

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL NO. 175 OF 2001

Radha Dubey, W/o Munnu Dubey, aged about 36 years, R/o Village Kasaha, P.S. Pandari, District Mirzapur, present R/o Irrigation Colony, Darri, District Korba (C.G.)

... Appellant

Versus

State of Chhattisgarh, through P.S. Darri, District Korba (C.G.)

... Respondent

For Appellant	:	Mr. Tarkeshwar Nande, Advocate.
For Respondent-State	:	Mr. S.R.J. Jaiswal, Panel Lawyer.

Hon'ble Shri Justice P. Sam Koshy

Judgment on Board

26/10/2016

1. The present appeal has been preferred by the Appellant assailing the judgment dated 30.1.2001 passed by the Special Judge (Atrocities), Bilaspur in Special Case No. 31 of 2000, convicting the Appellant for the offence punishable under Section 376(2)(g) of IPC and sentencing her to undergo R.I. for 10 years and to pay fine of Rs.500/- with default sentence of R.I. for 3 months.
2. Case of the prosecution in brief is that the Appellant along with her husband, Mannu Dubey, had engaged the Prosecutrix (PW-6) for household job with the consent and permission of the parents of the Prosecutrix. It is alleged that subsequent to the Prosecutrix been taken to the house of the Appellant, they forced her to go into prostitution forcing her to have physical relationships with the persons who used to visit the house of the Appellant seeking physical favour. An FIR in this regard was lodged on 31.3.2000 by the Prosecutrix herself. It is pertinent at this juncture to mention that in the FIR offence was registered against the Appellant and her husband, Mannu Dubey, and two other accused persons. However, subsequently, the name

of the co-accused Dinesh Kumar also came up. The matter was put to trial before the Special Court (Atrocities) where the case was registered as Special Case No. 31 of 2000 against the Appellant, her husband Mannu Dubey and another accused Dinesh Kumar.

3. During the trial, the prosecution examined as many as 13 witnesses and no witnesses were examined on behalf of the defence. After the conclusion of the trial, the Court below reached to the conclusion that the prosecution has not been able to prove its case beyond reasonable doubt so as to the charge which was levelled against the two co-accused persons, Mannu Dubey and Dinesh Kumar, and therefore acquitted them of the charge under Sections 342, 34, 376(2)(g), 109 of IPC and Sections 3(2)(v) and 3(1)(xi) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act. However, the Court below reached to the conclusion that so as to the charge against the Appellant is concerned the case stands proved so far as the offence under Section 376(2)(g) of IPC is concerned with the aid of Section 109 of IPC, and accordingly acquitting her of the charges under Sections 342 of IPC and Sections 3(2)(v) and 3(1)(xi) of the Atrocities Act, however convicted her for the offence under Section 376(2)(g) of IPC to undergo R.I. for 10 years with fine, leading to the filing of the present appeal.

4. Assailing the impugned judgment, Shri Tarkeshwar Nande, learned Counsel appearing for the Appellant, submits that prima facie offence against the Appellant under the provisions of Section 376(2)(g) of IPC is not made out for the simple reason that the two co-accused persons who were charged of having committed the offence of rape with the Prosecutrix have been acquitted and that since there is no accused person who has been convicted for the offence under Section 376(2)(g) the present Appellant who is a lady cannot be convicted for the offence under Section 376(2)(g) in the

absence of any co-accused persons been convicted for committing the substantive offence of rape. Shri Nande, further argues that the charge under Section 376(2)(g) of IPC itself could not have been levelled against the Appellant on account of the fact that she is a lady and it is conceptually unconceivable to believe that the Appellant could have committed an act of rape with the Prosecutrix by virtue of the fact that she herself being of feminine gender. It was further argued by Shri Nande that once when the offence of rape itself has not been proved and established by the prosecution against any of the accused persons, the question of present Appellant having abetted the commission of the said crime also automatically stands collapsed and therefore the judgment of conviction deserves to be and should be set aside.

5. Shri S.R.J. Jaiswal, learned Counsel for the State, opposing the appeal submits that in fact it is a case where the allegation against the Appellant is of abetting the commission of crime. According to him, the deposition of the Prosecutrix itself reveals that the present Appellant along with her husband had taken the Prosecutrix to her (Appellant) house for performing the household jobs on a monthly salary of Rs.500/-. However, later on, it was learnt that in fact the Prosecutrix was taken by the Appellant and her husband for using her for prostitution as it is alleged that the Appellant and her husband were involved in the said offence of operating a flesh trade and they used to force and compel the Prosecutrix to have physical relations with the so called customers who used to visit the house of the Appellant. Further, referring to the medical evidence also the State Counsel submits that the medical evidence of the Prosecutrix also is positive and there is the report of Dr. Veena Agrawal (PW-9) proving the medical report as well as the fact that the Prosecutrix was subjected to

recent sexual intercourse, at the time of medical examination of the Prosecutrix.

6. Shri Jaiswal, further submits that the prosecution in fact has been able to lead both ocular as well as medical evidence to establish the offence. It was also alleged that though the prosecution has not been able to bring home the offence of rape against any other co-accused person but so far as the abetment to the commission of the said crime is concerned the same stands established from the statement of the Prosecutrix and the other prosecution evidence which has come on record, and thus prayed for the rejection of the appeal.

7. Having considered the rival contentions put forth on behalf of either side and on perusal of the records what is an undisputed fact is that in the said crime which was registered at the instance of the Prosecutrix, the prosecution has not been able to establish its case against any persons who is alleged to have committed the act of rape. It also reflects from the records that apart from the three accused persons who have been prosecuted there does not seem to have been any other person involved in the case. In addition, it also reflects that the Appellant was a sole lady member in the list of the accused persons and her role only was that of forcing the Prosecutrix to have physical relationship with the persons who used to visit the house of the Appellant for the same and that there is no such accused person for the actual rape.

8. At this juncture, it would be relevant to refer to the decision of the Supreme Court reported in **AIR 2006 SC 2639 [Priya Patel Vs. State of M.P.]**, wherein the Supreme Court in some what similar set of facts in a case where the framing of charge under Section 376(2)(g) of IPC was levelled against the lady accused held as follows :

“8. 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 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 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 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 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\(2\)\(g\)](#).”

9. In the light of the aforesaid judgment of the Supreme Court, this Court has no hesitation to reach to the conclusion that the offence which has been levelled against the Appellant is not made out firstly on the ground that she is a lady herself and secondly once when the prosecution itself has not been able to establish an offence of rape against the other co-accused persons or any other person the present Appellant on her own cannot be convicted for the offence under Section 376(2)(g) of IPC with the aid of

abetment particularly in the absence of conviction of any other persons for the substantive offence of rape.

10. Accordingly, this Court is of the opinion that the conviction of the Appellant for the offence under Section 376(2)(g) of IPC is bad in law and is therefore set aside. She is acquitted of the charge levelled against her. Though after the granting of bail, on account of default committed by the Appellant in appearance before the Registry of this Court, warrant of arrest has been issued against the Appellant, it is ordered that that the said warrant of arrest shall not be acted upon.

11. The appeal is allowed.

Sd/-
(P. Sam Koshy)
Judge

/Sharad/