

**IN THE HIGH COURT OF BOMBAY AT GOA  
CRIMINAL APPEAL NO.6 OF 2019.**

Mohammad Siddaqui,  
son of Mohammad Abubakar,  
age 36 years,  
r/o Near Laxmi Temple,  
Baina, Vasco- Goa.  
and presently undergoing  
sentence at Colvale Jail,  
Bardez, Goa.

... Appellant.

***Versus***

1. S T A T E

Through P. P.  
High Court of Bombay at  
Panaji, Goa.

2. The Police Inspector,  
Women Police Station,  
Panaji, Goa.

... Respondents.

Mr. Vibhav Amonkar, Advocate for the Appellant under Legal Aid Scheme.

Mr G. Nagvenkar, Additional Public Prosecutor for the Respondents.

**Coram:- M. S. SONAK, J.**

**Date:- 4<sup>th</sup> September, 2020**

**ORAL JUDGMENT :**

Heard Mr. V. Amonkar, learned counsel for the Appellant

under Legal Aid Scheme and Mr. Nagvenkar, learned Additional Public Prosecutor for the State.

2. This appeal is directed against the judgment and order dated 31<sup>st</sup> August, 2017, in Special Case No.108/2015 made by the Children's Court for the State of Goa at Panaji, convicting and sentencing the Appellant (Accused) for offence under Section 375(a), punishable under Section 376(2) (f), (i) and (n) of IPC, under Section 2(y)(i) and (iii), punishable under Section 8(2) of the Goa Children's Act, 2003, under Section 3(a), punishable under Section 4, under Section 5(m) and (n), punishable under Section 6 and under Section 11(iii), punishable under Section 12 of the Protection of Children from Sexual Offences Act, 2012 and sentencing him to undergo rigorous imprisonment for a term of 10 years for offences under the Goa Children's Act, 2003 and three years for offence under the Protection of Children from Sexual Offences Act, 2012

3. The case of the prosecution is that for the period between November, 2009 and November, 2014, the accused committed rape/grave sexual assault/penetrative sexual assault/incest/aggravated penetrative sexual assault on his minor step daughter, aged 9 to 14 years by having forcible sexual intercourse/oral sex with her and also showed pornographic video on his mobile phone with sexual intention and required her to perform similar acts.

4. The prosecution had also alleged that the wife of the accused and the biological mother of the victim was aware of such acts but failed to report the same to the Special Juvenile or local police and further the wife also sold her two minor children born out of relationship with the accused to some unknown person and also employed the minor victim girl in the house of one Mr. Lobo. Accordingly, the wife of the accused was also charged for committing offence under the Goa Children's Act, 2003 and the Protection of Children from Sexual Offences Act, 2012.

5. By the impugned judgment and order however, the wife of the accused was acquitted of the offence under Section 8(16) punishable under Section 8(2) of the Goa Children's Act, 2003 and Section 19(1), punishable under Section 21 of the Protection of Children from Sexual Offences Act, 2012. However, the wife of the accused was convicted for offence under Section 2(m)(i) punishable under Section 8(2) of the Goa Children's Act, 2003.

6. Mr. Amonkar, learned counsel for the Accused informed the Court that the wife of the accused has already suffered imprisonment awarded to her and she has not appealed her conviction for the offence under Section 2(m)(i) of the Goa Children's Act, 2003. Therefore, in the present appeal only the conviction of the Appellant i.e. the Accused No.1 is under challenge.

7. Mr. Amonkar, at the outset submits that the entire charge levelled against the accused is inherently improbable. He submits that it is inconceivable that the minor girl if indeed sexually assaulted in this manner, did not report this fact to her biological mother. He submits that this points out to the falsity of the prosecution case or at least renders the testimony of the victim girl (PW2) unreliable.

8. Mr. Amonkar submits that the scene of offence panchanama will indicate that the incident as alleged to have taken place in a very small room having dimension of 2 X 2 in a crowded slum area. He submits that it is the prosecution version that some of the instances of sexual assault have taken place when the wife of the accused and the biological mother of the victim was present in the room. He submits that all this is inherently improbable and therefore, cast a serious doubt upon the prosecution version.

9. Mr. Amonkar submits that the medical evidence in this case hardly supports any case of penetrative sexual assault. In the absence of any corroborative medical evidence, the accused ought not to have been convicted in this matter.

10. Mr. Amonkar submits that Lobo's with whom the accused was alleged to have been working was never examined by the prosecution. He submits that there is no evidence on record to suggest

that the victim was ever living with the accused and his wife for the period during which the accused is alleged to have committed sexual assault. He submits that all these aspects have not been given due consideration by the learned Children's Court.

11. Mr. Amonkar submits that the evidence on record, which includes the defence evidence of the accused indicates that this is a case fostered by an NGO, possibly to divert the attention of the authorities from the position that the victim girl was placed to work with Lobo's without obtaining consent from the prescribed authorities. He therefore submits that the impugned judgment and order is liable to be set aside and the accused be acquitted of the offence for which he was charged.

12. Mr. Nagvenkar, learned Additional Public Prosecutor submits that the deposition of minor victim girl inspire confidence and there is sufficient corroborative evidence on record to sustain the conviction of the accused. He relies upon the reasoning in the impugned judgment and order and submits that this appeal is liable to be dismissed.

13. The rival contentions now fall for my determination.

14. Though, some allegations have been made against the NGO and its volunteers, there is absolutely no evidence on record in support

of such allegations made by and on behalf of the accused. In fact the accused in this case has examined himself as a witness. However, in his deposition, no allegations were made against the NGO. It is only on the basis of some suggestions which again, are not quite clear and inference is sought to be drawn that it is the NGO which has fostered some improbable case and secured conviction of the accused. On perusal of the entire evidence on record, it is necessary to note that no such case has been made out or proven by the accused even going by the test of preponderance of probability, which is incidentally the test when assessing the defence of the accused.

15. However, it is true as urged by Mr. Amonkar that the burden in such matters is on the prosecution to establish the guilt of the accused beyond reasonable doubt, unless of course the prosecution is entitled to prove its case under Section 32(1)(l) of the Goa Children's Act, 2003. This provision *inter alia* provides that whenever any offence is alleged to have been committed against a child, the burden of proving that such offence has not been committed by the accused lies on the accused if the child was in his custody at the time of his arrest or at the time of committal of offence or at the time of rescue or removal of the child victim, as the case may be.

16. In this case, although, there is material to suggest that the victim child was in the custody of the accused at the time of commission

of the offence, it is proposed to evaluate the evidence on record by applying the normal principle that the burden is upon the prosecution to establish the guilt of the accused beyond reasonable doubt.

17. To begin with the reference is required to be made to the deposition of Sr. Lourencia Marques (PW1), a Social Worker, who claims that she has been doing social work since 1993 and residing at Holy Family Convent, Sancoale. She has deposed quite categorically to the manner in which she came to know the minor victim girl (PW2) and the circumstances in which she counselled the minor victim girl. It is in the course of such counselling on 31.05.2015 that the minor victim girl (PW2) informed her of the manner in which she was sexually abused by her father i.e. accused in the present case. PW1 has deposed that at times during the course of sexual acts committed by the accused, the mother of the victim and the wife of the accused used to be at home but she used to be '*fully drunk*'.

18. Mr. Amonkar did try to point out certain improvements. These are in the context of PW1 deposing that the victim girl had told her that when her mother used to go out of the house the accused used to abuse her sexually. This portion is not to be found in these words in the complaint lodged by PW1. Similarly, PW1 in her deposition has stated that the victim girl had told her that at the time of sexual assault the accused used to commit on her, some time, her mother used to be

present in the house but was '*fully drunk*'. It is true that the words to this effect are not to be found in the complaint of PW1. But this can hardly be called as improvement if the complaint and deposition of PW1 is read and construed in its entirety. Besides, the evidence of victim and Sister who is incidentally the biological daughter of the accused and his wife also corroborates the aspect of their mother being drunk on most occasions. Therefore, on the basis of such slight improvement, there is no case made out to discard the testimony of PW1 which, according to me was rightly relied upon by the learned Children's Court.

19. It is necessary to advert to the most crucial testimony of minor victim girl who has been examined as PW2 by the prosecution. At the time of her examination, the victim was of 15 years of age and the manner in which she has given her statement or the manner in which she has deposed in the Court, there is absolutely no ground to question her competence to depose in this matter. In fact, it was not even the case of Mr. Amonkar that PW2 was not competent witness.

20. Mr. Amonkar only submitted that though the conviction on the basis of sole testimony of a child witness or the prosecutrix may be permissible in law, such conviction can be recorded only where it is shown that the deposition of such witness is incompatible in nature and sterling quality. Mr. Amonkar submits that in the present case, the

testimony of PW2, has neither of such characteristics and therefore the learned Children's Court was not justified in basing the conviction upon the testimony of PW2. PW2 has deposed that though she was initially going to the school at Revora, after she returned from vacations, she was not sent back to the school as her mother was not having any money. She has deposed that for some time she was sent to work in the house of one Francisco Lobo and that from there she was taken to Convent by Sister i.e. PW1.

21. PW2 has categorically deposed that during her stay with the accused and her mother and her two siblings, whenever mother used to go out the accused who was her step father used to touch her here and there. The Court has made a noting that PW2 was totally disturbed and began to cry and took her time to answer the questions.

22. PW2 has then deposed that the accused used to make her suck his private part some times. She has deposed that this was during the absence of mother and some time when the mother was in the house but asleep. She has deposed that she was made to do such acts by the accused during the day time as well as night time.

23. PW2 has deposed that the accused used to show her dirty pictures and videos on his mobile phone and told her to do the same things. She has deposed that the accused used to remove her clothes and

do dirty things with her. She has deposed that the accused used to send her sisters to go out to play and when she used to accompany them, then the accused used to call her back.

24. PW2 has also deposed that her mother used to consume alcohol everyday and even beat her two younger sisters. PW2 has stated that she has not told her mother about such acts but she was not aware as to whether her mother was aware what the accused was doing to her. PW2 has categorically deposed that she did not tell about such acts of the accused to any one because she was scared of the accused who used to beat her.

25. PW2 has also deposed that in all they were five sisters but her mother sold two of the sisters. One was sold to a person near the house. PW2 has deposed that she informed about such acts of the accused to Sister Lourenca (PW1) after she came to stay in Convent at Sancoale.

26, PW2 has deposed to the scene of offence panchanama and has also identified the mobile phone (Micromax make ) as that belonging to the accused. PW2 was also shown the picture and video and she has confirmed that these were some of the pictures and videos which were shown to her by the accused on the said mobile phone.

27. The cross examination of PW2 has made no dent whatsoever in the clear and categorical deposition of PW2 in her examination in chief. The cross examination is only in the form of suggestions that whatever PW2 had deposed to was not true.

28. According to me, the learned Children's Court, was entirely justified in relying upon the clear and categorical testimony of PW2. In the absence of any dent to the testimony of PW2, there was nothing wrong in convicting the accused for the offence under the Goa Children's Act, 2003 and the Protection of Children from Sexual Offences Act, 2012

29. Mr. Amonkar's contention that the medical evidence does not offer any corroboration in this matter cannot be accepted in the facts of the present case. True, there is no substantial evidence of any vaginal penetration. However, PW2 has clearly deposed that the accused used to penetrate his penis in the mouth of PW2. Taking into consideration the definition of '*rape*' in Section 375 of IPC, the acts committed by the accused clearly warrants conviction which the learned Children's Court has recorded against the accused.

30. Besides, Section 2(y) of the Goa Children's Act, defines "*sexual offence*" to mean in the following terms :

(y) '*Sexual offences*' for the purposes of awarding appropriate punitive action means and includes,—

*[(i) “Grave Sexual Assault” which covers different types of intercourse, vaginal or oral or anal, use of objects with children, forcing minors to have sex with each other, deliberately causing injury to the sexual organs of children, making children pose for pornographic photos or films, and also includes rape;]*

*(ii) Sexual Assault which covers sexual touching with the use of any body part or object, voyeurism, exhibitionism, showing pornographic pictures or films to minors, making children watch others engaged in sexual activity, issuing of threats to sexually abuse a minor, verbally abusing a minor using vulgar and obscene language;*

*(iii) Incest which is the commission of a sexual offence by an adult on a child who is a relative or is related by ties of adoption.”*

31. Similarly, the Children's Act, defines 'child abuse' under Section 2(m) in the following term :

*(m) “Child abuse” refers to the maltreatment, whether habitual or not, of the child which includes any of the following:—*

*(i) psychological and physical abuse, neglect, cruelty, sexual abuse and emotional maltreatment;*

*(ii) any act by deeds or words which debases, degrades or demeans the intrinsic worth and dignity of a child as a human being;*

*(iii) unreasonable deprivation of his basic needs for survival such as food and shelter; or failure to immediately give medical treatment to an injured child resulting in serious impairment of his growth and development or in his permanent incapacity or death.”*

32. Taking into consideration the amplitude of the aforesaid definitions as well as clear and categorical evidence on record, there is no ground to upset the conviction recorded by the learned Children's Court in this matter.

33. In so far as the defence of inherent improbability is concerned, the same cannot be said to have been made out in the present case. The prosecution, in its cross examination of the accused who offered himself as a witness has put suggestions to him that his wife was in fact indulging in prostitution and the accused was procuring customers for her. All these positions may not have been established by the prosecution nevertheless from the evidence on record, it transpires that the room where these incidents have taken place are in a crowded slum in Biana area. There is evidence of not only PW2 but also, of natural biological daughter of both the accused and her mother i.e. PW8 which suggest that the parents used to drink alcohol and beat the victim as well as PW8 herself.

34. Even PW8 has stated that her father used to touch the victim though, she had not actually seen him touching the victim. This witness, has no doubt, stated that she likes her mother and wanted to stay with her mother and she was never scolded by her parents, when she scored less. However, no much advantage can be taken by the accused from such deposition, which only, explains the circumstances in which

the family was living. After saying that she wants to live with her parents, this minor witness aged about 11 years at the time of her deposition has also stated that she personally knows that her two younger sisters were given away.

35. PW2 has also deposed that she was extremely scared of the accused. The children under these circumstances cannot be expected to act like normal children who would complain about such acts to their own mother. Here the perpetrator was the step father. The mother, as evidence suggest was mostly drunk. There were insecurities of the future. There were insecurities about where such children could stay in case, they were to react against such acts of the father. In these circumstances, there is nothing inherently improbable in the version deposed to by PW2.

36. The decision in *Mohd. Ali alias Guddu Vs State of UP*, 2015(7) SCC 272 relied upon by Mr. Amonkar was in the context of entirely incomparable fact situation. In the said case, upon studied scrutiny the Court found that it was difficult to believe the version of the prosecutrix for several reasons. There was unexplained delay in lodging the FIR. There were no injuries on the private parts. The version of the prosecution that the prosecutrix had intimated her brother and sister of her abduction and rape was not established since such brother and sister were never examined by the prosecution. Taking into

consideration all these facts, the Court opined that there was cloud of suspicion and testimony of prosecutrix could not be regarded as unimpeachable character.

37. It is in the aforesaid circumstances that the Hon'ble Supreme Court whilst impregnating principle that there can be no iota of doubt that the conviction can be based on the sole testimony of prosecutrix even without corroboration and cautioned that the testimony of prosecutrix must be unimpeachable and beyond reproach. In the present case, the learned Children's Court has correctly found the testimony of PW2 as unimpeachable and beyond reproach. No dent was made to her testimony in the course of her cross examination. There is no good ground made out even in this appeal to disbelieve the testimony of PW2. Therefore, the decision in *Mohd. Ali* (supra ) can be of no assistance to the accused in this matter.

38. There is corroboration from the evidence of PW1 as well as PW8 though, corroboration was not even necessary in the present case. There is evidence of other witnesses, which describe the living conditions of the accused and the victim girl. Even the evidence of the accused himself to a certain extent corroborates the testimony of PW2 though not on the aspect of sexual assault. Although the accused, tried to insinuate that this is a case fostered by the NGO, such plea has not been established even by the test of preponderance of probability. In

fact, the accused, did not even depose to such matters in the course of his defence evidence. Mere reliance upon some vague suggestions to some of the witnesses can hardly be regarded as sufficient to make out a case that the prosecution was not independent but rather being fostered and promoted by an NGO.

39. Therefore, upon consideration of the evidence on record, quite independently, I am satisfied that there is no good ground to interfere with the conviction recorded by the learned Children's Court. The learned Children's Court in this case, has quite correctly marshaled the evidence on record and applied correct principles. There is accordingly, no case made out to interfere with the impugned judgment and order.

40. Before I part, however, it is necessary to record that Mr. V. Amonkar put in a lot of efforts to present the case on behalf of the Accused. He in fact canvassed all possible grounds in support of this appeal and offered very good assistance to this Court for the disposal of this matter.

41. This appeal is accordingly dismissed. There shall be no order as to costs.

**M. S. SONAK, J**

**at\***