**Ex. No.17**

**IN THE COURT OF ADDL. SESSIONS JUDGE-XTH, KARACHI WEST**

**BEFORE:- (IRSHAD HUSSAIN)(J)**

S.C. No. 1706/2018

The State

Versus

Abdul Wadood S/o Khaista Bacha …………………………………………………….Accused

                             Offence under section 376/511 PPC

                             (Cr. No. 228/2018 of P.S Peerabad, Karachi)

**MS. ZAINAB BIBI, COUNSEL FOR ACCUSED**

**MS. ASIYA MUNEER, COUNSEL FOR COMPLAINANT**

**MR AFTAB AHMED, ADPP FOR THE STATE**

**J U D G M E N T**

**29.04.2021**

1.       The above named accused was sent up by S.H.O of P.S. Peerabad, Karachi West to face his trial, for offence punishable under section 376/511 PPC bearing crime No.228/2018 registered at P.S Peerabad, Karachi West.

2.       The brief facts of prosecution case divulged in the F.I.R lodged by complainant Muhammad Rafique S/o Sain Muhammad are that on 29.06.2018, he had went for labor work and at about 1300 hours, his daughter Tahira aged five was playing in the street, in the meantime one Abdul Wadood S/o Khaista, who was residing in building Akbar Khan taken away his daughter in the room of his house. It is further narrated that where Abdul Wadood had forcibly committed Zina with her as such she was weeping came at her home and she disclosed to her elder sister Saira aged nine years and her mother/his wife that the Baba who was residing infront of his house had forcibly taken away her in his house, where he put off her Shalwar and fell asleep on top of her and he put his penis inside her vagina and had committed Zina with her. It is further narrated that from the vagina of victim, the blood was oozing as such his wife Gulshan had shifted the victim at private clinic, where doctor had verified that Zina was committed upon her while due to fear/honor his wife did not disclose about the incident to him but from two days, his wife was disturbed, due to which he asked her about the reason, she verified the incident and after consultation he lodged the present FIR. Hence, present FIR. Police after usual investigation submitted challan in the Court.

3.       The necessary documents were supplied to the accused vide receipt at Ex.1.

4.       Thereafter a formal charge was framed against the accused at Ex.2, to which he pleaded not guilty to the charge and claimed to be tried vide his plea at Ex.2/A.

5.       To just strengthened its case, the prosecution has examined his witnesses as P.W-1, ASI Alam Zaib Ex.03, who produced Qaimi entry at Ex.03/A and FIR at Ex.03/B, P.W-02, victim Tahira at Ex.04, she produced her statement recorded U/s 164 Cr.P.C at Ex.04/A, P.W-03, complainant Muhammad Rafique at Ex.05, who produced memo of site inspection at Ex.05/A, memo of arrest at Ex.05/B, P.W-04, Muhammad Fayaz at Ex.06, P.W-05, Mst. Gulshan at Ex.07, P.W-06, Dr. Sumiya Sayed at Ex.08, she produced police letter at Ex.08/A and MLC No. 31/2018 at Ex.08/B, final medical report at Ex.08/C, P.W-07, SIP Daryaman at Ex.09, who produced Roznamcha entry No.33 at Ex.09/A, statement at Ex.09/B, entry No.43 at Ex.09/C, letter dated 04.07.2018 at Ex.09/D, entry No.15 at Ex.09/E, entry No.18 at Ex.09/F, notice U/s 160 Cr.P.C at Ex.09/G, statement of victim recorded U/s 164 Cr.P.C at Ex.09/H, letter dated 06.07.2018 at Ex.09/I report at Ex.09/J, P.W-08, Dr. Muhammad Arif at Ex.11, who produced ML No.305/2018 at Ex.11/A, PW-09 ASI Sajjad Ahmed at Ex.12, who produced entry No.30 at Ex.12/A, letter at Ex.12/B, TCS receipt at Ex.12/C, DNA and Chemical reports at Ex.12/D and Ex.12/E, PW-10 Shahbaz Ahmed Sheikh at Ex.14, who produced police application at Ex.14/A. Thereafter, learned ADPP for the state closed the side of the prosecution vide her statement at Ex.15.

6.       The statement of accused was recorded under section 342 Cr.P.C at Ex.16 wherein he denied the allegations levelled against him and contended that he is innocent and has falsely been implicated in this case by complainant party. However, accused did not opt to examine himself on oath nor want to lead any evidence in his defense to disprove the allegations levelled against him by the prosecution.

7.       My points for determination are as under:-

**POINTS FOR DETERMINATION**

1.    Whether on 29.06.2018, at about 1300 hours, at Inside house building Akbar Khan Rabbani Muhalla Near Rabbani Masjid Frontier Colony No.3, Orangi Town, Karachi, the accused Abdul Wadood S/o Khaista Bacha had attempted to commit offence of rape/zina with Baby Tahira Daughter of Complainant Muhamamd Rafique, aged about 05 years?

2.    What offence, if any, has been committed by the accused?

8.       I have heard the learned counsel for accused and learned ADPP appearing on behalf of the State.

9.       The learned counsel for the accused mainly contended that the accused is innocent and has falsely been implicated in this case by parents of the victim as the accused had given loan to the parents of the victim but despite returning the same, the parents have given reward to the accused by involving him in false FIR. She has also contended that investigating officer has acted with malafide intention. She has also contended that FIR was lodged after the delay of 04 days on the basis of hearsay evidence of victim, who was fully tutored by the parents. She has also contended that the evidence of victim is not trustworthy and confidence inspiring as she has only four years of age according to the contents of FIR and was unable to disclose the date and time of the alleged incident. She has also contended that the parents of victim has not produced any tenancy agreement of themselves and as well as of accused which shows that the both the parties were residing in the same building where offence was taken place. She also contended that parents of victim has not produced any record related to the private doctor/clinic. She has also contended that the DNA report is also negative. She has also contended that mashir of site inspection is not the locally resident and even not a single witness of the same area was examined by the I.O. She has also contended that the prosecution has failed to prove the prosecution case against the accused beyond reasonable shadow of doubt as so many doubts and major contradictions are appearing in the prosecution case as suggested by her herein above and therefore, accused is entitled for such benefits of doubt. Lastly, she prayed for acquittal of accused in the great interest of the justice. In support of her contentions, she relied upon the case laws cited as 2020 P.Cr.L.J Note 10, 2020 P.Cr.L.J 895.

10.     On the other hand, learned counsel for the complainant has mainly contended that the parents of victim are illiterate persons and when they came to know about attempt of rape through private doctor then they reported the matter to the police. She has also contended that victim herself identified the accused and fully implicated before her parents, before learned Magistrate during recording her statement U/s. 164 Cr.P.C, before MLO and as well as before this Court. She has also contended that parents of victim have no enmity with the  accused to falsely implicate him with this case where their family honor is also involved. She has also contended that all the prosecution witnesses were cross examined at length by the learned counsel for the accused but their evidence remained unshaky and unshattered. She has also contended that no doubt that DNA report is in negative but according to the case law cited as PLD 2020 S.C 313 medical evidence not a requirement of law. Lastly, she prayed that since prosecution has proved the case against the accused beyond any reasonable doubt, therefore, accused is not entitled any leniency and liable to be convicted according to law.

11.     I have given due consideration to the arguments advanced by the learned counsel for accused, learned ADPP for the State  and perused the entire evidence produced by the prosecution as well as relevant record.

12.     My findings coupled with reasons on the above points are as under:

**F I N D I N G S.**

Point No.1-------------------------- Proved.

Point No.2--------------------------Accused is convicted U/s. 265-H(ii)

Cr.P.C. and sentenced to rigorous imprisonment for five (05) years and he is also liable to pay fine of Rs. 100,000/- (one  Hundred Thousand Rupees) for the offence punishable under section 376 PPC R/w 511 PPC and in case of default of payment of fine he will further suffer SI for the period of 6 months.

**R E A S O N S**

**POINT NO.1**

13.     In order to prove its case, the prosecution has examined as many as ten witnesses. The allegation against above named accused is that he made an attempt to commit rape of minor baby Tahira aged about 05 years.

14.     The case of prosecution opens with the deposition of Duty officer/ASI Alam Zaib, was examined as P.W-01 at Ex. 03. He deposed that “on 02.07.2008, he was posted at P.S Peerabad as Duty Officer. At about 1900 hours, complainant Muhammad Rafique appeared at P.S and as per instruction of complainant and on his statement he lodged the instant FIR, which he produced at Ex. 03/B and thereafter, investigation was handed over to SI.O”. He was cross examined by the learned counsel for the accused.

15.     During the cross he admitted that the incident of this crime was disclosed to him as dated 29.06.2018. He admitted that prior to lodging the FIR of this incident he did not move any written application of this incident. He deposed that he lodged this FIR on his oral statement. He admitted that at the time of lodging the FIR the accused was not together with complainant”.

16.     After that, prosecution has examined victim Baby Tahira as P.W-02 at Ex. 04. The entire case of prosecution revolved around its star witness/alleged victim Tahira. The victim was confident enough when she appeared into witness box and has categorically implicated the present accused and fully supported the case of prosecution. She deposed that she was standing outside her house and playing that one uncle namely Wadood (accused) called her, and took off her shalwar as well as he (accused) took off her shalwar and thereafter made her lie down on charpai and he (accused) Abdul Wadood slept over her. That (accused) Abdul Wadood put cloth on her mouth. Accused Abdul Wadood told her not to tell about this incident to her mother otherwise he would kill her. However she disclosed the said incident to her sister Sania, she told her mother. Her father lodged the FIR and she disclosed the said incident to police. She was also taken to the hospital, where the doctor (WMLO) examined/checked her. Prior to this she also came in Court and recorded her statement disclosing the whole incident. She produced her statement U/s 164 Cr.P.C and the contents of her statement recorded U/s. 164, Cr.P.C and the present statement are almost identical and proved the guilt of the accused beyond any shadow of doubt for she has fully implicated him and her statement remained unshakey and unshattered. She had also identified the accused when she had appeared before learned Judicial Magistrate on 07.07.2018 and she had also identified the accused when she appeared before the trial Court on 01.10.2019. She was also cross examined by the learned counsel for the accused.

17.     During the cross she deposed that she doesn’t remember date and month of this incident took place. She was called by accused Abdul Wadood at 01:00 pm. She went to the hospital alongwith her mother after this committing Ziati, with her. She admitted that she doesn’t remember date and time visiting hospital. She admitted that when she visited to the hospital alongwith her mother police official were available there. She doesn’t remember the name of police official. She was taken to the police station by her father. She admitted that she doesn’t remember date and time visiting police station alongwith her father. She doesn’t remember the name of hospital. She denied that her mother and Wadood (accused) wife having visiting terms. She admitted that on the day of incident she was playing outside the house alongwith her minor sister. She denied that accused resides alongwith his children in his house. she denied that  in her statement U/s 164 Cr.P.C she did not mention that accused Abdul Wadood children was not present in his/accused house. She admitted that accused Abdul Wadood is a neighbor. She denied that prior to said incident she used to go at accused house and he used to give her sweets. There is no dispute took place between her mother and Abdul Wadood wife. When the said incident took place thereafter her mother called Wadood wife. She admitted that on the ground floor land lord reside and the upper floor was resides, house of accused is situated near my house. She admitted that she was conscious. She deposed that after the said incident she was conscious. She denied that no incident took place. She denied she deposed falsely. She denied that she is 5 and half year old. She deposed that she is 7 years old.

18.     The testimony of victim/baby Tahira and the medical evidence is further supported by P.W Complainant Muhammad Rafique, who is father of victim and examined by prosecution as P.W-03 at Ex. 05. He deposed that on 29.09.2018, he was present at his work and he came back from work at home, about 06:00 pm to 07:00 pm. His wife was worried but she did not disclose him anything. Thereafter on next day he left for work in the morning, when he came back home from work then his wife disclosed him that their neighbor namely Abdul Wadood called out daughter namely Tahira at his home and committed Zina with her. That victim/baby Tahira disclosed the said incident to her elder sister, who disclosed to her mother (his wife). He further inquired to his wife that why she could not informed me about the said incident yesterday, on which she disclosed that she conducted medical checkup of victim and thereafter informed to him. Then he went to police to report the said incident on 04.10.2018 again witness deposed that matter was reported on 02.10.2018. Then I.O visited place of incident and prepared memo of site inspection which he produced at Ex.5/A. On 14.10.2018 in front of Rehmani Masjid Frontier Colony No.3, the accused was arrested on his pointation by the police. He produced memo of arrest at Ex.5/B I.O recorded his statement U/s 161 Cr.P.C. He rightly identified the accused and said that the accused present in the Court is same. He was cross examined in length by the learned counsel for the accused.

19.     During the cross he deposed that he has 4 children ages, in 10 years, 5 years, 4 years, and 1 year. The victim Tahira is her second child. He admitted that he is residing in a rented house sitaut;ed in a building with reference to som other. Previously he was residing some other address. He has no submitted any tenancy agreement at PS. He deposed that he has submitted his CNIC with the landlord. He does not remember the name of the landlord. He denied that that he does not know the landlord. Thereafter rooms in a building which are on rent. He admitted that accused Wadood reside in one room on rent. He admitted that the accused has major sons. He has seen two sons as they coming in court. He admitted that accused has a wife also. He admitted that wife of accused and his wife have talking terms with each other.He admitted that said incident was taken placed on 29.006.2018 and FIR was lodged on 02.07.2018. He wife took the victim Tahira at private clinic.  He does not remember the name of private clinic. He cannot produce any letter of private doctor. He denied that his wife did not take victim Tahira to any private doctor or clinic. He admitted that at the time of alleged incident her daughter/victim was playing in the gali with her elder sister. He deposed that her elder sister went inside the house while victim was alone in the street.  He deposed that at the time of arrest of accused no area Nazim was with him. He denied that accused lived in one room house. He denied that accused was alongwith his sons and wife on the day of alleged incident. He deposed that on the day of alleged incident his family was not available. He denied that he is habitual of lodging false FIR.

20.     In addition to above, the prosecution has examined Muhammad Fayyaz as P.W-04 at Ex. 06. The said witness was hearsay witness and also mashir of memo of site inspection. The said witness has also fully supported the prosecution case to the extent of memo of site inspection. He was cross examined in length by the learned counsel for the accused.

21.     During the cross he admitted his address of KPK has been mentioned in his CNIC. He  does not  know the address of place of incident but he  knows the place. The Nazim and Muhalla people were not present at the time of site inspection. When they  went to the place of incident the lock of the door was opened by the police. He admitted that  accused was not present at the time of site inspection. He denied that he was  called by the complainant from his village as nobody was giving the evidence in this case.

22.     In addition to the father, Mst. Gulshan, who is mother of victim was examined as P.W-05 at Ex. 07. She is also supported the version of victim and she has further clarified the circumstances which had caused the victim. She deposed that On 29.06.2018, her two daughters and one son were playing outside of house in the street at 01:00 pm. The accused called her daughter Tahira aged about 5 years in his house and asked her for a glass of water from cooler lying in his house. After some time her daughter returned back while weeping in the house and disclosed her that accused put off her shalwar and his own shalwar and put a blanket on her face then he committed Zina with her. He took her daughter to lady doctor. His husband was not present in the house. After two days, He disclosed these facts to her husband. Thereafter, her husband went to PS Pirabad where the FIR was lodged. The police referred her daughter to Civil Hospital for proper medical examination. WMLO issued medical certificate of her daughter. Her statement U/s 161 Cr.P.C was recorded. She also identified the accused in open court being the same accused. She was also cross examined in length by the learned counsel for the accused.

23.     During the cross  she deposed that she  had shifted in the house where incident took place prior to one week of the incident and the accused was already residing in our neighbor house. She admitted that her house is  consisted at one room as well as house of accused was also consisted upon one room. She admitted that  accused was residing in the said house alongwith his four sons and one wife. She deposed that  after the incident, she called wife of accused and informed her that in her absence, the incident had taken place. She  disclosed the fact of incident to the wife of accused on next day of incident. She admitted that she has  not produced any medical slip of private hospital of her daughter before this Court. She admitted that after four days police took her daughter to private hospital who advised them  to take her  daughter to government hospital. The police was alongwith them. She admitted that she has  not seen this incident with her own eyes. She deposed that  her  daughter returned back while weeping. She admitted that there was no mark of injury on the face of her daughter. She admitted that the peoples of locality are not witnesses in this case. She denied that  prior to this incident, they  also levelled allegation of Zina with her elder daughter against another person, while they  were residing in another house. She denied that  they used to change the house after every month. She denied that accused Wadood had given loan of Rs.5000/- to them. She denied that  they  had given reward to accused for his good deed with them  by lodging this FIR. She denied that  she deposed  falsely before this Court.

24.     The prosecution has examined WMLO Dr. Sammiya Syed as P.W-06 at Ex. 08. She deposed that on 03.07.2018, she was posted as Senior Women Medico Legal Officer at Civil Hospital Karachi. On that day, at 12:30 pm SIP Daryaman brought a 4 years old girl Tahira D/o Muhammad Rafique with police letter from PS Peerabad which she produce at Ex.8/A. She obtained her affirm consent on the original MLC by getting her RTI. As per the history provided that she was subjected to rape as alleged on 29.06.2018 around 01:00 pm. Her height was 3 feet 5 inches, weight was 11 kg and teeth 6/6, 6/6, she has not attained minor try and her breast were undeveloped. She established her mark of identification as mole on left arm near deltoid. She observed the following marks of violence on her body.

1.       Abraded contusion on lower back with heaped up epithelium towards coccyx measuring 2. cm into 1 cm with radish brown scrape formation

2.       Side losing on right shoulder, interiorly measuring 1 cm into 1 cm radish. Note: there was gape of three days between date of incident and his examination”.

3.       She had changed her cloth of incident and taken a bath with poor hygiene and passed urine and stool and washed her private parts.

**PER VAGINAL EXAMINATION**

          External Genitalia was radish with loosing around introits. Pubic hair absent. Vestibule and Vulva were congested and Tanda. Hymen was not visualized there was no bleeding and discharged P/Voluntarily says. As per statement of girl, she was held down on Charpai while the accused forced and or tried to force his penile organ into her. She further deposed that she made two vaginal swabs both of chemical examine and DNA and also collected blood sample of baby Tahira In EDTA. She of the opinion on the basis of clinical examination, victim Tahira has been subjected to an attempt of rape. She prepared MLC No.31/2018 which she produced. She also issued final report and as per final report she received a chemical examiner report and DNA report from I.O. On 08.08.2019, as per report of chemical examiner vide lab No.12150/51 dated 24.07.2018, “human sperm and human blood was deducted in the vaginal swabs of Mst. Tahira”. She further deposed that  sexual assault is herby confirmed. As per DNA report dated 04.12.2018, the accused Abdul Wadood S/o Khaista Bacha is not the contributor of human male epithelial remains found in the vaginal swabs sample of girl. The vaginal swabs do not contain any semen’s stain/sperm fraction” she produced final medical report at Ex.8/C. She was  cross examined by the learned counsel for the accused.

25.     During the cross she admitted that there was gape of three days in medical examination and incident. The letter she received from police was dated 2.7.2018. She admitted that  epithelial tissue obtained from vaginal swabs of victim is not matching with the accused Abdul Wadood”.

26.     In further support of its case, the prosecution has also examined MLO Dr. Muhammad Arif as P.W-08 at Ex. 11, who was performed potency test of accused Abdul Wadood and produced his report as ML No. 305/2018 at Ex. 11/A. He opined that the accused was potent and capable of sexual intercourse. He was also cross examined by the learned counsel for the accused.

27.     During the cross he deposed that he mentioned the date in MLC as told to him  by the accused himself”.

28.     Thereafter, prosecution has examined first I.O of the case namely SIP Daryaman as P.W-07 at Ex. 09. He deposed that on 02.07.2018, he was posted at P.S Mominabad as an Investigation Officer. He received the investigation in crime No. 228/2018, U/S 376 PPC of P.S Mominabad under the instructions of SIO. He perused the contents of FIR. The complainant and the victim girl were present at the police station as such he along with them went at Abbasi Shaheed Hospital. He produced departure entry No. 33 at Ex. 8/A”. He further deposed that “the MLO present at Abbasi Shaheed Hospital informed him that no lady MLO was posted at Abbasi Shaheed Hospital as such he advised to take the victim at the office of police surgeon. The office of police surgeon was closed due to evening as such he along with complainant and victim raided at the building of accused and found his portion locked. The accused was not present as such he called the landlord of the building and the key was with him as such the door was opened by him. The house was vacant. He inspected the place of incident and prepared the memo of site inspection. He obtained the signatures of mashirs on such memo. He also recorded the statement of witnesses U/S 161 Cr.P.C. Thereafter, he returned back at P.S while the minor girl and her father went to their house. In the meantime, he had served the notice U/S 160 Cr.P.C to the complainant for his appearance on next day at hospital along with minor. He produced such statement at Ex. 8/B. He also produced the Roznamcha entry No. 43 on his arrival back at P.S at Ex. 8/C”. He further deposed that “on next day i.e 03.07.2018, the complainant and the victim arrived at Police Surgeon Office for medical of minor. He had got conducted the medical examination of the minor through lady MLO. The WMLO handed over the samples for DNA and chemical analysis. The WMLO had also instructed that firstly the report of chemical examiner be submitted to her and if she found it necessary then she would recommend to conduct the DNA. On 04.07.2018, He submitted the sample with chemical examiner vide letter dated: 04.07.2018, at Ex. 8/D.  On the same day, he was busy in search of accused and had left the P.S by departure entry No. 15, which entry he produce at Ex. 8/E. During search of accused, on pointation of complainant, he arrested the accused from Rubani Masjid, Frontier Colony. He prepared the memo of arrest of accused in presence of mashir. Thereafter, he brought the accused at P.S vide Roznamcha entry No. 18, which entry he produce at Ex. 8/F. He obtained the remand of the accused and then interrogated him. He also obtained time for recording of statement of victim before concerned Judicial Magistrate and had also served notice to accused U/S 160 Cr.P.C, which notice he produced at Ex. 8/G. He also produce the letter submitted with concerned Judicial Magistrate for recording of statement of victim U/S 164 Cr.P.C at Ex. 8/H. The accused was also produced for his medical examination at Qatar Hospital and he had submitted the request to MLO vide letter dated: 06.07.2018, which letter he produced at Ex. 8/I. He obtained medical report from Qatar Hospital, which report he produced at Ex. 8/J. He further deposed that “on 07.07.2018, the accused was produced before concerned Judicial Magistrate, where statement of victim U/S 164 Cr.P.C was recorded.  On 09.07.2018, the accused was remanded to Judicial Custody. Since then, he had not received the report from chemical examiner as such he submitted letter U/S 168 Cr.P.C to High Ups and thereafter he had proceeded for his Departmental Upper Course. The rest of the investigation was carried by ASI Sajjad”. He rightly identified the accused in open court.  He was cross examined by the learned counsel for the accused.

29.     During the cross he  admitted that he has deposed in his chief that he was posted at P.S Mominabad, further say since he has  most of the time remained posted at P.S Mominabad so he mistakenly stated so, infact he was posted at P.S Peerabad. He produced the entire record pertaining to P.S Peerabad and in his chief. He  did not utter that he was posted at P.S Peerabad. He denied that he conducted the entire proceedings at P.S Mominabad. The incident pertains to 29.06.2018 and the same was reported on 02.07.2018. No any application was moved soon after the incident by the complainant. He denied that  the complainant party was not interested in further proceedings, further says upon their interest he carried out the proceedings. P.W Fayaz is the real brother of complainant. He denied that the accused was arrested from his house. He denied that the victim girl could not speak and identify the things. He deposed that victim could understand and recognized the things as she was aged 5 years. The girl was having no apparent issue when she had appeared before him. He denied that he has wrongly challaned the accused and no any offence was committed by him. He denied that due to enmity over fight between children, the accused was nominated in the present case. He denied that he had carried out investigation at P.S Mominabad. He deposed that he had carried out proceedings at P.S Peerabad”.

30.     Thereafter, prosecution has examined second I.O, ASIP Sajjad Ahmed as P.W-09 at Ex. 12. He deposed that on 02.09.2018, he was posted at P.S Peerabad. On the same day, he received the investigation of FIR No. 228/2018, U/S 376 PPC vide Roznamcha entry No. 30. He produced such entry at Ex. 12/A. The first I.O of the case was Duriyaman. On 03.12.2018, he had submitted the application before Incharge Chemical Examiner for obtaining Lab Case property for DNA Test. He produced such letter at Ex. 12/B. On 05.12.2018, he had forwarded the relevant documents and Parchajaat to Biological Laboratory, Jamshoro Sindh through TCS, which receipt he produced at Ex. 12/C. On 06.08.2019, DNA and Chemical reports were received by S.P Office, which he obtained and produced at Ex. 12/D and 12/E. Thereafter, he obtained supplementary report from WMLO Dr. Sumiya. On 26.08.2019, he submitted the final challan before concerned Judicial Magistrate. He rightly identified the accused in open court. He was also cross examined by the learned counsel for the accused.

31.     During the cross he admitted that the investigation of the case was carried out by Duriyaman while he was posted at P.S Mominabad. He denied that  the investigation of present case was withdrawn from Duriyaman due to his malafide. He deposed that  he had gone on departmental service course; therefore, investigation was given to him. He has not produced any document to reflect that Duriyaman had gone on in service course. He admitted that the DNA is in negative. He denied that he has  framed the false case against the accused. He denied that he has  not carried out fair investigation. He admitted that the age of the accused is not mentioned in Huliya Form of accused. He denied that he has  deposed falsely before this Court”.

32.     Lastly, the prosecution also examined learned Judicial Magistrate Shahbaz Ahmed Sheikh as P.W-10 at Ex. 14, who had recorded the statement of victim U/s. 164, Cr.P.C., and has supported the case of prosecution that victim had appeared before him and had voluntarily recorded her statement against the accused that the accused had committed rape with her. He was also cross examined by the learned cousenl for the accused.

33.     During the cross he deposed that the cross examination of victim was carried out in his presence during recording her statement U/s. 164, Cr.P.C.

34.     The accused was provided opportunity to record his statement on oath and also produce his defense but he avoided to opt such opportunity. Furthermore, no any reasonable defense was taken by accused and no any evidence was brought on record by accused to disprove the case of prosecution.

35.     I have given due consideration to the arguments advanced by learned counsel for the parties and have carefully gone through the material placed so far.  On this point, entire case of the prosecution rests upon ocular testimony of victim baby Tahira  supported by medical evidence.  In the criminal cases, each accused has his own specific role in the crime, and yard stick to assess the evidence depends upon the role and thus, the same evidence though may be believable against the accused. The above named victim was cross examined at length by the counsel of the accused but nothing fruitful came on record to provide any benefit to accused and to create any dent in prosecution story. The testimony of victim appears to be true, genuine and confidence inspiring. Nothing has come on record that her statement was tutored to her in any manner to falsely implicate the present accused. The victim baby has uttered truth and only truth from her mouth and there appears no mixture of falsity in her statements when she has fully implicated the present accused for commission of rape with her. The minor baby was attempted to be raped by an adult who was equal to the age of her father and he was well aware about the consequences of such shameful. Furthermore, the Court had asked number of questions from the victim to establish but she was competent to testify and the Court had recorded that she was quite mature and had answered the questions satisfactorily and was a competent witness. She was cross examined at length by the counsel of accused yet no material contradictions emerged nor did she resign from the accusation she had made against the present accused. The victim proved her reliable witness and was physically examined by WMLO and the said WMLO has supported the version of victim.

36.       The requisite elements of an attempt to commit a crime are: intent to commit it; an overt act towards its commission; failure of consummation and the apparent possibility  of commission. More so, attempt is an act done in part execution of a criminal design amounting to more than mere preparation, but falling short of actual consummation and possessing, except for failure to consummate, all the  elements  of the substantive crime. Another definition of attempt is that  intentional  act with a view to attain certain end but which fails to consummate its commission because  circumstances beyond control of offender. Here in this case removal of shalwar of victim  by accused  and as well as  removal of his own  shalwar of accused by himself and then laying of accused on the  victim  is proved from the statement of victim, which constitute an attempt since no other intention would be possible except that of desire of accused to commit rape of victim.

37.     I am not convinced with the contention of the learned counsel for the accused that accused is innocent as DNA report is negative. In present circumstances, the offence of an attempt of rape with victim baby Tahira has been established against the present accused beyond any shadow of doubt. The DNA test to determine that the semen retrieved from the victim’s body and the accused were immaterial and such DNA testing was not required under the circumstances. Furthermore, their lordships in its recent Judgment **Farooq Ahmed Versus The State (PLD 2020 Supreme Court 313)** have held “DNA testing is not a requirement of law”. In the same judgment, their lordships have placed reliance upon **case title Haji Ahmed Versus The State (1975 S.C.M.R 69)** ***“omission of scientific test of semen status and grouping of sperms is neglect on the part of prosecution which cannot materially affect the other evidence”*.** In the judgment of their lordships, it has been categorically settled that when the testimony of victim girl was confirmed by chemical Examiner’s report and the report of Medico Legal Officer showing her to have been sexually assaulted, the report of DNA was immaterial.

38.     I am also not convinced with the  contention of the learned counsel for the accused that I/o of the case has malafidely acted in this case.  It is matter of record that the I/o was cross examined at length but nothing material on the point of commission of offence with the minor baby came on record to benefit the accused. The learned counsel for accused made emphasis on this point that the I.O has deposed in his examination in chief that he was posted at P.S Mominabad and he did not carry out fair investigation and he managed this case at P.S Mominabad while instant case pertains to P.S Peerabad. The learned counsel also put certain questions about his posting and investigation carried out by him for which he cleared the air and deposed that “It is correct to suggest that I have deposed in my chief that I was posted at P.S Mominabad, further says since I have most of the time remained posted at P.S Mominabad so I mistakenly stated so, in fact I was posted at P.S Peerabad. I produce the entire record pertaining to P.S Peerabad and in my chief I did not utter that I was posted at P.S Peerabad. He further denied the suggestions that “It is incorrect to suggest that I had carried out investigation at P.S Mominabad, further says I had carried out proceeding at P.S Peerabad”.

39.     Furthermore, nothing came on record that there was any ill-will, malice and malafide on the part of victim or on part of her family or on part of police to falsely implicate the accused in the present offence. Though, learned counsel for the accused claimed that accused had given loan to the parents of the victim but despite of returning the same, parents of the victim have falsely booked the accused in present false case but in support of this claim of accused, accused has not produced any proof in respect of given loan given to the parents of victim and even has not uttered a single word in respect of alleged loan while recording his statement U/s. 342 Cr.P.C. From the above testimonies of prosecution witnesses, it is crystal clear that the accused has committed the shameful act of attempt of rape with the victim. All the prosecution witnesses were cross examined at length and nothing material came on record to shake and dent their testimonies. There are certain natural and immaterial contradictions and discrepancies in investigation which have not hampered the case of prosecution in any manner and prosecution case stands fully proved. I am satisfied that in the present case, the prosecution has established its case against the accused beyond reasonable doubt.  I am of the firmed view that the present accused has committed the shameful offence of an attempt of rape with the victim as such point under discussion is answered in affirmative.

**POINT NO. 2:**

40.     In view of forgoing facts, circumstances and discussions made in point No.1, this Court has reached to the conclusion that the accused has made an attempt to commit shameful act of rape of victim baby Tahira as such he requires no leniency under the law. The offence of an attempt of rape U/s. 376 read with section 511 has been fully proved against the accused beyond shadow of any doubt. The accused Abdul Wadood S/o Khaista Bacha is convicted U/s. 265-H(ii) Cr.P.C and sentenced to rigorous imprisonment for five (05) years and he is also liable to pay fine of Rs. 100,000/- (one Hundred Thousand Rupees). In case of default in payment of fine, the accused shall further undergo simple imprisonment for a period of six (6) months. The accused is also awarded benefit of section 382-B PPC. He is in custody since 04.07.2018. The accused is produced in custody by jail authority, he is remanded back to prison to serve out the sentence strictly in accordance with law. Let the copy of Judgment be supplied to the accused as required under the law.

**ANNOUNCED IN OPEN COURT**.

          Given under my hand and seal of the Court on this 29th day of  April 2021.