

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 228 OF 2013

1] Dnyanoba Baburao Pandhare,
Age : 39 years, Occu. Agricultural,

2] Lilawatibai @ Nilawatibai w/o
Dnyanoba Pandhare
Age : 34 years, Occu. Agricultural,

Both are R/o. Babhalgaon,
Tq. Ambajogai, Dist. Beed

...APPELLANT
(Ori. Accused)

VERSUS

The State of Maharashtra

...RESPONDENTS
(Ori. Complainant)

.....

Mr. S. J. Salunke, Advocate for appellant
Ms. P. V. Diggikar, APP for Respondent-State

.....

**CORAM : S.S. SHINDE AND
K.K. SONAWANE, JJ.**

DATE : 5th JANUARY, 2017

JUDGMENT : (Per : K.K. Sonawane, J.)

1] The Appellants, taking exception to the judgment and order of conviction under Section 302, 323, 324 r/w. 34 of I.P.C. and resultant sentence of imprisonment for life and to pay fine of Rs. 2,000/- each, in default, R.I. for one month, preferred the present appeal to redress their grievances. The learned trial court also held both the accused guilty for the

offence punishable under sections 323 and 324 of IPC. However, the trial court did not award separate sentence being a lesser offences.

2] The factual matrix giving rise to the prosecution of the appellants in this case, in brief, is as under :-

That, the ill-fated victim Tukaram Baburao Pandhare r/o. Babhalgaon, Taluka Ambejogai, Dist. Beed is the husband of PW-3 Shobha and father of PW-2 Janabai Pandhare. Accused Dnyanoba and Lilawatibai are the husband and wife, resident of same village Babhalgaon, Taluka Ambejogai. The Victim Tukaram was the real brother of accused Dnyanoba and both were eking livelihood by doing agricultural labour work. The relations in between the family of the victim Tukaram and accused Dnyanoba were strain on account of partition of joint family property.

On the fateful day of incident, i.e. on 2.1.2009, in the noon hours, victim Tukaram, and his daughter PW-2 Janabai were at home. The wife Shobhabai had been to fetch water, unaware of the tragic end of her husband Tukaram on that day. There was a vacant plot of accused Dnyanoba abutting to the dilapidated mud house of victim Tukaram. The common wall in between the mud house of victim Tukaram and vacant plot of accused Dnyanoba was collapsed and its bricks were lying nearby it. According to prosecution, at about 2.00 p.m. accused Dnyanoba and his wife accused Lilawati arrived in bullock cart at the house of victim Tukaram. The accused started collecting the bricks. The victim Tukaram and his daughter PW-2 Janabai raised objection for taking away the bricks without counting it. The

accused Dnyanoba became furious and hurled abuses to both, victim Tukaram and his daughter Janabai. There was endeavour to give understanding to the accused Dnyanoba but he was not in a mood to listen. The accused Dnyanoba took out the weapon - knife (Barcha) and dealt a blows of weapon at the abdomen, thigh, limbs etc. of the victim Tukaram. Shobha - wife of Tukaram also rushed to the spot after hearing the cries. The PW-2 Janabai made endeavour to intervene in the scuffle, but accused Lilabai prevented and pushed her down on the ground. The accused Lilawati picked up heir and beaten up Janabai with kicks and fists. The accused No.1 Dnyanoba also assaulted Janabai with knife on her left forearm. The victim Tukaram and daughter Janabai received bleeding injuries. They yelled for help. The onlookers thronged at the spot. The victim Tukaram and Janabai were escorted to the hospital at Ambejogai. The Medical experts attended the victim Tukaram and got him admitted for medical treatment. Since beginning, victim Tukaram was in unconscious condition. PW-2 Janabai was also hospitalized for medical treatment of her bleeding injuries at forearm.

Meanwhile, police personnel of Bardapur police station, received information about the occurrence of incident of assault on victim Tukaram and his daughter and they were taken to Government Hospital at Ambajogai for Medical treatment. The police of Bardapur Police Station immediately rushed to Government Hospital Ambejogai to take stock of situation. It was informed to the Police that victim Tukaram is admitted in ICU and he is in unconscious condition. The police personnel reduced into writing the statement of injured Janabai. She verbalized about the incident

of assault and blamed the accused for the injuries sustained to herself and her father Tukaram. In view of nature of allegations, the concerned P.S.O. registered the Crime NO. 3 of 2009 under Sections 307, 234, 504, 506 r/w. 34 of IPC and set the investigation in motion. The I.O. recorded statement of witnesses acquainted with the facts of the case. The concerned doctor took efforts to resuscitate the victim Tukaram, but unfortunately, he succumbed to injuries. The police applied Section 302 r/w. 34 of IPC against the accused. I.O. dealt with the mortal remains of deceased Tukaram and drawn inquest Panchanama. The dead body was referred for autopsy to determine the exact cause of death. The medical experts conducted post mortem and opined that the victim succumbed to stab injuries at his abdomen. The I.O. apprehended accused for the sake of investigation. The weapons of crime i.e. knife (Barcha) came to be recovered from the house of accused. The I.O. collected medical certificates and other relevant documents. After completing entire formalities, I.O. preferred the charge sheet against both the accused before the learned Magistrate, Ambajogai.

After receipt of charge sheet and investigation paper the learned Magistrate verified the charges pitted against the accused and transmitted the matter to learned Sessions Judge Ambajogai, Dist. Beed for further process. The learned Session Judge framed the charges against both the accused under Sections 302, 324, 504 and 506 of IPC. The accused denied the charges pitted against them and claimed for trial. In order to bring home guilt of the accused, prosecution adduced the evidence of PW-1 Bhanudas Jankar (Exh.39), PW-2 Janabai Pandhare, (Exh. 41), PW-3

Shobhabai (Exh. 45), PW-4 Dr.Gunal Jadhav (Exh.46 and 118), PW-5 Shaikh Sammat Shaikh Jilani (Exh.49), PW-6 Shri Vishnu Nivaruti Sonwane (Exh. 52), PW-7 Shri. Dr. Chandrakant Chavan (Exh. 55), PW-8 Shri. Vikas Hanumant Karpe (Exh. 69), PW-9 Shri. Bibishan Sidram Karpe (Exh. 80), PW-10 Shri. Narsing Patolba Gitte (Exh. 82), PW-11 Shri. Baburao Pandhare (Exh. 85). PW-12 Smt. Simintabai Pandhare (Exh. 87), PW-13 Shri. Govind Baste (Exh. 107), PW-15 Shri. Vishwanath Nilange (Exh. 121), PW-16 Shri. Madhav Gundile (Exh. 125), and PW-17 Dr. Sidheshwar Birajdar (Exh. 151).

The Learned Sessions Judge, recorded the statement of accused under Section 313 of Cr.P.C. After hearing both sides, the learned trial court arrived at the conclusion that both the accused are guilty of murder of victim Tukaram, and assault on PW-2 Janabai with deadly weapons. Therefore, the learned trial court convicted both the accused under section 302, 324, 323 r/w. 34 of IPC and imposed the resultant sentences, as indicated above. Being dissatisfied with the findings expressed by the learned trial court, the appellants preferred the present appeal to redress their grievances.

3] The learned counsel appearing for the appellants vehemently submitted that the impugned judgment and order of conviction is erroneous, illegal, and not within the ambit of law. learned trial court did not appreciate the oral and circumstantial evidence in its proper perspective. Prosecution witnesses P.W. 2- Janabai and P.W-3 Shobhabai are the interested/related witnesses in this case. The law contemplates that

evidence of interested witnesses should be examined carefully. Moreover, evidence of injured also must be in consonance with probabilities. The learned counsel for appellants assailed that there are material discrepancies in the evidence of P.W. 2- Janabai and P.W-3 Shobhabai. Their versions appear to be inconsistent with probabilities. In such circumstances, it would not just and proper to draw adverse inference against the appellants-accused on the suspicious evidence of such interested/related witnesses. He drawn attention to the circumstances that except related witnesses P.W. 2- Janabai and P.W-3 Shobhabai as well as police personnel and medical expert, rest of the witnesses turned hostile and they did not support the prosecution case. Therefore, versions of so-called eye witnesses P.W. 2 - Janabai and P.W-3 Shobhabai is doubtful and not inspire confidence. The trial Court committed error in convicting appellant No. 2 Lilawatibai by applying section 34 of the IPC, in this case. She had not assaulted victim Tukaram nor she was armed with any weapon at the time of incident. The complicity of accused Lilawatibai for the offence punishable under section 302 read with section 34 of the IPC is not sustainable and not as per the provisions of law. According to learned counsel Shri Salunke, there is delay in lodging the FIR. There were hospitals located on the way leading from village Babhalgaon to Ambajogai. The victim Tukaram was escorted to the hospital at Ambajogai instead of admitting him in nearby hospitals en-route to Ambajogai. The behaviour and conduct of the prosecution witnesses creates doubt about truthfulness and veracity of the allegations nurtured against accused. The learned counsel fervidly contended that the trial Court ought to have held

that prosecution has failed to prove the charges against accused.

4] The learned counsel for appellant relied upon on the medical evidence of Indoor Patient Papers produced on record in the cross-examination of PW-7 Dr. Chandrakant Chavan. The learned counsel fervidly contended that PW-17 Dr. Birajdar was custodian of the record of Hospital. The OPD Register, MLC Register and Indoor Patient Papers of the victim Tukaram were maintained and preserved in the hospital. In these medical papers, history of assault by bull horn on Patient Tukaram was mentioned. According to learned counsel the history of assault by bull horn written in medical papers caused serious doubt in the prosecution case. Therefore, he prayed to set aside and quashed the impugned judgment and order of conviction and sentence imposed on the appellants and appeal be allowed.

5] The learned counsel for appellants in support of his submissions placed reliance on the exposition of judicial pronouncement in case of : [1] Narayan Kanhu Datavale V/s State of Maharashtra 1997 Cri.L.J. 1788 (Bom.H.C.) [2] Sujit Gulab Sohatre V/s State of Maharashtra 1997 Cri.L.J. 454 (Bom.H.C.) [3] Balu @ Bala Subramaniam V/s State of (Union Territory of Pondichery) 2015 B.C.I. 361 (S.C.) [4] State of Maharashtra V/s Prabhu Barku Gade 1995 Cri.L.J. 1432 (Bom.H.C.) [5] Champak Balu Patel V/s State of Maharashtra 2013 Cri.L.J. 1589 (Bom.H.C.) [6] Kiran Ashok Jadhav V/s State of Maharashtra 2014 All M.R. (Cri.) 3850 (Bom.H.C.)

6] In refutal, learned APP vociferously opposed the contentions put forth on behalf of appellant-accused. He submitted that the evidence of P.W.2 - Janabai and P.W-3 Shobhabai established the involvement and participation of the appellants in this crime. The victim Tukaram was attacked by the appellant Dnyanoba in brutal manner with lethal weapon knife for the trifle reason of collecting bricks of common wall. According to learned APP, the medical evidence corroborates to the version of eye witnesses. The P.W.7 - Dr. Chandrakant Chavan stated the cause of death of victim Tukaram as homicidal death. He testified that victim Tukaram succumbed to his abdominal stab injury. The learned APP submitted that there was no possibility of accidental death of victim Tukaram after assault with bull horn. The learned APP asserted that the nature of injuries sustained to the victim Tukaram were serious and in view of stab injury there is no possibility of assault by bull horn. The Single stab injury would not be possible in case of attack by bull with horn. The learned APP fervidly contended that the entire evidence of witnesses and medical expert proved that the accused are the author of injuries received to victim Tukaram. The appellant-accused No.2 Lilawatibai was also responsible for the injuries caused to victim Tukaram as she has an involvement and participation in the crime committed by her husband. There are circumstances that accused No. 2 Lilawatibai shared the common intention and in-furtherance of common intention both the accused committed murder of victim Tukaram. Therefore, learned APP urged that prosecution has proved the case beyond reasonable doubt and there is no scope for interference in the impugned judgment and

order of conviction passed by the learned trial court. He prayed for dismissal of the appeal.

7] We have carefully considered the rival submission advanced on behalf of both the sides. We have also perused the relevant material produced on record. It seems that except the PW-2 Janabai, PW-3 Shobhabai, the daughter and wife of victim Tukaram, the Medical Experts and Police personnel, all rest of the prosecution witnesses turned hostile and did not support the prosecution case. In short, the entire edifice of the prosecution case appears based on the sole evidence of related witnesses PW-2 Janabai, PW-3 Shobhabai. The evidence of Medical experts and police personnel, also available on record to corroborate the ocular evidence of these related witnesses.

8] Before advertng to the merits of the matter for assessment of guilt of the appellant/accused, it would apposite and justifiable at the threshold to determine the exact cause of death of victim Tukaram and thereafter only, it would be convenient to evaluate the evidence of prosecution witnesses for ascertaining the nexus and proximity of the appellants/accused with the alleged cause of death of victim Tukaram.

9] The prosecution examined PW-7 Dr. Chavan of Department of Forensic Medicine, Government Medical College and Hospital, Ambejogai. PW-7 Dr. Chavan conducted the Post Mortem on the mortal remains of the victim Tukaram on 4.1.2009 in between 1.30 p.m. to 2.30 p.m. His associate Dr. Raut was also accompanied with him at the time of autopsy. During the

external examination, the medical experts came across with the following injuries :-

[1] Sutured wound over abdomen 28 cm. In length extending from epigastrium upto 5 cm below the umbilicus, vertically placed 27 stitches present. On opening the stitches a stab wound is present 4 cm above the umbilicus, 4 cm in length surgical wound starts at upper and lower ends cavity deep angle cannot be defined due to surgical wound.

[2] Sutured incised wound present over posterior aspect of left arm, middle 1/3rd, 4 stitches present. Length 7 cm. On opening the stitches, tailing downward medially, subcutaneous tissue deep.

[3] Stitched incised wound present over lateral aspect of left forearm, lower 1/3rd and L shape one arm of 10 cm in length and second arm is 5 cm in length, subcutaneous tissue deep.

[4] Sutured incised wound present over aspect of right thigh lower 1/3rd and lateral aspect of knee, 11 stitches present, length 18 cm. on opening it is muscle deep.

[5] Contusion present at 1 cm lateral right to stab stab wound in injury no. 1.2 cm X 1 cm in size, reddish brown in colour.

[6] Abrasion present over front of right knee 6 x 5 cm in size, dark brown in colour.

[7] Abrasion present over sheen, upper 1/3rd on right leg, 10 x 7 cm in size dark brown in colour.

[8] Abrasion present over lateral aspect of left thigh middle 1/3rd, 10x8 cm. In size, dark brown in colour.

[9] Multiple intravenous injection marks present over front of both forearm and back of wrist.

[10] Surgical stab wounds present over both flanks.

[11] Surgical stab wound middle 1/3rd on right side of neck, one stitch present.

Injury nos. ten and eleven are surgical treatment

injuries.

10] The Medical Experts also carried out the internal examination and observed injuries at the abdominal part of victim Tukaram, which were corresponding to the external injuries as mentioned above. There was also stab wound present over the interior wall of the stomach and incised wound on the lower border of the left lobe. PW-7 Dr. Chavan, categorically deposed that the victim Tukaram died owing to “Abdominal Stab Injuries”. PW-7 Dr. Chavan and his associate Dr. Raut issued the Post Mortem report (Exh.56). The medical experts certified that the abdominal injury caused to victim Tukaram was fatal and sufficient to cause death of human being in ordinary course of nature. The injury sustained by victim Tukaram could be possible by the weapon knife recovered in this case shown to medical experts. There was no arduous cross-examination devastating the significance of medical evidence in this case. The evidence of PW-7 Dr. Chavan is sufficient to draw the inference that the death of victim Tukaram was homicidal in nature.

11] Learned Counsel Shri Salunke appearing for the appellant strenuously submitted that the victim Tukaram received the injuries at his abdomen accidentally due to assault by the bull horn while working in the field day before the alleged incident. He drawn attention to the history of patients recorded at multiple places in the patients case papers of victim Tukaram while he was admitted in the hospital for medical treatment. These documents are maintained and preserved in the Government Hospital, Ambajogai. Learned Counsel Shri Salunke pointed out that the date

2.1.2009 at about 9.30 a.m. is mentioned in the patient's treatment papers (Exh. 64) being the date and time of hospitalization of victim Tukaram for medical treatment. He added that victim Tukaram was attacked by the bull while working in the field. He received injuries owing to bull horn accidentally day before the alleged incident. The medical treatment papers (Exh.64) shows that Victim Tukaram himself got admitted in the hospital early in the morning at about 9.30 a.m. on 2.1.2009. Therefore, Shri Salunke vehemently contended that accused have no concern at all with the alleged injuries caused to victim Tukaram. He asserted that there was no such incident of assault on victim Tukaram by the accused occurred in the noon hours at about 2.00 p.m. on 2.1.2009. These circumstances created doubt in the version of prosecution witnesses about occurrence of actual incident of assault on victim Tukaram. There was an attempt to implicate the accused for the death of victim Tukaram falsely.

12] The minute scrutiny of the evidence of PW-7 Dr. Chavan, PW-4 Dr. Kunal Jadhav and PW-17 Dr. Birajdar reveals that there was no possibility of injuries to victim Tukaram following assault by the bull horn. It is hard to believe that victim Tukaram received injuries after attacked by the bull with horn day before the alleged incident while working in the field. There was no first aid treatment provided to victim Tukaram, and, lateron, he was taken to Government Hospital, Ambajogai on 2.1.2009, in the morning hours at 9.30 a.m. for medical treatment. The circumstances ruled out the possibility that at the time of hospitalization, victim Tukaram was in conscious condition and gave history to the concerned doctor about the

accidental injuries caused to him due to attack by the bull. The story/theory propounded on behalf of appellants referred above seems based on figment of imagination.

13] At this juncture, it is essential to take into consideration the evidence of PW-4 Dr. Kunal Jadhav who was examined on second occasion as PW-14 in this case. The PW-4 Dr. Jadhav deposed that on 2.1.2009, he was on duty as Medical Officer in Casualty Ward of Swami Ramanand Tirth Medical College and Hospital, Ambajogai. During his duty hours, two patients, namely, Tukaram Pandhare and Janabai Pandhare were brought to the hospital for medical treatment. He clinically examined the patient Tukaram, There were fresh injuries on his right thigh, incised wound on left arm and abdomen wall was seen perforated in epigastric region. According to PW-4 Dr. Kunal Jadhav the injuries sustained to victim Tukaram were serious and he was in critical condition. Therefore, his daughter gave history of injury as “assault by known person”. PW-4 Dr. Jadhav also stated that on examination of PW-2 Janabai he noticed contused lacerated wound on her left forearm of size 4 cm x 1 cm. The injury was simple in nature and caused within 24 hours of examination. The medical expert - PW-4 Dr. Kunal Jadhav produced the MLC certificate of PW-2 Janabai (Exh.47) and extract of MLC register of victim Tukaram (Exh.120) on record. These documents of hospital indicate date of examination of injured Tukaram and Janabai by PW-4 Dr. Kunal Jadhav on 2.1.2009 at around 3.35 p.m. PW-17 Dr. Birajdar also conceded about these factual aspects of hospitalization of victim Tukaram and his daughter Janabai on 2.1.2009 in noon hours at about 3.35 p.m. The version

of PW-4 Dr. Jadhav and PW-17 Dr. Birajdar belies the theory propounded on behalf of accused/appellants that the injured Tukaram was admitted in the hospital in the morning hours at about 9.30 a.m. on 2.1.2009 and no such incident of assault by accused ever occurred in the noon hours at 2.00 p.m. on 2.1.2009, as alleged by the prosecution.

14] Learned Counsel Shri Salunke, gave much more emphasis on the patient case papers produced on record marked as (Exhs.59 to 67). He submitted that these patient case papers of victim Tukaram were maintained and preserved in the Govt. Hospital Aurangabad. The pages Exhibits 64 and 65 demonstrate that victim Tukaram was admitted in the hospital on 2.1.2009 at 10.00 a.m. and he was clinically examined at about 10.20 a.m. The history of the patient, i.e. "assault by bull horn before one day in field" was also mentioned in these hospital case papers. He, therefore, submits that the circumstances created doubt in the prosecution case for inference of homicidal death of victim Tukaram.

15] We are unable to persuade ourselves to accede to the so called theory propounded on behalf of appellants. It is to be noted that these controversial documents of patient case papers (Exhs.59 to 67) are brought on record at the behest of appellants/accused during the cross-examination of PW-7 Dr. Chavan. It is worth to mention that the PW-7 Dr. Chavan did not attend the patient for providing medical treatment in the ward, nor he performed surgery on victim Tukaram. His evidence is concerned with the autopsy on the dead body of the victim Tukaram to determine the exact

cause of his death. The evidence of PW-7 Dr. Chavan is material to prove the recitals of Post Mortem report (Exh.56) pertaining to the cause of death of victim Tukaram. He is not the author of patient case papers (Exh.59 to 67) nor he was aware about the genuineness of the recitals mentioned in the document. The evidence of PW-7 Dr. Chavan is totally alien to the recitals of patient case papers (Exh.59 to 67). PW-4 Dr. Kunal Jadhav, PW-17 Dr. Birajdar, both of them are also seems not related with there documents nor they are authors of the patient case papers (Exh.59 to 67). The PW-4 Dr. Jadhav categorically stated that these case papers does not bear his signature nor these documents are in his handwriting. Admittedly, the author of the relevant entries, particularly about date, time of admission and history of patient Tukaram shown written in the patient case papers (Exh.59 to 67), did not step into the witness box, to prove the contents of these vital documents. In such circumstances, in absence of proper proof, the particulars recorded in the patient case papers cannot be read in evidence. In contrast, the testimony of PW-4 Dr. Kunal Jadhav, (Exh. 46 and 118) as well as PW-17 Dr. Birajdar (Exh. 151) conjures up the image that the victim Tukaram and his daughter PW-2 Janabai were brought to the hospital at Ambajogai on 2.1.2009 in the noon hours at around 3.35 p.m. The alleged incident of assault by the appellants/accused was occurred in the noon hours at about 2.00 p.m. on 2.1.2009 and thereafter the injured were brought to hospital. The so called history of patient, written in the medical treatment papers in regard to assault by the bull horn, could not be appreciated in the absence of evidence of its author.

16] The PW-4 Dr. Jadhav was on duty as Medical Officer in Casualty Ward and the patient were brought to him initially for clinical examination prior to get them admitted in the hospital for medical treatment. We are at our wit's end, that how the history of assault by the bull horn came to be written in the patient case papers, when the PW-4 Dr. Kunal Jadhav, specifically noted down the history of the patient as "assault by known person", at the inception, in MLC register, while admitting the patients - Tukaram and Janabai for medical treatment in the hospital. Moreover, there were exercise of writing the history of accidental injury due to attack by bull horn, at several places in the patient case papers. These attempt to writ down the history of patient repeatedly without any reasonable cause smacks something amiss, in regard to its genuineness and truthfulness. We do not intend to go deep to examine the ramifications of these suspicious circumstances, but such things should not be happened in the cases of grave nature like murder of human beings.

17] Albeit, we are not inclined to accept the arguments advanced on behalf of appellants/accused about the cause of injuries to victim Tukaram by attack of bull horn. It is also significant to appreciate that the PW-7 Dr.Chavan categorically in his cross-examination ruled out the possibility that the victim Tukaram would receive injuries following assault by bull horn. He has also given explanation that after attack with the horn by bull, there would be CLW and not stab wound as the horn of bull penetrated in the stomach would not revert back from the stomach in the similar direction. There would not be a stab injury in case of attack by bull

horn. PW-7 Dr. Chavan deposed that stab injury caused on the abdomen of victim Tukaram was due to sharp pointed edged weapon like knife shown to him in the court. PW-7 Dr. Chavan denied the possibility of assault with horn by the bull for the stab injuries received to victim Tukaram on his stomach.

18] The overall analysis of evidence of Medical Experts demonstrates that the Victim Tukaram received the fatal injuries on his abdomen by lethal weapon like knife and while medical treatment in the hospital, he succumbed to the injuries. In the aftermath, we have no hesitation to draw the inference that the death of victim Tukaram was not accidental but homicidal in nature.

19] Now, turning to the another spectrum of the matter, in regard to nexus and proximity of the appellant/accused with the alleged cause of death of victim Tukaram, it has been alleged that the appellants/accused are the authors of the injury received to victim Tukaram and they are responsible for his homicidal death. In order to prove the complicity of the appellants in this case, the prosecution relied upon the ocular evidence of PW-2 Janabai, PW-3 Shobhabai, daughter and wife of victim Tukaram, respectively. They both are eye witnesses in this case for the murderous attack on the victim Tukaram, as alleged by the prosecution.

20] The PW-2 Janabai deposed that on the day of incident on 2.1.2009, she was at home accompanied with her parents. In the noon hours, at about 2.00 p.m. accused arrived in the bullock cart to collect the bricks of the common wall of mud house of victim Tukaram. PW-2 Janabai

further stated that they opposed the accused/appellants for taking away the bricks without counting it. The appellants reprimanded them, saying that the collapsed wall was belonging to them. The appellants/accused started hurling abuses to them. In the altercation, appellant Dnyanoba took out the weapon knife (Barcha) and dealt blows on the stomach, thigh as well as on the fore arm of victim Tukaram. PW-2 Janabai made endeavour to intervene in the scuffle but the accused Lilawatibai prevented and pushed her on the ground. The accused Lilawatibai assaulted the PW-2 Janabai by kicks and fists. Meanwhile, accused Dnyanoba also attacked PW-2 Janabai with weapon knife (Barcha) at her fore-arm. She yelled for help. The denizens Baban Sonawane, Bibhishan Karpe and others rushed to the spot. The appellants after giving threats of life to the family members of victim Tukaram made their escape good from the spot. The injured Tukaram and his daughter Janabai were escorted to the hospital for medical treatment. After receipt of information, about the incident of assault, police of Bardapur P.S. arrived in the hospital and recorded the FIR of PW-2 Janabai. She blamed the accused for the injuries sustained to herself and her father Tukaram.

21] PW-3 Shobhabai is the mother of PW-2 Janabai. PW-3 Shobhabai was also the eye witness to the incident. She stepped up in to the shoe of daughter PW-2 Janabai and verbalized the incident of assault by the accused on victim Tukaram and Janabai. PW-3 Shobhabai, at the time of incident, had been to fetch water. While returning, she heard the cries. Therefore, she rushed to the spot. She witnessed the incident of assault by

the appellant - Dnyanoba with knife on her husband Tukaram and daughter Janabai. She stated about the overt act of accused Lilawati while assaulting PW-2 Janabai.

22] The learned Counsel Shri Salunke raised objection for appreciation of evidence of these eye witnesses being related and interested witnesses. He contended that there is rule of law that the evidence of injured witnesses should not be accepted mechanically as a gospel truth. The version of injured witnesses should be in consonance with the probabilities. He relied on the observations of Division Bench of this Court (at Principal Seat) in the matter of *Narayan Kanhu Datavale vs. State of Maharashtra 1997 Cr.L.J. 1788*, as well as in the case of *Sujit Gulab Sohatre vs. State of Maharashtra 1997 Cri.L.J. 454*. Learned Counsel Shri Salunke further submitted that there are contradictions and discrepancies in the evidence of these eye-witnesses. It would be unsafe to act upon the evidence of PW-2 Janabai solely on the ground that she received the injuries in the alleged incident. The evidence of these interested witnesses should not be appreciated without any corroboration. Both these witnesses are interested witnesses and, therefore, their evidence is required to be discarded and brushed aside.

23] As regards to the admissibility of evidence of PW-2 Janabai and PW-3 Shobhabai being closely related to deceased as daughter and wife, it is to be appreciated that there is no bar for consideration of the evidence of relatives. In the instant case, as observed above, except the daughter and

wife of the victim Tukaram, rest of the prosecution witnesses, excluding the medical officers and police personnel all made volte-face and turned hostile. They did not support the prosecution case. Ultimately, prosecution heavily relied upon the sole evidence of PW-2 Janabai and PW-3 Shobhabai to prove the charges of brutal attack by the appellants/accused resulting into death of victim Tukaram.

24] At this juncture, it is to be borne in mind that the Honourable Apex Court, time and again in series of decisions, has held that where the evidence of interested witnesses is consistent and duly corroborated by medical evidence, it is not permissible to discard the same, merely on the ground that they are relatives or interested witnesses. It is a settled principle of law that relationship is not a factor to affect the credibility of a witness. In this respect, it would be profitable to make reference to the guidelines delineated by Their Lordships of the Apex Court in the case of *Daulatram Sadram Teli Vs. State of Chattisgarh reported (2008)17 SCC 112*, in which their Lordships in para.10, elucidated the magnitude of the evidence of related and interested witnesses as below :-

“10. Merely because the eyewitnesses are family members, their evidence cannot per se be discarded. When there is an allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. We shall also deal with the contention regarding interestedness of the witnesses for furthering prosecution version.

“11. ... Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent

person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

12. In *Dalip Singh v. State of Punjab*¹ has been laid down as under: (AIR p. 366, para 26)

“26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.”

The above decision has since been followed in *Guli Chand v. State of Rajasthan*² in which *Vadivelu Thevar v. State of Madras*³ was also relied upon.

13. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in *Dalip Singh case* (supra) in which surprise was expressed over the impression which prevailed in the minds of the members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed: (AIR p. 366, para 25)

“25. We are unable to agree with the learned Judges of the High Court that the testimony of the

¹ AIR 1963 SC 364

² (1974) 3 SCC 698

³ AIR 1957 SC 614

two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in—*Rameshwar v. State of Rajasthan* ⁴ (AIR at p.59). We find, however, that it unfortunately still persists, if not in the judgments of the courts, at any rate in the arguments of counsel.’

14. Again in *Masalti v. State of U.P* ⁵, this Court observed: (AIR pp. 209-10, para 14):

‘14. ... But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. ... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard-and-fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.’

15. To the same effect are the decisions in *State of Punjab v. Jagir Singh* ⁶, *Lehna v. State of Haryana* ⁷ and *Gangadhar Behera v. State of Orissa* ⁸—

The above position was also highlighted in *Babulal Bhagwan Khandare v. State of Maharashtra* ⁹, (2005) 10 SCC 404 *Salim Sahab v. State of M.P* ¹⁰, pp. 701-03, paras 11-15 and *Vinay Kumar Rai v. State of Bihar* ¹¹

25] In the light of above principles, it is imperative to consider the

4 AIR 1952 SC 54

5 AIR 1965 SC 202

6 (1974) 3 SCC 277

7 (2002) 3 SCC 76

8 (2002) 8 SCC 381

9 (2005) 10 SCC 404

10 (2007) 1 SCC 699

11 (2008) 12 SCC 202

acceptability or otherwise of the evidence of PW-2 Janabay and PW-3 Shobhabai, the daughter and wife of victim Tukaram. As mentioned above, PW-2 Janabay and PW-3 Shobhabai received opportunity to watch the spectacle of assault with lethal weapon knife by the appellant Dnyanoba on the victim Tukaram. The PW-2 Janabay herself received bleeding injuries after the attack with knife by the appellant Dnyanoba. Her presence at the scene of occurrence appears probable and natural one. The medical evidence of PW-4 Dr. Kunal Jadhav is also corroborated the version of PW-2 Janabay. The Medico-legal Certificate of PW-2 Janabay is produced on record at (Exh.47) in which the Medical Officer PW-4 Kunal Jadhav observed CLW on her left fore-arm. These circumstances, strengthen the version of PW-2 Janabay about the actual facts leading to occurrence of incident inflicting bleeding and fatal injuries to herself and victim Tukaram. PW-3 Shobhabai corroborated to the version of PW-2 Janabay on the factual aspect of participation of appellant/Dnyanoba in the incident of assault as well as his overt act for the fatal injuries to victim Tukaram. We do not come across with material contradictions or discrepancies in the evidence of these star witnesses of the prosecution. Learned counsel Shri Salunke made endeavour to point out the circumstance that PW-2 Janabay in her evidence did not make reference about the presence of PW-3 Shobhabai at the scene of occurrence on the day of alleged incident. But, the sole omission to that extent would not render entire ocular evidence of eye witnesses' account doubtful. The PW-3 Shobhabai deposed that, at the time of incident, she had been to fetch water and while returning, she heard the cries. Therefore,

she rushed to the spot of occurrence and witnessed the incident. There may be possibility that when the incident was going on, at that time, PW-2 Janabai might have not paid attention to the arrival of her mother on the scene of occurrence. Therefore, it would improper to assume that both these interested witnesses attempted to embroil the accused falsely in this case.

26] Moreover, in the evidence of the police personnels it has brought on record that after receipt of information about the occurrence of incident, police personnels rushed to the hospital. They learnt that victim Tukaram was in unconscious condition. Therefore, the police personnel recorded the FIR of PW-2 Janabai in which she verbalized the overt act of the appellants/accused inflicting fatal blows to her father Tukaram. The Police personnels immediately returned back to the police station and pursuant to the FIR of Janabai, registered the crime under Section 307 r/w. 34 of IPC. The FIR (Exh. 42) being a formal document rendered corroboration to the oral testimony of PW-2 Janabai as envisaged under Section 157 of the Evidence Act.

27] It is true that PW-2 Janabai in her evidence before the Court stated that the denizens Baban Sonawane and Bibhishan Karpe and others rushed to the spot. The prosecution made endeavour to adduce the evidence of eye witness Pw-9 Bibhishan Karpe to prove the case against accused. But he turned hostile and retracted from his earlier statement made before police. The parents of victim Tukaram PW-11 Babarao and PW-12 Simintabai also refused to support the prosecution case and made

attempt to shield the son - accused Dnyanoba from the legal punishment. There is no doubt that now-a-days, the witnesses are less prone to get themselves involved in the criminal matters. Ultimately, the prosecution has to keep reliance on the evidence of relative and family members of the victim to bring home guilt of the accused. The Honourable Apex Court in the matter of *Shyam Babu vs. State of Uttar Pradesh (2012)8 SCC 651*, in para.22, reiterated the principles as under :-

“22. This Court has repeatedly held that the version of an eyewitness cannot be discarded by the court merely on the ground that such eyewitness happened to be a relative or friend of the deceased. It is also stated that where the presence of the eyewitnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence, it will not be permissible for the court to discard the statement of such related or friendly witnesses. To put it clear, there is no bar in law on examining family members or any other person as witnesses. In fact, in cases involving family members of both sides, it is a member of the family or a friend who comes to rescue the injured. If the statement of witnesses, who are relatives or known to the parties affected is credible, reliable, trustworthy and corroborated by other witnesses, there would hardly be any reason for the court to reject such evidence merely on the ground that the witness was a family member or an interested witness or a person known to the affected party or friend, etc. These principles have been reiterated in *Mano Dutt V. State of U.P. And Dayal Singh V. State of Uttaranchal*.”

28] In the light of above principles, we do not find any impediment to accept the evidence of eye witnesses PW-2 Janabai and PW-3 Shobhabai in this case. We find that their evidence is cogent, credible & inspire confidence. The medical evidence brought on record also strengthened the version of these eye witnesses. There are no material discrepancies and contradictions to affect the credibility and trustworthiness of these

witnesses. As discussed above, it is proved that the appellant/Dnyanoba was the author of the fatal injuries received to victim Tukaram on his stomach. The accused Dnyanoba dealt multiple blows of lethal weapon in brutal manner and inflicted fatal injuries to victim Tukaram on vital part of the body. The number of blows by dangerous weapon and nature of injury inflicted to victim Tukaram shows the intention of appellant Dnyanoba to kill victim Tukaram to take umbrage of family dispute on account of partition of agricultural land. The findings expressed by the trial court in regard to offence of murder under Section 302 against accused Dnyanoba appears sustainable and appreciable one. Therefore, we are not prepared to cause any interference in the impugned judgment and order of conviction and sentence, under Section 302 of IPC, so far as accused Dnyanoba is concerned. The conviction of appellant Dnyanoba for the offence of murder of Tukaram under Section 302 is hereby confirmed. Obviously, the sentence of life imprisonment awarded to the appellant Dnyanoba needs no interference.

29] In regard to appellant No.2 Lilawatibai, the learned trial court drawn the adverse inference against her by invoking Section 34 of IPC in this case. It has been alleged that the appellant No.2 Lilawatibai in furtherance of common intention committed the offence of murder of victim Tukaram and caused hurt to PW-2 Janabai with lethal weapon. It is a settled rule of law that in order to prove the charge of common intention, the prosecution has to establish with cogent and credible evidence, whether direct or

circumstantial, that there was a plan or meeting of minds of both the accused to commit the offence for which they are charged with the aid of Section 34. The commission of crime may be pre-arranged or on the spur of moment. It must necessarily be before commission of crime. There must be meeting of minds or planning for it. The principles of law contemplate vicarious liability in such nature, that if two or more persons intentionally do an act jointly, the position in law is just the same, as if each of them has done it individually by himself. In case of Raghbir chand and others Vs. State of Punjab reported in (2013) 12 SCC 294, the Honourable Apex Court has described the scope of Section 34 in, para. 10 and 11 as under :-

“10. Common intention which is the gist of the principle of vicarious liability enshrined by Section 34 of the Penal Code can be the result of a premeditated decision between several co-accused or in a given case such common intention can very well develop on the spur of the moment or at the scene of the crime. What is of importance and, therefore, must be ascertained is the meeting of minds of the co-accused that the particular criminal act should be committed. Once the court can consider it safe to come to such a conclusion only then apportionment of liability amongst the co-accused would be permissible with the aid of Section 34 of the Penal Code. Liability of an accused under Section 34, therefore, is a matter of inference to be drawn from the facts and circumstances of each case. The above are the principles that have been laid down in a long line of decisions of this Court, few of which can be illustratively referred to hereinbelow.

11. This Court in Sripathi V. State of Karnataka observed as under :

Section 34 has been enacted on the principle of joint liability in the [Commission] of a criminal act. The Section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the

section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it prearranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true contents of the section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in ***Ashok Kumar V. State of Punjab*** the existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.

The section does not say “the common intentions of all” nor does it say “an intention common to all”. Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the [commission] of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in ***Chinta Pulla Reddy V. State of A.P.*** Section 34 is

applicable even if no injury has been caused by particular accused himself. For applying section 34 it is not necessary to show some overt act on the part of accused (As observed in ***State of M.P. v. Deshraj*** SCC pp.201-202, paras 5-6)”

30] In the instant case, PW-2 Janabai and PW-3 Shobhabai stated that while accused Dnyanoba was assaulting victim Tukaram with lethal weapon knife, PW-2 Janabai attempted to intervene in the scuffle but appellant Lilawatibai prevented and pushed her on the ground and beaten up her with kicks and fists. PW-2 Janabai received bleeding injury due to knife blow dealt with by the appellant Dnyanoba in the scuffle. The appellant Lilawatibai did not possess any weapon at the time of alleged incident. The sequence of events of assault on victim Tukaram by accused Dnyanoba, indicates that both the appellants arrived on the spot to collect the bricks of common wall. But, they were prevented by victim Tukaram and his daughter PW-2 Janabai. The appellant Dnyanoba dealt with multiple blows of knife at vital part of body of victim Tukaram. The overt act of appellant Dnyanoba and nature of injuries sustained to victim Tukaram manifestly reflects that the appellant Dnyanoba had an intention to kill Tukaram to take umbrage of family dispute on account of partition of agricultural land.

31] After taking into consideration the totality of the circumstances on record, it reveals that the appellants had the common intention to assault victim Tukaram and his family members. But, intention to commit murder appears to have been developed on the spot and it may not be result of per-arranged plan or pre-meetings of minds. Therefore, it would hazardous to

believe that appellant Lilawatibai had shared the common intention of husband accused Dnyanoba to kill victim Tukaram. Her criminal act during the alleged incident would not liable to be considered to fasten liability of murder of Tukaram with the aid of Section 34 of IPC. Admittedly, appellant Lilawatibai shared the common intention of her husband to attack victim Tukaram and his family members and to cause hurt to them. But, the circumstances did not permit to draw adverse inference against appellant Lilawatibai, for commission of murder of victim Tukaram with the aid of Section 34 of IPC. We reiterate that, in the instant case, the appellant Lilawatibai cannot be held guilty on the principle of joint liability for the criminal acts done by her husband Dnyanoba for murder of victim Tukaram. The liability of appellant Lilawatibai for offence committed by her husband cannot be considered at par with the criminal liability of her husband accused Dnyanoba. The evidence of PW-2 Janabai and PW-3 Shobhabai established the assault on victim Tukaram by appellant Dnyanoba and appellant Lilawatibai attacked PW-2 with kick and fists. In such peculiar circumstances, we are of the opinion that the conviction of Lilawatibai under Section 323 r/w. 34 of IPC is sustainable instead of offence punishable under Section 302 r/w. 34 of IPC. We, therefore, confirm the conviction of appellant Lilawatibai under Section 323 r/w. 34 of IPC and proceed to modify the sentence awarded to her.

32] In the above premises, we are of the considered opinion that the prosecution has proved that appellant Dnyanoba is guilty of offence punishable under section 302 of IPC for committing murder of victim

Tukaram. Therefore, the resultant sentence of imprisonment for life imposed upon the appellant No.1 Dnyanoba is hereby maintained. The conviction of appellant Dnyanoba under section 324 of IPC for assault with lethal weapon on PW-2 Janabai is also confirmed. But no separate sentence is required being lesser offence. However, we modify the finding of learned trial court in respect of conviction of the appellant No.2 Lilawatibai under Section 302 r/w. 34. She is exonerated from the charge of murder of victim Tukaram under Section 302 r/w. 34 of IPC and instead of that her conviction under Section 323 r/w. 34 of IPC is maintained for the assault on PW-2 Janabai by kicks and fists after using criminal force. Her sentence of imprisonment for life imposed by the trial court for the offence under section 302 r/w 34 of IPC is hereby quashed and set aside and same is substituted with imprisonment for the period which she has already undergone. The appellant No.2 Lilawatibai is on bail, her bail bonds stands cancelled. The acquittal of both accused under Sections 504 and 506 of IPC stands confirmed. Rest of the order of learned trial court in regard to set off, as prescribed under Section 428 of Cr.P.C. is hereby made absolute. Accused No.2 Lilawatibai shall furnish bail, as required under Section 437A of Cr.P.C. before the learned trial court, Ambajogai.

[K.K. SONAWANE, J]

[S.S. SHINDE, J.]

grt/-