



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

REVISION APPLICATION NO. 365 OF 2024
WITH
INTERIM APPLICATION NO. 2682 OF 2024

Subhash Shankar Desai

Age : 75 years, Occu: Labour

R/o. Plot No. 43,

Chambu Khadi

Vidyabhavan Patkeshwar Colony

Kolhapur

...Applicant

Vs.

The State of Maharashtra

...Respondents

(Through P.S.O., Shahupuri

Police Station, Kolhapur)

Dheeraj Patil	Advocate for the Applicant
Mr. H. J. Dedhia	APP for the Respondent-State

CORAM : S. M. MODAK, J.

DATE : 12th JULY 2024

JUDGMENT :-

1. Heard learned Advocate for the Applicant-convicted accused and learned APP.
2. There are concurrent findings of fact. The trial Court convicted

the Applicant for the offence punishable under Section 354, 354-A of the Indian Penal Code. Whereas the Appellate Court modified it to Section 509 of the Indian Penal Code. That is why this revision.

3. Though there is prayer for suspension of the sentence, considering the limited issue involved, the revision is taken up for the final hearing.

4. **Admit.**

5. The only issue involved in this revision is whether the Appellate Court was justified in convicting the Applicant for the offence punishable under Section 509 of the Indian Penal Code, when there was no charge and whether the evidence on record justifies the conviction for the offences punishable under Sections 354, 354A of the Indian Penal Code. After perusing the judgment of the both the Courts below and evidence, what transpires to me is that modification of the findings is permissible as per Section 216 of the Criminal Procedure Code. However, I feel that the Appellate Court committed an error in convicting the Applicant for an offence punishable under Section 509 of the Indian Penal Code for the reason that it is not disclosed from the evidence. It is true that revisional Court is having

the powers of the Appellate Court and in a given case it can be exercised as per the provisions of Section 386 (b) (iii) of the Criminal Procedure Code. The Appellate Court with or without altering the findings can alter the nature or extent and nature and extent of sentence. I will give the reasons.

Prosecution case.

6. The Applicant is working in Sai Samarat Hotel Management Institute at Kolhapur. The Victim also works in that institute as a Lecturer. The incident took place on 30/04/2018. The victim was proceeding to Kolhapur Paper Center at about 3.15 along with a scooter. The Applicant requested her that he will do the said work and she should drop him. Accordingly, the victim proceeded towards Kagad Kendra (Paper Center) and she was driving the scooter and the Applicant was pillion rider. The Center was closed. The Applicant requested the victim to drop him again in the Office and on way the incident took place.

7. When they were on a road behind Sayaji Hotel, two incidents took place. They are :- **first**, the Applicant was again and again coming near the victim and touching her back side. Even though told by the

victim, the Applicant gave an explanation that road was not in a good condition, and he is not doing it intentionally.

8. **Second incident** took place thereafter. When the road was lonely, the Applicant touched the shoulder and posterior part of the victim. She was frightened and not said anything. After returning to college, she tried to telephone PW No. 3-Geetanjali Mahesh Lad, she was not available. At 06.00 pm., the victim called her and narrated the incident, and she explained she was also faced with the similar situation. However, while giving the evidence before the Court, she has not supported the disclosure made by the victim to her. She was declared hostile.

9. The victim has not attended the college for 3 to 4 days. She was restless. Her husband PW No. 2-Sanjay Gunpal Kunnure inquired. At that time, she has disclosed about incident to her husband.

About findings by both the Courts below

10. Her version was challenged before the Court for the reason that there is a delay in lodging of the F.I.R.. The incident took place on 30/04/2018, whereas F.I.R. is lodged on 03/05/2018 with Shahupuri Police Station, Kolhapur under Section 354, 354-A of the Indian Penal

Code. However, both the Courts below have declined to disbelieve her on account of delay in lodging of the F.I.R. Even this contention is raised before me. I am rejecting it. The delay is not always fatal to the prosecution. The Court has to consider the circumstances in which the offence is committed and who is victim. If she is lady and offence is committed by his colleague, it is difficult for her to come out openly and makes the grievance.

11. My attention is invited to other evidence and some answers given by the victim during cross-examination. The victim has not shouted for any help. She has neither informed to the Management nor to the Police immediately. We cannot anticipate as to how the person should behave in a particular manner. Different person behaves in different way. The victim was riding the activa and the Applicant was pillion rider.

12. Considering their occupation, probably she might not have thought to shout. The delay of 3 days in lodging the F.I.R. is not fatal for the reasons stated above. She has also answered due to past incident she was frightened.

13. PW No. 4-API Shilprabha Bhagwan Patil conducted the

investigation, carried out spot panchnama and filed charge-sheet. Before the trial court four witnesses were examined on behalf of the prosecution. The defence of the accused is of the denial. There is much emphasis on the answers given by the Husband-PW No. 2. After consulting the Police, the Complaint is lodged. Consultation is not of such nature as to take advice and lodge false complaint. If they have made up mind to file the complaint after three days and if they have interacted with the Police, it does not mean that this is afterthought complaint or lodged with malice.

14. In fact PW No. 3-Geetanjali has answered that after the incident the victim has not attended the college for two to three days. There is also emphasis that independent witnesses are not examined. In every case it is not required. Suggestion was put to the investigating officer that PSI is friend of PW No. 2. It is denied.

15. As said above, the trial Court convicted the Applicant for the offence punishable under **Sections 354, 354-A** of the Indian Penal Code. Whereas the Appellate Court convicted the Applicant for the offence punishable under **Section 509** of the Indian Penal Code.

About alteration of section by appellate court

16. When I read the Appellate Court judgment, I do not find any finding, why the conviction is altered to Section 509 of the Indian Penal Code. There is absolutely no discussion. The Appellate Court ought to have discussed the evidence *vis-a-vis* the ingredients of Section 354, 354-A, 509 of the Indian Penal Code. It is missing.

17. There is reliance on observations in case of **Chandra Pratap Singh Vs. State of M.P.** in Criminal Appeal No. 1209 of 2011, dated 09/10/2023. The accused no. 2 was convicted by the trial Court alongwith other accused for the offence punishable under Section 302 read with Sections 148, 149 and Section 201 of the Indian Penal Code. When the appeal was preferred before High Court, it was converted from Section 302 read with Sections 148 and 149 of the Indian Penal Code to Section 302 read with Section 34 of the Indian Penal Code. (Para Nos. 14 and 15). The reason quoted by the High Court is only four persons were convicted and others were acquitted that is why there cannot be unlawful assembly. This was deprecated by the Hon'ble Supreme Court. Prior to altering the conviction, it was necessary to bring to the notice of the Applicant. It is true that Section 149 and Section 34 operates in a different field. Admittedly in that

case, charge was not framed under Section 302 read with 34 of the Indian Penal Code, it was necessary to bring it to the notice of the concerned accused. This ratio is not applicable for the facts of this case for the reason that the offence under Section 354, 354-A on one hand and offence under Section 509 of the Indian Penal Code on the other hand stands on the different footing. It will be relevant to consider their ingredients.

About offences u/s 354,354- A & 509 I.P.C.

18. Learned Advocate also tendered a table showing the comparison in between the Section 354 and 509 of the Indian Penal Code. He also placed reliance on observations in case of *Varun Bhatia Vs. State and Another*¹. The difference is elaborated in para nos. 19 and 21.

19. One can say that if there is assault or criminal force and then modesty is outraged, then it is an offence under Section 354 and whereas in case of Section 509, the intention to outrage the modesty is there, but there need not be criminal force or assault. If the victim will sense that her modesty is outraged by using the word, gesture or sound, it is sufficient.

About evidence as to the incidents

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20. Now coming to the facts of this case, as said above, there are two incidents, first, when the Applicant was trying to come near the victim when she was driving Activa scooter, it may happen that due to applying of the brakes. However, when the second incident about touching the shoulder and posterior part is done, what can be the intention of the Applicant rather than outraging her modesty.

21. In revision, appreciation of the evidence is not permissible. I do not find any perversity in the findings of the trial Court. The grounds raised before me pertains to the appreciation of the evidence and they are dealt with by both the Courts below. So certainly the Applicant is having intention to outrage her modesty.

Acts fall under which section of IPC.

22. Touching the shoulder and posterior part, *“whether it falls under Section 354 or 354-A or 509 of the Indian Penal Code”* is a question. As said above, the Appellate Court has not discussed this issue.

23. No doubt this act will not fall within the scope of Section 354 of the Indian Penal Code because no Criminal force or assault is used. It will not fall under Section 509 of the Indian Penal Code because the act is in excess of the plain words or gestures. So there cannot be

conviction either under Sections 354 or under 509 of the Indian Penal Code.

24. I think it will fall under Section 354A(1)(i) of the Indian Penal Code. There is submission that there was no sexual harassment. I reject it. When the shoulder and posterior part, is touched there cannot be any other intention but harass her sexually, so that she will be ashamed.

25. Section 354A(1) is as follows –

“(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 offense of Sexual Harassment”*

26. Certainly there is physical contact. The act cannot be welcomed by the lady and certainly sexual outrage are explicated. **So offence is proved under Section 354-A of the Indian Penal Code.**

27. I heard both the sides on the point of sentence. The Applicant is 80 years old and that is why it is prayed that lenient view may be taken. Whereas learned APP submitted that harsh sentence be imposed.

28. There are three options, first, either there can be rigorous imprisonment for three years or there can be fine only or there can be both also.

29. Considering the circumstances, I am inclined to impose the minimum sentence. Because considering his age, it will not be justifiable to send him to jail. But the victim needs to be compensated.

30. As per the provisions of Section **357 sub-clause 3** of the Code Criminal Procedure Code, when there is only sentence and fine does not form a part, then compensation can be ordered. I am ordering the Applicant to pay compensation of Rs. 50,000/- to the victim. This is for the purpose of compensating her for affecting her sentiments, that too by a person who has worked with her in same institute. It is true that there is no major to ascertain the amount of compensation. But this is the tentative assessment. Hence, the Order :-

ORDER

(i) Revision is partly allowed.

(ii) The judgment dated 02/07/2024 passed by the Court of Additional Session Judge, Kolhapur in Criminal Appeal No. 03 of 2022 is modified as follows :--

a. Instead of convicting the Applicant under Section 509
of the Indian Penal Code, the Applicant is convicted
for an offence punishable under Section 354-A of the
Indian Penal Code.

b. He is directed to undergo simple imprisonment till
rising of the Court and to pay compensation of Rs.
50,000/- to the Victim within a period of four weeks
from today and to undergo rigorous imprisonment for
three months in case of failure to deposit the amount
of compensation.

(iii) Such amount be deposited before the trial Court and once
deposited, it will be paid to the victim PW No. 1-first
informant.

(iv) Rule is discharged.

31. Accordingly, Revision application is disposed of.

32. Interim application, if any, stands disposed of.

[S. M. MODAK, J.]