

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

Criminal Appeal No.34 of 2014

Ashabai Kundalik Chate,
Age 28 years,
Occupation : Service,
R/o. Tambwa, Taluka Kaij,
District Beed.

.. Appellant.

Versus

The State of Maharashtra.

.. Respondent.

Shri. Sudarshan J. Salunke, Advocate, for appellant.

Shri. D.R. Kale, Additional Public Prosecutor, for
respondent.

With

Criminal Appeal No.63 of 2014

Amol @ Balu Sominath Dhakane,
Age 24 years,
Occupation : Labour,
R/o. Sarul, Taluka Kaij,
District Beed.

.. Appellant.

Versus

The State of Maharashtra,
Through Police Station Officer,
Police Station Kaij,
Taluka Kaij, District Beed.

.. Respondent.

2 Appeals 34, 63 & 154 of 2014

Shri. V.D. Sapkal, Advocate, holding for Shri. N.R. Pawade, Advocate, for appellant.

Shri. D.R. Kale, Additional Public Prosecutor, for respondent.

With

Criminal Appeal No.154 of 2014

Atamaram s/o Daiwan Munde,
Age 25 years,
Occupation : Labour,
R/o. Deogaon, Taluka Kaij,
District Beed.

.. Appellant.

Versus

The State of Maharashtra,
Through Police Station Officer,
Police Station Kaij,
Taluka Kaij, District Beed.

.. Respondent.

Shri. G.A. Kulkarni, Advocate, holding for Shri. R.S. Deshmukh, Advocate, for appellant.

Shri. D.R. Kale, Additional Public Prosecutor, for respondent.

**Coram: T.V. NALAWADE &
K.K. SONAWANE, JJ.**

Judgment reserved on : 27th August 2019

Judgment pronounced on : 23rd September 2019

COMMON JUDGMENT (By T.V. Nalawade, J.):

1) All the three appeals are filed against the judgment and order of Sessions Case No.50/2012 which was pending in the Court of the learned Additional Sessions Judge Ambajogai. The trial court has convicted and sentenced accused No.1 Amol and accused No.2 Atamaram for the offence punishable under section 376(g) of the Indian Penal Code and also for other offences punishable under the provisions of sections 3 (1)(xii), 3(2) (v) and 4 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act. Accused No.3 Smt. Ashabai, who has filed Criminal Appeal No.34/2014, is convicted and sentenced for offence punishable under section 306 of the Indian Penal Code. Imprisonment for life is given to accused Nos.1 and 2 and rigorous imprisonment for 10 years is given to accused No.3. Both the sides are heard.

2) In short, the facts leading to the institution of these three appeals can be stated as follows:

3) The prosecutrix was aged about 19 years at the relevant time. Accused No.1 Amol was aged 22 years and accused No.3 Atamaram was aged about 23 years. Accused Nos.1 and 2 together were plying taxi to earn the livelihood. Accused No.3 was working as Home-guard at the relevant time.

4) The prosecutrix hails from village Amalache Barad, Tahsil Kaij, District Beed. She had two sisters and two brothers. Two sisters were married and at the relevant time, the married sister Tilotama and her husband had come to Amalache Barad for short stay on account of one festival. Accused Nos.1 and 2 hail from different village and accused No.3 is also of other village.

5) The case was filed in respect of two incidents. One incident is of gang rape and after few days of the gang rape, the prosecutrix attempted to commit suicide and it is contended that accused No.3 had driven her to commit suicide by creating pressure on her.

6) The first incident took place on 20-2-2012. On that day the prosecutrix and her younger sister Babinanda left home in the morning for visiting temple of Lord Shiva situated at Uttareshwar Pimpri. The husband of Tilotama and Tilotama had also left for that place and these 2 sisters met the husband of Tilotama at Uttareshwar Pimpri. They had a darshan of Lord Shiva. When they wanted to return to Amalache Barad, the prosecutrix realised that the money which she had brought for expenses was exhausted. The husband of Tilotama was having a small gold ear-ring. He handed over it to the prosecutrix and asked her to sell it and collect money. From Uttareshwar Pimpri, the prosecutrix went to Kaij, Tahsil place, for selling the ear-ring and she reached there at about 6.30 p.m. As she was a girl aged about 19 years, she was not having the receipt, the goldsmith from Kaij refused to purchase the ear-ring. She was having some cash amount so she went upto Massajog for returning to Amalache Barad.

7) When the prosecutrix was waiting at Massajog for some conveyance, accused Nos.1 and 2 came there

with their jeep. They offered lift to the prosecutrix by saying that they would reach her to her village. As she had no money, she boarded the jeep. The accused took the jeep first to Uttareshwar Pimpri and there the accused dropped the passengers who were already in the jeep.

8) When they left Uttareshwar Pimpri it was dark, 8.00 to 8.30 p.m. On the way back, accused Nos.1 and 2 took the jeep to one kachha road and they stopped the jeep there. On that road by giving threats of life, accused Nos.1 and 2 committed rape on the prosecutrix one after other. After the incident, they left the prosecutrix to Uttareshwar Phata. It was night time, nobody was in the vicinity and the prosecutrix helplessly stayed at Uttareshwar Phata. As the prosecutrix had not returned to home, the husband of Tilotama and the parents of the prosecutrix started taking search for the prosecutrix. At about 10.00 p.m. the father of the prosecutrix noted that the prosecutrix was standing at Uttareshwar Phata.

9) At Uttareshwar Phata, the prosecutrix disclosed the aforesaid incident to her father, Bhagwan. From there

the prosecutrix and her father went to Kaij police station for giving report. Her report was recorded on 21-2-2012 in the early hours. She informed that she belongs to scheduled caste. Crime was registered for aforesaid offences. The prosecutrix knew the accused from prior to the date of incident, from her childhood and she had seen the accused plying the taxi. After registration of the crime, the clothes of the prosecutrix were taken over by police under panchanama.

10) With one lady constable and Home-guard (accused No.3) Kaij police referred the prosecutrix to Government Hospital for medical examination. In the Government Hospital, accused No.3 attempted to convince the prosecutrix by pressurising her not to proceed with the matter. She disclosed that she can arrange for payment of Rs. three lakh to her from accused Nos.1 and 2. She said that the prosecutrix had probably affair with the accused persons and as she was caught red handed, she had given the report. She advised the prosecutrix to settle the dispute and she said that prosecutrix cannot achieve anything, she will get defamed

and ultimately she will have to commit suicide. Accused No.3 expressed that accused Nos.1 and 2 were in a position to manage everything. The lady Constable had noticed this incident and on inquiry the prosecutrix disclosed the incident to the lady constable. On 21-2-2012, the prosecutrix was medically examined and it was noticed that there was rupture of hymen and it was recent.

11) On 25-2-2012, the prosecutrix consumed some tablets to commit suicide. She was taken to Government Hospital Kaij for treatment. There her second report was recorded in respect of the attempt of suicide and she disclosed the second incident.

12) Immediately after registration of the crime of commission of gang rape, accused Nos.1 and 2 came to be arrested. They were also referred for medical examination to ascertain that they were able to take sexual intercourse. Accused No.3 also came to be arrested. Caste certificate of the prosecutrix came to be collected. Blood samples came to be collected. Accused Nos.1 and 2

belong to Banjara community, not a scheduled caste or scheduled tribe. In view of the aforesaid circumstances, one charge-sheet came to be filed against three accused for the aforesaid two incidents.

13) In the trial court, the prosecution examined 17 witnesses including the prosecutrix, her father, two medical officers in respect of the two incidents, police constable who had noticed the second incident and the investigating officer. The trial court has believed all these witnesses.

14) The evidence of the prosecutrix (PW-1) shows that on 20-2-2012, after having darshan and after making attempt to sell the gold ear-ring at Kaij she had gone to Massajog and she was waiting there for conveyance. Her evidence shows that she had no money. Her other evidence need not be discussed in detail as the incident starts from Massajog where the prosecutrix was waiting for conveyance.

15) The prosecutrix (PW-1) has given evidence that at Massajog accused Nos.1 and 2 came in a jeep and they offered lift to her. She has deposed that she occupied the third seat, the rear side seat. She has deposed that accused dropped other passengers at Uttareshwar Pimpri and then they stated to return from Uttareshwar Pimpri. She has deposed that when she noticed that the jeep was not proceeding towards her village Amalache Barad she questioned the accused but the accused threatened her. She has deposed that the accused then took their jeep to kachha road and jeep was stopped at some distance and there the first incident, rape was committed by accused No.1 and 2 inside of the jeep.

16) The evidence of the prosecutrix (PW 1) shows that accused had closed the doors and windows when they were proceeding towards kachha road and even at kachha road the doors and windows were closed. According to her, accused No.1 and 2 took sexual intercourse with her in the jeep one after the other. Evidence is given that at that place also she was given threats. She has described the acts of taking sexual intercourse by accused Nos.1 and

2 in detail. She has deposed that after commission of the offence accused No.1 and 2 left her at Uttareshwar Phata and again threat was given to her not to disclose the incident to anybody.

17) The evidence of the prosecutrix (PW-1) shows that after some time her father noticed her at Uttareshwar Phata and then she disclosed the incident to her father. She has deposed that her father took her to Kaij Police Station from that Uttareshwar Phata. Her evidence shows that they were required to cross some distance on foot to reach Massajog and there they got one truck in which they went to Kaij Police Station. The report at Exhibit 25 given by the prosecutrix in respect of the first incident is duly proved in her evidence.

18) Evidence of Bhagwan (PW-2), father of the prosecutrix, shows that his daughter Tilotama and her husband Mohan Kamble and other daughter Babinanda returned to home from Uttareshwar Pimpri at about 7.00 to 7.30 p.m. but the prosecutrix did not return to home. He has deposed that search was started for the

prosecutrix and during the search they first went to Kaij at about 9.00 p.m. He has deposed that from that spot they went towards Massajog and Uttareshwar Pimpri also. He has deposed that he noticed the prosecutrix at Uttareshwar Phata. He has given evidence that the prosecutrix appeared in frightened condition and she was weeping and she disclosed the incident to him. He has deposed that prosecutrix herself expressed that she wanted to give report to police and so they went to Kaij Police Station in a truck. According to the prosecutrix, (PW-1) the incident took place at lonely place and both the accused committed rape inside of the jeep. In the substantive evidence she has described the place as kachha road. There is evidence of panch witness on spot panchanama and there is also the evidence of the investigating officer. That evidence may not matter much for either side and that evidence can be considered only to ascertain as to whether it was possible for others to notice that something suspicious was going on inside of the jeep there. It was dark time and the incident took place at about 8.30 p.m. on that day on kaccha road. Nothing is brought on the record to create probability that there was

always traffic at such hours on that road. Exhibit 86 and the evidence of the investigating officer Akhilsh Kumar (PW-15) shows that as per his instruction Bhujbal (PW-14) had gone to the spot to prepare the spot panchanama. The evidence of Bhujbal (PW-14) shows that the spot of offence was shown by the informant and there he found one empty beer bottle of Kingfisher in good condition and other bottle in broken condition. Exhibit 86, the spot panchanama, is duly proved by the prosecution. This road leads to village Lavari. This evidence and the evidence of map of scene of offence which is at Exhibit 71 which is proved in the evidence of Widekar (PW-10), Circle Inspector of Revenue Department shows that in the vicinity of the spot there were only agricultural fields and at some distance small temples were there but they were inside of the fields. There were no houses. This road was not in good condition and the evidence does not show that they noticed traffic on this road. This evidence shows that there was no opportunity to the prosecutrix to raise hue and cry and call for help. Further, she has given evidence that threats of life were given to her. Much cross examination is there to create probability that on that day

she had not raised hue and cry. Due to the nature of evidence available in the present matter, this Court holds that it was not possible for a lonely girl to resist or raise hue and cry as anybody like her would have tried to first save the life.

19) The evidence of Bhujbal (PW-14), a police officer shows that the prosecutrix came to the police station on 20-2-2012 at 11.30 p.m. to give the report. He recorded the said report. His evidence and the aforesaid evidence of the prosecutrix and her father show that the report was given immediately after the incident, at the first opportunity by the prosecutrix. She had first disclosed the incident to her father and then she disclosed the incident to police within two to three hours.

20) It is already observed that both the accused were known to the prosecutrix. The tenor of the cross examination made by the defence counsel also does not show that the accused are disputing the contention of the prosecution that she knew the accused. The evidence shows that accused were using the jeep for carrying

passengers. Due to this circumstance it was easy for police to trace the accused immediately. Evidence of Bhujbal (PW-14) shows that he could directly go to the residential place of the accused, owner of the vehicle and there he took the accused in custody and the jeep was also seized there, at village Sarul. Bhujbal (PW-14) has deposed that after taking accused No.1 in custody he got information about accused No.2 and then accused No.2 was also taken in custody on that night though from other place, like Kaij. Panchanama of seizure of jeep Exhibit 85 is duly proved in his evidence and it was prepared at about 3.10 a.m. of 21-2-2012. Other panchanama of spot was prepared at about 4.00 to 4.20 a.m. of 21-2-2012. These circumstances show that police believed the prosecutrix and action was taken immediately.

21) There is one admission of the prosecutrix (PW-1) in the cross-examination that when she went to police station to lodge report accused were present in the police station. Not much can be made out in favour of the accused due to this admission as the action was taken immediately by police and it can be said that even after

recording the report the prosecutrix was present in the police station and then the accused were picked up by police on that night and due to that she gave such evidence. If there is such admission it was necessary for the accused to explain as to why at such odd time they were present in Kaij Police Station. It is not possible that for any other reason they were called to the police station. No probability is created by the defence in the evidence of any witness that any witness had any reason to falsely implicate accused Nos.1 and 2. The prosecutrix was unmarried girl and she was doing one course. The prosecutrix or her father had no reason like vengeance as suggested for falsely implicating the accused in such a serious case and there was question of entire future of the prosecutrix. These circumstances show that action taken by the prosecutrix and police was immediate and the aforesaid circumstance give corroboration to the version of the prosecutrix.

22) The evidence of lady medical officer Dr. Gore (PW-8) shows that she examined the prosecutrix on 21-2-2012 at about 6.00 p.m. in Ambajogai Hospital,

Ambajogai. Referral slip and the letter of police are proved as Exhibits 56 and 57. The evidence of PW-8 shows that she noticed that there was tear of hymen. The report at Exhibit 58 is duly proved in her evidence and even opinion is also proved as Exhibit 59. Exhibit 58 shows that tear of hymen was "recent". Though no other injury was found on the person of the prosecutrix by PW 8, due to the aforesaid circumstances this Court holds that circumstance of absence of other injuries on the person of the prosecutrix has not created reasonable doubt about her version.

23) Surprisingly Dr. Gore (PW-8) created some other record which was unwarranted. She tried to collect so called history from the prosecutrix in respect of her previous sexual contacts with others. She noted that prior to the date of the incident the prosecutrix had sexual contact with other boy and such history was given by her. She also collected other particulars and on the basis of that, the doctor has given evidence that there was history of attempt of rape on 20-2-2012 and it is a case of attempt of rape.

24) The doctor to whom such patient, like the prosecutrix is referred for medical examination can collect some information, may be about the incident but the doctor is not expected to collect past history of the patient. Only information with regard to the incident can be collected. It is up to the court to draw inference on the basis of the findings of the doctor which are required to be recorded in the certificate of examination. The victim is from backward class and from labour class community. In the present matter the peculiar circumstances like the prosecutrix had attempted to commit suicide and the lady home-guard had created pressure on the prosecutrix need to be kept in mind. They show that few things were not done fairly at least in the hospital.

25) Dr. Gore (PW 8) has made positive attempt to show that it is not the case of rape but it is a case of attempt of rape. The tear of hymen was recent and the prosecutrix was unmarried. It was not possible for any medical witness to say that it was attempt of rape. The court is expected to draw inference on the basis of evidence of the prosecutrix and the medical evidence

which is mainly about injuries noticed by the doctor. Opinion of the aforesaid nature given by Dr. Gore that it was attempt of rape is not binding on the court. In view of the definition of rape given in section 375 of the Indian Penal Code, the prosecution can prove the incident of rape only on the basis of the evidence of the prosecutrix. In the present matter there is something more like rupture of hymen which was recent. Due to these circumstances and the position of law, this Court holds that the aforesaid circumstances like the evidence of doctor in favour of the accused cannot help them in any way. There is one more circumstance like the thumb impressions appearing on Exhibits 59 and 60 and they are said to be of the prosecutrix. She had put her signature in English on the FIR which is proved at Exhibit 25. Due to these circumstances this Court has formed opinion that the Department of Dr. Gore (PW-8) needs to take action against PW-8 for creation of aforesaid record and for giving the evidence of aforesaid nature in the court. For that, a copy of the judgment can be sent to her employer.

26) This Court holds that the medical evidence has given necessary corroboration to the version of the prosecutrix. Other evidence has also given corroboration to the version of the prosecutrix and the evidence as a whole has ruled out the possibility that no incident had taken place and the accused Nos.1 and 2 are falsely implicated.

27) The cross-examination of PW-1 was extensive and attempt was made to show that she did not raise hue and cry when the accused were taking her towards lonely place. In the cross-examination, attempt was made to create probability that she did not resist and probably she was consenting party. This was done because of the circumstance that no other injury was found on the person of the prosecutrix and no injury was found on the person of both accused Nos.1 and 2. As already observed, there is evidence to the effect that the windows of the vehicle were closed and when she tried to raise hue and cry threat of life was given to her. Her evidence shows that she knew both the accused as they used to carry passengers in the vehicle and she had seen them since her

school days. Thus, there was prior acquaintance. But due to that circumstance inference is not possible that she was consenting party. On the basis of this circumstance it can be inferred that she boarded the jeep due to prior acquaintance and she felt that accused Nos.1 and 2 can be trusted.

28) When a lonely girl is picked up with such intention by two youngsters like accused No.1 and 2 in the night time, when there is not much traffic on the road, when there is threat of life, the girl of such age may not offer resistance and she would like to save her life. The court also cannot expect that such girl should have taken risk of her life and she ought to have offered the resistance. Due to all these circumstances, this Court holds that the circumstance of absence of injuries on the person of accused Nos.1 and 2 has not created reasonable doubt about the case of the prosecution.

29) In the cross-examination of Bhagwan (PW-2) it is brought on record that he had a transaction in respect of open space with one Mahadeo Dhakane. The evidence

shows that PW 2 is still in possession of that property. It is suggested that accused No.1 and 2 were helping said Mahadeo Dhakane, they were trying to evict PW-2 from the plot and that is why they are falsely implicated in the case. This suggestion is denied. Accused Nos.1 and 2 have not produced any record to show that they have any relation with Mahadeo Dhakane or Mahadeo Dhakane had any dispute with PW-2 in respect of the said transaction. Thus, the defence has not created any probability of false implication of accused Nos.1 and 2. It is already observed that no father will put the entire future of his daughter at risk by using the daughter in such a case for false implication.

30) The defence has cross examined both PW 1 and PW 2 much on the amount which was taken by the prosecutrix with her for the aforesaid Yatra. An attempt was made by the defence to show that the version of the prosecutrix that she wanted to sell the ear-ring and for that she had left the company of the husband of her married sister and she was alone on the road is false. No such probability is created. In any case, even if it is

presumed that the prosecution wanted to move on her own on that day and she wants some space for herself, that circumstance could not have created a probability that she wanted to go with the accused Nos.1 and 2 and she was consenting party.

31) The trial court has believed the prosecutrix on all relevant points. When trial court gives finding in respect of credibility of the witness like victim of rape case and believes such witness the appellate court is not expected to lightly interfere in that finding. This Court holds that the trial court has not committed error in convicting accused Nos.1 and 2 for the offence of gang rape.

32) The learned counsel for the accused Nos.1 and 2 placed reliance on following cases.

- (1) *Mohan Lal v. State of Rajasthan* (2002 DGLS (SC) 1052 (SC).
- (2) *Vimal Suresh Kamble v. Chaluverapinake Apal S.P.* (2003 DGLS (SC) 8).
- (3) *Sadashkiv Ramrao Hadbe v. State of Maharashtra* (2006 DGLS (SC) 1245).

- (4) *Rajoo v. State of M.P. (2008 DGLS (SC) 1603).*
- (5) *Sham Singh v. State of Haryana (2018) DGLS (SC) 806.*

In the case of Mohan Lal (cited supra) the facts were altogether different. On the previous occasion the prosecutrix, who was a married woman, had taken some amount for allowing the accused to have sexual intercourse. F.I.R. was also late and in view of the facts of that case, the Court held that there was possibility of consent. In the case of Vimal Suresh Kamble (cited supra) it is laid down by the Apex Court that conviction on the basis of testimony of the prosecutrix alone is possible if it inspires confidence, it is natural and truthful. The facts of the reported case show that in that matter corroboration was necessary but as there was no corroboration of medical evidence or C.A. report and as the conduct of the prosecutrix after the incident was found to be suspicious, benefit of the circumstances was given to the accused. In the case of Sadashiv (cited supra) one doctor was involved as accused and the allegations made against him by the patient were found to be improbable in nature in view of the facts of that case. Close relatives of the accused were

available at the place where the incident allegedly took place. In the case of Rajoo (cited supra) the Apex Court has laid down that the basic principle in such a case is that ordinarily evidence of the prosecutrix should not be suspected and should be believed and her evidence needs to be evaluated as the evidence of injured witness. It is laid down that if the evidence is found to be reliable, no corroboration would be necessary. It is also laid down that if the evidence creates doubt, the possibility of embellishment or exaggeration needs to be kept in mind. On facts, it was held that truth and falsehood in that case was so inextricably intertwined, that it was not possible to discern where one ends and other begins. It was found that when allegedly, 13 accused persons were involved in the case, no injury was found on the prosecutrix. The prosecutrix was involved in some kind of improper activities. In the test identification parade she could identify only one of them when in the F.I.R. she had made allegation of rape against four of them. In the case of Sham Singh (cited supra) on facts it was held that the prosecution case was not probable.

33) In the case of **Md. Ali v. State of U.P. 2015 Cri.L.J. 1967** (Supreme Court), the F.I.R. was late by 11 days. There was no medical evidence. The testimony of the prosecutrix did not inspire confidence. In the case of **Valliappa Harijan v. Central Jail, Aghada, [1997 Bom. C.R. (Cri.) 215]** it was held that corroboration was necessary but it was absent and so benefit was given to the accused. In the case of **Sudhakar v. State of Maharashtra**, decided on 27-3-2004 by a learned Single Judge of this High Court, on facts the benefit of the circumstance was given to the accused. The facts were totally different.

34) On the other hand, learned Additional Public Prosecutor placed reliance on the case reported as **(1996) 2 SCC 384 (State of Punjab v. Gurmit Singh)**. In this case it is laid down by the Apex Court that it is duty of the court to show sensitivity in such cases. It is observed that minor contradictions or insignificant discrepancies should not be a ground to throw out the otherwise reliable prosecution case. It is observed that probability that due to threat, no alarm was raised and no resistance was offered needs to be always kept in mind by the courts in

such cases. In the case reported as **AIR 1981 SC 559 (Rafiq v. State of U.P.)** on which reliance is placed by the learned Additional Public Prosecutor, the Apex Court has observed that absence of corroboration or absence of injuries on person of victim may not be fatal in every case. In the case reported as **2008 (4) B Cr. C 191 (Navab Ansar Shaikh v. State of Maharashtra)** this Court has observed that evidence of the prosecutrix needs to be treated as evidence of an injured witness.

35) Facts of each and every criminal case are always different. In the present matter to the direct evidence there is corroboration of many circumstances including the medical evidence. In view of the facts of this case this Court holds that the observations made in the aforesaid cases on which reliance was placed by the learned counsel for accused Nos.1 and 2 cannot help the accused Nos.1 and 2.

36) One more point was argued by the learned counsel for the accused. The trial court has given conviction for offence of gang rape by presuming that

provisions of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act need to be used. On this point it was submitted by the learned counsel for the appellants that the amendment to the Act like provisions of section 3(2)(v) came to be introduced on 26-1-2016 and only after that, this provision can be used along with the provisions of section 376(g) of the Indian Penal Code and only if the offence is committed after 26-10-2016 the punishment like life imprisonment can be given. Reliance is placed on a case reported as **Asharfi Vs. State of Uttar Pradesh [2019 ALL MR (Cri) 1365 (S.C.)]**.

37) This Court has carefully gone through the observations made in the case of Asharfi (cited supra). The observations and the law laid down show that prior to the aforesaid amendment, it was necessary for the prosecution to prove that offence was committed on the ground that such prosecutrix was a member of scheduled caste or scheduled tribe. Thus only due to the reason of the caste if the offence was committed it was possible to use the provisions of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act and give conviction

of life imprisonment. After the amendment of the year 2016 the State is required to prove that such person prosecutrix belongs to scheduled caste or scheduled tribe and that was within the knowledge of the accused. So, the burden was heavy on the prosecution to prove the ingredient quoted as per the requirement of previous provision. That kind of evidence is not given in the present matter. In the past, it was necessary to prove that to belittle the person (prosecutrix) as she belongs to scheduled caste or scheduled tribe the offence was committed and that kind of evidence is not there. On the contrary, there is the evidence that the prosecutrix was known to the accused and the accused were also known to her and the accused used the circumstance on that day that she was alone on the road and she was helpless. The incident in question took place in the year 2012 and the evidence as per the requirement of the old provision is not there. So, this Court holds that it is not possible to hold that the accused persons committed the offence of gang rape only to belittle the prosecutrix and only because of the circumstance that she belongs to scheduled caste. In view of these circumstances, this Court holds that it is not

possible to give sentence of life imprisonment and in view of the previous provision, sentence of rigorous imprisonment for 10 years can be given to each of accused Nos.1 and 2. The fine amount of Rs.5000/- imposed on each of the accused can be maintained and such sentence would be just and proper.

38) In the second incident for which accused No.3 is convicted, there is evidence of the victim (PW-1), her father (PW-2), the evidence of lady constable Anita Tandale (PW-7) and Dr. Gorakh Munde (PW-9).

39) The victim girl (PW 1) has given evidence that she was referred for medical examination with Police Constable Tandale (PW-7) and Home-guard Ashabai (accused No.3). She has deposed that in the hospital, accused No.3 said to her that she (the victim) had the affair with accused and the report was given by her as they were caught red-handed by others. She has deposed that accused No.3 said to her that she would ask accused (accused Nos.1 and 2) to give Rs.2 to 3 lakh to the prosecutrix. She has deposed that accused No.3 said that

things about the incident will be published in news paper, TV etc. and the prosecutrix will be defamed. She has deposed that accused No.3 then said that due to such case, the prosecutrix will be required to commit suicide and die.

40) The evidence of PW-1 shows that she felt that accused No.3 was pressurizing her. She has deposed that she felt harassed by accused No.3 and when she returned home from the hospital she felt that she should commit suicide. She has deposed that she consumed 8 to 9 tablets and due to that she had vomiting and giddiness. She has deposed that when her parents and sister enquired with her she told that she had taken tablets on headache. She has deposed that she was then taken to Government Hospital Kaij where she was admitted for the treatment. She has deposed that, there, report Exhibit 27 was recorded by police in respect of the second incident. The report at Exhibit 27 is in respect of separate offence and it can be used for the corroboration purpose under section 157 of the Evidence Act. This report is consistent with the version of PW 1 on material points.

41) Lady constable Tandale (PW-7) who had taken the prosecutrix for examination on 21-2-2012 has given evidence that in the hospital the prosecutrix disclosed that accused No.3 had taken the prosecutrix to one side and there she had given offer of Rs. 3 lakh for settling the matter. PW-7 has deposed that it was also disclosed that accused No.3 had expressed that other alternative was suicide. It is true that no evidence is given by the prosecutrix that she had disclosed the second incident to PW-7 and the evidence of PW-7 can be called as hearsay in nature and can be ignored. However, the circumstance remains that there is evidence of PW 7 and there is record to show that accused No.3 was given with PW 7 for taking the prosecutrix to the hospital for medical examination. Such record is at Exhibit 52. Accused No.3 has not disputed that she was deputed for taking the prosecutrix along with PW-7 to Government Hospital.

42) Bhagwan (PW-2) has given evidence that on 24-2-2012 he learnt that the prosecutrix was not well, she had giddiness and she had vomiting. He has deposed that when he learnt that the prosecutrix had consumed tablets,

he took her to Kaij Hospital and the prosecutrix was admitted there. He has deposed that in the hospital the prosecutrix disclosed the incident. He has given evidence that the prosecutrix had disclosed to him that she was in disturbed mental condition and she had attempted to commit suicide. Though the prosecutrix has not given specific evidence that she disclosed the incident to her father (PW-2), the fact remains that the father had taken the prosecutrix to Government Hospital and there her report was recorded by police. Naturally the father got the knowledge about the incident at least in the hospital.

43) Dr. Gorakh Munde (PW 9) has given evidence that on 25-2-2012 the prosecutrix was admitted in the hospital for giving treatment on poisoning as it was informed that she had consumed tablets. He has deposed that he had given fitness certificate Exhibit 68 when police recorded the report of the prosecutrix which is at Exhibit 27. Exhibit 68 is the endorsement appearing on Exhibit 27. Though it is true that this doctor had not given treatment to the prosecutrix, evidence of this doctor is sufficient to prove that the prosecutrix was admitted in

Government Hospital for giving her treatment on poisoning. It is not probable that false case was created to implicate accused No.3 in the case.

44) For accused No.3 it is suggested to the prosecution witnesses that there is some land dispute and due to that accused No.3 is falsely implicated. Accused No.3 hails from other village and no reasonable probability is created that there was any reason either for the prosecutrix or her father to falsely implicate accused No.3.

45) The learned counsel for the accused No.3 submitted that accused No.3 cannot be convicted for offence of attempt punishable under section 511 of the Indian Penal Code. He placed reliance on some observations made by the Apex Court in the case reported as **State of Maharashtra v. Mohd. Yakub [(1980) 3 SCC 57]**. In this case the difference between 'attempt' and 'preparation' is given. Reliance was also placed on some observations made by the Apex Court in the case reported as **AIR 1956 SC 460 (Gurucharan Singh v. State of**

Punjab) in which the point of burden of proof is discussed by the Apex Court. In the case reported as **2018 Cri.L.J. 1812 (Latesh @ Dadu Baburao Karlekar v. State of Maharashtra)** the Apex Court has laid down that the prosecution needs to prove offence beyond reasonable doubt. It was submitted that there is no sufficient evidence to prove that it was an attempt of suicide and further the accused No.3 had really created a situation for accused No.3 due to which she made such attempt.

46) So far as the legal point raised by the learned counsel for accused No.3 is concerned, it can be said that, there is one case reported as **Gian Kaur Vs. State of Punjab (1996) 2 SCC 648**. In this case the Apex Court has held that abetment of attempt to commit suicide is outside the purview of section 306 and such offence can be punishable under section 309/107 of Indian Penal Code. It is held that even if punishment for attempt to commit suicide is not desirable (now not possible) its abetment can become offence. The Apex Court has laid down that in that case, section 116 of the Indian Penal Code can be used. Thus, if the offence of attempt of suicide is

punishable under section 309 of the Indian Penal Code then in that case the abetment by a person like accused No.3 would be punishable by using section 109 of Indian Penal Code.

47) The abetment of offence is one thing and attempt to commit an offence like attempt of abetment of the suicide is other thing. Abetment of suicide is itself offence punishable under section 306 of the Indian Penal Code. By virtue of section 40 of the Indian Penal Code read with section 511 of the Indian Penal Code such attempt is also offence. Section 40 of the Indian Penal Code runs as under :-

“40. “Offence”.-- Except in the Chapters and sections mentioned in clauses 2 and 3 of this section, the word “offence” denotes a thing made punishable by this Code.

In Chapter IV, Chapter V-A and in the following sections, namely, sections 64, 65, 66, 67, 71, 109, 110, 112, 114, 115, 116, 117, 118, 119 and 120, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, the word “offence” denotes a thing punishable under this Code, or under any special or local law as hereinafter defined.

And in sections 141, 176, 177, 201, 202, 212, 216 and 441, the word “offence” has the same meaning when the thing punishable under the special or local law is

punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine."

48) Provision of section 108 *Explanation 2* of the Indian Penal Code provides that even if offence is not committed the abetment becomes punishable as offence. Provision runs as under.

"108. Abettor.-- A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

Explanation 2.-- To constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused."

Abetment of suicide is an offence. By virtue of section 511 of the Indian Penal Code attempt to abet is also an offence. Abettor is liable under section 116 of the Indian Penal Code and the provision is as under.

"116. Abetment of offence punishable with imprisonment - if offence be not committed.- Whoever abets an offence punishable with imprisonment shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of any description provided for that offence for a term which may extend to one-fourth part of the longest term provided for that offence; or with such fine as is provided for that offence, or with both;

If abettor or person abetted be a public servant whose duty it is to prevent offence.-- and if the abettor or the person abetted is a public servant, whose duty it is to prevent the commission of such offence, the abettor shall be punished with imprisonment of any description provided for that offence, for a term which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for the offence, or with both."

The attempt of abetment of such offence can be considered for punishment by using section 511 of the Indian Penal Code. The provision of section 511 runs as under :

"511. Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment.-- Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both."

49) This Court holds that in such a case when a situation is created by the accused due to which the victim is driven to commit suicide and she makes an attempt to commit suicide but she survives, the person like accused

No.3 can be convicted by using section 306 read with 511 of the Indian Penal Code. If we read section 116 and section 511 of the Indian penal Code together it can be said that the punishment which is half of the sentence provided for commission of the offence itself can be given to such accused. So, this Court holds that the punishment needs to be reduced. In case of the first incident, as the provisions of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act could not have been used, the punishment could have been given only for the offence of gang rape punishable under the provision of the Indian Penal Code applicable at the relevant time. At the relevant time, for gang rape punishment of imprisonment for the period of 10 years could have been given and so this Court holds the period of imprisonment can be made as 10 years rigorous imprisonment as against accused No.1 and 2 and it needs to be 5 years for the second incident as against accused No.3.

50) In the result, all the three appeals are partly allowed. The conviction of accused Nos.1 and 2 given by the trial court by using the provisions of the Scheduled

Castes and Scheduled Tribes (Prevention of Atrocities) Act is hereby set aside and they are convicted for offence of gang rape punishable under section 376(g) of the Indian Penal Code and each of them is sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.5000/- each. In default of payment of fine they will have to undergo simple imprisonment for six months. The accused Nos.1 and 2 also stand convicted for the offence punishable under section 506 read with 34 of the Indian Penal Code and each of them is sentenced to suffer rigorous imprisonment for six months and to pay a fine of Rs.500/- each. In default of payment of fine each of them shall suffer simple imprisonment for one week. The substantive sentence of accused No.1 and 2 to run concurrently. They are entitled to set off in respect of the period for which they have been behind the bars in the case.

51) The conviction given to accused No.3 for offence punishable under section 306 of the Indian Penal Code is modified and it is given under section 306 read with 511 of the Indian Penal Code and she is sentenced to

suffer rigorous imprisonment for 5 years and to pay a fine of Rs.5000/-. In default of payment of fine she is to undergo simple imprisonment for 6 months. She is entitled to set off in respect of the period for which she has been behind the bars in the case. The bail bonds of accused Ashabai stand cancelled. She is to surrender to the bail to serve out the remaining sentence. The other part of the decision like giving the amount of Rs.10,000/- out of the fine amount to the victim as compensation is maintained.

Sd/-
(K.K. SONAWANE, J.)

Sd/-
(T.V. NALAWADE, J.)

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