

(2004) 08 GUJ CK 0001
In the Gujarat High Court
Case No : Criminal Appeal No. 830 of 1996

Shanabhai Balubhai Nayak

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 16-08-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374(2)
Penal Code, 1860 (IPC) — Section 300, 301, 302, 304, 304A

Citation : (2004) 08 GUJ CK 0001

Hon'ble Judges : J.R. Vora, J;J.M. Panchal, J

Bench : Division Bench

Advocate : G. Ramakrishnan, for the Appellant; U.R. Bhatt, APP, for the Respondent

Final Decision : Dismissed

Judgement

J.M. Panchal, J.—Instant appeal filed u/s 374(2) of the Code of Criminal Procedure, 1973, ("the Code" for short) is directed against judgment dated September 24, 1996 rendered by the learned Sessions Judge, Panchmahals at Godhra, in Sessions Case No.56 of 1996 by which the appellant is convicted of the offence punishable u/s 302 read with Section 301 of Indian Penal Code ("IPC" for short), and sentenced to suffer R.I. for life and fine of Rs.200=00 (Rs.Two Hundred Only), in default R.I. for three months.

2. The appellant is a resident of village Khandivav, Taluka Jambughoda, District Panchmahals. Deceased Lilaben was his wife. The appellant has two sons, i.e. Ranjit and Arjun. Ranjit is widower and, therefore, was residing with the appellant whereas Arjun was residing in a separate house situated near the house of the appellant. The incident in question took place on November 7, 1995 in the house of the appellant. Jashiben, who is daughter of the appellant, had come to the house of the appellant for delivery and was accompanied by her husband, Rajubhai. The appellant was suspecting chastity of his wife. At about 9.30 p.m., the appellant started abusing the deceased, as a result of which, an

altercation and scuffle took place between the appellant and the deceased. On hearing commotion, Arjunbhai, who was residing in a nearby house, came to the house of the appellant and found that the appellant was quarreling with his mother. The abuses which were hurled by the appellant were also heard by his son-in-law Rajubhai. Rajubhai, after expressing his displeasure at the conduct and behaviour of the appellant, left the house of the appellant to go to his house situated in village Malu, but was persuaded to return by Ranjitbhai who had come back after attending his duties in a factory. It was found by Ranjit also that the appellant was quarreling with his mother. Therefore, he persuaded his father not to quarrel with his mother. Thereupon, a quarrel took place between the appellant and his son Ranjit. In a flash, the appellant took out a "chharo", (a large and sharp knife) blade of which was seven inches long and handle of which was four inches long, and aimed the same at Ranjitbhai to cause an injury to him. Deceased Lilaben, who was wife of the appellant and mother of Ranjit, apprehended that the appellant would kill Ranjit. She, therefore, rushed and came in between. The appellant inflicted knife injury on her chest which was upward in direction. Because of great force with which injury was inflicted on the deceased, the deceased sustained fracture of 4th and 5th ribs whereas anterior wall of her heart was cut. Because of serious injuries sustained by her, the deceased bled profusely and died on the spot within no time. After the deceased fell down on the ground, an attempt was made by the appellant to run away which was foiled by his two sons, and while making an attempt to run away, the appellant threw the big knife in a hedge. In the melee, the appellant also sustained injury on his hand by his knife. The appellant was apprehended by his two sons and son-in-law and tied with a pole. Arjunbhai went to Jambughoda Police Station along with two persons and lodged first information report at about 10.00 p.m.. The information given by Arjunbhai was reduced into writing by Mr.R.M.Rathod, who was then PSI of Jambughoda Police Station. The Police Officer immediately went to the place of the incident and found that the appellant was tied with a pole. After drawing panchnama of his person, the appellant was arrested. As an injury was sustained by the appellant, he was referred to Jambughoda Community Health Centre for treatment. In the early morning of the next date, i.e. November 8, 1995, inquest on the dead body of the deceased was held in presence of panch witnesses. Investigating Officer drew panchnama of place of occurrence from where bloodstained earth and bloodstained chharo were recovered. He also recorded statements of those persons who were found conversant with the facts of the case. The dead body of the deceased was sent to the Hospital for postmortem examination. On completion of investigation, the appellant was chargesheeted in the Court of learned Judicial Magistrate First Class, Halol, for commission of offence punishable under Sections 302 read with 301 IPC. As the offence punishable u/s 302 IPC is exclusively triable by a Court of Sessions, the case was committed to the Sessions Court, Panchmahals at Godhra, for trial where it was numbered as Sessions Case No.56 of 1996.

3. The learned Sessions Judge, Panchmahals at Godhra, framed charge against the appellant at Exh.3 of the offence punishable under Sections 302 read with 301 IPC. The charge was read over and explained to the appellant who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined : (1) Arjunbhai Shanabhai as P.W.-1 at Exh.16; (2) Ranjitbhai Shanabhai as P.W.-2 at Exh.18; (3) Ramsingbhai Mansukhbhai as P.W.-3 at Exh.19; (4) Dr.Bharat Sharadchandra Vyas as P.W.-4 at Exh.20; (5) Govindbhai Maganbhai Baria as P.W.-5 at Exh.23; and, (6) Raghunathsinh Motisinh Rathod as P.W.-6 at Exh.25, to prove its case against the appellant. The prosecution also produced documentary evidence such as inquest panchnama at Exh.7; panchnama indicating seizure of clothes of the deceased at Exh.8; report of analysis issued by expert of Forensic Science Laboratory at Exh.14; First Information Report lodged by complainant, Arjunbhai at Exh.17; postmortem notes of the deceased at Exh.21; certificate of injury sustained by the appellant at Exh.22; panchnama of place of occurrence at Exh.24; map of place of incident at Exh.27; etc. in support of its case against the appellant.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellant the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement as required by Section 313 of the Code. In his further statement, the appellant admitted that it was true that on or about November 7, 1995 his daughter Jashiben had come to his house for delivery and that on the date of the incident, he had a quarrel with his son Ranjit. However, he denied that he had caused injury to deceased Lilaben who had come in between when the appellant had aimed blow of chharo at Ranjitbhai. The appellant also admitted that during the night of the incident, he had sustained injuries for which he was referred to Government Dispensary, Jambughoda, where he had taken treatment. Though the claim of the appellant in his further statement was that the case of the prosecution against him was false, he neither entered into witness box nor tendered evidence of any witness in support of his claim, which was advanced in further statement.

5. On evaluation of evidence adduced by the prosecution and after hearing the learned counsels of the parties, the learned Sessions Judge held that it was proved by the prosecution beyond reasonable doubt that the deceased died a homicidal death. According to the learned Judge, the sworn testimony of Arjunbhai Shanabhai, who was son of the appellant and the deceased, as well as testimony of Ranjitbhai, who was also son of the appellant and the deceased, and that of Ramsingbhai Mansukhbhai, who was an independent witness, established beyond reasonable doubt that the appellant inflicted fatal injury on the deceased with a knife. The learned Judge noticed that as per Dr.Vyas, injury sustained by the deceased was sufficient in ordinary course of nature to cause her death. According to the learned Judge, the principle of transfer of malice as contemplated by Section 301 IPC was applicable to the facts of the case and that the appellant was liable to be convicted u/s 302 IPC for commission of murder of

his wife with the help of provisions of Section 301 IPC. In view of abovereferredto conclusions, the learned Judge has convicted the appellant u/s 302 read with Section 301 IPC and imposed sentences referred to above by judgment dated September 24, 1996 giving rise to instant appeal.

6. Mr.G.Ramkrishnan, learned counsel of the appellant, contended that it is not proved by the prosecution beyond reasonable doubt that the appellant had inflicted fatal blow with a knife on the deceased and, therefore, the impugned judgment should be set aside. What was highlighted by him was that Arjunbhai i.e. P.W.-1, Ranjitbhai i.e. P.W.-2, and Ramsinghbhai i.e. P.W.-3, all have categorically stated in their examination-in-chief that knife blow was caused to the deceased by the appellant by mistake and not intentionally, which is evident from the use of the word "vagelo" and not the word "marelo", which would have been used by the witnesses if the injury had been caused to the deceased by the appellant intentionally and, therefore, the appeal should be accepted. In the alternative, it was argued that the facts of the present case would be governed either by Exception 1 or Exception 4 or Exception 5 to Section 300 IPC and, therefore, conviction of the appellant should be converted from one punishable u/s 302 to 304 Part II IPC, and sentence already undergone by him should be imposed for commission of offence punishable u/s 304 Part II IPC. Elaborating the said contention, it was argued that suspicion, which was entertained by the appellant against his deceased wife, has not been explained by the prosecution witnesses and it could have also been relating to poor financial condition or financial management or poor domestic management etc., whereas daughter Jashi, who had come for delivery along with her husband had intended to camp at the house of the appellant and in order to shoo them away, the appellant had picked up artificial quarrel with the deceased and the appellant had nearly succeeded in his feigned attempt, but it was Ranjit, who had poured water over the entire effort of the appellant by wooing his brother-in-law, Rajubhai, and persuading him to return to the house whereas Ranjit had also rebuked the appellant for unnecessarily quarreling with his mother which had gravely and suddenly provoked the appellant and, therefore, instant case would be governed by the provisions of Exception 1 to Section 300 IPC. It was further argued that the act of causing death of the deceased was not done by the appellant with premeditation, but the death had taken place in a sudden provocation and in a heat of passion upon a sudden quarrel and as the appellant had not taken undue advantage or acted in cruel manner by inflicting any other blow to the deceased or to his son, Ranjit, or acted in an unusual manner, the provisions of Exception 4 to Section 300 IPC would be attracted to the facts of the case. According to the learned counsel of the appellant, the prosecution has not established that it was the intention of the appellant to do away with Ranjit, who was his eldest son, and had flashed knife probably to scare and prevent him from interfering with the quarrel between the husband and the wife, but the appellant had no knowledge that his wife would suddenly jump in between when he was chasing Ranjit with a knife and as the deceased took the risk of her death with her own consent/

choice, instant case would also fall under Exception 5 to Section 300 IPC. The learned counsel of the appellant argued that the learned Sessions Judge has failed to appreciate the evidence in its true perspective and, therefore, the appeal should be accepted.

7. Mr.U.R.Bhatt, learned Additional Public Prosecutor, contended that trustworthy and cogent testimony of witness Arjun, witness Ranjit, and witness Ramsingbhai, establishes that the appellant had caused death of the deceased by inflicting knife blow on vital part of her body and, therefore, the conviction of the appellant u/s 302 read with Section 301 IPC should not be regarded as erroneous. According to the learned Additional Public Prosecutor, the evidence on record proves that witness Ranjitbhai, who is son of the appellant, had attempted to persuade the appellant not to quarrel with the deceased, but the appellant who was armed with a dangerous weapon had chased witness Ranjitbhai and, therefore, there is no manner of doubt that it was the intention of the appellant to kill Ranjitbhai. It was explained by the learned Additional Public Prosecutor that apprehending injury to her son at the hands of the appellant, the deceased had intervened and received fatal blow which was travelling in upward direction and, therefore, the provisions of Section 302 read with Section 301 IPC would stand attracted to the facts of the case. What was argued was that when an accused aiming at one, kills another person, he would be punishable for murder under doctrine of transfer of malice, as contemplated by Section 301 IPC and, therefore, conviction of the appellant u/s 302 read with Section 301 IPC is eminently just. Dealing with the plea raised by the learned counsel of the appellant that the provisions of Exception 1, Exception 4 and Exception 5 to Section 300 IPC are attracted to the facts, it was argued that there was no provocation from the deceased whereas an attempt made by witness Ranjit to persuade the appellant not to quarrel with deceased can hardly be regarded as grave and sudden provocation within well settled principles of law and, therefore, the appellant is not entitled to benefit of provisions of Exception 1 to Section 300 IPC. According to the learned Additional Public Prosecutor, there is nothing on record to suggest even remotely that the appellant had suspicion relating to poor financial condition and financial management or poor domestic management or in order to shoo away Jashi and her husband, a show of quarrel between the appellant and the deceased was created and, it is wrong to contend that there was any provocation to the appellant either from deceased or from anyone. It was pointed out by the learned Additional Public Prosecutor that the fact that the appellant had armed himself with a dangerous weapon and had hit the deceased on vital part of her body in a quarrel, which had not taken place suddenly, would indicate that the act of causing death of the deceased was committed with premeditation and as the appellant had taken undue advantage of the situation by giving blow with great force to the deceased, the provisions of Exception 4 to Section 300 would also not be applicable to the facts of the case. It was pleaded that the argument that the provisions of Exception 5 to Section 300 IPC are attracted to the facts of the case is based on inferences and surmises which have

no factual foundation at all. According to the learned APP, cogent and convincing reasons have been assigned by the learned Sessions Judge for convicting the appellant u/s 302 read with Section 301 IPC and, as the learned advocate of the appellant has failed to dislodge the same, the appeal should be dismissed.

8. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

9. The fact that the deceased died a homicidal death can hardly be a matter of dispute. Three eye witnesses, namely, Arjunbhai Shanabhai, P.W.-1; Ranjitbhai Shanabhai, P.W.-2, and Ramsingbhai, P.W.-3, have in terms maintained before the Court that the deceased had sustained knife injuries at the hands of the appellant. The injuries sustained by the deceased are mentioned in inquest panchnama, which is produced on record of the case at Exh.7. Testimony of Dr.Bharat Vyas, examined at Exh.20, would show that at the relevant time, he was discharging duties as Medical Officer of Jambughoda Community Health Centre and that he had received dead body of the deceased on November 8, 1995 at about 9.45 a.m. for postmortem examination. The Medical Officer has enumerated external as well as internal injuries, which were noticed by him while performing autopsy on the dead body of the deceased, in his substantive evidence before the Court. Those injuries are also enumerated in postmortem notes prepared by him. Postmortem Notes of the deceased are produced at Exh.21. The external injuries which were found on the dead body of the deceased have been enumerated in Column No.17 of the postmortem notes. They are as under:

"Incised wound over chest on lower 1/3rd of sternum at level of 4th & 5th Rib Extended Lt. laterally obliquely upward tapering at both end. 2" x 1" Skin & Subcutaneous. Tissue completely cut up to Rib"s. Bleeding from wound. Fracture 4th and 5th (Lt.) Rib Anteriorly near Lt. Sterno Costal junction."

The internal injuries, which have been enumerated in Column No.20 of the postmortem notes, are as under:

"At level of 4th & 5th Rib 1 Inch Lt. Lateral to sterno costal Junction Subcutaneous Tissue / Enter Costal Muscles, 4th & 5th Rib incised obliquely upward and laterally on Lt. side 2"x2" Chest wall completely cut Haematoma in surrounding tissue. Hemorrhage in Lt. Chest Cavity.

Pale.

Hemorrhage in pleural cavity lung collapse/pale.

Incised wound on anterior surface. Extended obliquely upward & Lt. Laterally 2" x 2" Hemorrhage in Pericardial cavity. Incised wound on anterior wall of heart. Extended obliquely upward and Lt. Laterally from Rt. Ventricle to Lt. Ventricle completely piercing. Heart anterior posteriorly Rt. & Lt. Ventricle cavity open and exposed. Inter ventricular septum incised 2" x 2" x 2". All chambers empty. Walls

pale. No injury to large vessels."

The Medical Officer has specifically stated before the Court that above injuries were ante mortem and they were possible by chharo, which was shown to the witness during the course of recording his testimony. It is not the case of any one that that abovereferredto injuries were received by the deceased in an accident or were self-inflicted. Under the circumstances, the finding recorded by the learned Sessions Judge that it is proved by the prosecution beyond reasonable doubt that the deceased died a homicidal death, is eminently just, and is hereby upheld.

10. In order to determine the guilt or otherwise of the appellant, it would be essential to refer to testimonies of eye witnesses examined by the prosecution.

11. The first eye witness examined by the prosecution is Arjunbhai Shanabhai. He is son of the appellant and the deceased. His testimony was recorded at Exh.16. His testimony shows that the name of his elder brother is Ranjitbhai and that as Ranjitbhai is a widower, he was residing with his parents whereas he was residing in a separate house situated near the house of his father. According to him, his younger sister, Jashi, was married to Rajubhai of village Malu. The witness has stated that incident in question had taken place on November 7, 1995 and on or about the same day, his sister Jashi had come to his father's house for delivery along with her husband. The witness has testified before the Court that his brother had gone to factory situated nearby and his sister Jashi, his brother-in-law Raju, and his mother were in the house of the appellant. What is mentioned by the witness is that an altercation and scuffle had taken place between the appellant and the deceased and, therefore, he had gone to the house of his father and found that his father was quarreling with his mother. According to this witness, his brother Ranjitbhai had attempted to persuade the appellant not to quarrel with the deceased and thereupon, a quarrel had taken place between the appellant and Ranjit. It is mentioned by the witness that thereupon, the appellant had taken out a big knife and aimed at Ranjit to injure him and apprehending that the appellant would cause injury to Ranjit, the deceased had come in between and that she had received knife injury at the hands of the appellant. It is maintained by the witness that on receipt of injury, his mother had fallen down on the ground whereas his father had made an attempt to flee away, but that was foiled by him and his brother. It was also stated by the witness that his father was tied with a pole and in the melee, his father had also received injury on his hand. According to this witness, after the incident, he had gone to Police Station and lodged the complaint against the appellant.

In his cross-examination, the witness has stated that the distance between his village Khandivav and Jambughoda is about 7 to 8 kms. According to him, he had gone in the company of two others for lodging the complaint in a tempo belonging to one Firoz. It was mentioned by him that Firoz had come to house of his father, but he had not accompanied him when he had gone to lodge

complaint at the Police Station. According to this witness, Police had arrived at the scene of offence immediately as soon as first information report was lodged. It was also stated by the witness in his cross-examination that the policeman had arrested his father. It was further stated by the witness in his cross-examination that his sister, his brother-in-law and his deceased mother were sitting on otla and the appellant was abusing his mother outside his house. According to this witness, the mother of his brother-in-law was also present at the time of the incident. It was explained by the witness that his father was abusing his mother because his father was suspecting chastity of his mother as a result of which an altercation had taken place. The witness had accepted the suggestion that because of that, he and his brother were annoyed with the appellant. According to this witness, on the day of incident also, he and his brother had altercation with the appellant. However, the suggestion made by the defence that on the day of incident, a scuffle had taken place between himself, his brother and the appellant, was emphatically denied by him. It was admitted by the witness that when scuffle had taken place between the appellant and his brother, Jashi was inside the house. The suggestion made by the defence that Ranjit was armed with chharo, i.e. a big knife, which had hit the deceased, was emphatically denied by the witness. The suggestion made by defence that altercations were taking place between the appellant and the deceased because the appellant was suspecting character of the deceased was accepted to be true by the witness. The suggestion made by the defence that his brother Ranjit had chased the appellant to assault him, as a result of which, the deceased had intervened and received injury was, also denied by the witness. According to this witness, his father was not involved falsely by him in the case and that his mother had not received injuries at the hands of his brother Ranjit. It was also admitted by the witness that at the time of incident, several persons had collected because of shouts which were raised and that at the place of incident, there was darkness.

This is all what transpires from the testimony of witness, Arjunbhai. A bare perusal of the testimony of this witness would indicate that he is son of the appellant and the deceased. The record does not show that there was any dispute between him and the appellant regarding property etc. Though he had gone to the house of the appellant on hearing commotion of altercation and scuffle, he had not intervened in the quarrel and not made attempt to persuade the appellant not to quarrel with the deceased. He being son of the deceased would not allow the real culprit to go scot-free and involve his father falsely in such a serious case. His testimony establishes that the appellant had chased his brother, Ranjit, with a dangerous weapon and his mother had come in between apprehending that her son would be assaulted by the appellant and received fatal injury at the hands of the appellant. His testimony stands fully corroborated by his complaint which was lodged promptly. His evidence also gets corroboration from medical evidence on record and testimonies of two other eye witnesses. The defence could not probablise its case that Ranjit, who is son of the appellant, had, in fact, inflicted fatal blow on the deceased.

12. Another eye witness examined by the prosecution is Ranjitbhai, who is also son of the appellant. His testimony is recorded at Exh.18 which shows that on the day of the incident his sister Jashiben in the company of his brother-in-law, Rajubhai, had come to his house for the purpose of delivery. It is mentioned by the witness that the appellant was abusing Jashiben and her husband and, therefore, Rajubhai had left the house to return to his village, but he had persuaded him to stay in the house of the appellant. According to this witness, as he had persuaded his brother-in-law to return to his house, the appellant had started abusing him and had quarreled with his mother. According to this witness, he had persuaded his father not to hurl filthy abuses at him and his mother, but the appellant had continued to abuse the deceased in filthy language because he was suspecting her character. What is mentioned by the witness is that the appellant had chased him to inflict blow of chharo and that the deceased had intervened and received injuries on her chest. The witness has stated before the Court that because of injuries inflicted by the witness, his mother had expired. It is also stated by the witness that the appellant was apprehended by him, his brother, Arjunbhai, and his brother-in-law Rajubhai and was thereafter, tied with a pole. According to this witness, when an attempt was made to apprehend the appellant, the appellant had injured himself with chharo, which was in his hand. The witness has also stated that his brother, Arjunbhai, had gone to Police Station and lodged the complaint.

In his cross-examination, the witness has stated that on the day of incident, he had gone to Pipe Factory and returned home at 10.30 p.m. The suggestion made by the defence that his brother-in-law had met him on way was denied by him. According to him, shouting was going on near his house when he had returned home. The suggestion made by the defence that he was annoyed with the appellant was denied by him. It was admitted by the witness that he had scuffle with the appellant, but the suggestion made by the defence that he was armed with big knife was emphatically denied by him. Further, the suggestion made by the defence that the big knife, which was in his hand, had hit his mother was also emphatically denied by him. It was maintained by the witness that he had stated in his police statement that the appellant was abusing his sister and brother-in-law. The suggestion made by the defence that he was deposing against the appellant falsely to save his own skin was also emphatically denied by him.

The testimony of this witness also shows that he is son of the appellant and was residing with the appellant at the time of incident. The case of the prosecution that this witness had attempted to persuade the appellant not to quarrel with the deceased stands established by reliable and cogent testimony of this witness. The testimony of this witness gets complete corroboration in material particulars from reliable testimony of his brother Arjunbhai and also from medical evidence regarding injury received by the deceased on her chest. No major contradictions and/or omissions with reference to his earlier police statement could be brought on record. The fact that the appellant was suspecting character of his mother

and, therefore, was abusing her stands proved by this witness. It is also proved by this witness that the appellant had chased him to hit him with a big knife and as his mother had intervened, she had received injury as a result of which, she had died.

13. Yet another witness examined by the prosecution is Ramsingbhai Mansukhbhai. The testimony of this witness is recorded at Exh.19. This witness has stated that he is knowing the appellant and also his two sons, i.e. Arjun and Ranjit. It is mentioned by this witness before the Court that the incident in question had taken place on November 7, 1995 at about 9.30 p.m. and at that time he was in his house. It is mentioned by the witness that the appellant was abusing the deceased loudly and, therefore, he had come out from his house. It is also stated by the witness that at that time, son-in-law of the appellant, was leaving the house of the appellant because of hurling abuses by the appellant to the deceased was not liked nor approved by him. The witness has further stated that Ranjitbhai had persuaded son-in-law of the appellant to return home, as a result of which, son-in-law of the appellant had returned. According to this witness, Ranjitbhai was persuading the appellant not to abuse the the deceased, but the appellant had taken out a big knife and started rushing towards Ranjit to inflict blow with knife on him. What is maintained by the witness before the Court is that thereupon, the deceased had come in between to save Ranjit and, therefore, she had received knife blow on her chest. According to this witness, on receipt of injury, the deceased had fallen down and died whereas the appellant had started running away, but was apprehended and tied with pole. According to this witness, he had accompanied Arjunbhai to Jambughoda Police Station where he had gone to lodge first information report.

In his cross-examination, the witness has stated that on the day of incident, he was alone and was only member of his family who was present in the house. It was stated by him that earlier also, quarrels had taken place between the appellant on one hand and his sons on other hand and at that time he had intervened. The witness has informed the Court that on the day of incident, his wife was present in the house, but had gone to bed after taking supper. According to this witness, Rajubhai, i.e. son-in-law of the appellant, had intended to leave the house of the appellant to go to his house situated at village Malu, but Ranjitbhai had brought him back to the house of the appellant. The suggestion made by the defence that he had come out of his house at the time when the appellant was apprehended while fleeing the place of the incident, was emphatically denied by the witness. It was mentioned by the witness that at the time when Ranjit had returned home, all were present. It was also denied by the witness that Ranjit had injured the appellant as well as his mother, i.e. the deceased. The witness informed the Court that he had not helped Arjunbhai etc. while apprehending the appellant. The witness denied the suggestion of the defence that he had not seen the incident and was deposing falsely to save Ranjit.

On reassessment of testimony of this witness, it becomes evident that the

witness has narrated before the Court the incident in a straight forward manner as he had seen it. No major contradictions or omissions with reference to his earlier police statement could be brought on record by the defence. The name of this witness figures in the complaint also, which was filed promptly by Arjunbhai. It could not be even suggested to this witness that he was on inimical terms with the appellant and was, therefore, out to implicate the appellant falsely in the case. The learned Judge of the trial Court, who had advantage of observing demeanour of the witnesses, has believed the testimony of this witness. The testimony of this witness is found to be cogent, consistent and trustworthy. The testimony of this witness also establishes that the deceased had received injury at the hands of the appellant.

14. The discussion of the evidence tendered by three eye witnesses, thus, makes it evident that it was the appellant who had inflicted fatal blow on the deceased. The plea, therefore, that the prosecution has failed to establish that the appellant had inflicted fatal blow on the deceased cannot be accepted, and is hereby rejected.

15. The contention that the evidence of P.W.-1, P.W.-2 and P.W.-3 establishes that knife blow was caused by mistake and not intentionally because the word used is "vagelo" and not "marelo", which would have been used if the appellant had intention to cause knife blow on the deceased, is merely stated to be rejected. The prosecution has been successful in proving that the appellant was suspecting chastity of the deceased who was his wife as a result of which, he was hurling filthy abuses at her. It is also proved by the prosecution that Ranjit, who is eldest son of the appellant, had merely persuaded the appellant not to abuse the deceased. The evidence on record shows that the appellant had taken out a big knife, which was in his possession, and chased Ranjit to injure him with knife. The deceased, who was mother of Ranjit had apprehended injury to Ranjit by the appellant and had, therefore, intervened to save Ranjit. Thereupon, the appellant had given blow on the chest of the deceased which was found by the Medical Officer to be travelling in upward direction. The blow was given with such a great force that it had cut anterior wall of heart after causing fracture of 4th and 5th ribs. There is no manner of doubt that the blow delivered by the appellant was fatal because the deceased had died on the spot within no time. Under the circumstances, there is no manner of doubt that the death of the deceased had not taken place by mistake nor it was unintentional. The direction in which the blow has travelled, would indicate that it was the intention of the appellant to cause that very injury which was ultimately found by the Medical Officer while performing autopsy on the dead body of the deceased. Thus, the intention of the appellant to cause death of the deceased is quite evident from the record of the case.

16. Even if it is assumed for the sake of argument that the appellant had no intention to cause death of the deceased, the offence committed by the appellant would be nonetheless one punishable u/s 302 IPC. In order to decide this issue,

it would be advantageous to refer to provisions of Section 302, which are as under:

"301. If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person, whose death he intended or knew himself to be likely to cause."

From the perusal of the provision of Section 301 IPC, it becomes manifest that Section 301 embodies what the English authors describe as the doctrine of transfer of malice or the transmigration of motive. Under the Section, if A intends to kill B, but kills C whose death he neither intends nor knows himself to be likely to cause, the intention to kill C is by law attributed to him. If A aims his shot at B, but it misses B either because B moves out of the range of the shot or because the shot misses the mark and hits some other person C, whether within sight or out of sight, u/s 301, A is deemed to have hit C with the intention to kill him. What is to be noticed is that to invoke Section 301 IPC, A shall not have any intention to cause the death or the knowledge that he is likely to cause the death of C. This Section lays down that culpable homicide may be committed by causing death of a person whom the offender neither intended nor knew himself to be likely to kill. If the killing takes place in the course of doing an act which a person intends or knows to be likely to cause death, it must be treated as if the real intention of the killer had been actually carried out.

17. Having noticed salutary principles on which Section 301 IPC is based, it would be instructive to refer to law on the point as laid down by the Supreme Court. In *Gyanendra Kumar Vs. The State of U.P.*, the accused was deliberately trying to shoot at a fleeing man who had criticized his father in a School Committee Meeting, but unfortunately, his own maternal uncle came in between him and the intended victim and thus got killed. The Supreme Court has held that the act of the accused was nothing but murder u/s 302 read with Section 301 IPC.

In *Hari Shankar Sharma v. State of Mysore*, 1979 UJ (SC) 659, the intention of the accused was to kill prosecution witness No.15 by firing a shot at him, but the accused shot the fire and killed the deceased. A plea was raised before the Supreme Court that the appellant would be guilty of offence u/s 304A or 307 IPC. While negating the said plea, the Supreme Court has held as under:

"This appeal under the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act is directed against the judgment of the Mysore High Court convicting the appellant under s.302 and sentencing him to imprisonment for life. Detailed facts of the case have been narrated in the judgment of the High Court and it is not necessary for us to reproduce the same here. The main allegation against the appellant was that he had shot the deceased Nazirunnia and

Killadher. So far as the facts are concerned both the Sessions Judge and the High Court have concurrently found that the case was fully proved. The Sessions Judge was of the opinion that the first appellant wanted to kill PW 15, but as PW 15 was not available at that time, Nazirunnissa came in between and she was shot, therefore the appellant could be guilty of an offence under S.304A or under S.307 I.P.C. This view of the learned Sessions Judge was legally erroneous as rightly pointed out by the High Court. S.301 furnishes a complete answer to the view taken by the Sessions Judge. It is obvious that the appellant has the intention to kill PW 15 and if with this intention, he kills somebody also, he is undoubtedly guilty of committing murder. There is evidence of PW 13, 14 and 15 to show that A.1 fired that shot and killed the deceased. There is no escape from conclusion that the appellant committed an offence under S.302 of the I.P.C. In these circumstances, the High Court was right in correcting the error of law committed by the Learned Sessions Mr. Udayarathnam, tried to bring the case of the appellant within the ambit of S.304(a) or S.307 but on the fact found it is not possible for us to accede to her contention. For the reasons given above, there is no merit in the appeal, which is accordingly, dismissed."

18. In Jagpal Singh and others Vs. The State of Punjab, appellant Jagpal had shot at Surjit Kaur even though he aimed at only Kapur Singh. After applying doctrine of transfer of malice as contemplated u/s 301 IPC, the Supreme Court has held that Jagpal had made himself punishable u/s 302 IPC.

In Abdul Ise Suleman v. State of Gujarat, 1995 Cri.L.J. 464, it was the case of the prosecution that the accused had fired freely towards the fleeing complainant party and the first shot had injured one person whereas second shot had resulted into death of ten year old son of the complainant. It was noticed that firing was resorted to in a commercial locality. The Sessions Court had acquitted the accused, but acquittal appeal was allowed by the High Court and the appellant was convicted u/s 302 read with Section 301 and other provisions of IPC. It was submitted before the Supreme Court that the facts and circumstances of the case and evidence led by the prosecution did not establish that the appellant had any intention to commit murder of an innocent boy aged ten years with whom there was no question of having any enmity or any occasion to take a revenge. According to the learned counsel of the appellant, even from the evidence, it was possible to hold that such death of the boy was absolutely unintentional and at best it could be held that such firing was a rash and negligent action on the part of the appellant. It was argued by the learned counsel of the appellant that act committed by the appellant was not murder u/s 302 read with Section 301 IPC as held by the High Court, but was an offence u/s 304A IPC. Negating the said contention, the Supreme Court has held that gun was not fired in the air just to frighten the complainant and his companions, but the gun was fired by the appellant towards fleeing person even when by the first shot one of such person was injured. According to the Supreme Court, such firing was resorted to in a locality where there were number of shops and provision of Section 301 IPC was clearly attracted in the facts and circumstances of the case. Ultimately, the

conviction of the appellant u/s 302 read with Section 301 IPC was upheld by the Supreme Court.

19. In view of the principles laid down by the Supreme Court in above quoted decisions, it is evident that even if it is held for the sake of argument that the appellant had no intention to cause death of his wife, it will have to be held that doctrine of transfer of malice, as contemplated u/s 301, is applicable to the facts of the present case and that the appellant would be guilty u/s 302 IPC.

20. This brings the Court to consider the question whether the case of the appellant is covered by Exception 1 or Exception 4 or Exception 5 to Section 300 IPC as pleaded by the learned counsel of the appellant. Murder is an aggravated form of culpable homicide. The existence of any of the four conditions in the Section turns culpable homicide into murder while the exceptions reduce the offence of murder again to one of culpable homicide not amounting to murder. The IPC recognizes no exception to a case of murder other than the five exceptions enacted in Section 300 and no Court will be justified in reducing a crime of murder into one of culpable homicide not amounting to murder without advertence to those exceptions.

21. The burden of proving existence of circumstances bringing the case within any general or special exception or proviso in IPC is upon the accused and the Court shall presume the absence of such a circumstance. However, if upon the facts of the case and the evidence let in by prosecution itself it appears that the accused is entitled to benefit of any of the exceptions, he cannot be deprived of it on the ground that he had not pleaded it or proved it. The accused can rely on any of the facts brought out in the case and may, thus, discharge the burden of proving the exception even when he has not pleaded or let in evidence thereon.

22. In order to bring the case within the Exception 1 to Section 300 IPC, it is necessary that the following facts should be established (1) the offender must have done the act whilst deprived of power of self-control; (2) he must have been so deprived by reason of the provocation; (3) the provocation must have been grave and sudden; (4) the provocation must not have been sought by the offender; and, (5) it must not have been voluntarily provoked by the offender as an excuse for doing the act. The whole doctrine relating to provocation depends on the fact that it causes or may cause a sudden and temporary loss of self-control whereby malice which is the formation of an intention to kill is negated. The provocation must have come from the victim. Where a provocation ripens into resentment and malice, and the person aggrieved deliberately determines to take the life of a person, the Exception will not apply. There can never be any direct evidence as to what was the psychological effect upon the mind of a person in certain circumstances. The state of mind of a person must be gathered from proved facts.

23. Having regard to the nature of evidence let in by prosecution, the Court will have to consider whether the provision of Exception 1 to Section 300 would be

applicable or not. A son objecting to the father abusing his mother as enough provocation to kill him may be taken as too archaic. The Courts, no doubt, do visualize the feelings of an accused at the time of commission of the offence. At the same time, it is not any sensitivity, howsoever reckless, misguided or desperate in nature that should call for recognition as a justifiable provocation. It is not every slight provocation which will reduce the crime from murder to culpable homicide not amounting to murder. It is necessary that the provocation must be both grave and sudden. The provocation must be such as to have resulted in the loss of self-control. The provocation mentioned in the Section is something which is recognized as provocation in law and not merely something which arouses uncontrollable anger in a particular individual.

24. Judged in this light, persuasion made by witness, Ranjit, to the appellant not to abuse or quarrel with the deceased can hardly be regarded as constituting a grave and sudden provocation. A major son, who finds that his father is abusing his mother in filthy language and quarrels, has right to persuade his father not to do so. Such persuasion can never be regarded in law as provocation to the father. Thus, the defence has failed to probablise that there was provocation by witness, Ranjit, to the appellant.

As mentioned above, the requirement of law is that provocation must be from the victim. The evidence on record does not show at all that there was any provocation to the appellant from his deceased wife. It was not even the case of the appellant in his further statement u/s 313 of the Code or cross-examinations of witnesses that he had suspicion relating to poor financial condition or financial management or poor domestic management by his deceased wife nor there is any evidence which would show that Jashi and her husband had intended to camp at the house of the appellant and, therefore, in order to shoo them away, a show of quarrel between the appellant and the deceased was created wherein the appellant had succeeded in his feigned attempt, but it was Ranjit who had poured water over the entire episode by wooing his brother-in-law to return to the house and, therefore, there was grave and sudden provocation to the appellant. The plea that provision of Exception 1 to Section 300 IPC is attracted is based on surmises and conjectures, but on surmises and conjectures, Exception 1 to Section 300 IPC cannot be held to be applicable to the facts of the case because the evidence on record clinchingly establishes that the appellant had suspicion about bad character of his wife and he had no suspicion relating to poor financial condition or financial management or poor domestic management by the deceased. The record shows that though the appellant was doubting chastity of the deceased and was abusing her in filthy language, she herself had not offered any provocation to the appellant. The evidence on record, on the contrary, shows that so-called provocation was sought by the appellant himself. As there was no provocation from the deceased or from any one, the appellant was not justified in inflicting fatal blow on the deceased and causing her death. Thus, the plea that the appellant is entitled to benefit of provisions of Exception 1 to Section 300 IPC, has no substance, and is hereby rejected.

25. Similarly, the record does not show that the appellant had not committed murder of the deceased without premeditation and that too in a sudden fight and in heat of passion upon sudden quarrel and without taking undue advantage or acting in cruel or unusual manner. The evidence on record shows that the appellant had armed himself with a dangerous and deadly weapon, Chharo, i.e. big knife. It is fully described in muddamal list produced at Exh.5. It is evident that such a knife normally would not be found in a kitchen of an ordinary family. The appellant could not furnish any explanation in his further statement u/s 313 of the Code as to what prompted him to possess such a deadly weapon. The appellant also did not offer any explanation as to how he had procured the deadly weapon. A person may arm himself with deadly weapon if he apprehends danger to his life. However, the appellant even could not probablise that he had danger to his life either from his son Ranjit or his deceased wife. Under the circumstances, the fact that the appellant had armed himself with a deadly weapon before the incident had taken place, goes against him.

26. It is relevant to notice that the appellant was doubting chastity of his wife without any basis and was quarreling with her. Therefore, if a person arms himself with a deadly weapon and quarrels with his wife on mere suspicion of her character without any basis, he must be regarded as having taken undue advantage of the situation and acted in an unusual manner. Moreover, the appellant had used dangerous weapon on the deceased who was unarmed and caused her instantaneous death. This would also constitute taking undue advantage within the meaning of this exception. Further, before actual inflicting of blow on the deceased, a quarrel had taken place between the deceased and the appellant and, thereafter, on intervention of Ranjit, quarrel had ensued between the appellant and Ranjit meaning thereby, the quarrel had not taken place in a sudden fight nor the appellant had inflicted blow on the deceased in heat of passion upon a sudden quarrel. Having regard to all the abovereferredto circumstances, this Court is of the firm opinion that the provisions of Exception 4 to Section 300 IPC are not attracted to the facts of the case and, therefore, the appellant is not entitled any benefit thereunder.

27. Last submission that provision of Exception 5 to Section 300 IPC is attracted to the facts of the case, is merely stated to be rejected. This submission, as rightly contended by the learned Additional Public Prosecutor, is based on surmises and inferences. Exception 5 refers to cases where a man consents to submit to the doing of some particular act, either knowing that it will certainly cause death or that death will be the likely result. The record does not indicate that the deceased had consented for her death when she had intervened while an attempt was made by the appellant to kill his son Ranjit. It is well settled that Exception 5 must receive strict and not liberal construction. Having regard to the totality of the circumstances of the case, this Court is of the opinion that provisions of Exception 5 to Section 300 IPC are not applicable to the facts of the case.

28. The contents of panchnama of place of occurrence produced at Exh.24, which is duly proved by testimony of Mr.Barua, P.W.-5, Exh.23, show that big knife used by the appellant in commission of the offence, was recovered at the time of drawing the said panchnama. The knife along with other articles seized was sent to Forensic Science Laboratory for analysis. The report of analysis produced at Exh.14 indicates that the blood group of the deceased was 'A' and blood having same group was found on the big knife. The find of blood on knife having same blood group as that of the deceased establishes that the appellant was in close proximity of the deceased when she was fatally wounded and the appellant had every opportunity to commit murder of the deceased. The evidence tendered by three eye witnesses proves beyond doubt that the appellant was armed with the said knife. Thus, report of the analysis also connects the appellant with the crime in question.

29. The net result of above discussion is that it is established that the conviction of the appellant u/s 302 read with Section 301 IPC is well founded and no ground is made out by the learned counsel of the appellant to interfere with the same in instant appeal. Therefore, the appeal, which lacks merits, is liable to be dismissed.

30. For the foregoing reasons, the appeal fails, and is dismissed. Muddamal to be disposed of in terms of directions given by the learned Judge in the impugned judgment. The record of the case shows that the appellant is enlarged on regular bail during the pendency and final hearing of Criminal Appeal No.830 of 1996 by Division Bench of this Court vide order dated March 8, 2001 passed in Criminal Misc. Application No.884 of 2001. As the appellant has not undergone sentence of life imprisonment imposed by the trial Court, which is confirmed by this Court, he will have to surrender to the authorities for undergoing the remaining part of the sentence. Having regard to the facts and circumstances of the case, the appellant is given time of five weeks to surrender to the authorities.