

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO. 62 OF 2018**

Smt. Pratima Naik, Presently lodged
in Central Jail, Colvale, Bardez, Goa. Appellant

Versus

- 1) State of Goa, Through Vasco
Police Station, Vasco, Goa.
- 2) Public Prosecutor, High Court,
Goa. Respondents

Mr. C.A. Ferreira, Advocate with Ms. Prithvi Bandekar,
Advocate under Legal Aid Scheme for the Appellant.

Mr. Sagar Dhargalkar, Additional Public Prosecutor for the
Respondents.

**Coram:- DAMA SESHADRI NAIDU &
M.S. JAWALKAR, JJ.**

Reserved on : 15th APRIL 2021

Pronounced on : 29th APRIL 2021

JUDGMENT: (Per M.S. Jawalkar, J.)

This Appeal is filed against the judgment and order dated 29.03.2017, by which, the appellant stands convicted by the Sessions Court, Margao in Sessions Case No. 21/2015 for offences under Section 302, 380 and 328 of IPC.

2. It is the case of the prosecution that the appellant by administering stupefying drugs, committed murder by

strangulating and smothering the deceased Uma and Neha Naik with intention to cause death and committed theft of gold jewellery. The appellant was awarded sentence under Section 302 of IPC of life imprisonment and of payment of fine of Rs.25,000/- or in default, two years simple imprisonment. For the offence under Section 380 of IPC, the appellant was awarded simple imprisonment for a period of three years and payment of fine of Rs.10,000/- or in default, six months simple imprisonment. For the offence under Section 328 of IPC, the appellant was awarded simple imprisonment for a period of three years and payment of fine of Rs.10,000/- or in default, six months simple imprisonment. All the substantive sentences are ordered to run concurrently.

3. The prosecution examined in all 18 witnesses to prove their case. On completion of prosecution evidence, statement under Section 313 of Cr.P.C. was recorded and after hearing the arguments, the learned Sessions Judge, Margao held the appellant guilty and awarded her with sentences as stated herein above.

4. Heard learned Counsel Mr. C.A. Ferreira with Ms. Prithvi Bandekar, the learned Counsel under Legal Aid Scheme for the appellant and Mr. Sagar Dhargalkar, the learned Additional Public Prosecutor for the respondents.

5. The main ground in appeal is that while framing charges, they were not framed properly as per provisions under Section 211 to 224 of Cr.P.C. It is the case of prosecution that the accused committed offence of murder and theft. In the said process, accused no. 2 was made an approver. The learned Counsel for the appellant submitted that once, the approver gives his confessional statement, it should not be looked into and its only purpose is corroboration. While framing charge, there is no reference at all of accused no. 2 that any act is committed by accused no. 1 along with accused no. 2. In support of this, the learned Counsel relied on the decision of the Hon'ble Apex Court in **Dalbir Singh Vs. State of U.P. (2004) 5 SCC 334**, wherein it is held thus:

6. Before we proceed to set out our answer and examine the provisions of the Code, we will pause to observe that the Code is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well established and well understood lines that accord with our notions of natural justice. If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is 'substantial' compliance with the outward forms of the law.

(Emphasis supplied)

17. In order to judge whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself.

(Emphasis supplied)

6. It is submitted that omission in framing charge is fatal. There is no reference of accused no. 2 at all and his confession cannot be used against accused no. 1. Apart from this statement and evidence of accused no. 2, there is no evidence to connect accused no. 1 with the alleged offence.

7. It is submitted that the learned Sessions Court based its judgment on the deposition of PW-1 and then, looked for its corroboration by other evidence, which is not in fair play. The learned Sessions Court have failed to appreciate evidence, other than approver's evidence and if there is any material connecting the accused with the offence, he may seek corroboration from the approver. Moreover, statement of accused no. 2, before the Magistrate was not voluntary. The law is well settled that in assessing the evidence of the approver, the Court has to first see whether the evidence is doubtful and whether, the witnesses are reliable witnesses. The deposition of PW-1 is not corroborated by the other evidence on record. As deposed

by PW-1, there are no call details produced on record of the phone of accused no. 1. It is also not established that accused no. 1 had called him on three or four occasion from the Nokia mobile, which is stated to have been used by accused no. 1. The said mobile stands in the name of PW-1 (accused no. 2) and it is not proved that the said mobile is used by accused no. 1. Therefore, there is no evidence to show that she had made the call from the said mobile. It is also pointed out that wife of PW-1 was not examined, though shown in the chargesheet as CW-25. The learned Counsel for the appellant pointed out that though accused no. 2 had been arrested on 04.02.2015, his confessional statement was recorded before the learned JMFC on 03.03.2015 (first part) and the second part was recorded on 07.03.2015. From his statement, it appears that his statement was not voluntary. In answer to question no. 4, he replied that he was assaulted on 02.02.2015, when he was called to Vasco police station for inquiry, of which, he clicked photographs and kept at home, which shows that he was threatened or under pressure of police.

8. The learned Counsel for the appellant placed reliance on the decision of the Hon'ble Apex Court in the case of **Haricharan Kurmi Vs. State of Bihar AIR 164 SC 1184**, wherein it is held thus:

11. The question about the part which a confession made by a co-accused person can play in a criminal trial, has to be determined in the light of the provisions of Section 30 of the Act. Section 30 provides that when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. The basis on which this provision is found is that if a person makes a confession implicating himself, that may suggest that the maker of the confession is speaking the truth. Normally, if a statement made by an accused person is found to be voluntary and it amounts a confession in the sense that it implicates the maker, it is not likely that the maker would implicate himself untruly, and so Section 30 provides that such a confession may be taken into consideration even against a co-accused who is being tried along with the maker of the confession. There is no doubt that a confession made voluntarily by an accused person can be used against the maker of the confession, though as a matter of prudence criminal courts generally require some corroboration to the said confession particularly if it has been retracted.

14. In appreciating the full effect of the provisions contained in Section 30, it may be useful to refer to the position of the evidence given by an accomplice under Section 133 of the Act. Section 133 provides that an accomplice shall be a competent witness against an accused person; and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. Illustration (b) to Section 114 of the Act brings out the legal position that an accomplice is unworthy of credit, unless he is

corroborated in material particulars. Reading these two provisions together, it follows that though an accomplice is a competent witness, prudence requires that his evidence should not be acted upon unless it is materially corroborated; and that is the effect of judicial decisions dealing with this point. The point of significance is that when the court deals with the evidence by an accomplice, the court may treat the said evidence as substantive evidence and enquire whether it is materially corroborated or not. The testimony of the accomplice is evidence under Section 3 of the Act and has to be dealt with as such. It is no doubt evidence of a tainted character and as such, is very weak; but, nevertheless, it is evidence and may be acted upon, subject to the requirement which has now become virtually a part of the law that it is corroborated in material particulars.

(Emphasis supplied)

15. The statements contained in the confessions of the co-accused persons stand on a different footing. In cases where such confessions are relied upon by the prosecution against an accused person, the court cannot begin with the examination of the said statements. The stage to consider the said confessional statements arrives only after the other evidence is considered and found to be satisfactory. The difference in the approach which the court has to adopt in dealing with these two types of evidence is thus clear, well understood and well-established.

(Emphasis supplied)

9. The learned Counsel also relied on para 4 of the order dated 17.02.1949 passed by the Privy Council in

Bhuboni Sahu Vs. The King, Viscount Simon 62 LW (PC) 664, which reads as under:

4. The law in India relating to the evidence of accomplices stands thus:- Even before the passing of the Indian Evidence Act, 1872, it had been held by a Full Bench of the High Court of Calcutta in R. v. Elahee Buksh (1866) 5 W.R. (Cr) 80 that the law relating to accomplice evidence was the same in India as in England. Then came the Indian Evidence Act which by Section 133 enacts 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.

Illustration (b) to Section 114 of the Indian Evidence Act, however, provides that The Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars.

Reading these two enactments together the Courts in India have held that whilst it is not illegal to act upon the uncorroborated evidence of an accomplice it is a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act upon the evidence of an accomplice unless it is corroborated in material respects so as to implicate the accused; and further that the evidence of one accomplice cannot be used to corroborate the evidence of another accomplice. The law in India, therefore, is substantially the Same on the subject as the law in England, though the rule of prudence may be said to be based upon the interpretation placed by the Courts on the phrase "corroborated in material particulars" in illustration (b) to Section 114.

10. Relying on the judgment in the case of **Bhuboni Sahu** (supra), the Hon'ble Apex Court in **Kashmira Singh**

Vs. State of MP AIR 1952 SC 159 considered the rule that save in exceptional circumstances one accomplice cannot be used to corroborate another, nor can he be used to corroborate a person who though not an accomplice is no more reliable than one.

11. The learned Additional Public Prosecutor Shri Sagar Dhargalkar relied on following Judgments:

1. **Shivaji Sahebrao Bobade and Another v/s. State of Maharashtra** (1973(2)SCC 793)
2. **State of UP verses M.K. Anthony** (1985) 1 SCC 505
- It appears that reliance is wrong placed on this judgment as it is in respect of extra judicial concession.
3. **State (Delhi Administration) v/s. Dharampal** (2001)10 SCC 372
4. **Madhu and Another v/s. State of Karnataka** (2014(12) SCC 419)
5. **Ravinder Singh v/s. State of Haryana**(1975)3 SCC 742)
6. **Sitaram Sao v/s. State of Jharkhand** (2007)12 SCC 630
7. **State of UP v/s. Fakira Dhivar** (AIR 2007 SC 16)

Learned Additional Public Prosecutor Shri Dhargalkar placed reliance on **Shivaji Bobade**(supra) in support of his contention that it is trite law, nevertheless

fundamental that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. He also relied on this judgment in support of his contention that there is discretion with the Public Prosecutor to pick and choose the witness.

The learned Additional Public Prosecutor submitted that there is no prejudice caused to the accused. Other citations are discussed at proper places.

12. By keeping in mind this settled position of law we will proceed to evaluate evidence keeping aside the evidence of approver. If evidence of approver is kept aside, there is no direct evidence and the total case is based on circumstantial evidence. Let us see whether prosecution succeeded in establishing guilt of accused beyond reasonable doubt on the basis of circumstantial evidence.

PW-4 Baburao Naik, who is the neighbour and was a first person to whom accused no. 1 after the said incident had conversation. He deposed that on 30.01.2015 at around 3:50 hours when he was in his flat sleeping, he heard

someone knocking on their flat door and ringing their door bell. On getting up, he and his wife came to door and on opening the door, he saw accused no. 1 present outside their door and was holding the baby of Neha in her left hand and the baby was crying. On enquiry with the accused no. 1 about her sudden visit to their flat with the baby, she told that some goondas had entered their flat and had assaulted her with some object on her head. When he enquired with the accused no. 1 about her mother-in-law Usha and sister-in-law Neha, she informed that the said culprits had also assaulted them. Thereafter, this witness informed the Chairman, Treasurer and Member of their Society and he along with one member came down and went to the flat of Siddharth to see the condition. They noticed Usha was lying unconscious on the floor. They went to first floor they saw Neha was lying on the ground unconscious. All the articles from the cupboard were seen scattered on the floor. Thereafter, they lodged complaint at Vasco Police Station. He admitted in his cross that when the accused no. 1, Pratima had come, she was holding her right hand on her head and stated that the goondas had assaulted her on her head.

13. PW-2, Abhay Patil is the complainant and neighbour. This witness is not having personal knowledge and he lodged a complaint as Baburao informed him what

the accused no. 1 had informed to Baburao. He along with Baburao first visited the house.

14. PW-3, Dattaram Kamat who is neighbour and resident of the said Society deposed that after the incident he was informed that death had taken place in the flat of Siddharth Naik. He came down and thereafter, he alongwith Sandesh and Srinivas went to the flat of Siddharth Naik. While going down he had seen accused no. 1, Pratima Naik present in the flat of one Rajendra Sawant. In cross, he deposed that he had not gone inside the flat but had seen Usha Naik lying on the floor from outside only.

15. Apart from these witnesses the prosecution examined PW-6, Prithvy Kadam, sister of accused no. 1. She has not deposed about any enmity of any such a nature between the accused no. 1 with her in laws so as to lead her to take such a drastic step. She deposed mostly on Pratimas's earlier behaviour. However, she has no personal knowledge. PW-6 also deposed that her sister Poornima informed her that three days immediately after marriage, Pratima (accused no. 1) had sent four gold bangles to their mother along with one Giriraj with instructions to exchange the gold bangles and make one necklace and two bangles. Mr. Dhargalkar, the learned Additional Public Prosecutor submitted that the statement of sister of accused no. 1 is

relevant as accused no. 1 was not in good terms with her in laws. However, her information is based on what she was informed by Poornima (wife of accused no. 2), who is another sister of accused no. 1. The prosecution has neither examined Poornima nor her mother or father in support of this fact. In view thereof, this evidence being hearsay cannot be relied upon.

Reliance placed by the learned Additional Public Prosecutor in Shivaji Boabde's case is of no help because in the said matter itself Apex Court observed that there is discretion to the Public Prosecutor to pick and choose the witness but he should be fair to the Court and to truth. Instead of examining Poornima who have personal knowledge as alleged prosecution examined Pw6. Poornima would have unfold the prosecution's story but the reason best known to prosecution though her statement was recorded the prosecution has not examined her as a witness.

16. If evidence of the jeweller, PW-11 is perused, it appears that he was knowing Mrs. Poornima Korgaonkar as she was his regular customer since one year prior to the incident i.e. from January, 2015. He deposed that in the month of May, 2015, said Poornima Korgaonkar came to his shop along with her husband Abhijeet Korgaonkar. He identified Abhijeet. He further deposed that Poornima wanted to exchange some gold ornaments i.e. two "ghots"

and two “todhas”. She exchanged them for two bangles, one necklace and one pair of earrings. After exchange, there was additional amount of Rs.10,000/-, which he paid to Poornima in cash. Thus, the best witness for the prosecution to establish that accused no. 1 handed over those gold bangles to Poornima through mother or Giriraj was Poornima herself. The prosecution has not examined her.

17. The prosecution also examined PW-10, Giriraj Mandrekar. It appears that this witness is examined by the prosecution to establish the motive. He was knowing Pratima, accused no. 1, as both were studying in the same school and till standard tenth both were in the same division and they were friends. After standard tenth, they were not in contact as he opted for 12th and then did B.Com, whereas Pratima had failed in the tenth standard. Sometime in February, 2014, he again came in contact with the accused, Pratima, through his tenth standard classmates as they were meeting often at Baina beach for picnic. At that time, Pratima had told him that she is friendly with one Pravin Naik and they would be marrying soon. Further, he deposed that sometime in March 2014 when their group went for a picnic at Opa at that time, sister and brother of accused no. 1, were also present. Pratima told them that she does not like her to be mother-in-law as she is interfering between her (accused no.1) and Pravin and forcing Pravin not to

marry her. The accused no. 1 also told them that she was fed up of her to be mother-in-law and wants to kill her. Pratima got married with Pravin on 08.05.2014. Thus, the said alleged statement which is made in March, 2014 lost its relevancy. Admittedly, this witness was not in contact with the accused till her marriage on 08.05.2014. He also deposed that he came to know about the said incident through his friend. So far as incident of handing over of bangles is concerned, he neither had any knowledge about what is handed over to him immediately two days after the marriage inside the small purse. The said purse was handed over by him to the mother of the accused no.1. This witness has not gone to the police station on its own, but as per his deposition on 02.02.2015, one policeman told him to come to the Vasco Police Station. It also appears to be improbable that Pratima would give gold bangles to a friend, who was not in regular touch/contact with Pratima.

18. Another witness examined by the prosecution is PW-13, Siddharth Naik (brother-in-law of accused no. 1), husband of Neha Naik. This witness deposed that there were never any complaints to him by his wife against accused no. 1 nor against his mother. Though from this witness the prosecution wants to make identification of articles, the witness identified the articles as shown by the police on 06.02.2015. In respect of missing gold ornaments,

he was informed by his mother in June, 2014 that she doubted accused no. 1 based on her inquiry with an astrologer. This information was not given by his wife to him.

19. These are the witnesses who are acquainted to accused nos. 1 and 2 and the prosecution is relying on their testimony to demonstrate that there was a motive of accused no. 1 to commit murder of her mother-in-law and Neha. The prosecution cannot make out motive on basis of previous statement made in March, 2014 to PW-10, Giriraj Mandrekar of her wish to kill her mother-in-law as she was opposing marriage of accused no. 1 with Pravin Naik. Sister of appellant (PW-6) also speaks of relationship of the appellant and her husband 4 years prior to their marriage and does not speak about enmity. Siddharth Naik, PW-14 deposed that there were never any complaints by his wife against accused no.1 nor against his mother.

20. Considering the above evidence, there is absolutely no motive established by the prosecution. Some stray statements before one Giriraj are on account of opposition to the marriage of accused no. 1 with Pravin by Usha Naik (mother-in-law of accused no. 1), cannot be termed as motive for committing murder, in the month of January, 2015, specifically when she already got married with

Pravin in May, 2014. Moreover, absolutely, there is no motive established to commit the murder of Neha by accused no. 1. In view of the deposition of PW-13, Siddharth Naik, there was never any complaint to him by his wife against accused no. 1.

The learned Additional Public Prosecutor relied on **Madhu** (supra), however, the facts involved in the matter are totally differentiable. There was sufficient circumstantial evidence connecting accused and recovery at the instance of the accused of dead bodies.

The learned APP also relied on **Babu Ram** (supra) in support of his contention that there is recovery of articles based on statement of Approver cannot be rejected merely because of belated interrogation of accused by Investigating Officer. However, this judgment cannot be equated as dead bodies were recovered at the instance of accused. Even spades and blood stained clothes recovered at the instance of the accused.

21. Thus, the other motive that the prosecution is suggesting is the theft. If that would be the case, we must see what is recovered from the accused no. 1. It is admitted fact that the recovery of jewellery in the packet was at the instance of accused no. 2, which was done on 04.02.2015. Arrest panchanama shows the arrest of this accused from 14:20 to 14:50 hours. Recovery panchanama shows that it

commenced at 16:05 and concluded at 17:15 hours. However, the pancha witness of recovery Panchanama deposed that he was called at the police station at around 14:00 hours. He also deposed that after 15 minutes in the chamber of P.I., they went along with accused no. 2 from police station and after two hours they returned back after the completion of the panchanama. If that would be the case, there is substance in the contention of the appellant that recovery has been made before the arrest of accused no. 2 and it was shown as made at 16:05 to 17:15 hours. In the recovered articles from the accused no. 2, there is jewellery claimed to be that of deceased mother-in-law, Usha and deceased sister-in-law, Neha. There was a nylon rope, orange powder, mobile, many pokh pants and one dollar note. It is the contention of the appellant that the composition of the items show that it was clearly planted to somehow connect this recovery with the items from the said flat. It appears that the appellant/accused no. 1 also moved an application during the pendency of this proceeding i.e. on 17.02.2017 stating that during the trial of the case, when PW-15 was being examined, at that time, the accused no. 1 saw for the first time that among the attached gold ornaments there are gold ornaments belonging to her, which were at her home and she wishes to identify and further to claim the same. Unfortunately, this application is taken as incriminating circumstance by the Trial Court.

22. Such observation treating this circumstance as incriminating and without putting her any question under Section 313 of Cr.P.C., cannot be used against accused no. 1. Nowhere she was put on material fact that she has committed theft by handing over the packet of jewellery to accused no. 2 at whose instance the recovery is made. Thus, there is neither any role played by the accused no. 2, spelt out in the charge nor any question on this material circumstance in connection with theft, of handing over the jewellery packet is put to the appellant/accused no. 1.

23. There is recovery of knife at the instance of accused no. 1/appellant. It is not the case of the prosecution that the said knife is used in committing the murder of Usha or Neha. The said knife was recovered from the very flat which was sealed by the police on 04.02.2015. Though, prosecution attempting to prove that the injury is self inflicted. If the deposition of PW-8 i.e. Dr. Yatindra Vaidya (who examined accused no. 1 when she was admitted at SMRC hospital, Vasco) is perused, it appears that after alleged recovery of the knife, there is no opinion sought by the I.O. as to whether the injuries caused to accused no. 1 is by that knife or whether the injuries were self inflicted. Even after cross examination, there is no question by the prosecution to this witness in the re-examination. This witness admitted in his cross examination that this patient

was referred for assault by an unknown person at her home at about 2:30 a.m. She also gave history of some powder being thrown on her by one of the persons who assaulted her and who had attempted to strangulate her just prior to the assault. She also gave history of loss of consciousness after the assault on her head. After she regained consciousness, she was informed by her neighbours that she had injuries on her external abdominal wall. He admitted that it is possible that after she had head injury, she became unconscious and somebody caused stab injury. As such, there is no evidence in the deposition of Dr. Yatindra Vaidya suggesting that the injuries are self inflicted.

24. It appears that the knife along with night gown was sent to CFSL. As per the report/opinion of the CFSL, it appears that the cut mark found on the night gown marked as Exhibit-A was microscopically examined and was identified as having being produced by a sharp tool such as knife marked as Exhibit-20. In this regard, the Trial Court observed thus in para 327 of the order:

“This, therefore, proves this part of the prosecution case that the accused no. 1, probably caused the wound on her stomach region to mislead the investigating machinery and to suggest the involvement of some outsiders in the incident”.

25. We are afraid to agree with this finding as in

criminal matters, prosecution has to prove beyond reasonable doubt the guilt of the accused. There cannot be any probability of causing the wound on the stomach region, specifically when nowhere, the prosecution has asked the Doctor about the nature of the injuries as to whether those were self inflicted or otherwise. There is no reference about any blood stains either on the gown or on the knife. Moreover, there is no reference of the colour of the gown by CFSL. In the opinion of the expert, the said cut mark on the gown, after microscopically examined is identified as having being produced by a sharp tool such as knife marked as Exhibit-20. This is not sufficient to conclude that injuries are self inflicted. Thus, this circumstance cannot be held against the appellant.

26. Another circumstance claimed to be against the appellant/accused no. 1 is that accused no. 1 had asked accused no. 2 to arrange for a sim card and mobile phone on around 13.01.2015 and accordingly, accused no. 2 handed over nokia mobile and BSNL sim card to accused no. 1. It is the case of the prosecution that this fact is established by the prosecution by placing call details report. However, this phone, which is alleged to be handed over to accused no. 1 belonging to accused no. 2 was recovered at the instance of accused no. 2. Even the sim card belongs to accused no. 2.

27. In this regard, the learned Trial Court observed thus:

“There are entries showing that on 30.01.2015, at 01:24:21 hours and again at 01:58:01 hours, two calls had been made from the mobile number 9405929502 to the mobile number 8007097523. This evidence therefore proves the truthfulness of the deposition of PW1 that he had received the calls from the accused no. 1 on the morning of 30.01.2015, at around 1:30 hours, calling him to the flat no. 10, at the Kamat Palace Building, at Mangor Hill, Vasco.”

28. The prosecution has not established the identification of another no. 8007097523 to ascertain to whom it belongs to and to whom the calls were made. The most important is the location of the second person as alleged by accused no. 2 as accused, Pratima was calling. Though it is deposed by accused no. 2 that the said spare nokia mobile hand set was handed over by him to accused no. 1 there is nothing on record apart from his oral evidence to establish that actually any such handset was handed over to Pratima and she used the said mobile from her house. The prosecution would have established this fact beyond reasonable doubt if the prosecution would have placed on record the location of the caller of phone no. 9405929502. Unless that tower location is established, it is difficult to conclude that prosecution has established that accused no. 1 had used the phone from that flat.

29. It is alleged that accused no. 1 had committed theft of gold jewellery of deceased mother-in-law and deceased sister-in-law. The said packet was containing jewellery along with blue nylon rope, mobile, many pokopants and one dollar note. As discussed earlier, it appears that the said recovery was at the instance of accused no. 2 on 04.02.2015 before his arrest. It is also a matter of record that accused no. 1 applied for return of her gold jewellery, which is recovered at the instance of accused no. 2. In the charge also, there is no reference that the said jewellery was handed over by accused no. 1 to accused no. 2. Thus, apart from statement of accused no. 2, there is no circumstance leading to the conclusion that accused no. 1 had committed theft. Neither the recovery of the jewellery is at her instance nor any circumstance is established by the prosecution so as to conclude that the accused no. 1 has committed theft of the jewellery, specifically when her own jewellery was found in the Court when it was shown to the pancha witness. This cannot be held as incriminating fact against the accused no. 1/appellant as observed by the learned Trial Court.

30. It is also the case of the prosecution that by administering stupefying substance to the deceased, offence of murder has been committed. In the packet recovered at the instance of accused no. 2, there was another packet, in

which, the orange colour powder containing lorazepam was found. However, no poisons, pesticides, barbiturates, benzodiazepine group of drugs, toxic metal ions and anions was detected in viscera. Thus, the visceral samples of Usha as well as Neha were not having any stupefying substance (Exhibit-128). It appears that the learned Trial Court, completely relied on deposition of PW-1 (accused no. 2) and came to the conclusion that accused no. 1 probably had herself administered the powder to both the victims, Usha and Neha Naik. On presumption that PW-1 (accused no. 2) is deposing the truth, the learned Trial Court proceeded further in holding accused no. 1 guilty of the offence. The words used that “the victim Usha Naik was probably sedated” will not be sufficient to hold accused no. 1 guilty of the offence. There are injury marks of resistance on the body of Neha which suggest resistance on her parts. There has to be proof beyond reasonable doubt and there should be a complete chain of circumstances, which lead to the conclusion of guilt of the accused and no other possibility.

31. PW-16, P.I. (who at the relevant time was holding additional charge of Vasco Police station) deposed that services of dog squad was utilized apart from the services of finger print expert. However, dog squad had not found any trail nor any chance print had been found. It has come in the evidence of PW-16 that he got suspicion that accused

no. 1/appellant is involved in the incident as the front door of the flat was not broken. If third person had entered into the house he must have broken the door. However, there was no question put up to accused no. 1 under Section 313 of Cr.P.C. in this regard.

The learned Additional Public Prosecutor relied on **State (Delhi Administration)**(supra) in support of his contention that the accused had to show that some prejudice was caused to him by the report not being put to him. It is held in the said matter by the Hon'ble Apex Court that "even otherwise it was the duty of the Sessions Judge and /or high Court if they found that some vital circumstance had not been put to the accused, to put those question in the counter for the accused and get the answers of the accused.

32. This Court found it essential to seek the appellant's explanation under Section 313 of Cr.P.C. in respect of the assailants' entry in the house without breaking the front door or other such acts of force. Ms. Bandekar was directed to secure duly signed written explanation from the appellant. Accordingly, in presence of learned Additional Public Prosecutor, the statement was recorded and placed before us. Accused no. 1 in her explanation submitted that someone must have opened the door or somebody must have entered into the house as her mother-in-law was in habit of keeping Diya (light) in front

of the door to keep away evil and used to take it inside once it is off.

33. As observed earlier, the learned Trial Court presumed that the deposition of PW-1 (accused no. 2) as true and correct and examined other evidence on the touchstone of the evidence of PW-1. However, if PW-1's statement is kept aside, there is hardly any evidence against accused no. 1 to connect her to the murder or theft.

34. For evaluation of deposition or confession of accused no. 2, the following sections of the Indian Evidence Act are relevant:

Section 133 of the Evidence Act reads as under:

133. Accomplice.—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.

35. Section 114 of the Evidence Act reads as under:

114 Court may presume existence of certain facts. — 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—

(a)

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

(c)
(d)

36. Section 30 of the Evidence Act reads as under:

30. Consideration of proved confession affecting person making it and others jointly under trial for same offence.—When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

37. It is settled position of law that when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself or some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. If a person makes a confession implicating himself, that may suggest that the maker of the confession is speaking the truth.

The learned APP relied on **Ravinder Singh**(supra) wherein the Hon'ble Apex Court held that conviction justified on the basis of accomplice's evidence of conviction for murder. However, an approver's evidence has to be corroborated in material particular bridging closely the distance between the crime and the criminal. Every

approver comes to give evidence in some such manner seeking to purchase his immunity and that is why to start with he is an unreliable person and the rule of caution calling for material corroboration is constantly kept in mind by the court by time-worn judicial practice.

Similarly learned APP also relied on **Sitaram Sao**(supra). In both the judgments the principle of law laid down in **Bhuboni Sahu** (supra) is reiterated. The rule of prudence assumes great significance when its reliability on the touchstone of credibility is examined.

38. Section 133 of the Indian Evidence Act provides that an accomplice shall be a competent witness against an accused person. Illustration (b) to Section 144 of the Evidence Act brings out the legal position that an accomplice is unworthy of credit unless he is corroborated in material particulars. Conjoint reading of these two provisions follows that though an accomplice is an competent witness, prudence require that his evidence should not be acted upon unless it is materially corroborated as held in **Haricharan Kurmi** (supra). The stage to consider the confession of the co-accused person arise only after the other evidence is considered and found to be satisfactory. It is further held by the Apex Court that in criminal trials, there is no scope for applying the principle of moral

conviction or grave suspicion.

39. Thus, we will have to appreciate now the evidence of PW-1 i.e. accused no. 2. On the first place, prosecution has to establish that the confessional statement of accused no. 2 (Exhibit-24) was voluntary without any fear or allurements. We have gone through the statement under Section 164 of Cr.P.C. recorded on 03/03/2015 and 07/03/2015. If this statement is perused, the answer to question no. 4 reads as under:

Q. No. 4: "I desire to examine your person. Do you consent to it ?

Answer: I was assaulted on 02.02.2015 when I was called at Vasco Police Station for inquiry, for which, I have clicked photographs and kept at home. I do not have any wounds or marks on my body (result of examination – NIL as witness stated that he has no marks on body)."

40. Needless to mention here that statement of accused no. 2 under Section 164 of Cr.P.C. was recorded on 03.03.2015 i.e. nearly after one month from his arrest. The answers to question nos. 11 and 12 are reproduced as under:

Q. No. 11: Have the police or any other person given you any allurements to make statement ?

Answer: I was told by the police on 20.02.2015 that in case, I fail to give my statement under Section 164 then they would file case against me and see that I will suffer life imprisonment and the main accused Pratima would be left free.

Q. No. 12: Have the police or any other person given you promise that if you make a statement then you will be made witness for the prosecution in the case ?

Answer: I was so told by the police on 20.02.2015, but they have not promised anything as on today.

41. In cross examination, this witness deposed that on 04.02.2015 itself, he told to the P.S.I., Vasco Police Station that he wanted to make a confessional statement. If that would be the case, there is no explanation whatsoever for producing him before the JMFC on 03.03.2015. He also admitted that I.O. vide letter dated 05.04.2015 requested JMFC to record statement of witness under Section 164 of Cr.P.C. However, there was no mention of the name of accused no. 2. He further also admitted that "I was threatened by one person to make a disclosure, but I do not know his identity. This person had come when I was in police lock up and said so in the presence of the police".

Thus, delay in producing this accused for recording confessional statement after a period of one month and his answer to question nos. 4, 11 and 12 and his above statement raises a serious doubt about his free and voluntary statements. It also appears from record that accused no. 2 moved an application stating that he wants to make full and correct disclosure. To the said application, I.O. had filed his reply giving no objection for accused no. 2 to be made an approver.

42. It appears that as per deposition, accused no. 2 i.e. PW-1 was arrested on 04.03.2015 at 3:00 p.m., whereas as per the arrest panchanama it commenced at 14:20 hours and concluded at 14:50 hours. This arrest panchanama was not established by the prosecution by examining the pancha witnesses. In cross examination, the pancha witness to recovery deposed that when he was contacted by the Police Constable on 04.02.2015 at 14:00 hours, he was at the sea shore. Thereafter, on going to the police station also, they were in the cabin of the P.I. for about 15 minutes. Thereafter, they went to the place of recovery and returned back in two hours.

43. In such circumstances, it was incumbent on the prosecution to prove arrest panchanama, specifically when they are claiming recovery at the instance of accused no. 2.

The information has to be there from a person accused of any offence and in the custody of the Police Officer.

44. Conduct of accused no. 2 is not at all natural and somehow he wants to save himself from punishment. If his story is believed that he had seen Pratima committing murder by strangulating her mother-in-law, the normal person would have ran away from the place or would have made hue and cry. However, as per his story he was there for half an hour and waited for 10 minutes for Pratima to return from upstairs and collected the packet handed over by her. As such, the story put forth by accused no. 2 i.e. PW-1 is neither reliable nor probable.

45. Moreover, from the deposition, it is clear that accused no. 2 went to hospital to meet accused no. 1. However, he has not handed over or discussed about the packet alleged to be handed over by accused no. 1 to accused no. 2. It also appears that accused no. 1 was taken to the house of accused no. 2. There also, he has not made any attempt to return that packet alleged to be handed over by accused no. 1 to accused no. 2. Not only this, he was attending his duties as claimed by him from 29th till his arrest and all the while, if his statement is accepted, the said packet was in the dicky of his Dio. Statement of an accomplice would have been accepted only if he is making

some confessional statement implicating himself. However, from the whole statement of accused no. 2, he claims to be innocent and point out involvement if accused no. 1 alone.

46. As observed in **Haricharan Kurmi** (supra), Section 30 of the Evidence Act provides that when more person than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. The basis on which this provision is found is that if a person makes a confession implicating himself that may suggest that the maker of the confession is speaking the truth. Normally, if a statement made by the accused person is found to be voluntary and it amounts a confession in the sense that it implicates the maker, it is not likely that the maker would implicate untruly, and so Section 30 provides that such a confession may be taken into consideration even against a co-accused who is being tried along with the maker of the confession.

True it is that there should not be independent confirmation of every material circumstance. However, all that is required is that there must be some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon

it. The corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime. In this matter except statement of accused No.2 (Approver) the prosecution failed to establish circumstantial evidence sufficient and satisfactory so as to lead to conclude A1 is the author of crime. As discussed earlier the evidence of Pw2 is neither trustworthy nor probable. Thus, the prosecution failed to establish:

- (a) Motive.
- (b) Self inflicted injuries by accused no.1, connecting the recovered kitchen knife at the instance of accused no. 1.
- (c) Use of phone, alleged to be handed over by accused no. 2 to accused no. 1.
- (d) Administering of stupefying substance to deceased Usha and Neha by accused no. 1.
- (e) Theft of jewellery by Accused No.1 kept in the packet recovered at the instance of accused no. 2.

47. As discussed earlier, there is delay in making confessional statement and there is no plausible explanation for the same, specifically when accused no. 2 showed his desire to make his confession on 04.02.2015 and he was produced before the Magistrate on 03.03.2015. His answers to the questions stated above shows that his statement is not

voluntary. Possibility of threats and allurement cannot be ruled out. His evidence or his statement before the Magistrate is nothing but to save himself from the severe punishment. If his evidence is kept aside, the other circumstantial evidence is not at all sufficient or satisfactory to conclude that accused no. 1 is guilty of offence charged with. Thus, the testimony of the accomplice is evidence under Section 30 of the Evidence Act is clear, but prudence requires that his evidence should not be acted upon unless it is materially corroborated. If other evidence is taken into consideration, it is not at all satisfactory for the reasons stated against each of the circumstance. The learned Trial Court substantially relied on confessional statement of accused no. 2, but not independently considered whether the other evidence is sufficient to conclude the guilt of accused no. 1. The confessional statement nowhere makes any such statement admitting his (accused no. 2) participation in the offence. As held in **Dipakbhari Patel** (supra), “in criminal trials, there is no scope for applying the principle of moral conviction or grave suspicion. In criminal cases where the other evidence adduced against an accused person is wholly unsatisfactory and the prosecution seeks to rely on the confession of a co-accused person, the presumption of innocence which is the basis of criminal jurisprudence assists the accused person and compels the Court to render the verdict that the charge is not proved against him, and so,

he is entitled to the benefit of doubt”.

48. From the judgment of the Trial Court, it appears that the Trial Court relying on the deposition of PW-1 (accused no. 2) came to the conclusion that both the murders were committed by accused no. 1 without there being any other evidence on record.

49. It is well settled principle that life and liberty of a person cannot be put in jeopardy on mere suspicions, howsoever strong, and they can only be deprived of these on the basis of definite proof. As such, we are satisfied that the appellant is entitled for benefit of doubt and acquittal. Accordingly, we proceed to pass the following :

O R D E R

- i. The appeal is allowed. The judgment and order dated 29.03.2017 passed by the Sessions Judge, Sessions Court, Margao in Sessions Case No. 21/2015, convicting the appellant is hereby quashed and set aside.
- ii. The appellant/accused no. 1, Pratima Naik is acquitted of the offence punishable under Section 302, Section 380 as well as offence

punishable under Section 328 of IPC.

- iii. The appellant, Pratima Naik shall be released immediately, if not required in any other offence.
- iv Order in respect of M.O. will remain as it is.
- v The learned Sessions Court, South Goa Margao to execute the order.

M.S. JAWALKAR, J.

DAMA SESHADRI NAIDU, J.

EV/MV