

nsc.

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.565 OF 2010

Gulabchand Lalman Yadav

Age - 26 years,

Indian Inhabitant,

R/o.Watchman's Room, Walkanji,

Basi School, Near Juhu Garden,

Juhu, Santacruz (West),

Mumbai.

(Appellant is at present in Nasik Road

Central Prison.)

...Appellant/Accused

Versus

1. The State of Maharashtra
(At the instance of Santacruz Police Station,
vide C.R.No.19 of 2009).

2. Pranali Bhaud,
R/at. Gardar Bhand,
Lovely Mutton Shop Lane,
Santacruz (W),
Mumbai – 400 054.

...Respondents

Ms.Simantini Mohite, as *Amicus Curiae*.

Mr.S.V.Gavand, A.P.P. for the Respondent - State.

CORAM : REVATI MOHITE DERE, J.

RESERVED ON: 11th APRIL, 2019

PRONOUNCED ON: 3rd MAY, 2019

JUDGMENT:

1. The Appellant vide Judgment and Order dated 30th June, 2010, passed by learned Additional Sessions Judge, Greater Bombay, in Sessions Case No.319 of 2009, has been convicted and sentenced as under:-

- for the offence punishable under Section 376(2)(f) of the Indian Penal Code to suffer rigorous imprisonment for 5 years and to pay fine of Rs.3,000/- in default, to suffer simple imprisonment for 1 month.

The amount of fine, if paid, was directed to be given to the victim girl towards compensation.

2. At the outset, it may be noted that Ms.Sarojini Upadhyay was appointed as a legal aid counsel, as per order dated 22nd June, 2016. However, as Ms.Upadhyay has expired, Ms.Simantini Mohite, was appointed as an *Amicus Curiae* to espouse the cause of the Appellant in the said matter, vide order dated 5th April, 2019.

3. The prosecution case in brief is as follows:-

According to the prosecution, the victim girl, (PW3), aged 5 years was studying in Junior K.G. in a School at Santacruz, Mumbai. The

timings for her school were from 9.00 a.m. to 12.30 p.m. The incident is alleged to have taken place on 15th January, 2009 between 12.00 to 12.30 p.m., when PW3 had gone to school. According to PW3, the appellant, who was working as a watchman at the gate of the school, held her hand, took her to some office, made her sit on the table and thereafter poured 'water' from his private part on her private part. At about 12.30 p.m., PW1 (father of the victim) picked up PW3 from the school and dropped her home and went back to work. After about an hour, PW1 (father of the victim) received a call on his mobile from PW2, his wife, who asked him to immediately return home. When PW1 returned home, his wife (PW2) narrated the incident as disclosed to her, by PW3. As PW3 had disclosed that white fluid had fallen on her private part and nicker, PW1 and PW2 inspected the same and found that there were white spots on her nicker. Thereafter, PW1 and PW2 along with PW3 went to the school, where PW3 pointed towards the appellant (watchman) and disclosed that he was the same person. The appellant was taken inside the school to meet the officials. The lady who was present in the office called up one Dr.Vora, a trustee of the school and asked PW1 to speak to him. Dr.Vora is stated to have told PW1 to come to the office on the next day at 11.00 a.m. and not

to make a scene in the school. Accordingly, PW1 and PW2 went to the school on the next day and had a discussion with Dr.Vora. According to PW1, Dr.Vora promised to take suitable action against the appellant (watchman), pursuant to which, they returned home. On 19th January, 2009, PW1 again went and met the school officials and told them that they should give him in writing that they would not trouble his daughter. The officials stated that they would not give anything in writing. PW1 and PW2 thereafter took PW3 to Cooper Hospital for medical check-up and thereafter to Oshiwara Maternity Hospital, where she was admitted. The medical officer himself informed the Santacruz Police Station, pursuant to which, the officials of Santacruz Police Station recorded the complaint of PW1. Pursuant thereto, investigation commenced, statements were recorded, appellant was arrested, clothes were seized and sent to the Chemical Analyser etc. and after investigation, charge-sheet was filed as against the appellant in the Court of learned Judicial Magistrate First Class, Bandra, Mumbai. Since the offence punishable was sessions triable, the case was committed to the Court of Sessions for trial.

The learned Additional Sessions Judge, framed charge as against the appellant for the offence punishable under Section 376 (1) (2)

(f) of the Indian Penal Code, to which the appellant pleaded not guilty and claimed to be tried.

The prosecution in support of his case examined 7 witnesses. PW1 – victim's father (complainant); PW2 – victim's mother; PW3 – victim girl; PW4 – Dr.Ambrine Shaikh, the doctor who examined the victim and issued injury certificate (Exhibit – 21) and produced the admission papers (Exhibit – 22); PW5 – Sandeep Shinde, Police Inspector. attached to Santacruz Police Station, who recorded the FIR; PW6 – Vilas More, Assistant Police Inspector, attached to Santacruz Police Station (Investigating Officer) and PW7 – teacher of the victim girl.

The defence of the appellant was that of total denial and false implication. According to the appellant, the girl (PW3) was always brought late by her parents to school and when he refused her entry, they would quarrel with him; that the parents of the girl would always create a scene and that after one such incident they filed a false complaint against him.

The learned Additional Sessions Judge, after considering the evidence on record, vide Judgment and Order dated 30th June, 2010, convicted and sentenced the appellant, as mentioned in paragraph 1 of this Judgment.

4. Learned Counsel for the appellant submitted that the appellant has been falsely implicated in the said case. She submitted that the reason for falsely implicating the appellant was, that he used to refuse entry to the complainant's daughter i.e. victim girl after the school commenced, requiring PW3 to return home. She submitted that the fact, that quarrel used to take place between the appellant and PW3's parents, at the gate has been deposed to, by PW7 – teacher of PW3. She submitted that even the medical evidence on record does not support the prosecution case. According to the learned counsel, it is highly impossible that an incident such as this would take place when the school was functioning. She submitted that the evidence on record shows that there was lady staff to look after the small children. She further submitted that neither the spot panchanama nor the C.A. Report, point to the complicity of the appellant.

5. Learned APP supported the impugned Judgment and Order of conviction and sentence and submitted that no interference was warranted in the same.

6. Heard learned counsel for the parties and perused the papers with the assistance of the learned counsel.

7. According to the complainant (PW1) his daughter (PW3-victim girl) was taking education in a School at Mumbai and that the school timings were 9.00 a.m. to 12'noon. He has stated that on 15th January, 2009, his wife (PW2) escorted their daughter (victim girl) to the school and that he went for his work. He has stated that at about 12.30 p.m., he went to the school to bring back his daughter home and after dropping her home went back to work. He has stated that after about an hour, his wife (PW2) called on his mobile, and asked him to return home immediately; that when he enquired the reason, his wife only asked him to come home immediately and did not disclose the reason. According to PW1 (complainant) on his return home, his wife (PW2) narrated the incident; that their daughter (victim girl) had told her that as her nicker was wet, she wanted to change the same; that when she changed her daughter's nicker, she found some liquid over it; that on repeated enquiries with the daughter, the daughter started weeping and disclosed to his wife that she was playing in the school and as she was thirsty, she went to drink water, when the appellant

held her hand, whisked her in a room, took her to a corner, and moved his hand over her cheek; that the appellant told his daughter that he would give water to her; that the appellant unzipped his pant and put his private part in her private part; and that some white fluid fell upon on her private part. He has stated that when he inspected his daughter's nicker, he found that it had a white stain, pursuant to which, he, his wife and his daughter went to the school. He has stated that at the gate of the school, his daughter pointed out towards the watchman (appellant) and disclosed that he was the same person who had done the activities as narrated by her earlier; that he took the said watchman (appellant) inside the school to meet the officials; that he questioned the lady staff member who was present there, who called one of the Trustees i.e. Dr.Vora and asked him (complainant) to speak to Dr.Vora; that Dr.Vora told him to come to the office on the next day at 11.00 a.m and not to make a scene in the school; that on the next date he and his wife again went to the school, where they had a discussion with Dr.Vora for a considerable time; that Dr.Vora promised them that he would take suitable action against the watchman (appellant); that in view of what was stated by Dr.Vora, they returned home and decided to wait; that on 19th January, 2009, they again went to the school and asked the officials to give

him in writing that his daughter will not be troubled; that the school refused to give anything in writing; that thereafter they took their daughter to Cooper Hospital for medical check-up; that the Medical Officer of the Cooper Hospital referred them to go to Oshiwara Maternity Hospital; that the Medical Officer at the Oshiwara Maternity Hospital admitted their daughter in the Hospital and informed the Santacruz Police Station, pursuant to which, the officials of the Santacruz Police Station recorded the complaint i.e. Exhibit – 10 of PW1 (complainant). The complainant (PW1) has identified the appellant, as being the person as pointed out by his daughter (victim girl).

8. In his cross-examination, PW1 (complainant) has admitted that there were lady attendants in the school and that there is discipline maintained by the school. He has stated that at times he had escorted his daughter to the school and that some times the appellant would be present at the gate. The tenor of the cross-examination was to show that there was a fight between the complainant i.e. PW1's wife and the appellant on 10th January, 2009, as PW3 was brought late to school and that she was not permitted to enter the school. Several suggestions were made to the said

witness i.e. on 10th January, 2009, the appellant had told his wife (PW2) that he would not permit PW3 to enter the school, as she was brought late to the school, in view of the instructions of the teacher, pursuant to which, there was a quarrel between the appellant and his wife; that again on 15th January, 2009, his wife had a quarrel with the appellant, though she had taken PW3 late to the school; that on 15th January, 2009, he and his wife had gone to the school to raise a quarrel regarding the behavior of the appellant in not permitting their daughter to enter the school; that he had talked to Dr.Vora on phone and that Dr.Vora had asked him to come to the school on the next date and not to make a scene in the school. All the said suggestions were denied by the said witness. The said witness has admitted that when the school officials refused to give a declaration in writing on 19th January, 2009, he and his wife became angry. He has also admitted that they had not made any written complaint to the school authorities. Certain omissions were brought on record i.e. non-disclosure to the police that he found white spots on the nicker of his daughter; that Dr.Vora had told him that he would take suitable action against the watchman (appellant) and that they should wait for a few days. Although, it is sought to be suggested to the said witness that as the school authorities refused to give anything in

writing, he filed a false complaint against the appellant and that before taking his daughter to the hospital, he himself caused injury to his daughter's private part by inserting his finger, the said suggestions have been denied by him.

9. The evidence of PW2, mother of the victim girl is on similar lines with respect to the incident of 15th January, 2009. PW2 has stated that she had escorted her daughter to the school; that at about 12.45 p.m. her husband brought the daughter from school; that her daughter told her that her under wear had become wet and therefore it should be changed; that when she inspected the under wear she found the same to be wet; that on enquiry with her daughter, her daughter told her that while she was playing as she was feeling thirsty, she went to drink water, when the appellant held her hand and told her that he would give her water; that the appellant took her to the office, made her sit on the table; that the appellant unzipped his pant and thereafter put his private part into hers and released 'water'; that she called her husband and asked him to return home and thereafter narrated the incident; that they went to the school along with their daughter, when their daughter pointed out to the appellant; that they informed the

employee of the school, who asked them to speak to Dr.Vora; that her husband spoke to Dr.Vora on phone who asked him to come to the school on the next day; that on the next day, Dr.Vora asked them to wait for two days; that on 19th January, 2009, they went to school; that they asked the Principal of the School to give an undertaking in writing, with respect to PW3, which was refused by the Principal; that thereafter they took their daughter to Cooper Hospital and from there to Oshiwara Maternity Hospital; and that the doctors of Oshiwara Maternity Hospital informed the Santacruz Police Station, pursuant to which, the Police recorded the complaint of her husband (PW1).

10. Certain omissions were brought in the cross-examination of the said witness with regard to the disclosure by the victim girl to her that her nicker was wet and that she changed the same; that her husband had brought their daughter from school on 15th January, 2009; that Dr.Vora had told them that within two days action would be taken and that there was a talk with the Principal of the School regarding a written undertaking. The tenor of the cross examination is to show that the said witness i.e. PW2 would have regular quarrel with the appellant at the gate of the school as

PW3 was not allowed to enter the school, as she was brought late. Much emphasis was laid on the admission that the complaint was not filed with the police, as Dr.Vora had promised action.

11. Coming to the evidence of the victim girl (PW3), aged 5 years, the said witness has stated that the appellant had caught her hand, taken her in the office, made her sit on the table, had pulled her underwear and thereafter poured water on her private part from his private part. PW3, the victim girl has identified the appellant as being the person who had done the act. The said witness in her cross-examination has admitted that the appellant had got upset/angry with her mother, when she was brought late to the school.

12. A careful analysis of the evidence of all the aforesaid witnesses shows that they all corroborate each other. The evidence of the victim girl aged 5 years is brief and pointed and clearly points to the complicity of the appellant. The testimony of the victim girl inspires confidence and is duly corroborated by her parents. It is well settled that an FIR is not an encyclopedia and therefore a few omissions would not render the FIR

suspect. In the facts, all the material facts with respect to the incident have been stated by the complainant (PW1), which facts, have been duly corroborated by PW2 and PW3, as well as by the medical evidence. Any quarrel between parties, is a double edged weapon, for either the complainant to falsely implicate or for an accused to take revenge and hence it is necessary to scrutinize the evidence in detail.

13. Learned *Amicus Curiae* has laid much emphasis on the fact, that there was a quarrel between the appellant and PW2, the mother of the victim girl and hence the appellant was falsely implicated. In support of the said submission, she submits that in a case like this, the question of seeking an undertaking would not arise unless the school was refusing entry to PW3, when she came late to school. She also questioned the delay. Although, the said submissions at the first blush appear to be attractive, however, one cannot forget the fact, that the victim girl and her parents came from the lower strata of the society, being unaware of the niceties of law; the fact that the trustee of the school had promised to take action against the appellant, and that they were pursuing the school to take action against the appellant. It is also pertinent to note that the reaction of the

parents on learning of the incident was prompt i.e. they immediately approached the school authorities. Thus, in the facts, delay in lodging the complaint as against the appellant, cannot be said to be fatal.

14. The evidence of sexual assault is consistent with the medical evidence i.e. of PW4 – Dr.Ambrine Shaikh. PW4 – Dr. Shaikh has stated that on 19th January, 2009, the mother of the victim girl had brought her daughter to his ward and that they were accompanied by a Police Constable. He has stated that the history was given by the mother (PW2) of the victim girl (PW3), that on 15th January, 2009, she found that the under garment of her child was wet and upon examination found white drops on her panty; that on enquiry the victim girl stated that she had gone to drink water, when one watchman took her to a room, made her sit on a table and pressed his genital on hers and sprayed her with secretions. PW4 – Dr. Shaikh has further stated that the mother of the victim girl told him that she had taken her daughter to a private practitioner on 15th January, 2009 and that the said doctor referred her to Cooper Hospital. He has stated that the child was complaining of pain during maturation and pain in lower abdomen. The child was also complaining of pain on defecation part. He

has stated that on examination, he found that soreness was present over Labia majora and Minora on the lower one third; that it was a diffused soreness ad-measuring 2cm X 2cm and that it was on the posterior region on the one third of Labia majora and Labia minora. He has stated that on the basis of the said examination, he issued the Injury Certificate (Exhibit – 21). He has stated that the injury noted on the child were possible by pressing of the penis at the place of injury.

15. In his cross examination, he has admitted that he was unable to give the age of the injury. He, has however denied that the injury was possible due to venerable infection. Thus, the medical evidence corroborates the evidence of the victim girl and the disclosure made by her to her parents. The question of any other injury in the facts cannot be expected, considering the evidence that has come on record with respect to the sexual assault by the appellant on PW3.

16. As far as the evidence of PW7 – the teacher of the victim girl is concerned, her evidence is not of much significance, having regard to the evidence that has come on record i.e. of PW1 to PW4. It is pertinent to

note, that no suggestion has been made to either PW1, PW2 or PW3 in their cross-examination, that PW2 had threatened the appellant on 15th January, 2009 of lodging a false rape case against him and therefore the admission of PW7 in her cross, that PW2 had threatened the appellant of lodging a false rape case is not of much significance. The evidence of PW1, PW2 and PW3 as well as the medical evidence, clearly shows the complicity of the appellant.

17. Considering the aforesaid, no interference is warranted in the impugned Judgment and Order of conviction and sentence.

18. The Appeal is accordingly dismissed.

19. I would like to record a word of appreciation for the able assistance provided and the efforts taken by Ms.Simantini Mohite, as an *Amicus Curiae*, in conducting the appeal. High Court Legal Services Committee to award fees of the learned *Amicus Curiae*, as per Rules.

REVATI MOHITE DERE, J.