

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 16 OF 2014

1. Ramchandra s/o Laxman Dhanad,
Age : 26 Years, Occ. Agriculture,
2. Dattatraya s/o Laxman Dhanad,
Age : 22 Years, Occ. Agriculture,
3. Sumanbai wo Laxman Dhanad
Age : 48 Years, Occ : Household

All Resident of Palkhed, Taluka
Vaijapur, District Aurangabad

...APPELLANTS

VERSUS

The State of Maharashtra

..RESPONDENT

....
Advocate for the Appellants : Mr. N.S. Ghanekar
A.P.P for Respondent-State : Mrs. D.S. Jape

....

**CORAM : T. V. NALWADE AND
S. M. GAVHANE, JJ.**

DATE : 26-11-2019.

JUDGMENT(PER T.V. NALWADE, J.] :-

1. The appeal is filed to challenge the Judgment and order of Sessions Case No. 233 of 2012 which was pending in the

Court of learned Additional Sessions Judge, Vaijapur District Aurangabad. The trial Court has convicted all the three appellants for the offence punishable under section 302 read with Section 34 of the Indian Penal Code and each of the appellant is sentenced to undergo imprisonment for life and to pay fine of Rs. 1,000/-. The appellant No.3 Smt. Sumanbai is separately convicted for the offence punishable under Section 324 of the Indian Penal Code and for that offence the sentence of imprisonment of three years is given and she is directed to pay fine of Rs. 1,000. Appellant No.2 Dattatraya is separately convicted for the offence punishable under Section 323 of the Indian Penal Code and he is sentenced to suffer imprisonment for one year and to pay fine of Rs. 1,000/-.

2. Both the sides are heard.

3. In short, the facts leading to the institution of the appeal can be stated as follows :-

The deceased Baburao Dhanat was step brother of accused No.1 Ramchandra Dhanad and accused No.2 Dattatraya Danad. Accused No.3 Sumanbai is the mother of accused Nos. 1 and 2. The informant Rajendra is a son of deceased Baburao. The agricultural lands of these two

families are situated adjacent to each others and their relations were strained.

4. The incident in question took place on 26.01.2011 at about 11.30 a.m. The informant and the deceased were present in the field and there was onion crop in their field. Both the sides have their houses in the fields. At about 11.30 a.m the informant Rajendra (P.W. No.3) noticed that accused Ramchandra was creating water channel by the side of the common Bandh and he was cutting the common Bandh and that way he was trying to get possession of that portion. The deceased Baburao was present near the Bandh. When complainant side requested Ramchandra not to cut the common Bandh, Ramchandra who was armed with Iron rake gave blow of the rake on the head of Baburao. Accused No.2 was also there and he gave blow of stick on the head of the Baburao. Sumanbai was holding a spade and she gave blow of the spade on the head of Rajendra (P.W. No.3). Rajendra was assaulted on his back and legs and by using stick by Dattatraya. When the wife of Rajendra viz Archana (P.W. No.5) rushed forward, she was also assaulted by Dattatraya by using stick. Dnyaneshwar who is relative of both the sides rushed to the spot and then the accused persons went away. Attempt

was made to save life of Baburao by shifting him to the Sub District Hospital, Vaijapur. Baburao succumbed to the injuries on 05.02.2011 in Governmental Hospital, Aurangabad.

5. Rajendra gave report about the incident on 27.01.2011, when he was receiving treatment in Hospital and on the basis of that report, initially the crime was registered for the offences punishable under Sections 324 and 323 read with Section 34 of the Indian Penal Code. After the death of Baburao supplementary statement of Rajendra came to be recorded and then the crime was registered for the offence of murder also. During the course of the investigation, police prepared inquest panchnama, spot panchnama and police recorded statements of witnesses who include the injured witnesses. The clothes of the deceased were taken over and the weapons came to be recovered. The *post mortem* report and injury certificates came to be collected. The property seized in the case came to be forwarded to the Chemical Analyzer and after completion of the investigation charge sheet came to be filed for aforesaid offences.

6. The prosecution has examined in all 11 witnesses. The defence produced a copy of report given by Sumanbai,

accused No.3 in respect of the same incident. On 26.01.2011 non cognizable offence was registered on the basis of that report. The defence of total denial was taken and no defence witness is examined. The trial Court has believed the witnesses who are mainly injured eye witnesses.

7. The learned counsel for the appellants submitted that the decision given by the trial Court itself shows that there was no common intention of murder of Baburao as the trial Court has sentenced accused Nos. 2 and 3 separately for the offences punishable under Sections 323 and 324 respectively, without using Section 34 of the Indian Penal Code. He submitted that in view of nature of injuries sustained by Baburao and the circumstances that other side was also having two male persons and the incident started due to trifle dispute, inference is not possible that there was intention of murder of Baburao.

8. The learned A.P.P. on the other hand submitted that force was used for inflicting injuries and the site of the body chosen for inflicting injuries is the circumstance on the basis of which inference is easy of common intention of murder. Learned A.P.P submitted that only because accused Nos. 2 and

3 are separately convicted for assaulting witnesses, it cannot be said that the accused persons had no common intention to murder Baburo.

09. The trial Court has convicted accused Nos. 2 and 3 separately, not by using section 34 of the Indian Penal Code for causing injury to Archana (P.W. No.5) and Rajendra (P.W. No.3) respectively. Section 34 of the Indian Penal Code is used to convict all the three accused for the offences punishable under Section 302 of the Indian Penal Code. As for remaining two offences the provision of Section 34 of the Indian Penal Code is not used and it is held that it was their individual act and there was no common intention, the interpretation of provision of Section 34 of the Indian Penal Code needs to be seen first. Apparently, when many persons are involved in one incident only few of them can have common intention and others may not have meeting of mind with those few. That probability needs to be considered on the basis of the provision of Section 34 of the Indian Penal Code and interpretation of the provision made by the Apex Court. The provision of Section 34 of the Indian Penal Code runs as under :-

Section 34 Acts done by several persons in furtherance of common intention.

“When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.”

10. Section 34 of the Indian Penal Code is introduced to enable to ascertain criminal liability of all the persons involved in one incident. The liability, complicity can be ascertain only on the basis of evidence available in that particular case. In one incident, there may be design and action, both but in other incident there may be only action. When there is evidence on designs or plan of all, all of them can be held jointly liable for the result of the action, even if the acts of the several persons involved are not identical or similar. When there is evidence on plan, which can be inferred on the basis of circumstances, every accused becomes liable for the act of other which gave the result in the same manner, as if the act of other was done by him alone. For this interpretation, reliance can be placed in the case reported as **Nagraja Versus The State of Karantaka**, [(2008) 17 SCC Page 277].

11. In the cases reported as **Krishna Patil Vs. State** (AIR 1963 SC 1413) and **Kripal Vs. State of Utter Pradesh** (AIR 1954 SC. 706). The Apex court has laid down that the design or plan may develop on the spot, during the course of commission of the offence, but the crucial condition is that the said plan or designs must precede the act constituting the offence. Thus, essence of the section 34 of the Indian Penal Code is the simultaneous consensus of mind, meeting of mind of persons participating in the criminal action, to bring about a particular result.

12. Inference of common intention can be drawn on the basis of the evidence available on the record. Thus, the applicability of Section 34 of the Indian Penal Code, depends upon the facts and circumstances of each case. When the incident had started on spur of moment and many accused are charged for the offence, the result, by using Section 34 of the Indian Penal Code, the prosecution needs to prove by reliable evidence, " participation in some way " of each accused in the offence. On the basis of such material inference of common intention developed on the spot can be drawn. In the case reported as **Kanbi Virji Vs. The State of Gujarat** (AIR 1970 SC 219), the Apex Court has laid down that

expression used in Section 34 of the Indian penal Code like “in furtherance of common intention of all” need not necessarily relates to the person actually killed and it is sufficient that the common intention was to commit murder irrespective of specific person.

13. The aforesaid interpretation of Section 34 of the Indian Penal Code shows that when the incident had started on spur of moment, it is possible that only few of the accused involved in the incident had developed common intention to commit particular offence and others though appear to be involved in the incident had no clue about the common intention of few of them. This may happen when the others had no opportunity or no reason for meeting of mind with those few who had common intention. In the light of this interpretation, let us appreciated the evidence available in the present matter.

14. It appears that in the trial Court on one hand, the defence of total denial was taken by all the accused but on the other hand during the cross-examination of prosecution witnesses, particularly of Kisan (P.W. No.11) the report given to police by accused No.3 in respect of the same incident was brought on record. The report at Exh. 73 shows that the

report was given by the accused No.3 on 26.01.2011 at 17.10 hours and non cognizable offence was registered on the basis of this report for the offences punishable under Sections 323, 504 and 506 read with Section 34 of the Indian Penal Code. In the report, accused No.3 had informed to police that the deceased Baburao and two prosecution witnesses, Prosecution Witnesses No. 3 and 5 had assaulted accused No.3 and her sons (accused Nos.1 and 2), with fists blows and kicks. It was informed that the incident had taken place when accused No.3 and her sons were doing some agricultural operations like planting onion crop in the land. The FIR of the present matter came to be recorded on 27.01.2011 in the Government Hospital Aurangabad and it was initially registered for the offence punishable under Sections 324 read with Section 34 of the Indian Penal Code. This FIR was sent to the concerned Police Station and in the concerned Police Station the crime came to be registered on 28.01.2011. Thus, when Exh. 73 the report of the Non cognizable case was given by accused No.3, no crime was registered against accused Nos. 1 to 3 and they were not arrested in any case. This circumstances shows that accused Nos. 1 to 3 are not disputing their presence on the spot of the offence at the

relevant time. This circumstances needs to be kept in mind at the time of appreciation of the evidence given against them.

15. Baburao died on 05.02.2011 in the Government Hospital Aurangabad. The tenor of the cross-examination by defence shows that the defence did not specifically admit that Baburao died homicidal death. The trial Court has held that prosecution has proved that Baburao died homicidal death. The evidence on record shows that after the incident, Baburao was first taken to Vaijapur Sub District Hospital and from there he was shifted to District Hospital, Aurangabad. The first injury certificate in respect of Baburao was prepared by the Vaijapur Government Hospital and it is at Exh. 77. This document is admitted by the defence. This certificate needs to be considered, while considering the evidence given on the cause of death. The other record shows that treatment was given to Baburao from 26.01.2011 to 05.02.2011. In Exh. 77, the first injury certificate, the history of assault was given to Government Hospital and the time of the examination in Government Hospital, Vaijapur is mentioned as 12. 45 horus of 26.01.2011 i.e. within about one hour of the incident. Two CLW's were found as surface wounds and they were as under :-

CLW over scalp of the size of 7x2x1 c.m. at temporal lobe and second C.L.W over right ear lacerated (2x1 cm). The description of the injuries shows that both the injuries were directed upward. The age of injuries is mentioned as within six hours. The weapon which can cause such injuries is described as hard and blunt object. This document does not show that x-ray etc was taken. The injuries were injury was described as simple injuries.

16. Dr. Mahesh Jambure (P.W. No.9) conducted the *post mortem* examination on the dead body of deceased Baburao on 06.02.2011. His evidence shows that he found following external injuries which are described in column No. 17 of *post mortem* report at Exh. 57.

- i) Evidence of treatment in the form of stitch wound over high partial region of size 6 cm in length, 5 stitches seen.
- ii) Treatment in the form of stitch wound over left temporal region of length 3 cm.
- iii) Contusion over occipital region of size 3 x 2 cm irregular in shape.

- iv) Lacerated wound over right ear pinna of size 2 x 0.5 cm margins irregular and blood infiltrated.
- v) Stitch wound left parital region of size 2 cm length.
- vi) Evidence of treatment in the form of trachestomy wound over neck.
- vii) Evidence of treatment in form of puncture mark over left dorsum and right cubital fossa."

17. On internal examination Dr. Mahesh (P.W. No.9) found internal injuries which are described in the column No. 19 of the *post mortem report* at Exh. 57 and they are as under :-

- i) Under scalp hematoma over parito temproro occipital region.
- ii) Communitied displaced fracture of bilateral parital bone extending upto temporal bone on both size.
- iii) Communitied fracture of right frontal bone
- iv) communitied fracture of squamous part of right temporal bone.
- v) Subdural bleed is parital region.

vi) Subarchnoid hemorage all over prominetely on right cerebal homisphere.

vii) Hemorehagic contusion on right parital lobe of 2.6 x 1.5 cm.

18. Dr. Mahesh(P.W. No.9) has given evidence that the injuries noted in column No. 19 of the *post mortem* report correspond to the external injuries described in Column No. 17. He has deposed that injuries were caused by hard and blunt object and the injuries which were found on the head can be caused by the weapon like Iron rake. (Article A) shown to be seized in the present matter. He has deposed that if the blunt side of such agricultural implement is used as weapon, such injuries can be caused.

19. The defence counsel suggested to Dr. Mahesh, P.W. No.9 that the injuries described in column No. 17 and 19 of the *post mortem* report can be sustained, if one meets with road traffic accident. This suggestion is denied. If the aforesaid injuries are considered and the evidence of Dr. Mahesh, his opinion is considered, it can be said that there were many fractures to the Bones of head and face. These injuries had caused bleed and hemorrhage at different places in and over brain. On the

basis of the evidence of Dr. Mahesh and aforesaid injuries inference is easy that more than one blows of blunt weapon were given on the head and face of the deceased. (Exh.77) the first injury certificate also shows that at least two, visible surface injuries were noticed by the doctor from Vaijapur Government Hospital on the head of deceased Baburao. These injuries caused the death of Baburao. The death took place after about 10 days of the incident. The evidence shows that these injuries cause the death of Baburao. This Court holds that this evidence is sufficient to hold that Baburao died homicidal death. In view of this medical evidence, there is no need to discuss the evidence of panch witnesses on inquest panchnama. Most of the injuries were internal injuries and hard and blunt weapon was used. In many cases when hard and blunt weapon is used, surface wounds are not visible on head though internal damage is caused. This medical evidence needs to be kept in mind at the time of appreciation of direct evidence.

20. For proving the offence for which the charge was framed, prosecution has given evidence of two injured eye witnesses. Though there is evidence of two other witnesses who had

reached spot within no time, there evidence is not at all convincing and one witness has turned hostile.

21. Rajendra (P.W.No.3), son of the deceased has given evidence that the incident took place at about 11.30 a.m of 26.01.2011. He has deposed that he, his wife Archana (P.W. No.5) and the deceased Baburao were present in their field and in their field, there was standing crop of onion. He has deposed that all the accused were present in field of accused and there is only common Bandh between the fields of Rajendra and filed of the accused. He has deposed that accused persons were carving-cutting the common Bandh from the side of the accused and so the deceased went towards the common Bandh and requested not to do so. He has deposed that when Baburao questioned the accused about their activity, the incident took place. The evidence of eye witnesses and the spot panchnama show that accused were creating water channel by the side of common Band though towards the side of their land. When such channel is created by the side of the Bandh, the Band gets cut and width gets reduced. The farmer of the other side feels that by using

such modus operandi, the other side is trying to encroach, take possession of the other land.

22. Rajendra (P.W. No.3) has deposed that, first accused No.1 gave abuses to the deceased and when the deceased was looking at the cut portion of common Bandh, accused No.1 came from behind and assaulted the deceased on the head of the deceased with iron rake.(Agricultural implement of metal). Rajendra has deposed that his father Baburao sustained injury and he fell down due to blow and then accused No.2 Dattatraya assaulted deceased with the stick. He has deposed that he rushed towards to rescue father and then accused No.3. the lady accused assaulted him on his head by using spade. He has deposed that due to this blow, he also sustained injury to his head. He has deposed that accused No.2 then assaulted him with stick. He has deposed that when his wife Archana came forward, accused No.2 assaulted Archana also with stick. He has deposed that accused No.3 also assaulted Archana with fists and kicks blows. He has deposed that when they started shouting, the persons like Dnyaneshwar and Ganesh Jadhav came there. He has further deposed that he, his father and his wife-Archana were taken first to Vijapur Government Hospital and then to

the Government Hospital, Aurangabad. He has deposed that all of them were admitted in the Government Hospital Aurangabad. He has deposed that on 27.1.2011, police recorded his statement in the Government Hospital Aurangabad and document at Exh. 41 is the same. He has deposed that during the treatment, Baburao died in the Government Hospital, Aurangabad on 05.02.2011 and death took place due to the assault made by the accused. Rajendra has identified as articles weapons like iron rake, spade and stick which are marked as articles A to C in muddemal property. He has deposed that during the investigation his clothes and clothes of the deceased were taken over by the police. He has identified those clothes also.

23. The injury certificate in respect of Baburao and the injury certificate at Exh. 75 in respect of Rajendra show that within one hour of the assault, the injured were reached to the Government Hospital at Vaijapur and there history of the assault was given. Informant (P.W.. No.3) was also examined in Vaijapur along with deceased Baburao and history of assault was given when these three persons were examined. The injury certificate in respect of deceased (Exh.77) in respect of

Rajendra (Exh.75) and in respect of Archana (Exh.76) are admitted by the defence.

24. The injury certificate at (Exh.75) in respect of Rajendra (P.W.No.3) show that he sustained three injuries in the incident. One CLW was on scalp at temporal region of the size of 4x2x1 cm. The second injury was CLW and it was over the left hand of the size of 2x1 cm and third injury was blunt trauma over right leg. The documents show that all the three injuries were caused by hard and blunt objects and they were sustained within six hours. It is already mentioned that accused No.3 had given report on 26.01. 2011 itself in which she had admitted that some incident did take place. Thus, Rajendra (P.W. No.3) sustained injuries in the incident in question. It is specifically suggested to the P.W. No.3 in the cross-examination that he had used spade as weapon in the incident and the blow of the spade accidentally landed on the head of Bburao. This suggestion is denied by P.W. No.3.

25. In F.I.R (Exh. 41) given by P.W. No.3 it was specifically informed by P.W. No.3 to police that accused No.1 had given blow of iron rake on the head of Baburao and accused No.2 had used stick to assault Baburao. In substantive evidence

there is no specific statement of P.W. No.3 that accused No.2 had given blow of the stick on the head of the deceased, but fact remains that the evidence is to the effect that accused No.2 had participated in that part of the incident in which Baburao was assaulted. The other contents of the FIR are also fully consistent with the version given by P.W. No.3 in the Court. Thus, Exh. 41 FIR has given necessary corroboration to the version of P.W. No.3 as provided under Section 157 of the Indian Evidence Act.

26. The evidence of the Archana (P.W. No.5) is similar to the evidence of Rajendra (P.W. No.3) on most of relevant points. Only one circumstance is there in respect of evidence of P.W. No.5 that she has not given substantive evidence that accused No.2 had assaulted deceased Baburao with stick. There is her evidence of presence of accused No.2 and there is evidence of assault made by him on Rajendra and also on her. She has admitted in the cross-examination that she has stated before the police that she was assaulted by accused No.1 with stick. Though such admission is there, she has not given such substantive evidence and not much can be made out in favour of defence due to such previous statement. It needs to be kept in mind that she had stated before police also that

accused No.1 had assaulted the deceased by using iron rake and there is no inconsistency in respect of that substantive evidence. She described the weapons which were used by the accused Nos. 1 to 3 in the substantive evidence and there is no inconsistency in relation to her previous statement in substantive evidence. It is already observed that P.W. No.5 has not given evidence that accused No.2 had also assaulted the deceased. These circumstances show that she is not exagrating the things and whatever she saw, she has given account of that in the Court.

27. The FIR at Exh. 41 was given on 27.01.2011 and this was the first information given to police by the side of Rajendra (P.W. No.3). The evidence on record shows that first Baburo went towards Bandh and then P.W. No.3 rushed towards that side when he saw that Baburao was being assaulted. P.W. No.5 is a lady and inference is easy that she went ahead only when accused No.3 came forward to participate in the incident and she reached the spot subsequently, when assault on the Baburao was over. So not much can be made out due to absence of substantive evidence from the P.W. No.5 against the accused No.2 that he had assaulted the deceased. As already observed, there is injury certificate in respect of

Archna (Exh.76) which is of the same date and it shows that she was also examined within one hour of the incident. This certificate which is admitted give corroboration to the version of Archna.

28. Dnyaneshwar (P.W. No.4) and Ganesh (P.W. No.6) were expected to give evidence on the disclosures made to them by the injured witnesses immediately after the incident. P.W. No.4 has not given such evidence. Rajendra (P.W. No.3) is brother of wife of P.W. No.6. P.W. No.6 admitted injured persons first in Sub District Hospital, Vaijapur and then in District Government Hospital Aurangabad. He has given evidence on disclosures made to him by aforesaid two injured eye witnesses. Some omissions are there in relation to the previous statement which are pointed out in cross-examination. He tried to say that he had seen the accused near the spot of offence. In view of the omissions in previous statement in respect of that substantive evidence and as it was not probable for him to rush to the spot within that time, the said evidence given by P.W. No. 6 cannot be used against the accused. Thus, the evidence of Ganesh P.W. No.6 is only on disclosures made to him by the injured witnesses after the incident. It is already observed that the history of assault was given in

Government Hospital Vijapur. The evidence on record shows that things were not taken seriously even on 27.01.2011 by police and crime came to be registered only for the offence punishable under Section 324 read with Section 34 of the Indian Penal Code on the basis of Exh. 41. The evidence on record shows that no attempt was made to exaggerate the things. Probably x-ray was not taken prior to recording of Exh. 41, but the fact remains that P.W. No.3 was admitted in the Government Hospital and there Exh.41 was recorded on 27.01.2011. All of these circumstances have ruled out the possibility of concoction. These circumstances also explain the delay caused in giving FIR by P.W. No.3. He had sustained injury to his head and he was also admitted in Government Hospital Aurangabad. His wife had also sustained injury and she was also taken to Ghati Hospital Aurangabad. In such cases, on the basis of circumstances Court can hold that the delay is properly explained though no word as such is uttered by witness like P.W. No.3 to explain the delay. This Court holds that the delay is sufficiently explained in the present matter by the aforesaid circumstances.

29. The panch witness on the spot panchnama Bhanudas (P.W. No.8) has turned hostile. He only admitted his signature

appearing on Exh. 52, spot panchnama. Police Head Constable Ramnath (P.W. No.10) has given evidence on the spot panchnama and its contents are proved. It was prepared on 29.01.2011. The evidence of P.W. No. 10 and Exh. 52 show that from the spot of offence ordinary earth sample and earth sample containing blood were collected. The spot of offence was shown by Archana (P.W. No.5). Both the eye witnesses and police Head Constable (P.W. No. 10) are cross-examined in respect of the contents of the spot panchnama. The evidence shows that the common Bandh was cut from the side of the land of accused for creation of water channel. Hand sketch map of the lands is given in Exh. 52 and it shows that blood was found by the side of the common bandh. In view of the direct evidence discussed already, this Court holds that Exh. 52 gives corroboration to the versions of eye witnesses. Though chemical analyzer report at Exh. 16 shows that earth samples were tested and blood was found in one earth sample, there is no covering letter in respect of the muddemal property and there is no evidence on this point from the Investigating Officer. The spot panchnama at Exh. 52 however can be used to show the location of the lands and spot of the incident.

30. The deceased was step brother of accused Nos. 1 and 2. In the evidence of P.W. No.3 and P.W. No. 5, it is brought on record by both the sides that there was dispute over agricultural lands between the parties. Though as per the family arrangement, some portion was given to the family of the deceased for cultivation, no partition as such had taken place according to the side of the complaint. Even suit was filed by the deceased for partition. The suit was dismissed but as per the evidence of the two witnesses, appeal was filed by the deceased and appeal was pending on the date of the incident. In the report given by accused No.3 mentioned already, there is mention of this dispute. The cutting of common Bandh on that day for creating water channel became starting point of the quarrel. Thus, there was motive of the crime.

31. In view of the circumstances already discussed and in view of the circumstance that defence has brought on record the presence of all the accused on the spot at the relevant time, there is no need to discuss some other defences suggested during the cross-examination of the P.W. Nos. 3 and P.W. No. 5. The evidence of both the eye witnesses remained

unshattered even after extensive cross-examination. They are injured witnesses and against them allegations were made in the report given by accused No.3, (Exh.73) that P.W. No.3 and P.W. No.5 had committed offence against the family members of accused No.3.

32. The trial Court has believed both the aforesaid eye witnesses. There are many circumstances which are already quoted and which give corroboration to the versions of two eye witnesses. Though, P.W. Nos. 3 and 5 are close relatives of the deceased, due to this circumstances the evidence of these two witnesses cannot be discarded. This Court has carefully scrutinized the evidence of these two witnesses and circumstances which are corroborating their evidences are also quoted. The trial court has believed these witnesses and this Court sees no reason to interfere in that findings given by the trial Court.

33. The question now arises as to what offences are committed and who committed the offences. The evidence on record is sufficient to prove that minimum two blows were given on the head of the deceased and the weapons used were hard and blunt. One weapon was heavy. The injuries

caused due to blows were fractures of skull and face bones and those injuries caused internal damage. The circumstances that accused Nos. 1 and 2 are step brothers of the deceased and deceased was insisting for proper partition in respect of the immovable property needs to be kept in mind at the time of ascertaining the intention. The deceased had filed litigation to get the decision in respect of the dispute. On that day the accused persons were creating water channel by cutting some portion of the common Bandh. The evidence shows that there was already grudge against the deceased and on that day the things became more serious as the deceased tried to obstruct the accused from their activity like cutting common Bandh. Accused Nos. 1 and 2 had chosen vital part of the body like head of the deceased for making assault. The evidence on record shows that blows were given on the head one after another. Considering the nature of injuries it can be said that much force was used. Considering the site of body chosen, the motive and the circumstances that a heavy weapon of metal was also used, the inference is easy that there was intention of murder. The evidence shows that due to the blows, the deceased collapsed and accused Nos. 1 and 2 left the spot only when P.W. No. 3 and P.W. No. 5

and others rushed to the spot. These injuries ultimately caused the death of Baburao. The evidence on record shows that the deceased could not be saved though he was indoor patient for many days. In view of the nature of evidence available, this Court holds that case falls both under part I and part III of Section 300 of the Indian Penal Code and it is murder.

34. Section from 299 explanation (ii) runs as under :-

299. **Culpable homicide**

“Explanation 2.- Where death is caused by bodily injury, the person who causes such injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.”

35. In view of the aforesaid provision it is not open to the defence to show that the deceased could have been saved as he had survived till 5th of the next month. In view of evidence available this Court holds that the case does not fall under exception No. 4 to Section 300 of the Indian Penal Code. Further, it needs to be presumed that the injuries inflicted to Baburao were sufficient in ordinary course of nature to cause

the death. There is no specific substantive medical evidence that injuries found on the head either individually or cumulatively are sufficient in ordinary course of nature.

36. The expression “ordinarily sufficient to cause the death” used in Section 300 of the Indian Penal Code shows high probability of death in ordinary course of nature. When such high probability exists and death ensues and the injuries are caused intentionally, then the offence becomes murder under part III of the Section 300 of the Indian Penal Code. In the case reported as **Virsa Singh Vs. State of Punjab**, (A.I.R. 1958 S.C. 465) the Apex Court has laid down that following facts need to be established by the prosecution for use of part III of Section 300 of the Indian Penal Code.

“(1) It must establish, quite objectively, that a bodily injury is present.

(2) The nature of the injury must be proved. These are purely objective investigations.

(3) It must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and

(4) It must be proved that the injury of the type described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the inquiry is purely objective."

37. The aforesaid circumstances and position of law show that in the matter like present one, the accused can escape the liability given in aforesaid provision, if on the basis of material available, it can be reasonably deduced or accused is in a position to show that injury was accidental or otherwise unintentional. Such probability is not created in the present matter. In such a case Part I and Part III of the Indian Penal Code can overlap each other and so the offence committed is murder.

38. The learned counsel for the appellant placed reliance on the observations made by the Apex Court in some cases.

- (I) Padmakar s/o Dadarao Thorat
In Criminal Appeal No. 601 of 2002 with
Criminal Appeal Nos. 634 and 683 of 2002
(Nagpur Bench)
- (ii) Abani K. Debnath and Another Vs. State of Tripura
2006 ALL MR (Cri) 560 (S.C.)
- (iii) Daya Nand Vs. State of Harayana
2008 ALL MR (Cri) 2279 (S.C.)

(iv) Chenda @ Chanda Ram Vs. State of Chhatisgarh
Supreme Court of India LEX(SC)2013 868

The learned A.P.P also placed reliance on one case **The State of Madhya Pradesh Vs. Kalicharan And Others** (Supreme Court of Indian in Criminal appeal No. 1411 of 2014)

39. Learned counsel for the appellant submitted that the offence committed by the accused will fall under Section 304 part (ii) of the Indian Penal Code. Though in the aforesaid cases, it was held that the offence committed would fall under Section 304 either in part I or part II of the Indian Penal Code, the facts and circumstances of each and every criminal case are always different. All the relevant circumstances of the present matters are considered by this Court to ascertain the intention of the assailants. These circumstances are properly considered by the Trial Court also. Thus the observations made in the aforesaid cases are no help to the accused.

40. The question arises as to whether all the three accused had common intention of murder of Baburao. The evidence shows that in the beginning of the incident only accused Nos. 1 and 2 were near the deceased as cutting of common bandh,

creating of water channel was going on. The evidence is given by P.W. No.3 that one after other accused Nos. 1 and 2 assaulted deceased by using aforesaid weapons. Thus the evidence is given that when the assault was made on Baburao, accused Nos. 1 and 2 were together. Though accused No. 3 was present in the field, only due to that circumstance it cannot be inferred that she was also with the accused Nos. 1 and 2 when actual assault was made on the deceased. There is no specific allegations against her from both the eye witnesses that she assaulted the deceased or helped accused Nos. 1 and 2 in any way. On the basis of this evidence, the inference is available only against accused Nos. 1 and 2 that they had the common intention of the murder of Baburao. As accused No.3 had not assaulted the deceased and she came forward when the other witnesses came forward, it is difficult to believe that there was meeting of mind between accused No.3 on one side and accused Nos. 1 and 2 on the other side. This Court holds that by using Section 34 of the Indian Penal Code accused No.3 cannot be held guilty for the offence of murder of Baburao committed by accused Nos. 1 and 2.

41. The evidence on record shows that when accused No.3 came forward she was having weapon like spade. The evidence shows she assaulted P.W. No.3 and caused injury to him. For that she can be held liable for the offence punishable under Sections 324 of the Indian Penal Code and there is medical evidence to prove that injury. The accused No.2 assaulted P.W. No.3 and also P.W. no.5. The accused No.2 had caused injuries to P.W. nos. 3 and P.W. No. 5 as already mentioned. In view of nature of weapon used by him like stick he is held liable for the offence punishable under Section 323 of the Indian Penal Code, for causing injury to the witnesses. Thus, there is no need to interfere in the finding given by the trial Court that accused No.3 is guilty of the offence punishable under Section 324 of the Indian Penal Code and accused No.2 is guilty of the offence punishable under Sections 323 of the Indian Penal Code. The imprisonment given to the accused No.3 for the offence punishable under Section 324 of the Indian penal Code which is three years is harsh. In view of the material which is mentioned above and circumstance that she is lady, this Court holds that she was virtually dragged in the incident and there was no other option to her than to come forward and participate in some way in

the incident . There were two male persons and one female person on the opposite side. This Court holds that sentencing accused No.3 for imprisonment already undergone which is more than few months is just and sufficient. The fine already imposed against her can be maintained. So the following order :-

ORDER

1. Appeal of appellant Nos. 1 and 2 stands dismissed.
2. Appeal of appellant No.3 is partly allowed. The conviction given to her for the offence punishable under section 302 read with section 34 of the Indian Penal Code is quashed and set-aside. She stands acquitted of offence of murder. Appellant No.3- Sumanbai, however, stands convicted for the offence punishable under section 324 of the Indian Penal Code. She is sentenced to suffer imprisonment for the period already undergone and to pay fine of Rs. 1,000/- (Rupees One Thousand). If the fine amount is already deposited, she is to set at liberty forthwith.
3. Rule made absolute in the aforesaid terms.

(S.M. GAVHANE, J.)

(T.V. NALAWADE, J.)