

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**  
**R/CRIMINAL APPEAL NO. 345 of 2014**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR.JUSTICE P.P.BHATT**

**and**

**HONOURABLE MR.JUSTICE B.N. KARIA**

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ?  |  |
| 2 | To be referred to the Reporter or not ?   |  |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ?   |  |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? |  |

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**NAVALSINH BALSINGBHAI RATHVA**

Versus

**STATE OF GUJARAT**

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Appearance:

HCLS COMMITTEE(4998) for the APPELLANT

MR PH BUCH(1018) for the APPELLANT

MS BHAVIKA H KOTACHA(2942) for the APPELLANT

MS HANSA PUNANI, APP for the RESPONDENT-STATE

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**CORAM: HONOURABLE MR.JUSTICE P.P.BHATT**

**and**

**HONOURABLE MR.JUSTICE B.N. KARIA**

**Date : 30/06/2018**

**ORAL JUDGMENT**

**(PER : HONOURABLE MR.JUSTICE P.P.BHATT)**

1. The present appeal is filed by the appellant-convict being aggrieved and dissatisfied with the judgment and order of conviction and sentence dated 27.06.2012 passed by learned 5<sup>th</sup> Additional Sessions

Judge, Vadodara in Session Case No.18/2012 , whereby the learned Trial Court convicted and sentenced the appellant-convict as under:

- (1) To undergo life imprisonment and to pay fine of Rs.1,000/- and in default to undergo, further rigorous imprisonment for one year for the offence punishable under Section 302 of the Indian Penal Code (hereinafter referred to as “the IPC” for short);
- (2) To undergo rigorous imprisonment for four years and to pay fine of Rs.100/- and in default to undergo, further imprisonment for one month for the offence under Section 135 of the Bombay Police Act.
- (3) Both the sentences are directed to run concurrently.

2. The brief facts leading to the filing of the present case are as under:

2.1 That on 28.11.2011 at about 09:00 hours, deceased-Sakhiben, who was mother of the appellant-convict, rebuked the appellant-convict for not doing any job. For the said reason, deceased-Sakhiben criticized him very often. It is further stated in the complaint that when deceased-Sakhiben went towards Village: Tadmachhala from Kharivav, at that time, near Shihod Village Bus-Stand, he met her and since he was frustrated due to criticism as her mother often rebuke him for not doing any work, he got provoked and inflicted sword blows on his mother with an intention to kill her and because of that injuries, she died.

2.2 Based on the above, an FIR came to be lodged with Jetpur-Pavi Police Station being I-C.R.No.80/2011 against the appellant-accused for the offence punishable under Section 302 of the Indian Penal Code and Section 135 of the Bombay Police Act.

3. After completion of the investigation, the chargesheet was filed before the learned Judicial Magistrate First Class. As the case was exclusively triable by the Court of Sessions, learned Magistrate Court under Section 209 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") committed the said case to the Court of learned 5<sup>th</sup> Additional Sessions Judge, Vadodara which was thereafter numbered as Sessions Case No.18/2012. Since he did not plead guilty and claimed to be tried, he was tried for the alleged offences.

4. At the time of trial, in order to bring home the charges levelled against the original accused, the prosecution examined 11 witnesses and produced 18 documentary evidences.

5. At the end of the Trial and after recording the statement of the appellant-accused under Section 313 of Cr.P.C. and hearing the arguments on behalf of the prosecution and the defence, the Trial Judge convicted him for the alleged offences. On completion of the trial, the Trial Court passed the judgment and order of conviction and sentence

dated 27.06.2012.

6. Being aggrieved and dissatisfied with the aforesaid judgment and order of conviction and sentence passed by the Trial Court, the present appeal is preferred by the appellant-convict on the various grounds enumerated in the appeal memo.

7. Heard Mr.P.H. Buch, learned advocate for the appellant and Ms.Hansa Punani, learned Additional Public Prosecutor for the respondent-State and perused the judgment and order of conviction and sentence passed by the learned Trial Court.

8. Mr.P.H. Buch, learned advocate for the appellant-convict submits that the judgment and order passed by the learned Trial Court is against the well established principle of law. It is further submitted that the learned Trial Court has committed error while appreciating the evidence on record. It is further submitted that the learned Trial Court has completely ignored the contradictions and omissions in the instant case made by various witnesses. Learned advocate for the appellant, while referring the judgment and order passed by the learned Trial Court, submits that there are many infirmities in the findings recorded by the learned Trial Court and the evidence on record is not properly appreciated. Therefore, the conviction and sentence imposed upon the present appellant are required to be set aside and the appellant may be

acquitted from the charges levelled against him. Learned advocate for the appellant, while referring the evidence on record, submits that the complaint was lodged by PW:1 complainant-Ramsinghbhai Jarkabhai Rathva at Exh.:14. While referring the deposition of PW:1, it is stated that the complainant has reached to the place of incident after occurrence of incident. The complainant is not the eyewitness, but after receiving the telephonic message from PW:2 Shanabhai Punabhai Rathwa at Exh.:16, the complainant immediately rushed to the scene of offence. Learned advocate for the appellant further submits that there are two eyewitnesses viz. PW: 2 Shanabhai Punabhai Rathwa at Exh.:16 and PW:3 Bharatbhai Melabhai Rathwa at Exh.:19, but according to learned advocate for the appellant, there are contradictions and omissions in the deposition of so-called eyewitness. While referring the deposition of eyewitness viz. Shanabhai Rathwa, it is submitted that the said eyewitness stated that while deceased-Sakhiben was passing through the cross road, her son came from opposite direction and there was a conversation between them and her son got provoked and gave sword blow on his mother i.e. deceased. It is also stated by the said witness that the present appellant-convict has inflicted blow on the head of the deceased. It is further submitted by learned advocate for the appellant that the information was given through telephonic message to the family members, and thereafter, the police arrived at the scene of the offence. Likewise while referring the

deposition given by another eyewitness also, it is submitted that there are major contradictions in the deposition given by the said eyewitness as well. It is also pointed out from the cross-examination given by the said eyewitness that he stashed away the sword from the accused, but after the incident, the appellant-accused ran away from the spot. About the place of incident, it is submitted that there are major contradictions as according to learned advocate for the appellant from the evidence on record, it was populated area, whereas as per the deposition of the Investigating Officer, near the place of the incident where open vacant field was situated. Learned advocate for the appellant, in support of his submissions, has also referred to and relied upon the deposition given by the Medical Officer, who has not mentioned in the M.P. Note. While referring the cross-examination, it is also submitted that so far as injuries described in the P.M. Note is concerned, Injury no.1 cannot be caused by muddamal articles sword which was not mentioned in the postmortem report. Learned advocate for the appellant submits that the Investigating Officer is PW:12 and in his cross-examination, he has admitted that entry was not made in the police diary and without making any such entry of telephonic call in the incident, he has rushed to the scene of offence. It is submitted that the evidence of the Investigating Officer is required to be read along with the evidence of two eyewitnesses, whose statements are reliable piece of evidence, but doing so, it is submitted that there are

major contradictions, and therefore, the said evidence is not required to be believed. Learned advocate for the appellant further submits that the appellant is the son of the deceased, therefore it is beyond comprehension that a son could act or behave in a manner described in the incident. It is further submitted that as per the evidence of sister, the appellant-accused was having problem of mental disorder. It is also submitted that there is no other piece of evidence on record to substantiate this mental disorder, but the family members were knowing about the mental condition of the appellant-convict. It is also submitted that there is a consistent say as per the prosecution case that the appellant was not working. Moreover, his mental condition was also such on account of his unemployment, and therefore, the remarks which used to be passed against the accused appellant regarding his being unemployed by his mother frequently, drove the appellant-convict to act in a manner described in the complaint, whereby he was provoked and he might have given blow upon the mother, but there was no intention on the part of the appellant to commit such an act. It is further submitted that ingredients of Section 302 of the IPC are not attracted and satisfied in the instant case. However, the learned Trial Court, without appreciating the evidence on record, convicted and sentenced the present appellant for the offence punishable under Section 302 of the IPC. It is submitted that the case of the appellant- convict would fall within the parameters of Section 302 (II) of

the IPC. It is also submitted that the appellant-accused is a poor-man and was not having job at the relevant point of time and due to sudden provocation and on account of certain remarks made by his mother, unfortunate incident has occurred. At no stretch of imagination, it can be proved from the material that the appellant is responsible person for the offence under Section 302 of the IPC. Learned advocate for the appellant, in support of his submissions, has referred to and relied upon the decision given by the Hon'ble Supreme Court of India in the case of **State Vs. Sanjeev Nanda** reported in (2012) 8 SCC 450 and another decision given by the Hon'ble Supreme Court of India in the case of **Madanayya Vs. State of Maharashtra** reported in AIR 2017 SC 3064, wherein the the accused had no intention to cause death of the deceased. Therefore, the Hon'ble Apex Court converted the conviction of the accused from Section 302 to Section 304 (II) of the IPC. In the instant case, there is no cogent evidence to show that the appellant-convict has caused the injuries to the deceased with an intention to kill her. Therefore, keeping in mind the aforesaid decisions, the case of the appellant may be considered under Section 304 (II) of the IPC.

9. Ms.Hansa Punani, learned Additional Public Prosecutor for the respondent-State, while supporting the judgment and order passed by the Trial Court, submits that there is no major contradiction or material



contradiction in the instant case. It is submitted that the learned Trial Court, after appreciating the evidence on record more particularly the evidence given by two eyewitnesses, medical evidence and evidence given by the Investigating Officer and other witnesses, convicted and sentenced the appellant and the conclusion drawn by the learned Trial Court based on the evidence is required to be believed, and therefore, the order of conviction and sentence passed by the learned Trial Court may not be disturbed and conviction under Section 302 of the IPC may be upheld. Learned APP, in support of her submissions, has also referred to and relied upon the evidence given by two eyewitnesses. It is submitted that the evidence given by both the eyewitnesses inspired confidence about the said evidence being occurred in a natural way, and therefore, eye version is crucial piece of evidence and on the basis of the said evidence, the case of the appellant is proved. It is further submitted that there is a consistent say of all the prosecution witnesses that the appellant was jobless and was not doing any constructive activities. It is further submitted that the medical evidence given by the doctor is also in consistent with the observation made by Column No.17 in the postmortem report. It is further submitted that the deposition given by the Investigating Officer is also as per the investigation carried out by the said officer and there is no infirmity with the said evidence, and therefore, considering the totality of the material and oral evidence on record, the

view taken by the learned Sessions Court which is based on sound analysis of documentary evidence as well as oral evidence, may be taken into consideration. It is submitted that there is no infirmity with the findings recorded by the learned Trial Court, and therefore, the judgment and order passed by the Trial Court regarding conviction under Section 302 of the IPC may be upheld. It is submitted that the evidence of prosecution witnesses as well as oral and documentary evidence have been appreciated by the learned Trial Court in its proper perspective, and thereafter, the learned Trial Court has reached to the conclusion that the alleged offences are established against the present appellant. It is submitted that the order of conviction and sentence passed by the learned Trial Court convicting the present appellant for the alleged offences may not be disturbed. Learned APP further submits that the learned Trial Court has properly appreciated the evidence and there is no infirmity in the findings recorded by the learned Trial Court. Therefore, the present appeal may be dismissed and the order of conviction and sentence may be confirmed. It is further submitted that if the Hon'ble Court is not inclined to disturb the order of conviction passed against the appellant, an appropriate order that may be deemed fit and proper by this Court may be passed considering the facts and circumstances of the case.

10. Regard being had to the above submissions and considering the

evidence on record, the prosecution case is required to be evaluated on the basis of oral evidence given by two eyewitness, medical evidence and the evidence of the Investigating Officer. The other witnesses are hearsay witnesses. On perusal of the evidence of crucial witnesses and versions of two eyewitnesses read with medical evidence and the evidence of the Investigating Officer, it appears that the deceased mother was not happy with the conduct and behaviour of his son who was roaming here and there without doing any work. On the date of incident, mother and son met on the road. The mother asked him to do some work instead of roaming here and there which is not liked by the son. On account of sudden provocation due to remarks made by the mother, the appellant has committed act of giving assault upon his mother-deceased. It appears from the material on record that this version is given by the eyewitness viz. PW:2 Shanabhai Punabhai Rathwa and the second version is also given by PW:3 Bharatbhai Melabhai Rathwa. It also appears that the sister of the appellant-accused viz. PW:6 Sumitraben Bhimsinghbhai Virsinghbhai Rathwa at Exh.:22 has also stated about the mental condition of the appellant and there is concrete evidence to support this version, but the fact remains that there is a consistent say of all the eyewitnesses that the appellant-convict was jobless, and therefore, it can be presumed that being an unemployed, the appellant was depressed and was not having proper frame of mind which resulted in the act of

committing murder of the mother, but looking to the relationship between the appellant-convict and the deceased person and also considering the above referred decisions cited by the appellant, no son can intentionally commit such act. Moreover, there is nothing on record to show that there was property dispute between the appellant and other family member such as mother and other relatives. Therefore, as such, there is no material on record to substantiate this particular submission. However, looking to the evidence of two eyewitnesses and the occurrence of incident, the factum of injury is proved, but manner in which the incident has occurred, is required to be seen, and therefore, by appreciating the entire evidence on record including the evidence of Medical Officer and the evidence given by the Investigating Officer as also considering the map prepared by the Mamlatdar, who has deposed before the Court as one of the witnesses PW:11, we are of the view that the case of the appellant deserves consideration for the offence punishable under Section 304 (II) of the IPC. The place of incident appears to be surrounding vacant field and there were no shops, houses adjacent to the place of incident. It was not populated area, and therefore, the version of eyewitness along with the evidence given by the Investigating Officer regarding place of incident, there appears to be minor contradictions and such minor contradictions cannot fatal prosecution case. The provisions as contained in Section 300 Exception-1, 302 and 304 (II) of the IPC are

reproduced hereinbelow which are necessary to be looked into for proper adjudication of the issue involved:

*“300. Murder – Exception 1. - **When culpable homicide is not murder** – Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.”*

*“302. **Punishment for murder-***

*Whoever commits murder shall be punished with death, or [imprisonment for life] and shall also be liable to fine.”*

*“304. **Punishment for culpable homicide not amounting to murder-***

*Whoever commits culpable homicide not amounting to murder shall be punished with [imprisonment for life ],or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death,*

*or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death ,but without any intention to cause death, or to cause such bodily injury as is likely to cause death.*

***Part- II- Punishment – Imprisonment for 10 years, or fine, or both – Cognizable – Non-bailable – Triable by Court of Sessions – Non-Compoundable.”***

11. In view of the aforesaid factual as well as legal position emerging

from the material on record, it appears that the case of the appellant does not fall within the parameters of Section 302 of the IPC, but at the same time, looking to the evidence on record more particularly the evidence given by the eyewitnesses and other prosecution witnesses and also considering the decision given in the case of **Madanayya Vs. State of Maharashtra (supra)**, we are of the view that we convert the conviction of the accused from Section 302 to Section 304 (II) of the IPC and the case of the appellant would fall within the parameters under Section 304 (II) of the IPC as it was done due to sudden provocation and there was no intention on the part of the appellant to commit murder of the deceased described in the prosecution witnesses. Hence, the judgment and order dated 27.06.2012 passed by the learned 5<sup>th</sup> Additional Sessions Judge, Vadodara in Sessions Case No.18/2012 for the offences punishable under Section 302 of the Indian Penal Code, qua conviction of the appellant for the offence under Section 302 of the IPC is required to be converted into the offence under Section 304(II) of the IPC.

12. In view of the above, the present appeal is ***partly allowed*** and the judgment and order dated 27.06.2012 passed by the learned 5<sup>th</sup> Additional Sessions Judge, Vadodara in Sessions Case No.18/2012 for the offences punishable under Section 302 of the Indian Penal Code, qua conviction is modified to the extent that the conviction of the appellant for the offence

under Section 302 of the IPC is ordered to be converted into the offence under Section 304(II) of the IPC and the period of sentence already undergone shall be treated as the sentence for the offence under Section 304(II) of the IPC. Rest of the judgment shall remain unaltered. Record and Proceedings be sent back to the Trial Court concerned forthwith.

**(P.P.BHATT, J)**

**(B.N. KARIA, J)**

rakesh/