

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 1704 OF 2019

Abdulla Aniulhaq Ansari
Age 45 years, Occ: Service,
R/s. Zore Chawl,
Mahatma Kabir Nagar,
Chakala Sahar Road,
Near Suba Hotel,
Vile Parle (East), Mumbai
at present in Nagpur Central Prison ..Appellant

v/s.

1. The State of Maharashtra
at the instance of Vile Parle
Police Station in C.R.No. 308 of 2015

2. Miss "X"
Age 19 years, R/o. Asha Sadan
Bal Sudhar Griha,
Umer Khadi,
Mumbai ..Respondent/s

Mr. Aniket Vagal for the Appellant.
Mr. S.V. Gavand APP for the Respondent-State.
Mr. S. R. Nargolkar a/w. Arjun Kadam for the Respondent No.2.

**CORAM : ANUJA PRABHUDESSAI, J.
DATED : 16th DECEMBER, 2021.**

JUDGMENT.

1. This Appeal is directed against the judgment dated 10th
October, 2019 in Special Case No. 211 of 2015. By the impugned

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judgment, the learned Addl. Sessions Judge & Special Judge, City Civil & Sessions Court, Borivali Division, Dindoshi, Mumbai has convicted the Appellant for offences under Section 376(2)(f) and 506 of Indian Penal Code and under Section 5 (n) r/w. Section 6 of Protection of Children from Sexual Offences Act (POCSO), and sentenced him to undergo

- (i) rigorous imprisonment for 10 years and one of Rs.5000/- I.d. rigorous imprisonment for 3 months for offence under Section 376(2)(f) of IPC;
- (ii) rigorous imprisonment for 10 years and fine of Rs.5000/- i.d. simple imprisonment for 3 months for offence under Section 5(n) r/w. 6 of POCSO Act; and
- (iii) rigorous imprisonment for one year for offence under Section 506 of IPC.

2. The Appellant (hereinafter referred to as 'the Accused') is the father of the prosecutrix (PW2). The prosecutrix along with her siblings, parents and grand parents was residing at Zore Chawl, Mahatma Kabir Road, Vile Parle, Mumbai. Some time in the year 2013, the prosecutrix was housed in Dongri Bal Sudhar Griha in

connection with theft of a laptop. About a month later, the accused brought her home. Some days later, she ran away from home and was seen loitering at Kalyan Railway Station. She gave fake name to the police on duty at Kalyan Railway Station. She was produced before the Committee. She was sent to Bhivandi Bal Sudhar Griha (Children's Home) and four months later, she was shifted to Dongri Bal Sudhar Griha.

3. In September, 2015, PW2 informed the Child Welfare Committee that the accused had subjected her to sexual abuse. Hence, by letter dated 08.09.2015, the Chairperson of the Child Welfare Committee directed the police to record the statement of the prosecutrix. Accordingly, PW5- Madhavi Kadav recorded the statement of the prosecutrix (PW2) pursuant to which FIR came to be registered against the Accused for offences under Section 376 (1)(ii) , 506 of IPC and Section 6 of POCSO Act. PW5 referred the prosecutrix for medical examination, she conducted spot panchanama, arrested the accused and handed over further investigation to PW6- Sudhir Ghosalkar. PW6 requested the Magistrate to record the statement of the prosecutrix under

Section 164 of Cr.P.C. He also referred the accused for medical examination and recorded the statement of the other witnesses and filed the charge sheet upon completion of investigation.

4. The Accused pleaded not guilty to the charge and claimed to be tried. Prosecution in support of its case examined 6 witnesses. Statement of the accused was recorded under Section 313 of Cr.P.C. The defence of the accused was that of total denial. He has stated that the prosecutrix always used to run away from home. He objected to the same as he did not approve of the same. He claims that sometimes he used to beat her and hence she has lodged false complaint against him. The Accused has examined his wife as DW1.

5. After evaluating the evidence adduced by the prosecution, the learned Judge has held that the evidence of the prosecutrix amply proves that the Accused herein had subjected her to rape. Hence, relying upon the sole testimony of the prosecutrix, the learned Judge held the Accused guilty of offence under section 376(ii)(f) of the IPC and section 5(n) of POCSO Act, 2012 and

sentenced him as stated above. Being aggrieved by the conviction and sentence, the accused has preferred this Appeal under Section 374 of Cr.P.C.

6. Heard Shri Wagal, learned Counsel for the Appellant and the learned APP for the State. I have perused the record and considered the submissions advanced by the learned Counsel for the respective parties.

7. It is well settled that the conviction can be based on the sole testimony of the prosecutrix provided the evidence of the prosecutrix is found to be worthy of credence and reliable and is of sterling quality. In *Rai Sandeep vs. State (NCT of Delhi) (2012) 8 SCC 21*, the Apex Court has held that the “sterling witness” should be of a very high quality and calibre whose version should be unassailable. The Court considering the version of such witness should be in a positing to accept it for its face value without any hesitation. To test the quality of such witness, what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency

of the statement right from the starting point till the end. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross examination of any length and howsoever strenuous it may be, and under no circumstance should be roomed for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it.

8. In the instant case, the evidence of PW2 reveals that she was housed in Bal Sudhar Griha for theft of a laptop. About a month later, the accused brought her home. She has deposed that the accused did not allow her to leave the house and used to beat her. She therefore ran away from the house, but the accused brought her back and assaulted her and cut her hair.

9. PW2 has deposed that she had gone to her native place with her family members to attend a marriage. She returned with the accused and stayed in the house of her paternal aunt. She claims that one night the accused came home under the influence of

alcohol and he touched her inappropriately all over her body. When she resisted, the accused offered her money. The accused thereafter removed her clothes and had forcible sexual intercourse with her. She claims that she did not inform the incident to her paternal aunt because of the threats given by the accused.

10. PW2 has deposed that about two days later she ran away from the home and went to the native place of her mother. After she returned to Mumbai, she stayed with her grandmother. She has deposed that the accused used to beat her and hence she once again ran away. She claims that when she was questioned by the police at Kalyan Railway Police Station, she gave a fake name apprehending that they would drop her home. She was kept in Bhiwandi Bal Sudhar Griha and later at Dongri Bal Sudhar Griha. She has deposed that initially she did not tell anyone about the incident, but later when the Senior Lady Officer of Bal Sudhar Griha repeatedly questioned her, she disclosed that she was raped by the accused.

11. PW2 has admitted in her cross examination that she had not

stated in her statement under Section 161 of Cr.P.C. that she had gone to her native place along with her family to attend a marriage and that on return, she and the accused stayed with her paternal aunt. It is also to be noted that this witness had not stated in her statement under 161 of Cr.P.C. that the accused had touched various parts of her body and offered her money and tried to have forcible sexual intercourse with her. This is a material omission which casts a doubt on the credibility of this witness.

12. PW2 has stated that the accused is a driver. She has admitted in her cross examination that most of the time he used to be away from home. She has admitted that in the year 2013, she was residing with her parents, grand parents, three brother and sisters, her paternal uncle and aunt and their children. This assumes significance as DW1, the mother of the victim has deposed that the room wherein they were residing was a single room admeasuring 10 x 12 sq.ft. She has deposed that she along with her husband, her six children , her mother-in-law, father-in-law, brother-in-law and his wife and their children were residing in the said room. She has deposed that PW2 used to sleep by her

side and the accused used to mostly sleep in the vehicle for want of sufficient space in the room. The evidence of this witness which has gone unchallenged clearly indicates that several members of the family were occupying a small room and that the victim used to sleep by her side, whereas the accused used to sleep in the vehicle outside the room. PW2 claims that the accused had committed rape on her in a room occupied by her family members. She did not shout for help nor did she tell her mother or her other family members. In such circumstances, it is highly improbable that the accused would rape his daughter without any of his family members coming to know about the incident.

13. PW2 has admitted that after the incident of theft of laptop, the accused used to get angry with her and beat her. She has stated that prior to the said incident, the accused had not done anything wrong with her. She has admitted that she did not listen to her father and that he used to beat her and had cut her hair. She has admitted that she was annoyed with him because he had cut her hair. She has stated that two days after her father cut her hair, she left the house by telling the family that she was going to

her mother's village, but went somewhere else.

14. The evidence of DW1 also reveals that her daughter used to leave the house in uniform under the pretext of going to school, but she would not attend classes. She used to change her clothes somewhere on the way and roam around with boys in the garden. She has deposed that she had left the house with one boy named Akbar. She has stated that even after her release from Children's home, there was no improvement in her behavior. The accused came to know from the neighbors that PW2 was roaming with a boy. He therefore beat her and cut her hair. PW2 thereafter left the house and that they did not find her, despite desperate search. It was only in the year 2015 that they came to know that she was housed in Dongri Childrens Home. PW2 has admitted that after the accused had brought her back from Bal Sudhar Griha, he prevented her from leaving the house and whenever she did not listen to him, he would beat her and that he had even cut her hair. Her evidence also indicates that she was annoyed with the accused for beating her and putting several restrictions on her. In such circumstances, the possibility of PW2 falsely implicating the

accused in the case of rape cannot be ruled out.

15. The evidence of PW2 is not reliable and trustworthy. She has not emerged as a truthful witness and has not passed the test of a 'sterling witness' and hence no conviction can be based on the uncorroborated testimony of PW2. The trial Court has based the conviction on conjectures and surmises, which are not well founded. Hence the impugned judgment cannot be sustained. Under the circumstances, the appeal is allowed. The impugned judgment is set aside. The accused is acquitted of offences under Section 376(2)(f) and 506 of Indian Penal Code and under Section 5 (n) r/w. Section 6 of Protection of Children from Sexual Offences Act (POCSO).

. His bail bond stands discharged.

(ANUJA PRABHUDESSAI, J.)