

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON : 24th FEBRUARY, 2018
DECIDED ON : 26th APRIL, 2018

+ **CRL.A. 781/2016**

RAMEEZ @ RAMISH AHMED Appellant
Through : Mr.Anurag Jain, Advocate with
Ms.Ayushi Sharma, Advocate.

versus

THE STATE NCT OF DELHI Respondent
Through : Mr.Rajat Katyal, APP.

CORAM:
HON'BLE MR. JUSTICE S.P.GARG
HON'BLE MR. JUSTICE C.HARI SHANKAR

S.P.GARG, J.

1. Aggrieved by a judgment dated 03.12.2014 of learned Addl. Sessions Judge in Sessions Case No.207/2013 arising out of FIR No.22/2009 under Sections 376/506/323 IPC and Section 3 of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act (in short 'SC/ST Act') PS Baniyadher whereby the appellant – Rameez @ Ramish Ahmed was held guilty for committing offences punishable under Sections 376/323/506 IPC and 3(2)(v) of the SC/ST Act, the instant appeal has been preferred by him to challenge its

legality and correctness. By an order dated 09.12.2014, the appellant was sentenced to undergo RI for life with fine ₹50,000/- for the offence under Section 376 IPC read with Section 3(2)(v) of the SC/ST Act; RI for one year with fine ₹5,000/- under Section 506 IPC and RI for six months with fine ₹5,000/- under Section 323 IPC. The sentences were to operate concurrently.

2. Shorn of details, the prosecution case as set up in the charge-sheet was that on 24.04.2009 the prosecutrix 'X' (changed name) aged around 10 years was present at their mango orchard at village Naroli to look after it in the absence of her parents who had gone to see her 'mausi' suffering from some ailment at village Khera. The victim's parents had taken the said mango orchard on contract from Nanhe Mian, the appellant's uncle. At about 01.00 p.m. the appellant came at the tube-well installed in a nearby orchard on a bicycle and enquired from the prosecutrix about her mother. 'X' informed that her mother had gone to Khera. The appellant immediately forcibly dragged 'X' to the 'kothri' of the tube-well and threatened to kill her if she raised alarm. Inside the 'kothri', rape was committed on her person by the appellant. When her sister PW-2 (Rakhi) arrived at the spot to serve lunch, she did not find 'X' there. She went to the 'kothri' and saw 'X' lying unconscious; her salwar was away at some distance. On seeing it, Rakhi frightened; she poured water on X's face and brought her home. She immediately informed her parents about the incident and they rushed home at around 04.00 p.m. 'X' was taken by her parents to the police chowki in the village to lodge complaint. The police did not register the

complaint. On the third day, they approached senior police officers at Sambhal. On their intervention, complaint (Ex.PW-1/1) of victim's father came to be recorded. The investigation was carried out by PW-14 (Sarvesh Kumar Mishara). On 08.05.2009 the victim along with her mother and sister recorded their supplementary statements. Efforts by the Investigating Officer to apprehend the appellant proved futile. On 18.05.2009 clothes which the prosecutrix was wearing at the time of occurrence were produced and seized by the Investigating Officer. PW-15 (Brajesh Singh) took over further investigation on 19.05.2009. In the meantime, the appellant surrendered before the Court and was arrested. Statements of the witnesses conversant with the facts were recorded. Various exhibits collected during investigation were sent for examination to Forensic Science Laboratory and its report was collected. Upon completion of investigation, a charge-sheet was filed against the appellant for commission of the aforesaid offences before the Court concerned.

3. By an order dated 18.11.2009, charge for the commission of the above said offences was framed against the appellant by the learned Addl. Sessions Judge, Court No.2, Moradabad; the appellant pleaded not guilty to the charges and claimed trial. The prosecution examined PW-1 (Badan Singh) before the said Court on 29.11.2011. By an order dated 30.08.2013 in Transfer Petition (Crl.) No.387/2012 '*Badan Singh vs. Ramiz @ Ramish Ahamed & Anr.*', the Hon'ble Supreme Court transferred the case from the court of District and Sessions Judge, Moradabad (U.P.) to the District & Sessions Court, Tis Hazari Courts, Delhi.

4. The prosecution examined fifteen witnesses in all thereafter. In 313 Cr.P.C. statement, the appellant denied his complicity in the crime and pleaded false implication; he did not adduce any witness in defence. The Trial resulted in conviction as mentioned previously. Being aggrieved and dissatisfied, the present appeal has been preferred by the appellant.

5. We have heard the learned Addl. Public Prosecutor and learned defence counsel Mr.Anurag Jain, Advocate and have examined the file minutely.

6. Learned defence counsel urged that the Trial Court did not appreciate the evidence in its true and proper perspective. Counsel made a fervent effort to persuade that there is an obvious contradiction between the evidence of witnesses including that of the victim which should enure to the benefit of the appellant. According to him, at the time of medical examination, no injuries were found on the victim's body. Vaginal smear of the prosecutrix did not have spermatozoa. As per ossification test report (Ex.PW-5/A), X's age was estimated 16 years. There was unexplained delay in sending victim's clothes to FSL. Moreover, her clothes were never produced in the court for identification. The appellant's blood or semen samples were not collected. In the FSL report (Ex.PW-12/A), there was no mention of any blood / semen group and it did not match with that of the appellant. Counsel further urged that the delay in lodging the FIR has remained unexplained. Identity of the perpetrator of the crime is suspect as the appellant was not acquainted with the prosecutrix or her family members prior to the occurrence, how he was named in the FIR

is not understandable. The Investigating Officer did not conduct any Test Identification Proceedings. The prosecution witnesses have given conflicting versions about the incident. No independent public witness was associated at any stage of the investigation. Moreover, appellant's conviction with the aid of Section 3(2)(v) of the SC/ST Act is flawed as its provisions are not attracted.

7. Learned Addl. Public Prosecutor urged that statement of the prosecutrix aged around 10 years is sufficient to base conviction without further corroboration. No valid reasons exist to disbelieve her and her statement is worthy of credence.

8. Badan Singh – victim's father had taken mango orchard on contract from Nanhe Mian, appellant's uncle who has since expired. The appellant in 313 Cr.P.C. statement admitted that mango orchard was taken on 'contract' by Badan Singh from his uncle late Nanhe Mian. He further admitted that on the day of occurrence, he had gone on a bicycle to his fields near the mango orchard. Denying the incident of rape, he claimed that a scuffle had taken place with 'X' on his plucking mangoes. When he was in the process of getting down the tree, 'X' noticed it and started abusing him. She even tried to snatch mangoes plucked by him. On that, he slapped 'X' 2-3 times. 'X' in retaliation gave him beating with a broom. Thereafter, he came back to his house. He further elaborated that X's father was in possession of the orchard on contract basis for the last 4-5 years prior to the incident. Apparently, there is no denial of his presence at the spot at the time of incident by the appellant.

9. The occurrence took place on 24.04.2009 at around 01.00 p.m. The victim's parents who were away to village Khera were immediately informed by the victim's sister - Rakhi about the incident. They rushed to the house and arrived at around 04.00 p.m. Sincere attempt was made by the victim's father to lodge FIR with the local police immediately without any delay, however, the local police, may be due to influence of the appellant or his relatives, did not register the FIR. No proceedings whatsoever were conducted by the local police; even the prosecutrix was not medically examined. Victim's father - PW-1 (Badan Singh) did not give up and approached senior officers at Sambhal. On their intervention, the police machinery came into motion. Badan Singh lodged written complaint dated 27.04.2009 (Ex.PW-1/1). In the complaint, he gave graphic details of the incident whereby her daughter 'X' aged around 10 years was defiled by the appellant. He further informed that the appellant after criminally intimidating 'X' committed rape upon her. Apparently, there was no delay in reporting the incident to the police. The delay (if any) was due to slackness of the local police in not lodging the FIR despite being approached by the victim and her father. The satisfactory explanation of delay is weighty enough to reject the plea of false implication or vulnerability of the prosecution case. Moreover, in sexual offences delay in lodging the FIR cannot be a factor to discard the prosecution case.

10. Crucial testimony to infer the appellant's guilt is that of PW-4 ('X'), the victim. In her court statement, she deposed that on 24.04.2009 she was present in the mango garden to look after it in the

absence of her parents who had gone to village Khera to enquire about her Mausi's illness. Identifying the appellant to be the offender, she further stated that he came on a cycle and enquired her about her parents. When she informed that her parents were away to village Khera, the appellant dragged her to a 'Kothri' in the garden; forcibly removed her clothes and committed rape upon her; she was also criminally intimated and injured on her back with a 'khurpi' several times. After the crime, the appellant fled the spot leaving her unconscious. The victim further stated that soon thereafter, her sister Rakhi came there and brought her home. Rakhi apprised her parents and they rushed home at 4.00 p.m. She also narrated her ordeal to her parents and they took her to the police station Naroli. However, their complaint was not lodged and the written complaint was torn by the police officials. Her parents thereafter took her to senior police officers at district Sambhal, (UP) and thereafter her statement was recorded and she was medically examined. She further disclosed that she belonged to 'Jaatav' caste. She had handed over her clothes i.e. salwar and kameez which she was wearing at the time of commission of the offence to the police. In the cross-examination, she informed that she was a student of Vth standard that time. She explained that though she was regular but on the day of incident, she had gone to the mango garden due to her parents' visit to her Mausi's house. She further elaborated that it was Friday that day and workers in the nearby field had gone to offer 'namaz' in the mosque. She denied that a scuffle had taken place between the two on appellant's plucking mangoes from the garden and she had assaulted and abused him. She

denied that a false case was lodged to claim compensation from the government. On scrutinizing the testimony of the prosecutrix in its entirety, it reveals that despite searching cross-examination, no infirmity could be extracted to disbelieve her version. The appellant did not deny his presence at the spot at the time of occurrence. The material facts deposed by the victim remained unchallenged and unrebutted in the cross-examination. No ulterior motive was assigned or attributed to the child witness to make a false statement. In the absence of any prior animosity or ill-will, the prosecutrix who had no acquaintance or familiarity with the accused and knew him only due to his being resident of the village is not imaged to level serious false allegations of rape. It is highly unbelievable that to get petty amount of compensation, 'X', a girl of self-respect and dignity and who is conscious of her chastity having expectation of married life would accuse falsely against any other person of rape, sacrificing thereby her chastity. It is inconceivable that victim's parents make their daughter of tender age a pawn to claim compensation. Evidence of the victim of sexual assault has great probative force. It is highly unexpected that the victim, a minor, would pick up a quarrel with the appellant, a grown up man, over plucking of mangoes, as alleged.

11. PW-2 (Rakhi), the victim's elder sister has corroborated her version without any variation; her testimony is in consonance with that of 'X'. She deposed that on 24.04.2009, she had gone to serve lunch to her sister 'X' at the mango garden. On reaching there, she did not find 'X'. Despite her giving a call, there was no response. Then she went to the 'kothri' /small room in the garden and saw 'X'

lying unconscious there; her salwar was lying at a distance. She became frightened and poured water upon 'X's face. 'X' regained some consciousness but was not able to walk. She assisted 'X' in wearing her salwar and brought her home. She informed her parents telephonically and they reached home after about two hours. Her sister 'X' apprised her parents. She was taken to the police station but her complaint was not registered. It could be registered only on the 3rd day of the incident after intervention of the senior police officers at Sambhal. In the cross-examination, she clarified that on the day of occurrence, they had not gone to school as their parents were away. She further informed that 'X' was brought home within 10/15 minutes. She denied that no such incident of rape had taken place.

12. Again nothing material has emerged in the cross-examination to suspect 'X's version of the incident. Her presence at the crime spot is quite natural and probable as she as usual had taken lunch for 'X'. Since the perpetrator of the crime was not arrested at the spot on her arriving there, her natural reaction was to bring the prosecutrix home and inform her parents. On getting the information about the incident, the victim's parents rushed to the house and immediately went to lodge the report with the police. Nothing was suggested to her in the cross-examination if 'X' had picked up a quarrel with the appellant over plucking of mangoes by him.

13. Similar is the testimony of PW-3 (Naina Devi), victim's mother. She deposed that on 24.04.2009 she and her husband had gone to village Khera as her sister Saroj was ill there. On getting information about the incident from her daughter Rakhi, they reached

back home at around 4.00 p.m. 'X' disclosed there that the appellant had committed rape upon her. They immediately went to police chowki to lodge report but the police refused to do it. On the 3rd day, she along with her husband, daughters Rakhi and 'X' went to Sambhal to lodge their protest before the senior police officers. On their asking, the statement of her husband and that of 'X' were recorded; 'X' was got medically examined. She further informed that at Muradabad, the appellant used to threaten her family members not to depose against him or else they would face dire consequences. They were compelled to move Hon'ble Supreme Court for transfer of the case to Delhi. In the cross-examination, she disclosed that the mango orchard was taken on 'batai' by her husband and it was with him for the last 21 years. She further informed that they had taken 'X' to a private doctor in the village after the incident and he had given some medicines. She denied if in any quarrel over plucking of mangoes, the victim had assaulted the appellant with a broom. PW-1 (Badan Singh) victim's father, too deposed similarly. In the cross-examination, he fairly admitted that ₹25,000/- were given to him by the Government as assistance. He denied if the case was falsely lodged to get 'compensation'. Nothing material, thus, could be extracted in his cross-examination.

14. It is true that the victim's exact age could not be ascertained during investigation. The prosecution placed reliance upon the school record where 'X' had taken admission in Vth standard vide admission No.8439. The prosecution examined PW-9 (Irfan) to prove the relevant school records (Ex.PW-9/A and Ex.PW-9/B) where 'X's

date of birth was recorded as 18.06.1999. He admitted in the cross-examination that he had no personal knowledge as to on the basis of which documents, the said date of birth came to be recorded. He also admitted that the record of the school first attended by the prosecutrix was not brought by him. As per the school record, the victim was aged around 10 years on the day of occurrence. During investigation, ossification test to ascertain the age of the victim was conducted. As per the ossification report (Ex.PW-5/A), her approximate age was estimated 16 years. The huge gap in age in both the school record and of ossification report has not been explained by the prosecution. No credible document such as birth certificate etc. has come on record to find out the exact age of the prosecutrix. Nevertheless, victim's age is immaterial as allegations against the appellant are that he committed rape upon the prosecutrix forcibly without her consent.

15. It was urged by the learned counsel for the appellant that no reliance can be placed on 'X's' statement and it cannot be acted upon as initially in her statement to the police, she did not disclose commission of rape and in the supplementary statement making apparent, she implicated the appellant for commission of rape. It was emphatically contended that no injuries were noted on the private parts of the prosecutrix at the time of her medical examination. As per FSL report even spermatozoa was not found in the vaginal smear.

16. This Court finds no valid reasons to disbelieve the testimony of the prosecutrix merely because no injuries were found on her body at the time of her medical examination. Relevant to note is that soon after the occurrence, the police officials declined to register

the FIR and failed to medically examine her. Her medical examination took place after about three days of the incident. Absence of injuries on the private parts of the prosecutrix would not rule out her being subjected to rape. It is quite possible to commit legally the offence of rape without producing any injury to the genitals. To constitute the offence of rape, it is not necessary that there should be complete penetration and rupture of hymen. In law, slightest degree of penetration is sufficient.

17. To corroborate 'X's ocular version, the prosecution also relied upon FSL report (Ex.PW-12/A) where on exhibit-1 i.e. salwar, human semen was found; it also contained sperms. Blood stains were there on both Ex.-1 (Salwar) and Ex.-2 (Kurta). It is pertinent to note that the victim's wearing clothes were sent to Forensic Science Laboratory for examination. However, despite efforts by the Court below, the case property i.e. victim's clothes could not be produced during trial. Finally, it was found that these clothes could be lost and an FIR under Section 409 IPC was registered at Police Station Baniyadher, U.P. It shows the slackness and carelessness of the concerned police officials in the investigation of the case; its benefit, however, cannot be given to the appellant. The trial court has noted various deficiencies in the investigation where seemingly the police was hand in glove with the appellant. Initially, they declined to register FIR. Subsequently, on the intervention of higher officer, when they were compelled to lodge FIR, it was diluted and exact version of the victim accusing the appellant for rape was not recorded. Every defective investigation need not necessarily result in acquittal.

18. Undisputedly, the prosecutrix 'X' belonged to scheduled caste community. PW-11 (Harish Chand Tripathi) has proved the relevant record (Ex.PW-11/A, Ex.PW-11/B, Ex.PW-11/C collectively} in this regard. 'X' caste/status is not in controversy.

19. Minor inconsistencies, discrepancies and improvements highlighted by the appellant's counsel are insignificant to discard the version narrated by the prosecutrix without any material variation. Settled position is that courts have to show greater responsibility when trying an accused on charge of rape. In such cases, brand probabilities are required to be examined and the courts are not to get swayed by minor contradictions which are not of substantial character. The evidence is required to be appreciated having regard to the background of the entire case and not in isolation. Any deficiency or irregularity in investigation need not necessarily lead to rejection of the case of the prosecution when it is otherwise proved. She is consistent throughout and her testimony has been corroborated in all material particulars by her sister. Non-joining of independent public witnesses is not fatal to the prosecution case as the incident was not witnessed by any such individual. Moreover, the appellant and his family members exerted influence in the village where the occurrence took place. The victim and her family members were allegedly criminally intimidated and were forced to finally abandon the village to settle in Delhi. In such an hostile atmosphere, no independent public witness was expected to come in support of the victim from the village.

20. The appellant's conviction under Section 376/323/506 IPC based upon fair appreciation of evidence warrants no intervention and is confirmed.

21. We do agree with the appellant's contention that conviction with the aid of Section 3 (2)(v) of the SC/ST Act cannot be sustained. It is true that the prosecutrix belonged to SC community. No credible evidence has, however, come on record that the sexual assault upon the prosecutrix was due to the factum of her belonging to Scheduled Caste or Scheduled Tribe. Under Section 3 (2)(v) of the Act, it is sine-qua-non to establish that the victim is a person who belongs to Scheduled Caste or Scheduled Tribes and that the offence under Indian Penal Code was committed against her on the basis of such a person belonging to Scheduled Caste or Scheduled Tribe. In the absence of such ingredients, no conviction under Section 3 (2)(v) of the Act arises.

22. In *Asharfi vs. State of Uttar Pradesh* MANU/SC/1556/2017, (2018) 1 SCC 742, the Supreme Court observed as under:-

“5. In respect of the offence Under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act, the Appellant had been sentenced to life imprisonment. The gravamen of Section 3(2)(v) of SC/ST Prevention of Atrocities Act is that any offence, envisaged under Indian Penal Code punishable with imprisonment for a term of ten years or more, against a person belonging to Scheduled Caste/Scheduled Tribe, should have been committed on the ground that "such person is a member of a Scheduled

Caste or a Scheduled Tribe or such property belongs to such member". Prior to the Amendment Act 1 of 2016, the words used in Section 3(2)(v) of the SC/ST Prevention of Atrocities Act are "..... on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe".

6. *Section 3(2)(v) of the SC/ST Prevention of Atrocities Act has now been amended by virtue of Amendment Act 1 of 2016. By way of this amendment, the words "..... on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe" have been substituted with the words "..... knowing that such person is a member of a Scheduled Caste or Scheduled Tribe". Therefore, if subsequent to 26.01.2016 (i.e. the day on which the amendment came into effect), an offence under Indian Penal Code which is punishable with imprisonment for a term of ten years or more, is committed upon a victim who belongs to SC/ST community and the Accused person has knowledge that such victim belongs to SC/ST community, then the charge of Section 3(2)(v) of SC/ST Prevention of Atrocities Act is attracted. Thus, after the amendment, mere knowledge of the Accused that the person upon whom the offence is committed belongs to SC/ST community suffices to bring home the charge Under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act.*

7. *In the present case, unamended Section 3(2)(v) of the SC/ST Prevention of Atrocities Act is applicable as the occurrence was on the night of 8/9.12.1995. From the unamended provisions of Section 3(2) (v) of the SC/ST Prevention of Atrocities Act, it is clear that the statute laid stress on the intention of the Accused in committing such offence in order to belittle the person as he/she*

belongs to Scheduled Caste or Scheduled Tribe community.

8. *The evidence and materials on record do not show that the Appellant had committed rape on the victim on the ground that she belonged to Scheduled Caste. Section 3(2)(v) of the SC/ST Prevention of Atrocities Act can be pressed into service only if it is proved that the rape has been committed on the ground that PW-3 Phoola Devi belonged to Scheduled Caste community. In the absence of evidence proving intention of the Appellant in committing the offence upon PW-3-Phoola Devi only because she belongs to Scheduled Caste community, the conviction of the Appellant Under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act cannot be sustained.*

23. Resultantly the appellant's conviction under Section 376 with the aid of Section 3 (2) (v) of SC/ST Act cannot be sustained. The sentence order is modified and the appellant shall undergo rigorous imprisonment for ten years with fine ₹1,00,000/- and failing to pay it, the default sentence would be simple imprisonment for three months under Section 376 IPC. He shall also undergo rigorous imprisonment for one year with fine ₹10,000/-; in default to undergo simple imprisonment for 15 days under Section 506 IPC. The sentence under Section 323 IPC shall be simple imprisonment for one month with fine ₹5,000/-; default sentence being simple imprisonment for ten days. All the sentences shall run concurrently.

24. The appellant shall be entitled to the benefit under Section 428 Cr.P.C. The period already undergone by him in custody in this case shall be counted and set off against substantive sentence.

25. The appeal stands disposed of in the above terms.

26. Trial court record along with the copy of the order be sent back forthwith.

27. Copy of the order be sent to concerned Superintendent Jail for information.

(S.P.GARG)
JUDGE

(C.HARI SHANKAR)
JUDGE

APRIL 26, 2018 / tr/sa