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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.L.P. 549/2018

STATE (GOVT. OF NCT OF DELHI)

..... Petitioner

Through: Mr Hirein Sharma, APP for State

versus

SATENDER

..... Respondent

Through: None

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE VINOD GOEL

ORDER

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21.08.2018

Crl. MA 30404/2018 (Exemption)

1. Allowed, subject to all just exceptions.

Crl. MA 30403/2018 (delay)

2. In view of the submissions made in the application, the delay in filing the criminal leave petition is condoned. The application is disposed of.

CRL.L.P. 549/2018

3. The State seeks leave to appeal against the judgment dated 16th December, 2017 passed by the learned Additional Sessions Judge-01 (North East), Karkardooma Court in Sessions Case No.44371/15 arising out of the FIR No.300/12 registered at Police Station ('PS') Jafrabad, Delhi to the extent that the Respondent has been acquitted of the offence under Section

376 (2) (f) of the Indian Penal Code ('IPC').

4. It must be mentioned at the outset that by the same impugned judgment, the trial Court convicted the Respondent for the offence under Section 10 of the POCSO Act and by an order on sentence dated 3rd January, 2018, sentenced him to undergo rigorous imprisonment ('RI') for six years with a fine of Rs.50,000/-; and in default of payment of fine to undergo simple imprisonment ('SI') for a period of six months.

5. Relevant to the present criminal leave petition, the question that requires to be considered is whether any ground has been made out by the State for grant of leave to appeal against the judgment of the trial Court which, on analysing the evidence that was placed before it, came to the conclusion that the prosecution has failed to prove that the Respondent committed penetrative sexual intercourse with the victim and, therefore, could not be convicted for the offence under Section 376(2) (f) IPC.

6. The age of the victim as on the date of the offence i.e. 25th November 2012 was proved to be around five and a half years and, therefore, she was a child within the meaning of the POCSO Act.

7. In her deposition in the trial Court as to what exactly happened with her, the victim stated that after the accused called her inside his room and bolted the door, he 'then started playing'. The questions and answers and the Court observation thereafter read as under:

“Q. What was he playing?

Ans. He took off his underwear and my underwear and then started

playing. First of all, he made me lie and then he laid upon me and then started playing and at that time the TV v/vas on. Thereafter, he started playing and blood came out of him which got stained on my *pajami*.

Court observation: The witness is unable to tell the part of the body of the accused from where had bled and as such, the diagrams of male figures as printed on the reverse of the MLQ have been shown to the witness to identify the part of body of the accused from where he had bled. On seeing those diagrams, she points out towards the penis as depicted in the said diagram.

Q. Did the accused touch you anywhere?

(The witness appears to be avoiding the answer but only states that the blood got on her thigh and leg and that too, she tells by gestures).

Q. Did you feel any pain in the game played by the accused?

Ans. No.

Q. Did the accused touch the part of his body as pointed by you in the diagram shown to you anywhere on your body and if yes, on which part?

Ans. Yes. He touched it but I cannot tell on which part of my body.”

8. The MLC of the victim showed that the hymen was torn, but failed to indicate whether it was a fresh tear. As far as the forensic evidence is concerned, the semen stains found on the victim’s clothes were confirmed to be that of the Respondent. Since the Respondent was unable to explain as to how his semen could have been found on the clothes of the victim, Section 106 of the Indian Evidence Act (‘IEA’) was invoked and he was convicted for the offence punishable under Section 10 of the POCSO Act.

9. This being an incident that occurred on 25th November 2012 i.e. before the amendments to the IPC and the Cr PC that became effective in 2013, it

was incumbent on the prosecution, if it wanted to prove the guilt of the Respondent under Section 376(2) (f) IPC, to show that there was penetrative sexual assault. With no semen being present in the cervical and vaginal swabs/ slides of the victim, and no external injury seen, this aspect of the case could not be proved.

10. Having carefully perused the impugned judgment of the trial Court in light of the documents placed on record and after considering the submissions of the learned APP, this Court is not persuaded that the trial Court has erred in acquitting the Respondent for the offence under Section 376(2) (f) IPC while convicting him for the offence under Section 10 of the POCSO Act and sentencing him accordingly.

11. The criminal leave petition is accordingly dismissed, but in the circumstances, with no orders as to costs.

S. MURALIDHAR, J.

VINOD GOEL, J.

AUGUST 21, 2018

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