

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO.67 OF 2016

Rukmuddin Kudminchi @
Rukmuddin Kunbenchi
S/o Haminsab Kudminchi @
Aminsab Kunbenchi
Aged about 27 years
Occupation : Unemployed
Resident of Sangapur, Budanayakadini,
Bagalkot, Karnataka,
At present Gaonkarwada,
Bicholim-Goa.
Custody since 16-9-2011 and
presently in Jail, Central Jail,
Colvale Goa.

... Appellant

Versus

State through Public Prosecutor
High Court of Bombay at
Panaji Goa.

... Respondent

Mr. Roshan Taricar, Advocate for the Appellant.

Mr. Pravin Faldessai, Additional Public Prosecutor for the Respondent.

Coram:- M. S. SONAK, J.

Date:- 11th September, 2020

ORAL JUDGMENT :

Heard Mr. Roshan Taricar, learned counsel for the Appellant

and Mr. P. Faldessai, learned Additional Public Prosecutor for the Respondent.

2. This appeal is directed against the judgment and order dated 25th February, 2016/11th March, 2016 made by the learned Children's Court for the State of Goa in Special Case No.52/2011, convicting the Appellant (accused) for the offence punishable under Section 377 of IPC and Section 8(2) of the Goa Children's Act, 2003 (the said Act).

3. The accused in this case, has been sentenced to undergo rigorous imprisonment for a term of seven years and pay a fine of ₹1000/- and in default to undergo simple imprisonment for eight days for the offence punishable under Section 377 of IPC. Similarly, the accused, has been directed to undergo rigorous imprisonment for a term of 10 years and pay fine of ₹2,00,000/- and in default to undergo simple imprisonment for two years for the offence punishable under Section 8(2) of the said Act. The learned Children's Court has granted the accused benefit of provisions of Section 428 of Cr. P.C. and further directed the substantial sentences of imprisonment imposed upon the accused to run concurrently. Aggrieved by all these, the accused, has instituted the present appeal.

4. Mr. Taricar, learned counsel for the Appellant, at the outset submitted that the complaint made by the victim's father refers to series

of phone calls made to him and made by him. These calls are alleged to have been made by the victim to the father; by the father to the accused; and by the father to the mother. Mr. Taricar however points out that the SIM cards attached have no nexus with the parties who are alleged to have made or received such calls. He points out that even the CDR do not support making or receiving of any such calls. He therefore, submits that the very genesis of the complaint is uncreditworthy and renders the entire prosecution version extremely doubtful. He submits that even the learned Children's Court has substantially accepted that no credibility attaches to this version of the Prosecution. Mr. Taricar submits that despite this the learned Children's Court was not justified in convicting the accused in this case.

5. Mr. Taricar then points out that the statements recorded in this case by the police had made reference to the minor victim boy wearing half pant at the time of the incident. However, PW2 – minor victim boy in his deposition refers to wearing 3/4th jean pant. Besides, there are photographs on record and some of the witnesses state that the minor victim boy was wearing clothes which are seen in the photographs, at the time of alleged incident. Mr. Taricar points out that in the photographs the minor victim boy is seen to be wearing a full pant. Mr. Taricar submits that these are serious discrepancies which render the prosecution version totally improbable. On this ground also the accused was entitled to either an acquittal or at least benefit of doubt.

6. Mr. Taricar then refers to the testimony of minor victim boy- PW2 and submits that same does not inspire much confidence. He submits in alternate that the testimony of PW2 read with the testimony of doctor -PW4 as well as the documentary medical evidence on record does not make out any case of grave sexual assault. He submits that in this case no penetration has been established by the prosecution beyond reasonable doubt. Therefore, he submits that the accused ought not to have been convicted for any grave sexual assault in this matter. He clarifies that this submission is in the alternate and without prejudice to the contention that the accused is entitled to an acquittal in the matter.

7. Mr. Taricar then refers to the medical certificate which has been produced on record and points out that the absence of any injuries on the penis of the accused, completely negates the prosecution version that the accused attempted to sodomize a nine year old boy without his consent. Mr. Taricar points out that the report regards blood or semen are completely inconclusive and do not support the prosecution version. In these circumstances, he submits that the prosecution has failed to make out any case of grave sexual assault.

8. Finally, Mr. Taricar submits that the accused was 22 years of age at the time of the incident and was already married and had a child. He points out that the accused was a poor mason by profession who has now by already served almost nine years of imprisonment. He points out

that the accused will never be able to afford to pay fine of ₹2,00,000/- and in such circumstances, it would be too harsh to require the accused to suffer in default imprisonment of two years. He therefore submits that if at all, the conviction to be maintained, then, at least the sentence may be interfered with.

9. Mr. Taricar submits that for all the aforesaid reasons, this appeal may be allowed and the impugned judgment and order be set aside.

10. Mr. Faldessai, learned Additional Public Prosecutor defends the impugned judgment and order on the basis of the reasonings reflected therein. He points out that for grave sexual assault this is the minimum sentence and fine that is required to be imposed in terms of Section 8(2) of the said Act. He therefore submits that this appeal may be dismissed.

11. The rival contentions now fall for my determination.

12. In this case, it is true that there are discrepancies on record on the phone calls exchanged on the date of the incident i.e. 16th September, 2011 as urged by Mr. Taricar. In fact, even the learned Children's Court has accepted this submission and held that no much relevance can be placed upon these exchange of phone calls. The

discussion on this aspect is to be found at paragraph 38 of the impugned judgment and order. However, even if the entire evidence relating to the exchange of calls is to be excluded from consideration, such exclusion does not make any serious dent to the prosecution version which is substantially deposed to by the minor victim boy (PW2) and whose version has received very strong corroboration from the evidence of PW3, PW4 and PW7, the neighbouring ladies.

13. In this case, the minor victim boy (PW2) was about nine years old at the time of incident but he was almost 13 years at the time of his deposition before the learned Children's Court. He was questioned generally in order to assess his competence to depose without being administered oath and from the answers given by him and his demeanour in the Court, the learned Children's Court has certified that he was a competent witness. Only thereafter, PW2 was permitted to be examined without administration of oath.

14. PW2, has deposed that he knew the accused who was friend of his father and whom he used to call as '*Mama*'. He has deposed that on 16th September, 2011, when he was alone in the house, as his mother and younger brother had gone to visit his father at his work place, the accused, came to the house and sat next to him. Thereafter, whilst he was keeping the things in the fridge, the accused sat on the bed in the room which is used as both kitchen as well as bedroom. Thereafter, he pulled him and latched the main door from inside.

15. Thereafter, this is what PW2 has deposed :

“He pulled me and forced me to lie down on the bed with my face and chest downwards. He removed my 3/4th Jean pant and my underwear. He also removed his pant. He caught hold of my mouth and hands and put his nunu (penis) into my anus (the witness showed the part of his body with hand in the open Court).He put his penis forcibly into my anus which pained me. So I screamed and started crying. But he continued with his act and he threatened me by saying that he will kill me and my brother.

I found some oily thing coming out from his penis and spreading on my buttocks. He warned me not to shout and then he wore his clothes and also put me my pant and then opened the door for the neighbours who were knocking at the door by hearing my screams. My neighbours were Farida and some other persons, whose names I do not remember at present. They are my close neighbours.

They inquired with me as to what happened and why I was crying. I did not tell them anything because Rukmuddin was present and I was afraid of him. He told them that nothing has happened and I am simply crying and he went away. The neighbours also went out and they came again and asked me again and again as to what had happened. At that time, I informed them about the act of Rukmuddin. They were three ladies.”

16. In the course of his cross examination, no dent has been made to the core of PW2's testimony. A slight discrepancy regards visit to the doctor or on some other details is no means sufficient to express any lack of confidence in the testimony of PW2. The testimony of PW2 is clear, cogent and inspires confidence. There is no discrepancy about

clothes. The reference to half pant at one place and three-fourth at another, is hardly any discrepancy worth consideration.

17. The medical evidence on record also bears out the injuries to the anus of PW2. The medical evidence very clearly indicates that on anal examination in the knee elbow position, it was noted that the anal tissue dilated and was tender to touch. There was loss of elasticity and tear of the anal sphincter. Anal opening admitted one examining finger when placed at the opening. Anal fissures and tears involving mucocutaneous junction were seen in 3 o'clock position (0.5 x 0.3 x 0.1 cms) and 6 o'clock position (1 x 0.5 x 0.1 cms) bruised and wedge shaped with wider area lateral and pointing medially towards the anal canal. The tears were reddish and recent.

18. PW4, the doctor who examined PW2 has deposed to the aforesaid injuries on the person of PW2. No dent whatsoever has been made in the course of his cross examination. Now, it is true as contended by Mr. Taricar that there were no injuries found on the penis of the accused. The doctor, PW4 was specifically questioned on this aspect of absence of injuries, since, PW4, had also examined the accused. This is what PW4 has deposed at page 111 of the paper book :

“Considering the age and injuries on the anus of victim, what would be the chances of having injuries on the penis of the accused, if he had forcibly inserted his penis in the anus of the victim ?

Ans : There may or may not be injuries.

There may or not be injuries on the erected penis of the accused in case of forceful penetration by the accused in the constricted hole.

It is not true to suggest that in such cases there ought to have been injuries on the erected penis of the accused.”

19. According to me, the testimony of PW2 and the testimony of doctor PW4 alongwith the contemporaneous documentary evidence in the form of medical certificates is sufficient to sustain the conviction of the accused in this matter. The so called discrepancies pointed out by Mr. Taricar really, do not go to the core of the matter and based upon such trivial discrepancies, there is no case made out to discard the clear and cogent testimony of both PW2 and PW4 in this matter.

20. As if it is not sufficient PW3, PW4 and PW7, ladies residing in the neighbourhood have deposed that they heard cries of PW2 and thereafter knocked on the door to find out what was happening. They deposed that the door was eventually opened and it is the accused who stepped out from the door. They have deposed that PW2 was quite scared but refused to speak about the incident in the presence of the accused. Only after the accused left, PW2 informed the neighbouring ladies about what had happened. On the same date, PW2 as well as the accused were medically examined.

21. PW1, the father of PW2 has deposed that upon receiving information about what had happened, he, called up the accused who

was his friend and told him to meet him at the KTC bus stand so that they can buy chicken together. No sooner the accused reached at KTC bus stand, PW1 confronted him with the information he has received and in anger, even slapped the accused. The learned Children's Court, has rightly, attributed some minor injuries on the person of accused to this altercation with PW1.

22. Though, I have considered the contention of Mr. Taricar that the incident in the present case does not amount to a grave sexual assault, looking to the provisions of Section 2(y)(i), it is quite clear that there was an anal intercourse and therefore the incident amounts to a grave sexual assault. Even if, some latitude is given to the accused and for want of clear medical evidence, it is to be held that the factum of penetration is not completely proved, even then the definition of grave sexual assault includes not only different types of intercourse but also includes causing injuries to the sexual organs of the children. Therefore, a case of grave sexual assault has been established by the prosecution.

23. Upon consideration of the evidence on record in its entirety, there is really no case made out to interfere with the conviction recorded by the learned Children's Court in the present case.

24. In so far as the sentencing is concerned, the focus has to be upon the sentence imposed under Section 8(2) of the said Act, since, the

sentence under Section 377 of IPC is shorter and made to run concurrently with the sentence under Section 8(2) of the said Act.

25. Now, upon examination of the provisions of Section 8(2), it does appear that the sentence imposed upon the accused is minimum sentence which is prescribed under Section 8(2) of the said Act.

26. However, the submissions made by Mr. Taricar on the aspect of in default sentences are quite convincing and deserve acceptance for the reasons referred to by him in the course of his submissions. The accused is a married person and has a child. The accused was a mason and therefore will not be in a position to afford payment of fine of ₹2,00,000/- at this stage. Mr. Taricar points out that since, the accused is not a local, he was not in a position to even get the benefit of parole which was permitted to him for want of local sureties. Taking into consideration all these factors, in-default of imprisonment of two years is indeed quite harsh and the same is required to be scaled down to eight days in-default imprisonment.

27. Accordingly, this appeal is only partly allowed. The conviction of the appellant is maintained. Even the substantive sentences and fines are maintained. The benefit of Section 428 of IPC extended by the learned Children's Court is maintained. The direction that the substantial sentences shall run concurrently is also maintained.

However, the direction that the appellant, in-default of payment of fine of ₹2,00,000/-, having to undergo simple imprisonment of two years is set aside and the same is substituted by in-default simple imprisonment of eight days only.

28. In addition to the aforesaid, I am quite sure that if the behaviour of the accused in the prison has been good, then, the Prison Authorities will consider extending him the benefit of remission etc., in terms of Rules as may be applicable.

29. The appeal is partly allowed in the aforesaid terms. There shall be no order as to costs.

30. Registry to forward the copy of this judgment and order to the Prison Authorities for necessary action.

31. Before I conclude, I must record my appreciation for the excellent manner in which Mr. Taricar presented the case of the appellant herein. He left no stone unturned to put forth the appellant's version, but at the same time was extremely fair in his approach.

M. S. SONAK, J

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