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PARDEEP KUMAR

v.

UNION ADMINISTRATION, CHANDIGARH

AUGUST 18, 2006

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[B.N. AGRAWAL AND P.P. NAOLEKAR, JJ.]

*Penal Code, 1860; Ss. 109, 366, 368 and 376:*

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*Rape—Trial Court found all the five accused persons guilty under Section 376 and sentenced them to undergo rigorous imprisonment for 10 years—Upholding conviction of accused-appellant and another, High Court acquitted one of the accused, remaining two accused died during the pendency of the appeal—Filing of appeal by one of the convicts—Held: Direct proof of common intention/act done in furtherance of the common intention is seldom available, it could be inferred from the proved facts and circumstances—Prosecutrix supports the case of the prosecution in the beginning but at subsequent stages she differs with it—Prosecutrix categorically stated that the accused-appellant had not defiled her and also did not mention anything about his conduct to show that he shared common intention with other accused, on the other hand, the prosecution could not prove its case—Prosecutrix had kept on changing her version—Her statement does not inspire confidence to reach the conclusion that the accused in question was present at the place of incident right from the beginning to infer any pre-concert with other accused persons to commit rape—Under the circumstances, the accused is entitled to benefit of doubt.*

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**According to the prosecution, on the fateful day, Accused-(L) on the pretext of marriage took the prosecutrix to the residence of his cousin to settle the marriage. On the way, another person also accompanied them. When the prosecutrix, along with these two persons entered the house, yet another person joined them. These three persons then consumed liquor. When the advances made by them were resisted by the prosecutrix, one of them threatened her with dire consequences. Three persons then committed rape on her. Thereafter, two other persons arrived there and they also committed rape on her. After committing the crime, when the accused persons were taking liquor in another room, the prosecutrix escaped from the house. On**

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the way, she met police personnel, to whom she narrated the whole incident. An FIR was lodged in the Police Station. The police came to the place of incident and apprehended three accused persons from there, but two other accused managed to escape. The victim was sent for medical examination. On examination, the Medical Officer found no evidence of external injury on the body of the victim and opined that she was habitual to sexual intercourse. Trial Court found all the accused guilty under Section 376 IPC and sentenced them to undergo rigorous imprisonment for 10 years and to pay fine. Appeals were filed by the accused persons before the High Court. Two accused persons died during pendency of the appeal. The High Court upheld the conviction of the accused-appellant and another for committing the offence under Section 376 IPC and acquitted another. The present appeal is filed by one of the convicts.

It was contended for the appellant that the High Court committed an error in convicting him under Section 376 IPC since the prosecutrix herself had deposed before the Court that only two of the accused persons, other than the appellant, defiled her against her wish and consent.

Respondent-State submitted that though the accused-appellant had not actually committed rape on the prosecutrix, but he was rightly convicted under Section 376 IPC, as it was proved by the prosecution that he was a member of the group which acted in concert to commit rape on the prosecutrix and in furtherance of the common intention rape was committed and by virtue of Explanation 1 to Section 376(2)(g) IPC, all members of such a group would be liable for the acts committed by other members of that group when the act/rape is committed in furtherance of their common intention.

Allowing the appeal, the Court

HELD: 1.1. It is settled law that the common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. [601-E-F]

1.2. If the case of the prosecution that the accused-appellant was present at the spot right from the very beginning along with other accused persons is believed, Explanation 1 to Section 376(2) would be attracted as it can be safely inferred that all the accused persons acted in concert with a common intention

**A** to commit rape even if all the accused person have not actually committed rape. But if statement of the prosecutrix is considered as a whole with the FIR, it appears that the accused-appellant entered the house after the rape had been committed on the prosecutrix by the other two accused persons, then his mere presence would not be sufficient to find him guilty taking aid of Explanation 1 to Section 376(2) IPC. Although there has been some probability of the accused-appellant's presence at the place of the commission of offence as he was apprehended from a place nearby the spot of occurrence of the crime with the other accused persons, but mere presence at such place is insufficient to show that there was a prior concert or meeting of mind or plan formed suddenly at the time of commission of offence by the accused-appellant with the other accused persons for the commission of rape on the prosecutrix.

[602-B-C-D-E]

**B** 1.3. The prosecutrix in her statement before the court had categorically stated that the accused-appellant had not defiled her and nothing specific was mentioned about his conduct or role to show that he shared the common intention to commit rape. The prosecution did not produce any medical evidence to show that the accused-appellant had consumed liquor though he was available for such test as he was alleged to have been arrested immediately after the incident at the place of occurrence. Besides, the prosecutrix had changed her version from time to time. She began with alleging commission of the offence of rape by all the accused who faced trial, whereas in her deposition before the court she stated that only two out of five accused had committed rape on her. The statement of the prosecutrix does not inspire confidence to reach to the conclusion that the accused-appellant was present at the place of incident right from the very beginning to infer any pre-concert of the appellant with other accused persons to commit rape. In these circumstances, the accused-appellant is entitled to the benefit of doubt.

[602-F-G-H; 603-A]

*Kumar v. State of Haryana*, [2003] 2 SCC 143; *Bhupinder Sharma v. State of Himachal Pradesh*, [2003] 8 SCC 551; *Pramod Mahto and Ors. v. State of Bihar*, [1989] Supp. 2 SCC 672 and *Priya Patel v. State of M.P. and Anr.*, JT [2006] 6 SC 303, relied on.

**G** CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 434 of 2005.

From the Judgment and Order dated 13.8.2004 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 457-SB of 1989.

**H** K.T.S. Tulsi and Jagjit Singh Chhabra for the Appellant.

Kamini Jaiswal, Shomila Bakshi and Rani Mishra for the Respondent. A

The Judgment of the Court was delivered by

**P.P. NAOLEKAR, J.** Accused Lalit Gupta, Ashok Kumar alias Babbu, Pardeep Kumar and Karam Chand were tried under Sections 366, 376, whereas accused-Inderjit Singh was tried under Section 376 read with Section 109 and Section 368 of the Indian Penal Code, 1860 (for short "IPC"). All the five accused were held guilty under Section 376, IPC by the Additional Sessions Judge, Chandigarh and sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs.500/- each and in default of payment of fine to undergo further rigorous imprisonment of two months. The accused preferred appeals before the High Court of Punjab & Haryana at Chandigarh. Ashok Kumar and Karam Chand died during pendency of proceedings; Inderjit Singh was acquitted of the charge under Section 376, IPC, while the conviction of Lalit Gupta and Pardeep Kumar under Section 376, IPC was upheld by the High Court. Against the impugned judgment, accused-Pardeep Kumar has preferred this appeal by special leave. B C D

The prosecution case as set out in the First Information Report (FIR) is that the prosecutrix was living in House No. 3359, Sector 19D, Chandigarh with her brother and mother. Accused-Lalit Gupta was after her and also promised to marry her. On 2nd February, 1987 at about 6.30 p.m., the prosecutrix had gone to the market of Sector 19. Accused- Lalit Gupta met her in the market and invited her to the house of his cousin so that the proposal regarding marriage could be discussed with his relations. On this, the prosecutrix agreed to accompany him to Sector 38, Chandigarh. Lalit Gupta hired a three-wheeler scooter (auto-rickshaw) and they proceeded towards Sector 38. In the midway, the auto-rickshaw was got stopped by Lalit Gupta and accused-Ashok Kumar alias Babbu also boarded the auto-rickshaw. When the prosecutrix, Lalit Gupta and Ashok Kumar entered the house, another accused-Inderjit Singh, who was acquitted by the High Court, met them there. The three accused then consumed liquor in the house. When the advances made by the accused were resisted, accused-Inderjit Singh threatened her with dire consequences of death and thereafter she yielded to the wishes of the accused persons. Thereafter, Lalit Gupta committed rape on the prosecutrix against her wish and without her consent which was followed by Ashok Kumar who also defiled her. Thereafter, Karam Chand and Pardeep Kumar arrived there and they also committed rape. All of them started taking liquor in another room, taking advantage, the prosecutrix escaped from the house. E F G H

A On the way, she met police personnel to whom she narrated the whole incident. The police came to the house and apprehended Pardeep Kumar, Karam Chand and Lalit Gupta, but two other accused Ashok Kumar and Inderjit Singh managed to escape. The FIR was lodged on the intervening night of 2nd & 3rd February, 1987 with Sub-Inspector Moti Ram at about 2.20 a.m. The prosecutrix was unmarried at the time of incident, and she was sent  
B for medical examination. Dr. G.K. Dhillon examined her on 3rd February, 1987 at 1.30 p.m. and found no evidence of any external injury. The doctor also opined that she was habitual to sexual intercourse.

C The High Court, *inter alia*, has upheld the conviction of the accused-appellant Pardeep Kumar for the offence under Section 376, IPC relying on the version of the prosecutrix supported by the testimony of Constable Raghbir Singh to whom she had narrated the entire incident soon after her escape from the place of occurrence. The High Court has observed that the presence of the accused-appellant on the spot where the rape was committed by other accused persons, was further corroborated by the fact that he was  
D apprehended from that house itself by CRPF jawans.

E It was submitted before us by Mr. K.T.S. Tulsi, learned senior counsel for the appellant that the High Court committed an error in convicting the accused-appellant under Section 376, IPC when the statement of the prosecutrix before the court completely exonerated him from the commission of offence of rape by deposing that only two accused persons, namely, Karam Chand and Ashok Kumar, defiled her against her wish and consent; and that she had further stated that the other accused could not have sexual intercourse with her because getting a chance she opened the bolt of the room and ran away from the house. It was submitted that on the face of the above statements  
F of the prosecutrix, the accused-appellant Pardeep Kumar could not have been convicted.

G On the other hand, Ms. Kamini Jaiswal, learned counsel for the State submitted that the accused-appellant, although had not actually committed rape on the prosecutrix, was rightly convicted under Section 376, IPC, as it was amply proved by the prosecution that the appellant was a member of the group which acted in concert to commit rape on the prosecutrix and in furtherance of the common intention, rape was committed. Thus, the submission of the learned counsel for the State is that by virtue of Explanation 1 to Section 376(2)(g), IPC, all members of a group would be liable for the acts committed by other members of that group when the act is committed in  
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furtherance of their common intention, namely, intention to commit rape. A

In order to appreciate the arguments advanced by the learned counsel appearing on both sides, it would be appropriate for us to extract the relevant provisions of Section 376, IPC, as under:

“376. *Punishment for rape.*- B

xxx xxx xxx

(2) Whoever, -

xx xx xx

(g) commits gang rape, C

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..... D

*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.” E

In *Ashok Kumar v. State of Haryana*, [2003] 2 SCC 143, this Court observed :

“8.....In order to establish an offence under Section 376(2)(g) IPC, read with Explanation I thereto, the prosecution must adduce evidence to indicate that more than one accused had acted in concert and in such an event, if rape had been committed by even one, all the accused will be guilty irrespective of the fact that she had been raped by one or more of them and it is not necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused. In other words, this provision embodies a principle of joint liability and the essence of that liability is the existence of common intention; that common intention presupposes prior concert which may be determined from the conduct of offenders revealed during the course of action and it could arise and be formed suddenly, but, there must be meeting of minds. It is not enough to have the same intention independently of each of the offenders. In such cases, there must be H

A criminal sharing marking out a certain measure of jointness in the commission of offence.”

In *Bhupinder Sharma v. State of Himachal Pradesh*, [2003] 8 SCC 551, the observations made by an earlier Bench in *Pramod Mahto and Ors. v. State of Bihar*, [1989] Supp. 2 SCC 672, were reiterated by this Court as follows:

B “14. In cases of gang rape the proof of completed act of rape by each  
C accused on the victim is not required. The statutory intention in  
introducing Explanation I in relation to Section 376(2)(g) appears to  
have been done with a view to effectively deal with the growing  
menace of gang rape. In such circumstances, it is not necessary that  
the prosecution should adduce clinching proof of a completed act of  
rape by each one of the accused on the victim or on each one of the  
victims where there are more than one in order to find the accused  
guilty of gang rape and convict them under Section 376 IPC.”

D In a recent decision in *Priya Patel v. State of M.P. and Anr.*, JT (2006)  
6 SC 303, this Court has observed as follows:

E “8. ....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 that the act must  
be done in furtherance of the common intention to do a criminal act.  
F The expression ‘in furtherance of their common intention’ as appearing  
G in the Explanation to Section 376(2) relates to intention to commit  
rape....”

To bring the offence of rape within the purview of Section 376(2)(g), IPC, read  
with Explanation I to this Section, it is necessary for the prosecution to  
H prove:-

- (i) that more than one person had acted in concert with the common intention to commit rape on the victim ; A
- (ii) that more than one accused had acted in concert in commission of crime of rape with pre-arranged plan, prior meeting of mind and with element of participation in action. Common intention would be action in consort in pre-arranged plan or a plan formed suddenly at the time of commission of offence which is reflected by element of participation in action or by the proof of the fact of inaction when the action would be necessary. The prosecution would be required to prove pre-meeting of mind of accused persons prior to commission of offence of rape by substantial evidence or by circumstantial evidence; and B C
- (iii) that in furtherance of such common intention one or more persons of the group actually committed offence of rape on victim or victims. Prosecution is not required to prove actual commission of rape by each and every accused forming group. D

On proof of common intention of the group of persons which would be of more than one, to commit the offence of rape, actual act of rape by even one individual forming group, would fasten the guilt on other members of the group, although he or they have not committed rape on the victim or victims.

It is settled law that the common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. E F

In the light of the principles enumerated in the above-mentioned cases, we have to analyse the factual matrix of the present case with regard to the accused-appellant's conduct and role played by him in the commission of offence. The prosecutrix while lodging the FIR had stated that the accused-appellant reached the spot after the rape had been committed by Lalit Gupta and Ashok Kumar, but in her statement before the court she deposed that on reaching House No. 2451, Sector 38C, Chandigarh, when she did not find parents of accused-Lalit Gupta present in the house, she told accused-Lalit Gupta that she would return to her home. She also told him that he had G H

A defrauded her. On this, accused-Ashok dragged her inside the house and at the instance of Inderjit Singh, Pardeep Kumar and Karam Chand came to the house. Accused had also brought one person by name Bitu. Accused-Karam Chand caught hold of her and raped her and, thereafter Ashok caught hold of her and committed rape against her wish. She stated that Pardeep, Lalit and one other person Bitu were taking liquor in the kitchen. If we believe the case of the prosecution that the accused-appellant (Pardeep Kumar) was present at the spot right from the very beginning along with other accused persons, Explanation 1 to Section 376(2) would be attracted as it can be safely inferred that all the accused persons acted in concert with a common intention to commit rape even if all the accused person have not actually committed rape.

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C But if statement of the prosecutrix is considered as a whole with the FIR, it appears that the accused-appellant entered the house after the rape had been committed on the prosecutrix and thereafter he was consuming liquor with Lalit Gupta and one Bitu, then his mere presence would not be sufficient to find him guilty taking aid of Explanation 1. Although there has been some probability of the accused-appellant's presence at the place of the commission of offence as he was apprehended from a place nearby the spot of occurrence with the other accused persons, namely, Lalit Gupta and Karam Chand, but mere presence at such place is insufficient to show that there was a prior concert or meeting of mind or plan formed suddenly at the time of commission of offence by the accused-appellant with the other accused persons for the commission of rape on the prosecutrix. The prosecutrix in her earlier version had mentioned that the accused-appellant arrived late at the place of incident and thereafter he was consuming liquor with the other accused persons in a room. Moreover, where specific acts had been attributed to the other accused persons to show their connivance and pre-concert to facilitate the offence in pre-planned manner, no such act or conduct has been attributed to portray the accused-appellant's role in furtherance of the common intention to commit rape. The prosecutrix in her statement before the court had categorically stated that the accused-appellant had not defiled her and nothing specific was mentioned about his conduct or role to show that he shared the common intention to commit rape. The prosecution did not produce any medical evidence to show that he consumed liquor when accused-appellant was available for such test as he was alleged to have been arrested immediately after the incident at the place of occurrence. The prosecutrix had changed her version from time to time. She began with alleging commission of the offence of rape by all the accused who faced trial, whereas in her deposition before the court she stated that only Karam Chand and Ashok Kumar had committed rape on her. The statement of the prosecutrix does not inspire confidence to

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reach to the conclusion that the accused-appellant was present at the place of incident right from the very beginning to infer any pre-concert of the appellant with other accused persons to commit rape. In these circumstances, we feel that the accused-appellant is entitled to the benefit of doubt. A

Hence, in the light of above discussion, we set aside the order of the Session Court as also that of the High Court convicting the accused-appellant under Section 376, IPC. The appeal is, accordingly, allowed. The accused-appellant shall be set at liberty forthwith if not required in any other case. B

S.K.S.

Appeal allowed.

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