

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Criminal Appeal (SJ) No.352 of 2015**

Arising Out of PS.Case No. -36 Year- 2010 Thana -FALKA District- KATIHAR

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SANJAY KUMAR CHOUDHARY S/O LATE SHATRUGHAN CHOUDHARY,  
RESIDENT OF VILLAGE - GAYA RAHIKA, P.S. - FALKA, P.O. -  
DHANAITHA, DISTRICT - KATIHAR.

.... .... APPELLANT/S

VERSUS

THE STATE OF BIHAR

.... .... RESPONDENT/S

with

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**Criminal Appeal (SJ) No. 389 of 2015**

Arising Out of PS.Case No. -36 Year- 2010 Thana -FALKA District- KATIHAR

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PAWAN KUMAR CHOUDHARY S/O JAI SHANKAR CHOUDHARY  
RESIDENT OF VILLAGE- GAYA RAHIKA,P.S FALKA, P.O. DHANAITHA,  
DISTRICT KATIHAR.

.... .... APPELLANT/S

Versus

THE STATE OF BIHAR

.... .... RESPONDENT/S

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**Appearance:**

(In CR. APP (SJ) No.352 of 2015)

For the Appellant/s : Mr. Arun Kumar Tripathi, Amicus Curiae

For the Respondent/s : Mr. Abha Singh, APP

(In CR. APP (SJ) No.389 of 2015)

For the Appellant/s : Mr. Nadimul Hassan, Adv.

For the Respondent/s : Mr. Sujit Kumar Singh, APP

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**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI**

ORAL JUDGMENT

**Date: 18-07-2017**

As the learned counsel for the appellant failed to appear in  
Criminal Appeal (SJ) No.352 of 2015 on account thereof, Mr. Arun Kumar  
Tripathi, learned advocate has been requested to assist the court as an  
Amicus Curiae.



2. Criminal Appeal (SJ) No.352 of 2015 wherein Sanjay Kumar Choudhary is the appellant and Criminal Appeal (SJ) No.389 of 2015 wherein Pawan Kumar Choudhary is the appellant commonly originate against the judgment of conviction and sentence dated 02.06.2015 passed by Additional Sessions Judge, IIIrd, Katihar in Sessions Trial No.206/2011 whereby and whereunder both the appellants have been found guilty for an offence punishable under Section 366/34A of the IPC and sentenced to undergo R.I. for seven years as well as to pay fine Rs.5000/- and in default thereof, to undergo R.I. for six months, under Section 372/34 IPC and sentenced to undergo R.I. for eight years as well as to pay fine appertaining to Rs.10,000/- in default thereof to undergo R.I. for six months, under Section 376/34 of the IPC and sentenced to undergo R.I. for ten years, to pay fine of Rs.10,000/- and in default thereof, to undergo R.I. for six months with a further direction to run the sentences concurrently, with a further direction that in case of deposit of fine amount, 75% thereof, should be paid to the victim.

3. PW.5, Bijendra Jha, father of the victim, (name withheld, PW.4) filed written report before the Officer-in-charge, Falka P.S. on 04.03.2010 disclosing therein that he happens to be private tutor and on account thereof, he used to remain away from his house at morning as well as evening hour. Rakesh Choudhary, Amit Mandal, Pawan Choudhary, for the last fifteen days on one pretext or other used to visit although, he had objected over their activity. On 27.02.2010 when he returned back after tuition, his daughter Prem Lata aged about five years, who was weeping disclosed that the persons who were coming since before took away the



victim (name withheld), aged about sixteen years. No sooner than, he rushed to the place of Rakesh Choudhary and disclosed the event before his father Arbind Choudhary whereupon, he instructed to calm down as, his daughter will be returned back. Days have gone and then lastly on 02.03.2010 at evening hour, he disclosed that he is unable to trace out his son whereupon, being apprehensive regarding fate of his minor daughter who might be forced to indulge in prostitution, in sexual activity against her will, or any other illegal activity at the ends of the accused persons.

4. After registration of Falka P.S. Case No.36/2010, investigation commenced and during course thereof, it is evident that victim was traced out, her statement under Section 164 Cr.P.C. was recorded at the instance of the Investigating Officer, was medically examined and thereafter, concluding the same charge sheet was submitted facilitating the trial before the court of sessions whereupon, the verdict of guilt has been recorded against these two appellants while acquitting the remaining accused.

5. The defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. Furthermore, though conflicting stand has been taken, but during course of argument the learned counsel for the appellant pinpointed suggestion that in order to have marriage with the accused, this case has been instituted as a coercive measure. However, neither any DW nor any kind of document has been adduced on behalf of defence.

6. In order to substantiate its case, prosecution had examined



altogether six PWs who are PW.1-Dr. Abhilasha Kumari, PW.2-Pinki Devi (mother), PW.3-Vijay Shankar Mishra (Part Investigating Officer), PW.4- (Name withheld), the victim, PW.5-Bijendra Jha and PW.6-Pritam Kumar Ratan, Judicial Magistrate who had recorded statement of the victim under Section 164 Cr.P.C. Side-by-side also exhibited Ext.1-Medical Report, Ext.2-Signature of victim over statement recorded under Section 164 Cr.P.C., Ext.3-written report, Ext.4-Complete statement of the victim recorded under Section 164 Cr.P.C. As stated above, neither any DW nor a chit of paper has been exhibited on behalf of defence.

7. While assailing the judgment of conviction and sentence it has been submitted on behalf of learned counsel for the appellants that from bare perusal of the prosecution case in its entirety, it speaks its falsity which, the learned lower court completely ignored while recording the finding of guilt against the appellants. In order to substantiate such plea, it has been submitted that victim during course of her statement under Section 164 Cr.P.C. which was recorded while investigation was going on divulged chain of incidence identifying activity of the appellants but, the Investigating Officer, PW.3 had not cared to testify after visiting the relevant places, locating the persons with whom victim met and so, the adventurous journey as narrated at the end of victim is found uncorroborated which is fit to be rejected in the background of the fact that none had claimed that the victim was brought by them. Therefore, the chain of circumstance which could have either properly identified the appellants to be guilty of the offence, in case properly been located during course of investigation gone uncared whereupon, the version of the victim



became unreliable considering her conduct. To justify such plea, it has also been submitted that during stay with the accused, the victim had not disclosed that she was confined in a room without having permission to ingress out-grace any threat or coercion was there and that being so, the non compelling circumstances, as well as permitting her company to the appellant being voluntarily is indicative of the fact that she was a consenting party and further, as per evidence of the doctor, PW.1 she was major and so, appellant should have been acquitted.

8. It has also been submitted that save and except victim PW.4 none others have been examined to corroborate the incident even to the extent that having seen lifting the victim by the accused from her house as well as taking her away on a jeep. During course of investigation, the Investigating Officer had not care to identify the jeep, if any, having been used during course of commission of the crime and its driver. That happens to be another circumstance which could be found adverse to the prosecution case. Furthermore, it has also been submitted that the reason best known to the prosecution, the main Investigating Officer has not been examined. That being so, the interest of the appellant is found prejudiced. It has also been submitted that the reason best known to the prosecution as well as without having any kind of explanation on that very score, prosecution withheld to examine Prem Lata who has been alleged to be present in her house at the relevant time of commission of the occurrence. Had there been, then in that circumstance the actual version of the occurrence would have been exposed. Therefore, the non-examination of Prem Lata happens to be death nail for the prosecution whereupon, the



whole version is to be discarded consequent thereupon, the appellant be acquitted.

**9.** The learned Additional Public Prosecutor while controverting the submissions made on behalf of appellants have submitted that had there been conclusive evidence on the record at the end of the appellant that victim was major then in that event, the argument having been advanced at the end of appellants would have proper legal appreciation. True it is that the doctor, PW.1 had estimated age of the victim PW.4 in between 17-18 years but, the appellant on their own blurred their fate while cross-examining the victim PW.4 who disclosed her date of birth to be 10.12.1993 which never been challenged nor controverted at the ends of the appellant whereupon, the evidence of PW.1, the doctor is to be seen and appreciated in the aforesaid background. Being minor neither her consent was legally recognizable nor, the activity of the appellants. That being so, the finding of the learned lower court did not attract interference.

**10.** Now coming to the evidence of the respective witnesses, it is apparent that PW.2, Pinki Kumari, the mother and PW.5 Bijendra Jha, father, informant are not an eyewitness to occurrence. They, even did not disclose the source save and except gathered information from Prem Lata, their minor daughter who did not turn up to substantiate their plea. But, from their evidence it is crystal clear that there was absence of victim from their house which only materialized after appearance of the victim, after a long duration. Further, it is apparent from their evidence that intermediary event was disclosed to them by the victim PW.4 after her arrival and so,



their status in the aforesaid background apart from being hearsay, would be considered as corroborative in nature.

**11.** PW.1, is the doctor who during course of examination of the victim had found the victim habituated in sexual intercourse coupled with the fact that as disclosed by the victim she was pregnant carrying amanoria. Aforesaid event is not at all found supported at the end of the victim PW.4 in her examination-in-chief nor during course of examination having at the end of the appellants. However, she had disclosed her age in between 17-18 years, but without any ossification report.

**12.** So far status of PW.3, Vijay Shankar Mishra is concerned he happens to be part Investigating Officer, during whose tenure victim appeared, got her examined by a doctor, got her statement recorded under Section 164 Cr.P.C. and then, submitted the charge sheet. He fairly admitted that he had not gone to the places as disclosed by the victim during her statement under Section 164 Cr.P.C. In likewise manner, PW.6, Pritam Kumar Ratan is the Magistrate who had exhibited statement of the victim recorded under Section 164 of the Cr.P.C. Moreover, it is needless to say that legal recognition of a statement under Section 164 Cr.p.C. is for the purpose of corroboration or contradiction and nothing more. The aforesaid statement cannot be basis for any kind of conclusive finding.

**13.** Now remains the evidence of victim, PW.4. With regard to acceptability of the evidence of the victim, it is needless to say that sole evidence of the victim is deemed to be sufficient for recording a conviction in case, it inspires confidence. If not, then in that event, it needs corroboration. In the aforesaid backdrop, the evidence is to be seen. She



had deposed that she happens to be handicap. On the alleged date and time while she was at her house, Pawan and Sanjay came and forced her to accompany them which she refused. She had also seen a jeep having been parked at her darwaja. Then thereafter, the accused made a tablet soluted in a glass of water and then forcibly administered her as a result of which she felt dizziness. During such condition, both the accused committed rape one by one. Thereafter, they took her away. When she regained sense she found locked in a room where wine, meat etc. were kept. One lady came, consoled her and also assured that accused persons will keep her in good condition. On the following morning, another lady came who during course of conversation disclosed that a kidney racket is being run here and so advised her to slip, and managed the same. She came out and boarded a Tata bus however, followed by the accused who after arrival at the Katihar Station grappled her and took her to Jaipur where they kept confined in a room where she was badly raped by both of them. Thereafter, they both quarreled as a result of which, Sanjay left the place while, the another accused remained with her. After two months Sanjay came and then, he disclosed that she has been sold at a price of 2-4 lacs. The aforesaid disclosure was also corroborated by a lady who had purchased. While staying there she met with a man, begged before him who facilitated mobile conversation with her brother and as per instruction, she requested that man to provide her liberty, who stood as good samaritan by way of providing a ticket on the basis of which she returned back to her home. Then thereafter police came, took her to court as well as hospital. Identified the accused in dock. In para-4 of her cross-examination, she had disclosed her date of birth as 10.12.1993. She had further disclosed that



both the accused were her classmate. Both were on friendly term. Both were on visiting terms. It has also been disclosed by her that she never mind whenever there was an offer at their end to slip. Then had disclosed that as, she became unconscious she found unable to say how the accused persons lifted. Prem Lata was pushed by the accused persons at that very moment. At para-5 there happens to be suggestion that she had not made statement before the police in the context that she was raped. She was further suggested that she has been married with Bhutan Sah. It has further been suggested that his father was inclined to marry her with Pawan and for that, instant case has been registered.

**14.** From the evidence of the victim, PW.4 it is apparent that defence had themselves exposed the event that means to say both were classmate and that happens to be reason behind that the date of birth having been disclosed by the victim under para-4 of cross-examination as 10.12.1993 has not been challenged nor, the victim during course of her further cross-examination been ever suggested that she happens to be major. The aforesaid conduct of the appellants has got crucial role in deciding this appeal because of the fact that the victim, if identified to be major, her activities suggest that she was a consenting party as, she never raised an alarm right from Katihar to Rajasthan where she was taken to by the appellants, attracting attention of the surroundings which could have prevented her from grip of the accused. In the background of medical evidence, PW.1 who had opined the victim to be in between 17-18 years. Furthermore, it is also settled at rest that the age having been estimated under the medical evidence is not at all conclusive moreover, PW.1 had



not disclosed that age of the victim was ascertained by way of ossification report. Apart from this it is also to be considered that the medical evidence is not the legal way to ascertain the age of the victim as has been held by the Hon'ble Apex Court in *Jarnail Singh Vs. State of Haryana* reported in **2013 CR.L.J. 3976** as well as in *State of Madhya Pradesh vs. Anoop Singh* reported in **(2015) 7 SCC 773**. That being so, unchallenged disclosure of victim with regard to date of birth being 10.12.1993 is to be accepted. That being so, there happens to be no hitch and hindrance in identifying the status of the victim to be minor and on account thereof, consent has got no legal identity.

**15.** Furthermore, from the cross-examination of the victim, PW.4, it is evident that whatever episode has been exposed by her right from her house has not been challenged or tested during course of cross-examination.

**16.** In *Gian Chand & others v. State of Haryana* reported in **2013(4) PLJR 7 (SC)** it has been held it has been held that when no cross-examination has been made to a witness on a particular point the same would be accepted to be admitted at the end of the appellant. For better appreciation, the relevant para is quoted below:-

“11. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in *Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors.*, AIR 2013 SC 1204 observing as under:

“31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his



*attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.”*

17. Giving anxious consideration over the evidence having available on the record, it is evident that the evidences substantiate the finding recorded by the learned lower court relating to offences punishable under Section 366A/34 IPC as well as under Section 376/34 IPC. So far Section 372/34 of the IPC is concerned, from the evidence of the victim it is not at all found substantiated more particularly being evasive and further, deficiency at the end of the prosecution during course of investigation of the case as is apparent from the evidence of the PW.3. Consequent thereupon, the finding recorded by the learned lower court relating to Section 372/34 IPC is set aside. Sentences whatever been inflicted by the learned lower court relating to other two penal provisions in the facts and circumstances of the case, need no interference.



18. Accordingly, these appeals lack merit and is accordingly dismissed in terms as indicated above. First and last page of judgment be handed over to the learned Amicus Curiae for the needful.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

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