2025:CGHC:20188-DB
AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

CRA No.102 of 2024

1 - Vineet Kumar, S/o Sonsay, Aged About 23 Years, R/o Village Basdei, P.S. Tahsil and District Surajpur Chhattisgarh.

Appellant

versus

1 - State Of Chhattisgarh Through the S.H.O. (Ajak) - P.S. Surajpur, District Surajpur Chhattisgarh

Respondent(s)

CRA No.122 of 2024

1 - Abbu Bakar @ Monty S/o Abu Talik Aged About 28 Years R/o Bhaiyathan Road Mahagawan P.S. And District- Surajpur, Chhattisgarh.

2 - Ashraf Ali @ Chotu S/o Abu Talik Aged About 27 Years R/o Bhaiyathan Road Mahgawan P.S. And District- Surajpur, Chhattisgarh

Appellants

Versus

1 - State Of Chhattisgarh Through Station House Officer, Police Station Ajak Surajpur, District- Surajpur, Chhattisgarh.

Respondent(s)

CRA No.263 of 2024

1 - Mo. Masuk Raza Mansuri S/o Yakub Mansuri, Aged About 20 Years R/o Village Gopalpur, P.S. And District Surajpur,, District : Surajpur, Chhattisgarh

Appellant

Versus

1 - State Of Chhattisgarh Through Police Station Ajak, Surajpur, District : Surajpur, Chhattisgarh

Respondent

CRA No.289 of 2024

1 - Mohit Kumar Paikra @ Jain @ Jayant, S/o Basant Paikra Aged About 20 Years R/o Village Bagda (Dhograpara), P.S. Pratappur, District : Surajpur, Chhattisgarh

Appellant

Versus

1 - State Of Chhattisgarh Through P.S.- Ajak, Surajpur, District : Surajpur, Chhattisgarh

Respondent(s)

For Appellants	:	Mr. Ashok Kumar Shukla, Adv along with Mr. Vikas Dhritlahre, Adv in CRA No.102/2024, Mr. Shakti Raj Sinha, Adv in CRA No.122/2024, Ms. Sareena Khan, Adv in CRA No.263/2024 & Mr. Shashi Bhushan Tiwari, Adv in CRA No.289/2024
For Respondent-State	:	Mr. Shashank Thakur, Dy. AG

Hon'ble Shri Justice Ramesh Sinha, Chief Justice

Hon'ble Smt. Justice Rajani Dubey

Judgment on Board

02.05.2025

Per Rajani Dubey J.

1. Since all the appeals arise out of common judgment of conviction and order of sentence, therefore, the same have been clubbed and heard together and are being disposed of by a common order.

2. The present appeals are directed against the judgment of conviction and order of sentence dated 20.12.2023 passed by the learned Upper Session Judge (FTSC), Surajpur, District Surajpur in Special Session Case No.67/2022, whereby the appellants Masuk Raza, Abu Bakar, Ashraf Ali @ Chhotu and Vineet Kumar have been convicted and sentenced as under:-

Conviction	Sentence
Section 363/34 of IPC	RI for 4 years with fine of Rs.5,000/- and in default of payment of fine amount, additional RI for 6 months
Section 366/34 of IPC	RI for 6 years with fine of Rs.5,000/- and in default of payment of fine amount, additional RI for 6 months
Section 376D of IPC	RI for 20 years and fine of Rs.5,000/- and in default of payment of fine amount, additional RI for 6 months
Section 506/34 of IPC	RI for 2 years and fine of Rs.5,000/- and in default of payment of fine amount, additional RI for 6 months
Section 6 of POCSO	RI for 20 years with fine of Rs.5,000/-

Act	and in default of payment of fine amount, additional RI for 6 months
Section 67-B of IT Act	RI for 5 years with fine of Rs.1,00,000/- and in default of payment of fine amount, additional RI for 6 months
Section 3 (2) (v) of the SC/ST (Prevention of Atrocities) Act	Life imprisonment with fine of Rs.5,000/- and in default of payment of fine amount, additional RI for 4 months

All the sentences shall run concurrently.

The appellant Mohit Kumar has been convicted and sentenced as under:-

Conviction	Sentence
Section 363/34 of IPC	RI for 4 years with fine of Rs.5,000/- and in default of payment of fine amount, additional RI for 6 months
Section 366/34 of IPC	RI for 6 years with fine of Rs.5,000/- and in default of payment of fine amount, additional RI for 6 months
Section 376 of IPC	RI for 10 years and fine of Rs.5,000/- and in default of payment of fine amount, additional RI for 6 months
Section 376D of IPC	RI for 20 years and fine of Rs.5,000/- and in default of payment of fine amount, additional RI for 6 months
Section 506/34 of IPC	RI for 2 years and fine of Rs.5,000/- and in default of payment of fine amount, additional RI for 6 months
Section 6 of POCSO Act	RI for 20 years with fine of Rs.5,000/- and in default of payment of fine amount, additional RI for 6 months
Section 67-B of IT Act	RI for 5 years with fine of Rs.1,00,000/- and in default of payment of fine amount, additional RI for 6 months

All the sentences shall run concurrently.

3. The prosecution case, in brief, is that on 01.10.2022, the prosecutrix (PW-2) lodged a written report (Ex-P/2) at police station Surajpur alleging that on 19.12.2021, the appellant Masuk called her and took her to old petrol pump at bypass road, where the co-accused persons were already there, and all the accused persons committed gang rape on her and made a video and threatened her to make the video viral. Thereafter in January, 2022, the co-accused Jayant called her and threatened her to meet, else he would make the video viral, then she went to meet him at Shiv Park, where he committed rape on her. Subsequently, on 01.02.2022, the accused persons called her at Chhotu Singh's birth party and committed gang rape on her. Upon the report of the prosecutrix, a case was registered against the accused persons and they were arrested. After investigation, the charge sheet was submitted before the Magistrate concerned. After appreciating the oral and documentary evidence available on record, the learned trial court convicted the appellants and sentenced them, as described in para 1 of the judgment.

4. Learned counsels for the appellants jointly submit that the judgment of conviction and order of sentence passed by learned Trial Court is bad in law as well as facts available on

record. The learned Trial Court has relied upon the statements of the prosecutrix, but the statements of the prosecutrix are not at all reliable. The FIR was also lodged after a long delay and no satisfactory explanation has been offered by the prosecution in this regard. The prosecution has failed to prove the age of the prosecutrix below 18 years of age at the time of the incident. The learned Trial Court has also failed to prove the caste of the prosecutrix being Scheduled Tribe category, as the caste certificate was issued after the registration of the FIR against the accused persons, the said aspect of the matter has totally been ignored by the learned Trial Court. Learned counsels for the appellants further argue that the DNA report was also not matched with the accused persons which itself shows that the appellants have been falsely implicated in this case. The learned trial Court has not appreciated this aspect that the mobile phones seized from the appellants have not been examined by the prosecution and even no video was found to be recovered by the prosecution, as such the offence under IT Act is not proved against the appellants beyond reasonable doubt. Learned counsel for the appellants further submit that in the cross-examination of the prosecutrix, she has not stated against the appellants and even admitted that no forcible sexual intercourse was committed with her by the appellants, but the learned trial Court has not considered all

these aspects of the matter and has wrongly convicted the appellants for the aforesaid offence. Therefore, all the appeals deserve to be allowed. Reliance has been placed on the judgment rendered by the Hon'ble Supreme Court in the matter of **Alamelu and another vs State represented by Inspector of Police** and other connected matters, reported in **(2011) 2 SCC 385, Lalliram and another vs State of Madhya Pradesh**, reported in **(2008) 10 SCC 69 an**d **Rai Sande**e**p @ Deepu vs State (NCT of Delhi) and** another connected matter, reported in **(2012) 8 SCC 21.**

5. Per contra, learned State counsel supports the impugned judgment and submits that the appellants have committed heinous crime on a minor girl, who got pregnant and delivered a male child, which is corroborated by the medical as well as documentary evidence available on record. The learned Trial Court has minutely appreciated the oral and documentary evidence available on record and has rightly convicted the appellants for the aforesaid offences, as such no interference is called for by this Court. Thus, all the appeals are liable to be dismissed.

6. We have heard learned counsel for the parties, considered their rival submissions made herein-above and perused the material available on record.

7. Before the learned Trial Court, the prosecution examined as many as 14 witnesses in support of its case, whereas the defence examined only one witness in its support. The statements of the accused persons under Section 313 of CrPC was also recorded, in which they abjured the guilt. The learned trial Court framed charges against the appellants under Sections 363 read with Section 34, Section 366 read with Section 34, Section 506 read with Section 34 and Section 376 (d) of IPC, Section 3 (2) (v) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, Section 6 of POCSO Act, 2012 and Section 67-B of Information Technology Act, 2000. After appreciation of oral and documentary evidence available on record, the learned trial Court convicted and sentenced the appellants, as described in para 2 of the judgment.

8. Firstly, we have to consider the fact that whether on the date of incident, the prosecutrix was below 18 years of age or not?

9. As per prosecution, the prosecutrix was aged about 17 years on the date of the incident and was below 18 years of age. The prosecutrix (PW-2) stated in her chief examination before the learned Trial Court that her date of birth is 05.06.2005. PW-7 Smt. Rajni Gupta, Principal of Primary School Navapara, Surajpur stated that she is posted in the said school from

29.06.2021. The police seized the original Dakhil Kharij Register (Ex-P/17) provided by her as per seizure memo (Ex-P/11), whereas attested copy of this register is Ex-P/17C. In this register, the name of the prosecutrix was entered at serial No. 1818 and her date of birth is mentioned as 05.06.2005. She further stated that she had issued the birth certificate of the prosecutrix vide Ex-P/19 on the basis of this register. In the cross-examination she admitted that she did not enter the name of the prosecutrix on this register and she also does not know as to who entered the name of the prosecutrix in the register. She admitted that the birth certificate or any declaration form regarding the age of the prosecutrix is not attached with the dakhil kharij register, as such she cannot tell exactly as to whether the date of birth of the prosecutrix is correct or not.

10. PW-1 mother of the prosecutrix stated that her daughter is aged about 17 years, but she admitted this suggestion of defence that she did not take her to school for getting admission and she does not know the age of her daughter. The learned trial Court relied upon the documents Ex-P/17 and Ex-P/19, which are dakhil kharij register and birth certificate of the prosecutrix, and observed that the prosecutrix was below 18 years of age at the time of incident.

11. The Hon’ble Supreme Court in the matter of **Alamelu** (supra)

held in paras 40 & 48 as under:-

> "40. Undoubtedly, the transfer certificate, Ex.P16 indicates that the girl's date of birth was 15th June, 1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31st July, 1993. The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under Section 35 of the Indian Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded.
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> 48. We may further notice that even with reference to Section 35 of the Indian Evidence Act, a public document has to be tested by applying the same standard in civil as well as criminal proceedings. In this context, it would be appropriate to notice the observations made by this Court in the case of Ravinder Singh Gorkhi Vs. State of U.P. held as follows:-
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> > “The age of a person as recorded in the school register or otherwise may be used for various purposes, namely, for obtaining admission; for obtaining an appointment; for contesting election; registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum

> e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his behalf was void as he was a minor. A court of law for the purpose of determining the age of a party to the lis, having regard to the provisions of Section 35 of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under Article 21 of the Constitution, as in that case the accused may unjustly be convicted."

12. Keeping in view the aforesaid judgment, it is evident that in the case in hand, the prosecution has failed to prove this fact that on the date of incident, the prosecutrix was below 18 years of age on the date of incident, as such the finding recorded by the learned Trial Court in this regard is not sustainable and thus the appellants deserve to be acquitted of the offence under Section 6 of POCSO Act.

13. Now, we have to consider that whether all the appellants

abducted the prosecutrix, threatened her of life and committed gang rape with her.

14. The prosecutrix (PW-2) stated that she recognizes all the accused persons prior to the incident. She further stated that on 19.12.2021, the appellant Masuk called her and took her to old petrol pump, where the co-accused persons were already there, and all the accused persons committed gang rape on her and the appellant Masuk made her video and threatened her to make the video viral and due to fear, she did not tell the incident to anybody. She further stated that in January, 2022, the co-accused Jayant called her and threatened her to meet, else he would make the video viral, then she went to meet him at Shiv Park, where he committed rape on her. Subsequently, on 05.02.2022, the accused Matluk called her and told her that he is sending the accused Masuk to take her to Madras Hotel, thereafter Masuk came and took her to the room of Chhotu, whereas the accused persons Matluk, Monty, Saif and Chhotu were already there and even no birthday party was there. Thereafter the accused persons committed gang rape on her.

15. As per prosecutrix, she did not tell the incident to anyone because of fear and when she got pregnant, she told about the same to her brother and sister-in-law and thereafter written report (Ex.P/2) was lodged at the police station concerned.

The prosecutrix gave her consent for medical examination vide Ex-P/3 and spot map was prepared vide Ex-P/4. She gave her statement under Section 164 of Cr.P.C. before the Trial Court vide Ex-P/5 and admitted her signature on A to A part of the said document as well as the order sheets (Ex-P/6). In the cross-examination, she admitted that the written report (Ex.P/2) was not in her writing and was written by her friend/Mitanin. In her long cross-examination, except some minor contradictions, she remained firm on this point that accused persons committed gang rape on her.

16. Dr. Garima Singh (PW-8) stated that she examined the prosecutrix on 10.10.2022 and after examination she found the prosecutrix 8 month's pregnant. She referred her for Sonography, the report of which is Ex-P/22.

17. The mother of the prosecutrix (PW-1) stated that the delivery of the prosecutrix was done at District Hospital, Ambikapur and she gave birth to a male child and as per DNA report (Ex-P/42), the prosecutrix is the biological mother of the male child, but the appellants are not the biological father of the child.

18. Learned counsel for the appellants have strongly relied upon the DNA report (Ex-P/42) and have argued that the appellants are not the biological father of the child, as such the appellants

have been falsely implicated in the present case, but it is evident from the DNA report that blood sample of only those accused was collected who charge-sheeted before the learned Session Court and Juvenile Court i.e. the accused Masuk, Abu Bakar, Ashraf, Mohit and Vineet and blood sample of others was not collected. The co-accused namely Mahendra is still reported to be absconding.

19. The mother of the prosecutrix (PW-1), prosecutrix (PW-2), sister of the prosecutrix (PW-3), brother of the prosecutrix (PW-4) stated this fact that the prosecutrix gave birth to a male child at District Hospital, Ambikapur. Heeramati (PW-5) was working as Mitanin in the said hospital. She also stated that the prosecutrix was pregnant.

20. After delivery of the child, the DNA sample of the prosecutrix was also matched with the DNA of the child and as per DNA report, she was the biological mother of the child. Thus, it is evident that the prosecutrix gave birth to a male child at District Hospital, Ambikapur and as per prosecutrix she got pregnant after gang rape was committed on her by all the accused persons.

21. The Hon'ble Supreme in the matter of **Raju @ Umakant** (supra) held in paras 20, 21, 22 & 23 as under:-

> "20. It is important to note that in Explanation 1 to

376(2)(g) in the Criminal Law (Amendment) Bill, 1980 (which eventually became Criminal Law (Amendment) Act, 1983), it was proposed that gang rape be defined as rape committed by three or more persons acting in furtherance of their common intention. The Joint Committee of Parliament recommended that in cases of gangrape "even if one commits rape all the other persons involved should be held responsible and be equally punished" and recommended that gangrape should be defined as "rape committed by one or more in a group of persons". [See the Report of the Joint Committee presented on 02.11.1982 on the Criminal Law (Amendment) Bill, 1980.] This recommendation was accepted and the Criminal Law (Amendment) Act, 1983 was enacted with the explanation in the present form as extracted hereinabove.

21. This aspect has also come up for judicial consideration before this Court in Pramod Mahto and Others vs. State of Bihar, (1989) Supp (2) SCC 672 wherein this Court held that the Explanation has been introduced with a view to effectively dealt with the growing menace of gang rape and in such circumstances, it was not necessary that the prosecution should adduce clinching proof of complete act of rape by each one of the accused on the victim or on each one of the victims where there are more than one.

22. Further, in Ashok Kumar vs. State of Haryana, (2003) 2 SCC 143, it was held as under:-

"8. Charge against the appellant is under Section 376(2)(g) IPC. In order to establish an offence under Section 376(2)(g) IPC, read with Explanation I thereto, the prosecution must adduce evidence to indicate that more than one accused had acted in concert and in such an event, if rape had been committed by even one, all the accused will be guilty irrespective of the fact that she had been raped by one or more of them and it is not necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused. In other words, this provision embodies a principle of joint liability and the essence of that liability is the existence of common intention; that common intention presupposes prior

> concert which may be determined from the conduct of offenders revealed during the course of action and it could arise and be formed suddenly, but, there must be meeting of minds. It is not enough to have the same intention independently of each of the offenders. In such cases, there must be criminal sharing marking out a certain measure of jointness in the commission of offence." (Emphasis supplied)
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> 23. In view of this, it is very clear that in a case of gang rape under Section 376(2)(g), an act by one is enough to render all in the gang for punishment as long as they have acted in furtherance of the common intention. Further, common intention is implicit in the charge of Section 376(2)(g) itself and all that is needed is evidence to show the existence of common intention."

22. In view of the foregoing discussions and keeping in view of the law laid down by the Hon'ble Supreme Court, it is evident that in the present case, the prosecutrix clearly stated that the accused/appellants abducted her and committed gang rape on her on so many occasions by threatening her of life and making her obscene video viral and due to fear, she did not disclose the incident to anyone. The prosecutrix got pregnant and even delivered a male child and merely on the point that the DNA of the child was not matched with the accused persons' sample, her whole testimony cannot be ruled out. The learned Trial Court has also minutely appreciated the statement of the prosecutrix and has rightly observed that though the incident took place in January, 2022 and after so many months the statement of the prosecutrix was recorded, as such there can be some minor contradictions in the

statements of the prosecutrix. The appellants have also failed to prove as to why the prosecutrix is implicating them in a false case. The testimony of the prosecutrix is corroborated by the documentary and other evidence as well. Thus, the conviction of the appellants under Sections 363, 366, 506-B, 376 and 376D of IPC is hereby affirmed. The sentence and fine as imposed by the learned Trial Court against the appellants for the aforesaid offence is maintained and shall remain intact.

23. As regards offence under Section 3 (2) (v) of the Act, 1989, it is unambiguous that the mother of the prosecutrix (PW-1), prosecutrix (PW-2), sister of the prosecurix (PW-3) and brother of the prosecutrix (PW-4) have all stated that they belong to Gond Community which falls under the Scheduled Tribe category and the prosecution has also filed caste certificate (Ex-P-44) in this regard, but the date of issuance of the certificate is 12.10.2022, whereas the incident occurred in January, 2022, thus the caste certificate was issued after about 10 months of the incident.

24. The High Court of Madhya Pradesh in the matter of **Babulal Patel vs The State of Madhya Pradesh**, passed in **CRA No.648/2004 vide judgment dated 15.05.2024** held in para 6 as under:-

> “6. The learned trial court has convicted the accused for the offence of Section 3(1) (x) of the Act and for this, reliance has been placed upon the provisional

> caste certificate of complainant, marked as Ex.P-2. It was issued by Tahsildar on 18.12.2002 and contents thereof reveal that it was issued temporarily while the incident of the present case occurred on 8.12.2002, therefore, it is clear that this provisional caste certificate was obtained from Tahsildar after the date of incident."

25. In the present case, it is unequivocal that all the appellants in reply to question No.2 have answered that they had no knowledge that the prosecutrix belongs to the Scheduled Tribe Category. Thus, it is the duty of the prosecution to prove the fact that the prosecutrix belongs to the Scheduled Tribe category. Though the prosecution has filed the caste certificate (Ex-P/44), but the same was issued after 10 months of the incident.

26. The Hon'ble Supreme Court in the matter of **Raju @ Umakant vs The State of Madhya Pradesh**, reported in **2025 INSC 615**, held in paras 40 to 44 as under:-

> 40. The Court went on to hold in Patan Jamal Vali (supra) as under:
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> "59. … … As we have emphasised before in the judgment, an intersectional lens enables us to view oppression as a sum of disadvantage resulting from multiple marginalised identities. To deny the protection of Section 3(2)(v) on the premise that the crime was not committed against an SC & ST person solely on the ground of their caste identity is to deny how social inequalities function in a cumulative fashion. It is to render the experiences of the most marginalised invisible. It is to grant impunity to perpetrators who on account of their privileged social status feel entitled to commit atrocities against

socially and economically vulnerable communities. This is not to say that there is no requirement to establish a causal link between the harm suffered and the ground, but it is to recognise that how a person was treated or impacted was a result of interaction of multiple grounds or identities. A true reading of Section 3(2)(v) would entail that conviction under this provision can be sustained as long as caste identity is one of the grounds for the occurrence of the offence. In the view which we ultimately take, a reference of these decisions to a larger Bench in this case is unnecessary. We keep that open and the debate alive for a later date and case." (Emphasis supplied)

41. Earlier, in the same judgment, dealing with the situation where oppression operated at an intersectional fashion, this Court held in

"54. The key words are "on the ground that such person is a member of an SC or ST". The expression "on the ground" means "for the reason" or "on the basis of". The above provision (as it stood at the material time prior to its amendment, which will be noticed later) is an example of a statute recognising only a single axis model of oppression. As we have discussed above, such single axis models require a person to prove a discrete experience of oppression suffered on account of a given social characteristic. However, when oppression operates in an intersectional fashion, it becomes difficult to identify, in a disjunctive fashion, which ground was the basis of oppression because often multiple grounds operate in tandem. Larrisa Behrendt, an aboriginal legal scholar from Australia, has poignantly stated the difficulty experienced by women facing sexual assault, who are marginalised on different counts, to identify the source of their oppression:

"When an Aboriginal woman is the victim of a sexual assault, how, as a black woman, does she know whether it is because she is hated as a woman and is perceived as inferior or if she is hated because she is Aboriginal, considered inferior and promiscuous by nature?" [Larissa Behrendt, "Aboriginal Women and the White Lies of the Feminist Movement : Implications for Aboriginal Women in Rights Discourse", 1 Australian Feminist Law Journal 1

(1993), p. 35.]" (Emphasis supplied)

42. Section 3(2)(v) has since been amended (amended on 26.01.2016) and in the amended form it reads as under:-
"3. (2) Whoever, not being a member of a Scheduled Caste or Scheduled Tribe— ***
(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 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;"

43. The Court notices in Patan Jamal Vali (supra) that the amendment has decreased the threshold of proving that the crime was committed on the basis of the caste identify to a threshold where mere knowledge is sufficient to threshold a conviction. The Court also noticed that presumption in Section 8 which provided 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.

44. Reverting to the facts of this case, we find that there was no evidence to bring the case within the threshold of Patan Jamal Vali (supra). There is no evidence whatsoever to establish the fact that the victims caste identity was one of the grounds for the occurrence of the offence. In the absence of any evidence attracting the offence of Section 3(2)(v), we are constrained to record an acquittal for the appellant from the charge of Section 3(2)(v) of the 1989 Act."

27. In the present case also, there is no evidence adduced by the prosecution that the victim's caste identity was one of the ground for occurrence of the offence. In absence of any evidence attracting Section 3 (2)(v) of the Act, 1989, we are of the opinion that the offence under Section 3 (2) (v) of the Act is

not made out against the appellants Masuk Raza, Abbu Bakar, Ashraf and Vineet Kumar. Thus, the finding recorded by the learned Trial Court in this regard is not sustainable.

28. As regards offence under Section 67-B of IT Act, it is evident from the renquiry report dated 13.07.2023 that two mobile phones were recovered from the possession of the accused Masuk and Mohit Kumar. The mobile phone recovered from the appellant Masuk could not be opened due to pattern lock, whereas in the mobile phone recovered from the accused Mohit Kumar, no obscene video was found.

29. Section 67-B of the Information Technology Act, 2000 provides as under:-

> "67-B. Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form – Whoever-
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> (a) publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually esplicit act or conduct; or
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> (b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner; or
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> (c) cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource; or
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> (d)facilitates abusing children online, or
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> (e)records in any electronic form own abuse or that of

> others pertaining to sexually explicit act with children,
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> shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either discription for a term which may extend to seven years and also with fine which may extend to ten lakh rupees."

30. In the present case, though the mobile phones of the two accused persons were seized but no obscene video was found to be recovered, as is evident from the enquiry report dated 13.07.2023, but the learned Trial Court did not consider this fact and only the basis of the statement of the prosecutrix convicted the appellants for the offence under Section 67-B of the IT Act, as such the finding recorded by the learned Trial Court in this regard is not sustainable and the appellants deserve to be acquitted of the aforesaid offence.

31. Accordingly, all the appeals are partly allowed. The impugned judgment of conviction and order of sentence is modified to the extent that the conviction and sentence imposed upon the appellants under Section 363/34, 366/34, 506/34, 376 and 376D of IPC is affirmed, whereas the appellants Masuk Raza, Abbu Bakar, Ashraf and Vineet Kumar are acquitted of the offence under Section 6 of POCSO Act, Section 67-B of IT Act and Section 3 (2) (v) of the Act, 1989, whereas the appellant Mohit Kumar is acquitted of the offence under Section 6 of

POCSO Act and Section 67-B of IT Act.

32. The appellants Masuk, Abbu Bakar and Ashraf are in jail since 02.10.2022 and the appellants Mohit Kumar and Vineet Kumar are in jail since 04.10.2022, whereas the co-accused Mahendra is reported to be still absconding.

33. After setting off the period of detention undergone by the appellants against the sentence of imprisonment, the remaining jail sentence shall be served by the appellants.

34. The trial Court record along with a copy of this judgment be sent back immediately to the trial Court concerned for compliance and necessary action.

Sd/-
Rajani Dubey
Judge

Sd/-
Ramesh Sinha
Chief Justice

Nirala

HEAD NOTE

Conviction can very well be based on the unrebutted and consistent evidence of prosecutrix corroborated by other evidence.