

**(2007) 08 JH CK 0028**  
**In the Jharkhand High Court**

Ram Janam Singh @ Ram Janam Kharwar, Shankar  
Choudhary and Ketar Bhuiyan and Another

APPELLANT

Vs

State of Jharkhand

RESPONDENT

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**Date of Decision :** 14-08-2007

**Acts Referred:**

Evidence Act, 1872 — Section 114

Penal Code, 1860 (IPC) — Section 34, 342, 364, 366, 376

**Citation :** (2008) 1 JCR 90

**Hon'ble Judges :** Dilip kumar sinha, J

**Bench :** Single Bench

**Final Decision :** Allowed

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## Judgement

D.K. Sinha, J.—All the three sets of Cr. Appeals are directed against the judgment of conviction passed against the appellants by the 1st Addl. Sessions Judge, Garhwa in Sessions Trial No. 316 of 1993 on 12.5.2003 whereby and whereunder the appellant Ram Janam Singh @ Ram Janam Kharwar @ Charku (Cr. Appeal No. 703/03) and the appellant Shankar Choudhary (Cr. Appeal No. 704/03) were convicted under Sections 366/34, 342/34 and 376/34, IPC and sentenced to undergo RI for 7 years, 1 year and 10 years respectively. The appellants Ketar Bhuiyan and Basudeo Bhuiyan (Cr. Appeal No. 692 of 2003) were convicted only under Sections 364/34 and 342/34, IPC and sentenced to undergo RI for 7 years and 10 years respectively arising out of Meral P.S. Case No. 83/92 which was lodged on 12.10.1992 on the statement of the informant PW 2 Faguni Devi.

2. The prosecution story as it stands narrated in her statement at the police station is in the following manner. Faguni Devi along with her husband Suresh Bhuiyan (not examined) had visited her parental home on 6.10.1992 on the eve of "dashara". At about 4 p.m. on 8.10.1992 Shankar Chaudhary, Charku @ Ram Janam Kharwar, Basudeo Bhuiya, Ketar Bhuiyan (All appellants) and Dhanesh Choudhary (absconder) came to her parental home and asked to accompany

them in panchayati. When the informant and her husband refused, both were forcibly taken away and confined in the room of the house of the appellant Ram Janam Kharwar @ Charku. From there she was separated from her husband and was removed to another room in the same night where she was ravished by the appellant Shankar Chaudhary and Charku @ Ram Janam Kharwar against her will till morning. In the next morning she was shifted in the room where her husband was confined and both were released in the morning on 3rd day (10.10.1992) but at the same time her husband was taken away forcibly by the appellants to which she raised objection but without heed. She then anyhow came to her parental home in agony and pain but she did not find her parents and therefore, she went to her sister's house at village Tasrar. When her father came there after locating her whereabouts, she narrated the occurrence and was brought to her parental home. On the next day she along with her parents came to the police station and by that time she had no knowledge of the whereabouts of her husband. The case was instituted on her statement against 5 named accused persons including one Dhanesh Choudhary who was declared absconder.

3. After framing of charge, the appellants were put on trial and their defence was of false implication. The allegation of commission of rape of Faguni Devi was specific against Shankar Choudhary and Ram Janam Kharwar @ Charku but in place of framing of the charge u/s 376(2)(g), IPC of the gang rape, the charge was framed erroneously u/s 376/34, IPC against both the appellants on the basis of prima facie materials which could not be modified at any stage either on the instance of the prosecution or by the Court on its own motion.

4. Learned Counsel for the appellants submitted that the occurrence as alleged took place on 8.10.1992 at about 4 p.m. but the statement of the prosecutrix was recorded after 5 days on 12.10.1992 whereas the police station was at the distance of only 12 K.M. west from village Karke. The inordinate delay was not explained in lodging FIR and the trial Judge ignored the fact that the FIR was received in the Court of C.J.M on the next day of 13.10.1992.

5. Learned Counsel Mr. K.P. Deo pointed out that in the instant case the Investigating Officer has not been examined, causing prejudice to the appellants in view of the allegation of the prosecutrix that she was moved from one place to another and that she was ravished by Shankar Choudhary and Ram Janam Kharwar @ Charku in a carpet room situated in the house of the appellant Charku. No objective finding of the investigating Officer was brought on the record when he visited different places of occurrence as pointed out by the witnesses.

6. Learned Counsel exhorted that the husband of the prosecutrix has been withheld from the witness box for the reasons best known to the prosecution who could have been an important eye-witness and for such reason also the appellants have been prejudiced and adverse inference can be drawn against the prosecution u/s 114(g) of the Evidence Act. The attention of the Court has been attracted towards the report of the Medical Board wherein no sign of rape or any

injury either on her body or on her private part was found and no definite opinion about rape alleged to be committed on Faguni Devi could be given and in this manner the charge u/s 376 could not be proved against the appellants Shankar Choudhary and Ram Janam Kharwar. As a matter of fact the learned Counsel submitted that the prosecutrix presented an improbable story but the trial Judge partly believed and partly disbelieved the prosecution case. There is no eye-witness of the occurrence except the prosecutrix and keeping in view the inconsistency in her narration, it was not safe for the trial Court to convict the appellants on the uncorroborated evidence of the prosecutrix.

7. Finally, Mr. Deo submitted that it would transpire from the statement of the PW 1 Kismatiya Devi, as contained in paragraph No. 12, under cross-examination, that she came across her son-in-law Suresh Bhuiyan after about 1 year of the occurrence but without any detail explanation on her part as to what she gathered from him and that the conduct of the prosecutrix Faguni Devi did not inspire confidence on the fact that though she was confined in a room of the house of the appellant Charku @ Ram Janam Kharwar which was situated in the village Karke with her husband but at no point of time she raised alarm to attract the attention of the co-villagers and therefore, there was no allegation that they were put on constant threat of life, her depiction suffers from concoction, flights of imagination which do not call for consideration, hence false implication of the appellants for the alleged charge cannot be ruled out.

8. Before appreciating the merit of the appeals, it would be relevant to discuss the statements of a few material witnesses. In the instant case only 5 witnesses were produced and examined on behalf of the prosecution viz. PW 1 Kismatiya Devi, mother of the prosecutrix, PW 2 Faguni Devi the prosecutrix, PW 3 Budhai Bhuiyan her father whereas PW 4 Dr. Ajay Kumar Jha and PW 5 Dr. Susma Verma were the members of Medical Board who medically examined the prosecutrix. The other material witnesses such as Investigating Officer, husband of the prosecutrix Suresh Bhuiyan were not examined who could have thrown much light upon the circumstances, its veracity as projected by Faguni Devi in her statement before the police as also in the Court.

9. PW 1 Kismatiya Devi was examined after 4 years of the occurrence. She testified that when she returned back in the evening at her home after harvesting she came to learn from father-in-law Bifan Bhuiyan that her daughter Faguni Devi and her husband Suresh Bhuiyan were forcibly taken away by the appellants and one Dhanesh Choudhary. She communicated the overt acts of the appellants and another when her husband returned back in the evening. In course of search, her daughter Faguni Devi was discovered in the house of her another daughter at village Tasrar where she narrated the occurrence as to how she as well as her husband were forcibly taken away by the appellants, both were separated and confined in two different rooms where she was ravished by Ram Janam Kharwar and Shankar Choudhary and from there how she came to her sister's village. She deposed that the wearing apparel of her daughter

(victim) was delivered at the police station and she was referred for medical examination. In the cross-examination she admitted that her family members had no enmity with the appellants from before. In the cross-examination she admitted that after two days and two nights she met her victim daughter in the matrimonial home of her another daughter. She admitted having not found any injury on the body of Faguni nor her clothes were found torn.

10. PW 2 Faguni Devi in her testimony corroborated her earlier statement recorded by the police before the trial Judge and narrated that she and her husband were forcibly taken away by the appellants and Dhanesh Choudhary when her parents were out to work in the field. Both were first taken in the house of Charku where they were confined in a room and from there she was separated and taken to a different room in the midnight by the appellant Shankar Choudhary and Charku @ Ram Janam Kharwar and there they committed gang rape on her twice each by gagging her mouth with clothes. Her husband was forcibly taken away by them and she was let-off, from where she came to her sister's house at village Tasrar where her parents came and met her. Her statement was recorded at the police station and from there she was sent to Garhwa Hospital for medical examination. She delivered her clothes at the police station and that she identified all the 4 appellants in the dock. The prosecutrix testified that her parental home was surrounded by several houses but she did not raise alarm when both were assaulted by the appellants and taken away. Her grandfather was also assaulted who was forcibly taken but was let-off near school. The appellants were known to her from before as they belonged to her parental home village and there was no enmity with them. She admitted that mukhia and sarpanch were there in the village and that police station was situated at the distance of about 2-1/2 kose but no information was given. She admitted that she did not cry nor her husband for help while being dragged to the house of Charku and it took about half an hour in covering the distance. There were other houses in the vicinity of the house, where she was confined with her husband and admittedly their limbs were not tied by the appellants. There also in confinement she did not raise alarm to attract the attention of the neighbours. She further testified that she did not raise alarm while she was being separated from her husband and was taken to a different room where carpets used to be manufactured in the house of Charku. She has simply explained that she was put under constant oral threat. The prosecutrix further testified that she sustained injuries in the arm on account of crack of her bangles in the wrist while she was forcibly taken by Shankar Choudhary in a different room but without blood stain in her "sari" though she admitted that certain drops of blood fell on the earth. She was put in seclusion in confinement by the appellants Shankar Choudhary and Charku @ Ram Janam Kharwar for about half an hour but in the meantime neither she nor her husband raised alarm. She narrated that there was no bed in the room but she was ravished on the earth without sustaining laceration or abrasion on any part of her body, specially on her back side. She did not resist, she explained as because she was

under constant threat by Shankar Choudhary that she would be killed. She narrated the occurrence to her husband when she was brought to his room that she was ravished by Shankar Choudhary and Charku @ Ram Janam Kharwar. She further narrated that both were confined in the room for about two nights and one day and that she had shown the injuries sustained in her wrist to the police. She explained that she escaped from that place leaving her husband in the room itself and further admitted that she had narrated before the police that her husband was confined by the accused persons in the room but the police at no point of time made any attempt to secure the release of her husband with her aid from the house of Charku, instead she was sent to Garhwa Hospital for her examination.

11. PW 3 Budhai Bhuiyan the father of the prosecutrix partly corroborated the statement of the prosecutrix by testifying that in course of search when he came to the matrimonial home of his elder daughter at village Tasrar, he found his missing daughter Faguni there and she narrated the entire occurrence that she along with her husband was confined in the house of Charku and that she was twice ravished by each of the appellants Shankar Choudhary and Charku @ Ram Janam Kharwar and that though she anyhow escaped but her husband Suresh Bhuiyan was under their confinement. The village "chaukidar" was informed and he came to the police station with his daughter Faguni Devi and wife Kismatiya Devi where her statement was recorded by the police. He admitted that in spite of the information about the kidnap: ping of his daughter and son-in-law, he did not inform either to the police or mukhia or sarpanch of the village or the village chaukidar. The names of the accused were known to him from before but he did not go to their houses in search of his daughter and son-in-law. He had been to only Tasrar in search of his daughter and not to any other relation. The witness admitted that the house of Charku was situated at the visible distance from his house and there were several houses around the house of Charku, occupied by different families.

12. PW 4 Dr. Ajay Kumar Jha and PW 5 Dr. Susma Verma were the members of Medical Board who examined Faguni Devi (prosecutrix) on 12.10.1992 at Sub-Divisional Hospital, Garhwa but no injury was found either on external or internal examination of her body. Old ruptured, hymen was detected and no spermatozoa was found on microscopic test of the vaginal swab taken out from her private part. The Medical Board expressed inability to give any definite opinion about rape on the prosecutrix Faguni Devi and when called upon, PW 5 Dr. Susma Verma testified that usually no spermatozoa survive after lapse of 72 hours of co-habitation. The medical report was proved Ext. 1.

13. Mr. Tapas Roy, learned A.P.P. opposed the contention as advanced on behalf of the appellants and submitted that the prosecution case as propounded by the present prosecutrix and corroborated by other witnesses cannot be disbelieved only on the minor discrepancy in the statements of Faguni Devi (PW 2). The learned APP exhorted that she has narrated the occurrence constantly as to how

she and her husband were whisked away forcibly on the pretext of village panchayati which did never convene. She had categorically named all the four appellants with one Dhanesh Choudhary who actively participated in their abduction and confinement in the room situated in the house of Charku @ Ram Janam Singh. That apart she consistently pin pointed the allegation and commission of gang rape against the appellant Ram Janam Singh @ Charku and Shankar Choudhary and for that charge should have been framed appropriately u/s 376(2)(g), IPC but it was framed u/s 376/34, IPC and accordingly, on the materials available on the record both were convicted and sentenced 10 years rigorous imprisonment apart from conviction of all the appellants under Sections 364/34, 342/34, IPC with adequate sentence of imprisonment which do not call for interference.

14. Having regard to the facts and circumstances of the case, I find substance in the arguments advanced for the appellants that the statements of the prosecutrix PW 2 (Faguni) suffer from infirmities and inconsistency in material particulars. In her statement recorded first point in time before the police she narrated that she was let-off by the appellants Shankar and Charku but her husband Suresh was forcibly taken towards -west by both the appellants. Then she came to her parental home and when she did not find her parents she then came to her sister's village home at Tasrar. But in her substantive evidence she testified under cross-examination as contained in paragraph 15 that she escaped from the place of occurrence leaving her husband behind in confinement and that she had narrated this fact before the police but the police did not take initiative for the release of her husband. She further admitted that she delivered her petticoat to the police but there was neither seizure list of petticoat before the trial Court nor there was any evidence to the effect that it was sent for chemical examination.

15. The next point which needs conscious consideration is the conduct of the prosecutrix from very beginning of the alleged occurrence till the delivery of her statement before the police. She narrated that she as well as her husband Suresh were forcibly taken away by the appellants and one Dhanesh on 8.10.1992 at about 4.00 p.m. from her parental home but she did not raise alarm for help from the neighbours. She admitted that her parental home was surrounded by several houses but no attempt was made to attract the attention of the villagers when she was being taken away forcibly by 5 accused to the house of Charku in the same village.

16. PW 3 Budhai Bhuiyan, father of the prosecutrix very fairly admitted by testifying that the house of Charku @ Ram Janam Singh was situated in the same village at visible distance but in spite of knowing the names of the appellants on the alleged date of occurrence, he neither at his own nor with the help of villagers attempted to enquire from any of the appellants including from Charku visiting his house as to the whereabouts of his daughter and son-in-law. The conduct of this witness and his statement made thereto in the Court do not

inspite confidence.

17. I further find from the testimony of the prosecutrix that she was confined in the different rooms of the appellant Ram Janam Singh @ Charku for nearly 36 hours but she did not raise alarm even at the time when she was allegedly ravished by two of the appellants. It was not the allegation that she was put under constant threat by the appellants Shankar Choudhary and Ram Janam Singh @ Charku displaying in lethal weapon or otherwise which prevented her from raising alarm. Her husband conspicuously kept mum against the natural human conduct when her wife was forcibly taken away by two appellants in his presence and committed gang rape.

18. No Information was made to the nearest police station situated at the distance of 12 k.m. by the PW 3 father of the prosecutrix for long 5 days from 8.10.1992 till the morning of 12.10.1992 about their kidnapping by named accused persons/appellants. Similarly village mukhiya, sarpanch or the chaukidar were not informed and for that no explanation could be afforded by the prosecution.

19. There is substance that abstinence of the Investigating Officer from the witness box has prejudiced the defence of the appellants under the facts and circumstances of the case. I do not find the objective finding of the I.O. on the record as to what evidence he collected when he visited the place of occurrence alleged to be the house of Ram Janam Singh @ Charku, whether he picked up the broken piece of bangles from his carpet room alleged to be such, place where prosecutrix was gang rape.

20. Similarly, what information the I.O. gathered in respect of the allegation that manufacturing work of carpet was stopped in the house of Charku during the alleged period of confinement of the prosecutrix. There appears substance that the absence of the husband Suresh Bhuiyan, elder sister of the prosecutrix who was married at Tasrar and her grandfather from the witness box gives rise to adverse inference u/s 114(g) of the Code of Criminal Procedure.

21. In the facts and circumstances and the discussions made hereinabove, coupled with medical evidence which did not support the allegation of gang rape for limited purpose, I find and hold that the prosecution failed to prove the charges as alleged against the appellants beyond the reasonable doubts and therefore their conviction in the present appeals arising out of Sessions Trial No. 316/1993 cannot sustain and hence it is set aside. All the three appeals aforesaid are allowed and the appellants are acquitted.

Let the appellants (1) Ram Janam Singh @ Ram Janarn Kharwar @ Charku; and (2) Shankar Choudhary be set at liberty at once in this case. Other appellants viz. Ketar Bhuiyan and Basudeo Bhuiyan are discharged from their bail bonds.