

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 20th March, 2017

Decided on: 25th May, 2017

+ CRL.A. 858/2016

AMIT @ LALU

..... Appellant

Represented by: Mr. Braham Singh, Mr. N.S.
Vidhudi, Mr. Rohit Vidhudi,
Ms. Manju, Advs.

versus

STATE

..... Respondent

Represented by: Ms. Meenakshi Chauhan, APP
with Insp. Badruddin Khan,
ASI Jaiveer, PS Khajuri Khas.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Amit @ Lalu challenges the impugned judgment dated 8th July, 2016 convicting him for offences punishable under Sections 354/354A IPC and Section 8 of Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO Act') and the order on sentence dated 9th July, 2016 directing him to undergo rigorous imprisonment for a period of three years and to pay a fine of ₹3,000/- for offence punishable under Section 8 of POCSO Act, rigorous imprisonment for a period of one year for the offence punishable under Section 354A IPC and rigorous imprisonment for a period of one year and to pay a fine of ₹1,000/- for offence punishable under Section 354 IPC.

2. Assailing the conviction, learned counsel for the appellant contends that the present case is a case of sexual harassment punishable under Section 354A IPC and not a case of sexual assault. He further submits that the

appellant cannot be convicted simultaneously for the offences punishable under Sections 354/354A IPC and Section 8 of POCSO Act.

3. Learned APP for the State on the other hand submits that there is no illegality in the impugned judgment and the order on sentence. The version of the prosecutrix was that she was touched thus constituting offence punishable under Section 8 of POCSO Act. Further the sexual intent is clear from the fact that the appellant pushed the prosecutrix on the sofa and forced her for a kiss.

4. FIR No. 247/2013 was registered under Sections 354/354A IPC and Section 12 of POCSO Act at PS Khajuri Khas on the complaint of PW-3 the prosecutrix wherein she stated that she studied in class 8th in Govt. Senior Secondary School, Khajuri Khas, Delhi. On 7th May 2013, around 9:00 P.M. when she had gone to fetch milk from the dairy of the appellant, the appellant stated that he wanted something from her. On her asking, he stated that he wanted a kiss from her. When she rebuked, he held her hand, pulled her and started assaulting her. He was under the influence of alcohol. However, she freed herself, went home and narrated the incident to her mother. After she told PW-4 her mother, she went to the shop of the appellant to confront him but he started misbehaving with her mother. Thereafter, PW-8 SI Pravesh Kumar along with the prosecutrix and her mother went to the house of the appellant where he was present and under the influence of alcohol. SI Pravesh Kumar interrogated and arrested him. On 8th May, 2013, statement of the prosecutrix was recorded before the learned Metropolitan Magistrate under Section 164 Cr.P.C. After completion of investigation, charge sheet was filed for offences punishable under Sections 354/354A IPC and Section 12 of POCSO Act and charge was

framed for offences punishable under Sections 354/354A IPC and Section 8 of POCSO Act.

5. Before Court, the prosecutrix deposed in conformity with her statement made before the police. She further deposed that when the appellant caught hold of her hand, the appellant pulled down the shutter of the milk dairy. She deposed that the appellant stated, '*kajal mujhe tumse kiss chahiyea*'. When she resisted, the appellant forced her for a kiss and threw her down on the sofa by pulling her hand.

6. Mother of the prosecutrix corroborated the testimony of the prosecutrix and stated that when the prosecutrix returned home at 9:15 P.M. on the day of incident, she was weeping and she stated that the appellant had caught hold of her hand and asked for a kiss.

7. The issue whether an accused could be simultaneously convicted for offences punishable under Sections 354 and 354A IPC came up for consideration before this Court in the decision reported as 237 (2017) DLT 271 *T. Manikandan Vs. The State (Govt. of NCT of Delhi) & Anr.* wherein this Court held-

“6. Sections 354 and 354A to 354D IPC read 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 shall not be less than one year but which may extend to five years, and shall also be liable to fine.

354 A. Sexual harassment and punishment for sexual harassment.-(1) A man committing any of the following acts—

- (i) *physical contact and advances involving unwelcome and explicit sexual overtures; or*
- (ii) *a demand or request for sexual favours; or*
- (iii) *showing pornography against the will of a woman; or*
- (iv) *making sexually coloured remarks, shall be guilty of the offence of sexual harassment.*

(2) *Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.*

(3) *Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both*

354B. *Assault or use of criminal force to woman with intent to disrobe. – Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.*

354C. *Voyeurism.- Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or*

subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.

354D. Stalking.- (1)Any man who—

- (i) follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman;*
- (ii) monitors the use by a woman of the internet, email or any other form of electronic communication, commits the offence of stalking:*

Provided that such conduct shall not amount to stalking if the man who pursued it proves that—

- (i) it was pursued for the purpose of preventing or detecting crime and the man accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or*
- (ii) it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or*
- (iii) in the particular circumstances such conduct was reasonable and justified.*

(2) Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.”

7. *The short issue before this Court is whether the appellant*

can be convicted for both the offences punishable under Section 354 and 354A IPC simultaneously. Section 354 IPC provides for the offence relating to assault or criminal force to woman with intent to outrage her modesty. Section 354A which was inserted by Criminal Law (Amendment) Act, 2013 provides for punishment for sexual harassment.

8. *The two necessary ingredients of Section 354 IPC are 'assault' or 'use of criminal force' to any woman and with the intention to outrage or knowing it to be likely that he will thereby outrage her modesty. Sections 350 and 351 IPC define 'criminal force' and 'assault' as under:*

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.

351. Assault.—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.

Explanation.—Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault.

9. *Thus when the modesty of a woman is outraged or it is likely to be outraged coupled with an assault or criminal force, Section 354 IPC would be attracted. Though assault can be by mere gesture or preparation intending or knowing that it is likely that such gesture or preparation will cause any person present to apprehend use of criminal force. This is an act more than mere physical contact with advances involving unwelcome and explicit sexual overtures. Ingredients of Section 354 IPC would show that the same*

mandate an actus reas of assault or criminal force with an intention to outrage or likely to outrage the modesty whereas a mere physical contact with advances as noted above would attract Section 354A IPC. Though in certain fact situations there may be cases where there may be an overlap of both Sections 354 and 354A IPC however, there may be cases which may exclusively fall either in Section 354 or Section 354A IPC. Once an offence falls under Section 354 IPC even if ingredients of Section 354A IPC are satisfied, the accused will be punished for Section 354 IPC the same being more serious in nature as it prescribes the minimum sentence of one year and term for imprisonment which may extend to five years.”

8. On the allegations as proved by the prosecution, ingredients of offence punishable under Section 354 IPC i.e. assault/criminal force to a woman to outrage her modesty as well as Section 354A IPC i.e. physical contact with explicit sexual overtures and demand of sexual favour are fulfilled. Thus, the prosecution has proved beyond reasonable doubt that the appellant committed the offences punishable under Section 354 IPC as well as Section 354A IPC.

9. As regards offence punishable under Section 8 of the POCSO Act, the prosecution has proved that the prosecutrix was a minor studying in 8th standard. The Act of the appellant amounts to a sexual assault without penetration with sexual intent involving physical contact satisfying the ingredients for offence punishable under Section 8 POCSO Act. Hence the conviction of the appellant for offence punishable under Section 8 of the POCSO Act is also upheld.

10. Defence of the appellant is of false implication as payment was due towards the mother of the prosecutrix. However, no such suggestion has

been given to the witnesses. Though appellant examined Ashraf Malik as DW-1 however he only witnessed the quarrel between the appellant and mother of the prosecutrix post the incident. In his reply to the question No.21 in his statement under Section 313 Cr.P.C. the appellant stated:-

“Q.21 Anything else to say?

Ans. I am innocent. Victim came at my dairy in the presence of my wife and started touching the things placed on the counter and I rebuked her for the same. No such incident, as alleged, ever took place and mother of the victim has concocted a false story to evade payment of the dues towards the milk supplied to her house, as I used to supply milk at the house of the victim for the last 2-3 years before the date of alleged incident and some payment was due upon them which they were avoiding to make. Victim has been tutored by her mother to make false statement against me.”

11. For the reasons aforesaid, the impugned judgment of conviction and order on sentence are upheld.
12. Appeal is dismissed.
13. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.
14. TCR be returned.

(MUKTA GUPTA)
JUDGE

MAY 25, 2017
‘v mittal’