

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 70 OF 2018

Mrs. Vimal Singh, w/o late Dharmendra Singh,
major of age, Indian National, C/o Mr. Albert De
Souza, H. No. 1044A, Premiro Bairo, Santa Cruz,
Tiswadi, Goa.

.... Petitioner

Versus

1. The State of Goa, through Police Inspector,
Old Goa Police Station, Old Goa, Tiswadi,
Goa.
2. Mr. Mushtafa Shaikh, s/o Karim Shaikh,
major of age, Indian, C/o Anton J.
Fernandes, Premier Bairo, St. Cruz, Tiswadi,
Goa.

.... Respondents

Mr. Ryan Menezes, Advocate under Legal Aid Scheme for the
Petitioner.

Mr. Mahesh Amonkar, Additional Public Prosecutor for Respondent
No. 1.

Mr. Virendra Parsekar, Advocate holding for Mr. Pavithran A.V.,
Advocate for Respondent No. 2.

Coram:- M.S. SONAK &
C.V. BHADANG, JJ.

Date:- 4th November, 2019

ORAL JUDGMENT: (Per C.V. Bhadang, J.)

By this Appeal under Section 372 of the Code of Criminal
Procedure, 1973 (Code, for short), the appellant, who is claiming to be

a victim under Section 2(wa) of the Code, is challenging the acquittal of the respondent no. 2 from the offence punishable under Section 302 of Indian Penal Code (IPC, for short). The learned Sessions Judge, by the impugned judgment and order dated 07.05.2018 in Sessions Case No. 55/2015, while acquitting the respondent no. 2 from the offence punishable under Section 302 of IPC, has convicted him under Section 304 (Part II) and Section 324 of IPC.

2. The prosecution case in brief is that on 17.08.2015, at around 21:45 hours, respondent no. 2 assaulted one Dharmendra Singh (since deceased) and Mr. Piyushkumar Bishwakarma with a knife at Premier Bairro, St-Cruz, Tiswadi. Dharmendra Singh succumbed to the injuries sustained, while Piyushkumar received simple injuries in the incident. The appellant happens to be the widow of Dharmendra Singh.

3. At the trial, prosecution examined as many as eighteen witnesses and produced the contemporary record of investigation. The

respondent no. 2 did not lead any evidence in defence. The learned Sessions Judge framed the following points for determination :

- (i) Whether the death of Dharmendra Singh was homicidal ?
- (ii) Whether the accused caused death of Dharmendra Singh ?
- (iii) Whether the accused murdered Dharmendra Singh ?
- (iv) Whether the accused caused simple injuries with a sharp weapon to Piyushkumar ?

4. The learned Sessions Judge answered point no. 1 in the affirmative, holding that Dharmendra Singh suffered a homicidal death. For the present purpose, we are only concerned with the findings as against point nos. (ii) and (iii). The learned Sessions Judge found that it was respondent no. 2, who assaulted Dharmendra Singh with a pocket knife (M.O. No. 10) resulting into his death. However, at the same time, the learned Sessions Judge came to the conclusion that the assault was neither pre-planned nor premeditated and the respondent no. 2 never intended to cause death of Dharmendra Singh.

On the basis of the evidence of PW-2, the learned Sessions Judge found that the attack was on account of the fact that it was Dharmendra Singh, who went to catch hold of respondent no. 2, which in the opinion of the learned Sessions Judge “would be in the nature of a sudden fight”. The learned Sessions Judge found that the respondent no. 2 has not acted in a cruel manner and the case falls within the ambit of Exception 4 to Section 300 of IPC. The learned Sessions Judge also found that the possibility of the respondent no. 2, causing injury in the exercise of his private defence, cannot be ruled out. Thus, according to the learned Sessions Judge, the case would also be covered under Exception 2 to Section 300 of IPC. In the face of the findings as above, the learned Sessions Judge has found that the act of the respondent no. 2 would fall within the purview of Section 304 (Part II) of IPC.

5. We have heard Mr. Menezes, the learned Counsel for the appellant, Mr. Amonkar, the learned Additional Public Prosecutor for the respondent no. 1 and Mr. Parsekar, the learned Counsel for the

respondent no. 2. With the assistance of the learned Counsel for the parties, we have gone through the impugned judgment and the prosecution evidence led.

6. Mr. Menezes, the learned Counsel for the appellant has extensively taken us through the prosecution evidence and the reasoning articulated by the learned Sessions Judge from para 25 onwards, while dealing with point no. (iii), in order to submit that the findings are not borne out of record. The learned Counsel has referred to the evidence of Piyushkumar in order to submit that the respondent no. 2 had inquired with them and had also told that he (respondent no. 2) would kill Anupam, son of Dharmendra Singh and also Priyanka, daughter of Dharmendra Singh. It is also submitted that the evidence of PW-2 clearly establishes the premeditation of the respondent no. 2 to assault Dharmendra Singh and thus, the finding recorded by the learned Sessions Judge that the case would be covered by Exception 4 of Section 300 of IPC is not correct. The learned Counsel also pointed out that there is absolutely no evidence to show

that the act of the respondent no. 2 was in the exercise of private defence. It is submitted that this is a case where the intention of the respondent no. 2 to cause death of Dharmendra Singh is clearly borne out and therefore, the part of the impugned judgment acquitting the respondent no. 2 from the offence punishable under Section 302 of IPC, may be set aside and the respondent no. 2 may be convicted for the offence punishable under Section 302 of IPC.

7. Mr. Amonkar, the learned Additional Public Prosecutor submitted that although, the State has not challenged the acquittal of the respondent no. 2 from the offence punishable under Section 302 of IPC, the State supports the appellant. Mr. Amonkar, the learned Additional Public Prosecutor also submitted that the attack was premeditated and in any event, cannot be said to be the result of sudden fight or in the exercise of the private defence as has been held.

8. Mr. Parsekar, the learned Counsel for the respondent no. 2 has supported the impugned judgment. It is submitted that the view

taken by the learned Sessions Judge is a plausible view, which is not amenable to interference in an Appeal against acquittal, where the scope is limited. It is submitted that unless and until the view taken is shown to be perverse, no interference is called for.

9. We have considered the circumstances and the submissions made and we do not find that any case for interference is made out.

10. The scope, ambit and the powers of this Court in an Appeal challenging acquittal is subject matter of several decisions of the Hon'ble Supreme Court and various High Courts. It is now well settled that where two views are equally possible (out of which, the Trial Court has preferred one), the Appellate Court shall not substitute its view in place of one taken by the Trial Court, on the ground that it is more plausible. It is only where the view taken by the Trial Court is perverse or an impossible view, which is not borne out of the evidence on record that the Appellate Court can justifiably interfere (see **Chandrappa & Others Vs. State of Karnataka (2007) 4 SCC 415**).

11. Coming to the present case, the learned Sessions Judge has found that Dharmendra Singh died a homicidal death, which finding is not challenged by the respondent no. 2. The only question is whether, this is a case, which would fall under any of the exceptions to Section 300 of IPC and particularly, Exception 2 or Exception 4 as held by the learned Sessions Judge, so as to mitigate the offence to one under Section 304 (Part II) of IPC, instead of Section 302 of IPC.

12. We have carefully gone through the prosecution evidence, including that of PW-2 Piyushkumar. He states that on 17.08.2015, he had gone to the house of Dharmendra Singh on account of birthday party of his daughter. At around 9:45 p.m., PW-2 alongwith Arohi were returning by foot. There were no street lights. On their way back, they came across one unknown person i.e. respondent no. 2, who inquired as to from where they were coming and for how many years he (PW-2) is residing in Goa. PW-2 informed respondent no. 2 that they were returning from a birthday party of Dharmendra Singh's

daughter and at that time, respondent no. 2 told that he would kill Anupam and Priyanka. It is at this stage that Dharmendra Singh alongwith with one Venkataih arrived there with the parcel of food to be handed over to PW-2. It is claimed that Dharmendra Singh over heard the threat held out by respondent no. 2. Dharmendra Singh asked respondent no. 2 the reason for threat to kill his children and at that time, the respondent no. 2 told that on a single call, he can gather 10 persons. Dharmendra Singh told the respondent no. 2 to call the said persons. It has further come in the evidence of PW-2 that at that time, he i.e. PW-2 alongwith Dharmendra Singh went to catch hold of respondent no. 2 and it is at this stage that the respondent no. 2 is said to have assaulted both PW-2 as well as Dharmendra Singh.

13. After this, PW-2 proceeded to his house and the respondent no. 2 is claimed to have “disappeared from the scene”. It can thus clearly be seen that there was an altercation or exchange of words between the deceased and the respondent no. 2 in the presence of PW-2, after which, it is PW-2 and the deceased, who are said to

have catch hold of respondent no. 2, after which, there is an allegation of assault by the respondent no. 2. The evidence also clearly brings out that after this incident, the three dispersed in different directions, while PW-2 and the deceased went to their house, the respondent no. 2 is said to have “disappeared from the scene”. Thus, it is not a case where the respondent no. 2 is shown to have persisted in the assault or having undertaken undue advantage or acted in cruel manner as has been rightly held by the learned Sessions Judge. There is evidence to show that there was altercation between the deceased and the respondent no. 2 and not only that, PW-2 and the deceased having catch hold of the respondent no. 2, after which, the assault by the respondent no. 2, is alleged to have been made. We have carefully gone through the reasoning articulated by the learned Sessions Judge in para 25 onwards and we do find that the view taken is a plausible view and the case would fall within the ambit of Exception 4 of Section 300 of IPC. The finding so recorded is not shown to be perverse or an impossible view. It is significant to note that unlike Exception 2, as per explanation to Exception 4, it is immaterial in cases governed by the said exception,

as to which party offers the provocation or commits the first assault.

In that view of the matter, we do not find that a case for interference is made out in the limited scope available in the present Appeal. The Appeal is without any merit and is accordingly dismissed.

C. V. BHADANG, J.

M. S. SONAK, J.

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