

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 6 of 2014

SHRI MADHU NAIR,
son of Shri. Betu Nair,
resident of Shirent,
Chimbel, Tiswadi, Goa,
(currently in custody and
lodged at Central Prison,
Aguada, Bardez, Goa)

.. Appellant

V/s

THE STATE OF GOA,
Through Police Inspector,
Old Goa Police Station,
Old Goa, Tiswadi, Goa.

.. Respondent

Mr. Ryan Menezes, Advocate under Legal Aid Scheme for the appellant.

Mr. S. R. Rivankar, Public Prosecutor for the respondent.

CORAM :- C. V. BHADANG, J.

Date :- 14th July, 2015.

ORAL JUDGMENT :

By this appeal, the appellant is challenging his conviction under Section 2(y)(i) read with Section 8(2) of the Goa Children's Act, 2003 (the Act, for short)'. The appellant has been sentenced to undergo Rigorous Imprisonment for 10 years and to pay a fine of Rs.2 Lakhs and in default, to undergo Simple Imprisonment for six months.

2. The prosecution case may be briefly stated thus:

That PW1, who is the mother of the victim (PW2), who was then a girl, aged 6 years, is a neighbour of the appellant. The complainant PW1 is serving as a Sweeper at G.M.C., Bambolim. On 23/04/2009, after the complainant returned home from her duty, the victim PW2 had gone out to play with the neighbouring children. At about 22.00 hours, the complainant called her daughter for serving her food. At that time, the victim was complaining that she is having fever. PW2 also allegedly told her mother PW1 that she has pain in her private part. PW1 on checking found that the private part of the victim was reddish. PW1 asked the victim as to what had happened when she told that one Mr. Madhu (appellant) had put his finger in her vagina. She also informed that the appellant, who was sitting on the steps of a store, took the victim near him, made her sit on her lap and abused her. As it was already late in the night and for want of transport facility, PW1 could not immediately report the matter to the police. On the following morning, PW1 lodged a complaint (Exhibit 9) with Old Goa Police Station, on the basis of which an offence under the relevant sections of the Act was registered against the appellant. During the course of investigation, the

Investigating Officer, PW5, Gurudas Gawde recorded a spot panchanama. The statement of the victim was also recorded. She was sent for medical examination, where she was examined by PW3 Dr. Rodrigues, who opined on physical and genital examination of the victim that there was evidence of penetration and injury. On completion of investigation, a chargesheet came to be filed against the appellant before the Children's Court at Panaji.

3. The Children's Court framed charge (Exhibit 8) against the appellant, for the offence punishable under Section 2(y)(i) read with Section 8 of the Act, to which the appellant pleaded not guilty and claimed to be tried. The defence as elicited from the cross-examination, is that PW1 had demanded money, which was not given by the appellant and annoyed by that, PW1 has falsely implicated him.

4. At the trial, the prosecution examined in all 5 witnesses, namely mother of the victim (PW1), the victim (PW2), Dr. Rodrigues (PW3), Ajay Mandrekar, Panch on spot panchanama (PW4) and Gurudas Gawde, Investigating Officer (PW5). The prosecution also produced the contemporary record of the investigation, including the complaint (Exhibit 9) and the medical

report (Exhibit 13).

5. The President, Children's Court came to the conclusion that the prosecution has established that the appellant had committed the offence of 'grave sexual assault', on the victim child and thus, proceeded to convict and sentence the appellant accordingly.

6. I have heard Shri Menezes, the learned Counsel for the appellant and Shri Rivankar, the learned Public Prosecutor for the State. With the assistance of the learned Counsel, I have perused the entire evidence and the impugned judgment.

7. It is submitted on behalf of the appellant that the medical opinion in this case is not sufficient to establish penetration, inasmuch as PW3 has admitted about the vagina admitting barely tip of middle finger. It is submitted that the offence of "grave sexual assault", contemplated under Section 2(y) (i) of the Act consciously employs the words namely, 'deliberately', causing injury, which would require intention of the appellant to cause such injury. In other words, it is submitted that unless and until the prosecution is able to establish an intention on the part of the appellant to cause such an injury, no

offence under Section 2(y)(i) of the Act can be said to be made out. The learned Counsel was at pains to point out that at the highest the offence would fall under Section 2(y)(ii) of the Act and not under Section 2(y)(i) of the Act. He submitted that PW2 has also admitted in the cross-examination that the appellant had touched her body and thereafter, the appellant went. He submitted that the act of the appellant would not constitute anything more than what is envisaged under Section 2(y)(ii) of the Act. The learned Counsel further submitted that there are discrepancies in the evidence of PW1 and PW2 inasmuch as PW1 has stated that the victim had narrated that the appellant had made her to sit on the lap while PW2 has stated that the appellant asked her to remove her under garments. The learned Counsel would submit that merely because medical opinion about penetration is there, it would not be sufficient to hold that an offence under Section 2(y)(i) of the Act is made out. It is also submitted that the evidence of PW2 does not show that the appellant had removed the clothing and as such, the offence under Section 2(y)(i) of the Act could not be said to be made out. He, therefore, submitted that the appellant be acquitted. Alternatively, it is submitted that the offence needs to be read down to one under Section 2(y)(ii) of the Act, in which case, the appellant has served more than the maximum punishment prescribed and would be entitled to be set

at liberty forthwith.

8. On the contrary, it is submitted by Shri Rivankar, the learned Public Prosecutor that the evidence of PW1 and PW2 is cogent and reliable on material aspects. It is submitted that the complaint is lodged promptly on the following morning and the victim was examined on the same day of lodging of the complaint, in which, there is a clear opinion by the Medical Officer of pain and injury. It would be sufficient to bring the act within the ambit of Section 2(y)(i) of the Act. It is submitted that variance, which has been pointed out, is minor and would not strike at the root of the matter and the learned President of the Children's Court has rightly refused to act on the same. It is submitted that the evidence of PW1 would be by way of corroboration to the evidence of PW2.

9. On hearing the learned Counsel for the parties and on perusal of the impugned judgment and the evidence, I do not find that any interference is call for in the impugned judgment.

10. PW1 has stated that she is staying in one rented room, belonging to Surya Kankonkar, where she is staying along with her minor daughter PW2 and one other daughter. She has stated

that on 23/04/2009, when she came from her duty at G.M.C. at around 6.30 p.m., PW2 had gone for playing with neighbouring children. After cooking the food, at about 10 p.m., she brought PW2 back when she found that she had fever. When she asked about this to her daughter, PW2 told that she is suffering pain in the lower part. When this witness verified/ checked the private part of the victim, she noticed some reddishness. She has then stated about the victim narrating her about the incident, namely of the appellant inserting a finer in the private part, on the steps of liquor store, which is situated opposite to the room, where she was staying. She has then stated that as there was no transport facility during night, the following morning, she went to G.M.C. with her daughter at the O.P.D. and there, she was instructed to go and file the complaint. Thereafter, she went to Old Goa Police Station, where she filed the complaint (Exhibit 9). She has given the birth date of her daughter as 24/06/2003. The birth certificate is at (Exhibit 10). This witness was cross-examined and there is absolutely nothing, which has come in the cross-examination so as to discredit the evidence of this witness. A suggestion was given to this witness that false complaint is lodged against the appellant, as PW1 was in need of money, which the appellant had failed to give her and, therefore, this witness was against the appellant. The suggestion was refuted. Except this, there is nothing in the

cross-examination, so as to discard the evidence. It may be significant to note at this stage that although the cross-examination would indicate that such a defence of PW1 being in need of money, which the appellant failed to give her, is set up, this has not been so stated by the appellant, in his statement under Section 313 of the Cr.P.C. except that he has been falsely implicated.

11. PW2, who was then aged 6 years, was put some formal questions by the President of the Children's Court and it was found that she was able to understand the questions and give rational answers and was thus, competent to depose. Thereafter, her evidence was recorded, without administering oath. PW2 has stated about the incident. She has stated that while she was sitting on the steps by the side of her house, the appellant came near her. She was knowing the appellant as he was residing by the side of their house. The appellant asked her to remove nicker, when she refused. Thereafter, she has stated about the actual incident. She has also stated about narrating the incident to her mother.

In the cross-examination, PW2 has stated that the appellant had come near her. However, there was no talk. She then stated that the appellant had touched her body and

thereafter, he went. Except this, there is nothing significant, which has come in the cross-examination. It is on the basis of this part of the examination that it is tried to be urged that there was a mere touch, which at the highest would fall under Section 2(y)(ii) of the Act. Before advertng to said submissions, it would be necessary to look into the evidence of PW3, Dr. Rodrigues. PW3 had examined the victim on 24/04/2009 and had found the following inquiries on her person :-

"There was a bruise reddish present at 3 to 9 o'clock position of hymenal opening, tender to touch. Vaginal opening barely admitted tip of middle finger. There were no fresh or old tears to hymen. Vaginal contents and vaginal wall were normal."

PW3 opined as under :

"On physical and genital examination of the victim, I opined that there was evidence of penetration. I identify my signature at Point A on the said report as well as my endorsement on the request letter from PI Old Goa Police. The said letter is admitted in evidence and marked exbt. 12 and the medical report is marked exbt. 13."

12. It was suggested to this witness that he had not conducted the medical examination and the opinion is given only

on the basis of the narration by the victim, which has been denied. Except this, nothing has come in the cross-examination. PW3 is an independent expert witness and there is absolutely no reason to disbelieve or discard her evidence. It is trite that the evidence of any witness has to be read as a whole and any portion, including that of cross-examination, cannot be considered or appreciated out of context.

13. If we look to the evidence of PW2, it is in consonance with the evidence of PW1. In fact, the conduct of the PW2 in narrating the incident to her mother is a natural conduct. Even the conduct of PW1 of asking about the incident to PW2 and of lodging the complaint on the following morning, to my mind, is a conduct, which is expected of a mother of a child, who has been subjected to sexual abuse. I also find that the medical evidence affords corroboration to the evidence of PW2 in all material particulars. The submission that the Medical Officer had stated that the vaginal opening barely admitted the tip of the middle finger, cannot derogate from the fact that the Medical Officer had specifically opined that there was evidence of penetration. Not only that, the medical report as to the genital examination at clause 4, namely presence of bruises or abrasions on genitals reads as under :

“Bruise reddish present at 3 to 9 o' clock position of hymenal opening, tender to touch.”

Thus, in my considered view, the incident as alleged by the prosecution stands proved.

14. In order to appreciate the arguments, based on offence as defined under Sections 2(y)(i) and (ii), it would be necessary to reproduce the said Sections, which read as under :

“ 2(y). ‘Sexual offences’ for the purposes of awarding appropriate punitive action means and includes,—

[(i) “Grave Sexual Assault” which covers different types of intercourse; vaginal or oral or anal, use of objects with children, forcing minors to have sex with each other, deliberately causing injury to the sexual organs of children, making children pose for pornographic photos or films, and also includes rape;]

(ii) Sexual Assault which covers sexual touching with the use of any body part or object, voyeurism, exhibitionism, showing pornographic pictures or films to minors, making children watch others engaged in sexual activity, issuing of threats to sexually abuse a minor, verbally abusing a minor using vulgar and obscene language;”

15. It can, thus, be seen that the sexual assault as envisaged under Section 2(y)(ii) of the Act would only cover sexual

touching with the use of any body part or object and voyeurism, etc. which is not relevant for the present purpose. The offence of 'grave sexual assault' as contemplated under Section 2(y)(i) of the Act, is an aggravated form of sexual assault, which covers deliberate causing of injury to the sexual organs of the children. It is plain that if at all the offence has to fall under any of the acts under Section 2(y)(i), it would fall and be relatable to 'deliberate causing of injury to the sexual organ of a child'. It is apparent that the word 'deliberate' would indicate that the act is voluntary, and with sexual intent. This is because sexual abuse is what Section 2(y) envisages and defines. Element of intention to cause injury (without any sexual intent) cannot be imported in it. As noticed earlier, the medical evidence in this case sufficiently establishes an injury being caused to the sexual organ of the victim and it would be certainly more than what is contemplated under Section 2(y)(ii) of the Act, namely of only sexually touching, with the use of any body part or object.

16. It is trite that while interpreting the provisions, the object of the Act has to be kept in mind. The said act aims at making stringent provisions to protect, promote and preserve the best interest of children in Goa and to create a society that is proud to be child friendly. The provisions of the Act would make

it clear that it makes stringent provisions for punishment in respect of offences against the children. Section 2(y) creates two separate offences, namely a 'sexual assault' and 'grave sexual assault', for which separate stringent punishments are provided. The individual facts of any case have to be appreciated, keeping in mind the object of the said Act.

17. I have given my anxious consideration to the submissions made on behalf of the appellant and I am unable to hold that the offence would only fall under Section 2(y)(ii) and not under Section 2(y)(i) of the said Act. It may be mentioned that once the offence falls under Section 2(y)(i) of the Act, on the score of the punishment, Section 8(2) of the Act, does not leave any discretion in the Court. For the offence under Section 2(y)(i) of the Act, the minimum period of imprisonment provided is of 10 years and a fine of Rs.2 Lakhs. Thus, there is no scope to interfere with the sentence also.

18. In such circumstances, the impugned judgment does not call for any interference. The appeal is without any merit and it is consequently, dismissed.

C. V. BHADANG, J.

SMA