

IN THE HIGH COURT AT CALCUTTA

(Criminal Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRA 323 of 2016

Subhas Mondal

Vs

The State of West Bengal & Anr.

For the Appellant : Mr. Md. Makaram Hossain,
Mr. Md. Naimul Islam,
Mr. K.P. Mukherjee.

For the State : Mr. Ranabir Roy Choudhury,
Mr. Sandip Chakraborty.

For the Opposite Party No. 2 : None.

Hearing concluded on : 01.03.2024

Judgment on : 05.04.2024

Shampa Dutt (Paul), J.:

THE APPEAL:-

1. The present appeal has been preferred against a Judgment and Order of conviction dated 19th day of April, 2016 and sentence dated 19th day of April, 2016 passed by the Learned Additional Sessions Judge (IE Act), Berhampore, Murshidabad in Sessions Serial No. 463 of 2010 (S.T. No. 6 of March, 2012) arising out of Berhampore Police Station Case No. 86/2010 dated 12.02.2010 under Section 376(2)(f)/511 of the Indian Penal Code, 1860 convicting the appellant and sentencing him to suffer rigorous imprisonment for two years and to pay fine of Rs.10,000/- i.d. to suffer R.I. for 2 months for the offence punishable under Section 354 of Indian Penal Code and in case of payment of fine amount, the same is to be given to the victim girl as compensation under Section 357 of the Indian Penal Code. Period of detention already undergone by the convict, if any, be set-off under Section 428 of the Code of Criminal Procedure.

THE PROSECUTION:-

2. The prosecution case in brief is that:-

“On 12.02.2010 at about 6 a.m. in the morning, the victim girl went to answer nature’s call beside the primary school of her village and while she was returning to her house, she was caught hold of by the abovenamed appellant on her way and the accused tried to commit rape on her, but

due to her timely shouting, the local people rushed to the spot and the accused person fled away.”

3. On the basis of the said allegations, the de facto complainant who happens to be the mother of the victim girl, lodged F.I.R. with the I.C., Berhampore Police Station on that very date and the I.C., Berhampore initiated Berhampore P.S. Case No. 86/2010 dated 12.02.2010 under Sections 376(2)(f)/511 of the Indian Penal Code against the above named appellant. The investigation culminated in filing of the Charge-sheet for the offences punishable under Sections 376(2)(f)/511 of the Indian Penal Code against the above named appellant, before the Court of the Learned Chief Judicial Magistrate, Berhampore, Murshidabad on 12.03.2010.
4. On completion of trial, the Appellant was convicted and sentenced as above.
5. 11 witnesses were examined. Documents Exhibited are, the written Complaint (Exhibit-1), statement of the victim under Section 164 Cr.P.C. (Exhibit-2), ossification report (Exhibit-3), Medical Report of the victim (Exhibit-4).

THE EVIDENCE:-

6. **The victim in this case was aged only 10 years at the time of incident.**

7. The **ossification report** (Exhibit-3) shows her age is above **9-12 years** but below 14 years.
8. Prosecution witness no. 1 is the de facto complainant and father of the victim.
9. The incident occurred at around 6 a.m., when the victim child went to answer nature's call.
10. P.W. 4 has proved the written complaint.
11. The victim has been examined as P.W. 7 in this case. She has identified the accused on dock. She has categorically stated that when she went to the toilet at about 6 a.m. on the date of incident and when she was returning, the accused/appellant hugged her from behind and touched her breasts. She has further stated that the accused touched her breasts only once and he did nothing else. She has also proved her statement made her under Section 164 Cr.P.C. and her signature on the ossification report.
12. The petitioner has relied upon judgment in ***Santosh Giri vs State, 2012(4) CHN (CAL) 453 , decided on June 25, 2012***, High Court of Calcutta, (Para 16, 17).
13. The facts and circumstances in the present appeal is entirely different from the facts & circumstances in the Judgment referred to.
14. The **Supreme Court** in the case of ***Tarkeshwar Sahu vs State of Bihar (Now Jharkhand), Appeal (Crl.) 1036 of 2005, on 29.09.2006***, laid down the ingredients required to prove charge under

Section 354 IPC. The **Bench of Justice S. B. Sinha and Justice Dalveer Bhandari**, held:-

"Section 354 IPC reads 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 may extend to two years, or with fine, or with both."

So far as the offence under Section 354 IPC is concerned, intention to outrage the modesty of the women or knowledge that the act of the accused would result in outraging her modesty is the gravamen of the offence.

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 is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex.

'Modesty' is given as "womanly propriety of behaviour, scrupulous chastity of thought, speech and conduct (in man or woman); reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions".

The ultimate test for ascertaining whether the modesty of a woman has been outraged, assaulted or insulted is that the action of the offender should be such that it may be perceived as one which is capable of shocking the sense of decency of a woman. A person slapping on the posterior of a woman in full public glare would amount to outraging her modesty for it was not only an affront to the normal sense of

feminine decency but also an affront to the dignity of the lady.

The word 'modesty' is not to be interpreted with reference to the particular victim of the act, but as an attribute associated with female human beings as a class. It is a virtue which attaches to a female on account of her sex.

We deem it appropriate to reproduce the cases of various Courts indicating circumstances in which the Court convicted the accused under Section 354 IPC.

In State of Kerala v. Hamsa, it was stated as under:-

"What the legislature had in mind when it used the word modesty in Sections 354 and 509 of the Penal Code was protection of an attribute which is peculiar to woman, as a virtue which attaches to a female on account of her sex. Modesty is the attribute of female sex and she possesses it irrespective of her age. The two offences were created not only in the interest of the woman concerned, but in the interest of public morality as well. The question of infringing the modesty of a woman would of course depend upon the customs and habits of the people. Acts which are outrageous to morality would be outrageous to modesty of women. No particular yardstick of universal application can be made for measuring the amplitude of modesty of woman, as it may vary from country to country or society to society."

A well known author Kenny in his book "Outlines of Criminal Law" has dealt with the aspect of indecent assault upon a female. The relevant passage reads as under:-

"In England by the Sexual Offences Act, 1956, an indecent assault upon a female (of any age) is made a misdemeanour and on a charge for indecent assault upon a child or young person under the age of sixteen it is no defence that she (or he) consented to the act of indecency."

In the case of State of Punjab v. Major Singh , a three-Judge Bench of this Court considered the question whether modesty of a female child of 7 months can also be outraged. The majority view was in affirmative. Bachawat, J., on behalf of majority, opined as under: "The offence punishable under section 354 is an assault on or use of criminal force to a woman the intention of outraging her modesty or with the knowledge of the likelihood of doing so. The Code does not define, "modesty". What then is a woman's modesty?

The essence of a woman's modesty is her sex. The modesty of an adult female is writ large on her body. Young or old intelligent or imbecile, awake or sleeping, the woman possesses a modesty capable of being outraged. Whoever uses criminal force to her with intent to outrage her modesty commits an offence punishable under Section 354. 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, as for example, when the accused with a corrupt mind stealthily touches the flesh of a sleeping woman. She may be an idiot, she may be under the spell of anaesthesia, she may be sleeping, she may be unable to appreciate the significance of the act, nevertheless, the offender is punishable under the section.

A female of tender age stands on a somewhat different footing. Here body is immature, and her sexual powers are dormant. In this case, the victim is a baby seven and half months old. She has not yet developed a sense of shame and has no awareness of sex. Nevertheless from her very birth she possesses the modesty which is the attribute of her sex."

In Kanhu Charan Patra v. State , the Orissa High Court stated as under:-

"The accused entered the house and broke open the door which two girls of growing age had closed from inside and molested them but they could do nothing more as the girls made good their escape.

On being prosecuted it was held that the act of accused was of grave nature and they had committed the same in a dare devil manner. As such, their conviction u/s 354/34 was held proper."

The High Court of Delhi in the case of Jai Chand v. State observed as under:-

"The accused in another case had forcibly laid the prosecutrix on the bed and broken her pyzama's string but made no attempt to undress himself and when prosecutrix pushed him away, he did make no efforts to grab her again. It was held that it was not attempt to rape but only outraging of the modesty of a woman and conviction u/s 354 was proper."

In Raja v. State of Rajasthan , it was stated as under:-

"The accused took the minor to solitary place but could not commit rape. The conviction of accused was altered from Section 376/511 to one u/s 354."

The Court in State of Karnataka v. Khaleel stated as follows:

"The parents reached the sugarcane field when accused was in process of attempting molestation and immediately he ran away from the place. There was no evidence in support of allegation of rape and accused was acquitted of charge u/s 376 but he was held liable for conviction under section 354/511 IPC."

The Court in Nuna v. Emperor stated as follows:-

"The accused took off a girl's clothes, threw her on the ground and then sat down beside her. He said nothing to her nor did he do anything more. It is held that the accused committed an offence under Section 354 IPC and was not guilty of an attempt to commit rape."

The Court in Bishewhwar Murmu v. State stated as under:-

"The evidence showed that accused caught hold of informant/victim and when one of the prosecution witnesses came there hearing alarm of victim, offence u/s 376/511 was not made out and conviction was converted into one u/s 354 for outraging modesty of victim."

The Court in Keshab Padhan v. State of Orissa stated as under:-

"The test of outrage of modesty is whether a reasonable man will think that the act of the offender was intended to or was known to be likely to outrage the modesty of the woman. In the instant case, the girl was 15 years of age and in the midnight while she was coming back with her mother the sudden appearance of the petitioner from a lane and dragging her towards that side sufficiently established the ingredients of Section 354."

The Court in Ram Mehar v. State of Haryana stated as under:-

"The accused caught hold of the prosecutrix, lifted her and then took her to a bajra field where he felled her down and tried to open her salwar but could not do so as in order to make the accused powerless the prosecutrix had injured him by giving a blow of the sickle. The accused failed to give his blood sample with the result it could be presumed that his innocence was doubtful. Ocular evidence of prosecutrix was also corroborated by other evidence. It was held that conviction of accused u/s 354, 376/511 was proper but taking the lenient view only two years RI and a fine of Rs.1000/- was imposed on him."

In the case of Rameshwar v. State of Haryana , the Court observed as follows:-

"Whether a certain act amounts to an attempt to commit a particular offence is a question of fact

dependant on the nature of the offence and the steps necessary to take in order to commit it. The difference between mere preparation and actual attempt to commit an offence consists chiefly in the greater degree of determination. For an offence of an attempt to commit rape, the prosecution must establish that it has gone beyond the stage of preparation."

The Court in Shokut v. State of Rajasthan stated as follows:-

"The accused took the prosecutrix nurse for the purpose of attending a patient but on way he tried to molest her and beat her also. The accused was held guilty u/s 354/366 IPC as he by deceitful means had taken the prosecutrix from her house and had then outraged her modesty."

- 15. So the ultimate test to ascertain if the modesty of a woman has been outraged, is that the action of the offender should be such that it may be perceived as one which is capable of shocking the sense of decency of a woman.**

CONCLUSION:-

- 16.** In the present case, the evidence on record has proved the case beyond all reasonable doubt against the appellant that the victim a minor was hugged from behind and the accused touched her breasts, when she was returning from the toilet at 6 a.m. alone.
- 17. Child abuse is a grave violation of children's rights and well-being, encompassing physical, emotional, sexual, or neglectful harm inflicted by adults or peers. It scars victims mentally, emotionally, and physically, often leading to long-term**

consequences. Early recognition, prevention, and intervention are crucial in safeguarding children and promoting their safety, health, and development.

18. The allegations and then the evidence during trial in the present case clearly makes out a case of conviction of an offence under Section 7 of the POCSO Act which is punishable under Section 8 of the said Act, which came into force on 14th November, 2012. But the incident in this case occurred on 12.02.2010, the act not applying retrospectively.
19. It is thus clear from the materials and evidence on record that the accused/appellant's action upon the victim, is clearly capable of shocking the sense of decency of a women, in this case a helpless child and the prosecution has proved the same beyond all reasonable doubt.
20. Considering the nature of conduct of the appellant towards a child of only 10 years, the appellant does not deserve any leniency. Accordingly, the trial court's judgment of conviction and sentence being in accordance with law requires no interference and is thus **affirmed.**
21. **CRA 323 of 2016 is accordingly dismissed.**
22. **Appellant is directed to surrender before the trial court with a period of 1 month from the date of his order to serve out his sentence, in default the trial court shall proceed in accordance with law.**
23. All connected applications, if any, stand disposed of.

- 24.** Interim order, if any, stands vacated.
- 25.** Copy of this judgment be sent to the learned Trial Court for necessary compliance.
- 26.** Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)