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

% ***Date of decision: 28.02.2024***

+ **CRL.L.P. 386/2022 & CRL.M.A. 15263/2022**

STATE

..... Petitioner

Through: Ms. Manjeet Arya, APP with SI Rishi
Kant Mishra, PS V K North.

versus

KAPILADDIN MANDAL

..... Respondent

Through: Mr. Umakant Kataria, Advocate.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MR. JUSTICE MANOJ JAIN

J U D G M E N T (oral)

1. The State has taken exception to order dated 16.12.2021 passed by learned Trial Court whereby the accused (respondent herein) has been acquitted of charges under Section 376 IPC and Section 6 of Protection of Children from Sexual Offences Act, 2012 (POCSO Act).

2. On 08.12.2014, the mother of victim 'A' (*name withheld*) came to the police station and revealed that she used to work as domestic help in *kothis* and her husband was also a *safai karamchari* in one of the office at Mehrauli, Delhi. She had a minor daughter aged 3½ years. On 01.12.2014 at about 9.00 AM, she left for her work while leaving her said minor daughter 'A' with her neighbour i.e. accused herein. When she returned at



about 12.30 PM, she saw her daughter playing outside her house. She took her in her lap. Her daughter indicated that she was feeling pain in her private part. When asked, she told her that her private part was touched by accused whom she used to call as *Jamai*. When father of 'A' returned back in the evening, she told him about the above incident who claimed that if the matter was reported, it might cause harm to their reputation. She claimed that later on, accused himself came and started proclaiming that there was no proof of all these things.

3. Apprehending that he may not indulge in similar kind of incident again, Mother of 'A' along with her employer came to police station for lodging report.

4. 'A' was taken to hospital for medical examination and her statement under Section 164 Cr.P.C. was also got recorded with the help of translator and child counsellor. Accused was arrested and it was in those circumstances that he was charge-sheeted.

5. Accused/respondent was charged for offences under Section 376 IPC and Section 6 of Protection of Children from Sexual Offences Act (POCSO Act) to which he pleaded not guilty and claimed trial.

6. Prosecution examined six witnesses. Few of the witnesses were dropped as the accused had admitted certain documents under Section 294 Cr.P.C.

7. Accused, in his statement under Section 313 Cr.P.C., claimed that he had been falsely implicated as there was quarrel between the two families.



He also examined his wife in his defence.

8. Learned Trial Court acquitted the accused for the following reasons: -
- (i) *Testimony of victim did not sufficiently incriminate the accused.*
 - (ii) *Aspect of her being tutored by her father could not be ruled out.*
 - (iii) *There is no medical corroboration.*
 - (iv) *Victim has not identified the accused during the trial.*
 - (v) *There is delay in lodging FIR which has not been explained by the prosecution.*
 - (vi) *Testimony of other public prosecution witnesses is hearsay in nature.*
9. Such order of acquittal is under challenge before us.
10. According to the State, the impugned judgment is based on conjectures and surmises and evidence has not been appreciated in the desired manner. It is argued that the victim was hardly 3½ years of age and she categorically indicated that she had been wronged as the accused had put finger in her private part. It is contended that there is no dispute regarding his identification either. It is further contended that there was nothing on record which might even remotely indicate that 'A' had been tutored by her father and her version remained consistent when she was examined under Section 164 Cr.P.C. and when she appeared before the learned Trial Court during the trial. It is also argued that she knew the accused by the name of *Jamai* and, therefore, there was no question of granting any kind of benefit to the accused.
11. As regards delay, it is submitted by Id. APP that it stood explained



automatically as in such type of matters of sexual offences, victim and her family members are generally reluctant and hesitant to report the matter to the police as they apprehended that the same might affect their reputation and, therefore, delay, in itself, should not have been taken against the prosecution.

12. All such contentions have been refuted and learned counsel for respondent has contended that learned Trial Court has, after meticulous analysis of the evidence, come to the right conclusion that tutoring could not be ruled out. He has asserted that when victim was cross-examined during the trial, in response to one specific question, she categorically claimed that whatever she had deposed was at the instance of her father.

13. We have carefully gone through the digitized copy of Trial Court Record and given our anxious consideration to the rival contentions.

14. FIR was registered on the basis of the complaint (Ex. PW2/B) made by mother of 'A' to the police but prior thereto, 'A' was taken to the hospital. We have seen said complaint, corresponding *rukka* and DD No. 51A. Though the information was recorded by the police at around 11.00 PM but it is not explained as to why the FIR was not recorded at 7.00 PM itself when mother of 'A' had come at PS with her employer.

15. As per MLC, when 'A' was brought to said hospital by her mother and one lady SI, she had given history of molestation one week ago i.e. on 01.12.2014 *by one 70 years old man* who was residing near her house. Mother of 'A' also told the attending doctor that there was no history of sexual/anal intercourse and she was not willing to go for gynaecological



examination.

16. Since child was 3½ years old and was not able to speak Hindi properly, her statement under Section 164 Cr.P.C. was got recorded with the help of child counsellor. During recording of such statement under Section 164 Cr.P.C., concerned learned Magistrate tried to speak to victim child but he was unable to communicate to her directly and with the indulgence of child counsellor, victim told by sign that person named *Jamai* had put his finger in her private part. We may also point out that such ‘child counsellor’ also acted as translator.

17. For the purposes of identification of the accused and the fact whether the victim has been tutored or not, let us come straightway to the testimony of child witness who has been examined as PW1.

18. Her testimony would reveal that before she was asked to mention about the incident, several preliminary questions were put to her. Fact remains that she did not reply to several such questions. Though she claimed that she used to go to school but when asked about the name of the school, she kept quiet. She also did not reveal her age and the number of brothers she had. She was asked as to what had happened and then she pointed her finger towards her private part and as per translator/child counsellor, child had said in Bengali that finger had been put inside the *susu*. When asked who had put such finger, she named *Jamai Babu*.

19. Also claimed that she could identify him if shown to her.

20. Accused was then shown to the witness.



21. However, 'A' closed her eyes and refused to look at the accused. One more attempt was made and she was again asked to identify him but the child refused to look at him.

22. During her further cross-examination, she was asked a specific question to the effect whether she had been told by someone as to what was to be stated before the Court. In response to such question, she replied that her father (*Abbu*) had told her to say that the finger was inserted in her *susu*.

23. Coming to the aspect of identification first, according to the State, accused was also known as *Jamai Babu* but such fact has not been proved in the desired manner. No independent witness has been examined who may claim that accused was known as *Jamai Babu* or that the victim used to call him as *Jamai Babu*. Neither in arrest memo nor in remand papers, his such alias name is found to be mentioned either. Interestingly, wife of accused entered into witness box as DW1 and when was cross-examined by the prosecution, no such question was put to her.

24. This assumes importance because the child witness had merely described the offender as *Jamai Babu* and when asked to identify such person, she refused to even have a look at him. Mere fact that she closed her eyes would not mean that she had identified the accused. Any assumption of implied identification would be bizarre and dangerous. In the present factual matrix, at least. Thus, there is no proper identification, direct or by way of implication.

25. There is one more aspect of the case.



26. As per the documents of the prosecution, accused was aged 52 years but when 'A' and her mother had gone to hospital for medical examination, they claimed that the offender was 70 years old man. This variance in the age of the perpetrator has also not been explained by the State.

27. We understand that the child was of tender age and, therefore, her examination was being recorded after taking all the precautions but at the same time, there cannot be any scope of uncertainty with respect to the identification aspect. The girl had indicted one *Jamai Babu* and when alleged accused was shown to her, she refused to even have a look at him for identification purpose. There is no other independent witness who may claim that accused Kapiladdin Mandal was also known as *Jamai Babu*.

28. Moreover, the aspect of tutoring has also been dealt with by the learned Trial Court in an appropriate manner. A very specific question was put to child witness. It is not that she could not understand the question. She was asked whether anybody had told her as to what was to be stated in the Court and she replied that her father had told her to say that a finger was inserted in her *susu*. Such answer, coupled with the tender age of the child witness, is bound to create some kind of uncertainty in the mind of the Court.

29. To make things worse, there is no explanation as to why the matter was reported to the police after a gap of one week.

30. According to the State, in such type of matters, victim and her family members are generally hesitant in reporting the matter to the police and, therefore, delay should not be given any weightage.



31. However, such aspect has not been properly brought on record by the State and its witnesses.

32. When mother of 'A' entered into witness box, she claimed that when same evening i.e. on 01.12.2014, her husband returned, she told all the facts to him *but her husband told her not to tell anything to anyone as it would bring disrepute to their family.*

33. However, her husband has something else to say.

34. When his statement was recorded by the police under Section 161 Cr.P.C., he rather stated that *his wife was of the view that matter should not be reported to the police.* In witness box, he deposed that when he returned home on 01.12.2014, his wife told him about the incident and then his wife took their daughter to her employer who then took them to police station where FIR was recorded. Thus, in his initial examination-in-chief, he indicated that on 01.12.2014 itself, he learnt about the incident and immediately thereafter the matter was reported to the police. Since, such version was not in synchronization with the case of prosecution, learned Addl. P.P. for the State had to put a leading question to him and in response to such question, he replied that it was correct that they had not lodged the complaint as he apprehended that it would bring disrepute.

35. Thus, there is no enough clarity as to who was apprehensive in reporting the matter to the police - whether it was mother or father of child witness? Moreover, father of child, as noted above, did not say anything in this regard on his own. Rather, if his initial deposition is to be believed, the police was contacted same day. It was only when he was cross-examined by



the prosecution, he became wiser and claimed that they had not lodged the complaint, initially, as they had apprehended that it would bring disrepute to them.

36. The purpose of insisting upon prompt lodging of the report is to obtain early information about the circumstances in which the offence was committed and to reach the real culprit. Any delay in filing could lead to embellishment, coloured versions, exaggerated accounts resulting from consultations and afterthought. Thus, delay in filing must be supported with satisfactory explanation. There is no strait-jacket formula and in a given case, at times, delay of one or two days may become fatal whereas if properly explained, Court may not give any significance to the delay of period of even more than a year.

37. Admittedly, any such incident of sexual assault comes with lot of trauma and stigmatization. Any such victim or family members of victim would always be hesitant in reporting such matter to the police as they remain apprehensive that it might bring them disrepute. Such aspect can never be forgotten though at the same time, delay needs to be explained by the prosecution as delay in lodging FIR is bound to give rise to suspicion, which can put the court on guard to look for extra assurance and deeper scrutiny of evidence. Here, as noted already, delay has not been explained.

38. We are conscious of the fact that the testimony of any such victim, in such type of matters, may not require any corroboration. Requirement of corroboration is simply a rule of prudence but at the same time, quality of testimony of any such child victim should be inspiring enough and should



not contain anything suggesting tutoring. The unexplained delay in lodging FIR and the aspect of tutoring which is present in the testimony of child victim compels us to hold that there is not enough credibility in the testimony of child witness.

39. Moreover, the present application is seeking leave to appeal against acquittal. Order of acquittal is not, generally, interfered with when view taken by the learned Trial Court is found to be reasonable and plausible one. It is, certainly, not a case where conviction is the sole possibility. Moreover, Appellate Court cannot reverse the decision merely because a different view was also possible. Presumption of innocence, which is in favour of the accused, gets strengthened by such order of acquittal and he, thus, even otherwise becomes entitled to get the benefit of doubt.

40. In view of the above, we do not find any compelling reason to grant leave to appeal to State.

41. Such application is accordingly dismissed.

(SURESH KUMAR KAIT)
JUDGE

(MANOJ JAIN)
JUDGE

FEBRUARY 28, 2024/dr