

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 4 OF 2020

State,

Through Police Inspector (major)

Mapusa Police Station,

Mapusa, Goa.

..... Appellant

V e r s u s

Vasikur Rehaman, (Major)

s/o. Barikatulla Shaikh,

r/o Freitaswado, Verla,

Canca, Bardez, Goa.

N/o. Uttar Pradesh

..... Respondent

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

Mr. Rohan Desai, Advocate for the Respondent.

Coram :- M. S. SONAK &
M. S. JAWALKAR, JJ.

Date : 11th August, 2020

ORAL JUDGMENT (Per M. S. Jawalkar, J.)

1. The present appeal is preferred by the State against the judgment and order dated 31st January, 2019, passed by the Children's Court, Panaji in Special Case no.49/2017 acquitting accused of charges under Section 363,

376(2) of I.P.C., Section 8(2) of the Goa Children's Act 2003 and offence under Section 5(m) and Section 6 of the Protection of Children from Sexual Offences Act, 2012.

2. Learned Public Prosecutor, Shri S. R. Rivankar, represented the State and learned Advocate Shri Rohan Desai, represented the respondent. The charge came to be framed against the accused on 12.07.2017 as under :

“ CHARGE

(Section 221, 222, 223 of Cr.P.C.)

I, Ms. Vandana Tendulkar, President, Children's Court for the State of Goa, at Panaji, hereby frame charge against you, accused Vasikur Rehaman, s/o Barikatulla Shaikh, aged 19 years, Occupation: Carpenter, r/o Freitaswado, Verla, Canca, Bardez-Goa, N/o. Uttar Pradesh as under :

That on 12.03.2017, from 17.00 hours to 18.00 hours, at Pintowado, Verla, Canca, Bardez, Goa, you have kidnapped the minor daughter of complainant, aged 8 years and 01 month, from his lawful custody and have taken her to a secret place. Thereby you have committed an offence punishable under Section 363 of I.P.C.

During the same time, on the same date and at the same place, you have committed 'rape'/grave sexual assault'/aggravated penetrative sexual assault' on the minor victim girl, aged 8 years and 01 month. Thereby you have committed an offence under Section 375, punishable under Section 376(2) of I.P.C., under Section 2(y)(i) and punishable under Section 8(2) of the Goa Children's Act, 2003 and under Section 5(m), punishable under Section 6 of the Protection of Children from Sexual offences Act, 2012."

3. As accused pleaded not guilty, trial proceeded further. The prosecution in all examined 14 witnesses and there are two defence witnesses. After recording evidence by the prosecution, in support of its case, statement under Section 313 of the Cr.P.C., came to be recorded and thereafter, accused examined witnesses in his defence. After considering the evidence on record, learned Children's Court, Panaji, acquitted the accused from the charges levelled against him on the basis of reasoned order.

4. Learned Public Prosecutor, Shri Rivankar, submitted that the order passed by the Children's Court acquitting the accused is patently erroneous,

illegal and contrary to the evidence led by the prosecution on record. It is contended that the learned Children's Court gave much emphasis on the issue of non-recording of the statement of younger brother of victim specifically when he was four years old so also non-examination of Sakshi, friend of victim. It is further contended that the learned Children's Court has not properly appreciated the reason for delay in lodging complaint that is incident took place on 12.03.2017 and complaint came to be lodged on 16.03.2017 by father of the victim. The delay in such cases is not at all fatal to the case of prosecution. The Children's Court erred in discarding T.I. parade. The learned Children's Court erred in discarding the medical evidence of Doctor who opined that there was evidence of vaginal penetration within two to three days of the examination of Pw.1 by her. There was no reason to disbelieve the prosecutrix, who is eight years old girl, and her statement was recorded under Section 164 before the learned J.M.F.C., which corroborates with medical evidence. The learned Children's Court arrived at a wrong conclusion that the prosecution has failed to prove the identity of the accused and the Children's Court wrongly discarded the material evidence such as identity of accused who was confirmed by Pw.5 at

the time of medical examination. The accused has not made any complaint during the remand about his identity. The driving licence of the accused was produced by the father of the accused. The learned P.P. relied on the citations reported in *(2005) 8 SCC 122* in the case of *State of M. P. vs. Dayal Sahu* and also upon the judgment and order in *Criminal Appeal nos. 52 of 2019, 55 of 2019 and 6 of 2020*, in support of his contention that only statement of prosecutrix or victim is sufficient to hold accused person guilty if it inspires confidence.

5. As against this, the learned Counsel Shri Rohan Desai, for the respondent-accused, submitted that the Children's Court rightly appreciated the evidence on record and there is no error or illegality whatsoever committed by Children's Court. He submitted that this appeal is against acquittal and, therefore, this Court has very limited scope to interfere with the order of acquittal. He relied on *Chandrappa vs. State of Karnataka*, reported in *(2007) 4 SCC 415* wherein Hon'ble Apex Court laid down certain guidelines/principles regarding powers of Appellate Court while dealing with an appeal against an order of acquittal.

6. The learned Counsel Shri Desai, relied on the following decisions in support of his contention that the testimony of child witness can be accepted only if it inspires confidence and there was no time to tutor him/her :

1. Bhagwan Singh & Ors. Vs. State of MP 2003 (3) SCC 21

2. Golla Yelugu Govindu vs. State of AP – 2008 (16) SCC 769

3. Narayan Datwale vs. State of Maharashtra – 1197 Cri.L.J. 1788

4. Vikram Babasaheb Jadhav vs. State of Maharashtra – 2012 All M.R. (CRI) 2548.

5. Parminder Vasihnav vs. State of Chattisgarh – 2019 (4) SCC 522.

6. State of Haryana vs. Ram Singh 2002 CR.L.J. 987.

7. It is further submission of learned Counsel Shri Desai, that defence witnesses to be given equal importance and their evidence cannot be discarded just because they stand by the accused person. He has relied on *State of Haryana vs. Ram Singh* reported in *2002 Cri. L. J. 987*

8. The learned Counsel for the respondent submitted that the case put up by the prosecution does not sound probable. The medical evidence brought on record by the prosecution, viz a viz, the ocular evidence and the other type of evidence including expert opinion, is not in consonance with each other. On all these counts and on the count of his identification, the order passed by the Children's Court was justified.

9. These rival submissions fall for our determination.

10. The testimonies of victim girl Pw.1, her father, who is also the complainant, Pw.2, and her mother, Pw.3, are material so far as occurrence of alleged incident is concerned. There are no other witnesses. The testimony of Pw.1 reveals that she was playing with her younger brother near Satari Temple at around 4.00 p.m. At that time, a boy came on a scooter and asked Pw.1 where the house of Sakshi is. Then he asked her to accompany him to show the house of said Sakshi. Pw.1 requested the culprit to take her younger brother too with them but he refused as claimed by Pw.1.

11. It is further statement of prosecutrix that she is quite familiar with Sakshi and the location of her house. She has stated that the house of Sakshi is in front of the house of her tuition teacher and near to her school at Parra. According to the knowledge of Pw.1, said Sakshi roams on a cycle and she used to also visit the house of Pw.1, prosecutrix sometimes. On that day, the said culprit while proceeding on a scooter instead of going in the direction of the house of Sakshi, he turned on the other side which she was aware of the wrong diversion taken by the culprit. According to Pw.1, she was taken by the culprit towards Sheetaladevi temple and from there he took her to the hill on his scooter. On hill, the culprit took off her clothes and also his clothes. Thereafter, he inserted his private part to her private part and that he also inserted his private part in her mouth by making her lie down on rock. She was asked to wear clothes by the culprit. His sandals and mobile phone were lying there and he asked her to give it to him and then he showed obscene video on his mobile phone to Pw.1. After the alleged incident, she was dropped back to Sattari Mandir by the culprit. What is stated in her examination in chief that culprit told her that he would drop her at Sai Mandir but Pw.1 asked him to drop her at Sattari Mandir. It is

very unnatural on the part of prosecutrix that inspite of such alleged incident of sexual assault, she was in a proper state of mind. From her deposition, her acquaintance/directions in the locality is exhibited. However, it appears that, spot panchanama of only near Sattari temple is carried out and no efforts were made by Pw.14/I.O. to locate the spot of alleged sexual assault through Pw.1. Even the spot of incident where alleged act of kidnapping took place was shown by the father of the Pw.1 i.e. the prosecutrix and not by the Pw.1.

12. Pw.2, father of prosecutrix, deposed that police only asked to show the place near Sattari temple and did not ask him to show any other place which raises reasonable doubt about the nature of investigation carried out by Pw.14 who did not even attempt to find out the actual place of alleged sexual assault on the P.w.1. As per Pw.1, she met her parents Pw.2 and Pw.3 and her younger sister and brother near Sattari temple after being dropped by the culprit. In fact, it is highly improbable that a person who has committed such heinous offence on a minor girl, by taking her to an isolated place on some hill, would prefer to come back to drop the victim to the same place i.e. near Sattari temple. It is also not explained why she has not made

any noise/any resistance when culprit took her in opposite direction to the house of Sakshi nor she has made any noise on her way of return. She got down near the temple from the scooter and met her parents and younger siblings there but none of them could see the culprit. Only after reaching back home, she told her mother about the alleged incident of sexual assault on her. There are discrepancies in the deposition of Pw.1, Pw.2 and Pw.3 on the point of their meeting after the alleged incident. It has come in the evidence of Pw.3 that at around 6.00- p.m. they found Pw.1 by the side of the road near Sattari temple and she was crying so they brought her home and upon inquiries with her, they came to know that she was taken by a boy on black colour scooter on the pretext of showing the house of Sakshi and then by taking Pw.1 to a lonely place and committed sexual assault as what was informed by Pw.1.

13. In this case, Pw.14 has not found any mobile phone in possession of the accused nor any call details, sim card details, were called to know whether there is any SIM card in the name of the accused. It is also material to note that though colour of scooter was described, no attempts were made

by Pw.14/I.O. to trace the records of the scooter involved in the alleged incident of kidnapping. Though Pw.1 has not given any description of the scooter but Pw.2 and Pw.3 have come up with the description of the scooter as black in colour being informed to them by Pw.1. No efforts were made by I.O. to find out whether any vehicle is registered in the name of the accused or his family members.

14. Admittedly, Pw.14 has not attached any scooter from the possession of the accused during his investigation nor he verified from any RTO office. There is no driving licence also in the name of accused which is ceased or secured by the I.O. The testimony of prosecutrix also highly sounds improbable as Sheetaldevi temple is not very far from Sattari temple and it is next to the road. The said temple is also a big temple frequently visited by many devotees. There are flower vendors present at the said temple and there are shops in the vicinity of the temple. In such circumstances, the claim of the Pw.1 that the culprit had taken her on the scooter from Sattari temple towards Sheetaldevi temple and from there to a hill, is hard to believe. So also near Sattari temple, there are shops and there

is only one access to the temple. From the description and admission, it appears that the place from where she was picked up is crowded place where there are houses and factory. If the parents were searching for her, the temple which was clearly visible from the road, could have easily located the rider coming towards Sattari along with the prosecutrix.

15. Most important fact is that as claimed by the prosecutrix, she was playing with her younger brother and by dropping him there only, she went away on the scooter, however, I.O. has not taken any pains to interact with the child. On the other hand, it has come on record that she identified the accused after three days. The I.O. also has not taken any pains to record the statement of Sakshi or to find out where is the house of Sakshi. She could have thrown some light on the identity of the accused if she was acquainted with the accused. In spite of the fact that the said place of occurrence is a crowded place, there are houses, factory workers, devotees.

16. The I.O. has not examined any independent witnesses though he stated that he has recorded statement but not a single statement is part of record. He could have easily secured the presence of Government servant as

Panch witnesses or any other independent witness.

17. It is a matter of record that statement of Pw.1 was not recorded immediately after the alleged incident. She has not disclosed all the facts about kidnapping and sexual assault to her in her first statement. The medical evidence is not in consonance with the alleged incident of sexual assault at any hill place or on a rock. If that would have been the case, she would have some external injuries over her body, bruises or scratches of hard surface.

18. The reason put forth for delay in lodging FIR is that they were searching for culprit boy. As per the claim of Pw.1, she had occasion to see that boy in the carpentry shop near the temple. However, no attempts were made by Pw.2, father of the prosecutrix, to search for that boy in the carpentry shop near the temple. He made statement that he was only searching in the nearby locality when it was specifically claim of the prosecutrix that he was boy from the carpentry shop, it is unusual for a father not to search for him in the said shop.

19. There is no explanation whatsoever for delay in lodging complaint nor there is anything in the complaint explaining the delay. Only in the Court, the delay is tried to be explained by the witness and I.O. The Panch witness is the neighbour of Pw.2 and, as rightly observed by the Children's Court, who came along with Pw.2, which raises doubt about his trustworthiness.

20. So far as medical examination is concerned, victim has no external injury specifically to her back as she claimed that she was asked to lie down on rock and accused committed offence of sexual intercourse. Hymen was found torn. There is no opinion disclosed by the concerned Doctor how old was the hymen tear. Only in the Court he deposed that it is two to three days old. Admittedly, there are many additional alterations without there being any counter signature which creates suspicion about the genuineness of report, sample was sent to the CFSL for scientific analysis.

21. The parcel sent by Mapusa Police and GMC, was analysed by Pw.13, a Junior Scientific Officer, as follows :

Parcel 1 : Exhibit M-1 (a)- frock of victim

Exhibit M-1 (b)- short pant of victim.

Parcel 2 : Exhibit V-1(a) – shirt of accused

Exhibit V-1(b) jean pant of accused, and

Exhibit V-1(c) – underwear of accused.

Conclusion : Neither semen nor blood was detected in any of the exhibits.

He received six parcels under the seal of Forensic Medicine, GMC, which contained :

Parcel no. 1 : containing exhibit A, two vaginal swabs of victim.

Parcel no. 2 : exhibit B – two vaginal smear slides of victim

Parcel no. 3 : exhibit P – two urethral swabs of accused

Parcel no. 4 : exhibit Q – two urethral smear slides of accused

Parcel no. 5 : exhibit R – pubic hair sample of accused

Parcel no. 6 : exhibit S – right hand nail clippings.

Conclusion : Human semen was detected in exhibit A, B, P and Q – no semen was detected in exhibit R. Blood was not detected in exhibit R, S (R) and S (L). Blood group test was inconclusive for exhibits A, B, P and Q.

22. As per this witness, human semen was detected in exhibits A, B, P and Q. In cross, this witness specifically admitted that after comparison of exhibits A and B with exhibits P and Q, he cannot arrive at any conclusion

of similarity or common origin of human semen because of the imitations of serological examinations. He further clarified that to arrive at a definite conclusion, the sample collection agency has to collect the sample appropriately for DNA profiling. In this case, since sample was not collected for the purpose of DNA profiling, definite conclusion of origin of human semen cannot be determined.

23. There are following circumstances which raises doubt in the mind of the Children's Court such as delay of three to four days in registering the complaint inspite of knowledge that victim had seen earlier the said person in carpentry shop, near the temple. No efforts were made to search him in the said shop. No spot located or attempts were made to locate the same where actual sexual assault took place. No physical external injuries detected on the body of victim. Police has not made any inquiry to the younger brother of victim, who was alleged to be playing with victim at the relevant time and mother of victim claimed that he also identified the accused on 15th. If that could be the case, he would have given some direction to the investigation. No attempts were made to record statement of Sakshi or to

locate her house. No independent witnesses were called for panchanama on spot wherefrom the victim was alleged to be picked up on scooter. The place of kidnapping was not shown by the victim herself but shown by her father. Though it is claimed by the IO that he has recorded statement of persons from factory and nearby locality, not a single statement is part of record. Such non-examination of witnesses raises doubt about fairness in investigation, who could have unfolded the genesis of prosecution case. No attempts were made by IO to seize any vehicle from the accused or to obtain the information whether there is any vehicle registered in his name or in the name of his family member. No mobile was seized nor arrest subsequent to it though it is claimed by the victim that accused had shown her some obscene scenes thereon. It is highly improbable for a person having committed such offence of sexual assault to drop back the victim at the same place. All these circumstances raises serious doubt about the creditability of the prosecution case as well as investigations carried out by the I.O.

24. Statement of Pw.1 under Section 164 came to be recorded on 06.04.2017. Therefore, there is every possibility of tutoring to the witness.

The learned J.M.F.C. has not asked any question whether her statement was voluntary or under anybody's pressure.

25. In the several decisions relied upon by Mr. Desai on the issue of evaluation of testimony of child witnesses, this is what emerges:

“A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any pother competent witness and there is no likelihood of being tutored. A child witness is susceptible to tutoring. The appreciation of their evidence is a difficult task, as any mistake or discrepancy in their statements, can easily be ascribed to innocence or failure to understand and undue weight is often given to what can merely be a well taught lesson and, therefore, it is well settled that the evidence of a child witness should be accepted with great caution.”

26. There is much argument advanced on the issue of identity. Accused claims that he is Nasikur Rehaman whereas as per police officer, he told his name as Vasikur Rehaman. In our considered opinion, there may be mistake

which could not be located by the accused also with his name is wrongly written but as soon as he came to know, he applied for correction of the name. However, it appears that the I.O. stretched to the extent by putforthing a theory of twin brother. Just making statement is not sufficient. The I.O. has not made any effort to show that Vasikur Rehaman is having any twin brother. Nasikur Rehaman has produced his Aadhar card to show his name.

27. In our opinion, it hardly makes any difference because he was not identified as Nasikur Rehaman or Vasikur Rehaman but as a same person as alleged by the victim who has committed sexual offence. So, even if his name was rightly recorded, it would not turn on it. In fact, when Pw.1 herself claimed to have identified T.I. Parade, is having no importance.

28. In so far as the plea of alibi is concerned, we agree with Mr. Rivonkar that the accused has not produced any substantial evidence to sustain such plea. However, in this case, such plea does not assume much importance since the prosecution has not succeeded in establishing the guilt of the accused person beyond reasonable doubt.

29. The scope of an appeal against acquittal is quite limited. In *Chandrappa* (supra), this is what is held by the Hon'ble Apex Court :

“(1) An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, ‘substantial and compelling reasons’, ‘good and sufficient grounds’, very strong circumstances’, ‘distorted conclusions’, ‘glaring mistakes’, etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of ‘flourishes of language’ to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.”

30. Taking into consideration the evidence or rather lack of it on record and applying the aforesaid principles explaining the scope of the appeal against acquittal, we see no good ground to reverse the acquittal recorded by the learned Children's Court in the present case.

31. Before we conclude, however, we cannot resist observing that the investigation in the present case was rather shoddy and bordered upon casualness. The investigation, particularly where sexual offences are committed against the children, must be undertaken with a great degree of seriousness and sensitivity. We have already pointed out several lapses in the investigation, as a result of which, several leads remained to be investigated or were shoddily investigated. Though it is true that mere lapses in the investigation do not entitle an accused person to acquittal, if there is otherwise evidence to sustain a conviction, in this case, the lapses are neither minor, nor inconsequential. Besides, where there are such serious lapses, even the other evidence on record has to be evaluated by the Court with circumspection and caution. The lapses render it rather unsafe to rely upon

the prosecution version, particularly when there is no clinching evidence produced by the prosecution and there is no explanation as to why the leads were not effectively investigated.

32. According to us, the lapses in the investigation, particularly in matters of this nature, seriously affect the administration of criminal justice system. This is more so where the offences are committed against the children. Therefore, in such cases, the Investigating Agencies must take additional care and put in additional efforts. The society is bound to suffer if the perpetrators of crimes against the children are not brought to book. So also the society will suffer if the innocents are simply roped in, or the guilty are prosecuted on the basis of insufficient evidence, resulting from half hearted, casual or even shoddy investigations. Therefore, we direct the Director General of Police (DGP) to take cognizance of this matter and to consider whether any action is necessary against the Investigating Agency. Even if the DGP comes to the conclusion that the lapses may not have been deliberate, we direct the DGP to consider whether any training needs to be imparted to the Investigating Agencies dealing with cases of the offences

against children and if so, to take steps to impart such training within a reasonable period, so that the administration of criminal justice does not suffer.

33. For all the aforesaid reasons, we are constrained to dismiss this appeal and we do so accordingly. If the accused person has given any bail bonds, the same stand discharged.

M. S. JAWALKAR

M. S. SONAK, J.

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