

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

CRIMINAL APPEAL NO. 585 OF 2014

Sanjay s/o Namdeo Gaikwad
Age 52 years Occu. Nil.
r/o Shankarnagar Parbhani
at Present Adharsha colony Latur
Taluka and District : Latur

... Appellant
(Orig. Accused)

Versus

The State of Maharashtra
Through Police Station
Shivajinagar, Latur
Tq. and District Latur.

... Respondent

...
Advocate for Appellant : Mr. M. A. Tandale (Appointed)
APP for Respondent – State : Mr. R. V. Dasalkar
...

**CORAM : RAVINDRA V. GHUGE AND
B. U. DEBADWAR, JJ.**

**RESERVED ON : 30TH JANUARY, 2021
PRONOUNCED ON : 17TH FEBRUARY, 2021**

JUDGMENT [PER B. U. DEBADWAR, J.]:

1. This appeal, under Section 374(1) of Code of Criminal Procedure, 1973 (hereinafter referred as 'Cr.P.C.'), has been directed against the judgment and order dated 16-08-2014 passed by the learned Additional Sessions Judge, Latur, in Sessions Case No. 124 of 2013, thereby convicting the appellant / accused under Section 302 of the Indian Penal Code (hereinafter referred as 'I.P.C.') and sentencing him to undergo imprisonment for life and pay fine of Rs.2,000/- (Rupees Two Thousand only), in default to

undergo further rigorous imprisonment for two months.

2. Facts unfolding the case of the prosecution in the nutshell are as under :

a) Deceased Umabai, a middle aged lady, was the wife of the appellant / accused. The couple was blessed with two daughters and two sons. Both the daughters were married. The appellant / accused was original resident of District Parbhani. He had migrated to Latur for earning livelihood. Satish Bora (DW3) had employed him as a watchman at his construction site, situated at New Adarsh Colony, Latur. The appellant / accused along with his father, wife Umabai and two sons namely Akash and Vikas used to reside at the construction site. Elder daughter of appellant / accused and deceased Umabai by name Sheela Dilip Raibhole (PW2) used to reside with her husband in Narsinh Nagar, Latur.

b) Appellant / accused was in habit of drinking liquor. He used to pick up quarrel and beat wife Umabai, suspecting her character. On 08-07-2013 at about 10:30 p.m., as usual, appellant / accused had come to house in drunken state and started quarreling and beating wife Umabai, after raising doubt about her fidelity. Father and sons of the appellant / accused tried to give him understanding, but in vain. Since, appellant / accused had become violent and was not in a mood to listen to father and sons,

father and elder son of the appellant / accused left the house and proceeded to Parbhani. When wife Umabai and younger son Vikas (PW3) remained in the house, appellant / accused mercilessly beat wife Umabai with a solid stick. Consequently, deceased Umabai suffered 22 injuries all over the body and ultimately succumbed to the said injuries in the house itself.

c) Soon after deceased Umabai's lying in supine condition without giving response, appellant / accused along with the younger son Vikas (PW3) rushed to the house of Sheela (PW2) situated in Narsinh Nagar, Latur, and informed her about the incident. Since, appellant / accused was under the influence of liquor, Sheela (PW2), by taking brother Vikas (PW3) aside from the appellant / accused, asked him in detail about the incident. On Vikas's disclosing her about the incident and the death of Umabai, Sheela along with her husband and brother Vikas left her house and proceeded to the house of appellant / accused, situated at the construction site of Satish Bora (DW3) and saw her mother Umabai lying in the house in dead condition, with injuries all over the body. Then, along with brother Vikas, went to Shivajinagar Police Station, Latur, and lodged the report narrating the incident referred above.

d) On the basis of the said report lodged by Sheela (PW2), Crime bearing No. 129 of 2013, for the offence punishable under

Section 302 of I.P.C., came to be registered at Shivajinagar Police Station, Latur, on 09-07-2013 at about 04:10 a.m.

e) The investigation of the said crime was carried by Rajkumar Ganpatrao Sonawane (PW5), Police Inspector. During the course of investigation, initially, inquest panchanama of the dead body of Umabai was drawn by proceeding to the spot of incident along with panchas, then, dead body of Umabai was sent to the Government Medical College and Hospital, Latur, for conducting postmortem, along with copy of the inquest and requisition for conducting postmortem. Thereafter, in presence of panchas, spot panchanama was drawn and blood found on the spot was collected with cotton swab in a plastic box, and the same was packed and sealed. Then, appellant / accused was arrested after drawing arrest panchanama. Then, the statements of material witnesses, including PW3 Vikas, were recorded. Then, crime weapon viz. solid *Velu* stick, came to be recovered from the place discovered at the instance of appellant / accused, under Section 27 of the Evidence Act. Then, blood samples of deceased Umabai and appellant / accused, collected by the Medical Officer, were sent to the Forensic Science Laboratory, along with the crime weapon and blood collected from the spot, for chemical analysis and report. Thereafter, postmortem report and C.A. reports were collected.

After completion of investigation, accused was charge-sheeted for committing murder of wife Umabai under Section 302 of I.P.C., before the learned J.M.F.C., Latur, who, in turn, committed the case to the Sessions Court at Latur.

f) After committal of the case, on 05-12-2013, learned Additional Sessions Judge, Latur, vide Exhibit-7, framed charge under Section 302 of I.P.C. against the appellant / accused. Since appellant / accused claimed to be tried, after pleading not guilty, trial was commenced.

g) During the course of trial, prosecution had examined five witnesses viz. :-

PW1 – Saddam Abbaskhan Pathan

PW2 – Sheela Dilip Raibhole, daughter of the deceased

PW3 – Vikas Sanjay Gaikwad, son the deceased

PW4 – Dr. Rahul Bhagwan Umbre, Medical Officer

PW5 – Rajkumar Ganpatrao Sonawane, P.I., Investigating Officer

h) The trial Court recorded statement of appellant / accused under Section 313(1)(b) of Cr.P.C. Thereafter, recorded the evidence of appellant / accused and two more witnesses examined by him in his defence viz. Arjun Sudhakar Bakale (DW2) and Satish Tejmal Bora (DW3). Upon that, held appellant / accused guilty for the murder of wife Umabai and sentenced him to life

imprisonment and fine, which is a minimum sentence provided for the offence of murder, punishable under Section 302 of I.P.C., holding that the testimony of Vikas (PW3) is clear, cogent and sufficient to prove the incident and complicity of the appellant / accused in the incident. The defence of appellant / accused that deceased Umabai suffered the injuries due to falling on the hard and rough surface, is not at all worthy of credence and cannot be accepted. Being aggrieved by the impugned judgment and award, appellant / accused has preferred the present appeal.

2. We have heard Mr. M. T. Tandale, learned advocate for the appellant and Mr. Dasalkar, learned Additional Public Prosecutor, appearing for the respondent – State, at length.

3. Mr. Tandale, learned advocate, while taking us through record, vehemently argued that the case of the prosecution is mainly based on the evidence of Vikas Gaikwad (PW3), son of the appellant / accused and deceased Umabai, who was 9 years old child when the incident took place. Therefore, his evidence should be evaluated more carefully and with greater circumspection, and it should be corroborated by other cogent evidence. Prosecution has not examined father or elder son of the appellant / accused to corroborate the evidence of Vikas (PW3). Non examination of father and elder son of appellant / accused, though available, is

fatal lapse on the part of prosecution. Moreover, in view of the admission given by Vikas (PW3) in his cross examination that since the death of mother Umabai he is residing with his sister Sheela (PW2) and she is incurring his educational expenses, it would not be legal and proper to rely on his solitary evidence, for basing conviction of accused.

4. Mr. Tandale, learned advocate, further argued that, evidence of Sheela (PW2) is hearsay in nature. She had lodged the FIR on the basis of information received from Vikas (PW3). Therefore, her evidence no way helps the prosecution for seeking corroboration to the evidence of Vikas (PW3). Mr. Tandale also argued that, in the absence of panch witnesses, merely relying on the evidence of Rajkumar Sonawane (PW5), investigating officer, the case of prosecution about recovery of crime weapon, i.e. solid stick, from the place discovered at the instance of appellant / accused, under Section 27 of the Evidence Act, cannot be believed and accepted.

5. According to Mr. Tandale, when evidence of Sheela (PW2) is of hearsay in nature, evidence of Vikas (P3) is not free from tutoring and evidence of I.O. Rajkumar Sonawane (PW5) about recovery of crime weapon, under Section 27 of the Evidence Act, is doubtful, appellant / accused cannot be convicted for the

offence of murder of wife Umabai.

6. Mr. Tandale, lastly submitted that prosecution has to stand on its own legs and cannot take benefit of weaknesses of defence. In view of this settled position of law, appellant / accused cannot be held guilty of the charge under Section 302 of I.P.C. relying on the evidence in defence, led by him. Learned Additional Sessions Judge, Latur, failed to appreciate the evidence on record in proper perspective and wrongly held the appellant / accused guilty.

7. In alternate, Mr. Tandale submitted that all the injuries suffered by the deceased Umabai were on non-vital parts of the body and simple in nature. After having suffered those injuries, Umabai was lying at the spot unattended for about four hours. Looking to the nature of injuries suffered by Umabai, she would have survived if she had been shifted to the hospital immediately. Dr. Rahul Umbre (PW4), who conducted postmortem on the dead body of deceased Umabai, nowhere stated in his evidence that the injuries suffered by Umabai were sufficient to cause death in ordinary course of nature. Evidence on record indicates that quarrel took place between husband and wife and during that quarrel, deceased Umabai suffered the injuries. The element of intention is

totally absent. When evidence on the aspect of intention is missing and none of the injuries were life threatening, at the most, case falls within the ambit of Section 304 Part-II of I.P.C. and not under Section 302 of I.P.C. Accordingly, Mr. Tandale prayed for conversion of case from Section 302 of I.P.C. to Section 304 Part-II of I.P.C. and setting the appellant / accused free by awarding the sentence which he has already undergone.

8. Per contra, Mr. Dasalkar, learned APP, vehemently argued that the case is based on the sole eye witness. It is clear from record that at the time of incident, except appellant / accused, deceased Umabai and their son Vikas (PW3), nobody was present in the house. Father and elder son Akash had left the house when they realised that appellant / accused was not responding to the understanding being given by them. Since, the incident took place during night time, inside the house, and nobody was residing in close vicinity of the said house, question of examining any adult independent witness does not arise.

9. According to the learned APP, Vikas (PW3), being son of deceased Umabai and appellant / accused both, cannot be said to be interested witness. It was Vikas (PW3), who along with appellant / accused rushed to the house of Sheela (PW2), after Umabai's death due to assault committed by appellant / accused,

and informed her about the incident. And, on the basis of the information received from him, Sheela (PW2) lodged the FIR. Therefore, question of Sheela's (PW2) tutoring Vikas (PW3) does not arise. Vikas (PW3) has given clear account of the incident in his evidence at Exhibit-22. He withstood searching cross examination. Therefore, merely for the reason that he was a child witness, his evidence supported by the medical evidence and recovery of crime weapon at the instance of appellant / accused, cannot be discarded.

10. Mr. Dasalkar, learned APP, further argued that evidence of Dr. Rahul Umbre (PW4) completely rules out possibility of Umabai's suffering injuries by falling from the third floor. Therefore, from any angle, the impugned judgment cannot be said to be incorrect or improper.

11. Lastly, Mr. Dasalkar argued that, when the evidence on record clearly makes out the case covered by clauses 'Secondly' and 'Thirdly' of Section 300 of I.P.C., only for the reason that most of the injuries suffered by the deceased Umabai were on the non-vital parts, absence of intention cannot be drawn. Moreover, evidence of Satish Bora (DW3) completely negatives the defence of appellant / accused. Therefore, appeal is liable to be dismissed.

12. The case is based on the direct evidence, circumstantial evidence and motive. Prior to dealing with the evidence, we would

like to note down the facts which are not in dispute. They are as under :-

- a) Deceased Umabai was the legally wedded wife of appellant / accused.
- b) The couple was blessed with two daughters and two sons.
- c) The marriages of both the daughters were performed.
- d) First informant Sheela (PW2) was the eldest and married daughter of deceased Umabai and appellant / accused and she used to reside with her husband at Narsinh Nagar, Latur.
- e) Vikas (PW3) was the youngest son of appellant / accused and Umabai and he used to reside with them at the construction site of Satish Bora (DW3), situated in New Adarsh Nagar, Latur.
- f) Satish Bora (DW3) had employed appellant / accused as a watchman at his construction site situated at New Adarsh Nagar, Latur, where he was constructing three storey building.
- g) Appellant / accused, along with family, used to live at the construction site situated in New Adarsh Nagar, Latur.

WHETHER DECEASED UMABAI DIED OF HOMICIDAL DEATH

13. To prove that Umabai died of homicidal death, prosecution has placed its reliance on inquest panchanama (Exhibit-31), proved in the evidence of I.O. Rajkumar Sonawane (PW5), and postmortem report (Exhibit-25), proved in the evidence of Dr.

Rahul Umbre (PW4), Medical Officer, Government Medical College and Hospital, Latur, who conducted postmortem on the dead body of deceased Umabai. Dr. Rahul Umbre (PW4), vide its testimony at Exhibit-24, deposed that on 09-07-2013, dead body of Umabai was brought to the Government Medical College and Hospital, Latur for postmortem. He conducted postmortem on the said dead body. During the postmortem 22 external and 5 internal injuries were found on the dead body of Umabai, which are as follows :-

“External wounds and injuries :-

- 1) Laceration on right forehead of size 2.5 cm x 0.5 cm. present on 2.5 cm. above right eye brow and 2 cm. lateral to mid line, reddish margins.
- 2) Contusion of size 7.5 cm. X 4.5 cm present on left side of chest at infraclavicular region, 7 cm. above left nipple, 6 cm. lateral to midline, reddish margins.
- 3) Contusion of size 11 cm x 12 cm on epigastric region at mid line, 5.5 cm. above umbilicus, reddish margins.
- 4) Contusion of size 15 cm. X 11 cm present on left fore arm flexor aspect at lower part involving wrist and dorsal aspect of thumb, reddish margins.
- 5) Contusion of size 5 cm x 4 cm on dorsal aspect of left hand reddish colour.
- 6) Laceration of size 3.5 cm x 2 cm on interphalangeal space between little finger and ring finger, reddish colour, blood oozing.
- 7) Contusion of size 6.5 cm x 5 cm on dorsal aspect of right arm, reddish.
- 8) Contusion of size 14 cm x 4.5 cm present on right (palm) hand going to flexor aspect of forearm, reddish.
- 9) Contusion of size 9 cm x 10 cm present on right arm at upper part on lateral aspect, 7.5 cm below tip of shoulder, reddish.
- 10) Contusion of size 37 cm x 39 cm present on antero

lateral surface and gluteal surface of right thigh at upper part, reddish.

- 11) Contusion of size 12 cm x 9 cm present on right leg, anteriorly just below knee joint, reddish margins.
- 12) Laceration of size 5.5 cm x 2 cm on right leg anteriorly, 13 cm above malleolus with surrounding contusions, reddish, with underline fracture of tibia fibula, blood infiltration. The contusion was 12 cm x 6 cm.
- 13) Contusion of size 10 cm x 8 cm on dorsal aspect of right foot just in front of ankle joint, reddish.
- 14) Contusion of size 8 cm x 5 cm on medial thigh 10 cm below inguinal region of left lower limb, reddish.
- 15) Contusion of size 13 cm x 6 cm present on left thigh medially 12 cm above popliteal fossa, reddish colour.
- 16) Contusion of size 6 cm x 5 cm, present on left thigh anteriorly just above knee joint, reddish.
- 17) Contusion of size 16 cm x 11 cm present on left gluteal region upper aspect, reddish.
- 18) Contusion of size 12 cm x 11 cm present on left buttock posteriorly on left side medially, reddish.
- 19) Contusion of size 25 cm x 23 cm present on lateral posterior (posterolateral) aspect of left thigh, reddish.
- 20) Contusion of size 9 cm x 7 cm just below and lateral to left knee, reddish.
- 21) Laceration of size 3 cm x 1 cm on middle 1/3rd of shin of left leg, reddish.
- 22) Contusion of size 16 cm x 13 cm present on antero lateral aspect of lower half of left leg, reddish.

Internal wounds and injuries :-

- 1) Subperiosteal and subgaleal contusion present on high parietal region to left parietal protrubance of size 17 cm x 13 cm, reddish.
- 2) Contusion under scalp on right frontal region of size 2 cm x 2 cm, reddish.
- 3) Subarachnoid haemorrhage was seen at upper part of left parietal lobe, red.
- 4) Contusion of size 6 cm x 3 cm present under skin on chest at 2nd to 3rd inter costal space, 2 cm lateral to mid line, reddish (left side).
- 5) Contusion of size 9 cm x 8 cm present on left chest under skin at 2nd to 4th inter costal space, 6 cm lateral

to mid line, reddish.”

14. According to Dr. Rahul Umbre (PW4), all the aforesaid injuries suffered by deceased Umabai were ante-mortem in nature and were the cause of her death. Postmortem report (Exhibit-25) supports his aforesaid version, as to the injuries suffered by deceased Umabai, nature of the said injuries and cause of death of Umabai. The inquest panchanama (Exhibit-31), drawn at the spot prior to shifting the dead body of Umabai to Government Medical College and Hospital, Latur, for postmortem, also lends corroboration to his evidence, as far as injuries suffered by Umabai are concerned.

15. In cross examination, Dr. Rahul Umbre (PW4) has stated about the age of aforesaid injuries suffered by Umabai. According to him, age of the said injuries was 12 Hours to 18 Hours. Postmortem report (Exhibit-25) reveals that postmortem on the dead body of deceased Umabai was carried out by Dr. Rahul Umbre (PW4) and two more medical experts viz. Dr. V. M. Kumre and M.E. Bansude, on 09-07-2013 during 02:00 p.m. to 04:00 p.m. Looking to the age of the injuries suffered by deceased Umabai, which has come on record through the cross examination of Dr. Rahul Umbre (PW4), it is clear enough that deceased Umabai succumbed to the multiple injuries during intervening night of

08-07-2013 and 09-07-2013.

16. Dr. Rahul Umbre (PW4), during further cross examination, has very clearly denied the suggestion put to him that the injuries mentioned in postmortem report (Exhibit-25) are possible by falling from the third floor of the building, however, he has admitted that contusions and lacerations can be caused by falling on the ground. In examination-in-chief, after looking at the crime weapon stick (Article-A), Dr. Rahul Umbre (PW4) very clearly stated that all the injuries suffered by deceased Umabai, as mentioned in the postmortem report (Exhibit-25), are possible by the blows of the stick at Article-G.

17. Thus, having regard to the totality of the evidence of Dr. Rahul Umbre (PW4), it is clear enough that deceased Umabai died of homicidal death.

**WHETHER APPELLANT / ACCUSED IS THE AUTHOR OF
INJURIES SUFFERED BY DECEASED UMABAI**

18. Vikas (PW3) a star witness of the case, vide his deposition at Exhibit-22, has deposed that incident took place on 08-07-2013 at about 10:30 p.m. Prior to the incident, appellant / accused had come to the house in drunken state. After coming house, appellant / accused started beating mother Umabai,

suspecting about her character. At that time, he himself, his brother Akash and grandfather were present. They asked appellant / accused not to beat his mother. Thereafter, his brother Akash and grandfather left the house. Therefore, he alone was present in the house. When he asked appellant / accused not to beat mother Umabai, appellant / accused gave him a blow of stick. The incident lasted for about one to two hours. His mother died in that incident. Thereafter, appellant / accused took him to the house of Sheela (PW2). On reaching there, appellant / accused pelted stones on the house of Sheela (PW2). Sheela (PW2) was residing on the first floor. She came down the stairs and asked him what happened, after taking him aside. He told her that Umabai died due to beating her with the stick, by appellant / accused. Thereafter, he along with appellant / accused, Sheela (PW2) and husband of Sheela came to their house. Husband of Sheela made a phone call to Satish Bora (DW3). Satish Bora (DW3) came to their house in pursuance of the call made by husband of Sheela. He called the police by making phone call to the police station. Sheela and her husband saw that deceased Umabai was lying in the room. Vikas (PW3) has identified the stick Article-G when shown to him. Besides, he has identified Saree Article-A, Petticoat Article-B, Blouse Article-C, which were worn by his mother Umabai at the time of incident and also identified pant Article-D, shirt Article-E

and Baniyan Article-F, worn by the appellant / accused at the time of incident.

19. In the cross examination, he has stated that nobody from them, at any point of time, had lodged the report against appellant / accused, complaining that he drinks and quarrels with mother Umabai. His mother was not doing the work of watering new construction for curing purpose. According to him, incident of falling down of mother Umabai from third floor, while pouring / spraying water on new construction, did not happen. They went to the house of Sheela (PW2) at about 01:00 a.m. to 01:30 a.m. Now, he resides with Sheela (PW2). Since one year, Sheela is incurring his educational expenses.

20. He has denied all the suggestions put to him during the course of cross examination including that everything was going smoothly in their family, appellant / accused was not drinking liquor, on the contrary, he used to sing devotional songs, appellant / accused used to mind his own business, mother Umabai was doing labour work, Satish Bora (DW3) had employed her for filling water, his mother used to return to house at about 11:00 to 11:30 p.m., he knew nothing about the incident, as he had slept, he told Sheela (PW2) that mother fell down from third floor and died while watering the new construction for curing purpose and on

the say of Sheela (PW2) he deposed that his mother Umabai died due to beating by appellant / accused, though, in fact, she died by falling on the ground.

21. Except one omission pertaining to his father's pelting stones on the door of house of Sheela (PW2), his aforesaid testimony is consistent one. He has very clearly deposed about the incident and complicity of the accused in the incident and denied the defence of the accused that mother Umabai died due to falling on the ground from third floor while watering the new construction for curing purpose. It is pertinent to note that, in entire lengthy cross examination, no suggestion denying the presence of Vikas (PW3) at spot, when incident took place, was given to him. Since presence of Vikas (PW3) at the spot when incident took place has not been denied by appellant / accused, his evidence as to the incident and complicity of appellant / accused in the incident inspires full confidence.

22. Vikas (PW3) was 9 to 10 years old child when incident took place. Under Section 118 of the Indian Evidence Act, 1872, all persons are competent to testify, unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those question, by tender years, extreme old age, disease, whether of body or mind, or any other

cause of the same kind.

23. In the case of ***Dattu Ramrao Sakhare And Others Vs. State Of Maharashtra [(1997) 5 Supreme Court Cases 341]*** the Hon'ble Supreme Court, while dealing with the aspect of competency and credibility of the testimony of the child witness, in view of Section 118 of the Indian Evidence Act, 1872, held as under:-

"A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his / her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand, but as a rule of prudence the court always finds it desirable to have the corroboration to such evidence from other dependable evidence on record."

24. In the case of ***Panchhi and Others Vs. State of U.P. [(1998) 7 Supreme Court Cases 177]***, the Hon'ble Supreme Court, as far as evidence of child witness is concerned, has held as

under :

"It cannot be said that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring.

Courts have laid down that evidence of a child witness must find adequate corroboration before it is relied on. It is more a rule of practical wisdom than of law."

25. From the aforesaid ratio, laid down by the Hon'ble Supreme Court, it is clear enough that evidence of child witness must be evaluated more carefully and with greater circumspection because child is susceptible to tutoring. Besides, he must be reliable one and his / her demeanour must be like any other competent witness and there is no likelihood of him being tutored, and as a rule of prudence, it would be desirable to have the corroboration to the evidence of child witness from other dependable evidence.

26. Upon considering the evidence of Vikas (PW3), in the light of aforesaid principles laid down by the Hon'ble Supreme Court, it can be gathered very well that Vikas (PW3) is truthful witness. His evidence is fully reliable and he is not at all tutored

witness.

27. Record speaks volumes that soon after the incident, appellant / accused took Vikas (PW3) to the house of Sheela (PW2), where Vikas (PW3) informed Sheela (PW2) about the incident and on the basis of information received from appellant / accused and Vikas (PW3), Sheela (PW2) had lodged the FIR against appellant / accused. Therefore, absolutely, there was no possibility of tutoring of Vikas (PW3).

28. The testimony of Sheela (PW2) is relevant to the extent of conduct of appellant / accused and her lodging FIR on the basis of information received from appellant / accused and Vikas (PW3). Vide her deposition at Exhibit-19, she has very clearly deposed that accused was in the habit of drinking liquor. He used to beat wife Umabai by suspecting about her character, after drinking liquor. In her further evidence, she has made it clear that, after the incident, her father i.e. appellant / accused along with brother Vikas (PW3) came to her house and informed her about the death of Umabai. At that time, appellant / accused was under the influence of liquor. She has specifically deposed that Vikas (PW3) disclosed her that appellant / accused has beaten Umabai by stick, after suspecting her character, and therefore, she died. She has also made it clear in her further evidence that prior to lodging the FIR, she had

verified the fact of death of mother Umabai by visiting to the spot i.e. house of the accused.

29. In cross examination, Sheela (PW2) has denied the suggestions put to her that on the day of incident, since accused was ill, his mother Umabai was watering the new construction for curing purposes, and while she was engaged in the activity of watering new construction, her leg slipped and therefore, she sustained injuries due to falling on the floor, the accused used to love all family members, he had searched a good match for her as well as her sister, he used to invite herself and her sister at his house at the time of festivals, he used to behave with wife in well manner and she lodged false FIR at the instance of others.

30. Thus, the aforesaid testimony of Sheela (PW2) not only inspires confidence about truthful version of Vikas (PW3) pertaining to the incident, but also throws light on the motive. Sheela (PW2) and Vikas (PW3) both, in one voice, deposed as to how the appellant / accused used to harass wife Umabai, mentally and physically, after suspecting about her character / fidelity. They both, also in one voice, deposed that appellant / accused was in the habit of drinking liquor and on the day of incident, he had come to the house in drunken state, picked up quarrel with wife Umabai out of suspicion about her character and killed her after beating

mercilessly by stick. Looking to the very close relationship of Sheela (PW2) and Vikas (PW3) with appellant / accused, they had no reason to lodge false FIR and give false statement against the accused.

31. FIR Exhibit-20 lodged by Sheela (PW2) reveals that appellant / accused, along with wife Umabai and two sons namely Akasha and Vikas, used to reside at the construction site of Satish Bora (DW3), situated at New Adarsh Nagar, Latur. However, from the deposition of Sheela (PW2) at Exhibit-19, it transpires that at the time of incident, father of the appellant / accused was also present with them in their house, where incident took place and the same also reveals from the testimony of Vikas (PW3). Harping on the aspect of presence of father and elder son Akash in the house along with appellant / accused and younger son Vikas, when the alleged incident took place, Mr. Tandale, vehemently argued that non examination of father and elder son of the appellant / accused namely Akash, though available, is fatal lapse on the part of the prosecution and it gives rise to draw adverse inference.

32. Upon close scrutiny of the testimony of Vikas (PW3), in the light of aforesaid submissions made by defence counsel, it can be gathered very well that accused, on the fateful night of 08-07-2013, came home at 10:30 p.m., in drunken state. Soon

after coming home, he started beating deceased Umabai by suspecting her character, though, Vikas (PW3), his grandfather and elder brother Akash insisted appellant / accused not to beat mother Umabai, in vain. Therefore, grandfather and elder brother Akash left the house, leaving him alone there. After grandfather and elder brother Akash left house, Vikas (PW3) again asked appellant / accused not to beat mother Umabai but appellant / accused not only continued to beat deceased Umabai, but also gave one blow of stick to him. According to him, incident of beating mother Umabai by appellant / accused continued for one to two hours and ultimately mother Umabai died due to the assault committed by appellant / accused.

33. When it is clear from the testimony of Vikas (PW3) that his grandfather and elder brother Akash left house soon after commencement of the incident of assaulting mother Umabai by appellant / accused by stick, question of their witnessing further beating to Umabai by stick, which resulted in her death, does not arise, since they had not seen the incident in its entirety including Umabai's succumbing to death due to assault committed by appellant / accused, hence, neither clear and cogent testimony of Vikas (PW3) can be doubted, nor adverse inference about the case of prosecution, due to non examination of father and elder son of

appellant / accused, can be drawn.

34. Spot panchanama Exhibit-18, proved in the evidence of Saddam Abbaskhan Pathan (PW1), demonstrates that incident took place in a room admeasuring 10 ft. x 10 ft. forming east – south part of ground floor of three storey building, the construction of which was not fully completed. Spot panchanama Exhibit-18 also demonstrates that blood was spread on the floor of the said room at different places. Besides, broken pieces of bangles, two silver toe rings and pieces of earthen pot were scattered there. So also, clothes found lying here and there.

35. Saddam Pathan (PW1), one of the two panch witnesses of the spot panchanama, has testified the same in his testimony Exhibit-17. Nothing is brought on record through his cross-examination, on the basis of which his testimony regarding existing situation of spot, when spot panchanama was drawn at about 07:15 a.m. on 09-07-2013, can be viewed with suspicion and discarded. Thus, spot panchanama Exhibit-18 and evidence of Saddam Pathan (PW1) lends full corroboration to the testimony of Sheela (PW2) and Vikas (PW3) on the aspect of incident of murderous assault on deceased Umabai, took place in the house where she used to reside with husband and sons and not elsewhere in the premises

belonging to Satish Bora (DW3), where construction of three storey building was going on.

36. Memorandum of statement of appellant / accused at Exhibit-34 and recovery panchanama under which crime weapon viz. 3.5 ft. long solid stick was recovered at the instance of appellant / accused proved in the evidence of I.O. Rajkumar Sonawane (PW5), evidences that on 14-07-2013 while in police custody, in presence of panchas, appellant / accused disclosed him that the stick has been concealed in a store room situated behind the room where he used to reside with his family and he would show the store room and place where stick has been concealed. Thereafter, he led I.O. Rajkumar Sonawane (PW5), police staff, panchas to the said store room forming part of three storey building, being constructed by Satish Bora (DW3) at his plot situated in New Adarsh Nagar, Latur, pointed out particular place where the stick was concealed and I.O. Rajkumar Sonawane (PW5) recovered / seized the same by drawing recovery / seizure panchanama Exhibit-35.

37. Testimony of I.O. Rajkumar Sonwane (PW5), on this aspect remained consistent and has not been shaken to any extent. It is true that nobody from the two panchas of the said discovery

and recovery under Section 27 of the Evidence Act, has been examined by the prosecution, but merely for that reason said discovery and recovery of crime weapon, i.e. solid stick, cannot be discarded outrightly, when it has been proved in the evidence of its author i.e. I.O. Rajkumar Sonawane (PW5). Had the appellant / accused brought on record some material through cross examination of I.O. Rajkumar Sonawane (PW5), pertaining to Memorandum Exhibit-34 and recovery panchanama Exhibit-35, then there would have been scope to discard the discovery and recovery of crime weapon, i.e. solid stick, for the reason of non examination of panch witnesses of said discovery and recovery. Since, no such material is brought on record by appellant / accused, in our considered view, discovery and recovery of crime weapon, i.e. 3.5 ft. long solid stick, at the instance of appellant / accused, can be used for corroboration to the testimony of eye witness Vikas (PW3).

38. I.O. Rajkumar Sonawane (PW5) in his evidence at Exhibit-30 categorically deposed as to the manner in which he had investigated the crime start from his visiting to the spot soon after registering the FIR lodged by Sheela (PW2), drawing inquest panchanama (Exhibit-31) of the dead body of Umabai, lying at the spot, thereafter, drawing spot panchanama (Exhibit-18), then

collecting blood spread at the spot and articles lying there, recording statements of witnesses, attaching clothes of deceased Umabai removed by the autopsy surgeon from her body at the time of postmortem, under the panchanama at Exhibit-32, seizure of clothes worn by appellant / accused at the time of incident under panchanama at Exhibit-33 and sending articles seized from the spot, crime weapon viz. stick, clothes of deceased Umabai and accused and viscera, to the Forensic Science Laboratory under requisition at Exhibit-36 for examination and report and also about C.A. reports at Exhibits- 37 to 40, received from the said laboratory.

39. Nothing could be brought on record from his searching cross examination, on the basis of which his testimony can be discarded. On the contrary, through the cross examination it has come on record that the building where incident took place was not closely surrounded by the houses. Considering the said statement and the time of incident, it can be firmly said that, incident was not witnessed by independent witness and when no independent witness is available, defence cannot claim rejection of evidence of Vikas (PW3) for want of corroboration by independent witness.

40. Postmortem report Exhibit-25 reveals that at the time of

postmortem of dead body of Umabai, rigor mortis was well developed all over the body. As per the medical jurisprudence, it starts developing in the dead body after about three hours of death and it spreads all over the body within 12 hours and then passes away. Having regard to the fact that rigor mortis was fully developed at about 02.22 p.m. on 09-07-2013 and age of injuries suffered by deceased Umabai, i.e. 12 hours to 18 hours, came on record through cross-examination of Dr. Rahul Umbre (PW4), medical officer, it can be gathered very well that Umabai died due to assault committed by appellant / accused at about 11:30 p.m. of 08-07-2013 to 12:30 a.m. of 09-07-2013.

41. Once it is clear that Umabai died between 11:30 p.m. of 08-07-2013 to 12:30 a.m. of 09-07-2013 as stated above, the FIR which came to be lodged by Sheela (PW2) prior to 04:10 a.m. cannot be said to be lodged belatedly. Since FIR was lodged without any delay, case made out therein, supported by the evidence of Vikas (PW3) and evidence of Sheela (PW2), cannot be discarded.

42. To substantiate his defence, appellant / accused stepped into witness box and examined two more witnesses, one is Arjun Bakale (DW2) and another is Satish Bora (DW3). According to appellant / accused, Satish Bora (DW3) had employed him as a

watchman at his construction site situated at New Adarsh Nagar, Latur. In addition to discharging services as a watchman, he used to pour water on the construction for the purpose of curing. Since few days prior to the incident, he was suffering from typhoid, he could not do the activity of curing of new construction. On the day of incident Satish Bora (DW3) came and asked him as to why he did not pour water on the new construction for curing purpose. He replied that, since he was ill his wife Umabai was pouring / spraying water on parapet floor of third floor. Thereafter, when he went to third floor, he saw wife Umabai and Satish Bora (DW3) in naked condition. On seeing him, they both started running away. While running away leg of Umabai slipped from the stairs and she fell down.

43. Arjun Bakale (DW2) has denied the entire aforesaid story narrated by appellant / accused. According to him Umabai had worked in the cloth shop of Satish Bora (DW3) for some time. During cross examination Arjun Bakale (DW2) stated that appellant / accused told him that his wife Umabai was serving in the cloth shop of Satish Bora (DW3) for some time and he has no personal information about the same. There is no whisper in the evidence of Arjun Bakale (DW2) about alleged illicit relationship between deceased Umabai and Satish Bora (DW3). When Satish

Bora (DW3) has denied all these allegations and nothing was transpired on the said aspect to the investigating officer during investigation of the crime, merely on the say of appellant / accused, his defence as stated above, cannot be believed and accepted.

44. It is pertinent to note that no suggestions about illicit relations between Umabai and Satish Bora (DW3), appellant's witnessing them while indulging in sexual activity, Umabai's running away from third floor and slipping from the stair of third floor and suffering injuries, were given to Sheela (PW2) and Vikas (PW3) during their cross examination.

45. Thus, there is no consistency in the defence, when Sheela (PW2), Vikas (PW3) and I.O. Rajkumar Sonawane (PW5) have denied that at the time of incident while watering on third floor of new construction for curing purposes, Umabai fell down and suffered the injuries and Satish Bora (DW3) has also very clearly denied that on the day of incident appellant / accused caught him red handed while indulging in sexual activity with his wife Umabai and on seeing him, they both started running away and while running away Umabai fell down from the stairs. Therefore, from any angle, defence of the accused cannot be accepted. By examining Satish Bora (DW3) appellant / accused has indirectly

supported the case of prosecution on the point of motive i.e. his suspecting about character of wife Umabai.

46. Thus, having regard to the totality of evidence discussed above, we have no hesitation to hold that deceased Umabai died of homicidal death and appellant / accused is responsible for her death.

47. Mr. Tandale, learned advocate, while harping on the aspect that all the injuries suffered by Umabai were on non vital parts and simple in nature, submitted that it is not a case under Section 302 of I.P.C., but it is a clear case under Section 304 Part-II of I.P.C.

48. Per contra, learned APP argued that, having regard to the number and nature of injuries suffered by Umabai and motive behind the crime, it is clear enough that accused had committed assault on Umabai with an intention to kill her. Therefore, case clearly falls within the ambit of Section 302 of I.P.C.

49. In the case of ***Virsa Singh Vs. State of Punjab [AIR 1958 Supreme Court 465]***, the Hon'ble Supreme Court while discussing about applicability of clause 'thirdly' of Section 300 of I.P.C., held as under :

"12. To put it shortly, the prosecution must prove the following facts before it can bring a case under Section

300 "thirdly " ;

First, it must establish, quite objectively, that a bodily injury is present ;

Secondly, the nature of the injury must be proved; These are purely objective investigations.

Thirdly, 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,

Fourthly, it must be proved that the injury of the type just 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 enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

13. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under Section 300 "thirdly ". It does not matter that there was no intention to cause death. It does not matter that there was no intention to even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced that the injury was accidental or otherwise unintentional."

50. In the case of ***Phulia Tudu and Another Vs. State of Bihar (now Jharkhand) [AIR 2007 Supreme Court 3215]***, the

Hon'ble Supreme Court has held as under :

"It cannot be said as a rule of universal application that whenever one blow is given s.300, IPC is ruled out. It would depend upon the facts of each case. The weapon used, size of the weapon, place where the assault took place, background facts leading to the assault, part of the body where the blow was given are some of the factors to be considered. In the instant case admittedly one blow was inflicted by accused with a small stick on deceased and the place where the assault took place was dimly lit. Inevitable conclusion is that the case is covered by S. 304 Part I, IPC and not S. 302."

51. In the case of ***State of Andhra Pradesh Vs. Rayavarapu Punneya and Another [AIR 1977 SUPREME COURT 45]***, the Hon'ble Supreme Court has held as under :

" The 'intention to cause death' is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause.

(para 14)

Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of causes falling under cl. (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be.

(para15)

If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given.

(para 15)

In Clause (3) of Section 300, instead of the words 'likely to cause death' occurring in the corresponding clause (b) of Section 299, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death.

(para 16)

The distinction is fine but real, and if overlooked, may result in miscarriage of justice. The difference between clause (b) of Sec. 299 and clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree.

(para 16)

The word "likely" in clause (b) of Section 299 conveys the sense of 'probable' as distinguished from a mere possibility. The words "bodily injury sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature.

(para 16)

For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. AIR 1966 SC1874 and AIR 1958 SC 465. Rel. on.

(para 17)

Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. Cl. (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

(para 20)

The expression "bodily injury" in clause 3rdly includes also its plural, so that the clause would cover a case where all the injuries intentionally caused by the accused are cumulatively sufficient to cause the death in the ordinary course of nature, even if none of those injuries individually measures upto such sufficiency. The 'sufficiency' spoken of in this clause, is the high probability of death in the ordinary course of nature, and if such sufficiency exists and death is caused and the injury causing it is intentional, the case would fall under Clause 3rdly of Section 300.

(para 39)"

52. We have carefully verified the facts of the case in the light of aforesaid ratio laid down by the Hon'ble Supreme Court. In case at hand, it is clear enough that accused was suspecting character of his wife and out of that suspicion he used to come house in drunken state and beat his wife Umabai frequently. On the day of incident, as usual, at about 10:30 p.m. he came to house in drunken state and mercilessly beat wife Umabai with a solid stick. He caused, as many as, 22 injuries on her person with solid stick held by him. Deceased Umabai died on the spot due to the said injuries. Autopsy surgeon Dr. Rahul Umbre (PW4) opined that death of Umabai is possible by multiple injuries all over the body by stick like muddemal stick. The injuries suffered by deceased Umabai was the direct cause of her death. No secondary factor such as gangrene, tetanus, etc. supervened. The aim of appellant / accused was to smash arms and legs of the deceased Umabai and he succeeded in it, causing in all 22 injuries including

fracture of some of the right leg. The stick used by appellant / accused was solid stick, locally known as *Velu* stick.

53. Thus, aforesaid injuries, weapon used for inflicting the said injuries and motive behind the crime, squarely makes out the case covered by clause 'thirdly' of Section 300 of I.P.C., as discussed by the Hon'ble Supreme Court in aforesaid rulings. Therefore, question of converting the case to Section 304 Part II from Section 302 does not arise.

54. Learned Additional Sessions Judge, Latur, rightly held the appellant / accused guilty for the offence punishable under Section 302 of I.P.C. and accordingly sentenced him to suffer life imprisonment and fine as stated above. Therefore, no inference therein is called for. Accordingly, appeal is dismissed.

55. This Court had appointed learned Counsel Mr M.A. Tandale through the High Court Legal Services Authority, Sub-committee, Aurangabad to represent the appellant in this case. We are, therefore, quantifying his fees at Rs.15,000/- (Rs. Fifteen Thousand Only) to be paid by the High Court Legal Services Authority, Sub-committee, Aurangabad.

(B. U. DEBADWAR, J.)

(RAVINDRA V. GHUGE, J.)

SVH