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

+ **CRL.M.C. 1802/2024**

ANIL PATHAK

..... Petitioner

Through: **Mr. Soibal Gupta and Mr. Himanshu Swami, Advocates.**

versus

STATE OF (NCT OF DELHI)

..... Respondent

Through: **Mr. Nawal Kishore Jha, APP for State with WSI Akanksha PS Bhalswa Dairy, Delhi.**

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

ORDER

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25.04.2024

1. The present petition has been instituted under Section 482 Cr.P.C. as the petitioner herein is aggrieved by the directive dated 07.06.2023 passed by the learned ADJ, North Delhi in FIR No. 995/2022 registered under Sections 363/376/377 IPC read with Section 6 POCSO Act at P.S. Bhalswa Dairy, Delhi wherein the petitioner was not allowed to put forth certain suggestions to the prosecutrix/child victim on account of her tender age, however, her examination-in-chief was allowed to be conducted.

2. Learned counsel for the petitioner states that at the time of deposition of the child victim, to determine if she was a competent witness, certain preliminary questions were put to her, and upon consideration of the same, she was found to be a competent witness. Thereafter, her examination-in-chief was allowed to be conducted. However, at the time of cross-examination, suggestions were not allowed to be put to her on ground of her tender age. It is thus contended that there has been contradictory recordings



in the said proceedings and refusal to put suggestions to her has prejudiced the petitioner.

3. This Court, in the decisions of Delhi Commission for Women v. Delhi Police reported as **2009 SCC OnLine Del 1057**, Virender v. State of NCT of Delhi reported as **2009 SCC OnLine Drl 4413** and State v. Jai Hind reported as **2012 SCC OnLine Del 3616** have dealt with the aspect of recording of testimony/evidence of child witnesses and has laid down detailed guidelines in this regard.

4. In Jai Hind (Supra), following guidelines were laid down by a Division Bench of this Court:-

“PROCEDURE DURING TRIAL AND CROSS EXAMINATION

a) Child appropriate questioning techniques must be employed. The age of the child must be kept in mind with respect to the language used. Attention must be paid to the language used. Complex, technical, hypothetical, abstract and compound sentences should be avoided. Questions must be literal and concrete, tending to draw out information.

b) The neutral support person (described in the previous section) shall be present during the court deposition of the child, in addition to the parent or guardian as the case may be.

c) The court deposition of the child shall also be at the designated chamber/court room mentioned above (as in the case of recording Section 164. Cr. PC statement). The deposition may be video recorded and shall be duly certified by the concerned Judge.

d) During examination-in-chief, the child should be given adequate time and encouragement to narrate the incident witnessed by her or him.

e) Persistent and repeated questioning of the child witness should be avoided as it tends to mislead and confuse children who can



easily be manipulated into contradictions, intimidated into silence and confused into general emotional or cognitive disorganization.

f) Judges should disallow inappropriate questioning which include questions that are misleading or confusing, unduly annoying, intimidating, offensive, oppressive, humiliating, repetitive, or harassing, and asked in a manner or tone way that is belittling, insulting or otherwise inappropriate.

g) Questions which are leading in nature should be avoided since children are easily misled and tend to confirm any information conveyed to them by an adult since they consider adults credible and competent.”

5. Recently, in P. Ramesh v. State reported as **(2019) 20 SCC 593**, an appeal came to be filed against the decision of the High Court, wherein it had remanded back the matter to the trial court for an objective determination of the capacity of two child witnesses to depose. Earlier, the trial court had come to the conclusion that the child witnesses were not competent to depose. While upholding the decision of High Court, the Supreme Court observed that posing relevant questions to a child witness is to determine the child’s capacity to provide rational answers. It allows the court to determine whether the child has intellectual and cognitive skills to recollect and narrate the incidents of crime. It was further observed that :-

“xxx

15. In order to determine the competency of a child witness, the Judge has to form her or his opinion. The Judge is at the liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand



questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. A child becomes incompetent only in case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined.

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20. In the present case, the High Court in the considered exercise of its appellate jurisdiction has remanded the proceedings back to the Trial Court to assess objectively the capacity of the two child witnesses and if the evidence is recorded, to furnish an opportunity to the accused to offer evidence in rebuttal. The accused will also be entitled to cross examine them...

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22. The appellant would undoubtedly have a right to cross-examine the witnesses once their evidence is recorded by the trial judge.

xxx”

6. In the present case, the relevant extract of the satisfaction recorded by the trial court before recording the examination-in-chief of the prosecutrix/child victim reads as under:-

“07.06.2023

PW-1: Statement of Victim ‘S’ D/o Sh. ‘V’ (identity withheld), Witness mentioned at Serial No,1 as per list of witnesses annexed with the chargesheet aged 4 years.

At this stage, to find out whether this child witness is a competent witness, capable of giving rational answers to the questions put to her, some preliminary questions are being asked to her to find out her competency to depose. Ms. Harsha Saxena,



Counsel from DCW and Ms. Neelima Dubey, Ld. Support Person are sitting with the victim in the Vulnerable Witness Deposition Room for in camera proceedings.

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After making the aforementioned preliminary examination of the above said child witness, I am satisfied that she is capable of understanding the questions put to her and she is capable of giving rational answers to the questions put to her. Therefore, I am satisfied that she is a competent witness. Keeping in view the tender age of the witness, let her statement be recorded without oath.

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XXXX by Sh. Sanjeev Kohli, Ld. Counsel for accused.

Nil. Opportunity given.

Considering the tender age of the witness, suggestions are not being allowed to put to her. However, contradictions, if any, in the statement of the child witness, shall be given due care and attention at the time of final arguments... ”

7. A perusal of the above extract would show that while at the time of examination-in-chief of the child victim, consequent to certain preliminary questions, the trial court recorded satisfaction that the child victim was capable of understanding the questions put and giving rational answers to the same. Thus, she was determined to be a competent witness. However, on the same day at the time of cross-examination, it was stated that considering her tender age, suggestions were not allowed to be put to her.

In the considered opinion of this Court, the record reflects no reason as to why at one time, the child victim was determined to be competent witness, but at another time on the same day, suggestions were not allowed to be put to her. Once the child victim was determined to be a competent witness, such blanket refusal for putting suggestion was not justified.



8. Considering the aforesaid, the present petition is allowed and the petitioner's counsel is allowed to put the relevant suggestions to the child victim. However, the learned MM is directed to ensure that at the time of cross-examination of the child victim, strict compliance is made to the various guidelines issued for examination of child victim/witness.
9. The petition is disposed of in the above terms.
10. Copy of this order be communicated to the concerned Trial Court.

MANOJ KUMAR OHRI, J

APRIL 25, 2024/rd