

**Avdresh vs.state**

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**Court :** Delhi

**Decided On :** Oct-10-2017

**Appellant :** Avdresh

**Respondent :** State

**Judgement :**

§~ \* IN THE HIGH COURT OF DELHI AT NEW DELHI % Date of Judgment:

10. h October, 2017 + CRL.A. 700/2017 AVDRESH STATE CORAM: Through: Mr. Sumeet Verma alongwith ..... Appellant Mr. Aman Chaudhary, Advocates. Versus ..... Respondent Through: Mr. Rajat Katyal, APP alongwith SI Sachin, PS Narela. HON'BLE MR. JUSTICE G.S.SISTANI HON'BLE MR. JUSTICE CHANDER SHEKHAR G.S.SISTANI, J.

(ORAL) 1. The present appeal has been preferred under Section 374 (2) of the Code of Criminal Procedure (hereinafter referred to as Cr.P.C.) against the judgment dated 02.02.2017 by which the appellant Avdresh has been held guilty for the offence under Section 302 of the Indian Penal Code (hereinafter referred to as IPC). Challenge is also made to the order on sentence dated 07.02.2017 by which the appellant has been sentenced to imprisonment for life with a fine of Rs. 5,000/- for the offence under Section 302 of IPC and in default of payment of fine, to further undergo simple imprisonment for a period of six months. CRL. Appeal No.700/2017 Page 1 of 26 2. We may note that when the application seeking bail was taken up for hearing, both the counsels agreed that the appeal itself may be

disposed of.

3. The case of the prosecution as noticed by the learned Trial Court reads as under: 1. On 09.08.2016 Radha Devi made a complaint to the police alleging that she is residing in a house situated in Shiv Mandir wali Gali. Near Shivam Garden, Vishal Bagh, Narela. She is permanent resident of village Parsara police station Pear, Distt. Mujjafarpur, Bihar. About 17-18 years back she was married with Ram Sewak. Two sons were born out of that wedlock. In the year 2007 her husband died due to illness. Thereafter, she married with Avdesh. Her earlier husband purchased a plot of 40 sq. yards in C-block, Vishal Bagh in her name. For the last many days Avdesh was not working and she [sic: he]. was pressurizing her to sell that plot. Mother of Radha, Smt. Batahi Devi was against that and was asking her not to sell. On this Avdesh used to quarrel Smt. Batahi Devi and also used to say that he will kill her as she is not allowing the sale of the plot and after her death he could easily sell that plot. On 08.08.2016 at about 9 pm Avdesh came home and started quarreling with mother of Radha. Radha intervened and made her husband understand and thereafter they went to sleep. Avdesh and mother of Radha slept outside the house on two separate cots and Radha slept inside the house. In the morning at about 6:00 am on 09.08.2016 due to some sound she got up and came out. She saw that her husband Avdesh was pressing the neck of her mother. She raised alarm on which Avdesh fled away from there. Radha tried to wake up her mother but she did not woke up. Jitender son of Radha made a call to Rekha younger sister of Radha who was residing in Swatantra Nagar. Rekha came there. Mukesh husband of Rekha made a call at 100 number police came there. On this statement of Radha the FIR was got registered. CRL. Appeal No.700/2017 Page 2 of 26 4. On 10.11.2016, charge under Section 302 of IPC was framed against the appellant Avdhesh to which he pleaded not guilty and claimed to be tried.

5. To establish the guilt of the appellant, the prosecution examined as many as 21 witnesses. The statement of the appellant was recorded under Section 313 of Cr.P.C. whereby it was stated that the plot in question was purchased by him in the name of his wife in the year 2010. The first husband of his wife had already expired in the year 2007. The appellant also had property in his native village and alleged that his wife wanted to grab his property. His mother-in-law and his wife

used to quarrel because his mother-in-law had gifted the property which was in her name to her nephew and this was the reason that his wife was very annoyed with her mother. The appellant pleaded innocence and claimed to be falsely implicated in the present case by his wife. The appellant denied all the incriminating material against him. However, no evidence was led by the appellant in his defence.

6. Mr. Sumeet Verma, learned counsel for the appellant submits that the judgment of the Trial Court is based on surmises and conjectures and learned Court has digressed the factual matrix of the matter. It is contended that the prosecution has failed to prove its case beyond reasonable doubt and as such the Trial Court should have given the benefit of doubt to the appellant.

7. Learned counsel for the appellant submits that it would be highly unsafe to convict the appellant solely on the testimony of an eye witness, which is full of contradictions and is evident upon a reading the cross-examination of PW1 in Court. The counsel contends that the appellant is an innocent person and has been falsely implicated in the CRL. Appeal No.700/2017 Page 3 of 26 present case by his wife where in fact she was the one who had a property dispute with her mother.

8. Mr. Verma contends that the motive in the present case has not been proved. It is further contended that admittedly the first husband of Radha had died in the year 2007 while the documents pertaining to the plot are of the year 2010 which is much after the expiry of her husband. This clearly shows the false implication of the appellant in the instant case.

9. The counsel for the appellant has highlighted this fact that a reading of the evidence of PW14 Dr. N. K. Gunjan, would show that the post- mortem was conducted on 10.08.2016 at 11.40 AM and the time of the death was opined to be 6 to 12 hours from the preservation of the dead body in the mortuary which was mentioned as 09.08.2016 at 10.10 AM. The scientific evidence does not support the case of the prosecution as PW1 has testified that the time of the incident was 6.00 AM on 09.08.2016. In this background, the testimony of PW1 cannot be accepted as the same is not supported by the scientific evidence.

10. The counsel for the appellant has drawn the attention of this Court to the statement made by the appellant under Section 313 of Cr.P.C., more particularly; answers to question No.s 6, 11 and 22 to show that the appellant was falsely implicated in the present case. The questions read as under: Q. 6: It is further in evidence against you that husband of PW-1 deceased Ram Sewak purchased a plot of 40 sq. yrd. at Vishal Bagh in C-block in the name of PW-1. You used to quarrel with PW-1 by insisting that she should transfer the plot of 40 sq. yards in your name. What have you to say?. Ans. It is incorrect. The plot was purchased by me in the name of my wife Radha. CRL. Appeal No.700/2017 Page 4 of 26 xxxx Q.11 It is further in evidence against you that in the morning hours PW-1 heard some screams from outside, she saw you were pressing the neck of her mother with hands while sitting on her chest. PW-1 rush towards her mother, you accused left her mother and ran away. PW-3 Jitender hear screams of PW- 1 ma ma. PW-3 saw you running from the house. PW-1 tried to woke up her mother by shaking, who did not respond. What have you to say?. Ans. It is incorrect. I am falsely implicated in the present case by PW-1 in connivance with the local police and family members. xxxx Q.22 It is further in evidence against you that on 16.08.16 you were arrested vide arrest memo Ex.PW-18/D and your personal search was conducted vide memo Ex.PW-18/E. You made disclosure statement Ex.PW-18/F and pointed out the place of occurrence vide memo Ex.PW-18/G. What have you to say?. Ans. It is incorrect. I was apprehended in the present case on 09.08.16 and later on falsely shown to be arrested on 16.08.16 by the local police. xxxx 11. Lastly, learned counsel for the appellant also submits that there was no weapon used in the commission of the offence and there is no evidence on record to show that the appellant had any intention to kill the deceased or made any preparation in the execution of the same.

12. Per contra, Mr. Katyal learned counsel for the State submits that the State has been able to prove its case beyond any shadow of doubt. There is no infirmity in the order of conviction as also the order on sentence. The case of the prosecution is premised on the eye witness account of PW1 Radha who was none other than the wife of the CRL. Appeal No.700/2017 Page 5 of 26 appellant, who had named the appellant in the first opportunity of time i.e. rukka as well as in the PCR form.

13. Counsel for the State contended that undoubtedly there was no weapon used in the commission of the offence; a quarrel took place between the appellant and the deceased; the appellant was under the influence of alcohol on the fateful night and there was sufficient time gap between the quarrel and the death of the deceased which leaves no room for doubt that it was none other than the appellant who had committed the offence.

14. The counsel for the State further submits that the motive in the present case has been established. It is the case of the prosecution that the appellant used to quarrel with his wife as well as his mother-in-law for transferring the 40 sq. yards plot which was owned by the wife of the appellant in his name. The presence of the appellant on the fateful night and the quarrel between the appellant and the deceased stands proved. Keeping in view all the incriminating material against the appellant, it was prayed that the learned Trial Court has rightly convicted the appellant under Section 302 of IPC.

15. We have heard learned counsel for the parties and considered their rival submissions, carefully examined the testimonies of the witnesses on record and the impugned judgment rendered by the Trial Court. Before delving into the merits of the case, it would be relevant to note the reasoning adopted by the learned Trial Court while convicting the appellant under Section 302 of IPC. The relevant para 40 to 43 read as under: 40. After hearing the arguments and going through the record, I found that in this case all the public witnesses are relatives of the accused. PW-1 is his legally wedded wife. CRL. Appeal No.700/2017 Page 6 of 26 PW-2 Rekha is sister of his wife and also wife of real brother of the accused. PW-3 is his own son and PW-4 is none else but his real brother. PW-1 stated that when she heard the cries of her mother, she woke up, came out and saw the accused pressing neck of her mother. This fact is mentioned in the complaint itself. When she appeared in the witness box she stated that accused was sitting on the chest of her mother and was pressing her neck. This fact does not show that she has improved or tried to make out a different case. She had only explained as to where the accused was when he was pressing the neck of her mother. Hence, this cannot be taken as a contradiction. The fact stated by PW-1 is also corroborated by the post mortem report Ex.PW-14/A wherein the doctor opined the cause of

death as asphyxia secondary constriction of neck structure (manual strangulation). From this it is clear that the deceased died due to manual strangulation. Therefore, this scientific evidence supports the ocular evidence of PW-1. PW- 1 said that when her mother did not respond, she started crying and her son came out. PW-3 said that on hearing the cries of her mother, he came out and saw the accused running. PW-1 said that he saw that her son came out after 5 minutes of hearing her cries. But not much importance can be attached to that as firstly she was not having any watch with her at the time and secondly she was under tremendous shock as she had seen her husband killing her mother. So far as contention that death has occurred much before the alleged time, I find that the doctor has not given any specific time, hence merely saying that the time may be between 6 to 12 hours may also vary and may be less than 6 hours and then it again depends upon the preserving condition. Particularly when there is an eye witness to the factum of strangulation which is corroborated by the scientific evidence in my opinion it does not discredit PW-16. It is also pertinent to mention here that PW-1 is wife of accused. There is nothing on record that relations between the two were strained or that she had any reason to falsely implicate the accused.

41. Ld. Counsel has also contended that it was the accused, who purchased the plot for Radha Devi PW-1 but PW-5, who sold the plot to Radha Devi denied this suggestion specifically. CRL. Appeal No.700/2017 Page 7 of 26 He stated that Awdesh never met him and did not make any payment. It is also important to note that in the documents Ex.PW-1/C1 to C4, Radha Devi is not shown as wife of Awdesh but is shown as widow of Ram Sewak. If Awdesh had married with PW-1, as alleged, before the transfer of the property then it would have been mentioned as Radha Devi wife of Awdesh. It is not the case and hence it can not be said that it was accused, who purchased the plot in his name of PW-1 coupled with the fact that PW-5 specifically said that Awdesh was not with Radha at that time and Awdesh did not make any payment.

42. So far as DNA profiling of material found in nail clippings is concerned, the DNA of the deceased only was found and not of any other person, hence it cannot be said that deceased was strangulated by some other person and not by the accused. Defence also tried to bring the theory of murder by some other person in

the gold chain but all the witnesses specifically stated that deceased never used to wear any gold chain. She was only having a silver chain and that was in her neck even after death. Even in the photographs Ex. PW-1/B4 and Ex.PW- 1/B5 that silver ornament is clearly visible in her neck. Hence, I do not find any merit in the contention of the Ld. Defence counsel.

43. It is also on record that he absconding after the offence and this fact is corroborated by all the witnesses including his real brother, which strengthen the prosecution case and reflects upon the conduct of the accused immediately after the commission of offence and point towards his guilt. Though there are contradictions as to at what time they took the dinner and where the statements were recorded but that does not go to the route of the case, hence much importance can not be attached to that. It is also important to note that the bone of the contention was the plot which was in the name of PW-1. Accused was pressurizing to transfer that plot in his name. There used to be quarrel between the accused, PW-1 and the deceased used to intervene and say that Radha will not transfer the plot in his name and also asked Radha not to do so. This fight was going on for the last few days and due to this CRL. Appeal No.700/2017 Page 8 of 26 reason accused also started sleeping out side the room. The fact that this dispute was going on is also supported by PW-2 and PW-3 and they said that accused used to say, budhia jab tak nahi maregi, yeh plot mere naam nahi hoga. Ld. Defence counsel raised the objection that in the complaint the contention is that accused was asking for sale of the plot, whereas when the witnesses appeared they deposed that accused used to pressurize for transfer of plot in his name, which is contradictory to the stand taken in the complaint. I found that sale or transfer of the plot in his name or in the name of any other person will have the same impact, so far as Radha is concerned. She will loose the title of the plot and then the money will be coming to the accused and if it is transferred in the name of the accused then he can sell it any time to any person for any consideration. Hence, this does not effect the merit of the case. (Emphasis Supplied) 16. In order to deal with the contentions of both the parties, it would be appropriate to analyse the testimonies of the material witnesses. The case of the prosecution is primarily based upon the eye witness account of PW1 Radha (wife of the appellant). At the outset, we deem it appropriate to analyse her testimony in detail.

17. PW1 Radha testified in her examination-in-chief that she was married to Ram Sewak, who had passed away due to some ailment. PW1 had two male children out of the said wedlock. The elder son of PW1 was of about 17 years and younger son was of aged about 12 years at the time of her deposition in Trial Court. In the year 2011, PW1 re-married the appellant Avdhesh. It was further deposed by PW1 that her late husband purchased a plot of 40 sq yards in C-Block, Vishal Bagh in her name. The appellant was working at the construction site for about one and a half years after the marriage. Thereafter, the appellant got addicted to drinking liquor and stopped working. The CRL. Appeal No.700/2017 Page 9 of 26 appellant used to quarrel with PW1 and insisted on transferring the plot of 40 sq yards in his name. Batahi devi (mother of PW1/deceased) used to intervene and told the appellant that her daughter would not transfer the said plot in his name. The appellant used to threaten her mother by saying Budiya jab tak nahi maregi yeh plot mere naam nahi hoga. On 08.08.2016, the appellant returned home late at night heavily drunk and started quarrelling with PW1. The mother of PW1 intervened and told the appellant as plot ko le kar mat ladh, kama ke kha le, plot ka peecha chhod de, mein yeh plot tere naam nahi hone doongi. At about 10.00 PM, after PW1 pacified the quarrel, she along with her sons went to bed inside their house. However, the deceased and the appellant slept outside their house on two separate cots. The next day, in the morning, PW1 heard screams from outside. When PW1 opened the door, she saw that the appellant was sitting on the chest of her mother and pressing her neck with his hands. As PW1 rushed towards her mother, the appellant left her mother and ran away. PW1 tried to wake her mother up by shaking her but she did not respond. PW1 called her elder son Jitender (PW3) who came out and called the younger sister of PW1 telephonically namely Rekha (PW2). She alongwith her husband (PW4/Mukesh) reached their house and thereafter PW4 Mukesh made a call at number 100. Police reached the spot and recorded the statement of PW1 which was proved by her as Ex.PW1/A. PW1 further deposed that she handed over the photocopies of the documents of the plot measuring 40 sq. yards which was in her name i.e. agreement to sell, affidavit, receipt of Rs.48,000/- to the Police which were seized by them vide seizure memo Ex.PW1/C1 to C4. CRL. Appeal No.700/2017 Page 10 of 26 18. In her cross-examination, PW1 stated that her late husband died in Delhi in a rented

accommodation where they were previously living together. PW1 alongwith her family shifted to the place of occurrence and were residing there for the last 7 to 8 years. It was further stated by PW1 that the appellant was a resident of District Mujaffarpur and was having some property in Bihar. The appellant was doing the work of fixing the shuttering and used to return home in the evening around 8 PM or 9 PM. It was further stated by PW1 that she did not remember the date and month of her marriage with the appellant nor of her first marriage. The appellant asked PW1 as well as her mother to transfer the house in his name after about one and a half years of the marriage. The quarrel on this issue was going on for about one week prior to the incident. There was no property in Delhi in the name of her mother except for one situated in her native village which was gifted by her mother to her nephew about 4-5 years prior to this incident. Neither PW1 nor her mother made any complaint in the Police Station or with any other authority that the appellant was pressurizing or fighting with them to transfer the property in his name. There was only one mobile phone in her house at the time of the incident which used to remain in her custody. PW1 denied the suggestion that the appellant was suffering from psychological problem or that he was mentally ill for which he was getting treatment. It was further stated by PW1 that her statement was recorded twice i.e. firstly; at the time of the incident and secondly; at the time of the arrest of the appellant.

19. PW1 was confronted with her statement Ex.PW1/A wherein it was not mentioned that the appellant was insisting for the transfer of the plot CRL. Appeal No.700/2017 Page 11 of 26 in his name but it was mentioned that he was insisting on selling the plot. Due to which the appellant used to quarrel with the deceased. PW1 was further confronted with her statement wherein it was not mentioned that the deceased objected to the request of the transfer to the appellant and that was the reason that the appellant used to threaten her mother by saying BUDIYA JAB TAK NAHI MAREGI, YE PLOT MERE NAAM NAHI HOGA. In addition to that, it was stated by the appellant, main tujhe jaan se maar doonga kyonki tu plot ko nahi bechne deti, tere marne ke baad mein aaram se iss plot ko bech doonga. PW1 further stated that she told the Police that on 08.08.2016, the appellant returned home in a drunken state and started quarrelling with her, on which the deceased intervened and told the appellant, plot ko le kar mat lad, kama ke kha le, plot ka picha chorr de, main

yeh plot tere naam nahi hone dunggi. On confrontation, the said statement was not found mentioned therein. PW1 was also confronted with her statement Ex.PW1/A wherein it was not mentioned that she saw the appellant sitting on the chest of her mother. PW1 reiterated that the appellant returned home at about 6/7.00 PM on the fateful night and had dinner at about 10.30 PM. The quarrel continued for about one and a half hours. PW1 pacified the matter and did not make any complaint to the Police regarding the quarrel which took place on 08.08.2016. PW1 stated that there were no residential houses near her home and the nearest house was at a distance of about 50 ft. away.

20. It was further stated by PW1 that her house comprised of only two rooms. The mother of PW1 and the appellant were sleeping outside their house on separate cots; PW1 heard the screams despite the CRL. Appeal No.700/2017 Page 12 of 26 ceiling fan being switched on inside the room; in addition to that the air cooler was also switched on outside the room. There was no person in the street when PW1 woke up. The cot on which her mother was sleeping was at a distance of 15 ft from the room where she was sleeping. The appellant Avdresh fled away towards Bawana Narela road and PW1 did not try to chase or catch hold of the appellant. PW1 raised alarm but no one from the nearby houses came as there were none in near vicinity. The neighbours reached the spot after an hour of the incident. The son of PW1 namely Jitender (PW3) came out while she was weeping loudly as her mother was not responding when she tried to wake her up. On 16.08.2016 at about 6/6.30 PM, the appellant was brought to the home of PW1 by the Police officials. It was denied by PW1 that the appellant was apprehended on 09.08.2016 from her house at the instance of PW1 in connivance with the local Police. It was further denied that the appellant never used to quarrel or insist for transfer/sale of the plot or that was the reason that he did not make any complaint to the Police or any authority. It was denied by PW1 that the relations between PW1, her son and her husband were not cordial or that PW1 falsely implicated the appellant after the incident. The appellant was sleeping outside the room for the last 2-3 days. However, the mother of PW1 (deceased) used to sleep outside the room in summers as well as in winters.

21. The next witness examined by the prosecution was PW2 Rekha who testified in her examination-in-chief that the appellant was the brother of her husband and was married to her sister PW1 Radha. PW1 was previously married to Ram Sewak, who passed away due to illness. Out of the said wedlock, two sons were born to her sister Radha. PW1 CRL. Appeal No.700/2017 Page 13 of 26 remarried with the appellant Avdhesh who was a habitual drunkard. There was a plot measuring 40 sq. yards in the name of her sister Radha which was purchased by her late husband Ram Sewak. The appellant used to quarrel with her sister in regard to selling the plot or transfer it in his name. The mother of PW2 Batahi Devi (deceased) objected to transfer of the plot or to sell the same. The appellant used to quarrel with her mother as well as her sister. It was further deposed by PW2 that one week prior to the death of her mother, the deceased visited her house for getting her clothes stitched where she informed her that the appellant used to threaten her by saying tu beech mai mat bola kar nahi tau mai tera gala daba dunga. The mother of PW2 further told her ki agar yeh (Radha) plot bech degi to yeh do bachcho ko kaha rakhengi. The mother of PW2 told the appellant, kama ke kha le, plot ke pichche kyun pada hai. In response to the above conversation, PW2 told her mother yeh aise hi bolta rehta hai yeh kuch nahi ker sakta. On 09.08.2016 after 6.00 AM, the son of her sister namely Jitender (PW3) made a call to her and informed her while weeping that the appellant had ran away after killing his maternal grand-mother. Thereafter, PW2 alongwith her husband reached the house of her sister Radha where the deceased was lying dead outside their home. PW2 noticed marks on the neck of the deceased. The husband of PW2 made a call at number 100. Subsequently, the neighbours gathered at the spot and Police also reached the spot.

22. In her cross-examination, it was stated by PW2 that the appellant married her sister in the year 2011 but she did not remember the date CRL. Appeal No.700/2017 Page 14 of 26 and month. PW2 also failed to state the date and month when the appellant had a quarrel with her mother in her presence.

23. PW3 Jitender (step-son of the appellant) deposed in his examination- in-chief that the appellant Avdhesh was his step father who used to drink liquor and consume ganja. The appellant used to quarrel with his mother and maternal

grand-mother by saying that the plot measuring 40 sq. yards should be transferred in his name. The said plot was in the name of his mother which was purchased by his late father in the name of his mother. The maternal grand-mother of PW3 used to object the appellant by saying, yeh makaan to tum (accused) bech donge or us paiso ki daroo waroo pee jayonge aur in bachcho ka kya hongra or yeh kaha rahenge. It was further deposed by PW3 that on 08.08.2016 at about 7/8.00 PM, a quarrel took place between the appellant and his grand-mother on the issue of the plot. His mother (PW1) intervened and pacified the quarrel. At about 9.00 PM, PW3 alongwith his younger brother and his mother went inside the house for sleeping, however, the appellant and the deceased went to sleep on separate cots lying outside their house. The next day at about 6.00 AM, PW3 heard the screams of his mother. On reaching outside the house, PW3 found his mother was weeping and was sitting next to the cot of the deceased. PW3 also saw the appellant running away from the spot. Thereafter, PW3 made a call to his uncle Mukesh (PW4) who after reaching the spot informed the Police officials by calling number 100.

24. PW4 Mukesh (real brother of the appellant) deposed in his examination-in-chief that the appellant used to drink liquor and consume ganja. The appellant used to quarrel with his mother-in-law CRL. Appeal No.700/2017 Page 15 of 26 (deceased) and his sister-in-law (PW1/Radha). PW4 further deposed that it came to his knowledge that his sister-in-law Radha (PW1) owned a plot measuring 40 sq. yards which was purchased by her late husband for Radha. On 09.08.2016, Jitender (PW3) made a call on his mobile phone and informed him that his maternal grand-mother had expired and that she was strangulated by the appellant. Thereafter, PW4 alongwith his wife reached their house. The appellant was found missing at the spot. PW4 was informed by PW3 Jitender and PW1 Radha that the appellant had strangulated and killed his mother -in- law. PW4 made a call to number 100. Police reached and photographed the spot. PW4 admitted that the appellant Avdresh said that he would get the plot transferred in his name and for that purpose he would even kill his mother-in-law (deceased). The appellant also used to quarrel with his mother-in-law on this issue who used to object to the transfer of the said plot in the name of the appellant as it was a gift to PW1 Radha by her late husband.

25. In his cross-examination, PW4 stated that the appellant was suffering from some psychological problem after the death of their father and was undergoing treatment. It was further stated by PW4 that the appellant married with PW1 Radha in the year 2011. PW3 Jitender made a call to PW4 at about 6/6.30 AM on the day of incident. PW4 alongwith his wife reached the spot at about 7.00 AM.

26. The previous owner of the plot in question was also examined by the prosecution as PW5 Rajender Prasad Singhal. It was deposed by PW5 that he was the owner of the plot measuring 40 sq. yards bearing khasra No.1/23, 24, situated in the area of Sanoth, in front of Vishal Bagh, Bawana Road, Narela, Delhi. PW5 further deposed that CRL. Appeal No.700/2017 Page 16 of 26 on 23.03.2010, the said plot had been sold to PW1 Radha for a sum of Rs. 48,000/- and had executed the documents including agreement to sell, affidavit, receipt which were proved as Ex.PW1/C-1 to C-4. In his cross-examination PW5 stated that two meetings were held with PW1 Radha with regard to the purchase of the plot in question. It was denied by PW5 that the appellant Avdhesh came to his house alongwith PW1 Radha or that the appellant made the payment or purchased the said plot in the name of PW1 Radha.

27. Besides the above public witnesses, PW13 Sumit who was working as a DD writer at Police Station Narela on the day of the incident. On 09.08.2016, at about 7:24 AM, he received information with regard to the killing by strangulation at Vishal Bagh, Shivam Garden, Bawana Road, Bharat Mata School Narela. The said information was recorded vide DD No.16B and the copy of the same was proved as Ex.PW13/A.

28. PW15 Renu Yadav was posted at CPCR Police headquarter at extension No.129 deposed that on 09.08.2016, information was received at 7:20:49 from mobile phone No.8860150708 as Vishal Enclave, Shivam Garden ke paas, Bawana road, Bharat Mata School ke pass gala daba kar maar dala hai. The said information was recorded in form No.1 which was proved by him as Ex.PW15/A.

29. PW16 Ram Kumar was the officer in-charge of the crime team on 09.08.2016 and after receiving the information, he along with his team i.e. Const. Vikas (PW6/photographer) and HC Manoj (finger print proficient) reached the spot i.e.

Shiv Mandir wali Gali, Vishal Enclave, Shivam Garden Narela where he inspected the scene of crime and submitted his report as Ex.PW16/A. CRL. Appeal No.700/2017 Page 17 of 26 30. PW17 Pawan Kumar was working as a duty officer at the Police Station Narela and deposed that on 09.08.2016, he recorded the FIR in the present case and the same was proved by him as Ex.PW17/A.

31. PW20 Insp. Jarnail Singh was the Investigating Officer in the instant case who prepared the site plan and carried out the investigation in the present case. The site plan was proved by him as Ex.PW20/A.

32. In this backdrop, we deem it appropriate to analyse the other evidence relied upon by the prosecution under separate heads. Medical Evidence:

33. PW14 Dr. N. K. Gunjan who was posted as Autopsy Surgeon at BJRM Hospital deposed in his examination-in-chief that on 10.08.2016, at 11.40 AM, he conducted post-mortem examination of the deceased Batahi. The cause of death was opined as asphyxia secondary to constriction of the neck structures (manual strangulation). Time since death was opined as less than 12 hours from the time of preservation of dead body in mortuary i.e. 10.10 AM on 09.08.2016. The detailed report was proved by him as Ex.PW14/A wherein the following injuries were found on the body of the deceased: External Injuries:

1. Multiple reddish abraded contusions, over an area of 11.7 x 8.3 cm, were present over the front of neck on both the side, varying in sizes from 8.5 x 1.8 to 01 x 0.9 cm, extending from left side of neck at a point 0.5 cm below and 06 cm away from symphysi menti to a point over right side of neck being situated 4.9 cm above and 05 cm away from the supra sternal notch. CRL. Appeal No.700/2017 Page 18 of 26 xxx xxx The above mentioned injuries were ante-mortem in nature Internal Examination: xxx B) Neck Subcutaneous tissue: The soft tissues and muscles were showing contusions at places bilaterally. Pharynx, Larynx and Trachea: Tracheal mucosa showed petechial haemorrhage and congestion. Fracture of right greater horn of hyoid bone and superior horn of thyroid cartilage associated with surrounding contusion was present. Thyroid gland was grossly normal in appearance. xxx Heart: Petechial haemorrhages were present on the surface. xxx xxx 34. It was stated by PW14 in his cross-examination that the

deceased had died within the duration of 6 to 12 hours from the time of preservation of the dead body in the mortuary. FSL RESULTS:

35. PW19 Manisha Upadhyaya, Asst. Director, Biology at FSL Rohini deposed in her examination-in-chief that on 08.09.2016, she received three parcels. After examination, PW19 found blood on Ex.1a (one sari having dirty stains), 1b (one blouse having dirty stains), 1c (one petticoat having dirty stains), 3a (dark brown foul smelling liquid kept in a tube) and 3b (gauze cloth piece having dark brown stains) and further DNA examination of the said exhibits were conducted. It was further deposed by PW19 that the DNA profile generated from the CRL. Appeal No.700/2017 Page 19 of 26 source of Ex.1 (clothes) was similar with the DNA profile generated from the source of Ex.2 (nail clippings). The biological and DNA report was proved as Ex.PW19/A and the allelic data of the DNA examination was proved as Ex.PW19/B.

36. The moot question which arises for our consideration is as to whether the present case is one of intentional killing resulting in the injuries, which would be a case of murder under Section 302 of IPC, or if it is a case of unintentional and not a premeditated act and had arisen out of a sudden quarrel, in the spur of the moment whether it falls under one of the special exceptions carved out under Section 300 of IPC?. MOTIVE:

37. It is the case of the prosecution that the appellant was pressurizing his wife Radha (PW1) to transfer or sell the said plot in his name. It has also come on record that the appellant Avdhesh threatened the deceased Batahi Devi by saying budhia jab tak nahi marengi, yeh plot mere naam nahi hoga. The factum of the quarrel between the appellant and the deceased regarding transfer of the plot is corroborated by the testimonies of PW1, PW2, PW3 and PW4. The prosecution has relied upon the documents with regard to the plot in question including agreement to sell, affidavit and the receipt all bearing date 23.03.2010 which were proved by PW1 as Ex.PW1/C-1 to C-4.

38. We may note that PW5 Rajender Prashad Singhal deposed in his examination-in-chief that on 23.03.2010, the said plot was sold to PW1 Radha for a sum of Rs. 48,000/- and had executed the documents including agreement to

sell, affidavit, receipt in the favour of PW1 CRL. Appeal No.700/2017 Page 20 of 26 Radha. However, in his cross-examination, it was stated by PW5 that two meetings were held with only PW1 Radha regarding the purchase of the plot in question. It was categorically denied by PW5 that the appellant Avdhesh came to his house alongwith PW1 Radha or that the appellant made the payment or purchased the said plot in the name of his wife PW1 Radha.

39. Keeping in view the testimony of PWs 1 to 5 and the documents relied upon by the prosecution which were proved as Ex.PW1/C-1 to C-4, we have found that the plot in question has been purchased by PW1 Radha in the year 2010 and her name has been mentioned as Smt. Radha Devi, wife of late Shri Ram Sewak. Undoubtedly, all the documents relied upon by the prosecution to support their case were executed in the year 2010 whereas the previous husband of PW1 Radha expired in the year 2007. We may note that PW2 Rekha and PW4 Mukesh had deposed that PW1 Radha was re-married in the year 2011. In this background, we are of the view that it cannot be said that the said plot was gifted by her late husband and can be inferred that the said plot was purchased by her after payment of Rs. 48,000 to PW5.

40. Reading of the testimonies of PW1 and PW3 would show that PW3 on hearing the screams of his mother (PW1) rushed outside their house and saw the appellant running away from the spot and also that his mother was weeping while his maternal grand-mother was lying dead on the cot. Furthermore, it is evident from the arrest memo of the appellant Avdhesh which was proved as Ex.PW18/D, that the appellant was arrested on 16.08.2016 at about 6.05 PM from Near CRL. Appeal No.700/2017 Page 21 of 26 Shivam Garden, Shiv Mandir Gali, Vishal Bagh which shows that the appellant was arrested on the 8th day of the incident.

41. In the present case, we are of the view that the prosecution has proved that the appellant often quarrelled with his wife over sale of the plot on which the deceased would often side with her daughter (wife of the appellant) and he considered the deceased as an obstruction to the sale of the plot. Thus, in our view the motive alleged by the prosecution stands established.

42. Before dealing with the arguments of the counsels for the parties regarding as to whether the case of the appellant is covered under Section 302 or Section 304 of IPC?. We deem it appropriate to re-visit the law regarding the culpability of the appellant.

43. In the case of Jitender Pal Singh vs. State reported at 2016 (2) JCC906 whereby the Division Bench of this Court had modified the order of conviction of the appellant to 304 Part II and the order on sentence was reduced to 7 years. The relevant Para 45 reads as under: 45. The case of the prosecution is premised on circumstantial evidence and in absence of direct evidence, we are required to reconstruct what may have transpired at the locus in quo (scene of crime), after taking valuable clues afforded from the material available on record that would throw some insight. Perusal of the post-mortem report reveals that no marks of violence were found upon the body of the deceased other than the faint bruises and abrasions on the neck that were evidently suffered during the process of strangulation itself. It assumes significance that the hyoid bone or the underlying structures in the neck region such as the cartilages of the larynx and the rings of the trachea were not found fractured. At this juncture we may profit from the luminous observations expressed by Dr. Jaising P. Modi in his authoritative treatise Modi- A Textbook of Medical Jurisprudence and Toxicology, 24th Edition, Reprint 2012, Lexis Nexis Butterworths, Wadhwa CRL. Appeal No.700/2017 Page 22 of 26 Nagpur. It has been stated by the eminent author that the cartilages of the larynx or the rings of trachea may be fractured when considerable force is used [Pg. 454].. The said fact evinces that excessive pressure was not exerted by the appellant and he may not have harboured the intention to kill the deceased. The appellant did not take undue advantage or act in a cruel or unusual manner. The unfortunate incident seems to have erupted at the spur of the moment and stemmed from marital discord. It has emerged in evidence that the appellant would frequently quarrel with his wife for obtaining money to purchase liquor as he would largely remain unemployed. A similar incident must have occurred on the fateful day. The deceased must have resisted the demands of the appellant and provocative utterances must have been exchanged between the two. In a fit of rage during the sudden quarrel the appellant grabbed the neck of his wife that resulted in asphyxiation and snuffed her life. (Emphasis Supplied) 44. A coordinate

bench of this Court, of which one of us (G.S. Sistani, J.) was member, in the subsequent judgment *Anuj Kumar Tiwari vs. State of the NCT of Delhi* reported in 2016 IV AD (Delhi) 524, had also taken a similar view and the order of conviction was modified to Section 304 Part I of IPC and sentence was reduced to seven and a half years. The relevant paras 32 and 34 read as under: 32. In deaths because of ligature strangulation, petechiae are usually present. It is generally more intense than in other forms of strangulations because of the strength applied by the arms in tightening the ligature. In the majority of cases, the ligature furrow runs horizontally round the neck on its front and sides. If the ligature is a wide band of cloth with a smooth surface, the lesion of the stratum corneum may be so minimal that no mark ligature strangulations may simply leave a reddish hyperaemia on the skin of the neck. However, in cases of intense strangulation the larynx and hyoid bone might suffer a fracture. Occasionally, a fine white foam may adhere to the laryngeal, tracheal and is discernible. Non- intense CRL. Appeal No.700/2017 Page 23 of 26 bronchial walls, which may be streaked with blood The foam accumulates from bronchial secretion and tidal air during dyspnoea. ....

34. Applying the broad guidelines laid down by the Hon'ble Supreme Court and this court in the afore-mentioned cases, we are of the considered view that the evidence adduced by the prosecution falls short of bringing the case within the ambit of Section 300 of the Indian Penal Code and the offence committed by the appellant is covered by Section 304 Part I of the Indian Penal Code. No weapon was used for committing the offence. It, thus, stands proved that unfortunate incident took place on account of sudden quarrel between the deceased and the appellant; there was no pre-mediation; no animus and motive to kill the deceased. Therefore, having regard to the totality of the evidence on record, we have no hesitation in coming to the conclusion that the present case does not fall within the ambit of Section 300 of the Indian Penal Code. The aforesaid facts when analyzed in conjunction with the attending circumstances enwombing the present incident, strongly dispels the possibility that the appellant harboured an intention to kill the deceased. (Emphasis Supplied) 45. In *State of Punjab v. Joginder Singh* reported at 2003 (9) SCALE604 the Hon'ble Supreme Court fastened the respondent-accused guilty for the offence punishable under Section 304 Part II of IPC and awarded a sentence of six years imprisonment. It was observed by the

Apex Court that the accused was not armed with any weapon and visited the house of the deceased to recover the money lent to him. When the deceased was not in a position to pay the money, the accused flared up and caught hold of the neck of the deceased. The deceased was frail and slight pressure on his neck resulted in his death. CRL. Appeal No.700/2017 Page 24 of 26 46. In the case of 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. 47. Applying the broad guidelines laid down by the Hon'ble Supreme Court and this Court in the afore-mentioned cases, we are of the considered view that the evidence adduced by the prosecution falls short of bringing the case within the ambit of Section 300 of IPC and the offence committed by the appellant is covered by Section 304 Part I of IPC.

48. As defined in the Exception 4, in the present case, there was no premeditation on the part of the appellant; no weapon used by the appellant; there is no evidence that the appellant made special preparation for assaulting the deceased with the intent to kill her. There is no dispute that the appellant assaulted the deceased in such a manner that the deceased suffered grievous injuries, but considering the fact that the appellant did not act in a cruel or unusual manner, and did not take undue advantage. The medical evidence further establishes that no other mark of external or violent injury except some bruises was found on the body of the deceased. The unfortunate incident seems to have erupted at the spur of the moment and stemmed from an ongoing quarrel between them. Undoubtedly, the deceased was a senior citizen of age 75 years and considering the age of the deceased, it is safe to conclude that the deceased was frail and CRL. Appeal No.700/2017 Page 25 of 26 slight pressure on her neck resulted in asphyxiation and snuffed her life.

49. The ends of justice would be met if we modify the conviction of the appellant from Section 302 of IPC to Section 304 Part I of IPC. Accordingly, the sentence

awarded to the appellant is also modified to rigorous imprisonment for a period of seven and a half years. Consequently, the appeal of the appellant is allowed in part, the conviction and order on sentence recorded by the Trial Court is modified to the extent indicated hereinabove. The fine imposed upon the appellant Avdhesh and the default sentence awarded to him shall remain unaltered.

50. Accordingly, the appeal stands disposed of.

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

52. 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.**

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