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PRIYA PATEL

v

STATE OF M.P. AND ANR.

JULY 12, 2006

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[ARIJIT PASAYAT AND S.H. KAPADIA, JJ.]

*Penal Code, 1860:*

C

*ss. 375 and 376(2)(g), Explanation I—'Gang rape'—A woman charged u/s 376(2)(g)—On the allegation of facilitating her husband in commission of offence of rape of prosecutrix—Held, s.375 makes it clear that rape can be committed only by a man—The expression "in furtherance of their common intention" as appearing in Explanation I to s.376(2) relates to intention to commit rape—A woman cannot be said to have an intention to commit rape and, therefore, cannot be prosecuted u/s 376(2)(g)—It is for the court concerned to consider whether such a woman can be charged for abetment, if in law it is permissible and the facts warrant such a course to be adopted.*

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**On the basis of a complaint lodged by the prosecutrix, husband of the appellant was charged for offences punishable under ss.323 and 376 IPC and the appellant was charged under ss.323 and 376(2)(g) IPC. The allegation against her was that while her husband was ravishing the prosecutrix, she instead of saving her, slapped her, closed the door of the house and left the place of incident. In the revision filed by the appellant it was argued before the High Court that a woman could not be charged for commission of offence of rape. The High Court dismissed the revision holding that if a woman facilitates the act of rape, Explanation I to s. 376(2) would come into operation and she could be prosecuted for 'gang rape'. Aggrieved, the accused woman filed the present appeal.**

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**Allowing the appeal, the Court**

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**HELD: 1.1. Section 375 IPC shows that rape can be committed only by a man. The section itself provides as to when a man can be said to have committed rape. Section 376(2) IPC makes certain categories of serious cases of rape as enumerated therein attract more severe punishment. One of them relates to 'gang rape'. The language of sub-section(2)(g) provides that**

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"whoever commits 'gang rape' shall be punished etc. Explanation I thereto only clarifies that when a woman is raped by one or more in a group of persons acting in furtherance of their common intention each such person shall be deemed to have committed 'gang rape'. That cannot make a woman guilty of committing rape. This is conceptually inconceivable. The expression "in furtherance of their common intention" as appearing in the Explanation relates to intention to commit rape. A woman cannot be said to have an intention to commit rape. Therefore, the appellant cannot be prosecuted for alleged commission of the offence punishable under Section 376(2)(g).

[460-C-H; 461-A]

2. The residual question is whether the appellant can be charged for abetment. This is an aspect which has not been dealt with by the trial court or the High Court. If in law, it is permissible and the facts warrant such a course to be adopted, it is for the court concerned to act in accordance with law.

[461-B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 754 of 2006.

From the Judgment and Order dated 4.10.2005 of the High Court of Judicature at Jabalpur, Madhya Pradesh in Criminal Revision No. 1306/2005.

Rachna Gupta and Dr. Indra Pratap Singh for the Appellant.

C.D. Singh, Minakshi Sharma, Kiran Suvarna and Dhruvad Kashyap for the Respondents.

The Judgment of the Court was delivered by

**ARIJIT PASAYAT, J.** Leave granted.

Can a lady be prosecuted for gang rape is the interesting question involved in this appeal.

Challenge in this appeal is to the order passed by a learned Single Judge of the Madhya Pradesh High Court holding that the charge framed against the appellant under Sections 323 and 376(2)(g) of the Indian Penal Code, 1860 (in short 'IPC') is in order.

Background facts in a nutshell are as follows:

A Complaint was lodged by the prosecutrix alleging that she was returning by Utkal Express after attending a sports meet. When she reached her destination at Sagar, accused Bhanu Pratap Patel (husband of the accused appellant) met her at the railway station and told her that her father has asked him to pick her up from the railway station. Since the prosecutrix was suffering from fever, she accompanied accused Bhanu Pratap Patel to his house. He committed rape on her. When commission of rape was going on, his wife, the present appellant reached there. The prosecutrix requested the appellant to save her. Instead of saving her, the appellant slapped her, closed the door of the house and left place of incident. On the basis of the complaint lodged, investigation was undertaken and charge-sheet was filed. While accused

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C Bhanu Pratap Patel was charged for offences punishable under Sections 323 and 376 IPC the appellant, as noted above, was charged for commission of offences punishable under Sections 323 and 376(2)(g) IPC. The revision filed before the High Court questioned legality of the charge framed so far as the appellant is concerned, relating to Section 376 (2)(g) IPC. It was contended that a woman cannot be charged for commission of offence of rape. The High

D Court was of the view that though a woman cannot commit rape, but if a woman facilitates the act of rape, Explanation-I to Section 376(2) comes into operation and she can be prosecuted for “gang rape”.

E According to learned counsel for the appellant the High Court has clearly missed the essence of Sections 375 and 376 IPC. It was submitted that as the woman cannot commit rape, she cannot certainly be convicted for commission of “gang rape”, and Explanation-I to Section 376(2) IPC has no relevance and/or application.

F *Per contra*, learned counsel for the State supported the order. Additionally, it was submitted that even if for the sake of argument it is conceded that the appellant cannot be prosecuted for commission of offence punishable under Section 376(2)(g), she can certainly be prosecuted for commission of the offence of abetment.

G In order to appreciate rival submissions Sections 375 and 376 need to be noted. They so far as relevant read as follows:-

“375. Rape -

H A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—

First—Against her will. A

Secondly—Without her consent.

Thirdly—With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt. B

Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. C

Sixthly.—With or without her consent, when she is under sixteen years of age. D

*Explanation.*—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

*Exception.*—Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape. E

### 376. *Punishment for rape*

(1) Whoever, except in the cases provided for by sub-section (1), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: F  
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Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,— H

A            x            xx            xx            xx

(g) commits gang rape,

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:

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Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years,

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*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.

x            xx            xx            xx            xx

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A bare reading of Section 375 makes the position clear that rape can be committed only by a man. The section itself provides as to when a man can be said to have committed rape. Section 376(2) makes certain categories of serious cases of rape as enumerated therein attract more severe punishment. One of them relates to “gang rape”. The language of sub-section(2)(g) provides

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that “whoever commits ‘gang rape’ shall be punished etc. The Explanation only clarifies that when a woman is raped by one or more in a group of persons acting in furtherance of their common intention each such person shall be deemed to have committed gang rape within this sub-section (2). That cannot make a woman guilty of committing rape. This is conceptually inconceivable. The Explanation only indicates that when one or more persons

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act in furtherance of their common intention to rape a woman, each person of the group shall be deemed to have committed gang rape. 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

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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

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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. The expression "in furtherance of their common intention" as appearing in the Explanation to Section 376(2) relates to intention to commit rape. A woman cannot be said to have an intention to commit rape. Therefore, the counsel for the appellant is right in her submission that the appellant cannot be prosecuted for alleged commission of the offence punishable under Section 376(2)(g).

The residual question is whether she can be charged for abetment. This is an aspect which has not been dealt with by the Trial Court or the High Court. If in law, it is permissible and the facts warrant such a course to be adopted, it is for the concerned court to act in accordance with law. We express no opinion in that regard.

The appeal is allowed to the aforesaid extent.

R.P.

Appeal allowed.