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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.A. No.1472/2010 & CrI.M.(Bail) No.697/2012**

Date of Decision: 21st December, 2012.

RAJ KUMAR @ GUDDU Appellant
Through Mr. Avadh Kaushik, Adv.

Versus

THE STATE OF DELHI Respondent
Through Ms.Ritu Gauba, APP

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE J.R. MIDHA

GITA MITTAL, J

1. By way of the present appeal, the appellant assails the judgment dated 2nd June, 2010 passed by the learned Additional Sessions Judge, finding him guilty of commission of the offence under Section 302 of the Indian Penal Code and the order of the same date whereby he was sentenced to undergo life imprisonment along with fine of Rs.5,000/- in default whereof, simple imprisonment for three months for the commission of the said offence.

2. As per the prosecution, Gajraj Singh Yadav- PW 5, an employee of the MTNL posted at Gulabi Bagh, Delhi, was residing at House No.173,

Libaspur, Delhi with his family comprising of his deceased wife Smt. Sunita Yadav and two sons namely Sushant Yadav and Prashant Yadav. In the year 2003, Sushant and Prashant, were studying at the Panasia National Public School. Sunita Yadav was a housewife and remained at home. The children used to return from school at about 2.00 p.m. On the fateful day of 22nd of September, 2003, Prashant Yadav (PW 3), the younger child was suffering from pain in his foot and returned home at about 1.40 p.m. with his friend Sunil on his cycle. There was no response from inside when Prashant Yadav rang the bell of his house. The child saw blood near the door of the room; jumped into the house over the gate; opened the gate from inside and took his bag into the house. His friend had left by that time.

3. Inside the house, Prashant saw his mother-Sunita Yadav lying on the cot with blood spilt all around at which he started weeping. Raj Kumar @ Guddu-the appellant, was present in the room and he asked Prashant not to cry and to lock the gate. The appellant disclosed to the child that he had seen someone who had attacked Sunita Yadav with a knife and escaped. Raj Kumar asked him to bring a cloth to clean the floor so that the blood does not flow outside the gate. The child cleaned the floor as directed by the appellant. His efforts to

telephonically contact his father were obstructed by the appellant who told him not to do so.

4. In the meantime, his brother Sushant Yadav also reached the house. According to Prashant, Raj Kumar dissuaded him from opening the gate for his brother Sushant but he still proceeded to do so. Sushant testifying as PW 4, stated that Prashant was weeping when he reached the house. Their mother was lying in an injured condition. Raj Kumar repeated the story to Sushant Yadav to the effect that someone had attacked his mother Sunita with a knife and thereafter escaped. Prashant Yadav has testified that the appellant did not let both the brothers make the telephone call to their father to inform him about the incident.

Both children have deposed that their mother Sunita Yadav was breathing at the time when they reached their house.

5. So far as the plight of the injured Sunita is concerned, Prashant has stated that Raj Kumar held up his mother from the neck and told him (PW 3) to bring water. The appellant thereafter proceeded to press the throat of his mother and poured water into her mouth, as a result of which there was bubbling therefrom. Sunita was breathing even when Raj Kumar was pouring water into his mother's mouth. As

Raj Kumar was pressing their mother's throat when pouring water into her mouth Prashant told Sushant to hit Raj Kumar.

6. The child also stated that when he was able to connect with his father's telephone, Raj Kumar snatched the phone from him and the phone line snapped. Prashant was able to reconnect the phone line and managed to contact his father's office but while he was talking to the person who had answered the phone, the accused pulled out the telephone wire. In these circumstances, Prashant states that he could only convey the message that his mother has been attacked ("mere Mammy ko mar diya") before the phone line was pulled out.

7. It is further in the testimony of PW 4 Sushant Yadav @ Sunny, the elder of the two children, that Prashant was also extremely frightened when Raj Kumar enquired from him as to whom Prashant was calling and asked Sushant to hit him. PW 4-Sushant had also asked the appellant to call for an ambulance at which Raj Kumar pretended to call one Shanta Nursing Home asking for an ambulance. No ambulance ever arrived at the spot. On being asked by the children as to why the ambulance was not coming, the appellant assured them that the ambulance would come. In the meantime, the appellant kept asking them repeatedly to get more water which he kept pouring into the mouth of their mother Sunita. Both the children have referred to

Raj Kumar pressing Sunita's throat and pouring water into her mouth. Sushant also stated that when he turned his back on the appellant, he saw that the appellant pressed his mother's nose while pouring water into her mouth and that her mother expired at that time.

8. It was amidst such commotion that Prashant managed to convey the aforesaid message at his father's office before the appellant pulled out the telephone wire. In the struggle between the appellant and Prashant, a utensil in which the water had been brought, fell down. On hearing this sound, PW-4-Sushant who had gone out of the room, rushed back and saw that Raj Kumar was now throttling his brother. Upon Sushant's return to the room, Raj Kumar pretended as if he was in fact massaging his brother Prashant's neck. At this Sushant attacked Raj Kumar trying to save his brother from the clutches of Raj Kumar and also raised an alarm. He told his brother Prashant to rush out of the room. As Prashant tried to flee from the room, Raj Kumar tried to grab his leg but Prashant managed to escape his clutches. Prashant rushed to his neighbour's house (referred to as "taiji" on record) and returned with her to the house.

9. In the meantime, as per PW 4-Sushant, the appellant fled through the terrace of their house, even though Sushant tried to prevent him by catching his leg.

10. It is in the testimony of both the brothers that the clothes of the appellant were blood stained. Sushant has also testified that while fleeing, the appellant wore his father's shirt hanging on the terrace.

11. It appears that at 1412 hrs. on 22nd September, 2003, the Police Control Room received information to the effect that one lady had been murdered in the house no.173 of Gajraj Yadav in Gali No.9 located in village Libas. The form of the police control has been exhibited as Exh PW 21/X-1 before the trial court.

12. At 14:20 hours it is recorded that the head constable had gone there and it was stated that the SHO be sent to the spot as soon as possible.

13. In this police control room record, at 14:35 hours, it is recorded to the effect that Sunita, wife of Gajraj, aged 30 years was alone at home when Guddu @ Raj Kumar committed the murder and ran away; that she was lying on a cot covered with a sheet and that the arrival of the SHO was being awaited. At 14:52 hours, it has been recorded that ACP had come on the spot and entered the premises.

14. It is further recorded on the police control room form at 15:20 hours that the two sons of Sunita, wife of Gajraj, namely Prashant aged thirteen and a half years and Sushant aged twelve years returned from school when they saw Guddu@Raj Kumar son of Kanwar Singh (their

`tau'), throttling (`reta') their mother's neck. The neck of their mother had been cut; there were two knife injuries on her left hand and one knife injury on the other hand. The appellant refers to the further entry that "Guddu ko pakkad liva".

15. The crime team of the North-West District, Delhi conducted an inspection on the spot from 3.22 p.m. to 4.10 p.m. As per its report, Exh.PW 21/X-2, the crime team left several instructions for the investigating officer.

16. The local police station Samaipur Badli received information from the wireless operator on the 22nd September, 2003 itself at about 2.20 p.m. that in House No.173, Gali No.9, Libaspur, Delhi belonging to one Gajraj Singh, one person had been murdered. This information was recorded as DD No.13/A (Exh.PW 13/2) and handed over to SI Dhruv Narain through Yashpal Singh to take appropriate action.

17. The crime team officials as well as photographers were called to the spot. The then SHO Inspector R.P. Gautam-PW 21 (who retired as ACP) proceeded to the spot at about 2:45 p.m.

18. PW-21-SHO R.P. Gautam also made inquiries from Prashant Yadav and recorded his statement Exh.PW 3/A. In view of the statement given by Prashant and the position on the spot, an offence under Section 302 of the IPC was found to have been made out. SHO R.P.

Gautam prepared a Rukka which was sent to the police station through Constable Yashpal at 5:30 p.m. FIR No.473/2003 under Section 302 IPC was registered by the police station Samaipur Badli and DD No.17A was endorsed in this regard. It is urged by Mr. Kaushik, learned counsel for the appellant that as per DD No.17/A, the scribing of the FIR commenced at 5.50 p.m. and the same was completed at 7.10 p.m.

19. Inquest papers, which included the requisite application to perform the autopsy of Sunita (Exh.PW 21/B), the brief facts of the case (Exh.21/C) and the death report of the deceased Sunita (Exh.PW 21/D) were prepared.

20. It appears that at this stage, PW 11 Vineet Yadav-brother of the deceased, also reached her house at 4:15 p.m. Prashant's statement Exh.PW 3/A was recorded in his presence and investigation was undertaken by the police. The witness has stated that Sunita's husband Gajraj Singh was not present when he had reached the spot.

21. PW 11 Vineet Yadav has supported the statements of PW 3 Prashant & PW 4-Sushant with regard to the position on the spot and the blood which was found lying on the ground as well as on the bedding which included two sheets, a 'bichona', pillow cover as well as a towel. He has also supported the case of the prosecution with regard to the multiple injuries on the body of the deceased; blood stains;

samples taken by the crime team and the police; the seizure of articles; preparation of the site plan; photographs of the spot and the recording of statements. PW 11-Vinod Yadav has made a further categorical statement that the deceased was clutching a bunch of hair in her left hand and that this hair was also seized by the police.

22. The post-mortem of the deceased was conducted on 23rd September, 2003 by PW 7-Dr.Anil Shandilya. The post mortem report was proved as Exh.PW 7/A. The deceased was found to have suffered the following ante mortem injuries:-

“External injuries:

1. Clean incised stab wound 2.5 cm x 1 cm spindal shaped situated 19 cm from medial end of left clavical and 3.5 cm from midline and 11 cm from left nipple. On dissection of the wound, the wound entered the chest cavity in between the sixth and seventh rib and pierced through lungs and entered the heart.
2. Clean incised stab wound on left side chest 12 cm from the axilla in anterior axilliary line 7 cm from injury 1. Size 2 cm x 0.5 cm spindal shaped. On dissection of the wound, the wound entered the chest cavity and pierced the lung between seventh and eighth rib.
3. Clean incised wound in mid axilliary line 15 cm from axillia size 3 cm x 1 cm piercing the abdominal cavity. On dissection of the wound the wound pierced the spleen as mentioned already.

4. Back of the chest clean incised stab wound 12 cm from midline and 9 cm from angle of scapula on left side. The wound entered the chest cavity and pierced the lung in between fifth and sixth rib as already mentioned.

5. Right side back of chest 9 cm from midline and 8 cm from right angle of scapula, clean incised stab wound entering the chest cavity and piercing the lung size 2 cm x 1 cm.

6. Multiple incised wounds skin to muscle deep in both upper limbs, nine on left and ten on right upper limb. They are all defensive wounds of varying in size.

Internal Injuries:

Head : Brain matter pale. Rest NAD

Neck : Tracea shows cut mark anteriorly. No extravasation of blood in underlying neck tissues or blood and clots in and around tissues of the wound. No foreign body in tracea and its division.

Chest : Both ribs intact. Left lung linear incised cut mark size 1.8 cm x 0.1 cm, 2 cm x 0.1 cm and 1.9 cm x 0.2 cm, three in number present. Right lung showed linear incised cut mark size 2 cm in length. Chest cavity full of 2 ltr of liquid blood and clots.

Heart : Heart showed linear cut mark on base of the heart size 1.8 cm x 0.2 cm.

Abdomen : Spleen showed linear cut mark at the lateral aspect size 2 cm x 0.2 cm x 1.5 cm. All viscerae pale. Abdominal cavity full of liquid blood and clots.

Stomach : Mucosa NAD. Abnormal smell nil.

Contents - Juice like fluid about 500 ml."

23. As per the opinion of Dr. Anil Shandilya, the cause of death was haemorrhagic shock following multi visceral injury i.e. injury to heart, lungs and spleen. It was also opined that all the injuries were ante mortem in nature except injury no.7 which was caused by sharp weapon.

24. On completion of the investigation, the charge-sheet was filed. By the orders passed on 30 April 2004, the charge for the offences punishable u/s 302 IPC and u/s 27 Arms Act, 1959 was framed against the petitioner.

The appellant pleaded not guilty and was put to trial on the above charge. The prosecution examined 21 witnesses whereafter the learned trial Judge put the incriminating circumstances to the appellant under Section 313 of the Cr.P.C. giving him an opportunity to render his explanation for the same. The appellant also opted to lead his defence and examined DW-1, his mother Premvati as the sole witness.

25. There was no eye witness to the inflicting of injuries on the deceased and the case of the prosecution rests solely on circumstantial evidence. The trial court found that the circumstances proved by the prosecution unequivocally established the guilt of the appellant and were incompatible with his innocence resulting in his

conviction by the judgment dated 2nd June, 2010. The appellant was heard on sentence and the afore-noticed order on sentence was passed the same day. This judgment and order on sentence are assailed before us by way of the present appeal.

26. We may note that the prosecution was unable to prove motive for the murder and it was so concluded by the learned trial Judge. This finding has not been challenged by the prosecution. However, it is well settled that failure to prove motive would not necessarily be fatal to the prosecution case even if the case rested on circumstantial evidence.

Child Testimony – Reliability

27. Mr. Kaushik, learned counsel for the appellant has urged that the testimonies of the two minor sons of the deceased are unnatural, improbable and full of contradictions. It is disputed that these testimonies could be relied upon to base the conviction of the appellant. Before us, it is contended that PW-3-Prashant Yadav and PW-4- Sushant Yadav have stated that they had gone to the school on their own in the morning of 22nd September, 2003 whereas their father PW-5-Gajraj Yadav has stated that he had dropped the children to the school.

28. Learned counsel for the appellant has further submitted that the testimony of PW 3 & PW 4 is contradictory with regard to the clothes which the accused was wearing at the time. PW 3 Prashant Yadav has stated that the appellant Raj Kumar was wearing a sky blue shirt with full sleeves and black pant at the time of incident, while PW 4 Sushant Yadav has stated that the appellant was wearing a black pant, white vest and cream T-shirt. Immediately after that he deposed that he was wearing a light blue T-shirt. Thereafter he finally deposed that he was not sure of the colour of the T-shirt.

29. Mr. Kaushik, learned counsel or the appellant has also challenged the testimony of PW 3 Prashant Yadav who had stated that his friend Sunil Yadav had accompanied him to the house as he wanted to drink water. It is urged that Sunil Yadav has appeared as PW 9 and has not supported his friend PW 3-Prashant Yadav on this aspect.

30. Ms. Ritu Gauba, learned APP for the State has placed reliance on several judicial pronouncements on the manner in which child testimony has to be evaluated. In this regard, she has drawn our attention to the judgment reported at **(2010) 12 SCC 324 State of Uttar Pradesh Vs. Krishna Master & Ors.; (2011) 4 SCC 786 State of Madhya Pradesh Vs. Ramesh & Anr. & (2012) 4 SCC 559 Promode Dey Vs. State of West Bengal.**

31. In the ***Krishna Master case supra***, a child, aged six years at the time of occurrence in the dead of the night, was an eye witness to the incident. He had given evidence in a simple manner without making any noticeable improvements and/or embellishments. The defence had set up a case of false implication. The child was the sole witness to the incident. The court observed that a child being of tender age would be incapable of nurturing a grudge against the accused.

So far as the ability of a young witness or a child to recapitulate a gruesome incident witnessed by him is concerned, it was observed by the court thus:

“36. xxx There is no principle of law known to this Court that it is inconceivable that a child of tender age would not be able to recapitulate facts in his memory witnessed by him long ago. This witness has claimed on oath before the Court that he had seen five members of his family being ruthlessly killed by the respondents by firing gun shots. When a child of tender age witnesses gruesome murder of his father, mother, brothers etc. he is not likely to forget the incident for his whole life and would certainly recapitulate facts in his memory when asked about the same at any point of time, notwithstanding the gap of about ten years between the incident and recording of his evidence.

37. This Court is of the firm opinion that it would be doing injustice to a child witness possessing sharp memory to say that it is inconceivable for him to recapitulate facts in his memory witnessed by him

long ago. A child of tender age is always receptive to abnormal events which take place in its life and would never forget those events for the rest of his life. The child would be able to recapitulate correctly and exactly when asked about the same in future. Therefore, the spacious ground on which the reliable testimony of PW2, Madan Lal came to be disbelieved can hardly be affirmed by this Court.”

32. In the instant case as well, two children have witnessed their mother lying in a bloodied condition with knife injuries. The appellant obstructed their contacting their father or seeking help otherwise for their mother. They witnessed their mother dying before their very eyes. Certainly the events would have been indelibly imprinted in their mind.

33. The pronouncement of the Supreme Court in **(2010) 12 SCC 545 Balaji Vs. State** throws light on evaluation of the testimony of PW-2- the ten year old daughter of the deceased, who had witnessed his murder by her mother and a nephew of her father as well as the place where the deceased was buried by them. In this case, the child witness had remained silent for a period of ten days and related the incident thereafter only to the grandfather i.e. father of the deceased, thereafter.

34. In **(2011) 4 SCC 786 State of Madhya Pradesh Vs. Ramesh & Anr.**, it was held that the child would not be competent witness

unless the trial court finds him otherwise and that the court may rely upon evidence of such child witness in the event her deposition inspires the confidence of the court and there was no embellishment or improvement. The court may also reject the testimony of such child witness if it is found that the child has been tutored, which inference can be drawn from the contents of her deposition. In the case before the Supreme Court, the deposition of the child was found precise, concise, specific and vivid without any improvement or embellishment and was found to be worth believing in toto.

In this judicial precedent, the court placed reliance on prior judgments relating to child testimony. The discussion and the findings of the court shed valuable light on the manner in which child witness testimony requires to be evaluated. The applicable principles of law noticed by the Supreme court deserve to be considered in extenso and read as follows:-

“7. In AIR 1952 SC 54 Rameshwar S/o Kalyan Singh v. The State of Rajasthan, this Court examined the provisions of Section 5 of Indian Oaths Act, 1873 and Section 118 of Evidence Act, 1872 and held that every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age, extreme old age, disease whether of body or mind or any other cause of the same kind. There is always competency in fact unless

the Court considers otherwise. The Court further held as under:

“11.... it is desirable that Judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate.”

8. In AIR 1995 SC 959 : 1995 Cri.L.J. 1461 Mangoo and Anr. v. State of M.P. this Court while dealing with the evidence of a child witness observed that there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The Court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.

9. In 1998 Cri.L.J.3305 Panchhi and Ors. v. State of U.P., it was held that:

“It is not the law that if a witness is a child his evidence shall be rejected, even if it is found reliable. The law is that evidence if a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell them and this a child witness is easy prey to tutoring.”

Further the Court while placing reliance upon a large number of its earlier judgments observed that the testimony of a child witness must find adequate corroboration before it is relied on. However, it is more

a rule of practical wisdom than of law. It cannot be held that

"The evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring."

10. In AIR 2008 SC 1460 : 2008 (2) SCALE 663 Nivrutti Pandurang Kokate and Ors. v. State of Maharashtra, this Court dealing with the child witness has observed as under:

"10. The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.""

11. The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on a oath and the import of the questions that were being put to him. (Vide: *Himmat Sukhadeo Wahurwagh and Ors. v. State of Maharashtra*.)

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13. Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. (Vide: *Gagan Kanojia and Anr. v. State of Punjab*.)

14. In view of the above, the law on the issue can be summarized to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.

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23. The Trial Court after taking note of rulings of various judgments of this Court as to what are the essential requirements to accept the testimony of a child witness held as under:

“In the present case, statement of child witness gets affirmed by the circumstances of the incident, facts and from the activities of the other witnesses carried out by them on reaching at the place of occurrence. Thus, on the basis of above-said law precedents, statement of witness Rannu Bai not being unreliable in my opinion are absolutely true and correct... Statement of child witness Rannu Bai gets affirmed by the statements of Munna and witness Hannu and from the medical evidence. Therefore, facts of the above-stated law precedents are not applicable to the present case.”

In view of the above, it is evident that the statement of Rannu Bai (P.W.1) is affirmed by the statements of other witnesses, proved circumstances and medical evidence. Her deposition being precise, concise, specific and vivid without any improvement or embroidery is worth acceptance in toto.”

35. It is well settled that the court can place reliance on the solitary statement of a witness even if it is a child, if the evidence is found to be true and correct version of the case of the prosecution. The court, after careful scrutiny of its evidence, is required to be convinced about the quality and reliability of the same **(2004 (1) SCC 64 Ratansinh Dalsukhbai Nayak Vs. State of Gujarat).**

36. Reliance was placed in this decision on a prior judgment of the Supreme Court reported at **(1997) 5 SCC 341 Dattu Ramrao Sakhare Vs. State of Maharashtra** wherein it was held that:

"A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanor must be like any other competent witness and there is no likelihood of being tutored."

Corroboration would be sought only when the testimony of the solitary witness was neither wholly reliable nor wholly unreliable.

37. It is, equally also well settled that minor contradictions or omissions in a deposition which are of a trivial nature and not of such magnitude as may materially affect the core of the prosecution case, would be of no consequence to discredit testimony of witness.

38. We find both PW 3 & PW 4 are categorical that they had walked to the school in the morning of 22nd September, 2003. There is, therefore, no contradiction in their statements vis-a-vis each other. The statement by PW 5-Gajraj Yadav to the effect that he had dropped

the children would require to be scrutinized at the time of evaluation of his testimony and cannot effect examination of the children's depositions.

39. It is noteworthy that the incident had occurred on 22nd September, 2003. The statements of Prashant then 12 years of age, and Sushant, then 14 years were recorded on 26th October, 2004 & 13th December, 2004 respectively when the boys both were still of tender ages. The question as to whether they were dropped to school by their father or not, is not material so far as the consideration of the issue as to whether the appellant is responsible for the commission of crime or not.

40. We may now examine the second point pressed as a contradiction by learned counsel with regard to the clothes alleged to have been worn by the appellant. It is normal for human memory to have blurred with the passage of time and sharp details fade from recollection. It is essential to also keep in mind the trauma which the children were undergoing at the time. The colour or nature or detailing of the appellant's clothes would be the last thing on their mind when the children saw their mother bleeding and die before their eyes. Both the children say that the appellant was wearing black pants and a light coloured shirt, whether cream coloured or of sky blue colouring. In his

deposition, Sushant mentions that the appellant was wearing a black pant, white vest and a cream T-shirt. He does not stop at that and immediately deposed that the appellant was wearing a light blue T-shirt. He thereafter said that he was not sure of the colour of the T-shirt. The child was however able to recollect the colour of the shoes (brown) that the appellant was wearing at that time. There is, therefore, no major contradiction so far as the colouring of the clothes which the appellant was wearing. The oral testimonies of the witnesses with regard to the colour contrast of the apparel worn by the appellant is corroborated by the physical articles which were seized from the house premises and form part of the exhibits on record.

41. It is urged by learned counsel as a contradiction is that while PW-4-Sushant has stated that the appellant was wearing a T-shirt, Prashant has said that he was wearing a shirt. The perception of different people as to whether the piece of clothing is a T-shirt or shirt could vary depending on its style or the material from which it had been made or the social milieu from which the person hails. Certainly, the reference to the clothing worn by the appellant as a shirt or a T-shirt by one of the children cannot be construed as contradiction in material particulars so as to discredit his entire testimony.

42. We find that the defence has extensively cross-examined PW 3 Prashant Yadav as to the manner in which he reached the house and has been unable to shake his testimony. PW 9-Sunil Yadav has corroborated PW 3 when he stated that he dropped his friend Prashant Yadav. The two children differ only on the spot at which PW 9 dropped PW 3. In his testimony before the court, Sunil Yadav stated that he dropped Prashant Yadav at the Libaspur More (turning) on his cycle and left him there. This was contrary to the statement given by him under Section 161 of the Cr.P.C. He was declared hostile by the prosecution and cross-examined by the learned APP on this aspect.

43. Unfolding of events as have been disclosed by PW 3 & PW 4 establishes the presence of the appellant on the spot. The appellant has also not disputed his own or the children's presence on the spot. The incriminating circumstances which were put to the appellant under Section 313 of the Cr.P.C. as question no.2 and the appellant's explanation thereto are important and read as follows:-

"Q.2: It is in evidence against you that you on the date of incident i.e. 22.9.2003, PW-3 Prashant Yadav and PW-4 Sushant Yadav were studying in Panasia National Public School, Siraspur in 6th and 7th class respectively. Their mother Sunita used to remain in the house. On 22.9.2003 PW-3 Prashant Yadav and PW-4 Sushant Yadav had gone to school in the morning. The school used to close at 1.30 pm and both of them used to come back at home at 2 pm.

On 22.9.2003 PW-3 Prashant Yadav was having pain in his foot as such, he came back to his house along with his friend PW-9 Sunil Yadav on his cycle at about 1.40 pm and at that time, the brother of PW-9 Sunil Yadav was also on the cycle along with PW-3 Prashant Yadav and PW-9 Sunil Yadav. Thereafter PW-9 Sunil Yadav requested a glass of water then PW-3 Prashant Yadav rang the bell of his house and also made noise on the gate but none responded from inside the house. PW-3 thought that his mother i.e. Sunita (deceased) might have gone to the terrace for drying of clothes. What you have to say?

Ans. On 22.09.2003, I was passing from outside the house of my Chacha Gajraj Singh when I heard some noise and voice of my Chachi from inside. The main gate of the house was locked from inside but side gate was open. I went inside and saw my chachi Sunita Yadav was lying injured and blood was coming out. I asked her who had injured her but she could not tell. She asked me for a glass of water. In the meantime, her son Prashant Yadav returned from the school. I told him that someone had injured his mother and ran away and asked him to bring water as Sunita Yadav was asking for same and I thereafter telephoned Shanta Nursing Home for calling of an Ambulance. Sunita Yadav was breathing heavily at that time and I further asked Prashant to call his father Gajraj also and inform him about the said incident as I do not know the phone number of Gajraj Yadav (Chacha). I do not know how did Prashant return from school. No person with the name of Sunil Yadav had accompanied Prashant when he came back from the school and nobody rung any bell”.

The appellant has thus admitted that PW 3 & PW 4 had also reached the spot while he was there and that Sunita Yadav was alive at that time.

44. So far as the testimony of PW 9 Sunil Yadav is concerned, the same manifests that it was not even the case of the prosecution that he had gone inside the house or witnessed the events that transpired inside. It is manifest, therefore, that nothing turns on the place where Sunita Yadav dropped Prashant on return from school.

45. Ms. Ritu Gauba, learned APP has also placed reliance on the judgment of the Supreme Court reported at **(2012) 4 SCC 559 *Pramode Dey Vs. State of West Bengal*** wherein PW 2 was an eight year old child who had given a vivid account of how her mother was killed by the appellant with a dao. This testimony was relied upon by the court in upholding the conviction.

46. Learned counsel for the appellant has placed reliance on the celebrated pronouncement of the Supreme Court reported at **(1984) 4 SCC 116 *Sharad Birdhichand Sarda Vs. State of Maharashtra*** to contend that given the close relationship of the children to the deceased, their testimony cannot be relied upon.

47. No absolute principle has been laid down in ***Sharad Birdhichand Sarda (supra)*** to the effect that merely because the evidence is being given by the child of a person who has been murdered, the same ought to be completely disregarded. This submission of learned counsel for the appellant is wholly unacceptable.

We have noticed heretofore several pronouncements wherein the Supreme Court has categorically held that the testimony of a child witness relating to circumstances in which his parents has suffered injury, deserves to be accepted, if otherwise found reliable.

48. The children have also spoken in one voice with regard to what transpired after they had entered the room where their injured mother was lying. As per the evidence on record, PW 3-Prashant Yadav and PW 4 Sushant Yadav found their mother Sunita in an injured condition when they reached home on 22nd September, 2003 from school. She was injured and profusely bleeding. The gate and doors of the house were locked from inside.

They both deposed that Raj Kumar @ Guddu was pressing Sunita's throat and pouring water into her mouth. It is in the testimony of PW 4-Sushant Yadav that the appellant had even pressed her nose closed while pouring water into her mouth. There is no contradiction at all in their statements with regard to the events which transpired after they returned home from school. The appellant was found inside the house alone with a badly injured Sunita. His conduct was odd and not normal. No contradiction or improvement in material particular in their evidence has been pointed out. PW 3 & 4 are truthful witnesses who

have given cogent and reliable evidence noticed above and have been rightly relied upon by the learned trial Judge.

Challenge to time of Arrest of Appellant

49. Learned counsel for the appellant has attempted to support his challenge to the arrest of the appellant placing reliance on an illegible portion of a noting on Police Control Room Record Exh. PW 21/X1 recorded at 15:20 hours. At the end of this note, the person scribbling the same has endorsed the words "*Guddu ko pakad liva*". While the defence counsel would want us to accept that this shows that the appellant was in custody at 15:20 hours, learned APP has sought to explain that the word "liva" means that the appellant should be arrested.

50. We have noticed above the complaint lodged with the police control room on 22nd September, 2003 about which Mr. Kaushik, learned counsel has contended at some length that the same shows that the appellant was in the police custody at 3:20 hours.

51. Mr. Kaushik, learned counsel for the appellant has also drawn our attention to the testimony of PW 3-Prashant Yadav who has stated that Raj Kumar @ Guddu was caught by the police on the date of the incident at about 4.00 p.m. However, this statement is not supported by the witness who has categorically testified that he was not present

when the accused was apprehended and that he (PW-5) came to know that the accused was apprehended from his house. The witness has only deposed that Raj Kumar was present in the police station where he had gone to sign the statement. No clarification has been sought by the defence with regard to the date or time at which the statement of Prashant Yadav was signed by him. Nothing has been put to the investigating officer in this regard.

52. As per the prosecution, the appellant was arrested on 23rd September, 2003 at around 6.50 a.m. from Sant Nagar Burari bus stand. Ms. Ritu Gauba, learned APP has pointed out that after the appellant fled from the scene of occurrence, he could not be traced out despite best efforts by the police. We find that as per the arrest memo (Exh.PW 5/A) the appellant was arrested by PW 21-Retired ACP R.P. Gautam on 23rd September, 2003 at 6.30 a.m. from the main road, Sant Nagar, Burari in the presence of PW 5-Gajraj Singh and HC Krishnan. PW 5 Gajraj Singh a witness to the arrest, has stated that the appellant was arrested on that location in Sant Nagar Burari where his in-laws stay.

53. The arrest of the appellant is also corroborated also by the testimony of PW 18 Head Constable Krishan Kumar Kaushik and PW 21-Shri R.P. Gautam. The testimony of PW 5, 18 & 21 on the aspect of

the appellant's arrest, could not be challenged by the appellant in the cross-examination.

54. It is nobody's case that PW 21 Shri R.P. Gautam, who was the then investigating officer, was the author of the notings on the Police Control Room form. No question has been put with regard thereto on behalf of the appellant to the witness. We also find that in the statement under Section 313 of the Cr.P.C., it is the case of the appellant himself that he was arrested in the night of 22nd September, 2003. Even in his own statement, it is not the appellant's case that he was arrested at the spot. We find no discrepancy in the evidence with regard to the appellant's arrest. The reliance on the contents of Exh.PW 21/X-1 is therefore completely misconceived.

Disclosure & Recovery of two knives pursuant thereto

55. It is also in the evidence of PW 21 Shri R.P. Gautam that after his arrest, the appellant had made a disclosure statement Exh.PW 5/D leading to the recovery, on his pointing out, of two blood stained knives from the room on the first floor of his house which had been hidden in a packed fridge. It is stated that one knife was an iron knife and while the other was a paper cutting knife. The sketch of the iron knife was prepared which was proved on record as Exh.PW 5/F while the sketch of the paper cutting knife was proved as Exh.PW 5/G. The

two knives were kept in a separate seal vide Exh.PW 5/E by PW 21-R.P. Gautam. The seizure memo of the knives was proved on record as Exh.PW 5/E.

56. The disclosure statement Exh.PW 5/D was proved in the testimony of PW 5 Gajraj Singh Yadav as well as PW 21 Shri R.P. Gautam. These witnesses also identified the paper cutting knife as Exh.PW 5/1 and the metallic knife as Exh.PW 5/2 in the court room. The recovery of these two knives on 23rd September 2003, was also proved at the instance of the accused was also proved by the deposition of these witnesses.

57. The recovery of these knives has been challenged by the learned counsel for the appellant contending that they were planted by the investigating officer as Exh.PW 5/1, was in a broken condition when produced in court and also that the prosecution failed to prove that the same had been given by PW 6 Kavita Monga to the appellant for whom he worked.

58. It is noteworthy that PWs 3 & 4, sons of the deceased did not depose about having seen any knife with or being used by the appellant at that time. The injuries had already been inflicted on the person of the deceased by the time the sons reached the house. The knives were recovered subsequently on 23rd September, 2003. The

prosecution was unable to prove its case that PW 6 Kavit Monga had not provided the recovered paper cutting knife to the appellant who worked as his indenting agent. It could only prove that the appellant was working as an indenting agent in his office and that paper cutting knives were used for their work. However, in the present case, the source of the knife would be irrelevant. The issue is as to whether the knife which was recovered was used in the commission of the offence.

59. We find that the trial court has rightly rejected the challenge to the recovery of the knives on behalf of the appellant, placing reliance on the testimonies of PW 5, PW 7 & PW 21 as well as the forensic science laboratory report. The appellant has not made out any ground before us as well to reject the authenticity thereof.

Recovery of clothes of accused worn at the time of commission of the offence.

60. After his arrest on the 23rd September, 2003, the appellant made afore-noticed disclosure statement, Exh.PW 5/D wherein he disclosed that the blood stained shirt and vest (baniyan) which he was wearing at the time of the incident in the bathroom in the roof of the house of Gajraj Singh Yadav which he could get recovered as also the recovery of the pant worn by him at that time. It is in the evidence of the

witnesses that the accused thereafter led the police authority to his House No.120, Gali No.10, Libaspur, Delhi.

61. The appellant is stated to have also taken out the blood stained black pant (Exh.PW 5/3) which he was wearing at the time of commission of the offence from beneath the sofa kept in the room of his house. The accused then led the police party to the roof of the house of PW 5 Gajraj Singh Yadav; pointed out towards the bathroom from where on his pointing out one blood stained sky blue shirt (Exh.PW 5/4) and a sando baniyan (Exh. PW 5/5) from beneath gunny bags of cement, and a parcel which were seized as per the seizure memo Exh.PW 5/J. These recoveries are proved by the testimonies of PW 5 Gajraj Yadav; PW 18-Head Constable Krishan Kumar Kaushik and PW 21 ACP R.P. Gautam. The sealed seized articles were kept in safe custody in the malkhana.

62. Mr. Kaushik, learned counsel for the appellant has laid elaborate arguments challenging to the recovery of the clothes of the appellant resting on an isolated statement of PW-4 Sushant Yadav, the police had recovered the T-shirt and vest of the appellant on the very day of incident i.e. 22nd September, 2003.

63. We, however, find that in the very next sentence, PW 4 Sushant Yadav has stated that he had not personally witnessed the recovery

but had come to know about it. Therefore, Sushant Yadav's statement that the police has recovered the t-shirt and vest on the date of the incident is not based on personal knowledge and no significance can be attached to this part of the deposition.

64. The appellant has thus been unable to challenge either the admissibility of the disclosure by the appellant to the extent of the recovery or the authenticity of the recoveries at all.

Weapon of offence and forensic examination of recovered articles

65. Ms. Ritu Gauba, learned APP for the State has also pointed out that the blood stained clothes of the deceased seized by the police were sealed with the seal of the Medical Superintendent, Babu Jagjivan Ram Memorial Hospital, Jahangir Puri, Delhi.

66. It is in the testimony of PW 11-Shri Vineet Yadav; PW -20 Dr. Neeraj Chaudhary; PW 21-retired ACP R.P. Gautam & PW 22-Jag Narayan that in her left hand, the deceased Sunita was clutching a bunch of hair. The hair which the deceased was clutching was seized by PW 21-Retired ACP RP Gautam.

67. After the arrest of the accused, he was taken for a medical examination to the Babu Jagjivan Ram Memorial Hospital, Jahangir Puri, Delhi for medical examination where he has examined by Dr.Manohar Kumar Nirala.

68. In order to prove the medical examination of the appellant as well as the drawing of the sample, the prosecution examined PW 20-Dr. Neeraj Chaudhary who had proved the record prepared by Dr. Manohar Kumar Nirala, the examining doctor. According to PW 14-Shyam Singh, the doctor took a hair sample of appellant Raj Kumar and converted the same into a parcel which was duly sealed and handed over to the Head Constable Krishan Kumar Kaushik vide memo Exh.PW 14/A. The testimony of PW 14-HC Shyam Singh that the hair sample of the appellant was taken, sealed and handed over to Head Constable Krishan Kumar Kaushik was corroborated by PW 20-Dr. Neeraj Chaudhary. The witness PW 20, was not cross-examined on these aspects at all.

69. No dispute has been raised by the appellants with regard to safe custody of any of the samples. However, Ms. Ritu Gauba, learned APP for the State has drawn our attention to the testimony of PW 14-Shyam Singh, PW 16-Head Constable Ram Singh & PW 19-Constable Ranbir in this regard who have established the safe custody of the sample; its deposit with the forensic laboratory and receipt of the report.

70. We have noticed hereinabove the several injuries in the nature of six incised wounds on the body of the deceased as well as the cut throat wound. Perusal of the photographs Exh.PW 12/1- Exh.PW 12/8

of the dead body also reflected that the injuries were inflicted by sharp edged weapon which could have been by the knife in question. To establish that the knives were the weapons of offence and whether the two knives recovered at the instance of the accused persons were the weapon of offence, the prosecution examined PW 7 Dr. Anil Shandilya who had conducted the post-mortem.

71. Pursuant to an application being Exh.PW 21/X by the investigating officer before Dr. Anil Shandilya for obtaining his opinion with regard to the two recovered knives, PW 7 Dr. Shandilya examined the two knives. He proved in court his opinion as Exh.PW 7/B regarding the single edged cutting metallic knife of metallic nature with imprint of New R.K. Brand over the handle on both sides as being the weapon of offence. Dr. Anil Shandilya also gave opinion (Exh.PW 7/C) regarding the plastic handle single edged sharp blade paper cutting knife with the reddish brown stains opining that injuries mentioned in the post-mortem report (Exh.PW 7/A) including the cut throat injury might have been caused by the knives produced by the investigating officer or similar thereto.

72. All articles/objects and samples seized or recovered were sent to the Forensic Science Laboratory for forensic examination. The recovered articles which included concrete material described as blood

stained earth; the pillow with cover; bed sheet; mattress; towel; duster; few strands of hair; salwar; lady's shirt; dupatta; under clothing; blood stained gauze cloth piece (described as 'blood sample'); one all metallic weapon of offence having brownish stairs; one broken weapon of offence of plastic and metallic blade; pant; shirt & baniyan; few strands of hair were marked Exh.1, 3a, 3b, 3c, 3d, 4, 5, 6, 7a, 7b, 7c, 7d, 8. 9, 10, 11, 12a, 12b & 13 by the Forensic Laboratory.

73. The report of the Forensic Science Laboratory dated 27th February, 2004 (Exh.PW 21/X-3) reported the following on the forensic examination:-

"RESULTS OF ANALYSIS

1. Blood was detected on exhibits '1', '3a', '3b', '3d', '4', '5', '6', '7a', '7b', '7c', '7d', '8', '9', '10', '11', '12a' & '12b'.
2. Blood could not be detected on exhibit '2'.
3. From morphological and microscopical studies the hair in exhibits '6' & '13' were found to be human in origin. Exhibit '6' (hair recovered from the spot and from the hand of deceased) and exhibit '13' (Hair of accused) were found to be similar in most of their morphological and microscopical characteristics."

74. The serological analysis of the blood sample of the deceased (Exh.8) shows that the deceased was having blood group 'O'

75. It is noteworthy as per the report (Exh.PW 21/X-4) of the Forensic Science Laboratory, though human blood was identified on the two knives, its grouping, however, could not be identified.

76. As per the report of the Forensic Science Laboratory dated 27th February, 2004 (Exh.PW 21/X 3), the microbiological study of the hair samples showed that they were human in origin and similar in most of their morphological and microbiological characteristics. This indicates that the deceased was clutching the hair of the appellant in her left hand at the time of her death.

Conduct of husband of the deceased

77. Mr. Kaushik, learned counsel for the appellant, has challenged the conduct of PW 5 Gajraj Singh Yadav urging that there are contradictions in the statements of various witnesses with regard to the time at which PW 5-Gajraj Singh had reached the spot. Reference in this regard is made to the testimony of PW 21 R.P. Gautam who has stated that he reached the spot at 3.00 p.m. when Gajraj Singh Yadav, husband of the deceased Sunita Yadav, was present. As against this, PW 11-Vineet Yadav-the brother of deceased Sunita who reached the spot at about 4.00 p.m., has categorically stated that Gajraj was not present at the spot when he had reached there.

78. PW 5 Gajraj Singh Yadav has explained that a telephone message was received at his office by another employee Smt. Indermani who got the impression that her daughter was calling on the telephone in an emergency and she requested PW 5-Gajraj Singh Yadav to take her to her residence. We have noticed above the deposition of PW 5's son Prashant who had actually telephoned his office about the injury to his mother but the phone line was pulled away by the appellant. Given the information communicated by Smt. Indermani and her request, Gajraj Singh Yadav accompanied her to her residence in Shastri Nagar where they found her daughter in normal condition. Thereafter, a telephonic message was received from the office of PW – 5 Gajraj Singh Yadav informing that the earlier message related to him and not to Smt. Indermani. PW 5 has explained that on receipt of this message, he called his house when he was informed for the first time that the condition of his wife was very serious. He thereupon took permission from his immediate boss and reached his house when he found that the police had already reached there. His sons Prashant and Sushant told him that the appellant had murdered his wife Sunita Yadav and run away from the spot by way of the terrace. The testimony of PW 5 Gajraj Singh could not be shaken in cross-examination.

79. The appellant opted to lead defence and examined his mother Smt.Premvati as the sole witness who stated that the appellant was a person of good behavior and was innocent. She claimed that PW 5 Gajraj Singh Yadav was having disputes with her husband (brother of Gajraj Singh Yadav); that her husband was missing since 10-12 years and that Gajraj Singh was taking revenge from her son, the present appellant for which reason he had falsely implicated him. She also claimed that the appellant had been lifted from their house. PW 5 Gajraj Singh had denied all suggestions to the above facts.

80. The absence of PW 5 Gajraj Singh Yadav (husband of the deceased) from the spot when PW 2 R.P. Gautam reached the spot and conducted the inspection is also manifested from the fact that memos of various items seized from the spot by PW 21-ACP R.P. Yadav have not been witnessed by Gajraj Singh Yadav, who would have been a natural witness if he had been present. On the contrary, the seizure memos contain the signatures of PW 11-Vineet Yadav as witness. None of the other witnesses have stated that Gajraj Yadav was present at the spot at that time.

81. It is also not the case of the appellant that he had seen Gajraj Singh Yadav anywhere near the spot at the time of the occurrence. In this background, the statement of PW 21 R.P. Gautam with regard to

the presence of PW 5 Gajraj Singh is mistaken. It is also not of such significance or a contradiction in material particulars so as to dent the prosecution case in any manner. Nothing therefore turns on the statement of PW 21 with regard to the presence of PW 5 Gajraj Singh yadav in view of the other convincing evidence on the issue.

82. Mr.Kaushik, learned counsel for the appellant has submitted that the conduct of this witness was most suspicious inasmuch as he had remarried within two months of the death of his wife. This question was put to PW 5 Gajraj Singh in his cross-examination when he explained that because his two children (Prashant and Sushant) were of tender ages and there was none to look after them, under social pressure his family had observed the final ceremony (Chhamai) relating to the death of his wife Sunita so that he could be remarried. He has further stated that after the expiry of one year from her death, the traditional anniversary was also observed. The witness remarried only after performing `chhamai' ceremony. The witness has denied the suggestion of the defence side to the effect that he had got married two months after the death of his wife because he had an affair with another lady during the lifetime of his wife.

83. The defence led no evidence to establish such affair. There is no evidence also of any prior relationship of PW 5 with his second wife.

We, therefore, find no reason to doubt the explanation given by PW-5-Gajraj Singh Yadav. In any case, it is not the case of the appellant that PW 5 Gajraj Singh Yadav was in any way responsible for or instrumental in the murder of Sunita Yadav.

Failure to examine a witness

84. A half hearted submission has been made on behalf of the appellant to the effect that though Prashant and Sushant Yadav have stated that their Taiji came to the spot, she has not been examined as a witness. We may note that in answer to the question by the court in his statement under Section 313 of the Cr.P.C., the appellant has admitted that Taiji was brought to the spot by Prashant Yadav. She, in any event, is not witness to the crime or to any of the events which transpired thereafter. Her testimony is wholly irrelevant for the purposes of the present case.

85. Ms. Ritu Gauba, learned APP has placed reliance on the judgment reported at **(2011) 1 SCC (Crl) 381 State of Uttar Pradesh Vs. Krishna Master & Ors.** so far as choice of a witness is concerned. It is submitted that in this pronouncement, it was held that it was the prerogative of the public prosecutor to decide who has to be examined as a witness.

86. On the same aspect, learned APP has also placed reliance on the pronouncement of the Supreme Court in **(2004) 1 SCC 414 Banti @ Guddu case Vs. State of Madhya Pradesh**. Learned APP has also drawn our attention to **Promode Dey case (supra)** wherein it was held that no adverse inference could be drawn from non-examination of the particular witness for the reason that he was neither the eyewitness nor the complainant and was in fact not in the same house where the incident occurred.

In the present case as well, the position is the same.

Analysis & Conclusion

87. In the instant case, on examination of the evidence which has been brought on record as well as the admissions by the appellant, the following facts have been proved beyond reasonable doubt:-

- (i) On 22nd September, 2003, when PW 3 Prashant and PW 4 Sushant came home from their school, they found their mother, Sunita in an injured condition on a cot in their house and blood coming out from her body which had spilt over the ground.
- (ii) The accused was found to be present alone in the room where the deceased was lying in an injured condition.

(iii) No hue and cry was raised by the appellant about any intruder. No effort was made to call the police.

(iv) The main gate of the house stood closed from inside and the son of the deceased PW 3 Prashant Yadav had to jump the gate as none responded to his ringing the bell.

(v) PW 3-Prashant was asked by the appellant to close the door after he was inside and also to clean the blood which was spilt on the floor.

(vi) The appellant obstructed the child from telephoning his father to inform him about the occurrence.

(vii) The deceased was alive when her sons reached the house. The appellant made no effort to get medical help for her.

(viii) It is in the evidence of both, PW 3 & PW 4 that instead of getting medical assistance, the appellant was pressing the nose and throat of their mother and pouring water into her mouth resulting in bubbles. Sunita expired when the appellant was doing so in the presence of her two sons.

(ix) PW 3 Prashant Yadav as well as his brother PW 4 Sushant Yadav were also not permitted by the appellant from raising hue and cry.

(x) The appellant made the pretence of calling an ambulance from a private nursing home which never reached the spot. It is manifest that

no call for an ambulance was made as no ambulance from any nursing home reached the spot.

(xi) PW 3 Prashant Yadav tried to get out of the room to seek help. The appellant physically prevented him from doing so.

(xii) The appellant made attempts to throttle PW 3 Prashant Yadav.

(xiii) Both, PW 3 & PW 4 have categorically stated that PW 4 managed to escape with difficulty and brought a neighbor to the house. The appellant then fled from the spot from the terrace of their house.

(xiv) The first official record i.e. the form of the police control room (Exh.PW 21/X1) mentions the presence of the appellant, children and also that the appellant had been named by the children.

(xv) The police arrested the accused next morning on 23rd September, 2003 from a spot near the house of his in-laws.

(xvi) After his arrest, the appellant made a disclosure statement leading recovery of two knives (Exh.PW 5/1 & PW 5/2) and blood stained clothes worn by him.

(xvii) The appellant was wearing the recovered pant, shirt and vest on 22nd September, 2003 when he was found with the injured Sunita by her two sons.

(xviii) As per the expert medical opinion, the injuries found inflicted on the body of the deceased were possible by the two recovered knives. The forensic science laboratory confirmed human blood on the blade of these two knives.

(xix) The report of the Forensic Science Laboratory confirmed that the blood group 'O' which was the blood group of the deceased was present on the pant, vest as well as shirt worn by the appellant on 22nd September, 2003 which were recovered at his instance.

(xx) The forensic examination also confirmed human blood on the knives recovered at the instance of the appellant which have been established as the weapons of offence.

(xxi) The forensic examination report confirmed that the deceased was clutching hair which was similar in morphology and microscopical character to that of the appellant in her left hand.

(xxii) The injuries found on the deceased were sufficient to cause death in the ordinary course of nature and all injuries were ante-mortem in nature.

88. The appellant has failed to render any explanation at all for any of the above circumstances. His explanation to the effect that some intruder caused the injuries and ran away is rendered unacceptable given his conduct in not raising a hue & cry even, let alone giving a hot

pursuit to the attacker and the above circumstances and evidence on record. Instead, the appellant was found inside the room with the doors of the house bolted from within and blood on his clothes. The appellant's conduct even thereafter was suspicious as he failed to get medical help for the deceased, who was still alive then, and prevented her sons from informing her husband or getting help. The appellants actions in physically pulling out the telephone line, attempting to throttle one son and preventing the other son from reaching other persons and seeking help, pouring water into her mouth, pressing the throat of the deceased was highly unnatural and does not inspire any confidence. On the contrary, these circumstances point towards the guilt of the appellant. Instead of being concerned with the life of the dangerously injured lady, he compelled her children to mop her blood from the floor.

89. In para 153 of ***Sharad Birdhichand Sarda case (supra)*** the Supreme Court has culled out the circumstances which are required to be established before culpability of a person in a prosecution based on circumstantial evidence can be concluded. The same reads as thus:

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahebrao Bobade v. State of Maharashtra* 1973 CriLJ 1783 where the following observations were made:

certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

90. There can be no dispute at all with the well settled principle that there must stand established an unbroken chain of circumstances from which the conclusion of the guilt would be required, to be drawn. The facts established should also be consistent with the only hypothesis of

guilt of the accused and should not be explainable on any other hypothesis except that the accused is guilty. The chain of evidence must be so complete so as to leave no ground for conclusion of innocence of the accused and must show that in all human probability, offence must have been done by the accused.

91. We find that the learned Trial Judge has considered the evidence placed on record in great detail and has carefully analyzed the same as in the context of principles of law which would apply.

92. We have considered the grounds on which the judgment has been challenged.

93. The cumulative effect of the circumstantial evidence established before the trial court and extracted above negatives the innocence of the appellant. In this background, we hold that the appellant has been rightly found guilty of commission of the offence under Section 302 of the IPC with which he was charged.

94. So far as the sentence imposed upon the appellant is concerned, the learned trial Judge has recorded reasons as to why the instant case does not fall in the rarest of the rare category and has awarded the sentence of life imprisonment for three months for commission of the offence under Section 302. Benefit of Section 328 of the IPC has been given to the convict.

95. We see no reason to disagree with or vary the order of sentence as well.

96. Before parting with this case, we are constrained to point out the agony which the two child witnesses would have undergone in having to recount circumstances leading to their mother's death. Apart from this emotional agony, the two child witnesses would have been in close proximity with the person who was accused of having murdered their mother. There can be no manner of doubt that such an experience would have resulted in extreme traumatization of these two children. Adding to the whole experience would be the intimidation which a young child of 12 or 14 years would feel in the formal environment of the court complex as well as the court room. It appears that the several guidelines for recording evidence of child witnesses have not been followed.

97. Extensive guidelines have been laid down in several judicial pronouncements with regard to the manner in which child witnesses (which may include child victims) are to be treated. In this regard, reference can be made by a judicial pronouncement by one of us (Gita Mittal, J) passed on 18th September, 2009 in Crl.A. No.121/2008 entitled *Virender Vs. State* wherein the applicable principles were culled out from the various judicial pronouncements as well as those which came to the fore in the course of hearing the judgment.

98. As a result of the initiative taken by the Delhi High Court, a child witness court room stands operationalized in the Karkardooma District

Courts which is implementing the afore-noticed guidelines as well as the protocol framed for the purposes of the working of the child witness court room, titled the 'Guidelines for Recording of Evidence of Vulnerable Witnesses in Criminal Matters'. While the effort to provide the necessary sensitive environment catering to the special needs and sensitivities of the child witness in every court complex are underway, it is essential that every court seized with a case involving child witnesses implements the guidelines and follows them implicitly to ensure fairness in the criminal justice dispensation system.

99. For all these reasons, we find no merit in this appeal which is hereby dismissed.

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100. Inasmuch as the appeal was taken up for regular hearing, this application was not pressed.

101. The judgment in the main case having been pronounced, this application is rendered infructuous and is disposed of as such.

**(GITA MITTAL)
JUDGE**

**(J.R. MIDHA, J)
JUDGE**

**DECEMBER 21st , 2012
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