

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.170 OF 2008**

The State of Maharashtra ... Appellant
(Orig. Complainant)

V/s.

Dayal Kinnu Mandal,
Age – 22 years, Shivaji Nagar,
Rafique Nagar Zopadpatti,
Room No.6, Govandi, Near Baba Nagar, Respondent
Mumbai – 43. ... (Orig. Accused No.1)

**WITH
CRIMINAL APPEAL NO.820 OF 2006**

The State of Maharashtra ... Appellant
(Orig. Complainant)

V/s.

Shafiq Rafique Ansari,
Aged – 22 years, Shivaji Nagar,
Rafique Nagar Zopadpatti,
Room No.10, Govandi, Near Baba Nagar, Respondent
Mumbai – 43. ... (Orig. Accused No.2)

Ms. P.P. Shinde, APP for the Appellant – State in Apeal/170/2008.

Mr. Prabhakar Jadhav, Appointed Advocate for the Respondent in
Apeal/170/2008.

Mr. S.R. Phanse, Appointed Advocate for the Respondent in
Apeal/820/2006.

**CORAM : SMT. SADHANA S. JADHAV &
N.R. BORKAR, JJ.**

JUDGMENT RESERVED ON : 12th JANUARY 2021.

JUDGMENT PRONOUNCED ON : 22nd MARCH, 2021

JUDGMENT : (Per Sadhana S. Jadhav, J.)

1. The State of Maharashtra takes an exception to the judgment and order passed by the Additional Sessions Judge, Mumbai in Sessions Case No.166/2004 wherein the accused (present respondents) have been acquitted of the offences punishable under section 376 of the Indian Penal Code vide judgment and order dated 17th April 2006.

2. Such of the facts necessary for the decision of these appeals are as follows :-

(i) On 5th October 2003, Ms.X lodged a report at Shivaji Nagar Police Station alleging therein that she was acquainted with the respondents herein i.e. Bihari, Shafique and Dayal, who was acquainted with Bihari, since he was residing with one lady Tamanna, who lived in her vicinity.

(ii) She alleged that on 4th October 2003, it was Dasara Festival and therefore, she had holiday. At about 5.00 pm, she had gone to answer nature's call. She was accompanied by a lady who was residing in her neighbourhood. They had gone near the dumping ground. She

had seen the accused persons standing there. After the lady, who accompanied her had gone home, Bihari asked her about one girl Rani. Ms.X had feigned ignorance about the same, upon which Bihari slapped her. Shafiq had pushed her in a ditch, he gagged her and had ravished her. Dayal was inspecting Shafiq to tie her hands. Upon hearing her cries, the boys in the locality viz. Hasan, Munna and Firoz had approached to rescue her. Thereafter, the accused had fled from the scene. She had not disclosed about the incident to her mother. At about 7.00 pm, Tamanna had informed her mother about the same.

(iii) Her parents had then taken her to the Police Station and lodged a report. On the basis of the said statement, Crime No.156/2003 was registered at Shivaji Nagar Police Station against accused for the offence punishable under section 376(f)(g) r/w 34 of the Indian Penal Code. The prosecution examined as many as 7 witnesses to bring home the guilt of the accused.

3. PW.1 is the prosecutrix. She has deposed in consonance with the FIR. She has further volunteered before the Court that Hasan had warned her mother not to send her outside the hut. That,

Tamanna had informed her mother about the indecent act of the accused and had also disclosed that the boys had regrets for having committed the said act. That, Tamanna had slapped her. Her mother had also thrashed her. It is admitted in the cross-examination that the place where she went to answer nature's call was not at the dumping ground but is adjacent to Rafiq Nagar and there are distinct places for ladies and gents. She has further testified that she was accompanied by her aunt. The victim could not recollect the name of the woman whom she referred as 'Khala' in the FIR, however, she has clarified that she was also accompanied by her aunt at the relevant time. It is admitted that Bihari was residing just opposite her house and she had strained relations with Bihari. That, he was indulging in theft and he used to inhale Ganja. There are material omissions and contradictions in the evidence of P.W.1. She has admitted that at the time of incident other ladies had also been to the same spot for answering nature's call.

4. P.W.2 – Dr. Shridhar M. Patil had examined Ms.X on 5th October 2003 after obtaining the consent of the mother of the victim. P.W.2 has proved the contents of the medical examination certificate of the victim of rape which is marked at Exh.16. He had examined the

victim. He has testified before the Court that the victim had given the case history to the effect that on 4th October 2003 when she had gone to attend nature's call she was forcibly taken to an unknown place by Shafiq and Bihari and that Shafiq had ravished her. According to P.W.2, the history of menarche was since one year. When she was examined she was going through her menstrual period. P.W.2 did not find any injuries on her private part. Opinion of P.W.2 is as follows:-

“I did not find any injuries on her private part.
Abdominal Examination. Nothing abnormal detected.

Local Examination on Private Parts:

- (a) Labia Majora : Normal
- (b) Labia Minora : Normal
- (c) Clitoris : Normal
- (d) Vaginal Mucosa : Not seen.
- (e) Type of Hymen : Circular, Hymen is intact.
- (f) Hymenal Orifice : Admits Tip of little finger.

Vaginal Smear not preserved due to 2nd day of M.C.”

5. P.W.2 has further testified that some girls have irregular menstrual cycle. The victim had given history of irregular menstrual cycle which was not recorded. The hymen was intact. Doctor has further opined as follows :

“If the intercourse is not forceful, there will not be injury to the private part of the girl.
..... I do not think, due to forceful sexual intercourse she got bleeding.”

6. PW.5 – Keshav Sanap was attached to Shivaji Nagar Police Station as API in the year 2005. He has proved registration of the FIR. He has also proved the omissions and contradictions of the witnesses.

7. PW.6 – Firoz Sattar was a resident of Rafiq Nagar and has identified the original accused nos.1 and 2. He has deposed before the Court that at around 4.30 to 5.00 pm on 4th October 2003 when he was proceeding by the side of the creek near the dumping ground, he had heard some chaos. He had seen his friend Hasan. The people who had gathered on the spot were talking about an incident of rape. Before he could react the Police personnel had reached the spot. He saw some people running away. He had seen Ms.X when she was proceeding to attend nature's call. In the evening, he met her at home and inquired with her. He has denied to have seen the accused at the scene of offence.

8. PW.7- Pandurang Jadhav was the Investigating Officer. Investigation of Crime No.156/03 was entrusted to him on 6th October 2003. On 6th October 2003, Dayal was arrested, on 16th October 2003 Mohd. Jakir @ Bihari was arrested and was referred to Juvenile Court

as he was found to be a juvenile in conflict with law. On 28th October 2003, Shafiq was arrested by API Sankpal. The accused Mohd. Jakir @ Bihari was sent to Borstal School at Nashik for two years.

9. In the present case, it is pertinent to note that the medical evidence does not corroborate the allegations of rape. In the absence of medical evidence, it would be difficult to arrive at a conclusion that the incident has occurred in the manner in which it was narrated. It would be doubtful as to whether the victim was subjected to sexual assault. There is no doubt that the sole testimony of the victim of rape can be relied upon implicitly, however, some corroboration would be necessary as a matter of prudence. The Supreme Court in the case of **Sadashiv Hadbe Vs. State of Maharashtra¹**, has held as follows :-

“8. It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring of confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.”

1 (2006) 10 SCC 92

10. In view of the above discussion and the judgment of the Hon'ble Apex Court, the appeals deserve to be dismissed. Hence, we pass the following order :

ORDER

- (i) The Appeals are dismissed;
- (ii) The judgment and order passed by the Additional Sessions Judge, Mumbai in Sessions Case No.166/2004 is confirmed;
- (iii) The appeal are disposed of in above terms.

(N.R. BORKAR, J)

(SMT. SADHANA S. JADHAV, J)