

STATE OF RAJASTHAN

v.

HEMRAJ & ANR.

(Criminal Appeal No. 847 OF 2009)

APRIL 27, 2009

**[DR. ARIJIT PASAYAT AND ASOK KUMAR
GANGULY, JJ.]**

Penal Code, 1860 – ss.376(2)(g) Explanation 375 and 34 – Female, whether liable to be convicted for rape – Held: In view of definition of rape, holding a woman guilty of committing rape is conceptually inconceivable -- Common intention as occurring in Explanation to s. 376(2) is not applicable to a woman.

The questions for consideration in the present appeal was whether a female was liable to be convicted u/s 376(2)(g) IPC.

Dismissing the appeal, the Court

HELD :1.1. A bare reading of Section 375 IPC makes the position clear that rape can be committed only by a man. The Section itself provides as to when a man can be said to have committed rape. Section 376(2) IPC makes certain categories of serious cases of rape as enumerated therein attract more severe punishment. One of them relates to “gang rape”. The language of sub-section (2)(g) provides that “whoever commits ‘gang rape’ shall be punished etc. The Explanation only clarified that when a woman is raped by one or more in a group of persons acting in furtherance of their common intention each, such person shall be deemed to have

A committed gang rape within sub-section (2). That cannot make a woman guilty of committing rape. This is conceptually inconceivable. [Para 7] [1128-B-D]

B 1.2. By operation of the deeming provision, a person who has not actually committed rape is deemed to have committed rape even if only one of the group in furtherance of the common intention has committed rape. "Common intention" is dealt with in Section 34 IPC and provides that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it was done by him alone. "Common intention" denotes action in concert and necessarily postulates a pre-arranged plan, a prior meeting of minds and an element of participation in action. The acts may be different and vary in character, but must be actuated by the same common intention, which is different from same intention or similar intention. The sine qua non for bringing in application of Section 34 IPC is that the act must be done in furtherance of the common intention to do a criminal act. The expression "in furtherance of their common intention" as appearing in the Explanation to Section 376(2) relates to intention to commit rape. A woman cannot be said to have an intention to commit rape. [Para 7] [1128-E-H; 1129-A]

F CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 8472 of 2009

G From the Judgment & Order dated 9.1.2007 of the High Court of Rajasthan in S.B. Criminal Leave to Appeal No. 99 of 2006.

V. Madhukar, Jayaendra Savada and Milind Kumar for the Appellant.

H Imtiaz Ahmed, Naghma Imtiaz and Equity Lex Associates

for the Respondent.

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The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Leave granted.

2. Challenge in this appeal is to the order passed by a learned Single Judge of the Rajasthan High Court, Jaipur Bench dismissing the application for grant of leave to question correctness of the judgment of learned Additional District Sessions Judge (Fast track), No.2 Alwar.

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3. Background facts in a nutshell are as follows:

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Respondents were facing the trial for alleged commission of offence punishable under Section 342 and 376(2) of the Indian Penal Code, 1860 (in short the 'IPC'). PW1 was the victim. The trial court noticed that it was the accused Chandan who committed rape on her. There was no allegation of rape against the other accused persons namely Hemraj and Smt. Kamla. The accused Chandan was facing trial under the provisions of Juvenile Justice Act, 2000 (in short the 'Juvenile Act').

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The trial court as noted above held the accused Hemraj guilty of offence punishable under Section 342 IPC and held that the Accused Kamla cannot be convicted in terms of Section 376 (2) IPC. The State filed an appeal questioning acquittal of the respondent from the accusations relatable to Section 376(2) IPC. The High Court held that so far as the accused Hemraj is concerned his presence at the spot was doubtful. In any event both the respondents cannot be held guilty of offence punishable under Section 376(2) IPC.

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4. Learned counsel for the appellant-State submitted that scope and ambit of Section 376(2)(g) and the explanation appended thereto have been lost sight of by the High Court.

5. Learned counsel for the respondent on the other hand

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A submitted that the High Court rightly noted that the presence of accused Hemraj at the alleged time of rape has not been established. Additionally, a lady i.e. respondent No.2 cannot be held guilty even in terms of the Explanation to Section 376 (2)(g) of the IPC.

B 6. In order to appreciate rival submissions Sections 375 and 376 need to be noted. They so far as relevant read as follows:-

C "375. *Rape*

A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:--

D First.—Against her will.

Secondly.—Without her consent.

E Thirdly.--With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

F Fourthly.--With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

G Fifthly.--With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

H Sixthly.--With or without her consent, when she is under sixteen years of age.

Explanation.--Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. A

Exception.--Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.]

376. *Punishment for rape* B

(1) Whoever, except in the cases provided for by sub-section (1), 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 cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: C D

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. E

(2) Whoever,--

xx xx xx xx xx

(g) commits gang rape, F

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years, G

A *Explanation 1*.--Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

B x xx xx xx xx"

C 7. A bare reading of Section 375 makes the position clear that rape can be committed only by a man. The section itself provides as to when a man can be said to have committed rape. Section 376(2) makes certain categories of serious cases of rape as enumerated therein attract more severe punishment. One of them relates to "gang rape". The language of sub-section(2)(g) provides that "whoever commits 'gang rape' shall be punished etc. The Explanation only clarifies that

D when a woman is raped by one or more in a group of persons acting in furtherance of their common intention each such person shall be deemed to have committed gang rape within this sub-section (2). That cannot make a woman guilty of committing rape. This is conceptually inconceivable. The

E Explanation only indicates that when one or more persons act in furtherance of their common intention to rape a woman, each person of the group shall be deemed to have committed gang rape. By operation of the deeming provision, a person who has

F not actually committed rape is deemed to have committed rape even if only one of the group in furtherance of the common intention has committed rape. "Common intention" is dealt with in Section 34 IPC and provides that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it was done by him alone. "Common intention"

G denotes action in concert and necessarily postulates a pre-arranged plan, a prior meeting of minds and an element of participation in action. The acts may be different and vary in character, but must be actuated by the same common intention, which is different from same intention or similar intention. The

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sine qua non for bringing in application of Section 34 IPC that the act must be done in furtherance of the common intention to do a criminal act. The expression "in furtherance of their common intention" as appearing in the Explanation to Section 376(2) relates to intention to commit rape. A woman cannot be said to have an intention to commit rape. Therefore, the counsel for the appellant is right in her submission that the appellant cannot be prosecuted for alleged commission of the offence punishable under Section 376(2)(g).

8. The appeal is without merit, deserves dismissal, which we direct.

K.K.T.

Appeal dismissed.