

State Through Police Inspector Vs. Shaikh Mohammad Rafiq S/O Shaikh Amrul Hassan

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Court : Mumbai

Decided On : Oct-16-2009

Reported in : 2009(111)BomLR4640

Judge : N.A. Britto, J.

Acts : Goa Children's Act, 2003 - Sections 2 and 8(2); [Probation of Offenders Act, 1958](#) - Sections 3, 4, 4(1), 4(2), 5, 6, 6(2), 8 and 13; Prevention and Corruption Act; Indian Penal Code (IPC) - Sections 304A, 363 and 377; Prevention of Food Adulteration Act; [Central Reserve Police Force Act, 1949](#) - Sections 10

Appeal No. : Criminal Appeal No. 67/2009

Appellant : State Through Police Inspector

Respondent : Shaikh Mohammad Rafiq S/O Shaikh Amrul Hassan

Advocate for Def. : Mike Mehta, Adv.

Advocate for Pet/Ap. : C.A. Ferreira, Public Prosecutor

Judgement :

N.A. Britto, J.

1. Heard Shri C. A. Ferreira, learned Public Prosecutor on behalf of the Appellant and Shri Mike Mehta, learned Counsel on behalf of the Respondent/accused.
2. These appeals can be conveniently disposed of by this common judgment.
3. The Second Appeal is directed against the acquittal of the accused under Section 363 IPC, and, the First Appeal is directed against the sentence imposed upon the accused under Section 8(2) of the Goa Children's Act, 2003 (Act, for short) i.e. the accused has been dealt with under Section 4(1) and 5 of the [Probation of Offenders Act, 1958](#), (P.O. Act, for short).
4. The case of the prosecution is that the respondent accused on or about 21.12.2006 at about 8.15 hours at Green Park Junction at Guirim, kidnapped the victim boy i.e. to say PW2 from the lawful guardianship and thereafter committed sexual abuse on him, thereby committing offences punishable under Section 363 of IPC and Section 8(2) of the Act.
5. The case of the accused is that on that day, he was going to Mapusa from Panaji with his red colour Alto car, and as the battery was weak, he parked the car near Bodgeshwar Temple. At that time he saw a boy, PW2 urinating, so he slapped him. Accused stated that he limps with his left leg as he has paralysis. He stated that this is a false case filed against him. Accused did not examine any witnesses.
6. To support the charge framed against the accused, the prosecution examined six witnesses which included the said PW2, a minor boy, who at the relevant time was of 15 years, 3 months of age, having been born on 28.9.1992; PW1 Dr. Kuncolienkar who medically examined him subsequently; his mother PW3 Shobha Padgaonkar; and PW4 Namdev Mandrekar who happened to reach the scene and who informed the said mother; PW5 Rajesh Kerkar who acted as a pancha witness to the scene of offence panchanama, as well as arrest panchanama of the accused, which took place at about 16.15 hours on the same day. PW6 PSI Prajyot Fadte not only recorded the complaint of PW2 but also investigated the case.

7. The State having filed both these appeals, one against the acquittal and the other against the sentence, on behalf of the accused, it is submitted that the accused is entitled for an acquittal or in the alternative, for the sentence to be maintained, if required, after calling for a report of the Probation Officer.

8. PW2, who at the relevant time was below 16 years of age was residing at Bastora and was studying in Saraswat Vidhyalaya at Mapusa, in IXth standard. As stated by him, on 21.12.2006, he left his house at Bastora to go to school at about 7.45 a.m. and as he was waiting for the bus, at the bus stop near Green Park Junction at Guirim, at about 8.15 a.m., he saw a red colour Alto car going to Mapusa and the said car stopped near him. Then he described the accused and the clothes he was wearing. He further stated that on stopping the car, he opened the left side front door thinking that the car had stopped for him, and when he went to see, the accused caught him by his hand and pulled him inside. He further stated that he was frightened as there was no one around him but he sat in quietly and he sustained scratches on his right hand and on reaching near Bodgeshwar Temple, as there was traffic jam, the accused took the car in the field and he started to drive the vehicle slowly, and started kissing him on his face and also attempted to remove his short pant and he screamed for help, when he saw that one person was coming towards him. According to him, the accused was holding his right hand tightly, but he managed to free himself from his hand, opened the door of the car, and escaped and he pulled his pant up and went running towards one person who was nearby and on seeing him crying, the said person, whose name he came to know later as Namdev Mandrekar, and he inquired with him as to what had happened and told him everything and in the meantime the driver of the car i.e. the accused disappeared, leaving the car in the field but he noted down the number of the car as GA-08-A-4903 and he also noticed that the driver ran away, limping. He stated that he gave his landline number and his father's mobile number to the said Namdev Mandrekar and he telephoned his parents, and his mother reached the spot, and thereafter he went to the Mapusa Police Station and lodged the complaint against the driver of the Alto car. He produced the complaint and identified his signature on the said complaint and identified the accused as the driver of the said car. He further stated that after lodging the complaint, the police came to the spot and he accompanied them, and he showed the spot to the police

who conducted the panchanama. He also identified the clothes of the accused which were shown to him.

9. In cross examination PW2 stated that the distance between the seat of the driver of the car and the front door may be around 1 metre. He stated that he was standing at the bus stop which was towards Panaji side from Green Park Junction and at the junction one by-pass road goes towards Pernem, and one goes towards Mapusa. He further stated that the Bodgeshwar Temple would be seen from the tar road and same is at a distance of about 100 metres from the road. He further stated that his mother reached within 15 minutes after PW4 Namdev Mandrekar had telephoned her, from his mobile. He stated that from the spot, they came from somebody's vehicle, to Mapusa Police Station, and further stated that he did not know how many persons were with the police, when they had come to the spot. He stated that a crane was also brought by them. He admitted that on that day there was school picnic but denied the suggestion that he was not regularly attending the school from December, 2006. He denied all the suggestions put to him which were contrary to the facts stated by him and, further denied that he signaled the accused to stop and asked for a lift to Mapusa. He also denied the suggestion that when the car reached near Bodogeshwar Temple, the battery of the car was low and as such the car was stopped. He also denied the suggestion that he started fighting with the accused to reach him to school and because the accused had declined, he opened the door and he started urinating inside the car. He also denied the suggestion that the accused had slapped him once or that the accused had got down, locked the car and then had gone away.

10. PW4 Namdev Mandrekar stated that he drives van No. 5703 and on the morning of 21.12.2006 he dropped the teachers at the Holy Family High School, Porvorim, by the said van, kept the said van near the school and returned with one Ramesh who dropped him near Bodgeshwar Temple. He stated that he heard shouts of one boy asking for help saying sir, help me from one red colour Maruti Alto car at around 8.25 a.m. He stated that the car was parked in the field near Bodgeshwar Temple, which was in the field and the number of the car was GA-08-A-4903. He stated that the boy came running towards him and he was around 15 to 17 years of age and the boy was in a frightened condition and his short pant

was unbuttoned which he was buttoning and the bag of the boy was kept in the car. He stated that the boy told him that he had been pulled inside the car by the driver of the car, and inside the car he started kissing him and tried to remove his short pant. He stated that boy told his name as Vallabh Padgaokar and he went to the car to bring the bag of the said boy and at that time he noticed the accused was sitting on the front seat of the car and when he asked his name he gave his name as Sheikh Mohamood Rafique. He stated that he opened the door of the car and ran away towards Bodgeshwar Temple and while he was running he noted that he was limping by right leg. He further stated that, he was having a mobile of his Madam Irene Manuel and from the same he contacted the mother of the boy on her phone, and told her to come to the Bodgeshwar Temple to take her son and after that his mother came and they took a lift and went to the Mapusa Police Station. He identified the said boy and the clothes worn by him as well as by the accused.

11. In cross examination PW4 stated that his statement was recorded on the same day at about 9.00 a.m., but he did not know the name of the policeman who recorded the same. He admitted that he had not stated to the police that he had called the mother of the boy from mobile of his Madam and had also not stated to the police that the mother and the victim took a lift and went to the police station. He stated that he went to the Police Station later. He denied all the suggestions put to him contrary to the facts stated by him. He was confronted with his statement recorded by the police where he had not stated that the said boy had said to him, Sir, help me. He further stated that he was given a cash award of Rs. 1500/-by Mapusa Police Station for having done good job by helping the victim in this case. In further cross examination he stated that he did not remember the landline number of the mother of the victim.

12. The learned Children's Court after considering the evidence led by the prosecution came to the conclusion that PW2, the boy had emerged as truthful and reliable witness. Learned Children's Court further observed that the defence of the accused appeared to be wild imagination and further observed that only because the accused has not reached the victim boy to Mapusa, the victim boy would have started urinating in the car as that was not the normal conduct of

human being. As regards PW4 Namdev Mandrekar, the Children's Court noted that there were no inconsistencies between his evidence and that of PW2, the boy, and further observed that even if there was a minor variation the law was well settled that there are bound to be minor variations in the depositions of even truthful witnesses and the Court cannot expect parrot like depositions from truthful witnesses. Learned Children's Court referred to the aforesaid omission which was proved through PW6 PSI Fadte and found that the same was not very material, and, in my view rightly, and further held that only because PW4 Namdev Mandrekar was subsequently given a cash reward by Mapusa Police Station for having done a good job, his testimony could not be discarded and he too had emerged as a reliable witness.

13. First, I will deal with the aspect whether the accused is entitled for an acquittal. Accused has sought for his acquittal and is entitled to in an appeal against sentence. The Act itself has laid down the standard required to be followed in appreciating the evidence in cases involving offences against the children and that standard is a standard which is followed in appreciating the evidence of child rape victims i.e. the evidence of victim should carry as much weight as that of an injured person. In other words, the statement of a victim of an offence under the Act is not required to be corroborated but some evidence which lends assurance to his or her evidence would be sufficient : 1995 (5) SCC 518.

14. Learned Counsel on behalf of the accused submits, that the victim boy was to go on picnic on that day, and, was in haste to go to school, and further submits that as the accused was not in a position to take him, the victim boy behaved in the manner, narrated by the accused. He further submits that the mother of the boy namely PW3 Shobha is a teacher and boy's father is a reporter and it is because of that the police have falsely implicated the accused. He further submits that PW4 Namdev Mandrekar is also associated with teaching as he had dropped some teachers at Holy Family High School, Porvorim, and he was a chance witness and as such his evidence ought not to have been accepted by the Court. Learned Counsel further submits that the cause for the said boy to complain was that the accused had slapped him for urinating in his car. He further submits that if PW4 Namdev Mandrekar was present, then he did not make any efforts to catch

the accused from running. Learned Counsel further submits that in case the accused had pulled the boy there could have been some resistance on his part and this very story shows that the version of the boy is improbable. He further submits that the accused would not have behaved with the boy in the manner alleged by him, because on the road there was heavy traffic.

15. Learned Public Prosecutor, on the other hand, submits that if the case of the accused is only of urination and slapping, then the accused has not explained as to how the boy got scratches on his hand. Learned Public Prosecutor submits that the plea of the accused that the said boy has urinated in his car is unreasonable and unbelievable. Learned Public Prosecutor submits that the version of PW2, the minor boy, is consistent, corroborated by PW4 Namdev Mandrekar and also by medical evidence. Learned Public Prosecutor submits that there was no reason for a young boy to falsely implicate a total stranger.

16. Considering the evidence produced by the prosecution, in my opinion there is no scope for the acquittal of the accused at all. The case of the prosecution as projected through the evidence of PW2 is consistent, convincing and amply corroborated by the evidence of PW4 Namdev Mandrekar, his mother PW3 Shobha as well as the medical evidence of PW1 Dr. Kuncolienkar, besides other evidence.

17. The presence of PW4 Mandrekar at the scene cannot be doubted. In fact he is the very reason for PW2 Shobha to reach the scene, and then for the mother and son go to the Police Station to lodge the complaint. In fact he connects the versions of PW2 and PW3 and prompt lodging of the complaint at 8.50 hours.

18. PW2 has stated that the scratch marks on his hand were caused when he was pulled in the car, but in my view, it is more probable that these scratches were caused in the process of the accused kissing PW2 and attempting to remove his short pant. It is quite possible that PW2 has got his facts mixed up, but that is no reason to disbelieve him. As rightly pointed out by the learned Public Prosecutor, there is no reason at all as to why PW2 a minor boy, should falsely implicate a total stranger like the accused in this case. The explanation given by the accused that battery of the car was weak is inheritantly improbable explanation considering

that the car of the accused had run at least from Panaji to Mapusa and even in case the battery was low, the said run was more than sufficient for the battery to be sufficiently charged. If the battery was low, why did not the accused stop the car by the side of the road If the battery was low, the car would not move, slowly in the field as stated by PW2. The very purpose of taking the car in the field was to abuse the boy. Similarly, the explanation of the accused that PW2 urinated in the car cannot be accepted. A small boy would not venture to do that in the presence of an accused who was almost thrice of his age. This is a case where the evidence of PW2, the minor boy, is not only consistent but the same is amply corroborated by medical evidence of PW1 Dr. Kuncolienkar who found two superficial minor abrasions over forearm of the said boy, by the evidence of PW3, his mother, who otherwise had no reason to reach the scene unless she was called by PW4 Namdev Mandrekar as well as by PW4 Namdev. It may be that there is no evidence on record to show as to how the car of the accused was ultimately taken to the Police Station but the accused also made no effort to get such evidence by cross examining the relevant witnesses but that is of no importance to the case of prosecution.

19. Learned Counsel on behalf of the accused submits that PW4 Namdev Mandrekar could not have known the name of the accused for it was stated by the investigation officer in the reply filed to the bail application that the accused was required to be identified. Here, it may be stated that there was no question of any identification of the accused as the incident itself was not disputed though the version given by the accused is different. PW2 had travelled in the car of the accused for some distance. Secondly, the statement of PW4 Namdev that he had asked the accused for his name and was told by the accused, is a fact which is reflected in his statement recorded earlier, subsequent to the recording of the complaint. There was no contradiction brought out in the evidence of PW4 Namdev Mandrekar in that regard, and even otherwise the statement given by PW4 Namdev Mandrekar is in conformity with the statement given by him to the police and therefore it is quite possible that by the time the statement of PW4 Namdev Mandrekar was recorded, PW4 Namdev Mandrekar was aware of the name of the accused and only because PSI Fadte stated in his reply that the accused was required to be identified, is no reason to doubt the credibility of the

version given by PW4 Namdev Mandrekar. The said explanation might have been given by PW6 PSI Fadte only with a view to deny bail to the accused but that in no way can affect the veracity of the version given by PW4 Namdev Mandrekar. That PW4 Namdev went to assist PW2 is quiet commendable. Nowadays, not everyone intervenes. It was certainly not expected of PW4 Namdev to have caught the accused and for not doing that, he cannot be disbelieved. Not everyone gets involved to that extent inviting a risk upon himself.

20. PW3 Shobha might have been a teacher and her husband a reporter. PW4 Namdev was only a driver and even if he was a teacher, there was no reason to discard his evidence which is also consistent. His presence at the scene cannot be doubted. The omission noticed in his evidence is too minor to be taken note of.

21. There are two other submissions made by learned Counsel on behalf of the accused. One is that the prosecution produced all witnesses who were associated with the family of the victim boy and has further submitted that on the same day PW5 Rajesh Kerkar stood as a pancha witness twice. Both the submissions made on behalf of the accused by learned Counsel need to be rejected. Only because the victim boy was known to PW5 Rajesh Kerkar when he was residing at Saligao which is also the place of residence of the said PW5 Rajesh Kerkar is no reason to suspect his independence. The Apex Court in *Joseph Fernandes v. State of Goa* 2001 SCC 707 has observed that if a pancha witness had stood as a pancha witness previously that would not denude him from his independent character. It is good to remember that when a person gives his evidence on oath, the presumption is that he has spoken the truth and that presumption can be rebutted by showing that the evidence given is inherently improbable or against the general tenor of the case or otherwise demonstrated to be false. The Apex Court with reference to independent witnesses observed in *Hazari Lal v. Delhi Administration* : 1980 (2) SCR 1053 that:

Every citizen of India must be presumed to be an independent person until it is proved that he was a dependent of the police or other officials for any purposes whatsoever.

The Apex Court further observed that:

Acquaintance with the police by itself would not destroy a man's independent outlook. In a society where police involvement is a regular phenomenon many people would get acquainted with the police. But as long as they are not dependent on the police for their living or liberty or for any other matter, it cannot be said that those are not independent persons.

The said observations of the Apex Court are relevant to the facts of this case not only in relation to PW5 Rajesh Kerkar being known to the family of the victim boy as well as being called for the second time by the police to act as a pancha witness.

22. Another submission made by learned Counsel for the accused is that there is delay in filing the charge sheet which appears was filed after about seven months i.e. 18.7.2007. Learned Counsel submits that there is no explanation for this delay but the fact remains that the accused even did not try to find out in cross examination of PW6 PSI Fadte as to why there was delay in filing the charge sheet. If asked, possibly he could have given a convincing explanation. That apart only because the charge sheet was filed with delay does not mean that the trial would be vitiated. Learned Counsel further submits that in a Sessions triable case more serious investigations were required to be done. I do not find merit in this submission, for whatever was required to be done was done. The I.O. was not cross examined to bring all details of investigation, on record, and for that it cannot be said, the case was not sufficiently investigated.

23. Considering the evidence produced by the prosecution, the accused was not at all entitled to be acquitted.

24. Next, what is to be considered is whether the learned Children's Court was justified in acquitting the accused under Section 363 IPC ?

25. Learned Children's Court has rightly observed that what was required to be proved for an offence of kidnapping was that the accused had taken the victim out of lawful guardianship. Learned Children's Court accepted the submission that the accused had given a lift to the said boy who was waiting near the bus stop and who was standing at a distance of about 15 metres from the Green Park Junction

and in case the accused had any intention of kidnapping the said boy, he would have proceeded with his car by the by-pass road towards Mapusa side and therefore learned Children's Court observed that there was no intention of kidnapping the victim boy from lawful guardianship. The learned Children's Court entirely lost sight that the direction taken by the accused was wholly irrelevant. There can be no dispute that as the boy was waiting at the bus stop, to go to school, he was very much under lawful guardianship of his parents. Even if a child goes out on the street or into the fields by himself or herself or goes to school, he or she is still continues to be under control of his or her guardian. The offence of kidnapping has four essential ingredients namely:

- (i) Taking away or enticing any minor,
- (ii) The minor being below 16 years in case of a male and 18 years in case of female,
- (iii) Out of keeping of the lawful guardian and
- (iv) Without his or her (guardian's) consent.

26. The word keeping in the context connotes the idea of charge, protection, maintenance and control. The consent of the minor who is taken or enticed is wholly irrelevant or immaterial and what is only material is guardian's consent. It is also not necessary that there should be any force or fraud. Persuasion by an accused which creates willingness on the part of the minor is held to be sufficient. (See : AIR 2004 SC 227). The object of the section is to protect the children of tender age of being abducted or seduced for improper purposes, as for the protection of the rights of parents and guardians having the lawful charge or custody of minor or insane person. In determining whether a person takes a minor out of the lawful keeping of his guardian, the destination to which the minor is taken away is immaterial. The offence gets completed as soon as the minor is actually taken out of the custody of his/her guardian. The Apex Court in *S. Varadarajan v. State of Madras* : AIR 1965 SC 942 held that even where the minor girl is kept by her father at the house of his relative, she still continues to be in the lawful guardianship of the former. It is further held that taking or enticing away a

minor out of the keeping of lawful guardian is an essential ingredient of the offence of kidnapping. In the case of *State of Haryana v. Rajaram* 1973 (1) SCC 144 the Apex Court with reference to the expression takes or entices any minor ...out of the keeping of the lawful guardian of such minor observed that the object of Section was to protect the minor children from being seduced for improper purposes, as to protect the rights and privileges of the guardians having the lawful charge or custody of their minor wards and the gravamen of this offence lies in taking or enticing of a minor under the ages specified in this Section, out of keeping of the lawful guardian. In *State v. Sulekh Chand* AIR 1964 P&H; 83 it was held that offence of kidnapping under Section 363 consists solely of taking a minor from keeping of her lawful guardian and no intention needs to be established. Learned Children's Court was not right in coming to the conclusion that the accused would not have taken the boy by the by-pass road in case he had any intention to kidnap victim boy. The accused was going to Mapusa and so also the victim boy, and in case the accused had taken the said boy, by the by pass-road, the victim boy would have immediately reacted, because that would not have taken him to his school destination. Learned Counsel on behalf of the accused submits that mere giving a lift to a minor boy would not amount to kidnapping. This is a wrong notion of law considering the ingredients of the offence of kidnapping. That may help in mitigation of sentence. In the case at hand, even assuming the accused gave a lift to the victim boy and the latter accepted it, soon thereafter, within a distance of two kilometers the accused took the victim boy in the field and misbehaved with him. The only inference in such a situation is that accused gave a lift to the victim boy with a view only to physically abuse his person and that being the position, in my view, the learned Children's Court was not at all justified in acquitting the accused under Section 363 of IPC. Consequently, the acquittal of the accused under Section 363 of IPC has got to be reversed and as a result, the accused is hereby convicted under Section 363 of IPC.

27. The third aspect which needs to be considered is whether the learned Children's Court was at all justified in giving the benefit of Section 4(1) of the P.O. Act to the accused ?

28. Section 4(1) of the P.O. Act provides that when any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the Court by which the person is found guilty is of the opinion that having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the Court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the Court may direct, and in the meantime to keep peace and be of good behaviour.

29. The learned Children's Court came to the conclusion that the accused appeared to be of a weak character and was not an expert or dangerous criminal and it is for such kind of offenders that the benefit under Section 4 of the P.O. Act can be extended. One of the requirements for extending the benefit of probation under Section 4 of the P. O. Act is the character of the accused. How did the learned Children's Court come to the conclusion that the accused was of a weak character and not a dangerous criminal How did the learned Children's Court know that the accused had not committed such offences before and would not commit them again Ordinarily, the Investigating Officer would not have known the information whether the accused in the past had indulged in such act nor would he know whether the accused would have a tendency to indulge in such act in future. An offences like this is committed by an accused who has psychological bent of mind to commit such offences.

30. The Probation Officer appointed under Section 13 of the P.O. Act is said to be a lynch pin in the operation of probation system. His report is a fundamental document for the guidance of the Court whether to grant the benefit of probation or not. The object of his report is to appraise the Court about the character of the offender, exhibit his surroundings and antecedents and throw light on the background which prompted him to commit the offence and give information about the offenders conduct in general and chances of his rehabilitation in particular, on being released on probation.

31. There is no doubt that Sub-section (1) of Section 4 of the P. O. Act has a non obstante clause but at the same time it gives discretion to the Court to release an accused on probation after considering the nature of the offence, the character of the offender and after finding out whether it is expedient to release him on probation of good conduct. Expression expedient means desirable. The Apex Court in Dalbir Singh (infra) has observed that the word expedient was thoughtfully employed by Parliament so as to mean apt and suitable to the end in view. The Apex Court further held that the Court must construe the said word in keeping with the context and object of the provisions in its widest amplitude. It casts a duty on the Court to take into account the circumstances of the case including the nature of the offence and form an opinion that it is suitable and appropriate for accomplishing a specified object that the offender can be released on probation of good conduct. Sub-section (2) of Section 4 of Act further provides that before making any order under Sub-section (1), the Court may take into consideration the report, if any, of the Probation Officer concerned in relation to the case. Section 6 deals with offenders who are under 21 years of age and Sub-section (2) of that section again provides that for the purpose of satisfaction itself, it would not be desirable to deal under Section 3 or Section 4 with an offender referred to in sub -section (1), the Court shall call for a report from the Probation Officer and consider the report, if any, and any other information available to it relating to the character and physical and mental condition of the offender.

32. A Division Bench of this Court in the case of State of Maharashtra v. B. R. Patel : 1978 Cri. L. J. 411 was dealing with Sections 4(2) and 6(2) of the P.O. Act and came to the conclusion that calling for a report under Section 4(2) was discretionary while under Section 6(2) was mandatory and further held that though calling for a report from a probation officer under Section 4(1) of the Probation of Offenders Act was not a condition precedent for making an order under Section 4(1) of the Act, it is very essential that such a report should ordinarily be called from a probation officer. The object of the P. O. Act is to attempt for the possible reformation of certain offenders, instead of inflicting on them the normal punishment for their offences and thereby to prevent the turning of the offenders into criminals, by their association with hardened criminals of mature age within the walls of a prison. However, while keeping this object in view, it must also be

borne in mind that the exercise of the discretion given to the Courts under Section 4 of the Act needs considerable sense of responsibility and the Courts should not be misled into the free use of the section by misplaced leniency and sympathy. The provisions of the said Act relating to probation must be applied with discretion for otherwise rather than preventing the turning of the offenders into criminals, it may assist in the manufacture of criminals, for it may be become known that first offences even in respect of rather serious lapses can be committed with impunity, by merely offering to execute a bond for good behaviour. This would certainly be not in the interest of the offender as well as the society. Before making an order under Section 4(1) of the Act, it is necessary for the Court to consider (i) circumstances of the case, (ii) nature of the offence and (iii) the character of the offender. It will thus be seen that the circumstance that no previous conviction is proved against the offender would not by itself be a sufficient reason for inflicting no penalty upon him. Calling for a report from the probation officer is, therefore, absolutely necessary in the interest of the offender and the society, and the same should be considered by the Court before releasing the offender on probation of good conduct. Releasing the offender on probation without proper enquiry as regards the character and antecedents of the accused would be exposing the society to the risk of the offender repeating the unlawful act and to bring the whole scheme of the probation into discredit.

33. It is well settled that the probation officer is the pivot in the matters of probation. As stated by the Division Bench, the probation officer is an important officer in the machinery for the implementation of the P. O. Act. The post is created to assist the Courts in the matter of probation. There is, therefore, no reason why his services should not be availed of before the order of probation is passed. It is essential that his services should be utilized, for otherwise important material relevant to be considered will not be available to the Court at all. It is, therefore, very essential that the Courts should not, in order to hasten up the disposal of the cases, be inclined to dispense with the calling for a report and give the benefit of Section 4 to the offenders without there being sufficient material on record before them. In the case of this nature, the release of the accused under Section 4(1) of the Probation of Offenders Act, without calling report of the probation officer was a wrong exercise of discretion conferred under Section 4(1)

of the Act and therefore the impugned order needs to be set aside.

34. Learned Counsel on behalf of the accused then submits that a report may now be called from the probation officer and the accused be dealt with under Section 4 of the P.O. Act. However, the learned Public Prosecutor submits that the Act was passed by the legislature as can be seen from its objects, to protect, promote and preserve best interest of the children in the State and create a society that is proud to be child friendly and as such this would not be a fit case to extend the benefit of Section 4(1) of the P. O. Act to the accused. Learned Public Prosecutor further submits that the accused indulged in sexual abuse of the minor boy and therefore the Court ought to have awarded a deterrent sentence so that the accused as well as others like him keep away from committing such acts on children. Learned Public Prosecutor has referred to some decisions of the Apex Court to which I will now make a reference, but prior to that, it may also be noted that another object of the Act, as spelt out in Section 8 of the Act is that all the children should be assured of safe environment. A safe environment is an environment in which a child will not be abused in any way and his/her development will be matured.

35. The P. O. Act, as observed by the Apex Court in *Rattan Lal v. State of Punjab* : AIR 1965 SC 444 is a milestone in the progress of the modern liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of the criminal law is more to reform the individual offender than to punish him. Broadly stated that the P. O. Act distinguishes offenders below 21 years of age and those above that age, and offenders who are not guilty of having committed an offence punishable with death or that imprisonment for life and those who are guilty of a lesser offence. While in the case of offenders who are above the age of 21 years absolute discretion is given to the Court to release them after admonition or on probation of good conduct, subject to the conditions laid down in the appropriate provisions of the P. O. Act. In case of offender below the age of 21 years an injunction is issued to the Court not to sentence them to imprisonment unless it is satisfied that, having regard to the circumstances of the case, including the nature of the offence and the character of the offenders, it is not desirable to deal with them under Sections 3 and 4 of the P. O. Act.

36. The P. O. Act is still in force, but 50 years down the line with ever increasing crime rate, the benefits of the P.O. Act, by judicial trend are not being extended to large number of cases. This is not to say that it ought not to be extended in appropriate cases. The benefits have not been encouraged in cases involving socio-economic offences, offences involving sex perversity cases involving moral turpitude or moral delinquency, cases involving misappropriation of property, gold smuggling, food adulteration offences, offences under Prevention and Corruption Act, and even in cases under Section 304A of IPC. Judicial trend has been cautious in not extending probation to persons who are educated and experienced in life and deliberately flout the law with impunity and to those who are potential dangers to the society. It would be apt to refer to the decision of the Supreme Court in *Isher Das v. State of Punjab* : AIR 1972 SC 1295 though it was case relating to food adulteration, but the observations are very much relevant to our case as well. The Apex Court stated that adulteration of food is menace to public health. The Prevention of Food Adulteration has been enacted with the aim of eradicating that anti-social evil and for ensuring purity in the articles of food. In view of the above object of the P.F.A. Act and the intention of the legislature as revealed by the fact that a minimum sentence of imprisonment for a period of six months and a fine of rupees one thousand has been prescribed, the Courts should not lightly resort to the provisions of the Probation of Offenders Act in the case of persons above 21 years of age found guilty of offences under the Prevention of Food Adulteration Act. As regards persons under 21 years of age, however, the policy of the law appears to be that such a person inspite of his conviction under the Prevention of Food Adulteration Act, should not be deprived of the advantage of Probation of Offenders Act which is a beneficent measure and reflects and incorporates the modern approach and latest trend in penology. Again, in *Pyarali K. Tejani* AIR 1974 SC 288 another case of adulteration of supari with saccharin, the Apex Court observed:

The kindly application of the probation principle is negatived by the imperatives of social defence and the probabilities of moral proselytisation. No chances can be taken by society with a man whose anti-social operations guised as respectable trade, imperil numerous innocents. He is a security risk.

The same thing could be said of the offences under the Act, wherein the legislature has also provided minimum fine which by virtue of an amendment carried out by Act 20 of 2005 is enhanced. Offences against children who are vulnerable sections of society are also anti-social and in this case is the result of a depraved mind of the offender. In cases like this, Courts are required to exercise utmost caution in interpreting the provisions of probation law and keep in forefront the public policy and the impact of the offender's act on the society. If today, it was PW2, tomorrow it will be someone else. Observations of the Apex Court in Dalbir Singh AIR 2000 SC 1677 are also relevant. An offender against children must also constantly inform himself that if he commits a crime against them, he might not be convicted of the offence and if convicted he would be dealt leniently by the Court. He too must keep in mind the fear psyche that if he is convicted, he will not escape from jail sentence.

37. The Law Commission in its 47th report opined that the P. O. Act should not be applicable to socio-economic offences. It observed:

But ultimately, the justification of all sentencing is the protection of the society. There are occasions when an offender is so anti-social that his immediate and sometimes prolonged confinement is the best assurance of society's protection. The consideration of rehabilitation has to give way because of the paramount need for the protection of society.

38. The Apex Court in *Commandant 20 BN, ITB v. Sanjay Binjola* : 2001 5 SCC 317 held that:

Nobody can claim the benefit of Sections 3 and 4 of Probation of Offenders Act, as a matter of right and the Court has to pass appropriate orders in the facts and circumstances of each case having regard to the nature of the offence, its general effects on the society and character of the offenders etc.

The Apex Court also observed that:

There are laws which specifically direct that the provisions of Probation of Offenders Act shall not apply to the persons convicted for those offences and

there may be cases under laws as well which may not justify the exercise of the powers of Probation of Offenders Act. Even apart from such exclusions the Courts should be wary of extending the benefit of Probation of Offenders Act to offences relating to corruption, narcotic drugs, etc.

Referring the *Dalbir Singh v. State of Haryana* (Supra), the Apex Court has reiterated that the benefit of Probation of Offenders Act should not normally be afforded in respect of the offences under Section 304-A of IPC when it involves rash or negligent driving. Those are instances for showing how the nature of offence could dissuade from giving the benefit. However, considering that the case under Section 10 of [Central Reserve Police Force Act, 1949](#), was of trivial nature, the Apex Court extended the benefit of Section 3 of the P. O. Act.

39. In *State of U.P. v. Kishan* : 2005 Cr.L.J. 333, the Apex Court has observed that:

Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every Court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc.

The Apex Court further observed that:

For deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court. Such act of balancing is indeed a difficult task and referring the case of *Dennis Councle* (402 US 183) observed that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only

way in which such judgment may be equitably distinguished.

40. In *State of M.P. v. Saleem* : 2005 Cr. L.J. 3435, the Apex Court has observed as follows:

Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The Social impact of the crime, eg. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitudes by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

41. In *State of M.P. v. Munna Choubey and Anr.* : 2005 Cr. L.J. 913, the Apex Court has observed that:

The physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame.

The Apex Court has referred to *Dhananjay Chatterjee v. State of W.B.* : 1994 (2) SCC 220 and stated that:

Shockingly large number of criminals go unpunished thereby increasingly, encouraging the criminals and in the ultimate making justice suffer by weakening the system creditability. The imposition of appropriate punishment is the manner in which the Court responds to the society crying for justice against the criminal. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment.

42. Lastly, the Apex Court in *Hussein V. Mohammed Saiyed v. State of Gujarat* has stated as follows:

The object of awarding appropriate sentence should be to protect the society and to deter the criminal from achieving the avowed object to break the law by imposing appropriate sentence. It is expected that the Courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be resultwise counterproductive in the long run and against the interest of society which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Court must not only keep in view the rights of the victim of the crime but the society at large while considering the imposition of appropriate punishment. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which both the criminal and the victim belong.

If offences against women and those involving moral turpitude or moral delinquency including kidnapping require exemplary treatment, as observed by the Apex Court in the State of M. P. v. Saleem (supra) the offences against children cannot be left far behind, for they too constitute a weaker section of the society. The offences committed by the accused involves moral turpitude or moral delinquency. The accused is educated man over 40 years of age. The accused has committed offences obviously because he has propensity or tendency to commit such offences and facts show that it was committed with due deliberation and there is no reason at all that he will not commit it again. As already stated, if PW2 was the victim today, some else will be tomorrow. Considering his age, even assuming that he gave a lift to the victim boy, the accused was expected to show greater sense of responsibility but manifested a very mischievous disposition and therefore judicial attitude ought to have been against allowing the benefit of probation to him, who was otherwise an educated and experienced person in life.

In my opinion, considering the nature of offences committed by the accused, the accused is not entitled to be released on probation.

43. The Apex Court in a case under Section 377 of IPC : (1982) 3 SCC 9 observed that the notions of permissive society and the legalisation of homosexuality in some countries cannot influence the Court while convicting the accused under Section 377 of IPC but in judging the depravity of the action for determining the quantum of sentence, all the relevant aspects bearing on the question of nature of offence and quantum of sentence must be kept in view. However, the Apex Court reduced the sentence from three years R.I. to six months R.I. in that case.

44. In the light of above discussion, both the appeals are hereby allowed. The acquittal of the accused under Section 363 IPC is hereby set aside and the accused convicted under Section 363 IPC. Likewise, the sentence i.e. order releasing the accused under Section 4(1) with fine under Section 5 of the P.O. Act is hereby set aside.

45. Mr. Ferreira, learned Public Prosecutor, on sentence, submits that the mother of the injured has deposed that the victim boy was terribly disturbed and not able to concentrate on his studies and therefore the learned Public Prosecutor submits that this is a devastating effect of the acts of the accused. Learned Public Prosecutor submits that considering the facts of the case an exemplary punishment of at least 3 years R.I. be imposed on the accused in addition to fine.

46. Learned Counsel on behalf of the accused submits that the benefit of probation extended to the accused be maintained and further submits that the mother of PW2 could be exaggerating, the effects of the action of the accused.

47. Section 363 of IPC provides punishment with imprisonment of either description which may extend to seven years and fine. Section 8(2) r/w 2(m)(i) of the Goa Children Act, 2003 provides, in case of child abuse or sexual assault imprisonment of either description which may extend to three years and shall also be liable to fine of rupees one lakh. The fine provision is mandatory and there is no scope to reduce it. In this context, I may refer to the decision of this Court in the case of Maloji Patil v. State of Goa 2009 ALL M. R. (Cri) 1118 wherein it was

observed that the statutory provision provides a fixed amount to be the fine and once the offence is established, there is no discretion to the Court to impose fine of less than Rs. 1,00,000/-.

48. Considering the facts and circumstances of the case, ends of justice will be met by sentencing the accused under Section 363 IPC to undergo S.I. for three months and directing him to pay a fine of Rs. 5000/-in default to undergo S.I. for one month. The accused is also sentenced under Section 8(2) r/w 2(m) (i) of the Act to undergo S.I. for three months and pay a fine of rupees one lakh in default to undergo S.I. for 6 months. In case the fine is realised a sum of Rs. 50,000/-shall be paid to PW2.

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