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

% *Date of Judgment: 28th July, 2017*

+ **CRL.A. 1424/2012**

PAWAN KUMAR Appellant

Through : Mr.U.M.Tripathi

versus

STATE OF NCT OF DELHI Respondent

Through : Mr.Rajat Katyal, APP for State

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE CHANDER SHEKHAR

G.S.SISTANI, J. (ORAL)

1. Present appeal has been filed under Sections 374 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') against the judgment dated 07.09.2012 by which the appellant has been convicted for the offence punishable under Sections 302 and 201 of the Indian Penal Code, 1860 ('IPC') and the order of sentence dated 25.09.2012 whereby the appellant has been sentenced under Section 302 IPC to imprisonment for life with fine of Rs.10,000/-, in default of which to undergo further simple imprisonment for six months; and under Section 201 IPC to rigorous imprisonment for five years and also fine of Rs.2,000/-, in default of which to further undergo simple imprisonment for two months.

2. The Trial Court had noticed the case of the prosecution as under:

"1. The case of the prosecution is that on 21.09.2010, on receiving DD No.44B, dated 21.09.2010, PS Shahbad Dairy, SI Ajay alongwith Ct. Guljari reached at the spot i.e. H.No.118(A), Harijan Basti, Barwala, Delhi, where on the first floor of the house, he found one body of a lady namely Manju wife of Pawan. One nylon rope was found in the neck of

deceased, which was tied from the Khunti from one end and other end of the rope was tied with the iron kada (ring). SI Ajay called the crime team, which inspected the spot and took photographs. He seized the nylon rope after cutting the rope. Father of the deceased was informed and dead body was sent to the BJRM Mortuary. He inquired from the father of the deceased and recorded his statement. The dead body got released to the deceased's family members after postmortem examination.

2. In his statement, Shri Jage Ram stated that, he was residing in the village Shikarpur, PS Chawla, Delhi and deceased Manju is his daughter, who was married with Pawan in June 2002 and from the said wedlock they had two sons namely Luv and Kush aged about 7 years and 6 years respectively. He further stated that Pawan used to beat her daughter. Three months prior to the incident also he gave beatings to his wife Manju and thereafter left her to their house and only fifteen days prior to the incident accused Pawan took back Manju after giving assurance that he will keep their daughter well. On 21.09.2010 at 3.30 am Pawan made a call to him that Manju has committed suicide by hanging herself. Therefore, he and his relatives came to the house of Pawan and found his daughter hanged with rope, which was tied with Khunti (iron ring). He further stated that on the intervening night of 20/21.09.2010 her daughter had made a call to her brother in law (Jija) Ved prakash and told him that, Pawan has brutally beaten her and went out of the house by saying that, 'he will kill her'. Therefore, he has suspicion that Pawan has hanged his daughter after killing her.

3. On the basis of statement of Jage Ram (father of the deceased), SI Ajay (PW-18) prepared *rukka* and got the FIR 203/2010 registered at PS Shahbad Dairy under Sections 302/201 IPC. Further investigation was assigned to the Ins.Rakesh Rawat (PW-19), who reached at the spot with SI Mahender Pratap (PW-6), SI Ajay Singh and Ct.Anand. He prepared the site plan and collected the photographs. Appellant was arrested on 27.09.2010 and his statement was recorded wherein he stated that he had brought the deceased back from her parental

house about 15 days before the incident and thereafter, her behaviour had changed causing stress to the appellant. On the date of the incident, he had returned from work in the afternoon to find that the deceased was missing; when she came back an altercation took place in which the appellant hit the deceased with an iron scale. Then both slept in different rooms and after waking up at about 6 AM, he woke up the deceased and asked for tea. The deceased angrily went to the other room. The appellant got angry, went to the room and a scuffle ensued, in which the head of the deceased hit the wall and she started shouting and the appellant kept his hand on the mouth of the deceased and her breath went away. He then became afraid and attempted to make it look like a suicide. In pursuance of the statement, an iron scale was recovered at the instance of accused from the ground floor of his house. Ins.Rakesh Rawat (PW-19) collected the call details of the mobile phone of the deceased and witness Ved Prakash, postmortem report and also collected subsequent opinion of the doctor regarding the weapon of offence. After completion of investigation, chargesheet was filed under Section 302/201 IPC against the appellant and he was put to trial.

4. Charges were framed for the offences under Sections 302 and 201 IPC, to which the appellant pleaded not guilty and claimed trial. The prosecution examined 19 witnesses; the statement of the accused/appellant was recorded under Section 313 Cr.P.C. and the defence examined one witness, Smt.Prem (DW-1) (mother of the appellant).
5. After appreciating the evidence before it, the Trial Court held that the prosecution had been able to prove the complete chain of

incriminating circumstances against the accused/appellant and convicted of the appellant as noticed in paragraph 1 foregoing.

6. Mr.Tripathi, learned counsel for the appellant, at the outset submits that he does not contest the matter as far as the conviction is concerned. He submits that in fact, a case under Section 304 Part II IPC is made out. He relies upon the call details to show that Manju ('deceased') was talking to her brother-in-law for about 1½ hours in the early morning which would show that the testimonies of PW-1 (father) and PW-7 (brother-in-law) are not reliable. He submits that the deceased was not beaten throughout the night as alleged as the call details reveal that the deceased was talking to her brother-in-law and thus, she could not have been beaten by her husband/appellant during that period.
7. Learned counsel submits that it is hard to believe that the husband was ill-treating his wife from 2002 up to the date of incident and having regard to the fact that out of their wedlock two children were born, and no police complaint was filed, it is submitted that the testimony of father is highly exaggerated in nature and cannot be relied upon. Counsel also contends that in fact, on account of the husband-wife altercation, in the spur of the moment, had led to the incident. The injury marks are not the cause of the death which were only made with the scale, thus, there was no intention whatsoever on the part of the appellant to kill the deceased. The incident of smothering was unintentional. He submits that the appellant is the sole bread earner of the family. There are two minor children who are staying with the old mother, who is unable to look after them. Having regard to the submissions made, counsel for the appellant submits that a case under Section 304 Part II IPC would be made and the appellant has already

undergone for a period of almost 8 years including the remission earned by him.

8. Mr.Katyal, learned counsel for the State, submitted that there is no infirmity in the order of conviction passed by the Trial Court. Prosecution witnesses have testified that the deceased had been beaten regularly by the appellant and on the fateful day, throughout the night. Deceased was also threatened by the appellant that he would kill her. It has also come in evidence that the appellant used to continuously maltreat the deceased, being his wife, and used to repeatedly beat her. On a previous occasion, he had dropped her to her parental home after beating her and taken her back only 15 days prior to the incident stating that he will mend his ways. Even thereafter, he continued to beat his wife and killed her on intervening night of 20-21.09.2010. The previous conduct of the appellant and the threats extended clearly establish the intention of the appellant to murder the deceased and thus, the Trial Court was right in convicting the appellant under Section 302 IPC.
9. We have heard the learned counsel for the parties, examined the impugned judgment and the evidence placed on record. Though Mr.Tripathi has restricted his submissions to the applicability of Section 302 IPC, however, we deem it appropriate to examine the judgment of the Trial Court on its merits as well.
10. Jage Ram (PW-1) deposed that the deceased was his younger daughter and she was married to the appellant in June, 2002 as per Hindu Rites and Customs. After marriage, his daughter Manju started residing at her matrimonial house and out of the said wedlock two sons were born. Since the date of marriage, the appellant used to beat his daughter after confining her in a room. The appellant was

unemployed; however, he was running a shop of shoes. When his daughter Manju tried to object to the beatings, he again used to beat her mercilessly. Three months prior to the incident, appellant had dropped his daughter to his house after beating her. Fifteen days prior to the incident, appellant visited his house and took Manju to her matrimonial home by giving an assurance to him and his family members that he will not beat Manju in future and keep her well. PW-1 further stated that for the better matrimonial life of Manju, he sent his daughter with the appellant. On 21.09.2010 at about 3:30 PM, he received a phone call from the appellant that his daughter Manju had hanged herself (*Manju ne fasi laga li hai*). Thereafter, he alongwith his relatives went to the house of the appellant and found his daughter Manju hanging with *khunti* with the help of a rope at the first floor of the house of accused and she was no more at that time. He also deposed that his daughter Manju used to tell him about the beatings and ill treatment meted by the appellant Pawan, as and when she met him or he and his family members used to meet her.

11. PW-1 was thoroughly cross-examined by the counsel for the defence before the Trial Court wherein he stated that appellant had informed him telephonically at about 3:30 PM that the Manju hanged herself. He reached at the matrimonial house of Manju at Barwala at about 5:30 PM. PW-1 further stated that he had lastly talked with his daughter 15 days prior to her death when she had come to his house. He had inquired from his daughter why they were living separately and she told him that relations between her husband and his parents are not good (*apas mein banti nahin thi*). He denied the suggestion that appellant had a shop on the ground floor and he was residing on the first floor.

12. The mother of the deceased (PW-2) deposed on similar lines of her husband (PW-1). She deposed that after marriage, accused started harassing and beating her daughter mercilessly and this fact was told to her by her daughter/deceased, when she used to visit her house. When her daughter Manju tried to object the beatings by the accused, he again used to beat her mercilessly after confining her in a room. Three months prior to the incident, the appellant had dropped her daughter Manju at her house after beating her. She noticed injury marks on the person of the deceased and on their enquiry, Manju told them that, she was beaten by the appellant. About 15 days prior to the incident appellant had visited her house and took her with him to his house by giving assurance to her and her family members that he will not beat Manju in future and will keep her well. She sent her daughter Manju with the appellant as she did not want to ruin her matrimonial life. On 21.09.2010 at about 3.30 PM, her husband received a phone call of appellant that her daughter Manju had hanged herself. Thereafter, she alongwith her husband and other relatives went to the house of the appellant and found her daughter/deceased hanging with *khunti* with the help of a rope at the first floor of the house of appellant and she was no more at that time.
13. In her cross-examination, PW-2 admitted that before the incident, appellant and Manju were residing separately from the other family members of the appellant and the appellant was also doing the business of shoes from the ground floor of said house where they were residing separately. She stated that the deceased talked with her on phone before two days of her death and further volunteered that she told her that accused give beatings to her daughter and her hands and legs have been broken by the appellant.

14. The prime prosecution witness is Ved Prakash (PW-7), who deposed that the deceased was his sister in law (*saali*). Appellant Pawan was not keeping his wife Manju properly and he used to beat her regularly. The appellant used to come to his house late and whenever she asked about his reason for coming late, appellant used to beat her. Appellant used to forcibly throw out Manju (*ghar se bhaga deta tha*) from her matrimonial house and thereafter, she used to return to her parental house at Shikarpur. The deceased was residing at her parental house for about three months and 15 days before her death, the appellant had apologized for his acts. At that time, the appellant was accompanied with uncle Ram Kishan and they assured that Manju will be treated properly and she will not be given any beatings. Thereafter, appellant Pawan took Manju to her matrimonial house. On 21.09.2010 at about 3:30-3:45 PM, he received a telephone call from his father in-law Jage Ram that the appellant had called him and informed that Manju had committed suicide by hanging herself.
15. PW-7 further deposed that he has a mobile phone number 9215965888 in the name of his sister Sunita and he used this phone, which remained at his house. Deceased was also having a phone number 9210373633. In the intervening night of 20-21.09.2010 at about 2 AM, his mobile phone number 9215965888 was ringing and when he woke up, he found four/five missed calls from the mobile phone of deceased Manju. Thereafter, he had made a call from his mobile phone to the mobile phone of deceased Manju. Manju told him that, she was mercilessly beaten by the appellant with a steel scale, *danda* and fist and leg blows. She also informed him that the appellant told her that he was going to the house of his parents and he will come alongwith his parents and thereafter, he will kill her and she was

continuously weeping. He had tried to pacify her and told her that he will see her tomorrow. Manju also informed him that, she had not taken any meals since evening time. Ved Prakash (PW-7) further stated that after 3-3:15 AM mobile phone of Manju was switched off. This witness was thoroughly cross-examined by the defence, but to no avail. The testimony of Suresh (PW-16) also similar.

16. The postmortem examination on the dead body of the deceased was conducted by Dr.Bhim Singh (PW-10) who deposed that he had conducted the examination on 22.09.2010 and prepared the report (Ex.PW-10/A). He deposed as under:

“On general examination were built adult female. Rigor mortis present. Postmortem staining present over back except at pressure point. Mouth and eyes were partially opened. Conjunctivae suffused, tongue between teeth, nail blues. On the postmortem I found following injuries.

External injuries

- 1. Incomplete obliquely placed patterned ligature marks around the neck., width varies from 3.5 cm to 4 cm, two in numbers, merges each other situated 5 cm below chin, 5 cm from right ear & 4.5 cm from left ear, absent on back side merges with hair line, no ecchymosis seen surrounding the ligature mark, brownish in colour. ? Postmortem [sic].*
- 2. Inner side of upper lip shows abrasion 3 cm x 2 cm, reddish in colour*
- 3. Inner side of lower lips show abrasion 3.5 cm x 1 cm reddish in colour.*
- 4. Reddish coloured multiple bruises outer aspect of left arm ranges from 1 cm x 1cm to 2 cm x 1 cm.*
- 5. Multiple bruises, reddish in colour outer aspect of left arm, measuring from 1 cm x 1 cm to 2 cm x 1cm.*
- 6. Contusion, reddish in colour, 2 cm x 0.5 cm outer aspect of right arm.*
- 7. Multiple contused abrasions, reddish in colour in an area of 16 cm x 10 cm back of right side of chest, measuring from 1 cm x 1 cm to 2 cm x 1 cm.*

8. Multiple contusions merges with each other 6 cm x 5 cm back of left hand.

9. Contusion, reddish in colour 2 cm x 2 cm, back middle portion of right thigh.

INTERNAL EXAMINATION

Head. Extravasation of blood present over left frontal of temporal area of scalp layer.

Brain. Congested, shows subarachnoid hemorrhage in left front- temporal area.

Chest. Both lungs congested, edematous with patchy haemorrhage's at place.

Other organs were congested.”

17. PW-10 opined that the cause of death was due to the combined effect of asphyxia due to smothering and coma consequent upon head injury, sufficient to cause death in ordinary course of nature. All injuries were *ante mortem*, fresh and caused by blunt object and smothering due to closure of mouth and nostrils by hand. He also stated that the ligature marks could be *post mortem* in nature and the time since death was about 30 hours. Having regard to the time of postmortem, the time of death can be computed to be around 7:20 AM on 21.09.2010. His subsequent opinion (Ex.PW-10/B) was also taken in respect of the weapon of offence, i.e. the steel scale wherein he opined that injuries number 4, 5, 6, 7, 8, and 9 could have been caused by the weapon of offence. He stated in his cross-examination that incase of fresh injury, the colour of the bruises is red and after one day, it becomes blue-black in colour. His testimony had clearly shown that the hanging of the body was after the death of the deceased in order to cover up the same. We may also notice that the Trial Court had after studying the authorities in this regard, observed that injuries at serial number 2 and 3 (incorrectly mentioned as 2, 3 and 4) were caused while smothering

and we find no infirmity in the same. The relevant portion is extracted below:

“35. In Parik's Textbook of Medical Jurisprudence and Toxicology, Vth Edition at page no.204, it is mentioned that “smothering is a form of asphyxia caused by mechanical occlusion of the external air passages, viz, the nose and the mouth by hand, cloth, plastic bag or any other material. It is further mentioned that in homicidal smothering, abrasions and bruises are generally found in the region of nose and mouth. They may be absent if soft material, such as cloth, has been used. The injuries on the inside of the lips from pressure of the teeth, bruising of gums or sometimes from splits in the delicate tissues may be found. They may be missed at autopsy. These injuries are usually produced as a result of struggling and may therefore be absent in infants, young children, the aged and debilitated persons”.

36. In Modi's Medical Jurisprudence and Toxicology XXIIInd Edition, Student Edition on page no.276 it is mentioned that “in homicidal smothering effected by the forcible application of hand over the mouth and the nostrils, bruises and abrasions are often found on the lips and on the angles of mouth, and alongside the nostrils. The inner mucosal surface of the lips may be found lacerated from pressure on the teeth. The nose may be flattened, and its septum may be fractured from pressure of the hand, but these signs are, in Modi's experience, very rare. There may be bruises and abrasions on the cheeks and molar regions or on the lower jaw, if there has been a struggle.

37. All these injuries as mentioned above, in the Modi's book is found by PW10 Dr. Bhim Singh on the dead body of deceased Manju, which he had mentioned in his PM Report Ex.PW10/A at serial number 2,3 & 4 in column of external injuries. ...”

(Emphasis Supplied)

18. SI Mahender Pratap (PW-6), SI Ajay Yadav (PW-18) and Ins.Rakesh Rawat (PW-19) have deposed in respect of the recovery of the weapon of offence, i.e. a steel scale, at the instance of the appellant/accused and its seizure vide Ex.PW-6/E.

19. Gaganjit Singh Sidhu (PW-11), Nodal Officer, Tata Tele Services Ltd. had deposed and proved that mobile number 9215965888 was issued to Sunita Devi (Ex.PW-11/A to 11/C) and 9210373633 was owned by the deceased (Ex.PW-11/E and 11/F). He also produced the call detail records of the two numbers (Ex.PW-11/D and 11/G) as per which the following calls were exchanged between the two numbers on 21/09/10:

<u>Time</u>	<u>Caller</u>	<u>Recipient</u>	<u>Duration (in Secs)</u>
02:05:35	9215965888	9210373633	1168
02:29:36	9215965888	9210373633	3
02:30:00	9215965888	9210373633	107
02:32:00	9215965888	9210373633	309
02:37:23	9215965888	9210373633	1800
03:07:23	9215965888	9210373633	161
03:10:21	9215965888	9210373633	149
03:13:16	9215965888	9210373633	438
03:21:28	9215965888	9210373633	286

20. From the foregoing evidence led by the prosecution, the following circumstances stand proved:
- The deceased and the appellant were married to each other;
 - The appellant used to beat the deceased which led to her going back to her parental home;
 - On the intervening night, the deceased had informed PW-7 and PW-16 that she feared for her life;
 - The time of death was approximately 7:20 AM and the appellant was present at the time;
 - Injury number 4, 5, 6, 7, 8, and 9 could have been caused by the weapon of offence, i.e. steel scale, recovered at the instance of the appellant;

- (vi) The cause of death was due to the combined effect of asphyxia due to smothering and coma consequent upon head injury which rules out the possibility of suicide;
- (vii) The body of the deceased was hanged thereafter, in order to cover up the death; and
- (viii) 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)]

- 21. The foregoing circumstances conclusively point towards the guilt of the appellant and hence, we find no reason to interfere in the order of conviction of the Trial Court.
- 22. We proceed to analyse the submission of Mr.Tripathi regarding the applicability of Section 302 IPC. Exception 4 of Section 300 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)

- 23. A coordinate bench of this Court, of which one of us (G.S. Sistani, J.) was member, in ***Kamaljeet v. State***, MANU/DE/1752/2017 (paragraph 40) observed that “[t]o bring a case under the exception, fourfold requirement must be satisfied: first, there must be a sudden

fight; second, absence of pre-meditation; 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.”

24. 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 burn 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)

25. 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]

26. In the present case, we find that though it was the case of the prosecution that the appellant used to regularly beat his wife/the deceased, the same is belied by the medical evidence as no old injuries were found on the body of the deceased. All the contusions and the bruises were red in colour and not blue-black and hence, were less than one day old. Further, it cannot be said that the deceased was beaten all through the night as the call records (Ex.PW-11/D and 11/G) show that the deceased was on call from around 2 AM till 3:30 AM on the fateful day with Ved Prakash (PW-7). In this background,

we find force in the submissions of the learned counsel for the appellant that the incident occurred due to a husband-wife altercation in the spur of the moment. The altercation led to a sudden fight in which the appellant inflicted blows upon the deceased in the heat of passion. The weapon of offence is also of significance as it was a steel scale, which could have been procured from the place of incident showing no pre-meditation on the part of the appellant and the appellant acted neither in a cruel nor unusual manner. Hence, all the essentials of Exception 4 of Section 300 stand satisfied. The conviction deserves to be converted. Having regard to the injuries on the body of the deceased and the weapon of offence, it cannot be said that the appellant intended to cause such bodily injury as was likely to cause death. Accordingly, the conviction of the appellant is modified from Section 302 to one under Section 304 Part II of the Indian Penal Code.

27. We had called for the fresh nominal roll of the appellant, as per which, the appellant has been incarcerated for a period of about 8 years 2 months including remission. 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 the period already undergone for the offence under Section 304 Part II.
28. Thus, the appeal is partly allowed and orders of conviction and sentence are modified in the above terms.
29. Trial Court record be returned.
30. Copy of this Judgment be sent to the concerned jail superintendent for updating the jail record.
31. As we have converted the conviction under Section 302 to one under Section 304 Part II to the period undergone and the appellant has

already served his sentence under Section 201 IPC, the appellant be released forthwith, if he is not wanted in any other case.

G. S. SISTANI, J.

CHANDER SHEKHAR, J.

JULY 28, 2017

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