

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO. 42 OF 2011**

Mansoor K. K. Mohammed,s/o Mohammed,
Age 29 years, Service,
Native of Kishakke Kavalad,
Police Station – Eltoor,
Dist. Calicut, Kerala,
Presently residing at Molaco,
c/o Mousin Braganza,
Merces, Goa.

.... Appellant

V e r s u s

STATE
Through P. P.

.... Respondent

Mr. Arun Bras de Sa, Advocate for the Appellant.

Mr. S. R. Rivankar, Public Prosecutor for the Respondent.

CORAM: T. V. NALAWADE, J.
DATE: 31ST JANAURY, 2014.

J U D G M E N T:

The appeal is filed against Judgment and order of Special
Case No.66/2010, which was pending in the Children 's Court created
for the State for Goa at Panaji-Goa. The appellant is convicted for the

offence punishable under section 354 I.P.C. and he is sentenced to suffer rigorous imprisonment for six months and to pay fine of Rs.10,000/-. He is also convicted for offence punishable under section 8 (2) of the Goa Children's Act, 2003 and he is sentenced to suffer rigorous imprisonment of six months and to pay fine of Rs.10,000/-. Both the sides are heard.

2. In short, the facts leading to the institution of the appeal can be said as follows:

The offence is committed against a girl child who was aged about 4 years at the relevant time. The accused was aged about 29 years and he was a married man. The father of the girl child was working as a security guard in campus known as “Tropical Estate Private Ltd” at Morod, Sangolda and this complex is situated within the local jurisdiction of Calangute Police Station. The father of the girl child was staying in a room given to him in the same complex.

3. The incident took place on 24/3/2009. On that day, the father of the girl child was deputed to work as watchman at other site like Soccoro site and he was not present in the campus of Tropical Estate. He had left for this site of work at about 7.a.m.

4. The girl child used to attend Anganwadi. On that day, she returned home at about 12.30 noon. Initially, the child, her younger sister and her mother were sleeping in the room in the noon time. Then this child left the room when her mother was sleeping. The child went to the campus of other Estate, which is situated adjacent to Tropical Estate where the incident took place. The accused and his friend had come to this estate known as “Findol Estate” to do some work in respect to repairs of swimming pool. At about 3.00p.m., the girl child was sitting on the chair meant for the watchman at the entrance gate of “Findol Estate”. The accused went there and he put his finger inside the underwear/panty of the girl child and started sexually abusing the girl child.

5. Rashmi and Amita were working as sweepers in a bungalow from in Findol Estate. After finishing the work, Amita was present in the balcony of the first floor of the bungalow. She noticed that the accused was sexually abusing the girl child. She also noticed that the accused was pretending that he was playing with the girl child when somebody was passing by that side. Amita called her colleague Rashmi to the balcony and she showed her the act of the accused.

Then Amita requested the supervisor to see that the child was sent to the room of her parents. Amita knew that the child was living in the vicinity. She had seen the accused and his friend on that morning when they had come there to do some work in respect of the repairs of swimming pool.

6. At 3.30 p.m., the mother of the child woke up and she noticed that the child was not present in the room. The mother went out and she noticed that the child was standing in front of the room. The child complained that she had pains in her private part. She disclosed about the incident. She also gave description of the man who had done the act by describing him as the person wearing red colour shirt. The aforesaid two ladies then informed about the incident to the mother of the child. They knew the name of the accused and so name of the accused was also told to the mother of the child.

7. The mother of the child gave complaint to the Calangute police station on 25/3/2009 and Crime No. 39/2009 came to be registered for the aforesaid offences in the police station. P. S.I. Gawas of this police station made the investigation. He prepared

scene of offence panchanama and he took the photographs of the spot. He referred the child for medical examination. He recorded the statements of the aforesaid two ladies and others on the same day. The accused came to be arrested on 25/3/2009 and the accused was also referred for medical examination. Inquiry was made with the child with the help of a lady working with a NGO to collect information. After investigation, Shri Gawas filed charge sheet against the accused for the aforesaid offences.

8. To the charge framed by the trial Court, the accused pleaded not guilty. Prosecution examined four witnesses. The child and her parents had shifted to their native place, Nepal and they were not available for giving evidence. The prosecution relied on the evidence of the two ladies. The trial Court has believed these two witnesses.

9. Amita Mandrekar, (PW.2) has given evidence that from the balcony of the bungalow where she was working, she noticed the incident. Her evidence shows that the incident took place in the noon time. Her evidence shows that she had seen the accused on that day prior to the incident when the accused was doing repair work of

swimming pool. She has given evidence that the child was sitting on the chair meant for the watchman and she saw that the accused was sexually abusing the child. She has deposed that the accused had put his finger inside the underwear (panty) of the girl. She has deposed that when somebody was passing by that side, the accused was pretending that he was playing with the child. Pw.2 has given evidence that after noticing this incident, she called Rashmi (PW.1), other sweeper and she drew her attention to the activity of the accused. She has given evidence that she requested their supervisor to take steps for sending the child to the room of her parents.

10. In the cross examination of PW.2, it is brought on record that the spot where the incident took place was at the distance of about 4 to 5 metres from the balcony from where the incident was witnessed by Pw.2. It is brought on record that this incident was going on for about 10 minutes. Though she has admitted in the cross examination that she had not informed about the incident to the mother of the child, this circumstance has not created reasonable doubt about her version. No other circumstance could be brought on record to create probability that Amita has deposed falsely. She had no reason to give false evidence against the accused and only on that

day she had seen the accused in the campus.

11. Rashmi, PW.1 has given evidence that she she went to the balcony of the bungalow and there PW2 drew her attention to the act of the accused. Her evidence is consistent with the evidence of PW.2. In cross examination, it is brought on record that the accused was touching the girl on such parts from which bad intention could have been gathered easily. Her evidence shows that the girl appeared frightened. A suggestion is given in the cross examination that the girl at the relevant time was laughing at the accused as if she knew the accused. This suggestion is denied. There was no reason for this lady to give false evidence against the accused.

12. The evidence of I.O., PW.4 shows that he recorded the complaint of the mother of the child on 25/3/2009. His evidence shows that the statements of eye witnesses were recorded on the same date. His evidence shows that the complainant was not available for giving evidence as they had left for Nepal, their native place. In his evidence, the complaint is proved. Though, the complainant is not available, the circumstance that the mother of the child gave the complaint needs to be considered. The record shows that the defence

has not suggested anything to show that the family of the complainant had any grudge or enmity against him.

13. There is nothing incriminating in the spot panchanama which is proved against the evidence of the I.O. The record of medical examination of prosecutrix is not disputed and it is also not incriminating in nature. The child was examined on the next day medically. In view of the nature of allegations, one cannot expect the presence of any injury on the person of the child. Thus, the absence of injury is not a circumstance which has created doubt about the case of the prosecution.

14. The trial Court has relied on the case of ***“Manga Vs. State of Haryana” reported in (AIR 1979 SC 1194)***. In that case the prosecutrix was aged 13 years and was deaf and dumb girl. There was charge of rape. Some witnesses had seen that the accused was lying on the girl. The girl was not examined. In view of the facts of the case, the Apex Court held that non-examination was not fatal to the case of the prosecution. In the present case, in view of the age of the child, it can be said that non-examination of the girl is not fatal to the case of the prosecution. It is not disputed that the age of the child

was about 4 to 6 years. It can be said that the mother of the child could have given some corroboration by saying that the child had disclosed about the incident to her.

15. In the Statement recorded under Section 313 of Cr. P.C., the accused has admitted that on that day he had visited the aforesaid campus. He has further admitted that the child was sitting on the chair meant for watchman. This circumstance also gives corroboration to the case of the prosecution. The accused has not offered any explanation about the evidence given by the two ladies.

16. For the appellant/accused case reported in (2013) 5 Supreme Court Cases 722 “***Raj Kumar Singh Alias Raju Alias Batya Vs. State of Rajasthan***” was cited. In that case, the Apex Court has discussed the circumstances like failure of the accused to explain incriminating circumstances in view of section 114 III (g) of the Evidence Act. It is observed by the Apex Court that adverse inference is possible only if incriminating circumstances are full established. There cannot be any dispute over this proposition. In the present case, there is evidence of direct nature and that evidence is sufficient to prove the act of the accused. The answer given by the accused to the

two questions put to him under section 313 Cr. P.C. can be definitely used in the present case to prove that the accused was present in the campus and the girl child was sitting on the chair meant for the watchman. Thus, the observations made by the Apex Court are of no help to the accused.

17. The aforesaid evidence is sufficient to prove both the offences against the accused beyond reasonable doubt. This Court holds that the trial court has not committed any error in holding the accused guilty for both the offences.

18. At the relevant time, for the offence punishable under section 354 I.P.C, the imprisonment provided was up to two years and offence could be punishable with fine only or with both. The offence under section 8 (2) of Children's Act is punishable with imprisonment which may extend to three years and fine which may be Rs.1,00,000/-. The trial Court has imposed the fine of Rs.10,000/- for each offence and rigorous imprisonment is given for each offence. The aforesaid record shows that the accused was married man and he was having a child at the relevant time. At the time of giving of penalty some circumstances can definitely be considered in

favour of the accused. There is no medical evidence in corroboration and there is no evidence of the mother who could have said that the child had disclosed the incident to her. The two ladies witnessed the incident from some distance. In view of these circumstances, this Court holds that sending the accused behind bars for six months will be harsh. But sending the accused behind bars for one month and imposing fine amount which is imposed by the trial court would be just and sufficient in this case.

19. In the result, the appeal is partly allowed. Conviction for the offence under section 354 IPC is maintained. For this offence, the accused is sentenced to pay fine of Rs.10,000/-, in default, to undergo imprisonment for 10 days. The conviction for offence punishable under section 8 (2) of the Children' s Act is maintained. For this offence, the accused is sentenced to suffer rigorous imprisonment for one month and to pay fine of Rs.10,000/-, in default, to undergo imprisonment for 10 days. The accused is to surrender to the bail bonds and is to be in custody for undergoing sentence.

T. V. NALAWADE, J.

AP/-

