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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Judgment: 23rd May, 2017

+ **CRL. A. 453/2013**

KAMALJEET

..... Appellant

Through : Mr. Pramod Kumar Dubey, Ms. Namita
Wali and Mr. Akshay Sehgal, Advocates

versus

STATE

..... Respondent

Through : Mr. Rajat Katyal, APP

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE PRATHIBA M. SINGH

G.S.SISTANI, J. (ORAL)

1. This is an appeal preferred under Section 374 of the Code of Criminal Procedure, 1973 ('CrPC') filed against the judgment dated 31.03.2012 by which the appellant stands convicted for the offence punishable under Section 302/201 of the Indian Penal Code ('IPC') and order on sentence dated 08.06.2012 by which the appellant has been sentenced to imprisonment for life with a fine of Rs.2,000/-, in default of payment of fine, to further undergo simple imprisonment for three months. The appellant also stands convicted and sentenced to rigorous imprisonment for 3 years for an offence punishable under Section 201 of IPC with a fine of Rs.1,000/- and in default of payment of fine, to further undergo simple imprisonment for one month.

2. The case of the prosecution, as noticed by the Trial Court reads as under:

"1) On 04.02.2010 DD no.4A was registered in PS Mahendra Park regarding lying of a dead body near Kudedan. SI Madan Mohan along with Ct. Rakesh reached at the spot i.e. Opp. H.No.1050, near Kudedan, A-Block, Jahangirpuri, Delhi where one dead body of a male, aged

about 30/32 was lying and there were injuries on the head of the dead body. The dead body was wearing pant and shirt. The right hand of dead body was having name of Anil Kumar and Ram Pal Singh along with four other names. The dead body was wrapped in an old quilt and dari. On search of dead body, one wrist watch, five keys, one ten rupees coin, one spectacle with cover having Eye Tech Optical written on it were recovered. The dead body could not be identified even interrogation in the neighbourhood. FIR was registered u/s 302/201 IPC. On 05.02.2010, one public person identified the photograph of deceased as that of Anil, brother of Rajni. Inspector Heman Kumar reached at the jhuggi of Rajni at N-21-B-81, jhuggi Moujiwala Bagh, Lal Bagh where Rajni identified the photograph of deceased as that of his brother Anil, Rajni also disclosed that deceased Anil used to reside with his friend Kamaljeet @ Dhammal at near the thiya of rickshaws near Hans Cinema Kudedan. Inspector Hemant Kumar alongwith Rajni reached at kudedan, near Hans Cinema, GTK Road where one person was trying to slip away on seeing the police. Rajni identified that person as Kamaljeet @ Dhammal. Accused Kamaljeet @ Dhammal was apprehended. On interrogation, accused Kamaljeet confessed his guilt and disclosed that he was owing money towards Anil and Anil was demanding his money. On 03.02.2010 accused killed the deceased with the help of concrete slab and his body was thrown in A-Block, near Kudedan, Jahangirpur. Accused was arrested and after completion of investigation, chargesheet was filed in the Court u/s 302/201 IPC.”

3. To bring home the guilt of the appellant, the prosecution examined 21 witnesses in all. No evidence was led by the appellant in his defence. Statement of the appellant was recorded under Section 313 CrPC wherein he denied all the allegations against him. Charge under Section 302/201 of IPC was framed against the appellant to which he pleaded not guilty.
4. At the outset, learned counsel for the appellant submits that he does not challenge the order of conviction but contends that a case under Section

302 IPC is not made out as the incident took place on the spur of the moment and the only one injury was inflicted on the deceased. The appellant did not act in an unusual or cruel manner and there was no weapon of offence as for the prosecution the appellant had hit the deceased with a concrete slab which resulted in his death. It is prayed that the appellant has been incarcerated for a period of more than 8 years 11 months and there was no pre-meditation in the fight which had erupted in the spur of the moment on a dispute pertaining to a small amount of Rs.4,000/- in all, thus, the order of sentence should be modified to the period already undergone.

5. Mr.Dubey has also contended that the trial Court has passed the judgment and order of sentence based on presumption, conjectures and surmises. There are various discrepancies in the testimonies of the witnesses. The trial court has failed to apply the law in the right perspective.
6. *Per contra*, Mr.Rajat Katyal, learned counsel for the State submits that no doubt a single injury has caused the death of the deceased, however, it was well within the knowledge of the appellant and the appellant had every intention to kill the deceased as he used a concrete slab and hit the deceased on the vital part of the body, i.e. his head, which resulted in his death. Hence, no infirmity can be found in the judgment of the Trial Court which has rightly convicted the appellant under Section 302/201 IPC.
7. We have heard the learned counsel for the parties, examined the Trial Court record and also considered their rival submissions.
8. The Trial Court in the present case, has convicted the appellant on the basis of circumstantial evidence. The prosecution had established that the deceased and the appellant/accused knew each other and the deceased used to sleep with the accused at the garage near the *kudedan* (dustbin) at night. The appellant owed Rs.4,000-5,000/- to the deceased. The appellant was

last seen with the deceased on 03.02.2010 at around 7 PM and in the morning of 04.02.2010, the employer of the deceased Satpal (PW-6) found the deceased missing from the *chole-bhature rehri*. The appellant was found sitting near a wooden box of Satpal (PW-6) and was shivering. PW-6 and Bhagwati Prasad (PW-5) had seen the deceased demanding repayment of his money. It was further established that the appellant had tried to run away upon seeing the police, when he was overpowered and arrested by the police. The appellant/accused had got recovered the weapon, i.e. a piece of concrete slab, blood-stained clothes as well as *rickshaw-rehri* used to ferry the dead body of the deceased from the place of commission of the crime to the place where the body was disposed. The medical evidence also corroborated the story of the prosecution as Dr.Kulbhushan Goel (PW-21) opined that the injury resulting the death of the deceased could have been occasioned from the slab used.

9. The Trial Court had found that the circumstantial evidence conclusively proved the guilt of the accused/appellant herein that there was motive behind the commission of the offence and also the chain of events clearly pointed towards the guilt of the accused and causing of the disappearance of evidence with the intention of screening himself from legal punishment.
10. We proceed to analyse the testimonies of the prime independent prosecution witnesses, i.e. Rajni (PW-2) (sister of deceased), Ram Niwas (PW-4), Bhagwati Prasad (PW-5) and Satpal (PW-6).
11. Ram Niwas (PW-4) had deposed that in 2010, though he did not remember the date and month, he was going to drop his daughter to her school. There was one dustbin and he saw public persons collected there. Upon going to the dustbin, he noticed that a dead body of a male person was lying there. He called the police from his mobile number. Upon a leading question being put to him, the witness stated that the call was made by him on

04.02.2010.

12. Rajni (PW-2) has deposed that the deceased was her real brother and used to work at the stall of Satya Pal near Hans Cinema, Lal Bagh. She identified the accused/appellant as the friend of her deceased brother, who used to work in the rickshaw *rehdi* of the garage of Bhagwati Prasad near Hans Cinema. The deceased used to sleep with the appellant at the garage near the *kudedan* (dustbin) and both the appellant and the deceased used to come meet PW-2 at her *jhuggi*. She deposed that at about 7:15 PM on 05.02.2010, some police official came to her *jhuggi* and showed her the photo of injured condition of her brother. She had identified her brother in the photo. She along with the police officials came to near Hans Cinema and the appellant was standing there. On seeing them, the appellant tried to flee, but was overpowered by the police officials.
13. During cross-examination, PW-2 stated that Satpal used to prepare *chole-bhature* in his stall. The appellant used to visit the *jhuggi* of the witness. The deceased used to inform PW-2 that the appellant had borrowed Rs.4-5 thousand from him.
14. The next prime witness is Bhagwati Prasad (PW-5), who deposed that he is running a rickshaw garage near Hans Cinema dustbin and used to provide rickshaws and *rickshaw-rehris* on daily hire basis. In the evening time, the rickshaw pullers return the rickshaw at his garage. All the rickshaws during the night hours are tied with a chain and locked. PW-5 used to hand over the keys of the lock to the appellant. The appellant used to stay at his garage in the night and in return, the witness used to provide him food. Deceased used to work as a maid [sic: male] servant at a *chole-bhature rehri* of Satpal in the day and stayed at his garage in the night with the appellant. The appellant had borrowed some money from the deceased. Both of them were in a habit of taking liquor. The witness used to mark his

name and the name of his son Jugnu on the rickshaws and *rehris*. On 03.02.2010, PW-5 had left the deceased with the appellant at around 9 PM at the garage. Upon his return in the morning, at about 8:30 AM on 04.02.2010, the witness found both the appellant and the deceased missing. The chain tied with the rickshaws was broken and one rickshaw bearing Sl.No. 14 was missing. He presumed that the deceased and the appellant might have taken the same. The same day, PW-5 left for Aligarh by train and returned on the morning of 06.02.2010, when he learnt about the murder of the deceased by the appellant and the dumping of the body at Jahangirpuri khatta. He came to know that his rickshaw had been seized by the police of Mahindra Park Police Station. On 08.02.2010, the witness went to the police station and identified his rickshaw *rehri* no.14 and also found that one of the *phatta* (plank) of the *rehri* was missing. The witness duly identified the *rehri* before the Trial Court.

15. PW-5 was extensively cross-examined by the counsel for the accused/appellant herein. During his cross-examination, he denied the assertion that the appellant had stopped taking liquor 4-5 years back and stated that both the deceased and the appellant used to take liquor daily. He admitted that the appellant had not taken money from the deceased in his presence, but the deceased used to demand repayment of his money from the appellant in his presence. When his statement was recorded by the police (Ex.PW-5/D1), he claimed to have stated that the appellant had borrowed money from the deceased. The witness was then confronted with his statement (Ex.PW-5/D1) where it was not so recorded.
16. The testimony of Satpal (PW-6) also establishes that the deceased was last seen with the appellant. In his deposition before the Trial Court, PW-6 stated that he used to run a *chole-bhature rehri* near Shiv Temple, Bada Bagh. The deceased used to work at his *rehri* as a helper and used to be

paid Rs.100 as daily wage. Both the accused/appellant and the deceased used to sleep near the dustbin. On 23.02.2010 at around 7 PM, PW-6 handed over the keys of his wooden box to the deceased; the box was used for keeping utensils and the clothes of the deceased and PW-6 and was put near the dustbin. The appellant was also present at the place. On 04.02.2010 at about 5 AM, the witness went to his *rehri* and found the deceased missing, while the appellant was sitting near the wooden box and was shivering. Upon enquiry, appellant informed PW-6 that the deceased had run away with his clothes. Thereafter, the witness went to the house of the sister of the deceased and enquired about his whereabouts. She was unable to tell about the deceased. The witness came back and broke open the lock of the wooden box and took out the utensils. On 06.02.2010, the police came and enquired whether the deceased was working with him, to which he answered in the positive. The police informed that someone had murdered him and left from there. PW-6 further deposed that he had seen the deceased exchanging hot words with the appellant as he was not returning money borrowed from the deceased. He did not know the amount owed by the deceased was owing towards the accused.

17. When Satpal (PW-6) was cross-examined, he stated that the deceased used to come to his *rehri* at 6 AM in the morning and he used to wind up his work at about 4 – 4:30 PM in the evening. He did not know where the deceased used to go after finishing the work. He affirmed that the deceased and the appellant used to sleep in their rickshaw garage. He denied that 10-12 persons used to sleep in the garage in the night also. He further stated that the deceased had not given money on loan to anyone.
18. Satpal (PW-6) also stated during his cross-examination that he had stated to the police about the appellant informing about the deceased running away with his clothes and that he had went to the house of the sister of the

deceased to enquire about his whereabouts to no avail. At this stage, the witness was confronted with his earlier statement under Section 161 CrPC (Ex.PW-6/DA) wherein it is not so recorded. He also alleged to have stated to the police that on 06.02.2010, the police had come to him and asked whether the deceased worked with him, the fact that he answered in the affirmative and that the police informed that someone had murdered the deceased. Again, the witness was confronted with Ex.PW-6/DA, where it is not recorded.

19. We may add that Virender Kumar (PW-3) has also deposed that he had identified the dead body of the deceased as that of his relative Anil Kumar at BJRM Hospital on 06.02.2010.
20. It cannot be gainsaid that investigation also plays an important part in criminal trials. Accordingly, we proceed to analyse the testimony of the police witnesses.
21. Const.Abul Hassan (PW-18) has deposed that he was on duty on 03-04.02.2010 between 8 PM and 8 AM at Police Command Room. On 04.02.2010 at about 7:28 AM, he received a call from Ram Niwas (PW-4) that a dead body was lying near *Kudey Daan* near house no.1051, A-Block. He passed the information at District Net, who further passed on the information to the police station.
22. The message forwarded by PW-18 was received by HC Sadhu Ram (PW-11) (Duty Officer) on 04.02.2010 at about 7:30 AM that a dead body was recovered near dustbin at A Block Jahangir Puri near house no.1051. He recorded DD No.4-A (Ex.PW-7/A). The DD No.4-A (Ex.PW-7/A) was received by SI Madan Mohan (PW-7).
23. SI Madan Mohan (PW-7) had deposed before the Trial Court that he had received the DD No.4-A (Ex.PW-7/A) in the police station from the Duty Officer. He along with Const. Rakesh (PW-13) reached the place of

occurrence, i.e. opposite house no. 1051, A Block, near *Kudedaan* where he found a dead body of an unknown person aged about 30-32 years. The deceased was having injury marks on his forehead and his head with some sharp edged weapon. A part of the brain had also come out from the head of the body. The body of lying covered with an old quilt and *dari* made of old clothes. Blood was lying on the floor. He deposed that from the condition of the body it appeared that after murder, he was thrown there. Ins.Hemant Kumar (PW-20) also came there. PW-7 stated that he prepared the *rukka* (Ex.PW-7/B) and sent the same through Const. Rakesh (PW-13) for registration of FIR. After registration of FIR, the investigation was entrusted to Ins.Hemant Kumar (PW-20), who called the Crime Team. The witness has deposed in respect of the investigation by the Crime Team and seizure of numerous articles from the personal search of the deceased, blood earth, earth control, quilt, *dari* and other clothes, of which we need not extract in detail. In his cross-examination, PW-7 has stated that the *kudedaan* belongs to the MCD, does not have any gate and no enquiry was conducted from sweeper or supervisor of MCD.

24. HC Jagmohan (PW-1) (Duty Officer between 8 AM to 4 PM on 04.02.2010) has also deposed on similar lines, with Cont. Rakesh (PW-13) coming to the police station and handing over original *rukka*. PW-1 recorded DD No.9-A (Ex.PW-1/A) and registered the FIR No.25/10 under Sections 302/201 IPC.
25. Ins.Hemant Kumar (PW-20) (IO) has deposed that on 04.02.2010, the investigation in the case was entrusted to him after the registration of the FIR. He inspected the file along with SI Madan Mohan (PW-7), who was already investigating the case. The site plan (Ex.PW-20/A) was prepared. An unknown dead body was searched by Ct.Rakesh (PW-13) and numerous articles were seized through seizure memo (Ex.PW-7/A). After

inspection of the site and the seizure of the articles, blood, blood stained soil, earth control, etc., the dead body was sent to the mortuary through Ct.Rakesh (PW-13). On the next day, i.e. 05.02.2010, he along with SI Yogesh (PW-8) and Ct.Sukhdev (PW-10) took up the investigation and went to Derawalan Nagar at the spectacle shop by the name of Eye Tech Opticals, but no clue could be found regarding the identity of the deceased. PW-20 proceeded to the nearby *jhuggies* to get identification of the deceased from his photograph. Upon reaching near Lal Bagh *jhuggi*, Adarsh Nagar, someone from the public informed that the photograph resembled with a person namely Anil Kumar, whose sister lives nearby Lal Bagh *Jhuggi*. Then they went to the *jhuggi* of Rajni (PW-2), who identified the said photograph of her brother Anil Kumar (deceased). Rajni (PW-2) led the police party to the place of occurrence, where her brother and the appellant used to sleep and lived together. The appellant was also standing at some distance, who on seeing the police, attempted to flee but was overpowered by the police party. The appellant was identified by Rajni (PW-2). The appellant was interrogated in front of PW-2 and confessed to his involvement in the murder of the deceased. Rajni (PW-2) left the spot after starting weeping. Ins.Hemant Kumar (PW-20) further deposed that after the arrest of the accused/appellant, he pointed out the place of incident, i.e. near *kudedan* (garbage house), GTK Road, Model Town, Delhi, from where a wooden box having blood stained marks was found and seized (seizure memo Ex.PW-8/D). The appellant then pointed out to the drain where after committing the murder, he threw the weapon of offence, i.e. a big piece of concrete slab (Ex.P-5); which was recovered and sealed (seizure memo Ex.PW-8/F). The appellant had further got recovered one pant and shirt lying under a sheet near *kudedan*, which he was wearing at the time of the incident (seizure memo Ex.PW-8/E). PW-

20 stated that the appellant then led the police to where he had thrown the body, i.e. opposite H.No.1051, near *Kudedan*, A-Block, Jahangir Puri, Delhi and pointed to the place.

26. PW-20 further deposed that on 06.02.2010, the appellant was taken out of police lockup of Shalimar Bagh and he led the police to Shahalam Bandh near *Majar* in the area of PS Mahendra Park and got recovered a rickshaw *rehri* which was used by the accused to carry the dead body from the place of murder to the place of its disposal. The said rickshaw having blood stains was seized (seizure memo Ex.PW-8/H). Some portion of the rickshaw having blood stains were separately sealed. The postmortem of the body was conducted. Later on 08.02.2010, PW-20 has deposed to have gone to the scene of the crime and met Bhagwati Prasad (PW-5), owner of rickshaw *rehri*. PW-5 handed over the ownership documents of the rickshaw *rehri*. The opinion of the doctor was obtained on the concrete slab and the exhibits were sent to FSL for its report. The case property was identified by the witness.
27. PW-20 was cross-examined by the *amicus* for the accused/appellant, wherein he stated that the *kudedan* near the place of occurrence was used by one rickshaw owner for parking his rickshaw *rehris*, but no other cycle richshaws were parked there. He denied the suggestion that rickshaw pullers used to sleep there. He further stated that he had asked public persons to join the proceedings on 05.02.2010 and during recovery on 06.02.2010, but none agreed. The rickshaw recovered on 06.02.2010 was not examined by the crime team; though the same was examined by PW-20 and he found no human tissues, strands of hair or pieces of skin in the rickshaw *rehri*.
28. SI Yogesh Kumar (PW-8) has also primarily deposed on the lines of PW-20, but stated that on 05.02.2010, the owner of the shop whose name was

mentioned on the spectacle box told that the name of the deceased was Anil. Thereafter, the police came in a private car at Sangam Park jhuggis to ascertain the identity of the deceased. The big stone weighing about 50-55 kgs was recovered from a *nala* near the wall of the *kudedan*, which was wet with water. He also deposed that on 05.02.2010, the appellant had taken the police to Shah Alam Bandh for the search of the rickshaw *rehri*, but the same could not be recovered. On 06.02.2010 at about 9 AM, PW-8 along with Ins.Hemant Kumar (PW-20) and Const.Sukhdev (PW-10) brought the accused from lockup and he took them to Shah Alam Bandh near a *Mazaar* from where the appellant got recovered the rickshaw. There was blood on the side *phatta* of the rickshaw. The witness was then cross-examined by the Additional Public Prosecutor as he had suppressed some facts. In his cross-examination by Addl.PP, PW-8 stated that from enquiry from the optical shop, nothing could be known about the deceased. He further stated that the pant and shirt were recovered from an old bag.

29. PW-8 was next cross-examined by the counsel for the appellant. In his cross-examination, he stated that lot of rickshaws remained parked near the *thiya*. They are not parked during the day time, but remain parked in the night.
30. The testimony of Const.Sukhdev Singh (PW-10) is similar to that of PW-8: he had also deposed that on 05.02.2010, the accused/appellant had taken them to Shah Alam Bandh for the search of the rickshaw, but the same could not be found. On 06.02.2010 at about 9:15-9:30 AM, the witness along with Ins.Kumar (PW-20) and SI Yogesh Kumar (PW-8) took the accused to Shah Alam Bandh from where the appellant got the rickshaw recovered. In his cross-examination, PW-10 denied the suggestion that the *kudedan*/dustbin is being used as parking space for the rickshaws and voluntarily went on to depose that the rickshaws remained adjacent to the

kudedan. He further stated that they had gone to Shah Alam Bandh on the night between 5th and 6th and reached there at about 12:15 AM. They remained there for about 10-15 minutes. It is correct that the rickshaws are parked at the night in the ground near Shah Alam Bandh. PW-10 did not notice any rickshaw standing there in the night of 5th and 6th. He further deposed that any rickshaw puller can bring and take rickshaw from the said ground.

31. Since the case of the prosecution is based on circumstantial evidence, the forensic and medical evidence gain significance. The post mortem of the deceased was conducted by Dr.Kulbhushan Goyal (PW-21). As per the post mortem report (PW-21/A), the following injuries were noticed on the body of the deceased:

- (i) Laceration avulsion 15x6 cm over fronto parietals and part of forehead with crushed margins;
- (ii) Depressed deformity all over skull; and
- (iii) Multiple abrasions over left side of forehead.

32. The opinion of the doctor (PW-21) was as under:

“All injuries are ante-mortem in nature, caused by heavy hard blunt force impact directed upon head. Cause of death is extensive cranio-cerebral injuries and sufficient to cause death in ordinary course of nature. Mode of death is homicidal. Time since death is about 2 ½ days.”

33. Having regard to the fact that the post mortem was conducted on 06.02.2010 at 12:30 PM, the time of death can be estimated to the intervening night of 03-04.02.2010 at about 12:30 AM. Subsequently, the opinion was also sought in respect of the weapon of offence; to which, the doctor had opined as under:

“The injuries mentioned in PM report No.139 dt 06/02/10 on the body of Anil Kumar are possible by this object or similar such other one if assailant is able to lift a heavy

object and divert it on the head of the victim.”

34. The report of FSL (Ex.PW-20/E and Ex.PW-20/F) also show that human blood was found on the weapon of offence (marked as Exhibit ‘6’), pants recovered on the instance of the appellant (marked as Exhibit ‘7b’) and the wooden plank/*phatta* removed from the rickshaw recovered at the instance of the appellant (marked as Exhibit ‘8’).
35. We proceed to analyse the incriminating circumstances established against the appellant. From the foregoing, the following incriminating circumstances stand established against the accused/appellant:
- (i) The motive of the offence stands established as the demand for repayment of money by the deceased from the appellant as evinced by the testimonies of Rajni (PW-2) and Satpal (PW-6);
 - (ii) The appellant/accused was last seen with the deceased by Satpal (PW-6) at about 7 PM and by Bhagwati Prasad (PW-5) at about 9 PM at his garage;
 - (iii) The weapon used for the offence, i.e. concrete slab (Ex.P-5) and blood stained clothes was recovered at the instance of the appellant;
 - (iv) Forensic evidence [FSL Report (Ex.PW-20/E and Ex.PW-20/F)] establishes that human blood was present upon the weapon of offence and the clothes recovered;
 - (v) Medical evidence [post mortem report (Ex.PW-21/A)] establishes that the death of the deceased occurred in the intervening night of 03-04.02.2010 at about 12:30 AM;
 - (vi) PW-21 has also opined (Ex.PW-21/B) that the injury in question could have been caused by the weapon being the concrete slab;
 - (vii) The appellant was found by Satpal (PW-6) the next morning as sitting beside the wooden box and shivering and unable to give any satisfactory answer about the whereabouts of the deceased;

(viii) Appellant attempted to flee upon seeing the police party and Rajni (PW-2); and

(ix) The prosecution having established that the deceased was last in the company of the appellant, the onus was shifted on the appellant to show when they departed company, thus establishing an additional link in the chain of circumstances.

[See Section 106 of the Indian Evidence Act, 1860; *State of Rajasthan v. Kashi Ram*, AIR 2007 SC 144; and *Md.Shakeel v. The State NCT of Delhi*, MANU/DE/1334/2016 (paragraphs 29-31)]

36. The foregoing circumstances and the evidence brought on record conclusively point towards the guilt of the appellant and no other inference could be drawn. Hence, the Trial Court was correct in convicting the appellant.
37. The submission of Mr.Dubey that there were various discrepancies in the testimonies of the witnesses deserves to be rejected. Though there were few contradiction in the testimonies of the prosecution witnesses, none of them go to the root of the matter and hence, do not render the depositions unreliable.
38. We have already recorded the submission of Mr.Dubey that he does not press the present appeal on the point of conviction and only on the point that the offence under Section 302 is not made out.
39. Regarding the applicability of Section 302, we are of the opinion that the learned counsel for the appellant's argument has merit and deserves to be accepted. There is evidence that the deceased and the appellant used to sleep in the area next to the *kudedan* and were friends. On the fateful night, the deceased and the appellant exchanged hot words due to the failure of the appellant to return borrowed money, which led to the appellant

inflicting a solitary injury on the deceased. The weapon used is also of significance. The appellant had used a heavy concrete slab, which could have been obtained at the spot of the incident evincing that there was no preparation. It is clear that the intention to kill has not been established and actually the fatal blow suffered by the deceased was a result of sudden fight and in the heat of passion, without any premeditation. It cannot be said that the appellant had taken any undue advantage or acted in a cruel or unusual manner as he had only given one blow with the concrete slab. Hence, the present case would be covered under Exception 4 of Section 300, which reads as under:

“Exception 4.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.”

(Emphasis Supplied)

40. To bring a case under the exception, fourfold requirement must be satisfied: *first*, there must be a sudden fight; *second*, absence of premeditation; *third*, the accused must have been overcome with the heat of passion; and *fourth*, the accused must not have taken undue advantage or acted in a cruel or unusual manner.
41. In ***Sayaji Hanmant Bankar v. State of Maharashtra***, (2011) 14 SCC 477, the convict had thrown a water pot and a kerosene lamp on the deceased (his wife) after a quarrel with her, the accused was exasperated by the fact that the deceased was wearing a nylon *sari* resulting in her death. The Apex Court found that there was a sudden fight and modified the conviction from Section 302 IPC to Section 304 Part I IPC. The relevant paragraphs read as under:

“8. It is clear from the reading of aforesaid Exception 4 that if the act is done without premeditation in a sudden fight or in the heat of passion upon a sudden quarrel and if the offender does not take any undue advantage or act in a cruel or unusual manner, then Exception 4 will be attracted.

9. We have gone through the evidence carefully. It seems that as soon as the accused entered the house, there appeared to be some quarrel with his wife and in that fight first, he threw a water-pot and thereafter a kerosene lamp. The burning seems to be more out of the fact that unfortunately at that time, the lady was wearing a nylon sari. Had she not been wearing a nylon sari, it is difficult to imagine how she could have been burnt to the extent of 70%. In our view this was a case which clearly falls under Exception 4 to Section 300 IPC since there was a sudden fight. There was no premeditation either. Therefore the appellant-accused is liable to be convicted for the offence punishable under Section 304 Part I.

10. We, accordingly, alter the conviction of the accused from Section 302 IPC to Section 304 Part I IPC and sentence him to the period already undergone by him. The sentence of fine remains the same.”

(Emphasis Supplied)

42. In ***Sandhya Jadhav v. State of Maharashtra, (2006) 4 SCC 653*** a solitary knife blow was given to the deceased when he attempted to intervene and separate the convicts trying to assault his uncle. The Supreme Court converted the conviction to Section 304 Part I observing as under:

“8. For bringing in operation of Exception 4 to Section 300 IPC, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

9. The Fourth Exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution not covered by the First Exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of

Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two or more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that

there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression “undue advantage” as used in the provision means “unfair advantage”.

(Emphasis Supplied)

[Also see *Abhijeet Raj v. State (Govt. of NCT of Delhi)*, MANU/DE/1264/2016 and *Jagtar Singh v. State of Delhi*, 190 (2012) DLT 445]

43. Coming to the case at hand, all the essentials of Exception 4 stand satisfied: the offence was committed pursuant to a sudden fight pertaining to repayment of borrowed money, there was no pre-meditation on the part of the appellant, the single solitary blow was inflicted in the heat of passion with a concrete slab obtained from the place of the offence, the appellant did not carry with him the weapon of offence, and the appellant neither acted in a cruel nor unusual manner. However, having regard to the weapon of offence, i.e. a concrete slab weighing 50-55 kgs, and the severity of the injury caused, the appellant must be imputed to cause such bodily injury as was likely to cause death, if not the intention to cause death. Accordingly, the conviction of the appellant is modified from Section 302 to one under Section 304 Part I of the Indian Penal Code. Having regard to the culpability of the appellant, we are of the view that the ends of justice would be met if the sentence of the appellant is modified to imprisonment for 9 years.
44. Thus, the appeal is partly allowed and orders of conviction and sentence are modified in the above terms. Order on the payment of fins shall remain unchanged.
45. Trial Court record be returned.
46. Copy of this Judgment be sent to the Superintendent, Central Jail, Rohini

for updating the jail record.

47. In view of the foregoing order passed in the appeal, CrI.M.B. 399/2017 seeking suspension of sentence is dismissed as infructuous.

G.S.SISTANI, J.

MAY 23, 2017
//pst

PRATHIBA M. SINGH, J.

