

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 739 OF 2006**

Faiyaz @ Baba Arif Zariwala.

Age: 33 years. An Adult, Indian

inhabitant, residing at

B-44, Geeta Bhavan, Warden Road,

Mumbai 400 036.

..Appellant.

v/s.

State of Maharashtra

(Through Gamdevi Police Station)

Vide C.R. No. 732/92).

..Respondent.

**WITH
CRIMINAL APPEAL NO. 919 OF 2006**

State of Maharashtra

(Through Gamdevi Police Station)

Vide C.R. No. 732/92).

..Appellant.

v/s.

Faiyaz @ Baba Arif Zariwala.

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..Respondent.

Mr. Girish Kulkarni, advocate for appellant in Cr. Appeal No. 739 of 2006 and for respondent in Cr. Appeal No. 919 of 2006.

Ms. P.P. Shinde, APP for State.

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**CORAM : SMT. SADHANA S. JADHAV &
N.J.JAMADAR, JJ.**

**RESERVED ON : OCTOBER 27, 2020
PRONOUNCED ON : DECEMBER 8, 2020.**

JUDGMENT (PER SMT. SADHANA S. JADHAV,J):

1 The appellant being aggrieved impugns the Judgment and Order dated 15th June, 2006 passed by Addl. Sessions Judge, Gr. Bombay in Sessions Case No. 957 of 1993, convicting the appellant for offence punishable under section 376 of the Indian Penal Code and sentencing him to undergo R.I. for 3 years and to pay a fine of Rs. 10,000/- in default to undergo S.I. for one year.

2 Such of the facts necessary for the decision of this appeal are as follows :

(i) Ms. X, a helpless adolescent girl was working as a maid servant in Mumbai to earn her livelihood. According to the prosecution, on 8/8/1992 Ms. X had approached Gamdevi Police Station along with her parents and a sister and lodged FIR alleging therein that she is native of village Shirdi. That 5 years prior to 1992, her father had got her employed as a maid servant with Shri Jahangir owner of Hotel Sai-Village at Shirdi. Mr. Jahangir, his wife Naseem and two children i.e. present

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accused No. 1 and his sister Farhad, were original residents of Geeta Bhavan, Bombay. The wife of Mr. Jehangir i.e. accused No. 2 had brought Ms. X to Bombay to work at their residence. After few days, sister of the victim namely, Ranjana was also employed as a maid servant with Mrs. Khurshid i.e. mother of Mrs. Naseem accused No. 2.

(ii) At the residence, Ms. X was molested and ravished by accused No. 1 the son of A2. Due to fear and apprehension of assault, she could not disclose the same to accused No. 2 at the initial stage and had only disclosed that she was being teased by accused No. 1.

(iii) That she had conceived pregnancy from accused No. 1. That accused no. 2 had taken all efforts to abort the foetus. That she was taken to Bhatia Hospital where the doctor had refused to perform medical termination of pregnancy on account of advanced stage of pregnancy. Accused No. 2 had assured the doctor that she would look after the victim who was her maid and inform her relatives accordingly and therefore, it would not be necessary to report to the police.

(iv) That she was then admitted to Asha Sadan by accused No. 2. The officials of Asha Sadan had admitted her in J.J. Hospital where she gave birth to female child.

(v) That accused No. 2 had instructed her to leave the child in Asha Sadan. She refused to abandon the child in the institution and therefore, was allowed to take the child along with her

(vi) On the way, the sister of accused no. 2 had snatched the child from Miss X on the assurance that it would be returned after a few months.

(vii) That she was not allowed to meet anyone. The officials of Asha Sadan had visited the house of accused No. 2 to enquire about welfare of child and mother. But, accused No. 2 had not allowed her to tell the truth.

(viii) She was harassed at the hands of accused No. 2 and was not allowed to return to her native place. Finally, she escaped from the house of accused No. 2 and had been to J.J. Hospital, where she took shelter with one nurse, who had helped her to reach home and, thereafter, she had returned with

her parents and lodged FIR. On the basis of which Crime No. 732 of 1992 was registered at Gamdevi Police Station on 8/8/1992 against the accused for the offences punishable under section 376, 365, 342, 114 of the Indian Penal Code.

(ix) After completion of investigation, charge-sheet was filed against both the accused. The case is committed to Sessions Court and numbered as Sessions Case No. 957 of 1993. The prosecution examined as many as 8 witnesses to bring home the guilt of the accused. The case mainly rests on the evidence of the victim Ms. X (P.W.4) and her version has been corroborated by the other witnesses such as P.W. 1, P.W. 2, P.W. 3, P.W. 5, P.W.6, P.W.7 and P.W. 8.

3 P.W.1 Dr. Smt. Suchak is a gynecologist and has her dispensary at Nagpada. She is family doctor of accused No. 2 and she also practices in clinic of her brother-in-law. According to her, accused No. 2 had brought her maid servant to P.W. 1. She was a minor girl. She was found to be pregnant. In fact, she was brought by accused No. 2 to P.W. 1 for medical termination of pregnancy, but since the girl was in an advanced stage of pregnancy i.e. more than 3 months, P.W. 1 refused to

abort fetus. The statement of P.W. 1 was recorded on 10/8/1992. The name of the girl as mentioned by accused No. 2 is as that of the victim in the present case. P.W. 1 has identified accused No. 2 as the person who had brought the victim to her for abortion.

4 The defence has been unable to create any dent in the facts narrated by P.W. 1. This would clearly establish that the victim was taken to Dr. Suchak(P.W.1) by accused No. 2 in the month of May, 1991 and P.W. 1 had found her to be pregnant of about 3 months. The evidence does not show any steps taken by accused No. 2 in a sympathetic manner in favour of victim. But on the other hand, accused No. 2 had tried her level best to see that the fetus is aborted.

5 At the trial, the victim had not attended the court on stipulated dates and therefore, P.W. 8 Investigating Officer who was then attached to EOW had informed the Court by a letter dated 17/11/2003 that upon enquiry mother of the victim had disclosed to him that one person namely, Ashok from Mumbai had visited her house and threatened her with dire consequences in the eventuality, her daughter came to Mumbai for attending

the court. He had accordingly informed PSI Bhosale to give necessary protection to the witness i.e. victim. The mother of the first informant had further made it clear that she could not report about the threat extended by Ashok to the police station due to fear and reprisal at the hands of said Ashok. The letter is at Exh. 15 and the statement of the mother of the victim is at Exh. 16, in which she has disclosed that Ashok was employee of accused No. 2.

6 P.W. 2 Mrs. Kanta Shejwal, mother of the victim has deposed before the court that her daughter Ms. X has worked as maid servant with accused no. 2 for 4 to 5 years. She used to meet her daughter once in 6 months or a year. That her daughter Ms. X had fled from the house of accused, returned to Shirdi and informed her mother about the traumatic life that she had to live at the house of the accused. Almost 9 months prior to that, she had not met her daughter, as they had kept her somewhere else. Upon hearing the facts disclosed by Ms. X, they had approached the police station and lodged a FIR. She has deposed that her daughter had given birth to a female child, she was made to stay at remand home at Dongari after lodging the complaint also. When the victim had started working with

the accused, she was 12 years old and she had worked there for 5 years. She further deposed that she had got her daughter married five years ago to another person.

7 The evidence of mother of victim would clearly establish that the victim was employed with accused No. 2 who was living along with her son i.e. accused No. 1 and her daughter Farhad. P.W. 2 has further made it clear that she was not allowed to meet her daughter for about 9 to 10 months prior to lodging of the FIR. In the eventuality that the victim was pregnant from her husband, who had abandoned her as is the case put up by the accused, then it was incumbent upon the employer accused No. 2 to inform the parents of the victim about the pregnancy. In fact, one of the suggestion to P.W. 2 is that Ms. X was raped by Ashok and therefore, they had demanded compensation and on account of failure on the part of the accused to pay that compensation, the victim has lodged a false FIR against the accused.

8 P.W. 3 Mr. Sudhakar Shejwal is the father of the victim. He has admitted before the Court that his daughters were working as maid servants with the accused for about 8 to

10 years. They initially worked at Shirdi and then, were taken to Mumbai by the accused to work at their house. He has also deposed that Ms. X had returned to Shirdi and informed her mother about the harassment meted out to her at the hands of both the accused. She has disclosed about the sexual abuse meted out to her by the accused No. 1 and harassment by accused No. 2 and therefore, they had lodged the report at the Gamdevi Police Station. He has feigned ignorance about the pregnancy of Ms. X and the fact that she has given birth to a female child. The witness was declared hostile. It appears that P.W. 3 was won over by the accused.

9 The case mainly rests upon the evidence of the victim of rape. P.W.4 Ms.X is the unfortunate victim. She has deposed before the court as follows :

- (i) She initially worked with accused No. 2 at Sai-village, Shirdi. Her parents had full faith in the Sindhi woman who had referred her to work with accused No. 2 and therefore, without making any inquiry, she was sent by her parents to work with accused No. 2 at Bombay where accused was living with her son i.e. accused No. 1 and a daughter named Farhad.
- (ii) That she worked with accused No. 2 for 2 to 3 years.

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Accused No. 1, the son of accused No. 2 had started molesting her. He used to touch her inappropriately despite her resistance.

(iii) One day she was forcibly taken to the bedroom by accused No. 1, and was ravished under coercion. She was threatened of dire consequences in the eventuality she disclosed about it to accused No. 2 or anyone else. But when she could not take the harassment anymore, she complained to accused No. 2 that accused No. 1 was teasing her. After being warned by accused No. 2, accused No. 1 had discontinued his nefarious activities for some time and later on revived it. She has vividly stated the manner in which she was sexually abused by accused No. 1 on several occasions.

(iv) She has also stated that she could not divulge about the sexual abuse meted out to her at the hands of accused No. 1 to accused No. 2 because she apprehended that she would be assaulted by accused No. 2.

(v) That one day she had started vomiting. Then she was taken to a lady doctor at Chowpatty. The doctor had initially diagnosed that she was suffering from Acidity and prescribed

medicines to her. At that juncture, P.W. 4 has corrected herself by stating that in the FIR, by mistake, she had stated diabetes instead of acidity.

(vi) She was not keeping good health and therefore, she was taken to Bhatia Hospital. The doctor at Bhatia Hospital had informed that she has conceived pregnancy. He had also told accused No. 2 that the matter needs to be reported to the police as it is a serious matter. Accused No. 2 had assured the doctor that she would report it to her relatives as the girl was working with her and therefore, it is not necessary to report it to the police. The doctor had further refused to perform medical termination of pregnancy.

(vii) At that time, Ms. X had candidly informed accused No.2 that it is none other than accused No. 1 who had got her pregnant. Upon hearing this, accused No. 2 had brutally assaulted Ms. X. Her apprehension had come true. Accused No. 2 had sent Ms. X to Surat to stay with her relatives. She returned after 2 weeks.

(viii) That accused No. 2 had then admitted her in Asha Sadan. That at the time of admission, accused No. 1 had

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instructed Ms. X not to disclose about the real facts to the officers of Asha Sadan.

(ix) The officials of Asha Sadan had then admitted her in J.J. Hospital where she delivered a female child. A week after delivery she was sent to Asha Sadan.

(x) That on 31/12/1991 accused No. 2 had been to Asha Sadan to take Ms. X back home, and at that time she was insisting upon her to leave the child at Asha Sadan, however, Ms. X was reluctant to dissociate with the child and therefore, accused No. 2 had agreed to take the child and mother. It is specifically stated that the sister and mother of accused No. 2 had accompanied her at that time.

(xi) That on the way near Haji Ali, the sister of accused N. 2 had snatched the infant from Ms. X, they told her that she would not be able to take care of the child, hence the child would be returned to her after 5 months.

(xii) That before being taken to Asha Sadan, accused No. 2 had left her with two women, at Kurla, who were apparently prostitutes. She had overheard accused No. 2 telling them to

make Ms. X deliver and dispose of the child. The women did not succeed, they were demanding money from accused No. 2 and hence, she was taken back home.

(xiii) That after few days of being released from Asha Sadan with the child, Mrs. Mhatre had visited the house of accused No. 2 at Geeta Bhavan along with police to inquire about the welfare of the child, and Ms. X had disclosed that the child is in custody of accused No.2. That accused No. 2 had instructed her to tell Mrs. Mhatre that the child is given in adoption, but she refused to oblige. Thereafter, she had no knowledge about the conversation between accused No. 2 and Mrs. Mhatre.

(xiv) That one day she managed to escape from the accused and went to J.J. Hospital. There she met Latifa Kadri, with whom she had got acquainted, when she was admitted for delivery. She did not disclose her ordeal to Latifa because Latifa was also under stress due to her dispute with her husband. Thereafter, Latifa had made arrangements to reach her to her parents home, and accordingly, she had returned to Shirdi.

(xv) That she had not immediately disclosed the life that she lived at Bombay, to her mother but disclosed the same to

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her elder sister who then told the parents and then the FIR was lodged.

(xvi) The FIR was recorded in English and read out to her. That she had started crying in the course of recording evidence and was seeking help from the Court to get her child back. She voluntarily informed the Court that her life is ruined, because after receipt of court summons, her husband abandoned her and she was living in penury with her son and daughter.

10 The victim was cross-examined at length. The emphasis in the cross-examination as per the suggestions was as following :

(i) That she has falsely implicated accused nos. 1 and 2 for the purpose of extortion as they happen to belong to an affluent society. On this suggestion, the victim broke down and voluntarily addressed the Court stating that it would be unjust to make these accusations against her especially when she turned down the offer of the accused to accept the money and settle the matter outside the court.

(ii) That she had not disclosed about the sexual abuse

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meted out to her by accused No. 1 and accused No. 2 although she had sufficient opportunities to do so firstly before the doctor, secondly at Asha Sadan before the Social worker, at J.J. Hospital before the doctors, to Mrs. Mhatre when she visited the house of accused or to Latifa Kadri with whom she stayed for 16 days. The answer to all these suggestions was that she was perpetually under the threat of accused No. 1 and accused No. 2. She could not disclose about the penetrative sexual assault by accused No. 1 to accused No.2 because she feared assault by accused No.1 and her apprehension had come true i.e. she was assaulted after she disclosed the same after returning from Bhatia Hospital. Secondly, she was of a tender age and could not take care of herself in a city like Bombay where she was at the mercy of accused No. 2. Thirdly, because of her helplessness as she was not allowed to meet anyone, talk to the other servants, etc. and that there was threat perception to her and her child.

(iii) She has denied the suggestion that she was married to Deepak, by her grandmother, and was abandoned by him after she conceived pregnancy and was picked up by accused No. 2 from a florist. She was then reminded that she had disclosed at Asha Sadan that she was an orphan and that she was being

taken care of by accused No. 2 after having been abandoned by her husband and she has categorically stated that all previous statements till lodging of FIR were under the instructions of accused No. 2. That she was helpless.

(iv) One of the suggestion was that she was raped by Ashok, the driver and that she was demanding compensation and since the accused did not fulfill the demand, she has falsely implicated them. P.W. 4 has denied the suggestions. She expressed in many ways that she could not take this humiliation any more.

(v) That she had not disclosed the exact year, month or date when the incidents of sexual abuse had taken place. She has answered that she has studied up to 2nd Standard and that she did not understand the year month and date.

11 Evidence of victim of rape is at par with the injured witness. It is clear that the defence of the accused was lame and manifold at the same time. But the substantive evidence of the victim is corroborated by P.W. 1, P.W. 5, P.W. 6, P.W. 7 and further supported by documentary evidence.

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12 P.W.5 Alka Mhatre was working as a Superintendent and Social Worker at Asha Sadan. She had produced records maintained by Asha Sadan which included the admission forms and undertakings given by Mrs. Merchant at the time of admission of the victim to Asha Sadan. According to her, on 12/10/1991 Mrs. Merchant had visited Asha Sadan along with Ms. X aged about 18 years. Ms. X was pregnant at that time. Her residential address was shown as Geeta Bhavan. According to her, Mrs. Merchant had informed officials of Asha Sadan that the girl was her maid servant, she is pregnant, it was difficult to get her aborted and therefore, she was being admitted in the institution. She had signed as a guardian of that girl. Ms. X was then referred to Ms. Geetanjali, a social worker attached to the institution. She interviewed Ms. X. The statement recorded by Ms. Geetanjali was maintained in a separate file. Mrs. Merchant had also given an undertaking that after delivery child would be kept in the same institution and that she would take Ms. X back for work. She has identified the accused No. 2 as the lady who had admitted Ms. X. She has also identified Ms. X, as the same girl, who was admitted by accused no. 2. She has produced before the Court the personal file maintained in

respect of Ms. X in the Institution. The application by Mrs. Merchant in the form of undertaking dated 12/10/1991 at the time of admission of Ms. X is at Exh. 29. The record shows that on 5/12/1991 Ms. X was referred to J.J. Hospital for delivery. On 19/12/1991 Ms. X delivered a female child. On 26/12/1991 Ms. X was discharged from J.J. Hospital and brought back to Asha Sadan along with female child and during the period 12/10/1991 to 31/12/1991 Mrs. Merchant was regularly visiting Ms. X. On 31/12/1991 Mrs. Merchant along with her sister had visited the institution to take back Ms. X to their house. However, Ms. X refused to abandon the child and therefore, accused No. 2 was constrained to take the victim and the child. At the time of discharge from institution, accused No. 2 had disclosed to P.W. 5 that the child would be adopted by her sister. The accused No. 2 has given in writing that Ms. X and her child are being taken with her. The application/-undertaking dated 12/10/1991 (Exh. 29) shows that the accused No. 2 had informed Asha Sadan that Ms. X was working with her for the last 3 months. She was pregnant. Dr. Padma Mehta had referred the victim to Asha Sadan. In the said letter it is mentioned as follows :

“After her delivery I will give the child for adoption

and take Sunita back with me and Sunita will sever all ties with the kid.”

This is in fact, sufficient to indicate that without the consent and knowledge of Ms. X accused had given an undertaking that the child would be given for adoption. P.W. 5 has further stated that social worker Ms. Geetanjali had interviewed the victim. According to P.W. 5 victim had disclosed to Ms. Geetanjali that she is an orphan and she had conceived pregnancy from one Deepak who had abandoned her with the florist and that the accused No. 2 had brought her home for shelter from florist. The said statement recorded by Ms. Geetanjali is at Exh. 33. However, it is pertinent to note that the prosecution for the reasons unknown, has not examined Geetanjali as a prosecution witness.

13 P.W. 5 has further deposed that on 31/12/1991 Mrs. Merchant had taken charge of Ms. X and her child. Sister of Merchant had accompanied her. Exh. 30 is the letter dated 31/12/1991 which is in the handwriting of Mrs. Merchant while taking away the mother and the child.

14 On 2/1/1992 an infant child was brought to Asha

Sadan by Dadar Police Station as per the order of Juvenile Court for admission. P.W. 5 and her staff identified the said child as the same child who was taken by accused No. 2 along with mother on 31/12/1991. The staff had informed P.W. 5 about the admission of the infant child and stated that it is the same child which has been brought back to the institution. The child was abandoned in the cradle at Prabhadevi and pursuant to the orders of the Juvenile Court was admitted by Dadar Police Station in Asha Sadan. The entry is at Sr. No. 63. The name of the said female child was recorded as Anita since that was the name given to the child by Juvenile Court at Umerkhedi. The order of the Metropolitan Magistrate, Juvenile Court, Umerkhedi is at Exh. 31. P.W. 5 had taken escort from Dadar Police Station during her visit to the house of accused No. 2 at Geeta Bhavan. She enquired with Ms. X about the child. Ms. X had candidly informed P.W. 5 that the child is in the custody of accused No. 2.

15 In the cross-examination, P.W. 5 has stated that she was not satisfied with the information provided by Ms. X and therefore, she had informed Ms. X that the child which is admitted in Asha Sadan on 2/1/1992 is similar to the child

delivered by Ms. X. But P.W. 5 had not asked Ms. X to visit the institution and identify the child. P.W. 5 admits to have informed Dadar Police Station on 3/1/1992 that the child admitted on 2/1/1992 at their instance was wearing similar cap and found to be wrapped in same clothes in which they had sent the said child of Ms. X who was discharged from institution along with her child on 31/12/1991 from Asha Sadan. She had also informed the police that they had suspicion that the mother of the infant had abandoned the child at Prabhadevi Cradle.

16 P.W. 5 has further stated that on 6/3/1992 the infant child was admitted to J.J. Hospital as she was sick and on 8/3/1992 the said female child had died in the hospital. It is unfortunate that the mother of the child had no knowledge that the child had fallen sick and on 8/3/1992 the child had died in the hospital. It clearly reflects upon the conduct of P.W. 5 of not informing about it to the mother of the child. There was no enquiry. It is further pertinent to note that the birth extract of the child which must have been recorded in J.J. Hospital is not placed on record. It is the specific case of the accused that Ms. X had conceived pregnancy from one Deepak. Full name of

Deepak is not mentioned. It was never disclosed to the police that they would search for her husband. No enquiry was made from the parents. It is a false defence on the face of record.

17 The child was admitted by Asha Sadan in J.J. Hospital. Death certificate issued by J.J. Hospital shows the name of the child as Anita. Further details are not known. Negligence of Asha Sadan needs to be deprecated. P.W. 5 has not even stated that she had informed accused No. 2 about demise of that infant child. In fact, the letter at Exh. 35 written by Ms. Geetanjali and P.W. 5 to the Inspector-in-charge of Dadar Police Station shows that they had strong suspicion that the child which was abandoned at Prabhadevi cradle is the same child which was taken by accused No. 2. The contents of the letter dated 3/1/1992 sent by Asha Sadan to the Inspector-in-charge, Dadar Police Station are as follows :

“Ms. X an unwed 7 months pregnant mother brought to Asha Sadan by her employer Mrs. N. Merchant. Ms. X delivered a female child on 19/12/1991 at J.J. Hospital and we have brought her back to Asha Sadan on 26/12/1991 at 4.30 p.m.

On 31/12/1991 Mrs. N. Merchant came to take Ms. X at her home. At the time of leaving Asha Sadan Sunita was reluctant to abandon her child, so we let

her take the child with her to her former employer. When the police brought the child to Asha Sadan on 2.1.1992 she was wearing the same cap and was wrapped in the same cloth in which we had sent her from Asha Sadan. We suspect that the mother has abandoned the child at Prabhadevi Cradle and since we are aware that the mother where lives. We would like the police to visit the mother along with me and find out the mother's intention regarding her child.”

The contents of Ex. 35 would show that Ms. X was referred as an unwed mother which casts doubt on the history given by Ms. X to Ms. Geetanjali. At the time of admission, it was accused No. 2, who had shown the name of the husband of Ms. X as Deepak working in hotel. Even in the statement of Ms. X given to Ms. Geetanjali, it is shown that she was married to Deepak by her maternal grand-mother. She stayed with her husband for 3 months and thereafter, she was abandoned and had not met her husband since Holi. It is more than clear that the story had been concocted by accused No. 2. Said statement given to Geetanjali at Exh. 33 appears to have been signed by one Raju. The entries dated 4/12/1991 and 19/12/1991 are also signed by one Raju. A new story was concocted by sister of accused No. 2 at the time of discharge from J.J. Hospital on

26/12/1991. Where it is stated that “Ms. X was working with them, later left work and went to Pune, when returned, she was found to be pregnant.” The accused have concocted different stories at different stages.

18 It is unfortunate that a charge under section 317 of the Indian Penal Code was not framed against the sister of accused No. 2 despite there being material evidence to that effect. Section 317 of the Indian Penal Code reads as follows :

“317. Exposure and abandonment of child under twelve years, by parent or person having care of it.—Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation.—This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child dies in consequence of the exposure.”

The suspicion expressed by Asha Sadan could have been confirmed by subjecting the child to blood test or DNA test with Ms. X.

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19 P.W.6 Smt. Latifa Suleman Kadri was working as staff nurse in J.J. Hospital. She was residing in the staff quarter. Mrs. Diwekar, another staff nurse was her neighbour. That it was Mrs. Diwekar who introduced Ms. X to P.W. 6 and informed her that the said girl was in search of employment. That Ms. X had worked with P.W. 6 for one and half months. After taking instructions, P.W. 6 had addressed letter to the parents of Ms. X and she had also received reply that due to poverty, they are unable to come to Mumbai to fetch their daughter, and that they would send their elder daughter Ms. Sangita to fetch her. Ms. X had returned home with her sister Sangita. According to P.W. 6 Ms. X had not informed her anything about atrocities meted out to her by her employer. However, it is admitted that while she was working with P.W.6, she had been to Asha Sadan once or twice to meet one madam from Asha Sadan. P.W. 6 was declared hostile. When she was confronted with the previous statement, she had denied to have stated that Ms. X had divulged to her about the atrocities meted out to her at the hands of both the accused. The defence had suggested to her that Ms. X had informed Mrs. Diwekar as well as P.W. 6 that she is married to maternal cousin who had abandoned her after she became pregnant. Exh. 54, 55 and 56

are the contradictions marked in the evidence of P.W. 6. Exh. 55 clearly shows that she had told P.W. 6 that she was raped by the son of her employer namely, Faiyazbaba. They had tried to get her aborted during pregnancy, but did not succeed and she had not disclosed to anybody about the same as she was threatened by her employer of dire consequences. P.W. 6 was also informed that the new born child was handed over to someone by accused No. 2 on an assurance that the child would be returned after 5 months. But the child was never returned. That P.W. 6 had given money to Sangita and Ms. X and asked them to return home.

20 P.W. 7 Dr. Shivaji Narayan Daund was working as medical officer in Police hospital at Nagpada. He had examined Ms. X who was brought by Gamdevi Police Station on 14/8/1992. Ms. X was brought for examination by Gamdevi Police Station. Ms. X delivered child 7 months back and the child belongs to her employer's son who had regular sexual intercourse with her against her will and child is kept somewhere in orphanage without her knowledge by her lady employer. On further medical examination, P.W. 7 had opined that the victim was subjected to sexual intercourse and had

delivered a child. The doctor had conducted ossification test and determined the age of the victim girl to be in between 17 to 18 years. The medical reports of Ms. X are at Exh. 41. On 18/8/1992 accused No. 1 was brought to the hospital by Gamdevi Police. Medical certificate is at Exh. 43. In the cross-examination, P.W. 7 has stated that Ms. X has disclosed to the doctor that she is unmarried.

21 At this stage, it is relevant to mark that on 1/8/1992 Ms. X had returned home along with her sister. On 8/8/1992 FIR was lodged. She was referred for medical examination on 14/8/1992.

22 P.W. 8 Mr. Rajan Balkrishna Katdare is the investigating officer. According to him, on 8/8/1992 Sudhakar Shejwal and his wife had informed the police that their daughter Ms. X who was working with Naseem accused No. 2 as maid servant was not being allowed to leave her house. The police constable was deputed to the house of accused No. 2 and Ms. X was brought to the police station by her parents and on the basis of the statement of Ms. X, Crime No. 732 of 1992 was registered against the accused for offences punishable under

section 376, 365, 342, 114 of the Indian Penal Code. The accused could not be arrested on 8/8/1992 since they were not found at their house. On 18/8/1992 he had recorded statement of Dr. Suchak. On 17/8/1992 accused No. 1 has surrendered before the police. He had disclosed his age as 19 years. Accused No. 2 was arrested on 6/11/1991. P.W. 8 had proved the omissions and contradictions in the evidence of the witnesses.

23 In the cross-examination, P.W. 8 has stated that he has sent letter to Dadar Police Station to forward papers in respect of child abandoned at Prabhadevi cradle. However, he was informed that the papers are destroyed. According to him, he had not received any response from the concerned police station and since he was transferred, he had not taken any steps. He had also not received any response from J.J. Hospital to the query as to whether any record is available in respect of blood group of the child who had died in J.J. Hospital. He had not taken any efforts to ascertain parentage of the child since he believed that only in exceptional case, DNA test should be conducted. He admits to have not recorded the statement of Mrs. Geetanjali or Ms. Mahua who was working as probation

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officer.

24 It is clear that several lacunas were deliberately left in the course of investigation.

25 Statement of the accused No. 1 was recorded under section 313 of the Code of Criminal Procedure, 1973. In answer to question No. 46, accused No. 1 has admitted that Ms. X was taken to dispensary of Dr. Suchak as she was not well. In answer to question No. 48, accused No. 1 has stated as follows :

“It is not correct that when she started to work at our house her age was 12 years. We were disclosed her age as 15 years, when she started to work at our house. She has worked for 5 years at our house.”

According to accused No. 1, he has been falsely implicated and has no knowledge as to why P.W. 4 i.e. Ms. X had falsely implicated him. It is a specific defence that the real culprit is Ashok. The defence of accused No. 1 is as follows :

“The real culprit Ashok has absconded and police have implicated us in this case. During absence of myself and my mother at Mumbai my sister and my domestic servant Laxmibai used to stay at the house of my

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maternal grandmother, where Ashok was serving as driver on the car of my maternal grandmother. Ranjana was staying at the house of my maternal grandmother. During our absence at Mumbai my sister used to shift along with Laxmibai and Ms. X at my maternal grandmother's house. Ashok caused pregnancy to Ms. X as well as Ms. Y but false case has been registered against me and my mother. As we are staying at Warden Road locality, which is known as top locality in the City of Mumbai, the police have falsely implicated us in this case.”

26 Accused No. 2 in her statement under section 313 of the Code of Criminal Procedure, 1973 in answer to question No. 52 has stated that while she was at Shirdi, her sister might have taken Ms. X to Asha Sadan, as Ms. X was kept at her mother's house. It is further defence that the letter at Exh. 29 is in the handwriting of her sister and also bears her signature. It is the specific defence of accused No. 2 that she had treated Ms. X like her daughter; after the complaint was lodged Ms. X met her at Shirdi and apologised to her but stated that she was forced to make police complaint by the police officer.

27 It is pertinent to note that the evidence on record shows that the accused No. 2 had disclosed to doctor at Bhatia

Hospital that the victim was an orphan and that she had been raped by some roadside boy, but she wanted to look after the victim. As against this, the victim has stated in her evidence that she had frequently enquired about the child with accused No. 2 and requested her to return the child and on every such occasion, she was assaulted and further threatened in the words as *“ab tere ko bacha milega nahin, tujhe jo karne ka hai, kar.”*

28 Learned Counsel for the appellant has vehemently submitted as follows :

(i) That the appellant is innocent. He is falsely implicated.

(ii) That there is an inordinate delay in lodging FIR and the victim has not offered any plausible explanation for the same.

(iii) That although the victim had several opportunities, she had not levelled any allegations against the accused before any person including Dr. Smt. Suchak, doctor at Bhatia Hospital, office bearers of Asha Sadan, doctors of J.J. Hospital, nurse

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who had employed her for a month and therefore, it is clear that the story is subsequently concocted only to extort money from the accused.

(iv) That the statement of the victim recorded by Mrs. Geetanjali indicated that the victim was married to her relative and that the accused have no role to play.

(v) That accused No. 2 had only shown sympathy to the victim and that she was taken home from a florist and therefore, according to the learned Counsel for the appellant, learned Sessions Judge had committed error in recording conviction against the appellant accused No. 1 for offence punishable under section 376 of the Indian Penal Code as the learned Sessions Court has failed to take into consideration the different stands taken by the victim. Statement and the deposition of the victim are not trustworthy.

29 As against this, learned APP has vehemently submitted that in fact, the evidence of the victim is corroborated by the evidence of P.W. 1 Dr. Suchak who had examined Ms. X and opined about her pregnancy. It is also corroborated by the

evidence of P.W. 5 Mrs. Mhatre who has placed on record the applications given by accused No. 2 in the form of undertaking that Ms. X would sever all the ties with the child and that she would take Ms. X along with her. The admission forms and letters at Exh. 29, 30, 31 and 35 are signed by Accused No. 2. The evidence of victim is further corroborated by the evidence of P.W. 7 Dr. Daund to whom the victim had disclosed that she had been raped by accused No. 1 and had delivered child on 19/12/1991. It is also submitted that unfortunately P.W. 3 father of the victim and P.W. 6 Latifa Kadri have resiled from their previous statement.

30 Learned APP has placed reliance upon Judgment of the Hon'ble Apex Court in the case of Mohd. Imran Khan v/s. State Government (NCT of Delhi) reported in (2011) 10 SCC 192, wherein the Apex Court has held that -

“The court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestation. Rape is not merely a physical assault, rather it often distracts the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination

even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence.”

“It is a trite law that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust. The prosecutrix stands at a higher pedestal than an injured witness as she suffers from emotional injury. Therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. [The Indian Evidence Act](#), 1872 (hereinafter called '[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](#) of Evidence Act 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.”

31 Learned APP has further pointed out that there is clear admission of accused No. 1 that the victim was working with the family of the accused for almost 5 years, whereas, it was the case of the accused No. 2 that the victim was brought home on humanitarian ground from a florist and she had worked for only 3 months at the house of the accused. It is submitted that the

circumstances speak for themselves and therefore, according to the learned APP, the State is constrained to file appeal for enhancement being Criminal Appeal No. 919 of 2006 against the appellant. It is unfortunate that despite there being evidence, the State has not preferred an appeal challenging acquittal of accused No. 2. Hence, merits of the criminal Appeal No. 919 of 2006 are being discussed separately.

32 It is settled position of law that delay in lodging FIR in a case of rape is not fatal and the accused cannot claim any benefit, as the victim has to think of several aspects before lodging FIR. Moreover, the victim in her evidence had sought protection from the Court for her parents and herself. She was helpless, she was in the custody of the accused persons and therefore, could not approach police station in Mumbai. Moreover, the victim was almost kept in confinement and was not allowed to communicate with anyone.

33 It is true that the learned Sessions Court has not discarded the testimony of the victim and has convicted the accused No.1. It is a settled law that the evidence of rape victim stands at par with the injured witness. And therefore,

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the evidence of the victim of sexual offence deserves to be considered with great weightage. The facts and circumstances corroborate the evidence of victim and leave no room for suspicion that the victim was ravished by none other than the accused No. 1.

34 The contention of the learned Counsel for the appellant that there is a delay in lodging FIR and non-disclosure of harassment or sexual abuse, if any, for considerable time, is considered by the Hon'ble Apex Court in the case of **Bharwada Bhoginbhai Hirjibha vs. State of Gujarat reported in AIR 1983 SC 753**. The Apex Court has observed that -

“Because: (1) A girl or a woman in the tradition bound non- permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracised by the Society or being looked down by the Society including by her own family members, relatives, friends and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an

alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being over powered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent.”

“We are therefore of the opinion that if the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities-factor' does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the

medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualification: Corroboration may be insisted upon when a woman having attained majority is surprised in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of self-preservation. Or when the 'probabilities-factor' is found to be out of tune.”

35 In the present case, the evidence of P.W.4 is corroborated in material aspects. The victim has vividly divulged the manner in which the accused No. 1 had physically, sexually abused her and further frantic efforts made by accused No. 2 to screen the offender.

36 Delay in lodging FIR per se in case of rape is not a mitigating circumstance against the complainant. False implication is a lame defence taken by accused without making any efforts to probabalise the same. The defence of the accused is not consistent. The story of taking victim from florist is also not substantiated by examining any florist or location of the florist. At one stage, the accused has suggested that the victim had not met her husband after Holi i.e. after March and the

very next suggestion is that she had once met her husband between March and December. Another defence is that the perpetrator of the offence was Ashok who was working as a driver with the mother of accused No. 2. It is a far stretched defence because in that case also, the accused would have taken Ashok to task. In fact, the allegation of the victim is that her sister Ranjana was ravished by Ashok.

37 In any case, the learned Sessions Court has found evidence of the victim to be trustworthy. He has given credence to the claim of the victim that she was raped by accused No. 1. However, the trauma meted out to her at the hands of accused No. 2 after the victim was diagnosed with pregnancy has been overlooked although the same is corroborated by documentary evidence. The evidence of P.W. 1 corroborates the evidence of P.W. 5 and P.W. 7.

38 A rape victim is left with a feeling of degradation, humiliation and guilt for the whole life. The offence of rape is a heinous offence which cannot be viewed with any leniency. Once the Court finds the evidence of victim to be trustworthy, conviction would follow and said conviction should be followed

by a sentence proportionate to the gravity of the offence. Social position of the accused is totally irrelevant.

39 In a catena of pronouncements, the Supreme Court has held that society cannot look upon a woman with derision, depravity, contempt and as an object of desire. Rape tantamounts to a serious blow to the supreme honour and dignity of a woman. It is a violation of human rights. The injury sustained by a rape victim is not just a physical injury, but an injury to her womanhood. She is forced to live with indignation throughout her life and in the present case, she had given birth to a child who lived with her for hardly 6 days and thereafter, the child was brutally snatched by accused No. 2, abandoned and had died. It is unfortunate that she was not even informed about the demise of her child. But the said injury would leave a scar on her further development as a person. It demeans her from femininity. It is not just a physical injury, but injury to the soul of a victim. In the present case, Ms. X had attained motherhood at a young age of 15 years.

40 In fact, sister of accused No. 2 ought to have been

charged for an offence under section 317 read with section 34 of the Indian Penal Code. However, she was not even shown as accused although there was incriminating material against her.

41 Upon evaluation of the evidence adduced by the prosecution which is corroborated in material particulars and for the reasons assigned hereinabove, the appeal deserves to be dismissed.

CRIMINAL APPEAL NO. 919 OF 2006

42 The State being aggrieved by the meager sentence imposed upon the accused No. 1 despite his conviction for offence punishable under section 376 of the Indian Penal Code has filed present appeal.

43 The learned Sessions Judge after finding evidence of the victim trustworthy has convicted the accused No. 1 for offence punishable under section 376 of the Indian Penal Code. The legislature in its wisdom after considering heinousness of offence like rape has framed section 376 of the Indian Penal Code as follows:

“(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of

either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine”

The intention of the legislature is clearly spelt by the very words that it shall not be less than 7 years except in exceptional circumstances wherein the Court is duty bound to assign special and adequate reason for imposing a sentence lesser than minimum.

44 In the case of [State of Karnataka vs. Krishnappa reported in JT 2000 \(3\) SC 516](#), a three Judge Bench of the Supreme Court while considering the case where an inadequate sentence was passed against the accused, who was convicted for the offence punishable under section 376 of the Indian Penal Code has held as follows :

“The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Crimes of violence upon women need to be severely dealt with. Socio- economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and deterring

the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence."

45 The Apex Court in the case of Kamal Kishor v/s. State of Himachal Pradesh reported in AIR 2000 SC 1920 has observed thus :

“As Parliament has disfavoured the sentence to plummet below the minimum limit prescribed Parliament used the expression "shall not be less than" which is peremptory in tone. The court has, normally, no discretion even to award a sentence less than the said minimum. Nonetheless Parliament was not oblivious of certain very exceptional situations and hence to meet such extremely rare contingencies it made a departure from the said strict rule by conferring a discretion on the court subject to two conditions. One is that there should be "adequate and special reasons", and the other is that such reasons should be mentioned in the judgment. The expression "adequate and special reasons" indicates that it is not enough to have special reasons, nor adequate reasons disjunctively. There should be a conjunction of both for enabling the court to invoke the discretion. Reasons which are general or common in many cases cannot be regarded as special reasons. What the Division Bench of the High Court mentioned (i.e. occurrence took place 10 years ago and the

accused might have settled in life) are not special to the accused in this case or to the situations in this case. Such reasons can be noticed in many other cases and hence they cannot be regarded as special reasons. No catalogue can be prescribed for adequacy of reasons nor instances can be cited regarding special reasons, as they may differ from case to case.

The long time lag which elapsed subsequent to the date of offence and the fact that the prosecutrix got married and is well settled in life and that she is now mother of children - all these things which happened during the intervening period, may be factors for consideration by the executive or constitutional authorities if they have to decide whether remission of the sentence can be allowed to the accused.”

46 Passage of time will not be a justifiable reason to take a lenient view. Courts cannot be oblivious of the impact of such a heinous offence. The object of deterrence in commission of such heinous offence cannot be lost sight of while sentencing. Once the accused is convicted, the victim also deserves justice. Dishonour of a woman needs to be eliminated and judicial pronouncement, which imposes a disproportionately lenient sentence, needs to be set aside. The sexual harassment of a woman at a place, where she is working to earn her livelihood is a disgrace meted out to her at the hands of the abuser, which needs to be deprecated and set right.

47 It needs to be painfully observed that despite there being material evidence against the accused No. 2, the learned Sessions Court has recorded acquittal. It was incumbent upon the State to file an appeal against acquittal, in view of the fact that the victim P.W.4 was subjected to harassment, she was brutally assaulted, she was forced to abandon her child, which in fact is an offence punishable under section 317 of the Indian Penal Code.

48 The Court has shown undue leniency to the accused No. 2 and the State has failed in discharging its duty of prosecuting the case diligently. The Hon'ble Apex Court in the case of Lakhan Mahto v/s. State of Bihar reported in **AIR 1966 SC 1742** observed as under :

“If an order of conviction is challenged by the convicted person but the order of acquittal is not challenged by the State then it is only the order of conviction that falls to be considered by the Appellate Court and not the order of acquittal.”

It is in view of this pronouncement of Supreme Court that the acquittal of accused No. 2 cannot be interfered with.

49 The quantum of sentence to be imposed upon the

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accused convicted under section 376 of the Indian Penal Code cannot be viewed with leniency unless there are special reasons. The reasons assigned by the learned Sessions Judge are not special and adequate reasons for imposing sentence lesser than the minimum. Hence, in view of the law laid down by the Hon'ble Apex Court and the facts of the case, the sentence imposed upon the respondent/accused No. 1 deserves to be enhanced and appeal for enhancement deserves to be allowed.

50 Hence, following order is passed in both the criminal appeals:

ORDER

- (i) The Criminal Appeal No. 739 of 2006 is dismissed.
- (ii) The Criminal Appeal No. 919 of 2006 is allowed.
- (iii) The sentence imposed upon the accused No. 1/respondent for offence punishable under section 376 of the Indian Penal Code vide Judgment and Order dated 15th June, 2006 passed by Addl. Sessions Judge, Gr. Bombay in Sessions Case No. 957 of 1993, is hereby quashed and set aside. The appellant is instead sentenced to rigorous imprisonment for 7 years and to pay fine of Rs. 1,10,000/- I.d. to suffer further R.I.

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for 6 months.

(iv) His Bail bond stands cancelled.

(v) The accused No. 1/respondent shall surrender before the Sessions Court, Greater Bombay on or before 4/1/2021.

(vi) The amount of fine shall be deposited in the Sessions Court, Gr. Bombay on or before 4/1/2021.

(vii) The Sessions Court shall issue notice to victim and pay the compensation amount of Rs. 1,00,000/- out of the fine amount deposited by the accused No. 1/respondent as contemplated under section 357 of the Code of Criminal Procedure, 1973.

51 The appeals are disposed of accordingly.

52 This order will be digitally signed by the Private Secretary of this Court. All concerned will act on a digitally signed copy of this order.

(N.J.JAMADAR, J)

[SMT. SADHANA S. JADHAV, J.]

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