

IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL REVISION APPLICATION NO.48 OF 2014.

Shri Pascoal Lobo, s/o
Kistod Lobo, Major of age,
resident of H. No.73,
Sodovim, Verna, Salcete,
Goa. Through Next Friend
Mr. Caetano Lobo.

..... Applicant.

Versus

1. State of Goa
represented by PI of
Verna Police Station,
Verna, Salcete-Goa.

2. The Public Prosecutor,
State of Goa, High
Court Panjim-Goa.

..... Respondents.

Mr. Shailesh Redkar, Advocate for the applicant.

Mr. S. R. Rivankar, Public Prosecutor for the respondents.

Coram:-PRITHVIRAJ K. CHAVAN,J.

Reserved on:-9th October,2017.

Pronounced on:-31st October,2017.

JUDGMENT

Legality, propriety, and correctness of the impugned Judgment of conviction of the applicant/Original accused no.1 passed in Criminal Case No.264/S/2008/E for the offence punishable under Sections 323, 341 read with Section 34 of Indian

Penal Code("IPC" for short) has been challenged by way of this Revision Application.

2. The applicant/accused no.1 has been convicted by the learned Judicial Magistrate, First Class "E" Court Margao and sentenced to undergo simple imprisonment for three months for the offence under Section 323 read with Section 34 of IPC and simple imprisonment for seven days for an offence under Section 341 read with Section 34 of IPC and also directed the applicant to pay compensation of Rs.10,000/- to the injured PW5-Rosy Gracias.

3. Brief facts are as follows:-

On 19.6.2008 at 07.45 hours the applicant and his wife original accused wrongly restrained the complainant PW5 Rosy Gracias and pulled her out of the bus which she was boarding by holding her hair and thereafter assaulted her with sandal/slipper and also with slaps and fist blows due to which she sustained injuries. The accused is also alleged to have threatened the complainant with dire consequences. On the basis of the complaint lodged by the PW5 Rosy Gracias, on the same day an offence came to be registered against the accused. ASI Ganpat Nalkar PW9, who telephonically received an information about the said incident immediately rushed to the spot and noticed the accused assaulting the complainant. The complainant was rescued from the clutches

of the accused and was sent for medical examination. PW9 Ganpat Nalkar held investigation into the crime by recording the statement of witnesses, drawing panchanama and by attaching chappal used by accused in committing the offence. He collected medical certificate of the injured and after investigation he laid a chargesheet against the applicant in the Court of JMFC, Margao under Sections 341, 323, 506(ii) read with Section 34 of IPC.

4. When the accused were summoned by the learned Magistrate, it was found that accused no.2, wife of accused no.1 had gone abroad and, therefore, proclamation was issued against her and the matter proceeded under Section 299 of Cr.P.C. against accused no.2. A charge was framed against accused no.1 under Sections 341, 323, 506(ii) read with Section 34 of IPC. He pleaded not guilty and claimed to be tried.

5. The prosecution has examined 9 witnesses before the trial Court. The accused did not examine any defence witness. His defence was of denial of the offence alleged.

6. The learned Magistrate, after going through the evidence, by the impugned judgment, convicted and sentenced the applicant as above. An appeal preferred by the applicant against the said judgment and order of conviction also came to be

dismissed by learned Additional Sessions Judge in Criminal Appeal No.98/2012, as according to the learned Additional Sessions Judge, the impugned judgment passed by the learned Magistrate does not call for any interference in appeal.

7. I have heard Shri S. Redkar, learned Counsel appearing for the applicant who has assailed the impugned judgment mainly on the ground that there are discrepancies and inconsistencies in the evidence of the so-called eye witnesses namely PW5 Rosy Gracias, PW7 Angel Fernandes and PW8 Jose Abranches. He vehemently argued that the prosecution has miserably failed to prove the discovery under Section 27 of the Indian Evidence Act, as it has come in the evidence of PW5 Rosy Gracias that police did not seize sandals which were used by the accused in the offence. There is also discrepancy in the time of incident. Alternately, the learned Counsel for the applicant submits that the sentence of three months may be reduced to a period of 15 days which has already been undergone by the applicant.

8. On the other hand, Shri S. Rivankar, learned Public Prosecutor supported the impugned judgment by stating that there is no reason to disbelieve the independent eye witnesses namely PW7 Angel Fernandes and PW8 Jose Abranches who cannot be said to be interested witnesses only because they are neighbours of

PW5 Rosy Gracias. It is also argued by Shri Rivankar that only because sandals could not be discovered would not render prosecution case false when there is ample evidence in the form of independent witnesses which is supported with medical evidence and, therefore, urged to dismiss the petition.

9. It is not a disputed fact that daughter of the accused was in love with son of PW5 Rosy Gracias. It is also not in dispute that son of PW5 Rosy Gracias thereafter left the daughter of the accused and, therefore, she committed suicide. This fact has been admitted by PW5 Rosy Gracias in her cross examination as well as it has not been disputed by the accused also. This is the motive behind the offence by the applicant and his wife. Once motive has been established, it would become easier to appreciate evidence in correct perspective.

10. Testimony of PW5 Rosy Gracias indicate that on the day of the incident the applicant and his wife assaulted her with sandals on her head and also inflicted fist blows when she was proceeding to her work. She was accosted by both the accused who started beating her at the bus stop. Several people gathered over there and somebody had telephoned to the police who arrived at the spot. She was shifted to Hospicio Hospital for medication. Her evidence also reveals that she sustained injuries to her head,

entire body and left eye. She was unable to see with her left eye. She also deposed that the accused assaulted her with kicks. She was admitted in the hospital for eight days. PW5 Rosy Gracias has also identified the sandals with which she was assaulted when they were shown to her in the course of evidence. As already stated, the reason behind the assault was the suicide of the daughter of the accused who was in love with son of PW5 Rosy Gracias namely PW6 Savio Dias. Defence has made a futile attempt to rebut the testimony of PW5 Rosy. However, defence could not make any dent in the testimony of this witness except bringing a few discrepancies which are quite natural and which are bound to occur. However, in the cross examination itself it has been substantiated that it was original accused no.2 who first started assaulting this witness and thereafter the applicant assaulted her. The learned Counsel for the applicant thereafter tried to show that it was an omission however the mode and manner in which omission is brought on record is not as per law. Defence Advocate has also substantiated the fact that the incident occurred just near the bus stop and house of one Angel Fernandes. His cross also reveals that PW7 Angel Fernandes came to the spot and asked the accused not to assault Rosy Gracias. PW3 Dr. Vardhan Bhobe and PW4 Dr. Gwen Saldhana had examined PW5 Rosy Gracias on the very same day. PW3 Dr. Bhobe examined and noticed 'blunt chest trauma with left sub conjunctival haemorrhage.' Dr. Bhobe opined that the injuries sustained by

victim were simple in nature and would have been caused in an assault. Similarly, PW4 Dr. Gwen Saldhana has also examined Rosy Gracias and noticed the following injuries:-

- i. Tenderness on chest anterior and posterior,
- ii. Tenderness on left frontal region.
- iii. Bruise with mild swelling 2 cm X 1 cm on left frontal region,
- iv. Congestion(redness) with tenderness of left eye laterally,
- v. abrasions 0.3 X 0.2 cms each on lower lip on left side,
- vi. Tenderness on left parietal region of scalp,
- vii. Tenderness on left thigh.

According to him, the injuries were caused by blunt object and within 6 hours duration. Certificate issued by Doctor is proved at Exh. 17-C. He clearly opined that these injuries could be caused due to the assault with kicks and sandal blows.

11. During cross examination by defence, it was pointed out that there are some overwriting over the Certificate so far as date is concerned. That would not be significant in the light of the fact that Rosy Gracias was also examined by Dr. Bhobe and the fact that she sustained injuries in an assault by the applicant was on 19.6.2008 itself. Presence of the applicant on the spot at the time

of incident and the manner in which PW5 Rosy Gracias was assaulted has not been rebutted in any way and, therefore, some interpolation in date would not falsify the prosecution case as there was no reason for Dr. Saldhana to issue any false Certificate.

12. PW7 Angel Fernandes, is residing in the neighbourhood of PW5 Rosy Gracias who was watering the plant at the time of incident. When he heard the noise, he came to the gate of his compound wall which is adjacent to the road and noticed one male and one female assaulting the complainant with chappals. The bus stop is near his house. According to this witness, several people gathered at the spot. He identified the applicant who was sitting in the dock. There is no reason to disbelieve PW7 Angel Fernandes being an independent and natural witness of the incident. He has no axe to grind against the applicant. Similarly PW8 Jose Abranches was also an eye witness who came out of his house after hearing barking of the dog and noticed two persons beating Rosy Gracias who was waiting at the bus stop. He testified that those two persons were beating Rosy Gracias with shoes which were in their hand. They were assaulting her on her face and due to assault Rosy Gracias's face was swollen.

13. PW8 Jose Abranches, therefore, ran towards them and separated Rosy Gracias. This witness had informed the police about

the incident. Police arrived at the spot and took both persons in the jeep. Obviously, he was not aware as to why Rosy Gracias was attacked by the accused. However, he testified that later on he came to know that there was a love affair between the daughter of accused and son of Rosy Gracias. This witness also appears to be a natural witness of the incident who had no grudge against the applicant. Nothing could be elicited during his cross examination by defence. Even PW9 ASI Ganpat Nalkar who investigated the crime had an occasion to witness the incident which has been brought in his cross examination by defence. It has come in his cross that after receiving telephonic message he rushed to the spot and noticed that both the accused assaulting the victim with chappal and sandal. Much has been argued by the learned Defence Counsel that there is difference between chappal and sandal. Normally it is not expected of the eye witness or the witness to exactly describe the article used as every one has his own perception while describing a weapon used in commission of the offence. The fact remains that it was a footwear used by the accused in commission of the offence which someone may call "chappal" and another "sandal". Merely describing a footwear either as a "chappal" or a "sandal" in itself would not construe a material contradiction when the testimonies are otherwise consistence, trustworthy and acceptable which corroborates the testimony of PW5 Rosy Gracias.

14. PW6 Savio Dias, son of PW5 Rosy Gracias was not an eye witness. According to him, he received information about the assault on his mother by the accused and therefore, he immediately rushed to the Police Station Verna. His evidence could not be of any use to the prosecution in proving the charge as his testimony is of hearsay nature. However, during cross it has been elicited that the cause of incident was probably due to his love affair with the daughter of the accused who committed suicide.

15. There are no material omissions or contradictions on record. There is no reason to disbelieve the testimonies of the eye witnesses including the victim in view of the admitted fact of motive behind the offence. Since both the Courts below have correctly appreciated the evidence on record and has reached proper conclusion, I do not deem it proper to interfere in the findings arrived at by the Courts below. However, it cannot be lost sight of the fact that what had prompted the accused to assault the victim is that their daughter was in love with the son of the complainant PW5 Rosy Gracias. Feelings of parents whose young daughter committed suicide needs to be given due importance and perhaps in that particular state of mind the accused must have assaulted PW5 Rosy Gracias. It is not the case of the prosecution that the applicant is a habitual offender. As a

Revisional Court it would not be proper to upset concurrent findings of facts arrived at by the Trial Court as well as the First Appellate Court. The evidence on record is clear, trustworthy and unimpeached. The impugned judgment does not warrant interference, as there is absolutely no illegality, impropriety or incorrectness.

16. Taking into consideration the circumstances and background as discussed above, though the applicant wrongly restrained the victim and then assaulted her, sentence of three months for offence under Section 323 of IPC would be little harsh and, therefore, I am of the view that without altering the findings, extent of the sentence in so far as an offence under Section 323 of IPC is concerned is required to be reduced to the extent of one month. It is informed by the learned Counsel for the applicant that the applicant has already deposited the compensation which was payable to PW5 Rosy Gracias. In view of the aforesaid observations following order would meet the ends of justice.

ORDER

- (i) Conviction of the applicant under Section 323 of IPC is maintained. However, instead of three months he is directed to suffer simple imprisonment for one month.
- (ii) Sentence, as regards offence under Section 341 of IPC is concerned, is maintained.

- (iii) The applicant shall be given set off as per Section 428 of Cr.P.C. for the period of detention which he had already undergone during the course of investigation/inquiry or trial.
- (iv) Office shall certify the judgment to the Court of JMFC Margao, who shall take necessary steps as per Section 388 of Cr.P.C.
- (v) Rest of the order passed by the learned Magistrate is maintained.
- (vi) Revision Application stands disposed of accordingly.

PRITHVIRAJ K. CHAVAN,J.

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