

Mohd. Imran Khan Vs State (Govt. of NCT of Delhi)

Court: Supreme Court of India

Date of Decision: Oct. 10, 2011

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€” Section 164, 313, 315

Evidence Act, 1872 â€” Section 114, 118

Penal Code, 1860 (IPC) â€” Section 34, 342, 363, 366, 376, 506

Registration of Births and Deaths Act, 1969 â€” Section 17

Indian Evidence Act, 1872 â€” Section 118

Citation: (2011) 3 ACR 3452 : (2012) 2 ALT(Cri) 217 : (2012) BomCR(Cri) 817 : (2012) CriLJ 693 : (2011) 4 Crimes 205 : (2012) 1 JCR 50 : (2011) 13 JT 159 : (2011) 2 NCC 762 : (2012) 1 RCR(Criminal) 75 : (2011) 11 SCALE 376 : (2011) 10 SCC 192 : (2011) 6 UJ 4277

Hon'ble Judges: P. Sathasivam, J; B.S. Chauhan, J

Bench: Division Bench

Advocate: P.P. Maihotra, ASG, Amrendra Sharan, Abhay Kumar, Sujeet Kr. Murty, Somesh Jha, S. Islam, Anis Ahmed, Balraj Dewan, P.K. Dey, Rajana Narayan and Anil Katiyar, for the Appellant;

Final Decision: Dismissed

Judgement

B.S. Chauhan, J.

Both these criminal appeals have been preferred against the common impugned judgment and order dated 8.12.2009 of

the High Court of Delhi passed in Criminal Appeal Nos. 311 of 1999 and 312 of 1999, by which the High Court has affirmed the conviction of the

Appellants u/s 376 of the Indian Penal Code, 1860 (hereinafter called "Indian Penal Code"), however, set aside their conviction under Sections

366/34 Indian Penal Code and further reduced the sentence from 7 years RI to 5 years RI with a fine of Rs. 10,000/- each and in default to

undergo further punishment for 3 months.

2. Facts and circumstances giving rise to these appeals are unfolded by the statement of Shri Prabhu Dass (father of prosecutrix Monika) dated

28.11.1989 made before the Police Station, Vinay Nagar, New Delhi to the effect that his daughter Monika, aged about 15 years, studying in

standard 9th in Green Field School, Safdarjung Enclave, New Delhi had left her house on 24.11.1989 for going to school. She informed through

telephone that she would stay in the house of her friend Amita for the night. On 25.11.1989 at about 8.30 a.m. Monika telephoned her cousin

Satish Anand that she was going to Pragati Maidan along with her school friends and asked him to reach there so that she would come back with

him. Monika asked Satish Anand to meet her at Ahmed Food Restaurant, U.P. Pavilion, where Mohd. Imran Khan and Jamal Ahmed (appellants)

used to work. Satish Anand went to Pragati Maidan at the pointed place, but he could neither meet Monika nor either of the Appellants, but he

came to know that Monika was roaming inside Pragati Maidan along with the Appellants. As she did not come back till evening, the complainant

Prabhu Dass went to Pragati Maidan on 26.11.1989 and on enquiry he came to know that Monika was seen roaming with the Appellants. The

Appellants were known to Monika as Prabhu Dass, complainant was having a stall of readymade garments at shop No. 11 in Anarkali Bazar,

Pragati Maidan in front of the food stall where the Appellants were working. Complainant's wife Devki and daughter Monika used to come to

work there also. Complainant searched for his daughter at many places but could not find.

3. On the basis of his statement, a case u/s 363 Indian Penal Code was registered and investigation ensued. It was during the investigation Monika,

prosecutrix was recovered. The Appellants-accused Mohd. Imran Khan and Jamal Ahmed were also arrested. Offences under Sections 366 and

376 Indian Penal Code were added. Monika was examined u/s 164 of Code of Criminal Procedure, 1973 (hereinafter called "Code of Criminal

Procedure") on the basis of which the Appellants-accused were arrested. After having further investigation, offences punishable under Sections

342/506 Indian Penal Code were also added.

4. Monika, prosecutrix was medically examined to determine her age and to find out the possibility of commission of rape. The Appellants were

also examined medically. After conclusion of the investigation, the matter was committed to Sessions Court and trial commenced. Prosecution

examined as many as 16 witnesses in support of its case. The defence examined 4 witnesses. Mohd. Imran Khan, first Appellant also examined

himself u/s 315 Code of Criminal Procedure After conclusion of the trial, the Trial Court vide judgment and orders dated 29.5.1999 and

31.5.1999 convicted the Appellants u/s 366 Indian Penal Code read with Section 34 and sentenced them to undergo RI for 4 years and a fine of

Rs. 2,000/- each. In default of payment of fine, they would undergo SI for two months. Both the Appellants were further sentenced u/s 376 Indian

Penal Code to RI for 7 years and a fine of Rs. 3,000/- each. In default of payment of fine, they would undergo SI for 3 months. However, both

the sentences were directed to run concurrently.

5. Being aggrieved, both the Appellants preferred separate Criminal Appeal Nos. 311 of 1999 and 312 of 1999 which have been disposed of by

the common impugned judgment and order dated 8.12.2009, by which the High Court acquitted both the Appellants of the charges under Sections

366/34 Indian Penal Code, but maintained their conviction u/s 376 Indian Penal Code. However, the sentence u/s 376 Indian Penal Code was

reduced from 7 years to 5 years each and to pay a fine of Rs. 10,000/- each failing which to undergo SI for 3 months.

Hence, these appeals.

6. Shri Amrendra Sharan, learned Senior counsel for the Appellant Jamal Ahmed in Criminal Appeal No. 1517 of 2010 has submitted that the

prosecutrix Monika was over and above 16 years of age. The Investigating Officer deposed in the court that the Birth Certificate produced in the

court did not relate to her. The prosecution did not cross-examine him after declaring hostile. In such an eventuality the Appellant is entitled for the

benefit of his statement. The Appellant Jamal Ahmed had no physical connection with the prosecutrix. She had an affair with Mohd. Imran Khan

and had gone with him voluntarily. She had been taken from Delhi to Meerut by bus. She met with an Advocate for planning her marriage with

Mohd. Imran Khan. She stayed in the hotel. Thus, she had ample opportunity to raise hue and cry or inform some body at some place that she had

been subjected to some threat or coercion. The courts below erred in placing reliance on her statement.

7. Shri Anis Ahmed, learned Counsel appearing for another Appellant in Criminal Appeal No. 1516 of 2010 has also assailed the impugned

judgment on similar grounds.

8. Per contra, Shri P.P. Malhotra, learned ASG appearing for the State of Delhi has opposed the appeals contending that Monika, prosecutrix

was below 16 years of age on the date of incident. She remained under persistent threats from the Appellants. Therefore, she could not raise hue

and cry. The concurrent finding of facts regarding rape by both the Appellants does not warrant any interference. The appeals lack merit and are

liable to be dismissed.

9. We have considered the rival submissions made by the learned Counsel for the parties and perused the record.

10. The Trial Court has meticulously scrutinised and appreciated the evidence of the prosecution as well as of defence. Shri Prabhu Dass, father of

the prosecutrix died on 10.11.1995 during trial before his statement could be recorded. Som Wati, Lady Constable (PW.1) deposed that she was

in the team which recovered the prosecutrix on 29.11.1989 and taken her for medical examination. She has also recovered the underwear of the

prosecutrix and was handed over to I.O. Dr. Reeta Rastogi (PW.2) proved the M.L.C., Ext.PW2/A of the prosecutrix and deposed that the same

was prepared by her according to which there was no sign of external injury. The hymen of the prosecutrix was inflame and there was slight

bleeding. Her vagina admitted two fingers tightly. Prosecutrix was not habitual of intercourse but there was evidence of intercourse. Its witness was

not cross-examined by the defence as to whether the evidence of intercourse was recent one or not. Monika, the prosecutrix (PW.3) had given full

version of the incident as to how she had been picked up by the Appellants from Pragati Maidan. She knew both the accused as they had been

working in the stall near the stall of her father. When prosecutrix was waiting for her cousin, the accused persons showed her a knife and told her

in case she tried to run away or raise noise, they would kill her. Both the accused persons forcibly took her to ISBT in a three wheeler and from

there to Meerut by bus. The accused kept their respective knives on the back of the prosecutrix in such a manner that neither the passengers nor

the bus conductor could notice of their activity. She was taken to Hotel Ajanta in Meerut where the Appellant Jamal Ahmed made the entry in the

Hotel register and took her to room No. 101. At the time of making entry in the Hotel register by accused Jamal Ahmed, accused Mohd. Imran

Khan stayed with the prosecutrix throughout. Both the accused persons committed rape upon her in that room. Next day in the morning she was

taken by the accused persons to the house of the sister of one of them and from there she was brought to Delhi to the house of elder brother of

Appellant Jamal Ahmed. Both the accused persons committed rape upon her in that house. They had put their knives on her back in such a manner

that other persons could not notice them. She could not raise hue and cry while coming from Meerut to Delhi as she was totally in a position of

shock and the accused Appellants threatened to kill her in case she raises voice or tries to run away. On 27.11.1989 she had been locked inside

the house as the Appellants had gone away and after coming back in the evening she was raped by both of them. On 28.11.1989 both the

Appellants left the house and returned in the evening along with elder brother and brother-in-law of accused Imran. These two persons had taken

the prosecutrix to a flat behind G.B. Pant Hospital where she found both the Appellants present. After sometime, police recovered her from that

place and she was sent for medical examination. Her statement was recorded u/s 164 Code of Criminal Procedure on 29.11.1989.

11. Shri Babu Lal (PW.11), the then Metropolitan Magistrate proved the statement of the prosecutrix recorded u/s 164 Code of Criminal

Procedure Other witnesses also supported the case of the prosecution. Both the Appellants denied their involvement while their statements u/s 313

Code of Criminal Procedure were recorded. Some defence witnesses were examined, however, relevant witness had been Appellant Imran Khan

who has examined himself as DW.5 u/s 315 Code of Criminal Procedure According to him Monika, prosecutrix met him on 25.11.1989 at 3 p.m.

at his restaurant and told him that her mother had turned her out so she would not go to her house and if he refused to keep her she would die. It

was on the insistence of the prosecutrix that he along with another Appellant and prosecutrix went to Meerut to consult Shri Mustafa, Advocate

who was known to other Appellant, however, the lawyer told her to bring the Birth Certificate etc. as it was to be produced in the court for getting

married and court would issue one month's notice.

12. All the prosecution witnesses have faced grilling cross-examination but nothing could be elicited to discredit any part of their evidence. This

part of the prosecution has been accepted by both the courts and we do not see any cogent reason to interfere with the same.

13. Learned Counsel for both the parties have emphasised on the question as to whether the conduct of the prosecutrix had been such that the

Appellants could not be held responsible as she had voluntarily gone with them to Meerut and, in spite of the fact, that she had ample opportunity

to raise hue and cry or inform any person, she did not do so. It is submitted on behalf of the Appellants that it was a case of consent as the

prosecutrix had voluntarily accompanied the Appellants to Meerut. In order to buttress his argument, Shri Amrendra Sharan, learned senior

counsel, placed reliance upon the judgments of this Court in *Mussaaddin Ahmed v. State of Assam* (2009) 14 SCC 541; and *Alamelu & Anr. v.*

State represented by Inspector of Police, (2011) 2 SCC 385 wherein after appreciating the evidence on record, the Court held that the

prosecutrix had been a willing partner in the entire episode. The conviction accorded u/s 376 Indian Penal Code by the courts below has been set

aside by this Court in similar circumstances.

In our considered opinion, such arguments may be relevant in case we reach the conclusion that the findings of fact recorded by the courts below

on the issue of age of the prosecutrix and commission of rape could not be factually correct and were liable to be set aside.

In view of the fact that the High Court has acquitted the Appellants for the offences under Sections 366/34 Indian Penal Code the issue of

kidnapping is not required to be considered further.

AGE:

14. Both the courts below have laboured hard to find out the age of the prosecutrix for the reason that defence produced certificate from

Safdarjung Hospital, New Delhi to create confusion and the I.O. in order to help the Appellants had made a statement that the certificate on

record did not belong to the prosecutrix. The medical report of the Radiologist issued by Ram Manohar Lohia Hospital, New Delhi revealed that

age of the prosecutrix was between 16 and 17 years. The Birth Certificate issued u/s 17 of the Registration of Birth & Death Act, 1969 reveals

that a female child was born on 2.9.1974 by the wedlock of Prabhu Dass and Devki, residents of Sector 12/69, R.K. Puram, New Delhi and its

registration number had been 4840. It also reveals that number of live children including this child had been two. However, this certificate has been

duly proved by Vijay Kumar Harnal, Medical Record Officer, Safdarjung Hospital, New Delhi (PW.9), who explained that one female child was

born in Safdarjung Hospital at 7.15 a.m. on 2.9.1974. Her mother's name was Devki, wife of Prabhu Dass and her address was R.K. Puram,

New Delhi. He also explained that the other Birth Certificate produced by the defence according to which a female child was born on 12.9.1971

was of a different female child who was born to one Devi Rani, wife of Prabhu Dayal, residents of Kotla Mubarakpur and thus, it did not belong to

Monika, prosecutrix. Similar evidence had been given by Dr. R.K. Sharma, C.M.O., N.D.M.C., Delhi (PW.7). According to him, the female child

was born with Registration No. 4840 on 2.9.1974 and he further explained that the name of the parents and address of another female child born

on 27.9.1971 bearing different registration No. 4502 had been totally different, i.e. Prabhu Dayal and Devi Rani, residents of Kotla Mubarakpur.

The number of living children with that family is also different from that of the prosecutrix. These documents have thoroughly been examined by the

courts below and we do not see any cogent reason to examine the issue further.

The medical report and the deposition of the Radiologist cannot predict the exact date of birth, rather it gives an idea with a long margin of 1 to 2

years on either side. In *Jaya Mala v. Home Secretary, Government of J & K & Ors.*, AIR 1982 SC 1297 this Court held:

However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on

either side.

(See also: *Ram Suresh Singh v. Prabhat Singh @ Chhotu Singh and Anr.* (2009) 6 SCC 681; and *State of Uttar Pradesh v. Chhotey Lal*, (2011)

2 SCC 550)

In view of the above as we have seen the original record produced before us, we are of the considered opinion that the prosecutrix was less than

16 years of age on the date of incident.

EVIDENCE OF PROSECUTRIX:

15. It is a trite law that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust. The

prosecutrix stands at a higher pedestal than an injured witness as she suffers from emotional injury. Therefore, her evidence need not be tested with

the same amount of suspicion as that of an accomplice. The Indian Evidence Act, 1872 (hereinafter called 'Evidence Act'), nowhere says that her

evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness u/s 118 of Evidence Act and

her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must

attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. If the court keeps this in mind and feels

satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration

(b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of

the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. If

the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve

the person charged, the court should ordinarily have no hesitation in accepting her evidence. The court must be alive to its responsibility and be

sensitive while dealing with cases involving sexual molestations. Rape is not merely a physical assault, rather it often distracts the whole personality

of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the

background of the entire case and in such cases, non-examination even of other witnesses may not be a serious infirmity in the prosecution case,

particularly where the witnesses had not seen the commission of the offence. (Vide: State of Maharashtra v. Chandraprakash Kewalchand Jain,

AIR 1990 SC 658 State of U.P. v. Pappu @ Yunus and Anr. AIR 2005 SC 1248 and Vijay @ Chinee v. State of M.P., (2010) 8 SCC 191)

Thus, the law that emerges on the issue is to the effect that statement of prosecutrix, if found to be worthy of credence and reliable, requires no

corroboration. The court may convict the accused on the sole testimony of the prosecutrix.

16. The Trial Court came to the conclusion that there was no reason to disbelieve the prosecutrix, as no self-respecting girl would level a false

charge of rape against anyone by staking her own honour. The evidence of rape stood fully corroborated by the medical evidence. The MLC of

the prosecutrix Ext.PW2/A was duly supported by Dr. Reeta Rastogi (PW.2).

17. This view of the Trial Court stands fortified by the judgment of this Court in *State of Punjab v. Gurmit Singh & Ors.* AIR 1996 SC 1393 ,

wherein this Court observed that "the courts must, while evaluating evidence remain alive to the fact that in a case of rape, no self-respecting

woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on

her.

Similarly, in *Wahid Khan v. State of Madhya Pradesh*, (2010) 2 SCC 9, it has been observed as under:

It is also a matter of common law that in Indian society any girl or woman would not make such allegations against a person as she is fully aware of

the repercussions flowing therefrom. If she is found to be false, she would be looked at by the society with contempt throughout her life. For an

unmarried girl, it will be difficult to find a suitable groom. Therefore, unless an offence has really been committed, a girl or a woman would be

extremely reluctant even to admit that any such incident had taken place which is likely to reflect on her chastity. She would also be conscious of

the danger of being ostracised by the society. It would indeed be difficult for her to survive in Indian society which is, of course, not as forward-

looking as the western countries are.

18. Much reliance has been placed by learned Counsel for the Appellants on the judgment of this Court in *Javed Masood & Anr. v. State of*

Rajasthan, (2010) 3 SCC 538, wherein it had been held that in case the prosecution witness makes a statement and is not declared hostile, he is

supposed to speak the truth and his statement is to be believed.

It is in view of this fact in the instant case that *Puran Singh*, I.O. (PW.15) has deposed in the court that the "birth certificate of the prosecutrix did

not relate to the prosecutrix. I did not verify about the birth certificate from the NDMC. I do not remember if at the time of bail application I had

submitted that the birth certificate is genuine but does not relate to prosecutrix.

19. Thus, the question does arise as to what extent the court is under an obligation to accept the statement of *Puran Singh*, I.O. (PW.15)

particularly in view of the birth certificate available on the record. In view of our finding in respect of the date of birth we are of the view that *Puran*

Singh, I.O. (PW.15) unfortunately made an attempt to help the accused/appellants, though in the examination-in-chief the witness has deposed that

the Birth Certificate providing the date of birth as 2.9.1974 was genuine.

Be that as it may, by now *Puran Singh* (PW.15) might have retired as the incident itself occurred 22 years ago. Therefore, we do not want to say

anything further in respect of his conduct.

20. In *State of Karnataka v. K. Yarappa Reddy*, AIR 2000 SC 185, this Court while dealing with a similar issue held:

It is well-nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinized independently of the

impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance

and pre-eminence in criminal trials over the action taken by investigating officers. Criminal justice should not be made a casualty for the wrongs

committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true

the court is free to act on it albeit the investigating officer's suspicious role in the case.

21. The investigation into a criminal offence must be free from all objectionable features or infirmities which may legitimately lead to a grievance to

either of the parties that the investigation was unfair or had been carried out with an ulterior motive which had an adverse impact on the case of

either of the parties. Investigating Officer is supposed to investigate an offence avoiding any kind of mischief or harassment to either of the party.

He has to be fair and conscious so as to rule out any possibility of bias or impartial conduct so that any kind of suspicion to his conduct may be

dispelled and the ethical conduct is absolutely essential for investigative professionalism. The investigating officer "is not merely to bolster up a

prosecution case with such evidence as may enable the court to record a conviction but to bring out the real unvarnished truth." (Vide: *Jamuna*

Chaudhary & Ors. v. State of Bihar, AIR 1974 SC 1822; *State of Bihar & Anr. etc. etc. v. P.P. Sharma & Anr.*, AIR 1991 SC 1260 and

Babubhai v. State of Gujarat & Ors., (2010) 12 SCC 254)

22. *Shri Amrendra Sharan*, learned senior counsel has placed reliance on the judgment of this Court in *Baldev Singh & Ors. v. State of Punjab*,

AIR 2011 SC 1231, wherein the convicts of gang rape had been sentenced to 10 years RI and a fine of Rs. 1000/- each had been imposed and

served about more than 3 years imprisonment and incident had been very old, this Court in the facts and circumstances of the case reduced the

sentence as undergone, directing the Appellants therein to pay a sum of Rs. 50,000/- of fine to be paid to the victim and prayed for some relief.

23. The High Court after taking into consideration all the circumstances including that the incident took place in 1989; the appeal before it was

pending for more than 10 years; the prosecutrix had willingly accompanied the Appellants to Meerut and stayed with them in the hotel; and she

was more than 15 years of age when she eloped with the Appellants and the Appellants were young boys, reduced the sentence to 5 years which

was less than the minimum prescribed sentence for the offence. As the High Court itself has awarded the sentence less than the minimum sentence

prescribed for the offence recording special reasons, we do not think it to be a fit case to reduce the sentence further in a proved case of rape of a

minor.

The appeals lack merit and are, accordingly, dismissed.