Patan Jamal Vali vs The State Of Andhra Pradesh on 27 April, 2021

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Bench: M R Shah, Dhananjaya Y Chandrachud

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No 452 of 2021
(Arising out of SLP(Crl) No 1795 of 2021)

Patan Jamal Vali ....

Versus

The State of Andhra Pradesh ....R

JUDGMENT

Dr Dhananjaya Y Chandrachud, J This judgment has been divided into the following sections to facilitate analysis:

A Factual Background

B Proceedings before this Court

C Analysis

C.1 Intersectionality: The Different Hues of Identity C.2 Disability and Gender: Twin Tales of Societal Oppression C.3 The 'Caste' that is Difficult to Cast Away: Protection of Members of Scheduled Castes and Scheduled Tribes C.4 Section 3(2)(v) of SC & ST Act C.5 Punishment under

Section 376 of the IPC 19:35:56 IST Reason:

D Conclusion and Summary of Findings

PART A

A Factual Background

1 Leave granted.

2 This appeal arises from a judgment of a Division Bench of the High Court of

Andhra Pradesh dated 3 August 2019. The High Court has affirmed the conviction of the appellant for offences punishable under Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 19891 and Section 376(1) of the Indian Penal Code.

3 The appellant has been sentenced to suffer imprisonment for life for each of the above offences, the substantive sentences being directed to run concurrently. In addition, the appellant has been sentenced to pay a fine of Rs. 1,000 for each of the offences and in default to suffer imprisonment of six months. 4 The appellant was residing in Gajulapalli village and was engaged in carrying out manual work for two years prior to the incident. PW2 who is blind since birth used to live with her mother (PW1) and brother (PW3). PW3 and LW5 are the sons of PW1. They were also engaged in manual work together with the appellant, at the same place. The appellant, according to the prosecution, lived in the same village and regularly visited the house of PW1 due to his acquaintance with her sons.

“SC & ST Act” PART A 5 At about 9 am on 31 March 2011, PW1 was attending to her household chores at a public tap which was within a distance of fifty feet and her sons were cutting fire wood in the vicinity. The appellant is alleged to have enquired about her sons when PW1 replied that her spouse and sons were chopping fire wood and asked him to wait for a while. After half an hour, on hearing the voice of her daughter (PW2) in distress, she rushed to the house and found that the door was locked from inside. Upon raising an alarm her husband and sons rushed to the house. The appellant opened the door and tried to escape but was apprehended at the spot. Upon entering the house, PW1 observed that PW2 was lying on the ground in a nude condition and was bleeding from her genitals. The clothes of PW2 were torn and stained with blood. Upon enquiry, PW2 is alleged to have stated that the appellant came to the house and enquired about her brothers; he locked the door and fell on her, gagged and raped her.

6 The case of the prosecution is that at 10 am, the Sub-Inspector of Police (PW9), Mahanandi Police Station, who received a call from PW4, a cousin of PW1, rushed to the scene of the occurrence. By that time, the Circle Inspector of Police, Nandyal Rural Police Station had also arrived and the villagers handed over the appellant to him. PW1 furnished a written report to the police which was

registered as Crime No 28/2011. PW11 sent the victim to the Government Hospital where she was examined by PW10, the Civil Surgeon at the District Hospital. The medical examination revealed that PW2 was blind. The medical report of the examination of PW2 has been extracted in the judgment of the Sessions Judge and the High Court and reads as follows:

> PART A "(1) Contusion of 1 x 1 cm on left cheek, red in colour, (2) Pubic Hair develop, breast develop (3) Axillary Hair developed. On examination of vagina is lacerated at 4-00 O' clock position, bleeding present. 3 swabs and slides taken from Hymeneal Orifice Vaginal canal and near cervix, vaginal wall sutured with 10 Chromicatgut, hair and nail clippings taken and she i1ssued the wound certificate under Ex.P.6 and gave her final opinion under Ex.P.8 after receiving the report from A.P.F.S.L. and she opined that the evidence is suggestive of penetration of male genital parts."

7 Charges were framed against the appellant under Section 376(1) of the Penal Code and Section 3(2)(v) of the SC & ST Act. To substantiate its case, the prosecution examined eleven witnesses, PWs 1 to 11 in addition to which, it relied on exhibits P1 to P12 and MOs 1 to 8. On the closure of the evidence, the appellant was examined under Section 313 of the Code of Criminal Procedure, 1973. By a judgment dated 19 February 2013 the Special Judge for the Trial of Cases under the SC - ST (POA) Act - Cum - VIth Additional District and Sessions Judge convicted the appellant for offences under Section 3(2)(v) of the SC & ST Act and Section 376(1) of the Penal Code. Based primarily on the testimonies of PW1, PW2 and PW3 the learned Sessions Judge held that:

> (i) The appellant had access to PW2 since he was acquainted with her brothers and was regularly visiting the house where she lived with her family;
>
> (ii) The evidence of PW1 and PW2 was corroborated by PW3, the brother of PW2;
>
> (iii) The narration of the incident by PW1 was duly corroborated by an independent witness and neighbour, PW5;

PART A

(iv) The oral testimony of the witnesses established that the appellant was apprehended at the scene of occurrence and when PW1 who was accompanied by PW3 and PW4 opened the door of the house, the appellant was apprehended while attempting to escape and PW2 was found bleeding from her injuries lying in a nude condition on the ground;

(v) PW2 who was blind by birth had identified the appellant by his voice which was familiar to her since the appellant was regularly visiting the house;

(vi) PWs 1,3,4,5 apprehended the appellant handed him over to PW11 and the appellant was taken to Mahanandi Police Station;

(vii) PW5 is the neighbour whose house was opposite to that of PW1 and was a natural witness. PW4 though related to PW1 had also corroborated the testimony of PW1;

(viii) The clothes of PW2 had been duly seized;

(ix) The narration of the incident by PW2 was trustworthy and was duly corroborated by PW1 and PW3; and

(x) The oral testimony was consistent with the medical evidence and the deposition of PW10, the doctor at the government hospital who deposed in that regard.

The Sessions Judge, in coming to the conclusion that an offence under Section 3(2)(v) was established observed thus:

> "39. Coming to the facts of the present case P.W.11 in the cross examination stated that P.W.1 and P.W.2 did not state before him that since P.W.2 belongs to scheduled caste, accused committed the offence. The learned defence counsel argued that in view of the evidence of P.W.11, the prosecution failed to prove that the accused committed the offence on the PART A ground that the victim belongs to scheduled caste. I do not find any merit in the above argument for the reason that Ex. P.1 discloses that the victim belongs to Madiga of Scheduled Caste. P.W.1 the mother of the victim girl is an illiterate village rustic woman simply because she has not mentioned in the report or in the statement to the police that accused did commit the offence on the ground that the victim belong to scheduled caste is no way fatal to the case of the prosecution to establish the guilt of the accused for the offence under section 3 (2) (v) of SC/ST (POA) Act.
>
> 40. It is needless to say that if the victim belongs to upper caste than the caste of the accused, particularly in village atmosphere, I am of the considered view that he would not have done the act and dared to pounce upon her, and commit the offence of rape at her own house at about 9.30 am in morning when her mother was working near the house at public tap and her house is situated in the residential locality.

This court is of the view that as the victim girl is helpless, blind and belongs to scheduled caste, so that the accused developed evil eye on her and taken advantage of her loneliness committed the heinous crime of rape against her. Hence I am not convinced with the argument of the learned defence counsel and this court held that the accused committed the act of rape on the victim un-married girl of 19 years at the time of the incident and blind by birth and he did commit the act on the ground that she belongs to scheduled caste and on the impression that she cannot do anything against him. Hence, the prosecution has established the guilt of the accused for the offence under section 3 (2) (v) of SC/ST (POA) Act." On the aspect of sentence, the Sessions Judge observed:

> "When questioned about the quantum of sentence in respect of the. offence under section 376 (1) IPC, the accused pleaded to take lenient view stating that he is a poor

person and eking out his livelihood by doing coolie work.

In view of the facts and circumstances of the case that it is a heinous crime of rape committed against a blind un-married girl of 19 years of age, I am not inclined to exercise my discretion to give lesser punishment to the accused as it is not a fit case to take a lenient view.

The accused is sentenced to undergo life imprisonment and to pay a fine of Rs.1,000/- i/d SI for 6 months for the offence punishable under section 376 (1) of IPC and also sentenced to undergo life imprisonment and to pay a fine of Rs.1,000 /-

PART B i/d SI for 6 months for the offence under section 3 (2) (v) of SC/ ST (POA) Act. Sentences shall run concurrently for the whole life. M.0.1 to M.0.8 shall be destroyed after the expiry of appeal time."

8 The High Court by its judgment dated 3 August 2019 affirmed the conviction and sentence imposed by the Sessions Court. The High Court has held that the testimonies of PW1, the mother of PW2; and of PW2 were consistent and duly corroborated by PW3, the brother of PW2 and by PW4 and PW5. The High Court adverted to the medical evidence and, in particular, the deposition of PW10. The prosecution was held to have established its case beyond reasonable doubt. 9 Before the High Court, it was urged that the ingredients of the offence under Section 3(2)(v) were not established as the offence was not committed "on the ground" that PW2 belongs to a Scheduled Caste. The High Court declined to accede to the submission, observing:

"Section 3(2)(v) of the Act provides that the offence gets attracted if it is committed against a person knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such members. Even otherwise still the offence under Section 376(1) I.P.C. is made out." B Proceedings before this Court

10 On 19 February 2021, this Court at the preliminary hearing of the Special Leave Petition adverted to the submissions of the learned Counsel appearing on behalf of the appellant and passed the following order:

"2 Mr Harinder Mohan Singh, learned counsel appearing on behalf of the petitioner, has adverted to the findings contained in paragraph 39 of the judgment of the Sessions Court dated 19 February 2013 (Annexure P-12). Learned counsel submits that in view of the expression "on the ground PART C that such person is a member of a Scheduled Caste or a Scheduled Tribe" in Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989, which has been interpreted in the decisions of this Court, an offence under this provision has not been established. Hence, the imposition of a sentence of life imprisonment in respect of an offence under Section 376 of the Indian Penal Code 1860 was not in accordance with law.

3 Issue notice, confined to the aforesaid submission, returnable in six weeks.

4 Liberty to serve the Standing Counsel for the State of Andhra Pradesh, in addition."

11 Notice has been issued by this Court confined to the above submission. However, before we proceed to analyse the submission, we are unequivocally of the view that the offence under Section 376(1) has been proved beyond reasonable doubt. The testimonies of PW1, the mother of PW2 and of PW 2, who was sexually assaulted, are clear and consistent. The oral account has been corroborated by the evidence of PW3, PW4 and PW5. The medical evidence, more particularly, the deposition of PW10 clearly establishes that PW2 was sexually assaulted. The appellant was apprehended at the spot in close proximity of the commission of the offence. The offence under Section 376 has been established beyond reasonable doubt. This Court shall now proceed to deal with the question of the conviction and sentence under the SC & ST Act.

C Analysis C.1 Intersectionality: The Different Hues of Identity 12 The experience of rape induces trauma and horror for any woman regardless of her social position in the society. But the experiences of assault are PART C different in the case of a woman who belongs to a Scheduled Caste community and has a disability because the assault is a result of the interlocking of different relationships of power at play. When the identity of a woman intersects with, inter alia, her caste, class, religion, disability and sexual orientation, she may face violence and discrimination due to two or more grounds. Transwomen may face violence on account of their heterodox gender identity. In such a situation, it becomes imperative to use an intersectional lens to evaluate how multiple sources of oppression operate cumulatively to produce a specific experience of subordination for a blind Scheduled Caste woman.

13 A movement for recognition of discrimination and violence emanating from the effects of the interaction of multiple grounds was pioneered by African American women in United States. Kimberly Crenshaw has been credited for coining the term intersectionality. In her seminal work on the subject, she describes the principle with the help of the following hypothetical:

> "Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination." 2 In her article, Crenshaw argues that sex discrimination and race discrimination statutes, as well as the judicial opinions in the United States that she studied are K. Crenshaw, Demarginalizing The Intersection Of Race And Sex: A Black Feminist Critique Of Anti- Discrimination Doctrine, Feminist Theory, And Anti-Racist Policies, University of Chicago Legal Forum, Vol. 4 (1989) 149 ("Crenshaw, Demarginalizing Intersection of Race and Sex").

PART C narrowly tailored and address the claims of the most privileged within the targeted group. She states:

> "With Black women as the starting point, it becomes more apparent how dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis. I want to suggest further that this single-axis framework erases Black women in the conceptualization, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise-privileged members of the group. In other words, in race discrimination cases, discrimination tends to be viewed in terms of sex- or class-privileged Blacks; in sex discrimination cases, the focus is on race- and class-
>
> privileged women.""3 (emphasis added) She further highlights the intersectional nature of gender violence, where she states that: "[t]he singular focus on rape as a manifestation of male power over female sexuality tends to eclipse the use of rape as a weapon of racial terror."

14 Intersectionality can be defined as a form of "oppression [that] arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone…".4 While the model of intersectionality was initially developed to highlight the experiences of African-American women, there is a growing recognition that an intersectional lens is useful for addressing the specific set of lived experiences of those individuals who have faced violence and discrimination on multiple grounds. A single axis approach to violence and discrimination renders invisible such minority Id at p. 146.

Mary Eaton, Homosexual Unmodified: Speculations on Law s Discourse, Race, and Construction of Sexual Identity, in LEGAL INVERSIONS: LESBIANS, GAY MEN AND THE POLITICS OF THE LAW , Didi Herman and Carl Stychin eds. (Philadelphia: Temple University Press 1995), p. 46. PART C experiences within a broader group since it formulates identity as "totemic" and "homogenous".5 Laws tend to focus on a singular identity due to the apparent clarity a monistic identity provides in legal analysis where an individual claiming differential treatment or violence can argue that "but for" that identity, they would have been treated in the same way as a comparator. Therefore, their treatment is irrational and unjustified.6 However, such essentialization of experiences of identity groups creates a problem where intersectional discrimination or violence has occurred. This is because the evidence of discrete discrimination or violence on a specific ground may be absent or difficult to prove.7 Nitya Iyer has argued that law based on single axis models forces claimants to ignore their own lived reality and "caricaturize themselves so that they fit into prefabricated, rigid categories".8 Their claim will fail if they are not able to simplify their story to accord with the dominant understanding of how discrimination or violence on the basis of a given characteristic occurs.9 15 It is important to note that an analysis of intersectionality does not mean that we see caste, religion, class, disability and sexual orientation as merely "add ons" to the oppression that women may face. This is based on the assumption that gender oppression is oppressive in the same way for all women, only more so for women suffering marginalization on other grounds. However, an Ben Smith, Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective, The Equal Rights Review, Vol. 16 (2016) 74 ("Smith, Intersectional Discrimination"). Ibid, 83.

Ibid, 81.

Nitya Iyer, Categorical Denials: Equality Rights and the Shaping of Social Identity, Queen's Law Journal, Vol. 19 (1993–1994) 179.

Ibid.

PART C intersectional analysis requires us to consider the distinct experience of a sub-set of women who exist at an intersection of varied identities. This is not to say that these women do not share any commonalities with other women who may be more privileged, but to equate the two experiences would be to play down the effects of specific socio-economic vulnerabilities certain women suffer. At its worse it would be to appropriate their pain to claim a universal subjectivity. 16 There is a fear that intersectionality would open a Pandora's box of "endless new discrete identity categories for every possible permutation of identity"10. We can avoid this trap by eschewing an identity-based conception of intersectionality in favour of a systems-based conception. Specifically, as Gauthier De Beco argues, instead of focusing on identity-categories, the intersectionality enquiry should focus on "co-constituted structures of disadvantage that are associated with two or more identity-categories at the same time".11 By exhibiting attentiveness to the 'matrix of domination'12 created by the intersecting patterns at play, the Court can more effectively conduct an intersectionality analysis. A legal analysis focused on delineating specific dimensions of oppression running along a single axis whether it be caste, disability or gender fails to take into account the overarching matrix of domination that operates to marginalise an individual. The workings of such a structure have Smith, Intersectional Discrimination, supra n. 5, p. 84. Gauthier de Boco, Harnessing the Full Potential of Intersectionality Theory in Human Rights Law: Lessons from Disabled Children's Right to Education in INTERSECTIONALITY AND HUMAN RIGHTS LAW (Shreya Atrey & Peter Dunne, Hart Publishing 2020).

PH Collins, The Difference That Power Makes: Intersectionality and Participatory Democracy, 8(1) Revista de Investigaciones Feministas (2017), p. 22, noting: "Intersectionality's emphasis on intersecting systems of oppression suggests that different forms of domination each have their own power grid, a distinctive "matrix" of intersecting power dynamics." PART C been aptly stated by a woman with visual impairment (due to Albinism) in the following words:

> "I can never experience gender discrimination other than as a person with a disability; I can never experience disability discrimination other than as a woman. I cannot disaggregate myself nor can anyone who might be discriminating against me. I do not fit into discrete boxes of grounds of discrimination.
>
> Even when only one ground of discrimination seems to be relevant, it affects me as a whole person"13

17 Intersectionality merely urges us to have "an open-textured legal approach that would examine underlying structures of inequality"14. This requires us to analyse law in its social and economic context allowing us to formulate questions of equality as that of "power and powerlessness" instead

of difference and sameness.15 The latter being a conceptual limitation of single axis analysis, it may allow certain intersectional claims to fall through the cracks since such claims are not unidirectional in nature.

18 Intersectional analysis requires an exposition of reality that corresponds more accurately with how social inequalities are experienced. Such contextualized judicial reasoning is not an anathema to judicial inquiry. It will be useful to note the comments of Justice L'Heureaux-Dubé and Justice McLachlin in the Canadian Supreme Court's judgment in R. v. S (RD)16 that, "[j]udicial inquiry into the factual, social and psychological context within which litigation arises is D. Pothier, Connecting Grounds of Discrimination to Real People's Real Experiences, 13(1) Canadian Journal of Women and the Law (2001), p. 39, 51.

Smith, Intersectional Discrimination, supra n. 5, p. 84. Ibid.

(1997) 3 S.C.R. 484 at 506-507.

PART C not unusual. Rather, a conscious, contextual inquiry has become an accepted step towards judicial impartiality…this process of enlargement is not only consistent with impartiality; it may also be seen as its essential pre-condition." 19 Single axis models of oppression are a consequence of how historically movements aiming for legal protection of marginalized populations developed. Most political liberation struggles have been focused on a sole characteristic like anti-caste movements, movements by persons with disabilities, feminism and queer liberation. Many such movements have not been able to adequately address the intra-group diversity leading to a situation where the needs of the relatively privileged within the group have received more than a fair share of spotlight. When these liberation struggles were adopted in law, the law also developed into mutually exclusive terrains of different statutes addressing different marginalities failing to take into account the intersectional nature of oppression.

20 In India, the fundamental guarantees under the Constitution provide for such a holistic analysis of discrimination faced by individuals. One of us (Justice DY Chandrachud), in Navtej Johar v. Union of India17 applied the intersectional lens to Article 15(1) of the Constitution. In doing so, Justice DY Chandrachud observed that:

> "36. This formalistic interpretation of Article 15 would render the constitutional guarantee against discrimination (2018) 10 SCC 1.

PART C meaningless. For it would allow the State to claim that the discrimination was based on sex and another ground ('Sex plus') and hence outside the ambit of Article 15. Latent in the argument of the discrimination, are stereotypical notions of the differences between men and women which are then used to justify the discrimination. This narrow view of Article 15 strips the prohibition on discrimination of its essential content. This fails to take into account the intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities, especially from the socio-political and economic context. For example, a rule that people over six feet would not be employed in the army would be able to stand an attack on its disproportionate impact on women if it

was maintained that the discrimination is on the basis of sex and height. Such a formalistic view of the prohibition in Article 15, rejects the true operation of discrimination, which intersects varied identities and characteristics." (emphasis supplied) 21 Noting how the discrimination caused by intersecting identities amplifies the violence against certain communities (gendered/religious/otherwise), the Justice J.S Verma Committee appointed in the aftermath of the Nirbhaya incident to suggest reforms in Indian criminal law, observed that:

> "34. We believe that while certain measures may have been taken over a period of time but they have been too far and too few and they certainly have not attempted to restructure and transform society and its institutions. If there has to be a society which is based on equality of gender, we must ensure that not only does a woman not suffer on account of gender but also not suffer on account of caste or religion in addition. Thus a woman may suffer a double disadvantage – a) because she is a woman, and b) because she belongs to a caste/tribe/community/religion which is disadvantaged, she stands at a dangerous intersection if poor."18 Justice JS Verma (Retd.), Justice Leila Seth (Retd.) & Gopal Subramanium, Report of the Committee on Amendments to Criminal Law, 23 January 2013, p. 38 ("JS Verma Committee Report").

PART C

22 While intersectionality has made considerable strides in the field of human rights law and anti-discrimination law, it has also emerged as a potent tool to understand gender-based violence. In 1991, Crenshaw applied the concept of intersectionality to study violence against women of colour. She showed how race, gender, poverty, immigrant status and being from a linguistic minority interacted to place these women in violent relationships.19 23 To deal with cases of violence against women from intersectional backgrounds, Shreya Atrey proposes the model of intersectional integrity. She notes:

> "Intersectional gender violence is about: (i) rejecting violations of bodily and mental integrity when perpetrated based on people's multiple and intersecting identities (intersectionality); and (ii) recognizing that violence should be understood as a whole taking into account unique and shared patterns of violations yielded by intersections of gender, race, caste, religion, disability, age, sexual orientation etc(integrity)."20

24 She points out that a failure to consider violence perpetrated based on multiple identities results in an inaccurate portrayal of the violence at issue which may impact the ability to obtain relief. On the other hand, a comprehensive appraisal of the intersectional nature of the violence can translate into an appropriate legal response. 21 K Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color, 43 Stanford Law Review 1241 (1991), 1246-50.

Shreya Atrey, Lifting as We Climb: Recognising Intersectional Gender Violence in Law, 5 Oñati Socio-legal Series 1512 (2015), 1519-20.

Id at 1531.

PART C 25 The above analysis stresses on the need for the Court to address and unpack the qualitative impact of the various identities an individual might have on the violence, discrimination or disadvantage being faced by them in the society. C.2 Disability and Gender: Twin Tales of Societal Oppression 26 For many disabled women and girls in India, the threat of violence is an all-too-familiar fixture of their lives, contracting their constitutionally guaranteed freedom to move freely and curtailing their ability to lead full and active lives. This threat of violence can translate into a nagging feeling of powerlessness and lack of control, making the realization of the promises held by Parts III and IV of our Constitution a remote possibility for women with disabilities. 27 In saying so, we do not mean to subscribe to the stereotype that persons with disabilities are weak and helpless, incapable of charting the course of their lives or to deprive them of the agency and bodily autonomy that we all possess and are entitled to exercise. Such a negative presumption of disability translating into incapacity would be inconsistent with the forward-thinking conceptualization of disabled lives embodied in our law and, increasingly, albeit slowly, in our social consciousness. As Saptarshi Mandal notes, in critiquing the fashion in which the Punjab and Haryana High Court dealt with the testimony of a mentally disabled and partially paralyzed prosecutrix22, stamping a prosecutrix with the badge of Samitri and Ors. v. State of Haryana, 2010 SCC OnLine P&H 2245. PART C complete helplessness, merely on the basis of disability, is an inapposite course of action. He notes:

> "the entire rationale behind the conviction of the accused turned on sympathy for the helpless prosecutrix and her inability to physically resist the aggressor. Even if one agrees with the judge that there cannot be a single standard of burden of proof for the disabled and the able-bodied, a differentiated scale of burden of proof must be based on the concept of vulnerability, not victimhood."23

28 Instead, our aim is to highlight the increased vulnerability and reliance on others that is occasioned by having a disability which makes women with disabilities more susceptible to being at the receiving end of sexual violence. As the facts of this case make painfully clear, women with disabilities, who inhabit a world designed for the able-bodied, are often perceived as "soft targets" and "easy victims" for the commission of sexual violence. It is for this reason that our legal response to such violence, in the instant case as well as at a systemic level, must exhibit attentiveness to this salient fact.

29 As the analysis by the Sessions Judge and High Court makes clear, a critical feature of this case is the fact that PW2 is blind since birth. It would be overly simplistic and reductionist to reduce her personality to her disability alone. Equally, however, the Court has to exhibit sensitivity to the heightened risk of violence and abuse that she was rendered susceptible to, by reason of her disability. We would like to utilize the facts of this case as a launching point to explore a disturbing trend that this case brings into sharp focus and is Saptarshi Mandal, The Burden of Intelligibility: Disabled Women's Testimony In Rape Trials, Indian Journal of Gender Studies, 20 No. 1 (2013): 1-29, p. 20 ("Mandal, Disabled Women Testimony in Rape Trials"). PART C symptomatic of – that of sexual violence against women and girls with disabilities and to set in motion a thought process

for how the structural realities resulting in this state of affairs can be effectively addressed. In this part of the judgment, we will first highlight the unique reasons that make these women more vulnerable to being at the receiving end of sexual violence, with the help of some illustrations. Thereafter, we will outline some challenges that are faced by such women in accessing the criminal justice system generally and the judicial system in particular. We will then outline some measures that can be taken to lower the barriers faced by them. We will finally conclude by outlining the judicial approach which should be adopted for assessing their testimony. Unique vulnerability of women and girls with disabilities 30 An April 2018 report by Human Rights Watch, titled 'Invisible Victims of Sexual Violence: Access to Justice for Women and Girls with Disabilities in India'24 offers a thoroughgoing assessment of the problem of sexual violence against women with disabilities. The report documents the stories of 17 survivors of sexual violence – 8 girls and 9 women – who live with a spectrum of physical, sensory, intellectual and psychosocial disabilities.25 Human Rights Watch, "Invisible Victims of Sexual Violence: Access to Justice for Women and Girls with Disabilities in India", available at https://www.hrw.org/report/2018/04/03/invisible-victims-sexual-violence/access-justice-women-and-girls-disabilities, 3 April 2018 ("HRW Report"). HRW Report, supra n. 24, p. 12.

PART C 31 As the report points out, women and girls with different disabilities face a high risk of sexual violence:

> "Those with physical disabilities may find it more difficult to escape from violent situations due to limited mobility. Those who are deaf or hard of hearing may not be able to call for help or easily communicate abuse, or may be more vulnerable to attacks simply due to the lack of ability to hear their surroundings. Women and girls with disabilities, particularly intellectual or psychosocial disabilities, may not know that non -consensual sexual acts are a crime and should be reported because of the lack of accessible information. As a result, they often do not get the support they need at every stage of the justice process: reporting the abuse to police, getting appropriate medical care, and navigating the court system."26

32 In India, no disaggregated data is maintained on the extent of violence against women and girls with disabilities. This poses a formidable obstacle to understanding the problem better and designing suitable solutions. As Rashida Manjoo, the United Nations Special Rapporteur on violence against women, noted, this lack of data "renders the violence committed against women with disabilities invisible."27 33 The HRW report points to two studies that quantify the scale of this problem. A 2004 survey in Orissa conducted in 12 districts with 729 respondents found that nearly all of the women and girls with disabilities surveyed were beaten at home, and 25 percent of women with intellectual disabilities had been raped.28 Id at p. 4.

UN Human Rights Council, "Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo," A/HRC/26/38/Add.1. available at http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A-HRC-26-38-Add1_en.doc, 1 April 2014, para 72.

S. Mohapatra and M. Mohanty, “Abuse and Activity Limitation: A Study on Domestic Violence Against Disabled Women in Odisha,” available at PART C In the same vein, a 2011 study found that 21 percent of the 314 women with disabilities surveyed had faced emotional, physical or sexual violence from someone other than their intimate partner.29 34 The HRW Report brings to light several harrowing examples of circumstances in which a survivor’s disability was exploited by those perpetrating sexual violence. To illustrate, the report describes the story of a woman with low vision from Bhubaneshwar, Odisha who alleged that she was raped in June, 2013. The report notes:

> “The police did not help ...get legal aid. The staff of the [residential shelter home] helped her to find a lawyer, but the lawyer they found was not free of cost. It has been tough for her to continue with the lawyer. This has affected the progress of the case.”30 Interaction of disabled survivors of sexual violence with the criminal justice system and the judiciary

35 In the wake of the Nirbhaya rape incident that shocked the conscience of the nation, Indian criminal law underwent a series of changes. The Justice J.S. Verma Committee, set up to suggest amendments to the law, attached special emphasis to creating an enabling environment to enable women with disabilities to report cases of sexual violence and to obtain suitable redress. As the Committee noted:

> http://swabhiman.org/userfiles/file/Abuse%20and%20Activity%20Limitation%20Study.pdf, 2004 referred in HRW Report, supra n. 24, at footnote 19.
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> CREA, “Count Me In! Violence Against Disabled, Lesbian, and Sex-working Women in Bangladesh, India, and Nepal”, http://www.creaworld.org/sites/default/files/The%20Count%20Me%20In%21%20Research%20Report.pdf, 2011 referred in HRW Report, supra n. 24, at footnote 20.
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> HRW Report, supra n. 24, p. 8.
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> PART C “6. A special procedure for protecting persons with disabilities from rape, and requisite procedures for access to justice for such persons is also an urgent need. Amendments to the Code of Criminal Procedure, which are necessary, have been suggested.”31

36 The Committee’s suggestions translated into changes in the Indian Penal Code and the Criminal Procedure Code. Some key changes were as follows:

> (i) When the victim of the offences specified in the provision is either permanently or temporarily mentally or physically disabled, the FIR shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of a special educator or an interpreter, as the case may be.32 Such information may also be video-graphed.33

(ii) The same accommodations, as outlined above, have also been made as regards the recording of confessions and statements.34 Further, as regards those who are physically and mentally disabled, such a statement shall be considered a statement in lieu of examination-in-chief, obviating the need for it to be recorded at the time of trial.

(iii) The amendments also sought to put in place a framework to enable victims with disabilities to participate in a test identification parade. In such cases, a judicial magistrate will oversee the procedure to ensure the witness is JS Verma Committee Report, supra n. 18 .

CrPC, Section 154(1) proviso 2, (a).

CrPC, Section 154(1) proviso 2, (b).

CrPC, Section 164 (5A) (a), provisos 1 and 2.

PART C supported in identifying the accused with a means they find comfortable.35 This process must be video-graphed.36 37 Further, guidance issued by the Union Ministry of Health and Family Welfare notes the challenges faced by survivors with disabilities in reporting cases given the barriers to communication, their dependency on caretakers, their complaints not being taken seriously and the lack of an appropriate environment which encourages them to express their grievances and complaints.37 In addition, unfamiliar and stressful court environments pose a heightened challenge, during protracted cases, for such women. Lack of information about their entitlements under the law, as well as the right to seek legal representation, compels them to be mute and helpless spectators.38 38 Certain concerns have also been highlighted by the Committee on the Rights of Persons with Disabilities in its concluding observations on the initial report on India. These include lack of measures to identify, prevent and combat all forms of violence against persons with disabilities; lack of disaggregated statistical data in National Crime Records Bureau on cases of gender-based violence against women and girls with disabilities, including violence inflicted by intimate partners; limited availability of accessible shelters for women with CrPC, Section 54A, proviso 1.

CrPC, Section 54A, proviso 2.

Ministry of Health and Family Welfare, Guidelines and Protocols: Medico-legal care for survivors/victims of sexual violence, 16 May 2019, available at https://main.mohfw.gov.in/sites/default/files/953522324.pdf, p. 14. HRW Report, supra n. 24, p. 7.

PART C disabilities who are victims of violence; and lack of effective remedies for persons with disabilities facing violence, including rehabilitation and compensation.39 39 While changes in the law on the books mark a significant step forward, much work still needs to be done in order to ensure that their fruits are realized by those for whose benefit they were brought. In this regard, we

set out below some guidelines to make our criminal justice system more disabled-friendly.

(i) The National Judicial Academy and state judicial academies are requested to sensitize trial and appellate judges to deal with cases involving survivors of sexual abuse. This training should acquaint judges with the special provisions, concerning such survivors, such as those outlined above. It should also cover guidance on the legal weight to be attached to the testimony of such witnesses/survivors, consistent with our holding above. Public prosecutors and standing counsel should also undergo similar training in this regard. The Bar Council of India can consider introducing courses in the LL.B program that cover these topics and the intersectional nature of violence more generally;

(ii) Trained special educators and interpreters must be appointed to ensure the effective realization of the reasonable accommodations embodied in the Criminal Law Amendment Act, 2013. All police stations should maintain a database of such educators, interpreters and legal aid providers, in order to facilitate easy access and coordination;

Committee on the Rights of Persons with Disabilities, "Concluding Observations on the Initial Report Of India", GE.19-18639(E) available at https://digitallibrary.un.org/record/3848327?ln=en, 29 October 2019, para 34. PART C

(iii) The National Crimes Record Bureau should seriously consider the possibility of maintaining disaggregated data on gender-based violence. Disability must be one of the variables on the basis of which such data must be maintained so that the scale of the problem can be mapped out and tailored remedial action can be taken;

(iv) Police officers should be provided sensitization, on a regular basis, to deal with cases of sexual violence against women with disabilities, in an appropriate way. The training should cover the full life cycle of a case involving a disabled survivor, from enabling them to register complaints, obtain necessary accommodations, medical attention and suitable legal representation. This training should emphasize the importance of interacting directly with the disabled person concerned, as opposed to their care-taker or helper, in recognition of their agency; and

(v) Awareness-raising campaigns must be conducted, in accessible formats, to inform women and girls with disabilities, about their rights when they are at the receiving end of any form of sexual abuse.

40 We hasten to add that these suggestions are not a reflection of the manner in which the investigation, enquiry and trial were conducted in the instant case. They simply represent our considered view on the systemic reforms needed to ensure that cases such as the instant one are dealt with in the most appropriate way.

PART C Testimony of disabled prosecutrix:

41 Another feature of the case that we would like to dwell on relates to the testimony of the prosecutrix, PW2. In his judgment, the Sessions Judge noted as follows:

> "21. Identification of the accused by the victim girl:- It is needless to say that identifying the accused basing on the voice is weak type of evidence. Coming to the present facts and circumstances of the case, P.W.2 is blind by birth as the access of the accused to victim proved by the prosecution she can easily identify the accused by hearing his voice. Moreover, P.W.I, P.W.3, P.W.4 and P.W.5 and some others caught hold the accused when he opened the door of the house of P.W.I, on the date of the incident and the evidence of the police officials also corroborates with the witnesses who caught hold of the accused and handed over him to P.W.II and on the instructions of P.W. II, the accused was taken to Mahanandi Police Station. It was suggested to P.W.2 that her statement that she identified the accused with his voice is false. In view of the categorical evidence of P.W.I, P.W.3, P.W.4, so also the admission made by the accused in 313 Cr.P.C examination that he used to visit the house of P.W.l to call the brothers of the victim for doing coolie work, the above suggestion has no legs to stand. The above evidence would amply prove that the victim has successfully identified the accused and her evidence cannot be doubted simply because she is a blind girl."

42 In the High Court, the defense sought to cast doubt on the testimony of the prosecutrix by arguing that she would have been unable to identify the accused due to her disability. While the above plea was not pressed by the appellant in this Court, we would like to take this opportunity to affirm the conclusion of the Sessions Judge and to clarify the position of law on this point. 43 There have been instances where the testimony of a disabled prosecutrix has not been considered seriously and treated at an equal footing as that of their PART C able-bodied counterparts. One such instance is the judgment of this Court in Mange v. State of Haryana40, where the testimony of a thirteen year-old girl who was deaf and mute was not recorded and the conviction was confirmed on the account of an eye witness and supported by medical evidence. This Court in affirming the conviction noted that the non-examination of the prosecutrix was not a major infirmity in the prosecution's case "apart from being a child witness, she was also deaf and dumb and no useful purpose would have been served by examining her." We are of the considered view that presumptions of such nature which construe disability as an incapacity to participate in the legal process reflect not only an inadequate understanding of how disability operates but may also result in a miscarriage of justice through a devaluation of crucial testimonies given by persons with disabilities. The legal personhood of persons with disabilities cannot be premised on societal stereotypes of their supposed "inferiority", which is an affront to their dignity and a negation of the principle of equality. 44 A survey and analysis of High Court judgments by Saptarshi Mandal indicates that the testimony of the disabled witnesses is devalued by not recording the testimony of the prosecutrix at all; or recording it without adherence to correct legal procedure, thereby rendering it ineffectual; dismissal of the testimony for its lack of intelligibility or for not being supported by the condition of her body.41 (1979) 4 SCC 349.

Mandal, Disabled Women Testimony in Rape Trials, supra n. 23, p. 6. PART C 45 This kind of a judicial attitude stems from and perpetuates the underlying bias and stereotypes against persons with disabilities. We are of the view that the testimony of a prosecutrix with a disability, or of a disabled witness for that matter, cannot be considered weak or inferior, only because such an individual interacts with the world in a different manner, vis-a-vis their able-bodied counterparts. As long as the testimony of such a witness otherwise meets the criteria for inspiring judicial confidence, it is entitled to full legal weight. It goes without saying that the court appreciating such testimony needs to be attentive to the fact that the witness' disability can have the consequence of the testimony being rendered in a different form, relative to that of an able-bodied witness. In the case at hand, for instance, PW2's blindness meant that she had no visual contact with the world. Her primary mode of identifying those around her, therefore, is by the sound of their voice. And so PW2's testimony is entitled to equal weight as that of a prosecutrix who would have been able to visually identify the appellant. C.3 The 'Caste' that is Difficult to Cast Away: Protection of Members of Scheduled Castes and Scheduled Tribes 46 Social movements in India for securing justice to those who have suffered centuries of caste-based discrimination paved way for the enactment of the SC & ST Act in 1989 to prevent commission of atrocities against members of the Scheduled Caste and Scheduled Tribe42 communities. The Act also falls within "SC & ST" PART C the purview of Article 17 of the Constitution, which prohibits untouchability. The Statement of Objects and Reasons of the Act states the following:

> "1. Despite various measures to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes, they remain vulnerable. They are denied number of civil rights. They are subjected to various offences, indignities, humiliations and harassment. They have, in several brutal incidents, been deprived of their life and property. Serious crimes are committed against them for various historical, social and economic reasons.
>
> 2. Because of the awareness created amongst the Scheduled Castes and the Scheduled Tribes through spread of education, etc., they are trying to assert their rights and this is not being taken very kindly by the others. When they assert their rights and resist practices of un-touchability against them or demand statutory minimum wages or refuse to do any bonded and forced labour, the vested interests try to cow them down and terrorise them. 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. Occupation and cultivation of even the government allotted land by the Scheduled Castes and the Scheduled Tribes is resented and' more often these people become victims of attacks by the vested interests of late, there has been an increase in the disturbing trend of commission of certain atrocities like making the Scheduled Castes persons eat inedible substances like human excreta and attacks on and mass killings of helpless Scheduled Castes and Scheduled Tribes and rape of women belonging to the Scheduled Castes and the Scheduled Tribes. Under the circumstances, the existing laws like the protection of Civil Rights Act, 1955 and the normal provisions of the Indian Penal Code have been found to be inadequate to check these crimes. A special legislation to check and deter

crimes against them committed by non-Scheduled Castes and non-Scheduled Tribes has, therefore, become necessary.

3. The term 'atrocity' has not been defined so far. It is considered necessary that not only the term 'atrocity' should be defined but stringent measures should be introduced to provide for higher punishments for committing such atrocities. It is also proposed to enjoining, on the States and the Union territories to take specific preventive and punitive measures to protect the Scheduled Castes and the Scheduled Tribes from PART C being victimised and where atrocities are committed, to provide adequate relief and assistance to rehabilitate them." (emphasis added) 47 While the Statement of Objects and Reasons of the Act specifically mentions commission of rapes against SC & ST women as a form of atrocity committed against the SC & ST communities, it does not specifically articulate the distinct disadvantage women of these communities face on account of casteism, patriarchy and poverty at the same time. Shreya Atrey notes that while the anti- caste movements began in early 1900s and saw active participation of SC & ST women, their oppression was imagined only on the basis of caste rather than patriarchy43. On the other hand, the mainstream feminist movement also failed to take into consideration the specific forms of oppression that SC & ST women face not only at the hands of upper caste men but also upper caste women. To reframe the words of the Combahee River Collective Statement, a classic text in US anti-racist feminism - the SC & ST women struggled together with SC & ST men against casteism, while they also struggled with men about sexism.44 Adrija Dey in her work has specifically highlighted that class, caste, geography and religion play a pivotal role in how gender violence is perceived and how punishments are meted out in the criminal justice system.45 How pervasive sexual violence is against women from SC & ST community is emphatically stated by V. Geetha in extract her book titled 'Undoing Impunity':

> SHREYA ATREY, INTERSECTIONAL DISCRIMINATION, Oxford University Press) 2019, p. 69.
>
> Combahee River Collective, The Combahee River Collective Statement, in HOME GIRLS: A BLACK FEMINIST ANTHOLOGY, Barbara Smith ed., (New York: Kitchen Table/Women of Color Press, 1983; reprint, New Brunswick, N.J.: Rutgers University Press 2000) 267. The original quote read, "We struggle together with Black men against racism, while we also struggle with Black men about sexism." A. Dey. 'Others' Within the 'Others': An Intersectional Analysis of Gender Violence in India, Gender Issues 36, 357–373 (2019).
>
> PART C "As for sexual violence, Dalit women activists understood it to be part of a continuum of violence that Dalit women experienced: in a life-world where food, water, clean living spaces are routinely denied to Dalit women, where their labour was exploited, and no protection available in their places of work, where to be in bondage to a landlord or petty trader was commonplace, and at all times they are viewed as sexually available, and humiliated in their bodily being, sexual violence emerged as not an exceptional act of violence, but the most concentrated expression of a fundamental animus against Dalits"46

48 The above discussion highlights the social and economic context in which sexual violence against women from SC & ST communities occurs. This contextualized legal analysis has to be adopted by the Court which is sensitive to the nature of evidence that is likely to be produced in a case where various marginalities intersect. In the present case, a distinct individualized experience for PW2 is created on account of her gender, caste and disability due to her association with wider groups that face a societal disadvantage.

C.4 Section 3(2)(v) of SC & ST Act

49 Section 3(2)(v) of the SC and ST Act as it stood at the material time read as follows:

" 3. 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 on the ground 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;" V. Geetha, UNDOING IMPUNITY: SPEECH AFTER SEXUAL VIOLENCE, (Zubaan, 2016), Chapter 11. PART C 50 Under Section 3(2)(v), an enhanced punishment of imprisonment for life with fine is provided where

(i) The offence is committed by a person who is not a member of a Scheduled Caste or Scheduled Tribe;

(ii) The offence arises under the Penal Code and is against a person or property and is punishable with imprisonment for a term of ten years or more; and

(iii) The offence is committed "on the ground that such person is a member of a Scheduled Caste or Scheduled Tribe" or such property belongs to such a person.

The key words are "on the ground that such person is a member of a 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 recognizing 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:

> PART C "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?"47

51 Being cognizant of the limitation of Section3(2)(v) – as it stood earlier - in dealing with matters of intersectionality, we are however bound to apply the standard that has been laid down in the law. The expression "on the ground" was considered in a two-judge Bench judgment of this Court in Dinesh Alias Buddha v. State of Rajasthan48, where the Court speaking through Justice Arijit Pasayat held:

> "15. Sine qua non for application of Section 3(2)(v) is that an offence must have been committed against a person on the ground that such person is a member of Scheduled Castes and Scheduled Tribes. In the instant case no evidence has been led to establish this requirement. It is not case of the prosecution that the rape was committed on the victim since she was a member of Scheduled Caste."

52 The Court held that in the absence of evidence to that effect, the offence under Section 3(2)(v) would not stand established. This principle was subsequently followed in a two judge Bench judgment of this Court in Ramdas and Others v. State of Maharashtra49 where it was held that merely because a woman belongs to the SC & ST community, the provisions of the SC & ST Act would not be attracted in a case of sexual assault. This Court observed that there 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. (2006) 3 SCC 771.

(2007) 2 SCC 170.

PART C was no evidence to prove the commission of offence under Section 3(2)(v) of the SC & ST Act.

53 The contours of the terms "on the ground of" have been explicated by this Court in the following cases. In Ashrafi v. State of Uttar Pradesh50, a two judge Bench of this Court held that conviction under Section 3(2)(v) of the SC & ST Act cannot be sustained because the prosecution could not prove that the rape was committed only on the ground that the woman belonged to the SC & ST community. This Court speaking through Justice R Banumathi held:

> "9.The evidence and materials on record do not show that the Appellant had committed rape on the victim on the ground that she belonged to Scheduled Caste. Section 3(2)(v) of the SC/ST Prevention of Atrocities Act can be pressed into service only if it is proved that the rape has been committed on the ground that PW-3 Phoola Devi belonged to Scheduled Caste community. In the absence of evidence proving intention of the Appellant in committing the offence upon PW-3-Phoola Devi only because she belongs to Scheduled Caste community, the conviction of the Appellant Under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act cannot be sustained."

(emphasis added)

54 In another judgment of this Court in Khuman Singh v. State of MP51, Justice R Banumathi speaking for this Court held :

> "As held by the Supreme Court, the offence must be such so as to attract the offence under Section 3(2)(v) of the Act. The offence must have been committed against the person on the ground that such person is a member of Scheduled Caste and Scheduled Tribe. In the present case, the fact that the deceased was belonging to "Khangar"-Scheduled Caste is not disputed. There is no evidence to show that the offence was committed only on the ground that the (2018) 1 SCC 742 ("Ashrafi").

Criminal Appeal 1283 of 2019 decided on 27 August 2019 ("Khuman Singh"). PART C victim was a member of the Scheduled Caste and therefore, the conviction of the appellant-accused under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is not sustainable." `` (emphasis supplied) 55 In the above two extracts, this Court has interpreted Section 3(2)(v) to mean that the offence should have been committed "only on the ground that the victim was a member of the Scheduled Caste." The correctness of this exposition. Is debatable. The statutory provision does not utilize the expression "only on the ground". Reading the expression "only" would be to add a restriction which is not found in the statute. The statute undoubtedly uses the words "on the ground' but the juxtaposition of "the" before "ground" does not invariably mean that the offence ought to have been committed only on that ground. To read the provision in that manner will dilute a statutory provision which is meant to safeguard the Scheduled Castes and Scheduled Tribes against acts of violence which pose a threat to their dignity. As we have emphasized before in the judgment, an intersectional lens enables us to view oppression as a sum of disadvantage resulting from multiple marginalized 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 marginalized 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, PART C but it is to recognize 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. 56 If the evidence in this case was sufficient to establish the commission of the offence on the ground that PW2 was a member of a Scheduled Caste, a fresh look at the judgments in Ashrafi (supra) and Khuman Singh (supra) would have been warranted. However, a close look at the evidence would demonstrate that the prosecution has not led evidence to prove the ingredients of section 3(2)(v). Unfortunately, there has been a serious gap in the evidence on that count. In the present case, PW11 who was the Investigating Officer deposed:

> "PW 1 and PW2 did not state before me that since she belongs to Schedule Caste the accused committed the offence. Part 1 C.D does not disclose in specific that the accused was handed over to the Circle. 'Inspector of police. Witness adds by the time he reached the scene of offence the Sub Inspector and Circle inspector of police were present and the witnesses present there handed over to the accused to them in turn he instructed them to take the accused to Mahanandi Police Station. It is not true to suggest that my statement that the accused was handed over to Sub Inspector of police or Circle Inspector of police is false as accused was not present at the scene of offence."

57 The Sessions Judge noticed the deposition of PW11. However, the Sessions Judge noted that Exhibit P-1 disclosed that PW 2 belongs to a Scheduled Caste. The Sessions Judge also observed in paragraph 39 of the PART C judgment that PW1, who is the mother of PW2 is an "illiterate village rustic woman" and merely because she did not mention in the report or statement to the police that the accused committed the offence on the ground that PW2 belonged to the Scheduled Caste is not fatal to the case of the prosecution under Section 3(2)(v) of the SC & ST Act. The Sessions Judge has also made observations in that regard in paragraph 40 of the judgment which has been extracted earlier where he stated that the accused would not have dared to commit the crime if PW2 belonged to an upper caste community particularly in a village atmosphere. In appeal, the submission that the ingredients of the offence under Section 3(2)(v) were not established was specifically urged before the High Court. The submission was dismissed with the observation that "even otherwise still the offence under Section 376(1) of the Penal Code is made out". Both the Sessions Judge as well as the High Court have failed to notice the crucial ingredient of Section 3(2)(v) (as it stood at the material time prior to its substitution by Act 1 of 2016)52.

Section 3(2)(v) of the SC & ST Act, prior to its amendment, read:

> "(2) Whoever, not being a member of a Scheduled Caste or a 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 on the ground 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" The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015, w.e.f 26 January 2016, amended Section 3(2)(v) and currently states:
>
> "(2) Whoever, not being a member of a Scheduled Caste or a 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 Scheduled Tribe or such property belongs to such member] shall be punishable with imprisonment for life and with fine".

PART C 58 The issue as to whether the offence was committed against a person on the ground that such person is a member of a SC or ST or such property belongs to such member is to be established by the prosecution on the basis of the evidence at the trial. We agree with the Sessions Judge that the prosecution's case would not fail merely because PW1 did not mention in her statement to the police that the offence was committed against her daughter because she was a Scheduled Caste woman. However, there is no separate evidence led by the prosecution to show that the accused committed the offence on the basis of the caste identity of PW2. While it would be reasonable to presume that the accused knew the caste of PW2 since village communities are tightly knit and the accused was also an acquaintance of PW2's family, the knowledge by itself cannot be said to be the basis of the commission of offence, having regard to the language of Section 3(2)(v) as it stood at the time when the offence in the present case was committed. As we have discussed above, due to the intersectional nature of oppression PW2 faces, it becomes difficult to establish what led to the commission of offence – whether it was her caste, gender or disability. This highlights the limitation of a provision where causation of a wrongful act arises from a single ground or what we refer to as the single axis model. 59 It is pertinent to mention that Section 3(2)(v) was amended by the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015, which came into effect on 26 January 2016. The words "on the ground of" under Section 3(2) (v) have been substituted with "knowing that such person is a member of a Scheduled Caste or Scheduled Tribe". This has PART C decreased the threshold of proving that a crime was committed on the basis of the caste identity to a threshold where mere knowledge is sufficient to sustain a conviction. Section 8 which deals with presumptions as to offences was also amended to include clause (c) to provide 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. The amended Section 8 reads as follows:

> "8. Presumption as to offences. - In a prosecution for an offence under this Chapter, if it is proved that
>
> (a) the accused rendered [any financial assistance in relation to the offences committed by a person accused of], or reasonably suspected of, committing, an offence under this Chapter, the Special Court shall presume, unless the contrary is proved, that such person had abetted the offence;
>
> (b) a group of persons committed an offence under this Chapter and if it is proved that the offence committed was a sequel to any existing dispute regarding land or any other matter, it shall be presumed that the offence was committed in furtherance of the common intention or in prosecution of the common object.

[(c) the accused was having personal knowledge of the victim or his family, the Court shall presume that the accused was aware of the caste or tribal identity of the victim, unless the contrary is proved.]" 60 The Parliament Standing Committee Report on Atrocities Against Women and Children has observed that, "high acquittal rate motivates and boosts the confidence of dominant and powerful communities for continued perpetration" and recommends inclusion of provisions of SC & ST Act while registering cases of PART C gendered violence against women from SC & ST

communities53. However, as we have noted, one of the ways in which offences against SC & ST women fall through the cracks is due to the evidentiary burden that becomes almost impossible to meet in cases of intersectional oppression. This is especially the case when courts tend to read the requirement of "on the ground" under Section 3(2)(v) as "only on the ground of". The current regime under the SC & ST Act, post the amendment, has facilitated the conduct of an intersectional analysis under the Act by replacing the causation requirement under Section 3(2)(v) of the Act with a knowledge requirement making the regime sensitive to the kind of evidence that is likely to be generated in cases such as these. 61 However, since Section 3(2) (v) was amended and Clause (c) of Section 8 was inserted by Act 1 of 2016 with effect from 26 January 2016 these amendments would not be applicable to the case at hand. The offence in the present case has taken place before the amendment, on 31 March 2011. Therefore, we hold that the evidence in the present case does not establish that the offence in the present case was committed on the ground that such person is a member of a SC or ST. The conviction under Section 3(2)(v) would consequently have to be set aside.

Parliament Standing Committee Report on Atrocities Against Women and Children, 15 March 2021, available at https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/15/143/230_2021_3_14.pdf

PART

C.5 Punishment under Section 376 of the IPC

62 Mr Harinder Mohan Singh, learned Counsel has submitted that as a sequel to the setting aside of the conviction under Section 3(2)(v), the imposition of a sentence of imprisonment for life for the offence under section 376 needs to be modified. In this context, learned Counsel relied upon the provisions of Section 376(1).

63 Now Section 376(1), as it stood at the material time prior to its substitution by Act 13 of 2013, was substituted by the Criminal Law (Amendment) Act 1983 (Act 43 of 1983) with effect from 25 December 1983. Section 376(1) as substituted by the amendment read as follows :

> "376. Punishment to rape: (1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years." Essentially, the submission which has been urged on behalf of the appellant is that under Section 376(1) as it then stood, Parliament had made provisions for:

(i) A minimum sentence of seven years;

PART C

(ii) The imposition of a sentence of imprisonment for a term of less than

seven years for adequate and special reasons to be recorded by the Court;

(iii) A term of imprisonment extending to ten years; and

(iv) A term of imprisonment for life.

In the context of (iii) and (iv) above, the words used in Section 376(1) were "but which may be for life or for a term which may extend to ten years".

64 On behalf of the appellant it has been urged that in the present case the Sessions Judge proceeded to impose a term of imprisonment for life on the basis that an offence under Section 3(2)(v) was established. If it is held that the offence under Section 3(2)(v) has not been established, the Sessions Judge, it was urged, erred in taking the view that the court was not inclined to exercise its discretion "to give lesser punishment to the accused". In other words, it was submitted that the Sessions Judge proceeded on the basis that a sentence of imprisonment for life was the norm and there was a discretion to award a lesser punishment, which is erroneous.

65 In evaluating the submission, it is necessary to note that the Sessions Judge came to the conclusion that the appellant was guilty of an offence under Section 3(2)(v) of the SC and ST Act and, independent of that, also of an offence punishable under Section 376(1) of the Penal Code. In considering the sentence to be imposed in respect of the two distinct offences, the Sessions Judge held that:

PART C

(i) A sentence of imprisonment for life should be imposed for the offence under Section 376(1); and

(ii) A sentence of imprisonment for life would have to be imposed for the offence under Section 3(2)(v) of the SC and ST Act.

66 For the reasons which we have indicated earlier we have come to the conclusion that the ingredients of the offence under Section 3(2)(v) of the SC and ST Act were not established. The issue which survives for consideration is as to whether the punishment of imprisonment for life in respect of the offence under Section 376(1) should have been imposed.

67 On a plain reading of Section 376(1), as it stood after its insertion with effect from 25 December 1983 by Act 43 of 1983, it is evident that a sentence of imprisonment for life is one of the sentences contemplated by the provision. The Criminal Law Amendment Act 1983 was introduced with the aim of bringing widespread amendments to the laws of rape in the country, making it difficult for the offenders to escape conviction. The stated object and purpose of the Act was:

> "There have been pressing demands inside and outside Parliament for the amendment of the law relating to rape so that it becomes more difficult for the offenders to escape conviction and severe penalties are imposed on those convicted. [...]
>
> 2. [...] The changes proposed in the Bill have been formulated principally on the basis of the following considerations:-
>
> [...] (3) minimum punishments for rape should be prescribed;" PART C Pursuant to the above-mentioned objective, Section 376(1) provided that except for cases covered by sub-Section (2), a person committing rape shall be punished with imprisonment of either description for a term which shall not be less than seven years. However, the proviso stipulated that the court may for 'adequate and special reasons' to be mentioned in the judgment impose a sentence of imprisonment for a term of less than seven years. The minimum sentence of seven years could, in other words, be reduced to a lesser term only for adequate and special reasons to be recorded in the judgment. This Court has time and again noted that adequate and special reasons depend on the facts and circumstances of each case. These special and adequate reasons are an exception to the rule and must be used sparingly and interpreted strictly as held by this Court in State of Madhya Pradesh v. Bala54. Section 376(1) however also stipulated that the term of imprisonment "may be for life or for a term of ten years".

68 Subsequently, in 2013, post the Nirbhaya case, the Criminal Law Amendment Act 2013 was brought into force which amended Section 376(1). The Parliament sought to take a tougher stand on crime against women and limited the discretion of the judiciary regarding imposition of sentences for offences involving rape by providing a minimum punishment of seven years and a maximum punishment of life imprisonment, without any exceptions for reduction of sentence. In 2018, Section 376 has been further amended by the Criminal Law (2005) 8 SCC 1.

PART C Amendment Act 2018 (Act 22 of 2018) by which the minimum punishment has been enhanced to ten years, with the maximum punishment remaining the same. 69 Having detailed the amendments in Section 376 by the Parliament, we are cognizant that we must apply the law as it was at the time of occurrence of the crime. The range of punishment within which we must exercise our judicial discretion is the imposition of a minimum punishment of 7 years (or less on existence of adequate and special reasons), or 10 years or imprisonment for life. In determining the appropriate sentence, this Court has consistently laid down that we must of necessity be guided by all the relevant facts and circumstances including

(i) The nature and gravity of the crime;

(ii) The circumstances surrounding the commission of the sexual assault;

(iii) The position of the person on whom the sexual assault is committed;

(iv) The role of the accused in relation to the person violated; and

(v) The possibility of the rehabilitation of the offender. The above factors are relevant for the determination of the quantum of punishment as held in Ravji v. State of Rajasthan55, State of Karnataka v. Krishnappa56, and State of Punjab v. Prem Sagar57 among others. (1996) 2 SCC 175.

(2000) 4 SCC 75.

(2008) 7 SCC 550.

PART C 70 In addition to these factors, we must also be alive to the intersectional identity of PW2 and the underlying societal factors within which the offence was committed. PW2 is a woman who is blind since birth and is a member of a Scheduled Caste. These intersectional identities placed her in a uniquely disadvantageous position. The Chhattisgarh Pradesh High Court in Tekan v. State of Madhya Pradesh (Now Chhattisgarh)58 dealt with the conviction of a person accused of raping a blind woman on multiple occasions, on the promise of marriage. The High Court was acutely aware of the misuse of the woman's disability by the accused and sentenced him to 7 years of rigorous imprisonment. The conviction and sentence were later upheld by this Court59. This Court also dealt with the question of compensation to be paid to the prosecutrix and the physical disadvantage accruing to her on account of her disability. In doing so, Justice M Y Eqbal, speaking for the two-judge bench, noted:

> "15. Coming to the present case in hand, victim being physically disadvantaged, she was already in a socially disadvantaged position which was exploited maliciously by the accused for his own ill intentions to commit fraud upon her and rape her in the garb of promised marriage which has put the victim in a doubly disadvantaged situation and after the waiting of many years it has worsened. It would not be possible for the victim to approach the National Commission for Women and follow up for relief and rehabilitation. Accordingly, the victim, who has already suffered a lot

since the day of the crime till now, needs a special rehabilitation scheme." (emphasis supplied)

71 Similarly, we are also aware of the disadvantage faced by women (and persons generally) belonging to the Scheduled Castes and Scheduled Tribes. As 2014 Cri LJ 1409. Physical disability has been considered as an aggravating factor in sentencing by other High Courts as well. See, for e.g., Rabindrayan Das v. State, 1992 Cri LJ 269, Orissa High Court. (2016) 4 SCC 461.

PART C explained above, it is difficult and, in our opinion, artificial to delineate the many different identities of an individual which overlap to place them in a disadvantaged position of power and create the circumstances for heinous offences such as rape to occur. At this point, it would be relevant to note that a series of decisions of this Court rendered by three-judge benches60 and two-judge benches61, have stated that "socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy". However, it is necessary to understand the context in which this finding was made. In all of these cases, the Court was dealing with the plea of mitigation of sentence awarded by the High Courts or the lower courts on the ground of existence of 'adequate and special reasons' on account of the accused being a member of the scheduled caste/tribe; belonging to a rural background; or being illiterate. It is on this count that the Court rejected such a plea given the heinous nature of the crime of rape and the gravity of the criminal act. In our opinion, these judgments do not bar us from taking a holistic view of the various intersectional identities which form a vital part of the facts and circumstances of the act and speak to the nature of the crime. 72 In the present case, several circumstances bearing on the sentence must be borne in mind. First, PW2, who was subjected to a sexual assault was blind since birth. Second, the appellant was known to the brothers of PW2, including PW3. The appellant used to visit the house in which PW2 resided with her State of Karnataka v. Krishnappa (2000) 4 SCC 75; State of Madhya Pradesh v. Basodi (2009) 12 SCC

318. State of Karnataka v. Raju (2007) 11 SCC 490; State of Rajasthan v. Vinod Kumar, (2012) 6 SCC 770; State of Madhya Pradesh v. Santosh Kumar (2006) 6 SCC 1. PART C parents and brothers. Bereft of eye-sight, PW2 was able to identify the appellant by his voice with which she was familiar. Third, shortly before entering the home of PW2, the appellant enquired of PW1 where her sons were, when he was told that they were not at home. PW1 proceeded with her chores at a public water tap. Taking advantage of the absence of the members of the family from the family home, the appellant entered the house and subjected PW2 to a sexual assault. PW1 has deposed that when she entered the house together with PW3, PW4 and PW5 she found PW2 in a nude condition on the ground bleeding from the injuries sustained on her genitals. The nature and circumstances in which the offence has been committed would leave no manner of doubt that the appellant had taken advantage of the position of the PW2 who was blind since birth. He entered the house, familiar as he was with members of the family, in their absence and subjected PW2 to a sexual assault. PW2 belongs to a Scheduled Caste. The prosecution has not led evidence to prove that the offence, as we have noticed, was committed on the ground that she belongs to a Scheduled caste within the meaning of section 3(2)(v) of the SC and ST Act. This is a distinct issue. But the fact that PW2 belonged to a Scheduled Caste is not a factor which is extraneous to the sentencing process for an offence under Section 376. It is in that context, that we must read the observations of the Sessions

Judge with a robust common sense perception of ground realities. The appellant was 27 years old, a mature individual who was working as a coolie together with the brothers of PW2 for a couple of years. The nature and gravity of the offence in the present case is serious in itself and it is compounded by the position of PW2 who was a visually disabled woman. A heinous offence has been committed on a woman belonging PART D to Scheduled Caste. The imposition of a sentence of imprisonment for life cannot be faulted.

D Conclusion and Summary of Findings

73 For the above reasons we have come to the conclusion that the conviction

under Section 376(1) and the sentence imposed by the Sessions Judge must be affirmed. In the circumstances we order as follows:

(i) The conviction of the appellant for an offence under Section 3(2)(v) of the SC and ST Act and the sentence imposed in respect of the offence is set aside and the appeal allowed to that extent; and

(ii) The conviction of the appellant for an offence punishable under Section 376(1) of the Penal Code and the sentence of imprisonment for life is upheld. The fine of Rs 1,000/- and default imprisonment of six months imposed by the Sessions Judge and affirmed by the High Court shall also stand confirmed.

74 The appeal is disposed of in the above terms.

75 Pending application(s), if any, stand disposed of.

.....J. [Dr Dhananjaya Y Chandrachud]
.....J. [M R Shah] New Delhi;

April 27, 2021