

**HIGH COURT OF TRIPURA
AGARTALA**

Crl.A.No.01 of 2024

Sri Bibhishan Ghosh,

S/O- Lt. Sushil Ch. Ghosh, @ Lt. Sushil Kumar Ghosh

Resident of Ramrai Bari,

P.S.:- Baikhora, District:- South Tripura.

....Convict/Appellant.

Versus

The State of Tripura

.....Respondent.

For Appellant(s)	:	Mr. Ratan Datta, Adv, Mr. Aditya Baidya, Adv.
For Respondent(s)	:	Mr. Raju Datta, P.P., Mr. R. Saha, Addl. P.P.
Date of Hearing	:	10.01.2025
Date of delivery of Judgment and Order	:	15.01.2025
Whether fit for Reporting	:	YES

HON'BLE MR. JUSTICE BISWAJIT PALIT

Judgment & Order

This appeal is preferred challenging the judgment and order of conviction and sentence dated 25.01.2024 delivered by Learned Sessions Judge, South Tripura, Belonia in connection with case No.S.T.36(Type-I) of 2021. By the said judgment Learned Trial Court has sentenced the convict to suffer R.I. for one year and to pay fine of Rs.5,000/- for commission of offence punishable under Section 354 of IPC, in default to suffer further S.I. for six months. It was further

ordered that if fine money is realized the same be handed over to the victim as compensation.

02. Heard Learned Counsel, Mr. Ratan Datta appearing for the appellant-accused and also heard Learned P.P., Mr. Raju Datta along with Learned Addl. P.P., Mr. R. Saha appearing on behalf the State-respondent.

03. In course of hearing, Learned Counsel for the appellant-accused first of all drawn the attention of this Court that in this case, no charge was framed under Section 354 of IPC by the Learned Trial Court against the appellant although after the completion of trial, Learned Trial Court found the appellant to be guilty under Section 354 of IPC and convicted him accordingly. Learned Counsel further submitted that from the evidence on record, it is clear that the prosecution before the Learned Trial Court has miserably failed to prove the charge levelled against the appellant but the Learned Trial Court failed to appreciate the evidence on record properly and convicted the appellant for which the interference of the Court is required. Learned Counsel also submitted that even from the evidence of the victim, it is clear that the victim in course of her examination only stated that the accused touched her body but to attract the charge under Section 354 of IPC, according to Learned Counsel there should be evidence of criminal force or assault. But in the given case there is no such evidence on record like that. Furthermore, no independent witnesses

supported the case of the victim, even the Medical Officer also did not support the case of the victim. So, in absence of cogent and corroborating evidence on record, there is no scope to sustain the charge levelled against the appellant and urged for acquitting the appellant from the charge of this case by setting aside the judgment of the Learned Trial Court. Learned Counsel for the appellant also submitted that Learned Magistrate who recorded the statement of the victim was not produced for examination by the prosecution. Even the FIR was not duly proved by the prosecution in this case. Finally, Learned Counsel also relied upon two citations which will be discussed later on.

04. On the other hand, Learned P.P., Mr. Raju Datta accompanied by Learned Addl. P.P., Mr. R. Saha appearing on behalf of the State-respondent submitted that from the contents of the FIR, it is clear that the present appellant committed the offence as alleged on the alleged day and furthermore, the appellant by the trend of cross-examination of the witnesses of the prosecution could not dismantle their evidence and according to Learned P.P., the citations as referred by Learned Counsel for the appellant are not applicable in this case and finally submitted that Learned Trial Court below after considering the evidence on record rightly and reasonably found the appellant to be guilty and convicted him accordingly for which there is no merit in the appeal and urged for dismissal of this appeal.

05. This present case was set into motion on the basis of an FIR laid by the victim (name withheld) as informant to the O/C, Baikhora P.S. alleging inter alia that on 03.12.2020 at about 5 p.m. in the evening, she went to a medical shop near Ramraibari PHC to administer two injections on her body for pain to her legs and body and that time the appellant-accused, Bibhishan Ghosh started to give massage on her body and on the pretext of giving massage to her body, he removed all her wearing apparels and taking the chance to physically abuse her, he removed all her clothes and tried to rape her by touching her whole body and also tried to kill her by pressing her throat. She cried loudly and pushed him and somehow she saved herself. On the basis of the FIR, O/C Baikhora P.S. registered Baikhora P.S. case No.86 of 2020 under Section 341/354 (B)/354 (A)/307 of IPC against the appellant and the case was endorsed to the concerned I.O. for investigation. The I.O. on completion of investigation laid charge-sheet against the appellant to the Jurisdictional Court and thereafter, the same was committed to the Court of Learned Sessions Judge, South Tripura, Belonia. Learned Sessions Judge, being the Trial Court by order dated 29.04.2022 framed charge against the appellant under Section 354 (B)/354 (A)/341/307 of IPC and thereafter, proceeded to record evidence of the witnesses of the prosecution and after recording evidence of the witnesses of the prosecution proceeded to examine the appellant under Section 313 of Cr.P.C. where the appellant denied to adduce

any witnesses in support of his defence and finally, on conclusion of trial, Learned Trial Court convicted the appellant as already stated above. Now before coming to the conclusion of this appeal, on the basis of points of arguments raised by Learned Counsels of both the sides, let us discuss the evidence on record of the prosecution.

06. PW1 Subhash Dey deposed that the alleged incident took place about one year and 5/6 months back. When he was preparing bread in his shop, that time he noticed that one lady was arguing with shopkeeper namely, Bibhison Ghosh nearby his shop.

During cross, he deposed that there is one pathology shop between his shop and the shop of Bibhison Ghosh and his house is in the Southern direction of the shop of Bibhison Ghosh where his family resides. In the southern direction of his shop, there are shops of Gouranga Dey, Dipak Pal and Kamal singh. On opposite of the shop, there is staff quarters of PHC and the shops nearby his shop remain open from 3 pm to 9 pm.

07. PW2 Dr.Debasree Reang deposed that on 03.12.2020 she was posted as Medical Officer at Baikhora PHC. On that day the victim was brought by police personnel for her examination at Baikhora P.H.C. in connection with case No.86/20. She examined her on that day in presence of female attendant and she was married and duration of cycle was 4-5

days. On her general examination, her breast was found developed, axillary hair was developed and pubic hair present. She was well wearing. On her private part examination, she was found normal. After examination, she gave opinion that there was no sign of any struggling injury mark, hymen was absent. However, vaginal and cervical swab were taken and handed over to the police for forensic examination. After receiving the report from SFSL, she gave final opinion on 26.04.2021 though lab investigation report was negative for presence of seminal, stain/spermatozoa/blood stain of human origin in vaginal stain. However, possibility of recent sexual intercourse could not be ruled out. She identified her report in two sheets signed by her marked as Exhibit P-1. She further stated that WSI Ruma Noatia seized cervical swab and vaginal swab of victim on her production and she put her signature on the seizure list and identified her signature on the seizure list marked as Exhibit P-2.

During cross-examination she stated that for married woman, if she has cohabitation of several times, there will be no hymen.

08. PW3 Dr. Sabyasachi Nath is the Senior Scientific Officer-cum-Asst. He deposed that on 04.01.2021 he was posted as the Senior Scientific Officer-cum-Asst., Chemical Examiner, SFSL, Narsingarh, Agartala. On that day, their office received one sealed parcel containing two exhibits marked as

Exhibit-A and Exhibit-P and subsequently marked in the laboratory as A1, A2, P1 and P2 in connection with Baikhora P.S. case No.2020/BKR/086 dated 03.12.2020. He conducted examination on the said exhibits during the period from 05.01.2021 to 21.01.2021. On examination, he opined that seminal stain/spermatozoa/blood stain/hair of human origin could not be detected in the exhibits marked as A1, A2, P1 and P2. This report was prepared by him in his official computer and put his signature in one page and the report was forwarded by Dr. H.K. Pratihari, Director-cum-Chemical Examiner, to the Government of Tripura by forwarding dated 22.01.2021 and he identified his report and forwarding report in two sheets marked as Exhibit P-3.

09. PW4 is the victim. She deposed that the incident took place many years back. She could not remember the fact. The case was filed against Bibhison Ghosh and also stated that Bibhison Ghosh touched on the several portion of her body. She informed this incident to her husband. Thereafter, her husband along with others went to see Bibhison Ghosh that how he did such act. But Bibhison Ghosh denied the allegation. She also stated that the ejahar was written by Pandit Krishna Tripura. The victim identified her signature on the ejahar marked as Exhibit P-4. She also stated that she was produced by the police to the Court and her statement was recorded and identified her signature on the statement marked as Exhibit P-

5. She identified her signature on the consent paper for medical examination marked as Exhibit P-6.

During cross-examination she stated that Bibhison Ghosh has got one medicine shop and she used to go his shop for purchasing medicines. She also stated that she stated to the doctor at the time of medical checkup about her reason to visit the doctor.

10. PW5 Swarna Choudhury Tripura deposed that the alleged incident took place about 2/3 years back. He took his sister-in-law to the shop of Bibhison Ghosh for giving injection. He was waiting outside of the shop. After giving one injection Bibhison Ghosh advised to remain for ten minutes for giving another injection. That time his sister-in-law came from the shop after crying. He asked the reason of her crying. Then she informed that Bibhison Ghosh tried to touch several parts of her body. She asked him to call her husband. Then his brother came with local people at the shop and the case was filed at Jolaibari outpost.

During cross-examination he stated that he recognized the shop of Bibhison Ghosh. There is one pathology in the northern side of the shop of Bibhison Ghosh and there is one tea shop near the pathology. In the southern side of the shop of Bibhison Ghosh, there is one medicine shop and tea shop. There is hospital in the western side of the shop of Bibhison Ghosh.

11. PW6 Dr.Subhrajyoti Majumder deposed that on 04.12.2020 he was posted as Medical Officer at Baikhora PHC. On that day, Bibhison Ghosh was brought to the PHC by attending police officer Ruma Noatia in connection with Baikhora case No.86 of 2020 dated 03.12.2020 and accordingly, he examined him and after systematic examination, he was found normal. In potency test, his genital was found well developed and he gave his opinion that there was nothing to be suggested that the accused was not capable for performing sexual intercourse under normal circumstances. He gave his report on 20.04.2021 after receiving the report from SFSL. He identified his report marked as Exhibit P-7 and identified his signature on the seizure list as a producer marked as Exhibit P-8.

During cross-examination he stated that he did not find any nail mark or scratch mark on the body of Bibhison Ghosh.

12. PW7 Sri Rajmangal Tripura is the husband of the victim. He deposed that the incident took place before three years back. His wife went to the shop of Bibhison Ghosh when the accused tried to touch the body of his wife forcibly. His wife informed him over telephone and accordingly, he along with Pandit Krishna Tripura went to the shop of Bibhison Ghosh. And then his wife narrated that the accused tried to touch the body

of his wife. Bibhison was not present at his shop and after that they went to P.S.

During cross-examination he stated that police examined his wife and before the incident he never purchased any article from the shop of Bibhison Ghosh.

13. PW8 Pandit Krishna Tripura who according to the prosecution scribed the ejahar of the informant. He deposed that the incident took place about one year back. On that day, he was in his house. That time his nephew Mangal asked her to go to the market as something has happened in the market in the shop of Bibhison Ghosh with his wife at the time of injection. On reaching there he heard from the victim that the accused touched her body at the time of giving injection. He is not the eye witness. The victim was crying and about 70/80 persons gathered therein and they informed the matter to Jolaibari outpost.

During cross examination he stated that FIR was not written by him and the shop of Bibhison Ghosh is 2 km away from his house.

14. PW9 Subhash Tripura deposed that on 03.12.2020 at about 5/5.30 pm Panji Krishna Tripura informed him over telephone that his wife had gone to the chemist shop near Ramraibari Hospital and she had some problem with the shop owner and he requested him to come there and accordingly he went there and found that police had arrived therein and

further stated that he came to know that the chemist shop owner was one Bibhison.

15. PW10 WSI Ruma Noatia. She deposed that on 03.12.2020 she was posted as Baikhora P.S. as WSI of police. On that day O/C Baikhora P.S. registered Baikhora P.S. case No.2020 BKR 086 under Section 341, 354B, 354A and 307 of IPC and the case was endorsed to her for investigation. She identified the FIR registration note and signature of O/C Rajib Saha on the written complaint marked as Exhibit P-4/1. She also identified the filled up printed FIR form filled up by O/C marked as Exhibit P-9 and identified the signature of O/C marked as Exhibit-9/1. She also stated that in course of investigation, she visited place of occurrence and prepared hand sketch map with index and identified the hand sketch map with index marked as Exhibit P-11 and index marked as Exhibit P-12. She examined witnesses and recorded their statement under Section 161 of Cr.P.C. He collected the SFSL report. He identified the seizure memo marked as Exhibit P-2/1 and also identified another seizure memo regarding seizure of coronal swab of penis and shaft of penis swab of the accused which was sent to the SFSL for examination marked as Exhibit P-8/1 and also stated that he caused arrest of the appellant-accused, produced the victim before the Court for recording her statement and on completion of investigation, she laid charge-sheet.

During cross she deposed that she arrested the accused on 03.12.2020 at 10.50 pm and during the investigation it did not reveal to her as to whether the victim went to the medical shop with medical prescription or not. She did not record the statement of the wife of the accused nor took any photograph of the place of occurrence. She also did not seize any wearing apparel of the victim and the medical reports of the victim and the accused did not reveal any injury mark and also she did not obtain any medical opinion on the claim of the victim regarding pushing of injection to her by accused.

These are the sums and substance of the evidence on record of the prosecution.

16. From the evidence on record, it appears that to the alleged place of occurrence excepting the victim, no other persons were present. All the witnesses who are produced by the prosecution appeared to the place of occurrence after the alleged occurrence. Now we are to see how far the evidence of the victim is trustworthy. The I.O. in course of investigation could not collect any injury report in respect of the victim nor could collect any injury report of the alleged accused. Even no Medical officer who appeared on behalf of the prosecution did whisper anything as to whether they found any injury mark on the body of the victim or to the alleged accused also. Furthermore, there is also no evidence on record that the

victim went to the shop of the alleged accused-appellant for pushing of injection. Now, if we meticulously go through the evidence of the victim, it appears that she only stated that the accused only touched her body. But she specifically did not mention anything as to how the appellant-accused committed the offence to substantiate the charge under Section 354 of IPC for which he was convicted.

17. Now in course of hearing of argument, Learned Counsel for the appellant drawn the attention of the Court that to substantiate the charge under Section 354 of IPC, there should be ingredients of 'criminal force or assault'. But referring the definition of 'criminal force or assault', Learned Counsel for the appellant drawn the attention of the Court that from the evidence on record, it is crystal clear that the prosecution in this case could not place any material before the Court to substantiate that the accused used criminal force or caused assault upon the victim in committing the offence. Learned Counsel also submitted that as the victim went to the medicine shop for administration of injection, so, it is quite natural that at the time of pushing of injection, there may be some bodily touch by the alleged appellant upon the victim because in absence of any bodily touch how the accused would administer injection upon the victim, although prosecution in this regard could not produce any cogent evidence on record, nor the I.O. during investigation tried to ascertain as to

whether what sort of injections were pushed by the alleged appellant upon the victim. Nor any prescription in this regard was collected or seized by I.O. during investigation. So, this part of evidence of the prosecution appears to be doubtful. Furthermore, the FIR in this case could not be proved by the prosecution in accordance with law nor the prosecution could produce the Magistrate who recorded the statement of the victim. Prosecution only identified the signature of the victim on the judicial statement recorded by Magistrate. Even the contents of the FIR and also the contents of the statement of the victim could not be proved by the prosecution in this case.

18. Learned Counsel for the appellant, in course of hearing, referred the citation of Hon'ble the Supreme Court **Naresh Aneja alias Naresh Kumar Aneja vs. State of Uttar Pradesh and Anr.** dated 02.01.2025 reported in **(2025) SCC OnLine SC 3** in para No.12 observed as under:

"12. A bear perusal of Section 354, IPC reveals that for it to apply, the offence must be committed against a woman; criminal force must be applied against her; and such application of force must be with the intent to outrage her modesty. [See : *Raju Pandurang Mahale v. State of Maharashtra: (2004) 4 SCC 371*

12.1. Criminal force is defined in Section 350 IPC¹¹, however, what exactly does modesty means, which is an essential aspect for this Section to apply, has not been defined so as to constitute an offence u/s 354 IPC. Any discussion on this Section is incomplete without reference to *Rupan Deol Bajaj v. K.P.S Gill: (1995) 6 SCC 194* wherein the Learned Judges observed:

"14. Since the word 'modesty' has not been defined in the Penal Code, 1860 we may profitably look into its dictionary meaning.

According to *Shorter Oxford English Dictionary* (3rd Edn.) modesty is the quality of being modest and in relation to woman means "womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct". The word 'modest' in relation to woman is defined in the above dictionary as "decorous in manner and conduct; not forward or lewd; shamefast". *Webster's Third New International Dictionary of the English Language* defines modesty as "freedom from coarseness, indelicacy or indecency; a regard for propriety in dress, speech or conduct". In the *Oxford English Dictionary* (1933 Edn.) the meaning of the word 'modesty' is given as "womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct (in man or woman); reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions".

15. ... From the above dictionary meaning of 'modesty' and the interpretation given to that word by this Court in *Major Singh* case [AIR 1967 SC 63 : 1967 Cri LJ 1 : 1966 Supp SCR 286] it appears to us that the ultimate test for ascertaining whether modesty has been outraged is the action of the offender such as could be perceived as one which is capable of shocking the sense of decency of a woman ..."

12.2. While we hold the above observations as also the discussion made in *Major Singh* (supra) in the highest esteem and regard, it must not escape us that the observations were made in the societal context and milieu of that time and its import today should be interpreted in our present context. Reference in this regard may be made to observations by Bhat, J in *Attorney General v. Satish*: (2022) 5 SCC 545,

"66. ... These require an element of application of physical force, to women. The expression "modesty" was another limitation as older decisions show that such a state was associated with decorousness [Rupan Deol Bajaj v. Kanwar Pal Singh Gill, (1995) 6 SCC 194 : 1995 SCC (Cri) 1059] of women. This added a dimension of patriarchy and class. [Section 354 (or any other provision of IPC) does not offer a statutory definition of the term "modesty", and over time, was interpreted broadly, contemporaneously with the developing and acknowledged role of women in society, to overcome its inherently colonial and patriarchal origins. ... One cannot be unmindful of the circumstances in which these

provisions were enacted by a colonial power, at a time, when women's agency itself was unacknowledged, or had limited recognition. Further, women in India were traditionally—during the time of enactment of IPC, in the mid-Nineteenth Century—subordinated to the care of their fathers, or their husbands, or other male relatives. They had no share in immovable property; notions of gender equality were unheard of, or not permitted. Women had no right to vote. Quite naturally, the dignity of women—or indeed their autonomy, was not provided for.

67. The advent of the Constitution of India revolutionised—at least in law, all that. Regardless of gender, race, caste, religion or region, or all of the acknowledged sectarian and discrimination enabling barriers, everyone enjoyed equality of law, and equal protection of law (Article 14). Further, the provision in Article 15(1) proscribed discrimination by the State (in all its forms) on various grounds, including gender. Article 15(3) enabled the State to enact special provisions for women and children.”

12.3. Turning to the facts of the instant case, keeping in view the contents of the FIR, the statement in the final report of the investigating officer, and the statement u/s 164 CrPC of the complainant, we are of the view that even *prima facie* the ingredients as referred to supra, are not met. The record is silent with respect to the use of any force, apart from bald assertions of mental and physical discomfort caused to the complainant by the appellant.

12.4. It is well settled that for *mens rea* to be established, something better than vague statements must be produced before the court. As evidenced by the annexures referred to above, i.e. the FIR, the preliminary investigation report as also the concluding portion of the chargesheet, no direct allegation nor any evidence in support thereof can be found attributing intent to the appellant. It cannot be said, then, that a case u/s 354 IPC is made out against the appellant.”

Referring the said principle of law laid down by the Hon'ble Apex Court, Learned Counsel drawn the attention of this Court that here in this case there is no evidence on record that the alleged appellant used any criminal force or caused

assault to the victim on the alleged day to substantiate the charge under Section 354 of IPC.

19. Learned Counsel further referred another citation of the Hon'ble Apex Court in **Somasundaram Alias Somu vs. State of Rep. by the Deputy Commissioner of Police** dated 03.06.2020 reported in **(2020) 7 Supreme Court Cases 722**, wherein para Nos.81, 82, 83 & 84 observed as under:

"81. Section 164 CrPC enables the recording of the statement or confession before the Magistrate. Is such statement substantive evidence? What is the purpose of recording the statement or confession under Section 164? What would be the position if the person giving the statement resiles from the same completely when he is examined as a witness? These questions are not res integra. Ordinarily, the prosecution which is conducted through the State and the police machinery would have custody of the person. Though, Section 164 does provide for safeguards to ensure that the statement or a confession is a voluntary affair it may turn out to be otherwise. We may advert to statements of law enunciated by this Court over time.

82. As to the importance of the evidence of the statement recorded under Section 164 and as to whether it constitutes substantial evidence, we may only advert to the following judgment i.e. in *George v. State of Kerala*: (1998) 4 SCC 605: (SCC p. 624, para 36)

"In making the above and similar comments the trial court again ignored a fundamental rule of criminal jurisprudence that a statement of a witness recorded under Section 164 CrPC, cannot be used as substantive evidence and can be used only for the purpose of contradicting or corroborating him."

83. What is the object of recording the statement, ordinarily of witnesses under Section 164 has been expounded by this Court in *R. Shaji v. State of Kerala*: (2013) 14 SCC 266: (SCC p. 279, paras 27-28)

"15. So far as the statement of witnesses recorded under Section 164 is concerned, the object is twofold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement, and secondly, to tide over immunity from prosecution by the

witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in court should be discarded, is not at all warranted. (*Vide Jogendra Nahak v. State of Orissa: (2000) 1 SCC 272 and CCE y. Duncan Agro Industries Ltd.: (2000) 7 SCC 53*)

16. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 CrPC, can be relied upon for the purpose of corroborating statements made by witnesses in the committal court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 CrPC, such statements cannot be treated as substantive evidence."

84. Thus, in a case where a witness, in his statement under Section 164 CrPC, makes culpability of the accused beyond doubt but when he is put on the witness stand in the trial, he does a complete somersault, as the statement under Section 164 is not substantial evidence then what would be the position? The substantive evidence is the evidence rendered in the court. Should there be no other evidence against the accused, it would be impermissible to convict the accused on the basis of the statement under Section 164."

Referring the same Learned Counsel submitted that since the Magistrate who recorded the statement of the victim was not produced, so, only by identifying the signature of the victim on the body of the statement recorded, there is no scope to convict the accused in a case of this nature because according to Learned Counsel, a statement recorded under Section 164 of Cr.P.C. can be relied upon only for the purpose of corroborating the statement made by the witness in the committal Court or for the purpose of contradiction of the witness. But here in the case at hand, prosecution has failed to prove the FIR or to the statement of the victim as per law. Even from the statement of the victim, recorded by the Court,

the ingredients of offence of using 'criminal force or assault' upon the victim could not be established by the prosecution. So, in absence of clear and specific evidence on record, simply on the evidence on record of the victim, there is no scope here in this case to presume the appellant to be guilty and prosecution before the Learned Trial Court has failed to prove the case beyond reasonable doubt and the Learned Trial Court below has failed to appreciate the evidence on record properly for which this Court feels it necessary to interfere with the judgment delivered by the Learned Trial Court.

20. In the result, the appeal filed by the appellant is hereby allowed. The judgment and order of conviction of sentence dated 25.01.2024 delivered by Learned Sessions Judge, South Tripura, Belonia in connection with case No.S.T. 36 (Type-I) of 2021 is hereby set aside and the appellant-accused is hereby acquitted in benefit of doubt from the charge of this case and his surety also stands discharged from the liability of the bond. The case is disposed of on contest.

Send down the LCR along with a copy of the judgment/order.

Pending application(s), if any, also stands disposed of.

JUDGE

**MOUMITA
DATTA**
Purnita

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