
(2019) 10 BOM CK 0127

In the Bombay High Court

Case No : Criminal Appeals No. 57 Of 2015, 4 Of 2016

Vinesh Fal Dessai And Ors

APPELLANT

Vs

State Of Goa And Ors

RESPONDENT

Date of Decision : 17-10-2019

Acts Referred:

Indian Penal Code, 1860 — Section 109, 354, 375, 376, 377
Goa Children's Act, 2003 — Section 2(d), 8, 8(1), 8(1A), 8(2), 30
Code Of Criminal Procedure, 1973 — Section 313
Evidence Act, 1872 — Section 114(b), 118

Citation : (2019) 10 BOM CK 0127

Hon'ble Judges : M.S. Sonak, J;Nutan D. Sardesai, J

Bench : Division Bench

Advocate : Ryan Menezes, S.R. Rivonkar, Anoop Gaonkar, S.R. Rivonkar

Final Decision : Dismissed/ Allowed

Judgement

M.S. Sonak, J

1. Heard Mr. Ryan Menezes for the Appellant in Criminal Appeal No.57/2015.
2. Heard Mr. Anoop Gaonkar for the Appellant in Criminal Appeal No.4/2016.
3. Mr. S. R. Rivankar, Public Prosecutor for the State in both the Appeals.
4. Both these Appeals are directed against the common Judgment and Order dated 28th April, 2015/7th May, 2015 made by the Children's Court for the State of Goa in Special Case No. 11/2011, in which the Appellant in Criminal Appeal No.57/2015 was arraigned as accused No.1 (A.1) and Appellant in Criminal Appeal No.4/2016 was arraigned as accused No.2 (A.2).
5. By the impugned Judgment and Order, the Children's Court has convicted A.1 for the offences punishable under Sections 354 and 376 of the Indian Penal Code (IPC) and Section 8 of the Goa Children's Act, 2003 (Children's Act) and A.2 for the offence punishable under Section 109 of the IPC and Section 8 of the

Children's Act. The Children's Court has sentenced A.1 and A.2 in the manner set out in paragraph 100 of the impugned Judgment and Order, which reads as follows:

"It is therefore, the accused no.1 is sentenced to undergo rigorous imprisonment for a term of 3 years and is directed to pay fine of `5,000/-, in default, to undergo simple imprisonment for a period of 3 months for the offence punishable under Section 354 of I.P.C.

Further, the accused no.1 is sentenced to undergo rigorous life imprisonment and is directed to pay fine of `25,000/-, in default, to undergo simple imprisonment for a period of 1 year for the offence punishable under Section 376 of I.P.C.

Further, the accused no.1 is sentenced to undergo rigorous life imprisonment and is directed to pay fine of `2,00,000/-, in default, to undergo simple imprisonment for a period of 5 years for the offence punishable under the second part of Section 8(2) of the Goa Children's Act, 2003.

The accused no.2 is sentenced to undergo rigorous life imprisonment and is directed to pay fine of `25,000/-, in default, to undergo simple imprisonment for a period of 1 year for the offence punishable under Section 109 of I.P.C.

Further, the accused no.2 is sentenced to undergo rigorous life imprisonment and is directed to pay fine of `2,00,000/-, in default, to undergo simple imprisonment for a period of 5 years for the offence punishable under the second part of Section 8(2) of the Goa Children's Act, 2003.

The substantial sentences of imprisonment imposed on the accused no.1 and 2 shall run concurrently."

6. The Prosecution, in the present case, had alleged that from July, 2010 till 26/01/2011, A.1 used criminal force against the victim girl, who is incidentally the daughter of A.2, and touched her breasts and thighs, intending to outrage her modesty and also raped her several times. A.2 is alleged to have abetted the commission of the said offence by A.1, during the aforesaid period. It is pertinent to note that the date of birth of the victim girl, as per birth certificate produced on record at Exhibit 10, is 11/02/1995. This means that during the period between July, 2010 and 26/01/2011, the victim girl was more than 15 years of age, but less than 16 years of age. Accordingly, the victim girl answers the definition of "child" within the meaning assigned to this term under Section 2(d) of the Children's Act."

7. The Children's Court framed charges on 1/8/2011 and upon A.1 and A.2 pleading "not guilty" and claiming "to be tried", the trial commenced, in which the Prosecution examined in all 11 witnesses. The statements of A.1 and A.2 were recorded under Section 313 of the Code of Criminal Procedure and thereafter, both, A.1 and A.2 examined themselves by way of defence and were styled DW.1 and DW.2 for the said purpose.

9. Mr. Ryan Menezes, learned Counsel for A.1 contends that the Children's Court has failed to appreciate the evidence on record in its proper perspective. In particular, he submits that this is a case where both, A.1 and A.2, have led defence evidence by themselves stepping into the witness box and offering themselves for cross examination. He submits that A.1 and A.2 have totally denied the charges levelled against them on oath and the testimonies of A.1 and A.2 have not been dented in the course of cross examination. This aspect has been almost ignored by the Children's Court in making the impugned Judgment and Order.

10. Mr. Ryan Menezes submits that this is a case where A.1 has led positive evidence that he was impotent and, therefore incapable of committing the offence of rape. He submits that even the medical evidence was produced by A.1 and such evidence was incorrectly rejected by the Children's Court by emphasizing upon the form of evidence, rather than its substance. Mr. Menezes submits that again, the evidence on this aspect has not at all been appreciated by the Children's Court in its proper perspective

11. Mr. Menezes submits that there is ample evidence on record, which establishes that both, A.1 and A.2 were in inimical terms with one Mohan Desai, the brother-in-law of A.2 and paternal uncle of the minor victim girl. Mr. Menezes submits that though this incident is alleged to have taken place in the year 2011, both, A.1 and A.2 had lodged complaints against the said Mohan Desai way back in the years 2008 and 2010. He submits that there are property disputes between A.2 and said Mohan Desai. He, therefore, submits that this is a case maliciously foisted by the said Mohan Desai who was incidentally a Police Constable, in order to harass and break vengeance upon A.1 and A.2. Mr. Menezes points out that even the Pancha witnesses i.e. PW.7 and PW.8 have admitted in their evidence that they gave statements at the behest of the said Mohan Desai and further, they merely signed pre-prepared statements at the Police Station, without knowing the contents of such statements. Mr. Menezes points out that these witnesses were declared hostile by the Prosecution, but nothing was elicited in the course of their cross examinations. Again, Mr. Menezes submits that these significant aspects have not at all been appreciated by the Children's Court in their proper perspectives.

12. Mr. Menezes submits that there are inherent contradictions in the depositions of the victim girl (PW.1), and her bother (PW.2). Mr. Menezes submits that on one hand the victim girl claims that there was serious difficulty in communicating with her uncle Mohan Desai or Pratima Desai (PW.6) and, therefore, she was not in a position to complain to them earlier, on the other hand, there is evidence on record that both, Mohan Desai and Pratima Dessai reside in the property touching the house of the victim girl. Mr. Menezes points out that there are serious contradictions in the deposition of the victim girl on one hand, and Pratima Desai (PW.6) on the other. He submits that all these contradictions have not at all been taken into consideration by the Children's Court, rendering the

impugned Judgment and Order vulnerable.

13. Mr. Menezes submits that in the present case, the medical evidence does not indicate any injuries on the private part of the minor victim girl (PW.1). He submits that this corroborates the version of A.1 and A.2 who have themselves stepped into the witness box and deposed that this case was falsely foisted against them. He submits that even this aspect has not at all been considered by the Children's Court in proper perspective.

14. Mr. Menezes submits that the Children's Court has not applied the same yardstick when it comes to appreciation of the evidence led by and on behalf of the Prosecution and the evidence led by and on behalf of A.1 and A.2. He submits that the contradictions and the discrepancies in the Prosecution witnesses have been overlooked as being minor, or inconsequential. However, much is made of trivial and inconsequential discrepancies in the defence evidence. Mr. Menezes submits that in fact, there are no discrepancies in the defence evidence. He submits that on account of such an approach, the impugned Judgment and Order is liable to be set aside.

15. Mr. Menezes submits that whereas the Prosecution, in such matters, is required to establish the charges beyond reasonable doubt, the defence is to be established only on the standard of preponderance of probabilities. He submits that the Children's Court has failed to appreciate this significant aspect and has virtually convicted A.1 and A.2 merely because they were unable to establish their defence beyond reasonable doubt. He submits that this is a serious flaw in the impugned Judgment and Order.

16. Mr. Menezes, relying upon a decision of the Full Bench of Allahabad High Court in the case of Rishi Kesh Singh vs. The State 1970 0 AIR (ALL) 51 submitted that even in a case where the accused persons rely upon any "general exception" under the IPC, but the evidence adduced by them in the course of trial fails to satisfy the Court affirmatively that the exception has been made out nevertheless, the accused persons will be entitled to an acquittal if, upon consideration of the evidence as a whole, including the evidence given in support of the plea of the said general exception, a reasonable consequential doubt is created in the mind of the Court as to whether the accused is really guilty of the offence which he is charged. Mr. Menezes submits that applying this principle to the facts of the present case, both, A.1 and A.2 are entitled to a clean acquittal or, in any case, are entitled to an acquittal by extending a benefit of doubt. Mr. Menezes submits that this aspect of the matter has not even been examined by the Children's Court and for these reasons, the impugned Judgment and Order warrants interference.

17. Mr. Anoop Gaonkar, learned Counsel for A.2, whilst adopting the submissions made by Mr. Menezes on behalf of A.2, raises some additional pleas in support of Criminal Appeal No.4/2016.

18. Mr. Gaonkar, at the outset, points out that the Charge, as framed by the

Children's Court, was absolutely vague and the same fails to even mention whether the accused persons are alleged to have committed any offence under any particular sub-section or sub-sections of Section 8 of the Children's Act. He submits that framing of such a charge has immensely prejudiced the accused persons in the matter of their defence and on this ground itself, the impugned Judgment and Order is liable to be set aside.

19. Mr. Gaonkar submits that A.2, whom he represents has been ultimately convicted under later part of Section 8(2) of the Children's Act and sentenced to undergo rigorous imprisonment for life and a fine of Rs.2,00,000/- and, in default, directed to undergo simple imprisonment for a period of 5 years. He submits that such a conviction is totally unsustainable, because the only allegation against A.2 was that she abetted A.1 in committing the offences punishable under Sections 354 and 376 of the IPC and Section 8(2) of the Children's Act. He points out that there was no any allegation, nor is there any evidence against A.2, who is incidentally the mother of the victim girl herself committing any offence under Section 8(2) of the Children's Act. He points out that whilst Section 8(1A) of the Children's Act speaks about abetment, there is no reference to any abetment under Section 8(2) of the Children's Act. He, therefore, submits that the conviction of A.2 and the consequent sentence under Section 8(2) of the Children's Act is clearly without jurisdiction and deserves to be set aside.

20. Mr. Gaonkar joins Mr. Menezes in submitting that a false case was foisted at the behest of Mohan Desai with whom both the accused persons were in inimical terms. Mr. Gaonkar submits that because A.1 used to help A.2 in many matters, it is possible that the victim girl and her brother suspected that there was something illicit in relationship between A.1 and A.2. He submits that an advantage was taken of this circumstance by Mohan Desai, the brother-in-law of A.2 and a case was filed against the accused persons by him, after tutoring the victim girl and her brother, PW.2. He submits that these aspects have not been considered by the Children's Court in proper perspective and, therefore, the impugned Judgment and Order deserves to be set aside.

21. Mr. Gaonkar submits that the material on record establishes that Mohan Desai was a Constable and, therefore, had contacts with the Police, has monitored the entire investigation in this matter. He points out to the depositions of PW.7 and PW.8, the Pancha witnesses who have clearly deposed that they were procured by the said Mohan Desai. He submits that all these aspects have not been considered by the Children's Court in proper perspective.

22. Mr. Menezes and Mr. Gaonkar, without prejudice to their contentions, made submissions on the severity of the sentence imposed upon A.1 and A.2. Mr. Menezes pointed out that A.1 has a ailing mother, with no person to take care of her. Mr. Gaonkar pointed out that A.2 has already suffered incarceration for over 9 years and the Children's Court has failed to consider that one of the significant aspects of sentencing, is reformation. He relies on Bhondu @ Santlal Ramdhar

Yadav vs. The State of Maharashtra Cri. Appeal No.1076/2002 decided on 12.11.2009 and State of U.P. vs. Kishan AIR 2005 SC 1250 on the aspect of sentencing and submits that at least A.2 may be spared of further incarceration even if the conviction under Section 109 of the IPC against her is to be sustained.

23. Mr. Rivankar, learned Public Prosecutor defends the impugned Judgment and Order on the basis of the reasoning reflected therein. He submits that the Children's Court has applied proper parameters, when it comes to appreciation of not only the Prosecution evidence, but also the defence evidence. He submits that the theory of enmity with Mohan Desai, who was only a Constable in the Police Department, is far-fetched. In any case, he submits that it is inconceivable that on account of so called enmity the minor victim girl and her minor brother would level such serious allegations against their own mother and thereafter depose to those allegations in the Court of law. He points out that the deposition of the minor victim girl (PW.1) and her minor brother (PW.2) is quite clear and inspires full confidence. He relies upon Sudhansu Sekhar Sahoo vs. State of Orissa (2002) 10 SCC 743 and Ramdas and others vs. State of Maharashtra (2007) 2 SCC 170 to submit that the conviction on the sole basis of the testimony of the prosecutrix is very much sustainable and mere delay in lodging an FIR can never be fatal to the case of the Prosecution. For all these reasons, Mr. Rivankar submits that there is no case made out to interfere with the impugned Judgment and Order.

24. However, on the aspect of conviction of A.2 under Section 8(2) of the Children's Court, Mr. Rivankar concedes that Section 8(2) speaks about actual commission of an offence by the accused person and not abetment of such offence. He, however, submits that A.2 has been rightly sentenced to undergo life imprisonment for an offence of abetment in terms of Section 109 of the IPC since, there is clear and cogent evidence available on record to sustain this charge against A.2.

25. The rival contentions now fall for our determination.

26. In the present case, there is no dispute whatsoever that the date of birth of the minor victim girl is 11/02/1995, as is evidenced by the birth certificate produced in evidence as Exhibit 10. There was in fact no challenge to this aspect. From this, it is quite clear that in July, 2010, the minor victim girl was about 15 years and 5 months, and as on 26/01/2011 as well, the minor victim girl was yet to complete the age of 16 years.

27. Section 2(d) of the Children's Act defines "Child" to mean any person who has not completed 18 years of age unless any other law in force specifies otherwise or unless otherwise indicated in specific provisions of the Children's Act. The proviso to Section 2(d) of the Children's Act, however provides that in so far as a victim in an offence of rape is concerned, "child" shall mean any person who has not completed sixteen years of age. This means that clearly the minor victim girl was "child" within the meaning assigned to this term under

Section 2(d) of the Children's Act. The charge-sheet in the present case was rightly filed before the Children's Court and the Children's Court was the competent Court to take cognizance of the charges levelled against the accused persons.

28. Section 30 of the Children's Act provides that subject to the provisions of the Children's Act, the Children's Court shall have jurisdiction to try all offences against children whether such offence is specified under the Children's Act not. The contention that where there was no material to frame any charge under Section 8(2) of the Children's Act, the Children's Court would lack jurisdiction to try the offences under the IPC, was rejected by this Court in Rohan Dhungat & ors. vs. State and ors. 2019 (2) Bom.C.R. (Cri.) 431 relying upon Section 30 of the Children's Act and pointing out that the jurisdiction of the Children's Court under Section 30 of the Children's Act is quite wide and the Children's Court shall have jurisdiction to try all offences against the children, irrespective of such offences are specified in the Children's Act or not. Besides, in the present case, we are satisfied that the offence under 8(2) of the said Act has certainly been made out against A.1 for which he has been rightly convicted by the Children's Court. In addition to the offence under Section 8(2) of the Children's Act, A.1 was also charged for having committed the offences under Sections 354 and 376 of the IPC, for which also, in terms of Section 30 of the Children's Act, the Children's Court was fully competent to try him. A.2 is alleged to have aided and abetted A.1, inter alia, in commission of the offences under Section 354 and 376 of the IPC. Accordingly, the Children's Court was the competent Court in the present matter to try A.1 and A.2 for having committed the offences against the minor victim girl, who answered the definition "Child" in Section 2(d) of the Children's Act.

29. In the present case, the offences are alleged to have been committed by A.1 and A.2 between July, 2010 and 26/01/2011. There is no dispute that the minor victim girl is the daughter of A.2. The evidence on record substantially bears out that A.1 and A.2, were in physical relationship with each other, for which purpose, A.1 frequently resided in the house of A.2 and would also force the minor victim girl to have physical relations with him. The FIR in the present case was lodged by the minor victim girl on 7/2/2011.

30. The delay in lodging of the FIR has been well explained by the minor victim girl. The explanation finds support in the evidence of Sr. Refa Coutinho (PW.4), (a nun the school where the minor victim girl was studying), as well as Pratima Desai (PW.6) aunt of the minor victim girl. The minor victim girl was initially studying in a boarding school, but, thereafter during the relevant period, was studying in Maria Bambina H.S.S. at Cuncolim in Std. Xth where St. Refa Coutinho (PW.4) was teaching.

31. PW.1, the minor victim girl has deposed that her father had expired about 10 years prior to the date she was deposing in the Court and A.2 was her mother. She has deposed that A.1 was in relationship with A.2, in the sense that they

were staying together and sleeping together in the house. She has deposed graphically as to the manner in which A.2, her own mother was forcing her to sleep with A.1 and how A.1 would kiss her, touch her breasts, her legs and other parts of her body. She has also deposed to A.1 taking her into the bedroom, latching the door from inside, removing her cloths and putting his private part into her private part. She has deposed to A.1 first did this in July, 2010 and thereafter, on a number of occasions. She has deposed that the last time A.1 did this was on 26/1/2011. She has deposed that she complained about this to her mother A.2, but A.2 rather than protecting her, used to abuse and assault her. She has deposed that her mother A.2 used to force her to do whatever A.1 wanted and used to even threaten her that she would not allow her to go to the college, if she did not allow A.1 to sexually assault her. She has deposed that whenever she was resisting to go into the bedroom with A.1, both, A.1 and A.2 used to drag her into the bedroom.

32. PW.1 has deposed that she did not have support of any person, particularly as her mother A.2 used to fight with all the family members. She has deposed that since she could not bear the situation any further, she told about her sufferings to a nun from her school i.e. Sr. Refa Coutinho (PW.4). She has deposed that PW.4 inquired of her as to whether she had any support from any family members, upon which she replied that she had a paternal uncle, but the family was not in talking terms with this paternal uncle. She has then deposed that Sr. Refa Coutinho required her to give phone number of this paternal uncle and when she gave the same, Sr. Refa Coutinho called the paternal uncle to the school.

33. PW.1 has deposed that when the uncle and aunt came to meet Sr. Refa Coutinho in the school, she told everything to them. Thereafter her uncle Mohan Desai contacted the other family members, including her maternal uncle and then it was decided to lodge a complaint, which was ultimately lodged on 7/2/2011.

34. The version of PW.1, the minor victim girl is almost entirely corroborated by clear and cogent evidence of Sr. Refa Coutinho (PW.4), as well as Pratima Desai (PW.6) who is the aunt and wife of PW.1 and wife of said Mohan Desai, who had since expired and was therefore unable to depose in the matter. According to us, looking to the circumstances in which the minor victim girl was placed, it is not possible to draw any adverse inference on account of any alleged delay in lodging of an FIR in a case of this nature. The Children's Court has correctly appreciated both, legal as well as factual position on this issue. There is really no case made out to interfere with the impugned Judgment and Order, or the conviction recorded therein on the ground that there was some unexplained delay in lodging the FIR in the present case.

35. In Ramdas and others (supra), the Apex Court has pointed out that the aspect of mere delay in lodging of the FIR is not necessarily fatal to the case of the Prosecution. However, this aspect has to be examined in the light of the

totality of the evidence, and the Court has to consider whether the delay in lodging the FIR adversely affects the case of the Prosecution. That is a matter of appreciation of evidence. There may be cases where there is direct evidence to explain the delay. Even, in the absence of direct explanation, there may be circumstances appearing on record which provide a reasonable explanation for the delay. There may be cases where on account of fear and threats, the witnesses may avoid going to the police station immediately. The time of occurrence, the distance to the police station, mode of conveyance available, are all factors which have a bearing on the question of delay in lodging of the report. It is also possible to conceive of cases where the victim and the members of his or her family belong to such a strata of society that they may not even be aware of their right to report the matter to the police and seek legal action, nor was any such advice available to them. In the case of sexual offences, there is another consideration which may weigh in the mind of the Court i.e. the initial hesitation of the victim to report the matter to the police which may affect her family life and family's reputation. Very often in such cases, only after considerable persuasion the prosecutrix may be persuaded to disclose the true facts. There are also cases where the victim may choose to suffer the ignominy rather than to disclose the true facts which may cast a stigma on her for the rest of her life. These are cases where the initial hesitation of the prosecutrix to disclose the true facts may provide a good explanation for the delay in lodging the report. In the ultimate analysis, what is the effect of delay in lodging the report with the police is a matter of appreciation of evidence and the Court must consider the delay in the background of the facts and circumstances of each case. Different cases have different facts and it is the totality of evidence and the impact that it has on the mind of the court that is important. No straitjacket formula can be evolved in such matters and each case must rest on its own facts.

36. Applying the aforesaid principles to the facts as unfolded from the evidence on record, we are satisfied that the delay in lodging the FIR has in least affected the case of the Prosecution. Here is a case of a minor victim girl who is subjected to grave sexual assault by A.1 with the active abetment of her own mother A.2. Version of the minor victim girl has been fully corroborated by her minor brother PW.2, who has deposed that even he has seen both, A.1 and A.2 committing the offences for which they were charged. In the situation in which the minor victim girl was placed, it is actually that she hesitated to complain to the authorities. In this case, the minor victim girl had support from none of the family members and it is only when the situation became unbearable and when she was questioned by Sr. Refa Coutinho (PW.4) as to the cause of her sadness and even non-inclination to participate in the school activities, that it was ultimately disclosed what she was going through, to Sr. Refa (PW.4) in the last week of January, 2011. Thereafter, Sr. Refa called her uncle and aunt to the school and it is in their presence that the minor victim girl again narrated the entire sufferings. The uncle and the aunt also alerted other relatives and thereafter a conscious decision was taken to lodge a complaint to the police. According to us, there are

more than valid explanations for the so called delay in lodging the FIR.

37. In *Sudhansu Sekhar Sahoo* (supra), the Apex Court has reiterated the well settled position in law that the sole testimony of the victim of a sexual offence can be a basis for conviction provided it is safe, reliable and worthy of acceptance. In para 18, the Apex Court has held thus:

"18. It is well settled that in rape cases the conviction can be solely based on the evidence of the victim, provided such evidence inspires confidence in the mind of the court. The victim is not treated as an accomplice, but could only be characterised as injured witness. It is also reasonable to assume that no woman would falsely implicate a person in a sexual offence as the honour and prestige of that woman also would be at stake. However, the evidence of the prosecution shall be cogent and convincing and if there is any supporting material likely to be available, then the rule of prudence requires that evidence of the victim may be supported by such corroborative material."

38. In *State of Maharashtra v. Chandraprakash Kewalchand Jain* (1990) 1 SCC 550 the Apex Court had elaborately considered the question whether the conviction can be based on the sole testimony of the victim of a sexual offence, as follows:

" Is it essential that the evidence of the prosecutrix should be corroborated in material particulars before the court bases a conviction on her testimony? Does the rule of prudence demand that in all cases save the rarest of rare the court should look for corroboration before acting on the evidence of the prosecutrix?

* * *

A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless

the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness."

39. In *State of H.P. v. Lekh Raj* (2000) 1 SCC 247 on the same issue, this is what the Apex Court has held at para 10:

"The hypertechnicalities or figment of imagination should not be allowed to divest the court of its responsibility of sifting and weighing the evidence to arrive at the conclusion regarding the existence or otherwise of a particular circumstance keeping in view the peculiar facts of each case, the social position of the victim and the accused, the larger interests of the society particularly the law and order problem and degrading values of life inherent in the prevalent system. The realities of life have to be kept in mind while appreciating the evidence for arriving at the truth."

40. In *State of Rajasthan v. N. K.* (2000) 5 SCC 30, this is what the Apex Court has held at para 11.

"11. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject-matter being a criminal charge. However, if the court of facts may find it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony."

41. Applying the aforesaid principles, we have no hesitation in accepting the testimony of the minor victim girl (PW.1) in the present case. We agree with the Children's Court that the evidence of PW.1 in the present case is cogent, convincing and inspires full confidence. We also agree with the reasoning of the Children's Court that even if it is assumed that there was some enmity between A.2 and Mohan Desai, the minor victim girl PW.1, who is the daughter of A.2, would not go to the extent of levelling such serious and false accusations against her own mother, A.2, or A.1.

42. Besides, in the present case, the Children's Court has not relied upon the sole testimony of the minor victim girl, PW.1. This is a case where PW.2, the minor brother of the minor victim girl PW.1 has also deposed in the matter. Again, we find that the deposition of PW.2 is extremely cogent, convincing and inspiring of confidence. The contention that PW.1 and PW.2 might have been tutored by Mohan Desai, who had taken custody of the two children, after A.2

was incarcerated, cannot be accepted. In the first place, when the complaint was lodged by the minor victim girl PW.1, she was very much in the custody of A.2 and had, in fact, no truck with Mohan Desai, or his wife Pratima Desai (PW.6). Besides, we cannot accept that the testimonies of PW.1 and PW.2 against their own mother A.2, is a product of some tutoring by Mohan Desai or Pratima Desai (PW.6) with whom A.2 had some property dispute, or A.1 had some scuffle in the past. From the testimonies of PW.1 and PW.2, there is absolutely no scope to even entertain any such doubt which is sought to be created on behalf of A.1 and A.2.

43. Mr. Gaonkar and Mr. Menezes urged that the depositions of PW.1 and PW.2 are so similar that they are virtually stereotype, in order to suggest tutoring. Perusal and the analysis of the depositions of PW.1 and PW.2 would indicate that the charge of stereotyping is quite misconceived. Secondly, because there is consistency and ample corroboration between the deposition of PW.1 and PW.2, it cannot be said that this is a case of tutoring, or stereotyping. The evidence of PW.1-the minor victim girl is corroborated in substantial particulars by PW.2, her minor brother, who has deposed that on some of the occasions he would be sleeping in the room where the offences were committed by A.1 and A.2. He has also deposed to the minor victim girl crying and pointing out the indignities which she was made to suffer at the hands of A.1 and A.2. PW.1 has also deposed as to how he was assaulted by A.1 for attempting to aid his sister, the minor victim girl. According to us, the testimony of PW.1 and PW.2 which again is corroborated on several aspects by the testimony of PW.4 and PW.6, is more than sufficient to conclude that the Prosecution, in the present case, has established beyond reasonable doubt the commission of offences under Sections 354 and 376 of the IPC and Section 8(2) of the Children's Court by A.1 and the offence of abetment in terms of Section 109 of the IPC to the offences under Sections 354 and 376 of the IPC committed by A.1.

44. This is not at all a case where the Children's Court has applied any unequal standards when it comes to appreciation of the Prosecution evidence and the defence evidence. No doubt, in this case, both A.1 and A.2 have stepped into the witness box and denied that they have committed any offence or rather stated that false cases have been foisted against them. A.1 went to the extent of even deposing that he had never even visited the house of the minor victim girl or her mother A.2. This statement is belied by the complaint made by A.1 to the police in past. In any case, such deposition by A.1 and A.2 is not sufficient to either establish that indeed some false case has been foisted against them or for that matter to even create any doubt, much less any reasonable doubt that the version put forth by A.1 and A.2 is even plausible.

45. There is absolutely no doubt that the standard of proof which is expected of the defence is that of preponderance or probabilities; whereas the standard of proof which is expected of the Prosecution, is the proof beyond reasonable doubt. However, upon due appreciation of the deposition of A.1 and A.2, as also

the material which A.1 as produced on record (even though such material has not been proved in the manner required by law), we are unable to accept that A.1 and A.2, in the present case, have made out some case which deserves acceptance by applying the rule of preponderance of probabilities.

46. The proposition laid down by the Full Bench of the Allahabad High Court in the case of Rishi Kesh Singh (*supra*), is also of no assistance to A.1 and A.2. This is a case where A.1 and A.2 have failed to even create any doubt, much less any reasonable doubt on the basis of their depositions. Even after consideration of the evidence in its totality, including, in particular, the evidence tendered on behalf of the defence, this is not a matter where we can say that the defence has succeeded in making out some plausible version in their support so as to extend them a benefit of doubt. It is settled position in law that it is not any and every doubt which entitles an accused person to the benefit and ultimately, an acquittal. Even a doubt has to arise from the material on record and further, the doubt is required to be reasonable. In the present case, both the tests are not fulfilled and therefore, we see no merit in the criticism levelled by the Appellants in the matter of appreciation of evidence by the Children's Court in the present matter.

47. The aspect of so called enmity between the accused persons and Mohan Desai, who expired before he could depose in the matter, is duly considered by us. Even, if something can be said about such enmity, we are not prepared to accept that such enmity was over the property matter or the scuffle in the past is the only reason for both, PW.1 and PW.2 to depose in the manner in which they have deposed against their own mother i.e. A.2. We agree that unless the minor victim girl PW.1 were to have actually suffered indignities to depose to by her in graphic terms, she would never have made such allegations against her own mother-A.2 and further deposed to such allegations before the Children's Court. The same applies to the deposition of PW.2 who, again, a minor boy of hardly 11 years when he saw his sister suffering such indignities.

48. The case of A.1 that he was impotent or incapable of performing sexual intercourse, deserves no acceptance. In the first place, the medical case papers produced by A.1 in the course of his defence evidence, were only xerox copies and appear on the record with the remark "subject to production of originals and subject to proof". A.1 has failed to produce the originals or prove such documents. However, even if such documents which themselves bear no date, are to be considered, the same are to be assessed on the basis of the statements made by A.1 in the course of his defence evidence that the said documents pertain to his medical examination conducted after filing of the present case. A.1 has stated that he does not remember the date of the medical examination. These documents, therefore, are of no assistance to A.1 in establishing that between July, 2010 and 26.1.2011, A.1 was either impotent or incapable of performing sexual intercourse. The Children's Court has considered these aspects in the proper perspective and the criticism levelled on behalf of A.1 is quite

unjustified.

49. In the present case, however, we have to accept Mr. Gaonkar's contention that A.2 could not have been convicted under Section 8(2) of the Children's Act and sentenced to rigorous life imprisonment and fine of Rs.2,00,000/- and in default, to undergo simple imprisonment for 5 years.

50. Section 8(1), 8(1A) and 8(2) of the Children's Act, reads as follows:

"8. Child Abuse [and trafficking]. - (1) All children should be assured of a safe environment. A safe environment is an environment in which he/she will not be abused in any way and his/her development will be nurtured.

[(1A) Child Trafficking shall be an offence punishable under this Act. Any person who commits or aids or abets in the child trafficking shall be punishable with imprisonment for a term which may extend to seven years and a fine which may extend to Rs.1,00,000/-;]

(2) Whosoever commits any [child abuse or sexual assault] as defined under this Act, shall be punished with imprisonment of either description for a term that may extend to three years and shall also be liable to fine of Rs. 1,00,000/-. Whoever commits any Grave Sexual Assault shall be punished with imprisonment of either description for a term that shall not be less than [ten years] but which may extend to [life imprisonment] and shall also be liable to a fine of Rs. 2,00,000. Whoever commits incest shall be punished with imprisonment of either description for a term that shall not be less than ten years but which may extend to life imprisonment and also a fine which may extend to Rs.2,00,000/- [Statement of the child victim shall be treated on par with the statement of a child rape victim] under Section 375 of the IPC, as laid down by the Supreme Court of India."

[emphasis supplied]

51. From the analysis of the provisions in Section 8 of the Children's Act, it is clear that Section 8 (1A) of the Children's Act, which deals with offence of "Child Trafficking" makes it clear that any person who commits "or aids or abets" in the child trafficking shall be punishable with imprisonment for a term which may extend to seven years and a fine which may extend to Rs.1,00,000/-. However, crucial words "aids or abets" which are to be found in Section 8(1A) of the Children's Act are conspicuous by their absence in Section 8(2) of the Children's Act.

52. From the perusal of the impugned Judgment and Order, it is clear that the Children's Court has convicted A.2 under later part of Section 8(2) of the Children's Act. This later part under which A.2 has been convicted, reads as follows :

"Whoever commits any Grave Sexual Assault shall be punished with imprisonment of either description for a term that shall not be less than [ten

years] but which may extend to [life imprisonment] and shall also be liable to a fine of Rs. 2,00,000."

53. Aforesaid means that whoever commits any grave sexual assault shall be punished with imprisonment of either description for a term that shall not be less than ten years, but which may extend to life imprisonment and shall also be liable to a fine of Rs. 2,00,000/-. This later part of Section 8(2) of the Children's Act does not speak of whoever aids or abets any person in committing a grave sexual assault, can be so punished. From the charge levelled against A.2 and, in any case, from the evidence on record no case is made out of A.2 herself committing any grave sexual assault on the minor victim girl. Rather, the charge, as well as the evidence on record is to the effect that A.2 aided and abetted A.1 in inflicting the grave sexual assault upon the minor victim girl. Therefore, having regard to the peculiar wordings of Section 8(2) of the Children's Act, we are satisfied that the conviction and the consequent sentence imposed upon A.2 under Section 8(2) of the Children's Act is required to be quashed and set aside qua A.2. Accordingly, we quash and set aside the conviction and consequent sentence imposed upon A.2 under Section 8(2) of the Children's Act.

54. A.2 in the present case has been convicted under Section 109 of the IPC for having abetted A.1 in commission of the offences under Sections 354 and 376 of the IPC. There is overwhelming evidence on record to sustain these charges against A.2. Section 109 of the IPC provides that whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence. The explanation to this section provides that an act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

55. Having regard to the evidence on record and the provisions of Section 109 of the IPC, we are satisfied that the Children's Court was justified in convicting A.2 under Section 109 of the IPC.

56. Section 376 of the IPC provides that whoever, except in the cases provided for by sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine. This means that in the present case, A.2 on account of her conviction under Section 109 of the IPC can be punished with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

57. In the case of Bhondu @ Santlal Ramdhar Yadav (supra), the Appellant was charged for commission of offence punishable under Section 377 of the IPC, for having committed carnal intercourse upon a small child, hardly 14 months old. The Division Bench of this Court, upon noting that reformation is also one of the

aspects of judicial sentencing, reduced the punishment of life imprisonment to that of 10 years' of rigorous imprisonment.

58. In matters of sentencing, the Courts invariably have to undertake a balancing exercise. One of the objects is to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. Any liberal attitude or taking too sympathetic view might be counter productive and amount to ignoring the effect of social order or social impact of the crime. At the same time, the Courts cannot discount reformatory object of judicial sentencing. The reformatory theory posits that every person is born good, but it is the circumstances that make the person a criminal. Therefore, the Courts have to pay due regard to proclivity to reformation as by now, it is mostly accepted that reformation is the legitimate goal of prison sentencing.

59. In so far as A.2 is concerned, she has suffered imprisonment for almost 9 years by now. A.2 was a widow. At the time of commission of the offence, her husband had died almost 10 years earlier. This Court, obviously, cannot, in any manner approve of the conduct of A.2 in virtually coercing her own minor daughter to suffer indignities and sexual assaults at the hands of A.1. However, the circumstances in which she was placed, call for some reduction in the sentence. Her proclivity to reformation cannot be completely ignored. The acts of A.2 have to be judged in the circumstances in which they were committed. Upon cumulative consideration of all such factors as are borne out from the material on record, we feel that the sentence of life imprisonment imposed upon A.2 is required to be substituted by a sentence of 12 years' of rigorous imprisonment for the offence under Section 109 of the IPC. According to us, the sentence of 12 years rigorous imprisonment, with fine of Rs.25,000/-, would meet the ends of justice in the facts and circumstances of the present case. In so far as A.2 is concerned, the in default sentence of one year awarded to A.2 is also required to be reduced from one year to six months.

60. In so far as A.1 is concerned, we are satisfied that there are no mitigating circumstances of whatsoever nature involved, so as to modify the sentence imposed upon him. According to us, the sentence imposed upon A.1 is quite proportionate and the same warrants no modification.

61. We, therefore, dispose of these Appeals by making the following Order:

(A) Criminal Appeal No.57/2015 instituted by A.1 -Vinesh Fal Dessai is, hereby, dismissed;

(B) Criminal Appeal No.4/2016 instituted by A.2 -Manisha Naik Dessai is partly allowed in the following terms:

(i) The conviction of A.2 under Section 8(2) of the Children's Act and the consequent sentence under the said section is, hereby quashed and set aside;

(ii) In respect of the offence under Section 109 of the IPC, the punishment of rigorous life imprisonment is, hereby set aside and the same is substituted with

punishment of rigorous imprisonment for a term of 12 years;

(iii) the fine amount of Rs.25,000/- is maintained. However, the in default sentence of one year is set aside and substituted with sentence of six months;

(iv) Except for the aforesaid modification, the remaining part of the impugned Judgment and Order, in so far as A.2 is concerned, is maintained.

62. We appreciate the assistance rendered to us in these matters by Mr. Ryan Menezes and Mr. Anoop Gaonkar, learned Counsel for the two Appellants. We also appreciate a fair approach of Mr. Rivankar, learned Public Prosecutor in these Appeals.