

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

**Reserved on 03.04.2025
Pronounced on 16.04.2025**

Crl A(S) No. 5/2020

Dinesh Kumar

.....Appellant(s)/Petitioner(s)

Through: Ms. Deepika Mahajan, Adv.
Mr. Atharv Mahajan, Adv.

vs

U. T. of Leh and Ladakh th. Police Station,
Leh

..... Respondent(s)

Through: Mr. Vishal Sharma, DSGI
Mr. Eishan Dadhichi, CGSC

Coram: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1. The appellant has challenged judgment dated 01.08.2019 passed by the learned Principal Sessions Judge, Leh Ladakh (hereinafter to be referred as the trial court), whereby the appellant has been convicted for offences under section 376 RPC and 323 RPC. Challenge has also been thrown to the order of sentence passed on the same day, whereby the appellant has been sentenced to undergo rigorous imprisonment for a period of eight years and a fine of Rs. 5,000/- for having committed offence under section 376 RPC and to imprisonment for a period of three months and a fine of Rs. 1000/- for having committed offence under section 323 RPC. In default of payment of fine, the appellant has been directed to undergo

further imprisonment of three months in respect of offence under section 376 RPC and for one month in proof of offence under section 323 RPC.

2. As per the prosecution case, on 23.06.2017, Lamberdar of Village Nimo telephonically informed the Police that a labourer (appellant herein) has attempted to commit rape upon a minor girl (Miss X). On receiving this information, FIR No. 44/2023 for offences under section 376 and 511 RPC came to be registered by the Police and investigation of the case was set into motion.
3. During the course of investigation, the victim girl was subjected to medical examination, which revealed that she had been subjected to sexual assault. Her clothes were seized and the appellant was arrested. The statements of witnesses were recorded and the appellant was subjected to medical examination. It was found after investigation of the case that the victim girl was enticed by the appellant to go with him whereafter, she took her to a deserted place where he tried to commit rape upon her, as a result of which, the victim girl received injuries. Thus, offences under section 376, 511 and 323 RPC were found established against the appellant and the challan was laid before the trial court.
4. The learned trial court vide order dated 21.07.2017 framed charges for offences under section 376/323 RPC against the appellant to which he pleaded not guilty and claimed to be tried. Accordingly, the prosecution was directed to lead evidence in support of the charges. The prosecution examined all the nine witnesses cited in the challan. After completion of the prosecution evidence, statement of the appellant/accused in terms of

section 342 Cr.P.C. was recorded by the learned trial court on 16.03.2019 in which he termed the case of the prosecution as false and stated that the parents of the victim girl were inimical towards him because drunken brawls had taken place between them. He further claimed that he had even narrated these incidents to some of the villagers. The appellant/accused, however, did not lead any evidence in defence.

5. The learned trial court after hearing the parties and after appreciation of evidence on record came to the conclusion that the charge framed against the appellant stands established beyond any reasonable doubt and accordingly in terms of the impugned judgment, he has been convicted of offences under sections 376 and 323 RPC.
6. The appellant has challenged the impugned judgment on the grounds that the same is based upon wrong appreciation of evidence. It has been contended that the learned trial court has overlooked the important aspects of the case, particularly the identity of the accused as he was not known to the victim or her family prior to the alleged occurrence. It has been contended that the appellant has been falsely implicated and in the absence of any medical evidence to show that the victim was subjected to sexual intercourse, it was not open to the learned trial court to record a conviction against the accused for offence under section 376 RPC. It has been further contended that the appellant has been wrongly charged for offence of rape when the case put up by the prosecution before the trial court was pertaining to attempt to rape.

7. I have heard learned counsel for the parties and perused the grounds of appeal, impugned judgment and the evidence led before the trial court.
8. The first and foremost ground for impugning the judgment of the learned trial court that has been advanced by the learned counsel for the appellant is that test identification parade of the appellant/accused has not been conducted and because the appellant was not previously known to the victim or her family members and because she has not named him in her statement recorded during investigation of the case, the identity of the alleged assailant has remained unsubstantiated in the present case.
9. A perusal of the evidence on record led by the prosecution before the trial court would reveal that assertion of the learned counsel for the appellant/accused that the appellant was not named by the victim during the course of investigation of the case, is correct. The victim, in her statement, recorded under section 164-A Cr.P.C. during investigation of the case has referred to the assailant as “Dilliwalla Uncle” and even her parents PWs Savita Thappa and Janak Thappa have in their statements recorded under section 164-A Cr.P.C. stated that their daughter (victim) narrated to them that she was assaulted by “Dilliwalla Uncle”. However, when we have a look at the statement of PW Janak Thappa, the father of the victim girl, recorded during trial of the case, he has clearly stated that he had previous acquaintance with the appellant/accused. He has stated that right from the date, he started working in Village Nimo, he knew the appellant/accused. He has also stated that on the day of occurrence, the appellant/accused came to their residence and he enquired about his

welfare, whereafter, he went away. The appellant in his statement recorded under section 342 Cr.P.C. has taken a stand that he had drunken brawls with the parents of the victim girl regarding which he had made complaints to the villagers.

10. Thus, there is enough material on record to conclusively prove that there was previous acquaintance between the appellant/accused and the family of the victim girl. The contention of the learned counsel for the appellant/accused that he was not known to the victim or her family members, is therefore, contrary to the evidence on record. On the contrary, the evidence on record clearly suggests that the appellant was known to the victim and her parents. The victim has, while making her statements before the court, clearly identified the appellant/accused as the person, who committed assault upon her. In these circumstances, there was hardly any requirement for the investigating agency to conduct the test investigation parade of the assailant as the identity of the assailant was clearly known to the victim and her parents. The contention of the learned counsel for the appellant is, therefore, without any substance.
11. The next contention that has been raised by the learned counsel for the appellant is that even as per the charge sheet, the appellant is alleged to have committed offence of attempt to rape, but the learned trial court has convicted the appellant for graver offence of rape without there being any evidence on record in this regard. It has been contended that the victim girl in her statement has not supported the story of rape and she has clearly stated in her cross examination that the appellant had only touched

her private part and he had not done anything else with her. On this basis, it is being contended that it was not open to the trial court to record conviction for offence under section 376 RPC against the appellant. Learned counsel for the appellant has also contended that even in the memo of charge, the learned trial court has only narrated the ingredients of offence of attempt to rape and therefore, conviction for offence of rape could not have been recorded against the appellant/accused.

12. In order to determine the merits of the aforesaid contention of the appellant, it would be apt to refer to the material evidence recorded during trial of the case.
13. The victim, in her statement, deposed that the appellant/accused had met him at Nimo when he was standing outside their house. She further stated that the appellant took her to a desolate place, where he was committed a dirty act upon her. She stated that the appellant bite on her cheeks and threw away her chappel into a nallah. She further stated that the appellant committed dirty act with her on her place of urination with his finger which caused pain to her and she cried. Thereafter, she was left by the appellant in the market and she started crying. She met her mother to whom she narrated that "Dilliwalla Uncle" had committed wrong act with her. She further stated that her mother and her father gave a beating to the appellant/accused and thereafter, she came back to her home, wherefrom, she was taken by the Police. She was subjected to medical examination and remained hospitalized for about four days.

14. In her cross examination, she has stated that she suffered injuries on her cheeks with a wood. She further stated that the appellant touched her place of urination with his hand. She was not beaten up by the appellant. She further stated that the appellant only touched her place of urination with his hand and did not do anything else.
15. It will also be profitable to refer to the statement of PW Dr. Padma Dolma, Consultant Gynecologist. She has stated that she examined the victim on 23.06.2017. She observed bite marks on her face. There was foul smell emitting from vagina of the victim. There were cuts on the vulva, mons-pubis and there was inflammation and tenderness on vulva and mons-pubis. She further stated that there was mild bleeding from the cuts and she had painful urination. As per the report of the Pathologist, there was no presence of spermatozoa. In her cross examination, the Doctor admitted that the injuries on the private part of a female, are also possible by impact of any physical object. She, however, stated that in the case of the victim, it is not so possible because foul smell was emitting from her vagina and she had also painful urination, which ruled out fall or slipping.
16. Statement of mother of the victim PW Sarita Thappa is also relevant in this regard. She has stated that on the day of the occurrence, when her daughter did not come back, she along with her husband started looking for her in the market. She spotted her in the market near the bridge and she saw her crying loudly with pajama in her hand. Her daughter was wearing chappale in one foot only. She brought her back to home where

she went to the toilet but while urinating, she experienced pain. When the witness enquired from her, the victim disclosed to her that “Dilliwalla Uncle” had bitten her cheeks and had committed dirty act with her. On hearing this, the witness set out and looked for the appellant/accused. She got hold of him with the help of her husband and they took her to Lamberdar who informed the Police. In her cross examination, she has stated that she did not witness the occurrence herself. She further stated that her daughter told her that “Dilliwalla Uncle” had committed wrong act with her. The statement of father of the victim PW Janak Thappa is also on similar lines.

17. The contention of learned counsel for the appellant the fact that the victim has in her cross examination admitted that the appellant had only touched her private part and done nothing else, shows that it is not a case of rape but it is a case of outraging modesty of the victim or at worst a case of attempt to rape, appears to be attractive but in the present case, we have to consider the fact that the victim was only four years old at the relevant time, therefore, her statement has to be appreciated in the light of the attending circumstances. Having regard to tender age of the victim, who was only six years old at the time when her statement was recorded, she cannot be expected to depose with perfection and narrate minute details of the incident. A child witness is vulnerable and susceptible to be swayed by what others tell and his/her perception of the things is different from adults. There are bound to be some imperfections and contradictions in her statement having regard to her tender age. Some aspects of the matter,

which appear very vital to an adult witness, may not appear to be so to a child witness. Therefore, while assessing and evaluating the statement of a child witness, a different approach has to be adopted by a Court.

18. A Division Bench of the High Court of Delhi has, in the case of **State vs Sujeet Kumar, 2014 SCC Online Del 1952**, while discussing the approach that is required to be adopted by a Court in appreciating the testimony of a child witness, observed as under:

“48. It is trite that the children have been accorded special treatment by the legislature (of various countries) and courts because of their special needs. The environment of a court room is unfamiliar and definitely intimidating to a child who is required to testify as a witness. The trauma faced by a child witness where a child witness is a victim as well is further aggravated. This important subject has received attention of the United Nations as well which has framed the 'United Nations Guidelines on Justice in matters involving Child Victims and Witnesses of Crime 2005'. The UN guidelines prescribe that the children are particularly vulnerable and need special protection, assistance and support appropriate to their age, level of maturity and unique needs in order to prevent further hardship and trauma that may result from their participation in the criminal justice process. The UN guidelines further prescribe that female child witness is more vulnerable than the male child witness and may face discrimination at all stages of the justice system. The UN guidelines stresses the importance of ensuring dignity and physical, mental and moral integrity of the child witness; the justice process should be sensitive to child's age, wishes, understanding, gender, sexual orientation, ethic, cultural, religious, linguistic and social background, caste, socio- economic condition as well as special needs of the child including health, ability and capacities.

49. The assessment of competence of a child witness is not an easy task and fraught with various difficulties, some of which are being enumerated herein under:-

- A court operates in an atmosphere which is intended to be imposing. It is an atmosphere which is foreign to a child. The child has to testify in the presence of accused person and other strangers including the presiding judicial officer, the counsel of the accused, the prosecutor and court officials. The testimony of child is recorded in an atmosphere which is probably bewildering and frightening to the child. Unless appropriately adapted to a child, the

effect of the courtroom atmosphere on the child may be to reduce the child to a state of terrified silence. Instances of children who have been so frightened by being introduced into the alien atmosphere of the courtroom they refuse to say anything are not unknown.

- The child is required to give evidence in the presence of the accused. The accused will be a few paces from the child, and will invariably be staring at the child while the child gives evidence. This scares the child to no lengths and he often thinks that he would be punished for speaking the truth. In fact, children worry about seeking the accused again. The research shows that this is the most common and intense court-related worry among testifying children.
 - Children worry about not being believed while testifying, especially the children who are victims of sexual abuse. The research on children who are victims of sexual abuse shows that fear of disbelief is a major impediment to disclosure by children. Children assume that the word of an adult will always be taken over the word of a child.
 - Children worry about people finding about the offence while testifying. A courtroom is a public place and few witnesses relish the public exposure that testifying entails. Children are no different. Children worry about getting yelled at, getting into trouble or being hurt while testifying.
 - Children worry about getting their facts mixed up or forgetting things while testifying.
 - Children may be afraid or embarrassed to say what happened. The content of a child's testimony may involve something the child is reluctant to say out loud, perhaps because it involves body parts, sexual acts or the need to repeat rude words or bad language someone said to them. Children worry about repercussions and retaliation by or against their family while testifying. It is normal for witnesses to worry about retaliation for testifying. Children are no different, except they might feel more vulnerable than an adult would.
- Since children see the world differently from adults, some details which may appear to be important to adults like time and place may be missing from the recollection of children.
- Children see adults as authority figures and will therefore accede to what they say to them.
 - Young children can be susceptible under specific conditions. These include: when they are asked about personal events that happened a substantial period of time ago, with no 'refresher' interview in the interim; when they are questioned by a biased interviewer who pursues a hypothesis single- mindedly.
 - Very young children (those aged between three and under) have difficulty understanding that scale models can represent real objects and are confused about their bodies that require them to represent touching on anatomical bodies.
 - Children can assign different meanings to words than those generally understood by adults. For example, 'touch'

often means only by hand to the children. 'Private part' often means anything under clothing to the children. Children often use words without knowing what they mean or have different understanding from adults as to meaning of a word. For example, a child could use the word 'glue' to mean semen.

- Some concepts are developmentally difficult for children to understand such as 'behind', 'in front of', 'above', 'beneath' etc. Children are reluctant to relate their sad and often sordid experiences to several different people. As a result, repetition tends to heighten the sense of shame and guilt of children as to what happened to them. Children have special difficulty in identifying the source of their beliefs, so if false information is introduced, they will confuse it with the event.

- It is not only cognitive abilities, memory and social and emotional factors that affect children's abilities to give detailed and reliable statements that can be used in child abuse prosecutions. Their ability to understand and interpret the questions put to them is also crucial."

- 19 In light of the aforesaid analysis of law with regard to assessment of statement made by a child witness, it is clear that a Court has to take into account the fact that a child witness is vulnerable and susceptible under imposing atmosphere which a courtroom presents.
20. It is to be noted that at the time when the statement of the victim in the present case was recorded, there were no vulnerable witness deposition facilities available in this part of the country. Therefore, the victim must have deposed before the trial court in the same atmosphere as an adult witness disposes before the court. She must have also faced the imposing personality of the appellant/accused at the time of her deposition. In these circumstances, the fact that the victim girl in her cross examinations, has stated that the appellant had only touched her private part and not done anything else, may not be of much consequence, because in her examination in chief, she has clearly stated that the appellant did dirty act

on her private part with his finger which resulted in pain to her. This statement of the victim is corroborated by the medical evidence and the Doctor has in clear cut terms deposed that there were cuts on the vulva, mons-pubic of the victim. She had inflammation and tenderness on vulva and mons-pubis and there was mild bleeding from the cuts. The Doctor has also stated that the victim had painful urination and foul smell was emitting from her vagina. The Doctor has further stated that the injuries to the private part of the victim could not have been possible by fall as there was foul smell emitting from the private part of the victim and she had painful urination. Even the mother of the victim has made a statement on similar lines.

21. Thus, without any doubt, there is evidence on record to suggest that some foreign object was inserted inside the vagina of the victim and the evidence on record clearly suggests that it is the appellant who inserted his finger inside the vagina of the victim. It is in the light of this evidence that the statement of the victim is to be appreciated. Thus, there is no reason to discard the finding of the learned trial court that the appellant had inserted his finger in the private part of the victim.
22. That takes us to the question as to whether the appellant could have been convicted of offence under section 376 RPC when in the memo of charges, framed by the learned trial court, only ingredients of offence of attempt to rape have been mentioned, though the appellant has been charged with offence under section 376 RPC. In this context if we have a look at the provisions contained in section 225 of the J&K Cr.P.C. which

is in *para materia* with section 215 of the Central Cr.P.C, it provides that an error in stating offence or the particulars required to be stated in the charge, cannot be recorded as material unless the accused was, in fact, misled by such error or omission and it has occasioned a failure of justice.

23. The Supreme Court has, in the case of **Main Pal vs. State of Haryana, (2010) 10 SCC 130**, while considering the provisions contained in sections 212, 215, and 464 of the Central Cr.P.C. laid down the following principles with regard to the matters relating to error in framing of charge:

(i) The object of framing a charge is to enable an accused to have a clear idea of what he is being tried for and of the essential facts that he has to meet. The charge must also contain the particulars of date, time, place and person against whom the offence was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(ii) The accused is entitled to know with certainty and accuracy, the exact nature of the charge against him, and unless he has such knowledge, his defence will be prejudiced. Where an accused is charged with having committed offence against one person but on the evidence led, he is convicted for committing offence against another person, without a charge being framed in respect of it, the accused will be prejudiced, resulting in a failure of justice. But there will be no prejudice or failure of justice where there was an error in the charge and the accused was aware of the error. Such knowledge can be inferred from the defence, that is, if the defence of the accused showed that he was defending himself against the real and actual charge and not the erroneous charge.

(iii) In judging a question of prejudice, as of guilt, the courts must act with a broad vision and look to the substance and not to the technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself.

24. From the foregoing analysis of law on the subject, it is clear that when there is an error in framing of charge, the Court has to see whether any

prejudice has been caused to the accused/convict due to the error or irregularity in framing of a charge. In adjudging the question of prejudice on account of error in framing of charge or omission in framing of a charge, it has to be seen whether the same has led to prejudice or substantial likelihood of it to the accused and whether objection to this effect has been raised by the convict at any stage of the trial.

25. Adverting to the facts to the present case, there is no doubt to the fact that the particulars of the charge mentioned in the memo of charge against the appellant disclose ingredients of offence of attempt of rape and not the offence of rape but the learned trial court has clearly mentioned that the appellant has been charged for offence under section 376 RPC. Therefore, it was clear to the appellant that he was being tried for offence under section 376 RPC, even though the learned trial court has committed error in giving details of the particulars of the charge in the memo of charge. The record of the trial court shows that the appellant has at no stage of the trial raised any objection in this regard and has not projected this ground even in the appeal before this Court. It was only during the course of arguments that the issue was agitated by the learned counsel for the appellant. The record clearly shows that the appellant was all along aware of the fact that he was being tried for offence of rape and not for offence of attempt to rape, as such, it cannot be stated that the appellant was subjected to any prejudice while making his defence to the charge for which he was being tried. The contention of the learned counsel for the appellant in this regard, at this belated stage, cannot be accepted.

26. For what has been discussed hereinbefore, I do not find any ground to interfere in the judgment rendered by the learned trial court. The instant appeal lacks merit and is dismissed accordingly. The appellant, who is in jail, shall serve the balance period of sentence.

(SANJAY DHAR)
JUDGE

Jammu:
16.04.2025
Rakesh PS

Whether the order is speaking: Yes/Nb
Whether the order is reportable: Yes/Nb

