

GAHC010088162020



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRL.A(J)/36/2020

GOUTAM BINDIA
S/O. LT. SUKRA BINDIA, R/O. HANSARA T.E. LINE NO.10, P.S.
DOOMDOOMA, DIST. TINSUKIA, ASSAM.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MS. M BARMAN, AMICUS CURIAE

Advocate for the Respondent : PP, ASSAM

Linked Case : CRL.A(J)/37/2020

GOPI BINJIA @ BINDIA
S/O. LT. SUKRA BINJIA
R/O. HANSARA T.E. LINE NO.10
P.S. DOOMDOOMA
DIST. TINSUKIA
ASSAM.

VERSUS

THE STATE OF ASSAM

REP. BY PP
ASSAM.

Advocate for : MR. N HASAN
AMICUS CURIAE
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM

BEFORE
HONOURABLE MR. JUSTICE LANUSUNGKUM JAMIR
HONOURABLE MR. JUSTICE KARDAK ETE

JUDGMENT AND ORDER (CAV)

Date : 04-04-2023

(Kardak Ete, J)

Heard Ms. M. Barman, learned Amicus Curiae in CrI. A.(J) No. 36/2020 and Mr. N. Hasan, learned Amicus Curiae in CrI. A.(J) No. 37/2020. Also heard Ms. S. Jahan, learned Additional Public Prosecutor representing the State of Assam.

2. These two appeals have been preferred by Shri. Goutam Bindia and Gopi Binjia @ Bindia assailing the judgment and order dated 30.08.2019 passed by the Court of Sessions Judge, Tinsukia in connection with Sessions Case No. 9 (T) of 2018 whereby, both the appellants have been convicted under Section 302 of the Indian Penal Code, 1860 for committing the murder of Dilip Kishan and Sivaratri Karmakar and sentenced to undergo rigorous imprisonment for life and also to pay fine of Rs. 25,000/- each and in default of payment of the fine, both the convicts shall undergo imprisonment of 6 months.

3. The prosecution case, in a nutshell, is that on 15.08.2017 at about 11 PM, the accused Gopi Binjia @ Bindia led a mob to the house of Dilip

Kishan. They suspected that Dilip Kishan and his wife Sivaratri Karmakar were practising witchcraft in the village. The mob forcibly dragged out Dilip Kishan and Sivaratri Karmakar and lynched them. On the next day, i.e., 16.08.2017, Debaru Mura had lodged an *ejahar* before the Officer-in-Charge, Doomdoooma Police Station stating that he is a line chowkidar of line No. 10 of Hansara Tea Garden. Around 11:00 pm, on 15.08.2017, a person namely Shri. Gopi Minz of the line, accompanied by some other persons (both male and female) of the line, called Dilip Kishan and his wife Sivaratri Karmakar from their house which is situated in the same line and suspecting them to be witches, they brought them across the garden and killed them on the road of the line near their house by dealing fist and kick blows and blows with lathi. On receipt of the Ezhaar, FIR was registered being Doomdoooma P.S. case No. 239 of 2017 under Section 143/109/120(B)/302 of Indian Penal Code, 1860 and the matter was entrusted to Shri. Jyotisman Neog, S.I. for carrying out the investigation of the case. Upon completion of the investigation, the I.O. had filed a chargesheet on 23.10.2017 against 31 accused persons (which includes both the convicts) namely: Sri Gopi Binjia, Sri Mahesh Bhumij, Sri Ram Mura, Sri Nirmal Garh, Sri Khalinder Bhowmij, Sri Baisaku Garh, Sri Ajay Karmakar, Sri Julum Mura, Sri Babul Mura, Sri Tufan Mura, Sri Gopi Khariya, Sri Sanjib Bhowmij, Sri Gautam Bindia, Sri Ramesh Rajput, Smt.i Rita Garh, Smti. Binti Bindiya, Smti. Sukurmoni Mura, Smti. Krishma Bindiya, Smti. Tanuja Tanti, Smt. Malti Bindia, Smti. Tina Mura, Smti. Mangali Bindia, Smti. Puno Mura, Smti. Arti Garh, Smti Laxmi Tanti, Smti Phulko Bishnu, Smti. Niha Bhowmij, Smti. Anu Murah, Smti. Mangli Mura and Smti. Sabitri Sibui.

4. On 15.12.2017, the Additional Chief Judicial Magistrate, Tinsukia committed the matter to the Court of Sessions Judge, Tinsukia as the offence

under Section 302 of Indian Penal Code, 1860 is exclusively triable by the Court of Sessions Judge. On the date of committing the case to the Sessions Judge, Tinsukia, one accused namely Pinki Manik was reported to have died, accordingly, the case stood abated on the death of the accused Pinki Manik. Based on the chargesheet, charges were framed against all the accused persons. Since the accused persons had pleaded not guilty and claimed to be tried, the matter went up for trial.

5. During the investigation 13 (Thirteen) Nos. Of bamboo sticks of different sizes were found scattered nearby the dead body of the victims Dilip Kishan and Sivaratri Karmakar at Raidang T.E. Hansara Division Line No. 10 and it was seized on 16.08.2017. Inquest was conducted on the dead bodies of the deceased Dilip Kishan and Sivaratri Karmakar on 16.08.2017 by the police. The inquest report is Ext. 4-4(7) and Ext. 5-5(7). The dead bodies of Dilip Kishan and Sivaratri Karmakar were also subjected to post mortem examination. On examination of the dead body of Dilip Kishan, the Doctor found the following:

*" Average built of a male, 55 years of age with multiple injuries.
Rigor mortis present.
Injuries:-
1. Lacerated injury on right forehead 5cm x 4cm x 1 cm.
2. Lacerated injury on left chin including left eye 4 cm x 4cm x 1cm.
3. Closed fracture of left humerus in the lower end, multiple bruised over the body.
Rest of the organs were healthy".*

The Doctor opined that the death of Dilip Kishan was due to shock and haemorrhage as a result of injury sustained, which were ante mortem and homicidal in nature.

6. On the same day, the post mortem examination was done upon the dead body of Sivaratri Karmakar. The Doctor's report goes like this:-

" Average built of a female, about 40 years of age, wearing a green salwar. Rigor mortis present.

Injuries:-

1. *Lacerated injury on face 6cm x 4cm including the forehead, eyes and nose.*
2. *Multiple bruises over the body i.e. chest, abdomen, hands and legs.*

Other organs were healthy."

In her case also, the Doctor opined that the death of Sivaratri Karmakar was due to shock and haemorrhage as a result of injury sustained, which were ante mortem and homicidal in nature.

7. During the investigation, four witnesses namely, Debaru Mura, Robi Mura, Sushma Kishan and Sri Bijay Kharia @ Bikash Sukru were examined under section 164 Cr.PC, 1973. It may be stated that Sushma Kishan is the daughter of the deceased couple.

8. In order to bring home the charges framed against the accused persons, the prosecution side had examined as many as 13 witnesses including the I.O. namely, Jyotishman Neog, P.W.- 13 and the Doctor namely Dr. Gauri Sankar Gogoi, P.W.- 5, who had performed the autopsy upon the dead bodies of the deceased persons. The defence plea is total denial and no evidence has been adduced by the accused.

9. Ms. Sushma Kishan, PW-12 was examined as eye witness to the occurrence. Upon going through the evidences adduced on record, the learned Trial Court was of the view that the prosecution had succeeded in establishing the charges brought against the two appellants namely Shri Goutam Bindia and Gopi Binjia @ Bindia beyond reasonable doubt and accordingly convicted them under Section 302 of Indian Penal Code, 1860 and sentenced them as aforesaid, however, the other 28 accused persons namely Sri Mahesh Bhumij, Sri Ram Mura, Sri Nirmal Garh, Sri Khalinder Bhowmij, Sri Baisaku Garh, Sri Ajay Karmakar, Sri Julum Mura, Sri Babul Mura, Sri Tufan

Mura, Sri Gopi Khariya, Sri Sanjib Bhowmij, Sri Ramesh Rajput, Smti Rita Garh, Smti. Binti Bindiya, Smti. Sukurmoni Mura, Smti Krishma Bindiya, Smti. Tanuja Tanti, Smt. Malti Bindia, Smti. Tina Mura, Smti. Mangali Bindia, Smti. Puno Mura, Smti. Arti Garh, Smti Laxmi Tanti, Smti Phulko Bishnu, Smti. Niha Bhowmij, Smti. Anu Murah , Smti. Mangli Mura and Smti. Sabitri Siblu were acquitted by holding that they were not found guilty.

10. Ms. M. Barman, learned Amicus Curiae representing the appellant in CrI.A(J)/36/2020 submits that the learned Trial Court while convicting the accused(s) has solely based on the evidences led by the so called eye witness, i.e., PW-12 but her clear admission in the cross examination that all along, she stayed with her maternal aunt after the incident and was accordingly tutored by the maternal aunt and her brother, as how to depose before police and court was not taken into account. Further, the evidence of PW-12 being the daughter of the deceased(s) is also an interested witness and not an independent witness. It is settled proposition of law that the version of interested witness can be trustworthy only when the said evidence is corroborated by an independent witness. In the present case, there is none to corroborate the version of the PW-12 independently as all other witnesses are hearsay witnesses. Further although the PW-12 had mentioned in her evidence regarding presence of one Bulu, the brother of her uncle at the time of occurrence in her house, was not examined by the prosecution who could have shed light on the incident. The maternal aunt of the PW-12 was also not examined by the prosecution for proving the authenticity of the evidence given by the PW-12. Hence, the reasoning of being inspired confidence of the court in respect of PW-12 is not correct and not beyond all reasonable doubt.

11. Ms. M. Barman submits that PW-12 in her statement under section

164 Cr.PC, 1973 which is exhibited as Exhibit-9 clearly mentioned that the accused persons were holding dao and lathis while entering their house but she never stated that they have assaulted her parents with the blunt side of the dao and beat them with lathi. On being tutored by her maternal aunt she deposed before the learned Trial Court that the assault took place in front of her eyes and the I.O. also confirmed about the fact that she did not mention the assault part before him. The said evidence is undoubtedly an improved version and sole reliance of deposition of PW-12 without any corroboration of independent witness is not trust-worthy and conviction on the basis of same is incorrect.

12. Ms. M. Barman submits that although the prosecution tried to bring the corroboration of PW-12 with that of PW-6 regarding the occurrence being seen by the PW-12 as eye witness, the PW-12 in her cross examination specifically admitted that she was not allowed to talk to her brother by her maternal aunt, as such the same cannot be accepted as corroboration.

13. The material exhibits, i.e., seized bamboo sticks and the DVD were also not sent for any forensic examination or for examination by court as stated by the Investigating Officer in his deposition. Hence, the Exhibit-8 where mention is made by the seizure witness that during the interaction with media persons, the accused Gopi Binjia confessed that he along with some other people had killed the witches Dilip Kishan and Sivrati Karmakar is not proved.

14. Hence, Ms. M. Barman submits that in this perspective, the learned Trial Court convicting the accused(s) on the sole basis of testimony of so called eye witness is not proved beyond reasonable doubt as the discrepancies created serious doubt on the credibility of the said witness.

Therefore, the finding of the learned Trial Court as held by the judgment and order dated 30.08.2019, convicting the appellants under section 302 Indian Penal Code, 1860 for life with a fine of Rs. 25,000/- each and in default of payment of the fine, to undergo further imprisonment for 6 months should be set aside and appeals be allowed.

15. Mr. N. Hasan, learned Amicus Curiae representing the appellant in CrI.A(J)/37/2020 while adopting the submissions made by Ms. M. Barman, submits that in the instant case at the time of examination of the accused(s) persons under section 313 Cr.PC, 1973 the learned Trial court put a single question to all the accused persons including the appellants and the answer to that question is in the negative by all the accused persons. He submits that the purpose, procedure and consequences of examination of accused(s) under section 313 Cr.PC, 1973 has been discussed elaborately by the Hon'ble Apex Court in a decision rendered in ***Sanatan Naskar & Anr vs. State of West Bengal reported in AIR 2010 SC 3507***. Relying on the Sanatan Naskar(supra) he submits that in the present case, apart from a solitary question, no other incriminating statement as may surface from the evidence of the prosecution witnesses was put to the accused(s) persons thereby causing serious prejudice to the accused persons and as such the trial was vitiated. Accordingly, he prayed to allow the appeal and the judgment and order of conviction rendered by the learned Trial Court dated 30.08.2019 be set aside and quashed and the appellant may be set at liberty.

16. Refuting the above submissions, Ms. S. Jahan, learned Additional Public Prosecutor for the State of Assam submits that the evidence appearing in the present case is that the minor daughter of the deceased examined as PW-12 was an eye witness to the occurrence, she saw the appellants taking

her parents and little thereafter the appellants came and took her too. The statements of PW-12 corroborates to the effect that the appellants took her parents. PW-3 had also witnessed both the appellants beating the deceased, upon reaching the place of occurrence . The PW-6 states that he was told by his sister (PW-12) that the appellants had dragged out their parents. This is *res gastea* evidence under Section 6 of the Evidence Act, 1872. PW-7 stated that Gopi Bindia came and told him that they had captured witches and killed them and requested PW-7 to go and see. PW-8 although turned hostile later had given a positive statement that Gopi Binjia came with a machete in his hands. Finally, the Doctor's evidence corroborates the prosecution story.

17. Ms. S. Jahan, further submits that one aspect that cannot be brushed aside is that during the examination of the appellants under Section 313 Cr.PC, 1973 only one question was put although there were other incriminating evidences that had surfaced as mentioned above. Ms. S. Jahan, relying on the case of ***Nar Singh vs State of Haryana reported in (2015) 1 SCC 496*** submits that the Hon'ble Apex Court had held that section 313 demands that the accused(s) has to explain/ confirm the circumstances appearing in the evidence against him. The provisions of the section is mandatory and cast a duty on the court to afford an opportunity to the accused(s) to explain each and every circumstance incriminating evidence against him and in the present case it has not been done so, therefore the option would be to remand the case for hearing it again from the stage of examination under section 313 Cr.PC, 1973, 1973.

18. We have considered the submissions made by the learned Counsels and learned Additional P.P and have also gone through the materials available on record.

19. In this case, except for Smti. Sushma Kishan (P.W.-12) and Shri Pratap Karmakar (P.W.-3) there are no other eye witnesses to the occurrence.

20. PW-1, Shri. Debaru Mura was the informant in the case who lodged the ejahar on 16.08.2017 based on which Doomdoo P.S. case No. 239 of 2017 under Section 143/109/120(B)/302 of Indian Penal Code, 1860 was registered. In his deposition, PW-1 had stated that he knew all the accused(s) and they hail from the same line of their garden and he also knew Dilip Kishan and Sivaratri Karmakar. He stated that the occurrence took place last year on 15.08.2017. At the time of occurrence, he was sleeping in his house and his family members were not present at that time and his house was situated in the same line as of the accused(s). His son woke him up and told him that murder had taken place in the football field and he saw two dead bodies lying near his shop, then he informed the garden manager. He stated that the deceased persons were murdered on accusation that they were practising witchcraft. On the next day, he filed an ejahar before the police. He heard that the accused persons Gopi Bindia and Gautam Bindia along with some other persons had committed murder of Dilip Kishan and Sivaratri Karmakar and his statements was recorded under section 164 Cr.PC, 1973. Ext.2(1) and 2(2) and Ext.1 is the ejahar and Ext.1(1) is his signature. He also stated that 13 nos. Of bamboo sticks which were found lying by the side of the dead bodies were seized and Ext.3 is the seizure list and Ext.3(1) is his signature. He also stated that the police conducted inquest on the dead bodies and Ext.4 and Ext.5 are the inquest reports and Ext.4(1) and 5(1) are his signatures. He further stated that the said football field was situated at a distance of about 2/3 kilometres from his house and

he did not go to the football field.

21. This witness has confirmed that he had lodged the ejahar and witness to the seizure of 13 numbers of bamboo sticks and also witness of inquest reports. He had deposed that his son woke him up and told that murder had taken place and he has seen two dead bodies which were lying near his shop and also stated that the deceased persons were murdered on the accusation that they were practising witchcraft. In his statement under Section 164 of Cr.P.C. he has stated that he saw the two dead bodies lying near his shop and the accused(s)/appellants told him that they have murdered both Dilip Kishan and Sivaratri Karmakar and they were holding daos in their hands. Therefore, his testimony is to the extent of confirming the lodging of ejahar, witness to the seizure, conduct of inquest of dead bodies of the deceased(s) and also witnessed the two dead bodies and heard of murder by appellants on accusation of practising witchcraft as being told by appellants.

22. PW-2, Smri Langi Karmakar, in her deposition stated that the occurrence took place in the last Shravan month, which was on 15.08.2017 at night and the time of occurrence was around 9/10 pm and she was in her house. She stated that Gopi Bindia and Gautam Bindia had committed murder of Dilip Kishan and Sivaratri Karmakar and she came to know of the said fact only in the next morning. She noticed the dead bodies lying on the road with several injury marks upon their bodies and her house is situated at about one kilometre away from the house of the deceased persons. In her cross, she also stated that the place of occurrence was a football field and it is situated at a distance of about 2/3 kilometres away from her house. Therefore, this witness appears to be a hearsay witness although she has

seen the dead bodies.

23. PW-3, Sri Pratap Karmakar, in his deposition stated that the deceased Dilip Kishan and his wife Sivaratri Karmakar were his paternal uncle and aunt. He stated that the occurrence took place on 15.08. 2017 at about 9/10 pm. At the time of occurrence, he was sleeping in his house and his wife woke him up and told him that Dilip Kishan and his wife Sivaratri Karmakar were apprehended by the villagers and they were taken to the house of the line chowkidar Debaru. He stated that he went to that house along with his wife and saw Gopi and Gautam beating Dilip Kishan and his wife. At that time, they were already dead, but those two persons were still beating the deceased persons. He further stated that many persons were present there but except Gopi and Gautam, the others were just watching. He also stated that he did not enquire as to why Gopi and Gautam were beating the deceased persons because they were possessing sharp weapons with them. Since his children were in his house, he returned home. In his cross examination, he denied the suggestions. He stated that the accused Gopi Bindia and Gautam Bindia informed the garden manager that two persons have been killed and the actual occurrence took place in an open field. His house is situated at a distance of about ½ kilometres from the field. PW-3, though related to the deceased(s), he has stated that he has seen the appellants still beating the deceased(s) though they were already dead. Thus testimony of PW-3 cannot be easily discarded.

24. PW-4, Sri Robi Mura, in his deposition stated that he knew the complainant Debaru Mura and he also knew the deceased persons Dilip Kishan and Sivaratri Karmakar. He states that the occurrence took place on 15th August last year and his house is situated at a distance of about three

kilometres from the house of the deceased persons. He also stated that the dead bodies of the deceased persons were kept in front of the house of the complainant Debaru Mura and he did not go there. He further stated that the police recorded his statement and he was also produced before a Magistrate for recording his statement under section 164 Cr.P.C., wherein he had put his thumb impression. In his statement under section 164 of Cr.P.C. he stated that he saw the dead bodies of Dilip Kishan and Sivaratri Karmakar lying near the house of Debaru Mura and they asked Gopi Bindia and Gautam Bindia as to why they had killed Dilip Kishan and Sivaratri Karmakar to which Gopi told them that he killed Sivaratri because she was a witch and he also showed the dao which was soaked in blood. Both Dilip Kishan and Sivaratri Karmakar had injuries all over their heads and bodies. Thus the statement of this witness is not reliable as the statements in examination-in-chief and under section 164 Cr.P.C., 1973 are contradictory and it was not confronted by prosecution.

25. PW-5, Dr. Gauri Sankar Gogoi, in his deposition has stated that on 16.08.2017, he was working as SDM & HO at Tinsukia Civil Hospital and on the same day at about 3:15, he had conducted post-mortem examination upon the dead body of Dilip Kishan in connection with Doomdooma P.S. G.D.E. No. 450 dated 16.08.2017. The dead body was brought and identified by UBC/112 Bimal Konwar and Sri Debaru Mura and Sri Jeki Kishan. On examination, he found the following:-

" Average built of a male, 55 years of age with multiple injuries. Rigor mortis present.

Injuries:-

1. *Lacerated injury on right forehead 5cm x 4cm x 1 cm.*
2. *Lacerated injury on left chin including left eye 4 cm x 4cm x 1cm.*
3. *Closed fracture of left humerus in the lower end, multiple bruised over the body.*

Rest of the organs were healthy”.

Opinion : In my opinion, the cause of death is due to shock and haemorrhage as a result of injury sustained, which are ante mortem and homicidal in nature. Time since death was 12 to 18 hours.”

He had stated that injury Nos. 1 and 2 are individually sufficient to cause death of a person in normal course. Ext.6 is the post-mortem report and Ext.6 (1) is his signature. He further stated that along with the dead body, he also received the inquest report and Ext.4 is the inquest report and Ext.4(2), 4(3), 4(4) and 4(5) are his signatures.

He had also stated that on the same day at about 3 P.M., he had conducted post-mortem examination on the dead body of Sivaratri Karmakar in connection with the aforesaid Doomdooma P.S. G.D.E. No. 450 dated 16.08.2017. On examination, he had found the following:

“ Average built of a female, about 40 years of age, wearing a green salwar. Rigor mortis present.

Injuries:-

3. Lacerated injury on face 6cm x 4cm including the forehead, eyes and nose.

4. Multiple bruises over the body i.e. chest, abdomen, hands and legs.

Other organs were healthy.”

He had stated that in his opinion, the cause of death is due to shock and haemorrhage as a result of the injuries sustained, which are ante mortem and homicidal in nature. The time since death was 12 to 18 hours. Ext.7 is the post-mortem report and Ex.7(1) is his signature. He further states that along with the dead body, he received the inquest report. Ext.5 is the inquest report and Ext.5(2), 5(3), 5(4) and 5(5) are his signatures. Cross examination was declined by the Defence side. Therefore, we are of the opinion that the Doctor's evidence corroborates the prosecution story.

26. PW-6, Sri. Jeki Kishan, in his deposition has stated that he knew all the accused(s) of the case and the deceased(s) were his parents. He stated

that the occurrence took place on 15.08.2017 at night. He resides at Doidam T.E. whereas his parents reside in Hansara T.E. On the next day of occurrence, in the morning, he went to the office of Hansara T.E. and his friends told him that his parents were murdered in the previous night. He was also told that the accused(s) of the case had committed murder of his parents on an accusation that his parents were practising witchcraft. He further stated that his sister Sushma Kishan was residing with his parents at the time of occurrence and one Bulu was also residing with his parents at the time of occurrence. He stated that in the police station, all the accused persons had admitted that they had committed murder of his parents. He had asked his sister as to how the occurrence took place and she told him that the accused(s) had come to the house and dragged out his parents and beat them . He was also told that his parents were taken to Line No. 10 and killed them there. He further stated that the police conducted inquest on the dead bodies of his parents and prepared inquest report. Ext.4(6) and 5(6) are his signatures and police had seized a bunch of bamboo sticks and Ext.3 is the seizure list and Ext.3(2) is his signature. Thus, PW-6 statement corroborates evidence of PW-12.

27. PW-7, Sri. Bijay Kharia @ Bikash Sukru, in his deposition has stated that he knew the complainant Debaru Mura and the deceased Dilip Kishan and Sivaratri Karmakar. He also knew all the accused(s) of the case. He stated that the occurrence took place on 15.08.2017 at night. He was at his house at that time and Gopi Binjia came to his house on that day and told him that they had apprehended witches and killed them. He was asked to come to the place of occurrence and accordingly he went there and saw the dead bodies of both the deceased persons. He further stated that the

police sent him to the court for recording his statement under section 164 of Cr.P.C. In his cross examination, he stated that he do not know where the occurrence took place and who killed the deceased persons and the statements made under Section 164 of Cr.P.C. was given as per the version of the police. So, statements of PW-7 are full of contradictions.

28. PW-8, Sri Bijoy Gorh, in his deposition has stated that he knew the complainant Debaru Mura and the deceased Dilip Kishan and Sivaratri Karmakar. He knew all the accused(s), including Gautam and Gopi Binjia. He did not remember the date when the occurrence took place but the occurrence took place at night. The deceased persons lived in his locality. At the time of occurrence, he was sleeping in his house. He stated that next morning he came to know that the dead bodies of the deceased persons were lying in front of the house of Debaru Mura and he went there and saw the dead bodies. PW-8 was declared hostile. In his cross examination by the prosecution, he had stated that in the night of the day of occurrence, while he was sleeping in his house, Gopi had come to his house and at that time he was holding a dao in his hands and that he had stated before police that at that time, Gopi was asking them to come with him in order to kill a witch which they had captured earlier but since his wife did not allow him to go with Gopi, Gopi left the house. In the cross examination by the defence, he stated that the deceased persons resided in a separate line, not in their line and he did not meet the police and in the night of the occurrence, he was sleeping in his house and woke up in the morning only. PW-8 was declared hostile, but there appears some positive statement which supports the prosecution case.

29. PW-9, Smti. Munu Gorh in her deposition has stated that she

knew the complainant Debaru Mura and the deceased Dilip Kishan and Sivaratri Karmakar. She also knew all the accused persons. The occurrence took place in the month of August, last year at night. She did not remember the date of the occurrence but it took place at night. She stated that the distance between her house and that of the deceased would be about 150 feet. She was sleeping in her house and heard some shouting at mid night but when she went out of the house, she could not find anyone outside the house. Next morning, Gopi Bindia came to her house and called her to come to the house of Debaru Mura. Accordingly, she went there and saw the dead bodies of Dilip Kishan and Sivaratri Karmakar which were lying in front of the house of Debaru Mura. This witness is only to the extent of witness to dead body.

30. PW-10, Sri Sujit Deb in his deposition has stated that he did not know the complainant Debaru Mura nor did he know the deceaseds Dilip Kishan and Sivaratri Karmakar. He did not know any of the accused(s) of the case. On the day of the occurrence he came to know that on an accusation of practising witchcraft, two persons were murdered in Hansara T.E. For reporting the matter in television, he went there along with Ajoy Thakur. About 10:30 pm he reached the place of occurrence and he saw the dead bodies lying on the ground and also saw that police men were already present there. They took the footage and he interviewed one person. He gave one copy of the DVD containing the said interview to the police. He further stated that the Police seized the DVD, Ext 8 is the said seizure list and Ext.8(1) is his signature.

31. PW-11, Sri. Ajoy Kr. Thakur in his deposition has stated that he did not know the complainant Debaru Mura nor did he know the deceaseds

Dilip Kishan and Sivaratri Karmakar. He did not know any of the accused(s) of the case. The occurrence took place in the month of August 2017. He came to know that on an accusation of practising witchcraft, two persons were murdered in Hansara T.E. He stated that he went there along with Sujit Deb. He reached the place of occurrence and he saw the dead bodies lying on the ground and took video footage of the two dead bodies. He also states that that police men were already present there. He recorded one interview taken by Sujit Deb in which it was stated that the accused(s) were killed since they were practising witchcraft. He gave a copy of the video containing the said interview to the police. He further stated that the Police seized the same and put his signature in the same, Ext 8 is the said seizure list and Ext.8(2) is his signature. Both PW-10 and PW-11 are reporters who claimed to have taken footage and interviewed one person and they came to know, thus they are hearsay witnesses.

32. PW-12, Smti. Sushma Kishan, in her deposition had stated that Dilip Kishan and Shivarati Karmakar were her parents. She also knew the accused Bottom @ Gautam. The occurrence took place more than one year ago. The occurrence took place at about 10/11 pm. At the time when they were sleeping, Gautam, Gopi and some other persons from their line had come to their house and asked her mother to open the door of the house. When her mother came out of the house, Gopi and Gautam and some other persons hit her mother with the blunt side of the dao. At that time, her father came out of his room and then Gopi, Gautam and the other people gave blows to her father with blunt side of daos. They also used sticks to beat her father. She further stated that her parents were dragged to the house of the line chowkidar Debaru Mura. Thereafter, some people

dragged her to the house of Debaru Mura and was asked to stand there. The people from the line along with Gopi and Gautam were assaulting her parents. She had seen it with her own eyes as it took place in front of her. She stated that her parents died because of the said assault. The Police brought her to the court for recording her statement under section 164 Cr.P.C. Ext.9 is her statement and Ext.9 (1) and 9(2) are her signatures. She saw the accused(s) in the light and the persons namely Gopi Khariya, Tufan Mura, Baisaku Gorh, Mohesh Bhumij, Sanjib Bhowmij, Ram Mura, Julum Mura, Ajay Karmakar, Nirmal Garh, Babul Mura, Ramesh Rajput, Khalinder Bhowmij, Krishna Bindiya, Malti Bindia, Neha Bhowmij, Sukurmoni Mura, Mangli Mura, Aroti Garh, Laxmi Tanti, Phulko Bishnu, Geeta Garh, Mangali Bindia, Anu Mura and Puno Mura were also present at the time of occurrence and they had also participated in the occurrence. In her cross examination PW-12 stated that her maternal aunt tutored her as to how she should give statement to police. During those days of recording her statement under Section 164 of CrPC she was staying with her maternal aunt who taught her what to speak in the Court and as per the tutoring given to her, she gave statement under section 164 of Cr.PC, 1973. PW-12 also stated that she had been brought to the court by her brother Jacky Kishan and his wife Korishma Kishan and they have told her to give evidence properly and explained her about the facts of the case and asked her to speak properly in the Court. She further stated that when she was taken to the house of Debaru Mura, on reaching she saw the people assaulting her parents and the place was lit by electricity light.

33. PW-13, Sri Jyotishman Neog, the I.O. in his deposition has stated that on 16.08.2017, he was working at Doomdooma P.S. On that

day, Sri Pritam Sharma, Assistant Manager of Raidang T.S. verbally informed that on a suspicion of practicing witchcraft a couple were murdered and their dead bodies were lying in Line No. 10 of the garden. On the basis of the said information, the G.D. entry no. 450 dated 16.01.2018 was made by the OC, Moni Mohan Koch. Ext. 10 being the certified extract copy of the said G.D. entry. He was entrusted the task of investigation of the case, so he immediately went to the place of occurrence at 7:30 am. He prepared a sketch map of the P.O. Ext. 11 is the sketch map and Ext. 11 (1) is his signature. He conducted an inquest upon the dead body of the deceased persons. Ext.4 is the inquest report and Ext. 4(7) is his signature. Ext.5 is the another inquest report and Ext. 5(7) is his signature. He stated that he recorded statements of Debaru Mura, Jeki Kishan, Lengi Karmakar, Pratap Karmakar, Sushma Kishan, Robi Mura, Bijay Kharia, Munu Garh, Bijay Garh and Priyam Sharma. At that time he seized 13 numbers of bamboo stick, which was suspected to be used for the commission of the offence. Ext. 3 is the seizure list and Ext. 3(3) is his signature. He further stated that he sent the dead bodies for post mortem examination and arrested 31 numbers of accused(s) on that day itself and recorded their statements. He further stated that on that day at about 12:05 pm the written ejahar was lodged by Sri Debaru Mura. On the basis of the said ejahar, O.C. registered the case as Doomdooma P.S. Case No. 239/2017 under section 143/109/120(B) and 302 of the Indian Penal Code, 1860. Ext. 1 is the ejahar and Ext. 1(2) is the signature of Moni Mohan Koch along with endorsement. He further stated that he was acquainted with the signature of Moni Mohan Koch and was entrusted with the task of investigation of the case. When he was in the P.O some media persons

were also present and before them, the accused(s) admitted that they had committed murder of the couple because they were practising witchcraft. Thereafter, he seized the DVD containing the statements. Ext. 8 is the seizure list and Ext. 8(3) is his signature. Thereafter, on conclusion of investigation, he collected the P.M. report and filed the charge sheet against the accused(s). Ext. 12 is the charge sheet and Ext. 12 (1) is his signature.

34. PW-13 in his cross-examination stated that the occurrence of the case, i.e., the assault upon the deceased persons took place in the playground. He was told so by Debaru and Sushma, and the playground is situated in front of the house of the deceased persons. He stated that none of the witnesses, whom he had examined has claimed to have seen the occurrence in the playground. The incident occurred at about 9/10 pm on 15.08.2017. PW-12 was in the custody of Lengi Karmakar after the night of occurrence and he did not test Sushma Kishan as to whether she was tutored to ascertain the authenticity of her statement. He stated that there is nothing in the C.D. to explain as to why Sushma was not sent to the court on 16.08.2017 and 17.08.2017. However, she was sent to the court on 18.08.2017. There is also nothing in the C.D. to show as to in whose custody, Sushma was during those two days. He further stated that though he sent the girl to the court on 18.08.2017, the court recorded her statement on 24.08.2017. He had collected the copy of statement of Sushma recorded under section 164 Cr.PC, 1973 and at the time of filing of the charge sheet, he had taken into consideration the statement of Sushma. In his cross examination, he also stated that PW-12 in exhibit 9 did not state that the accused persons assaulted her parents with dao and sticks. She also did not state before him that Goutam, Gopi and some other

persons had come to her house and asked her mother to open the door and when her mother opened the door, she was behind her. He stated that the PW-12 also did not state before him that when her mother had come out of the house, Gopi, Goutam and some other persons had hit her mother with the blunt side of the dao and also did not state before him that when her father came out of the room, Gopi, Goutam and some others gave blows to her father with the blunt side of the dao. The witness also did not state before him that the miscreants used sticks to beat her father.

35. Further, in his cross examination, he stated that when he first reached by the side of the dead bodies of the deceased, he found that they were lying in front of the shop of Debaru Mura, which is a road. He found during investigation that the couple was killed in the plain field and later on, the dead bodies were thrown to the road in front of the shop of Debaru and none of the witnesses has taken the names of the accused(s) of the case other than Goutam. He further stated that from the statement of Priyam Sharma, it was evident that Debaru Mura never told him the names of any of the accused(s). When Priyam Sharma informed the police about the occurrence, he also did not name any persons as accused(s) of the case. He stated that the witness PW-12 told him that at the time of occurrence, she was in the company of her brother Bulu and in the investigation, he also found that Bikash had informed Debaru about the occurrence, but Bikash was not examined by him. Lastly, he stated that he did not send the seized sticks for forensic examination, apart from simply seizing the DVD. He did not follow other requirements pertaining to seizure of such evidence and he also did not send the DVD to the court and it was not a fact that the accused(s) were never involved in the said offence.

36. On consideration of the testimony of PW-13 we find that the I.O. has not sent the seized bamboo sticks and DVD for forensic examination which is a total lapse on his part. We also noticed that S-164 statements by PW-12 had neither been confronted nor contradicted.

37. Both Mr. N. Hasan, learned counsel and Ms. S. Jahan, learned Additional PP have submitted that during the examination under section 313, Cr.PC, apart from the solitary question, no other incriminating statement as may surface from the evidence of prosecution witness was put to the accused(s), thereby causing prejudice to the accused(s).

38. We find that the accused(s) were examined under section 313 of Cr.PC, 1973 by the learned Trial court on 15.03.2019. Both the appellants were put three questions each which are reproduced herein below:-

"Q.No.1 The witness Sushma Kishan has stated in her evidence that on the day of occurrence, at about 10/11 pm, you along with Goutam Bindia had come to her house and assaulted her father?"

Ans: It is not true.

Q.No. 2. The witness Sushma Kishan has stated in her evidence that at the relevant time of occurrence, you along with Goutam Bindia had dragged away her father and mother and took them to the house of Debaru Mura?

Ans:- It is not true.

Q.No. 3. The witness Sushma Kishan has further stated in her evidence that you along with Goutam Bindia assaulted her parents in front of her eyes and her parents died because you assaulted her?

Ans:- It is not true.

Q.No.1 The witness Sushma Kishan has stated in her evidence that on the day of occurrence, at about 10/11 pm, you along with Gopi Binjia had come to her house and assaulted her father?

Ans: It is not true.

Q.No. 2. The witness Sushma Kishan has stated in her evidence that at the relevant time of occurrence, you along with Gopi Binjia had dragged away her father and mother and took them to the house of Debaru Mura?

Ans:- It is not true.

Q.No. 3. The witness Sushma Kishan has further stated in her evidence that you along with Gopi Binjia assaulted her parents in front of her eyes and her parents died because you assaulted her?

Ans:- It is not true."

39. The Hon'ble Supreme Court in catena of decisions held that the real importance of examination under Section 313 of CrPC lies in that, it imposes a duty on the Court to question the accused properly and fairly so as to bring home to him the exact case, he will have to meet and thereby an opportunity is given to him to explain any such point. It prescribes the procedure for the accused by giving him an opportunity to explain the facts and circumstances appearing against him in the evidences and this opportunity is valuable from the stand point of the accused. It is a settled position of law that Section 313 (1)(b) Cr.PC, 1973 is mandatory which cast a duty on the Court to provide an opportunity to the accused to explain each and every circumstances and any incriminating evidence against him. The examination of the accused under Section 313 (1)(b) Cr.PC, 1973 is not a mere formality.

40. In the case of ***Janak Yadav v. State of Bihar reported in (1999) 9SCC 125***, the Hon'ble Supreme Court observed as follows:

"5. Section 313 CrPC prescribes a procedural safeguard for an accused facing the trial to be granted an opportunity to explain the facts and circumstances appearing against him in the prosecution's evidence. That opportunity is a valuable one and cannot be ignored. It is not a case of defective examination under Section 313 CrPC where the question of prejudice may be examined but a case of no examination at all under Section 313 CrPC and as such the question whether or not the appellants have been prejudiced on account of that omission is really of no relevance."

41. On scrutiny of examination of both the accused(s) under section 313 of Cr.PC, 1973, we noticed that the learned Trial Court has put three relevant questions or incriminating evidence from the deposition of

prosecution witnesses in as much as PW-12 i.e., an eye witness to the occurrence has stated that Goutam Bindia and Gopi Bindia along with others assaulted her parents in front of her eyes and they died due to such assault.

42. As stated above, the incriminating evidences of PW-12 were put to both the appellants while they were being questioned under section 313 Cr.PC, 1973, by giving them an opportunity to explain the facts and circumstances but the appellants failed to explain despite opportunity, except that of simple denial. Though no question was put to the appellants as regards the tutoring part as seen from the cross examination of PW-12, but such non-questioning regarding tutoring by itself will not vitiate the trial. Moreso, the accused(s) has to establish the prejudice caused to them.

43. The Hon'ble Apex Court in the case of ***Nar Singh (Supra)*** held, which are reproduced herein below:

"16. Undoubtedly, the importance of a statement under Section 313 Cr.P.C., insofar as the accused is concerned, can hardly be minimised. The statutory provision is based on the rules of natural justice for an accused, who must be made aware of the circumstances being put against him so that he can give a proper explanation to meet that case. If an objection as to Section 313 Cr.P.C. statement is taken at the earliest stage, the Court can make good the defect and record additional statement of the accused as that would be in the interest of all. When objections as to defective Section 313 Cr.P.C. statement is raised in the appellate court, then difficulty arises for the prosecution as well as the accused. When the trial court is required to act in accordance with the mandatory provisions of Section 313 Cr.P.C., failure on the part of the trial court to comply with the mandate of the law, in our view, cannot automatically enure to the benefit of the accused. Any omission on the part of the Court to question the accused on any incriminating circumstance would not ipso facto vitiate the trial, unless some material prejudice is shown to have been caused to the accused. Insofar as non-compliance of mandatory provisions of Section 313 Cr.P.C., it is an error essentially committed by the learned Sessions Judge. Since justice suffers in

the hands of the Court, the same has to be corrected or rectified in the appeal.

17. *So far as [Section 313 Cr.P.C.](#) is concerned, undoubtedly, the attention of the accused must specifically be brought to inculpable pieces of evidence to give him an opportunity to offer an explanation, if he chooses to do so. A three-Judge Bench of this Court in [Wasim Khan v. The State of Uttar Pradesh](#), AIR 1956 SC 400; and [Bhoor Singh & Anr. v. State of Punjab](#), AIR 1974 SC 1256 held that every error or omission in compliance of the provisions of [Section 342](#) of the old [Cr.P.C.](#) does not necessarily vitiate trial. The accused must show that some prejudice has been caused or was likely to have been caused to him.*

18. *Observing that omission to put any material circumstance to the accused does not ipso facto vitiate the trial and that the accused must show prejudice and that miscarriage of justice had been sustained by him, this Court in [Santosh Kumar Singh v State through CBI](#), (2010) 9 SCC 747 (Para 92), has held as under:*

" 92. ... the facts of each case have to be examined but the broad principle is that all incriminating material circumstances must be put to an accused while recording his statement under [Section 313](#) of the Code, but if any material circumstance has been left out that would not ipso facto result in the exclusion of that evidence from consideration unless it could further be shown by the accused that prejudice and miscarriage of justice had been sustained by him..."

44. From a careful reading of the questions put to the appellants while they were being examined under Section 313 of CrPC and in the light of law laid down in the aforesaid decision, we are of the view that attention of appellants were drawn to inculpatory material so as to enable them to explain it, but were not explained except of simple denial. Even if any omission has occurred, it does not *ipso facto* vitiate the trial as no material prejudice has been established by the appellant. Therefore, we are unable to accept the arguments of the learned counsels in this regard.

45. From a scrutiny of the evidences available on record we find that

the victims have been assaulted and they had succumbed to their injuries on 15.08.2017. The dead bodies of Dilip Kishan and Sivaratri Karmakar were seen lying near the house of PW-1, i.e, Shri Debaru Mura, who lodged an ejahar on 16.08.2017.

46. We have noted the fact that the death of Dilip Kishan and Sivaratri Karmakar, happened because of the injuries, had not been disputed by the accused(s). The Doctor, who has proved the post mortem report of the two deceased person has not been cross examined by the learned Defence counsel and the prosecution had proved beyond all reasonable doubt that Dilip Kishan and Sivaratri Karmakar had died after sustaining the aforesaid injuries.

47. From a careful examination of the testimonies of PWs, we find that there are omissions, contradictions and embellishments in their testimonies, however same need not be discarded altogether.

48. In the case of ***Leela Ram vs. State of Haryana, reported in (1999) SCC 525***, the Hon'ble Supreme Court observed that one hardly comes across a witness whose evidence does not contain some exaggeration or embellishments but this Court can sift the shaft from the grain and find the truth from the testimony of witness.

49. Now, coming to the evidence of PW-12, we noticed that PW-12, Smti. Sushma Kishan who is the daughter of the deceased(s), is about 9 years and has deposed in her evidence that on the day of occurrence at about 10/11pm she and her parents were sleeping inside the house after having dinner. She has stated at that point of time, Gopi Binjia and Goutam Bindia along with some persons had come to her house and asked her mother to open the door. While her mother was opening the door, she was

behind her. Accordingly, when her mother came out of the house, Gopi and Gautam and some other persons hit her mother with the blunt side of the dao. She stated that at that time, her father came out of the room and then Gopi, Gautam and some other persons gave blows to her father with blunt side of daos. She further stated that those persons beat her father with sticks. She also disclosed that her mother and father were dragged to the house of Debaru Mura and she was also dragged the house of Debaru Mura. The PW-12 has stated that many people including Gopi Bindia and Goutam Binida started to assault her parents. She had claimed that the entire incident took place in front of her eyes. She has stated that her parents died after they were assaulted by those persons. She has also stated that the entire incident took place in the light of electric bulb. PW-12 has lastly stated that at the time of occurrence, Gopi Karia, Tufan Mura, Baisaku Gorh, Mohesh Bhumji, Snajib Bhumij, Ram Mura, Julum Mura, Ajay Karmakar, Nirmal Garh, Babul Mura, Ramesh Rajput, Khalindra Bhumij, Krishna Bindiya, Malti Bindia, Neha Bhumij, Sukurmoni Mura, Mongli Mura, Aroti Garh, Laxmi tanti, Phulko Bishnu, Geeta Garh, Mangli Bindia, Anu Mura and Puno Mura were also present at the place of occurrence and she stated that they were also participating in the said occurrence.

50. On the scrutiny of the testimony/ deposition of PW-12 we have noticed that PW-12 has clearly stated that she has seen the entire incident that took place in front of her eyes, whereby the deceased(s) (her parents), were assaulted by the appellant(s), i.e., Gopi Bindia and Goutam Bindia along with others, thereby the deceased have succumbed to the injuries inflicted by the appellant(s).

51. PW-12, i.e., Ms. Sushma Kishan in her cross examination stated

that one girl named Bulu was also staying in her house at the relevant time of occurrence. She has also stated that the witness Jeki Kishan is her brother from the first wife of her father. She has stated that when Jeki Kishan had come to her house after the occurrence, she did not talk to him. She has stated that her maternal aunt tutored her as to how she should give statement to police. Sushma Kishan has stated that when her statement was recorded by police, her maternal aunt was standing by her side and police also simultaneously recorded the statement of her maternal aunt. She also disclosed that her maternal aunt, i.e., the mother of the aforementioned Bulu brought her to the court for giving statement under section 164 Cr.PC, 1973. Sushma Kishan has stated that after two days of the incident, her statement was recorded in the court and on both occasions, she was staying in the house of her maternal aunt. She has stated that on both those days, her maternal aunt taught her what to speak in the court. She also stated that as per the tutoring given to her by her maternal aunt, she gave the statement under section 164 Cr.PC, 1973. She has disclosed that at the time of occurrence, about 300/400 people gathered at the place of occurrence. PW-12 has stated that some of the villagers had taken her to the house of Debaru Mura and at that time, she had seen that the people were assaulting her parents and has also disclosed that the place where the assault took place was lit by electricity.

52. On close scrutiny of the testimony in her examination-in-chief, PW-12, i.e., Sushma Kishan, we find that her evidence is reliable in as much as though she is about 9 years old and she has been subjected to extensive cross examination. Even in the cross examination she has stated that she had seen the people assaulting her parents. In her examination-in-chief,

she has stated that Gopi Bindia, Goutam Bindia and some other persons had caused injuries to her parents and they were dragged out from the house. Further she has stated that some people including Gopi Bindia and Goutam Bindia has assaulted her parents and she had seen the incident with her own eyes and that evidence has not been challenged by the defence side. Therefore, evidence of PW-12 has got credibility which can be safely relied upon.

53. In the case of ***Anil Phukan Vs. State of Assam reported in (1993) 3 SCC 282***, the Hon'ble Apex Court has held that, "*conviction can be based on the testimony of a single eye-witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passes the test of reliability. So long as the single eye-witness is a wholly reliable witness, the courts have no difficulty in basing conviction on his/her testimony alone. However, where the single eye-witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he/she could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the courts find that the single eye-witness is a wholly unreliable witness that his/her testimony is discarded in toto and no amount of corroboration can cure that defect.*"

54. In the case of ***Namdeo vs. State of Maharashtra reported in (2007) 14 SCC 150*** after consideration of all the earlier cases, the Hon'ble Supreme Court held that it is clear that a close relative cannot be characterised as 'interested witness. He is a 'natural' witness. His evidence, however, must be scrutinized carefully. If on such scrutiny, his evidence is

found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the 'sole' testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one.

55. In the present case, the eye witness, i.e., PW-12 on the scrutiny of her deposition is wholly reliable and trust worthy. Therefore, there is no ground to reject her evidence.

56. On scrutiny of the testimony of PW-3 Sri Pratap Karmakar, he had stated that that when he had reached the place of occurrence, he had seen that Gopi Bindia and Goutam Bindia were beating Dilip Kishan and his wife Sivaratri Karmakar and at that time, they were already dead, but still, the aforesaid two persons were beating the deceased persons. Therefore, we find that the evidence of PW-3 corroborates the testimony of the PW-12.

57. It is trite that evidence of child witness must be evaluated carefully and with greater circumspect, as the child witness is susceptible to be swayed and she is an easy prey to tutoring but that does not mean that the Court has to begin with the presumption that the child witness is untruthful and unreliable. In the instant case, PW-12 is of 9 years old and accordingly, the learned Trial Court before recording the deposition certified that PW-12 understands the questions put to her and she is able to give reasonable answers, therefore, it cannot be held that since PW-12 was a child witness and thus her testimonies/statements can be disputed or discarded. The Hon'ble Supreme Court in the case of ***Ratansind***

Dalsukhbhai Nayak vs. State of Gujarat reported in (2004) 1 SCC 64 held that:

"The learned trial Judge has elaborately analysed the evidence of eyewitness. There is no reason as to why she would falsely implicate the accused. Nothing has been brought on record to show that she had any animosity to the appellants. Therefore, in our view, the prosecution has been able to bring home its accusations beyond shadow of doubt.

*The [Indian Evidence Act](#), 1872 (in short the '[Evidence Act](#)') does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, [Section 118](#) of the Evidence Act envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease- whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer J in *Wheeler v. United States*. The evidence of a child witness is not required to be rejected per se; but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon.*

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 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 his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring

and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken 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.

The learned trial Judge has elaborately analysed the evidence of eyewitness. There is no reason as to why she would falsely implicate the accused. Nothing has been brought on record to show that she or her father had any animosity so far as the accused is concerned. The prosecution has been able to bring home its accusations beyond shadow of doubt. Further, the trial court on careful examination was satisfied about child's capacity to understand and to give rational answers. That being the position, it cannot be said that the witness (PW11) had no maturity to understand the import of the questions put or to give rational answers. This witness was cross-examined at length and in spite thereof she had described in detail the scenario implicating the accused to be author of the crime. The answers given by the child witness would go to show that it was only repeating what somebody else asked her to say. The mere fact that the child was asked to say about the occurrence and as to what she saw, is no reason to jump to a conclusion that it amounted to tutoring and that she was deposing only as per tutoring what was not otherwise what she actually saw. The learned counsel for the accused-appellant has taken pains to point out certain discrepancies which are of very minor and trifle nature and in no way affect the credibility of the prosecution version."

58. The Hon'ble Supreme Court in the case of ***Pramila vs. State of Uttar Pradesh reported in (2021) 12 SCC 550*** observed as follows:

"5. Criminal jurisprudence does not hold that the evidence of a child witness is unreliable and can be discarded. A child who is aged about 11 to 12 years certainly has reasonably developed mental faculty to see, absorb and appreciate. In a given case the evidence of a child witness alone can also form

the basis for conviction. The mere absence of any corroborative evidence in addition to that of the child witness by itself cannot alone discredit a child witness. But the Courts have regularly held that where a child witness is to be considered, and more so when he is the sole witness, a heightened level of scrutiny is called for of the evidence so that the Court is satisfied with regard to the reliability and genuineness of the evidence of the child witness. PW-2 was examined nearly one year after the occurrence. The Court has, therefore, to satisfy itself that all possibilities of tutoring or otherwise are ruled out and what was deposed was nothing but the truth."

59. From a careful reading of the testimonies of PW-3, PW-5, PW-12, PW-13, and in the light of law laid down as aforesaid, we are of the view that the evidences of these witnesses pertaining to the assault, seizures and eye witness of the occurrence which resulted in the death of the victims/deceased(s) are credible, reliable and trustworthy and appears credible, and conviction of appellants by the Court can be based on the testimony of PW-12 which is corroborated by other evidences which warrants no interference. We have, therefore, no incertitude in holding that the evidences led by the prosecution establishes the charges brought against the appellant(s) Goutam Bindia in CrI.A(J)/36/2020 and Gopi Binjia @ Bindia in CrI.A(J)/37/2020, beyond reasonable doubt. Therefore, the learned Trial court had rightly convicted them.

60. For the reasons stated herein above, these appeals fails and the conviction of appellants, Goutam Bindia and Gopi Binjia @ Bindia is hereby affirmed.

61. Appeals stands dismissed accordingly.

62. We appreciate the able assistance rendered by the learned counsels for the parties.

63. Send back the LCR.

JUDGE

JUDGE

Comparing Assistant