

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO. 8 OF 2016**

Vishakha Fadte,
daughter of Anand Fadte,
24 years old, Indian National,
Resident of H.No.42, New Wada,
Pilgao, Bicholim Goa.

... Appellant

Versus

STATE
(Through Police Inspector,
Bicholim Police Station,
Bicholim Goa.)

... Respondent

Mr. Pavithran A. V., Advocate for the Appellant.

Mr. G. Nagvenker, Additional Public Prosecutor for the Respondent.

Coram: NITIN W. SAMBRE, J.

Date: March 18, 2021

ORAL JUDGMENT:

Heard the respective counsel.

2. In Special Case No.30/2013, the Children's Court for the State of Goa ordered conviction of the appellant accused for an offence punishable under Section 379 of the Indian Penal Code thereby sentencing her to undergo simple imprisonment for a term of six months. A further conviction and sentence is awarded for an offence

punishable under Section 8(2) of the Goa Children's Act, 2003 thereby ordering simple imprisonment of six months and fine of ₹1,00,000/-, in default, simple imprisonment of six months. As such this appeal.

3. The facts necessary for deciding the appeal are as under :-

The victim girl PW2, a minor having born on September 11, 2002 was subjected to an offence of theft thereby removing ear-rings from her body on February 14, 2013 by the appellant accused resulting into registration of offence, investigation and filing of the charge-sheet.

4. Charge came to be framed against the appellant accused under Section 212 of the Criminal Procedure Code at Exhibit 10/C on January 13, 2014 for an offence punishable under Section 379 of IPC and Section 8(2) of the Goa Children's Act, 2003.

5. In support of establishing guilt, the prosecution has examined in all 10 witnesses.

6. After appreciating the evidence on record, the appellant accused came to be convicted as mentioned herein above.

7. While questioning the conviction, the learned counsel for the appellant accused following grounds are pressed :

(a) that there was defect in the charge framed as necessary

ingredients of Section 8(2) of the Goa Children's Act, 2003 which is a punishing section, and Section 2(m), which defines child abuse are not incorporated in the charge framed against the appellant,

(b) there was denial of an opportunity of hearing as the counsel for the appellant accused remained absent and as such, out of ten only three witnesses were subjected to cross examination.

8. So as to substantiate the aforesaid contentions, learned counsel for the appellant accused has invited my attention to the deposition of the witnesses which are placed on record so as to claim that only PW1 Martin, PW2 victim girl and PW3 Rajkuvar were subjected to the cross examination whereas the remaining witnesses were not cross examined even though an opportunity was offered to the appellant accused who was present in person, for want of presence of the lawyer. According to the learned counsel, in absence of the proper legal/technical assistance, the appellant accused could not cross examine the witnesses for want of legal knowledge and that being so there is denial of an opportunity of hearing. The learned counsel has relied on the judgment of the Bombay High Court in the matter of *The State of Maharashtra Vs Sheshrao*, reported in 2017 SCC OnLine Bom 9402, paras 19, 20 and 21 and also the judgment of the Delhi High Court in the matter of *Salamat Ali Vs State*, reported in 2010 SCC OnLine Del

1343, paras 19, 22, 23, 24 and 25.

9. As far as the issue as regards non framing of charge is concerned, though the appellant accused has relied on judgment of the Apex Court in the matter of *Main Pal Vs State of Haryana*, reported in (2010) 10 SCC 130, judgment of this Court in the matter of *Asaram Bhavandin Yadav Vs State of Maharashtra*, reported in 1991 Mh.L.J. page 362, paras 6 to 11 and 17, this Court having regard to the charge framed at Exhibit 10/C, is not inclined to examine the said issue and that being so the said issue is kept open to be adjudicated at the proper stage of trial.

10. As far as the submission as regards the denial of an opportunity is concerned, the fact remains that PW1, PW2 and PW3 were subjected to cross examination at the hands of the legal expert who was engaged by the appellant accused. Rest of the Prosecution witnesses are concerned, fact remains that the lawyer for the appellant accused remained absent on number of occasions. As and when he attended the trial, an adjournment which was granted by the Court at the request of Counsel for Accused. As such, it could be inferred that the appellant accused is not having legal knowledge, and in the absence of the proper legal assistance was unable to cross examine the witnesses i.e. PW4 to PW10. As the aforesaid witnesses i.e. PW4 to PW10 were not subjected to cross examination, the consequences were, the Special Court has

accepted the testimony of these witnesses which is also formed to be basis for ordering the conviction of the appellant accused.

Right of an accused to be represented by a Counsel is guaranteed under Article 22 of the Constitution of India. An accused may or may not produce evidence in his defence. However, that by itself will not disentitle an accused to have the assistance of a legal expert. In case if the accused brings on record evidence in defence, same cannot be ignored or brushed aside without an analytical approach by the Judge, of such evidence, while judging the guilt or innocence of the accused. As such, it can be inferred that the defence of the accused cannot be raised and effectively established in absence of legal assistance.

11. In the case in hand, though intermittently lawyer of the appellant accused attended the trial, however, as stated hereinabove, the testimony of the PW4 onwards remained unchallenged, as her lawyer remained absent or has failed to carry out the cross-examination. In such an eventuality, the Apex Court in the matter of *Mohd. Hussain alias Zulfikar Ali v/s. State (Government of NCT of Delhi)*¹ reported in 2012 2 SCC 584 has observed that the trial vitiates. Paragraphs 24, 42, 43 and 45 of the said judgment read thus:

'24. Not only was the accused (appellant) denied the assistance of a counsel during the trial but such designation of counsel, as was attempted at a late stage, was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. The court

¹ 2012 2 SCC 584

ought to have seen to it that in the proceedings before the court, the accused was dealt with justly and fairly by keeping in view the cardinal principles that the accused of a crime is entitled to a counsel which may be necessary for his defence, as well as to facts as to law. The same yardstick may not be applicable in respect of economic offences or where offences are not punishable with substantive sentence of imprisonment but punishable with fine only. The fact that the right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our judicial proceedings in India, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of a counsel was a denial of due process of law. It is equally true that the absence of fair and proper trial would be violation of fundamental principles of judicial procedure on account of breach of mandatory provisions of Section 304 CrPC.

42. *While holding the appellant guilty the trial court has not only relied upon the evidence of the witnesses who have been cross-examined but also relied upon the evidence of witnesses who were not cross-examined. The fate of the criminal trial depends upon the truthfulness or otherwise of the witnesses and, therefore, it is of paramount importance. To arrive at the truth, its veracity should be judged and for that purpose cross-examination is an acid test. It tests the truthfulness of the statement made by a witness on oath in examination-in-chief. Its purpose is to elicit facts and materials to establish that the evidence of the witness is fit to be rejected. The appellant in the present case was denied this right only because he himself was not trained in law and not given the assistance of a lawyer to defend him. Poverty also came in his way to engage a counsel of his choice.*

43. Conviction and sentence can be inflicted only on culmination of the trial which is fair and just. In the Indian adversarial system of criminal justice, any person facing trial can be assured a fair trial only when the counsel is provided to him. Its roots are many and find places in manifold ways. It is internationally recognised by covenants and the Universal Declaration of Human Rights, constitutionally guaranteed and statutorily protected.

45. It is accepted in the civilised world without exception that the poor and ignorant man is equal to a strong and mighty opponent before the law. But it is of no value for a poor and ignorant man if there is none to inform him what the law is. In the absence of such information that courts are open to him on the same terms as to all other persons the guarantee of equality is illusory. The International Covenant on Civil and Political Rights guarantees to the indigent citizens of the member countries the right to be defended and right to have legal assistance without payment. The salutary features forming part of the international covenants and the Universal Declaration on Human Rights are deep rooted in our constitutional scheme.'

12. As such, the Apex Court having held that if the defence lawyer at the time of the cross-examination of the prosecution witnesses remained absent and the Court remained a mute spectator to such trial proceedings without offering any legal assistance to the accused, amounts to denial of offering fair trial or equal justice. The Apex Court has held that the Court should have sensitive approach and should immediately provide legal assistance to the accused.

13. As far as the case in hand is concerned, the evidence of such prosecution witnesses who were not subjected to cross-examination was taken into consideration by the Special Judge for ordering conviction of the accused. Of course, the learned Public Prosecutor was justified in claiming that the accused so also the prosecution has right of speedy trial. However, in such an eventuality as has occurred in the case in hand, it is the duty of the trial Court to strike a balance so as to offer a fair opportunity of hearing to the accused which is a primary requirement in a criminal trial.

14. The Apex Court in the matter of ***Md. Sukur Ali Vs State of Assam***, reported in AIR 2011 SC 1222 has held that in case if the Advocate for the accused remains absent may be for negligently or deliberate cause, it is the duty of the Court to appoint a counsel for the accused in a criminal case as the accused should not be made to suffer for the fault of the counsel. The Apex Court has also observed that rendering proper legal assistance in a criminal trial to an accused is a part of guarantee of protection of life and liberty under Article 21 of the Constitution of India. The Apex Court has gone to the extent of observing that in the absence of a counsel for the accused for whatever reasons, the case should not be decided forthwith against the accused but in such a situation the Court should appoint a counsel who is practising on the criminal side as Amicus Curiae and then proceed to decide the matter.

15. The decision of the Special Judge thereby ordering the conviction of the appellant accused without there being legal assistance or absence of lawyer during the trial amounts to negation of concept of due process of law. As such, it is apparent that the conviction of the appellant accused is based on an undefended trial. As such, the conviction of the appellant accused cannot be sustained. That being so the conviction of the appellant accused is hereby quashed and set aside.

16. The trial as such stood restored to the file of the learned Special Judge presiding over the Children's Court at Panaji who shall take immediate steps for appointment of counsel so as to represent the interest of the appellant accused, in case the appellant accused failed to appoint a lawyer within a period of two weeks from the date of appearance given herein below. The accused shall appear before the Special Court i.e. Children's Court for the State of Goa at Panaji, on June 7, 2021.

17. The Special Court shall proceed ahead with the trial from the stage of cross examination of PW4 onwards. If the proceedings are taken out at the behest of the appellant accused in relation to the modification of charge or otherwise, or for adducing additional evidence in the form of further cross examination of PW1 to PW3, we expect the Special Court to deal with such prayer in accordance with law.

18. Since, the prosecution against the appellant accused is pending since 2013, the hearing of the trial is expedited with a direction to conclude the trial in any case by December 31, 2021.

19. The appeal as such stands partly allowed in the above terms.

NITIN W. SAMBRE, J

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TARI AMRUT
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