

HIGH COURT OF SIKKIM, GANGTOK
(Criminal Appellate Jurisdiction)

HON'BLE SHRI SUNIL KUMAR SINHA, CHIEF JUSTICE

Crl. A. No. 07 of 2015

Naresh Kumar Agarwal,
Son of Shri Anand Agarwal,
Aged about : 35 years,
Resident of : Naya Bazar, Siliguri,
District: Darjeeling, West Bengal.

Present Status: -
On Bail u/S. 389 of Cr. P.C., 1973.

... **Appellant / Convict.**

Versus

State of Sikkim.

... **Respondent**

Appeal u/S. 374(2) of the Code of Criminal Procedure, 1973.

Appearance :

Mr. Ajay Rathi and Mr. Rahul Rathi, Advocates for the
Appellant.

Mr. Karma Thinlay, Additional Public Prosecutor with Ms.
Pollin Rai, Assistant Public Prosecutor for the State.

J U D G M E N T

(07.04.2016)

SUNIL KUMAR SINHA, CJ.

1. This Appeal is directed against the Judgment dated
25.03.2015 passed in S.T. Case No. 58 of 2013 (originally
instituted as S.T. Case (SC & ST (POA) Act Case No. 02 of 2012)

by the Special Judge SC & ST (Prevention of Atrocities) Act, 1989, East Sikkim at Gangtok. By the impugned Judgment, the Appellant has been convicted u/S. 3 (1) (x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "Special Act") and Sec. 353 of the IPC and sentenced to undergo SI for six months and to pay fine of Rs.3,000/- with default sentence of SI for three months and SI for six months, respectively, with the direction to run the sentences concurrently.

2. The facts, briefly stated, are as under: -

2.1 Complainant, Bikash Lohar (PW-1) was working on the post of Junior Engineer (JE), Rural Management and Development Department (RM & DD), Government of Sikkim. He was in-charge of PMGSY Road (under construction) from Tareythang to Kerabari. Bikash Lohar (PW-1) was a member of 'Kami' caste recognized as Scheduled Caste in the State of Sikkim under the Constitution (Sikkim) Scheduled Tribe/Caste Order 1978. The work of construction and carpeting of the road was allotted to Santosh Kumar Agarwal (DW-2). The allegations are that on 27.04.2012, at about 10.30 AM, the Appellant used derogatory language against the complainant (PW-1) taking the name of his caste while the complainant (PW-1) was on official duty. Further allegations are that the Appellant, in fact, used criminal force to deter the complainant from discharge of his duty. All this happened at an open place within public view, which was witnessed by three eye witnesses, namely, Nima Lama (PW-2), Goma Chettri (PW-3) and Durga Devi (PW-4).

2.2 The complainant (PW-1) reported the matter to the concerned Police Station in writing vide Exhibit-1, on which a First Information Report, Exhibit-2, was registered u/Ss. 353/323 IPC and Sec. 3 (1) (x) of the Special Act.

2.3 The learned Special Judge framed charges u/Ss. 3 (1) (x) of the Special Act and 353 IPC and relying on the testimonies of the above eye witnesses held that both the charges were proved against the Appellant. The Appellant, thus, was convicted and sentenced as above. Hence, this Appeal.

3. Mr. Ajay Rathi, learned counsel appearing on behalf of the Appellant, has firstly contended that the versions of all the eye witnesses are different on the alleged abusive/derogatory language used by the Appellant. This creates doubt on their testimonies. If the Appellant, in fact, had abused the complainant (PW-1) by using particular word in a particular manner the evidence on that account would have been identical.

4. Mr. Karma Thinlay, learned Additional Public Prosecutor, has opposed the above contention of Mr. Rathi. His contention was that the very import of the language stated by all the eye witnesses would disclose that the Appellant had abused the complainant taking the name of his caste, which was sufficient to hold that he was liable for punishment u/S. 3 (1) (x) of the Special Act.

5. Let us see, what are the versions of the eye witnesses on this account? Bikash Lohar (PW-1) has deposed that after a

short discussion with the Appellant regarding measurement of the work done, the Appellant caught hold of his neck and tried to assault him and ultimately assaulted him by hands. Thereafter, when he was returning back to his office the Appellant hold him and said "*Kami Kaam garnu jandaina, Peon ma pani nahunay manchey, J.E. Ma kaam gari rako cha*"*. Same derogatory language, the complainant has mentioned in his written report (Exhibit-1). Nima Lama (PW-2) is the other eye witness. According to him, he was the Supervisor of RMDD looking after the said work of road construction. According to him, the Appellant abused the complainant by taking the name of his caste in the following manner "*Kami, Daangra, Sarkhar lay toh lai J.E. Kasori banayo, Peon ko yogya pani chainas*"**. Goma Chettri (PW-3) is the third eye witness. She also claimed to be present on the road where the hot exchanges were being going on. According to her, the Appellant said to the complainant "*Ta Kami ko Behurah dekhauchas*"***. Durga Devi (PW-4) deposed that the Appellant abused the complainant saying that "*Ta Kami ko Behurah dekhauchas*"****.

* *You Caste you don't know how to work, you are not fit to be a peon, you are working as J.E. (Junior Engineer).*

** *You Caste, how did government made you J.E., you are not eligible to be a peon.*

*** *Showing the behavior/conduct of caste.*

**** *Showing the behavior/conduct of caste.*

(Above translated versions supplied by the counsel for the Appellant)

6. On appreciation of evidence of these eye witnesses on the above aspect, it would be clear that two of them (PWs 1 and 2) have given similar phraseology allegedly used by the Appellant, whereas the phraseology given by the two other witnesses (PWs 3 and 4) are quite different than the phraseology of PWs 1 and 2.

7. If four persons have simultaneously heard the version of the accused, in normal circumstance, possibly they would depose identical version or at least a version more matching and akin to the version of the accused. There may not be word by word repetition of the statement of the accused but there must be some resemblances in the versions of the eye witnesses about the language used by the accused. If the witnesses are true, they should be able to say as nearly as possible actual words spoken by the accused.

8. Mr. Karma Thinlay, relying on the decision in **State vs. Saravanan & Anr. : (2008) 17 SCC 587**, has argued that minor contradictions or inconsistencies would be immaterial and it has to be seen by the Court that the evidence of the witness read as a whole appears to have a ring of truth. He referred to paragraph 18 of the Judgment in which paragraph 10 of an earlier Judgment of the Supreme Court in *State of U.P. vs. M.K. Anthony : (1985) 1 SCC 505* has been reproduced in which it has been ruled that it is the totality of the situation, which has to be taken note of. Difference in some minor detail, which does not otherwise affect

the core of the prosecution case, even if present, that itself would not prompt the court to reject the evidence on minor variations and discrepancies.

9. In the instant case variations mentioned in the evidence of the eye witnesses are not minor variations. The import of evidence of the witnesses may be that Appellant was abusing the complainant, but to find out as to whether the Appellant was intentionally insulting or intimidating with the intent to humiliate the complainant as a member of Scheduled Caste, the words allegedly used by the Appellant would assume importance. If variations are there about words used by the Appellant, any inference ignoring those material versions would be vitiated. On the above variations in the evidence of four eye witnesses, I am of the view that it would not be safe to convict the Appellant for the charge framed u/S. 3 (1) (x) of the Special Act.

10. As far as offence u/S. 353 IPC is concerned, it is found that there is sufficient material on record to hold it as proved. The Appellant was a sub-contractor for carpeting of the road and the main contractor was Santosh Kumar Agarwal (DW-2). There is no dispute that on the relevant date the Appellant was present at the work site. While the complainant (PW-1) started measurement of soil erosion for preparing estimate, at that time the Appellant objected to the measurement and told the complainant that the measurement should be on higher side than the measurement

recorded by him. When the complainant (PW-1) did not agree to it, the Appellant caught hold of the neck of the complainant and tried to assault him by hands. This is what the complainant (PW-1) has deposed in his examination-in-chief. He was subjected to lengthy cross-examination, but nothing material could be elucidated therein so far as Section 353 IPC is concerned. The cross-examination would show that the entire focus of the Appellant was on the offence u/S. 3 (1) (x) of the Special Act and the evidence relating to assault or using criminal force to deter the complainant from discharge of his duty almost remained intact. The evidence of Bikash Lohar (PW-1) on the above aspect is corroborated by the evidence of Nima Lama (PW-2).

11. Mr. Rathi has argued that the defence version was not at all considered. His contention was that a few days prior to the incident the Appellant had given a press release against the conduct of the Government in relation to the construction of the said road, therefore, in retaliation a false case was slapped upon him. The paper clippings have been brought on record as Exhibit D-2 collectively. In the said press release, there is nothing against the complainant and the main import is that the contractor has blamed the concerned Department for negligence in construction of the road and further that the Department was responsible for non-completion of the construction work. This does not appear to be so incriminating on which a false case would be slapped by an

officer of the rank of J.E. against the contractor or the Appellant. Thus, the argument of Mr. Rathi in this regard is to be rejected.

12. For the forgoing reasons, the Appeal is partly allowed. Conviction and sentences awarded to the Appellant u/S. 3 (1) (x) of the Special Act are set aside. He is acquitted of the charge framed under the said Section. The conviction of Appellant u/S. 353 IPC is maintained, however, the sentence awarded to him requires to be modified as the mitigating circumstances are in his favour. The Appellant was aged about 32 years on the date of incident. This was his first offence. He has faced agony of the trial and appeal since the year 2012. He has already undergone for a period of 9 (nine) days in jail. I am of the view that no fruitful purpose would be served in sending the Appellant once again to jail and the ends of justice would be served if the sentence awarded to him u/S. 353 IPC is reduced to the period already undergone. Accordingly, while maintaining the conviction u/S. 353 IPC, the Appellant is sentenced to the period already undergone. The Appeal is allowed to extend indicated above.

Sd/-
Chief Justice
07.04.2016

Approved for Reporting : Yes/~~No.~~
Internet : Yes/~~No.~~