STATE OF PUNJAB

v.

MAJOR SINGH

April 28, 1966

[A.K. SARKAR, C.J., J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.]

Indian Penal Code (45 *of* 1860), *s.* 354—*Scope of—Relevancy of age of victim.*

Per Mudholkar, J.: Under s. 354 of the Indian Penal Code, while the individual reaction of the victim to the act of the accused would be irrelevant, 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 act must fall within the mischief of the section and would constitute an offence under the section. [293 A-C]

Since the action of the accused (respondent) in interfering with and thereby causing injury to the vagina of the child, who was seven and half months old, was deliberate, he must be deemed to have intended to outrage her modesty. [293 C]

Per Bachawat J: The essence of a woman's modesty is her sex. Even a female of tender age from her very birth possesses the modesty which is the attribute of her sex. Under the section 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.

The respondent is punishable for the offence under the section because, by his act he outraged and intended to outrage whatever modesty the little victim was possessed of. [293 F; 294 B-C]

Per Sarkar, C.J., (dissenting): Under the section the accused would be guilty of an offence if he assaults or uses criminal force "intending to outrage or knowing it to be likely that he will thereby outrage" the modesty of a woman. This intention or knowledge is the ingredient of the offence and not the woman's feelings or reaction. The test therefore, would 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. [288 B, F].

In the present case, there could be no question of the accused having intended to outrage the modesty of the child or having known that his act was likely to have that result, because, though the victim is a "woman" under the Penal Code, no reasonable man would say that a female child of that age was possessed of womanly modesty. [289 G]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 54 of 1964.

Appeal from the judgment and order dated the May 31, 1963 of the Punjab High Court in Criminal Appeal No. 1023 of 1962.

Dipak Dutt Chaudhuri and *R. N. Sachthey*, for the appellant.

A *A. S. R. Chari,* for the respondent.

The following Judgments of the Court were delivered.

Sarkar, C.J. The question is whether the respondent who caused injury to the private parts of a female child of seven and half months is guilty under s. 354 of the Penal Code of the B offence of outraging the modesty of a woman. In the High Court, the matter was heard by three learned Judges two of whom answered the question in the negative and the third answered it in the affirmative. Hence this appeal by the State.

It would be convenient to set out the section at once.

C S. 354. "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".

D "Criminal force" is defined in s. 350 of the Code and it is not in dispute that such force had been used by the respondent to the child. It is also not in dispute that the child was a woman within the Code for in the Code that word is to be understood as meaning a female human being of any age: see ss. 7 and 10. The difficulty in this case was caused by the words "outrage her modesty". The majority of the learned Judges in the High Court E held that these words showed that there must be a subjective element so far as the woman against whom criminal force was used is concerned. They appear to have taken the view that the offence could be said to have been committed only when the woman felt that her modesty had been outraged. If I have understood the judgment of these learned Judges correctly, the test of outrage of modesty was the reaction of the woman concerned. F These learned Judges answered the question in the negative in the view that the woman to whom the force was used was of too tender an age and was physically incapable of having any sense of modesty. The third learned Judge who answered the question in the affirmative was of the view that the word "modesty" meant, accepted notions of womanly modesty and not the notions of the woman against whom the offence was com- G mitted. He observed that the section was intended as much in the interest of the woman concerned as in the interest of public morality and decent behaviour and the object of the section could be achieved only if the word 'modesty' was considered to be an attribute of a human female irrespective of whether she had developed enough understanding to realise that an act was offen- H sive to decent female behaviour or not. The reported decisions on the question to which our attention was drawn do not furnish clear assistance. None of them deals with a case like the present.

But I do not think that there is anything in them in conflict with what I propose to say in this judgment. A

I would first observe that the offence does not, in my opinion, depend on the reaction of the woman subjected to 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. B C D

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. E F G H

A Another argument used to support the view, that the reaction of the woman concerned decided the question, was that the section occurred in a chapter of the Code dealing with offences affecting human body and not in the chapter dealing with offences relating to decency and morals. I think this argument is fallacious. None of the other offences against human body, which B occur in the same chapter as s. 354, depends on individual reaction and therefore there is no reason to think that the offence defined in s. 354 depends on it. There is no incongruity in holding that the commission of an offence against human body does not depend on the reaction of the person against whom it is alleged to have been committed but on other things.

C It will be remembered that the third learned Judge (Gurdev Singh, J.) had said that modesty in the section has to be understood as an attribute of a human female irrespective of the fact whether she has developed a sense of modesty or not. This view seems to me to be erroneous. In order that a reasonable man may think that an act was intended or must be taken to have been known likely to outrage modesty, he has to consider whe- D ther the woman concerned had developed a sense of modesty and also the standard of that modesty. Without an idea of these, he cannot decide whether the alleged offender intended to outrage the woman's modesty or his act was likely to do so. I see no reason to think, as the learned Judge did, that such a view would defeat the object of the section. The learned Judge said that modesty had to be judged by the prevalent notions of modes- E ty. If this is so, it will also have to be decided what the prevalent notions of modesty in the society are. As such notions concerning a child may be different from those concerning a woman of mature age, these notions have to be decided in each case separately. To say that every female of whatever age is possessed of modesty capable of being outraged seems to me to be laying down too rigid a rule which may be divorced from reality. There F obviously is no universal standard of modesty.

If my reading of the section is correct, the question that remains to be decided is, whether a reasonable man would think that the female child on whom the offence was committed had modesty which the respondent intended to outrage by his act or knew it to be the likely result of it. I do not think a reasonable G man would say that a female child of seven and a half months is possessed of womanly modesty. If she had not, there could be no question of the respondent having intended to outrage her modesty or having known that his act was likely to have that result. I would for this reason answer the question in the negative.

At the Bar, instances of various types of women were men- H tioned. Reference was made to an imbecile woman, a sleeping woman who does not wake up, a woman under the influence of drink or anaesthesa, an old woman and the like. I would point

out that we are not concerned in this case with any such woman. But as at present advised, I would venture to say that I feel no difficulty in applying the test of the outrage of modesty that I have indicated in this judgment to any of these cases with a satisfactory result. If it is proved that criminal force was used on a sleeping woman with intent to outrage her modesty, then the fact that she does not wake up nor feel that her modesty had been outraged would be no defence to the person doing the act. The woman's reaction would be irrelevant in deciding the question of guilt.

Before concluding, I may point out that the respondent had been convicted by the trial court under s. 323 of the Code for the injury caused to the child and sentenced to rigorous imprisonment for one year and a fine of Rs. 1,000/- with a further period of imprisonment for three months in default of payment of the fine. That sentence has been maintained by the High Court and as there was no appeal by the respondent to this Court, that sentence stands.

I would, for these reasons, dismiss the appeal.

Mudholkar, J. It has been found as a fact by the courts below that the respondent had caused injuries to the vagina of a seven and a half month old child by fingering. He has been held guilty of an offence under s. 323, Indian Penal Code. The contention on behalf of the State who is the appellant before us is that the offence amounts to outraging the modesty of a woman and is thus punishable under s. 354, Indian Penal Code. The learned Sessions Judge and two of the three learned Judges of the High Court who heard the appeal against the decision of the Sessions Judge were of the view that a child seven and a half month old being incapable of having a developed sense of modesty, the offence was not punishable under s. 354. The third learned Judge, Gurdev Singh, J., however, took a different view. The learned Judge quoted the meaning of the word "modesty" given in the Oxford English Dictionary (1933 Edn.)—which is, "womanly propriety of behaviour, scrupulous chastity of thought, speech and conduct (in men or women) reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions"—and observed: "This obviously does not refer to a particular woman but to the accepted notions of womanly behaviour and conduct. It is in this sense that the modesty appears to have been used in section 354 of the Indian Penal Code". The learned Judge then referred to s. 509 of the Penal Code in which also the word "modesty" appears and then proceeded to say:

> "The object of this provision seems to have been to protect women against indecent behaviour of others which is offensive to morality. The offences created by section 354 and section 509 of the Indian Penal Code are as much in the

A interest of the women concerned as in the interest of public morality and decent behaviour. These offences are not only offences against the individual but against public morals and society as well, and that object can be achieved only if the word "modesty" is considered to be an attribute of a human female irrespective of fact whether the female concerned B has developed enough understanding as to appreciate the nature of the act or to realise that it is offensive to decent female behaviour or sense of propriety concerning the relations of a famale with others".

S. B. Capoor J., one of the other two Judges, on the other hand, referred with approval to the following passage from the judgment C of Jack J., in *Soko* v. *Emperor*(1):

> "Under section 354 it must be shown that the assault was made intending to outrage or knowing it to be likely to outrage the modesty of the girl. It is urged for the petitioner that the conduct of the girl shows that in fact her modesty was not outraged. There is no suggestion that she had any hesitation in telling her mother exactly what had D happened. In the circumstances, I think that it is, therefore, doubtful whether in fact the modesty of the girl was outraged

He also referred to two other decisions in *Mt. Champa Pasin & Ors.* v. *Emperor*(2) and *Girdham Gopal* v. *State*(3) and took the view that the authorities do not support the view that in construing s. 354, I.P.C. it is irrelevant to consider the age, physical E condition or the subjective attitude of the woman against whom the assault has been committed or the criminal force used. The third Judge Mehar Singh J., in his judgment referring the case to a larger bench has quoted the following passage from Dr. Gaur's Penal Law of India, 7th Edn., Vol. 3, p. 1744:

> F "Ordinarily, then, women who are likely to be made victims of this offence are those who are young and who are old enough to feel the sense of modesty and the effect of the acts directed against it. But it does not deprive others of the protection from the licence of man, provided their sense of modesty is sufficiently developed".

and observed that the opinion of the learned author tends to agree with the dictum of Jack J., in *Soko's case*(1). G

The respondent before us was unrepresented and considering the importance of the question we had requested Mr. A. S. R. Chari to assist us by appearing *amicus curiae*. He drew our attention to the fact that the Sexual Offences Act, 1956 (4 & 5 Eliz. 2 c. 69) enacted by the British Parliament has used much H wider language in s. 14 which deals with indecent assault on

(1) A.I.R. 1933 Cal. 142. (2) A.I.R. 1928 Patna 326.
(3) A.I.R. 1953 M.B. 147.

women than that used in s. 354, I.P.C. He also said that in one sense s. 354 can also be said to be wider than s. 14 of the British Act in that it is not confined to sexual offences which is quite correct. The two provisions run thus:—

Section 14 of the Sexual Offences Act, 1956:

"Indecent assault on a woman—(1) It is an offence, subject to the exception mentioned in sub-section (3) of this section for a person to make an indecent assault on a woman.

(2) A girl under the age of sixteen cannot in law give any consent which would prevent an act being an assault for the purposes of this section.

(3) Where a marriage is invalid under section two of the Marriage Act, 1949, or section one of the Age of Marriage Act, 1929 (the wife being a girl under the age of sixteen), the invalidity does not make the husband guilty of any offence under this section by reason of her incapacity to consent while under that age, if he believes her to be his wife and has reasonable cause for the belief".

(4) A woman who is a defective cannot in law give any consent which would prevent an act being an assault for the purposes of this section, but a person is only to be treated as guilty of an indecent assault on a defective by reason of that incapacity to consent, if that person knew or had reason to suspect her to be a defective".

Section 354 of the Indian Panel Code 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".

What is made an offence under s. 14 is the act of the culprit irrespective of its reaction on the woman. The question is whether under s. 354 the position is different. It speaks of outraging the modesty of a woman and at first blush seems to require that the outrage must be felt by the victim herself. But such an interpretation would leave out of the purview of the section assaults, not only on girls of tender age but on even grown up women when such a woman is sleeping and did not wake up or is under anaesthesia or stupor or is an idiot. It may also perhaps, under certain circumstances, exclude a case where the woman is of depraved moral character. Could it be said that the legislature intended that the doing of any act to or in the presence of any woman which according to the common notions of mankind is suggestive of sex, would be outside this section unless the woman

A herself felt that it outraged her modesty? Again, if the sole test to be applied is the woman's reaction to particular act, would it not be a variable test depending upon the sensitivity or the upbringing of the woman? These considerations impel me to reject the test of a woman's individual reaction to the act of the accused. I must, however, confess that it would not be easy to lay down a B comprehensive test; but about this much I feel no difficulty. In my judgment 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 act must fall within the mischief of this section. What other kind of acts will also fall within it is not a matter for consideration in this case.

C In this case the action of Major Singh in interfering with the vagina of the child was deliberate and he must be deemed to have intended to outrage her modesty. I would, therefore, allow the appeal, alter the conviction of the respondent to one under s. 354, I.P.C. and award him rigorous imprisonment to a term of two years and a fine of Rs. 1,000/- and in default rigorous imprisonment for a period of six months. Out of the fine, if realised, D Rs. 500/- shall be paid as compensation to the child.

Bachawat, J. Section 10 of the Indian Penal Code explains that "woman" denotes a female human being of any age. The expression "woman" is used in s. 354 in conformity with this explanation, see s. 7. The offence punishable under s. 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 E of doing so. The Code does not define "modesty". What then is a woman's modesty?

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 F 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 anaesthesia, she may be sleeping, she may be unG able 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. H Nevertheless, from her very birth she possesses the modesty which is the attribute of her sex. But cases must be rare indeed where the offender can be shown to have acted with the intention of

outraging her modesty. Rarely does a normal man use criminal force to an infant girl for satisfying his lust. I regret to say that we have before us one of such rare cases. Let us reconstruct the scene. The time is 9-30 p.m. The respondent walks into the room where the baby is sleeping and switches off the light. He strips himself naked below the waist and kneels over her. In this indecent posture he gives vent to his unnatural lust, and in the process ruptures the hymen and causes a tear ¾" long inside her vagina. He flees when the mother enters the room and puts on the light. I think he outraged and intended to outrage whatever modesty the little victim was possessed of, and he is punishable for the offence under s. 354.

I agree with the order proposed by Mudholkar, J.

ORDER

In view of the judgment of the majority, the appeal is allowed, the conviction of the respondent is altered to one under s. 354 I.P.C., and he is awarded rigorous imprisonment for a term of two years and a fine of Rs. 1,000/-, and in default, rigorous imprisonment for a period of six months. Out of the fine, if realised, Rs. 500/- shall be paid as compensation to the child.

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NALNIKANT AMBALAL MODY

v.

COMMISSIONER OF INCOME-TAX, BOMBAY

May 4, 1966

B

[A. K. SARKAR, C.J., J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.]

Indian Income-tax Act 1922, *ss.* 46, 10, 12—*Outstanding fees from legal profession received after cessation of practice—Cash system of accounting—Receipts whether can be taxed under s.* 12 *income from 'other sources'.*

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The appellant an advocate who maintained his accounts on the cash system gave up practice when he was elevated to the Bench in 1957. Certain outstanding professional dues were however received by him in the accounting years 1958 and 1959. These receipts were shown by him as income in his return for the assessment years 1959-60 and 1960-61 and were assessed by the Income-tax Officer. The appellant then went in revision to the Commissioner of Income-tax contending that the said receipts were not income and had been wrongly taxed. The Commissioner having decided against him the

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appellant came to this Court under Art. 136 of the Constitution.

HELD: (i) The receipts in the present case were clearly the fruits of the assessee's professional activity and fell under the fourth head of s. 6 of the Indian Income-tax Act 1922. They were however not chargeable to tax under that head because under the corresponding computing section that is. s. 10, an income received by the assessee who kept his accounts on the cash basis in an accounting year in which the profession had not been carried on at all is

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not chargeable. [297 D-F]

Commissioner of Income Tax v. *Express Newspapers Ltd.*, 53 I.T.R. 250, relied on.

(ii) The income could not be taxed under s. 12 either. Section 12 deals with income which is not included under any other preceding heads covered by ss. 7 to 10. If the income is so included, it falls outside s. 12. It follows that if, as in the present case, the income is

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profits and gains of profession it cannot come under s. 12. [301 E]

The heads of income in s. 6 are mutually exclusive and it would be incorrect to say that as the receipts could not be brought to tax under the fourth head they could not fall under that head and must therefore fall under the residuary head 'other sources'. There is no justification for the assumption that an income falling under one head has to be put under another head if it escapes taxation under the computing section corresponding to the former head. [298 A;

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300 E-F]

The character of the income cannot change merely because the assessee received it at a certain time or adopted a certain system of accounting. [301 B]

Section 4 does not say that whatever is included in total income must be brought to tax. The income has to be brought under

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one of the heads mentioned is s. 6 and can be charged to tax only if it is so chargeable under the computing section corresponding to