

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/CRIMINAL APPEAL (AGAINST CONVICTION) NO. 658 of 2016****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE ILESH J. VORA****and****HONOURABLE MR. JUSTICE SANDEEP N. BHATT**

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Approved for Reporting	Yes	No
	Yes	
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KANUBHAI @ KISHANBHAI ARVINDBHAI MACHHI - PATEL
Versus
STATE OF GUJARAT & ANR.

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Appearance:

MR BHAVESH J PATEL(6801) for the Appellant(s) No. 1
MR. RADHESH Y VYAS(7060) for the Appellant(s) No. 1
DS AFF.NOT FILED (N) for the Opponent(s)/Respondent(s) No. 2
MS C M SHAH, APP for the Opponent(s)/Respondent(s) No. 1

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CORAM: HONOURABLE MR. JUSTICE ILESH J. VORA
and
HONOURABLE MR. JUSTICE SANDEEP N. BHATT

Date : 09/05/2025

ORAL JUDGMENT
(PER : HONOURABLE MR. JUSTICE ILESH J. VORA)

1. This criminal appeal preferred by the sole accused Kanubhai @ Kishanbhai Arvindbhai Machhi - Patel under Section 374(2) of the Cr.P.C. is directed against the judgment of conviction and order of sentence dated 20.02.2016 passed by the Additional Sessions Judge,

Bharuch in Special POCSO Case No.30 of 2015 by which the appellant has been convicted under Sections 363, 366, 376 and 377 of the IPC and Section 4 of Protection of Children from Sexual Offences Act, 2012 and Section 3(2) (v) of The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "Atrocities Act" for short) and sentenced as tabulated herein:

Conviction under Section	Punishment	Fine	In default of fine
Section 363 of IPC	S.I. for 5 years	Rs.1,000/-	S.I. for 1 month
Section 366 of IPC	S.I. for 5 years	Rs.1,000/-	S.I. for 1 month
Section 376 of IPC and Section 4 of POCSO Act	R.I. for 7 years	Rs.5,000/-	S.I. for 2 months
Section 377 of IPC	R.I. for 10 years	Rs.2,000/-	S.I. for 1 months
Section 3(2)(v) of Atrocities Act	Life Imprisonment	Rs.5,000/-	S.I. for 2 months

2. The case of prosecution leading to conviction of the appellant-accused is as follows:

2.1 The appellant-accused had been prosecuted for the offence of rape, abduction and sexual assault, alleged to have been committed upon the minor victim aged about 16 years. The incident occurred on 19.01.2013. The appellant-accused was school van driver and prior to the incident, his services were being hired for pick up and drop from the house of the victim to the school. The

mobile number of the victim was available with the accused as it was necessary for communication in case of difficulty. The accused got acquainted with the minor and started messaging her, but, the victim did not responded to his messages. On the day of incident, the accused came late to pick up the victim and no any other students were there in the school van. The victim picked up at about 7:45 a.m. and it was Saturday. The Maruti Van used to run on the usual road of the school, but, on that day, it had gone towards Sardar Bridge and due to this diversion, the victim raised a complaint, but the accused said that he wants to talk to her in a secluded place. The van was taken to border of Village: Mulud. The accused thereafter, stripped the victim in the van and committed rape upon her and also did unnatural sex with her and then, she was dropped at her house. The victim was under the shock and narrated the entire incident to her mother and then father and after due deliberation with other family members, they decided to lodge an FIR against the accused. The complaint came to be lodged on 21.01.2013 with Bharuch City Police Station as C.R. No.I-17 of 2013 for the offences as indicated above.

2.2 PW.14 - G.M. Patel, Dy. S.P. was entrusted the investigation of the case. During the course of investigation, he recorded the statement of the witnesses including the victim, took visit of the place of occurrence

and drew the panchnama, sent the victim for medical examination, arrested the accused, sent him for medical examination, collected and obtained the necessary samples for FSL, seized and recovered the clothes of the victim and accused, obtained the Caste Certificate of the victim and thereafter, upon completion of investigation, filed a chargesheet before the Jurisdictional Court and later on case was committed to the Court of Sessions at Bharuch.

3. On the basis of material on record, the charges were framed against the appellant for which the appellant pleaded not guilty.

4. In the course of trial, the prosecution adduced the following oral and documentary evidence:

Oral evidence

PW 1 – Exh.8	Punabhai Chagganbhai, panch witness
PW 2 – Exh.12	Nasrudin Fatehsinh Raj, panch witness
PW 3 – Exh.13	Victim
PW 4 – Exh.16	Neeruben Sudhirbhai Vasava, witness mother
PW 5 – Exh.17	Sudhirbhai Chandubhai Vasava, witness father
PW 6 – Exh.19	Dr. Vinodkumar Brijnandan Upadhaya, Medical Officer
PW 7 – Exh.22	Dr. Rupeshbhai Jerabhai Divakar, Medical Officer
PW 8 – Exh.26	Dr. Miteshkumar Gajrakarabhai Godi, Medical Officer
PW 9 – Exh.30	Dr. Neelaben Chenabhai Katara, Medical Officer
PW 10 – Exh.32	Jagdisbhai Ishwarbhai Vasava, Police Inspector
PW 11 – Exh.45	Yogeshbhai Bhogilal Modi, Clerk @ birth certificate division at Baruch Municipality
PW 12 – Exh.39	Ramanbhai Shanabhai Vasava, Collector, Nandod
PW 13 – Exh.45	Kanaksinh Parbatsinh, PSO

PW 14 – Exh.49	Gumanbhai Mithalbhai Patel, Investigating Officer
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Documentary evidence

Exh.09	Panchnama of Victim's clothes
Exh.10	Panchnama of Scene of Offence
Exh.11	List of Articles
Exh.14	Complaint
Exh.20	Certificate Issued medical officer of the victim at civil hospital, Bharuch
Exh.23	Certificate Issued medical officer of the accused at civil hospital, Bharuch
Exh. 27	Medical Examination report of victim, SSG Hospital, Vadodara
Exh.31	X-Ray report of victim, SSG Hospital, Vadodara
Exh.33	Medical examination certificate of victim on request of police inspector, General hospital, Bharuch
Exh.36	Xerox of Birth and Death Register, Bharuch Municipality
Exh.37	Birth Certificate of victim issued by Sub-registry, Birth-Death division, Bharuch Municipality
Exh. 40	Schedule Tribe Certificate of the Victim issued by Mamlatdar, Bharuch
Exh. 41	Certified Copy of note extract of appeal no.12588 regarding provision of caste pattern issued by Mamlatdar office, Nandod
Exh.42	Panchnama of state of accused's body and clothes
Exh.46	Xerox of true copy of Police Diary
Exh.50	Order to appoint as Investigating Officer
Exh.51	Letter from FSL, Surat
Exh.52	Biological analysis report, FSL, Surat
Exh.53	Serological analysis report, FSL, Surat

5. After closure of the evidence of prosecution, the accused upon being questioned under Section 313 with regard to incriminating circumstances made against him in the evidence rendered by the prosecution which he denied and stated that he has been falsely implicated.

6. Though opportunity afforded, the accused did not lead any evidence in his defence.

7. The court below after hearing the parties and upon appreciation of the evidence, found guilty the appellant for the offences and convicted and sentenced him for the offences as referred above.

8. Being dissatisfied with the conviction and sentence, the accused-appellant has come up with the present appeal.

9. We have heard Mr. Radhesh Vyas, learned counsel for the appellant and Ms. C.M. Shah, learned APP for the respondent-State.

10. Mr. Radhesh Vyas, learned counsel for the appellant has submitted that, the accused has undergone 11 years and 8 months of his jail term. So far as offences under Sections 363, 366, 376 and 377 of the IPC and Section 4 of POCSO Act are concerned, the accused was awarded to undergo 10 years imprisonment which he has already undergone. In this view of the matter, learned counsel Mr. Vyas does not press the appeal on merits qua the IPC and POCSO offences.

11. Mr. Vyas, learned counsel for the appellant-accused has submitted that, the trial court committed a serious error in holding the appellant-accused guilty of the offence

punishable under Section 3(2)(v) of the Atrocities Act; to invoke the provision of SC ST Act, it must be proved that the offence was committed on the ground that the victim belong to an SC or ST Community and must be shown that the offence of rape was committed only because the victim belong to SC ST Community and thus, merely proving an offence under the provisions of IPC does not automatically attract the provisions of SC ST Act; the charge under Section 3(2)(v) of the SC ST Act has not been substantiated by the prosecution, in as much as, there is no evidence to prove that the accused was aware about the caste of the victim and the witnesses including the I.O. failed to throw light on the applicability of the provisions of SC ST Act. In support of his submission, heavy reliance has been placed on the case of *Khuman Singh vs. State of Madhya Pradesh Criminal Appeal No.1283 of 2019* decided on 27.08.2019 to submit that, in order to attract Section 3(2)(v) of the SC ST Act, it is require to be proved that the offence must have been committed against the person on the ground that such person is a member of Scheduled Caste and Scheduled Tribe.

12. Learned APP Ms. C.M. Shah on the other hand submitted that the offence of rape is proved against the accused beyond reasonable doubt and the victim being a member of Scheduled Caste had been subjected to sexual

assault and therefore, the charge under Section 3(2)(v) is also proved and there is sufficient evidence for proving the charge.

13. The accused-appellant has been charged for the offence under Sections 363, 366, 376 and 377 of IPC and Section 4 of the POCSO Act. The trial court has found the aforesaid charges proved against the accused beyond doubt and sentenced him to undergo 10 years imprisonment under Section 376 and 377 of the IPC. All the sentences were order to run concurrently.

14. The appellant-accused does not press the appeal on merits qua the IPC offences. He is challenging his conviction and sentence under Section 3(2)(v) of the SC ST Act. In this view of the matter, the issue falls for our consideration as to whether the trial court was justified in convicting the appellant-accused for the offence punishable under Section 3(2)(v) of the SC ST Act?

15. In order to appreciate the rival contentions of the parties, it would be useful to reproduce the relevant section 3(2)(v) of the SC ST Act which reads as under:

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



16. Before we proceed further, it is relevant to analyse the evidence of the relevant witnesses on the limited aspect:

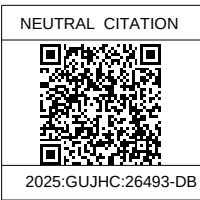
- (a) PW.3: Victim - victim in her testimony has stated about how the accused sexually abused her and committed rape upon her in the maruti van. She did not have stated that she being a member of SC ST Caste, the accused committed rape upon her.
- (b) PW.4 & 5: Niruben Vasava and Sudhir Vasava - the witnesses are parents of the victim. In their testimony, nowhere they have stated that the accused committed rape upon their daughter intentionally because of caste.
- (c) PW.14: Guman M. Patel, Dy.S.P. (SC ST Cell) - the witness was the investigating officer of the case and during the course of investigation, he obtained the Caste Certificate of the victim and upon completion of the investigation, he submitted chargesheet before the Jurisdictional Court. The witness in his testimony does not throw any light on the issue whether the offence committed upon the victim because she belongs to SC ST Caste. The accused whether not belongs to SC ST Caste was also not properly

investigated because it is his duty to obtain the caste certificate of the accused to prove that he does not belong the SC ST Caste.

17. We have examined the case records, evidence and findings of the court below on the aspect of conviction and sentence awarded under Section 3(2)(v) of the SC ST Act. The court below while convicting the appellant under Section 3(2)(v) of SC ST Act, has not properly appreciated the evidence and failed to assign sound and cogent reasons of his conclusion that why the offence under the provision of SC ST Act is proved. The offence in the present case alleged to have been committed on 19.01.2013. Section 3(2)(v) of the SC ST Act now been amended by virtue of Amendment Act 1 of 2016. By way of this amendment *"....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 Scheduled Caste and Scheduled Tribe"*. In the present case unamended Section 3(2)(v) is applicable as the offence was on 19.01.2013. In such circumstances, in order to establish an offence under Section 3(2)(v) of the SC/ST Act, the prosecution is required to prove that the offence is committed on the ground that such person is a member of scheduled caste or scheduled tribe. In the case of *Asrafi Vs. State of Uttar Pradesh* (Criminal Appeal No.1182 of 2015, decided on

08.12.2017), the Supreme Court while interpreting unamended Section 3(2)(v) has observed that the statute laid stress on the intention of the accused in committing such offence and provisions can be pressed into service only if it is proved that the offence has been committed on the ground that the victim belonged to SCST community and in absence of evidence proving intention of the accused in committing the offence, upon the victim only because she belongs to SCST community, the conviction cannot be sustained. The same view has been reiterated by the Supreme Court in the case of *Asrafi Vs. State of U.P.* (2018 (1) SCC 742) and in the case of *Khuman Singh Vs. State of Madhya Pradesh* (Criminal Appeal No.1283 of 2019, decided on 27.08.2019) and thereafter, in the case of *Patan Jamal Vali Vs. State of Andhra Pradesh* (AIR 2019 SC Page-2190).

18. Reverting to the facts of the present case, and in view of the settled legal position of law, there is nothing on record to show that the offence was committed because the victim belonged to SCST caste. In that view of the matter, we are of the considered opinion that the prosecution failed to bring on record any evidence which may demonstrate that the victim was kidnapped and raped on the ground of her being scheduled caste and merely because the victim is a scheduled caste would not automatically attract the offence under Section 3(2)(v) of



the SCST Act.

19. For the above reasons, we set aside the judgment of conviction and order of sentence dated 20.02.2016 convicting the accused appellant under Section 3(2)(v) of the SCST Act. Accordingly, the present appeal is **allowed in part**. It is reported that the accused has undergone 12 years of his imprisonment and as per the jail report, he has completed the sentence qua IPC offences and the offence under the POCSO Act. The State has not challenged the sentence on the ground of its inadequacy. Thus, the jail authority shall set at liberty forthwith the accused if his custody is not required in any other offence. R & P shall be returned forthwith. If the fine deposited qua the offence under Section 3(2)(v) of the SCST Act, it shall be refunded.

20. The present appeal stands disposed of in the aforesaid terms.

Sd/-
(ILESH J. VORA,J)

Sd/-
(SANDEEP N. BHATT,J)

TAUSIF SAIYED