
(2015) 01 BOM CK 0167

In the Bombay High Court

Case No : Criminal Application No. 1199 of 2010

Surajkumar Satyabrath Pal

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 15-01-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 209
Penal Code, 1860 (IPC) — Section 341, 349, 350, 351, 354

Citation : (2015) ALLMR(Cri) 1365

Hon'ble Judges : P.N. Deshmukh, J.; A.B. Chaudhari, J.

Bench : Division Bench

Advocate : Anjan De, for the Appellant; S.M. Uikey, APP, Advocates for the Respondent

Judgement

A.B. Chaudhari, J.—By this criminal application, applicant seeks quashment of first information report and charge-sheet in Criminal Case No. 212/2010 before the Judicial Magistrate, First Class, 6th Court, Gondia as well as order rejecting application for not committing the case to Sessions Court under Section 209 of Code of Criminal Procedure.

2. We have heard Dr. De, learned Counsel for the applicant. Dr. De vehemently argued that perusal of first information report and charge-sheet even remotely does not make out any offence under Sections 365, 366, 354 and 511 of Indian Penal Code. In the alternative, he submitted that at any rate no offence under Section 354 of Indian Penal Code is at all made out in the light of ingredients required by Section 354 of Indian Penal Code since there is no allegation of force/criminal force being used by the applicant against complainant. Learned Counsel Dr. De contended that for attracting Section 354 of Indian Penal Code, as per definition of "force" under Section 349 of Indian Penal Code, an overt act in the nature of physical contact would be necessary. Perusal of the first information report so also charge-sheet, according to learned Counsel Dr. De, does not show any such thing and the only allegations are that the applicant used to make SMS,

telephonic calls and open offer during meetings with her for fulfilling sexual demands in lieu of exempting her from payment of fees. He then submitted that the applicant has not committed any offence and, therefore, entire charge-sheet is required to be quashed.

3. Learned Counsel Dr. De further contended that there is an order made by the learned Magistrate, which amounts to shirking of duty by him by not accepting the application for not committing the case to Sessions Court under Section 209 of Code of Criminal Procedure. He, therefore, submitted that the said order is also wrong and is liable to be quashed and set aside.

4. Per contra, Shri Uikey, learned Additional Public Prosecutor for respondent no.1, opposed the criminal application and submitted that the charge-sheet having been filed, the applicant should go for trial rather than prosecuting the present criminal application and the present criminal application is premature. He prayed for dismissal of the criminal application.

5. We have gone through the criminal application, first information report as well as statements of witnesses. From perusal of the first information report as well as statements of witnesses recorded under Section 161 of Code of Criminal Procedure, we find that there is no allegation about kidnapping within the meaning of Sections 365 and 366 of Indian Penal Code. We also find that there is not even a remote allegation against the applicant that there was any kidnapping made or even attempted to be made. That being so, we are satisfied that no offence punishable under Sections 365, 366 and 511 of Indian Penal Code is at all made out. We, therefore, hold that the offences punishable under Sections 365, 366 and 511 of Indian Penal Code in the charge-sheet will have to be removed.

6. Insofar as offence punishable under Section 354 of Indian Penal Code is concerned, Section 354 reads thus:

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. The above definition shows that requirement is of use of criminal force in the context of arguments made by learned Counsel Dr. De. Dr. De invited our attention to Section 349 and submitted that first Section 349 defines what is force and thereafter Section 350 defines what is criminal force. His submission is that definition of force in Section 349 must be read in Section 350 as sine qua non for finding out what is criminal force. He also relied on illustration (a) of Section 350 of Indian Penal Code in support of his submission that unless force is used as stated in illustration (a), there cannot be a criminal force.

7. In the Indian Penal Code, Section 349 defines "Force" while Section 350 defines "Criminal Force" and Section 351 defines "Assault". We quote these

sections as under:

349. Force:-

A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling: Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described.

First--By his own bodily power.

Secondly- By disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person. Thirdly-By inducing any animal to move, to change its motion, or to cease to move.

350 Criminal Force:-

Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other. 351. Assault:-

Whoever makes any gesture, or any preparation intending or knowing. it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault. Explanation-

Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault.

8. The submission made by Dr. De, learned counsel for the applicant that there has to be a force to find out whether there is assault within the meaning of Section 354 of IPC or not and that therefore overt act of physical conduct or beating would be necessary, does not appeal to us. The English law recognizes "battery" as an exclusive term for physical assault or beating of another but the said word "battery" is not used in this provision. Section 354 does not use the word "force" as defined in Section 341 of the IPC and, therefore, there is no need for us to take into consideration the said definition of force all the more so because Section 350 defines the word "criminal force" which has been utilized in Section 354 along with another word "assault" defined by Section 354 of IPC. Reading of definition of word "assault" in Section 351 in the present case and FIR lodged by the victim clearly shows that "assault" means any gesture which would

cause any person present to apprehend that such a gesture is for use of criminal force to that person. The explanation is clarificatory. The words which a person uses may give gestures such a meaning as may make those gestures amounting to assault.

9. In the present case, the allegations in the FIR are that the applicant used to call the complainant on mobile phone and used to tell her either to pay fees of the college or to keep physical relations with him. She had deposited Rs.9,000/- out of Rs.15,278/-but still he used to make phone calls to her at odd times in night. He used to use the obscene language with her while talking on telephone and used to ask her for physical relations with him in lieu of exempting her from paying fees. He used to send SMS to her in the night and was thus torturing her during her studies. The FIR clearly shows that she was apprehending loss of her career and was terrified by his activities.

10. We, thus, find that the victim was tormented by the applicant merely because the applicant was in a dominant position. According to us, the above facts clearly fall within the purview of Section 351 defining "assault" read with its explanation.

11. The question is about the meaning of the word "Modesty". It is not necessary for us to write anything further but to quote the following paragraphs from the judgment of the Supreme Court in Tarkeshwar Sahu Vs. State of Bihar (Now Jharkhand), :

40. 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.

41. "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".

42. 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.

43. 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.

44. ...

45. 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. 46. 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. 47. In *State of Punjab v. Major Singh*, a three-Judge Bench of this Court considered the question -whether modesty of a female child of 7 1/2 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.

12. In view of above discussion, we make the following order.

ORDER

(i) Criminal Application No. 1199/2010 is partly allowed.

(ii) First Information Report No. 41/2010 dated 10.04.2010 registered with Police Station, Ramnagar, Gondia and chargesheet relating to the said FIR, so far as it relates to an offence punishable under sections 365, 366 read with section 511 of the Indian Penal Code against the applicant are quashed and set aside.

(iii) Criminal Application No. 1199/2010 for quashment of FIR and chargesheet, so far as registration of an offence punishable under Section 354 and 511 is concerned, is rejected.

(iv) The applicant shall be tried for an offence punishable under section 354 read with section 511 of the IPC and the trial shall be completed within a period of six months from today.