

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.60 OF 2014

- 1 Shri Zelio Silvester D'mello
s/o. late Crisol D'mello,
Major of age, R/o. Villa Zelaine,
Hill Side Enclave, Bambolim- Goa.
- 2 Smt. Elaine Justina Amara D'mello
W/o. Zelio D'Mello, Major of age,
R/o. Villa Zelaine, Hill Side
Enclave, Bambolim- Goa. Appellants

Versus

- 1 State
(Through Women's Police
Station), Panaji-Goa
- 2 Police Prosecutor (High Court) Respondents

Shri S.D. Lotlikar, Senior Advocate with Shri G. Teles, Advocate
for the appellant.

Shri S.R. Rivankar, Public Prosecutor for the respondents.

Coram:- NUTAN D. SARDESSAI, J.

**Reserved on : 12th December, 2019
Pronounced on: 06th January, 2020**

JUDGMENT :

This appeal takes exception to the judgment of conviction rendered by the Children's Court, Panaji pursuant to which it held the appellants guilty of the commission of the offences punishable under Sections 8(2) and 8(9) of the Goa Children's Act, 2003 (the Act, for short). The parties would be referred as the appellants and the State for brevity's sake hereinafter.

2. The State had filed the chargesheet against the accused on the premise that about 16 months prior to 30/11/2006 the accused no.2 had introduced the two minor girls to work as maids in the house of the appellants who thereafter kept them with him, not being related to him by blood without prior written permission of the Director as per the requirements of the said Act and had wrongfully confined the victim, the second appellant assaulted the victim no.1 and thereby committed an offence under Sections 342, 323 r/w. 34 IPC and Section 8(9) of the said Act. The prosecution in support of its case examined 12 witnesses while the appellants examined the second appellant as their witness in defence and closed their case after denying

the case of the prosecution as put to them in their statement recorded under Section 313 CrPC.

3. The learned Children's Court on the basis of the material on record came to hold the accused guilty of the offences punishable under Sections 342 and 323 IPC r/w. 8(2) of the Act and for the offences punishable under Section 8(9) of the Act and sentenced them to undergo simple imprisonment for a term of three years and to pay the fine of ₹1,00,000/- each, in default to undergo simple imprisonment for a period of one year each, for the offence punishable under Section 8(2) of the said Act and to undergo simple imprisonment for a term of three years each to pay the fine of ₹5,000/- each and in default to undergo one year each for the offence punishable under Section 8(9) of the Act each and which sentences were ordered to run concurrently and the fine amount ordered to be paid to both the victim girls in equal shares.

4. Heard Shri S.D. Lotlikar, learned Senior Advocate on behalf of the appellant who adverted to the FIR and submitted that in view of the clear assertion therein that the two named girls, one being a minor and the other bordering majority, were

introduced to work as maids through D. Tiklo more than 16 months back and therefore the provisions of the Act as it was enacted applied to the case of the appellants and not as it stood amended subsequent to the amendment Act of 2005. On that basis alone it was his contention that both the victim girls were major in age at the time of the alleged commission of the offences and therefore the Children's Court lacked the jurisdiction to deal with the matter and as a consequence thereof the judgment of conviction was vitiated and they were entitled to a clean acquittal on that premise alone.

5. It was next the contention of Shri Lotlikar, learned Senior Advocate that the only evidence relied upon to establish the minority of the victim girls was the opinion of the Doctor and the Election Identity Card of one of the victim girls which was admittedly prepared much after the date of the alleged offence. There was no such evidence in respect of the second victim even in the nature of an Election Identity Card and apart from the testimony of the Doctor, there was no independent witness on the age of the second victim girl. The determination of the age was very crucial and in the absence thereof and consequently as

the victims were not minors, the Children's Court lacked the jurisdiction, and the jurisdiction, if any, vested was with the regular Criminal Court. It was incumbent upon the prosecution to prove the age of both the victim girls beyond all reasonable doubt.

6. Shri S.D. Lotlikar, learned Senior Advocate next adverted to the testimony of Dr. Ghodkirekar Pw8 and that of the victims and submitted that their testimony did not at all inspire confidence on the age of the victims. Rather the testimony of Dr. Ghodkirekar Pw8 showed that the first victim girl was between **18-21** years of age as on the date of her examination on **07/12/2006**. Besides, it was his contention that the elder of the two victim girls alone was employed by the appellants and there was no basis in the case of the prosecution that he had engaged both the victim girls in his house as maid servants. He also referred to the testimony of the second victim girl who was admittedly younger in age compared to the first victim girl and submitted that not even a School Leaving Certificate was produced on record to establish her minority. This was besides the fact that she was not employed by the

appellants in their house as maid. He placed reliance in **Babloo Pasi v/s. State of Jharkhand and Ors.**[(2008)13 SCC 133] and **Jaya Mala v/s. Home Secretary, Government of Jammu and Kashmir and other** [1982 Cri L.J. 1777] and submitted that the Trial Court could not conclude on the date of birth and that she was a minor. Further, reliance was placed in **Shah Nawaz v/s. State of Uttar Pradesh and another** [(2011) 12 SCC 751] and to buttress his case that there was no evidence to show that the victim girls were minors.

7. It was the contention of Shri S.D. Lotlikar, learned Senior Advocate that there was no evidence in the nature of School Leaving Certificate to establish the age of the victim girls. The prosecution had not produced the best possible evidence and relying on opinion evidence of the doctor was not conclusive. The Children's Court had no jurisdiction as the age of the victim girls was not established beyond reasonable doubt particularly when it was a case of conviction. The Children's Act was also not attracted and the appellants could have been tried before the regular Court at the highest for wrongful confinement and hurt. This was besides the fact that the evidence on record

did not inspire confidence either on the aspect of their age, the acts of wrongful confinement and/or hurt inflicted on them. It was his contention further that the offence of simple hurt and confinement was simple in nature unlike the offences under the Act of which the penal consequences were very stringent. He placed reliance in **Shah Nawaz** (supra) and submitted that the benefit must go in favour of the juvenile. Last but not the least he reiterated that the amendment Act came into force on 21/12/2005 unlike the FIR which showed that the offence was alleged to have been committed 16 months previously i.e. before the amendment Act came into force to change the age of the minor from 14 years to 18 years. The penal statute could not have any retrospective operation and on that premise too the judgment was not tenable and liable to be interfered with entitling the appellants to a clean acquittal.

8. Shri S.R. Rivankar, learned Public Prosecutor on behalf of the State referred to the definition of 'child' in terms of the Act, referred to the testimony of Dr. Ghodkirekar Pw8 and of the two victim girls and submitted that both the victims were employed by the appellants. He next referred to Section 30 and

31 of the Act and submitted that the Children's Court did have the power to deal with the offences and therefore there was no basis in the contention of the learned Senior Counsel that the Children's Court lacked the jurisdiction to try the offences. He also adverted to the other evidence on record and submitted that the prosecution had amply made out a case against the appellants and the appeal rightly had to be dismissed and the judgment of conviction had to be confirmed.

9. In **Babloo Pasi**(supra), the Hon'ble Apex Court observed at paragraph nos.13 and 14 as below:

"13. From a bare reading of the provision, it is clear that it merely provides that when it appears to the competent authority viz., the Board, that the person brought before it is a juvenile, The Board is obliged to make an enquiry as to the age of that person; for that purpose it shall take evidence as may be necessary and then record a finding whether the person in question is a juvenile or not. Explaining the scope and purpose of Section 32 of the Juvenile Justice Act, 1986 which is almost pari materia with Section 49 of the Act in *Bhola Bhagat Vs. State of Bihar*, this Court had observed as under:-

".....when a plea is raised on behalf of an accused that he was a "child" within the meaning of the definition of the expression under the Act, it becomes obligatory for the court, in case it entertains any doubt about the age as claimed by the accused, to hold an inquiry itself for determination of the question of age of the accused or cause an enquiry to be held and seek a report regarding the same, if necessary, by asking the parties to lead evidence in that regard. Keeping in view the beneficial nature of the socially- oriented legislation, it is an obligation of the court where such a plea is raised to (1997) 8 SCC 720 examine that plea with care and it cannot fold its hands and without returning a positive finding regarding that plea, deny the benefit of the provisions to an accused. The court must hold an enquiry and return a finding regarding the age, one way or the other."

14. Nevertheless, in *Jitendra Ram alias Jitu Vs. State of Jharkhand*⁶, the Court sounded a note of caution that the aforestated observations in *Bhola Bhagat* (supra) would not mean that a person who is not entitled to the benefit of the said Act would be dealt with leniently only because such a plea is raised. Each plea must be judged on its own merit and each case has to be considered on the basis of the materials brought on record."

And held at paragraph 16 that though as per Rule 22, in the absence of birth or matriculation certificates, in order to record a finding in respect of the age of a person, the Board is required to obtain the opinion of a duly constituted Medical Board. It is clear from a bare reading of the Rule that although the Board is bound to obtain the opinion of the Medical Board but the opinion per se is not a conclusive proof of age of the person concerned. It held at paragraph 17 as below while dealing with an appeal, by special leave, directed against the judgment and order rendered by the High Court of Jharkhand at Ranchi which had allowed the revision petition preferred by the accused under Section 53 of the Juvenile Justice (Care and Protection of Children) Act, 2000 against the order passed by the Juvenile Justice Board, Dumka. The learned Single Judge had held that on the date of commission of the alleged offence, the accused was a "juvenile" within the meaning of the Act.

"17. It is well settled that it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. The date of birth is to be determined on the basis of material on record and on appreciation of evidence adduced by the parties. The Medical evidence as to the age of a person,

though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence.”

10. In **Jaya Mala**(supra), another two Judge Bench of the Hon’ble Apex Court held that it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side while dealing with a habeas corpus writ for release of Riyaz Ahmed who had been detained under the Public Safety Act, 1978.

11. In **Shah Nawaz**(supra), a two Judge Bench of the Hon'ble Apex Court held that the entry relating to the date of birth entered in the marksheet is one of the valid proofs of evidence for determination of the age of an accused person. The School Leaving Certificate is also a valid proof in determining the age of the accused person. Further, the date of birth mentioned in the high school marksheet produced by the appellant has been duly corroborated by the School Leaving Certificate of the appellant and has also been proved by the statement of the clerk of Nehru High School. It considered the procedure to be followed in determining the age and observed that in every case concerning a child or juvenile in conflict with law, the age

determination enquiry shall be conducted by the Court or the board or as the case may be, the committee by seeking evidence by obtaining (i) the matriculation or equivalent certificates, if available; and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat; (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child.

12. The Act as it stood prior to its amendment in December, 2005 defines the "child" in case of child labour to be a person who had not completed 14th year of age. In terms of Section 20 of the Act cognizance of offences can be taken only on the basis of the complaint made by the child victim or his or her parent(s), and in their absence, his or her guardians or close relatives, or police or the Competent Authority or the Director or a Special Officer or Labour Inspector or any authority or Officer authorized in this behalf by the Government. Section 30 deals

with the jurisdiction of the Children's Court and provides that subject to the provisions of this Act, the Children's Court shall have jurisdiction to try all offences against children whether such offence is specified under this Act or not, while Section 31 deals with the powers of the Children's Court being those akin to the Court of Sessions under the Code of Criminal Procedure and a Civil Court for the purpose of summoning and enforcing the attendance of witnesses, compelling the discovery and production of documents and material objects, and administering oath and recording evidence.

13. In the backdrop of the preamble to the Act and the provisions contained therein, it would have to be examined whether the victim girls were minors as on the date of the offence which was 16 months prior to 30/11/2006 i.e. July 2016 and well prior to the amendment Act, 2005 which came into force w.e.f. **21/12/2005**. In that context, it would be apt to advert to the testimony of Dr. Ghodkirekar Pw8 who stated that he had received requests from a Women's Police Station to conduct the examination of the first victim and also her younger sister on 07/12/2006 in Crime No.4 of 2006. He had examined

the elder of the two alongwith the panel of Doctors consisting of himself, Dr. Mahesh Sardessai and Dr. Dinkar both Professors and Head of the Department of Radiology and HOD of Medicine and Radiology Department respectively. Based on physical, radiological and dental assessment, in their opinion, the elder of the victim girls was above 18 years and below 21 years at the time of examination which would clearly take the victim girl to be at least 16 years of age when the alleged offence took place as per the FIR 16 months prior thereto. In other words, the first victim girl was positively more than 16 years of age at the time of her employment with the appellants and therefore not a minor in terms of the Act as it stood prior to its amendment on 21/12/2005.

14. Dr. Ghodkirekar Pw8 had similarly conducted the medical examination of the younger victim girl being a part of the panel and on examination based on physical, radiological and dental assessment had confirmed the age of the second victim of above 16 years and below 18 years at the time of her examination. Therefore, relating back to the time of the offence, the second victim girl was more than 14 years of age at the time

of the alleged commission of the offence and therefore not a minor as to attract the jurisdiction of the Children's Court for the trial of the appellants. It would be apt to advert to the testimony of the first victim girl Pw5 who had stated that she was born sometime in December in the year 2005 and she was around 16 years old who did not know if her birth was registered anywhere.

15. She was schooling in Liligura, a Government School and had studied up to 7th standard. She had left school thereafter and did not join any other school, she had only produced the Election Card which contained her birth date as XX/XX/1990. The statement of the victim was recorded in June 2010 in respect of the offence alleged to have taken place much prior to 2006. Apparently, the Election Identity Card was prepared on **31/01/2009** i.e. much after the alleged offence and therefore no value could be attached to the Election Identity Card to establish the age of the first victim girl. Therefore to all intents and purposes, the first victim girl was more than 16 years of age at the time of her examination based on the

opinion of Dr. Ghodkirekar Pw8 who had examined her as a member of the panel comprising of three doctors.

16. The second victim girl Pw7 stated at the outset that she did not know her birth date who claimed that she was schooling in Liligura High School up to 7th standard. She did not hold any Birth Certificate but may be it was available in the school. According to the first victim girl she was younger than her and about 13 years old but as per the opinion of the doctor, she was **above** 16 years of age and below 18 years at the time of her examination. Hence in the absence of any conclusive proof on the age of the alleged second victim girl coupled with the testimony of Dr. Ghodkirekar Pw8, it is apparent that both the victim girls were positively more than 14 years of age as on the date of the offence and therefore not a child within the meaning of "child" in case of child labour in terms of Section 2(e) of the Act.

17. The other witnesses examined on behalf of the prosecution namely Shilpa Pw1 clearly indicated that though enquiries were made about the ages of the victim girls, they were not sure about their respective ages. Rather one of the

prosecution's witnesses Catherine Pw2 indicated that on an enquiries with the victim girls about their names and ages, one of them had disclosed her age as 20 years whereas the other had disclosed her age as 18 years which totally militates against the prosecution that they were 14 years of age at the time of the commission of the offence. Father Severes Pw3 was unable to shed any light on their ages and so too Angela Pw4. Jacob Pw6, a so called relation of the victims did not utter a word nor whispered about the age of both the girls except to state that his sister had agreed to send her daughters to Goa for work in November 2005 as they would get good salary in Goa apart from food and clothing. Radhakant Pw9, a relation of the victim girls broadly stated that the first victim girl was about 16 years old and the second victim girl was 14 years old at the time when they were employed in the house of the appellants i.e both not less than 14 years at the time of the alleged offence. PI Verekar Pw10 had carried out the investigation in the crime based on the FIR registered at the Police Station and who too stated that the first victim was 16 years old and the second 14 years as at the time of the enquiries and for which they were submitted for general medical examination. Roque Pw11 and Albertina Pw12

were examined by the prosecution, no light whatsoever was shed by either of them on the age of the victim girls, so much for the claim of the prosecution that they were minors at the time of the alleged offence in 2005.

18. Thus, the contention of Shri Lotlikar, learned Senior Advocate for the appellants that the victim girls not being minors at the time of the alleged commission of the offences, the jurisdiction of the Children's Court was flawed deserves to be accepted, wholeheartedly. In the absence of any jurisdiction in the Children's Court to deal with the case, it could not have conducted the trial and held the appellants guilty of the offences alleged against them and on that premise alone the judgment of conviction is liable to be quashed and set aside.

19. Assuming for a moment that there was jurisdiction in the Children's Court to deal with the case of the prosecution as it was, on the premise that both the victim girls were minors, it is to be seen whether the offence alleged of assault, ill-treatment and wrongful confinement was established by the prosecution. In that context Shilpa Pw1 stated that while working as a Centre Coordinator with Child Line Goa when she

came to lodge the complaint in November, 2006, one Jacob Nayak had approached their office in 2006 stating that two of his nieces were working in one house belonging to one doctor at Bambolim. The said Jacob had disclosed that both children were small and below 18 years old whom he had brought from their native place Orissa, due to very poor financial condition of their family. They were initially kept with one Tiklo at Mapusa and thereafter through the said Tiklo both girls were shifted to one Doctor at Bambolim about one and a half years back. They had tried to locate the house of the Doctor but could not do so. She had also gathered information from Jacob that the victim girls were kept in the house of Doctor without paying the salary and they were not allowed to go and meet their ailing father at their native place. She had personally visited the house of the first appellant who was working at GMC but he was not available at his residence and his wife and old mother did not open the door. She had informed the second appellant and her mother-in-law that the father of both the girls have expired and allow them to talk to both the girls but she had not allowed them. She had accordingly lodged the complaint as there was no response from the Doctor and his wife.

20. Shilpa Pw1 stated that both the girls had told them that they were beaten up and even shown the marks on beating including burn mark of hot tava and also disclosed that they were not provided food properly in the said house. She also disclosed that the Police Authorities took both the girls from the house of the first appellant and placed them in Apna Ghar. She had no personal knowledge about the so called beating and harassment of the victim girls and what she had deposed was only on the basis of the disclosures made by the victims to her and without narrating any details to her. Therefore no much credence can be attached to her testimony. Catherine Pw2 reported at the Women Police Station, Panaji on 06/12/2006 when they were taken to the house of first appellant based on the house search warrant issued by the Deputy Collector. The first appellant had signed the search warrant and thereafter the panchanama was recorded. Nothing turns on her testimony which only re enforces the case in defence that both the victim girls were well above 14 years of age i.e. one above 18-20 years and second 16-18 years at the time of the alleged offence.

21. Father Severes Pw3 stated that he had received an information from an NGO from Panaji that there were two minor girls, native of Orissa working in the house of one Doctor at St. Cruz and who had to go back on account of the illness of their father. He had deputed the staff members to go to the spot and who reported back stating that they had tried to get the information by visiting at St. Cruz but the Doctor in question did not co-operate and even refused to give his name and other details and stated that he will contact Child Line through his Advocate. The wife of the Doctor informed that one of the girls was brought through one person named Ticklo. Thereafter they started returning from the said house and made inquiry in the locality which revealed the name of the Doctor employing the victim girls and thereupon he gave the phone number to Child Help Line to the second appellant. He too was not in a position to stated anything about the age of the victim girl much less the ill treatment or harassment meted out to them by the appellants in question.

22. Angela Pw4 had occasion to interact with Jacob who told her that he was working for one Dilbur Tiklo as a labourer

who had asked him to arrange for a domestic servant upon which he informed him that he had his sister's daughter in Orissa and he would bring her. Jacob had accordingly brought two girls being the two victims for the said Tiklo. He had informed her that Tiklo was not allowing the parents to communicate with the girls nor their salary was paid for more than one year and he expressed that he wanted to meet the girls since their father was serious in Orissa. Although she narrated about her interaction with the one of the victim girls, nothing was stated by her about the ill treatment and harassment at the hands of the appellants. Her testimony too is of no significance to prove the prosecution's case against the appellants. Rather her statement that she believed on the basis of the information given by Jacob that the victims were minors speaks volumes that this was based only on the information and that she had no personal knowledge about the age of the victim girls.

23. The first victim girl Pw5 had further stated that after coming from Orissa they halted in the house of one Munna at Guirim for two days. Munna had contacted his employer Wilbur

and informed him that they had come to Goa. Wilbur informed him that he had a friend who is a Doctor who required a maid servant and they had to go there. Wilbur then phoned the Doctor and called him who came with his wife. Wilbur then told them that they can choose any one of them for their work and the doctor chose her and took her in his car to St. Cruz. She was doing the household work which included sweeping, swabbing, washing clothes, preparing food etc. She used to get up in the morning and do the household work. She had received a telephone call from her mother on one day who requested her to telephone the second victim as she was in difficulty and her mother also gave her the telephone number of the second victim. She had prevailed on the first appellant but he did not allow her to speak with the second victim.

24. On 26th January, she told the first appellant that she wants to speak to her mother as it was her birthday and she spoke to her mother who told her that her sister is in difficulty and she should bring her and in case of need, she would send Jacob. She had informed the first appellant that her sister was not not happy with the work and she would bring her and take

her to Orissa. The first appellant had expressed his anxiety that there would be no one to work for him in case she went and he telephoned Wilbur who told her that the first appellate wanted to keep her sister and her with him after prevailing on her not to go to Orissa. She next stated about the scolding that she received from the accused no.3 i.e. the second appellate for small mistakes and also the complaints of the first appellate over silly mistakes assaulting them by catching their hair or neck and physically assaulting them.

25. The first victim girl had otherwise admitted that she had come to Goa for doing household work which included washing of clothes, utensils, cooking etc. as such jobs were not available in her village. She had also confirmed that the first appellant wanted only one maid servant and he did not take her sister with him. Except for the bare statement that there was harassment at the hands of the two appellants, there was no other material on record to substantiate the case of the prosecution against the appellants. Jacob Pw6 too confirmed that the appellants had employed only the first victim girl in his house as a maid and not the second on assurance to pay

₹1500/- per month apart from food and clothing. The second victim girl had gone to the house of the sister of Wilbur. He had not stated about the harassment to the victim and his testimony rests at that.

26. The second victim girl too had stated that she was taken to the house of one Arvind for work where she used to do the work of mopping the floor, washing clothes, utensils and other household work and was ill treated by her employer, beaten up and scolded and therefore was not happy with the said work. It is only thereafter that she was taken to the house of the first appellant where she worked for sometime. She stated that the second appellant used to assault both of them on silly grounds and that the first appellant used to assault her with belt, stick and used to catching her hair and give fist blows. However, if one sees the evidence of Dr. Ghodkirekar Pw8, it is apparent that on an examination of the first victim girl he had found one bruise over the left side face caused by a blunt object and of more than two weeks duration, a healed scar and a scab separating scratch abrasion which was between one to two weeks duration. He had noticed three linear scratch abrasions

over the left malar region, another linear scratch to the right cheek, an abrasion with reddish brown scab over the left forearm and hard scab formed abrasion over dorsal medial aspect of right forearm of the second victim girl. All these injuries were caused by a blunt object, simple in nature and about a week's duration. This was his assumption at the time of examination of both the victim girls on 07/1/2006 which however does not reconcile with the version given by the two victim girls on the history of assault. The Investigating Officer too was not able to secure any evidence on record regarding the incidents of assault on the victim girls assuming both were employed in the house of the appellants. This is all the evidence available on record to establish the so called incident of the assault on the person of the victim girls.

27. It has been held as before that the Children's Court lacked the jurisdiction to deal with the offences against the appellants when it was amply demonstrated that both the victim girls were not minors on the date of the alleged commission of the offence. Therefore to all intents and purposes the appellants at the highest could be tried for the offence under section 342

and 323 IPC before the regular Criminal Court. On the merits of the case it has been found that the prosecution has failed to establish that both the victim girls were subjected to ill treatment, confinement and harassment at the hands of the appellants. On that basis too the case of the prosecution cannot be said to be proved beyond all reasonable doubt. In the result therefore this appeal has to succeed. i therefore pass the following

O R D E R

The Appeal is allowed. The impugned judgment of conviction and sentence is quashed and set aside. The State shall be at liberty to prosecute the appellants for the offences under Sections 342 and 323 IPC before the regular criminal Court as it deems fit in the circumstances of the case. Bail Bonds shall stand discharged accordingly.

NUTAN D. SARDESSAI, J.