

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 26.11.2020

+ CRL.A. 493/2013& CRL.M.(BAIL) 7547/2020

SABHAJEET MAURYAAppellant

Versus

STATE NCT OF DELHI Respondent

Advocates who appeared in this case:

For the Appellants : Ms Anu Narula, Advocate with Mr Rohan Ahlawat, Advocate.

For the Respondent : Mr Ravi Nayak, APP for State.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The appellant impugns a judgment dated 27.08.2012 delivered by the learned ASJ-02, North West Rohini Courts, Delhi (hereinafter 'The Trial Court'), whereby the appellant was convicted under Sections 376/313/307 of the Indian Penal Code, 1860 (hereinafter 'IPC'). The appellant also impugns an order on sentence dated 14.09.2012, whereby the appellant was sentenced to undergo (i)

rigorous imprisonment for a period of ten years with a fine of ₹2000/- and in default of payment of fine, to undergo one month simple imprisonment, for the offence punishable under Section 376 of the IPC; (ii) rigorous imprisonment for a period of five years with a fine of ₹2000/- and in default of payment of fine, to undergo one month of simple imprisonment for the offence punishable under Section 313 of the IPC; and (iii) rigorous imprisonment for a period of ten years with a fine of ₹2000/- and in default of payment of fine, to undergo one month of simple imprisonment for the offence punishable under Section 307 of the IPC. All the sentences were directed to run consecutively. Thus, in effect, the appellant has been sentenced to twenty-five years of rigorous imprisonment apart from fines.

2. The Trial Court found the appellant guilty of raping his step daughter and since the appellant is infected with Human Immunodeficiency Virus (HIV Positive), he was also convicted for an offence punishable under Section 307 of the IPC – attempt to murder. The Trial Court reasoned that since the appellant was aware that his acts could result in transmitting the potentially lethal disease, he had knowingly committed an act, which if resulted in transmitting of HIV and consequently, the death of the victim from that disease, it would amount to murder.

Factual background

3. The appellant was prosecuted pursuant to registration of FIR bearing no. 281/2011, under Section 376 of the IPC with PS Shalimar

Bagh. The said FIR was registered on 05.08.2011, pursuant to the statement made by a girl, who was aged about fifteen years at the material time. Her identity is concealed and she is hereafter referred to as 'the prosecutrix'. She had alleged that the appellant – who is her step father – had forcibly raped her multiple times

4. On 05.08.2011, the prosecutrix along with one Swati Sharma (PW-7) from NGO Prayas came to PS Shalimar Bagh and reported that the accused, who was her step father had continuously raped her. She handed over one UPT Positive Kit dated 03.08.2011 (Ex PW6/B) with one prescription/observation of Dr. Anita Harish (Ex PW6/C) and four medical documents of BSA Hospital (Ex PW14/A-1 to PW14/A-4) to SI Durga Kapri (PW-14). SI Durga Kapri examined the prosecutrix and recorded her statement (Ex. PW 8/A). Thereafter, the prosecutrix along with Ct. Parul, Swati Sharma and SI Durga reached Babu Jagjivan Ram Hospital (BJRM Hospital), where the prosecutrix was medically examined. SI Durga Kapri received the MLC of the prosecutrix. She prepared the *rukka* (Ex PW14/B) and on her direction, the duty officer recorded the FIR on the basis of the statement of the prosecutrix and the *rukka*.

5. The prosecutrix was referred to the Gynecological ward and underwent Dilation and Evacuation procedure. She remained admitted in the hospital till she was discharged on 09.08.2011.

6. On 06.08.2011, SI Durga Kapri went to BJRM Hospital to record the statement of the prosecutrix. The prosecutrix was

discharged from the hospital on 09.08.2011, and the concerned doctors handed over the exhibits of the prosecutrix to HC Usha (PW-1). She in turn handed over the exhibits to SI Durga Kapri, who prepared a seizure memo (Ex PW1/A) and seized the said exhibits. She came back to the PS and deposited the said exhibits in the *malkhana*.

7. In her statement to the police recorded on 05.08.2011 (Ex PW8/A), the prosecutrix stated that her mother had expired in January 2011 and her step father (the appellant herein) had raped her several times since April 2011. According to the prosecutrix, her step brother Suraj, aged about six years, was HIV positive and was being treated at Sneh Sadan, Khera Khurd. She stated that on 03.08.2011, she had visited Sneh Sadan to take care of her step brother and while she was there she fell ill and started vomiting. The doctors, who provided immediate medical aid, became aware that she was pregnant. The prosecutrix further informed the police that she was admitted for treatment at Sneh Sadan for two days and on 05.08.2011, at about 06:00 am, her step father Sabhajeet Maurya (the accused) came to the hospital and gave her five pills, after which she started bleeding profusely. She further informed the police that the accused had raped her for the first time in the month of April 2011 and at the time, her step brother and sister were asleep. She had also stated that thereafter, he had raped her several times. She stated that she was handed over to Swati Sharma from Child Line, NGO Prayas, who brought her to the police station and her statement was recorded.

8. In her supplementary statement to the police recorded on 06.08.2011 (Ex PW8/DX1), the prosecutrix stated that she had disclosed that her step father had raped her, to her neighbour Mehboob. She also stated that she used to frequently talk with her maternal uncle and aunt (*mama and mami*) on the telephone and she stated that her maternal uncle (Rajendra Maurya) knew about her being raped. She further stated that her maternal uncle had spoken to one Ashutosh about their marriage, however, her step father was against the alliance as Ashutosh was their neighbour and belonged to the same village. She stated that Ashutosh also wanted to marry her and he had come to visit her in Delhi along with his mother and they stayed at her house for about two days.

9. Thereafter, on 12.08.2011, the IO moved an application (Ex14/D) for DNA testing of Ashutosh Maurya (friend of the prosecutrix) as well as the appellant. It was stated that the same was necessary as the investigation had revealed that the prosecutrix had a love affair with Ashutosh. The said application was allowed and on the same date (12.08.2011), the appellant and Ashutosh Maurya were taken to DNA Unit, FSL, Delhi for DNA Fingerprinting Test and blood samples of both of them were collected.

10. Subsequently, the custody of the prosecutrix was handed over to her maternal uncle (*mama*), who lived in Azamgarh, UP. Her statement under Section 164 of the Cr.PC was recorded after more than four months, that is on 23.12.2011.

11. In her statement recorded under Section 164 of the Cr.PC (Ex PW8/B), the prosecutrix stated that she used to reside at Gali No 4, Sheesh Mahal Park, Shalimar Gaon, Delhi with her step brother, sister and step father. She stated that about eight months back, she went to Azamgarh (UP) with her maternal uncle (*mama*) and she developed friendship with one Ashutosh. She stated that she stayed there for about eight days and thereafter, came back home. She stated that she had called Ashutosh and asked him to come to her house in Delhi. She further stated that she developed physical relations with Ashutosh when nobody was present at her house. She stated that Ashutosh left Delhi after about two days. She started suffering from stomach ache and bouts of vomiting. In order to mitigate the pain, she consumed her step father's (who is HIV positive) medicine and thereafter, she started bleeding. She stated that she informed her step father about the same and he took her to the hospital and the doctor informed them that she was pregnant. She further stated that she had called Ashutosh from the hospital and he had advised her to make allegations against her step-father. She stated that she had informed the police that her father had done a wrong act (*galat kaam*) with her. But her step father had never done any wrong act (*galat kaam*) with her and he takes good care of her, her sister and her step brother.

12. On 29.12.2011, SI Durga collected the DNA Fingerprinting Test Report (Ex PW13/A). The allelic data of DNA profiles generated from the samples of the prosecutrix and the accused Sabhajeet Maurya was accounted in the allelic data profile generated from the abortus

(Products of Conception). Thereafter, SI Durga interrogated and arrested the accused from his house and the arrest memo (Ex PW10/A) was prepared. His personal search was taken (search memo Ex PW10/B) and his confessional statement was recorded (Ex PW10/C). Thereafter, the accused was taken to BJRM Hospital for his medical examination. The statements of the witnesses were recorded and after the completion of the investigation, SI Durga filed a charge sheet against the accused Sabhajeet. She also filed a charge sheet against Ashutosh, without his arrest.

13. The appellant was charged with committing offences punishable under Section 307/313/376 of the IPC. He pleaded not guilty. He was tried and convicted by the impugned judgment.

Evidence

14. Before proceeding further, it is necessary to consider the relevant testimonies of various witnesses. To establish its case, the prosecution examined fourteen witnesses and the defence did not lead any evidence.

15. Dr Anita Harish, Medical Officer, Sneh Sadan, deposed as PW-6. In her examination in chief, she stated that on 03.08.2011, the prosecutrix, who was aged about fifteen years at the time, was brought to the Community Care Centre by her step father with complaints of repeated vomiting for the last ten days, vaginal warts for the past three-four months and ammenorrhoea for the past six weeks. Her last menstruation date was 23.06.2011. She deposed that the prosecutrix

had confided in the nurse attending to her and had informed her that since the death of her mother due to HIV AIDS in February 2011, her step father had repeatedly made physical relations with her and sexually abused her in front of her siblings, as they were staying in one room. The prosecutrix had also told the nurse that her step father used to give her pills for abortion. PW-6 further stated that when the prosecutrix was still in the Community Centre and they were attending to her, the accused had taken advantage of the absence of the nurse and when the prosecutrix had been left unattended, the accused had slapped the prosecutrix and had given her some pills and left. The same was pointed out by the prosecutrix. PW-6 stated that they had informed the Child Line immediately. She further deposed that the details given by the prosecutrix were reduced in writing (Ex PW6/A) and the same was handed over to the representative of the NGO. In her statement (Ex PW6/A), the prosecutrix had specifically mentioned that while she was sleeping, at about 05:45 AM, her step father had come and forcibly put the pills in her mouth after slapping her. Thereafter, the UPT of the prosecutrix was done. The exhibits were sealed with the seal of the hospital (Ex PW6/B) and handed over to Swati Sharma. She further deposed that the prosecutrix did not want to go back home and hence, she was handed over to the Child Line/NGO. She further stated that she had prepared a detailed report (Ex PW6/C). The prosecutrix and her step father had handed over four documents of BSA Hospital to them and the same were further handed over to Swati Sharma along with her detailed report. She further stated that the prosecutrix as well as her younger sister were

tested for HIV and at the time, both of them had tested negative. On being asked by the court, she deposed that the prosecutrix had tested negative for HIV but this did not mean that the HIV virus had not infected her as she could have been in the window period and the HIV virus starts showing up after about three to six months depending upon the immunity levels of the victim. On cross examination, she affirmed that the alleged history of sexual assault was given by the prosecutrix herself.

16. Ms. Swati Sharma deposed as PW-7. She stated that at the material time, she was working as a Project Manager with Child Line, Prayas NGO. She deposed that on 05.08.2011, at about 11-11:30 am, she received information from Sneha Sadan, Khera Khurd about the admission of a girl aged about fifteen years with a history of sexual assault by her step father. Thereafter, she immediately went to Sneha Sadan and met with Dr Anita and Dr Sheela. She stated that she spoke to the prosecutrix and she was informed that the prosecutrix's mother had expired and her step father, who was HIV positive, had sexually abused her. The doctor handed the UPT kit, prescription slip and report with some BSA documents. Thereafter, she stated that she went to PS Shalimar Bagh and made a written complaint (Ex PW7/A) to the SHO, PS Shalimar Bagh and SI Durga interrogated the prosecutrix and recorded her statement. She further stated that the police took the prosecutrix to BJRM Hospital and she had accompanied them. She stated that the prosecutrix was admitted in the aforementioned hospital. PW-7 was not cross examined.

17. HC Usha was examined as PW-1. She tendered her affidavit as examination-in-chief. She affirmed that on 09.08.2011, she was posted at PS Shalimar Bagh and on the said date, she was entrusted with the duty to take care of the prosecutrix admitted in the Gynae Ward of BJRM Hospital. She stated that during her duty at the hospital, the doctor had discharged the prosecutrix and handed over the discharge slip along with sample of PO C's (Products of Conception) duly sealed with the seal of "MS BJRM H J PURI DELHI" and one sample seal of "MS BJRM H J PURI DELHI". She further affirmed that she handed over the discharge slip along with the sample PO C's duly sealed to the IO (PW-14). She stated that the IO seized the exhibits and prepared the seizure memo (Ex PW1/A). She stated that she made her signature on the seizure memo in the hospital. PW-1 was not cross examined.

18. HC Pawan Kumar was examined as PW-2. He affirmed that on 05.08.2011, he was posted as a Duty Officer at PS Shalimar Bagh and at around 08:00 pm, SI Durga, the IO (PW-14), handed over the *rukka* of the present case to him and he recorded the *kayami* in Daily Diary Register vide DD No 25A in his own handwriting and got the FIR in question registered. He stated that after the registration of the FIR, he made an endorsement on the *rukka* (Ex PW 2/B) in his own handwriting and sent the original copy of the FIR (Ex PW 2/A) and *rukka* (Ex PW 14/B) to SI Durga through HC Dalbir. PW-2 was not cross examined.

19. HC Mukesh Chand deposed as PW-3. He stated that on 09.08.2011, he was posted at PS Shalimar Bagh and on the said date, SI Durga (PW-14) handed him one sealed exhibit with the seal of “MS BJRM H J PURI DELHI” along with one sample seal of “MS BJRM H J PURI DELHI” in connection with the present case. He stated that he deposited the exhibit and sample seal in the *malkhana* and made an entry in this regard in register no. 19 vide Mud No 3753/11 (Ex PW3/A). He stated that on 11.08.2011, he handed over the said exhibit along with sample seal to SI Durga (PW-14) vide R.C. No. 63/21/2011 (Ex PW 3/B) to deposit the same in FSL Rohini for DNA test. He further stated that SI Durga (PW-14) handed him the copy of R.C. No. 63/21/2011 along with FSL acknowledgement slip after depositing the same at FSL, Rohini. He also stated that on 29.12.2011, SI Durga (PW-14) handed over the *jamatalshi* and the same was deposited in the *malkhana* and he had made an entry in this regard in register no. 19 vide Mud No 4222/11. PW-3 was not cross examined.

20. HC Dalbir Singh deposed as PW-4. He deposed that on 05.08.2011, he was posted at PS Shalimar Bagh and during his duty, at about 08:40 pm, HC Pawan Kumar (PW-2) gave him an original *rukka* and computerized copy of the FIR in question to hand it over to the IO, SI Durga (PW-14). He stated that he handed over the same to PW-14 at about 08:50 pm at the place of occurrence. He stated that PW-14 made search of the accused Sabhajeet, however, he was not found present at his address. He stated that on local inquiry, they were informed that the accused Sabhajeet was sick and he had gone

somewhere for his medicine. He stated that the IO had given directions to some public persons.

21. In his cross examination, PW-4 affirmed that he did not know the names of the public persons who had informed him that the accused was sick and had gone somewhere for his medical treatment. He further affirmed that the IO did not record their statements in his presence. He stated that it was wrong to suggest that he was not present at the spot.

22. Ms. Rita Jain, School-in-charge, MCD Primary School, deposed as PW-5. She stated that the prosecutrix was admitted to MCD Primary School on 20.07.2007 in Class II and the date of birth, as per the school record, is 14.08.1997. Thereafter, the prosecutrix passed Class V in 2010 and was issued a transfer certificate from the school on 23.07.2010. She identified the copy of the admission register (Ex PW5/A), copy of admission form given by the mother of the prosecutrix (Ex PW5/B) and copy of the declaration (Ex PW5/C) in open court. She affirmed that the declaration certificate (Ex PW5/D) was issued by the principal of the school- Ms. Roshni Devi to the IO. On being asked the basis on which the date of birth is mentioned in the school record, she stated that the same is done on the basis of the declaration made by the mother of the child.

23. The prosecutrix deposed as PW-8. She stated that the name of her deceased mother was Rita and the name of her natural father was Sanjay, who had expired long back. She also stated that the accused is

her step father Sabhajeet and she correctly identified him in open court. She stated that she has a younger sister named Aarti aged about eight years (from her biological father) and she has a step brother named Sunny (from her step father). She stated that her mother expired in the month of January 2011 and at the time of death of her mother, they used to reside with their step father at Village Shalimar Bagh, Sheel Mahal Park, Gali No. 4. She stated that after the death of her mother, she used to take care of the household affairs. She further stated that in April 2011, after the death of her mother, the accused started doing *zabardasti* with her. On being asked by the court as to what she meant by *zabardasti*, she stated that her step father had forcibly established physical relations with her (*sharirik sambandh banana shuru kar diye*). She further deposed that she did not disclose this fact to anybody as there was no one to support her, however, she stated that she later confided in her neighbour about the same, who was staying in the adjoining room, but they did not believe her and they told her that the accused treated her like a daughter and the same could not be possible (*Jab wo tumhe beti ki tarah manta hai to aise kaise kar sakta hai?*). She further deposed that her step brother was diagnosed with HIV and the accused used to take him frequently to Khera Hospital and got him admitted at Sneh Sadan. She stated that she was left at Sneh Sadan to take care of her step brother and while taking care of her brother, she suddenly fell sick and started vomiting. She stated that she did not tell the accused about the same, however, he came to know that she was vomiting and after two days, the accused came to Sneh Sadan in the morning and forcibly asked her to

consume some pills/tablets. She stated that after she administered the pills, she started bleeding. Thereafter, she stated that she confided in the doctors/nurses at Sneh Sadan and informed them that her step father had forced her to take some pills/tablets. She further stated that she had reduced the said information in writing (Ex PW6/A) and gave them to the doctors. She stated that she had told the doctors that she did not want to go back home. On 05.08.2011, she stated that she had told Swati Ma'am about the incident and thereafter, she along with Swati Ma'am went to PS Shalimar Bagh, where she disclosed to the police officials what had transpired and her statement was recorded (Ex PW8/A). She stated that thereafter, she was taken to the hospital for her medical examination and she remained admitted in the hospital for some time and she was provided medical treatment after her abortion. She stated that she was discharged from the hospital on 09.08.2011 and she thereafter, went with her uncle (*mama*) to his house. She stated that on 09.10.2011, a site plan (Ex PW14/G) was prepared by the IO of the place where they used to stay and the place of incident, at her instance. She stated that in the month of December, she made a statement to the learned MM, under Section 164 of the Cr.PC (Ex PW8/B). She affirmed that in the said statement, she had put the name of Ashutosh because her paternal uncle (*chacha*) had threatened her (*daraya dhamkaya tha*) and had told her that if she named Ashutosh, her step father would be saved and she will be married to Ashutosh. On being asked by the court the true facts of the incident, she stated that her step father had committed a wrong act (*galat kaam*) with her and the accused Ashutosh was only her friend

and there were no physical relations between them. She stated that she had taken Ashutosh's name as her uncle (*chacha*) had asked her to do so. She further stated that at the time, she was staying with Ashutosh as her maternal uncle (*mama*) has five children and he was unable to take care of her. She stated that she will get married to Ashutosh after 2-3 years as she was currently a minor aged about sixteen years.

24. On cross examination, the prosecutrix stated that it was correct that before the death of her mother, the accused Sabhajeet used to take care of her and her sister and there were no complaints. She affirmed that the accused had taken care of her and her sister after the death of their mother as well. She stated that the name of the neighbour to whom she had disclosed the alleged incident is Mehboob. She stated that Mehboob and his family used to reside in the adjoining room and she had disclosed the incident to his wife and him. She stated that she had told the IO/police that she had disclosed the fact regarding her sexual exploitation to the neighbours, however, they refused to believe the same. She was confronted with her statement (Ex PW8/A), where the same is not recorded, however, the same has been mentioned in her statement under Section 161 of the Cr.PC recorded at a later stage (Ex PW8/DX-1). She stated that it was wrong to suggest that she had not disclosed the same to her neighbours. She stated that it was also wrong to suggest that she was having an affair with Ashutosh, which was objected by the accused and that is why she had falsely implicated him. She stated that it was wrong to suggest that she had named the

accused Sabhajeet in the present case on the asking of the co-accused Ashutosh and her other family members including her uncle (*mama*).

25. WCt. Parul deposed as PW-9. In her examination in chief, she stated that on 05.08.2011, she was posted at PS Shalimar Bagh and on the said date, she along with Swati Sharma (Child Line, NGO Prayas) and the IO (PW-14) took the prosecutrix to BJRM Hospital for her medical examination. She stated that on the request of PW-14, the medical examination was conducted vide MLC No. 29636 and the doctor advised to admit the prosecutrix in the Gynae Ward of the said hospital. She stated that she handed over the MLC of the prosecutrix to PW-14 and on the direction of PW-14, she remained in the hospital for the care and protection of the prosecutrix in the intervening night of 5/6.08.2011.

26. In her cross examination, she stated that apart from the representatives of the NGO, there were no other persons from the family of the prosecutrix present at the hospital. She stated that she did not remember the time when they reached the hospital but it was around evening. She stated that they stayed in the hospital throughout the night and the prosecutrix was discharged after two/three days as per her knowledge, however, she is not sure. She further stated that during the time she stayed in the hospital, nobody from the family of the prosecutrix had visited her.

27. Ct. Varjil deposed as PW-10. He correctly identified the accused in open court. He stated that on 29.12.2011, he was posted as

a Constable at PS Shalimar Bagh and he had joined the investigation of the present case along with the IO. He stated that they had gone to Shalimar Bagh in a *gatta* factory situated at Gali No. 4 and on the third floor, they had found the accused at his residence and arrested him vide arrest memo (Ex PW10/A) and conducted his personal search vide personal search memo (Ex PW10/B). He stated that the IO had interrogated the accused and the accused admitted his involvement in the case. The accused had disclosed that he had purchased the pills/tablets from Om Medicos and administered the same on his daughter i.e. the prosecutrix (Ex PW10/C). Thereafter, the accused was taken to BJRM Hospital, where his medical examination was conducted. On cross examination, he stated that he prosecutrix was not present at the time of arrest of the accused and the IO had identified the accused. He stated that it was wrong to suggest that the accused had not made any disclosure statement or the same had been recorded by the IO to work out the present case. He further stated that it was wrong to suggest that the accused had been falsely implicated.

28. Dr. Meenakshi Bansal, Senior Resident, BJRM Hospital, deposed as PW-11. She stated that on 05.08.2011, the prosecutrix was brought to the hospital by WCt. Parul and Swati Sharma. She stated that Dr. Meet had medically examined the prosecutrix and prepared MLC No. 29636 (Ex PW11/A) and the prosecutrix was referred to the Gynae Department for her medical examination. She stated that she had medically examined the prosecutrix in the Gynae Department with an alleged history of repeated sexual assault by her step father for the

past three months. She stated that the last assault was about twenty days back and the prosecutrix had further informed them that the step father is VcTc positive (HIV). She also stated that the prosecutrix's mother died in January 2011 and was VcTc positive and her step brother is also VcTc positive and admitted in a hospital. She stated that she gave her detailed observations after her medical examination (Ex PW11/A). She stated that during the examination, the prosecutrix's last menstrual period was on 23.06.2011 and UPT that was done in Sneh Sadan on 03.08.2011 was positive. She stated that on further examination, the prosecutrix's vitals were stable and hymen was torn. There were no sign of injuries and the introitus admitted two fingers. She stated that on perspeculam examination, there was no bleeding and on vaginal examination the uterus was ante verted just bulky to normal size. The examining finger was stained with blood but it was closed and thereafter, the prosecutrix was admitted in the ward for further management. She also stated that she had been deputed by the MS to depose in respect of the MLC prepared by Dr. Kalpana. She identified the signatures and handwriting of Dr. Kalpana on the said MLC (Ex PW11/A) and on the discharge summary (Ex PW11/B).

29. Dr. Seema, CMO, BJRM Hospital deposed as PW-12. She stated that she has been deputed to depose with respect to the MLCs prepared by Dr. Meet, Dr. Subhash and Dr. Shailesh. She identified the signatures and handwriting of the aforementioned doctors in MLC No. 29636, MLC No. 36146 respectively.

30. Dr. AK Srivastava, Deputy Director (Biology) DNA Unit, FSL Rohini, deposed as PW-13. He stated that on 11.08.2011, he was posted at FSL Rohini and he received one sealed cloth parcel sealed with the seal of "MS BJRM H J PURI DELHI" in connection with FIR No. 281/11. It contained two small pieces of flesh which were marked as Ex 1A and some flesh marked as Ex 1B. He stated that on 12.08.2011, blood sample of Sabhajeet and Ashutosh Maurya were collected in FSL, DNA Unit in presence of SI Durga and Ct. Pradeep. He stated that STR (Short Tandem Repeat) Analysis was used for the said samples and data was analysed using GeneMapper ID-X Software. He stated that the detailed DNA Fingerprinting Report (Ex. PW13/A) bears his signature at point A.

31. SI Durga Kapri, IO, deposed as PW-14. She correctly identified the accused in open court. She stated that on 05.08.2011, she was posted in Sub Division, Shalimar Bagh in the rape cell and at about 04:30 pm, one Swati Sharma of NGO Prayas came to the PS alongwith the prosecutrix and handed over one UPT positive kit dated 03.08.2011 (Ex PW6/B), with one prescription/observation of Dr. Anita Harish (Ex PW6/C) and four medical documents of BSA Hospital (Ex PW14/A-1 to PW14/A-4) and thereafter, PW-14 examined the prosecutrix and recorded her statement in detail (Ex PW8/A). Thereafter, the prosecutrix along with Ct. Parul, Swati Sharma and her reached BJRM Hospital, where the prosecutrix was medically examined and the MLC of the prosecutrix was obtained. She stated that she had prepared the *rukka* (Ex PW14/B) and on her

direction, the duty officer had recorded the FIR bearing No 281/11, on the basis of the statement of the prosecutrix and the *rukka*. Thereafter, she reached the place of the incident and came to know that the accused had gone to take his medicine as he was sick and, in the meanwhile, she handed over the copy of the FIR and original *rukka* to HC Dalbir and returned back to the PS. She stated that she recorded the statement of the witnesses. Thereafter, on 06.08.2011, she went to BJRM Hospital to record the statement of the prosecutrix. Thereafter, on 09.08.2011, the prosecutrix was discharged from the hospital and the concerned doctors handed over the exhibits of the victim to HC Usha. She stated that she seized the said exhibits vide a seizure memo (Ex PW1/A). She came back to the PS and deposited the said exhibits in the *malkhana*. She stated that on 11.08.2011, she took the exhibits from the MHC(M) and deposited the same in FSL Delhi in the DNA Unit. Thereafter, on 12.08.2011, the accused Sabhajeet and co-accused Ashutosh (friend of the prosecutrix) came to the PS and she took both of them to DNA Unit, FSL, Delhi for DNA Fingerprinting Test and blood samples of both were collected. She further stated that on 23.12.2011, she moved an application (Ex PW14/E) for recording the statement of the prosecutrix and the same was recorded under Section 164 of the Cr.PC by the Ld. MM, Ms. Vandana, at Rohini Courts. Thereafter, on 29.12.2011, she collected the DNA Fingerprinting Test Report (Ex PW13/A) and reached the house of the accused along with Ct Varjil (PW-10). She interrogated and arrested the accused from his house vide arrest memo (Ex PW10/A) and his personal search was taken vide search memo (Ex PW10/B) and his confessional statement

was recorded (Ex PW10/C). Thereafter, the accused was taken to BJRM Hospital for his medical examination and his MLC was collected. She also stated that during the course of the investigation, on 12.08.2011, she along with the prosecutrix had visited the spot of the incident and she had prepared a site plan (Ex PW14/G), at the instance of the prosecutrix. She had also collected certain documents verifying the age of the prosecutrix (Ex PW5/D) and other documents with respect to the prosecutrix on her application (Ex PW14/H). She also stated that the prosecutrix had produced certain documents of her primary school at Tohari, District Azamgarh, with respect to her age, however, the principal of the school had informed her that the documents had not been issued by him. The statements of the witnesses were recorded and after the completion of the investigation, she filed a charge sheet against the accused Sabhajeet and filed a charge sheet against the co-accused Ashutosh without his arrest.

32. On cross examination, she stated that it was wrong to suggest that she did not make any inquiries from the maternal family of the prosecutrix. She affirmed that she had made inquiries from the maternal uncle (*mama*) of the prosecutrix, however, he refused to believe the allegations that were made. She further affirmed that she had also made inquiries from the neighbor – Mehboob, however, he too refused to believe the allegations. She stated that it was correct to state that during the investigation, she came to know that the prosecutrix had an affair with the accused Ashutosh and the accused Sabhajeet had objected to the same. She further stated that the

allegations against Sabhajeet were found to be true after the DNA Fingerprint Report and thereafter, he was arrested. She stated that it was wrong to suggest that she had tampered with the exhibits that had been handed over to her at the hospital and the accused did not make any disclosure statement and she had recorded the same on her own, to work out the present case. She stated that it was wrong to suggest that the accused Sabhajeet had been falsely implicated by her at the instance of the co-accused Ashutosh.

33. The statement of the accused Sabhajeet was recorded under Section 313 of the Cr.PC. He denied all the allegations against him. He denied making any disclosure statement. He had stated that he is innocent and has been falsely implicated in the present case. According to him, he had done nothing wrong to the prosecutrix and the witnesses have deposed falsely against him.

Reasons and Conclusion

I. Re: Conviction for Rape – offence punishable under Section 376 of the IPC

34. The first and foremost question to be examined is whether there is any doubt that the appellant is guilty of committing an offence punishable under Section 376 of the IPC.

35. It was contended by Ms. Narula, learned counsel appearing for the appellant that the statements made by the prosecutrix and her testimony could not be relied upon as she was an unreliable witness.

She stated that the prosecutrix had no reservation in stating falsehoods on oath. In her statements recorded under Section 164 Cr.PC, she had made allegations against her friend Ashutosh. She had affirmed that her father had done no wrong and had taken good care of her and her siblings. However, her testimony before the trial court was to the contrary and therefore, could not be relied upon.

36. Ms. Narula further pointed out that apart from the prosecutrix changing her deposition on oath, her stand as to her age is also inconsistent. She had disclosed her year of birth in the FIR as 1996. However, as per her school records, her date of birth is recorded as 14.08.1997. In her statement recorded under Section 164 of the Cr.PC, she had stated that she was aged about seventeen years. But in her statement recorded under Section 161 of the Cr.PC, she had stated that she was fifteen years. The medical report by Dr. Anita Harish (Ex.PW6/C) indicated her age to be about fifteen years.

37. The statement of the prosecutrix was recorded on 23.12.2011 and she resiled from her statement recorded earlier. She withdrew all her allegations against the appellant and stated that he had been taking good care of her and her siblings. She now alleged that Ashutosh Maurya had established physical relations with her and she had blamed her father on the instructions of Ashutosh.

38. She stated that about eight months prior to the said date (that is, eight months prior to 23.12.2011), she had gone to Azamgarh, UP to visit her maternal uncle (*mama*) and there she met one boy Ashutosh

Maurya and became friends with him. She stayed there for about eight days and thereafter, returned home. Thereafter she called Ashutosh to come to her house in Delhi and when no one was present in the house, she and Ashutosh had established physical relationships without comprehending the consequences. She stated that Ashutosh returned back after two days. Thereafter, she had felt a little pain in her stomach and vomited. She stated that she had consumed medicine prescribed for her father, who is an HIV positive patient. On consuming the same, she started bleeding. She informed the same to her father, who took her to the hospital. The treating doctor informed her that she was pregnant and when the police arrived, she told them that her father had done a wrong act with her as Ashutosh had instructed her to blame her father, when she had called him from the hospital. She stated that her father had not done any wrong act with her and he had taken good care of her and her siblings (Ex.PW8/B).

39. In her testimony, she stated that she had made false allegations against Ashutosh because her paternal uncle (*chacha*) had threatened her that if she named Ashutosh, the appellant would be saved and he would get her married to Ashutosh. She testified that it was the appellant who had done wrong acts with her and Ashutosh was only her friend and there were no physical relations between them.

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

“22To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross- examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it...”

41. Considering that the prosecutrix has given varied statements at various points of time and had changed her stand on oath, there is merit in the contention that she cannot be considered as “a ‘sterling witness”, whose version can be accepted by the court without any corroboration and based on which the guilty can be punished” [*Rai Sandeep (supra)*]

42. Clearly, the testimony of the prosecutrix cannot be considered as wholly reliable and the Trial Court erred in proceeding on the said basis. However, this Court is also not persuaded to accept that she is a wholly unreliable witness. The prosecutrix has provided a plausible explanation for blaming Ashutosh Maurya in her statement under Section 164 of the Cr.PC. She had stated that she had named Ashutosh as the one responsible for her condition as she was under

threat from her paternal uncle (*chacha*). She further stated that he had lured her by stating that if she blamed Ashutosh, her father would be saved and he would ensure that she gets married to Ashutosh. Undeniably, there are reasons to doubt this explanation. For one, there is no material to indicate as to how the appellant's brother (*chacha*) had got in touch with her because from 03.8.2011 she was in the care of NGOs or her maternal uncle (*mama*). More importantly, there is no reason for the prosecutrix to believe that she could get married to her friend Ashutosh, if she implicated him instead of the appellant. But considering that the prosecutrix is undoubtedly a victim of the offence, she must be given as much latitude as possible. There is also no clear reason provided for her to falsely implicate the appellant. In this view, it would not be apposite to consider her as a wholly unreliable witness and discard her testimony in toto.

43. Having stated the above, it is also clear that it would be unsafe to rely on her testimony without any corroborative evidence. The appellant cannot be convicted solely on the basis of her testimony. However, in this case, there is unimpeachable corroborative evidence that the petitioner had raped the prosecutrix. The DNA Fingerprints of the Products of Conception and the DNA Fingerprints generated from the blood sample of the petitioner conclusively established that the appellant was the biological father of the abortus. The conclusion of the DNA Fingerprinting Unit of FSL, Rohini is set out below:

“CONCLUSION

The DNA Fingerprinting performed on exhibits is sufficient to conclude that the source of exhibit 2 (Blood sample of Sh Sabhajeet) is the biological father of the source of exhibits 1A (Two small pieces of flesh) & 1B (Some flesh).”

44. In addition to the above, it is also material to note that the prosecutrix had in the first instance, when she was brought to the Community Care Centre, reported to the nurse that her step father had been repeatedly establishing physical relations with her and had been sexually abusing her in front of her siblings. Dr. Anita Harish, who was examined as PW-6, had testified to the aforesaid effect. Her report dated 03.08.2011 also recorded the history of *“Repeated Rape by HIV positive step father after the death of mother suffering from HIV/AIDS in Jan 2011. Patient was overdue by one week in April 2011 when she was given an injection to get back her periods back. She bled with clots and pieces. UPT done showing pregnancy positive result”*.

45. Ms. Narula contended that the DNA Fingerprint Report could not be taken as conclusive as there is a possibility of technical errors, population genetics error etc. She submitted that although DNA tests yield results with high probability, however, a person cannot be convicted on the basis of such probability.

46. In the facts of the present case, the prosecutrix had made allegations against two persons: initially, against her stepfather (the appellant) and thereafter, against her friend Ashutosh. The inquiries made by the IO also indicated that the petitioner was in a relationship with Ashutosh Maurya. It is also conceded by her that she wanted to

get married to him. In fact, she had testified that she had falsely implicated Ashutosh Maurya as her paternal uncle (*chacha*) had told her that her father would get her married to Ashutosh Maurya. Although in her testimony, she stated that she and Ashutosh Maurya were just friends, clearly, the relationship between the prosecutrix and Ashutosh Maurya was much deeper than that. It is also relevant to note that at the time she testified before the court, she was living with Ashutosh Maurya and had stated so on a question asked by the court. She had also stated that she would get married to him on attaining the age of majority. However, the fact that the prosecutrix was close to Ashutosh Maurya, does not necessarily exclude the possibility that the appellant had raped her as alleged. The allegation required verification and therefore, DNA Fingerprints were generated from samples of Ashutosh as well as the appellant and compared with the DNA generated from the Products of Conception.

47. As stated above, the testimony of the prosecutrix could not be accepted without corroborative evidence. However, her testimony is fully corroborated by forensic evidence. The FSL report was used only as corroborative evidence and a minor scope of error does not dilute its evidentiary value. The FSL report not only established that the appellant was the father of the abortus but also excluded the possibility of Ashutosh being the father of the abortus.

48. In view of the above, there can be no doubt that the appellant is guilty of raping the prosecutrix. This Court concurs with the decision of the Trial Court that the evidence obtained in this case clearly

establishes beyond any reasonable doubt that the appellant had engaged in a sexual intercourse with the prosecutrix without her consent and had committed an offence punishable under Section 376 of the IPC. This Court also concurs with the sentence awarded to the appellant for committing the said offence i.e. – rigorous imprisonment for a period of ten years along with the fine of ₹2,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of one month.

II. Re: Conviction for causing miscarriage – offence punishable under Section 313 of the IPC

49. The next question to be examined is whether it is established that the appellant is guilty of committing an offence punishable under Section 313 of the IPC. In terms of Section 313 of the IPC, whoever commits an offence as defined in Section 312 of the IPC, would be liable to be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and he shall also be liable for fine. Sections 312 and 313 of the IPC are set out below:

“312. Causing miscarriage. - Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation. - A woman who causes herself to miscarry, is within the meaning of this section.

313. Causing miscarriage without woman's consent. - Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

50. In the present case, there is little evidence to establish that the appellant had caused the prosecutrix to miscarry. The Trial Court had held that the appellant was guilty of causing miscarriage to the prosecutrix by administering her pills. The only evidence that the appellant had administered any pills to the prosecutrix on 05.08.2011 is her testimony to the aforesaid effect, her complaint (Ex PW6/A) and the history recorded in her MLC. Thus, apart from the prosecutrix stating so, there is no evidence whatsoever to establish that the appellant had committed the said offence. In her statement, she had stated that on that day, at about 05:45 a.m., her father had come and had given her some medicines. However, since she refused to take it, the appellant had slapped her and had forcibly put the medicines in her mouth.

51. Dr. Anita Harish (PW-6) had testified that while the prosecutrix was still in the Community Centre and they were attending to her, the appellant had taken advantage of the prosecutrix being left unattended for some time. He had slapped her and had given her some pills and left, which “*the child immediately pointed out to us*”. She further

testified that they had “*immediately informed the Child Line*”. However, there is no evidence that any pills were collected or recovered at the material time.

52. There is no other evidence whatsoever to establish that the appellant had visited the hospital at 05:45 a.m. on 05.08.2011. The nurse that had left the prosecutrix unattended was not examined. Undisputedly, the establishment is not an open establishment where anyone can walk in and access the children. None of the guards, if any, were examined to corroborate that the appellant had visited Sneh Sadan at 05.45 a.m.

53. Insofar as PW-6’s testimony that she had immediately informed the Child Line is concerned, there is no evidence that any call or any information had been transmitted to Child Line at 05:45 a.m. on 03.08.2011 or immediately thereafter.

54. PW-7 (Ms. Swati Sharma from Child Line, Prayas NGO) had testified that she had received information from Sneh Sadan at about 11:30 a.m., on 05.08.2011, regarding admission of a girl who had been sexually abused by her stepfather. She did not testify that she was informed that the father of the child had forcibly administered any pills to the child.

55. Apart from the above, it is also relevant to note that even though the prosecutrix was in Sneh Sadan when she was allegedly administered pills by the appellant and the same was allegedly informed to doctors immediately, no action was taken by any of the

doctors in this regard. No steps were taken to wash the prosecutrix's stomach. There is no material to indicate that the pills were for abortion, the same could also be lethal, and if the prosecutrix reported that she had been administered five pills by her assailant, it was expected that the doctors would take immediate steps in this regard.

56. There is no material to indicate as to what pills were administered to the prosecutrix. Although, three medical doctors were examined, none of them mentioned that in their opinion the prosecutrix's miscarriage was induced by the said pills.

57. The prosecutrix had testified that she started bleeding profusely immediately after taking the said pills. However, there is no evidence on record that the abortion pills act instantaneously. Dr. Anita Harish had testified that they were informed by the prosecutrix immediately after she had administered the said pills, however, she did not testify that the prosecutrix started bleeding immediately. The complaint/statement of the prosecutrix (PW6/A) is stated to have been recorded immediately after the appellant had allegedly administered the pills to the prosecutrix. The same also does not record that she started bleeding profusely.

58. The MLC of the prosecutrix also does not record any history of bleeding. Dr. Meenakshi Bansal (PW-11), who had examined the prosecutrix testified that *"there were no signs of injuries seen and introitus admitted two fingers. On perspeculam examination there was no bleeding. On per vaginal examination uterous was ante verted just*

bulky to normal size. The examining finger was stained with blood but os was closed” Thus, even on examination by speculam (device used to look inside the vagina and examine the cervix), no bleeding was seen. On internal examination, the testing finger was stained with blood.

59. It is relevant to note that that the prosecutrix was brought to Babu Jagjivan Ram Hospital (BJRM Hospital) for her MLC at about 5.30 PM and was examined thereafter. At that time, while the testing finger did indicate some blood, there is no evidence of any profuse bleeding prior to that except the testimony of the prosecutrix. This does not substantiate the allegation that the prosecutrix had started bleeding profusely as reported in her statement (Ex PW8/A).

60. There is no description of the pills allegedly administered to the prosecutrix. There is nothing on record to remotely indicate as to what was the substance that was allegedly administered to the prosecutrix.

61. Even if the testimony of the prosecutrix is accepted that her father had forcibly administered pills to her at about 05:45 a.m., on 05.08.2011, there is no evidence whatsoever that her miscarriage was a result of those pills. As stated above, there is no description of the pills administered to the prosecutrix. There is no evidence as to what was the substance (Active Pharmaceutical Ingredient in the pills). There is no evidence that the said pills would act instantaneously – within minutes.

62. The prosecutrix's discharge summary indicates that a procedure for dilation in evacuation was carried out on 09.08.2011, that is, four days later.

63. Apart from the above, there is also material inconsistency in the testimony of the prosecutrix and the testimony of Dr. Anita Harish as to how the prosecutrix came to be admitted to Sneh Sadan. The prosecutrix had testified as under:

“In the meanwhile, my younger brother Suraj was detected with HIV disease and Sabhajeet used to take him frequently to the Khera hospital and got him admitted at Sneh Sadan and left me there to take care of him. At Sneh Sadan when I was taking care of my younger brother Suraj I suddenly fell sick and started vomiting. I did not tell Sabhajeet about it but he came to know that I was vomiting and after two days when he came to Sneh Sadan in the morning he gave me some pills/tablets and forced me to take the same. After I was administered the pills, I started bleeding. Thereafter, I confided about this fact to the doctors and nurses at Sneh Sadan and told them what Sabhajeet had done to me and also the fact that he had forced me to take some pills/tablets.”

64. Thus, according to the prosecutrix, she suddenly became sick and started vomiting on 03.08.2011 and she had concealed the same from the appellant, yet somehow, he came to know and had forced her to have some pills. She had started bleeding and thereafter, she confided in the doctors and the nurse and told them what the appellant had done to her (i.e. that he had raped her and that he had forced her to have some pills)

65. However, Dr. Anita Harish (PW-6) had testified as under:

“On 03.08.2011 Priyanka aged 15 years, female was brought at the above said Community Care Centre by her step father Sabhajeet with complaints of repeated vomiting for the last ten days and vaginal warts and the last mensuration date 23.06.2011”

66. Thus, according to Dr Anita Harish (PW-6), the prosecutrix was brought to the Community Care Centre by her step father on 03.08.2011 with complaints of repeated vomiting for the last 10 days and vaginal warts for three-four months and amenorrhea for six weeks. Her report (Ex.PW6/C) also indicates that on 03.08.2011, the prosecutrix was examined with the complaint of “*Nausea/vomiting – 10 days*”, “*vaginal warts – 3-4 four months*”, “*amenorrhea – six weeks*” and her last menstrual period was on 23.06.2011. The said report also indicates that she was referred to STI Clinic in BSA Hospital for genital herpes infection on 29.07.2011.

67. Dr. Anita Harish had also testified that the appellant had handed over certain documents from BSA Hospital (Ex.PW14/A-1 to A-4). The same were also handed over to Swati Sharma (PW-7) along with her report. One of the said documents (Ex.PW14/A4) indicates that on 29.07.2011, the prosecutrix was referred to STI Clinic for “*herpes pro genitalis*”. The prosecutrix was also being treated at the said hospital prior to that date as one of the said documents (Ex PW14/A3) is an OPD Slip of 02.08.11. She was also tested for HIV on 29.07.2011 (Ex PW14/A2).

68. Thus, the prosecutrix's testimony that she had vomited while she was in Sneh Sadan but had concealed the same from the appellant; yet, he had come to know about it and had come to the Sneh Sadan two days later (that would be on 5.08.2011) and forcibly administered pills to her, is wholly inconsistent with the testimony of Dr. Anita Harish (PW-6).

69. In view of the above, this Court is of the view that there is insufficient evidence to conclude that the appellant had committed the offence of causing the prosecutrix's miscarriage. Therefore, the appellant's conviction for committing an offence under Section 313 of the IPC cannot be sustained and is, accordingly, set aside. The appellant is acquitted of the charge of committing the said offence.

III. Re: Conviction for attempt to murder – offence punishable under section 307 IPC

70. The Trial Court has found the appellant guilty of committing an offence punishable under Section 307 of the IPC. The said finding is premised on the following conclusions:

71. First, that the appellant is suffering from Acquired Immunodeficiency Syndrome (AIDS) and he is HIV Positive. The appellant was also suffering from Pulmonary Koch's (Tuberculosis). His wife was also suffering from AIDS and had expired in January 2011. In addition, his minor son is also HIV Positive. Second, that the appellant's infections – AIDS and Pulmonary Koch's (Tuberculosis) – are highly contagious and endanger human life. Third, that the

appellant had engaged in sex with the prosecutrix. Fourth, that the appellant's act of raping the prosecutrix or engaging in sexual intercourse with the prosecutrix had resulted in the prosecutrix acquiring 'genital warts' – a sexually transmitted disease (STD). And fifth, that the appellant's act of raping the prosecutrix had amounted to an act, which was done with the intention or at least the knowledge that if the prosecutrix had died as a result of acquiring AIDS, the same would amount to murder.

72. The Trial Court had further reasoned that although Sections 269 and 270 of the IPC provide punishment for spreading infectious disease dangerous to life, intentionally or negligently, there is a need for tougher criminal laws connected with non-disclosure regarding the STD/STI, which the person may be suffering from, to his/her sexual partner. Thus, according to the learned Trial Court, it was necessary for the Court to find solutions within the existing "legal paraphernalia" till such time the legislature gave a serious thought and enacted a legislation to deal with the issue of non-disclosure of STD/STI status and of recklessly endangering the life of others.

73. This Court is unable to subscribe to the aforesaid approach of the learned Trial Court. Merely because the learned Judge was of the view that the Legislature must provide for a higher punishment for non-disclosure of the STI/STD status of the person engaging in sexual activity, does not justify contriving to classify it as an offence entailing a higher punishment.

74. It is relevant to note that the FIR was under Section 376 of the IPC. After investigation, the charge-sheet was filed which also included an allegation of commission of an offence punishable under Section 313 of the IPC. The charge-sheet did not impute any charge of commission of an offence under Section 307 of the IPC. However, on 08.06.2012, the Trial Court passed the order on charge framing an additional charge under Section 307 of the IPC. The relevant extract of the said order is set out below:

“Heard arguments on charge. On the basis of the complaint, MLC of the victim and other material on record, prima facie charge under Section 376/313 IPC is made out against the accused Sabhajeet Maurya. It is evident that the accused Sabhajeet himself is HIV positive and had committed rape upon his step daughter / victim / prosecutrix thereby infecting her with the same life threatening disease i.e. HIV / AIDS, deliberately with intention or knowledge and under such circumstances if by the act the death of the prosecutrix would have been caused, he would be been guilty for the murder. Unfortunately, there being no special legislation to deal with such situation of the accused transmitting life threatening disease to another person intentionally with knowledge that the same is likely to cause death of that other person, this court is of the opinion that under the given circumstances such person is also liable to be charged for the offence under Section 307 IPC. Accordingly, charge under Section 307 IPC is also framed against the accused Sabhajeet.”

75. It is important to note that the order on charge indicates that the charge of committing an offence under Section 307 of the IPC was founded on the premise that the appellant had, by raping the prosecutrix, transmitted the life-threatening disease of HIV/AIDS to

her. The charge framed against the appellant also indicates so. The relevant extract of the charge is set out below:

“Secondly during the above said period, time and place you being HIV Positive committed rape upon your step daughter Kumari Priyanka and infected her with the same disease i.e. HIV/AIDS with such intention or knowledge and under such circumstances that if you by your act caused the death of Kumari Priyanka you would be guilty of murder and thereby committed an offence under Section 307 Indian Penal Code and within my cognizance.”

76. Concededly, there was no material furnished along with the charge-sheet to establish that the prosecutrix was infected with AIDS or was HIV positive. On the contrary, her tests for HIV had yielded a negative result. No evidence was led to establish that the prosecutrix had contracted AIDS, yet, the Trial Court framed a charge of actual transmission and found the appellant guilty of the charge framed.

77. This Court does not concur with the view that the appellant is guilty of an offence punishable under Section 307 of the IPC for several reasons.

78. First, that the import of holding so would also mean that any sexual activity by a person infected by HIV is punishable under Section 307 of the IPC, notwithstanding that his or her partner has consented to such sexual activity. This is because the culpable act under Section 307 of the IPC does not cease to be one if the victim of such an act has also consented to the same. If the reasoning adopted by the learned Trial Court is extended further, it would also mean that a

healthy person who willingly engages in unprotected sexual intercourse with an HIV positive partner and acquires the said disease as a result thereof that eventually proves fatal, would have committed suicide and, the HIV positive partner would be guilty of abetment of suicide under Section 306 of the IPC if not guilty of committing murder as defined under Section 300 of the IPC.

79. Second, that the Trial Court had drawn support for its conclusion by mentioning that several countries prosecute cases of transmission of HIV and non-disclosure of HIV status. However, the court had not examined the specific provisions, or the rationale used in various jurisdictions for prosecuting non-disclosure of HIV positive status as general offences. Several countries have enacted specific laws relating to HIV non-disclosure. However, there are countries, which have not done so but prosecute persons for non-disclosure of their HIV status as general offences under their respective pre-existing laws. The learned Trial Court had mentioned the same and had proceeded to consider the appellant's act of raping the prosecutrix as an additional offence on account of him being a patient of AIDS. It is thus necessary to briefly note as to how various countries have considered the act of non-disclosure of HIV status and/or the acts of HIV Positive persons engaging in sexual activities.

80. In most countries following common law principles, sexual transmission of HIV is treated as a culpable act if the HIV positive person has engaged in sexual activity with an HIV negative partner, while concealing his condition. In United Kingdom, non-disclosure of

HIV positive status is prosecuted under Offences Against The Person Act, 1861. The Crown Prosecution Service, for want of a specific legislature on such a matter, have utilized the pre-existing law (similar to the IPC) to fill the lacunae through a legal guidance note. (The legal guidance note is available at <<https://www.cps.gov.uk/legal-guidance/intentional-or-reckless-sexual-transmission-infection>>). In terms of the said policy, suspects are prosecuted under Sections 18 and 20 of Offences Against The Person Act, 1861. Section 18 of the said Act provides that “*Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, or shoot at any person, or, by drawing a trigger or in any other manner attempt to discharge any kind of loaded arms at any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life*”. Section 20 of the said Act provides “*whosoever shall unlawfully and maliciously would or inflict any grievous bodily harm upon another person.. shall be guilty of a misdemeanor and being convicted thereof shall be liable to ..imprisonment.. for not more than five years*”.

81. It is relevant to note that in terms of the aforesaid guidance note, prosecution under the aforesaid provisions is relevant only to cases of consensual intercourse. In cases of rape, the fact that the offender is HIV positive is considered as an aggravating factor, while sentencing

the offender. The aforementioned guidance note expressly provides: *“The sexual transmission of an infection may be the consequence of the defendant committing a serious sexual offence on the complainant, such as rape or sexual assault. The Sentencing Guidelines Council has indicated that where an offender knows that he or she has a sexual infection and commits a sexual offence on another, that fact can be taken into account as an additional aggravating factor for sentencing purposes.”*

82. In the Australian State of Victoria, non-disclosure of HIV Positive status is liable for prosecutions as *“conduct endangering life”* [S. 22 of the Crimes Act 1958 (Vic.)]. In New Zealand, the offender is liable to be prosecuted for, *inter alia*, *“reckless disregard for the safety of others”* that *“causes grievous bodily harm”* [S. 188(2) of the Crimes Act 1961, No. 43]

83. In Russia, Article 131 of the Criminal Code includes an aggravated sentence for *“Rape entailing, by negligence, the infliction of grave injury to the victim, the infection of the victim with HIV, or other grave consequences”* with 8 to 15 years of imprisonment rather than the basic 3 to 6 years. However, actual transmission is essential for such prosecution. Article 132 further criminalizes transmission of HIV by *‘Violent Sexual Actions’* with 8 to 15 years.

84. The Criminal Code of the Kyrgyz Republic has included a provision (Article 129) similar to the Russian Criminal Code that criminalizes *“Rape resulting in death of the victim, infecting the victim*

with HIV or other severe consequences”, and renders the offenders liable for 15 to 20 years of imprisonment rather than 5 to 8 years.

85. As is apparent from the plain language of the said section, the same is applicable only in cases when actual transmission of the disease has taken place.

86. The United States of America has enacted no federal law that criminalises HIV transmission. However, various states have either enacted specific laws or have prosecuted transmission and exposure under their non-specific laws. There is no uniformity in the manner in which such offences are prosecuted. The manner in which such offences are dealt with in some of the states is briefly noted as under:

- The State of Alaska does not have an explicit law punishing HIV transmission. However, under the Code of Criminal Procedure § 12.55.155. – “Factors in aggravation and mitigation” any sexual assault by an individual which may expose the victim to a chance of HIV transmission is an aggravating factor for sentencing (*Wans v. State*, No. A-6188, 1996 WL 671355 at *2 (Alaska Ct. App. 1996). The Code provides “(33) *the offense was a felony specified in AS 11.41.410--11.41.455, the defendant had been previously diagnosed as having or having tested positive for HIV or AIDS, and the offense either (A) involved penetration, or (B) exposed the victim to a risk or a fear that the offense could result in the transmission of HIV or AIDS; in this paragraph, “HIV” and “AIDS” have the meanings given in AS 18.15.310*”.
- The State of California prosecutes for both exposure and actual transmission. However, in

case of a sexual offence committed by person who possesses the knowledge that he or she is infected with HIV at the time of commission is liable for a three-year enhancement for each violation in addition to the sentence provided for the sexual offense itself (Cal. Penal Code § 12022.85.).

- Similarly, the State of Colorado, criminalizes exposure by a HIV prostitute as a class 5 felony and punishes an HIV person patronizing a prostitute as a class 6 felony. If it is proved beyond a reasonable doubt that a person had knowledge of his or her HIV infection prior to committing a sexual offense, the Court shall sentence the person to a mandatory term of imprisonment of at least three times the upper limit of the presumptive range for the level of offense committed, up to the remainder of the person's life (Colo. Rev. Stat. § 18-3-415.5).
- In Nevada, as per Nev. Rev. Stat. § 441A.300, a Sentence Enhancement can be called for by the Court if a person diagnosed with HIV fails to comply with a written order of a health authority, or he/she engages in behavior through which the disease may be spread to others, is subject to confinement by order of a court, in addition to any other penalty imposed pursuant to state statute.
- Massachusetts General Laws – 265 §22B(f) – provides that *“If a person, “has sexual intercourse or unnatural sexual intercourse with a child under 16 . . . in a manner in which the victim could contract a sexually transmitted disease or infection of which the defendant knew or should have known,” they were infected, they may be sentenced to imprisonment for life or any term not less than 15 years.”* This however is limited to children. For adults, Courts have sometimes held transmission

chargeable as “*assault and battery with a dangerous weapon*” depending on circumstances.

- As per the Tennessee Code Ann. § 40-35-114(21), if a person is convicted of the offense of aggravated rape (§ 39-13-503), sexual battery (§ 39-13-505), rape of a child (§ 39-13-522), or statutory rape (§ 39-13-506), and the defendant knew or should have known that, at the time of the offense, the defendant was HIV-positive, the court shall consider this as a factor in determining whether to enhance the defendant’s sentence.
- In Wisconsin, vide Wis. Stat. § 973.017(4), when making a sentencing decision concerning a person convicted of a serious sex crime, the court shall consider as an aggravating factor the fact that the crime was committed under all of the following circumstances: (1) the person being sentenced had HIV, (2) he or she knew he or she had HIV, and (3) the victim of the crime was significantly exposed to HIV by the acts constituting the serious sex crime.”

87. In some cases, in the United States of America, the courts had accepted that an HIV positive person is like a ‘*loaded gun*’ and any sexual act is akin to firing the same. However, this view, which was first accepted in early 1990’s stemmed from limited understanding and has been subject to wide criticism.

88. The International Criminal Court Trial Chamber III for the situation in the Central African Republic in the case of: ***Prosecutor v. Jean-Pierre Bemba Gombo: 2012 SCC Online ICC 16*** held as under:

“44. The Chamber is not persuaded by the defence arguments regarding the (non) relevance of the

transmission of HIV to the issues in the case. While it is correct that HIV transmission is not an element of the crime of rape, this does not render the medical documents irrelevant. In the case of conviction, it may be relevant as an aggravating factor in sentencing or to show the harm allegedly suffered by victims for the purposes of reparations.”

89. The Policy Brief of the Joint United Nations Programme on HIV/AIDS (UNAIDS) advises Governments as under:

“to ensure any application of general criminal laws to HIV transmission is consistent with their international human rights obligations. Where a violent offence (e.g. rape, other sexual assault or defilement) has also resulted in the transmission of HIV or created a significant risk of transmission, the HIV-positive status of the offender may legitimately be considered an aggravating factor in sentencing only if the person knew he or she was HIV positive at the time of committing the offence”.

90. In Canada, its criminal code does not have any specific offence relating to non-disclosure of the HIV status. However, such cases have been prosecuted as aggravated sexual assaults. Non-disclosure of an HIV positive status by a person is viewed as a fraudulent act that vitiates the consent of the non-infected partner to engage in any sexual activity with an HIV positive person and thus, constitutes a ‘sexual assault’. Since, it poses a significant risk of serious bodily harm, it would constitute an ‘aggravated sexual assault’ (*R. v. Cuerrier: [1998] 2 S.C.R. 371*)

91. As is apparent from the above, most countries that do not have specific laws to prosecute offences relating to HIV, prosecute such

offences under their pre-existing laws. In cases of actual transmission where an HIV Negative person acquires the said disease as a result of engaging in any sexual activity with an HIV Positive partner, the offender is prosecuted for causing bodily harm. The rationale is not difficult to understand. The person, who is inflicted with the said disease, does suffer bodily harm and if the same is done recklessly and with mal-intent, the offender is liable to be prosecuted for the same. In certain cases where an HIV Positive person fails to disclose his status and engages in any sexual activity, he/she may be prosecuted for sexual assault as in such cases, the consent of the other person to engage in sexual intercourse is vitiated and the sexual act can be construed as one without consent. However, all these cases relate to consensual sex. In cases of sexual assault or rape, it is widely accepted that the HIV Positive status of the offender is an aggravating factor to be considered while sentencing the offender.

92. Third, on a plain reading of Section 307 of the IPC, an offence under Section 307 of the IPC is not made out. Section 307 of the IPC punishes any act which is done by a person with such intention or knowledge and under the circumstances that by that act cause death, the persons committing such act would be guilty of murder. Murder is defined under Section 300 of IPC as under:

“300. Murder. - Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or -

2ndly. - It is done with intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or -

3rdly. - If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or -

4thly. - If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.”

93. Clearly, in the facts of the present case, the appellant had not raped the prosecutrix with an intention of causing her death. This is also not the prosecution's case. According to the prosecution, the appellant was lonely after the death of his wife and he had sexually preyed on his step daughter (as allegedly disclosed by him in his disclosure statement PW 10/C). Plainly, the second and third limb of Section 300 of the IPC are also not applicable as the said act was not done with intention of causing any bodily injury to the prosecutrix, which is likely to cause death or is sufficient in the normal course of nature to cause death. There is no ground to hold that the appellant intended to inflict a deadly bodily injury on the prosecutrix. The fourth limb of Section 300 of the IPC is perhaps closest to this case. It applies to a person committing an act which he knows is so imminently dangerous that in all probably would cause death or such bodily injury as is likely to cause death and yet, the offender commits

such an act without any excuse for incurring the risk of causing death or such injury as aforesaid.

94. It is relevant to note that one of the key ingredients of the second, third and fourth limb of Section 300 of the IPC is that the culpable act is so inherently dangerous as is likely to cause death; or is sufficient in normal course of nature to cause death; or in all probability it would cause death.

95. The Trial Court has proceeded on the basis that the act of a penetrative sexual intercourse by a person who is HIV positive is likely to cause death to the receptive partner. This is based on two assumptions. First, that such sexual intercourse is most likely to transmit the disease to the healthy partner; and second, that on transmission of the disease, the partner so infected is likely to die. However, both the said assumptions, are without basis and without any scientific evidence, to support the same.

96. In *R v. Clato Lual Mabior: [2012] 2 SCR 584*, the Supreme Court of Canada was concerned with the question as to whether in all cases, non-disclosure of HIV Positive status constitutes a ‘*significant risk*’ of serious bodily harm. In this context, the Supreme Court had observed as under:

“97. baseline risk of HIV transmission per act of vaginal intercourse with an infected male partner (i.e. the risk of transmission based on the male ejaculating, without a condom, having a normal unreduced viral load) varies from study to study. Dr. Smith's written report put the

risk at 0.05% (1 in 2000) to 0.26% (1 in 384) (p. 4). Ms. McDonald, a public health nurse, testified about the Manitoba Health post-exposure protocol, which puts risk per act at 0.1% (1 in 1000). A systemic review and meta-analysis of 43 publications comprising 25 different study populations, put the risk in high-income countries at 0.08% per sexual act (1 in 1250): M.-C. Boily, et al., “Heterosexual risk of HIV-1 infection per sexual act: systematic review and meta-analysis of observational studies” (2009), 9 *Lancet Infect. Dis.* 118.”

97. The court reasoned that use of condoms and reduced viral load would mitigate the risks and in such cases, would not present a significant risk. The court held that an HIV positive person can be convicted of an aggravated sexual assault only if the following three criteria are met: (i) that the HIV positive person does not disclose or misrepresents his/her HIV status while knowing that he/she is positive and there is a risk of transmission of the said virus; (ii) that the sexual activity poses a significant risk of serious bodily harm; and (iii) that the HIV negative partner would not have consented to the sexual activity if he/she had known of the HIV positive status of the other person.

98. On 08.12.2018, the Attorney General of Canada had issued a directive to the public prosecutors not to prosecute (i) HIV non-disclosure cases, where the HIV positive person has maintained a suppressed viral load (under 200 copies per milliliter of blood) as there would be no realistic possibility of transmission and; (ii) HIV non-disclosure cases, where the HIV positive person used condoms or

engaged only in oral sex or was taking treatment as prescribed unless there are other risk factors because in such cases there is no realistic possibility of transmission.

99. Centers for Disease Control and Prevention (CDC), which is one of the major operating components of the Department of Health and Human Services in the United States of America has published estimates of acquiring HIV from various acts based on published studies [Source: Patel P, Borkowf CB, Brooks JT. Et al. Estimating per-act HIV transmission risk: a systematic review. AIDS. 2014. doi: 10.1097/QAD.0000000000000298; and Pretty LA, Anderson GS, Sweet DJ. Human bites and the risk of human immunodeficiency virus transmission. Am J Forensic Med Pathol 1999; 20(3):232-239]. The tabular statement published by it is set out below:

“Estimated Per-Act Probability of Acquiring HIV from an infected Source, by Exposure Act*

Type of Exposure	Risk per 10,000
Exposures	
Parenteral	
Blood Transfusion	9,250
Needle-Sharing During Injection Drug Use	63
Percutaneous (Needle-Stick)	23
Sexual	
Receptive Anal Intercourse	138
Insertive Anal Intercourse	11
Receptive Penile-Vaginal Intercourse	8
Insertive Penile-Vaginal Intercourse	4

Receptive Oral Intercourse	Low
Insertive Oral Intercourse	Low
Other[^]	
Biting	Negligible
Spitting	Negligible
Throwing Body Fluids (Including Semen or Saliva)	Negligible
Sharing Sex Toys	Negligible
<p>* Factors that may increase the risk of HIV transmission include sexually transmitted diseases, acute and late-stage HIV infection, and high viral load. Factors that may decrease the risk include condom use, male circumcision, antiretroviral treatment, and pre-exposure prophylaxis. None of these factors are accounted for in the estimates presented in the table.</p> <p>[^] HIV transmission through these exposure routes is technically possible but unlikely and not well documented.</p>	

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100. While the aforesaid statistics are in public domain, this Court is conscious of the fact that the same do not stand proved. However, this only underscores the obligation of the prosecution to lead the necessary evidence and the necessity of the court to base its decision on evidence led and not on impressions. In this case, there is no evidence of the appellant's viral load or his propensity to transmit the same to the recipient by a penetrative sexual assault.

101. The assumption that penetrative sexual assault would in all probability lead to transmission of the disease, which in all probability would result in the death of a healthy partner is not established. In the facts of the present case, no evidence whatsoever was led to establish the probability of the prosecutrix being transmitted the said disease. Further, no evidence whatsoever was led to establish that if AIDS was

transmitted, it would in all probability lead to her death. In the given circumstances, the decision of the Trial Court is largely based on surmises and impressions, without analysis of any scientific data to assume that sexual intercourse by an HIV positive patient would in all probability lead to the demise of his partner.

102. Fourth, that the second reason indicated by the learned court for convicting the appellant – that the prosecutrix was suffering from vaginal warts (a sexually transmitted disease caused by human papilloma virus), which had been transmitted by the appellant – is also unmerited. The said conclusion is also premised on surmises and without any evidence whatsoever. First, there is no evidence that the prosecutrix had in fact contracted vaginal warts. None of the medical experts examined before the court had testified to the aforesaid effect. Further, there is no medical document establishing that the prosecutrix had been diagnosed as suffering from vaginal warts. The only document available on record, which could lead to such assumption, is a report furnished by Dr. Anita Harish (Ex.PW6/C). The said report merely states that the prosecutrix had complained of vaginal warts for three-four months. However, the said report also indicates that the appellant was referred to STI Clinic in BSA Hospital for genital herpes infection on 29.07.2011. The said report also indicates that prosecutrix was prescribed a red kit (acyclovir 400 MG Tablets). The said medicine is a common prescription for treating Herpes Simplex Viruses, which cause Genital Herpes. Genital herpes is also a sexually transmitted infection and is known to cause painful blisters. Therefore,

it is possible that prosecutrix was suffering from Genital Herpes and not Genital Warts. Second, that there is no evidence whatsoever that the prosecutrix had contracted the said disease from the appellant. The appellant was medically examined and there is no evidence to indicate that he was a carrier of Herpes Simplex Virus. Thus, there is no evidence that the appellant would have transmitted the said disease to the prosecutrix. Third, no charge was framed imputing that the appellant had transmitted the disease of 'Genital Warts' to the prosecutrix and that the same is a life threatening disease, likely to result in her death.

103. Lastly, this Court is of the view that the Trial Court had erred in proceeding on the basis that provisions of Section 270 of the IPC would not be applicable. The learned Trial Court had noted in the order that a charge under Section 270 of the IPC was not framed (and a Charge under Section 307 IPC was framed instead) because the said Section uses the word '*malignantly*' and the same refers to a kind of general malice, which was absent in the instant case.

104. At this stage, it is relevant to refer to Sections 269 and 270 of the IPC and the same are set out below:

“269. Negligent act likely to spread infection of disease dangerous to life.—Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease, dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

270. *Malignant act likely to spread infection of disease dangerous to life.*—Whoever maliciously does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

105. In *Queen-Empress v. Kahanji*, (1893) ILR 18 Bom 758 at p. 775, the Bombay High court observed that that the word maliciously implies a sort of general malice.

106. In *Bromage v. Prosser*, (1825) 4 B and C 247 at p. 255 : (1825) 107 ER 1051 at p. 1054, Vide Bayley, J observed that “*Malice in common acceptation means ill will against a person but in its legal sense it means a wrongful act done intentionally, without just cause or excuse.*”

107. In *Gangadharan Nair v. State Of Kerala: Crl. MC. No. 1873 of 2019 (D) decided on 6th October, 2020*, the Kerala High Court observed that “*any unlawful act done intentionally without just cause or excuse would come within the purview of malignant act.*”

108. The expression ‘maliciously’ is synonymous to ‘maliciously’. In *State Government, Madhya Pradesh v. Indarsingh Labhsingh: AIR 1962 MP 292*, a Division Bench of the Madhya Pradesh High Court had observed that “*the word ‘maliciously’ implies, the doing of a thing with malice or ill-will*”. The said decision as well as the decision in *Gangadharan* (*supra*) and *Kahanji* (*supra*) were rendered

in the context of Section 153 of the IPC and in that context it is apparent that, the expression ‘malignantly’ was construed as general malice. However, that does not restrict the import of the said expression.

109. The word malignant is a synonym of malice. ‘Malice’ means a “*formed design of doing mischief to another, technically called militia praecogitata, or malice prepense of afore-thought.. Aforethought does not necessarily imply premeditation, but implies intention which must necessarily precede the act intended.*” (Jowitt’s Dictionary of English Law, 4th Ed).

110. Malice can also be implied in certain cases of gross negligence and complete disregard to the probable consequences of an act. This is illustrated by the maxim, *Culpa lata dolo aequiparatur* – when negligence reaches a certain point, it is the same as intentional wrong.

111. Plainly, the words ‘malice’ and ‘maliciously’ are of a wide import and cannot be interpreted to be restricted only to acts, which are done with general malice and not malice towards any one person. Whether an act is malignant or not is determined by the intention of doing such act. Thus, an act occasioned by mal-intent and malice would fall within the scope of Section 270 of the IPC.

112. In *Mr ‘X’ v. Hospital ‘Z’: (1998) 8 SCC 296*, the Supreme Court considered a case where the respondent hospital had disclosed that the appellant was HIV positive to his fiancé. As a result of such disclosure, the appellant’s marriage to his fiancé was called off. The

appellant instituted an action to recover damages on the ground that the information regarding his HIV positive status was required to be kept secret under medical ethics and was disclosed illegally. The appellant pleaded that since the hospital had breached its duty to maintain confidentiality, they were liable to pay damages to the appellant.

113. The Supreme Court rejected the said contention and held that the disclosure of the appellant's HIV status would not violate the rule of confidentiality or the appellant's right to privacy, as his fiancé with whom he was to be married, was saved by the disclosure. She may have been infected too if the marriage had been consummated. The Court had further referred to Sections 269 and 270 of the IPC and observed as under:

“41. These two sections spell out two separate and distinct offences by providing that if a person, negligently or unlawfully, does an act which he knew was likely to spread the infection of a disease, dangerous to life, to another person, then, the former would be guilty of an offence, punishable with imprisonment for the term indicated therein. Therefore, if a person suffering from the dreadful disease “AIDS”, knowingly marries a woman and thereby transmits infection to that woman, he would be guilty of offences indicated in Sections 269 and 270 of the Penal Code, 1860.”

114. The Supreme Court further held that the right of an HIV positive person to marry stood suspended. The observations made by the court were impugned in a petition filed under Article 32 of the

Constitution of India. The said petition was treated as an application for clarification/directions in the disposed of matter. Whilst the conclusion was upheld, the other observations made by the Supreme Court were set aside on the ground that the same did not arise for consideration [See: *Mr 'X' v. Hospital 'Z': (2003) 1 SCC 500*].

115. Notwithstanding the same, the reasoning that unprotected sexual engagement by an HIV positive person, who is aware of the nature of his disease, can be termed as a negligent act, which he knows is likely to spread the infection of a disease that endangers life and is thus, liable to be punished under Section 270 of the IPC is persuasive and cannot be faulted.

116. Having stated the above, this Court is of the view that even if the Trial Court was of the view that it would not be apposite to frame charges under Section 270 of the IPC, the same did not necessarily warrant that charges be framed under Section 307 of the IPC.

117. Accordingly, the appellant's conviction for committing an offence under Section 307 of the IPC cannot be sustained and is, accordingly, set aside. The appellant is acquitted of the charge of committing the said offence.

118. In view of the above, the impugned judgment to the extent that it convicts the appellant for committing an offence punishable under Section 376 of the IPC is upheld and, to the extent that it convicts the appellant of committing offences under Sections 313 and 307 of the IPC, is set aside.

119. Consequently, WWW.LIVELAW.IN the sentences awarded to the appellant for committing those offences are also set aside and the impugned order dated 14.09.2012 is modified to the aforesaid extent. The Pending application is also disposed of.

NOVEMBER 26, 2020
RK

VIBHU BAKHRU, J

HIGH COURT OF DELHI



सत्यमेव जयते