

Form J(2)

**IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side**

**Present :
The Hon'ble Justice Bibek Chaudhuri**

C.R.A. 632 of 2016

**Entajul Sk @ Intajul Sk.
Vs.
The State of West Bengal & Anr.**

For Appellant : Mr. Kushal Kumar Mukherjee, Adv.

**For the State : Mr. Prasun Kumar Dutta, Adv.,
Mr. Sandip Chakraborty, Adv.**

Heard & Judgment on: 11.02.2022

Bibek Chaudhuri, J.

Judgment and order of conviction and sentence dated 23rd August, 2016 passed by the learned Additional Sessions Judge, Nabadwip, Nadia in Sessions Trial No.48(Sept) 15 corresponding to Sessions Case No.7(9) 15 thereby convicting the appellant for the offence under Section 354 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for one year with fine and default clause, is assailed in the instant appeal.

The appellant is the brother-in-law of the de facto complainant. Elder brother of the appellant is the husband of the de facto complainant. On 23rd March, 2015 she lodged a written complaint before the Officer-in-charge, Nabadwip Police Station stating, inter alia, that her husband used to work in Kerala at the relevant point of time. In absence of her husband she used to stay at her matrimonial home with her minor child. The brother-in-law and parents-in-law of the de facto complainant used to stay in the same house with her. It is alleged by the de facto complainant that in absence of her husband her brother-in-law namely Entajul Sk @ Intajul Sk used to give bad proposal to her. On 21st March, 2015 at about 4 P.M. the said Entajul Sk @ Intajul Sk pounced upon her and tried to commit rape upon her. She somehow resisted the accused and informed the incident to her father-in-law and mother-in-law. But they and Entajul Sk @ Intajul Sk assaulted her indiscriminately. They also tried to commit murder of the de facto complainant by strangulation. When she was raising hue and cry, her younger son rushed to the room where the incident took place and somehow saved his mother. Immediately they left the said house and started to come to Chapra to her paternal home by bus. After getting down at Chapra from bus the de facto complainant lost her sense. Her father got the information and admitted her to the local hospital. On the basis of the said complaint police registered

Nabadwip Police Station Case No.134 of 2015 dated 23rd March, 2015 against the accused persons and took up the case for investigation. On completion of investigation charge sheet was submitted against the accused Entajul Sk @ Intajul Sk under Sections 376/511 and Sections 323/34 of the Indian Penal Code. Charge sheet was also submitted against other two accused persons under Sections 323/34 of the Indian Penal Code.

As the offence under Sections 376/511 of the Indian Penal Code was exclusively triable by the Court of Sessions, the case was committed to the Court of the learned Additional Sessions Judge at Nabadwip. The appellant and other accused persons duly appeared before the learned Additional Sessions Judge, Nabadwip to face trial. Charge sheet was framed against Entajul Sk @ Intajul Sk under Sections 376/511 of the Indian Penal Code as well as under Sections 323/34 of the Indian Penal Code. The charge against the father-in-law and mother-in-law of the de facto complainant was framed under Sections 323/34 of the Indian Penal Code. As the accused persons pleaded not guilty, trial of the case commenced.

During trial, prosecution examined as many as ten witnesses. They were duly cross-examined. The defence case as disclosed from the cross-examination of the witnesses on behalf of the prosecution and examination of the accused persons under Section 313 of the

Code of Criminal Procedure appears to be complete denial of the prosecution story.

The learned trial Judge on due consideration of evidence on record and argument advanced by the prosecution and the defence convicted the accused Entajul Sk @ Intajul Sk for the offence under Section 354 of the Indian Penal Code and sentenced him accordingly. Other two accused persons were acquitted from the charge.

The convict/appellant has assailed the judgment and order of conviction and sentence in the instant appeal.

During trial of the case, the de facto complainant deposed as P.W.1. It is ascertained from her evidence that on 21st March, 2015 at about 4 P.M. when she was sleeping in her room, the appellant entered into her room and gave bad proposal to her. Thereafter, he jumped upon her in order to commit rape. The de facto complainant forcibly removed him from her body but still he was in her room. She then informed the matter to her parents-in-law but they did not believe the said allegation and tried to commit murder of the de facto complainant by strangulation. At that time the younger son of the de facto complainant rushed to the room and seeing the incident he started shouting. At that time the accused persons left her. Then she managed to leave her room and went to her paternal home at Chapra by bus. After getting down from the bus at Chapra bus stand she

became unconscious and fell down on the ground. Local people took her to the hospital. Her parents also came to the hospital. She was admitted to the hospital for three days. After she was discharged from the hospital, she went to Mayapur Police Station to lodge complaint. The police at Mayapur then told her to go to Nabadwip Police Station. She went to Nabadwip Police Station and lodged a complaint. It was written by her elder brother under her instruction. The written complaint was marked as exhibit-I during trial of the case. The statement of the de facto complainant recorded under Section 164 of the Code of Criminal Procedure was marked as exhibit-II in the trial.

Drawing my attention to the evidence of P.W.1 and the written complaint, it is submitted by the Learned Advocate for the appellant that lodging of complaint is shrouded by mystery and delay in lodging complaint has not been explained by the *de facto* complainant. In order to substantiate his contention it is submitted by the Learned Advocate for the appellant that the complaint was lodged on 23rd March, 2015 narrating an incident that took place on 21st March, 2015. In the written complaint, the *de facto* complainant did not give any explanation for delay in lodging complaint. On the contrary, it is stated by the *de facto* complainant in her evidence on oath that after the incident dated 21st March, 2015 she returned to her paternal

home and from Chapra Bus Sand she was taken to local hospital and admitted to the hospital for three days. Thus, if the evidence of the *de facto* complainant is believed, she was discharged from the hospital on 24th March, 2015. Therefore, she had no opportunity to lodge complaint at least prior to 24th March, 2015. But the complaint was lodged on 23rd March, 2015. Therefore, it is easily presumed that the *de facto* complainant is not telling truth either regarding the date of lodging complaint or on the point of her medical treatment as indoor patient in the hospital. When the *de facto* complainant was telling lie on a simple question of the date of lodging complaint, the Learned Advocate for the appellant has raised a question as to whether her evidence should be believed or not.

It is argued by the Learned Advocate for the appellant that suspicion arises on the date of lodging complaint because of the fact that the complaint was forwarded to the Learned Magistrate at Nabadwip on 27th March, 2015, i.e. four days after lodging the FIR. The Investigating Officer of the case did not offer any explanation as to why he violated the essential requirement of Section 157 of the Code of Criminal Procedure where an Officer-in-Charge of a Police Station is entrusted to forward a report and the written complaint forthwith if there is a reason to believe that the written complaint discloses commission of cognizable offence. Such delay in lodging

complaint is fatal for the prosecution. In support of his contention Learned Advocate for the appellant refers to a decision of the Division Bench of this Court in ***Rebati Baidya & Ors. -Vs.- State of West Bengal*** reported in ***2014 (1) CLJ (Cal) 67***. In the said report it is observed by the Division Bench that an FIR which has been received belatedly by the Magistrate would have to be considered with caution as the possibility of which being tampered cannot be ruled out. Section 157 of the Code of Criminal Procedure mandates that the report should be sent forthwith to the Magistrate empowered to take cognizance of the offence. The Supreme Court has opined in ***Ishwar Singh -Vs.- State of Uttar Pradesh*** reported in ***AIR 1976 SC 2423*** that when no explanation is offered for the extraordinary delay in sending the report to the Magistrate, it is a circumstance which provides a legitimate basis for suspecting that the FIR was recorded much later than the stated date and hour, affording sufficient time to the prosecution to introduce improvements and embellishments and to set up a distorted version of the occurrence.

It is further submitted by the Learned Advocate for the appellant that the prosecution introduced the case against the appellant with distorted version of the occurrence. In support of his contention, he refers to injury report prepared by Dr. Aburba Kumar Roy (P.W. 9) on 21st March, 2015. On that date the victim was

medically treated by Dr. Apurba Kumar Roy. During medical examination, she complained of back ache and chest pain. She did not state how she received injury on her back or chest on the date of examination. In the FIR it was alleged by the *de facto* complainant that she was attempted to be strangled either with the help of rope or by a 'saree' (some of the witnesses stated that she was tried to be strangled by rope and some others by 'saree'). She also stated in the FIR that the mark of strangulation was visible around her neck but surprisingly enough neither the *de facto* complainant brought the said injury to the knowledge of P.W. 9, Dr. Apurba Kumar Roy nor the Medical Officer found such injury.

Learned Advocate for the appellant further submits that according to the *de facto* complainant the appellant who is her brother-in-law was going on making indecent proposal to her for about six months prior to the incident. She did not inform the matter earlier to her husband or her relatives at her paternal home. It may be a fact that some dispute cropped up on 21st March, 2015 between the *de facto* complainant and the appellant. But the allegation that the appellant attempted to commit rape upon her or outraged her modesty are wild allegations subsequently manufactured by the *de facto* complainant and the Learned Trial Judge committed grave error in convicting the accused under Section 354 of the Indian Penal Code.

Mr. Sandip Chakraborty, learned Public Prosecutor-in-Charge, on the other hand, submits that though there is some contradictions in the evidence on record, such contradictions may be overlooked in view of the essential evidence adduced by the victim/*de facto* complainant and other witnesses on behalf of the prosecution. The *de facto* complainant stated that on 21st March, 2015 she was inappropriately touched and assaulted by her brother-in-law, appellant herein. The said fact was corroborated by other witnesses. As a result of such incident, the *de facto* complainant had to leave her matrimonial home. While she was going to her paternal home at Chapra, she became senseless. She was taken to Chapra Block Primary Health Centre. She complained of chest pain though the history of assault was not recorded by the Doctor. The incident of assault and medical treatment took place within close proximity. Considering such aspects of the matter, the judgment and order of conviction passed by the learned Trial Judge should be confirmed.

Having heard the learned Counsel for the parties and on careful scrutiny of entire evidence on record, it is found that the learned Advocate for the appellant has rightly pointed out that the *de facto* complainant did not offer any explanation as to delay in lodging the FIR. There is also no explanation as to the delay of about 4 days in transmitting the FIR to the learned Magistrate. Following the ratio

laid down by the Division Bench of this Court in ***Rebati Baidya*** (supra) relying on the decision of the Hon'ble Supreme Court in ***Ishwar Singh*** (supra) it is open for the Court to hold that when no explanation is given for extraordinary delay in sending the first information report to the Magistrate, it is open for the Court to hold that the FIR was suspect, affording sufficient time to the prosecution to introduce improvements and embellishments and to set up a distorted version of the occurrence.

Be that as it may, the learned Trial Judge convicted the appellant without considering the essential ingredients of offence under Section 354 of the Indian Penal Code. In order to constitute the offence under Section 354 of the Indian Penal Code, the following ingredients are to be satisfied by adducing cogent evidence:-

- (i) that the person assaulted must be a woman;
- (ii) that the accused must have used criminal force on her,
and
- (iii) that the criminal force must have been used on the
woman intending thereby to outrage her modesty.

The accused/appellant was also charged under Section 323 of the Indian Penal Code. The learned Trial Judge acquitted the appellant from the said charge under Section 323 of the Indian Penal Code. When the appellant was acquitted from the charge under

Section 323 of the Indian Penal Code and no appeal is filed by the State against the said judgment, it can be safely held that the Prosecution failed to prove that the accused caused hurt to the *de facto* complainant. In case of hurt, there must be use of criminal force. When the charge of hurt fails, the ingredient of using criminal force upon the *de facto* complainant will also fail. Moreover, in case of outrage modesty, the evidence of the woman whose modesty was outraged is of prime importance because mere knowledge that the modesty of a woman is likely to be outraged is sufficient without any deliberate intention of having such outrage alone for its object. In ***Vidyadharan Vs. State of Kerala*** reported in **2004(1)SCC 215**, it was held by the Hon'ble Supreme Court :-

"Intention is not the sole criteria of the offence punishable under Section 354 IPC, and it can be committed by a person assaulting or using criminal force to any woman, if he knows that by such act the modesty of the woman is likely to be affected. Knowledge and intention are essentially two things of the mind and cannot be demonstrated like physical objects. The existence of intention or knowledge has to be culled out from various circumstances in which and upon whom the alleged offence is alleged to have been committed. A victim of molestation and indignation is in

the same position as an injured person and her testimony should receive the same weight.”

In the instant case, there is absolutely no evidence to show that the appellant had the intention and knowledge that by assaulting or using criminal force the modesty of the *de facto* complainant would be outraged. The de facto complainant never stated in her evidence that the specific act of the accused had outraged her modesty. Last but not the least, when causing assault or criminal force was not proved and the appellant was acquitted for the charge under Section 323 of the Indian Penal Code, question of outraging modesty by assault or using criminal force does not arise at all.

For the reasons stated above, this Court is of the view that the learned trial Judge erred in convicting the appellant and sentencing him to suffer imprisonment for one year with fine and default clause for the offence under Section 354 of the Indian Penal Code.

The impugned judgment and order of conviction is, therefore, liable to be set aside.

Accordingly, the instant appeal is **allowed**.

The impugned order of conviction and sentence is set aside.

The appellant is discharged from his bail bond.

Let a copy of this judgment be sent down to the trial Court along with the lower Court record.

(Bibek Chaudhuri, J.)