

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL MISC. APPLICATION NO. 310 OF 2017
IN
STAMP NUMBER MAIN NO. 390 OF 2016

Josep Graciano Felizardo
Barreto @ Joseph Barreto .. Applicant

Versus

1. Madhavrao Shivajirao Dessai
and three others .. Respondents

Shri Ryan Menezes, Advocate for the applicant.

Shri A. D. Bhobe, Advocate for the respondent nos.1 and 2.

CORAM:- C.V. BHADANG, J.
Reserved on : 3rd October, 2018
Pronounced on : 10th October, 2018

ORDER :

Leave to delete the respondent no.3 granted.
Necessary deletion to be carried out forthwith.

2. This is an application for special leave to appeal against acquittal.

3. The applicant had instituted a private complaint against the respondent nos.1 to 3 and two others before the Judicial Magistrate, First Class, Sanguem, under Sections 384, 385, 427, 447, 504, 506(II) read with Section 34 of Indian Penal Code (IPC, for short), which was registered as Criminal Case No.26/P/2008.

4. According to the applicant, a land admeasuring 8000 square metres known as 'Tambadi', from out of Survey No.16/4(part), 16/5(part) and 17/4(part) of Surla village, belonging to the accused nos.1 to 3 and late Shri Prataprao Desai, was leased to him for a period of 20 years under a Lease Deed dated 09/10/1995. The accused nos.1 to 3 and late Prataprao Desai, after executing the Deed of Lease, had demarcated the said land and the applicant was put in possession thereof. The applicant carried out landscaping of the said property and constructed huts in the same for housing foreign tourists and affluent Indian tourists and there were 36 huts existing in the said property apart from some katcha structures, including fabricated toilets and 5 bamboo huts for housing staff members and three cowsheds, etc. The applicant had spent Rs.40 Lakhs for the development of the property and was running 'Shanti Nature Resort', in the same.

5. The complaint was filed in respect of three incidents, i.e. dated 08/11/2007, 10/11/2007 and 14/04/2008. In so far as the incident dated 08/11/2007 is concerned, it was claimed that the accused nos.1, 4 and 5 came at the resort of the applicant and the accused no.1 abused the watchman and the accused no.4 also threatened the staff of the applicant not to do any work in the said property. The accused no.1 also demanded that the accused no.5

be allowed to sell fruits and drinks to the customers. It is also alleged that the accused asked the Mahouts to take the elephants (which were there for the tourists to take a ride) to leave Goa else the mahouts and the elephants would be "killed like dogs". According to the applicant, the entire staff was terrified on account of the act of the accused nos.1 and 4.

6. On 10/11/2007, the accused no.1 again came to the resort, in a Alto Car and used abusive language with the incharge of the resort and accosted him as to whether he and the staff did not understand the orders given on 08/11/2007 and again, threatened the incharge Deepak Gaonkar with dire consequences. The accused no.1 also allegedly threatened the guide Mr. Zephrians Pinto and the employee of the applicant.

7. Thereafter, on 14/04/2008, the accused no.2 came to the resort in the afternoon along with his friends and had his lunch and drinks, however, did not make the payment and threatened the incharge Deepak Gaonkar of dire consequences and asked them to leave the property by 17/04/2008 and in case they did not leave, they would face serious consequences.

8. It is a matter of record that the order of issue of process dated 23/06/2009 was challenged before the learned

Sessions Judge in Criminal Revision Application No.70/2009 and the learned Sessions Judge by a judgment and order dated 07/12/2009 had partly allowed the Revision Application. The learned Sessions Judge has found that there is a prima facie case against the accused nos.1, 2 and 4 for the offences punishable under Sections 447, 504, 506(II) read with Section 34 of IPC. The record shows that the original accused nos.3 and 5 have been dropped/ discharged. In the present application, the respondent nos.1 to 3 are the original accused nos.1 to 3. Thus, the respondent no.3 being the original accused no.3 stood discharged before the learned Magistrate.

9. Before the learned Magistrate, the applicant examined himself as PW1 along with Gondhu Mahato (PW2), Deepak Gaonkar (PW3), Ranjan Mandal (PW4), Sunil Gaonkar (PW5). The accused neither entered into witness box nor examined any defence witnesses.

10. The learned Magistrate, by a judgment and order dated 30/10/2015, acquitted the accused nos.1, 2 and 4 of the offences as charged. Hence, this application.

11. I have heard Shri Menezes, the learned Counsel for the applicant and Shri Bhobe, the learned Counsel for the respondent

nos.1 and 2. With the assistance of the learned Counsel for the parties, I have gone through the record.

12. It is submitted by Shri Menezes, the learned Counsel for the applicant that the learned Magistrate, after finding that the applicant was not an eye-witness of the incident, could not have relied upon some minor contradictions between the evidence of PW1 and other prosecution witnesses. It is submitted that even otherwise, the contradictions/ discrepancies noted are of minor nature about the type of the vehicle, in which the accused had come to the resort, which would not be material. It is submitted that the discrepancies noted in the context of the evidence of PW2 Gondhu Mahato that the accused had come by three jeeps as against the version of the applicant that there was only one vehicle, is also not material so as to discard the evidence.

13. Shri Bhobe, the learned Counsel for the respondent nos.1 and 2 has supported the impugned judgment. It is submitted that the learned Magistrate, after appreciating the evidence, has rightly come to the conclusion that the applicant has failed to prove the involvement of the respondents accused in the offences as alleged and it being a plausible view, no case for grant of leave is made out.

14. I have carefully considered the rival circumstances and the submissions made.

15. The learned Magistrate has noticed certain discrepancies in the evidence of PW1 as compared to evidence of PW2. Admittedly, PW1 was not an eye-witness. Once the Magistrate found that PW1 was not eye-witness, the discrepancies as noticed, *prima facie* would not be material discrepancies. It is true that there was civil litigation between the parties. However, Civil Suit was disposed of in view of the arbitration clause in the lease deed and it transpired during the course of the arguments that the Arbitrator was appointed, who had passed an Award on 31/03/2011. It also transpired during the course of the arguments that the applicant has surrendered the possession of the land. Be that as it may, the pendency of the civil dispute at the relevant time, cannot *per se* affect the prosecution, if the incident as alleged has indeed happened. At this stage, it is neither necessary nor appropriate to examine the material in details in order to record any final or binding conclusion. On a careful consideration of the evidence led by the applicant and the judgment of acquittal passed by the learned Magistrate, I find that a case for grant of leave is made out. As noticed earlier, the respondent no.3 (accused no.3) was dropped/ discharged and as such, grant of leave is restricted to the respondent nos.1 and 2 alone. The application is

partly allowed, granting leave to appeal against acquittal against the respondent nos.1 and 2. Let the Criminal Appeal be registered as against the respondent nos.1 and 2, which shall be treated as admitted.

16. The learned Magistrate to take action under Section 390 of Cr.P.C.

17. The application is disposed of in the aforesaid terms.

C.V. BHADANG, J.

SMA