a different conclusion that the Himmtbhai (deceased) died homicidal death. In view of what is stated hereinabove, the learned Judge of the trial Court has, rightly and correctly, appreciated the evidence of inquest panchnama, Ex.35 and testimony of P.W.2 Dr.Prajapati read with P.M. Notes Ex.34 and he has come to a right conclusion that the deceased Himmtbhai died homicidal death. We, therefore, uphold the finding of the learned Judge of the trial Court given by him at the end of para-14 of the impugned judgment.

15. To connect the accused with the crime, the prosecution has placed heavy reliance on evidence of eye witness P.W.3 Kasamben, who is examined at Ex.38. As per her evidence, she was staying with her parents, sisters and brothers in village Gumali and for her education purpose, she was commuting between Gumali and Kanjeta. She was studying in 12th Standard in Higher Secondary School at Kanjeta. As per her evidence, eldest amongst seven children of her parents, is her brother Laxmanbhai, second is Maniben, wife of present appellant, third is Maganbhai, fourth is Himmtbhai (deceased), fifth is she herself, sixth is her brother Parvatbhai and youngest seventh is Kanubhai. As per her evidence, Maniben, her elder sister had married to the appellant and they both were staying at village Kanjeta. As per her evidence, Maniben was serving as an employee in the Higher

Secondary School at Kanjeta, for doing the work of fetching water for school. Her brother deceased Himmrbhai was also studying in the same School i.e. Higher Secondary School at Kanjeta. From her evidence, it appears that the relations of the complainant and her family members with the appellant were not cordial but strained. With regard to motive, we will discuss the evidence with regard to such relations of the complainant and her family members with the appellant, hereinafter at appropriate place.

In respect of the incident, she has deposed that on fateful day of the incident i.e. 11.10.1993 in the early morning at about 8.00 A.M., she, her brother Himmrbhai (deceased), one Tejlben (P.W.10) and some other 6-7 students of her village Gumali left, village by travelling in S.T. Bus, for Kanjeta, as on that day an examination was scheduled to be held and they reached village Kanjeta at about 9.00 A.M. P.W.3 Kasamben has further deposed that before 09.10.1993, the present appellant had received one letter - chit Ex.41 addressed to her. When that letter was attached and seized from P.W.3 Kasamben, it was attached in pieces and, therefore, they are preserved in separate envelope and kept on record. It is difficult to read the contents of that letter Ex.41 written by the appellant and addressed to the complainant Kasamben, because it is in pieces. The learned Judge of the trial Court has discussed about the contents of the said letter Ex.41, in para-16 of his judgment. The learned Judge of the trial Court has observed, in para-16 of his judgment that before that letter Ex.41 was addressed to the complainant - Kasamben, Maniben wife of the present appellant had left her matrimonial home as she was displeased due to some domestic problem and had come to her parental home. It is also stated in para-16 of the judgment of the learned Judge of the trial Court that the appellant had requested in that letter Ex.41 to send back Maniben to her in-laws' house. It also appears from para-16 of the judgment that P.W.3 Kasamben had stated before the police that the appellant had exceeded his limits in his letter Ex.41 by stating in his letter Ex.41 that if, his wife (Maniben) would not be sent back then he was ready to keep Kasamben in his house and, therefore, Kasamben was irritated and annoyed for such ugly demand made by the appellant. It appears from the record that taste and tenor of text of letter Ex.41 of the appellant addressed to Kasamben, were not good and it was full of bitterness. From the record, it appears that Kasamben became very angry towards the appellant for his courage to write for and make an unpleasant demand of the appellant and, therefore, in

reply to letter Ex.41, she prepared letter Ex.40 in her own handwriting. From the evidence, it appears that though it was prepared on 09.11.1993, Kasamben handed over that letter to Maniben on 11.10.1993. On reading Ex.40, it appears that Kasamben had become very angry on receipt of a letter Ex.41 from the appellant and she surpassed her feelings with high degree of anger to the extent that she informed the appellant that he would be killed. As per the evidence of P.W.3 Kasamben, on the fateful day of the incident i.e. on 11.10.1993, after reaching to the School at Kanjeta, she handed over the said letter Ex.40 dated 09.10.1993, which she had written to the appellant to her sister Maniben requesting her to hand over it to the appellant and, thereafter, she went inside the examination hall and appeared at the written examination, which was fixed on that day. From her evidence, it also appears that her examination was over at about 1.30 P.M. and, therefore, she in company of other students left the School for going to their respective destinations. She has deposed that along with her ; P.W.6 Navalsinh, P.W.8 Sumitraben, P.W.9 Shankarbhai, and P.W.10 Tejaliben and others were going on foot to catch the S.T. Bus and amongst them, her brother Himmatbhai was also going on foot. Regarding the incident, she has deposed that when they were about to reach near the police out post of Kanjeta, the present appellant came from her behind and asked her, as to what she had written in her letter Ex.40. Thereupon, she replied in a question form, as to what he had written in his (appellant) letter Ex.41 and on hearing this reply, the appellant got excited and inflicted a knife blow on her waist portion. On seeing this, the deceased Himmatbhai, who was also going on foot along with Kasamben and other students, came to the appellant and asked the appellant, as to why he (appellant) was beating his sister. Thereupon, the appellant inflicted knife blow on chest of Himmatbhai, as a result of which, Himmatbhai fell down and as said by Kasamben, Himmatbhai died at that very place. This is some and substance of the case of the prosecution.

As said by P.W.3 Kasamben, she had sustained an injury at her waist portion, because the appellant had inflicted knife blow on her. As per the evidence of the prosecution, she was examined by P.W.1 Dr.Devada, who is examined at Ex.31.

16. P.W.1 Kailashchand Ramlalji Devada, Ex.31 has deposed that on 11.10.1993, he was performing his duty as Medical Officer in J.S.Chauhan Hospital, Devgadhi-Baria and when he was on duty at about 7.45 P.M., Ms.Kasamben,

who had sustained injury, came to him along with a reference note of the Medical Officer of Primary Health Centre, of Dhanpur. P.W.3 Kasamben gave a history to P.W.1 Dr.Devada that assault was made on her by knife at about 1.00 P.M. on 11.10.1993. Dr.Devada examined Kasamben and he had noticed the following external injuries -

Incised wound on back - thoracic region 1"
lateral to mid line at 12th vertebra level 1 1/2"
x 1/4" x 1" size.

Dr.Devada issued a medical certificate Ex.32 for injuries sustained by Kasamben. In his (Dr.Devada) certificate Ex.32, he has opined that the injuries could be possible by sharp cutting object, and age of injury was within 12 hours. He was shown muddamal article No.8 knife and he has opined that the injuries stated in his certificate Ex.32, could be possible by this knife.

In the cross-examination, he has opined that if some person falls on sharp glass or iron sheet in such way, that waist portion falls on that object, then it could possible to cause injuries. This was merely a suggestion and Doctor has given his mere opinion. From the cross-examination, it appears that it is not a case of the accused that the said injuries stated in certificate Ex.32 were self inflicted injuries. Looking to the evidence of P.W.1 Dr.Devada read with Medical Certificate Ex.32, the prosecution has proved that Kasamben sustained injuries in the incident because her presence at the place is not denied. She is an injured eye witness. On reading the evidence of P.W.3 Kasamben, we are satisfied that she is a natural and an independent witness and she had sustained injuries in the incident. In view of this, there is an in-built guarantee of her presence at the spot when the incident took place. She is a real sister of deceased Himmatbhai and she herself also sustained injuries in the incident. No close and near relative would allow a real culprit to Scot-free and would involve an innocent person falsely in the case. A near and close relative would always see that a real culprit is booked and punished. In view of this, we find that the evidence of P.W.3 Kasamben is trustworthy and reliable. Her evidence inspires confidence. Her evidence is corroborated by a contemporaneous document viz. her complaint Ex.56. Her evidence is also corroborated by the medical evidence of P.W.1 Dr.Devada and the medical certificate Ex.32. She has been cross-examined at length by the defence lawyer and she withstood in her cross-examination, and no substantial

material in favour of the appellant has come out to discredit her say.

17. The evidence of P.W.3 Kasamben is also corroborated by evidence of P.W.6 Navalsinh, P.W.8 Sumitraben, P.W.9 Shankarbhai, and P.W.10 Tejaliben. These four witnesses were the students in whose company P.W.3 Kasamben and deceased Himmatbai were proceeding on foot towards the S.T. Bus-stand. All these witnesses have narrated the same story, which has been stated by P.W.3 Kasamben.

18. In view of what is discussed hereinabove, the prosecution has led ample evidence to connect the accused with the crime. It is proved beyond reasonable doubt that on 11.10.1993 at about 13.30 hours, when P.W.3 Kasamben and her brother Himmatbhai (deceased) were proceeding towards the S.T. Bus-stand to catch the S.T. Bus for their return journey to village Gumali, the appellant met them on the way near police out post of village Kanjeta and the appellant first inflicted knife blow on the waist portion of P.W.3 Kasamben, as a result of which, she sustained injury noted down in medical certificate Ex.32 by P.W.1 Dr.Devada. As appellant made an assault on Kasamben, naturally her brother would intervene and, therefore, he came to her rescue and asked the appellant, as to why he was beating his sister and on saying so by Himmatbhai, the appellant inflicted knife blow on the chest of Himmatbhai (deceased). As per para-17 of P.M.Notes, Ex.34, it appears that knife blows was landed on the left side of the chest causing incised wound just medial to left nipple and direction was vertical in the 4th intercostal space. Its size is also required to be taken into consideration. Its size was 1 1/4" length x 1/2" breadth x 2" deep upto the lung. As Himmatbhai (deceased) sustained aforesaid injuries, which were fatal, he died on the spot and, therefore, the prosecution has proved beyond reasonable doubt that the author of the said injuries was no one else, but it was appellant only and thus, the offence punishable under Section 302 of I.P.C. is proved beyond reasonable doubt. As discussed earlier, Mr.Budhbhatti has not disputed much with regard to complicity of the accused in the crime. On the contrary, he has fairly conceded that the complicity of the accused is proved. His main argument is to the effect that the case of the accused falls under Exception 4 of Section 300 of I.P.C. and, therefore, as argued by him the offence which can be said to have been committed by the accused, was punishable under Part I of Section 304 of I.P.C. Exception 4 of Section 300 of I.P.C. reads as follows :-

"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."

19. In the case of State of Maharashtra Vs. Krishnamurti Laxmipati Naidu, reported in AIR 1981 S.C. 617, the Hon'ble Supreme Court has held that it is for the accused to establish with a balance of probability circumstances which would bring his case within any Exception.

20. Mr.K.T.Dave has placed reliance on the case of Surinder Kumar Vs. Union Territory, Chandigarh, reported in A.I.R. 1989 S.C. 1094, it has been held in para-6 as follows :-

" 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....."

21. Mr.K.T.Dave has argued that looking to the facts and circumstances of the case, the appellant is unable to satisfy this Court about the necessary ingredients to bring the case under Exception 4 of Section 300 of I.P.C. He has argued that from the facts, it emerges that there was no sudden fight, when deceased Himmatbhai and P.W.3 Kasamben, both were going on foot from the School to reach their residence to catch the S.T.Bus reaching village Kanjeta and when, they were so going, the appellant suddenly appeared at the place and he caught hold of P.W.3 Kasamben from her behind and inquired from

her, as to what she had stated in her letter at Ex.40. As discussed earlier, P.W.3 Kasamben was very much irritated and annoyed against the appellant, as the appellant had written a nasty letter Ex.41 addressed to P.W.3 Kasamben and, therefore, she replied the appellant in a question form, as to what he had stated in his letter Ex.41 and thereupon, the appellant got excited and inflicted a first knife blow on the waist portion of P.W.3 Kasamben. Of course, verbal altercation might have taken place, but there was no sudden fight in between the appellant and P.W.3 Kasamben and, therefore, this first requirement is not established from the facts of the case. For a moment, if it is believed that there was a fight in between the appellant and P.W.3 Kasamben then that fact cannot be stretched to the extent that the said fight was in between the appellant and the deceased Himmatbhai. Deceased Himmatbhai came in picture, after the appellant inflicted a knife blow on the waist portion of his sister Kasamben. He came to the appellant to rescue her sister and he asked the appellant, as to why he was beating her sister and immediately, thereafter the appellant turned to Himmatbhai and inflicted a knife blow on the chest portion of Himmatbhai. Under the circumstances, there was no fight much less sudden flight in between the appellant and deceased Himmatbhai and, therefore, he ought not to have inflicted a knife blow on the chest portion of the deceased Himmatbhai, merely because, P.W.3 Kasamben had written a letter Ex.40 to the appellant.

22. Mr.Budhbhatti has argued that the appellant first inquired from P.W.3 Kasamben, as to what she had written in her letter Ex.40 and in reply to that question, P.W.3 Kasamben replied in a question form, as to what he (appellant) had stated in his letter Ex.41 and thereupon, the appellant got excited and in that excitement in the heat of passion, he inflicted knife blow on the waist portion of P.W.3 Kasamben. It be noted that P.W.3 Kasamben had written a letter Ex.40 in reply to a letter Ex.41 addressed by the appellant to P.W.3 Kasamben and, therefore, a cause was given by the appellant and not by P.W.3 Kasamben. Had the appellant not written a letter Ex.41 to P.W.3 Kasamben in a nasty manner, perhaps, P.W.3 Kasamben would not have replied letter Ex.40 to the appellant and, therefore, the provocation was not provoked at the instance of P.W.3 Kasamben. From the facts, it reveals that the provocation was initiated by the appellant himself because he had written a letter Ex.41 to P.W.3 Kasamben in which he (appellant) had written that if, his (appellant's) wife Maniben was not sent back to her in-laws' house then he was ready to keep

P.W.3 Kasamben in her (Maniben's) place, meaning thereby he asked P.W.3 Kasamben to his house to live with him as his wife, instead of Maniben. Naturally, if this type of letter Ex.41 was addressed by the appellant to P.W.3 Kasamben, a School going unmarried girl, would certainly be irritated and annoyed and would become angry towards the appellant and, therefore, she reacted sharply by addressing a letter Ex.40 to the appellant. Of course, taste and tenor of letter Ex.40 are not good and a bitterness is reflected from the letter Ex.40 to the extent that a threat was given by P.W.3 Kasamben to the appellant that he would be killed. In ordinary course of nature, the appellant might have got excited because he received such letter Ex.40 with threats from P.W.3 Kasamben. From this evidence, it can be said that the appellant had given a cause for getting him excited against the P.W.3 Kasamben and on that excitement, he inflicted knife blow on the waist portion of P.W.3 Kasamben. In view of this, the appellant is not entitled to get any benefit of Exception 4 to Section 300 of I.P.C. for his assault by knife on deceased Himmatbhai. The letter Ex.40 was not written by Himmatbhai (deceased). Perhaps he might not be knowing about the said letter Ex.40 written by P.W.3 Kasamben and addressed to the appellant. P.W.3 Kasamben has deposed in her evidence that when she gave letter Ex.40 to her sister Maniben, Maniben had already come to the school for her duties and that Maniben was knowing that Kasamben was to come to appear at the examination of the school. She has further made it clear that when she handed over the letter Ex.40 to Maniben, there was no any other third person present, except she herself and Maniben. She has also deposed that Himmatbhai (deceased) was also not present there, when she gave letter Ex.40 to her sister Maniben and, therefore, there was no reason for the appellant to inflict knife blow on the chest of Himmatbhai (deceased). Himmatbhai (deceased) only intervened to rescue his sister Kasamben. He came in picture, after the appellant had already inflicted one knife blow on the waist portion of Kasamben and, therefore, we are of the view that an act of inflicting the blow on Himmatbhai (deceased) was not done in a heat of passion.

22.1 Now the another ingredient which is required to be established, is to the effect that the assailant had not taken any undue advantage or acted in a cruel manner. Himmatbhai (deceased) was not having any weapon with him and Kasamben was also not having any weapon with her. Both were unarmed and the appellant came with the knife from his house and merely because, deceased Himmatbhai

came to rescue her sister Kasamben, the appellant inflicted a knife blow with force on the chest portion of Himmatbhai because depth of injury is 2" and, therefore, certainly it can be said that the appellant acted in a cruel manner and he took an undue advantage of unarmed Himmatbhai and, therefore, this third ingredient is also not established.

22.2 Mr.K.T.Dave, learned APP for the respondent State has vehemently argued that one of the most important ingredients required to be established by the appellant, is that there was no premeditation. P.W.3 Kasamben has deposed that on the date of the incident, she, her brother Himmatbhai and other students, by travelling in a S.T.Bus came to Kanjeta from their village Gumali and they reached the school at about 9.30. A.M. Immediately, after reaching to the school, Kasamben handed over a letter Ex.40 to her sister Maniben with a request to her to give that letter Ex.40 to her husband i.e. present appellant and, thereafter, she entered into the examination hall and appeared at the examination. Generally, the duration of the examination remains for two to three hours. In the complaint, P.W.3 Kasamben has stated that the period of examination was 11.00 A.M. to 2.00 P.M. In the cross-examination, in para-5, of her deposition, she has deposed that her examination was over at 1.30 P.M. and, thereafter, they left the school to go to village Gumali. Looking to this timing in between 9.30 A.M. and 1.30 P.M., the appellant had ample time to think over the contents of the letter Ex.40 received from his wife Maniben. Kanjeta is a small village in which the police, is functioning in Police Out Post. If, Kasamben had given a letter Ex.40 to her sister Maniben at 9.30 A.M. possibly she must have handed it over to the appellant within an hour. So from 10.30 A.M. to 1.30 P.M., the appellant thought over the contents of a letter Ex.40 and he determined to teach a lesson to Kasamben. He came from his house to the way leading from the school to S.T.Bus-stand. He came with a deadly weapon knife. All these facts and circumstances do suggest that he came with a premeditation to teach a lesson to P.W.3 Kasamben and, therefore, it cannot be said that there was no premeditation. The facts clearly suggest that there was a premeditation on the part of the appellant before leaving his house to come to the way leading from the school to the S.T.Bus-stand. Thus, one of the most important ingredients that there was absence of premeditation to bring the case under Exception 4 of Section 300 of I.P.C., it is not established. Recently, we have come across two decisions of the Hon'ble Supreme Court ;

[1] Ghapoo Yadav and others, Vs. State of M.P., reported in AIR 2003 S.C. 1620, it has been held as follows.

"The Fourth Exception of Section 300, IPC covers acts done in a sudden fight. 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. The 'fight' occurring in Exception 4 of Section 300, IPC is not defined in the IPC. Heat of passion requires that there must be no time for the passions to cool down..... 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 cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage."

[2] Dhirajbhai Gorakhbhai Nayak Vs. State of Gujarat, (decided on 25.07.2003) reported in 2003 AIR SCW 3596, wherein it has been held as follows.

"Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side.

The "fight" occurring in Exception 4 to Section 300, I.P.C. is not defined in the I.P.C. 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 cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage."

23. Keeping in mind the aforesaid legal position with regard to Exception 4 to Section 300 of I.P.C. We have re-appreciated the evidence on record. Herein this case most important ingredient with regard to absence of premeditation, is found absent. The appellant received a letter Ex.40 from his wife Maniben round about 10.30 A.M. and, thereafter, he came armed with a knife at about 1.30 P.M. at the place of occurrence This shows that there was an ample time for his passions to cool down and, therefore, the ingredient of presence of premeditation is found established in this case. The verbal altercation took place in between Kasamben and the appellant. There was a reason for the appellant to have an anger towards Kasamben and, therefore, his act at the best can be justified for inflicting injury on Kasamben. Looking to the facts, it appears that deceased Himmatbhai did not give any cause for provocation to the appellant, because he was unarmed. He only asked the appellant as to why he was beating his sister. This act of asking a question to the appellant by deceased Himmatbhai, is not so grave that the appellant had reason for being provoked against deceased Himmatbhai. He had no reason to cause a fatal injury by inflicting knife blow on the chest of the deceased Himmatbhai. Thus, to our mind, the arguments of Mr.Budhbhatti cannot be accepted. We come to conclusion that the appellant is not entitled to any benefit of Exception 4 to Section 300 of I.P.C. His (appellant's) act squarely falls under Clause (3) of Section 300 of I.P.C. and, therefore, the learned Judge of the trial Court has rightly convicted the appellant for committing an offence of murder of Himmatbhai which is punishable

under Section 302 of I.P.C. and held the appellant guilty for the same.

24. Except, the aforesaid only contention with regard to the case falling under Exception 4 to Section 300 of I.P.C., no other arguments were advanced by Mr.Budhbhatti to assail the impugned judgment.

25. For the foregoing reasons, this appeal is devoid of merit and it deserves to be dismissed. Accordingly, this appeal is dismissed. The judgment Ex.59 of the conviction and sentence dated 20.04.1995 rendered by the learned Additional Sessions Judge, Panchmahals, at Godhra Camp at Dahod in Sessions Case No.30 of 1994 is, hereby confirmed. The order regarding disposal of the Muddamal articles as per directions given by the learned Judge of the trial Court in the final operative order of the impugned judgment, is maintained.

Dt.29.08.2003 [M. H. Kadri,J.]

[H. H. Mehta,J.]

(vijay)

* * * * *