

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO. 41 OF 2017**

Shri Kanhaiya Naik,
Son of Shantaram Naik,
Aged 41 years, Teacher by profession,
Indian National,
Resident of Flat No. G-5,
Vastu Apts., Ribandar – Goa.
Through his next friend (wife)
Mrs. Kartiki Kanhaiya Naik,
Aged 32 years,
Indian National,
Resident of Flat No. G-5,
Vastu Apts., Ribandar – Goa.

..... Appellant
(Ori. Accused)

V e r s u s

1. STATE
Through Panaji Police Station
Panaji-Goa.

2. Public Prosecutor,
Panaji, Tiswadi, Goa.

..... Respondents

Mr. Prasheen Lotlikar, Advocate for the Appellant.

Mr. Mahesh Amonkar, Additional Public Prosecutor for the
State-Respondents.

CORAM : M. S. JAWALKAR, J.

DATE OF RESERVING: 12th January, 2021.

DATE OF PRONOUNCEMENT : 18th January, 2021.

JUDGMENT

The present appeal is filed by accused against impugned judgment and order dated 03.08.2017 continued on 16.08.2017, by the Children's Court of the State of Goa at Panaji in Special Case no.24 of 2012.

2. The PI of Panaji Police Station filed chargesheet against the appellant under Section 354, 342, 376 and 201 of I.P.C. and Section 8 (2) of the Goa Children's Act 2003.

3. It was the case of the prosecution before the Children's Court that on 29.12.2011, at about 14.00 hours, at Ribandar, the accused 'wrongfully confined' the minor victim girl, aged 15 years, in his flat and used 'criminal force' on her, with intention to outrage her modesty and then molested and sexually abused the minor victim girl and caused the evidence of offence such as clothes, data in the camera and laptop to disappear, with the intention of screening himself from punishment.

4. The Children's Court framed charges against the appellant under Section 342, 354, 201 of IPC and Section 2(y)(ii) and 8(2) of the Goa Children's Act. Learned Children's Court for the State of Goa at Panaji, convicted the appellant under Section 354 of IPC and Sections 2(y)(ii) and 8 (2) of the Goa Children's Act, 2003 and sentenced the appellant to undergo rigorous imprisonment for a term of four years for offence punishable under Section 354 of IPC and fine of Rs. 50,000/- or in default to undergo simple imprisonment for one year and to undergo rigorous imprisonment for a term of three years for offence punishable under Section 8(2) of the Children's Act and fine of Rs. 1,00,000/- or in default to undergo simple imprisonment for two years.

5. The appeal is filed on the ground that conviction is unjust, illegal and arbitrary and will cause gross miscarriage of justice if allowed to stand.

6. It is submitted by learned Counsel for appellant that the learned Children's Court has failed to appreciate that prosecution had miserably failed to prove the case beyond reasonable doubt as against the appellant and, as such, accused ought to have been acquitted by the Children's Court. The learned Presiding Officer, failed to appreciate that there was absolutely no evidence on record to point out to the fact that the appellant was involved in such acts. The learned Children's Court failed to appreciate that the accused was already discharged for offence punishable under Section 376. Accused is also discharged in another Criminal proceeding for offence punishable under Section 305 of IPC as there was absolutely no evidence on record to proceed against the appellant. The learned Children's Court also acquitted the appellant for offences punishable under Section 342 and 201 of IPC. As such, there was absolutely no evidence to convict the appellant for any other offences including offences punishable under Section 354 as well as Section 8(2) of the Goa Children's Act.

7. While convicting, Children's Court misconstrued the evidence on record specifically, evidence of Pw.6. Pw.6, in his cross examination, had clearly admitted that he had not seen the appellant personally taking the victim and dropping her back. The said aspect has not at all been considered by the learned Presiding Officer. There is nothing on record to show that the victim was in the custody of the appellant at his house. Absolutely, there was no medical evidence to show that the accused committed sexual assault on the victim girl.

8. Learned Counsel for the appellant, Shri Prasheen Lotlikar, also pointed out that learned Children's Court erred in relying on the deposition of Pw.12. In cross of Pw.11, who was one of the Investigating Officer, it has been stated that the mother of the victim had stated to him that she had first time seen injury marks on the victim's neck on 03.01.2012 and, therefore, what Pw.12 deposed that mother of the victim girl had shown Pw.12 the injury marks on her daughter's neck on 29.12.2011, was itself baseless and false.

9. The prosecution has not examined the mother of the victim girl. Therefore, adverse inference ought to have been drawn against the prosecution. It is also pointed out that camera, laptop and other seized items were sent for examination to the CFSL at Hyderabad which has given a report which fortifies the case of the appellant that he is innocent. Moreover, he is acquitted by the Children's Court for offence under Section 201 of IPC. Learned Counsel also pointed out that three of the witnesses turned hostile. There are material omissions brought on record in the evidence of witnesses specifically in the evidence of Pw.1 and Pw.2. The learned Children's Court also erred in sentencing the accused to undergo rigorous imprisonment for a period of four years, when as per the law then existing, at the time of alleged commission of the offence, was punishable with maximum sentence of two years. It is also submitted that when there are two possibilities, view favourable to the accused has to be adopted and benefit is required to be extended to the accused.

10. It is also pointed out that the victim did not tell the police where the house of accused was or scene of offence. Her father deposed that the police took them, which clearly goes to show that the investigation is faulty and farce.

11. Learned Counsel also pointed out that the learned Children's Court erred in convicting appellant relying on the evidence which for other offences treated by Children's Court as hearsay evidence of the witnesses. Learned Counsel relied on the following citations :

1. Ganpat Singh vs. State of Madhya Pradesh (2018) 2 SCC (Cri) 159.

2. Dev Kanya Tiwari vs. State of Uttar Pradesh (2018) 2 SCC (Cri) 860.

3. Anthony Fernandes vs. Police Inspector, Margao Town Police – 2020 (1) Goa CP 163.

12. As against this, learned APP Shri Mahesh Amonkar, submitted that statements of Pw.1 and 2 are in corroboration

with each other and also supported by medical evidence. As per Section 32(i)(l) of the Goa Children's Act, the burden of proof is on the accused to prove his innocence, if the child was in his custody at the time of his arrest or at the time of committal of offence or at the time of rescue or removal of the child victim as the case may be. It was duly established by the prosecution that victim girl was taken on 29.12.2011 at 2.30 p.m. by the accused and dropped her at 5.30 a.m. at her home. Therefore, accused has to explain what had happened there which is in his special knowledge, to prove his innocence. However, considering statement of accused, there is no explanation whatsoever given by the accused. In view of Section 6, even hearsay evidence is admitted if the statements are contemporaneous. It is submitted that statement of victim is recorded on 05.01.2012 and, on the same day, statement of Pw.1 and 2 came to be recorded. As such, statements were contemporaneous and they are being exception to hearsay evidence are admissible in evidence.

13. He relied on the following citations in support of his

above contention :

- 1. Krishan Kumar Malik vs. State of Haryana - (2011) 7 SCC 130;**
- 2. State of Madhya Pradesh vs. Ramesh & anr. - (2011) 4 SCC 786;**
- 3. Sukhar vs. State of U.P. - (1999) 9 SCC 507;**

14. Learned Additional Public Prosecutor further submitted that the accused should explain to the incriminating circumstances revealed from deposition of the witnesses and read over to him while recording his statement under Section 313 of Cr.P.C. The learned Counsel relied on the citation **Joseph s/o. Kooveli Poulo vs. State of Kerala – (2000) 5 SCC 197**, wherein it is held that :

"... During the time of questioning under Section 313 of Cr.P.C., the appellant instead of making at least an attempt to explain or clarify the incriminating circumstances inculcating him, and connecting him with the crime by his adamant attitude of total denial of everything when those circumstances were brought to his notice by the Court not only lost the

opportunity but stood self condemned. Such incriminating links of facts could, if at all, have been only explained by the appellant, and by nobody else they being personally and exclusively within his knowledge. "

15. It is also submitted that medical evidence is supporting. Learned Advocate for the appellant in reply submitted that there is no substance in the contention of the learned Additional Public Prosecutor that the alleged incident is of 29.12.2011 and as per Doctor's opinion, on 05.01.2012 that the injuries are of maximum during the period of six days. If calculated the said period it cannot be said that such incident could have taken place on 29.12.2011.

16. The rival contentions now fall for my determination. As per story of prosecution, accused picked up victim girl on 29.12.2011 from her house and dropped her at 5.30 p.m. The complaint is not lodged by any of the family member but the same was lodged by one Nisha Desai, NGO person on 05.01.2012. As per her contention, she received a phone call

on 03.01.2012 from Panaji P.S. at 5.00 p.m. calling them at Police Station for assisting in recording statement at Police Station. She and Venancia Cardozo reached Panaji Police Station at 6.30 p.m. On that day, victim was not ready to give any statement. They were again called on 05.01.2012. The victim was present along with few of her friends and victim made a disclosure in presence of the police about the molestation she had undergone.

From her cross, it appears that there are many improvements. Pw.2 accompanied the girl for medical examination and admitted that, initially on 05.01.2012, the victim had given consent of examination of certain part of the body and on 06.01.2012, she consented for the entire medical examination.

17. From the deposition of Pw.1 and 2, it appears that, they interacted with the girl on 3rd and 5th of January, 2012, however, as per their evidence, she gave statement on 05.01.2012 when she was accompanied along with her friends.

18. It is a matter of record that no friend of victim was examined or any statement was recorded. As per evidence of these two witnesses, they noticed marks on the neck when they interacted with the girl. However, both the witnesses were not able to state the size and number of marks on the neck of victim.

19. Supplementary statement of victim came to be recorded on 08.01.2012. In supplementary statement, she has denied any attempts to penetrate finger/pens or any other object in any private part at the time when the victim was along with her Sir Kannaya Naik (accused) and she said that her statement recorded on 05.01.2012 is correct.

20. If medical evidence is considered, Dr. Pannag S. Kumar, Pw.3, had examined victim on 05.01.2012. As per his deposition, victim gave consent only to examine some parts of the body. Accordingly, he examined face, lips, upper limbs, back of chest, back of lower trunk, abdomen and lower

limbs from the knees at 10.40 p.m. to 11.10 p.m. He observed brownish bruises around the neck and opined that the said injuries were of maximum duration within six days prior to the examination. Injuries were simple in nature and could be persistent with love bites due to sucking of the skin or due to blunt force object impact. There were also mention of multiple lineal superficial incised wound having partly separated brownish black scabs over the forearm (near the wrist) being of maximum duration within 7 days prior to the examination which appears to be caused by sharp object. Similar healed scarred superficial incised wounds which were of duration of more than 15 days prior to the examination.

21. The victim could not be examined as regards sexual offences as she refused consent for examination of genitalia and breast. As she gave consent of examination of genitalia by a female Doctor, she was referred to Gynaecology Department. On 06.01.2012, in presence of witness and one Dr. Deepa Karmali, Gynaecology Department, GMC, he carried out victim's medical examination. After examination,

the witness opined that there was evidence of healed hymenal tear of age any time older than seven days before examination, suggestive of vaginal penetration having occurred at any point of time prior to seven days before examination.

22. It is a matter of record, that there is supplementary statement recorded of the victim and the said NGO lady Ms. Venancia Cardozo explained her the medical report in details and asked her whether there was any attempt to penetrate finger, penis or any other object in her private part at the time when she was along with accused. She stated that there was no any such act done by the accused. The accused was also discharged for the offence of rape or grave sexual assault.

23. In view of medical opinion, hymenal tear suggestive of vaginal penetration and specific statement of victim that the accused had not committed any such act, possibility of other person's involvement cannot be ruled out. There are

many material omissions brought on record in the evidence of Pw.1 and Pw.2. No date on complaint; Pw.1 and Pw.2 both deposed that they have not stated to the police that they were called at 1.00 p.m. Non-examination of mother of the victim create doubt about involvement of the accused. The victim cannot be examined as she committed suicide on 27.07.2012. Offence is alleged to have been committed on 29.12.2011 where as crime came to be registered on 05.01.2012 as Pw.1's complaint.

24. Pw.5, panch witness, deposed that in his presence scene of offence panchanama was conducted. At that time, laptop, charger and camera were attached by the police. The key of swift car was also handed over to the police. The said articles seized while conducting panchanama i.e. laptop and camera, were sent to the expert. The retrieved data after chemical analysis and microscopic examination sent to the IO, which is placed on record vide exhibit C-82. There is nothing connecting accused to the alleged incidents of taking photographs of victim is revealed. Therefore, learned

Children's Court acquitted the accused from the charge under Section 201 of IPC. Thus, prosecution could not establish that accused made to disappear any evidence.

25. Pw.6, father of the victim, did not stand by the prosecution. Therefore, the learned Public Prosecutor sought permission to cross examine this witness. He denied that his statement was recorded by the police as per his say. He only admitted that the accused had come to him at the college on 29.12.2011 and had asked for his permission to take the victim to his residence to give some career guidance about what she can do after her SSC examination and he had given them permission. On 03.01.2012, he received a phone call from his wife calling him to Panaji Police Station and when he reached there, he noticed that his wife and victim were present and his wife was narrating some facts to the police. He immediately stopped his wife from giving statement and he took his wife and victim home with him.

In cross by the accused, he deposed that he had not seen personally accused taking the victim with him and

dropped her back. He admitted that his wife does not have any mobile phone and Panaji police spoke to him. In connection with scene of offence panchanama, he deposed that police had come to his house at 2.00 p.m. (on 06.01.2012, scene of offence panchanama). The police had taken them to the house of accused. There were four policemen. He admitted that the victim did not tell the police as to where the house of accused was. In view of his deposition, it appears that the spot was not shown by the victim and they were taken to the spot by the police.

26. Pw.7 and Pw.8, panch witnesses of disclosure panchanama, also did not stand by the prosecution.

27. Pw.11, who is the Investigating Officer, deposed in cross that he did not find any bottle or container of Vaseline in the house of accused. He has not recorded statements of any friends of victim. He deposed that they all left i.e including victim and her father, the Police Station together to go to the flat of the accused. They did not visit any other

place on the way nor did they take any halt. This statement is contrary to the statement of Pw.6 as well as panch witness Pw.5. Some omissions in the evidence of Pw.12 confirmed through this witness. He has also admitted that in his investigation it is revealed that the mother of the victim had seen the marks on the neck of victim for the first time on 03.01.2012.

28. Pw.12, who is mother in law of victim's elder sister, she deposed that on 29.12.2011, she visited the house of victim at around 8.00 p.m. and the mother of victim informed her that victim was taken by Kannaiya (accused) to Ribandar. She inquired with the victim and noticed some bite injury marks on the neck. Victim informed her that on 29.12.2011, in the morning hours, Kannaiya (accused) had taken her to Ribandar in a flat in red colour car and asked her to wear some other clothes and he hugged her, kissed her and pressed her breast. Then he dropped her in the evening. It needs to be noted here that in the statement of victim, it is recorded that she was taken at around 2.00 p.m. There are

material omissions recorded in the evidence of this witness.

29. Accused examined sister of victim as defence witness, Dw.1. She deposed that she and victim both studied together till tenth standard till the year 2011. She was in love with Alex Fernandes, son of Pw.12, her neighbour. Pw.12, mother of Fernandes opposed their marriage. Her neighbours and her teachers including accused, approached Pw.12 to fix her marriage with Alex Fernandes. She had a child from Alex. Her marriage was not finally registered as Pw.12 did not allow to get the formalities completed. After her husband leaving for Kuwait, Pw.12, drove her out. He had returned back and after his return, she went again to her matrimonial house. As per her statement, Pw.12 had taken her mother and victim to police station to teach a lesson to the accused as P.w.12 as she was unhappy about her marriage with her son which was forced on her by the accused. Though she used to visit the house of her father everyday, in the evening, (which is around 200 metres away from her house), on 03.01.2012, she had seen some marks

on the neck of the victim for the first time. However, victim refused to tell anything about that. She specifically denied in the cross that she had seen the mark on the neck of victim on 29.12.2011. Though she had admitted that on inquiries with the victim, she has disclosed to her that the accused had taken her to his flat and had made her wear different clothes and jewellery and had clicked her photograph, however, she denied that victim disclosed any hugging or kissing or touching and other incidences suggested to her. She denied all other suggestions put to her by the prosecution.

30. From the evidence of all these witnesses including I.O., nobody had seen or noticed any mark on the neck of victim till 03.01.2012 though some witnesses were having opportunity to see her. Medical report though suggests that there is penetration and rupture of hymen, the supplementary statement of victim goes to shows that accused had not committed any such attempt. Not a single witness have deposed that they had seen victim going along with accused. Even the Pw.6, father of the victim, deposed

that accused had been to his college to seek permission to take away victim along with him. He has also deposed that he has not seen personally the victim going along with the accused. The mother of the victim was not examined. The articles seized at the flat of the accused i.e. camera, laptop, sent for examination to the expert agency. However, retrieved data after chemical analysis as well as microscopic test does not support at all to the prosecution story. As per Pw.1, victim was present at the Police Station on 05.01.2012 along with her friends but no statement of any of the friend is recorded or examined as a witness. If at all, victim could have been comfortable with her friends and come to Police Station with her friends, her friends would have thrown light about the incidents and their evidence would have been vital. So it raises serious doubt whether any such friend accompanied her or not.

31. Considering the omissions brought on record in the evidence of Pw.1 and P.w.2, the genuineness of the investigation is doubtful. As victim committed suicide on

27.07.2012, she could not be examined as a witness and evidence of Pw.1 and Pw.2, is hearsay evidence. Children's Court for one offence treat their testimony a hearsay and for other admissible.

32. Learned Additional Public Prosecutor relied on citation **Krishan Kumar Malik** (supra) wherein Hon'ble Apex Court held that purpose of incorporating Section 6 in evidence i.e. to complete missing links in chain of evidence in solitary witnesses. Section 6 is an exception to general rule where under, hearsay evidence becomes admissible. But, for bringing such hearsay evidence within the ambit of Section 6, it must be almost contemporaneous with the facts and there should not be an interval which would allow fabrication. With due respect to the principle laid down, it is not applicable in the present set of facts. The alleged incident took place on 29.12.2011 and statement of Pw.1 and Pw.2 came to be recorded on 08.01.2012. Complaint was alleged to be filed on 05.01.2012 however, there is no date on complaint. Statement of Pw.2 is recorded on 08.01.2012. As such, one

cannot say that the said statements or complaints come under the exception of General Rule of evidence. It cannot be said to be contemporaneous.

33. It is also argued by learned Additional Public Prosecutor Shri Amonkar, that accused has not given any explanation in 313 statement, except answering the question as false.

34. In my considered opinion, it has come on evidence that spot of incident was not shown by the victim, it is also not established that anybody has seen the accused taking the victim to his flat. The expectation from the accused that he should explain what had happened in the flat is unreasonable, when his stand itself is that, he has not taken the victim to his flat. What had happened in the flat, cannot be expected to be explained by the accused. Learned Children's Court acquitted accused from the charge of 201 of IPC on the ground that there was no material on record to show that accused has tried to destroy or has destroyed the evidence of

commission of crime by him in any manner. It is also held that even the prosecution has not come up with a clear stand as to what was the evidence that is destroyed by the accused. It is also held that as just because no clothes were found in the house of accused which were given by him to the victim to wear on the date of incident, it cannot be directly presumed that the accused has destroyed the said clothes or has caused to disappearance with the intention of saving himself from the legal punishment and, therefore, he was acquitted for committing offence under Section 201 of IPC. He was also acquitted from having committed offence of a wrongful restraint. While acquitting of that charge, learned Children's Court held that victim girl has committed suicide on 27.07.2012 and there is no direct evidence available on this count of her alleged wrongful confinement by the accused in his flat. Learned Children Court has also observed that evidence available before this Court through Pw.1, Nisha Desai and Pw.2, Venancia Cardozo and Pw.6, father of the victim, is not direct since their testimonies are based on the information furnished to them by the victim girl. Such

indirect evidence is not sufficient to prove the charge of wrongful confinement of victim girl as against the accused as, the testimonies of Pw.1, Pw.2 and Pw.6 to that effect amounts to hearsay evidence. Therefore, accused was acquitted of the charge under Section 342.

35. In my considered opinion, if that would be the case, the learned Children's Court erred in basing her judgment on the evidence of Pw.1, Pw.2, Pw.6 and Pw.12 specifically when it is held that their evidence is hearsay evidence. The other charges which were held by the Children's Court on the same evidence, of Pw.1 and Pw.2, it cannot be said that part is hearsay and part is admitted specifically when the evidence relied on is also based on information given by victim girl. Even records show that not a single person noticed the marks on neck till 03.01.2012, who were in close associates of victim specifically when Investigating Officer also deposed that he revealed that during his investigation, it is revealed that mother noticed marks on victim's neck on 03.01.2012 only. The family

members atleast would have noticed the marks if such alleged incident took place on 29.12.2011. Dw.1 also, who is elder sister of victim, used to visit her house daily, has also deposed that she has noticed marks on 03.01.2012, that creates reasonable doubt. In these circumstances and even in view of medical evidence, possibility of other person involved in the offence cannot be ruled out. Medical report shows that there is hymenal tear, however, in victim's supplementary statement denies any involvement of the accused in the same.

36. Learned Counsel for the accused, Shri Lotlikar, relied on **Anthony Fernandes** (supra) in support of his contention that when conviction is on the basis of circumstantial evidence, conviction cannot be sustained merely on the basis of some sort of suspicion about the involvement of the appellant in the crime. It is quite well settled that suspicion, however, grave, can never be a substituted for legal proof of such matters.

37. Learned Counsel also relied on **Ganpat Singh**

(supra) and **Dev Kanya Tiwari** (supra) in support of guiding principles to be followed when the case is based on circumstantial evidence. The said principles are reproduced in **Anthony Fernandes** (supra) which are as under :

'(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human

probability the act must have been done by the accused.

38. As such, there is reasonable doubt about involvement of the accused in the alleged incident and benefit needs to be given in favour of the accused.

39. The learned Additional Public Prosecutor has drawn my attention to Section 32(1)(I) of the Goa Children's Act, which reads as under :

(I) Burden of Proof : Whenever any offence is alleged to have been committed against a child, the burden of proving that such offence has not been committed by the accused [shall lie on the accused of the child was in his custody at the time of his arrest or at the time of committal of offence or at the time of rescue or removal of the child victim, as the case may be.]

He submitted that the accused failed to discharge his burden to prove that such offence has not been committed by the accused. In my considered opinion, for

shifting of that burden on the accused, it has to be established that the child was in his custody at the time of his arrest or at the time of committal of offence or at the time of rescue or removal of the child victim. In the present matter, the prosecution failed to establish beyond reasonable doubt that child was in the custody of accused on 29.12.2011 and he is the only author of crime of which he is charged. In view of the above foregoing discussion, the prosecution also failed to establish any sexual assault as alleged in view of Section 2(y)(ii) of Goa Children's Act.

40. In view of the above discussion, no offence under Section 354 of IPC or under Section 2(y)(ii) punishable under Section 8(2) of the Goa Children's Act, 2003, has been established as committed by the accused beyond reasonable doubt. As such, accused is entitled for acquittal.

41. Accordingly, I pass the following :

ORDER

(i) The appeal is allowed.

(ii) The judgment and order convicting the accused in Special Case no. 24 of 2012, passed by the Children's Court at Panaji, dated 03.08.2017, is hereby quashed and set aside.

(iii) The accused-appellant is hereby acquitted for the offence punishable under Section 354 of IPC and for the offence under Section 2(y)(ii) punishable under Section 8(2) of the Goa Children's Act, 2003.

(iv) Bail bonds stand discharged.

(v) Muddemal be destroyed, if any, as per direction of Trial Court.

M. S. JAWALKAR, J.