
(2018) 07 BOM CK 0014
In the Bombay High Court
Case No : Criminal Appeal No. 625 Of 2005

Manohar John Sable And Another	Vs	APPELLANT
State Of Mah.Thr.Pso Akola		RESPONDENT

Date of Decision : 06-07-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302
Code of Criminal Procedure, 1973 — Section 169, 306(4)(a)
Indian Evidence Act, — Section 114, 114(b), 133

Citation : (2018) 07 BOM CK 0014

Hon'ble Judges : P. N. DESHMUKH, M. G. GIRATKAR, J

Bench : Division Bench

Advocate : Suyash Agrawal, S. V. Sirpurkar, H. N. Jaipurkar

Final Decision : Allowed

Judgement

M.G. Giratkar, J

1. Appellants have assailed the judgment of conviction awarded by learned 2nd AdÂhoc Additional Sessions Judge, Akola dated 29Â10Â2005 in

Sessions Trial No. 129/2004, by which they are sentenced to suffer life imprisonment each and to pay fine of Rs. 500/each in default of which each of them has to suffer S.I. for 50 days only.

2. The case of prosecution against the appellants (hereinafter referred as accused) in short is as under.

(i) Ashok @ Avan John Tayade was a Gangman working at Lehgaon Railway Station on Murtizapur Â Daryapur narrow gauge railway line. His wife

Lalita along with her children residing in a rented railway quarter near to Murtizapur Railway Station. Ashok Tayade used to come to Murtizapur on weekly off. Accused nos. 2 and 3 were also working as Railway Gangmen at

Murtizapur.

(ii) Deceased Ramesh Laxman Ahire was working as a Railway Gangman at Murtizapur. Husband of Lalita normally used to stay away from the

house and used to come to Murtizapur once in a week. Lalita developed love affair with deceased Ramesh Ahire. They started illicit sexual relations.

On 6th 1994 at about 4.30 to 5.00 a.m., Ramesh Ahire went to the house of Lalita and had sexual intercourse with her. After sometime, he left her

house by rear side door telling her that he would entrust his duty to another watchman and return back shortly.

(iii) Accused nos. 2 and 3, namely Manohar and Milind entered in the house from front door, immediately, after departure of Ramesh. Both accused

Manohar and Milind told Lalita to allow them to have sexual intercourse with her. Initially, she refused. However, accused persons threatened to

inform her husband about her illicit relations with Ramesh. Accused no. 2 Manohar lied on a cot with her and was about to commence sexual

intercourse with her. During that time, deceased Ramesh came back and saw accused no. 2 Manohar lying with Lalita. He got annoyed and became

angry. He abused both the accused persons and also Lalita. He slapped Lalita saying that she was not faithful (xn~nkj). Lalita told him that even her

husband never abused or slapped her and how he could dare to beat her. Scuffle took place between accused nos. 2 and 3 (appellants) and Ramesh

Ahire. During the scuffle, accused no. 3 Milind fell down Ramesh on cot. Accused no. 2 Manohar caught his legs and Lalita caught his hairs.

(iv) Accused no. 3 Milind killed Ramesh by pressing his throat. After he died, both accused nos. 2 and 3 left the house. After the departure of

accused Manohar and Milind, Lalita changed her cloths and went to railway platform, requested accused nos. 2 and 3 to remove dead body of

Ramesh from her house otherwise she would be exposed. Accused no. 2 accompanied her to her house. She requested him to call cousin brother of

deceased, namely, Fakira. Accused no. 2 did not go to the house of Fakira. After sometime, Lalita herself went to the house of Fakira. She along with

Fakira and other 2-3 persons went to Dr. Wankhede. Dr. Wankhede came to her house and examined deceased Ramesh and declared him dead. Dr.

Wankhede advised them to take deceased to Government Hospital.

(v) Ramesh Ahire was missing from his duty since evening of 5th 1994.

Mukadam (Gangman) Rajaram Sonone came to know that Ramesh Ahire was serious and he went to the house of Lalita and saw the dead body. Thereafter he lodged report at Murtizapur Police Station. Initially, A.D. was registered.

(vi) Mother of deceased suspected Lalita and her husband for causing death of Ramesh. Lalita and her husband were arrested by the police. Both were remanded to police custody. Accused Lalita became approver. She was released on bail on 31/08/1994. Accused nos. 1 and 2 came to be arrested. Statement of accused no. 1 Lalita was recorded by Judicial Magistrate First Class. She has stated in her statement that both accused killed deceased.

(vii) Charge was framed at Exhibit 17 for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. Prosecution has examined 10 witnesses. After hearing the prosecution and defence, learned trial Court convicted accused nos. 2 and 3 (appellants), hence, the present appeal.

3. Heard learned counsel Shri Suyash Agrawal appearing on behalf of Shri Sirpurkar, learned counsel for the accused/appellants. He has pointed out cross-examination of P.W. 2 Lalita (accused no. 1). Learned counsel has submitted that evidence of approver (P.W. 2) is not corroborated by any other evidence. Learned counsel has submitted that as per her admission in the cross-examination, at Exhibit 97, she has specifically stated that deceased Ramesh started sexual relations with her. On 6/7/1994 at about 5.00-5.30 a.m., Ramesh had sexual intercourse with her and left her place from rear door of her house. Accused nos. 2 and 3 came and wanted to have sexual intercourse with her. During that time, Ramesh again came. He abused her saying that 'तुम्हारी पत्नी नहीं, बल्कि एक दुष्ट महिला' (not faithful lady). Ramesh slapped her twice. She has further admitted that she told Ramesh that her husband never beat her and how could he beat her. She caught hold of his hair on head, then he fell on the cot and became speechless. Both the accused went away. She went to the platform and requested accused Milind and Manohar to dispose the dead body of Ramesh. They did not help her. Therefore, she had taken their name as accused.

4. Learned counsel has submitted that this material admissions of accused no. 1 (P.W. 2) washed out the case of prosecution. Her evidence is not corroborated by any material evidence. Learned trial Court wrongly recorded its findings, hence, prayed to allow the appeal.

5. Heard learned Additional Public Prosecutor Ms. Jaipurkar for the State/respondent. She has submitted that evidence of P.W. 2 Lalita is well corroborated by medical evidence and evidence of Fakira and Rajaram. Evidence of Fakira and Rajaram show that her husband was not present in the house. Evidence of P.W. 2 Lalita shows that accused nos. 1, 2 and 3 killed deceased by pressing his neck. Postmortem report, Exhibit 48 shows that cause of death was due to throttling. Learned Additional Public Prosecutor has submitted that trial Court rightly convicted the accused, hence, appeal is liable to be dismissed.

6. Conviction of accused are based on the evidence of approver. Accused no. 1 (P.W. 2) taken part in the commission of crime. She was arrested along with her husband. They were in police custody. She made application to become approver. Her statement was recorded. In her statement, she has stated that appellants killed deceased by throttling. After recording her statement, she was released on bail. Her husband Ashok Tayade came to be discharged under Section 169 of the Code of Criminal Procedure.

7. Evidence of approver is to be scrutinized very carefully. Before placing reliance on the evidence of approver, Court has to keep in mind Section 114

and Section 133 of the Indian Evidence Act. Section 114 reads as under :Â?

114. Court may presume existence of certain facts. Â The Court may presume the existence of any fact which it thinks likely to have happened,

regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume Â?

(a) Â?Â?Â?Â?

(b) That an accomplice is unworthy or credit, unless he is corroborated in material particulars ;

(c) Â?Â?Â? Â?Â?Â?Â?Â?Â?

Section 133 reads as under :Â?

133. Accomplice. Â 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.

8. Conviction can be based on the evidence of approver but as per Section 114, the care has to be taken by the Court that it should corroborated in material particulars. The combined effect of Section 114(b) and Section 133 of the Evidence Act is that though a conviction can be based on uncorroborated testimony of an accomplice but as a rule of prudence, it is unsafe to place reliance on the uncorroborated testimony of an approver as per illustration (b) of Section 114 of the Evidence Act.

9. It is observed by Hon'ble Supreme Court in the case of Suresh Chandra Bahri Vs. State of Bihar reported in AIR 1994 SC 2420 as under : Â?

Section 133 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 one read S. 133 with illustration (b) of S. 114 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 S. 133

illustration (b) to S. 114 lays down â??that an accomplice is unworthy of credit, unless he is corroborated in material particularsâ?. A combined

reading of the two provisions that is S. 133 and illustration (b) of S. 114 go 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 S. 133 a conviction is â??not illegal or in other words not unlawfulâ?

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 the illustration (b) of S. 114 with a view to emphasise that the rule contained therein as well as

in S. 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 S. 114 is placed in Chap VII of Evidence Act while S. 133 is

inserted in Chap. IX of the Act. The better course was to insert the illustration (b) to S. 114 as an explanation or in any case as proviso to S. 133 of

the Act instead of their insertion at two different places and that too in different chapters of Evidence Act. In any case since an approver is guilty

companion in crime and, therefore, illustration (b) to S. 114 provides a rule of caution to which the Courts should have regard. It is now well settled

that except in circumstances of special nature it is the duty of the Court to raise the presumption in S. 114 illustration (b) and the Legislature requires

that the Courts should make the natural presumption in that section.

Though a conviction can be based on uncorroborated evidence of an accomplice but as a rule of prudence it is unsafe to place reliance on the

uncorroborated testimony of an approver as required by illustration (b) of S. 114.

Â 10. In the present case, conviction of both the appellants is based only on evidence of approver i.e. accused Lalita (P.W. 2). Learned trial Court in

paragraph 37 of the judgment has observed as under : Â?

â??Before parting with the judgment, I would like to mention that the evidence of approver Lalita is sufficient enough to infer that she had not shown

any sign of hesitation in declaring her illicit relations with deceased Ramesh prior to incident â?|..â??

In paragraph 38 of the judgment, it is observed by learned trial Court that :Â?

â??I would like to give final touch to the evidence of Lalita, an approver which is corroborated in material particulars by Fakira, Dr. Wankhede and

Kashiram and though they were crossÂ?examined at length by defence, they found stick up to their examinationÂ?inchief. â?|.â??

11. The findings recorded by the trial Court perfectly not in consonance with the evidence of witnesses on record. Learned trial Court not considered

the crossÂ?examination of approver (P.W. 2). She has specifically given her admissions in her crossÂ?examination as per the evidence on record.

There is no dispute that statement of Lalita was recorded by Chief Judicial Magistrate, Akola. Thereafter case was committed to the Court of

Sessions. Charge was framed. Then Sessions Judge Shri Bhatia proceeded to

record the evidence. The case was fixed for statement of accused.

During the course of argument, it was submitted that as per the requirement of Section 306(4)(a) of the Code of Criminal Procedure, evidence of

approver was to be recorded by the Judicial Magistrate First Class and opportunity ought to have been given to the accused to cross-examine the

approver. Said case was again sent back to the Court of Judicial Magistrate First Class, Murtizapur. Thereafter Judicial Magistrate First Class,

Murtizapur recorded the evidence of P.W. 2 Lalita and committed the case to the Court of Sessions. During the course of cross-examination, her

evidence recorded by Judicial Magistrate First Class was pointed out to her. Material contradictions are proved by the defence.

12. As per the evidence recorded by Judicial Magistrate First Class in Sessions Trial No. 200/1994 (Old R.C.C. No. 203/1994, Exhibit 97), P.W. 2

Lalita has specifically stated that "she had love relations with deceased Ramesh before 4-5 months of the incident. He used to visit her house. On

6-7-1994 at about 5.30 a.m., her both sons were sleeping. Deceased Ramesh knocked the door. She opened the door. He had sexual intercourse

with her. After 15 minutes, he went away. He told her that he would come back. Thereafter accused Milind and Manohar came inside her house.

Accused Manohar wanted to have sex with her. Thereafter Manohar forcibly laid on her cot and made her gown upward. At that time Ramesh came

there. He started abusing her by saying that she is nalayak, gaddar etc. Thereafter Ramesh started fighting with both the accused. Ramesh beat her.

Then she asked him as to how he can beat her, her husband never beat her. She caught hold hairs of Ramesh. Ramesh fell on cot and became

speechless. Thereafter Milind and Manohar went away." In her further cross-examination, she has specifically stated as under : "It

"It is true to say that P.S. Murtizapur arrested my husband in this offence. It is true to say that I was in jail in this offence for a period of 1½

months along with my husband. It is true to say that Court at Murtizapur granted me bail but bail of my husband was not granted. It is true to say that

while I was in jail, Murtizapur police used to bring me at Court at Murtizapur. It is true to say that I had written letter to the Court while I was in Jail at

Akola. It is at Exh. 45. I had requested for grant of pardon and I am ready to disclose the material facts regarding the offence. We both were in jail.

Police discharged my husband and granted pardon in this case. Bail was granted by the Court of Magistrate to me.â??

13. Above admissions clearly show that accused no. 1 Lalita and her husband were arrested in the crime. She has made both the accused nos. 2 and

3 scapegoats by making false statements against them. It is clear from her further admissions in Exhibit 97 which are as under :â??

Accused no. 2 and 3 came from back door. That time, accused nos. 2 and 3 were inside the room. She, accused, her children were present in the

room. Accused Manohar took her gown upward. He was forcing her to have sex. She did not shout for help. At that time, deceased Ramesh entered

in the room. Deceased Ramesh abused her and slapped her. He abused her saying â??rw ukyk;d vkgs] xn~nkj vkg sâ?. Ramesh slapped her twice.

She became angry. She has admitted that â??she told Ramesh that her husband do not beat her and how could he beat her. She caught hold his hairs

of head. He fell on the cot. After falling down, he became speechless. Thereafter accused went outside the house.â?? These particular admissions

show that she herself killed deceased. Her specific admission show that accused nos. 2 and 3 not taken any part for killing deceased.

14. P.W. 2 (accused no. 1) has further stated in her crossâ??examination in Exhibit 97 (recorded by Judicial Magistrate First Class) that after changing

the clothes, she went towards railway platform. She saw accused Milind on railway platform. She told him to call brother of deceased Ramesh.

Brother of Ramesh, namely, Fakira came to her house. She has further stated in her crossâ??examination that when she met Milind and Manohar for

the first time on platform near pan shop on the day of incident, she called Milind and Manohar. She had shown accused Milind that deceased Ramesh

was lying on the cot and he should bring Fakira. She had wished that accused Milind, Manohar and Fakira should take deceased Ramesh to hospital.

Accused did not take deceased Ramesh to hospital. She was fearing that if her husband came to know that deceased Ramesh was lying in her house,

then he would be defamed and if her husband came to know about the illicit relations between herself and Ramesh, then she herself and her children

would be on streets. She has specifically admitted in her crossâ??examination as under : â??

â??It is true to say that accused persons did not behaved as I wished. It is true to say that I had taken their name (of accused) in this case as they did

not behave as I wished.â??

15. The cross-examination of P.W. 2 (accused no. 1) clearly shows that she has falsely implicated accused nos. 2 and 3. This particular evidence is

not properly considered by the trial Court. On the other hand, learned trial Court while recording its findings came to the conclusion that evidence of

P.W. 2 Lalita is corroborated in material particulars by Fakira, Dr. Wankhade and Kashiram. This particular finding is without any material evidence.

16. Evidence of Fakira (P.W. 6) only shows that on 6/7/1994, accused Lalita came to his house at about 6.00 a.m. and requested him to come to

her house. She told him that Ramesh was lying in her quarter. He went to the house of accused no. 1. He went to Doctor. Doctor examined the body

of Ramesh and declared Ramesh dead. Except this, he has not stated anything more.

17. P.W. 4 Kashiram has stated in his evidence that Avon Tayade was on duty on 5/7/1994. He was on duty at Lehgaon. On Friday, he used to

come to Murtizapur. He has admitted in his cross-examination that bus route is available from Murtizapur to Lehgaon. Taxi service was also available

in case of urgent work. Gangmen used to go to their houses as per their convenience. This evidence is not helpful to the prosecution to corroborate the

testimony of P.W. 2. Even it is assumed that her husband was on duty on 5/7/1994, as per the evidence of Kashiram, duty hours were from 7.30

a.m. to 5.00 p.m. Distance from Lehgaon to Murtizapur is about half an hour by bus. Bus and Taxi services are available. Therefore, it cannot be said

that in the night of incident, her husband was at Lehgaon. The possibility cannot be ruled out that her husband came to Murtizapur in the night of 5/7/1994.

7/1994.

18. As per the defence, her husband saw deceased Ramesh in compromising position with his wife Lalita and, therefore, they both killed deceased.

This possibility cannot be ruled out and this is supported by the evidence of Investigating Officer. He has stated in his cross-examination that initially,

Lalita and her husband both were arrested in the crime. They were in jail for about 1½ months. After the statement of Lalita, her husband was

discharged under Section 169 of the Code of Criminal Procedure. Lalita was also released on bail. Therefore, evidence of Kashiram is also not

corroborating to the evidence of P.W. 2 (Lalita).

19. Learned trial Court recorded finding that evidence of P.W. 2 is corroborated by the evidence of Dr. Wankhade. P.W. 7 Dr. Wankhade has stated

in his evidence that on 6th 1994, he was called at the house of Lalita. He examined deceased and found that deceased Ramesh was died. Except

this, he has not stated anything more. Therefore, it cannot be said that this evidence is corroborated to the evidence of P.W. 2.

20. Evidence of prosecution witnesses Kashiram, Fakira and Dr. Wankhade are not corroborated with the evidence of Lalita. The Court has to be

very careful while relying on the evidence of approver as per illustration (b) of Section 114 of the Evidence Act.

21. Hon'ble Supreme Court in the case of Central Bureau of Investigation Vs. Ashok Kumar Aggarwal and anr. [(2013) 15 SCC 222] has observed

as under :

21. Section 114 Illustration (b) and Section 133 of the Evidence Act, 1872 provide for the same that an accomplice is a competent witness and that his

testimony can be relied upon but depending upon the quality of the evidence. While Section 133 reads that "Accomplice is a competent witness and

a conviction can be maintained on his evidence", Illustration (b) of Section 114 provides for presumption that "an accomplice is unworthy of

credit, unless he is corroborated in material particulars". Thus, in practice conviction of a person on such evidence should not take place except under

very rare and exceptional circumstances. Usually substantial corroboration is required. This provision incorporates a rule of caution to which the court

must have regard. (Vide Sk. Zakir v. State of Bihar, Niranjan Singh v. State of Punjab and State of T.N. v. Suresh.)

22. In Bhiva Doulu Patil v. State of Maharashtra this Court considered the judgment in Bhuboni Sahu vs. R. wherein it has been observed as under :

(Bhuboni Sahu case, IA p. 157)

"... The danger of acting on accomplice evidence is not merely that the accomplice is on his own admission a man of bad character who took part

in the offence and afterwards to save himself betrayed his former associates, and who has placed himself in a position in which he can hardly fail to

have a strong bias in favour of the prosecution ; the real danger is that he is telling a story which in its general outline is true, and it is easy for him to

work into the story matter which is untrue. He may implicate ten people in an

offence, and the story may be true in all its details as to eight of them, but untrue as to the other two, whose names have been introduced because they are enemies of the approver. This tendency to include the innocent with the guilty is peculiarly prevalent in India, as Judges have noted on innumerable occasions, and it is very difficult for the court to guard against the danger.â??

23. This Court placing reliance on the above, held as under : (Bhiva Doulu Patil case, SCC p. 601, para 7)

Â??7. The combined effect of Sections 133 and 114, Illustration (b) may be stated as follows : According to the former, which is a rule of law, an accomplice is competent to give evidence and according to the latter which is a rule of practice it is almost always unsafe to convict upon his testimony alone. Therefore though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal yet the courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars.â??

22. Learned trial Court wrongly appreciated the evidence. It has not taken into consideration the material admissions given by P.W. 2 Lalita. Exhibit

97, the evidence recorded by the Judicial Magistrate First Class washed out whole case of prosecution. This particular document, Exhibit 97 was

shown to her during the trial in the crossÂ?examination. She has denied some portion but those portions are exhibited. Moreover, Exhibit 97 was

recorded by the Judicial Magistrate First Class.

23. Her admissions in crossÂ?examination in Exhibit 97 clearly shows that she was in love with deceased Ramesh since 4Â?5 months before the

incident. Ramesh started sexual intercourse with her. On 67Â?1994, at about 5.30 a.m. Ramesh had sexual intercourse with her and went away saying

that he would return back. During that time accused nos. 2 and 3 reached there. They wanted to have sex with her. Accused Manohar lifted her

gown upward. That time, Ramesh reached there. Ramesh became angry. He slapped her twice and abused her saying â??rw ukyk;d vkgs] xn~nkj

vkg sâ?. P.W. 2 Lalita told Ramesh that her husband never beat her and how he could beat her. She caught hold his hairs, then he fell on the cot and

became speechless. Thereafter she went to platform and requested accused Milind and Manohar to come to her house. She requested both the

accused to take the dead body from her house but they refused. She has specifically admitted that accused Manohar and Milind not behaved as per her wish, therefore, she took their names in this case.

24. Material admissions brought on record by the defence not taken into consideration by the trial Court. Learned trial Court wrongly recorded its

findings that evidence of P.W. 2 Lalita is corroborated in material particulars by the evidence of Fakira, Dr. Wankhade and Kashiram. In fact Fakira,

Kashiram and Dr. Wankhade not stated anything about the incident. Fakira and Dr. Wankhade reached after the incident. Kashiram has only stated

that on 5th 7th 1994, her husband was on duty.

25. Evidence of P.W. 2 Lalita is not reliable because her cross-examination shows that her residential room/quarter was on the road. There are many

quarters. She did not make any hue and cry. Her both children were sleeping, as per her evidence. It is pertinent to note that her elder son was aged

about 10 years and younger was 8 years. As per her evidence, there was quarrel between deceased, Ramesh and both the accused. If it was so, then

definitely, her children would have woke up. None of the children was examined by the prosecution. Learned trial Court not taken into consideration

all the material evidence supporting to the defence and wrongly convicted the appellants. Hence, we are of the view that appeal is liable to be allowed.

In the result, we proceed to pass the following order.

(i) The appeal is allowed.

(ii) Accused nos. 2 and 3, namely, Manohar John Sable and Milind Atmaram Pawar are hereby acquitted of the offence punishable under Section 302

read with Section 34 of the Indian Penal Code.

(iii) Accused/appellants are on bail. Their bail bonds stand cancelled.

(iv) R & P be sent back to the trial Court.