
(2016) 2 AIRBomRCri 403 : (2016) 3 BomCR(Cri) 241

BOMBAY HIGH COURT

Case No: Criminal Appeal No. 919 of 2009

Tanaji Dattu Bajbalkar

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision: May 6, 2016

Acts Referred:

- Penal Code, 1860 (IPC) - Section 300, 302

Citation: (2016) 2 AIRBomRCri 403 : (2016) 3 BomCR(Cri) 241

Hon'ble Judges: Smt. V.K. Tahilramani and Smt. Anuja Prabhudessai, JJ.

Bench: Division Bench

Advocate: Mrs. A.S. Pai, A.P.P, for the Appellant;

Final Decision: Allowed

Judgement

Smt. Anuja Prabhudessai, J.—The Appellants were prosecuted in Sessions Case No.74 of 2008 for offences under sections 498 A and 302 r/w. 34 of the IPC. By judgment and order dated 31.7.2009 the learned Sessions Judge, Pandharpur, convicted and sentenced them to undergo rigorous imprisonment for a period of three years each and to pay a fine of Rs. 500/- each i/d further imprisonment for a period of one month each for the offence under section 498A IPC. The Appellants have been sentenced to suffer rigorous imprisonment for life and to pay fine amount of Rs. 500/- each i/d further imprisonment for one month each for the offence punishable under section 302 r/w. 34 of the IPC. Being aggrieved by the conviction and sentence the Appellants have filed this appeal.

2. The brief facts necessary to decide these appeals are as under:-

The Appellant No. 1 Tanaji is the husband of deceased Sanjubai. Whereas the Appellant No.2, Sarubai is mother in law of the deceased and Appellant Nos. 1 and 2 in Criminal Appeal No.898 of 2009 are the family members of the Appellant No. 1-Tanaji. The marriage between Appellant No. 1-Tanaji and the deceased Sanjubai was solemnized

sometime in the month of June, 2002 and since her marriage she was residing in her matrimonial house along with her husband and in-laws. A girl child was born from the said wedlock about a year and half prior to the incident.

3. It is alleged that said Sanjubai was treated well for initial period of six months. However, thereafter she was subjected to ill treatment because of her dark complexion and looks. The Appellants accused her that she would not be able to bear a child. It is alleged that Sanjubai had complained to her father, brother and other family members that she was being assaulted over trivial issues. Said Sanjubai did not lodge any complaint as she had to live with her husband and his family members.

4. The case of the prosecution is that about 2 and half months prior to the incident the deceased Sanjubai had told her parents that the Appellant No. 1 Tanaji and his family members were demanding Rs. 20,000/- for construction of house. The father of Sanjubai gave Rs. 20,000/- to the Appellants. About eight days prior to the incident the deceased once again came to her parental house crying and told that the appellants had demanded Rs.1 lakh and that they had threatened to kill her if their demand was not fulfilled. The father of Sanjubai expressed his inability to meet the demand and sent her back to her matrimonial house.

5. On 14.5.2008 at about 7.00 a.m. the deceased Sanjubai came to her parental house and complained that her husband Tanaji had assaulted her by a cane stick. Her face, hands and legs were swollen. PW4 Dattatraya, brother of Sanjubai took her to the house of Dhondiram Narale, the maternal uncle of Appellant No.1- Tanaji and informed him about the incident of assault. Said Dhondiram told him that he was unable to intervene in the matter and advised them to settle the dispute amongst themselves.

6. On the same day at about 5 p.m. Sanjubai went to her matrimonial house to feed her daughter. Immediately thereafter PW4 and the other family members of Sanjubai heard loud noise and screaming from the house of Sanjubai. When they went to her matrimonial house, they saw Tanaji assaulting Sanjubai with a cane stick and her mother-in-law and the other Appellants herein assaulting her by kicks and blows. On seeing the family members of Sanjubai, the Appellant Tanaji dragged her near a tank and banged her head on rocky surface. Sanjubai was unconscious and bleeding through nose and mouth. She was taken to a hospital at Junoni. Since her condition was critical she was referred to Mission Hospital at Miraj. She expired on 16.5.2008. PW4 therefore lodged the FIR against the appellants for subjecting Sanjubai to cruelty and committing her murder.

7. PW 15- Prashant Sampate, Asstt. P.I. recorded the FIR and registered the crime. PW-20 Tukaram Jamadar, P.S.I. visited the place of the incident and conducted the spot panchnama exh.16. He arrested the appellants and on 18.5.2008, pursuant to the disclosure statement made by Tanaji, he recovered the velu (cane) stick. He recorded the statements of the witnesses. Upon completion of the investigation, he filed a charge-sheet against the Appellants for offences under sections 498 A and 302 r/w. 34 of

the IPC.

8. Charges for offences punishable under section 498 A and 302 r/w. 34 of the IPC were framed and explained to the Appellants/accused, who pleaded not guilty and claimed to be tried.

9. The prosecution in support of its case, examined 20 witnesses. The statements of the Appellants were recorded under section 313 Cr.PC. The appellants denied all the incriminating material put to them. Relying upon the testimony of the eye witnesses, viz. PW4, 5 and 6 the Land sessions judge held the Appellants guilty of the offences under sections 498 A and 302 r/w. 34 of the IPC and convicted and sentenced as stated above.

10. Mrs. P.U. Badadare the learned counsel for the Appellants in Cri. Appeal No. 919 of 2009 and Mr. P.R. Arjunwadkar, the learned counsel for the Appellants in Cri. Appeal No.898 of 2009 have submitted that the deceased was known to the Appellants prior to the marriage and as such there was no question of subjecting her to cruelty because of her colour or looks. The Land Counsels for the Appellants have further submitted that there is no cogent evidence to prove the demand of dowry. It is submitted that the appellants nos. 3 and 4 are residing in a separate house and have been falsely implicated.

11. The Land Counsels for the appellants have further submitted that the alleged incident as per the medical history, had occurred at 4pm. the testimony of PW7 reveals that PW4 was at Junoni at 4pm. In the light of these facts, the Land Counsel contends that it is doubtful whether PW4 had in fact witnessed the incident as deposed.

12. It is canvassed that there is no cogent evidence to prove that the injuries sustained by Sanjubai were caused by Velu stick or by banging her head on the stone. The Land Counsels have submitted that it is highly impossible for any person to lift a woman and bang her head on the ground as alleged. It is submitted that the fact that there were no external head injuries further falsifies the case of the prosecution.

13. The learned counsels for the Appellants claim that death of Sanjubai was not homicidal. They have submitted that the medical opinion that the injury could be caused by banging of head on a rocky surface, is sans any reasons. They have submitted that the prosecution has failed to establish that the appellants had inflicted injury on Sanjubai with an intention to cause her death or with the knowledge that such act was likely to cause her death.

14. Mrs. Pai, the learned APP for the Respondent-State has submitted that the testimony of PW 4 and the other eye witnesses amply proves that the Appellants had subjected the deceased to cruelty. She has submitted that the evidence on record proves that the deceased was assaulted about 8 days prior to the incident. The learned APP has further submitted that the evidence of the eye witnesses amply proves that the Appellants herein had committed murder of Sanjubai.

15. We have perused the records and considered the submissions advanced by the learned counsels for the Appellants and the learned APP for the Respondent-State.

16. Before we delve factual aspects, it would be relevant to reproduce Section 498A IPC.

"498A. Husband or relative of husband of a woman subjecting her to cruelty.- Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.- For the purpose of this Section, "cruelty" means-

(a) Any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) Harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

A plain reading of Section 498A IPC reveals that the section postulates two types of cruelty, i.e. (i) wilful conduct of a nature which is likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health. (ii) harassment with a view to coercing her or her relatives to meet unlawful demand of any property or valuable security or on account of her failure or of any person related to her to meet such demand. Having charged the Appellants for the offence under section 498A IPC, onus was on the prosecution to prove beyond reasonable doubt that the Appellant no.1 as the husband and the other Appellants as the relatives of the Appellant no.1 had subjected Sanjubai to "cruelty" as defined in the Explanation to Section 498A IPC.

17. Reverting to the facts of the case, it is not in dispute that Sanjubai was a resident of Satki Vasti, which is a small hamlet with 10 to 15 houses. The Appellants were residing in the same locality. Both families were known to each other and were on regular visiting terms. It is in evidence that Sarubai, the Appellant No.2, had proposed that said Sanjubai should marry her son, the Appellant No. 1-Tanaji. The parents and brothers of Sanjubai accepted the proposal and accordingly the marriage of Sanjubai and Tanaji was solemnized on 2.6.2002. Since her marriage the deceased had been residing in her matrimonial house, which is close to her parental house.

18. The case of the prosecution is that Sanjubai was treated well for about six months of her marriage. Thereafter she was illtreated and constantly taunted because of her dark complexion and burn scar on her chest. The family of the deceased Sanjubai have also levelled allegations of demand of money. To substantiate these allegations the prosecution has relied upon the testimony of PW4 Dattatraya, PW5 Manisha, PW6 Sujata

and PW7 Kaka Sopan, brother, sisters-in-law and the maternal uncle of the deceased.

19. PW-4 Dattatraya Tayappa Atpadkar, the elder brother of the deceased Sanjubai has deposed that accused had treated Sanjubai well for about six months from the date of her marriage. He has deposed that subsequently when Sanjubai had come to her parental home for festival she had complained that her husband and in-laws were subjecting her to cruelty because she was of dark complexion and had a burn scar on her chest. PW4 has further stated that Sanjubai had also complained that the Appellants /accused were taunting her that she would not be able to bear a child. He has deposed that his father and maternal uncle Kaka Sopan Narale and some others had called a meeting and had tried to persuade the in-laws of the deceased Sanjubai not to ill-treat her.

20. PW4 has deposed that about four months prior to the incident the Appellants had severely assaulted Sanjubai as she was frequently visiting her parental house for getting milk. He has stated that they did not lodge any complaint against the Appellants as Sanjubai had to cohabit with her husband. He has further stated that about 2 and 1/2 months prior to the incident Sanjubai had come to her parental home and informed them that the Appellants had told her to bring Rs.20,000/- for construction of the house. PW4 has stated that his father had given her Rs.20,000/-. About 8 days prior to the incident Sanjubai came to her parental home crying and told them that her in-laws were demanding Rs.1 lakh and that they had threatened kill her if the demand was not fulfilled. PW-4 has stated that he and his father told Sanjubai that they did not have the money to give to the accused and they persuaded her to go to her matrimonial house. PW4 has denied the suggestion that the accused had not subjected Sanjubai to cruelty because she was of dark complexion or because she used to visit her parental house to bring milk. He has also denied the suggestion that the accused had never demanded any money for construction of house.

21. PW-5 Manisha, is the sister-in-law of Sanjubai. She has stated that Sanjubai was married to Appellant No.1 about 5 years prior to the incident and she was living in her matrimonial house along with the Appellants/accused. This witness has also stated that Sanjubai was treated well for about 6 months after her marriage. She has stated that once when Sanjubai had come home she had informed them that she was being harassed because she was of dark complexion and since she had a burn scar on her chest. They had also accused her that she would not bear a child. She has stated that two and half months prior to the incident the Appellant No.1 had started constructing a house and that he had told Sanjubai to get Rs.1,00,000/- from her parents and had threatened to kill her in case she failed to bring the money. PW-5 further deposed that they were unable to meet the demand of Appellant No.1 and the father of Sanjubai persuaded her to return to her matrimonial home.

22. PW-6 Sujata is also the sister-in-law of the deceased Sanjubai. This witness has deposed that about two months prior to the incident, the Appellant No.1 had sent Sanjubai to bring amount of Rs.1 lakh from her parents for construction of house. She

has deposed that the father and the brothers of Sanjubai had told her that they were unable to meet the demands of PW 1 and had persuaded her to return her matrimonial house.

23. PW-7 Kaka Sopan is the maternal uncle of deceased Sanjubai. He has deposed that Sanjubai was married to Appellant No. 1 Tanaji about 5 years prior to the incident. Since her marriage she was residing in her matrimonial house along with the Appellant No. 1 and other accused persons. He has stated that Sanjubai was treated well for six months after her marriage and thereafter she was being ill treated because of the dark complexion and she had a scar on her neck. He has stated that he along with Narayan Pandurang Mohite and Dhondiba Dayappa Narle had gone to the house of the Appellant No. 1 and had persuaded them to not to ill treat Sanjubai. The Appellants did not change their behaviour towards Sanjubai despite their intervention. This witness has also stated that the Appellant No. 1 had sent Sanjubai home to get Rs. 20,000/- from her father and accordingly father of Sanjubai had paid him Rs. 20,000/-. Subsequently, the Appellant No. 1 demanded Rs. 1 lakhs but father of Sanjubai was unable to pay the money.

24. The aforesaid evidence amply proves that the deceased Sanjubai was married to the Appellant No. 1 in the year 2002 and since her marriage she was residing in her matrimonial house. PW- 4, PW-5 and PW-6 have stated that the Appellants used to harass Sanjubai because of her dark complexion. However, the testimony of these witnesses clearly indicates that both families were residing in the same locality and were known to each other. The evidence of PW4 indicates that the Appellant no 2, used to visit their house even prior to the marriage of Sanjubai and Tanaji. It is also on record that the Appellant no.2 had proposed that Sanjubai should marry her son Tanaji. This proposal was accepted by the family of Sanjubai and accordingly the marriage of the Appellant no. 1 Tanaji and Sanjuai was solemnized on 2.6.2002. It is therefore evident that the Appellants knew Sanjubai even prior to the marriage and despite her colour and complexion they had proposed that she should marry Tanaji. This fact creates a reasonable doubt as to whether Sanjubai was in fact harassed or taunted because of her dark complexion.

25. It is also to be noted that Sanjubai and Tanaji had a girl child from the said wedlock. Under the circumstances, there was no question of taunting her that she would not bear a child and/or threatening her that they would get Tanaji remarried. Furthermore, there are material contradictions in the evidence as regards demand of money. The evidence of PW4 that the accused had assaulted Sanjubai about four months prior to the incident and that about two and half months prior to the incident the accused had sent Sanjubai to her parental home to bring Rs. 20000/ is not corroborated by PW5 and PW6. It is also pertinent to note that according to PW4 the demand for Rs. 100000/- was made by the accused about eight days prior to the incident whereas PW5 and PW6 have claimed that such demand was made about two and half month prior to the incident. PW7 had no personal knowledge about such demand or payment.

26. The evidence of the above referred witnesses is inconsistent as each of these witnesses has given a different version. Furthermore the allegations of demand of money are quite vague and unspecific besides being inconsistent. Other than the general and vague allegations of the brother, sisters-in-law and maternal uncle of the deceased there is no evidence on record to establish that the appellants had raised a demand of money or that they had subjected Sanjubai to harassment with a view to coerce her or her family to meet the unlawful demand. The prosecution has thus failed to establish that Sanjubai was subjected to cruelty as postulated in the explanation to section 498 A IPC. Consequently the conviction and sentence under this section cannot be sustained.

27. The Appellants are also alleged to have committed murder of Sanjubai. PW-4 deposed that on 14.5.2008 at about 7.00 a.m. Sanjubai had come to her parental home crying. She had told them that her husband and in-laws had severely assaulted her with a velu (cane) stick since she had not filled cow dung manure in the cart. He has further deposed that the face, hands and legs of Sanjubai were swollen. He therefore, took Sanjubai to Dhondiram Narale, the maternal uncle of the Applicant No. 1. He told him about the incident and showed him the injuries inflicted on Sanjubai. Said Dhondiram Narale told him that the Appellant No. 1 Tanaji does not listen to him and thus refused to intervene. PW4 therefore, returned home with Sanjubai.

28. PW4 has deposed that sometime later, Sanjubai told him that she was going home as her daughter would be hungry and crying. He has further stated that soon thereafter they heard her cries. He and his family members rushed to the house of Sanjubai and they saw the Appellant No. 1- Tanaji beating her with a Velu Stick (cane stick). He has deposed that the other Appellants were assaulting her by kicks and fist blows. On seeing them the appellants dragged Sanjubai near a water tank. PW-4 told the appellants that Sanjubai was pregnant and requested them not to beat her. He has stated that the Appellant No. 1-Tanaji lifted Sanjubai and banged her on the rock thrice. The other appellants Sarubai Bajbalkar and Mandabai Bajbalkar also stated that PW4 should not be spared and he too should be killed. Thereafter the appellant Uttam caught him by his neck. PW-4 has stated that Sanjubai was unconscious and was bleeding through her nose. He carried her on his shoulders to her parental home and thereafter took her to the hospital. He has stated that Sanjubai succumbed to the injuries on 16.5.2008. He therefore, lodged a FIR against the appellants for committing murder of his sister Sanjubai. It is pertinent to note that PW-4 had not stated in the FIR that Sanjubai had told him that the appellants Nos. 2 to 5 had assaulted her with kicks and fist blows. The omission in this regard was elicited in his cross examination. He has denied the suggestion that the appellants had not assaulted Sanjubai and that he has falsely implicated the appellants because of previous enmity.

29. PW-5 Manisha, the sister-in-law of deceased Sanjubai has deposed that on 14.5.2008 at about 7.00 a.m. Sanjubai came crying and told them that the Appellant No.1 Tanaji had assaulted her with a velu stick as she had not filled cow dung manure in the cart. PW-4 took Sanjubai to the house of Dhondiram Narale, the maternal uncle of Tanaji.

PW-4 and Sanjubai returned home after some while and told them that said Dhondiram had refused to intervene alleging that the Appellant No.1 Tanaji does not listen to him. She has deposed that thereafter Sanjubai went to her matrimonial house to feed her daughter and immediately thereafter they heard her cries. She along with her brother in law PW-4 Dattatraya and others went to the house of the Appellants and saw Appellant No.1 assaulting Sanjubai with a Velu stick. She has further deposed that appellant Nos.2 to 5 were also assaulting Sanjubai by kicks and blows. She has deposed that thereafter Sanjubai was dragged towards the water tank and her head was banged on a rocky surface. She has stated that Sanjubai became unconscious and was bleeding through her nose. PW-4 Dattatray took her to Junoni Hospital, from where she was referred to Mission Hospital, Miraj. She has deposed that Sanjubai died on 18.5.2008.

30. PW 6 Sujata, the sister-in-law of the deceased has deposed that on 14.5.2008 at about 7.00 a.m. the deceased Sanjubai had come to her parental house crying and complained that the appellant No.1 had assaulted her with a cane stick. She has stated that her husband PW-4 took Sanjubai to Dhondiba Narale, maternal uncle of the Appellant No.1 but said Dhondiba Narale had refused to intervene and told them to settle the dispute amongst themselves. She has further deposed that thereafter Sanjubai had returned home to feed her daughter. She has deposed that immediately after Sanjubai went to her matrimonial house they heard cries of Sanjubai and hence, she along with her husband (PW4) and others went to the house of the Appellant No. 1. They saw the Appellant No. 1 assaulting Sanjubai with a cane stick and the other Appellants assaulting her by kicks and blows. She has stated that the Appellant No. 1 dragged Sanjubai towards the tank and lifted her and banged her head thrice on a rocky surface. She has stated that PW-4 told the Appellant No. 1 that Sanjubai was pregnant and requested him not to assault her. She has stated that Sanjubai was unconscious and was bleeding through her nose. Thereafter PW-4 lifted her and brought her home and took her to a Doctor at Junoni Hospital. She was shifted to Wanless Mission Hospital, Miraj. She expired on 18.5.2008.

31. The testimony of these witnesses reveals that on 14.5.2008 during morning hours Sanjubai had come crying to her paternal home and complained that the Appellant no 1 had assaulted her with a cane stick over a trivial issue of not filling cow dung manure in the cart. The testimony of these witnesses discloses that the face, hands and legs of Sanjubai were swollen. PW4 had taken Sanjubai to Dhondiba Narale, the maternal uncle of the Appellant no.1 and informed him about the incident. Said Narale told PW4 that the Appellant no.1 does not listen to him. Since he refused to intervene, PW4 and Sanjubai returned home. Later in the day, concerned that her minor daughter would be hungry, Sanjubai returned home to feed her daughter.

32. The evidence of these witnesses clearly indicates that on hearing cries of Sanjubai, they rushed to her matrimonial home. They saw the Appellant no 1 assaulting her with a cane stick and the other Appellants assaulting her with kicks and blows. The evidence of PW4 in particular reveals that he had requested the Appellants not to assault Sanjubai

since she was pregnant. The testimony of these witnesses further indicates that on seeing them the Appellant no.1 had dragged Sanjubai near a tank and banged her head thrice on a rocky surface. Sanjubai had become unconscious and was bleeding from mouth and nose.

33. PW-8 Radhika resides at a distance of 300 feet away from the house of the Appellants. She has stated that on the date of the incident, she had heard some noise and when she came out of the house she saw the Appellants, Sanjubai and her family members near the tank. She had stated that Sanjubai was bleeding through nose and mouth and that she had seen PW-4 lifting Sanjubai and taking her towards his house. In her cross examination omission has been elicited regarding bleeding of Sanjubai through nose and mouth. She has admitted that the Appellant No.1-Tanaji had filed a criminal case against her husband. She has stated that the said case was amicably settled.

34. PW8 Radhika had not witnessed the incident of assault. Her testimony reveals that she had reached the spot after the incident. Nonetheless she had seen the Appellants as well as the family members Sanjubai near the tank. She had also seen PW4 lifting and carrying Sanjubai home. Her testimony therefore corroborates that the incident had occurred near the tank and further proves presence of the appellants and the afore stated eye witnesses at the place of the incident.

35. PW-9 Sharda Bajbalkar resides at 300ft away from the house of the Appellants. She has stated that the Appellants accused are her distant relatives. She has stated that on the date of the incident, she had gone to the field to graze her sheep. She heard cries of the family members of Sanjubai. Hence, she came to the place of the incident. She saw Sanjubai lying in the house and that she was bleeding through her mouth and nose.

36. PW10 has deposed that he used to drive Mahindra Jeep of Appasaheb Mane. He has deposed that one day while he was at Sat Vasti PW4 had told him that his sister had sustained injuries in a quarrel and had requested him to take her to the hospital. PW10 has deposed that he had taken the injured Sanjubai to the hospital of Dr. Kamble at Junoni.

37. PW7, Kaka Sopan, the maternal uncle of PW4 Dattatraya, has deposed that on 14.5.2008 at about 4.00 p.m. while he was in his shop at Junoni, PW-4 came to his shop and told him that the Appellant No.1 had severely assaulted Sanjubai with a Velu stick. PW4 further told him that the Appellant no.1 had lifted Sanjubai and banged her head on a rocky surface. He has stated that PW-4 had told him that he had brought Sanjubai to the Hospital of Dr. Kamble. Thereafter he along with PW-4 went to the Hospital to see Sanjubai. He has stated that Sanjubai was bleeding through nose and had a head injury and she was unconscious. He has stated that he arranged for a vehicle and took Sanjubai to Mission Hospital at Miraj for further treatment.

38. The testimony of the afore stated eye witnesses indicates that the incident had occurred sometime after 4pm. The presence of PW4 at the place of the incident is sought to be doubted in view of the statement of PW10 that PW4 had come to his shop at 4pm. It is on record that Junoni is barely at a distance of 5 kms from the place of the incident. The testimony of PW10 indicates that he had brought Sanjubai from Satkivasti to Junoni at the request of PW4. The evidence of PW5 and PW6 which is duly corroborated by PW 8 also proves that PW4 had carried Sanjubai from the place of the incident and later taken her to the hospital. In the light of the said unimpeachable evidence, there is no reason to doubt the presence of PW4 at the place of the incident. Furthermore it is well known that the villagers normally give time by approximation. Hence minor variation in the timings as deposed by the PW7 is natural and does not affect the prosecution version.

39. It is to be noted that though the incident had occurred on 14.5.2008 the FIR came to be registered on 16.5.2008. The evidence on record indicates that Sanjubai was unconscious and was battling for life. The family members of Sanjubai would therefore be busy attending to her rather than rushing to the police. The FIR was lodged only after the death of Sanjubai. Under the circumstances, the delay of two days in lodging the FIR is inconsequential.

40. It is submitted that the assertion of the witnesses that the appellant no. 1 had lifted Sanjubai and banged her head thrice on a rocky surface is a highly exaggerated statement particularly in view of the nature of the injuries sustained by Sanjubai. In **State of UP v. Naresh & Ors. 2011 Vol 4 SCC 324** the Apex Court after considering several other decisions has held as under:

" 25. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety.

The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. "Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility." Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited.

41. These principles have been reiterated in **Gangabhavani v. Rayapati Venkat Reddy & Ors. 2013 AIR SC 3681**. In the instant case, the evidence of PW4, PW5 and PW6 is reliable and trustworthy. Suffice it to state that minor variations, contradictions or exaggerations cannot be a ground to reject their testimony particularly when these eyewitnesses have corroborated each other on all material facts and have remained consistent and coherent on core issues such as sequence of events leading to the incident of assault, the place of occurrence, the weapon used and the manner of assault. The evidence of these witnesses therefore proves beyond reasonable doubt that the Appellant no1 had whacked Sanjubai with a cane and thereafter banged her head on a rocky surface despite being told that she was pregnant, whereas the other Appellants had assaulted her with kicks and blows. As a result Sanjubai became unconscious and was bleeding from nose and mouth. She was immediately taken to Dr. Kamble hospital at Junoni for treatment.

42. PW-13 Dr. Suvarna Kamble, is a medical/private practitioner at Junoni hospital. She has deposed that on 14.5.2008 at about 6 to 6.15 p.m. patient by name Sanjubai was brought to OPD by her brother and mother. She examined the patient. The patient was unconscious and was bleeding through nose. She had injuries on her knees and legs. Her blood pressure and pulse was not normal. Since the condition of the patient was critical, the patient was shifted to Sangli Civil Hospital.

43. PW 11 Dr. Marina Thomas, the Assistant Medical Officer, Wanless Hospital, Miraj, has deposed that Sanjubai was admitted in the hospital on 14.5.2008 at about 8.30 p.m. She was unconscious. Her relatives had given the history of assault by stick on head and other parts of the body. On examination her pupils were found to be dilated and fixed, respiration was laboured and she had decerilbrate type rigidity. There was abrasion on the left cheek and bluish discolouration over the neck. She was shifted to ICU and all investigation including CT scan was done. The CT scan was suggestive of left side subdural hematoma. The patient was taken to emergency for craniotomy and evacuation of subdural collection. Post operatively she was put on ventilator. On 16.5.2008 said Sanjubai went into Bradicardia and hypo tension. Despite giving required treatment, said Sanjubai expired on 16.5.2008. PW-11 issued death certificate (Exh.34) certifying that death of Sanjubai was due to severe head injury with intra-cranial Haemorrhage with cardio respiratory arrest. She has stated that the injuries referred to in the death certificate could be caused if the person is lifted and banged with force on any rocky surface. The body was sent to civil hospital for post mortem for ascertaining the exact cause of death.

44. PW-12 Dr. Shailaja Hindurao Kundale, Medical Officer, Government Medical College and Hospital at Miraj has deposed that on 16.5.2008 they had received the body of Sanjubai in the hospital along with the inquest panchanama for post mortem. She and Dr. Sonavale conducted the postmortem over the body of deceased Sanjubai. PW-12 has deposed that she had noticed the following external injuries over the body:

(i) Multiple minute abrasions over both parietal region and occipital region of size .5 cm x .5 cm dark brownish in colour.

(ii) Sutured wound over the left parietal region 8 stitches present, there was evidence of oedema.

(iii) Abrasion over the left leg in lower third part of size .5 x.5cm. Dark brownish in colour.

(iv) Abrasion over the right knee joint of size .5 x.2cm. dark brownish in colour.

45. PW12- Dr. Shailaja further deposed that all the injuries were antemortem in nature. On internal examination following observations were recorded:

(I) Haematoma over the left parieto temporal region of size 4cm x 3cm.

(ii) There was no fracture of elbow.

(iii) Brain was congested and oedematous.

(iv) There was evidence of subdural haemorrhage i.e. intracranial haemorrhage.

(v) Plura was congested. Larynx, Trachea and Bronchi were congested.

(vi) Sanjubai was three months pregnant.

46. PW12 Dr. Shailaja has opined that the death of Sanjubai was due to head injury. She has produced the postmortem report, which is at Exh. 39 as well as her opinion as to cause of death at Exh. 40. She has opined that the head injury, which is described in column No. 19 of postmortem report was sufficient in ordinary course of nature to cause death. The medical evidence therefore, proves that the death of Sanjubai was homicidal in nature and that she had died on account of the head injury.

47. The medical evidence therefore proves that Sanjubai had suffered subdural haematoma and had expired as a result of the said head injury. It is true that there was no corresponding visible external head injury. It is however to be borne in mind that the external appearance of the impact would very often depend on the nature of the weapon used or as in the instant case the surface over which the head was hit i.e whether the surface was smooth and even or had jagged edges. Similarly, whether the point of impact was protected by hair or by any other head gear would also be a decisive factor. In the instant case PW11 Dr. Marina has opined that the said injury could be caused by hitting of head on a rocky surface. The said opinion has virtually gone unchallenged. No evidence was elicited to show that such injury could not have been caused by hitting the head on a rocky or hard surface, without there being laceration, contusion or any other visible head injury. Under the circumstances, the prosecution case cannot be doubted merely because said Sanjubai had not suffered any corresponding external head injury.

48. The medical evidence therefore corroborates the ocular evidence and supports the case of the prosecution that Sanjubai had died due to the head injury inflicted by the appellant no.1. It is true that the relatives of the deceased Sanjubai had given history of assault by a stick whereas in the evidence before the court the eye witnesses have categorically deposed about assault by stick as well as banging of head of the deceased on a rocky surface. As stated earlier, the medical evidence is consistent with ocular evidence. Under these circumstances, the fact that the relatives had not given a detail history would not falsify ocular evidence particularly when the medical evidence does not rule out the possibility of the head injury being caused by hitting of head on rocky surface or when the medical evidence is not inconsistent with ocular evidence.

49. It is pertinent to note that Sanjubai had died two days after the incident as a result of one fatal injury. The medical evidence states that the head injury inflicted on Sanjubai was sufficient in the ordinary course of nature to cause death. Hence, the moot question is whether the offence can attract exception 4 to Section 300 IPC. Section 300 reads as under:

"Section 300: Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or--

xxxxxx

Thirdly.--If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or--

xxxxx

Exception 4 to section 300 reads as under:

Exception 4.--Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation It is immaterial in such cases which party offers the provocation or commits the first assault.

50. We may refer to the landmark judgment of the Apex Court in **Virsa Singh v. State of Punjab AIR 1958 SC 465** wherein the Apex Court has held as under:

"To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300, 3rdly " ; 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.

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, 3rdly. It does not matter that there was no intention to cause death. It does not matter that there was no intention 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."

51. The Apex Court in **Pappu v. State of Madhya Pradesh AIR 2006 (7) SCC 391** has held as under:

"13. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

14. It cannot be laid down as a rule of universal application that whenever one blow is given, Section 302 IPC is ruled out. It would depend upon the weapon used, the size of it

in some cases, force with which the blow was given, part of the body it was given and several such relevant factors".

52. The Apex Court in **Pulicherla Nagaraju @ Nagaraja Reddy v. State of Andhra Pradesh (2006) 11 SCC 444** has enumerated some of the circumstances relevant to finding out whether there was any intention to cause death on the part of the accused as under:

"...Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of a cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no pre-meditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances :

(i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention..."

(emphasis supplied)

53. Reverting to the case at hand, the deceased was the wife of the Appellant no. 1. At the time of the incident she was three months pregnant. The evidence on record indicates that the incident had not occurred on the spur of the moment or in a sudden fight but was a sequel to the previous incident of assault during early morning hours when the Appellant had whacked the deceased with a cane stick over a trivial issue of not filling cow dung manure in a cart. The second incident which finally culminated in death of

Sanjubai had occurred on the same day at about 4pm, when Sanjubai had returned home to feed her minor daughter. Thus even assuming that the appellant was filled with sudden passion of anger and lost self-control due to non filling of cow dung manure in the cart, by the time the second incident occurred, the Appellant had sufficient time to calm down and regain dominion over the mind. The incident had not therefore ensued in sudden fight or in the heat of passion.

54. The evidence further reveals that at the time of the incident Sanjubai was three months pregnant. Despite PW4 pleading with appellant no.1 not to assault her since she was pregnant, he had assaulted Sanjubai, with a cane stick and thereafter banged her head on a rocky surface till she became unconscious and started bleeding from her mouth and nose. The medical evidence reveals that the deceased had suffered multiple abrasions over both parietal region as well as occipital region, which fact indicates that though the death of Sanjubai was caused due to a single fatal injury, the accused had in fact inflicted several blows on her head. We have no doubt in our mind that the appellant no.1 had committed the crime in a cruel and unusual manner, taking undue advantage of a defenceless pregnant woman, who had returned home only to feed her minor daughter. Thus the case is not covered by Exception 4 to section 300 IPC. Consequently the Land Judge was justified in holding the Appellant no.1 guilty of offence punishable under section 302 IPC.

55. Now coming to the complicity of the appellant no.2 Sarubai (in Cri. Appeal No. 919 of 2009) and the appellant nos.1 and 2 (in Cri. Appeal No. 898 of 2009), it is not in dispute that they had not inflicted the fatal blow on the deceased. The only allegations against these Appellants are that they had assaulted Sanjubai by kicks and blows. Nonetheless, they have been held guilty of offence under section 302 IPC with aid of section 34 IPC, which reads as under:

"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."

56. Section 34 IPC lays down the principle of constructive liability, wherein the accused committing any act in furtherance of common intention of the other co-accused, is equally liable for the acts committed by the co-accused. In order to hold the accused vicariously liable for the acts of the other accused the prosecution is required to prove that he shared the common intention to commit the offence conjointly with another or the other accused and that he actually participated in commission of crime in one form or the other.

57. In **Virendra Singh v. State Of M.P (2010) 8 SCC 407**, the Apex Court while considering the scope and object of section 34 IPC has held as under:

"18. The words "common intention" implies a prearranged plan and acting in concert pursuant to the plan. It must be proved that the criminal act was done in concert pursuant

to the pre-arranged plan. Common intention comes into force prior to the commission of the act in point of time, which need not be a long gap. Under this section a preconcert in the sense of a distinct previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. Though common intention may develop on the spot, it must, however, be anterior in point of time to the commission of the crime showing a pre- arranged plan and prior concert. The common intention may develop in course of the fight but there must be clear and unimpeachable evidence to justify that inference. This has been clearly laid down by this Court in the case of **Amrik Singh & Ors. v. State of Punjab 1972 CrLJ 465 (SC)**.

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19. The essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. Undoubtedly, it is difficult to prove even the intention of an individual and, therefore, it is all the more difficult to show the common intention of a group of persons. Therefore, in order to find whether a person is guilty of common intention, it is absolutely necessary to carefully and critically examine the entire evidence on record. The common intention can be spelt out only from the evidence on record.

21. Section 34 is not a substantive offence. It is imperative that before a man can be held liable for acts done by another, under the provisions of this section, it must be established that there was common intention in the sense of a pre-arranged plan between the two and the person sought to be so held liable had participated in some manner in the act constituting the offence. Unless common intention and participation are both present, this section cannot apply.

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45. The dominant feature of Section 34 is the element of intention and participation in action. This participation need not in all cases be by physical presence. Common intention implies acting in concert.

46. The essence of Section 34 IPC is a simultaneous consensus of the minds of the persons participating in criminal action to bring about a particular result.

47. Section 34 IPC does not create any distinct offence, but it lays down the principle of constructive liability. Section 34 IPC stipulates that the act must have been done in furtherance of the common intention. In order to incur joint liability for an offence there must be a pre-arranged and pre-meditated concert between the accused persons for doing the act actually done, though there might not be long interval between the act and the pre-meditation and though the plan may be formed suddenly. In order that Section 34 IPC may apply, it is not necessary that the prosecution must prove that the act was done by a particular or a specified person. In fact, the section is intended to cover a case where

a number of persons act together and on the facts of the case it is not possible for the prosecution to prove as to which of the persons who acted together actually committed the crime. Little or no distinction exists between a charge for an offence under a particular section and a charge under that section read with section 34."

58. In the instant case, as stated earlier the incident in question was preceded by the incident of assault during morning session at about 7 a.m. Though PW4 had stated that Sanjubai had complained that these appellants had also assaulted her with kicks and blows, no such statement was made in the FIR and an omission in this regard has been elicited in the cross examination of this witness. Furthermore, the evidence of PW5 and PW6 also does not indicate that the appellant nos. 2 to 4 were involved in the first incident of assault.

59. As regards the second incidence at 4 p.m., the evidence of PW4, PW5 and PW6 reveals that the appellant no.1 had assaulted Sanjubai with a cane whereas the other appellants had assaulted her by kicks and blows. There is no cogent and consistent evidence to prove that these applicants were involved in dragging Sanjubai to the water tank or that they had assaulted her in any manner when the appellant no. 1 had dragged her to the water tank and inflicted the fatal blow. There is no cogent and conclusive evidence of prior meeting or a pre-arranged plan between these appellants and the appellant no. 1 to cause death of Sanjubai. The evidence on record reveals that these appellants had individually assaulted Sanjubai by kicks and blows. There being no evidence of sharing of common intention, the acts of these appellants constitute offence under section 323 IPC. Consequently, the appellant nos. 2 to 4 cannot be held vicariously liable for the acts of the appellant no. 1. Hence these appellants cannot be convicted for the offence under Section 302 with the aid of Section 34 of IPC.

60. Under the circumstances and in view of the discussion supra, the appeals are partly allowed. The conviction and sentence imposed against the appellants for offence under Section 498 A is hereby quashed and set aside. The conviction and sentence on the appellant no.1 Tanaji (in Cri.Appeal No. 919 of 2009) for offence under Section 302 IPC is maintained. The appellant no.2 Sarubai (in Cri.Appeal No. 919 of 2009) and the appellant nos. 1 and 2 (in Cri. Appeal No. 898 of 2009) are acquitted of offence under Section 302 r/w. 34 of IPC, and they are held guilty of the offence under Section 323 of IPC and are sentenced to undergo imprisonment for one year. Since these appellants were already in custody for over one year during the pendency of the trial, the period of imprisonment undergone is ordered to be set off. Their bail bonds cum surety bonds are accordingly discharged.