

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.480 OF 2013

1) JAGDISH UTTAM KHAIRNAR	)
	)
2) SANJAY @ SATISH DAGA BHAMARE	)
	)
3) RAVINDRA KASHINATH AHIRE	)
	)
4) ASHOK UTTAM KHAIRNAR	)...APPELLANTS

V/s.

THE STATE OF MAHARASHTRA	)...RESPONDENT
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Mr.H.E.Palve Advocate for the Appellant.

Mr.S.V.Gavand, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 10th APRIL 2018

ORAL JUDGMENT :

1 By this appeal, appellants/accused are challenging the judgment and order dated 11th March 2013 passed by the learned Adhoc District Judge-2 and Additional Sessions Judge, Malegaon,

in Sessions Case No.43 of 2010, thereby convicting them of the offence punishable under Section 304(Part I) of the Indian Penal Code and sentencing each of them to rigorous imprisonment of 10 years and further direction to pay fine of Rs.25,000/- by each of them and in default, to undergo further rigorous imprisonment for 2 years.

2 Brief facts leading to the prosecution of appellants/accused are thus :

- (a) Appellants/accused so also Tryambak Khairnar (since deceased) were resident of Village Kikwari Budruk. Accused no.4/approver/PW1 Deelip Birari was also residing at the same village.
- (b) On 19th January 2010, tractor of Tryambak Khairnar (since deceased) was hired by the accused no.4/approver/PW1 Deelip Birari for transporting onions to the agricultural produce market situated at Village Kalavan. Accordingly, along with accused no.4/approver/PW1 Deelip Birari,

Tryambak Khairnar (since deceased) went to the market of the Agricultural Produce Market Committee (hereinafter referred to as APMC for the sake of brevity) of Village Kalavan for selling the agricultural produce. Pick up jeep of appellant/accused no.1 Jagdish Khairnar was hired by PW14 Balu Bagul for transporting his onion to the APMC market at Kalavan on the very same day for selling his agricultural produce. Hence, appellant/accused no.1 Jagdish Khairnar along with PW14 Balu Bagul had also been to APMC Kalavan on 19th January 2010. Other appellants/accused persons namely accused no.2 Sanjay @ Satish Bhamare, accused no.3 Ravindra Ahire and accused no.5 Ashok Khairnar had also visited the said market at Kalavan on 19th January 2010.

- (c) According to the prosecution case, after second auction which was held at about 4 p.m. on 19th January 2010, the accused no.4/approver/PW1 Deelip Birari went to the hotel near the market for having breakfast. Appellant/ accused

no.1 Jagdish Khairnar and appellant/ accused no.3 Ravindra Ahire were also present in that hotel taking breakfast. Thereafter, all appellants/accused persons and Tryambak Khairnar (since deceased) as well as approver/PW1 Deelip Birari started return journey to their Village Kikwari by different vehicles including tractor, pickup jeep and motorcycle. At about 7 to 7.30 p.m., all appellants/ accused persons as well as PW3 Bapu Bagul and Tryambak Khairnar (since deceased) took a halt near Government Dispensary, Bundhate at Village Dangsaundane. Appellant/accused no.1 Jagdish Khairnar, appellant/accused no.2 Sanjay @ Satish Bhamare, appellant/accused no.3 Ravindra Ahire along with Tryambak Khairnar (since deceased) went to the nearby liquor shop for consuming liquor. Approver/PW1 Deelip Birari and PW3 Bapu Bagul stayed near the vehicles. After booze session at the liquor shop near Government dispensary of Village Bundhate, further return journey started. Tryambak Khairnar (since deceased) and

appellant/accused no.2 Sanjay @ Satish Bhamare sat in the tractor of Tryambak Khairnar (since deceased). Approver/ PW1 Deelip Birari and PW3 Bapu Bagul sat in the pickup jeep of appellant/accused no.1 Jagdish Khairnar. Other accused persons i.e. appellant/ accused no.3 Ravindra Ahire and appellant/accused no.4 Ashok Khairnar resumed return journey on the motorcycle. They all again took a stop at Kalika hotel at Village Dangsaundane on Satana Road. Appellant/accused no.1 Jagdish Khairnar, appellant/accused no.2 Sanjay @ Satish Bhamare along with Tryambak Khairnar (since deceased) then went to the hotel at Village Dangsaundane owned by PW7 Kishor Pawar for dinner. They again had liquor. After sometime, appellant/accused no.1 Jagdish Khairnar, appellant/accused no.2 Sanjay @ Satish Bhamare and Tryambak Khairnar (since deceased) came out of the hotel and returned to their vehicles. Hot exchange of words started there. Appellant/accused no.1 Jagdish Khairnar and appellant/accused no.2 Sanjay @ Satish Bhamare were

abusing Tryambak Khairnar (since deceased) by making allegation that he had not provided liquor to them and they would see how he would become Sarpanch. Appellant/accused no.3 Ravindra Ahire caught hold of Tryambak Khairnar from backside. Appellant/accused no.1 Jagdish Khairnar, appellant/accused no.2 Sanjay @ Satish Bhamare, appellant/accused no.3 Ravindra Ahire and appellant/accused no.5 Ashok Khairnar assaulted Tryambak Khairnar by means of stick and iron tommy. The tommy was held by appellant/accused no.5 Ashok Khairnar whereas other appellants/accused persons were holding sticks. Approver/PW1 Deelip Birari and PW3 Bapu Bagul tried to save Tryambak Khairnar but accused persons restrained them and threatened them. They then bodily lifted Tryambak Khairnar and put him up in the pickup jeep of appellant/accused no.1 Jagdish Khairnar. Approver/PW1 Deelip Birari was forced to drive the tractor of Tryambak Khairnar. Further return journey to Village Kikwari then started.

- (d) During the course of return journey, the tractor driven by approver/PW1 Deelip Birari skidded and landed in a ditch. With the help of tractor of PW12 Kashinath Jagtap it was again brought on the road by towing it by another tractor. On reaching Village Kikwari, Tryambak Khairnar was kept in the trolley of his tractor and approver/PW1 Deelip Birari was asked to reach that tractor and trolley at the house of Tryambak Khairnar. Accordingly, approver/PW1 Deelip Birari took the tractor to the house of Tryambak Khairnar and informed his wife that Tryambak had consumed liquor and his sleeping in the trolley. Approver/PW1 Deelip Birari then returned to his house.
- (e) On the next day, i.e. on 20th January 2010, family members of Tryambak Khairnar found him immobile and his body cold. Therefore, he was taken to Dr.Jagtap of Satana. Upon examination, Dr.Jagtap declared Tryambak Khairnar as dead. The family members of Tryambak Khairnar noted some injuries on the dead body and therefore, it was taken

to Government Hospital Satana. PW2 Kantilal Khairnar, who is brother of deceased Tryambak Khairnar, then lodged report.

- (f) After conducting inquest panchnama, dead body of Tryambak Khairnar was sent for autopsy. PW5 Dr.Prashant Devare of Rural Hospital, Satana, conducted postmortem examination and prepared report Exhibit 41.
- (g) On 20th January 2010 itself accused persons including approver/PW1 Deelip Birari came to be arrested. Spots where the incidents took place came to be examined and Spot Panchnama Exhibit 55 came to be recorded in presence of PW9 Shashikant Jagtap, panch witness. Weapons of offence came to be recovered from accused persons. Statement of witnesses came to be recorded. On completion of investigation, charge-sheet came to be filed.
- (h) Original accused no.4 Deelip Birari moved an application for grant of pardon and accordingly, the same came to be

allowed vide order dated 22nd March 2012 by the learned Adhoc Additional Sessions Judge-1, Malegaon and pardon was tendered to him on condition of making full and true disclosure of whole of the circumstances within his knowledge relating to every person concerned in the commission of offence. His statement was also recorded under Section 164 of the Code of Criminal Procedure. The learned trial court framed Charge for the offence punishable under Section 302 read with 34 of the Indian Penal Code against appellants/accused persons. They pleaded not guilty and claimed trial.

- (i) In order to prove the Charge, the prosecution has examined in all fifteen witnesses. Approver/accused no.4 Deelip Birari is examined as PW1. First Informant Kantilal Khairnar is examined as PW2. Exhibit 31 is the First Information Report (FIR) lodged by him. Eye witness Bapu Bagul is examined as PW3. Panch witness to Inquest Panchnama namely Jibhau Ahire is examined as PW4.

Inquest Panchnama is at Exhibit 37. Autopsy Surgeon Dr.Prashant Devare is examined as PW5. Exhibit 41 is the Postmortem Report. Vishwas Khairnar – brother of the deceased is examined as PW6. Kishor Pawar, Hotel owner, of Village Dangsaundane is examined as PW7. Panch witness Manoj Sonawane is examined as PW8. Shashikant Jagtap, panch witness to the Spot Panchnama is examined as PW9. Spot Panchnama is at Exhibit 55. Panch witness Ramesh Sonawane is examined as PW10. Another panch Bharat Katke is examined as PW11. Tractor owner Kashinath Jagtap who helped the accused persons in taking out the tractor of the deceased Tryambak Khairnar from the ditch is examined as PW12. Secretary of APMC, Kalavan, Ravindra Hiray is examined as PW13. Balu Bagul is examined as PW14. Police Inspector Shaligram Patil, Investigating Officer, is examined as PW15.

- (j) The defence of the appellants/accused persons is that of total denial. However, they did not enter in the defence.

After hearing the parties, by the impugned judgment and order, the learned trial court was pleased to convict the appellants/accused persons of the offence punishable under Section 304(Part I) of the Indian Penal Code and they are accordingly sentenced, as indicated in the opening paragraph of this judgment.

3 I have heard Shri Palve, the learned advocate appearing for the appellants/accused persons. By placing reliance on judgments in the matter of Manisha Ravindra Humbe vs. State of Maharashtra¹ and Dayaram @ Jayaram Parshuram vs. State of Maharashtra² the learned advocate for the appellants/accused persons argued that the Medical Officer, who has conducted the autopsy has not deposed that the injuries found on the dead body of Tryambak Khairnar were sufficient in the ordinary course of nature to cause death of a person. The learned advocate further argued that the learned trial court erred in convicting the appellants/accused persons for the offence

1 [2017(3) Mh.L.J. (Cri.) 547

2 [1996(2) Mh.L.J. (Cri.)1056

punishable under Section 304 (Part I) of the Indian Penal Code. Infact, even if it is assumed that the case of the prosecution is correct, then the conviction can at the most be for the offence punishable under Section 324 of the Indian Penal Code. The learned advocate drew my attention to the provisions of Section 163 of the Code of Criminal Procedure and submitted that evidence of PW3 Bapu Bagul needs to be discarded because prior to recording of his statement under Section 161 of the Code of Criminal Procedure, he was assaulted by police and thereafter, he was compelled to depose by police as per his statement recorded under Section 161 of the Code of Criminal Procedure. The learned advocate relied on judgment in the matter of **Shankar Raju Banglorkar vs. State of Goa**³ to buttress his contention that disclosure made under duress, pressure or threats of police is inadmissible. By relying on judgment in the matter of **Suresh Chandra Bahri vs. State of Bihar**⁴, the learned advocate for the appellants/accused argued that if evidence of PW3 Bapu Bagul is ignored from consideration, then there remains nothing to

3 1992 CRI.L.J. 3034

4 AIR 1994 SUPREME COURT 2420

corroborate version of approver/PW1 Deelip Birari. Evidence of this witness cannot be accepted without corroboration and has to be looked upon with great suspicion. Therefore, appellants/accused deserve to be acquitted.

4 The learned APP supported the impugned judgment by contending that approver/PW1 Deelip Birari and PW3 Bapu Bagul are natural witnesses to the incident in question and prosecution case is corroborated by version of PW14 Balu Bagul as well as that of PW13 Ravindra Hiray, Secretary of APMC Kalavan. Evidence of these witnesses shows presence of approver/PW1 Deelip Birari and PW3 Bapu Bagul apart from that of appellant/accused no.3 Ravindra Ahire and appellant/accused no.1 Jagdish Khairnar on the spot of the incident apart from the fact that this evidence shows that all accused persons were in company of the deceased at the relevant time. The learned APP submitted that evidence of the Autopsy Surgeon shows that learned trial court has rightly convicted

appellants/accused for the offence punishable under Section 304(Part I) of the Indian Penal Code.

5 I have carefully considered the rival submissions and also perused the record and proceedings including deposition of prosecution witnesses as well as the documentary evidence adduced by the prosecution on record.

6 As the appeal is challenging conviction of the appellants/accused persons for the offence punishable under Section 304(Part I) of the Indian Penal Code, let us examine whether the prosecution has proved that Tryambak Khairnar died homicidal death. Evidence of PW4 Jibhau Ahire, panch witness, shows that dead body of Tryambak Khairnar was inspected at Government Hospital, Satana, in his presence. He deposed that he saw injuries on left eyelid, elbows of both hands, on hip joint as well as on private part of dead body of Tryambak Khairnar. This witness noticed black-blue and reddish coloured mark on the dead body and he found injuries on penis of the dead body. This

witness has proved the Inquest Panchnama Exhibit 37 which reflects injuries on the dead body of Tryambak Khairnar.

7 PW5 Dr.Prashant Devare, Medical Officer working with Rural Hospital, Satana, had conducted postmortem examination on dead body of Tryambak Khairnar. Evidence of this witness shows that he noticed following ante-mortem injuries on dead body of Tryambak Khairnar :

- i) Contusion over Lt. Inguinal region
- ii) Contusion over Rt. Thigh upper part
- iii) Contusion over Lt. Thigh Lt. Lateral region
- iv) Contusion over Lt. Knee joint and Lt. Fore leg
- v) Abrasion over Lt. Lumbar region
- vi) Contusion over Rt. Elbow
- vii) Abrasion over Lt. Eyebrow
- viii) Contusion over back Lt. Lumbar region
- ix) Contusion over Lt. Fore arm

As per version of this witness, upon internal examination, he found rupture of left kidney and urinary bladder of the deceased.

The Autopsy Surgeon stated that the death was due to hypovolumic shock caused by rupture of left kidney and urinary bladder. Contemporaneous document i.e. report of postmortem examination Exhibit 41 corroborates the version of this witness.

8 Though it was suggested to this witness that rupture of kidney and urinary bladder can be caused by a fall with force on projecting substance, this expert witness has denied this suggestion. Even otherwise, evidence of prosecution witnesses shows that after assaulting him, Tryambak Khairnar was kept in the pickup jeep of appellant/accused no.1 Jagdish Khairnar and not on the tractor or trolley which accidentally went in the ditch. Therefore, I find no substance in arguments of the learned Advocate for appellants/accused persons that deceased Tryambak Khairnar died accidental death due to fall from the tractor and trolley when it accidentally landed in the ditch. Thus, with this evidence, the prosecution has successfully proved homicidal death of Tryambak Khairnar.

9 Though charged for the offence punishable under Section 302 read with 34 of the Indian Penal Code, appellants/accused are convicted for the offence punishable under Section 304 (Part I) read with 34 of the Indian Penal Code by the learned trial court vide the impugned judgment and order, primarily relying on evidence of approver/PW1 Deelip Birari and PW3 Bapu Bagul. PW1 Deelip Birari is the approver. In paragraph 43 of its judgment in the matter of **Suresh vs. State of Bihar (supra)** the Honourable Apex Court has reiterated the principles of appreciation of evidence of the approver. Paragraph 43 reads thus:

“43 The evidence of an approver does not differ from the evidence of any other witness except that his evidence is looked upon with great suspicion. Consequently in the event the suspicion which is attached to the evidence of an accomplice is not removed his evidence could not be acted upon unless corroborated in material particulars. But where the suspicion is removed and the evidence of an approver is found to be trustworthy and acceptable then that evidence may be acted upon even without corroboration and the conviction may

be founded on such a witness. Here in this connection it would be appropriate to make reference to the provisions of [Section 133](#) of the Evidence Act which deal with the testimony of an accomplice. It contemplates that an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. The first part envisages that an accomplice, in other words, a guilty companion in crime, shall be a competent witness while the second part states that conviction is not illegal merely because it is based on the uncorroborated testimony of an accomplice. But if we read [Section 133](#) of the Evidence Act with illustration (b) of [Section 114](#) of the Evidence Act it may lead to certain amount of confusion and misunderstanding as to the real and true intention of the Legislature because quite contrary to what is contained in [Section 133](#) illustration (b) to [Section 114](#) of the Evidence Act lays down "that an accomplice is unworthy of credit, unless he is corroborated in material particulars". A combined reading of the two provisions that is [Section 133](#) and illustration (b) of [Section 114](#) of Evidence Act

goes to show that it was considered necessary to place the law of accomplice evidence on a better footing by stating in unambiguous terms that according to [Section 133](#) a conviction is "not illegal or in other words not unlawful" merely because it is founded on the uncorroborated testimony of an accomplice while accepting that an accomplice is a competent witness. But at the same time the Legislature intended to invite attention to illustration (b) of [Section 114](#) of the Evidence Act with a view to emphasise that the rule contained therein as well as in [Section 133](#) are parts of one and the same subject and neither can be ignored in the exercise of judicial discretion except in cases of very exceptional nature. However, the difficulty in understanding the combined effect of the aforementioned two provisions arises largely due to their placement at two different places of the same Act. It may be noticed that illustration (b) attached to [Section 114](#) is placed in Chapter VII of Evidence Act while [Section 133](#) is inserted in Chapter IX of the Act. The better course was to insert illustration (b) to [Section 114](#) as an explanation or in any case as a proviso to [Section 133](#) of the Act instead of their insertion at two different places and that too

in different chapters of the [Evidence Act](#). In any case since an approver is a guilty companion in crime and, therefore, illustration (b) to [Section 114](#) provides a rule of caution to which the courts should have regard. It is now well settled by a long series of decisions that except in circumstances of special nature it is the duty of the court to raise the presumption in [Section 114](#) illustration (b) and the Legislature requires that the courts should make the natural presumption in that section as would be clear from the decisions which we shall discuss hereinafter.”

It is, thus, clear that one will have to keep in mind that approver/PW1 Deelip Birari being accomplice, his evidence is unworthy of credit unless it is corroborated in material particulars by other evidence adduced by the prosecution on record. It is duty of the court to raise such presumption and to trace out whether evidence of approver/PW1 Deelip Birari is gaining corroboration in material particulars from other evidence adduced by the prosecution.

10 Let us, therefore, put on record what approver/PW1 Deelip Birari is deposing about the incident in question. This witness has stated that by hiring the tractor of Tryambak Khairnar (deceased) along with Tryambak Khairnar he went to the APMC Market at Kalavan for selling maize on 19th January 2010. He sold maize in the auction. Thereafter, along with appellant/accused no.2 Sanjay @ Satish Bhamare, he went to the nearby hotel for having breakfast. He saw appellant/accused no.1 Jagdish Khairnar and appellant/accused no.3 Ravindra Ahire along with Devji Sonawane taking breakfast.

11 Approver/PW1 Deelip Birari deposed that after sale of agricultural produce and after taking breakfast, Tryambak Khairnar (deceased), appellant/accused no.1 Jagdish Khairnar, appellant/accused no.2 Sanjay @ Satish Bhamare and appellant/accused no.3 Ravindra Ahire along with PW3 Bapu Bagul started return journey by the tractor and pickup jeep of appellant/accused no.1 Jagdish Khairnar. On the way, vehicles

were stopped near the country liquor shop located in the vicinity of Bundhate Gram Panchayat Office. Then, Tryambak Khairnar (deceased), appellant/accused no.1 Jagdish Khairnar, appellant/accused no.2 Sanjay @ Satish Bhamare and appellant/accused no.3 Ravindra Ahire went to that shop whereas he himself and PW3 Bapu Bagul sat in the pickup jeep. Appellant/accused no.5 Ashok Khairnar was sitting on the parked motorcycle near the Gram Panchayat Office. After return of Tryambak Khairnar, appellant/accused no.1 Jagdish Khairnar, appellant/accused no.2 Sanjay @ Satish Bhamare and appellant/accused no.3 Ravindra Ahire further journey towards Village Kikwari started. As per version of approver/PW1 Deelip Birari, then, they all took halt at Kalika hotel. Approver/PW1 Deelip Birari himself, Tryambak Khairnar (deceased), appellant/accused no.1 Jagdish Khairnar and appellant/accused no.2 Sanjay @ Satish Bhamare went inside Kalika hotel. He immediately came out and sat at the fire place. After sometime, Tryambak Khairnar (deceased), appellant/accused no.1 Jagdish Khairnar and appellant/accused no.2 Sanjay @ Satish Bhamare came out. As

per version of approver/PW1 Deelip Birari, when he had gone for urinating, he heard noise, and therefore, he rushed to see what is happening. He saw all appellants/accused assaulting Tryambak Khairnar. This witness has stated that appellant/accused no.3 Ravindra Ahire had caught hold of Tryambak Khairnar from backside. At that time, appellant/accused no.5 Ashok Khairnar was assaulting Tryambak Khairnar by tommy, appellant/accused no.2 Sanjay @ Satish Bhamare was assaulting Tryambak Khairnar by piercing a stick in body of Tryambak Khairnar, whereas appellant/accused no.1 Jagdish Khairnar assaulting him by means of stick. The assault, as described by approver/PW1 Deelip Birari was on waist and thigh of Tryambak Khairnar. Approver/PW1 Deelip Birari stated that while assaulting, the accused persons were scolding Tryambak Khairnar that he had not provided liquor to them and they would see how he would become Sarpanch. As per version of this witness, he as well as PW3 Bapu Bagul tried to rescue Tryambak Khairnar but the accused persons threatened to kill them. After assaulting Tryambak Khairnar, as stated by this witness, accused persons

lifted him and put him in the jeep. He was forced to drive the tractor belonging to Tryambak Khairnar. Then, return journey to Village Kikwari started. Approver/PW1 Deelip Birari stated that during the course of return journey, appellant/accused no.3 Ravindra Ahire and appellant/accused no.5 Ashok Khairnar were on motorcycle, whereas appellant/accused no.1 Jagdish Khairnar, appellant/ accused no.2 Sanjay @ Satish Bhamare and PW3 Bapu Bagul along with Tryambak Khairnar were in the jeep. He stated that during the return journey, as he was not knowing driving of a tractor, it went in the road side ditch and it was taken out by towing it by another tractor, with the help of that tractor owner and his son. That is how, as per version of this witness, they went to their village. Thereafter, appellants/accused persons put Tryambak Khairnar in the trolley. They threatened him as well as PW3 Bapu Bagul and this witness was then asked to take the tractor and trolley to the house of Tryambak Khairnar.

12 Approver/PW1 Deelip Birari further stated that he took the tractor and trolley to the house of Tryambar Khairnar

and informed wife of Tryambak Khairnar that Tryambak Khairnar is sleeping in the trolley, as he had consumed liquor.

13 Approver/PW1 Deelip Birari further stated that he was arrested on the next day and then, he disclosed the incident to police as well as to the Judicial Magistrate First Class, Satana, where his confessional statement Exhibit 24 came to be recorded. This witness identified the stick and tommy to be the weapons of the assault.

14 Cross-examination of this witness shows that none of the appellants/accused had given any blow on head or chest of Tryambak Khairnar. His cross-examination further shows that his evidence that appellant/accused no.2 Sanjay @ Satish Bhamare was assaulting deceased Tryambak Khairnar by piercing the stick in his body, has come on record by way of omission. He denied that when the tractor went into the ditch, deceased Tryambak Khairnar had a fall from that tractor and suffered injuries. Confession of this witness at Exhibit 26 makes it clear that this

witness has not stated to the learned Judicial Magistrate First Class while recording his statement that appellant/accused no.2 Sanjay @ Satish Bhamare was piercing the body of Tryambak Khairnar by means of a stick.

15 This is what approver/PW1 Deelip Birari has stated about the incident while in the witness box, which is in tune with his confession Exhibit 26 recorded by the learned Judicial Magistrate First Class, Satana. One may argue that the approver/PW1 Deelip Birari has not participated in commission of the murder and therefore, he cannot be the approver, and therefore his evidence needs to be ignored. However, evidence of this witness approver/PW1 Deelip Birari goes to show that after assault on deceased Tryambak Khairnar, this witness had driven the tractor and trolley belonging to deceased Tryambak Khairnar and then on reaching Village Kikwari, in the trolley of that tractor dead body of Tryambak Khairnar was loaded. Approver/PW1 Deelip Birari then transported that dead body up to the house of Tryambak Khairnar and informed his wife that as Tryambak

Khairnar had consumed liquor, he is sleeping in the trolley of the tractor. That is how, this witness approver/PW1 Deelip Birari was arraigned as an accused and subsequently, on tender of pardon, he became prosecution witness.

16 Now let us examine whether this evidence of the approver/PW1 Dileep Birari is corroborating in material particulars by other evidence adduced by the prosecution. PW3 Bapu Bagul claims to be an eye witness to the incident in question. As per his version, he had hired pickup jeep of Vishwas Khairnar (PW6) for selling onions at APMC market, Kalavan, on 19th January 2010. He further deposed that he was undertaking return journey to his Village Kikwari in the tractor of Ashok Ahire. Appellant/accused no.2 Sanjay @ Satish Bhamare was also in that tractor. The tractor was stopped at Village Bundhate. He himself and appellant/accused no.2 Sanjay @ Satish Bhamare alighted from the tractor of Ashok Ahire and the said tractor then went ahead. PW3 Bapu Bagul further deposed that then appellant/accused no.1 Jagdish Khairnar, appellant/accused no.2

Sanjay @ Satish Bhamare along with Tryambak Khairnar (since deceased) went to the shop for consuming liquor whereas, he and approver/PW1 Deelip Birari waited outside. After sometime, they came out and appellant/accused no.2 Sanjay @ Satish Bhamare sat in the tractor of Tryambak Khairnar. In the pickup jeep of appellant/accused no.1 Jagdish Khairnar, he himself, appellant/accused no.1 Jagdish Khairnar and approver/PW1 Deelip Birari sat. Further return journey then resumed.

17 As per version of PW3 Bapu Bagul, vehicles were then again stopped at Kalika hotel. Appellant/accused no.1 Jagdish Khairnar, appellant/accused no.2 Sanjay @ Satish Bhamare and Tryambak Khairnar went in that hotel whereas he and approver/PW1 Deelip Birari sat out. Appellant/accused no.3 Ravindra Ahire and appellant/accused no.5 Ashok Khairnar then came on motorcycle at that place. After coming out of Kalika hotel, hot exchange of words started on the subject of drinking liquor and Gram Panchayat Election and during the course of exchange of hot words, as deposed by this witness,

appellant/accused no.3 Ravindra Ahire caught hold of Tryambak Khairnar from backside. Appellant/accused no.2 Sanjay @ Satish Bhamare assaulted him by stick, appellant/accused no.5 Ashok Khairnar assaulted him by means of a tommy and when he intervened, he was threatened. This witness PW3 Bapu Bagul further stated that when approver/PW1 Deelip Birari tried to intervene, appellant/accused no.5 Ashok Khairnar pushed him. As per version of PW3 Bapu Bagul, appellant/accused no.1 Jagdish Khairnar, appellant/accused no.2 Sanjay @ Satish Bhamare and appellant/accused no.5 Ashok Khairnar gave two to three blows on Tryambak Khairnar. Thereafter, appellant/accused no.1 Jagdish Khairnar, appellant/accused no.3 Ravindra Ahire and appellant/accused no.2 Sanjay @ Satish Bhamare lifted Tryambak Khairnar and put him in the pickup jeep. He also sat in the pickup jeep. PW3 Bapu Bagul in chief-examination itself has stated that appellants/accused persons asked him to take care of Tryambak Khairnar, and therefore, he caught hold of head of Tryambak Khairnar and rested it on his thigh. This witness then deposed about driving the tractor of Tryambak Khairnar by

approver/PW1 Deelip Birari, despite his reluctance to do so, and then landing the tractor in the ditch. PW3 Bapu Bagul has also spoken about seeking help of two persons and taking out the tractor of Tryambak Khairnar from the ditch by means of towing by another tractor. He, further, deposed that, on reaching the village, appellants/accused persons namely, appellant/accused no.1 Jagdish Khairnar, appellant/accused no.2 Sanjay @ Satish Bhamare, appellant/accused no.3 Ravindra Ahire and appellant/accused no.5 Ashok Khairnar took out body of Tryambak Khairnar from the pickup jeep and kept it in the trolley of the tractor. PW3 Bapu Bagul deposed that, then, as per their directions, approver/PW1 Deelip Birari had taken that tractor to the house of Tryambak Khairnar. He further stated that the accused persons had threatened him not to disclose the incident and warned him that he is Harijan and residing alone in the village with his family and he will not be kept alive, if the incident is disclosed to anybody else.

18 Cross-examination of this witness goes to show that he had not disclosed the incident to anybody including his brothers and neighbours as well as Police Patil. He, however, had disclosed the incident to his wife. His statement under Section 161 of the Code of Criminal Procedure, as seen from his cross-examination, was recorded on 22nd January 2010.

19 Cross-examination of this witness further goes to show that when he was taken at the police station, police had given two blows of belt on his hand and he was frightened. Then, his statement was recorded. Even on the day of recording of his statement by the court, his police statement was read over to him and police had directed him to depose before the court as per his police statement. With the aid of this material brought on record, it is argued by the learned advocate for appellants/accused persons that this witness was assaulted by police to extract his police statement and then he was tutored to depose before the court. Hence, his evidence needs to be discarded as Section 163 of the Code of Criminal Procedure

provides that no Police Officer shall extend any threat to the witness.

20 In the matter of Gopal Madhukar Bombatkar vs. State of Maharashtra⁵ this court has held that meeting of the witness with the prosecutor prior to recording of his evidence by itself will not amount to tutoring. It is further held that if the witness is made aware about his police statement and was told to narrate the incident properly in the court, the same does not amount to tutoring. Undoubtedly, the police was not justified in assaulting PW3 Bapu Bagul prior to recording of his statement, but that by itself does not make what he has deposed before the court as false. If his evidence is found to be truthful and trustworthy, then, merely because the police had given two blows of belt on his palm prior to recording of his statement, his entire substantive evidence before this court cannot be jettisoned. Therefore, let us examine whether evidence of PW3 Bapu Bagul is gaining corroboration from other evidence adduced by the prosecution on record.

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21 PW13 Ravindra Hiray is the Secretary of the APMC, Kalavan. Evidence of this witness demonstrate that on 19th January 2010, Ravindra Hiray was present in the APMC, Kalavan, for selling bajra. Similarly, receipt Exhibit 74 proved by this witness goes to show that PW14 Balu Bagul had sold onion at the APMC market, Kalavan, on 19th January 2010. This evidence and receipt at Exhibit 74 fortifies version of PW14 Balu Bagul to the effect that he along with appellant/accused no.1 Jagdish Khairnar had been to the said market in the pickup jeep of appellant/accused no.1 Jagdish Khairnar. Evidence of PW13 Ravindra Hiray further proves receipts at Exhibits 75 and 76 which goes to show that approver/PW1 Deelip Birari had sold maize in the APMC market, Kalavan, on 19th January 2010. This establishes presence of approver/PW1 Deelip Birari in the APMC market, Kalavan, on 19th January 2010, and lends assurance of his testimony in respect of the happenings during the course of his return journey to his village Kikwari in company of appellants/ accused persons as well as deceased Tryambak

Khairnar. Evidence of approver/PW1 Deelip Birari is to a large extent in tune with version of PW3 Bapu Bagul.

22 Both approver/PW1 Deelip Birari and PW3 Bapu Bagul have spoken about forcing approver/PW1 Deelip Birari to drive the tractor belonging to deceased Tryambak Khairnar after assault on Tryambak Khairnar by appellants/accused persons. Both these witnesses have stated that during the course of driving of that tractor, because approver/PW1 Deelip Birari was not knowing driving of the tractor, it went in the ditch. PW12 Kashinath Jagtap is owner of the other tractor. He helped in taking out the tractor of Tryambak Khairnar from the ditch, where it was landed, when it was being driven by approver/PW1 Deelip Birari. PW12 Kashinath Jagtap has deposed that in the night hours two persons of village Kikwari approached him and requested him to tow the tractor on the road from the ditch. Evidence of this witness further shows that after separating the trolley from the tractor, rope was tied to the tractor and it was pulled by the tractor belonging to this witness, so as to make it

roadworthy. Thus, evidence of PW12 Kashinath Jagtap is corroborating the version of approver/PW1 Deelip Birari as well as that of PW3 Bapu Bagul establishing their presence on the scene of occurrence with the appellants/accused persons. Therefore, I see no reason to disbelieve their version about the incident in question and the material on record as indicated in the foregoing paragraphs, thus, corroborates the version of approver/PW1 Deelip Birari in all material particulars. In this view of the matter, it needs to be held that the prosecution has duly established the fact that during their return journey to village Kikwari, Tryambak Khairnar was assaulted by appellants/accused persons by means of tommy and stick.

23 The learned trial court upon holding that deceased Tryambak Khairnar was assaulted by appellants/accused persons, has held in paragraphs 45 and 46 that the prosecution has failed to make out the offence punishable under Section 302 of the Indian Penal Code and the case is falling in Exception 4 to Section 300 of the Indian Penal Code, as the incident was a fall

out of sudden fight and the assault was in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage. The State has not challenged this finding and we are dealing with the appeal at the instance of appellants/accused persons. In paragraph 35 of its judgment, the learned trial court has held that kidney and bladder are vital limbs in the body of human being and the assault was on those parts which reflect intention to cause such bodily injuries, as is likely to cause death. The learned trial court further held that the act was with an intention of causing such bodily injuries as are sufficient to cause death of a person, and therefore, the offence is one punishable under First part of Section 304 of the Indian Penal Code. This finding is assailed by the appellants/accused persons by contending that the same is not in consonance with the evidence made available on record.

24 In order to infer intention or knowledge of appellants/accused persons, this court will have to take assistance of evidence of expert i.e. PW5 Dr.Prashant Devare, who had

conducted the autopsy on the dead body. Though this witness has narrated the external as well as internal injuries found on the dead body of Tryambak Khairnar, he has not stated that the injuries so found on dead body were sufficient in the ordinary course of nature to cause death of a human being. On this aspect, the learned advocate for the appellants/accused persons rightly relied on judgment of Division Bench of this court in the matter of **Dayaram @ Jayaram Parshuram (supra)**. Relevant portion from paragraph 10 of the said judgment can be extracted with advantage and it reads thus :

“10There can be no quarrel with the proposition that in an exceptional case, in the interest of justice, the Court can reach its own conclusion on the issue of sufficiency of injuries to cause death, in the ordinary course of nature. But this should be done rarely and within permissible limits, for two reasons;

(i) It is well settled that the burden is on the prosecution to lead evidence in respect of the offence for which the charge has been framed against the accused. Since the charge in this case was framed against the appellant under [section 302](#)

I.P.C. it was ordinarily the duty of the prosecution to have asked the Autopsy Surgeon Dr. Bahubali Nagaonkar (P.W. 9) in his examination-in-chief whether the injuries were sufficient in the ordinary course of nature to cause his death. That obligation the prosecution has failed to discharge;

(ii) Secondly it is the Medical Expert (Autopsy Surgeon) who is qualified on account of his expert knowledge to know whether the injuries are sufficient to cause death in the ordinary course of nature in a given case. Unless the injuries per se appear to be fatal, as was in the decision reported in 1995 Supreme Court Cases Page 231 (supra), it would be hazardous for the Court to assume the task of an expert for that may result in injustice.”

25 Similarly, reliance is also placed on behalf of appellants/accused persons on judgment of Division Bench of this court in the matter of **Manisha Ravindra Humbe (supra)** wherein this court had considered whether the assault was with an intention to cause such bodily injuries as is likely to cause death or with the knowledge.

26 In the instant case, let us examine whether appellants/accused persons intended to cause death of Tryambak Khairnar by assaulting him by means of the tommy as well as wooden sticks. In chief-examination itself, approver/PW1 Deelip Birari has stated that the assault was only on lower part of body of Tryambak Khairnar and no blows were given on upper part of the body of the victim. PW3 Bapu Bagul has categorically stated in his chief-examination that after assaulting Tryambak Khairnar, appellants/accused persons had asked him to take care of Tryambak Khairnar during their return journey, after keeping him in the pickup jeep. Evidence of PW3 Bapu Bagul shows that, therefore, he rested head of Tryambak Khairnar on his thigh during the onward journey. Evidence on record shows that after assaulting Tryambak Khairnar he was not left to die but he was kept in the pickup jeep and he was taken to the village by appellants/accused persons.

27 Evidence of the Autopsy Surgeon is mentioning the injuries found on the dead body which are already put on record

in foregoing paragraphs. The injuries were on lower part of the dead body and not on vital parts such as head and chest. Weapons of assault were tommy and sticks. The victim was not left to die but was taken to the village and was reached to his house. The Medical Officer has not deposed about sufficiency of injuries found on the dead body to cause death in the ordinary course of nature. Therefore, intention cannot be attributed to appellants/accused persons. The Honourable Supreme Court in the matter of **Jawaharlal and Others vs. State of Punjab**⁶ has held that merely because the blow landed on a particular spot on the body divorced from the circumstances in which the blow was given, it would be hazardous to say that the first appellant intended to cause that particular injury. In that matter, despite the fact that the accused assaulted the deceased with a dragger and the injury was sufficient to cause death in the ordinary course of nature, with this observation, the Honourable Apex Court has converted the conviction from Section 302 of the Indian Penal Code to one under Section 304 (Part II) of the Indian Penal Code on the ground that there was no intention to

⁶ AIR 1983 SC 284

inflict the said injury. Similarly, in the case in hand, the assault was by sticks and tommy and the material on record does not indicate that appellants/ accused persons while causing injuries to the lower part of body of the deceased had intended to cause his death. No doubt left kidney and urinary of the deceased was found to be ruptured, but merely because of this effect of the external injury, it is not possible to infer that appellants/accused persons intended to cause such bodily injury to the victim as is likely to cause his death. It cannot be said that the blows were intended to cause such fatal injuries that would have likely to give result of death of Tryambak Khairnar. At this juncture, it is apposite to quote observations of the Honourable Apex Court in the matter of **Khuman Singh vs. State of Madhya Pradesh**⁷ found in paragraph 11 of the report. It reads thus :

“11 Keeping these principles in mind and applying them to the facts of this case we find that the occurrence took place suddenly. There was no premeditation on the part of the appellants and quarrel really arose from a trivial issue. The parties had danced all night and nothing untoward had

⁷ 2004 DGLS (SC) 1083

happened except this small incident. Thereafter they proceeded towards their respective villages. It is not the case of the prosecution that the appellants were armed with deadly weapons. Some of them were carrying lathis, as are usually carried by the tribals in that part of the State, and had not made any special preparation for the assault. Some others had just picked up stones when the deceased was overpowered, and assaulted him. It is, no doubt, true that they assaulted the deceased in such a manner that the deceased suffered several fractures, but the injury which caused the death of the deceased was the one suffered by him on account of the rib bone puncturing the liver. We are convinced that this injury was not intended by the appellants, and the injury suffered by the deceased on his liver was at best accidental. We therefore, hold that [Section 300](#) "thirdly" [IPC](#) is not attracted, and it cannot be said that the appellants intended to cause any injury to the liver which perhaps proved fatal. There is no evidence to suggest that any of the other injuries suffered by him was sufficient to cause death in ordinary course of nature."

28 Having considered all the relevant facts, I am of the considered opinion that the prosecution has made out the offence punishable under Section 304 (Part II) of the Indian Penal Code and not the one falling falling under Section 304 (Part I) of the Indian Penal Code. Hence, conviction of appellants/accused persons for the offence punishable under Section 304 (Part I) of the Indian Penal Code is required to be quashed and set aside. Therefore the order :

ORDER

- i) The appeal is partly allowed.

- ii) Conviction of appellants/accused persons under Section 304 (Part I) of the Indian Penal Code and the resultant sentence is quashed and set aside. Instead, they are convicted for the offence punishable under Section 304(Part II) of the Indian Penal Code. They are sentenced to suffer rigorous imprisonment for 8 years apart from

payment of fine of Rs.25,000/- by each of them. In default of payment of fine, appellants/accused persons are sentenced to suffer further rigorous imprisonment for 3 months, by each of them.

- iii)** If appellants/accused persons have already undergone the sentence now imposed on them, they shall be set at liberty forthwith, if not required in any other case.

(A. M. BADAR, J.)