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

% *Date of Judgment: 15th May, 2017*

+ **Crl. A. No.872/2012**

ASHOK PASWAN

..... Appellant

Through: Mr. Sumeet Verma with Mr. Abhijeet
Sharma, Advocates.

versus

STATE

..... Respondent

Through: Mr. Rajat Katyal, APP for the State
with Insp. Hanumant Singh & SI
Vikas Rana, PS F.P. Beri.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE REKHA PALLI

G.S.SISTANI, J. (ORAL)

1. The appellant has filed the present appeal under Section 374 (2) of the Code of Criminal Procedure against the judgment dated 12.03.2012 and the order on sentence dated 15.03.2012. The appellant has been convicted under Section 302 of the Indian Penal Code (hereinafter referred to as 'IPC') and sentenced to undergo rigorous imprisonment for life with a fine of Rs.1,000/- and in default of payment of fine, to further undergo simple imprisonment for a period of six months.

2. At the outset, Mr. Verma, learned counsel for the appellant submits that he has instructions not to assail the judgment on conviction but he submits that a case under Section 302 of IPC is not made out. He pleads that having regard to the evidence on record, a case under Section 304 Part II of IPC would be made out and he prays that the judgment be modified in the above terms as also the order on sentence be modified to the period already

undergone which is about 7 ½ years which includes the remission earned by the appellant. Before the rival submissions of learned counsel for the parties can be considered, we deem it appropriate to examine the case of the prosecution as noticed by the trial Court.

“1. Vide DD no.58A dated 15.09.2011, police was informed by a person about murder of a lady by her husband from mobile No.9873390985. The abovesaid information was assigned to SI Upender Singh for preliminary inquiry. SI Upender Singh alongwith Ct. Chanderbhan had reached to the spot i.e. 1120B, G-1, Phase VI, Aaya Nagar, Delhi and found a woman lying dead on the floor of a room constructed on a plot. Name of the deceased was disclosed as Bhuli. She was having injury mark on her throat and head. One Vishwajeet Sarkar found at the spot handed over the accused Ashok Paswan to the police. In his statement, Vishwajeet stated that he was serving with Volvo Car Corporation as Driver. In the neighbouring plot Ashok Paswan along with his wife and children was living and did labour job. There Ashok Paswan quarrelled with his wife and had been beating his wife after taking liquor for the last two days. Yesterday also Ashok had beaten his wife a lot. Today at about 4.45 pm he was present at his house and he had heard cries of children from the house of Ashok Paswan. He had rushed to the house of Ashok Paswan and saw that Ashok laid his wife on the floor of his room and throttled her. On seeing him, Ashok ran away from there. He cried and with the assistance of the neighbours caught hold Ashok. He had seen the wife of Ashok who was not breathing and was dead. He informed the police. PCR vehicle had reached. Ashok murdered his wife by throttling. The abovesaid statement was got endorsed and police registered the case and arrested the accused. After completion of the investigation, police had filed the chargesheet against the accused.

2. Vide order dated 22.12.2011, accused was charged for the offence under section 302 IPC. Accused pleaded not guilty

and claimed trial.”

3. The prosecution examined 20 witnesses in all; no evidence was led by the appellant in his defence. Statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure wherein it was admitted that he had placed his hand once upon the deceased but thereafter he had removed his hand. He also admitted that a quarrel had erupted between him and his wife and his son (PW3) had witnessed the quarrel. The appellant further admitted that Vishwajeet Sarkar (PW4) had produced him before SI Upender stating that he had killed his wife. The appellant pleaded ignorance as to how her wife died in his hand.

4. Mr. Verma, learned counsel for the appellant contends that the judgment of the trial Court is based on conjectures and surmises. The trial Court has placed heavy reliance on testimonies of PW3 Raj Kumar and PW4 Vishwajeet Sarkar whereas the testimony of the child witness is unreliable. Mr. Verma has placed reliance on PW5 Dr. Munish Sharma in support of his argument that there was no intent on the part of the appellant to kill his wife. He submits that the entire incident took place in a fit of anger and as per the opinion of the doctor, Thyroid complex was intact, which would show that the appellant has not used excessive force on the deceased. The counsel for the appellant has relied on the case of ***Jitender Pal Singh vs. State*** reported at **2016 (2) JCC 906**, whereby the Division Bench of this Court had modified the order of conviction of the appellant to 304 Part II and the order on sentence was reduced to 7 years. The counsel submits that the case in hand has almost identical facts to the aforesaid case. Reliance is placed on Para 45 which reads as under:

“45. 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. Perusal of the post-mortem report reveals that no marks of violence were found upon the body of the deceased other than the faint bruises and abrasions on the neck that were evidently suffered during the process of strangulation itself. It assumes significance that the hyoid bone 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. 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 marital discord. It has emerged in evidence that the appellant would frequently quarrel with his wife for obtaining money to purchase liquor as he would largely remain unemployed. A similar incident must have occurred on the fateful day. The deceased must have resisted the demands of the appellant and provocative utterances must have been exchanged between the two. In a fit of rage during the sudden quarrel the appellant grabbed the neck of his wife that resulted in asphyxiation and snuffed her life.”

(Emphasis Supplied)

5. The counsel further submits that in a subsequent judgment **Anuj**

Kumar Tiwari vs. State of the NCT of Delhi reported in **2016 IV AD (Delhi) 524**, another Division Bench of this Court, of which one of us (G.S. Sistani, J.) was also a member, had also taken a similar view and the order of conviction was modified to Section 304 Part I of IPC and sentence was reduced to 7 ½ years. The relevant paras 33 and 34 read as under:

“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.

.....

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.”

(Emphasis Supplied)

6. Per contra, Mr. Katyal, learned counsel for the State submits that the prosecution has established its case beyond any shadow of doubt. He has drawn the attention of this Court to the statement made by the appellant under Section 313 of the Code of Criminal Procedure, more particularly; answer to question No.3 to show that the appellant admitted that he pressed the throat of his wife. The question reads as under:

“Q.3 It is further in evidence against you that at that time, PW-4 Vishwajeet Sarkar heard noise of weeping and crying of children and on hearing this he came out of his house and went towards your house and saw you had laid your wife on the floor of the house and was pressing her throat. What have you to say?”

Ans. It is correct. But my mind was not with me. I had placed my hand once upon the deceased but thereafter, I removed my hand.”

7. Mr. Katyal further submits that the testimony of the witnesses would show that it was not a solitary incident. A quarrel had taken place a day prior to the incident which is resulted in injury No.1 as testified by PW5 Dr. Munish Sharma. In rejoinder, Mr. Verma, however, explains that the injury was a result of quarrel which occurred a day prior to the incident and the appellant had taken his wife to the doctor which also finds mention in the testimony of PW3 and thus it cannot be said that the second incident was in

continuation of the incident which took place a day earlier.

8. We have heard learned counsel for the parties and considered their rival submissions, carefully examined the testimonies of the witnesses on record and the impugned judgment rendered by the Trial Court. Learned Trial Court while convicting the appellant under Section 302 of IPC held as under:

“15..... From the post-mortem report Ex.PW5/A, the prosecution has succeeded in proving the fact that the deceased was died due to asphyxia caused due to manual strangulation (throttling). The abovesaid report remained unchallenged, unrebutted and uncontroverted. PW-3 and PW-4 have proved the fact that they had seen the accused pressing the throat of his wife. PW-4 has categorically deposed that he came out of the house after hearing the cries of children of the deceased, he had seen the accused had laid his wife on the floor and pressing her throat and on seeing him, he fled away and only thereafter accused had been apprehended with the help of labour. Therefore, when he had seen the wife of the accused dead, he called police. The same is the version of PW-3. Mere admitting by PW-3 in his cross examination that his mother died after falling on the floor does not dilute the case of the prosecution, particularly in view of the unchallenged testimony of PW-5 and further evidence of PW-4. Moreover, the accused has not denied the evidence in his examination under section 313 Cr.P.C. Rather he has admitted the fact about the quarrel erupted between his wife and him on the previous night and got recovered the sari, pant and brick having blood stains, which he had hid after the quarrel. His version is that he did not know how his wife died but it is the fact that his wife had died at his hand. The argument of learned amicus curiae that the act of the accused does not fall in the category of section 302 IPC does not find favour with this court. The act as well as the intention of the accused in killing his wife has been established by the prosecution.”

9. In order to deal with the contentions of both the parties, it would be appropriate to examine the testimonies of the material witnesses including the testimonies of PW3 Raj Kumar and PW4 Vishwajeet Sarkar who had witnessed the incident.

10. PW3 Raj Kumar (son of the deceased and the appellant) in his examination-in-chief deposed that on the day prior to the fateful day, there occurred a quarrel between his parents and during that quarrel; the appellant hit the deceased with a brick as a result of which she sustained injury on her head. On the next day, in the evening at about 4.00 pm, PW3 saw the appellant pressing throat of the deceased. PW3 in his cross-examination stated that on the previous day of the incident, the appellant accompanied the deceased to the Doctor. PW3 also stated no one came to rescue the deceased when the appellant was throttling her.

11. Another eyewitness, PW4 Vishwajeet Sarkar (neighbour) deposed in his examination-in-chief deposed that on 15.09.2011, at about 4.45 pm or 5.00 pm, upon hearing cries of the children, he went towards the house of the appellant and saw that the appellant had laid his wife on the floor and was throttling her. PW4 further deposed that on seeing him, the appellant tried to flee from the spot. When he tried to catch hold of him, the appellant escaped and was later apprehended with the help of some persons after raising an alarm. Thereafter, he returned to the house of the appellant and found her dead. PW4 further deposed that he immediately called up the police at 100 no. Police reached the spot and the appellant was handed over to them. PW4 further deposed that the appellant had a habit of consuming liquor or drug like substance. On 14.09.2011, the appellant had also quarrelled with the

deceased and beaten her. In his cross-examination, he stated that he had not lodged any complaint on 14.09.2011 as quarrels usually took place in the house of the appellant and the deceased. He denied the suggestion that the appellant was not throttling the deceased; further denied the suggestion given to him that he had wrongly called the Police under misconception.

12. Besides the above public witnesses, PW13 Lady Const. Shyam Kaur has proved the copy of PCR form which is Ex.PW13/A. PW12 HC Kedar Prasad has proved the copy of FIR, which is Ex.PW12/A and also proved copy of DD entry as Ex.PW12/C. PW19 SI Jitender Kumar (In-Charge Crime Team) who inspected the spot has proved his report vide Ex.PW19/A. PW20 Insp. Anil Sharma was the Investigating Officer in the present case and had conducted the inquest proceeding and proved the same as Ex.PW20/C.

13. Before deciding the appeal in hand, we deem it appropriate to analyse the medical evidence in detail. In this regard testimonies of PW21 Dr. Asit Kumar Sikary and PW5 Dr. Munish Sharma assume importance. PW21 Dr. Asit Kumar Sikary, who has proved the MLC of the deceased as Ex.PW21/A. PW5 Dr. Munish Sharma, conducted post-mortem of the deceased Bhuli Devi on 18.09.2011. His detailed report is Ex.PW5/A. PW5 had found the following injuries on the body of the deceased:

- “1. *Lacerated wound of size 6x1 cm irregular and contused margins present over the occipital region of the scalp in the midline. It was muscle deep. It was present 148 cms above the left heel and 15 cms from the tip of right mastoid process and 14 cms from the tip of left mastoid process.*
2. *Scratch abrasion of size 1x1 cm was present over*

anterior aspect of neck in the midline. It was 6 cms below chin and 10 cms above suprasternal notch. It was 12 cm and 13 cms from the tip of right and left mastoid processes respectively (reddish brown in colour).

3. *Reddish brown scratch abrasion of size 0.5 x 0.5 cms was present over the right lateral anterior aspect of neck. It was 5 cms from midline and 10 cms from tip of right mastoid.*
4. *Reddish brown scratch abrasion of size 1 x 0.5 cms was present over the right lateral anterior aspect of neck. It was 5.5 cms from midline and 9.5 cms from tip of right mastoid.*
5. *Reddish brown scratch abrasion of size 0.5 x 0.5 cms was present over the right lateral anterior aspect of neck. It was 5 cms from midline and 6 cms from tip of right mastoid.*
6. *Reddish brown scratch abrasion of size 1 x 1 cm was present over the right lateral anterior aspect of neck. It was 6 cms from midline and 5 cms from tip of right mastoid.*

On dissection of neck extravassation of blood and sub facial haemorrhages were present. Thyrohyoid complex was intact and tracheal mucosa was congested. Face was congested. Bluish discolouration of nails was present. Rigor-mortis were present all over the body. Post-mortem lividity was present over back and dependent parts except over pressure areas. All the internal organs were congested.

(Emphasis Supplied)

14. After post-mortem examination, PW5 Dr. Munish Sharma opined the cause of death as asphyxia due to manual strangulation (throttling) and all the injuries were ante-mortem in nature.

15. From the post-mortem report, it is abundantly clear that the deceased did not suffer any other fatal injury apart from a lacerated wound of size 6 x 1 cm found on the occipital region of the deceased. The explanation to this injury was given to be a quarrel which took place one day prior to the incident. No fresh marks of violence were found upon the body of the deceased. The Thyrohyoid complex of the deceased was intact which is suggestive of this fact that the pressure exerted by the appellant while throttling was not excessive. It is evident from the testimony of PW4 Vishwajeet Sarkar (neighbour) who categorically deposed that it was quite common that the appellant and the deceased quarrel with each other. On the fateful day, the appellant in a fit of anger committed this act which resulted in the death of the deceased. We are of the considered view that the appellant did not have the requisite intention to be held guilty under the offence of murder. Therefore, the nature of the offence committed would be culpable homicide not amounting to murder. Hence, the present case is squarely covered under Section 304 of IPC which reads as under:

“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.”

(Emphasis Supplied)

16. Applying the law as laid down in *Jitender Pal Singh’s* case and *Anuj Kumar Tiwari’s* case (*supra*) to the facts of the present case, 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 Part I of IPC. The ends of justice would be met if we modify the sentence awarded to the appellant and sentence him to undergo rigorous imprisonment for a period of 8 years.

17. Consequently, the appeal is allowed in part, the conviction and order on sentence recorded by the Trial Court is modified to the extent indicated hereinabove. The appeal stands disposed of. The fine imposed upon the appellant and the default sentence awarded to him shall remain unaltered.

18. The Trial Court record be sent back along with a copy of this judgment.

19. Copy of this judgment also be sent to the Superintendent-Central Jail, Tihar for updating the jail record.

G. S. SISTANI, J.

REKHA PALLI, J.

MAY 15, 2017 //gm