

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO. 42 OF 2016

Dr. Dilip Amonkar,
Major of age,
Resident of House no. 522,
Lake-view Colony,
near Rosary High School,
Miramar Panaji,
and working as Professor & Head
of Department of Surgery,
Goa Medical College,
Bambolim, Goa.

... Petitioners

V e r s u s

1. State of Goa,
through Senior Inspector In-Charge,
Vasco Police Station.
2. Shri Michael Rodrigues,
H. No. 143/2, Poriebhat, Verna Goa,
Through the I.O. (Police Inspector)
Vasco Police Station,
Vasco Goa.

... Respondents

Mr. S. D. Lotlikar, Senior Advocate with Ms. M. Furtado, Advocate for the Petitioners.

Mr. Pravin Faldessai, Addl. Government Advocate for the Respondent no. 1.

Mr. Nigel Da Costa Frias, Advocate for the Respondent no. 2.

Coram :- **F. M. REIS,**
 NUTAN D. SARDESSAI, JJ.

Date : **23rd June, 2016**

JUDGMENT (Per F. M. Reis, J.)

Heard Shri S. D. Lotlikar, learned Senior Advocate appearing for the Petitioner, Mr. Pravin Faldessai, learned Addl. Government Advocate appearing for

the Respondent no. 1 and Mr. Nigel Da Costa Frias, learned Counsel appearing for the Respondent no. 2.

2. The above Petition, inter alia, prays for quashing and setting aside the chargesheet bearing no. 174 of 2012 filed by the Vasco Police Station in Special case no. 63 of 2012 of the Children's Court constituted under The Goa Children's Act, 2003 and Rules, 2004, at Panaji, Goa.

3. Briefly the case of the Petitioner is that he is the Head of Surgery Department in the Goa Medical College and that one Miss Ravina Rodrigues, allegedly 16 years of age was admitted at the Pai Hospital, Vasco da Gama, Goa, with a complain of severe abdominal pain on or about 01.07.2010. Dr. Pai, the Director and Chairman of Pai Hospital, Vasco da Gama, who is also a Fellow of Royal College of Surgery London, requested the Petitioner to come to the said Pai Hospital to perform an emergency operation on the said patient. Since the Petitioner has been practising as a Doctor and as it was on an emergency, he went to the hospital on the early morning of 03.07.2010 and upon clinical examination, the patient had found the patient was having a problem of acute appendicitis and, as such, had performed a surgical operation on the patient. As the patient was progressing, she was discharged on 05.07.2010. The said patient was thereafter re-admitted by her mother at the said Hospital on 09.07.2010 and was thereafter treated by Dr. Shantaram N. Surme and as she was showing signs of distress, it was suggested that she be immediately admitted to the Goa Medical College. Accordingly, she came to be admitted at 7.30 p.m. on 10.07.2010. The said patient was operated on 11.07.2010 and was thereafter admitted to ward no. 106 of the

Goa Medical College. Subsequently, on 15.07.2010, she developed complications when she was still at Goa Medical College and ultimately died on 29.07.2010. The death was registered as a medico-legal case on 29.07.2010 on the recommendations of the Petitioner in his capacity as the head of the Surgery Department and the same was re-registered at the Vasco Police Station as Unnatural death. The post mortem report was apparently submitted on 30.07.2010 and thereafter on 02.08.2010, Mrs. Ravika Rodrigues, married sister of said Ravina filed a complain at the Vasco Police Station contending that the death of her sister was on medical negligence. Pursuant to the said complaint, the Government of Goa conducted an inquiry and a committee of Member was asked to inquire into the death of said Ravina Rodrigues. While the inquiry was going in the complaint for unnatural death registered on 29.07.2010, statement of Dr. Shridhar Pai, Dr. Suresh Kannan, Dr. Shantaram Navlu Durme, and others was recorded and during the course of the inquiry on 25.11.2011, Mr. Michael Rodrigues, father of said Ravina produced a report submitted by the Committee constituted by the Government and on the receipt of the said report, the case was registered as Crime no. 193/2011 against the Petitioner, Dr. Shantaram Surme and others under Section 304, 468, 471, 201 read with 34 of I.P.C. On conclusion of the investigation, the police filed a chargesheet against the Petitioner Dr. Surme and Dr. Pai in the Children's Court. Summons were issued to the Accused and Petitioner and ultimately heard. The matter was fixed for arguments on five occasions and as the case has not made any progress, the above Petition came to be filed.

4. Shri S. D. Lotlikar, learned Senior Advocate appearing for the

Petitioner, submits that the chargesheet filed by the Vasco Police Station is under Sections 304, 468, 471 and 201 read with Section 34 of the Indian Penal Code and under Section 8(2) read with Section 2(m)(iii) of The Goa Children's Act, 2003, (for short '*Children's Act of 2003*') is untenable and baseless and liable to be quashed and set aside. Learned Senior Advocate further pointed out that the records clearly demonstrate that the investigation Agency has heavily relied upon the Inquiry Report submitted by the Committee constituted by the Government and proceeded on an assumption that the Committee recommends that it is a fit case though according to him is unsustainable in law. Learned Senior Advocate further pointed out that no chargesheet which accuses the Petitioner of negligence, could have been filed against the Petitioner before the Children's Court without following the mandate as prescribed by the Apex Court. It is further pointed out that there is no warrant for the police to file a chargesheet in the Children's Court by invoking the provisions of Children's Act namely Section 8(2) against the Petitioner which is absolutely unwarranted and baseless. Learned Senior Advocate further points out that the present case is not a case of child abuse or assault and, therefore, chargesheet under Section 8(m)(iii) of the Children's Act of 2003, is totally baseless. Learned Senior Advocate as such submits that the said chargesheet be quashed and set aside.

5. On the other hand, Shri Rivankar, learned Public Prosecutor appearing for the Respondent no. 1, has pointed out that the chargesheet has produced enough material to prosecute the Petitioner for medical negligence under Sections 304, 468, 471 and 201 read with Section 34 of the Indian Penal Code and under Section 8(2) read with Section 2(m)(iii) of Children's Act of 2003. Learned

Counsel further pointed out that as a child is involved, proceedings under the Children's Court Act is justified. Learned Counsel further pointed out that there is no case made out for any interference in the chargesheet filed before the Children's Court.

6. Shri Nigel Da Costa Frias, learned Counsel appearing for the Respondent no. 2, has pointed out that there is cogent material on record to prosecute the Petitioner for medical negligence. Learned Counsel has further pointed out that the Respondent no. 3 had not alleged of any child abuse against the Petitioner and/or any other person.

7. We have considered the submissions of the learned Counsel. We have also gone through the records. We are not inclined to examine the validity or otherwise of the chargesheet filed by Respondent no. 1 under Sections 304, 468, 471 and 201 read with Section 34 of the Indian Penal Code. The only aspect we proceed to examine is whether the offence under Section 8(2) read with Section 2(m)(iii) of the Goa Children's Act, can be invoked in the present case. Section 8(2) of the Children's Act reads thus :

“8. Child Abuse and trafficking -

(1) ...

2. Whosoever commits any child abuse or sexual assault as defined under this Act, shall be punished with imprisonment of either description for a terms that they may extend to three years and shall also be liable to fine of Rs.1,00,000/-/ Whoever commits

any Grave Sexual Assault shall be punished with imprisonment of either description for a term that shall not be less than ten years but which may extend to life imprisonment and shall also be liable to a fine of Rs.2,00,000/-. Whoever commits incest shall be punished with imprisonment of either description for a term that shall not be less than ten years by which may extend to life imprisonment and also a fine which may extend to Rs.2,00,000/-. Statement of the child victim shall be treated on par with the statement of a child rape victim under Section 375 of the IPC, as laid down by the Supreme Court of India.”

8. In order to proceed to prosecute for an offence referred to above under the Children's Act, the Accused has to commit child abuse. In such circumstances, we shall proceed to consider whether there is any material on record to prosecute the Accused under the said provisions of the Children's Act. Children's rights and the abuses and injustices committed against them have provoked debate and critics in contemporary society. Protection of children's rights is a relatively new concept as previously the rights of a child was not a matter considered to be of any importance, nor given much thought. There are number of children who are victims of exploitation. The preamble of Children's Act, reads thus:

“To protect, promote and preserve the best interest of Children in Goa and to create a society that is proud to be child friendly.”

9. In meeting the objectives of the said Act, it clearly provides that only cases of child abuse are to be prosecuted under the Children's Act. This Court in a

Judgment reported in **(2010) Cri. L. J. 2007 (Bom)** in the case of **Mr. Suresh Narvekar vs. State of Goa**, has observed at Paras 16 and 17 thus :

“16. In the light of Apex Court Judgment in the matter of People's Union for Civil Liberties v. Union of India and Ors. (supra), the said Act would also have to be interpreted in the light of the International convention of the Rights of the Child, 1989. As mentioned earlier in this Judgment, the said convention culls out various provisions in the form of Articles to prevent child abuse. The raison d'etre of the said Act can be said to be to facilitate the full and harmonious development of the child's personality so that the child could grow up in a family environment with happiness, love and understanding. The entire endeavour, therefore, is to protect the rights of the child and prevent child abuse. If such an interpretation is to be given to the provisions of Section 8(2) and especially the word child abuse, the incident in question on the basis of which FIR came to be registered, cannot be said to be incident involving any child abuse. The incident has taken place purely by accident, without there being any intention of any person to cause any harm to any child. It is unfortunate though that five children have died in the said accident, the said five children could therefore be said to be the victims of the unfortunate incident which has taken place without there being any intention on the part of the Accused no. 1 or Accused no. 2 to cause harm to them. In fact, there could never have been any intention as the Accused no. 2, who was driving the vehicle and who is the owner of the vehicle, was sitting in the same vehicle

with his own daughter. Moreover, it is also required to be considered that one of the persons whose two sons expired has very fairly stated in his statement that the said incident was an accident and he does not want to blame anybody for the same. Therefore, in my view, the provisions of the said Act were not at all attracted and at the highest, it could be said that the Accused were liable to be charged under Section 304-A and Section 435 of the IPC and were liable to be tried by the regular procedure prescribed by the Cr. P.C.

17. The reliance of the learned Public Prosecutor, Ms. Coutinho, on Sections 2(s) and 30 of the said Act, in my view, is misconceived. The offence postulated in Section 2(s) and Section 30 have to be against children though not defined under the said Act. Such is not the case in the instant matter as the incident has taken place purely by accident and there was no intention to harm any child. If the offence was against the children, then the Accused were liable to be tried under the Childrens Act.”

In our view, though in the case of Suresh Narvekar vs. State of Goa (supra), what was challenged to an Order of framing of charge for an offence punishable under Section 8(2) of the Goa Children's Act, the Court had considered as to what is an offence against a child as also the reasons for creating a Children's Court and vesting its jurisdiction to try offences where children were victims. Section 30 of the Goa Children's Court Act merely enable the Children's Court to try an offence under other acts also committed against the children. This provision is

made in order to obviate two trials for offences arising out of the same transaction.

10. A similar view has also been taken in another Writ Petition being **Criminal Writ Petition no. 103 of 2014** decided on 29.10.2015 in the case of **Smt. Smita Khaunte vs. Police Inspector & anr.**, where one of us (F. M. Reis, J., is a party). In another Judgment passed in **Criminal Writ Petition no. 107 of 2015**, decided on 14.12.2015 in the case of **Mr. P. Ravi vs. Police Inspector & anr.** where one of us (F. M. Reis, J. is a party), it has been observed at para 11 thus :

“11. A bare reading of the aforesaid section in the context of the object of the Act of 2003, which is to protect, promote and preserve the best interests of children in Goa and to create a society that is proud to be child friendly, if read in juxtaposition to the allegations in the complaint, no offence under Section 8 of the Act of 2003 could be said to have been made out.”

11. On perusal of the allegations made against the Petitioner in the chargesheet, we find that they are more in the context of the alleged offences punishable under Sections 304, 468, 471 and 201 read with Section 34 of the Indian Penal Code. The chargesheet does not show that the acts complained of were committed or omissions attributed to the Petitioner were allowed by the Petitioner because the victim was a child. Therefore, there is nothing to show that the Petitioner neglected in discharging his duties of care because the victim happened to be a child. Merely because the victim is a child by itself, it cannot be said that cognizance of the offence has to be taken only by the Children's Court.

12. Though the learned Public Prosecutor appearing for the Respondent no. 1 tried to point out that in terms of Section 30(1) of the Children's Act of 2003, the Children's Court has jurisdiction to try all offences against children whether such offence is specified under the Act or not, we find that sub-section (1) of Section 30 of the Children's Act of 2003 are only an enabling provision and not provision which would exclude the jurisdiction of the other Courts. An enabled provision cannot be equated to the provisions requiring the Children's Court to decide all dispute or question or liability where children are involved. As such, as in this case, is a case of medical negligence and not that medical help was refused because the victim was a child, the case had to be tried by the Criminal Court and not by the Children's Court.

13. In such circumstances, we find that the Petition is partly allowed. The chargesheet to the extent of invoking the provisions of Section 8(2) read with Section 2(m)(iii) of the Children's Act of 2003, stands quashed and set aside. It is clarified that the observations made herein are only for limited purpose for deciding whether the offences under the Children Act were made out in the impugned chargesheet.

14. Rule is made absolute in the above terms.

NUTAN D. SARDESSAI, J.

F. M. REIS, J.

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