

**IN THE HIGH COURT OF BOMBAY AT GOA****CRIMINAL APPEAL NO.46 OF 2015**

Shri Khalil Kureshi  
S/o. Chand Badshah Kureshi,  
major of age, businessman,  
resident of House No.B/157,  
Valant, Near Baba Tiles,  
Reis Magos, Betim, Bardez, Goa.  
(in custody at Central Jail,  
Colvale as a convict prisoner,  
through his next friend  
Mr. Khaum A. Pastani,  
S/o. Allauddin Pastani,  
resident of E-210A-9,  
Valant, Near Baba Tiles,  
Reis Magos, Betim, Bardez, Goa.

.... Appellant

V/s

The State of Goa,  
Through Police Inspector,  
Provorim Police Station,  
Porvorim, Bardez, Goa.

.... Respondent

Shri Ryan Menezes, Advocate for the Appellant.  
Shri S.R. Rivankar, Public Prosecutor for the Respondents.

**CORAM : PRITHVIRAJ K. CHAVAN, J.**

**Reserved on : 26<sup>th</sup> September, 2019**

**Pronounced on : 11<sup>th</sup> October, 2019**

**JUDGMENT :**

Feeling aggrieved with the judgment and order of  
conviction dated 31/07/2015 by the Children's Court, Panaji, Goa, the

appellant has preferred this appeal.

2. The appellant came to be convicted and sentenced to undergo simple imprisonment for 6 months of an offence punishable under Section 323 IPC. He is sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of ₹2,00,000/-, in default, simple imprisonment for 2 years of the offence punishable under Section 376(2)(i) of IPC and under Section 8(2) of the Goa Children's Act, 2003 and under Section 4 of the Protection of Children from Sexual Offences Act, 2012.

3. Facts of the case in brief are as follows:

On 06/07/2013, PW1 Shamina Begum Shaikh had lodged a report with Porvorim Police Station. She was residing at Ramnagar Betim, Bardez Taluka, Goa along with her husband, daughter (prosecutrix) aged about three and half years and two sons aged about 2 years and 3 months, respectively in a rented room. Her husband works as a labourer. On 06/07/2013, at about 12.45 hrs. prosecutrix was crying for a chocolate and, therefore, PW1 Shamina asked her to get it from the general shop of the appellant by giving her two rupees.

The prosecutrix always used to go to the appellant's shop to buy chocolate and would return within few minutes. Since she did not return for about 20 minutes or so, PW1 Shamina went to see her in the appellant's shop and noticed that the prosecutrix was inside the shop of the appellant along with the appellant. The prosecutrix was crying. She brought her outside the shop and asked her the reason as to why she was crying upon which the prosecutrix replied that the appellant removed his pant and put his private part in her mouth and said “dudu piyo” (drink milk). PW1 Shamina brought her daughter home and again asked her in detail, to which she replied in a similar manner. It is alleged that the appellant removed his pant and put his private part in the mouth of the prosecutrix and said “dudu piyo”. He also slapped on her face. PW1 Shamina immediately contacted her husband, who was on his centering work. Thereafter, a written report came to be lodged with the police station.

4. An offence came to be registered against the appellant under Section 376(2)(i) IPC, Section 8(2) of Goa Children's Act, 2003 and Section 4 of the Protection of Children from Sexual Offences Act, 2012.

5. The Investigating Officer PW9 PI Manoj Mardolkar registered a crime bearing Cr. No.91/2013 under Sections 377, 323 IPC, 8(2) of the Goa Children's Act and Section 4 of the Protection of Children from Sexual Offences Act. He visited the scene of occurrence and drew a spot panchanama in the presence of two pancha witnesses namely Kisan Satardekar and Gaurish Morajkar. He had recorded the statement of the witnesses. He had also arranged for a photographer, who took photographs of the scene of offence on a digital camera of the Porvorim Police Station. The clothes of the appellant which were on his person at the time of commission of the offence as well as his banyan and underwear were seized under a seizure panchanama. The appellant was referred for medical examination. A statement of the prosecutrix was also recorded.

6. The Investigating Officer vide letter dated 10/07/2013 to the JMFC, Mapusa prayed for addition of Section 376(i) (h) of IPC in the crime and deleting Section 377 of IPC.

7. The seized muddemal property was sent for chemical analysis to CFSL, Hyderabad. He had obtained birth certificate of the victim by

writing a letter to the Registrar of Births and Deaths Registration, GMC, Bambolim. After investigation, he filed a charge sheet against the appellant in the Children's Court for the State of Goa.

8. The appellant appeared before the learned President Children's Court on 11/09/2014. A charge was framed against the appellant under Sections 375(a) of IPC read with Section 2(y)(i) of the Goa Children's Act, 2003 and Section 3(a) of the Protection of Children from Sexual Offences Act, 2012 punishable under Sections 376(2)(i) of IPC, Section 8(2) of the Goa Children's Act, 2003 and Section 4 of the Protection of Children from Sexual Offences Act, 2012. It was read over and explained to the appellant to which he pleaded not guilty and claimed to be tried.

9. The defence of the appellant is that of denial of the commission of the offence alleged. However, according to him someone else had committed the offence, but PW3 Shahbaz (father of prosecutrix) implicated him falsely because he had stopped helping him by paying his monthly rent, which he used to collect from the appellant. It is stated that the appellant came to know that despite collecting the rent

from him, PW3 Shahbaz was not paying the same to the landlord. It is further stated that he has been implicated because he refused to help PW3 Shahbaz, who was demanding a huge amount and that the appellant demanded back his gas cylinder.

10. Another weapon in the armory of his defence is that at the time of the alleged offence he was in his daughter's school for attending a Parents Teacher's Association (PTA) meeting, meaning thereby the appellant has taken a plea of alibi. Though it is the contention of the appellant that the heinous crime had been committed by someone else of which the father of the prosecutrix had a knowledge, but he had implicated the appellant at the behest of the real culprit from whom the father of the prosecutrix had probably expected some amount. The appellant had examined his daughter as a defence witness.

11. The learned Trial Court after going through the evidence of the prosecution as well as the defence evidence and after hearing the respective Counsel, convicted and sentenced the appellant as above. The learned President Children's Court found the evidence of the victim as well as her mother and other witnesses reliable and

trustworthy. The learned President disbelieved the defence as raised by the appellant as well as the evidence of his daughter DW1 Shabnam Khureshi.

12. Shri Ryan Menezes, the learned Counsel appearing for the appellant contends that the Trial Court failed to appreciate the material on record in its correct perspective, in the sense, that the evidence adduced by the prosecution is inadequate and not up to the standard required of the prosecution to prove the offence with which the appellant has been charged. It is contended that the learned Trial Court has committed an error in brushing aside discrepancies as stating the same to be minor as well as ignored the material inconsistencies in the depositions of the witnesses examined by the prosecution. Mr. Ryan Menezes vehemently argued that the material on record would replete with glaring regularities, lacunae and inconsistencies giving rise to a reasonable doubt with regard to the guilt of the appellant. The Trial Court, according to the learned Counsel, however has chosen to gloss over these glaring irregularities. It is contended that the learned Trial Court committed a grave error in believing the testimony of the prosecutrix, who could not identify the

appellant by stating that the appellant was not “Bade Abba”. This clear and unambiguous statement, according to the learned Counsel, is sufficient enough to disbelieve the prosecution case when the question of identification of the appellant itself is the main issue in the matter.

13. The learned Counsel further contends that the Trial Court erred in invoking the operation of Section 32 of the Goa Children's Act inasmuch as the victim was never in his custody to cast the burden of proof upon him. There is complete ignorance of Article 20 of the Constitution of India, which contemplates about the right of the accused to remain silent and the right against self incrimination, enshrined therein.

14. It is further according to Shri Menezes that the appellant had established his plea of alibi, which cannot be said to be an after thought as observed by the Trial Court in the light of the fact that he had produced sufficient and believable evidence on record in the form of the attendance sheet of the school as well as the signature of the appellant over it. Except the testimony of the prosecutrix, it is stated that the rest of the evidence is of hearsay nature and, therefore,

inadmissible. The learned Counsel has also taken exception to the authenticity of the spot panchanama as well as the seizure of the clothes of the appellant. Since the victim failed to identify the appellant it is confirmed that the case is based on circumstantial evidence for which there is no complete chain established by the prosecution. Shri Menezes has placed reliance on several authorities of the Supreme Court and the High Courts, which shall be dealt with at appropriate stage.

15. Thus, the learned Counsel for the appellant has prayed for setting aside the impugned judgment and order of conviction and sentence.

16. Per contra Shri Rivankar, the learned Public Prosecutor has strongly supported the impugned judgment and order. He contends that there is no reason to disbelieve the testimony of the prosecutrix.

17. The evidence of the prosecutrix came to be recorded on 26/11/2014, when she was about 4 years of age i.e. almost one and half year of the incident. It reveals from the record that the learned

Trial Court ascertained the competency of the prosecutrix as to whether she can depose, by putting appropriate questions and the answers thereof.

18. As the prosecutrix had given answers to the satisfaction of the Trial Court, her examination in chief was conducted by a lady Public Prosecutor.

19. The evidence of the prosecutrix (PW2) reveals that she used to visit the shop of the appellant for buying chocolates which is adjoining to her house. The appellant was referred to as 'Bade Abba'. On that day, she had been to his shop to buy chocolates after her mother gave her two rupees. The appellant called her inside the shop. He did '*kili mili*' and then she testified that "mujhko dhudh pilaya aur mara" when she was asked what is kili mili she answered with action that the appellant put his hand in her panty and tickled. She was also asked what is meant by 'dudu pilaya' to which she answered that the appellant removed his pant and put his private part in her mouth and she was made to drink the milk. The evidence further reveals that he assaulted on her cheeks and, therefore, she cried and called her mother

by saying “mummy mummy”. She heard her mother (PW1 Shamina) calling her. She further testified that the appellant did not allow her to come out from the shop. It was her mother who came inside the shop and took her away. On being asked, the prosecutrix told her mother the reason for her crying and about the act done by the appellant. This is what is the evidence of the prosecutrix.

20. When the appellant was shown to the prosecutrix by drawing aside the curtain, she testified that the appellant is not “Bade Abba” and that she has not seen him before. However, the prosecutrix has duly identified the photographs of the shop as well as the place where she was molested by the appellant. Except asking a question that she has been tutored to identify the photographs nothing else has been asked to her during cross-examination by the defence.

21. It is pertinent to note that father of the prosecutrix PW3 Shahbaz Shaikh has testified that at the time of incident the appellant was thin and dark but he has put on weight and became fairer and, therefore, was looking different than earlier. Similarly, PW4 Amina Adhuni sister-in-law of PW3 Shahbaz has also spoken in tune with PW3

Shahbaz that the appellant has become fairer and has put on weight when she adduced evidence. She testified that the appellant looks different than earlier. There is a corroboration to the testimony of these two witnesses by PW5 Avinash Shinde and PW6 Vithal Naik.

22. PW5 Avinash is an independent panch witness on the arrest panchanama of the appellant, in the sense, that the appellant was arrested in his presence by the Investigating Officer PW9 Mardolkar. He has unequivocally and in clear terms testified that he had identified the appellant in the dock, who was looking different than what he was looking earlier. It is testified that he was looking fairer.

23. Similarly, PW6 Vithal Naik is another independent witness, who had given his shop on rent to the appellant and testified that appellant had become fairer than earlier. There is no effective cross of these witnesses except a suggestion that they have falsely testified at the behest of PW9 PI Mardolkar. Presuming for a while that PW3 Shahbaz, PW4 Amina are the partisan witnesses, there seems to be no reason for independent witnesses, PW5 Avinash Shinde and PW6 Vithal Naik, to testify about the change of appearance of the appellant

at the time of evidence for the reason that they have no axe to grind against him.

24. PW7 Vikram Gohar is also an independent witness, who works for some security service and on whose advise the complainant lodged a report against the appellant and testified that he did not find any major change in the appellant. However, it is not his case that there is absolutely no change in the appearance. This is significant in the light of the fact that the prosecutrix was just three and half years of age at the time of incident and there was an occasion to see the appellant almost after one and half years which is a sufficient period in getting some change in the appellant's appearance. It cannot be said that she has been tutored by her parents. Had it been so, she would have definitely identified the appellant during the course of the trial. Rather, it is the test of authenticity of her testimony.

25. PW3 Shahbaz is the father of the prosecutrix, whose evidence can be said to be hearsay in nature as it was his wife PW1 Shamina, who had informed him about the incident. He supports and corroborates the testimony of his wife in material particulars. It has

come in his evidence that being an outsider he was scarred of lodging a report against the appellant. However, he discussed the matter with one of his neighbours namely PW7 Vikram and, thereafter, a report came to be lodged. There is nothing unusual in the sense that admittedly it reveals from the record that the complainant and her family has been migrated to Goa from Hyderabad. PW3 Shahbaz does the work of centering. Having such a poor economic background it was not expected of him to immediately approach the police to lodge a report and, therefore, he had solicited the assistance of PW7 Vikram to whom the couple approached on the same day and informed about the incident. The First Information Report is prompt without any delay and, therefore, there is no question of any embellishment.

26. During the cross-examination of PW3 Shahbaz by the defence it was suggested that he was on enemical terms which the witness denies. A specific question was asked to the witness as to why he was forcibly evicted by his landlord, upon which he answered that he had been to his native place to attend some rituals on the eve of death of his father and, therefore, during his absence the landlord had removed

his household articles as he wanted to fix tiles. However, when he returned, he noticed that his belongings were lying on the water, and, therefore, he lodged a report with the police against his landlord.

27. It is also suggested that since the appellant stopped paying rent to this witness, the landlord evicted him and, therefore, due to anger he had falsely implicated the appellant in this case, which has also been denied. Interestingly, there is nothing on record as to why the appellant was paying the rent of PW3 Shahbaz as it is nobody's case that they were either related or were friends. There seems to be no convincing or satisfactory reason as to why the appellant would pay the rent of PW3 Shahbaz?

28. It is also interesting to note that a specific plea of alibi taken by the appellant that at the relevant time he had been to the school of his daughter for attending parents teachers meeting has not been suggested to any of the prosecution witnesses. Be that as it may.

29. I shall discuss the evidence of the defence witness in the subsequent paras. The only suggestion given to the prosecution

witnesses was that the shop of the appellant was closed on the day of the incident which almost all the witnesses have denied.

30. PW4 Amina is the sister-in-law of the complainant and her next door neighbour. She works as a housemaid. On 06/07/2013, she did not go to work as it was late. When she approached the house of PW1 Shamina, she found Shamina and the prosecutrix crying. Upon being asked she came to know about the incident and the involvement of the appellant. There is no effective cross-examination of PW4 Amina by the defence barring few suggestions in the sense that she has deposed falsely which she denies. Nothing has been elicited which would render her testimony unworthy of credit.

31. It is pertinent to note that the appellant in his 'additional written statement' at Exhibit 49 states thus :

*14. That the Victim's father knows very well who has committed the heinous crime and I suspect he has taken money from that person and used his Victim as a tool against me to avenge his revenge against me.*

That being so, it can be safely inferred that the appellant probably knew the real offender, who, according to the appellant, had committed a heinous crime and more so, if he knows that the appellant

had taken money from that person the appellant could have, at least, given some hint or the name of such person. It is pertinent in the light of the fact that the appellant had failed to establish that he was on enemical terms with the appellant. Enmity is a double edged weapon. It can provide motive to commit offence as well as false implication. Nothing of that sort has been surfaced in the evidence of any of the witnesses.

32. PW6 Vithal Naik, has given his shop styled as “Suvidha General Stores” to the appellant on rent. He is the next door neighbour who would definitely know as to whether on 06/07/2013 the shop was closed or otherwise. It seems that there is no suggestion given to this witness by the appellant during cross. The appellant has gone to the extent in suggesting that wife of PW6 Vithal Nayak is not the owner of the shop. Be that as it may. A judicial note can be taken that the incident in question had occurred on Saturday. In Goa, shops are normally closed on Sunday.

33. The testimony of an independent witness namely PW7 Vikram vis-a-vis the testimony of PW2 Tabassum Sheikh, PW3 Shahbaz and

PW4 Amina are consistent as they corroborate in material particulars. They may not be the direct witnesses to the incident nevertheless, they point the needle towards the complicity of the appellant in the crime. Except the sole testimony of the prosecutrix, rest of the things revolve around circumstantial evidence. It is an equally settled position of law that motive alone is not sufficient to convict the accused in case of circumstantial evidence unless it finds support qua the involvement of the appellant in the offence. I find no reason as to why evidence of PW1 Shamina and PW4 Amina cannot be said to be relevant in view of Section 6 of the Indian Evidence Act.

34. Section 8 of the Evidence Act deals with motive, preparation and previous or subsequent conduct. I have already discussed the effect of the testimony of the prosecutrix in the preceding paras.

Section 8 of the Indian Evidence Act reads thus:

**8. Motive, preparation and previous or subsequent conduct**—Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or

*relevant fact, and whether it was previous or subsequent thereto.*

*Explanation 1.—The word “conduct” in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.*

*Explanation 2.—When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.*

Illustration (j) of Section 8 reads thus:

*(j) The question is, whether A was ravished. The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant. The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant as a dying declaration under Section 32, clause (1), or as corroborative evidence under Section 157.*

35. The First Information Report in this case, as already stated herein above, is prompt and, therefore, is admissible under Section 8 as a part of informant's conduct, which corroborates the evidence of the prosecutrix.

36. Reverting back to the testimony of PW7 Vikram, his evidence reveals that he acts as a liaisoning officer with the police and with the local authorities. It reveals from his evidence that if children are in some problem or difficulty they approach him. According to this

witness, when the prosecutrix and PW1 Shamina along with PW3 Shahbaz approached him on the very same day at about 5.30 to 6.00 p.m. and informed him about the misdeed of the appellant, he advised them to first consult “Jammat” and seek their guidance. It was informed by PW3 Shahbaz that he had already approached the Jammat which had not given him any guidance and, therefore, as per the advise of PW7 Vikram they approached the police. It also reveals from the evidence of PW7 Vikram that the appellant was scared of a group of people, who might assault him on his way to the police station as that group was related to the appellant. PW7 Vikram, therefore, took them to Porvorim Police Station in his car. I do not think there is any reason to disbelieve PW7 Vikram merely because he was not cited as prosecution witness and was subsequently examined by the Court for which there is no legal bar. Even during his cross, it is surfaced that he is in touch with police whenever required. It is suggested that he is a planted witness, who has deposed falsely against the appellant. The witness denies the suggestion.

37. The testimony of prosecutrix cannot be ignored for want of corroboration unless inconsistencies or contradictions are sufficiently

serious and in view of the fact of the prevailing values in India, women would not, as of rule come with false cases of molestation or rather false implication of an innocent. This aspect has been repeatedly enunciated in various pronouncements. The report, here, is prompt, which rules out any embellishment, no inconsistencies or contradictions which can be said to be material. There is proper and believable corroboration and, therefore, there is no reason to discard the testimony of the prosecution witnesses.

38. Now, turning to the defence of the appellant. According to him, on the date of incident his shop was closed and that he was at the school of his daughter namely Our Lady of Rosary Higher Secondary School at Dona Paula for a Parents Teachers Association (PTA) meeting. He examined his daughter DW1 Shabnam Kureshi, who was studying in eleventh standard at the relevant time. She testified that her father had attended the PTA meeting from 9 a.m. to 1.00 p.m. He was present all along during the meeting and they returned home at around 2.00 p.m. They travelled by bus. Her evidence further reveals that Sr. Jenet Almeida was the Principal of the school at that time. She has tendered the attendance sheet (Exhibit 51) in support of her

contention that her father had attended the meeting.

39. During her cross-examination by the learned Public Prosecutor it has been brought out that an intimation is sent to the parents by the school to attend the PTA meeting. However, the witness could not produce any such intimation or its copy. Rest of the questions were about the manner in which the meeting was managed, the sitting position of the parents vis-a-vis their wards, which is not relevant.

40. However, it is testified by DW1 Shabnam that Miss. Bevinda was sitting outside the hall with the register, who obtained the signature of the parents. Interestingly, appellant has not examined Miss. Bevinda nor the principal of the school. The appellant had examined one Sunita Fernandes George, who is a teacher in the school. I shall go through her evidence subsequently.

41. The evidence of DW1 Shabnam indicates that no photographs were taken during the meeting. Perhaps DW1 Shabnam might not be aware as to whether the photographs were taken or otherwise.

42. DW1 Shabnam as well as DW2 Sunita admit two signatures in the attendance sheet (Exhibit 51) in the column against the name of DW1 Shabnam. There is a signature of one Kashyap and, thereafter, the signature of the appellant, which is partly out of the column meant for signature of the parents. This aspect also creates a doubt about the genuineness of this document for the reason that if one Mr. Kashyap had wrongly put his signature in the column indicating the name of DW1 Shabnam and it was subsequently found to be incorrect, the name Kashyap could have been struck or erased. The said Kashyap could also have been examined to substantiate that he wrongly signed in the said column no.14. It is pertinent to note that DW2 Sunita admits that signature of Kashyap at serial number 14 might have been a mistake as name of said Kashyap appears at serial no.47 on the second page of original attendance sheet. It reveals from the evidence of DW2 Sunita that she has pointed out to the blank column of signature against serial no.47 which carries the name of student as 'Kashyap Baishali'. There was no difficulty in asking Kashyap to sign at serial no.47, which remained blank by scoring his signature at serial no.14.

43. In her cross-examination DW2 Sunita admits that a students' list is prepared class wise and then signatures of the parents are obtained against the name of the roll number of the student. Generally, the class teachers obtain the signature of the parents. Here, neither the class teacher of the DW1 Shabnam was examined nor there is any satisfactory answer as to how signature of the appellant was found made subsequently in the said column against DW1 Shabnam which is partly outside the bracket. This cannot be said to be probable or acceptable defence even on the premise of preponderance of probability. It is important to note that DW2 Sunita does not recognise the appellant and that his signature was not obtained in her presence. She further admits that merely on the basis of attendance sheet (Exhibit 51), it cannot be confirmed that the father or mother of the student had attended the meeting. Her further admission that it is possible for any parent to leave the meeting, in between, probabalises the chances of the appellant returning to his shop, somewhere near the time of incident, in the light of the fact that he failed to prove that his shop was closed on the date of incident which was Saturday. Had the shop been closed, the Investigating Officer would not have been in a position to prepare the spot panchanama in the presence of PW8

Ganesh.

44. At least, the principal of the school namely Sr. Jenete Almeida, who issued a certificate (Exhibit 54) could have been examined in the light of the fact that she had specifically certified that the appellant had attended the meeting from 8.40 a.m. to 1.00 p.m. Since the presence of the appellant at the school itself was doubtful, it is rather risky to say that Exhibit 51, in fact, bears his signature.

45. The prosecution has, thus, proved that the prosecutrix was in the custody of the appellant of which the burden is upon him as per Section 32(1)(l) of the Goa Children's Act to disprove the said fact.

Section 32(1)(l) reads as under:

*(l) **Burden of Proof:** Whenever any offence is alleged to have been committed against a child, the burden of proving that such offence has not been committed by the accused 126 shall lie on the accused if the child was in his custody at the time of his arrest or at the time of committal of offence or at the time of rescue or removal of the child victim, as the case may be.*

46. It is crystal clear from the evidence of prosecutrix and PW1 Shamina that she (prosecutrix) was taken from the room of the appellant. The appellant has failed to discharge the reverse burden. It

also cannot be lost sight of the fact that clause (n) of Section 32(1) provides a safe guard while cross-examination of a child witness. It provides as under:

*(n) Cross examination of child witness: Whenever there is a need to cross examine a child witness, care shall be taken to see that the tender age or in case of a victim, the psychological condition of the child is taken into consideration and the Children's Court may adopt such procedures which are fair and suitable to the child.*

The conditions enumerated in clause (n) are required to be understood in its correct perspective even on the aspect of identification of the appellant. The psychological condition of the prosecutrix is quite relevant in the given set of circumstances.

47. The burden of proving the guilt of the accused, indeed, rests on the prosecution which it has successfully discharged and, therefore, now the onus shifts upon the appellant under Section 106 of the Evidence Act to disprove that the prosecutrix was not in his custody at relevant time or that he had no mens rea. It is equally true that the onus of proving alibi, undoubtedly, lies on the appellant, nevertheless, the burden of proving the case against the appellant is on the prosecution irrespective of whether or not the appellant makes out a

plausible defence. There is no doubt that the accused in a criminal trial is entitled to keep silence; but if he is in a position to explain the only alternative theory to his guilt, the absence of explanation must be taken into account. There is no reason to disbelieve PW8 Ganesh Morajkar, the panch witness in whose presence the spot panchanama (Exhibit 38) was drawn by the Investigating Officer. The spot was shown by the prosecutrix. PW8 Ganesh has described the shop as pointed out by the prosecutrix with all material details.

48. The observation of the learned Trial Court that adverse inference is required to be drawn against the appellant for not stepping into the witness box and for not raising the defence of PTA meeting while cross-examining the prosecution witnesses is incorrect, but that does not, in itself, render his evidence totally unworthy of credit or unacceptable. The only aspect which needs to be considered is as to whether the appellant succeeds in showing, on preponderance of probability, that he was not at the spot of the incident when the alleged offence occurred. As already stated, the appellant has failed in the same.

49. So far as the enmity is concerned, it is the case of the appellant that he had helped PW3 Shahbaz in getting rented premises as well as gas connection. As already stated, there is no material on record in support of the same. Rather, DW1 Shabnam has testified that they have only one gas connection. Therefore, there is no question of providing gas connection to PW3 Shahbaz.

50. In the written statement, the appellant states that he had told the Investigating Officer as regards his attendance of PTA meeting at the relevant time, but the Investigating Officer refused to listen to him. Similar stand was taken by DW1 Shabnam. However, there is nothing on record to show that they had told the Investigating Officer about it. If the Investigating Officer had not noted this fact as alleged, the appellant could have approached the higher authorities.

51. Strangely, when the appellant moved an application for bail before the Children's Court under Section 439 Cr.P.C. on 16/12/2014, he had not raised the ground that he was attending the PTA meeting at Our Lady of Rosary School on 06/07/2013. No sane man will believe the appellant that he would, at his peril, withhold this material fact

from the Court in order to thwart his chances of getting released on bail. It is significant in the light of the fact that the evidence of PW1 Shamina came to be recorded on 26/11/2014. There is no such suggestion to PW1 Shamina to that effect.

52. Thus, there is reason to believe that a false plea of alibi has been taken. The learned Trial Court has, correctly and properly appreciated the evidence on record.

53. The report of CFSL, Hyderabad (Exhibit 18) in respect of the material preserved qua the victim and the appellant though indicate negative, that itself would not negate the testimony of the prosecution witnesses which is quite cogent, trustworthy and inspires confidence.

54. Sine qua non of the offence of rape is penetration and not ejaculation. This is significant in the light of the medical report Exhibit 23 in which the medical officer could not render specific opinion as to whether there was any oral penetration or discharge. The medical report (Exhibit 23) in respect of appellant reveals that there is nothing to suggest that the appellant was incapable of performing

sexual intercourse. No doubt, there are no external injury marks or laceration seen, yet that is not the requirement of law in order to establish the ingredients of Section 375(a) of IPC. Even partial penetration of the penis or any object or part of the body not being the penis into the vagina, urethra, anus or mouth attracts the ingredients of Section 375. Oral examination of the prosecutrix reveals that her oral hygiene was good, buccal mucosa healthy and no injuries noted over the buccal mucosa, lips, tongue, posterior pharyngeal wall. No abrasion, bruise or any laceration was seen.

55. There is no dispute about the date of birth of the prosecutrix as per certificate (Exhibit 24) as 05/01/2010.

56. This Court in the case of *Rohan P. Dhungat V/s. State of Goa* reported in **2018(6) Bom.C.R. 876**, in which one of us (Prithviraj K. Chavan, J.) while discussing the scope of Sections 364-A, 302, 201 & 120-B vis-a-vis Section 8(2) of the Goa Children's Act and Article 21 and 226 of the Constitution of India, held that there is no conflict in the provisions under the Indian Penal Code, Goa Children's Act and the Protection of Children from Sexual Offences Act, 2012. It will be

an academic exercise as conflict does not give rise to violation of Article 21 of the Constitution of India so far as the petitioner therein was concerned. We also, *inter alia*, held that it was not appropriate to comment on issue of repugnancy between Goa Children's Act, 2003 and POCSO Act as the petitioner was not charged with any of the sexual offences against the child. We have observed that Section 32(1)(l) of the Goa Children's Act lays down that whenever any offence is committed against the child, burden of proving such offence has not been committed by accused shall lie on accused if child was in his custody at the time of his arrest or removal of child victim, as the case may be. This provision is in consonance with the last seen theory adopted by the Court. Initial burden of showing that when offence committed against child, and that child was in custody of the accused, is on the prosecution and, thereafter, it shifts onto the accused to explain circumstances. Therefore, there is no conflict at all between the Goa Children's Act and the Parliamentary enactments.

57. As the matter of fact, there is no such stand raised by the learned Counsel for the appellant as regards the inconsistency or repugnancy in the respective provisions.

58. In another land mark judgment of the Hon'ble Supreme Court in case of *Sharad Birdhichand Sarda V/s. State of Maharashtra* reported in (1984) 4 SCC 116, it has been a settled principle as to how a circumstantial evidence is to be assessed. The judgment needs no elaboration as the said view is no more res-integra. Suffice it to say, the Hon'ble Supreme Court has culled out the following salient aspects which are to be considered while appreciating circumstantial evidence:

*"1. The circumstances from which the conclusion of guilt is to be drawn should be fully established.*

*2. The facts so established should be consistent with the hypothesis of guilt and the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.*

*3. The circumstances should be of a conclusive nature and tendency.*

*4. They should exclude every possible hypothesis except the one to be proved.*

*5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."*

It is observed that in a criminal trial which is based on circumstantial evidence, a false plea or a false defence taken by the

accused would constitute an additional link in the chain of circumstantial evidence against him. No doubt, infirmities in the prosecution case cannot be cured by use of such additional link.

59. The ratio laid down by the Supreme Court would be of no help to the appellant. Rather, as he failed in proving his alibi, that would be an additional circumstance linking him with the offence with which he is charged.

60. Reliance is placed in case of ***Kali Ram V/s. State of H.P.*** reported in ***1973 DGLS(SC) 286***. It is held thus:

*“It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilised society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and undergoes the sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of expiation.*

*All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in*

*any system of the administration of criminal justice. Such a risk can be minimised but not ruled out altogether.”*

61. The ratio would not be applicable for the simple reason that the material on record, if tested on the touchstone of law of evidence as well as the provisions under the Goa Children's Act, would definitely points towards the complicity of the appellant in the alleged offence. There is no question of he being wrongfully convicted, for, there was no reason for the mother of the prosecutrix to falsely implicate the appellant in view of the fact that her family itself belongs to a very humble and poor background. The appellant, on the other hand, is quite better off than the complainant. The ratio can be distinguished accordingly.

62. In case of ***Sham Singh V/s. State of Haryana*** reported in **2018 DGLS(SC) 806**, which was a case under Section 376(2)(g) of IPC, it is opined by the medical officer about the absence of hymen and did not mention the age of tear of hymen because tear was old. No semen was found on clothes and vaginal swap. It was observed that although the doctor opined possibility of sexual assault upon victim but did not specify whether assault was recent. It was held by the Hon'ble

Supreme Court that it was highly improbable for accused to have committed offence of rape in his own house in presence of sister, mother, wife and children. It is observed that the High Court and the Trial Court convicted the accused merely on conjectures and surmises and, therefore, he was acquitted. By no stretch of imagination, this ratio would be made applicable to the case at hand for the simple reason that the offence has been committed in the room adjoining to the shop of the appellant where he was alone and no one else. The act which he did has already been elaborated in the preceding paras. Thus, this ratio would be of no help to the appellant.

63. Upshot of the aforesaid discussion would obviously result in dismissing the appeal, for, the impugned judgment and order of the Trial Court does not warrant any interference.

64. Hence, the appeal is dismissed.

**PRITHVIRAJ K. CHAVAN, J.**

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