

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL REVISION APPLICATION NO.14 OF 2016**

Shri Lyndron Jaques ...Petitioner
V/s
Mr. Minguel Rodrigues & Ors. ...Respondents

Shri Ryan Menezes, Advocate for the Petitioner.
Shri Shivan Desai, Advocate for Respondents No.1
& 3.
Shri S.R. Rivankar, Public Prosecutor for
Respondent No.2.

CORAM : C.V. BHADANG, J.

DATE : 10th OCTOBER, 2016

ORAL ORDER :

The challenge in this criminal revision application at the instance of the petitioner, who is an injured is to the concurrent finding of acquittal of the respondent nos.1 to 4 (accused) recorded by the Courts below.

2. The brief facts are that the respondent nos.1 to 4 were put on trial before the learned Judicial Magistrate First Class at Margao for the offence punishable under Section 325 read with Section 34 of IPC for having assaulted the petitioner with kicks, slaps and fist blows.

The incident in question had occurred on 3/05/2012 at about 8.30 p.m. at the shop of the petitioner which is situated at Mobor. The complaint was lodged by Mrs. Maria Jaques, who is the mother of the petitioner. It was claimed that some four unknown persons had gone to the shop of the petitioner for buying playing cards. After buying a sealed pack, the said four persons went away. They returned after five minutes and started arguing with the petitioner claiming that there were only two packs instead of three. When the petitioner told them that the pack was sealed, they started assaulting the petitioner with slaps and kicks all over his body, on account of which the petitioner suffered injury. The complainant Mrs. Maria Jaques lodged a complaint on the basis of which the matter was investigated and the charge sheet was filed.

3. At the trial, the prosecution examined in all eight witnesses, out of which PW1 Mrs.

Maria Jaques, PW2 Mr. Sujito Moraes and the petitioner PW4 are material witnesses. The learned Magistrate by the impugned judgment dated 5/08/2014 acquitted the respondent nos.1 to 4 for the offence punishable under Section 325 read with Section 34 of IPC. The petitioner challenged the same before the learned Sessions Judge in Criminal Appeal No.97/2014/I, which was dismissed on 14/08/2015, which brings the petitioner to this Court.

4. I have heard Shri Menezes, the learned Counsel for the petitioner and Shri Desai, the learned Counsel for respondent nos.1 to 4. I have also heard Shri Rivankar, the learned Public Prosecutor for the respondent no.5. With the assistance of the learned Counsel for the parties, I have gone through the evidence of the relevant witnesses and the impugned judgment of the Courts below.

5. It is submitted by Shri Menezes, the learned Counsel for the petitioner that once the accused had not disputed their identity, the learned Magistrate could not have acquitted them for want of identification. It is submitted that once the respondents/accused do not challenge/dispute their identification, the necessary corollary is that they do not dispute their presence at the spot of the incident. It is submitted that the Courts below failed to properly consider the effect of the accused not disputing the identity and erred in brushing aside the said aspect while acquitting them. It is next contended that on the basis of the medical evidence on record the learned Magistrate erred in coming to the conclusion that an offence punishable under Section 325 of IPC was not made out. Reliance is placed on the decision of this Court in the case of ***Farman Imran Shah @ Karu V/s. State of Maharashtra, 2014 0 Supreme (Mah) 751*** and in particular para 8 thereof to submit that the First Information

Report is not an encyclopedia and may not contain all the details about the accused/incident. It is submitted that in the matter of administration of criminal justice, there are three stake holders namely the victim, the accused and the society in general which is represented by the State. It is submitted that the interest of the victim cannot be lost sight of.

6. On the contrary, it is submitted by Shri Desai, the learned Counsel for the respondent nos. 1 to 4 that the fact that the accused were not disputing their identification is not sufficient and the prosecution has to independently establish the involvement and the complicity of the accused in the alleged crime. It is submitted that both the Courts below have threadbare considered the circumstances and the evidence on record including the aspect of the identification not being disputed and have

rightly come to the conclusion that even identification in the Court would not have helped in this case. It is submitted that the Courts have rightly disbelieved the evidence of PW2. The learned Counsel was at pains to point out that the scope of interference in the matter of the present nature is limited and even where two views are possible, the appellate or revisional Court cannot substitute its view in the place of the one taken by the learned Magistrate.

7. The learned Public Prosecutor has supported the petitioner. He, however, fairly concedes that mere fact of the identification not being disputed would not be sufficient to hold that the accused admit their presence at the time of the incident.

8. I have carefully considered the

circumstances and the submissions made. PW1 Maria Jaques, PW2 Sujito Moraes and PW4 Lyndron Jaques i.e. the petitioner are the material witnesses to be considered. At the outset, it is necessary to mention that the petitioner, who is the sole eyewitness examined and is also the victim, has stated in his cross-examination that PW2 Sujito Moraes reached the spot after the incidence was over. In such circumstances, the Courts below have rightly refused to place reliance on the evidence of PW2 Sujito Moraes. PW1 Maria Jaques is also not an eye witness to the incident. She has lodged the complaint on the basis of the information received from the petitioner. It is therefore necessary to make a reference to the evidence of the petitioner PW4. He has stated that at the time of the incident he was at his shop when four persons came to his shop and asked for playing cards. He sold a sealed pack of the playing cards and then the four persons went away. He stated that one Leonel Cardozo paid for the said playing cards.

He further stated that after five minutes, the said four persons came back to his shop and said that there were only two packs of the cards and one pack of the cards was missing. The petitioner told that it was a sealed pack but they were not ready to listen and assaulted him with fist blows, slaps and kicks all over his body. PW2 Sujito then came at the spot and the petitioner called his mother and narrated the incident. He has then given the names of four persons, who assaulted him i.e. respondent nos.1 to 4. In the cross-examination, this witness has stated that he was knowing all the accused as on the date of the incident by their names. Insite of this, the complaint lodged by PW1 on the information received from the petitioner is silent about the names of the accused except a mention to one Minguel. The petitioner has stated that he had accompanied his mother at Orlim police outpost to lodge the complaint. He has again stated that he knew the names of all the four persons and had told their names to his

mother i.e. the complainant when she came to the shop.

If the petitioner had given the names of the assailants to the complainant and the petitioner had also accompanied the complainant when the complaint was lodged in his presence, the absence of the names of the accused in the said complaint assumes importance. The Courts below after considering this aspect and also the circumstance about the full name of the accused Minguel, not being mentioned, have acquitted the respondent nos.1 to 4.

9. Now let us briefly consider the contention as to the effect of the accused not disputing their identity. At the outset, it is necessary to mention that the mere fact that the accused do not dispute their identity at the trial, cannot by any stretch of imagination be construed that the accused admit their presence at the spot of the incident much less their

involvement in the crime. The learned Magistrate has considered the effect of non-disclosure of the names of the accused in the context of the absence of any dispute as to their identity in paragraphs 20 and 21 of the judgment which read thus:

"20. In case in hand PW1, PW2 and PW4, inspite of tall claim of knowing all four accused prior to the incident, did not name or involve or identified them in FIR. This infirmity makes testimonies of all three witnesses on identity unworthy of credence thereby justifying rejection of prosecution case on that ground itself and as rightly held by Apex Court in the matter of **Harinath V/s. State of U.P. 1987, Law suit (SC) 783**, would also raises a reasonable doubt about complicity of the accused in the crime which doubt as submitted by learned Advocate R. Gomes must go in favour of the accused.

21. The accused sought exemption and to facilitate smooth trial did not dispute their identity. However, that is not answer to omission in mentioning their names in neither the FIR nor it will not absolve prosecution from proving their complicity in the crime. Non disputing identity followed by exemption is not substitute for proof of involvement of accused by prosecution by producing admissible

evidence. The submission of learned Advocate F. Rebello that as accused did not dispute their identity therefore participation/involvement of accused stands proved therefore cannot be upheld."

10. A similar consideration can be found in the judgment of the learned Sessions Judge in para 40 of the judgment.

11. In my considered view, the learned Sessions Judge has rightly come to the conclusion that even assuming that the petitioner would have identified the accused during the course of the trial, the same would not have helped the prosecution as the names of the accused did not figure in the complaint, which although was lodged by the mother of the complainant, was lodged as per the information received and in the presence of the petitioner. The learned Sessions Judge has also found that the identification in the Court would not have

helped the prosecution since the petitioner and his mother on their own had done some investigation and had then implicated the respondent nos.1 to 4. In short, the absence of the names of the accused in the complaint, (although the petitioner claims that he was knowing the accused by names) assumes importance and which had weighed with the Courts below while acquitting the accused. This is a plausible view taken by the Courts below. Thus, I do not find that any exception can be taken to the said finding.

12. There cannot be any manner of dispute with the proposition that FIR is not an encyclopedia as has been held in several decisions. The question whether a particular omission is either minor or of a material nature and even where it is of a material nature, whether it is properly explained away by the circumstances obtaining on record are matters

which would be individual to the facts and circumstances of each case.

13. In the case of **Farman** (supra), the FIR was lodged on 14/03/2012, while the supplementary statement of the complainant was recorded on 16/03/2012 wherein she has specifically named the accused along with the role attributed to him.

14. It is now well settled that the scope of interference available in a challenge against acquittal is limited. If the view taken by the Trial Court is a plausible view, the appellate or the revisional Court cannot substitute its view on the ground that it is more probable. It is only when the view taken by the learned Trial Court is patently incorrect or against the weight of the evidence and/or where the appellate Court finds that no prudent person

would have ever, on the basis of the evidence come to the conclusion as is recorded by the Trial Court, that the appellate Court can interfere. The scope in the revision would be still limited where two Courts have concurrently recorded a finding of acquittal.

15. On a careful consideration of the rival circumstances and the submissions made, I do not find that any case for interference is made out. The revision application is without any merit and is accordingly dismissed.

C.V. BHADANG, J.

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