

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 297 OF 1997

Sajjad Ahmed Gulam Yasin Ansari .. Appellant
Versus
The State of Maharashtra .. Respondent

WITH

CRIMINAL APPEAL NO. 235 OF 1997

Atik Ahmed Nazeer Ahmed Ansari .. Appellant
Versus
The State of Maharashtra .. Respondent

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Mr. Ajinkya Udane with Mr. Prasad Jadhav, appointed Advocate for the appellant in Criminal Appeal No. 235/1997.
Mr. Amin H. Solkar with Ms. Misbaah Solkar for the appellant in Criminal Appeal No. 297/1997.
Mr. S.R. Agarkar, APP for the State.

CORAM: BHARATI DANGRE, J.
DATED : 4th DECEMBER, 2023

JUDGMENT:-

1 The two Appeals are preferred by the two accused persons who faced the trial in Sessions Case No. 17/1996 before

the 2nd Addl. District and Assistant Sessions Judge, Malegaon and are aggrieved by the judgment dated 20/3/1997, convicting them for distinct offences.

Accused no.1, Atik Ahmed Nazeer Ahmed Ansari and Accused no.2 Sajjad Ahmed Gulam Yasin Ansari are convicted for the offences punishable u/s.376(2)(g), 354, 342 and 506 r/w 34 IPC and they are sentenced to Rigorous Imprisonment for 10 years and to pay fine of Rs.5,000/- in default to undergo Simple Imprisonment for six months. They are also convicted u/s.342 r/w 34 IPC and sentenced to suffer RI for one month and to pay fine of Rs.100/- each in default to undergo SI for 15 days. Though convicted u/s.354 r/w 34 of IPC, no separate sentence is awarded. On being convicted u/s. 506 r/w Section 34, they are directed to suffer RI for one month and to pay fine of Rs.100/- each, in default to undergo SI for 15 days.

Accused No.1 Atik is also convicted for offence punishable u/s.292(1) r/w 292(2)(a) and he is sentenced to suffer RI for two years and to pay fine of Rs.2,000/- in default to undergo SI for six months, whereas accused no.2 is acquitted of the said charge.

By the impugned judgment, the accused no.1 was given set off from 30/12/1995, whereas accused no.2 is given set off from 30/12/1995 to 30/12/1996.

2 On admitting both the Appeals, the appellants are directed to be released on bail, and the order continue to operate till date.

On the appeals being ready for hearing, they are taken for final hearing.

Since the appellant Atik in Appeal No. 235/1997 is not represented by a counsel, Advocate Ajinkya Udane, whose name is empanelled with Legal Services Authority was appointed to represent him. Advocate Amin Solkar along with Misbah Solkar represented the appellant in Appeal No.297/1997. The State is represented by the learned APP Mr.S.R. Agarkar.

3 The prosecution case surfaced before the Sessions Judge through 10 witnesses, and in specific, through PW 1, the prosecutrix, aged 18 ½ years. Her marriage was solemnized with PW 3 Nihal at Malegaon on 24/11/1995 and thereafter, she started residing with him in Zopadpatti at Malegaon. After 15 days from her marriage, she expressed her desire to her husband of having her photograph clicked in the marriage attire, but her husband did not show any interest and rather permitted her to click the photograph alone. She, therefore, approached 'Sunrise Photo Studio' located in Islampura area of Malegaon for clicking such photograph.

As per the prosecutrix, when she went to the Studio, accused no.1 Atik was present there, who asked her to apply make-up.

At that time, accused no.2, Sajjad closed the door of the Studio from inside and she was dragged to the make-up room and was made to lie down on a wooden bench inside the Studio. When she raised shouts, she was slapped by Atik and was asked to pull her Salwar below her knees and by asking her to lift her legs close to her body, a photograph was clicked by him. Thereafter, turn by turn, both the accused persons raped her and she was threatened not to disclose the incident to anyone or else, the photograph clicked, would be shown to the members of her family. Since she was newly married and apprehended that her husband would divorce her, she did not narrate the incident either to her husband or to any other person.

According to the prosecutrix, after 15 days of the incident, when she and her husband Nihal decided to watch a movie in the theatre, they decided to collect the photograph and reached the studio. Atik was present there and he was asked to click a photograph of both of them together. As the photograph was about to be clicked, some females entered the Studio and therefore, Nihal was asked to step out. Atik showed the prosecutrix her nude photograph and asked her to accompany him to one lodge at Manmad for filming her and she was threatened that if she did not agree, he would reveal the photograph to her husband. She tore the photograph out of anger and at the same time, her husband who was waiting outside also discovered her nude photograph in the tray, and when he

intended to confront Atik, he tore the photograph, and threw away the pieces which were picked up by her husband and kept in the pocket of his pant. Looking at her nude photographs, her husband was furious and he assaulted her, despite an attempt by her to convince him that she would narrate the incident once they reach home, and after narrating the incident to his brother Jamal Ahmed, a decision was taken to lodge a report to Malegaon police station.

The report was therefore, lodged (which is exhibited as 'Exhibit-19A') and the Investigating machinery was set rolling. The pieces of the photograph which was torn and handed over to the police is shown to her and identified by her as the same photograph in Article 16.

4 To corroborate the prosecutrix, the prosecution has examined her husband Nihal as PW 3, who corroborate her by stating that after 15 days of marriage, his wife expressed her desire to get snapped in her marriage costume and he gave Rs.20/- to her for getting the job done. In the evening, when he returned back, he asked whether the photograph was clicked and she answered in the affirmative, and informed that the prints would be delivered after 15 days. Thereafter, on 15th or 16th day i.e. 29th December 1995, they intended to watch a movie and decided to collect the photograph and accordingly, visited the studio of accused no.1, and Nihal corroborate the prosecutrix on the aspect of their visit to the studio and about he discovering the nude

photograph of his wife, in a tray at the counter which was snatched by accused no.1, who tore it. He picked up the pieces of the photographs which retained with him and were subsequently tendered in investigation.

PW 3, Nihal in variance with PW 1, has further deposed that before reaching the house, he met one Raju Studiowala and he inquired about the procedure of capturing the photograph and showed him the pieces of photographs by informing that they belong to his wife. He was then informed that unless and until the negatives are destroyed, multiple prints of the same can be obtained and therefore, he once again visited Sunrise Photo Studio along with his wife (PW 1) and sought the negative film which was handed over to him by accused no.1. Thereafter, they again went to Raju Studiowala and showed the negatives to him which were collected from Sunrise Photo Studio and realizing the seriousness of the matter, they were advised to meet one Naseem Ahmed, PW 8, Journalist of Hindustan Times. They approached the said person who made necessary inquiries about the photograph and tried to contact Senior Police Officer by making a telephone call but could not connect. Naseem Ahmed therefore, asked them to come next day morning and they handed over the torn photographs and negatives to him.

As per Nihal, the negative film and torn pieces of photographs were given to him by Datta Narod and even his wife had picked up some pieces of photograph from the studio, which

she had given to him and they were identified by him as Articles 15 and 16.

5 Naseem Ahmed is examined by the prosecution as PW 8, who supported the case of the prosecution by deposing that on 29/12/1995, when he was present in his office, one person came inquiring about him and disclosed his name as 'Nihal Ahmed'. He narrated that the naked photographs of his wife were snapped by the owner of Sunrise Photo Studio and he was shown the torn pieces of photo print in colour and one negative. Though he attempted to join the torn pieces, the complete photograph could not be arranged. He deposed that the pieces of the photographs were the parts showing naked portion of lady from waist downward. He was confronted with Article 15 – negative film, and Article 16 – pieces of torn photograph.

He corroborate PW 3 by stating that he attempted to seek police help, but could not contact and therefore, asked him to return the next day, pursuant to which a report was lodged by the prosecutrix about the rape on her by the owner of Sunrise Photo Studio and his friend.

6 On the complaint being lodged resulting into an FIR, invoking Section 376(g) IPC, the prosecutrix was referred for medical examination on 30/12/1995. PW 4 Dr. Bhimrao Kisan Tribhuvan, who was on duty at Wadia Hospital, examined her and noticed that all her secondary sexual characters were fully

developed. He did not find any positive fact of evidence of rape, nor did he notice any abrasion or nail marks on her face, neck, breast, etc. He issued a certificate to that effect (Exhibit 43) under his signature. He also examined accused no.1 and accused no.2 and issued a certificate accordingly.

7 Four photographs and two negatives are seized from accused no.1 by by executing memorandum of panchnama and Mujjafar Shaikh, a panch to the said panchnama is examined as PW 6.

As per this witness, accused no.1 lead the Investigating Officer and the panch to Sunrise Photo Studio and he removed one plastic packet kept on wooden plank in a concealed condition which contained four colour photographs of postcard size which were obscene. The four photographs and the negatives were placed in a packet which was sealed. They were numbered as 'Article 2' and PW 6 has identified his signature put on the back side of the photograph. The same were exhibited as Exhibit 52, 53, 54 and 55. He was also confronted with the negative i.e. Article 1, and the witness confirmed it to be a film having two negatives.

PW 6 also deposed that the prosecutrix was called at the Studio by the Investigating Officer and she was shown two bed-sheets and one black colour cloth, which came to be seized.

Apart from this, one red colour bag was also found inside the dark room kept above wooden loft like structure (Article 7), which contained obscene photographs of men and women in black and white. The photographs were seized after the panch witness signed on its back side. Further, 13 other colour photographs of post-card size which were also picked up from the same packet, were also seized. Six negative photographs, two packets of Nirodh condom were also found in the bag and it also contained two passports which were seized.

The Investigating Officer Bapusaheb Palve is examined as PW 9 who recorded the complaint filed by the prosecutrix invoking Sections 376(2)(g), 292, 506 IPC. He deposed about the details of the investigation carried out by him and specifically stated that on 31/12/1995, the husband of the complainant had produced one negative film and torn pieces of photograph which were seized under panchnama (Exhibit 49). He also deposed that the pieces of the photographs were tried to be re-arranged and reconciled with a view to get the complete picture, but some constituting parts of the torn pieces were missing.

The Investigating Officer also deposed about a supplementary statement of the complainant being recorded on 31/12/1995 and certain omissions from the statement of prosecutrix as well as her husband are proved through him, to which I would make a reference at a later stage.

Two other witnesses which are examined by the prosecution is the Police Sub Inspector Srinivas Patil (PW 10), who was working under Shri Narod, Dy. S.P. Malegaon, who has deposed about the direction given to him by Dy.S.P. Narod, to take positive prints of the negatives seized in the case by taking the films to Nasik. He was also directed to get positive films developed from the negative roll loaded in the camera which was seized.

According to the said witness, the seals were removed from Articles 6, 15 and 16 from the negatives seized in the crime and one positive film was printed from the Socola Laboratory. The camera roll was taken out from the camera in the processing room and put on the processing machine and a positive copy of nine negatives was prepared. According to him, the positive copies which were printed from Socola Laboratory were compared with the seized positive photographs and pieces of negative. The positive copies, so obtained, were seized and sealed, and they were numbered as Article 24A, B, C and Article 24 D1 to D6.

PW 2, is a panch who was called by the police at Socola Laboratory, Nasik as the policemen wanted reprints of certain photographs from the Laboratory. He has deposed that the sealed packets were opened at the laboratory in his presence

and four photographs (prints) were taken from those packets. He identified Article 2 before the Court as the four positive films, while Article 1 is the negative film. The second packet containing three prints and three films was also opened in his presence, but the witness clarify that the articles which are described at Serial No.1 of the list of muddemal filed along with the charge-sheet, is not the muddemal property filed in the present Sessions trial, but is filed as muddemal articles in Criminal Case No. 34 of 1996.

He is also a panch to the removal of roll from the camera, which was seized and he depose that the negative films bearing 36 A – E, 34, 35, 35A, 36 and the films taken out from the camera were given for developing, to the proprietor Pujari in his presence, and he was asked to print positive photograph from each of the negative given. The photographs obtained, were signed by him as well as another panch of the Laboratory.

8 All the above witnesses are examined by the prosecution to establish the charge against the two accused persons for confining the complainant in the cabin of Sunrise Photo Studio on 18/12/1995 in furtherance of the common intention, and thus committing an offence u/s.342 r/w Section 34 IPC. They also face a charge of forcibly committing gang rape on the complainant and thus committing an offence u/s.376(2)(g) of IPC. Since the nude and obscene photographs of the prosecutrix and also other pictures were seized, the accused were also charged for putting into circulation the said photographs which are

lascivious or appealing to the prurient interest and thus committing an offence punishable u/s.292(1) r/w Section 292(2) (a) r/w 34 of the IPC.

9 With the able assistance of Mr.Ajinkya Udane and Mr.Amin Solkar, I have perused the evidence led before the Addl. Sessions Judge in support of the above charge.

The star witness is the prosecutrix, who had testified that her marriage was solemnized on 24/11/1995 and about 15 days from her marriage, she visited the Sunrise Photo Studio as she intended to obtain her photograph in her marriage attire. She categorically deposed that it was Monday, after about 14 days from her marriage. Accused no.1 was present in the Studio and it is her version that accused no.2 closed the door of the studio from inside and she was dragged outside the make-up room in the Studio and she was made to lie down on the wooden bench lying in the studio and she raised shouts, but was coerced by accused no.1 not to raise voice and by removing her apparel below her knee, a photograph was clicked by Atik.

It is her version that she was initially raped by him no.1 and then by Sajjad. As per the prosecutrix, after committing rape, Atik clicked her picture in the same condition and thereafter, Sajjad raped her. She has identified the post card size photo Article 2/1, 2/4, but the perusal of the said exhibit would reveal that they are the photographs of private part of a woman, but it cannot be identified that they belong to the prosecutrix.

10 As per the prosecutrix, after 15 days when she visited the Studio along with her husband, Atik confronted her with the said photograph which she tore out of anger, and thereafter even her husband, found her nude photograph in the tray which was torn by accused no.1, but collected by her husband and retained with him. The said photograph which was attempted to be collated, is also on record as 'Article 16', but on its perusal, it is noted that it is in a tattered condition, and in the said picture, it is seen that there is a young woman wearing red colour attire revealing her private part.

PW 3 Nihal has narrated that he had given these pieces of photograph which was torn by accused no.1, to PW 8 which was in several pieces. PW 8 has also deposed that the pieces of photograph were parts of the photograph, showing naked portion of lady from waist downwards., whereas Article 15 was negative film of the said photograph. From Article 16, it cannot be conclusively held that it is the prosecutrix in the picture as what is seen, is a red apparel and some portion of the body below waist. It is difficult to conclude from the photograph that it is of the prosecutrix. PW 3 has deposed that, at the say of PW 8, he went back to the Studio and requested for negative of the nude photograph, which Atik had torn in his presence, and it is surprising to note that accused no.1, who had torn the photograph to destroy the evidence, handed over the negative to PW 3.

11 The prosecution case is full of inconsistencies as PW 1 and PW 3, the wife and the husband have given inconsistent version. As per Nihal, his wife, after 15 days of marriage expressed desire to have a photograph of the couple and she insisted that she should get the photograph clicked in marriage costume. He, therefore, gave Rs.20/- to her and in the evening, his wife informed that she had gone alone to click the photograph and it is likely to be delivered within next 15 days. She remained completely silent and normal in these 15 days and Nihal, her husband did not notice any abnormality in her behaviour.

Despite the incident having been taken place, the prosecutrix chose to visit the same photo studio for clicking the joint photograph as it was her suggestion that the joint photograph should be clicked and PW 3, Nihal categorically deposed that this suggestion came from his wife when they reached the photo studio. However, he is not aware whether the photograph was clicked, as three ladies entered the studio. As per PW 3, he asked Atik to deliver the previous photograph and he was asked to wait outside, whereas according to the prosecutrix, when they were about to click the photograph, some women entered and therefore, her husband was asked to step out.

PW 3 state that Atik told him that he would search for the print afterwards and take snap of the three ladies, but when he approached the counter of the studio, he found some photographs lying in the tray and he noticed naked picture of his

wife in the various photographs lying there. He picked up the said photograph, when Atik came there and snatched the photograph and tore it and pieces were thrown there. This is also highly unbelievable as if the photograph was torn, there was no reason that the accused should have thrown the pieces there and let him pocket the same as the photograph was torn, so that PW 3 had no access to it.

12 There is some missing link in the evidence tendered by the prosecution, as the prosecutrix has narrated that after 15 days, she went to Sunrise Photo Studio when the incident is alleged to have taken place and again after 15 days on a Friday, she visited the Studio once again. She was shown the nude photograph and was asked to accompany her in a lodge, whereas it is her own version that when she was asked to sit next to her husband for a photograph to be clicked, two to three females came to the studio and after their photograph was snapped, they left the studio.

 Thereafter, Atik showed her the nude photograph, and one of her photograph was found in tray by her husband and even she tore the photograph. Thus, there were distinct photographs which were torn, as she has deposed that her husband had picked up the torn pieces of the photograph.

13 In the cross-examination, prosecutrix has admitted that there are shops adjacent to Sunrise Photo Studio and one old man used to sit in front of the Photo Studio of Atik though she

was not aware whether it was his father. She has deposed that she was not knowing the accused Atik prior to the incident, but she also deposed that 1 ½ year back, she had her photograph clicked by Atik in Kashmiri dress and one more occasion, she along with her paternal uncle and family members, had been to Sunrise Photo studio and he took pictures. She admit that she had not given description of accused Sajjad as the police had not asked about the same.

She also admit that accused had clicked her photograph in marriage attire, which she wanted, whereas her husband had deposed that the photograph that was clicked, was in the red colour marriage attire, which he destroyed as he was furious, and even in her complaint, prosecutrix has narrated that she had gone to the Studio as she wanted to click her photograph in wedding dress which was red in colour.

In the complaint, she narrates that her husband while in the studio had noticed a photograph of her face cut and noticing that the photograph was in a nude condition, he had picked up the same which was torn by Atik. In her complaint, she has failed to narrate that her husband had collected the pieces of photograph which were retained by him and handed over to PW 8.

As per Nihal, immediately, on leaving Sunrise studio, he went to meet Raju Studiowala and disclosed to him about the torn photograph of his wife and thereafter, as per his say, for the

purpose of collecting the negatives, he along with his wife went to Sunrise Photo studio and demanded the negatives which were handed over by Atik. PW 1 is, however, silent on this aspect of the negative and that she accompanied her husband to Sunrise Photo Studio once again after visiting Raju Studiowala. It is Raju Studiowala who had directed the couple to meet Naseem Ahmed, Journalist (PW 8) and according to PW 3, both of them i.e. PW 1 and 3, had gone to Naseem Ahmed and showed him the negatives and pieces of torn photographs and he attempted to call the Senior Police Officer, but the call could not be connected. As per PW 3, the torn photographs and negatives were given to Naseem Ahmed.

14 What is pertinent to note is, when PW 3 Nihal has deposed before the Court about the happenings when he reached home on noticing the nude photographs of his wife and inquired with her, she narrated the events which had occurred and he was angry. He deposed that in the hit of anger, he tore off the red marriage attire of his wife and threw the pieces in the river and did not sleep.

Worth it to note that Nihal do not speak of rape having been committed upon his wife.

Nihal in utter contrast to the version of his wife, deposed before the Court that even his wife had picked up some torn pieces of photographs at Sunrise Photo Studio, which she had given to him on 29th, while they had gone to the Studio, but

the prosecutrix never spoke about she picking up any pieces of photographs. In fact, what is marked as Articles 15 and 16, are two photographs in torn condition, one reflecting a face and another without face, but reflecting of some red colour apparel.

The two photographs, however, cannot conclusively establish that they belong to the prosecutrix.

15 Another relevant aspect of the matter is the location and the position of the Sunrise Photo Studio. PW 3 Nihal in cross-examination, was specifically confronted with the location of the Sunrise Photo studio, and he admit that there are shops adjoining both sides of Sunrise Photo Studio and there are shops on the other side at Nishad Road opposite Sunrise Photo Studio. He also admit that Sunrise Photo Studio is divided into two parts and there is a way joining these two parts for going to the studio and the outer portion in the Studio and the inner portion is divided by a curtain and there is one bench inside the studio. He also admit that Islampura where the studio was located, was a densely populated area. He also deposed that Raju Photo Studio is situated in the close proximity of Sunrise Photo Studio i.e. 1000 ft and the office of Hindustan Times i.e. PW 8, is situated in the same compound of Raju Photo Studio.

It has come on record that there is a common shutter to the studio and shop and when the prosecutrix had raised shouts, in a densely populated area, it is surprising as to how nobody could hear the shouts and no one came to her rescue.

From the photographs, (Article 24A, 24B and 24C), which are alleged to be of the prosecutrix, which according to her, are taken before and after committing rape upon her, do not disclose any fear on the face of the woman in the photograph and from the said photographs, it cannot be said that definite conclusion that it is clicked after she was raped by accused no.1.

The medical evidence on record also do not support the case of rape, as she is medically examined 15 days after the alleged incident. Except the version of the prosecutrix that she was raped by accused no.1 and 2, and the fact that for 15 days, she did not report about the incident to anyone, nor did she disclose such a serious incident to her husband and even the husband do not speak of the rape committed on his wife, when he deposed that while returning from the Studio, when he found the nude photographs of his wife and after going home, she narrated the entire incident to him, he did not even whisper about she complaining to him about rape. It is surprising as to by looking at the photographs and only after visiting PW 8, they decided to lodge a report and the prosecutrix alleged that she was raped by accused no.1 and 2.

16 It is also important to note that accused no.1 Atik led to some photographs and negatives which were recovered under discovery panchnama and marked as Article nos.52, 53, 54 and 55. They are some nude photographs, but none of the photograph belong to the prosecutrix. The camera which was

seized and the roll therein which was developed through Socola Laboratory also do not have any obscene photographs or films, which were taken out from the camera.

17 PW 7 Vilas Pujari deposed before the Court, who has developed the films and obtained the photographs at Article 24D(1) to 24D(5). In any case, the photographs which are otherwise seized from the Photo studio do not belong to the prosecutrix and though Atik is convicted for committing an offence punishable u/s.292 (2)(a) of the IPC which punishes an act for purpose of sell, hire, distribution, public exhibition or circulation, producing or making or being in possession of any obscene book, pamphlet, paper, drawing, painting, representation of figure of any other obscene object whatsoever.

The prosecution has utterly failed to demonstrate any circumstance to establish that the photographs seized from accused no.1, was intended for the purpose of sale, distribution, public exhibition or circulation and as such, no charge u/s.292(2) (a) is proved even against accused no.1.

18 From perusal of the evidence placed before the trial Court, the case of the prosecution appears to be doubtful, in the wake of the inconsistency which surfaced through the evidence of its key witnesses. The prosecution accused both the appellants of committing rape by invoking clause (g) of sub-section (2) of Section 376, but in absence of any cogent material to establish the said charge, with several lacunae and inconsistencies appearing

in the case of the prosecution, the said charge is not proved. As far as charge u/s.354 is concerned, which punishes an act of assault or criminal force to woman with an intent to outrage her modesty, since the prosecution has failed to establish by convincing evidence that the photographs which are seized during investigation and are placed on record, are taken by use of criminal force, even the ingredients of the said section are not made out and the appellants deserve acquittal on that count.

19 The impugned judgment has failed to take into consideration the gross lacunae and the loopholes in the case of the prosecution which affect its credibility and only on the ground that the prosecutrix did not report the incident as she was newly married, the trial Judge has believed her version despite there is a delay of about 15 days in filing the report.

In fact, the delay in lodging the report has not so much affected the case of the prosecution as the inconsistency in the version of the prosecutrix and her husband and about the serious offence of rape having been proved or inferred, merely on the basis of the photograph of the prosecutrix collected during investigation in an objectionable position. There is no cogent evidence to establish the incident which is alleged to have occurred in 'Sunrise Photo Studio', nor it is established with certainty on what date the incident occurred. The offence of rape is not conclusively established as the testimony of prosecutrix do not inspire confidence by itself, and there is no

corroboration for her version on the incident of rape and her illegal confinement though it appear some photographs having been clicked, but once again, it is not clear whether they are of the date when she allege rape as even prior, she has visited the Studio. In any case, there is no material to prove that the same was intended for sale, exhibition of it as per requirement of Section 292 of IPC.

The impugned judgment therefore, cannot be sustained and for the reasons recorded above, it is quashed and set aside.

The appellant Atik Ahmed Nazeer Ahmed Ansari in Criminal Appeal No.235/1997 and the appellant Sajjad Ahmed Gulam Yasin Ansari in Criminal Appeal No. 297/1997, deserve an acquittal though they have undergone a portion of the sentence as an under trial prisoner.

The bail bonds of the appellants stand cancelled.

(SMT. BHARATI DANGRE, J.)