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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 15.10.2026

\# **CNR No. DLHC010036132025**

\+ CRL.REV. P. 37/2025 & CRL.M.A. 2891/2025

ANSXXX AND ANR .....Petitioners

Through: Ms. Tanya Agarwal, Advocate with Ms. Ritu, Mr. Akshay Singhal and Mr. Vishal M., Advocates.
Mr. Rohan J. Alva, *Amicus-Curiae* with Mr. Anant Sanghi, Advocate.

versus

STATE OF NCT OF DELHI AND ANR .....Respondents

Through: Mr. Digam Singh Dagar, APP for State with SI Naresh Kumar, P.S.: Bhalswa Dairy.

HON'BLE MR. JUSTICE A. J. BHAMBHANI

J U D G M E N T

A. J. BHAMBHANI, J

"He who holds the ladder is as guilty as the thief.[1]"

By way of the present petition filed under sections 438, 442 and 528 of the Bharatiya Nagarik Suraksha Sanhita, 2023 ('BNSS') read with Article 227 of the Constitution of India, the petitioners impugn order on charge dated 17.01.2025 passed by the learned Additional Sessions Judge:05 (POCSO) North District, Rohini Courts in case FIR No. 0520/2024 dated 09.07.2024 registered under section 137(2) of the Bharatiya Nyaya Sanhita, 2023 ('BNS') at P.S.:

[1] Translation of a German proverb.

Bhalswa Dairy, Delhi. Upon completion of investigation, allegations of offences under the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act') have been added *vidé* chargesheet dated 27.11.2024 filed in the matter.

2. *Vidé* impugned order dated 17.01.2025, the petitioners have been charged variously for the offences under sections 70(2)/351(3)/64(2)(m) of the BNS and section 6 of the POCSO Act.[2] Though the prayer in the petition is worded somewhat differently, the petitioners have pressed their challenge only on the ground that petitioner No.1, a woman, cannot be charged with the offence of gang rape.

3. It may be mentioned here for sake of clarity that offences have been alleged against the petitioners for the period between December 2023 to July 2024; which accordingly straddles the period during which the Indian Penal Code, 1860 ('IPC') was in force, as well as the period during which BNS was in force.

4. The short question that arises for consideration in the present matter is:

> *Can a 'woman' be charged with the offence of 'gang rape' under section 376D IPC/section 70 BNS ?*

5. Notice on the present petition was issued *vidé* order dated 30.01.2025, and considering the contours of the matter, an interim order was passed staying further proceedings in the subject FIR before the learned trial court. Order dated 30.01.2025 was subsequently

[2] For reference, the corresponding provisions are sections 376DA and 376DB/506/376(2)(n) of the Indian Penal Code, 1860 respectively.

modified *vidé* orders dated 02.05.2025 and 09.05.2025, to the extent that the learned trial court was permitted to proceed to record the deposition of the victim, so that the petitioners' bail plea could be considered.

6. Status Report dated 11.02.2025 has been filed on behalf of the State.

7. *Vidé* order dated 06.03.2025, Mr. Rohan J. Alva, Advocate was appointed as *Amicus Curiae* to assist the court in the matter.

8. Final written submissions dated 30.04.2025 have been filed on behalf of the petitioners; and written submissions dated 20.03.2025 have been filed by learned *Amicus.*

9. The court has heard Ms. Tanya Agarwal, learned counsel appearing on behalf of the petitioner and learned *Amicus*, at length. Mr. Digam Singh Dagar, learned APP appearing for the State has adopted the submissions made by learned *Amicus*.

FACTUAL MATRIX

10. Briefly, the subject FIR was registered on 09.07.2024 at the instance of petitioner No.1, who is the mother of the minor victim. Initially the allegation in the FIR was that the minor had been kidnapped. During investigation, on 01.10.2024 the victim came to the police station of her own accord, whereafter she was sent for medical examination to BJRM Hospital, Delhi. During her medical examination, the victim stated that she had been sexually assaulted. Status report dated 11.02.2025 narrates that the victim refused internal medical examination.

11. On 04.10.2024 the victim's statement was recorded under section 183 BNSS. In that statement the victim stated that on 23.12.2023, she was

threatened by petitioner No.1 that if she did not have physical relations with petitioner No.2, petitioner No.1 would kill her. The victim said that despite her protestations, petitioner No.1 forced the victim to make physical relations with petitioner No.2. The victim further stated that during the incidents of sexual assault on her, petitioner No.1 remained present in the same room. She said that she was sexually assaulted multiple times between December 2023 and July 2024. The victim also said that a video-clip of the incident of 23.12.2023 would be found on petitioner No.1's mobile phone. Lastly, the victim stated that when she was threatened again by petitioner No.1 into having sexual relations with petitioner No.2, she left home on 08.07.2024.

SUBMISSIONS ON BEHALF OF THE PETITIONERS

12. Arguing on behalf of the petitioners, the main plank of Ms. Agarwal's submissions is that a charge of gang rape is not tenable against petitioner No.1 at all, since petitioner No.1 is a woman and as per the settled interpretation of law, a woman can never be charged with that offence.

13. The legal proposition canvassed by Ms. Agarwal, may be stated thus:

> *That as per the definition of 'rape' in section 63 BNS only a 'man' can commit the offence of 'rape'; and therefore the reference in section 70 BNS, which defines 'gang rape', to a 'group of persons' can only mean a 'group of men'.*

14. Ms. Agarwal has submitted that in fact the question of whether a woman can be prosecuted for gang rape is no longer *res integra,* since the question stands decided by the rulings of the Supreme Court in

Priya Patel vs. State of M.P. & Anr.[3] and ***State of Rajasthan vs. Hemraj & Anr.***[4]

15. It has been pointed-out that in *Priya Patel* the Supreme Court has 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 the same intention or similar intention. The sine qua non for bringing in application of*

[3] (2006) 6 SCC 263
[4] (2009) 12 SCC 403

> *Section 34 IPC is 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 the 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)****."*

(emphasis supplied)

16. It has further been submitted that the same view has been followed and reiterated by the Supreme Court in *Hemraj*.

17. Ms. Agarwal has argued that the phrase "one or more persons constituting a group or acting in furtherance of a common intention" appearing in section 70 BNS (and in the earlier section 376D IPC) has in substance been carried-over from Explanation 1 to section 376(2)(g) IPC as it stood before the enactment of Criminal Law (Amendment) Act, 2013. It has further been contended that like section 375 IPC before it, section 63 BNS still only names a "man" as the perpetrator of the offence of rape. It has accordingly been argued on behalf of the petitioners that the ratio of *Priya Patel* and *Hemraj* applies squarely to the present case, and binds this court; and consequently petitioner No.1, being a woman, cannot be charged with gang rape under section 70 BNS.

18. Elaborating on her argument, learned counsel has referred first to section 63 BNS [which is identical to post-2013 section 375 IPC], which defines 'rape' as under:

***63. Rape**.—**A man** is said to commit "rape" if he —*

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions—

(i) against her will;

(ii) without her consent;

(iii) 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;

(iv) 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;

(v) 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;

(vi) with or without her consent, when she is under eighteen years of age;

(vii) when she is unable to communicate consent.

Explanation 1.—For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1..—A medical procedure or intervention shall not constitute rape.

Exception 2..—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.

(emphasis supplied)

19. It has been the petitioners' contention that as per section 63 BNS, only a *man* can be charged with the offence of rape if he commits any of the acts described in section 63(a) to (d) under the circumstances set-out in that provision.

20. Next, attention of the court has been drawn to section 70 BNS [which is identical to section 376D IPC] which defines the offence of 'gang rape' in the following terms:

70. Gang rape.—(1) 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 committed 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 imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, and with fine:*

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this sub-section shall be paid to the victim.

(2) Where a woman under eighteen years of age 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 committed the offence of rape*** *and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine, or with death:*
>
> *Provided that … …*

(emphasis supplied)

21. It has accordingly been argued that, since going by the plain definition of the offence, only a 'man' can commit rape, the offence of 'gang rape' also can only be committed by a 'group of men' and a woman can never be charged with that offence.

22. To further substantiate her argument, while drawing parallels with other offences in the penal code, Ms. Agarwal has placed reliance on the judgment of the Supreme Court in ***Rafiq Ahmad alias Rafi vs. State of U.P.***[5], in which case the Supreme Court has interpreted the reference to 'murder' as it appears in section 396 IPC *viz.,* in the offence of 'dacoity with murder'. The relevant portion of *Rafiq* reads as follows:

> "*62. On the conjoint reading of Sections 396 and 302 IPC,* ***it is clear that the offence of murder has been lifted and incorporated in the provisions of Section 396 IPC****. In other words, the offence of murder punishable under Section 302 and as defined under Section 300 will have to be read into the provisions of offences stated under Section 396 IPC. In other words,* ***where a provision is physically lifted and made part of another provision, it shall fall within the ambit and scope of principle akin to "legislation by incorporation" which normally is applied between an existing statute and a newly enacted law****. The expression "murder" appearing in Section 396 would have to take necessarily in its ambit and scope the ingredients of Section 300 IPC. In our*

[5] (2011) 8 SCC 300

> *opinion, there is no scope for any ambiguity. The provisions are clear and admit no scope for application of any other principle of interpretation except the "golden rule of construction" i.e. to read the statutory language grammatically and terminologically in the ordinary and primary sense which it appears in its context without omission or addition.* ***These provisions read collectively, put the matter beyond ambiguity that the offence of murder, is by specific language, included in the offences under Section 396. It will have the same connotation, meaning and ingredients as are contemplated under the provisions of Section 302 IPC***."

(emphasis supplied)

23. Ms. Agarwal has also cited the example of the offence of 'hurt' in section 319 IPC, which, it is submitted has been incorporated in several other provisions of the Indian Penal Code, *inter alia* in: (i) section 321 IPC (voluntarily causing hurt); (ii) section 324 IPC (voluntarily causing hurt by dangerous weapons or means); (iii) section 327 IPC (voluntarily causing hurt to extort property or to constrain to an illegal act); (iv) section 328 IPC (causing hurt by means of poison, etc., with intent to commit an offence); (v) section 330 IPC (voluntarily causing hurt to extort confession or to compel restoration of property); (vi) section 332 IPC (voluntarily causing hurt to deter public servant from his duty); (vii) section 334 IPC (voluntarily causing hurt on provocation); and (viii) section 337 IPC (causing hurt by act endangering life or personal safety of others). It has been submitted that the expression 'hurt' appearing in each of these provisions carries the same connotation, meaning, and ingredients as in section 319 IPC.

24. In the same vein, Ms. Agarwal has also cited section 340 IPC (wrongful confinement), section 359 IPC (kidnapping), and section 405 IPC (criminal breach of trust), to argue that the said offences are also part of other related offences; and in each case the meaning of the basic offence remains the same in all related offences.

25. Ms. Agarwal has accordingly argued that since there is no independent definition of 'rape' in section 70 BNS, which sets-out the offence of 'gang rape', the definition of 'rape' contained in section 63 BNS must be taken to have been incorporated in section 70 BNS for construing the offence of 'gang rape' and must be ascribed the same meaning in the latter provision. It is therefore the submission that, since by definition only a 'man' can commit rape, it is only a 'group of men' that can commit the offence of gang rape.

26. Ms. Agarwal has also submitted that, as a matter of statutory interpretation, whenever the Legislature makes a new law either by way of an amendment or otherwise, there is a presumption that there is no radical departure from existing law, unless so stated in express words.[6]

27. Tracing the legislative history of the offence of rape as defined under section 375 IPC (now section 63 BNS), learned counsel has argued that, in the backdrop of the *Nirbhaya* incident[7] the scope of section 375 IPC was broadened in 2013 only to include acts of non-penile

[6] *M.K. Ranganathan vs. Government of Madras*, 1955 SCC OnLine SC 28, paras 13, 23-24
[7] *Mukesh vs. State (NCT of Delhi)*, (2017) 6 SCC 1

penetration within the definition of rape and *not to include a woman as an offender* for the offence of rape.

28. Learned counsel has also submitted that it is apparent that the Legislature has consciously amended the offence of rape and gang rape *only* to provide for higher punishment for those offences and not for enlarging the scope of who may be charged with the offence.

29. Most importantly, it has been submitted that in the Criminal Law (Amendment) Ordinance 2013, the Legislature has consciously omitted any amendment to the opening line of section 375 IPC and has not replaced the word '*man'* with '*person'* even though that was proposed in the Criminal Law (Amendment) Bill 2012.

30. Thus, Ms. Agarwal has argued that in the absence of an express provision suggesting that a woman can commit rape, and since the Legislature has specifically not amended the opening line of section 375 IPC, it must be taken that the Legislature did not envisage that a 'woman' could be prosecuted for the offence of gang rape under section 376D IPC.

31. To further bolster her contention, learned counsel for the petitioners has argued that the legislative intent in relation to the offence of 'rape' has remained consistent, namely of positioning a 'man' as the perpetrator of that offence.

32. It has further been submitted that interpreting the word 'person' in section 70 BNS to include a woman would lead to absurdity for the following reasons:

    32.1. Firstly, since a woman *acting alone* cannot be prosecuted for the offence of 'rape' for the acts mentioned in section 63(a) to

(d) of the BNS, it would be absurd if for the same acts a *group of women* can be held liable for the offence under section 70 BNS.

32.2. Secondly, being a general term, the word 'person' would take its colour from the context in which it is used;[8] and since the offence of rape, which forms the basis of the offence of gang rape, defines only a 'man' as the perpetrator, it would be incongruous to hold that the word 'person' appearing in section 70 of the BNS could include a woman.

32.3. Thirdly, the phrasing of section 70 BNS is substantially imported from Explanation 1 to section 376(2)(g) IPC (as it stood prior to the 2013 amendment) and section 376D IPC; and the word 'person' has been used in section 70 BNS in the same sense as it was employed in the erstwhile provision.

32.4. Lastly, the recommendation in the Justice J.S. Verma Committee Report dated 23.01.2013, which recommended that the offence of gang rape be modified to cover accused persons "regardless of their gender", stands rejected by the Legislature.

33. In support of her submissions, learned counsel for the petitioners has *inter-alia* relied on the decision of the House of Lords in ***Nairn & Ors. vs. University of St. Andrews***,[9] in which the word 'person' as used in section 27 of the Representation of the People (Scotland) Act, 1868 was interpreted to refer only to 'male' persons. This was done in

[8] Maxwell: Interpretation of statutes, Chapter III, 6th Ed.
[9] [1909] A.C. 147 (HL)

view of the fact that when the statute was introduced in 1868, the Legislature could only have contemplated male persons, since women were not admitted to graduation in any of the Scottish universities, and parliamentary franchise was, by constitutional principle and practice, confined only to men.

34. Counsel has also relied on ***State of Maharashtra vs. Indian Medical Assn. & Anr.,***[10] to argue that general words need to be read in context in which they are used.

35. Accordingly, learned counsel has argued that the ambit of who can be accused for the offence under section 70 BNS or under the erstwhile provisions of the IPC cannot be broadened to include a woman.

36. It has also been argued that the purpose of the deeming fiction in section 70 BNS is to alter the rule of evidence and to provide for higher punishment and not to widen the ambit of the offence, namely of making a woman an accused in cases of gang rape.

37. Ms. Agarwal has also relied on the decision of the Supreme Court in ***Consolidated Coffee Ltd. & Anr. vs. Coffee Board***,[11] to submit that the effect of a deeming provision cannot be such that it betrays the object of the statute. The relevant portion of the judgment cited, reads as under:

> "*11. … … a deeming provision might be made to include what is obvious or what is uncertain or to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail, but in each case it would be a question as to*

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[10](2002) 1 SCC 589
[11](1980) 3 SCC 358

with what object the legislature has made such a deeming provision."

38. In a similar vein, learned counsel for the petitioners has argued that in ***Ashok Kumar vs. State of Haryana***,[12] the Supreme Court has interpreted the phrase 'deemed to have caused her death' used in section 304-B IPC as introducing only a rebuttable presumption. The relevant extract of *Ashok Kumar* is reproduced below:

> "*23.* ***The Court cannot ignore one of the cardinal principles of criminal jurisprudence that a suspect in the Indian law is entitled to the protection of Article 20 of the Constitution of India as well as has a presumption of innocence in his favou****r. In other words, the rule of law requires a person to be innocent till proved guilty.* ***The concept of deeming fiction is hardly applicable to the criminal jurisprudence****. In contradistinction to this aspect, the legislature has applied the concept of deeming fiction to the provisions of Section 304-B. Where other ingredients of Section 304-B are satisfied, in that event, the husband or all relatives shall be deemed to have caused her death. In other words, the offence shall be deemed to have been committed by fiction of law. Once the prosecution proves its case with regard to the basic ingredients of Section 304-B, the Court will presume by deemed fiction of law that the husband or the relatives complained of, has caused her death. Such a presumption can be drawn by the Court keeping in view the evidence produced by the prosecution in support of the substantive charge under Section 304-B of the Code.*
>
> "*24.* ***Of course, deemed fiction would introduce a rebuttable presumption and the husband and his relatives may, by leading their defence and proving that the ingredients of Section 304-B were not satisfied, rebut the same****. While referring to raising of presumption under Section 304-B of the Code, this Court, in Kaliyaperumal v. State of T.N. [(2004) 9 SCC 157 : 2004 SCC (Cri) 1417], stated the following ingredients which should be satisfied : (SCC p. 162, para 4)*

[12] (2010) 12 SCC 350

> *"(1) The question before the court must be whether the accused has committed the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence under Section 304-B IPC).*
>
> *(2) The woman was subjected to cruelty or harassment by her husband or his relatives.*
>
> *(3) Such cruelty or harassment was for, or in connection with any demand for dowry.*
>
> *(4) Such cruelty or harassment was soon before her death.*""

(emphasis supplied)

39. Learned counsel for the petitioners has also placed reliance on the decision of the Supreme Court in ***Sher Singh alias Partapa vs. State of Haryana***[13] to submit that the word 'deemed' as appearing in section 304-B of the IPC has been read down to mean 'presumed'; and, on the prosecution proving the elements of the section 304-B IPC, the only effect of the deeming provision is to shift the burden of proof onto the accused. The relevant extract of *Sher Singh* reads as follows:

> "*16. As is already noted above, Section 113-B of the Evidence Act and Section 304-B IPC were introduced into their respective statutes simultaneously and, therefore, it must ordinarily be assumed that Parliament intentionally used the word "deemed" in Section 304-B to distinguish this provision from the others. In actuality, however, it is well-nigh impossible to give a sensible and legally acceptable meaning to these provisions, unless the word "shown" is used as synonymous to "prove" and the word "presume" as freely interchangeable with the word "deemed". In the realm of civil and fiscal law, it is not difficult to import the ordinary meaning of the word "deem" to denote a set of*

[13](2015) 3 SCC 724

> *circumstances which call to be construed contrary to what they actually are.* ***In criminal legislation, however, it is unpalatable to adopt this approach by rote****. We have the high authority of the Constitution Bench of this Court both in State of Travancore-Cochin v. Shanmugha Vilas Cashewnut Factory [(1953) 1 SCC 826 : AIR 1953 SC 333] and State of T.N. v. Arooran Sugars Ltd. [(1997) 1 SCC 326],* ***requiring the Court to ascertain the purpose behind the statutory fiction brought about by the use of the word "deemed****" so as to give full effect to the legislation and carry it to its logical conclusion. We may add that it is generally posited that there are* ***rebuttable as well as irrebuttable presumptions, the latter oftentimes assuming an artificiality as actuality by means of a deeming provision****. It is* ***abhorrent to criminal jurisprudence to adjudicate a person guilty of an offence even though he had neither intention to commit it nor active participation in its commission****. It is after deep cogitation that we consider it imperative to construe the word "shown" in Section 304-B IPC as to, in fact, connote "prove". In other words, it is for the prosecution to prove that a "dowry death" has occurred, namely,……*
>
> *……* ***Once the presence of these concomitants is established or shown or proved by the prosecution, even by preponderance of possibility, the initial presumption of innocence is replaced by an assumption of guilt of the accused, thereupon transferring the heavy burden of proof upon him and requiring him to produce evidence dislodging his guilt, beyond reasonable doubt. It seems to us that what Parliament intended by using the word "deemed" was that only preponderance of evidence would be insufficient to discharge the husband or his family members of their guilt.*** *This interpretation provides the accused a chance of proving their innocence. ……*"

(emphasis supplied)

40. Relying upon the aforesaid precedents, Ms. Agarwal has argued that the deeming fiction in section 70 BNS is created in order to (i) alter the rule of evidence *i.e.,* once prosecution proves rape, and a *man* is shown to be member of the group, the burden shifts on him to show

otherwise; and (ii) prescribe higher punishment for that offence. Furthermore, learned counsel has emphasized that a legal fiction must be *limited* to the purpose for which it was created,[14] and must be strictly construed.[15]

41. In view of the above, learned counsel for the petitioners has submitted that the deeming fiction contained in section 70 BNS cannot be extended beyond the purpose for which the Legislature intended it; and consequently, a woman cannot be charged with the offence of gang rape.

SUBMISSIONS ON BEHALF OF THE *AMICUS CURIAE*

42. Responding to the arguments made on behalf of the petitioners, Mr. Rohan J. Alva, learned *Amicus* has made the following principal submissions.

43. Drawing parallel with the provisions of section 3 of the POCSO Act, Mr. Alva has first drawn attention to the text of that provision:

> ***3. Penetrative sexual assault**.—A **person** is said to commit "penetrative sexual assault" if—*
>
> *(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or **makes the child to do so with him or any other person**; or*
>
> *(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or **makes the child to do so with him or any other person**; or*
>
> *(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body*

[14] *Bengal Immunity Co. Ltd. vs. State of Bihar*, (1955) 1 SCC 763
[15] *Raj Kumar Khurana vs. State (NCT of Delhi)*, (2009) 6 SCC 72, paras 10 and 11

> *of the child or* ***makes the child to do so with him or any other person****; or*
>
> *(d) he applies his mouth to the penis, vagina, anus, urethra of the child or* ***makes the child to do so to such person or any other person****.*

(emphasis supplied)

44. It has been submitted by learned *Amicus* that clauses (a) to (d) of section 3 show that under the POCSO Act, the offence of 'penetrative sexual assault' may occur in two distinct situations: *one*, where the accused himself engages in the act of penetrative sexual assault upon the child, in which case the offence stands committed by the accused; and *two*, where the accused does not personally engage in any act of penetrative sexual assault but *makes the child suffer the offence at the hands of any other person*. It is learned *Amicus*' submission that in the second situation also, the accused would be culpable for the offence under section 3. It has been submitted that accordingly even where a *woman* makes a child suffer penetrative sexual assault of the nature mentioned in clauses (a) to (d) of section 3 at the hands of any other person, the offence under section 3 is complete against the woman also, and not just against the person who commits the physical act.

45. In support of the above submissions, learned *Amicus* has placed reliance on the decision of this bench in ***Sundari Gautam vs. State of NCT of Delhi.***[16] Learned *Amicus* has pointed-out that this court has already declared section 3 of the POCSO Act to be gender-neutral, thereby holding that a woman can also be charged with the offence

[16] 2024:DHC:5944 (CRL.REV.P. 852/2024, decided on 09.08.2024)

under section 3 of the POCSO Act. The relevant paras of *Sundari Gautam* as referred to by learned *Amicus* read as follows:

> "*18. The next important provision, which is required to be read is section 8 of the IPC, which reads as follows :*
>
> *8. Gender.—The pronoun "he" and its derivatives are used of any person, whether male or female.*
>
> * * * * *
>
> "*22. It is clear that the pronoun 'he 'is not defined anywhere in the POCSO Act. In view of the provision of section 2(2) of the POCSO Act, one must fall back upon the definition of that pronoun as it appears in section 8 of the IPC. Giving due regard to the fact that the Legislature enacted the POCSO Act in order to provide protection to children from sexual offences –* ***regardless of whether an offence is committed upon a child by a man or a woman*** *– the court must not interpret any provision of the statute that derogates from the legislative intent and purpose.*
>
> "*23. When viewed from this lens, the only rational inference is that the pronoun 'he 'appearing in section 3(a), 3(b), 3(c) and 3(d)* ***must not be so interpreted as to restrict the offence engrafted in those sections only to a 'man'****. It is extremely important to note that the said provisions include within the ambit of penetrative sexual assault , the insertion of any object or body-part ; or the manipulation of any body- part of a child to cause penetration; or the application of the mouth . It would therefore be completely illogical to say that the offence contemplated in those provisions refers only to penetration by a penis.*
>
> "*24. Though it has been argued on behalf of the petitioner that in Independent Thought (supra) the Supreme Court has held that the definition of 'rape 'appearing in the IPC is pari materia with the definition of 'penetrative sexual assault 'in the POCSO Act, in the opinion of this court, the petitioner is reading the observations of the Supreme Court in Independent Thought in the wrong context and manner, since, as argued by the learned APP, the definition of 'penetrative sexual assault' under section 3 and of*

'aggravated penetrative sexual assault' in section 5 of the POCSO Act is not limited to the offence of rape.

"*25. In the opinion of this court, a comparison of the offence defined in section 375 of the IPC (on the one hand) and in sections 3 and 5 of the POSCO Act (on the other) shows that the offences so defined are different. Though the acts that form the gravamen of the offence in section 375 of the IPC are the same as those in sections 3 and 5 of the POCSO Act,* ***the opening line of section 375 specifically refers to a "man" whereas the opening line of section 3 refers to a "person"****. The scope and meaning of the word "man" appearing in section 375 of the IPC is not under consideration of this court in the present proceedings. But there is no reason why the word "person" appearing section 3 of the POCSO Act should be read as referring only to a 'male'.* ***It is accordingly held that the acts mentioned sections 3 and 5 of the POCSO Act are an offence regardless of the gender of the offender provided the acts are committed upon a child*** *.*

"*26. On a conjoint reading of the foregoing provisions of the POCSO Act, it is accordingly held that the word 'he' appearing in section 3 of the POCSCO Act cannot be given a restrictive meaning, to say that it refers only to a 'male'; but must be given its intended meaning, namely that it* ***includes within its ambit any offender irrespective of their gender*** *.*"

(emphasis supplied)

46. Learned *Amicus* has submitted that *Sundari Gautam* reaffirms the legislative intent of the POCSO Act, namely to deal holistically with every situation in which a child may come to be subjected to penetrative sexual assault, and to hold culpable even those who do not themselves engage in the physical act envisaged in the offence; and that any person, regardless of gender, who *compels the child to suffer* the offence under section 3 as well as the person who commits it are equally liable.

47. Next, learned *Amicus* has drawn attention to the decision of the Allahabad High Court in ***Suneeta Pandey vs. State of U.P. & Anr.***,[17] wherein, on a challenge to the summoning of a woman under section 319 of the Cr.P.C. to face trial under section 376D of the IPC, it was held that a woman can be prosecuted for gang rape under the amended provision, with the court expressing the following opinion:

> "*12. 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 376D 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 committed 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 376D IPC, it is seen that in order to establish an offence under Section 376D 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*** **[sic]** ***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*

[17] 2023 SCC OnLine All 44

> *offence.* ***The term "person" used in the Section should not be construed*** **[sic]** ***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*** **[sic]** ***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* [sic] *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.***"
>
> (emphasis supplied)

48. Adverting to the submission made on behalf of the petitioners relying on *Priya Patel* and *Hemraj*, namely that a woman cannot be liable for the offence of rape under section 375 IPC or for gang rape under section 376(2)(g) of the IPC (as those provisions stood prior to the amendment in 2013), learned *Amicus* has pointed-out that post the 2013 amendment, the said two provisions have undergone substantive change, and that section 63 BNS and section 70 BNS have followed the amended version of the respective IPC provisions.

49. Learned *Amicus* has argued that it is important to note the change in the language of the definition of 'rape' in the amended section 375 IPC, which change has been retained in section 63 BNS, is summarised in the table below:

Pre-Criminal Law (Amendment) Act, 2013	As amended by The Criminal Law (Amendment) Act, 2013	Section 63 BNS
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*	***375. Rape**.—A man is said to commit "rape" if he—* *(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person;* *or* ***(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or*** ***(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or*** *(d)* ***applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven 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*	***63. Rape.—A man is said to commit "rape" if he—*** *(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person;* *or* ***(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or*** ***(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or*** *(d)* ***applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person under the circumstances falling under any of the following seven descriptions—*** *(i) against her will;* *(ii) without her consent;* *(iii) with her consent, when her consent has been obtained by putting*

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.*	*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 eighteen years of age.* *Seventhly.—When she is unable to communicate consent.* *Explanation 1.—For the purposes of this section, "vagina" shall also include labia majora.* *Explanation 2.— Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:*	*her or any person in whom she is interested, in fear of death or of hurt;* *(iv) 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;* *(v) 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;* *(vi) with or without her consent, when she is under eighteen years of age;* *(vii) when she is unable to communicate consent.* *Explanation 1.—For the purposes of this section, "vagina" shall also include labia majora.* *Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-*

	Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity. *Exception 1.— A medical procedure or intervention shall not constitute rape.* *Exception 2.— Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.*	*verbal communication, communicates willingness to participate in the specific sexual act:* *Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.* *Exception 1. — A medical procedure or intervention shall not constitute rape.* *Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.*

50. It has been submitted that after the 2013 amendment, the latter part of each of clauses (a) to (d) of section 375 IPC have been amended to include the crucial words: "or makes her to do so with him or any other person"; and with the addition of those words the provision now also treats as 'rape' any action where a 'man' makes the victim suffer any of the acts as set-out in the four clauses of section 375 with him or with "any other person". Furthermore, it has been argued that the aforesaid words are used in contradistinction to the word "man" appearing in the opening part of the provision; and that the same legislative scheme has been followed in section 63 of the BNS as well. Learned *Amicus* has submitted that accordingly, if "any other

person" – whether man or woman – commits any of the offending acts as set-out in clauses (a) to (d) of section 375 IPC or section 63 BNS, which are *ad-verbatim*, they too would fall within the net of liability cast by the said offence.

51. Learned *Amicus* has however pointed-out that, taken on its terms, section 63 makes a woman culpable *only* when she acts at the behest of a man; so that it may be argued that a woman cannot, as a sole accused, commit the offence of rape. It has accordingly been submitted that the word "man" in the opening line of section 63 of the BNS may be interpreted as including "woman", or as meaning a "person", the direct result of which is that any person, regardless of gender, could be liable for that offence if they commit the actions contemplated in that provision.

52. Attention of this court has also been drawn to section 2(19) of the BNS which defines a "man" as "*male human being of any age*"; a "woman" in section 2(35) as "*female human being of any age*"; and "person" in section 2(26) as including "*any company or association or body of persons, whether incorporated or not*", to point-out however that the definition section opens with the words "*In this Sanhita, unless the context otherwise requires* ……". It has been submitted that the BNS itself therefore permits a word to be accorded a meaning different from its definition *where the context so requires*, arguing that the context of section 63 does require that a wider meaning be accorded to "person" and even to "man" in that provision, for the following reasons:

52.1. By reason of the acts that it criminalises, section 63 BNS clearly envisages that the offence of rape *can* be committed even by a woman (or by any non-male offender), since the offence under section 63 is no longer confined to penile-vaginal penetration;

52.2. The purpose and object of section 63 BNS is to protect women from all forms of sexual assault, and since the provision itself recognises acts of non-penile-vaginal penetration as rape, there is no rational basis to confine its applicability only to a male offender; and

52.3. Confining section 63 BNS only to a male offender would bear no intelligible differentia with rational nexus to the object sought to be achieved by the provision, and the gender of the offender ought not to be the dispositive factor in determining the applicability of the law.

53. It has further been submitted by learned *Amicus* that the Supreme Court ruling in *Priya Patel* itself supports the proposition that words can be read differently from how they are defined in a statute *if the context so requires*, since in that case, while holding that a woman cannot be accused of gang rape under section 376(2)(g) of the IPC as it stood prior to the 2013 amendment, the Supreme Court read the word "persons" in Explanation 1 to section 376(2)(g) to mean "man", given the context in which the provision was being interpreted. In support of his submission learned *Amicus* has relied upon the following extract of *Priya Patel*:

*"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 the same intention or similar intention. The sine qua non for bringing in application of Section 34 IPC is 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 the 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)."

(emphasis supplied)

54. Learned *Amicus* has further placed reliance on the decisions of the Supreme Court in ***Ramakant Mishra alias Lalu & Ors. vs. State of U.P.***[18] and ***V.K. Mishra & Anr. vs. State of Uttarakhand & Anr.***[19] for the proposition that, where the words of a criminal statute need to be *read up* in order to make the statute holistically workable, it is permissible for courts to do so. It is accordingly the *Amicus*' submission that, given the context of section 63 of the BNS, the word "man" may be read as "person", with the consequence that a woman can, in all circumstances, be an accused for an offence under section 63.

55. In relation specifically to the provisions of section 70 BNS and section 376D of the IPC dealing with gang rape, it has been pointed-out that, in the present case, since the alleged offences are alleged to have occurred on several dates both before and after 01.07.2024 (*i.e.,* when the BNS came into force), the allegations attract the provisions of section 376D of the IPC as well as section 70 of the BNS.

56. It has been submitted that section 376D IPC, which was introduced by the 2013 amendment, was couched in identical terms as section 70(1) of the BNS. However, it is pointed-out that prior to the amendment,

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[18](2015) 8 SCC 299
[19](2015) 9 SCC 588

the offence of gang rape was punishable under section 376(2)(g) of the IPC, which read as under:

> *376. Punishment for rape.— ... ...*
>
> *(2) Whoever,— ... ...*
>
> *(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: ... ...*
>
> *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.*

(emphasis supplied)

57. Learned *Amicus* has submitted that in *Priya Patel* and *Hemraj*, on which rulings the petitioners rely, though the Supreme Court held that a woman could not be arrayed as an accused for the offence of gang rape under section 376(2)(g) IPC, the context in which those judgments were delivered is markedly different from the situation that obtains under the extant law; and that therefore, the *ratio decidendi* of *Priya Patel* and *Hemraj* may not fully apply to the present case.

58. It has been pointed-out that section 376(2)(g) IPC was only a punishment provision for an aggravated form of rape, and not an independent and stand-alone offence. It has been submitted that for the said reason, section 376(2)(g) had to be read with section 375 IPC, and prior to its amendment in 2013, the latter provision defined rape as sexual intercourse by a man with a woman in the six situations envisaged therein. It has been argued that it was on a reading of the penal provisions as they then stood, that Explanation 1 to section

376(2)(g) was interpreted in *Priya Patel* and *Hemraj*. It has been submitted that an Explanation, by its very nomenclature and essence, cannot be a stand-alone provision and can only explain the scope of the main provision to which it is appended.

59. To explain the function of an Explanation, learned *Amicus* has relied upon the decision of the Supreme Court in ***S. Sundaram Pillai & Ors. vs. V.R. Pattabiraman & Ors.***,[20] to submit that the purpose of an Explanation is to elucidate the meaning of the provision to which it is attached, and that an Explanation cannot be treated as being on par with the main statutory provision.

60. It has been submitted that, in contradistinction, section 376D of the IPC and section 70 of the BNS are not in the nature of an Explanation to a main provision, but are independent and stand-alone statutory provisions; and that this context is material when examining whether any equivalence ought to be drawn between Explanation 1 to section 376(2)(g) IPC on the one hand, and section 376D IPC and section 70 BNS on the other.

61. Relying upon the decisions of the Supreme Court in ***Oriental Insurance Co. Ltd. vs. Raj Kumari & Ors.***[21] and ***K.T.M.T.M. Abdul Kayoom & Anr. vs. Commissioner of Income Tax***,[22] it has been submitted by learned *Amicus* that a judgment is an authority for a proposition in the context of the specific law and facts in which it is

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[20](1985) 1 SCC 591, para 53
[21](2007) 12 SCC 768
[22]1961 SCC OnLine SC 244

delivered; and that if the Legislature subsequently amends the statute, such judgment cannot be treated as binding in absolute terms.

62. Learned *Amicus* has further submitted that a statutory provision ought to be interpreted in its own context, even in cases where it is similar in phraseology to other provisions; and that contextual interpretation is an important part of statutory interpretation. For this proposition, reliance has been placed on ***Gujarat Urja Vikas Nigam Ltd. vs. Amit Gupta & Ors.***[23] and ***V. Nagarajan vs. SKS Ispat & Power Ltd. & Ors.***,[24] in addition to *Sundari Gautam*.

63. Learned *Amicus* has also submitted that the meaning of section 376D IPC and section 70 BNS ought to be ascertained from the text of the statute and not from the headings of the provisions, which reads "*Gang rape*" which heading may be evocative of the old section 376(2)(g) IPC. Placing reliance on the decisions of the Supreme Court in ***Sarah Mathew vs. Institute of Cardio Vascular Diseases & Ors.***[25] and ***Frick India Ltd. vs. Union of India & Ors.***,[26] it has been submitted that the heading of a statutory provision does not control its true meaning.

64. Turning to the meaning of 'common intention' in the present context, learned *Amicus* has emphasised that while Explanation 1 to section 376(2)(g) IPC used the words "acting in furtherance of ***their*** common intention", section 376D IPC and section 70 BNS use the words

[23](2021) 7 SCC 209
[24](2022) 2 SCC 244
[25](2014) 2 SCC 62, para 47
[26](1990) 1 SCC 400, para 8

"acting in furtherance of ***a*** common intention". It has been submitted that this change in phraseology is important, since it indicates that for purposes of section 376D and section 70, the common intention spoken of is that the offence of rape *be committed on a woman*, and not that each member of the group *should intend to commit the act of rape on a woman*. It has therefore been submitted by learned *Amicus* that different words used in a statute may indicate different meanings. In this regard, reliance has been placed on the decision of the Supreme Court in ***Kailash Nath Agarwal & Ors. vs. Pradeshiya Industrial & Investment Corporation of U.P. Ltd. & Anr***.[27] Furthermore, attention has also been drawn to the following extract of the Supreme Court ruling in *Sher Singh*:

> "*13.* ***In our opinion, it is beyond cavil that where the same word is used in a section and/or in sundry segments of a statute, it should be attributed the same meaning, unless there are compelling reasons to do otherwise. The obverse is where different words are employed in close proximity, or in the same section, or in the same enactment, the assumption must be that the legislature intended them to depict disparate situations, and delineate dissimilar and diverse ramifications***. *Ergo, ordinarily Parliament could not have proposed to ordain that the prosecution should "prove" the existence of a vital sequence of facts, despite having employed the word "shown" in Section 304-B. The question is whether these two words can be construed as synonymous. It seems to us that if the prosecution is required to prove, which always means beyond reasonable doubt, that a dowry death has been committed, there is a risk that the purpose postulated in the provision may be reduced to a cipher. This method of statutory interpretation has consistently been disapproved and deprecated*

[27] (2003) 4 SCC 305, para 20

except in exceptional instances where the syntax permits reading down or reading up of some words of the subject provisions."

(emphasis supplied)

65. It has therefore been submitted by learned *Amicus* that the use of the word "persons" in section 376D IPC and section 70 BNS also assumes salience. It has been argued that in Explanation 1 to section 376(2)(g) IPC, the word "persons" was relatable to the main offence of rape under section 375 IPC, and was therefore interpreted as the plural form for a group of men. However, under section 376D IPC and section 70 BNS, the word "persons" indicates members of the group who have in some way contributed towards the actualisation of the offence of rape on the victim; and since these provisions are independent and stand-alone offences, they are not to be read in aid of, or in relation to, the main offence of rape under section 375 IPC or section 63 BNS.

66. Learned *Amicus* has further submitted that the juristic supposition informing section 376D IPC and section 70 BNS is that it is not essential that each person in the group *individually commits* the offence of rape, or *is even capable* of committing it; rather, if the victim is raped by one man who is part of the group, and the common intention of the group was to have the victim raped, each person is "*deemed to have committed the offence of rape*". It has further been submitted that a deeming provision in a statute fastens responsibility which may in the ordinary course not obtain. In this regard, reliance has been placed on the Supreme Court decision in ***Sudha Rani Garg***

vs. Jagdish Kumar (Dead) & Ors.,[28] the relevant paras of which read as under:

> "*11. When a thing is to be "deemed" something else, it is to be treated as that something else with the attendant consequences, but it is not that something else (per Cave, J. in R. v. Norfolk County Court [(1891) 60 LJQB 379 : 65 LT 22])*
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> "*12. "When a statute gives a definition and then adds that certain things shall be 'deemed' to be covered by the definition, it matters not whether without that addition the definition would have covered them or not." (Per Lord President Cooper in Ferguson v. McMillan [1954 SLT 109])*
>
> "*13. Whether the word "deemed" when used in a statute established a conclusive or a rebuttable presumption depended upon the context. (See St. Leon Village Consolidated School Distt. v. Ronceray [(1960) 23 DLR (2d) 32])*
>
> "*14. "I ... regard its primary function as to bring in something which would otherwise be excluded." (Per Viscount Simonds in Barclays Bank v. IRC [1961 AC 509 (HL)])*
>
> "*15. "Deems" means "is of opinion" or "considers" or "decides" "and there is no implication of steps to be taken before the opinion is formed or the decision is taken". [See R. v. Brixton Prison (Governor), ex p Soblen [(1962) 3 All ER 641 : (1963) 2 QB 243 : (1962) 3 WLR 1154 (CA)] , All ER p. 669 C.] (See Ali M.K. v. State of Kerala [(2003) 11 SCC 632 : 2004 SCC (L&S) 136])*"

67. Learned *Amicus* has further submitted that the fact that an accused played an active role in facilitating the commission of an offence is sufficient to show that the accused shared the common intention for the offence to be committed. In support of this submission learned *Amicus* has drawn attention to the decision of the Privy Council in ***Barendra Kumar Ghosh vs. King-Emperor***[29] and of the Supreme Court in ***State of U.P. vs. Iftikhar Khan & Ors.***[30] It has also been

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[28](2004) 8 SCC 329

[29]1924 SCC OnLine PC 49 : AIR 1925 PC 1

[30](1973) 1 SCC 512

pointed-out that, while upholding the conviction of an accused under sections 302/34 IPC who claimed to have merely stood outside the room where the victim was shot, in *Barendra Kumar Ghosh* the Privy Council has observed as follows:

> "*As soon, however, as the other sections of this part of the Code are looked at, it becomes plain that the words of sec. 34 are not to be eviscerated by reading them in this exceedingly limited sense. By sec. 33 a criminal act in sec. 34 includes a series of acts and, further, "act" includes omission to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By sec. 37, when any offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence.* ***Even if the Appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things "they also serve who only stand and wait."*** *By sec. 38, when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain. Sec. 34 deals with the doing of separate acts, similar or diverse, by several persons;* ***if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself****, for "that act" and "the act" in the latter part of the section must include the whole action covered by "a criminal act" in the first part, because they refer to it. Sec. 37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. Sec. 38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other.*
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> "… … *In truth, however, the amending words introduced, as an essential part of the section, the element of a common intention prescribing the condition, under which each might be criminally liable when there are several actors. Instead of enacting in effect that participation as such might be ignored, which is what the argument amounts to, the amended section said that, if there was action in furtherance of a common intention, the individual came under a special liability thereby, a change altogether Repugnant to the suggested view of the original section. Really the amendment is an amendment, in any true sense of the word, only if the original object was to punish participants by making one man answerable for what another does, provided what is done is done in furtherance of a common intention, and if the amendment then defines more precisely the conditions under which this vicarious or collective liability arises. In other words,* "***a criminal act" means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone****, that is, in a criminal offence.*"

(emphasis supplied)

Furthermore, it has been submitted that, in *Iftikhar Khan* the Supreme Court observed as follows:

> "*33. In Krishna Govind Patil v. State of Maharashtra, [AIR 1963 SC 1413 : (1964) 1 SCR 678 : (1963) 2 SCJ 718] the principle has again been reiterated that before a court convicts a person under Section 302 read with Section 34, it has to record a definite finding that the said person had prior concert with one or more other persons, armed or unarmed, for committing the said offence. In JaikrishnadasManohardas Desai v. State of Bombay, [AIR 1960 SC 889 : (1960) 3 SCR 319 : (1961) 1 SCJ 42] it has been held that "the essence of liability under Section 34 is to be found in the existence of a common intention animating the offenders leading to the doing of a criminal act in furtherance of the common intention and presence of the offender sought to be rendered liable under Section 34 is*

> *not, on the words of the statute, one of the conditions of its applicability. As explained by Lord Sumner in Barendra Kumar Ghose v. King Emperor, [AIR 1925 PC 1 : (1924) LR 52 IA 40, 52 : 85 IC 47] the leading feature of Section 34 of the Penal Code, 1860 is "participation" in action.* ***To establish joint responsibility for an offence, it must of course be established that a criminal act was done by several persons; the participation must be in doing the act, not merely in its planning. A common intention — a meeting of minds — to commit an offence and participation in the commission of the offence in furtherance of that common intention invite the application of Section 34. But this participation need not in all cases be by physical presence. In offences involving physical violence, normally presence at the scene of offence of the offenders sought to be rendered liable on the principle of joint liability may be necessary, but such is not the case in respect of other offences where the offence consists of diverse acts which may be done at different times and places****.'"*"

(emphasis supplied)

68. Learned *Amicus* has therefore submitted that whether the "person" is a man or a woman ought not to be a material consideration in deciding whether such person can be arrayed as an accused, if they were part of the group and contributed towards the commission of the offence; that there is no rational basis to confine section 376D IPC and section 70 BNS only to male offenders; and that these provisions ought to be understood as imposing punishment upon a group of persons who share *a common intention of having the act of rape committed on a victim*, regardless of gender.

DISCUSSION & CONCLUSIONS

69. The court has considered the submissions made by learned counsel for the petitioners and by learned *Amicus*, and has examined the concerned penal provisions both pre and post-amendment of the IPC in 2013, as well as after re-enactment of the penal code by way of BNS in 2023.

70. Learned APP appearing for the State has adopted the submissions made by the learned *Amicus.*

71. First and foremost, it is necessary to examine the legislative history of the concerned penal provisions in order to distill and decipher the legislative intent behind the amendments and, subsequently, the re-enactment of those provisions by way of the BNS.

72. Prior to the 2013 amendment, 'gang rape' was only an aggravated form of 'rape', which found place in section 376(2)(g) IPC read with Explanation 1 to that provision, and therefore had a direct connection with the parent provision *i.e.,* section 375 IPC. Accordingly, section 376(2)(g) IPC, which was the punishment provision for 'rape' in the aggravated form called 'gang rape', was founded upon the definition of 'rape' in section 375 IPC.

73. Under the pre-2013 section 375 IPC, rape was understood as the conventional penile-vaginal offence committed by a man upon a woman. Subsequently however, by way of the 2013 amendment, the definition of rape under section 375 was expanded by the Legislature to also criminalise acts other than penile-vaginal penetration, namely the acts of:

73.1. insertion of any object or body part other than the penis;

73.2. manipulation of any body part; and

73.3. application of the mouth to, or on the vagina, urethra, or anus of a woman.

74. Simultaneously with the expansion of the definition of rape under section 375 IPC in 2013, the Legislature also introduced section 376D IPC, which enacted 'gang rape' as a separate offence by way of a new statutory provision. Though the wording of section 376D IPC was in *pari materia* with Explanation 1 to section 376(2)(g) IPC, the Legislature had made 'gang rape' a separate offence instead of it being only an aggravated form of rape in the punishment provision *i.e.,* section 376 IPC, as it stood before the amendment.

75. The expanded definition of rape in the post-2013 section 375 is mirrored in section 63 BNS; and the offence of gang rape in section 376D IPC is retained as section 70 BNS.

76. Under the extant penal provisions therefore, the offence of rape is no longer confined to penile-vaginal penetration but includes acts such as insertion of any object or body part (other than the penis), manipulation of any body part, or application of the mouth to the vagina, anus, or urethra of a woman.

77. Delineation of gang rape as a separate provision under section 376D IPC and section 70 BNS is, in the opinion of this court, intended to engraft a separate, substantive provision or offence in the penal law. Accordingly, the interpretation and construction to be accorded to these separate, substantive penal provisions need not be confined to the definition of rape in section 375 IPC or section 63 BNS.

78. It is extremely important to note that the question that has arisen in the present case is whether a woman can be charged with the offence of *gang rape* and *not* whether a woman can be charged with the offence of *rape*. It must be clearly understood therefore that by way of this judgment, this court is *not* expressing any opinion on whether a woman can commit *rape*, and *is not interpreting the word "man" that appears in the opening words of the post-2013 section 375 IPC and section 63 BNS*, namely the words: "A man is said to commit "rape" if he … …".

79. Consequently, while interpreting the scope of the offence of 'gang rape' under section 376D IPC and section 70 BNS, this court is *not* expansively construing or widening the scope of the offence of 'rape' under section 375 IPC and section 63 BNS; but is merely according its ordinary, natural, and therefore strict meaning to the offence of gang rape, bearing in mind that the offence of 'gang rape' refers to "*persons*" and does not refer to men alone. Such interpretation is therefore in consonance and accord with the settled principle of interpretation, that a penal provision is to be ordinarily construed strictly and narrowly.

80. Requisite significance must therefore be attached to the phrases "*one or more persons constituting a group*" and "*acting in furtherance of a common intention*" and to the phrase "*deemed to have committed the offence of rape*" appearing both in section 376D IPC and section 70 BNS.

81. This court is of the view that there is no rationale or basis to restrict the word "persons" appearing in the phrase "*one or more persons*

constituting a group" to mean *only a group of men*; and therefore, the word "persons" appearing in the said phrase must be construed in its gender-neutral form. Furthermore, there is also no basis to hold that the phrase "*acting in furtherance of a common intention*" must be restricted to the common intention *only of men*. It is well settled that the concept of "common intention" as understood for purposes of section 34 IPC and section 3(5) BNS, does not require that *every* co-accused must have individually committed *all and every* act that form the ingredients of a given offence.[31]

82. It is also important to notice that the two phrases, "*one or more persons constituting a group*" and "*acting in furtherance of a common intention*" appearing in section 376D IPC and section 70 BNS, are separated not by a conjunctive "and" but by a disjunctive "or". In the opinion of this court, this is significant, since for purposes of the offence of gang rape it is *not necessary* that a person acting in furtherance of a common intention *must also be* amongst the persons who physically commit the offence of rape. For instance, a woman who may not be part of the group of persons who commit the physical offence of rape may yet have acted in furtherance of a common intention to have rape committed upon the victim.

83. Most significantly, in the opinion of this court, the use of the phrase "*deemed to have committed the offence of rape*" is clearly reflective of the legislative intent that, for being liable to be charged with the offence of 'gang rape', every person who constitutes a group *or* acts

[31] Jasdeep Singh @ Jassu vs. State of Punjab, (2022) 2 SCC 545, paras 20-28

in furtherance of a common intention *need not have individually committed the offence of rape*. In line with the well-settled concept of a deeming fiction, section 376D IPC and section 70 BNS create a juristic postulate that each person who constitutes a group *or* acts in furtherance of a common intention to have rape committed upon a woman, is culpable for having committed the offence of gang rape.

84. Once these aspects are given due consideration, the inevitable conclusion is that though a person may not individually have committed the act of rape as set-out in the post-2013 section 375 IPC and section 63 BNS, they are deemed to have committed the offence of rape within the meaning of section 376D IPC and section 70 BNS; and are therefore liable to be charged with that offence of gang rape *regardless of gender*.

85. As a *sequitur* to the above, this court is of the view that there is no basis to hold that a woman cannot be charged with the offence of gang rape under section 376D IPC and section 70 BNS.

86. The query posed in the present judgment is answered accordingly.

87. It is, however, necessary to clarify that a woman *alone* cannot be charged with the offence of *gang rape* since that would *prima-facié* not be in conformity with the statutory definition of *rape* as it appears even in the post-2013 section 375 IPC and section 63 BNS, *as currently construed.* This question may have to be visited in an appropriate case, especially in light of the additional acts that have been criminalised in the expanded definition of 'rape', which acts can equally be committed by a non-male offender. This court would reiterate that it is not expressing any opinion on whether the word

"man" appearing in the post-2013 section 375 or section 63 BNS is gender-neutral or not.

88. It may be mentioned for sake of completeness that, the charge framed against the petitioners under section 6 of the POCSO Act is, in any case, sustained on the strength of the ruling of this bench in *Sundari Gautam*.

89. As a sequitur to the above, order on charge dated 17.01.2025 passed against the petitioners is upheld.

90. The petition is dismissed.

91. Pending applications, if any, also stand disposed-of.

A. J. BHAMBHANI, J

OCTOBER 15, 2026
HMJ