

(2009) 03 P&amp;H CK 0298

**High Court Of Punjab And Haryana At Chandigarh****Case No:** Criminal Appeal No. 361 SB of 1998

Vijay

APPELLANT

Vs

The State of Haryana

RESPONDENT

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**Date of Decision:** March 9, 2009**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 363

**Citation:** (2009) 5 RCR(Criminal) 423**Hon'ble Judges:** Harbans Lal, J**Bench:** Single Bench**Advocate:** Anhul Singh, for Mr. Baldev Singh, for the Appellant; Amit Kaushik, Assistant Advocate General, Punjab, for the Respondent**Final Decision:** Allowed

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**Judgement**

Harbans Lal, J.

This appeal is directed against the judgment dated 21.4.1998/order of sentence dated 22.4.1998 rendered by the Court of learned Additional Sessions Judge, Hisar whereby he convicted and sentenced the accused Vijay to undergo rigorous imprisonment for 4 years and to pay a fine of Rs. 2,000/- u/s 363 of IPC and in default of payment of the same to further undergo rigorous imprisonment for one year and acquitted him of the charges under Sections 366/376 of IPC.

2. The factual matrix is that on 10.7.1996 Madan Lal complainant father of the prosecutrix X (the name of the victim is not being indicated in the judgment to prevent social victimization of her in view of Premia @ Prem Parkash v. State of Rajasthan 2008 4 RCR CrI 539 : 2008 (5) RAJ 490 (SC) lodged report with the police that he is an agriculturist. He has five children, eldest of whom is his daughter Sushil and younger to her is his daughter X the prosecutrix, who got plucked in 10+2 Class. She was married in village Dhingsra. She was to go to the house of her in-laws on 15.7.1996. On 9.7.1996, he (complainant) was asleep with his children. Around 2.00

A.M., he saw that the prosecutrix X was missing from her cot. He woke up his wife Guddi. They searched for her here and there till morning. In the next morning, he saw that Vijay (accused) a student of 10+2 class, who was on visiting terms to their house was too absent from his house. He suspected his (Vijay) hand in the abduction of her. On his statement, the case was registered. On 2.7.1996, she was recovered from the company of accused Vijay at Bus Stand, Agroha. She was produced before the Magistrate, before whom she made a statement u/s 164 of Cr.P.C.. She was also got medico-legally examined. The accused was arrested. On completion of investigation, the charge-sheet was laid in the court of learned Judicial Magistrate, 1st Class, Hisar, who committed the same to the court of Sessions for trial of the accused.

3. On commitment, the accused was charged u/s 363, 366 and 376 of IPC, to which he did not plead guilty and claimed trial. To bring home guilt against the accuse, the prosecution has examined Dr. Saroj Bhukal PW-1, Mr. G.S. Wadhwa, Judicial Magistrate, 1st Class PW-2, HC Tek Chand PW-3, Constable Pritam Singh PW-4, Constable Satbir Singh PW-5, Mange Ram Head Master PW-6, S.K. Chanana PW-7, Prosecutrix X PW-8, Madan Lal father of the prosecutrix PW-9, Dr. R.K. Chaudhary PW10, SI Rajinder Singh PW-11, Radhye Sham Draftsman PW-12, ASI Raj Kumar PW-13 and closed its evidence. When examined u/s 313 Cr.P.C., the accused denied all the incriminating circumstances appearing in the prosecution evidence against him and pleaded innocence, In defence, he examined Deepak Jain Finger Prints and Hand Writing Expert DW1. After hearing the learned Public Prosecutor for the State, the learned defence counsel and examining the evidence on record, the learned trial Court convicted and sentenced as noticed at the outset. Feeling aggrieved with his conviction/order of sentence, he has preferred this appeal.

4. I have heard the learned counsel for the parties, besides perusing the record with due care and circumspection.

5. Mr. Anhul Singh, Advocate appearing on behalf of the appellant urged with great eloquence that the prosecutrix has admitted in her evidence that she was married 5 years earlier to the present occurrence and she was only about 14 years of age at that time. In this way, she was about 19 years of age at the material time and thus, the offence u/s 363 is not made out.

6. To tide over this submission, Mr. Amit Kaushik, Assistant Advocate General, Haryana on behalf of the State argued that as per the school certificate Ex. PG purportedly issued in the discharge of official duties, the prosecutrix was below 16 years of age at the relevant time. The oral evidence of the prosecutrix referred to by the learned counsel for the appellant cannot be given precedence over the documentary evidence in the nature of Ex. PG, which is admissible in evidence.

7. I have given a deep and thoughtful consideration to the rival contentions. Madan Lal complainant PW9 has stated in clear and unambiguous terms that "Her

(referring to the prosecutrix) date of birth was got recorded in Chowkidar's Register. Entry of the birth was handed over to the police by me. I had got mentioned the day, month and year of the birth of the prosecutrix. My brother had got admitted my daughter prosecutrix as I was ill. I had not told the date of birth of the prosecutrix to my brother, nor I can tell as to what date was told by my brother to the school Incharge at the admission of my daughter. School admission form does not bear my signature or thumb impression. I also did not fill up that admission form. I cannot tell the age of prosecutrix at the time of her marriage." The prosecution has not furnished any explanation for withholding the birth entry, which was given by this witness to the Investigator. For holding back this best evidence, an adverse inference has to be drawn against the conduct of prosecution. It is deducible from the afore- extracted evidence that the date of birth of the prosecutrix was got entered in the school record by her paternal uncle orally. Would it be reasonable and legitimate to base the decision regarding date of birth on such school entry ? Its answer must be in the negative. Madan Lal's brother, who got admitted her in the school has also been kept off the witness box.

8. PW6 Mange Ram Head Master Government High School, Bhana, District Hisar has solemnly affirmed that "I have brought the original record pertaining to the prosecutrix. As per the school record, the date of birth of the prosecutrix daughter of Madan Lal, resident of Bhana is 14.2.1980. She was admitted in our school on 21.5.1994 and appeared in the Matriculation Examination on 31.03.1996. Ex.PG is the School Leaving Certificate issued by one under my signatures, which is correct according to record." It is in his cross- examination that "I have issued certificate of date of birth on the basis of school leaving certificate of 9th Class. Prior to this, she was in middle section. Primary section of the school is separate from our school, but under the supervision of this school. I have not brought the original admission form which was filled at the time of child in the primary section. I can not say who got admitted the child in school." As per this evidence, the birth certificate of the prosecutrix was issued on the basis of school leaving certificate of 9th Class. It is a rule of thumb, unless proved to the contrary, the date of birth of a student in the Admission/Withdrawal Register of the school is based upon the date shown in his/her Admission Form. Palpably, here in this case, the admission form was not produced by Mange Ram (sic). Only that could have revealed as to on the basis of what evidence either the birth entry or the affidavit or the oral statement of her paternal uncle, the date of birth was recorded. It was incumbent upon the prosecution to have summoned the Chowkidar alongwith the Register in which he had entered the date of birth of the prosecutrix. As is borne out from the record, no such endeavour has been made.

9. In re : Naresh Kumar v. State of Haryana, 2009 (1) RCR (Crl.) 775 (P&H), it has been observed by this Court that "No birth record pertaining to the prosecutrix V and the prosecutrix M was produced. There is no proof on the record to indicate the basis whereupon the date of birth of the prosecutrix V and prosecutrix M had been

recorded in the school admission form. The persons who got prosecutrix V and prosecutrix M admitted into the school were not examined at the trial." In these circumstances, it was held that the only inference, which is deducible is that the prosecution has not been able to prove the age of the prosecutrix. Here in, it is in the cross- examination of the prosecutrix X that "my marriage has taken place about 5 years earlier to the present occurrence. I was only about 14 years old at that time." It is inferable from this evidence that she was about 19 years of age at the time of commission of offence. Whoever, takes or entices any minor under 16 years of age if a male, or under 18 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, a case of kidnapping is made out. The offence is technical in nature. Prosecution has not adduced any cogent, convincing and clear evidence leading to an irresistible illation or inescapable inference that the prosecutrix was less than 18 years of age, when the offence took place. Thus, the given evidence falls short of establishing the offence under Sec 363 of I.P.C..

10. As a sequel of the above discussion, this appeal is accepted, setting aside the judgment/order of sentence. The accused/appellant is hereby acquitted of the said offence.