

(2012) 09 BOM CK 0017

In the Bombay High Court

Case No : Criminal Appeal No. 468 of 1996

Hanif Abdul Kadir Gondekar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 11-09-2012

Acts Referred:

Penal Code, 1860 (IPC) — Section 354, 509

Protection of Civil Rights Act, 1955 — Section 7(1)(d)

Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 —
Section 3(1)(xi), 3(xi)

Citation : (2013) ALLMR(Cri) 1814

Hon'ble Judges : R.C. Chavan, J

Bench : Single Bench

**Advocate : Ganesh Gole assisted with Ms. Gulestan Dubhesh, for the Appellant;
Y.M. Nakhwa, APP, for the Respondent**

Judgement

R.C. Chavan, J.—This appeal is directed against appellant's conviction by the learned Special Judge, Alibaug, District-Raigad for the offence punishable u/s 3(xi) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and sentence of rigorous imprisonment for two years with a fine of Rs. 2000/- or in default rigorous imprisonment for six months imposed upon the appellant on conclusion of Special Case No. 23 of 1994 before him. Facts which are material for deciding this appeal are as under:-

The victim, a ten years old girl had been sent by her parents to the shop of the appellant for purchasing some colour on 16th August, 1994 at 6:30 p.m. to 6:45 p.m.. The appellant allegedly showed her some nude photographs and touched her breast and private parts. She came back and reported the matter to her mother. Her parents first tried to take her to the appellant's shop to confront the appellant, who was not found. Eventually, a report was given to the police whereupon an offence was registered and investigation commenced. In course of investigation, police arrested the appellant and seized obscene photographs. They recorded statements of witnesses and on completion of investigation, sent

charge sheet to the Court of Special Judge, Alibaug, District-Raigad.

2. The learned Special Judge charged the appellant for the offences punishable under Sections 354 and 509 of the Indian Penal Code, Section 3(1)(xi) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and Section 7(1)(d) of the Protection of Civil Rights Act, 1955. Since the appellant pleaded not guilty, he was put on trial at which the prosecution examined in all 9 witnesses in its attempt to bring home guilt of the appellant. After considering the prosecution evidence, in the light of defence of denial, the learned Special Judge convicted and sentenced the appellant as aforementioned. Aggrieved thereby, the appellant is before this Court.

3. I have heard the learned counsel for the appellant and the learned Additional Public Prosecutor for the State. With the help of both the learned counsel I have gone through the evidence on record. The learned counsel for the appellant first submitted that the entire investigation and trial was vitiated, since investigation was not conducted by Deputy Superintendent of Police. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 provides for framing of rules. Accordingly, rules have been framed. Rule 7 of those rules provides that an offence under the Act shall be investigated by the Officer not below the rank of Deputy Superintendent of Police. Such investigating officer has to be appointed by the State Government or Director General of Police or Superintendent of Police after taking into account the past experience, ability and sense of justice, implications of the case and ability to investigate the offence along the right lines within the shortest possible time. In this case, the investigation was carried out by PSIs PW-8 Vijaya Yashwant Bagade, PW-9 Madhukar Murlidhar Chandane and PW-10 Ashok Dattatraya Sawant. Of them, PW-10 Ashok Sawant had sent charge sheet. Though the learned Additional Public Prosecutor submitted that there is a reference to the Sub-Divisional Police Officer in the evidence of PW-9 Madhukar Chandane, there is nothing on record to show that Sub-Divisional Police Officer, in fact, carried out investigation. Since investigation itself was not carried out as provided by Rule 7 of the rules framed under the Act, the learned counsel for the appellant may be right in submitting that conviction of the appellant for the offence punishable u/s 3(1)(xi) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 cannot be sustained.

4. That apart, the learned counsel for the appellant pointed out that in this case, victim's father PW-1 Haribhau Pandurang Gade and victim's mother PW-3 Nirmala Haribhau Gade have not at all supported the prosecution case and were turned hostile. It appears that PW-1 Haribhau Gade had been serving in police department for some time. Thus, it is not that he was not conversant with the procedure in the department. He stated that the complaint was lodged out of some misunderstanding and his inquiry with his daughter revealed that the appellant had only provided Chocolate to his daughter and not made any indecent advances. The victim, who was examined as PW-2, however, stated that the appellant took her inside the shop, showed her some nude photographs and

then touched her breast and private parts with his hand. Thereafter, she claims to have come out of the shop. She, however, admitted in her cross examination that she had not stated before lady PST PW-8 Vijaya Bagade that the appellant had touched her breast and private parts, though she also denied that the appellant had not done so.

5. PW-8 lady PSI Vijaya Yashwant Bagade categorically stated that the victim had not stated before her that the appellant had touched her breast and private parts. Thus, it is clear that the disclosure by the victim about the incident omitted any reference to any indecent assault.

6. PW-4 Pradip Gajanan Bania, PW-5 Santosh Kamlakar Vajantri and PW-6 Meghshyam Kamlakar Zaware, who are panchas have turned hostile. PW-7 Dungal Govind Lendait, head constable had recorded report of PW-1 Haribhau Gade vide Exhibit No. 10. PW-9 PSI Madhukar Chandane had proved panchanamas recorded by him in course of investigation. One of those panchanamas at Exhibit No. 21 is about seizure of obscene photographs. This panchanama shows that the photographs were produced by the appellant. However, the witness categorically stated in para 3 of his deposition that the appellant was, in fact, in police custody at that time and the photographs were handed over to him by Sub-Divisional Police Officer. PW-10 Ashok Dattatraya Sawant had simply filed charge sheet.

7. The learned trial Judge had not believed the evidence about victim being shown any obscene photographs with the intent to outrage modesty of the victim. The learned Judge, however, believed the word of victim about an assault to outrage modesty of the victim when such evidence was not supported by the word of victim's own parents. Apart from this, PW-8 Vijaya Bagade, who had recorded statement of the victim immediately after the incident stated that the victim had not referred to any such indecent assault and in fact, the victim too had admitted that she had not so reported to the PSI. If that be so, it is difficult to understand as to how the appellant could have been held guilty for the offence punishable u/s 354 of the Indian Penal Code or 3(1)(xi) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. In view of this, conviction of the appellant for the offence punishable u/s 3(1)(xi) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 cannot be sustained. The appeal is, therefore, allowed. Conviction of the appellant for the offence punishable u/s 3(1)(xi) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and sentence of rigorous imprisonment for two years with a fine Rs. 2000/- or in default rigorous imprisonment for six months is set aside. He is acquitted of the said offence.