

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.47 OF 2015

Shri Devilal Kurmi
S/o. Umashankar Kurmi,
Aged 23 years,
Occupation: Security Guard,
Resident of Bambolim-Goa,
n/o Balutila Village,
Bidhyanagar, Post Ramkrishna nagar,
Karimganj District,
Assam.
(Presently undergoing sentence
in Judicial Custody, Central Jail,
Colvale.

.... Appellant

Versus

S T A T E,
through PP.
High Court of Bombay at Goa.

.... Respondent

Mr. A. V. Pavithran, Advocate U/LAS for the Appellant.
Mr. Mahesh Amonkar, Additional Public Prosecutor for the State.

Coram:- M.S. SONAK J.

Reserved on:- 6th November, 2020

Pronounced on: 11th November, 2020

JUDGMENT:

Heard Mr. A. V. Pavithran, learned counsel for the appellant appointed under the Legal Aid Scheme, and Mr. Mahesh Amonkar, learned Additional Public Prosecutor for the State.

2. This appeal is directed against the Judgment and Order dated 23.07.2015 made by the learned Children's Court for the State of Goa at Panaji in Special Case No.69/2010 by which the learned Children's Court convicted the appellant-accused for an offence under Section 2(y)(i) and 2(y)(ii) punishable under Section 8(2) of the Goa Children's Act, 2003 (said Act) and sentenced him to undergo Rigorous Imprisonment for a term of ten years and directed him to pay fine of ₹2 lakhs, and in default to undergo Simple Imprisonment for one year for the offence under Section 2(y)(i) punishable under Section 8(2) of the said Act and to a sentence of Rigorous Imprisonment for a term of three years and pay a fine of ₹1 lakh and in default to undergo Simple Imprisonment for six months for the offence under Section 2(y)(ii) punishable under Section 8(2) of the said Act. The substantial sentences of imprisonment were directed to run concurrently. The accused was also granted the benefit under Section 428 of the Criminal Procedure Code (Cr.P.C.).

3. The case of the prosecution is that before 09.10.2010, near Bambolim beach, the accused committed grave sexual assault on the

minor victim girl by inserting his finger in her private part and also by inserting his private part in her mouth. During the same period and at the same place, the accused committed sexual assault on the minor victim boy by showing his private part and touching his private part to the private part of the victim boy.

4. Initially, the Children's Court, framed the charge on 16.03.2011 alleging the commission of offence under Section 2(y)(ii) of the said Act. However, as the evidence progressed, the learned Children's Court, framed an additional charge on 29.07.2013 alleging commission of offence under Section 2(y)(i) of the said Act as well. The prosecution in support of its case examined eleven witnesses. The statement of the accused was recorded under Section 313 of the Cr.P.C. Despite opportunity, the accused neither examined himself nor led any defence evidence. By the impugned Judgment and Order the accused has been convicted and sentenced as aforesaid. Hence the present appeal.

5. Mr. Pavithran, learned counsel for the appellant-accused at the outset submits that the accused was a minor i.e. less than 18 years of age on the date of the commission of the alleged offences and therefore, the Children's Court had no jurisdiction in the matter. He relies on Rule 12(3)(b) of the Juvenile Justice (Care & Protection of Children) Rules, 2000 (said Rules) in this regard. He also relies on

*Darga Ram alias Gunga v/s. State of Rajasthan*¹, *Mukarrab & Others v/s. State of Uttar Pradesh*² and *Abuzar Hossain alias Gulam Hossain v/s. State of West Bengal*³ in support of his contentions.

6. Mr. Pavithran submits that the testimony of the doctor who carried out the Ossification Test was never put to the accused when recording his 313 Cr.P.C. statement. He, therefore, submits that such evidence ought not to have been relied upon by the Children's Court. In the absence of such evidence, the prosecution has not established beyond a reasonable doubt that the accused was more than 18 years of age on the date of the commission of the alleged offences. Mr. Pavithran submits that in such circumstances the accused is entitled to be acquitted in the matter.

7. Mr. Pavithran pointed out the contradictions, omissions, and exaggerations in the testimony of PW1 (minor victim girl) and PW4 (minor victim boy) to submit that the testimony of the child victims is not at all reliable. He submits that in any case, the testimony of PW1 and PW4 ought not to be relied upon without corroboration from independent sources. He submits that since there is no corroboration, the conviction based upon the testimony of PW1 and PW4 is quite unsustainable.

¹(2015) 2 SCC 775

²(2017) 2 SCC 210

³(2012) 10 SCC 489

8. Mr. Pavithran pointed out to certain discrepancies in the testimony of the parents of the child victims i.e. PW2 (mother) and PW5 (father) to submit that their evidence ought to have been discarded by the learned Children's Court. Mr. Pavithran also pointed out to the discrepancies in the evidence of the investigating officer (PW10) to submit that this was not a matter where any fair investigation was undertaken. In particular, Mr. Pavithran pointed out that the safeguards provided in the decision of the Hon'ble Apex Court in the case of *D. K. Basu v/s. State of West Bengal*⁴ were not complied with at the time of the arrest of the accused. He submits that in such circumstances the accused was entitled to an acquittal in the matter.

9. Finally, and without prejudice, Mr. Pavithran submits that the evidence on record, at the highest makes out a case under Section 2(y) (ii) but not under Section 2(y)(i) of the said Act. He points out that the medical evidence on record does not support the commission of offence under Section 2(y)(i) of the said Act. Further, he points out that in this case the accused was never medically examined to determine whether he was capable of committing any type of sexual intercourse. He submits that in the absence of such examination, there was no question of convicting the accused under Section 2(y)(i) of the said Act. He relies on *Bandu s/o KawaduThakre v/s. State of Maharashtra and another*⁵ and *Yograj alias Yogesh s/o Laxman*

⁴(1997) 1 SCC 416

⁵1995 SCC OnLine Bom 494

*Gakhare v/s. State of Maharashtra*⁶ in support of his contentions.

10. Mr. Amonkar, learned Additional Public Prosecutor defends the impugned Judgment and Order based on the reasoning reflected therein. He points out to the provisions of Section 2(y)(i) of the said Act and submits that the same cover oral intercourse or causing deliberate injuries to the sexual organs of the children. He points out that the testimony of the child victims inspires confidence and the Children's Court, was very much justified in relying on the same. He points out that there was overwhelming evidence on record to establish that the accused was above 18 years of age at the time of the commission of the offences and there was not even any challenge on this aspect throughout the trial. He points out that the accused after his release on bail has absconded but there is no case made out to interfere with the impugned Judgment and Order.

11. The rival contentions now fall for my determination.

12. The charge, in this case, was initially framed on 16.03.2011 in which, the accused was indicated as an 18-year-old person. Based upon this charge, the plea of the accused was recorded, in which, the accused himself stated that he is about 18 years old. He agreed that he understood the charge which was read and explained to him and of which a copy was also given to him. There was no protest by the accused that he was less than 18 years old.

⁶1993 SCC OnLine Bom 156

13. The additional charge was framed against the accused on 29.07.2013. Again, this time also, the accused did not raise any issue concerning his age. The documentary evidence in form of medical certificates also indicated his age as 18 years. The said is the position with the arrest/court surrender form. At all these stages, the accused never took up any plea based upon his age. For that matter, throughout the trial, no such plea was ever taken. Such a plea is taken for the first time in the appeal court.

14. No doubt, there can be no bar to taking up such plea provided, the evidence on record points to an accused being less than 18 years of age on the date of commission of the offence. In this case, the prosecution examined Dr. E. J. Rodrigues (PW11), who conducted the Ossification Test of the accused. Based upon this test PW11 opined that the accused was above 18 years and below 21 years as on the date of his examination which was 11.10.2010 i.e. hardly a day after the date of the commission of offences. Significantly, the accused, despite the opportunity, chose not to even cross-examine PW11. In such circumstances, it is not possible to accept Mr. Pavithran's contention that the accused was less than 18 years of age and therefore, no trial against him was competent.

15. The ruling in *Abuzar Hussain (supra)* supports the accused to the limited extent that the accused is entitled to raise the claim of juvenility for the first time in the Appellate Court even though, such a

claim may not have been raised or pressed before the trial court. Therefore, the accused is permitted to raise this claim in this Court for the first time. However, this ruling itself lays down that the claim of juvenility lacking credibility or a frivolous claim of juvenility or a patently absurd or inherently improbable claim must be rejected by the court at the threshold whenever raised.

16. Rule 12(3)(b) of the said Rules provides that where the prescribed documents relating to proof of age are not available, the medical opinion can be sought from a duly constituted Medical Board which will declare the age of juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. In the present case, since no documents were available, the accused was referred to Ossification Test. PW11 has deposed that based upon the physical, dental, and radiological examination, the accused was above 18 years and below 21 years of age on the date of examination. This, coupled with other factors like this plea never being raised at any stage or that PW11 was not even cross-examined by the accused despite being granted the opportunity to do so, is quite sufficient to reject this plea based on juvenility. In such a situation, the accused, cannot insist upon the benefit of the margin referred to in Rule 12(3)(b) of the said Rules.

17. In *Darga Ram (supra)*, the medical evidence stated that the accused was “about” 33 years on the date of examination. This means that the accused was 18 years, 2 months, and 7 days on the date of the occurrence but such an estimate was only an estimate. Therefore, the court, in the facts of the said case, extended the benefit of Rule 12(3) (b) of the said Rules to the accused. In the present case, PW11 has categorically deposed that the accused was above 18 years of age but below 21 years of age.

18. In *Mukarrab (supra)*, the Hon’ble Apex Court, on account of several reasons disbelieved the medical evidence regards the age of the accused persons. The Hon’ble Apex Court noted that both the applicants before it had been involved in various offences allegedly committed previously between 1988 and 1995, and going by the medical evidence, the appellants would have been born in 1979 and therefore would have been only 9, 10, 11 and 14 years of age respectively, when those offences were committed. Had it been so, whether the appellants were produced in those cases, they would have been considered as “children” by the very appearance and would have been dealt with accordingly by the Juvenile Court concerned and the matters would have been kept pending till the present date. Since this was never done, the Hon’ble Apex Court did not deem it safe to rely upon the medical opinion based on the Ossification Test. Even in this matter, the Hon’ble Apex Court reiterated that the plea of juvenility can be raised at any stage but the purpose of the 2000 Act was not to

give shelter to the accused of grave and heinous offences.

19. In *Ram Suresh Singh v/s. Prabhat Singh*⁷, the Hon'ble Apex Court has held that an error on either side in determining the age is possible when ascertained by radiological examination. However, it is difficult to lay down whether the lower or the upper age or the average age is to be taken into consideration and each case depends on its facts. Therefore in the facts of the present case, it is not possible to agree with the plea of the juvenility raised for the first time in this court. There is no basis to doubt the testimony of PW11, which is clear and cogent. As noted earlier, despite the opportunity, the accused did not even cross-examine this witness.

20. Now in Section 313 Cr. P. C. statement, the accused was questioned about being referred to the Ossification Test. However, it is true, as contended by Mr. Pavithram that the contents of the Ossification Test report have not been put quite clearly to the accused. However, in such matters, it is not sufficient for the accused to merely point out some technical breach without urging or establishing any prejudice whatsoever. This is a matter where the accused had himself stated that he was 18 years of age at the time of record of his plea. Besides, at several stages when his age was recorded as 18 years, the accused, chose not to protest. The accused did not even cross-examine PW11 in the context of the Ossification Test. In these circumstances, it cannot be said that the failure to precisely bring to the notice of the

⁷(2009) 6 SCC 681

accused, the contents of the Ossification Test report is fatal to the prosecution case.

21. For all the aforesaid reasons Mr. Pavithran's first contention based on juvenility is required to be rejected.

22. The testimony of PW1 and PW4, the child victims is clear, cogent, and reliable. The Children's Court, to begin with, posed certain questions to these child witnesses to ascertain their competency to depose in the matter. The Children's Court certified that both these child witnesses were competent witnesses based upon the logical answers given by them. Accordingly, the child witnesses were allowed to be examined by the prosecution without the administration of the oath.

23. PW1 (minor victim girl) has deposed that she and her brother used to be at home when both her parents used to go to work. She has deposed that the accused was a security person who used to stay close to their house. She has deposed that one day, the accused came to their house, got her to remove her blouse, and started pressing her chest. She has deposed that the accused put his hand in her panty and inserted his finger at the place from where she passes urine (the girl has used the word susu). She then deposed that she felt pain in the said place and her stomach and started crying and even shouted and hit the accused. She has deposed that she told her mother about what the accused had

done to her when the mother returned. She has deposed that she even told her mother that she was having pain while passing urine.

24. PW1 also deposed that the accused had done such things thrice earlier but she had not informed her mother about the previous incidents as the accused had told her that he would beat her. She deposed that the ghost (bhoot) would come and take her away. She deposed that the accused had told her that the ghost (bhoot) was his friend and that he would beat her mummy and pappa. She deposed that one day the accused put his lauda (private part) in her mouth and something white came in her mouth. She deposed that he pulled the chain of his pant and went away.

25. In the course of the cross-examination, absolutely no dent has been made to the clear testimony of PW1. On behalf of the accused, it was suggested that the father of the child victims had borrowed ₹5,000/- from the accused, and to avoid the repayment a false case has been filed. Other than this suggestion, nothing was elicited from PW1 to doubt her clear testimony.

26. Similarly, PW4 (minor victim boy) has deposed that the accused, who used to reside near their house used to come in the absence of their parents. He has deposed that one day when the accused was having a bath, he pulled down the zip of his trousers and showed him his private part. PW4 also deposed that the accused touched his private

part to his private part. He deposed that one day the accused made him drink liquor forcibly. He also deposed of pulling down his sister's underwear and touching her private parts. He also deposed that the accused used to tell him not to tell anything to the parents, otherwise, the ghost would come and eat him. He deposed to informing all this to his parents.

27. Again, no dent has been made to the examination of PW4 in the course of cross-examination.

28. The parents of the child victims have also been examined as PW2 (mother) and PW5 (father). Although they were not witnesses to the actual incidents of sexual assault on their children, they have deposed to what was told to them by their children and how they lodged a complaint with the police, pursuant to which investigation commenced. The evident of PW2 and PW5 offers corroboration to certain material aspects. In any case, there is no reason not to rely upon the testimony of PW1 and PW4. The defence that the father of these child witnesses had taken a loan of ₹5,000/- and a false case was foisted upon the accused only to avoid repayment of this loan has neither been proved by the accused on the test of preponderance of probability nor is such defence some probable defence. It is too much to expect that the parents, will expose their little children to such kind of trauma only to avoid repayment of ₹5,000/-. This means that a patently false defence was taken by the accused in this matter.

29. Where, the testimony of the child victims is reliable, there is no bar to rely upon the same even in the absence of any corroboration. In the present case, there is sufficient corroboration in the form of the evidence of the parents. The two child victims have also corroborated each other's versions. The so-called contradictions or exaggerations are not at all material. The grain of the testimony is quite intact. There may be some minor variations in the matter of expression. However, that by itself is by no means sufficient to reject the testimony of PW1 and PW4 the child victims.

30. The prosecution, ought to have medically examined the accused. However, as pointed out by Mr. Amonkar, such non-examination may have impacted the prosecution version if the prosecution was alleging any vaginal or anal intercourse. He submitted that even oral intercourse or causing any injuries to the sexual organs of the children is sufficient to bring the case under Section 2(y)(i) of the said Act.

31. The absence of any injuries on the private parts of the child victims is not determinative for two reasons. In the first place, the depositions of these two witnesses are clear and cogent. In ***B. C. Deva @ Dyava v/s. State of Karnataka***⁸, the Hon'ble Apex Court has held that even where the medical evidence did not corroborate the allegations of forced sexual intercourse, the conviction could be sustained on the oral evidence of the prosecutrix and her subsequent conduct. The Hon'ble Supreme Court held that where the oral

⁸(2000) 12 SCC 122

testimony is found to be cogent, reliable, convincing, and trustworthy has to be accepted. Therefore, the conviction can be sustained even when the medical examination of the prosecutrix does not disclose the evidence of sexual intercourse. Secondly, in this case, what is alleged is oral intercourse or insertion of a finger in the private part of the child victim. Now such acts will undoubtedly constitute the offence under Section 2(y)(i) of the said Act though, they may not leave traces of injuries or rather physical injuries on the victim child. In this case, PW1 has deposed to the pain suffered by her at the time of urination and in her stomach as a consequence of the accused interfering with her private parts. She has also deposed to the oral intercourse perpetrated on her by the accused. In such a situation, the non-examination of the accused does not affect the prosecution case.

32. The fact situation in *Ramesh Naik @ Lamani v/s. The State of Goa*⁹ was entirely different and offers no parallel to the fact situation in the present case. In that case, the prosecution had alleged a forcible vaginal intercourse with a 7-year-old girl. It is in this context that the absence of medical evidence was held as fatal to the prosecution version. However, the appellant in that matter was convicted for the offence under Section 2(y)(ii) of the said Act.

33. Section 2(y)(i) of the said Act defines grave sexual assault to cover different types of intercourse, vaginal or oral or anal. This

⁹ Judgment dtd. 09.10.2020 in Criminal Appeal No.45 of 2015

includes deliberately causing injury to the sexual organs of the children taking into consideration the definition under Section 2(y)(i) and the evidence of PW1 and PW4 particularly concerning the oral intercourse or the accused putting his finger in the private part of the child victim, the prosecution, has established beyond a reasonable doubt, the commission of offence under Section 2(y)(i) of the said Act, in addition to the offence under Section 2(y)(ii) of the said Act.

34. The decisions in *Bandu Thakre (supra)* and *Yograj Gakhare (supra)* related to the offences under Section 376 of the IPC where the specific charge was of vaginal intercourse. It is in the context of such a charge that there were some observations about the impact of the non-examination of the accused. Such observations, will not assist the accused in the present matter in the context of the provisions of under Section 2(y)(i) of the said Act which is wider than the provisions of Section 376 of IPC.

35. There are no discrepancies in the testimony of the I.O. (PW10). Besides, there is nothing in the testimony of PW10 to infer any unfairness in the investigation. The I.O. initially stated that the parents of the child victims came to the police station to record their complaints. Mr. Pavithran pointed out that it was the case of the parents that they called 100 to lodge their complaint. The I.O. has explained that the parents were brought to the police station by the staff of PCR and thereafter, the complaint was recorded. This can

hardly be styled as some major discrepancy. There is no discrepancy as such because both the versions are hardly inconsistent with one another.

36. PW10 has deposed to the compliances as provided in *D. K. Basu (supra)*. The accused was informed of his rights and there is contemporaneous material to establish the same.

37. For all the aforesaid reasons, there is no case made out to interfere with the impugned Judgment and Order and this appeal is liable to be dismissed. The respondents, to take steps to apprehend the accused so that he serves the remainder of the sentence.

38. The appeal is accordingly dismissed without any order as to costs.

39. This Court records the appreciation for the efforts put in by Mr. Pavithran, the learned counsel appointed under Legal Aid Scheme, in so ably presenting the accused's case in this matter.

M. S. SONAK, J.