

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.1 OF 2011

Gabriel Barnabas Gorelal	..	Applicant
v/s.		
State of Maharashtra	..	Respondents

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Mr. Mohit R. Salvi, for the Applicant.

Ms. Anamika Malhotra, APP, for State.

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CORAM: R.G. AVACHAT, J.

DATE : 22 FEBRUARY 2023.

P.C:-

Rule is already issued in the matter on 25 March 2011.
Heard finally by consent of the parties.

2. The challenge in this revision application is to the order dated 3 January 2019, passed by the Court of Judicial Magistrate, First Class, (J.M.F.C.) in Summary Case No.1896 of 2004. Vide impugned order, the Applicant herein has been convicted for offence punishable under Section 354 of the Indian Penal Code and, therefore, sentenced to suffer rigorous imprisonment for one year and pay fine of Rs.2,000/- with default stipulation. The Applicant has been unsuccessful in his appeal against conviction. Hence, the present

application. The facts giving rise to the present application is as follows:

3. The FIR (Exhibit 12) is lodged by P.W.2 Rajiv on 29 July 2004. It is his case that, his daughter "X" (name not disclosed), was little over eight years of age. During relevant time, she was student of 4th standard. On 26 July, she came home after the school hours were over. She informed him (P.W.2 Rajiv) that she, along with her friend "Y", were sitting on the school platform, after the school was over. It was little past 2.30 p.m. One person (Applicant) came to them. He claimed to be a doctor. He took both of them to nearby bathroom. He told them that he would medically check both of them. He, therefore, pulled up frock of "X". Brought down her nicker. He also brought down his trouser and underwear. He asked "X" to take his private part in her hand. He too touched her private part. When he lifted "X"'s frock, "Y" fled therefrom.

4. It is also the case of the prosecution that P.W.2 did not lodge the report of the incident immediately, since he wanted to first find out the culprit. He had, however, informed the headmistress of the school (P.W.7- Sangeeta). It is also the case of the prosecution that while taking search of the culprit, the Applicant was seen nearby the school campus, "X" pointed him out. P.W.2 (the Informant) then lodged the FIR (Exhibit 12). As usual, on investigation of the crime,

the charge-sheet was laid. The Applicant pleaded not guilty. To bring home the charge, the prosecution examined seven witnesses. The Applicant too examined two witnesses in his defence. It was his case that he was somewhere else, specifically at Hotel Natraj. As such, his defence of alibi. It is also his defence that his mother was headmistress of another school. Relations between his mother and the headmistress of the school, in which "X" was studying, were not good. At the instance of the said headmistress, the false FIR has been lodged.

5. As stated above, the trial court, relying on the prosecution evidence, held the charge to have been proved. The appellate court affirmed the conviction and consequential sentence.

6. Learned Advocate for the Applicant would submit that there was three days delay in registration of the FIR. Delay has not been explained. Statement of victim "X" was recorded 40 (forty) days after the alleged incident. In her statement, she named the Applicant. The same indicates the victim to have been tutored. The victim was a child witness. Her evidence was recorded three years after the alleged incident. On arrest of the Applicant, he was not subjected to test identification parade. The Applicant's identification in the dock for the first time is, therefore, of little consequence. The friend of the victim "X", who was with her at the relevant time, although supported the prosecution case to some extent, the Investigating Officer had not

recorded her statement. Her evidence before the court, therefore, loses its efficacy. According to learned Advocate, the impugned order of conviction and consequential sentence is, as such, perverse and, therefore, liable to be set aside.

Learned APP, on the other hand, submits that both the courts below have recorded finding of fact. In exercise of revisional jurisdiction, this Court cannot interfere therewith. According to her, identification of culprit/the Applicant before the Court, is substantive evidence. Cross-examination of the victim and other witnesses would indicate that the Applicant failed to make out his defence of false implication. The headmistress of the school did not support his case. The Applicant's case of alibi fell flat. Such a defence was raised for the first time during trial of the case. According to learned APP, such incident remains imprinted on the mind of a victim. The victim gave details thereof in her oral evidence. There is no reason to disbelieve her evidence, which was corroborated by the evidence of her friend "Y". Learned APP, therefore, urge for dismissal of the revision application.

7. Considered the submissions advanced. The Court is conscious of the scope of revisional jurisdiction. In the case in hand, the incident took place on 26 July 2004. The victim "X" reported the incident to her father (P.W.2) same day. He still lodged the FIR three

days thereafter, i.e. on 29 July 2004. It is his explanation that he first decided to identify the culprit. The First Information Report (Exhibit 12) indicates that the victim had told the name of the Applicant (Gabriel) to her father (P.W.2) same day. He, therefore, ought to have lodged the FIR immediately. According to the father of the victim, he lodged the FIR after the victim pointed him the culprit. Upon arrest of the Applicant, he was not put to test identification parade. The victim was little over eight years of age, at the relevant time. She identified the Applicant after three years of the incident, that too, for the first time in Court. The police statement of the victim was recorded 40 (forty) days after the incident. So far as regards evidence of the victim's friend, an eye witness, is concerned, the Investigating Officer has not at all recorded her statement. Whatever she has deposed to before the court after four years of the incident, had no base for the reason of there being no police statement. Needless to mention the prosecution has to prove the guilt of the accused beyond reasonable doubt, even though, accused fails to make out his defence of alibi or offers false/no reason for his false implication.

8. The following facts lead this Court to hold the impugned order of conviction and consequential sentence to be not correct and proper. This Court even finds it to be perverse. The reasons, therefore, are as follows:

- (i) Three days delay in lodging of the FIR.
- (ii) Failure to hold test identification parade upon arrest of the Applicant.
- (iii) Recording of statement of the victim 40 (forty) days after the incident.
- (iv) Non-recording of statement of the friend of the victim (P.W.7), an eye witness to the incident.

9. The revision application is, therefore, allowed. The impugned order of conviction and consequential sentence of the Applicant for offence punishable under Section 354 of Indian Penal Code is hereby set aside. The Applicant stands acquitted of the offence. His bail bond to stand cancelled. Fine amount, if deposited be paid back to the Applicant.

(R.G. AVACHAT, J.)