

**IN THE HIGH COURT OF BOMBAY AT GOA**  
**CRIMINAL APPEAL NO.63 OF 2019**

Shri Girish Shirodkar,  
s/o Shamba Shirodkar,  
27 year of age,  
r/o H.No.1234,  
Madel, Chorao,  
Tiswadi, Goa.  
Presently undergoing  
sentence at Central Jail  
Colvale, Bardez, Goa and  
presently released on furlough  
for a period of 21 days.

.... Appellant.

***Versus***

1. S T A T E,  
Represented by the PP  
High Court of Bombay at  
Panaji, Goa.

2. The Police Inspector,  
Old Goa Police Station,  
Old Goa.

.... Respondents.

Mr. Arun Bras De Sa with Mr. S. Sardessai, Advocates for the Appellant.

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

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

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

**Pronounced on :- 7<sup>th</sup> September, 2020**

## JUDGMENT

Heard Mr. Arun Bras De Sa alongwith Mr. S. Sardessai, learned counsel for the Appellant and Mr. P. Faldessai, learned Additional Public Prosecutor for the State.

2. This appeal is directed against the judgment and order dated 10<sup>th</sup> August, 2017 in Special Case No.22/2016 made by the learned Children's Court, the State of Goa convicting and sentencing the appellant, in terms of operative portion which reads as follows :-

*“It is therefore, the accused is sentenced to undergo rigorous imprisonment for a term of 10 years and is directed to pay fine of Rs.2,00,000/-, in default, to undergo simple imprisonment for 2 years for the offence punishable under Section 8(2) of the Goa Children's Act, 2003, under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and under Section 377 of I.P.C.*

*Further, the accused is sentenced to undergo rigorous imprisonment for a term of 3 years and is directed to pay fine of Rs.5,000/-, in default, to undergo simple imprisonment for 3 months for the offence punishable under Section 8 of the Protection of Children from Sexual Offences Act, 2012.*

*The substantial sentences of imprisonment imposed on the accused shall run concurrently.*

*The accused was arrested on 1.11.2015 and he is in judicial custody till date. The aforesaid period of detention is set off against the term of substantial imprisonment imposed on the accused, under Section 428 of Cr.P.C.*

*The fine amount, if any, recovered from the accused shall be deposited in the name of the victim boy in Fixed*

*Deposit in any Nationalised Bank till he attains majority.*

*M.O.1 and 2; Exh.1 and 2 and the exhibits as per the CFSL Report, at Exh.C-46 colly, shall be destroyed after the appeal period is over.”*

3. The case of the prosecution is that on 31<sup>st</sup> October, 2015 after 8.30 p.m, near St. Bartholomeo's Church hall, in the jungle area, at Chorao, Tiswadi Goa, the appellant (accused) had '*carnal intercourse against the order of nature*' with the minor victim boy, then aged 12 years and five months and that such acts constitute '*grave sexual assault*' under Section 2(y)(i) of the Children's Act, 2003 and had '*penetrative sexual assault*' under Section 3 of the Protection of Children from Sexual Offences Act, 2012.

4. The accused pleaded that he was not guilty and claimed to be tried. The prosecution therefore examined eleven witnesses in support of its version. The accused then gave the statement under Section 313 of Cr. P.C and also examined one witness in his defence. The arguments were heard and the learned Children's Court has made the impugned judgment and order convicting and sentencing the accused. Hence, the present appeal.

5. Mr. De Sa, learned counsel for the accused has pointed out that in this case the victim did not know the accused and the incident as alleged to have taken place at about 9.30 p.m., in the jungle area. He therefore, submits that holding of test identification parade (TIP) was a

must and since the same has not been held, there is no identification or rather, identification by the victim boy in the Court cannot be relied upon. He pointed out that there are serious contradictions between the versions suggested by the victim's uncle and the victim himself. He pointed out that at least two crucial witnesses on the issue of identification have turned hostile. He pointed out that the mobile phone, on which, PW8 is alleged to have shown the photograph of the accused to the victim was never attached and PW8 denied having shown any such picture to the victim or his parents. He therefore submits that the accused is entitled to be acquitted of the charge levelled against him.

6. Mr. De Sa points out that there is evidence about learning disability of the victim as also the mental retardation of the accused. He submits that if these circumstances are taken into consideration, this is a case of mistaken identity and even in case had any doubt the benefit of such doubt is required to be extended to the accused.

7. Mr. De Sa points out that the learned Children's Court has completely misconstrued the evidence of defence witness (DW1) and the findings recorded by the learned Children's Court are mostly in the nature of surmises and conjectures. For all these reasons, he submits that the impugned judgment and order is liable to be set aside and the accused, who has already suffered imprisonment of almost five years is liable to be released.

8. Mr. Faldessai, learned Additional Public Prosecutor defends the impugned judgment and order on the basis of the reasonings reflected therein. He submits that even though the incident may have taken place in the jungle and where there was no light, the accused took the minor victim from the well- lit church area. He submits that the identification in the Court is in fact substantive evidence. He submits that the evidence of DW1 also supports the prosecution. He submits that the minor contradictions here and there cannot be a ground to acquit the accused. For all these reasons, he submits that this appeal is required to be dismissed.

9. The rival contentions now fall for my determination.

10. The prosecution, in this matter, has examined Dr. Ivonne D'Silva Pereira, Professor and Head of Department in Psychiatry at the Institute of Psychiatry and Human Behaviour, Bambolim, as PW11. She has deposed that based upon the available history, clinical psychiatric evaluation and psychological assessment of the victim, she found that the victim has dull normal intelligence with IQ 86 and learning disability in Maths. She has also deposed that based upon the available history, clinical psychiatric evaluation and psychological assessment, she found that even the accused has mild mental retardation with IQ 65 with some traits of personality disorder. According to me, the factum of such deposition has been completely missed by the learned Children's

Court in convicting the accused in this matter. Such evidence, by PW11 can certainly not be only ground for acquitting the accused but such evidence was required to be borne in mind for the purpose of evaluation of other evidence on record. This, does not appear to have been borne in mind, in the present case.

11. The evidence of PW1 i.e. the victim boy is undoubtedly crucial in this matter. He has deposed that on 31.10.2015, he had gone alongwith his uncle Damodar Surlikar (PW9) to attend a meeting at St. Bartholomeos Church hall at Chorao at about 8.30 p.m. He has deposed that while his uncle was attending the meeting he went to play carom in the church hall and one person told him not to play, as, it was causing noise. The uncle PW9, has deposed that he had noticed the victim playing carom with the accused and after some time, he also noticed that the victim and the accused had gone out of the church hall where they were playing carom. On the later aspect of noticing the victim and the accused going out of the church hall, the uncle PW9 has retracted in his cross examination and admitted that he had not noticed anything of this sort.

12. PW1, the victim, has nowhere deposed that he was playing carom with the accused. From the deposition of PW1, it is very apparent that he was never playing carom with the accused. There is accordingly, a variation in the version put forth by PW9 and PW1, for

which, there is really no explanation offered by the prosecution.

13. PW1 has deposed that the accused put his hands around his (victim's) shoulder and took him outside the church and while walking started asking him the questions whether he knew one Neha and whether he has seen any sex video. Thereafter, PW1 has deposed that the accused took him to a jungle area which was down a slope and about 60 metres away from the church. PW1 has deposed that upon reaching the spot the accused took off his pant and his own pant and thereafter asked him to hold his private part in his hands. PW1 has deposed that thereafter the accused put his private part in his (victim's) anus for which, he suffered pain. PW1 has then deposed that he heard his uncle calling him and so, the accused left him and told him not to tell anyone about the incident.

14. PW1 has deposed that he did not tell his uncle anything about the incident but after returning home he told everything to his parents. He has deposed that his father and the uncle took him to Madel to inquire about the accused and at that time one boy whose name he does not know showed him a photograph on the mobile phone and asked him whether he was the same person. PW1 claims to have identified the accused from the photograph on the mobile phone, upon which, this boy stated that the name of the said person is Girish Shirodkar ( accused ).

15. PW9, the uncle has deposed that after they returned home, the victim told his father (PW2), in his presence about the incident. PW9 has deposed that he alongwith PW2 went to the house of one Shrikrishna Haldankar (PW7) to make inquiries. Here, Pandurang Haldankar (PW8), brother of PW7 showed them the photograph of the accused on his mobile phone and the victim, identified the accused from the photograph. Accordingly, the victim's father PW2 lodged the complaint to the police.

16. Now, it is admitted fact that neither the victim PW1 nor his uncle PW9 were knowing the accused. Therefore, there should have been some explanation as to what prompted PW1, PW2 and PW9 to go on the same night to the residence of PW7 to make inquiries. There is no evidence that these witnesses made inquiries in and around the area of offence with some of the people residing in the locality. The evidence is that these witnesses directly went to the house of PW7 to make inquiries.

17. The complaint was lodged on the same night of the incident. If this be so, it was quite crucial to attach mobile phone from PW8, as, it is the case of the prosecution that the accused was identified in the first instance on the basis of his photograph in the mobile phone of PW8. However, in this case, the mobile phone was never attached and there is no explanation as to why such a crucial item was never

attached. Therefore, there is absolutely no evidence on record that the initial identification was based upon the photograph in the mobile phone of PW8.

18. As if the aforesaid is not sufficient, neither PW7 nor PW8 have really supported the version of the prosecution. PW7 has admitted that on 01.11.2015 at about 00.30 hours, PW2 and PW9 alongwith victim had come to his residence and informed him that one person who had accompanied him to the meeting had kidnapped the victim and taken into the jungle. However, PW7 flatly denied having stated to the police that his brother PW8 had shown the photograph of the accused to the victim and the victim had identified the accused. PW8, was declared as hostile by the prosecution but except for some bare suggestions, nothing has been elicited from this witness which will support the prosecution case on this crucial aspect of identification.

19. PW8 is the most crucial witness on the aspect of identification. Again, PW8, in his chief deposed that though he knows PW2 i.e. father of the victim, he does not know anyone of his family members. He has deposed that though he knows the accused who is present in the Court, he does not know anything about this case. He admitted that he was called by the police but deposed that he has stated to the police that he does not know anything about this case. He also admitted that PW2 had come to his house during one night, around a

year back to search PW7 alongwith many people. He admitted that there was a minor boy present with them and they said that he was disrobed and assaulted by someone. At this point of time the prosecution declared PW8 as hostile.

20. In the cross examination of PW8, he stated that around 7 to 8 months back, the police just asked him if he knew the accused to which he replied in positive but he told the police that he does not know anything about the case. He categorically deposed that he has not stated to the police that PW2 and others had informed his uncle (PW7) that the minor son of PW2 was kidnapped and taken to jungle. He also deposed that he has not stated to the police that he had shown the photograph of the accused to the victim who identified the photograph of the accused and said that he is the same person who had taken to the jungle. On confrontation, he stated that he is not in a position to explain why such facts are recorded in his statement. He denied the suggestion that he was deposing in favour of the accused because he was neighbour and has been won over by the accused. He emphatically denied the suggestion having shown the photograph of the accused to the victim.

21. The I.O. Kirtidas Gaude (PW10) has also not been able to explain any of the contradictions in the evidence of PW7 and PW8. In fact, the I.O., in the context of deposition of PW2 i.e. victim's father,

deposed that PW2 had never told him that the victim boy had informed them that the name of the culprit was Girish Shirodkar. The IO has deposed that PW2 had not even described the clothes of the victim in his complaint. The I.O., has deposed that PW9 had not stated to him that he had noticed the victim and the accused go out of the church hall. The IO also deposed that PW9 had never stated to him that he alongwith PW2 went to the house of PW7 to make inquiries about the accused and the brother of PW7, namely PW8 showed them the photograph of the accused on his mobile phone.

22. The I.O. (PW10) also admitted in his evidence that he did not attach the mobile phone on which the photograph of the accused was shown to PW2 by PW9 and PW8. The IO (PW10) also admitted that he has not conducted any TI parade to confirm the identity of the accused. He has also admitted that PW2 and PW9 has not furnished the description of the culprit to him. He has also admitted that he had shown the accused to the victim at the police station itself. He has admitted that on the relevant day, some people were present in the church for meeting but he has not recorded the statements of any of the other witnesses in the church.

23. From the aforesaid, it is quite evident that there has been no proper identification of the accused in this matter. The most crucial item namely the mobile phone was never attached. The witnesses, who were

alleged to have shown the picture of the accused on the mobile phone have not supported the version of the prosecution. There was no TI parade ever conducted and there is absolutely no explanation as to why this mobile phone was not attached. Coupled with the medical evidence of PW11 that the victim himself has dull normal knowledge and learning disability and the accused also has mild mental retardation of IQ 65, it will really not safe to act upon the identification by PW1 in the Court though, normally such identification is the substantive evidence.

24. There are variations in the versions put forth by PW1 and his uncle. Even the evidence of IO, really, does not support the prosecution version. There is nothing in the evidence of DW1, on the basis of which the conviction of the accused can be sustained.

25. The learned Children's Court, has, emphasised substantially upon certain portions of the evidence of DW1 Dayanand Khandeparkar. DW1 is a neighbour of the accused and his family. No doubt, he has deposed that the accused was a very mischievous child from his childhood and troubled other children in the school, when he began to go to the school. He has deposed that the accused used to tear the books of other children and argue with his father when scolded and threw stones on the house and run away. He has deposed that the accused was also listening to his father but listening to others. He has

deposed that the accused used to consume alcohol in the company of notorious boys from the village. According to me, on the basis of this evidence, no conclusion of guilt could at all have been drawn against the accused. These are the opinions of DW1 and though, it is possible that these are the experiences of DW1, such experiences could not have been taken into consideration for convicting the accused and sentencing him to undergo imprisonment for a period of 10 years and pay a fine of Rs.2,00,000/-. The prosecution has also challenged the evidence of DW1 by putting suggestion that he was not deposing truly and correctly.

26. DW1 has also deposed that the accused has a sister who is not mentally sound. He has also deposed that the paternal uncle of the accused as well as his son are also mentally unsound. DW1 has opined that from his personal observation, he felt that the accused has no fear of law, social obligations and respect for his parents. DW1 is certainly entitled but his opinion, however, according to me, such opinion cannot form the basis for convicting the accused of such a crime in the absence of any proper identification.

27. In *Noorahammad and others Vs State of Karnataka*<sup>1</sup>, the Hon'ble Supreme Court has held that where the incident took place at night with improper lighting and the accused and victim are not knowing one another, it may not be safe to rely upon the identification

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<sup>1</sup> (2016) 3 SCC 325

in the Court even though, such identification may be substantive evidence and the TIP only a means of corroboration.

28. Similarly, in *Dana Yadav Vs. State of Bihar*<sup>2</sup> the Hon'ble Supreme Court has held that it is also well settled that failure to hold test identification parade, which should be held with reasonable dispatch, does not make the evidence of identification in court inadmissible, rather the same is very much admissible in law. Question is, what is its probative value? Ordinarily, identification of an accused for the first time in court by a witness should not be relied upon, the same being from its very nature, inherently of a weak character, unless it is corroborated by his previous identification in the test identification parade or any other evidence. The purpose of test identification parade is to test the observation, grasp, memory, capacity to recapitulate what a witness has seen earlier, strength or trustworthiness of the evidence of identification of an accused and to ascertain if it can be used as reliable corroborative evidence of the witness identifying the accused at his trial in court. If a witness identifies the accused in court for the first time, the probative value of such uncorroborated evidence becomes minimal so much so that it becomes, as a rule of prudence and not law, unsafe to rely on such a piece of evidence. In support of this position, the Hon'ble Supreme Court has itself referred to a catena of decisions in *Kanta Prashad v. Delhi Admn.*,<sup>3</sup> *Vaikuntam Chandrappa*<sup>4</sup>, *Budhsen*<sup>5</sup>,

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<sup>2</sup> (2002) 7 SCC 295

<sup>3</sup> AIR 1958 SC 350

<sup>4</sup> AIR 1960 SC 1340

<sup>5</sup> (1970) 2 SCC 128

*Kanan v. State of Kerala*<sup>6</sup>, *Mohanlal Gangaram Gehani v. State of Maharashtra*<sup>7</sup>, *Bollavaram Pedda Narsi Reddy*<sup>8</sup>, *State of Maharashtra v. Sukhdev Singh*<sup>9</sup>, *Jaspal Singh v. State of Punjab*<sup>10</sup>, *Raju v. State of Maharashtra*<sup>11</sup>, *Ronny*<sup>12</sup>, *George v. State of Kerala*<sup>13</sup>, *Rajesh Govind Jagesha*<sup>14</sup>, *State of H.P. v. Lekh Raj*<sup>15</sup> and *Ramanbhai Naranbhai Patel v. State of Gujarat*<sup>16</sup>.

29. If the evidence on record is to be evaluated by applying the aforesaid principle, we agree with the contention of Mr. De Sa that it will not be safe to rely upon the identification of the accused by the victim in the Court, though such identification by the victim in the Court may constitute substantive evidence.

30. In this case, there is absolutely no corroboration, since no TIP was never held and there is no explanation as to why the same was never held. Similarly, the crucial mobile phone which allegedly contain the photograph of the accused and from which photograph the victim is stated to have identified the accused was never attached. PW8 who is alleged to have shown photograph on his mobile phone has also denied ever having shown such photograph on his mobile phone to the victim

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6 (1979) 3 SCC 319

7 (1982) 1 SCC 700

8 (1991) 3 SCC 434

9 (1992) 3 SCC 700

10 (1997) 1 SCC 510

11 (1998) 1 SCC 169

12 (1998) 3 SCC 625

13 (1998) 4 SCC 605

14 (1999) 8 SCC 428

15 (2000) 1 SCC 247

16 (2000) 1 SCC 358

or to the victim's relatives. All this, creates very serious doubt on the prosecution version and the benefit of such serious and reasonable doubt is required to be extended to the accused.

31. Mr. Faldessai pointed out that medical evidence indeed suggest some anal penetration. This is correct, however the scientific evidence on record i.e. by way of blood tests or DNA examination or tests for semen, are completely negative, in the sense nothing incriminating in so far as the accused is concerned has been detected. The medical evidence, may at the highest suggests some activity but such evidence is by no means sufficient to connect the accused to this activity.

32. The learned Children's Court, has considered the evidence of Psychiatrist (PW11) and DW1 from the context of plea of insanity, which incidentally, was never raised on behalf of the accused. However, according to me, the evidence regards mental retardation of the accused and lower IQ of the victim were the factors to be kept in mind for evaluating the other evidence on record and this has not been done in the present matter.

33. In the aforesaid circumstances, it cannot be said that the prosecution has succeeded in proving its case beyond the reasonable doubt. Accordingly, the impugned judgment and order is liable to be

set aside and the accused is liable to be set at liberty forthwith, if he is not required in connection with any other matter.

34. This appeal is accordingly allowed. The impugned judgment and order is set aside. The appellant is acquitted of the charges levelled against him and is directed to be set at liberty forthwith, if he is not required in connection with any other matter.

35. Registry to take necessary steps in this matter.

**M. S. Sonak, J**

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