IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.140 OF 2017**

1. Yuvraj Ananda Chavan
2. Komal Yuvraj Chavan
Both R/o. Chinch-Vihir,
Tal. Nandgaon, Dist. Nashik. ...Appellants
v/s.
The State of Maharashtra ...Respondent

Mr. Raviraj Paramane, for the Appellants
Ms. P.P. Shinde, A.P.P. for the State.

CORAM : **SMT SADHANA S. JADHAV &**
**N.J. JAMADAR, JJ.**

JUDGMENT RESERVED ON : **24th NOVEMBER, 2020**
JUDGMENT PRONOUNCED ON : **8th DECEMBER, 2020**

---

**JUDGMENT** (Per N.J.Jamadar, J.)

V. S. Parekar

Digitally signed by V. S. Parekar
Date: 2020.12.09 13:36:02 +0530

. This appeal is directed against the judgment and order dated 30th July, 2016 passed by the learned Additional Sessions Judge, Niphad in Sessions Case No. 86 of 2014 whereby the appellant/accused No. 1 Yuvraj and No. 2 Komal, husband-wife duo, came to be convicted for the offences punishable under section 120B, 302 and 201 read with 34 of Indian Penal Code, 1860 (the Penal Code) and sentenced to suffer imprisonment for life and pay fine of Rs. 1,000/- each, on the first and second

count, and rigorous imprisonment for three years and fine of Rs. 500/- each, on the third count, with default stipulation for having committed murder of Hirabai (deceased), the grand mother of accused No. 2 Komal, pursuant to a criminal conspiracy and also caused disappearance of evidence thereof in order to screen themselves from legal punishment.

2. The prosecution case, as unfolded by Deepali Khairnar (P.W.1), the first informant, runs as under:

a] Deepali, was residing with Hirabai, the deceased, her grand mother as her parents had passed away. Komal (A2) and Rajeshwari, her elder sister are married. Yuvraj (A1) is the husband of Komal (A2). First informant's younger brother Rakesh resides with Rajeshwari. Sons of the deceased namely Shivaji and Prakash also reside separately at Shingve, at a distance of about 3 km from the house of the deceased.

b] Accused Nos. 1 and 2 had came to the house of the deceased few days prior to the occurrence, which took place on the intervening night of 15th and 16th June, 2014. In the evening, preceding the night of occurrence, there was an altercation between the deceased and Komal(A2), who had

charged upon the deceased. After dinner, accused Nos. 1 and 2 went to sleep on the terrace. The deceased and the first informant slept on the separate cots (baaz) in the courtyard.

c] The first informant woke up in the middle of the night as her cot was moved aside by accused Nos. 1 and 2. She noticed that accused No. 2 Komal was standing beside a Bassil (Tulsi) plant. Accused No. 1 Yuvraj was armed with Acacia (Babhul) stick . Accused No. 1 Yuvraj gave blow by means of the said stick on the head of the deceased. The later screamed in pain. The first informant, however, did not wake up and pretended to sleep as she apprehended that she would also be assaulted. At about 5.30 a.m., the first informant tried to woke up the deceased. As the deceased did not respond, first informant called accused Nos. 1 and 2. Accused Nos. 1 and 2 suggested that they should approach the police station. After covering some distance on the way to police station, accused No. 1 asked the first informant to return home and not to disclose anybody that they had been to the house of the deceased. Accused No. 1 also threatened the first informant to inform the police that the deceased was done to death by her step brother Sagar.

d] The first informant initially informed the incident to the

cousin of her maternal uncle, who, in turn, apprised the sons of the deceased. Police arrived at the spot. However, in view of the threat administered by the accused, the first informant named Sharad, brother of accused No. 1 Yuvraj, as the culprit. Since the first informant was disabused of the fear, the first informant on the very next day gave a supplementary statement and disclosed the true facts. The statement of the first informant (Exhibit 27) under section 164 of the Code of Criminal Procedure, 1973 (the Code) came to be recorded wherein the first informant reiterated the true facts.

3. In the meanwhile, pursuant to the report (Exhibit 26) the crime was registered at C.R. No. 81 of 2014 at Chandwand police station for the offences punishable under sections 120B, 302 and 201 read with 34 of the Penal Code. The investigating officer visited the scene of occurrence and drew panchanama (Exhibit 28) under which Acacia stick (Article 5) came to be seized. Inquest (Exhibit 22) was held. The body of the deceased was sent for postmortem examination. The autopsy surgeon opined that the deceased died on account of 'head injury'. The investigating officer interrogated the witnesses and recorded

their statement. Seized articles, including the quilts and the weapon of offence, were sent for Forensic analysis. The accused were apprehended on 29th June, 2014. After obtaining the postmortem and C.A. reports and finding the complicity of the accused, charge sheet was lodged against the accused.

4. Upon committal, the learned Additional Sessions Judge framed charge for the offences punishable under sections 120B, 302 and 201 read with 34 of the Penal Code. The accused abjured their guilt and claimed for trial.

5. At the trial, to substantiate the indictment against the accused, the prosecution examined in all eight witnesses. The material witnesses are Deepali Prakash Khairnar (P.W.1), the first informant, Prakash Khatal (P.W.2), son of the deceased, Dr. Hemant Mandlik (P.W.5), the autopsy surgeon and Shrihari Bahirat (P.W.8), the investigating officer. After closure of the prosecution evidence, the accused were examined under section 313 of the Code. The accused did not lead any evidence in their defence which consisted of denial and false implication.

6. After evaluation of the evidence and material on record, the learned Additional Sessions Judge was persuaded to hold that the prosecution succeeded in establishing the guilt of the accused. The learned Additional Sessions Judge was of the view that the testimony of Deepali Khairnar (P.W.1), the first informant, inspired confidence and found ample corroboration in the evidence of Prakash Khatal (P.W.2) and the statement (Exhibit 27) recorded before the learned Magistrate under section 164 of the Code. Deepali Khairnar (P.W.1) had no animus to depose against accused No. 2, who was her real sister, and accused No. 1, the brother in law. In the opinion of the learned Additional Sessions Judge the conduct of accused Nos. 1 and 2 in fleeing away from the scene of occurrence after threatening the first informant to implicate another person for the murder of the deceased constituted a strong incriminating circumstance against them. Thus, the learned Sessions Judge entered the finding of guilt for the offences punishable under sections 120B, 302 and 201 read with 34 of the Penal Code and sentenced the accused, as indicated above.

7. Being aggrieved by and dissatisfied with the aforesaid

judgment of conviction and order of sentence, accused Nos. 1 and 2 are in appeal.

8. We have heard Mr. Raviraj Paramane, the learned counsel for the Appellants and Ms. P.P. Shinde, learned A.P.P. for the State at length. With the assistance of the learned counsels, we have perused the evidence and material on record.

9. Mr. Paramane, the learned counsel for the appellants submitted that the conviction of the appellants is singularly unsustainable. The learned Sessions Judge, according to the learned counsel for the appellants, completely misdirected himself in placing implicit reliance on the testimony of Deepali Khairnar (P.W.1), the first informant, who had discredited herself by reporting different and contradictory versions. The very presence of the appellants at the time and place of occurrence cannot be said to have been firmly established. The contemporaneous conduct of Deepali Khairnar (P.W.1) erodes the credibility of her claim. The learned Additional Sessions Judge thus could not have returned a finding of guilt on the strength of the testimony of Deepali Khairnar (P.W.1) without

there being any corroboration of whatsoever nature from any other source. A proper appraisal of the evidence leads to an inescapable inference that the guilt of the accused is not established beyond reasonable doubt, urged Mr. Paramane.

10. Ms. P.P. Shinde, the learned A.P.P, on the other hand, laboured to support the findings arrived at by the learned Additional Sessions Judge. It was submitted that the testimony of Deepali Khairnar (P.W.1), if found to be worthy of credence, sustains the conviction of the appellants. In the light of the relationship between the parties, according to the learned A.P.P, the first informant would not implicate the accused, her real sister and brother in law, and save the real culprit. Viewed from this perspective no fault can be found with the impugned judgment, urged Ms. Shinde.

11. To begin with, the relationship between the accused interse, and the first informant and deceased, is not in dispute. The fact that the first informant has been residing with the deceased since her parents passed away is also not in contest, nor the fact that the deceased was residing separately from her

sons Prakash Khatal (P.W.2) and Shivaji. The fact that the deceased met a homicidal death on the night intervening 15th and 16th June, 2014 is also, by and large, incontrovertible. Yet, the recourse to the evidence of Dr. Hemant Mandlik (P.W.5), the autopsy surgeon, becomes imperative as it bears upon the veracity of the prosecution case.

12. Dr. Hemant Mandlik (P.W.5) informed the Court that on 16th June, 2014 in between 12.10 p.m. to 1.15 p.m. he had conducted the postmortem examination and prepared the report (Exhibit 35). He claimed to have noticed the following external injuries on the person of the deceased.

> (1) Head completely crushed on the left side extending from frontal bone, parietal bone, occipital bone with exposed brain matter of 15 cm length, 6 cm wide and full thickness.
> (2) CLW 2x1x3 cm on the right arm below the bangles 5 cm away from the wrist joint.
> (3) Contusion 3 x 4 cm over the right hand on the dorsum of hand.
> (4) Contusion 1 x 1 cm on the left hand's middle finger.
> (5) CLW 1x 1 cm over left elbow Jt. posterior
> (6) Contusion 3 x 4 cm over right elbow posterior.
> (7) CLW 1 x 1 x 0.5 cm on the left wrist and 4 x 2 cm over a forearm.

13. Dr. Hemant Mandlik (P.W.5) also found fractures on base of skull, maxilla, mandible on left side and nazal bone. On internal examination, he noticed completely crushed head with skull fracture with exposed brain matter. Dr. Hemant Mandlik (P.W.5) claimed to have examined the alleged weapon of assault i.e. Acacia stick(Art.5) and opined that the fatal injury caused to the head might be possible by the said stick.

14. Evidently, the autopsy surgeon Dr. Hemant Mandlik (P.W.5) had noticed multiple external injuries on the person of the deceased, apart from the completely crushed head injury on the left side of the head extending from frontal bone, parietal bone, occipital bone with exposed brain matter. Indubitably, the impact was such that the head was completely crushed. This nature of injury establishes the homicidal death beyond the pale of controversy. The question which comes to the fore is whether the evidence adduced by the prosecution establishes the identity of the appellants as perpetrators thereof.

15. To this end, the recourse to the testimony of Deepali

Khairnar (P.W.1) is indispensable. In fact, the fate of the prosecution case hinges upon the sole testimony of Deepali Khairnar (P.W.1).

16. We have noted above the substance of the testimony of Deepali Khairnar (P.W.1) while narrating the prosecution version. The manner in which Deepali Khairnar (P.W.1), fared in the cross examination warrants consideration. Deepali Khairnar (P.W.1) conceded that her mother was a Railways employee. Sagar is her step brother. Her maternal uncles were of the view that Sagar be appointed in Railways on compassionate ground, in place of her mother. Deepali Khairnar (P.W.1), however, denied that Komal (A2) was insistent on securing employment for their younger brother Rakesh on compassionate ground. Deepali Khairnar (P.W.1) went on to concede that Bhagwan and Somnath, the cousins of her maternal uncle, have their houses adjacent to the house of the deceased. On the morning of 16th June, 2014 her maternal uncles Shivaji and Prakash (P.W. 2) as well as Bhagwan and Somnath had been to their house. Deepali Khairnar (P.W.1) went on to admit in no uncertain terms that at that time she

did not inform them that Yuvraj (A1) gave blow on the head of the deceased and killed her. Deepali Khairnar (P.W.1) candidly conceded that she had lodged first information report (Exhibit 26), the gist of which was recorded in the report(Exhibit 41).

17. Indisputably, the initial report (Exhibit 26) lodged by the first informant alleged that Sharad, the brother of Yuvraj (A1), had a grudge against the deceased as he was desirous of marrying Komal(A2) and yet her marriage was solemnized with Yuvraj(A1) by the deceased. Thus Sharad might have killed the deceased. Subsequently, the accusations were leveled against accused Nos. 1 and 2.

18. The claim of the prosecution that the first informant had initially reported an untrue version on account of threat given by accused Nos. 1 and 2 found favour with the learned Sessions Judge. Since the testimony of Deepali Khairnar (P.W.1) was found consistent with her statement (Exhibit 27), recorded under section 164 of the Code before the learned Magistrate, the learned Sessions Judge was persuaded to observe that there was no reason to disbelieve the evidence of Deepali

Khairnar (P.W.1), especially in view of the fact that she had no reason to depose against the accused. Whether this approach of the learned Sessions Judge is justifiable ?

19. The learned Sessions Judge sought to draw support to the testimony of Deepali Khairnar (P.W.1) from the evidence of Prakash Khatal (P.W.2), son of the deceased. Prakash Khatal (P.W.2) informed the Court that he rushed to the scene of occurrence after being informed by Mr. Gulab, his cousin. According to Prakash Khatal (P.W.2), Deepali Khairnar (P.W.1), narrated the events which transpired, commencing from the arrival of accused persons 4-5 days prior to the occurrence to accused threatening the first informant to lodge the report against Sagar, her step brother.

20. The evidence of Prakash Khatal (P.W.2) is bereft of any corroborative value. As indicated above, Deepali Khairnar (P.W.1) conceded in the cross examination that on 16th June, 2014, at about 7.00 am, when her maternal uncles including Prakash Khatal (P.W.2) had reached the scene of occurrence she had not informed them that Yuvraj (A1) assaulted the

deceased. This admission robs the testimony of Prakash Khatal (P.W.2) corroborative significance. Moreover, if Prakash Khatal (P.W.2) was aware of the alleged true state of affairs even before the first informant lodged the report (Exhibit 26), it defies comprehension as to how a completely divergent version could be reported to the police after an hour of the said disclosure by Deepali Khairnar (P.W.1).

21. The second pillar of support sought to be drawn to the testimony of Deepali Khairnar (P.W.1) was her statement (Exhibit 27) recorded under section 164 of the Code. It is true that nothing could be elicited in the cross examination of either Deepali Khairnar (P.W.1) or Shrihari Bahirat (P.W.8), the investigating officer, so as to throw a cloud of doubt over the regularity of the recording of the said statement. However, mere procedural regularity in recording of the statement under section 164 of the Code would not clothe such statement evidentiary value beyond its corroborative utility. Statement of a witness under section 164 of the Code is not a substantive evidence. It can only be used to contradict or corroborate the substantive evidence of the witness before the Court.

22. A profitable reference in this context can be made to a judgment o the Supreme Court in the case of **R Shaji vs. State of Kerala**[1] wherein the evidentiary value of a statement recorded under section 164 of the Code was expounded in the following terms:

> *26. Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161 Cr.P.C. can be used only for the purpose of contradiction and statements under Section 164 Cr.P.C. can be used for both corroboration and contradiction. In a case where the magistrate has to perform the duty of recording a statement under Section 164 Cr.P.C., he is under an obligation to elicit all information which the witness wishes to disclose, as a witness who may be an illiterate, rustic villager may not be aware of the purpose for which he has been brought, and what he must disclose in his statements under Section 164 Cr.P.C. Hence, the magistrate should ask the witness explanatory questions and obtain all possible information in relation to the said case.*
>
> *27. So far as the statement of witnesses recorded under Section 164 is concerned, the object is two fold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement, and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in Court should be discarded, is not at all warranted. (Vide: Jogendra Nahak & Ors. v. State of Orissa & Ors., AIR 1999 SC 2565; and Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd. & Ors., AIR 2000 SC 2901).*
>
> *28. Section 157 of the Evidence Act makes it clear*

1 (2013) 14 Supreme Court Cases 266

> *that a statement recorded under Section 164 Cr.P.C., can be relied upon for the purpose of corroborating statements made by witnesses in the Committal Court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 Cr.P.C., such statements cannot be treated as substantive evidence.*
>
> *29. During the investigation, the Police Officer may sometimes feel that it is expedient to record the statement of a witness under Section 164 Cr.P.C. This usually happens when the witnesses to a crime are clearly connected to the accused, or where the accused is very influential, owing to which the witnesses may be influenced. (Vide: Mamand v. Emperor, AIR 1946 PC 45; Bhuboni Sahu v. King, AIR 1949 PC 257; Ram Charan & Ors. v. The State of U.P., AIR 1968 SC 1270; and Dhanabal & Anr. v. State of Tamil Nadu, AIR 1980 SC 628).*
>
> *(emphasis supplied)*

23. It is legally impermissible to read the statement of a witness recorded under section 164 of the Code as if it is a substantive evidence. In the case at hand, we find that the trial Court was influenced by the consistency of the version of Deepali Khairnar (P.W.1) in her statement, recorded under section 164 of the Code, with the deposition before the Court. In the process the trial Court went on to draw support and sustenance to its finding by relying upon the statement (Exhibit 27) of Deepali Khairnar (P.W.1) recorded under section 164 of the Code, far in excess of its corroborative value.

24. A useful reference, can be made to a judgment of the Supreme Court in the case of **George and Others vs. State of Kerala and Another**[2] wherein, in the backdrop of the approach of the trial Court in the said case of according more than legally permissible value to a statement under section 164 of the Code, the Supreme Court observed that the trial Court ignored the fundamental rule of criminal jurisprudence that a statement of a witness recorded under section 164 of the Code can not be used as substantive evidence and can be used only for the purpose of contradicting or corroborating.

25. Instead of looking for formal consistency of the deposition with the statement recorded under section 164 of the Code, the learned Sessions Judge, in our view, ought to have posed unto himself pertinent question of reliability and trustworthiness of the evidence of Deepali (P.W.1) in the light of broad probabilities of the case and attendant circumstances. The fact that the first informant Deepali (P.W.1) had reported a version completely different from the deposition before the Court, while setting the law in motion, ought to have put the Court on guard.

2 (1998) 4 Supreme Court Cases 605.

26. Even if the case of the prosecution that the first informant had reported an untrue version with a view to save the accused or, for that matter, on account of the threat given by the accused, the incongruity in the claim of Deepali Khairnar (P.W.1) becomes stark. Deepali Khairnar (P.W.1) wants the Court to believe that accused Nos. 1 and 2 threatened her to implicate her step brother Sagar for the murder of the deceased. Yet, within hours of arrival of the police, Deepali Khairnar (P.W.1) lodged a report pointing out the niddle of suspicion against Sharad, the brother of accused No. 1. Even motive was attributed to Sharad, namely, the marriage of Komal (A2) with Yuvraj(A1).

27. It is not the case that the first informant Deepali Khairnar (P.W.1) declined to have narrated the said version. On the contrary, she disowned the correctness thereof. Deepali Khairnar (P.W.1) was a 13 years old girl when she lodged the report. It is not her claim that she was threatened or tutored to implicate Sharad. We find it rather difficult to persuade ourselves to agree with the position that Deepali Khairnar (P.W.1) would have invented a version to falsely implicate

Sharad despite her being allegedly threatened by accused No. 1 to implicate her step brother Sagar.

28. This propels us to the aspect of reliability of the claim of Deepali Khairnar (P.W.1) of having witnessed the assault on the deceased by accused No. 1. Deepali Khairnar (P.W.1) claimed to have been woken up as her cot was moved aside. Yuvraj (A1) allegedly gave a blow by means of Acacia stick. Deepali Khairnar (P.W.1) wants the Court to believe that despite noticing the said assault she pretended to be asleep as she feared for her life. Whether this claim appeals to human credulity ?

29. It is pertinent to note that the medical evidence belies this claim of single blow by means of Acacia stick on the head of the deceased. Dr. Hemant Mahadik (P.W.5), the autopsy surgeon, found as many as six other injuries, primarily on the hands of the deceased (extracted above). Some of those injuries were also noted in the inquest (Exhibit 22). The completely crushed head injury coupled with aforesaid external injuries on the person of the deceased lead to two legitimate inferences. One, a

single blow by the stick would not have resulted in a completely crushed head injury. Multiple blows were unleashed by the assailant. Two, the deceased tried to fend off the blows and sustained injuries on her hands which were in the nature of defence wounds. The possibility of the deceased having tried to fend off the blows in an awakened state can not be ruled out.

30. The conduct of Deepali Khairnar (P.W.1) is also of material significance. Undoubtedly, in the wake of such murderous assault, a 13 year old girl would be scared. However, after finding the deceased not giving any response, when she tried to wake up her at about 5.30 am, Deepali Khairnar (P.W.1) would not have again called the accused, who were sleeping on the terrace, having known that the accused Nos. 1 and 2 assaulted the deceased. There is evidence to indicate that the houses of Bhagwan and Somnath, her maternal uncles were adjacent to the house of the deceased. In such situation it does not stand to reason that Deepali Khairnar (P.W.1) would have solicited the assistance of the very assailants.

31. In the aforesaid view of the matter, a genuine doubt arises as to whether Deepali Khairnar (P.W.1) had the opportunity to witness the assault and observe the feathers of the assailants. The contemporaneous conduct of Deepali Khairnar (P.W.1), on the contrary, indicates that the possibility of Deepali Khairnar (P.W.1) having found the deceased in fatally injured condition when she woke up in the early morning of 16th June, 2014, can not be ruled out firmly.

32. There is no independent evidence to show that the accused Nos. 1 and 2 were present in the house of the deceased since 4-5 days prior to the occurrence, direct or circumstantial. Nor there is evidence to indicate that accused Nos. 1 and 2 made themselves scares after the occurrence. In the absence of any other evidence to connect the accused with the crime, the sole testimony of Deepali Khairnar (P.W.1) in the light of the aforesaid analysis, in our view, appears too fragile to sustain the guilt of the accused. To sum up, the evidence of Deepali Khairnar (P.W.1) does not induce the necessary assurance to come to the conclusion that the guilt of accused Nos. 1 and 2 is established beyond reasonable doubt.

33. The upshot of the aforesaid consideration is that the impugned judgment of conviction is liable to be set aside and the appeal deserves to be allowed. Hence, the following order.

**ORDER**

a] The appeal stands allowed.

b] The impugned judgment of conviction for the offences punishable under sections 120B, 302 and 201 read with 34 of the Penal Code and the sentence stands set aside.

c] The appellants/accused No. 1 Yuvraj Ananda Chavan and No. 2 Komal Yuvraj Chavan stand acquitted of the offences punishable under sections 120B, 302 and 201 read with 34 of the Penal Code.

d] The appellants/accused No. 1 Yuvraj Ananda Chavan and No. 2 Komal Yuvraj Chavan be released forthwith if not required to be detained in any other case.

e] The fine, if paid, be refunded.

**(N.J.JAMADAR, J.)** **(SMT SADHANA S. JADHAV, J.)**