

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE**

**HON'BLE SHRI JUSTICE SUSHRUT ARVIND
DHARMADHIKARI**

&

HON'BLE SHRI JUSTICE PRAKASH CHANDRA GUPTA

ON THE 31st DAY OF JANUARY, 2023

CRIMINAL APPEAL No. 1172 of 2012

BETWEEN:-

**ASHOK MALVIYA S/O TEJ MALVIYA
AGED ABOUT 23 YEARS
R/O RAJIV GANDHI NAGAR
DISTRICT DEWAS (MADHYA PRADESH)**

.....APPELLANT

(MS. GEETANJALI CHAURASIA, ADVOCATE)

AND

**THE STATE OF MADHYA PRADESH
THROUGH P.S. KOTWALI
DISTRICT DEWAS (MADHYA PRADESH)**

.....RESPONDENT/STATE

(SHRI K. K. TIWARI, GOVERNMENT ADVOCATE)

Reserved on : 16.01.2023

Pronounced on : 31.01.2023

*This appeal having been heard and reserved for judgement,
coming on for pronouncement this day, Hon'ble Shri Prakash
Chandra Gupta pronounced the following:*

J U D G E M E N T

Appellant has filed this appeal under Section 374 of the Code of Criminal Procedure, 1973 (hereinafter referred to as “the “Cr.P.C.”), against the judgement dated 09.08.2012, passed by the learned Sessions Judge, Dewas in S.T. No.42/2012, whereby the appellant has been convicted u/S 302 of the Indian Penal Code (hereinafter referred to as “the IPC”) and sentenced him to rigorous imprisonment of life.

2. It is admitted fact that the deceased Pavitra Bai was earlier married to a person, resident of village Babadiya. Prior to 3 years of the incident, Pavitra Bai and appellant had love marriage. Thereafter, deceased used to live with her husband/appellant at Rajiv Gandhi Nagar, Dewas. Her father-in-law Tej Singh (PW/3) and mother-in-law Smt. Sukan Bai (PW/4) were also living with deceased and appellant in the same house, in which, the incident had taken place. At the time of marriage, family members of the deceased had told the appellant that the uterus of the deceased is small, and she will not be able to conceive child, even after knowing this fact, the appellant had married the deceased.

3. The facts lie in a short compass, which proceeds as, sister of deceased, Smt. Sushila Bai (PW/1) lives just 8-10 houses away from the house of deceased in Rajiv Gandhi Nagar. Appellant Ashok was a labour, and deceased used to work in nursing home. The relation between appellant and deceased were not cordial, and they used to

fight usually. 1 year post-marriage, the appellant started physically assaulting the deceased. Before the incident, the deceased had consumed poison on Diwali, for which she was admitted to Mahatma Gandhi District Hospital, Dewas. On the date of incident, i.e. on 21.12.2011 in the evening, appellant Ashok and deceased were alone at home, at that time, Tej Singh (PW/3) and Sujan Bai (PW/4) had went to sell fruits, and they returned home at around 10:00 PM. Then appellant had told them that he killed the deceased Pavitra Bai by strangling her neck with *dupatta*. Tej Singh (PW/3) and Sujan Bai (PW/4) saw that, deceased was lying dead on bed. Tej Singh (PW/3) called Smt. Sushila Bai (PW/1) and maternal aunt (mousi), Guddi Bai (PW/6) and told them about the incident. Sushila Bai (PW/1), Guddi Bai (PW/6) and maternal uncle (mouasa) of deceased Giridhari Lal (PW/2) went to the house of the deceased and saw that Pavitra Bai was lying dead on the bed present in the middle room. There was blackish mark on her neck. On being asked by Giridhari Lal (PW/2), the appellant told him that he strangled the neck of the deceased with her *dupatta* and killed her. Appellant killed the deceased as she was not able to conceive child. Thereafter, Sushila Bai (PW/1) went to Police Station Dewas alongwith Giridhari Lal (PW/2) and intimated the incident to the police. On the basis of this intimation, S.I. R.P. Tiwari (PW/10) lodged an FIR (Ex.P/1) against the appellant and also registered merg intimation (Ex.P/13).

4. During investigation S.I. R.P. Tiwari (PW/10) sent a letter (Ex.P/14) to Naib Tehsildar/Executive Magistrate to conduct Lash Panchnama of the deceased. On 22.12.2011, Naib Tehsildar/Executive Magistrate, Smt. Darshini Singh (PW/7) went to mortuary room in the District Hospital, Dewas. She gave notice (Ex.P/3) to the witnesses and prepared Lash Panchnama (Ex.P/4). Inspector Abdul Jabbar Khan (PW/11) wrote a letter (Ex.P/12A) to the doctor of district hospital for post-mortem. On 22.12.2011 at 10:20 AM, Dr. R.K. Sharma (PW/9) conducted post-mortem and gave post-mortem report (Ex.P/12). On the same day at 12:00 AM, Inspector B.P.S. Parihar (PW/12) inspected the place of incident and prepared a spot map (Ex.P/2) at the instance of Smt. Sushila Bai (PW/1). On 23.12.2011 at 09:15 AM, Inspector Abdul Jabbar Khan (PW/11), arrested the appellant vide arrest memo (Ex.P/10). On the same day at 09:45 AM, he recorded disclosure statement of the appellant vide disclosure memo (Ex.P/11) and at 10:30 AM he recovered a *dupatta* which was used in the commission of the offence at the instance of the appellant vide seizure memo (Ex.P/8). Statement u/S 161 of Cr.P.C. was recorded. After completion of the investigation, charge-sheet has been filed against the appellant before the concerning Magistrate. The offence was exclusively triable by the Court of Sessions, therefore, the case was committed before the Court of Sessions.

5. Learned Trial Court has framed charge against the

appellant/accused. The appellant abjured the guilt and sought trial. In turn the prosecution to prove its case examined 20 prosecution witnesses. On completion of prosecution evidence, the appellant was examined u/S 313 of Cr.P.C. The appellant denied commission of the offence and took the defence that he is innocent and has falsely been implicated in the case, though he has not examined any witness in his defence.

6. Learned Trial Court after hearing the parties convicted and sentenced the appellant for the offence, as mentioned above.

7. Learned counsel for the appellant criticizing the judgement submits that there is no eye-witness in the case and entire prosecution case is based upon circumstantial evidence. Alleged circumstances are not complete and exclusive against the appellant. Father and mother of appellant and Smt. Guddi Bai (PW/6) have not supported the case of prosecution. Smt. Sushila Bai (PW/1), Giridhari Lal (PW/2) are relatives of the deceased, therefore, their statement is not reliable. Learned counsel for the appellant in alternate also submitted that injury was found only on the neck of the deceased, even if this is found proved then too it does not fall in the definition of murder and comes u/S 304 of IPC. Learned counsel has heavily placed reliance on the case of *State of Madhya Pradesh V Abdul Latif [(2018) 2 SCC (Cri) 783]* and *Lavghanbhai Devjibhai Vasava V State Of Gujarat [(2018) 4 SCC 329]*.

8. Learned counsel for the State has supported the impugned judgement.

9. Learned counsel for the parties confined their arguments to the extent indicated above.

10. We have heard the learned counsel for the parties and perused the record.

11. Firstly, it is pertinent to consider that whether the death of deceased was homicidal in nature or not?

12. Abdul Jabbar Khan (PW/11) stated that after registering the offence, he sent letter (Ex.P/14) to the Naib Tehsildar/Executive Magistrate for conducting Lash Panchnama of the body of the deceased. Naib Tehsildar/Executive Magistrate, Smt. Darshini Singh (PW/7) stated that on 22.12.2011, she went to mortuary room in MG Hospital, Dewas and issued notice (Ex.P/3) to the witnesses and she prepared a lash panchnama (Ex.P/4). Her statement is supported by Smt. Sushila Bai (PW/1), Giridhari Lal (PW/2) and Tej Singh (PW/3). Statement of witnesses is also supported by lash panchnama (Ex.P/4), therefore, their statement is reliable.

13. Abdul Jabbar Khan (PW/11) stated that he wrote a requisition letter (Ex.P/12A) to the doctor for conducting post-mortem. Doctor R.K. Sharma (PW/9) deposed that on 22.12.2011, he was posted as Medical Officer in District Hospital, Dewas. On the said date at

10:20 AM, he conducted post-mortem of the deceased and found following injuries on the body of the deceased:-

1. *Distressed grooved abrasion all around the neck, size 28cm X 2cm.*
2. *Abrasion depressed grooved in front of neck, size 5cm x 1cm.*
3. *Depressed grooved abrasion in front of neck, sub-mental region, size 8cm x 1cm.*
4. *Depressed abrasion over chin, size 7cm x 1cm.*
5. *Depressed abrasion over right iliac crest, size 2cm x 1cm.*

Echymosis underneath abrasion present in all of the injuries.

14. Dr. R.K. Sharma (PW/9) further stated that on internal examination, he found that fracture of hyoid bone seen. Fracture of odontide process of second vertebral was found. Liver, spleen, lungs and kidney had cherry red congestion.

15. On the basis of aforesaid examination, Dr. R.K. Sharma (PW/9) opined that the injuries present on the body of the deceased were ante-mortem in nature. Mode of death was asphyxia due to strangulation. Nature of death is homicidal. Duration between 12-18 hours since the post-mortem examination. He proved post-mortem report (Ex.P/12).

16. Dr. R.K. Sharma (PW/9) in paragraph 4 of cross-examination, stated that the case is not related to suicide. The witness further

stated that this case is related to murder. There is no evidence in the case to indicate that deceased had committed suicide. No amount of cross-examination could cause dent on the testimony of this witness. Therefore, statement of this witness is trustworthy and reliable.

17. Therefore, it is clear that the death of deceased was homicidal in nature.

18. It is true that there is no eye-witness in the case and entire prosecution case depends on circumstantial evidence. As per prosecution, following circumstances are against the appellant, which have been found proved by the learned Trial Court, are as under:-

1. *The appellant married to the deceased even after knowing she is incapable of bearing child.*
2. *Before the occurrence of the incident, the relation was no more cordial between appellant and deceased.*
3. *The appellant was the only person present at the place of incident when the incident occurred.*
4. *Deceased was found dead in the house of appellant having ante-mortem injuries on her body and her death was homicidal in nature.*
5. *The appellant made extra-judicial confessions*

regarding commission of death of deceased by strangulating her.

6. The appellant had motive to kill the deceased.

19. Learned Trial Court has relied on the case of ***Trimukh Maroti Kirkan V State of Maharashtra [(2006 (10) SCC 681]***, in which the Apex Court has held as under:-

“15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.”

20. Learned Trial Court has further relied on the case of ***Ram Gulam Choudhary V State Of Bihar [(2001) 8 SCC 311]***, where the Apex Court opined as under:-

“Even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section

would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The Appellants by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference. We, therefore, see no substance in this submission of Mr. Mishra.”

21. A Coordinate Bench of this Court in the case of **Rajesh Sharma and Ors. V State Of M.P. [Cr.A. No.1327 of 2006, judgement dated 05.01.2022]** has held as under:-

“14. The circumstances which have been noticed by the learned Addl. Sessions Judge on the basis of evidence, that the husband of the deceased Rajesh has failed to give any explanation as to in what circumstances the deceased died. It is correct that being a husband he was supposed to know the cause of the fire because he was living with the deceased and the child in the said house. According to him, there was a short circuit but no evidence has been led by him, therefore, in absence of any explanation or evidence, appellant No.1 Rajesh has rightly been convicted u/s. 302 of the IPC . We find support from the judgement passed by the Apex court in the case of **State of Rajasthan v. Kashi Ram**, reported in (2006) 12 SCC 254

23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must

furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohd., Re. [AIR 1960 Mad 218 : 1960 Cri LJ 620]

24. There is considerable force in the argument of counsel for the State that in the facts of this case as well it should be held that the respondent having been seen last with the deceased, the burden was upon him to prove what happened thereafter, since those facts were within his special knowledge. Since, the respondent failed to do so, it must be held that he failed to discharge the burden cast upon him by Section 106 of the Evidence Act. This circumstance, therefore, provides the missing link in the chain of circumstances which prove his guilt beyond reasonable doubt.”

22. In the case of ***Bija and Ors. V State of Haryana [(2008) 11 SCC 242]***, the Apex Court has observed as under:-

“16. But, there is no evidence that parents of the accused No.3-Jagdish i.e. accused Nos. 1 & 4 and former husband of the deceased-accused No.2-Raghibir Singh had common intention to kill deceased Santro and they were parties in killing the deceased. It is no doubt true that Jagdish, who was the present husband, had grievance against Santro. He had to marry Santro who was neither beautiful nor able to bear child. The marriage was subsisting. After Santro married to Jagdish in 1997, he was unhappy as she could not conceive. Presumably because of that, he was also indifferent towards her and in the intervening night of May 1 & 2, 1998, he was not along with her in the company of his wife in the room where she was sleeping but was on the roof along with other family members. But, in view of the fact that accused Nos. 1, 2 & 4 could not be said to be directly connected with the death of Santro, in absence of clear evidence to that effect, the Courts below could not have convicted them by invoking Section 34, IPC. So-called extra judicial confession by Smt. Sona Devi, accused No.4 before Gaje Singh and Amar Singh has not been proved. Direct, immediate and proximate grievance at the relevant time was for accused Jagdish. Hence, his conviction for an offence punishable under Section 302, IPC recorded by the trial Court and confirmed by the High Court cannot be said to be contrary to law or otherwise unlawful. But there was no sufficient evidence as to common intention on the part of the other accused in absence of requisite material on record. In our considered opinion, therefore, Section 34, IPC could not have been invoked by the Courts below. To that extent, therefore, both the judgments deserve to be set aside.”

23. Now it is pertinent to move ahead in accordance with the

principles discussed above.

CIRCUMSTANCES NO.1 AND 2

24. Learned Trial Court has relied upon the statement of Smt. Sushila Bai (PW/1), Giridhari Lal (PW/2) and Smt. Sujan Bai (PW/4) in respect of both the circumstances.

25. It is an admitted fact in the case by the appellant that it was second marriage of deceased with the appellant. Smt. Sushila Bai (PW/1) in paragraph-12 of cross-examination has stated that the deceased had not left her 1st husband, but her 1st husband had remarried to another woman and the deceased and her 1st husband had divorced. Thereafter, deceased remarried with the appellant. It is also an admitted fact in the case that the deceased was unable to conceive due to issue in uterus. Smt. Sushila Bai (PW/1) further stated that after the marriage, there was cordial relationship between appellant and the deceased but after a year, as the deceased was not able to bear child, the appellant started physically assaulting her. In paragraph-11 of cross-examination, this witness stated that deceased told her a plenty of times that the appellant used to physically assault her for the fact that she could not conceive child. Statement of this witness is supported by Giridhari Lal (PW/2).

26. Smt. Sujan Bai (PW/4) has not supported the case of prosecution, therefore, prosecution declared her hostile and cross-examined the witness. In paragraph-3 of cross-examination, she has

admitted the suggestion of prosecution that the appellant and deceased used to fight. She has also admitted that deceased consumed poisonous substance just before 2-3 days before Diwali and she was admitted in hospital for treatment. The witness further admitted the suggestion of prosecution that even thereafter, they used to fight. In paragraph-7 of cross-examination, she admitted the suggestion of appellant that appellant and deceased married each other without the will of this witness, Smt. Sujan Bai (PW/4) and Tej Singh (PW/3). Further in same paragraph, the witness has admitted that deceased had told the appellant that she cannot conceive child. This being the reason, this witness, Smt. Sujan Bai (PW/4) and Tej Singh (PW/3) were not happy with the deceased.

27. Therefore, on the basis of statement of aforementioned witnesses, it appears that the appellant married the deceased even after knowing that she is incapable of bearing child and it is also proved that before the occurrence of the incident, the relation was no more cordial between appellant and deceased. Hence, circumstances No.1 and 2 are proved.

CIRCUMSTANCE NO. 3

28. Learned Trial Court has relied upon the statement of sole-witness Giridhari Lal (PW/2) in respect of circumstance No.3.

29. Tej Singh (PW/3) and Smt. Sujan Bai (PW/4) have stated that both the witnesses live in Rajiv Gandhi Nagar, Dewas. Appellant

and deceased also used to live in the same house. Neighbour of the appellant Anil Agrawal (PW/5) in para-3 of cross-examination has admitted the suggestion of appellant that there are 2 rooms in the house of the appellant and appellant, his parents and deceased used to live together. Tej Singh (PW/3) and Smt. Sugan Bai (PW/4) are parents of the appellant and Anil Agrawal (PW/5) is neighbour of the appellant, therefore, their statement is reliable that at the time of the incident deceased, appellant and his parents were living in the same house.

30. Tej Singh (PW/3) stated that on the date of incident, he had gone to work and returned home at 10:00 PM. Smt. Sugan Bai (PW/4) also stated that she had gone to work and returned home at about 09:30 PM. Both the witnesses further stated that when they had returned home they saw the deceased was lying on bed and she was dead. Therefore, on the basis of aforementioned statement, it appears that both the witnesses were not present at home at the time of incident and the witnesses had come home after the incident took place. Tej Singh (PW/3) has not stated anything about presence of the appellant in the home at the time of incident. Smt. Sugan Bai (PW/4) in paragraph-3 of examination-in-chief has stated that the appellant was not present at home on the date of incident and the deceased was alone in the house. Smt. Sushila Bai (PW/1) has also not stated that when she went to the house of appellant, then she saw appellant there in his house. Guddi Bai (PW/6) has not

supported the case of prosecution and this witness has denied that she had gone to the house of appellant after the incident took place.

31. Giridhari Lal (PW/2) stated that after listening about the incident, at that time, he went to the house of appellant and asked the appellant about the incident. In paragraph-4 of cross-examination, he again stated that when he asked the appellant about the incident, the appellant was present in the room. Statement of this witness is not challenged by the appellant, hence, his statement is reliable and it appears that at the time of incident only appellant and deceased were present in the house.

32. Therefore, in circumstance No.3, it is found proved that the appellant was the only person present at the place of incident when the incident occurred.

CIRCUMSTANCE NO.4

33. From the statement of Smt. Sushila Bai (PW/1), Giridhari Lal (PW/2), Tej Singh (PW/3) and Smt. Sukan Bai (PW/4), it appears that they had seen the body of the deceased, lying on the bed in her room. From the statement of Smt. Sushila Bai (PW/1) and Giridhari Lal (PW/2), it appears that they had seen sign of injury on the neck of the deceased. At the time of post-mortem, Dr. R.K. Sharma (PW/9) had found 3 injuries on the neck and 2 other injuries on the body of the deceased. He opined that cause of death of deceased was asphyxia due to strangulation and her death was homicidal in

nature. Spot map (Ex.P/2) shows that place of incident is the room of appellant. Therefore, the statement of aforementioned witnesses is reliable and it appears that the deceased was found dead in the house of appellant and there were ante-mortem injuries present on the body of the deceased and her death was homicidal in nature.

34. Therefore, in circumstance No.4, it is found proved that deceased was found dead in the house of appellant having ante-mortem injuries on her body and her death was homicidal in nature.

CIRCUMSTANCE NO. 5

35. As per prosecution case, the appellant had made extra-judicial confession on two occasions, first before her parents, Tej Singh (PW/3) and Smt. Sugan Bai (PW/4) and subsequently before Guddi Bai (PW/6), Smt. Sushila Bai (PW/1) and Giridhari Lal (PW/2). Tej Singh (PW/3), Smt. Sughan Bai (PW/4) and Guddi Bai (PW/6) have not supported the case of prosecution and the prosecution has declared them hostile. Though Smt. Sushila Bai (PW/1) has supported the case of prosecution but has not stated anything about the extra-judicial confession.

36. Learned Trial Court has relied on the sole statement of Giridhari Lal (PW/2) in respect of extra-judicial confession given by the appellant and has placed reliance upon the case of *Shahdevan and Ors. V State of Tamil Nadu [2012 CrLJ 2014]* and found that the appellant has made extra-judicial confession before

Giridhari Lal (PW/2) that the appellant has killed his wife/deceased by strangulating her neck with *dupatta*. In the case of ***Shahdevan and Ors. (Supra)***, the following was observed:-

“22. Upon a proper analysis of the above-referred judgments of this Court, it will be appropriate to state the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused.

The Principles

i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

ii) It should be made voluntarily and should be truthful.

iii) It should inspire confidence.

iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

vi) Such statement essentially has to be proved like any other fact and in accordance with law.”

37. Giridhari Lal (PW/2) stated that on the date of incident at

about 10:00 PM after listening the incident, he went to the appellant soon and asked the appellant that what he did to the deceased, the appellant stated that deceased was incapable to conceive child, so he killed her. There is minor discrepancy in the case diary statement (Ex.D/1) of the witness where it is mentioned that on being asked by this witness, the appellant stated that he killed the deceased with her *dupatta* (in case diary statement Ex.D/1, A-A). Therefore, it appears that the aforementioned discrepancy is common in nature. There is no discrepancy in extra-judicial confession by appellant that the appellant has killed the deceased by strangulating her. Hence, the learned Trial Court has rightly relied on the statement of Giridhari Lal (PW/2).

38. Therefore, it is found proved in circumstance No.5 that the appellant made extra-judicial confessions regarding commission of death of deceased by strangulating her.

CIRCUMSTANCE NO. 6

39. It appears that the learned Trial Court has not considered the evidence in respect of motive of the appellant to kill the deceased.

40. In this respect, it is an admitted fact that the appellant married with the deceased even after knowing about the fact that the deceased is incapable to conceive as her uterus was small.

41. Smt. Sushila Bai (PW/1) stated in paragraph-2 of

examination-in-chief and paragraph-11 of cross-examination, that the deceased used to tell her that appellant and deceased had a good relationship for 1 year from the marriage. Thereafter, the appellant had started to beat her for not being able to conceive child. Her statement is supported by Giridhari Lal (PW/2).

42. Mother of the appellant Smt. Sugan Bai (PW/4) has admitted in paragraph-3 of examination-in-chief that the appellant and deceased used to quarrel a lot. She had even consumed poison once. Further in paragraph-7 of cross-examination, she has admitted that the appellant and deceased had married without the consent of this witness and her husband Tej Singh (PW/3), further she admitted that the deceased had told that she is unable to conceive child, due to which this witness and Tej Singh (PW/3) were not happy with the deceased. In paragraph-8 of cross-examination, she stated that the behaviour of the deceased was not well at all. This witness has not supported the case of prosecution, hence, the prosecution has declared her hostile. She is mother of the appellant, she has admitted that there was no good relationship between deceased and her. Therefore, it appears that statement of Smt. Sushila Bai (PW/1) and Giridhari Lal (PW/2) is partly supported by this witness. Hence, statement of aforementioned witnesses is reliable and appears that the appellant had married with the deceased even after knowing that she is unable to conceive child but right after 1 year from marriage, the appellant started to quarrel and physically assault the deceased.

Hence, it is certain that the appellant had motive to kill the deceased.

43. Therefore, it is found in circumstance No.6 that the appellant had motive to kill the deceased.

44. On the basis of foregoing analysis, it is apparent that the appellant had love marriage with the deceased. It was second marriage of the deceased. The appellant had married with the deceased even after knowing that the deceased is unable to conceive child as her uterus was small. The relationship between the appellant and the deceased was cordial for 1 year from the marriage, thereafter they had disputes between them, because of which the appellant had started to quarrel and physically assault the deceased. Once the deceased had tried to commit suicide by consuming poison. On the date of incident at about 10:00 PM, the body of the deceased was found in the house of the appellant. There were ante-mortem injury marks on neck and other body parts on the deceased. Therefore, in view of Section 106 of Indian Evidence Act, 1872, there is a corresponding burden on the appellant to give a cogent explanation as to how the crime was committed. At that time the appellant was alone in the house. The appellant has not explained that how the deceased got injured. Therefore, the aforementioned circumstances show that no one else but the appellant alone has committed murder of the deceased.

45. Apart from that, it is also apparent that the appellant made extra-judicial confession before, Giridhari Lal (PW/2) that he killed the deceased by strangulating her by *dupatta*. It is also apparent that the appellant had motive to kill the deceased. Hence, it is certain that the appellant had killed the deceased.

46. So far as the argument of learned counsel for the appellant is concerned that the appellant had no intention to kill the deceased, looking to the fact of the case, it is clear that the incident took place due to sudden quarrel between the appellant and the deceased. Hence, the act of the appellant comes under Section 304 of IPC.

47. In the case of *State of Madhya Pradesh (Supra)*, the following was observed by the Apex Court:-

“12. It is clear from the evidence on record that the accused came to the house after attending the ‘Milad’ at midnight. The deceased opened the door and, thereafter, the deceased and the accused went to sleep. Suddenly, quarrel took place between them. It is clear from the evidence of PW-1 that the death occurred due to injury Nos. 11 and 12. The other injuries were simple in nature. The evidence of PW-1 shows that the death occurred on account of Asphyxia. The evidence of PW-5 and PW-6 coupled with evidence of PW-1 makes it clear that the incident had occurred all of a sudden, without any premeditation. It is evident that the accused had not taken undue advantage or acted in a cruel or unusual manner. Therefore, the High Court has rightly convicted the accused under Section 304 Part I of IPC. We do not find any infirmity in the judgment of the High Court. The appeal is accordingly dismissed.”

48. The Apex Court in the case of **Lavghanbhai Devjibhai Vasava (Supra)**, in paragraph-7 has opined as under:-

“7. This Court in the case of Dhirendra Kumar v. State of Uttarakhand [2015]3) SCALE 30] has laid down the parameters which are to be taken into consideration while deciding the question as to whether a case falls under Section 302 IPC or 304 IPC, which are the following:

(a) The circumstances in which the incident took place;

(b) The nature of weapon used;

(c) Whether the weapon was carried or was taken from the spot;

(d) Whether the assault was aimed on vital part of body;

(e) The amount of the force used.

(f) Whether the deceased participated in the sudden fight;

(g) Whether there was any previous enmity;

(h) Whether there was any sudden provocation.

(i) Whether the attack was in the heat of passion; and

(j) Whether the person inflicting the injury took any undue advantage or acted in the cruel or unusual manner.

8. Keeping in view the aforesaid factors it becomes evident that the case of the appellant would fall under Section 304 IPC as the incident took place due to a sudden altercation which was a result of delay in preparing lunch by the deceased. The appellant

picked up a wooden object and hit the deceased. The medical evidence shows that not much force was used in inflicting blow to the deceased. The prosecution has not set up any case suggesting that relationship between the the husband and wife was not cordial, otherwise. Manifestly, the incident took place due to sudden provocation and in a heat of passion the appellant had struck a blow on his wife, without taking any undue advantage. We are therefore, of the opinion that it was an offence which would be covered by Section 304 Part II IPC and not Section 302 IPC.”

49. There is no evidence to show in the instant case that there was sudden quarrel between the appellant and the deceased. On the basis of foregoing discussion, it appears that the act of appellant does not come under any exception of Section 300 of IPC. But it is proved that the appellant has killed the deceased with intention to cause death, hence, the offence is of culpable homicide amounting to murder, punishable u/S 302 of IPC. The case-laws produced by the learned counsel for the appellant are based on different facts and circumstances thus, the aforementioned case-laws cannot be pressed into service in the instant case.

50. Therefore, the prosecution has succeeded to prove the offence u/S 302 of IPC against the appellant beyond reasonable doubt. Hence, the learned Trial Court has not committed any error in convicting the appellant for the offence. Learned Trial Court has also given the minimum sentence to the appellant, hence, conviction and sentence deserves to be maintained.

51. Resultantly, the appeal filed by the appellant is **dismissed** and the impugned judgement is hereby upheld.

52. The appellant is in jail, be intimated about the outcome of this appeal through the Jail Superintendent concerned. A copy of this judgement alongwith the record of the Trial Court be also sent back to the Trial Court for intimation and compliance.

Certified copy, as per Rules.

(S. A. DHARMADHIKARI)
JUDGE

(PRAKASH CHANDRA GUPTA)
JUDGE

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