

(2019) 01 BOM CK 0090
In the Bombay High Court
Case No : Criminal Appeal No. 636 Of 2005

Raju Dashrath Sadar And Ors

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 22-01-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 294, 319, 323, 324, 504, 506
Scheduled Castes And Scheduled Tribes (Prevention Of Atrocities) Act, 1989 — Section 3(1)(x)
Protection Of Civil Rights Act, 1955 — Section 7(d), 7(1)(d)
Code Of Criminal Procedure, 1973 — Section 107, 438

Citation : (2019) 01 BOM CK 0090

Hon'ble Judges : V.M. Deshpande, J

Bench : Single Bench

Advocate : S. Joshi, S.V. Kolhe

Final Decision : Allowed

Judgement

V. M. DESHPANDE, J.

1. Present appeal is directed against judgment and order of conviction passed by learned 2nd Ad hoc Additional Sessions Judge, Washim dated 28.11.2005 in Atrocity Case No. 10/2005. By the impugned judgment and order of conviction, appellant no.1-Raju Sadar is convicted for an offence punishable under Section 323 of the Indian Penal Code (IPC) and is directed to suffer rigorous imprisonment for three months and to pay a fine of Rs.500/- and in default of payment of fine, to suffer further simple imprisonment for 15 days.

Appellant no.1-Raju, appellant no.2-Suresh, appellant no.3-Bharat and appellant no.4-Ganesh are convicted for an offence punishable under Sections 294, 506 read with Section 34 of the IPC and under Section 3 (1) (x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Atrocities Act). For offence under Section 294 of IPC each of them is directed to suffer simple imprisonment for three months and to pay a fine of Rs.500/-. For offence

punishable under Section 506 read with Section 34 of IPC they are directed to suffer simple imprisonment for three months and to pay a fine of Rs.500/-, in default of payment of fine, to suffer simple imprisonment for 15 days.

For the offence punishable under Section 3 (1) (x) of the Atrocities Act they are directed to suffer simple imprisonment for six months and to pay a fine of Rs.1,000/-, in default to suffer simple imprisonment for one month.

2. The case of the prosecution is in short compass and is stated hereunder:

(i) On 03.12.2004, ASI Shyamrao Rathod (PW4) was attached to Police Station, Shirpur. On the said day, Devidas (PW1) came and lodged his oral report, Exh.17. After lodgment of report, ASI Shamrao (PW4) registered an offence vide Crime No.234/2004 for the offence punishable under Section 323, 294, 504, 506 read with Section 34 of the IPC and under Section 3 (1) (x) of the Atrocities Act and under Section 7 (1) (d) of the Protection of Civil Rights Act.

(ii) As per the oral report dated 03.12.2004, complainant borrowed an amount of Rs.2500/- from Raju Sadar on 13.12.2003. The loan was to carry an interest. First informant gave one blank Stamp Paper to appellant- Raju, having his thumb impression and also thumb impression of his wife. As per the agreement, first informant used to pay Rs.175/- per month towards interest and it was decided that the principal amount should be repaid at the time of Diwali festival. It is also stated in the FIR that on 02.11.2004 at 7 O'clock, Raju came to his house and asked him to accompany to the cattle shed and asked him as to what arrangement he has made for repayment of money. Upon that, it was replied by the first informant that he is ready to repay and will arrange for the same by 20th. However, on that Raju asked him that he should give tin- sheets of his house at that time only. As per the oral report, when he refused to agree for the same, Raju started beating him with slaps and kicks. First informant got himself rescued from the clutches of appellant-Raju and he started running. Thereafter, Raju called his brother and asked him to catch the first informant by using abusive language in the name of his caste. He was caught by hands and legs by Suresh Sadar, Bharat Sadar and Ganesh Sadar and they used abusive language in the name of caste. According to the FIR, this incident has occurred on road. With these allegations in the FIR, the offence was registered.

(iii) Since the offence was registered for the penal provision of Atrocities Act, case diary of Crime No.234/2004 was entrusted to S.D.P.O. Saiyad Mujjaffaruddinn Khan (PW5). He recorded statements of witnesses. He prepared spot panchanama on 04.12.2004 at Exh.-28. According to the investigating agency, as the complainant belongs to Scheduled Caste whereas the appellants are Maratha, an upper caste, charge-sheet was filed in the Court of law.

(iv) Learned Additional Sessions Judge, Washim framed charge against appellants for an offence punishable under Sections 324, 294, 506 read with Section 34 of the IPC and under Section 3 (1) (x) of the Atrocities Act. No charge under Section 7 (d) of the Protection of Civil Rights Act, was framed.

(v) In order to bring home guilt of accused, prosecution has examined five witnesses. They are Devidas Kamble (PW1), Vimal Kamble (PW2), Jaishree Kamble (PW3), ASI Rathod (PW4), who registered the offence and SDPO Saiyad Mujjaffaruddin Khan (PW5), who had conducted the investigation.

(vi) After appreciation of the prosecution case, Court below passed the impugned judgment. Hence, this appeal.

3. I have heard Mr. S. G. Joshi, learned counsel for the appellants and Mrs. S. V. Kolhe, learned A.P.P. for the State. With their able assistance, I have gone through record and proceedings.

4. According to the learned counsel for appellants, though as per the FIR, incident has occurred on 02.11.2004, the FIR is lodged on 03.12.2004. Thus, there is enormous delay in lodging the FIR.

5. Another limb of submission of learned counsel is that assuming that prosecution case is true, as per the complainant's evidence, though offence is alleged to have been committed on the road but it was not committed within "Public View". Therefore, appellant cannot be convicted for the offence under the Atrocities Act. Third limb of submission of the learned counsel for appellants is that in absence of any medical examination of complainant by medical officer and absence of injury certificate, the prosecution has utterly failed to prove the ingredients of Section 323 IPC. He, therefore, submitted that the appeal be allowed.

Per contra, Mrs. Kolhe, learned A.P.P. vehemently submitted that in view of consistent evidence of Devidas (PW1), his wife Vimal (PW2) and daughter Jaishree (PW3), prosecution has proved the utterances in the name of caste at public place and therefore the Court below was right in convicting appellants. She, therefore, submitted that the appeal be dismissed.

6. According to the FIR dated 03.12.2004, incident has occurred on 02.11.2004. Thus, on the face of FIR itself, there is delay of one month. Merely because there is a delay, that by itself is not sufficient for not considering the prosecution case on its own merit. When there is a delay, it is always open for the prosecution to explain the delay properly either at the stage of inquiry, investigation or during the course of trial.

7. Though, FIR is lodged for incident dated 02.11.2004, the FIR is conspicuously silent as to why there occurred delay. Thus, at the stage of lodging the report, first informant could not offer and rather did not offer any explanation for lodging report at belated stage. Investigation is done by Shyamrao (PW4) and Saiyad Mujjaffaruddin Khan (PW5). Role of Shyamrao (PW4) though limited to registration of offence on the basis of oral report, Exh.-17, his evidence is silent that at the time of obtaining oral report of complainant Devidas, he made inquiries with him regarding the reason for lodging the report belatedly.

8. Investigation was conducted by SDPO Saiyad Mujjaffaruddin (PW5). Thus,

investigation was conducted by Senior Police Officer. His evidence is also silent that during the course of investigation, he made attempts for vouching the reasons for delay in lodging the report after a period of a month from the date of incident.

Thus, it is clear that during the course of investigation, though there was an opportunity for the prosecution to afford explanation for delay, the prosecution has failed to do so.

9. Devidas Kamble (PW1) the complainant, has offered explanation during the course of trial from the witness box. As per his evidence, on 02.11.2004 itself, he had been to Police Station. However, police official Rathod did not reduce his report into writing as per his say. Therefore, on 04.11.2004, he made representation to the Superintendent of Police, Washim which is at Exh.-20. However, no action was taken on it. Hence, again on 29.11.2004, he made another representation to Superintendent of Police, Exh.-21. In the said representation, as per the evidence, he disclosed that he will go for Uposhan and, therefore, report was reduced into writing on 03.12.2004. Exhs. 20 and 21 are typed copies of representations. In left hand column of these representations, there is a rubber stamp of Inward/Outward clerk of Superintendent of Police. Thus, it is clear that Exh.-20 was filed on 04.11.2004 itself. Exh.-20 is recital that in spite of reporting the matter on 03.11.2004, the report was not taken by police officer. In that view of the matter, though submission of learned counsel for the appellants appears to be attractive on the point of delay, those submissions cannot be accepted. After inaction on the part of the Police Station Officer to reduce into writing the report, Devidas made a representation and brought to the notice of the higher ups of the police authority about inaction and ultimately, when he gave threats that he will sit on Uposhan then only action was taken against accused persons. In my view, therefore, during the course of trial, complainant has offered explanation regarding registration of the crime in Police Station on 03.12.2004 in respect of the incident that had occurred on 02.11.2004. In view of this, there is no hesitation in my mind to reject the submission of the learned counsel for the appellants that the prosecution case is required to be thrown on account of delay.

10. Once obstacle of delay is overcome, the prosecution has to prove its case, in accordance with law. In view of certificate Exh.-19, it is clear that complainant belongs to Scheduled Caste. The complainant is a member of Scheduled Caste and it is not at all challenged by the defence during the course of trial. It is not in dispute that accused-appellants are members of Maratha caste. Though, submission was tried to be made before me feebly that prosecution has not filed caste certificates of the appellants, in my view, said submission is to be considered only for rejection since it is not in dispute by appellants that they belong to Maratha caste.

11. As per evidence of complainant-Devidas (PW1), he took hand loan in the month of December-2003 to the tune of Rs.2500/- from appellant no.1-Raju. He

was to repay the same along with interest. Said aspect is corroborated by his wife Vimal (PW2). It is also version on oath by this couple that blank stamp paper duly signed by them was handed over to Raju. Their evidence would show that it was agreed that complainant would repay Rs.175/- per month by way of interest for 10 months and principal amount was to be paid at the time of Diwali festival.

12. Though it is the evidence of Devidas (PW1) and Vimal (PW2) that their signatures-thumb impressions were obtained by appellant no.1-Raju on blank stamp paper, it is not their case and/or their statement on oath during the course of trial that at any point of time, appellant-Raju misused and/or tried to misuse blank stamp paper duly signed by these two prosecution witnesses.

13. Evidence of Devidas would reveal that on 02.11.2004, at 7 O'clock in the morning, appellant no.1-Raju came to his house and he took him to his Kotha, which is away from the house of the complainant. This aspect is also corroborated by Vimal (PW2). According to version of Devidas, at Kotha, appellant no.1 inquired about repayment of loan, on that Devidas assured that he will repay the same by 20.11.2004. However, as per the evidence, that time, appellant no.1-Raju asked for tin-sheets of his house. On refusal, according to Devidas (PW1), he was assaulted by Raju by fist and kick blows. It is not the version of Devidas that assault on the part of appellant no.1 was noticed by anybody. Further, it is not the version of Devidas that at the time of assault, appellant no.1 used any abusive language in the name of caste. As per the evidence of Devidas, somehow he got himself free from the clutches of appellant no.1 and started running. As per the version of Devidas, at that time, accused no.2-Suresh was coming from the house and he got assaulted by Suresh by using abusive language in the name of caste. Thereafter, all the appellants started beating him and also used abusive language in the name of caste. Devidas (PW1) claimed in his evidence that the incident of beating and using of abusive language was noticed by his wife Vimal (PW2) and Jaishree (PW3). Even these two prosecution witnesses corroborate the complainant.

14. According to these three prosecution witnesses, incident of using abusive language in the name of caste has occurred on a road. Exh.-28 is spot panchanama. It is drawn on 03.12.2004, i.e. the date on which the offence was registered. Exh.-28 recites that spot of incident is shown by the complainant himself. In view of evidence of Devidas (PW1), Vimal (PW2) and Jaishree (PW3), coupled with recitals in Exh.-20, it is clear that incident of utterance in the name of caste by appellants has occurred on a road, which is a "Public Place".

15. Learned A.P.P. would submit that since prosecution has proved that offensive language in the name of caste was hurled in public place and hence offence is complete. Therefore, according to her, the Court below was right in convicting the appellants for the offence punishable under the provisions of the Atrocities Act. The incident in question has occurred on 02.11.2004 i.e. prior to amendment of 2016. Therefore, it will be governed by the old Act and Section 3

(i) (x) of the old Act reads as under:

3. Punishments for offences of atrocities.-

(1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe-

(i) to (ix)

(x) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view"

From the aforesaid, it is clear that Legislation has not used words "Public Place" but phraseology used is "Public View".

16. True import of expression "Public View" will have to be ascertained in the light of evidence brought on record by prosecution. Before adverting to the evidence in the present case, I would like to refer to decision of this Court in *Shri Mahesh Sakharam Patole & Ors. .Vs. State of Maharashtra*; reported in 2009 ALL MR (Cri) 1601. This particular case relates to decision of an application for anticipatory bail under Section 438 of the Code of Criminal Procedure. In the said judgment, it was found that though incident in question has occurred in courtyard of complainant's house, which is not a public place. Paragraph 5 of the said judgment reads thus:

"5. The offence, in the present case, occurred in the courtyard of the complainant's house. It is not a public place. The provision of Section 3(1)(x) of the Act does not use the expression "public place", but instead the expression used is "in any place within public view". There is a clear distinction between the two expressions. If a private place, such as the courtyard of a residential house, can be seen by someone from road or lane outside the boundary wall, and if the incident occurred at such a place is audible and visible to the people, it would, indubitably constitute an offence under Section 3 (1) (x) of the Act, it being a place within public view. In other words, a place of offence can be a private place, but if the remarks made, with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe, are audible and/or if members of public have viewed the incident, even if the incident occurred at a private place, such as the courtyard of a house, in my opinion, it would constitute an offence under section 3(1)(x) of the Act. It is evident from the Statement of Objects and Reasons of the Act that it was enacted to prevent indignities, humiliation and harassment to the members of SC/ST community. Therefore, while interpreting the expression "in any place within public view", one will have to hold that occurrence of the incident was viewed by the public. The expression "within public view" will have to be read to mean that the offence under section 3(1)(x) of the Act, should take place in view of the "public". If no member of the public has either seen the incident or heard the remarks, then even if the place is a "public place" or a place "visible to the public", it would not attract the ingredients of the offence under section 3(1)(x) of the Act."

Another useful reference can be made to authoritative pronouncement of Hon'ble

Apex Court in Swarna Singh and Ors. .Vs. State through Standing Counsel and anr; reported in 2009 (2) Mh. L. J. 22. Paragraph 28 of the said judgment reads as under.

"28. It has been alleged in the FIR that Vinod Nagar, the first informant, was insulted by appellants 2 and 3 (by calling him a 'Chamar') when he stood near the car which was parked at the gate of the premises. In our opinion, this was certainly a place within public view, since the gate of a house is certainly a place within public view. It could have been a different matter had the alleged offence been committed inside a building, and also was not in the public view. However, if the offence is committed outside the building e.g. in a lawn outside a house, and the lawn can be seen by someone from the road or lane outside the boundary wall, the lawn would certainly be a place within the public view. Also, even if the remark is made inside a building, but some members of the public are there (not merely relatives or friends) then also it would be an offence since it is in the public view. We must, therefore, not confuse the expression 'place within public view' with the expression 'public place'. A place can be a private place but yet within the public view. On the other hand, a public place would ordinarily mean a place which is owned or leased by the Government or the municipality (or other local body) or gaon sabha or an instrumentality of the State, and not by private persons or private bodies."

In the case before Hon'ble Apex Court, accused used abusive language against the complainant when he was standing near car which was parked at the gate of premises. Paragraph 34 of the said judgment reads as under:

"34. However, a perusal of the F.I.R. shows that Swaran Singh did not use these offensive words in the public view. There is nothing in the F.I.R. to show that any member of the public was present when Swaran Singh uttered these words, or that the place where he uttered them was a place which ordinarily could be seen by the public. Hence in our opinion no prima facie offence is made out against appellant no.1."

17. From the aforesaid two decisions and many others, which I am refraining myself from mentioning in the present judgment just to avoid unnecessary bulkiness to the present judgment, it is clear that there is a distinction between "Public Place" and "Public View".

18. If offensive language is used even at a private place and the said offensive language is audible to the passers-by or the said incident of using abusive language and assault on the private place is visible to the public at large then definitely the accused will have to be convicted under penal provision of the Atrocities Act, because though the act is committed at the private place, it is committed within public view. In my opinion the soul of clause (x) of Section 3 (1) of the Atrocities Act, is "Public View" and not "Public Place".

19. Keeping the aforesaid principal in mind, now let's scrutinize whether the prosecution has proved that appellants have uttered obnoxious language in the

name of caste of Devidas, in "public view".

20. Complainant Devidas (PW1), is cross-examined thoroughly. In his cross-examination, he has admitted that kotha of appellant no.1-Raju is 200 ft. away from his house and not 1 km as suggested to him. He has admitted that appellant no.1-Raju took him to his kotha from his house. There was no talk in between them. He also admitted that nobody met him on the way to kotha who were known to him. Nobody was present in kotha.

21. Thus, it is established on record that when complainant Devidas was taken from his house to kotha of appellant no.1-Raju, there was no talk in between them nor anybody met them. It is not the prosecution version right from the beginning that any force was used by appellant no.1-Raju upon complainant. In the examination in chief, it is not the claim of Devidas that the incident of slapping and utterances in the name of caste were made by accused person in anyone's presence.

22. In the cross-examination, Devidas has admitted that in kotha, discussion took place in respect of repayment of money and at that time, appellant-Raju assaulted Devidas by fist and kick blows and the beating continued for about 4-5 minutes. Even in the cross-examination, it is admitted by Devidas that this time also no abusive language in the name of caste was used by Raju.

23. Further cross-examination of star witness Devidas shows that thereafter he ran away from the spot up to 300 ft. and near the house of Namdeo Bajal, Prakash Bajal and Sanjay Misal, etc. near a public well, he was caught hold and was assaulted and at that time, utterances were made. However, following is the admission given by Devidas:

"Nobody outsider was present when accused abused and assaulted me....."

"Nobody outsider came there. I did not shout."

24. Vimal (PW2) is also silent about presence of any member of public in general when the incident has occurred. Similar is the testimony of Jaishree (PW3). In her cross-examination, a specific admission is given by Jaishree that at the time of incident, except her mother, nobody was present.

25. According to the prosecution case, the incident has occurred in the morning near a public well in the village, which in my view, is a rush period for villagers to fetch water. Absence of any third person except husband, wife and their daughter in the morning at the public place near the well, in my view, is a pointer to raise question about truthfulness of the prosecution case itself.

26. From the evidence of the prosecution witness, it is clear that the incident did not occur within "Public View". Therefore, in my view, the Court below has committed serious mistake at law in convicting appellants for the offence punishable under Section 3 (1) (x) of the Atrocities Act.

27. The appellants are also convicted for an offence punishable under Section

323 of the IPC i.e. punishment for causing voluntary hurt. Section 319 of the IPC defines "Hurt". It reads as under:

"319. Hurt-Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt."

28. In the present case, though it is the claim of the prosecution witness that Devidas was assaulted by fist and kick blows by all the appellants at public place and prior to that in the kotha, by appellant no.1-Raju alone, Devidas (PW1) neither made himself available and/or presented himself nor at the time of or during the course of investigation, Devidas was medically examined.

Be that as it may. Evidence of Devidas is conspicuously silent that in view of assault made on him, he was feeling any bodily pain. If that be so, it cannot be said that ingredients of Section 319 of IPC are proved. Consequently, conviction on the part of learned Judge of the Court below for an offence punishable under Section 323 of the IPC, in my view is unsustainable.

29. In the cross-examination of Devidas, it is brought on record that on 02.11.2004, appellant-Raju lodged report against him and Chapter proceeding under Section 107 of the Cr.P.C. were pending before Tahsildar, Risod. Incidentally, this report of 02.11.2004, which commenced Chapter proceedings against the appellants, was lodged on the very same day. Further, it is an admitted position on record that complainant has obtained loan from appellant no.1-Raju and appellant no.1-Raju was demanding repayment of the said loan. These facts, in my view, allow me to deduce an inference that report Exh.-17 is a counter-blast on the part of complainant-Devidas.

30. The learned Judge of the Court below, in my view, has utterly failed to evaluate the prosecution case and the evidence of the prosecution was not evaluated properly. Therefore, this Court, while exercising its appellate jurisdiction, has to step in.

31. Reappreciation of the entire prosecution case and the discussion made in the preceding paragraphs, leads me to pass the following order.

ORDER

(i) The appeal is allowed.

(ii) Impugned judgment and order of conviction dated 28.11.2005 passed by II Ad hoc Additional Sessions Judge, Washim in Atrocity Case No.10/2005 is quashed and set aside. The appellants are acquitted of the offence punishable under Sections 323, 294, 506 read with Section 34 of the Indian Penal Code and Section 3 (1) (x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

(iii) The appellants are on bail. Their bail bonds stand cancelled.

(iv) The appellants are entitled to refund of the fine amount, which they have

paid.