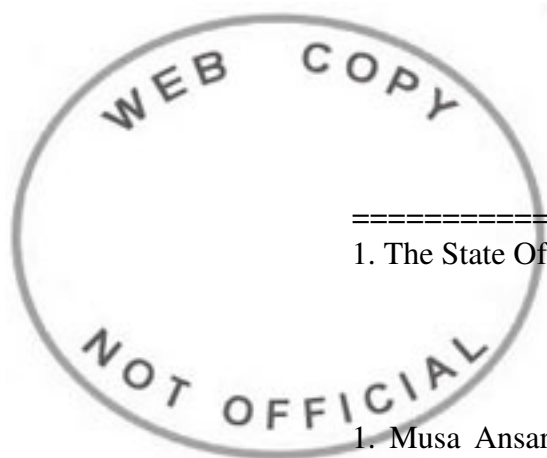


IN THE HIGH COURT OF JUDICATURE AT PATNA



Govt. Appeal (DB) No.18 of 2013
WITH
Criminal Appeal (SJ) No. 308 of 2013

Arising Out of Jehanabad (Mahila) PS.Case No. -39 Year- 2012

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1. The State Of Bihar

.... **Appellant** [In Govt. Appeal (DB) No. 18/2013]

Versus

1. Musa Ansari Son Of Almuddin Ansari R/O- Badahar, P.S.- Jehanabad Kalpa
O.P.) District- Jehanabad

.... **Respondent** [In Govt. Appeal (DB) No. 18/2013]

WITH

1. Musa Ansari @ Md. Musa Ansari S/O Late Alimuddin Ansari Resident Of
Village- Badhar, Police Station- Jehanabad, District- Jehanabad

.... **Appellant** [In Criminal Appeal (SJ) No. 308/2013]

Versus

1. The State Of Bihar

.... **Respondent** [In Criminal Appeal (SJ) No. 308/2013]

=====

Appearance :

(In G. APP. (DB) No. 18 of 2013)

For the Appellant/s : Mr. Dilip Kumar Sinha, A.P.P.

For the Respondent/s : Mr. Sanjay Singh, Advocate

(In CR. APP (SJ) No. 308 of 2013)

For the Appellant/s : Mr. Sanjay Singh, Advocate

For the Respondent/s : Mr. Ajay Mishra, A.P.P.

MR. AJAY KUMAR THAKUR, LEARNED COUNSEL, AS AMICUS CURIAE

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE

AND

**HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

CAV JUDGMENT

(Per: HONOURABLE THE ACTING CHIEF JUSTICE)

Date: 06-10-2015

When can a woman's modesty be said to have been
outraged amounting to commission of an offence punishable

under Section 354 of the Indian Penal Code is one of the vital questions, which these appeals have raised?

2. Under the judgment, dated 18.03.2013, passed, in Sessions Trial No. 656 of 2012, by the learned Sessions Judge, Jehanabad, the sole accused-appellant, Musa Ansari, stands convicted under Sections 293 and 354 of the Indian Penal Code.

3. By the order, dated 25.03.2013, passed in the case aforementioned, the accused-appellant has been sentenced, for his conviction under Section 293 of the Indian Penal Code, to suffer rigorous imprisonment for a period of three years with fine of Rs. 2,000/- and, in default of payment of fine, undergo rigorous imprisonment for a period of one year. The accused-appellant has further been sentenced, under the said order, to suffer, for his conviction under Section 354 of the Indian Penal Code, rigorous imprisonment for a period of two years with fine of Rs. 5,000/- and, in default of payment of fine, undergo rigorous imprisonment for a period of six months. Both the sentences have been directed to run consecutively.

4. The case of the prosecution, as unfolded at the trial, may, in brief, be described thus:

(i) On 01.08.2012, at about 9:00 AM, the accused came to the house of the first informant, where the first informant's children asked the accused to sing a song and,



after a while, first informant's son, Horil Kumar, and her elder daughter left for their school and the first informant's eldest daughter went outside her house for some work. The accused continued to sing songs and showed pictures, on his mobile, to the first informant's youngest daughter (hereinafter referred to as 'X'). The accused caught hold of the hands of the first informant's 5-year old daughter, X, and, making her hold his penis, told her that he was feeling good and, then, the accused forcibly had sexual intercourse with X, who started bleeding and the accused fled away.

(ii) When the first informant came back to her house, she found her daughter, X, weeping and, on making enquiry, her daughter, X, told her (first informant) that the accused had attempted to insert his penis into her vagina and when she started crying out of pain, accused fled away. Having noticed bleeding from X's vagina, first informant lodged an information, in writing, in the form of *fardbayan*, against the accused alleging, *inter alia*, commission of rape by the accused on her daughter, X.

(iii) Treating the *fardbayan*, as First Information Report, Jehanabad (Mahila) Police Station Case No. 39 of 2012, under Section 376 of the Indian Penal Code, was registered against the sole accused, Musa Ansari.

(iv) During investigation, first informant's daughter,

X, was medically examined, her statement, under Section 164 of the Code of Criminal Procedure, was recorded and, on completion of investigation, a *charge sheet* was laid, under Section 376 of the Indian Penal Code, against the sole accused, Musa Ansari.

5. At the trial, a charge, under Section 376 of the Indian Penal Code, was framed against the accused. To the charge so framed, the accused pleaded not guilty..

6. In support of their case, prosecution examined altogether 07 (seven) witnesses. The accused was, then, examined under Section 313 (1) (b) of the Code of Criminal Procedure and, in his examination aforementioned, he denied that he had committed the offence, which was alleged to have been committed by him, the case of the defence being that of denial. It is also the case of the defence that accused was the Sarpanch of Surangapur Gram Panchayat and he, according to the Government policy, was trying to construct the boundary wall of burial ground, which made the Hindus angry and the Hindus had falsely implicated him in a case of rape.

7. While the learned trial Court acquitted the accused of the charge framed under Section 376 of the Indian Penal Code, it convicted the accused under Sections 293 and 354 of the Indian Penal Code. Following his conviction, sentences have been passed against the accused as mentioned above.

8. Aggrieved by his conviction and the sentences passed against him, the accused, as a convict, has preferred an appeal, which has given rise to Criminal Appeal (SJ) No. 308 of 2013.

9. An appeal has also been preferred by the State of Bihar against the acquittal of the accused under Section 376 of the Indian Penal Code seeking thereby conviction of the accused under Section 376 of the Indian Penal Code, which has given rise to Govt. Appeal (DB) No. 18 of 2013.

10. Both the appeals having arisen out of the impugned judgment of conviction, dated 18.03.2013, and the impugned order of sentence, dated 25.03.2013, these appeals have been heard together and are being disposed of by this common judgment and order.

11. We have heard Mr. Dilip Kumar Sinha, learned Additional Public Prosecutor for the appellant-State, and Mr. Sanjay Singh, learned Counsel, appearing on behalf of the accused-appellant in Govt. Appeal No.18 of 2013. We have also heard Mr. Sanjay Singh, learned Counsel, appearing on behalf of the accused-appellant and Mr. Ajay Mishra, learned Additional Public Prosecutor, appearing for the State, in Criminal Appeal (SJ) No. 308 of 2013. We have also heard Mr. Ajay Kumar Thakur, learned Counsel, appearing as Amicus Curiae.

12. There is no dispute before this Court that unless the accused-appellant can safely be held to have committed rape on the first informant's daughter, **X**, the question of his conviction, under Section 376 of the Indian Penal Code, does not arise.

13. Let us, therefore, take into consideration the evidence of **X**, daughter of the first informant, who has been examined as PW 2. According to her evidence, she (PW 2) was playing on a cot in her house, the accused came and, by making her hold his penis, told her that he was feeling good and, then, the accused sat on the cot. Thereafter, however, PW 2 refused to answer any question except saying that there was bleeding from her vagina and her urination stopped.

14. Understandably, therefore, the evidence before the learned trial Court was direct evidence of PW 2, which was to the effect that the accused had made her hold in her hand his penis and told her that he was feeling good.

15. The question, therefore, is as to what offence was committed by the accused, in the light of what have been indicated above.

16. Mr. Dilip Kumar Sinha, learned Additional Public Prosecutor, conceded that by merely making her hold his penis, accused cannot be held to have committed an offence under Section 376 of the Indian Penal Code. It is, however, the

contention of the learned Additional Public Prosecutor that the medical evidence on record shows that there was injury on **X**'s vagina and there were some blood spots present there and, hence, these circumstantial evidence were sufficient to hold the accused guilty of an offence under Section 376 of the Indian Penal Code.

17. We are afraid that the submission, so made on behalf of the State-respondent, is not correct inasmuch as there is no evidence indicating that the accused was the one, who had caused injury on the vagina of **X**. Merely because of the fact that **X** had suffered an injury on her vagina and blood spots were found on her vagina, accused could not have been held, and has rightly not been held, to have committed an offence punishable under Section 376 of the Indian Penal Code.

18. With regard to the above, it is noteworthy that the occurrence, in the present case, took place on 01.08.2012, i.e., at the time, when Section 375 of the Indian Penal Code had not undergone amendment, which has come into force, with effect from 03.02.2013, by the Act 13 of 2013. In terms of the definition of *rape*, as stood embodied in Section 375 of the Indian Penal Code, prior to its amendment, with effect from 03.02.2013, by the Act 13 of 2013, no offence of *rape* could have been held to have been proved until penile



penetration by an accused into the vagina of his victim was proved; whereas penile penetration is, in the light of the amended definition of *rape*, no longer the only means of committing *rape* as embodied in Section 375 of the Indian Penal Code, with effect from 03.02.2013, by the Act 13 of 2013.

19. The present case is a case, which arose prior to the amendment, which Section 375 of the Indian Penal Code has undergone.

20. In the case at hand, when there is, admittedly, nothing to show penile penetration by the accused into the vagina of X, the accused could not have been held, and has rightly not been held, to have committed an offence punishable under Section 376 of the Indian Penal Code.

21. Situated thus, we find no merit in the appeal, which has been preferred by the State.

22. Coming to the appeal, which has been preferred by the convicted person, we notice, as already indicated above, that he has been convicted under Section 293 and Section 354 of the Indian Penal Code.

23. After the amendment, which Section 293 of the Indian Penal Code has undergone by the Act 8 of 1925, Section 293 of the Indian Penal Code read, "***Sale, etc., of obscene objects to young person.-*** Whoever sells, lets to



hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section, or offers or attempts so to do, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to seven years, and also with fine which may extend to five thousand rupees”.

24. On a bare reading of Section 293 of the Indian Penal Code, it becomes clear that a person, who sells, lets to hire, distributes, exhibits or circulates to any other person, who is less than twenty years of age, any obscene object, described in Section 292 of the Indian Penal Code, or offers or attempts to do so, shall be punished, on his/her first conviction, with imprisonment of either description for a term, which may extend to three years and with fine, which may extend to Rs. 2,000/- and, in the event of a second or subsequent conviction, with imprisonment of either description for a term, which may extend to seven years and also with fine, which may extend to Rs. 5,000/-.

25. In the case at hand, since there was no sale, hire, distribution, exhibition or circulation of any obscene object, no

commission of offence, under Section 293 of the Indian Penal Code, can be said to have been made out. In fact, this position has not been disputed even by the learned Additional Public Prosecutor.

26. We have, therefore, no hesitation in holding conviction of the accused-appellant under Section 293 of the Indian Penal Code as wholly incorrect and not sustainable in law.

27. Turning to the accused-appellant's conviction under Section 354 of the Indian Penal Code, it may be noted that it has been submitted, on behalf of the accused-appellant, that he cannot be said to have committed an offence under Section 354 of the Indian Penal Code in terms of what pre-amended Section 354 of the Indian Penal Code envisaged.

28. For reasons of clarity, Section 354 of the Indian Penal Code, as it stood before its amendment, which was carried out by the Act 13 of 2013, with effect from 03.02.2013, is reproduced below:

"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."*

29. Section 354 of the Indian Penal Code comes into play, when anyone *assaults* or uses *criminal force* to any woman intending to outrage or knowing to be likely that he will thereby outrage her modesty.

30. It was contended, on behalf of the accused-appellant, by Mr. Sanjay Singh, learned Counsel, that even if one were to believe that the accused-appellant had made first informant's daughter, **X**, hold, in her hand, the penis of the accused-appellant, it cannot be said that the accused used *criminal force* against **X**, or that the accused-appellant had assaulted the informant's daughter, **X**.

31. In order to determine the correctness of the above submission, a combined reading of Sections 349, 350 and 351 of the Indian Penal Code is essential, which define '*force*', '*criminal force*' and '*assault*' respectively.

32. The questions, therefore, are: what an '*assault*' is and what '*criminal*' force' means?

33. The questions, posed above, bring us to Section 349, Section 350 and Section 351 of the Indian Penal Code.

34. Let us, first, turn to Section 349 of the Indian Penal Code, which defines '*force*' as follows:

"349. Force.- A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such

motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling: provided that the person causing the motion, or change of motion, or cessation of motion causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described.

First: - By his own bodily power.

Secondly: - By disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person.

Thirdly: - By inducing any animal to move, to change its motion, or to cease to move."

35. From a bare reading of Section 349 of the Indian Penal Code, it becomes clear that anyone, who causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling, shall be treated to have used 'force', provided that the person, causing the

motion, or change of motion, or cessation of motion, in one of the three ways, one of such ways being '*by his own bodily power*'.

36. The definition of '*assault*', as given in Section 351 of the Indian Penal Code, reads:

"351. – *Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.*"

37. A careful reading of Section 351 of the Indian Penal Code shows that whoever makes any gesture, or any preparation, intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he, who makes that gesture or preparation, is about to use *criminal force* to that person, is said to commit an '*assault*'.

38. Thus, whoever makes even a gesture intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he, who makes that gesture or preparation, is about to use *criminal force* to that person, is said to commit an *assault*.

39. What, therefore, is a '*criminal force*'?

40. The definition of '*criminal force*', under Section 350 of the Indian Penal Code, is as follows:

"350. Criminal force.-

Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other."

41. A close and cautious reading of the definition of '*criminal force*', as contained in Section 350 of the Indian Penal Code, means that whoever, intentionally uses '*force*' to any person, without that person's consent, in order to the committing of any offence, or intending, by the use of such *force*, to cause, or knowing it to be likely that by the use of such *force*, he will cause *injury, fear, or annoyance* to the person to whom the *force* is used, is said to use '*criminal force*' to that other.

42. Thus, as long as a person intentionally uses '*force*' to any person without that person's consent in order to commit any offence, such use of '*force*' has to be regarded as '*criminal force*'.

43. In other words, a *criminal force* subsumes an

assault and, therefore, when a person uses *criminal force*, his act of *criminal force* subsumes *assault*.

44. In short, every use of *criminal force* includes *assault*; but, in *assault*, there is merely apprehension of use of *force* and no use of actual *force*.

45. In the context of the facts of the case at hand, we need to reiterate that from a bare reading of the definition of *force*, as embodied in Section 349 of the Indian Penal Code, it becomes clear that anyone, who causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance, such motion, or change of motion, or cessation of motion, as brings that substance into contact with any part of that other's body, or with anything, which that other wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling, shall be treated to have used force: provided that the person, causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion, in one of the three ways, one of such ways being "*by his own bodily power*".

46. In the backdrop of the law, which we have discussed above, when we turn to the case at hand, what attracts our eyes, most prominently, is that in the case at hand, it is the accused-appellant, who, according to the evidence on record, had made the first informant's daughter,

X, held his penis in her hands meaning thereby that he did cause '*by his own bodily power*', '*change of motion*' in the hands of **X**, and thereby used '*force*'.

47. Can the use of '*force*' by the accused-appellant be described as use of *criminal force*?

48. With regard to the above, it needs to be noted that according to Section 350 of the Indian Penal Code, whoever, intentionally uses *force* to any person, without that person's consent, knowing it to be likely that by such use of *force*, he will cause annoyance to the person to whom the force is used, is said to use *criminal force*.

49. In the case at hand, the accused-appellant, according to the evidence on record, had intentionally used *force* to **X** without the consent of the parents (the consent of **X** being immaterial) knowing it to be likely that by the use of such *force*, he will cause annoyance to the first informant and her minor daughter, **X**.

50. Clearly, therefore, the accused-appellant had used '*criminal force*' and the use of such '*criminal force*' in the manner in which the accused-appellant is proved to have used, cannot but be regarded as outraging the modesty of **X**.

51. The question, therefore, is: Whether the use of '*criminal force*' by the accused-appellant constitutes, in the face of the evidence on record and law relevant thereto, an

offence under Section 354 of the Indian Penal Code?

52. We have already pointed out above that whoever *assaults* or uses *criminal force* against any woman intending to outrage or knowing to be likely that he will thereby outrage her modesty, commits an offence under Section 354 of the Indian Penal Code.

53. In the present case, when the accused-appellant uses '*criminal force*' to the informant's daughter, **X**, knowingly it to be likely that he would thereby outrage her modesty, an offence under Section 354 of the Indian Penal Code can be safely held to have been committed by the accused-appellant.

54. In the light of the evidence on record, we do not find that the conviction of the accused-appellant, under Section 354 of the Indian Penal Code, is bad in law or calls for any interference in the appeals.

55. In the result and for the reasons discussed above, while we set aside the conviction of the accused-appellant and the consequential sentence passed against him by the judgment and order, under appeal, under Section 293 of the Indian Penal Code, we uphold his conviction under Section 354 of the Indian Penal Code and also the sentence passed against him.

56. In terms of what have been observed and concluded above, both these appeals shall stand disposed of.

57. Since the accused-appellant has been in custody for a period longer than his sentence passed for his conviction under Section 354 of the Indian Penal Code, he be set at liberty forthwith unless he is required to be detained in connection with any other case.

58. The Registry shall send a copy of this judgment and order to the learned trial Court along with the lower court records.

(I. A. Ansari, ACJ.)

Chakradhari Sharan Singh, J.: I agree.

(Chakradhari Sharan Singh, J.)

Prabhakar Anand/AFR

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