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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **CRL.L.P. 305/2019**

STATE

Through

..... Petitioner

Mr. Rajat Katyal, APP with
SI Ranbir Singh, PS Nangloi

versus

AJAY

Through

..... Respondent

None

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Date of Decision: 06th May, 2019**CORAM:****HON'BLE MR. JUSTICE MANMOHAN****HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL****J U D G M E N T****MANMOHAN, J: (Oral)****CRL. M.A. 9649/2019**

Keeping in view the averments in the application, the delay in filing the criminal leave petition is condoned.

Accordingly, the application stands disposed of.

CRL. M.A. 9650/2019

Allowed, subject to just exceptions.

CRL.L.P. 305/2019

1. Present petition has been filed under Section 378(3) Cr. P.C. for grant of leave to appeal against the judgment dated 26th November, 2018 passed

by learned Additional Sessions Judge-06, West, Tis Hazari Courts, Delhi in FIR No. 40/2013 registered with Police Station Nagloi under Sections 342/377/511 IPC & Section 4/18 POSCO Act.

2. The allegation against the accused is that in the intervening night of 1st and 2nd February, 2013, Master V., a minor boy aged about 12 years was wrongly confined by the accused and was sexually abused. The complainant made allegation of both oral and carnal sex against the accused.

3. Learned additional public prosecutor appearing for the petitioner-State submits that the trial court has erroneously acquitted the accused on account of some minor discrepancies in the statement of complainant/victim and the prosecution witnesses. He submits that the trial court failed to appreciate that there were no major variations in the testimonies of the complainant which could be fatal to the case of the prosecution.

4. He emphasises that as the allegations related to both oral and anal sex, there was not much possibility of medical evidence. He submits that the conviction can be done on the sole testimony of the victim and in the present case the victim had clearly named the accused in his statement.

5. However, upon examination of the paper book, this Court is of the view that the trial court has rightly concluded that there are material discrepancies in the testimony of the victim at the three stages, i.e., Section 161 Cr.P.C. statement, Section 164 Cr. P.C. statement and evidence in the Court. The relevant portion of the impugned judgment is reproduced hereinbelow:-

“20. On appreciation of the testimony of victim boy, PW2, it is observed that there are material discrepancies in his testimony on the material points.

In his statement u/s 164 Cr.P.C. he has stated that he had gone for some marriage and was playing near the spot of occurrence but in his complaint as well as testimony he has not stated so regarding marriage. Also his father in his testimony does not talk about any such marriage.

In his complaint as well as in his statement recorded u/s 164 Cr. PC., the name of boys with whom he was playing has been stated as Ajay & Mangni but in his cross-examination he has named the name of his friends as Mangni and Chahay. Thus, in his testimony deposed in the court, the name of his two friends are different as stated by him in his earlier two versions.

21. *Further the activities of the accused are different in his three versions one in his complaint, second in his statement recorded u/s 164 before the Ld. MM and third in his testimony before the court and even the description given about the manner of occurrence is different.*

In his statement recorded u/s 164 Cr.PC. he does not talk anything regarding putting of penis of the accused into his mouth (oral sex) or putting his urinating part into his anus.

In his testimony he has testified the fact relating to penetration of the penis into the mouth and attempt into his anus.

In his statement recorded u/s 164 Cr.PC, he has stated that the accused has bitten on his cheek but neither in his complaint nor in his deposition he has stated any facts regarding biting of his cheek by the accused and the MLC Ex. PW4/A of the victim boy also does not reflect any such injury on his cheek or on any of the parts of his body also.

22. *Further, the testimony of the father of the accused is on the form of hearsay as he was not present at the time of occurrence and he was not the eye witness of the alleged occurrence.*

23. *Further, if both the testimonies of victim boy and his father are read together then the story of the prosecution becomes improbable.*

According to his father his son returned at 3 AM, in his house and he had taken his son to the place of occurrence and met with the accused and caught hold of him but according to DD entry No. 9A dated 02.02.2013 Ex. PW7/A, it is reported by

him 'that accused has already detained his son'.

24. According to the testimony of master boy as PW2, he returned home at 4:30 AM & he has taken his father in the morning to the spot of occurrence that was within the distance of 5 to 10 minutes walking from the place of their home, thus, they might have reached within 15 minutes to the place of occurrence i.e. by 4:35 AM if boy is believed for his timing of return or by 3.05 AM, if father is believed for his time of return, but the DD entry No. 9A Ex. PW7/A shows the time of reporting at 8:10 AM.

But, the prosecution has failed to explain the relevant facts as to what had happened for 4 hours between the accused and the master boy and his father on the spot.

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36. If appears highly improbable that victim was playing with his two friends at the peak hours of winter in the night in dark & story becomes more doubtful when according to victim both the friends returned back after 'knocking' of the door of the room where he was detained by the accused but surprisingly his two friends had not reached to the house of their friend to inform his parents about his detention in the night.

This is also highly improbable that none of the two friends had informed about the detentions either to their parents or to the parents of the child victim.

Moreso, these two children were not made witnesses who were the best evidence to say that they were playing with the victim boy at the relevant date, time and place and the boy was detained by the accused even to prove the incident as described.

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41. It is doubtful as to what had been done with the victim boy who has changed his versions at 3 places before three different persons about the description of the incident and the activities of the accused.

Victim boy has informed that he was playing with two children and there are discrepancies in the names of the children allegedly playing with the victim boy. As none of them has been produced in the court, thus, the testimony of the victim boy comes under the shadow of doubt as to whether he was ever playing with them or not at the relevant, date, time and place.

Thus, on the basis of above-noted settled principles, in the given facts and circumstances, the testimony of victim boy do not inspire confidence & placing credence on his testimony is not safe, in view of the law settled in case titled as Rai Sandeep's case.

42. Thus, in the above-noted facts and circumstances on appreciation of the entire evidence on record, it is observed that the prosecution has miserably failed to prove the basic ingredients above mentioned for proving the offences under section 4/18 of POSCO Act or under section 342/377/511 IPC against the accused Ajay, beyond reasonable doubt.

43. Thus, a benefit of doubt is given to the accused namely Ajay on the basis of above-noted principles.

44. Consequently, the accused namely Ajay is acquitted of the offences under section 4/18 of POSCO Act or under section 342/377/511 IPC."

6. Consequently, the story of the prosecution is improbable and the testimony of the victim does not inspire confidence.

7. Further, this Court is not impressed by the contention that as regards allegation related to oral or anal sex there was not much possibility of the medical evidence. In the present case, the medical record does not support the statement of the victim inasmuch as it does not show any injury on the cheek of the victim. The FSL report also does not support the case of penetrative sexual assault or carnal assault as no semen was found on the clothes/body of the accused or the victim.

8. There is also no explanation offered as to why the father of the victim did not approach the police despite the victim being missing, admittedly between 8.30 p.m. and 3.00 a.m. during 1st and 2nd February, 2013 respectively.

9. For all the aforesaid reasons, this Court is in agreement with the trial court that the benefit of doubt has to go to the accused.

10. Consequently, the present criminal leave petition, being bereft of merit, is dismissed.

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

MAY 06, 2019

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