
(2015) 08 AHC CK 0007
In the Allahabad High Court
Case No : Criminal Appeal No. 1400 of 2006

Asif

APPELLANT

Vs

State of Uttar Pradesh

RESPONDENT

Date of Decision : 04-08-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311, 313
Penal Code, 1860 (IPC) — Section 376(2)(f), 377
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 —
Section 3(1) XII, 3(2)(5), 3(2)(v), 3(2)V

Citation : (2015) 8 ADJ 90 : (2016) 1 ALJ 327 : (2015) 91 ALLCC 96

Hon'ble Judges : Surendra Vikram Singh Rathore, J;Raghvendra Kumar, J

Bench : Division Bench

Advocate : Manish Tiwary, A.K. Awasthi, A.K. Singh, Dileep Gupta, Dileep Kumar, Rajeev Gupta, S.V. Singh, Santosh Shukla and Aradhna Chauhan, for the Appellant

Final Decision : Partly Allowed

Judgement

Raghvendra Kumar, J—Heard learned counsel for the appellant, learned AGA for the State and perused the material available on record. This criminal appeal has been preferred against the judgment and order dated 7.2.2006 passed by Special Judge, SC-ST (Prevention of Atrocities) Act in S.T. No. 374 of 2000 in Case Crime No. 380 of 1999, under Section 377 IPC/under Section 3(2)V of SC-ST (Prevention of Atrocities) Act, P.S. Dibiyaapur, District-Auraiya whereby accused Asif has been sentenced to imprisonment for life and a fine of Rs. 5000/- each of the offence with default stipulation of three months additional imprisonment. Both the sentences were ordered to run concurrently and Rs. 5000/- were awarded to the victim girl from the amount of fine after realization.

2. As per the prosecution version, the FIR of the case was lodged with the police on 31.10.1999 at 12:10 p.m. with respect to the incident occurred on 31.10.1999 at about 11 a.m.

3. The perusal of the FIR reveals that accused Asif called the victim aged about 4 years daughter of Jai Ram (informant-complainant) to his house on the pretext of viewing T.V. The accused undressed her underwear and started doing unnatural intercourse with the girl. Hearing the shrieks of the victim, the informant went to second floor of house and saw that the girl was lying on the floor and Asif was committing unnatural intercourse. The informant alongwith others apprehended the accused alongwith the victim. The spots of blood and stool were noticed on the underwear of the victim. The aperture of anal was swollen. The condition of the victim was critical. The FIR was got scribed by one Sri Krishna Pichhra. Complainant went to the police station alongwith victim and accused and lodged his FIR.

4. After registration of the case, the investigation proceeded in accordance with law. The underwear of prosecutrix and accused were respectively taken by the police and recovery memos respectively Ext. Ka-7 and Ext. Ka-8 were drawn. Accused Asif was medically examined. The prosecutrix was also medically examined. The underwears were sent to State Laboratory for chemical examination. The investigation culminated into filing of the charge-sheet against the accused-Asif.

5. After complying with the procedure contemplated under law, the accused was charged for the offence under Section 377 IPC and 3(1) XII of SC-ST Act on 10.10.2000. Subsequently, vide order dated 22.1.2004, the charge framed under Section 3(1) XII of SC-ST (Prevention of Atrocities) Act was amended and converted under Section 3(2)V SC-ST (Prevention of Atrocities) Act.

6. As per the defence version, the accused has been falsely implicated due to enmity. The informant was having hens at his house which frequently intruded into the premises of the accused. On this score, there has been altercation between the family members of the accused and the informant due to which he has been falsely implicated.

7. To substantiate the charge, the prosecution has examined Jai Ram (P.W.-1), who has proved the execution of the written report Ext. Ka-1, victim (P.W.-2). Dr. P.K. Gupta (P.W.-3), who has conducted the medical examination of accused-Asif on 31.10.1999 at District Hospital at 7:50 p.m. has proved the medical examination report Ext. Ka-2. The doctor has noted following injuries:

(i) Abraded contusion size 3 c.m. X 1 c.m. on the right arm in the middle part reddish.

(ii) Contusion size 2.5 c.m. X 1 c.m. on the right forearm reddish 11 c.m. below elbow joint.

(iii) Multiple contusion in the area of 20 c.m. X 14 c.m. on the right buttock smallest 2 x 2 c.m. largest 8 x 2 c.m. Reddish.

(iv) Multiple contusion in the area of 21 c.m. X 18 c.m. on the right buttock smallest 2 c.m. X 1 c.m. Largest 12 c.m. X 2 c.m. Reddish

(v) Contusion 9 c.m. X 1.5 c.m. on the left thigh reddish in middle.

(vi) No external injury is seen on the glance, prepuce and shaft of penis and scrotum.

All the injuries have been noted as simple in nature. No opinion has been expressed with respect to injury No. 6. All the injuries were noted fresh in duration and caused by hard blunt object.

8. Dr. Rizwana Khatoon (P.W.-4) has conducted the medical examination of the victim and has proved the medical examination report Ext. Ka-3 and supplementary medical report Ext. Ka-4. Both the reports are being reproduced herebelow:

As per Ext. Ka-3

M/I : A black mole present on the forehead 6.5 c.m. above from the tip of nose.

6/E : Teeth 10/10 weight-14 k.g. Height 3 feet 2 inches

No mark of injury on external parts of body. Secondary sexual characters are not well developed.

L/E of genital organs : Anal and Perianal region : Dry blood stain seen around perianal region and at buttocks. Anal orifice irritable (2) tender to touch. Bruising seen around anal orifice and perianal region. A radial fissure of mucous membrane of anus seen at post aspect measuring about one centimeter. Lowest part of anal canal showing injury of 1/2 (half centimeter) centimeter of post anal mucosa. Slight oozing of blood seen from injury. Rest of the anal canal healthy and normal. Anal swab taken and slide sent to the pathologist Dr. B.R.A. Combined (M) District Hospital Etawah for microscopic examination to detect any sperm. Vulva and vagina are healthy and normal. Girl is sent to the Radiologist, Dr. B.R.A. Combined District Hospital (M) Etawah for X-ray wrist, elbow and knee joint for age determination.

Opinion (i) Injury of perianal and anal region present as described above.

(ii) Anal swab report is awaited to find out spermatozoa.

(iii) X-ray report is awaited for age determination.

2. (Ext. Ka-4)

Smear Report: Report No. 57 done on 1.11.99 by Dr. S.K. Agarwal, Pathologist, District Hospital, Etawah.

Anal Smear Report: No spermatozoa dead or alive seen.

X-ray report: Report No/Reg No. 1323199, done on 1.11.99 by Dr. B.B. Prakash, Radiologist/sonologist Dr. B.R.A. Joint Hospital (Male) Etawah.

Parts X-rayed (i) Right elbow (ii) Right wrist (iii) Right knee

Radiologist Report:

- (1) Right elbow joint: Epiphysis of bones of elbow joint have not appeared.
- (2) Right wrist: Epiphysis of lower ends of ulna bone have not appeared. Epiphysis of pisiform carpal bone have not appeared.
- (3) Right knee joint : Epiphysis of upper end of fibula appeared.

Opinion : (1) The girl had injury of perianal and anal region, which was described previously.

- (2) Anal Smear report shows no spermatozoa dead or alive.

On the basis of clinical examination and anal smear report it is not possible to decide whether anal intercourse has been committed or not.

- (3) According to X-ray report age of the girl was about five to six years (5 to 6 years).

9. H.C.P. Kunwar Singh (P.W.-5) has proved the execution of chik FIR Ext. Ka-5 and relevant entry G.D. Ext. Ka-6, the recovery memo of underwear of the victim Ext. Ka-7, recovery memo of the underwear of the accused Ext. Ka-8 and the underwears respectively Ext. 1 and 2.

10. Mewa Ram (P.W.-6) is the witness of fact who has corroborated the testimony of P.W.-1 and P.W.-2. P.W.-7 is Ajai Singh, retired C.O. who has conducted the investigation and proved the site plan Ext. Ka-9 and the charge-sheet Ext. Ka-10. Subhash Chand (P.W.-8) clerk of Janta Inter College, Chandnagar, Court witness has been examined. Dr. F.A. Khan who is the Senior Scientific Assistant Forensic Laboratory Mahanagar, Lucknow has proved the execution Ext. Ka-11 chemical analysis report of Forensic Science, Laboratory, Lucknow.

11. The accused was examined under Section 313 Cr.P.C. Respectively 4.9.2003, 19.5.2004, 18.6.2004 and 21.9.2004.

12. Sami Ullah Khan (D.W.-1), Babu Khan (D.W.-2), Dharmendra Singh Sengar (D.W.-3) and Dr. Rizwana Khatun (D.W.-4) have been examined as defence witnesses.

13. After appreciating the evidence available on record, learned Court below recorded finding of conviction against the accused-Asif for the offence under Section 377 IPC and 3(2)V SC-ST (Prevention of Atrocities) Act.

14. It has been argued on behalf of the accused-appellant-Asif that there is enmity between the family of the accused and the informant. The son of the informant has assaulted the accused-Asif prior to the alleged incident. The accused is innocent and has been falsely implicated on the basis of enmity.

15. Further submission is that no definite opinion of commission of unnatural offence has been recorded by the P.W.-4 Dr. Rizwana Khatoon. P.W.-3 who has

conducted the medical examination of the accused has also made an observation that there is no mark of injury on the front portion of the penis. Injury should have been caused on the front portion of the penis in the event of unnatural offence. No faecal matter was found present on the front portion of the penis. On the basis of observation made by P.W. 3 and P.W.-4, it has been argued that the entire prosecution version stands falsified in view of the medical opinion. It has further been submitted that P.W.-2 has given the statement on the basis of the instructions given to her. It has been submitted on behalf of the defence that offence under Section 3(2)V SC-ST (Prevention of Atrocities) Act was not made out.

16. Refuting the statement made by the counsel for the appellant, it has been argued by learned AGA that it is a broad day light incident. The FIR of the incident has promptly been lodged with the police. The medical evidence can be interpreted in favour of the prosecution. P.W.-1-informant, P.W.-2-victim girl and P.W.-6 namely Mewa Ram, who are the witnesses of fact have fully corroborated the prosecution version and guilt has been established beyond reasonable doubt.

17. While deciding the appeal by the High Court, it is to be guided by the principle laid down by Hon"ble Apex Court from time to time. The Hon"ble Apex Court has propounded the following principles in Padam Singh Vs. State of U.P., AIR 2000 SC 361 : (2000) CriLJ 489 : (1999) 9 JT 351 : (1999) 7 SCALE 268 : (2000) 1 SCC 621 : (1999) 5 SCR 59 Supp : (1999) AIRSCW 4492 : (1999) 9 Supreme 545 , which is quoted here:

"it is the duty of an appellate Court to look into the evidence adduced in the case and arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even if it can be relied upon, then whether the prosecution can be said to have been proved beyond reasonable doubt on the said evidence. The credibility of a witness has to be adjudged by the appellate Court in drawing inference from proved and admitted facts. It must be remembered that the appellate Court, like the trial Court, has to be satisfied affirmatively that the prosecution case is substantially true and the guilt of the accused has been proved beyond all reasonable doubt as the presumption of innocence with which the accused starts, continues right through until he is held guilty by the final Court of appeal and that presumption is neither strengthened by an acquittal nor weakened by a conviction in the trial Court."

18. Further guidelines have been issued by the Hon"ble Apex Court in case of Rama and others v. State of Rajasthan, 2000 (4) SCC 571, which is as under:

"It is well-settled that in a criminal appeal, a duty is enjoined upon the appellate Court to reappraise the evidence itself and it cannot proceed to dispose of the appeal upon appraisal of evidence by the trial Court alone especially when the appeal has been already admitted and placed for final hearing. Upholding such a procedure would amount to negation of valuable right of appeal of an accused, which cannot be permitted under law."

19. The guidelines have been issued by three Judges Bench of the Hon"ble Apex Court in case of Majjal Vs. State of Haryana, (2013) CriLJ 3999 : (2013) 4 JCC 2796 : (2013) 4 RCR(Criminal) 474 : (2013) 8 SCALE 129 : (2013) 6 SCC 798 : (2013) AIRSCW 4961 : (2013) AIRSCW 4583 , which is as under:

"It was necessary for the High Court to consider whether the trial Court's assessment of the evidence and its opinion that the appellant must be convicted deserve to be confirmed. This exercise is necessary because the personal liberty of an accused is curtailed because of the conviction. The High Court must state its reasons why it is accepting the evidence on record. The High Court's concurrence with the trial Court's view would be acceptable only if it is supported by reasons. In such appeals it is a Court of first appeal. Reasons cannot be cryptic. By this, we do not mean that the High Court is expected to write an unduly long treatise. The judgment may be short but must reflect proper application of mind to vital evidence and important submissions which to the root of the matter."

20. The aforesaid observations have been quoted by the Hon"ble Apex Court in a very recent judgment in the case of Kamlesh Prabhudas Tanna and Another Vs. State of Gujarat, (2013) 9 AD 188 : (2014) CriLJ 443 : (2013) 3 DMC 358 : (2013) 10 SCALE 676 .

21. Keeping in view the propositions cited above, the Court is to scrutinize the evidence available before it and to draw the inference accordingly, bearing in mind the presumption of innocence of accused unless otherwise is established from evidence available on record without being influenced by the findings recorded by learned trial Court.

22. It has been submitted that false implication of the accused is a consequence of enmity with the informant. The informant was having hens at his house who frequently entered into the house of the accused. There has been altercation between the family of the accused and the informant. It has come in the evidence of P.W.-3 that Sunil and Asif studied together but the factum of assault as suggested by the defence has been denied by the witnesses. It has been denied by P.W.-1 that because of enmity Asif was pulled out from the house and was beaten and thereafter taken to the police station. P.W.-1 has also denied the suggestion of falsely implicating the accused on the score of enmity. P.W.-6 has denied the suggestion of giving false deposition being relative of the informant Jai Ram.

23. The grounds of enmity regarding entry of hens of informant in the house of the accused is not an issue of importance. It has been admitted by P.W.-1 that Sunil son of informant and Asif studied together and as such even for argument sake, if presumed that there has been an assault, it cannot be treated to be such a high magnitude for informant that he would like to caste a life time stigma of sexual assault on his own daughter and on his family just to settle the score with the accused. Even for argument sake, the enmity is taken to be true, even then

it cannot be presumed that appellant has been falsely implicated unless and until there are other circumstances to substantiate the plea of false implication. On the contrary such enmity may be the consideration for taking revenge whereby the accused might have been persuaded to commit the offence with the daughter of the informant i.e. the victim girl. This probability cannot be ruled out. The enmity is such a plea which can be interpreted either way. No specific instance of entry of the hens into the house or its frequency or the details of the assault committed by Sunil has been disclosed by any direct, specific and cogent evidence. In absence of such evidence, no definite inference can be drawn. As such we are of the considered opinion that plea of enmity is not of much avail for the appellant.

24. It has been contended on behalf of the appellant that the factum of commission unnatural offence with the victim-girl by the accused appellant-Asif has not been substantiated by the medical examination report. It appears appropriate to consider the ocular evidence and the testimony of the victim girl and to appreciate the medical evidence so as to draw the correct inference on this aspect.

25. In sexual assault case, the victim of the sexual assault is always treated to be star witness. She has categorically stated that she was called by accused Asif on the pretext of viewing T.V. and she was taken to his house. The appellant was known to the victim girl. Her underwear was undressed by the accused appellant. Thereafter he started "gunda baji". She further explained such act of the appellant in her own words. Then the blood started coming out from the anus due to the act of the appellant. She categorically mentioned the names of those persons who reached the spot on hearing her shrieks. The statement of the victim was recorded in the year 2002 whereas the incident took place in the year 1999. The age of the victim girl has been mentioned as 8 years on the date of recording on oath statement. The incident relates back to three years then she was approximately five years of age. The testimony of the witness has been assailed on the ground that she was a tutored witness. She was instructed by her father. Accordingly, she gave the statement to the Dagoraji (police officer) and thereafter in the Court. The age of the child is material in this regard. She was hardly about five years.

26. P.W.-2 has categorically denied the suggestion of the defence (Yeh Kahna Galat Hai Ki Asif Ne Mere Sath Gunda Bazi Nahi Kiya). This clearly indicates that the prosecutrix/victim was definite about allegation which was made against accused-appellant. Considering her age, her testimony cannot be discarded on the ground that she is a child. This aspect of the matter has already been considered by the Hon''ble Apex Court from time to time and the Hon''ble Apex Court has been pleased to propound the guidelines in this regard.

27. In the cases of Shivasharanappa and others v. State of Karnataka and Jagadevappa and other v. State of Karnataka and others decided on 7.5.2013 in Criminal Appeal No. 1366 of 2007 and Criminal Appeal No. 508 of 2007

respectively in paragraph 16 of the judgment, the Hon''ble Apex Court has propounded as follows:

"Thus, it is well-settled in law that the Court can rely upon the testimony of a child witness and it can form the basis of conviction if the same is credible, truthful and is corroborated by other evidence brought on record. Needless to say, the corroboration is not a must to record a conviction, but as a rule of prudence, the Court thinks it desirable to see the corroboration from other reliable evidence placed on record. The principles that apply for placing reliance on the solitary statement of witness, namely, that the statement is true and correct and is of quality and cannot be discarded solely on the ground of lack of corroboration, applies to a child witness, who is competent and whose version is reliable."

28. In the case of Alagupandi @ Alagupandian v. State of Tamil Nadu, in reference to Criminal Appeal No. 1315 of 2009 decided on 8.5.2012, the Hon''ble Apex Court in paragraph 23 has pleased to observe as follows:

"It is a settled principle of law that a child witness can be a competent witness provided statement of such witness is reliable, truthful and is corroborated by other prosecution evidence."

29. In the case of State of Rajasthan v. Chandgi Ram and others, reference to Criminal Appeal No. 937 of 2008 decided on 9.9.2014 the Hon''ble Apex Court has highlighted the safeguards, which the Courts should undertake for appreciating the evidence of a child witness. The safeguards have been disclosed in paragraph 11, which are being reproduced below:

"The evidence of a child must reveal that he was able to discern between right and wrong and the Court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The Court may ascertain his suitability as a witness by putting questions to him [pic] and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on oath and the import of the questions that were being put to him. The law on the issue can be summarised to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the Court and there is no embellishment or improvement therein, the Court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition. It is well-settled in law that the Court can rely upon the testimony of a child witness and it

can form the basis of conviction if the same is credible, truthful and is corroborated by other evidence brought on record. Needless to say, the corroboration is not a must to record a conviction, but as a rule of prudence, the Court thinks it desirable to see the corroboration from other reliable evidence placed on record. The principles that apply for placing reliance on the solitary statement of the witness, namely, that the statement is true and correct and is of quality and cannot be discarded solely on the ground of lack of corroboration, apply to a child witness who is competent and whose version is reliable."

30. In view of above propositions laid down from time to time it can safely be discerned that for appreciating the evidence of a child witness it must be kept in mind that the testimony of a child witness should be credible, truthful and it should inspire confidence. Corroboration by an independent witness is a rule of prudence and it is not a cogent precedent for discarding the evidence of a child witness. Reliance can be placed upon the solitary statement of a child witness if, the statement is true and correct and is of quality and her deposition is found to be reliable and is away from the shadow of tutoring.

31. The testimony of P.W.-2 appears to be natural, direct, cogent, credible and reliable and inspires confidence. The reliance can be placed for drawing inference about the veracity of the prosecution version. There is absence of animus against the appellant for giving false evidence.

32. Even for argument sake, if it is presumed that her father narrated her the incident and asked her to depose the facts, I think we are of the opinion that considering the age of the victim girl, it cannot be treated to be tutoring. She has fully corroborated the FIR version. The factual situation cannot be ignored that asking a small kid of 5 years to depose correctly or to give the correct narration of incident would not amount to tutoring. More so it is the settled proposition of law that testimony of prosecutrix has been assigned the importance like an injured witness.

33. Jai Ram (P.W.-1) who is the informant has proved the execution of the tahriri report Ext. Ka-1 and has fully corroborated the FIR story regarding date, time, place, manner of occurrence and by whom offence has been committed. He has also narrated that on the pretext of viewing the T.V., her daughter was allured and was taken by the accused appellant on the top of the house where the incident of unnatural offence was committed by the accused appellant. He has also disclosed the manner that when the victim girl/prosecutrix raised alarm, on hearing her shrieks he went to the top of his house and saw the incident and rushed to the spot alongwith his wife and P.W.-6. Accused Asif was found committing unnatural sexual act. The accused was apprehended on the spot and was taken to the police station alongwith the prosecutrix/victim girl.

34. The witness was put to a cross-examination. Nothing could be extracted from the witness by way of cross-examination which may have the oblique impact on the veracity of his statement recorded in Court and the prosecution version as

well.

35. P.W.-6 has been examined as an eye-witness. He has fully corroborated the date, time, place and manner of occurrence and has also stated by whom it has been committed. He has also seen the incident of committing sexual assault by the accused Asif with the victim/prosecutrix. He further corroborated the fact that the accused was apprehended on the spot and was taken to the police station alongwith the prosecutrix/victim and was handed over to the police. The witness was also put to a cross-examination. He has not made any admission in the cross-examination which may prejudice the statement of the witness recorded as in chief or the prosecution case as disclosed in the FIR. There is no inconsistency or material contradiction in the examination in-chief and in cross-examination of P.W.-1. No material contradiction or inconsistency in the examination in-chief and cross-examination of P.W.-2 and P.W.-6 could be brought to our notice during arguments. There is inter se , coherence and consistency in the testimony of P.W.-1, P.W.-2 and P.W.-6 with respect to date, time, place, manner of occurrence and by whom the offence has been committed.

36. It has been admitted by P.W.-6 that he is the relative of the P.W.-1. P.W.-1 is the father of P.W.-2 (prosecutrix/victim girl). It has vehemently been argued that all the witnesses of fact are inter se related. So their evidence cannot be taken to be true, fair and free from bias.

37. The matter of appreciation of evidence of related witness has from time to time been considered by the Hon''ble Apex Court in the case of Shiv Ram and Another Vs. State of U.P., AIR 1997 SC 3996 : (1998) CriLJ 76 : (1997) 8 JT 500 : (1997) 6 SCALE 466 : (1998) 1 SCC 149 : (1997) 4 SCR 531 Supp , wherein it has been opined that nowadays it is common tendency that no outsider would like to get involved in a criminal case much less in the crime of present magnitude. Therefore, it is quite natural that no independent witness will come forward to assist the prosecution. It is well-settled that the evidence of witnesses cannot be discredited only on the ground that they are close relatives of the deceased person. But, what is required is that the Court must scrutinize the evidence with utmost care and caution. Time and again, it has also been stated by the Hon''ble Apex Court that civilized people are in general insensitive when the crime is committed even in their presence, they withdraw themselves from both victim and the assailants. They keep themselves away from the Court. Evidence has to be appreciated keeping in view such ground realities. The Court instead of doubting prosecution case when no independent witness has been examined must consider the broad spectrum of the prosecution version and then search for nugget of truth with doubt of probability, if any suggested by the accused.

38. In the case of Kuria and Another Vs. State of Rajasthan, AIR 2013 SC 1085 : (2012) CriLJ 4707 : (2012) 4 JCC 2644 : (2012) 9 JT 296 : (2013) 2 RCR(Criminal) 108 : (2012) 9 SCALE 42 : (2012) 10 SCC 433 : (2012) AIRSCW 5259 , it has been held in paragraph No. 34 as under:

"The testimony of an eye-witness, if found truthful, cannot be discarded merely because the eye-witness was a relative of the deceased. Where the witness is wholly unreliable, the Court may discard the statement of such witness, but where the witness is wholly reliable or neither wholly reliable nor wholly unreliable (if his statement is fully corroborated and supported by other ocular and documentary evidence), the Court may base its judgment on the statement of such witness. Of course, in the latter category of witnesses, the Court has to be more cautious and see if the statement of the witness is corroborated. Reference in this regard can be made to the case of Sunil Kumar Vs. The State Govt of NCT of Delhi, (2004) CriLJ 819 : (2003) 2 JT 426 Supp : (2003) 8 SCALE 633 : (2003) 11 SCC 367 : (2003) 4 SCR 767 Supp , Brathi alias Sukhdev Singh Vs. State of Punjab, AIR 1991 SC 318 : (1991) CriLJ 402 : (1991) 1 Crimes 74 : (1991) 5 JT 217 : (1991) 1 SCC 519 : (1990) 2 SCR 503 Supp and Alagupandi @ Alagupandian Vs. State of Tamil Nadu, AIR 2012 SC 2405 : (2012) CriLJ 3363 : (2012) 5 SCALE 595 : (2012) 10 SCC 451 : (2012) AIRSCW 3479 ."

39. From the law laid down by the Apex Court from time to time it can safely be deduced that the testimony of related or interested witness as a whole cannot be discarded but, a heavy duty is cast upon the Courts to appreciate the evidence with utmost care and caution.

40. The evidence of P.W.-1, P.W.-2 and P.W.-6 cannot be discarded merely on the basis of their relationship. There is complete consistency and coherence in the testimony of P.W.-1, P.W.-2 and P.W.-6 on the material points. No material contradiction on any vital points on prosecution version has been pointed out in reference to deposition of P.W.-1, P.W.-2 and P.W.-6 which may impair the evidentiary value of the witnesses. The testimony of P.W.-2 has been duly corroborated by the evidence of P.W.-1, P.W.-2 and P.W.-6. On critical appraisal and assessment of the testimony of witnesses of fact we are of the considered view that their evidence is credible, reliable and trust worthy. There is no legal impediment in placing reliance upon these witnesses and their evidence falls within the purview of wholly reliable.

41. So far as the medical evidence regarding the factum of sexual assault is concerned, the doctor P.W.-3 in his statement has denied any injury on the front part of the penis and he has also made an observation about the absence of faecal particles on the penis. P.W.-4 Dr. Rizwana has conducted the medical examination of the victim-prosecutrix. On the inspection of anal and perianal region, she has made an observation about of presence of dry blood stains on perianal region and at buttocks. Anal orifice irritable too tender to touch. Bruising seen around anal orifice and perianal region Radial fissure of mucous membrane of anus seen at post aspect measuring 1 c.m. Lowest part of anal canal showing injury of 1/2 c.m. of post anal mucosa. Slight oozing of blood seen from injury. She has stated in her statement that there was no injury on anal canal. Further she stated in her opinion that injuries were found on anal and perianal region of the girl. She has opined that it is difficult to give an opinion whether unnatural

intercourse has been done with the girl or not. Later in her cross-examination, she has stated that the injuries might have been caused by this sexual assault or by unnatural intercourse with the girl. In her cross-examination, she has stated that in absence of presence of sperm, no definite opinion can be given about the alleged sexual assault. She has categorically denied the defence suggestion that such injuries may be caused due to dysentery.

42. From the testimony of P.W.-4, it is evident that the injuries have been caused in anal and perianal region of the victim girl. Dr. F.A. Khan (C.W.-1), Senior Scientific Assistant Forensic Science Laboratory, Lucknow has categorically mentioned the presence of sperm on the underwear of the victim girl and the underwear of the accused. Further he has clarified the presence of the sperm and semen. Thus, the medical opinion regarding the injuries caused on the anal and perianal region of the victim girl finds support from the chemical analysis report of Forensic Science Laboratory. The observation of P.W.-4 that no definite opinion of unnatural sexual intercourse can be given in the absence of signs of presence of sperm and semen whereas the presence of semen and sperms have been specifically mentioned in report of Forensic Laboratory. This aspect goes against the accused-appellant and makes a positive support to prosecution version. The testimony of victim and eye-witnesses i.e. P.W.-1, P.W.-2 and P.W.-6 finds complete support from the medical and chemical analysis report of Forensic Science Laboratory. Evaluating the oral evidence as well as medical evidence and the chemical analysis report, it all goes to prove the FIR version of sexual assault by accused Asif with the victim girl.

43. It has been argued that the injuries sustained by the accused Asif have not been explained. The law on the point has been established such plea has to be considered keeping in mind the entire facts and circumstances of the case. In the instant case, the factum of sexual offence/sexual intercourse has been established by the testimony of P.W.-1, P.W.-2 and P.W.-6 as well as medical examination report and the evidence of the Court witness-Dr. F.A. Khan. Mere on the score of non explanation of the injuries would not amount to rejection of the whole prosecution case. It is noteworthy that on the examination by the doctor P.W.-3, he did not notice the presence of semen or sperm on the penis of the accused whereas the presence of semen and sperm have been mentioned in the chemical analysis report of Forensic Science Laboratory from the underwear of the accused. Thus, we are of the considered opinion that in the facts and circumstances of the case, this omission on the part of the prosecution would not prove to be fatal for it. Apart from it there were very superficial injuries on the body of the appellant. It is an established fact that he was apprehended on the spot by the witnesses. Such type of superficial injuries appears to have been caused while apprehending the appellant.

44. It has been submitted on behalf of the accused appellant that unnatural offence was not committed for the reason that victim girl/prosecutrix belongs to the Scheduled Caste or Scheduled Tribes community. Hence the conviction under

Section 3(2)V SC-ST (Prevention of Atrocities) Act cannot be sustained. For appreciation of argument it would be appropriate to see the legislative and judicial provisions of law.

45. For appreciation of the commission of the offence under Section 3(2)(5) SC/ST Act, it would be appropriate to have a glance over the *Dinesh @ Buddha Vs. State of Rajasthan*, AIR 2006 SC 1267 : (2006) CriLJ 1679 : (2006) 3 JT 66 : (2006) 2 SCALE 734 : (2006) 3 SCC 771 : (2006) 1 UJ 340 : (2006) AIRSCW 1123 : (2006) 2 Supreme 363 . The observation of the Hon"ble Apex Court are reproduced here below:

"16. Sine qua non for application of Section 3(2)(v) is that an offence must have been committed against a person on the ground that such person is a member of Scheduled Castes and Scheduled Tribes. In the instant case no evidence has been led to establish this requirement. It is not case of the prosecution that the rape was committed on the victim since she was a member of Scheduled Caste. In the absence of evidence to that effect, Section 3(2)(v) has no application. Had Section 3(2)(v) of the Atrocities Act been applicable then by operation of law, the sentence would have been imprisonment for life and fine.

17. In view of the finding that Section 3(2)(v) of the Atrocities Act is not applicable, the sentence provided in Section 376(2)(f), IPC does not per se become life sentence."

46. Hon"ble Supreme Court in *Ramdas and Others Vs. State of Maharashtra*, AIR 2007 SC 155 : (2006) 11 SCALE 340 : (2007) 2 SCC 170 , has held as under:

"8. At the outset we may observe that there is no evidence whatsoever to prove the commission of offence under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The mere fact that the victim happened to be a girl belonging to a Scheduled Caste does not attract the provisions of the Act. Apart from the fact that the prosecutrix belongs to the Pardhi community, there is no other evidence on record to prove any offence under the said enactment. The High Court has also not noticed any evidence to support the charge under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and was perhaps persuaded to affirm the conviction on the basis that the prosecutrix belongs to a Scheduled Caste community. The conviction of the appellants under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 must, therefore, be set aside."

47. From the perusal of above proposition of law, it is clear that for appreciating Section 3(2)(5) SC/ST Act, it is essential that the offence should have committed because the victim belonged to a SC/ST community with the intention to denigrate her position as being the member of the SC/ST community. Nowhere the evidence to this effect has been led that the prosecutrix was victimized because she belonged to the SC/ST community. In absence of such evidence we are of the considered opinion that the offence under Section 3(2)(5) SC/ST Act

would not be made out.

48. Before parting with the judgment we think it necessary to observe that Section 3(2)V of the SC-ST Act does not define any substantive offence but it only provide for enhanced punishment when an offence is committed under given circumstances stated therein. So the trial Court ought not to have convicted the appellant under Section 3(2)V SC-ST Act separately. But if any offence is made out which was committed under the specified conditions then accused can be convicted for that offence and read with Section 3(2)V SC-ST Act he shall be inflicted with enhanced punishment provided under this section.

49. In this case, the prosecution has not set up the case that the prosecutrix was subjected to sexual assault because she belongs to a Scheduled Caste and Scheduled Tribe community. The assault was not committed because she was member of particular caste. Learned AGA during the course argument has conceded the absence of evidence in this regard.

50. So far as the defence is concerned, D.W.-1 and D.W.-2 has stated that if any such incident of sexual assault might have been committed with the victim girl then he must had the knowledge. Simply he has stated that hens used to intrude the house of the accused-appellant. The testimony of D.W.-1 and D.W.-2 is based on hypothesis. They lack any definite information as such their testimony do not inspire confidence. D.W.-4 is a doctor who has conducted medical examination of the victim girl. She has again reiterated the factum of medical examination of victim. She has opined that the injuries may be caused by fallen of a hard object. This part of the testimony does not inspire confidence because the presence of bruises have been noted by the doctor in an around orifice and perianal region. This part appears to be incoherent with the medical examination report. Nothing has been submitted by the learned AGA how the witness has been examined as defence witness when she has already been examined as a prosecution witness. Moreso, if her presence was required by any side either for the purpose of re-examination or cross-examination then the appropriate application could have been moved under Section 311 Cr.P.C. D.W.-3 is the college staff who has deposited copy of the S.R. register. The evidence led in defence is not of much avail for the accused-appellant. Neither any other point has been argued or pressed on behalf of the appellant's counsel.

51. It has been submitted on behalf of the accused appellant that in the event the learned Court confirms the finding of conviction recorded against the appellant then a lenient view may be adopted considering the mitigating circumstances. It has been submitted that accused-appellant is in jail after conviction. He is a poor man. It has been submitted on behalf of the appellant that he is a young boy. He has no criminal history at his credit. He belongs to a very poor family. His father is also a very poor man. If he is released from the jail, he will earn money which would be helpful for the family. His father and mother are old persons. Thus, he would be of helpful for them.

52. After critical appraisal of the prosecution case and the evidence available on record, we are of the considered opinion that the finding of conviction recorded by the learned Court below for the offence under Section 377 IPC do not require any interference whereas the finding recorded with respect to offence under Section 3(2)V Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act requires interference. The appeal deserves to be allowed partly.

53. The appeal is partly allowed. The conviction of accused-Asif for the offence under Section 377 IPC is affirmed and sentence is modified to R.I. for 10 years and fine of Rs. 5000/- with default stipulation of 6 months" S.I. The conviction and sentence awarded for the offence under Section 3(2)V Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act is hereby set aside.

54. The accused-appellant is in jail. He shall serve out the sentence awarded by this Court. He shall be entitled to get the benefit of commutation for the period already spent in jail as per provisions of Code of Criminal Procedure. Let copy of the judgment alongwith lower Court record be transmitted forthwith to learned Court below for compliance.