

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Revisional Jurisdiction)

SINGLE BENCH: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Crl. Rev. P. No. 03 of 2018

Sashi Shekhar Thakur,
Son of Shri Arun Kumar Thakur,
Permanent resident of Barha,
Benipatti,
District Madhubani,
Bihar – 847223.

..... Revisionist

Versus

State of Sikkim

..... Respondent

**Application under section 397 and 401
of the Code of Criminal Procedure, 1973.**

Appearance:

Mr. N. Rai, Sr. Advocate with Ms Sushmita Gurung, Advocate for the Revisionist.

Mr. Sudesh Joshi, Public Prosecutor with Mr. Sujan Sunwar and Mr. Hissey Gyaltsen, Assistant Public Prosecutors, for the Respondent.

Date of hearing : 15.10.2020

Date of judgment : 23.11.2020

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. On 08.09.2017, the victim lodged a First Information Report (FIR) before the police station alleging that the branch manager of Syndicate Bank (the bank) had, while taking her interview on 06.09.2017, talked to her inappropriately by asking her to wear her

dress that showed her breasts and had also touched her body. The investigation conducted by Joshna Gurung (PW-7), the Investigating Officer of the case, culminated in filing of a charge-sheet having found prima facie case under section 509 of the Indian Penal Code, 1860 (IPC). On 22.02.2018, a charge under section 354-A IPC was framed against the revisionist. The revisionist pleaded not guilty. During the trial, seven witnesses were examined by the prosecution and one by the defence. The revisionist was examined under section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.) in which he admitted that the victim had come for the interview and that he had asked her to change her clothes as the clothes were dirty and tight fitting. He also admitted that he had touched her backbone just to show her the right posture to stand and did not touch her on any other part of her body. He denied that he had told her that she should look hot and sexy when at work and explained that he had only told her that for official work an employee should be properly dressed and should be attractive. He stated that the victim's assertion that throughout the interview she was uncomfortable was incorrect and that she was smiling all through out. He took the plea that after the interview Romi Rai had demanded money from him which he refused after which the false FIR had been lodged. It was also alleged by the revisionist that the relatives of the victim also demanded money and that he had been falsely implicated in the case to extract money from him.

2. On 30.04.2018, the learned Chief Judicial Magistrate, South Sikkim at Namchi, convicted the appellant for the offence of sexual harassment under section 354-A(1) IPC and sentenced him to

undergo simple imprisonment for a period of two years and a fine of Rs.5000/-. The fine was directed to be given to the victim by way of compensation.

3. Dissatisfied with the judgment and order on sentence, both dated 30.04.2018, Criminal Appeal Case No. 2 of 2018 was preferred by the revisionist before the Court of the Sessions Judge, South Sikkim at Namchi. On 24.10.2018, the learned Sessions Judge upheld the judgment and order on sentence both passed by the learned Chief Judicial Magistrate and dismissed the appeal. The learned Sessions Judge while doing so held that the learned Chief Judicial Magistrate had not specified the particular clause of section 354-A IPC for which the appellant had been found guilty. It was held that the prosecution had established the case against the appellant under section 354-A(1)(i) & (iv) IPC and accordingly, modified the conviction.

4. Criminal Revision Petition No. 3 of 2018 has been preferred by the revisionist against the impugned judgment dated 24.10.2018 passed by the learned Sessions Judge.

5. Heard Mr. N. Rai, learned Senior Advocate and Mr. Sudesh Joshi, learned Public Prosecutor.

6. This is a case, in which, both learned Chief Judicial Magistrate as well as the learned Sessions Judge, have arrived at concurrent factual findings. At the outset, when this court enquired from Mr. N. Rai as to whether concurrent findings of fact could be

upset by the revisional court in the absence of any incorrectness, illegality, impropriety or irregularity, he submitted that section 397 Cr.P.C. must be read along with section 401 Cr.P.C. which has also been invoked and in so doing, it would be seen that the revisional court would have all the powers of the appellate court. Mr. N. Rai's submission in this regard may not be entirely correct in view of the law laid down by the Supreme Court.

7. In *State of Maharashtra vs. Jagmohan Singh Kuldip Singh Anand & Others*¹, the Supreme Court held that:

“22. The revisional court is empowered to exercise all the powers conferred on the appellate court by virtue of the provisions contained in Section 401 CrPC. Section 401 CrPC is a provision enabling the High Court to exercise all powers of an appellate court, if necessary, in aid of power of superintendence or supervision as a part of power of revision conferred on the High Court or the Sessions Court. Section 397 CrPC confers power on the High Court or Sessions Court, as the case may be, “for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior court”.

It is for the above purpose, if necessary, the High Court or the Sessions Court can exercise all appellate powers. Section 401 CrPC conferring powers of an appellate court on the revisional court is with the above limited purpose. The provisions contained in Section 395 to Section 401 CrPC, read together, do not indicate that the revisional power of the High Court can be exercised as a second appellate power.

23. On this aspect, it is sufficient to refer to and rely on the decision of this Court in Duli Chand v. Delhi Admn. [(1975) 4 SCC 649 : 1975 SCC (Cri) 663 : AIR 1975 SC 1960] in which it is observed thus: (SCC p. 651, para 5)

“The High Court in revision was exercising supervisory jurisdiction of a restricted nature and, therefore, it would have been justified in refusing to reappreciate the evidence for the purposes of determining whether the concurrent finding of fact reached by the learned Magistrate and the learned Additional Sessions Judge was correct. But even so, the High Court reviewed the evidence presumably for the purpose of satisfying itself that there was evidence in support of the finding of fact reached by the two subordinate courts and that the finding of fact was not unreasonable or perverse.”

¹ (2004) 7 SCC 659

8. The Supreme Court in ***Central Bureau of Investigation vs. Ashok Kumar Aggarwal and Another***², held that the revisional powers under section 397 read with section 401 Cr.P.C. can be exercised to examine the correctness, legality or propriety of any findings, sentence or order and as to the regularity of any proceeding of the inferior court. Sections 397 and 401 Cr.P.C do not create any right in favour of the litigant but only empower and enable the High Court to see that justice is done in accordance with recognised principles of criminal jurisprudence.

9. The learned Sessions Judge had held that the victim had made similar allegations in her statement recorded under section 164 Cr.P.C. (Exhibit-3) as the one deposed by her in court. Mr. N. Rai, in this context, urged that Exhibit-3, however, does not reflect that it was a statement recorded under section 164 Cr.P.C. and therefore, reliance upon the same by the learned Sessions Judge would amount to perversity. A perusal of Exhibit-3 reflects that it is recorded in the form for recording depositions. It also records that the deposition of the victim was recorded under section 5 of the Indian Penal Code, 1860. This was incorrect. However, perusal of Exhibit-3 and preliminary examination of the victim (Exhibit-4) reflects that the procedure prescribed under section 164 Cr.P.C. had been followed. The learned Judicial Magistrate was not examined as a prosecution witness. The victim exhibited Exhibit-3 as her statement recorded under section 164 Cr.P.C. The exhibition of the said Exhibit-3 by the victim was not objected to by the defence. According to the Investigating Officer,

²(2013) 15 SCC 222

Exhibit-15 was the application she made before the learned Judicial Magistrate for recording the statement of the victim under section 164 Cr.P.C. The defence did not even cross-examine the Investigating Officer about Exhibit-3. Mr. N. Rai fairly admitted that this point had neither been raised during the trial nor in the appeal. The trial court record reveals that the revisionist himself had asserted to the victim that Exhibit-3 was a statement under section 164 Cr.P.C. Even if we were to remove Exhibit-3 from consideration, the evidence led by the prosecution clearly establishes the ingredients of the offence of sexual harassment. This court is thus not inclined to interfere with concurrent findings of facts on this ground.

10. Mr. N. Rai further urged that the finding of the learned Sessions Judge in paragraph 16 of the impugned judgment is perverse in as much as video clipping titled “ch03_20170906141614” is actually not there in the video footage (MO-I). The learned Chief Judicial Magistrate examined the contents of MO-I and held that the clip showed the accused touching the back of the victim and teaching her how to stand emphasising on the chest area to be out and the back to be straight. She also held that the video clip titled “ch03_20170906141420” clearly showed the revisionist touching the back of the victim as well as her buttock. These clippings were once again examined by the learned Sessions Judge who held that on going through the contents of MO-I (video footage), it was clearly seen in the video clippings titled “ch03_20170906141614” and “ch03_20170906141420”, that the revisionist had touched the back as well as the buttock of the victim. It is noticed that this plea is also

being raised for the first time in the revision. MO-I was exhibited by PW-5, Raman Kumar Choudhary, Assistant Branch Manager of the bank, without any objection from the defence. Neither Raman Kumar Choudhary (PW-5) nor the Investigating Officer were cross-examined on this aspect by the defence. A perusal of the appeal, i.e., Criminal Appeal No. 2 of 2018 filed before the learned Sessions Judge, also does not reflect that such an issue had been raised by the revisionist. In fact, it was urged that the victim was seen smiling frequently in the video footage contained in MO-I. In the circumstances, this court is of the view that there was no perversity in the finding of the learned Sessions Judge in paragraph 16 of the impugned judgment.

11. Mr. N. Rai urged that the Investigating Officer had started investigating the case before the lodgement of the FIR and consequently, the FIR is hit by the provision of section 162 Cr.P.C. The Investigating Officer stated during cross-examination that the case was endorsed to her after 6:15 p.m. on 08.09.2017. She, however, denied the suggestion that she had gone to the bank at around 12:30-1:00 p.m. on 08.09.2017 along with the victim and that she had seen the CCTV footage prior to the registration of the FIR. There is no material, therefore, to show that the Investigating Officer had started investigating the case before the FIR was lodged. According to Mr. N. Rai, the contents of MO-II falsify the stand of the Investigating Officer that she started investigating the case after the lodging of the FIR. A perusal of the cross-examination reflects that not even a suggestion was made to the Investigating Officer about it. Consequently, the revisionist is precluded to agitate this issue in the present revision.

12. Mr. N. Rai finally submitted that the learned Chief Judicial Magistrate and the learned Sessions Judge had erred in convicting the revisionist for sexual harassment.

13. Section 354-A(1)(i) & (iv) IPC reads as under:

“354A. Sexual harassment and punishment for sexual harassment. – (1) A man committing any of the following act-

- (i) physical contact and advances involving unwelcome and explicit sexual overtures; or
- (ii)
- (iii)
- (iv) making sexually coloured remarks,

shall be guilty of the offence of sexual harassment.”

14. The ingredient of the offence is the commission of physical contact and advances involving unwelcome and explicit sexual overtures and making sexually coloured remarks.

15. The victim dock identified the revisionist as the manager of the bank and gave a detailed account of what transpired on 06.09.2017 in the interview that she had attended. Both the learned Chief Judicial Magistrate and the learned Sessions Judge have found the evidence of the victim reliable. The setting of the crime is an interview for a vacant post at the bank. PW-2 had informed the victim about the job opening in the bank and taken her for the interview. According to her, the victim informed her about the incident after the interview. The victim deposed that the revisionist told her that she should be wearing figure hugging clothes as women look attractive in such clothes. She further deposed that the revisionist also showed her how to speak with customers in order to attract them. The victim

deposed that the revisionist also touched her body particularly on the hook of the bra as well as her backside while showing her how to speak to the customers. She deposed that she was not comfortable and wanted to leave the bank. PW-3, the victim's sister, deposed that the victim told her she was not interested in the job as she was not comfortable after the interview. PW-4, the victim's sister-in-law, deposed that the victim had told her that she had been asked to change her clothes and return. She was also told by the victim that she did not want to work with the bank as she was not comfortable. At the interview, there was no reason for the revisionist to ask the victim to change her clothes and appear in a particular manner and further to touch her on the pretext of teaching her the correct posture while dealing with customers. The detailed account as to what transpired on that particular date of interview does establish that the revisionist had committed physical contact and made unwelcome advances and explicit sexual overtures. It also establishes that the revisionist had made sexually coloured remark upon the victim.

16. The learned Chief Judicial Magistrate and the learned Sessions Judge have unanimously held that the prosecution had been able to establish the case of sexual harassment committed by the revisionist. This court does not find any perversity in their findings.

17. Alternatively, and without prejudice to his aforesaid contentions, Mr. N. Rai prays that the revisionist may be given the benefit of section 4 of the Probation of Offenders Act, 1958. On this aspect, he relied upon the judgments of the Supreme Court in ***State of***

***Haryana vs. Prem Chand*³, *Pritam Singh vs. State of H.P.*⁴, *B.S. Narayanan vs. State of A.P.*⁵ and *Chandreshwar Sharma vs. State of Bihar*⁶ and *Eliamma & Another vs State of Karnataka*⁷.**

18. Mr. Sudesh Joshi, learned Public Prosecutor, submitted that considering the fact that the revisionist had been convicted for sexual offence he may not be granted the benefit of section 4 of the Probation of Offenders Act, 1958. For the said purpose, he relied upon judgment of the Supreme Court in ***State of Rajasthan vs. Sri Chand*⁸.**

19. When Mr. N. Rai was asked by this Court as to whether it was permissible for the revisional court to exercise the power under section 4 of the Probation of Offenders Act, 1958, Mr. Sudesh Joshi fairly pointed out the provision of section 11 of the Probation of Offenders Act, 1958 and submitted that the revisional court did in fact have the power to do so. Mr. Joshi also referred to the judgment of the Supreme Court in ***Ramji Missar vs. State of Bihar*⁹** to support that view.

20. In ***Prem Chand*** (supra), the Supreme Court held that the trial court was justified in extending benefit of probation to the accused therein under the Probation of Offenders Act, 1958. The learned Sessions Judge had held that the prosecutrix therein had not been actually raped but an attempt had been made in that direction. The accused therein was held guilty for the offence under section 376/511 IPC but since he was less than 21 years of age the benefit of

³(1997) 7 SCC 756

⁴2011 SCC Online HP 6249 / 2012 Cri. L.J. 468

⁵1987 (Supp) SCC 172

⁶(2000) 9 SCC 245

⁷(2009) 11 SCC 42

⁸(2015) 11 SCC 229

⁹AIR 1963 SC 1088

probation, it was held, could not be denied when he was not a previous convict. The Supreme Court was of the view that since the offence for which the accused had been found guilty was for attempt to rape it would not attract imprisonment for life disentitling him to the benefit of probation.

21. In **Chandreshwar Sharma** (supra), the Supreme Court held on the facts of that case that the courts below including the High Court had not considered the question of applicability of section 360 Cr.P.C. The Supreme Court also held that section 361 and 360 Cr.P.C. on being read together would indicate that in any case where the court could have dealt with an accused under section 360 of the Code and yet does not want to grant the benefit of the said provision then it shall record in its judgment specific reasons for not having done so. The Supreme Court in the facts of the case, which was a case of theft, thought it fit while maintaining the conviction of the accused to direct release of the accused on probation of good conduct instead of sentencing him under section 360 Cr.P.C.

22. In **Pritam Singh** (supra), the Himachal Pradesh High Court deemed it fit to extend the benefit of section 4 of the Probation of Offenders Act, 1958 to the accused therein considering his young age and the fact that his social standing had taken a mauling and he had to marry and settle in life.

23. In **Sri Chand** (supra), the Supreme Court was examining a case under section 376 read with sections 511 and 354 IPC for attempt to rape and outraging the modesty of a woman. The Supreme Court held that the offences under section 354 had been proved

beyond reasonable doubt. The question of sentence and benefit under the Probation of Offenders Act, 1958 was thereafter examined and it was held:

“10. Now we move to the question of sentence vis-à-vis the benefit granted under the Probation of Offenders Act, 1958. In *Ajahar Ali v. State of W.B.* [*Ajahar Ali v. State of W.B.*, (2013) 10 SCC 31 : (2013) 3 SCC (Cri) 794], this Court while dealing with the question of applicability of the 1958 Act to an offence under Section 354 IPC, found as follows: (SCC p. 35, para 12)

“12. In the instant case, as the appellant has committed a heinous crime and with the social condition prevailing in the society, the modesty of a woman has to be strongly guarded and as the appellant behaved like a roadside Romeo, we do not think it is a fit case where the benefit of the 1958 Act should be given to the appellant.”

11. In *State of H.P. v. Dharam Pal* [*State of H.P. v. Dharam Pal*, (2004) 9 SCC 681 : 2004 SCC (Cri) 1477] this Court was dealing with probation of offenders in case of offence of attempt to commit rape. The finding of this Court in the said judgment is relevant for all the offences against women, which is as follows: (SCC p. 682, para 6)

“6. According to us, the offence of an attempt to commit rape is a serious offence, as ultimately if translated into the act leads to an assault on the most valuable possession of a woman i.e. character, reputation, dignity and honour. In a traditional and conservative country like India, any attempt to misbehave or sexually assault a woman is one of the most depraved acts. The Act [Probation of Offenders Act, 1958] is intended to reform the persons who can be reformed and would cease to be a nuisance in the society. But the discretion to exercise the jurisdiction under Section 4 [of the Probation of Offenders Act, 1958] is hedged with a condition about the nature of the offence and the character of the offender.”

In the above case although this Court did not interfere with the benefit of probation granted by the High Court due to peculiar facts of the case however it did not approve the reasoning given by the High Court.

12. In the present case the accused is not a minor, rather he has committed an offence against a minor girl who is helpless. Further, it is clear from the evidence on record that he ran away only when the prosecutrix screamed and PW 3 came to the place of incident, which goes on to show that the accused could have had worse intentions. The offence is heinous in nature and there is no reason for granting benefit of probation in this case. The trial court has not given any special consideration to the character of the accused apart from the fact that this was the first conviction of the accused. We find this is far from sufficient to grant probation in an offence like outraging the modesty of a woman.

13. In view of the discussion in the foregoing paragraphs, we allow this appeal to the limited extent that the respondent-accused is not granted the benefit of the Probation of Offenders Act, 1958, but his conviction is maintained under Section 354 IPC only. The respondent-accused is hereby sentenced to rigorous imprisonment for two years. The respondent is directed to surrender within a period of two weeks to serve out the sentence, failing which the Additional District and Sessions Judge, Laxmangarh, shall take necessary steps to take him into custody to serve out the sentence. Let a copy of this judgment be sent to the Additional District and Sessions Judge, Laxmangarh for information and necessary action."

24. In *Eliamma* (supra), before the Supreme Court it was pleaded that neither the trial court nor the High Court considered the effect of section 360 Cr.P.C. The Supreme Court while upholding the conviction remitted the matter to the trial court for deciding whether the benefit under section 360 Cr.P.C. can be extended to the appellant therein.

25. The record reveals that neither the learned Chief Judicial Magistrate nor the learned Sessions Judge had examined the applicability of section 360 Cr.P.C. or Section 4 of the Probation of Offenders Act, 1958. Therefore, while declining to interfere with the judgments of the learned Chief Judicial Magistrate and the learned Sessions Judge, in exercise of this court's power conferred by sections 397 and 401 Cr.P.C., the matter is remitted to the court of the learned Chief Judicial Magistrate for the limited purpose for deciding whether the benefit of section 360 Cr.P.C. and section 4 of the Probation of Offenders Act, 1958 can be extended to the revisionist. The revisionist shall appear before the learned Chief Judicial Magistrate, South Sikkim at Namchi on 25.11.2020 for the said purpose.

26. The revisionist is presently on bail. He shall continue to be on bail until the learned Chief Judicial Magistrate takes a decision. In case the learned Chief Judicial Magistrate arrives at a conclusion that the revisionist is not entitled to the benefit of section 360 Cr.P.C. or section 4 of the Probation of Offenders Act, 1958, his bail bonds shall automatically stand cancelled.

27. Criminal Revision Petition No. 3 of 2018 is disposed accordingly.

28. Copy of this judgment be made over to the court of the learned Sessions Judge and to the court of the learned Chief Judicial Magistrate, South Sikkim at Namchi, forthwith.

29. Records of the courts below be remitted.

(Bhaskar Raj Pradhan)
Judge

Approved for reporting: **Yes/No**
Internet : **Yes/No**

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