

**THE HIGH COURT OF MADHYA PRADESH : BENCH AT  
INDORE**

Case No.	:	<b>Criminal Appeal No.333/2015</b>
Parties name	:	Appellants :- (1) Ratanlal S/o Amarlal Sharma, (2) Tarvarsingh S/o Kishanlal Sondhya Vs. Respondent:-State of M.P. through Police Station Biaora, District Rajgarh
Date of Judgement	:	<b>28/01/21</b>
Bench constituted of	:	<b>Division Bench :</b> Hon'ble Justice Sujoy Paul Hon'ble Justice Shailendra Shukla
Judgement delivered by	:	Hon'ble Justice Shailendra Shukla
Whether approved for reporting	:	Yes
Name of counsels for the parties	:	Shri Santosh Kumar Meena, learned counsel for appellants. Shri Shrey Raj Saxena, learned Dy.A.G. for respondent/State.
Law laid down	:	[1] Presumption under Section 114-A of Evidence Act is not available in case of gang rape provided under Section 376-D of IPC after the amendment incorporated in Section 376(2) of IPC and in Section 114-A of Evidence Act by the Act 13 of 2013 dated 03.02.2013 for offences committed after 03.02.2013. <u>Relevant Paras 33 to 41</u> [2] Oversight of the legislature cannot be amended or corrected by the Courts. <u>Relevant Para 42</u>

**(Sujoy Paul)**  
Judge

**(Shailendra Shukla)**  
Judge

**HIGH COURT OF MADHYA PRADESH BENCH AT INDORE**  
**CRIMINAL APPEAL NO.333/2015**

Appellants :- (1) Ratanlal S/o Amarlal Sharma,  
 (2) Tarvarisingh S/o Kishanlal Sondhya

Vs.

Respondent:-State of M.P. through Police Station Biaora, District Rajgarh

**Coram :**

Hon'ble Mr.Justice Sujoy Paul, Judge

Hon'ble Mr.Justice Shailendra Shukla, Judge

**Presence:**

Shri Santosh Kumar Meena, learned counsel for appellants.

Shri Shrey Raj Saxena, learned Dy.A.G. for respondent  
 /State.

Whether approved for reporting:

**ORDER**  
**28.01.2021**

**As per: Shailendra Shukla,J.**

The present appeal has been preferred under Section 374 of Cr.P.C. by the appellants seeking to set aside the judgment of conviction and sentence dated 18.02.2015 pronounced against them by the First Additional Sessions Judge, Biaora, District Rajgarh in S.T. No.33/2014; whereby they have been convicted as under :-

S.No.	Under Section	Conviction	Fine	In default of payment of fine
1	376(D) of IPC	Life Imprisonment	Rs.5,000/-	One year's Additional R.I.
2	506 Part-II of IPC	Three years' imprisonment	Rs.1,000/-	Six months' Additional R.I.

[2] Admitted facts are that the appellant Ratanlal is the real brother of the husband of the prosecutrix namely Nandlal and it is also admitted that prior to marriage of prosecutrix with Nandlal she had been engaged to be married to appellant Ratanlal.

[3] Prosecution story in short is that, the prosecutrix lodged a report on 26.12.2013 at Police Station Biaora, District Rajgarh to the effect that while she was feeding the cattle in the night of 20.12.2013, Ratanlal, her brother-in-law (elder brother of her husband) came from behind and caught hold of her hand and when she tried to shout, her mouth was pressed and tried to drag her out. When prosecutrix tried to free herself, appellant Tarvarisingh also came and both of them pressed her mouth so that she may not protest and they dragged her to bamboo grove situated near a well and tried to force themselves upon her. When she protested, Ratanlal threw her on the ground and rapped her and the same act was committed by Tarvarisingh. Thereafter both of them threatened her that she would be done to death, if she narrated the incident to anyone. The prosecutrix returned to her house and narrated the incident to her husband in the next morning, who was not present at home at the time of incident, however, her husband did not believe her and sent her to her parental house. However, prosecutrix was ultimately brought to the Police Station by her husband Nandlal.

[4] After lodging of FIR investigation ensued and charge-sheet was filed under Section 376(D) and 506 of IPC against both the appellants. Charges were read out under same provisions of IPC and appellant Ratanlal took a defence that there is a dispute between him and his brother Nandlal (husband of prosecutrix) over money and land and, hence, he has been falsely implicated. Appellants have produced two defence witnesses namely Bane Singh and Suresh Sharma. After examination of prosecution evidence and recording of defence evidence the appellants have been convicted and sentenced as described earlier.

[5] In the present appeal it has been submitted that the FIR has been lodged very belatedly, that although prosecutrix has stated that her bangles had got broken, the Investigating Officer has not seized any broken bangles, that the appellant has been implicated due to previous enmity on account of land dispute, that no injury has been found on the person of prosecutrix, that the prosecutrix has not been supported by any other witness and there are number of omissions/contradictions in the statements of prosecutrix and other witnesses and on these grounds appellants have requested that they be acquitted.

[6] That question of consideration is whether the grounds contained in the appeal is liable to be allowed and the appellants deserve to be acquitted.

[7] The Trial Court has held that the evidence of prosecutrix is reliable and the contradiction between the court statements of prosecutrix and statement made under Section 164 of Cr.P.C. is explainable.

[8] It would be appropriate to revisit the evidence of the prosecutrix and other witnesses while considering the present appeal. The prosecution has examined 12 witnesses in all. The prosecutrix-X is PW-9, her husband Nandlal is PW-10. Another important relevant witness is Mangilal (PW-4), whose name comes up in FIR and court statements. The Police officials engaged in the investigation are Sinia Singar (PW-2), Radhakishan (PW-6), Rajkumar Tiwari (PW-7) and Surendra Singh (PW-3) (Investigating Officer). The medical experts, who have been examined are Dr. Sudha Sharma (PW-5), who has examined the prosecutrix and Shri Sharad Sharma (PW-1), who has examined appellant.

[9] It would be appropriate in the first place to consider the evidence of prosecutrix and whether there are any material contradictions/omissions in her evidence vis-a-vis other witnesses.

[10] The prosecutrix-X (PW-9) states that on the date of the incident at around 2.00 a.m., in the night, the witness had been laying fodder before her buffalows and her husband had gone to the agriculture field for irrigating the field and her three children including two daughters and a son had also gone to other field for irrigation and her two other children both girls aged 9 years and 7 years were sleeping inside the house and at that point of time accused Ratanlal came and caught hold of her hands. When she shouted, he cupped her mouth with his hands and took her to bamboo grove situated near a well belonging to Vijay Singh, MLA. Witness state that when she started shouting the other accused Tarvarsingh told Ratanlal that if the prosecutrix protests much then she should be hung in the well. Thereafter Ratanlal removed the petticoat of the prosecutrix and raped her, which was followed by Tarvarsingh. After raping her, both of them fled away and she came back and when her husband came in the morning, the prosecutrix narrated incident to him. However, on hearing such narration husband of prosecutrix did not believe her and instead, accused her for falsely implicating his brother appellant (Ratanlal). He also assaulted her and called up Mangilal, the brother of prosecutrix, who came over and took her away. As per prosecutrix, she told the incident to Mangilal, and also to her brother-in-law namely Bapulal. Witness states that Mangilal later on brought her back to her matrimonial home and she asked her brother to lodge FIR but Mangilal and her brother-in-law did not agree and, therefore, she came by herself and when she set out to go to the Police Station by herself but was then accompanied by her husband and both of them lodged the report. She admits to have appended her thumb impression on report Ex.P/2. She has also stated that after lodging of report, her court statements (under Section 164 of Cr.P.C.) were recorded before the Presiding Officer, but when she came for recording her statements, the near relatives of the appellants pressurized her in the court premises not to divulge

the incident and threatened that if she divulges, then they would cause hindrance in the marriages of the daughters of the prosecutrix. Hence under pressure she did not divulge the incident before the Presiding Officer but instead gave false narration to the Presiding Officer stating that she had come to appellant Ratanlal for demanding Rs.5,000/- from him but she was abused by Ratanlal and Tarvarsingh and, hence, she lodged the report.

[11] Thus the witness herself admits that contrary to allegations of rape made by her against the appellants, she did not accuse the appellants in her 164 Cr.P.C. statements for raping her but instead had given the statements pertaining to dispute relating to money matters.

[12] Evidently, what has been narrated by prosecutrix in deposition and also in her FIR differs from what has been stated by her in her statements under Section 164 Cr.P.C.. The reliability of prosecutrix has to be tested under such conraindicatory statements. The prosecutrix-X (PW-9) has stated that when she had come to report for recording statements (under Section 164 Cr.P.C), she was accompanied by Police personnel (Para 6 of cross-examination).

[13] In the same paragraph she admits that her statements were recorded in a closed room and there was no one apart from the Presiding Officer of the Court and Clerk and she further admits that the Presiding Officer had asked her as to whether she is giving the evidence voluntarily and she had answered in affirmative. She states in Para 7 that the pressure tactics had been applied by the relatives of the appellants in the Court premises and this was done by taking her aside and threatening her. She states that she was accompanied by her husband on that day but she did not narrate the incident to her husband on that day and neither did she complain to the Presiding Officer about such threat meted out to her.

[14] It would be appropriate to consider the statements of Nandlal (PW-10) regarding his version of such threat as narrated by the prosecutrix. This witness states that when he along with his wife - the prosecutrix came to the Court for recording statements of wife, the relatives of appellants surrounded both of them in the Court premises and threatened them that if the prosecutrix divulges the incident, these people would take away the unmarried daughters of the witness and could spoil their life. This witness states in Para 8 that he could not do much because had he tried to move, he would have been killed by those persons.

[15] Thus, one can see that there is divergence between the statements of prosecutrix-X (PW-9) and her husband Nandlal (PW-10) in the sense that whereas the prosecutrix has stated that she was taken aside by persons and was threatened, her husband Nandlal (PW-10) stated that persons had surrounded him as well as the prosecutrix and had threatened both of them. The prosecutrix states that she did not narrate the incident of threat to her husband on that day; whereas her husband Nandlal (PW-10) states that threatening occurred before him only. It also appears unnatural that threat was meted out to prosecutrix before the Police personnel and further that she did not narrate such incident to the Presiding Officer and also did not lodge the report in the Police Station regarding such threat. If she could lodge report against the appellant for committing rape upon her, then what could have prevented her from complaining to the authorities regarding such threat meted out to her later on. Statements recorded under Section 164 of Cr.P.C. have much more sanctity than the statements recorded under Section 161 of Cr.P.C. and such statements recorded before the Magistrate cannot be discredited until very valid and reliable version is put forth before the Court. As already seen, there is divergence between the statements of prosecutrix (PW-9) and that of her husband Nandlal (PW-10) regarding the manner in which the threat was meted out.

[16] Thus, the prosecutrix has not been able to assign a believable explanation for the deposition made under Section 164 of Cr.P.C.

[17] Prosecutrix-X (PW-9) has stated that the incident occurred at around 2.00 a.m. in the night while she was laying fodder before the buffaloes. This itself is unnatural as to why the cattle would be fed at such strange hours. She further states that her husband and three children were not present in the house and had gone to irrigate the fields and that her husband had come only in the morning. It also appears to be unnatural that her two daughters would go to agriculture field for irrigation and would remain there through out the night. It also appears strange that she would wait till the morning for her husband to arrive and then complain. Such ghastly incident could at least have been reported to the neighbours. In Para 26 the prosecutrix states that her sister-in-law and brother-in-law both are her neighbours but she did not woke them up and narrated the incident to them. She in fact states that she is mother of five children, having four daughters and one son; whereas her husband Nandlal (PW-10) states that he has seven children which includes six daughters and one son. Dr. Sudha Sharma (PW-5) has also stated that prosecutrix is having told her that she is having seven children. Thus, the prosecutrix has inexplicably withheld the fact about the number of children that she had given birth to.

[18] Prosecutrix has admitted in Para 25 that in the course of the act of rape, her clothes had got torn. She also admits that the Police Officer investigating the matter had asked her to produce the torn clothes but she did not do so. In this matter, such torn clothes have not been seized by the Police.

[19] The prosecutrix (PW-9) in Para 18 has stated that as a result of resistance with appellants, her bangles and the necklaces worn by her had got broken. However, in Para 21 she states that one of her bangles had come out of her wrist and another bangle had lost

its shape. However, she states that she did not narrate this fact to the Police and she did not hand over her such bangles to the Police. Incidentally no bangles have been recovered by the Police. Nandlal (PW-10) has stated in Para 4 that he had found broken bangles and the necklaces of his wife in the bamboo grove, however, he also has not handed over such pieces to the Police.

[20] Prosecutrix-X (PW-9) states that when she narrated the incident to her husband, her husband did not believe her and called her brother Mangilal to take her away and later on when her brother brought her back and prosecutrix asked him to report, her brother and brother-in-law both declined to report. However, in Para 27 the prosecutrix states that when her brother came to fetch her, he had asked the prosecutrix to lodge report but she did not do so and came with her brother to Biaora, where her brother resides. While the prosecutrix (PW-9) states that after 3-4 days her brother brought her back to her matrimonial home, Nandlal (PW-10) states in Para 5 that he himself went to Biaora and fetched his wife back to his village Bhatpura. Thus, there is divergence in the statements of prosecutrix and her husband in this respect as well.

[21] Nandlal (PW-10) admits that after bringing her back to village Bhatpura he again came along with his wife to Police Station Biaora for lodging report. In Para 21 he admits that Police Station at Biaora is merely a half kilometer from the house of his brother-in-law. It is strange that instead of directly proceeding to Police Station Biaora, the prosecutrix was brought back to Bhatpura and then they set out again for lodging report at Police Station Biaora on the day. The witness Nandlal (PW-10) in Para 21 has stated that he and prosecutrix had reached the Police Station at about 8 to 9 a.m. for lodging the report but some politicians were causing hindrance and were wanting them to enter into compromise and the report was ultimately lodged at 3 to 4 p.m.. However, the prosecutrix herself

does not make any statement regarding any such hindrance caused by politicians etc. and consequential delay in lodging of the FIR. The prosecutrix (PW-9) in Para 22 has stated that when appellants were dragging her, she had sat down placing her hands on the ground and her hands developed signs of friction due to such dragging. Her husband Nandlal (PW-10) in Para 17 also states that the hands of the prosecutrix got injured. However, Dr. Sudha Sharma (PW-5) has stated that she did not find any sign of injury on the person of prosecutrix. Her report is Ex.P/3A and she submits that no sign of forcible intercourse were also found on the persons of prosecutrix.

[22] While Nandlal (PW-10) states in Para 17 that he had seen the injuries on the hands of his wife but in the very next para i.e. Para 18 he states that he was so shocked to hear about the incident that he did not see any sign of injury on the person of prosecutrix. In the same paragraph the witness states that he had come to believe about the correctness of the wife's version of the incident at about 7 to 8 a.m. of the day of the incident only, but in the examination in chief in Para 4 he states that he did not believe the version of his wife. The witness Nandlal (PW-10) although admits in Para 18 that he had come to know about the correctness of the incident on the day of incident only but still states that report was lodged by him 4 - 5 days later on. A review of the deposition of prosecutrix (PW-9) would show that as per the witness, the incident occurred at 2.00 a.m., in the night, when she had put fodder before her buffaloes. It is strange that the appellants, one of whom was her brother-in-law would be waiting for her to come out at 2.00 a.m., in the night, so that they can drag her and subsequently rape her. Other contradictions and unnatural statements of prosecutrix have already been narrated earlier.

[23] The prosecutrix (PW-9) and her husband (PW-10) have been given suggestions regarding rivalry between the appellant Ratanlal

and Nandlal (PW-10), who is his real brother. As per the suggestion, husband of the prosecutrix namely Nandlal (PW-10) had taken the thrasher machine of appellant Ratanlal and had not returned the same and further after partition of agriculture land between the brothers, the appellant Ratanlal had paid off the loan of Nandlal (PW-10) and was demanding the money back from Nandlal, which Nandlal had refused to return and a Panchayat was summoned, which had taken cognizance about the dispute between the brothers. The suggestions regarding such dispute have been given both to prosecutrix and Nandlal (PW-10).

[24] The prosecutrix in her cross-examination in Para 9 has admitted that the thrasher machine belonging to Ratanlal had been kept by her husband Nandlal. However, she claims ignorance regarding such dispute raised before the Panchayat. She has further been given suggestion that her husband further sold off the thrasher machine to another person namely Suresh. In Para 10 the witness states that the machine had been purchased by her husband and that this machine had been taken by one Suresh but Suresh sold off this machine to another person instead of returning the same. Thus, the witness declines that the machine had been sold by her husband to Suresh and states that the machine was taken away by Suresh and later on Suresh sold it off to another person. In Para 11 this witness admits that no report was lodged against Suresh by her husband for disposing of the machine belonging to her husband.

[25] Contrary to the admission of prosecutrix (PW-9) that Nandlal had taken the thrasher machine of appellant Ratanlal, Nandlal (PW-10), in Para 10 declines the suggestion that he had taken the machine from Ratanlal. He also declines that such dispute was raised before the Panchayat. Prosecutrix (PW-9) only claims of ignorance of such Panchayat.

[26] Further another suggestion has been given to the prosecutrix

and her husband Nandlal (PW-10) regarding the dispute also occurring because of refusal of Nandlal to pay back Rs.9,500/- to Ratanlal, which Ratanlal had spent for clearing the loan dues of Nandlal. Prosecutrix in Para 11 has claimed ignorance regarding any such dispute. She also claims her ignorance regarding her husband being taken to the Police Station by MLA Vijay Singh and lodging of report against her husband by Ratanlal. Nandlal (PW-10) on the other hand admits that there was a loan on his land by land development Bank but states that he had paid off the loan himself and denies the suggestion that Ratanlal had paid of his loan.

[27] The defence witness Bane Singh (DW-1) and Suresh (DW-2) have stated that there was a standing dispute between brothers and a Panchayat had been called and written document has been executed, which is Ex.D/6, in which it has been mentioned that both brothers shall not quarrel with each other in future and whoever initiates quarrel would have to pay Rs.551/- as fine. This witness has been given suggestion in Para 9 of cross-examination that no fine was imposed on either of the brothers. Another suggestion has been given to the witness that after the execution of the document Ex.D/6 on 13.08.2008, no dispute arose between the brothers thereafter. Witness states that despite the aforesaid execution of document, the brothers continues to quarrel with each other. Such suggestion itself shows the admission on the part of prosecutrix that there was indeed a dispute between the appellant and her brother Nandlal (husband of prosecutrix). Suresh Sharma (DW-2), who is a witness to Ex.D/6 states that he had appended his signatures on Ex.D/6 from E to E part and both brothers had signed the document on B to B and C to C parts. Witness categorically states that the dispute did not end after the execution of the document and both brothers remained at loggerheads with each other.

[28] There is no reason to disbelieve both the defence witnesses

and it is quite substantially clear that there was animosity between the families of Nandlal and appellant Ratanlal.

[29] Ramkaran Sharma (PW-12), who is nephew of Nandlal is hostile and admits in cross-examination that the relations between Ratanlal and Nandlal have turned sour.

[30] Nandlal (PW-10) makes exaggerated statements that his wife had told him that she was hung in the well and that she was forced to consume liquor by Ratanlal. Prosecutrix (PW-9) however has made no such statements that she was hung in the well and was forced to consume liquor. Nandlal (PW-10) states that he had found broken bangles etc. of prosecutrix in the bamboo grove but such statements are not contained in his statement Ex.D/3. This witness states that when he became 100% sure that his wife was speaking truth then he went with his wife to lodge the report. However, such statements are not contained in Ex.D/3.

[31] Thus one can see that the statements of prosecutrix (PW-9) are full of contradictions and omissions and contrary to her statements, no injury has been found on her person, her clothes alleged to be torn have not been seized and allegedly broken bangles and necklaces have not been recovered. The aspect of mutual rivalry has already been proven. Although as has been mentioned by the Trial Court, the statements of prosecutrix can alone result in conviction and there is no need for corroboration but it is also true that in such case the evidence of prosecutrix must be found to be credible and inspiring total confidence, which is not the case here.

[32] The Trial Court has also taken recourse to applicability of Section 114-A of Evidence Act submitting that if the sexual intercourse is found to be proved and the prosecutrix denies her consent then it shall be presumed that she did not consent. A

Supreme Court citation of **State of Rajasthan V/s. Roshan Khan and Other** reported in **(2014) Volume 2 SCC 476** has been cited in this connection by the Trial Court.

[33] However, a perusal of Section 114-A of Evidence Act shows that prior to the amendment carried out in Section 114-A of Evidence Act on 03.02.2013 the presumption was applicable in case of gang rape. However, after incorporation of the amendment clause pertaining to gang rape has been omitted from the earlier provision of Section 376(2) of IPC in which this provision applies. It would be appropriate to clarify the aforesaid position by reproducing Section 114-A of the Evidence Act as it is stood prior to the amendment and as it stands now.

[34] The original Section 114-A was incorporated by Act No.43 of the year 1983, which is reproduced as under :-

**“114A. Presumption as to absence of consent in certain prosecutions for rape.—**In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of section 376 of the Indian Penal Code, (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.”

Subsequently earlier Section 114-A was substituted by the Act 13 of 2013, which is reproduced as under :-

**“114-A. Presumption as to absence of consent in certain prosecution for rape. 114A.** In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m) or clause (n) of sub-section (2) of section 376 of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court. That she did not consent, the court shall presume that she did not consent.

Explanation.- In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375 of the Indian Penal Code.”

[35] The aforesaid presumption under Section 114-A is applicable

only in respect of such classes of rape which are mentioned in Section 376 (2) of the IPC. This provision of IPC has also been amended by the Act 13 of 2013. Prior to this date Section 376 (2) read as under :-

**“Section 376(2) in The Indian Penal Code**

(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 woman'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;

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;

[36] After amendment the new Section 376 (2) of IPC reads as under :-

**Section 376. Punishment for rape.**

(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever,—

(a) being a police officer, commits rape—

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

(ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) 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, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

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

\* \* \* \* \*

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm

or maims or disfigures or endangers the life of a woman;  
 or  
 (n) commits rape repeatedly on the same woman,  
 shall be punished with rigorous imprisonment for a term  
 which shall not be less than ten years, but which may  
 extend to imprisonment for life, which shall mean  
 imprisonment for the remainder of that person's natural  
 life, and shall also be liable to fine.”

[37] The new provision of Section 376(2) of the IPC leaves out the offence of gang rape and the offence of gang rape has been mentioned separately under Section 376-D as under :-

**376-D. Gang rape :-**

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 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 section shall be paid to the victim.

[38] The aforesaid Section 376-D has also been incorporated by the Act 13 of 2013.

[39] Along with the incorporation of aforesaid offence under Section 376-D, number of other offences pertaining to rape have also been incorporated which are reflected as Section 376-A, 376-AB, 376-B, 376-C, 376-DA, 376-DB and 376-E of IPC.

[40] However, the presumption clause under Section 114-A of the Evidence Act is attracted only in case of offences reflected in Section 376 (2) of IPC which incidentally now does not contain gang rape. At the cost of repetition, in an offence of gang rape, the presumption clause under Section 114-A was attracted prior to

03.02.2013, but has ceased to apply in case of gang rape after 03.02.2013. It may be an oversight on the part of legislature in not mentioning the applicability of this presumption clause in an offence of gang rape which is much more serious offence than an offence under Section 376 simplicitor.

[41] In the present case the incident had occurred after 03.02.2013 and the date of incident was 22.12.2013, hence, the newly amended provision under Section 114-A of Evidence Act would be attracted which misses out on applicability of presumption clause in case of gang rape.

[42] Assuming that the aforesaid anomaly is result of oversight of the legislature, the question would be whether this Court can pass an order to the effect that the presumption clause shall be read in a matter pertaining to gang rape as well? In the treatise on "Principles of Statutory Interpretation", Hon'ble Justice Shri G.P.Singh (the author) has referred to number of citations of Apex Court at Page 72 of the 14<sup>th</sup> edition and the crux of the citations have been noted down as under :-

“It is an application of the same principle that a matter which should have been, but has not been provided for in a statute cannot be supplied by courts, as to do so will be legislation and not construction.”

Again in Page No.73 the following excerpts of Apex Court judgment of **Singareni Collieries Co. Ltd. V/s. Vemuganti Ramakrishan Rao & Ors.** reported in **(2013) 8 SCC 789** has been mentioned in which following observations have been made :-

“While interpreting section 11-A of the Land Acquisition Act, 1984, the Supreme Court held that there is no apparent omissions therein to justify application of the doctrine of casus omissus and, by that route, to rewrite section 11-A by providing for exclusion of time taken for obtaining a copy of the order, which exclusion is not provided for in the said section.”

Thus it is clear that the Courts cannot make modifications to amend or correct the legislative errors.

[43] After due consideration, in view of the appreciation of evidence of the prosecutrix, it has been made clear that the prosecutrix does not inspire confidence and is not creditworthy. Further, there are contradictions between her statements and the statements of her husband Nandlal (PW-10). After due consideration we are of the opinion that the Presiding Officer of the Trial Court failed to consider the consequence of omissions and contradictions as arising in the statements of prosecutrix and failure on the part of prosecution to credibly corroborate her statements with other pieces of evidence. Consequently, we are of the view that the prosecution has failed to prove the offence under Section 376-D and Section 506 Part-2 of the IPC against the appellants. Consequentially this appeal filed under Section 374 of Cr.P.C. stands allowed. Appellants stands acquitted from the charges framed under Section 376-D and 506 Part-2 of IPC. They are directed to be released from jail forthwith and the amount of fine if deposited by them is directed to be returned to them. The seized property shall be disposed of in accordance with Para 106 of the judgment pronounced by the Trial Court.

[44] A copy of this judgment along with original record of this case be sent to the Trial Court for compliance.

[45] The petition is accordingly **disposed of**.

**(Sujoy Paul)**  
Judge

**(Shailendra Shukla)**  
Judge