

(2002) 10 BOM CK 0119
In the Bombay High Court
Case No : Criminal Appeal No. 298 of 1998

Patiram

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 28-10-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Penal Code, 1860 (IPC) — Section 300

Citation : (2003) CriLJ 4718

Hon'ble Judges : S.T. Kharche, J;D.D. Sinha, J

Bench : Division Bench

Advocate : Rajendra Daga, for the Appellant; A.S. Fulzele, Addl. Public
Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

D.D. Sinha, J.—Heard Mr. Daga, learned counsel for the appellant and Mr. Fulzele, learned Additional Public Prosecutor for the respondent-State.

2. The appellant-accused has challenged the judgment and finding of conviction recorded by the trial Court in the present appeal for the offence punishable u/s 302 of the Indian Penal Code.

3. Mr. Daga, learned counsel, contended that in the instant case the prosecution has examined eleven prosecution witnesses. However, the material witnesses are Istari Sakharwade (PW-1), the father of the deceased, Shankar (PW-2), who claims to be an eye-witness to the incident, and is the elder brother of the deceased Someshwar, Smt. Lalitabai (PW-3), the mother of the deceased, Smt. Gopikabai (PW-4), another eyewitness, and Dr. Gopal (PW-8). It is contended that the other witnesses, i.e., Patiram (PW-5) and Dnyaneshwar (PW-6) are the Panch witnesses examined by the prosecution in order to prove seizure of clothes of accused, Spot Panchanama, Inquest Panchanama respectively. Janba (PW-7) is, a witness who, tried to get an ambulance to carry the injured to the hospital. Gangadhar (PW-9) is the Police Constable, who had carried the axe to the

Medical Officer for obtaining his opinion. Mahendraraj (PW-10) is Asstt. Police Inspector, who has registered the First Information Report (Exh. 31) and thereafter handed over the investigation to Rajendra (PW-11), who is Police Sub-Inspector and the Investigating Officer in the present case.

4. Mr. Daga, learned counsel, contended that the direct evidence adduced by the prosecution is that of Shankar (PW-2) and Gopikabai (PW-4). It is submitted that during the course of investigation, the prosecution has not recorded the statements of these witnesses u/s 161 of the Criminal Procedure though they were available and there is no reason given by the Investigating Officer for not recording their statements u/s 161 of the Code. It is further contended that Shankar (PW-2) and Gopikabai (PW-4) were not produced by the Investigating Officer before the Magistrate who had recorded their statements u/s 164 of the Criminal Procedure Code. It is contended that these two witnesses on their own went to the Court of the Magistrate and asked the Magistrate to record their statements u/s 164. It is contended that the Magistrate recorded the statements of these witnesses u/s 164 and those statements were kept in a sealed cover and they were never made available to the defence in order to prove the omissions and contradictions.

5. Mr. Daga, learned counsel, contended that the Apex Court in *Jogendra Nahak and Others Vs. State of Orissa and Others*, , has held that Section 164 of the Code of Criminal Procedure does not empower a Magistrate to record statement of witness on his request even though asked for by Investigating Agency to do so. It is contended that in view of the ratio laid down by the Apex Court in the above referred case, the statements of Shankar (PW-2) and Gopikabai (PW-4) (alleged eye-witnesses to the incident) recorded by the Magistrate on the request made by these witnesses cannot be admitted in the evidence and the same also cannot be relied on. It is submitted that if the evidence of these two eye-witnesses is excluded, then the remaining evidence adduced by the prosecution is totally inadequate to bring home the guilt of the accused for the offence u/s 302 of the Indian Penal Code. The learned counsel, therefore, contended that the finding of conviction recorded by the trial Court relying mainly on the evidence of Shankar (PW-3) and Gopikabai (PW-4) is not sustainable in law in view of the law laid down by the Apex Court, and, therefore, the judgment and order impugned in the present appeal may be quashed and set aside.

6. Mr. Fulzele, the learned Additional Public Prosecutor, contended that Rajendra (PW-11), the Investigating Officer, in his examination-in-chief, has stated that he produced Shankar (PW-2) and Gopikabai (PW-4) before the Magistrate for recording their statements by the Magistrate u/s 164 of the Criminal Procedure Code. However, the learned Additional Public Prosecutor does not dispute the fact that it has come in the cross-examination of the Investigating Officer that the witnesses, whose statements were recorded by the Magistrate, declined to tell him anything and he did not take any note of it and this witness only intimated the witnesses to go to the Court for getting their statements recorded by the

Magistrate u/s 164. It is also not disputed that it has further come in the cross-examination of this witness that he did not know how and with whom these witnesses appeared in the Court. The Additional Public Prosecutor contended that the Investigating Officer has no reason to tell falsely in his examination-in-chief wherein he has categorically stated that he himself had produced these two witnesses before the Magistrate for recording their statements u/s 164 of the Criminal Procedure Code and, therefore, though this witness has given slightly different version in his cross-examination, it does not demonstrate that these witnesses, i.e., Shankar (PW-2) and Gopikabai (PW-4), were not produced by him before the Magistrate. It is contended that in the facts and circumstances of the present case, the ratio laid down by the judgment of the Apex Court is not applicable.

7. The Additional Public Prosecutor has also not disputed the fact that though the prosecution has examined eleven witnesses, the prosecution case is primarily based on the evidence of Istari (PW-1), Shankar (PW-2), Lalitabai (PW-3), Gopikabai (PW-4) and Dr. Gopal (PW-8) and out of these witnesses, Shankar (PW-2) and Gopikabai (PW-4) are the eye-witnesses to the incident in question. It is contended that these two witnesses have unfolded the material particulars of the prosecution case in their respective testimonies and the same are corroborated by the medical evidence and other evidence adduced by the prosecution and, therefore, the conviction awarded by the trial Court for the offence punishable u/s 302 of the Indian Penal Code is sustainable in law.

8. We have given our anxious thought to the various contentions canvassed by the respective counsel. Perused the provisions of Section 164 of the Criminal Procedure Code and the judgment of the Apex Court cited by the learned counsel for the appellant.

9. In the instant case, the prosecution has examined eleven prosecution witnesses. However, the prosecution case rests mainly on the direct evidence of Shankar (PW-2) and Gopikabai (PW-4), who are the eye-witnesses to the incident in question. Before we consider the evidence of these witnesses, it would be appropriate to consider the legal position -- vis-a-vis Section 164 of the Criminal Procedure Code in the light of the ratio laid down by the Apex Court in the above referred judgment.

10. In the instant case, Rajendra (PW-11), the Investigating Officer, in his evidence, has not stated any reasons for not recording the statements of Shankar (PW-2) and Gopikabai (PW-4) u/s 161 of the Criminal Procedure Code during the course of investigation. There is no reason given by this witness in the evidence as to why he felt a need to get the statements of these witnesses recorded by the Magistrate u/s 164 of the Criminal Procedure Code. However, this witness in his chief has stated that he produced these witnesses before the Magistrate for recording their statements u/s 164 of the Criminal Procedure Code. This version of the Investigating Officer stands totally falsified by his admission in the cross-examination, in which he has stated that he was totally

unaware about how and with whom these two statements appeared before the Magistrate for recording their statements u/s 164 by the Magistrate. He has also admitted that he had not taken any note in this regard in the case diary. The above referred admission by the Investigating Officer makes it clear that the Investigating Officer was not at all aware about the appearance of these two witnesses before the Magistrate. It further reveals that these two witnesses, i.e., Shankar (PW-2) and Gopikabai (PW-4) appeared before the Magistrate on their own and the Magistrate appears to have recorded their statements u/s 164 of the Criminal Procedure Code.

11. The Apex Court in Para 22 in Jogendra Nahak and Others Vs. State of Orissa and Others, observed thus :--

"22. If a Magistrate has power to record statement of any person u/s 164 of the Code, even without the Investigating Officer moving for it, then there is no good reason to limit the power to exceptional cases. We are unable to draw up a dividing line between witnesses whose statements are liable to be recorded by the Magistrate on being approached for that purpose and those not to be recorded. The contention that there may be instances when the Investigating Officer would be disinclined to record statements of willing witnesses and therefore such witnesses must have a remedy to have their version regarding a case put on record, is no answer to the question whether any intending witness can straightway approach a Magistrate for recording his statement u/s 164 of the Code. Even for such witnesses provisions are available in law, e.g., the accused can cite them as defence witnesses during trial or the Court can be requested to summon them u/s 311 of the Code. When such remedies are available to witnesses (who may be sidelined by the Investigating Officers) we do not find any special reason why the Magistrate should be burdened with the additional task of recording the statements of all and sundry who may knock at the door of the Court with a request to record their statements u/s 164 of the Code."

The Apex Court in Para 23 of the said judgment has further observed thus :--

"23. On the other hand, if door is opened to such persons to get in and if the Magistrates are put under the obligation to record their statements, then too many persons sponsored by culprits might throng before the portals of the Magistrate Courts for the purpose of creating record in advance for the purpose of helping the culprits. In the present case, one of the arguments advanced by accused for grant of bail to them was based on the statements of the four appellants recorded by the Magistrate u/s 164 of the Code. It is not part of the investigation to open up such a vista nor can such step be deemed necessary for the administration of justice."

The Apex Court finally concluded this issue by observing in para 24 of the above judgment as follows :--

"24. Thus, on a consideration of various aspects, we are disinclined to interpret Section 164(1) of the Code as empowering a Magistrate to record the statement

of a person un-sponsored by the investigating agency. The High Court has rightly disallowed the statements of the four appellants to remain on record in this case. Of course, the said course will be without prejudice to their evidence being adduced during trial, if any of the parties requires it."

12. In order to consider the ratio laid down by the Apex Court, it will be appropriate to consider the facts involved in the case which was before the Apex Court.

Four appellants had filed a Writ Petition before the High Court for directing the Investigating Agency to record their statements u/s 161 of the Code and for a further direction to the Magistrate concerned to record their statements u/s 164 of the Code. High Court permitted the appellants as per its order, dated 22-12-1997, to file a petition before the Magistrate for the purpose of recording their statements and the Magistrate was directed to pass appropriate orders on such petition. Pursuant to the said order, appellants went to the Magistrate's Court and filed petition. However, Magistrate declined to record the statements. The appellants again moved the High Court and the High Court, vide order, dated 24-3-1998, directed the trial Court to comply with its earlier order, dated 22-12-1997, by recording the statements u/s 164 of the Code of Criminal Procedure.

13. The Magistrate, pursuant to the directions, dated 22-12-1997, issued by the High Court, recorded the statements of the appellants and, therefore, the informant filed an application before the High Court to recall the order, dated 24-3-1998. The Division Bench, which passed the order, dated 24-3-1998, heard both the sides and dismissed the Writ Petition filed by the appellants by holding that the appellants have miserably failed to prove any mala fide action of the Investigating Officer so as not to investigate the case properly or to screen any offender and the learned Judges of the High Court in the said Writ Petition had held thus :--

"Therefore, the anxiety of the petitioners to examine themselves, is not with a view to help the investigating agency or the prosecution but to favour a person who has been charge-sheeted as an accused. Under such circumstances, the writ application is devoid of merit. It thus appears that petitioners did not file the writ application for securing fair justice but to play tricks so as to get their statements under Sections 161 and/or 164 of the Code recorded to help a charge-sheeted accused."

Being aggrieved by the order, the appellants filed a Criminal Appeal before the Apex Court and the Apex Court passed the above referred judgment and order and recorded the findings in the paragraphs quoted hereinabove.

14. The Apex Court in para 24 of its judgment has categorically observed that the Apex Court was disinclined to interpret Section 164(1) of the Code of Criminal Procedure as empowering the Magistrate to record statement of a person un-sponsored by the Investigating Agency. These observations, in no

uncertain terms, convey that the Apex Court neither Intended to interpret the provisions of Section 164(1) or any other sub-clause of Section 164 of the Code. The Apex Court in Para 22 has made observations in respect of the Magistrate, who is not expected to record statement u/s 164 of the Code without the Investigating Officer moving for it and this does not indicate that such statement, if recorded by the Magistrate, is either inadmissible in law or cannot be admitted in the evidence. The Apex Court was more concerned about the ensuing consequences if such practice is adopted by the Magistrate which, in a given case, may be helpful to the culprit to shield his crime.

15. The contention canvassed by Mr. Daga that the statements of Shankar (PW-2) and Gopikabai (PW-4) are not admissible in law for the reasons mentioned hereinabove, in our considered view, cannot be accepted. The said contention suffers from lack of merit and is rejected.

16. Another contention, which is canvassed by Mr. Daga, the learned counsel for the appellant, that he had no occasion to get the copies of 164 statements recorded by the Magistrate also cannot be accepted, since it is the part and parcel of the case diary of the investigation and even in the charge-sheet there is a mention about these two documents and there is a note in the charge-sheet itself which refers to the statements of these two witnesses recorded by the Magistrate u/s 164 of the Criminal Procedure Code. Similarly, in view of the above fact, it is not possible for us to hold that the accused was deprived of the copies of 164 statements, particularly when the accused has not made any grievance at the appropriate stage before the Court below. At least there is nothing on record to show anything in this regard. The contention in this regard canvassed by the counsel for the appellant is rejected.

17. Mr. Daga, learned counsel for the accused, argued the case on merits of the matter and contended that in the instant case the evidence of Shankar (PW-2) and Gopikabai (PW-4) (alleged eye-witnesses to the incident) and the material particulars of the prosecution case unfolded by these witnesses are concocted, since the statements of these witnesses are recorded by the Magistrate u/s 164 of the Code admittedly after about fifteen days from the date of incident, i.e., on 25-3-1997. It is submitted that these witnesses, who were available to the Police, are residents of the same village where the incident had taken place and, therefore, their statements ought to have been recorded by the Police immediately, particularly when they claim to be the eye-witnesses to the incident. It is further contended that the First Information report is lodged by Istari (PW-1), the father of the deceased, on the information received by him from Shankar (PW-2). It is submitted that the evidence of PW-1 is hearsay as far as the incident of assault is concerned. Similarly, Lalitabai (PW-3), mother of the deceased, also stated in her evidence that she received an information about the assault from Shankar (PW-2) and, therefore, if the evidence of Shankar (PW-2) itself is not truthful and free from tutoring, the evidence of these two other witnesses cannot be relied on.

18. Mr. Daga, learned counsel, contended that the evidence adduced by the other prosecution witnesses is in respect of seizure of clothes and Inquest Panchanama etc., and is insufficient to bring home the guilt. The learned counsel, therefore, contended that the finding recorded by the trial Court on the basis of such evidence is not sustainable in law.

19. The Additional Public Prosecutor, on the other hand, supported the judgment and finding recorded by the trial Court and contended that both the eye-witnesses are truthful and their evidence was rightly accepted by the trial Court. It is submitted that the First Information Report was lodged by Istari (PW-1) on the same day and the same is corroborated by the evidence of the eyewitnesses. It is contended that the evidence of Lalitabai (PW-3) corroborates the prosecution case coupled with the medical evidence of Dr. Gopal. It is, therefore, contended that the trial court was justified in recording the finding of conviction u/s 302 of the Indian Penal Code.

20. We have considered the contentions canvassed by the respective counsel and perused the evidence adduced by the prosecution.

21. In the instant case, the case of the prosecution is primarily based on testimonies of eye-witnesses Shankar (PW-2) and Gopikabai (PW-4). The First Information Report though was lodged by Istari (PW-1), father of the deceased on 8-5-1997, i.e., on the day of incident, the said report was lodged by Istari on the information about the incident received by him from Shankar (PW-2). Admittedly, he is not the witness who has seen the incident in question. Similar is the case about Lalitabai (PW-3), who also stated that the information about the incident was received by her from Shankar (PW-2). In the facts and circumstances of the present case, the entire prosecution case would depend upon the evidence of Shankar (PW-2) and Gopikabai (PW-4) and, therefore, it would be appropriate to scrutinize the evidence of these two witnesses. Shankar (PW-2) is a child witness, aged about nine years. This witness has stated in his chief that deceased Someshwar was on the swing at the house of the accused. The accused picked up an axe from his house and dealt a blow on the head of the deceased Someshwar. The blade of the axe had stuck in the head of Someshwar. This witness went inside his house and informed the incident to his mother, i.e. Lalitabai (PW-3). In the cross-examination of this witness, this witness has admitted that his family was not on visiting terms with the accused. It has further come in the cross-examination of this witness that he went to Bhandara with his father after ten days of the incident and his statement was recorded by the Magistrate in the Court. This witness has admitted in his cross-examination that his father told him to state before the Magistrate that Patiram assaulted Someshwar. We cannot lose sight of the fact that this witness, who claimed to be an eye-witness to the incident, is a resident of the same village and was very much available to the prosecution for recording his statement u/s 161 of the Code. In the First Information Report, which was lodged by his father Istari on the day of incident, i.e., on 8-5-1997, it is specifically stated by Istari

that the report was lodged by him on the basis of the information in respect of the incident in question received by him from his son Shankar (PW-2). The Police Station Officer was very well aware that Shankar (PW-2), who is the son of the complainant, is the eye-witness to the incident and he is a resident of this village. In a situation like this, what we expect from the Investigating Agency is to record statements of such eye-witnesses without any delay, particularly when they are available to the prosecution. In the instant case, the Investigating Officer admittedly did not take any steps to record statement of this witness u/s 161 of the Code and the Investigating Officer, PSI Nagare (PW-11) has not given any reason as to why the statement of the child witness Shankar (PW-2) u/s 161 of the Code was not recorded* immediately after the incident in question. The Investigating Officer kept quiet for about fifteen days and did not even attempt to record the statement of this witness Shankar (PW-2) u/s 161 of the Code for the reasons best known to the Investigating Officer. The evidence of the Investigating Officer would show that he is not even aware with whom Shankar (PW-2) appeared in the Court of Magistrate for recording his statement u/s 164 of the Code. It has come in the cross-examination of the Investigating Officer that Shankar (PW-2), whose statement was recorded by the Magistrate, declined to tell the Investigating Officer anything about the incident. In the instant case, it is undoubtedly clear that the statement of Shankar (PW-2) was, for the first time, recorded by the Magistrate u/s 164 of the Code after a fortnight of the incident. In the cross-examination of this witness, he has specifically admitted that his father Istari (PW-1) told him to state before the Magistrate that accused Patiram assaulted the deceased Someshwar. We cannot lose sight of the fact that this witness is a child witness and the admission in the cross-examination of this witness would show that the material particulars of the prosecution case disclosed by this witness in his 164 statements are the outcome of tutoring by his father, i.e., Istari (PW-1). It has also come on record that the family members of Istari (PW-1) and Shankar (PW-2) were not on visiting terms. Even otherwise a considerable delay is caused in recording the statement of Shankar (PW-2) u/s 164 of the Code by the Magistrate and, therefore, the possibility of tutoring this witness cannot be ruled out. Similarly, the evidence of the Investigating Officer is totally silent as to why he has not recorded the statement of this witness u/s 161 of the Code and why it took fifteen days to send Shankar (PW-2) to the Magistrate for recording of his statement u/s 164 of the Code. The totality of the evidence of Shankar (PW-2), in our considered view, cannot be said to be free from tutoring and it is unsafe to rely on the testimony of such child witness in the facts and circumstances of the present case. Since we are not inclined to rely on the testimony of Shankar (PW-2), the First Information Report lodged by Istari (PW-1) on the basis of the information received from Shankar (PW-2) loses its authenticity. Similar is the case in respect of evidence of Lalitabai (PW-3).

22. As far as the evidence of Gopikabai (PW-4) is concerned, she has stated in her chief that at the relevant time deceased Someshwar was sitting on the swing of the house of the accused. Accused Patiram picked up an axe and then dealt a

blow of the axe on the head of deceased Someshwar. However, we cannot turn the Nelson's eye to the fact that her statement u/s 164 of the Code was recorded by the Magistrate only after fifteen days of the incident. This witness is also a resident of the same village and the wife of the complainant PW-1. The Investigating Agency was well aware of these facts and ought to have taken immediate steps to record the statement of this witness u/s 161 of the Code, since this witness Gopikabai was the eyewitness to the incident. However, there is no explanation forthcoming from the Investigating Officer in this regard. Since the statement of this witness was recorded after a considerable delay, which has not been explained by the prosecution at all, it will be highly unsafe to rely on the evidence of such witness, who admittedly was not on visiting terms with the accused. In the facts and circumstances of the case, there is a serious doubt about the authenticity in respect of the material particulars of the prosecution case disclosed by this witness in her evidence and, therefore, in our view, the testimony of Gopikabai (PW-4) is not truthful and difficult to rely.

23. As far as the other prosecution witnesses examined by the prosecution are concerned, they are mainly in respect of seizure of clothes, Spot Panchanama, Inquest Panchanama etc., and that part of the evidence adduced by the prosecution is totally inadequate to bring home the guilt of the accused for the offence punishable u/s 302 of the Indian Penal Code. The evidence of Doctor, in a situation like this, does not further the case of the prosecution.

For the reasons stated hereinabove, in our considered view, the prosecution failed to prove the offence punishable u/s 302 of the Indian Penal Code against the accused. The impugned Judgment and Order, dated 18th April, 1998, passed by the Additional Sessions Judge, Bhandara, is hereby quashed and set aside. The accused be released forthwith if not required in any other criminal case. Appeal is allowed.