

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.5 OF 2018



... Appellant

Versus

State,
Through Officer-in-Charge,
Ponda Police Station,
Ponda Goa.

... Respondent.

Ms. K. Govenkar, Advocate for the Appellant.

Mr. Pravin Faldessai, Additional Public Prosecutor for the Respondent.

Coram:- M. S. SONAK, J.

Date:- 17th December 2020.

ORAL JUDGMENT

Heard Ms. K. Govenkar, learned counsel for the Appellant, and Mr. P. Faldessai learned Additional Public Prosecutor for the Respondent.

2. This appeal is directed against the judgment and order dated 19th January 2018/22nd January 2018 made by the Additional Sessions Judge, Panaji sitting at Ponda Goa in Sessions Case No.59/2015 convicting the Appellant for offence punishable under Section 307 of the

Indian Penal Code (IPC) and sentencing her to undergo simple imprisonment for one year and to pay fine of ₹10,000/-.

3. The case of the prosecution is that on 12th September 2014 between 8.50 hours to 9.55 hours at Nirankal Ponda Goa, the Appellant (accused) requested the complainant (PW8) to take her to Nirankal via Kodar road and on reaching Kodar, stabbed the complainant with a sharp knife on his back body region and attempted to kill him. It is the case of the prosecution that the accused thereafter jumped from the scooter and ran away from the spot until she was arrested.

4. The prosecution examined 13 witnesses. The accused was questioned under Section 313 of the Criminal Procedure Code, in which she denied the charge but also offered an explanation about the incident. No defence evidence was led on behalf of the accused. The learned Sessions Judge, by the impugned judgment and order, has convicted and sentenced the accused as aforesaid. Hence, the present appeal.

5. Ms. Govenkar, learned counsel for the Appellant submits that based on the evidence on record the conviction is not sustainable. She points out that the explanation offered by the accused under Section 313 of the Criminal Procedure Code is corroborated by the prosecution evidence on record. Based upon the same, the defence raised by the accused was extremely probable. She submits that in a criminal trial, the accused is not expected to establish her defence beyond the realm of reasonable doubt. She submits that by applying the test of

preponderance of probability the defence raised by the accused in this matter is certainly established and therefore, the conviction is unsustainable.

6. Ms. Govenkar pointed out that PW8 alleged victim has deposed that he did not even realise for some time that he was allegedly stabbed with a knife. She pointed out that the doctor who is alleged to have performed the surgery on the victim was never examined by the prosecution but some other doctor was examined in his place. She pointed out that there is evidence on record that on the previous day of the incident, PW8 made almost 150 calls to the accused. She pointed out that in this case the accused herself reported the correct incident to the police at the earliest opportunity. She submits that from all this, it is apparent that the defence raised by the accused was established by her. She submits that non-consideration of such defence is a serious error, on account of which the conviction is liable to be set aside.

7. Ms. Govenkar without prejudice submitted that the accused hails from a poor family, her father was a heart patient and at the relevant time her younger brother was unemployed. The accused was at that stage maintaining her family and looking to these circumstances the sentence imposed is quite harsh and disproportionate. She, therefore, submits that this appeal be allowed and the conviction and sentence imposed upon the accused be set aside.

8. Mr. Faldessai, learned Additional Public Prosecutor defends

the impugned judgment and order based on the reasonings reflected therein. He submits that even going by the answers given by the accused in the course of record of her statement under Section 313 of Criminal Procedure Code, it is quite clear that the last seen theory is clearly established. He submits that the explanation offered by the accused that PW8 inflicted injury on himself is too fantastic to deserve any credence. He submits that such a defence is not supported by medical evidence as well. He, therefore, submits that there is no infirmity in the impugned judgment and order, since, the learned Additional Sessions Judge has been quite lenient in the imposition of the sentence. He, therefore, submits that this appeal be dismissed.

9. The rival contentions now fall for determination.

10. The learned Additional Sessions Judge has naturally, laid maximum emphasis on the testimony of victim PW8. However, according to me, though PW8 is the most important witness in this matter, his testimony was required to be considered along with the defence raised by the accused in the course of her statement under Section 313 of the Criminal Procedure Code. Along with this defence, certain other circumstances, which are borne out from the prosecution evidence itself were also required to be taken into account. If, the entire evidence on record is to be considered, then, it cannot be said with certainty that the defence raised by the accused was some frivolous defence or was not a plausible defence. Rather, if the evidence on record is considered in its entirety, then at least plausible defence has been

established thereby entitling the accused at least a benefit of reasonable doubt in this matter.

11. From the testimony of PW8 there does not appear to be any dispute that PW8 and the accused knew each other quite intimately for quite some time. PW8 seems to suggest that the accused was pursuing his affection one-sided and the accused has raised a defence that it is PW8 who was persistently after her affection. Even PW8 in his deposition at the very outset has admitted that the accused was his “*ex-girlfriend*”.

12. The version of PW8 that it is the accused who was, in a one-sided manner, pursuing her affection does not appear to be correct. This is because PW8 in his cross-examination has admitted that after the accused left the job at Marcaim, he was contacting the accused on phone from his two mobile phones. PW8 has also deposed that the accused was also having two mobile phones though at the time of deposition he could not recollect the numbers.

13. PW8, in the course of his cross-examination, has admitted that on the day before the incident, it is he who had contacted the accused after dinner. He has deposed that he started calling her after 10.00 p.m., but she was not responding to his calls by even lifting the phone. He admitted that he must have made 150 to 160 calls to the accused but she did not lift any such calls. PW8 admitted that he was making continuous calls to the accused at that time and if she did not

respond, he used to contact her on Whatsapp.

14. From the aforesaid testimony of PW8, it is not possible to believe that it is the accused who was pursuing the affection of PW8 and that too in a one-sided manner. Rather, the defence of the accused that it is PW8 who was pursuing her affection continuously, is a more probable version. Ms. Govenkar was quite right in her submission that an accused has to only probabalise her defence and it is not the law that an accused has to establish the defence beyond the realm of doubt. Therefore, by applying this test, at least the version of the accused that PW8 was the one continuously pursuing her affection is required to be accepted in the state of evidence on record.

15. Now the learned Additional Sessions Judge has gone by last seen theory. True, last seen theory, can be said to have been made out from the deposition of not only PW8 but the defence of the accused herself in the course of her statement under Section 313 of Criminal Procedure Code. However, it is not the law that the moment the accused and the victim are spotted together, the conviction has to follow. The last seen theory only shifts to a certain extent, the onus on the accused to explain the incident. In this case, the accused has explained that quite against her will, PW8 insisted that she travels with him on a scooter to Kodar. She has explained that she was reluctant to go with PW8, *inter alia* because she had with her the office keys, which if not delivered would cause inconvenience for the opening of the office. She stated that ultimately she started crying and requested PW8 to at least let her hand

over the keys to the friend/office colleague. The prosecution evidence corroborates even this part of the explanation offered by the accused.

16. PW8 has then deposed that they got into quite a heated discussion while traveling on the scooter towards Kodar. PW8 has in fact even deposed that as a result of the discussion the accused had started crying, informed him that she was having a headache, and requested to drop her at the residence Nirankal. From this point, there is a diversion in the versions of PW8 and the accused.

17. PW8 has then deposed that while the vehicle was in motion, he felt “*some poking sensation on my back*”. He further deposed that at this point the accused jumped from his scooter and fell by the side of the road. PW8 has deposed that he thought that the accused must have fallen down on the road and therefore he stopped the scooter at some distance. Then, he saw the accused running.

18. PW8 has then deposed that he also noticed and checked back to his neck and found that there was some bleeding. He then deposed that he turned his scooter and came back towards Ponda and it is only on the way somebody informed him that there is a knife sticking on his back. That is when he came directly to the Police Station to report about the same and was thereafter referred for medical treatment to the hospital.

19. Now, it is a little strange is that PW8 only felt some poking

sensation while his scooter was in motion. He has deposed that even after the accused fell off the scooter and thereafter started running he did not realise that there was some knife in his neck. PW8 claims to have realised this fact only after this was pointed out to him by some bystander, who was not examined by the prosecution. Thereafter, PW8 did not seek immediate medical help but rather went to Police Station to complain along with the knife still in his neck. Now, all this does not inspire too much confidence. In any case, based on all this, it would be quite unsafe to convict the accused under Section 307 of IPC.

20. The accused explained that it is PW8 who was continuously pursuing her affection. She also explained that on account of harassment she also quit her job at Marcaim. She has also explained that despite all this PW8 did not stop pursuing her. She also explained about 149 missing calls on the previous day and about her call on the date of the incident only to inquire with PW8 as to why he had made so many calls to her. She has explained that it is PW8 who insisted that she traveled on the scooter with him. She has explained that PW8 was threatening to harm himself in case the accused does not yield to matrimony.

21. One of the doctors, in the context of injury on PW8, did depose that such injury could not be self-inflicted. However, the surgeon who actually removed the knife from the neck of PW8 has not deposed in this matter. The medical evidence is therefore is not totally conclusive.

22. If, the evidence on record is evaluated in its entirety, then,

the defence raised by the accused does not seem to be fantastic or for that matter even implausible. In this case, the accused, herself reported the incident to the police station. This conduct is also consistent with her explanation that after she saw, what she believes was a self-inflicted wound on PW8, she along with her friend reported the matter to the police station. She has also explained that PW8 had threatened to file a false complaint against her by attempting to commit suicide, should the accused not yield to matrimony with him.

23. According to me, the learned Additional Sessions Judge, has laid too great an emphasis only upon the incriminatory portion of the testimony of PW8. However, there was no consideration of the defence raised by the accused and the corroborative circumstances to be found in the prosecution evidence itself. The lacunae in the investigations, the non-examination of some crucial witnesses, or producing the call details also render it unsafe to sustain the conviction. In such matters, suspicion cannot take place of proof. The prosecution is duty-bound to prove the guilt of the accused beyond a reasonable doubt.

24. In the aforesaid circumstances, the accused is at least entitled to benefit of reasonable doubt which arises in the matter. The conviction, therefore, deserves to be interfered with.

25. For all the aforesaid reasons, this appeal is allowed and the impugned judgment and order, as well as the conviction recorded therein, is hereby set aside. The bail bonds furnished by the accused are

hereby discharged. There shall be no order for costs.

M. S. SONAK, J

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