

Jitender Vs. State

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Court : Delhi

Decided On : May-05-2009

Reported in : 184(2009)DLT767

Judge : Mool Chand Garg, J.

Acts : Indian Penal Code (IPC) - Sections 34, 109, 362, 363, 366, 366A, 372(2), 376, 376(2) and 506; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 161, 164, 216 and 313

Appeal No. : Crl. Rev. P. 7/2009

Appellant : Jitender

Respondent : State

Advocate for Def. : Arvind Kumar Gupta, APP

Advocate for Pet/Ap. : Vikram Pawar, Adv

Disposition : Petition allowed

Judgement :

Mool Chand Garg, J.

1. This order shall dispose of aforementioned revision petitions filed on behalf of the petitioners who are already facing charges under Section 363/366A/376/34

IPC in Sessions Case No. 294/2007 registered vide FIR No. 244/2003 of P.s. Kanjhawala. The petitioners are aggrieved by the order dated 11.09.2008 whereby the learned ASJ on an application moved by the prosecution also framed a charge against him as well as the other co-accused persons under Section 376(2)(g) of the Indian Penal Code (IPC).

2. It is the case of the petitioners that at the stage when this application was moved by the prosecution the case had reached at the stage of pronouncement of judgment inasmuch as not only the prosecution evidence had been closed and the statement of all the accused under Section 313 Code of Criminal Procedure (Cr.P.C.) of the petitioner had been recorded. As a matter of fact, Manoj, one of the co-accused also produced two witnesses in his defence and closed his defence evidence on 15.05.2008 and thereafter the case was listed for hearing final arguments in this case.

3. It has been submitted that the entire case of the prosecution rests upon the allegation made by prosecutrix in her statement made to the police on 08.10.2003, which is also the basis of registration of the FIR in question. In her statement the prosecutrix had alleged that on 08.10.2003 she was kidnapped by the three accused persons, namely, Manoj, S/o Sh. Jeevan Sharma and the two petitioners from outside her school, she was dropped back by the accused persons at the same place from where she was kidnapped, and that the three accused took her to a farm house at village Bijwasan, Delhi, where accused Manoj after bolting the room from inside, committed rape on her person, whereas the petitioners remained standing outside that room.

4. Initially a challan was filed against the petitioners and Manoj by the police only under Section 363/366A/34 IPC. But, after the statement of PW1 was recorded, charge under Section 376 IPC was also slapped. However, it is only on 20.09.2008 that the charge under Section 376(2)(g) Cr.P.C. was also framed against them after, when an application was filed by the prosecution on 22.08.08. The said application is reproduced hereunder:

Application under Section 216 Cr.P.c. for amendment of charge

Respected Sir,

It is submitted that:

1. That above said case is fixed today, i.e. 22.08.2008 for judgment.
2. That charge under Section 363/366/34 IPC was framed against accused Manoj, Jitender and Mukesh, separate charge under Section 109/376/34 IPC was framed against Jitender and Mukesh and a separate charge under Section 376 IPC was framed against accused Manoj on 29.04.2004 by Ld. Predecessor of this Court.
3. But in the facts and circumstances and evidence on record offence under Section 376(2)(g) IPC is made out against accused persons.

It is prayed that said amendment in the charge may kindly be allowed and Amended charge be framed.

(Addl. PP for State.)

22.08.2008

5. The application was opposed by the petitioners but vide order dated 11.09.2008, the trial Court added charges under Section 376(2)(g) of the IPC against all the three accused persons in addition to other charges and took them in judicial custody. However, now the petitioners are on bail as they were already on bail before amendment of charge.

6. Vide impugned order the trial Court, while framing the charge contained under Section 376(2)(g) of the IPC by observed that:

Now coming to the facts of the case in hand, the prosecutrix appeared as PW1 and she has categorically stated that 3 boys came in a car in which she was taken while she was on her way to school. She identified all the accused persons in the Court, she has even stated that accused Manoj and one of the boy who was sitting next to the driver seat had got down from the car and had taken her forcibly inside the car and accused Manoj has kept his hand on her mouth. From there they had taken her to a farm house where accused Manoj took her inside a room in the

farm house and bolted the door from inside. She further stated that other two accused persons kept standing outside when she was raped by accused Manoj. She has further stated that accused Pradhan @ Jitender had forcibly took her photographs. Thereafter she was dropped by them outside her school.

7. It was also observed that in view of the particular piece of evidence on record, it cannot be said that the accused persons had not acted in concert. They had all come together, kidnapped the prosecutrix in a car, she was raped while accused Jitender and Mukesh were standing outside, her photographs were clicked, she was dropped by them after commission of rape. It was observed,

So in my opinion, a charge under Section 376(2)(g) IPC is made out against the accused persons. The judgment relied upon by the counsel for the accused persons is not applicable to the facts of the present case. The application is, therefore, allowed.

8. The petitioners have assailed the order dated 11.09.2008 and 20.9.2008 by which an additional charge under Section 376(2)(g) IPC was framed by submitting that:

i) the impugned order directing framing of the amended charge could not have been passed in law as well as on the facts. There is no basis for the prosecution to have moved an application under Section 216 Cr.P.C. that too also on the date of judgment in view of the fact that the previous charge was framed on 29.04.2004 and statement of PW1 stood completely recorded on 03.09.2004.

ii) It is also urged that no fresh material warranting invocation of Section 376(2)(g) IPC had surfaced against the accused persons during the evidence of the prosecution witnesses and that the material ascribing roles to the petitioner remained the same from the stage of filing of the charge sheet till the date of judgment as fixed by the trial Court.

iii) It is also submitted that the essential ingredients of the offence under Section 372(2)(g) of the IPC are missing in this case, from the evidence of the prosecutrix as pressed it is apparent quite clearly that no other person except accused Manoj

had committed rape with her. There is also no evidence on record to show that the other accused persons had any intention to commit a gang rape with the prosecutrix.

iv) It is submitted that in such a situation when allegedly rape was committed only by Manoj, the question of presuming that the petitioners also had any common intention to commit gang rape should not have been presumed.

v) It is also submitted that a common intention as visualized in Section 376(2)(g) is intention in contrast to the intention where only one of the accused from the group may commit rape while the other only facilitate the said offence. In such a situation the only offence which could have been made out is of abetting the offence of rape and not of gang rape.

vi) It is submitted that even as per the testimony of PW1 when Manoj took her inside the room and others remained outside and had not interfered or helped Manoj to rape her. As such it could not be presumed that there was any common intention between the petitioner and Manoj to rape PW1 jointly.

9. The learned APP has submitted that the case of the prosecution was fully supported by PW1, the prosecutrix, who categorically stated that three persons including the petitioners had kidnapped her from the outside gate of her school on the date of incident, i.e, on 08.10.2003. In fact, while Manoj, her neighbor, was sitting inside the car, the petitioner, Jitender @ Pradhan dragged her inside the car along with the other co-accused and thereafter rape was committed on her by Manoj. The prosecutrix gave her statement both under Section 161 as well as Section 164 of the Cr.P.C. and then again supported her version as PW1. The car in question in which the prosecutrix was abducted was driven by Mukesh while Pradhan @ Jitender, the present accused got out from the car and forcibly dragged her in the car. Manoj put his hand on her mouth while Manoj drove the car and then after reaching at the farm house Manoj committed rape on the prosecutrix while Jitender, and Mukesh stood outside the room.

10. It is also stated that from the aforesaid facts and the testimony of the prosecutrix, it is crystal clear that there was a common intention and the prior

meeting of a mind which stand established on the record. The common intention was to commit a rape on the prosecutrix. It is further submitted that the common intention can be proved either from the evidence or by inferences from the acts and the attending circumstances of the case and the conduct of the parties. It is further submitted that from the facts and circumstances of the case common intention is reflected by the participation of all the three accused persons in the crime. It is further submitted that even though the petitioners had not actually committed the rape on the prosecutrix but there is sufficient material on the record which shows that the petitioners were members 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 charge framed under Section 376(2)(g) IPC justified.

11. The State has also relied upon the judgment delivered in the case of Pradeep Kumar v. Union Administrator, Chandigarh : 2006 CriLJ3894 as well as in the case of Ashok Kumar v. State of Haryana : 2003 CriLJ4932 .

12. However, the petitioners to rebut the case of the prosecution have relied upon the judgment of the Supreme Court in the case of Priya Patel v. State of M.P. and Anr. : 2006 CriLJ3627 as well as in the case of Hanuman Prasad and Ors. v. State of Rajasthan 2008 (15) SCALE 106.

13. I have gone through the aforesaid judgment cited on behalf of both the parties.

14. A perusal of the judgment cited by the petitioner to show that the judgments of Priya Patel (Supra) it has no application to the facts of this case whereas the judgment delivered in Hanuman Prasad's Case (Supra) which defines common intention is of some relevance. In the aforesaid case it has been observed that:

4. In order to bring in application of Section 376(2)(g) common intention to commit rape is necessary and the evidence of the prosecutrix in court clearly shows that the appellants did not have any intention to commit rape. In the statements recorded in terms of Sections 161 and 164 of the Code of Criminal Procedure, 1973 (in short the `Code') also, that was the position.

It was further observed that:

7. The important expression to attract Section 376(2)(g) is 'common intention'. The essence of the liability in terms of Section 376(2) is the existence of common intention. In animating the accused to do the criminal act in furtherance of such intention, the principles of Section 34 IPC have clear application. In order to bring in the concept of common intention it is to be established that there was simultaneously consensus of the minds of the persons participating in the act to bring about a particular result. Common intention is not the same or similar intention. It presupposes a prior meeting and pre-arranged plan. In other words, there must be a prior meeting of minds. It is not necessary that pre-consent in the sense of a distinct previous plan is necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons which has to be gauged on the facts and circumstances of each case.

8. In the instant case no evidence was led to show that the appellants had a common intention of committing rape from the victim. This aspect unfortunately has been lost sight of by the High Court though the Trial Court has elaborately dealt with this aspect.

15. To understand the judgment, it would also be appropriate to take note of the facts of the case as narrated in para 2 of the aforementioned judgment which are as under:

2. Background facts, as projected by the prosecution, in a nutshell, are as follows: On 6.10.1997 at about 4.10 p.m. the prosecutrix (PW-6) daughter of Nemchand (PW-4) lodged a report Ex.P/9 before Kan Singh, Dy. SP, Raigarh Nagar District Sri Ganganagar (PW-5) against 8 accused persons and one Vinod Sachdeva stating inter-alia that her father Nemchand was under the employment of Indian Agriculture Farm and she has two brothers and one elder sister. It was further stated in the report that in the month of April, 1996 when she was going to her house, accused persons encircled her and took her forcibly to the house of accused Shivmuni who was Chowkidar and when she tried to make hue and cry she was beaten by them and she was offered water and after drinking water she

felt giddy and thereafter, she was raped by accused Dhruvendra Singh and rest accused persons were flirting with her and when she came to her senses they told her that what had happened and in case she would tell this incident to anybody, her brothers would be killed. Thereafter, she came to her house. It was further stated in the report that whenever she went to school, all accused persons used to take her to the house of accused appellant Shivmuni and all accused persons Nos. 1 to 8 used to commit rape on her and this process remained continued for many times.

16. Now, coming to the case of Ashok Kumar (Supra), it is apposite to take into consideration that one of the co-accused obstructed the brother of the prosecutrix from going towards the side of baithak where his sister who was being raped by another accused showing a pistol was held to have no common intention to commit rape and therefore the appeal filed by the said accused was allowed. The relevant observation made in the said case is reproduced hereunder:

7. When we have the direct evidence of PW.6--the brother of the deceased, the bald statement attributed to the deceased in an apparent bid to rope in the appellant in addition to the other accused cannot be given much weight. The evidence of PW.6 [Rajbir] is to the effect that his sister was at a distance of about 300 yards having started from the house one or two minutes earlier to his departure that she was picked up from the street and that he noticed her being taken inside the Baithak of Ram Karan and as he came near the Baithak, he found that the doors were closed. PW.6 then says that he jumped the wall and went inside the Baithak. Then he noticed the accused Anil Kumar and the deceased in compromising position. The appellant herein came there soon after his arrival at the spot and left from there immediately. From the sequence of events, it is not possible to draw a reasonable conclusion that the appellant had raped the deceased person. The time gap between PW.6 noticing the victim being taken inside the Baithak and his entry into the Baithak was so short that it is not possible to infer that the appellant would have committed rape in the first instance. Soon after PW.6 entered the Baithak and witnessed what was happening, the appellant withdrew from there. In the face of this version in cross examination, it is difficult believe that both have committed rape. However, we have to examine whether the

appellant could be convicted with reference to Section 376(2)(g) IPC even if he had not actually raped the victim.

8. Charge against the appellant is under Section 376(2)(g) IPC 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 offer. In such cases, there must be criminal sharing marking out a certain measure of jointness in the commission of offence.

9. Now what is to be seen is whether there are any circumstances to indicate concert between the appellant and Anil Kumar in committing rape on Sudesh. Learned Advocate appearing for the respondent, contended that the appellant had facilitated Anil Kumar to commit rape on the deceased. Sudesh and, therefore, it must be inferred that he was in concert with him. Facilitation of rape by Anil Kumar by the appellant, if at all, has to be inferred from the circumstances. Apart from the fact that he was present in his house at about 3.30 p.m. in hot summer month at the crucial time, nothing more is established. By that factum alone, the inference that the appellant being in concert with Anil Kumar cannot be established. We cannot presume that by his mere presence in his house, he was aware of the illicit affair going on between Anil Kumar and the victim, or that he was acting in concert with Anil Kumar. The evidence of Ranbir (PW-4) and Rajbir (PW-6) before the Court that they found Anil Kumar to be in compromising position with Sudesh when the appellant walked in with a pistol and threatened to shoot them is not believed by the Trial Court. In fact, no pistol was recovered from him. He has been acquitted of that charge Section 506 IPC and that part of the order has now

become final since no appeal has been preferred against such acquittal.

10. No case is put forth or established that the appellant committed an offence under Section 376 IPC as such, but he is charged with an offence arising under Section 376(2)(g) IPC by which he is deemed to have committed such an offence. In the absence of any evidence of concert between Anil Kumar and the appellant the conviction recorded by the Trial Court as affirmed by the High Court cannot be sustained.

11. In the result, we set aside the order made by the Trial Court as affirmed by the High Court and acquit the accused of the offence with which he was charged. He shall be set at liberty forthwith. Fine amount, if already paid by the appellant shall be refunded to him.

17. As far as the judgment delivered in the case of Pradeep Kumar (Supra) is concerned, the Supreme Court has laid down certain tests which are required to be proved for the purpose of framing a charge under Section 376(2)(g) of the IPC in para 10 of the Judgment which reads as under:

10. To bring the offence of rape within the purview of Section 376(2)(g), IPC, read with Explanation 1 to this Section, it is necessary for the prosecution to prove:

(i) that more than one person had acted in concert with the common intention to commit rape on the victim;

(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

(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.

18. In that case also after analyzing the testimony of the prosecutrix her allegations of gang rape against Lalit Gupta and One Bittu was not accepted. The observations made in this regard are also reproduced hereunder:

12. 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 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. 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 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.

19. Thus, to appreciate the facts of the present case, it is necessary to refer to the statement of PW1 dated 26.08.2004, who has deposed: On 08.10.03, I alongwith my younger sister Preeti were going to our school Sarvodya Kanya Vidyala, Rani Khera, Delhi. I was studying in 11th standard and Preeti was studying in 7th standard. At about 7:45 am when I reached near the gate of our school a white Maruti car stopped near us. There were three boys in a car. One of them was our neighbor Manoj. All the three boys are accused present in Court. One boy who was sitting next to the driver seat and Manoj present in the Court got down from the car and forcibly took me inside the car. I raised the alarm and Manoj kept his hand on my mouth and he also put his other hand on my neck. Thereafter they

took me to a farm house at village Brijwasan. When I got down from the car I had noted down the No. of care which was DL_3C_G 6086. Accused Manoj took me to a room in the farm house. He bolted the door from inside. The other two accused persons present in the Court kept standing outside. He asked me to remove my clothes. I refused to remove my clothes. He threatened to call my in laws in that room and my relationship will be broken. Accused Manoj removed my clothes forcibly. Thereafter he put me on the bed which was lying in the room and forcibly committed rape upon me. Thereafter, accused Pradhan had forcibly had clicked my photographs. Accused Manoj threatened me that in case I disclose this incident to anyone my photographs will be shown a wedding day to my in laws. Thereafter they again took me in the same car. Accused Manoj told to accused Pradhan present in the Court if he also wants to involve in the same Act he should wait for the next turn thereafter they dropped me outside the gate of my school. Thereafter I came back home.

20. The aforesaid statement of the prosecutrix in no way shows that there was any common intention of all the three persons to commit a gang rape in this case, so as to attract the charge under Section 376(2)(g) of the explanation 1 of the IPC, more so, when except for the statement of PW1 recorded in 2004, no other evidence is available on record which may go to prove a common intention between the three accused person for commission of a gang rape on the part of the petitioners. Merely because the two of the other accused persons assisted Manoj in kidnapping prosecutrix in bringing her to the farm house where only Manoj who was the neighbor of prosecutrix committed rape on her would not prove that it was a case of gang rape and therefore framing of the charges against the petitioners under Section 376(2)(g) needs to be set aside.

21. Accordingly, both the petitions are allowed. The interim orders are modified to the extent that the trial Court may now proceed on the basis of evidence which came on record from the stage of passing of the order dated 11.09.2008 on the basis of the charges framed earlier, i.e., under Sections 362/366A/376/34 IPC only. Parties to appear before the trial court on the date fixed.

22. TCR be sent back forthwith.

