

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO. 39 OF 2015

Mujeeb Abubakar,
Son of late Ibrahim Abubakar,
Aged 30 years, Driver,
r/o H.no. 55, Gallint Bogmalo,
Vasco, Goa.
Presently in Central Jail,
Aguada Goa.

..... Appellant

Versus

State
(through Vasco Police Station)
Vasco, Goa.

..... Respondent

Mr. Anthony D'Silva, Advocate for the Appellant under the Legal Aid Scheme.

Mr. Pravin Faldessai, Additional Public Prosecutor for the State.

***Coram : M.S. Sonak &
Smt. M.S. Jawalkar, JJ.***

Date : 14th September, 2020.

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

Heard Mr. Anthony D'Silva, under the Legal Aid Scheme and Mr. Pravin Faldessai, learned Additional Public Prosecutor for the State.

2. The challenge in this Appeal is to the Judgment and Order dated 10th October, 2014, made by the learned Children's Court in the State of Goa in Special Case No.33/2009, convicting the Appellant for the Offence punishable under Section 376 of the Indian Penal Code, read with Section 8(2) of the Goa Children's Act, 2003, as also for fine under Section 2(m), punishable under Section 8(2) the Goa Children's Act, 2003 (said Act). The Appellant was, however, acquitted of the offence punishable under Section 328 of the IPC.

3. By the impugned Judgment and Order, the Appellant was sentenced to undergo imprisonment for a term of 12 years for the offence punishable under Section 376 of the IPC, read with Section 8(2) of the said Act and also directed to pay fine of ₹2,00,000/-, in default, to undergo simple imprisonment for a period of 2 years. Further, the Appellant was also sentenced to undergo rigorous imprisonment for a term of 3 years for the offence punishable under Section 2(m), punishable under Section 8(2) of the said Act and fine of ₹1,00,000/-, in default, to undergo simple imprisonment for a period of one year. The substantive sentences of imprisonments were ordered to run concurrently. The Appellant was, however, granted the benefit of Section 428 of the Cr.P.C.

4. The case of the Prosecution in this matter is that the Appellant on 26/04/2009, between 20.30 hours to 24.00 hours, near Bogmalo Church, offered lift to the minor victim girl of 14 years in

his vehicle and on the pretext of dropping her, administered her some stupefying or unwholesome substance due to which she started feeling drowsy, with an intention to commit offence. Further the Appellant, took the victim girl near one stone crusher machine, Chicolna, Bogmalo, Vasco and committed grave sexual assault and raped her in a Maruti vehicle bearing registration No.GA-02-V-2702.

5. Mr. Silva, the learned Counsel for the Appellant has attached the conviction and sentencing on several grounds. He points out that there is no evidence about administering any substance to the victim and, in fact, the Appellant has been acquitted of this charge. He points out that the testimony of the victim herself carries no credence since it inspires no confidence. He points out to the medical evidence on record which states that there were no injuries on the private part of the Appellant. He points out that in any case, the evidence of PW.4 is non-committal. For all these reasons, he submits that the impugned judgment and Order warrants interference.

6. Mr. Silva points out that in fact, there is a serious dispute as to whether the victim was below 16 years of age on the date of the offence. He points out that in this case, though the victim was stated to be attending school, neither has any school certificate been produced, nor the Headmaster or the Principal of the School was examined by the Prosecution. He points out that the age of the victim has only been determined on the basis of the ossification test,

even then the same was found to be 16 years, plus or minus 6 months. He refers to the deposition of the Doctor PW.5, who has also confirmed the same position. He refers to the decision of the Hon'ble Supreme Court in *Rajak Mohammad v. State of Himachal Pradesh* - (2018) 9 SCC 248 to submit that the benefit of doubt in such matters must be given to the accused. He refers to the provisions of Section 2(d) of the said Act, including, in particular, the proviso thereto and submits that the learned Children's Court basically lacked jurisdiction to take cognizance of the matter.

7. Mr. Silva submits that by now the Appellant has already suffered more than 10 years incarceration. He submits that as on 26/04/2009, the minimum punishment for the offence of rape was 7 years and maximum was 10 years. In these circumstances, he submits that the Appellant may now be set at liberty, forthwith.

8. Mr. Pravin Faldessai, the learned Public Prosecutor defends the impugned Judgment and Order on the basis of the reasoning reflected therein. He submits that this Appeal may, therefore, be dismissed.

9. We have considered the rival contentions and examined the provisions of the said Act.

10. The said Act was enacted to protect, promote and preserve the best interests of Children in Goa and to create a society that is

proud to be child friendly. Section 2(d) of the said Act defines 'child' in the following terms :

“2(d) 'Child' means any person who has not completed eighteen years of age unless any other law in force specifies otherwise or unless otherwise indicated in specific provisions in this Act:

Provided that in so far as a victim in an offence of rape is concerned, “child” shall mean any person who has not completed sixteen years of age;”

11. From the aforesaid, it is clear that the child means any person who has not completed eighteen years of age, unless any other law in force specifies otherwise or, unless otherwise indicated in specific provisions of the said Act. However, the proviso makes it clear that in so far as the victim in an offence of rape is concerned, child shall mean any person who has not completed sixteen years of age.

12. In the present case, since the victim is alleged to have been raped by the Appellant, the proviso will clearly be attracted and the onus will be upon the Prosecution to establish that on the date of commission of the alleged crime, the victim had not completed sixteen years of age.

13. Now, in the present case, there is some evidence that the victim was attending school. However, neither is any School certificate produced, nor has the Headmaster or the Principal of the School, has been examined by the Prosecution to establish the precise age of the victim.

14. The Prosecution has, however, examined Dr. Mandar Kantak PW.5 who had conducted the tests for examination or assessment of the age of the victim girl. PW.5 has deposed that based upon the physical, oral, dental and radiological examination, the age of the victim girl, as on 19/06/2009 i.e. within hardly about two months from the date of the alleged crime, was sixteen years, plus or minus six months. In the cross examination, he has deposed that based on X-ray and physical and dental examination, he has opined that the victim was between age of fifteen and half year to sixteen and half year. He denied the suggestion that the victim was more than eighteen years on the date when he examined her.

15. In *Rajak Mohammad (supra)*, the Hon'ble Apex Court has held that while it is correct that the age determined on the basis of radiological examination may not be an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of such doubt naturally must go in favour of the accused. Therefore, the Hon'ble Supreme Court held that the Prosecution had not succeeded in proving that the prosecutrix was a minor on the date of the alleged occurrence.

16. In the present case as well, the benefit of such doubt will have to be extended to the Appellant. Upon extension of such

benefit of doubt, it is possible to say that the Children's Court may not have been authorised to convict the Appellant in the manner it has convicted the Appellant. In fact, the learned Children's Court has held that minimum punishment provided under Section 8(2) of the said Act is 10 years, coupled with the fine of ₹2,00,000/-. The learned Children's Court has, therefore, proceeded to impose a sentence of 12 years and fine of ₹2,00,000/-. Since, we have decided that the benefit of doubt has to be extended in favour of the Appellant, interference is certainly warranted with the impugned Judgment and Order. However, at the same time, we note that the evidence of the victim in this case inspires confidence and, therefore, per se there may have been nothing incorrect in the conviction of the Appellant where such conviction is to be recorded by the competent Court of law.

17. The Appellant has today undergone sentence of little more than 10 years. In these circumstances, we feel that the interest of justice will be served if the Appellant is not made to undergo any further imprisonment or to pay any further fine in this matter. In fact, the imposition of fine in this matter deserves to be quashed and set aside and we, therefore, do so. As a result, there is no question of suffering any in-default imprisonment by the Appellant.

18. For all the aforesaid reasons, we partly allow this Appeal and direct that the Appellant shall be forthwith set at liberty, unless his presence is required in relation to any other matter.

19. The Appeal is partly allowed. There shall be no order as to costs.

20. We record our appreciation to the efforts put in by Advocate Mr. D'Silva and appreciate the fair manner in which he presented the case on behalf of the Appellant.

21. The Registry to do the needful in the matter at the earliest.

Smt. M.S. Jawalkar, J.

M.S. Sonak, J.