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

+ **CRL.L.P. 639/2017**

STATE (NCT OF DELHI)

..... Petitioner

Through: Ms.Radhika Kolluru, APP along with
S.I. Parmod Kumar, P.S.Shalimar Bagh.

versus

RASHID KHAN

..... Respondent

Through: None.

**CORAM: JUSTICE S.MURALIDHAR
JUSTICE I.S. MEHTA**

ORDER

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08.11.2017

Crl.M.A. No. 18232/2017 (exemptions)

1. Allowed, subject to all just exceptions.

Crl.L.P.No.639/2017 & Crl.M.A. No.18231/2017 (delay in filing)

2. There is a delay of 154 days in filing this Criminal Leave Petition.

3. From the explanation offered in Para-4 of the application for condonation of delay, the Court finds that the file has travelled from the Additional Public Prosecutor to Chief Prosecutor (North West), thereafter to the Director of Prosecution, thereafter to the Principal Secretary (Law & Justice) and from there to the Law Minister and ultimately to the Lieutenant Governor. Why, for the purpose of approval for filing a Criminal Leave Petition, a file should have to travel to so many levels is not clear. Be that as

it may, it appears that despite grounds being made out by the Addl. PP why the case was fit for appeal, the file was again returned from the Office of the Principal Secretary (Law & Justice) to the Addl PP after several months for the same purpose. In this process several months were lost. The Court further finds that although the file was thereafter returned to the Office of the Principal Secretary on 7th June 2017, he gave his ultimate opinion only on 14th August 2017, i.e. after more than two months. There is no explanation why, when the matter had already been delayed, it received no urgent attention at that stage. In the circumstances, the Court is not satisfied with the explanation offered for the delay of 154 days and, therefore, is not inclined to condone it.

4. Even on merits, the Court finds that this is not a case where leave to appeal should be granted. This is a case where a Muslim male whose age was proved to be between 20 to 22 years of age went away with a Muslim girl who, according to the prosecution, was below 15 years of age at that i.e. around 24th September 2013. However, the trial court was not convinced about the school certificate of the girl that was produced in this regard.

5. What weighed with the trial court was that the two got married by the time they were apprehended. The girl was categorical that she had gone of her own accord and had fully consented to the marriage with the Respondent. The trial Court referred to the judgments of the Division Bench of this Court where, in similar circumstances, the Division Bench was not willing to view the circumstances as pointing to the commission of an offence under Section 366 of the Indian Penal Code ('IPC').

6. What also weighed with the trial Court was that the provisions of Sections 29 and 30 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO') were in conflict with the Muslim Personal Law with regard to marriage of a Muslim girl as POCSO treats the girl below 18 years as not capable of giving consent for her marriage and confirmation thereto, whereas the Muslim personal law does.

7. The learned APP for the State referred to the recent judgment of the Supreme Court in *Independent Thought v. Union of India (2017) 12 SCALE 621* where the Supreme Court did away with the distinction between POCSO Act on the one hand and the Exception 2 to Section 375 IPC on the other which states that "Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape". In para 105 of the judgment, the Supreme Court holds that the Exception 2 to Section 375 will "**now** be meaningfully read as 'Sexual intercourse by a man with his own wife, the wife not being under eighteen years of age, is not rape.' " In his concurring judgment, Justice Deepak Gupta emphasized that "This judgment will have prospective effect".

8. It may be noted that as far as the case at hand is concerned, Exception 2 to Section 375 IPC had not undergone the above change as on the date of the occurrence of the alleged offence. It was submitted by learned APP that in the same judgment, the Supreme Court held that the POCSO Act would in any event have to prevail over the provision in the IPC. That would be correct in a situation where there is no distinction between the relevant

provision under the IPC and that under the POCSO which have only now been equated in a sense by the Supreme Court. Further, it is not clear from a reading of the judgment of the Supreme Court that it had considered the situation that would arise in the case of marriage of a Muslim girl who is above 15 but below 18 years of age and whether the interpretation of POSCO in such a situation would contradict the Muslim personal law.

9. On the facts of the present case, the Court does not consider it necessary to further examine this aspect and leaves it open for decision in an appropriate case. The Court is of the view that, on the facts of the present case, the impugned judgment of the trial court acquitting the respondent of the offences under Section 376 IPC and Section 6 of the POCSO does not give rise to any ground for appeal.

10. The Court, accordingly, declines to grant leave to appeal.

11. The petition is dismissed both on the ground of the delay as well as on merits.

S. MURALIDHAR, J.

I.S. MEHTA, J.

NOVEMBER 08, 2017
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