

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 21.08.2020

+ **CRL. A. 800/2016 & CRL. M. (BAIL)195/2020,**
CRL. M.(BAIL) 6420/2020

SANJAY CHUNIANA @ SANJUAppellant

Versus

GOVT. OF NCT OF DELHI Respondent

Advocates who appeared in this case:

For the Appellant :Mr Anwesh Madhukar, Advocate
(DHCLSC) with Ms Prachi Nirwan,
Advocate.

For the Respondent :Ms Kusum Dhalla, APP for State.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal seeking to challenge the judgment dated 10.09.2015 passed by ASJ-01, Patiala House Courts, whereby the appellant was convicted for committing penetrative sexual assault on a child victim – an offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereafter the 'POCSO Act'). He was also convicted under Sections 376/506 of the Indian Penal Code, 1860 (hereafter 'IPC') for raping and threatening to kill the victim.

2. The appellant also seeks to challenge the order on sentence dated 11.01.2016, whereby the appellant was directed to undergo

rigorous imprisonment for a period of ten years with a fine of ₹50,000/-, for committing the offence punishable under Section 6 of the POCSO Act. It was further directed that in default of the payment of the fine, the appellant would undergo simple imprisonment for a further period of three months. The appellant was sentenced to rigorous imprisonment for a period of seven years for the offence punishable under Section 506 of the IPC. All the sentences were directed to run concurrently.

3. The appellant was prosecuted pursuant to registration of a FIR being FIR No. 91/2013, under Sections 376/506 of the IPC, at PS Sagar Pur. The said FIR was registered on the basis of the statement (PW 1/A) made by the prosecutrix – a girl aged eleven years at the material time – on 01.05.2013. In her statement, she stated that she resides with her maternal grandparents and that she is eleven years of age. She is a student in the fifth standard. She stated that on 11.04.2013, she was with her step aunt's (*mausi's*) daughter, Bhavna, who was over one year old at the material time. She had taken her to the first floor of the residence to play with her in a room. She stated that Sanju – her step maternal aunt's husband, *mausa*, the appellant herein – had followed her and bolted the door from inside. She stated that he switched on the television and increased its volume. He made her lie on the bed and took off her underwear. She was wearing a skirt and a coty at that time. She stated that Sanju (the appellant herein) then gagged her mouth with his hand and raped her. She stated that she screamed but the noise did not travel outside the room. She started

crying and the appellant threatened to kill her if she told anyone in the house about the incident. She stated that this was the reason for her not telling anyone about the incident. She stated that Sanju had raped her in November, 2012, as well, when no one was in the house, but she did not remember the exact date. He had also threatened to kill her if she informed anyone about the incident. She stated that she told her maternal grandfather about the incident on that day (that is, on 01.05.2013) and he took her to Sagarpur Police Station.

4. The appellant contends that there are many inconsistencies in the testimony and the statements made by the prosecutrix and the medical evidence is not sufficient to substantiate the allegation that the appellant had committed the offence. The appellant contends that the Trial Court erred in not taking into account the testimony of (i) the real maternal grandfather (Sharvan Kumar) of the prosecutrix, who was examined as DW1; (ii) her step grandmother (Kusum) who deposed as PW5; and (iii) the wife of the appellant (Radhika), who deposed as DW-2. The said witnesses had clearly stated that the prosecutrix had not mentioned anything about being assaulted by the appellant. The Trial Court had also erred in not appreciating that there was a dispute regarding the property where the appellant and the prosecutrix resided and that Mohan Lal (referred to by the prosecutrix as her maternal grandfather) had tutored the prosecutrix to falsely implicate the appellant to put pressure on him to leave the said property.

5. The statement of the prosecutrix was recorded on 02.05.2013 under Section 164 of the Cr.PC. She stated that she was playing upstairs, under the sun, with her sister, Bhawna (*main apni bahan Bhawna ko dhoop me upar khila rahi thi*). She stated that the husband of her maternal aunt (*mausa*), Sanju, followed her upstairs and asked her why she was standing in the sun. He told her to bring the girl (Bhawana) inside. She stated that she went into the room and he closed the door from inside. He increased the volume of the TV. She shouted but nobody heard her. She stated that her maternal grandfather (*nana*) does machinery work (*machine ka kaam*). She stated that she was wearing a skirt and coty. Her *mausa* removed her lower clothes and misbehaved (*battamiji kari*) with her. She stated that he also took off his clothes and gagged her mouth with his hand and then he put his private part on her private part (*apne toilet ki jagah ko mere toilet ki jagah laga di*). She stated that he did a bad act (*gandi harkat*) with her and as a result she also bled. She stated that she opened the gate and came out and thereafter, she narrated the incident to her maternal aunt (*mausi*) but she scolded her and also beat her. She stated that her maternal aunt told her grandmother (*nani*) that she was leveling a false allegation against her *mausa* (Sanju). She stated that her grandmother (*nani*) made her withdraw from her school and sent her to her another *mausi* at Timarpur.

6. There is much confusion in this case regarding the relatives mentioned by the prosecutrix. The maternal grandfather referred to by the prosecutrix as *nana* in some of her statements, is not her real

grandfather. He is the younger brother of the maternal grandfather of the prosecutrix. Apart from referring to her maternal grandmother as *nani*, she has also referred to the second wife of her maternal grandfather as *nani*.

7. At this stage, it would be relevant to state that there is evidence that the prosecutrix has an elder sister and two brothers. Their parents expired in the year 2008 and thereafter the prosecutrix was living with her maternal grandparents. The name of the maternal grandfather of the prosecutrix is Sharvan Kumar (he deposed as DW1).

8. It has also been brought in evidence that Sharvan Kumar has two wives – Geeta and Kusum. The prosecutrix is the daughter of the deceased daughter of Sharvan Kumar and Geeta. The appellant is the husband of one Radhika who is the daughter of Sharvan Kumar and his second wife Kusum. Sharvan Kumar's younger brother (Mohan Lal) has also been referred to by the prosecutrix as her maternal grandfather (*nana*), however, he is not her maternal grandfather.

9. Mohan Lal (PW6) had brought the prosecutrix to the police station for recording the complaint. In her statement recorded on 01.05.2013, she had referred to Mohan Lal as her *nana*. The appellant is also not her maternal aunt's husband. He is the husband of her step maternal aunt– Radhika.

10. The statement of Sh. Mohan Lal under Section 161 of the Cr.PC was recorded on 02.05.2013. He stated that the prosecutrix is the granddaughter of his elder brother and she resides with him as her

parents have expired. He stated that he had come to attend the wedding of one of his relatives at Brahmपुरi, Pankha Road and he came to know that the prosecutrix had been raped by her *mausa* (the appellant herein) on 11.04.2013. He stated that he contacted the prosecutrix and then she told him that her *mausa*-Sanju (the appellant herein) had raped her and had also threatened her that if she told anybody, he would kill her. He stated that on coming to know the same, he brought the prosecutrix to the police station and her statement was recorded.

11. The prosecutrix was examined as PW1. She stated that she was studying in the 6th standard in Nagar Nigam Prathmik Vidhyalaya. She stated that her birthday was on 17th October, 2003. On being asked, she stated that both her parents had died and that she was residing with her maternal grandparents, maternal uncle and aunt, with two sisters and two brothers. She correctly identified the appellant as her *mausaji* in Court. She deposed that on 11.04.2013, in the afternoon, she had come back from school and had started playing with a girl, Bhawna, who was aged one year, and was the daughter of the accused *mausaji*. The prosecutrix deposed that the accused is not her real *mausa* but is in such relation in the family. She stated that the accused *mausaji* came into the room and raped her. He removed her skirt, coty and undergarments. He also took off his clothes and put her on the bed and raped her. She deposed that she tried to raise an alarm but the accused *mausaji* raised the volume of the television very high. She stated that he committed rape upon her on the second floor of the house. She was

asked to clarify and she stated that she lived on the ground floor and the rape was committed on the room, which was situated on the floor above. She deposed that she told him that she would tell her *nanaji*, but he threatened to kill her. She was very frightened and did not tell anyone about the incident. During the wedding time of her *mausi*, she told everything to her *nana ji* on 29.04.2013. She deposed that accused *mausaji* had also raped her last year, that is in 2012, during the wedding time of the *devar* of her *mausaji*. She stated that she did not recollect the date or month of the incident and at that time no one else was in the room. She deposed that on being told about the incident, her maternal grandfather (*nanaji*) took her to the police station where she told everything to the police and her statement was recorded. Thereafter, she was taken to the DDU hospital where she told everything to the doctor who medically examined her. She also deposed that she was produced before the Child Welfare Committee and remained in Nirmal Chhaya for about three-four days. In her cross examination, the prosecutrix stated that her *nanaji* Mohan Lal is not her real *nanaji* as such and that the house she resided in, belonged to him.

12. In her cross examination, she was confronted with her statement recorded under Section 164 of the CrPC. She stated that she had told about the said incident to Radhika *mausi* in the evening of the same day, that is on 11.04.2013. She stated that when she told Radhika *mausi* about the incident, her Geeta *nani* was also present there.

13. The principal of the school in question was examined as PW2. She deposed that as per the original admission and withdrawal register of the school, the date of birth of the prosecutrix was reflected as 17.10.2003.

14. Dr. Rachna Gupta, SR, Department of Obstetrics and Gynecology, DDU Hospital was examined as PW-4. She proved the MLC report of the prosecutrix (PW 4/A). She deposed that on 02.05.2013, the prosecutrix was sent to her for medical examination by Dr. Manoj and she was accompanied by the police and her grandfather Mohan Lal. The victim told her that she was raped by her *mausa* named Sanju in Brahmपुरi at her *nana*'s residence. Sanju had also raped her in November, 2012. PW-4 deposed that she examined the patient and on local examination, the hymen was found to be torn. There was no active bleeding and no fresh tear seen. She lifted nine samples from the body of the victim. She deposed that the victim had initially been examined by Dr. Manoj, CMO in DDU Hospital.

15. The prosecutrix was taken to the Deen Dayal Upadhyay Hospital for her medical examination, which was conducted on 02.05.2013 at 12:10 pm. The MLC (Ex.PW 4/A) indicates that the prosecutrix had narrated that she was raped by her *mausa* and he had done so in November, 2012, as well. The MLC indicates that she was accompanied by her maternal grandfather (*nana*). However, in fact, she was accompanied by Sh. Mohan Lal (her maternal grandfather's younger brother).

16. Smt Kusum (step maternal grandparent- *nani*) deposed as PW-5. She deposed that her husband has two wives and that she is the second wife of her husband. She stated that Mamta is the daughter of Geeta and the prosecutrix is the daughter of Mamta. She deposed that Mamta and her husband had expired in the year 2008. Mamta had four children and the prosecutrix was the youngest of them. She deposed that two of the children, including the prosecutrix, reside with her and the two other children reside with their maternal aunt (*mausi*) in Timarpur. She stated that the prosecutrix was admitted in the school by her and her husband and that the date of birth of the prosecutrix had been mentioned in the school records as 17.10.2003.

17. In the cross examination, PW5 deposed that it was correct that accused Sanjay had a job and that he used to go to office at 8:00 am and come back at 05:00 pm. She stated that the accused Sanju and his wife Radhika were residing on the top floor and there was one kitchen on the said floor. She deposed that they would prepare lunch from 12 noon to 02:30 pm. She stated that the prosecutrix did not tell her or her husband about the incident.

18. Mohan Lal deposed as PW6. He deposed that Sharvan Kumar is his eldest brother. He has two wives namely Geeta and Kusum. Geeta is the first wife of his brother and she had six children, including Mamta, who was the mother of the prosecutrix. He deposed that Mamta and her husband Anil expired in the year 2008. Mamta had four children including the prosecutrix. Out of them, two children, including the prosecutrix started residing with their *nana* (Sharvan

Kumar). PW6 deposed that on 30.04.2013, there was a marriage function in the house of his younger brother in Brahmपुरi. On 01.05.2013, while he was coming from the house of his younger brother, the prosecutrix, who had come to attend the marriage at his brother's house met her and she appeared to be sad. He deposed that he asked her what happened and she told him that her step *mausa*, the appellant, (identified by him in Court) had raped her in the month of November, 2012 and on 11.04.2013, in the house of her *nana*, Sharvan Kumar. She further told him that he had threatened that he would kill her if she disclosed the incident to anyone. He deposed that he took the prosecutrix to the police station and thereafter, the police took the prosecutrix for her examination to the hospital. He deposed that the prosecutrix was sent to Nirmal Chhaya by the police and she was kept there. On the next day she was produced before the court where her statement was recorded. On 06.05.2013, he alongwith the brother of the prosecutrix had secured her release from Nirmal Chhaya, Hari Nagar and since then she has been residing with him and is studying in the fifth standard.

19. In his cross examination, PW6 stated that it was correct that he gave his statement to the police on 02.05.2013. He stated that the prosecutrix had told her that she was raped by her *mausa* on 11.04.2013. The prosecutrix had told him about the incident in the afternoon, when she had come to attend the marriage of his niece. He deposed that both wives of his brother Sharvan Kumar reside with Sharvan Kumar in the same house. There are five rooms in the

premises where both wives of his brother Sharvan Kumar reside. It has an area of 22 sq yards and it is a three storeyed building. On the ground floor, his nephew Suresh Kumar resides. There are two rooms on the ground floor, two rooms on the first floor and one room is built in the second floor. He stated that the rooms in the ground floor are in his possession. His brother Sharvan Kumar resides with his wife Kusum on the first floor and his first wife Geeta resides on the second floor.

20. In the cross examination, PW6 stated that when he came to know about the incident from the prosecutrix, he did not tell his brother Sharvan about the incident. He admitted that he did not confront the accused Sanjay either. He stated that he did not tell them because they could exert pressure upon him to not pursue the matter. He stated that he reached the police station with the prosecutrix at about 1 or 2 pm. He stated that after lodging of the FIR, the police when to Brahmpuri to arrest the accused Sanjay. He stated that he did not recollect whether the accused was brought to the Police Station from Brahmpuri by the police. He stated that he did not tell his brother Sharvan Kumar and his wife about the incident after the registration of the FIR as he was told by the prosecutrix that she had told her maternal grandparents about this incident and also her *mausi* Radhika but they did not pay heed to the incident and rather, she was scolded by them. He stated that they returned back at about 3 am from the hospital.

21. Dr. Ashish K. Jain, deposed as PW10 and he had conducted the medical examination of the appellant and he stated that there was nothing to suggest that the appellant was not capable of sexual intercourse on the day of his examination.

22. W/SI Dominica Purty deposed as PW12 and she stated that on 01.05.2013, she was called by her ACP to reach PS Sagarpur. On reaching there, she met the prosecutrix and Mohan Lal and recorded the statement of the prosecutrix. She deposed that she took the prosecutrix to DDU Hospital for her medical examination where the doctor gave her nine sealed *pullandas*. She stated that she seized the exhibits and from the hospital, she returned to the house of the victim. She stated that she prepared the site plan (Ex. PW 12/C) at the instance of the prosecutrix. She searched the house for the accused but he was not available. Thereafter, she went to the Police Station with the prosecutrix. She stated she along with SI Krishan Kumar and Ct Surender went to Tigri to arrest the accused from his house as he was residing in House No. K-40, Janta Jiwan Camp, Tigri. The accused was arrested and his disclosure statement was recorded.

23. In her cross examination, PW 12 stated that the maternal grandparents were residing on the ground floor and the victim's mausi was residing along with her family members on the first floor. The victim was residing on the first floor of the premises. She stated that it was correct that the real grandfather of the victim, Sharvan Kumar, did not say anything about the commission of the alleged offence. She stated that she did not record the statement of the victim's *nani* since

she was not willing to talk. She stated that the prosecutrix had taken the child along with her when she had gone on the room on the first floor. She stated that she had visited the premises in question and the *verandah* on the first floor was outside the room and was about six feet wide and as long as the size of the house.

24. The accused in his statement under Section 313 of the CrPC, stated that he was innocent and had been falsely implicated. He stated that Mohan Lal (PW 6) was his paternal uncle (*chacha*) and was unhappy with him as he wanted him to leave the residence of Sh. Sharvan Kumar (*nana* of the prosecutrix- DW1) as he wanted his children to reside in the said house. In his defence, the accused examined three witnesses.

25. Sharvan Kumar deposed as DW1 and he stated that he is the father in law of the accused and that the victim is the daughter of his late daughter Mamta. He stated that the prosecutrix was residing with him prior to the registration of the present case and thereafter for some more days. He stated that he and his daughter, Radhika were taking care of the victim and she was solely under his guardianship. He stated that the accused and his daughter, Radhika were residing in the second floor of the house from the year 2013 along with their children. The accused was residing in his house with his consent due to his weak financial condition and was supporting them in their day to day affairs. He stated that on 11.04.2013, at no point of time, did the prosecutrix tell him about any such offence committed by the accused. He stated that he never made any such complaint to the police against the

accused. He stated that he was called by phone from CWC (Nirmal Chhaya) to come and take custody of the prosecutrix after about three-four days of keeping the prosecutrix in custody. He stated that he visited the CWC and the official told him that required formalities would have to be fulfilled to take custody of his granddaughter. He deposed that one lady official in a civil dress told the officials of CWC that he was not the real grandfather of the victim and was the step grandfather and hence, the custody could not be granted to him. They told him that the real *nana* would be given custody of the victim. He stated that three-four police officials had visited the neighbourhood of his residence and had inquired about the real *nana* of the victim and his neighbour had said that Sharvan Kumar was the real *nana* of the victim. The said fact was communicated to him by the neighbour. He stated that he did not know what was the conspiracy between Mohan Lal (PW 6) and the police officials to grant him custody of the victim.

26. DW1 further testified that on the date of 11.04.2013, he was inside the room with his wife. He stated that the victim had returned after school in the afternoon. He stated that he did not hear any high volume sound of the television from the room of the accused, in the afternoon of that day. He stated that he knew the accused well and that the accused could not have committed any such act. He stated that Sanjay was falsely implicated in the present case and that the victim was being tortured to depose falsely to victimize the accused.

27. Smt Radhika, wife of the accused, deposed as DW2 and stated that on 11.04.2013, she was on the second floor of the house along

with her husband and her father. The prosecutrix returned back from school on that day i.e. 11.04.2013 at about 1:30 pm. She stated that the prosecutrix was residing alongwith them and used to sleep along with her *nana-nani* (maternal grandparents) on the first floor. She stated that she looked after the prosecutrix and all her needs. She stated that the prosecutrix came after some time to her room and took her child and went to the first floor where her father and mother were present. She stated that the accused was present with her on the second floor till about 5 pm on that day. She deposed that no such incident of rape was committed upon the prosecutrix till that time. She stated that the accused had been falsely implicated in the case. She asserted that the prosecutrix had not complained about the accused to her or to her father and mother. She claimed that the prosecutrix was residing in the house in a cordial atmosphere and was bestowed with love and affection by them. She stated that the accused, her husband, was innocent and that the police officials, in connivance with Mohan Lal had falsely implicated the accused in the present case.

28. Mrs. Preeti, CWC Welfare Officer deposed as DW3 and stated the custody of the prosecutrix was given to her brother John, who was aged about nineteen years. She stated that CWC did not conduct any inquiry with regard to who was the guardian of the prosecutrix and under whose custody she was residing. She deposed that the chairperson of CWC could not appear before the Court as she had been operated recently. DW3 stated that it was correct that Vicky, the brother of the prosecutrix was just nineteen years old when the

custody of the prosecutrix was handed over to him. She deposed that Vicky was working as a housekeeping boy at New Diagnostic Centre, MRI Centre Pvt. Ltd.

29. DW3, was asked the question as to why the custody of the prosecutrix was not given to her real *nana* (grandfather) with whom she was residing earlier. She stated that she had handed over the custody to the real brother of the prosecutrix after consultation with the prosecutrix as she showed her desire to go with him.

Reasons and Conclusion

30. The prosecution's case rests most entirely on the statement made by the prosecutrix. In this case, no meaningful investigation was conducted and there is no evidence corroborating the testimony of the prosecutrix. It is trite law that the sole testimony of a witness can be relied upon provided that the quality of the testimony is reliable. Thus, the principal question to be addressed is whether her statements and her testimony are reliable and establish beyond any reasonable doubt that the appellant had committed the offence for which he was charged.

31. In the present case, the statements made by the prosecutrix are not entirely consistent. Further, some of her statements are also contradicted by the evidence on record. In her initial statement recorded on 01.05.2013 (Ex.PW12/A), she had unequivocally stated that she had not mentioned the incident to any of her family members at the material time. According to her, she had been assaulted in

November 2012 and on 11.04.2013, but she had not informed about the same to any person. She stated that on that date (that is, 01.05.2013), she had informed about the incidents to her maternal grandfather (*nanaji*) and he had brought her to the police station. As stated above she had referred to Mohan Lal as her *nanaji* and not to her real maternal grandfather (Sharvan Kumar). It is relevant to note that she had stated that she had taken the daughter of her *mausi* who was about one year old to a room on the first floor and she was standing outside the said room. In her statement recorded under Section 164 of the CrPC, she stated that she was feeding her sister (Bhawna) under the sun on the top (*main apni bahan Bhawna ko dhoop me upar khila rahi thi*). Her statement can also be interpreted to mean that she was playing with her sister. She then narrated the incident, and her narration is more or less consistent with her statement recorded on 01.05.2013. However, she also stated that she had bled as a result of the act committed by her *mausaji* (the appellant herein). This was not mentioned by her in her statement recorded a day earlier. It is important to note that she also added that she had informed about the incident to her *mausi*, but in turn, her *mausi* had scolded and beaten her. She also stated that her *mausi* also told her nani that she was leveling a false allegation against Sanju. She stated that her grandmother got her to leave the school and then sent her to her other *mausi* who was residing at Timarpur. Thus, her statement to the aforesaid effect is contrary to the statement made by her on 01.05.2013. In her statement made on 01.05.2013, she had clearly stated that she had not informed about the incidents to anybody.

32. Her assertion that her maternal grandmother (Nani) had withdrawn her from her school and sent her to Timarpur is belied by the attendance register (Ex.PW 2/D) of her school. The said attendance registered indicates that the prosecutrix had attended her school till 26.04.2014. She was absent from school on 12.04.2013 but had attended the school for the entire next week, that is, from 15.04.2013 to 20.04.2013 (except 19.04.2013, which was a holiday). She had also attended her classes on 25.04.2013 and 26.04.2013. The Admission and Withdrawal Register of the School (Ex PW2/A) also establishes that the prosecutrix was not withdrawn from her school.

33. The prosecutrix was examined as PW1. She testified that the accused had raped her in a room located on the second floor of the house. She was asked by the Court to clarify the same and she stated that there was a ground floor and the room where she was raped was located on the floor above. In other words, she confirmed that she had been assaulted on the first floor. This is also consistent with her statement recorded on 01.05.2013 on the basis of which the FIR in question was registered. She testified that she did not inform about the incident to anybody as the accused had told her to keep quiet and had threatened to kill her if she didn't. However, she stated that at the wedding time, she informed about the incident to her *nanaji* on 29.04.2013. This, clearly, is not consistent with her statement made earlier; both, in her statement recorded on 01.05.2013 and her statement recorded under Section 164 of the Cr.PC on 02.05.2013, she had stated that she informed about the incident to her maternal

grandfather (nanaji) on 01.05.2013. She testified that on being told about the incident, her *nana nani* had taken her to the police station where her statement was recorded. This is also not in conformity with the other statements as there is nothing on record that her maternal grandmother had accompanied her to the police station. In fact, she was accompanied by Sh. Mohan Lal (the younger brother of her maternal grandfather) and as observed earlier she refers to Mohan Lal and not her real maternal grandfather, as *nanaji* in her statement recorded on 01.05.2013 and her statement recorded on the next day under Section 164 CrPC.

34. The prosecutrix was cross-examined. In her cross-examination she confirmed that she had not mentioned the incident to any of her brothers and sister. She stated that on the date of the incident, her *nana nani* were in their room on the ground floor of the house. She stated that there was only one room at the first floor and the kitchen is inside that room. She further stated that there were two rooms on the ground floor besides a temple. She further stated that the house in question belonged to her Nana Ji (Mohan Lal).

35. In her cross examination, she was confronted with her statement recorded under Section 164 of the CrPC where she had asserted that she had informed about the incident to her mausi. On being confronted, she contradicted her statement made in the examination-in-chief and stated that she had narrated the incident to her Mausi (Radhika) in the evening of the same day (that is, 11.04.2013). She

further stated that when she informed her about the incident, her nani (Geeta) was also present there.

36. As stated before, the maternal grandfather of the prosecutrix (Sharvan Kumar) had two wives who were residing with him at the same premises. The real maternal grandmother of the prosecutrix is named Geeta. The prosecutrix had not mentioned in any of her earlier statements that her Nani (Geeta) was also present when she had narrated the incidents to her Mausi (Radhika). In her statement recorded under Section 164 of the CrPC, she had merely stated that her mausi Radhika had told her *nani* that she had leveled a false allegation against Sanju. In her cross-examination, she stated that her mausi had scolded her but did not mention that she had beaten her as well. As observed above, no such allegation was made in her initial statement recorded on 01.05.2013. However, in her statement recorded under Section 164 CrPC, she had stated that her Mausi had scolded her and also beaten her. Thus, her statements recorded on 01.05.2013, 02.05.2013 and her testimony are inconsistent in this regard. In her cross-examination, she had also stated that there was some bleeding after she was raped. As noticed above, this was not mentioned by her in her initial complaint.

37. It is material to note that the prosecution did not examine the maternal grandmother of the prosecutrix (Geeta). Thus, her statement that she had narrated the incident to her Mausi (Radhika) in the evening of the same date, that is, 11.04.2013 has not been corroborated by her maternal grandmother (Geeta). The step maternal

grandmother (Kusum) – the second wife of Sh. Sharvan Kumar – was examined as PW5. She stated in her cross-examination that the prosecutrix had not told her or her husband about the incident at any point of time.

38. The prosecutrix also testified that she had informed about the incident to her nana (Mohan Lal) on 29.04.2013 at the time of the wedding. However, in her statement she had stated that she had informed her *nanaji* (Mohan Lal) about the incident on that day (the day her statement was recorded – 01.05.2013)

39. The statement of Mohan Lal under Section 161 of the CrPC was recorded on 02.05.2013. In his statement, he stated that he had come to Brahmpuri, Pankha Road to attend a wedding of his relative and there he came to know that the prosecutrix had been raped on 11.04.2013. He stated that he contacted the prosecutrix and she told him that her *mausa* (Sanju) had raped her and had threatened to kill her if she informed about the incident to anyone.

40. Mohan Lal was examined as PW6. In his testimony, he stated that there was a marriage function in the house of his younger brother on 30.04.2013 and when he was coming from the house of his younger brother, the prosecutrix who had come to attend the marriage at his brother's house met him and she looked very sad. He stated that he asked her as to what happened and she told him that her step *mausa* had raped her in the month of November 2012 and on 11.04.2013 in the house of her maternal grandfather (Sharvan Kumar). He testified

that the prosecutrix had also told him that the accused had threatened to kill her if she disclosed the incident to anyone.

41. As is apparent from the above, there is a material inconsistency between the statement of PW6 recorded on 02.06.2013 and his examination-in-chief, which was recorded on 11.12.2013. In his statement, he had said that he became aware that the prosecutrix had been raped. He then contacted her and she had told him that her step mausa (the accused) had raped her on 11.04.2013. Whereas, in his testimony he states that he had found the prosecutrix looking sad and on inquiring from her the reason for the same, she informed him that her step mausa had raped her. In addition to the above, it is also material to note that in his statement recorded on 02.05.2013, Mohan Lal did not mention that the prosecutrix had told him about being raped in the month of November 2012; but in his testimony he stated that she had informed him that the accused had raped her in November 2012 as well.

42. Mohan Lal did not confront his elder brother, Sharvan Kumar, who is the real maternal grandfather of the prosecutrix and with whom she was staying. He also did not accost the accused but he brought the prosecutrix straight away to the police station. He stated that he did not inform them or confront them because they could pressurize him not to pursue the matter. This is improbable. In the natural course, one would expect that an elder of the family being informed of any such incident would make inquiries from other family members. The prosecutrix was residing with the maternal grandparents. Thus it

would be natural for Mohan Lal to at least make inquiries from them regarding the accusations made by the prosecutrix considering that the prosecutrix was in their care.

43. In addition to the above, there is also some confusion regarding the place where the offence is alleged to have been committed. The prosecutrix in her testimony had stated that she was raped in a room located on the second floor of the house. She was asked to clarify this and she stated that there was a ground floor and the room where she was raped was located on the floor above. Thus, according to her, she was raped on the first floor of the building. In her complaint (statement recorded on 01.05.2013), she stated that she had taken the daughter of her Mausi to the first floor. However, during the course of arguments, it was contended that the incident had taken place on the second floor of the building. Ms Dhalla had contended that there was a small room on the floor above the first floor, which was occupied by the appellant and the offence in question was committed in that room. She submitted that if one carefully examines the testimony of the prosecutrix, it is clear that she had been assaulted in a room on the second floor of the house as she had clarified that there is a ground floor and the room where she was raped was on the floor above. She contended that the prosecutrix used to reside on the first floor and from her perspective from the first floor, there was a ground floor and a room above (which would be the second floor). Whilst, Ms Dhalla may be correct that the examination-in chief of PW1 may be read in the manner as suggested by her. But that would be inconsistent with

her statement recorded on 01.05.2013 where she stated that she had taken the daughter of her *mausi* to the first floor of the premises. Further in her cross examination the prosecutrix confirmed that “*there is only one room on the first floor and the kitchen is inside that room only*”

44. At this stage, it is also necessary to observe that no meaningful investigation was conducted in this case. W/SI Dominica Purty (who was the IO in this case) was examined as PW12. She testified that she had returned to the house of the victim and prepared a site plan (Ex.PW12/C) at the instance of the prosecutrix. However, a plain perusal of the said plan indicates that that it is a rough site plan which indicates the location of the house. The said site plan is of little relevance insofar as the controversy in the present petition is concerned. It was important in this case to have made a site plan as to the building where the offence is alleged to have been committed. This would have lent certain clarity in the matter. However, it is doubtful whether PW12 had even entered the house to conduct any meaningful investigation. This is apparent because in her testimony she stated that the maternal grandfather and grandmother of the prosecutrix were residing on the ground floor of the premises. The *mausi* of the prosecutrix was residing along with her family members on the first floor. In her cross-examination, she stated that the residence of the victim was only made up to the first floor. This is contrary to the testimony of PW6 as well as DW1 and DW2. Ms Dhalla had also contended that the premises had been built up to the second floor and

not the first floor. Thus, the investigating officer really did not seem to have any idea where the offence is alleged to have occurred. The IO also did not testify as to the description of the room and/or verify whether a television was placed inside the said room.

45. Apart from ascertaining and examining the scene of the alleged offence, it was also necessary for the investigating officer to have ascertained the number of people residing in the said building and those that were present in the house at the time of the alleged incident. However, it does not appear that any such exercise was done. There is no evidence as to who was present in the house and, if not, their whereabouts at the material time. In any view, there is nothing in the testimony of the IO that indicates the same.

46. There is also no clarity as to the date of the wedding, which was attended by the prosecutrix and Mohan Lal. In his statement under Section 313 of Cr.PC, the appellant stated that the wedding in question was held was on 29.04.2013. The prosecutrix also testified that she had informed about the incident to her nana (Mohan Lal) on 29.04.2013 at the time of the wedding. However, Mohan Lal had stated that he came to know about the incident on 01.05.2013 from the prosecutrix, when she had come to attend the wedding.

47. It was contended on behalf of the appellant that on the date of the incident, there were other family members present. Smt. Kusum (the step maternal grandmother of the prosecutrix) was examined as PW5. In her cross-examination, she testified that they had prepared

lunch from 12:00 noon to 02:30 pm. It is in evidence that the kitchen was inside the room where the appellant and his family resided and where the offence was allegedly committed. The prosecutrix had in her cross-examination stated that there was only one room on the first floor and the kitchen was inside that room.

48. Mohan Lal (PW6) had testified that the building in question was built on a plot measuring 22 sq. yards and it was a three storeyed building. He testified that on the ground floor his nephew Suresh Kumar, who was married, and his two children were residing and there were two rooms built on the first floor and one room built on the second floor. He claimed that the rooms on the ground floor were in his possession. He stated that his brother Sharvan Kumar resided with his wife Kusum on the first floor and his first wife Geeta was residing on the second floor of the said building. He did not mention about the appellant, his wife Radhika or any of their children residing in the said premises. According to him, there were three rooms in the possession of Sharvan Kumar and his family.

49. It thus appears that there were some property disputes between Mohan Lal and Sharvan Kumar. Mohan Lal claimed that he was in possession of the rooms on the ground floor although, he did not reside there. The prosecutrix also believed that the said property belonged to Mohan Lal. But Sharvan Kumar stated that the house belonged to him. On being cross examined Mohan Lal (PW6) admitted that there were disputes between him and Sharvan Kumar as he denied the suggestion that there were no disputes between them.

50. It is settled law that the solitary testimony of a victim is sufficient for convicting the accused provided the testimony is unimpeachable and trustworthy. It should be reliable so as to establish that the accused had committed the offence beyond any reasonable doubt.

51. In *Rai Sandeep @ Deepu v. State: (2012) 8 SCC 21*, the Supreme Court had set out the attributes of a sterling witness. The Court had, *inter alia*, observed as under:

“22To test the quality of such a witness, the status of the witness would be immaterial and 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, namely, at the time when the witness makes the initial statement and ultimately before the court. 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 give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it...”

52. In *Krishan Kumar Malik v. State: (2011) 7 SCC 130*, the Supreme Court had observed as under:

“31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality...”

53. In *State of Rajasthan v. Babu Meen: (2013) 2 SCALE 479*, the Supreme Court had explained that oral testimony can be classified into three categories, namely, (i) wholly reliable, (ii) wholly unreliable and (iii) neither wholly reliable nor wholly unreliable. An accused can be convicted on the basis of wholly reliable testimony of a single witness. However, testimony of a witness, which is neither wholly reliable nor wholly unreliable would require corroboration. The relevant extract of the said decision is set out below:

“8. We do not have the slightest hesitation in accepting the broad submission of Mr. Jain that the conviction can be based on the sole testimony of the prosecutrix, if found to be worthy of credence and reliable and for that no corroboration is required. It has often been said that oral testimony can be classified into three categories, namely (i) wholly reliable, (ii) wholly unreliable and (iii) neither wholly reliable nor wholly unreliable. In case of wholly reliable testimony of a single witness, the conviction can be founded without corroboration. This principle applies with greater vigour in case the nature of offence is such that it is committed in seclusion. In case prosecution is based on wholly unreliable testimony of a single witness, the court has no option than to acquit the accused.”

54. In view of material improvements, the testimony of the prosecutrix cannot be accepted as that of a sterling witness.

55. In *Pancchi v. State of U.P.: AIR 1998 SC 2726*, the Supreme Court observed as under:

“11... The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring.”

56. In *Dattu Ramrao Sakhare v. State of Maharashtra: (1997) 5 SCC 341*, the Supreme Court held as under:

“5... A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored...”

57. In the present case, the prosecutrix was brought to the police station by Mohan Lal (PW 6) and he had accompanied her for her Medical examination as well. Except for the brief period when the prosecutrix was in the care of Nirmal Chayya, she was in the effective custody of Mohan Lal even though her custody was handed over to her brother. It also appears that there was some property dispute in respect of the house where the prosecutrix resided with her grandparents. Thus, her testimony has to be carefully evaluated to rule out any possibility being given under the influence of Mohan Lal.

58. As observed earlier, there are material inconsistencies and improvements in her statements. Her statements are not corroborated by any witness and no meaningful investigation has been conducted in this case so as to lend any support to the case set up by the prosecution.

59. Thus, this court is of the view that given the evidence and material on record, the standard of proof to convict the appellant has not been met. The appeal is, accordingly, allowed. The appellant is acquitted. He is directed to be released forthwith.

60. The pending applications are also disposed of.

AUGUST 21, 2020
RK

VIBHU BAKHRU, J

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