

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 818 of 2012****Reserved on : 23.08.2018****Delivered on : 12.10.2018**

1. Virendra Kumar, S/o Valmiki Halwa, Aged About 18 Years, R/o Village- Medgaon, Deharitola P.S.-Mannpur, District- Rajnandgaon (C.G.).
2. Yogesh Kumar, S/o Parasram Gond, Aged About 20 Years, R/o Village - Korramtola, P.S. Manpur, District- Rajnandgaon (C.G.)
3. Kamlesh Kumar, S/o Umediram Halwa, Aged About 19 Years, R/o Village - Medgaon, Deharitola, P.S. - Mannpur, District - Rajnandgaon (C.G.)

---- Appellants**Versus**

State of Chhattisgarh, Through P.S.- Mannpur, District- Rajnandgaon (C.G.)

---- Respondent

For Appellants	:	Mr. H.S. Ahluwalia, Advocate.
For State/respondent	:	Ms. K. Tripti Rao, Panel Lawyer.

Hon'ble Shri Justice Ram Prasanna Sharma**CAV JUDGMENT**

1. This appeal is preferred under Section 374(2) of the Code of Criminal Procedure, 1973 against judgment dated 22.08.2012 passed by First Additional Sessions Judge, Rajnandgaon (C.G.) in Session Trial No. 67/2011, wherein the said court convicted all the three appellants for commission of offence under Sections 376(2)(g) & 506(Part-II) of IPC, 1860 and sentenced to R.I. for 10 years and fine of Rs. 1000/- and R.I. for 5 years and fine of Rs. 500/- respectively each with further default stipulations.

2. As per the prosecution case, prosecutrix is (PW-2). It is alleged that on 04.05.2011 prosecutrix along with her friends had gone to other village- Deharitola to attend marriage function and when she was returning from the function at about 12.00 p.m. in night, all the accused persons dragged her towards forest where appellant- Virendra Kumar committed rape on her and rest of two appellants were in group and acted in furtherance of their common intention to commit rape. After rape by Virendra Kumar, appellant- Yogesh Kumar committed rape on her. Matter was reported on next day and investigated thereof. Appellants were charge-sheeted and after completion of trial, the trial court convicted as mentioned above.
3. To substantiate the charge, the prosecution examined as many as 7 witnesses. Prosecutrix (PW-2) deposed that she had gone to village- Deharitola in a marriage function and while she was returning from the said marriage function at about 12.00 to 12.30 in midnight, all the three appellants dragged her towards forest and threatened her in the forest. Appellant- Virendra Kumar committed rape on her and appellant- Yogesh Kumar and Kamlesh Kumar were sitting near tree at nearby place. While she was returning after the rape by Virendra Kumar, appellant- Yogesh Kumar committed rape on her.
4. Version of this witness is supported by version of Chhatter Singh (PW-3) who is father of the prosecutrix, who has

informed by his son-in-law namely Mahendra Tekam (PW-5) that someone abducted prosecutrix while returning from the function. The prosecutrix informed him that all the three appellants dragged her towards forest and appellant- Virendra Kumar & Yogesh Kumar committed rape on her, while appellant- Kamlesh who was in group of appellants assisted them in commission of rape. Savita (PW-4) also deposed on the same line. Mahendra Tekam (PW-5) also deposed on same line and he deposed that all the three appellants have confessed their guilt. All these witnesses were subjected to searching cross-examination, but nothing could be elicited in favour of the defence.

5. Shirt and underwear of the prosecutrix were seized and when prosecutrix was examined by Dr. Seema Thakur (PW-6), she prepared slide of vaginal slope of prosecutrix and seized underwear & shirts and the same was sent for chemical examination. As per report of chemical examination (Ex. P/25), semen was found in all the articles. From evidence of all the witnesses, it is clear that the prosecutrix is student of class-IX and she is unmarried, therefore, report of forensic laboratory confirmed rape on prosecutrix.
6. Incident took place in the midnight of 4th May, 2011 and matter was reported next day in police station- Mannpur, which is at distance to 9 km. from village- Nedgaon to the place of incident of forest near village- Deharitola, in which all the three appellants have been named as culprit.

7. Learned counsel for the appellants submits that appellant- Kamlesh Kumar did not commit intercourse with her and as per version of the prosecutrix, he was sitting near bush, therefore, charges against appellant- Kamlesh Kumar is not established. He placed reliance in the matter of **Dilip & another Vs. State of M.P.**, reported in **2001 4 Crimes(SC) 105; 2001 0 CrLJ 4721**, **Tameezuddin @ Tammu Vs. State of (NCT) of Delhi** reported in **2009 (4) Crimes(SC) 127**, **Narayan S/o Umrao Vs. State of Madhya Pradesh** reported in **2002 4 MPHT 190**, **Bharwada Bhoginbhai Hirjibhai Vs. State of Gujrat** reported in **1983 0 AIR(SC) 753**, **Bablu @ Uday Vs. State of Chhattisgarh** reported in **2006 3 CGLJ 405** and **Hem Raj S/o Moti Ram Vs. State of Haryana** reported in **2014 2 SCC 395**.
8. Section 376 of IPC is punishable clause for offence of rape and in explanation (1) of the said Section, it is mentioned that 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. All the three appellants were in group when they dragged the prosecutrix towards forest and from evidence of the prosecutrix, appellant- Virendra Kumar committed rape on her, when she was returning after the incident by Virendra Kumar, appellant- Yogesh Kumar committed rape on her. Appellant- Kamlesh Kumar was in group while they dragged the prosecutrix toward forest,

therefore, in absence of any explanation from appellant-Kamlesh Kumar, his participation as a member of said group, is established and his assistance of other co-accused is also established which shows common intention of all the three appellants.

9. Learned counsel for the appellants submits that the appellant-Kamlesh Kumar has no intention to commit rape on prosecutrix with other co-accused, therefore, charge under Section 376(2)(g) of IPC is not made out against him. He further submits that in FIR it is mentioned that appellant-Yogesh Kumar was returning from the place of incident before commission of rape, therefore, his involvement in commission of crime is not established.
10. In view of this Court, when appellant- Yogesh Kumar participated in dragging towards forest is established, his participation as member of group is also established. From evidence of the prosecutrix, it is established that while she was returning from forest, appellant- Yogesh Kumar committed rape on her which shows guilty mind on the part of this appellant and he initially acted in furtherance of common intention, therefore, he cannot escape from criminal liability for the said offence.
11. It is contended on behalf of the appellants that appellant-Yogesh Kumar left the prosecutrix after the incident upto her kitchen garden which shows that it is a case of consent and it is not against her will. In view of this Court, when this

appellant dragged the prosecutrix with other co-accused towards forest where one of the appellant- Virendra Kumar committed rape on her, his participation in furtherance of common intention is established. If, he left the prosecutrix after commission of offence, the same is not sufficient to show his innocence, therefore, he is liable for his criminal act. Considering all the facts and material on record, this court is of the view that the case laws cited by learned counsel for the appellants, are clearly distinguishable from the facts and circumstances of the present case.

12. Rape by group of persons acting in furtherance of common intention is an offence under Section 376(2)(g) of IPC for which the trial court convicted all the three appellants and this Court has no reason to record contrary finding. Conviction of all the appellants for commission of rape under Section 376(2)(g) is hereby affirmed.
13. So far as offence under Section 506 (Part-II) of IPC is concerned, the prosecutrix (PW-2) deposed that the appellants had said that when she will cry then they will kill her, but from her evidence, it is not clear as to who really uttered this words. From her evidence, it is also not clear that any of the appellant was determined to execute the threat. For attracting Section 506 (Part-II). It has to be established that anyone gave the threat was determined to execute threat on spot, but the evidence on this part is lacking. Any words uttered without knowing its consequences is mere fury which

has no substance, therefore, offence under Section 506(Part-II) of IPC is not established. Conviction and sentence under Section 506 (Part-II) is liable to be and is hereby set aside. They are acquitted of the charge under Section 506 (Part-II) of IPC.

14. Accordingly, the appeal is partly allowed. Conviction and sentence passed by the trial court against all the appellants for commission of offence under Section 376 (2)(g) of IPC is maintained. The trial court has awarded minimum sentence, less than minimum cannot be awarded. Sentence part is also affirmed.
15. Appellant- Virendra Kumar and Yogesh Kumar are reported to be in jail, therefore, no order for their arrest etc. is required. Appellant- Kamlesh Kumar is reported to be on bail and his bail bonds are cancelled. The trial court will prepare super-session warrant and issue warrant of arrest against appellant- Kamlesh Kumar and after his arrest, he be sent back to the concerned jail for serving out the remaining part of the jail sentence. The trial court shall submit compliance report on or before 30th January, 2019.

Sd/-
(Ram Prasanna Sharma)
Judge