

IN THE HIGH COURT OF BOMBAY AT GOA.

Criminal Revision Application No.61/2014

MR.FRANCIS D'SOUZA,
son of Macario Alexander,
major of age, married,
r/o Jimmi Doggi's Hut,
Gaunsawado, Siolim,
Bardez, Goa.

Petitioner

Versus

THE STATE OF GOA
Through Police Inspector,
Calangute Police,
Calangute, Goa.

Respondent

...

Shri Ryan Da Piedade Menezes, Advocate for the petitioner.

Shri S.R.Rivankar, Public Prosecutor for the respondent.

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**CORAM : PRITHVIRAJ K. CHAVAN, J.
RESERVED ON :18/09/2017.
PRONOUNCED ON :26/09/2017.**

JUDGMENT :

1. By this Criminal Revision Application, the petitioner challenges his conviction under Section 354 of the Indian Penal Code, by the Judicial Magistrate First Class, Mapusa, in Criminal Case No.215/S/2011-C by which, instead of sentencing, the petitioner was released after due admonition under Section 3 of the Probation of Offenders Act, *inter alia* directing him to pay compensation of Rs.1000/- under Section 5 of the said Act to the

complainant. An appeal bearing No.86/2013 preferred by the petitioner also came to be dismissed by the learned Additional Sessions Judge (FTC) on 19.4.2014.

2. A few facts can be summarised thus:-

Prosecutrix was aged about 55 years at the time of incident. She alleged that on 27.10.2010 at about 5.30 p.m., she noticed the petitioner arguing and hitting a Worker namely Krishna - PW 5 and that her guest PW 4 - Barbara Hill, a British National, was about to intervene when the petitioner also tried to hit Barbara, at that time the prosecutrix intervened, however, the petitioner during that incident touched her left breast. The prosecutrix pushed him aside. She, therefore, lodged a report with Calangute Police Station on the same day by stating that the petitioner had outraged her modesty. Undisputedly, the petitioner and the prosecutrix are neighbours, who are on cross-terms due to some other reasons. It is also not in dispute that the petitioner is a Senior Citizen residing in Villa No.5, Sun Park Resort and the prosecutrix residing in Villa no.4, Sun Park Resort, Calangute. After charge-sheeting him, the learned Judicial Magistrate First Class having gone through the evidence of seven prosecution witnesses, by the impugned judgment

convicted the petitioner, but, instead, released him on probation.

3. Both the Courts below conclusively held that the petitioner had outraged modesty of the prosecutrix in the light of the fact that there is acceptable evidence and there was previous enmity between them. The Courts below relied upon the testimonies of PW 4 – Barbara, PW 5 - Krishna, which found corroborated by the evidence of PW 6 - Dr. Dilip Kuncolienkar, who had opined about the injury in the form of a bruise over the left breast of the prosecutrix.

4. I have heard Shri Ryan Menezes, learned counsel appearing for the petitioner.

5. The main thrust of the learned counsel is that though the hand of the petitioner touched the left breast of the prosecutrix yet, he had absolutely no intention nor knowledge of outraging the modesty of the prosecutrix. It was during a sudden push when his hand inadvertently touched that part of the body of the prosecutrix. The learned counsel took me through the evidence of prosecution witnesses in order to demonstrate as to how

there are discrepancies and improvements made by the witnesses.

6. Per contra, the learned Public Prosecutor, Shri Rivankar, has strongly supported the impugned judgments by contending that it is not an accidental act, but a deliberate one by which, the petitioner had not simply touched the left breast of the prosecutrix, but pressed it, which found full corroboration from the testimony of the medical expert. In support of his submissions, learned Public Prosecutor has pressed into service two case laws namely (i) **Kanwarpal S. Gill Vs. State (admn., U.T.Chandigarh) Thro' Secy., & Anr.** reported in **2005(5) Supreme 218**; and (ii) **Raju Pandurang Mahale Vs. State of Maharashtra and Anr.** reported in **2004(2) Supreme 234**.

7. The learned counsel appearing for the petitioner has relied on (i) **Ram Das Vs. State of W.B. Reported in 1954 0 AIR (SC) 711**; and (ii) **Rajesh Swarupchand Kankaria and ors Vs. The State of Maharashtra reported in 2011 7 0 Supreme (Mah) 327**.

8. At the outset, it needs to be mentioned here that the petitioner is invoking revisional jurisdiction of this Court challenging the judgment and order of the conviction passed by the Courts below, which had concurred with the findings of conviction. It is well settled that the revisional jurisdiction is to be exercised sparingly and in an exceptional cases when it is shown that there is manifest error on the point of law which has resulted in miscarriage of justice or there is a glaring defect of procedure. The revisional court cannot re-appreciate evidence and cannot function as an appellate court. If finding of fact is supported by some evidence on record, then the same cannot be interfered with, but when the court below comes to a conclusion which no reasonable man of ordinary prudence could have arrived at on the basis of the evidence on record, or in other words, when the finding is perverse, then the revisional court is justified in interfering with the impugned judgment and order. Keeping in mind these limitations while exercising revisional jurisdictional, I will have to examine the impugned judgments.

9. Undisputedly, the incident in question, did occur on 27.10.2010 at Sun Park Resort, Khobrawado,

Calangute. The defence has not seriously disputed the fact that at the relevant time the petitioner had an argument with PW 5 - Krishna and he was about to beat him when PW 4 - Barbara, a British National, intervened and the petitioner was also about to make a gesture of attack when the prosecutrix intervened. It is also not seriously disputed that during that process the petitioner had touched the breast of the prosecutrix. Rather, that is the only crucial question to be looked into and to see as to whether the accused had intention and knowledge by which he alleged to have outraged the modesty of the prosecutrix.

10. There are three eye witnesses, apart from the prosecutrix, who appears to be natural witnesses to the incident or rather, their presence on the spot have not been disputed. They are PW 3 - Victor, PW 4 - Barbara and PW 5 - Krishna.

11. The evidence of the prosecutrix, who was aged about 57 years, reveals that when the petitioner was about to inflict a fist blow on Barbara, she went to stop and at that time the petitioner pressed her left breast and, therefore, she pushed him away. The petitioner thereafter

ran towards Villa No.6. Interestingly, during the cross-examination of the prosecutrix the fact that they are not in good terms has been reiterated and so also the argument of the petitioner with PW 5 - Krishna on account of demand of some bills by the petitioner. The fact that the prosecutrix had to intervene when the petitioner was about to assault Barbara, has also been reiterated during her cross-examination. It is interesting to see that, it is again reiterated in the cross of the prosecutrix that the petitioner pressed her upper half breast.

12. It is vehemently argued by Shri Menezes, learned counsel appearing for the petitioner, that the testimony of the prosecutrix is unbelievable in the sense that she had changed her versions from time to time. In her complaint, she states that the petitioner had touched her breast. During her evidence, she testified that the petitioner had pressed her breast, however, before the Medical Officer PW 6 – Dilip Kuncolienkar, she had stated that the accused held her breast. First of all, a complaint cannot be said to be an encyclopedia of events. The prosecutrix in her evidence made it clear that as she was in pain and depressed at the relevant time she signed the complaint, which was read over to her in Konkani by

the police. Even otherwise, this cannot be said to be a material contradictions but, it can be said to be a small variation, which is bound to occur in such a situation. It is not expected of a woman to exactly narrate the incident when she was in such a state of trauma after having undergone such an experience. It cannot be said that she is giving false evidence in the light of the fact that her testimony has been materially corroborated by PW 3- Victor, who was also a resident of Villa no.3 at Sun Park Resort. What he testified is that at the relevant time he noticed the petitioner arguing with PW 4 – Barbara and the arrival of prosecutrix on the spot to intervene. According to this witness, the petitioner pushed the prosecutrix and unfortunately his hand went on her breast. He does not say that the petitioner touched the breast. The fact remains that the petitioner had touched the breast of the prosecutrix at the relevant time. During his cross-examination, he denied the suggestion that the prosecutrix was calm and cool after the incident.

13. PW 4 - Barbara a British Citizen, aged about 66 years, corroborated the testimony of the prosecutrix by stating that when she went to stop the petitioner who was assaulting PW 5 – Krishna, the petitioner was about to hit

her when the prosecutrix intervened and that the petitioner pressed her left breast with his right hand. Nothing has been elicited during the cross-examination of these witnesses or any of these witnesses, which would render their testimonies unworthy of credit. Rather, these witnesses have no axe to grind against the petitioner. No doubt, the petitioner and the prosecutrix are on cross-terms and, therefore, it can be said that there is an enmity between them, which is a double edged weapon. It can provide a motive for the petitioner to commit the offence as well as false implication by the prosecutrix. The effect of their testimonies, if tested on the touchstone of the Law of Evidence, appear to be quite consistent insofar as time, venue and manner of occurrence. It would only conclude that the petitioner had a motive to commit the offence.

14. This is significant, in the light of the testimony of PW 6 - Dr. Dilip Kuncolienkar, who had examined the prosecutrix on the very day at about 7.15 p.m. The prosecutrix had given a history of holding her breast by the petitioner. The doctor had noticed a bruise on her left breast measuring 3 x 2.5 cm. on the upper part which, according to him, could be caused by a hard object less than six hours of duration. This brushes aside or belies the

story of the petitioner that his hand inadvertently touched the breast of the prosecutrix. Had it been an innocent or inadvertent act, there would have been no question of any bruise admesuring 3. x 2.5 cm. for which the doctor had to administer anti biotic and anti inflammatory drug to the prosecutrix. The medical certificate is duly proved by the prosecution. Surprisingly, during cross, it has been elicited from this witness that in such type of injury pain may remain for a month also. This would clearly demonstrate the amount of pressure with which the petitioner must have pressed the breast of the prosecutrix, which no sane man would believe that it was a simple touch due to inadvertence. Surprisingly, in his statement under Section 313 of CrPC, the petitioner took a plea of *alibi* by stating that he was not on the spot when the evidence of prosecutrix was brought to his notice. Be that as it may.

15. The Hon'ble Supreme Court in the case of **Ram Das Vs. State of W.B.** (supra), sentenced the accused under Section 352 of IPC. He was earlier prosecuted for the offence punishable under Section 354 of IPC. It is the case where the accused, who was a Railway Officer of some status behaved unfairly and rudely with the passenger and tried to forcibly occupy the seat which were

occupied by a woman passenger by assaulting her when she resisted. The accused had also added insult to injury in casting aspersions on the character of the woman passenger. In the case at hand, admittedly, in view of prior enmity between the petitioner and the prosecutrix, he had every reason to commit the offence which he did by pressing the breast of the prosecutrix with his right hand. Not only the eye witnesses even PW 6 Dr. Dilip Kuncolienkar has substantiated the said fact. It is also pertinent to note that immediately after the incident the prosecutrix pushed the petitioner away. The act of the accused indeed is a manifestation of his knowledge that by his act he would outrage the modesty of the prosecutrix. Similar are the facts in case of **Rajesh Swarupchand Kankari Vs. The State of Maharashtra** (supra), wherein this Court on similar lines observed that it was a case of Section 352 of IPC and not under Section 354 of IPC. The ratio, therefore, would not be of any assistance to the petitioner.

16. The Hon'ble Supreme Court in case of **Kanwarpal S. Gill Vs. State (Admn., U.T.Chandigarh) Throu' Secy., and Anr.** (supra), culled out the ingredients of Section 354 of IPC and about the knowledge

and intention of the accused in committing the said offence. It is well-known case in which the appellant, who was the Director General of Police had, in a party, gently slapped the posterior of the prosecutrix, whose conviction has been ultimately upheld by the Hon'ble Supreme Court. The relevant portion can be quoted for advantage which reads thus:-

"The findings of the various courts is to the effect that the accused gently slapped on the posterior of the prosecutrix in the presence of some guests. This act on the part of the accused would certainly constitute the ingredient of [Section 354](#) IPC. It is proved that the accused used criminal force with intent to outrage the modesty of the complainant and that he knew fully well that gently slapping on the posterior of the prosecutrix in the presence of other guests would embarrass her. Knowledge can be attributed to the accused that he was fully aware that touching the body of the prosecutrix at that place and time would amount to outraging her modesty. Had it been without any culpable intention on the part of the accused, nobody would have taken notice of the incident. The prosecutrix made such a hue and cry immediately after the incident and the reaction of the prosecutrix is very much relevant to take note of the whole incident. The accused being a police officer of the highest rank should have been exceedingly careful and failure to do so and by touching the body of the complainant with culpable intention he committed the offence punishable under [Section 354](#) and [509](#) IPC. In view of the findings of fact recorded by the two courts

and affirmed by the High Court in revision, the order of the High Court cannot be set aside on the mere assertion by the accused that the whole incident was falsely foisted on him with ulterior motives. Therefore, we find no merit in the appeal preferred by the accused. The appeal is dismissed accordingly."

17. Here, in the case at hand, the petitioner did use criminal force to such an extent that it not only outraged modesty of the prosecutrix but resulted in minor injury over her left breast. By no stretch of imagination, it could be said to be an inadvertent touch, as the petitioner could have pushed the prosecutrix without touching/pressing her breast. The prompt action of pushing the petitioner by the prosecutrix and approaching the police are also the relevant factors in the present set of circumstances as no woman would otherwise immediately approach the police to lodge a report against a person unless she feels insulted or humiliated.

18. The learned Public Prosecutor has also placed reliance on a judgment of the Hon'ble Supreme Court in the case of **Raju Pandurang Mahale Vs. State of Maharashtra and Anr.**(supra). The relevant paragraphs 11, 12 and 13 of the judgment can be reproduced as

follows:-

"11. Coming, to the question as to whether Section 354 of the Act has any application, it is to be noted that the provision makes penal the assault or use of criminal force to a woman to outrage her modesty. The essential ingredients of offence under [Section 354 IPC](#) are:

- (a) That the assault must be on a woman.
- (b) That the accused must have used criminal force on her.
- (c) That the criminal force must have been used on the woman intending thereby to outrage her modesty.

12. What constitutes an outrage to female modesty is nowhere defined. 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 in this Section is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of pulling a women, removing her saree, coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman; and knowledge, that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object. As indicated above, the word 'modesty' is not defined in [IPC](#). The shorter Oxford Dictionary (Third Edn.) defines the word 'modesty' in relation to woman as follows:

"Decorous in manner and conduct; not forward or lowe; Shame-fast: Scrupulously chast."

13. Modesty is defined as the quality of being modest; and in relation to woman, "womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct." It is the reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions. As observed by Justice Patterson in Rex v. James Llyod, (1876) 7 C & P 817. In order to find the accused guilty of an assault with intent to commit a rape, court must be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person but that he intended to do so at all events, and notwithstanding any resistance on her part. The point of distinction between an offence of attempt to commit rape and to commit indecent assault is that there should be some action on the part of the accused which would show that he was just going to have sexual connection with her".

19. Thus, the essence of a woman's modesty is her sex and the culpable intention of the accused is the crux of the matter.

20. Having gone through the impugned judgments of the trial Court as well as the First Appellate Court, the same does not warrant interference while exercising the revisional jurisdiction. The Courts below have already taken a very lenient view against the petitioner. As such, there is no substance in the Criminal Revision Application

which needs to be rejected. The Criminal Revision Application, therefore, stands rejected.

PRITHVIRAJ K. CHAVAN, J.

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