A HANUMAN PRASAD AND ORS.

v.

STATE OF RAJASTHAN

(Criminal Appeal No. 1186 of 2001)

B NOVEMBER 18, 2008

[DR. ARIJIT PASAYAT AND DR. MUKUNDAKAM SHARMA, JJ.]

C *Penal Code, 1860 – s. 376(2)(g) – Application of – Necessary ingredients – Held: 'Common intention' to commit rape is necessary – On facts, no evidence to show that accused had a common intention of committing rape on victim – Thus, conviction by High Court u/s. 376(2)(g) not* D *sustainable and set aside.*

According to the prosecution case, accused DS raped the prosecutrix, a school going girl and other accused flirted with her. This continued for several times. E **Accused persons threatened her not to disclose this fact to anyone. After some time prosecutrix told her parents. FIR was lodged. The main accused were convicted and other accused-appellants were acquitted. However, High Court convicted and sentenced the appellants u/s.** F **376(2)(g) IPC. Hence, these appeals.**

Allowing the appeals, the Court

HELD: 1.1. The important expression to attract Section 376(2)(g) is 'common intention' to commit rape. G **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**

H

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-consert 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 gauzed on the facts and circumstances of each case. [Para 7] [262-E-H; 263-A]

1.2. In the instant case, a bare reading of the entire evidence of the prosecutrix goes to show that the appellants were not involved in the act of rape. There is also nothing on evidence to show that they shared common intention. In the statements recorded in terms of ss. 161 and 164 Cr.P.C. also that was the position. No evidence was led to show that the appellants had a common intention of committing rape on the victim. This aspect unfortunately has been lost sight of by the High Court though the Trial Court has elaborately dealt with this aspect. Thus, conviction by High Court cannot stand and is set aside. [Paras 4, 8 and 9] [262-B-C; 263-A-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1186 of 2001.

From the final Judgment and Order dated 30.4.2001 of the High Court of Judicature of Rajasthan at Jodhpur in S.B. Criminal Appeal No. 326 of 1999.

WITH

Crl. A.No. 799 of 2002.

A R.K. Kapoor, Anis Ahmed Khan, Doongar Singh, V.J. Francis and Anupam Mishra for the Appellants.

Naveen Kumar Singh and Aruneshwar Gupta for the Respondents.

B The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. In these appeals, challenge is to the judgment of a learned Single Judge of the Rajasthan High Court at Jodhpur. Though the appellants were acquitted C by the trial Court, the High Court in appeal filed by the State of Rajasthan directed their conviction for offence punishable under Section 376(2)(g) of the Indian Penal Code, 1860 (in short the 'IPC') and each was sentenced to undergo 10 years rigorous imprisonment and fine with default stipulation. In all there were D 8 accused persons. Three of them who were convicted by the trial Court namely, Dhruvendra Singh, Shivmuni @ Babua and Sushil Kumar did not prefer any appeal before the High Court questioning their conviction. However, the Trial Court acquitted the present appellants and in appeal filed by the State their E acquittal was set aside.

2. Background facts, as projected by the prosecution, in a nutshell, are as follows:

F 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, Raisingh Nagar District Sri Ganganagar (PW-5) against 8 accused persons and one Vinod Sachdeva stating inter-alia that her father Nemchand was under the G 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

H

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.

It was further stated in the report that when she was perturbed she was asked by her mother Panadevi (PW-3). Then she unfolded the whole story to her mother and then her mother narrated the whole story to her husband Nemchand (PW-4). It was further stated in the report that thereafter they met Vinod Sachdeva, who told them that accused persons hailed from high family and if they were enjoying with her, let them do so and he further told them that he would arrange the marriage of the prosecutrix with accused Dhruvendra Singh. It was further stated in the report that to rule out pregnancy she was given tablets for preventing pregnancy and she was given Mala-D tablets also.

This report was sent by Kan Singh (PW-5) to Police Station Sri Vijyanagar, District Sri Ganganagar, where the case was registered and regular FIR Ex.P-10 was chalked out and investigation was conducted by Tajaram (PW-7)

The High Court by the impugned judgment found that the acquittal so far as the present appellants are concerned was not sustainable. It held that because of broad language of Section 376(2)(g), the appellants were also liable to be convicted.

A 3. Learned counsel for the appellants submitted that Section 376(2)(g) has no application so far as the present appellants are concerned.

4. In order to bring in application of Section 376(2)(g) common intention to commit rape is necessary and the B 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, C that was the position.

5. Learned counsel for the respondent on the other hand submitted that a complete act is not necessary. Mere presence would be sufficient to bring in application of Section 376 IPC.

D 6. A bare reading of the entire evidence of the prosecutrix goes to show that the appellants were not involved in the act of rape. There is also nothing on evidence to show that they shared common intention.

E 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 F 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-G arranged plan. In other words, there must be a prior meeting of minds. It is not necessary that pre-consert 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

H

gauzed on the facts and circumstances of each case. A

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

9. Above being the position the conviction as recorded by the High Court cannot stand and is set aside. Appeals are allowed. Appellants are on bail. Their bail bonds shall stand discharged. C

N.J. Appeals allowed.