

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

CRA S-1072-SB of 2003 (O&M)

Date of Decision: 06.09.2017.

Kewal

... Appellant

Versus

State of Haryana

... Respondent

CORAM : Hon'ble Mr. Justice Jitendra Chauhan

Present : Mr. P.L. Verma, Advocate,
for the appellant.

Ms. Aditi Girdhar, Advocate and
Mr. Abhilash Grover, Advocate,
Amicus-Curiae for the appellant.

Ms. Dimple Jain, AAG Haryana.

JITENDRA CHAUHAN.J.

This appeal is directed against the judgment dated 09.05.2003 and order dated 12.05.2003 passed by Additional Sessions Judge, Gurgaon vide which the appellant was convicted under Sections 363 and 366 IPC and sentenced to undergo imprisonment as under:-

Offence	Sentence	Fine	In default
363 IPC	RI for 2 years	Rs.1000/-	RI for 1 month
366 IPC	RI for 3 years	Rs.2000/-	RI for 2 months

Both the substantive sentences were ordered to run concurrently.

Brief facts of the case as mentioned in the judgment passed by the trial Court are as under:-

“Brief facts of the prosecution case are that on 8.12.1999 Nawal Singh complainant presented an application at Rajindera Park Police Post to Vijay Singh S.I stating that he was working in United India Insurance Co. He has four children 3 sons and one daughter who is at No.2. His daughter Kavita left her studies when she was in 13th class. On 24.11.1999 at about 9 a.m his daughter Kavita had left the house for going to the house of her friend but she did not return till evening. He then enquired about her from her friends but her whereabouts could not be known. He enquired from Delhi and other places in his relationship but his daughter was not found there also. When he enquired about her from here and there then he came to know that his daughter was seduced by Kewal son of Siri Ram Balmiki resident of Gurgaon village. On the above application a case under Sections 363 and 366 IPC was registered. In course of investigation, the prosecutrix was recovered on 19.12.1999. She stated in her statement dated 19.12.1999 that she had left her studies in B.A. Part II. On 24.11.1999 in the morning when she was going to see her friend and when she reached near the well

of Jataan then all of a sudden a Maruti Van coloured red stopped near her. Kewal opened the window and pulled her inside the Van. One more person was also sitting in the van regarding whom she came to know later on to be Ramdia, brother-in-law (Jija) of Kewal accused. Kewal accused closed her mouth by putting hand on it and Maruti Van started running at a high speed. Kewal accused laid her on the seat and threatened her that if she would cry he would kill her. She was then taken to village Bega and was kept confined in a house. Kewal accused used to call the owner of the house as brother and the lady of the house as Bhabhi. The name of brother was Vijay and that of Bhabhi Bala. Kewal accused also told them to have vigilance on her. After 5-6 days Kewal accused took her to village Garhi Kesari where he got a house on rent. The accused raped her day and night there and she used to be taken by the accused to the house of his brother and brother's wife on Saturdays and Sundays. He used to come back on Monday. The accused threatened her that if she would tell that she had been kidnaped to anybody then he would kill her. She on one day after opening the bolt came out and

came back to her house. The prosecutrix made supplementary statement also to the police stating that the other person named Ramdia who was with Kewal accused also asked Kewal to release her but he did not agree. On the basis of above statement offences under Sections 376, 342 and 506 IPC were also added. Accused Kewal, Vijay Singh and Bala Devi were arrested. After completing necessary formalities of investigation, the above accused were sent up before the Court for trial. ”

Copies of challan and other documents were supplied to the accused free of costs.

Charges under Sections 363, 366, 376, 342 and 506 IPC were framed against accused Kewal whereas, accused Vijay Singh and Bala were charge-sheeted for the offence under Section 342 IPC to which the accused pleaded not guilty and claimed trial.

In order to prove its case, the prosecution examined PW-1 Minakshi S.S. Mistress, PW-2 prosecutrix, PW-3, complainant Nawal Singh, PW-4 Dr. Ayesha Bano, PW-5 SI Mawasi Ram, PW-6 Inspector Bharat Singh, PW-7 Satish Kumar, PW-8 HC Jagdish Chand, PW-9 Inspector Randhir Singh, PW-10 Inder Parshad, PW-11 SI Vijay Singh SI and closed the prosecution evidence.

Statements of accused were recorded under Section

313 Cr.P.C and all the incriminating circumstances appearing in the prosecution evidence were put to them to which they denied and pleaded false implication.

No evidence in defence was led by the accused.

After appraisal of the evidence, the learned trial Court, vide impugned judgment and order, convicted and sentenced the accused as narrated above. The appellant was acquitted of the charge under Sections 376 and 506 IPC. However, co-accused Vijay and Bala were acquitted of the charge framed against them under Section 342 IPC. It was observed by the trial Court that since the prosecutrix is proved to be of the age of below 18 years at the time of occurrence and accused Kewal is proved to have kidnapped her from the lawful guardianship of her parents and also is proved to have done so with intent to compel the prosecutrix to marry her against her will and also had sexual intercourse with her, the offence under Sections 363 and 366 IPC are well attracted.

Feeling dis-satisfied with the impugned judgment and order, the present appeal has been filed by the accused/appellant, Kewal.

It is contended that the occurrence is alleged to have taken place on 24.11.1999 whereas, the FIR was lodged after a gap of 26 days on 19.12.1999, therefore, there is a considerable delay in lodging the FIR. It causes aspersion on the case of the prosecution

particularly in view of the fact that the the appellant and the complainant knew each other.

It is further contended that the birth certificate of the complainant was not produced on record to establish her age. The prosecution had produced the school record Ex.P-1 to P-2. An affidavit Ex.P-3 was also tendered by the father of the prosecutrix in support of her age. It is asserted that it is settled law that in determining the age of the victim of rape, the birth certificate is to be looked into. He relies upon **State of Madhya Pradesh versus Anoop Singh CRA No.442 of 2010 (para 12)** to contend that the Court must rely on the document i.e the matriculation certificate and in the absence of the same, the birth certificate from the school first attended. No ossification test was carried out in this case though PW-4 Dr. Ayesha Bano had referred her for ossification test.

Lastly, it is asserted that as the the trial Court has already acquitted the appellant of the charges under Sections 376 and 506 IPC by returning a finding that the prosecutrix was proved to be a consenting party and she lived with the appellant with her consent, therefore, the appeal deserves to be allowed.

On the other hand, the learned State counsel supports the judgment and order passed by the trial Court. It is submitted that the victim was less than 18 years of age so, the offence of kidnapping is proved in the matter.

I have heard the learned counsel for the parties and have gone through the case file.

The trial Court while acquitting the appellant of the offence under Section 376 IPC has observed as under:-

“Kavita prosecutrix appearing as PW-2 has stated that she remained with the accused at village Bega Tehsil Ganaur Distt. Sonapat in big family where Kewal used to tell the children of the family that she is their aunt and she also used to observe Ghungat before the head of the family whom she used to call Jeth and wife to be Jethani. The name of Jeth was Vijay and that of Jethani was Bala, both accused in this case. She remained there for about 4-5 days then accused took her at some other place in a rented house from where she used to visit the house of Vijay and Bala off and on. She was again taken to village Bega and she stayed there for one night. In her cross examination, she admitted that she knew Kewal accused earlier. She was having her academic certificates and photos album for her family also with her. The prosecutrix was confronted with two photographs Ex.DA and DB also, which she admitted to have been snapped in her presence. She further

admitted that she along with the accused crossed several red light chowks and she found police also there and took about 5-7 hours in reaching village Ganaur. She was supplied with tea and food also on the way by the accused. The house in which she stayed at Bega is admitted to have been surrounded by other residential houses and she could see the persons in the village on the way and she did not try to resist against the accused during the above period. She further admitted that during her stay of 5 days at Bega, residents of village used to visit the house of the accused but she did not raise any noise during that period. The other house in which she stayed for some time is also admitted to be surrounded by residential houses. When she used to go to the house of Vijay she used to go on a tempo and on the way and in the tempo ladies and gents used to meet her but she did not raise noise. She visited village Bega 4-5 times. She stayed at village Garhi for about 8-10 nights with accused Kewal and a toilet at that place was outside the house. She used to prepare the food. The accused had taken all the household goods with him in the vehicle including utensils. The accused used to go

outside also to take vegetables and other eatables. Accused Kewal provided her three pair of suits one pair of Pajeb made of silver and she used to wear the same daily. Besides this the prosecutrix visited Delhi also with the accused on 27.9.1999 and got affidavits attested from there which are Ex.D-1 and D-2 on the file and are duly proved to have been signed by the prosecutrix and attested by oath commissioner, Delhi. The reason for not raising hue and cry and not telling anything about the conduct of the accused towards her is stated to be that the accused had threatened to kill her and her family if she would do so. The above version of the prosecution is not worthy of credence. Photos Ex.DA and DB, affidavits Ex. D-1 and D-2, report of the doctor regarding her medico legal examination and the above conduct of the prosecutrix are sufficient to show that she was a consenting party. She had sexual intercourse with accused Kewal of her own sweet will and free consent. The offence under Section 376 IPC therefore is not made out by the evidence on record.”

Hon'ble the Supreme Court in *S. Varadarajan Vs.*

State of Madras, 1965 AIR (SC)942, has observed as under:-

“9. It must, however, be borne in mind that there is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of Section 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.

10. It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our opinion if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfillment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to 'taking'.”

In view of above, the charge of kidnapping falls to the ground. The prosecutrix was a grown up girl. She had attained the age of discretion though not the age of majority. She could understand what is good and bad for her. She remained with the accused at village

Bega Tehsil Ganaur Distt. Sonapat in big family where Kewal used to tell the children of the family that she is their aunt and she also used to observe Ghungat before the head of the family whom she used to call Jeth and wife to be Jethani. She remained there for about 4-5 days then accused took her at some other place in a rented house from where she used to visit the house of Vijay and Bala off and on. She was again taken to village Bega and she stayed there for one night. She has admitted that she knew Kewal accused earlier. She had with her academic certificates and photographs of her family. She further admitted that she along with the accused crossed several red light chowks and she found police also there and took about 5-7 hours in reaching village Ganaur. She was supplied with tea and food also on the way by the accused. The house in which she stayed at Bega is admitted to have been surrounded by other residential houses and she could see the persons in the village on the way and she did not try to resist against the accused during the above period. She further admitted that during her stay of 5 days at Bega, residents of village used to visit the house of the accused but she did not raise any noise during that period. The other house in which she stayed for some time is also admitted to be surrounded by residential houses. When she used to go to the house of Vijay she used to go on a tempo and on the way and in the tempo ladies and gents used to meet her but she did not raise noise.

She visited village Bega 4-5 times. She stayed at village Garhi for

about 8-10 nights with accused Kewal. She used to prepare food. The accused had taken all the household goods with him in the vehicle including utensils. The accused used to go outside to take vegetables and other eatables. Accused Kewal provided her three pair of clothes, one pair of Pajeb made of silver and she used to wear the same daily. Besides this, the prosecutrix visited Delhi with the accused on 27.9.1999 and got affidavits attested from there which are Ex.D-1 and D-2 on the file and are duly proved to have been signed by the prosecutrix and attested by oath commissioner, Delhi. Her conduct suggests that she was a willing partner and she was not taken away by the accused. In fact, she voluntarily left her home and stayed with the accused as his wife. There is delay of 26 days in lodging the FIR. The prosecution has failed to explain the delay. The prompt lodging of FIR is insisted upon by the law so as to avoid any embellishment and after-thought version. The delay has not been explained by the prosecution.

In view of above, the present appeal is accepted and the impugned judgment and order are set aside. The accused/appellant is acquitted of the charges framed against him. The bail bonds and surety bonds stand discharged.

06.09.2017.
SN

(JITENDRA CHAUHAN)
JUDGE

Whether speaking/reasoned :	Yes/No
Whether reportable :	Yes/No