

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL 51 OF 2018

Mr. Abdul Rajak Chapparban,
S/O Dastagir Chapparban, Aged 28 years,
R/O H.No.91/1, Indiranagar, Chimbhel,
Tiswadi, Goa.
Presently lodged at Modern Central Jail,
Colvale, Bardez Goa.

...Appellant.

Versus

- 1). State of Goa
(As represented by the Officer In
charge, Pernem Police Station)
Pernem, Goa.
- 2). The Public Prosecutor,
High Court Building,
Altinho, Panaji, Goa.

.... Respondents.

Mr. Salil Saudagar, Advocate for the Appellant.

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

Coram : M. S. SONAK, J.

Date : 17th September, 2020

Oral Judgment:

Heard Mr. Salil Saudagar, learned Counsel who has been
appointed under Legal Aid Scheme to appear on behalf of the

Appellant and Mr. Pravin Faldessai, learned Additional Public Prosecutor for the State.

2. This appeal is directed against the judgment and order dated 16.12.2016 made by the learned Children's Court for the State Of Goa in Special Case No. 54/2013 convicting the appellant-accused for offences under Section 376 and 506 of IPC, under Section 8(2) of the Goa Children's Act, 2003 and under Section 6 of Protection of Children from Sexual Offences Act, 2012. Further, by the impugned judgment and order, the following sentences came to be imposed upon the accused:-

- a) Rigorous imprisonment for a term of one year for the offence punishable under Section 506 of IPC;
- b) Rigorous imprisonment for a term of 10 years and fine of ₹2 lakhs, and in default, imprisonment of 2 years for the offence punishable under Section 376 IPC, 8(2) of the Goa Children's Act, 2003 and Section 6 of the Protection of Children from Sexual Offences Act, 2012.
- c) The substantial sentences of imprisonment were directed to run concurrently and the accused was also entitled to the benefit under Section 428 of CrPC.

3. Mr. Salil Saudagar, learned Counsel for the appellant, at the outset submits that the charge framed against the accused in this

case related only to a single incident dated 24.02.2013. He points out that in relation to this single incident, there is no evidence on record. Instead, the learned Children's Court, without altering the charge or affording the accused any opportunity, has chosen to convict the accused for a different charge. He submits that in such a situation, prejudice is writ large to the accused. He relies on the decision of the Hon'ble Apex Court in *Main Pal v/s. State of Haryana*¹ to submit that the conviction is liable to be set aside in such circumstances.

4. Mr. Saudagar submits that in this case, the statement of the accused under Section 313 CrPC and the defence evidence led on behalf of the accused has not at all been considered though such evidence was duly proved or in any case probabalized by the accused. He submits that this is yet another infirmity in the impugned judgment and order. Mr. Saudagar submits that in any case there are material discrepancies in the testimony of the prosecution witnesses. He submits that in this case, even the competency of the minor victim deposition was never certified by the Court and in the absence of such certification, the learned Children's Court, was not justified in relying upon the sole testimony of the minor victim. He submits that even on this ground, the impugned judgment and order deserves to be set aside.

¹ (2010) 10 SCC 130

5. Mr. Faldessai, the learned Public Prosecutor points out that in terms of Section 464 of the CrPC some errors or omissions in the framing of charge can never result in acquittal. He points out that in the present case, the accused has not demonstrated any prejudice whatsoever. He submits that if the evidence on record is perused, though, it is clear that the accused, has cross examined the prosecution witnesses on incidents prior to 24.02.2013. He submits that the medical evidence on record corroborates the statement of the medical evidence on record regards incidents prior to 24.02.2013. For all these reasons, he submits the accused has not made out any case to warrant any interference with the impugned judgment and order. Mr. Faldessai relies upon the reasoning in the impugned judgment and order and submits that this appeal may be dismissed.

6. The rival contentions now fall for my determination.

7. In this case, the charge was framed against the accused on 20.01.2014 and the same reads as follows:

*“SPECIAL CRIMINAL CASE NO.54/2013
Exhibit No.7*

C H A R G E

I, Smt. Anuja Prabhudessai, President, Children's Court for the State of Goa, at Panaji, hereby frame charge against you, Abdul Rajak Chapparban, S/o.

Dastagir Chapparban, aged 28 years, Occupation: nil, R/o.H.No.91/1, Indiranagar, Chimbél, Tiswadi-Goa, as under:

That on 24.02.2013 at 12.20 hrs, near Nandi Theater you took your minor step daughter near the bushes near Railway Station at Pernem and had forcible sexual intercourse with her. You have thereby committed offence of rape and grave sexual assault punishable under section 376, 506 IPC, section 8 Goa Children's Act and section 5(n) of Protection of Children from Sexual Offences Act 2012.

On the same date and time you threatened to cause death of the victim by drowning her and also threatened to cause death of her mother incase she disclosed the incident to anyone. You thereby committed an offence of grave sexual assault under section 376, 506 IPC and Section 8 Goa Children's Act and section 5(n) of Protection of Children from Sexual Offences Act 2012.

And I hereby direct that you be tried by this Court on the said charges.

Sd/-

(Anuja Prabhudessai)

Panaji-Goa

President

20.01.2014

Children's Court for the State of Goa"

8. From the perusal of the aforesaid charge, it is quite clear that the accused was charged for the incident of 24.02.2013 and not for any incidents prior to the same. There is not even a whisper in the charge that the appellant-accused, from 2011 onwards till the date of his arrest on 26.02.2013 had committed sexual offences

against the minor victim. The charge, no doubt, very specifically speaks about the incident of 24.02.2013 when, it was alleged that the accused took his minor step-daughter in the bushes near the railway station at Pernem and had forcible sexual intercourse with her. The charge proceeds to state that on the same date and time the accused threatened to cause the death of the victim by drowning her and also threatened to cause death of her mother incase she disclosed the incident to anyone.

9. However, when the evidence of PW-1, the complainant and the mother of the victim girl is perused, the same speaks about commission of sexual offences by the accused as was told to her by the minor victim girl (PW-2). To that extent, the evidence of PW-1 cannot be said to be sufficient to convict the accused either of the charged offences or the offences for which ultimately the accused has been convicted. However, what is significant from the testimony of PW-1 is that the cross-examination on the part of the accused was to a certain extent focused on the incident of 24.02.2013. This indicates that the accused was going by the charge framed against him and accordingly defended himself.

10. The crucial testimony in this matter is naturally that of the minor victim girl (PW-2). If this deposition is perused, there is reference to competency test carried out by the learned Children's

Court. However, there does not appear to be any certification regards the competency. However, considering the circumstances that the minor victim girl was over 12 years old at the time of the incident for which the accused was charged and about 14 years at the time when she deposed before the learned Children's Court, there is no good ground to uphold the objections raised by Mr. Saudagar. If the deposition of the minor victim girl is perused, it is not possible to hold that she was not a competent witness.

11. PW-2, when it comes to the incident of 24.02.2013 for which the accused was specifically charged, has deposed the following:

“On 24/2/2013, I was taken to the Railway station by my step father to a place, where there were trees/bushes, in the noon time. At that time, two persons came to the spot. When the said two persons came, my step father was pulling me and taking me. That time, the said persons questioned my step father as to what he was doing and he told that he had come to check for stones and he also told them that he is my father. Then the said persons told us to go away and my step father brought me back home.”

12. Even by accepting the testimony of PW-2, it is difficult to hold that at least on 24.02.2013 the accused had forcible sexual intercourse with her. There is also no evidence that on the same date

the accused threatened to cause the death of the victim by drowning her and also threatened to cause the death of her mother in case she disclosed the incident to anyone. Therefore, based upon the testimony of the victim, as it stands, it cannot be said that the prosecution, had proved that the accused, had indeed committed the offence for which he was specifically charged.

13. The prosecution, in fact, examined PW-8 and PW-9 in support of its case. According to the prosecution, it is PW-8 and PW-9 who were the two persons referred to by PW-2 in her deposition which is quoted above.

14. PW-8 has deposed that on 24.02.2013, at around 12:00 to 12:30noon one person came with a small girl of about 14 years age on a motorcycle and went behind the railway station with the motorcycle. Upon the PW-8 and other taxi drivers following them, the person turned his bike and returned. PW-8 has deposed that he alongwith the others questioned this person as to where he had gone and this person replied that he had gone to see the laterite stone quarry. PW-8 deposed that when they asked him who was the girl, he told them that she was his daughter and even the girl confirmed this fact by stating that the said person was her father. PW-8 has deposed that he alongwith the others did not interfere any further.

15. PW-8 was in fact declared hostile by the prosecution but in the course of cross examination this witness stood his ground.

16. PW-9 has deposed that on 24.02.2013 he was at the taxi stand and at around 12:00noon one man came with a boy of about 11 years and a girl aged 14 years. The man kept the boy at the railway station and took the girl towards the jungle area. Since the witness had some doubt in his mind he alongwith the others followed the man. PW-9 deposed that he could see the man pulling the girl and therefore they went and asked him why he had come there he became nervous and then they enquired with the girl her name and she disclosed her name. This witness deposed that the girl told them that the said man was her father and then the man disclosed his name as Abdul. PW-9 has then deposed that the said man then returned with the victim and the boy.

17. Now, from the evidence of PW-8 and PW-8 again, it cannot be said that the prosecution has established the charge as specifically framed against the accused. This means that neither the victim girl nor the PW-8 and PW-9 have deposed about the forcible sexual intercourse on 24.02.2013 at 12:20hours near Nandi Theater.

18. The victim girl, in the course of her deposition, though has said nothing incriminating regards the incident of 24.02.2013,

however deposed that from the year 2011 onwards the accused, who is her step-father, had been sexually exploiting her. It is on the basis of this statement which found some corroboration in the medical evidence that the learned Children's Court has convicted the accused.

19. According to me, the charge in the present case, was absolutely specific. There was no whisper in the charge regards commission of any offences by the accused for the period between 2011 and 24.02.2013. In regard to the specific charge, there is no evidence on record to sustain the conviction of the accused. From the nature of the cross-examination on behalf of the accused, it is possible to say that the accused, had focused upon his defence to the specific charge framed against him and had not raised any significant defence at least in the course of the cross-examination for the allegations of sexual exploitation between 2011 and 2013. In such circumstances, the contention of Mr. Saudagar that serious prejudice is occasioned the accused in the matter of his defence is required to be accepted.

20. In Main Pal (supra), the Hon'ble Apex Court, has formulated the following principles relating to section 212, 215 and 464 of CrPC.

“17. The following principles relating to Sections 212, 215 and 464 of the Code, relevant to this case,

become evidence from the said enunciations:

(i) The object of framing a charge is to enable an accused to have a clear idea of what he is being tried for and of the essential facts that he has to meet. The charge must also contain the particulars of date, time, place and person against whom the offence was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(ii) The accused is entitled to know with certainty and accuracy, the exact nature of the charge against him, and unless he had such knowledge, his defence will be prejudiced. Where an accused is charged with having committed offence against one person but on the evidence led, he is convicted for committing offence against another person, without a charge being framed in respect of it, the accused will be prejudiced, resulting in a failure of justice. But there will be no prejudice or failure of justice where there was an error in the charge and the accused was aware of the error. Such knowledge can be inferred from the defence, that is, if the defence of the accused showed that he was defending himself against the real and actual charge and not the erroneous charge.

(iii) In judging a question of prejudice, as of guilt, the courts must act with a broad vision and look to the substance and not to the technicalities, and their main concern should be to see whether the accused had a fair trial, whether he know what he was being tried for, whether the main facts sought to be established against him were explained to him

fairly and clearly, and whether he was given a full and fair chance to defend himself.”

21. Applying the aforesaid principles to the facts in the present case, it is clear that whilst, the charge as framed, was quite clear and specific with regard to the incident of 24.02.2013, there was no reference whatsoever with regard to any alleged incidents between 2011 and 2013. In fact, there was no reference to such incidents much less, even some vague reference.

22. The Hon'ble Apex Court has held that the accused is entitled to know with certainty and accuracy, the exact nature of the charge against him, and unless he has such knowledge, his defence will be prejudiced. Where an accused is charged with having committed offence against one person but on the evidence led, he is convicted for committing offence against another person, without a charge being framed in respect of it, the accused will be prejudiced, resulting in a failure of justice. But there will be no prejudice or failure of justice where there was an error in the charge and the accused was aware of the error. Such knowledge can be inferred from the defence, that is, if the defence of the accused showed that he was defending himself against the real and actual charge and not the erroneous charge. The Hon'ble Apex Court has held that in judging a question of prejudice, as of guilt, the courts must act with a broad

vision and look to the substance and not to the technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew that he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself.

23. Applying the aforesaid principles to the facts of the present case, it will have to be held that the accused, was in fact prejudiced in the matter of his defence. This is because there was absolutely no inkling in the charge as framed that the incidents between 2011 and 2013 were intended to be taken into consideration or that the accused was being prosecuted in respect of such alleged incidents. In fact, in a situation of this nature, upon perusing the evidence of PW-2, the learned Children's Court should have considered alteration of the charge, which powers the learned Children's Court undoubtedly possessed. However, without the alteration of the charge, the learned Children's Court, could not have proceeded to straightaway find the accused guilty of the offences for which, he was not really charged in the present matter. The prejudice, according to me, is evident if the defence of the accused is perused.

24. In this case, the accused, in his 313 CrPC statement in

response to the question 85 responded as follows:

“This is a totally false case. I am married and my wife is residing at Chimbhel along with my children. That since I was residing at Pernem with the complainant and her children, my wife got annoyed and came to reside with me at Pernem. Therefore there was quarrel between wife and the complainant and that their relation was not good. The complainant told me in presence of my wife that he should not allow his wife to stay with me at Pernem and to send her to Chimbhel. I told that I am not going to send her. The complainant told me that incase if I do not send my wife in that event she is going to file rape case against me & accordingly complainant proceeded to Vasco at her brother's place and systematically filed false case against me & that the victim girl was tutored by the complainant to depose falsely.”

25. Apart from the aforesaid, accused examined Hussain Bi, who claimed to be the real wife of the accused as DW-1. Now DW-1 has deposed that on 25.02.2013, i.e. the next date of the alleged incident, PW-1-the complainant (mother of victim) directly threatened to implicate the accused in a rape case, should DW-1 persist in seeing the accused or staying with the accused. DW-1 has deposed that PW-1 used to always quarrel with DW-1 because the accused was returning to DW-1.

26. According to me, the defence of the accused, ought to have been considered carefully by the learned Children's Court. This

is because when it comes to defence, the accused, has to only probabalize the same and there is no requirement of establishing the same beyond reasonable doubt. Be that as it may, in this case it is not necessary to go into this issue, because this is a case where the accused, has been virtually convicted for offences for which he was not charged. The omission to frame the charge for which the accused has now been convicted has occasioned prejudice to the accused in the matter of his defence. No doubt, the accused, has raised a general defence about implication in a false case. However, the accused, was really defending the charge which relates to the incident of 24.02.2013. In respect of this incident, there is really no justification to sustain the conviction of the accused.

28. Mr. Faldessai points out that even in Main Pal (supra), the Hon'ble Apex Court did not simply acquit the accused but remanded the matter and directed the competent court to reframe the charge and thereafter proceeded with the matter. Though, the submission of Mr. Faldessai is correct, such a course of action in the facts and circumstances of the present case, may not meet the ends of justice.

29. In this case, the accused was arrested on 26.02.2013 and has been in custody ever-since. This means that the accused has already suffered imprisonment of about 7 years even though, there

was no evidence on record to establish that he had committed the offence for which he was specifically charged. Besides, there is explanation offered by the accused in his statement under Section 313 CrPC and coupled with the testimony of DW-1, this is not a case where the defence of the accused deserved some outright rejection.

30. For all the aforesaid reasons, the interest of justice will be met if, the impugned judgment and order is set aside and the accused is directed to be set at liberty forthwith if, his presence in custody is not required in connection with any other matter. It is ordered accordingly.

31. This appeal is, therefore, allowed. There shall be no order as to costs.

32. The Registry, to do the needful in the matter at the earliest.

33. In this matter, I must express my gratitude to both, Mr. Salil Saudagar and Mr. Pravin Faldessai, the learned Additional Public Prosecutor, for rendering fair and able assistance to this Court in disposing of this criminal appeal.

M. S. SONAK, J.