

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.R. 2193 of 2013

**Manirul Haque @ Sk. Mantu
-Vs-
The State of West Bengal**

For the Petitioner : Mr. Tapas Ghosh
Mr. Tanmay Chowdhury

For the State : Mr. Narayan Prasad Agarwala
Mr. Pratick Bose

Heard on : 11.04.2023, 15.06.2023.

Judgment on : 28.11.2023.

Ananya Bandyopadhyay, J.:-

1. The instant criminal revisional application is filed by the petitioner being aggrieved and dissatisfied with the impugned judgment and order dated 20th May, 2013 passed by the Learned Additional Sessions Judge, 3rd Court at Suri, Birbhum in Criminal Appeal No. 1 of 2008 affirming the judgment and order dated 29th November, 2007 passed by the Learned Assistant Sessions Judge at Bolpur, Birbhum in Sessions Case No. 190 of 2006, corresponding to Sessions Trial No. 6 dated 23rd November, 2006 convicting the petitioner under Section 354 of the Indian Penal Code, 1860 and sentencing him to

suffer simple imprisonment for one year and to pay a fine of Rs.1,000/- in default simple imprisonment for another two months.

2. The prosecution case precisely stated on 3rd June, 2005 at about 8 PM, the victim lady namely, Unnati Das, a house-wife, proceeded to her elder brother-in-law's house, namely Sukumar Das, towards the village road. On the eastern side of the house of said Sukumar Das, the grocery shop of the petitioner is situated. The Petitioner sitting in front of his said shop saw the victim lady and on the pretext of taking the torch light from the said victim lady, he came close to her and forcibly took her into his said grocery shop with an intent to commit rape. The said victim lady resisted herself and raised alarm and hearing the same, the said Sukumar Das along with his wife, namely Sulekha Das, came to the spot and the co-villagers namely Uday Barman, Md. Sudin, Naresh Mudi and others came to the said spot and the victim lady narrated the said incident to all of them, who appeared at the spot immediately.
3. On the basis of such complaint, Bolpur Police Station Case No. 80 of 2005 dated 3rd June, 2005 under Sections 376/511 of the Indian Penal Code 1860 was initiated for investigation. The investigation ended in the submission of Charge-Sheet under Sections 376/511 of the Indian Penal Code, 1860.
4. Subsequently the charge was framed against the petitioner on 23rd November, 2006 on two separate grounds, firstly, under Section 376 and secondly, under Section 511 of the Indian Penal Code, 1860, to which the petitioner pleaded not guilty and claimed to be tried.

5. To prove its case, the prosecution adduced as many as five witnesses and certain documents were exhibited, being Ext. No. 1 to Ext. No. 3, but none was examined on behalf of the defence.
6. The victim lady, namely Unnati Das, adduced her evidence as PW-1. Her husband, namely Harisadhan Das, adduced his evidence as PW-2, who was a post-occurrence witness and heard the entire incident from PW-1, being the victim lady. PW-3 and PW-4 being Uday Barman and Naresh Mudi, were the local residents, who allegedly after hearing the commotion arrived at the spot and both of them heard the whole incident from the said victim lady, being PW-1. The Investigating Officer, Md. Khairul Alam adduced his evidence as PW-5 on behalf of the prosecutrix.
7. After considering the evidence on record and hearing the arguments made by the parties as well as other materials produced before the Learned Court, the Court of the Learned Assistant Sessions Judge at Bolpur, District-Birbhum on 29th November, 2007 convicted the petitioner under Sections 354 of the Indian Penal Code, 1860, but not under Sections 376/511 of the Indian Penal Code. 1860 thereby sentencing him to rigorous imprisonment for one year and to pay a fine of Rs.1,000/- in default, simple imprisonment for two months more.
8. On the self-same day, i.e. on 29th November, 2007 the petitioner moved an application praying for bail under Section 389(3) of the Code of Criminal Procedure, 1973 before the Learned Trial Judge, when the Court of Learned

Trial Judge released the petitioner on bail till 15th January, 2008 for preferring an appeal and bringing the stay order.

9. Challenging the aforesaid judgment and order of conviction dated 29th November, 2007, the petitioner preferred an appeal under Section 374 (3)(a) of the Code of Criminal Procedure, 1973 before the Court of the Learned Sessions Judge, Birbhum at Suri being Criminal Appeal No. 1 of 2008 which was subsequently transferred for adjudication before the Court of the Learned Additional Sessions Judge, 3rd Court at Suri, Birbhum.
10. The Court of the Learned Additional Sessions Judge, 3rd Court at Suri, District-Birbhum, after considering the submissions made by the parties and perusing the judgment appealed against as well as evidence and other materials on record by passing the judgment and order dated 20th May, 2013 dismissed the said appeal by affirming the judgment and order passed by the Learned Trial Court. By the said judgment, the Learned Appellate Court directed the petitioner to surrender before the Court of the Learned Assistant Sessions Judge at Bolpur, District-Birbhum i.e. the Learned Trial Court, within one month from the date of passing of the order.
11. Learned Advocate for the petitioner submitted that:-
 - i. The judgments and orders passed by both the Learned Courts below are bad in law and fact.
 - ii. Right from the beginning, there are errors and illegalities as the judgment and orders passed by both the Learned Courts below are devoid of proper reasonings and findings based on evidence and

materials on records and full of irregularities and, as such, it is fit to be set aside.

- iii. It is the prosecution case that when the victim lady was proceeding towards her elder brother-in-law's house, then the petitioner was sitting on the bench on the right side of the road in front of his said grocery shop and the petitioner asked her to give him the torch light, which was in the hand of the victim lady and, thereafter, he took the torch light from the said victim lady and committed an offence. But, interestingly, the said torch light was not seized by the concerned Investigating Officer of this case. Therefore, the entire prosecutrix story is full of doubt as she failed to connect the petitioner in the alleged offence in any manner whatsoever.
- iv. The framing of the charge by the Learned Trial Judge is full of ambiguity and illegality in as much as two separate charges were framed against the petitioner under Section 376 and 511 of the Indian Penal Code, 1860 which shows the absolute non-application of judicial mind which caused gross miscarriage of justice in this case.
- v. Both the Learned Courts below came to a conclusion that the prosecution failed to prove the charges framed against the petitioner behind the shadow of reasonable doubt, but without passing the order of acquittal, the order of conviction and sentence has been passed against the petitioner.

- vi. It is the prosecution case that immediately after the incident, PW-1, being the victim lady, started to cry and her brother-in-law, namely Sukumar Das, who died during trial, and the wife of her brother-in-law, namely Sulekha Das, came out and saw the petitioner fleeing away, but interestingly, said Sulekha Das, who should have been the vital witness in the present case, was not examined by the prosecution.
- vii. PW-2 and PW-4 did not corroborate the evidence of PW-1 in any manner whatsoever, because all of them were the post-occurrence witnesses and they heard the incident from PW-1, being the victim lady.
- viii. There are many laches and faults in the investigation carried out by PW-5, i.e., non-examination of the victim lady either under Section 161 or 164 of the Code of Criminal Procedure, 1973, non-seizure of the torch light, non-seizure of the wearing apparels etc. and non-examination of the victim lady medically, in absence of which the petitioner cannot be convicted under Section 354 of the Indian Penal Code, 1860.
- ix. It is the further case of the prosecution that immediately after the occurrence, on hearing the cry of PW-1, many local people came there but to support the prosecution case nobody came in Court to adduce evidence, as such, the order of conviction and sentence passed against the present petitioner unwarranted in law.

- x. The prosecutrix failed to prove the charges under Sections 376/511 of the Indian Penal Code, 1860 against the petitioner. Therefore, in no circumstances, on the basis of the same and identical materials including the evidence on record against the petitioner, the order of conviction cannot be passed under Section 354 of the Indian Penal Code, 1860.
- xi. While convicting the petitioner under Section 354 of the Indian Penal Code, 1860, no legal reasoning has been offered by both the Learned Courts below and only their opinion has been recorded, which are based on perversity, arbitrary and the law does not permit to do so.
- xii. Ingredients are not at all available in the present case to convict the petitioner under Section 354 of the Indian Penal Code, 1860, and for the sake of punishment, the Learned Trial Court passed the order of conviction, which has been approved by the Learned Appellate Court in a very casual and cut-sort manner.
- xiii. Solely, relying on the evidence adduced by PW-1, when the learned Trial Judge failed to convict the present petitioner under Sections 376/511 of the Indian Penal Code, 1860, therefore, in absence of any corroboration of the evidence of PW-1 by any other witnesses, the present petitioner cannot be convicted under Section 354 of the Indian Penal Code, 1860.

- xiv. The Learned Trial Judge failed to appreciate the enmity and grudge between the present petitioner and the family members of the prosecutrix.
- xv. Both the Learned Courts below were totally oblivious of the basic principle in holding trial, if there is any shadow of doubt about the commission of offence by the accused person, he should be acquitted from the charge and the Court is not, therefore, only to pass the order of conviction or to punish an innocent person when the prosecutrix could not prove the case beyond reasonable doubt.
- xvi. Both the judgments and orders passed by both the Learned Courts below are out and out illegal and liable to be set aside forthwith for the ends of justice.

12. A circumspection of the evidence of prosecution witnesses reveals the victim i.e. PW-1 to have been compelled to enter the grocery shop of the appellant who tried to ravish her. PW-1 cried aloud for help. Consequently, one Sukumar Das and Sulekha Das came to the spot which prompted the appellant to flee. Sulekha Das, sister-in-law of PW-1 was not examined. Sukumar Das, the elder brother-in-law of the victim was also not examined. The evidence of PW-2, the husband of the victim was based on hearsay. PW-2 deposed to have reached the place of occurrence at the clamour of his wife. Arriving at the place of occurrence he found his elder brother and sister-in-law present, however, did not find the accused at the spot.

13. PW-3, a co-villager of the victim, Uday Barman had been to the place of occurrence, however, PW-4 did not find the presence of the appellant at the spot. PW-4 did not mention the presence of PW-2 i.e. the husband of the victim at the place of occurrence. PW-4 learnt the occurrence of the incident from the victim.

14. PW-5, the Investigating Officer during his cross-examination stated to have recorded the statement of Sukumar Das who was not examined before the Court. He claimed to have recorded the statement of one Uday Barman at the place of occurrence which, however, did not reflect in the case diary. PW-5, the Investigating Officer stated that he did not seize any torch from the place of occurrence nor did he seek for an order of medical examination of the victim lady from the Trial Court. He further stated *“As it is not required for the purpose of investigation, as such, no medical examination was done. I did not seize wearing apparels or anything and as such I did not prepare seizure list during investigation. I did not take any permanent landmark at the time of preparing rough sketch map.*

I did not record the statement under Section 161 of Cr.P.C. of Sulekha Das. I did not record the statement of the victim girl under Section 161 of Cr.P.C. I did not pray before the Learned A.C.J.M. for recording the statement of the victim girl under Section 164 of Cr.P.C.

All the witnesses, whose statements were recorded under Section 161 of Cr.P.C. have stated the date and year of the incident in English. None of the witnesses have stated in their statement under Section 161 Cr.P.C. that

Monirul Sk. was sitting on a bench in front of his grocery shop. It has not been written in the written complaint that when the incident occurred whether it is night or day. It has not been stated by Harisadhan Das and Uday Barman in their statement under Section 161 Cr.P.C. that Unnati Das was trembling when she was in the house of Sukumar Das. I did not find any mark of dragging at P.O. when I visited the P.O.”

15. The Learned Advocate for the petitioner submitted the error committed by the Learned Trial Courts in convicting the petitioner under Section 354 of the Indian Penal Code as the prosecution failed to prove the charges framed under Sections 376/511 of the Indian Penal Code.

16. In ***Tarkeshwar Sahu Vs. State of Bihar (Now Jharkhand)***¹, the Hon’ble Apex Court is of the opinion that:

“36. In view of the foregoing facts and circumstances of the case, we are of the opinion that the crime committed by the accused was at the initial stage of preparation. The offence committed does not come within the purview of offence punishable under Sections 376/511 IPC. The offence committed squarely covers the ingredients of Sections 366 and 354 IPC. The appellant was charged under Sections 376/511 IPC but on invoking the provisions of Section 222 of the Code of Criminal Procedure, the accused charged with major offence can always be convicted for the minor offence, if necessary ingredients of minor offence are present.”

17. It is pertinent in the conspectus of the case to assess as to whether the petitioner charged with the major offences of Section 376 and 511 of the Indian Penal Code can be convicted of the relatively minor offence of

¹ (2006) 8 SCC 560

Section 354 of the Indian Penal Code considering the ingredients of such minor offence to be at all present.

18. The Hon'ble Apex Court in **Tarkeshwar Sahu (Supra)** further observed as follows:

“38. Section 354 IPC reads as under:

"354. Assault or criminal force to woman with intent to outrage her modesty.- Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

39. So far as the offence under Section 354 IPC is concerned, intention to outrage the modesty of the women or knowledge that the act of the accused would result in outraging her modesty is the gravamen of the offence.

40. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex.

41. “Modesty” is given as,

“womanly propriety of behaviour, scrupulous chastity of thought, speech and conduct” (in man or woman); reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions.

42. The ultimate test for ascertaining whether the modesty of a woman has been outraged, assaulted or insulted is that the action of the offender should be such that it may be perceived as one which is capable of shocking the sense of decency of a woman. A person slapping on the posterior of a woman in full public glare would

amount to outraging her modesty for it was not only an affront to the normal sense of feminine decency but also an affront to the dignity of the lady.

43. *The word “modesty” is not to be interpreted with reference to the particular victim of the act, but as an attribute associated with female human beings as a class. It is a virtue which attaches to a female on account of her sex.*

44. *We deem it appropriate to reproduce the cases of various courts indicating circumstances in which the Court convicted the accused under Section 354 IPC.*

45. *In State of Kerala v. Hamsa², it was stated as under:*

“What the legislature had in mind when it used the word modesty in Sections 354 and 509 of the Penal Code was protection of an attribute which is peculiar to woman, as a virtue which attaches to a female on account of her sex. Modesty is the attribute of female sex and she possesses it irrespective of her age. The two offences were created not only in the interest of the woman concerned, but in the interest of public morality as well. The question of infringing the modesty of a woman would of course depend upon the customs and habits of the people. Acts which are outrageous to morality would be outrageous to modesty of women. No particular yardstick of universal application can be made for measuring the amplitude of modesty of woman, as it may vary from country to country or society to society.”

46. *A well known author Kenny in his book Outlines of Criminal Law³ has dealt with the aspect of indecent assault upon a female. The relevant passage reads as under:*

² (1988) 3 Crimes 161 (Ker)

³ 19th Edn., para 146, p. 203

“In England by the Sexual Offences Act, 1956, an indecent assault upon a female (of any age) is made a misdemeanour and on a charge for indecent assault upon a child or young person under the age of sixteen it is no defence that she (or he) consented to the act of indecency.”

19. In **S.P.S. Rathore Vs. Central Bureau of Investigation and Another**⁴ the

Hon’ble Supreme Court held as follows:

“42. In order to constitute the offence under Section 354 of the IPC, mere knowledge that the modesty of a woman is likely to be outraged is sufficient without any deliberate intention of having such outrage alone for its object. There is no abstract conception of modesty that can apply to all cases. A careful approach has to be adopted by the court while dealing with a case alleging outrage of modesty. The essential ingredients of the offence under Section 354 IPC are as under:

- (i) that the person assaulted must be a woman;*
- (ii) that the accused must have used criminal force on her; and*
- (iii) that the criminal force must have been used on the woman intending thereby to outrage her modesty.*

43. This Court, in *Vidyadharan v. State of Kerala*⁵ held as under:

“10. Intention is not the sole criterion of the offence punishable under Section 354 IPC, and it can be committed by a person assaulting or using criminal force to any woman, if he knows that by such act the modesty of the woman is likely to be affected. Knowledge and intention are essentially things of the mind and cannot be demonstrated like physical objects. The existence of intention or knowledge has to be culled out from

⁴ (2017) 5 SCC 817

⁵ (2004) 1 SCC 215

various circumstances in which and upon whom the alleged offence is alleged to have been committed. A victim of molestation and indignation is in the same position as an injured witness and her testimony should receive the same weight.”

20. The vital witnesses namely, Sukumar Das, Sulekha Das and other independent witnesses were not examined. Prosecution failed to establish the presence of the appellant at the spot. PW-5, the Investigating Officer stated that none of the witnesses, apart from the PW-1, stated before him that they had seen the appellant sitting on a bench in front of his grocery shop. PW-2, PW-3 did not see the appellant to be present at the spot. Sukumar Das expired after the incident. PW-3 and PW-4 stated to have reached the spot after one and half minutes of hearing the commotion. Apparently, the family members of the victim and the appellant were supporters of rival political groups. The appellant being engaged profitably in his grocery shop in competition to the grocery shop of the brother-in-law of the victim, there is every probability to incriminate the appellant in order to mitigate or sub-serve personal vendetta. The appellant was not seen at the spot by any of the prosecution witnesses apart from the PW-1. The Investigating Officer deliberately avoided the process of medical examination of the victim lady on the plea of non-requirement of the same for the purpose of investigation and such an objectivity is unacceptable. The ingredients to constitute an offence under Section 376 of the Indian Penal Code as well as Section 511 of the Indian Penal Code are absent.

21. The prosecution failed to establish the infliction of criminal force intended to outrage the modesty of the victim. It is unlikely that the grocery shop on a road will not be in view of the public without the presence of any eyewitnesses at the spot. The evidence of the victim in the instant case could not be relied upon as there were sufficient probabilities to falsely indict the petitioner owing to reasons which were presumably political rivalry and business competitiveness and a ploy with the intervention of outsider as would transpire from evidence of PW-3 and 4.

22. In ***Pandurang Sitaram Bhagawat Vs. State of Maharashtra***⁶, the Hon'ble Supreme Court has observed as follows:

“16. The approach of the learned trial Judge as noticed supra that ordinarily a lady would not “put her character at stake” may not be wrong but cannot be applied universally. Each case has to be determined on the touchstone of the factual matrix thereof. The law reports are replete with decisions where charges under Sections 376 and 354 IPC have been found to have been falsely advanced.”

23. The Learned Trial Courts in absence of credible evidence and plausible reason without any ulterior motive on the part of the appellant/petitioner should not have committed the appellant/petitioner under Section 354 of the Indian Penal Code. Accordingly, the instant criminal revisional application being C.R.R. 2193 of 2013 is allowed.

24. The impugned judgment and order dated 20th May, 2013 passed by the Learned Additional Sessions Judge, 3rd Court at Suri, Birbhum in Criminal Appeal No. 1 of 2008 affirming the judgment and order dated 29th

⁶ (2005) 9 SCC 44

November, 2007 passed by the Learned Assistant Sessions Judge at Bolpur, Birbhum in Sessions Case No. 190 of 2006, corresponding to Sessions Trial No. 6 dated 23rd November, 2006 convicting the petitioner under Section 354 of the Indian Penal Code is set aside.

25. Accordingly, C.R.R. 2193 of 2013 stands disposed of.

26. There is no order as to cost.

27. Let the copy of this judgment be sent to the Learned Trial Court as well the police station concerned for necessary information and compliance.

28. All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

(Ananya Bandyopadhyay, J.)