

Nadeem Alias Nadim Vs. State

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Court : Delhi

Decided On : Jan-23-2014

Judge : Indermeet Kaur

Appellant : Nadeem Alias Nadim

Respondent : State

Judgement :

\$~R-18 & 19 * IN THE HIGH COURT OF DELHI AT NEW DELHI % + Judgment reserved on:16.01.2014 Judgment delivered on:23.01.2014 CRL.A. No.55/2006 NADEEM ALIAS NADIM Through Appellant Mr.Shyam Moorjani and Mr. Sanjeev Kumar, Advs. versus STATE Through + Respondent Mr. Varun Goswami, APP CRL.A. No.543/2006 ZAKIR Through Appellant Mr.Shyam Moorjani and Mr. Sanjeev Kumar, Advs. versus STATE Through Respondent Mr. Varun Goswami, APP CORAM: HON'BLE MS. JUSTICE INDERMEET KAUR INDERMEET KAUR, J.

1 Appellants Zakir and Nadeem @Nadim are aggrieved by the impugned judgment and order of sentence dated 26.11.2005 and 30.11.2005 respectively whereby each of them had been convicted under Sections 392, 394 read with Section 34 of the IPC and had been sentenced to undergo rigorous imprisonment for a period of 5 years and to pay fine of Rs.2000/- in default of payment of fine to undergo rigorous imprisonment for 3 months for the offence under Section 392 of the IPC; for the offence under Section 394 of the IPC each of them had been

sentenced to undergo rigorous imprisonment for 3 years and to fine of Rs.1000/- in default of payment of fine to undergo rigorous imprisonment for 2 months. Benefit of Section 428 Cr.P.C. had been granted to them. 2 The version of the prosecution was unfolded in the statement of Rajjo Singh (PW-3). As per his version on 27.02.2004 while he was going to Kanpur from his house at about 4.30 a.m., he hired a TSR to reach the railway station; when the TSR reached the iron bridge it stopped and the TSR driver told him that the TSR had suffered a technical snag. PW-3 started walking and after some steps 3-4 boys came from behind and caught hold of him and started beating him. They tried to snatch his bag which contained important papers and cash of Rs.2000/-. In this scuffle PW-3 was thrown down from the bridge. The boys came under the bridge; one the boys showed him a knife and another caught hold of him; the third boy snatched his bag; they thereafter fled away. PW-3 met some metro persons who informed the police. ASI Purshotam Dutt (PW-6) posted at the PCR North Zone received a call at about 7.00 a.m. at 100 number that one person had been beaten up by 4-5 persons at the iron bridge; the injured was found lying there; he was removed to the Trauma Centre. 3 Victim was medically examined in the hospital by Dr. Girish Chand Parbhat (PW-2). His MLC was proved as Ex. PW-2/A. It had noted the injuries due to a blunt object. Tenderness over the right side of the chest; over the lower spine and over both the hip joints was noted. Patient was referred to surgery and orthopedic emergency for a further detailed examination. K.K.Bakshi (PW-1) was the employer of PW-3. He had gone to visit PW-3 at the Trauma Centre. He deposed that at that time PW-3 was crying with pain. 4 The role of the accused surfaced in the disclosure statement given by Zamal @ Saleem who had been arrested in FIR No.170/2004 under Section 25 of the Arms Act, Police Station Kotwali. CrI.A. Nos.55/2006 and 543/2006 This disclosure Page 3 of 21 statement had been recorded by constable Jitender (PW-8); it was proved as Ex.PW-5/A; it was in this disclosure statement that for the first time complicity of the other co-accused Nadeem @ Nadim, Zakir and Mohd. Sahid Khan surfaced. 5 SI Rajinder Khatri (PW-10) the investigating officer arrested the accused Nadeem and Zakir on 11.3.2004 vide memos Ex.PW-7/B and Ex.PW-7/A respectively; their disclosure statements Ex.PW-8/A and Ex.PW-8/B were also recorded. Pursuant to the disclosure statement of Nadeem he got recovered a thaila (Ex.P-1) which was

taken into possession vide memo Ex.PW-7/F. 6 Relevant would it be to note that the accused persons had refused TIP on 26.4.2004; Smt. Archana Sinha, Ld. M.M. (PW-11) had conducted the TIP proceedings proved as Ex.PW-11/D and notice of adverse inference for not joining TIP was brought to the knowledge of the accused. 7 In the statement of the accused persons recorded under Section 313 Cr.P.C. they pleaded innocence. They denied that they were involved in this crime. Submission being that this is case of false implication. 8 Two witnesses had been examined in defence. They were examined on behalf of accused Zakir. DW-1 was Firdosh. She was his purported landlady. As per her version the police picked up Zakir at around 2.00 a.m. at night; he had told her that Zamal, Nadeem had also been picked up by the police; she did not know any further details of the accused. DW-2 Babu who was running a dhaba had deposed that he knew all the accused persons. Shahid, Nadeem and Kamal were working in his dhaba. Zakir was looking for a job. 9 These witnesses produced on behalf of the defence, establish that all the co-accused i.e. Nadeem, Zakir, Zamal and Shahid were well known to each other; they were working at a common place. 10 On behalf of appellant Zakir arguments have been addressed in detail by counsel Mr. Shyam Moorjani assisted by Mr. Sanjeev Kumar, Advocate. At the outset it is pointed out that Zakir is a juvenile and the plea of juvenility of Zakir had been taken before the trial judge; ample evidence, both oral and documentary had been produced before the trial judge to substantiate this plea but the trial judge has committed an illegality by ignoring this well established documentary evidence holding that accused Zakir is a major. It is contended that in this appeal both the judgment on merits convicting the appellant for the offence under Section 392 and 394 of the IPC as also the impugned order dated 24.5.2006 passed by the Sessions Judge holding Zakir to be an adult are the subject matter of challenge. Qua the role of Nadeem the contest is on the merits of the case. It is submitted that the story set up by PW-3 is highly improbable; it appears to be a figment of his imagination and it is impossible to believe that four persons had attacked him yet they were not able to grab his bag from him and especially when one of them was armed with a knife, it is nothing but a concocted story. This appears to be a case where victim in order to save himself from the wrath of his employer has built up this sob story as admittedly he was carrying important papers and cash of Rs.2000/- out of which

Rs.1500/- have been given to him by his employer; he most likely wanted to run away with this money. The accused persons had been arrested one month after the date of the incident. Attention has been drawn to the version of PW-3 wherein in his cross-examination he has admitted that on 07.5.2006 he had gone to the court where he had identified the accused persons. It is pointed out that once the accused persons had been identified at the behest of the investigating officer subsequent identification in the court would be useless. The metro persons whom PW-3 had contacted and who had allegedly reported the matter to the PCR have not been examined. Adverse inference for their non-examination as also non-examination of the TSR driver has to be drawn against the prosecution. On all counts, the appellants are entitled to benefit of doubt and a consequent acquittal.

11 Arguments have been refuted by the learned public prosecutor. It is submitted that the impugned judgment does not call for any interference. There was no reason whatsoever with PW-3 to have falsely implicated the accused. The thaila Ex.P-1 had also been recovered from co-accused Nadeem and it was correctly identified by the complainant. unchallenged. This part of the version of PW-3 has remained. Victim had also suffered injuries which have been established by his MLC. The rukka had been sent in the early morning hours of 27.02.2004 i.e. at about 10.00 a.m.; this also itself establishes the authenticity of the version of the prosecution especially when the incident had occurred at about 4.30 a.m. Qua the order dated 25.4.2006 whereby the accused ZAKir had been held to be a major, it is pointed out that on no count does it call for any interference. It is submitted that this Court is not an appellate court; it is only a revision which can lie against the order declining a person to be held juvenile. No appeal is maintainable. Admittedly, no revision has been filed; appeal on this ground is not maintainable; powers of revision are limited and scope of interference is also confined.

12 Arguments have been heard. Record has been perused. 13 The testimony of the eye-witness who is the complainant and the injured PW-3 is coherent and credible. He has on oath testified that on the fateful day i.e. on 27.02.2004 while he had boarded a TSR to reach the railway station to go to Kanpur about 4.30 a.m., the TSR broke down; PW-3 had no option but to walk on foot; 3-4 boys came behind him and caught hold of him; his thaila which contained money of Rs.2000/- and important documents could not be snatched in spite of their efforts. In the scuffle

PW-3 was thrown down the iron bridge; the accused persons came under the bridge and snatched his bag. In this incident hip bone of PW-3 got fractured. The police was informed. PW-3 was partly hostile and was permitted to be cross-examined by the learned public prosecutor. He admitted that on 07.5.2004 he had gone to Tis Hazari Court where he had seen the accused persons and identified them. Relevant would it be to state that that TIP of the accused had been requisitioned for 26.4.2004 but the same had been refused by the accused persons. This has been recorded by PW-11 in her proceedings conducted vide Exs.PW-11/D, E and F. These proceedings show that the accused persons had been specifically warned that an adverse inference would be drawn against them if they refused TIP; in spite of this they refused TIP. The accused persons were thereafter identified by the complainant on a later date i.e. on 07.5.2004 and as such the submission of the learned counsel for the appellant that this is a bad identification is an argument bereft of merit. 14 The sanctity of the TIP is that accused persons who are unknown to the complainant can be identified from a group of other similarly placed persons and it is only if the identification is correctly made by the complainant will the accused face trial. It is this sanctity which is contained in Section 8 of the Indian Evidence Act which has to be born in mind when the TIP proceedings are ordered. Refusal to join TIP for no valid reason as in this case permits the court to draw an adverse inference against the accused. Subsequent identification on 07.5.2004 by the complainant is thus a valid identification. 15 The Apex Court had an occasion to examine this issue of adverse inference on refusal of TIP by the accused in JT2011(12) SC31Prem Singh Vs. State of Haryana; the Apex Court had inter alia held as under:

The two eye-witnesses PW-11 and PW-12 have given a graphic description of the incident and have stood the test of scrutiny of cross-examination and had also stated that they could identify the assailants, but the accused had declined to participate in the test identification parade on the ground that he had been shown to the eye-witnesses in advance. In my considered view, it was not open to the accused to refuse to participate in the T.I. parade nor it was a correct legal approach for the prosecution to accept refusal of the accused to participate in the test identification parade. If the accused-Appellant had reason to do so, specially on the plea that he had been shown to the eye-witnesses in advance, the value

and admissibility of the evidence of T.I. Parade could have been assailed by the defence at the stage of trial in order to demolish the value of test identification parade. But merely on account of the objection of the accused, he could not have been permitted to decline from participating in the test identification parade from which adverse inference can surely be drawn against him at least in order to corroborate the prosecution case. 16 Reverting back to the cross-examination of PW-3 he has admitted that he was thrown down from the iron bridge from a height of 17-18 feet; he was in great pain; he met the metro labourers who were working there; this was at around 5.30 a.m. he had to drag himself to reach them; police was then informed. 17 The first DD entry recorded by the PCR at about 7.30 a.m. was to the effect that a person had been beaten up and was lying near the old Loha Pul. This information was received by PW-6. He had removed the injured to the hospital. There was no delay in the incident which was reported at 5.30 a.m.; the first DD was recorded at 7.30 a.m.; it must also be remembered that the time sense of each person is not according to a mathematical calculation; it was a winter morning and PW-3 being in a perplexed state of mind had suffered injuries; he had been robbed of his valuables. A difference of an hour here and there which is calculated as per the perception of each individual is understandable; FIR registered thereafter at 10.30 a.m. was with promptitude. 18 MLC of the victim (who had been removed to the Trauma Centre) had been prepared by Dr.Girish Chander (PW-2). This document also speaks volumes about the authenticity of version of PW-3. The medical document prepared by a public hospital does not lie; it clearly recites that PW-6 had brought the injured to the hospital; PW-6 also had no reason to give a false version; for that matter PW-3 also had no reason to implicate the accused for any ulterior purpose. The victim had also been visited in the hospital by his employer PW-1. He had also reiterated that the victim was in pain at that time. 19 The MLC of the victim evidenced tenderness over his lower spine, hip joint and over the right side of the chest. He had been referred to surgery and orthopedic emergency for a further detailed examination. This is clear version of PW-2. PW-3 has categorically stated that after his discharge from the Trauma Centre he approached LNJP Hospital and a surgery had been performed upon him. These documents i.e. the medical treatment papers of the LNJP Hospital had been brought before the court which included his X-ray and

discharge slip from the LNJP Hospital (Ex.PW-3/B and Ex. PW-3/C). These documents had been sought to be exhibited in his version. The court had taken note of these documents that their admissibility will be decided at the appropriate stage. No arguments have been propounded by learned counsel for the appellant on this score. There is also no reason as to why these public documents from a reputed public hospital i.e. LNJP would be issued wrongly. These medical papers of PW-3 show that he had undergone a hip surgery and had remained in the hospital from 27.02.2004 to 06.3.2004. 20 The accused persons had been arrested later on. This was after the disclosure statement made by co-accused Jamal in an FIR pending against him under Section 25 of the Arms Act wherein he had disclosed the complicity of the other co-accused in the present case. Both these accused persons Nadeem and Zakir were arrested thereafter. From Nadeem a thaila which had a special mark i.e. the cloth bag having JB Super Solution printed upon it; it was exhibited in court as Ex.P-1. There was no objection to the proof of this document. The recovery memo had been proved as Ex. PW-7/F. This document had been testified by constable Naresh (PW-7), constable Mahesh and the investigating officer (PW-10) who have also on oath corroborated this version. This recovery cannot be disbelieved. 21 On no count can it be said that the impugned judgment calls for an interference. The accused as noted supra had been convicted under Section 394 IPC and also for the lesser offence under Section 392 IPC. Offence under Section 394 IPC which is graver than offence under Section 392 speaks of a robbery coupled with a hurt. The offence of robbery has been proved and so also the hurt which had been suffered by PW-3. The conviction of the appellant on no count on either of the two sections calls for any interference. 22 This court shall now deal with the submission of the learned counsel for the appellant qua the order of the Sessions Judge dated 25.4.2006 holding him not to be a juvenile. 23 As noted supra it has been pointed out that this order suffers from inherent infirmities for the reason that the public record of the Madarsa which is admittedly a Government Madarsa had been ignored. This is a perversity and calls for interference. 24 The Juvenile Justice (Care and Protection of Children) Act, 2000 is a beneficial legislation which has been promulgated for the benefit of such category of persons who fall under its ambit. Section 52 of the Act reads herein as under:

52. Appeals- (1) Subject to the provisions of this section, any person aggrieved by an order made by a competent authority under this Act may within thirty days from the date of such order, prefer an appeal to the Court of Session; Provided that the Court of Session may entertain the appeal after the expiry of the said period of thirty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time. (2) No appeal shall lie from (a) any order of acquittal made by the Board in respect of a juvenile alleged to have committed an offence; or (b) any order made by a Committee in respect of a finding that a person is not neglected juvenile. (3) No second appeal shall lie from any order of the Court of Session passed in appeal under this Section. 25 A plain reading of this section shows that no statutory appeal is available against any finding of the court that a person was not a juvenile at the time of commission of the offence. 26 Section 53 of the said Act reads as under:

53. Revision.- The High Court may, at any time, either of its own motion or on an application received in this behalf, call for the record of any proceeding in which any competent authority or Court of Sessions has passed an order for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit; Provided that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard. 27 This section states that the High Court may at any time either on its own motion or on an application received in this behalf call for the record of any proceedings in which any competent authority or court of session has passed an order for the purpose of satisfying itself as to the legality or propriety of any such order in relation thereto as it thinks fit. While exercising this revisional power the High Court cannot convert itself into an appellate court and reverse the finding of fact arrived at by trial judge on the basis of the material on record except where the High Court concludes that the order suffers from a perversity. 28 The legislature is conscious of the fact that an appeal cannot be preferred against an order refusing to hold a person as a juvenile; a revision is the only remedy. As noted supra the present is an appeal which has been filed by Zakir impugning the order dated 25.4.2006. No revision has been preferred against the said order. Even presuming that this appeal may be treated as a revision the powers of the revisional court are limited and have to be

exercised within the ambit as discussed supra. Needless to state that the powers of appellate court are wider. 29 It is on this touchstone that the impugned order dated 25.4.2006 has to be tested. 30 There were four witnesses who had been examined before the Session Court at the time when the plea of juvenility had to be decided. Relevant would it be to state that this plea of juvenility had been taken by Zakir after the judgment dated 26.11.2005 convicting him under Sections 392 and 394 IPC had been passed. It was only at the time of hearing of arguments on sentence that the counsel for the appellant Zakir had chosen to make a submission that Zakir was a juvenile on the date of the incident. 31 Law on this aspect is clear. The plea of juvenility is permitted to be taken at any stage. The trial court accordingly thought it fit to examine the plea raised by Zakir. Four witnesses were examined by Zakir. 32 Abdul Rab, Head Maulvi of Madarsa Islamia, Anwarul Quaran, Lodha Bari, Kishan Ganj, Bihar has brought the record qua the admission of Zakir showing his admission in the Madarsa on 10.02.1997 in second class. His date of birth was mentioned as 15.5.1990. In his cross-examination, this witness admitted that this is not a Government register and had been obtained from a private book shop. He also admitted that there is no stamp or seal on this register. The teacher of the Madarsa, Islamia, Anwarul Quaran, Lodha Bari, Kishan Ganj, Bihar, who had taught Zakir in his second class was examined as PW-3; he was Lal Mohd. He had deposed that Zakir was his student in the year 1977. Court has given a benefit of 1977 as typographical error holding it to read it as 1997. The father of the appellant Abdul Hakim was examined as PW-4. He was subjected to a lengthy cross-examination. He has given evasive answers on almost all scores. He admitted that his marriage was solemnized in the year 1972; he has ten children; Zakir was his last born. He has children in the gap of two and half years. He does not remember the date of birth of any of his children except the date of birth of Zakir which has been told by him to the clerk of Madarsa as 15.9.1990. Benefit of doubt was again given to read this date as 15.5.1990. The trial judge had however drawn a conclusion that this evidence being highly perfunctory an ossification of the appellant be ordered. The ossification report of the appellant was ordered. As per the medical board which had been constituted the age of the appellant was opined between 20-22 years. Submission of the learned counsel for the appellant being that as per this report on

the date of the offence the appellant would be less than 18 years of age. 33 These submissions and the counter submission which have been addressed before this court have been answered in this impugned order. The trial judge has drawn a fact finding noting the demeanour of the witnesses and had concluded that the father of the petitioner was a totally unreliable witness. It was impossible to believe that out of his ten children he had remembered the date of birth of his last child alone; he was a confused witness. That apart the record from the Madarsa which is admittedly not a Government record; was a register purchased from a private book shop and this had no Government seal or signatures to authenticate its veracity. It would definitely not fall within a public document as defined under Section 35 of the Indian Evidence Act. 34 The Apex Court in JT20102) SC603Jabar Singh Vs. Dinesh & Anr. had an occasion to examine this issue. In that case the High Court had reserved the finding of the trial court in its revisional jurisdiction holding the petitioner in that case to be a juvenile. The Apex Court had noted that the powers of a revisional court are not that of an appellate court. They are more restricted. An interference is not called for in a fact finding arrived at by the trial court unless there is an illegality or a perversity. This is clearly not so in the instant case. As noted supra the appellant has also not chosen to file a revision petition. He has filed an appeal wherein he has challenged both the impugned judgment of conviction and the order dated 25.4.2006 vide which he had been declared to be an adult. Provisions of Sections 52 and 53 have already been noted. In this context, the observations of the Apex Court in Jabar Singh (supra) would be relevant. They reads as under:

High Court was not at all right in reversing the findings of the trial court in exercise of its revisional jurisdiction. The entry of date of birth of Respondent No.1 in the admission form, the school records and transfer certificates did not satisfy the conditions laid down in Section 35 of the Evidence Act inasmuch as the entry was not in any public or official register and was not made either by a public servant in the discharge of his official duty or by any person in performance of a duty specially enjoined by the law of the country and, therefore, the entry was not relevant under Section 35 of the Evidence Act for the purpose of determining the age of Respondent No.1 at the time of commission of the alleged offence. As has been held by this Court in Ravinder Singh Gorkhi and Jyoti Prakash (supra) the

age of Respondent No.1 was a question of fact, which was to be decided on the evidence brought on record before the court and it was for the trial court to appreciate the evidence and determine the age of Respondent No.1 at the time of commission of the alleged offence and in this case, the trial court has arrived at the finding that the claim of Respondent No.1 that he was less than 18 years at the time of commission of the alleged offence, was not believable. While arriving at this finding of fact, the trial court had not only considered the evidence produced by Respondent No.1 but also considered the fact that either in the earlier cases or during the investigation of the present case, the Respondent No.1 had not raised this plea. While arriving at this finding of fact, the trial court had also considered the physical appearance of Respondent No.1. Such determination on a question of fact made by the trial court on the basis of the evidence or material before it and other relevant factors could not be disturbed by the High Court in exercise of its revisional powers.

35 The order dated 25.4.2006 does not suffer from any infirmity. The claim of juvenility of Zakir was rightly dismissed. 36 Accused Zakir is on bail since 01.8.2006; he has not abused this process; he got a family to support. Appellant Nadeem @ Nadim also got a family to support. The parties have also suffered a long and protracted trial for almost a decade. The maximum sentence of 5 years imposed upon the appellants is accordingly reduced to 4 years. 37 Bail bond of Zakir stands cancelled; his surety stands discharged. He is not present in the court today. Learned counsel for the appellant Zakir states that because of the illness of his mother he has gone to his village. It is undertaken that appellant Zakir will surrender before the trial court within 15 days from today and non-bailable warrants be kept in abeyance for the said period of 15 days. Accordingly in view of this undertaking of the learned counsel for the appellant Zakir no coercive steps be taken against Zakir for the next 15 days. In case he fails to surrender non-bailable warrants be ordered against him and notice to his surety returnable for 26.02.2014. Trial court shall ensure compliance. Compliance report be submitted by the trial court. 38 Appellant Nadeem @ Nadim is not present and he is not traceable. Non-bailable warrants be issued against him and as and when he is arrested he be sent to jail to suffer his remaining sentence.

39. List before the trial court on 26.02.2014. 40 Appeals are disposed of in the above terms. 41 A copy of this order be sent to jail superintendent for intimation and implementation under signature of the Court Master. INDERMEET KAUR, J
JANUARY23 2014/ndn

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