

Maria S.

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.33 OF 2019

Shri Subhash Pawaskar,
S/o Dattu Nanu Pawaskar,
60 years of age,
R/o. H. No.312/1, 4th ward,
Colva, Salcete, Goa. ...Appellant

Versus

STATE
Represented by the PP
High Court of Bombay at
Panaji, Goa. ... Respondents

Mr Arun De Sa with Mr Kyle D'Souza, Advocates for the Appellant.

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

CORAM: BHARAT P. DESHPANDE,J.

Reserved on : 27th JANUARY, 2023.

Pronounced on: 2nd FEBRUARY, 2023.

JUDGMENT:

1. The appellant is challenging the judgment dated 03.05.2019 in Special Case No.58/2014 whereby the learned Children's Court, Panaji found appellant guilty for the offence punishable under Section

323 of I.P.C. and 8(2) of Goa Children's Act and accordingly sentenced for imprisonment and fine.

2. The appeal was admitted on 27.06.2019 and thereafter Records And Proceedings along with paper-book were called.

3. Heard Mr Arun De Sa, learned counsel for the appellant and Mr Gaurish Nagvenker, learned Additional Public Prosecutor for the respondents.

4. With the assistance of learned counsel appearing for the respective parties, I have perused records as well as findings in the impugned judgment.

5. The learned counsel Shri De Sa appearing for the appellant strongly contended that in the present matter prosecution has failed to prove that the accused/appellant was involved in any assault on the victim child so as to punish him for both the offences. In the alternative he submitted that even if he considered that there was some force used by the accused against the minor, it was not with intent to assault him but only to correct him for his mistake and to inform his teacher. He submitted that the learned Children's Court failed to consider this aspect and more particularly the provisions of Section 88 and 89 of I.P.C. He would submit that the definition of physical or psychological abuse as defined in Section 2 (m) of Goa Children's Act

is vague and, therefore, such physical abuse cannot be construed as an assault or causing hurt as there is no *mens rea* involved.

6. The learned Additional Public Prosecutor Shri Nagvenker would submit that statement of victim as well as that of his classmate is sufficient enough to consider that the accused committed child abuse and, therefore, the findings of learned Children's Court need no interference. He would submit that definition of child abuse has to be taken into account as per the aims and objects of Goa Children's Act which basically consider environment in which the child should be treated and protected. Any physical harm caused to the child or any harm caused to his dignity is sufficient enough for imposing punishment.

7. Rival contention falls for the consideration of this Court as under:

Whether prosecution succeeded in proving that accused committed the offence of child physical abuse?

8. Since the victim was 13 years old at the relevant time, matter was directly filed before the Children's Court of Goa and, accordingly, charges were framed against the accused for the offences punishable under Section 323 of I.P.C and Section 8(2) of Goa Children's Act.

9. In nutshell, it is the case of prosecution that on on 31.08.2013 at around 12:45hrs in the premises of Infant Jesus High School, Colva, accused assaulted minor son of the complainant aged 13 years with slaps on his face and thus committed child abuse.

10. During trial, prosecution has examined in all 8 witnesses. PW1 is the mother of the victim who is not the eye-witness but set the law in motion by filing complaint which is at Exhibit 9, dated 31.08.2013. PW2 is the victim child who was studying in 8th Standard in the said school. He deposed that on 31.08.2013 he along with his elder sister went to the school and 7th lecture was of Scouts and Guides from 12:45 to 13:15 hours. During the said period of Scouts and Guides, the teacher was teaching them games as well as knowledge regarding nature. On the relevant day students of 8th Standard class were doing cleaning and after finishing such work he along with his friend, PW6 went to wash hands near the tap in the school premises. After washing their hands and while returning, he accidentally dashed one earthen pot which was on the ground. Due to it, the pot fall aside but did not break. On seeing this the accused came angrily towards him and slapped on his left side face. Accused then dragged him by holding the collar of his shirt. In the meantime, the P.E. Teacher came and he rescued the victim from the accused.

11. The evidence of PW2 who is the victim showed that during their 7th lecture of Scouts and Guides which starts from 12:45 to

13:15 hours, they were engaged in games and also doing the cleaning work. When he along with PW6 were returning after washing their hands from the tap he dashed against the earthen pot. This witness admitted during cross-examination that accused is a toddy tapper and he comes to the school premises to collect toddy. Thus, the earthen pot kept on the ground is for collection of toddy of the trees which are in the school premises. He admitted that there are 6 to 7 coconut trees touching the compound wall in the premises of the school. Water tap is attached to the wall of the school building. He also admitted during cross-examination that the accused is using earthen pots for collecting toddy and after collecting it, he used to put the pots below the coconut tree. He then admitted that at the relevant time the accused was on the coconut tree. He then admitted that in the past, the earthen pots of the accused were broken by the children and that he had lodged his complaint about it to the Principal of the school in the past. He further admitted that it was not known as to who were breaking the earthen pots of the accused in the past. Therefore, when PW2 dashed against the earthen pot, accused who was on the tree got very angry and caught him presuming that PW2 was the same boy who used to break his earthen pots.

12. Though PW2 claimed that he accidentally dashed against the earthen pot on that day, there is a clear omission brought on record during cross-examination wherein such word “accidental” is not found recorded in the statement under Section 161 of Cr.P.C. Thus, during

deposition before the Children's Court, PW2 improvised by saying that he accidentally dashed against the earthen pot, which is not found recorded in his previous statement. This omission has been duly proved by examining the Investigating Officer who admitted that no such word was stated by PW2 while recording his statement. Thus, it is clear from the above deposition of PW2 that he dashed against the earthen pot of the accused which was kept below the coconut tree for collecting toddy. The accused was on the tree at the relevant time and on seeing this he got very angry as on earlier occasions also, earthen pots were broken deliberately by the school children.

13. At this stage, it is necessary to note that the accused is professional toddy tapper and his earning is dependent on collection of toddy. If the earthen pot in which he is collecting toddy is broken by committing mischief by the school children, he is supposed to suffer loss in his business and bound to get angry. It is also brought on record that accused raised complaint with the Principal of the school in the past regarding such incidences. There is nothing on record to show that the Principal took any steps in this regard to rectify such mistakes or mischiefs committed by the school children causing loss to the accused.

14. PW3, Ismail Nadaf, is panch witness for the scene of offence panchanama and the sketch produced on record, showing the spot of incident which is close to the boundary wall. However, the cross-

examination of this witness creates serious doubt as to whether he actually acted as a panch witness in order to prove the scene of offence.

15. PW4 Flora Valadares was acting as Headmistress in the year 2013 in the said school. She stated that at around 12:30 noon, when she was coming down from 10th Standard class, she heard some loud noise. She saw the P.E. teacher with students including the victim gathered at the entrance. She then deposed that she knew the accused who was present at the entrance on that day and he was screaming and saying that his pots were broken by the victim boy. On enquiry with the victim boy and the P.E. teacher, she was told that the accused had slapped the victim boy. However, this is only hearsay evidence. PW4 is not a witness to the actual incident of alleged slapping of the victim.

16. However, from the evidence of PW4 Flora, it is clear that the accused was present at the entrance and he was annoyed whilst saying that his pots were broken by the victim boy. She then claimed that she saw some swelling on the ear and the face of the victim boy and, accordingly, she inquired with the accused as to why he slapped the victim boy, upon which the accused told her that the victim was breaking his pots often and that he had caught the victim on that day. She then claimed that since the accused was screaming and abusing her and the Manager of the school, she called the police by making a phone call.

17. It is necessary to note that it is no one's case that the accused was screaming and abusing the Headmistress or the Manager of the school. Similarly, statement of PW4 that she noticed swelling on the ear and face of the victim boy, was not found recorded or stated to the police and she was confronted with it. The explanation of the witness is that the police noted the swelling on the ear and face of the boy which was quite noticeable. Certain improvements in the statement of PW4 are found and, accordingly, contradictions have been recorded during her cross-examination which were finally proved through the Investigating Officer.

18. Further, in her cross-examination, she admitted that accused is a toddy tapper and he used to tap trees which are behind the school premises. She also accepted that such tapping of the trees was done for the safety of the school children and for the benefit of the management. She showed her ignorance when asked as to whether she is aware about the complaint lodged by the accused regarding breaking of his pots in the past by the school children. Similarly, she was confronted with the statement where she claimed that the accused was screaming and abusing her and the Manager of the school, which was not found recorded by the police. The Investigating Officer admitted that no such statement was made by PW4. It thus shows that PW4 tried improvising and exaggerating the incident by claiming that accused even abused her and the management and was screaming at her. Thus, credibility of PW4 with regard to her presence at the

spot and noticing swelling on the ear and face of the victim or that the victim and accused disclosing to her about slapping incident, is clearly doubtful.

19. The classmate of victim boy examined as PW6 claims to be the eye-witness of the incident. However, this witness claims that on that day he along with PW2 and other classmates went to the water tap in the school premises to wash their hands. Thus, it is clear that along with PW2 and PW6, there were other students or classmates present at the said spot. No one was examined apart from PW6 to corroborate about such incident.

20. PW6 then claimed that while they were going towards the water tap, PW2 dashed against earthen pot which was on the ground, by mistake. Thus, according to PW6 the incident of dashing against earthen pot was while going towards the tap in order to wash hands. Whereas, PW2 deposed that such incident of dashing against earthen pot took place while they were returning from the tap.

21. The learned trial Court brushed aside this aspect by saying that it is a minor discrepancy. At this stage, it is required to note that both these boys were around 13 years of age and were studying in 8th Standard. Their understanding of the incident needs to be judged from their statement. If the victim says that alleged incident of dashing against the earthen pot took place while he along with PW6

were returning from the water tap, the statement of PW6 to that effect is totally contrary. Similarly, PW2 victim deposed that he along with PW6 went to wash hands. He did not disclose about the presence of other schoolmates while going towards the tap. Thus, statement of PW6 creates serious doubt about the actual incident. Whether PW2 dashed against the earthen pot while going towards the tap or while returning, cannot be brushed aside as minor contradiction. It creates doubt with regard to presence of PW6 at the relevant time.

22. It is interesting to note that PW6 was confronted with his statement recorded under Section 161 of Cr.P.C wherein he stated that PW2 while going from the tap after washing hands dashed against the earthen pot. When his explanation was sought about such recording, he firmly stated that such sentence in his statement recorded by police under Section 161 of Cr.P.C is not correct. He then explained that PW2 dashed against the pot whilst going towards the tap.

23. PW2 as well as PW6 conveniently avoided the answer as to whether due to dashing the earthen pot, the earthen pot broke down and the toddy spilled over. It is quite unusual that after dashing the earthen pot, it remains intact. Similarly, in such circumstances, there was no possibility of the accused to be annoyed or to claim that his pots were broken by the victim boy. In normal human conduct, there was no question of getting annoyed or slapping the victim when the earthen pot of the accused remained intact. The reaction of accused, if

considering as proved, would be natural as it is his specific contention that on earlier occasions the school children used to break his earthen pots only for committing mischief. Only on that day he found the victim and caught him red-handed. In such circumstances, his annoyance or anger is but natural as he used to suffer loss due to breaking of his earthen pots and spilling over of toddy which is actually his source of income for livelihood.

24. Coming back to PW6, he stated that accused came there and slapped PW2 on his left cheek. The accused then dragged PW2 by holding his collar in the school. At that time the P.E. teacher came and then the other students and staff gathered. This witness nowhere disclosed about the presence of PW4-Flora and the alleged screaming and abusing by accused to Flora and the Manager. A specific suggestion was put to PW6 that the earthen pot broke and the toddy spilled out from the pot and the answer of this witness is that he cannot say anything to it. Thus, it shows that he did not deny about the breaking of pot and spilling of toddy from it.

25. Another important witness is PW7, the P.E. teacher who claimed that he knew the accused as contract was given to the accused for tapping toddy of the coconut trees existing in the school premises. He then claimed that on 31.08.2013 he was conducting Scouts and Guides class for 8th Standard students. The class got over at 1:15PM. He then told the students to wash their hands and be ready for the

next period. From this statement of PW7 it is clear that class of Scouts and Guides got over at 1:15PM and then he directed the students to wash their hands. It goes without saying that the students of 8th Standard class who were attending such class would go together for washing hands. The tap for washing hands is also located on the outer wall of the school building and near the entrance. Therefore, the statement of PW2 that he along with PW6 went for washing hands is difficult to digest, whereas, PW6 claimed that he along with PW2 and other classmates went towards the water tap.

26. Be that as it may, PW7 claimed that after the students went to wash their hands, accused came with PW2. At that time accused was holding collar of PW2 and accused was talking to him very aggressively. The accused told him that PW2 knocked down his earthen pot. At that time the accused was very arrogant and was fuming all the time. He then released PW2 from the hands of accused and then assured the accused that he will handle the matter in his way. Thereafter, he informed PW4. At that time accused spoke arrogantly with PW4. He then informed the parents of PW2 about the incident.

27. First of all, PW7 only speaks about accused coming towards him with PW2 by holding the collar of his shirt. He nowhere states that there was any assault on PW2 by accused or that he noticed some swelling on the face or ear of PW2, as tried to be claimed by PW4.

28. During cross-examination, PW7 admitted that the earthen pot had fallen down but showed his ignorance about whether it was knocked down by PW2. He then admitted that accused was regularly coming in the school premises during school hours to tap toddy. He then admitted that accused was very angry because his pot was knocked down. He then admitted that accused told him that the boy had knocked down the pot knowingly.

29. Last witness, PW8, is the police officer who conducted the investigations including scene of panchanama.

30. However, it is clear from the record that the accused was regularly coming to the school premises for tapping of toddy from the trees which are existing in the premises itself. There is evidence to show that on earlier occasions earthen pots of the accused were broken by the school children. On that day, when he saw PW2 dash against his earthen pot, he became angry and he brought PW2 in front of PW7 who was the P.E. Teacher.

31. The case of prosecution with regard to assault or slapping by accused of PW2 is not supported by sufficient evidence except statement of PW2 alone. PW6 claimed that the incident took place while they were going to wash hands, whereas, PW2 who is the victim claimed that the incident took place while they were returning from the tap. This itself creates a doubt about the presence of PW6 or

witnessing the alleged incident of slapping. No other classmate was examined to corroborate the contention of PW2.

32. PW2 clearly admitted that he dashed against the earthen pot of the accused which fell down. The reaction of accused due to previous incidences of breaking of earthen pots by children or students was but natural for the simple reason that his livelihood is fully dependent on the toddy which he used to collect from the trees. The mischief allegedly committed by PW2 is required to be taken into account. The contention of PW2 that he dashed against the earthen pot by mistake or accidentally, is highly doubtful. First of all, such word 'accidentally' or 'by mistake' is not found recorded in his statement and, secondly, he has been confronted on this aspect which has been proved through the Investigating Officer. This confrontation has to be looked into by taking into account the statement of other witnesses and that of the defence taken by the accused. It is clear from the record that some mischief was played by PW2 and, therefore, accused got annoyed. When the accused saw PW2 dashing against the pot and throwing it down, he immediately caught hold of the collar of PW2 and brought him before PW7 who was the P.E. teacher. This reaction of accused is only to correct the child who allegedly committed the mischief. The conduct of the accused in bringing PW2 to his teacher positively show the intention of the accused to inform the teacher so as to correct the child and not to cause any loss to him because the entire livelihood of

the accused was depending upon collecting toddy and selling it. The circumstances in which incident happened has to be looked into.

33. As earlier observed that there is serious doubt about the incident of slapping, the other reaction of the accused of bringing PW2 before PW7 by holding his collar and talking in aggressive manner would not in any way constitute any abuse or even assault.

34. Section 2(m) of Goa Children's Act deals with child abuse and (i) deals with psychological and physical abuse. However, this definition is widely couched without specifying as to what would be psychological and physical abuse in reference to Section 2(m). No doubt Section 8 of Goa Children's Act and specifically sub-section (2) deals with offence of child abuse or sexual abuse, the definition of child abuse has to be looked into from Section 2(m) of the said Act. Therefore, if the accused, on noticing PW2 committing mischief and loss on breaking the earthen pot, holds his collar and brings him to his teacher only to correct the child, would not, in any manner, amount to child abuse. In fact, the conduct of the accused in bringing PW2 before his teacher and then informing the teacher as to what happened, clearly suggest the intention of the accused only to correct the child and to inform his teacher accordingly.

35. Having said so, the impugned judgment needs interference. The accused/appellant herein succeeded in showing his defence and

probability that his intention was only to correct the child and not to cause any child abuse. In these circumstances, Section 88 of I.P.C would squarely apply as it is clear that there was no ill intention on the part of accused but whatever he did is only in good faith for the benefit of the child. It is no doubt true that accused was not part of the school management. However, it is clear from the record that he was given contract by the management to tap toddy from the trees existing in the school premises. It is also clear from the record that he used to tap toddy from the trees existing in the school premises. It is also clear from the record that he used to tap toddy from such trees even during school hours. It is common knowledge that for tapping toddy, one requires earthen pots to be hanged on the tree and after collecting the toddy, to bring it down for sale. The pot which accused kept on the ground near the tree was for the purpose of collection of toddy itself. The accused was admittedly on the tree and therefore any loss caused to the accused by breaking of such earthen pot would seriously harm his day-to-day life as well as income. In these circumstances, the probability shown by the accused in his defence and during cross-examination of prosecution witnesses needs to be accepted and considering the reaction of the accused by bringing PW2 to the teacher, the intention is only to correct the child. Hence, the conviction of the accused/appellant certainly needs interference.

36. The appeal stands allowed. The conviction of the accused/appellant under Section 323 of I.P.C. and Section 8(2) of Goa

Children's Act is hereby quashed and set aside. The accused/appellant stands acquitted from both the charges.

BHARAT P. DESHPANDE, J.

MARIA SUZANA
REBELLO

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SUZANA REBELLO
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