

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 45 of 2015

Ramesh Naik @ Lamani,
son of Tejappa Lamani,
major of age, labourer,
R/o Katem, Baina, Goa.
(currently in custody at
Central Jail, Colvale, Goa,
through his next friend
Renuka Lamani, major,
resident of House No.3,
R/o Katem, Baina, Goa.

... Appellant.

Versus

The State of Goa,
Through Police Inspector,
Vasco Police Station,
Vasco da Gama, Goa.

.... Respondent.

Mr. Ryan Menezes with Mr. Nigel Fernandes, Advocates for the
Appellant.

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

Coram : M. S. SONAK, J.

Date: 9th October, 2020.

ORAL ORDER:

Heard Mr. Ryan Menezes with Mr. Nigel Fernandes, learned Counsel for the appellant and Mr. Mahesh Amonkar, learned Additional Public Prosecutor for the Respondent.

2. The challenge in this appeal is to the judgment and order dated 10.07.2015 made by the learned Children's Court for the State of Goa in Special Case No.6/2010 by which the learned Special Judge of Children's Court has convicted the appellant for offences punishable under Section 342, 376, 506(ii) of IPC read with Section 8(2) of the Goa Children's Act, 2003 (the said Act). The learned Children's Court, has sentenced the appellant to undergo simple imprisonment for a term of one year for the offence punishable under Section 342 of the I.P.C. Further, the accused was sentenced to undergo rigorous imprisonment for a term of ten years and pay fine of ₹ 2 lakhs and in default to undergo simple imprisonment for two years for the offence punishable under Section 376 of the I.P.C. r/w Section 8(2) of the said Act. The learned Children's Court has also sentenced the appellant to undergo simple imprisonment for a term of one year for the offence punishable under Section 506(ii) of the I.P.C. The substantive sentences of imprisonment are directed to run

concurrently. The appellant was also granted the benefit of the provisions under Section 428 of Cr.P.C.

3. The case of the prosecution is that, sometime in the last week of June 2005 or in the first week of July, 2005 at Katem, Baina, the appellant wrongfully confined the minor victim girl aged about 7 years in his house and committed rape on her. The appellant, then threatened the minor victim girl with dire consequences saying that he would kill her if she disclosed this incident to anyone.

4. The charge was framed against the appellant to which he pleaded 'not guilty'. The prosecution, in the ensuing trial, examined ten witnesses in support of this case. Statement was recorded under Section 313 Cr.P.C. Despite opportunity, the appellant chose not to lead any defence evidence in this matter. Ultimately, the learned Children's Court, by the impugned judgment and order, convicted the appellant and sentenced him as aforesaid. Hence, the present appeal.

5. Mr. Menezes, the learned Counsel for the appellant points out that in this case the medical evidence completely militates against the prosecution version that the appellant, committed rape on the minor victim girl. He refers to the Medical Certificate on record as

also the deposition of Dr. E. J. Rodrigues,(PW-4). He submits that the deposition made on the basis of the medical evidence, the learned Children's Court ought not to have convicted the appellant for the offence punishable under Section 376 of the I.P.C. and punished him under Section 8(2) of the said Act.

6. Mr. Menezes submits that on the basis of this evidence, the learned Children's Court ought not to have convicted the appellant for the offences punishable under Section 376 of the IPC and punished the appellant under Section 8(2) of the said Act.

7. Mr. Menezes submits that even otherwise, the testimony of the child witness does not inspire confidence where, the possibility of tutoring cannot be ruled out. He points out that there is evidence on record that in the past, there were no allegations of such nature against the appellant. He points out that the incident is alleged to have occurred in a room which is surrounded by several houses. He points out that the incident is alleged to have taken place at 1:00PM in the afternoon. He submits that all this is inherently improbable and, therefore, the impugned judgment and order and the conviction recorded therein warrants interference. Mr. Menezes points out that there are contradictions in the evidence of the prosecution witnesses

and no sufficient attention has been paid by the learned Children's Court to the various lacunae in the prosecution evidence.

8. For all the aforesaid reasons, Mr. Menezes submits that this appeal may be allowed and the impugned judgment and order may be set aside.

9. Mr. Mahesh Amonkar, the learned Additional Public Prosecutor defends the impugned judgment and order for the reasonings reflected therein. He submits that the testimony of the minor victim girl is quite clear. There was absolutely no reason not to rely upon such testimony. He points out that even if there is any conflict between ocular evidence and medical evidence, then, it is ocular evidence which must prevail particularly in matters of this nature. He points out that there is absolutely no evidence produced to show any previous enmity between the minor victim girl or, her family on one hand and the appellant on the other. He submits that in these circumstances, it is too much to believe that the appellant may have been falsely implicated in this case. Mr. Amonkar submits that for all these reasons this appeal may be dismissed.

10. The rival contentions now fall for my determination.

11. In matters of this nature, the testimony of the minor victim girl is most significant. Prosecution, thereafter, has examined the minor victim girl as PW-2. At the time of the deposition, the minor victim girl was about 12 years of age. This deposition was recorded in the year 2010 and the incident relates to the year 2005. Therefore, at the time of the incident, the minor victim girl was about 7 years of age.

12. The minor victim girl has deposed that sometime in the year 2005, when her parents had gone to the village of Bijapur to attend to her sick grandmother, her neighbour Leelabai called her and handed over a mixer to her and requested her to deliver it to the house of the appellant. She has deposed that the appellant's house was close to the seashore and was at a distance of about two to three minutes walking distance from her house. She has deposed that she knew the appellant as she used to go to his house to watch television. She deposed that the appellant was not related to her. The minor victim girl then deposed that when she went to the house of the appellant to hand over the mixer which was given to her by Leelabai, the appellant who was alone in his house caught her hand. She has deposed that she bit the appellant's hand and tried to escape. However, the appellant again caught her and took her inside the inner room of his house. She

deposed that she tried to shout for help but the appellant closed her mouth with his hand, pulled her inside and latched the door. She deposed that the appellant then showed her a knife and threatened that in case she shouts she will be cut into pieces and thrown into the sea. Finally, she has deposed that the appellant made her lie on the floor, lifted her frock and removed her underwear and then put his penis in her private part. She has deposed that the appellant was touching all over her body and also kissed her. She deposed that there was some liquid discharge inside her from his private part. She deposed that the appellant threatened her not to tell about the incident to anyone.

13. Now, the evidence of the minor victim girl is quite incriminating. However, it is necessary to know that at the time of the incident, the appellant was hardly 7 years of age. Therefore, it would be prudent to look through some corroboration from the other witnesses on record. Taking into consideration the deposition of the minor victim girl on the aspect of intercourse, obviously, the most relevant evidence in this case would be that of prosecution witness (PW-4) who examined the minor victim girl and issued the Medical Certificate based on such examination. PW-4, in this case, has clearly deposed that the hymen of the minor victim girl was intact and there

were no tears to the hymen. The labia majora fully covered the labia minora and introitus (opening). There were no tears to the vestibule, fourchette. PW-4 clearly deposed that in his opinion there was no evidence of recent forcible sexual intercourse and there were no injuries on the body. He deposed that the vaginal swabs and smear slides were retained for serological examination.

14. Prosecution, has not been able to produce any incriminating evidence to prove the analysis of vaginal swabs to serological examination.

15. PW-4 also examined the appellant himself and deposed that there were no injuries on his body. PW-4 deposed that his genital development was good, pubic hair were black and not matted with blood or semen and no injuries were found in the genital area. Finally, PW-4 deposed that in his opinion, in the absence of any positive signs of sexual intercourse, no opinion to that effect can be given. He deposed that however materials were retained for serological examination. Again, prosecution has not been able to produce any incriminating evidence on account of serological examination. There is also medical evidence on record which suggests that the minor victim girl was found to be HIV positive whereas the appellant was

found to be HIV negative. This is important because the prosecution, at one stage, had tried to suggest that it is on account of the appellant that the victim girl contracted HIV.

16. Though, it is true that there is no rule that some primacy should be given to the opinion of a medical expert over the deposition of prosecutrix, in the particular facts and circumstances of the case, it may not be safe to rely almost entirely upon the version of the minor victim girl, who, was admittedly hardly 7 years of age at the time of incident, in the context of the clear and cogent evidence on record which rules out any sexual intercourse. If, the version of penetration deposed to by the minor victim girl is to be believed, then, the medical evidence would have certainly suggested some circumstance in support of this version. The medical evidence, militates against any recent forcible sexual intercourse upon the minor victim girl. This is corroborated by the fact that there were no injuries found on the genitals of the appellant as well. In the light of this evidence in the facts of the present case, it will not be safe to sustain the conviction of the appellant under Section 376 of the IPC r/w. Section 8(2) of the said Act for having committed a grave sexual assault on the minor victim girl.

17. However, although the version of the minor victim girl on the aspect of forcible sexual intercourse is not safe to be relied upon, there is no good reason to disregard the evidence of the minor victim girl in entirety. The deposition of the minor victim girl is sufficient to establish beyond reasonable doubt that the appellant in this case, did commit a sexual assault upon her. The acts referred to by the minor victim girl in her deposition certainly qualify to be styled as 'sexual assault' as defined under Section 2(y)(ii) of the said Act. The medical evidence on record does not at least militate against the prosecution version that the appellant had committed sexual assault on the minor victim girl. Even the testimony of the minor victim girl is quite clear on this aspect of sexual assault.

18. The evidence on record, is also sufficient, to sustain the conviction under Section 342 and 506(ii) of the IPC. There is corroboration to be found in the testimony of other prosecution witnesses. The learned Children's Court has properly marshalled the evidence and evaluated the same. There is no substance in the contentions based upon inherent improbability. Therefore, upon cumulative consideration of the material on record, though I am satisfied that in this case it will not be safe to sustain the conviction of

the appellant under Section 376 of the I.P.C. r/w. Section 8(2) of the said Act, the conviction for other offences is quite justified.

19. Therefore, the appellant, deserves to be convicted for sexually assaulting the minor victim girl. In terms of Section 8(2) of the said Act, the appellant is required to be awarded the maximum penalty which is of three years and fine of ₹1 lakh. In case, the appellant fails to pay the fine, then, the appellant, must suffer in-default imprisonment for a period of six months.

20. Accordingly, this appeal is partly allowed and disposed of by making the following Order:

ORDER

- (i) The conviction of the appellant under Section 376 of I.P.C. r/w. Section 8(2) of the Goa Children's Act and the sentence of rigorous imprisonment of 10 years and fine of ₹ 2lakhs is hereby set aside.
- (ii) Instead, the appellant, is convicted for the offence of committing sexual assault on the minor victim girl as defined under Section 2(y)(ii) of the Goa Children's Act, 2003 and sentenced to rigorous imprisonment of three

years and also fined an amount of ₹ 1 lakh. In case of failure to pay the fine, the appellant shall, suffer in-default simple imprisonment for six months.

(iii) The conviction and sentence under Section 342 and 506(ii) is maintained.

(iv) The appellant who is currently on bail shall surrender before the Children's Court within a period of one month from today. In case he fails to surrender, the Children's Court, to take necessary steps for securing his arrest to serve the sentence now imposed.

(v) Except for the aforesaid modification, the sentences, imposed in the impugned judgment and order are maintained.

(vi) It is once again clarified that the substantive sentences imposed upon the appellant shall run concurrently and further, the appellant, will also be entitled to the benefit of the provisions of Section 428 of the Cr.P.C.

(vii) The fine amount, if recovered from the appellant, is to be paid to the minor victim girl.

21. The appeal is disposed of in the aforesaid terms. There shall be no order as to costs.

M. S. SONAK, J.

msr.