

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE
HON'BLE SHRI JUSTICE PREM NARAYAN SINGH**

CRIMINAL APPEAL No. 53 of 2022

(NITESH PATIDAR AND OTHERS

Vs

THE STATE OF MADHYA PRADESH AND OTHERS)

Appearance:

(BY SHRI VIRENDRA SHARMA, ADVOCATE FOR APPELLANTS)

(BY SHRI H.S. RATHORE, GOVERNMENT ADVOCATE FOR STATE)

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Reserved on : 22.05.2024

Delivered on : 09.07.2024
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This criminal appeal having been heard and reserved for orders, coming on for pronouncement this day, the court passed the following:

JUDGMENT

This criminal appeal is preferred under Section 374 of Cr.P.C. by the appellants being crestfallen by the judgment dated 27.12.2021, passed by Special Judge (Protection of Children from Sexual Offences, 2012)/XIth, Additional Sessions Judge, Ujjain, in Sessions Trial No.207/2018, whereby appellant Nitesh has been convicted for the offence punishable under Sections 354, 323 read with Section 34 (two counts) of Indian Penal Code, 1860 (hereinafter referred as 'I.P.C.') & Section 7 read with Section 8 of the Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO') and sentenced to undergo 01 year R.I., 06 months R.I. (two counts) & 03 years R.I. with fine of Rs.500/-, Rs.500/- (two counts) and Rs.500/- respectively and default stipulations and appellants Laxman and Gajendra have been convicted under Section 323 of I.P.C. (two counts) and sentenced to undergo for 06

months R.I. (two counts) with fine of Rs.500/- and default stipulation.

2. Before dwelling upon the points in this appeal, it is worth mentioning that appellants Nitesh, Laxman and Gajendra have already been acquitted from the charges of the offence punishable under Section 323 of IPC (two counts), on the basis of the compromise petition filed by the injured persons/complainants Vijay Gaud, Ankit and Himanshi Gaud. Since the offence under Section 354 of IPC is not compoundable, the compromise petition with regard to the charges framed against appellant Nitesh Patidar under Section 354 of IPC and under Section 7/8 of POCSO Act could not be allowed. Thus, this appeal is being decided with regard to the aforesaid offences against appellant No. 1.

3. As per the case of prosecution, on 07.02.2018 at about 04:00 pm, the prosecutrix went to take tuition from her tuition teacher's house where one Nitesh Patidar was also used to come for tuition. After tuition at about 5:30 pm, when the prosecutrix was going to her home, Nitesh Patidar gave her a mobile phone and caught her hand with bad intention and asked her to talk to him. Further, the prosecutrix went to her home and told about the incident to her parents. Thereafter, her father, her brother alongwith tuition teacher went to the house of Amarsingh Gehlot where Nitesh Patidar was residing. On reaching thereon, the tuition teacher called Nitesh Patidar. However, Gajendra Singh Gehlot and his son Laxman Gehlot came there and informed them that, Nitesh was not in the house and asked them as to why they came to his brother's house. Meanwhile, Nitesh Patidar also came on the spot and thereafter, Nitesh alongwith Gajendra and Laxman started beating the father of the prosecutrix and her brother with fists and slapping. They also abused them. During the altercation, Saurabh Bhati, tuition teacher intervened to rescue them. In the course of incident, father of prosecutrix received injuries on chicks, head and

stomach. On the same day, the complainant went to police station and lodged a complaint, thereafter, offence was registered against the appellants.

4. In course of investigation, injured persons prosecutrix's father and brother Ankit were sent for medical examination, spot map was prepared, seizure memos were prepared and statements of the witnesses were recorded. After completion of investigation, charge-sheet was filed and case was committed to the Court of Sessions and thereafter made over to the Court Xth Additional Sessions Judge, Ujjain.

5. The prosecution has examined total 07 witnesses namely Prosecutrix (PW-1), S. Rubisas, Principal of School (PW-2), Prosecutrix's father (PW-3), Dr. S.S. Daboriya, Medical Officer (PW-4), cousin of prosecutrix (PW-5), Saurabh Bhati (PW-6) and Laxman Ukey, Sub-Inspector (PW-7). No witness has been examined in support of the defence. The appellants abjured their guilt and they took a plea that they are innocent.

6. After analyzing the prosecution evidence and considering the rival submissions, the learned trial Court has acquitted the appellants Gajendrasingh and Laxman under Sections 354 and 294/34 of IPC (two counts) and Section 7 readwith Section 8 of POCSO Act and also acquitted the appellant Nitesh under Section 294/34 (two counts) of IPC, whereas convicted them as mentioned in para-1 of this judgment. Taking risk of repetition, it is worth referring that inasmuch as on the basis of compromise, other co-accused persons have already been acquitted and accused Nitesh is also acquitted under Section 323 of IPC, now the appeal will be adjudicated only with regard to the conviction of appellant No. 1 Nitesh under Section 354 of IPC and Section 7/8 of POCSO Act.

7. The appellant has preferred this criminal appeal on several grounds wherein it is contended that prosecution has willfully avoided the examination of independent witness tuition teacher, who could state the actual facts before the Court. The question of giving mobile to prosecutrix is also doubtful because there was no evidence which shows that the said mobile belongs to appellant Nitesh. There is major contradiction regarding "bad intention". In this case, most of the witnesses have been turned hostile and it seems that only due to some grave altercation, this case was fabricated against the appellant Nitesh. The learned trial Court has not considered the circumstances regarding falsity of the report. Under these premises, appellant requested for acquittal.

8. In course of argument, it is also contended when the complainant party considered that appellant is innocent, they have also filed compromise before this Court. Learned counsel for the appellant also expostulated that since the appellant has already suffered **eight days** in custody, looking to the age of appellant, he should be given the benefit of Probation Act. He is also not having any criminal past and a compromise petition has already been filed by the prosecutrix herself.

9. Learned counsel for the respondent/State has opposed the prayer.

10. Having considered the rival submissions, the question for determination arises as to whether the findings of the learned trial Court regarding conviction and sentence of the appellant is correct in the eyes of law and facts.

11. At the outset, the statement of prosecutrix (PW-1) is required to be ruminated, she stated in her examination-in-chief that appellant Nitesh Patidar stopped her and gave her a mobile. Further, she narrates that mobile was given to her of spice company. Thereafter, she says that the appellant had caught her

hand with bad intention and thereafter, she trembled. Further, she states that appellant Nitesh stated her to talk with him. In anxiety, she went her home. In para 14 of her cross-examination, prosecutrix clearly conceded that in her report the word "bad intention" and being trembled, has not been mentioned. She also submitted that there was no sign of injury on her hand. As such, since the word "bad intention" and "being trembled" are not available in FIR and her statement recorded under Section 161 of Cr.P.C., the whole story of prosecution is fallen down regarding sexual intention.

12. On this aspect, the following ratio held by Full Bench of Hon'ble Apex Court in the case of ***State of Punjab Vs. Major Singh*** reported in ***AIR 1967 SC 63***, is worth of quote here :-

"15. The offence punishable under Section 354 is an assault on or use of criminal force to a woman with 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?"

16.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 anesthesia, 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. Her 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."

13. In view of the aforesaid law, the intention to outrage the modesty of a woman is significant ingredient of Section 354 of IPC. In this case, there is a material contradiction on the point of "bad intention" and due to that "trembling of prosecutrix". In this way, the word "bad intention" and "trembling" are found as an exaggeration in the Court statement. The prosecution also failed to prove the fact that the said mobile given to prosecutrix was belonged to the appellant. It is also emanated from the evidence that FIR was lodged not just after the incident of molestation but rather it was lodged after receiving injury by the prosecutrix's father and brother. In these circumstances, there is a great chance to make a false case against the appellant regarding molestation with intention to aggravate the nature of offence.

14. It is also poignant to point out that the prosecutrix has also not received any injury in the incident. She cannot be treated as injured witness and therefore, the testimony of prosecutrix doesn't inspire confidence. Likewise, the other witnesses, the father of prosecutrix (PW-2), the cousin of prosecutrix (PW-4) have tried to support the prosecution case but their statements are also not found creditworthy. The independent witness Madam Aarti, the tuition teacher has not been produced by the prosecution, whereas she is pivotal

evidence of the case. As such the culpable intention of outraging modesty has not been established against the appellant.

15. In view of the foregoing discussion, since the prosecution case has not been fortified by the statements of witnesses and the important ingredients as to intention of outraging the modesty of prosecutrix has not been evinced beyond reasonable doubt by the prosecution, the appellant cannot be convicted for the offence under Section 354 of IPC and Section 7/8 of POCSO Act. As such, the decision of learned trial Court regarding conviction of appellant Nitesh under Section 354 of IPC and Section 7/8 of POCSO Act, is devoid of merits and accordingly, deserves to be set aside.

16. In the result thereof, the present appeal filed by the appellant Nitesh is hereby allowed. Accordingly, having set aside the impugned judgment, the appellant Nitesh is acquitted from the charge under Sections 354 of IPC and Section 7/8 of POCSO Act. The appellant is on bail, hence, his bail bond and surety stand discharged. The appellant is entitled to receive back the fine amount deposited by him from the learned trial Court.

17. A copy of this judgment be sent to the concerned trial Court alongwith record for information and necessary compliance.

18. The order of the learned trial Court regarding disposal of the seized property stands confirmed.

19. With the aforesaid, the appeal is allowed and disposed of.

(PREM NARAYAN SINGH)
JUDGE