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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION (ST) NO. 13234 OF 2024

1. Nitin Upadhyay
2. Archna Nitin Upadhyay ...Petitioners

Versus

The State of Maharashtra ...Respondent

Mr. Aniket Nikam i/b Ms. Sadhna Singh for the Petitioner.

Mr. K.V.Saste, A.P.P for the Respondent-State.

**CORAM : REVATI MOHITE DERE &
PRITHVIRAJ K. CHAVAN, JJ.**
DATE : 5th AUGUST 2024

ORAL ORDER (PER REVATI MOHITE DERE, J.) :

1. Heard learned Counsel for the parties.
2. By this petition, the petitioners seek a direction to the respondent No.1 – Oshiwara Police Station, Mumbai, to add Sections of molestation i.e. 354 and criminal conspiracy i.e. 120B of the IPC to

C.R.No. 543 of 2024, registered with the said Police Station. Transfer of investigation of the said C.R. is also sought from the Oshiwara Police Station to Crime Branch or State CID.

3. According to Mr. Nikam, learned Counsel for the petitioners, the petitioner No.2 – Archana's modesty was outraged and therefore, it was incumbent for the Police to register an offence under Section 354 of the IPC. He also seeks addition of Section 120B of the IPC.

4. Mr. Saste, learned Addl.PP has produced the papers of investigation. He submits that since no case is made out for addition of Sections 354 and 120B of the IPC from the statements so recorded by the Police i.e. of the petitioner No.2 and others, these sections have not been added.

5. Perused the papers. It appears that an FIR was lodged at the behest of the petitioner No.2 against the accused alleging offences punishable under Sections 143, 147, 149, 452, 323, 504, 427 of the

IPC. It is the petitioners' case, that the Police ought to have also added Sections 354 and 120B of the IPC to the said FIR, in addition to the aforesaid sections.

6. Learned Addl.PP states that the Police have conducted detailed investigation. Learned Addl.PP Mr. Saste further submitted that infact, the Injury Certificates of both the petitioners do not show that either of them had sustained any injury.

7. Perused the papers, the petitioner No.2- Archna's first statement, on the basis of which, FIR was registered, as well as, the petitioner No.2's supplementary statement recorded by the Police, post the filing of the aforesaid petition. In her first statement, the petitioner No.2 - Archna (first informant) has narrated how the incident took place and how certain male persons entered her house and assaulted her husband. She has stated that the said persons were assaulting her husband with fist blows; that the said persons also assaulted her two young children with fist blows; and that thereafter,

accused - Mayuresh and Abhijit pulled her hair and took her to another room, after which, her husband escaped. It is also alleged that the accused damaged her house and took away certain articles. The said statement was recorded on 9th June, 2024.

8. Thereafter, the Police recorded the supplementary statement of the petitioner No.2 - Archna on 30th July, 2024, post the filing of the petition. The petitioner was specifically asked with respect to her allegation of molestation. In the said statement dated 30th July, 2024, to the said question, the petitioner No.2 - Archna has stated that accused - Mayuresh and Abhijit pulled her hair and took her to another room and thereafter, assaulted her. She has stated that in view of the same, Section 354 of the IPC be added. She has further stated that, apart from the same, she did not wish to say anything more with respect to outraging of her modesty.

9. Having perused both, the petitioner No.2 – Archna’s statements, we do not *prima facie* find that a case is made out for

directing the Police to add Section 354 of the IPC to the aforesaid C.R. Section 354 of the IPC (now repealed) reads thus;

“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.”

10. Thus, in order to attract Section 354 of the IPC, the following ingredients would be necessary.

- (i) The assault must be on a woman;
- (ii) The accused must have used criminal force on a woman; and
- (iii) The assault or criminal force must have been used with intent to outrage or knowing that the accused thereby would outrage her modesty.

11. The Apex Court, in the case of ***State of Punjab v/s Major Singh***¹ observed in paras 4,5 and 16 as under :

“4] I would first observe that the offence does not, in my opinion, depend on the reaction of the woman subjected to

1 AIR 1967 SC 63

the assault or use of criminal force. The words used in the section are that the act has to be done "intending to outrage or knowing it to be likely that he will thereby outrage her modesty". This intention or knowledge is the ingredient of the offence and not the woman's feelings. It would follow that if the intention or knowledge was not proved, proof of the fact that the woman felt that her modesty had been outraged would not satisfy the necessary ingredient of the offence. Likewise, if the intention or knowledge was proved, the fact that the woman did not feel that her modesty had been outraged would be irrelevant, for the necessary ingredient would then have been proved. The sense of modesty in all women is of course not the same-, it varies from woman to woman. In many cases, the woman's sense of modesty would not be known to others. If the test of the offence was the reaction of the woman, then it would have to be proved that the offender knew the standard of the modesty of the woman concerned, as otherwise, it could not be proved that he had intended to outrage "her" modesty or knew it to be likely that his act would have that effect. This would be impossible to prove in the large majority of cases. Hence, in my opinion, the reaction of the woman would be irrelevant.

5] Intention and knowledge are of course states of mind. They are nonetheless facts which can be proved. They cannot be proved by direct evidence. They have to be inferred from the circumstances of each case. Such an inference, one way or the other, can only be made if a reasonable man would, on the facts of the case, make it. The question in each case must, in my opinion, be: will a reasonable man think that the act was done with the intention of outraging the modesty of the woman or with the knowledge that it was likely to do so? The test of the outrage of modesty must, therefore, be 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 considering the question, he must imagine the woman to be a reasonable woman and keep in view all circumstances concerning her, such as, her station and way of life and the known notions of modesty of such a woman. The expression "outrage her modesty" must be read with the words "intending to or knowing it to be likely that he will". So read, it would appear that though the modesty to be considered is of the woman concerned, the word "her" was not used to indicate her reaction. Read all together, the words indicate an act done with the intention or knowledge that it was likely to outrage the woman's modesty, the emphasis being on the intention and knowledge.

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16] I think that 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 s. 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 anesthesia, she may be sleeping, she may be unable to appreciate the significance of the act, nevertheless, the offender is punishable under the section.”

12. In the case of *Raju Pandurang Mahale v/s State of Maharashtra & Anr.*², the Apex Court dealt with what is outraging of modesty in para 12, 13, 14 and 15 as under :

"12] What constitutes an outrage to female modesty is nowhere defined. 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 in this Section is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of pulling a women, removing her saree, coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman; and knowledge, that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object. As indicated above, the word 'modesty' is not defined in IPC. The shorter Oxford Dictionary (Third Edn.) defines the word 'modesty' in relation to woman as follows:

"Decorous in manner and conduct; not forward or lowe; Shame-fast: Scrupulously chast."

13] Modesty is defined as the quality of being modest; and in relation to woman, "womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct." It is the reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions. As observed by Justice Patterson in Rex v. James Llyod, (1876) 7 C & P 817. In order to find the accused guilty of an assault with intent to commit a rape, court must be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person but that he

2 AIR 2004 SC 1677

intended to do so at all events, and notwithstanding any resistance on her part. The point of distinction between an offence of attempt to commit rape and to commit indecent assault is that there should be some action on the part of the accused which would show that he was just going to have sexual connection with her.

14] Webster's Third New International Dictionary of the English Language defines modesty as "freedom from coarseness, indelicacy or indecency, a regard for propriety in dress, speech or conduct". In the Oxford English Dictionary (1933 Edn.), the meaning of the word '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."

15] In State of Punjab v. Major Singh, AIR (1967) SC 63 a question arose whether a female child of seven and a half months could be said to be possessed of 'modesty' which could be outraged. In answering the above question the majority view was that when any act done to or in the presence of a woman is clearly suggestive of sex according to the common notions of mankind that must fall within the mischief of Section 354 IPC. Needless to say, the "common notions of mankind" referred to have to be gauged by contemporary societal standards. It was further observed in the said case that the essence of a woman's modesty is her sex and from her very birth she possess the modesty which is the attribute of her sex. From the above dictionary meaning of 'modesty' and the interpretation given to that word by this Court in Major Singh's case (supra) the ultimate test for ascertaining whether modesty has been outraged is whether the action of the offender is such as could be perceived as one which is capable of

shocking the sense of decency of a woman. The above position was noted in Rupan Deol Bajaj (Mrs.) and Anr. v. Kanwar Pal Singh Gill and Anr., [1995] 6 SCC 194. When the above test is applied in the present case, keeping in view the total fact situation, the inevitable conclusion is that the acts of accused appellant and the concrete role be consistently played from the beginning proved combination of persons and minds as well and as such amounted to "outraging of her modesty" for it was an affront to the normal sense of feminist decency. It is further to be noted that Section 34 has been rightly pressed into service in the case to fasten guilt on the accused- appellant, for the active assistance he rendered and the role played by him, at all times sharing the common intention with A-4 and A-2 as well, till they completed effectively the crime of which the others were also found guilty."

13. From the aforesaid judgments, it is evident that Section 354 of the Penal Code punishes indecent assault or use of criminal force to a woman, as distinguished from assault simpliciter. The essential ingredient to attract Section 354 is intent to outrage or the knowledge that by the offending act, the accused would outrage the modesty of a woman, whereas, the assault or use of criminal force to a woman simpliciter unaccompanied by such a state of mind may not fall within the four corners of the offence under Section 354 of the Penal Code, though the accused may be liable for having committed

some other offence.

14. Coming to the facts in the present case, it is alleged that the accused were assaulting the petitioner No.1 i.e. the husband of the petitioner No.2 by fist blows in his bedroom; that when the petitioners' two children entered the room, they too were assaulted by fist blows by the accused; and when the petitioner No.2 entered the bedroom, the accused pulled the petitioner No.2 by her hair and took her to another room and assaulted her with fist blows.

15. From the aforesaid facts, it, prima facie, appears that it was a sudden quarrel and was not a premeditated act. Similarly, the act of pulling petitioner No.2's hair and assaulting her with fist blows also appears to be a sudden act and not a premeditated act. The first informant i.e. petitioner No.2, in her statement has not alleged that the act of pushing her was accompanied by any utterances or gestures or indecent touch which would underscore sexual overtures. Neither is there any allegation made by the petitioner No.2 (first informant)

that the accused had an evil eye or had touched her inappropriately. Thus, even if the prosecution case is taken as it stands, the existence of mens rea, a prerequisite to attract Section 354 is amiss in the given facts.

16. Of course, it is always open for the Trial Court to consider the invocation of the same if a case is so made out by the petitioners during trial. Similarly, no case is made out for adding Section 120B of the IPC. Infact, we may note, that the learned Counsel did not even argue with respect to applicability of Section 120B in the facts.

17. As far as the transfer of investigation is concerned, it appears that the Police are investigating the case and have recorded statements of several witnesses. The same is reflected from the file produced before us. Considering the same, no case is made out to transfer the investigation of this case, to the Crime Branch or to the State CID.

18. As far as, Police Protection is concerned, it is open for the petitioners to file an appropriate application before the Competent Authority for seeking the same. If such an application is filed seeking Police Protection, the Competent Authority is to decide the same, as expeditiously as possible, in accordance with law.

19. Petition is accordingly dismissed with the aforesaid observations and disposed of as such, on the aforesaid terms.

20. All concerned to act on the authenticated copy of this order.

PRITHVIRAJ K. CHAVAN, J.

REVATI MOHITE DERE, J.