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

**CRIMINAL APPEAL NO. 870 OF 2014
along with
CRIMINAL INTERIM APPLICATION NO. 1775 OF 2022
along with
CRIMINAL APPLICATION NO. 1460 OF 2019
along with
CRIMINAL INTERIM APPLICATION NO. 1646 OF 2019**

Aftab Mustaq Khan ..Appellant
vs.
The State of Maharashtra ..Respondents

Mr. Aniket Vagal a/w. Mr. Kunal Pednekar for the Appellant.
Mr. A.R. Kapadnis, APP for the Respondent – State.

**CORAM : PRASANNA B. VARALE &
N.R.BORKAR, JJ.**

**RESERVED ON : 28.09.2022.
PRONOUNCED ON : 06.10.2022.**

JUDGMENT (PER: N.R. BORKAR, J.)

1] This appeal takes an exception to the judgment and order dated 26 September 2014 passed by the learned Additional Sessions Judge, Greater Mumbai in Sessions Case No. 920 of 2013. By the impugned judgment and order, the trial court convicted the appellant for the offence punishable under Section 376 of the Indian Penal Code and sentenced to suffer Life Imprisonment and to pay fine of Rs.1000/- and in default of payment of fine to undergo further Rigorous Imprisonment for two months.

2. We have heard the learned counsel for the appellant and the learned APP for the respondent – State.

3. The learned counsel for the appellant submits that on the basis of evidence on record, the only offence which can be said to be proved against the appellant is the offence of attempt to commit rape. It is submitted that the trial court, therefore, erred in convicting the appellant for the offence of rape. The learned counsel for the appellant further submits that at the relevant time, the appellant was aged about 18 to 19 years and therefore, the trial court ought not to have imposed the punishment of life imprisonment.

4. On the other hand, the learned APP submits that on the basis of evidence on record, the trial court was justified in convicting the accused for the offence punishable under section 376 of the Indian Penal Code. It is submitted that on the date of incident the victim was 5 to 6 years old and therefore, the trial court was justified in imposing maximum punishment.

5. The trial to convict the appellant has relied upon the evidence of the victim. However, it appears that her statement under section 161 of the Code of Criminal Procedure, was not recorded. As the said point is not raised, we do not wish to delve into it.

6. We have perused the evidence of the victim. She deposed that on the day of incident i.e., on 11 May 2012, the appellant gave her One Rupee. He then took her to his shop. He closed the door. She was

wearing Kurti-Pyjama. The appellant removed her pyjama. He then removed his jeans pant. The appellant then put his private part on her private part. The trial court has recorded it in vernacular as '*milane laga*'. She deposed that when the appellant was doing something at the back side of his shop, she ran away from the place of incident and disclosed the incident to her parents.

7. After registration of the crime, the victim was medically examined. PW-7 Dr. Richa Bansal, who conducted medical examination of the victim has deposed that on 11 May 2012, the victim was brought to her for medical examination. PW-7 deposed that she did not notice any injury mark on her body. Victim's private parts were little reddish. Hymen was intact. Perusal of medical examination report at Exhibit-29 shows that opinion regarding penetrative intercourse was not given and it was reserved till receipt of reports of Forensic Science Laboratory (FSL). It appears that the prosecution has not made any endeavour to obtain the opinion of PW-7 after receipt of FSL reports.

8. The Hon'ble Supreme Court in ***Koppula Venkat Rao vs. State of Andhra Pradesh***¹ has held that the *sine qua non* of the offence of rape is penetration. Without penetration constitutes an attempt to commit rape and not actual rape. Definition of '*rape*' as contained in section 375 refers to '*sexual intercourse*' and the Explanation appended to the section provides that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

1 (2004) 3 SCC 602

9. In the present case, on the basis of evidence of the victim, it is difficult to conclude or infer that the victim was subjected to penetrative intercourse. During the medical examination, private parts of the victim were found to be little reddish. However, the opinion regarding penetrative intercourse was reserved till receipt of FSL report. However, as stated earlier the prosecution has not obtained the opinion of PW-7 after receipt of FSL reports. In absence of any evidence of penetration, in our view the conviction of the appellant will have to be altered to from the offence of rape to attempt to commit rape. In the result, the following order is passed.

ORDER

- a] Criminal Appeal is partly allowed.
- b] The conviction of the appellant is altered from section 376 of the I.P.C. to section 376 read with 511 of the I.P.C. and is sentenced to suffer Rigorous Imprisonment for 10 (ten) years;
- c] The impugned judgment and order of the trial court shall stand modified to the above extent;
- d] The sentence of fine is maintained;
- e] In view of disposal of main appeal, pending interim application (s) and criminal application(s), if any, do not survive and the same are also disposed of.

[N.R.BORKAR, J]

[PRASANNA B. VARALE, J.]