

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO. 45 OF 2016

Agnel Pedru D'Costa,
major of age, presently in
Judicial Custody at
Central Jail, Colvale, Bardez, Goa. Appellant.

Versus

The State of Goa,
through Police Inspector,
Quepem Police Station,
Quepem, Goa. Respondent.

Ms. Prithhvi Bandekar, Advocate under Legal Aid Scheme for the
Appellant.

Mr. S. R. Rivankar, Public Prosecutor for the State-Respondent.

***Coram : N.M. Jamdar &
Prithviraj K. Chavan, JJ.***

Date : 2 July 2018.

ORAL JUDGMENT: (Per N.M. Jamdar, J.)

By this Criminal Appeal, the Appellant-Accused is challenging the Judgment and Order, passed by the Additional Sessions Judge, Margao, in Sessions Case No.21/2014, dated 14 August 2014, holding the Appellant-Accused guilty and convicting him under Sections 324, 376, 506(ii) of the Indian Penal Code, read with Section 8(2) and Section 2(y)(iii) of the Goa Children's Act,

2003.

2. The Appellant is the father of the victim. The case of the Prosecution, in brief, is that the Appellant-Accused was residing with his wife PW.2 at Catemol, Molcornem, Quepem, Goa. PW.2 was working as a cook outside Goa and would occasionally come home after few months. The victim, who was 17 years old, daughter of the Accused was school going. When PW.2 returned to her village in November 2009, she found the victim not in house and the Accused informed her that he had employed her in somebody's house. According to the Prosecution, PW.2 found absence of the victim from the house suspiciously and when she accosted the Accused, the Accused told her that he had taken the victim to PW.4 Sister Rosanne Vaz from Sanguem and Sister Rosanne told her that the victim was pregnant. According to the victim, some time in the month of April 2009, when PW.2 was not at home and the siblings of the victim had gone elsewhere to the house of their uncle, around 9.00 p.m., the Accused sexually assaulted the victim. According the victim, when she told the Accused that she would tell this to her elder brother, the Accused slashed her neck with a blade and threatened her that if she informed the fact of sexual assault to any one, she would be put to death, or serious injuries. The victim stated that due to forcible intercourse by the Accused, she became pregnant. PW.4 took her to

Mother Teresa Convent and she received certain medical care. The victim delivered a baby boy and was discharged after 3 days. After staying for a month in Ashram, PW.4 brought the victim back to Sanguem and to her own house. The child was given in Ashram. The victim disclosed to her mother that she had become pregnant due to the acts of the Accused.

3. Again on 21 March 2010, the Accused sexually assaulted the victim and had forcible sexual intercourse. When PW. 2 mother returned back at 11.30, the victim disclosed the incident to her. PW.4 and the victim then came to Quepem Police Station and lodged a complaint. The Police Officer conducted a panchanama. Clothes of the Accused and the victim were attached. The victim was referred to medical institution for medical check up. Police recorded statement of PW.4 Sister Rosanne. The police also sent blood samples of the victim accused and the baby boy to the Central Forensic Science Laboratory, Hyderabad. Report of the CFSL was received stating that the Accused was the biological father of the baby boy and that the victim was the biological mother. The accused was arrested and taken into custody.

4. Initially, Charge Sheet in this case was filed by Qupeme Police against the Accused for the offences punishable under Sections 324, 376, 506(ii) of the Indian Penal Code, read with Section 8(2)

and Section 2(y)(iii) of the Goa Children's Act, 2003 in the Children's Court, Panaji. By order dated 9 June 2014, the learned President of the Children's Court concluded that since the victim was above 16 years and not child, the case would had to be forwarded to the Sessions Court, Margao. Accordingly, the case records were forwarded to the Sessions Court, Margao. Charges were framed against the Accused under Section 324 of the Indian Penal Code, read with Section 506(ii) of the Indian Penal Code, and Section 376 of the Indian Penal Code. The case was tried. The Prosecution examined PW.1 Dr. Ivonne Pereira, who had examined the Accused as regards his medical condition and whose medical report was produced at Exhibits 14 and 15. The mother of the victim was examined as PW.2. The victim was examined as PW.3. Biological Sample Authentication Cards were placed on record. Sister Rosanne Vaz was examined as PW.4. Assistant Lecturer in Forensic Medicine, GMC Dr. P.S. Kumar who carried out the medical examination of the victim was examined as PW.6 and his report was placed on record as Exhibit 30. Dr. Dheeraj Sawant, Senior Resident, Goa Medical College was examined as PW.7 who assisted the delivery of the baby boy. Investigating Officer, Police Inspector Sudesh Narvekar was examined as PW.9. With this evidence produced, the case was tried by the learned President of the Children's Court. The learned Additional Sessions Judge, Margao, considering the evidence of the

victim, PW.2 her mother, PW.4 Sister Rosanne and the DNA Report, concluded that the case was proved by Prosecution and, as stated above, the learned Additional Sessions Judge, by Judgment and Order dated 14 August 2014, convicted the Appellant-Accused under Sections 324, 376, 506(ii) of the Indian Penal Code, read with Section 8(2) and Section 2(y)(iii) of the Goa Children's Act, 2003.

5. We have heard Ms. Prithvi Bandekar, learned Counsel for the Appellant-Accused appointed under the Legal Aid Scheme and Mr. S. R. Rivankar, learned Public Prosecutor for the State-Respondent.

6. Ms. Bandekar, learned Counsel for the Appellant-Accused contended that the Accused was not in fit state of mind and he was recurrently suffering from various mental illnesses which fact has been tried to be suppressed by the Prosecution witnesses. It was contended that the Accused was suffering from serious depression and it has come on record that he also tried to slash his neck. It was contended that the injuries on the neck of the victim have not been established as there is no corresponding medical certificate and these were only shown to the Court during the deposition of the victim. The learned Counsel submitted that since the Accused was harassing the family of the victim, the fact that the victim was pregnant because of some other person, a false case was lodged

against the Accused. It was contended that there was no other witness for the incident which is not believable. It was also contended that the DNA report is not conclusive and based on scanty report, the learned Additional Sessions Judge, Margao convicted the Accused.

7. Mr. Rivonkar, learned Public Prosecutor for the State submitted that there is nothing in the deposition of the victim and PW.2, mother of the victim, so as to discard their version. The DNA report confirms the fact that the Appellant-Accused is the biological father of the child. It was contended that under Section 105 of the Indian Evidence Act if the Accused takes up a defence of unsoundness of mind and insanity, the burden is on him to prove such a defence. It was contended that except two suggestions, nothing has been brought on record by the Appellant-Accused so as to uphold the defence of insanity. The learned Public Prosecutor pointed out that even otherwise, the mental illness was only depression, which was after the incident. The learned Public Prosecutor submitted that considering the facts of the case, no interference in the conviction recorded is called for.

8. The Prosecution has primarily relied upon the evidence of PW.2 mother, the victim and PW.4 Sister Rosanne. The Prosecution has also relied upon the medical evidence and the DNA

reports. PW.2 mother of the victim has stated that the Accused and she married 20 years ago. They have six children, three sons and three daughters. She produced the birth certificate of the victim at Exhibit 18 showing that she had born on 25 April 1992. The Accused was working as a labourer and toddy tapper. PW.2 was working as a cook outside Goa. She stated that when she came home in November 2009 she did not see the victim in the house and when she inquired with the Accused about her whereabouts, the Accused started quarreling with her and also assaulted her. She stated that again in the year 2010, when she came home she found out that the victim was pregnant on account of the Accused and had delivered a baby boy on 6th January, in Goa Medical College. She also inquired from Sister Rosanne about the pregnancy. PW.2 deposed that when she came home, the things did not improve. The victim informed PW.2 that the Accused had sexually assaulted her in the month of April. Sister Rosanne advised PW. 2 to file a complaint. In the cross examination of PW.2, nothing has been eluded. Mere suggestions are put regarding physical and mental condition of the Accused. PW.2 has stated that the Accused used to consume liquor, behave abnormally and assault them. In April, he had attempted to cut his throat, after which he was hospitalized. She also stated that some tablets were given to him in view of some damage to the brain. She categorically denied that the Accused was a mentally sick person

or behave like one. She also denied the suggestion that the victim had a boyfriend and he used to visit her at home. Except giving suggestions regarding mental condition of the Accused and the victim having a boyfriend, the testimony of PW.2 has remained unshaken. PW.2 being the mother of the victim, if the victim had a boyfriend from whom she became pregnant, a normal course of human conduct would be to file a complaint against the boy, than against the father and malign the entire family. Nothing cogent has been shown as to why such a conduct would be adopted. Even as regarding mental condition, behaviour of the accused and his attempts to harm himself could very well be the result of his extreme alcoholism as deposed by PW.2.

9. PW.3, the victim has deposed that in January 2009, she was around 17 years. In absence of her mother, she used to carry out the work in the house, including cooking of food. She deposed that in April 2009, when her siblings had gone to their uncle's house and she was alone with her father-the Accused, the Accused came near her and started touching her body, including her private part. She deposed that the Accused demanded to have sex with her and upon her refusal, he started beating her. She deposed that when she told the accused that she would inform her elder brother, the Accused brought a blade and caused an injury across her neck. Thereafter, he

committed forcible sexual intercourse against her wish. During the proceedings, the victim showed the learned Judge the scars on her neck. The victim deposed that in November 2009, the Accused contacted some nuns from Sanguem and sister Rosanne (PW.4) took the victim to Mother Teresa Asharam where she delivered a baby boy. The victim deposed that when PW.2 came in the year 2010, she told PW.2 her mother about the incident. The victim stated that her mother told the accused that the victim should be brought back and, therefore, the victim was brought back home. She further deposed that on 21 March 2010, when her mother and the siblings had gone out of the house at around 1030 hours, again the Accused committed forcible sexual intercourse. When the mother of the victim returned, the victim informed the mother of the incident and thereafter, the complaint was filed. The version of the victim is consistent and there is nothing in the cross examination that has shaken her testimony. The cross examination went to the extent of doubting whether the boy was born. Even a suggestion was put that a false complaint was filed against the accused in collusion with Sister Rosanne. From her deposition, it is clear that the victim had become pregnant on account of the Accused and even after she returned home, once again rape was committed.

10. The Medical Report which is placed on record by PW.6

Dr. Kumar, who examined the victim, reveals that the victims had undergone vaginal delivery. He also opined that the recent sexual intercourse could not be ruled out. The DNA Report was received from the Central Forensic Science Laboratory, Hyderabad and marked as Exhibit 52. One sealed EDTA bulb containing 2 ml. liquid blood of the victim, baby boy and the Accused was sent to the Laboratory. The conclusions in that regard are as under :

***“Conclusion :** Based on the above observation it can be concluded that the Accused (source of Exhibit-C) is the biological father of the Baby Boy (source of Exhibit-B) and the victim (source of Exhibit-A) is the biological mother.”*

Therefore, the evidence of PW.2 mother, and the victim is corroborated by the DNA report and the Medical report. Papers regarding the delivery of the baby boy in Goa Medical College are also produced on record. This evidence produced by the Prosecution is consistent and there are no contradictions regarding the same.

11. As regards the contention advanced by the learned Counsel for the Appellant-Accused that the Appellant-Accused was suffering from mental illness is concerned, in view of Section 105 of the Evidence Act, the burden of proving existence of circumstance, bringing the case within general explanation, such as unsoundness of mind, is on the one who takes such a defence. Though PW.2 has

used the words “mental illness”, she clarified that it was after consuming liquor that the Accused used to behave abnormally. She also stated that no villager also informed that the Accused was mentally sick or was behaving like mentally sick person and the abnormal behaviour of the Accused was attributed to his alcoholism.

12. Dr. Ivonne Pereira PW.1 who examined the Accused on 13 April 2010 categorically stated that the Accused was fit to stand trial. He did not require any further hospitalization and he was suffering from brief depressive reaction with anti social personality trends. This examination was after the incident. In the cross examination, Dr. Pereira has deposed that the Accused had told him that he started having this problem after the incident with his daughter. The Accused did not give him any such prior history. Dr. Pereira has deposed that the accused expressed that he was disturbed of what he had done because of which he went in depression. Medicines were prescribed for depression.

13. Therefore, at the most what could be seen from the evidence is that the Accused was suffering from depression and used to behave disorderly after consuming liquor. This cannot be considered as a general explanation to hold that the Accused is not guilty of the offences. The contention of the learned Counsel for the Appellant-Accused that the DNA Report is inclusive because it is

99.9999% and not cent percent, is stated to be rejected.

14. Therefore, considering the evidence on record, a clear case is made out by the Prosecution that the victim was sexually assaulted by the Accused, her father. The Appellant-Accused was rightly held guilty of the offences punishable under Sections 324, 376, 506(ii) of the Indian Penal Code by the learned Additional Sessions Judge, Margao.

15. Under these circumstances, no interference is called for in the order of conviction. The Appeal is dismissed.

Prithviraj K. Chavan, J.

N.M. Jamdar, J.