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**(2016) 02 P&H CK 0168**

**In the Punjab And Haryana At Chandigarh**

**Case No : Criminal Appeal No. S-2636-SB of 2013.**

Bhajan @ Kanchan @ Raju

APPELLANT

Vs

State of Haryana

RESPONDENT

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**Date of Decision : 17-02-2016**

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 376

**Citation :** (2016) 3 AICLR 57 : (2016) 4 CriCC 721 : (2016) 2 LawHerald 1489 : (2016) 4 RCRCriminal 100

**Hon'ble Judges :** Anita Chaudhry, J.

**Bench :** Single Bench

**Advocate :** Aditya Pal Singla, Advocate, for the Appellant; Surender Singh, AAG Haryana, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

Anita Chaudhry, J. - The appellant was convicted in FIR No. 174 dated 05.07.2012 registered under Sections 363, 366-A, 376 IPC at Police Station SGM Nagar, Faridabad. He was sentenced to undergo 7 years rigorous imprisonment under Section 376 IPC along with fine of Rs. 5000/-. In default of payment of fine to further undergo imprisonment for 2 months. He was also sentenced to undergo 5 years rigorous imprisonment under Section 366 IPC along with fine of Rs. 2000/-. In default of payment of fine to further undergo 1 month imprisonment and to undergo 3 years rigorous imprisonment under Section 363 IPC along with fine of Rs. 1000/- and in default of payment of fine to further undergo 1 month imprisonment. All sentences were ordered to run concurrently.

2. A complaint was made by Arun. His 14 years old daughter did not return from school. His daughter was student of 8th class and had left for school at about 7 a.m. She did not return. The family searched for her but could not find her. The family had not reported the matter to the police for the fear of humiliation. The complainant later came to know that she might have been enticed by Bhajan, resident of West Bengal who lived as a tenant in their house. Bhajan was also

missing since then. His mobile was switched off. Acting on this complaint, the police registered the FIR under Sections 363, 366A IPC. Investigations were started. The girl was recovered from the custody of the appellant after about 6 months. She was pregnant. The statement of the girl under Section 164 Cr.P.C. was recorded. Section 376 IPC was added later on. After completion of the investigation challan was presented.

3. The prosecution examined 12 witnesses.

4. In the statement under Section 313 Cr.P.C., the accused pleaded false implication. No evidence was led in defence. The trial Court convicted the appellant and sentenced him to the imprisonment mentioned herein before.

5. Learned counsel for the appellant urges that it was a case of consent. Attention was drawn to the photograph placed on record and it was submitted that presence of the prosecutrix and the accused in photo showed that they were happy. It was submitted that the prosecutrix had willingly and voluntarily gone with the accused and even as per version of the prosecution she was missing for almost six months and during this period she did not raise any hue and cry and had travelled to different parts of the county by bus and public transport and it is a clear case where the prosecutrix had consented to go with him.

6. My attention was drawn to the MLR to point out that there was no injury noted upon her. It was pointed out that the ossification report reflects that she was between 15-17 years and the trial Court accepted the date of birth as given in the certificate and the Court had relied upon school certificate where the date of birth is recorded as 09.06.1998. It was urged that prosecutrix in her statement under Section 164 Cr.P.C. had stated that she had gone along with accused to West Bengal and she had got married to him and she had remained with Raju's family and then they had left for Bangalore where she remained for about 6 months and they had returned the same day from Bangalore but later at the trial she had supported the prosecution version. It was contended that it was a case of consent and the ossification report should have been accepted.

7. On the other hand the submission was that the consent of minor is irrelevant and can not be treated as a valid consent as a minor girl can be easily lured to give a consent and it can not be treated as an informed consent given after understanding the pros and cons as well as consequences of the intended action. It was contended that according to school certificate the girl was minor and just because the girl has given birth to a child would not be a mitigating circumstance. Reliance was placed upon *Satish Kumar Jayanti Lal Dabgar v. State of Gujarat*, 2015(2) RCR(Criminal) 230.

8. Responding to the submissions counsel for the appellant had urged that the girl had given birth to a child and in the birth certificate the name of appellant is mentioned as his father and the Investigating Officer had admitted that during investigation it had appeared before him that the girl had married the accused.

9. The prosecution had relied upon a school certificate Ex. P8 which gives the date of birth as 09.06.1998. No birth certificate or school certificate had been produced. The copy of the admission and withdrawal Register Ex. P9 and the school leaving certificate Ex. P10 were produced wherein the date of birth is mentioned as 09.06.1998. The date of admission in the school is stated to be 04.05.2003. The prosecution did not produce any document which were produced before the school authorities at the time of admission. The prosecutrix had studied in another school before attending this school. That material was withheld. In order to ascertain the age of the victim, the police had got the ossification test carried out and according to it, the age of the victim was 15-17 years with an error of margin on either side. The main submission of the appellant was that the girl was not a minor and since the ossification report reflects that the victim was between 15-17 years the trial Court should have granted benefit of 2 years and the benefit would enure in favour of the accused and she should have been treated as major.

10. The star witness for the prosecution was the victim herself. She had stated that on 31.05.2012 she was taken away by the accused firstly to Calcutta and then to Bangalore. She stated that Bhajan Lal was also known as Raju and Kanchan. She had alleged that the accused had committed rape upon her and she was brought back from Bangalore on 05.12.2012. She admitted that she had also given statement under Section 164 Cr.P.C. This is the only statement made in the examination-in-chief. In the cross examination she had revealed that Bhajan was a tenant in their house but she did not want to marry him. She stated that Bhajan Lal performed marriage with her at Calcutta. She admitted that they stayed as husband and wife. The photograph Mark "X" was shown to her. She stated that the photograph was hers. She also stated that she was taken to Calcutta by train and there were several other passengers. She admitted that she left with the accused as he allured her to accompany him. She did not make any complaint to any one. She admitted that she had told this fact at the time of medical examination to the doctor thus admitting that she had left with the accused on her own will and had married him. She stated that prior to this incident, she was beaten up by her parents and then she left with the accused.

11. In the statement recorded under Section 164 Cr.P.C. the prosecutrix had stated that she had called up Raju from the mobile phone of Sabi and had asked him to meet her on the way and she wanted to accompany her and she stated that she left home to go to the school and she met Raju near the temple and together they left for West Bengal and she had got married to him. She had stated that the parents and other relatives of Raju were also present and they left for Bangalore where they lived for 6 months. She had stated parents of Raju did not want any dowry but she wanted to complete her studies and then she would get married to Raju only after she attained the age of 18. This would show that the girl had been travelling to different places using public transport. No complaint was made to any passenger or to the police nor the girl had tried to

run away. The girl was living with the family of the accused. The medical evidence did not show any mark of injury. The victim had the opportunity to complain to number of persons but the same was not done. Coming to the age of the victim, the ossification report was the only reliable evidence.

12. In 1999(1) Crimes 1 Mahabir Prasad v. State, the Court while dealing with the age of the prosecutrix, in this context has held as under:-

"On consideration of the entire evidence on record and the judgment cited at the bar, if there can be difference of two years, even in the ossification tests, in that event, the benefit of doubt has to go to the accused."

13. Relying upon ossification report the benefit of margin of 2 years had to be given and the benefit of doubt had to go to the accused and if the benefit of 2 years is given it must be held that the prosecutrix was more than 18 years and major on the date of incident.

14. If the prosecutrix is major and she had consented to be in the company of the accused then it can safely be held that it was a case of consent. The consent was not out of fear, coercion or misconception. The prosecutrix did not say that she was under any threat or fear. She had stayed with the accused for 6 months. Admittedly, the accused and the prosecutrix had intimate relations. Even after her return she had made a statement that she had called the accused and had gone with him. It was not a case of kidnapping, the girl had willingly accompanied him and had expressed her desire to marry him after the completion of her education, therefore, defence could not have been rejected. There was no complaint from the girl. It was a case of consent.

15. Keeping in view the above facts and circumstance of the case, the appeal is allowed. The judgment and order passed by the Court below is set aside and the accused is acquitted.