

the accused 'Indal-talb' cannot be equated with an undertaking to produce an accused wherever and whenever called upon to do so.

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I, therefore, hold that the bond, which was furnished by the petitioner, was not in accordance with law and as such no penalty can be imposed upon him under that bond.

The revision petition is consequently accepted and the order of the Courts below imposing penalty upon the petitioner is set aside.

B.R.T.

#### FULL BENCH

Before Mehar Singh, S. B. Capoor and Gurdev Singh, JJ.

MAJOR SINGH,—Appellant.

*versus*

THE STATE,—Respondent.

Criminal Appeal No. 796 of 1962.

Penal Code (XLV of 1860)—S. 354—Causing injuries to the private parts of a girl of 7½ months by fingers—Whether amounts to an offence under S. 354.

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May, 30th

Held, by majority (Mehar Singh and Capoor, JJ.—Gurdev Singh, J. Contra)—Modesty has some relation to the sense of propriety of behaviour in relation to the woman against whom the offence is said to have been committed. In addition, therefore, to the intention or the knowledge of the accused person of which section 354 of the Indian Penal Code speaks, there must be not merely the physical act of the accused, that is, assault or the use of the criminal force, but a subjective element so far as the woman against whom the assault is committed or the criminal force used. A girl of the age of 7½ months is physically incapable of having any sense of modesty or propriety of behaviour and all that can be said is that if she was sufficiently grown-up to have developed such a sense, the act of the accused would

have outraged her modesty. The scope of section 354 cannot be extended in this sense as it is a misnomer to talk of sense of modesty in connection with an infant girl of age of 7½ months. The accused who caused injuries to the private parts of the infant girl by his fingers is guilty of an offence under section 323 of the Indian Penal Code and not under section 354 or 376/511 of the said Code.

*Case referred by Hon'ble Mr. Justice Mehar Singh and Hon'ble Mr. Justice Gurdev Singh on 3rd May, 1963, to a larger bench for decision of the question of law involved in the case. The Full Bench consisting of Hon'ble Mr. Justice Mehar Singh, Hon'ble Mr. Justice S. B. Kapoor and Hon'ble Mr. Justice Gurdev Singh after deciding the legal question referred to it returned the case to the D. B. for decision on 30th May, 1963. The case was finally decided by Hon'ble Mr. Justice Mehar Singh and Hon'ble Mr. Justice Gurdev Singh on 31st May, 1963.*

*Appeal from the order of Shri A. D. Koshal, Sessions Judge, Amritsar, dated the 20th day of July, 1962, convicting the appellant.*

V. K. RANADE, ADVOCATE, for the Appellant.

K. L. JAGGA, ASSISTANT ADVOCATE-GENERAL, AND M. R. CHHIBBER, ADVOCATE, for the Respondent.

#### JUDGMENT

Capoor, J. CAPOOR, J.—The question referred to the Full Bench is as follows:—

“Whether the appellant having fingered the private parts of Balvinder, a girl of 7½ months, causing injury to those parts, has or has not committed an offence under section 354 of the Penal Code?”

Section 354 of the Indian Penal Code is in these words:

“Whoever assault 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.”

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The definition of “woman” as given in section 10 of the Code is as follows:—

“The word ‘woman’ denotes a female human being of any age”.

The use of criminal force *per se* is punishable under section 350 of the Indian Penal Code and the commission of assault under section 351, Indian Penal Code. Section 354 is an aggravated form of assault or the use of criminal force and the aggravating element consists of the intention of the accused to outrage the modesty of the woman or his knowledge that he will thereby outrage her modesty.

As mentioned in the referring order, there are two possible views, one that irrespective of whether a woman has or has not developed modesty or can develop modesty, as soon as she is interfered with according to the terms of the section with the intention or knowledge laid down in it, the offence under this section is made out; two, that this section has only reference to a woman who has developed a sense of modesty.

The word “modesty” is not defined in the Indian Penal Code. The Shorter Oxford English Dictionary (Third Edition) defines the word “modest” in relation to woman as follows: “Decorous in manner and conduct; not forward or lewd; shamefast.” Hence (in later use also of men) scrupulously chaste. “Modesty” is defined as the quality of being modest, and in relation to woman, “womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct”. Webster’s New International Dictionary of the English Language (Second Edition) amplifies the definition of

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“modest” by adding “observing the proprieties; free from undue familiarity, indecency, or lewdness”. “Modesty”, therefore, has some relation to the sense of propriety of behaviour in relation to the woman against whom the offence is said to have been committed. In addition, therefore, to the intention or the knowledge of the accused person of which the section speaks, there must, in my view, be not merely the physical act of the accused, that is, assault or the use of the criminal force, but a subjective element so far as the woman against whom the assault is committed or the criminal force used. This result appears to follow in consequence of the use of the words “outrage her modesty” in section 354 of the Code and the concept of modesty as given above.

Now, so far as the girl of the age of 7½ months is concerned, she is physically incapable of having any sense of modesty or propriety of behaviour, and all that can be said is that if she was sufficiently grown-up to have developed such a sense, the act of the accused would have outraged her modesty. It does not appear to me to be open to extend in this sense the scope of section 354 and it appears to be a misnomer to talk of sense of modesty in connection with an infant girl of the age of 7½ months.

The decided cases, which the counsel for the parties cited, are few in number and not really helpful. The earliest is *Emperor v. Tatia Mahadev* (1). In that case, Chandribai, a girl of 6 years of age, lived with her parents in a room on the first floor of a chawl in Bombay. The accused, who lived on the second floor, took the girl to his room, made her lie down and lay on her. Immediately the girl screamed and ran away. She reported the matter to her mother. The accused was charged with an offence punishable under section 354 of the Indian Penal Code. The trying Magistrate

(1) (1912) 14 B.L.R. 961.

altered the charge to one under section 352 and convicted the accused under the alternate charge holding that "the girl was only six years old and her modesty could hardly be outraged". Notice was issued to the accused to show cause why the sentence passed upon him be not enhanced.

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The learned Judge, after referring to the definition of "woman" under section 10 of the India Penal Code, pointed out that for the purposes of section 354, the girl Chandribai was a woman within that section. From the fact that the girl screamed and ran away when the accused began his assault upon her, the learned Judge came to the conclusion that this action of hers was a clear indication that she felt her modesty to be outraged by the conduct of the accused. The question, therefore, whether the offence came within the ambit of section 354, was decided not upon the abstract proposition that Chandribai was a woman as defined in section 10, but the learned judge treated the question as to whether her modesty was outraged or not, as a question of fact. This I consider to be the proper approach to the matter.

The next case to which reference was made by Mr. V. K. Ranade on behalf of the convict in the present case was *Mt. Champa Pasin and others v. Emperor* (2). Macpherson, J. with whom Adami, J. agreed, observed at page 332 that the incidents and the conduct of the prosecutrix were clear indications that she either had no modesty to mention or that it was not such as would be outraged by any of the acts which were attributed to the male accused persons. The prosecutrix in that case was a grown-up woman and the above observations, which again hinged on the evidence, are not relevant for deciding the question referred to the Full Bench.

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The next case is *Soko v. Emperor* (3), the facts of which have been detailed in the referring order also. The girl against whom the offence was committed was some five years of age and while she was playing the accused aged 50 put his finger into her private parts and caused a mark on them. This was noticed by her mother when she was bathing the child and on being questioned the child told her that it had been caused by the accused. Jack, J., observed:—

“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 happened. In the circumstances, I think that it is, therefore, doubtful whether in fact the modesty of the girl was outraged.”

He accordingly altered the conviction from one under section 354, Indian Penal Code, to section 323, Indian Penal Code. The other learned Judge M. C. Ghose, J. considered that on the facts as found by the Magistrate, section 354, Indian Penal Code, would apply. He went on to remark “the learned Advocate has been unable to show any authority for his contention that a man who puts his finger into the private parts of a girl of 5½ years of age is not guilty under section 354, but is guilty under section 352, Indian Penal Code, inasmuch as she has not developed a sense of modesty. I am of the opinion that such action on the part of a man as has been committed here would tend to destroy the formation of a sense of modesty in the girl and for lack of any authority I cannot agree that the case does not come under section 354, Indian Penal

Code". Having regard to the circumstances the sentence, which was six months' rigorous imprisonment, was maintained.

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Now, according to the view, viz., that irrespective of whether a woman has or has not developed modesty or can develop modesty, as soon as she is interfered with according to the terms of the section with the intention or knowledge laid down in it, the offence under the section was made out, both the learned Judges would be wrong. Jack, J., treated the question as one of fact. Since the girl had no hesitation in telling her mother what had happened, he was of the opinion that it was doubtful if in fact the modesty of the girl was outraged. M. C. Ghose, J. was of the contrary opinion; the reason given by him was that the action of the accused would tend to destroy the formation of a sense of modesty in the girl. Now, so far as the child of 7½ months is concerned, there could even be no question of the action of the accused in the present case tending to destroy the formation of a sense of modesty in her.

The last case cited was *Girdhar Gopal v. State* (4). The accused person in that case confined a girl of 9 years in a room, made her lie on a bed, sat on her and became naked. The girl then shouted and called her brother. Now, on these facts there could be no doubt that the action of the accused had outraged the girl's modesty. The learned Judge after referring to the views of Jack, J. in *Soko v. Emperor* (3), stated that he was unable to find himself in agreement with his reasoning. He went on to observe, however, that it was unnecessary to consider here whether a little girl of five years of age can be said to have developed a sense of modesty contemplated by section 354, Indian Penal Code. On that view, there was hardly any question for expressing dissent from the views of Jack, J., in *Soko's case* (3).

(4) A.I.R. 1953 M.B. 147.

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There is thus really no support in authority for the view that for an offence under section 354, Indian Penal Code, it is altogether irrelevant to consider the age, physical condition or the subjective attitude of the woman against whom the assault has been committed or the criminal force used. The question will be one of fact, and having regard to the facts, as stated in the referring order and for reasons given in the earlier part of this judgment, I would answer the question referred in the negative.

Mehar Singh, J. MEHAR SINGH, J.—I agree. The facts are stated in the referring order as also in the judgment of my learned brother Capoor, J. On reconsideration I am of the opinion that whether a woman has or has not developed modesty, as that word is used in section 354 of the Penal Code, is a question of fact in each case, and there is no abstract conception of modesty that can apply to all cases. The Code not having defined the word 'modesty', its dictionary meaning has to be taken, and the dictionary meaning as referred to in the judgment of Capoor, J., also leads to the conclusion that the question whether a woman has or has not developed modesty must in the nature of things be a question of fact in each case. It follows that a girl of seven-and-half months cannot be described either as having modesty or having developed the same. The answer to the question referred to this bench is in the negative that the appellant has not committed an offence under section 354 of the Penal Code.

Gurdev Singh, J. GURDEV SINGH, J.—I had the advantage of going through the opinion recorded by Capoor, J., with which my learned brother Mehar Singh, J., has concurred, but despite the great respect that I have for my learned brothers, I do not find it possible to subscribe to their view.

Detailed facts of the case are given in the order of reference, but I would briefly recapitulate the same.



Shrimati Balbir Kaur, P.W. 2, had gone out of her house to attend to wedding in the neighbourhood on the Lohri evening of 12th January, 1962, leaving her infant daughter Balvinder, just 7½ months old, sleeping. As she returned home at 9-30 p.m. and switched on the light of her bed room, she found the appellant, who was naked below his waist, kneeling over baby Balvinder. The baby shrieked. The appellant picked up his *chadar* and ran out. Injuries were found on the private parts of the baby and she was bleeding. Soon after she was examined by Dr. Amir Kaur, P.W. 1, who found that besides the rupture of the hymen in the midline, the baby had a superficial tear ¾" long extending from the lower end of the posterior wall of vagina towards the perineum with bleeding. The appellant, who was prosecuted for rape under section 376 of the Indian Penal Code, however, completely denied the prosecution allegations and complained of false implication. This plea of his was, however, rejected by the learned trial Judge, and though he held the appellant responsible for causing injuries to the private parts of Balvinder, he was of the opinion that they were not the result of thrusting of the male-organ but had been caused in some other manner. Accordingly, he convicted the appellant under section 323 of the Indian Penal Code only, sentencing him to rigorous imprisonment for one year, being of the opinion that the offence did not fall either under section 376 or 354 of the Indian Penal Code. In appeal against his conviction, while the appellant contended that he committed no offence, the State in its cross-appeal challenged the order of Major Singh's acquittal under section 376 of the Indian Penal Code and contended that even on the findings recorded by the trial Court, the offence fell either under section 376/511 or at least under section 354 of the Indian Penal Code. On hearing both these appeals, which were placed before my brother Mehar Singh J, and myself, and reviewing the

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evidence led in the case we came to the conclusion that Balvindar had not been subjected to rape nor was an attempt to commit rape made on her, and the injuries were caused to her by the appellant by fingering or in some other similar manner. The question that then arose was whether on these findings the appellant was guilty merely of an offence under section 323 of the Indian Penal Code, as held by the trial Court, or could be convicted under section 354 of the Indian Penal Code, as contended on behalf of the State. The few decisions that were cited at the Bar in this connection revealed conflict of opinion and were not helpful. In view of this conflict and the importance of the question involved, the following question was referred to this Full Bench:—

“Whether the appellant having fingered the private parts of Balvinder, a girl of 7½ months, causing injury to those parts, has or has not committed an offence under section 354 of the Penal Code?”

My learned brother Capoor J., with whom Mehar Singh J. has concurred, has returned a negative answer to this question, being of the opinion that a girl 7½ months old was physically incapable of having any sense of modesty or propriety of behaviour and, accordingly, there could be no question of her modesty being outraged which is an essential ingredient of the offence under section 354 of the Indian Penal Code.

Section 354 of the Indian Penal Code enacts:—

“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 or either description for a term which may extend to two years, or with fine, or with both.”

“Criminal force” is defined in section 350 and “assault” in section 351 of the Indian Penal Code. Use of Criminal force or commission of assault on any person otherwise than on grave and sudden provocation is punishable under section 352 of the Indian Penal Code. Sections 353 to section 357 of the Indian Penal Code prescribe punishment for use of criminal force or assault in varying circumstances which are considered to aggravate the offence. Section 354 of the Indian Penal Code is one of those provisions and prescribes punishment for use of criminal force or assault on “any woman”. Whereas the punishment provided for simple use of criminal force or assault under section 352 of the Indian Penal Code is imprisonment of either description for a term not exceeding three months or fine, which may extend to Rs. 500/- or both, a person convicted under section 354 of the Indian Penal Code is liable to be sentenced to imprisonment of either description upto two years or with fine without any limit, or with both. This clearly indicates the gravity with which the legislature viewed the use of criminal force or assault on women.

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Assault committed on women may be of various types and of varying degrees. Some of the other offences against women are rape punishable under section 376 of the Indian Penal Code, and attempt to commit rape, which can be punished under section 376/511 of the Indian Penal Code. There may be cases, and frequently there are, where the assault on a woman neither amounts to rape nor an attempt to commit it. It may still be such an assault as interferes with modesty of a woman or is considered indecent, not only according to the prevalent notions of morality, but also in the eye of law. The provision contained in section 354 of the Indian Penal Code is one of the few provisions contained in the Indian Penal Code to protect women against indecent behaviour or lust of men. It

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is also intended in the interest of decency and morals and the value that the legislature attaches to the protection of women against such assaults is obvious from the fact that it has prescribed a punishment of imprisonment of either description for two years and fine without limit as maximum penalty for such an offence. In construing section 354 of the Indian Penal Code this object of the legislature has not to be lost sight of.

For conviction under section 354 of the Indian Penal Code, what the prosecution is required to prove is that:

- (a) an assault has been committed or criminal force used,
- (b) the object of the assault or criminal force is a woman, and
- (c) that it was with the intention of outraging the modesty of a woman or knowledge that it was likely that her modesty would be thereby outraged.

The word "woman" is defined in section 10 of the Indian Penal Code as denoting the female human-being of any age. It will be thus obvious that if assault is committed or criminal force used with the intention or knowledge specified in this section, the offender would be guilty, irrespective of the age of the female victim. Once the requisite intention or knowledge relating to the commission of assault or use of criminal force is proved, the offence will be complete and there would be no occasion for enquiry into the result of the act complained of, and, in my opinion, it will not avail the offender to contend that the victim of his assault was too old or too young to understand the purport or the significance of his act.

Of course, to bring the offence under section 354 of the Indian Penal Code the intention or knowledge specified in this section has to be made out, and if such

intention or knowledge is lacking, even if it is proved that the assault had been committed or criminal force used and the victim was a woman, the offence would not be punishable under section 354 of the Indian Penal Code but only under section 352 of the Code.

There is no difficulty about the interpretation of the expression "outrage her modesty" used in this section. There can however, be no two opinions that any act which adversely affects the modesty of a woman or is offensive to the sense of modesty, decency and repugnant to womanly virtues or propriety of behaviour would be an outrage or insult to the modesty of a woman.

As observed by my learned brother Capoor J, the word "modesty" has not been defined either in the Indian Penal Code or in any other statute. Its meaning according to the Shorter Oxford English Dictionary quoted by my learned brother is "womanly propriety of behaviour, scrupulous chastity of thought, speech and conduct." Relying upon this, my learned brother has expressed the opinion that modesty has some relation to the sense of propriety of behaviour in relation to the woman against whom the offence is said to have been committed, and, accordingly, he has held that in dealing with an offence under section 354 of the Indian Penal Code, the age, physical condition or the subjective attitude of the woman against whom the assault has been committed or criminal force used have to be considered. According to this view, if on account of age or other infirmity a female is incapable of knowing or realizing what is proper womanly behaviour or how she is to conduct herself, or does not consider the act complained of as offensive, she cannot be considered to have possessed any modesty, and no offence of outraging her modesty can, consequently, be committed *qua* her, despite the fact that the act complained of may be admittedly repugnant to morality and decent behaviour towards the weaker sex,

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In the Oxford English Dictionary (1933 edition), the meaning of the word “modesty” is given as “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.” 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 word “modesty” appears to have been used in section 354 of the Indian Penal Code.

It is significant that in the Indian Penal Code there is no corresponding provision which punishes an outrage against modesty possessed by men or against propriety of behaviour or sense of shame proceeding from instinctive aversion to impure or coarse suggestions possessed by a man as distinct from a woman. From this it is obvious that what the legislature had in mind when it enacted section 354 of the Indian Penal Code was the protection of an attribute which was peculiar to women. In my opinion, the word “modesty” in section 354 of the Indian Penal Code has not to be interpreted with reference to the particular victim of the Act, but as an attribute associated with female human beings as a class. It is a virtue which attaches to a female on account of her sex.

A similar expression occurs in section 509 of the Indian Penal Code, which runs as follows:—

“Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be heard, or that such gesture or object seen shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.”

From the language of this section, it is evident that the mere uttering of any word, making of any sound or gesture of exhibition of any object to a female with the intention that such word or sound shall be heard or such gesture or object seen by such woman is punishable irrespective of the fact whether the woman concerned has or has not heard the words, noticed the gestures or seen the object exhibited. If that is so, it will be obvious that in order to make out an offence under section 509 of the Indian Penal Code it is not necessary to go into the mental or physical condition of the woman concerned.

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If the same words are used at different places in the same enactment, same meaning has to be given to them unless the context indicates otherwise. If the Dictionary meaning of the word or the meaning which my learned brother Capoor J. attaches to the word "modesty" is adhered to while interpreting section 509 of the Indian Penal Code, the result will be that making an indecent gesture or exhibition of a male organ or some lewd object to a child who has not attained sufficient maturity of thought or understanding would constitute no offence, whereas similar acts when committed in the presence of a woman of higher age would be an offence. This is my opinion could not have been the intention of the legislature in enacting section 509 of the Indian Penal Code. 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 interest of the woman 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

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the fact whether the female concerned has developed enough understanding as to appreciate the nature of the act or to realize that it is offensive to decent female behaviour or sense of propriety concerning the relations of a female with others. I can discover no reason for the legislature confining the protection afforded by sections 354 and 509 of the Indian Penal Code only to females who had attained enough understanding as to realize that the act complained of was intended to corrupt their morals or is offensive to propriety of womanly behaviour.

The language of section 354 of the Indian Penal Code does not indicate that the legislature wanted to limit its applicability only to females above a certain age or those who had attained sufficient maturity of thought or understanding. Could the section have been differently worded if the object of the legislature was to extend this protection against indecent behaviour to female human-beings of all ages? In my opinion, the language employed to achieve this object would still have been the same. Since this is a provision which is intended to promote morality, there is no justification for putting a narrow interpretation on it or to limit its applicability only to women of certain ages against its clear language. I also find it difficult to believe that while the legislature was alive to the necessity of affording special protection to women, traditionally known as the weaker sex, it should have denied this protection to younger members of the same sex who, on account of their age or deficient mental development, would not be in a position to defend themselves. These persons, in fact, need the protection of law the most.

The contention that indecent behaviour towards a child who has not attained enough maturity of thought or understanding so as to judge of the nature of the act would not constitute an offence because she



has not developed sense of modesty or shame seems to proceed on the assumption that the result of the act is relevant to the determination of the question whether an offence under section 354 of the Indian Penal Code is or is not committed. This is, however, not warranted by the provisions of section 354 of the Indian Penal Code. It is not necessary under this section that the act complained of should have resulted in outraging or insulting the modesty of a woman. What is necessary to prove is that such act has been committed with the intention of outraging the modesty of a woman or knowing it to be likely that her modesty would be outraged by such act. It is not necessary for the prosecution to prove that the act complained of has, in fact, resulted in outraging the modesty of the woman concerned. If it were otherwise, it will always be necessary for the Court to go into the question of the mental development, character and antecedents of a victim so as to find out whether she had acquired any sense of modesty, and if so whether she still possessed it, and whether she had realized the significance or import of the act and felt that it was an outrage against her modesty. Such an enquiry, in my opinion, is excluded by the language of the section itself. If a different interpretation were adopted, then in dealing with an offence under section 354 of the Indian Penal Code, an offender could always put the prosecution to proof of the fact that the woman concerned had developed a sense of modesty and was in a position to realize that the intention of the offender was to outrage her modesty. Similarly, in a prosecution for an offence under section 509 of the Indian Penal Code, it will be a good defence for an accused to urge that the words uttered by him had not been heard or understood by the female concerned, or that she had not taken exception to the indecent gestures made to her having failed to realize their significance. In this view of the matter, the uttering of highly obscene

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words or use of grossly vulgar language before a female, who does not understand that particular language, would constitute no offence. This, in my opinion, is not what the legislature intended. Both under sections 354 and 509 of the Indian Penal Code once the act complained of is said to have been done with the specified intention or knowledge, the Court is not to go further to find out the effect of such an act. By doing so it will be introducing a fresh element in these sections. If the extreme view, which is urged by Mr. Ranade on behalf of the appellant, is adopted, it would mean that even in the case of grown-up women or young girls no offence under section 354 of the Indian Penal Code can be committed if the woman concerned is an idiot, imbecile or mentally deficient. Similarly, interference with the person of a prostitute or an act like touching her breasts or even her private parts would not be punishable except as a simple assault under section 352 of the Indian Penal Code despite the indecency and immorality of behaviour of the offender.

This, in my opinion, could not have been intended by the legislature. Under section 376 of the Indian Penal Code—a person who has sexual intercourse even with a prostitute would be guilty of an offence of rape if he indulges in sexual intercourse without the consent of that woman. It will not be open to the offender to say that the woman had been submitting to others for sexual enjoyment and even to him previously on payment. I fail to understand when protection against violation of her person has been extended even to a prostitute under section 376 of the Indian Penal Code, why a similar protection against assault or criminal force should not be available to such a woman under section 354 of the Indian Penal Code.

Dealing with the case of a prostitute, this is what Gour had to say in his Commentary on the Penal Law

of India (seventh edition) at page 1746:—

“The question whether this section is equally applicable to unfortunate women, who live by their immorality, must be answered in the affirmative. For, they can be no more subjected to the unbridled lust of other persons than respectable women, and if a person takes indecent liberties with them, he will be as much punishable as if he had outraged the modesty of a virtuous woman. But, in the case of such women, the question would be whether what was done was not done by leave and licence. It is, however, a question of fact, which in no way affects the law.”

This, in my opinion, would be the correct exposition of law. As already observed, the question is not whether the chastity of a woman who is subjected to assault or criminal force has in fact been violated, but only of the intention with which she was subjected to assault or criminal force. Assailing the correctness of this view, Mr. Ranade relied upon *Mst. Champa Pasi and others v. Emperor (2)*, where in the head-note it was stated:—

“Where a woman has no modesty to mention or it is not such as would be outraged by a person having sexual intercourse with her, the act of a person in taking her to a room and having intercourse with her, cannot be said to outrage her modesty.”

On going through the body of the judgment, I, however, find that this head-note proceeds upon the following observations of Macpherson J. at page 332 of the report:—

“With regard to the offence under section 354, it is only committed when a person assaults or uses criminal force to a woman intending to outrage or knowing it to be likely

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that he will thereby outrage her modesty. To my mind, the incidents and the conduct of Lakhpatia are clear indications that she either had no modesty to mention or that it was not such as would be outraged by any of the acts which are attributed to Wilayat and the other male accused after the alleged sexual intercourse in the open with Wilayat. Even if she had some remnants of modesty, the credible evidence in this case, which is meagre, does not show that it was in any way outraged by the overtures to her."

These observations have, however, to be read in the context in which they occur, and before they were made the learned Judge had arrived at the positive finding that Wilayat, the main culprit in the case, had sexual intercourse with the prostitute concerned "with her full consent, and she may well have accompanied him there with a view to it." It is thus obvious that in that case it had been found, as a fact, that the prostitute was a consenting party to sexual intercourse, and thus there was no question of any indecent assault. On going through the facts of the case, we further find that the learned Judges rejected the evidence against the other accused who were charged under section 354 of the Indian Penal Code, as they found that the witnesses did not belong to a respectable class, and their evidence was replete with discrepancies and contradictions. In these circumstances, this decision does not at all advance the appellant's case nor support the contention that no offence under section 354 of the Indian Penal Code can be committed against a woman of loose moral character or even a prostitute.

Mr. Ranade sought support for his argument from *Soko v. Emperor* (3), in which the conviction of an accused, who had caused a mark on the private parts

of a girl of 5½ years by putting a finger in them, recorded by the trial Court under section 354 of the Indian Penal Code was altered to section 323 of the Indian Penal Code. There was, however, a difference of opinion as to the nature of the offence between the two learned Judges constituting the Division Bench. Jack, J., who was of the view that the offence did not fall under section 354 of the Indian Penal Code, expressed himself in the following words:—

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“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 happened. In the circumstances, I think that it is, therefore, doubtful whether in fact the modesty of the girl was outraged, and that therefore the conviction ought not to have been under section 354 of the Indian Penal Code. As a matter of fact, the charge might have been under section 323 of the Indian Penal Code.”

From these observations it is obvious that the learned Judge did not go into the question whether the act was committed with the requisite intention or knowledge stated in section 354 of the Indian Penal Code, but whether it had resulted in outraging the modesty of the girl. As I have stated earlier, it is not the result which determines the offence but what is relevant is the intention or the knowledge with which it is committed in dealing with a charge under section 354 of the Indian Penal Code, and, if I may say so with respect, the approach of Jack, J., was not correct. M. C. Ghose, J., the other member of the Division Bench, did not share his opinion that unless the woman in question had developed a sense of modesty, no offence under section 354 of the Indian Penal Code could be committed.

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 ———  
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The view expressed by Jack, J., in *Soko's case* (3) was dissented from by Dixit, J., in *Girdhar Gopal v. State* (4), and he held that the act of a person who confined a nine-year old girl in a room, made her lie on a bed, and then sat on her becoming naked, clearly amounted to an offence under section 354 of the Indian Penal Code. The facts in *Emperor v. Tatia Mahadev* (1), were similar. A girl of six years was taken by the accused to his room. After making her lie down, he himself lay on her, but the girl immediately screamed and ran away. The trial Magistrate acquitted the offender of the charge under section 354 of the Indian Penal Code being of the opinion that the girl was too young to understand that anything wrong was intended, and that when she screamed and ran away, she did so through fear. In appeal by the Crown, the learned Judges altered the conviction from section 352 to section 354 of the Indian Penal Code. Though they took into consideration the fact that the girl had screamed and run away, they pointed out that section 354 of the Indian Penal Code would be applicable to her, as she was a woman as defined in section 10 of that Code, and observed that "there were many answers to the view of the learned Magistrate that the girl was too young to have any sense of modesty developed."

Though there is no direct authority on the point, the weight of observations made in the various decisions cited at the Bar is against the contention urged on behalf of the appellant, and for the reasons recorded above, my answer to the question referred to this Bench would be in the affirmative.

#### COURT'S ORDER

The question referred to the Full Bench is answered in the negative by majority. The case will now be placed before the Division Bench for decision.

B.R.T.