

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPLICATION (MAIN) NO.207 of 2015**

State,
Through Police Inspector
(major),
C.I.D., Crime Branch,
Dona Paula Police Station,
Dona Paula, Goa. .. Applicant/ Appellant

VERSUS

Vaman Naik, (Major)
s/o Hari Naik,
Indian National,
Service,
r/o H.No.73, Torsem Village,
Pernem, Goa. .. Respondent

Mr. S. R. Rivankar, Public Prosecutor for the applicant/ appellant.

Mr. S. D. Lotlikar, Senior Advocate with Mr. J. Simoes, Advocate
for the respondent.

CORAM :- F. M. REIS, &

C. V. BHADANG, JJ

Reserved on : 9th December, 2015

Pronounced on : 23rd December, 2015

ORDER : (Per C. V. Bhadang, J.)

This is an application for leave to appeal against acquittal.

2. The respondent is a police constable. At the relevant time, he was attached to P.S., Calangute. According to the prosecution case, the respondent had forcible anal sexual intercourse with transgenders, sexual intercourse with sex

workers at Calangute and had extorted money from the sex workers and the transgenders, by abusing his position as a police constable. It was also alleged that the respondent, by abusing his position, had induced and seduced the victims to carry on prostitution. He was living on their earnings.

3. The respondent was accordingly prosecuted before the learned Special Judge (CBI Court), Panaji in Special Case No.2/2013, for the offences punishable under Sections 376, 377, 384, 385 of Indian Penal Code (IPC, for short) and Sections 4, 5, 8 and 9 of the Immoral Traffic (Prevention) Act, 1956, read with Sections 7 and 13(1), read with Section 13(2) of the Prevention of Corruption Act.

4. At the trial, the prosecution examined as many as 31 witnesses and produced contemporary record of the investigation. The respondent neither entered into witness box nor examined any other defence witness in his defence. The learned Sessions Judge, by the impugned judgment dated 30/04/2015, has acquitted the respondent from the offences as charged. A perusal of para 208 of the impugned judgment would show that the learned Sessions Judge came to the conclusion that the prosecution has been unable to prove the charges beyond reasonable doubt and that the respondent deserves to be

acquitted, by giving benefit of doubt. Feeling aggrieved, the State is before this Court.

5. We have heard Shri Rivankar, the learned Public Prosecutor for the applicant and Shri Lotlikar, the learned Senior Counsel for the respondent. With the assistance of the learned Counsel for the parties, we have perused the impugned judgment as also the copies of the evidence of the prosecution witnesses, produced on record.

6. It is submitted by Shri Rivankar, the learned Public Prosecutor for the applicant that this case cannot be viewed as a normal case, as the offences are committed, in an unusual situation, wherein the respondent, a Police Constable, attached to the Police Station, Calangute, had abused his position as such and had, not only indulged into the offences of rape, unnatural sex as also extortion, but also had induced the victims to indulge into prostitution and was found to be living on their earnings. The learned Public Prosecutor, in particular, made reference to the evidence of PW1- Fida Khan, PW2- Jasmine Khan, PW3- Anu Parmar and PW4- Joyce D'Souza, who are all victims. It is submitted that the prosecution has more than established the charge on the basis of the evidence of these witnesses, which is corroborated in material particulars by the rest of the prosecution

evidence. The learned Public Prosecutor would submit that Auda Viegas (PW7) and Sofia Caldeira (PW8), who are working with the NGO 'Rista', are independent witnesses and cannot have any intention to falsely implicate the respondent. Even so far as the rest of the prosecution evidence is concerned, Head Constable, Mangesh Satodkar (PW6), Velerie Fernandes (PW13), the owner of the rented house, where the alleged incident took place, and the Police Officers are witnesses, who had no intention to grind an axe against the respondent. The learned Public Prosecutor was at pains to point out that neither there is a defence nor any material on record led by the respondent, to show as to why he could have been possibly falsely implicated. The learned Public Prosecutor submitted that the case arose after a raid was conducted at the premises and this itself would be sufficient to inspire confidence in the prosecution case and the evidence led. The learned Public Prosecutor submitted that the learned Sessions Judge has decided the case in a casual manner and the appreciation of the evidence cannot be said to be appropriate. It is submitted that the finding that the respondent is entitled to a benefit of doubt, is clearly perverse and is not borne out of record and on the basis of the weight of the evidence led. He submitted that once the finding is found to be perverse and/ or against the weight of the evidence, this Court will have to interfere with the finding and this is a case, in which leave to appeal against

acquittal, needs to be granted.

7. On the contrary, it is submitted by Shri Lotlikar, the learned Senior Counsel for the respondent that the impugned judgment of the learned Sessions Judge cannot be branded as being delivered in a casual or cavalier manner. The learned Senior Counsel would submit that the learned Sessions Judge has considered the evidence threadbare and in the face of glaring contradictions, has rightly extended the benefit of doubt. It is submitted that even where two views are equally possible, the benefit has to go to the respondent. It is submitted that having regard to the limited scope of interference in an application/appeal of the present nature, no case for interference is made out. The learned Senior Counsel submitted that the entire prosecution story is a farce. The learned Senior Counsel has taken us through the evidence led, particularly of the victims, including Joyce D'Souza (PW4) in order to contend that the said witnesses claim to be working with N.G.O. in the field of Sex Education and Awareness as to Aids and also claim to be police informer/s. It is submitted that it is unacceptable that the witness would keep quiet for a period of more than two years. It is submitted that the evidence, in this regard, has rightly been disbelieved. The learned Senior Counsel submitted that more serious the offence, the stricter is the proof required and insisted

upon. In such circumstances, it is submitted that no case for interference is made out.

8. We have given our anxious consideration to the rival circumstances and the submissions made, in the context of the charges and the allegations made against the respondent and the evidence led and we express our inability to hold that this is a case, in which leave to appeal against acquittal needs to be granted.

9. Before proceeding to consider the evidence, it may be noted that the principles as to scope and ambit of the challenge to a judgment of acquittal, are now well settled. It is trite that when two views are equally possible and the Trial Court has chosen one, it is not permissible for the Appellate Court to substitute the other view, on the ground that it is a more plausible view, than the one taken by the learned Trial Court. It is only when the view taken by the Trial Court is an impossible view and is perverse, based on misappreciation of the evidence on record or if the Trial Court has ignored an important piece of evidence, which has a bearing on the question and the offence alleged against the accused, that this Court is required to interfere. In this regard, useful reference can be made to the decision of the Hon'ble Supreme Court in the case of ***"Basappa Vs. State of***

Karnataka” reported in (2014)5 SCC 154.

10. It would now be necessary to make a reference to the evidence of prosecution witnesses, who are examined as victims in this case. Fida Khan @ Saarah Khan (PW1) claims that she was born as a male child, however as she grew up, she found that she had feminine traits. On account of this, she was harassed by her friends and college mates, as a result of which, she left her college and came down to Goa, some time in the year 2007. She stayed with one Jasmine Khan (PW2), whom she claims to be her “Guru”, in a rental room in the house of one Domnic. She says that she had undergone a sex change surgical process and she was working as a commercial sex worker (CSW) and also working as part time Peer Educator with NGO by name 'Rista', which was working for transgenders. It is her material evidence that she was knowing the respondent since the time she came to Goa i.e. in the year 2007. The respondent was attached to P.S., Calangute. He used to come on his motorcycle mostly at night in the rented room, where she used to live with Jasmine (PW2). The respondent used to harass them physically and financially. The respondent also used to ask them to have oral sex with him. He also had sexual intercourse with both of them. These acts of sexual harassment continued from the year 2007 to 2010 in the rented house, belonging to Domnic. She then stated that she was

knowing Velerie Fernandes, the daughter of Domnic. After she left the rented room of Domnic, Jasmine and the witness started residing at Baga Residency, where the respondent came twice. Jasmine refused to open the door and threatened to call the neighbouring people, whereupon, the respondent left. She claims that she was indulging in prostitution at Baga Beach and whenever she was found with the customer, the respondent used to approach her and extort money from the customers. She then claims that some time in the year 2010, she informed Sofia Caldeira (PW8) of Rista that the respondent was harassing them. However, she claims that Sofia (PW8) told her that as the respondent is a policeman, they cannot take any action against him. She has then claimed that she knows one Joycee (PW4), who is also working as a CSW and a peer educator for Rista. In the cross-examination, this witness has stated that some time in the year 2010, this witness and some other transgenders were taken to P.S., Calangute from Discotheque by name 'No Escape', where her statement was recorded. They were kept in the police lock-up during night and next morning, were produced before the Magistrate at Mapusa, where they were released on payment of fine. Apart from above incident, she was never arrested in any another incident. She did not lodge any complaint against the respondent, when she was taken to P.S., Calangute or before the Magistrate at Mapusa. She denied that she knows PI Raposo

(PW27) or PSI S. Jacques.

11. The evidence of Jasmine Khan (PW2) is more or less on same lines. She claims to be working as CSW and a peer educator at Rista, supported by Goa State Aids Control Society. She was staying in the rented room at Domnic house from the year 2005-2007. This witness claims that the respondent had anal sex, thigh sex and oral sex with her and Seema and Fida every alternate day. This witness had stayed at Baga Residency from the year 2007 to 2010. She claims that the respondent used to come there also and extort money from the customers. She has stated in the cross-examination that her statement was recorded at the Rista office. Her statement was not read over and explained to her. She has stated that 'Norms Club 24 hours' was raided twice, from where, she along with others were taken to the police station and were released the following morning. She was also twice taken into custody while soliciting customers outside. She also claims that she had fight with some people from their colony and had injured her hand and she was taken to Mental Hospital, where she was admitted for a period of 10 days and was subsequently discharged. She had told Sofia (PW8) about the sexual and financial abuse by the respondent.

12. Anu Parmar (PW3) also claims to be a transgender,

working for NGO Rista to create awareness and educate men about HIV. She has also stated that she was residing in the rented room at Domnic House from the year 2007 to 2010 along with one Seema, who is since dead. She claims that Seema was also working for NGO Rista as a Peer Educator. She states that she had not complained about the abuse by the respondent earlier as he was a policeman. She states that she was arrested by P.S., Calangute once from a Club, where she used to perform.

13. Lastly, Joycee (PW4) had come down to Goa in the year 2000 after the death of her parents. Initially, she stayed at Colva and in the year 2007, shifted to Khobrawado, Calangute, where she stayed in the rented room at Domnic house. There were 7 rooms in the Domnic house, which were occupied by transgenders. She was working for NGO Rista as a peer educator and creating awareness and was also associated with Goa Aids Control Society. She was also working as a bouncer in the discotheque by name 'Uthopia' at Verna. Her duty hours were 10p.m. to 3.a.m. She was deputed at the said discotheque by a private Organization "Scorpio". She was also working as a CSW. She claims that on 04/11/2012, she had gone to Britos at Baga to solicit customers at about 3.30 to 4 a.m. P.I. Rapoz of Calangute P.S., rescued her, took her to the Police Station and thereafter, to the protective home. She has then stated about the abuse by the

respondent, including extortion of money. She states that on 09/11/2012, while she was in the protective home at Merces, she narrated the incident to Auda Viegas and other panel members, where her statement was recorded. Subsequently, her statement was recorded by P.I. Sunita Sawant on 27/11/2012 at Protective Home and thereafter, by Judicial Magistrate, First Class at Mapusa on 30/11/2012.

14. It can, thus, be seen that these prosecution witnesses claim to be working as CSWs and were also arrested in connection with incident of either soliciting customers or dancing at a bar, which was raided. Although PW4 claims to be a police informer and all these witnesses claim to be working for NGO, they did not lodge any complaint whatsoever for a period of more than two years. The only reason given is that the respondent was working as a Police Constable. In our considered view, this explanation cannot be accepted. The evidence, as discussed above, would show that the witnesses were taken to Police Station and also before the Magistrate earlier, where they could have narrated the above incident and abuse by the respondent.

15. PW5 is the Executive Magistrate, who had conducted T.I. Parade. In our considered view, when the prosecution witnesses claim that they were knowing the respondent, the

conduction and the outcome of the identification parade pales into insignificance.

16. The evidence of Head Constable, Mangesh Satodkar (PW6) is not of much significance except saying that the respondent had a black colour Splendour motorcycle and used to go alone on his duty. He claims that he does not have personal knowledge about the complaint against the respondent. He had heard that the respondent was transferred because of complaints.

17. Auda Viegas (PW7) is a social worker, working with Women Development, Rehabilitation and Reintegration of victims of commercial sexual activities. She is also a member of Panel under S.D.M. to assist and record statements of victims at Protective Homes and Police Station.

18. Sofia (PW8) is the founder member and program manager of 'Rista'. She claims that Joycee (PW4), who was working for the Organization initially as a Peer Educator since the year 2008, was promoted as an outreach worker. She claims that Joycee (PW4) was rescued by Calangute Police as she was found soliciting customers and she was kept in Protective Home. She had gone to meet Joycee (PW4) at the Protective Home. Subsequently, PW4 was released. This witness namely Joycee as

well as Jasmine, Anu, Fida and Seema had earlier disclosed about physical and sexual harassment by the respondent. This witness, however, had not lodged any complaint against the respondent. She claims that being a member of the NGO, she used to go to Police Station whenever sex workers and others involved were arrested. She also claims that transgenders, when arrested, are produced before the Collector. She was confronted with an omission in police statement about PW4 and other witnesses having attributed forcible intercourse to the respondent. She explained it away by saying that PW4 and others had stated about illicit and criminal acts, which meant illicit forcible sexual relations. She claims that she did not lodge complaint against the respondent as she felt that the transgenders would be further harassed.

19. Velerie (PW13) is the daughter of Domnic Fernandes. She claims that the respondent used to come to Domnic's house for checking whether the forms are filled and used to visit the rooms occupied by transgenders. She claims that Joycee and transgenders used to inform her that during his visit, the respondent used to demand sexual favours from them and used to threaten them. This witness has also not disclosed about this incident earlier.

20. We have carefully gone through the judgment passed by the learned Sessions Judge. The learned Sessions Judge has found that there is no explanation for not reporting the matter by PW4 or other victims, although PW4 claims to be working as a police informer and also for a NGO. It has also been found that there is a delay of 16 days in filing complaint by Auda Viegas (PW7) and there are additions and improvements in the complaint Exh.46, which are not found in the statements of the victims dated 09/11/2012. We find that after meticulously considering the circumstances and the evidence on record, the learned Sessions Judge has come to the conclusion, and to our mind rightly so, that this is a case in which, a benefit of doubt would arise and the respondent would be entitled to acquittal.

21. We are conscious of the fact that the case arises in an unusual circumstance, whereunder a police constable is alleged to have indulged into offences, which he is expected to prevent. However, in the absence of any reliable evidence, it is not possible to hold that the finding of acquittal is an impossible view, which would require interference. The only reason given for not reporting the matter is that the respondent was a policeman. Even assuming that a Police Constable may wield some influence, the fact remains that there were superior officers as the respondent was only a Police Constable and when PW4 is stated

to be acting as a police informer, nothing prevented PW4 or the other victims from reporting the matter to the police. It may not be out of place to mention that although Sofia Caldeira (PW8) claims that PW4 and other victims had complained about the respondent, there also the matter is not reported with promptitude. In the aforesaid circumstances, we find that no case for grant of leave to appeal against acquittal is made out.

22. In the result, the application is hereby dismissed.

SMA

C. V. BHADANG, J.

F. M. REIS, J.