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

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Date of Judgment: 30th August, 2017

+ CRL.A. 1149/2016

RAJESHWAR PATHAK

..... Appellant

Through: Ms. Inderjeet Sidhu, Advocate

versus

STATE

..... Respondent

Through: Mr. Rajat Katyal, APP for the State
along with SI Sumit, P.S. Begumpur.

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 Section 374 (2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') against the impugned judgment dated 10.08.2016 in Sessions Case No. 183/2013, FIR No. 207/2013, P.S. Begum Pur, by virtue of which the appellant has been convicted under Section 302 of the Indian Penal Code (hereinafter referred to as 'IPC') and the order on sentence dated 22.08.2016 by which the appellant has been sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.25,000/- and in default of payment of fine to further undergo simple imprisonment for 06 months for the offence punishable under Section 302 of IPC.
2. The case of the prosecution in a nutshell is that on 01.07.2013, DD No. 3-A was recorded at P.S. Begum Pur, Delhi with regard to the murder of Bina (wife of the appellant/hereinafter referred to as the

deceased) at her residence i.e. House No. 245, Begum Pur, MCD School, Delhi. It is a case of death by strangulation which was alleged to be committed by the husband of the deceased i.e. Rajeshwar Pathak (the appellant herein). The appellant was arrested on 01.07.2013 and got recovered the weapon of offence i.e. electric iron (press) with cable (wire). A charge under Section 302 of IPC was framed against the appellant for committing murder of the deceased. The appellant pleaded not guilty and claimed to be tried.

3. To bring home the guilt of the appellant, the prosecution examined 22 witnesses in all. The statement of the appellant was recorded under Section 313 of Cr.P.C. whereby he pleaded innocence and claimed to be falsely implicated in the present case. It was stated by the appellant that at the time of the incident, he alongwith his brother Neeraj had gone to weekly Sunday Market and were purchasing vegetables when he received a call from Khushboo (PW14/sister of the deceased) after which they rushed home. Thereafter, he took his wife to the hospital where he was detained by the police and was taken to the police station. The appellant denied all the incriminating circumstances against him and claimed that he was having good relations with his wife and there were no dispute of any kind between them and were leading a happy life. The appellant examined three witnesses in his defence.
4. Ms. Sidhu, learned counsel appearing for the appellant submits that the judgment of the Trial Court is based on surmises and conjectures. The Trial Court has placed heavy reliance on the testimony of child witness PW 15 Master Rohit @ Manoranjan Tiwari (brother-in-law of the appellant) whereas his testimony is unreliable.

5. The appellant has been produced in Court. Ms. Sidhu, on instructions, submits that the appellant does not dispute the conviction recorded by the learned Trial Court. She, however, submits that no case under Section 302 of IPC is made out against the appellant. Counsel contended that the appellant and his family, including PW15 Master Rohit was residing together. On the fateful day, the appellant gave money to his brother-in-law (PW15) and asked him to purchase chicken from market. Thereafter, chicken was cooked by the deceased; the deceased gave a saucer containing some chicken and asked PW15 to give it to her sister PW14 Khushboo. PW15 took the said saucer to the residence of PW14 and gave it to her. PW15 had returned within half-an-hour from the residence of his sister. Counsel submits that till that point of time everything was normal and it is only during this period of half-an-hour, the appellant in the heat of passion, strangled his wife. Counsel further submits that there is no pre-meditation, there is no weapon of offence but was a case of strangulation. The appellant did not act in an unusual or cruel manner. Learned counsel further submits that there was no intent on the part of the appellant to kill his wife. The entire incident took place in a fit of anger. Learned counsel claimed benefit of Exception-4 of Section 300 of IPC and has relied upon the judgment in the case of **Ankush Shivaji Gaikwad v. State of Maharashtra**, reported at **JT 2013(7) SC 26**, more particularly para 10, which is reproduced as under:

“10. Time now to refer to a few decisions of this Court where in similar circumstances this Court has held Exception 4 to Section 300 of the I.P.C. to be applicable and converted the offence against the appellant in those cases from murder to culpable homicide not amounting murder. In **Surinder Kumar v. Union Territory, Chandigarh (1989) 2 SCC 217**, this Court held that if on a sudden quarrel a person in the heat of the moment picks up a weapon which is handy and causes injuries

out of which only one proves fatal, he would be entitled to the benefit of the Exception provided he has not acted cruelly. This Court held that the number of wounds caused during the occurrence in such a situation was not the decisive factor. What was important was that the occurrence had taken place on account of a sudden and unpremeditated fight and the offender must have acted in a fit of anger. Dealing with the provision of Exception 4 to Section 300 this Court observed:

“..... To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly.”

(Emphasis Supplied)

6. Lastly, Ms. Sidhu submits that the appellant has two minor children to look after and it is thus prayed that a lenient view be taken against him.
7. *Per contra*, Mr. Rajat Katyal, learned counsel for the State submits that there is no infirmity in the judgment passed by the learned Trial Court. He submits that the prosecution has been able to prove its case beyond any shadow of doubt. Mr. Katyal further submits that the testimony of the witness PW15 would show that it was not a solitary

incident and the appellant frequently used to come late to the house which was the cause of quarrel between the husband and wife.

8. We have heard the 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. The learned Trial Court has convicted the appellant Rajeshwar Pathak on the basis of the following incriminating circumstances which were proved against him:

- i) On 30.06.2013, the appellant was last seen by PW15 Master Rohit in the company of the appellant on both the occasions i.e. *firstly* when PW15 left for the house of his sister Khushboo (PW14) to give a saucer containing some chicken and *Secondly*, when he returned to the house of the deceased after about half-an-hour, the appellant was found in the house and was watching movie Singham in high volume;
- ii) The abscondence of the appellant from his house after 30.06.2013 and the arrest of the appellant on 01.07.2013 point towards the guilt of the appellant;
- iii) Recovery of electric iron (press) along with wire at the instance of the appellant;
- iv) Extra judicial confession was made by the appellant to PW15 Master Rohit with regard to the offence committed by him;
- v) The motive behind the incident was frequent quarrels between the deceased and the appellant due to his coming late to the house also stand proved.

9. The case in hand is based on circumstantial evidence. It is settled law that in a case based on circumstantial evidence, the chain of events has to be linked together to prove the sequence of events. In the present

case, the case of prosecution is based on the evidence of last seen account of PW15 Master Rohit who is the brother of the deceased and was living with her on the fateful day. At the outset, we deem it appropriate to discuss the testimony of PW15.

10. PW15 Master Rohit, aged 13 years at the time of his deposition in Court testified that the appellant was a driver by profession and he used to come late at the house or sometimes, he did not even turn up for the whole night. For that reason, there used to be quarrels between the deceased and the appellant. The incident was of Saturday. The deceased telephoned the appellant and he told her that he would come by 1.00 a.m. The deceased kept on trying to contact the appellant on telephone that night, but the phone did not get connected. Thereafter, PW15 alongwith the deceased went to sleep. Next day, it was Sunday and the appellant came at the house at 11.00 a.m., when the appellant was changing clothes, the deceased noticed blood on his underwear and pant and enquired about the same from the appellant. The appellant stated that it was grease. The deceased called PW15 and asked him about the said mark, he replied it was blood. The deceased kept the underwear of the appellant with her for the purpose to show the same to the parents of the appellant. The appellant snatched underwear from the deceased and washed it. This resulted in a quarrel between both of them. The appellant was not talking to the deceased. In the evening, the appellant gave PW15 some money and asked him to buy chicken from the market. PW15 bought the chicken and the deceased cooked the same. The deceased gave a saucer containing some chicken and asked PW15 to give it to her sister Khushboo (PW14). PW15 took the said saucer to the residence of PW14 and gave it to her. PW14 started talking with PW15 and half an hour had

elapsed during the conversation. Thereafter, PW15 came back to the house of the deceased. Both the children of the deceased were playing outside their house. PW15 went inside the house and asked the appellant as to whether the deceased had taken her dinner. The appellant told him that the deceased had taken her dinner and that was the reason she was sleeping. PW15 found that the deceased was lying on the bed, her hands were on her eyes and her face was covered with *chunni*. At that time, the appellant was watching movie Singham at very high volume on TV. PW15 got suspicious on seeing the deceased lying in that situation and asked the appellant, what happened to her? Whether the appellant had murdered the deceased? In reply to question put to him, the appellant told that he had murdered his sister and ran away from the house. After 5-6 minutes, his sister (PW14), PW16 Neeraj Pathak (husband of PW14) came at the spot and found that the deceased was not moving and it looked like as if she had died. Thereafter, PW14 and PW16 took the deceased to the hospital. On 05.07.2013, the statement of PW15 was recorded under Section 164 of Cr.P.C. by the then Metropolitan Magistrate in Rohini Courts which was proved as Ex. PW15/A.

11. In his cross-examination, PW15 stated that he used to study in a Government School, Begum Pur but he did not remember the complete name of the School. The school was near the house of PW16 and was little away from the house of the appellant. The parents-in-law of the deceased would not visit the house of the appellant. He admitted that he used to visit the house of PW14. The appellant used to leave for duty in the morning. At the time of his deposition in Court, he was studying at a Government School in Bihar, however, he did not remember the name of the School. He came to Delhi two days

prior to his deposition in Court and had visited the police station twice i.e. one day prior and on the day of his deposition in Court. He went to the police station alongwith his father. Police did not tutor him. It was told to PW15 that they were taking him to the Court. The appellant used to bring the household goods on his own. PW15 categorically admitted that at the place where the deceased was residing, 6-7 more families were also residing. PW15 stated that he mentioned in his statement Ex.PW15/A about the underwear incident, however, it was not mentioned therein. PW15 denied the suggestion that he made statement in the Court at the instance of his father (PW13) and the police officials. PW13 told him to tell only the truth. He denied the suggestion that on the date of incident, there was no quarrel between the deceased and the appellant; further denied that on the day of incident, he went to the house of PW14 and thus, he was not aware about the incident or that whatever he stated, he stated at the instance of his family members.

12. Another witness PW11 Shyamakant Pathak (father of the appellant) deposed that he was a TSR driver by profession. The appellant was his eldest son and was living separately. The appellant had one son and one daughter. On 30.06.2013, at about 10.45 p.m., he received information that the deceased was lying unconscious at House No. 245. Thereafter, he alongwith his other son namely Neeraj Pathak (PW16) went there and found that the deceased was lying unconscious. He took the deceased to BSA Hospital in his TSR where she was declared brought dead. Thereafter, he returned to the spot where the site plan was prepared at his instance.
13. PW14 Khushboo (sister of the deceased) deposed in her examination-in-chief that there was some dispute between the deceased and the

appellant with regard to his coming late to the house and for not going to work. The deceased used to complain to her about the same. On 30.06.2013, the deceased sent cooked chicken to her house. When they went to the house of the deceased, the son of the deceased namely Shivam informed her that a quarrel had taken place between his parents. They got suspicious when the deceased was found unconscious and was lying near the bed. She found the eyes and mouth of the deceased were opened and she shouted “*Jao Yeh To Maar Diya*” and started weeping. The appellant was present in the house at that time and on seeing that incident, he started running away. Her parents in-law, PW16 and she herself took the deceased to the hospital where she was declared brought dead. PW14 admitted that she stated to the police that the deceased was suspicious that the appellant was having illicit relationship with other women.

14. In his cross-examination, PW14 deposed that she alongwith PW15 and PW11 took the deceased to the hospital in a TSR. When her marriage took place, PW11 Shyamakant Pathak and the appellant used to maintain the house expenses. The appellant financially helped them while PW16 (husband of PW14) purchased a TSR. It was voluntarily stated by PW14 that the said money was taken for some other purpose and not for TSR. She admitted that PW15 was fond of watching TV and used to come to their house as the appellant was not having dish antenna. The deceased informed PW14 and her mother-in-law regarding the beatings given to her by the appellant. They did not know the lady with whom the deceased was suspecting the illicit relationship of the appellant. She admitted one suggestion that the appellant had taken the deceased up to the TSR. It was again voluntarily stated by PW14 that the appellant was trying to flee away

from the spot. She denied the suggestion that the appellant was not trying to flee away from the spot and was cooperating.

15. PW13 Vishwamohan Tiwari (father of the deceased) deposed in his examination-in-chief that he was farmer by profession and had six daughters and one son. The deceased married the appellant and his other daughter Khushboo (PW14) married the brother of the appellant (PW16). The appellant and PW16 were drivers by profession and were residing separately in Begum Pur. There was some quarrel on a domestic issue between the deceased and the appellant. The deceased complained to him that the appellant was having illicit relationship with other women and there had also been quarrels due to the appellant coming late to the house. PW13 told the deceased that he would come to her place, however, the appellant asked him not to come as the matter had been resolved between them. Police informed him about the incident and he came to Delhi on 02.07.2013 and directly reached the police station. PW15 was residing with the deceased. On enquiry, PW15 informed that there was “Jhagda” (quarrel) between the deceased and the appellant. On 02.07.2013, he identified the dead body of the deceased vide Ex. PW13/A. After post-mortem, the dead body of the deceased was handed over to him vide Ex. PW13/B. In his cross-examination, PW13 deposed that he did not send any person from his family or other relatives to the house of the deceased on the issue of quarrel between the deceased and the appellant. It was not within his knowledge with whom the appellant was having illicit relationship nor he himself made any enquiry from the appellant or the deceased. He did not make any complaint to the police, relatives or PW11 (father of the appellant) regarding the said issue. He could not tell any specific date when the quarrel took place

between the appellant and the deceased during their married life. He denied the suggestion that it was the appellant who informed him about the incident.

16. At this stage, we deem it appropriate to analyse the medical evidence in detail. In this regard testimonies of PW18 Dr. Meet Kumar and PW19 Dr. Vijay Dhankar assume importance. PW18 Dr. Meet Kumar, who examined the deceased on 30.06.2013 at about 11.45 pm and declared her brought dead. The MLC of the deceased was proved by her as Ex.PW18/A. PW19 Dr. Vijay Dhankar, conducted post-mortem of the deceased Bina on 02.07.2013. His detailed report is Ex.PW19/A. PW19 had found the following external injuries on the body of the deceased:

“i) Multiple pressure abrasion type ligature marks present over the front, sides and back of neck. The biggest mark was 24 cm long. 1 cm to 4cm wide and was extending from anterior part of right side of neck through the front and left side of neck upto the right side of back of neck. The mark was placed 5cm below the right ear lobe, 7cm below the chin in the midline, 7.5cm from the left ear lobe, 2cm below the occipital protuberance on the back of neck and was missing for a distance of 4cm on the right side of back of neck, Multiple scratch marks were present on the front of neck above the ligature mark with redness upto 3cm above the ligature mark. The mark was horizontally placed over the neck.

ii) A pressure abrasion 5cm x 1cm present over the right side of front of neck, horizontally placed, present 2cm above the injury no.1.

(iii) A pressure abrasion 8cm x 1 cm “C” shaped present over the right side of front of neck along the mandibular margin, situated 1 cm above the injury no.2

(iv) Contusion 5cm x 4cm present over the inner upper part of left arm.

(v) Abrasion 1cm x 0.2cm present over the outer aspect of lower part of back of right forearm.”

17. PW19 Dr. Vijay Dhankar further opined that the cause of death of the deceased was combined effect of hemorrhagic shock and asphyxia consequent to multiple injuries to the body and ligature strangulation of the neck. All the injuries were opined as fresh and ante-mortem in nature. Injury No.1 was caused by a ligature material. Injury No.2 and 3 could be caused by a ligature/blunt force. Injury No.4 and 5 had been caused by blunt force. The internal injuries to the chest and abdomen had been caused by a soft blunt object. The external as well as internal injuries to the neck, chest and abdomen were sufficient to cause death in the ordinary course of nature.
18. As to the possibility of the injuries caused by the weapon of offence recovered at the instance of the appellant. On 01.08.2013, PW19 examined the iron and opined that the injuries mentioned in the post-mortem report could be caused by the iron along with the wire.
19. It is noteworthy to mention the relevant Court question put to PW19 which reads as under:

“Court Question: You are directed to see the iron Ex.P-7 and inform which injury is compatible to which part of iron.

Ans. Injury no.1 has been caused by the cord of Ex.P-7, and injury No. 2 and 3 could have been caused by the cord or any of the basic plate or the side of the press (iron). The contusions present on the fore-arm could have been possible by a fist blow or by a blow with the base of the iron Ex.P-7. The scratches on the body could be possible by nails.”

20. It is evident from the testimony of PW15 Master Rohit who categorically deposed that it was quite common that the appellant and the deceased quarrel with each other. The night prior to the incident, the deceased had called the appellant and he told her that he would

come late. The deceased tried to contact the appellant but the phone did not get connected. When the appellant reached home the next day at 11 a.m., she found blood on his underwear which led to a quarrel. However, in the evening, the appellant had asked PW15 to go and bring chicken which was cooked by the deceased and the deceased had asked PW15 to deliver some to her sister. At that point, both the appellant and the deceased were present in the house. Evidence of PW15 does not show that the deceased and the appellant were quarrelling with each other, however, the incident took place during the half hour when PW15 had gone to deliver chicken cooked by the deceased at her request. Thus, it can safely be inferred that on the fateful day, the appellant in a fit of anger committed this untoward 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 kill the deceased which is evident from the fact that no lethal weapon was used for the act, nor he had asked PW15 to leave house. Accordingly, the nature of the offence committed would amount to 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)

21. We may also note the view taken by another Division Bench of this Court, of which one of us (G. S. Sistani, J.) was a member in the case of *Naeem vs. The State (NCT of Delhi)* reported at **2016 SCC Online Del 2603**, whereby the conviction of the appellant was converted from Section 302 to Section 304 Part I of IPC and the sentence was modified to eight years. The facts of the abovementioned case were similar to the case in hand wherein a quarrel took place between the married couple and in the heat of the passion, the appellant throttled the neck of his wife. This Court modified the conviction of the appellant for the reason that no weapon was used by the appellant, there was no pre-meditation, there was no prior enmity and the appellant did not act in a cruel manner.
22. The present appeal is to be decided on the touchstone of the law laid down by the Hon'ble Supreme Court and reiterated by this Court in the foregoing para. Applying the law as laid down in *Ankush Shivaji Gaikwad'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. In the present case, after analysing the evidence on record, it is evidently clear that the occurrence has the features of an incident in which the injuries were inflicted in a sudden fight without pre-meditation in the heat of passion upon a sudden quarrel within the contemplation of Exception 4 to Section 300 of IPC, which takes the case out of the purview of murder. Evidence also shows that the appellant did not have the requisite intention to kill the deceased and the incident had happened on the spur of moment which was ensued in a scuffle between the married couple and resulted in hot exchange of words between them.

There was no motive which could have impelled the appellant to commit the murder of Bina. 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.

23. 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.
24. The Trial Court record be sent back along with a copy of this judgment.
25. Copy of this judgment also be sent to the Superintendent-Central Jail, Tihar for updating the jail record.

G. S. SISTANI, J.

CHANDER SHEKHAR, J.

AUGUST 30, 2017

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