

IN THE HIGH COURT OF BOMBAY AT GOA.

Criminal Misc.Application No.276/2015

Mr. Farish Rebellow and another **Applicants**

Versus

State **Respondent**

....

Shri Arun Bras De Sa with Shri S.Shet, Advocates for the applicants.

Shri S.R.Rivankar, Public Prosecutor for the State.

**CORAM : PRITHVIRAJ K. CHAVAN, J.
RESERVED ON : 04.07.2017.
PRONOUNCED ON :17/07/2017.**

ORDER :

1. By this application, under Section 391 of the Code of Criminal Procedure, the applicants-original accused have prayed for recording of additional evidence in this case, who have been convicted by the learned President, Children's Court, Panaji in Special Case No.48/2012, sentencing each of them to undergo simple imprisonment for a period of six months, for the offence punishable under Section 504 read with Section 34 of the Indian Penal Code and further for a period of six months with a fine of Rs. One lakh each for the offence punishable under Section 2(m) (i) read with Section 8(2) of the Goa Children's Act.

2. The facts in brief are as follows:-

The applicants-accused and the original informant Maria Anglica D'souza @ Vaishali Kerkar are the neighbours in the sense that they have their respective houses adjacent to one another. Admittedly, there is a dispute amongst them and some matters are pending in Civil Court. PW 1 - Deepika Kerkar is the victim and daughter of Maria D'souza, who resides with her mother. The incident in question occurred on 4th August, 2012 at 11.00 a.m., wherein it is alleged by the informant that all the applicants in furtherance of their common intention intentionally insulted the victim by abusing her in filthy language with intent to provoke her to commit breach of peace. They also criminally intimidated the victim by threatening to commit "rape on her" which act amounted to child abuse, in view of the provisions of Goa Children's Act. Accordingly, the matter was reported to the Police Station. After investigation, a charge-sheet was filed and after trial, the applicants came to be convicted, as above.

3. According to the applicants, they are illiterate and doing unskilled/manual work. The informant Maria Anglica D'souza @ Vaishali Kerkar, who resides in adjoining House No.794, along with her daughter at Khurswado, Goa Velha, is in habit of picking quarrel with the neighbours. As a matter of fact, the said Maria D'souza constantly started quarreling with her sister-in-law namely Maria Nazita Carvalho E. D'souza, which

resulted in two complaints and counter complaint as well as some litigation. Since the applicants were in good terms with the sister of Maria D'souza, the informant used to threaten the applicants, as she being a social activists and a member of NGO, by filing false cases. It is also the contention of the applicants that Maria D'souza along with her husband Yashwant Kerkar frequently used to pick up quarrels with the applicants. It is the specific contention of the applicants that on 3.8.2012 at 17.00 hours, they were constrained to lodge complaint with the Police Inspector, Agassaim Police Station against her husband Yashwant Kerkar and informant for the reason that Maria's husband namely Yashwant Kerkar used to watch their child having bath/changing clothes in the bathroom situated outside their house next to the compound wall by removing the plastic cover. The residents in the vicinity previously did not come forward on account of fear of Maria D'souza, her husband and other members of "Bailacho Saad". Thus, in short, it is the contention that the present case is a counter blast of the complaint dated 3.8.2012 lodged by the applicants against said Maria D'souza @ Vaishali Kerkar and her husband and a copy of which has been duly acknowledged by the concerned Police Station Officer which has been tendered on record. It is also the contention of the applicants that the prosecution witness Sabina Fernandes – PW2 and one Aftab are close to informant Maria D'souza @ Vaishali Kerkar and joined

her in illegal acts to harass the applicants. There is a terror of Maria D'souza, her husband Shabana Shaikh, Aftab and other members of Bailacho Saad in the said locality. The complaint dated 3.8.2012 lodged with Agassaim Police Station is said to have been signed by many residents of the locality.

4. I have heard Shri Arun Bras De Sam learned counsel for the applicants and Shri Rivankar, learned Public Prosecutor for the respondent.

5. It is a fact on record that none of the prosecution witnesses have been suggested including that of PW 4 - Dinesh Gadekar, the Investigating Officer that the applicants had lodged a complaint on 3.8.2012 against Maria. It cannot be lost sight of the fact that apparently there was no investigation conducted by the Investigating Officer of the same Police Station on the complaint lodged by the applicants few hours before the report was lodged by Smt. Maria Angela D'souza @ Vaishali Kerkar. There seems to be some substance in the contention of the applicants that true copy of their complaint was in custody of another illiterate signatory, who could not realise the significance of the complaint dated 3.8.2012 though all the facts have been brought to the notice of the police. Prima facie, it appears that prejudice has been caused to the applicants in their defence in the light of the

fact that that the Investigating Agency failed to investigate into the complaint dated 3.8.2012 lodged with the same Police Station earlier in point of time than the one on the basis of which charge-sheet came to be filed and the applicants came to be prosecuted and convicted. Had there been a proper investigation on the basis of the said complaint dated 3.8.2012, the truth could have been surfaced. It is difficult to understand as to why the same Police Station investigated the report lodged by Maria D'souza @ Vaishali Kerkar. which was subsequent in point of time i.e.. on 4.8.2012. I am, therefore, of the view that there is substance in the argument of learned counsel for the applicants that failure of justice had occasioned on account of non-production of crucial piece of said document in the form of complaint dated 3.8.2012 and, therefore, the matter needs to be re-looked by directing the Special Court to record additional evidence to that effect. The Hon'ble Supreme Court in case of **Zahira Habibulla H. Sheikh Vs. State of Gujarat** [(2004) 4 SCC 158], which is commonly known as "Best Bakery case" elaborately discussed, amongst others, the scope of Section 391 of the Code of Criminal Procedure. It would be apposite to quote the relevant paragraphs, which reads thus:

"24. There is no proper reason indicated by the High Court to refuse to take on record the affidavits and the only inferable reason as it appears i.e. that the affidavits were also filed in

this Court in another proceeding is no reason in the eye of law. Admissibility of material is one thing and what is its worth is another thing and relates to acceptability of the evidence. Since they were relevant, being filed by alleged eye-witnesses, there was no basis for the High Court to discard them. Even if the appellant Zahira has taken different stands as concluded by the High Court, it was obligatory for the Court to find out as to what is the correct stand and real truth which could have been decided and examined by accepting the prayer for additional evidence. The High Court has, without any material or sufficient basis, come to hold that the FIR was manipulated, and the fax message referred to by the State could also have been manipulated. There is no basis for coming to such a conclusion. There was no material before the trial Court to conclude that the FIR was lodged by one Rahish Khan, though the statement of appellant Zahira was anterior in point of time. The stand of the State was that it was relying on Zahira's version to be the FIR. The State had filed the application for acceptance of additional evidence as it was of the view that the FIR registered on the basis of Zahira's statement was an authentic one and no evidence aliunde was necessary. In the absence of even any material the abrupt conclusion about manipulation and the other conclusions of the High Court are perverse and also contradictory in the sense that after having said that affidavits were not to be brought on record it went on to label it as not truthful. The High Court should not have thrown out the application as well as the materials sought to be brought on record even at the threshold and yet

gone on to surmise on reasons, at the same time, professing to decide on its correctness.

35. *This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs in breach and violation of public rights and duties, which affect the whole community as a community and harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society is not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an over-riding duty to maintain public confidence in the administration of justice - often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a Court of law in the future as in the case before it. If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has*

occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

54. Though justice is depicted to be blind-folded, as popularly said, it is only a veil not to see who the party before it is while pronouncing judgment on the cause brought before it by enforcing law and administer justice and not to ignore or turn the mind/attention of the Court away from the truth of the cause or lis before it, in disregard of its duty to prevent miscarriage of justice. When an ordinary citizen makes a grievance against the mighty administration, any indifference, inaction or lethargy shown in protecting his right guaranteed in law will tend to paralyse by such inaction or lethargic action of Courts and erode in stages faith inbuilt in judicial system ultimately destroying the very justice delivery system of the country itself. Doing justice is the paramount consideration and that duty cannot be abdicated or diluted and diverted by manipulative red herrings.

59. Merely because the High Court permits additional evidence to be adduced, it does not necessarily lead to the conclusion that the judgment of the trial Court was wrong. That decision has to be arrived at after assessing the evidence that was before the Trial Court and the additional evidence permitted to be adduced. The High Court has observed that question of accepting application for additional evidence will be dealt with separately, and in fact dealt with it in a cryptic manner practically in one paragraph

and did not think it necessary to accept the additional evidence. But at the same time made threadbare analysis of the affidavits as if it had accepted it as additional evidence and was testing its acceptability. Even the conclusions arrived at with reference to those affidavits do not appear to be correct and seem to suffer from apparent judicial obstinacy and avowed determination to reject it. For example, to brand a person as not truthful because a different statement was given before the trial Court unmindful of the earliest statement given during investigation and the reasons urged for turning hostile before Court negates the legislative intent and purpose of incorporating Section 391 in the Code. The question of admission of evidence initially or as additional evidence under Section 391 is distinct from the efficacy, reliability and its acceptability for consideration of claims in the appeal on merits. It is only after admission, the Court should consider in each case whether on account of earlier contradiction before Court and the testimony allowed to be given as additional evidence, which of them or any one part or parts of the depositions are creditworthy and acceptable, after a comparative analysis and consideration of the probabilities and probative value of the materials for adjudging the truth. To reject it merely because of contradiction and that too in a sensitised case like the one before Court with a horror and terror oriented history of its own would amount to conspicuous omission and deliberate dereliction of discharging functions judiciously and with a justice-orientated mission. In a given case when the Court is satisfied that for

reasons on record the witness had not stated truthfully before the trial Court and was willing to speak the truth before it, the power under Section 391 of the Code is to be exercised. It is to be noted at this stage that it is not the prosecution which alone can file an application under Section 391 of the Code. It can also be done, in an appropriate case by the accused to prove his innocence. Therefore, any approach without pragmatic consideration defeats the very purpose for which of the Code has been enacted. Certain observations of the High Court like, that if the accused persons were really guilty they would not have waited for long to commit offences or that they would have killed the victims in the night taking advantage of the darkness and/or that the accused persons had saved some persons belonging to the other community were not only immaterial for the purpose of adjudication of application for additional evidence but such surmises could have been carefully avoided at least in order to observe and maintain the judicial calm and detachment required of the learned Judges in the High Court. The conclusions of the High Court that 65 to 70 persons belonging to the attacked community were saved by the accused or others appears to be based on the evidence of the relatives of the accused who were surprisingly examined by prosecution. We shall deal with the propriety of examining such persons, infra. These aspects could have been, if at all permissible to be done, considered after accepting the prayer for additional evidence. It is not known as to what extent these irrelevant materials have influenced the ultimate judgment of the High Court, in

coming with such a strong and special plea in favour of a prosecuting agency which has miserably failed to demonstrate any credibility by its course of action. The entire approach of the High Court suffers from serious infirmities, its conclusions lopsided and lacks proper or judicious application of mind. Arbitrariness is found writ large on the approach as well as the conclusions arrived at in the judgment under challenge, in unreasonably keeping out relevant evidence from being brought on record."

6. Thus, in view of the ratio laid down by the Hon'ble Supreme Court, this is a fit case in which it is essential to direct the Special Judge to record further evidence.

7. In view the discussion hereinabove, the matter is remitted to the President, Children's Court, Panaji for recording the evidence as per Section 391 of the Code of Criminal Procedure and submit the same to this Court, at the earliest. The parties are directed to appear and co-operate the President, Children's Court, Panaji in recording the evidence only to the extent as observed hereinabove. The parties shall appear before the President, Children's Court, Panaji on 14.8.2017 at 11.00 a.m. The application stands disposed of accordingly.

PRITHVIRAJ K. CHAVAN, J.

mukund