

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

CRIMINAL APPEAL NO. 183 OF 2021

Sampa Vishwas Roy	..Appellant.
Versus	
The State of Maharashtra & Anr.	..Respondents

**WITH
CRIMINAL APPEAL NO. 664 OF 2022**

Mangal Tapon Ray	..Appellant.
Versus	
The State of Maharashtra	..Respondent

**WITH
INTERIM APPLICATION NO. 4039 OF 2022
IN
CRIMINAL APPEAL NO. 664 OF 2022**

Ms. Anjali Patil, for Appellant in Appeal/183/2021.

Ms. Janhavee Joshi a/w. Vishal Kanade (appointed as *Amicus Curiae*) in Appeal No.664 of 2022.

Ms. Saili N. Dhuru (appointed Advocate) for Respondent No.2.

Mr. S. R. Agarkar, APP for State/Respondent No.1.

**CORAM : SARANG V. KOTWAL, J.
DATE : 22nd DECEMBER 2022**

JUDGMENT :

1. Both these Appeals are decided by this common Judgment because they arise out of the same impugned Judgment. For the sake of convenience, the Appellants are referred to by their original status in the trial. The Appellant Sampa Vishwas Roy in Criminal Appeal No.183 of 2021 was the original accused No.1 and the Appellant Mangal Tapon Ray in Criminal Appeal No.664 of 2022 was the accused No.2 in POCSO Special Case No.425 of 2015 before learned Special Judge under POCSO Act, Greater Mumbai. Vide his Judgment and order dated 24/12/2020, learned trial Judge convicted and sentenced the Appellants as under:

- i) The Appellant Sampa Roy-accused No.1 was convicted for commission of offence punishable U/s.5 of the Immoral Traffic (Prevention) Act, 1956 (for short 'ITPA') and was sentenced to suffer R.I. for 5 years.
- ii) She was convicted for commission of offence punishable under section 370(2) of the I.P.C. and was sentenced to suffer R.I. for 7 years and to pay a fine of Rs.10000/- and in default of payment of fine to suffer S.I. for three months.

- iii) She was also convicted for commission of offence punishable U/s.370-A(2) of the I.P.C. and was sentenced to suffer R.I. for 5 years and to pay a fine of Rs.5000/- and in default of payment of fine to suffer S.I. for three months.
- iv) She was further convicted for commission of offence punishable under section 109 r/w. 376 of the I.P.C. and was sentenced to suffer R.I. for 12 years and to pay a fine of Rs.10000/- and in default of payment of fine to suffer S.I. for three months.
- v) The Appellant Sampa Roy was acquitted from the Charges of commission of offences punishable under sections 370-A and 370(4) of the I.P.C. and under sections 4 and 6 of the Protection of Children from Sexual Offences Act (for short 'POCSO Act') read with Section 4 of ITPA.
- vi) All the sentences were directed to run concurrently. She was given set off for the period of detention in jail.
- vii) The Appellant Mangal Ray-accused No.2 was convicted for commission of offence punishable U/s.5 of the Immoral Traffic (Prevention) Act, 1956 (for short 'ITPA') and was sentenced to suffer

R.I. for 5 years.

viii) He was convicted for commission of offence punishable U/s.370-A(2) of the I.P.C. and was sentenced to suffer R.I. for 5 years and to pay a fine of Rs.5000/- and in default of payment of fine to suffer S.I. for three months.

ix) He was further convicted for commission of offence punishable under section 376 of the I.P.C. and was sentenced to suffer R.I. for 12 years and to pay a fine of Rs.10000/- and in default of payment of fine to suffer S.I. for three months.

x) The Appellant Mangal Ray was acquitted from the charges of commission of offences punishable under sections 370(2), 370-A and 370(4) of the I.P.C. and under sections 4 and 6 of POCSO Act r/w. Section 4 of ITPA.

xi) All the sentences were directed to run concurrently. He was given set off for the period of detention in jail.

2. Heard Ms. Anjali Patil, learned counsel for the appellant in Criminal Appeal No.183 of 2021, Ms. Janhavee Joshi, learned counsel a/w. Shri. Vishal Kanade, appointed as *Amicus Curiae* in

Criminal Appeal No.664 of 2022, Ms. Saili Dhuru, learned appointed advocate for the Respondent No.2 in Criminal Appeal No.183 of 2021 and Shri. Agarkar, learned APP for the State.

3. The prosecution case is that the victim in this case was in a poor financial condition. She was residing with her mother, sister and brother. The Accused No.1 brought her to Mumbai in May 2015 on the pretext of giving her a good job in some hotel at a good salary. When she came to Mumbai, she was exploited sexually on the first night itself. The accused No.2, who according to the prosecution case, was the husband of the accused No.1 committed rape on her. Subsequently, the victim was subjected to sexual assault by different persons. It is the prosecution case that the accused No.1 had forced her into prostitution. Ultimately, on 21/06/2015 she somehow escaped from her detention. She met a resident of the building and with his help contacted the Child Help Line number. She was rescued by a social worker. She was taken to MIDC police station and on her grievance, the offence was registered vide C.R.No.360 of 2015 at M.I.D.C. police station. Both the Appellants/accused were arrested on 22/06/2015. The

investigation was carried out and the statements of various witnesses were recorded. The victim was sent for medical examination. Her statement U/s.164 of the Cr.p.c. was recorded. Different panchanamas were drawn and at the conclusion of the investigation the charge-sheet was filed. The case was committed to the Special Court.

4. During trial, the prosecution examined 12 witnesses including the victim, the panchas, the neighbour who rescued her, the social worker who took her to the police station, the medical officer and the investigating officer.

5. The defence of the accused No.1 was of total denial. According to her, she had never seen the victim earlier. She had seen the victim for the first time in the court. According to the accused No.1, she was unable to tell why the victim was deposing against her. She stated in her statement recorded U/s.313 of the Cr.p.c., that her husband's name was Vishwas Roy. She did not know the accused No.2 and she had seen the accused No.2 only at the police station.

6. The defence of the accused No.2 was also of total denial. According to him, the name of the husband of accused No.1 was Mangal Roy, whereas, his own name was Mangal Ray. According to him, therefore, he was arrested because of a misunderstanding. He was not the husband of accused No.1.

7. Learned Trial Judge considered this evidence and the defence. He heard both the sides and reached at the conclusion that the prosecution did not prove that the victim was below 18 years of age. He, therefore, acquitted both the accused from some of the Charges as mentioned earlier. However, he believed that the victim and the prosecution's evidence to conclude that the offences for which ultimately both of them were convicted were proved by the prosecution beyond reasonable doubt.

8. The main evidence in this case is that of the victim herself. She is examined as PW-5. She has mentioned her birth date as 05/08/1999. She had two elder married sisters, one younger sister and one younger brother. She had studied up to 8th standard in a school at Delhi. Her father was a rickshaw driver, but

he died when PW-5 was still young. She was a bright student, but her mother who was the only earning member of the family could not afford her further education. Therefore, the victim had to leave her school. She started working with her mother as a maid servant in different houses. But she could not continue with her job, because she was a minor. At that time, her brother was only 6 months old. One lady who was their neighbour offered them help. The victim's family trusted her. The victim used to call her as *Buva (aunt)*. PW-5 requested that lady to find work for her. She told PW-5's mother that her niece was in Mumbai and she was having a business of hotel and that she could get a job for PW-5 as a waitress. She told PW-5's mother that PW-5 could continue with her studies in Mumbai. According to her, PW-5 could earn good salary upto Rs.30000/-p.m. Believing that neighbour, the victim decided to go to Mumbai.

9. On 23/05/2015, the accused No.1 came to Delhi to take her to Mumbai. That neighbour met the accused No.1 on the railway station and asked her to take PW-5 with her. They came to Mumbai. They went to accused No.1's flat in a building at Andheri.

The room was on the 7th floor. They reached in the evening. According to her, in the midnight, both the accused whom she described as Sampa Roy and her husband Mangal Roy came to the place where she was sleeping. There were two rooms in the flat and there was a passage where PW-5 was sleeping. It is her case that the accused No.1 forced her to have physical relations with the accused No.2. PW-5 refused and told the accused No.1 that she was expecting to get some work. At that time, the accused No.1 told her that she was entertaining unreal expectations and that she had spent money for PW-5 and that she had to recover her money from PW-5. Till then, she was not willing to send back PW-5. She then described as to how both the accused took her in one of the rooms. The accused No.1 helped the accused No.2. It is her case that, in spite of her resistance and shouts, accused No.2 committed rape on her. The accused No.1 had held her legs. The windows and the doors were shut and, therefore, her shouts could not reach outside that room.

10. From the next day onwards, the accused No.1 started sending different customers to PW-5 in that very house. PW-5 used

to resist with screams and cries, but even then the customers used to force themselves by saying that they had already paid money for her services. The accused No.1 used to beat her. Because of her continuous resistance, the accused No.1 got fed up and sent PW-5 to Hyderabad. PW-5 has further described that the situation was worse there and she was exploited by at least 15 to 16 people everyday. She was not given food to eat. She was kept in a locked room. Because of her continuous resistance there, the accused No.1 was contacted from the Hyderabad. PW-5 was sent back to Mumbai. The accused No.1 picked her up at the station and took her back to the same house. On the way, PW-5 was slapped and abused. On one occasion, the accused No.2 again wanted to have physical relations with her but PW-5 refused. Therefore, she was punished. She was made to sleep in a cold room without clothes. On 20/06/2015, PW-5 heard that the accused wanted to sell her.

11. On 21/06/2015, PW-5 took an opportunity to escape from the flat. She ran downstairs. She saw one elderly man. She sought his help. He, in turn, made a telephone call to a Child Helpline number. One person came there and took her to MIDC

police station. Her statement was recorded. She was taken back to the same house, but that house was found to be locked. She was then sent for medical examination. She informed the police about the accused's other home in Powai. With great efforts, the police could find the accused No.1 in the said building. PW-5 was sent to a shelter home and then on 27/01/2016, she was taken to Delhi and kept in a shelter home there. In April 2016, she was reunited with her family. The F.I.R. given by her is produced on record at Exhibit 32. Her Aadhar card was left with the accused No.1. She identified both the accused in the Court. According to PW-5, her statement was recorded in the court U/s.164 of the Cr.p.c. She did not produce her birth certificate, but she gave a copy of her school leaving certificate. The F.I.R. lodged by the victim vide C.R.No.360 of 2015 mentions about her background and also describes as to how she came to Mumbai. The F.I.R. also mentions about the incident of rape committed by the accused No.2 with the help of accused No.1 on 25/05/2015. However, there is no reference in the F.I.R. to the fact that she was taken to Hyderabad and the instances that took place in Hyderabad.

In the cross-examination, she accepted that her financial condition was poor and there was no earning member except her mother and herself. She did not ask her neighbour the name of the hotel where she was supposed to work. On the day when she had gone to the house of the accused No.1 with the police, the house was found to be locked and police did not break open the lock. After two days again, she along with police went to the same house. At that time, the police broke the lock. One cupboard was found to be locked, but the police did not break open that cupboard. According to PW-5, her Aadhar card was kept in that cupboard. She admitted that, whenever anybody entered the building, the watchman made inquiries and made entries in the register. She could not give details about her visit to Hyderabad regarding the train or railway station etc. She could not explain as to why her F.I.R. did not mention all the other facts including her travel to Hyderabad; except what she had referred to in her F.I.R. about the instances in Mumbai. In her further cross-examination, she admitted that, she had stated in her statement recorded U/s.164 of the Cr.p.c. that, Riya's husband had

committed rape on her. She voluntarily added that accused No.1 Sampa was also known as Riya. She also admitted that, before the Magistrate she had stated that Accused No.1's daughter's name was Riya. She admitted that, Riya was not married.

12. PW-1 Mumtajali Majid was a house agent and PW-2 Raju Chalmalla was the landlord of the house of the accused No.1. PW-1 has deposed about the leave and license agreement dated 05/11/2014, but it was not signed by the accused No.1. It was signed by her father. PW-1 deposed that the accused No.1, her husband and their daughter were residing in that room.

13. PW-7 Bablu Singh was another Estate Agent. He had not helped the accused No.1 in getting that room. However, he has deposed that the accused No.1 was residing with her husband Mangal, her daughter and one maid servant. He identified the accused No.2 in the court.

14. PW-6 Abdul Shaikh was a pancha for arrest of the accused No.2 and seizure of his clothes. That panchanama was carried out between 9:45p.m. to 10:00p.m. on 22/06/2015. It is

produced on record at Exhibit 38.

15. PW-8 Labbu Patel was a pancha for spot panchanama carried out on 22/06/2015 between 6:00p.m. to 6:45p.m. At that time, a bed-sheet was seized. The spot panchanama is produced on record at Exhibit 44. The seizure of victim's clothes panchanama was produced on record at Exhibit 45.

16. PW-10 Ranjan Saha is an important witness. He has deposed that, he was residing in the same building and on the same floor as that of accused No.1. On 21/06/2015, at about 4:00p.m. he was going out with his friend to have tea. They had reached at the gate of the building, when suddenly a small girl came. She was crying. She sought their help. She told him about the entire incident and as to how she was sexually exploited. According to him, that girl was a child, therefore, he called the Child Helpline number 1098. The receiver of the call told them to wait there for some time. After quite some time, PW-3 Shantilal Rikibe came there from the Child Protection Cell. PW-5 repeated her story to him. Then, all of them went to MIDC police station.

This witness had seen the accused No.1 in that building. He identified the accused No.2. There was no challenge to the identity of the accused No.1.

In the cross-examination, there were some inconsequential contradictions from his police statement which were brought on record.

17. PW-3 Shantilal Rikibe was working as Night Counselor with one social organization named as Navnirman Samaj Vikas Kendra at Malvani Malad (West). Their organization was affiliated to a child helpline. That child helpline in turn was having a call center. The Toll Free number was 1098. This witness received some information from the call center at 6:30p.m. on 21/06/2015 that PW-10 had called the Child Helpline and had sought help. Pursuant to the information, this witness met PW-10 and the victim. She told her story to this witness. Then, they went to Meghwadi police station. They were sent to MIDC police station, where the victim's F.I.R. was registered.

In the cross-examination, he deposed that, their

organization was registered, but he did not remember the registration number. Their institute did not have an independent call center. He admitted that the details of the call are recorded. He did not know PW-10 before the incident. His duty hours in the night were from 10:00p.m. to 9:00a.m. The day counselors worked from 9:00a.m. to 6:00p.m. and the afternoon counselors worked from 2:00p.m. to 10:00p.m.

18. PW-4 Dr. Ankita Somani had medically examined PW-5 on 22/06/2015. She has given history of the incident regarding multiple episodes of sexual exploitation. On examination, this witness found old scar mark around 5mm in size lateral to the right eye. There was a 4cm. long old scar on left para spinal area. There were two parallel linear reddish marks on her left thigh of the size 4 to 5cm. Her hymen was not intact. There was no evidence of any tear, bleeding or injuries. However, the cervix showed circumcised erosion and oral torsion; meaning that there was some injury on the cervix. The medical opinion was that, there was sexual and physical violence. She had issued the medical report as per examination. It was produced on record at Exhibit 30

(Colly). All the samples and swabs drawn by her were given to the police for sending them to FSL for chemical analysis. According to this witness, scars on the victim could be possible due to physical assault. As the victim had taken bath, her swab reports could not be conclusive.

In the cross-examination, she deposed that there were many possible reasons for hymen tear. If the victim was subjected to multiple sexual intercourse, then there could be hymen tears and their position could be determined. In this case, there was no mention of hymen tear but she added that the hymen was not intact. She could not specify the age of the old scars. She has accepted that he has not given his final opinion but has only given a provisional opinion.

19. PW-12 Dr. Kalel had conducted the tests to determine the age of the victim. He conducted various examinations including radiological examination and came to the conclusion that the victim's age was between 17 to 18 years. The report is produced on record at Exhibit-68. He accepted that as per Modi's

Jurisprudence, the medical report has a margin of two years on either side.

20. PW-9 PSI Ayare was the first investigating officer. He was attached to MIDC police station. At about 10.30 p.m. on 21.6.2015, PW-5 and PW-3 came to his police station and gave the information about the offence. He recorded the FIR. He had prepared the spot panchnama after visiting the spot of incident. On 22.6.2015, he arrested both the accused from their residential house at Chandivali. The accused No.2 was residing in the house of his relative at Chandivali from where both of them were arrested. He recorded the statements of various witnesses.

In the cross-examination, the omissions from the statements which he had recorded and in particular from the FIR which he had recorded were brought on record.

21. PW-11 API Modiraj was the next investigating officer. He had recorded the statements of five witnesses including that of PW-10 Ranjan Saha. He had collected various reports and had filed the charge-sheet. He had proved the omissions from the police

statements of witnesses viz. PW-3 Shantilal and PW-10 Saha. He admitted that he had not collected the CDR. He had not collected any documents to show that PW-3 Shantilal was working with that particular organization. He had also proved the omissions from the police statement of PW-10 Ranjan Saha. He admitted that he had not carried out any investigation in respect of the neighbour of the victim in Delhi who had caused the victim to come to Mumbai. The CCTV footage from Delhi railway station was not obtained by him. He did not record the statement of the mother of the victim.

. This, in short, was the evidence led by the prosecution.

22. Learned counsel for the appellant-accused No.2 made the following submissions :

- i. The prosecution case is not proved beyond reasonable doubt. The role of PW-3 Shantilal in taking the victim to the police station is extremely doubtful. As per his evidence, he could not be on duty when the Child Helpline Call Center had contacted him. His duty ended in the morning itself.
- ii. The victim's own evidence was not reliable. It is full of

major omissions and contradictions. There was no reference to her visit to Hyderabad and to the various incidents in Hyderabad which she had narrated in her deposition. The victim PW-5 and PW-10 contradict each other as to when and how they went to the police station.

- iii. Considering the description of various instances, the medical evidence should have reflected severe injuries to the victim. However, the medical evidence is to the contrary and, therefore, there is no corroboration to the story of the victim.
- iv. The accused No.2 was not residing with the accused No.1. There is no sufficient evidence to show that the accused Nos.1 & 2 were married to each other. None of the residents from the locality is examined. Nobody had seen the victim in that house.
- v. The evidence shows that the watchman of the building made entries of the visitors but that watchman is not examined. No entries are produced on record. PW-8 was a resident of

the same building and he has accepted that the shouts could be heard from outside. The victim i.e. PW-5 has deposed that at the time of commission of rape she shouted loudly but nobody had heard her shouts. This was contrary to the version of PW-8. When the police had gone to the flat after registration of the FIR, no articles of the victim were found in that flat. This is improbable if the victim's version was true.

- vi. According to the victim, she stayed there for about a month and, therefore, her articles including her clothes should have been found in the flat. The incident itself could not have happened and the accused No.2 could not have committed rape on the victim in front of his own wife.

23. The learned counsel Smt. Anjali Patil supported most of these submissions and made additional submissions as follows :

- i. The prosecution has not clearly established as to how the victim had come to Mumbai and who exactly had brought her. There is contrary evidence in that behalf. The victim

was educated and was a bright student. Yet, she could not give details of the train journey either from Delhi to Mumbai or from Mumbai to Hyderabad and back.

- ii. The victim PW-5 could stay connected with her mother but no such grievance was made by her to her mother. Even her mother's statement is not recorded and she is not examined as a prosecution witness. No other family member of the victim is examined.
- iii. The neighbour who was instrumental in sending the victim to Mumbai is also not examined. She is not even identified by the investigating agency. The CCTV footage of Delhi Railway Station is not procured. The CDR is not produced. There is nothing to show that PW-10 had made any call to the Child Helpline Number.
- iv. PW-2 who is an important witness, who claims to be a resident of the same building. He has not produced any document to show that he was residing in that building. The leave and license agreement produced on record was not

signed by the accused No.1 and, therefore, there is nothing to show that she had occupied any flat in that building.

- v. If many people visited the house of the accused No.1, it would have been natural for the residents to notice them. But no one from the building is examined to establish and corroborate the prosecution evidence.
- vi. The medical evidence does not corroborate the victim's evidence. The doctor had not given his final opinion during investigation. The victim's story as to why she had come to Mumbai is extremely doubtful.
- vii. There is no evidence to show why she actually stayed with the accused No.1. She had not stated anything about her visit to Hyderabad in her FIR.
- viii. There is no evidence that there really was such N.G.O. and that PW-3 was its worker.

24. The learned counsel appearing for the victim – respondent No.2 in Criminal Appeal No.183/2021 made her submissions. Since she was representing the victim in that appeal I

have also heard her on behalf of the victim in the connected Criminal Appeal No.664/2020. She submitted that though the victim has not stated anything about her visit to Hyderabad and the incidents in Hyderabad; her deposition in respect of all the incidents in Mumbai are consistent. The main incident which is the subject matter of both these appeals is commission of rape by the accused No.2 with the help of the accused No.1 and in that behalf the evidence of PW-5 is quite reliable. When the incident took place, the victim did raise shouts but her shouts could not be heard outside because the windows and the door of the flat were shut. This is explained by PW-5 in her evidence and there is no reason to doubt that explanation. The medical evidence did in fact support the prosecution case. PW-3 and PW-10 are totally independent witnesses and they have no reason to implicate the accused falsely.

25. The learned APP also made the same submissions. He added that the background of this case needs to be taken into consideration. Some contradictions which do not go to the root of the matter are quite understandable under the circumstances. She

has consistently deposed that she was forced to undergo this ordeal in spite of her strong resistance. The medical evidence does indicate physical violence.

26. I have considered these submissions. Undoubtedly the evidence of PW-5-the victim will have to be scrutinized minutely. There is hardly any dispute that she was in a bad financial position. As far as her age is concerned, the learned Judge has given benefit of doubt in favour of the accused, as according to the learned Judge, the prosecution has not proved that the victim was below eighteen years of age. The learned Judge has recorded a finding that the school record of PW-5 showed different date of birth and the Aadhaar Card showed some different date of birth. The evidence of the doctor was that the victim was between 17 to 18 years of age and there was a margin of two years in that medical report. In this view of the observations and finding, the accused were acquitted from the charges of the offence under the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and under Sections 370A, 370(4) read with 34 of the Indian Penal Code. The State has not challenged this acquittal and,

therefore, this finding which is based on sound reasoning has attained finality.

27. The next question would be whether her deposition inspires confidence. From that point of view, it is necessary to see in what manner and under what circumstances the case came to light. PW-10 who was residing in the same building was approached by the victim herself asking for help. The said witness PW-10 has not had personal interaction with either of the accused. He acted purely on humanitarian grounds with social awareness. He made a phone call to Child Helpline Number pursuant to which PW-3 met them and the victim was taken to the police station. That part of the story has practically remained unchallenged. Therefore, it is quite clear that PW-5 was in urgent need of help to rescue herself from the clutches of the accused. Because of the help given by PW-10 and PW-3 she could approach the police. After that, the police immediately went to the house where she was confined. The house was found locked. It was not opened on that day. On the second visit, they broke the lock and entered the house. By that time the accused were aware that PW-5 had

escaped and, therefore, they had sufficient time to set their house in order. In such circumstances, the victim's clothes or other articles not being found in that flat, would not be a circumstance in favour of the accused. Moreover, there was one cupboard which was still locked and it was not opened during investigation. Therefore, it cannot be said that, based on this evidence, as suggested by the defence that it was unnatural that clothes and articles were not found in the flat.

28. Significantly, the victim PW-5 had identified both the accused Nos.1 & 2 before the Court. Again, there is hardly any challenge to that particular identification. She was staying with the accused No.1 for almost a month. The accused No.2 used to visit that house and, therefore, she was knowing them.

29. Both the learned counsel for the accused rightly submitted that the victim PW-5 has not spoken a word about her visit to Hyderabad. To that extent they are right, but, that still does not wipe out the consistent story regarding the incidents that had taken place in Mumbai during PW-5-the victim's stay with the

accused No.1 in particular. In that behalf it is necessary to take into consideration the victim's state of mind. When she had approached the police, she was rescued from the clutches of the accused in that evening itself and naturally her first reaction was to narrate how she could approach the police and she could only highlight the important events. Therefore, not mentioning the trip to Hyderabad will not go to the root of the matter particularly in respect of the prosecution case regarding the incidents which have taken place in Mumbai.

30. There is hardly any substance in the submission that how the victim came to Mumbai; would make a difference to the outcome of this case. There cannot be any dispute that the victim was in Mumbai. She was found in that very building where the accused No.1 and PW-10 were staying. Subsequently, she was sent to a Shelter Home at Delhi and then was reunited with her family. Therefore, there cannot be any dispute that she was rescued from Mumbai; and hence, how she came to Mumbai would hardly make any difference to the prosecution case. There is no possible explanation by the defence as to why the accused were implicated

by PW-5.

31. As far as the medical evidence is concerned, the doctor PW-4 has in clear terms mentioned that her medical opinion was that sexual and physical violence was committed on her. Though, she had not specifically mentioned it in his report, while giving deposition before the Court she has recorded her opinion and has given reasons for the same. I do not see any reason to over-turn this opinion given by the medical officer based on her examination of the victim. She had also found that there were injuries on the cervix. Therefore, it cannot be said that the medical evidence did not corroborate the victim's version.

32. Since I have reached the conclusion that the victim was a reliable witness and that her evidence is supported by the medical opinion, then the only question which remains to be discussed is about the incident when the accused No.2 had committed rape on PW-5. In that regard, her narration is consistent throughout. She has described the incident. She has described the role played by the accused No.2 as well as by the accused No.1 and she has also

specified as to how the accused No.1 helped the accused No.2 in that act. She has deposed that the said incident took place in one of the rooms and, therefore, presence of the accused No.1's daughter in the house when there was one more room will not make the incident improbable. The victim has also explained that the doors and the windows of the house were closed. The evidence shows that she was over-powered by both the accused Nos.1 & 2 and, therefore, the other residents and in particular PW-8 or PW-10, not hearing any shouts was not improbable.

33. As far as the allegations that PW-5 was subjected to sexual exploitation within the meaning of Section 370 of IPC is concerned, the learned Judge has already convicted the accused in that connection and they were sentenced for the same. There is no appeal by the State for enhancement of the sentence awarded for those sections. Both of them are also convicted and sentenced for commission of offence punishable under Section 5 of the Immoral Traffic (Prevention) Act, 1956. Therefore, there is no reason to interfere with that part of the conviction and sentence.

34. Therefore, now the next question is about the sentences which can be imposed on the accused for commission of offence punishable under Section 376 of IPC for the accused No.2 and under Section 376 read with Section 109 of IPC for the accused No.1.

35. The learned counsel for the accused No.1 submitted that even if it is held that the offence is committed, the main offender is the accused No.2 and not the accused No.1 as far as the offence under Section 376 read with Section 109 of IPC is concerned. She is a lady. She was granted bail in January, 2022. Till then she was in custody for more than six and a half years. She has no other criminal antecedents. Therefore, the minimum sentence which could be imposed under Section 376 of IPC on the date of incident i.e. in the year 2015 be imposed on her.

36. The learned counsel for the accused No.2 submitted that he is continuously in custody since more than seven and a half years. He does not have any criminal antecedents. He has his own family and there is no one to look after the family. The appellant

No.2 was never granted either parole or furlough during all these years and he could not spend time with his family and growing children. He, therefore, submitted that some leniency be shown to him.

37. The learned APP as well as the learned counsel for the respondent No.2 submitted that considering the background the sentence imposed by the trial Court is proper.

38. I have considered these submissions. Based on the submissions made by both the learned counsel for the accused, some leniency can be shown to the accused considering that they have spent considerable period in jail during pendency of the trial and during pendency of these appeals. There are no criminal antecedents. The accused No.1 is a lady. Hence, in my opinion, the minimum sentence which could be imposed on the date of offence can be imposed on the accused No.1 Sampa Roy. However, since the accused No.2 has committed the main offence he needs to be sentenced with a higher sentence. Considering the background, some more sentence than the minimum sentence is

required to be imposed on him. That will meet the ends of justice. In my opinion, sentence of RI for nine years for the accused No.2 would serve the purpose. Hence, the following order :

::: O R D E R:::

- i. The appeals are partly allowed.
- ii. The conviction and sentence recorded against the appellant i.e. accused No.1 Sampa Roy for commission of the offence punishable under Section 370(2), Section 370A(2) of the Indian Penal Code as well as under Section 5 of the Immoral Traffic (Prevention) Act, 1956 are maintained.
- iii. The conviction of accused No.1 Sampa Roy under Section 109 read with 376 of IPC is also maintained. However, the sentence of RI for twelve years imposed on her for this offence is reduced to RI for seven years in addition to fine of Rs.10,000/- (Rupees Ten Thousand Only) and in default of payment of fine to suffer SI for three months.
- iv. The conviction and sentence as recorded by the trial Court against the accused No.2/appellant Mangal Ray for

commission of offences punishable under Section 5 of the Immoral Traffic (Prevention) Act, 1956 and under Section 370A(2) of IPC are maintained.

- v. The conviction of the accused No.2/appellant Mangal Ray for commission of offence punishable under Section 376 of IPC is maintained. However, instead of RI for twelve years, he is sentenced to suffer RI for nine years in addition to payment of fine of Rs.10,000/- (Rupees Ten Thousand Only) and in default of payment of fine to suffer SI for three months.
- vi. All the substantive sentences of both the accused are directed to run concurrently.
- vii. Both the accused/appellants are given set off under the provisions of Section 428 of Cr.P.C.
- viii. The rest of the clauses of the operative part of the impugned judgment and order, which are not inconsistent with this order, are maintained.
- ix. The Trial Court shall take steps in accordance with law so

that both the accused/appellants serve their remaining sentence.

- x. With these directions, both the appeals are disposed of. With disposal of the appeals, nothing survives in the pending Interim Application and the same also stands disposed of.

(SARANG V. KOTWAL, J.)