

HIGH COURT OF TRIPURA
AGARTALA

Crl.A(J) 36 of 2023

Shri Kajal Sarkar

---Appellant(s)

Versus

The State of Tripura

---Respondent(s)

For Appellant (s)	:	Mr. Samar Das, Advocate.
For Respondent(s)	:	Mr. S. Ghosh, Addl. PP.
Date of hearing and date of judgment and order	:	16.07.2024.
Whether fit for reporting	:	No

HON'BLE MR. JUSTICE T. AMARNATH GOUD
HON'BLE MR. JUSTICE BISWAJIT PALIT

Judgment & Order (Oral)

T.Amarnath Goud, J

Heard Mr. Samar Das, learned counsel appearing for the appellant also heard Mr. S. Ghosh, learned Addl. PP appearing for the state-respondent.

[2] This is an application under Section 374 of Cr.PC against the order of conviction and sentence passed by the Learned Addl. District and Sessions Judge, Sepahijala District, Bishalgarh, in case No. ST(T/1) 17 of 2020 vide judgment dated 09.11.2022 in which the Ld. Trial Court below convicted and sentenced the appellant to suffer RI for 10 (ten) years and to pay a Rs.6000/- only under Section 304(Part-I) of the IPC in default of payment of fine he will undergo further RI for 1 year.

[3] The prosecution case in brief is that the victim was married to the accused 12 years before the incident as per social customs. After the marriage, her husband Kajal Sarkar and mother- in-law Gita Rani Sarkar used to torture her for money etc. On 30.04.2020, the accused husband had assaulted the victim and thereafter set her on fire on pouring kerosene oil over her. The victim had got burnt and was moved to Bishramganj

hospital at first and subsequently shifted to AGMC & GBP Hospital on the said day. On 01.05.2020 the victim had succumbed to her burn injuries at GBP hospital, Agartala.

[4] On the written ejahar filed by the informant Smt. Kiran Bala Das (mother of the victim), Bishramganj PS case no. 2020 BRG 009 u/s 498-A/302/34 of IPC was registered against 2 accused Kajal Sarkar and Smt. Gita Rani Sarkar and the same was endorsed to WSI Swarna Debbarma for investigation.

[5] After conclusion of investigation the I/O filed the c/s in this case vide Bishramganj PS c/s no. 21 of 2020 dated 29.09.2020 u/s 498-A/302 of IPC against the accused person namely Kajal Sarkar only for trial before the Court. The case record was received on commitment from the Court of Ld. SDJM, Bishalgarh, Sepahijala on 28.10.2020 after the committing Court had complied with the section 207 of CrP.C.

[6] The charge was framed against the accused u/s 498-A/ 302 of IPC on 02.02.2021 and the accused had pleaded not guilty after the charge was read over to the accused in Bengali. Accordingly trial was commenced.

[7] The prosecution adduced as many as 13 witnesses and also exhibited certain documents described fully in the appendix and after closure of the prosecution evidence, the accused person was examined by me u/s 313(1)(b) of Cr.P.C. on 16.06.2022 wherein the accused was inclined to adduce defence witness from his side. Accordingly 4 Dws were adduced from the side of the accused.

[8] After hearing both sides, the learned trial Court delivered the judgment and order of conviction and sentence dated 09.11.2022 wherein, the accused-appellant has been convicted as under:

In the result, the convict namely, Sri Kajal Sarkar is sentenced to suffer RI for 10 (Ten) years and to pay fine of Rs.6000/- (six thousand) only for the offence u/s 304 (Part I) of IPC, in default of payment of fine, to suffer RI for 1 (one) year.

The period of custody already undergone during investigation, inquiry or trial (from 28.08.2018 to 08.03.2021 and from 18.03.2021 to till today i.e. 09.11.2022) shall be set off u/s 428 of Cr.P.C.

[9] Being aggrieved by and dissatisfied with the judgment and order of conviction, the present appeal has been preferred by the appellant.

[10] It is the case of the counsel for the appellant that there are discrepancies in the evidence of the PW-2, the minor complainant and also in the other defence witnesses who support the case of the appellant. It is further contended by the counsel for the appellant that the appellant is innocent. He also pointed out that since the entire case moves around setting fire upon the deceased wife of the appellant by way of pouring kerosene. The prosecution has failed to obtain the analysis report from the forensic department to say that the burnt injuries of the deceased wife were due to pouring of kerosene.

[11] Learned counsel for the appellant to support his contention has placed his reliance on a judgment of the apex court in ***Hari Om alias Hero versus State of Uttar Pradesh*** reported in (2021) 4 SCC 345 where the apex court has observed as follows:

22. At the outset, we must note the perspective from which the evidence of a child witness is to be considered. The caution expressed by this Court in *Suryanarayana* that “corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence” is a well-accepted principle. While applying said principle to the facts of that case, this Court in *Suryanarayana* observed:- (SCC pp. 133-35, paras 5-9)

“5. Admittedly, Bhavya (PW 2), who at the time of occurrence was about four years of age, is the only solitary eyewitness who was rightly not given the oath. The time and place of the occurrence and the attending circumstances of the case suggest no possibility of there being any other person as an eyewitness. The evidence of the child witness cannot be rejected per se, but the court, as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of the child witness. The evidence of PW 2 cannot be discarded only on the ground of her being of tender age. The fact of PW 2 being a child witness would require the court to scrutinise her evidence with care and caution. If she is shown to have stood the test of cross-examination and there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix-up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the courts are required to rule out the

possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not.

6. This Court in *Panchhi v. State of U.P.* : (1998) 7 SCC 177 held that the evidence of the 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 an easy prey to tutoring. The evidence of the child witness must find adequate corroboration before it is relied upon, as the rule of corroboration is of practical wisdom than of law (vide *Prakash v. State of M.P.* : (1992) 4 SCC 225, *Baby Kandayanathil v. State of Kerala* : 1993 Supp (3) SCC 667, *Raja Ram Yadav v. State of Bihar*: (1996) 9 SCC 287, and *Dattu Ramrao Sakhare v. State of Maharashtra*: (1997) 5 SCC 341

7. To the same effect is the judgment in *State of U.P. v. Ashok Dixit* : (2000) 3 SCC 70.

8. In this case Bhavya (PW 2) when appeared before the trial court was of 6 years of age. After questioning the witness, the Sessions Judge found, "though the girl is 6 years old she is active and she understands everything". Without administering the oath to the witness her statement was recorded wherein she stated:

"I know Saroja, I call her as ammayi, she is my aunt. The person sitting in the court box is my uncle. His name is Suryanarayana. Since I call him as uncle, he is my uncle.

My aunt Saroja is now dead. I know how she died. Several days back after taking lunch my ammayi i.e. my aunt Saroja and myself went to the lake to wash the clothes and to take bath. On that day, my uncle Suryanarayana sitting in the court pierced with a knife the stomach and neck of my ammayi. Hence she suffered injuries and her entire body covered with blood. My ammayi while running after being injured, fell down, I screamed. Immediately I ran and told my father and mother that uncle killed the aunt. If the knife is shown I can identify (a white cloth bag sealed, was opened). I have seen the knife now. With the same knife that day my uncle pierced my ammayi (this was marked as Ext. P-01) on that day. Police asked me as to what happened, I have told everything to the police."

9. In her cross-examination the witness stated that before the date of occurrence the deceased was living with her (witness) parents. At the time of occurrence the witness used to go to aanganwadi school. The witness denied the suggestion that she had not gone with the deceased to wash the clothes. Nothing favouring the defence could be extracted out of her in the cross-examination. She denied the suggestion that "my uncle did not pierce my aunt with the knife. It is not correct that I have not seen the knife in the hands of my uncle". The trial court as well as the High Court accepted her testimony as no inherent defect was pointed out by the defence. We also find no reason to take a contrary view. The mere fact that her mother had told that she did not know any other language except Malayalam and that the words spoken to by her were not in that language cannot be used as a ground to reject her testimony. The child and her parents conversed in Malayalam language at their residence which was explained to the investigating officer in the language which was understood by him. There is no ground of doubting the veracity of the testimony of this child witness as we find that her name is mentioned in the FIR which is proved to have been recorded immediately after the occurrence. P.H. Krishnappa, the Tahsildar who prepared the inquest report is also proved to have recorded the statement of this child witness, wherein, she is shown to have made similar deposition. Otherwise also there is sufficient corroboration on record to rule out the possibility of PW 2 being tutored or used for ulterior purposes by some alleged interested persons. In the absence of any inherent defect we do

not find any substance in the plea to reject the testimony of this child witness. The statement of PW 2 shows that the deceased and the appellant were living together as husband and wife and she used to address them as uncle and aunt. Her testimony to the effect of the deceased living with PW 1 is sufficiently corroborated by the other evidence led in the case. The factum of the deceased having received stabbed wound with a knife is proved by the medical evidence. The recovery of the knife at the instance of the appellant, in consequence of his disclosure statement, leaves no doubt to believe her statement. The place of occurrence being near the water tank has not been seriously disputed. The report received from FSL as per Exhibit P-15 shows that blouse (MO 2), towel (MO 3) and the bangle pieces (MO 4) of the deceased and the knife (MO 1) which was used in the commission of the crime, the towel (MO 7), lungi (MO 6) and shirt (MO5) of the appellant were found to be stained with blood. Dr Ram Dass (PW 12) has opined that the injuries found on the dead body of the deceased could be caused with a weapon like MO 1.” (emphasis supplied)

[12] Learned counsel for the appellant contended before this court that the child witness cannot be treated in toto and omission needs to be considered. He also prayed to allow the appeal by setting aside impugned judgment and order of the learned court below.

[13] On the other side, Mr. S. Ghosh, learned Addl. PP appearing for the state-respondent has contended before this court the evidence of PW 2 and the injury witnesses clearly indicates that the accused person is guilty of the offence and he shall be punished and prayed to confirm the impugned judgment and order by dismissing the present appeal.

[14] Heard both sides.

[15] Admittedly it is a case of burns and the eye witness is PW 2 who is the child of the accused and the deceased. She has categorically narrated the entire incident that had taken place wherein her father poured kerosene upon her mother and set her ablaze. When she cried watching the scenario, her father slapped her and also pushed her aside. PW 2 further narrated that she ran towards the neighborhood and alerted everyone. Being alarmed, they came to the place of occurrence for providing assistance. PW 2 has also deposed that her father also made an attempt to extinguish the fire by way of jumping over the deceased body and while doing so, the accused got himself injured. The

same statement has been confirmed by the other witnesses and more particularly by the defence witnesses with regard to the injuries sustained by the accused person.

[16] On perusal of the judgment relied by the learned counsel for the appellant, this court is of the view that the said judgment is not relevant to the subject matter of this case and hence it holds no weightage.

[17] Considering the statement made by PW-2, this Court is of the opinion that since the death has taken place because of the burns caused by the accused person out of fit of anger and there was no intention to kill the deceased. But in considering his action that he went to extinguish the fire and the accused person also got himself injured while making that attempt. Stating thus, it can be said that the accused cannot be punished under Section 302 of the IPC but this whole incident clearly attracts the provision of Section 304 (Part-1) of IPC. Therefore, we are of the opinion that the conclusion reached by the learned Court below is apt and proper and does not need interference of this Court. Hence the present appeal is liable to be dismissed.

[18] In view of the above discussion, the present appeal stands dismissed confirming the impugned judgment dated 09.11.2022 passed by the Addl. District and Sessions Judge, Sepahijala District, Bishalgarh, in case No. ST(T/1) 17 of 2020.

B.Palit, J

T. Amarnath Goud, J

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