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IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.49 OF 2015

KAVESH GOSAVI,
Son of Vasudev Gosavi,
28 year old. Indian National,
Resident of H.No. 57, Cotto Balli,
Quepem, Goa. ... Appellant.
(Original Accused
No.3.

Versus

1. S T A T E
(Through Police Inspector, Colva
Police Station, Colva, Salcete, Goa)
2. Vinesh Dessai,
Son of Narayan Dessai,
Major in age,
Resident of H.No. 132/B, Mol,
Fatorpha, Goa. Original Accused no.1
- [3. Raison Almeida,
Son of Hector Almeida,
Major in age,
Resident of H.No. 462, Murida,
Cuncolem, Goa]
[Deleted as per Order dated
03.02.2018] Original Accused no.2
4. The Public Prosecutor,
High Court of Bombay at Panaji,
Goa ... Respondents.

Mr. Pavithran A.V., Advocate for the Appellant.
Mr. S.G. Bhobe, Public Prosecutor for the Respondent-State.

CORAM: BHARAT P. DESHPANDE, J.
DATED: 22 September, 2022

ORAL JUDGMENT:

The Appellant before this Court is assailing the Judgement and Conviction passed in Sessions Case No.35/2014 dated 30.07.2015 passed by the learned Additional Sessions Judge, South Goa, Margao.

2. Heard learned Counsel Mr. Pavithran A.V. for the Appellant and the learned Public Prosecutor Mr. S.G. Bhobe appearing for the State.

3. With the assistance of the learned Counsels, I have perused the entire record as well as the impugned Judgement.

4. Learned Counsel Mr. Pavithran forcefully submitted that the present Appellant/Accused No.3 was convicted for the offences punishable under Sections 384, 419 r/w 34 of IPC, and sentenced to undergo simple imprisonment for a period of one year and to pay fine of ₹5,000/- for the offence punishable under Section 419 of IPC. Similarly, the Appellant/Accused No.3 was sentenced to undergo simple imprisonment for a period of one year and pay a fine of ₹5,000/- for the offence punishable under Section 384 of IPC. In default of payment of the fine, Appellant was directed to undergo simple imprisonment of one month for each offence.

5. The learned Counsel Mr. Pavithran submitted that the findings of the learned Sessions Court are totally perverse and not based on the facts and circumstances as well as the evidence led before it. He invited the attention of this Court to the complaint dated 08.06.2007 lodged by the victim. He points out that there is absolutely no offence

made out against the Accused as far as the said complaint is concerned. The only allegations against the present Appellant are that he entered the room and thereafter suggested to the victim to give an amount of ₹50,000/- to a person impersonating as a policeman. He then submitted that there are no ingredients made out with regard to common intention as tried to be projected by the Prosecution. He then invited the attention of this Court to a charge framed against the Accused which is on page 43. According to him, there is no charge framed against Accused No.3 with regard to extortion or demand of ₹50,000/- by him from the Complainant.

6. Learned Counsel Mr. Pavithran then submitted that the so-called recovery of the gold chain and mobile phone from the pocket of the Appellant at the Police Station after a period of three days is highly suspicious and that cannot be a ground for conviction. He then submitted that the victim in her deposition did not utter a single word against the present Appellant as far as any overt act is concerned.

7. Learned Public Prosecutor Mr. Bhobe appearing for the said victim submitted that the material brought on record is not sufficient enough to even implicate Accused No.3/Appellant herein in the said offence. However, he submitted that the Court may decide in accordance with the law and the material placed on record.

8. After considering the entire material on record and on hearing the learned Counsel for the Appellant and the learned Public Prosecutor for the State, the point for determination together with my finding against it is as under:-

I. Whether the Prosecution succeeded in proving that Appellant/Accused No.3 committed the offence punishable under Section 384, 419 r/w 34 of the IPC?

My answer to the above point is in the negative for the following reasons:-

9. The Complainant in her complaint dated 08.06.2007 alleged that somewhere in the month of May, 2007, her brother-in-law by name Janu Gaonkar requested her to lend him an amount of ₹10,000/-. The Complainant informed Janu Gaonkar that all the amounts which she received as the beneficiary of her deceased husband are invested in fixed deposits and therefore, she is not having any money in hand. However, she told Janu Gaonkar that she could arrange some amount from her friends/well-wishers. Accordingly, she contacted Vinesh Desai/Accused No.1 and requested him to arrange an amount of ₹10,000/- if possible. Accordingly, said Vinesh/Accused No.1 called the Complainant at Colva to hand over the money on 07.06.2007. It is alleged by the Complainant that Accused No.1/Vinesh took her to one hotel at Colva and thereafter in one room and then committed rape on her. It is further alleged in the complaint that thereafter someone knocked on the door of the said room and one person impersonated himself as a police officer entered the room and demanded the gold chain and mobile phone of Vinesh/Accused No.1 and also that of the Complainant. Vinesh/Accused No.1 told the Complainant to hand over her gold chain and the mobile phone, which she did. Thereafter, Accused No.1/Vinesh rushed out of the room while the alleged person who

impersonated himself as a police officer questioned the Complainant about her family members. The Complainant then stated that thereafter Kavesh/Accused No.3/Appellant herein asked her whether she would be able to give ₹50,000/- to the alleged policeman, to which the Complainant informed that she would have to encash the amount by cancelling fixed deposit. After giving assurance to the alleged police officer, he left the room while Kavesh remained outside while she got herself dressed. Thereafter, she came out of the room and Kavesh went to the reception and returned after five minutes. Kavesh started the motorcycle of Vinesh and thereafter dropped her at Margao near the garden. Therefore, she lodged the complaint stating that Vinesh/Accused No.1 committed rape on her and against Kavesh/Appellant herein and an unknown person for demanding money by putting the fear of spoiling her name in the locality.

10. After the investigation was over, the charge-sheet was filed before the learned Magistrate who committed the matter to the Court of Sessions.

11. The learned Additional Sessions Judge framed the charges against the Accused persons vide Exh. 11 which are on pages 43 and 44 of the paper book.

12. On perusal of the said charges, it is clear that there is no charge framed against the present Appellant/Accused No.3 for putting her in fear of spoiling her name in the locality and demanding any amount on that count.

13. The learned Counsel Mr. Pavithran has pointed out that Accused No.2 was discharged vide order dated 04.03.2015 which is on page 38 of the paper book. A perusal of this order shows that Accused No.2 was discharged on the ground that the Complainant failed to identify him during the test identification parade. Therefore, at the time of framing of the charge, Accused No.2 was not at all in the picture and only Accused No.1 and 3 were directed to answer the charge.

14. During the trial, Prosecution examined five witnesses including the Complainant/PW1. A perusal of the deposition of PW1/Complainant clearly goes to show that there is absolutely no material or evidence brought against the Appellant/Accused No.3 with regard to extortion as alleged or even demand of ₹50,000/- which is mentioned in the complaint though no separate charge was framed to that effect.

15. The entire deposition of PW1/victim is only against Accused No.1 and the person who claimed to be a police officer. On page 3 of the deposition of PW1, she specifically deposed that after the alleged incident of rape, there was a knock on the door of the said room and one man claiming to be a police officer came in the room. The said person claiming to be a policeman told her to give two gold chains which she was wearing and also to hand over her mobile phone. PW1 then stated that there was a threat of assault if she refused to hand over her gold chain and mobile phone as well as taking her to Panaji. Therefore, she removed her two gold chains and gave them to the said person along with the mobile phone. Thereafter, Vinesh came

out of the bathroom, took out his gold chain and gave it to the said person claiming to be the police. Vinesh/Accused No.1 also handed over his phone to the said person.

16. PW1/Complainant then claimed that thereafter the said person claiming to be the police went away along with Vinesh/Accused No.1 and thereafter, Accused No.3/Appellant told her to give him a sum of ₹50,000/- as Vinesh/Accused No.1 was arrested.

17. This aspect is contrary to the complaint. PW1 nowhere stated that Appellant/Kavesh was present when the alleged extortion took place by the person who claimed to be a police officer. There is absolutely no evidence brought on record by the investigating agency to show that Accused No.1, 2 and 3 were having any common intention or that there was any such attempt on their part. Therefore, the so-called story of Accused No.3/Appellant herein committing the so-called offence of extortion and even cheating is not found in the deposition of PW1.

18. The learned Counsel Mr. Pavithran then pointed out that the so-called chain and the mobile phone were released to the Complainant and thereafter attempt was made during her testimony to identify such items which is found on page 72 of the paper book. Admittedly, the gold chains and the mobile were handed over to the Complainant much prior to her deposing before the Court. Thus, such identification by the Complainant is of no consequence.

19. The learned Counsel Mr. Pavithran then submitted that Appellant/Accused No.3 was arrested on 09.06.2007 i.e. after a

period of two days from the alleged incident and during the conducting of arrest panchanama, the Police/Investigating Officer recovered two gold chains and one mobile phone from the pocket of Appellant which is highly improbable. The evidence to that effect of the Pancha witnesses and that of the Investigating Officer cannot be relied upon for the purpose of the so-called recovery of two gold chains and mobile phones from the pocket of Appellant/Accused No.3 after a period of two days from the incident. It is highly improbable that an Accused will carry such articles in his pocket after two days knowing that such articles are extorted by some other person. It is not known as to how such articles landed in possession of the Accused No.3 as it is not the case of the Prosecution that gold chains and mobile phones were extorted by Accused No.3. In fact, PW1 admitted that at that time Accused No.3 was not present in the room. She handed over gold chains and a mobile phone to a person who claimed himself to be a police officer.

20. The observation of the learned Trial Court with regard to the so-called recovery and placing reliance on it is clearly unacceptable as there is no evidence to that effect. Only giving a few suggestions here and there by an Accused person to a witness will not supplement the case of the Prosecution which has to stand on its own legs. The burden is only on the Prosecution to prove beyond all reasonable doubt the charges framed against the Accused. The Accused is having the right to remain silent. Therefore, the observation of the learned Trial Court that the Accused failed to explain, is contrary to the settled proposition of law and therefore, cannot be accepted.

21. In sum and substance, the material brought on record by the Prosecution is totally unacceptable for the purpose of proving the charges against the Appellant. In the result, the appeal succeeds.

ORDER

- 1.** The Appeal stands allowed.
- 2.** The impugned Judgement in Sessions Case No.35/2014 qua the Appellant is quashed and set aside.
- 3.** Bail bonds of the Appellant shall stand discharged. However, the bail bonds shall continue till the appeal period is over.
- 4.** Proceedings closed.

BHARAT P. DESHPANDE, J.

JOSE
FRANCISCO
DSOUZA

Digitally signed by
JOSE FRANCISCO
DSOUZA
DN: cn=JOSE FRANCISCO
DSOUZA, o=JUDGE