

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.359 OF 2014

Mohamed Farid Jafer Shaikh ...appellant
Versus

The State of Maharashtra ...Respondent

Ms Nasreen S.K. Ayubi, Advocate appointed for the appellant.
Mrs. A.S. Pai, A.P.P. for the Respondent -State.

**CORAM: SMT. V.K. TAHILRAMANI &
SMT. ANUJA PRABHUDESSAI, JJ**

DATED: 29th March, 2016

ORAL JUDGMENT [PER SMT. V.K. TAHILRAMANI, J]:-

The appellant original accused No.1 has preferred this appeal against the judgment and order dated 3rd August, 2013 passed by the learned Sessions Judge, Greater Bombay in Sessions Case No.699 of 2011. By the said judgment and order the learned Sessions Judge convicted the appellant under section 376(2) (f), 342, 363 r/w. 34 and 452 r/w. 34 of the IPC. For the offence under section 376 (2) (f) the appellant was sentenced to suffer rigorous imprisonment for life and fine of Rs.10000/- i/d rigorous imprisonment for one year. For offence under section 342 of the IPC the appellant was sentenced to suffer rigorous imprisonment for one year and fine of Rs.1000/- i/d rigorous imprisonment for

three months. For offence under section 363 r/w. 34 of the IPC the appellant was sentenced to suffer rigorous imprisonment for three years and fine of Rs.3000/- i/d. rigorous imprisonment for five months. For the offence under section 452 r/w. 34 of the IPC the appellant was sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.2000/- i/d. rigorous imprisonment for two months. The learned Sessions Judge directed that all the substantive sentences shall run concurrently. The learned Sessions Judge further directed that out of the fine amount Rs.15,000/-, if recovered be paid to the survivor child under section 357(3) of the Cr.P.C.

2. The prosecution case briefly stated is as under:-

The first informant- PW 1 Alimabi was residing in Mahim alongwith her two sons Tahir and Imran and three daughters viz. Najma-(PW2), Mahijabin, victim girl and wife of Tahir. Her elder daughter PW2- Najma was married to Arif. Najma alongwith her husband was residing with Alimabi. Age of the victim girl was 11 years at the time of the incident. On 20.4.2011 at about 1.00 a.m. Alimabi and others heard the noise of quarrel coming from outside hence, she came out of the house. She saw quarrel going on between her son-in-law Arif and the appellant Mohamed Farid Jafar. Alimabi's son Tarif tried to resolve the quarrel. At that time the appellant was having 'Dhupatne' (wooden log used for

washing clothes) in his hand. Scuffle took place between Tahir and the appellant. At that time both Arif and Tahir received injuries. Tahir took Arif for treatment. The appellant also left the place. Due to the incident Alimabi got frightened, hence, she left her minor son Imran, daughter Mahijabin and daughter in law Noorjahan at the house of her sister Tarimunnisa. Thereafter only Alimabi alongwith daughter PW2 Najma and the victim girl were present in the house. Thereafter at about 4.30 a.m. the appellant came to the house of Alimabi. He forcefully knocked on the door of Alimabi, hence, Alimabi opened the door. She saw the appellant Mohamed Farid Jafer Shaikh standing in her door way alongwith a sickle in his hand. The original accused No.2 Anna was with the appellant. The appellant entered into the house of Alimabi and enquired where her son Tahir was. Alimabi told the appellant that Tahir had gone to the hospital. Then the appellant caught the hair of the victim girl, who was sleeping in the house. The appellant dragged the victim girl and took her with him. The appellant threatened Alimabi that if she chases him he would kill her with sickle. Meanwhile neighbours also gathered at the spot on hearing the hue and cry. As the appellant was a vagabond person the neighbours did not intervene due to fear. Moreover the appellant had created fear in the minds of neighbours by showing them the sickle and saying that he would kill them if they tried to interfere.

The appellant then took away the victim girl with him in one lane of the Zopadpatti. Thereafter Alimabai with her daughter Najma and her sister Tarimunnisa tried to search for the victim girl. The house of Tarimunnisa was situated near the house of Alimabi. Alimabi then alongwith her sister went to the police station and lodged FIR. The said FIR is at Exh.14. While Alimabi was in the police station, the police caught Anna, i.e. original accused No.2 and brought him to the police station. The police enquired with Anna the whereabouts of the appellant. Said Anna gave the whereabouts of the appellant. Then police alongwith Alimabi went to Naya Nagar, New Basti in a lane near Chamunda Medical shop. The police went to the mezzanine floor of the construction. The mezzanine floor did not have a roof. There they saw the victim girl. She was frightened. The appellant was sleeping on the said mezzanine floor. A sickle was near his head. The Police then brought the victim girl and the appellant to the police station. In the police station the victim girl told her mother Alimabi that the appellant had committed rape on her. The victim girl was then sent to Nagpada police hospital. The appellant was also sent to Nagpada police hospital. PW-8 Dr. Bansod examined the victim girl. On examination Dr. Bansod noticed that the breasts were not developed. Axillary hair and pubic hair was absent. On local examination (private parts) Dr. Bansod found bruises over both

labia minora of size 0.5 cm x 0.2 cm at middle portion, reddish in colour, tender, age of injuries-within 24 hours. Dr. Bansod noticed that Hymen was torn and it was bleeding on touch. The injury was tender, red in colour. Age of tear was within 24 hours. Hymenal orifice admitted tip of little finger. Ossification test of the victim was done. Age of the victim as per the ossification test was 11-12 years. According to Dr. Bansod findings are suggestive of recent forceful sexual assault. Thereafter the supplementary statement of PW1-Alimabi was recorded. An offence under section 376(2) (f) was added to the earlier sections, which were 366, 342, 452 and 506 (II) of the IPC. After completion of investigation charge sheet came to be filed. In due course, the case was committed to the Court of Sessions.

3. Charge came to be framed against the appellant, original accused No.1 and original accused No.2- Mahamed Ismail Kally Shaikh @ Anna. The charge was framed against both the accused under sections 363 and 452 of the IPC in addition against the appellant charge was framed under section 376 (2) (f) and 342 of the IPC. Both the accused pleaded not guilty to the charge and claimed to be tried. The defence is that of total denial and false implication. After going through the evidence adduced in this case, the learned Sessions Judge convicted and sentenced the appellant as stated in para 1 above, hence, this appeal.

4. We have heard the learned counsel for the appellant and the learned APP for the Respondent -State. We have carefully considered their submissions, the judgment and order passed by the learned Sessions Judge and the evidence in this case. After carefully considering the matter for the below mentioned reasons, we are of the opinion that the prosecution has fully proved its case against the appellant.

5. In order to support the conviction the prosecution has mainly relied on the evidence of PW1-Alimabi, PW-2 Najma , PW-3 Shabnam and PW 6, who is the victim girl. PW 1, Alimabi was the mother of the victim girl, PW2 Najma was the sister of the victim girl. PW3 Shabnam was the neighbour of Alimabi. The first informant- PW 1 Alimabi has stated that she was residing in Mahim alongwith her two sons Tahir and Imran and three daughters viz. Najma-(PW2), Mahijabin, victim girl and wife of Tahir. Her elder daughter PW2- Najma was married to Arif. Najma alongwith her husband was residing with Alimabi. Age of the victim girl was 11 years at the time of the incident. According to Alimabi on 20.4.2011 at about 1.00 a.m. Alimabi and others heard the noise of quarrel coming from outside hence, she came out of the house. She saw that quarrel was going on between her son-in-law and the appellant Mohamed Farid Jafer Shaikh. Alimabi's son Tarif tried to

resolve the quarrel. At that time the Applicant was having 'Dhupatne' (wooden log used for washing clothes) in his hand. Scuffle took place between Tahir and the appellant. At that time both appellant and Arif received injuries. Tahir took Arif for treatment. The appellant also left the place. Due to the incident Alimabi got frightened, hence, she left her minor son Imran, daughter Mahijabin and daughter in law Noorjahan at the house of her sister Tarimunnisa. Thereafter only Alimabi alongwith daughter PW2 Najma and the victim girl were present in the house. At about 4.30 a.m. the appellant came to the house of Alimabi. He forcefully knocked on the door of Alimabi, hence, Alimabi opened the door. She saw the appellant standing in her door way alongwith a sickle in his hand. The original accused No.2 Anna was with the appellant. The appellant entered into the house of Alimabi and enquired where her son Tahir was. Alimabi told the Appellant that Tahir had gone to the hospital. Then the appellant caught the hair of the victim girl, who was sleeping in the house. The appellant dragged the victim girl and took her with him. The appellant threatened Alimabi that if she chased him he would kill her with sickle. Meanwhile neighbours also gathered at the spot on hearing the hue and cry. As the appellant was a vagabond person the neighbours did not intervene due to fear. Moreover the appellant had created fear in the minds of

neighbours by showing them the sickle and saying that he would kill them if they tried to interfere. The appellant then took away the victim girl with him in one lane of the Zopadpatti. Thereafter Alimbai with her daughter Najma and her sister Tarimunnisa tried to search for the victim girl. The house of Tarimunnisa was situated near the house of Alimabi. Alimabi then alongwith her sister went to the police station and lodged FIR. While Alimabi was in the police station, the police caught Anna, i.e. original accused No.2 and brought him to the police station. The police enquired with Anna the whereabouts of the appellant. Said Anna gave the whereabouts of the appellant. Then police alongwith Alimabi went to Naya Nagar, New Basti in a lane near Chamunda Medical shop. The police went to the mezzanine floor of the construction. The mezzanine floor did not have a roof. There they saw the victim girl. She was frightened. The appellant was sleeping on the said mezzanine floor. A sickle was near his head. Thereafter Alimabi alongwith the police, victim girl and the appellant came back to the police station. At the police station, the victim girl informed that the appellant had committed rape on her. Then the supplementary statement of Alimabi came to be recorded.

6. PW 2 Najma is the sister of the victim girl and daughter of the first informant PW 1 Alimabi. Najma has stated that she

resided alongwith her mother and her husband Arif at Mahim. Alongwith them her two brothers alongwith wife of one brother and her two younger sisters were residing. She knew the appellant as the appellant was residing in their locality. On 20.4.2011 at about 1.00 a.m. the appellant was assaulting her husband Arif with a wooden log used for washing clothes, hence, Najma sent her brother Tahir. Tahir tried to resolve the quarrel. Meanwhile her brother and the appellant fell down on tin sheet, due to which both of them received injuries. Then Najma's husband Arif took Najma's brother to the hospital. Thereafter her mother Alimabi left her sister-in-law Noorjahan, Mahijabin and her other brother Imran at the house of Tarimunnissa. Najma alongwith her mother Alimabi and the younger sister i.e. victim girl remained in the house. Najma has stated that at about 4.30 a.m. the appellant came to their house and started knocking forcefully on the door, hence, her mother opened the door. They saw the appellant and co-accused Anna were present outside the door. The appellant enquired with Alimabi where her son had gone. Alimabi replied that her son had gone to the hospital. Thereafter the appellant enquired about Arif i.e. husband of Najma. Alimabi told the appellant that Arif had also gone to the hospital. Then the appellant came into their house. The appellant was holding a sickle in his hand. The appellant threatened Alimabi with sickle.

Then the appellant caught hold of the hair of the victim girl and took her away. While going the appellant threatened that he would kill anyone if they tried to intervene. Thereafter Alimabi alongwith Tarimunnisa went in search of the victim girl. However, the victim girl was not found. Thereafter at about 5.30 a.m. Alimabi alongwith Tarimunnisa went to the police station.

7. PW 3 Shabnam was the neighbour of the Alimabi. She has stated that she knew the appellant as he was residing in Naya Nagar, i.e. the same locality where she was residing. Shabnam has stated that on 24.4.2011 at about 1.00 a.m. she heard the voice of the appellant hence, she came outside her house. She saw the appellant assaulting Arif, who was the son-in-law of Alimabi. Alimabi's son came and tried to intervene. The appellant, Son-in-law of Alimabi and Tahir got injured. Arif and Tahir went to hospital. Shabnam has further stated that at about 4.30 a.m. she heard the noise of someone knocking on the door forcefully, hence, she opened the door of her house. She saw the appellant taking away the daughter of Alimabi i.e. she saw that the appellant was taking away the victim girl. Shabnam has stated that the appellant had sickle in his hand and he had caught hold of the victim girl. The appellant showed the sickle and took away the victim girl. Soon thereafter Alimabi visited the police station as her daughter was kidnapped. Nothing has been elicited

in the cross examination of this witness so as to cause us to disbelieve her testimony. Moreover her room is situated two rooms away from the house of Alimabi, hence it was possible for her to easily witness the appellant taking away the victim girl with him at the point of sickle. Shabnam has also stated that electricity bulb was on after one or two houses. In such case, it was very much possible for her to witness the appellant taking away the victim girl.

8. Thus, the evidence of PW 1, PW 2 and PW 3 Shabnam clearly shows that the appellant at the point of sickle took away the victim girl with him on 20.4.2011 at about 4.30 a.m. The evidence of Alimabi also shows that the appellant entered into her house armed with a sickle and thereafter he caught hair of the victim girl and took the victim girl alongwith him. The evidence of Alimabi further shows that her daughter i.e. the victim girl informed her that the appellant had committed rape on her. The star witness on the aspect of rape is the victim girl, who is examined as PW 6. The victim girl has stated that she was residing alongwith her brother, his wife, her mother, sister Najma and Najma's husband Arif was also residing with them. On 20.4.2011 the appellant was assaulting Arif, on hearing the noise they opened the door and on seeing Arif was being assaulted by the appellant the victim girl's brother enquired with the appellant

why he was beating Arif. Thereupon the appellant started to beat Tahir. Both of them fell down and got injured. Then Tahir alongwith Arif went to the hospital. The appellant went away. Thereafter her mother left her other brother Imran, Mahajabin and wife of the brother at the house of maternal aunt Tarimunnisa. Tarimunnisa was residing near the house of the victim girl. The victim girl alongwith her mother and sister Najma stayed back in the house. The victim girl had further stated that at about 3 to 3.30 a.m. the appellant came to their house and enquired about her brother. The appellant was knocking on the door of their house forcefully, hence, her mother opened the door. They saw the appellant had a sickle in his hand and the appellant threatened saying that he would kill if anybody interferes. The appellant then asked the whereabouts of Tahir and Arif. At that time the victim girl was sleeping inside the house. The appellant then came inside the house and he caught hold of the hair of the victim girl and took her outside the house. Alimabi started crying and told the appellant to leave the victim girl. The appellant gagged the mouth of the victim girl when she tried to shout. He also beat her and dragged her through the lane by holding her hair. The appellant took the victim girl at a mezzanine floor and committed rape on her. The appellant threatened to kill the victim girl with sickle. The victim girl sat on the mezzanine floor in a state of fear.

Meanwhile the police came there and then they took the victim girl and the appellant to the police station.

9. It is the categorical case of the victim girl that the appellant committed rape on her. This is also borne out by the medical evidence as stated by PW 8 Dr. Bansod, who examined the victim girl on 20.4.2011 at about 6.30 p.m. The victim girl gave him history that the appellant had committed rape on her. On examination of the victim girl Dr. Bansod found that the breasts were not developed, Axillary hair and pubic hair was absent. On local examination (private parts) Dr. Bansod found bruises over both labia minora of size 0.5 cm x 0.2 cm at middle portion, reddish in colour, tender, age of injuries-within 24 hours. According to Dr. Bansod hymen was torn and it was bleeding on touch, it was severely tender and red in colour. Age of tear was within 24 hours. Hymenal orifice admitted tip of little finger. Ossification test of the victim was done. Age of the victim as per the ossification test was 11-12 years. According to Dr. Bansod findings are suggestive of recent forceful sexual assault. Dr. Bansod also examined the appellant on 20.4.2011. He noticed contusion over mid parietal region and linear finger nail scratches over right side of neck. According to the Doctor the age of the injury was within 24 hours. Dr. Bansod noticed that smegma was absent. This showed that the accused had sexual intercourse

within 12 to 24 hours prior to examination. Thus, the evidence of the victim girl and the medical evidence clearly shows that the appellant had committed rape on the victim girl.

10. On going through the evidence of PW 1, Pw2, PW 3 and PW 6 we are of the opinion that the prosecution has proved its case against the appellant beyond reasonable doubt, hence, we do not find it necessary to advert to any other evidence. On going through the record we find no merit in the appeal, hence the appeal is dismissed.

11. We quantify legal fees to be paid to Advocate Ms Nasreen S.K. Ayubi by the High Court Legal Services Committee at Rs.5000/-.

(SMT. ANUJA PRABHUDESSAI,J.) (SMT. V.K. TAHILRAMANI,J.)