

**(2009) NCC 877**

**Uttarakhand High Court**

**Case No:** Criminal Revision No. 279 of 2001

Ghanshyam Kala

APPELLANT

Vs

The State

RESPONDENT

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**Date of Decision:** May 6, 2009

**Acts Referred:**

Constitution of India, 1950 " Article 341, 366#Criminal Procedure Code, 1973 (CrPC) " Section 173, 190, 193, 207, 209#Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 " Section 14, 2(c), 3(x)

**Citation:** (2009) NCC 877

**Hon'ble Judges:** Dharam Veer, J

**Bench:** Single Bench

**Advocate:** Rajendra Kotiyal, for the Appellant; M.A. Khan, Brief Holder, for the Respondent

**Final Decision:** Allowed

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**Judgement**

Dharam Veer

1. This appeal, preferred by the appellant u/s 374(2) of The Code of Criminal Procedure, 1973 (hereinafter to be referred as Cr. P.C.), is directed

against the judgment and order dated 9.02.1993 passed by Special Judge (Sessions Judge), Tehri Garhwal in S.T. No. 5 of 1991, State Vs.

Ghanshyam Kala, whereby the learned Special Judge (Sessions Judge) has convicted the appellant/accused u/s 3(x) of The Scheduled Castes &

the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter to be referred as the Act) and was sentenced to undergo one year R.I. with

fine of Rs. 1,000/- and in default of payment of fine, three months" further R.I. was awarded. I have heard learned counsel for the parties and

perused the entire material available on record.

2. In brief, the prosecution case is that P.W. 1 Kirpa Lal Vishwakarma lodged an FIR on 8.9.1991 at P.S. Tehri with the averment that he was the

Principal of Govt. Inter College, Rajakhet, Tehri Garhwal and the appellant/accused Ghanshyam Kala was posted as Chowkidar in the aforesaid

college. In the night of 6.9.1991, appellant/accused was found absent from his duties. On 7.9.1991 at about 10:00 P.M., appellant/accused came

along with his companions at the residence of complainant and hurled filthy abuses to him and with the intention to kill the complainant, assaulted at

the door and the appellant/accused also challenged the complainant to come out of the room and said - After raising the alarm by the complainant,

the neighbours came on the place of occurrence and saved complainant's life. Appellant/accused and his companions were continued making

noise till 2:00 Am in the night. Due to the above-said incident, the complainant felt insulted, tortured and the above-said defamatory words were

used against him. With these averments, the FIR Ex. Ka-1 was lodged by P.W. 1 Kripalal Vishwakarma at P.S. Tehri on 8.9.1991 at 5:30 PM.

On the basis of the FIR, Chik FIR was prepared by Constable Clerk Lakhi Ram Raturi, i.e. Ex. Ka-2. The entry was also made by him in the

G.D., the carbon copy of which is Ex. Ka-3. Investigation of this case was initially entrusted to S.I. RC. Sidhaura and later on the investigation was

transferred to SSI K.P. Singh (P.W. 5). The I.O. during the course of investigation inspected the place of occurrence and prepared the site plan,

i.e. Ex. Ka. 4. During the course of investigation, the I.O. recorded the statements of witnesses and after completing the investigation, he filed the

charge sheet against the appellant/accused in the court of Special Judge (Sessions Judge) Tehri, i.e. Ex. Ka. 8.

3. On 30.1.1992, learned Special Judge, Tehri Garhwal framed the charge against the appellant/accused u/s 3(x) of the Act. The charge was read

over and explained to the appellant/accused, who pleaded not guilty and claimed to be tried.

4. To prove its case, the prosecution has examined P.W. 1 Kirpalal Vishwakarma, victim and complainant; P.W. 2 Sanjeev Sharma, Lecturer;

P.W. 3 Shashi Kant Dwivedi, L.T. Science/Maths; P.W. 4 Shiromani Singh, Lecturer and P.W. 5 SSI K.P. Singh, I.O. of the case.

5. Thereafter, the statement of the appellant/accused was recorded u/s 313 of Cr. P.C. The oral and documentary evidence was put to him in

question form, who denied the allegations made against him. However, he did not produce any oral or documentary evidence in his defence.

6. After appreciating the evidence on record and after hearing learned counsel for the parties, the learned Special Judge (Sessions Judge), Tehri

Garhwal vide judgment and order dated 09.02.1993 has convicted and sentenced the appellant/accused as mentioned above. Feeling aggrieved

by the aforesaid judgment and order, the present appeal has been preferred.

7. P.W. 1 is Kirpalal Vishwakarma is the victim and complainant of the case. He has reiterated the entire version of the FIR lodged by him. He

also proved the FIR Ex. Ka-1 lodged by him.

8. P.W. 2 is Sanjeev Sharma who has not supported the prosecution case and was declared hostile.

9. P.W. 3 is Shashikant Dwivedi who has also not supported the prosecution case and was declared hostile.

10. P.W. 4 is Shiromani Singh who too has not supported the prosecution case and was declared hostile.

11. P.W. 5 is SSI K.P. Singh, I.O. of the case, who has stated that on the basis of the report Ex. Ka-1, Constable Clerk Lakhi Ram prepared Chik

FIR, i.e. Ex. Ka-2. Necessary entry was also made in the G.D. by Constable Clerk Lakhi Ram, the carbon copy of which is Ex. Ka-3 the initial

investigation of this case was entrusted to S.I. Rakesh Chand Sidhaura, who prepared the site plan of the place of occurrence, i.e. Ex. Ka-4. After

that he conducted the investigation of the case. During the course of investigation, he recorded the statements of witnesses and after completing the

investigation, he filed the charge sheet, i.e. Ex. Ka-8 against the appellant/accused.

12. Thereafter, the statement of the appellant/accused was recorded u/s 313 of Cr. P.C. The oral and documentary evidence was put to him in

question form, who denied the allegations made against him. However, he did not produce any oral or documentary evidence in his defence.

13. Sri Rajendra Kotiyal, learned counsel for the appellant/accused argued that the charge sheet in the present case was filed in the court of

Special Judge (Sessions Judge) Tehri Garhwal on 28.11.1991 and the Special Court i.e. Special Judge (Sessions Judge) Tehri Garhwal under the

Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 could not take cognizance of any offence straightway without the case

being committed to the court. He further submitted that the charge sheet cannot straightway be laid before Special court. I find force in the

arguments raised by counsel for the appellants for the reasons to be stated hereinafter.

14. As regard the jurisdiction, it is necessary to refer Section 14 of the Act which is as follows:

14. Special Court - For the purpose of providing for speedy trial, the State Government shall, with the concurrence of the Chief Justice of the High

Court, by notification in the Official Gazette, specify for each district a Court of Session to be a Special Court to try the offences under this Act.

From the above-said provision, it can be seen that the Special Court is constituted by the Act with concurrence with the Chief Justice of the High

Court by a Notification with an object of speedy trial of the offences under the Act.

15. A perusal of the Act does not show any procedure prescribed for trial of the offences under the Act, and also does not specifically bar the

procedure prescribed under the Cr. P.C. No doubt the language employed in the above Section shows that it is a Court of Session.

16. The relevant provisions of the Cr. P.C. are in Section 173, which deals with report of the Police Officer after completion of investigation.

Section 190 Cr. P.C. deals with the procedure of taking into cognizance of the offence by the Magistrate and after taking cognizance of the

offence, the procedure prescribed under Sections 207 and 209 of the Cr. P.C. has to be followed. At this juncture, it is relevant to extract the

provisions under Sections 193 and 209 of Cr. P.C:

193. Cognizance of offences by Courts of Session: Except as otherwise provided by this Code or by any other law for the time being in force, no

Court of Sessions shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate

under the Code.

209. Commitment of case to Court of Sessions when offence is triable exclusively by it - When in a case instituted on a police report or otherwise,

the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of

Sessions, he shall-

(a) commit the case to the Court of Sessions;

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Sessions.

17. A reading of Section 193 shows that a Court of Sessions is barred from taking into cognizance of any offence as a Court of original jurisdiction

unless the case has been committed to it by a Magistrate and Section 209 of the Cr. P.C. expressly provides that if it appears to the Magistrate

that the offence is triable exclusively by the Court of Sessions, such cases shall be committed to a Court of Sessions.

18. A combined reading of these two provisions only goes to show that the Magistrate Court is the initial Court to take cognizance of any offence

including that of an offence exclusively triable by a Court of Sessions. It is for the Magistrate to decide whether the offence is exclusively triable by

the Court of Sessions or not. In other words, if the offence falls under the category of offences which are exclusively triable by a Court of Sessions,

the magistrate has to commit the same to the Court of Sessions for trial. It further follows that the Court of Sessions cannot directly take into

cognizance of any offence unless provided by the Cr. P.C. or by any other law. After such committal, the procedure for trial prescribed under

Chapter XVIII of the Cr. P.C. has to be followed.

19. Now, it has to be seen whether the Special Court constituted under the Act has made any express provision with regard to taking into

cognizance of an offence by the special Court without there being any committal proceeding by the Magistrate as provided under Sections 193 and

209 of the Cr. P.C.

20. As already observed, except Section 14 of the Act, no other express provision is available under the Act to try the offence under the Act by

taking into cognizance straightway. Further no procedure to try any offence by Special Court is prescribed under the Act equivalent to that of the

procedure prescribed under Chapter XVIII of the Cr. P.C. nor there is any specific provision expressly excluding the procedure prescribed u/s

193 and 209 of the Cr. P.C.

21. Learned counsel for the appellant/accused referred a judgment of Hon"ble Supreme Court in the case of Moly & another Vs. State of Kerala

reported in 2004 SCC (Cri.) 1348 in support of his case and relied on para 16 of the said judgment which reads as under:

16. Hence, we have no doubt that a Special Court under this Act is essentially a Court of Session and it can take cognizance of the offence when

the case is committed to it by the Magistrate in accordance with the provisions of the Code. In other words, a complaint or a charge-sheet cannot

straight away be laid down before the Special Court under the Act. We are reiterating the view taken by this Court in Gangula Ashok v. State of

A.P. and in Vidhyadharan v. State of Kerala in above terms with which we are in respectful agreement. The Sessions Court in the case at hand,

undisputedly has acted as one of original jurisdiction, and the requirements of Section 193 were not met.

22. Therefore, in the light of the detailed discussion made in the judgment referred to above and the relevant provisions of the Act and the Cr. P.C.

as well as in view of the aforesaid judgment of Hon"ble Supreme Court in the case of Moly & another (Supra), I am of the considered view that

Special Court could not have tried the offence under the Act by directly taking into cognizance of the offence deviating from the procedure

prescribed under the Cr. P.C. and thereby vitiate the trial of the offence by the Special Court rendering such trial as without jurisdiction and

consequently any judgment rendered by such Court without jurisdiction, would not be a judgment in the eye of law.

23. Learned counsel for the appellant/accused further argued that the complaint P.W. 1 Kripalal Vishwakarma is not a member of the Scheduled

Castes and as such the provisions of the Act will not apply in the case at hand. I also find substance in this argument raised by counsel for the

appellant/accused. Before any further discussion in the matter, it is pertinent to mention Section 2 (c) of the Act, which is as under:

2 (c) ""Scheduled Caste and Scheduled Tribes"" shall have the meanings assigned to them respectively under clause (24) and clause (25) of article

366 of the Constitution;

Clause 24 of Article 366 of the Constitution of India is also reproduced as under:-

366. (24) ""Scheduled Castes"" means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under

article 341 to be Scheduled Castes for the purposes of this

Constitution;

Article 341 of the Constitution of India defines Scheduled Castes which is also reproduced as under:

341. Scheduled Castes- (1) The President [may with respect to any State {or Union territory}, and where it is a State [\*\*\*], after consultation

with the Governor [\*\*\*] thereof], by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which

shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State [or Union territory, as the case may be].

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification is sued under clause (1) any caste, race

or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by

any subsequent notification.

The Fifth Schedule, Amendment of the Constitution (Scheduled Castes) Order, 1950 is also essential to mention here which reads as under:

The Fifth Schedule Amendment of the Constitution (Scheduled Castes) Order, 1950,-

(a) in paragraph 2, for the figures ""XXIII"" the figures ""XXIV"" shall be substituted;

(b) in the Schedule, after part XXIII, the following shall be inserted, namely:-

Part XXIV- Uttaranchal

1. Agariya
2. Badhik
3. Badi
4. Baheliya
5. Baiga
6. Baiswar
7. Bajaniya
8. Bajgi
9. Balhar
10. Balai
11. Balmiki
12. Bangali



13. Banmanus
14. Bansphor
15. Barwar
16. Basor
17. Bawariya
18. Beldar
19. Beriya
20. Bhantu
21. Bhuiya
22. Bhuyiar
23. Boria
24. Chamar, Dhusia, Jhusia, Jatava
25. Chero
26. Dabgar
27. Dhangar
28. Dhanuk
29. Dharkar
30. Dhobi
31. Dom
32. Domar
33. Dusadh
34. Dharmi
35. Dhariya
36. Gond

37. Gwal
38. Habura
39. Hari
40. Hela
41. Kalabaz
42. Kanjar
43. Kapariya
44. Karwal
45. Kharaita
46. Karhwar (excluding Vanwasi)
47. Khatik
48. Kharot
49. Kol
50. Kori
51. Korwa
52. Lalbegi
53. Majhwar
54. Mazhabi
55. Musahar
56. Nat
57. Pankha
58. Parahiya
59. Pasi, Tarmali
60. Patari

61. Sahariya

62. Sanaurhiya

63. Sansiya

64. Shilpkar

65. Turaiha.

24. In view of what has been quoted above, it is proved that the caste ""Vishwakarma"" does not fall in the Fifth Schedule, Amendment of the

Constitution (Scheduled Castes) Order, 1950 as applicable in the State of Uttaranchal now Uttarakhand. Therefore, the caste ""Vishwakarma

does not fall within the ambit of sub-clause 24 of Article 366 as deemed under Article 341 of the Constitution of India and also u/s 2 (c) of the

Act. Accordingly, it is also proved that the caste ""Vishwakarma"" is not a scheduled caste as defined u/s 2 (c) of the Act. Resultantly, the

complainant Kirpalal Vishwakarma (P.W. 1) is not a member of scheduled caste category. Consequently, the entire trial proceedings initiated on

the basis of the fact that the complainant is a member Of scheduled caste candidate, stands vitiated.

25. Learned counsel for the appellant/accused further argued that on the basis of the merit also, the prosecution has not proved its case against the

appellant/accused beyond reasonable doubt. I also find force in this argument. In support of its case, the prosecution got examined only one

witness of fact i.e. P.W. 1 Kripalal Vishwakarma who has reiterated the entire version of the FIR. Besides P.W. 1, three other witnesses viz. P.W.

2 Sanjeev Sharma, P.W. 3 Shashi Kant and P.W. 4 Shiromani Singh were also been examined and whose names were also mentioned in the

statement of P.W. I Kirpalal Vishwakarma recorded in the trial court, however they have not supported the prosecution case and they were

declared hostile. Thus, the version of P.W. 1 Kripalal Vishwakarma does not inspire confidence, as the same was not supported by the evidence

of three independent eyewitnesses who were said to be present at the time and place of occurrence as has been stated by P.W. 1 Kripalal

Vishwakarma in the statement recorded before the trial court. As such, due to the above-said reasons, only on the sole basis of deposition of P.W.

1 Kripalal Vishwakarma, the conviction and sentence recorded by the trial court is not justified and correct. For the reasons recorded above, the

appeal is allowed. The judgment and order dated 9.02.1993 passed by Special Judge (Sessions Judge), Tehri Garhwal in S.T. No. 5/1991, State

Vs. Ghanshyam Kala, is hereby set aside. The conviction and sentence as awarded against the appellant/accused, as discussed above, is also

hereby set aside. Appellant/ accused Ghanshyam Kala is on bail. He needs not surrender unless required in any other case. His bail bonds are

cancelled and sureties are discharged.