

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 205 of 2010

Aiteswar Barman

-Vs-

The State of West Bengal & Anr.

For the Appellant	: Mr. Anirban Dutta Mr. Ayan Mondal
For the State	: Mr. Avishek Sinha
For the Respondent No.2	: Md. Sabir Ahmed Mr. Dhiman Banerjee
Heard on	: 04.01.2024, 20.02.2024, 08.03.2024, 24.04.2024, 22.08.2024
Judgment on	: 13.11.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against judgment and order of conviction dated 24.02.2010 passed by the Learned Additional Sessions Judge, Fast Track Court, Mathabhanga, District – Cooch Behar in Sessions Trial No.4(3)2009 arising out of the Sessions Case No.57 of 2009 thereby convicting the appellant for the offence under Sections 448/354 of the Indian Penal Code and sentencing him to suffer simple imprisonment for 6 months and to pay a fine of Rs.500/-, in default to suffer simple imprisonment for 1 month for the offence under Section 448 of the Indian Penal Code and also sentencing him to suffer simple imprisonment for 1

year to pay fine of Rs.1000/- in default to suffer simple imprisonment for 2 months for the offence under Section 354 of the Indian Penal Code.

2. The prosecution case precisely stated on 13.08.2006 at about 10:00 a.m., in absence of other family members of the de facto complainant, the accused person entered her house and suddenly embraced her, kissed her and molested her and thereafter tried to commit rape on her. At that time the complainant in order to save herself gave the accused a blow, who thereafter fled from her house threatening to kill her. The complainant raised alarm and the neighbours rushed to the place of occurrence.
3. On the basis of the said written complaint a case being Sitalkuchi Police Station Case No.51 of 2006 dated 13.08.2006 was registered under Sections 448/376/511 of the Indian Penal Code against the appellant and an investigation was taken up.
4. After completion of the investigation a charge-sheet was submitted by the investigating officer against the appellant under Sections 448/376/511 of the Indian Penal Code.
5. Charge was framed under Sections 448/376/511 of the Indian Penal Code against the appellant who pleaded not guilty and claimed to be tried.
6. The prosecution cited 8 witnesses and exhibited certain documents.
7. Learned Advocate for the appellant submitted as follows:-
 - i. The prosecution failed to prove the commission of offence of house trespass in open day-light in order to assault or application of criminal force to woman with intent to outrage her modesty and on the basis of contradictory version of the alleged prosecutrix who

was an aged married woman, the story of outraging her modesty had been made out without any evidence and as such there was substantial embellishment of the prosecution case.

- ii. The de facto complainant had been residing with Sudhin Barman as husband and wife. She left her previous husband Kachu Barman without divorce and the appellant was a local leader of political party and a meeting was held over the issue in the presence of appellant.

9. Learned Advocate for the appellant further submitted as follows:-

- i. PW-1 Radharani Barman who was the elder sister of the de facto complainant had stated in her deposition that the date of occurrence of the incident was on 27th day of Ashar, 2006 and could not state the date and month as per the English calendar. This raised doubts regarding the genuineness of the story as the eyewitness of the incident was not able to properly establish the actual date when the alleged incident took place as mentioned by the complainant in the written complaint which was on 13.08.2006.
- ii. PW-1 also stated in her deposition that the weapon with which the complainant had attacked the appellant herein was a knife and not a spear as mentioned by the complainant in her written complaint. It should be noted that the complainant in her written complaint had specifically stated that at the time when the alleged incident occurred, she was doing her household chores and that no other family member was present in the house. Therefore the

existence of PW-1 at the place of occurrence was improbable and an afterthought.

- iii. Even if the statement of the PW-1 was considered, it was impossible to understand as to why she chose to remain as a mere spectator and did not take any action in order to save the complainant from the hands of the appellant at that point of time when the alleged incident was taking place. Furthermore, PW-1 did not mention anywhere in her deposition that she had made any attempt to rescue her sister i.e. the complainant when the alleged incident was taking place. PW-1 also did not raise any alarm to seek help from the neighbors whose houses were at stone's throw distance.
- iv. Thus PW-1 being a planted witness, her testimony should not have been relied on by the learned trial court. PW-2 being the de facto complainant had in her deposition stated at the time of occurrence of the alleged incident, her sister i.e. PW-1 had entered into her bedroom to take her child which was absolutely in contradiction to the fact stated in the written complaint which was treated as F.I.R where she had specifically mentioned that she was alone and no family member was present at the time of the occurrence of the alleged incident.
- v. PW-2 had stated that she had not sustained any injury by nail scratch of the accused person i.e. the appellant in spite of the fact the accused was trying to forcefully establish physical relationship

with her and PW-2 was resisting such approach of the petitioner. In such situation absence of any mark on the body of the victim was highly improbable.

- vi. PW-2 had mentioned in her deposition that she had been residing with one Sudhin Barman as husband and wife even for almost 3 years even though she had not divorced her previous husband being Kachu Barman i.e. PW-3 which was corroborated by PW-1.
- vii. PW-3 Kachu Barman had been the actual husband of PW-2 and in his deposition he had explicitly stated that PW-2 had deserted him and had been staying with one Sudhin Barman. After becoming aware of the love affair of PW-2 with the said Sudhin Barman, PW-3 had initiated a complaint against Sudhin Barman since the issue had continued for a long time, and a Salishi was held under the leadership of the appellant herein who was the neighbor of PW-3 to address the issue. In that Salishi, the appellant had told PW-2 that such extra-marital relationship with Sudhin Barman could not continue. After the meeting was over, PW-2 out of vendetta towards the appellant for asking her to end her relationship with Sudhin Barman had attacked the appellant with a knife and had thereafter concocted a false story against the appellant to safeguard herself so that she could justify the attack made upon the appellant and at the same time to falsely implicate the appellant in a false criminal case to teach him a lesson.

- viii. PW-4 Dr Kausik Bhattacharya had medically treated the appellant after PW-2 attacked the appellant and from the treatment sheets, it could be established that the appellant suffered an incised wound on the back and scapula. The appellant was admitted at Subham Hospital on 13.08.2006 and remained there for two days before getting discharged on 15.08.2006. However, no medical paper from the institution was seized by the Investigating Officer before proving any such injury.
- ix. PW-5 Bablu Barman in his deposition stated that he heard clamour from the house of PW-2 while he was heading towards the market and upon reaching the house he had seen the appellant flee from the place who had a injury on his back. The remaining story of the incident was heard as per the version narrated to him by PW-2 and PW-1.
- x. During the deposition it revealed that PW-5 was the husband of PW-1 and hence it could be very well understood that PW-5 had every reason to make statements which would help to establish the story narrated by PW-2 as the same had been corroborated by his wife i.e. PW-1. Thus, the said witness was not an independent witness, as had been wrongly observed by the Learned Trial Court and the neutrality of the statement of this witness could also not get established.
- xi. PW-5 was also an alleged seizure list witness of the seized dagger which had been collected from the house of PW-2. However, the

said dagger was not produced or identified by the said witness which was a major lacuna which was necessary to complete the chain of circumstances.

- xii. PW-6 S.I RK Seal was posted as Officer in Charge at Sitalkhuchi P.S. at the time of the occurrence of the incident. He had received the written complaint of PW-2 and treated the same as F.I.R. However, there was a significant gap between the time when the alleged incident occurred which was at 10 a.m., on 13.08.2006 and the time when the written complaint was received which was at 18:30 hrs. on the same date but the reason for delay was not stated in the complaint.

10. The Learned Advocate representing the appellant relied on the decisions cited in

- i. *Sharad Birdhi Chand Sarda v State of Maharashtra* [1985] 1 SCR 88.
- ii. *State of Rajasthan Vs Babulal Meena* (2013) 4 SCC 206.

11. The Learned Advocate representing the appellant further submitted that the prosecution could not prove its case beyond reasonable doubt and the appeal shall be allowed.

12. The Learned Advocate representing the State submitted the absence of rebuttal on the part of the appellant with lack of explanation and reasons of sustaining the injury on his person at the house of the victim on the same date of the incident which prompted him to be hospitalized without

sufficient reasons to the contrary. The prosecution was successful in proving its case and the appeal should be dismissed.

13. A circumspection of evidence of the prosecution witnesses revealed as follows:-

- i. PW-1 in her deposition stated the victim girl was her elder sister. Incident of her elder sister took place on 27th day of Asar, at about 10:00 a.m. At the relevant time she was in the house of her “didi”. At that time Aiteswar Barman embraced her “didi” and thereafter that man tried to laid down her elder sister on bed and then her didi to save her gave knife blow on the back side of Aiteswar. That Knife was on the table. Receiving Knife blow Aiteswar sustained injury and fled away.
- ii. PW-1 in her cross-examination stated she was examined by the I.O. over the incident of that case. She stated the I.O. that 27th day of Asar, the occurrence took place. She stated to I.O. that at the relevant time of incident she was in the house of her elder sister. She stated to the I.O. that Aiteswar Barman embraced her elder sister and touched her chest and then tried to lay down her on bed. Kachu Barman was husband of her elder sister.
- iii. PW-2 in her deposition stated that the incident took place in the last part of Sharabone. At the relevant time she was performing domestic work in her bed room. At the relevant time accused Aiteswar Barman caught her from behind, thereafter kissed him, then the accused placed his hand on her breast. The accused then tried to commit rape on him. To save herself she hurt the accused

by knife. Then the accused escaped leaving him. She lodged complaint at Sitalkuchi P.S. At the relevant time of incident her sister Radharani Barman entered into her bedroom.

- iv. PW-2 in her cross-examination stated that she had mentioned in the F.I.R. that at the relevant time her sister entered into her room to take her child. Besides the accused Sulekha, her Mashi, Paresh Barman, Haridas, Narayan were her adjoining neighbours. Haridas was adjoining North of her house. Her father's house stand at a distance of three miles from her village. At the relevant time Aiteswar Barman was leader of local committee of a political party. The accused placed his hand on her breast but she sustained no injury because the accused did not cause any injury by nail scratch. At the relevant time her husband had been to filed for planting paddy. At that time she had been residing with Sudhin Barman as husband and wife. She was not divorced by her previous husband. It is fact that since last three years she was not residing with her husband Kachu Barman. Her sister and parents was well aware about her relation with Sudhin Barman as husband and wife.
- v. PW-3 in his deposition stated that PW-2, was his wife. Incident took place in the last part of Sharabone, three years back. At that time he had been to field for seedling. At about evening he returned home. He did not see any incident of his wife. After returned he heard about the incident from his wife. He was told by his wife that Aiteswar entered into her room and caught the breast

of his wife and then his wife caused hurt Aiteswar by knife. Darogababu seized that knife for preparing seizure list and he put his signature in the seizure list.

vi. PW-3 in his cross-examination could not state as to whether at the relevant time he had been to field for seedling. He also used to work as a Van-puller. He lodged complaint against Sudhin Barman over the issue of love affair with his wife and Sudhin Barman. PW-1 was living with Sudhin Barman as husband and wife and since then she deserted him. Their love-affairs was continuing since the month of Sharbon long before the incident. Salishi was held over the issue and it was decided not to be continued such relation. The meeting was held under the leadership of Aiteswar and Aiteswar Barman told not to be continued such relationship. After meeting his wife gave knife blow on Aiteswar. His wife thereafter created a concocted story against the accused Aiteswar Barman and it told him. His wife told him falsely that the accused entered into his house and thereafter molests her breast and kissed her. He did not see his sister-in-law on his arrival at home after day's home. Aiteswar Barman was his neighbour who took part in Salish.

vii. PW-4 in his deposition stated that he was a medical officer and attached to Subham Hospital and Diagonosis Centre Private Ltd. On 13.08.06 he was attached in same hospital. On that date one Aiteswar Barman was admitted in their hospital at 03:34 p.m. His father's name was Lt. Pania Barman of Sitamari. He was admitted

under him. Treatment sheet was marked as Exbt.-3 series. He has incised wound on back and scapula. He was admitted for two days under him. He was discharged on 15.08.2006. The discharge certificate issued by him being a carbon copy of the certificate was marked as Exbt.-4. He was admitted at the emergency. The admission sheet was marked as Exbt.-5. The injury as mentioned may be caused by any type of sharp cutting weapon which might be caused by knife or dagger.

- viii. PW-4 in his cross-examination stated such type of injury might be caused by right of private defence depending on the force.
- ix. PW-5 in his deposition stated that the incident took place three years ago. At about 10 a.m. as he was proceeding towards market, he heard a shout from the house of PW-2, and found Aiteswar Barman to fled away. He found injury on the back of Aiteswar Barman. He heard from PW-2 and PW-1 that at the relevant time PW-2 was working in her bed room and at that time Aiteswar Barman tried to commit rape on PW-2. PW-2 in order to save herself caused hurt on the back of accused. Daroga had been to the house of PW-1 and seized dagger from the house of PW-2 after preparing seizure list. He put his signature on the seizure list. Kachu Barman also put his L.T.I. in the seizure. Signature in the seizure list was marked as Exbt.-7.
- x. PW-6 in his deposition stated that he was S.I. of Police. On 13.08.06 he was posted at Sitalkuchi P.S. as O.C. On that date he received a written complaint from PW-2 and started Sitalkuchi P.S.

Case No.51/06 dated 13.08.06 under Sections 447/376/511 of I.P.C. That was the endorsement made by him and it bears his signature with official seal and endorsement marked as Exbt.-1/1. That was the formal F.I.R. filled up by him and it bears his signature which was marked as Exbt.-8. He endorsed the case to S.I. P.S. Chetri for investigation.

- xi. PW-6 in his cross-examination stated that no investigation was done by him in that case. Direction from P.S. was North-West but distance was not mentioned in formal F.I.R. A F.I.R. was lodged at about 18:30 hours. No reason for delay mentioned in the written complaint column 8 regarding reason of delay left blank.
- xii. PW-7 in his deposition stated that he used to scribe F.I.R., G.D., if requested by anybody. On 13.08.06 he scribed that written complaint as per instruction of the complaint by PW-2. He read over and the contents of written complaint after scribing and then the complaint signed in the written complaint. He also signed in the written complaint as scribe of written complaint. That was the written complaint scribed by him and it bears his signature. Written complaint marked as Exbt.1/2.
- xiii. PW-7 in his cross-examination stated that he had got no personal knowledge about the incident of that case. Time of scribing of F.I.R. and place of scribing was not mentioned in the written complaint. It was not mentioned in the written complaint at the relevant time sister of victim came to take her child.

xiv. PW-8 in his deposition stated that he was S.I. of Police and posted at D.I.B., as D.I.O. Sadar. On 13.08.06, he was posted at Sitalkuchi P.S. as S.I. of Police. At that time S.I. Ranjit Seal was O.C. At that time, Sitalkuchi P.S. Case No.51/06 dated 13.08.06 under Sections 448/376/511 of I.P.C., was endorsed to him for investigation. During investigation, he visited the P.O. on 13.08.06 at 19:05 p.m., prepared rough sketch map with index which marked as Exbt.-9. He examined available witnesses on the same date and recorded their statement under Section 161 Cr.P.C. He submitted prayer for recording statement of the victim under Section 164 of Cr.P.C. and accordingly her statement was recorded. He arrested the accused on 15.08.06. The memo of arrest prepared by him and bore his signature marked as Exbt.-10. He seized one dagger from the house of Kachu Barman who was being husband of the victim after preparing seizure list. The seizure list which was prepared by him in presence of witnesses was marked as Exbt.-7/1. P.R. Number was 44/06. The said offending weapon was seized by him under P.R. No.44/06 marked as Mat Exbt.-I. After completion of investigation, he submitted charge-sheet against the accused under Sections 447/376/511 of I.P.C. against Aiteswar Barman.

14. The Hon'ble Supreme Court held the following in ***Raju Pandurang Mahale v. State of Maharashtra***¹:-

“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

¹(2004) 4 SCC 371

the assault or use of criminal force on 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.”*

15. In **Vidyadharan v. State of Kerala**², (2004) 1 SCC 215, the following was held by the Hon’ble Supreme Court:-

“9. In order to constitute the offence under Section 354 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. There is no abstract conception of modesty that can apply to all cases. (See State of Punjab v. Major Singh [AIR 1967 SC 63 : 1967 Cri LJ 1] .) A careful approach has to be adopted by the court while dealing with a case alleging outrage of modesty. The essential ingredients of the offence under Section 354 IPC are as under:

- (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.*

10. Intention is not the sole criterion 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 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

²(2004) 1 SCC 215

position as an injured witness and her testimony should receive the same weight. In the instant case after careful consideration of the evidence, the trial court and the High Court have found the accused guilty. As rightly observed by the courts below, Section 3(1)(xi) of the Act which deals with assaults or use of force to any woman belonging to a Scheduled Caste or Scheduled Tribe with the intent to dishonour or outrage her modesty is an aggravated form of the offence under Section 354 IPC. The only difference between Section 3(1)(xi) and Section 354 is essentially the caste or the tribe to which the victim belongs. If she belongs to a Scheduled Caste or Scheduled Tribe, Section 3(1)(xi) applies. The other difference is that in Section 3(1)(xi) dishonour of such victim is also made an offence. Section 448 provides for punishment relating to house trespass. In order to sustain the conviction under Section 448 IPC it must be found that the intention of the accused was to commit an offence or to intimidate, insult or annoy the complainant. There must be unlawful entry and there must be proof of one or the other of the intentions mentioned in Section 441 IPC. In the case at hand, evidence clearly establishes the commission of offence punishable under Section 448.”

16. In **Gokak Patel Volkart Ltd. v. DundayyaGurushiddaiah Hiremath**³, the Hon’ble Supreme Court held the following:-

“14. Section 441 of the Penal Code, 1860 defines criminal trespass as follows:

“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’.”

³(1991) 2 SCC 141

House trespass is punishable under Section 448 of the Penal Code, 1860. It is significant that when entry into or upon property in possession of another is lawful then unlawfully remaining upon such property with the object of intimidating, insulting or annoying the person in possession of the property would be criminal trespass. The offence would be continuing so long as the trespass is not lifted or vacated and intimidation, insult or annoyance of the person legally in possession of the property is not stopped. The authors of the Code had the following words to say:

“We have given the name of trespass to every usurpation, however slight, of dominion over property. We do not propose to make trespass, as such, an offence, except when it is committed in order to the commission of some offence injurious to some person interested in the property on which the trespass is committed, or for the purpose of causing annoyance to such a person. Even then we propose to visit it with a light punishment, unless it be attended with aggravating circumstances.

These aggravating circumstances are of two sorts. Criminal trespass may be aggravated by the way in which it is committed. It may also be aggravated by the end for which it is committed.”

17. The evidence of sole witness being the victim to have been subjected to physical molestation can be relied upon if the testimony of such victim appeared to be devoid of malice, fabrication and accusations. The defence in the instant case could not prove any incident which might have provoked the victim to cast aspersions or false imputations upon the appellant in order to indict him as a result of grudge or revenge.

18. PW-5 had seen the appellant to escape from the house of the victim with an injury on his back which corroborated with the medical evidence. The appellant could not justify to have sustained the injury recouring him to hospitalization for a specific cause. The offending weapon was seized from

the house of the victim which fortified the prosecution case with credence. Lapses on the part of the investigating agencies in the instant case would not affect the crux of the prosecution case since the defence could not improbabilize, refute or contradict the prosecution case. The evidence of PW-3 the estranged husband of the victim at a later stage after cessation of his relationship with PW-1 his erstwhile wife due to marital discord had deposed before the Court out of frustration and aghast which reflected mendacity on his part.

19. The oral evidence corroborating the medical evidence in the instant case cannot be discarded and the order of conviction granted by the Learned Trial Court is affirmed. In view of the above discussions, the sentence is modified to the extent of imprisonment undergone by the appellant.
20. Accordingly, the instant criminal appeal being CRA 205 of 2010 is dismissed.
21. There is no order as to costs.
22. Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
23. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)