

**Mohinder Kumar Vs. the State**

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**Court :** Delhi

**Decided On :** Dec-21-1984

**Reported in :** 1984(3)Crimes58; 28(1985)DLT41

**Judge :** J.D. Jain, J.

**Acts :** [Indian Penal code, 1860](#) - Sections 366; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 311

**Appeal No. :** Criminal Appeal No. 21 of 1984

**Appellant :** Mohinder Kumar

**Respondent :** The State

**Advocate for Pet/Ap. :** K.K. Sud and; Harish Gulati, Advs

**Judgement :**

**J.D. Jain, J.**

(1) The appellant has been convicted of offences under sections 366 and 376, Indian Penal Code, by an Additional Sessions Judge vide his judgment dated 26/12/1983. He has been sentenced to rigorous imprisonment for seven years on the first count and rigorous imprisonment for ten years and a fine of Rs. 2.0CO.00 on the second count ; in default of payment of fine, he has been awarded further rigorous imprisonment for oneyear. However, the substantive sentences on both

the counts have been made to run concurrently. Feeling he has come up in appeal against his conviction and sentence.

(2) The appellant is resident of house No. 5/5230, Regharpura, KarolBagh, New Delhi. He also owns house No. F-240, Street No. 12, LaxmiNagar, which is a trans-yamuna colony. Balkrishan Gupta (PW 8), father of the prosecutrix, was living in a portion of the said house at the relevant time as tenant of the appellant. He plies a scooter rickshaw. On 16/10/1981 at about 10.00 p.m. he lodged a report at Police Station Shakarpur to the effect that on return to his home after day's work he learnt that the appellant had seduced his daughter Rekha aged about 15 years at about 2.00 p.m. on the said date and that his daughter be got recovered from him. The investigation of the case was entrusted to Si Sewa Ram Sharma (PW 10) who was prompt enough to proceed to the house of the appellant in Street No. 5, Regharpura, Karol Bagh, New Delhi, Along with the father of the prosecutrix and constable Darshan Kumar. On reaching the house of the appellant, he found that the appellant and Prabha, daughter of the complainant, were lying on one bed in naked condition. He recovered the girl and took her with himself vide memo Ex. Public Witness 8/A. He also arrested the appellant and took them both to Police Station Shakarpur where the custody of the girl was restored to her rather, She was produced before a Metropolitan Magistrate on the afternoon of 17/10/1981 and her statement under section 164, Code of Criminal Procedure (for short 'the Code') was recorded by Shri Rajesh Kumar, Metropolitan Magistrate, it being Ex. Public Witness 1/B. On the next following day, viz. 18/10/1981, she was got medically examined. Dr. S. Chaudhary, Medical Officer Police Hospital, Delhi, examined her and recorded her report Ex. PW 4/A. She then referred the prosecutrix to the radiologist for ossification test to determine her age. Dr. M.C. Bhatia, Radiologist took X-rays for assessment of her bony age and made his report Ex. Public Witness 5/A. According to him, her age was about 14 years. The Investigation Officer also obtained a certificate of her age from the Principal, Govt. Girls Senior Secondary School, Laxmi Nagar, where she was studying in the 7th class at the relevant time and on completion of investigation the appellant was challaned.

(3) The prosecution case as unfolded by the prosecutrix Prabha is that on 16/10/1981 at about 2 or 3 p.m. when she was present at her house the appellant came there and asked her to accompany him but she refused to do so. The appellant then took her forcibly in a taxi to a restaurant in Connaught Place and offered her food which she refused to take. From there he took her to his own house at Karol Bagh in a scooter rickshaw and he asked her the whereabouts of her elder sister Meena. However, she expressed her ignorance about the same. Thereupon, the appellant gave her beating, stripped her and also undressed himself. He then committed rape on her. However, the police arrested the appellant after mid-night and she was restored to her father. She gave her age to be 12 years on the date of the occurrence. During her cross-examination she admitted that her elder sister Meena, aged about 22 years, had lived with the appellant for about two years and she had a female child from him. However, she was not aware where she was living in those days.

(4) Balkishan Gupta has deposed to the factum of the prosecutrix having been kidnapped by the appellant and her subsequent recovery from the house of the appellant in his presence when they were lying on the same bed. He explained that he mentioned the name of his daughter Rekha in Fir as having been kidnapped, instead of the name of Prabha out of confusion.

(5) The stand of the appellant as spelt out in his examination under section 313 of the Code is that the elder sister of the prosecutrix, namely, Meena had come to him and lived with him for two years. She had a daughter from him but he eventually turned her out of his house because she was a woman of ill-repute. therefore, Balkishan Gupta nurtured a grudge against her and relations between the two were strained on that account. On the date of occurrence the prosecutrix came to his house and told him that she had abandoned the guardianship of her parents and would like to live with him just as her elder sister had lived with him earlier. She explained that her father had neglected her elder sister and similarly he was neglecting her too. Moreover, he wanted to sell her to someone for a price. He i.e. the appellant, and his wife persuaded her to go back to her parents' house as there was no place for her in his house. While he and his wife were still persuading the prosecutrix to go back to her parents and he was about to take her to her house,

the police arrived there and took both him and Prabha to the Police Station even though Prabha had told her father that she would not go back to her house Along with him under any circumstances. He thus admitted the factum of recovery of the prosecutrix from his house at about 11.30 pm. on 16/10/1981 vide memo Ex. Public Witness 8/A. However, he denied having ravished her and he further asserted that she was major.

(6) The appellant examined his wife Smt. Gulab Devi in defense. She too lent support to the defense version as spelt out above. During cross-examination she admitted that Prabha's elder sister Meena used to come to their house and stay with her husband. She also admitted that Meena had a female child from her husband. However, she denied that in fact she was step-mother of the appellant, being second wife of his father Puran Chand.

(7) The most crucial question which falls for determination in this case is regarding the age of the prosecutrix. No doubt, the father of the prosecutor had mentioned the name of Rekha and her age to be about 15 years in the FIR, Ex. Public Witness 2/A but as shall be presently seen, nothing would turn upon it because it is an admitted fact that it was Prabha (PW 7) and not her sister Rekha who was recovered from the house of the appellant on the night between 16/17th of October 1981 under circumstances mentioned above.

(8) During his cross-examination Balkishan Gupta said that Meena was his eldest child. She was born in the year 1962 and Prabha was his second child having been born one and a half year after the birth of Meena, but he did not remember where she was born. However, in the next breath he stated that he shifted to Delhi immediately after the birth of Prabha and before that he was residing at Jahangirabad in District Bulandshahr (U.P.). This witness was recalled for further examination on the application dated 20/12/1983 made by the prosecution. During his further examination he explained that his earlier statement that Prabha was his second child had been wrongly made because he was under mental tension on account his three wheeler scooter along with the luggage having been stolen on 26th November 1983. So he rectified his earlier deposition by saying that in fact Prabha was his third child his son Narinder Kumar being his second child. He

further deposed that both Narinder Kumar and Prabha were born in Bhikhu Ram Hospital at Pahari Dhiraj as he was residing in Gali Jatan, Pahari Dhiraj, in those days. He also testified to the correctness of their birth entries in the municipal records, copies Ex. C1 and C2. A perusal of Ex. C1 and C2. A perusal of Ex. C1 would show that a son was born of Balkishan on 8/03/1969 at maternity home, Pahari Dhiraj. He was his second child. According to Ex. C2, a daughter was born of Balkishan on 3/04/1970 apparently at the same maternity home. She was his third child. However, these certificates of birth further show that Balkishan had two living children including the newly born son at the time of his son's birth and similarly he had three living children including the newly born daughter at the time of the birth of third child. In other words, no child of his had died prior to their birth. It is pertinent to note that at the time of both these births Balkishan was living at house No.4527, Gali Jat Wali. During his cross-examination he refuted the suggestion that Ex. C1 and C2 were not the correct entries from the municipal records. However, he explained that he did not tell the police about their birth at Pahari Dhiraj because no such question was put to him by the police. On further cross-examination he stated that after Prabha, his wife delivered three female children and all three of them were alive.

(9) The next place of evidence regarding age of the prosecutrix is the school register in which too her date of birth is recorded as 3/04/1970. This entry has been duly proved by Smt. Kamla Chawla, Vice-Principal, Govt. Girls Senior Secondary School, Laxmi Nagar. She explained that the prosecutrix was admitted to their school on 13/07/1980 in 6th class and the said date of birth was verified from her primary school certificate. Of course, she admitted that she had not brought the admission form as the same had not been summoned from her. However, she offered to produce the same if so directed. The certificate issued by her is Ex. Public Witness 6/A.

(10) There is the medical evidence on record. According to Dr. M.C. Bhatia (PW 5), a Radiologist in Police Hospital, X-rays of the prosecutor were taken on 19/10/1981 and they revealed that epiphysis at elbow were united. However, line of union of medial epicondyle and olecranon process were clearly seen. At the wrist the epiphysis were not yet fused. Thus, he expressed the opinion that her age

was around 14 years, Ex. Public Witness 5/A being his report. During cross-examination he stated that radiological age does not determine the exact chronological age of the patient and there can be a difference between the radiological age and the chronological age due to dietetic, climatic and hereditary factors. He also conceded that in temperate zones epiphysis may be united earlier and there may be a difference of two years on either side in radiological age and chronological age.

(11) Lastly, there is the evidence of Dr. S. Chaudhary of Police Hospital, who examined her medically on 18/10/1981. She, inter alia, deposed that secondary sexual characters of the prosecutrix were not developed and public hair were not present. On cross-examination of the witness in this respect.

(12) From the foregoing conspectus of evidence on record there is absolutely no reason to doubt the correctness of her date of birth as given in the municipal records especially when the same is duly corroborated by the entries in the school records. Surely it cannot be just a sheer coincidence. It is true that the father of the prosecutrix has made contradictory statements, in that in the Fir he mentioned the age of Rekha, who, according to him, had been seduced by the appellant, as 15 years. However, in his examination-in chief as Public Witness 8 he stated the age of Prabha to be 12 years at the time of this occurrence and explained that Rekha was younger to Prabha who was his second child. He even went to the extent of saying that his first child Meenu & Meena was born in the year 1962 and Prabha who was his second child was born one and a half year after the birth of Meena. If they were so, the prosecutrix must have been around 16/17 years of age at the time of her seduction. Not only that he went to the extent of saying that he shifted to Delhi immediately after the birth of Prabha and before that he was residing in Jhangirabad in District Bulandshahr. If this statement of his is accepted as truthful then both the birth entries Ex. C1 and C2 are rendered highly doubtful. However, for obvious reasons no reliance can be placed on the testimony of a person like him who is not sure of what he is saying. It may be that he is a confused person and as such he cannot recall facts vividly. However, his subsequent statement dated 24/12/1983 clearly brings out that Prabha is his third child, having been born next to his son Narinder Kumar. This is clearly borne out by documentary

evidence, viz., entries Ex, C1 and C2 from the municipal records which were prepared by the concerned officials in due discharge of their duty. Not only that the entries in the school register too lend ample corroboration to the same. (See Harpal Singh and another v. State of Himachal Pradesh, : 1981 CriLJ1 ). Even the medical evidence on record points out in the same direction. It is no doubt notorious and one can take judicial notice of the fact that the margin of error in age ascertained by radiological examination is two years on either side. Hence, too much reliance cannot be placed upon medical evidence. It merely indicates an average and is likely to vary in individual cases even of the same province owing to the eccentricities of development. However, giving allowance for the possible margin of error the age of the prosecutrix can be between 12 to 16 years. In other words, this circumstance tends to coverage on the same point that the age of the prosecutrix could be 12 years and, therefore, authenticity of the entries in the municipal records and the school register cannot be doubted. Unfortunately for the appellant, there is no circumstance to warrant an inference that the age of the prosecutrix would be more than 14 years and as such benefit of margin of error may be given to him. Absence of development of secondary sexual character and public hair is also pointer in the same direction. Hence, taking all the circumstances in so consideration I have no hesitation in endorsing the finding of the trial Court that the age of the prosecutrix at the relevant time was just 12 years or even less.

(13) The learned counsel for the appellant has, however, canvassed with considerable fervour that the trial court gravely erred in recalling Balkishan for further examination and permitting him to tender municipal certificates of birth Ex. C1 and C2 in evidence. This, according to him, enabled the prosecution to fill up the lacuna in the prosecution evidence and resulted in grave miscarriage of justice. However, on a consideration of the entire material on the record I do not think that the discretion vesting in the trial Court under section 311 of the Code of Criminal Procedure has been wrongly or injudiciously exercised. The said section reads as under :

'ANY Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance,

though not summoned as a witness, or recall and re-examine any person already examined ; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.'

On a plain reading this section confers a wide discretion on the Court to act as the exigencies of justice require. It apparently consists of two parts. The first part confers discretionary power on the court while the second part imposes an obligation on it to summon and examine or recall and re-examine any witness if his evidence appears to be essential to the just decision of the case. The object of the section is obviously to enable the court to arrive at the truth and get to the bottom of a case. It hardly matters whether the suggestion for recalling a witness emanates from the prosecution or not. Further as observed by the Supreme Court in *Jamatraj Kewalji Govanli v. State of Maharashtra*, : 1968 CriLJ231 :

'AS the section stands there is no limitation on the power of the Court arising from the stage to which the trial may have reached, provided the Court is bona fide of the opinion that for the just decision of the case, the step must be taken. It is clear that the requirement of just decision of the case does not limit the action to something in the interest of the accused only. The action may equally benefit the prosecution.'

So, all that has to be seen by the court while exercising the discretionary power under this provision of law is whether the new matter is strictly necessary for a just decision and not intended to give an unfair advantage to one of the rival sides. In the instant case it can hardly be doubted that the entries from the municipal records were absolutely essential to clear any ambiguity which persisted regarding the age of prosecutrix because of divergence in oral evidence of Balkishan Gupta and the medical evidence which, as observed earlier, cannot be considered to be absolutely reliable for basing conviction of the accused. Hence, the exercise of the discretion by the trial Court in this case was perfectly sound and judicious.

(14) This brings me to the circumstances attendant upon the kidnapping of the prosecutrix and her eventually being ravished by the appellant. It is significant to note that the defense version is utterly preposterous and unworthy of credence. It

does not stand to reason that the prosecutrix would have gone to the house of the appellant of her own and implored him to keep her with him. It is rather astounding that the suggestion made to the prosecutrix, her father and the Investigating Officer was that when the police arrived she was still unwilling to leave the house of the appellant and she even told her father point blank that she would not live with his parents because he wanted to sell her/marry her to someone whom she did not like. Indeed, the defense evidence aims at showing that the prosecutrix was not sexually assaulted. However, this stand is clearly belied by medical evidence on record. Dr. S. Chaudhary has stated in no uncertain terms that even though she was examined on 18/10/1981, the prosecutrix was complaining of pain in the right side, tenderness was present and swelling too was present over the back right side. Further on vaginal examination of the prosecutrix she noticed that hymen was ruptured due to sexual intercourse and it was a fresh tear. Vagina was red congested. Vaginal orifice admitted one finger tight and it was very painful on examination. On cross-examination while conceding that rupture of the hymen may be possible as a result of fall on a hard surface she hastened to add that it must be in very rare cases. In the face of unequivocal testimony of the petitioner that she was ravished by the appellant on the night of 16/10/1981 at his house it would be highly speculative to even imagine that she had fallen on a hard surface or that she had otherwise contrived to cause a rupture of her hymen. The mere fact that there was no visible injury on the private parts of the appellant would not detract from the fact of sexual assault by the appellant on her. It may at best be indicative of passive submission is not on the part of the prosecutrix but submission is not necessarily consent. In the instant case the condition of the private part of the prosecutrix herself amply corroborate her version she was victim of sexual assault on the part of the appellant. At any rate, the question of consent becomes wholly irrelevant when the age of the girl, who is victim of rape, is below 16 years.

(15) There is now abundant authority for the proposition that corroboration is not a sine qua non for a conviction in a rape case. The following observations of their Lordships of the Supreme Court in *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* 1983 Scc (Cri.) 728, are pertinent to notice :

'IF the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities factor' does not render it unworthy of credence, as a general rule, corroboration cannot be insisted upon, except from the medical evidence, where, having regard to the circumstances of the case medical evidence can be expected to be forthcoming. This rule is subject to the qualification that corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having leveled such an accusation on account of the instinct of self-preservation ; or when the 'probabilities factor' is found to be out of true.'

Their Lordships further observed :

'IN the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion To do so is to justify the charge of male chauvinism in a male dominated society.....rarely with a girl or a woman in India make false allegations of sexual assault due various psycho-social factors. And when in the face of those factors the crime is brought to light there is a built-in-assurance that the charge is genuine rather than fabricated.'

In the instant case nothing has come on the record to suggest that the prosecutrix was prone to invent a false story in order to wreak vengeance upon the appellant who on his own showing had illicit connections with her elder sister Meena. Such a step is more harmful to her than anyone else. Indeed, having regard to her tender age it would be preposterous to suggest that she went to the house of the appellant of her own accord just to wreak vengeance upon him. In the Fir itself the appellant was named as having taken the prosecutrix at about 2 p.m. although her name was wrongly stated as Rekha. The circumstances under which she was rescued by the police are very telling in this respect.

(16) The learned counsel for the appellant has also invited my attention to certain discrepancies which have cropped up in the testimony of the prosecutrix vis-a-vis her statement to the police under section 161 Criminal Procedure Code and her

statement to there Magistrate under section 164 of the Code. However, none of the discrepancies goes to the root of the matter and tend to shake the basic version of the witnesses and, therefore, no undue importance can be attached to the same. Indeed, the learned Additional Sessions Judge has elaborated dealt with the entire evidence touching on the subject and I see no reason to take a different view of the matter.

(17) To sum up, therefore, I hold that the conviction of the appellant for the said offences is well founded. However, the sentence awarded to him is rather severe and harsh. I think that the ends of justice will be duly met if it is reduced to rigorous imprisonment for six years and a fine of Rs. 7,000.00. Hence, I reduce the sentence of the appellant to rigorous imprisonment for six years and a fine of Rs. 7,000.00 (rupees seven thousand only) for offence under section 376 Indian Penal Code ; in default of payment of fine, he shall undergo further rigorous imprisonment for two years. In case the fine is recovered, the whole of the amount be paid to the prosecutrix as compensation for the grave wrong done to her and social ignominy which she has suffered and has yet to rehabilitate herself in life. The sentence for the offence under section 366 Ipc is also reduced to six years rigorous imprisonment, but both the sentences shall run concurrently.

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