

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 2021

Padam Bahadur Bardewa,
S/o Kharka Bahadur Bardewa,
R/o Upper Temi,
P.O & P.S. Temi, South Sikkim.

*(Presently serving sentence at State Jail
Rongyek, East Sikkim)*

..... Petitioner

Versus

State of Sikkim

.....Respondent

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

Appearance:

Mr. N. Rai, Senior Advocate with Ms. Malati Sharma
and Mr. Yozan Rai, Advocates for the petitioner.

Mr. Sudesh Joshi, Public Prosecutor with Mr. Thinlay
Dorjee Bhutia and Mr. Yadev Sharma, Additional
Public Prosecutors for the State respondent.

Date of judgment: 25.11.2021.

J U D G M E N T (O R A L)

Bhaskar Raj Pradhan, J.

1. Heard Mr. N. Rai, Learned Senior Advocate for the
revisionist and Mr. Sudesh Joshi, Learned Public Prosecutor for
the State of Sikkim.

2. This is an application under Section 397 and 401 of the Code of Criminal Procedure, 1973 (in short Cr.PC). The jurisdiction of the revisional court is for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceeding of such inferior court.

3. The first point urged by Mr. N. Rai was with regard to the delay in lodging First Information Report (in short FIR). The record reveals that the alleged incident happened a day before the lodging of the FIR on 11.03.2019. There does not seem to be any apparent delay. The learned trial court has extensively dealt with the argument made before it and concluded that it is of not much consequence. The learned appellate court has also examined it and arrived at the same conclusion.

4. The next point urged by Mr. N. Rai is, what he alleges, are material contradictions. In support of his argument he has relied upon the judgment of the Supreme Court in **Santosh Prasad vs. The State of Bihar**¹ in which it had been found that there were material contradictions and that the manner in which alleged incident took place as per the version of the prosecutrix was not probable. In such circumstances, the Supreme Court held that the evidence of the prosecutrix did not withstand the test of a sterling witness. He also relied upon **Rajesh Patel vs. State of Jharkhand**² in which the Supreme Court examined the evidence in an appeal and concluded that

¹ 2020 3 SCC 443

² 2013 3 SCC 791

the prosecution case is not natural, consistent and probable to sustain the conviction of the appellant therein. The Supreme Court also noticed that the delay of 11 days in lodging FIR had no proper explanation and that the testimony of the prosecutrix was most unnatural and improbable which did not inspire confidence.

5. The learned trial court as well as the learned appellate court examined the submissions of the defence regarding the contradictions, again extensively, and concluded that they were not material contradictions. Contradictions which are the usual wear and tear of time gaps and its effect on human memory that does not vitally affect the substratum of the prosecution case cannot be termed as material contradictions. While examining the evidence, it is clear that the victim had given a detailed testimony of what happened from the time she took a lift in the vehicle of the revisionist till she got off at a place close to the hospital she worked in. The revisionist asked the victim if she wanted to touch the steering and offered to teach her how to drive. He came close to her, started sniffing and smelling her and asked her what fragrance she was wearing. He stopped the vehicle, got out, came in again and said "*dey na*" (give me). When she resisted, he got in and touched her all over her thighs, shoulders and arms. The evidence of the victim is not unnatural or improbable. The revisionist has not disputed that the victim had boarded the vehicle that fateful day. Narration of the facts as stated by the victim does inspire confidence. The

cross-examination did not bring out any material contradiction in the testimony of the victim from her statements recorded during the investigation and trial.

6. The learned trial court had convicted the appellant under Section 354 and 354A of the Indian Penal Code, 1860 (in short IPC) and sentenced him to undergo simple imprisonment for a term of one year under Section 354 IPC and further to undergo rigorous imprisonment for a term of one year and pay a fine of ₹ 5,000/- under Section 354A IPC. In default of payment of fine the revisionist was to undergo simple imprisonment of one month. The learned appellate court declined to interfere with the conviction and sentence passed by the learned trial court. As the learned trial court had not specified the relevant clause of Section 354A IPC, the learned appellate court held that the prosecution had been able to establish the case of the revisionist under Section 354A(1)(i) of IPC, 1860.

7. In the circumstances none of the points urged by Mr. N. Rai would amount to incorrectness, illegality or impropriety of the appellate court.

8. Section 354 IPC provides that 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 the term which shall not be less than one year but which may extend to five years, and shall also be liable to fine.

9. Section 354A IPC relates to sexual harassment and punishment for sexual harassment. Sub-section (1) thereof provides that a man committing any of the following acts-

- (i) physical contact and advances involving unwelcome and explicit sexual overtures; or
 - (ii) a demand or request for sexual favours; or
 - (iii) showing pornography against the will of a woman; or
 - (iv) making sexually coloured remarks,
- shall be guilty of the offence of sexual harassment.

10. Section 354A (2) provides that any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.

11. The testimony of the victim satisfies the ingredients of Section 354 as well as 354A(1)(i) IPC. The learned trial court as well as the learned appellate court found the revisionist guilty of the offences under Section 354 and 354A IPC. The learned court not only convicted the revisionist for the offences but also sentences him separately for the offences. The evidence of the victim makes it clear that it was a singular incident which led to the prosecution. The same set of facts constituted both the offences. In such circumstance Section 71 of the IPC would come into play. It provides that:-

“Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than

one of such his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.”

12. In view of the clear provision of the Section 71 IPC this court is of the view that the sentence meted out to the convict under Section 354 IPC which is the lesser of the two offences cannot stand. It is set aside. The conviction of the revisionist are upheld; the sentences are revised as above. The revisionist is in custody. He shall continue there until completion of the sentence.

(Bhaskar Raj Pradhan)
Judge

Approved for reporting : **Yes**
Internet : **Yes**

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