

ASHOK KUMAR  
v.  
STATE OF HARYANA

DECEMBER 17, 2002

[S. RAJENDRA BABU AND P. VENKATARAMA REDDI, JJ.]

*Penal Code, 1872—Section 376 (2)(g) Explanation 1—Rape—Conviction under section—Allegation that accused along with other committed rape—Conviction—During pendency of appeal accused died—High Court dismissing appeal of other person—On appeal held in the absence of evidence of concert between accused and the other person, conviction by trial court as upheld by High Court cannot be sustained—Thus the other person is entitled to acquittal.*

According to the prosecution, PW6 witnessed the accused committing rape of his sister. At that moment, appellant came from adjoining room and threatened to shoot PW6. He raised an alarm and several persons came on the spot after which appellant ran away. Victim consumed poison in order to commit suicide. She told the family members that she did so as she was feeling ashamed of the incident. Victim died later on. Accused and appellant were charged under sections 376 and 506 IPC. Trial Court convicted them under section 376(2) (g), but acquitted them under section 506. Aggrieved by the order they filed appeals. During pendency of appeals accused died. High Court dismissed the appeal filed by appellant. Hence the present appeal.

Respondent contended that appellant had facilitated accused to commit rape on victim and, therefore, it must be inferred that he was in concert with him.

Allowing the appeal, the Court

HELD: 1.1. No case is put forth or established that 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 accused and appellant, the conviction recorded by Trial Court as upheld by High Court cannot be sustained and appellant is

A acquitted of the offence with which he was charged. [165-B; C]

B 1.2. In order to establish an offence under section 376(2)(g), read with Explanation I IPC 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 of the accused. 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 C 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 offender. In such cases, there must be criminal sharing marking out a certain measure of jointness in the commission of offence. [164-C, D, E]

D 1.3. Facilitation of rape by accused by 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 appellant being in concert with accused cannot be established. It cannot E be presumed that by his mere presence in his house, he was aware of the illicit affair going on between accused and the victim, or that he was acting in concert with accused. The evidence of prosecution witnesses before the Court that they found accused to be in compromising position with the victim when appellant walked in with a pistol and threatened to shoot them F is not believed by Trial Court. In fact, no pistol was recovered from him. He has been acquitted of that charge under section 506 IPC and that part of the order has become final since no appeal has been preferred against such acquittal. [164-F, G, H; 165-A]

G 2. When there is direct evidence of PW6-brother of the deceased, the bald statement attributed to the deceased in an apparent bid to rope in appellant in addition to the other accused cannot be given much weight. Further the time gap between PW6 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 appellant would have committed rape in the first H instance. Soon after PW6 entered the Baithak and witnessed accused and

deceased in compromising position, appellant withdrew from there. In the face of this version in cross-examination, it is difficult to believe that both of them committed rape. [163-F; H; 164-A]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 734 of 2002.

From the Judgment and Order dated 14.2.2002 of the Punjab and Haryana High Court in Crl. A. No. 49-DB of 1996.

Sushik Kumar, S.C. Paul, Shiv P. Pandey and Anil Kaushik, for the Appellant.

Aditya Kumr Chaudhary and Ranbir Yadav, for the Respondent.

The Judgment of the Court was delivered by

**RAJENDRA BABU, J.** On May 9, 1993 at about 3.30 p.m., when Rajbir [PW.6] was passing in front of the Baithak of the residence of Ram Karan, father of the appellant, he heard the cries of his sister, Sudesh, aged about 15 years and when he went inside the Baithak by scaling over the wall he saw Anil Kumar (now deceased) committing rape of his sister, Sudesh and she was weeping while lying on the ground. Then came Ashok Kumar, the appellant, from the adjoining room with a pistol in his hand asking the witness Rajbir [PW.6] to run away as otherwise he would shoot him. Rajbir [PW.6] raised an alarm upon which several persons in the neighbourhood and his brother Ranbir [PW.4] and his father, Dhanpat, came to the spot. On seeing this, the appellant ran away from the place. Sudesh, sister of Rajbir [PW.6], after putting on her salwar went away as she was feeling ashamed. She was not found in the house when other members of the family looked for her. When they came back to their houses at about 12 midnight, she was vomiting and weeping. On asking her, they came to know that she had consumed aluminium phosphide tablets which are used for preservation of wheat in order to put an end to her life as the appellant and deceased Anil Kumar [1st accused] had committed rape on her and she was feeling ashamed. As no other conveyance was available, they took her to the hospital on a bicycle at about 5 A.M. on May 10, 1993. The doctor admitted her in the hospital at about 5.30 A.M. and thereafter both the brothers returned to their village to make arrangement for money for payment to the hospital. Dr. A.K. Suri [PW.2] sent intimation to the police station regarding the admission of Sudesh in the hospital, upon which H.C. Mohinder Singh [PW.12] went to

A the hospital and inquired about her fitness to make statement. The doctor declared her unfit to make any statement and she expired at about 7.10 A.M. on May 10, 1993. Thereafter H.C. Mohinder Singh [PW.12] recorded a statement of Rajbir [PW.6] at about 9 A.M. on the basis of which FIR for offences under Sections 376, 306 and 506 IPC were recorded at the Police Station, Safidon at 9.10 A.M. and after investigation the charge sheet for offences under Sections 376 and 506 IPC was laid before the court against the appellant and Anil Kumar. Ranbir and Rajbir [PW.4 and PW.6] were charged under Section 306 IPC for abetting suicide of Sudesh, but they were acquitted of the charge. This in brief is the prosecution case.

C The Trial Court convicted each of the accused to undergo rigorous imprisonment for 11 years and to pay a fine of Rs. 2,000 under Section 376(2)(g) IPC and in default of payment of fine to undergo further imprisonment of one year. Both the accused filed appeals. During the pendency of the appeals, Anil Kumar died in an accident. The High Court, having dismissed the appeal filed by the appellant, this appeal by special leave is preferred.

The post-mortem report of the body of Sudesh disclosed as under:

E “It was moderately built, moderately nourished body of a female. Auxiliary hair were present. Breasts were well developed. Pubic hair were present. There was no external mark of injury seen in perineum, thighs, hips, breast or on any other part of body. Hymen was ruptured, which was old healed and ruptured and admitted two fingers. No fresh injury was present in the vagina. Uterus was ante-verted and nulliparous.”

F In the court, evidence was tendered to the effect that two vaginal swabs were taken from posterior and lateral fomices and pubic hair were sent to the chemical analysis as well as the salwar, under-shirt and the underwear worn by the deceased were also sent to the Forensic Science Laboratory, which, however, did not indicate anything positive. Dr. V.P. Kakkar [PW.3] opined that the possibility of recent intercourse is totally ruled out. From the condition of vagina and hymen, he stated that the deceased was habituated to sexual intercourse. He did not find any injury upon the deceased. He opined that she has died as a result of poisoning. Similarly medico-legal examination of the appellant did not find any mark of injury on any part of the body and his underwear which was sent to the FSL did not produce anything positive.

H Apart from stating that he was fit to perform sexual intercourse, no other

statement was made before the court.

The Trial Court acquitted the accused with reference to the offence arising under Section 506 IPC. The finding in this regard is as follows:

“.....To my mind the prosecution has failed to prove this charge because in his statement Ex. PW 6/A the complainant has stated that when he entered in the house of Ram Karnan, Ashok accused came out from a room with a pistol and directed him (PW-6) to get lost from that place failing which he would finish him. This version is supported by PW-6 in his on oath statement. Except this evidence, no other evidence has come on the record. Therefore from this evidence it is clear that the threat uttered by accused Ashok to PW-6 was a conditional threat and nothing was done by the accused Ashok, even the witness did not follow his directions. Thus the conditional threat was no threat in the eyes of law and if any law on this point is required, then reference may be made to *Sita Ram v. State*, 1974 P.L.R. 421. Thus viewed from every angle, I have come to the conclusion that the prosecution has not been able to prove the second charge i.e. charge under Section 506 Indian Penal Code, against the accused persons.”

Both the Trial Court and the High Court placed strong reliance upon the statements made by Ranbir [PW.4] and Rajbir [PW.6] that Sudesh had told them, when she came back to the house at midnight after consuming poison, that both the accused had raped her.

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 this 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

A 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 to 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.

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 offender. In such cases, there must be criminal sharing marking out a certain measure of jointness in the commission of offence.

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 under Section 506 IPC and that part of the order has now become final since no appeal has been preferred against such acquittal. A

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. B

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. C

The appeal is allowed accordingly.

N.J.

Appeal allowed. D