

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPLICATION (MAIN) NO.192 OF 2019**

State of Goa,
Through Cuncolim Police Station,
Cuncolim Goa.

.... Applicant

V/s

Pandhari Kerkar,
son of Harishchandra Kerkar,
aged 53 years, fisherman,
r/o. H.No.44, Tari Wada,
Betul, Quepem, Goa.

.... Respondent

Shri S.R. Rivankar, Public Prosecutor for the Applicant.
Shri Avdhut S. Arsekar, Advocate for the Respondent.

Coram:- PRITHVIRAJ K. CHAVAN, J.

Reserved on :- 30th September, 2019

Pronounced on :- 15th October, 2019

ORDER :

State of Goa through Canacona Police Station moved the instant application for leave to appeal against the impugned judgment of the Additional Sessions Judge, Margao dated 17/01/2019, which allowed the appeal of the respondent acquitting him of the offence under Section 354 of IPC.

2. Heard Shri S.R. Rivankar, the learned Public Prosecutor for the applicant and Shri H. Arsekar, the learned Counsel for the respondent.

3. Shorn of unnecessary details, few facts germane for the decision of the application can be enumerated as follows :

The respondent was tried and convicted by the learned JMFC of an offence punishable under Section 354 IPC and was sentenced to undergo simple imprisonment for a period of one year and fine of ₹10,000/-, in default, simple imprisonment for one month.

4. The story goes like this. In the midnight of 23/12/2013, prosecutrix, who was examined as PW1, got up in the midnight as her daughter PW5 Amisha was to go to the toilet situated abutting to the house. The house of the respondent is also in the neighbourhood. When the daughter of the prosecutrix was inside the WC, it is alleged that the respondent suddenly came over there, caught hold of the prosecutrix and said that she should sleep with him, and if she agrees, he will withdraw the cases filed against them by him (respondent). The prosecutrix made a hue and cry, listening to which her daughter PW5 Amisha and her niece PW4 Vinanti came out. By that time, the respondent made his escape good. A report came to be lodged immediately. The prosecutrix, her daughter PW5 Amisha and her

niece PW4 Vinanti went to the police station and lodged a report. After investigation, a charge sheet came to be filed. After examining the prosecution witnesses, the learned JMFC found the evidence of the witnesses acceptable and trustworthy and, hence, convicted the respondent as above.

5. The learned Additional Sessions Judge, while dealing with an appeal by the respondent reversed the judgment of conviction and sentence by quashing the same and acquitted the respondent of the charge framed against him.

6. Shri S.R. Rivankar, at the outset, submits that the version of the prosecutrix vis-a-vis her daughter PW5 Amisha and her niece PW4 Vinanti is quite consistent in so far as the time, place and manner of occurrence is concerned. Merely because PW3 Dr. Nafisa Vaz could not find any injuries, would not in itself be sufficient to hold that the other witnesses are false.

7. Shri Rivankar submits that the plea of alibi raised by the respondent is false, in the sense, that he took a contradictory stand. It

is submitted that it is a fit case of conviction and, therefore, leave needs to be granted.

8. Per contra, Shri Arsekar vehemently urged to refuse leave mainly on the ground that the view of the Sessions Judge is quite correct and plausible view, in the light of various inconsistencies and contradictions in the testimony of the prosecutrix vis-a-vis her daughter PW5 Amisha and her niece PW4 Vinanti. Shri Arsekar, points out that the daughter and niece only could see somebody running away and had not witnessed the alleged act. Secondly, if the chudidar of the prosecutrix was torn, why it was not seized by the police.

9. It is strenuously argued by Shri Arsekar that since there are disputes between the respondent and the prosecutrix's family and pending cases in the Courts, only out of vengeance and to take revenge, a false case has been foisted. It is also submitted as to why the prosecution has not examined any other independent witnesses, as admittedly, there are 10 to 12 houses in the close proximity and it is difficult to believe that nobody could hear the shouts raised by the

prosecutrix except her daughter PW5 Amisha and niece PW4 Vinanti.

10. It is a settled position of law that one should be slow in interfering with a judgment and acquittal, unless it is shown that the Court below had grossly ignored the material evidence on record and the judgment is based on surmises and conjectures.

11. Without going much into that aspect, it would be necessary to go through the evidence of the prosecution witnesses and the view taken by the learned Additional Sessions Judge.

12. True it is that except PW5 Amisha, the daughter of the prosecutrix and PW4 Vinanti, niece of the prosecutrix, none in the vicinity heard the shouts raised by the prosecutrix, which is quite probable though not impossible. PW4 Vinanti testified that when she opened the door after hearing the shouts of her aunt; she felt someone running from outside, however, she says she noticed respondent running away. It is clear from her testimony that she did not witness prosecutrix being molested by the respondent. She explains that her aunt told her as to what had happened. In cross, two material

omissions were brought, in the sense, that the statement does not reveal that she noticed someone running from outside and she saw respondent running when she opened the door. Omissions might go to the root of the prosecution and would render her testimony not believable to its fullest extent, being material. Even during cross, the prosecutrix expresses her unawareness as regards property disputes or as regards enmity between the respondent or her family. She has even gone to the extent in exhibiting her ignorance about FIR registered against her husband on a complaint lodged by one Ruchita Kerkar on 14/12/2013 alleging that by keeping the door of the bathroom open the husband of the prosecutrix made gestures with his right hand and lowering his pant and showing his private part. She further exhibits her ignorance as to whether a report had been lodged against her husband by the respondent or about the case pending at Quepem Court. This is something unusual. In the totality of the circumstances and in view of the observations made by the Additional Sessions Judge in the impugned judgment, these are the factors, which need to be considered while entertaining an application for leave to appeal.

13. PW5 Amisha testified that she had seen the respondent holding

her mother from backside, which is not the evidence of the prosecutrix.

14. In defence, respondent testified that at the relevant time he was on his fishing boat and had gone for fishing along with one Ajit Chodankar and one Raju. He received a call on his phone at about 3.30 a.m. from his wife, who told him about the arrival of police in search of him. According to him, he left the house at about 8.00 p.m. on 22/12/2013 and returned at 8.00 a.m. on 23/12/2013, meaning thereby, a plea of alibi is taken by him. He testified about the enmity between him and the family of the prosecutrix as well as the criminal case pending against the husband of the prosecutrix. He also testified as to how the husband of the prosecutrix used to come naked in front of his brother's daughter for which a complaint came to be lodged against him and a charge sheet has already been filed.

15. If the police had been to the house of the respondent searching for him pursuant to the report by the prosecutrix, the police could have entered into the house to find out whether he was there. It will not lie in the mouth of the prosecution to say, because the wife of the

respondent said that her husband was not at home, the police were powerless to search for him or, at least to keep a watch outside the house till the respondent arrives. The defence as raised by the respondent even on preponderance of probability appears to be reasonable and believable. It is pertinent to note that the medical report of the prosecutrix is nil. The police had not seized the chudidar of the prosecutrix which she says was torn by the respondent. The respondent had filed the complaint against the husband of the prosecutrix on 14/12/2013 and by the prosecutrix on 23/12/2013 and, therefore, the possibility of afterthought or false implication due to enmity cannot be totally ruled out.

16. In view of the above, I do not find it to be a fit case in which leave to appeal can be granted to the State. The application stands dismissed.

PRITHVIRAJ K. CHAVAN, J.

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