

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 5 OF 2020

State, Through Police Inspector (major),
Vasco Police Station, Vasco, Goa. Appellant

Versus

Chandrakant @ Chandru Jaiswar, s/o
Lalman Jaiswar, major in age, r/o Near
Safi Masjid, Baina, Vasco, Goa. Respondent

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

Mr. Vibhav R. Amonkar, Advocate for the Respondent.

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

Date:- 4th August, 2020.

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

Heard the learned Public Prosecutor, Mr. S.R. Rivankar for the appellant and the learned Counsel, Mr. Vibhav R. Amonkar for the respondent.

2. The present Appeal is preferred by the State against the order of acquittal vide impugned judgment dated 28.01.2019 by the Children's Court, Panaji, Goa in Special Case No. 03/2017.

3. The present Appeal is preferred mainly on the ground that the learned Children's Court has erred in disbelieving the evidence of PW-1 i.e. the victim, whose evidence is not shaken in cross examination. It is contended that being a child victim, his testimony becomes material, unless it is shown that he is either tutored or that he has deposed falsely. It is also submitted that the learned Children's Court has disbelieved the testimony of PW-2, complainant (mother of the victim), mainly on the ground that she was doing the business of prostitution. It is further submitted by the learned Public Prosecutor that PW-3 and PW-4, who are the NGOs have taken up the issue upon information given by the victim on 11.11.2016. Upon which, the complaint was filed by the mother. It is submitted that the Children's Court wrongly arrived at a conclusion that there was delay in lodging the complaint. In fact, the delay in lodging the same was well explained. It is submitted that the learned Children's Court gave undue credence to the defence witnesses. It is submitted that the learned Children's Court has not properly appreciated the medical evidence on record.

4. The learned Public Prosecutor relied on the citation **(2005) 8 SCC 122, State of M.P. Vs. Dayal Sahu** in support of his contention that non-examination of the Doctor and non-production of Doctor's report is not fatal to the prosecution case, if the statement of the prosecutrix and other prosecution witnesses inspires confidence. Though, in the present matter, Doctor has not been examined on injury to the victim, the certificate is on record, which supports the deposition of PW-1. He further relied on **(2011) 11 SCC 524, State Bank of Travancore Vs. Kingston Computers India Private Limited.**

5. Per contra, the learned Counsel for the respondent, Mr. Amonkar submitted that there is no error whatsoever or illegality in the judgment passed by the learned Children's Court. It is submitted that it has come on record that the relation between the family of the accused and the family of PW-1/PW-2 was not good. It is submitted that it is also a fact on record that PW-2 was doing the business of prostitution and on that count there was always dispute between the father of the accused and PW-2 (mother of the victim). It is submitted that the accused examined defence witnesses,

whose evidence is on par with the evidence of the prosecution witnesses. It is submitted that their evidence cannot be discarded only on the ground that the witnesses are related to the accused or interested witnesses.

6. The learned Counsel for the respondent has relied on **(2002) 2 SCC 426, State of Haryana Vs. Ram Singh** in support of his contention that the evidence of defence witnesses is equally important and it cannot be discarded labeling them as interested witnesses and they are to be treated at par with prosecution witnesses. He also relied on **2019 SCC Online SC 897, Girish Singh Vs. State of Uttarakhand** on scope of Appeals against acquittal.

7. The rival contentions of the parties fall for our consideration and determination.

8. The prosecution examined in all 14 witnesses. PW-2, is the complainant (mother of the victim), who lodged the complaint on 11.11.2016 i.e. the day when she received information from one Julian and Anna that her child was raped by the accused. The alleged assault is of 30.10.2016.

After receiving information, she went to the hospital along with Julian and Anna. The Doctor removed the clothes of the victim and did the check up. She further deposed that the victim also informed that when he was playing at 4 p.m. he was called by Raj, who is the brother of the accused and he informed him that victim was called by the accused and sexually abused him. In the cross examination, this witness admitted that she was carrying on the business of prostitution at Baina slum, when she was initially residing at Baina slum before coming to stay at the present address. She has also admitted her relations with the family of the accused are not good. She also stated that the house of the accused is just adjacent to the house of the victim. So one fact is very clear from her evidence that the relationship of the complainant with the family of the accused was not good. There are certain suggestions to her that she has also established relations with the accused, though, she has denied the same.

9. It is the story of the prosecution that on 11.11.2016, PW-1 disclosed about the incident to PW-3 and PW-4, when they were conducting counseling sessions at the creche to the children of the labourers. It is also evident from

record that it is claimed that PW-4 was accompanying PW-2 (complainant) all the while i.e. from taking the victim to the Doctor to lodging of the complaint at the Police Station and thereafter also. However, it is surprising that the statement of PW-3 and PW-4 was not recorded by the Police for about two months. There is no plausible explanation by the Investigating Officer for delay in recording the statement of PW-3 and PW-4, specifically when they were very much available for recording such statement, when in fact, they were accompanying the complainant. PW-10, Investigating Officer deposed that he tried to contact on phone, however, there is nothing on record to show that such efforts were made either in the case diary or otherwise. In fact, PW-3 and PW-4 claimed that they being NGO persons accompanied the complainant. The involvement of PW-3 at all stages is evident, still PW-3 by herself also, had neither approached to the Police to get her statement recorded nor asked the Police to do so. It raises reasonable doubt in respect of the investigation conducted by the Police. Moreover, there is nothing on record to show that PW-3 and PW-4 are possessing any specialized training qualification to hold such counseling sessions.

10. It is admitted position that relations of PW-2 with the family of the accused were not good. The evidence also reveals that PW-2 admitted the photographs produced by the accused in her cross examination, which clearly show that one has to pass through the narrow path in front of the house of the accused to reach to the house of PW-2, complainant. This fact is also support by PW-9, who was examined by the prosecution. It has come on record that the room of PW-9 was let out to the father of the accused and that PW-9 was also knowing both, the complainant and the accused as he is having a wholesale shop in one of the rooms. From his evidence also, it is revealed that the house of the accused and PW-2, complainant is adjacent to each other. PW-9, who is an independent witness was examined by the prosecution to establish that the accused is residing in the house let out by PW-9. This witness, in his cross examination has deposed that one cannot go to the house of the complainant, unless he passes through the passage in front of the house of the accused. He has also deposed that the father of the accused was complaining to him (PW-9) that male members used to visit PW-2 and they used to peep into their house, where his

young daughter is also residing with him and that there are some wrong things going on in the house of PW-2. PW-9 deposed that when he went to verify, he saw PW-2 and as she was quarrelsome lady, he returned back without saying anything. Surprisingly, there was no permission sought by the prosecution to cross examine this witness and therefore, whatever PW-9 deposed went unrebutted.

11. DW-3, sister of the accused also confirmed the fact of peeping by male members into the house of PW-2, who used to visit the house of PW-2. PW-2 has deposed that she is not having any relatives at Vasco. The father of the accused appears to have objected for the visit of male members, who used to peep in the house and he conveyed his objection to PW-2, whereupon she told him not to interfere with her business. DW-3, sister of the accused confirmed the fact of male members visiting to the house of the complainant, PW-2. It has also come on record that the accused was working for one Shetty and used to supply chips to various places. It is the defence that the accused used to come only in lunch hours to his house. DW-3 deposed that she returned from school at around 12:30 p.m and thereafter, she used to

remain in the house. Her brother (accused) used to come at 2:30 p.m and go back at around 3:30 p.m. By giving suggestions to this witness, the prosecution confirmed that the occupation of the accused was to supply chips at various shops at Vasco. As such, there is no reason to disbelieve DW-3, specifically when the prosecution witness PW-9 confirmed these facts. Mr. Amonkar, the learned Counsel for the respondent has relied on **Ram Singh** (supra) and the principles laid down in the said case in order to submit that the evidence tendered by defence witnesses cannot always be termed to be a tainted one, the defence witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution. In the present matter, we do not see any perversity in appreciating the evidence of the defence witnesses by the learned Children's Court.

12. Thus, the possibility of false implication cannot be ruled out considering the fact that the house of the complainant and that of the accused are adjacent to each other and the strained relations between the two families.

The evidence of the independent witnesses reveal the complaints made by the father of the accused, so also the deposition of the defence witnesses creates reasonable doubt about the prosecution version and the possibility of false implication of the accused cannot be ruled out.

13. When we turn to testimony of PW-1, it also does not inspire much confidence as there is material omission to the effect that he was told by the brother of the accused that the accused is calling him (PW-1) inside the house. It is also hard to believe that on the say of brother of the accused, PW-1 went inside the house of the accused, specifically when there were strained relations between the family of the accused and complainant. As per the deposition of PW-1, he was not used to playing with the siblings of the accused. It is claimed by PW-1 that earlier also, the accused took him to the jungle on motorcycle and did the same acts with him. If such would be the case, going of PW-1 to the house of the accused is unusual. Subsequent conduct of PW-1 is also material that after this incident if, he would have any pain in his anus, he did not inform about the same to his mother, specifically when PW-2 (mother of PW-1) was inside the house, as alleged. On

the contrary, he went out to play. Secondly, as per the deposition of PW-1, earlier also, he was taken to the jungle by the accused on motorcycle and the accused did the same acts and PW-1 could not scream as his mouth was covered by the accused. It does not appear plausible that a person riding motorcycle will press the mouth of PW-1 while riding the motorcycle. Even if it is assumed that while taking him away from his house he was not aware what the accused was going to do with him, however, he could have shown some resistance while they were returning back to his house. From the evidence of PW-1 reasonable doubt raises in the mind about his trustworthiness. The houses of the accused as well as the complainant are situated in densely populated area and therefore, it is very difficult for a person to do such act in daylight that too, when other family members are present in the house.

14. The learned Children's Court rightly appreciated the evidence on record, which raises doubt about involvement of the accused. It is settled principle that in criminal law if two views are possible on evidence adduced in the case, one pointing to the guilt of the accused and other to his

innocence, the view which is favourable to the accused should be accepted. Investigation is also not beyond suspicion as the statement of the material witnesses i.e. PW-3 and PW-4 were recorded after two months, specifically when their involvement is there since lodging of the complaint. It is also revealed from the deposition of PW-2 that her statement was recorded only once, but, it appears that supplementary statement of PW-2 shown to be recorded i.e. two months after the recording of statement of the complainant. In view of this, the learned Children's Court rightly observed that there is some manipulation of record on the part of PW-10 to suit the case of the prosecution.

15. PW-10 had not carried out any investigation in respect of earlier incident stated by PW-1. It is also admitted by PW-10, Investigating Officer that the investigation revealed that PW-1 was beaten with stick at the hostel and history of physical assault was given by the victim to the Doctor on 11.11.2016, but she has not conducted any investigation to that effect. The panch witness also did not stand by the prosecution in respect of seizure of clothes or mobile of the accused.

16. The citation relied on by the learned Public Prosecutor, Mr. Rivankar, in the facts and circumstances and the evidence on record, is of no help. Insofar as the citation **Dayal Sahu** (supra) is concerned, there is no dispute about the proposition laid down in the citation and it cannot be applied in the present set of facts. In absence of the examination of the Doctor or non production of Doctor's report, only on the statement of the prosecutrix and other prosecution evidence, conviction can be based. For doing so, the evidence of the victim and other witnesses must inspire confidence. However, as disclosed in foregoing paras we are of the considered opinion that the finding recorded that the evidence of PW-1 does not inspire confidence or other evidence on record is not sufficient to hold accused guilty of offence charged with. The view taken by the learned Children's Court is certainly a plausible view requiring no interference in an Appeal against acquittal.

17. Mr. Amonkar, the learned Counsel for the respondent pointed out the limited scope in an Appeal against acquittal, relying on the decision in the case of **Girish Singh** (supra). In this case, it is held that if the view taken by the

acquitting Court is a possible or plausible view, the same need not be interfered in Appeal of this nature. In such matters, there is always a presumption of innocence. This presumption is further fortified by the acquittal recorded by the learned Trial Court. Therefore, unless compelling case is made out, there is no scope to interfere with the acquittal.

18. Considering the scope of the Appeal and evidence on record, there is no case made out for interference in the judgment passed by the Children's Court in Special Case No. 3/2017. Accordingly, we dismiss the Appeal.

19. We record our appreciation at the fair manner in which, both, Mr. Rivankar, the learned Public Prosecutor for the appellant and Mr. Amonkar, the learned Counsel appearing for the respondent, presented their respective versions before this Court.

SMT. M. S. JAWALKAR, J.

M. S. SONAK, J.