

ARJUN SINGH
v.
STATE OF H. P.
(Criminal Appeal No. 224 of 2009)

FEBRUARY 06, 2009

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

Penal Code, 1860:

ss.376, 511, 365, 366, 109 – Conviction under, by trial Court – Affirmed by High Court – On appeal, Held: Commission of rape was not established, however attempt to rape was clearly established – Hence, conviction under s.376 is not proper – However, conviction under s.511 is made out – Regarding offence under ss.365 and 366, courts below analysed the evidence in detail – There was no infirmity in its conclusion to warrant interference – In the background of facts, s.109 is also not applicable.

s.109 – Applicability of.

s.109 and s.120A – Distinction between.

Words and Phrases: ‘abetment’ and ‘rape’ – Meaning of.

Prosecution case was the appellant committed forcible sexual intercourse with the prosecutrix against her will and without her consent. He was charged for offences under ss. 376, 511, 365, 366 and 109 IPC. The trial Court held that the age of victim was less than 16 years by placing reliance on the documents produced and held the appellant guilty. The High Court affirmed the same. Hence the present appeal.

Partly allowing the appeal, the Court

HELD:1. The offence of rape in its simplest term is

A 'the ravishment of a woman, without her consent, by force, fear or fraud', or as 'the carnal knowledge of a woman by force against her will'. 'Rape' or 'Raptus' is when a man hath carnal knowledge of a woman by force and against her will; or as expressed more fully, 'rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will'. In the crime of rape, 'carnal knowledge' means the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation [Para 9] [989-C-F]

Vishnu v. State of Maharashtra (2006) 1 SCC 283 and *State of Chhattisgarh v. Lekhram* (2006) 5 SCC 736, relied on.

D 2. In the instant case, though the rape does not appear to have been committed but the attempt to commit the rape is clearly established. That being so the conviction for offence punishable under Section 376 IPC is not made out but the offence punishable under Section E 511 IPC is clearly made out. So far as the offence under Sections 365 and 366 IPC are concerned the Trial Court and the High Court had analysed the evidence in great detail. There is no infirmity in the conclusion to warrant interference. [Para 10] [989-H; 990-A-B]

F 3.1. Under Section 109 IPC the abettor is liable to the same punishment which may be inflicted on the principal offender, if the act of the latter is committed in consequence of the abetment and no express provision is made in the IPC for punishment for such an abetment. G Law does not require instigation to be in a particular form or that it should only be in words. The instigation may be by conduct. Whether there was instigation or not is a question to be decided on the facts of each case. It is not H necessary in law for the prosecution to prove that the

actual operative cause in the mind of the person abetting was instigation and nothing else, so long as there was instigation and the offence has been committed or the offence would have been committed if the person committing the act had the same knowledge and intention as the abettor. The instigation must be with reference to the thing that was done and not to the thing that was likely to have been done by the person who is instigated. It is only if this condition is fulfilled that a person can be guilty of abetment by instigation. Further the act abetted should be committed in consequence of the abetment or in pursuance of the conspiracy as provided in the Explanation to Section 109. Under the Explanation an act or offence is said to be committed in pursuance of abetment if it is done in consequence of instigation, conspiracy or with the aid constituting abetment. Instigation may be in any form and the extent of the influence which the instigation produced in the mind of the accused would vary and depend upon facts of each case. [Para 11] [990-C-H; 991-A]

3.2. The offence of conspiracy created under Section 120A is bare agreement to commit an offence. It has been made punishable under Section 120B. The offence of abetment created under the second clause of Section 107 requires that there must be something more than mere conspiracy. There must be some act or illegal omission in pursuance of that conspiracy. The punishment for these two categories of crimes is also quite different. Section 109 IPC is concerned only with the punishment of abetment for which no express provision has been made in the IPC. An offence of criminal conspiracy is, on the other hand, an independent offence. It is made punishable under Section 120 B for which a charge under Section 109 is unnecessary and inappropriate. In the background of the facts, Section 109 IPC has no application. [Paras 11 and 12] [991-A-F]

A 4. The conviction of the appellant for the offences punishable under Sections 365, 366 and 511 IPC is upheld with the corresponding sentence as imposed by the trial court and sustained by the High Court. The convictions in terms of Sections 109 and 376 IPC are set
B aside. [Para 13] [981-F]

Kehar Singh and Ors. v. The State (Delhi Admn.) AIR (1988) SC 1883, relied on.

Case Law Reference:

C	(2006) 1 SCC 283	relied on	Para 6
	(2006) 5 SCC 736	relied on	Para 7
	AIR (1988) SC 1883	relied on	Para 11

D CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
E No. 224 of 2009.

From the final Judgment and Order dated 1.5.2008 of the High Court of Himachal Pradesh at Shimla in CrI. Appeal No. 112 of 2001.

Sanjay Jain for the Appellant.

Naresh K. Sharma for the Respondent.

F The Judgment of the Court was delivered by

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

G 2. Challenge in this appeal is to the judgment of a learned Single Judge of the Himachal Pradesh High Court upholding the conviction of the appellant for offences punishable under Sections 376, 511, 363 and 366 as well as Section 109 of the Indian Penal Code, 1860 (in short the 'IPC'). He was sentenced to undergo rigorous imprisonment for 7 years, 3 years, 4 years, 5 years and 7 years for the aforesaid offences alongwith fine
H with default stipulation.

3. Prosecution version as unfolded during trial is as follows: A

On 18.7.1999, the victim (PW10) boarded the bus to Shimla from Solan. When the bus bearing registration No. HP-12-4113 reached near petrol pump (HIMFED) situated near Nav Bahar towards Chotta Shimla, all the passengers got down, except the prosecutrix and accused-appellant Arjun Singh. Accused Arjun Singh committed forcible sexual intercourse with the prosecutrix against her will and without her consent. The victim was kidnapped by the accused who was minor at the time of kidnapping in bus No.HP-12-4113 from Solan. The accused had induced the prosecutrix that he would marry her after reaching Nalagarh. The FIR was registered. Thereafter the investigation was carried out and the challan was put in the Court. The appellant was charged for offences punishable under Sections 376, 511, 366 and 109 of the Indian Penal Code. The prosecution examined 15 witnesses to prove its case. The appellant had examined Shri Arvind Sharma (DW 1) as defence witness. The learned Additional Sessions Judge, Solan, convicted and sentenced the accused as stated above. The sentences were directed to run concurrently. It is to be noted that two persons faced trial for the aforesaid offences i.e. appellant who was the conductor of the vehicle, and one Daler Singh who was the driver of the vehicle. Since accused persons abjured guilt, trial was held. The trial court placed reliance on the evidence of the prosecutrix (PW1) and her mother (PW 3). As a plea relating to the age of the prosecutrix to show that she was a consenting party was taken, the person who had issued the date of birth certificate was examined as PW 4. According to the said certificate the date of birth was 19th October, 1984. She was admitted to the school on 1st April, 1997 and had left it on 24th October, 1998. The trial Court held that the age of the victim was less than 16 years and placed reliance on the documents produced. It was also submitted by the accused persons that no rape has been committed. This plea also was rejected by the trial court. B
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A Accordingly the trial court while holding the appellant guilty, acquitted co-accused. As noted above, appeal before the High Court was dismissed.

B 4. In support of the appeal the stand taken before the trial court and the High Court were reiterated.

5. Learned counsel for the respondent-State supported the judgment of the High Court.

C 6. So far as the age aspect is concerned in *Vishnu v. State of Maharashtra* [2006(1) SCC 283] it was inter alia held as follows:

D “20. It is urged before us by Mr Lalit that the determination of the age of the prosecutrix by conducting ossification test is scientifically proved and, therefore, the opinion of the doctor that the girl was of 18-19 years of age should be accepted. We are unable to accept this contention for the reasons that the expert medical evidence is not binding on the ocular evidence. The opinion of the Medical Officer is to assist the court as he is not a witness of fact and the evidence given by the Medical Officer is really of an advisory character and not binding on the witness of fact.”

E 7. In *State of Chhattisgarh v. Lekhram* [2006(5) SCC 736] it was held that the register maintained in a school is admissible evidence to prove the date of birth of the person concerned in terms of Section 35 of the Indian Evidence Act, 1872 (in short ‘Evidence Act’). It may be true that in the entry of the school register is not conclusive but it has evidentiary value.

F 8. Learned counsel for the appellant has submitted that the evidence of the Doctor clearly rules out the commission of rape. The Medical officer (PW 9) has stated that rape had not been committed and sexual intercourse had not taken place.

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9. The offence of rape occurs in Chapter XVI of IPC. It is an offence affecting the human body. In that Chapter, there is a separate heading for 'Sexual offence', which encompasses Sections 375, 376, 376-A, 376-B, 376-C, and 376-D. 'Rape' is defined in Section 375. Sections 375 and 376 have been substantially changed by Criminal Law (Amendment) Act, 1983, and several new sections were introduced by the new Act, i.e. 376-A, 376-B, 376-C and 376-D. The fact that sweeping changes were introduced reflects the legislative intent to curb with iron hand, the offence of rape which affects the dignity of a woman. The offence of rape in its simplest term is 'the ravishment of a woman, without her consent, by force, fear or fraud', or as 'the carnal knowledge of a woman by force against her will'. 'Rape' or 'Raptus' is when a man hath carnal knowledge of a woman by force and against her will (Co. Litt. 123-b); or as expressed more fully, 'rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will' (Hale PC 628). The essential words in an indictment for rape are rapuit and carnaliter cognovit; but carnaliter cognovit, nor any other circumlocution without the word rapuit, are not sufficient in a legal sense to express rape; 1 Hon.6, 1a, 9 Edw. 4, 26 a (Hale PC 628). In the crime of rape, 'carnal knowledge' means the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation (Stephen's "Criminal Law" 9th Ed. p.262). In 'Encyclopaedia of Crime and Justice' (Volume 4, page 1356) it is stated ".....even slight penetration is sufficient and emission is unnecessary". In Halsbury's Statutes of England and Wales (Fourth Edition) Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation with violence of the private person of a woman-an-outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order.

10. In the instant case though the rape does not appear to have been committed but the attempt to commit the rape is

A clearly established. That being so the conviction for offence punishable under Section 376 IPC is not made out but the offence punishable under Section 511 IPC is clearly made out. So far as the offence under Sections 365 and 366 IPC are concerned the trial court and the high Court have analysed the evidence in great detail. We find no infirmity in the conclusion to warrant interference.

11. Under Section 109 the abettor is liable to the same punishment which may be inflicted on the principal offender; (1) if the act of the latter is committed in consequence of the abetment and (2) no express provision is made in the IPC for punishment for such an abetment. This section lays down nothing more than that if the IPC has not separately provided for the punishment of abetment as such then it is punishable with the punishment provided for the original offence. Law does not require instigation to be in a particular form or that it should only be in words. The instigation may be by conduct. Whether there was instigation or not is a question to be decided on the facts of each case. It is not necessary in law for the prosecution to prove that the actual operative cause in the mind of the person abetting was instigation and nothing else, so long as there was instigation and the offence has been committed or the offence would have been committed if the person committing the act had the same knowledge and intention as the abettor. The instigation must be with reference to the thing that was done and not to the thing that was likely to have been done by the person who is instigated. It is only if this condition is fulfilled that a person can be guilty of abetment by instigation. Further the act abetted should be committed in consequence of the abetment or in pursuance of the conspiracy as provided in the Explanation to Section 109. Under the Explanation an act or offence is said to be committed in pursuance of abetment if it is done in consequence of (1) instigation (b) conspiracy or (c) with the aid constituting abetment. Instigation may be in any form and the extent of the influence which the instigation produced in the mind of the accused would vary and depend

upon facts of each case. The offence of conspiracy created under Section 120A is bare agreement to commit an offence. It has been made punishable under Section 120B. The offence of abetment created under the second clause of Section 107 requires that there must be something more than mere conspiracy. There must be some act or illegal omission in pursuance of that conspiracy. That would be evident by Section 107 (secondly), "engages in any conspiracy....for the doing of that thing, if an act or omission took place in pursuance of that conspiracy". The punishment for these two categories of crimes is also quite different. Section 109 IPC is concerned only with the punishment of abetment for which no express provision has been made in the IPC. The charge under Section 109 should, therefore, be along with charge for murder which is the offence committed in consequence of abetment. An offence of criminal conspiracy is, on the other hand, an independent offence. It is made punishable under Section 120B for which a charge under Section 109 is unnecessary and inappropriate. {See *Kehar Singh and Ors. v. The State (Delhi Admn.)* AIR 1988 SC 1883}. Intentional aiding and active complicity is the gist of offence of abetment.

12. In the background of the facts Section 109 IPC has no application.

13. Above being the position, we uphold the conviction of the appellant for the offences punishable under Sections 365, 366 and 511 IPC with the corresponding sentence as imposed by the trial court and sustained by the High Court. The convictions in terms of Sections 109 and 376 IPC are set aside. The sentences would run concurrently.

14. The appeal is allowed to the aforesaid extent.

D.G.

Appeal partly allowed.