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HIGH COURT OF MADHYA PRADESH AT JABALPUR
SINGLE BENCH : HON'BLE SHRI JUSTICE ATUL SREEDHARAN

Cr.R No. 2304 of 2017

Balgoti Soni

Vs.

Amit Pateria and others.

Cr.R No.2225 of 2017

Rahul @ Meenendra

Vs.

State of M.P

Cr.R No. 3047 of 2017

Amit

Vs.

State of M.P.

For petitioners : Shri Anoop Saxena, Advocate (in Cr.R No. 2225/17 and Cr.R No. 3047/17).
Shri J.L. Soni, Adv (Cr.R No. 2304/17)

For Respondent : Shri Aditya Jain,Dy. Govt. Advocate.

ORDER
(24.08.2018)

1. The present sets of petitions have been filed by two persons, who are standing trial in ST No. 34/17 for the offences under Sections 354, 509 and 506 Part-2 of IPC and under Section 12 of POCSO Act,2012.
2. The impugned order is dated 1-08-2017 by which the learned Additional Sessions Judge, Bijawar, District Chhatarpur, framed charges as aforementioned against the petitioners Rahul @ Meenendra, petitioner in Cr.R No. 2225/17 and Amit, petitioner in

Cr.R No.3047/17. Cr.R No. 2304/17 has been filed by Balgoti Soni, the father of the deceased, who has also assailed the order framing charges as charge under Section 305 of IPC was not framed against Amit and Rahul.

3. The facts of the case relate to an incident that had taken place on 19-12-2016. The deceased Sakshi, while returning home from school was allegedly teased/harassed by Himanshu Choubey, Rahul Choubey, Amit Pateria and Rohit Choubey. They are also alleged to have indulged in improper behaviour with her. She came home and informed her mother. Her mother is stated to have gone to the house of the petitioners to inform their parents about the improper conduct of the petitioners and to prevail upon them to ensure that they don't repeat their actions.
4. While the mother was away from home, the deceased who was at home alone, poured kerosene oil on her body and set herself on fire. Hearing her shouts, the witnesses arrived who put out the flames and took her to the hospital for treatment. A dying declaration was recorded on 20-12-2016 at 11:20 AM, wherein the deceased has stated that a "lot of boys trouble her". These boys allegedly levelled "vulgar allegations" against her and so fed up of the teasing, she set herself on fire. She takes the name of Rahul Choubey, Amit Pateria, Himanshu Choubey as the boys who were troubling her. Thereafter, she says that these boys be subjected to severe punishment so that they don't trouble any another girl in future.

5. The police has examined and recorded the statements of five witnesses beside the deceased. The first witness is Surendra Soni, who states that the incident is of 19-12-2016. He has named the petitioners herein as having teased the deceased and indulged in improper behaviour and had issued the threat of killing her if she informed anyone. This information is stated to have been given to this witness by the deceased herself. The next witness is Krishna Reddy. He is a neighbour and has stated likewise that the petitioners and the other co-accused persons used to trouble her. He further states that the Petitioners had also threatened to kill her, if she informed anyone. The next witness examined by the police is Balgoti, who is the father of the deceased. He says that his daughter informed him that the petitioners and other co-accused persons used to trouble her. This witness does not state that there was any threat of death issued to the deceased by the petitioners and other co-accused persons. The next witness is Govind Das Soni. He is the uncle of the deceased. He also states that the petitioners and the co-accused persons used to trouble the deceased. This witness however, does not state that the deceased ever informed him that the petitioners and the co-accused persons had threatened her to kill, if she informed anyone. The next witness is Neera, the mother of the deceased, who also alleges that the petitioners were troubling and teasing the deceased and is silent as far as any allegations making the threat of death being held out to the deceased. Thereafter, there is the statement of the deceased herself under Section 161, but, for

the allegations of threat to kill, held out by the petitioners and other co-accused persons, she has reiterated the allegations of being troubled by the petitioners and other co-accused persons.

6. The petitioners Amit and Rahul are aggrieved by the framing of charges against the petitioners under Sections 354, 506 and 509 of IPC and Section 12 of POCSO Act. Learned counsel for the petitioner Balgoti on the other hand, has argued that the impugned order is bad in law to the extent that the charge under Section 305 of IPC was not framed against the petitioners.
7. Learned counsel for the State has also supported the impugned order and has prayed for the dismissal of the petitions filed by Amit and Rahul. He has also supported the contentions raised by the petitioner Balgoti Soni that the charge under Section 305 of IPC has been erroneously left out as the material on record adequately establish, *prima facie*, that the offence under Section 305 of IPC was committed by the Petitioners and the co-accused persons.
8. Learned counsel for the petitioners has submitted that even taking the case of prosecution in its entirety, without changing a comma or full stop, none of the offences for which the charges have been framed are made out against the petitioners Amit and Rahul. He has referred to Section 354 of IPC and submitted that for the offence to be committed, there must be an assault or criminal force employed by the accused on the woman concerned. The 161 statements of the witnesses and the dying declaration of the deceased do not reflect that there was ever any physical contact between the deceased and

the petitioners Rahul and Amit. Under the circumstances, the offence under Section 354 of IPC is not made out.

9. Per contra, learned counsel for the State has vehemently contested this contention and drew the attention of this court to Section 351 of IPC, which defines assault. He has submitted that for an assault to take place, physical contact is not essential. A mere gesture or preparation is adequate enough to constitute an offence of assault. Therefore, as the offence under Section 354 not only makes the application of criminal force on a woman with intent to outrage her modesty punishable, even a gesture to that effect which would fall within the definition of Section 351 of IPC as an assault, is adequate enough to make the petitioners Rahul and Amit, liable to punished under Section 354 of IPC.
10. Section 354 of the IPC makes an assault or the application of criminal force on a woman with a intention to outrage her modesty, as a punishable act. Whereas, Section 351 of IPC, as the learned counsel for the State has argued, does not require physical contact to complete an act of assault and a gesture is adequate enough. However, upon reading Section 351 of IPC, in its entirety, which defines an assault, it is apparent that the gesture complained of, must be such that it would cause any person present to apprehend that the person making such gesture, is about to use criminal force upon the person to whom such gesture is directed. In fact, the explanation to Section 351 states unequivocally that mere words do not amount to an assault. However, it has further clarified it by

saying that words, which a person may use, which gives to his gesture a meaning, as may make those gestures amount to an assault, would bring it within the ambit and scope of Section 351 of IPC. Thus, to constitute an offence under Section 354, it is not merely an assault but an assault done with the intent to outrage the modesty of a woman, which must *prima facie* be revealed from the evidence on record.

11. Criminal force is defined under Section 350 of IPC and force is defined under Section 349 of IPC. The meaning given to the word force, as applicable in the Indian Penal Code, requires the application of physical contact. Section 350 of IPC defines criminal force as force used intentionally, without the consent of the person upon whom such force is used, in order to the committing an 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 on whom such force is used. It is only in that case, that the force is defined as criminal force. The statement of the witnesses and the deceased herself only reflects that the petitioners Rahul and Amit had indulged in “troubling her”, made “vulgar allegations” against her and teased her. Neither from the dying declaration, nor from the statement of the witnesses, does it reflect that there was any kind of aggressive movement by the petitioners Rahul and Amit, which could have given a reasonable apprehension to the deceased, that force could be used upon her by Rahul and Amit to bring it within the ambit of an assault. The

evidence on record reveals that there was no physical contact by either Rahul or Amit on the deceased, therefore the application of criminal force with intent to outrage the modesty of the deceased does not come through and thus the charge u/s. 354 IPC is not made out against the petitioner Rahul and Amit.

12. As regards the offence under Section 509 of IPC is concerned, the same makes an act, whereby the word, gesture or act, done by the accused, intending to insult the modesty of women, is punishable as criminal intimidation. The said Section makes a person punishable for an offence under Section 509 of IPC, who utters any words, makes any sound or gestures, or exhibits any object, with the intention that such words, sound shall be heard or that such gesture or object shall be seen by such woman, as an offence. The evidence on record completely excludes any kind of gestures or exhibition of any objects by the petitioners Rahul and Amit. The evidence on record only states that the used words, teased her and levelled vulgar allegations against her. The evidence on record, is dismally deficient as to what those words or vulgar allegations were. In the absence of precision, it was impossible for the trial court or for any court to arrive at a *prima facie* finding whether the offence under Section 509 of IPC was committed.
13. Learned counsel for the State while opposing the petition has drawn the attention of this court to the fact that the girl was a minor and the absence of those precise words used by the petitioners against her, will not dilute the actions of the petitioners Rahul and Amit.

The law relating to framing of charges is well settled. A criminal case cannot be set into motion merely on suppositions and assumptions based upon non-existent material. The material/evidence on record must *prima facie* suggest that the offence for which the petitioners are being charged for, has been committed. Undoubtedly, a roving enquiry of the evidence is not required to be entered into by the Trial Court at this juncture and all that the court is required to see at this stage is whether the evidence on record raises a strong suspicion that the accused has committed the offence. However, it is also the settled law that at this stage, the Trial Court is not to act as a “post office” or a “mouth piece” of the prosecution and frame charges only because a charge sheet has been filed by the police. The framing of charges by the Trial Court is not a hollow formality but a solemn act giving rise to serious implications for the accused who would now have to stand trial. Thus, at the stage of framing charges, the Trial Court must appreciate the material/evidence on record to *prima facie* satisfy itself whether the evidence discloses the commission of an offence by the accused. If such evidence is not forthcoming, then the accused deserves to be discharged. The Trial Court does not have to see if the uncontroverted evidence will lead to the acquittal or conviction of the accused but whether sufficient material exists on record for the Court to proceed to the next stage against the accused.

14. Where the nature of the words used or the alleged vulgar allegations has not been mentioned, either by the deceased or by the witnesses

to whom the deceased is alleged to have disclosed, immediately after suffering burns, the ingredients of an offence u/s. 509 IPC cannot be said to have been fulfilled. Under the circumstances, the evidence on record does not reveal that an offence under Section 509 of IPC was committed.

15. The offence under Section 12 of POCSO Act makes a person liable to punishment for sexual harassment. Sexual harassment is defined under Section 11 of the Special Act. It commences with “a person is said to have committed sexual harassment upon a child when such person with ‘sexual intent’ commits any of the acts as defined in all the six instances which are given in Section 11.
16. Learned counsel for the State has drawn the attention of this court to Clause 4 of Section 11, which brings into the ambit and scope of “sexual harassment” to mean the act of a person who, “repeatedly and constantly follows or watches or contacts a child either directly or through electronic, digital or any other means”.
17. Learned counsel for the State submits that there is sufficient evidence on record in the form of the dying declaration and the statement of witnesses which goes to show that the deceased was repeatedly being harassed by the petitioners Rahul and Amit and the other co-accused persons and therefore, the same would fit the definition of sexual harassment under Section 11 of the POCSO Act.
18. Per contra, learned counsel for the petitioners states that the act specified in Clause 4 of Section 11 is only an offence, if the same is made with a sexual intent. He submits that the evidence on record,

does not reflect at all that the action of the petitioners Rahul and Amit had any sexual connotation or colour to it as vulgar allegations, as so stated by the deceased, is not specific and the same can be an imputation of improper behaviour on the part of the deceased of plain and simple abuse, where the deceased person does not state, that the harassment had any sexual connotation or the so-called vulgar allegations were sexually coloured, it would not *prima facie* satisfy the requirement of Section 11 of the POCSO Act. It is also pertinent to mention here that none of witnesses have stated that there was any sexual connotation or colour attributable to the acts of the accused persons. Under the circumstances, the ingredients to constitute an offence under Section 11 of the POCSO Act not having been satisfied, the framing of charge under the said act is untenable.

19. As regards offence under Section 506 of IPC, *prima facie* there is material on record to show that the said offence was committed. Learned counsel for the petitioners submits that the deceased does not state in her dying declaration that any kind of threat to her body or life was ever meted out to her by the petitioners Rahul and Amit and therefore, the offence under Section 506 of IPC is not made out. He further states that in the 161 statement of the deceased also, she does not state that the petitioners Rahul and Amit had ever threatened her with death. However, two witnesses Surendra, who is the cousin of the deceased and Krishna Reddy, who is the neighbour, have categorically stated in their 161 Statements that the

deceased was threatened by the petitioners Rahul and Amit with death, if she informed anyone. Learned counsel for the petitioners states that these witnesses are hearsay witnesses as they are not the eye-witness to the incident itself but, that information has been given to them by the deceased. Undoubtedly, the information has been given by the deceased to these two witnesses, after she had received burn injuries. The said disclosure by the deceased to the witnesses Surendra and Krishna Reddy would come under the scope of an oral dying declaration and therefore, for the purpose of framing charge under Section 506 of IPC, the same is adequate. Under the circumstances, the charge under Section 506 of IPC is sustained against the petitioners Rahul and Amit.

20. The petitioner- Balgoti Soni (in Cr.R No. 2304/17), is the father of the deceased, who is aggrieved by the impugned order as charge was not framed under Section 305 of IPC and under Sections 7 and 8 of the POCSO Act. The learned court below has very rightly not framed charges under Section 8 of POCSO Act. Section 8 makes an act of sexual assault on child punishable. Sexual assault is defined in Section 7 of the POCSO Act. For sexual assault to be committed, there must be physical contact with sexual intent by the accused upon the vagina, penis, anus or breast of the child or accused must make the child touch the vagina, penis, anus or breast of such a person or any other person or the accused must have done any other act with sexual intent which involves physical contact without penetration for an offence of sexual assault to take place. A plain

reading of Section itself, makes it adequately clear that physical contact is an imperative requirement of sexual assault. The entire evidence on record fails to reveal any physical contact between the petitioners Rahul and Amit with the deceased. Therefore, the charge has rightly not been framed under Section 8 of the POCSO Act.

21. The second argument put forth by the learned counsel for the petitioner-Balgoti is that there was an error committed by the learned trial court by not framing charge against the petitioners under Section 305 of IPC. Section 305 of IPC makes the abetment of suicide by a minor punishable. Learned counsel for the petitioners has placed before this court, the judgement of this court in *Wahid Khan Vs. State of M.P. 1998 (1) J LJ 290* in order to support his contention that the “vulgar allegations” which the deceased has given in her dying declaration would only mean sexual coloured remarks. In the aforementioned case, this court had come to the conclusion that “*Bura Kaam kiya*” mentioned by the prosecutrix in her deposition in a case in which the accused was tried under Section 376 of IPC would only mean ‘rape’ where the prosecutrix had disclosed that “*bura kaam*” was done after her clothes were removed by the accused. The term “*bura kaam*” when used in the context of a rape case may or may not reflect sexual intercourse and the same has to be seen in the context of the evidence that comes up before the trial court. In that case, this court had arrived at the finding that the prosecutrix has stated that their clothes were all removed and thereafter, “*bura kaam*” was done,

which in the facts and circumstances of that case, this court has arrived at a conclusion that the same was an act of rape and could not reasonably connote to anything else. In this case, the evidence on record go to show that the petitioners Rahul and Amit teased the deceased, harassed the deceased and levelled vulgar allegations against her. All these acts were done verbally without any physical contact where vulgar allegations have not been specified by the deceased and that she is no longer available to give evidence, cannot mean to have only sexual connotation. A vulgar allegations may be an abuse, may be an imputation on integrity and chastity and same may depend upon how sensitive a person is to perceive whether any allegations hurled against him/her is vulgar in nature. None of the witnesses have also stated what these vulgar allegations is. Learned counsel for the petitioner-Balgoti has supported the framing of charge under Section 354 of IPC and in support of the same, he has placed before this court the judgment in *Anjani Kumar and another Vs. State of M.P (2001) 1 MPHT 142*, wherein in criminal appeal, this court had sustained the conviction of the accused under Section 354 of IPC. The facts of that case itself, go to reveal that the appellants in that case had misbehaved with the prosecutrix/deceased and tried to remove her saree. The undisputed case of the prosecution reveal that there was physical contact between the appellants of that case and the prosecutrix/deceased. The prosecutrix in that case committed suicide by hanging herself allegedly humiliated by the acts of the appellants. In this case, there

is no evidence of physical contact or any such aggressive gesturing with sexual connotation by the petitioners Rahul and Amit in order to apply the judgment of this court in *Anjani Kumar* case to the facts of this case. Therefore, the same does not apply.

22. As regards the offence under Section 305 of IPC is concerned, learned counsel for the petitioner-Balgoti has argued that the very fact that the petitioners have harassed and levelled vulgar allegations against the deceased is adequate enough at this stage for framing charges and to frame charge under Section 305 of IPC. In this context, this court is taking recourse to the judgment in the case of *Anjani Kumar's* which has been put forth by the learned counsel for the petitioner-Balgoti to show that abetment of an offence must strictly fall within the three instances provided under Section 107 of IPC. In *Anjani Kumar's case* the appellants were convicted and sentenced by the trial court for both, the offence under Sections 306 and 354 of IPC. This court in appeal set aside the conviction under Section 306 of IPC and held in paragraph-10 that "From the evidence, it is established that accused tried to outrage the modesty of the deceased but their act was serious to what extent is not established so as to make out a case under Section 306 of IPC. Though, it is true that a woman may commit suicide if her modesty is outraged but, for that degree of the act of the accused is required to be established. Unfortunately, in this case the other witness examined namely Prabha (PW-4), who was with the deceased at the time of the incident as per the deposition of Ramprasad also, has not

supported the prosecution case and was declared hostile. Thus, the severity and the degree of the act of the accused is not established. Further, it is proved by the deposition of Ramprasad that the accused had misbehaved with the deceased and tried to outrage her modesty. But, the positive act and severity of their act is missing and hence, I am of the opinion that offence under Section 306 of IPC is not made out.”

23. In this case also, the contents of the dying declaration and the statement of the witnesses do not disclose a scenario that it was apparent to the petitioners Rahul and Amit that the quality of their act was of such a nature that would in all probability would not compel the deceased to commit suicide. Under the circumstances, even the *prima facie* evidence on record, does not disclose that suicide by the deceased was a forceable eventuality by the petitioners Rahul and Amit. Under the circumstances, Cr.R No. 3047/17 and Cr.R No. 2225/17 are partly allowed and the order framing charges against the petitioners under Sections 354, 509 of IPC and Section 12 of POCSO Act, is set aside and the charge framed under Section 506 of IPC is sustained.
24. Cr. No. 2304/17 for the reasons stated hereinabove is dismissed.

(Atul Sreedharan)
Judge

PG/