

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

**Crl.A. NO.125-SB OF 1994
Date of Decision: 21-4-2006**

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**Bhajan Singh son of Ujjagar Singh son of Hamam Singh
resident of village Ajnali, Police Station Gobindgarh now
detained in Central Jail, Patiala.**

.....Appellant

Versus

The State of Punjab

.....Respondent

Coram: Hon'ble Mr.Justice RS Madan

PRESENT:- Mr.Amarjit Sandhu, Advocate for the appellant.
Mr.Narinder Kapur,Assistant Advocate General, Punjab.

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JUDGMENT

The appellant has challenged in this appeal the order of conviction and sentence dated 15-1-1994 recorded by Mr.BS Bedi,learned Additional Sessions Judge, Patiala in Sessions Case No.51 of 1989 whereby he was sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs.500/- for committing the offence under Section 363 of the Indian Penal Code, in default of payment of fine to further undergo rigorous imprisonment for one month. He was also sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs.500/- for committing the offence punishable under Section 366 of the Indian Penal Code, in default of payment of fine to further undergo rigorous imprisonment for one month.

All the substantive sentences were ordered to run concurrently.

Briefly the facts of the case are that on the night intervening 29-9-1988 and 30-9-1988, the complainant Puran Singh and his wife Smt.Charan Kaur along with other family members including his daughter Smt.Sinder Kaur-prosecutrix then aged about 15 years were asleep in front of their house situated in village Ajanali. It was at about 6.00 A.M. On 30-9-1998, Puran Singh got up and found that Sinder Kaur was missing from her bed. He made inquiries from his wife Charan Kaur, who told him that she might have gone to answer the call of nature. Both Puran Singh and his wife Charan Kaur waited for her return but she did not return. After making enquiries in the village from relatives and neighbours, she was not traced. Puran Singh suspected that Bhajan Singh-accused might have kidnapped his daughter because he had been previously visiting the house of sister of his father, whose house was adjoining to their house and a day earlier he had visited the house of neighbourhood of her father's sister. It was on 1-10-1988 at about 11.00 A.M., he reported the matter to ASI-Hardev Singh, who recorded his statement Ex.PH on the basis of which FIR was registered against the accused under Sections 363,366 and 376 of the Indian Penal Code. After recording the FIR, ASI-Hardev Singh visited the house of Puran Singh to prepare the site plan and recorded the statements of various PWs under Section 161 of the Code of Criminal Procedure. It was on 12-10-1988, the accused Bhajan Singh was arrested and minor Sinder Kaur was recovered from his custody. She was medico legally examined by lady Dr.Asha Kiran-PW2, who prepared the medical report Ex.PD. She took out the swab from her vagina and sent it to the Chemical Examiner. The wearing clothes of Smt.Sinder Kaur were also taken into possession. Her

statement was recorded by the Police wherein she named the accused having kidnapped her at the knife point on the night intervening 29-9-1988 and took her towards Sirhind on his cycle from where he threw his cycle and made her to board a bus and took her to Sanaur to the house of his friend, Jasbir Singh @ Bhola. There he represented to Jasbir Singh that Sinder Kaur was his wife and because of flood in their village, they had come to stay there for a few days. After staying there for a few days, she was taken to village Shatrana in a bus where she was kept in a house in the fields outside the village owned by his friend for five days. During their stay at the house of Jasbir Singh and the friend of Bhajan Singh in village Shatrana, the accused committed sexual intercourse with her against her will. She further stated that due to fear, she did not raise hue and cry. It was on the morning of 12-10-1988, she was brought to her village Shatrana to Amloh and then to Khanna where police arrested the accused Bhajan Singh. He was sent to the Medical Officer for medico legal examination where the doctor opined that there was nothing to suggest that he was incapable of performing sexual intercourse. The Investigating Officer also took into possession the School Leaving Certificate of Sinder Kaur Ex.PA wherein the date of birth was recorded as 10-1-1971. Challan against the accused was filed in the Court of Illaqa Magistrate. Then learned Additional Sessions Judge framed the charge against the accused under Sections 363/366 and 376 of the Indian Penal Code. The said charge was read over and explained to the accused to which he pleaded not guilty and claimed trial. To bring over the charge against the accused, the prosecution examined ASI Shiv Raj Parkash, who had partly investigated the case by collecting the School Leaving Certificate, Ex.PA from the School

Headmaster and made attempts to SMO Civil Hospital Mandi Gobindgarh, Civil Hospital, Nabha and Civil Hospital, Fatehgarh Sahib for the ossification test of Smt.Sinder Kaur daughter of Puran Singh as advised by PW2-Dr.Asha Kiran to determine the age of the prosecutrix but the X-ray machine was either not in working order or proper material for the examination was not available. PW-2-Dr.Asha Kiran conducted the medico legal examination where she had declared her age as 18 and was of the opinion that she is not virgin. She is used to sexual intercourse. She further stated that patient at the time of examination disclosed her age as 18 years. After medical report, clothes which she has collected from the Chemical Examiner, she advised for the Ossification Test of Smt.Sinder Kaur daughter of Puran Singh. PW-3,ASI Hardev Singh partly investigated the case. PW-4, Puran Singh is the father of prosecutrix, who stated that he had got the date of birth of Smt.Sinder Kaur recorded in Chowkidar Register. PW-5-Smt.Charan Kaur, mother of the prosecutrix, who also disclosed that her date of birth is recorded in the Chowkidar Register. PW-6-Sinder Kaur-prosecutrix has not supported the case of the prosecution rather she disclosed that she was in love with Bhajan Singh-accused and wanted to marry him but her father and father's brother(uncle Nirmal) were opposing and she was subjected to severe beatings. She further stated that they had contracted the civil marriage and were living for 4-5 days with the cohabited marriage. The accused neither took her forcibly at point of knife on a cycle nor she was raped by him at Sanaur or Shatrana. In spite of lengthy cross-examination, she however disclosed her age as 18 years at the time of occurrence. PW-7-Dharam Pal,Patwari prepared the site plan. PW-8 is the Head Master,Gulzar Singh, who had not proved the Birth Certificate-Ex.PA

of the prosecutrix and proved the age of one Balwinder Kaur daughter of Puran Singh. PW-9, ASI-Gurdial Singh had tendered the affidavit Ex.PZ. PW-9 is a formal witness. Thereafter, the prosecution evidence was closed. Statement of accused under Section 313 of the Code of Criminal Procedure was recorded. Prosecution version was put to the accused to which he pleaded not guilty or the accused led no evidence in defence.

After going through the prosecution evidence and various documents placed on the file, the learned Additional Sessions Judge convicted and sentenced the accused as detailed above.

I have gone through the contentions of the learned counsel for the appellant and Mr.Narinder Kapur, Assistant Advocate General, Punjab.

At the very outset, learned counsel for the appellant contended that the prosecution has miserably failed to prove the age of the prosecutrix less than 18 years on the date of occurrence. Therefore, the order of conviction and sentence recorded by the Courts below is not sustainable. In support of his argument, he has taken me through the statement of Puran Singh-PW4, who had categorically admitted the factum of having got recorded the birth of Sinder Kaur in Chowkidar Register soon after her birth. Similar is the statement of PW-5, Charan Kaur-mother of the prosecutrix.

According to the learned counsel, Smt. Sinder Kaur-PW-6 had categorically stated that on the date of occurrence, she was 18 years of age. Dr.Asha Kiran-PW2, who medico legally examined Sinder Kaur has stated that Smt.Sinder Kaur had disclosed her age before her at the time of medico legal examination as 18 years whereas ASI-Hardev Singh

has collected the School Leaving Certificate of Sinder Kaur-Ex.PA from the Head Master of the School but this School Leaving Certificate has not been proved by summoning the Head Master of the School rather the age of some Balwinder Kaur another daughter of Puran Singh was proved.

Learned counsel stated that in view of the statement given by PW4-Puran Singh and PW5-Charan Kaur, the date of birth of Smt.Sinder Kaur was got recorded in Chowkidar Register. The prosecution has not made any attempt to collect the best evidence available with it. So far as, the School Certificate-Ex.PA is concerned that has not been got proved. There is statement of Dr.Asha Kiran-PW2, who had advised the police to get the ossification test to determine the age of Smt.Sinder Kaur. PW1-ASI-Shiv Raj Parkash tried to make several attempts to get her examination for ossification test but failed and thereafter no attempt was made by him to get her undergo ossification test.

Reference was made to **Hira Lal Vs. State of Haryana** 1994(2) RCR 435 where it was held as under:

“The prosecution in the instant case has not cared to produce the birth entry of the prosecutrix either from the Chowkidara register or from other record maintained in the office of the Civil Surgeon. It is quite patent that the prosecution has failed to produce the best evidence in this case concerning the age of the prosecutrix. Entry of date of birth in school admission register has very little evidentiary value.

No ossification test of the prosecutrix was conducted in order to determine her real biological age. Mere opinion of the lady doctor Kusum Lata that the age of the prosecutrix was about 17 years without conducting any ossification test also cannot be relied upon. The prosecution has failed to prove affirmatively beyond reasonable doubt that the age of the prosecutrix was below 18 years at the time she was kidnapped by the accused.

During this interval admittedly the prosecutrix did not complain to any body that she had been abducted by the accused under threats to her life. All the aforesaid circumstances concerning her conduct clearly show that she was herself a consenting party and in view of the fact that she was above 18 years of age, no case for kidnapping or abduction of the prosecutrix against the accused has been made out beyond reasonable doubt.”

It has also come in the cross-examination of Puran Singh-PW4 that he cannot deny the fact that the age of the prosecutrix on the date of prosecution was 19 years.

It is a case where the prosecutrix is a consenting party and her entry of date of birth recorded in School Leaving Certificate-Ex.PA shows that her age was 17 years 8 months and 20 days on the date of alleged occurrence.

The Supreme Court in **Brij Mohan Singh Vs. Priya Brat Narain Sinha and others**, AIR 1965 SC 282 has observed as under:

“In actual life it often happens that persons give false age of the boy at the time of his admission to a school so that later in life he would have an advantage when seeking public service for which a minimum age for eligibility is often prescribed. The Court of fact cannot ignore this fact while assessing the value of the entry and it would be improper for the court to base any conclusion on the basis of entry, when it is alleged that the entry was made upon false information supplied with the above motive.”

In the light of my above discussion, the prosecution has miserably failed to prove the age of Sinder Kaur below 18 years on the date of commission of offence under Sections 363/366 of the Indian Penal Code. Hence, the order of conviction recorded by the learned Additional Sessions Judge against the present appellant is not sustainable.

In the result, this appeal is accepted. The order of conviction and sentence recorded against the appellant is set aside. Fine, if any, paid be returned to the accused. Accused is discharged from the bail bonds furnished before the learned Chief Judicial Magistrate, Patiala.

April 21, 2006
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(R S MADAN)
JUDGE