

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.499 of 2023

Present:

Mr. Justice Mohammad Karim Khan Agha

Appellant: Umair Qadeer S/o Qadeer Ahmed
Through Mr. Muhammad Yousif Narejo, Advocate.

Respondent/State: Mr. Muhammad Iqbal Awan, Addl. Prosecutor
General, Sindh a/w Mr. Saleem Ahmed Shar,
Assistant Prosecutor General, Sindh

Date of hearing: 29.01.2024

Date of announcement: 02.02.2024

J U D G M E N T

Mohammad Karim Khan Agha, J.- Appellant Umair Qadeer son of Qadeer Ahmed has preferred this appeal against the impugned judgment dated 19.09.2023 passed by the learned VIIth Additional Sessions Judge, Karachi East in Sessions Case No.2743/2022 under F.I.R. No.288/2022 U/s. 294 PPC registered at P.S. Landhi, Karachi; whereby the appellant was convicted and sentenced under Section 377-B PPC as per charge to fourteen (14) years with fine of one million rupees and in case of default of payment, he shall suffer R.I. for six months more.

2. The brief facts of the prosecution case as per FIR are that on 02.05.2022 at about 08:30 p.m. accused Umair Qadeer committed "*nazaiya harkat*" with Aisha Nasir, who is aged about 08 years old inside his Kiryana Store located at area 36-J Landhi No.6, Karachi.

3. After completion of usual investigation charge was framed against the accused person to which he pleaded not guilty and claimed to be tried.

4. In order to prove its case the prosecution examined 06 witnesses who exhibited various documents in support of the prosecution case where after the prosecution closed its side. The statement of the appellant/accused was recorded under Section 342 Cr.P.C. wherein he denied the prosecution allegations and stated as under:

"I am innocent. About 3/4 days before alleged incident the complainant had exchanged hot words to me over demand of outstanding amount of Rs.50/-. On 02.05.2022, it was

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CHAND RAT. After Iftar and prayers I alongwith my brother brought the cartons of commodities/things at shop. We were busy in setting the shelves, and entrance of the shop was closed due to cartons lying there. Meanwhile, 3/4 children came to purchase but I refused them, as I was not free to deal with them. After some time, Aduan alongwith minor and grandmother came at my shop and started to beat me. I did not reply. Then I ran away from there, in order to save my skin. I pray for justice." (bold added)

However, the appellant neither examined himself on oath nor produced any witness in support of his defence case.

5. After hearing the learned counsel for the parties and assessing the evidence available on record, learned trial court vide judgment dated 19.09.2023 convicted and sentenced the appellant as stated above, hence this appeal has been filed against his conviction.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant has contended that the appellant is innocent and has been falsely implicated in this case; that the FIR was lodged after a delay of 8 hours; that the eye witnesses are planted witnesses and their evidence be discarded; that there are material contradictions in the prosecution evidence which renders it unreliable; that no medical evidence has been collected to support the prosecution case and that for any or all of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt. In support of his contentions, he placed reliance on the case of **Maqsood Alam and another vs. The State and others** (2024 SCMR 156).

8. Learned Additional Prosecutor General Sindh after going through the entire evidence of the prosecution witnesses as well as other record of the case supported the impugned judgment. In particular, he contended that the FIR was lodged with promptitude based on the particular facts and circumstances of the case; that there were 3 eye witnesses including the victim in this case all of whose evidence could be safely be relied upon and as such the prosecution had proved its case beyond a reasonable doubt and the appeal be dismissed. In support of his

contentions, he placed reliance on the cases of *Zahid and another vs. The State* (2020 SCMR 590)

9. I have heard the arguments of the learned counsel for the appellant and learned Additional Prosecutor General Sindh and have gone through the entire evidence which has been read out by the learned counsel for the appellant and the impugned judgment with their able assistance and have considered the relevant law including the case law cited at the bar.

10. Based on my reassessment of the evidence on record, I find that the prosecution has proved beyond a reasonable doubt that on 02.05.2022 at about 8.30pm the appellant committed sexual abuse with minor child Aisha (the victim) inside Kiryana store J.36 Landhi No.06 Karachi amounting to offense punishable under 337 B PPC as per charge for which he was convicted and sentenced by the impugned judgment for the following reasons;

- (a) That the FIR was lodged within 8 hours of the incident. In cases of rape and sexual assault involving a minor's/lady and family's honour, reputation and dignity delay in lodging the FIR is relatively immaterial. In this case the FIR was lodged within 8 hours of the incident which in any event was relatively promptly keeping in view the sexual nature of the offence against a minor and such delay can hardly be said to be fatal to the prosecution case and I find so accordingly. In this respect reliance is placed on the case of *Zahid* (Supra).
- (b) The appellant is named in the promptly lodged FIR with the specific role of attempting/sexually abusing the victim. Thus there was no time for the complainant to cook up a false case against the appellant. Even otherwise no specific/proven enmity has come on record between the appellant and the complainant or any PW which would motivate them to lodge a false case against the appellant.
- (c) In my view the prosecution's case primarily rests on the eye witnesses to the sexual assault whose evidence I shall consider below;
 - (i) Eye witness PW 3 Aisha is the victim who is a minor and the star witness. She is the daughter of the complainant. At the time she gave evidence she was 9 years old and the trial court gave her the relevant test to see if she was mature enough to give evidence which the trial court found her to be. In her evidence she states that she went to the shop of accused for getting a biscuit when the accused grabbed hold of her and put his face in urine place. He put his penis in my mouth and slapped over his face twice. (US NE PAISHAB KI JAGAH MUNI DALA. US NE PAISHAB KI JAGAH MERE MUN

MEIN DALA. US NE DO CHIAMATAY BIJI MARAY THAY.) She then raised hue and cry and one uncle came who saved her from the accused. According to her it was chandrat and it was Isha prayer time when she went to the shop.

The victim knew the accused from before as she used to go to his shop. She was close to the accused and got a good look at him and as such there is not case of mistaken identity. She is named in the promptly lodged FIR by the complainant as being sexually abused by the accused. She gave her evidence in a straightforward manner and was not dented during cross examination and neither she nor the complainant had any enmity or ill will which would lead to either her or the complainant to falsely implicate the accused on this offence. As such I believe her evidence and rely on the same as against the accused.

- (ii) Eye witness PW 2 Adnan Ahmed. He is not related to either the victim, complainant or the accused and is an independent witness. According to his evidence the incident took place on the night before eid ul Fitr which corroborates the evidence of the witness as to the date of the incident. He offered prayer in the mosque and went to the service station for washing his bike which again corroborates the time of the incident according to the victim's evidence being after Isha prayers. That due to a rush of bikes at the service station he went to the accused shop to purchase cigarettes. He saw that the pant of the accused was removed up to his knees and the accused was putting his penis in the mouth of the victim. He grabbed hold of the accused from his collar and beat him whereupon others gathered who later on caught hold of him after he had initially escaped. The police also arrived.

This witness knew the victim and accused from before as he used to frequent the accused shop and as such is not a chance witness. He names the victim who she had referred to as uncle in her evidence which clearly shows that he knew the victim as well as the accused and is corroborative of her evidence. He is named in the promptly lodged FIR as a witness. He gave his S.161 Cr.PC statement one day after the incident which was not materially improved during his evidence. He gave his evidence in a straight forward manner and was not dented during cross examination. He had no enmity with the accused and had no reason to implicate him in a false case. His evidence of beating the accused is corroborated by the police diary which records after the arrest of the accused that he had sustained injuries of the nature of a beating. In short his evidence corroborates that of the victim in all material respects. It is well settled by now that I can convict the accused on the evidence of a sole eye witness provided that I find his evidence to be trust worthy reliable and confidence inspiring. In this respect reliance is placed on the case of **Muhammad Ehsan v. The State** (2006 SCMR 1857). As also found in the cases of **Farooq Khan v. The State** (2008 SCMR 917), **Niaz-ud-Din and another v. The State** and another

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(2011 SCMR 725) Muhammad Ismail vs. The State (2017 SCMR 713) and Qasim Shazad V State (2023 SCMR 117). That what is of significance is the quality of the evidence and not its quantity and in this case I find the evidence of this eye witnesses to be of good quality and believe the same.

I however there is yet another eye witnesses.

- (iii) Eye witness PW 4 Muhammed Taouqeer Khan. He is not related to either the complainant, victim or the accused and is an independant witness. According to his evidence the incident took place on chand rat at about 7.45pm. He was at the service shop for washing his bike. He saw the victim going to the shop of the accused. He saw the shop keeper grab the victim and pull her inside the shop. After a few seconds one boy rushed to the show (PW 2 Adnan Ahmed) who he followed to the shop. Inside the shop he saw the said boy had got hold of the shopkeeper by his collar and the trouser of the victim was below her knees. The victim was crying and the accused was taken out of the shop and beaten. Other people of the Mohall gathered and during the scuffle the accused ran away. The distant between the shop and service station was only 20 to 22 paces.

This witness corroborates the evidence of the victim and PW 2 Adnan Ahmed in all material respects except he does not see the sexual assault. He is named in the promptly lodged FIR as a witness. He gave his S.161 Cr.PC statement within one day of the incident which was not materially improved upon during his evidence. He is not a chance witness as it is quite natural for him to be filling/washing his motor bike at the petrol station next to the shop. His evidence is honest in that he does not claim to have seen the sexual act himself which he could easily have made up. He gave his evidence in a straightforward manner and was not dented during his cross examination. He had no enmity or ill will with the accused and had no reason to implicate him in a false case. Hence I find his evidence to be reliable, trust worthy and confidence inspiring and I believe the same.

Having believed the evidence of the three eye witnesses which is discussed above I turn to consider the corroborative/supportive evidence whilst keeping in view that it was held in the case of Muhammad Waris v. The State (2008 SCMR 784) as under;

"Corroboration is only a rule of caution and is not a rule of law and if the eye witness account is found to be reliable and trust worthy there is hardly any need to look for any corroboration"

Thus, based on my believing the evidence of the 3 eye witnesses as mentioned above what other supportive/corroborative material is their against the appellant?

- (d) That the evidence of the complainant although hearsay matches that of the victim who was his daughter.
- (e) That it is very common in our society that when persons witness heinous crimes as in this case against a minor child they beat up the accused which is what happened in this case.
- (f) That there was no ill will or enmity between the police and the appellant and as such the police had no reason to falsely implicate the appellant in this case. Under these circumstances it is settled by now that the evidence of police witnesses is as good as any other witness. In this respect reliance is placed on the case of **Mustaq Ahmed V The State** (2020 SCMR 474). Thus, I believe the evidence of the police witnesses including the IO who were not dented during cross examination.
- (g) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence I consider these contradictions as minor in nature and not material and certainly not of such materiality so as to effect the prosecution case and the conviction of the appellant. In this respect reliance is placed on the cases of **Zakir Khan V State** (1995 SCMR 1793) **Khadim Hussain v. The State** (PLD 2010 Supreme Court 669) and **Maskeen Ullah and another versus The State and another** (2023 SCMR 1568). The evidence of the PW's provides a believable corroborated unbroken chain of events from the victim going to the shop to the accused attempting to perform a sexual act on her to him being seen and beaten by the eye witnesses to him escaping and later being arrested for the offence.
- (h) Admittedly there is no medical evidence against the appellant however I do not deem this to be relevant as the charge is one of sexual abuse or even attempt and as such since it concerned oral sex there might not have been any ejaculation.
- (i) The appellant in his S.342 Cr.PC statement which was reproduced earlier in this judgment states that the complainant had enmity with him as he refused to pay back RS.50 which he owed him and hence this is the reason why he has implicated him in this false case. It is simply not believable that the complainant would have falsely implicated the accused in such a heinous false case and dragged in his daughter and other independent witnesses on account of a debt of RS.50 which in the year 2022 could hardly buy you a cup of tea. He also did not cross examine any of the witnesses about this so called enmity. Thus, I do not believe that the appellant had proved any case of enmity with the complainant.
- (j) In the appellant's S.342 Cr.PC statement he admits his presence at the shop at the relevant time where along with his brother he was busy in setting up the shop. He also admits the presence of PW 2 eye witness Adnan and the victim and her grandmother at the shop at the relevant time who according to him just started beating him up for no reason. Hence he accepts both the presence of the victim and the eye witness at his shop at the time of the offence who had no

reason to beat him unless he was doing something to anger PW 2 eye witness Adnan Ahmed, for example, by attempting to sexually abuse the victim who was a minor child.

- (k) The appellant did not give evidence on oath and his defence case revolves around his brother supporting his defence case as per his Section 342 Cr.PC statement however the appellant did not call any defence witness in support of his defence case let alone his brother who was a crucial defence witness who might have been able to cast doubt on the prosecution case. This once again is completely unbelievable.

11. It is to be noted that such heinous crimes against defenseless women especially young baby female children which is an abhorrence and stain on our society needs to be stamped out and dealt with by an iron hand if proven in order to act as a deterrent to others who might consider carrying out similar such predatory acts.

12. Thus, based on the above discussion of the evidence and keeping in view the evidence of the 3 eye witnesses whose evidence I have found to be reliable and have believed, I find that the prosecution has proved its case against the appellant beyond a reasonable doubt for the offence for which he has been convicted and sentenced in the impugned judgment and as such his appeal is dismissed.