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

+ **CRL.L.P. 732/2017**

STATE (GOVT OF NCT OF DELHI) Petitioner
Through: Ms.Radhika Kolluru, APP for State
Inspector Avinish Tyagi, PS-Shahbad
Dairy
versus

ABHAY LAL @ SONU & ANR Respondents
Through:

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

% **ORDER**
10.01.2018

1. The State seeks leave to appeal against judgment dated 20th July 2017 passed by the learned Additional Sessions Judge-01, North District, Rohini Courts, New Delhi in Sessions Case No.58449/2016 acquitting the Respondents accused of the offences under Sections 363/376/109 Indian Penal Code 1860 ('IPC') and Section 4 Protection of Children from Sexual Offences Act 2012 ('POCSO Act'). The case arose out of FIR No.580/2015, registered at Police Station ('PS') Shahbad Dairy.

2. In the first place, the trial Court came to the conclusion that there was insufficient evidence placed on the record to substantiate the plea of the prosecution that the victim was 13 years old at the time of commission of

the offence. The trial Court therefore proceeded on the basis that the offence under Section 4 POCSO Act was not made out.

3. As regards the offence under Sections 363/376/109 IPC, the case of the prosecution is that the victim, at around 10 am on 6th May 2015, was present at her home at Shahbad Dairy. She was called by Accused No.2 (A-2), Kiran, who happens to be the sister-in-law (*bhabhi*) of Accused No.1 (A-1), Abhay Lal @ Sonu, both of whom were in the neighbourhood. A-2 told the victim that A-1 was calling her as a result of which the victim went to their house. Thereafter, A-2 left the house to fill water from a tanker, leaving the victim behind. A-1, who was present in the *jhuggi*, thereafter forcibly committed penetrative sexual assault upon her.

4. The further case of the prosecution was that A-2 returned to the *jhuggi* and A-1 then asked A-2 to take the victim back to the victim's house. Thereupon A-2 took the victim to her house. The victim did not disclose to A-2 or her mother about the incident during this time. In the evening apparently a quarrel ensued between A-2 and the mother of the victim. It is only thereafter that the victim disclosed to her mother about the rape and thereafter the police was approached by the victim's mother.

5. However, when the victim was taken to the hospital for her medical examination, she refused the internal examination of her private parts. The explanation given for this is that the father of the victim fainted and the victim was frightened.

6. The statement of the victim was recorded before the learned Metropolitan Magistrate under Section 164 Code of Criminal Procedure 1973 (Cr PC). The trial Court noticed certain inconsistencies and improvements in the said statement. Importantly, the victim stated that A-2 came to her house on 6th May 2015 and told her that her friend Laxmi was calling her and it is thereupon that the victim left her house in the company of A-2. The victim, however, maintained that when she went to the *jhuggi* of A-2, she found no one except A-1 and that after A-2 left the *jhuggi* to fetch water, A-1 began misbehaving with her and forcibly committed penetrative sex with her.

7. The reasons that weighed with the trial Court to disbelieve the victim have been elaborately discussed in para 30 of the impugned judgment. It is pointed out that if the victim was told that her friend Laxmi was calling her, there is no reason why she would wait in the house of A-2 where obviously her friend Laxmi was not found. Further if the victim was to be believed, A-1 was continuously gagging her mouth with his right hand while removing his own and her clothes with his left hand and thereafter committing rape. This did not seem probable to the trial Court since the victim's clothes were not torn. Further, the victim did not appear to have raised any alarm even thereafter. There were no injury marks noticed on the body of either the victim or A-1 in their respective MLCs. There was also no statement made by the victim about A-1 having threatened the victim at any point of time. Further, there were several other *jhuggis* next to the one occupied by A-1 and A-2 and there was a road outside which was a thoroughfare. The victim did not choose to seek help or even disclose to A-2 at anytime while accompanying her back to her house about A-1 having committed rape on

her. Even stranger is that she did not disclose the incident to her own mother till later in the evening after a quarrel ensued between her mother and A-2.

8. In para 31 of the impugned judgment, the trial Court has referred to the defence of the accused that the quarrel that had ensued between the mother of the victim and A-2 was “over filling of water from the tanker” and since A-1 had intervened, both A-1 and A-2 were falsely implicated.

9. Learned APP drew the attention of the Court to the decision in ***Ranjit Hazarika v. State of Assam (1998) 8 SCC 635*** to urge that even if the medical evidence did not reveal the commission of rape, the testimony of the prosecutrix, if found truthful, could form the basis of conviction for the offence under Section 376 IPC.

10. The Court finds that in the said case the victim did submit herself to an internal examination. Further, on the facts of that case, it appears that the case of the victim was that she was subjected to sexual intercourse in a standing posture and, therefore, the absence of external injury was held to be not fatal to the prosecution case.

11. In the present case, however, the victim has refused to undergo any internal examination. With her testimony being inconsistent not entirely truthful, the view taken by the trial Court cannot be said to be perverse or erroneous requiring interference by this Court.

12. The Court, therefore, declines to grant leave to appeal against the impugned judgment of the trial Court.

13. The petition is accordingly dismissed.

S. MURALIDHAR, J.

I.S. MEHTA, J.

JANUARY 10, 2018

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