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IN THE HIGH COURT OF BOMBAY AT GOA

**CRIMINAL MISC. APPLICATION NO.82 OF 2023
IN
CRIMINAL APPEAL NO.384 OF 2023 (F)**

State of Goa,
(Through officer-in-charge
Fatorda Police Station)

..... Applicant.

Versus

Xavier Ferreira,
S/o Camilo Ferreira,
Age 51 years, Indian National,
R/o H.No. 110, near Old survey office,
Borda, Margao, Salcete, Goa.

.... Respondents.

Mr Pravin Faldessai, Additional Public Prosecutor for the
Applicant-State.

**CORAM: M.S. SONAK &
VALMIKI SA MENEZES, JJ.**

DATED: 20th December 2023

ORAL ORDER (Per Valmiki Sa Meneses, J.):

1. This is an application for condonation of 461 days of delay in filing an appeal against an order of acquittal of an offence punishable under Section 302 IPC. Whilst hearing this application, being mindful of the parameters for a grant of leave to the State to appeal against the

Judgment of acquittal, we have considered the merits of the appeal to ascertain whether a case has been made out for a grant of leave. Consequently, we called upon the learned Additional Public Prosecutor to address us on the merits of the application for leave to appeal.

2. The appeal arises on the criminal proceedings instituted before the Sessions Court, Panaji, wherein the Accused/Respondent herein was charged for having committed an offence punishable under Section 302 IPC for having caused the death of his elder brother, Mr Bernardo Ferreira, by assaulting him on his head with a log of firewood. From the record of the entire trial, which is placed before us, it transpires that the Prosecution examined 12 witnesses in support of its case, which included two eyewitnesses; the defence of the Accused was that he himself was assaulted by the deceased and his wife (PW3-Milagrina) and the son of the deceased (PW1-Christopher), and that during the scuffle, the deceased fell and suffered a head injury. The Accused also examined his two daughters, DW1-Stevina and DW2-Blossha in support of his defence.

On considering the evidence, the Sessions Court has concluded that the Prosecution had proved that the Accused had assaulted the deceased with a log of firewood on his head, which ultimately caused his death.

3. From the record of the Sessions Court, it appears that after the assault, the injured Bernardo Ferreira was admitted to a hospital for several days before succumbing to his injuries, the main one being a blow with the wooden log to the right parietal temporal region of his head. The Sessions Court considered the evidence of the eyewitnesses. It concluded that the assault was not premeditated and was a result of a sudden fight in the heat of passion in which the Accused gave a blow with the wooden log to the head of the deceased. The Sessions Court had also concluded that there was no intention on the part of the Accused to kill the deceased Bernardo, nor was the act of assault cruel or done in any unusual manner. Accordingly, the Sessions Court acquitted the Accused/Respondent of the offence under Section 302 IPC and instead convicted him of the offence punishable under Section 304(ii) IPC and sentenced him to undergo simple imprisonment for a period of 1 year 9 months and to pay a fine of Rs.50,000/- and in default of payment of fine to undergo simple imprisonment for a further period of 6 months.

4. Shri Pravin Faldessai, learned Additional Public Prosecutor has submitted that the delay in filing the application for leave to appeal and the memo of appeal was not intentional but was only due to the procedure that the Government has to undergo for filing such an appeal.

On merits, the learned APP has taken us through the evidence of the eyewitnesses, who he contends has clearly deposed that the assault was with a dangerous weapon to the head of the deceased, with the clear intention to cause his death, and was not in the heat of the moment. He refers to the evidence of PW5, the doctor who attended to the deceased when he was first brought to the hospital and the evidence of PW6, Dr Chetan, who conducted the post-mortem on 06.06.2019. The learned Additional Public Prosecutor submits that on the medical evidence, the depositions clearly set out that the injuries found on the head of the deceased could have been caused by an assault with the use of a wooden log, which supports the ocular evidence of the witnesses PW1-Christopher and PW3-Milagrina, who have described the assault. He further submits that the view taken by the Sessions Court that the assault resulting in the death of Bernardo falls within Exception No.4 to Section 300 IPC and that the assault constituted an offence of culpable homicide not amounting to murder is perverse and contrary to the evidence on record. It is his submission that the Respondent ought to have been convicted for the offence under Section 302 IPC.

5. After perusing the depositions of PW1-Christopher and PW3-Milagrina, it becomes abundantly clear that the incident took place not with any premeditated intention but in the heat of the moment. The deposition of PW1 states that his aunt Beleza, who was the wife of the Accused, was cutting trees with a labourer on their property

when the deceased Bernardo told her not to cut the trees, and an argument ensued between them; the Accused came to the spot and during the altercation, in a fit of anger and in the heat of the moment, picked up one of the wooden logs fallen on the ground and assaulted Bernardo on the rear of his head, who fell to the ground. The Accused was then restrained from committing any further assault by PW1, and in the process, when PW1 intervened and pushed the Accused away, the Accused fell and injured his nose.

PW3-Milagrina Ferreira has deposed more or less on similar lines as PW1. What is clear from this deposition is that the assault by the Accused was not premeditated, there was no preparation for committing the offence and the weapon used was a wooden log which was fallen at the place where the assault took place.

6. The medical evidence on record supports the testimony of the eyewitnesses. PW5-Dr. Poonam deposed that she had examined the patient Bernardo when he arrived at the hospital and had a swelling on the right parietal temporal region, which an assault with a wooden log could have caused. PW6-Dr. Chetan, who conducted the post-mortem, deposed that he found a head injury which could have been caused by a blunt weapon such as a stick or a log of wood.

7. The Sessions Court has considered the above evidence in great detail and the view taken by it that from the circumstances described by the eyewitnesses, this was clearly a case that fell under Exception

4 to Section 300 IPC, being an assault which was a culpable homicide, not amounting to murder. The view taken by the Sessions Court appears to be plausible and based on the evidence on record. In fact, it would be difficult to convince us to take any other view on the matter based on the evidence recorded.

It is by now a well-settled principle of criminal law that where a view has been taken by the Trial Court acquitting the accused, based upon the evidence on record, and that view is plausible and based upon legal principles, a Court of Appeal should be extremely slow to interfere with such a decision of acquittal unless there are compelling reasons to do so or there is a total failure of justice. It is further a settled principle of law that when a judgment of acquittal confirms the innocence of an accused in relation to an offence, he is charged with, the presumption of innocence cannot be ignored by the Appellate Court hearing an appeal against a judgment of acquittal.

In the present case, the view of the Sessions Court appears to have been rightly taken, based upon the evidence, acquitting the Respondent of offences under Section 302 IPC and instead convicting him for an offence under Section 304(ii) IPC. We find no reason to differ in this view.

8. For reasons that we otherwise find no merit in this appeal after considering the evidence on record, we are of the view that condoning the delay in filing the appeal would not serve any purpose. For these

reasons, we dismiss the application with no order as to costs. In that view of the matter, the application for leave to appeal also stands disposed of.

VALMIKI SA MENEZES, J.

M.S. SONAK, J.

JOSE
FRANCISCO
DSOUZA

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