

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**Criminal Appeal No.1638-SB of 2003
Date of Decision : 25.02.2015**

Kapil Dev

.....Appellant

Versus

State of Haryana

.....Respondent

CORAM:- HON'BLE MR. JUSTICE JITENDRA CHAUHAN

Present: Mr. Krishan Singh, Advocate,
for the appellant.

Ms. Trishanjali Sharma, AAG, Haryana.

JITENDRA CHAUHAN, J.

The instant appeal is directed against the judgment and order dated 23-25.08.2003, passed by the learned Additional Sessions Judge, Sirsa, (for short, 'the trial Court'), whereby, the appellant has been convicted and sentenced as under:-

Section 376 IPC	RI for 10 years and fine of Rs.5000/- or in default of payment of fine, to further undergo RI for 02 year.
Section 366-A IPC	RI for 05 years and fine of Rs.2,000/- or in default of payment of fine, to further undergo RI for 01 year.
Section 363 IPC	RI for 05 years and fine of Rs.2,000 or in default of payment of fine, to further undergo RI for 01 year.

However, all the sentences were ordered to run concurrently.

ATUL SETHI
2015.03.09 16:25
I attest to the accuracy and
authenticity of this document
Chandigarh

2. The brief facts of the case in hand, as recorded in para Nos.2 and 3, of the impugned judgment are reproduced as under:-

“2. In brief, the case of the prosecution is that on 9.9.2002 ASI Sher Singh of Police Station, Ellenabad with other police officials was present at Railway Crossing, Nohar Road, Ellenabad in connection with investigation of a case bearing FIR No.126 of 2002 under Sections 452 and 354 of the Indian Penal Code, Police Station, Ellenabad where Om Parkash son of Jai Karan, Jat by caste, resident of Mithanpura, District Sirsa met the police and presented an application Ex.PC which inter alia runs as under:

“That the complainant Om Parkash, Caste Jat is a resident of village Mithanpura, Police Station Ellenabad. He has a daughter named Manju aged 14/15 years. She is a student of Girls School, Ellenabad. On 7.9.2002 she left for school along with Suman daughter of Balbr and other class-mates as usual. The Principal of the school at 12-noon made a telephonic call that Manju came to the school at 8.00 A.M. who is absent.

Thereupon the complainant went to the school and Suman told him that Manju after putting the bag of book went to a shop for buying some articles but she did not return. He had given his land on Batai to Ram Partap son of Raje Ram, caste Chamar, resident of Dhani Lalkhanwali. Kapil, brother-in-law of Ram Partap, had come to the Dhani of the complainant and stayed there for 4/5 days. Said Kapil about 15/16 days back visited the Dhani in a car. Even on yesterday Kapil was seen at taxi-stand, near Janta Hospital, Ellenabad. He was talking with the drivers. He has suspicion that Kapil son of Dalip Kumar, resident of village Ninan, Distt. Hanumangarh (Raj.) has enticed away his daughter Manju”.

This statement Ex.PC was sent by ASI Sher Singh to the SHO, Police Station, Ellenabad on which case FIR No.166 dated 9.9.2002 under Sections 363 and 366A of the Indian Penal Code was registered.

3. On 19.9.2002 at 12.05 AM (midnight) a V.T. Message was received in Police Station, Ellenabad from the Police Station, Bhirani, Distt. Hanumangarh (Rajasthan) that the accused and prosecutrix Manju have been nabbed. Thereupon, ASI Sher Singh and other police officials and Om Prakash complainant went to Police Station, Bhirani, Distt. Hanumangarh and brought the accused and the prosecutrix in Police Station, City Sirsa. The prosecutrix was medicolegally examined in Civil Hospital, Sirsa, ---- recorded the statement of Manju prosecutrix ----under Section 161 of the Cr.P.C. She was also produced before the Judicial Magistrate 1st Class, Sirsa who recorded her statement under Section 164 of the Code of Criminal Procedure. In her statement she narrated the facts of the prosecution case as discussed above and further deposed that on 21.08.2002 accused Kapil Dev visited their hamlet where Kanta wife of Partap Singh and sister of the accused resides with her family. The land of the family of the prosecutrix was under cultivation of Partap Singh. On 22.8.2002 she had gone to the house of Kanta Devi. She returned after taking

prasad. On 23.8.2002 at about 5.00 P.M., she again went to the house of Kanta Devi to deliver Kaachre (fruit). Kanta was not present at her residence at that time but on knife point accused Kapil Dev threatened her that he will kill her and her parents if she raised alarm. The accused caught her by arms and took her towards cotton crop by force and raped her. On 26.08.2002 she was present at her hamlet with her family members. The accused Kapil again on knife point took her to the nearby cotton crop and committed sexual act. On 7.9.2002 she had gone to school at Ellenabad. She put the school bag in her school and went to a nearby shop outside school premises where the accused was already present. He again threatened to eliminate the prosecutrix and her family members. He took her to Sirsa. On 9.9.2002 he took her to Lakkhan Wali Dhani which is the native place of said Partap, the brother-in-law of accused Kapil. Kanta and Partap were also there. On the night accused Kapil raped her. Both Kanta Devi and Partap assured her to be lawfully married through the process of Court. Thereafter, the accused Kapil took the prosecutrix

from one place to another. He kept her under constant fear of life. He also raped her against her wishes. On 18.9.2002 the police nabbed them. She was brought to Civil Hospital, Sirsa where she was medicolegally examined. She also made statement to the police and the Illaqa Magistrate. On her statement Section 376 of the Indian Penal Code was added. On the demarcation of the prosecutrix, the rough site-plan of the place of occurrence was prepared. After completion of investigation and other legal formalities, the report under Section 173 of the Cr.P.C. was prepared and presented in the Court to put the accused to trial.”

3. The copies of the challan were supplied to the accused and upon committal of the case to the Court of Session Judge, Sirsa, it was entrusted to the trial Court vide order dated 07.01.2003. After hearing both the sides, accused Kapil was charged under Sections 363/366-A/376 of the Indian Penal Code (IPC for short), whereas, accused Kanta Devi and Partap Singh were discharged finding no prima facie case against them. Accused-appellant, Kapil Dev, pleaded not guilty and claimed trial.

4. In order to substantiate the charges against the accused, the

prosecution examined the following witnesses:-

PW1, Mrs. Urmila, Principal, Govt. Girls' Senior School, Ellenabad, proved the school certificate of prosecutrix Manju as Ex.PA and Ex.PA/1, wherein, the date of birth of the prosecutrix is recorded as 07.04.1988.

PW2, Shri Krishan Kumar, Halqa Patwari, proved scaled site plan, Ex.PB.

PW3, SI Om Prakash, stated that on 09.09.2002, he recorded the formal FIR, Ex.PC/2, on the basis of ruqa, Ex.PC with endorsement Ex.PC/1.

PW4, Inspector Sat Narain deposed that after completion of investigation, he prepared the report under Section 173 of the Cr.P.C. and presented in the Court.

PW5, Dr. Dile Singh medico-legally examined accused, Kapil Dev on 19.09.2002, who found him to be capable of performing sexual intercourse.

PW6, Head Constable Amar Singh, a formal witness, tendered in evidence his affidavit, Ex.PE.

PW7, Constable Ram Chander, is also a formal witness, who tendered in evidence his affidavit, Ex.PF.

PW8, the prosecutrix, narrated the facts of the

prosecution case. She specifically deposed that accused Kapil, on knife point, abducted her from the lawful guardianship of her father. The accused raped her against her wishes and also threatened to kill her and her parents.

PW9, Dr. Santosh Bishnoi, medico-legally examined the prosecutrix on 19.09.2002 and proved her report, Ex.PG and the police report, Ex.PG/1.

PW10, Parkash, the complainant, proved the contents of the complaint, Ex.PC.

PW11, ASI Sher Singh, the Investigating Officer, deposed with regard to the investigation conducted by him.

The prosecution also relied upon the FSL report, Ex.PL. The remaining witnesses were given up as unnecessary.

5. In his statement under Section 313 Cr.P.C., the accused-appellant denied all the allegations of the prosecution case and pleaded false implication. He specifically stated that the prosecutrix, who was 18 years of age, was in love with the accused and wanted to marry him. She was Jat by caste, whereas, the accused, was Sunar, thus, the parents of the prosecutrix was against the matrimonial

alliance. In defence, he examined DW1-Shri Het Ram, Headmaster, Govt. Middle School, Bhuranpura, Tehsil Tibbi, Distt. Hanumangarh (Raj.), who proved the certificate, Ex.DB, which shows that the prosecutrix was never enrolled in Govt. Middle School, Bhuranpura.

6. The learned trial Court, after hearing learned counsel for the parties and appreciating the evidence on record, convicted and sentenced the appellant as noticed at the outset of this judgment.

7. Hence, the present appeal, which was admitted by this Court on 09.09.2003.

8. The learned counsel for the appellant contends that the prosecutrix was major at the time of the alleged occurrence. The school certificate, Ex.PA, cannot be relied upon, in the absence of the Middle School Certificate, allegedly on the basis of which, the date of birth was recorded in Ex.PA as 07.04.1988. Despite the specific recommendation of Dr. Santosh Bishnoi, PW-9, no ossification test was conducted upon the prosecutrix to determine her age. The grandfather of the prosecutrix, who allegedly got her admitted to the school, has also not been examined by the prosecution. It is further contended that the prosecutrix was a consenting party. She remained with the accused from 07.09.2002 to 18.09.2002, and visited various places in different modes of transport. In the statement of the prosecutrix, there is no mention that she made any effort to escape.

9. On the other hand, the learned State counsel, vehemently argued that the prosecutrix was less than 16 years of age. She was

under constant threat of the accused, thus, she had to submit to his wishes.

10. I have heard the learned counsel for the parties and gone through the record with their able assistance.

11. In the present case, the important questions for determination by this Court are with regard to the age of the prosecutrix and whether she was a consenting party or not.

12. In order to prove the age of the prosecutrix, the prosecution examined Urmila, the Principal of Government Girls Senior School, Ellenabad, as PW1. She proved school certificate Ex.PA and Ex.PA/1. In the school certificate, the date of birth of the prosecutrix is reflected as 07.04.1988, thus, she was around 14 years of age at the time of the alleged occurrence. The prosecutrix, PW8 and the complainant, PW10, also deposed on the same lines with regard to the age of the prosecutrix. However, except this evidence, there is no other evidence brought on record to prove the age of the prosecutrix. The school certificate, Ex.PA and Ex.PA/1, proved by PW-1 has no value in the eyes of law because she did not bring any other supporting document on the basis of which, certificate, Ex.PA, was prepared. The mother of the prosecutrix was neither joined in the investigation nor examined at trial to prove the date of birth of the prosecutrix. She was the best witness who could have deposed about the date of birth of her daughter. The best evidence, which was available, has been withheld. So, adverse inference is to be drawn

against the prosecution. Furthermore, it is settled position of law that age mentioned in such certificate is of no value unless the person, who made the entry or who gave the date of birth is examined. The Hon'ble Supreme Court in **2011 AIR (SC) 715 title as "Alamalu and another Vs State Rep. by Inspector of Police"** has held thus:-

"38. We will first take up the issue with regard to the age of the girl. The High Court has based its conclusion on the transfer certificate, Ex.P16 and the certificate issued by PW8 Dr. Gunasekaran, Radiologist, Ex.P4 and Ex.P5. Undoubtedly, the transfer certificate, Ex.P16 indicates that the girl's date of birth was 15th June, 1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31st July, 1993. The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under Section 35 of the Indian Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the

transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined. We may notice here that PW1 was examined in the Court on 9th August, 1999. In his evidence, he made no reference to the transfer certificate (Ex.P16). He did not mention her age or date of birth. PW2 was also examined on 9th August, 1999. She had also made no reference either to her age or to the transfer certificate. It appears from the record that a petition was filed by the complainant under Section 311 Cr.P.C. seeking permission to produce the transfer certificate and to recall PW2. This petition was allowed. She was actually recalled and her examination was continued on 26th April, 2000. The transfer certificate was marked as Ex.P16 at that stage, i.e., 26th April, 2000. The judgment was delivered on 28th April, 2000. In her cross-examination, she had merely stated that she had signed on the transfer certificate, Ex.P16 issued by the School and accordingly her date of birth noticed as 15th June, 1977. She also stated that the certificate has been signed by the father as well as the Headmaster. But the Headmaster

has not been examined. Therefore, in our opinion, there was no reliable evidence to vouchsafe for the truth of the facts stated in the transfer certificate”

13. The complaint, Om Prakash, PW-10 admitted in his cross examination that the maternal grandfather of the prosecutrix had got her admitted to school for the first time at his native village, Bhuran Bhura, State of Rajasthan. The complainant could not tell as to in which year the prosecutrix was admitted to school for the first time. However, the material grandfather of the prosecutrix was not examined by the prosecution. The Division Bench of this Hon’ble Court in “**Jaipal Singh Vs State of Haryana**” cited as **2003(2) RCR (Criminal) 310**” has held in para nos. 10 and 11, as under:-

“10. The foremost question for determination is the age of the prosecutrix. According to the school certificate (Ex.PC), which was produced by Mr. Inspector Singh (P.W.3), the date of birth of Ms. Sita Devi is April 4, 1994. Thus, she was above 15 years on May 30, 1994, which is the date of her elopement with the accused. In the first ever statement made by her father Jit Bahadur (P.W.4), on the basis of which the first information report was recorded on June 5, 1994, he mentioned her age as 16/17 years. Ms. Sita Devi prosecutrix on

the day of her medico legal examination by Dr. Supriya Gupta (P.W.1), i.e., August 23, 1994, got her age recorded as 17-1/2 years. Jit Bahadur (P.W.4), who is the father of the prosecutrix, in his statement before the Court on April 3, 1995, stated himself to be of 43 years age. According to him, he had five children and Ms. Sita Devi prosecutrix is the eldest one. According to him, when he was 22 years of age, he had got himself married and after 14 months of his marriage, the prosecutrix had taken birth. It means when he had made his statement before the Court 21 years had passed to his marriage. In this wife, he had married in the year 1974. In case Sita Devi prosecutrix had taken birth 14 months of the marriage of her father Jit Bahadur, then she seems to have taken birth in June 1975. This means that she was more than 18 years of age of the date of her elopement with Jaipal Singh appellant. Though according to the school certificate (Ex.PC), she was about 15 years of age on May 30, 1994, but the other overwhelming evidence coming in the aforementioned statements of the prosecutrix and her father Jit Bahadur (P.W.4), completely falsify the

date of birth recorded in the school record. Moreover, in the cross-examination, Mr. Inspector Singh (P.W.3), Headmaster of the school, where the prosecutrix is alleged to have studied for about one year from October 5, 1986 to November 18, 1987, has stated that they had entered the date of birth of "Sita Rani" (prosecutrix) in the record as had been told by her father. According to this witness, no other evidence was available in the school. The clear presumption is that the date of birth of the prosecutrix in the school was not recorded on the basis of the Birth Certificate but only on the basis of the statement made by her father Jit Bahadur (P.W.4), father of the prosecutrix, belongs to Nepal. Accordingly to him, the prosecutrix was born in Nepal and an entry regarding her birth was made in the Panchayat record there. He further stated that he had "not brought any birth entry from there." Jit Bahadur (P.W.4) is an illiterate man. This shows that at the time of admitting the prosecutrix "Sita Rani" in the School on October 5, 1986, in the Ist Class, he had lowered her age by about four years. He had not brought the birth certificate from the

Panchayat where by the entry regarding birth of the prosecutrix was made. Had Jit Bahadur (P.W.4) produced the birth certificate to the school authorities at the time of the admission of the prosecutrix in the Ist Class, she would have been shown to be of the age of more than 11 years. In order to conceal her age, he mentioned her to be of about 7 years of age at the time of her admission in the school.

11. *Still further, at the time of her medico-legal examination by Dr. Supriya Gupta (P.W.1) on August 23, 1994, the prosecutrix mentioned her age as 17-1/2 years. There is a general tendency in human beings, especially in women, to decrease the age at the time when no proof of age is required to be given. Anyhow, nobody likes to mention the age on the higher side. No ossification test has been got conducted by the prosecution.”*

14. PW-9 Dr. Santosh Bishnoi, who medico-legally examined the prosecutrix, recorded her age as 15 ½ years as stated by the prosecutrix. This witness has also admitted that she had advised for ossification test of the prosecutrix to determine her age. However, for

the reasons best known to the prosecution, no such test was got conducted. The Investigating Officer, ASI Sher Singh, PW-11, has admitted in his cross examination that despite the advise from the doctor to get the ossification test done on the prosecutrix, same was not conducted. No explanation was offered by this witness for such lapse. So, on this account also, the adverse inference is to be drawn against the prosecution.

15. Thus, from the above discussion, it becomes clear that the prosecutrix was major at the time of commission of alleged offence. Now, this Court would now determine as to whether the prosecutrix was a consenting party or not. The appellant in his statement recorded under Section 313 Cr.P.C. has categorically stated that the prosecutrix, who was 18 years of age, was in love with him and wanted to marry him. She insisted on seeing him against her parents' advice. The stand of the appellant is fortified by the conduct of the prosecutrix. The prosecutrix has stated that she was subjected to sexual assault by the accused/appellant under threat. However, she has admitted that she remained with the accused from 07.09.2002 till 18.09.2002, and stayed at different places in the States of Haryana and Rajasthan. She cohabited with the appellant for 10-11 days without any protest. This fact has been admitted by her in cross examination. It shows that the prosecutrix was accompanying the accused with her free will as she made no effort either to draw the attention of a member of the public or to escape herself. Both of them

were apprehended together by the Police of Rajashan. The Hon'ble Supreme Court, in Alamelu's case supra, in para no 46 has held as under:

46. In our opinion, the evidence of PW2 does not satisfy the aforesaid test. The High Court erroneously concluded that the girl had not willingly gone with Sekar. The conclusion (1952) SCR 377 could only be recorded by ignoring the entire evidence with regard to the conduct of the girl from the time of the alleged abduction till the time of the alleged recovery. We have noticed earlier that she did not make any complaint on so many occasions when she had the opportunity to do so. We may, however, notice that even after the alleged marriage, the girl continued to be a willing partner in the entire episode. Even if the prosecution version is accepted in its totality, it would be established that the girl was staying with Sekar (A1) from 31st July, 1993 till 10th August, 1993. Even PW5, Thiru Thirunavukarasu stated that Sekar (A1) had brought the girl with him to his house and

told him that he had married her. They had come to see Trichy and requested a house to stay. This witness categorically stated that he thought that they were newly married couple. He had made them stay in door no. 86 of the Police Colony, which was under his responsibility. On 10th August, 1993, the police inspector, who arrived there at 10.00 p.m. told this witness that Sekar (A1) had married the girl by threatening her and "spoiled her". The girl, according to the prosecution, was recovered from the aforesaid premises. Therefore, for six days, this girl was staying with Sekar (A1). She did not raise any protest. She did not even complain to this witness or any other residents in the locality. Her behavior of not complaining to anybody at any of the stages after being allegedly abducted would be wholly unnatural. Earlier also, she had many opportunities to complain or to run away, but she made no such effort. It is noteworthy that she made no protest on seeing some known persons near the car,

after her alleged abduction. She did not make any complaint at the residence of Selvi, sister of Sekar (A1) at Pudupatti. Again, there was no complaint on seeing her relatives allegedly assembled at the temple. Her relatives apparently took no steps at the time when mangalsutra was forcibly tied around her neck by Sekar (A1). No one sent for police help even though a car was available. She made no complaint when she was taken to the house of PW5, Thiru Thirunavukarasu and stayed at his place. Again, there was no protest when Sekar (A1) took her to the police station on 5th day of the alleged abduction and told at the Tiruchi Police Station that they had already been married. The above behaviour would not be natural for a girl who had been compelled to marry and subjected to illicit sexual intercourse.”

16. Moreover, as per the statement of the prosecutrix, before her abduction by the appellant on 07.09.2002, she was raped by the accused on two earlier occasions. On 23.08.2002, she went to the

house of Kanta for delivering some fruit. The accused alone was present there. He threatened the prosecutrix at knife point and took her forcibly to the cotton crop field and raped her. Again on 26.08.2002, when the prosecutrix was present in the hamlet along with other members of the family, the accused took her at knife point to the cotton crop field and committed the sexual act. It is highly improbable that in the presence of the family members of the prosecutrix, the accused took her at knife point to the cotton crop field and commit the crime. The accused-appellant is also stated to be 18 years of age at the time of the alleged occurrence. The sequence of events narrated by the prosecutrix, as also her conduct inasmuch as in spite of having numerous opportunities to run away or to inform any member of the public, she did not make any such effort. In his statement under Section 313 Cr.P.C., in answer to question No.10, the accused replied as under:-

“I am victim of a frame up. In fact, Manju had fallen for me and she expressed her desire to marry me since she had crossed 18 years of age but because she is the Jat by caste and I come from the Sunar community, her parents did not agree to the matrimonial alliance. She insisted on seeing me against her parents advise. I was framed in this false case even as I never had sexual contact with her.”

17. Thus, from the above facts, it is proved that the prosecutrix was major and a consenting party and had willingly gone with the accused.

18. In view of the above discussion, this Court is of the considered view that the prosecution has failed to prove its case against the appellant. Consequently, the present appeal is allowed, the impugned judgment of conviction and order of sentence are, hereby, set aside and the accused-appellant, Kapil Dev, is acquitted of the charges framed against him. The appellant is stated to be on bail. His bail bonds shall stand discharged.

Allowed.

25.02.2015
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(JITENDRA CHAUHAN)
JUDGE

Note: Whether to be referred to reporter ? Yes/No