

Meena

**IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO.5 OF 2015**

State of Goa,
Through Margao Town Police Station,
Margao, Goa.

...Appellant

Versus

Mr. Rosario Ferrao,
s/o. Caitano Ferrao,
age 64 years,
r/o. H.No.413, Coldem,
Navelim, Salcete Goa.

...Respondent.

Mr. S.G. Bhobe, Public Prosecutor for the Appellant – State.

Mr. Somnath Karpe with Ms. S.Vaigankar, Advocates for the Respondent.

Mr. Ryan Menezes and Mr. Nigel Fernandes, Advocates for the Complainant.

CORAM: BHARAT P. DESHPANDE, J.

RESERVED ON: 6th October, 2022

PRONOUNCED 21st October, 2022
ON :

JUDGMENT:

This is an appeal filed on behalf of the State through Margao Town Police Station under Section 378(1)(B) of the Criminal Procedure Code (CrPC), thereby challenging the judgment and order dated 30th April 2014 passed by the learned Judicial Magistrate First

Class, Margao in Criminal Case No.417/S/2012/III thereby acquitting of the respondent.

2. Vide order dated 22nd January 2015 leave was granted to file an appeal against the impugned judgment, accordingly, the appeal was registered and admitted on 5th February 2015.

3. Heard learned Additional Public Prosecutor Mr. G. Nagvenkar, the learned Counsel Mr. Ryan Menezes with Mr. Nigel Fernandes, for the original complainant and learned Counsel Mr. Somnath Karpe with Ms. S.Vaigankar for the respondent.

4. With the assistance of the learned Counsel appearing for the respective parties, I perused the entire record as well as the paper book.

5. The point for determination is as under together with my findings against it:

(1) Whether the learned Trial Court erred in acquitting the accused person by overlooking evidence of eyewitnesses?

6. The learned Additional Public Prosecutor appearing for the State submitted that the incident took place on 01st October 2012 at around 1.30 pm and the same was witnessed by the neighbours. The victim/injured deposed firmly before the Court which has been disbelieved on the ground that there are discrepancies and contradictions. He submitted that the Hurt Certificate produced by the Medical Officer clearly corroborates the ocular version. Independent witness was disbelieved without any sufficient cause. The weapon of assault i.e. a wooden rafter was recovered from the

spot and the same has been identified by the victim and other witnesses. He claimed that the clothes of the victim were also identified in the Court however such identification has been rejected on trivial grounds. The learned Trial Court while giving reasons disbelieved all the witnesses of the prosecution which finding is erroneous. He submitted that there is a ring of truth in the statements of the injured and eyewitnesses and therefore in such circumstances, minor discrepancies would not have been taken into consideration for discarding entire evidence. When there is direct evidence available, rejecting such testimony on the ground of an interested witness is improper. He placed reliance on the following decisions ***Abdul Sayyed v/s. State of Madhya Pradesh***¹ and more particularly paragraph No.28:

“The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. “Convincing evidence is required to discredit an injured witness.” [Vide Ramlagan Singh v. State of Bihar [(1973) 3 SCC 881 : 1973 SCC (Cri) 563 : AIR 1972 SC 2593] , Malkhan Singh v. State of U.P. [(1975) 3 SCC 311 : 1974 SCC (Cri) 919 : AIR 1975 SC 12] , Machhi Singh v. State of Punjab [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] , Appabhai v. State of Gujarat [1988 Supp SCC 241 : 1988 SCC (Cri) 559 : AIR 1988 SC 696] , Bonkya v. State of Maharashtra [(1995) 6 SCC 447 : 1995 SCC (Cri) 1113] , Bhag Singh .[(1997) 7 SCC 712 : 1997 SCC (Cri) 1163] , Mohar v. State of U.P. [(2002) 7 SCC 606 :

¹ (2010) 10 SCC 259

2003 SCC (Cri) 121] (SCC p. 606b-c), Dinesh Kumar v. State of Rajasthan [(2008) 8 SCC 270 : (2008) 3 SCC (Cri) 472] , Vishnu v. State of Rajasthan [(2009) 10 SCC 477 : (2010) 1 SCC (Cri) 302] , Annareddy Sambasiva Reddy v. State of A.P [(2009) 12 SCC 546 : (2010) 1 SCC (Cri) 630] and Balraje v. State of Maharashtra [(2010) 6 SCC 673 : (2010) 3 SCC (Cri) 211] .”

7. The learned Counsel Mr. Ryan Menezes appearing for the complainant submitted that the complainant has filed a Criminal Misc. Application No.524 of 2022 (F) with the prayer that the complainant be permitted to participate in the proceedings of the present appeal including advancing such oral and written submissions. He submitted that the complainant is having every right to participate and to argue the matter independently of the prosecution and therefore he may be granted an opportunity to argue or advance oral submissions.

8. On behalf of the respondent, such a request has been opposed by filing a reply affidavit. Similarly, written arguments are also placed on record on behalf of the complainant/victim.

9. Therefore, first of all, it is necessary to consider the rights of the victim/ complainant to participate in the proceedings and to advance oral arguments independently in an appeal filed by the State challenging judgment and acquittal.

10. In this respect Section 301 of CrPC is relevant which reads thus:

(1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under

inquiry, trial or appeal.

(2) If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.”

11. In this respect the learned Counsel Mr. Ryan Menezes placed reliance in the case of ***Jagjeet Singh and others v/s. Ashish Mishra alias Monu and another***². Whereas the learned Counsel Mr. Somnath Karpe placed reliance in the case of ***Rekha Murarka v/s. The State of West Bengal and Ors.***³

12. In the case of ***Jagjeet Singh***(supra) the question framed is found in paragraph 15 at clause a as under :

“Whether a ‘victim’ as defined under Section 2(wa) of Criminal Procedure Code, 1973 (hereinafter, “Cr.PC.”) is entitled to be heard at the stage of adjudication of bail application of an accused?”

13. In the case of ***Rekha Murarka*** (supra), the victim filed an application under Section 301 r/w. the proviso to Section 24(8) of CrPC for certain reliefs which include advancing oral argument in support of question of law and fact only after the learned Public Prosecutor, if so required; to raise objection in case any irrelevant question is put to any prosecution witness, if so required; to examine the prosecution witnesses only after the learned Public Prosecutor, if so required; to cross-examine the defence witnesses, if adduced, only

² 2022 SCC OnLine SC 453

³ AIR 2020 SC 100

after the learned Public Prosecutor, if so required and to assist the process of justice in accordance with law.

14. The application was filed before the Sessions Court which allowed it. The same was challenged before the Calcutta High Court in the revision petition wherein the order was confirmed. The matter was carried to the Supreme Court wherein a question was framed in paragraph 7 which reads as under :

“In light of the arguments advanced, the main question to be considered is the extent to which a victim's counsel can participate in the prosecution of a case. Since this is closely tied with the role that is envisaged for the Public Prosecutor, we will first deal with the same.”

15. The Supreme Court thereafter discussed the oral pleading by the Public Prosecutor as defined in Section 24 and then considered the provisions of Sections 301 and 302 of CrPC, as well as the objects and reasons of amendment carried out to the Code of Criminal Procedure.

16. After considering above provisions, the Supreme Court observed in paragraphs No.12, 12.1 to 12.5 as under:

“12. In light of this, we now proceed to consider the extent to which such assistance can be accorded. As mentioned supra, the learned Senior Counsel for the appellant has argued that there may be instances where the Public Prosecutor may fail to perform his functions properly, whether deliberately or due to oversight, which may obstruct justice instead of furthering it. To meet the ends of justice in such cases, he submitted that the role of the victim's counsel should not be limited to filing of written arguments as provided with respect to pleaders engaged by private parties under Section 301(2). Instead, it should

extend to making oral arguments and examining witnesses as well. On a perusal of the arguments advanced and the decisions relied on by both the parties, we find that such a broad mandate for the victim's counsel cannot be given effect to, as it is not rooted in the text of CrPC.

12.1. The use of the term “assist” in the proviso to Section 24(8) is crucial, and implies that the victim's counsel is only intended to have a secondary role qua the Public Prosecutor. This is supported by the fact that the original Amendment Bill to CrPC had used the words “coordinate with the prosecution”. However, a change was later proposed and in the finally adopted version, the words “coordinate with” were substituted by “assist”. This change is reflective of an intention to only assign a supportive role to the victim's counsel, which would also be in consonance with the limited role envisaged for pleaders instructed by private persons under Section 301(2). In our considered opinion, a mandate that allows the victim's counsel to make oral arguments and cross-examine witnesses goes beyond a mere assistive role, and constitutes a parallel prosecution proceeding by itself. Given the primacy accorded to the Public Prosecutor in conducting a trial, as evident from Sections 225 and 301(2), permitting such a free hand would go against the scheme envisaged under CrPC.

11.2. In some instances, such a wide array of functions may also have adverse consequences on the fairness of a trial. For instance, there may be a case where the Public Prosecutor may make a strategic call to examine some witnesses and leave out others. If the victim's counsel insists upon examining any of the left-out witnesses, it is possible that the evidence so brought forth may weaken the prosecution case. If given a free hand, in some instances, the trial may even end up becoming a vindictive battle between the victim's counsel and the accused, which may further impact the safeguards put in place for the accused in criminal trials. These lapses may be aggravated by a lack of advocacy experience on the part of the victim's counsel. In contrast, such dangers would not arise in the case of a Public Prosecutor, who is required to have considerable experience in the practice of law, and act as an independent officer of

the court. Thus, it is important to appreciate why the role of a victim's counsel is made subject to the instructions of the Public Prosecutor, who occupies a prime position by virtue of the increased responsibilities shouldered by him with respect to the conduct of a criminal trial.

12.3. At the same time, the realities of criminal prosecutions, as they are conducted today, cannot be ignored. There is no denying that Public Prosecutors are often overworked. In certain places, there may be a single Public Prosecutor conducting trials in over two-three courts. Thus, the possibility of them missing out on certain aspects of the case cannot be ignored or discounted. A victim-centric approach that allows for greater participation of the victim in the conduct of the trial can go a long way in plugging such gaps. To this extent, we agree with the submission made by the learned Senior Counsel for the appellant that the introduction of the proviso to Section 24(8) acts as a safety valve, inasmuch as the victim's counsel can make up for any oversights or deficiencies in the prosecution case. Further, to ensure that the right of appeal accorded to a victim under the proviso to Section 372 CrPC is not rendered meaningless due to the errors of the Public Prosecutor at the trial stage itself, we find that some significant role should be given to the victim's counsel while assisting the prosecution. However, while doing so, the balance inherent in the scheme of CrPC should not be tampered with, and the prime role accorded to the Public Prosecutor should not be diluted.

12.4. In this regard, given that the modalities of each case are different, we find that the extent of assistance and the manner of giving it would depend on the facts and circumstances of each case. Though we cannot detail and discuss all possible scenarios that may arise during a criminal prosecution, we find that a victim's counsel should ordinarily not be given the right to make oral arguments or examine and cross-examine witnesses. As stated in Section 301(2), the private party's pleader is subject to the directions of the Public Prosecutor. In our considered opinion, the same principle should apply to the victim's counsel under the proviso to Section 24(8), as it adequately

ensures that the interests of the victim are represented. If the victim's counsel feels that a certain aspect has gone unaddressed in the examination of the witnesses or the arguments advanced by the Public Prosecutor, he may route any questions or points through the Public Prosecutor himself. This would not only preserve the paramount position of the Public Prosecutor under the scheme of CrPC, but also ensure that there is no inconsistency between the case advanced by the Public Prosecutor and the victim's counsel.

12.5. However, even if there is a situation where the Public Prosecutor fails to highlight some issue of importance despite it having been suggested by the victim's counsel, the victim's counsel may still not be given the unbridled mantle of making oral arguments or examining witnesses. This is because in such cases, he still has a recourse by channelling his questions or arguments through the Judge first. For instance, if the victim's counsel finds that the Public Prosecutor has not examined a witness properly and not incorporated his suggestions either, he may bring certain questions to the notice of the court. If the Judge finds merit in them, he may take action accordingly by invoking his powers under Section 311 CrPC or Section 165 of the Evidence Act, 1872. In this regard, we agree with the observations made by the Tripura High Court in Uma Saha v. State of Tripura [Uma Saha v. State of Tripura, 2014 SCC OnLine Tri 859] that the victim's counsel has a limited right of assisting the prosecution, which may extend to suggesting questions to the court or the prosecution, but not putting them by himself.”

17. From the above observations, it is clear that the extent of assistance and the manner of giving it would depend on the facts and circumstances of each case. All possible scenarios that may arise during criminal prosecution would not entail the victim's Advocate to ordinarily has a right to make oral arguments or examine or cross-examine the witnesses. The Advocate of the victim or the complainant as the case may be is only to assist the Public Prosecutor

and therefore such principle should not apply to the matter in hand as it is nowhere alleged in the application filed for grant of such relief that the Public Prosecutor has failed to perform his duty in a proper manner.

18. There is no doubt that the victim is having an independent right to participate in the proceedings and to assist the prosecutor. However, the provisions of CrPC and more particularly proviso to Sub-Section 8 of Section 24 of CrPC permit the victim to engage an Advocate of his choice to assist the prosecution and that too with the permission of the Court. Section 301(2) of CrPC as quoted earlier also speaks only about assistance to the Public Prosecutor by the Counsel for the victim. Such Counsel of the victim shall act under the directions of the Public Prosecutor and may with the permission of the Court submit written arguments after evidence is closed in the case. Thus, it is very clear that as far as criminal appeal is concerned, the victim could be permitted to assist the Public Prosecutor in conducting the matter and to file written submissions. A question of giving a separate audience to the learned Counsel for the victim is nowhere mentioned in the CrPC. Thus, the observations in the case of ***Rekha Murarka*** (supra) are squarely applicable to the facts and circumstances in the matter.

19. ***Jagjeet Singh***(supra), is dealing only with the victim qua the stage of adjudication of the bail application. Therefore, it is clear that once the victim is permitted to assist the prosecution and to file written arguments, the same would comply with the provisions of Section 24 (8) (provisio) and Section 301 of CrPC. Permitting the

learned Counsel for the victim to argue independently apart from the arguments advanced by the learned Public Prosecutor, would amount to reading the provisions which are not found in the statute book. The question is only giving an opportunity to the victim to represent by a separate Counsel at the prosecution stage or even during the pendency of the appeal. In the matter, the victim was allowed to appear and assist the prosecution and also to submit written arguments. Thus, a request made by the learned Counsel Mr. Ryan Menezes to allow him to address the Court orally cannot be acceded to.

20. With this, I have to consider the points framed above so as to decide it on merit.

21. The learned Counsel Mr. Somnath Karpe while placing reliance in the case of ***Mohd. Akhtar and Ors v/s. State of Bihar and Ors***⁴ submitted that scope of this Court while dealing in an appeal needs to be kept in mind. He submitted that merely because another view is possible, this Court should not replace its view with that of a view taken by the learned Trial Court. He submitted that the present matter is an appeal against acquittal and therefore certain parameters laid down by the Supreme Court must be kept in mind.

22. In the case of ***Mohd. Akhtar***(supra), the Apex Court discussed the scope of the High Court while considering the appeal against acquittal. Paragraphs No.9 to 12 discussed the powers of the Appellate Court while dealing with an appeal against acquittal which reads thus:

4 (2019) 2 SCC 513

9. PW 6 who is the informant deposed that there was sufficient light cast because of the ghura (fireplace), the lantern and the torch which he was carrying. He witnessed the incident from behind the Simal tree which was 15 yards from the place of occurrence.

10. The oral testimonies of PWs 3, 4 and 6 were examined thoroughly and the trial court was of the opinion that it is not safe to rely on their statements. The trial court held that the evidence relating to identification of the accused in the available light was not convincing. There is reference to the evidence regarding the lantern in the verandah which was behind the place where the mob was standing and the improbability of their being identified in the light emitted by the lantern. The evidence of PW 6 that he flashed a torchlight for identifying the accused persons was disbelieved as no torch was seized by the police. For the aforesaid reasons, the trial court was of the opinion that the eyewitnesses could not have identified the accused. Previous enmity between the accused on one hand and the informant's family on the other was proved.

11. The trial court further found that there was a delay in lodging the FIR which provided an opportunity for the informant and other PWs to implicate their enemies. Thus, the false implication could not be ruled out. Further, the fardbeyan was recorded in the village at 9.00 p.m. on 5-1-1984. A dead body challan which was prepared by J.N. Singh, Sub-Inspector of Police (SI) which shows that the body was sent for post-mortem at 11.00 p.m. There was also an entry in the station diary that J.N. Singh (SI) returned to the police station at 9.00 p.m. If the fardbeyan was prepared at 9.00 p.m. at the place of incident which is six kilometres away from the police station, J.N. Singh (SI) could not have arrived at the police station at 9.00 p.m. The record shows that he prepared the inquest report at 10.00 p.m. and the dead body challan at 11.00 p.m. at the place of occurrence. J.N. Singh (SI) who is an important witness was not examined by the prosecution.

12. Referring to the above circumstances, the trial court held that it was clear that the inquest report and the dead body

challan were prepared later at the police station. An adverse inference was drawn against the prosecution. The trial court also took note of the presence of Mangal Tanti, the chowkidar of the village, who reached the place of the incident in 30 minutes after the incident took place. He was not examined as a witness. None of the witnesses deposed that they informed the chowkidar about the incident. No independent witness was examined though the village was hardly 200 m from the place of the incident. No pellet or traces of bullets were recovered from the place of the incident. On the basis of the above findings along with other contradictions in the evidence of the witnesses, the trial court acquitted the appellants of all the charges against them.

23. The learned Counsel Mr.Karpe then placed reliance in the case of ***Muralidhar @ Gidda and Anr v/s. State of Karnataka***⁵ wherein it is observed as under:

10. Lord Russell in Sheo Swarup [Sheo Swarup v. King Emperor, (1933-34) 61 IA 398 : (1934) 40 LW 436 : AIR 1934 PC 227 (2)] , highlighted the approach of the High Court as an appellate court hearing the appeal against acquittal. Lord Russell said : (IA p. 404)

“... the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.”

The opinion of Lord Russell has been followed over the years.

11. As early as in 1952, this Court in *Surajpal Singh*

5 (2014) 2 SCC 730

[Surajpal Singh v. State, AIR 1952 SC 52 : 1952 Cri LJ 331] while dealing with the powers of the High Court in an appeal against acquittal under Section 417 of the Criminal Procedure Code observed : (AIR p. 54, para 7)

“7. ... the High Court has full power to review the evidence upon which the order of acquittal was founded, but it is equally well settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial court, and the findings of the trial court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons.”

12. The approach of the appellate court in the appeal against acquittal has been dealt with by this Court in Tulsiram Kanu [Tulsiram Kanu v. State, AIR 1954 SC 1 : 1954 Cri LJ 225] , Madan Mohan Singh [Madan Mohan Singh v. State of U.P., AIR 1954 SC 637 : 1954 Cri LJ 1656] , Atley [Atley v. State of U.P., AIR 1955 SC 807 : 1955 Cri LJ 1653] , Aher Raja Khima [Aher Raja Khima v. State of Saurashtra, AIR 1956 SC 217 : 1956 Cri LJ 426] , Balbir Singh [Balbir Singh v. State of Punjab, AIR 1957 SC 216 : 1957 Cri LJ 481] , M.G. Agarwal [M.G. Agarwal v. State of Maharashtra, AIR 1963 SC 200 : (1963) 1 Cri LJ 235] , Noor Khan [Noor Khan v. State of Rajasthan, AIR 1964 SC 286 : (1964) 1 Cri LJ 167] , Khedu Mohton [Khedu Mohton v. State of Bihar, (1970) 2 SCC 450 : 1970 SCC (Cri) 479] , Shivaji Sahabrao Bobade [Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 : 1973 SCC (Cri) 1033] , Lekha Yadav [Lekha Yadav v. State of Bihar, (1973) 2 SCC 424 : 1973 SCC (Cri) 820] , Khem Karan [Khem Karan v. State of U.P., (1974) 4 SCC 603 : 1974 SCC (Cri) 639] , Bishan Singh [Bishan Singh v. State of Punjab, (1974) 3 SCC 288 : 1973 SCC (Cri) 914] , Umedbhai Jadavbhai [Umedbhai Jadavbhai v. State of Gujarat, (1978) 1 SCC 228 : 1978 SCC (Cri) 108] , K. Gopal Reddy [K. Gopal Reddy v. State of A.P., (1979) 1 SCC 355 : 1979 SCC (Cri) 305] , Tota Singh [Tota Singh v. State of Punjab, (1987) 2 SCC 529 : 1987 SCC (Cri) 381] , Ram Kumar [Ram Kumar v. State of Haryana, 1995 Supp (1) SCC 248 : 1995 SCC (Cri) 355] , Madan Lal [Madan Lal v. State of J&K, (1997) 7

SCC 677 : 1997 SCC (Cri) 1151] , Sambasivan [Sambasivan v. State of Kerala, (1998) 5 SCC 412 : 1998 SCC (Cri) 1320] , Bhagwan Singh [Bhagwan Singh v. State of M.P., (2002) 4 SCC 85 : 2002 SCC (Cri) 736] , Harijana Thirupala [Harijana Thirupala v. Public Prosecutor, (2002) 6 SCC 470 : 2002 SCC (Cri) 1370] , C. Antony [C. Antony v. K.G. Raghavan Nair, (2003) 1 SCC 1 : 2003 SCC (Cri) 161] , K. Gopalakrishna [State of Karnataka v. K. Gopalakrishna, (2005) 9 SCC 291 : 2005 SCC (Cri) 1237] , Sanjay Thakran [State of Goa v. Sanjay Thakran, (2007) 3 SCC 755 : (2007) 2 SCC (Cri) 162] and Chandrappa [Chandrappa v. State of Karnataka, (2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325] . It is not necessary to deal with these cases individually. Suffice it to say that this Court has consistently held that in dealing with appeals against acquittal, the appellate court must bear in mind the following:

(i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial court;

(ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal;

(iii) Though, the powers of the appellate court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate court is generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial court had an advantage of seeing the demeanour of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate court in interfering with such conclusions is fully justified; and

(iv) Merely because the appellate court on reappreciation and re-evaluation of the evidence is inclined to take a

different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate court in the judgment of the trial court.”

24. Thus, it is clear that unless the conclusion reached by the Trial Court at palpably wrong or based on the erroneous view of law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the Appeal Court in interfering with such conclusion is fully justified. Merely because by re-appreciating or re-evaluating evidence, the Appellate Court inclined to take different view, interference with the impinged judgment and acquittal is not justified if view taken by the Trial Court is a possible view.

25. The respondent was prosecuted for the offences punishable under Sections 427, 504, 324, 354, 506(ii) of IPC. In nutshell, it is the case of the prosecution that the respondent is the brother-in-law of the complainant i.e. her husband's brother. On 01st October 2012 at around 13.30 hours respondents under the influence of alcohol pushed the motorcycle of the husband of the complainant thereby causing damage, abused the complainant and her husband in filthy language, assaulted the complainant and caught hold of her clothes and pulled and tore her clothes and threw her on the ground thereby outraging her modesty. Similarly, the husband of the complainant was assaulted with the wooden rafter, kicks, fist blows and slaps.

26. During the trial in all 8 witnesses have been examined by the prosecution. The learned Trial Court after considering the evidence, oral as well as other circumstances, found that the case of the

prosecution is unbelievable and that there is every possibility of dragging the respondent into such offences due to the previous enmity between the family members.

27. The learned Public Prosecutor while inviting the attention of this Court to the deposition of relevant witnesses submitted that minor discrepancies and variations in the testimonies of complainant, victim and independent eyewitnesses have been discarded. He submitted that medical evidence supporting the case of the victim and since independent witnesses were not examined, cannot be a ground to disbelieve the victim and the complainant.

28. Charges were framed against the respondent vide Exhibit-6 and thereafter prosecution examined 8 witnesses. Pw1 is the Medical Officer who examined the complainant / Pw2 at around 2.40pm on 1st December 2012 and found multiple abrasions on the lower leg 4cm x 0.5 cm, simple in nature having a duration of six hours. Pw1 also examined the husband of the complainant by name Joaquim Ferrao on 2.55pm on the same day and found swelling on the dorsal aspect of the right leg 4cm x 3cm. The opinion was reserved. No external injuries were found. She then opined that such injuries as far as Pw1/complainant is concerned are possible by way of assault with fist blows, slaps and kicks. She then opined that the injuries found on Joaquim Ferrao/husband of the complainant are possible if assaulted with a wooden rafter. During cross-examination, she accepted that such injuries shown in the Hurt Certificate are possible if a person while running comes in contact with a hard surface or even due to fall from a motorbike. Thus, Pw1 who is the Doctor

attached to Hospicio Hospital, Margao opined about the nature of injuries found on the complainant/Pw2 and her husband Joaquim who is examined as Pw3.

29. Pw2-Complainant stated while depositing before the Trial Court that the incident took place on 1st October 2012 at around 5.30p.m. At this stage it is required to note that the timing mentioned by Pw2 of the alleged incident is apparently incorrect or considered to be a typographical mistake and the same needs to be read as 1.30pm for the simple reason that the complaint was lodged at 4.00pm and she was examined by the Medical officer/Pw1 in the hospital at 2.55pm. The complaint produced at page 33 of the paper book shows that it was registered at 16.45hours on 01st October 2012. Thus, the timing found in the deposition needs to be read as 1.30pm.

30. Pw2-Complainant then deposed that at that time accused came to their house under influence of alcohol. As far as this statement is concerned, there is no material or even the blood test report of the accused to suggest that he was under the influence of alcohol.

31. Pw2-complainant deposed that accused pushed their motorcycle which was kept by the side of their house. Thereafter, the accused abused them in filthy words and assaulted her husband with a rafter on his left hand. At this stage, it is necessary to revert back to the Hurt Certificate produced by Pw1 wherein the only injury found on the person of the husband of the complainant Joaquim is the swelling on the dorsal aspect of the right leg. Thus, there is no medical evidence to support the contention of the complainant that

the accused assaulted her husband with a wooden rafter on his left hand. It is not possible not to detect any injury on the left hand in case of assault with a wooden rafter.

32. Pw3-Joaquim who is the husband of the complainant claimed that on 1st October 2012 at around 1.30pm he along with his wife/Pw2 were having a meal in their house and at that time they heard a loud sound of falling something outside their house. He as such along with his wife came out of their house and saw a motorcycle bearing No.GA-09-H-4641 fallen on the right side gate of their house. He also saw the accused moving by the side of the said motorcycle and as such he asked the accused as to why he threw their motorcycle on the ground.

33. It is clear from the deposition of the Pw3-Joaquim that he along with his wife/Pw2 were having a meal and they only heard some sound of falling something. It means that both of them did not witness the alleged incident of the accused pushing the bike.

34. Pw3-Joaquim then stated that on questioning the accused as to why he pushed a motorcycle and caused damages, the accused started abusing him and his wife in filthy words. Thereafter, the accused took a wooden rafter and tried to hit on his head however when he tried to defend himself from the blow, the rafter landed on his left hand. Thus, it is clear from the deposition of Pw3-Joaquim that the rafter landed on his left hand and not on any other part of the body. However as discussed earlier, Pw1 Dr Siona Xariver did not observe any injury caused by the wooden rafter on the left hand of Pw3-Joaquim. She only found some swelling on the dorsal aspect of

the right leg of Joaquim. Thus, again it is clear that the medical evidence is not supporting the ocular version of the complainant and her husband qua assault by a wooden rafter.

35. Pw2-Complainant then claimed that the accused thereafter assaulted her husband with fist blows, kicks and slaps on the chest, stomach and other parts of the body due to which her husband sustained internal swelling on his hand and body. Pw3-Joaquim deposed that he was assaulted by the accused by fist blows, and kicks over his body thereby causing injuries to him. This version of Pw2 and Pw3 is again not corroborated by medical evidence at all. It is unlikely not to receive any injury due to assault with fist blows, kicks and slaps i.e. by giving multiple blows. Similarly, the medical certificate of Pw3 Joaquim nowhere shows that it was a bleeding injury over right leg, but only shows swelling on the dorsal aspect on the right leg. Thus, the story put forth by the prosecution of detecting blood on the wooden rafter is again highly improbable. Pw2/complainant in her deposition stated that there were blood stains on the wooden rafter which was used by the accused for the assault and she pointed out such wooden rafter at the time of scene of offence Panchanama. When there is no bleeding injury found on the person of Pw3-Joaquim who was allegedly assaulted by the wooden rafter and that too on his left hand, the question of blood stain on the wooden rafter cannot be accepted. Thus, it clearly goes to show that the prosecution witnesses tried to improvise their version on the basis of the previous enmity between the complainant and the accused. At this stage, it is necessary to note the age of the accused at the time of the alleged incident as 64 years.

36. Pw2-Complainant then deposed that she intervened so as to rescue her husband from the assault and at that time accused caught her head and shook her and then caught hold of her clothes and pulled and in that process tore her brassiere and blouse and further threw her on the ground and assaulted her with fist blows, kicks and slaps. Due to such assault, she sustained abrasion over her body and there was internal pain in her neck, head, shoulder and other parts of her body. She then deposed that at the relevant time she was wearing a white colour blouse with printed flowers on it and on the back side of the blouse there was a logo. This aspect is necessary as the Panchnama of attachment of clothes of the complainant show only white colour clothes without any print on it.

37. Pw3-Joaquim deposed that accused caught hold of his wife, pulled her hair and the clothes worn by her and tore them and threw her on the ground and then assaulted her with fist blows, kicks and slaps.

38. Pw4-Francisco Pereira is the panch witness who deposed that on 1st October 2012 he was present at the spot and in his presence the scene of offence panchanama was conducted. While deposing, he clearly stated that he witnessed the said incident of assault on the complainant and her husband. However, he did not disclose as to what happened on that day in his presence and how the assault took place. He then stated that the complainant disclosed the details of the incident of assault at the time of panchanama and also shown the rafter used by the accused to assault Joaquim. The said rafter was found falling outside the house and he saw some blood stains on the

said rafter. During cross-examination Pw4 admitted that on the date of the incident he was working for the complainant on a payment basis as labour and his timings were from 9.00am to 2.00pm. Thus, it is clear that this panch witness is not an independent witness from the locality but he was working as a labour for the complainant. Though he claimed to have witnessed the incident, no efforts were made to elicit the details of the incident through this witness during the trial.

39. The scene of panchanama is having a sketch attached to it and the place of offence is clearly seen on the pathway/mud road and not at the house of the complainant. A motorcycle is also found outside the house of the complainant and on the katcha road portion. Thus, one thing is clear that the alleged incident took place on the pathway and not inside the property of the complainant. Pw2 and Pw3 did not disclose that the alleged incident took place inside their property.

40. Pw6-Romaldina Fernandes is a so-called eyewitness of the alleged incident. She stated that on 01st October 2012 during the afternoon time she came out of her house and saw the accused on his bicycle. After the accused reached near the house of the complainant, he kicked the motorcycle which was parked near the gate of the complainant. On account of this, the motorcycle fell on the ground and sustained damages. Pw2 and Pw3 on hearing some sound came out of their house and asked who kicked down the motorcycle. On asking, the accused replied saying "I threw it down". The accused then picked up a wooden rafter from the place and assaulted Pw3. The accused then assaulted Pw3 with fist blows and

kicks. The accused then abused Pw2 and Pw3 with filthy language. The accused then caught hold of the hairs of Pw2 and pulled her. The accused caught hold of clothes of Pw2 and tore the blouse and the brassier. Then the accused assaulted Pw2 and her husband with fist blows causing them injuries.

41. During cross-examination Pw6 claimed that her house is at a distance of around 25 meters from the house of the accused and the complainant. She then admitted that since the last three years the accused is not in talking terms with them as accused created some problem.

42. Thus, it is clear from the deposition of Pw6 that she saw the accused while cycling and while passing from the side of the house of the complainant and he kicked the bike. Pw2 and Pw3 are absolutely silent about the bicycle on which the accused was passing through the said lane. Similarly, the version given by Pw6 and the manner in which the accused assaulted Pw2 and Pw3, is completely at variance with the deposition of Pw2 and Pw3. If the sequence of assault is considered as deposed by Pw6, it is not corroborating with the deposition of Pw2 and Pw3 on material aspects. Thus, presence of Pw6 at the time of the alleged incidence is highly doubtful.

43. It was argued on behalf of the respondent that there is a dispute between complainant, her husband on one side and the respondent on the other side, with respect to landed property and the present complaint is the outcome of such dispute. In this respect, it is necessary to look into the cross-examination of Pw2, Pw3 and Pw6.

44. Pw2-complainant admitted that respondent is the brother of her husband, and said respondent has constructed a new house which is at some distance from the old house. She then admitted that her mother-in-law Antonetta Ferrao along with her father-in-law were the owners of landed property known as Coldem or Donvodem bearing No.61/4 of Benaullim. She further admitted that their property is also known as Xiro bearing Survey No.89/6 of Telaullim. Both these properties have been sub-divided by her in-laws on the basis of a Gift Deed dated 18th May 1979, however Pw2 voluntarily claimed that such Gift Deed is a false Deed. A question was put to her that she along with her husband are signatories to the Gift Deed upon which she claimed ignorance. However, she admitted that as per the Gift Deed dated 18th May 1979 she along with her husband were allotted plots No.C and C1 and thereafter, they constructed house on plots C and C1 and residing therein. She then showed ignorance that plots A and E were allotted to the respondent in the said Gift Deed and thereafter, he constructed a house on the said plots.

45. Pw2 then admitted during cross-examination that her husband had lodged a complaint against the respondent and others which is pending in A Court bearing Case No.666 of 2010. She then admitted that case was filed against her sons Cajetan and Max for assault on the respondent. She then admitted that there are three cases pending between her family and the respondent. Since the last seven years and from the time of the death of her father-in-law, their relations with the respondent are strained.

46. Pw3-Joaquim admitted that the respondent is his younger brother. They are the owners of ancestral property bearing Survey No.61/4 at Talaulim Village and also Survey No.89/6 known as Xiro. He denied the suggestion that these properties were gifted by his parents to their three sons including himself. He claimed that such a Gift Deed is a false document. However, in the same breath, he admits that as per the Gift Deed he was allotted plots No.C and C1 and thereafter, he constructed a house in plots C and C1 wherein he is residing. He further admitted that plots A and E are allotted to the respondent who constructed his house. He then claimed that the Gift Deed is under challenge in civil proceedings bearing No.666 of 2010 wherein the respondent is one of the defendants. In the said suit he is praying to declare the Gift Deed as null and void.

47. Pw3 then admitted that his sons Cajetan and Max are facing criminal proceedings in respect of the alleged assault on the respondent by them. He also admitted that there are three cases pending between them and the respondent. Their relations from the last seven years are on inimical terms with that of respondent. He then specifically admitted as under :

“It is true that the present case is filed on account of enmity with the accused.”

48. Pw3 further showed ignorance when asked that old ancestral house of their parents has been allotted to their elder brother Minguel vide the Gift Deed. Such answer from Pw2 and Pw3 is clearly avoiding to disclose the fact even though they have challenged the Gift Deed in a civil proceedings. Similarly, they

constructed house on plots C and C1 which were allotted to them under the same Gift Deed. Thus, these witnesses are not trustworthy witnesses as they clearly avoided to answer the facts with regard to the Gift Deed and allotment made to their brothers. Therefore, credibility of both these witnesses is at stake.

49. Pw6 claimed that she is not aware of whether there is any division of the ancestral properties amongst the said brothers. However, she admitted that the respondent constructed a new house and he is residing there since 2011.

50. It is admitted by Pw2 and Pw3 that at the time of the alleged incident three labours were working at their house. However, no efforts were made to examine such independent witnesses. Secondly, the presence of blood on the wooden rafter clearly goes to show the tampering on the part of investigating agency so that such a rafter can be attached claiming therein as a weapon used in an assault. It is no one's case that due to the assault with the help of a rafter any bleeding injury was caused to Pw3. The Medical Certificate produced on record through Pw1 clearly goes to show that there was no injury found on the left hand of Pw3. It is highly improbable of not sustaining any injury in case of assault with the help of a wooden rafter. The absence of injury on the left hand of Pw3 clearly demonstrates that the said witness is not at all reliable and the version put forth by him in the deposition is a false and concocted version only to implead his own brother in connection with a criminal case.

51. Identification of clothes of Pw2-complainant by her and also

by Pw6 is again doubtful.

52. Pw5-Derrick Costa Correia acted as a panch witness on 1st October 2012 regarding the attachment of clothes of Pw2. He claimed that such panchanama was conducted in his presence when the complainant handed over clothes to the police. He identified the envelope containing the clothes as MO No.1. He admitted that he is working as a home guard and it is full time work. Thus, the attachment of Pw5 as a home guard with the Police Department clearly shows that he is not an independent witness for the purpose of panchanama. He also admitted that he might have come to the Court at about 10 to 15 times in different cases. He also admitted that the blouse of the Pw2 is not purely white but it is multi colour with a flower design which includes red, pink, blue and coffee colour. He admits that in the panchanama the colour of the blouse is shown as white. Similarly, the attachment panchanama at Exhibit-17 shows MO1 as one printed floral design white colour blouse having bleeding on it. Neither Pw2 nor Pw3 claimed that they sustained bleeding injuries due to the assault. Thus, the appearance of the blood on the wooden rafter as well as on the blouse of the victim clearly shows tampering of these articles in order to implead the respondent in a criminal matter due to the previous enmity.

53. The learned Magistrate considered these aspects and found that the testimonies of Pw2, Pw3 and Pw6 are not trustworthy and reliable so as to prove the charges against the respondent. Such findings are clearly based on the material produced by the prosecution during the trial. The plausible view taken by the learned

Trial Court is in fact the only view which culled out from the material placed on record. When the witnesses are not trustworthy and there is already enmity between the parties including the dispute with regard to the property of their parents, the possibility of falsely impleading the respondent is not at all ruled out. In fact, there are serious disputes as to whether such an incident did occur as claimed in the complaint.

54. The decisions cited by the learned Counsel Mr. Ryan Menezes in support of his arguments are therefore not applicable to the matter in hand though the proposition laid down in the said decisions is not at all in dispute. However, the basic concept of reliability of the depositions of the complainant/victim or the eyewitnesses is their trustworthiness. If their version is found to be unreliable and untrustworthy, such propositions relied upon cannot be applied. No doubt, the prosecution did not examine any independent witness though Pw2 and Pw3 claimed that 8 labours were present at the relevant time. However, it is not necessary for the prosecution to examine in each and every case only an independent witness. It depends upon the credibility and trustworthiness of the complainant or the victim to prove the charge levelled against the accused. Once these material witnesses are disbelieved non-examination of any independent witness will not come in a way to discard their testimonies.

55. Considering the observations of the Supreme Court in the ***Muralidhar***(supra), no case is made out for interference with the findings recorded by the Trial Court. As already discussed, the view

recorded by the Trial Court is the only view required to be taken in the matter. Thus, I answer the point framed above in negative.

56. The appeal, therefore, needs to be rejected.

ORDER

- i) Criminal Appeal stands rejected.
- ii) No order as to costs.

BHARAT P. DESHPANDE, J

MEENA
VISHAL
BHOIR

Digitally signed
by MEENA
VISHAL BHOIR
Date: 2022.10.21
17:20:04 +05'30'