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IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPLICATION (MAIN) NO. 2 OF 2023

State (Through PI, Agacaim Police
Station, Agacaim, Goa).

... APPLICANT

Versus

1. Robert Gonsalves, s/o Damien Gonsalves, 47 years, Male, Indian, R/o Flat No. G-7, Ramakant Appt., Panaji-Goa.
2. Abhinandan @ Raj Patel, S/o Harischandra Patel, 28 years, Male, Indian, c/o Maria D'Souza, Naikawado, Calangute, Native of Gopalganj, Bihar.
3. Anil Bhoe, S/o Maruti Bhoe, 24 years, Male, Indian, R/o Ramnagar, 3rd Cross, Khangrali, Belgaum, Karnataka.
4. Ravi Patil, S/o Prabhu Patil, 26 years, Male, Indian, r/o Ramnagar, 2nd Cross, Khangrali, Belgaum, Karnataka.
5. Arun Patil, S/o Budaji Patil, 19 years, Male, Indian, r/o Vishnu Galli, Khangrali, Belgaum, Karnataka.
6. Shivaji Patil, s/o Raju Patil, 23 years, Male, Indian, R/o Jyotinagar, Khangrali, Belgaum, Karnataka.

7. Mr. Aniket Yallurkar, son of Deepak Yallurkar, Aged 29 years, Male, Indian National, R/o Jaffer, Gauliwada, Betim, Porvorim, Bardez, Goa. Native from Nahnath Galli, Khanggrali, Belgaum, Karnataka. Presently lodged in Judicial Custody Central Jail, Colvale, Bardez, Goa.

... RESPONDENTS

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

CORAM: M. S. SONAK & BHARAT P. DESHPANDE, JJ.

RESERVED ON: 13th JUNE, 2023

PRONOUNCED ON: 28th JUNE 2023

ORDER: (per Bharat P. Deshpande, J.)

1. This is an Application filed on behalf of the Applicant-State for a grant of leave to file an Appeal, under Section 278 of the Code of Criminal Procedure, 1973 (for short, the Cr.P.C.), thereby challenging the judgment and order dated 16.08.2022 of the learned Sessions Court in Sessions Case No. 42 of 2013, thereby acquitting Accused No. 1, Robert Gonsalves and Accused No. 6, Shivaji Patil, for the offences punishable under Sections 120B, 302, 397 and 201 of the Indian Penal Code, 1860 (for short, the IPC).

2. By the said judgment, the learned Sessions Court convicted Accused Nos. 2, 3, 4, 5 and 7 for the offences punishable under Sections 120B, 302, 397 and 201 of the IPC.

3. The convicted Accused persons preferred Appeals challenging the said judgment and conviction vide Criminal Appeal Nos. 689 of 2022 (F), 702 of 2022 (F), 1 of 2023 and 2 of 2023.

4. Since the present Application was filed subsequent to the filing of the Criminal Appeals by the convicted Accused persons and paper books were ready, we decided to take up the said four Criminal Appeals filed by all five Accused persons (convicted) along with the present Application for leave to Appeal filed by the State challenging the acquittal of two Accused persons i.e. Accused Nos. 1 and 6.

5. We have extensively heard the learned Counsel appearing for the convicted Accused persons in the said Appeals, the learned Public Prosecutor appearing for the State as well as the learned Additional Public Prosecutor Mr. Faldessai appearing in the present Application for leave to Appeal since the record and proceedings as well as the paper books in all the four Appeals were ready and ripped for disposal.

6. Mr. Pravin Faldessai, learned Additional Public Prosecutor appearing for the State vehemently stated that inspite of sufficient evidence on record against Accused Nos. 1 and 6, the learned Sessions Court disbelieved it thereby acquitting them. According

to him, the confession of Accused No. 7 coupled with the evidence of Prosecution witnesses clearly show that Accused No. 1, Robert Gonsalves was the mastermind of the entire conspiracy which he hatched along with Accused No. 2, Abhinandan @ Raj Patel and thereafter, said Abhinandan @ Raj Patel contacted Accused No. 7, Aniket Yallurkar in order to arrange hired killers. Accused No. 7, Aniket Yallurkar then arranged Accused Nos. 3 to 6 to give effect to the conspiracy and eliminate deceased Hassan, for an amount of ₹7 lakhs. The part amount was even paid to Accused No. 3.

7. Thereafter, Accused No. 2 in furtherance of such conspiracy, arranged a room in a Hotel at Miramar on 18.03.2023 for two days and then brought Accused Nos. 3 to 6 in Goa, who stayed in the said Hotel. Thereafter, Accused Nos. 3, 4 and 5 contacted deceased Hassan Khan under the pretext of purchasing his old Honda City car. Accused Nos. 3, 4 and 5 then went to the garage of the deceased on 21.03.2013 and after inspecting the documents and negotiating the price, took the deceased along with them in the same car for the purpose of a test drive. Since the deceased did not return, his family members started searching, however, in the meantime, one Rupesh called Agassaim Police Station and disclosed that his friend is found injured in a Honda City car near the Bambolim Church. The said injured was then shifted to G.M.C. However, he was declared brought dead on examination by the Doctor in the Casualty. The said injured/deceased was then identified as Hassan Khan husband of PW-2, Tabasum and brother of PW-1, Hyder. The Police in action registered a complaint against unknown persons, however, PW-1 in his supplementary statement

suspected involvement of Accused Nos. 1 and 2 on the ground that the deceased had removed Accused Nos. 1 and 2 from the construction site due to disputes among them.

8. Mr. Faldessai, learned Additional Public Prosecutor would then submit that though there is no eye witness, the circumstantial evidence collected during the investigation is sufficient to prove the aspect of conspiracy hatched by Accused Nos. 1 and 2 and that the learned Trial Court has accepted that there was enmity between Accused Nos. 1 and 2 and the deceased. On the same analogy, the learned Trial Court ought to have accepted the contentions of the Prosecution regarding enmity between Accused No. 1 and the deceased.

9. Mr. Faldessai, learned Additional Public Prosecutor would then submit that apart from the confession given by Accused No. 7, there is strong material brought on record by PW-1, PW-2 and PW-4 which proves the last seen theory wherein Accused Nos. 3, 4 and 5 were lastly seen with the deceased and on that ground, the learned Trial Court convicted the said Accused persons, though challenged in Appeals.

10. Mr. Faldessai would then submit that the CDR and SDR record of mobile phones, tower location and the other circumstances such as admission of Accused Nos. 3, 4 and 5 given before the Doctor, recovery of knives at the instance of Accused No. 3, recovery of the gold chain at the instance of Accused No. 3, which belongs to the deceased, prove the link forming a strong chain of the circumstances and therefore, he would submit that

this is a strong case to grant leave to Appeal against Accused Nos. 1 and 6.

11. Since we have heard the Appeals challenging the conviction, filed by Accused Nos. 2, 3, 4, 5 and 7 and also the present Application, we found that no notice to the acquitted Accused Nos. 1 and 6 is required in the present matter since we are of the firm opinion that the judgment, conviction and sentence of the learned Trial Court qua Accused Nos. 2, 3, 4, 5 and 7 cannot be sustained. We have given detailed reasons for disbelieving the so called confession of Accused No. 7, identification of Accused Nos. 3, 4 and 5, the recovery of the gold chain, the recovery of knives etc. and therefore, it is not necessary for us to disclose such aspects in great detail.

12. The parameters with regard to the grant of leave to Appeal are well settled. In a three-Judge Bench decision in the case of **Prem Singh Vs. State of Haryana, (2013) 14 SCC 88**, the Hon'ble Apex Court discussed the provisions of Section 378 of the Code of Criminal Procedure in the light of its earlier decision and more specifically, the decision in the case of **Chandrappa Vs. State of Karnataka, (2007) 4 SCC 415**, wherein the Hon'ble Apex Court in paragraph 42 observed thus:

42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded.

(2) *The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.*

(3) *Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.*

(4) *An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.*

(5) *If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."*

13. It, therefore, emerges that if a conclusion with regard to the innocence of the Accused is reasonably possible on the basis of the material on record, the High Court ought not to have disturbed the findings recorded by the Trial Court, even if, on re-appreciation of the evidence, it was included to take a different view. So long as the view taken by the Trial Court was a possible

view the exercise of the Appellate Court under Section 378 of Cr.P.C. would remain circumscribed by the well settled parameters.

14. In the case of **Muralidhar @ Gidda & Another Vs. State of Karnataka, (2014) 5 SCC 730**, the Hon'ble Apex Court in paragraph 12 and others after consideration of the earlier decisions formulated four essential aspects which the Appellate Court must bear in mind and which are as under:-

(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 power 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 re-appreciation 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.

15. Keeping in mind the above settled proposition, laid down by the Hon'ble Apex Court in considering leave, first of all, we have to record that while dealing with evidence of the Prosecution as far as convicted Accused persons are concerned, it was observed that so called confessional statement of Accused No. 7 was not at all voluntarily given. Secondly, it was exculpatory in nature. Thirdly, the learned Magistrate while accepting and recording the statement of Accused No. 7 failed to record that the contents of such statement were read over to him in Marathi language.

16. Though on the basis of such confessional statements, the learned Sessions Judge convicted Accused Nos. 2, 3, 4, 5 and 7, we have already observed in such Appeals challenging the conviction that the so called confessional statement of Accused No. 7 was not voluntarily given. On reading the confessional statement and the questions put to Accused No. 7, it clearly goes to show that the Police Officer promised Accused No. 7 that if he gives a statement, he will be released and at the most, he would be made a witness. Another promise was given to him was that in case he gives such a statement, he would be awarded lesser punishment. This itself proves that the statement of Accused No. 7 given before the Magistrate was on the basis of some promise and therefore, it cannot be considered as a confessional statement.

17. It was observed that though the learned Trial Court accepted such statements on the ground that the Magistrate cautioned Accused No. 7 that if he gives a statement, it will be used against him and inspite of such caution, he stated voluntarily before the Magistrate. While disclosing such an aspect it is clearly observed that the impression carried out by Accused No. 7 continued even on the second occasion when he was produced before the learned Magistrate and seen to be reflected in his answers given to specific questions before the statement of confession was recorded. Such impression on Accused No. 7 was never removed by the Magistrate as provided under Section 28 of the Evidence Act so as to consider such confession relevant in admission.

18. The second aspect which we observed is the confusion caused about the dates on which the memorandum of test identification parade was prepared and signed by the learned Magistrate. In this respect, there is a lot of confusion. The learned Magistrate claimed that she conducted the test identification parade on 25.04.2013, the memorandum itself shows the date on which it was prepared and signed as 29.05.2013. The forwarding letter by which such memorandum was handed over to the Investigating Officer shows another date i.e. 22.05.2013. The cross examination of the learned Magistrate shows the correct date of the memorandum of the test identification parade as 22.05.2013. It, therefore, shows that the memorandum was not prepared and signed simultaneously while conducting the test identification parade. It, therefore, creates serious doubt about the actual date of conduct of the test

identification parade. No doubt, the learned Magistrate claimed that she conducted the test identification parade on 25.04.2013, which itself is delayed by one month from the date of arrest of Accused Nos. 3, 4, 5 and 6. Therefore, there is serious doubt about the identification of Accused Nos. 3 to 6 by the identifying witnesses during the investigation and that too before the Magistrate.

19. Apart from the above confusion about the dates, there are other serious flaws while conducting the test identification parade and such flaws also go to the root of the identification exercise creating serious doubt. Four Accused persons were called on a single day whereas six witnesses were asked to identify them in different identification parades. However, the learned Magistrate failed to ask the Accused persons as to whether they wanted to change their clothes or their position in connection with the subsequent identification parade and by different identifying witnesses. The learned Magistrate not only disclosed the names of the Accused to the identifying witnesses before such witnesses were asked to identify, but further failed to ask such witnesses about the role played by the suspects in the commission of the offence.

20. The said identification parade is directly connected with the last seen theory and therefore, when there is serious doubt about the procedure adopted by the Magistrate while conducting the test identification parade. Disclosing the names of the Accused persons to the identifying witnesses, even of Accused Nos. 3 to 5

to PW-1, PW-2 and PW-4 in the Court so as to prove the last seen theory, is highly doubtful.

21. We have seen the deposition of PW-1, PW-2 and PW-4. However, each witness gave a different version and the contention of these witnesses of seeing the Accused persons lastly with the deceased seems to be doubtful.

22. The learned Additional Public Prosecutor strongly contended that the CDR and SDR records and the decoding of the tower location and the chart prepared by PW-31 prove the path of the Accused persons from Miramar to Taleigao where the garage of the deceased exists and then towards Bambolim where the body of the deceased was found.

23. We have considered in great detail such evidence while deciding the Appeals filed by the convicted Accused persons. We have clearly observed that the aspect of decoding and the chart prepared by PW-31 cannot be accepted as evidence for the reason that he took the CDR and SDR records on a pen drive from the office of the S.P.(North). The Officer incharge of the office of the S.P.(North) failed to file a certificate under Section 65B of the Evidence Act so as to prove secondary evidence qua electronic documents. Admittedly, the data was transferred from the computer available in the office of S.P.(North) on a pen drive. Thus, at that stage of transfer of such data and storing it in a pen drive which is an electronic document, required a certificate under Section 65B of the Evidence Act by the Officer who was incharge of such a computer.

24. PW-31 claimed that he took such data in the pen drive and then with the help of the chart provided by the service provider about the location of the tower on a monthly basis and by using software available in the office of ATS, Panaji, he decoded and traced the location of the Accused persons and the deceased. First of all, such evidence is not supported by the material provided by the service provider to the office of the S.P.(North) on monthly basis showing the tower location and its code. Secondly, the data which was carried by PW-31 in the pen drive was susceptible to tampering.

25. As far as consideration of other material is concerned, from the recovery of the gold chain of the deceased, it is clear that the Prosecution has miserably failed to prove that the mother of Accused No. 3 failed to support such contention though it is claimed that the gold chain was recovered from her house.

26. The so called recovery of three knives from one of the Accused is also found doubtful while deciding the Appeals against conviction. In such circumstances, when the case of the Prosecution is based only on circumstantial evidence, the duty of the Prosecution is to prove the chain of circumstances beyond all reasonable doubt, thereby pointing fingers only against the Accused persons. The contention of the learned Additional Public Prosecutor for the State is that there is strong material to show the conspiracy hatched between Accused Nos. 1 and 2, though such material show that there was some dispute, it cannot be stretched too far to term it as enmity. There is material to show that Accused No. 1 was looking after the construction project which

in fact was in the name of the deceased. There is also material to show that Accused No. 1 was removed from the project by the deceased. Accused No. 2, Abhinandan was working for the deceased and was looking after the said project. However, the contention of the Prosecution is that there was enmity between Accused Nos. 1 and 2 and the deceased, cannot be accepted for the simple reason that a dispute without any further acts on the part of Accused Nos. 1 and 2, cannot be stretched to the level of enmity and that too, to kill the deceased. No material has been brought on record to show that after the removal of Accused Nos. 1 and 2 from the said project, any threats or any overt acts were committed by Accused Nos. 1 and 2 against the deceased.

27. Once the confession of Accused No. 7 is considered inadmissible, the theory put forth by the Prosecution about the conspiracy hatched by Accused Nos. 1 and 2 falls flat. Though there is suspicion, however, it is well settled that such suspicion, however strong it may be, cannot be considered for the purpose of conviction. The benefit must go to the Accused person.

28. Keeping in mind the parameters of Appeal against acquittal and even the grant of leave and since, we have already concluded in the Appeals filed by the convicted Accused persons that the judgment cannot be sustained and the said convicted Accused persons are entitled to acquittal on the ground of benefit of doubt, no case is made out for grant of leave to Appeal.

29. The Criminal Application (Main) No. 2 of 2023 stands rejected.

30. The Application stands disposed of.

BHARAT P. DESHPANDE, J.

M. S. SONAK, J.

VAIGANKAR
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