

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO.59 OF 2018

1. Pritish Sarkar,
son of Khokan Sarkar,
24 years of age,
r/o. H.No.094,
Charmandal Paka Rastan,
Ashwatthatala Haite,
Sindrani Charmandal Vhag,
Bagda North 24, Parganas.

2. Lakshmikant Gahir,
son of Ganeshwar Gahir, aged 23 years,
r/o. Sanaphurla Chhoriagad,
Juangad Kalahandi, Orissa.

3. Yashvant Sahu,
son of Chiraunji Sahu,
aged 32 years, r/o. H.No.44, Kurmpara
Manchara Simga, Dist. Raipur,
Chattisgarh.

.... Appellants.

Versus

1. state of Goa, (through Police
Inspector, Margao, Goa).

2. Public Prosecutor,
High Court of Bombay,
Panaji, Goa.

.... Respondents.

Mr. Pavithran A.V., Advocate under Legal Aid Scheme for Appellant
No.1.

Mr. Anoop Gaonkar, Advocate under Legal Aid Scheme for Appellant No.2.

Mr. Vivek Rodrigues, Advocate under Legal Aid Scheme for Appellant No.3.

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

***Coram : M.S. Sonak &
Nutan D. Sardesai, JJ.***

***Reserved on : 26th July, 2019.
Pronounced on : 14th August, 2019.***

JUDGMENT: (Per M.S. SONAK, J.)

This Appeal is directed against the Judgment and Order dated 31st July, 2017, by which the Appellants, who were arraigned as accused No.1, accused No.2 and accused No.3 in the Special Case No.44/2013, came to be convicted for the offences punishable under Sections 324, 342, 363, and 377, read with Section 34 of the Indian Penal Code (IPC), in addition to Section 8(2) of the Goa Children's Act, 2003 and Sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012. Separate sentences, in respect of each of the offences, were imposed upon the Appellants. However, substantial sentences of imprisonment imposed upon the Appellants were directed to run concurrently. In effect, therefore, the Appellants were directed to undergo Life Imprisonment each and pay fine of

₹ 2.00 lakhs each in respect of the offences under the Goa Children's Act, 2003 and the Protection of Children from Sexual Offences Act, 2012.

2. The operative portion of the Judgment and Order dated 31/07/2017 (impugned Judgment and Order) reads, thus :

“148. It is therefore, the accused No.1, 2 and 3 are sentenced to undergo rigorous imprisonment for a term of 7 years each and are directed to pay fine of ₹ 10,000/- each, in default, to undergo simple imprisonment for 6 months each, for the offence punishable under Section 363, r/w Section 34 of I.P.C.

Further, the accused no.1, 2 and 3 are sentenced to undergo rigorous imprisonment for a term of 3 years for the offence punishable under Section 324, r/w Section 34 of I.P.C.

Further, the accused no.1, 2 and 3 are sentenced to undergo rigorous imprisonment for a term of 1 year each, for the offence punishable under Section 342, r/w Section 34 of I.P.C.

Further, the accused no.1, 2 and 3 are sentenced to undergo rigorous imprisonment for a term of 10 years each and are directed to pay fine of 25,000/- each, in default, to undergo simple imprisonment for 1 year each, for the offence punishable under Section 377, r/w Section 34 of I.P.C.

Further, the accused No.1, 2 and 3 are sentenced to undergo life imprisonment each and are directed to pay fine of 2,00,000/- each, of the Goa Children's Act, 2003 and under Section 3, punishable under Section 4 of the

Protection of Children from Sexual Offences Act, 2012.

The substantial sentences of imprisonment imposed on the accused Nos. 1, 2 and 3 shall run concurrently.

The fine amount, if any, recovered from the accused Nos. 1, 2 and 3 shall be paid to the victim boy.”

2. The case of the Prosecution is that on 21.01.2013 at 20.00 hours, near Margao Railway Station, the Appellants, with common intention, kidnapped the minor victim boy from the lawful guardianship by covering his mouth, by forcibly lifting him and taking him to a construction site of a building, which is next to the foot bridge on Calconda side, thereby committing an offence punishable under Section 363, read with Section 34 of the IPC. It is further the case of the Prosecution that the Appellants, again, with common intention, caused hurt to the minor victim boy by assaulting him with a wooden danda, slaps and fist blows, thereby committing an offence punishable under Section 324, read with Section 34 of the IPC. It is further the case of the Prosecution that at the same place, time and date, the Appellants with common intention, wrongfully restrained the minor victim boy from proceeding in the direction in which he desired to go and wrongfully confined him in a room of the said building under construction, thereby committing an offence punishable under

Section 342, read with Section 34 of the IPC. It is further the case of the Prosecution that at the same place, time and date, the Appellants, with a common intention, had carnal intercourse against the order of nature with the said minor victim boy, thereby committing an offence punishable under Section 377, read with Section 34 of the IPC. It is further the case of the Prosecution that the Appellants, with a common intention, committed a grave sexual assault upon the said minor victim boy, by having anal sex with him and also by inserting their private parts in his mouth, thereby committing an offence under Section 2(y)(i), punishable under Section 8(2) of the Goa Children's Act, 2003, as well as an offence under Section 3, punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012.

4. Charges to the aforesaid effect were framed by the Children's Court on 17th October, 2014 and 9th January, 2015.

5. In fact, it was the case of the Prosecution that the Appellants were also accompanied by yet another person, who also committed all the aforesaid offences in relation to the minor victim boy. However, it is the case of the Prosecution that this additional person could not be apprehended and, therefore, was not put on trial.

6. In the course of the trial, the Prosecution examined in all 11 witnesses. Upon conclusion of the Prosecution evidence, 313 Cr.P.C. statements of the Appellant were recorded by the Children's Court. The Appellants did not choose to lead any defence evidence. Thereupon, by the impugned Judgment and Order, the learned Children's Court has convicted and sentenced the Appellants as aforesaid. Hence, the present Appeal.

7. Though a common appeal was instituted by the Appellants, as a special case, the Appellants were permitted to be represented by separate Advocates appointed under the Legal Aid Scheme. Mr. S.R. Rivankar, learned Public Prosecutor appeared on behalf of the Respondent-State in defence of the impugned Judgment and Order.

8. Mr. Pavithran, Mr. Vivek Rodrigues and Mr. Anoop Gaonkar, learned Counsel appearing for Appellants No.1, 3 and 2 respectively, at the outset, attacked the investigation in the present matter by pointing out that no efforts whatsoever were made to apprehend, or at least investigate into the conduct of the alleged fourth person who, the minor victim boy states, was also involved in the alleged incident of 21/01/2013. They submit that failure on the part of the State and its investigating agencies to make efforts to

apprehend this fourth person, vitiates the entire investigation process and the conviction therein. They submit that on this ground itself, the impugned Judgment and Order deserves to be set aside.

9. The learned Counsel for the Appellants, whilst not denying that a crime has taken place concerning a minor victim boy, in unison, submitted that there is no legal material on record or no cogent evidence on record to link the Appellants with the unfortunate incident of 21.1.2013.

10. The learned Counsel for the Appellants submit that it is the case of the Prosecution that the so called incident took place on 21.01.2013 at about 20.00 hours near Margao Railway Station and the incident of assault, or the sexual offence, took place later in the building under construction again in the late night of 21.1.2013. The learned Counsel for the Appellants submit that at both these places it was pitch dark and, therefore, there was no way in which the minor victim boy could have identified the perpetrators of the crime. They point out that PW.2 and PW.3, Police Constables, who claim to have discovered the minor victim boy in the under-construction building at about 2.30 a.m. on 22.01.2013, have stated that there were no lights in the said building. They submit that one witness stated that there was a bulb in the room where the minor

victim boy was found lying, while, the other witnesses have referred to street lights or even moonlight. They point out that there are serious contradictions and material omissions on the issue of there being any source of light in the building under-construction, in any case, source light, sufficient for the minor victim boy to identify his assailants. They submit that the evidence on the aspect of street light is also sketchy and contradictory. For all these reasons, they submit that there was no way in which the minor victim boy could have identified his assailants, with certainty. They submit that in such circumstances, it was necessary for the Prosecution to hold Test Identification Parade (TIP), which was never held by the Prosecution. The learned Counsel submit that failure to hold the TIP, vitiates the investigation and renders it extremely unsafe to convict the Appellants, who are young boys now sentenced to life imprisonment.

11. The learned Counsel for the Appellant submit that it is the case of the Prosecution that apart from the Appellants there were at least 10 to 12 persons in the building under construction. However, no person other than the Appellants were apprehended and put to trial by the Prosecution. They submit that this is yet another serious infirmity in the investigation which vitiates the impugned Judgment and Order.

12. The learned Counsel for the Appellants submit that whilst there is no legal bar to placing reliance on the sole testimony of the victim, particularly in case of sexual assault, in the present case, the testimony of the minor victim boy is riddled with so many contradictions and material omissions that it was not at all safe to rely upon such testimony and on such basis to sentence the Appellants to life imprisonment.

13. The learned Counsel for the Appellants point out that the minor victim boy at one stage deposed that two persons were found on the ground floor in one room of the building under construction and two persons in one room on the first floor, when he was along with PW.2 and PW.3. However, at a later stage, the minor victim boy (PW.1) stated that only three persons were found and the fourth person was not found. PW.1 has also stated that there were no persons in the building under construction at the time of the incident. However, the material on record, indicates that there were at least 10 to 15 persons in the building under construction. The learned Counsel for the Appellants submit that in such a state of evidence, the learned Children's Court erred in relying upon the testimony of PW.1 for convicting and sentencing the Appellants to life imprisonment.

14. The learned Counsel for the Appellants point out that the Investigating Officer – PW.11 had very clearly deposed that PW.2 and PW.3, Police Constables, upon discovery of the minor victim boy in the building had telephonically informed him about the incident and only thereafter, he had gone to the scene of offence. Learned Counsel for the Appellants point out that PW.11 has further deposed that upon arriving at the scene of offence, PW.2, PW.3 and PW.1 had met one labourer, who informed them that they have caught a robber, whose hands and feet were tied and was kept in one of the rooms in the building under construction. They further submit that PW.11 had clearly admitted that the labourer referred to minor victim boy as the robber. The learned Counsel for the Appellants point out that despite this, the said labourer was neither apprehended, nor his statement was recorded. They submit that this is a very serious flaw in the investigation, which again vitiates the entire investigation and conviction recorded therein.

15. Learned Counsel for the Appellants point out that there is a variance between the version put forth by PW.1, PW.2 and PW.3 on one hand, and the version put forth by PW.11-Investigating Officer on the other. They point out that the minor victim boy PW.1 had made no reference to PW.11 coming to the site and together apprehending the Appellants. Instead, it is the case of PW.11-

Investigating Officer that he was called to the site and only thereafter, the Appellants were apprehended. They submit that these are major contradictions which have not been explained by the Prosecution and the impugned Judgment and Order has failed to give due credence to these material contradictions in the case put forth by the Prosecution.

16. The learned Counsel for the Appellants point out that the medical evidence also does not incriminate any of the Appellants. They have pointed out that even the evidence in the form of blood grouping or DNA profiling does not, in any manner, incriminate any of the Appellants. They point out that absence of smegma or presence of sand particles in the private part of one of the Appellants, was by no means sufficient to connect the Appellants to the incident in question. They submit that in fact the medical evidence and the evidence of the forensic experts, support the case of the Appellants, rather than the case of the Prosecution.

17. The learned Counsel for the Appellants submit that the sentence imposed on the Appellants is too severe and aspects like age of the Appellants have not at all been taken into consideration. The learned Counsel for the Appellants clarify that they very firmly maintain that the Appellants deserve clean acquittal in this matter, or at least an acquittal on the basis that the Prosecution has failed to

establish, beyond reasonable doubt, involvement of the Appellants in the unfortunate crime upon the minor victim boy. They, therefore, clarify that the submission on the aspect of severity of the sentence is only in the alternative, and, may not be construed as otherwise.

18. The learned Counsel for the Appellants rely on certain decisions to submit that the provisions relating to reversal of burden of proof do not absolve the Prosecution from discharging the initial burden and establishing that the Appellants were indeed involved or connected with the alleged crime.

19. The learned Counsel for the Appellants point out that there is absolutely no evidence to invoke the provisions of Section 34 of the IPC. There is no evidence brought on record by the Prosecution that the Appellants knew each other or that they had any occasion or opportunity to plan the commission of any crime. The learned Counsel for the Appellants submits that in the absence of any legal evidence, the Prosecution erred in invoking the provisions of Section 34 of IPC and the learned Children's Court also erred in applying the said provision, in order to convict the Appellants. They submit that this is yet another serious infirmity in the impugned Judgment and Order.

20. The learned Counsel for the Appellants have also relied

upon certain decisions to the effect that in such matters suspicion can never take the place of proof and that distance between '*may*' and '*must*' be traversed by the Prosecution by placing on record legally admissible and cogent evidence which they submit, in the present case, the Prosecution has miserably failed. For all the aforesaid reasons, the learned Counsel for the Appellants submit that the impugned Judgment and Order deserves to be set aside and the Appellants deserve to be set at liberty.

21. Mr. Rivankar, learned Public Prosecutor, defends the impugned Judgment and Order on the basis of the reasoning reflected therein. He submits that it is settled position of law that conviction can be sustained even on the basis of a sole testimony of the victim, particularly in the matters involving sexual offences. He submits that in the present case, PW.1 minor victim boy has deposed clearly and cogently and there is absolutely no case made out to discard the testimony of PW.1 by relying upon some minor and irrelevant contradictions or omissions. He submits that the testimony of PW.1 has to be construed in its entirety. The testimony, so construed, clearly establishes that it is the Appellants who have committed the gruesome crime upon the minor victim boy.

22. Mr. Rivankar submits that there are no contradictions or material omissions, in so far as the testimony of PW.2 and PW.3 or

for that matter, PW.11 are concerned. He submits that in absence of smegma and the presence of sand particles on the private part of one of the Appellants, constitute clinching evidence. In any case, this evidence is sufficient to corroborate the evidence of PW.1 which, even other, does not require any corroboration. He also relies upon certain rulings, particularly in the context of appreciation of evidence, and submits that there is no infirmity whatsoever in the impugned Judgment and Order.

23. On the aforesaid basis, Mr. Rivankar, learned Public Prosecutor submits that this Appeal may be dismissed and the impugned Judgment and Order made by the Children's Court be upheld.

24. Rival contentions now fall for our determination.

25. In the present case, the minor victim boy was aged 14-15 years at the time of the incident. This aspect is established, *inter alia*, by the medical evidence. There was no challenge to this aspect either during the course of the trial, or in the course of hearing of this Appeal. Thus, it can be said that the Prosecution has established, beyond reasonable doubt, that the minor victim boy was aged 14-15 years and, consequently, was a child for the purposes of the Goa Children's Act, 2003 and the Protection of Children from Sexual

Offences Act, 2012.

26. The evidence on record, including, in particular, the medical evidence also establishes beyond doubt that the minor victim boy was not only physically assaulted, but also sexually assaulted. In particular, the medical evidence establishes beyond any reasonable doubt the position that the minor victim boy was subjected to forcible carnal intercourse. In fact, in the course of the trial, or for that matter in the course of hearing of this Appeal, there was no challenge in so far as even this aspect of the matter is concerned.

27. Learned Counsel for the Appellants, in fact, submitted that there is no serious dispute as to the age of the minor victim boy, or the fact that the minor victim boy was subjected to sexual assault as described in the charges framed against them. However, the learned Counsel for the Appellants, with much vehemence, contended that there was absolutely no legal evidence or cogent material on record to connect the Appellants with this crime. Therefore, the moot issue which arises in this appeal is, whether there is legal evidence sufficient to establish beyond reasonable doubt that it is the Appellants who were the perpetrators of the crime against the minor victim boy and consequently, whether the Appellants have rightly been convicted and sentenced for the offences alleged against them.

28. In a catena of decisions, the Hon'ble Supreme Court has made it clear that the evidence of all child witnesses cannot be rejected *per se*, but the Court, as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of the child witness.

29. The testimony of child witness cannot be rejected merely on the ground of tender age. In fact, in the present case, the minor victim boy was aged 14-15 years at the time of the incident. The Hon'ble Supreme Court has further held that some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix-up what the witness saw with what he/she is likely to imagine to have seen. While appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior presupposes of the prosecution, the courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not. (see ***Suryanarayana vs. State of Karnataka***, (2001) 9

SCC 129).

30. In State of *H.P. vs. Asha Ram*¹ the Hon'ble Supreme Court has held that it is now well settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement. The Courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also well settled principle of law that corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a requirement of law, but a guidance of prudence under the given circumstances. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a good ground for throwing out an otherwise reliable prosecution case.

31. In *Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat*² the Apex Court pointed out that in the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of

¹ (2005) 13 SCC 766

² (1983) 3 SCC 217

corroboration as a rule is adding insult to injury. In this case, it was pointed out that the evidence of the victim of sexual assault stands on a par with evidence of an injured witness. Therefore, just as a witness who has sustained an injury, which is not shown or believed to be self-inflicted, is the best witness in the sense that he is least likely exculpate the real offender, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding.

32. In *Madan Gopal Kakkad v. Naval Dubey*³ the Hon'ble Supreme Court has observed that even in cases wherein there is lack of oral corroboration to that of a prosecutrix, a conviction can be safely recorded, provided the evidence of the victim does not suffer from any basic infirmity, and the “*probabilities factor*” does not render it unworthy of credence, and that as a general rule, corroboration cannot be insisted upon, except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming.

33. In *Ranjit Hazarika v. State of Assam*⁴, the Hon'ble Supreme Court held that non-rupture of hymen or absence of injury on victim's private parts does not belie her testimony. This Court

³ (1992) 3 SCC 204

⁴ (1998) 8 SCC 635

further held that the opinion of the doctor that no rape was committed cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. This Court held that the evidence of the prosecutrix was amply corroborated by her mother and father whom she immediately informed about the occurrence.

34. Applying the aforesaid principles, the testimony of PW.1, the minor victim boy will have to be analysed, appreciated and evaluated.

35. At the outset, it is necessary to state that it was not even the case of the Appellants that PW.1 had an axe to grind against them or that PW.1 was tutored by any person who had an axe to grind against them to falsely implicate the Appellants. No doubt, absence of any motive to falsely implicate the Appellants is certainly not some substantial ground to sustain the conviction against the Appellants, if, otherwise, there is no legal or cogent evidence on record. However, this aspect has been clarified at the outset, because the Hon'ble Supreme Court in the case of ***Suryanarayana*** (supra) has observed that while appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored. In the absence of any allegation retarding tutoring or using the child witness for ulterior presupposes of the prosecution, the courts have

no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not.

36. Secondly, in the present case, it is not as if the minor victim boy was of extremely tender age at the time when the crime perpetrated upon him. At the time of his deposition, the medical evidence on record, as noted earlier, establishes that the minor victim boy was 17-18 years of age. This means that at the time when the crime was perpetrated upon him, he was 14-15 years of age. This is also amply borne out of medical evidence to which there was no challenge.

37. The minor victim boy has deposed that he used to collect scrap along with his mother. On the fateful day, at about 8.30 p.m., he was walking on the Railway track at old Railway Station, Margao towards the Railway Station to take a train to go back to Sanvordem, after delivering the scrap. Whilst walking, he stood by the side of the track to pass urine and at that time, suddenly four unknown male persons came and stood in front of him. This scared him, as they had appeared suddenly. He has deposed that these four persons started assaulting him with slaps and fist blows. One of them caught hold of his mouth and three of them lifted him and took with them to a building under construction, next to the Railway bridge.

38. PW.1 has then deposed that the four unknown persons took him to the first floor of the said building, kept him on a pile of sand, with his face downwards. They tore his underwear and one after another, three of them had anal sex with him (mera gand mara). He has deposed that he was also assaulted with wooden danda by them. He has deposed that one of them inserted his private part (lauda) in his mouth. He has deposed that they brutally pulled his private part, on account of which he suffered injuries to his private part. He has deposed that they caught-hold of his neck tightly with nails, and that he still has marks on his neck. PW. 1 in fact showed the nail marks on his neck.

39. PW.1 then deposed that the accused persons left him lying nude at the spot, with his hands and legs tied with a rope. He deposed that his body was paining very badly and he was crying by lying at the spot. He deposed that after some time, two policemen came to the spot and they saw him crying. He deposed that he narrated the incident to the policemen. He further deposed that the policemen asked him whether he was in a position to show the persons who assaulted him. Thereupon, he accompanied the police into the room of the building under construction and found three Appellants, who were then apprehended by the police.

40. PW.1 initially deposed that he, along with the police, found two persons on the ground floor in one room and two persons in one room on the first floor. Very soon, PW.1 corrected himself and stated that only three persons were found from the building and the fourth person was not found. According to us, this is too minor a contradiction, if at all it can be called a contradiction, to discard the otherwise cogent and clear testimony of PW.1.

41. PW.1 was confronted with his complaint wherein it is recorded that he had pointed out three persons who were sleeping in three different rooms in the building and, was given an opportunity to explain his deposition that the police had found two persons on the ground floor in one room and two persons, on the first floor. He stated that he could not state why the complaint was not recorded in his exact words.

42. Much was sought to be made by the learned Counsel for the Appellant by styling this as some material contradiction. Again, we are afraid, we cannot accept this to be some material contradiction as is sought to be made out by the Appellants. Crux of the deposition of PW.1, which we must say, inspires considerable confidence, is that he pointed out to three persons who had physically and sexually assaulted him and on such basis, the said three

persons were apprehended by the Police from the buidling. The discrepancy in the context of four persons being taken and later correction to three persons or the so called discrepancy in the context of the persons being found in one room or two rooms or three room are, really, not material discrepancies. Testimony of PW.1 has to be read in its entirety. On the basis of such discrepancies which, according to us, are quite minor, there is no good ground to discard the testimony of PW.1, which, otherwise, inspires confidence and is found to be reliable.

43. On the issue insufficient source of light and consequent value to be attached to the identification of he Appellants by the minor victim boy (PW.1), again, we cannot discount the clear and cogent deposition of the minor victim boy (PW.1). He has deposed that at around 8.30 p.m. when he was walking on the Railway track at old Railway Station, Margao he stopped by the side of track to pass urine. He deposed that at that time, suddenly four unknown male persons came and stood in front of him.

44. According to us, this sudden encounter, during which the minor victim boy (PW.1) was able to quite clearly see such persons, rendered him quite fit to identify them. This is not a case of the witness seeing some persons in the passing. This is a case where the

minor victim boy (PW.1) was quite suddenly confronted by these persons. This is a case where the minor victim boy (PW.1) was quite scared at the sudden appearance of these persons. Surely, therefore, there can be nothing seriously amiss if PW.1 identifies such persons. Further it is necessary to note that such identification has been after only a few hours since PW.1 was accosted on the Railway track by these persons in such a sudden manner.

45. Besides in the interregnum between accosting and the identification, PW.1 has deposed that these very persons forcibly took him to a room in a nearby building under construction and assaulted him both, physically and sexually. Identification by PW.1 of the Appellants has to be evaluated from this perspective. According to us, there was no error on the part of the learned Children's court in relying upon such identification by PW.1 looking not just to the material placed by the Prosecution on record, but also applying the law laid down by the Hon'ble Supreme Court in the several decisions referred to earlier explaining the scope of evaluation of such material.

46. The learned Counsel for the Appellants only pointed out the discrepancies in the depositions of PW.1, PW.2, PW.3 and PW.11 on the aspect of absence of light in the room or the building under construction where PW.1 was physically and sexually assaulted.

However, according to us, the discrepancies are, by no means, significant. The crux of the evidence of all these witnesses, on the aspect of source of light and the consequent identification is quite consistent and not been shattered in the course of cross examination.

47. On behalf of accused No.1, the minor victim boy (PW.1) was cross examined basically on the aspect of source of light and rest of the accused persons, more or less, adopted the line of cross examination on behalf of accused No.1. In the cross examination, PW.1 has clearly deposed that there was light source at the scene of offence and at the relevant time, it was not totally dark. PW.1 has denied the suggestion that there was no electric pole nearby the building or that no street lights were available.

48. PW.2, the Police Constable, who found the minor victim boy (PW.1) has deposed that he saw torch light emanating from the building under construction and that is what promoted him and PW.3 to investigate. This witness has also deposed that there was street light and denied the suggestion that there were no street lights nearby the building. The reference to torch light has to be construed in the context of deposition of PW.3, as well, who stated that he, along with PW.2, noticed torch light and that is what promoted them to investigate in the building under construction. PW.2 has

categorically maintained that street light was available when PW.1-minor victim boy identified the accused persons. This testimony has not been shaken in the cross examination.

49. PW.3-second Police Constable who accompanied PW.2, has also deposed that he saw a torch from the under construction building and, therefore, they went in to investigate. PW.3 deposed that there is a road in front of the building, but he did not remember if there were street lights. He, however, stated that there was no light available in the building. Merely because PW.3 could not remember whether there were street lights or not, it is not possible to discard or discount the clear and cogent testimony of both, PW.2 and PW.3 on this aspect.

50. It must be remembered that the minor victim boy (PW.1) has had an encounter or a close encounter with the accused persons and, therefore, he was in a best position to identify the accused persons. He had no interest in identifying some persons other than his assailants. Accordingly, based upon some minor discrepancies arising out of PW. 3 not remembering whether there were street lights or not, we cannot discard or discount the clear and cogent evidence of PW.1 and PW.2 on this aspect.

51. The identification by PW.1 has taken place hardly within a

couple of hours from the incident at the Railway track, following by the unfortunate incident in the room of the under-construction building. There is no much time lag. This is also not a case where PW.1 simply had some fleeting glance at the accused persons whilst they were committing some crime involving some other persons. This is a case where the accused persons had suddenly confronted PW.1 on the Railway track, forcibly taken him in a room of an under-construction building and thereafter from the close quarters physically and sexually assaulted him. In these circumstances, we cannot subscribe to the various doubts raised by the learned Counsel for the Appellants on the issue of absence of source of light to effect a proper identification by the victim, hardly a few hours of the incident. Based upon such doubts, which according to us neither arise, nor can be said to be reasonable, we cannot say that there was any deficit in the identification of the accused persons by the minor victim boy (PW.1).

52. The fact that the Investigating Agency did not place on record the steps taken by them for apprehending the fourth person, who also physically and sexually assaulted PW.1 along with the Appellants, makes no serious dent to the conviction recorded against the Appellants. On such basis, the Appellants cannot seek any advantage or purport to create any doubt as to their own involvement

in the crime. Similarly, just because the Investigating Agency may not have examined the 10 to 12 persons in the building under-construction neither vitiates the investigation process, nor renders the conviction against the Appellants infirm. Once the minor victim boy (PW.1), hardly within a couple of hours from the incident, identified the Appellants, there was really no reason to pursue the matter any further and investigate the 10 to 12 persons who might have been sleeping in the under-construction building at night time. According to us, there was really no reason for PW.1 to identify the Appellants or to exclude the real perpetrators of the crime against him. As we have already noted, the testimony of the minor victim boy (PW.1) inspires confidence and is found to be reliable. Based upon the minor discrepancies here and there, there is absolutely no case made out so as to discard the testimony of PW.1.

53. Besides, this is not a case where the conviction is based solely upon the testimony of the minor victim boy (PW.1). The medical evidence on record corroborates the version of the minor victim boy (PW.1) on the aspect of the injuries sustained by him. The medical evidence, in relation to the Appellants, refers to the absence of smegma and the finding of sand particles on the private part of one of the Appellant. To a certain extent, this medical evidence is quite consistent with the hypothesis put-forth by the

Prosecution. Accordingly, it cannot be said that there is any error in the view taken by the learned Children's Court in appreciating and evaluating the material on record.

54. The so called discrepancies in relation to the depositions of PW.1, PW.2 and PW.3 on the aspect of whether the Appellants were found in one room or in several rooms, are really not some serious discrepancies. The crux of testimony of all these witnesses is that the minor victim boy (PW.1) pointed out to and identified the Appellants within hardly few hours from the crime. The Appellants were apprehended on the basis of such identification from the very same building under-construction where the minor victim boy (PW.1) was tied and kept after he was physically and sexually assaulted by the Appellants. Therefore, on the basis of some minor contradictions or discrepancies, there is no scope to discard or discount the otherwise cogent and clear testimony of PW.1.

55. The circumstance that a labourer who is alleged to have stated that a thief was caught and tied and kept in the room, also does not make any dent to the case of the Prosecution. The minor victim boy (PW.1) has deposed that he was untied by the police and thereafter he led the police to the Appellants and identified the Appellants as the perpetrators of the crime upon him. PW.1 cannot

be expected to make a distinction between PW.1 and PW.2 on one hand and PW.11 who is the Investigating Officer, on the other hand. In so far as PW.1, the minor victim boy is concerned, he merely spoke about the rescue by the Police and the subsequent identification of the Appellants. Therefore, nothing much turns on the circumstance of PW.1 making no specific reference to PW.1 at the time of his rescue or at the time when he identified the Appellants. Based upon such minor discrepancies, there is no case made out to disregard or discount the otherwise clear and cogent testimony of the minor victim boy (PW.1).

56. The learned Counsel for the Appellants relied upon the cases of *Naresh Kumar alias Nitu vs. State of Himachal Pradesh*⁵ and *Maya Devi and another vs. State of Haryana*⁶ in the context of reverse of burden of proof under the provisions of the Goa Children's Act, 2003 and the Protection of Children from Sexual Offences Act, 2012. According to us, it is not necessary to go into this issue because we are satisfied that the Prosecution has discharged the burden of proving, beyond reasonable doubt, the involvement of the Appellants in the present case. Therefore, even without referring to the provision of reverse burden of proof, as is made applicable under the said Acts, the conviction of the Appellants in the present

⁵ (2017) 15 SCC 684

⁶ (2015) 17 SCC 405

case, can be sustained. There is, accordingly, no necessity to analyse or apply the ruling in *Naresh Kumar* (supra) or *Maya Devi* (supra) relied upon by the learned Counsel for the Appellants.

57. Judgment in the case of *Noor Ahammad and ors. vs. State of Karnataka*⁷ was relied upon to contend that failure to hold a test identification parade was fatal to the case of the Prosecution. The fact situation in *Noor Ahammad* (supra) offers to no parallel whatsoever to the fact situation in the present case. There, the evidence on record indicated that the incident took place at night at around 3.00 a.m. at a place with improper light, when the accused persons were intercepted while transporting stolen teak-wood. The identification of the accused persons, by the Prosecution witnesses, was made for the first time in the Court, after a gap of more than 2 years from the date of the incident. It is, in these circumstances, that the Hon'ble Apex Court held that the identification was not beyond reasonable doubt and the test identification parade ought to have been held. In the present case, the identification was virtually within hours from the time of the incident. Besides, there is evidence on the aspect of sufficient light, enabling the minor victim boy to identify the assailants who, not only physically assaulted, but also sexually assaulted him on close quarters. The ruling in *Noor Ahammad* (supra) is, therefore, of no assistance to the Appellants.

⁷ (2016) 3 SCC 325

58. Ruling in the case of *Sujit Biswas vs. State of Assam*⁸ was cited for the proposition that suspicion can never take the place of legal proof. There can, obviously, be no doubt regards this proposition. However, in the present case, the Appellants have not been convicted on the basis of mere suspicion, but there is clear and cogent evidence available on record in order to sustain the conviction. Besides, in *Sujit Biswas* (supra), the Hon'ble Apex Court has held that a reasonable doubt is not an imaginary, trivial or merely probable doubt, but a fair doubt that is based upon reason and common sense. On this aspect of the matter, the ruling in fact assists the case of the Prosecution, rather than the Appellants.

59. The fact situation in *Gowrishankara Swamigalu vs. State of Karnataka and another*⁹ was completely different from the fact situation in the present case. There the Hon'ble Supreme Court noted that it was unbelievable that the accused, every morning at 8 o'clock, committed unnatural offence of sodomy with the victim continuously for a period of 7 days inside the school premises. It is in these circumstances that the appellant-accused came to be acquitted in the said case. This ruling is of no assistance to the Appellants. In this case, another significant factor was that the medical evidence on

⁸ (2013) 12 SCC 406

⁹ (2008) 14 SCC 411

record ruled out commission of unnatural offence under Section 377 of the IPC. In the present case, the medical evidence completely supports the version of the minor victim boy that he was subjected to carnal intercourse.

60. The case of *Mohammad Imdar Ali vs. State*¹⁰ also does not assist the Appellants. In that case, it was held that charge can be held to be proved only when there is certain and explicit evidence and no person can be held guilty on pure moral conviction, however grave the alleged offence may be. In the present case, as noted earlier, we are satisfied that the conviction is based upon legal evidence on record. This is not a case of record of conviction on the basis of moral considerations or on the basis of mere suspicion. The ruling in *Mohammad Imdar Ali* (supra) is, therefore, of no assistance to the Appellants.

61. Therefore, upon evaluation of the evidence on record and upon consideration of the various contentions raised by and on behalf of the Appellants, we are not persuaded to interfere with the conviction of the Appellants as recorded by the learned Children's Court. In the present case, according to us, the Prosecution has proved the involvement of the Appellants in the crime alleged against them, beyond reasonable doubt.

¹⁰ Cri. A.No.39 of 2013 & ors. dated 08/02/19

62. Though, we are quite satisfied that the conviction against the Appellants is required to be upheld, the sentence of life imprisonment and the fine of ₹ 2.00 lakhs imposed upon the Appellants for the offences under the Goa Children's Act, 2003 and the Protection of Children from Sexual Offences Act, 2012, according to us, warrants revisit in the facts and circumstances of the present case. It is possible that the learned Children's Court was under an impression that this is the minimum sentence prescribed under the two Acts and, therefore, perhaps felt obliged to impose this sentence upon the Appellants.

63. The learned Children's Court, in the operative portion of the impugned judgment and order, has sentenced the Appellants in the following manner :-

“Further, the accused no.1, 2 and 3 are sentenced to undergo life imprisonment each and are directed to pay fine of Rs.2,00,000/- each, ...Goa Children's Act, 2003 and under Section 3, punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012.”

64. According to us, the learned Children's Court, was required to be more careful before imposing such an omnibus sentence of life imprisonment. This is because there is some difference in the punishments provided under the Goa Children's Act,

2003 and under the Protection of Children from Sexual Offences Act, 2012.

65. In this case, the charge framed against the Appellants was that they committed sexual offence of “*Grave Sexual Assault*” as defined under Section 2(y)(i) of the Goa Children's Act, 2003. There was a further charge framed against the Appellants that they committed an offence under Section 3 of the Protection of Children from Sexual Offences Act, 2012 as well.

66. The charge itself stated that the offence, as defined under Section 2(y)(i) of “*Grave Sexual Assault*”, is punishable under Section 8(2) of the Goa Children's Act, 2003. Section 8(2) of the Goa Children's Act, 2003 provides that whosoever commits any child abuse or sexual sexual assault, as defined under the said Act, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine of ₹1,00,000/-. This Section further provides that 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 pay a fine of ₹ 2,00,000/-.

67. From the aforesaid, it is quite clear that the minimum punishment for the offence of “*Grave Sexual Assault*”, in terms of Section 8(2) of the Goa Children's Act, 2003 is imprisonment of ten years and the learned Children's Court, depending upon other factors may extend this to life imprisonment. Therefore, it is not as if, in every case, a person convicted for the offence of “*Grave Sexual Assault*”, is required to be sentenced to undergo life imprisonment, though, such a person, may be required to undergo imprisonment for a term that shall not be less than ten years. This is the position under the Goa Children's Act, 2003. Therefore, the question is, whether, in the facts and circumstances of the present case, the learned Children's Court, was justified in imposing the maximum punishment of life term upon the Appellants. The issue is not whether the learned Children's Court lacks jurisdiction to do so, but the issue is, whether discretion in the matter of sentencing was properly exercised or not.

68. Now, as noted above, the learned Children's Court has purported to sentence the Appellants for life imprisonment, even under the provisions of the Protection of Children from Sexual Offences Act, 2012, for having committed an offence under Section 3 of the said Act of 2012. Section 3 of the Protection of Children from Sexual Offences Act, 2012 refers to offence of “*Penetrative Sexual Assault*”. Section 4 of the Protection of Children from Sexual

Offences Act, 2012 provides that whoever commits penetrative sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine. Here again, the punishment of imprisonment for life is not minimum punishment prescribed, but rather the same is maximum punishment prescribed. The minimum punishment prescribed under Section 4 of the Protection of Children from Sexual Offences Act, 2012 is seven years imprisonment, unlike the ten years term prescribed under Section 8(2) of the Goa Children's Act, 2003 for offence of "*Grave Sexual Assault*".

69. Thus, it is clear from the perusal of the provisions of the Goa Children's Act, 2003 and the Protection of Children from Sexual Offences Act, 2012 that imprisonment for a life term is not minimum punishment provided for offences of "*Grave Sexual Assault*" or "*Penetrative Sexual Assault*", but rather, this appears to be maximum punishment provided under the said Act. The minimum punishment provided under the Goa Children's Act, 2003 is of ten years and under the Protection of Children from Sexual Offences Act, 2012, is seven years. These aspects were required to be borne in mind by the learned Children's Court, before passing the omnibus sentence upon the Appellants.

70. Apart from aforesaid, the learned Children's Court does not appear to have adverted to certain other considerations, which ought to have been adverted to in sentencing process. In particular, we feel that the age of the Appellants, their backgrounds and their proclivity to reformation, were required to be taken into consideration, but have not been taken into consideration. By now, it is mostly accepted that the reformation is one of the legitimate goals of prison sentences and therefore, the Courts are required to advert to this aspect along with all other relevant considerations and aspects.

71. The Courts have to necessarily balance the demands of retribution and deterrence on one hand and the demands of reformation on the other. Just as the sentence cannot be manifestly inadequate, so also the sentence must not be dispassionately severe. The principles of proportionality in sentencing are, by now, well entrenched in our criminal jurisprudence.

72. In *Mohammad Giasuddin vs. State of Andhra Pradesh*¹¹ the Hon'ble Supreme Court held that a holistic view of sentencing is apt to be more rewarding. Therefore, the emphasis has to be as much as on man as on the system, on the inner imbalance as on the outer tensions. The Hon'ble Supreme Court has proceeded to observe that crime is a pathological aberration, that the criminal can ordinarily be

¹¹ (1977) 3 SCC 287

redeemed, and the State has to rehabilitate rather than avenge. The sub-culture that leads to antisocial behaviour has to be countered not by undue cruelty, but by secularisation. Therefore, the focus of interest in penology is the individual, and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. Sentencing has to be viewed as reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of social defense. Therefore, a therapeutic, rather than an '*in terrorem*' outlook, should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind.

73. Applying the aforesaid principles to the facts of the present case, we are of the opinion that the aspects like the Appellants being aged 19, 20 and 28 years on the date of the crime; aspect relating to the background of the Appellants; aspect of the Appellants proclivity reformation; aspect that this was not a case of murder of the minor victim boy; the aspect that life long imprisonment might turn the Appellants into hardened criminals, were required to be considered before imposing sentence of life imprisonment and fine of ₹ 2.00 lakhs. If, all such aspects are considered, no doubt, together with the aspect that the Appellants have perpetrated serious crime upon

the minor victim boy aged 14-15 years, according to us, the interests of justice will be better served, if the Appellants are sentenced to imprisonment of 10 years each and are directed to pay fine of ₹ 25,000 each, in respect of the offences under the Goa Children's Act, 2003 and the Protection of Children from Sexual Offences Act, 2012. Similarly, we are of the opinion that the in default sentences imposed upon the Appellants are rather severe and the same are also required to be reduced to 3 months in each case. The sentences imposed are, accordingly, required to be modified.

74. Consequently, we partly allow this Appeal. The conviction of the Appellants for the offences for which they were charged is, hereby, upheld. However, the sentences imposed upon the Appellants are modified as follows :

- (I) The 'in default imprisonment' for the offence punishable under Section 363, r/w Section 34 of I.P.C. is reduced from 6 months each, to 3 months each;
- (II) The 'in default imprisonment' for the offence punishable under Section 377, r/w Section 34 of I.P.C. is reduced from one year to 3 months;
- (III) The substantive sentence of life imprisonment under the Goa Children's Act, 2003 and fine of Rs.2,00,000/- is reduced to the sentence of rigorous

imprisonment for a term of ten years each and fine of Rs.25,000/- each;

(IV) The substantive sentence of life imprisonment under the Protection of Children from Sexual Offences Act, 2012 is reduced from life imprisonment to a term of ten years and a fine amount is also reduced from Rs.2,00,000/- to Rs.25,000/-;

(V) In default the sentences for failure to pay the fines in each case is reduced from one year to three months;

(VI) The substantive as well as 'in default the sentences' of imprisonment are ordered to run concurrently.

75. Before we part with this Judgment, there is necessity to advert to two aspects.

76. Firstly, we must record our appreciation at the thorough manner in which the learned Counsel for the Appellants, who are appointed under the Legal Aid Scheme, presented the matter on behalf of the Appellants.

77. Mr. Pavithran, Mr. Vivek Rodrigues, and Mr. Anup Gaonkar argued the Appeal after thorough study both, on facts as well as law. Although we may not have accepted most of their

submissions, we would be failing in our duty, if we do not record our appreciation for their efforts. We accordingly do so.

78. Secondly, we wish to invite the attention of the State Government to the Goa Victim Compensation Scheme, 2012, framed by them for payment of compensation to the victims of crime. The State Government has framed the said Scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation. According to us, this is a fit case where the minor victim boy, in the present matter, deserves to be compensated by the State Government under the provisions of the said Scheme. If, for any reason, the State Government is unable to compensate the victim minor boy involved in the present case under the said Scheme, then, in terms of Section 33(8) of the Protection of Children from Sexual Offences Act, 2012, we direct the State Government to pay the compensation to the minor victim boy for the physical and mental trauma caused to him on account of the crime perpetrated upon him. The compensation amount can always be determined on the basis indicated in the Scheme of 2012. We, accordingly, direct the State Government to pay compensation to minor victim boy and file a compliance report in this Court within three months from today.

79. The impugned judgment and order, in so far as it convicts the Appellants is upheld. However, the sentences imposed upon each of the Appellant stands modified in the aforesaid terms and shall operate accordingly.

80. The Appeal is partly allowed and disposed of in aforesaid terms.

Nutan D. Sardesai, J.

M.S. Sonak, J.