

(2023) 10 CHH CK 0003
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 1890 Of 2022

Vidhyadhar Yadav @ Vidhya Yadav

APPELLANT

Vs

State Of Chhattisgarh

RESPONDENT

Date of Decision : 06-10-2023

Acts Referred:

Indian Penal Code, 1860 — Section 90, 375, 376, 506
Code Of Criminal Procedure, 1973 — Section 164, 313, 374(2), 437A
Scheduled Castes and Scheduled Tribes (Prevention of Atrocities), Act, 1989 — Section 3, 3(1)(r), 3(1)(x), 3(2)(v)

Citation : (2023) 10 CHH CK 0003

Hon'ble Judges : Ramesh Sinha, CJ; N. K. Chandravanshi , J

Bench : Division Bench

Advocate : Ajeet Kumar Yadav, Chandresh Shrivastava

Final Decision : Allowed

Judgement

1. This criminal appeal filed by the appellant-accused under Section 374(2) of the Code of Criminal Procedure, is directed against the impugned judgment of conviction and order of sentence dated 18.11.2022 passed by learned Special Judge [under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities), Act,] Raigarh Distt. Raigarh (CG) in Special Criminal Case (under the Atrocities Act/21/2021, CNR-CGRG010006862021, whereby the appellant-accused has been convicted and sentenced in the following manner:

Sl.

No.

Conviction under Section

Sentence

Fine

Default

1.

376(2)(k) IPC

RI for 10 years

Rs.5,000/-

RI for 01 month

2.

376(2)(n) IPC

RI for 10 years

Rs.5,000/-

RI for 01 month

3.

506 Part-II IPC

RI for 01 year

Rs.2,000/-

RI for 15 days

4.

3(1)(r) of the Atrocities Act

RI for 06 months

Rs.1,000/-

RI for 07 days

5.

3(2)(v) of the Atrocities Act

Life imprisonment

Rs.12,000/-

RI for 02 months

It has been further directed that all the sentences shall run concurrently.

2. As per the prosecution story, the appellant and the prosecutrix are residents of same village. In the year 2016, the appellant proposed the prosecutrix that he love her but the prosecutrix told him that they both belong to different caste however, the appellant did not agree and used to talk to her and also promised to marry her, subsequently they fell in love relation. On 17th January, 2016, the

appellant called the prosecutrix beside the forest area located some distance away from her house and on the pretext of marriage, established physical relationship with her. Thereafter the appellant physically abused the prosecutrix many times. In December 2020 due to physical relation between the parties, the prosecutrix became pregnant and she informed about this to the appellant. The appellant forced the prosecutrix to terminate her pregnancy, else threatened to kill her, also told her that if she aborts her pregnancy, he would marry her and also administered her tablets to terminate her pregnancy, which was ultimately terminated. Thereafter he refused to marry her and he was trying to marry some other girl. In this regard the prosecutrix filed a written complaint (x-P/3) before police in Police Chowki Rairumakhud and unnumbered FIR (Ex-P/4) has been registered against the appellant under Section 376 and 506 IPC and also registered FIR (Ex-P/14) at Police Station Dharamjaigarh, thereafter police started investigation.

3. During investigation, the prosecutrix was medically examined vide Ex-P/2 and vaginal slides were prepared, spot map was prepared, caste certificate of the prosecutrix was seized, statement of the prosecutrix under Section 164 CrPC was recorded, statement of the witnesses were recorded, appellant was arrested, he was also examined vide ex-P/1 by doctor who also prepared two semen slides of the appellant which was seized by the police, seized vaginal slides and semen slides were sent for chemical examination to FSL and FSL report was received vide Ex-P/19. After completing the investigation, charge sheet was filed against the appellant under Section 376, 506 IPC and Section 3(1)(b) & 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities), Act (for short the Atrocities Act) before Special Court/ trial court.

4. Learned Special Court framed charges under Section 376(2)(k)(n), 506 Part-II of IPC and Section 3(1)(r) and 3(2)(v) of the Atrocities Act, read and explained to the appellant to which the appellant/accused abjured his guilt and entered into defence that he has not committed any offence. He further stated in his statement recorded under Section 313 CrPC that he has falsely been implicated in the alleged crime. He has also stated that he used to talk to the prosecutrix over the phone, therefore, later she pressurized him to marry her and on his refusal, he was falsely implicated.

5. In order to bring home the offence, the prosecution examined 14 following witnesses:-

Sl.

No.

Sl. No.

of witness

Name of the witness

1.

PW-1

Dr. Bhushan Khuntey

2.

PW-2

Dr. Nancy Lakda

3.

PW-3

Prosecutrix

4.

PW-4

Siril Kujur

5.

PW-5

Preetam Tirkey

6.

PW-6

Sahdev Khandel

7.

PW-7

Sangeeta Minj

8.

PW-8

Dinai Bai

9.

PW-9

Abha Kujur

10.

PW-10

David Toppo

11.

PW-11

Sushil Kumar Nayak

12.

PW-12

Dr. Akanksha Chouhan

13.

PW-13

James Kujur

14

PW-14

Anjana Kerketta

Besides aforesaid ocular evidence, prosecution also exhibited following documents:

Sl. No.

Exb.

Particulars

1.

Ex-P/1

Application for medical examination of accused Vidyadhar Yadav and medical examination report

2.

Ex-P/2

Memo of medical examination of prosecutrix and medical examination report

3.

Ex-P/3

Written complaint

4.

Ex-P/4

First Information Report

5.

Ex-P/5

Consent Letter

6.

EX-P/6

Crime Details Form

7.

Ex-P/7

Notice U/s. 91 of CrPC

8.

Ex-P/8

Property seizure memo

9.

Ex-P/9

Caste Certificate

10.

Ex-P/10

Property Seizure Memo

11.

Ex-P/11

Treatment Slip of the prosecutrix

12.

Ex-P/12

Memo for furnishing of Spot Map and Spot Map

13.

Ex-P/13

Statement of Prosecutrix U/s 164 CRPC

14.

Ex-P/14

First Information Report

15.

Ex-P/15

Property seizure memo

16.

Ex-P/16C

Copy of seized article register

17.

Ex-P/17

Nalsi Receipt

18.

Ex-P/18

Receipt of Exhibits

19.

Ex-P/19

FSL Report

20.

Ex-P/20

Memo regarding permission for medical examination of prosecutrix

21

Ex-P/21

Property Seizure Memo

22.

Ex-P/22

Memo regarding preparing Spot Map

23.

Ex-P/23

Memo of JMFC regarding providing date for recording the prosecutrix's statement U/s. 164 CrPC

24.

Ex-P/24

Memo of FSL Report

25.

Ex-P/25

Receipt of Exhibits

26.

Ex-P/26

Arrest/Court Surrender Memo

27.

Ex-P/27

Arrest Information

6. After completion of trial and after appreciating the oral and documentary evidence on record, the appellant has been convicted and sentenced as mentioned above, against which this appeal has been preferred by him.

7. Shri Ajeet Kumar Yadav, learned counsel for the appellant submits that the appellant is innocent and he has been falsely implicated in this case. He would submit that prosecutrix is 26 years major lady and she was acquainted with the appellant since many years prior to their first physical relation. He would further submit that perusal of her statement under Section 164 CrPC and the Court statement, it transpires that she was the consenting party. He would further submit that First Information Report was lodged after a lapse of five years when the appellant allegedly refused to marry with the prosecutrix. The Hon'ble Supreme Court in a catena of judgments have reiterated on the point of consent given by a person under misconception of fact. In this regard, he would further relied upon the decisions of Hon'ble Supreme Court in the matters of Uday vs. State of Karnataka, (2003) 4 SCC 46 (relevant paras 21, 22 & 23), Deelip Singh alias Dilip Kumar vs. State of Bihar (2005) 1 SCC 293; Deepak Gulati vs. State of Haryana (2013) 7 SCC 675; Dr. Dhruvaram Murlidhar Sonar vs. State of Maharashtra & Ors. (2019) 18 SCC 191. To substantiate his arguments, learned counsel for the appellant would submit that consensual sexual relationship which if continued between the parties for quite a long time, in the present case for about five years, could not be said to have continued under the 'misconception of fact' under Section 90 and could not be said to be 'rape' under Section 375 IPC.

7.1 Learned counsel for the appellant would further submit that in a recent judgment, the Hon'ble Supreme Court in the matter of Naim Ahmed vs. State of NCT of Delhi (2023) 2 CGLJ 313(SC) has reiterated the fact of consent and acquitted the accused by holding that the prosecutrix is a consenting party. He would next submit that there are various contradictions and omissions in the statement of the prosecution witnesses, but the learned trial Court has not

properly scrutinized the same before convicting the appellant. Further the prosecution has failed to prove the ingredients of offence under Sections 376(2) (k), 376 (2)(n) and 506 Part-II of IPC and Sections 3(1)(r) and 3(2)(v) of the Atrocities act against the appellant. Thus, learned counsel for the appellant pray for acquittal of the appellant by allowing the appeal.

8. On the other hand, learned counsel for the State while supporting the impugned judgment would submit that the trial Court has properly appreciated the evidence and rightly convicted the appellant for the aforesaid offence. According to him, even otherwise the prosecution has proved beyond doubt that the appellant had lured the prosecutrix to have sexual relationship with him by giving her a false promise that he would marry her, but he refused to marry her when she conceived, which clearly proved that her consent was obtained by the appellant under the misconception of fact/fraud. Therefore, the appeal deserves to be dismissed.

9. We have heard learned counsel for the parties, considered their rival contentions and have gone through the records with utmost circumspection.

10. The first question for consideration before this Court is whether the prosecutrix is a member of Scheduled Tribe and whether the accused belongs to same caste as of the prosecutrix or he is a member of other Backward Class/category?

11. The prosecutrix (PW-3), her brother Siril Kujur (PW-4), prosecutrix's sister-in-law Abha Kujur (PW-9) have deposed that they belong to Oraon caste which comes under the Scheduled Tribe category, whereas the appellant belongs Mahkool (Yadav) caste which comes under Other Backward Class. This fact has not been rebutted by the appellant in their cross-examination. Even IO James Kujur (PW-13) has deposed that he seized the caste certificate (Ex-P/9) of the prosecutrix vide seizure memo Ex-P/8, which also support statement of aforesaid witnesses, that victim belong to Scheduled Tribe community. These facts have also been admitted by the appellant in his statement recorded under Section 313 CrPC. Therefore, on the basis of oral and documentary evidence, as also the admission of the appellant, it is proved that the prosecutrix is a member of Scheduled Tribe category of Oraon caste and the appellant belongs to Mahkool (Yadav) caste which comes under Other Backward Class. Thus, it is proved that the accused is not cognate to the caste of the prosecutrix rather he is a member of Other Backward Class/category.

12. The next question for consideration before this Court is, whether the appellant, in between the period 17.02.2016 to 27.02.2021 had committed rape with prosecutrix on the false promise of marriage?

13. As per the statement of the prosecutrix (PW-3), after completion of her school education, she returned to her village, since then she is known to the appellant. It is also stated by her that agricultural land of the appellant was near her house and he used to see her while going to his land, thereafter they started

talking to each other over the phone. Even in her cross-examinations these statements of the prosecutrix remained un rebutted. She even stated that initially she used to talk with the appellant on the phone as a friend and also went out with him several times. In 2016 on the request of the appellant, she went forest area near her house to meet him, there the appellant asked her to have physical relation with him but she refused. However, on his promise that he would perform marriage with her, he established physical relationship with her for the first time in the forest and thereafter whenever they went out, they had sexual intercourse with each other till December 2020.

14. In cross-examination, victim/prosecutrix has admitted positive suggestion of learned defense counsel that all the physical relation that have been established between then have happened with the consent of both of them, i.e. prosecutrix and the appellant. She has stated in cross-examination also that they have been in physical relation since 2016 to December 2020. It was revealed from her deposition that when she conceived, then appellant terminated her pregnancy by administering her medicine and when the appellant refused to marry her thereafter she lodged FIR by filing written complaint.

15. When the prosecutrix became pregnant, she went in the Clinic of PW-12 Dr. Akanksha Chouhan (PW-12) who examined her and gave positive report vide Ex-P/11 with regard to her pregnancy. These facts have fully been supported by Dr. Akanksha Chouhan in her deposition.

16. Nothing has been elicited in cross-examination of the victim to discard her statement, rather the positive suggestion given to her by learned defence counsel and the manner in which she has been cross-examined also inspire confidence of the court with regard to her deposition made in examination-in-chief.

17. The statement of the prosecutrix were supported by her brother (PW-4), her friend (PW-7), mother of the prosecutrix (PW-8) and sister-in-law (PW-9). Perusal of the deposition of the prosecutrix shows that the prosecutrix developed friendship with the appellant and on pretext of marriage he made physical relation, which spread over a period of five years and during this period, the prosecutrix became pregnant which was terminated by the appellant by administering her medicine in January 2021. Subsequently, the appellant had expressed a disinclination to marry the prosecutrix which led to registration of FIR.

18. Evidence brought on record proves that physical relation was made between the parties with consent and willingness of both of them which has been admitted by victim/ prosecutrix herself in her cross-examination.

19. The expression "against her 'will' " means that the act must have been done inspite of opposition of the woman and inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in mind of a

person to permit the doing of the act complained of.

20. Section 90 of the IPC defines "consent" known to be given under fear or misconception:-

"90: Consent known to be given under fear or mis-conception. —A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception"

Thus, Section 90 though does not define "consent", but describes what is not "consent". Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. If the consent is given by the complainant under misconception of fact, it is vitiated. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but also after having fully exercised the choice between resistance and assent. Whether there was any consent or not is to be ascertained only on a careful study of all relevant circumstances.

21. Hon'ble Supreme Court in the cases of alike nature of Dr. Dhruvaram Murlidhar Sonar vs. State of Maharashtra and others, (2019)18 SCC 191 have considered misconception of fact in the light of breach of promise to marry and false promise to marry referring various judgments of Apex Court have held in para 18, 19, 20, 21, 22 & 23 as under:-

"18. In Uday v. State of Karnataka (2003) 4 SCC 46, this Court was considering a case where the prosecutrix, aged about 19 years, had given consent to sexual intercourse with the accused with whom she was deeply in love, on a promise that he would marry her on a later date. The prosecutrix continued to meet the accused and often had sexual intercourse and became pregnant. A complaint was lodged on failure of the accused to marry her. It was held that consent cannot be said to be given under a misconception of fact. It was held thus:-

"21. It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given

under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.

23. Keeping in view the approach that the court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown-up girl studying in a college. She was deeply in love with the appellant. She was, however, aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to them. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact."

19. In *Deelip Singh alias Dilip Kumar v. State of Bihar*, (2005) 1 SCC 88, the Court framed the following two questions relating to consent:-

(1) "Is it a case of passive submission in the face of psychological pressure exerted or allurements made by the accused or was it a conscious decision on the part of the prosecutrix knowing fully the nature and consequences of the act she was asked to indulge in?"

(2) Whether the tacit consent given by the prosecutrix was the result of a misconception created in her mind as to the intention of the accused to marry her?"

In this case, the girl lodged a complaint with the police stating that she and the accused were neighbours and they fell in love with each other. One day in February, 1988, the accused forcibly raped her and later consoled her by saying that he would marry her. She succumbed to the entreaties of the accused to have sexual relations with him, on account of the promise made by him to marry her, and therefore continued to have sex on several occasions. After she became pregnant, she revealed the matter to her parents. Even thereafter, the intimacy continued to the knowledge of the parents and other relations who were under the impression that the accused would marry the girl, but the accused avoided marrying her and his father took him out of the village to thwart the bid to marry. The efforts made by the father of the girl to establish the marital tie failed. Therefore, she was constrained to file the complaint after waiting for some time.

20. With this factual background, the Court held that the girl had taken a conscious decision, after active application of mind to the events that had transpired. It was further held that at best, it is a case of breach of promise to marry rather than a case of false promise to marry, for which the accused is prima facie accountable for damages under civil law. It was held thus:

"35. The remaining question is whether on the basis of the evidence on record, it is reasonably possible to hold that the accused with the fraudulent intention of inducing her to sexual intercourse, made a false promise to marry. We have no doubt that the accused did hold out the promise to marry her and that was the predominant reason for the victim girl to agree to the sexual intimacy with him. PW 12 was also too keen to marry him as she said so specifically. But we find no evidence which gives rise to an inference beyond reasonable doubt that the accused had no intention to marry her at all from the inception and that the promise he made was false to his knowledge. No circumstances emerging from the prosecution evidence establish this fact. On the other hand, the statement of PW 12 that "later on", the accused became ready to marry her but his father and others took him away from the village would indicate that the accused might have been prompted by a genuine intention to marry which did not materialise on account of the pressure exerted by his family elders. It seems to be a case of breach of promise to marry rather than a case of false promise to marry. On this aspect also, the observations of this Court in Uday case at para 24 come to the aid of the appellant".

21. In *Deepak Gulati v. State of Haryana*, (2013) 7 SCC 675, the Court has drawn a distinction between rape and consensual sex. This is a case of a prosecutrix aged 19 years at the time of the incident. She had an inclination towards the accused. The accused had been giving her assurances of the fact that he would get married to her. The prosecutrix, therefore, left her home voluntarily and of her own free will to go with the accused to get married to him. She called the accused on a phone number given to her by him, to ask him why he had not met her at the place that had been pre-decided by them. She also waited for him for a long time, and when he finally arrived, she went with him to a place called Karna Lake where they indulged in sexual intercourse. She did not raise any objection at that stage and made no complaints to anyone. Thereafter, she went to Kurukshetra with the accused, where she lived with his relatives. Here too, the prosecutrix voluntarily became intimate with the accused. She then, for some reason, went to live in the hostel at Kurukshetra University illegally, and once again came into contact with the accused at Birla Mandir there. Thereafter, she even proceeded with the accused to the old bus-stand in Kurukshetra, to leave for Ambala so that the two of them could get married at the court in Ambala. At the bus station, the accused was arrested by the police. The Court held that the physical relationship between the parties had clearly developed with the consent of the prosecutrix as there was neither a case of any resistance nor had she raised any complaint anywhere at any time, despite the fact that she had been living with the accused for several days and had travelled

with him from one place to another. The Court further held that it is not possible to apprehend the circumstances in which a charge of deceit/rape can be leveled against the accused.

22. Recently, this Court, in *Shivashankar @ Shiva v. State of Karnataka & Anr.*, in Criminal Appeal No.504 of 2018, disposed of on 6th April, 2018, has observed that it is difficult to hold that sexual intercourse in the course of a relationship which has continued for eight years is 'rape', especially in the face of the complainant's own allegation that they lived together as man and wife. It was held as under:-

"4.In the facts and circumstances of the present case, it is difficult to sustain the charges leveled against the appellant who may have possibly, made a false promise of marriage to the complainant. It is, however, difficult to hold sexual intercourse in the course of a relationship which has continued for eight years, as 'rape' especially in the face of the complainant's own allegation that they lived together as man and wife".

23. Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant had actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the later falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of the misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 of the IPC.

22. In the matter of *Pramod Suryabhan Pawar vs. State of Maharashtra*, (2019) 9 SCC 608, while dealing with similar situation, the principles of law which must govern a situation like the present were enunciated by the Hon'ble Supreme Court in the following observations:-

"Where the promise to marry is false and intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates the woman's "consent". On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it."

To further, the Court has observed:

"To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act."

23. Bearing in mind the tests which have been enunciated in the above decision, it is apparent that there is no allegation to the effect that the promise to marry given to the prosecutrix was false at the inception. On the contrary, it would appear from the contents of the FIR that there was a subsequent refusal on the part of the appellant to marry the prosecutrix which gave rise to the registration of the FIR.

24. The prosecutrix is a major lady, aged about 26 years and completed her school education. She was well aware of the fact that since they belonged to different castes, there may be lacuna in their marriage and the family members may oppose. She even told this fact to the appellant at the time of his proposal at the initial stage of their relationship. On perusal of her deposition, it transpires that she had established physical relationship with the appellant for quite long period of five years willingly, and without any resistance, which was well within the knowledge of her mother (PW-8) and her sister-in-law (PW-9) as they have stated in their deposition. Victim/prosecutrix had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. Despite that she did not resist the act of the appellant. She must have known the consequence of the act, particularly when she was conscious of the fact that there may be some problem in their marriage on account of caste consideration. All these circumstances lead us to the conclusion that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant and her consent was not in a consequence of any misconception of fact/fraud. Therefore, we are of the considered view that, charge of rape levelled against the appellant cannot be proved in light of aforesaid law laid down by the Apex Court.

25. The next question for consideration before this Court is whether on the date of incident the appellant intentionally insulted and intimidated the prosecutrix in a public place by fully knowing that she belongs to Scheduled Tribe category?

26. In order to appreciate the dispute, it would be appropriate to consider Section 3(1)(r) & 3(2)(v) of the Atrocities Act which reads as under: -

3. Punishments for offences of atrocities.- (1)

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

XXXX XXXX XXXX

XXXX XXXX XXXX

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

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

XXXX XXXX XXXX

XXXX XXXX XXXX

(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property (knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member) shall be punishable with imprisonment for life and with fine.”

27. A careful perusal of the aforesaid provision would show that there must be intentional insult or intimidation with intent to humiliate the member of a Scheduled Caste or a Scheduled Tribe by a non-Scheduled Caste or a non-Scheduled Tribe member and the insult must have been done in a place within public view. The use of expression “intentionally insults or intimidates with intent to humiliate” makes it abundantly clear that the mens rea is an essential ingredient of the offence and it must also be established that the accused had the knowledge that the victim is SC/ST and that the offence was committed for that reason.

28. The expression “public view” used in Section 3(1)(x) of the Act of 1989 [after amendment 3(1)(r)] was considered by the Supreme Court in the matter of Swaran Singh and others v. State through Standing Counsel and another (2008) 8 SCC 435 and it was held 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.

33. We have already stated above that in today's context even calling a person "chamar" ordinarily amounts to intentionally insulting that person with intent to humiliate him. It is evident from a perusal of the FIR that Appellant 1 Swaran Singh joined his wife and daughter in insulting Vinod Nagar, and he also used the word "chamar" in a derogatory sense. However, a perusal of the FIR shows that Swaran Singh did not use these offensive words in the public view. There is nothing in the FIR 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 1."

29. Similarly, the Delhi High Court in the matter of Daya Bhatnagar and others v. State (2004) 109 DLT 915, considered the meaning of the expression "public view" as employed in Section 3(1)(x) of the Act of 1989 and held as under: -

"19. The SC/ST Act was enacted with a laudable object to protect vulnerable section of the society. Sub-clauses (i) to (xv) of Section 3(1) of the Act enumerate various kinds of atrocities that might be perpetrated against Scheduled Castes and Scheduled Tribes, which constitute an offence. However, sub-clause (x) is the only clause where even offending "utterances" have been made punishable. The Legislature required "intention" as an essential ingredient for the offence of "insult", "intimidation" and "humiliation" of a member of the Scheduled Caste or Scheduled Tribe in any place within "public view". Offences under the Act are quite grave and provide stringent punishments. Graver is the offence, stronger should be the proof. The interpretation which suppresses or evades the mischief and advances the object of the Act has to be adopted. Keeping this in view, looking to the aims and objects of the Act, the expression "public view" in Section 3(1)(x) of the Act has to be interpreted to mean that the public persons present, (howsoever small number it may be), should be independent and impartial and not interested in any of the parties. In other words, persons having any kind of close relationship or association with the complainant, would necessarily get excluded. I am again in agreement with the interpretation put on the expression "public view" by learned brother Mr. Justice B.A. Khan. The relevant portion of his judgment reads as under:

"I accordingly hold that expression within 'public view' occurring in Section 3(1) (x) of the Act means within the view which includes hearing, knowledge or accessibility also, of a group of people of the place/locality/village as distinct from few who are not private and are as good as strangers and not linked with the complainant through any close relationship or any business, commercial or any other vested interest and who are not participating members with him in any way. If such group of people comprises anyone of these, it would not satisfy the requirement of 'public view' within the meaning of the expression used."

30. The aforesaid decision of the Delhi High Court in Daya Bhatnagar (supra) has been further followed in the matter of Ashwani Kumar v. State and another [WP (Cri) no.1593/2006 dated 09.1.2009] [Manu/DE/0988/2009] by holding as under:-

"17. Expression 'public' is a poli-morphus word which has different meanings, which is used as noun or as an adjective. As noun, 'public' means a body of people at large; the community at large, without reference to the geographical limits of any corporation like a city, town or country, the people; the whole body politics, or all the citizens of the state. In other words, the word public does not mean all the people or most of the people nor very many of the people of a place, but so many of them as contra-distinguishes them from a few. Therefore, public means inhabitants of a particular place, may be all or few or the people of the neighbourhood. As an adjective, 'public' would have meaning upon the subjects to which it is applied. SC/ST Act has been enacted with a view to protect a weaker section of the society from various kinds of atrocities that might be perpetrated against SC/Sts which find enumeration in Section 3 of the SC/ST Act as constituting an offence. Court has to keep in mind that offence under the SC/ST Act are quite grave and provide stringent punishment and therefore, stronger proof is required. Court has to adopt an interpretation which suppresses or evades the mischief which might have been played and advances the object of the Act. Therefore, 'public view' appearing in Section 3(1)(x) of SC/ST Act has to be interpreted to mean the presence of the public persons, however small may be, and those persons are independent and impartial and not interested in any of the parties. In other words, persons having any kind of close relationship or association with the complainant have to be excluded from the definition of 'public view'."

31. In the aforesaid judgment – Ashwani Kumar (supra), the Delhi High Court has clearly held that 'public view' appearing in Section 3(1)(x) of the Act of 1989 has to be considered to mean the presence of the public persons, however small may be, and those persons are independent and impartial and not interested in any of the parties. In other words, persons having any kind of close relationship or association with the complainant have to be excluded from the definition of 'public view'.

32. Reverting to the facts of the present case, it has been proved that both the parties indulged in physical relation for about 05 years with their full consent and willingness that too under the knowledge of family members of the victim/prosecutrix. But it is not evident from the deposition of the victim/prosecutrix that the appellant committed the aforesaid act to intentionally insults or intimidates with intent to humiliate her because she belongs to Scheduled Tribe community, in any place within the public view. Hence, the trial Court has wrongly convicted the appellant also under Section 3(1)(r) of the Atrocities Act.

33. Further, it was burden upon the prosecution to establish and prove that the appellant has committed the offence, as alleged, because prosecutrix was a

member of Scheduled Tribe. Perusal of entire evidence available on record, it is quite clear that prosecution has miserably failed to prove that appellant committed the offence on the basis of the caste identity of the prosecutrix, being a member of Scheduled Tribe. There is no separate evidence led on behalf of the prosecution to establish that appellant committed the offence on the basis of caste identity of the appellant. While it can be presumed that appellant knew that the prosecutrix belonged to Scheduled Tribe category as both the appellant as well as the prosecutrix were residents of same village, but the mere knowledge of the same cannot be said to be the basis of the commission of offence and it had to be proved by the prosecution by leading separate evidence. In absence of any such independent evidence led by the prosecution establishing that appellant committed the offence only on the ground that she belonged to Scheduled Tribe category, we are of the considered opinion that learned trial Court has legally erred in convicting the appellant for offence punishable under Section 3(2)(v) of the Act of 1989. Accordingly, his conviction for offence punishable under Section 3(2)(v) of the Act of 1989 is hereby set aside.

34. Thus, in view of the aforesaid discussion and the law laid down by the Hon'ble Supreme Court in the cases mentioned above, we find that the prosecution has failed to prove charges levelled against the appellant.

35. Accordingly, the appeal is allowed. The impugned judgment of conviction and order of sentence is set aside. The appellant/accused is acquitted of all the charges. He is in jail. He be set at liberty forthwith, if not required in any other case.

36. The appellant/accused is directed to file personal bond with a surety in the like amount to the satisfaction of the Court concerned in compliance with Section 437-A of the CrPC.

37. Let a copy of this judgment and original record be transmitted to the trial Court concerned forthwith for necessary information and compliance.