IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL (APEAL) NO. 133 OF 2020

Iliyas Ahmad Abdul Hamid Qureshi
Aged about 31 yrs, Occ: Labour,
R/o. Tajnagar, Near Teka Naka, Nagpur .... APPELLANT
Saheraj Masjid, Nagpur (In Jail)

// V E R S U S //

1. The State of Maharashtra,
Through Police Station Officer,
Panchpaoli, Napgur

... RESPONDENT

Mr, Amol Mardikar, Advocate for appellant
Ms Ritu Sharma, APP for the respondent/State

CORAM : G. A. SANAP, J.
DATE : 26/06/2024

O R A L J U D G M E N T :

1 Heard finally with the consent of learned Advocates for the parties.

2 In this appeal, the challenge is to the Judgment and order, dated 19.12.2019, passed by the learned Additional Sessions Judge-9, Nagpur, whereby the learned Judge on

conviction of the accused for the offences punishable under Section 376(2)(i)(j) of the Indian Penal Code (for short 'the IPC') and Section 5(m) punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act') sentenced him to suffer rigorous imprisonment for 10 years and directed to pay a fine of Rs.25,000/-, in default to suffer rigorous imprisonment for one year.

3. Background facts:

The report was lodged by the informant, who is the mother of the victim, a five year old girl at the time of the incident. The case of the prosecution, which can be culled out from the report, is that the informant has two daughters and one son. The victim is her younger daughter. The accused is residing adjacent to their house and was known to the children of the informant. It is the case of the prosecution that the informant reported that on 25.07.2015 at about 7.30 p.m.,

when she was attending household chores, the victim was playing outside. At about 8.00 p.m., the victim returned home crying. The victim carried her knickers in her hand. The informant questioned her about the cause of her crying, to which the victim told that the accused asked her to bring two packets of chips. The accused gave her one packet of chips and took her in his house. In the house, the accused lied to her on ground and removed her knickers and showed his private part and told her that they would play "doctor doctor." The accused lied on her person and put his private part in her private part. The victim informed her that the accused pissed on her person and due to which her knickers became wet. The informant examined her knickers and found semen stains over it.

4. The informant communicated this incident to her mother-in-law. The informant and her mother-in-law went to the house of the accused and questioned him. The informant

slapped the accused and questioned him as to what he has done to her daughter. The accused ran away from the spot. The informant called her brother-in-law and her husband. They went to the Police Station and reported the matter to the Police Station immediately.

5. On the strength of the report (Exh.26), the crime bearing No.252/2015 for the offences punishable under Sections 376(2)(i)(j) of the I.P.C. and Sections 5(m) and 6 of the POCSO Act was registered at Pachpaoli Police Station. The investigation was carried out by Mangla Mokashe, WPSI (PW-10). The victim was sent for medical examination. The Investigating Officer received the clothes of the victim in sealed condition from Medical Officer. The clothes of the accused were seized. The accused was also sent for a medical examination. The clothes of the victim and the accused were sent to Forensic Science Laboratory (for short 'F.S.L.'), Nagpur for analysis. The DNA report received by the Investigating

Officer revealed that the semen detected on the clothes of the victim was that of the accused. The sample matched the semen found on the clothes of the accused and his blood samples. After the completion of the investigation, the charge-sheet was filed. Learned Judge filed the charge against the accused. The accused pleaded not guilty.

6. In order to bring home the guilt against the accused, the prosecution examined eleven witnesses. The learned Judge, on consideration of the evidence found the accused guilty of the above offences and sentenced him as above. Being aggrieved by the judgment and order, the accused has come before this Court in appeal.

7. I have heard learned Advocate Mr Amol Mardikar for the appellant/accused and Ms Ritu Sharma, learned APP for the State. Perused the record and proceedings.

8. Mr. Amol Mardikar, Learned Advocate for the appellant/accused submitted that as far as the main incident of rape is concerned, the evidence of the victim and the evidence of the informant does not inspire confidence. Learned Advocate took me through their evidence and pointed out the major omissions and inconsistencies in their evidence on material aspects. Learned Advocate submitted that evidence of Medical Officer (PW-3) is not sufficient to corroborate the version of the victim and her mother on the point of penetrative sexual assault. Learned Advocate submitted that considering the age of the victim, who was five years old and the age of the accused who was 25 years old on the date of the incident, if the incident as narrated by the victim and her mother had occurred then the victim would have suffered serious injuries to her private part. Learned Advocate submitted that the medical examination of the victim conducted immediately after lodging the report did not even

reveal swelling or any sign of penetrative sexual assault. Learned Advocate submitted that therefore, the evidence is not sufficient to prove the offence of rape. Learned Advocate while assailing the DNA report submitted that the evidence on record is not sufficient to rule out the possibility of tampering and manipulation of samples. Learned Advocate further pointed out that samples were received in the lab on 01.08.2015 whereas analysis was carried out in 30.05.2016. Learned Advocate submitted that therefore, implicit reliance cannot be placed on the DNA report to convict the accused. Learned Advocate in the alternative submitted that medical evidence is not sufficient to establish the penetrative sexual assault. Learned Advocate submitted that the presence of semen on the underwear of the victim and the underwear of the accused could not be the evidence of penetrative sexual assault. Learned Advocate submitted that in the totality of the evidence brought on record, the possibility of the accused ejaculating before

committing the sexual assault cannot be ruled out. Learned Advocate submitted that on the basis of the available evidence, at the most the accused could be held guilty of an offence an attempt to commit rape and not the rape as defined under Section 375 of the I.P.C. Learned Advocate submitted that learned Judge has failed to properly appreciate the evidence on record and as such has come to a wrong conclusion.

9. As against this, learned APP submitted that there was no reason for the informant and victim girl, who was five years old to falsely implicate the accused in such a serious crime. Learned APP submitted that some omissions and inconsistencies are bound to occur in the evidence of the witnesses. Learned APP submitted that the Court has to keep in mind the core of the evidence as to the principal charge. In the submission of learned APP the evidence of the victim and the evidence of her mother is sufficient to prove beyond doubt the penetrative sexual assault on the victim by the accused.

Learned APP submitted that the slightest penetration is sufficient to constitute the offence of rape as defined under Section 375 of the IPC. Learned APP further submitted that the absence of injuries on the private part of the victim by itself could not be a ground to doubt the veracity of the statement of the victim and her mother. Learned APP submitted that the informant even to wreck revenge, would not have involved her daughter and jeopardized her entire life. Learned APP submitted that the DNA report is conclusive proof to establish that the accused had indulged in sexual intercourse with the victim. Learned APP submitted that the evidence of the Investigating Officer and the evidence of two witnesses from the C.A. Office, namely Neha Pravin Bhale (PW-9) and Uday Sarate (PW-11) is sufficient to rule out the possibility of manipulation or tampering of the samples. Learned APP submitted that learned Judge has thoroughly appreciated and analysed the evidence and found the accused guilty.

10. In the backdrop of the evidence on record, it would be just and proper at the outset to consider the evidence in the form of a DNA report. The victim was examined by Dr. Deepa Khobragade (PW-3) on 26.07.2015. According to PW-3, the victim's mother narrated the history of the assault. She has stated that on external examination, she did not notice any injury. She has also stated that she did not notice any injury to her private part. In her examination-in-chief, she has stated that in case of forceful penetration, the hymen will not remain intact. She has stated that if there is no application of force, then the hymen will not rupture. The evidence of the medical officer PW-3 clearly proves that no injury was found to private part of the victim. The hymen was intact. In my view, this evidence of the medical officer needs proper appreciation for the purpose of its corroborative value.

11. Medical Officer (PW-3) has stated that at the time of the examination, the clothes on the person of the victim were

collected, packed and sealed. The sealed clothes were handed over to WPC Kajal alongwith B form. Exh.35 is the medical examination report. It has been categorically stated at clause No.9 of the report that a blood sample and the clothes on the person of the victim were collected, packed and sealed and handed over to WPC. The accused was arrested. His clothes were seized. There is ample evidence on record to prove that the clothes of the victim, the clothes of the accused and blood samples of the victim and the accused were sent to FSL by the Investigating Officer. The contemporaneous documentary evidence is sufficient to prove the seizure of the clothes and blood samples. Similarly, the contemporaneous documentary evidence corroborates the oral evidence of the Investigating Officer that during the course of the investigation, the samples were sent to FSL, Nagpur, for analysis. Guruprasad G. Tripathi (PW-7) is the carrier of the samples. He has deposed that he carried the samples to CA FSL, Nagpur on 01.08.2015 and

handed over the same to the clerk at FSL, Nagpur. Exh.50 is the requisition letter issued under the signature of the Investigating Officer.

12. Neha Pravin Bhale (PW-9) is the Assistant Chemical Analyser. She has deposed that on 01.08.2015 the samples were received in the Biological Department of the DNA Section. Uday Sarate (PW-11) has deposed that at the relevant time, he was attached to FSL, Nagpur as Assistant Director. He has stated that the samples received from the police were opened for analysis on 30.05.2016. On analysis of the samples namely the pant of the victim and under garments of the accused were found to have semen stains. He has stated that semen stain cuttings were prepared. The semen stain cuttings and prepared blood stains were forwarded to the DNA Section. His evidence is categorical and unshaken with regard to the presence of the semen on the half pant of the victim and pant of the accused. Neha Bhale (PW-9) has stated that on

29.06.2016, the semen stain cuttings from the half pant of the victim, semen stain cuttings on the underwear of the accused, prepared blood stains of the victim and the accused were received in DNA Section. She has stated that after receipt of the samples the DNA extraction was performed. The extracted DNA was further analysed using polymerized chain reaction technique. She has deposed that DNA profiles were compared and it was interpreted that the DNA profiles obtained from semen detected on Exh.2, half pants of the victim and Exh.3 underwear of the accused are identical and from one and the same source of male origin and matched with DNA profiles obtained from blood samples of the accused. The DNA report is at Exh.36. Perusal of cross examination of PW-9 and PW-11 would show that no significant admission has been elicited to doubt their credibility and more particularly the credibility of the procedure adopted by them. The evidence on record, is therefore, sufficient to establish the chain.

13. It is true that some time was taken for analysis of the samples from the date of its receipt. However, on the ground of a delay in the analysis of the samples the DNA report cannot be discarded. In order to discard the DNA report, there must be sufficient material on record to indicate the manipulation or tampering of the samples. It has not been suggested to PW-9 and PW-11 that samples were not properly preserved. The DNA report is scientific evidence. Such evidence cannot be discarded unless and until there is material on record to suggest the tampering or manipulation. The DNA report therefore, proves beyond doubt that the semen of the accused was found on the short pant of the victim. Similarly the semen stains was found on the half pant of the accused. This evidence, in my opinion, is sufficient to establish the ejaculation by the accused. This evidence, in my view, is sufficient to establish the involvement of the accused in the incident. The DNA evidence is sufficient to establish the

involvement of the accused in the incident as narrated by the victim. The accused on the basis of this evidence, cannot be given a complete clean chit.

14. As far as the evidentiary value of the DNA report is concerned, the Apex Court in the case of ***Mukesh and Another Vs. State (NCT of Delhi) and others*** reported at ***(2017) 6 SCC, 1*** has observed that DNA Technology as a part of Forensic Science and Scientific discipline not only provides guidance to investigation but also supplies the Court accurate information about tending features identification of criminals. After the amendment in the Criminal Procedure Code by the insertion of Section 53-A by Act 25 of 2005, DNA profiling has now become a part of the statutory scheme. It is held that the DNA report deserves to be accepted unless it is absolutely dented and for non-acceptance of the same, it is to be established that there had been no quality control or quality assurance. If the sampling is proper and if there is no evidence as to tampering of

samples, the DNA test report is to be accepted. In the case in hand, the prosecution has adduced the evidence with regard to the sampling, sealing and packing. There is evidence of dispatch of samples through the carrier to CA FSL, Nagpur. The sample was initially analysed by PW-11 in a Biological Section of DNA Department. The DNA analysis was carried out by PW-9. They have deposed about the proper packing and sealing of samples when the same were received in the lab. There evidence established the quality control and quality assurance, therefore, the DNA report cannot be discarded. The DNA report is the most important corroborative piece of evidence to establish the involvement of the accused in the crime.

15. As far as DNA profiling is concerned, the ultimate DNA report depends upon the quality control and quality assurance. In case of scientific evidence, greater care is required to be taken while collecting the said evidence by the Investigating Officer. Similarly, a great care is required to be

taken while preserving the samples. The dispatch of the samples must be at the earliest so as to rule out the allegation of manipulation and tampering with the sample. As and when the sample is received in the lab, the in-charge of the lab is required to take proper care for preservation of the sample so as to maintain its contents and purity. The accuracy of the result by and large depends upon the proper preservation of the sample. The witness from the lab must adduce the evidence as to the chain of the custody of the sample. Invariably the chain of the custody form is maintained. It is not out of place to mention that Medical Officer while collecting the sample for DNA analysis is required to take extra care. The chain from time of the collection of the sample till the final analysis of the sample must be established on the basis of the oral and contemporaneous documentary evidence. Such evidence must be sufficient to establish quality control and quality assurance. The DNA evidence is very crucial weapon in possession of the

prosecution, if it is available in a case. The role of the Court while recording the evidence is also equally important. The Court is required to be very careful while receiving the evidence. The Court shall take care to ensure that each and every fact deposed by the DNA Analyst is properly recorded.

16. In the backdrop of the above clinching evidence against the accused, the Court has to consider whether the offence of rape has been proved or the offence made out is the offence of an attempt to commit rape. For this purpose, it would be proper to appreciate the evidence of victim. It is not out of place to mention that at the time of the incident, she was five years old and at the time of her evidence, she was eight years. In her evidence, before the Court, she has narrated the incident. She has stated that the accused lied her on ground. She has stated that the accused pissed sticky substance on her person. She has stated that due to the act of accused her half pant become wet. She therefore started crying and returned

home. She has further stated that the accused has put his private part in her private part and on account of that she was having pain. It needs to be stated that this fact was not stated by her during the police investigation as well as at the time of recording her statement before the Magistrate under Section 164 of the Cr.P.C. This statement has been found on the omission from her 164 of Cr.P.C. statement. The evidence of the victim therefore, at the most could establish that the accused attempted to commit rape. The possibility of ejaculation while attempt to commit rape cannot be ruled out in this case. One important fact which has been noticed from her evidence is very vital. She has stated that her half pant was removed by the accused and while returning home she carried the half pant and kept it in bath room. If the accused had removed her half pant then there would not have been semen stains on her half pant. The story of the victim that the half pant was removed and that she had carried the half pant with

her and kept the said half pant in bath room appears to be unbelievable. The presence of the semen on her half pant indicates that while she was wearing half pant this ejaculation occurred and therefore, the semen was present on her half pant.

17. PW-2 the mother of the victim, on this point has stated that when the victim narrated the incident to her, she took the knickers from the hand of the victim. She found that it was wet. She has stated that she put it into bath room. There is nothing on record to suggest that before taking the victim to police station, the same knickers was put on by the victim. In my view, this important fact needs to be borne in mind while appreciating the evidence of (PW-1) victim and (PW-2) informant. The admissions given by PW-1 and PW-2 clearly suggest that before ejaculation the knickers was not removed. The accused seems to have attempted to commit the offence and in the process ejaculated. The mother of the victim has not stated that the victim put on the knickers and then she carried

her to the police station. If the evidence of removal of the knickers as stated by PW-1 and PW-2 is accepted as it is, then it would indicate that after coming back to home the knickers was kept into bath room and another knickers was worn by the victim and then they went to the Police Station. The evidence is silent about change of knickers by the victim before proceeding to the Police Station. This fact has not been clarified by the informant-PW-2 in her evidence.

18. Perusal of the evidence of the informant would show that there are vital omissions and inconsistencies in her evidence on the point of actual penetrative sexual assault. Her 164 Cr.P.C. statement was recorded by the Magistrate. In her 164 Cr.P.C. statement, she has not categorically stated that the victim told her that the accused committed sexual intercourse with her. The statement of PW-2 recorded by Magistrate at the most, would show that the accused indulged in some act with the victim. The act which was indulged into by the accused

stated in the 164 Cr.P.C. statement would constitute the offence of the attempt to commit rape and not the rape.

19. The evidence of the medical officer, if appreciated in *juxtaposition* with the evidence of PW-2 and PW-3, would show that it is not sufficient to establish the penetrative sexual assault. The DNA report can be made use to establish the involvement of the accused in this crime. The offence made out on a conjoint reading of the DNA report and the evidence of medical officer, victim and informant would show that it was not an offence of rape but an offence of attempt to commit rape.

20. In the facts and circumstances, I conclude that the learned Judge has failed to properly appreciate the evidence available on record. The prosecution has failed to prove the charge of rape. The evidence on record is sufficient to prove an attempt to commit rape punishable under Section 376 read

with Section 511 of the I.P.C. and Section 7 read with Section 8 of the POCSO Act. In view of this, the conviction for the offence of rape under Section 376(2)(i)(j) of the I.P.C. and Section 5(m) read with Section 6 of the POCSO, Act 2012 is required to be set aside. It is accordingly **set aside.**

21. As far as the sentence is concerned, learned Advocate for the appellant submitted that the accused has undergone the substantial part of the sentence. Learned advocate submitted that the minimum punishment provided under Section 376(1) is 10 years imprisonment and the maximum punishment may extend to imprisonment for life with fine. Learned advocate submitted that the offence of attempt to commit rape would, therefore, be punishable under Section 511 of the IPC and considering the minimum sentence of 10 years, provided under Section 376(1) of the IPC, for an offence of attempt to commit rape, one-half of 10 years imprisonment may be awarded as a sentence. In short, it is

submitted that for the offence of an attempt to commit rape, five years rigorous imprisonment would be just and proper. It is further submitted that the maximum punishment provided under Section 8 of the POCSO Act is five years imprisonment.

22. Learned APP and learned advocate for the victim submitted that considering the overt act proved against the accused, the sentence of ten years' rigorous imprisonment for an attempt to commit rape would be necessary. Learned APP and learned advocate for the victim submitted that considering the age of the victim in this crime, ten years imprisonment for this proved offence would be the proper punishment.

23. Admittedly, no separate sentence was awarded by the learned Judge for the proved offence under the POCSO Act. Learned Additional Sessions Judge sentenced the accused to suffer RI for 10 (ten) years for the offence punishable under Section 376(2)(i)(j) of the IPC and to pay fine of Rs.25,000/-

with the default stipulation. In my view, considering the proved offence of attempt to commit rape, it would not be proper to award ten years rigorous imprisonment. In the facts and circumstances, the sentence of rigorous imprisonment for five years, would meet the ends of justice.

24. Accordingly, the Criminal Appeal is partly allowed.

i] The judgment and order dated 19.12.2019, passed by learned Additional Sessions Judge-9, Nagpur, convicting the appellant for the offence punishable under Section 376(2)(i)(j) of the IPC and under Sections 5(m) punishable under Section 6 of the POCSO Act, is set aside.

ii] Accused - Iliyas Ahamad Abdul Hamid Qureshi is convicted for the offence punishable under Section 376 read with Section 511 of the IPC and for the offence under Section 7, punishable under Section 8 of the POCSO Act.

iii] The appellant is sentenced to suffer rigorous imprisonment for 5 (five) years for the offence punishable

under Section 376 read with Section 511 of the IPC. No separate sentence is awarded for the offence punishable under Section 8 of the POCSO Act.

iv] The sentence with regard to the fine and default sentence is maintained.

v] The appeal stands disposed of in the aforesaid terms.

25. The criminal appeal stands **disposed of,** accordingly.

(G. A. SANAP, J.)

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