

(2001) 03 BOM CK 0103
In the Bombay High Court
Case No : Criminal.Appeal No. 51 of 1986

State of Maharashtra

APPELLANT

Vs

Abdul Majid Abdul Raheman Sayyed

RESPONDENT

Date of Decision : 09-03-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 377
Penal Code, 1860 (IPC) — Section 307, 326, 34
Probation of Offenders Act, 1958 — Section 4

Citation : (2001) 03 BOM CK 0103

Hon'ble Judges : Vishnu Sahai, J;Pratibha Upasani, J

Bench : Division Bench

Advocate : S.R. Shinde, app,-State, for the Appellant; B.G. Tangsali, for the Respondent

Final Decision : Dismissed

Judgement

Dr. Pratibha Upasani, J.—This criminal appeal for enhancement of sentence is filed by the State of Maharashtra, being aggrieved by the judgment and order dated 2.9.1985, passed by the Assistant Sessions Judge, Thane, in Sessions Case No.270 of 1984. By the impugned judgment and order, in Assistant Sessions Judge had found the respondent/accused (hereinafter referred to as the respondent) guilty for the offence punishable u/s 307 read with section 34 of the Indian Penal Code. However, instead of sentencing the respondent at once to any punishment, the respondent was directed to be released, on his entering into a bond of Rs.1,000/- with surety in the like amount for a period of one year. The respondent was also ordered, during this period of maintain peace and be of a good behaviour. The State has felt aggrieved as far as the sentence part of the order is concerned and hence this appeal.

2. The prosecution story can be briefly narrated as follows :

The complainant, one Asfak Ahmed Idris, the present respondent Abdul Majid Abdul Raheman Sayyed, Mohammed Umar Momin, Tanvir and Samsu were doing

business of black marketing of cinema tickets at Anand Talkies, Bhiwandi. Initially, all of them were doing this business jointly. However, later on Mohammed Umar, Tanvir and Samsu and the respondent asked the complainant Asfak Ahmed Idris to stop black marketing of cinema tickets at the said theatre. The complainant, however, continued the black marketing of cinema tickets at the said theatre. This gave rise to the incident in question which took place on 6.8.1983 at about 11.30 a.m. at Anand Talkies.

As per the prosecution story, the complainant Asfak went to Anand Talkies to purchase cinema tickets and while he was talking to the booking clerk Vilas Gurav (PW5), the absconding accused Umar came there and asked the complainant as to why he was doing black marketing of cinema tickets at Anand Talkies. The said absconding accused Umar was accompanied by the present respondent Abdul, accused Tanvir and Samsu. Umar assaulted the complainant on his chest by means of a gupti. The complainant tried to rescue himself from Umar but the respondent and the other accused caught hold of him. Tanvir then assaulted the complainant by means of a knife on his head. The present respondent and the absconding accused Samsu started beating the complainant by means of wooden sticks. Because of the beating, the complainant fell down on the ground. He was then taken to the Municipal Hospital, Bhiwandi where P1 Deshmukh (PW-9) recorded his dying declaration. This dying declaration was sent to Bhiwandi Police Station along with the report of P1 Deshmukh for registering the offence. Accordingly, offence came to be registered against all the above mentioned accused including the present respondent u/s 307 read with section 34 of the Indian Penal Code and the law was set in motion.

After routine investigation was completed, chargesheet came to be filed by P1 Deshmukh in the Court of the Judicial Magistrate, First Class, Bhiwandi, against the accused including the present respondent under sections 307 and 326 read with section 34 of the Indian Penal Code. Since the offence was exclusively triable by the Court of Sessions, the trial Court committed the case of the accused to the Court of Sessions, Thane. When charge was framed, read over and explained to the accused, the denied the same and claimed to be tried. His defence was that of total denial

3. The learned Assistant Sessions Judge, Thane, after recording evidence of all the prosecution witnesses and after hearing both the sides came to the conclusion that the prosecution had succeeded in establishing beyond reasonable doubt that the respondent/accused Abdul Majid Abdul Raheman Sayyed had committed offences punishable under sections 307 and 326 read with section 34 of the Indian Penal Code but what was proved was only the offence punishable u/s 307 read with section 34 of the Indian Penal Code. He, therefore, convicted the respondent; however; instead of sentencing him at once to any punishment, the learned Assistant Sessions Judge, Thane, ordered that the respondent be released, on his entering into a bond of Rs.1,000/- with surety in the like amount for a period of one year and that during this period of maintain peace

and be of a good behaviour.

4. Being aggrieved by the inadequacy of sentence imposed on the respondent, the State has approached this Court by way of filing the present criminal appeal for enhancement of sentence.

5. We have heard Mr. S.R. Shinde, Additional Public Prosecutor, appearing for the State and Mr. B.G. Tangsali, Advocate (appointed) for the respondent/accused. We have also gone through the impugned judgment and order and the depositions of the witnesses and the, other relevant record.

6. The prosecution to bring home the charge against the accused, examined 9 witnesses. PW-1 Dr. Kantilal Sontakke was the Medical Officer attached to Municipal Hospital, Bhiwandi at the relevant time. He identified the entries at serial No. 1468, dated 6.8.1983 pertaining to the complainant Asfak Ahmed Idris, who was brought to the Municipal Hospital on that day at about 12.30 p.m. Dr. Kantilal deposed that the entries were in the handwriting of Dr. Abdul Samad, who was working with him. He has further deposed that the said Desamad had expired on 18.3.1984 but that he was familiar with his hand-writing and signature and could identify the same, Dr. Kantilal deposed from the records that Dr. Abdul Samad had examined the complainant Asfak Ahmad Idris and had found the following injuries as per the M.L.C. register:

(1) C.L.W. right temporal region vertical muscle deep 1" x 1/4".

(2) Incised wound left anterior chest over ant. axillary line 1" lateral to left nipple 1/4" x 1/4" muscle deep.

(3) Incised wound right anterior chest over mid thorax region just lateral to sternum 1/4" x 1/4" muscle deep.

(4) Haemotoma over left anterior chest, around left nipple. No surgical emphyseum.

(5) Incised wound over left ant. chest lower and lateral aspect of thorax. No surgical emphyseum.

Dr. Kantilal stated that injury Nos.2, 3 and 5 were possible to be caused by a sharp weapon, and that injury Nos.1 and 4 were possible to be caused by means of a hard and blunt object. He further stated that injury Nos. 2, 3 and 5 were possible to be caused by means of a gupti. He further stated that injury Nos. 1 and 4 were possible to be caused by means of the handle of the weapon.

7. PW-2 Hanmant Namdeo Pawar was the Police Constable attached to Bhiwandi Police Station, who stated that on 30.8.1983 he was directed to carry the muddamal property, namely, one green coloured lungi, blood mixed earth and simple earth to the Chemical Analyser, Bombay, by P1 Deshmukh and that he accordingly carried the said three articles to the office of the Chemical Analyser along with the forwarding letter.

8. PW-3 was one Mohammad Shabbir Rasul Pathan, who stated in his deposition that he was working as a door keeper at Anand Talkies, Bhiwandi, at the relevant time. He further stated that on 5.8.1983 a film known by the name "Sangharsh" was released at Anand Talkies and that some incident took place on 6.8.1993 near the gate of Anand Talkies; but that he was inside the theatre and did not know what happened on the day of the incident. He further stated that he did not know the accused nor did he know the complainant. He also stated that he did not know anything about incident. This witness was declared hostile by the prosecution.

9. PW-4 Basha Abdul Karim has deposed in his deposition that he was working as a machine operator in Anand Talkies at Bhiwandi at the relevant time. He stated that he did not know the complainant nor did he know the accused. He stated that he had not seen the incident but that he saw that the complainant had sustained bleeding injuries. This witness was also declared hostile by the prosecution.

10. PW-5 was one Vilas Gurav, who has deposed that he was working as a booking clerk at Anand theatre at the relevant time and that on 6.8.1983 when he opened the booking window, he saw that there was a mob and uproar. He, therefore, enquired with the door keeper who informed him that some "mara-mari" was going on and thereupon he shut down the booking window. He stated that he knew Umar and that he also knew the complainant: that he also came to know that the complainant was beaten. However, he stated that he did not know the accused and Samsu. He further stated that he, however, had not seen the injuries on the complainant nor did he see Umar at the time of the incident. He further stated that he did not see the accused and the two others who had caught hold of the complainant. This witness was also declared hostile by the prosecution.

11. PW-6 is the complainant Asfak Ahmad Idris Shaikh who stated in his deposition that he knew Samsu and Tanvir and so also the accused who was before the Court and that all of them were doing black marketing of cinema tickets at Anand Talkies. He further stated that previously all of them including himself were doing that business jointly but that later on Umar and others asked him to do the said business separately, but that he declined to do so and that this fact was not liked by Umar and others. He further stated that Umar told him that he would not allow him to come to Anand Taikies.

The complainant Asfak further stated in his deposition that on 5.8.1983 a film "Sangharsh" was released at Anand Talkies and that on 6.8.1983 at about 11.30 a.m. he went to the booking window to purchase tickets. He further stated that at that time Umar asked him not to purchaser the tickets and at that time Umar assaulted him on his chest by means of a gupti and others caught hold of him. Tanvir also assaulted him on his head by means of a knife and others caught hold of him and beat him by means of a gupti. Umar assaulted him by means of a gupti on his chest and left axillary line. He stated that thereafter he ran away in

the compound of Anand Talkies. He further stated that some persons gathered and made a hue and cry. So the accused and others ran away from the spot.

12. PW-7 is Dr. Vijay Sangole, who stated that on 6.8.1983 he was attached to Civil Hospital, Thane, and that at about 2:30 p.m. he examined one Asfak Ahmed Idris Shaikh referred by the Medical Officer, Bhiwandi. He further stated that on examination of the complainant he found that the patient was conscious and he found following injuries on his person :

(1) I.W at left maral region in 4th intercostal space, horizontally placed 1/2" long both angles acute, lateral to sernum.

(2) I.W. at the anteroal fold of leg axillar in 3rd intercostal space horizontally placed, both angles acute 3/4" long gapping present.

(3) I.W over left elbow posteriorly 1/2" x 1/4" skin deep.

(4) Stitched wound at the right parietal temporal region 3" long. Due to haemotoma with emphysema over the left hammer region.

Dr. Vijay further deposed that injury Nos.1, 2 and 3 were, in his opinion, caused by a sharp object. He could not give the age and cause of injury No.4. He, however, stated that all the injuries were fresh.

13. PW-8 was one Isar Ahmad Mumtaj Ahmad Ansari, who was the panch witness who acted as a panch on 6.8.1983 for the scene of offence panchanama and also when the lungi, blood mixed earth and simple earth were taken charged of by the police.

14. PW-9 was the investigating officer P1 Deshmukh, who was attached to Bhiwandi Police Station at the relevant time. He recorded the dying declaration/ statement of the complainant, carried out the routine investigation and submitted the chargesheet.

15. We have heard Mr. Shinde, Additional Public Prosecutor, appearing for the appellant/State and Mr. Tangsali, Advocate appointed by the Court to represent the respondent/accused. We have also carefully gone through the evidence on record and the impugned judgment and order dated 2.9.1985, passed by the trial Court and we are constrained to observe that the trial Court has committed gross error in convicting the respondent when there was no evidence against him. If one goes through the evidence of all the prosecution witnesses, it will be seen that no prosecution witness had named the present respondent Abdul Majid Abdul Raheman Sayyed. Even the complainant Asfak Ahmed Idris has nowhere stated that the respondent was at Anand Talkies at the time of the incident along with Umar or that the respondent was one of the persons referred to by the complainant as "others". In fact there is nothing on record to link the respondent with the incident. The so called dying declaration of the complainant had been exhibited as Exhibit-17 by the trial Court. In the said dying declaration also the complainant has no where mentioned the name of the respondent. There is not a

whisper of his name anywhere. What one finds in the depositions of the prosecution witnesses is the name of Umar, who appears to be absconding. Nowhere there is even a mention of the presence of the present respondent. In these circumstances, it is surprising as to how the trial Court reached the conclusion about the guilt of the respondent. The recording of finding of guilt against the respondent itself was faulty and the trial Court committed error in coming to the finding of guilt against the respondent.

In addition, releasing the respondent/accused on his entering into a bond of Rs.1,000/- with surety in like amount for a period of one year and directing him to maintain peace and be of good behaviour during this period was another error committed by the trial Court, considering that the accused was found to be guilty by the trial Court for the offence punishable u/s 307 read with section 34 of the Indian Penal Code. Section 307 entails punishment of imprisonment for life which disentitled the accused who has been convicted under that section to be conferred with benefit of provision contained in section 4 of the Probation of Offenders Act, 1958. The trial Court, therefore, committed gross error in giving the accused this benefit.

16. Section 4 of the Probation of Offenders Act, 1958 states that the Court has power to release certain offenders of probation of good conduct. Sub-clause (1) of Section 4 of the said Act states as follows :

4. Power of Court to release certain offenders of probation of good conduct - (1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the Court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the Court may direct, and in the meantime to keep the peace and be of good behaviour, (emphasis supplied)

(2)

(3)

(4)

(5)

17. Thus, reading of section 4 makes it clear that benefit of section 4 of the Act is not to be given to a person who is found guilty of having committed offence which is punishable with death or imprisonment for life. Since the respondent in the present case was found to be guilty by the trial Court for the offence punishable u/s 307 of the Indian Penal Code, the trial Court ought not to have

given the benefit of section 4 of the said Act to the respondent. It thus appears that the trial Court completely lost sight of the provisions of section 4 of the said Act and erroneously directed to give benefit of section 4 of the respondent. Thus, firstly, the finding of guilt recorded against the respondent and his consequent conviction was erroneous inasmuch against the respondent and his consequent conviction was erroneous inasmuch as there was no evidence whatsoever against the respondent. Over and above this, the order with respect to sentence, the suspension thereof and ordering of giving benefit of section 4 of the said Act to the respondent/accused was all erroneous. All this, therefore, will have to be quashed.

18. Section 377 of the Code of Criminal Procedure, 1973, contains provisions for appeal by the State Government against a sentence. Sub-clause (3) of the said section lays down that wherein an appeal has been filed against the sentence on the ground of its inadequacy, the High Court shall not enhance the sentence except after giving to the accused a reasonable opportunity of showing cause against such enhancement and while showing cause, the accused may plead for his acquittal or for the reduction of his sentence.

19. After going through the entire evidence on record and after hearing both the sides, we have come to the conclusion that the trial Court's finding of guilt and the consequent recording of conviction against the respondent was totally erroneous. On the contrary, the respondent/accused is entitled to acquittal in the absence of total failure of the prosecution to prove its case. By virtue of the provisions contained in sub-clause (3) of section 377 of the Code of Criminal Procedure, 1973, the accused can plead for his acquittal in an appeal filed by the State Government against the sentence. We are of the considered opinion that this is a fit case where the respondent should be acquitted in the absence of any evidence against him. Hence, the following order:

ORDER

Criminal Appeal No. 51 of 1986 is hereby dismissed. Rule is discharged.

The impugned judgment and order dated 2.9.1985, passed by the Assistant Sessions Judge, Thane, in Sessions Case No.270 of 1984 is hereby quashed and set aside and the respondent Abdul Majid Raheman Sayyed is acquitted of the offence punishable u/s 307 read with section 34 of the Indian Penal Code.