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

Judgment reserved on : 01.02.2023
Judgment pronounced on: 29.03.2023

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\+ **CRL.A. 617/2020 & CRL.M.(BAIL) 8419/2020**

DEV NATH YADAV ..... Appellant
Through: Mr. Archit Upadhayay, Adv. (DHCLSC) with Ms. Charu Sharma, Adv.

versus

STATE OF NCT OF DELHI ..... Respondent
Through: Mr. Ajay Vikram Singh, APP
SI Dharmendra, PS Gokalpuri and SI Ashutosh Mishra, PS Bhajanpura

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\+ **CRL.A. 636/2020 & CRL.M.(BAIL) 8466/2020**

DEV NATH alias SHIV NATH ..... Appellant
Through: Mr. Rajneesh Bhaskar, Adv. (DHCLSC) through VC

versus

STATE OF NCT OF DELHI ..... Respondent
Through: Mr. Ajay Vikram Singh, APP
SI Dharmendra, PS Gokalpuri and SI Ashutosh Mishra, PS Bhajanpura

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: JASMEET SINGH, J

1. Inadvertently, in the order dated 01.02.2023, the fact that the appeals have been heard and reserved for judgment has not been noted. On 13.05.2022, it was directed that rather than hearing the applications for suspension of

sentence, the appeal should be heard. Hence, appeals were heard on 16.01.2023 and 01.02.2023.

2. These are appeals seeking setting aside of the common judgement dated 27.02.2020 and common order on sentence dated 06.03.2020 passed by the ASJ-1 (North East), Karkardooma Courts, Delhi whereby the appellant was convicted for the offences punishable u/s 354A IPC and u/s 10 read with section 9 of the POCSO Act and sentenced to undergo rigorous imprisonment for 5 years along with fine of Rs.10,000/-for conviction u/s 10 of POCSO Act and a period of 1 year rigorous imprisonment along with fine of Rs. 1,000/- u/s 354A IPC anda further period of 1 year rigorous imprisonment in default of payment of fine.

3. Combined facts of the case are-

   i. FIR No. 812/2014 was registered on 13.08.2014 the basis of statement of "S" (herein referred to as "victim No.1") studying in fifth class who stated that she, along with her younger brother used to commute together in the same school bus. The appellant herein was the driver of the said school bus. The allegations against the appellant are that he used to stop the bus on the way, come to the seat and used to touch the victim on her chest and waist and also used to touch the private parts of another girl (victim in FIR No. 1072/2014, herein referred to as "victim No.2"). It is also alleged that he used to threaten to kill them if they ever told anybody about these acts.

   ii. The victim No.1further stated that she informed her teacher Ms. Anu Anand about the acts of the accused, who scolded the appellant but thereafter, sent her back home with the accused in his vehicle. The victim No.1 informed her mother about these incidents and

therefore, FIR No. 812/2014 was registered against the appellant and he was arrested.

iii. Another FIR was registered against the appellant on the basis of statement of victim No.2's father. It is stated that when he was informed about the incident of victim No.1, he enquired from his daughter if she experienced similar incidents since she used to travel on the same school bus as victim No.1. Upon his enquiry, victim No.2 revealed that similar incidents happened with her which led to filing of the FIR No. 1072/2014.

4. Vide order dated 05.12.2016 passed by the learned ASJ, FIR No. 812/2014 in CRL.A. 617/2020 and FIR No. 1072/2014 in CRL.A. 636/2020 were clubbed together.

5. The Sessions Court after examining the witnesses, analysing the evidence and hearing the arguments, has acquitted the appellant for offences u/s 354D , 354B and 506 IPC and convicted him u/s 354A and section 10 read with section 9 of POCSO Act in both the cases.

6. It is stated by Mr. Upadhayay, learned counsel for the appellant that there are material contradictions in the statement of both the victims regarding:

A. <u>Date/month of the alleged incident:</u>

i. As regards CRL.A. 617/2020 (victim No.1):

a. He submits that in the complaint dated 13.08.2014, there is no mention of date/month of incident. He further submits that on the other hand, in her statement u/s 164 Cr.Pc, she has stated "*Shivratri se ek din pehle ki baat hai…"* and later on stated "*Shivratri ke agle din Devnath ne gaadi...."*

b. It is stated that the victim does not know the meaning of *Shivratri* and therefore, it is highly improbable that the victim would remember if the incident had occurred one day before

Shivratri or one day after, as stated by her in the statement u/s 164 Cr.PC. This casts a shadow of doubt over the happening of the incident.

ii. As regards CRL.A. 636/2020 (victim No.2):

a. He submits that in the statements u/s 161 and 164 Cr.PC, victim No.2 has given contrary dates of the incident being 26.07.2014 and 25.07.2014 respectively.

b. He further relies on the leading questions asked by the learned APP where the victim No.2 said that she does not remember the date correctly.

c. It is stated that since no such act as alleged has taken place, hence both the victims could not give the exact date and narration of the event. This casts a shadow of doubt over the happening of the incident.

B. <u>Disclosure of incident and arrival of police:</u>

i. As regards CRL.A. 617/2020:

Learned counsel for the appellant submits that the mother of victim No.1 while deposing before the court stated that her daughter informed her regarding the alleged offence on 13-08-2014 around 6-7 am and thereafter, she called the police. But at the time of cross examination she has stated that her daughter told about her about the incident on 12-08-2014 at night and she made a call to the police the next morning. He submits that this again shows that there are material contradictions regarding the date of incident this creates a doubt in the version of the prosecution witnesses.

ii. As regards CRL.A. 636/2020:

It is submitted that the victim No.2 does not remember when her father informed the police. It is further submitted that she does not remember the time the police came to her house and there is also no confirmation of date/place of the alleged offence.

C. Description of the incident

He further submits that the victim No.1 in her examination in-chief has not levelled any allegation regarding the appellant touching her private part or chest, while in her statement under 164, she has levelled allegations that the appellant touched her chest.

7. Mr. Upadhayay has placed relied upon "***Bhagwan Singh v. State of M.P.***" [(2003) 3 SCC 21], wherein the Supreme Court opined that:

"19. The law recognises the child as a competent witness but a child particularly at such a tender age of six years, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, is not considered by the court to be a witness whose sole testimony can be relied upon without other corroborative evidence. The evidence of a child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, always the court looks for adequate corroboration from other evidence to his testimony.

22. It is hazardous to rely on the sole testimony of the child witness as it is not available immediately after the occurrence of the incident and before there were any possibility of coaching and tutoring him."

8. He further states that the learned APP had put forth leading questions to the victim without declaring her hostile in order to put words in her

mouth. He has also relied upon the judgement of Supreme Court titled as "***Varkey Joseph Vs. State of Kerala***" [1993 Supp (3) SCC 745] to state that leading questions can be asked only when the witness has turned hostile. The relevant portion reads as:

> *"11. Leading question is one which indicates to the witnesses the real or supposed fact which the prosecutor (plaintiff) expects and desires to have confirmed by the answer. Leading question may be used to prepare him to give the answers to the questions about to be put to him for the purpose of identification or to lead him to the main evidence or fact in dispute. The attention of the witness cannot be directed in chief examination to the subject of the enquiry/trial. The court may permit leading question to draw the attention of the witness which cannot otherwise be called to the matter under enquiry, trial or investigation. The discretion of the court must only be controlled towards that end but a question which suggests to the witness the answer the prosecutor expects must not be allowed unless the witness, with the permission of the court, is declared hostile and cross-examination is directed thereafter in that behalf."*

9. Per contra, Mr. Singh, learned APP submits that at the time of the incident, both the victims were about the age of 10 years and the same is corroborated by the testimonies of the victims, their parents and the record of their birth certificate.

10. He further submits that the testimonies of Chandrapal Singh and Mukesh Sharma (PW-6 and PW-8 in CRL.A. 636/2020) show that at the time of the incident, the appellant was the driver of the bus which was being used by the victims for commuting to their school.

11. He also states that the offence of sexual harassment and assault have been proved against the appellant from the testimonies of the victims and their parents.

12. Mr. Singh states that as regards the questions being asked without turning the witnesses hostile is concerned, the very fact that the questions were put to the witnesses, itself means that they are hostile.

13. I have heard learned counsel for the parties.

14. In the present case, the age of the victims at the time of the alleged incident is of utmost importance.

    i. The birth certificate of victim No.1 shows her date of birth as 29.08.2004

    ii. The birth certificate of victim No.2 shows her date of birth as 14.09.2004.

15. Therefore, it is established that both the victims were minor, i.e aged about 10 years at the time of the incident.

16. The submission made by learned counsel for the appellant that there are contradictions in the depositions cannot be given much weightage. The Supreme Court in "***Appabhai v. State of Gujarat***" [1988 Supp SCC 241] observed that-

> *"13….The court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a*

doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy.

..."

17. In the case at hand, the alleged discrepancies which have been pointed out regarding-

(i) date/month of the alleged incident,

(ii) disclosure of incident and arrival of police, and

(iii) description of the incident;

are of a minor character and do not call into question the veracity of the prosecution's story.The victim No.2 has corroborated the version of victim No.1 and similarly, victim No.1 has also corroborated the version of victim No.2.

18. The victim No.1(PW-2 in CRL.A. 636/2020) in her testimony has deposed as under-

"At the time of incident I was studying in Class- V. At the time of incident my younger brother XXX was studying in Class-IV. We used to go to our School from our house by school bus. The bus used to drop us at our house and our house was a second last drop. My friendSS (victim) of Class-V (at the time of incident) used to be the last person to board down from the Bus. When I and SS used to reach near our house, we used to go to sit in the last seat of the bus in company of my friends. In the Summer Season in 2014 when the

Bus reached near our drop point, I went to the last seats of the bus to bye my friends, the bus driver stopped the bus and he came at the back seats and he put his hand inside of my skirt and touched my thighs by his hand and he also touched my back. The driver told us that the bus was faulted.Thereafter my stop came and I and my brother alighted from the bus.

On the next day the same bus driver again put his hand onmy back when we were going to alight from the bus. SS also informed me that the same bus driver also touched her thighs on the third seat on a different day. I discussed this incident with my friend V and thereafter we informed our teacher Anu Anand and she called the said bus driver when our classes were over and she scolded him about the incident.

Thereafter, we were dropped by the same driver at our stop. On the same day I informed my mother about the incident and my father was informed about the incident by her. I do not remember what happened thereafter. Police came at our house in the evening. I told all the facts to the police. Police recorded my statement."

19. The victim No.2 (PW-3in CRL.A. 636/2020) in her testimony has deposed as under-

"The victim SC is known to me who is studying in my school in class 8. I used to go to my school by bus. In August 2014, I used to go to my school by bus while I was in class 5. The victim SC as well as her younger brother XXX also used to go with me in the same bus. I used to be the last person to board down from the bus and before me, the victim SC and her brother used to board down.

When the bus used to be vacant, I and the victim SC used to sit anywhere in the bus. Whenever, the bus used to stop in a traffic jam or whenever it used to break down, the driver of the bus used to come to the sitting portion and used to sit with us and used to put vague questions. He also used to touch on our thighs. I used to wear skirt. He used to touch the victim SC similarly but I did not use to watch her. He did this act with me once and twice with victim SC. XXX complained to his father and he made a call to our house and then I also told my father about the acts of the accused. The accused also used to say that we should not tell his acts to anyone. When my father came to know about it, he lodged the complaint at the PS and the police approached me at my house and made inquiries. My statement was also recorded by them and then I was taken to the Court where a judge uncle recorded my statement."

20. The above said testimonies of both victim No.1 and 2 clearly describe the acts of aggravated sexual assault committed by the appellant on the minor child victims. The description of the incident has been described by both the victims in an identical manner and hence, the contention that the contradictions shake the version of the prosecution and makes it unreliable cannot be accepted**.** The contradictions in the version of the 164 statement of both the victims are of a minor character and do not make their testimonies unreliable.

21. The Supreme Court in *"**P. Ramesh v. State"***[(2019) 20 SCC 593] held that-

"16….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."

22. In the present case, even though both the victims were of tender age i.e., aged only about 10 years at the time of incident, however, they have duly corroborated the incident.

23. The judgement of ***Bhagwan Singh*** (supra) relied upon by learned counsel for the appellant is also not of much help to him. In the present case, apart from the testimonies of the minor victims, there is also other corroborative evidence against the appellant. The conviction of the appellant is not solely on the basis of statement of the minor victims. The statement of both the victims, besides supporting each other, are also supported by credible witnesses examined by the prosecution, being:

i. Ms. Sarita**,** mother of victim No.1 (as PW-7 in CRL.A. 617/2020):-

"*I am residing at the above address alongwith my husband and two children out of which the victim is my daughter who was aged about 9 years at the time of incident, i.e. in the year 2014, and was studying in Class 5 at Vivekanand School, Anand Vihar, Delhi. She used to commute to the school by school bus. My second child is my*

son who was also studying in the same school in class 4 and also used to go alongwith the victim by bus.

On 13.8.2014, at about 6-7 am the victim told me that the driver of her school bus used to misbehave with her on her way back to home in the afternoon when all other children used to be dropped at their stops. She told me that the driver used to stop the bus in between whenever there was jams and used to come on the rear seat and used to touch her on her back, chest and other body parts. He also used to do similar acts with another child namely XXX who used to deboard the bus at Yamuna Vihar."

ii. Mr. Brij Mohan Chaudhary, father of victim No.1(as PW-8 in CRL.A. 617/2020):

"At the night time, my wife asked about the incident from the victim. In the next morning, my wife informed me that the victim told her that the driver of her school bus used to misbehave with her on her way back to home in the afternoon when all other children used to be dropped at their stops and that the driver used to stop the bus in between whenever there was jams and used to come on the rear seat and used to touch her on her back, chest and other body parts and that the driver also used to do similar acts with another child namely XXX who used to deboard the bus at Yamuna Vihar and the said incident was continuing for last 2-3 days."

iii. Mr. Brijesh Kumar Sharma, father of victim No.2 (as PW-9 in CRL.A. 636/2020):

"I do not remember the exact but in July or August 2014, I received a call from Sh. Brij Mohan Chaudhary. He told me that his daughter had been indecently touched (galat harkat ki) by the driver of the bus. I told him that I did not know anything about it and I would inquire from my daughter. I inquired from my daughter. Initially, she hesitated but later on she told me that the bus driver had also touched her indecently. On receiving this information, I called the PCR."

iv. <u>SI Parvesh Kumar (as PW-11 in CRL.A. 617/2020in his cross examination):</u>

"The victim stated had stated that accused would stop the bus at 66 foota road, Yamuna Vihar and then molest her but she could not pin point to the specific spot at 66 foota road where the accused used to stop the bus."

24. All the aforesaid witnesses duly support the prosecution's case. The testimonies of the prosecution witnesses with regard to the basic version of the story are consistent.

25. As regards the argument that the prosecution witnesses should have been declared hostile as the learned APP had put leading questions, the Supreme Court in "***Sat Paul v. Delhi Admn***."[(1976) 1 SCC 727] observed as under-

"38. To steer clear of the controversy over the meaning of the terms "hostile" witness, "adverse" witness, "unfavourable" witness which had given rise to considerable difficulty and conflict of opinion in England, the authors of the Indian Evidence Act, 1872 seem to have advisedly avoided the use of any of those terms

so that, in India, the grant of permission to cross-examine his own witness by a party is not conditional on the witness being declared "adverse" or "hostile". Whether it be the grant of permission under Section 142 to put leading questions, or the leave under Section 154 to ask questions which might be put in cross-examination by the adverse party, the Indian Evidence Act leaves the matter entirely to the discretion of the court (see the observations of Sir Lawrence Jenkins in Baikuntha Nath v. Prasannamoyi). The discretion conferred by Section 154 on the court is unqualified and untrammelled, and is apart from any question of "hostility". It is to be liberally exercised whenever the court from the witnesses' demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. The grant of such permission does not amount to an adjudication by the court as to the veracity of the witness. Therefore, in the order granting such permission it is preferable to avoid the use of such expressions, such as "declared hostile", "declared unfavourable", the significance of which is still not free from the historical cobwebs which, in their wake bring a misleading legacy of confusion, and conflict that had so long vexed the English courts."

26. A reading of ***Sat Paul*** (supra) would show that a party is not required to declare their own witness as "hostile" or "adverse" in order to obtain permission to cross-examine them. Whether it be the grant of permission under section 142 to put leading questions, or the leave under section 154

to ask questions which might be put in cross-examination by the adverse party, the Indian Evidence Act leaves the matter entirely to the discretion of the court.

27. The judgement of ***Varkey Joseph*** (supra) is also not of much help to the appellant as this judgement observed that the prosecutor will not be allowed to frame his questions in such a manner that the witness is answering merely "yes" or "no". *The witness must account for what he himself had seen.*

28. The declaration that a witness is hostile merely means that the witness is adverse or unfriendly and not that the witness is unreliable.

29. The Sessions Court has correctly observed that the victims, being only about 10 years of age at the time of the incident, would have no grudge against the appellant so as to falsely implicate him in this case. It has also correctly observed that the victims were very young at the time of incident and keeping in view their tender age, minor contradictions cannot be a ground to disbelief or discredit their testimonies.

30. The Sessions Court has also correctly noted that the testimonies of the victims and their parents are consistent with regard to the wrongful acts done by the appellant.

31. The nature and gravity of the accusation is very serious in nature as the appellant is accused of offences under section 9/10 of POCSO Act coupled with section 354A IPC.

32. In the present case, the appellant has not been able to shake the version of the prosecution and the prosecution has successfully proved its case beyond a reasonable doubt.

33. Hence, I find no fault or irregularity in the common judgement dated 27.02.2020 and common order on sentence dated 06.03.2020 passed by the ASJ-1 (North East), Karkardooma Courts, Delhi.

34. The appeals are accordingly dismissed.

JASMEET SINGH, J

MARCH 29th, 2023/ st

Click here to check corrigendum, if any