Pramod Suryabhan Pawar vs The State Of Maharashtra on 21 August, 2019

Equivalent citations: AIR 2019 SUPREME COURT 4010, AIRONLINE 2019 SC 904, (2019) 11 SCALE 209, 2019 (3) ABR(CRI) 579, (2019) 3 CRILR(RAJ) 961, 2019 (3) SCC (CRI) 903, (2019) 3 UC 1899, (2019) 4 ALLCRILR 186, (2019) 4 CRIMES 487, (2019) 4 PAT LJR 71, (2019) 4 RECCRIR 135, (2019) 75 OCR 917, 2019 (9) SCC 608, 2019 CALCRILR 4 15, 2019 CRILR(SC MAH GUJ) 961, (9) 206 ALLINDCAS 44, AIR 2019 SC(CRI) 1489

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Bench: Indira Banerjee, Dhananjaya Y Chandrachud

Repo

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No. 1165 of 2019
(@SLP (Crl) No. 2712 of 2019)

Pramod Suryabhan Pawar …Appellant

Versus

The State of Maharashtra & Anr. …Respondent

JUDGMENT

Dr Dhananjaya Y Chandrachud, J

1. Leave granted.

2. By its judgement dated 7 February 2019, the High Court of Judicature at Bombay dismissed an application under Section 482 of the Code of Criminal Procedure 19731. The appellant sought the quashing of a First Information Report2 registered against him on 17 May 2016 with the Panvel City Police Station for offences punishable under Sections 376, 417, 504 and 506(2) of the Indian Penal

Code3 and Sections 3(1) (u), (w) and 3(2) (vii) of The Scheduled "CrPC" "FIR" "IPC" Castes and Scheduled Tribes (Prevention of Atrocities Act, 1989 (as amended by the Amendment Act, 2015)4. The second respondent is the complainant.

3. The allegations in the FIR are summarised thus:

> (i) According to the complainant, she and the appellant have known each other since 1998. She would speak to the appellant on the phone and met him regularly as early as 2004. In 2008 the appellant proposed marriage and assured her that their belonging to different castes would not be a hindrance. The appellant allegedly promised to marry the complainant after the marriage of his elder sister. On 23 January 2009 the appellant allegedly re-iterated his promise to marry her at the Patnadevi Temple in Chalisgaon;
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> (ii) The complainant completed her B.Sc. in Agriculture in 2002 and worked as a Junior Research Assistant. In 2007 she was selected as a Naib Tahsildar at Chalisgaon. In March 2009 she was appointed to the post of Assistant Sales Tax Commissioner at Mazgaon. The appellant would, it is alleged, come to meet her and lived with her in November 2009. During his visit, the complainant alleges that she refused to engage in sexual intercourse with the appellant, but "on the promise of marriage he forcibly established corporeal relationships";
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> (iii) The complainant alleges that throughout 2010, the appellant visited her on multiple occasions and they engaged in sexual intercourse. When "SC/ST Act" the appellant was posted in Gadchiroli, the complainant visited the appellant multiple times over the course of 2011. Each of these visits lasted four to five days during which the complainant resided with the appellant and they engaged in sexual intercourse. During these visits the complainant enquired about marriage and the appellant responded in the affirmative. In December 2011 the appellant visited her and resided in her house for four days;
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> (iv) The appellant's elder sister was married on 5 February 2012. On 23 December 2012 the appellant visited her and forced her to engage in sexual intercourse. Afterwards, for the first time the appellant raised concerns about marrying her on the ground that their belonging to different castes would hinder the appellant's younger sister's marriage. In January 2013 the complainant visited the appellant in Nagpur, and the appellant also subsequently visited her. On both occasions they engaged in sexual intercourse;
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> (v) During these years she missed her menstrual periods on several occasions. In 2013-14 the complainant and appellant jointly visited the hospital multiple times to check whether she was pregnant. In June 2013 the appellant was posted in Navi Mumbai and used to spend his weekends residing at the complainant's house. They regularly engaged in sexual intercourse during this period. Beginning in January

> 2014 the appellant raised concerns about marrying the complainant on the ground of her caste.

This led to heated arguments. However, the appellant used to regularly visit her house at Panvel until March 2015, each time engaging in sexual intercourse with her;

(vi) On 27 and 28 August 2015 and 22 October of 2015 the appellant sent the complainant certain WhatsApp messages. The complainant alleges that these messages were insulting and attacked her on the grounds of her caste. The messages stated:

> "You are bad for society. If shoe is kept on head, then head would get dirty. Reservation did not add any intelligence; You have got Govt.
>
> service with ease".
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> (vii) In November 2015 for the first time the complainant threatened to file a police complaint against the appellant. The appellant promised to marry her after the marriage of his brother. At this time also they engaged in sexual intercourse; and
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> (viii) On 9 March 2016 the appellant engaged in sexual intercourse with the complainant against her will. Subsequently, the complainant was apprised of the fact that the appellant was engaged to another woman. The appellant informed the complainant that the woman he was engaged to was demanding Rs. two lakhs to break of the engagement. On 28 March 2016 the appellant re-iterated his promise to marry the complainant and arranged for her to speak to the woman he had been engaged to, to assure the complainant that the appellant was no longer in a relationship with her.

Subsequently the complainant became aware that the appellant had married on 1 May 2016. On 17 May 2016 she filed the FIR.

4 The appellant applied for anticipatory bail. By an order dated 13 June 2016 he was granted ad-interim anticipatory bail. The order dated 13 June 2016 was confirmed by the High Court of Bombay on 1 July 2016. 5 In Criminal Application No. 813 of 2016, the appellant moved the High Court under Section 482 of the CrPC to quash the FIR dated 17 May 2016. By its order dated 7 February 2019 the High Court rejected the application, noting:

> "3. Though the relationship was with consent, it appears that there was a promise to marry and statement shows that later on, giving reason of caste of Complainant, promise was not kept.
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> 4. In view of this prima facie situation, we are not inclined to intervene in extra ordinary jurisdiction. We make it clear that our observations are only for the purposes of refusing to entertain the grievance in extra ordinary jurisdiction and we

have not recorded any finding either way on contentions."

6 Mr Sushil Karanjkar, learned counsel for the appellant contends that in refusing to quash the FIR the High Court failed to distinguish between rape and consensual sex. It is submitted that the allegations on the face of the FIR indicate that the physical relationship between the appellant and the complainant existed for over a period of six years with her consent as evidenced by multiple periods of co-habitation, visits, and lack of resistance or complaint by the complainant. Against this, Mr Katneshwarkar, learned counsel appearing for the respondent-State as well as Mr Nilesh Tribhavan, learned counsel for the complainant relied upon certain decisions of this Court. In her counter affidavit, the complainant has submitted:

> "i. It is submitted that the Petitioner has resorted forming a relationship with me only in order to fulfil his lust.
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> ii. It is submitted that the Petitioner promised to marry me and then manipulated me emotionally and mentally to have physical relations with him, even when he was well aware that such actions of his have caused me immense physical and mental suffrage.
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> iii. It is submitted that the Petitioner promised me matrimony only so that he could maintain a physical relation and would not have to face the hassle of having to find multiple women and establish physical relations with each one of them as his job was of a transferable nature and meeting multiple women to fulfil his luscious behaviour was not possible.
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> iv. It is submitted that the Petitioner from the start had ill and misconstrued notions about people belonging from SC/ST caste which he pretended to be absent of throughout the relationship and lied about but was unable to hold back when he was pressurized and put in a corner." Learned counsel referred to the submissions which have been set out in the counter affidavit, during the course of the hearing.

7 Section 482 is an overriding section which saves the inherent powers of the court to advance the cause of justice. Under Section 482 the inherent jurisdiction of the court can be exercised (i) to give effect to an order under the CrPC; (ii) to prevent the abuse of the process of the court; and (iii) to otherwise secure the ends of justice. The powers of the court under Section 482 are wide and the court is vested with a significant amount of discretion to decide whether or not to exercise them. The court should be guarded in the use of its extraordinary jurisdiction to quash an FIR or criminal proceeding as it denies the prosecution the opportunity to establish its case through investigation and evidence. These principles have been consistently followed and re-iterated by this Court. In Inder Mohan Goswami v State of Uttaranchal5, this Court observed.

"23. This Court in a number of cases has laid down the scope and ambit of courts' powers under Section 482 CrPC. Every High Court has inherent powers to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under Section 482 CrPC can be exercised:

(i) to give effect to an order under the Code;
(ii) to prevent abuse of the process of the court, and
(iii) to otherwise secure the ends of justice.

24. Inherent powers under Section 482 CrPC though wide have to be exercised sparingly, carefully and with great caution and only when exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the statute." 8 Given the varied nature of cases that come before the High Courts, any strict test as to when the court's extraordinary powers can be exercised is likely to tie the court's hands in the face of future injustices. This Court in State of Haryana v Bhajan Lal6 conducted a detailed study of the situations where the court may exercise its extraordinary jurisdiction and laid down a list of illustrative examples of where quashing may be appropriate. It is not necessary to discuss all the examples, but a few bear relevance to the present case. The court in Bhajan Lal noted that quashing may be appropriate where, (2007) 12 SCC 1 1992 Supp (1) SCC 335 "102. (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2). ... (7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge." In deciding whether to exercise its jurisdiction under Section 482, the Court does not adjudicate upon the veracity of the facts alleged or enter into an appreciation of competing evidence presented. The limited question is whether on the face of the FIR, the allegations constitute a cognizable offence. As this Court noted in Dhruvaram Murlidhar Sonar v State of Maharashtra,7 ("Dhruvaram Sonar") :

> "13. It is clear that for quashing proceedings, meticulous analysis of factum of taking cognizance of an offence by the Magistrate is not called for. Appreciation of evidence is also not permissible in exercise of inherent powers. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken, it is open to the High Court to quash the same in exercise of its inherent powers."

9 The present proceedings concern an FIR registered against the appellant under Sections 376, 417, 504, and 506(2) of the IPC and Sections 3(1) (u), (w) and 3(2) (vii) of SC/ST Act. Section 376 of the IPC prescribes the punishment for the 2018 SCC OnLine SC 3100 offence of rape which is set out in Section 375. Section 375 prescribes seven descriptions of how the offence of rape may be committed. For the present purposes only the second such description, along with Section 90 of the IPC is relevant and is set out below.

"375. Rape – A man is said to commit "rape" if he – ... under the circumstances falling under any of the following seven descriptions-

Firstly ... Secondly. – Without her consent.

... Explanation 2. – Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

> Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity."
> "90. Consent known to be given under fear or misconception - A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or..."

10 Where a woman does not "consent" to the sexual acts described in the main body of Section 375, the offence of rape has occurred. While Section 90 does not define the term "consent", a "consent" based on a "misconception of fact" is not consent in the eyes of the law.

11 The primary contention advanced by the complainant is that the appellant engaged in sexual relations with her on the false promise of marrying her, and therefore her "consent", being premised on a "misconception of fact" (the promise to marry), stands vitiated.

12 This Court has repeatedly held that consent with respect to Section 375 of the IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action. In Dhruvaram Sonar which was a case involving the invoking of the jurisdiction under Section 482, this Court observed:

> "15. ... An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in mind of a person to permit the doing of the act complained of." This understanding was also emphasised in the decision of this Court in Kaini Rajan v State of Kerala8:
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> "12. ... "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance of the moral quality of the act but after having fully exercised the choice between resistance and asset. Whether there was (2013) 9 SCC 113 consent or not, is to be ascertained only on a careful study of all relevant circumstances."

13 This understanding of consent has also been set out in Explanation 2 of Section 375 (reproduced above). Section 3(1) (w) of the SC/ST Act also incorporates this concept of consent:

> "3(1) (w) -
>
> (i) intentionally touches a woman belonging to a Scheduled Caste or a Scheduled Tribe, knowing that she belongs to a Scheduled Caste or a Scheduled Tribe, when such act of touching is of a sexual nature and is without the recipient's consent;

... Explanation.––For the purposes of sub-clause (i), the expression "consent" means an unequivocal voluntary agreement when the person by words, gestures, or any form of non-verbal communication, communicates willingness to participate in the specific act:

> Provided that a woman belonging to a Scheduled Caste or a Scheduled Tribe who does not offer physical resistance to any act of a sexual nature is not by reason only of that fact, is to be regarded as consenting to the sexual activity:
>
> Provided further that a woman's sexual history, including with the offender shall not imply consent or mitigate the offence;"

14 In the present case, the "misconception of fact" alleged by the complainant is the appellant's promise to marry her. Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled. In Anurag Soni v State of Chhattisgarh9, this Court held:

> "37. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 of the IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Sections 375 of the IPC and can be convicted for the offence under Section 376 of the IPC." Similar observations were made by this Court in Deepak Gulati v State of Haryana10 ("Deepak Gulati"):
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> "21. ... There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused..."

15 In Yedla Srinivasa Rao v State of Andhra Pradesh11 the accused forcibly established sexual relations with the complainant. When she asked the accused why he had spoiled her life, he promised to marry her. On this premise, the accused repeatedly had sexual intercourse with the

complainant. When the complainant became pregnant, the accused refused to marry her. When the matter was brought to the panchayat, the accused admitted to having had sexual intercourse with the complainant but subsequently absconded. Given this factual background, the court observed:

> (2019) SCC OnLine SC 509 (2013) 7 SCC 675 (2006) 11 SCC 615 "10. It appears that the intention of the accused as per the testimony of PW 1 was, right from the beginning, not honest and he kept on promising that he will marry her, till she became pregnant. This kind of consent obtained by the accused cannot be said to be any consent because she was under a misconception of fact that the accused intends to marry her, therefore, she had submitted to sexual intercourse with him. This fact is also admitted by the accused that he had committed sexual intercourse which is apparent from the testimony of PWs 1, 2 and 3 and before the panchayat of elders of the village. It is more than clear that the accused made a false promise that he would marry her. Therefore, the intention of the accused right from the beginning was not bona fide and the poor girl submitted to the lust of the accused, completely being misled by the accused who held out the promise for marriage. This kind of consent taken by the accused with clear intention not to fulfil the promise and persuading the girl to believe that he is going to marry her and obtained her consent for the sexual intercourse under total misconception, cannot be treated to be a consent...."

16 Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates the woman's "consent". On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The "consent" of a woman under Section 375 is vitiated on the ground of a "misconception of fact" where such misconception was the basis for her choosing to engage in the said act. In Deepak Gulati this Court observed:

> "21. ... There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently.
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> ...
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> 24. Hence, it is evident that there must be adequate evidence to show that at the relevant time i.e. at the initial stage itself, the accused had no intention whatsoever,

> of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The "failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term "misconception of fact", the fact must have an immediate relevance". Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her." (Emphasis supplied)

17 In Uday v State of Karnataka12 the complainant was a college going student when the accused promised to marry her. In the complainant's statement, she admitted that she was aware that there would be significant opposition from both the complainant's and accused's families to the proposed marriage. She engaged in sexual intercourse with the accused but nonetheless kept the relationship secret from her family. The court observed that in these circumstances the accused's promise to marry the complainant was not of immediate relevance to the complainant's decision to engage in sexual intercourse with the accused, which was motivated by other factors:

> (2003) 4 SCC 46 "25. There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary, the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, are permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 o'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married..." (Emphasis supplied)

18 To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act.

19 The allegations in the FIR indicate that in November 2009 the complainant initially refused to engage in sexual relations with the accused, but on the promise of marriage, he established sexual relations. However, the FIR includes a reference to several other allegations that are relevant for the present purpose. They are as follows:

> (i) The complainant and the appellant knew each other since 1998 and were intimate since 2004;
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> (ii) The complainant and the appellant met regularly, travelled great distances to meet each other, resided in each other's houses on multiple occasions, engaged in sexual intercourse regularly over a course of five years and on multiple occasions visited the hospital jointly to check whether the complainant was pregnant; and
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> (iii) The appellant expressed his reservations about marrying the complainant on 31 January 2014. This led to arguments between them. Despite this, the appellant and the complainant continued to engage in sexual intercourse until March 2015.

The appellant is a Deputy Commandant in the CRPF while the complainant is an Assistant Commissioner of Sales Tax.

20 The allegations in the FIR do not on their face indicate that the promise by the appellant was false, or that the complainant engaged in sexual relations on the basis of this promise. There is no allegation in the FIR that when the appellant promised to marry the complainant, it was done in bad faith or with the intention to deceive her. The appellant's failure in 2016 to fulfil his promise made in 2008 cannot be construed to mean the promise itself was false. The allegations in the FIR indicate that the complainant was aware that there existed obstacles to marrying the appellant since 2008, and that she and the appellant continued to engage in sexual relations long after their getting married had become a disputed matter. Even thereafter, the complainant travelled to visit and reside with the appellant at his postings and allowed him to spend his weekends at her residence. The allegations in the FIR belie the case that she was deceived by the appellant's promise of marriage. Therefore, even if the facts set out in the complainant's statements are accepted in totality, no offence under Section 375 of the IPC has occurred.

21 With respect to the offences under the SC/ST Act, the WhatsApp messages were alleged to have been sent by the appellant to the complainant on 27 and 28 August 2015 and 22 October 2015. At this time, Sections 3(1) (u), (w) and 3(2) (vii) of the SC/ST Act as it stands today had not been

enacted into the statute. These provisions were inserted by the (Prevention of Atrocities) Amendment Act 201513 which came into force on 26 January 2016. Prior to the Amending Act, the relevant provisions of the statute (as it stood then) were as follows:

> "3. (1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe. – "Amending Act" ...
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> (x) intentionally insults or intimidates with intent to humiliate a member of a Schedule Caste or a Scheduled Tribe in any place within public view;
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> (xi) assaults or uses force to any woman belonging to a Schedule Caste or a Scheduled Tribe with intent to dishonour or outrage her modesty;
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> (xii) being in a position to dominate the will of a woman belonging to a Scheduled Caste or a Scheduled Tribe and uses that position to exploit her sexually to which she would not have otherwise agreed; ..." 22 Without entering into a detailed analysis of the content of the WhatsApp messages sent by the appellant and the words alleged to have been spoken, it is apparent that none of the offences set out above are made out. The messages were not in public view, no assault occurred, nor was the appellant in such a position so as to dominate the will of the complainant. Therefore, even if the allegations set out by the complainant with respect to the WhatsApp messages and words uttered are accepted on their face, no offence is made out under SC/ST Act (as it then stood). The allegations on the face of the FIR do not hence establish the commission of the offences alleged.
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> 23 For the above reasons, we allow the appeal and set aside the impugned judgement and order of the High Court dated 7 February 2019. The FIR dated 17 May 2016 is quashed.

... ... J . [D r D h a n a n j a y a Y C h a n d r a c h u d]
.....J. [Indira Banerjee] New Delhi;

August 21, 2019.