Om Prakash vs State Of Haryana on 7 July, 2011

Equivalent citations: AIR 2011 SUPREME COURT 2682, 2011 (14) SCC 309, 2011 AIR SCW 4245, AIR 2011 SC (CRIMINAL) 1633, 2011 (4) AIR JHAR R 445, 2011 (4) AIR KANT HCR 101, (2011) 104 ALLINDCAS 121 (SC), 2011 (7) SCALE 396, 2011 ALL MR(CRI) 2707, (2012) 1 MAD LJ(CRI) 372, (2011) 3 CHANDCRIC 108, 2012 (3) SCC (CRI) 1319, 2011 (3) KER LT 51 SN, (2011) 3 RECCRIR 616, (2011) 3 CURCRIR 200, (2011) 7 SCALE 396, (2011) 74 ALLCRIC 659, (2011) 49 OCR 979, (2011) 3 DLT(CRL) 379, (2011) 4 CRIMES 64, (2012) 1 ALD(CRL) 148

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Bench: B.S. Chauhan, Swatanter Kumar

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 421 OF 2007

OM PRAKASH ... Appellant

Versus

STATE OF HARYANA ... Respondents

J U D G M E N T

Swatanter Kumar J.

The two accused Om Prakash (hereinafter referred as `the appellant') and Jai Prakash were committed to the Court of Additional Sessions Judge at Jagadhri vide order dated 30th September, 1994 to face trial in the case of Jai Prakash under Sections 363, 366 and 376(2)(g) of the Indian Penal Code, 1860 (in short the `IPC') and in the case of appellant under Sections 368 and 376(2)(g) IPC. Both these accused pleaded not guilty to the charge and faced trial. The prosecution -

examined as many as nine witnesses to bring home the guilt of the accused in response to the questions posed by the Court disclosing incriminating evidence against the accused under Section 313 of the Code of Criminal Procedure, 1973 (in short the 'Code'). The appellant denied the incident and stated that he had never known either Jai Prakash or the prosecutrix. Jai Prakash took the stand that he used to visit the house of one Bhagwan Dass and there was enmity between Bhagwan Dass and the father of the prosecutrix. Fufa of the prosecutrix, Jeet Ram, was posted at the Yamuna Nagar police station and because of personal animosity, he has been falsely implicated.

The trial court vide a detailed judgment dated 30th January, 1996 recorded a finding that all the essential ingredients constituting offence for which the accused were charged were fully proved and subsequently convicted both the accused of the said offences. After hearing them on the quantum of sentence and noticing the antecedents and the family background of the accused, the trial court took a lenient view and sentenced Jai Prakash to undergo rigorous imprisonment for five years under Section 363 of the IPC and to pay a fine of

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Rs.250/- and in default of payment of fine, to undergo further rigorous imprisonment for four months. The Court also convicted him under Section 376 (2)(g) IPC with a sentence of rigorous imprisonment for ten years and fine of Rs.500/- and in default of payment of fine to undergo further rigorous imprisonment for six months. However, the Court awarded sentence of five years rigorous imprisonment to appellant under Section 368 IPC and a fine of Rs.250/- and in default of payment of fine to further undergo rigorous imprisonment for four months and/or for the offence under Section 376(2)(g) of the IPC awarded him R.I. for seven years and fine of Rs.500/-

and to further undergo, in the event of default of payment of fine, four months R.I. Dissatisfied with the judgment of the trial court, Jai Prakash and the appellant preferred separate appeals before the High Court of Punjab and Haryana at Chandigarh. The same were dismissed and the judgment of conviction and order of sentence as awarded by the trial court, was upheld by the High Court vide its well reasoned judgment dated 9th August, 2005. Against this judgment of the High Court, the appellant alone has filed the present appeal.

Learned counsel appearing for the appellant, while challenging the judgment of the High Court before this Court, has contended that there was an inordinate delay in lodging the FIR, the appellant had been falsely implicated in the case and he had no role to play whatsoever either in the alleged kidnapping of the prosecutrix or in raping her. According to him, even if the entire evidence is read in its correct perspective, the appellant would be entitled to the benefit of doubt and consequent acquittal. It is also contended that the basic ingredients of Section 376 (2)(g) IPC are not satisfied in

the present case.

In order to examine the merit of these contentions, it will be important for us to notice the case of the prosecution in brief.

Complainant Ram Pal (PW-6) is a resident of House No. 115 in Vijay Colony and is a labourer in paper mill, Yamunanagar. He has five daughters and one son aged about three years. On the evening of 2nd January, 1994, one of his daughters the prosecutrix, aged about 14 years, went out of the house to throw rubbish but she did not return. The complainant searched for her but she could not be traced. On 3rd January, 1994, his son-in-law - Bali Ram (PW-7) came from Village Topra and told him that Jai Prakash had taken the prosecutrix on his cycle the previous night and then dropped her to Bali Ram's House that morning. After receiving this information he brought his daughter from the village Topra; she did not tell anything to the complainant at that time but after 2-3 days, she narrated the entire incident. She informed that she had been taken away by Jai Prakash-

accused at knife point and he raped her in the house of the appellant in his presence. Ram Pal (PW6), father of the prosecutrix lodged the report with the police on 6th January, 1994. Thereafter, as already noticed, Jai Prakash and the appellant were tried by the court of competent jurisdiction and convicted. In terms of the statement of the prosecutrix, Jai Prakash, accused threatened to kill her if she did not accompany him. She was taken on his cycle to Gulab Nagar after crossing the railway line. He took her to the house of the appellant and talked secretly with him to arrange space and a cot. Both the accused slept in the same room in which she was raped. It has also come in evidence that Jai Prakash had intercourse with her twice after threatening her with a knife and the appellant did not come to her rescue despite her cries for help. The appellant slept in that very room near the door to guard against entry of any other person as well as to prevent her from going out. Jai Prakash threatened to kill the prosecutrix with his knife if she raised alarm and at about 3-4 A.M., Jai Prakash-accused took her away to village Topra on cycle and left her at the house of her brother in law namely Bali Ram.

Dr. V.K. Sharma (PW8) had stated before the Court that he had examined Jai Prakash on 17th January, 1994 and in his opinion, he was capable of performing intercourse and this fact is proved by his report (Ex.PG).

Dr. Neeru Ohri (PW2) had medically examined the prosecutrix on 6th January, 1994 and had opined that the girl had been subjected to coitus. Besides medical experts and the investigating officer, there are three material witnesses-the prosecutrix (PW5), Ram Pal (PW6) and Bali Ram (PW7). All these witnesses have stated what they were told by the prosecutrix. Thus, the basic foundation for either acquittal or holding the accused guilty primarily depends upon the statement of these witnesses. According to her, the appellant met Jai Prakash after he had taken her away at a knife point to Gulab Nagar and there they had talked for some time and then the appellant had provided a cot and space to Jai Prakash. It is not the statement of the prosecutrix that she either over heard or was even certain as to what both of them discussed within that short duration. She has clearly stated that the appellant did not directly or indirectly participate in the act of rape. We are

not concerned with the offence committed by Jai Prakash in the present appeal. Statement of PW6 is primarily based upon what was narrated to him by the prosecutrix so is the statement of PW7. They have no personal knowledge about the event and role, if any, played by the appellant. The entire material evidence would relate to the medical evidence of Jai Prakash for performing the sexual intercourse and that of the prosecutrix that she was subjected to sexual inter course. It is in no way even suggestive of the role, if any, which has been played by the appellant. There can hardly be any doubt that Jai Prakash raped the prosecutrix. As far as the appellant is concerned, according to the prosecutrix, he did not come to her help when she tried out to him and thus the appellant wrongly ensured her confinement in the room where Jai Prakash subjected her to the assault of rape. To put in a nutshell the prosecutrix was threatened at knife point and taken away on the pillion rider on a cycle across a distance of 15 to 20 km, raped and then dropped to her brother in law-Bali Ram's house the next morning. In this entire episode no role is attributed to the appellant. Even according to Bali Ram (PW7), Jai Prakash alone came to drop her at his place. In the words of the prosecutrix " I asked Om Parkash accused to some (sic) to my help but he did not pay any heed. Om Parkash accused has slept in that very room. So that he may guard the entry of any other persons and so may guard my going out...."

This is the precise role, in the words of the prosecutrix, which is attributable to the appellant. Even if we take the statement of the prosecutrix as gospel truth, nothing more can be attributed to the appellant. Of course, Gandhi Prasad (DW1), the defence witness stated that he had been a tenant in Moti Ram's house in Gulab Nagar since five years. His room was situated towards the eastern side of the house and Moti Ram and his family were residing in the opposite room. Moti Ram had since died. The appellant was stated to be the nephew of Moti Ram but neither the owner of the house nor a tenant. The appellant was married, he denied that any girl ever came to those premises. The statement of DW1 does not really advance the case of the defence but the effect of the matter remains that the appellant was stated to be neither the owner nor tenant of the premises in question. Be that as it may, DW1's statement cannot be given greater weightage than the statement of the prosecutrix. It is not even the statement of DW 1 that he was there on that particular day. He has only stated that in January, 1994, he was in his room which obviously does not inspire confidence as it cannot be inferred that he was staying in the room the entire month, day in and day out. His statement was that no girl came to those premises on 2nd January, 1994. He does not even say that for the entire day and night of 2nd January, 1994, he was present in the house. For the above reasons and even otherwise, DW1 appears to be an interested witness being a friend of the appellant as he is staying in the same premises and would be interested in protecting the appellant.

There is some delay in lodging the FIR but that delay has been well explained. A young girl who has undergone the trauma of rape is likely to be reluctant in describing those events to any body including her family members. The moment she told her parents, the report was lodged with the police without any delay. Once a reasonable explanation is rendered by the prosecution then mere delay in lodging of a first information report would not necessarily prove fatal to the case of the prosecution.

The learned counsel appearing for the appellant has hardly been able to bring to our notice any material contradictions in the statements of the prosecution witnesses.

Every small discrepancy or minor contradiction which may erupt in the statements of a witness because of lapse of time, keeping in view the educational and other background of the witness, cannot be treated as fatal to the case of the prosecution. The court must examine the statement in its entirety, correct perspective and in light of the attendant circumstances brought on record by the prosecution.

The High Court in its judgment has not discussed whether the ingredients of Section 376(2)(g) of the IPC are satisfied in the present case. It will be useful to refer the provisions of Section 376(2) of the IPC at this stage which read as under:

"376(1) xxx xxx (2) Whoever,-

(a) being a police officer commits rape-

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand -

home or other place of custody established by or under any law for the time being in force or of a women' s or children' s institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(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:

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 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.

Explanation 2.- "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widows' home or by any other name, which is established and maintained for the reception and care of women or children.

Explanation 3.-" hospital"

means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation."

A plain reading of Section 376(2)(g) with Explanation I thereto shows that where a woman is raped by one or more of 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 Section 376 (2)(g) of the IPC. In other words, the act of gang rape has to be in furtherance of their common intention before the deeming fiction of law can be enforced against the accused. This Court in the case of Ashok Kumar v. State of Haryana, (2003) 2 SCC

-143 had occasion to dwell on Explanation 1 to Section 376(2)

(g), IPC while examining whether the appellant Ashok Kumar could be convicted under the same because at the crucial time, he happened to be in the house of the co-accused Anil Kumar in whose case the judgment of conviction under Section 376(2)(g) had attained finality. The Court observed that the prosecution must adduce evidence to show that more than one accused has acted in concert and in such an event, if rape had been committed by even one of the accused all will be guilty irrespective of the fact that she has not been raped by all of them. Therefore, it may not be necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused. The provision embodies a principle of joint liability and the essence of that liability is existence of common intention. That common intention pre-supposes prior concert as there must be meeting of minds, which may be determined from the conduct of the offenders which is revealed during the course of action. After examining the circumstances relied upon by the prosecution to indicate concert, the Court in Ashok Kumar (supra) concluded that mere presence of the appellant could not establish that he had shared a common intention with the co-accused to rape the prosecutrix. A similar view was taken in the case of Bhupinder Sharma v. State of Himachal Pradesh [(2003) 8 SCC 551] in which the court held as under:

> "14. In cases of gang rape the proof of completed act of rape by each accused on the victim is not required. The statutory intention in introducing Explanation 1 in relation to Section 376(2)(g) appears to have been done with a view to effectively deal with the growing menace of gang rape. In such circumstances, it is not necessary that the prosecution should adduce clinching proof of a completed act of rape by each one of the accused on the victim or on each one of the victims where there are more than one in order to find the accused guilty of gang rape and convict them under Section

376 IPC."

Another Bench of this Court in the case of Pardeep Kumar v. Union Administration, Chandigarh, [(2006) 10 SCC 608] after noticing the judgment of this Court in the case of Ashok Kumar (supra), Bhupinder Sharma (supra) and Priya Patel v. State of M.P. [(2006) 6 SCC 263], while elaborating the ingredients of the offence under Section 376(2)(g) of the I.P.C. stated the law as follows:

> "10. To bring the offence of rape within the purview of Section 376(2)(g) IPC, read with Explanation 1 to this section, it is necessary for the prosecution to prove:
>
> (i) that more than one person had acted in concert with the common intention to commit rape on the victim;
>
> (ii) that more that one accused had acted in concert in commission of crime of rape with pre-arranged plan, prior meeting of mind and with element of participation in action. Common intention would be action in concert in pre-arranged plan or a plan formed suddenly at the time of commission of offence which is reflected by the element of participation in action or by the proof of the fact of inaction when the action would be necessary. The prosecution would be required to prove pre-meeting of minds of the accused persons prior to commission of offence of rape by substantial evidence or by circumstantial evidence; and
>
> (iii) that in furtherance of such common intention one or more persons of the group actually committed offence of rape on victim or victims. Prosecution is not required to prove actual commission of -

rape by each and every accused forming group.

11. On proof of common intention of the group of persons which would be of more than one, to commit the offence of rape, actual act of rape by even one individual forming group, would fasten the guilt on other members of the group, although he or they have not committed rape on the victim or victims.

12. It is settled law that the common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances."

It must be noticed that in the case of Pardeep Kumar (supra), the Court stated the above principles but acquitted the accused. According to the statement of the prosecutrix in that case, the accused had reached the premises after commission of the offence, though he had consumed liquor with the persons who had actually raped the prosecutrix. The Court came to the conclusion that there was no common intention or prior concert to commit the offence of gang rape as mere presence would not

be sufficient to find the appellant guilty by taking aid of Explanation I. The present case is slightly similar to the case of Pardeep Kumar (supra), of course, it is not in any way identical on facts. In the case in hand, the prosecutrix had not been gang-raped, as alleged by the prosecution, and she had travelled all the way, i.e. nearly 15-20 kms on a cycle. Thus, the intention to kidnap and commit rape or subject her to sexual assault was the intention of Jai Prakash alone. There was no prior plan or meeting of minds between the appellant and the Jai Prakash to either kidnap or to rape the prosecutrix. As per the statement of the prosecutrix, the appellant had provided a room to both Jai Prakash and the prosecutrix and remained there to see that she does not go out or that nobody comes in. The crucial question in this entire sequence of events is whether Jai Prakash told the appellant that he had kidnapped the prosecutrix or that the prosecutrix was known to him and had accompanied him of her own accord. There is no direct evidence in this regard. A collective reading of the evidence would show that the role of the appellant is limited to wrongfully confining the prosecutrix and not rendering help when asked for.

However, it would have been an entirely different situation if the prosecutrix had stated in her statement that the appellant had been told by Jai Prakash about her alleged kidnapping and his intention to rape her, during the short conversation that they are stated to have had before entering the room. It is clear from her statement that she does not even claim that she overheard the conversation. Thus, it may not be possible for the Court to draw an adverse inference against the appellant when the prosecution has not been able to lead any definite evidence in that regard.

In the case of Smt. Saroj Kumari v. The State of U.P. [(1973) 3 SCC 669], this Court while explaining the constituents of an offence under Section 368 of the IPC clearly held that when the person in question has been kidnapped, the accused knew that the said person had been kidnapped and the accused having such knowledge, wrongfully conceals or confines the person concerned then the ingredients of Section 368 of the IPC are said to be satisfied. The prosecution evidence and particularly the statement of the prosecutrix shows that the act of kidnapping with the intention to rape and actual commission of rape of the prosecutrix were completed by Jai Prakash himself. The appellant had rendered the help of providing a room but there is nothing on the record, including the statement of the prosecutrix, to show that she overheard Jai Prakash telling the appellant that he had kidnapped her and/or that the appellant had any knowledge of the fact that she had been kidnapped.

The possibility of the appellant being informed by the Jai Prakash that she had come of her own will and had travelled a long distance of 15-20 km without protest does not appear to be unreasonable. As noticed, according to the prosecutrix, it was under threat but the prosecution was expected to produce evidence to show that the factum of kidnapping as well as intent to commit a rape was known to the appellant either directly or at least by circumstantial evidence. As per the evidence of the prosecution, the room where the prosecutrix was raped belonged to one Sh. Moti Ram, the uncle of the appellant who had died. Except the statement of DW1, no other defence had been led by the appellant to prove that he is innocent or has been falsely implicated. Though DW1 had made a vague statement that on the date of occurrence, no girl had come to that room, that statement cannot be said to be truthful and it does not inspire confidence.

Even in the cases where the statement of prosecutrix is accepted as truthful, it is expected of the prosecution to show some basic evidence of common intention or concert prior to commission of the offence. In the present case, it is an undisputed fact that Jai Prakash alone at the knife point had taken away the prosecutrix across a distance of more than 15 km and it is only after he reached Gulab Nagar that he met the appellant. Except providing a space and cot and helping the accused in wrongfully detaining the prosecutrix, no further act or common intention is attributable. There is no evidence that there was a common concert or common intention or meeting of minds prior to commission of the offence between the two accused.

For the reasons afore-recorded, we partially accept the present appeal. The judgment of the trial court convicting the accused under Section 376(2)(g) of the IPC is set aside and he is acquitted of the said charge. However, his conviction under Section 368 of the IPC and the sentence awarded by the High Court is maintained. Therefore, the accused shall undergo rigorous imprisonment for five years with fine of ` 5000/-, in default of payment of fine to undergo rigorous imprisonment for four months.

The appeal is accordingly disposed of.

.....J. [Dr. B.S. Chauhan] .....J. [Swatanter Kumar] New Delhi;

July 7, 2011 ***