

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRA 148 of 2020

SRI SWAPAN SARKAR
VS.
STATE OF WEST BENGAL & ORS.

For the Appellant	: Mr. Prabir Majumder, Adv. Mr. Snehansu Majumder, Adv. Mr. Avishek Chatterjee, Adv. Ms. Sangeeta Chakraborty, Adv.
For the Respondents	: Mr. Narayan Prasad Agarwal, Adv. Mr. Pratick Bose, Adv.
Hearing concluded on	: 10 th November, 2022
Judgement on	: 18 th November, 2022

Siddhartha Roy Chowdhury, J.:

1. Challenge in this appeal is to the judgement and order of conviction passed on 11th February, 2020 and sentence dated 12th February, 2020 pronounced by learned Additional Sessions Judge, Kalyani, Nadia in Sessions Trial No. 1 (9) 2017 arising out of Sessions Case No. 7 (6) 2016 whereby learned Trial Court was pleased to record an order of conviction against the appellant for committing offence under Section 354/448 of the Indian Penal Code and sentenced him to suffer imprisonment for two years and to pay fine of Rs. 20,000/- with default clause.

2. Smt. Bhadrori Singh wife of Dharam Singh set the criminal administration of justice into motion by informing the Officer-in-charge of Haringhata Police Station in writing that she used to visit the house of Swapan Sarkar, quack, for health checkup or on medical issues and became well acquainted with the said person. Swapan Sarkar used to visit her house as well. On 11th of November, 2015 at about 11 p.m. Swapan Sarkar came to her house in absence of her husband and gave some indecent proposal and made an attempt to commit rape upon her. She raised alarm which attracted the neighbouring people and the man fled away.
3. Since the information disclosed an offence cognizable in nature Haringhata P.S. Case No. 473 of 2015 was registered on 12th November, 2015 under Section 448/376/511 of the I.P.C. Police took up investigation which culminated into submission of charge sheet against the accused person under Section 448/376/511 of the I.P.C.
4. On 1st September, 2017 charge was framed against the accused person under Section 448/376/511 of the I.P.C. and pleading his innocence to the charges the accused person claimed to be tried.
5. In order to crown success prosecution examined as many as 12 witnesses and having considered the evidence adduced by prosecution witnesses learned Trial Court was pleased to record the order of conviction. Assailing the said judgement and order of conviction Prabir Majumder, learned Counsel for the appellant submits that learned Trial Court failed to appreciate the evidence on record and passed the impugned judgement absolutely upon misreading of evidence.

6. Drawing my attention to the written information which contains the narrative of the incident learned Counsel for the appellant submits that in her maiden statement before police the informant stated that the accused gave some indecent proposal and tried to commit rape upon her without disclosing the words allegedly used by the accused. While adducing evidence as P.W.1 she parroted the written information, without disclosing the exact words used by the accused and how the accused made an attempt to ravish the informant. Learned Trial Court, therefore, had no reason to hold that the accused person committed an offence within the meaning of Section 354 of the I.P.C. It is contended that in order to prove the charge under Section 354 of the I.P.C. prosecution is to prove that criminal force was applied to the lady to outrage her modesty or it was known to the perpetrator that by his act the modesty of the lady would be outraged. Therefore to appreciate the incident it was absolutely necessary to have the narrative in detail as to what was told by the accused person or what was done by him. A general statement made by P.W.1 cannot be said to be sufficient to satisfy the requirement of law to constitute an offence under Section 354 of the I.P.C.
7. It is argued by Mr. Majumdar, learned Counsel for the appellant that in her written information the de-facto complainant stated that there was visiting terms between the accused and victim. The accused being a quack used to visit the house of the P.W.1 off and on. However, while adducing evidence as P.W.1, the victim made an embellishment by saying that the accused person trespassed into her house while her

husband was absent. This embellishment made by the de-facto complainant as P.W.1 is bound to shroud the prosecution case with a shadow of suspicion which learned Trial Court failed to appreciate. It is argued that P.W.2 did not witness any incident. P.W. 3 and 4 stated that they found the accused fleeing from the house of the victim. While P.W.5 Manasha Singh the next door neighbour of P.W.1 claimed to have found the accused person at the place of occurrence meaning thereby in the room of the de-facto complainant and according to P.W.5 Bhadrori told him that the accused outraged her modesty by pulling her hand. P.W.6 is the husband of the de-facto complainant who was not witness to the occurrence and he acquired knowledge of the incident from his wife at a subsequent point of time. P.W.7 the father-in-law of the de-facto complainant claimed to have found the accused person pulling Bhadrori and having found the old man the accused fled away. According to Mr. Majumder the so called witnesses to the occurrence failed to give a uniform account of the alleged incident. Therefore, learned Trial Court had no reason to rely upon the testimony of those witnesses while recording the order of conviction.

8. Mr. Majumder adverted further that the de-facto complainant herself did not say that the accused person pulled her by her hand but it was her father-in-law and other witnesses who told the Court about such act of the accused. The discrepancies as transpired from the testimony of prosecution witnesses naturally make the prosecution case doubtful. Therefore, the charge under Section 354 of the I.P.C. cannot be said to have been proved. In order to appreciate if any

offence under Section 448 of the I.P.C. has been committed by the accused or not, we need to consider the provision as laid down under Section 441 of the I.P.C.

“Section 441. Criminal trespass.—Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit “criminal trespass”.”

9. From the attending facts of the case we find that admittedly the de-facto complainant is well acquainted with the accused person and they used to visit the house of each other and on the date of incident as a part of such practice the accused person lawfully entered into the house of the victim. But the moment the victim said that he gave an indecent proposal to her, such lawful entry of the accused person becomes unlawful and the accused person became culpable of committing the offence of criminal trespass. We need to understand whether having entered into the house of the de-facto complainant did the accused person do anything to annoy the de-facto complainant?
10. As I have already pointed out the de-facto complainant while adducing evidence did not say as to how her modesty was outraged, by reproducing the words spoken by the accused person or by giving a narrative as to how criminal force was applied upon her by the accused person. A general statement without any clear averment as to the act allegedly done by the accused person, it would be an act of surmise

and conjecture to hold that the accused person entered into the house of the P.W.1 with an intention to commit offence or having entered lawfully into the house of the P.W.1, he remained there unlawfully with the intent to intimidate, insult or annoy the de-facto complainant or with intent to commit an offence and he outraged her modesty. There is no evidence that the accused person having entered lawfully into the house of the de-facto complainant remained there unlawfully or committed any act so as to make him culpable for committing offence of criminal trespass into the house of the complainant. There is nothing to suggest that he did some mischief after having lawfully entered into the room of the victim and thereby made himself culpable for committing the offence punishable under Section 448 of the I.P.C.

11. Learned Trial Court held that presence of the accused person in the house of P.W.1 on the relevant date and time was proved by oral testimony of P.W.1 and other prosecution witnesses. Learned Trial Court further held: "There was a relation of doctor and patient in between the accused and victim and so it is expected that she must have initially welcome the entry of the accused in her house but when he would have advances an illicit proposal she might have resisted him resulting in injuries over her arms and other parts of her body. Therefore, all the circumstances revealed that something had occurred involving the accused and the victim at the house of the victim on 11th November, 2015 at about 11 p.m. The existence of injuries on the arms and back of the victim may have resulted due to some scuffling in between the accused and the victim while victim had

resisted to the accused person to save herself from him.” This observation of learned Trial Court is nothing but figment of his imagination. Learned Trial Court imported something going beyond fact when none of the witnesses made such statement including the de-facto complainant. No whisper was made by any of the prosecution witnesses about scuffling or application of criminal force on the part of the victim.

12. When the entry was lawful, in my humble opinion, it would not amount to criminal trespass unless it is proved that having entered lawfully the person remained in the house unlawfully. No evidence is forthcoming that the P.W.1, the de-facto complainant having found the accused person ever told him to leave. So there is no reason to hold that the accused person remained in the house unlawfully and when it is not proved that he committed any offence within the meaning of Section 354 of the I.P.C., it cannot be said he had the intention to commit any mischief to constitute criminal trespass and thus he cannot be said to have committed offence under Section 448 of Cr.P.C. When graver offence or subject offence has not been proved, lesser or predicate offence cannot hold the water.

13. Under such circumstances, I am of the view that the judgement impugned is based on surmise and conjecture; and it warrants interference.

14. Therefore, in my humble opinion the judgement impugned should not be allowed to remain in force and should be set aside which I accordingly do. Consequently the appeal succeeds. The order of

conviction and sentence imposed upon the appellant by the learned Trial Court is set aside. The convict be set at liberty and be released from the bail bond.

15. Let a copy of this judgement be sent down along with lower Court record to the learned Trial Court for information and necessary action.
16. Parties are to act on the server copy of this judgement.
17. Urgent photostat certified copy of this judgement, if applied therefor, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)