

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO.481/2018

Pawan s/o Billu Rathod,
Aged about 23 years, R/o.Ghonsara,
Tahsil Mahagaon, District Yavatmal. ... Appellant.

VERSUS

The State of Maharashtra,
through Police Officer Officer,
Police Station Mahagaon, District Yavatmal. ... Respondent

Mr. R.M. Daga, Advocate for the appellant.
Mr. T.A. Mirza, APP for respondent.

**CORAM: M.S. SONAK & PUSHPA V. GANEDIWALA, JJ.
DATE: 25-11-2021.**

ORAL JUDGMENT : (Per: M.S. Sonak, J.)

Heard learned Counsel for the parties.

2. This appeal is directed against the judgment and order dated 22-06-2018 made by the Additional Sessions Judge, Pusad in Sessions Trial Case No.46/2014 convicting the appellant under Section 302 of the Indian Penal Code (IPC) and sentencing him to suffer rigorous imprisonment for life and to pay a fine of Rs. 2000/- and in default to undergo further rigorous imprisonment for two months.

3. Mr. Daga, learned Counsel for the appellant did make some submissions on the merits of the matter in the context of the conviction recorded by the learned Additional Sessions Judge in the impugned judgment and order. However, after some time he restricted the scope of this appeal by contending that even if the prosecution version is taken at its face value, conviction under Section 302 of the IPC was not proper and at the highest, the conviction could have been under Section 304 Part II of the IPC.

4. Mr. Daga, learned Counsel submitted that the entire evidence on record makes it quite clear the appellant had no intention of either causing the death of his wife or of causing such bodily injury as was likely to cause her death. He submitted that even the prosecution version is about the appellant striking a single knife blow and not acting in some cruel or unusual manner.

5. Mr. Daga referred to the *post mortem* report as well as the deposition of Dr. Nitin Chaure (PW-8) to submit that this witness had not even deposed that the injury caused to the appellant's wife was sufficient in the ordinary course of nature to cause her death. He relies on **Vadla Chandraiah vs State of A.P.**, reported in (2006) 13 SCC 587 and **Ghanshyam Dashrath Waghmare vs State of Maharashtra**, reported in 2004 LawSuit(Bom) 211 to submit that in similar circumstances the

conviction under Section 302 of the IPC was set aside and substituted with conviction under Section 304 Part II of the IPC.

6. Mr. Mirza, learned APP submitted that the prosecution, in this case, has established the guilt of the appellant beyond a reasonable doubt. However, on the aspect of substitution of the conviction as urged by Mr. Daga, learned Counsel, he left the matter to the decision of the Court, particularly since this was a case of a single knife injury.

7. Since this appeal was now restricted to the issue of determining whether the conviction is required to be sustained under Section 302 of the IPC or Section 304 Part II of the IPC., we propose to examine and evaluate the material on record in that context only.

8. Dr. Nitin Chaure (PW-8), the Medical Officer at the Rural Hospital, Sawana, who conducted the *post mortem* has opined that the death of the appellant's wife was homicidal and caused by the neck injury referred to in the *post mortem* report. He denied the suggestion that such injury could be self-inflicted.

9. The *post mortem* report, which stands proved by the deposition of Dr. Nitin Chaure (PW-8) states that the following injuries were found on the neck of the appellant's wife:-

"Clean incise wound (CLW) of size 12x5x3 cm seen on neck on right of nect.

The incised wound was 2 cm on left side from the center of ventral aspect.

The anatomical structures incised were sternocleido mastoid muscle, skin and subcutaneous tissue in neck, external carotid artery on right side, internal jugular vein on right side, stenohyoid muscle superior belly of ambhyoid muscles and thyrohyoid muscle."

10. Therefore, it is quite clear that this is a case of a single knife injury. Though this injury was on the neck, having regard to certain circumstances borne out of the record, it is difficult to hold that the act by which the appellant's wife ultimately died was done with the intention of causing her death or of causing such bodily injury as was likely to cause her death. Moreover, in this case, Dr. Nitin Chaure (PW-8) nowhere deposed that the injury inflicted by the appellant on his wife was sufficient in the ordinary course of nature to cause her death. No such statement is found in any medical documentary evidence as well. At least in the facts of the present case, such evidence was necessary to sustain a conviction under Section 302 IPC.

11. In **Vadala Chandraiah** (supra), the *post mortem* report had nowhere stated that the injuries inflicted on the deceased by the appellant were sufficient in the ordinary course of nature to cause death or likely to cause death. Even the doctor examined did not

depose to this effect. In these circumstances, the Hon'ble Supreme Court, relying upon its earlier decision in **Shivappa Buddappa Kolkar vs State of Karnataka**, reported in (2004) 13 SCC 168, observed as follows:-

"16. We may notice that in the post-mortem report, Dr.O.Butchi Reddy did not state that the injuries inflicted on the deceased by the appellant were sufficient in ordinary course of nature to cause death or likely to cause death. In Shivappa Buddappa Kolkar alias Buddappagol Vs. State of Karnataka and Others, (2004) 13 SCC 168, a Division Bench of this Court in a case where there had been no such opinion on the part of the doctor who had conducted the post-mortem examination opined (SCC p. 173, para 13):-

"13. We need not dilate further on this aspect as it is not the prosecution case that the appellant was responsible for causing any injury other than Injury (1). If so, it is fairly clear that the injuries to occipital region as well as the thorax injury which caused damage to the ribs and lungs are both severe injuries and according to the medical evidence both these injuries cumulatively caused death. There is no evidence of the medical expert to the effect that Injury (1) by itself would have caused instantaneous death as has happened in this case or that Injury (1) by itself was sufficient in the ordinary course of nature to cause death. No doubt Injury (1) is a severe injury on a vital part and in all likelihood, it could cause death. Yet, it is difficult to extricate the impact of an equally severe injury which was found to be present on internal examination. In these circumstances, it is not safe to draw a conclusion that the injury inflicted by the appellant, if at all it was intended to be inflicted, by itself would be sufficient in the ordinary course of nature to cause death. On the state of medical evidence we have, it is not possible to draw such definite conclusion. Considering the nature of the injury and weapons used and the circumstances in which the injury came to be inflicted, we are of the view that the appellant shall be

imputed with the knowledge that the injury inflicted by him was likely to cause death. He is therefore liable to be convicted under Section 304 Part II."

12. Applying the aforesaid principles, we think that a case has been made out for substituting the conviction under Section 302 of the IPC with conviction under Section 304 Part II of the IPC. This is more so because the evidence on record does not suggest that any undue advantage was taken by the appellant of the situation or that the appellant acted with extreme cruelty. The prosecution version that is substantially borne from the record is that soon after the incident the appellant consumed poison to end his own life though he may not have been successful in this attempt. It was suggested that such consumption was on account of repentance for the blow that he has inflicted on his wife.

13. The evidence also suggests that the appellant was seen taking away their minor child of fewer than six months with him after striking the single knife blow on his wife. It is not even the case of the prosecution that any harm was inflicted upon this child. Rather no sooner than the appellant was confronted by Chandabai (PW-5), a relation of the appellant's wife, he left the child with her and attempted to flee. The appellant was in the hospital for almost 5 days after the incident that took place on 02-05-2014 recovering from the effects of

the poison consumed by him and was placed under arrest only on 07-05-2014 after he was discharged from the hospital. The prosecution also alleges that the appellant confessed his crime to the police though, as was readily conceded by Mr. Mirza, such confession is not even evidence or admissible evidence given the provisions of Section 25 of the Evidence Act.

14. Having regard to the aforesaid cumulative circumstances, we agree with Mr. Daga that this is not a case where the prosecution has established that the act by which the death was caused was done with the *intention* of causing death or of causing such bodily injury as was likely to cause death. At the same time, the evidence on record clearly states that the act done by the appellant was with the *knowledge* that it was likely to cause his wife's death though without the intention of causing her death. Therefore, this is a case where the conviction under Section 302 of the IPC is required to be interfered with but the same is also required to be substituted with a conviction under Section 304 Part II of the IPC.

15. Again, in somewhat similar circumstances, the Division Bench of this Court in **Ghansham** (supra) substituted the conviction under Section 302 of the IPC with conviction under Section 304 Part II of the IPC. In the said case, the report of the Chemical Analyzer had established that the Sickle used in the offense had bloodstains of the

deceased. The accused in the said case had made an extrajudicial confession about the crime. There was evidence, the accused after realizing what he had done, even tried to commit suicide. The Division Bench on evaluation of the evidence on record concluded that the prosecution had failed to prove any intention on the part of the accused to commit murder. Having regard all these circumstances, the Division Bench felt it appropriate to convert the conviction under Section 302 of the IPC to that under Section 304 Part II of the IPC. The approach adopted by the Division Bench, can, given the similarity of circumstances, be adopted in the present case as well.

16. For all the aforesaid reasons, we partly allow this appeal and set aside the conviction under Section 302 of the IPC but substitute the same with conviction under Section 304 Part II of the IPC. As a consequence, we modify the sentence from life imprisonment to that of rigorous imprisonment for a term of 8 years. The fine amount and the default sentence are however maintained.

17. The appeal is partly allowed in the aforesaid terms. There shall be no order as to costs.

(Pushpa V. Ganediwala, J.)

(M.S. Sonak, J.)