

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/CRIMINAL APPEAL NO. 490 of 2014****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE P.P.BHATT****Sd/-****and****HONOURABLE MR.JUSTICE B.N. KARIA****Sd/-**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

**HIMATBHAI NANJIBHAI VALA****Versus****STATE OF GUJARAT****Appearance:****HCLS COMMITTEE(4998) for the PETITIONER(s) No. 1,2****MS SHUBHA B TRIPATHI(5597) for the PETITIONER(s) No. 1,2****MR KL PANDYA, APP (2) for the RESPONDENT(s) No. 1****CORAM: HONOURABLE MR.JUSTICE P.P.BHATT****and****HONOURABLE MR.JUSTICE B.N. KARIA****Date : 30/06/2018****ORAL JUDGMENT****(PER : HONOURABLE MR.JUSTICE B.N. KARIA)**

1. The appellants have preferred this appeal under Section 374 of the Criminal Procedure Code against the judgment and order of conviction dated 30.12.2013 passed by learned 2<sup>nd</sup>

Additional Sessions Judge, Rajula, District-Amreli, in Sessions Case No.79 of 2011, whereby the accused-appellants herein came to be convicted for the offences punishable under Sections 302 and 201 of the Indian Penal Code as well as for the offence punishable under Section 135 of the Gujarat Police Act. For the offence under Section 302 of IPC, the accused were ordered to undergo imprisonment for life and to pay fine of Rs.50,000/- and, in default of payment of fine, further two years' simple imprisonment was awarded. For the offence under Section 201 of IPC, the accused were ordered to undergo three years' simple imprisonment and to pay fine of Rs.2,500/- and, in default of payment of fine, further two months' simple imprisonment was awarded. For the offence under Section 135 of the Gujarat Police Act, the accused were ordered to undergo simple imprisonment for one month and to pay fine of Rs.250/- and, in default of payment of fine, further seven days' simple imprisonment was awarded. All the sentences were ordered to run concurrently.

2. Complainant is the brother of the deceased-Lavjibhai Bhanabhai Makwana. The case of the prosecution is that the accused and the complainant are neighbours. As the deceased and sister of the accused persons, viz. Baliben were in love

with each other and they got married, it was not liked by the accused persons. Due to this reason, Baliben along with the deceased went to reside at another place and was not coming in the village. Once when the deceased came to the village, the accused persons tried to assault him but he ran away. The accused were in search of a chance to kill the deceased. On 21.8.2011, due to festival, the complainant and deceased along with other persons went to the house of Sarpanch to meet him. Deceased went to the village from there by taking motorcycle from the Sarpanch. In the evening, the deceased left the village to go to Rajula. Thereafter, the deceased was not traceable. On 23.8.2011, Baliben, wife of the deceased, went to the house of Sarpanch and informed that the deceased has not reached Rajula. Therefore, the Sarpanch asked the complainant to inquire about his brother. On 27.8.2011, Sarpanch informed the complainant that the motorcycle, which the deceased had borrowed from him, is lying on the way from Rajula to Katar. The complainant informed the police and they also went to the spot. Upon being searched, dead body of the deceased was found from a well in the farm of Chhaganbhai Parmar. Therefore, it is alleged that as the accused did not like the marriage of their sister with the deceased, they killed the deceased and thrown his dead body in a well.

3. Upon investigation being carried out, charge-sheet was filed in the Court of Judicial Magistrate, First Class, against the accused persons for the above referred offences. Since the offence is triable exclusively by the Court of Sessions, the case was committed to the Sessions Court. Thereafter, charge was framed against the accused and the accused pleaded not guilty to the charge and claimed to be tried.

4. During trial, the prosecution has examined as many as 24 witnesses and also produced documentary evidence on record. After completion of trial, learned Judge convicted the accused persons for the offences, as aforesaid, and imposed the sentence as referred to in earlier paragraph.

5. Being aggrieved by and dissatisfied with the said judgment and order of conviction dated 30.12.2013 passed by learned 2<sup>nd</sup> Additional Sessions Judge, Rajula, District-Amreli, in Sessions Case No.79 of 2011, present appeal is preferred by the appellants-accused challenging the impugned judgment and order.

6. Heard learned advocate Ms.Shubha Tripathi for the appellants and Mr.K.L.Pandya, learned APP for the respondent-State.

7. It is submitted by learned advocate for the appellants that the judgment and order passed by learned Sessions Judge dated 30.12.2013 in Sessions Case No.79 of 2011 convicting present appellants is bad in law, illegal and liable to be quashed and set aside. That learned Sessions Judge has completely based the conviction on theory of last seen together as well as suspicion, as can be seen from FIR at Exh.26 and deposition of other witnesses, admittedly, who were not eye witnesses. It is further argued that deceased was missing from 21.8.2011 and prosecution witnesses started searching the deceased, however, till registration of FIR dated 27.8.2011, none of the relatives have slightly doubted on the present appellants and only after they found the motor cycle, names of the accused were given on the basis of suspicion. It is further submitted that PW-3, Dr.Vanraj Nathubhai Parmar, who has performed postmortem on the dead body of the deceased has admitted that because of the de-composed body, he was not in a position to give opinion regarding injury no.1 found on the dead body as well as to opine whether the injury found on the dead body can be caused by weapon having edge on one side or by a weapon having edges on both sides. That evidence of the complainant itself is contradictory to each other and story of murder by the present appellants is

falsely created and deposition of the complainant as well as other witnesses are not at all trustworthy. That panch of panchnama of motorcycle has turned hostile and sarpanch Sureshbhai, owner of the motorcycle, has not stated regarding condition of the motorcycle and damage caused during such incident. That dead body of the deceased was recovered from the well showed by the appellants. Though panch witnesses of the discovery panchnama, PW-1 and PW-2 have turned hostile, learned Sessions Judge has relied on the deposition of Sarpanch. That regarding discovery of the dead body at the instance of the appellant, it is totally contrary to the facts and evidence on record. The deposition of the wife of the deceased does not help in completing the chain of evidence, as required in the case of circumstantial evidence. It is admitted that the deceased had driven through the road between Rajula and Moti Katar several times in seven months and no untoward incident had ever taken place. That motorcycle was never seized by the police to forward it to FSL and it was returned directly to the Sarpanch. The panch witnesses of the motorcycle have turned hostile. As such whole story of motorcycle is not convincing and cannot be relied upon to complete the chain of circumstantial evidence. From the deposition of the prosecution witnesses, they have created

doubt that the present appellants have committed the murder of the deceased and are not the eye witnesses and, therefore, there is absence of any reliable, admissible, clear evidence regarding such incident. The dead body of the deceased was identified only on the basis of floaters (chappals). Hence, it cannot be said to be conclusive identification of the deceased Lavjibhai. As dead body was completely de-composed, DNA test has failed, and as such the body cannot be said to be conclusively identified on the basis of floaters. There was complete missing of intention or knowledge on the part of the appellants to commit murder of the deceased. Therefore, it is requested by learned advocate to quash and set aside impugned judgment and order passed by learned Sessions Judge. Alternatively, she has fairly submitted that if this Court is not satisfied to quash and set aside the impugned judgment, she could not claim clean acquittal or could not claim benefit of doubt and tried to persuade to the Court that conviction under Section 302 may be modified and the present appellants may be convicted under Section 304, Part-I, of the Indian Penal Code.

8. On the other hand, learned APP, Mr.Pandya has strongly opposed the contentions raised by learned advocate for the

appellants. It is submitted that trial Court has passed the impugned judgment and order taking into consideration the facts and circumstances of the case as well as material, in the form of oral and documentary evidence produced before it and, hence, no interference is called for and the appeal deserves to be dismissed. Learned APP has further contended that it is the case of brutal murder and, therefore, no leniency should be shown to the accused since the injuries are on the vital part of the body. Hence, no interference is called for and appeal deserves to be dismissed.

9. Having gone through the complaint, deposition of the prosecution witnesses, record of the trial Court as well as considering the arguments advanced by learned advocates appearing for the respective parties, it is undisputed that the prosecution case is completely based on circumstantial evidence and there is no eye witness available with the prosecution. If we consider the deposition of Dr.Vanarj Parmar, PW-3, Exh.16, it appears that dead body of the deceased Lavjibhai was identified before postmortem was being carried out by this witness. This fact was never challenged by the appellants-accused nor it was denied. As per the postmortem report produced at Exh.17, dead body was handed over to



Head Constable, Shri A.G.Pada of Rajula Police Station. The dead body was found on 28.8.2011 at about 4 p.m. and postmortem was started on 29.8.2011 at about 8.15 a.m. and was completed at 10.45 a.m. In a letter written to Forensic Department, Exh.18, name of the deceased was also shown as Lavjibhai Bhanabhai Makwana, which is not challenged by the accused persons. If we consider other documents produced on record, Exh.19 and Exh.20, in both these letters name of the deceased was shown as Lavjibhai Bhanabhai, resident of Old Katar at present Rajula. The defence has not challenged these documents.

10. The brother of the deceased, Rameshbhai Bhanabhai, PW-4, Exh.26, was examined by the prosecution. As per his statement, he has also stated that dead body of his brother Lavjibhai was found from the well and it was identified by this witness. Deposition of the witness was never challenged in the cross-examination. In the complaint, Exh.27, it is stated that dead body was taken from the well and footwear were lying nearby the well which was belonging to the deceased. From the footwear the dead body was identified by the complainant, his brother. This was also not challenged by the defence side. PW-5, Madhabhai Bhanabhai Makwana, Exh.30, has also

supported the statement of other witnesses and, therefore, it was ascertained and affirmed that dead body was of the deceased, Lavjibhai Bhanabhai. It appears that identification of dead body of the deceased was not challenged by the defence side. Another witness, PW-7, Sureshbhai Amrubhai, Exh.33, has also stated in his deposition that dead body found from the well was of Dago @ Lavjibhai and he has also identified the same. PW-9, Baliben Lavjibhai was examined vide Exh.38. She is the sister of the accused and wife of the deceased. Her deposition was also not challenged by the defence side and, therefore, the defence raised by the accused side that dead body was not identified cannot be believed as prosecution witnesses have categorically identified the dead body of the deceased Lavjibhai Bhanabhai, there cannot be any doubt that it was not of the deceased. Learned Sessions Judge has rightly considered this issue in proper manner.

11. As per the deposition of the prosecution witness-5, Madhabhai Bhanabhai Makwana, Exh.30, he was standing with the deceased at about 4.30 p.m. on the day of incident, at that time also, some quarrel took place with the accused and while going to their filed, the accused were staring angrily towards the deceased. Thereafter, within a short time deceased started

to leave for Rajula from Village-Moti Katar and taking advantage of the situation, deceased was attacked by the accused. The motor cycle was thrown in a ditch and murder was committed by them. It was a clear that chain of last seen together was complete from the evidence available with the prosecution. Further, Sarpanch Sureshbhai Amrubhai was examined by the prosecution vide Exh.33, who happens to be an independent witness as he has no enmity with the accused. If we consider the conduct of the accused, it appears that there was love affair with the sister of the accused-Baliben and, therefore, they married each other. This marriage was disliked by the accused and, therefore, the deceased and sister of the accused, Baliben, left their village and went to Surat for a period of one and a half months and after returning back started residing in a rented premises at Rajula instead of Moti Katar village. The accused asked their sister to return back at matrimonial home, at that time Baliben informed that she had got married with the deceased and showed marriage papers. The accused again threatened to commit their murder if they visit Village-Moti Katar. This fact was informed by Baliben to her husband i.e. the deceased. At that time the deceased informed her that both the accused wanted to beat them. Baliben has further stated that while her husband-deceased

had visited Katar Village during *Urs* at that time also, both the accused had tried to beat them with a stick. However, they ran away in a rickshaw and saved themselves. It is to be noted that the accused were staying at Village-Katar and nearby to their house, Lavjibhai was residing. As sister of the accused married with the deceased, they had a grudge against him and, therefore, many a times, they were trying to assault the deceased. On the date of the incident as well as in the past, accused had took up quarrel with the deceased. Evidence of Baliben, who happens to sister of the accused, is material for the prosecution. She had no enmity with the accused and no question was asked by the defence on this point. From the record, it appears that from the conduct of the accused in the past as well as on the day of incident, theory of last seen together, identification of the dead body, prosecution has proved its case beyond reasonable doubt.

12. The motorcycle was found from a ditch nearby the place of offence. Said motorcycle was borrowed by the deceased Lavjibhai from the prosecution witness, Sureshbhai Amrubhai, Sarpanch of the village. Dead body was found from a well. Nearby the well one field was hired by the father of the accused. This indicates that both the accused are involved in

committing murder of the deceased. There is nothing on record that there was enmity of the accused with the deceased and no one else. Sister of the accused had got married with the deceased and, therefore, they had a grudge against the deceased and, therefore, he was murdered by the accused. To destroy the evidence, dead body of the deceased as well as footwear and knife were thrown in the well. Dress of the deceased was hidden by the accused.

13. We are unable to persuade ourselves that it is a clear case of acquittal and the reason for the same is that sister of the accused has supported the prosecution case as she was married with the deceased. She came into contact with the deceased as deceased was living nearby her house in Village-Katar. The love marriage of the sister of the accused was disliked by the accused and they were trying to assault on the deceased number of times. On the day of incident and previously also, they had tried to assault on the deceased but the deceased himself and his wife Baliben could save themselves.

14. On the date of the incident, motorcycle was borrowed by the deceased from Sureshbhai, who happens to be the

Sarpanch of the village for a short period. The deceased wanted to visit another village on the festival of *satam* and *aatham*. Identification of the dead body was clearly proved by the prosecution. Injuries found on the dead body was sufficient to cause death as per the opinion of medical officer, who performed postmortem. The FSL report and the theory of last seen together in the evidence of the witness would go to show that it was the accused and accused only, who had committed the offence and, therefore, we are unable persuade ourselves to take a different view than the one taken by learned trial Judge.

15. Further, as per the postmortem report and the medical evidence, case was made out that it was a homicidal death. From the injuries found on the dead body, Dr.Vanraj Parmar, Exh.16 has stated that dead body was in a de-composed and partially skelatanised condition. There were six injuries on the body. Injury no.1 was caused before death. This witness is not in a position to confirm that other injuries were caused before the death. Pleural membrane and pericardium covering the the lungs and the heart were de-composed. Due to de-composition, blood sample was not available. Five to seven days before the postmortem, death was caused.

16. Marriage of sister of the accused with the deceased solemnized and registered at Ahmedabad on 22.1.2011. This incident has taken place after a period of seven months i.e. in August 2011. Of course, there is some evidence produced by the prosecution that due to love marriage of the deceased with the sister of the accused, they had a grudge against him and, therefore, they tried earlier to assault the deceased. After passing of seven months of marriage, *prima facie*, this Court is of the view that the accused has committed murder 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. The act committed by the accused may be in a hit of passion and deceased died due to shock on account of injury.

17. We are unable to persuade ourselves to accept the submissions of learned advocate for the appellant Ms.Tripathi that this is a case of not offence under Section 302 of IPC, as no blood was found from the dead body as it was de-composed body. However, looking to the injuries, time of the incident and considering the fact that there was no intention to cause death, we are of the view that the offence does not fall under Section 304, Part (II) of IPC. From the relevant consideration

and appreciation of evidence, it cannot be said that the accused had no knowledge that injury was likely to cause death. The case would fall within the purview of Section 304, Part (I) of IPC. As per the decision of Honourable the Apex Court in the case of **Bakshish Ram and Another v. State of Punjab** reported in **AIR 2013 SC 1484**, it is held that High Court should apply its independent mind and record its own finding and record independent assessment of evidence. In view of above discussion, there is no doubt left in our mind as to the guilt of the appellants. However, at the same time, we feel that looking to the totality of the facts and circumstances of the case under which alleged incident occurred, accused had knowledge of the fact that attacking with a knife on the body of the deceased would cause death.

18. We are, therefore, inclined to accept the submission of learned advocate for the appellant that in the facts and circumstances of the case, and hold that Section 304, Part (I) would be attracted and this case would not fall under Section 302 of IPC. Hence, this appeal deserves to be allowed partly.

19. In the result, appeal is allowed in part. The impugned judgment and order dated 30.12.2013 passed by learned 2<sup>nd</sup>



Additional Sessions Judge, Rajula, District-Amreli, in Sessions Case No.79 of 2011 is modified and instead of offence punishable under Section 302 of IPC, accused nos.1 and 2 are held guilty for offence punishable under Section 304, Part (I) of IPC and ordered to undergo ten years' rigorous imprisonment. The default sentence shall remain unaltered. Rest of the judgment and order of the trial Court is confirmed. The period of sentence already undergone by accused may be given set off to them. Record and Proceedings be sent back to the trial Court forthwith.

20. This Court deems it just and proper to consider the victim compensation angle. The State Government has formulated Victim Compensation Scheme under Section 357 (A) of the Criminal Procedure Code so as to provide compensation to the victim who has suffered loss or injury on account of offence against body. The Victim Compensation Scheme is introduced with a laudable object of rehabilitation of the victim/his dependents. Considering the fact that Baliben had married the deceased seven months prior to the date of incident and in the incident she has lost her husband at the hands of the accused, who are her real brothers. Therefore, we are of the opinion that she should be compensated with a view to support her to live

the remaining life. In our opinion, she should be awarded Rs.2 Lacs under the Victim Compensation Scheme. Therefore, the Secretary, State Legal Services Authority, is directed to take necessary steps for providing compensation to the victim under the Victim Compensation Scheme. The action taken report be placed before this Court within a period of one month.

Sd/-  
**(P.P.BHATT, J)**

Sd/-  
**(B.N. KARIA, J)**

R.S. MALEK