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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved On: 23.04.2019
Judgment Pronounced On: 30.04.2019

CRL.A. 496/2015

STATE ..... Appellant

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Through: Mr. Ravi Nayak, APP for State with W/ASI Santosh Kumar, SHO Raj Kumar Saha, ASI Suresh Kumar, PS New Usmanpur.

Versus

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RAHUL ..... Respondent

Through: Ms. Manika Tripathy Pandey, Advocate (DHCLSC).

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CORAM:
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL
HON'BLE MS. JUSTICE ANU MALHOTRA

J U D G M E N T

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ANU MALHOTRA, J.

1. The State having been granted leave to appeal vide order dated 22.04.2015 in Crl.L.P.254/2014, assails the impugned judgment dated 20.02.2013 of the learned ASJ-01, North East, KKD Courts, Delhi in Sessions Case No.16/12 arising out of FIR No.424/11**,** PS New Usmanpur wherein the respondent was acquitted qua the offences punishable under Sections 342/376/511 of the Indian Penal Code, 1860.

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2. It is the avowed contention of the State that despite the consistent and corroborated testimonies of the victim Ms.X aged 5 years examined as PW-4 and the complainant Ms.Y examined as PW-5, - in relation to all material particulars of the wrongful confinement of the minor girl child PW-4 aged 5 years by the respondent/accused herein with the proved intent of the commission of acts amounting to an attempt in the commission of rape on the minor child PW-4, the learned Trial Court has drawn an erroneous conclusion by grant of misplaced benefit of doubt on aspects which are not germane to the incident in question of the respondent having attempted to rape the minor child PW-4 after having wrongfully confined her.

3. The prosecution in the instant case is indicated to have been launched vide the registration of DD No.40A Ex.PW7/A at PS New Usmanpur at 9.48 PM as per information received from the PCR of rape of a girl child near Som Bazar at Usmanpur at House no.A-230, Gali No.11, on receipt of which the Investigation Officer, PW-7 SI Vikrant Sharma along with PW-8, Constable Banwari Lal reached the spot where PW-5 Ms.Y the neighbor of the victim, the victim PW-4 Ms.X aged 5 years and PW-6 Mr.Z i.e. the father of the minor girl child met them. The initial Investigation Officer i.e. PW-7 SI Vikrant Sharma interrogated them and the minor child PW-4 was taken to the GTB Hospital for her medical examination with the minor child having been accompanied by PW-5, the complainant i.e. Ms.Y, PW-6 the father of the child and PW-8 Constable Banwari Lal. The initial Investigation Officer had called W/ASI Santosh PW-9 around 11.30 PM to the GTB Hospital whereafter PW-7 SI Vikrant Sharma had entrusted the investigation to W/ASI Santosh as the investigation related to a minor girl victim in relation to information of commission of rape.

4. PW-9 W/ASI Santosh recorded the statement of the complainant PW-5 i.e. Ms.Y as Ex.PW5/A and on the basis of which statement she sent the rukka Ex.PW9/A at about 2.20 AM on 16.12.2011 through PW-8 Constable Banwari Lal to the police station for the registration of the FIR. The said statement of the complainant i.e. Ms.Y, Ex.PW5/A which forms the basis of the registration of the FIR, which FIR was registered at 5.00 AM on 16.12.2011 is to the effect that on 15.12.2011 PW-5 i.e. Ms.Y/ the complainant aged 19 years was at her house at A-230, Gali No.11, Kartar Nagar near the Pushta Som Bazar and at about 3.00 PM, the respondent/accused Rahul who was the friend of PW-6 i.e. the friend of the father of the victim came and made tea and took the tea to the terrace, whereafter, after about 5-6 minutes, PW-5 also went upstairs and found the room of PW-6 i.e. the room of the father of the victim on the upper floor bolted from within and she PW-5 i.e. Ms.Y thus peeped from the small jungla (window) and saw the respondent/accused inside with the victim and saw that the accused/respondent herein had taken of the pyjami of the minor child and the accused/respondent herein had also taken of his shirt and she also saw that the chain of his pant was also open and that the accused/respondent herein was lying adjacent to the minor child and thus, PW-5 knocked on the door and then the accused/respondent herein wore his shirt, opened the door and ran away.

5. PW-5, as per her statement Ex.PW5/A stated that she had inquired from the prosecutrix and she informed her that the accused/respondent herein had taken of his shirt and had opened the chain of his pant and was lying down near her and was kissing her. The complainant has further stated through her complaint Ex.PW5/A that PW-6 i.e. the father of the minor victim was a tenant in the room next to her room and as his wife had gone to her village, PW-6 i.e.

the father of the minor child had left the minor child at her house. The complaint made by PW-5 to the police Ex.PW5/A after she saw the incident and had made inquiries from the minor child and when the father of the minor child returned, she informed him of the incident and PW-6 i.e. the father of the minor child had then called on telephone number 100 whereupon, the police had taken PW-5 Ms.Y, the minor child PW-4 and the father of the minor child to the GTB Hospital, where the minor child was medically examined though the father of the minor child had refused to get the internal examination conducted.

6. As per Ex.PW2/A i.e. the MLC bearing no.282/11 of the medical examination conducted of the minor child PW4 at GTB Hospital, Shahdara Delhi, it was recorded by the doctor to the effect:-

> **"History given by Father.**
>
> **Alleged H/o attempt of sexual assault to her daughter (X) by known person Rahul (father's friend) at victim's house in Som Bazar at 4.00 PM according to father- he was not at home at the time of incident [he was informed by neighbourer -Ms.Y] He was told that girl was taken upstairs at around 4.00 PM by Rahul in one room. The neighbor also went upstairs after 2-3 min suspecting something & found that the girl pant was removed and was lying down & Rahul shirt was also off and his pant's zip was also open. As she arrived at home Rahul ran away. No H/o bleeding/discharge p/v after that."**

7. It was also indicated vide Ex.PW2/A to the effect that there was no bleeding/discharge and that the labia majora of the minor child and the hymen were intact and that there was no physical sign of any injury and that the attendant was not willing for gynealogical examination and thus internal

examination had not been done. PW-6 i.e. the father of the minor child is also indicated to have signed Ex.PW2/A.

8. After the learned Trial Court was satisfied about the capacity of the minor child to understand questions and reply to the same, the minor child victim PW-4 i.e. Ms.X was examined without oath and stated as follows:-

> ***"PW-4, Ms. X, D/o Mr.Z, aged 5 years, R/o Chakkiwali Gali, Bhajanpura Market, Delhi. This witness has been examined by this court for ascertaining her knowledge and capacity of understanding being child witness by putting some questions as follows:***
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> ***Q1: What, is your name?***
>
> ***Ans: My name is 'X'.***
>
> ***Q2. What is the name of your mother?***
>
> ***Ans: My mother's name is Ms. A.***
>
> ***Q3: Where you have come today?***
>
> ***Ans: I have come before the court today.***
>
> ***Q4: With whom you have come to the court?***
>
> ***Ans: I have come with my father.***
>
> ***Q5. What \|is your father's name?***
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> ***Ans: My father's name is Mr. Z.***
>
> ***Q6: What is the name of your school?***
>
> ***Ans: My school's name is Jaya Public School, near P.S. Khajuri Khas.***
>
> ***Q7: In which class do you study?***
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> ***Ans: I study in LKG.***

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Q8: Whether a person should speak true or lie?

Ans: A person must speak true.

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Q9: Will you speak true today?

Ans: Yes, I will speak truth.

After getting reply this court is satisfied that this child witness can understand questions and reply the same.

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Without Oath

During the days of incident, I was studying in nursery. Earlier, I used to reside in the area of Som Bazar, Pusta, near the house of one lady, namely, Y w/o Shakil. Accused Rahul, present in the court (correctly identified), is the resident of Gali next to my house. Accused Rahul had taken me in a room at upper floor, in front of room of Y in the afternoon hours by alluring me that he will give me one rupee and toffee and he asked me to lay down, where, he removed my Pyjami and he also removed his pant and he laid upon me. Accused had bolted the door of room from inside. When accused was lying on me, in the meantime, Aunty, Y, came there and knocked the door, immediately, accused dressed up and opened the door and ran away. I narrated the entire incident to aunty Y and when my father came back at house, firstly, I narrated the incident to him and then aunty Y had also narrated about the Incident/ Accused had committed wrong act with me. Father's is like 'Daya'. Police had arrested accused in my presence after reaching at his house.

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XXX deferred as it is 05:00pm.

(This witness is being examined in child witness court room)

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PW-4, Ms. X, D/o Sh.Z, called for cross examination in continuation of 24.07.2012.

Without Oath

xxx by Sh. Rajiv Ranjan, counsel for accused.

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I had come with my father in the court on last date of hearing. My father had told me that we are going to court. My father had also told me about the facts of the case. I had deposed before the court whatever my father had told me.

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Court Question: Who had told your father about the facts of incident?

Ans: One Didi, namely, PW Y, had told the facts of incident to my father who was aware about the same. One Shakeel had also come to know about the incident through Smt. Z. It is wrong to suggest that accused had not committed any wrong act with me, or that I am deposing at the instance of my father. It is further wrong to suggest that I am deposing falsely."

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9. Just 7 ½ months from the date of incident, the statement of the child witness PW-4 Ms.X was recorded on 24.07.2012, when the victim stated that she was 5 years old and was residing at Chakki Wali Gali, Bhajanpura Market, Delhi and her statement was categorical to the effect that during the days of the incident she was studying in nursery and on the date of her examination she was studying in LKG and at the time of the incident she used to reside in the area of Som Bazar Pushta near the house of a lady i.e. PW-5 Ms.Y. The minor child has categorically identified the accused/respondent herein as being the resident of gali next to her house and categorically testified to the effect that the accused/respondent herein had taken her to a room on **the upper floor** in front of the room of PW-5 Ms.Y i.e. the complainant in the afternoon hours by luring her that he would give her one rupee and a toffee and asked her to lie down and then he removed her pyjami and also removed his pant and he laid upon her and he had bolted the door of the room from inside and whilst he was lying upon her in the meantime PW-5 came there and knocked the door and the accused immediately dressed up and ran away and she PW-

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4 had narrated the entire incident to PW-5 and when the father of the minor child came back home, then PW-5 had narrated the entire incident to the father of the victim.

10. PW-4, this child witness has categorically denied that the accused/respondent herein had not committed any wrong act with her. She stated that she had come with her father to the Court on 24.07.2012 when she was first examined in Court and stated that her father told her about the facts of the case and that they were going to the Court and that she had deposed before the Court whatever her father had told her, yet she was categorical in her denial that she had not deposed at the instance of her father and categorically denied that she had deposed falsely.

11. PW-5 Ms.Y i.e. the complainant through her statement corroborated her complaint Ex.PW5/A made to the police in relation to all material particulars and *inter alia* stated to the effect:-

> "***On 15.12.2011, at about 03.00 pm, victim was not present in my room. I made her search and I reached near room of victim at first floor. At that time that room was locked from inside. I peeped inside the room through window and saw accused Rahul, present in court (correctly identified), lying on floor with victim and zip of his pant was open. Pyjami of the victim lying on the floor. When I raised alarm, immediately, accused stand up and dressed up and opened the door. Accused ran away. I went to victim inside the room and asked her what accused Rahul was doing with you. She told me that he put off her Pyjami and kissed her.***
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> ***Sh. Sunny, father of victim, returned to her house in the evening from his job place. I had told the aforesaid facts to him. He immediately informed***

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police at 100 number. Police officials came at our house they took me and victim to GTB Hospital, where, victim was medically examined. Police recorded my statement, Ex.PW5/A in GTB Hospital which bears my signature at point A.

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Accused Rahul was earlier known to me as he used to visit as friend of Sunny. On following morning accused Rahul was arrested by the police. I do not know the other facts of this case.

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There was a small window between the kitchen and room of Sany which is at the hight of three feet from the floor. Slow voice of victim was coming from the room through window, but, I could not understand what she was saying. As soon as I saw accused and victim in a room through aforesaid window, immediately, I raised alarm by beating door of that room. I did try to call any neighbor as accused immediately had run away from that room after making unlock the door when I knocked the room. I was not able to overpower the accused at that time. I could not stop the accused as he was more powerful than me. Vol. There was no other person except me and victim in the house at that time. I had called the accused and try to stop him but he run away by opening the door of the room immediately. When I had seen inside the room through window of kitchen, I found accused and victim was lying altogether on floor inside the room. Accused was not lying on the victim at that time. Nothing special was seen by me at that time.

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It is wrong to suggest that on the day of incident, accused had come inside the room of Sunny or that he had not watched the T.V. there or that he had not served the tea to me and victim or that he had not taken the victim in a room of Sunny at first floor or that I had not searched the victim on that day or that I had not reached in the kitchen of Sunny at first

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> ***floor during search of victim or that I had not seen through window of kitchen inside the room of Sunny or that I had not seen accused and victim inside the room of Sunny at first floor or that I had not beaten the door of room of Sunny or that accused had not run away after opening the door of that room in my presence or that accused did not commit wrong act upon victim inside the aforesaid room. It is further wrong to suggest that I had not gone to GTB Hospital along with victim and police officials for medical examination of victim. It is further wrong to suggest that I am deposing falsely at the instance of father of victim."***

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12. The testimonies thus, of the minor child PW-4/victim and of PW-5/ the complainant corroborate each other in relation to all material particulars in relation to the minor child having been taken to the upper floor of the building at House no.230, Gali No.11, 4 ½ Pushta, Som Bazar, Kartar Nagar, Delhi in the afternoon of 15.12.2011 at about 3.00 PM. The testimony of PW-4 asserts that the accused/respondent herein had bolted the door of the room from inside and the statement of PW-5 Ms.Y i.e. the complainant states to the effect that when she made the search for the victim on the first floor, she found that the room was locked from inside. The minor child PW-4 has stated to the effect that the accused/respondent herein had removed her pyjami and he had also removed his pant and he had laid upon her. PW-5 Ms.Y has stated that when she had peeped inside the room of the victim at the first floor through the window, she found that the accused/respondent herein was lying on the floor with the victim and the zip of his pant was open and that the pyjami of the victim was lying on the floor.

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13. PW-4 i.e. the minor victim has stated that when PW-5 knocked at the door, the accused/respondent herein immediately dressed up, opened the door

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and ran away. PW-5 Ms.Y has stated that when she raised an alarm, the accused/respondent herein stood up, dressed up and opened the door and ran away. The minor child PW-4 has stated that she narrated the entire incident to PW-5 and thereafter when her father came back home, PW-5 had narrated the incident to her father. PW-5 Ms.Y i.e. the complainant has stated that she had asked what the accused had done to the victim who had told her that he had put of her pyjami and had kissed her.

14. Apparently, as observed hereinabove and as rightly contended on behalf of the State, the testimony of the minor child and that of PW-5 are both categorical in relation to the occurrence of the incident and the confinement of the minor child in a room on the upper floor of the building at House no.A-230, Gali No.11, 4 ½ Pushta, Som Bazar, Kartar Nagar, Delhi in which building both the minor child PW-4 and the complainant PW-5 used to live. The testimonies of PW-4 & PW-5 also corroborate the factum of the accused/respondent herein having removed the pyjami of the minor child and also corroborate each other in relation to the respondent/accused herein having laid himself adjacent to the minor child and bring forth through the statement of the minor child that the accused also laid himself on the minor child and had also been kissing her.

15. The learned Trial Court vide the impugned judgment has observed to the effect that as per the version of the victim, the accused had taken the victim to the upper floor in a room in front of the room of PW-5 i.e. the complainant and PW-5 i.e. the complainant in her statement had stated that the accused/respondent herein had taken the victim to the second floor but as per the site plan prepared in the instant case, there was no second floor in that building and that the site plan reflected only a house and did not mention

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whether it was first floor or the second floor or the room where the offence had been committed. The learned Trial Court has further observed to the effect that the site plan prepared by the Investigating Officer at the instance of PW-5 was not corroborated neither by the prosecutrix nor by the Investigating Officer and that the testimony of PW-7 SI Vikrant Sharma was different from the testimony of PW-9 W/ASI Santosh and that as per the testimony of PW-6 i.e. the father of the minor child, the house was constructed upto the ground floor and the first floor and thus, there was no question of the second floor and in the said circumstances and the learned Trial Court thus observed to the effect:-

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> ***"77. Into the facts of present case site plan was prepared by the LO. at the instance of PW5 Ms.Y but same is not corroborated either by prosecutrix or by the I.O. and testimony of PW S.I. Vikrant Sharma is also different from the testimony of PW9 W/ASI Santosh. As per PW6 house was constructed upto ground floor and first floor. Hence, there was no question of second floor. Hence, in these circumstances on careful perusal of record, this court come to the conclusion that merely on uncorroborated testimony of child victim conviction of accused in such case may cause miscarriage of justice. It is true that in a case of rape testimony of victim inspired the confidence then conviction can be awarded without corroboration but into the facts and circumstances of the present case, case of prosecution rest upon different footings. Hence, judgment relied by Ld. APP for the State is not applicable into the facts and circumstances of the present case.***
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> ***78. It is settled law that prosecution must proved its case beyond reasonable doubt.***
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> ***79. Considering the evidence available on record and testimonies of PWs, this court come to the conclusion that***

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prosecution has been failed to prove its case beyond reasonable doubt.

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80. In these circumstances, in absence of any evidence, this court acquit accused Rahul from charges u/s 342/376/511 IPC by giving him benefit of doubt."

16. *Inter alia* the learned Trial Court also observed to the effect:-

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"75. Since version of PW Ms.Y is not corroborated by testimony of PW victim and there is serious contradictions in the testimony PW5 Ms.Y and victim."

17. It has been urged on behalf of the State by the learned Additional Public Prosecutor, Mr. Ravi Nayak that the testimony of the prosecution witnesses examined in the instant case bring forth the guilt of the accused/respondent herein in relation to the commission of the offence punishable under Section 342 & 376 read with Section 511 of the Indian Penal Code, 1860 to the hilt and that the impugned judgment is fallacious in its observations to the effect that there were serious contradictions in relation to material particulars qua the commission of the offence of the confinement of the minor child in a room at the upper floor of the building in which both PW-4 & PW-5 lived and of the attempt made by the accused/ respondent herein to rape the minor child in as much as he had taken of the pyjami of the minor child and laid himself on the top of the minor child and had taken of his own shirt and had been kissing the minor child.

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18. On behalf of the respondent/accused herein, the learned Amicus curiae Ms. Manika Tripathy Pandey valiantly and strenuously contended that there was no infirmity whatsoever in the impugned judgment of the learned Trial Court and that the testimony of the minor child was apparently a tutored

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testimony as brought forth through the statement of the minor child herself when she stated that she had deposed in Court what her father had told her and that she had come to the Court with her father and that her father had told her that they were going to Court. It has thus been submitted on behalf of the respondent that the testimony of the minor child could not be believed and no conviction can be based on the same in as much as there are material contradictions in the testimony of PW-4 i.e. the minor child and that of PW-5 i.e. the complainant as also in the testimony of PW-6 i.e. the father of the minor child in relation to the place of the occurrence and that there also variations in the testimony of the prosecution witnesses in relation to the place of arrest of the accused/respondent herein as well.

ANALYSIS

19. On a consideration of the rival submissions, it is essential to observe as already observed elsewhere hereinabove that the testimonies of PW-4 & PW-5 are consistent in relation to all material particulars in relation to the incident and in relation to the manner of the commission of the offence. The variance in relation to the floor at which the offence was committed is rendered insignificant by the factum that the minor child has categorically stated that the incident took place on the upper floor of the building at A-230, Gali No.11, 4 ½ Pushta, Som Bazar, Kartar Nagar, Delhi. Significantly, the statement of PW-5 is to the effect that she had looked into the room of the victim when she had found it locked from inside. On being cross examined on behalf of the State, in her statement dated 06.09.2012, she stated that there were two rooms in the possession of the victim family, one is on the ground floor and another is on the second floor and that the accused had taken the victim in the room in

question at the second floor after taking tea. The minor child has also stated that the accused had taken her to the room at the upper floor in front of the room of PW-5. As per Ex.PW5/A, PW-5 stated that when she went after 5-6 minutes after the accused/respondent herein had gone up to the terrace and when she went towards the upper floor, she looked at the room of PW-6 i.e. of Mr.Z i.e. the father of PW-4 and found that the room was bolted from inside and thus, she peeped from the small jungla (window) and she saw the victim PW-4 and the accused/respondent herein and saw that the accused had taken of the pyjami of the minor child and that the accused had also taken of his shirt and that the zip of his pant was open and that the accused was lying next to the minor child and stated that when she knocked the door, the accused/respondent herein immediately wore his shirt, opened the door and ran away. ***The statement of PW-6 i.e. the father of the minor child is also categorical to the effect that PW-5 had told him that the accused had taken the victim to his tenanted room on the first floor*** and had put of her pyjami and opened the zip of his pant and that she had also told him that the accused was lying on victim and when PW-5 had knocked the door of the room, the accused/respondent herein had immediately ran away from there. It is apparent thus, that the incident had taken place in the tenanted room of PW-5 situated at the upper floor of the building and that the purported variations in the testimonies of PW-4, PW-5 & PW-6 in relation to the place of occurrence are meaningless and that Ex.PW9/B, the site plan prepared by the Investigating Officer W/ASI Santosh which does not spell out any number of floors, is wholly insignificant and rather the said site plan Ex.PW9/B which merely shows the house no.A-227 situated near Sunny Bazar Road, Gali No.11 and shows the house at point A as being the place where there was an attempt to

rape the minor victim with the occurrence being near the Shastri Park, Pushta Road, without even giving the number of floors in the building is inconsequential and the reliance thereon by the learned Trial Court vide para 77 of its verdict is apparently wholly misplaced.

20. As has been laid down by the Hon'ble Supreme Court in ***"Jagdish Vs. State of Madhya Pradesh"*** in Crl.A. No.378/1975 ***AIR 1981 SC 1167*** where the discrepancies pointed out are comparatively of a minor character and which do not go to the root of the prosecution story, they need not be given undue importance.

21. The verdict of the Hon'ble Supreme Court in ***"Sachin Kumar Singhraha Vs. State of Madhya Pradesh" 2019 SCC Online SC 363,*** has laid down to the effect that justice ought not to become a casualty because of minor mistakes committed by the Investigating Officer and that the criminal trial is to be conducted to ascertain the guilt or innocence of an accused arraigned and that in arriving at a conclusion about the truth, the Courts are required to adopt a rational approach and to judge the evidence by intrinsic words and the animus of the witnesses. The observations in Para 18 of the said verdict read to the effect:-

> ***"18. At this juncture, we would like to recall that it is well settled that criminal justice should not become a casualty because of the minor mistakes committed by the Investigating Officer. We may hasten to add here itself that if the Investigation Officer suppresses the real incident by creating certain records to make a new case altogether, the Court would definitely strongly come against such action of the Investigation Officer. There cannot be any dispute that the benefit of doubt arising out of major flaws in the investigation would create suspicion in the mind of the Court and consequently such inefficient investigation would accrue to the***

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> ***benefit of the accused. As observed by this Court in the case of State of H.P. v. Lekh Raj, (2000) (1) SCC 247, a criminal trial cannot be equated with a mock scene from a stunt film. Such trial is conducted to ascertain the guilt or innocence of the accused arraigned and in arriving at a conclusion about the truth, the courts are required to adopt a rational approach and judge the evidence by its intrinsic worth and the animus of the witnesses. The courts are not obliged to make efforts either to give latitude to the prosecution or loosely construe the law in favour of the accused. The traditional dogmatic hypertechnical approach has to be replaced by a rational, realistic and genuine approach for administering justice in a criminal trial."***

22. It has also been observed vide para 23 of the said verdict to the effect that justice cannot be made sterile by exaggerated adherence to the rule of proof, inasmuch as the benefit of doubt given to an accused must always be reasonable, and not fanciful and that merely because certain discrepancies in the evidence and procedure lapses have been brought on record, the same could not warrant giving the benefit of doubt to the accused.

23. The verdict of the Hon'ble High Court of Sikkim in ***"Damber Singh Chhettri vs. State of Sikkim"*** in Crl.A.05/2017 adverts to the verdict of the Hon'ble Supreme Court in ***"State of H.P. Vs. Lekh Raj" (2000) 1 SCC 247*** wherein it has been observed to the effect:-

> ***"10. The High Court appears to have adopted a technical approach in disposing of the appeal filed by the respondents. This Court in State of Punjab v. Jagir Singh [(1974) 3 SCC 277 : 1973 SCC (Cri) 886] held: (SCC pp. 285-86, para 23)***
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> > ***'23. A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In***

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arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures.'

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The criminal trial cannot be equated with a mock scene from a stunt film. The legal trial is conducted to ascertain the guilt or innocence of the accused arraigned. ***In arriving at a conclusion about the truth, the courts are required to adopt a rational approach and judge the evidence by its intrinsic worth and the animus of the witnesses.*** *The hypertechnicalities or figment of imagination should not be allowed to divest the court of its responsibility of sifting and weighing the evidence to arrive at the conclusion regarding the existence or otherwise of a particular circumstance keeping in view the peculiar facts of each case, the social position of the victim and the accused, the larger interests of the society particularly the law and order problem and degrading values of life inherent in the prevalent system.* ***The realities of life have to be kept in mind while appreciating the evidence for arriving at the truth. The courts are not obliged to make efforts either to give latitude to the prosecution or loosely*** *construe the law in favour of the accused. The traditional dogmatic hypertechnical approach has to be replaced by a rational, realistic and genuine approach for administering justice in a criminal trial. Criminal jurisprudence cannot be considered to be a utopian thought but have to be considered as part and parcel of the human civilisation and the realities of life. The courts cannot ignore the erosion in values of life which are a common feature of the present system. Such erosions cannot be given a bonus in favour of those who are guilty of polluting society and mankind."*

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(*Emphasis supplied*)

24. The verdict of the Hon'ble Supreme Court in "***Zahira Habibullah Sheikh Vs. State of Gujarat***" (2006) 3 SCC 374 also lays down to the effect:-

> ***"37. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact in issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny."***

25. The verdict of the Hon'ble Supreme Court in ***"Dhanaj Singh vs. State of Punjab" (2004) 3 SCC 654*** observes categorically to the effect that defective investigation does not itself suffice to acquit an accused person in as much as it is for the Court to examine de hors the omissions committed by the investigation agency to find out whether the evidence put forth is reliable or not. The observations of the Hon'ble Supreme Court in ***"Dhanaj Singh vs. State of Punjab"*** (supra) are to the effect:-

> ***"5. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. (See Karnel Singh v. State of M.P. [(1995) 5 SCC 518 : 1995 SCC (Cri) 977])***

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> ***6. In Paras Yadav v. State of Bihar [(1999) 2 SCC 126 : 1999 SCC (Cri) 104] it was held that if the lapse or omission is committed by the investigating agency or because of negligence the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not, the contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts; otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.***
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> ***7. As was observed in Ram Bihari Yadav v. State of Bihar [(1998) 4 SCC 517 : 1998 SCC (Cri) 1085] if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the lawenforcing agency but also in the administration of justice. The view was again reiterated in Amar Singh v. Balwinder Singh [(2003) 2 SCC 518 : 2003 SCC (Cri) 641] ."***

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26. The verdict of the Hon'ble Supreme Court in ***"Bhagwan Jagannath Markad vs. State of Maharashtra" (2016) 10 SCC 537*** categorically lays down to the effect that the evidence of a witness has to be appreciated to assess whether read as a whole and that normal discrepancies do not affect the credibility of a witness, it is truthful and an exaggeration of the rule of the benefit of doubt can result into miscarriage of justice and that letting the guilty escape is not doing justice and that a judge presides over a trial not only to ensure that no innocent is punished but also to see that the guilty does not escape. As observed in ***"Damber Singh Chhettri vs. State of Sikkim"*** (supra) vide para 13, which reads to the effect:-

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> ***"13. Certain salutary principles of criminal jurisprudence in appreciating evidence must be noted from the judgments rendered by the Supreme Court. The Court is mandated to perform the task of ascertaining the truth from the materials before it. The Court has to punish the guilty and protect the***

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innocent. The investigating agency is required to be fair and efficient. However, any lapse in investigation cannot per se be a ground to discard the prosecution case when overwhelming evidence is available to prove the offence. It is vital to examine evidence keeping in mind the setting of the crime. Appreciation of deposition of witnesses must be done keeping in mind this vital aspect. If the scene of crime is rural and the witnesses are rustics their behavioural pattern and perceptive habits are required to be judged as such. Very sophisticated approach based on unreal assumptions about human conduct should not be encouraged. Discrepancies and minor contradictions in narrations and embellishments cannot militate against the veracity of the core of the testimony. However, a trained judicial mind must seek the truth and conformity to probability in the substantial fabric of testimony delivered. Overmuch importance cannot be given to minor discrepancies. Witnesses' do not all have photographic memory and sometimes, more often than not, are overtaken by events. A witness may also be overawed by the Court atmosphere and the piercing cross-examination. Nervousness due to the alien surroundings may lead to the witness being confused regarding sequence of events. Witnesses are also susceptible to filling up details from imagination sometimes on account of the fear of looking foolish or being disbelieved activating the psychological defence mechanism. Quite often improvements are made to the earlier version during trial in order to give a boost to the prosecution case. Discrepancies which do not shake the foundation facts may be discarded. Merely because there are embellishments to the version of the witness the Court should not disbelieve the evidence altogether if it is otherwise trustworthy. It is almost impossible in a criminal trial to prove all the elements with scientific precision. A Court could be convinced of the guilt only beyond the range of a reasonable doubt. Proof beyond a reasonable doubt is the same as proof which affords moral certainty to the Judge. Doubt to be reasonable must be of an honest, sensible and fair-minded man supported by reason with a desire to ascertain the truth. An honestly entertained doubt of guilt is a reasonable doubt. While

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> ***appreciating the evidence of a witness the Court must ascertain whether the evidence read as a whole appears to be truthful. It is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court may discard his evidence. Section 155 of the Indian Evidence Act, 1872 indicates that all inconsistent statements are not sufficient to impeach the credit of the witness. To contradict a witness must be to discredit the particular version of a witness. In arriving at the conclusion about the guilt of the accused the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Even if a major portion of the evidence is deficient, in case the residue is sufficient to prove guilt of the accused his conviction can be maintained. It is the duty of the Court to separate the grain from the chaff. Exaggerating the rule of benefit of doubt can result in miscarriage of justice. Just because a close relative is a witness it is not enough to reject her/his testimony if it is otherwise credible. A relation may not conceal the actual culprit. The evidence can be closely scrutinized to assess whether an innocent person is falsely implicated."***

27. The verdict of the Hon'ble Supreme Court in ***"Smt. Shamin vs. State (GNCT of Delhi"*** in Crl.A. No.56/2018 decided on 19.09.2018 observes to the effect:-

> ***"15. Each criminal trial is but a quest for search of the truth. The duty of a judge presiding over a criminal trial is not merely to see that no innocent person is punished, but also to see that a guilty person does not escape. One is as important as the other. Both are public duties which the Judge has to perform. The trial court had erred and misappreciated the evidence to arrive at an erroneous conclusion."***

28. It is apparent thus, that in the circumstances of the instant case where the testimonies of PW-4 & PW-5 are consistent in relation to all material particulars qua the incident, the discrepancies in relation to the floor on which the incident occurred is insignificant. The deficiency in the site plan

Ex.PW9/B prepared by W/ASI Santosh and the factum that the Investigating Officer chose not to record the statement of the minor child under Section 164 of the Cr.P.C., 1973 are insignificant to render the consistent and cogent corroborated testimonies of PW-4 & PW-5 sterile**.** Rather the testimonies of PW-4 & PW-5 clinch the guilt of the accused to the hilt qua the commission of the offence of wrongful confinement of the minor child PW-4 with an intent to commit rape on the minor child in as much as all acts had been made by the accused/respondent herein in furtherance of his intent to commit rape by taking of the pyjami of the minor child, by taking of his own shirt, by opening the zip of his pant and by his lying down on the minor child and by kissing the minor child and lying adjacent to the minor child after having bolted the room of the minor child on the upper floor of her building.

29. In the circumstances, the refusal of PW-6 i.e. the father of the minor child for getting the medical examination conducted of the minor child loses significance, in as much as there had been no commission of rape but rather there had been an attempt to commit rape on the minor child. As regards the observations of the learned Trial Court that the testimony of the minor child could be tutored and could not be relied upon, it is essential to observe that the testimony of the minor child as PW-4 in her cross-examination categorically states to the effect:-

> ***"It is wrong to suggest that accused had not committed any wrong act with me, or that I am deposing at the instance of my father. It is further wrong to suggest that I am deposing falsely."***

30. Thus, the minor child has categorically refuted the contention raised on behalf of the accused/respondent herein that she had testified at the behest of her father and has also denied that she has testified falsely.

31. As regards the observations of the learned Trial Court to the effect that the testimony of the minor child without corroboration in the circumstances of the case where there are discrepancies in relation to the floor where the incident took place and there was an inconsistency and incomplete description in the site plan Ex.PW9/B and that thus, the accused/respondent herein could not be convicted for the commission of the offences with which he was charged and was liable to be acquitted qua the analysis of the testimony of the child witness, it is undoubtedly true that in terms of Section 118 of the Indian Evidence Act, 1872, the testimony of the child witness has to be subjected to the closest scrutiny and can be accepted only when the Court comes to the conclusion that the child understands the questions put to him/her and is capable of giving rational answers. In the instant case, the learned Trial Court itself at the time of examination of the minor child has observed to the effect that the minor child was capable of understanding questions put to her and the learned Trial Court had also ascertained the aspect of the understanding of the minor child to speak the truth before the statement of the minor child was recorded in the instant case. **The minor child has categorically denied the suggestion put to her that she has deposed at the instance of her father**. The child aged 5 years who is capable of stating that her father had told her what she had to depose and that she had come with her father to the Court on the previous date of hearing and who is in a capacity to deny that she had not deposed as per what was told to her by her father is clearly and evidently a truthful witness whose testimony cannot be negated on the grounds of grant

of *"benefit of doubt"* which benefit of doubt is on an erroneous misreading and mis-appreciation of the evidence on record and certainly does not fall within the ambit of the grant of **'a reasonable doubt'** and as observed by the Hon'ble Supreme in ***"State of HP Vs. Lekh Raj"*** (supra), it is the benefit of every reasonable doubt which is to be given to an accused but at the same time the Courts ought not to reject evidence which is *ex facie* trustworthy on grounds which are fanciful or in the nature of conjectures.

32. The verdict of the Division Bench of this Court in ***"Baljeet Singh and Ors. Vs. State of Delhi & Ors."*** in Crl.A. Nos.386,486,487 & 1080 of 2011 lays down to the effect that the competency of a child witness to give evidence is not regulated by the age but by the degree of understanding, he/she appears to possess. The observations in Paragraphs 88, 89 & 90 of the said verdict read to the effect:-

> ***"88. We think that, under the circumstances of this case, the disclosures on the voir dire were sufficient to authorize the decision that the witness was competent, and therefore, there was no error in admitting his testimony. Thus the general principles of appreciating the child witness having regard to Section 118 of the Evidence Act aptly transpire that the evidence of a child witness has to be subjected to the closest scrutiny and can be accepted only if the court comes to the conclusion that the child understands the questions put to him and he is capable of giving rational answers.***
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> ***89. Children are the most vulnerable faction of the society and by reason of their tender age definitely are considered to be a pliable witnesses. There is no denying the fact that each child is different and possesses varied level of interests and intellect. In today's fast paced world, where children are exposed to media, one cannot doubt their cognition levels. Not every child possesses sufficient understanding of nature and the consequences of his acts, but the same cannot negate the***

> ***intellect capabilities of those who can, very well grasp the state of affairs and maintain a vision of the same in their minds.***
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> ***90. One of the issues marring the growth of our country is the evil of child sexual abuse which we hear very often. The POCSO Act, 2013 was therefore formulated in order to effectively address the heinous crimes of sexual abuse and sexual exploitation of children. There lies no iota of doubt that it takes great amount of grit and courage to distinctly explain the horrendous incident that a child is made to go through because of certain ruthless section of the society. A child however even at a tender age does possess the ability to answer the questions put to her/ him spontaneously if she/he was present at the site of crime or if he/ she has been a victim herself. It is even the courts duty to be sensitive towards the child as the courtroom proceedings are alien to him and it may have a more stressful and terrifying effect which may create a fear in his mind rendering him unable to speak about the incident. It is for the court to adjudge the grasping abilities of children, their tendency to fantasise and their susceptibility to coaching, which are certain factors that need careful examination on case to case basis. Therefore, the court must be satisfied that the attendant circumstances do not show that the child was acting under the influence of someone or was under a threat or coercion. Careful evaluation of the evidence of a child witness in the background of facts of each case in context of other evidence on record is inescapable before the court decides to rely upon it."***

and are germane and relevant to the facts and circumstance of the instant case. **It is essential to observe that in the instant case PW-4, the child witness is not a mere witness to the incident but is the victim herself. In such circumstances, it is apparent that her testimony is a vivid recount of whatever took place with her.**

33. The verdict of the Hon'ble Supreme Court in ***"Nivrutti Pandurang Kokate and Ors. Vs. State of Maharashtra" AIR 2008 SC 1460*** categorically observes to the effect:-

> ***"8. In Dattu Ramrao Sakhare v. State of Maharashtra [(1997) 5 SCC 341] it was held as follows: (SCC p. 343, para 5):***
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> ***"A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."***
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> ***The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."***

34. The facts and circumstances of the instant case clearly point out thus, to the commission of the offence of wrongful confinement of the minor child by the respondent/accused herein by bolting the room under the tenancy of the father of the minor child which room was situated on the upper floor of the building in which the minor child and PW-5 lived, and also points out to the guilt of the accused in the commission of an attempt to commit rape on the minor child by the accused/respondent herein having committed acts in furtherance of the commission of such an attempt in commission of the rape on the minor child by opening the zip of his pant, by removing the pyjami of the minor child, by lying himself on the minor child and by kissing the minor child and by taking of his shirt of any by lying down next to the minor child. **That PW-4 & PW-5, the minor victim and the complainant respectively are truthful witnesses, is brought forth from the factum that they do not even attempt to whisper that the accused/respondent herein committed rape on the minor child and have stopped at stating to the extent that the incident took place only.**

35. **The impugned judgment is thus, a total negation in the quest for search of truth and overlooks the cardinal principle that the duty of a judge presiding over a criminal trial is not merely to see that no innocent person is punished but also to see that the guilty person does not escape and that both the public duties are equally important.**

36. As laid down by the Hon'ble Supreme Court in ***"Smt. Shamin vs. State (GNCT of Delhi)"*** (supra) small/ trivial omissions in testimonies of witnesses do not justify a finding by the Court that the testimonies of the witnesses cannot be relied upon and that minor discrepancies on trivial matters not touching the core of the case with a hypertechnical approach by taking

sentences torn out of context here or there from the evidence, attaching importance to some technical errors without going to the root of the matter does not permit ordinarily the rejection of the evidence as a whole and rather what is to be considered is whether those inconsistencies go to the root of the matter or whether they pertain to insignificant aspects and that though, the defence may be justified in seeking advantage of incongruities obtaining in the evidence if they relate to the root of the matter, where they relate to insignificant aspects, no benefit of doubt is available in relation thereto.

37. The learned Trial Court has observed to the effect that it was improbable in a city like Delhi that a person would not come on the happening of such an incident especially with the girl child and that the Investigating Officer could not prove that her application for medical examination was available on the record, are the aspects of investigation which in the facts and circumstances of the instant case do not suffice to negate the guilt of the accused/respondent herein, which is established through the testimonies of PW-4 & PW-5 to the hilt. The requirement of corroboration to the testimony of the minor child in the facts and circumstances of the instant case, which was apparently considered essential by the learned Trial Court is a misreading and mis-appreciation of the entire evidence on record and is in fact adding insult to injury. As laid down by the Hon'ble Supreme Court in ***"State of Punjab Vs. Gurmit Singh & Ors." 1996(20) ACR 220(SC)***, corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances and that it cannot be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of

suspicion, treating her as if she were an accomplice. It has also been observed by the Hon'ble Supreme Court herein in the said verdict to the effect that Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable and that inferences had to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty.

CONCLUSION

38. In the circumstances thus, the acquittal of the respondent/accused herein in relation to the commission of the offence punishable under Section 342 & 376 read with Section 511 of the Indian Penal Code, 1860, in relation to FIR No.424/11**,** PS New Usmanpur in Sessions Case No.16/12 vide the impugned judgment 20.02.2013 of the learned ASJ-01, North East, KKD Courts, Delhi is thus, set aside and the respondent/accused herein is convicted for the proved commission of the offences punishable under Section 342 & 376 read with Section 511 of the Indian Penal Code, 1860, and is directed to be taken into custody.

ANU MALHOTRA, J.

SIDDHARTH MRIDUL, J.

APRIL 30, 2019/NC

a *This print replica of the raw text of the judgment is as appearing on court website (authoritative source)*

Publisher has only added the Page para for convenience in referencing.

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