**(2003) 07 P&H CK 0170**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** Criminal Appeal No. 256-SB of 1987

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| Ashwani Kumar | | APPELLANT |
| | Vs | |
| State of Haryana | | RESPONDENT |

**Date of Decision:** July 16, 2003

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 361, 363, 366, 376

**Citation:** (2003) 6 CriminalCC 539 : (2003) 4 RCR(Criminal) 166

**Hon'ble Judges:** Nirmal Singh, J

**Bench:** Single Bench

**Advocate:** K.S. Nalwa, for the Appellant; K.S. Chauhan, for the Respondent

**Final Decision:** Dismissed

**Judgement**

1. This appeal is directed against the judgment/order dated 2.4.1987 passed by Additional Sessions Judge, Karnal whereby the appellant has been convicted and sentenced to undergo RI for two years and to pay fine of Rs. 100/- u/s 363 IPC and in default of payment of fine to undergo RI for 3 months. The appellant was further sentenced to undergo RI for four years and to pay fine of Rs.200/ - u/s 366 IPC and in default of payment of fine to undergo RI for six months.

2. The prosecution story in brief is that Veena-prosecutrix was studying in 8th Class in Government High School, Prem Nagar, Karnal but she failed. After that she got employment in Bhagson Pharmaceutical Factory, Karnal. Her sister Sunita was also employed there. On 1.10.1986 at about 8.00 A.M. she left her house to attend her duty in the factory. The appellant followed her on a Viki (Moped). When she reached behind the Liberty Foot-wear then appellant obstructed her and forced her to sit on the Viki. Thereafter she tried to raise alarm but the appellant threatened her to kill. Due to fear she sat on the Viki, and the appellant took her to NDR1 and from there she was taken to village Newal where she was kept in the house of Mange Ram. They stayed there for two

nights and the appellant raped her. Thereafter she was taken to village Gonda. She was also kept there for two nights at the house of Sadhu Singh and was raped. On 5.10.1986 the appellant was apprehended by Sube Singh SI, Incharge, Police Post, Ram Nagar, Karnal. The prosecutrix was recovered from his custody. After completion of the investigation the challan was presented before Chief Judicial Magistrate, Karnal who committed the case to the Court of Sessions as it was exclusively triable by the Court of Sessions. On commitment, the case was assigned to learned Additional Sessions Judge, Karnal. The appellant was charge-sheeted under Sections 363, 366 and 376 IPC to which he pleaded not guilty and claimed trial.

3. To prove its case, the prosecution examined Dr. Mrs. Subtiita Azamani as PW-1, Dr. R.K. Sachdeva as PW-2, Veena @ Meena as PW-3, Chhabil Dass as PW-4, Manohar Lal Draftsman as PW-5, Smt. Sudershan Devi as PW-6, Lakhmi Dass as PW-7, Sube Singh SI as PW-8. The prosecution tendered in evidence affidavit of HC Bhim Singh and certified copy of birth certificate and closed its evidence.

4. When the appellant was examined u/s 313 Cr. P.C. to explain the incriminating circumstances appearing in the prosecution evidence, he denied simplicitor and pleaded false implication. He also pleaded that Veena was found missing from her house and her father suspected her liaison with him and got registered a false case against him. She came back on 4.10.1986 and was pressurised to involve him in this false case. Initially she did not agree but ultimately she succumbed to the pressure. It was also pleaded that she had written letters to him and she loved him. The appellant also pleaded that the prosecutrix has sent him greeting card and the address on the envelope was in her handwriting. He further stated that she had written some letters on different occasions to him.

5. The appellant was called to lead defence evidence. He examined Yashpal Chand Jain, Handwriting and Finger Print Expert and proved that the address on the envelope Ex. DF and inland letter mark A were written by the prosecutrix.

6. After hearing the learned Public Prosecutor and the counsel for the accused, the learned Additional Sessions Judge acquitted the appellant u/s 376 IPC but convicted and sentenced the appellant as stated in paragraph I of the judgment, aggrieved by which the present appeal has been preferred.

7. Shri K.S. Nalwa, learned counsel for the appellant submitted that the prosecutrix accompanied the appellant of her own and was a consenting party for sexual intercourse as has been held by the trial court. He contended that the prosecutrix did not raise any alarm when she is alleged to have (been) taken away. He further submitted that the appellant had neither taken away the prosecutrix by force nor enticed her. He contended that the offence under sections 363, 366 IPC is made out only if someone takes or entices any minor under 16 years of age if male or under 18 years of age if female. He further submitted that there is no evidence on the record that the appellant has kidnapped

the prosecutrix i.e. taken away from the legal guardianship by force or has enticed her.

8. I have given my thoughtful consideration to the submissions made by the counsel for the appellant and perused the record.

9. The kidnapping from lawful guardianship has been defined in section 361 IPC which reads as under:-

361. Kidnapping from lawful guardianship:-

Whoever takes or entices any minor under (sixteen) years of age if a male, or under (eighteen) years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

10. For proving the kidnapping or taking away from the lawful guardianship, age is material but her consent is not material. If anyone takes away or entices any minor then the offence is made out. The Division Bench of this Curt in State of Haryana v. Islam, 1987(1) RCR (Cri) 259, held that the protective custody of the father does not come to an end even if the minor himself or herself abandons the custody of his/her parents.

11. In the instant case, as per the school certificate, the prosecutrix was 16 years 9 months at the time of occurrence, so, the prosecutrix was below age of 18 years. Veena-prosecutrix has appeared as PW-3. She has deposed that on 1.10.1986 she had started from her house at about 8.00 A.M. to go to the factory to attend to her duty. When she reached behind Liberty Factory, then Ashwani Kumar accused present in the Court came on a Viki (Moped). He threatened her and tried to make her sit on the Viki. He threatened her and showed her knife and told that if she raised alarm then she would be killed. He made her to sit on the Viki Moped and took her to NDR1 and from there he took her to village Newal. When she was made to sit on the Viki then on the way the accused induced her by saying that he would give her good ornaments and would also marry her. The learned trial court after appreciating the evidence on record came to the conclusion that it was a consent case. The age of the prosecutrix has also not been challenged before the trial Court nor in this Court, so, it is established from the record that she was below 18 years.

12. From a perusal of the evidence on record, it is established that the appellant enticed her on the ground that he will give her good ornaments and he will marry her and that is the reason she has left with the appellant. Therefore, as the prosecutrix was below 18 years and has been taken away from the lawful custody of her parents with a view to commit sexual intercourse with her, therefore, the learned trial has rightly convicted the appellant u/s 363/366 IPC but I am of the considered view that the sentence award by the Court is excessive one. The appellant had committed sexual intercourse with prosecutrix Veena with her consent. When the appellant has been acquitted u/s 376 IPC then the offence u/s 363, 366 IPC which is technical in nature, a lenient view with regard to

sentence is to be taken. The appellant is facing trial for the last more than 17 years. Before or after the registration of this case, there is no evidence to show that the appellant has indulged in any other criminal activity. The modern trend of penology is reformatory. So, taking into consideration the facts and circumstances of the sexual intercourse, the sentence awarded by the trial Court is reduced from two years to 3 months. However, the sentence of fine is maintained. With this modification in the sentence, the appeal fails and is dismissed.