

**A.F.R.****Judgment Reserved On: 08.02.2023****Judgment Delivered On: 13.02.2023****Court No. - 68****Case :- APPLICATION U/S 482 No. - 39234 of 2022****Applicant :- Suneeta Pandey****Opposite Party :- State Of U.P. And Another****Counsel for Applicant :- Ravindra Prakash Srivastava****Counsel for Opposite Party :- G.A.****Hon'ble Shekhar Kumar Yadav,J.**

1. Heard Sri Ravindra Prakash Srivastava, learned counsel for the applicant and Sri R.P. Mishra, learned A.G.A. for the State as well as perused the record.

2. The present application has been filed by the applicant- Suneeta Pandey for quashing of the impugned order dated 03.12.2018, whereby the applicant has been summoned to face the trial u/s 376-D, 212 IPC in exercise of power conferred under Section 319 Cr.P.C. as well as entire proceedings of Special Criminal (Sexual) Case No.08 of 2016 (State Vs. Fanindra Mani Ojha alias Dablu and others) arising out of Case Crime No.874 of 2015, under section 376-D & 212 I.P.C., Police Station- Kotwali Bansi, District- Siddharth Nagar, pending in the court of Additional District and Sessions Judge- Ist, Siddharth Nagar with a further prayer to stay the further proceedings of the aforesaid case.

3. As per F.I.R., the incident took place on 24.06.2015 and the F.I.R. was lodged against unknown persons on 28.07.2015 bearing Case Crime No. 874 of 2015, under Sections 363 and 366 I.P.C. alleging therein that someone has enticed away the daughter of the informant aged about 15 years and took her with him.

4. Statement of the victim has been recorded under Section 161 and 164 Cr.P.C. The victim in her statement recorded under Section 164

Cr.P.C. has stated that applicant was involved in the alleged incident but the applicant was not named in the charge sheet. Thereafter, opposite party no.2 filed an application under Section 319 Cr.P.C. for summoning the applicant and the court below vide order dated 03.12.2018 has summoned the applicant to face trial for the offence under Sections 376-D and 212 Cr.P.C. It is this order which is subject matter of challenge before this Court.

5. Learned counsel for the applicant submitted that the applicant is a lady hence no offence under Section 376-D I.P.C. is made out against the applicant and she has been wrongly summoned by the trial court. It is further argued that the applicant has been summoned in exercise of powers conferred under Section 319 Cr.P.C. solely relying upon the statement of Victim (P.W-1) as well as some other extraneous documents, which in fact is not sufficient. He contends that in view of the aforesaid facts and circumstances, the impugned order under challenge is vitiated by manifest error of law and amounts to blatant miscarriage of justice, and, therefore, is liable to be quashed.

6. Learned counsel for the applicant has further argued that the trial court has grossly erred in summoning the applicant for the offence punishable under Sectin 376-D IPC and Section 212 IPC. It is argued that a woman cannot commit rape and therefore, she cannot be prosecuted for gang rape because woman cannot be said to have an intention to commit rape. In support of his submission, he relied upon a decision of Hon'ble Supreme Court in **Priya Patel Vs. State of M.P. and another, (2006) 3 SCC (Cri.) 96.** He has further relied upon the judgment of the Apex Court in the case of **State of Rajasthan Vs. Hemraj & Another** reported in **2009 (12) SCC 402.** It is also submitted that the applicant cannot be held guilty even in terms of the explanation to Section 376(2)(g) of IPC.

The extract of Section 375 & 376(2)(g) IPC prior to amendment is as under:-

**375. Rape** :-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.

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.

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.

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

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.]

**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:

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,--**

xx xx 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:

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 I.--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.

7. On the other hand, learned A.G.A. has opposed the submission of learned counsel for the applicant and submitted that applicant has committed the alleged offence and it cannot be said that being a lady the applicant or a women cannot commit the offence under Section 376-D I.P.C. The judgements relied upon by the learned counsel for the applicant are of no help as the same are realted to prior to the amendment in the provisions of Sections 375 to 376E IPC.

8. I have considered the submission made by learned counsel for the applicant and the provisions of Section 319 Cr.P.C. and have arrived at a conclusion that no interference is called for in the impugned order. The scope and ambit of Section 319 of the Code have been elucidated in the case of **Hardeep Singh Vs. State of Punjab and others, (2014) 3 SCC 92** by the Hon'ble Apex Court. It has been held that, all that is required by the Court for invoking its powers under Section 319 Cr.P.C. is to be satisfied that from the evidence adduced before it, the person against whom no charge had been framed, but whose complicity appears to be clear, should be tried together with the accused. The ratio laid down by the Supreme Court in Hardeep Singh's case has been explained by the Hon. Apex Court in the case **Manjeet Singh Vs State of Haryana and others, (2021) SCC Online SC 632**. The Supreme Court after noticing its subsequent judgements on the issue, summarized the scope and ambit of the powers of the Court under Section 319 Cr.P.C. and has held that it is only the material collected by the court during the course of inquiry or trial and not the material collected by the investigating agency during the investigation of the case which can be used, while arraigning an additional accused. The Supreme Court has made it clear that the word "**evidence**" appearing in Section 319 Cr.P.C. means only such evidence as is made before the court in relation to statements and in relation to the documents which can be used by the court for unveiling all facts, other than the material collected during investigation. Of course, the evidence would also include the evidence led during the trial of the case after

framing of charges. It is also laid down that besides the evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 of the Cr. P. C.

9. So far as the argument of learned counsel for the applicant that a woman cannot commit rape and, therefore, she cannot be prosecuted for gang rape is not correct after going through the amended provisions of Section 375 to 376E IPC by Act 13 of 2013 of the Indint Penal Code, 1860.

10. The case of **Priya Patel (Supra)**, was a case of gang rape, where the wife of the appellant facilitated commission of gang rape within the meaning of Section 376(2)(g) IPC. After elaborate discussion on the provisions under Sectin 375 and 376 IPC, it was held therein, amongst other, that a woman cannot be prosecuted for alleged commission of offence of gang rape.

11. However, going through the amended provisions of Section 375 IPC & 376 IPC, the question, whether a female can commit the offence of rape is itself clear by the non-ambiguous language of section 375 of IPC which specifically states that the act of rape can only be done by a '**man**' and not by "**any woman**". Therefore, a woman cannot commit rape. But looking through again the amended provision of Section 376-D IPC, which is a distinct and separate offence of **Gang Rape**-according to which- "Where a woman is raped by '**one or more persons**' constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have comitted the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that persons's natural life, and with fine". Thus, from the language used in Section 376-D IPC, it is seen that in order to establish an offence under Section 376-D IPC, the

prosecution has to adduce evidence to indicate that **one or more persons** had acted in concert and in such an event, if rape had been committed by even one, all the accused will be guilty irrespective of the fact that victim had been raped by one or more of them. In other words this provision embodies a principle of joint liability and the essence of that liability is the existence of common intention that common intention presupposes prior concert which may be determined from the conduct of offenders revealed during the course of action. In such cases, there must be criminal sharing, marking out a certain measure of jointness in the commission of offence. The term "person" used in the Section should not be construed in a narrow sense. Section 11 I.P.C. defines 'person' as it includes any company or association or body of persons whether incorporated or not. The word "person" is also defined in the Shorter Oxford English Dictionary in two ways: firstly, it is defined as "an individual human being" or "a man, woman, or child"; and, secondly, as "the living body of a human being". As such, a women can not commit the offense of rape but if she facilitated the act of rape with a group of people then she may be prosecuted for Gang Rape in view of the amended provisions. Unlike man, a woman can also be held guilty of sexual offences. A woman can also be held guilty of gang rape if she has facilitated the act of rape with a group of person.

**12.** Keeping in view of the aforesaid facts and law laid down by the Apex Court, I find no scope for interference in the impugned order passed by the trial court at this stage. **The application has no force and is accordingly dismissed.**

**Order Date :-** 13.02.2023  
Krishna\*

**(Shekhar Kumar Yadav, J.)**