

Sukhvinder Singh vs State Of Haryana on 20 August, 2010

Author: Jora Singh

Bench: Jora Singh

Crl.Appeal No.331-SB of 2000

1

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

Date of decision: 20.8.2010

(I) Crl.Appeal No.331-SB of 2000

Sukhvinder Singh

... Appellant

versus

State of Haryana

... Respondent

(II) Crl.Appeal No.453-SB of 2000

Suresh Kumar

... Appellant

versus

State of Haryana

... Respondent

CORAM: HON'BLE MR. JUSTICE JORA SINGH.

Present: Mr.S.S.Dinarpur, Advocate,
for the appellants.
Mr.Amit Goyal, AAG, Haryana.
...

JORA SINGH, J.

Crl. Appeal No.331-SB of 2000 by Sukhvinder Singh and Crl.Appeal No.453-SB of 2000 by Suresh kumar were preferred to impugn the judgment of conviction dated 31.3.2000 and order of sentence dated 5.4.2000 rendered by Additional Sessions Judge, Ambala, in sessions case No.25 of 1998 arising out of FIR No. 123 dated 17.7.1997 under Sections 376/366/363/120-B IPC, PS, Nangal.

By the said judgment, both the appellants were convicted under Sections 363 and 366-A IPC. Appellant Suresh Kumar was also convicted under Section 376 IPC. Appellants Sukhvinder Singh and Suresh Kumar were sentenced to undergo RI for five years and to pay a fine of Rs.500/-, in default of payment of fine, to further undergo RI for one year each under Section 363 IPC, to undergo RI for five years and to pay a fine of Rs.500/-, in default of payment of fine, to further undergo RI for one year each under Section 366-A IPC. Appellant Suresh Kumar was also sentenced

to undergo RI for seven years and to pay a fine of Rs.2,000/-, in default of payment of fine, to further undergo RI for one and half year under Section 376 IPC.

Prosecution story, in brief, is that Karnail Singh, complainant, was the resident of Village Bhuranpur and on 17.7.1997 at about 5.30 PM, had lodged report with ASI Anil Kumar, incharge of Police Post Naneola, PS Nangal, that he has three daughters and one son. Eldest daughter Dalbir Kaur was engaged in Village Ali Majra, and younger to her Kulbir Kaur, aged about 16 years, was also engaged in Village Ugara Bara. House of Parkash, Carpenter, was near to his house. Suresh Kumar, resident of Village Rohera, son of his (Parkash's) sister-in-law, was also residing with Parkash for the last about one year and used to do the work of carpenter. On 16.7.1997 at about 10.00/11.00 AM, his daughter Kulbir Kaur had gone to the house of his brother, when he was away to Ambala City. In the evening when he came back, then his wife told him that Kulbir Kaur had gone to her uncle but failed to return. Enquiry was made about Kulbir Kaur, then came to know that Kulbir Kaur was abducted by Suresh Kumar with the help of Sukhvinder Singh, who had left them upto Ambala City Bus Stand. Statement (Ex.PK) was read over to Karnail Singh, who had thumb marked the same in token of its correctness. After making endorsement (Ex.PK/1), statement was sent to the police station, on the basis of which, formal FIR (Ex.PF) was recorded.

ASI Anil Kumar along with party had gone to Village Bhuranpur and recorded the statements of Paramjit Singh, Harwinder Kaur etc. On 21.7.1997, police party headed by SI Madan Pal received secret information that one boy and one girl have boarded a bus for Kaithal. Then police party with Karnail Singh and his cousin brother had gone to Kaithal Bus Stand. Prosecutrix and Suresh Kumar were arrested by the police while alighting from the bus. Memo (Ex.PL) was prepared.

Prosecutrix was produced before the doctor on 21.7.1997 at 8.00 PM, where she was medico legally examined by Dr. Rekha Garg. Rough site plan with correct marginal notes was prepared. On 24.7.1997, application was moved for recording statement of the prosecutrix under Section 164 Cr.P.C. Prosecutrix was also produced before the doctor for ossification test. Second accused Sukhvinder Singh was also arrested and after completion of investigation, challan was presented in the Court.

Accused were charged under Sections 363/366/376/120-B IPC, to which they pleaded not guilty and claimed trial.

In support of its case, prosecution examined number of witnesses.

PW1 A.S.Narang, SDJM, Safidon, has recorded the statement of prosecutrix under Section 164 Cr.P.C.

PW2 Dr. Subhash Chander Sharma stated that on 22.7.1997, application was moved by the police to report about the age of Suresh Kumar. After examination, Suresh Kumar was found to be about 18 years of age.

PW3 Dr.R.S.Bugalia stated that on 22.7.1997, he had radiologically examined Suresh Kumar to determine his age and as per examination, he was found to be above 19 years of age.

PW4 UGC Mange Ram tendered his affidavit (Ex.PE).

PW5 HC Kulwant Singh stated that on receipt of statement of Karnail Singh, complainant, he had recorded formal FIR (Ex.PF) and also tendered his affidavit (Ex.PG).

PW6 Dr. A.K.Garg stated that on 21.7.1997 at 8.25 PM, he had medico legally examined Suresh Kumar and reported that Suresh Kumar was fit to perform sexual intercourse.

PW7 Sudesh Gupta, Statistical Assistant, Office of Civil Surgeon-cum-Registrar Births and Deaths, Ambala, brought record and stated that Ex.PJ was the correct copy of birth certificate of Balwinder Kaur and Ex.PJ/1 was the birth certificate of Sukhvinder Kaur, daughters of Karnail Singh.

PW8 Karamjit Singh stated that on 16.7.1997 at about 1.00 PM, he was present near the bus stand of his village Bhurangpur for going to Ambala. Prosecutrix and accused were found present at the bus stand and they had boarded the bus for Ambala. Same bus was boarded by him. Sukhvinder Singh was heard while saying to Suresh Kumar that he (Suresh Kumar) should marry the prosecutrix after taking her at far of place. In the evening, he came to know that prosecutrix was missing. Then intimation was given to Karnail Singh, father of prosecutrix.

PW9 Prosecutrix appeared and stated that she was 16 years' old. On 16.7.1997 at 10.00/11.00 AM, she was going to their newly constructed house to bring wood. When she was in the house, then Suresh Kumar came and she was made to inhale something. Then she was raped in the kitchen by Suresh Kumar. After that, she was frightened by saying that her parents were very rich and they will kill her. She was directed to accompany him. In the street, Sukhvinder Singh meet them and she was taken to the bus stand of her village and from bus stand, she was taken to Ambala. Then Sukhvinder Singh requested Suresh Kumar to take her to Shimla and get married. From Ambala, she along with Suresh Kumar had gone to Shimla in a bus. She was kept in a hotel for about 5-6 days. During night, she was raped by Suresh Kumar. On 21.7.1997, she was brought in a bus to Kaithal. While alighting from the bus, they were arrested by the police. Her statement was recorded and was produced before the doctor for medical examination. She heard from her parents that her name was kept as Balwinder Kaur in the childhood. Later on, her name was changed. She was produced before the Magistrate, where her statement was recorded.

PW10 Karnail Singh is the father of prosecutrix and reiterated the story disclosed to the police.

PW11 UGC Ram Chander tendered his affidavit (Ex.PO). PW12 Dr. Rekha Garg on 21.7.1997 at 8.00 PM had medico legally examined the prosecutrix, aged about 15 years, and observed as under:-

"The person brought was fully conscious, vitals normal LMP 8.7.1997. Age of menarchae 14 years.

On examination, no external mark of injury was present. Secondary sex characters were present.

On internal examination, P/V introitus admitted two fingers. Hymen was ruptured. In my opinion, she was habitual to intercourse. Regarding recent rape, final opinion was kept pending subject to FSL report."

As per report of FSL (Ex.PR), human semen was detected on the underwear and swab. Possibility of intercourse with the prosecutrix cannot be ruled out.

PW13 ASI Anil Kumar had initially investigated the case. PW14 Constable Manohar Lal had prepared scaled site plan (Ex.PT).

PW15 SI Madan Pal had also investigated the case in hand after ASI Anil Kumar.

After close of the prosecution story, statements of accused were recorded under Section 313 Cr.P.C. They denied all the prosecution allegations and pleaded to be innocent.

Defence version of accused Suresh Kumar was as under:-

"The case is false. During the days of alleged occurrence, I was working as carpenter in village Bhuranpur. Prosecutrix fell in love with me. She had disclosed her age as 19 years at that time. I was 18 years old at that time. She had been writing letters to me placed on the record, which are Mark A1 to Mark A10. She wanted to marry with me. However, her father was not inclined and he got me falsely involved in this case. I had not kidnapped her or committed rape upon her. I had not taken her anywhere."

Defence version of accused Sukhvinder Singh was that case was false.

In defence, appellant Suresh Kumar appeared as his own witness and stated that he was the resident of Village Rohera, but from 1997, he was residing in Village Bhurangpur, and was working as a carpenter. While staying in Village Bhurangpur, he fell in love with the prosecutrix, who was residing near the house of his aunt Shakuntla wife of Om Parkash. Prosecutrix disclosed her age as 19 years. She used to write love letters (EX.D1 to Ex.D10). Balwinder Kaur was the younger sister of the prosecutrix. Prosecutrix was intending to marry him but her father was not agreeing because he was from backward class and the prosecutrix was Jat Sikh by caste.

After hearing learned Public Prosecutor for the State, learned defence counsel for the appellants and from the perusal of evidence on file, appellants were convicted and sentenced as stated aforesaid.

I have heard learned defence counsel for the appellants, learned State counsel and have gone through the evidence on file.

Learned defence counsel for the appellants argued that the prosecutrix was 19 years' old. Name of the prosecutrix was not Balwinder Kaur. Prosecutrix had studied upto 8th class but no school leaving certificate on the file. Certificate (Ex.PJ) produced on the file was not of the prosecutrix but certificate was of the sister of prosecutrix. Dalbir Kaur was elder sister of the prosecutrix but no birth certificate of Dalbir Kaur on the file to show that age of the prosecutrix was 15 years or 16 years at the time of alleged occurrence. Statement of the prosecutrix was recorded under Sections 161 and 164 Cr.P.C. Before the police and the Magistrate, prosecutrix disclosed her name but not stated a word that she was also known as Balwinder Kaur. FIR was got registered by the father of the prosecutrix, but while lodging the report, he did not state that the prosecutrix was also known as Balwinder Kaur. Before the doctor, prosecutrix had disclosed her name and age. According to the complainant, after birth, intimation was given to the Chowkidar, but no certificate by the Chowkidar that the prosecutrix was also known as Balwinder Kaur. In the absence of cogent and convincing evidence, it is not safe to opine that the prosecutrix was also known as Balwinder Kaur and her age was 15 or 16 years at the time of occurrence.

Occurrence is dated 16.7.1997. House of the prosecutrix was within abadi and bus stand was at a distance of 400 yards. Allegation of the prosecutrix was that on the day of occurrence, she had gone to her newly constructed house, where she was forced to inhale something, then in the kitchen, she was raped by Suresh Kumar. After rape, she was frightened by Suresh Kumar by saying that she was from a rich family and she was to be eliminated by her father. Being frightened, she was forced to accompany Suresh Kumar, appellant. From her newly constructed house, prosecutrix on foot had accompanied Suresh Kumar to board the bus. In the street, second appellant Sukhvinder Singh had met the prosecutrix. After boarding the bus, prosecutrix and appellants had gone to Ambala. At Ambala, Sukhvinder Singh requested Suresh Kumar to take the prosecutrix to Shimla to marry. At Shimla in a hotel, prosecutrix had stayed with Suresh Kumar for 5-6 days. On 21.7.1997, prosecutrix along with Suresh Kumar came back to Kaithal, but while going to Shimla and on return to Kaithal, no hue and cry at any stage. At Shimla, the prosecutrix was fully conscious. There were number of employees in the hotel but no report to any one. Prosecutrix while appearing in Court, then stated that before the present occurrence, she had not intercourse with anyone but report of the doctor is to the effect that the prosecutrix was habitual to sexual intercourse. All this shows that prosecutrix was the consenting party if the prosecution story is taken to be correct one. Sukhvinder Singh was named because he was related to the main appellant Suresh Kumar.

Learned State counsel argued that the prosecutrix was also known as Balwinder Kaur and as per certificate (Ex.PJ), date of birth of the prosecutrix was 15.10.1981. When age of the prosecutrix was less than 16 years at the time of occurrence, then no question of consent. Prosecutrix had gone to her newly constructed house where she was forced to inhale something. After that, she was raped. Prosecutrix was frightened by saying that she was to be eliminated by her parents because she belonged to rich family, Near Bus Stand of Village Bhurangpur, prosecutrix was seen in the company of the appellants and this fact is clear from the statement of PW8 Karamjit Singh. While appearing in Court, prosecutrix disclosed that she was 16 years' old. Karnail Singh, father of the prosecutrix, has given her age as 15/16 years. Prosecutrix was medico legally examined by the doctor and there was a report of the doctor that the prosecutrix was raped. Semen was detected as per report of the laboratory. Before the present occurrence, complainant had no enmity with the appellants. There

was no idea to implicate the appellants when reputation of minor daughter was at stake.

First submission of learned counsel for the appellants was that age of the prosecutrix was not 16 years. In fact, she was more than 16 years' old. After going through the evidence on file, I am of the opinion that submission of learned counsel for the appellants seems to be correct one. Ex.PK is the statement of Karnail Singh, complainant, dated 17.7.1997 and in the FIR, Karnail Singh reported to the police that prosecutrix, aged about 16 years, was abducted on 16.7.1997 at about 12.30/1.00 PM. Prosecutrix was apprehended with Suresh Kumar from Bus Stand, Kaithal, on 21.7.1997. In her statement recorded by the police and the Magistrate, she did not state a word that she was also known as Balwinder Kaur.

After arrest, prosecutrix was produced for medical examination and before the doctor, prosecutrix had disclosed her name. prosecutrix did not state a word that she was also known as Balwinder Kaur. She disclosed her age as 15 years. On 24.7.1997, prosecutrix was produced before SDJM, Safidon, to record her statement under Section 164 Cr.P.C. Before the Magistrate, prosecutrix had disclosed her name but prosecutrix did not state a word that she was also known as Balwinder Kaur. While appearing in Court as PW9, prosecutrix disclosed her name but in the last lines of her examination-in-chief, she stated that she heard from her parents that they kept her name as Balwinder Kaur in the childhood.

Karnail Singh, complainant, while appearing as PW10, then stated that he has three daughters. Elder one is Dalbir Kaur, second is the prosecutrix and third one is Sukhbir Kaur. Age of the prosecutrix is 15-16 years. Prosecutrix was also called as Balwinder Kaur in the childhood. So, for the first time when evidence was being recorded, then prosecutrix and her father stated that the prosecutrix was also known as Balwinder Kaur.

PW8 Karamjit Singh stated that on 16.7.1997 at about 1.00 PM, he had seen the prosecutrix in the company of the appellants near bus stand of his village Bhurangpur. Karamjit Singh did not state a word that prosecutrix was also known as Balwinder Kaur. By examining PW7 Sudesh Gupta, an effort was made to show that the prosecutrix was also known as Balwinder Kaur. Sudesh Gupta brought record maintained by the office of Civil Surgeon-cum-Registrar, Births and Deaths, Ambala. Ex.PJ is the certificate on file. As per this certificate, Balwinder Kaur is the daughter of Karnail Singh and her date of birth is 15.10.1981. In the certificate, there is not a word that prosecutrix was also known as Balwinder Kaur. Second certificate is Ex.PJ/1 of Sukhvinder Kaur daughter of Kela Singh son of Sadhu Singh. Karnail Singh when appeared in Court, then stated that he was illiterate. He cannot tell the date of birth of his children. At the time of birth of the prosecutrix, intimation was given to the Chowkidar but no certificate of the Chowkidar that the prosecutrix was also known as Balwinder Kaur. Prosecutrix when appeared as PW9, then stated that she has two sisters. Elder one is Dalbir Kaur and younger to her is Sukhvinder Kaur, whereas certificate (Ex.PJ/1) is of Sukhvinder Kaur. No certificate of Dalbir Kaur on the file. Prosecution was required to produce certificate of Dalbir Kaur to show that she was elder to the prosecutrix. Original record was not brought on the basis of which, entry was made in the register, copy of which is Ex.PJ. Prosecutrix had studied upto 8th class but no explanation why school leaving certificate was not produced. Prosecutrix admitted that in the school, her name was correctly recorded. Secondly, in her statement under Sections 161

and 164 Cr.P.C. and before the doctor, she had correctly disclosed her name.

In 1994(1) RCR (Crl.) 271, State of Karnataka vs. Sureshbabu Puk Rai Porral, prosecutrix went with the accused voluntarily and gave her age as 16 years, but doctor gave her age as 18 years. When age is in doubt, then question of taking the prosecutrix from lawful guardianship does not arise. Offence of kidnapping does not make out.

In 2010 (1) RCR (Crl.) 166, Sunil vs. State of Haryana, FIR was under Section 376 IPC- Accused and prosecutrix had love affair- Accused indulged in sexual intercourse- Prosecution version that prosecutrix was minor- As per clinical examination showed secondary sex characters were well developed- Father of prosecutrix gave approximate age- Accused was acquitted.

In 1994(2) RCR (Crl.) 456, Mohamad Imteaz Khan alias Sannu vs. The State of Haryana, prosecutrix gave her age as 14 years- School record showed that age was 12 years- Birth record showed the age of 15 years- As per ossification test by doctor, age was 14/15 years- No reliable direct evidence regarding age forthcoming- Age of prosecutrix could safely be taken as more than 18 years- Evidence showed that prosecutrix was a consenting party- Accused was acquitted.

In the present case, no school leaving certificate on the file. Before police and Court, prosecutrix disclosed her name. Complainant in the FIR and while appearing in Court disclosed name of the prosecutrix and for the first time stated that prosecutrix was also known as Balwinder Kaur, but certificate on the file nowhere showed that the prosecutrix was also known as Balwinder Kaur. School leaving certificate or birth certificate of elder sister, namely, Dalbir Kaur, was not produced. Dr. Rekha Garg had medico legally examined the prosecutrix and stated that on examination, no external mark of injury was present. Secondary sex characters were present. Further stated that vagina admitted two fingers. Hymen was found ruptured. Prosecutrix was habitual to sexual intercourse. Whereas, prosecutrix in Court stated that before the present occurrence, she had not intercourse with anybody. Oral as well as documentary evidence on the file leads to this conclusion that prosecutrix was not below or 16 years of age. In fact, she was about 19 years' old.

Next submission of learned counsel for the appellants was that prosecutrix was the consenting party and after going through the evidence on file, I am of the opinion that submission of learned counsel is correct one. As per prosecution story, on 16.7.1997, prosecutrix had gone to her newly built house to collect wood. When she was in the house, then she was forced to inhale something. After that, she was raped in the kitchen. Prosecutrix was frightened by appellant Suresh Kumar by saying that she belonged to rich family and she was to be eliminated by her father. Being frightened, she was forced to accompany Suresh Kumar. From newly constructed house, prosecutrix was taken to Bus Stand of Village Bhurangpur. On the way, Sukhvinder Singh had met them. From Bus Stand of Village Bhurangpur, they had boarded the bus for Ambala, where Sukhvinder Singh directed Suresh Kumar to take the prosecutrix to Shimla to marry. At Shimla, prosecutrix had stayed with Suresh Kumar for 5-6 days, then she was brought back to Kaithal on 21.7.1997. Near Bus Stand of Village Bhurangpur, prosecutrix was seen in the company of the appellants by Karamjit Singh. Now let us see whether prosecution story putforward by the prosecutrix is correct one or not.

Karamjit Singh appeared as PW8 and stated that he was present near Bus Stand, Bhurangpur, when he had seen the prosecutrix in the company of the appellants. They had boarded a bus to Ambala. He had boarded the same bus. Then in the evening, intimation was given to Karnail Singh, but Karnail Singh when reported the matter to the police on 17.7.1997, then did not state a word that in the evening on 16.7.1997, Karamjit Singh had informed him that he had seen the prosecutrix in the company of the appellants while boarding the bus to Ambala. Statement of PW8 was not recorded under Section 161 Cr.P.C. In case Karamjit Singh had seen the prosecutrix in the company of the appellants while boarding the bus from his village to Ambala and in the evening had given intimation to Karnail Singh, then why statement of Karamjit Singh was not recorded under Section 161 Cr.P.C. In the absence of statement under Section 161 Cr.P.C., statement of Karamjit Singh as PW8 is without any evidentiary value.

Prosecutrix while appearing as PW9, then in examination-in- chief stated that she had gone to her newly constructed house at about 10.00-11.00 AM on 16.7.1997. In the house, she was forced to inhale something, then she was raped in the kitchen by Suresh Kumar. She was frightened by Suresh Kumar by saying that she was from rich family and if matter was reported to her parents, then she was to be eliminated. While going towards Bus Stand, Bhurangpur, then in the street, Sukhvinder Singh had met them and from Bus Stand, Bhurangpur, they had boarded a bus upto Ambala. In cross-examination, admitted that she had stayed with Suresh Kumar for 5-6 days in a hotel at Shimla. On 21.7.1997, she was brought back to Kaithal. Before present occurrence, she had not sexual intercourse with anyone. When Suresh Kumar took her to Bus Stand, Bhurangpur, then she did not disclose to any passenger or any other person standing there at the bus stand or travelling in the bus. From the house upto Bus Stand, Bhurangpur, they had gone on foot. Explanation put forward by the prosecutrix was that she was semi conscious but the explanation is not correct one because if she was unconscious, then how she had gone to the bus stand on foot. No case of the prosecutrix that at the bus stand, no one was present or in the bus, there was no passenger. PW8 Karamjit Singh, from the village of the prosecutrix, stated that he had seen the prosecutrix with the appellants at Bus Stand of Village Bhurangpur. Prosecutrix was unmarried and if Suresh Kumar had lifted her to board the bus, then why no objection by Karamjit Singh because the prosecutrix was unmarried and was not related to the appellants. Further stated that she did not raise hue and cry when she was being taken forcibly. She was fully conscious at Shimla but did not tell to anybody either in the bus or in the hotel about the incident. At Shimla, she was requesting Suresh Kumar to take her back to her house, but he did not agree. No allegation of the prosecutrix that Suresh Kumar was armed or at any stage gave beating. Allegation of the prosecutrix that she was under fear is not correct one because from the newly constructed house, she had gone to the bus stand of Village Bhurangpur, on foot. If Suresh Kumar had raped the prosecutrix in her newly constructed house, then she should raise hue and cry but the prosecutrix remained silent while going on foot upto bus stand. No signal that she was being taken towards the bus stand forcibly. Lastly stated that she did not disclose to the Magistrate that she was not fully conscious upto Shimla. While appearing in Court, prosecutrix categorically stated that prior to the present occurrence, nobody had ever sexual intercourse with her but this fact is not correct one, when Dr. Rekha Garg stated that on examination, there was no external mark of injury. Secondly, vagina was admitting two fingers and hymen was found ruptured. Doctor was very much clear that the prosecutrix was habitual to sexual intercourse. Secondary sex characters were found present. All this shows that the prosecutrix is not

telling the truth regarding her age and name.

In 2010 (3) RCR (Crl.) 179, Dharmender and others vs. State of Haryana, case was under Sections 363/366/376 IPC- Accused alleged of kidnapping and forcibly committing rape on a 17 years' old minor- Prosecutrix while being removed from one place to another by accused in bus and train, neither raised any alarm nor complained to anyone-During medical examination, no injury was found on the person of prosecutrix- Accused not guilty of taking away the prosecutrix from keeping of lawful guardianship and prosecutrix was held to be a consenting party- Conviction set aside.

In 2007(3) RCR (Crl.) 818, Arvinder Kaur and another vs. State of Punjab, case was under Sections 363/376 IPC. In this case, school leaving certificate regarding age of prosecutrix was produced, but certificate was not relied upon as the original admission record was not produced. Secondly, the person who got admitted the prosecutrix in the school was not examined.

Allegation of the prosecution was that the prosecutrix was abducted and raped for 5-6 days. Medico legal examination showed absence of hymen and no injury on private parts. Doctor opined that absence of hymen indicates that she was used to sexual intercourse. Absence of hymen does not take place if woman was subjected to sexual intercourse on isolated occasions or in a week. It takes months and years for sexual intercourse for the hymen to be absent. Conviction was set aside because prosecutrix was a consenting party.

In 2009(1) RCR (Crl.) 775, Naresh Kumar vs. State of Haryana, case was under Sections 363/376 IPC- Prosecutrix remained with the accused for 4 days and travelled to 3/4 places in train, tonga and bus- Prosecution failed to prove what was the age of prosecutrix- Inference of consensual affair drawn- Conviction set aside.

In this case, birth certificate not produced- Date of birth recorded in school record produced- no evidence who got admitted the prosecutrix and on what basis, date of birth was recorded- School record not be relied upon to prove date of birth.

In the present case, no birth certificate or school leaving certificate on the file but an effort was made to produce certificate of another student with the allegation that the prosecutrix was also known as Balwinder Kaur. Prosecutrix was raped for the first time in her newly constructed house on 16.7.1997. After that, she was taken to Shimla by bus. After staying for 5-6 days in a hotel at Shimla, prosecutrix was brought back to Kaithal in a bus, but no complaint to any one while travelling in the bus or while going on foot. In case, Suresh Kumar had raped the prosecutrix for the first time on 16.7.1997 or in a hotel at Shimla, then why no injury on the person of the prosecutrix and there was no question of absence of hymen and the vagina admitting two fingers easily. Report of the doctor is to the effect that prosecutrix was habitual to sexual intercourse. Statement of the prosecutrix and report of the doctor show that prosecutrix was the consenting party. Defence version of the appellant was that he had developed relations with the prosecutrix. Prosecutrix was Jat Sikh by caste, whereas appellant Suresh Kumar was Carpenter. Prosecutrix was intending to marry Suresh Kumar but her father was not willing. Prosecutrix wrote number of letters (Ex.D1 to Ex.D10), but while appearing in Court, then prosecutrix denied to have written above said letters. In

case letters are ignored even than defence version seems to be probable. That is why, at the time of rape in newly constructed house or while going to Shimla by bus, no complaint to any body, particularly when the appellant was not armed. Prosecutrix was near about 19 years' old. Suresh Kumar was also 19 years' old. No evidence on the file that the prosecutrix was not keeping good health and was of weak physique. When Suresh Kumar and the prosecutrix were of the same age group, then prosecutrix could easily resist but no objection at any stage.

Sukhvinder Singh, appellant, is related to main appellant Suresh Kumar. Allegation against Sukhvinder Singh was that he had met the prosecutrix and Suresh Kumar while going to bus stand and at Bus Stand, Ambala, he had directed Suresh Kumar to take the prosecutrix to Shimla to marry. With this allegation, no question of punishment under Sections 363/366-A IPC. Section 366-A IPC is reproduced as under:-

"Procuration of minor girl.- Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine."

Sukhvinder Singh had not induced the prosecutrix at the initial stage. After rape in the newly constructed house of the prosecutrix, when prosecutrix with Suresh Kumar was going towards Bus Stand of Village Bhurangpur, then on the way, Sukhvinder Singh had met them. In case, Sukhvinder Singh had requested Suresh Kumar to take the prosecutrix to Shimla for marriage, then nothing to presume that Sukhvinder Singh had induced the prosecutrix to accompany Suresh Kumar.

In 2007(4) RCR (Crl.) 867, Iqbal vs. State of Kerala, Hon'ble the Supreme Court in para Nos.8 and 10 observed as under:-

"8. Clause 'sixthly' clearly stipulates that sexual intercourse with a woman with her or without her consent when she is under 16 years of age, amounts to rape. The evidence on record clearly establishes that the victim was less than 16 years of age and, therefore, the conviction for offences punishable under Section 376 IPC cannot be faulted.

10. In the instant case, the admitted case of the prosecution is that girl had left in the company of the accused of her own will and that she was not forced to sexual intercourse with any person other than the accused. The admitted case is that she had sexual intercourse with the accused for which, considering her age, conviction under Section 376 IPC has been maintained. Since the essential ingredient that the intercourse must be with a person other than the accused has not been established, Section 366 A has no application."

No other submission was put forward.

In the light of above discussion, I am of the opinion that evidence on the file was not rightly scrutinized by the trial Court. Impugned judgment suffers from illegality and infirmity and same is ordered to be set aside. Appellants are acquitted of the charges levelled against them.

Resultantly, both the appeals, i.e., Crl. Appeal No.331-SB of 2000 and Cr.Appeal No.453-SB of 2000, are accepted.

20.8.2010
pk

(JORA SINGH)
JUDGE