

**Amarjit Singh Vs. State**

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**Court :** Delhi

**Decided On :** Feb-17-1989

**Reported in :** 38(1989)DLT279; 1989(16)DRJ278

**Judge :** Santosh Duggal, J.

**Acts :** [Indian Penal code, 1860](#) - Sections 361

**Appeal No. :** Criminal Appeal No. 147 of 1987

**Appellant :** Amarjit Singh

**Respondent :** State

**Advocate for Pet/Ap. :** A.A. Khan and; M.S. Siddique, Advs

**Judgement :**

**Santosh Duggal, J.**

(1) The appellant, Amarjeet Singh alias Laliya, has come up in this appeal against his conviction for offences under Sections 363/ 366 and 376 Indian Penal Code recorded by judgment dated 15th May, 1987 by Shri Padam Singh, Additional Sessions Judge, Delhi. The appellant was sentenced to R.I. for three years and to fine of Rs. 1,000.00; sentence in default being R.I. for six months ; to R.I. for seven years and to fine of Rs. 2,000.00 in default the sentence being R.I. for one year and to R.I. for ten years and fine of Rs. 2,500.00, the sentence in default being R.I.

for on year, on the three counts' respectively, by order passed on the same day.

(2) The prosecution case, briefly stated, was that Kumari Sunita Mishra, daughter of Ram Dayal Mishra, resident of Pujari E Block Mandir, Tagore Garden Extension, New Delhi, then aged about 13 years of age, had been found missing from her house, since the night of 28th April, 1986 and the accused, who had his tea shop opposite the temple, was also not traceable, either at the said shop or at his residence, and that it was believed that he had taken away said Kumari Sunita with him without the consent of her father the lawful guardian. A case was initially registered for the offence under Section 363 Indian Penal Code .

(3) S.I. Surender Kumar Marwah (Public Witness 14) then posted at P.S. Rajouri Garden, New Delhi, took over the investigation and after looking for the accused as well as the girl at various places in Delhi, proceeded first to Panipat in search of the accused accompanied by constable Raj Kumar (PW 9), and Hira Lal, a relation of the prosecutrix (Public Witness 3), and not finding him there returned, and thereafter went to Rai Bareilly, a district in U.P., and on the basis of information collected, visited a village known as Mahadev Ka Purva. but there also no trace of the accused and the girl was not found and so they all returned to Delhi. But on reaching New Delhi Railway Station on the morning of 8th May, 1986, they found the accused along with the girl in the waiting hall of the New Delhi Railway Station. The recovery of the girl was effected there, and the accused was also taken into custody. After recording statement of the prosecutrix, having both of them medically examined, and collecting other evidence, the investigating officer found the offences under Sections 366 and 376 Indian Penal Code also made out, and thus consequently the accused was finally booked for offences under Sections 363/366 and 376 I.P.C. After completion of formalities, the accused was sent for trial.

(4) On the strength of the prosecution evidence, consisting of school leaving certificate, as corroborated by entry from the Register of Births & deaths; the date of birth of the prosecutrix was found to be 4th September, 1973, and thus holding it to be a case where the age of the girl at the relevant time was about 12 years and 7 months i.e. below 16 years, and accepting her testimony that she had been

reduced by the accused to leave her parental house and rejecting the defense plea that the prosecutrix was a willing person, primarily on the ground that the consent factor was of no consequence, considering the age of the prosecutrix, the Additional Sessions Judge held the charges proved against the accused and recorded his conviction, as aforesaid. It was further considered to be a case where the accused had betrayed trust of the girl and her parents as reposed in him, when he was allowed the facility of entering their house for the purpose of taking water from their tap, and having misled the girl offender age to leave the house with him, and then having subjected her to sexual intercourse ; the learned trial Judge felt that the accused should be visited with a heavy punishment and thus awarded sentences, as reproduced above.

(5) The judgment is assailed, in this appeal, on the ground that the learned trial Judge failed to take note of infirmities in the prosecution case, and that even though it was apparent that it was the girl who used to write letters to the accused, and it was she who had herself gone to him, even then a finding of offence under Section 363/366 Indian Penal Code has been recorded. The plea is that this is result of erroneous approach on the part Of the trial Judge and failure to take note of the lacunae in prosecution evidence. It is further averred that the prosecution had failed to establish by medical evidence that age of the prosecutrix was below 16 years, and thus offence under Section. 376 Indian Penal Code was in any case not made out because of the apparent position that the girl was a consenting party. Besides the plea that the conviction is not sustainable, it is further added that in any case the sentence awarded is very harsh and excessive, and that the appellant is a youngman of 24 years of age and not proved to be having any criminal antecedents and thus a heavy sentence was not called for in this case.

(6) Mr. Anis Ahmed Khan, appearing for the appellant at the time of bearing, took up these pleas, as set out in the grounds of appeal. His main thrust was on the question of age of the prosecutrix because he proceeded on the assumption that the consent of the prosecutrix was apparent on the face of the record. He first of all impinged the evidence of the doctor who had, on the basis of radiological and Orthopedic test, given the opinion about age of the prosecutrix. She is Dr. J. Chaterjee of Ram Manohar Lohia Hospital examined as Public Witness 8, and the

medical certificate regarding age as well as of ossification test has been proved by her as Public Witness 8/A. Mr. Anis Abrned Khan drew attention to the fact that the age in recorded in this certificate to '16 years', and further that no possibility of any margin is indicated, and that on the face of it, doctor's evidence in court, adding that the age was below 16 years was not acceptable. He contended that this doctor has shown bias as if keen to prove prosecution case, whereas as an expert witness she was expected to give evidence naturally on the basis of record, and what was contained in the certificate. Learned counsel submitted that whatever she stated in court was not worthy of credence. He therefore, pleaded that the age in this case, as per this certificate, is 16 years, and not below 16 years, whereas as per definition under Section 375 of the Indian Penal Code ., the offence of rape is made out only if the age of the prosecutrix is below 16 years.

(7) Mr. Anis Ahmed Khan was aware of the other evidence on record, namely, the evidence furnished by the school leaving certificate as proved by Mrs. I.P. Mahajan, Principal of Govt. Girls Senior Secondary School, Tagore Garden, New Delhi appearing as Public Witness 5 and also by the copy of the entry of the register of births and deaths for the year 1973 proved by Mr. P.S. Sharma, Sub-Registrar, as Public Witness 6. He, however, submitted that the school leaving certificate per se was of no significance because it is an established fact that the parents of a child give minimal age at the time of admission in school for various reasons and that as against that, the medical evidence is independent and based on scientific test, as to fusion of joints of certain bones. He quoted a judgment of the Punjab & Haryana High Court in support of this line of a argument as reported in Raunki Saroop v. State. He further added citing from a Supreme Court judgment reported as Jaya Mala v. Home Secretary, Government of Jammu and Kashmir and others, that the opinion evidence of a doctor as to the age of a person based on radiological test, cannot be treated as giving a precise estimate of age and that a margin of error of two years on either side ought to be normally kept in consideration. Relying on this authority, he argued that the age of the prosecutrix can be taken to be up to 18 years, and in view of statement that she had gone out of the house taking money and clothes, her consent has to be presumed, and thus neither any offence under Section 363/366 Indian Penal Code is made out nor under Section 376 Indian Penal Code .

(8) Mr. M.S. Siddiqui, counsel for the State, countered these arguments by pointing out from the record that in this case the evidence as to age of the prosecutrix is very positively established by the school record as well as entry from the register of births and deaths, coupled with the statement of the father of the prosecutrix, and that in view of this, direct evidence as to age, we do not have in this case, to go to the estimated age as determined as a result of ossification test.

(9) I have very carefully scrutinised the evidence in this regard because the appellant faces very grave accusation of having seduced a girl of about 13 years of age, and having subjected her to sexual intercourse against her will.

(10) The most crucial factor, in this regard, is apparently that of age of the prosecutrix. She herself appearing as Public Witness 1 deposed that she was a student of 8th standard at the time she was taken away by the accused, and so is the statement of her father Ram Dayal Mishra, appearing as Public Witness 2. Both of them have further deposed that she was earlier studying in Govt. Girls Senior Secondary School, Tagore Garden, in the 6th standard but she was withdrawn from the school and admitted in a private school known as Adarsh Public School in Janakpuri only a few days before this incident. The fact that she was studying in 6th standard in a school, in Tagore Garden is established by the testimony of the principal of that school Smt. I. P. Mahajan (PW 5), who proved the school leaving certificate Ex. Public Witness 5/A. As per entries in this certificate issued on 14th May, 1986, the age of the girl, named, Sunita Mishra, daughter of Ram Dayal Mishra, has been very clearly mentioned as 4th September, 1973, both in figures as well as words. It is further shown that at that time she was reading in 6th class of that school and had attended the same up to 21st April, 1986. The prosecutrix has deposed that she was got admitted in a school in Janakpuri on 22nd April, 1986 in 8th. standard. The father has stated that she was given a jump of one class in the new school and this averment is borne out by entries in the school leaving certificate. This shows that normally she would have been a student of 7th class, had she not discontinued from the former school. Even if the fact, as revealed by the father that she had failed once while in 6th class, be taken into consideration; then also she could be at the most a student of 8th class. The father has also deposed that when he first got his daughter

admitted in school, she four years of age. He has not been cross-examined on this aspect, at all. Keeping all these factors in view, the date given in the school leaving certificate as 4th September, 1973 has to be accepted as the correct date of birth of the prosecutrix because she would be at the relevant time below 13 years because having been admitted, according to the uncontroverted statement of the father, for the first time in school at the age of 4 years, she would be between 12 to 13 years while in 8th class.

(11) This is thus a case where the entry as to the date of birth in the school leaving certificate is fully corroborated by computing the year of admission of the prosecutrix inschool, and the class in which she was studying at the relevant time. It is further pertinent to note that according to certificate Ex. Public Witness 5/A, her date of admission in that school is recorded on, 30th July, 1984. The Principal has stated that this was on the basis of earlier school leaving certificate. She was no more questioned. Apparently while the girl was admitted in the school in July, 1984, from where certificate Ex. Public Witness 5/A has been issued, it would have been nowhere even within the wildest contemplation of the father of the girl or any one also that she would get involved in a case of this type where her age would become crucially relevant. I have thus no hesitation in holding, that this age was given forth genuinely in the ordinary course, and on the basis of record of birth entry.

(12) I say so because, there is corroboration of this fact by entry in the birth register, as proved from the official record by Shri P.S. Sharma, a Sub Registrar in the West Zone office of Municipal Corporation of Delhi at Rajouri Garden, New Delhi, examined as Public Witness 6. He has proved copy of the entry Ex. Public Witness 65/A. The date of birth of a female child born to Ram Dayal Mishra is given as 4th September, 1973. The only point raised in this connection by the counsel was that the name of the girl is given as Neeru. The father has very clearly explained that this name Neeru was given according to the horoscope, and reading of the stars, and that this girl Neeru, as per the certificate Ex. Public Witness 6/A, is the same girl as Sunita. There is no suggestion that the certificate does not relate to the child born to Ram Dayal Mishra, The address and other particulars are not questioned. The father has also given very consistent account

of the fact that in all, three children were born to him and his wife Smt. Prabhawati, and that eldest was a boy who died in infancy and the next was also a girl who also died within two hours of the birth ; and that this Sunita, named Neeru at the birth is the only surviving child, and that the date recorded in the birth register pertains to her. There is no attempt to show on the part of the accused/appellant that Ram Dayal Mishra had a daughter younger to Sunita prosecutrix, and that this birth entry dated 4th September, 1973 related to the said younger daughter. We have father's categorical statement that Sunita is the youngest born child and the sole living child, whose birth was registered in the office of the Registrar of Births, and it was she who was given the name of Neeru. In view of this unassailable testimony, and in view of the fact that while admitting Sunita in school, the same date, namely, 4th September, 1973 is entered, can lead to no other inference but that the date of birth of this girl is 4th September, 1973.

(13) That being so, all the authorities cited by the learned counsel for the appellant in an endeavor to show that the age of the prosecutrix was above 14 years, with a view to escape conviction for the grave offence under Section 376 Indian Penal Code, have to be held, with all respects, to be not applicable to the facts of this case.

(14) In the case before Punjab & Haryana High Court in Raunki Saroop (supra), there was no credible corroborative evidence as to the actual age of the prosecutrix, and in that context it was held that the medical evidence which was based on scientific test deserved preference. The case, before the Supreme Court in Jaya Mala (supra), was that of detention under Jammu Kashmir Public Safety Act, 1978. The plea that the detenu was below the age of 18 years at the relevant lime was accepted on the basis of radiological test on broad principles. It was not a case of a criminal trial where the evidence of the parents or other direct evidence was available or where the doctor could be subjected to cross-examination.

(15) I, therefore, find it a case where the age of the prosecutrix has been rightly held by the trial court to have been established to be positively bellows 6 years. There is evidence that the accused who used to visit her house to take water from the tap became gradually intimate with her, and in the absence of her parents

used to get letters written from her, addressed to him. The picture that emerges on a reading of her statement as a whole, is that this girl had been influenced by the accused, in such a way that she took away money stealthily from the house as well as handed over three pairs of her clothes to the accused three days before they finally left. She states in her deposition in court that on the fateful day, the accused gave her a signal, and then she left her parents' house when her parents were away and that the accused took her in a three wheeler scooter first to Sangam Vihar where his sister lives and kept her there for the night and from there he proceeded to Panipat with her and remained there for 3/4 days and then went to Rai Bareilly and when he ran out of money, he returned to Delhi. She has farther deposed that during all these days, he had sexual intercourse with her 4/5 times against her will and forcibly, and despite her protests, and even threatened her. The fact that she had been subjected to sexual intercourse is proved by medical evidence, given by Dr. Kamini Endley (Public Witness 4), who has stated that besides other indications of intercourse, there was a rupture of hymen. Except for the bald suggestion that there had been no sexual intercourse, no attempt to question the opinion of the doctor, with the help of any medical authority, has been made. The statement of the prosecutrix thus finds full corroboration from the medical evidence.

(16) The minor discrepancies, as pointed out by the learned counsel, such as failure of the prosecutrix to state in her first statement given to the investigating officer about her being taken to Sangam Vihar and kept there for the first night or being raped, or her having moved out in response to a signal, are of no consequence because apparently she was recovered after 12/13 days, and after going through the barrowing experience, she may have been in dazed state of mind and thus skipped certain details. But that, in any case, would not impinge upon her credibility, particularly when it finds corroboration from the medical evidence.

(17) APPELLANT'S counsel then argued that in view of the fact that the prosecutrix had left the house herself, it was not a case where there is a 'taking away' on the part of the accused, and thus there was no offence of kidnapping, as contemplated by Section 361 Indian Penal Code He cited in support of this plea a

recent judgment by a Single Judge of this court reported as 1988 (2) DL 139 (Ramesh Singh y. State), where it has been held that in the absence of any evidence on the record to show that the appellant had given any inducement, allurements or threat which influenced the minor prosecutrix in her leaving her guardian's custody, the offence of kidnapping cannot be said to have been made out. I find that this was a case where the age of the prosecutrix, as per prosecution case, was 17 years. It was further in evidence that the prosecutrix left the house of her parents voluntarily and met the appellant in a street, remained with him from place to place in different cities for 22 days. It was in this background that it was held that the age of the prosecutrix being slightly below 18 years, and she being capable of understanding the implications of her actions, and the fact of her long stay with the appellant from place to place, implied her full consent and that in these circumstances it could not be said that she had been kidnapped by the accused.

(18) The facts here are wholly different. It has already been observed.. that the age of the prosecutrix was not even 13 years at the relevant time. It is also a case where the accused positively influenced her, came to hold a sway on her, and took her under his commands so much so that she even: secreted away money amounting to Rs. 500.00 to Rs. 700/-; and gave it to the accused, and also handed over three pairs of her clothes to him three days before. The elopement was thus masterminded by the appellant. The photographs which were shown to her by the defense counsel, during cross-examination, and placed on record as Ex. D-1 and Ex. D-2 reveal that she is a girl of very tender age and the accused had such a vicious control over her that she was not mindful of any sense of decency or propriety and could even make her pose with him, in any manner he liked. This is thus a case of clear seduction. No other inference is possible in this setting of the facts, when the accused had already taken money, and her clothes, and was waiting with a three wheeler scooter, and she walked out responding to a signal, it was obviously a pre-arranged plan. In view of the very young age of the girl, when she does not seem to be capable of discriminating between right and wrong, or understand the implications of her actions ; the view expressed in the Ramesh Singh's case (supra), cannot be extended to the facts of this case. I would, therefore, hold that where the prosecutrix is of a very tender age, and of such

immature mind, that she could even go to the extent of allowing her photographs with the accused, permitting him to lift her, or take her in his lap, or have other intimate poses, write letters on his dictations, parts with her mother's savings in the form of cash ; it has to be taken a case where this minor girl had gradually fallen under the malign influence of the accused, and reached a point where she could be made to do anything at his bidding, and he had taken full advantage of her lack of maturity and understanding, and betrayed faith of her parents, and it can in no circumstances be treated to be a case where the girl is to be said to have left voluntarily nor does it seem to be a case where it can be argued that there was no taking or enticing away by the accused.

(19) The authority of the Supreme Court relied upon in this regard by the learned counsel for the accused/appellant is (*Lalta Prasad v. State of Madhya Pradesh*), is wholly distinguishable because there the age of the girl was about 18 years and it was in evidence that she had gone with the accused in that case with the consent of her mother because her mother wanted her to marry the said person, and even betrothal ceremony had taken place, but because of the opposition of the brother of the girl, the mother had sent her away before marriage with the concerned person. That authority on the face of it cannot apply, to the facts of the present case.

(20) I am, therefore, fully satisfied that the conviction of the appellant for offences under Sections 363/366 and 376 IPC has been rightly recorded. The judgment of the trial court is thus wholly maintained. However, since the offence under Section 366 Indian Penal Code is graver offence, inasmuch as it is kidnapping with the object of seducing or forcing the girl to sexual intercourse, no separate conviction for offence under Section 363 Indian Penal Code need have recorded, the conviction is thus upheld for offences under Section 366 IPC and 376 IPC.

(21) The learned counsel had lastly pleaded that the appellant is a youngman, and that the sentence awarded is very stringent, and that a lenient view may be taken. He also added, which is a statement at the Bar, that the prosecutrix has even got married, whereas the accused is in jail ever since the date of his apprehension, namely, 8th May, 1986. I have considered this aspect of the matter, but in view of

the fact that the appellant's conviction under Section 376 Indian Penal Code has also been maintained, there can be no escape for him from undergoing the minimum sentence of 7 years' imprisonment for this offence.

(22) The plea that the sentence of fine may be revoked, for the reason that the appellant is a youngman without earning, being in jail, can also not be considered because the Statute makes imposition of fine obligatory as a part of sentencing for both offences, for which conviction has been recorded. However, in face of the circumstances pleaded, reduction of fine can be considered.

(23) Accordingly, the order of sentence of the trial court dated 15th May. 1987 is modified to the extent that the sentence under Section 376 Ipc shall be R.I. for 7 years' and fine of RS.1000.00 and in default R.I. for 3 months and sentence for offence under Section 366 Indian Penal Code shall be R.I. for 5 years and fine of Rs.500.00 and in default R.I, for two months. All the sentences to run concurrently.

(24) In the result, the appeal is dismissed except to the extent of modifications of sentences, as indicated above.