

complainant, Charanjit Singh and Harbans Singh, both member of the Panchayat. It was also alleged in the complaint that on an earlier occasion, the prosecutrix who was aged 13/14 years and was studying in G.M. Model School, Kattianwali, had informed her that both Nirmal Singh, driver of the mini bus, and Malkiat Singh, conductor the said bus, had an ill eye on her and while traveling in their bus, they used to tease the prosecutrix. They inquired about Nirmal Singh and Malkiat Singh who were found missing from their house. The complainant along with Charanjit Singh and Harbans Singh met ASI Surinder Pal and other police officials at Tikoni Abohar-Fazilka Road, Malout and gave a complaint. The said complaint was sent for registration of the FIR, on the basis of which, FIR No. 47 dated 02.04.2002, under Section 366 of the Indian Penal Code was registered against the accused. On 02.05.2002, ASI Surinder Pal along with other police officials and Harbans Singh started searching for the prosecutrix and the accused and when they reached village Kabarwala, they found both accused Nirmal Singh and Malkiat Singh and the prosecutrix was also recovered from them. The young prosecutrix was medically examined from the hospital and her custody was thereafter handed over to the complainant. The Investigating Officer also collected the record regarding age of the prosecutrix. On 04.05.2002, ASI Surinder Pal sent Constable Gurmeet Singh to the Civil Hospital, Malout and the doctor was handed over sealed parcel containing two envelopes and one another parcel was sealed with the seals of 'JK' and 'GGS'. These parcels were handed over to police custody and marked as Ex. PJ. Vaginal swabs were sent to the Chemical Examiner who gave his report Ex. PF. After completing the necessary investigation, challan was presented in the Court of Illaqa Magistrate who committed the same to the Court of learned Additional Sessions Judge, Muktsar Sahib. On finding a prima facie case against the accused under Section 366-A, 376 and 34 of the IPC, charges were framed by the Additional Sessions Judge. The accused pleaded not guilty and

claimed trial.

3. In order to bring home the charges against the accused persons, the prosecution examined 7 witnesses namely PW-1 Bachan Singh, PW-2 Constable Gurmeet Singh, PW-3 Dr. G. S. Bhullar, PW-4 Dr. Jasjiwan Kaur, PW-5 Jasvir Kaur-complainant, PW-6 Manpreet Kaur and PW-7 ASI Surinder Pal. PW-3 Dr. G.S. Bhullar, Civil Hospital, Malout deposited that he had conducted the medico-legal examination of the accused Nirmal Singh, appellant No. 1 herein. PW-4 Dr. Jasjiwan Kaur, ESI Dispensary-2, Malout stated that she conducted the medico-legal examination of the prosecutrix, aged 14 years, and she also proved the copy of the medical report Ex. PE while deposing that as per the report and medical examination Ex. PF, semen was found and possibility of intercourse with the prosecutrix could not be ruled out. PW-5 Jasvir Kaur reiterated her complaint to the police in which she submitted that prosecutrix used to study in a private school in 8th standard in village Kattianwali and that she used to go to Malout in a mini bus to study there. She also stated that prosecutrix used to tell her that accused persons i.e. driver and conductor of the mini bus used filthy language towards her, whereas, she advised the prosecutrix to remain silent and not to have any confrontation with them. The prosecutrix was examined as PW-6. She deposed that her mother Jaswinder Kaur was earlier married to Jagtar Singh but some dispute arose between her parents and she started living at village Kattianwali with her grand mother after her mother's remarriage. She stated that she used to go to Malout through mini bus of Sandhu Bus Service to appear in her 8th class examination. Accused Nirmal Singh and Malkiat Singh were the driver and conductor of the bus, respectively. She stated that both the accused used filthy words towards her, and after she had narrated the said incident to her grand mother, she advised her not to travel in that bus again. She deposed that on 19.04.2002, she went to Malout to purchase books for 9th class by boarding the bus

of the accused persons. Nirmal Singh-accused allured her that he possessed sufficient property and cash and he along with his brother Malkiat Singh would take her for an outing. She came back to the house at 10/11 AM. Both the accused then came to the village on a scooter and they made her sit on the scooter. Firstly, they went to village Sarawan Bodla and then went to village Kabarwala. Thereafter, they went to Bus Stand, Malout where Malkiat Singh parked the scooter and they all went to Karanpur (Rajasthan) by boarding different buses. The accused rented a room at Karanpur where the prosecutrix was subjected to rape by Nirmal Singh against her consent and her will. During the stay, Nirmal Singh used to go out while Malkiat Singh kept guard and stopped her from leaving the room. Since she became ill, the prosecutrix insisted on going back to her house. The prosecutrix further deposed that as accused had spent all the money and she, in order to rescue herself, made an offer to arrange money for them. After 13/14 days, i.e on 02.05.2002 when they reached bus stand at village Kabarwala, Harbans Singh, member of the Panchayat, met them and both the accused were arrested and the prosecutrix was recovered from their possession.

4. PW-7 ASI Surinder Pal is the Investigating Officer who proved the entire investigation conducted by him. He proved the complaint on the basis of which formal FIR was recorded. He further deposed that he had sent Constable Gurmeet Singh to Civil Hospital, Malout on 04.05.2002 and the doctor concerned had handed over to him two sealed parcels containing two envelopes and one other parcel which were sealed with the seal of 'JK' and 'GGS'. He also proved that arrest memo of the accused.

5. When examined under Section 313 Cr.P.C., the accused denied having abducted and raped the prosecutrix. The defence produced Ex. D-1 to Ex. D-4 on the record.

6. Based on the oral evidence laid by the prosecution and after

considering the evidence on the record, learned Sessions Judge, Faridkot convicted the accused persons as mentioned in the first paragraph of this judgment.

7. Counsel for the appellants argues that there is a delay of six days in lodging of the FIR which has not been explained. It is argued that the prosecutrix was not kidnapped. It is also argued that taking the complaint in its entirety, the prosecutrix was allegedly kidnapped on the intervening night of 19-20.04.2002 whereas the application Ex. PH was moved to the police on 25.04.2002. It is also argued that the statement of the prosecutrix cannot be relied upon as the same has not been corroborated by any independent witness. Further stress has been laid on the fact that the prosecutrix was a consenting party. It is argued that the prosecutrix did not raise any hue and cry while being allegedly abducted by the accused and also did not try to escape or to inform any person about her abduction when they were on the way from the village to Karanpur (Rajasthan). Counsel for the appellants urged that the prosecutrix was carrying on a love affair with appellant-Nirmal Singh as would be evident from love letters which are Ex. D-1 to Ex. D-4. It is further argued that a reading of the cross-examination of the prosecutrix will show that she was not given any threat by the accused to accompany them and she went with them on her own free will while also agreeing that she did not raise any hue and cry when she accompanied the accused persons to different places. Reliance has been placed on the admission of the prosecutrix that Ex. D-1 to Ex. D-4 were written by her. It is also argued that the age of the prosecutrix as admitted in her cross-examination was as of 1981 and, therefore, she was a major at the time of occurrence.

8. I have heard learned counsel for the parties and have perused the record of the case.

9. The argument raised by the counsel for the appellants that there is a delay in lodging of the FIR would be of little consequence because the

complainant who appeared as PW-5 has stated that she along with the other member of the Panchayat searched for the prosecutrix at several places. It is only when they found that the accused were also absconding from his house that a formal complaint was made. In the instant case, the young prosecutrix was not residing with her parents but with her maternal grandmother Jasvir Kaur at village Katianwali and there would be no reason for the maternal grand mother to make up the story to implicate the two accused. The learned Sessions Judge rightly came to the conclusion that in such like offences there is a delay in lodging the FIR because of the reluctance of the family members of the prosecutrix to make the incident public with a view to avoid defamation of the family. Therefore, the argument regarding delay in lodging of the FIR is not a ground to disbelieve the complainant.

10. As regards the charge under Section 366 of IPC, in order to prove kidnapping the prosecution was required to prove that the appellants had taken or enticed the prosecutrix out of the keeping of her lawful guardian. In order to bring home conviction for kidnapping, there must be proof of the accused having done something which led to the girl going out of the keeping of her guardian which is wholly lacking in the instant case. There is no evidence that the appellants induced the prosecutrix by promising to marry her or by holding out any other promise. According to the prosecutrix, she had not been threatened while she accompanied them to the places visited by her. The prosecutrix also travelled separately by bus to reach Karapur at Rajasthan and, thus, had ample opportunity to raise an alarm which was not done. The facts and circumstances of the case clearly indicate that the prosecutrix willingly accompanied the appellants to a number of places and stayed till they were caught by the police on 02.05.2002. It also transpires that the room taken by accused Nirmal Singh was at a distance of 10 yards from the residence of the landlord and no effort was made to lodge a protest or try and

attract attention to be rescued. The prosecutrix has also admitted to staying at Karanpur for about 10 days and admitted to having written love letters Ex. D-1 to Ex. D-4 to appellant Nirmal Singh, this too despite her grandmother having warned her not to have contact with both Nirmal Singh and Malkiat Singh. It would, therefore, be difficult to convict the appellants under offence punishable under Section 366 IPC.

11. The question that needs to be considered is whether rape was committed upon the prosecutrix or would it be considered as consensual sex between the party? For this, the age of the young prosecutrix needs to be addressed at the first instance. As per the contention raised by counsel for the appellants, the prosecutrix revealed that her birth entry in the register of the Chowkidar at village Ghunduwala is of the year 1981, that would make her a major at the time of occurrence of the offense. It is argued that the register of the Village Panchayat, is a public document, and coupled with the statement of the prosecutrix, she is more than 16 years of age. Computed from the first date of the year 1981, the prosecutrix was a major on 20.4.2002 when appellant-Nirmal Singh had sexual intercourse with her for the first time. However, Ex. PB her certificate issued by the Punjab Education Board, her 5th class school certificate shows her to be born on 10.02.1989. As per the statement of PW-1 Bachan Singh, who was summoned to produce the record of the school where the prosecutrix was studying, the date of birth of a candidate was reflected on the basis of the information given by the guardian. There is nothing on the record to show that date of birth entered in the school certificate is on the basis of a birth certificate. No ossification test was done upon the prosecutrix to determine her age. The village register relied upon is not a part of the record. If the date of birth of the prosecutrix is taken as 10.02.1989 which is the date in the School record, she was about thirteen years, two months, when appellant-Nirmal Singh had sexual intercourse with her for the

first time .

12. The evidence proved on the record, which is Ex. PF, shows that semen was found on the clothes of the prosecutrix. Dr. Bhullar PW-3 who examined accused-appellant herein gave his report Ex. PD/2 and opined that there was nothing to suggest that the appellant was unable to have a sexual intercourse. The statement of Dr. Jasjiwan Kaur, PW-4, shows that the possibility of sexual intercourse with the prosecutrix could not be ruled out while also noting that the hymen was torn and the vagina admitted two fingers.

13. Assuming that appellant-Nirmal Singh had sexual intercourse with the prosecutrix with her consent, he would nevertheless be guilty of offence punishable under Section 376 Indian Penal Code, since Section 375 of the IPC provides that rape includes sex with the consent of a woman, where at the time of giving such consent, she is under sixteen years of age. Since the prosecutrix was less than sixteen years of age on 20.4.2002, appellant-Nirmal Singh is guilty of rape irrespective of whether he had sex with or without her consent. Therefore, appellant-Nirmal Singh has rightly been convicted under Section 376 of Indian Penal Code.

14. In view of the reasons stated in the preceding paragraph, conviction of appellant-Nirmal Singh under Section 376 of I.P.C. is maintained whereas he and Malkiat Singh are acquitted of the charges under Section 366 of I.P.C. As regards sentence for the offence under Section 376 IPC, though the minimum prescribed punishment is imprisonment for seven years coupled with fine, the Court may for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years. The incident in this case took place in the year 2002. More than fifteen years have passed since then. This appeal itself is pending for last more than ten years. The evidence that has come on record clearly shows that the prosecutrix had willingly

accompanied the appellants to the places visited by them and spent more than two weeks in their company despite having several opportunities to break away from their company. The prosecutrix was evidently in love with the appellant No. 1 as can be discerned from the exhibits D-1 to D-4 when she eloped with the appellant. The incident being of the year 2002, the unamended provision of section 376 IPC would apply where there is no minimum sentence prescribed for an offence under section 376. The main circumstance which persuades this court to take a lenient view in the matter of sentence and awarding lesser sentence than the minimum prescribed sentence of seven years is the consent on the part of the prosecutrix and the very great probability that the age of the prosecutrix is more than 13 years two months. In Ex. D-3, the prosecutrix had asked appellant-Nirmal Singh as to whether he would be able to bear her expenses of her lifestyle of wanting to go to hotels and shopping etc. The writing of the letters and the 'love poems' addressed to appellant-Nirmal Singh shows the maturity of the mind of the prosecutrix. Therefore, this Court, on the reading of the Exhibits, is inclined to believe that the prosecutrix is a young mature lady. Moreover, it is noted that learned Sessions Judge, Faridkot has taken the date of birth as mentioned in the school certificate as the actual date of birth without going into the fact or the statement of PW-1 Bachan Singh who deposed that date of birth reflected in the school certificate is prepared on the basis of the statement given by the guardian while getting the child admitted. Therefore, the date of birth mentioned in the school certificate is not on the basis of any official record. No birth certificate has been produced nor was any ossification test was done on the prosecutrix who herself admitted in cross-examination that her date of birth as registered in the village record was of the year 1981. In view of these facts and on perusal of the letters, this Court has no hesitation in coming to the conclusion that the prosecutrix was older than the age reflected in the school certificate. On the basis of this, the Court is taking a lenient

view regarding the punishment that has been awarded.

15. Therefore, keeping in view all the facts and circumstance discussed above, the sentence of appellant-Nirmal Singh is reduced to 05 years and a fine of Rs. 50,000/- is imposed upon him, and in default of payment of fine, he shall further undergo simple imprisonment for three months.

16. Appeal stands partly allowed.

16.01.2017
Ansari

(JAISHREE THAKUR)
JUDGE

<i>Whether speaking/reasoned</i>	<i>Yes/No</i>
<i>Whether reportable</i>	<i>Yes/No</i>