

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

**Criminal Appeal No.1167-SB of 2003
Date of Decision : 14.01.2015**

Raj Kumar @ Raju

.....Appellant

Versus

State of Haryana

.....Respondent

CORAM:- HON'BLE MR. JUSTICE JITENDRA CHAUHAN

Present: Mr. Kamal Goyal, Advocate/legal aid counsel,
for the appellant.

Ms. Trishanjali Sharma, AAG, Haryana.

JITENDRA CHAUHAN, J.

The instant appeal assails the judgment and order dated 5-6.02.2003, passed by the learned Sessions Judge, Jind, (for short, 'the trial Court'), whereby, the appellant has been convicted and sentenced as under:-

Section 376 IPC	RI for 07 years and fine of Rs.1,000/- or in default of payment of fine, to further undergo RI for 01 year.
Section 366 IPC	RI for 04 years and fine of Rs.5,00/- or in default of payment of fine, to further undergo RI for 06 months.
Section 363 IPC	RI for 03 years and fine of Rs.500 or in default of payment of fine, to further undergo RI for 06 months.

However, all the sentences were ordered to run concurrently.

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authenticity of this document
Chandigarh

2. The brief facts of the case in hand, as recorded in para No.2 of the impugned judgment are reproduced as under:-

“2. The prosecution case, in brief, is that Shri Ranbir Singh ASI along with Ram Kumar HC etc. was present on patrolling duty at Phawara chowk, Jind. Kitab Singh son of Bahadur Singh complainant came across him and he lodged a report with him on 16.10.2000 to the effect that he is residing in a pucca house in Vishwakarma colony, Jind. He has got two daughters and three sons. His elder daughter Kusum is aged 14 years and is a student of VIII class in Government Girls Senior Secondary School, near Bharat Cinema, Jind. On 14.10.2K as usual his daughter had gone at 7 AM on foot to the school. She used to come back at about 12.30 PM, but on that day she did not come back till 1.30 or 2 PM. The complainant searched for his daughter Kusum but she was not traceable. It is alleged that about one year prior to this date, Dilbag elder son of Roshan had dropped a letter containing objectionable material to his daughter but for the honour of the family that matter was compromised. However, all the neighbourers and respectables of the locality have

knowledge about this fact. It is further alleged that about 7 or 8 days prior to the lodging of this report, Raju younger son of Roshan had thrown some paper for his daughter after writing something but this fact was not disclosed to anybody except the family members. On 14.10.2000, Raju the present accused at about 7 AM was standing after wearing new clothes in front of his house which is located in front of the house of the complainant. Consequently, the complainant expressed his suspicion on Raju regarding the abduction of his minor daughter, namely, Kusum. The complainant enquired about Raju, but he was not found available and consequently, the complainant and Roshan father of the accused went away to Ludhiana for search of Kusum and Raju as Raju used to work at Ludhiana. Then search was also conducted in a factory located on the bye-pass of Jullundur. On 15.10.2000, the complainant came back to his house after making efforts. The complainant narrated this incident to several members of the locality. The complainant also enquired about the whereabouts of his daughter Kusum from Poonam

daughter of Sube Singh who told him that Kusum had come out of the school after about one or two hours of the start of the school. Thus, the complainant became doubly sure that Raju, the present accused had enticed away his daughter with intent to perform marriage. Other members of the family or Roshan might have conspired in this occurrence. On this statement of Kitab Singh which was forwarded to the police station after making endorsement, the present case was registered and investigated. Whereabouts of Raju were not known and ultimately on 16.08.2001, the accused was declared a proclaimed offender. On 5.10.2001, from the company of the accused Kusum was recovered. She was got medico-legally examined. The accused was arrested and was got medico-legally examined. On completion of investigation, the present challan was put up.”

3. In this background, FIR No.79 dated 04.07.2008, came to be registered at Police Station Satnali, under Sections 452/376 and 506 IPC. Upon investigation, site plan of the place of occurrence was prepared, the accused was arrested and the prosecutrix was got medico-legally examined from the Government hospital.

4. Charges under Sections 363/366/376 of the Indian Penal Code (IPC for short) were framed against the accused-appellant to which, he pleaded not guilty and claimed trial.

5. In order to substantiate the charges against the accused, the prosecution examined as many as thirteen following witnesses:-

PW1, Dr. R.N. Bura, medico-legally examined the accused-appellant, Raj Kumar. He stated that the appellant was found fit to perform sexual act. He also proved carbon copy of MLR, Ex.PA.

PW2, SI Labh Singh, deposed with regard to receipt of statement of the complainant, Kitab Singh, as Ex.PB, with endorsement, Ex.PB/1, on the basis of which, formal FIR, Ex.PB/2, was recorded.

PW3, Smt. Ramesh Kumar, Principal, proved certificate, Ex.PC, regarding the date of birth of the prosecutrix. As per this certificate, the date of birth of the prosecutrix is recorded as 25.05.1986. She further deposed that the certificate was signed by Krishna Devi, Vice Principal, whose signatures she could identify.

PW4, Constable Dilbag Singh, proved scaled site plan, Ex.PD.

PW6, Head Constable Deva Nand, tendered in evidence his affidavit, Ex.PF.

PW7, is the prosecutrix deposed that she was studying in 8th class at the time of occurrence in Government Girls Senior Secondary School. Raj Kumar had written a letter to her threatening to kill her and her family members because he was trying to outrage her modesty and to rape her. The brother of the accused had also written a letter to her earlier. On 13.10.2000, when her parents had gone outside and she was alone at the house, accused Raj Kumar present in the court came to her house and committed rape with her without her consent. After committing rape, the accused threatened to kill her and her family members in case she disclosed the factum of rape to anybody. On 14.10.2000, the accused threatened to kill her younger brother in case she did not accompany him. She further deposed that on 14.10.2000, the accused took her to Jullundur. He took a room in which she and Raj Kumar used to live. Raj Kumar raped her repeatedly. It was further stated that from Jullundur, the accused took her to Ludhiana and there they lived in a rented house. There also

the accused raped her repeatedly. Thereafter, the accused again took her to Jullundur and they started living in Gali No.13, Aftab Colony, in a rented accommodation. There also, the accused committed rape with her without her consent. The accused used to give beatings to her and threatened her that if she disclosed anything to anybody, she and her family members would be done to death. Then she wrote a letter to her parents. The accused asked her to accompany him to go back and they would stay somewhere in village Bhirtana in his relation. Consequently, when they reached back at Jund Junction railway station on 05.10.2001, they were arrested by the police. Her father, who accompanied the police officials, identified her. She also deposed that after 05.10.2001, she never visited any place with the police nor the police took her anywhere.

PW8, complainant-Kitab Singh, the father of the prosecutrix, reiterated his version made in the complaint. He further stated that on 05.10.2001, the accused and his daughter were recovered from railway station Jind, where he was also present.

PW9, ASI Ravinder Kumar, proved site plan, Ex.PH, prepared by him on 11.09.2001.

PW10, SI Balbir Singh, deposed that on 21.10.2000, he was posted in Police Station City Jind. He searched for the accused and the prosecutrix but could not trace them.

PW11, ASI Ranbir Singh, deposed with regard to recording of statement of the complainant, Ex.PB. He also recorded the statements of Pandit Rameshwar and Poonam.

PW12, Dr. Renu Aggarwal, stated that on 05.10.2001, at about 5.00 PM, she medico-legally examined the prosecutrix. She proved carbon copy of MLR, Ex.PL. It was opined that the hymen was old ruptured.

PW13, SI Kanhiya Lal (retired), the Investigating Officer, deposed with regard to the investigation carried out by him.

6. In his statement under Section 313 Cr.P.C., the accused-appellant denied all the allegations of the prosecution case and pleaded false implication. However, he did not lead any evidence in defence.

7. 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.

8. Hence, the present appeal, which was admitted by this Court on 04.08.2003.

9. The learned counsel for the appellant contends that the prosecutrix was more than 16 years of age at the time of the alleged occurrence, thus, had attained the age of discretion. In spite of the specific recommendation of the doctor, PW-12, Dr. Renu Aggarwal, no ossification test was conducted upon the prosecutrix to determine her age. The alleged school certificate, Ex.PC, wherein, the age of the prosecutrix is recorded as 25.05.1986, cannot be relied upon as no record, on the basis of which, this certificate was prepared, was laid before the Court. The prosecutrix herself stated her age as 18 years at the time of her medico-legal examination by PW-12, which is duly noticed in Ex.PL. It is further contended that the prosecutrix was a consenting party. She remained with the accused for about one year at various places. In the statement of the prosecutrix, there is no mention that she made any effort to escape.

10. On the other hand, the learned State counsel, vehemently argued that the prosecutrix was less than 16 years of age. She was threatened by the accused of dire consequences, and out of fear, the prosecutrix continued to accompany him.

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

12. In the present case, the question arises for determination of this Court is whether the prosecutrix was minor at the time of the alleged incident and if the answer is in negative, whether she was a consenting party.

13. In order to prove that the prosecutrix was minor at the time of incident, the prosecution examined PW-3 Smt. Ramesh Kumari, the Principal of Government Senior Secondary School, Jind. She proved on record certificate Ex PC, wherein, the date of birth of the prosecutrix is recorded as 25.05.1986. As per this witness, the certificate was signed by Krishna Devi, the Vice Principal, whose signatures were identified by this witness. However, said certificate has no value in the eyes of law because PW-3 Smt. Ramesh Kumari, had not brought the school register on the basis of which certificate, Ex. PC was prepared. 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”

14. In the present case also, the prosecutrix categorically admitted in her cross examination that she did not know as to who had got her admitted in the Government School and thereafter stated that her teacher of private school had got her admitted in the Government School. However, said teacher has not been examined by the prosecution and no evidence is coming forth as to why said teacher was not examined so as to prove her date of birth.

Furthermore, as already noticed, PW-3 has also admitted that she did not bring the school register on the basis of which the certificate was prepared. 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.”

15. PW-12 Dr. Renu Aggarwal, medico legally examined the prosecutrix on 05.10.2011. This witness in her cross examination had admitted that at the time of her medico-legal examination, the prosecutrix gave her age as 18 years, which was recorded by the doctor on report Ex PL. The prosecutrix, though denied stating her age as 18 years before the doctor, but admitted that she had told her age as 17 years.

16. In the absence of any conclusive proof of age of the prosecutrix, the ossification test was required to be conducted. PW-12, Dr. Renu Aggarwal, has categorcially deposed that she had recommended for ossification test to determine the age of the prosecutrix. However, for the reasons best known to the prosecution,

no such test was got conducted. The Investigating Officer, Kanhiya Lal PW-13, in his cross examination has admitted that despite opinion from the doctor to get the ossification test done on the prosecutrix, same was not conducted. No explanation was offered by this witness as to why ossification test was not conducted on the prosecutrix.

17. Thus, from the above discussion, it becomes clear that the prosecutrix was more than 16 years of age at the time of commission of alleged offence. It is evident from the testimony of PW-12 Dr. Renu Aggarwal, PW-12 that the prosecutrix had given the doctor her age as 18 years on 05.10.2001. This fact is further substantiated from the Report Ex PL, wherein, the Doctor had noted the age of the prosecutrix Kusum as 18 years, "as told by the patient". Not only this, the prosecutrix, in her cross examination had also admitted that she had told her age as 17 years to the doctor. Although said admission is contrary to the documentary evidence, still, even if her statement is taken to be true, still it is proved that the prosecutrix was more than 16 years of age at the time of alleged offence. Furthermore, it has come in cross examination of the prosecutrix herself that her younger sister is 15 years of age and she is two years younger to her. Thus, this fact also shows that at the time of commission of alleged offence, prosecutrix was more than 16 years of age. Moreover, no explanation is coming forth as to why the ossification test was not conducted. Accordingly, the first question is answered.

18. The answer to the first question coming in negative, this

Court would now advert to the second question. The prosecutrix has stated that she was forcibly taken away by the accused/appellant, who used to threaten her with dire consequences, in case, she disclosed anything to anybody. However, in her cross examination she has admitted that she remained with the accused at different rented accommodations in Ludhiana and Jalandhar and in fact she had also written a letter to her father. She had further admitted that the appellant, Raju told her that they should go back and start living at Village Bhirthana, District Jind. Consequently, they came back and were apprehended at Railway Station, Jind. She cohabited with the appellant Raju for nearly one year i.e., from 14.10.2000 to 05.10.2001, without any protest. This fact has been admitted by her in cross examination. Furthermore, it is also evident from her cross examination that Raju-appellant had taken the prosecutrix to Jalandhar where they lived in a rented accommodation for few months and later on shifted to Ludhiana, where again they lived for some months and thereafter, Raju himself asked the prosecutrix to accompany her back to Jind so that they could live in their village. This fact shows that the girl was living with her free will and had the opportunity to leave the company of the appellant in case she was wrongly/forcibly confined by him. However, she made no effort to escape, coupled with the fact that both were apprehended from Railway Station, Jind clearly show that the prosecutrix was a consenting party and was willingly staying with the appellant. 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.”

19. In a span of approximate one year, the prosecutrix stayed with the appellant, she had numerous opportunities to run away but she made no such effort or lodged any complaint to the police (as has been admitted by her in her cross examination). Thus, from the above facts, it is proved that the prosecutrix was a consenting party and had willingly gone with the accused Raju.

In view of the above discussion, this Court is of the considered view that the prosecution has miserably 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 appellant is acquitted of the charges framed against him. The appellant is stated to be on bail. His bail

bonds shall stand discharged.

Allowed.

14.01.2015

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**(JITENDRA CHAUHAN)
JUDGE**

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