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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**  
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*Judgment reserved on : 10.01.2018*

*Judgment delivered on : 15.01.2018*

+ CRL.A. 1586/2011, CrI.M.A.No.5122/2015 &  
CrI.M.A.No.16505/2015

VINOD @ BANTI

..... Appellant

Through Mr.Siddharth Aggarwal and  
Ms.Jhanvi Dubey, Advocates.

versus

STATE

..... Respondent

Through Mr.Amit Ahlawat, APP for State.

CORAM:

HON'BLE MS. JUSTICEINDERMEET KAUR

**INDERMEET KAUR, J.**

1 Appellant Vinod @ Bunti has been convicted under Section 376 (2)(g) of the IPC. He has been sentenced to undergo RI for period of 10 years and to pay a fine of Rs.7000/- in default to undergo RI for a period of 1 year. Out of the fine realized a sum of Rs.15,000/- was to be paid to the prosecutrix as token of the compensation. Benefit of Section 428 of the Cr.P.C. has been granted to the convict.

2 Record reflects that on 31.3.2006 a complaint was made by Janaki

Devi regarding missing of her grand daughter “L”. She was 13 years of age. FIR under Section 363 of the IPC was registered. This was against unknown persons. Investigation was handed over to SI Rakesh Kumar.

3 On 10.10.2017 on the basis of a secret information the prosecutrix “L” was recovered from District Moradabad, U.P. She was brought to Delhi. Her statement under Section 164 Cr.P.C. was recorded. In this statement it was alleged that the appellant along with two others namely Tinku and Ramesh (father in law) had committed rape upon her. Usha (mother of the appellant) had induced her to marry Tinku. The family of the appellant was charged sheeted under Sections 363/376 of the IPC.

4 Charge under Section 376 of the IPC was framed against the appellant. Separate charge under Section 376 of the IPC was framed against co-accused Tinku as well. Charge against Ramesh under Section 376 read with Section 109 of the IPC was also framed. These charges were framed on 23.02.2010.

5 The prosecutrix was examined in Court on oath in February, 2011. In her version on oath in Court (examined as PW-13) her version was that the appellant, Tinku and Ramesh had all committed rape upon her along with Titu (another brother of the appellant). Charges were accordingly amended and the charge of gang rape as contained in Section 376 (2)(g) of the IPC

(unamended) was then framed against the appellant and other accused persons.

6      22 witnesses were examined by the prosecution. The star witness of the prosecution was PW-13.

7      Learned counsel for the appellant points out that a substantial improvement has been made in the version of PW-13; although in her initial statement recorded under Section 164 Cr.P.C. she had spoken about the role of the appellant, no role was attributed to Ramesh, Tinku and Titu which submission of learned counsel for the appellant is not quite correct.

8      The statement of the prosecutrix recorded under Section 164 Cr.P.C. had clearly stated that not only the appellant but Tinku and Ramesh had also committed rape upon her. This was against her wishes. The fact that the prosecutrix was a minor (aged 13 years) is a fact which is not in dispute. The age of the prosecutrix as deposed both by PW-1 and PW-4 (grand father of PW-13) was never challenged. No suggestion was given to either of the witnesses that the prosecutrix was not a minor. Even before the doctor at the time when her MLC was recorded her age was disclosed as 13 years. Her statement recorded under Section 164 Cr.P.C. had also recorded her version as a minor. In fact no such argument has been addressed even in this Court

that the prosecutrix was not a minor. That apart PW-7 had brought the school record of the prosecutrix and her admission/withdrawal and transfer certificates again evidenced that she was a minor. The Trial Court had rightly concluded that the prosecutrix being a minor her consent (even presuming that there was a consent) is no consent in the eye of law.

9 Version of PW-13 has been examined in detail by the Trial Court. Her testimony was to the effect that on 28.3.2007 at about 7.00 -7.30 a.m. she had gone to market to purchase some namkeen. Usha (co-accused) met her in the way. She took her home. She was forcibly made to take tea. She was forced to marry with her son Tinku. She was threatened that in case she goes back she would be killed. She was forcibly made to cook food and wash clothes for the family of the appellant. Her further version was that in the absence of Usha the present appellant along with Tinku, Ramesh and Titu committed rape upon her. The vehement submission of learned counsel for appellant is that this version of the prosecutrix had led to the framing of charge under Section 376(2)(g) of the IPC. This is a vital improvement. This Court notes that in her statement recorded under Section 164 Cr.P.C. PW-13 had stated that the appellant along with Tinku and Ramesh committed rape upon her. In this statement Titu had not been named. The role of the

appellant has always remained but initially it was an individual act of the appellant (Section 164 Cr.P.C.) which was on oath improved as a group act which had led to the amendment of the charge as a charge under Section 376(2)(g) of the IPC.

10 The testimony of PW-13 was also corroborated from her medical evidence. Her hymen was found to be torn.

11 Learned counsel for the appellant points out that the conviction of the appellant under Section 376(2)(g) of the IPC is not called for. This is not a case where the prosecution has been able to prove the ingredients of the aforementioned section. Attention has been drawn to the aforementioned provision of law and particularly Explanation-1. Explanation-1 of Section 376 (2)(g) (unamended) IPC reads herein as under:

*“Explanation1.- 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.”*

12 Learned counsel for the appellant rightly points out that initially at the time when the statement of the prosecutrix was recorded under Section 164 Cr.P.C. she had attributed an individual role to the appellant as also to her alleged husband Tinku and to Ramesh (father-in-law) and nowhere was the version of the prosecution that this was a case of gang rape and accordingly

an individual charge of rape under Section 376 of the IPC had been framed against the appellant. It was only after the statement of prosecutrix was recorded in the Court that the Trial Court had thought it fit to amend charge from Section 376 to one Section 376(2)(g) of the IPC.

13 This Court notes that apart from the fact that there was an improvement in the version of PW-13 and the name of Titu had been uttered for the first time in Court even otherwise it was not the version of PW-13, even on oath in Court that this rape was committed by the aforementioned persons together or in a common group with one another. It was not the version of the prosecution that there were more than two members present when this act was committed by the appellant. In her version in Court no detail of any date, time or place as to when this act was committed upon the prosecutrix, even otherwise at the cost of repetition it was never alleged by PW-13 that this act was committed by the appellant at the time when more than one person was present; it was not her version that the appellant was accompanied by any of the aforementioned persons at that time.

14 This Court is thus of the view that conviction under Section 376(2)(g) of the IPC is improper. The conviction is accordingly altered to one under Section 376 of the IPC (unamended).

15 The minimum punishment which can be imposed upon a convict for such a conviction is rigorous imprisonment for a term which shall not be less than seven years but which may be for life and shall also be liable to fine.

16 The offence had taken place in the year 2006. The nominal roll of the appellant reflects that as on the date when he had been granted bail he had undergone incarceration of 7½ years. Accordingly, the sentence already suffered by the appellant be the sentence imposed upon him.

17 Appeal is disposed of in the above terms.

**INDERMEET KAUR, J**

**JANUARY 15, 2018**

**ndn**

