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

+ **CRL. A. 276/2013**

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Judgment reserved on: 9th March, 2016
Judgment pronounced on: 18th March, 2016

ANUJ KUMAR TIWARIAppellant
Through: Mr. Chetan Anand, Advocate.

Versus

STATE OF THE NCT OF DELHI Respondent
Through: Ms. Aashaa Tiwari, APP for the State.

CORAM:

HON'BLE MR. JUSTICE G. S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J.

1. Present appeal has been filed under Section 374 (2) of the Code of Criminal Procedure and is directed against the judgment dated 03.11.2012 and order on sentence dated 19.11.2012 passed by the Additional Sessions Judge in Sessions Case No. 152/10, by virtue of which the appellant has been convicted under Section 302/201 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life and to pay Rs.1,000/- as fine and in default of payment of fine to further undergo simple imprisonment for a period of one month for the offence punishable under Section 302 of the Indian Penal Code. The appellant was further sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 1,000/- for the offence punishable under Section 201 of the Indian Penal Code and in default

of payment of fine to further undergo simple imprisonment for one month. Both the sentences were ordered to run concurrently.

2. The facts of the case are as under:

“1. On receiving information through DD no.25 dated 06.07.09 IO Inspector CK Sharma (SHO Lajpat Nagar) reached spot i.e, O-2/II, Lajpat Nagar, 3rd Floor (Inflight Air Hostess Training Institute) at around 9.45 pm where he met SI Sandeep Ghai alongwith other police officials, Pammi Talwar and four other trainees, namely Rahul, Hemant Kothari, Ramesh Chand and Ajay Singh, and on inquiry he was informed that a dead body of a female is lying in a bathroom. He inspected the dead body and thereafter, statement of Rahul was recorded by SI Sandeep Ghai. Pursuant to which rukka was prepared and FIR was registered.

2. In the meanwhile, crime team was called and dead body was identified by Ms. Pammi Talwar being of one Geeta a maid servant working in Institute for last 3 years. During inspection of dead body she was found to be wearing salwar, suit and one orange colour dupatta found tied in her neck and word ‘Kishen’ found tattooed on her right forearm and a mobile number of 9915869233 was found written on the northern side of wall of bathroom near washbasin.

3. Rahul in his statement to the police alleged that they are studying diploma course in Aviation and Hospitality Management in that Institute and was residing along with Hemant Kothari and Ramesh chand for last 6-7 days in Institute on temporary basis. And on the day of incident at around 5.50 pm when he went on the ground floor, found made servant Geeta then asked her to clean their clothes as they were going to see room on rent at S. N. Puri and had given key of their room to Geeta who after cleaning was asked to put keys behing the poster near the gate and thereafter they all went away and came around 8 pm, but did not find keys behind the poster. He further

alleged in his statement that when they went upstairs, they found the gate of the IIIrd floor closed and on their knocking nobody replied, thereafter they started knocking the door briskly and about after 15 minutes one boy medium height clean shaved opened the door and told them that Geeta was washing clothes in the bathroom. Thereafter, he went down the stairs and then they thought Geetat was washing the clothes, but found their room locked thereafter they went to bathroom to take keys from Geeta and in bathroom they found Geeta was lying on floor and her neck was found strangulated through a chunni. Then, he called his three friends, Hemant Kothari called owner Pammi Talwar on mobile, as well called 100 number.

4. During investigation, crime team photographer took photographs of the spot and dead body, however, no chance-prints were found. When crime team checked the body, the word Hemant in Hindi and mobile no. 9915869233 was found written on her palm. Thereafter, IO prepared site plan at the instance of Rahul at around 1.30 am Ct. Sanjiv brought the original rukka and copy of FIR. Dead body was shifted to AIIMS mortuary at around 1.35 am. And articles lying at spot were seized and thereafter, statement of other trainees were recorded between 3 am to 4.15 am.

5. During investigation, Ms. Pammi Talwar stated that deceased Geeta was working with her for last 3 years and was using mobile no. 9873231275 but the same was not found at the spot and might have been taken away by the murderer. CDR of same mobile number was collected and it was found that the said mobile number was found to be registered in the name of one Anuj Kumar, who was her earlier driver, and was very friendly with Geeta thus shunted out from service.

6. On inquiry of CDR of mobile number 9873231275, CDR of mobile no. 9213909227 was obtained from Tata tele services and it was found that last call was made from this number is at around 7.15 pm on 06.07.09 at mobile number 9971737785 which was found in the name of D. Kamlesh but used by Pramod Kumar on which accused Anuj Kumar Tiwari contacted his brother Vipin Tiwari. During investigation, Mr. Pramod Kumar Tiwari took the police party to house of Vipin Kumar who stated that the mobile no. 9213909227 belongs to him however the same is used by Anuj Tiwari and further disclosed that Anuj on night of 06.07.09 came to his house and went to native village in night. Thereafter, accused Anuj Kumar Tiwari was apprehended from bus stop Shahbad Hardoi on 09.07.09.

7. During investigation, disclosed that he had sexual relationship with deceased Geeta for last so many years and now-a-days her demand started increasing and she started blackmailing him and deceased Geeta also started developing intimacy with other persons and he lost his job because of his relationship with deceased Geeta. He further disclosed that on 06.07.09 after calling her, he came to Institute and found her talking with Alok Kumar Singh @ Dipu driver of Pammi Talwar and when he raised objection, she started shouting and had altercation and finally in order to get rid of her, he strangulated her with her own dupatta. In the meanwhile, he heard the knock at door and thereafter he placed dead body in bathroom and went away from the institute.

8. Accused was produced in court no. 10.07.09 and an application for judicial TIP was moved, which was fixed for 14.07.09 but accused Anuj Kumar Tiwari refused to participate in TIP. As per postmortem report, deceased was found to be died of asphyxia due to ante mortem strangulation caused by ligature. During investigation, efforts were made to trace mobile phones but accused destroyed all of them. Therefore, section 201 IPC was

also added. Word 'Geeta Anuj' was found tattooed on forearm of accused Anuj Tiwari. On completion of investigation, chargesheet u/s 302/201 IPC was filed against accused Anuj Kumar Tiwari."

3. After completion of investigation, charge sheet for the offence under Section 302 of the Indian Penal Code was filed. The accused entered the plea of not guilty and claimed trial. The prosecution relied on the testimonies of 35 witnesses, besides the exhibits produced during the trial. The statement under Section 313 of the Code of Criminal Procedure was recorded wherein the appellant denied all the incriminating circumstances appearing in evidence against him and claimed to be falsely implicated.
4. Challenging the findings of the trial court, Mr. Chetan Anand, learned counsel appearing on behalf of the appellant contended that the judgment of the trial court is liable to be set aside on the ground that there is no eye witness in the present case. The counsel further contended that the circumstance of last seen is belied by the testimony of PW10 who in his cross examination categorically stated that he had not seen the appellant and only PW4 Rahul had seen him.
5. Counsel for the appellant submitted that the prosecution has miserably failed to prove the motive behind the alleged offence and that the fact of illicit relationship between the appellant and the deceased was not proved.
6. In the alternative, the learned counsel for the appellant addressed submission on the aspect of applicability of Section 302 of the Indian Penal Code in the facts of the present case. It was fervently urged that

even on a demurrer if the allegations leveled by the prosecution were accepted in its entirety, the present case would fall within the ambit of Section 304 Part II of the Indian Penal Code as the intention to kill the deceased could not be fastidiously imputed upon the appellant. The incident occurred on extreme provocation and at the spur of the moment without any premeditation. Admittedly, according to the post mortem report there were no marks of violence found upon the body of the deceased except abrasions and bruises upon the neck that were evidently suffered by the deceased during the process of strangulation. It was highlighted that the pressure exerted on the neck was not excessive, in as much as the hyoid bone or other structures underneath were not found fractured. It was submitted that the unfortunate saga transpired in a fit of rage during a sudden quarrel that erupted between the two. The appellant was not armed and used chunni of the deceased to commit the alleged offence. He did not take any undue advantage or acted in a cruel or unusual manner.

7. The counsel for the appellant has argued that the present case is squarely covered under Exception 4 of Section 300 of the Indian Penal Code, which reads as under:

"300. Murder-

Exception 1. - xxxx xxxx xxxx xxxx

Exception 2. - xxxx xxxx xxxx xxxx

Exception 3. - xxxx xxxx xxxx xxxx

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 offenders 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.”

8. To substantiate his arguments learned counsel for the appellant has relied on the judgment of the Apex Court ***Brajendrasingh Vs. State of Madhya Pradesh*** reported in ***AIR 2012 SCC 1552***, the relevant para 16 and 17 are as under:

“16. There is no doubt that it is not a case of direct evidence but the conviction of the accused is founded on circumstantial evidence. It is a settled principle of law that the prosecution has to satisfy certain conditions before a conviction based on circumstantial evidence can be sustained. The circumstances from which the conclusion of guilt is to be drawn should be fully established and should also be consistent with only one hypothesis, i.e. the guilt of the accused. The circumstances should be conclusive and proved by the prosecution. There must be a chain of events so complete so as not to leave any substantial doubt in the mind of the Court. Irresistibly, the evidence should lead to the conclusion inconsistent with the innocence of the accused and the only possibility that the accused has committed the crime. To put it simply, the circumstances forming the chain of events should be proved and they should cumulatively point towards the guilt of the accused alone. In such circumstances, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. Furthermore, the rule which needs to be observed by the Court while dealing with the cases of circumstantial evidence is that the best evidence must be adduced which the nature of the case admits. The circumstances have to be examined cumulatively. The Court has to examine the complete chain of events and then see whether all the material facts sought to be established by the prosecution

to bring home the guilt of the accused, have been proved beyond reasonable doubt. It has to be kept in mind that all these principles are based upon one basic cannon of our criminal jurisprudence that the accused is innocent till proven guilty and that the accused is entitled to a just and fair trial.

17. It is a settled rule of law that in a case based on circumstantial evidence, the prosecution must establish the chain of events leading to the incident and the facts forming part of that chain should be proved beyond reasonable doubt. They have to be of definite character and cannot be a mere possibility.”

9. Per contra, Ms. Aashaa Tiwari learned APP for the State submits that the evidence produced on record clearly establishes the guilt of the appellant and the trial court has rightly convicted the appellant for the offence punishable under Section 302 of the Indian Penal Code and hence the findings warrant no interference, accordingly the appeal is liable to be dismissed.
10. The counsel for the State vehemently urged that the commission of the alleged offence is supported by the Call Detail Record (CDR) of the deceased and the appellant. The location of the mobile phones was found to be in the vicinity of the Lajpat Nagar area where the alleged offence was committed. The counsel submitted that the circumstance of last seen along with the medical and electronic evidence has proved the case beyond any shadow of doubt.
11. The counsel for the State further submitted that the non explanation of the appellant under Section 313 of the Code of Criminal Procedure, goes against the appellant which guarantees the correctness of the prosecution allegation.

12. We heard learned counsel for both the parties and considered their rival submissions. The counsel also took us through the record of the trial court and the testimonies of the witnesses.

13. In this case, on consideration of evidence and materials on record and after considering the arguments advanced, we have found that the following circumstances are relied upon by the prosecution to prove the guilt of the appellant:

1. *The circumstance of last seen of the appellant corroborated by the testimonies of PW4 Rahul, PW13 Ajay Singh and PW14 Ramesh Chand.*
2. *Relations of the appellant and Geeta (deceased) corroborated by the testimony of PW1 Pammi Talwar (employer of the deceased) and PW2 Alok Kumar Singh @ Dipu (current driver of Pammi Talwar).*
3. *Medical Evidence.*
4. *Electronic Evidence in the form of Call detail record (CDR) of the mobile phones used by the appellant and the deceased in the alleged crime.*
6. *Dupatta used in strangulating Smt. Geeta.*
7. *Motive.*

14. Based on the testimony of PW4, Rahul; PW13 Ajay Singh; and PW14 Ramesh Chand, the circumstance no. 1 i.e. the presence of the appellant at the spot was proved. PW4 is the material witness in the present case who deposed as under:

“We knocked the main door of the 3rd floor for about 10/15 minutes. After 15 minutes of our knocking, accused present in the court today (correctly identified by witness), opened the main door from inside and told us that Geeta was washing the clothes. Accused went away from there. We found our room was locked from outside.

I went inside the bathroom, the door of the bathroom was closed. I pushed the door of the bathroom and found the dead body of Geeta inside the bathroom.”

15. PW13 Ajay Singh in his testimony deposed as under:

“As before leaving the hostel, we had asked deceased Geeta to keep the key of our room at a particular place at the hostel after washing our clothes, so we went towards the main gate on the 3rd floor of the hostel for taking the key but the door of the hostel was found bolted from inside, so we knocked for about 15 minutes. After 15 minutes, one person came outside, who is the accused, present in the court today, correctly identified the witness. After coming out, the accused told us that Geeta was washing clothes inside and thereafter, he went away from there through stairs. Thereafter, we went inside and found that Geeta was lying in the bathroom with the knot on her neck with chunni. Geeta was dead at that time.”

PW13 Ajay Singh in his cross-examination stated that when the accused opened the door, all of us viz. Rahul, Ramesh, Hemant and myself were present.

16. PW14 Ramesh Chand deposed on the similar lines and testified as under:

“We knocked the door for about 10-15 minutes and after 15 minutes, the accused present in the court today, opened the door from inside and came out and he told us that Geeta was washing the clothes inside. After telling us, the accused went from there through stairs.”

Based on the above mentioned testimonies, it is abundantly clear that firstly, the presence of the appellant at the spot is incontrovertible and

secondly, that they were the first who found the dead body and thirdly, that they were the one who set the criminal machinery into motion.

17. Based on the police complaint, PW5, ASI Kishan Kumar, had recorded DD No.25-A, Exhibit PW5/A. The electronic evidence, in the form of CDR details, along with the testimonies of Nodal Officer proved the presence of the appellant at the spot. The motive behind the alleged incident and the post mortem report, all of which leave no room for doubt that the appellant had strangled the deceased.
18. Furthermore, the other incriminating circumstances that guide us to the guilt of the appellant are that there were illicit relations between the appellant and the deceased and he himself had provided a mobile phone to the deceased. Moreover, there were frequent calls between them and the last call was made by the appellant to the deceased at around 6.45 pm on the day of incident. Thus, there appears no possibility of any other person to be on that floor. All these circumstances clearly and cogently form a chain which points towards the guilt of the appellant herein.
19. The next question for consideration is whether the evidence brought on record by the prosecution, establishes against the appellant a case of “*murder*” or in the alternative a case of “*culpable homicide not amounting to murder*”?
20. Both the said offences involve killing of a person. “*Murder*” is an aggravated form of “*culpable homicide*”. Section 299 of the Indian Penal Code defines the offence of culpable homicide and Section 300 deals with murder. Section 299 explains “*culpable homicide*” and sets

out the circumstances when culpable homicide amounts to murder and when it does not amount to murder. As per Section 300, existence of one of the four conditions, enumerated therein, which basically reflect four mental attitudes, turns “culpable homicide” into “murder”, while the three exceptions therein again reduce the offence of “murder” to “culpable homicide not amounting to murder”. The distinction between “murder” and “culpable homicide not amounting to murder” is very thin and in fact has always been a vexed question. Therefore, the question posed has to be examined carefully in the light of the broad principles laid down in the judicial pronouncements.

21. In the leading case of *State of Andhra Pradesh Vs. Ravavarapu Punnayya and Anr. AIR 1977 SC 45* their Lordships of the Hon'ble Supreme Court said that in the scheme of the Penal Code, "**culpable homicide**" is genus and "**murder**" is specie. All "murders" are "culpable homicide" but not vice versa. Speaking generally, "culpable homicide" sans "special characteristics of murder" is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognizes three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the gravest form of culpable homicide, which is defined in Section 300 as 'murder'. The second may be termed as "culpable homicide of the second degree". This is punishable under the 1st part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for

the three grades. Culpable homicide of this degree is punishable under the second part of Section 304 of the Indian Penal Code.

22. It was also observed that the safest way to approach the problem and appreciate the points of distinction between the two offences is to keep in focus the key words used in the various clauses of Sections 299 and 300 of the Indian Penal Code. Analysing the two Sections threadbare, their Lordships said that whenever a Court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", on the facts of the case, it will be convenient to approach the problem in three stages. The first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to culpable homicide as defined in Section 299 of the Indian Penal Code. If the answer to this question is, *prima facie*, found in the affirmative, the stage for considering the operation of Section 300 of the Indian Penal Code is reached. This is the stage at which the Court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of definition of "murder" contained in Section 300. If the answer to this question is in the negative, the offence "***would be culpable homicide not amounting to murder***", punishable under the first or the second part of Section 304, depending respectively, on whether the second or third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence

would still be "*culpable homicide not amounting to murder*", punishable under the first part of Section 304 of the Indian Penal Code. However, the Court observed that these were only broad principles and if applied, would facilitate the task of the Court but in some cases the facts are so intertwined and the second and the third stages so telescoped into each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stages.

23. There is no gain saying that the onus lies on the prosecution to prove the ingredients mentioned in Section 300 of the Indian Penal Code and bring the case under any one of the four clauses of the said provision, namely, 'firstly' to 'fourthly', to sustain the charge of murder. If it fails to do so, the charge of murder would not be made out and the case may be one of "*culpable homicide not amounting to murder*" as described under Section 299 of the Indian Penal Code.
24. Section 304 of the Indian Penal Code reads as under:

304. Punishment for culpable homicide not amounting to murder:

Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death,

or to cause such bodily injury as is likely to cause death.

Section 304 consists of two parts, the first dealing with second degree culpable homicide and the second dealing with third degree culpable homicide as has been noted above.

25. In ***Sukhbir Singh v. State of Haryana: (2002) 1 SCR 1152***, wherein two fatal blows were inflicted by the appellant therein by a bhala on the upper right portion of chest of the deceased, the Hon'ble Apex Court opined:

“19. The High Court has also found that the occurrence had taken place upon a sudden quarrel but as the appellant was found to have acted in a cruel and unusual manner, he was not given, the benefit of such exception. For holding him to have acted in a cruel and unusual manner, the High Court relied upon the number of injuries and their location on the body of the deceased. In the absence of the existence of common object, the appellant cannot be held responsible for the other injuries caused to the person of the deceased. He is proved to have inflicted two blows on the person of the deceased which were sufficient in the ordinary course of nature to cause his death. The infliction of the injuries and their nature proves the intention of the appellant but causing of such two injuries cannot be termed to be either in a cruel or unusual manner. All fatal injuries resulting in death cannot be termed as cruel or unusual for the purposes of not availing the benefit of Exception 4 of Section 300 IPC. After the injuries were inflicted and the injured had fallen down, the appellant is not shown to have inflicted any other injury upon his person when he was in a helpless position. It is proved that in the heat of passion upon a sudden quarrel followed by a fight, the accused who was armed with bhala caused injuries at

random and thus did not act in a cruel or unusual manner.”

26. Under similar circumstances, in ***State of Punjab v. Joginder Singh and Another: 2003 (9) SCALE 604***, the Hon’ble Supreme Court fastened the respondent-accused guilty for the offence punishable under Section 304 Part II of the Indian Penal Code and awarded a sentence of six years imprisonment. It was observed by the Apex Court that the accused was not armed with any weapon and visited the house of the deceased to recover the money lent to him. When the deceased was not in a position to pay the money, the accused flared up and caught hold of the neck of the deceased. The deceased was frail and slight pressure on his neck resulted in his death.
27. In ***Sandhya Jadhav v. State of Maharashtra: 2006 Cri LJ 2111***, the Hon’ble Supreme Court came to the conclusion that the Courts are bound to consider a large number of factors for arriving at an opinion as to whether the fight was sudden or not and/or whether the deceased has taken undue advantage of the situation in the following words:

“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.....

.... 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 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 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."***

28. In *Rampal Singh v. State of U.P.* reported in (2012) 8 SCC 289, the Hon'ble Supreme Court while altering the conviction from Section 302 of the Indian Penal Code to Section 304 Part-I of the Indian Penal Code observed as follows:

“20. In order to hold whether an offence would fall under Section 302 or Section 304 Part I of the Code, the courts have to be extremely cautious in examining whether the same falls under Section 300 of the Code which states whether a culpable homicide is murder, or would it fall under its five exceptions which lay down when culpable homicide is not murder.

21. Sections 302 and 304 of the Code are primarily the punitive provisions. They declare what punishment a person would be liable to be awarded, if he commits either of the offences. An analysis of these two Sections must be done having regard to what is common to the offences and what is special to each one of them. The offence of culpable homicide is thus an offence which

may or may not be murder. If it is murder, then it is culpable homicide amounting to murder, for which punishment is prescribed in Section 302 of the Code. Section 304 deals with cases not covered by Section 302 and it divides the offence into two distinct classes, that is (a) those in which the death is intentionally caused; and (b) those in which the death is caused unintentionally but knowingly. In the former case the sentence of imprisonment is compulsory and the maximum sentence admissible is imprisonment for life. In the latter case, imprisonment is only optional, and the maximum sentence only extends to imprisonment for 10 years. The first clause of this section includes only those cases in which offence is really 'murder', but mitigated by the presence of circumstances recognized in the exceptions to Section 300 of the Code, the second clause deals only with the cases in which the accused has no intention of injuring anyone in particular.

25. Classification of an offence into either Part of Section 304 is primarily a matter of fact. This would have to be decided with reference to the nature of the offence, intention of the offender, weapon used, the place and nature of the injuries, existence of pre-meditated mind, the persons participating in the commission of the crime and to some extent the motive for commission of the crime. The evidence led by the parties with reference to all these circumstances greatly helps the court in coming to a final conclusion as to under which penal provision of the Code the accused is liable to be punished. This can also be decided from another point of view, i.e., by applying the 'principle of exclusion'. This principle could be applied while taking recourse to a two-stage process of determination. Firstly, the Court may record a preliminary finding if the accused had committed an offence punishable under the substantive provisions of Section 302 of the Code, that is, 'culpable homicide amounting to murder'. Then secondly, it may proceed to examine if the case fell in any of the exceptions detailed

in Section 300 of the Code. This would doubly ensure that the conclusion arrived at by the court is correct on facts and sustainable in law. We are stating such a proposition to indicate that such a determination would better serve the ends of criminal justice delivery. This is more so because presumption of innocence and right to fair trial are the essence of our criminal jurisprudence and are accepted as rights of the accused.

30. ...It is clear that the Appellant had not committed the crime with any pre-meditation. There was no intention on his part to kill. The entire incident happened within a very short span of time. It is true that there was knowledge on the part of the Appellant that if he used the rifle and shot at the deceased, the possibility of the deceased being killed could not be ruled out. He was a person from the armed forces and was fully aware of consequences of use of fire arms. But this is not necessarily conclusive of the fact that there was intention on the part of the Appellant to kill his brother, the deceased. The intention probably was to merely cause bodily injury. However, the Court cannot overlook the fact that the Appellant had the knowledge that such injury could result in death of the deceased.”

29. However, upon anxious consideration of the matter we are persuaded to accept the alternative limb of submission advanced by the learned counsel for the appellant that the present case would fall within the ambit of Section 304 of the Indian Penal Code.
30. The case of the prosecution is premised on circumstantial evidence and in absence of direct evidence, we are required to reconstruct what may have transpired at the *locus in quo* (scene of crime), after taking valuable clues afforded from the material available on record that would throw some insight. The attending circumstances in consonance with the natural line of probabilities in as much as it is quite possible

for the appellant to commit the alleged offence. We cannot also be oblivious of the fact that the circumstance projected by the prosecution was that the appellant had sexual relationship with the deceased Geeta for last so many years and now-a-days her demand started increasing and she started blackmailing him and the deceased Geeta also started developing intimacy with other persons. It was further pointed out by the prosecution that on 06.07.2009 after calling the deceased, the appellant came to the institute and found her talking with PW2 Alok Kumar Singh @ Dipu (driver of PW1) and when he raised objection, the deceased started shouting and had altercation and finally in order to get rid off her, the appellant strangled her with her own duppatta. In the meanwhile, he heard the knock at the door and thereafter he placed the dead body in the bathroom and went away from the institute. Thus, the subsequent conduct of the accused after committing such a crime cannot be tested on the lofty anvils of abstract rationality.

31. PW11 Dr. Raghvendra Kumar conducted the post mortem of the deceased on 07.07.2009 and deposed as under:

“...On post mortem examination, a ligature mark was present around the neck completely encircling the middle part of neck. It was 5 cm from chin, 13 cm from supra sternal notch, 4 cm from both the mastoid process, 4 cm thickness. Total neck circumference was 30 cm. It was faintly visible. On dissection of neck extra vacation of blood was present over inner part of oropharynx and trachea. Neck lymph nodes and salivary glands were congested.

- Injury no. 2 One scratch abrasion of size 1 x .1 cm was present back of upper part of right forearm, 2 cm below right olecranon process.*
- Injury no. 3 A contusion of size 6 x 4 cm was present on left side of forehead.*
- Injury no. 4 One contusion of size 9 x 6 cm was present over front of left elbow.*
- Injury no. 5 Two scratch abrasions of size 1.2 x .1 cm and .8 x .1 cm were present over frontal aspect of neck.*

xxx

There were multiple petichiae seen in brain.

xxx

After post mortem examination, I found the cause of death in this case was asphyxia due to ante mortem strangulation by ligature."

32. In deaths because of ligature strangulation, ***petechiae*** are usually present. It is generally more intense than in other forms of strangulations because of the strength applied by the arms in tightening the ligature. In the majority of cases, the ligature furrow runs horizontally round the neck on its front and sides. If the ligature is a wide band of cloth with a smooth surface, the lesion of the stratum corneum may be so minimal that no mark is discernible. Non- intense ligature strangulations may simply leave a reddish hyperaemia on the skin of the neck. However, in cases of intense strangulation the larynx and hyoid bone might suffer a fracture. Occasionally, a fine white

foam may adhere to the laryngeal, tracheal and bronchial walls, which may be streaked with blood. The foam accumulates from bronchial secretion and tidal air during dyspnoea.

33. Perusal of the post mortem report reveals that no marks of violence were found upon the body of the deceased that she might suffer during the process of strangulation. It assumes significance that the thyroid complex or the underlying structures in the neck region such as the cartilages of the larynx and the rings of the trachea were not found fractured. At this juncture, we may profit from the luminous observations expressed by **Dr. Jaising P. Modi** in his authoritative treatise ***“Modi- A Textbook of Medical Jurisprudence and Toxicology, 24th Edition, Reprint 2012, Lexis Nexis Butterworths, Wadhwa Nagpur”***. It has been stated by the eminent author that the cartilages of the larynx or the rings of trachea may be fractured when considerable force is used [Pg. 454]. The said fact evinces that excessive pressure was not exerted by the appellant and he may not have harboured the intention to kill the deceased. No other mark of external or violent injury except some bruises was found on the body of the deceased. The appellant did not take undue advantage or act in a cruel or unusual manner. The unfortunate incident seems to have erupted at the spur of the moment and stemmed from extra marital discord. There were provocative utterances exchanged between the two. In a fit of rage during the sudden quarrel the appellant grabbed the neck of the deceased that resulted in asphyxiation and snuffed her life.

34. Applying the broad guidelines laid down by the Hon'ble Supreme Court and this court in the afore-mentioned cases, we are of the considered view that the evidence adduced by the prosecution falls short of bringing the case within the ambit of Section 300 of the Indian Penal Code and the offence committed by the appellant is covered by Section 304 Part I of the Indian Penal Code. No weapon was used for committing the offence. It, thus, stands proved that unfortunate incident took place on account of sudden quarrel between the deceased and the appellant; there was no pre-mediation; no animus and motive to kill the deceased. Therefore, having regard to the totality of the evidence on record, we have no hesitation in coming to the conclusion that the present case does not fall within the ambit of Section 300 of the Indian Penal Code. The aforesaid facts when analyzed in conjunction with the attending circumstances enwombing the present incident, strongly dispels the possibility that the appellant harboured an intention to kill the deceased.
35. Keeping in view, we are of the opinion that the conviction of the appellant should be altered from Section 302 to one under Section 304 Part I of the Indian Penal Code thereof. It is stated by the learned Counsel that the appellant has continuously been in jail for more than 7 years and 5 months. The fine imposed upon the appellant Anuj Kumar Tiwari and the default sentence awarded to him shall remain unaltered. In view of the statement made by learned Counsel for the appellant, we are of the opinion that the ends of justice would be met if we modify the sentence awarded to the appellant as the period already undergone by him. The appeal is allowed to the above

extent. The appellant shall be set at liberty forthwith, if not required in any other case.

36. The appeal is partly allowed and orders of conviction and sentence are modified in the above terms.
37. Trial Court Record be returned.
38. Copy of this decision be sent to the Superintendent- Central Jail, Tihar for updating the jail record.

SANGITA DHINGRA SEHGAL, J.

G. S. SISTANI, J.

MARCH 18, 2016

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