

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

% Decided on: 15th March, 2017

+ **CRL.A. 435/2002**

RAJU Appellant
Represented by: Ms. Inderjeet Sidhu, Adv.

versus

STATE Respondent
Represented by: Mr. Hirein Sharma, APP for the
State.

+ **CRL.A. 445/2002**

SANJAY Appellant
Represented by: Ms. Inderjeet Sidhu, Adv.

versus

STATE Respondent
Represented by: Mr. Hirein Sharma, APP for the
State.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. Vide impugned judgment dated 21st March, 2002, Raju and Sanjay were convicted for the offences punishable under Sections 366/376/34 IPC, however, the co - accused Sadanand and Ram Pal Singh were acquitted for offences punishable under Sections 368/376/201 IPC. Vide order on sentence dated 5th April, 2002, Raju and Sanjay were sentenced to undergo rigorous imprisonment for a period of four years and to pay a fine of Rs.1,000/- for offence punishable under Section 366/34 IPC and rigorous

imprisonment for a period of seven years and to pay a fine of Rs.1,000/- for offence punishable under Section 376/34 IPC.

2. Learned counsel for the appellants submits that there is no material on record to prove the offences punishable under Sections 366/376 IPC against the appellants. Since the prosecutrix PW-6 was not cross examined on behalf of the appellants, her testimony cannot be used for convicting the appellants. Besides the prosecutrix, no other witness has been examined to prove the incident alleged.

3. The prosecution case springs out of a missing report lodged by father of the prosecutrix on 4th May, 1988 stating that his daughter PW-6 had left the house on 1st May, 1988 around 4:00 P.M. to purchase the vegetables and did not return back.

4. PW-6 prosecutrix in her examination-in-chief stated that Sanjay committed sexual intercourse with her against her will. However, since the cross-examination of PW-6 prosecutrix on behalf of Sanjay and Raju was initially deferred and thereafter no opportunity was granted to them to cross-examine the prosecutrix as she did not appear in the Court thereafter, her examination-in-chief cannot be read in evidence to convict the appellants.

5. PW-7 Uncle of the prosecutrix, deposed that the prosecutrix was recovered from the custody of Raju. Later on, he stated that he mistakenly mentioned that the prosecutrix was recovered from the custody of Raju. In fact, she was with Sanjay.

6. PW-11 who was working as an Assistant Teacher in MP Primary School Darbanga House stated that she had prepared the school leaving certificate of the prosecutrix and as per the school records, the date of birth of the prosecutrix was 16th May, 1975. Thus on the date of alleged incident

i.e. 1st May, 1988, the prosecutrix was a minor.

7. Having gone through the evidence on record and finding that the testimony of the prosecutrix cannot be taken into consideration as no opportunity to cross-examine was given to the appellants, it is evident that there is no evidence on record to prove the offence punishable under Section 376 IPC against Raju and Sanjay. Further, with respect to the offence punishable under Section 366 IPC, the same has been proved by the testimony of PW-7 only against Sanjay.

8. Thus, the impugned judgment and the order on sentence are modified. Appellant Raju is acquitted for the offences punishable under Sections 366/376/34 IPC.

9. Appellant Sanjay is convicted for the offence punishable under Section 366 IPC and acquitted for the offence punishable under Section 376/34 IPC. Sanjay has been awarded sentence of rigorous imprisonment for a period of four years for offence punishable under Section 366 IPC. It is clarified that Sanjay need not undergo further incarceration since he already undergone nearly four years and three months sentence including remissions.

10. Appeals are disposed off accordingly. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

11. TCR be returned.

(MUKTA GUPTA)
JUDGE

MARCH 15, 2017
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