
(1982) 08 BOM CK 0034
In the Bombay High Court
Case No : Criminal Appeal No. 1122 of 1976

Abdul R. Pathan

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 03-08-1982

Acts Referred:

Bombay Children Act, 1948 — Section 57
Penal Code, 1860 (IPC) — Section 376

Citation : (1983) 1 BomCR 489

Hon'ble Judges : B.J. Rele, J

Bench : Single Bench

Advocate : T.H. Sardar, for the Appellant; M.D. Gangakhedkar, Public Prosecutor, for the Respondent

Judgement

B.J. Rele, J.—The accused has preferred this appeal against his conviction and sentence u/s 376 of the Indian Penal Code, passed by the learned Additional Sessions Judge, Greater Bombay.

2. The prosecution case is that the accused and the victim girl Zarina reside in Pathan Building, S.V. Road, Bombay. Zarina was at the relevant time living in Room No. 28, with her mother Khatunbi, her sister Hasina and her brother Gulam Kasam. The accused was residing in Room No. 38 on the second floor. Room No. 24 which is the scene of offence belongs to the brother of the accused by name Abdul Khalif. In that room Abdul Khalif resides with his wife and carries on embroidery business under the firm name and style of Fine Art Embroidery Works.

3. On 14th May, at about 5.30 p.m. Zarina was playing in the passage of Pathan Building. It is alleged that at that time, the accused called her to Room No. 24 but as Zarina refused, the accused forcibly took her in that room and there the accused committed sexual intercourse on her. The shouts of Zarina, occasioned by the pain which she got, brought her mother Khatunbi to Room No. 24. It is the prosecution case that Khatunbi took Zarina from that room to her room. She

also took with her the underwear of Zarina which was soaked in blood. Zarina was bleeding from the vagina. Khatunbi wanted to file a complaint, but as her brother Sayed Yusuf Sayed Amin was not present as also her husband, she waited till her brother came and ultimately she lodged the complaint at the Dongri Police Station. S.I. Arjun Jaunjan is the Investigating Officer. He drew up the panchanama Exhibit 7 of Room No. 24 and her sent Zarina to J.J. Hospital for medical examination. Zarina was examined by Dr. D. J. Karnik (P.W. 4) in the O.P.D. and on finding that Zarina was bleeding from the vagina and was complaining of abdomen pain, Dr. Karnik referred her to the Gynecologist Ward where she was examined by Dr. Jasmine Lopes (P.W. 6). Zarina was admitted in J.J. Hospital for 11 days and was thereafter discharged. On these facts, the accused was charged u/s 376 of the Indian Penal Code and in the alternative u/s 57 of the Bombay Children's Act, 1948. The accused pleaded not guilty to the charge. His case is that because of enmity he has been falsely involved in this case.

4. The learned Additional Sessions Judge believed the evidence led by the prosecution and convicted the accused u/s 376 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for three years. As against his conviction and sentence the accused has preferred this appeal.

5. Shri Sardar, the learned Advocate appearing on behalf of the accused has contended that the evidence is so grossly discrepant that no conviction can be based upon that evidence and, therefore, the conviction of the accused u/s 376 of the Indian Penal Code must be set aside.

6. Shri Gangakhedkar, learned Public Prosecutor, has submitted that the evidence of the prosecutrix Zarina is a cogent evidence and must be accepted. If her evidence is accepted, the conviction of the accused must be sustained.

7. I have been taken through the evidence recorded in this case and it must be stated that the evidence led in this case is not sufficient to convict the accused u/s 376 nor is the evidence sufficient to convict accused u/s 57 of the Bombay Children's Act. The prosecution has led the evidence of Khatunbi (P.W. 1), the mother of the victim girl, the victim girl Zarina (P.W. 2), and the maternal uncle of the victim girl Sayed Yusuf Sayed Amin (P.W. 8). The prosecution has also examined Dr. Karnik (P.W. 4). Who was the Casualty Medical Officer at J.J. Hospital on 14-5-1974. Dr. Jasmine Lopes (P. W. 6) is a lecturer in Bio-Chemistry and she has been examined because she was able to identify the handwriting of Dr. Pradeep Shirodkar who examined the girl. The evidence of Dr. Lopes is, therefore, of no value whatsoever. Dr. Franklin (P.W. 5) was the Police Surgeon and he examined the victim girl Zarina to ascertain her age as also the accused for his potency.

8. The victim girl Zarina was on 15th May, 1974 of about six years of age. There is no challenge before me in regard to the evidence of Dr. Franklin that the victim girl Zarina was about six years of age. She being a girl of tender age, her

evidence will have to be scrutinised with great care and caution and the likelihood of her evidence being tampered with must necessarily be borne in mind. Before I consider her evidence, it must be recorded that the learned Additional Sessions Judge has before the victim was examined made a note as follows :

"The girl is hardly 9 years of age and by consent I am examining her without administration of oath and her evidence is being recorded in Camera."

The learned Additional Sessions Judge has not stated as to who gave the consent and what was the consent. It is the duty of the Court while examining the child witness to see that the child witness is capable of understanding the questions which are put to the child witness as this has to be done by the Court asking questions to the child witness in order to ascertain whether the child witness is capable of giving evidence. It is only then that the Court has to decide that oath should be administered or should not be administered. This duty of the Court appears to have been abandoned in this case by the learned Additional Sessions Judge. The function of the Court is in order to see the mental state of the child-witness and this has not been done by the learned Additional Sessions Judge. There is another matter which also needs to be recorded. While recording the evidence only a statement has been put in the cross-examination of witness that they did or did not state before the police. No further examination has taken place, viz, confronting the witness with his previous police statement and seeking his explanation as to which of the two statements true. What has been done in the present case by the learned Additional Sessions Judge is to allow the question to be put with reference to whether the witness made such a statement to the police without even showing the statement to the witness. It is absolutely necessary that while recording the contradictions with reference to the police statement, the relevant part of the police statement which is shown to the witness is marked by the learned Judge in order to identify which part of the statement was shown to the witness and then to record the answer and thereafter to seek the explanation of the witness with reference to the portion of the statement contradicted. In the present case, the learned Sessions Judge has merely recorded that the witness has or has not made a particular statement before the police and then without even marking the statement to ask the Police Officers whether the witness has made such a statement. It is only during the evidence of the Police Officer that the statement which is marked is exhibited. This has not been done in the present case.

9. Since the age of the victim girl Zarina is admitted to be of 6 years, the only question that arises for consideration is whether the victim girl Zarina was subjected to sexual intercourse and if that was so, by whom. The question of consent of Zarina would not arise in this case. Zarina has in her evidence stated that on 14-5-1974 she was playing in the Verandah of the Chawl when the accused called her to Room No. 24. She was not prepared to go to that room, but the accused forcibly took her to the room. Then Zarina has stated that the

accused removed her Chaddi and slept over her and kissed her. Then the accused asked her to remove her chaddi which she did not do. Then the accused removed his Chaddi and had sexual intercourse with her. When she started crying due to pain, the accused kissed her private part. When blood started to come out he got up and put on his Chaddi and started running away. At that time her mother came. Thereafter, her uncle and father came and she was removed to the Hospital. In her cross-examination she has been contradicted with her police statement that she did not state before the police that the accused had sexual intercourse with her. Since this contradiction is a material contradiction, her evidence that she was subjected to sexual intercourse by the accused cannot be believed and there being no other evidence in this case the offence of rape must be held not to have been brought home to the accused who is entitled to the benefit of doubt.

10 There is also another reason why the evidence of witness Zarina that she was subjected to sexual intercourse by the accused cannot be believed and the reason is that Zarina was removed to J.J. Hospital by her father. She was first examined by Dr. Karnik and she has not given any history of bleeding from vagina. Dr. Lopes, P.W. 6, did not examine the victim girl Zarina. It was Dr. Pradeep Shirodkar who examined her and Dr. Jasmine Lopes was examined only to identify the handwriting of Dr. Pradeep Shirodkar on the case papers. The case papers, Exhibit 14, shows that the history was given as---

"Child says her under clothes were removed, that boy introduced tongue in her genitals and bit her."

Therefore, the history was given as insertion of tongue in her genitals and biting her genitals. Doctor has admitted that lacerations at fourchette can be as a result of scratching by nail. Since in the history which has been immediately given to the doctor and since in the statement before the police there is no allegation of any sexual intercourse, the charge u/s 376 of the Indian Penal Code must be held to be not provided. The conviction and sentence of the accused u/s 376 of the Indian Penal Code must, therefore, be set aside.

11. That is not the end of the matter. The accused has been charged u/s 57 of the Bombay Children's Act and the question that arises is whether the accused has committed the offence u/s 57 of the Bombay Children's Act. Here again, the evidence is that of the victim girl Zarina and her mother Khatunbi. Zarina being a child witness the probability of her being tutored by her mother cannot altogether be ruled out and for this reason it is necessary to consider the evidence of her mother Khatunbi, Khatunbi P. W. 1, has in her evidence stated that she was in Room No. 21. At about 5.30 p.m. on 14-5-1974 she heard the shout of Zarina and, therefore, she came out of the room and proceeded towards the direction of the shout and she has deposed that she saw the accused coming out of the room, but she said nothing to the accused. She went inside the room and she found that Zarina was bleeding through her vagina and she also found that the Chaddi worn by Zarina was in that room, which, according to her, was

soaked with blood. She took Zarina and also carried the underwear worn by her. But in her cross-examination she has stated at first, "On the day of the incident after I heard the shout of my daughter I saw Kutty going down the stairs." Then again she stated---

"He had come from upstairs to that room on that day because it belonged to his brother. I did not see that accused going inside the room but I saw him coming out therefrom. After hearing the shout of my daughter, I saw the accused with the girl in Room No. 24. I say that I saw the accused coming out of the room going down the passage after I heard the shout of my daughter."

Her evidence in regard to the exact spot at which she saw the accused is not cogent and, therefore, cannot be relied upon. There is also another very cogent reason to come to a conclusion that it is highly improbable that the offence could have at all taken place in Room No. 24. Khatunbi has in her evidence admitted that Room No. 24 belongs to the brother of the accused Abdul Khalif who lives in that room, that there is Zari Karkhana in that room, that about 8-10 persons work in the said Karkhana, that this Karkhana is closed on Sunday, that on the working day the work goes on till 9.00 p.m. or 10.00 p.m. and sometime seven till 11.00 p.m. Now, Khatunbi has mentioned Sunday as the day of offence in order to show that the karkhana was not working and the accused had opportunity to commit the offence. S.I. Jaunjan, P.W. 7, had admitted in his evidence that 14th May, 1974 was Tuesday. 100 years Calender 1901 to 2000 also shows that 14th May, 1974 was a Tuesday. It being a working day, the factory must have been working on that day and it is highly improbable that the accused could have committed the offence at a time when the factory was working.

12. There is also one more reason why the evidence of Khatunbi cannot be accepted. The prosecution has not shown that at the time the person to whom the room belonged was not in the room when ordinarily he should have been in the room especially when he resides in the room and carries on business in the room. The further reason why the evidence of witness Khatunbi cannot be accepted is that Khatunbi has given an explanation as to why she did not immediately lodge the complaint with the police and the explanation given by her is that at that time neither her brother Syed Yusuf nor her husbands were in the room nor there were any neighbours who could be contacted to come along with her to the police station. But in that evidence it has been brought out that in the adjoining room No. 23 there is a Dispensary of Dr. A. Memon, that he is in the Dispensary from 5.30 p.m. till 8.30 p.m. Khatunbi resides in room No. 28 about four rooms away. It is highly improbable that if Zarina had raised a shout Dr. A. Memon could not have heard it. Furthermore, opposite room No. 24 is room No. 27 in which one Zafar resides. Witness Khatunbi has admitted that in all the rooms people reside. It is highly improbable that on the first floor of that building at about 5.30 p.m. there was not a single person in that chawl who would have, come to the assistance of Khatunbi when she heard the shout of Zarina. From

this evidence of Khatunbi, the probability that her daughter Zarina was tutored cannot altogether be ruled out.

13. There is also another reason for holding that the probability cannot be ruled out. While giving the history of bleeding Zarina has not given the name of the boy. She has merely stated a boy, but in her evidence she has given the name of the accused. It must, therefore, be held that the prosecution has failed to prove who outraged the modesty of the girl Zarina. The charge u/s 57 of the Bombay Children's Act also must be held to be not proved all reasonable doubts.

14. In the result, the conviction and sentence passed by the learned Additional Sessions Judge, Greater Bombay, against the accused u/s 376 of the Indian Penal Code must be set aside.

15. I, therefore, pass the following order :

Conviction and sentence passed against the accused u/s 376 of the Indian Penal Code is set aside. Accused acquitted of the offence. Bail bond cancelled.