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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 11th December, 2019

+ **CRL.L.P. 526/2019**

STATE

..... Petitioner

Through: Ms. Neelam Sharma, APP for the State
with SI Manisha Sharma, PS Aman Vihar

versus

VIMAL KUMAR @KARWA

..... Respondent

Through: Mr. J. P. Singh and Mr. Ajay Nayar
Advocates

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

SANGITA DHINGRA SEHGAL, J (Oral)

1. By the present Leave Petition filed under Section 378 of the Code of Criminal Procedure (hereinafter referred to as '**Cr.P.C.**') the State seeks leave to appeal against the judgment dated 15.03.2019 passed by Additional Sessions Judge-01, Special Court (POCSO) North West District, Rohini Court, New Delhi, whereby the respondent (accused before the Trial Court) was acquitted of the offences punishable under Section 6 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as '**POCSO**') and for the alternative charges under Section 376(2)(f)(i)(n)/506 of the Indian Penal Code (hereinafter referred to as '**IPC**').

2. The brief facts of the case, as stated by the learned Trial Court are reproduced as under:

“Brief facts of the prosecution case are that DD No. 56B dated 26.07.2015 was recorded on PCR call regarding wrong act with 9 years old daughter of the caller about three days before but the victim had informed today only. The IO reached the spot where complainant S mother of the victim V met the IO and gave her statement to the effect that her husband is running a factory of making ladies purse in the residence itself where 4-5 workers are working. All the workers belong to their family. Accused Vimal @ Karwa was working in the factory since February, 2015 and left for his native village on Holi. He came back on 05.07.2015 and started working again. Today she has gone to market with her husband at 11.30 a.m. and they returned at 1.30 p.m. and found victim V having a mobile in her hand. On inquiry, she told that this mobile belongs to accused and thereafter started weeping and further told that about 2-3 days before accused took her to the room on the pretext of showing her game in the mobile and removed her and his clothes and inserted his penis in her shu shu. When she screamed he pressed her mouth and threatened to not to tell it anyone or else her parents shall be killed. Today her daughter also reported stomach ache and

she informed her husband who called the police. On her statement this FIR was registered. IO prepared the site plan and victim was brought to SGM hospital for her medical examination. Accused was arrested and was medically examined. Statement of victim u/s 164 Cr.P.C. was got recorded where she stated that accused used to call her on the pretext of mobile and used to do wrong act with her by inserting his penis in her vagina. He also applied mustard oil on her private part and his private part and also threatened not to tell it to anyone. She had severe stomach ache and informed her mother. Accused used to call her at 6.00/6.30pm. when her parents had gone to the market to get vegetables. Exhibits of the victim and accused were sent to FSL and after completion of investigation, chargesheet was filed.”

3. In order to bring home the guilt of the accused person, the prosecution examined 11 witnesses in all. The incriminating evidence and circumstances were put to the accused person during his statement recorded under Section 313 Cr.P.C., wherein he claimed to have been falsely implicated in the present case and examined one witness in his defence.

4. Aggrieved by the impugned judgment, Ms. Neelam Sharma, learned APP appearing for the State argued that the judgment dated 15.03.2019 is based on conjectures, surmises and the learned Trial Court has failed to appreciate the testimony of the victim in its right perspective ignoring the well-settled proposition of law that the sole testimony of the victim in the case of sexual assault is sufficient to base conviction of the accused. She further contended that the impugned judgment is a case of legal defects and therefore is liable to be set aside.
5. She further contended that the statements of PW-1 (the victim) recorded at different stages were consistent and stood corroborated with the testimony of PW-8 (mother of the victim); that the learned Trial Court has placed undue weightage on the minor contradictions and discrepancies in the statements of PW-1 (the victim) which is contrary to the settled principles of law that the courts should not get swayed by minor contradictions or discrepancies in the statement of a child witness. To substantiate her arguments, learned APP for State has placed reliance on cases titled as *Vijay@Chinee V. State of Madhya Pradesh* reported in **2010 8 SCC 191**; *State of Rajasthan vs. Shri Narayan* reported in **(1992) 3 SCC 615**; *Ratansinh Dalsukhbhai Nayak vs. State of Gujarat* reported in **2004 Cri. LJ 19**; *Panibhusan Behera and Others vs. State of Orissa* reported in **1994 Scc Online ORI 306**; *Harpal Singh & anr vs. State of Himachal Pradesh* reported in **1981 1 SCC 560**; *Panchi & ors vs State of UP* reported in **AIR 1998 SC 2726**; *Nivrutti Panduranga Kokati vs. State of Maharashtra* reported in **AIR 2008 SC 1460**;

State of UP vs Krishna Master & ors reported in *AIR 2010 SC 3071*; *Gagan Kanojia & Anr vs State of Punjab* reported in *2006 13 SCC 516*.

6. Learned APP for the State further added that the testimony of the victim is corroborated with the medical evidence, as her hymen was torn and bleeding was also there. She further submits that the Trial Court failed to appreciate that there is a presumption under Sections 29 and 30 of POCSO Act against the respondent-accused and it is for the respondent-accused to prove to the contrary.
7. Per contra, Mr. J. P. Singh, learned counsel for the respondent contended that there is no infirmity in the impugned judgment passed by the learned Trial Court and no interference is warranted by this Court. He further contended that the testimony of victim is bristled with lot of contradictions, inconsistencies and improvements. She has given different versions in her statements recorded at different stages. The learned counsel, however, did not dispute the fact that the solitary testimony of the victim in a case of rape is sufficient to convict the accused subject to condition that the same inspires confidence of the Court, but in instant case, the sole testimony of the victim fails to inspire confidence, unworthy of acceptance and creates a genuine doubt about her version.
8. We have heard the learned counsel for the parties and carefully examined the impugned judgment and the material available on record as well.
9. It is a settled principle of law that in a case of sexual assault, the conviction can be based on the sole testimony of the victim without

corroboration from any other evidence and where the testimony of a victim of sexual assault appears to be unblemished, trustworthy and instills confidence in the Court and should be of sterling quality. It is also a well settled principle of law is that the sole testimony of child witness can be relied upon along with other circumstances and corroborative evidence to convict the accused. Undoubtedly, the settled proposition of law is that the evidence of child witness is required to be scrutinised and approached with great caution. In this regard, reference can be made to the dicta of the Apex Court in the case of *State of M.P. v. Ramesh* reported in (2011) 4 SCC 786 wherein the Court has held that:

*“14. In view of the above, the law on the issue can be summarised to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. **The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.**”*

10. Further reliance can be placed on *Yogesh Singh Vs. Mahabeer Singh and others* reported in *AIR 2016 SC 5160*, wherein the Apex Court has held that:

“22. It is well settled that the evidence of a child witness must find adequate corroboration, before it is relied upon as the rule of corroboration is of practical wisdom than of law. (See Prakash v. State of M.P. [Prakash v. State of M.P., (1992) 4 SCC 225 : 1992 SCC (Cri) 853] , Baby Kandayanathil v. State of Kerala [Baby Kandayanathil v. State of Kerala, 1993 Supp (3) SCC 667 : 1993 SCC (Cri) 1084] , Raja Ram Yadav v. State of Bihar [Raja Ram Yadav v. State of Bihar, (1996) 9 SCC 287 : 1996 SCC (Cri) 1004] , Dattu Ramrao Sakhare v. State of Maharashtra [Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341 : 1997 SCC (Cri) 685] , State of U.P. v. Ashok Dixit [State of U.P. v. Ashok Dixit, (2000) 3 SCC 70 : 2000 SCC (Cri) 579] and Suryanarayana v. State of Karnataka [Suryanarayana v. State of Karnataka, (2001) 9 SCC 129 : 2002 SCC (Cri) 413] .)

23. However, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be

swayed by what others tell him and thus a child witness is an easy prey to tutoring. (Vide Panchhi v. State of U.P. [Panchhi v. State of U.P., (1998) 7 SCC 177 : 1998 SCC (Cri) 1561])”

11. In view of the settled law, we shall now examine whether the evidence adduced by the prosecution, particularly the testimony of the victim, is trustworthy, credible and can be relied upon.
12. From the perusal of the record, it transpires that there are material contradictions in the testimony of the victim recorded by the police and the statement recorded under Section 164 of the Cr.P.C. In her initial statement recorded by the police, the victim had stated that:

“Q-6:- Aaj aapke sath kya hua hain?”

Ans:- Aaj kuch nahi hua

Q-7:- Aaj nahi toh kab hua?

Ans:- Doh-Teen Din pehle.

Q-8:- Doh-Teen Din pehle kya hua?

Ans:- Mujhe mobile keh bahane chooteh kamre meh bulaya.

Q-9:- Kisne Bulaya?

Ans:- Karwa Bhaiya Neh.

Q-10: Phir Kya Kiya?

Ans:- Mere Sath Galat Kaam Kiya.”

13. However, when her statement was recorded under Section 164 of the Cr.P.C, she has altered her version and has stated that “Karwa

Bhaiya, unka naam Vimal hain, joh mujhe Mobile keh bahaneh Bulateh thae. Voh mere sath Galat Kamm Karta tha. Vo Apni Pishab vali jagah mere pishab vali jagah main dalta tha, Aadah-Aadah aur kabhi pura. Voh meri rasoī seh sarso ka tel bhi laya tha apni Peshab ki jagah par lagaya. Meri Peshab ki jagah par bhi lagaya". It is also of vital concern that in her statement recorded under Section 161 Cr.P.C, there are no specific allegations of penetrative sexual assault against the respondent and however, in her statement recorded under Section 164 Cr.P.C, she has altered her version and has stated that the accused used to penetrate her vagina with his private part.

14. The victim stepped into witness box and examined as PW-1. In her examination-in-chief, she deposed that :-

"Q. Beta Kya Hua tha?

Ans. : Karwa Bhaiya mere sath gandi baat karte the.

Q. Beta kya gandi baat karte the?

Ans. Wo mobile main gandi gandi game deekhate the (the witness is referring to obscene). Wo rasoī se tail bhi lata tha aur apne aur mere peshab ki jagah lagate the aur mere sath ganda kaam karte the.

Q. Beta aisa ganda kaam unhone aapke saath kitni baar kiya?

Ans. Chaar baar.

Q. Kya appne ye baat kabhi kisi ko batai?

Ans. Nahi, sirf apne mummy papa ko bataya tha.

Q. Aapne sabse pehli baar jab aapke sath galat kaam hua tha to aapne apne mummy-papa ko koyn nahin bataya tha?

Ans. Unhone mujhe kaha tha ki agar kisi ko bataya to tere mummy papa aur bhain aur behan ko jaan se maar dunga.

Q. Aapke mummy papa ko ye baat kaise pata chali?

Ans. Ek baar mere pait (Stomach) main dard ho gaya tha tab maine apni mummy ko sab baat batai thi.

Q. Beta ye aapke saath ki samay galat kaam karta tha?

Ans. Shaam ko 6-6:60 baje jab mere mummy papa subzi lene chale jaate the.

Q. Fir kya hua?

Ans. Mere papa ne police ko 100 nuber per call kar di aur police aai aur Karwa ko pakad liya."

15. During her cross examination, she deposed as under:

*"Karwa hamare ghar main bahut time se reh raha tha. Hamare ghar per aur bhi bahut saare bhaiya rehte hain jaise Chatu Bhaiya, Mohit Bhaiya aur Badlu bhaiya. Ye kehna galat hain ki meri mummy ki aur Karwa bhaiya ki aapas main ladai rehti thi. **Jab Karwa mere saath galat kaam karta tha to mujhe chot nahi lagti thi bas khoon nikla tha. Jab khoon nikla tha to maine apni mummy ko bataya tha. Khoon peshab ki jagah se nikalta tha. Karwa ne aakhri baar mere saath galat kaam*** 26

taarikh ko kiya tha. Ye kehna galat hain ki apni mummy ke kehne par maine Karwa ko jhootha fasaya hain joki Karwa ko ghar se neekalna chahati thi. Hamare ghar main chaar kamre hain. Baaki ke kaarigar hamare ghar se kuchh door aa-tara main rehte hain. Ye kehna galat hain ki maine aaj court main jhoothi gawahai di hain."

16. Mother of the victim, stepped into the witness box as PW-8 and deposed that:

"I do not know the date and month of the incident, however, it was last year when I had gone to Sunday market to purchase the clothes of my children. When I came back I saw my daughter V was weeping and in perplexed condition. She was having a mobile phone in her hand. I made inquiry from my daughter about the said mobile, who had told me that it was of accused Karwa @ Vimal, who was also working in our factory and was permanent resident of Village Aamtara, District, Hardoi, U.P. I made inquiry from my daughter about her said condition but she did not tell me anything. I also asked her gently and politely as to what had happened with her but then also she remained quite. I discussed the matter with my husband and we both apprehended that something wrong might have happened with the victim child and keeping in view of this my husband had called the police at 100 number. I

did not watch the said mobile phone and did not find any obscene material it. Despite my repeated asking my daughter V did not tell me anything as to what had happened with her. Police came at my house and obtained my signatures on some papers. I do not know as to what was written on those papers as I am illiterate. The contents of said papers were not readover to me by the police."

17. Father of the victim was examined as PW-9 and he deposed that:

"I have been residing on rent at the address mentioned against my name in the list of witnesses with my family which consists of myself, my wife and my four children. Child Victim V is my first born child, who is presently aged about 11+ years. I am running a small factory in the same house of manufacturing ladies purse and he has also employed 4-5 workers for the same and they all are from my native village namely Village - Aamtara, District Badau, U.P. My rented accommodation comprises of four rooms out of which two are being used for running the said factory.

I do not want to say anything in this case. My statement was never recorded by the police. Whatever my wife might have deposed today in the Court may be taken as truth and I do not want to add or subtract anything therefrom."

18. During his cross examination, he stated as under:

“It is wrong to suggest that my statement was recorded by the police.

At this stage, the statement of the witness recorded U/s 161 Cr.PC has been readover to him which he denies having made any such statement before the police.”

19. After examining the testimony of the above-mentioned prosecution witnesses with regard to the alleged incident, it is observed that the story of the prosecution has a lot of defects from its inception. As, the prosecutrix during her cross examination had deposed “*Karwa ne aakhri baar mere sath galat kaam 26 taarikh ko kiya tha*”, whereas in her initial statement which was recorded on 26.07.2015 U/s 161 Cr.P.C, she had stated that nothing has happened today and she had been assaulted by the respondent-accused two-three days prior from today.
20. Further, as per the version of the prosecution, the statements of PW-9 (father of the victim), PW-8 (mother of the victim) & PW-1 (Victim) were recorded by PW-10 SI Manisha Sharma U/s 161 Cr.P.C, who had deposed that :

“On 26.07.2015, I was posted in PS Aman Vihar. On that day, on receipt of DD No. 56B already Ex.PW2/A, I along with W/HC Phoolwati and Ct. Manish reached at the spot at A-16, Prem Nagar, Dellhi. There, I met the caller Sh. Vinod Kumar and Smt. Sunita with their daughter i.e. the victim child V. I called the NGO at the

spot and got the victim child counselled. Thereafter, I along with the victim, her mother and the above said Constables reached to SGM Hospital where the victim child was got medically examined vide MLC already Ex.PW6/A. Thereafter, I seized the exhibits of the victim child which were given by the Doctor to W/HC Phoolwati vide seizure memo Ex.PW10/A bearing my signatures at point A and that of WHC Phoolwati at point B. **Thereafter, I recorded the statement of Smt. Sunita, mother of the child on her dictation, which was duly signed by her at point A and the same was attested by me at point B.** The said statement is already Ex.PW8/A. On the basis of the statement of complainant, I made my endorsement and prepared rukka which is already Ex.PW3/B bearing my signature at point 'B'. The rukka was handed over to Ct. Manish for getting the case registered at PS, who had left for the same from the hospital. Thereafter, I along with the complainant, victim and W/HC Phoolwati had reached back to the spot, **there I prepared site plan at the instance of the complainant. I recorded the statements of victim child and her father Shri Vinod Kumar U/s. 161 Cr.PC.**

21. Contradicting the aforesaid version of the police witness, PW-9 (father of the victim) during his examination in chief had categorically deposed “ I do not want to say anything in this case. My

Statement was never recorded by the police” and further during his cross-examination “It is wrong to suggest that my statement was recorded by the police. At this stage the statement of the witness recorded U/s 161 Cr.P.C has been read over by him which he denies having made any such statement before the police”.

22. Perusal of the aforesaid testimonies also reveals that PW-8 (*mother of the victim*) had completely negated the version of the victim because during her cross-examination she deposed “**I had not stated to the police that on 26.07.2015, I along with my husband had gone to Sunday bazar for shopping at about 11:30 a.m. and that when at about 1:30 p.m., I came back, I found my daughter was holding a mobile phone and on inquiry she had told me that it was of accused Karwa or that accused had taken her inside the room on the pretext of showing games in the mobile phone 2-3 days ago. Confronted with portion B to B of Ex.PW5/A, where it is so recorded.**
23. Further during her cross examination she deposed “**I had not stated to the police that accused had committed wrong act with her 2-3 times after removing her clothes as well as his clothes and thereafter he inserted his male organ in her vagina** and that when she started crying he pressed her mouth and threatened her not to disclose this fact to her parents otherwise he would kill me and my husband. **Confronted with portion C to C of Ex.PW8/A where it is so recorded’** and **I had not stated to the police that my statement was recorded correctly and was readover to me by the police. Confronted with portion E to E of Ex.PW8/A where it is so recorded.”**

24. Having discussed the testimonies of the victim and other prosecution witnesses in detail, we deem it appropriate to examine whether the ocular testimony of the victim finds any support with the medical evidence adduced by the prosecution. Dr. Jyoti, S.R. Gynae, Sanjay Gandhi Memorial Hospital, Mangol Puri, who had examined the victim and proved the MLC as (Ex.PW6/A). PW-6 Dr. Jyoti, during her cross-examination had stated that *“I mentioned **hymen torn and it can be old torn. It is correct that hymen can be torn by itching, cycling, swimming, by fingering herself during itching, and any other physical activity. It is correct that if a 9 year old girl is subject to penetrative sexual assault for the first time, chances of she bleeding after tearing of hymen are there.**”*
25. Thereupon, even the FSL report does not support the version of the prosecution because the FSL Report No. FSL-2015/B-5530 was concluded with the following datum:
- “1. Blood was detected on exhibits ‘1f1’, ‘1f2’ and ‘3’*
 - 2. Blood could not be detected on exhibits ‘1a1’, ‘1b’, ‘1c’, ‘1d’, ‘1e’ and ‘1g’.*
 - 3. Semen could not be detected on exhibits ‘1a1’, ‘1a2a’, ‘1a2b’, ‘1b’, ‘1c’, ‘1d’, ‘1e’, ‘1g’, ‘2’ and ‘4’*
26. Consequently, there is no medical or forensic evidence available on record to corroborate the testimony of the victim (PW-1) and which could support the offence of rape having been committed upon her. Though, this Court finds merit in the submission of learned APP for State that the victim (PW-1) was a minor on the date of the incident and the presumption under Section 29 and 30 of the POCSO Act would be attracted, yet the contradictory versions of the victim on

material aspects at various stages of the proceedings create a serious doubt about the truthfulness of the prosecutrix.

27. The Hon'ble Apex court in the case of ***Sham Singh Vs The State Of Haryana*** reported in **(2018) 18 SCC 34** has laid down the following principles which need to be taken into consideration while analyzing the elements of false allegations in the case of rape because the same can cause equal distress, humiliation and damage to the accused. Relevant portion from the aforesaid judgment is extracted below:

“8. It is also relevant to note the following observations of this Court in the case of Raju vs. State of M.P. (2008) 15 SCC 133, which read thus:

“10. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a victim should not be suspected and should be believed, more so as her statement has to be evaluated on a par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the court.

11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would

not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration..”

28. Further, a coordinate Bench of this Court in ***Rohit Bansal Vs State*** reported in ***2015 SCC OnLine Del 9937*** has discussed that there is no hesitation in establishing that rape causes great suffering and embarrassment to the victim, contrarily false implication of committing a rape also results in defaming the reputation and social dignity of the accused. The germane portion of ***Rohit Bansal (Supra)*** is extracted below:

“47. There is no doubt that rape causes great distress and humiliation to the victim of rape but at the same time false allegation of committing a rape also causes humiliation and damage to the accused. An accused has also rights which are to be protected and the possibility of false implication has to be ruled out. The Supreme Court in Radhu vs. State of Madhya Pradesh reported in 2007 Cri. LJ 4704 had in this context noted as follows:

“The courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a person has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case.”

and in Abbas Ahmed Choudhary Vs. State of Assam : (2010) 12 SCC 115, the Hon'ble Supreme Court has held that:

“We are conscious of the fact that in a matter of rape, the statement of the victim must be given

primary consideration, but, at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a victim would always tell the entire story truthfully.”

29. Keeping in view the facts of the present case and applying the principles laid down by the Hon'ble Apex Court, this Court is of the view that it would neither be fair nor reasonable to convict the respondent-accused on the sole testimony of the victim, which had been wavering and was not consistent as recorded by the Learned Trial Court. Hence, this Court is of the opinion that the respondent-accused is entitled to the benefit of doubt.
30. It is settled law that while deciding a leave petition filed by the State, in case two views are possible, the High Court must not grant leave, if the trial court has taken one of the plausible views. Upon re-appraisal of evidence and relevant material placed on record, in case, the High Court reaches a conclusion that another view can reasonably be taken, then the view, which favours the accused, should be adopted unless the High Court arrives at a definite conclusion that the findings recorded by the trial court are perverse.
31. Having regard to the principles laid down by the Apex Court in the case of ***Ghurey Lal vs. State of U.P.*** reported at **2008 (10) SCC 450**, we do not find that there is any perversity in the reasoning given in the impugned judgment and for the abovementioned reasons, this Court does not find any reason to interfere with the same.

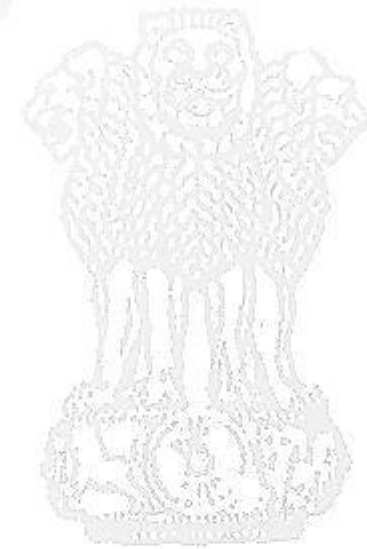
32. Accordingly, the present leave petition, being bereft of merit, is dismissed.
33. Trial Court record be sent back along with a copy of this order.

SANGITA DHINGRA SEHGAL, J.

MANMOHAN, J.

DECEMBER 11, 2019

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