

Jose

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.8 OF 2021

Mr. Mangesh Wadekar,
S/o Jaywant Wadekar,
32 years, C/o Sandhya Kambli,
H. No. 40, Near Brito Bar,
Headland Sada, Mormugao, Goa.
Presently at Central Jail Colvale. ... Appellant.

Versus

State,
Through Public Prosecutor,
High Court of Bombay, at Goa,
Panaji, Goa. ... Respondent.

Mr Anoop Atchut Gaoker, Advocate under Legal Aid Scheme
for the Appellant.

Mr Pravin Faldessai, Additional Public Prosecutor for the
Respondent.

CORAM: BHARAT P. DESHPANDE, J.

RESERVED ON: 23 February, 2023

PRONOUNCED ON: 28 February, 2023

JUDGMENT:

By this appeal, Appellant is challenging judgment and conviction passed by the learned President, Children's Court, Panaji in Special Case No.56/2015 vide Judgment dated 13.12.2016. The learned Children's Court found the Appellant guilty for the offence punishable under Section 375(b), punishable

under section 376(2)(i) of IPC, under Section 2(y)(i), punishable under Section 8(2) of Goa Children's Act, 2003 and under Sections 3 and 4 of Protection of Children from Sexual Offences Act, 2012. The Accused was acquitted for the offence punishable under Section 506(ii) of IPC. The Appellant was sentenced to undergo rigorous imprisonment for ten years and to pay fine of ₹2,00,000/- and in default to undergo simple imprisonment for two years for the offence punishable under Section 376(2)(i) of IPC, under Section 8(2) of Goa Children's Act, 2003 and under Section 4 of POCSO Act, 2012. Appellant was given set off for the period already undergone in judicial custody from the date of his arrest till the date of passing of the Judgment as provided under Section 428 of Cr.P.C.

2. This matter was admitted on 16.03.2021. The records and proceedings were called and the hearing was expedited as the Appellant is in custody from the date of his arrest i.e. from 06.03.2015.

3. Heard learned Counsel Mr Anoop A. Gaoker appearing under the Legal Aid Scheme for the Appellant and Mr Pravin Faldessai, the learned Additional Public Prosecutor for the State.

4. With the assistance of both the learned Counsels, I have perused the paper book.

5. Mr Gaoker appearing for the Appellant/Accused submitted that though ten witnesses were examined by the Prosecution,

relevant witnesses are PW1, PW2, PW3, PW6, PW7 and PW9. He submits that PW1/father of the victim lodged the complaint though belatedly but only on the information given to him by the victim and her sister. PW2/victim improvised in such a way that her testimony becomes highly improbable. Ocular evidence is not supported by medical evidence. PW3/sister of the victim again improvised in such a manner that her testimony smacks of vindictiveness. Both these witnesses were exposed during cross examination. PW6 the doctor, clearly opined that there was no injury and therefore, there was no question of blood coming out. The victim was examined after a period of three days from the date of alleged incident. PW7 being the grandmother, gives contrary version and her testimony is only on hearsay basis. However, she improvised by saying that she handed over the clothes with bloodstains to the police which was denied by the Investigating Officer. Finally, the Investigating Officer was cross-examined to show that no such incident ever took place. Mr Gaoker would therefore submit that the entire story was cooked up only to take revenge as there was some enmity between the Complainant and the Accused.

6. Mr Gaoker placed reliance on the following decisions:-

- i. ***Balai Natta vs. State of Tripura, (2010)*¹,**
- ii. ***Dola Alias Dologobinda Pradhan and Anr. vs. State of Odisha*²,**

1 (2010) 2 Gauhati Law Reports 744

2 (2018) 18 SCC 695

- iii. *Hari Om Alias Hero vs. State of Uttar Pradesh*³,
- iv. *Santosh Prasad Alias Santosh Kumar vs. State of Bihar*⁴, and
- v. *Ajeet Singh Constable vs. State of U.P And Anr.*⁵.

7. According to Mr Gaoker, the entire evidence on record would show that victim is totally unreliable and that her testimony is not supported by any cogent and convincing material. The findings of the learned Trial Court, according to Mr Gaoker are therefore perverse. The version of the victim and her sister ought not to have been accepted as gospel truth. The said victim and her father are having habit of making false allegations against the Accused and other persons.

8. The learned Additional Public Prosecutor Mr Faldessai though tried to justify the conviction, would submit that the ocular evidence is not supported by medical evidence. He also admits that there are contradictions in the form of improvements which goes to the root of the matter.

9. The rival contentions fall for consideration as under:-

1. Whether the Prosecution succeeded in proving that the Accused is guilty of the offences punishable under Section 376(2)(i) of IPC, Section 8(2) of Goa Children's Act and Section 4 of Protection of Children from Sexual Offences Act, 2012.

3 (2021) 4 SCC 345

4 (2020) 3 SCC 443

5 2023 LiveLaw (AB) 4

10. Before considering evidence brought by the Prosecution witnesses, charges levelled against Accused need to be taken into consideration. It is the case of Prosecution that on 03.03.2015 during evening hours, the Accused in his rented room near Britto Bar, Headland, Sada, Mormugao, committed rape/grave sexual assault /penetrative sexual assault on the minor victim girl by inserting his finger in her private part. With these allegations and the charges framed against Accused, Prosecution examined ten witnesses.

11. PW1, being the father/Complainant, deposed that he along with his two daughters is residing at Sada. He is working as a mason whereas both his daughters were schooling in the Government School. His wife expired about 6 to 7 years back. As a mason, he leaves his house at around 3:00 a.m. and returns back at around 4:00 to 5:00 p.m. In his absence, both his daughters remain alone in the house. Though he claimed that during his absence, both his daughters remained alone in the house, he further stated in the examination in chief itself that his mother i.e. grandmother of both the victim and her sister, took care of both his daughters during his absence.

12. As far as the alleged incident is concerned, PW1 was unable to give the date or the month when the alleged incident took place. However, he stated that on the 5th day of the month, he had gone to work as usual and returned at around 5:00 p.m. At that time, his mother was present in the house, who informed him that

his elder daughter/victim was complaining of pain in the stomach. Accordingly, he called the victim and asked about the reason and then she told him that the Accused called her to his room which is adjacent to his room and forcibly lifted her dress and then inserted his finger in her private part by removing her underwear. The victim further told her that she had bleeding from the private part. The Accused threw her underwear. He admits that such incident took place about two days prior to filing of the complaint. He also claimed that the victim told this to the sister of Accused and accordingly, the said sister told the landlady but no one took action. Since the victim was suffering pain, she finally told the wife of his younger brother. The Complainant then went in search of the Accused, brought him and then slapped him. His brother then called police.

13. It therefore shows that the alleged incident took place around two days prior to filing of the complaint and that too when the victim was complaining about pain in her stomach. PW1 in her cross examination admitted that he was arrested in a criminal case in connection with Ponda Police Station. However, denied that any case was pending against him in Vasco Court under Section 379 r/w 34 IPC. He denied specific suggestion that on 24.02.2015, he pulled the dupatta of the sister of Accused thereby outraging her modesty and when the Accused questioned him, as a revenge he filed false complaint against the Accused. He then admitted that on that day when he returned him, his neighbours, his mother, sister-in-law and both his daughters were present, apart from some

persons in front of the chawl. He was then confronted with the contents of complaint wherein some statements made by him in examination in chief were not found recorded.

14. PW2/victim deposed that at the relevant time, she along with her younger sister were studying in Government Primary School in 3rd and 2nd standard respectively. Her school timings were from 8:00 a.m. till 2:00 p.m. Her father used to go to work early in the morning and used to come back in the noon time. She identified the Accused who used to reside by the side of their house and she used to call him “kaka”. The Accused was residing with his sister Vanita. She then claimed that the Accused used to call her and her sister in his house to do homework. The Accused used to touch her hands and stomach which she did not like and used to tell him. However, the Accused used to continue with such activities. PW2 then claimed that in fact she told about it to her landlady who assured that she will inform her father/PW1. PW2 then claimed that she never informed her father because Accused threatened to beat her. First of all, all these things are neither disclosed by PW1 nor by any other witness. Such disclosures are not found in the statement of PW2 recorded by the police. There is no explanation coming forward as to why such disclosures were not made to the police. Surprisingly, the landlady who is found referred by PW2 in her deposition was not examined by the Prosecution to confirm that such disclosure was made to her by PW2 on previous occasions. This shows that PW2 tried to improvise.

15. The victim then deposed that on the day of incident, she was in the house of Accused when he put his hand in her panty and inserted his finger in her private part, due to which she suffered bleeding and pain in her stomach. PW2 then claimed that the Accused then came to her house and was offering ₹10/- to the victim and told her not to disclose to any one about the said act. She then deposed that she had gone alone to the house of Accused to do the homework since Accused assured her that he will not do anything. Victim then deposed that she told her younger sister and the landlady about the bleeding and pain in her stomach.

16. If such disclosure was made to the landlady about the bleeding and pain, the question remains as to why PW2 did not inform the landlady about the alleged insertion of the finger by the Accused as tried to be claimed in the examination in chief.

17. The victim then deposed that there were bloodstains on her panty and she kept her panty outside the bathroom when she had gone for bath. The said bathroom is in her house. PW2 then claimed that Accused came to her house and threw her panty on the roof tiles.

18. The victim then deposed that her sister informed her “nani” and “chachi”. Name of her nani is Gauramma whereas name of her chachi is Bharti. This again shows that PW2/victim did not inform her grandmother/nani or to the landlady known as chachi, however, her sister informed them about it. PW2 then claimed that

she cannot tell after how many days her nani told her father about the said incident.

19. During cross-examination, PW2/victim stated that her sister/PW3 had gone to play on the day of incident when she had gone to the house of Accused. She then admitted that the room of the landlady exists in between her house and that of the Accused. This shows that the house of the Accused is not touching the house of the Complainant.

20. PW2/victim then deposed during her cross-examination that while she was playing outside her house, Accused came and called her with books. At that time she was playing alone outside her house and her sister had gone to the house of her uncle to play. She then stated that her sister/PW3 came to the house of Accused after the incident. She then stated that during the incident, she screamed and cried due to pain but Accused told her to keep quiet and not to make noise.

21. PW2/victim then made a statement which reads thus:-

“I told my sister and landlady about the incident on the same day. I called the landlady outside her house and told her.”

22. If this statement is believed, it shows that the landlady was in her house which exists in between house of Accused and the Complainant. Surprisingly, this landlady is not examined by the Prosecution. Therefore, there is no corroboration to the statement

of PW2 that she told the above fact to the landlady on the same day and that too by calling her from her house. Similarly, PW2 claimed that she screamed and cried due to pain. This could have been possibly heard by the landlady who was present in her house which is adjacent to the room of the Accused. It shows that the Prosecution has kept the evidence away from the Court by not examining the material witness i.e. the landlady.

23. The cross-examination of PW2/victim clearly shows that material contradictions have been put to her, which were subsequently proved through the Investigating Officer. First of all, her statement that there were bloodstains on her panty is not found recorded in the statement. In fact, no such panty was attached by the police.

24. PW3, the sister of the victim identified the Accused as the person who was residing by the side of their room and they used to call him “kaka”. Accused used to residing along with his sister and used to call her and her sister on some occasions. She then deposed that Accused touched her sister and she had seen blood fallen near their house. It was the blood of her sister. She was told by her sister that it was her blood. She had seen the blood coming from her private part. Accordingly, she informed this fact to her grandmother and aunty.

25. PW3/the sister of victim claimed that she has seen blood fallen near their house, which is not at all the case of the victim herself. This fact was confronted to the witness as it was not

recorded in her statement. Similarly, PW3 claimed that she had seen her sister bleeding is also not corroborated or stated by PW2 in her deposition.

26. Prosecution then examined PW4-Sandhya Kambli who claimed that PW1 is her tenant who was residing with his mother and two daughters. She claimed that there are two tenements out of which one is rented to the Complainant and the other one is rented to one Vanita who is sister of Accused. Both these rented premises are near her house i.e. at a distance of around 15 metres. She claimed that on 05.03.2015 at around 8:30 p.m., she was called by PW2 and told her that PW1 is calling her. She went to the house of PW1 and found other people present there. At that time, PW1 told that Accused put his finger in the private part of PW2.

27. PW4 then specifically disclosed that she did not speak to PW2 at that time, but subsequently, PW2 told her that Accused touched her private part. She then inquired with the Accused, however, he denied about such incident. This lady specifically claimed in the examination in chief itself that she knows the Accused and frankly speaking, he is of good behaviour. Though PW4 was cross-examined by the learned Public Prosecutor on granting permission by the Court, the contradiction which the learned Public Prosecutor brought on record is only a hearsay statement or a possibility of the Accused sexually assaulting the victim.

28. PW4 in her cross-examination stated that the wife of PW1 stopped residing with him as he used to assault her under the influence of alcohol. She further admitted that Accused used to assault both his daughters under the influence of alcohol. She admitted that she had no knowledge personally about the said incident. This deposition of PW4 being the landlady shows that she was not told by PW2 either on the day of incident or thereafter about the alleged incident.

29. Prosecution then examined PW6 the doctor from GMC only to identify the signature of Dr. Shweta Rajan, Senior Resident, who examined the victim on 06.03.2015. Admittedly, Dr. Shweta Rajan who examined the victim was not available and therefore, Dr. Impana K. was examined to identify her signature on the medical certificate of examination in sexual offences for females produced at Exh. 29. Dr. Impana identified the signature of Dr. Shweta on the said report. In the entire chief examination, no questions were asked to this witness about the contents of the document though such document was taken on record with the consent of the Counsel for the Accused. Thus, it is clear that the contents of the medical reports at Exh. 29 were not established/proved except identifying signature of Dr. Shweta. Be that as it may, PW6 Dr. Impana during cross-examination stated that it takes around 6 to 7 days to heal any injury or tear. She further stated that an injury or tear is tender to touch for two to three days. She then admitted that when a victim complains of bleeding from private part, there has to be some laceration or abrasion to the private part in

absence of menses. She then admitted that even if a complain of bleeding in case of fleshy hymen, there has to be some laceration or abrasion. First of all, it shows that the contents of the certificate of the examination of victim are not proved in evidence as no questions were asked to Dr. Impala to disclose what the certificate states. Since the examination was carried out by an expert, evidence must be of the expert to prove the contents. However, even if the contents of the certificate/report and the opinion is considered, it is clear that there was no evidence of old/fresh tear though the hymen is found fleshy. The opinion part shows as under:-

“On physical and genital examination, no opinion as to recent sexual intercourse can be given. However in view of fleshy hymen, vaginal penetration cannot be ruled out.”

30. The evidence of PW6 nowhere shows that there was any injury or tear so also any laceration or abrasion on the private part of the victim. In such circumstances, bleeding from the private part is completely ruled out specifically when the victim was ten years old and not attained menarche yet. However, even such statement of any injury, abrasion, laceration is not found in the deposition of PW6. Thus, the possibility of bleeding from the private part of the victim is completely ruled out. If that is so, statement of PW2 the victim and PW3 her sister regarding bleeding from the private part is necessarily to be considered as improvisation and exaggeration. The victim claimed that bloodstains were found on her panty

whereas PW3 her sister claimed that even blood was found in front of their house. Such statements of both these witnesses who were of the age of around 10 and 8 respectively, susceptible to tutoring which cannot be ruled out.

31. Prosecution then examined PW7-Gauravva who is the grandmother of the victim. She claimed that she is residing at Sada with her younger son whereas her elder son resides at Kariawada, Vasco. Her elder son is having two daughters i.e. victim and PW3. She then claimed that she visited the house of PW1 on 3rd as well as on 05.03.2015. During evening of 05.03.2015, the victim informed her of pain in her stomach. She then inquired with the victim about the reason upon which victim told her that Accused inserted his finger in her private part. PW7 then claimed that the victim girl was bleeding from her private part. Accordingly, she informed PW1 who returned home and thereafter, PW1 started assaulting Accused. If this statement is believed, the victim was even found bleeding from her private part on 05.03.2015, which is not at all the case of the victim herself. Similarly, there is no medical evidence to support her contention.

32. During cross-examination, PW7 claimed that she had seen blood on the underwear of the victim, which she had shown to the police. She also claimed that the clothes with bloodstains were handed over to the police.

33. PW8-Vinayak Naik acted as a pancha witness on 06.03.2015 wherein scene of offence panchanama was conducted. Admittedly, nothing was attached as incriminating during such panchanama.

34. PW9-Bharti is the daughter-in-law of PW7. This witness claimed that on 05.03.2015, she had gone along with PW7 to the house of the victim. At that time, PW2 informed PW7 about pain in her stomach and on inquiring, PW2 told that on 03.03.2015, Accused had sexually assaulted her by putting his finger in her private part. After some time, PW1 came home and accordingly they informed him who went to the house of Accused to confront him. During cross-examination, this witness claimed that PW2 on earlier occasions informed her that the Accused used to touch her and accordingly, she informed PW1/father. There is nothing on record to prove that this lady had informed PW1/father about any earlier incident as PW1 is totally silent about it.

35. PW9 then deposed that on the day of incident, there was no bleeding suffered by PW2 at the time when she narrated the incident to PW7 in her presence. This statement is contrary to the one deposed by PW7. The remaining cross-examination of this witness is in connection with the contradictions which were proved through the Investigating Officer.

36. The last witness is PW10 who claimed that on receipt of complaint, he investigated the said matter and arrested the Accused. He referred the victim for medical examination,

conducted scene of offence panchanama, recorded statement of the victim and other witnesses and then filed the charge-sheet.

37. During cross-examination, PW10/Investigating Officer has clearly admitted that as per his investigation, PW1 was residing in the house of Rekha Mahadev Kambli and not PW4-Sandhya Kambli. Therefore, the reference in the deposition of PW2 that she informed the landlady has to be considered as Rekha Mahadev Kambli who was not examined by the Prosecution. The relevant contradictions in the depositions of all the Prosecution witnesses were put to the Investigating Officer and proved. The material contradictions were with regard to the blood, bloodstained panty and the disclosure made by the victim to the landlady. Interestingly, this witness nowhere states that bloodstained panty of the victim was handed over to him or attached.

38. The learned Children's Court believed the victim even though there are major discrepancies and contradictions. The improvements and exaggerations in the deposition of victim and her sister so also of PW7 the grandmother, are completely ignored. It is well settled proposition of law that sole testimony of the prosecutrix if found reliable, cogent and convincing, could be the basis for conviction. However, the testimony of the prosecutrix/victim of a sexual offence must be of sterling quality. If there are serious doubts with regard to the alleged incident, benefit must go to the Accused.

39. In the case of *Dola* (supra), the Apex Court observed in para no. 6 as under:-

“6. It is well-settled law that if the version of the prosecutrix is believed, basic truth in her evidence is ascertainable and if it is found to be credible and consistent, the same would form the basis of conviction. Corroboration is not a sine qua non for a conviction in a rape case. The evidence of a victim of sexual assault stands on a par with the evidence of an injured witness and is entitled to great weight, absence of corroboration notwithstanding. If the evidence of the victim does not suffer from any basic infirmity and the “probabilities factor” does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration, except from medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming. When a grown up and married woman gives evidence on oath in Court that she was raped, it is not the proper judicial approach to disbelieve her outright.”

40. In the case of *Hari Om* (supra), the Apex Court observed in para 22 as under:-

*“22. At the outset, we must note the perspective from which the evidence of a child witness is to be considered. The caution expressed by this Court in *Suryanarayana; (2001) 9 SCC 129* that “corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence” is a well-accepted principle. While applying said principle to the facts of that case, this Court in *Suryanarayana* observed: (SCC pp.133-35, paras 5-9)*

“5. Admittedly, Bhavya (PW 2), who at the time of occurrence was about four years of age, is the only solitary eyewitness who was rightly not given

the oath. The time and place of the occurrence and the attending circumstances of the case suggest no possibility of there being any other person as an eyewitness. The evidence of the child witness cannot be rejected per se, but the court, as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of the child witness. The evidence of PW 2 cannot be discarded only on the ground of her being of tender age. The fact of PW 2 being a child witness would require the court to scrutinise her evidence with care and caution. If she is shown to have stood the test of cross-examination and there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix-up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not.

6. This Court in Panchhi v. State of U.P (1998) 7 SCC 177 held that the evidence of the child witness must be evaluated more carefully and with greater

circumspection because a child is susceptible to be swayed by what others tell him and thus an easy prey to tutoring. The evidence of the child witness must find adequate corroboration before it is relied upon, as the rule of corroboration is of practical wisdom than of law (vide Prakash v. State of M.P. (1992) 4 SCC 225; Baby Kandayanathil v. State of Kerala; 1993 Supp (3) SCC 667; Raja Ram Yadav v. State of Bihar; (1996) 9 SCC 287 and Dattu Ramrao Sakhare v. State of Maharashtra; (1997) 5 SCC 341).

7. To the same effect is the judgment in State of U.P. v. Ashok Dixit; (2000) 3 SCC 70.

8. In this case Bhavya (PW 2) when appeared before the trial court was of 6 years of age. After questioning the witness, the Sessions Judge found, “though the girl is 6 years old she is active and she understands everything”. Without administering the oath to the witness her statement was recorded wherein she stated:

“I know Saroja, I call her as ammayi, she is my aunt. The person sitting in the court box is my uncle. His name is Suryanarayana. Since I call him as uncle, he is my uncle.

My aunt Saroja is now dead. I know how she died. Several days back after taking lunch my ammayi i.e. my aunt Saroja and myself went to the lake to wash the clothes and to take bath. On that day, my uncle Suryanarayana sitting in the court pierced with a knife the stomach and neck of my ammayi. Hence she suffered injuries and her entire body covered with blood. My ammayi while running after being injured, fell down, I screamed. Immediately I ran and told my father and mother that uncle killed the aunt. If the knife is shown I can identify (a white cloth bag sealed, was opened). I

have seen the knife now. With the same knife that day my uncle pierced my ammayi (this was marked as Ext. P-01) on that day. Police asked me as to what happened, I have told everything to the police.”

9. In her cross-examination the witness stated that before the date of occurrence the deceased was living with her (witness) parents. At the time of occurrence the witness used to go to Aanganwadi school. The witness denied the suggestion that she had not gone with the deceased to wash the clothes. Nothing favouring the defence could be extracted out of her in the cross-examination. She denied the suggestion that “my uncle did not pierce my aunt with the knife. It is not correct that I have not seen the knife in the hands of my uncle”. The trial court as well as the High Court accepted her testimony as no inherent defect was pointed out by the defence. We also find no reason to take a contrary view. The mere fact that her mother had told that she did not know any other language except Malayalam and that the words spoken to by her were not in that language cannot be used as a ground to reject her testimony. The child and her parents conversed in Malayalam language at their residence which was explained to the investigating officer in the language which was understood by him. There is no ground of doubting the veracity of the testimony of this child witness as we find that her name is mentioned in the FIR which is proved to have been recorded immediately after the occurrence. P.H. Krishnappa, the Tahsildar who prepared the inquest report is also proved to have recorded the statement of this child witness, wherein, she is shown to have made similar deposition. Otherwise also there is sufficient corroboration on record to rule out the possibility of PW 2 being tutored or used for ulterior purposes by some alleged interested persons. In the absence of any inherent defect we do not find any

substance in the plea to reject the testimony of this child witness. The statement of PW 2 shows that the deceased and the appellant were living together as husband and wife and she used to address them as uncle and aunt. Her testimony to the effect of the deceased living with PW 1 is sufficiently corroborated by the other evidence led in the case. The factum of the deceased having received stabbed wound with a knife is proved by the medical evidence. The recovery of the knife at the instance of the appellant, in consequence of his disclosure statement, leaves no doubt to believe her statement. The place of occurrence being near the water tank has not been seriously disputed. The report received from FSL as per Ext. P-15 shows that blouse (MO 2), towel (MO 3) and the bangle pieces (MO 4) of the deceased and the knife (MO 1) which was used in the commission of the crime, the towel (MO 7), lungi (MO 6) and shirt (MO 5) of the appellant were found to be stained with blood. Dr Ram Dass (PW 12) has opined that the injuries found on the dead body of the deceased could be caused with a weapon like MO 1.” (emphasis supplied)”

41. In the case of *Santosh Prasad* (supra), Apex Court observed in paras 5.5 and 6 as under:-

“5.5 With the aforesaid decisions in mind, it is required to be considered, whether is it safe to convict the accused solely on the solitary evidence of the prosecutrix? Whether the evidence of the prosecutrix inspires confidence and appears to be absolutely trustworthy, unblemished and is of sterling quality?”

6. Having gone through and considered the deposition of the prosecutrix, we find that there are material contradictions. Not only there are material contradictions, but even the manner in which the

alleged incident has taken place as per the version of the prosecutrix is not believable. In the examination-in-chief, the prosecutrix has stated that after jumping the fallen compound wall accused came inside and thereafter the accused committed rape. She has stated that she identified the accused from the light of the mobile. However, no mobile is recovered. Even nothing is on record that there was a broken compound wall. She has further stated that in the morning at 10 O'clock she went to the police station and gave oral complaint. However, according to the investigating officer a written complaint was given. It is also required to be noted that even the FIR is registered at 4:00 p.m. In her deposition, the prosecutrix has referred to the name of Shanti Devi, PW 1 and others. However, Shanti Devi has not supported the case of the prosecution. Therefore, when we tested the version of PW 5, prosecutrix, it is unfortunate that the said witness has failed to pass any of the tests of "sterling witness". There is a variation in her version about giving the complaint. There is a delay in the FIR. The medical report does not support the case of the prosecution. FSL report also does not support the case of the prosecution. As admitted, there was an enmity/dispute between both the parties with respect to land. The manner in which the occurrence is stated to have occurred is not believable. Therefore, in the facts and circumstances of the case, we find that the solitary version of the prosecutrix, PW 5 cannot be taken as a gospel truth at face value and in the absence of any other supporting evidence, there is no scope to sustain the conviction and sentence imposed on the appellant and accused is to be given the benefit of doubt."

42. From the above settled propositions of law, it is clear that in the present matter, the material on record shows that placing reliance on the deposition of victim as the sole evidence is highly

unacceptable. First of all, there are major contradictions including the fact that her testimony is not supported by medical evidence. When a victim complains of blood oozing out from her private part due to insertion of finger as alleged, there ought to have been an injury in the form of tear or abrasion, etc. which is clearly absent. Secondly, alleged incident took place about two days prior to filing of complaint. The delay is not explained. Thirdly, the deposition of the sister and grandmother also seems to be improvisation on material particulars for which they were contradicted and found to be unreliable.

43. The allegation of committing such grave sexual assault requires evidence of sterling quality as the punishment involved in it is harsh. In fact, the matter in hand goes to show that no credence could be given to the deposition of PW2 as this witness was not found to be creditworthy.

44. Having said so, the findings of the learned Children's Court requires interference.

45. Accordingly, the appeal stands allowed. The impugned Judgment and conviction dated 13.12.2016 in Special Case No. 56/2015 is hereby quashed and set aside. Accused/Appellant herein is acquitted for the offences punishable under Section 375(b), punishable under section 376(2)(i) of IPC, under Section 2(y)(i), punishable under Section 8(2) of Goa Children's Act, 2003 and under Sections 3 and 4 of Protection of Children from Sexual Offences Act, 2012.

46. Since the Accused is in custody from the date of his arrest, he shall be set at liberty at once if not required in any other offence. However, the Accused shall furnish bail bond for the amount of ₹15,000/- with one solvent surety in the like amount, to the satisfaction of the Trial Court, within a period of one week from the date of his release under Section 437-A of Cr.P.C.

BHARAT P. DESHPANDE, J.

JOSE
FRANCISCO
DSOUZA
Digitally signed by
JOSE FRANCISCO
DSOUZA
Date: 2023.02.28
17:09:13 +05'30'