
(2015) 07 BOM CK 0239
In the Bombay High Court
Case No : Criminal Appeal No. 513 of 1995

Raju and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 14-07-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 161(3), 164, 173(2)(i)
Penal Code, 1860 (IPC) — Section 120B, 292, 34, 342, 351

Citation : (2016) 1 BomCR(Cri) 99

Hon'ble Judges : A.M. Thipsay, J

Bench : Single Bench

Advocate : Anita Agarwal, for the Appellant; Deepak Thakre, APP, Advocates for the Respondent

Final Decision : Allowed

Judgement

A.M. Thipsay, J—The appellants were prosecuted on the allegation of having committed offences punishable under Sections 120B of Indian Penal Code (IPC), Section 452 IPC read with Section 34 IPC, Section 342 IPC read with Section 34 IPC, Section 506 IPC read with Section 34 IPC, Section 292 IPC read with Section 34 IPC, Section 385 IPC read with Section 34, Section 355 IPC read with Section 34 IPC, and Section 351 IPC read with Section 34 IPC. After holding a trial, the learned Additional Sessions Judge held the appellant No. 1 guilty of all the aforesaid offences and convicted him accordingly. She, however, held appellant Nos. 2 and 3 guilty only of the offences punishable under Section 452 IPC read with Section 34 IPC, Section 342 IPC read with Section 34 IPC, Section 506 IPC read with Section 34 IPC, and convicted them accordingly. The learned Additional Sessions Judge imposed the following sentences on the appellants:--

The learned Additional Sessions Judge directed that all the sentences would run concurrently.

2. Being aggrieved by their conviction and the sentences imposed by the learned Additional Sessions Judge, the appellants have approached this court challenging

the impugned judgment and order, and praying that they be acquitted.

3. The appellant No. 1 passed away during the pendency of the appeal. However, since the sentence is also of fine, the appeal, even in so far as it relates to appellant No. 1, does not abate. The same needs to be decided on merits.

4. The prosecution case, as put forth before the trial court, may, in brief, be stated thus :

"a) Ajit Porwar (PW1) - the First Informant - was, in the month of March 1986, residing as a tenant in a room on the ground floor of a building known as "Pitrukul", near Natraj Talkies, Jalgaon. The building was owned by one Shaligram Choudhari (PW5). Ajit Porwar was working in the jeweler's shop - Rajmal Lakhichand. One Rekha Sonawane was also working in the said shop as a Telephone Operator. Ajit Porwar got acquainted with sister of Rekha - Pratibha Sonawane - as she used to visit the shop to meet Rekha. Gradually, the friendship between Ajit Porwar and Pratibha Sonawane developed into a love relationship. Pratibha sometimes used to come to meet Ajit at the room where he was staying.

b) That, one day, she came to Ajit's room and was sitting on the cot. At that time, suddenly, the appellant No. 1 entered the room and accused Ajit Porwar of indulging into illicit relations with women. He then threatened Ajit that he would "see him". He then went out of room and bolted it from outside. Pratibha and Ajit remained inside the room. The appellant No. 1 returned after five minutes along with appellant Nos. 2 and 3, and one more person by name Umesh Patil. The appellant No. 1 was having a camera with him. He then showed a knife to Ajit and Pratibha and asked them to remove their clothes. He, then, asked the other three persons to stand outside the room. The appellant No. 1 then asked Pratibha and Ajit to take different poses, and took their nude photographs. After taking some photographs, the appellant No. 1 asked Ajit to put on his clothes. After Ajit had worn the clothes, appellant No. 1 slapped him and asked him to leave the room. When Ajit Porwar came out, the other three persons i.e. appellant Nos. 2 and 3 and Umesh Patil, who were standing outside, went inside the room, bolted the door from inside and remained there for about 15 to 20 minutes. Thereafter, they all came out, leaving Pratibha inside. Ajit Porwar was then told by Pratibha that she was called by appellant No. 1 at Hotel Tirupati.

c) Ajit Porwar was terribly frightened because of the incident and was also feeling guilty because Pratibha had to face humiliation because of him.

d) On the next day, appellant No. 1 came to the room of Ajit Porwar and showed him a black and white photograph, in which Pratibha and Ajit were seen naked. The appellant No. 1 demanded a sum of Rs. 25,000/- from him by giving a threat, that, otherwise, he would show the photograph to the relatives of Ajit and also publish the same. Ajit Porwar then told him that he would let him know about it within two to three days, but actually went away to his native place at Jamner. He returned to Jalgaon after about 15 to 20 days and went for his job.

That, at that time, appellant No. 1 came to the shop, contacted Ajit and inquired with him where he had gone, and threatened him that it would be a costly affair for him, if he would try to give the appellant No. 1 a slip. Ajit Porwar then told him that he could afford to pay him only Rs. 5,000/-. He went to the Manager, borrowed Rs. 5,000/- from him and handed over the said amount of Rs. 5,000/- to appellant No. 1. The appellant No. 1 then warned Ajit Porwar to keep silent. The appellant No. 1, thereafter, did not contact Ajit Porwar and Ajit Porwar also did not disclose the incident - of taking of the photograph and of paying money to the appellant No. 1 - to anybody.

e) After a few days, Ajit Porwar came to know that the appellant No. 1 had good relations with one Shivcharan Dandore (PW6). Shivcharan Dandore also used to visit the said jewellery shop to meet the proprietor (who was being addressed as "Babuji" by Ajit Porwar) thereof. Ajit Porwar told Shivcharan Dandore about the incident of photographs and also requested him to get the photographs back from appellant No. 1. After about four to five days, Shivcharan Dandore gave one photograph with negative, to Ajit Porwar. Ajit Porwar burnt the photograph and the negative."

5. The matter ended there without anything further happening. But in the month of June 1994, Ajit Porwar came to know that appellant No. 1 had been arrested by the police in connection with some offences arising out of what was commonly described as "Jalgaon Sex Scandal". Ajit Porwar read in newspapers an appeal made by some social organizations to masses that aggrieved persons should come forward to make complaints without any fear, and therefore, the fear due to which he had earlier not made any complaint, was considerably reduced. He then, thought over the incident for about 1 1/2 month, and ultimately, lodged a report on 1st August 1994, at Panchvati Police Head Quarters, which was treated as the First Information Report (FIR); and the investigation commenced.

In the course of investigation, the appellants came to be arrested. The said Umesh Patil absconded.

On completion of investigation, a Police report, as contemplated under Section 173(2)(i) of the Code, was filed against the appellants alleging commission of the aforesaid offences, who were prosecuted, convicted and sentenced, as aforesaid.

6. The prosecution examined totally nine witnesses during the trial. The first witness is Ajit Porwar - the First Informant - himself. The second witness - Bandu Pardeshi - is a panch in respect of the information allegedly disclosed by appellant No. 3, which led to the discovery of a camera, by which, the photographs in question were taken. The camera was taken charge of under a panchnama. This witness did not support the prosecution and was declared as hostile. The third witness - Shaikh Rashid - is the second panch, in respect of the alleged recovery of the camera, pursuant to the information disclosed by accused No. 3. Even he did not support the prosecution. Anyway, not much turns on the evidence of the "discovery of camera." The fourth witness - Padamchand Nahar -

is the Manager, working with Rajmal Lakhichand Jewelers at the material time, from whom Ajit Porwar is said to have taken Rs. 5,000/- for giving it to appellant No. 1. The fifth witness - Shaligram Chaudhari - was, at the material time the landlord of Ajit Porwar. The room in which the alleged incident took place, is situate in a building - Pitrukul - owned by this witness. His evidence has been adduced to show that indeed Ajit Porwar was a tenant in respect of the said room, at the material time. The sixth witness - Shivcharan Dandore - as aforesaid, is the one who had procured one photograph and negative from appellant No. 1, on the request of Ajit Porwar. The seventh witness - Abdul Samad - is the one with whose help Shivcharan Dandore managed to get the photograph and negative from appellant No. 1. In other words, PW7 Abdul Samad is the one, who had contacted appellant No. 1, and had requested him to hand over the photograph and the negative. When appellant No. 1 handed over the photograph and negative to him, he gave them to Shivcharan Dandore (PW6), who then handed over the same to Ajit Porwar. The eighth witness - Prakash Gaidhani - is a Sub-Inspector of Police. He has taken part in the investigation of this case. He speaks about the recovery of a camera and certain articles under a panchnama, at the instance of appellant No. 3. The ninth and last witness - Mahadu Mahale - is the Investigating Officer, who has filed the police report/charge-sheet in the matter.

7. Mrs. Anita Agarwal, the learned counsel for the appellants, contended that the impugned judgment and order of conviction is not in accordance with law. She contended that the very fact that the First Information Report (FIR) came to be lodged after more than eight years from the incident, itself renders it unsafe to rely on the evidence of the First Informant - Ajit Porwar. She also contended that corroboration to the evidence of Ajit Porwar is sought to be derived from the evidence of Shivcharan Dandore (PW6) and Abdul Samad (PW7), who, both, were having criminal record, and could not be treated as reliable witnesses. She also submitted that, there was no evidence to show that Ajit Porwar was indeed occupying a room in the building Pitrukul in March 1986, and that, the fabrication of evidence done for establishing that, was noticed by the learned Additional Sessions Judge also. The learned counsel for the appellants contended that appellant No. 1 being a Municipal Councilor, who had defected from the ruling party, had invited the wrath of the other politicians from the ruling party, and had, therefore, been falsely implicated. It was submitted that, non-examination of the victim girl, was a serious weakness in the prosecution case, and that, the judgment of conviction recorded by the learned Additional Sessions Judge is not tenable. The learned APP, on the other hand, contended that, the reason for reporting the matter to the police after eight years has been given by Ajit Porwar in the First Information Report itself, and the reason is valid and acceptable. It is submitted that, Ajit Porwar had no motive for making such a false allegation against the appellants after a lapse of eight years. It is submitted that, the findings arrived at by the learned Additional Sessions Judge are proper and legal.

8. I have carefully considered the matter. I have been taken through the entire

evidence, as was adduced during the trial, and the impugned judgment.

9. The delay of eight years in lodging the FIR is indeed extraordinary. The reason for delayed lodging of the FIR as given in the FIR is that appellant No. 1 was a known criminal, and that, as he always used to be armed, there was his terror in the locality. That, moreover, three years before, he had been elected as a Municipal Councilor. That, because of the photographs taken by him, Ajit Porwar as well as Pratibha Sonawane would be defamed and their lives would be shaken. That, Ajit Porwar had not reported the matter anywhere because of these factors. However, when the "Sex Scandal in Jalgaon" was brought to light, appellant No. 1 was arrested by the police in a number of cases. That, thereafter, several social organizers had highlighted the seriousness and magnitude of the offences, resulting in public outcry and anger against those said to be involved in the "sex scandal." Since the appellant No. 1 was involved in a number of cases, arising out of the "sex scandal", he was obviously in a difficult situation, which factor reduced the pressure on the mind of Ajit Porwar and he decided to lodge the FIR for seeking justice.

10. The incident in question is indeed very serious. It appears that, Pratibha used to come to the room of Ajit Porwar to meet him secretly. Apparently, neither Ajit Porwar, nor Pratibha Sonawane, wanted any others to know about their meetings. If, in such a situation, a person who is feared in the locality comes there, makes allegations of Ajit Porwar indulging into wrongful acts and threatens him of serious consequences, it is possible for a person like Ajit Porwar to have fear in the mind. Similarly, Pratibha also being in a vulnerable position, would try to suppress the matter, rather than reporting the same to the police. If such an incident indeed took place, it must have been a horrifying and humiliating experience for Ajit Porwar as well as Pratibha. Considering that appellant No. 1 was a Municipal Councilor and had some criminal record to his discredit, it was quite possible for a person to decide to forget the incident and not to report about it anywhere. Similarly, it is also possible that when Ajit Porwar realized that appellant No. 1 was already in serious difficulties, that public opinion had been generated against him, by reason of his being accused of serious and heinous offences, his fear disappeared and he decided to take revenge of the sufferings that he had to undergo because of the acts of the appellants. Moreover, the disclosure of the fact, that there were several others whose objectionable photographs had been taken by the appellants, would naturally result into reducing the embarrassment that would be caused to Ajit Porwar by disclosing the incident that allegedly took place. Therefore, considering the peculiar facts and circumstances of the case, simply because the FIR came to be lodged after more than eight years from the incident, the prosecution case cannot be thrown out as false. The abnormal delay in lodging the FIR is indeed a quite serious weakness in the prosecution case, but given the peculiar facts and circumstances of the case, that, by itself, would not be fatal, and the matter needs to be examined further.

11. The case rests basically on the testimony of Ajit Porwar. Pratibha Sonawane has not been examined as a witness. Her statement was not recorded during investigation also. Even her sister Rekha was not examined as a witness. Her statement, too, was not recorded in the course of investigation. The evidence of Ajit Porwar, therefore, needs to be minutely examined and thoroughly scrutinized. His position in life and the persons with whom he is associated would be quite relevant, particularly, in the context of the defence of the appellants.

12. Ajit Porwar is a salesman, and in the year 1995, when he had given evidence, he was drawing a salary of Rs. 4000/- per month. When the incident took place, he was drawing a salary of Rs. 1900/- per month. The building Pitrukul, where he was staying, is surrounded by residential houses and appears to be situated in a thickly populated locality. What is important to note is that the owner of the jewellery shop, where he works, is one Mr. Ishwarlal Jain, who is addressed as "Babuji" by Ajit Porwar. Ajit Porwar appears to be very close to Babuji, in as much as, he knew him since childhood, and according to Ajit Porwar, he had high regards for Babuji and used to honour his word. Babuji also used to trust him. In the cross-examination, it is revealed that Ishwarlal Jain @ Babuji was a member of the Legislative Assembly for a period of ten years i.e. from 1976 to 1986. Babuji used to help Ajit Porwar in times of need and Ajit Porwar used to obey him. In the cross-examination of Ajit Porwar, it is also revealed that appellant No. 1 was, at the material time, a Municipal Councilor, and that, this was known to Ajit Porwar. His evidence also shows that after there was publicity in the press about "Sex Scandal" and after Ajit Porwar learnt about the arrest of the appellants, he thought of lodging a report regarding the incident, there used to be discussions on the topic of "Sex Scandal" in the jewellery shop of Ishwarlal Jain also. According to Ajit Porwar, he first entertained the idea of lodging a report against the appellants sometime on 22.6.1994 or 23.6.1994, and thought it over till 1.8.1994, on which date, he actually lodged the report. It also transpires that Ishwarlal Jain had also given advertisement in the local newspapers generating public opinion against the "Sex Scandal" and appealing to the members of public to come forward and report similar objectionable incidents, if any, experienced by them to the police.

13. Thus, two things clearly emerge from this. The first is that, Ajit Porwar was very close to Ishwarlal Jain, who himself is a politician. The appellant No. 1 is also a politician and as is revealed from the other evidence, was in a different group than that of Ishwarlal Jain. The proprietor of the shop, where Ajit Porwar was working, had not taken a mere passive attitude about "Jalgaon Sex Scandal" but had given advertisement in newspapers, asking persons to come forward and report the incidents. Therefore, Ajit Porwar cannot be said to be a person who was not concerned with any politics or concerned with persons who could have had a dislike for appellant No. 1. The other thing is, even after the arrest of appellant No. 1 and some others, in cases arising out of the so called "Sex Scandal", Ajit Porwar had not lodged a report with the police immediately.

14. It would be necessary to consider whether the evidence of Ajit Porwar finds corroboration with respect to the other details given by him, such as the place where he was residing, what happened to the photographs that had been taken by the appellant No. 1, that he had borrowed money from the Manager Padamji Nahar for giving it to appellant No. 1, etc.

15. According to Ajit Porwar, in March 1986 when the incident took place, he was residing in the building Pitrukul. To establish this point, the prosecution has examined Shaligram Chaudhari (PW5) who is the owner of the said building, and therefore, the landlord of Ajit Porwar. Shaligram Chaudhari (PW5) was unable to produce any rent receipts or other record to show that in March 1986, Ajit Porwar was indeed occupying a room in his building Pitrukul. Though Shaligram Chaudhari said that Ajit Porwar was indeed occupying a room on the ground floor of Pitrukul, and that, he left the room at the end of July 1986, he was unable to produce any record in that regard. What is significant is that he claimed that he was having such record and produced a notebook (Exhibit 53) in which - he claimed - he had maintained some accounts regarding the payment of rent by Ajit Porwar and the occupants of other rooms (who were students according to him) in Pitrukul. It, however, transpired that though there were some entries in the said notebook regarding payment of rent received by him from Ajit Porwar, there was no entry regarding the payment of rent for the period from June 1985 till May 1986. The answer given to a specific question in that regard is quite interesting and according to Shaligram Chaudhari, Ajit Porwar had locked that room during the period from April 1985 to May 1986, and that, rent of all the months was given by Ajit Porwar to him at a time in the month of May 1986. Shaligram Chaudhari added in his reply that though the room had been locked, Ajit Porwar used to visit the same occasionally, and that, the room was in his possession, though he was not using it continuously. In the cross-examination, it was suggested to him that the notebook (Exhibit 53) that was produced by him as a record of the rent received by him, pertained to the period from 1983 to 1985, and that, the figure "5" appearing in "1985" was subsequently changed to figure "6" in a different ink. Though this was denied by him, he admitted that figure "6" in the relevant entry had been overwritten. He also admitted that there were no entries in the said notebook showing payment of rent of the first term of the year 1985 to 1986 made by any students who, he said, were occupying the other rooms in the building. Infact, that there is tampering with this notebook has been concluded by the learned Additional Sessions Judge also, but she did not give much importance to this aspect, by a peculiar reasoning, which shall be discussed later. What is significant in my opinion, is not so much the alleged manipulation of record and fabrication of evidence, but the fact that the wife of this witness was also a Municipal Councilor during the period from 1991 to 1994. The cross-examination reveals that she was the Chairman of Social Welfare Committee and was a member of the political group that was in majority in Jalgaon Municipality at the material time. It is also revealed that she belonged to the group of Suresh Jain and one Raisonni, which was the ruling

group in Jalgaon Municipality at the material time. Shaligram Choudhari also admitted in cross-examination that appellant No. 1 was one of the main persons who defected from the ruling group, and that, "Jalgaon Sex Scandal" was exposed within 2 to 3 days from his defection. He, initially, denied that Ajit Porwar had left the room in his building on 5th February 1985 and claimed, when questioned, that, he did not state so to the police when his statement was recorded. He was, however, confronted with a portion marked "A" in his statement recorded by the police which reads as follows :

He, thereupon, admitted having said so to the police.

16. Though the evidence of this witness about Ajit Porwar being his tenant in March 1986 is not convincing, and that, the record to support such a claim, as produced by him, appears to be manipulated, I am not inclined to conclude that Ajit Porwar was not in possession of any room in building Pitrukul in March 1986. I decline to draw such a negative conclusion, though the evidence of Shaligram Chaudhari is not convincing to establish Ajit Porwar indeed being there, in March 1986.

17. That, this witness had manipulated the documentary evidence to support his assertion that Ajit Porwar was in occupation of a room in Pitrukul in March 1986 has been observed by the learned Additional Sessions Judge, as aforesaid. She observed :

"It is true that there are some manipulations seen in the notebook (Exhibit 53) pertaining to the rent collection of one year, i.e. from 1985 to 1986 May. However, this notebook does not look like a fabricated document as a whole."

(Emphasis supplied)

The learned Judge further observed :

"Considering the evidence of the witness P.W.5 Chaudhari, it can be said that he might have acted in over enthusiasm to create a documentary evidence of the relevant period by writing some entries therein"

18. In spite of such a conclusion, the learned Judge only held that, "therefore, the entry could not be taken into consideration as supporting the oral evidence given by Shaligram Chaudhari," but refused to disbelieve the oral evidence of Shaligram Chaudhari that Ajit Porwar was residing in the building in March 1986. The learned Judge did not consider whether a person who went to the extent of manipulating the entries in a notebook and fabricated evidence to support a particular assertion made by him (which, incidentally, could be taken as his own assessment of the value that would be placed on his assertion without such support) could be still believed about such assertion, when the manipulation and fabrication is exposed.

19. Though much could be said about this sort of reasoning, the matter may be left at that, as, all said and done, it would not be proper to draw a negative

conclusion - viz., that "Ajit Porwar was not at all residing in the room in Pitrukul building in March 1986, and therefore, the incident as alleged by him could not have taken place at all." If such a negative conclusion is arrived at, that would be the end of the matter; and though no such conclusion may be arrived at, this weakness in the prosecution case needs to be kept in mind, while coming to a conclusion as to whether the prosecution had proved its case or not, which conclusion would necessarily be arrived at, by considering the entire evidence. The least that can be observed is that, the evidence of Ajit Porwar that he had in his possession a room in Pitrukul building in March 1986, fails to find any corroboration from the other evidence. The evidence of Shaligram Chaudhari - keeping in mind the contradictory version in his statement recorded by the police during investigation and the manipulation of record to support the claim of Ajit Porwar - fails to provide any corroboration to the assertion of Ajit Porwar to that effect.

20. In this case, none of the (obscene and objectionable) photographs of Ajit Porwar and Pratibha, said to have been taken by appellant No. 1 were recovered in the course of investigation. The story of Ajit Porwar is that one such photograph together with the negative thereof was recovered by him through his own efforts, within a few days after the incident, but he had destroyed it. Now, the existence of such a photograph and recovery thereof from the possession of, or at the instance of appellant No. 1, would have lend corroboration to the story of Ajit Porwar, but such corroboration is not available. The corroboration to the theory of existence of atleast one such photograph is expected to be found in the testimony of Shivcharan Dandore (PW6) and Abdul Samad (PW7), who, both, claim to have seen the photograph, and who were instrumental in procuring the same from appellant No. 1 and giving it to Ajit Porwar. Interestingly, when the FIR was lodged by Ajit Porwar, he did not mention about his having secured a photograph and a negative from appellant No. 1, and thereafter, having burnt it. Ajit Porwar admitted that he did not state anything about Shivcharan Dandore to the police; or about his having recovered a black and white photograph and a negative thereof (out of the photographs of Ajit Porwar and Pratibha said to have been taken by appellant No. 1) and having burnt the same. Thus, there is no corroboration in the form of an early disclosure of his version by Ajit Porwar.

21. The evidence of Shivcharan Dandore and Abdul Samad, which is relevant only in the context of establishing that (atleast) one objectionable photograph of Ajit Porwar and Pratibha had been taken by appellant No. 1, or that, such a photograph was with him, and that, the same had been obtained by Shivcharan Dandore (PW6) from appellant No. 1 through Abdul Samad (PW7), may now be examined. Shivcharan Dandore states that he knew the jeweler shop - Rajmal Lakhichand, and that, he used to visit the same for meeting Ishwarlal Jain, proprietor of the said shop. He claims to be knowing Ajit Porwar as a person working as a salesman in that shop. According to Shivcharan Dandore, about eight years back (from date of his giving evidence before the Additional Sessions Judge, which was 31st August 1995) Ajit Porwar had come to him when he was

sitting in the said jewellery shop. According to Shivcharan Dandore, it was at about 9.00 - 9.30 a.m. Ajit Porwar was looking nervous. He informed Shivcharan Dandore that his naked photographs had been taken by appellant No. 1 and requested to Shivcharan Dandore to get them back. Ajit Porwar also told Shivcharan Dandore that appellant No. 1 blackmailed him for Rs. 5,000/-. Shivcharan Dandore thereupon gave moral support to Ajit Porwar and assured him that he would do the needful. Shivcharan Dandore, then, contacted Abdul Samad (PW7) "as he knew that appellant No. 1 is a "Mohammedan." Shivcharan Dandore then states that he told Abdul Samad to get photographs of one person viz., Ajit Porwar, who was working with Ishwarlal Jain, from appellant No. 1, and thereafter, Abdul Samad gave him one photograph and one and one negative. Shivcharan Dandore saw the photograph and found it to be of Ajit Porwar and one girl in a "nude position." That, he handed over the photograph and negative to Ajit Porwar. In the cross-examination, it is revealed that even Shivcharan Dandore was a Municipal Councilor till September 1994 i.e. till the dissolution of Jalgaon Municipality. He was the Chairman of Health Department of Jalgaon Municipality. He also agreed that appellant No. 1 had defected from the ruling group in Municipality along with some Councilors in June 1994. Shivcharan Dandore was not a defector. He stated that there were two political groups in Jalgaon Municipality after the defection - one headed by Suresh Jain and the other - of defectors - headed by appellant No. 1. He agreed that the defection was the first incident challenging the leadership of Suresh Jain in the history of Jalgaon Municipality, and that, Shivcharan Dandore was loyal to Suresh Jain's political group. He also said that about five to six days prior to 7th August 1994, the police had called him at the Police Head Quarters, and that, he had seen Ajit Porwar there. According to Shivcharan Dandore, during those days, prior to 7th August 1994, the police had interrogated him (Shivcharan Dandore) regarding the photographs and negatives. Curiously, he said that he did not disclose about the incident of photographs and negatives and the incident of Ajit Porwar to anybody and till 7th August 1994 he was not knowing anything about Ajit Porwar or about the photographs or negatives. It was also revealed in the cross-examination that he had been externed from the districts of Jalgaon, Nashik, Dhule Buldhana and Aurangabad, and that, he had committed breach of the externment order and had been arrested. It was suggested to him that the police threatened him that he should give a statement about Ajit Porwar, otherwise the police would arrest him, but he denied the same. He admitted that one murder case and six other cases were pending against him.

22. Since in the cross-examination, Shivcharan Dandore admitted that "he did not know anything about Ajit Porwar or the photographs or negatives till 7th August 1994," the Special Public Prosecutor was permitted to put a question to him in the re-examination in that regard. Shivcharan Dandore then explained that, by his statement that "prior to 7th August 1994 he was not knowing about Ajit Porwar, photographs and negatives", he meant, "he was not knowing about them what was happening in the police station prior to 7th August 1994." In the

further cross-examination, after the re-examination, he again stated that "he was not knowing about the negative and photograph when he was called at the police station" and that, "the police showed Ajit Porwar to him as the person to whom he had given photograph." He, however, denied that he was not knowing about the incident of Ajit Porwar prior to 7th August 1994.

23. Abdul Samad (PW7) does state about Shivcharan Dandore coming to him (about 8 years back from the date of his giving evidence before the Additional Sessions Judge i.e. 1st September 1995) and telling him that naked photographs of "one person who was working at the shop of Babuji", had been taken by appellant No. 1, and that, the name of the boy was Ajit Porwar. Abdul Samad promised Shivcharan Dandore that "he would try." Within two to three days thereafter, Abdul Samad went to appellant No. 1 and told him that he had taken nude photographs of Ajit Porwar, who was working at Babuji's place, and told him that he should return those photographs. Appellant No. 1 then took Abdul Samad to one of the rooms in Tirupati Hotel and handed over one negative and photograph. Abdul Samad verified that the photograph was of Ajit Porwar with one girl. He, then, contacted Shivcharan Dandore and handed over the photograph and negative to him. In the cross-examination, it is revealed that some criminal cases were pending against Abdul Samad at the material time. According to him, he knew Ajit Porwar since prior to the incident. He agreed that, this fact was important, but stated that, inspite of the police asking him whether he knew Ajit Porwar, he did not mention it to the police, when his statement was recorded. By the very next sentence, he claimed that he had stated so to the police, and that, he could not assign any reason why it was not appearing in his statement. According to him, he was called at the police station on 7th August 1994 and this message was given to him by Shivcharan Dandore. Additionally, a constable also had given the message to him. His statement was recorded before a Magistrate under the provisions of Section 164 of the Code of Criminal Procedure (Code) and as per this statement, the photographs that he obtained from the appellant No. 1, were of a person known as "Lalwani." When questioned about this in the cross-examination, he was unable to explain how was it that the name "Lalwani" was appearing in the statement recorded by the Magistrate.

24. After carefully considering the evidence of Shivcharan Dandore and Abdul Samad, I find it difficult to place reliance on their evidence. Both are having a criminal record. Shivcharan Dandore is friendly with Ishwarlal Jain. He is also a politician - being a Municipal Councilor. He admitted to be in the group of Suresh Jain, and that, appellant No. 1 was the leader of the defectors group. Thus, Shivcharan Dandore had a reason to dislike the appellant No. 1. That, he was friendly with Ishwarlal Jain, whose support Ajit Porwar enjoyed, is also significant. The mistake in the name, as appearing in the statement of Abdul Samad recorded under Section 164 of the Code, for which no explanation could be offered by him, cannot be lightly ignored. It is, therefore, difficult to place reliance on the evidence of these two witnesses, in the light of a number of

weaknesses in the prosecution case.

25. Prakash Gaidhani (PW8) who was attached to Shani Peth Police Station as a Sub-Inspector of Police, at the material time, states about his having interrogated appellant No. 3 and a camera being recovered at the instance of appellant No. 3. It appears to be the prosecution case that the camera so recovered, is the one which was used by appellant No. 1 for taking the photographs of Ajit Porwar and Pratibha. It is not necessary to discuss his evidence.

26. The ninth and last witness is Mahadu Mahale, the Investigating Officer. According to him, on 1st August 1994, when he was in Police Head Quarters, investigating other offences pertaining to "Sex Scandal", Ajit Porwar came to him at about 9 p.m. Ajit Porwar expressed his desire to lodge a report and actually lodged it. Mahale sent the report for registration to Zilla Peth Police Station, and after the registration, the report made by Ajit Porwar was recorded. According to Mahale, appellant No. 1 was already under arrest in some other offences pertaining to "Sex Scandal." Mahale apprehended appellant Nos. 2 and 3 immediately on the same day at 23.30 hours. He recorded the statements of Shivcharan Dandore and Abdul Samad on 7th August 1994. Mahale was investigating into the offences pertaining to the "Sex Scandal" since 12th July 1994, and had obtained the remand of accused persons in custody, from time to time, on the ground that he wanted to trace the photographs, negatives etc., and also to apprehend the absconding accused. In the cross-examination, he was asked whether on 10th August 1994, while seeking remand of the appellants in police custody, he had made any statement to the effect that "appellant No. 1 had produced one photograph and one negative" before the Magistrate. He denied it. The remand application made by him and the order passed thereon was brought on record, tendered in evidence and marked as Exhibit 63. Indeed, in the order passed by the learned Magistrate on the remand application, there is a reference to Mahale appearing before the Magistrate and producing case diary to "show, inter alia, that appellant No. 1 had produced one photograph and one negative" and that the rest of the photographs being in his possession. Thus, in the light of the observations made by the Magistrate in his order, the denial of Mahale viz., that "he had not stated that appellant No. 1 had produced a photograph and a negative in the course of investigation", does not appear to be true.

27. The evidence of Mahale is remarkable in a number of respects. Ajit Porwar had stated that "at the time of recording the FIR he had stated to the police that the occupants of the other rooms in Pitrukul building used to leave their respective rooms at about 7.00 a.m.", but since it was not recorded in the FIR, the omission to state so before the Investigating Officer, was sought to be proved by adopting the usual procedure - viz., - of questioning the Police Officer who had recorded the previous statement. When questioned in that regard, Mahale stated that Ajit Porwar had indeed stated so to him, but that, he did not record

the same. Thus, Mahale, apparently, has gone to the extent of inviting the blame of not recording the statement properly, with the object of lending assurance to the testimony of Ajit Porwar. It is shocking that Mahadu Mahale had the audacity to state as follows :

"I used to record the contents which I felt proper and I used my discretion while eliminating the portion which I felt not proper."

28. Since Ajit Porwar had stated that "he had told the police at the time of recording the FIR that he was knowing appellant Nos. 1, 2 and 3 because they had been staying in the same area where he had been staying, and that, he had also told the police that he had seen them together many a times" which, however, did not appear in the FIR, with the object of proving the omission of Ajit Porwar to state so before the police, Mahale was questioned in the cross-examination, but Mahale stated that "Ajit Porwar had told him so, but he had not recorded it." This is indeed remarkable. A Police Officer, whenever, he chooses to reduce any statement made to him in the course of examination of persons, as contemplated under Section 161 of the Code, is bound to make a true record [Section 161(3)] of the statement. A Police Officer, therefore, usually sticks to the record made by him, but in Mahale we find an Officer, who, at the cost of inviting blame on himself, protects the credibility of the witnesses. According to Mahale, he did not record the fact because he thought that "the FIR would be very lengthy", and that, "it was not necessary."

29. Interestingly, when questioned about recording of the statement of Shivcharan Dandore, Mahadu Mahale stated that he did not exclude or omit any portion stated by him. He also stated that even the statement of Padamchand Nahar (PW4) was recorded as per his narration and nothing that he stated was excluded or omitted. However, when the omission of Padamchand Nahar to state that "he used to make rough noting of the advance payment and used to tear it off," was sought to be brought on record, Mahale stated that "Padamchand Nahar had indeed stated so, but he had not recorded it in the statement."

30. Mahale also stated that the statement of Abdul Samad was recorded as per his narration and nothing was omitted therefrom. He also agreed that, that Abdul Samad was knowing Ajit Porwar was an important fact, but claimed that he did not feel it necessary to mention it in the statement. He was reluctant to admit Abdul Samad and Shivcharan Dandore to be criminals, inspite of the record available with the police themselves, and gave an evasive reply to the effect that they "may be criminals." Such was the extent of anxiety felt by him about the necessity of protecting the credibility of the witnesses.

31. There are a number of factors which need to be taken into consideration, while judging the truth of the prosecution case. They may be summed up as follows :

"(a) The alleged incident was reported after a period of more than eight years.

(b) That, the room in Pitrukul building, where the incident allegedly took place, was indeed in possession of Ajit Porwar at the material time, is not supported by any documentary record and proof of this fact has to be gathered only from the oral evidence of Ajit Porwar and Shaligram Choudhari.

(c) The documentary evidence relating to this was available with Shaligram Choudhari, but the same did not support the claim that in March 1986, Ajit Porwar was occupying a room in Pitrukul building. Shaligram Chaudhari had manipulated the record to show that Ajit Porwar was in possession of a room in Pitrukul building in March 1986. That, he had fabricated false evidence, to show this was accepted by the learned Additional Sessions Judge also. Shaligram Choudhari had given a contradictory version in his statement recorded by the police in the course of investigation, which version was to the effect that, as per the record, Ajit Porwar had left the room on 5th February 1985. Thus, that Ajit Porwar was occupying a room in Pitrukul building in March 1986, where the alleged incident is supposed to have taken place, is extremely doubtful.

(d) Not even one of the objectionable and obscene photographs could be recovered by the police during investigation. That, one such photograph together with the negative existed and was obtained back by Ajit Porwar soon after the incident is sought to be established by the testimony of Ajit Porwar, Shivcharan Dandore (PW6) and Abdul Samad (PW7). Ajit Porwar, however, while lodging FIR did not mention about his having recovered and destroyed one photograph with negative. Shivcharan Dandore and Abdul Samad, both, are having criminal record to their discredit. Shivcharan Dandore is also a politician - a Municipal Councilor, who is friendly with Ishwarlal Jain @ Babuji, whose patronage Ajit Porwar enjoys. Shivcharan Dandore and appellant No. 1 belong to two different groups; and the group of Shivcharan Dandore was affected by the defection of appellant No. 1's group. Abdul Samad's statement recorded under Section 164 of the Code mentioned about his taking back a photograph of one "Lalwani" from appellant No. 1, and how the name of the person whose photograph it was supposed to be, was mentioned as "Lalwani" instead of "Ajit Porwar" has not been explained. The Investigating Officer had, apparently, made a false statement before the Magistrate, to the effect that appellant No. 1 had produced one photograph and one negative, while obtaining permission of appellant No. 1 in police custody. The prosecution is silent as to what happened to the other photographs of Ajit Porwar and Pratibha. Ajit Porwar did not show any anxiety to get back the other photographs and was satisfied after getting one out of the so many, said to have been taken by appellant No. 1. Thus, that any such photographs actually existed, was not satisfactorily established.

(e) The conduct of the Investigating Officer and his evidence is quite unusual and remarkable. When questioned, for the purpose of proving improvements made by the prosecution witnesses in their evidence by bringing out the contradictions and omissions appearing in their statements recorded by Mahale, Mahale claimed his record to be inaccurate, obviously with the object of protecting the credibility

of the witnesses. Thus, Mahale, did not bother about the risk involved in admitting that he did not keep a true record of the examination of the persons, but was more worried about the risk involved in discrediting the prosecution witnesses."

32. In my opinion, these factors clearly render the whole case of the prosecution doubtful. That, appellant No. 1 is a politician - a Municipal Councilor, who had defected from the majority group, and that, Ishwarlal Jain @ Babuji, wife of Shaligram Choudhari and Shivcharan Dandore, all belonged to the rival group, was not a matter which could be treated as a coincidence. This is particularly so, because, except the word of Ajit Porwar, there is absolutely nothing to show that any such incident took place. Apart from the other weaknesses, there is one patent absurdity in the story of Ajit Porwar, and that is, "that Ajit Porwar not bother about appellant No. 1 having retained the other photographs." The fact that he felt satisfied and relieved after allegedly obtaining one photograph and negative from appellant No. 1, by paying an amount of Rs. 5,000/- to him, is strange and cannot be accepted.

33. When appellant No. 1 was already accused of having committed most heinous offences, which had been given wide publicity by the media, and which had aroused a strong public opinion against appellant No. 1, it was quite easy and certainly possible for his political rivals or opponents to attempt to involve him in some more criminal cases. The extraordinary and unusual behaviour of the Investigating Officer Mahale shows the extent of pressure on the investigating agency to support the prosecution. When the case was based on the testimonies of the persons politically interested and belonging to a different and rival group, it was dangerous to place implicit reliance on the prosecution witnesses - and that too, inspite of the glaring infirmities in their evidence and inspite of a serious doubt about the character of two of them - Shivcharan Dandore and Abdul Samad. It is not possible to hold that the prosecution had been successful in proving the charge against the appellants.

34. I have examined the impugned judgment. I find that most of the contentions raised before this court, were raised before the trial court also. The learned Additional Sessions Judge, in my opinion, however, failed to view these contentions in a proper perspective. In paragraph 10 of the impugned judgment, the learned Additional Sessions Judge observed that the case was of a single witness, and also made it clear that, she was alive to the necessity of scrutinizing the evidence, in such cases, with caution. The learned Additional Sessions Judge, however, did not appreciate the evidence properly. She did note the contentions advanced on behalf of the defence, but she examined them only to see whether those contentions proved that the appellants were innocent, or whether they could still be guilty. This was not a proper approach to be adopted in a criminal trial, where there is always a presumption of innocence in favour of an accused. The learned Additional Sessions Judge has, as aforesaid, inspite of holding that Shaligram Choudhari had manipulated the record pertaining to rent collection to

falsely show that Ajit Porwar was occupying the room in Pitrukul building in May 1986, still, placed reliance on the evidence of Shaligram Choudhari, observing that this fabrication would only result in not placing reliance on the fabricated evidence, but the oral evidence of such manipulator and fabricator, could still be safely accepted.

35. The learned Additional Sessions Judge, among other things, while coming to a conclusion about the truth of the prosecution case, observed as follows :

"..... it is to be considered that if at all the police wanted to fabricate a case, then police would not have taken such an old story of eight years back, but of recent years."

This observation of the learned Additional Sessions Judge is incorrect and unfortunate. First of all, this could be said about all cases in which there is a delayed reporting of the matter, and more the delay, with this sort of reasoning, more credibility would be attached to it. This would be, clearly, contrary to the well accepted norms and parameters applied in the matter of appreciation of evidence. Further, the matter is not as simple as apparently thought by the learned Additional Sessions Judge. There could be many advantages in picking up an old story to level a false allegation. The first is that, the witnesses and victim can afford to be vague and evasive. The persons, accused of the offence, would not be able to contradict or refute the allegations for want of sufficient particulars and details. To illustrate, suppose in the instant case, Ajit Porwar was to mention in the FIR the same incident, but as having taken place before one or two months, then he would be required to meet several questions which he could avoid by reason of the fact that the incident was eight years old. Had the incident been recent, he would have been required to give a specific date of the happenings; whether he was indeed in possession of the room in question at that time, could have been satisfactorily verified. Moreover, there would be a tremendous risk in inventing such an incident claiming it to have taken place recently, as even if one of the accused would be able to establish that at the material time he was not there at all, then the whole case would be doubted. Thus, the observation that "for fabricating a case, the police would not have invented an old story", is not correct. Infact, that the allegation that was leveled, related to an incident which had taken place many years back, is a factor which has helped Ajit Porwar and other prosecution witnesses to avoid giving categorical answers to certain questions.

36. Apparently, as the case was one of the cases arising from the so called "Jalgaon Sex Scandal" which had been given tremendous publicity by the media resulting in an adverse opinion about those alleged to be involved in the matter, in the society, the approach of the learned Additional Sessions Judge in the matter was not usual or normal. It is not unusual for a trial court to find it difficult to maintain the usual, dispassionate and objective approach in appreciating the evidence, in such cases. It clearly appears to me that the learned Additional Sessions Judge viewed and examined the matter as if what

was to be decided was whether the infirmities in the prosecution evidence and the contentions raised by the appellants ruled out the possibility of the appellants being not guilty. Such an approach was contrary to law, and has resulted in the learned Additional Sessions Judge arriving at an incorrect conclusion.

37. This was a case, where, there was a serious doubt about the truth of the prosecution case. The appellants ought to have been acquitted.

38. Appeal is allowed.

The impugned judgment and order of conviction is set aside. The appellants stand acquitted.

The bail bonds of appellant Nos. 2 and 3 are discharged.

Fine, if it has been paid by appellant No. 1, be refunded to the legal heirs of appellant No. 1.

Fine, if paid by appellant Nos. 2 and 3, be refunded to them.

Appeal is disposed of accordingly.