

Balan Vs. State of Kerala

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Court : Kerala

Decided On : Oct-07-2003

Reported in : 2003(2)ALT(Cri)436; 2004(1)KLT122

Judge : G. Sasidharan, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 465; Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995 - Rule 7; Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Sections 3 and 3(1)

Appeal No. : Crl.A.No. 173 of 1997

Appellant : Balan

Respondent : State of Kerala

Advocate for Def. : Viju Thomas, Public Prosecutor

Advocate for Pet/Ap. : M.K. Damodaran,; Alan Papali and; M.P. Prabhanandan,

Disposition : Appeal allowed

Judgement :

G. Sasidharan, J.

1. Appellants are accused in Sessions Case 88/1996 on the file of the Sessions Court, Kasaragod and the order of conviction and sentence in the above case is under challenge. The allegation against the appellants was that they committed the offences under Sections 354 and 341 Indian Penal Code and Section 3(1)(xi) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. After trial, on an appreciation of the evidence the trial court found that the first appellant committed the offence under Section 3(1)(xi) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (hereinafter referred to as 'the Act') and Section 354 of the Indian Penal Code and the second appellant committed the offence under Section 341 of the Indian Penal Code. On convicting the appellants for the above offences the trial court proceeded on to sentence the first appellant under Section 3(1)(xi) of the Act to undergo rigorous imprisonment for a period of six months and to pay a fine of Rs. 5,000/- and in default of payment of fine, to undergo rigorous imprisonment for a further period of six months. No separate sentence was awarded under Section 354 of the Indian Penal Code in view of the sentence awarded under Section 3(1)(xi) of the Act. The second appellant was sentenced under Section 341 of the Indian Penal Code to pay a fine of Rs. 500/- and in default of payment of fine, to undergo rigorous imprisonment for a period of one week. Aggrieved by the order of conviction and sentence the appellants have come up in appeal.

2. Occurrence is alleged to have taken place at 3.30 p.m. on 8.4.1996 and the allegation is that PW1 was travelling in 'Yamuna' bus for going to Thimiri where her sister was residing. She had to get down at Cheruvathur bus stop for handing over ration card of her sister in a ration shop there. It is stated that at about 3.30 p.m. she occupied a seat which was indented for ladies and the appellants were sitting in the seat behind the seat which was occupied by PW1. The case is that the first appellant, who was sitting just behind PW1, wrote something with a pen on the lateral side of her body towards her breast PW1 protested by standing up and then she saw that was done by the first appellant who was sitting behind the seat. There is also allegation that when PW1 tried to get out of the bus when it reached Cheruvathur the first appellant caught hold of her on the left shoulder at the point where her sari was pinned to her blouse and made an attempt to beat her and also abused her. She escaped from the clutches of the first appellant and

went to a telephone booth to give information to police over telephone. The allegation is that the second appellant went to the booth and obstructed her from entering into the booth by keeping his hand across in front of her. She could not make a telephone call to police station and she went to the police station in an autorickshaw.

3. Ext. P1 first information was given to PW4, Head Constable in Chandera Police Station. On the basis of Ext. P1 first information Crime 91/1996 was registered on preparing Ext. P1(a) first information report alleging commission of offence under Section 354 of the Indian Penal Code. PW2, the doctor examined PW1 and issued Ext. P3 wound certificate. PW10, the Assistant Sub Inspector of Police took up the investigation of the crime and prepared Ext. P9 mahazar of the place of occurrence. On 20.4.1996 he sent a report to Court stating that during investigation it was revealed that the offence punishable under Section 3(1)(xi) of the Act was also committed. PW11, the Circle Inspector of Police, Neeleswaram took up the investigation of the crime. On completing the investigation of the crime, final report was filed in Court.

4. PW1, who is the victim of the offence, spoke about the occurrence, PW5, PW6 and PW7 were examined for the purpose of proving the occurrence. PW.5 was the person who was employed for collecting bus stand fee. He said before Court that he did not see the occurrence. He was declared hostile and was examined by the learned Public Prosecutor. PW6 was a person who was running the STD booth and he said that he knew PW1. At the same time he said that he did not know the appellants. He did not say anything about the occurrence which is alleged to have taken place near his STD booth. PW7 was the conductor of the bus and he said in the Trial Court that no incident as alleged by the prosecution took place in the bus in which he was working as conductor. PWs 6 and 7 were also declared hostile and were examined by the learned Public Prosecutor. There is only the evidence of PW1 which was relied on by the prosecution to prove that the occurrence took place in the manner suggested by the prosecution.

5. PW9 is the Tahsildar, Hosdurg who issued Ext. P8 certificate in which it is said that PW1 is a member of Vannan, a schedule caste. First appellant is an Ezhava

and the second appellant is a member of Vaniya Caste. It is clear from the evidence of PW1, who proved Ext. P8 that appellants are not members of any Scheduled Castes or Scheduled Tribe and PW1 is a member of Scheduled Caste.

6. This is a case in which after completing the investigation of the crime final report was filed in the Sessions Court, Kasaragod alleging commission of offences punishable under Section 3(1)(xi) of the Act and Sections 354 and 341 of the Indian Penal Code. The submission made by the learned counsel appearing for the appellants is that the Special Court can take cognizance of offence alleging commission of offences under the Act on the case being committed to that court by the Magistrate. The proper procedure would have been to file final report in the Court of the Magistrate and the Special Court would have taken cognizance of the offence only after the case was committed to the Special Court by the Magistrate. There is no provision in the Act which says that the Special Court can take cognizance of the offence only after the case is committed to that Court by the Magistrate. A Full Bench of this Court in the decision in Hareendran v. Sarada (1995 (1) KLT 231) on affirming an earlier decision of the Division Bench of this Court held that it was not necessary that the case had to be committed to the Special Court for that Court to take cognizance of the offence. In Gangula Ashok and Anr. v. State of A.P. 2000 (1) KLT 609 = AIR 2000 SC 740, the Supreme Court said that unless there is express provision to the contrary in any other law, the interdict contained in Section 193 of the Criminal Procedure Code cannot be circumvented and hence the Special Court can take cognizance of the offence under the Act only on the case being committed to that Court.

7. In State of M.P. v. Bhooraji and Ors. (AIR 2001 SC 3372) the Supreme Court considered the effect of the procedural irregularity in taking cognizance of the offence by the Special Court without the case being committed to that Court. Referring to Section 465 of the Criminal Procedure Code, the Supreme Court observed that the legislature imposed a prohibition that unless such error, omission or irregularity has occasioned 'a failure of justice' the superior court shall not quash the proceedings merely on the ground of such error, omission or irregularity. The expression 'a Court of competent jurisdiction' envisaged in Section 465 is to denote a validly constituted Court conferred with jurisdiction to try the

offence or offences. A validly constituted Court will not get denuded of its competence to try the case on account of any procedural lapse and the competence would remain unaffected by the non-compliance of the procedural requirement. Inability to take cognizance of an offence without a committal order does not mean that a duly constituted Court becomes an incompetent Court for all the purposes. In the case which came up before the Supreme Court it was held that the Trial Court was a Court of competent jurisdiction and that the proceedings in the Trial Court could not be held to be improper for the mere reason that it took cognizance of the offence without the case being committed to that Court. The procedural irregularity pointed out will not have any effect on the Trial Court unless it is shown that there occasioned a failure of justice. The mere reason that Sessions Court took cognizance of the offences under the Act without there being any commitment of the case in so far as there is nothing to show that any failure of justice was occasioned to the appellants, cannot be taken as a ground for setting aside the order of conviction and sentence.

8. Another point urged by the learned counsel appearing for the appellants is non-compliance of Rule 7 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995 (for short 'the Rules'). The above rule envisages that an offence committed under the Act shall be investigated by a police officer not below the rank of Deputy Superintendent of Police. There is also provision that the investigating officer shall be appointed by the State Government/Director General of Police/Superintendent of Police after taking into account his past experience, sense of ability and justice to perceive the implications of the case and investigate it along with right line within the shortest possible time. Here, the investigation of the case was conducted by PW11, the Circle Inspector of Police, Neeleswaram after it was disclosed that the offences punishable under Section 3(1)(xi) of the Act was committed. It was on 20.4.1996 that a report was sent to Court stating that the offence under the above section of the Act was also revealed to have been committed. That report was sent by PW10, the Assistant Sub Inspector of Police, who conducted the investigation before sending of the report. There is non-compliance of Rule 7 of the Rules in so far as the investigation was not conducted by a police officer not below the rank of a Deputy Superintendent of Police. The question to be considered is what will be the effect of the investigation being

conducted in violation of what is said in Rule 7 of the Rules.

9. In *State of Haryana and Ors. v. Bhajanlal and Ors.* (1992 Suppl. (1) SCC 335) the Supreme Court had the occasion to consider the effect of non-compliance of the provision in Section 5 of the Prevention of Corruption Act. In paragraph 117 of the judgment the Supreme Court said that a police officer not below the rank of an Inspector of Police authorised by the State Government in terms of the first proviso can take up the investigation of an offence referred to in Clause (e) of Section 5(1) only on a separate and independent order of a police officer not below the rank of a Superintendent of Police and that the strict compliance of the second proviso is an additional legal requirement to that of the first proviso for conferring a valid authority on a police officer not below the rank of an Inspector of Police to investigate an offence falling under Clause (e) of Section 5(1) of the Act. In paragraph 119 of the decision, after taking note of the fact that the Supreme Court had in several decisions observed that Section 5A of the Act is mandatory and not directory, it was held that the investigation conducted in violation thereof bears the stamp of illegality and even then that illegality committed in the course of an investigation does not affect the competence and the jurisdiction of the court for trial and where cognizance of the case has in fact been taken and the case is proceeded to termination, the invalidity of preceding investigation does not vitiate the result unless miscarriage of justice has been caused. The non-compliance of Rule 7 of the Rules will not be sufficient for saying that the entire trial in the case was vitiated. This is a case in which the trial of the case was conducted and the trial court on the basis of the evidence found that the first appellant committed the offence under the Act and it is not proper for this Court in appeal to say that the entire proceedings in the Trial Court were vitiated for the reason that the investigation was conducted by a police officer below the rank of a Deputy Superintendent of Police. That irregularity will have to be taken note of only if it is shown that that irregularity resulted in failure of justice.

10. There is evidence in this case to show that at the time when the offence is alleged to have been committed the appellants did not know that PW1 was a member of Scheduled Caste or Scheduled Tribe. PW1 herself says in the cross-examination that at the time when the occurrence is alleged to have taken place

she did not know the caste of the appellants and the appellants did not know her caste. Even at the time of giving Ext. P1 first information PW1 did not say that the appellants were not members of any Scheduled Caste or Scheduled Tribe and that she was a member of a Scheduled Caste. When PW1 was examined during cross examination she said that she told the police about her caste. But there is no mention in Ext. P1 that PW1 told the police that she was a member of a Scheduled Caste. The first information was given on 8.4.1996. It was only on 20.4.1996 that a report was filed in Court stating that an offence punishable under Section 3(1)(xi) of the Act was also committed by the accused, the appellants. The admission made by PW1 in the cross-examination that at the time when the occurrence is alleged to have taken place the appellants were not aware of the caste of PW1 would indicate that even according to PW1 at the time when the occurrence took place the appellants were not aware of the fact that PW1 was a member of a Scheduled Caste. According to the learned counsel appearing for the appellants, under Section 3(1)(xi) of the Act the assault or use of force to a woman belonging to a Scheduled Caste or Scheduled Tribe must be with the intention to dishonour or outrage the modesty of a woman belonging to Scheduled Caste or Scheduled Tribe. What is said in Section 3(1)(xi) is that the person, who commits the offence, should not be a member of a Scheduled Caste or Scheduled Tribe and assault or use of force must be to any woman belonging to a Scheduled Caste or Scheduled Tribe. There is also provision which says that assault or use of force must be with the intention to dishonour or outrage the modesty of a woman belonging to Scheduled Caste or Scheduled Tribe.

11. In support of the argument that the assault or use of force must be to dishonour or outrage the modesty of a member of Scheduled Caste or Scheduled Tribe, the decisions in *State of Kerala v. Hassan*, 2002 (2) KLT 565, *Binoy v. State of Kerala*, 2001 (1) KLT 125, and *Chandra Poojari v. State of Karnataka*, 1998 CrL.J. 53, are pressed into service. In *Binoy's case* (supra) a learned Judge of this Court was considering the ingredients to be established to prove that an offence under Section 3(1)(x) of the Act was committed. In that decision this Court said that it has to be established that there was intention to humiliate a member of Scheduled Caste or Scheduled Tribe. In Section 3(1)(x) it is said that there will have to be intention to humiliate a member of a Scheduled Caste or a Scheduled

tribe in any place within public view when he is being insulted or intimidated. Because there is clear provision in Section 3(1)(x) this Court said that there will have to be intention to humiliate the victim of the offence as a member of a Scheduled Caste or a Scheduled Tribe. In Hassan's case (supra) also a learned Judge of this Court was considering the ingredients to be established for bringing home an offence under Section 3(1)(x) of the Act. There, this Court said that the humiliation must be on the ground that the victim is a member of a scheduled caste or a Scheduled Tribe. In Chandra Poojari v. State of Karnataka, (1998 CrL.J. 53) also the Karnataka High Court was considering the ingredients to be established for attracting Section 3(1)(x) of the Act and it was held that it was necessary to establish that there was intention to humiliate a member of a Scheduled Caste or a Scheduled Tribe. In the above decisions it was held that there will have to be intention to humiliate a member of a Scheduled Caste or a Scheduled Tribe because there is specific provision in Section 3(1)(x) that the insult or intimidation will have to be with the intention to humiliate a member of Scheduled Caste or Scheduled Tribe in public view. In Section 3(1)(xi) there is no specific mention that there will have to be intention to dishonour or outrage the modesty of a member of a Scheduled Caste or Scheduled Tribe. So, the above decisions are not of any help to say that for attracting Section 3(1)(xi) there will have to be intention to dishonour or outrage the modesty of a woman belonging to Scheduled Caste or Scheduled Tribe.

12. Coming to the objects and reasons it is seen stated that when the Scheduled Castes and the Scheduled Tribes try to preserve their self-respect or honour of their women, they become irritants for the dominant and the mighty and that there has been an increase in the disturbing trend of commission of certain atrocities like making the Scheduled Castes persons eat inedible substance like human excreta and attacks on and mass killings of helpless Scheduled Castes and the Scheduled Tribes and rape of women belonging to the Scheduled Castes and the Scheduled Tribes. Under the above circumstances the existing laws like the Protection of Civil Rights Act and the normal provisions of the Indian Penal Code were found to be inadequate to check those crimes and that it was necessary that a special legislation to check and deter crimes against them committed by non-scheduled castes and non-scheduled tribes has to be made. On making note of the fact that

the term 'atrocities' had not been defined it was considered necessary that not only the term 'atrocities' had to be defined but stringent measures should be introduced to provide for higher punishments for committing such atrocities. It is clear from a reading of the statement of objects and reasons that the intention of the Legislature was to abate atrocities which have been committed against the members of Scheduled Castes and Scheduled Tribes.

13. 'Atrocities' is defined in Section 2(a) and it means an offence punishable under Section 3. That shows that the offence punishable under Section 3(1)(xi) will come under the term 'atrocities' defined in the Act. A reading of Section 3(1)(xi) would go to show that there will be an offence under that Sub-section when assault or use of force is made to any woman belonging to a Scheduled Caste or Scheduled Tribe. Then the clause says that that must be with the intent to dishonour or outrage her modesty. At the place where it is said that there will have to be intention to dishonour or outrage her modesty it is not specifically mentioned that the intention has to be to dishonour or outrage the modesty of a woman belonging to a Scheduled Caste or Scheduled Tribe. The term used there is 'her'. The meaning of the term 'her' has to be understood by taking into account what is said in that clause. In the opening portion of the clause it is said that assault or use of force has to be to a woman belonging to a Scheduled Caste or Scheduled Tribe and in the later portion the term 'her' is used. That term has the meaning a woman belonging to Scheduled Caste or Scheduled Tribe. The question whether at the time when the offence is committed the offender must at least know that the victim of the offence is a member of a Scheduled Caste or Scheduled Tribe has to be decided by taking into account the above fact, the definition of 'atrocities' occurring in the Act and also the statements of objects and reasons. The Act had been enacted with the intention of preventing atrocities shown by members of higher castes to the members of Scheduled Castes and Scheduled Tribes. What is made punishable under the provisions of the Act are the atrocities shown to the members of the Scheduled Castes and Scheduled Tribes because all the offences under Section 3 of the Act come within the term 'atrocities' used in the Act. For establishing the commission of offence under Section 3(1)(xi) it must be shown that at the time of doing the Act mentioned in that clause the person, who did that Act was aware of the fact that the victim of the offence was a member of a

Scheduled Caste or Scheduled Tribe. Otherwise, it cannot at all be said that it was an atrocity committed to a member of a Scheduled Caste or Scheduled Tribe. In case it is shown that at the time when the act which constituted the offence was done the person, who committed the act, was not aware of the fact that the victim of the offence was a member of the Scheduled Caste or Scheduled Tribe, the offence cannot be one under Section 3(1)(xi) of the Act. For the above reasons, the finding by the Trial Court that the offence punishable under Section 3(1)(xi) of the Act was committed by the accused cannot be sustained.

14. The next question which comes up for consideration is whether on the basis of the materials available on record it could be said that the first appellant committed the offence punishable under Section 354 and the second appellant committed the offence punishable under Section 341 of the Indian Penal Code- When giving Ext. P1 first information what PW1 said was that the offence was committed by one person whose name she knew from others. Nothing is said in Ext. P1 about the presence of the second accused in the bus where the occurrence took place. What is said in Ext. P1 is that one person, who was sitting in the seat behind the seat in which PW1 was sitting, wrote with a pen on the lateral part of her body near to the breast. It is also stated in Ext. P1 that when she was about to get down from the bus the first appellant caught hold of her sari and made an attempt to assault her by beating her. But when she was examined in Court she said that both the appellants were sitting in the seat behind the seat she occupied and that when the first appellant wrote on her body with a pen and she protested by getting up from the seat she saw both the appellants counting currency notes sitting in the rear seat. The overt act alleged against the second appellant is that when PW1 went to the telephone booth for giving information to the police station she was prevented by the second appellant by holding his hand in front of her. Ext. P1 there is no mention about the participation of the second appellant in the commission of the offence and about the incident which is alleged to have taken place near to the telephone booth. If as a matter of fact such a incident was there near the telephone booth, certainly PW1 would have mentioned about that also in Ext. P1 especially in the light of the fact that the evidence given by PW1 in Court was that the second appellant was alone there near the telephone booth where he wrongfully restrained her. There is improvement in the case of the prosecution at

the time when evidence was being given by PW1.

15. There was no proper identification of the persons who committed the offence. The evidence is that at the time when the occurrence took place PW1 did not know the appellants. Even in Ext. P1 it is said that she asked certain persons whom she met in the bus stand the name of the person who committed the offence inside the bus, and then somebody told her that his name was V.K. Balan, who is the first appellant. When giving evidence as PW1 she said in the cross-examination that she asked the persons there the name of the accused and they were reluctant to give the names of the persons who committed the offence and when she was about to leave the place in an autorickshaw two persons went near her and told her the names of the persons who committed the offence. That would indicate that PW1, whose evidence alone is there in support of the case of the prosecution, did not know the appellants before the commission of the offence. PW1 said in Court that on 9.4.1996 police showed the accused to her and then she identified them as the persons who committed the offences. They were identified by PW1 in Court. The evidence of a witness in Court regarding the identity of the person, who committed the offence, cannot be accepted when it is shown that the witness had no acquaintance with or did not know the persons who committed the offence before the commission of the offence provided a test identification parade was conducted during investigation and the accused was then identified. Even though PW1 says that on 9.4.1996 accused were shown to her by the police and then she identified them as the persons who committed the offences, PW10, the Investigating Officer said in the cross examination that the accused were not shown to the accused and they were not identified before him. Even if it is assumed that what PW1 says about identification of accused in police station is true, that is of no avail to support the identification of the accused in Court.

16. In *Mohanlal v. State of Maharashtra* (AIR 1982 SC 839) the Supreme Court held that when the witness did not know the accused before the occurrence and no test identification parade was held and he was shown by the police to the witness before he identified the accused in Court, his evidence becomes absolutely valuable on the question of identification. In that case, on that ground

alone the evidence regarding identification was not accepted and the accused was acquitted. In *Mohd. Iqbal M. Shaikh and Ors. v. State of Maharashtra*, (1998) 4 SCC 494, the Supreme Court had the occasion to consider whether the evidence regarding identification of the accused in Court by a witness who had no previous acquaintance with the accused could be accepted. The Supreme Court said that if the witness knew the accused persons either by name or by face, the question of the police showing him the accused persons becomes irrelevant. If the victim does not know the accused persons by name but could only identify from their appearance, then a test identification parade was necessary, so that the substantive evidence in Court about the identification, which is held after a fairly, long period, could get corroboration from the identification parade. In the above case prosecution did not take any steps to conduct an identification parade. On the other hand, the police showed the witnesses accused persons in the police lock-up to identify the accused. The Supreme court observed that the identification of the accused in Court was only because of the police showing the accused persons to the witness in the lock-up. The identification of the accused in the above case was not found to be reliable by the Supreme Court.

17. This is a case in which no steps for conducting identification parade were made by the investigating agency. In the absence of any test identification parade, the identification of the accused in Court by PW1 at the time of giving evidence cannot be accepted by Court.

18. There is unexplained delay in the first information report reaching Court. The first information regarding the commission of the offence was given at 1.35 p.m. on 8.4.1996. The first information report reached the Court at 5 p.m. on 9.4.1996. As pointed out by the learned counsel appearing for the appellants, there is unexplained delay in the first information report reaching Court. PW1 in the cross examination says that a written complaint was given to the police and the police officer said that he would take down what PW 1 had to say and then Ext. P1 first information was recorded. The submission made is that the written complaint stated to have been given to the police has to be treated as the first information and the evidence of PW1 is that it was after giving the complaint that she gave Ext. P1 first information to the police. PW4, the Head Constable says in the cross-

examination that he did not remember whether such a written complaint had been given by PW1 to him. That shows that the statement by PW1 that a written complaint was given in the police station is not denied by PW4, the Head Constable before whom the written complaint is stated to have been given by PW1. Once it is seen that such a written complaint is given Ext. P1 statement cannot be said to be the first information given to the police regarding the occurrence. The above circumstances would render the evidence of PW 1 regarding the occurrence not acceptable. This is a case in which it is not possible to hold that the appellants committed the offences on the basis of the evidence available on records. The order of conviction and sentence by the Trial Court has to be set aside and the appellants have to be acquitted.

In the result, appeal is allowed on setting aside the order of conviction and sentence by the Trial Court. The appellants are acquitted and they shall be set at liberty forthwith.

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