

Meena

**IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO.10 OF 2017**

Mr. Santosh Sahadev Khajnekar,
Son of Sahadev Khajnekar,
40years of age, service,
Married, Indian National,
Residence of Volvonem, Thivim,
Bardez- Goa.
Native of Matond Harijanwadi,
Sawantwadi, Maharashtra

...Appellant

Versus

1 State
(Through Mapusa Police Station)
Mapusa Goa.

2 Public Prosecutor
Panaji- Goa, High Court.

...Respondents

Ms. Gautami Kamat, Advocate for the Appellant under Legal
Aid Scheme.

Mr. Gaurish Nagvenkar, Additional Public Prosecutor for the
Respondents – State.

CORAM: BHARAT P. DESHPANDE, J.

DATED: 11th November, 2022.

ORAL JUDGMENT:

The appellant challenged the impugned judgment and sentence in the present appeal against the judgment and sentence passed by the learned President of Children's Court in Special Case No.88 of 2013 dated 06th January 2017.

2. Heard learned Counsel Ms. Gautami Kamat appointed under the Legal Aid Scheme for the appellant and the learned Additional Public Prosecutor Mr. Gaurish Nagvenkar for the State.

3. With the assistance of the learned Counsel for the parties, I perused the paper book as well as the records and proceedings of the Trial Court.

4. The learned Counsel for the appellant forcefully submitted that there is absolutely no evidence on record to arrive at the conclusion that the accused committed such offence beyond all reasonable doubt. She submitted that the date of actual incidence is not mentioned either by the victim or the mother who lodged the complaint. There is previous enmity between the parties. The Doctor who examined the victim has not stated as to how the injuries were caused. No independent witness is examined by the prosecution to support the version of the child. The school bag by which the alleged assault took place was not properly identified by the victim. She then submitted that the learned Trial Court cursorily considered evidence of the prosecution and arrived at a wrong conclusion. There are no proper findings given in the impugned judgment and the contradictions brought on record are even brushed aside without giving proper reasons.

5. The learned Counsel for the appellant then submitted that the appellant was not given any opportunity to produce documents showing previous enmity between the parties though he stated so while answering statement under Section 313 of CrPC. Thus, she

submits that in order to give justice to the parties and more particularly to the appellant, who is only a daily wage worker, the matter be remanded under Section 391 CrPC thereby allowing the appellant to lead evidence showing previous enmity between the parties.

6. The learned Counsel Ms. Kamat then placed reliance on the recent decision in *Jai Prakash Tiwari v/s. State of Madhya Pradesh*¹ to buttress her submissions regarding the purpose of the questions put to the accused under Section 313 of CrPC.

7. The learned Additional Public Prosecutor, *per contra*, submitted that evidence brought before the Trial Court is sufficient enough to prove the guilt on the part of the appellant/accused and the learned Trial Court has properly appreciated/considered it while arriving at conclusion. He submitted that minor discrepancies in the evidence cannot come to the rescue of the accused. The assault on the victim boy is fully established and testimony of the said victim is found to be cogent and convincing.

8. The learned Additional Public Prosecutor then submitted that there is no ground raised in the memo of appeal with regard to the request of remand under Section 391 of CrPC. There is also no ground raised in the memo stating that the appellant was prevented from producing any document before the Trial Court at any stage and, therefore, such a request at this stage cannot be accepted.

¹ 2022 SCC Online SC 966

9. The rival contention falls for the consideration of this Court together with the point as under:

1. Whether the learned Trial Court justified in holding the accused guilty on the basis of material placed before it?

10. The appellant was charge-sheeted for the offence punishable under Sections 323, 352 and 504 of the Indian Penal Code (IPC) and Section 8(2) r/w. 2(m)(i) of the Goa Children's Act, 2003. In nutshell, it is the case of the prosecution that on 1st February 2013, at around 8.00 hours, in the school premises of St. Ann's School, Tivim, Bardez, Goa, the accused voluntarily caused hurt to the minor victim boy, aged 9 years, by assaulting him with a school bag of his son, used criminal force, insulted him in filthy language and also threatened him.

11. Since, the victim was coming within the definition of 'child' under Section 2(m) of Goa Children's Act, 2003, the charge sheet was filed directly before the Goa Children's Court. After explaining the charge, the accused pleaded not guilty and accordingly, the prosecution was asked to prove its case by leading evidence.

12. The charges were explained to the accused which is at Exhibit-9 reads thus:

*BEFORE THE CHILDREN'S COURT FOR THE STATE OF
GOA, AT PANAJI-GOA.*

SPECIAL CRIMINAL CASE NO.88/2013

Exhibit No. C-Q9

C H A R G E

(Sections 221, 222, 223 of Cr.P.C.)

I, Ms. Xxxxxx xxxxxx, President, Children's Court for the State of Goa, at Panaji, hereby frame charge against you, accused Santosh Khajnekar, s/o.Sahadev Khajnekar, aged 40 years, Occupation: Pvt. service, n/o. Matond Harijanwadi Sawantwadi, Maharashtra, as under:

That on 1.02.2013, at about 8.00 hours, in the school premises of St. Ann's School, Tivim, Bardez, you have voluntarily caused hurt to the minor victim boy, aged 9 years, by assaulting him with a school shoulder bag of your son. Thereby you have committed an offence punishable under Section 323 of I.P.C.

At the same place, time and date, you have assaulted or have used criminal force to the minor victim boy, aged 9 years, otherwise than on grave and sudden provocation given by the said boy. Thereby you have committed an offence punishable under Section 352 of I.P.C.

At the same place, time and date, you have intentionally insulted the minor victim boy, aged 9 years, in filthy language, with intent to provoke breach of peace. Thereby you have committed an offence punishable under Section 504 of I.P.C.

At the same place, time and date, you have committed 'child abuse', by assaulting and abusing the minor victim boy, aged 9 years, causing psychological and physical abuse to him. Thereby you have committed an offence under Section 2(m)(i), punishable under Section 8(2) of the Goa Children's Act, 2003.

And I hereby direct that you be tried by this Court on the said charges.

Sd/-

(xxxxxx xxxxxxxxx)

President

*Panaji-Goa
16.02.2015.*

Children's Court for the State of Goa

13. The prosecution then examined four witnesses to prove its case.

14. The first witness examined by the prosecution is the mother of the victim and the complainant. She disclosed that the victim/Pw3, her son, was studying in 3rd standard in St. Ann's School at Tivim and he was attending the school from 8.00am to 1.00pm and thereafter, he used to attend tuition classes from 4.00pm to 6.00pm. The father of Pw1 by name Manohar used to drop her son to school and in his absence, she used to drop the victim to school. She then claimed that somewhere on the 9th day of a month in the year 2013, when she was giving bath to her son during night time and when applying soap on his body he experienced pain to his ear and back. She questioned the victim

about the injuries and at that time the victim told her that he was assaulted with the school bag by the father of Sahil (the accused), who was his classmate. She then deposed that the victim did not inform her about the said assault as the accused threatened him that he will be assaulted further if he disclose about it to anyone. She then deposed that the victim further told her that the accused used filthy words against him on that day.

15. Pw1 then deposed that she did not lodge the complaint on that day itself as it was late in the night and went to the hospital on the next day along with her son and mother. The victim informed the Doctor at Asilo Hospital as to how he sustained injuries and accordingly Doctor told her that it is medico legal case. Therefore, she went to the Police Station and lodged a complaint which is at Exhibit-16 dated 9th February 2013.

16. The second witness examined by the prosecution is Dr. James Jose who is attached to District Hospital, Mapusa. He deposed the victim boy was produced for medical examination on 9th February 2013 and he examined him at 5.05pm. The victim boy gave a history of assault about 8days prior to the day of examination. The said victim boy disclosed that he was hit with a bag. On examination, he found that there was discharge from the left ear and an abrasion on the left upper back. The victim boy was complaining of pain in that area. The victim boy was then referred to ENT Surgeon who opined blunt trauma to the left ear and his left temporo mendibular joint disfunction. The Hurt Certificate is at Exhibit-18 Pw3 is the victim boy himself. His deposition was

recorded by the President of the Children's Court by following the procedure and who deposed that at the relevant time he was going to the school and the accused being a father of his classmate Sahil hit him on his face near the ear and back with a black colour school bag, abused him in filthy words. He identified the accused in the Court as the same person.

17. The last witness examined by the prosecution is the Investigating Officer who deposed about the Panchanama and the investigation carried out by him.

18. After the evidence of the prosecution was over, the statement of the accused under Section 313 of CrPC was recorded by putting separate questions to the accused. The accused denied the allegation of assaulting the victim and claimed finally that he has been falsely implicated due to previous enmity.

19. Though the accused claimed that he wants to examine himself as found recorded in answer column to question No.20, he failed to step into the witness box and therefore, an endorsement dated 17th December 2016 on behalf of the Counsel for the accused "we are not leading any evidence". Thus, it is clear from the record that initially the accused wanted to lead evidence in defence, subsequently, he decided not to step into the witness box.

20. The learned Trial Court after considering the material on record found that the prosecution succeeded in proving the case on all counts and accordingly hold the accused guilty for the offence punishable under Section 323, 352 and 504 of IPC and Section 8

(2) of Goa Children's Act, 2003.

21. After hearing the accused on the point of sentence, the punishment was awarded as found mentioned in the impugned judgment.

22. The learned Trial Court sentenced the accused to undergo simple imprisonment for a term of 6months for the offence punishable under Section 323. Similarly, the accused is sentenced to undergo simple imprisonment for a term of 10months for the offence punishable under Section 504. Further, the accused is sentenced to pay a fine of ₹500/- for the offence punishable under Section 352 and in default to undergo simple imprisonment for 2 days. Finally, the accused is sentenced to undergo rigorous imprisonment for a term of 1year and to pay a fine of ₹1,00,000/- for the offence punishable under Section 8(2)of the Goa Children's Act, 2003 and in default to undergo simple imprisonment for 6months. The learned Trial Court also observed that substantive sentences of imprisonment imposed shall run concurrently and the accused is given a set off for the sentence period undergone under Section 428 of CrPC.

23. It is clear from the record that the complainant and the victim are the only persons who are examined before the Trial Court to prove the charges levelled against the accused. No independent witness has been examined in support of such allegations. However, it is a settled proposition of law that if the testimony of the victim is cogent and convincing there is no need

for corroboration. In the light of above, it is necessary to consider the evidence of the witnesses examined by the prosecution in the present matter.

24. The main witness in the present matter is the victim himself who at the relevant time was around 9 years old. He was examined before the Trial Court and the accused even cross-examined this witness.

25. It is well settled proposition of law that the testimony of the child has to be treated with care and caution as due to their tender age, is a pliable witness. The child is prone to tutoring and inducement and also is prone to telling imaginative and exaggerated stories. Keeping in mind that Pw3 is a child witness and it specifically has to be considered in the light of the above settled proposition. It is found in his testimony that incident took place somewhere in the month of February, 2013. Admittedly, he did not disclose the exact date however his testimony shows that while he was going to school in the morning, the father of Sahil hit him on his face near the ear and at the back with the black colour school bag and also abused him with filthy words. He identified the accused as the same person. During cross-examination this witness answered that the bag hit him near the left ear. He also stated that he is having a mark of injury even today on his back. He, however, deposed during cross-examination that his mother used to give him a bath and she noticed the swelling on his ear and back while giving a bath. Except for the above aspects, there is no other cross-examination of this witness on behalf of the accused. There is

absolutely no denial that the accused is the father of one Sahil, who is going in the same school.

26. The bag by which assault took place was attached as MO No.1 and it is found to be brown colour bag. Further, there is a specific note in the deposition on page 3 of Pw3 by the learned Trial Court that the bag forming MO1 is having black stripes and a black border on the front side. Therefore, the identification of the said bag by the victim as a black colour bag cannot be faulted with.

27. A specific suggestion is put to this child witness that the accused has been falsely impleaded by his parents as they are not in talking terms, which he has denied.

28. Pw3/victim stated that he was hit on his left ear and back with a school bag which caused him injury. This aspect is fully corroborated by the Hurt Certificate produced at Exhibit-18 and by the deposition of Pw2-Dr. James Jose. This witness stated that the child was brought before him who gave him a history of assault about 8 days back. Thus, it is further confirmed by the Doctor that the victim child informed him about the history of assault about 8 days prior to the examination with a school bag. On examination of the victim, he noticed a discharge from the left ear and an abrasion on the left upper back. The child was also complaining of pain in that area. He then referred the child to ENT Surgeon who opined blunt trauma to the left ear and his left temporomandibular joint disfunction. The Doctor then opined that such injury was aged

around 4 to 7 days. Thus, the opinion of the experts is further corroborated with the testimony of the victim that he was assaulted about 8 days back. During cross-examination Pw2 deposed that the cause of discharge from the ear can be by injury to the ear. He deposed that the discharge from the ear was visible. Then the question was put to him that is it possible to cause all the injuries to the victim due to fall? Upon which the Doctor opined in the affirmative. However, it is necessary to refer to the cross-examination of the Pw3/victim himself and to find out that there is no suggestion given to him that he received such injuries due to a fall. Thus, the opinion of the Doctor that such injuries are possible due to a fall is only general suggestion and opinion over the history given by the victim to the Doctor is having more value qua the nature of injuries sustained and the manner in which such injuries were caused to him.

29. Pw1/mother lodged the complaint on noticing injuries to her child. She specifically deposed that the victim told her that he received injuries due to assault by the accused. During cross-examination, she confronted with the portion marked from A to A in her complaint Exh.16 where she claimed that due to the previous enmity, the accused entered the school premises, abused and assaulted her son. However, there is absolutely no other material brought on record as to what was the previous enmity between the parties and what made the complaint to be lodged in connection with injuries caused to the victim. A suggestion was put to her during cross-examination that the victim sustained such

injuries due to fall while playing game which was denied specifically.

30. As observed earlier, no such suggestion was put to the victim himself and therefore, there is no material to disbelieve the version of the victim.

31. The learned Trial Court, while considering the above material on record, believed the version of the victim and his mother and arrived at the conclusion that the prosecution had succeeded beyond all reasonable doubts.

32. The reasoning of the learned Trial Court on the basis of the material placed on record and more particularly deposition of Pw3, the victim cannot be faulted with as there is absolutely no adverse material brought on record to show any ambiguity or inconsistency with the deposition/testimony.

33. The learned Counsel for the appellant while arguing the matter submitted that an opportunity was not given to the accused to lead evidence or to produce documents on record to prove previous enmity between the parties though he stated so while answering the question put to him under Section 313 of CrPC. In this respect, she placed reliance on the case of ***Jai Prakash Tiwari*** (supra). In the case of ***Jai Prakash Tiwari***(supra), it is observed in the matter wherein combined questions were put to the accused under Section 313 of CrPC depriving him from effectively answering the circumstances adversely recorded in evidence. Considering such flaws in the trial itself, the Apex Court observed

that the accused needs to be given a reasonable opportunity to explain adverse circumstances which emerged against him during the course of trial.

34. Coming back to the matter in hand, it is not at all the case of the accused that he was not given appropriate opportunity to explain adverse evidence brought against him by framing separate and independent questions. A perusal of the statement recorded under Section 313 of CrPC by the Trial Court clearly shows that full opportunity was given to the accused to explain each and every adverse evidence against him. He answered all the questions and even initially showed an inclination to examine himself. However, later on he changed his mind and put an endorsement stating that he did not want to lead any evidence in defence.

35. Thus, a question of alleged non-consideration of the document or opportunity to the accused to lead evidence cannot be considered at this stage. There is no ground raised in the memo of appeal to that effect. Therefore, the contention of the learned Counsel for the appellant to consider the case for remand under Section 391 of CrPC cannot be accepted. First of all the accused has to make out a ground for such a remand. In the absence of any such ground in the memo of appeal and any other aspect from the record of the Trial Court, the matter cannot be remanded only for asking. However, the record of the Trial Court shows that the accused had ample opportunities to produce such evidence at the time of cross-examination of the complainant, the victim as well as the Investigating Officer and finally at the stage of recording

statement under 313 of CrPC. No such efforts were made. Only giving the suggestion that there was previous enmity, is not sufficient enough to prove such an aspect even on the preponderance of probabilities.

36. The learned Counsel for the appellant submitted that the victim admitted during cross-examination that they were not in talking terms with the accused. Even if it is considered that the parties were not in talking terms, it does not prove that there was previous enmity so as to falsely implicate the accused in the matter. Further, the victim was just 10 year old boy at the relevant time, therefore, it is not expected from him to understand the aspect of previous enmity between his family and that of the accused. Pw1 during cross-examination clearly denied that there was any previous enmity between the parties. Therefore, the arguments advanced now for remand are of no substance.

37. From the material on record and the findings of the learned Trial Court, one thing is clear that the charges levelled against the accused stand proved beyond all reasonable doubts. The deposition of the victim is cogent and convincing. There is no material to disbelieve the testimony of the victim. Injuries sustained by him are corroborated by the Medical Certificate as well as by the deposition of Pw2. Thus, such findings cannot be faulted with.

38. As far as the sentences awarded by the learned Trial Court are concerned, though no separate arguments were advanced, the

same would have to be considered looking into the fact that the accused is a daily wage worker and the only breadwinner in the family.

39. To my mind the sentences awarded against the accused are on the harsh side and therefore, only on that count, the discretion can be exercised.

40. The learned Additional Public Prosecutor pointed out that while suspending the sentence this Court vide order dated 16th February 2017 in Criminal Miscellaneous Application No.53 of 2017 observed in paragraph 5 as under :

“ 5. The applicant was all along on bail during the course of the trial. Normally in such circumstances, this Court would have suspended the substantive sentence of imprisonment subject to a deposit of the fine amount. However, in the present case, it is pointed out by the learned counsel for the applicant that the petitioner is working as a mason and has dependent family members. The applicant was on legal aid before the Children's Court and he submits that the applicant is unable to deposit the entire amount of the fine. The learned counsel submits that the applicant will deposit Rs.25,000/- (Rupees twenty five thousand only) within six weeks from today. The statement is accepted. In such circumstances, the following order is passed:

ORDER:

(i) The substantive sentence of imprisonment is suspended on the condition of the applicant furnishing a personal bond in the sum of Rs.15,000/- with one solvent surety in the like amount.

(ii) The applicant shall deposit Rs.25,000/- before the

Children's Court within six weeks from today.

(iii) The Bail Bond to be furnished before the Children's Court."

41. Looking to the nature of offences and need of proportionate punishments to be awarded, in this matter since the said offence took place in the year 2013 and the accused is a daily wage worker, imposition of sentence awarded by the Trial Court is certainly detrimental to his family members as they are fully dependent on the income of the accused. Accordingly, it is expedient to notify the sentences awarded by the Trial Court which could be proportionate to the nature of offences.

42. The learned Additional Public Prosecutor pointed out that in the case of ***Uday alias Rupesh Falkar v/s. State of Goa***² decided on 7th February 2020 by the Division Bench of this Court, the imposition of fine as mentioned in Section 8(2) of Goa Children's Act, 2003 is discussed and a fine has been mentioned as ₹1,00,000/- since there is no discretion left with the Court to reduce such fine below ₹1,00,000/-.

43. The learned Additional Public Prosecutor then placed reliance in the case of ***Maloji Patil v/s. State of Goa***³ wherein this Court again considered Section 8(2) of the Goa Children's Act qua the quantum of fine and observed that a fine amount has to be imposed as mentioned in the Section itself.

44. On perusal of both the above citations, it is clear that

² Criminal Appeal No. 52 of 2018

³ 2009 ALL MR (Cri) 118

offences alleged against the accused therein were of grave sexual assault against the victim and accordingly this Court has observed that a fine as contemplated in Section 8(2) of the Goa Children's Act, 2003 has to be maintained.

45. It is a well settled proposition of law that the sentence of imprisonment as well as imposition of fine must be proportionate to the alleged offence which stands proved during evidence.

46. In the case of *Sham Sunder v/s. Puran*⁴, the Supreme Court observed that the Court in fixing the punishment for any particular crime should take into consideration the nature of offence, the circumstances in which it was committed, the degree of deliberation shown by the offender. The measure of punishment should be proportionate to the gravity of offence.

47. In the case of *Deo Narain Mandal v/s. State of UP*⁵, the Supreme Court observed that sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the Court should bear in mind the principle of proportionately. Sentence should not be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of court in awarding sentence cannot be exercised arbitrarily or whimsically.

4 (1990) 4 SCC 731

5 (2004) 7 SCC 257

48. In the case of *Adamji Umar Dalal v/s. State of Bombay*⁶, it is observed thus “*in imposing a fine it is necessary to have as much regard to the pecuniary circumstances of the accused persons as to the character and magnitude of the offence, and where a substantial term of imprisonment is inflicted, an excessive fine should not accompany it except in exceptional cases*”.

49. Keeping in mind the main purpose of imposition of fine qua the gravity of offence, the provision of Section 8(2) of the Goa Children’s Act must be interpreted constructively. It is also well established proposition of law that for the purpose of legislative interpretation and to give proper effect to the language used, word “shall” could be considered as “may”. Therefore, it cannot be construed that for minor offences such as assault on a minor under Section 323 of IPC r/w. Section 8(2) of the Goa Children’s Act, the Court is handicapped in reducing the amount of fine when the substantive sentence of imprisonment could be imposed up to a period of one year. Thus, the imprisonment could be even for few days considering the gravity of the offence. In such circumstances, imposing fine of ₹1,00,000/- and that too when it is clear from the record that the accused is a daily wage earner, would be certainly harsh and no purpose would be served by imposing such fine. The main purpose of imposing such fine is to compensate the victim out of such fine. Therefore, looking at the gravity of the offence like the one in hand, imposing fine of ₹1,00,000/- would certainly be very harsh. Such cannot be considered as an intent of the

6 AIR 1952 SC 14

legislature. Such fine could be imposed in case of serious offences such as sexual assault being a part and parcel of Section 8(2) of the Goa Children's Act.

50. Having said so while confirming the findings of the learned Trial Court regarding conviction, sentences and the fine amounts are modified in the following manner. Thus, appeal needs to be partly allowed only with regard to sentences awarded for the offences which stand proved against the appellant.

O R D E R

1. The appeal is partly allowed.
2. While maintaining the conviction of the appellant/accused for the offences as found mentioned in the impugned judgment, the sentences awarded therein stand modified to the following extent:
 - i. The accused is sentenced to undergo simple imprisonment for a period of 10 days for the offence punishable under Section 323 of IPC. The accused is directed to undergo simple imprisonment for a period of 10 days for the offence punishable under Section 504 of IPC.
 - ii. The accused is directed to undergo simple imprisonment for a period of 15 days for the offence punishable under Section 8(2) of the Goa Children's Act, 2003 and to pay a fine of ₹15,000/- (Rupees

Fifteen Thousand only) and in default to undergo simple imprisonment for a further period of 5days.

iii. The sentence of fine awarded for the offence punishable under Section 352 of IPC is thereby maintained.

iv. The appellant has deposited the amount of ₹25,000/- as directed by the order dated 16th February 2017, hence, the fine amount shall be deducted and paid to the victim as directed by the learned Children's Court and the remaining amount shall be refunded to the accused after undergoing the sentences modified as above.

3. The appellant shall surrender before the learned Children's Court on 28th November 2022 at 10.00 am and report compliance.

4. The appeal stands disposed of in the above terms.

BHARAT P. DESHPANDE,J.

MEENA
VISHAL
BHOIR

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VISHAL BHOIR
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