

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 24 OF 2015

Smt. Vinanti Gaude
Wife of Shri Vinayak Gaude
61 years of age, married, housewife,
R/o H.No.112, Gadwada,
Khandola, Marcel, Ponda Goa. ... Appellant

Versus

1. State,
(Through P. I. Ponda Police Station)
Ponda Goa.
2. Public Prosecutor,
High Court of Bombay at Panaji Goa,
High Court Complex, Altinho,
Panaji Goa. ... Respondents

Mr. Pavithran A.V., Advocate for the Appellant.

Mr. Mahesh Amonkar, Additional Public Prosecutor for the Respondents.

Coram:- M. S. SONAK, J.

Date:- 15th October, 2020

ORAL JUDGMENT

Heard Mr. Pavithran, learned counsel for the Appellant, and Mr. M. Amonkar, learned Additional Public Prosecutor for the Respondents.

2. The challenge in this appeal is to the judgment and order dated 30th March, 2015/13th April, 2015 made by the learned Children's Court for the State of Goa in Special Case No.45/2011

convicting the Appellant for the offenses punishable under Section 326 of IPC and Section 8(2) of the Goa Children's Act, 2003 (the said Act) and sentencing the Appellant to undergo simple imprisonment for a term of three years each, for the offenses and to pay fine of ₹10,000/- and ₹100000/-respectively and default sentences as specified.

3. By the impugned judgment and order, the learned Children's Court has directed the substantive sentences shall run concurrently and the fine amount, if any, recovered from the Appellant is to be paid to the victim boy who had then attained majority.

4. The case of the prosecution is that on 10.05.2010 at about 8.00 a.m. at Mestawada, Khandola, Marcel Goa, the Appellant and her juvenile son with common intention voluntarily caused grievous hurt to the victim boy who was then aged 13 years by assaulting him with a cricket stump.

5. The Appellant denied the charge and the trial ensued in which the prosecution examined seven witnesses in support of its case. The statement of the Appellant under Section 313 of Cr.P.C. was recorded and despite the opportunity, the Appellant led no defense evidence in the matter. Hence, by the impugned judgment and order the Appellant was convicted and sentenced as aforesaid.

6. Mr. Pavithran, learned counsel for the Appellant pointed out that though the incident took place on 10.05.2010, the complaint

was filed by PW1 only on 17.05.2010 which is after a delay of seven days. There is no explanation for such a delay. Rather, the evidence on record suggests that even the police were aware of the incident on 10.05.2010 itself and had even gone to the Goa Medical College for recording the statement of the minor victim boy. Mr. Pavithran submits that neither in the complaint nor in the statement the minor victim's boy mother (PW3) or his sister (PW4) has made any reference to the Appellant assaulting the minor victim boy. He points out that the entire complaint was that the juvenile son of the Appellant was the one who assaulted the minor victim boy. He points out that the juvenile son of the Appellant has since been acquitted in a separate trial.

7. Mr. Pavithran submits that PW1, PW3 and PW4 have thereafter made improvements in their evidence before the learned Children's Court. He submits that there is clear evidence on record that there was enmity between the families and the improvements, omissions, and contradictions which have been duly proved, have been ignored by the learned Children's Court in this matter. He submits that on account of such improvements, omissions, and contradictions, the learned Children's Court should have completely discarded the evidence of PW1, PW3, and PW4 in this matter.

8. Mr. Pavithran submits that even the evidence of PW2 the minor victim boy is not at all creditworthy. He points out that from this it is clear that the Appellant is sought to be roped into this incident only on account of the previous enmity which is established from the

evidence on record.

9. Mr. Pavithran points out that in this case most of the witnesses were related to the minor victim boy. He points out that even the so-called pancha witness was not an independent pancha but was a stock witness of the police. He submits that all these factors have not been properly appreciated by the learned Children's Court and therefore, the conviction deserves to be set aside.

10. Mr. Pavithran points out that the attachment of cricket stump after eight days from open space deserves no credence whatsoever. He submits that it is inconceivable that the stump was lying in a public place almost for eight days after the alleged incident. He points out that this is not a case of some recovery or discovery as contemplated under Section 27 of the Evidence Act.

11. Mr. Pavithran finally submits that in this case, the prosecution has failed to establish the complicity of the Appellant in the alleged incident. He submits that in such matters, the burden is entirely upon the prosecution to establish its case beyond the pale of reasonable doubt. He submits that since the prosecution has failed to do so, the impugned judgment and order deserves to be set aside.

12. Mr. Amonkar, learned Additional Public Prosecutor defends the impugned judgment based on the reasonings reflected therein. He submits that the evidence of the minor victim boy has been unshaken

and the same is completely reflected by the medical evidence on record. He points out that on account of the assault, by emergency surgery the spleen of the minor victim boy has to be removed. For all these reasons, Mr. Amonkar submits that this appeal may be dismissed.

13. The rival contentions now fall for my determination.

14. In this case, the prosecution has very clearly explained the delay in filing the complaint by PW1, the father of the minor victim boy. The record bears out that the incident took place on 10.05.2010 and soon after the incident the minor victim child has to be rushed to the hospital. The doctor i.e. PW6 has deposed that the minor victim boy was operated on an emergency basis and his spleen was removed and clots were evacuated. The minor victim boy had routine post-operative care and was discharged on 18.05.2010.

15. The prosecution, through its witnesses has explained that the parents of the minor victim boy were naturally attending the minor victim boy at the hospital during the period between 10.05.2010 and 17.05.2010, on which date the actual complaint was filed. According to me, this is an absolutely valid explanation, because it is quite natural that the parents would be primarily concerned about their child and only after the health position improved, the parents would proceed to make the complaint to the police.

16. Although indeed, the complaint or the statements of PW1,

PW3, and PW4 did not make any direct reference to the Appellant, the record bears out that PW2 who is the minor victim boy of the assault referred to the Appellant. The so-called omissions were not put to the I.O. in this case particularly, the so-called omissions in the evidence of PW1, Complainant, and PW4, sister of the minor victim boy. In any case, the evidence of PW2, the minor victim boy is quite clear that there is absolutely no good ground made out to disbelieve the testimony of the minor victim boy.

17. There is indeed some evidence of the previous enmity between the families. However, this cuts both ways. In any case, it is too much to expect that the minor victim boy would go through all these pains and suffering, which involved the removal of his spleen only to feed the so-called enmity between the families and make false allegations against the Appellant in this case.

18. Though, the prosecution has examined the father, mother, and sister of the minor victim boy as witnesses, it cannot be said that their testimonies be disregarded because they are related witnesses. In any case, these witnesses are not eyewitnesses. These witnesses have mainly deposed to what had happened after the minor victim boy reached home and they have deposed to what the minor victim boy told them. In this case, the main evidence is that of the minor victim boy and as noted earlier, there is absolutely no reason to reject the testimony of the minor victim boy.

19. The testimony of this minor victim boy (PW2) finds ample corroboration in the testimony of the doctor (PW6). This doctor has deposed to the injuries sustained by the minor victim boy and the medical procedure which are to be performed upon the minor victim boy on an emergency basis. PW6 has deposed that it is true that such type of injury could be caused by any blunt object with a considerable force but it is clearly stated that such injury is not possible by a simple fall.

20. So far as the recovery of the cricket stump is concerned, the same is not very important. Taking into consideration the deposition of PW2, it little matters whether the minor boy was assaulted with cricket stump or stick. The evidence on record very clearly establishes that the Appellant, in this case, had assaulted the minor victim boy with a blunt object and as a result, the minor victim boy sustained grievous injuries.

21. For all the aforesaid reasons, there is no case made out to interfere with the conviction recorded by the learned Children's Court. However, when it comes to the sentencing, I agree with Mr. Pavithran, learned counsel for the Appellant that the learned Children's Court has been disproportionately severe.

22. Mr. Pavithran points out that by now the Appellant is almost 66 to 67 years of age. He points out that even at the stage of grant of bail, the Appellant was unable to deposit the fine amount of ₹1,00,000/- and therefore, she had applied for variation which was

granted. He points out that if all these circumstances are considered, it will be harsh to impose any sentence of imprisonment on the Appellant.

23. Having considered the submissions made by Mr. Pavithran and having examined the material on record, according to me, this is not a fit case where the Appellant should be required to suffer any imprisonment. Instead, the interest of justice will be met if for the offense punishable under Section 326 of IPC, in the facts of the present case, the Appellant is directed to pay a fine of ₹5000/- and in default to undergo simple imprisonment for one month. Similarly, for the offense punishable under Section 8(2) of the Goa Children's Act, 2003, instead of simple imprisonment, the Appellant can be directed to pay a fine of ₹1,00,000/- and in default to undergo simple imprisonment for four months.

24. This appeal is accordingly partly allowed and disposed of by making the following order:-

(a) The conviction of the Appellant under Section 326 of IPC and Section 8(2) of the Goa Children's Act, 2003 is maintained;

(b) However, the sentence of simple imprisonment is set aside, and instead the Appellant is directed to pay a fine of ₹5000/- for the offense punishable under Section 326 of IPC and in default to undergo simple imprisonment for one month;

(c) Similarly, for the offense under Section 8(2) of the Goa Children's Act, 2003, the sentence of imprisonment is set aside, and instead, the Appellant is directed to pay

a fine of ₹1,00,000/- and in default to undergo simple imprisonment for four months;

(d) The Appellant has already deposited an amount of ₹50,000/- in this Court. Accordingly, the Appellant will be entitled to the necessary adjustment in this regard;

(e) Further, this amount of ₹50,000/- has to be paid to the minor victim boy;

(f) Registry together with the Goa State Legal Services Authority to ensure that this payment is made to the minor victim boy at the earliest and in any case within four weeks from today;

(g) At the request of Mr. Pavithran, four months is granted to the Appellant to deposit the balance fine amount of ₹55,000/- in this Court;

(h) In case, this balance fine amount of ₹55,000/- is not deposited by the Appellant in this Court on or before 15.02.2021, then, the Registry to intimate the learned Children's Court about the same. The learned Children's Court to take steps to apprehend the Appellant so that she serves the default sentence;

(i) In case, the balance fine amount of ₹55,000/- is deposited by the Appellant in this Court, the Registry to pay this amount as well to the minor victim boy as early as possible and in any case within four weeks from such deposit;

(j) In the facts of this case, there shall be no order as to costs.

M. S. SONAK, J.