

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.24/2021

RAGHUVIR @ RAGHU SHARMA,
son of Matacharan Sharma,
aged 45 years, Security Guard,
R/o. Nachinola, Bardez-Goa,
N/o. Village Karahi, Shivpuri,
Madhya Pradesh, Police Station
Karera, presently lodged in
Judicial Custody of Colvale at
Colvale, Goa.

...APPELLANT

Versus

1. STATE
(Through PSI, Shri Vijay Rane)
Mapusa Police Station
Mapusa, Bardez-Goa.

2. Public Prosecutor
High Court of Bombay at Goa
Altinho, Panaji Goa.

...RESPONDENTS

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

Mr. Sagar Dhargalkar, Additional Public Prosecutor *for the Respondent – State*.

**CORAM: M. S. SONAK &
M. S. JAWALKAR, JJ.**

DATED: 13th October 2021

P.C.:

1. Heard Mr. Pavithran, learned counsel for the appellant, and Mr. Dhargalkar learned Additional Public Prosecutor for the State.

2. This appeal is directed against the Judgment and Order dated 06.01.2014 made by the Children's Court for the State of Goa in Special Case No.5/2010 convicting the appellant under Section 377 Indian Penal Code (IPC) r/w Section 8 (2) of the Goa Children's Act, 2003 and sentencing him to undergo life imprisonment, pay a fine of ₹1,00,000/- and in default to undergo simple imprisonment for one year.

3. The appellant was charged with having committed grave sexual assault on a minor victim boy, then aged 11 years on 21.10.2009 between 17.00 hrs. to 17.30 hrs. in House No.80, Pirazon, Moira, Bardez-Goa. The appellant pleaded that he was not guilty. The prosecution examined 12 witnesses. The appellant, despite the opportunity, neither examined himself nor any defense witnesses. The Children's Court convicted and sentenced the appellant as aforesaid. Hence the present appeal.

4. Mr. Pavithran submitted that there is no legal evidence to sustain the conviction. He submitted that the medical evidence is sketchy and inconclusive. He submitted that there are contradictions in the versions of PW1 (mother of the victim) and PW2 (victim). He submitted that the confession was not properly recorded and the Children's Court erred in relying on the same. He submitted that the sentence is also very harsh and ignores entirely the reformatory element. He submitted that the appellant could not afford an advocate and was represented by no less than five to six advocates from the Legal Aid panel. He submits that the appellant's submissions concerning the record of confession by the Magistrate were based on the legal assistance granted to him. He submitted that the Children's Court ought not to have imposed the maximum punishment simply because at one stage the appellant made some allegation against the Special Magistrate who recorded the confession. Mr. Pavithran submits that the impugned Judgment and Order may be set aside or in the alternate, the sentence be reduced to that already undergone. He pointed out that by now, the appellant has suffered about 12 years of actual incarceration. He relies on *Pritish Sarkar v. State of Goa – Criminal Appeal No.59/2018 decided on 14.08.2019*.

5. Mr. Dhargalkar defends the impugned conviction and sentence based on the reasoning reflected in the impugned Judgment and Order. He submits that there is overwhelming evidence on record to sustain the conviction and even the sentence is quite proportionate. He submits that in terms of Section 8(2), the Children's Court was duty-bound to impose a fine of ₹2,00,000/- and there is an error apparent on the face of the record in imposing a fine of only ₹1,00,000/-. He submits that this appeal may be dismissed but the fine amount may be enhanced.

6. In this case, we have evaluated the testimonies of PW2 (victim) and PW1 (victim's mother). The so-called discrepancies pointed out by Mr. Pavithran are trivial and based upon the same, evidence of these two witnesses is not required to be discarded. The testimonies of these two witnesses are quite consistent and the contention that there are *inter se* contradictions cannot be accepted.

7. PW2 (victim) was 11 years old at the time of the incident. He was a competent witness and this position was ascertained by the Children's Court. This witness has graphically described the incident and there is no dent made to his testimony in the cross-examination. No motive was seriously suggested for

PW2 to falsely complain against the appellant and in any case, no such motive has been proved. The complaint was filed within a reasonable period i.e. within about five hours of the incident and the other evidence on record supports the version of PW2. The reaction of PW2 to the incident is also deposed to, and the same is the natural reaction of a victim under such unfortunate circumstances. Regards the actual incident of grave sexual assault, the testimony of PW2 is quite clear, cogent, and creditworthy. There is nothing in the cross-examination or for that matter the other evidence on record sufficient to make even the slightest dent to his testimony. Therefore, we are satisfied that the conviction, in this case, is required to be sustained based on the testimony of PW2 alone.

8. There is no contradiction between the testimony of PW1 (victim's mother) and PW2 (victim). PW1 was not present at the time of the incident but she has deposed about the conduct of PW2, about when, how, and in what manner PW2 disclosed the incident to her, about her reaction to the incident, and the steps taken by her to bring the appellant to book. To a similar effect is the testimony of PW3 (victim's father). There is a ring of truth to the testimony of the parents of the victim and all this evidence has been quite correctly evaluated by the Children's Court.

9. In this case, PW4, the employer of the appellant has also deposed that the appellant was employed in their establishment and was posted as a security guard at the bungalow of an actress named Celina Jaitley. He has deposed to the duty timings of the appellant and also produced the duty chart. This evidence amply proves that the appellant was on duty on the day and time of the incident. There is evidence that this bungalow was at a distance of hardly 200 meters from the house of the victim and his parents. There is evidence that the victim and his parents knew the appellant as he used to even salute them as they would pass by the bungalow. All this evidence is sufficient to prove the charge against the appellant beyond a reasonable doubt.

10. PW10 Dr. Anthony Nazareth examined the victim on the date of the incident itself but at around 10.30 p.m. i.e. about five hours after the incident. He has deposed to what was told to him by the victim and how he referred the victim to the Government hospital since this was a police case. PW7, the doctor at Asilo Hospital (Government Hospital) has deposed about how she examined the victim at midnight and about how the victim narrated the incident to her. She deposed that on local examination she found an abrasion at the anus. She referred the patient to Forensic Department, Goa Medical College for further

evaluation. The medical papers produced on record corroborate the oral testimony of the two doctors.

11. PW5 Dr. Andre Fernandes from the Forensic Department, GMC has deposed that he found that there was an injury in the anal region with a reddening effect to the mucocutaneous area of the anus. He has deposed that there were reddish fresh tears of the anal mucosa extending partly to the mucocutaneous area at 8 o'clock and 6 o'clock positions. The Doctor has opined that there was evidence of anal intercourse, which was forcible and forceful due to gross disparity between the adult penis and the anus of the young boy.

12. PW5 medically examined the appellant on 22.10.2009 i.e. a day after the incident and has deposed that the accused had a superficial reddish fresh laceration to the prepuce skin with reddening effect. There was reddening of corona glans of the penis. Lateral traction of buttocks was partially positive. Partial funneling of natal cleft at anus was seen and it was suggestive of anal intercourse in the past. The patient had a bath after the incident and had washed his penis and there was no smegma present over the glans or coronal sulcus of the penis. PW5 Dr. Andre has opined that there was evidence of forcible

anal intercourse because of superficial lacerations to the prepuce skin with a reddening effect on the corona glans of the penis.

13. Having regard to the medical evidence on record, including in particular the evidence of PW5, the contention about any lack of medical evidence cannot be accepted.

14. In this case, according to us, there is no necessity to even advert to the confessional statement of the appellant recorded before the Special Judicial Magistrate (PW6). Even if this statement is completely excluded from consideration, the conviction is required to be sustained based on the other evidence on record. The testimonies of PW2 (victim) and PW5 – the doctor who thoroughly examined the victim as well as the appellant are quite sufficient to sustain the conviction. The other oral, as well as medical evidence on record, lends assurance to the clear and cogent testimony of these two witnesses. Therefore, there is no reason to even advert to the confessional statement of the appellant.

15. Even otherwise, we have considered the procedural objections raised by Mr. Pavithran to the record of the confessional statement before the Special Judicial Magistrate. Mr. Pavithran also submitted that the confessional statement was

retracted by the appellant and therefore should have been excluded from consideration.

16. According to us, there is no merit in the procedural objections raised. By and far the mandatory requirements prescribed under Section 164 and Section 281 of the Code of Criminal Procedure were complied with. There is no merit in the contention that there was any force or duress applied on the appellant. Even the retraction, in this case, was at a highly belated stage of the trial and mainly during the cross-examination of PW6. Even a retracted confessional statement can be considered by the Court where there is evidence about the original statement being voluntary. No doubt, corroboration is insisted in such circumstances. In this case, there is ample evidence on record to sustain the conviction even without advert to the confessional statement. In any case, there is more than ample corroboration.

17. For all the aforesaid reasons, we are satisfied that the appellant has made out no case to persuade us to interfere with the conviction.

18. As regards the sentencing, the Children's Court has imposed the maximum sentence of life imprisonment. From the

reasoning, we gather that the Children's Court was influenced by the allegations which the appellant made against the Special Judicial Magistrate who recorded the confessional statement. The appellant, in his statement under Section 313 Cr.P.C. alleged that this Magistrate took money from the police. The Children's Court also held that the appellant was a security guard and had gained the trust of the victim, only to ultimately betray such trust.

19. In response to Question no.48, the appellant, in his statement under Section 313, Cr.P.C. denied that the Mapusa police had requested PW6, Special Judicial Magistrate to record confessional statement and further added that she has taken money from the police. If the responses to the remaining over 90 questions are perused, then, it is evident that the appellant has mostly answered "*it is not true*" or "*it is false*". Mr. Pavithran's contention that the appellant was represented by no less than five to six lawyers under the Legal Aid Scheme, also cannot be simply brushed aside. This allegation by the appellant, even though not established by him, should not have influenced the sentencing. There is no reference to the reformatory aspect, though, it is true that the crime committed by the appellant was grievous.

20. From the material on the record or rather based only on the allegation made by the appellant against the Special Judicial Magistrate, no conclusion could have been drawn that the appellant had no sympathy or empathy to the victim or that his remorse was only short-lived. This is certainly not a case to take a lenient view but the question is whether this was a case where the maximum punishment was required to be imposed without adverting to the other relevant factors that must go into the aspect of sentencing.

21. Section 8(2) of the Children's Act reads as follows:

“(2) Whosoever commits any child abuse or sexual assault as defined under this Act, shall be punished with imprisonment of either description for a term that may extend to three years and shall also be liable to a fine of Rs.1,00,000/-. Whoever commits any Grave Sexual Assault shall be punished with imprisonment of either description for a term that shall not be less than ten years but which may extend to life imprisonment and shall also be liable to a fine of Rs. 2,00,000. Whoever commits incest shall be punished with imprisonment of either description for a term that shall not be less than ten years but which may extend to life imprisonment and also a fine which may extend to Rs. 2,00,000/-. Statement of the child victim shall be treated on par with the statement of a child rape victim under Section 375 of the IPC, as laid down by the Supreme Court of India.”

22. This is certainly a case of grave sexual assault. The punishment prescribed under Section 8(2) for grave sexual assault is imprisonment of either description for a term that shall not be less than 10 years but which may extend to life imprisonment and shall also be liable to fine of ₹2,00,000/-. Thus, imposition of the fine of ₹2,00,000/- was necessary but the Children's Court has ultimately imposed a fine of only ₹1,00,000/-. As pointed out by Mr. Dhargalkar, this is an error. The further question is whether the Children's Court was justified in imposing the maximum punishment of life imprisonment.

23. In *Pritish Sarkar (supra)*, a case involving grave sexual assault on a minor, this Court, reduced the sentence from life imprisonment to ten years. This Court held that aspects like proclivity to reformation had to be considered because it is now accepted that one of the legitimate goals of prison sentence is reformation.

24. The Courts have to necessarily balance the demands of retribution and deterrence on one hand and the demands of reformation on the other. Just as the sentence cannot be manifestly inadequate, so also the sentence must not be dispassionately severe. The principles of proportionality in

sentencing are, by now, well-entrenched in our criminal jurisprudence.

25. In *Mohammad Giasuddin vs. State of Andhra Pradesh – (1977) 3 SCC 287*, the Hon'ble Supreme Court held that a holistic view of sentencing is apt to be more rewarding. Therefore, the emphasis has to be as much as on man as on the system, on the inner imbalance as on the outer tensions. The Hon'ble Supreme Court has proceeded to observe that crime is a pathological aberration, that the criminal can ordinarily be redeemed, and the State has to rehabilitate rather than avenge. The sub-culture that leads to antisocial behavior has to be countered not by undue cruelty, but by secularisation. Therefore, the focus of interest in penology is the individual, and the goal is salvaging him for society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. Sentencing has to be viewed as reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of social defense. Therefore, a therapeutic, rather than an '*in terrorem*' outlook, should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind.

26. The aforesaid principles do not appear to have been sufficiently focussed and the baseless allegation made by the appellant against the Special Judicial Magistrate who recorded his confessional statement has influenced the sentencing. Therefore, though we agree with the Children's Court that this was certainly not a case for showing leniency in sentencing, we feel that the sentence of life imprisonment that was the maximum prescribed sentence was not warranted. According to us, the ends of justice will be met if the sentence of life imprisonment is reduced to rigorous imprisonment for a term of 14 years and the appellant is required to pay a fine of ₹2,00,000/- and in default to suffer simple imprisonment of one year. If the fine is recovered, then, the same should be paid to PW2 (victim) as compensation. We order accordingly.

27. This appeal is partly allowed. The impugned conviction is maintained but the sentence is reduced from life imprisonment to rigorous imprisonment for a term of 14 years. In addition, the appellant is fined ₹2,00,000/- and will have to suffer in default simple imprisonment for one year on failure to pay this fine amount. The fine amount, if recovered, will have to be paid to PW2 (victim) as compensation.

28. The Children's Court and/or the Registry to ensure that the statement under Section 164 Cr.P.C. and the deposition of the victim are re-sealed. Every care should be taken to see that the name/identity of the victim is suitably masked in the records.

M. S. JAWALKAR, J.

M. S. SONAK, J.