

SUNIL

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v.

STATE OF HARYANA

(Criminal Appeal No. 2308 of 2009)

DECEMBER 4, 2009

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[DALVEER BHANDARI AND A.K. PATNAIK, JJ.]

Penal Code, 1860 – ss. 363, 366A and 376 – Prosecution under – Conviction by courts below – Love affair between the prosecutrix and accused – Accused repeatedly deflowered the prosecutrix with her consent – Controversy as regards age of prosecutrix – Doctor finding secondary sex characters of prosecutrix well developed – Reference to dental Surgeon and Radiologist – Failure to examine her by Dental Surgeon and Radiologist – School Leaving Certificate produced as proof of age – Admission form of the school not produced – Father of prosecutrix not able to give correct date of birth – Held: In the facts, there were many infirmities, lacunae in prosecution version – Prosecution failed to prove that prosecutrix was a minor – Accused entitled to benefit of doubt – Hence, acquitted.

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Appellant-accused was convicted u/ss. 363, 366A and 376 IPC by courts below. The question for consideration before this court was as to whether the prosecutrix was a minor.

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Allowing the appeal, the Court

HELD: 1. In the the facts and circumstances of this case, it would be unsafe to convict the appellant when there are so many infirmities, holes and lacunae in the prosecution version. The appellant is clearly entitled to benefit of doubt. It is clearly borne out from the evidence on record that the appellant belonged to the same Caste

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A and Gotra of the prosecutrix and was a frequent visitor
to the house of the prosecutrix. There was a love affair
between them and the court also observed that she did
not ever resist her being repeatedly deflowered by the
appellant-accused. In this background, close and careful
B determination of the age of the prosecutrix is imperative.
P.W.1, who had clinically examined the prosecutrix, found
that her secondary sex characters were well developed.
[Paras 28 and 34] [214-A-B; 215-C-D]

C 2. PW1, the doctor who examined the prosecutrix
referred her for verification to the Dental Surgeon and the
Radiologist. The failure of getting the prosecutrix
examined from the Dental Surgeon or the Radiologist
despite the fact that she was referred to them by PW1 is
D a serious flaw in the prosecution version. In the instant
case, in absence of primary evidence, reports of the
Dental Surgeon and the Radiologist would have helped
the Court in arriving at the conclusion regarding the age
of the prosecutrix. The prosecution also failed to produce
any Admission Form of the school which would have
E been primary evidence regarding the age of the
prosecutrix. [Paras 29 and 30] [214-D-F]

F 3. The School Leaving Certificate produced by the
prosecution was also procured six days after the incident
and three days after the arrest of the appellant. As per that
certificate also, she joined the school in the middle of the
session and left the school in the middle of the session.
The attendance in the school of 100 days is also not
reliable. The prosecutrix was admitted in the school by
her brother. The brother was not examined. The alleged
G School Leaving Certificate on the basis of which the age
was entered in the school was not produced. [Paras 31
and 32] [214-G-H; 215-A]

H 4. PW8, the father of the prosecutrix has also not

been able to give correct date of birth of the prosecutrix. In his statement, he clearly stated that he is giving an approximate date without any basis or record. In a criminal case, the conviction of the appellant cannot be based on an approximate date which is not supported by any record. It would be quite unsafe to base conviction on an approximate date. [Para 33] [215-B]

T.S. Murugesan Pillai v. M. D. Gnana Sambandha Pandara Sannadhi AIR 1917 PC 6; *Gopal Krishnaji Ketkar v. Mahomed Haji Latif and Ors.* (1968) 3 SCR 862; *Sukhwant Singh v. State of Punjab* (1995) 3 SCC 367; *Mohinder Singh v. The State* AIR 1953 SC 415; *Birad Mal Singhvi v. Anand Purohit* AIR 1988 SC 1796, relied on.

State of M.P. v. Surpa (2002) 9 SCC 447; *Arvinder Kaur v. State of Punjab* 2007(3) RCC (Cri) 818, referred to.

Modi's Medical jurisprudence Twenty Second Edition, referred to.

Case Law Reference:

AIR 1917 PC 6	Relied on.	Para 19	E
(1968) 3 SCR 862	Relied on.	Para 20	
(1995) 3 SCC 367	Relied on.	Para 22	
AIR 1953 SC 415	Relied on.	Para 22	F
(2002) 9 SCC 447	Referred to.	Para 23	
AIR 1988 SC 1796	Relied on.	Para 24	
2007(3) RCC (Cri.) 818	Referred to.	Para 27	G

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 2308 of 2009.

From the Judgment & Order dated 20.11.2008 of the High

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A Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 48-SB of 1998.

Sushil Kumar Jain, Puneet Jain, Eshita Baruah, Pratibha Jain for the Appellant.

B Mohit Sharma, Kamal Mohan Gupta for the Respondent.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. Leave granted.

C 2. This appeal is directed against the judgment and order dated 20.11.2008 delivered by the Punjab & Haryana High Court at Chandigarh in Criminal Appeal No.48-SB of 1998.

D 3. The appellant was convicted by the trial court under sections 363, 366A and 376 of the Indian Penal Code whereas another accused Baldev was convicted under section 366-A of the Indian Penal Code. The High Court acquitted Baldev. Therefore, in this appeal we are only concerned with the appellant, Sunil.

E 4. Brief facts of this case are as under.

F Bishan PW8, the father of the prosecutrix lodged a report that on 31st August, 1996 when he returned home, he did not find his daughter, the prosecutrix, Pinki. When he could not locate her for quite some time, then he reported the matter to the police and lodged a first information report. The prosecutrix was traced out by the police on 6th September, 1996. Bishan PW8 suspected that the appellant Sunil had abducted his daughter.

G 5. The appellant, Sunil belonged to the same Caste and Gotra of the prosecutrix and he was visiting the house of the prosecutrix frequently. The finding of the High Court is that the prosecutrix fell in love with the appellant. The High Court also found that she did not ever resist her being repeatedly

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deflowered by the appellant.

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6. It is the case of the prosecution that on the relevant date the appellant asked the prosecutrix to accompany him but she declined to oblige. Thereafter, the appellant held out a threat that if she resisted his request, he could do anything to the prosecutrix. Thereafter, the prosecutrix accompanied the appellant to Kalka Madlya. The appellant left her there for some time and went elsewhere. He returned to the house at night. At that time, she was asleep on the roof of the house. It was then the appellant Sunil raped her. He left the house in the morning along with the prosecutrix on a cycle. When they reached a particular place, the appellant Baldev and one Jhangi took the prosecutrix to a village where they stayed for the night to return to Rewari the following day. Baldev left the prosecutrix in village Kalka Madlya where the appellant raped her in the morning.

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7. The prosecutrix on 6.9.1996 was examined by Dr. Sadhna Verma, PW1. She opined that in view of the clinical examination, she found no mark of injury on her body. She found that her secondary sex characters were well-developed. She carried out a local examination and her opinion is as under:-

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"Local Examination

Labia Majora was well developed. Pubic hair were present. Carunculae myrinales formis was present. Vagina admitting two fingers. Uterus was normal and retroverted, furnaces free. Two vaginal swabs were taken and were sent for chemical analysis for semen detection. Two vaginal smears were prepared and were sent for chemical examination for semen detection.

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For her age verification, she was referred to dental surgeon and radiologist opinion."

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8. Dr. Verma, after clinical examination of the prosecutrix, categorically observed that possibility cannot be ruled out that the prosecutrix Pinki was habitual to sex. In her report, she also

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A stated that keeping in view the clinical examination, the possibility of rape cannot be ruled out.

B 9. Dr. Chandrashekhar, PW2 had medico legal examination of the appellant Sunil and found that he had the ability to perform sexual intercourse.

C 10. Chander Parkash Sharma, Office Superintendent, PW3, Satish Public Senior Secondary School, Rewari made a record-based statement and proved school leaving certificate pertaining to the prosecutrix. He also identified the signature of the Principal and averred that the date of birth of the prosecutrix as recorded in the school leaving certificate is 13.2.1983.

D 11. The appellant submitted before the court that he has been falsely implicated. No defence evidence was adduced on behalf of the appellant. Admittedly, no test identification parade was conducted in this case.

E 12. The trial court on the basis of evidence on record came to the conclusion that the appellant kidnapped a minor girl and induced her to go to village Kalka Madiya and committed rape on her and convicted the appellant. The High Court also found that offences under section 363, 366A and 376 IPC are proved against the appellant. The appellant aggrieved by the impugned judgment has preferred this appeal on various grounds.

F 13. The appellant placed reliance on the following findings of the High Court and submitted that no offence whatsoever can be attributed to the appellant. The said findings in the impugned judgment are quoted as under:-

G "There can be no dispute with the proposition that the prosecutrix was otherwise a consenting party to her being taken away and also the violation of her person by Sunil. It is evident from her statement under Section 164 Cr.P.C. in the course whereof, she categorically averred that she was in love with the appellant Sunil. She does not aver that

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she ever resisted her being repeatedly deflowered by appellant Sunil.”

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14. The appellant submitted that on medical examination Dr. Sadhna Verma, PW1 had found that the secondary sex characters of the prosecutrix were well-developed which lead to the conclusion that she was not a minor girl.

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15. According to the appellant, the prosecution has failed to prove that Pinki was minor at the time of the incident. The prosecution did not produce any Admission Form of the School. The School Leaving Certificate was obtained from the school after the incident. As per the prosecution, the prosecutrix was admitted in the school few months before, i.e., on 12.4.1996 and remained in school upto 12.9.1996 (inclusive of summer vacation). As per prosecution version, she joined in the middle of the session and left in the middle of the session. The attendance in the school of 100 days in ex-facie false. There is no reason why she was removed from the school and was forced to do household work in other houses. The appellant urged that all these facts create some suspicion regarding genuineness of the School Leaving Certificate particularly when the same was admittedly procured after several days of filing of the first information report.

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16. The prosecution examined Chandra Prakash Sharma, PW3 with regard to the School Leaving Certificate. The prosecutrix was admitted in the school by Ashok Kumar, her brother. The said Ashok Kumar was not examined by the prosecution. According to the prosecution, this is again a serious lapse in the prosecution version.

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17. Mr. Sushil Kumar Jain, the learned counsel appearing for the appellant vehemently asserted that the prosecution has deliberately withheld and suppressed the material evidence from the court. He also submitted that Dr. Sadhna Verma PW1's, who had examined the prosecutrix, specifically referred the prosecutrix to the Dental Surgeon and the Radiologist for

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- A ascertaining their opinion regarding the age of the prosecutrix, but the prosecutrix was neither referred to the Dental Surgeon nor to the Radiologist or both these opinions were withheld from the court. According to the appellant, this is a serious lacuna in the prosecution version and it casts suspicion on the
- B prosecution version.

C 18. Mr. Jain also submitted that the municipal record regarding the age of the prosecutrix was also suppressed from the court. According to him, the primary evidence in this case was the municipal record, where the date of birth of the prosecutrix was recorded, but this has been suppressed from the court. The entry regarding the date of birth of the prosecutrix Pinki would have revealed her correct age which has not been produced.

- D 19. He placed reliance on a Privy Council judgment in *T.S. Murugesan Pillai v. M. D. Gnana Sambandha Pandara Sannadhi* AIR 1917 PC 6 at page 8 wherein it was held as under:-

E "A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing according to furnish to the Courts the best material for the decision. With regard to third parties, this may be

F right enough, they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordship's opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition.

G The present is a good instance of this bad practice. It is proved in the case by the first witness that "the mutt has regular fair day-books; they are not now before the Court; ledgers are also maintained in the mutt." These ledgers and day-books were in the possession of the defendants

H or those of them who were heads of the institution, and they

are not put in evidence. The proposition that these defendants challenged was that the expenses incurred had been incurred for the mutt and were necessary for its purposes. The best assistance to a Court of Justice would have been a scrutiny of these documents, and their Lordships feel free to conclude that if they had been by their entries confirmatory of the defendants' view the defendants would have brought them into Court. This part of the case, which in their Lordships' view is of considerable importance, is not referred to in the High Court. Their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the High Court set aside, the decree of the Court of the Subordinate Judge restored."

20. According to him, this judgment of the Privy Council has been approved by this court in a subsequent judgment which is reported in *Gopal Krishnaji Ketkar v. Mahomed Haji Latif & Ors.* (1968) 3 SCR 862.

21. Mr. Jain placed reliance on the standard textbook of Modi's Medical jurisprudence and he has specially drawn our attention to page 49 of the Twenty Second Edition that to determine the age of an individual (especially in earlier years) are teeth, height and weight, ossification of bones can be very helpful. He also submitted that the estimation of age from teeth by noting the number and position of teeth erupted, and with X-ray examination with some amount as certainty. According to him, as per Modi's Medical jurisprudence, the test pertaining to ossification of bones is helpful for determining age.

22. Mr. Jain also placed reliance on the judgment of this court in *Sukhwant Singh v. State of Punjab* (1995) 3 SCC 367 in which this court has laid down that failure to produce the expert opinion before the trial court in such cases affects the creditworthiness of the prosecution case to a great extent. He also placed reliance on the judgment of this court in *Mohinder Singh v. The State* AIR 1953 SC 415 in which this court has

A laid down that non-examination of the ballistic expert is fatal.

23. Mr. Jain further placed reliance on *State of M.P. v. Surpa* (2002) 9 SCC 447 in which this court observed as under:-

B ".....a gap in the prosecution evidence on a most fundamental point and the error which has been committed by the courts below is to ignore the gap and decide the case merely upon the oral evidence of 3 witnesses...."

C 24. The learned counsel for the appellant placed reliance on the judgment of this court in *Birad Mal Singhvi v. Anand Purohit* AIR 1988 SC 1796. In that case, the court observed that date of birth in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The court observed as under:

D "The date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the scholar register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth of the person concerned. If the entry in the scholar's register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value, but if it is given by a stranger or someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value."

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G 25. The learned counsel for the appellant further submitted that in pursuance of the complaint of her father she was recovered on 6.9.1996. The alleged school leaving certificate is dated 12.9.1996, i.e. just after 6 days of recovery and three days after the appellant's arrest on 9.9.1996. It was submitted by Mr. Jain that the said document was created just to show

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the age of the prosecutrix as less than 16 years at the time of the incident. According to him, the document is not at all reliable.

26. The School Leaving Certificate is proved by Chandra Prakash Sharma, PW3 who had clearly stated as under:-

“Date of birth in Ex.PF is on the basis of School Leaving Certificate of 5th class which was given to us at the time of admission of Pinki in 6th class.”

27. Mr. Jain placed reliance on *Arvinder Kaur v. State of Punjab* 2007(3) RCC (Cri) 818 to strengthen his submission that the School Leaving Certificate would be no proof of age, without production of admission register. He also submitted that the statement of Bishan, PW8, the father of the prosecutrix also cannot be relied upon. As per his statement, he was married in the year 1972. The incident took place on 30th August, 1996. This shows that the marriage took place about 24 years back. This witness has stated the date approximately, without any basis or any record. He mentioned that his eldest daughter's age is 20 years and thereafter he by imagination and approximation has given the age of other children and showing Pinki as the youngest one. He could not give the exact date and gap between the age of the children but stated – “All my children are having a gap of one year or two years age approximately.” According to Mr. Jain the approximate age given by the witness is not reliable. He also stated that PW8 also tried to show that he had 7 children, 2 among them are not alive. He has not given their age and when they were born. PW8 has given the age of Pinki as having completed 14 years and running 15 years and the said statement has been made on approximation. According to him, the conviction of the appellant cannot be based on such a quality of evidence where on the basis of approximation, the age has been indicated. According to the learned counsel for the appellant, even Pinki's statement in this regard is a hearsay evidence and is not at all reliable.

A 28. We have heard the learned counsel for the parties at
length. It is clearly borne out from the evidence on record that
the appellatant belonged to the same Caste and Gotra of the
prosecutrix and was a frequent visitor to the house of the
prosecutrix. There was a love affair between them and the court
B also observed that she did not ever resist her being repeatedly
deflowered by the appellatant Sunil. In this background, close and
careful determination of the age of the prosecutrix is imperative.
Dr. Verma P.W.1, who had clinically examined the prosecutrix,
found that her secondary sex characters were well developed.

C 29. The short question in the facts and circumstances of
this case remains to be determined is whether the prosecutrix
was a minor? Dr. Sadhna Verma, PW1 who examined the
prosecutrix referred her for verification to the Dental Surgeon
and the Radiologist. The failure of getting the prosecutrix
D examined from the Dental Surgeon or the Radiologist despite
the fact that she was referred to them by Dr. Sadhna Verma,
PW1 is a serious flaw in the prosecution version. We are not
laying down as a rule that all these tests must be performed in
all cases, but in the instant case, in absence of primary
E evidence, reports of the Dental Surgeon and the Radiologist
would have helped us in arriving at the conclusion regarding
the age of the prosecutrix.

F 30. The prosecution also failed to produce any Admission
Form of the school which would have been primary evidence
regarding the age of the prosecutrix.

G 31. The School Leaving Certificate produced by the
prosecution was also procured on 12.9.1996, six days after the
incident and three days after the arrest of the appellatant. As per
that certificate also, she joined the school in the middle of the
session and left the school in the middle of the session. The
attendance in the school of 100 days is also not reliable.

H 32. The prosecutrix was admitted in the school by Ashok
Kumar, her brother. The said Ashok Kumar was not examined.

The alleged School Leaving Certificate on the basis of which the age was entered in the school was not produced. A

33. Bishan, PW8, the father of the prosecutrix has also not been able to give correct date of birth of the prosecutrix. In his statement he clearly stated that he is giving an approximate date without any basis or record. In a criminal case, the conviction of the appellant cannot be based on an approximate date which is not supported by any record. It would be quite unsafe to base conviction on an approximate date. B

34. On consideration of the totality of the facts and circumstances of this case, it would be unsafe to convict the appellant when there are so many infirmities, holes and lacunas in the prosecution version. The appellant is clearly entitled to benefit of doubt and consequently the appeal filed by the appellant deserves to be allowed. The appellant is directed to be released forthwith, if not required in any case. The appeal is accordingly disposed of. C D

K.K.T.

Appeal allowed.