

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPLICATION (MAIN) NO. 261 OF 2019

State of Goa,
Through Calangute Police
Station, Calangute-Goa ... Applicant

V e r s u s

Filipe Fernandes (Major)
s/o Pedro Fernandes, r/o.
H.No.1139/A, Ximer,
Candolim, Bardez, North Goa, ... Respondent
Goa.

Coram :- **M. S. SONAK &**
C. V. BHADANG, JJ.
Date : **4th December, 2019.**

ORAL ORDER

1. By this application, the applicant-State is seeking leave to appeal against acquittal of the respondent, from the offences punishable under Sections 302, 307 and 326 of Indian Penal Code (IPC) and Section 2(m)(iii) read with Section 8(2) of the Goa Children's Act, 2003.

2. The prosecution case is that on 26.12.2015, at around 3.00 hours, at House No. 1139/A, at Ximer, Candolim, the respondent intentionally caused death of his two minor children aged 7 years and 3 years and attempted to commit murder of his wife by voluntarily causing grievous hurt to her by hitting her on her forehead by an iron rod. Further, according to the prosecution, the respondent of his own accord went to the Calangute Police Station and informed about the incident to Pw.6, PSI Mahesh Gadekar. It appears that Pw.6, PSI Mahesh Gadekar, accordingly visited the scene of occurrence and thereafter lodged a formal FIR on behalf of the State principally based on the information allegedly given by the respondent.

3. During the course of the investigation, a spot panchanama was drawn, the wife of the respondent namely, Sviatlana, Pw.1, was sent for medical examination. Her statement came to be recorded and after completion of the investigation, a chargesheet was filed before the Children's Court being Special Case No.53 of 2016.

4. The Children's Court framed charge against the respondent for the aforesaid offences to which the respondent pleaded not guilty and claimed to be tried. The defence of the respondent is one of total denial and false implication.

5. At the trial, the prosecution examined in all 12 witnesses and produced the contemporary record of the investigation. The learned Children's Court found that the statement made by the respondent to Pw.6, PSI Mahesh Gadekar, was hit by Section 25 of the Evidence Act and was thus not admissible. The sole eye witness, Pw.1, Sviatlana, turned hostile and did not support the prosecution. In that view of the matter, the learned Children's Court found that the prosecution had failed to establish the ingredients of any of the offences and acquitted the accused by Judgment and order dated 16.03.2018.

6. We have heard the learned Public Prosecutor for the applicant. We have also heard the respondent, who appears in

person. We have gone through the evidence as well as the impugned judgment.

7. Mr. Rivankar, the learned Public Prosecutor, has submitted that the FIR which was registered by Pw.6, PSI Mahesh Gadekar, cannot be said to be inadmissible inasmuch as, Pw.6, PSI Mahesh Gadekar, himself went to the spot and verified information and drew a spot panchanama. Thus, in the submission of the learned Public Prosecutor, the FIR being based on the independent verification being made by Pw.6, PSI Mahesh Gadekar, cannot be said to be inadmissible on the ground that it is based on the information given by the respondent. It is submitted that although Pw.1, Sviatlana, did not support the prosecution, there is circumstantial evidence to show the complexity of the respondent in the offence. He pointed out that the respondent along with the victim i.e. Pw.1, Sviatlana, and the two minor children were together in the night. He submitted that there is evidence that the respondent had gone to Goa Medical College in the wee hours of 26.12.2015 and thereafter had gone to

Calangute Police Station at about 7.50 hours. It is therefore submitted that there is evidence in the nature of the last seen together which is established. He submits that there is also evidence that there was a quarrel which ensued between the respondent and his wife at about 3.00 a.m. on 26.12.2015 and the incident was an outcome of the said quarrel. He, therefore, submitted that the view taken by the Children's Court is an impossible view which is not based on the evidence on record and, therefore, the case for grant of leave is made out.

8. The respondent in person submitted that he has been falsely implicated and that at no point of time any such confessional statement was made by him to Pw.6, PSI Mahesh Gadekar, and even otherwise any such statement is inadmissible. It is submitted that the evidence of Pw.1, Sviatlana, shows that she was assaulted by some unidentified assailant who had gained entry in the house in the dead of the night and the respondent had gone to report the incident to the police.

9. We have carefully considered the submissions made and we do not find that any case for grant of leave is made out. The prosecution evidence against the respondent principally consists of the alleged confessional statement made and recorded by Pw.6, PSI Mahesh Gadekar, and the evidence of Pw.1, Sviatlana, who, before the Investigating Officer, claimed to be an eye witness to the incident later turned hostile. The statement allegedly made by the respondent to Pw.6, PSI Mahesh Gadekar, is clearly inadmissible by virtue of Section 25 of the Evidence Act as has been rightly held by the Children's Court and, therefore, the same cannot be relied upon. The contention that Pw.6, PSI Mahesh Gadekar, having independently verified the statement by visiting the place of occurrence and therefore is admissible in our view, cannot be accepted. Even the second piece of evidence namely Pw.1, Sviatlana, has also not supported the prosecution as she turned hostile. Thus, there is absolutely no evidence to connect the respondent with the alleged offence. The circumstance that the respondent was with the victim i.e. Pw.1,

Sviatlana, and the two minor children during the night, by itself is hardly of incriminating nature and cannot be taken into consideration in the nature of the last seen theory. The contention that there is motive established also cannot be accepted inasmuch the evidence of Pw.1, Sviatlana, does not support the case of the prosecution that there was any quarrel between the respondent and Pw.1, Sviatlana, on the date of the incident. Quite to the contrary, Pw.1 has claimed that there were no disputes or quarrel between her and the respondent and she was hit by some unidentified person in the middle of the night.

10. It is now well settled that the scope of interference in an appeal against acquittal is limited. It is only where the view taken by the Trial Court is perverse and is not borne out of record or is an impossible view that the appellate Court can justifiably interfere. In the present case, we find that the view taken by the Children's Court is not only a plausible view but it is the only view possible in the given circumstances. We are conscious of the fact that a gruesome murder of two minor children and an

attempt on the life of Pw.1, Sviatlana, is going unpunished. However, in the facts and circumstances of the case and on the basis of the evidence as led, we have no option than to refuse the leave as claimed. Thus no case for grant of leave is made out.

11. In the result, the Criminal Application is dismissed. The registration of the appeal stands refused.

C. V. BHADANG, J.

M. S. SONAK, J.

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