

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL MISC. APPLICATION NO.54 OF 2023
IN
CRIMINAL APPLICATION (MAIN) NO.396 OF 2023 (F)

STATE OF GOA, through Officer, P.I.
Colva Police Station, Goa.

... APPLICANT

Versus

RAHUL SHARMA, son of Ramprakash
Sharma, major in age, Indian national,
r/o Madhya Pradesh.

... RESPONDENT

Mr Pravin Faldessai, Additional Public Prosecutor *for the State*.

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

DATE: 13th FEBRUARY 2024

ORDER: (Per M. S. Sonak, J.)

1. This is an application seeking condonation of delay of 461 days in instituting an appeal against acquittal recorded by the learned Sessions Judge in Sessions Case (302) No.12/2005, thereby acquitting the respondent of the offence punishable under Section 302 of the Indian Penal Code.

2. Even though the cause shown was not entirely satisfactory, we heard Mr Pravin Faldessai, learned Additional Public Prosecutor, on the merits of the application bearing Criminal Application (Main) No.396 of 2023 (F), seeking leave to appeal against the respondent's acquittal. For this, Mr Faldessai placed notes of evidence containing depositions of not less than 26 witnesses before us.

3. Upon due consideration of the evidence of witnesses which Mr Faldessai submitted were most relevant and further, upon considering the impugned Judgment and Order dated 18.02.2021, by which the respondent was acquitted, we are satisfied that no case is made out for grant of leave, even if we were to condone the delay in seeking such leave.

4. Mr Faldessai urged the following grounds in support of his application seeking leave to appeal against acquittal:-

- (i) That the learned Sessions Judge erred in ignoring the dying declaration of the deceased Pramod Soni @ Lambu;
- (ii) That the learned Sessions court had failed to appreciate that the weapon of the crime was recovered at the instance of the accused himself;
- (iii) That the learned Sessions judge had failed to appreciate the explanation given by the accused to the doctor as to how his hand was injured as a result of using the knife on the deceased;
- (iv) That the learned Sessions court erred in giving utmost importance to the detection of blood not belonging to either accused or deceased, that it was type 'O';

(v) That the learned Sessions judge had failed to appreciate that the motive, conduct of the accused, the dying declaration of the victim, the extra-judicial confessions of the accused and recovery of the weapon of murder at the instance of the accused formed a complete chain of circumstances sufficient to convict the accused;

(vi) That the learned Sessions Judge failed to appreciate that the accused offered no explanation in his Section 313 statement but in his deposition raised a patently false plea that he was not Rahul Sharma and further, he had never been in Goa before his arrest in 2019.

5. Before we proceed to consider the above contentions, it is important to consider the scope of appeals against acquittals under Section 378 of the Code of Criminal Procedure. The scope is explained by the Hon'ble Supreme Court in several decided cases.

6. In *Hakeem Khan And Others v/s. State of Madhya Pradesh – (2017) 5 SCC 719*, the Hon'ble Supreme Court has held that if the view taken by the acquitting court is a possible view, then, leave should not be granted to appeal against acquittal. The Hon'ble Supreme Court approved its earlier decision in *Murugesan v/s. State – (2012) 10 SCC 383*, where, at paragraphs 33 and 34, it was observed thus:

“33. The expressions “erroneous”, “wrong” and “possible” are defined in Oxford English Dictionary in the following terms:

‘erroneous. - wrong; incorrect.

wrong. - (1) not correct or true, mistaken.

(2) unjust, dishonest, or immoral.

Possible.- (1) capable of existing, happening, or being achieved.

(2) that may exist or happen, but that is not certain or probable.’

34. It will be necessary for us to emphasise that a possible view denotes an opinion which can exist or be formed irrespective of the correctness or otherwise of such an opinion. A view taken by a court lower in the hierarchical structure may be termed as erroneous or wrong by a superior court upon a mere disagreement. But such a conclusion of the higher court would not take the view rendered by the subordinate court outside the arena of a possible view. The correctness or otherwise of any conclusion reached by a court has to be tested on the basis of what the superior judicial authority perceives to be the correct conclusion. A possible view, on the other hand, denotes a conclusion which can reasonably be arrived at regardless of the fact whether it is agreed upon or not by the higher court. The fundamental distinction between the two situations has to be kept in mind. So long as the view taken by the trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, the view taken by the trial court cannot be interdicted and that of the High Court supplanted over and above the view of the trial court.”

7. Very recently, the Hon’ble Supreme Court in the case of ***Mallappa and Others v/s. State of Karnataka – 2024 SCC OnLine SC 130***, reviewed the law and precedents on the subject and at paragraph 37 observed thus:-

“37. Our criminal jurisprudence is essentially based on the promise that no innocent shall be condemned as guilty. All the safeguards and the jurisprudential values of criminal law, are intended to prevent any

failure of justice. The principles which come into play while deciding an appeal from acquittal could be summarized as:

(i) Appreciation of evidence is the core element of a criminal trial and such appreciation must be comprehensive evidence, oral or documentary; inclusive of all

(ii) Partial or selective appreciation of evidence may result in a miscarriage of justice and is in itself a ground of challenge;

(iii) If the Court, after appreciation of evidence, finds that two views are possible, the one in favour of the accused shall ordinarily be followed;

(iv) If the view of the Trial Court is a legally plausible view, mere possibility of a contrary view shall not justify the reversal of acquittal;

(v) If the appellate Court is inclined to reverse the acquittal in appeal on a re-appreciation of evidence, it must specifically address all the reasons given by the Trial Court for acquittal and must cover all the facts;

(vi) In a case of reversal from acquittal to conviction, the appellate Court must demonstrate an illegality, perversity or error of law or fact in the decision of the Trial Court.

8. Accordingly, Mr Faldessai's contentions will have to be evaluated keeping in mind the above principles laid down by the Hon'ble Supreme Court in the matters of appeals against acquittals.

9. The so-called dying declaration of Pramod Soni was very correctly not relied upon by the learned Sessions Judge. From the evidence of S. B. Faria (PW16), the Special Magistrate before whom this statement was made, it is clear that neither were the usual safeguards complied with nor were the over-writings or the crucial insertion therein either initialled or explained. The overwriting, or rather the insertions, is most crucial because that is the part where some reference is made to the respondent-accused.

10. PW16 claims to have put some introductory questions to Pramod, but the same are not recorded. PW16 claims to have inquired with the doctor whether Pramod was fit to give a statement. But even this is not recorded anywhere. PW16 claims to have met the doctor treating Pramod but gives no details despite suggestions that PW16 met no doctor or that no doctor was present. PW16 admits that he did not ask Pramod whether he was fit and conscious to give a statement as, according to the witness, he was not recording a dying declaration.

11. The evidence of PW16, when read with the actual statement produced on record, does not inspire any confidence at all. In the statement, Pramod states that he was sleeping on the ground up to about 9.30 a.m. on 13.12.2004. He stated that one waiter by name (the word Rahul is inserted) who was working in the said restaurant came suddenly and stabbed him on his stomach, and ran away from the place. He stated that one more person, who is a friend of his and who was sleeping in the same room, got up, and Pramod told him that Rahul had assaulted him with a knife.

12. The learned Sessions Judge has considered this statement but found it difficult to accept its contents. The learned Sessions Judge has reasoned

that, admittedly, Pramod claimed that he was sleeping. The statement itself bears no date or time. PW16, except for saying that Pramod was admitted to the trauma ward of GMC at 3.50 p.m., as per his say, does not state the date and time when such a statement was actually recorded. The learned Sessions Judge considered all these circumstances for not convicting the respondent based on the so-called dying declaration.

13. Even the testimony of the friend (PW6) sleeping by Pramod's side is unclear. The learned Sessions Judge, after analysing the evidence of PW6 and the statement of the Special Magistrate (PW16), reasoned that since Pramod was sleeping, a doubt arose whether he had actually seen his assailant. Regarding the evidence of PW6, i.e. the friend who was allegedly sleeping next to the deceased at the time when the respondent allegedly stabbed him, we must note that when this witness was first examined, he was not cross-examined because the respondent was allegedly absconding. After the respondent was traced and apprehended, PW6 was not available, though he was re-called for cross-examination. Still, the learned Sessions Judge did consider the evidence of PW6 and, on its evaluation, found that the same was by no means sufficient to convict the respondent.

14. Regarding Mr Faldessai's second contention, the evidence about the recovery of the knife in pursuance to an alleged statement by the respondent is by no means conclusive. In any case, mere recovery may not be sufficient to convict the respondent. In this case, PW1 had deposed before the Court that the knife belonged to him since he used to buy cutlery for the restaurant. PW1 also deposed that he was informed by his cook Negi on 14.12.2004 that one knife was missing. PW6, i.e. the co-worker and Guru Pujari (the cook), were best suited to explain whether the knife was indeed missing on 13.12.2004, i.e. the date of the incident, or on

any other date and time. But PW6 spoke nothing about the missing knife, and the prosecution did not even examine Guru Pujari, the most crucial witness insofar as this circumstance was concerned. Based on all this, we cannot say that the learned Sessions Judge's view on the aspect of recovery was not even a possible or plausible view.

15. Regarding Mr Faldessai's third contention, we cannot ignore the evidence on record showing that the respondent was not taken immediately after his arrest for medical examination. Therefore, the so-called confession by the respondent, while he was in police custody to the doctor about the bruise on his right hand being caused by the handle of the knife used by him to stab Pramod, was rightly discarded by the learned Sessions Judge. This statement was allegedly made in the presence of the police and in the absence of any Magistrate. This statement was made after the recovery of the knife and not before. The respondent was not taken for medical examination immediately after his arrest but only after the knife was recovered. Considering all these circumstances, we cannot fault the reasoning of the learned Sessions Judge on this issue.

16. Regarding Mr Faldessai's fourth contention, we think that the learned Sessions Judge was justified in taking cognisance of the evidence of the discovery of some third party's blood on Pramod's person, which was never accounted for or explained by the Prosecution. This important circumstance emerged from the evidence of Dr Madhu Ghodkirekar (PW7) and Dr Clare D'Mello (PW12). These witnesses deposed that Pramod's blood group was found to be B Rh -ve. However, the CFSL report revealed that the human blood detected on the paper packet marked 'H' or Exh H was 'O'. This Exh. H contained blood-stained gauze used to control the flow of blood from the deceased's stomach. Based upon this,

the learned Sessions Judge correctly raised doubts as to whether some other person may have been involved in the assault on Pramod.

17. The learned Sessions Judge quite correctly laid emphasis on the detection of blood which belonged neither to the deceased nor to the accused on the body of the deceased. As noted earlier, it was for the prosecution to explain this circumstance. Instead, the prosecution failed to account for the clothes of the deceased and analysis reports, if any, concerning such clothes. Accordingly, we see no error in the learned Sessions Judge drawing adverse inference against the prosecution for failure to explain such blood on the person of the deceased or for the failure to account for the clothes the deceased was wearing when the respondent allegedly stabbed him.

18. There are no explanations for all these discrepancies and lacunae in the evidence. The recovery of the blood of some unknown person from the body of the deceased or on the deceased's person is a circumstance that the prosecution should have explained. Coupled with this, the prosecution failed to attach or produce in evidence the clothes of the deceased. The learned Sessions Judge reasoned that such clothes may either not have been sent for chemical analysis or the clothes and the results of such analysis were suppressed from the Court fearing that the analysis would reveal the involvement of some other person.

19. Regarding Mr Faldessai's fifth contention, the evidence about the motive or conduct is not quite clinching in the present case. The evidence of PW9, who was alleged to be the cause of the rift between the accused and the deceased, also does not inspire much confidence. Her conduct of not immediately reporting the matter to the police after the respondent

allegedly told her that he had finished the deceased was also correctly commented upon by the learned Sessions Judge. The learned Sessions Judge quite correctly concluded that there were no eyewitnesses in this matter. The circumstances constituting the chain were not conclusively proved. Even the facts established were not consistent with the hypothesis of the guilt of the respondent. The chain of evidence was itself not complete and did not exclude every possible hypothesis except the one to be proved. Accordingly, the evidence on record does not pass the *Sharad Sarda* muster (*Sharad Birdhichand Sarda v/s. State of Maharashtra - (1984) 4 SCC 116*).

20. Regarding Mr Faldessai's sixth contention, reference can be made to para 159 of *Sharad Birdhichand Sarda* (supra) where it is held that while taking into account the absence of explanation or a false explanation as an additional link, the Court must be satisfied that the various links in the chain of events lead by the prosecution have been satisfactorily proved; the circumstances pointed out to the guilt of the accused with reasonable definiteness and the circumstances are in proximity to the time and situation. If these conditions are fulfilled, only then a Court can use a false explanation or a false defence as an additional link to lend assurance to the Court and not otherwise. Since none of these conditions are fulfilled, there is no question of taking into account the alleged absence of explanation or false defence. In any case, such matters cannot form the basis of a conviction. Such matters can, at the highest, be used as an additional link to lend assurance to the Court. Accordingly, even this sixth contention will have to be rejected.

21. Apart from the contentions raised, we have evaluated the evidence on record holistically, and we are satisfied that the Prosecution, in this case, has

not proved its case beyond reasonable doubt. There are too many lacunae and discrepancies in the Prosecution case for which no reasonable explanation was offered. The Sessions Court's view was certainly a possible view, given the position of the evidence in this matter.

22. Therefore, considering all these factors and the law on the scope of appeals against acquittals, we are satisfied that no case is made out for the grant of any leave.

23. Accordingly, both the Criminal Misc. Application No.54 of 2023 and the Criminal Application (Main) No.396 of 2023 (F) are dismissed.

24. There shall be no order for costs.

VALMIKI SA MENEZES, J.

M. S. SONAK, J.

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