

A.F.R.

Court No. - 44

Case :- CRIMINAL APPEAL No. - 5275 of 2008

Appellant :- Aftaf @ Nafees @ Pappu

Respondent :- State of U.P.

Counsel for Appellant :- Rakesh Dubey

Counsel for Respondent :- Govt. Advocate

Hon'ble Dr. Kaushal Jayendra Thaker,J.

Hon'ble Ajai Tyagi,J.

1. Heard Sri Rakesh Dubey, learned counsel for the accused-appellant and Sri Vikas Goswami, learned A.G.A. for the State.

2. Non-following of the decision of Apex Court in Criminal Appeal No.308 of 2022 (**Saudan Singh vs. State of U.P.**) decided on 25.2.2022 and non-considering the case of accused for remission seems to be the natural administrative conduct of the officers and the jail authority. We once again pained to show our anguish.

3. This appeal was listed in the year 2004. Unfortunately, as the order sheet shows, the matter was listed only after few years and the delay came to be condoned in the year 2008. From 2008 till 2022, the matter was never listed for hearing as is clear from the order sheet and it was only after the listing application was filed that the matter was listed. The lower Court's records were there in the year 2004 but the office has not prepared the paper book. As the matter is pending since long and the accused-appellant is in jail for more than 21 years with remission, we dispense with the paper book. We have requested learned counsels to go through the record. We have also perused the record.

4. This appeal challenges the judgment and order dated 23.10.2003 passed by Special Judge (SC/ST Act), Kanpur Dehat in Special Sessions Trial No.50 of 2001 (State vs. Aftaf alias Nafees

alias Pappu) wherein the learned Special Judge has convicted & sentenced accused-appellant, Aftaf alias Nafees alias Pappu, under Section 376 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') read with Section 3 (2) (v) of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as SC/ST Act) and sentenced him to imprisonment for life with fine of Rs.5,000/- and, in case of default in payment of fine, further to under go one year's simple imprisonment.

5. Brief facts as culled out from the record are that Kamlesh Kumar, the husband of prosecutrix, made a complaint to Police Station Akbarpur, Kanpur Dehat stating that on 9.2.2001, at about 12.00 noon, when the prosecutrix went to her field for bringing silage for the cattle, the accused-appellant, Aftaf alias Nafees alias Pappu, caught her from behind, knocked her down and started committing rape on her. On raising alarm by the prosecutrix, the informant along with his brother, Dinesh Kumar who were cutting silage in the adjacent field reached at the place of incident where they saw that accused was committing rape on her. It was alleged that the prosecutrix sustained injuries, her glass bangles got broken and the informant, his brother and one Darogi Lal brought her to the Police Station. On basis of the written report, the F.I.R. being Case Crime No. 36 of 2001 under Section 376 of IPC and Section 3 (2) (v) of SC/ST Act came to be lodged against the accused.

6. After lodging of the F.I.R, the investigation was moved into motion. The prosecutrix was got medically examined. The Investigating Officer, after taking statements of witnesses, submitted charge-sheet against the accused-appellant under Section 376 of IPC and under Section 3 (2) (v) of SC/ST Act.

7. The accused was committed to the Court of Sessions as the

case was triable by the Court of Session. The learned Sessions Judge framed charges on the accused. The accused pleaded not guilty and wanted to be tried.

8. So as to bring home the charge, the prosecution has examined 7 witnesses who are as under :

1	Kamlesh Kumar	PW1
2	Prosecutrix	PW2
3	Dr. Subha Mishra	PW3
4	Maan Singh	PW4
5	Dinesh Kumar	PW5
6	Om Prakash Singh	PW6
7	B. R. Premi	PW7

9. In support of ocular version following documents were filed:

1	F.I.R. & G.D.	Ex.Ka.5 & Ka.6
2	Written Report	Ex.Ka.1
3	Recovery memo of glass bangles	Ex. Ka. 7
4	Recovery memo of petikot	Ex. Ka.2.
5	Medical Report of Prosecutrix	Ex. Ka. 3 & Ka.4
6	Charge-sheet	Ex. Ka. 12
7	Site Plan with Index	Ex. Ka.8

10. At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Special Judge convicted the appellant as mentioned aforesaid.

11. As far as commission of offence under Section 3 (2) (v) of

SC/ST Act is concerned, it is submitted by learned counsel that the F.I.R. nowhere states that the injured belongs to a particular community. No documentary evidence so as to prove that the injured belongs to Scheduled Caste or Scheduled Tribe was produced either before Investigating Officer or Sessions Court. No independent witness has been examined by the prosecution. It is stated by prosecutrix that she did not know the accused. P.W.1 had stated that he did not know the accused and in his cross examination he had denied the commission of offence and, therefore, no case is made out for commission of offence under Section 3 (2) (v) of SC/ST Act and finding of the learned Special Judge requires to be overturned.

12. As far as commission of offence under Section 376 of IPC is concerned, it is submitted by learned counsel for the appellant that the accused has been falsely implicated in the present case. The medical evidence does not support the prosecution version as no internal/external injury was found on person of the prosecutrix though the F.I.R. and medical examination were prompt. It is further submitted that even P.W.1, in his cross examination has denied the commission of rape and the finding of the Special Judge is based on surmises and conjectures and requires to be overturned. In support of his argument, learned counsel for the appellant has relied on the decision of this Court in Criminal Appeal No. 204 of 2021 (**Vishnu vs. State of U.P.**) decided on 28.1.2021 & in Criminal Appeal No.4083 of 2017 (**Pintu Gupta vs. State of U.P.**) decided on 28.7.2022 and has contended that no ingredients of Section (3) (2) (v) of SC/ST Act & Section 376 of IPC is made out and, therefore, the conviction is required to be set aside.

13. Per contra, Sri Vikas Goswami, learned A.G.A. for the State has submitted that the conviction of the accused is just and proper as ingredients of offence under Section 3 (2) (v) of SC/ST Act and

Section 376 are very much there. It is further submitted by learned A.G.A. that P.W.2, prosecutrix, has stated that before committing the unlawful act, the accused had asked her name, caste and her husband's name and, therefore, finding of the learned Special Judge is just and proper.

14. Before we venture upon to discuss the evidence and the arguments advanced by the learned counsel for the parties, it would be pertinent to discuss Section 3 (2) (v) of SC/ST Act and Section 375 of IPC which read as under:

"3. Punishments for offences of atrocities.—
(1).....**xx**.....**xx**.....
(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,—
(i).....**xxx**.....
(ii).....**xx**.....
(iii).....**xxx**.....
(iv).....**xxx**.....
(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 on the ground 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."

[375. Rape.—A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—
(First) — Against her will.
(Secondly) — Without her consent.
(Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
(Fourthly) — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
(Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
(Sixthly) — With or without her consent, when she is under sixteen years of age.
Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.
(Exception) —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.]

15. The aforesaid provisions of law would now be seen in view of the ocular version as well as the documentary evidence of the prosecution witnesses. P.W.1, in his cross examination, categorically

mentions that he has not seen the appellants committing any kind of sexual intercourse with the prosecutrix. P.W.3, whose oral testimony has been considered, also categorically states that she cannot conclusively opine that whether there was commission of sexual intercourse against the will or against the consent of the prosecutrix. None of the ingredients, according to us, has been proved by the prosecutrix.

16. The evidence on record highlights the theory of commission of rape on the ground that the prosecutrix belong to a particular community. Neither the F.I.R. nor the oral testimony have been remotely suggests the same. So as to attract the provisions of Section 375 read with Section 376 of IPC and Section 3 (2) (v) of SC/ST Act, ingredients of the said offence has to be proved.

17. P.W., Kamlesh Kumar, who had lodged the F.I.R. is the husband of prosecutrix who has stated that the accused appellant professes muslim religion. The appellant is the resident of a place which is 8 to 9 kms away from the house of the prosecutrix. The most important aspect is that he does not know the accused which goes to show that the accused would not be knowing the caste of the prosecutrix. The accident occurred on 9.2.2001 in broad day light at about 12.00 noon. The F.I.R. and evidence go to show that the accused caught hold the prosecutrix from behind and knocked her down. P.W.1, P.W.5 & Darogi Lal were in the nearby field. According to P.W.1, in resisting, the prosecutrix suffered injuries and her bangles got broken. The report was got lodged by one Omkan Singh and the informant has signed on the same. It is an admitted position of fact that broken bangles were found from the so called place of occurrence. But when we read the evidence of P.W.2, the prosecutrix, it shows that she was being dragged and when she shouted, her husband and one Darogi Lal came there to save her. According to prosecutrix, the accused ran

away and after lot of running around he could be caught. This is a statement which is opposite to the statement made by P.W.1 as in his statement and the statement of P.W.5, there is no corroboration to this statement. She also mentions that she does not know the accused nor the accused knows her. They are the witnesses of facts who have given different versions. Evidence of P.W.2, prosecutrix, goes to show that at the time of occurrence, first of all, the accused caught her from behind and asked her caste and name of her husband. It is highly unbelievable that person who is going to commit grave offence like rape would ask caste and name of husband of prosecutrix before commission of crime. Hence, there is no evidence which goes to show that the offence by the appellant is committed on the ground that prosecutrix belongs to scheduled caste. The improvement in statement before lower Court was made by the prosecutrix, P.W.2, stating that appellant first asked her caste and name of her husband then commit the said offence. This is nothing else but a totally manufactured evidence.

18. As per prosecution version, on hearing hue and cry of the prosecutrix, her husband, brother-in-law and one Darogi Lal reached at the spot but Darogi Lal who was independent witness has not been produced.

19. We now go to the depositions of P.W.3, the doctor, the medical examination of prosecutrix was conducted by P.W.3. In the medical report of the prosecutrix, no injury was found on her private part. Two slides were taken from the discharge of vagina and sent for examination. Pathology report received by the doctor and supplementary report was prepared. In supplementary report, no living or dead spermatozoa was found which shatters the prosecution case with regard to commission of rape. Neither dead nor live spermatozoa was found. She was having fetus of five months.

20. This judgment shows that the learned Sessions Judge has convicted the accused-appellant where there was no evidence for commission of offence under Section 3 (2) (v) of The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. Neither the First Information Report nor the oral testimony of P.W.1 to P.W.5 even remotely suggest that the accused knew the prosecutrix. It is not worth believing that a person who want to commit sexual offence would enquire from the prosecutrix her name and her caste and then commit the unlawful act. P.W. 1 who is the husband of the prosecutrix has flatly denied the commission of offence in his cross examination though he was in the adjacent field. He had also stated that he did not know the accused-appellant. Therefore, the evidence of P.W.5 is wholly unreliable. The judgment relied by the prosecution before the Court below namely **Ved Prakash vs. State of Haryana, JIC 1996 SC 18** cannot apply to the facts of this case.

21. The evidence of doctor and the medical report does not show presence of any spermatozoa though the prosecutrix after lodging of F.I.R. was directly taken from police station for medical examination. No injury was found on her private part. In medical report of prosecutrix, some little abrasions were found on her hand and knee but it has been specifically mentioned in the medical report that these abrasions were three to four days old while the medical examination of prosecution was conducted on the very next day of the occurrence, hence, these abrasions cannot be linked with the alleged occurrence of this case. It was also stated in her testimony by prosecutrix that at the time of alleged occurrence, the appellant threw her on the ground and at the time of commission of rape she was sliding herself along with the ground but not even a single injury has

been found on the back of the prosecutrix. The learned judge, unfortunately, nowhere has discussed about the ingredients of Section 375 of IPC. Rather, he has misread the evidence of P.W.3. The learned Sessions Judge has gone on the assumption that as saree was worn by the prosecutrix, there may not be any injuries. The learned Sessions Judge has also gone on the assumption that as she was married lady and she was carrying a child, there is no necessity of there being any kind of injury sustained by her. The learned Session Judge has considered the fact that spermatozoa may or may not be found. The important aspects are non founding of spermatozoa and non finding of any kind of injuries which would permit us to overturn the judgment of learned Sessions Judge. There is no finding as far as commission of offence under Section 3 (2) (v) of SC/ST Act. Only on the ground that the prosecutrix and her family members belong to a particular community, can it be said that the offence has been committed? The answer is, No. We are also fortified in our view by the decision of the Apex Court in **Patan Jamal Vali vs. State of Andhra Pradesh, 2021 SCC OnLine SC 343**, wherein the Apex Court has held as under :

"58. The issue as to whether the offence was committed against a person on the ground that such person is a member of a SC or ST or such property belongs to such member is to be established by the prosecution on the basis of the evidence at the trial. We agree with the Sessions Judge that the prosecution's case would not fail merely because PW1 did not mention in her statement to the police that the offence was committed against her daughter because she was a Scheduled Caste woman. However, there is no separate evidence led by the prosecution to show that the accused committed the offence on the basis of the caste identity of PW2. While it would be reasonable to presume that the accused knew the caste of PW2 since village communities are tightly knit and the accused was also an acquaintance of PW2's family, the knowledge by itself cannot be said to be the basis of the commission of offence, having regard to the language of Section 3(2)(v) as it stood at the time when the offence in the present case was committed. As we have discussed above, due to the intersectional nature of oppression PW2 faces, it becomes difficult to establish what led to the commission of offence – whether it was her caste, gender or disability. This highlights the limitation of a provision where causation of a wrongful act arises from a single ground or what we refer to as the single axis model.

59 It is pertinent to mention that Section 3(2)(v) was amended by the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015, which came into effect on 26 January 2016. The words "on the ground

of” under Section 3(2)(v) have been substituted with “knowing that such person is a member of a Scheduled Caste or Scheduled Tribe”. This has decreased the threshold of proving that a crime was committed on the basis of the caste identity to a threshold where mere knowledge is sufficient to sustain a conviction. Section 8 which deals with presumptions as to offences was also amended to include clause (c) to provide that if the accused was acquainted with the victim or his family, the court shall presume that the accused was aware of the caste or tribal identity of the victim unless proved otherwise. The amended Section 8 reads as follows:

“8. Presumption as to offences. - In a prosecution for an offence under this Chapter, if it is proved that

(a) the accused rendered [any financial assistance in relation to the offences committed by a person accused of], or reasonably suspected of, committing, an offence under this Chapter, the Special Court shall presume, unless the contrary is proved, that such person had abetted the offence;

(b) a group of persons committed an offence under this Chapter and if it is proved that the offence committed was a sequel to any existing dispute regarding land or any other matter, it shall be presumed that the offence was committed in furtherance of the common intention or in prosecution of the common object.

[c) the accused was having personal knowledge of the victim or his family, the Court shall presume that the accused was aware of the caste or tribal identity of the victim, unless the contrary is proved.]”

60 The Parliament Standing Committee Report on Atrocities Against Women and Children has observed that, “high acquittal rate motivates and boosts the confidence of dominant and powerful communities for continued perpetration” and recommends inclusion of provisions of SC & ST Act while registering cases of gendered violence against women from SC & ST communities⁵³. However, as we have noted, one of the ways in which offences against SC & ST women fall through the cracks is due to the evidentiary burden that becomes almost impossible to meet in cases of intersectional oppression. This is especially the case when courts tend to read the requirement of “on the ground” under Section 3(2)(v) as “only on the ground of”. The current regime under the SC & ST Act, post the amendment, has facilitated the conduct of an intersectional analysis under the Act by replacing the causation requirement under Section 3(2)(v) of the Act with a knowledge requirement making the regime sensitive to the kind of evidence that is likely to be generated in cases such as these. 61 However, since Section 3(2)(v) was amended and Clause (c) of Section 8 was inserted by Act 1 of 2016 with effect from 26 January 2016 these amendments would not be applicable to the case at hand. The offence in the present case has taken place before the amendment, on 31 March 2011. Therefore, we hold that the evidence in the present case does not establish that the offence in the present case was committed on the ground that such person is a member of a SC or ST. The conviction under Section 3(2)(v) would consequently have to be set aside.”

22. The decisions cited by learned counsel for the appellant in **Visnu (Supra)** and in **Pintu Gupta (Supra)** will also apply to the facts of this case. This is a similar case to **Vishnu (Supra)** where the man was languishing in jail for non commission of offence for which he was punished.

23 We, therefore, hold that no case for commission of offence under Section 376 read with Section 3 (2) (v) of IPC is made out. The judgment and order impugned to this appeal is set aside. The accused-appellant is acquitted from the charges leveled against him. We direct the jail authority concerned to set the accused-appellant free, if not warranted in any other offence.

24. Record and proceedings be sent back to the Trial Court forthwith.

25. This Court is thankful to both the learned advocate for ably assisting the Court and getting this old matter decided.

26. The office has not prepared the paper book in this matter though the record was very much there in the year 2004. We, by this omnibus direction, direct Registrar (Listing) to impress upon the officer concerned to follow the decision of this Court in **Vishnu (Supra)** which are yet not being followed as even after 2021, the matters are not being listed. Even this matter has been listed only after the counsel for the appellant has filed listing application as the accused is in jail for more than 19 years (21 years with remission). His case has not been considered for remission by the jail authorities though 14 years of incarceration is over and there are directions of the Apex Court and this Court. Even if there is no direction of the Courts, under Section 433 of Cr.P.C. the authorities concerned are under an obligation to consider the case of the accused for remission.

Order Date :- 3.11.2022
DKS