

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 668 of 2006

1. Rameshvar, age 28 years.
2. Raghunath, age 25 years
3. Bhailal, age 22 years.

All S/o Laxman Kumhar.

4. Ravendra, age 28 years, s/o Shyam Lal Kumahar

All R/o Gram Sipurva, P.S. Amarji (Patpara) Dist. Sidhi (MP)

Local Address, Gram Kusmul, P.S. Dabhara, Dist. Janjgir-Champa (CG)

---- Appellants (In jail)

Versus

- State Of Chhattisgarh, through the District Magistrate, Bilaspur (CG)

---- Respondent

For Appellants	:	Shri R.K. Gupta, Advocate
For Respondent	:	Shri Vivek Sharma, Government Advocate

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Ram Prasanna Sharma

Judgement

Per P. Diwaker, J

10/07/2017

1. This appeal has been filed against the judgment of conviction and order of sentence dated 27.6.2006 passed by the Additional Sessions Judge, Sakti in S.T. No.291/05 convicting the accused/appellants under Section 302/34 of the Indian Penal Code (for short 'the IPC') and sentencing each of them to undergo R.I. for Life and fine of Rs.1,000/-, in default to undergo additional R.I. for 06 months.

2. In the present case name of deceased is Valmiki, husband of PW-11 Ramwati.
3. The prosecution story, in brief, is that the deceased, his wife Ramwati and accused persons originally hail from District Sidhi (Madhya Pradesh) and they migrated to District Janjgir-Champa and started joint business of manufacturing bricks and tiles. It is further case of the prosecution that on account of some dispute regarding payment of tiles & bricks, they separated from each other. On the date of incident i.e. 31.5.2005, PW-11 Ramwati, wife of deceased, had gone to her parental home leaving behind her husband and two children. In the night intervening 31.5.2005 & 1.6.2005 the accused/appellants killed the deceased by causing several injuries to him by axe. Incident was witnessed by PW-10 Sanat Kumar, minor son of deceased who was sleeping along with the deceased. It is further case of the prosecution that on 1.6.2005 appellant No.2- Raghunath and appellant No.4 Ravendra informed PW-11 Ramwati that her husband has been killed by someone. On receiving such information, PW-11 Ramwati rushed to her house and on reaching there, her son i.e. Sanat (PW-10) informed her that it is the accused/appellants who had killed the deceased by causing several injuries to him by axe. On 1.6.2005 itself at about 10.30 a.m. FIR (Ex.P-25) under Section 302/34 IPC was registered by the police at the instance of PW-11 against the accused persons. Immediately thereafter Merg Intimation (Ex.P-33) was recorded. Inquest was prepared vide Ex.P-11. Body of the deceased was sent for post-mortem examination which was conducted by Dr. P.N. Mishra (PW-8) and he noticed following injuries on the body of deceased:-
 - Incised wound over right side of neck of 1½" x ½" x 1¼" in size.
 - Incised wound at middle of right side of neck of 2"x ½" x 1½" in size.
 - Incised wound on middle of right side of neck of 2"x ½" x ½" in size.

- Incised wound at the right upper side of neck of 2"x ½" x 1½" in size.
- Bruise & achymosis in front of neck of 3"x ½" in size.
- Bruise on right wrist joint of 3" x 2" in size.
- Four Abrasions at left hand.
- Bruise on left wrist point of 3"x 1½" in size.
- Echymosis on left hand at fifth metacarpal bone of 1½" x ½" in size.
- Bruise on the right leg of 2" x 1".
- Bruise on left leg of 1½" x 1" in size

The doctor has opined that cause of death was due to shock and asphyxia as a result of cutting of trachea and carotid vessel (right side) due to neck injury and the death was homicidal in nature. On 1.6.2005 itself diary statement of Sanat (PW-10) was recorded wherein he blamed the accused/appellants for committing murder of his father. The police statement of Ramwati (PW-11) was also recorded on 1.6.2005 itself and she has also stated that after coming to know about the murder of husband, she rushed to her house and on reaching there, it was disclosed by her son Sanat (PW-10) that it is the accused/appellants who had killed her husband.

4. On completion of investigation, charge sheet for the offence punishable under Section 302/34 IPC was filed against the accused/appellants and accordingly the charge was framed against them by the trial Court. The prosecution in order to bring home the charge levelled against the accused/appellant examined 15 witnesses in all. Statements of accused/appellants were recorded under Section 313 of Cr.P.C. in which they abjured their guilt and pleaded innocence & false implication.
5. After hearing the parties, the Court below has convicted & sentenced the accused/appellants in the manner as described above.
6. Counsel for accused/appellant submits that;
 - conviction of appellants is solely based on the evidence of Sanat

(PW-10), a child witness, but his evidence does not inspire confidence and is unreliable because he has specifically stated that he could not see the assailants at the time of incident as there was darkness at the spot. More so, this witness has been tutored by Ramlal (PW-13) and this fact has been admitted by him.

- If the incident was really witnessed by Sanat (PW-10), he would have disclosed the incident to villagers or his relatives but he failed to do so and this shows that he is a tutored witness. PW-6 & PW-7 to whom incident was allegedly disclosed by PW-10 have not supported the prosecution case and turned hostile.
- PW-12 & PW-15 who are the witnesses of memorandum of accused/appellant No.1 and seizure, have not supported the prosecution case.
- there is no report of FSL confirming presence of blood on the axe so seized by the prosecution.
- In support of the arguments, reliance is placed on the judgments in the matter of Bhagwan Singh & others v. State of MP reported in 2003 (2) CGLJ 9 and K. Venkateshwarlu v. State of Andhra Pradesh reported in 2012 Cri.L.J. 4388.

7. On the other hand, supporting the impugned judgment learned counsel for the State submits that conviction of accused/appellant is strictly in accordance with law and there is no illegality or infirmity in the same warranting interference by this Court. He further submits that there is no reason before this Court to disbelieve the testimony of Sanat (PW-10) who had witnessed the incident and immediately thereafter informed about the incident to PW-6 & 7 and these witnesses have duly supported the prosecution case. He further submits that at the time of incident Ramwati

(PW-11) was not in the house and had gone to her parental home and only after receiving information regarding murder of her husband, she returned home. It is also admitted fact that prior to her arrival, the villagers had gathered on the spot and PW-12 & PW-13 have deposed that on arrival of PW-11, Sanat (PW-10) had narrated her the entire incident to her. In these circumstances, it cannot be said that there was any chance of tutoring of this witness. He further submits that though it has come in the evidence of PW-11 that there was darkness on the spot yet this fact by itself cannot be lead to the inference that he had not seen the assailants of his father. He further submits that at the instance of accused/appellants bloodstained axe were seized vide seizure memo of Ex.P-15 and according to autopsy surgeon, the said axe was stained with human blood, however, the appellants did not offer any explanation as to how blood came on it. He further submits that it is not a thumb rule that the accused cannot be convicted on the sole testimony of a child witness. If the statement of child witness after due scrutiny inspires confidence, the conviction can be based on such statement. Referring to judgment cited by the counsel for the appellants, it has been argued by the State Counsel that in the said appeal acquittal of the accused was under challenge and the parameters in a case of appeal against conviction and appeal against acquittal are altogether different and therefore the said judgment is of no help to the accused/appellants.

8. We have heard counsel for the parties and perused the evidence available on record.
9. Devkumar Patel (PW-1) is the Patwari who prepared the spot map of Ex.P-1.
10. Bhushan Lal (PW-2) & Pooran Lal (PW-3) are the formal witnesses and

they are witnesses to seizure memos Ex.P-4, P-5 respectively. Memo of Ex.P-6 & P-7. Ram Awdhesh Singh (PW-4) is also a formal witness and he made an application for examination of seized axe and also sent the seized articles for chemical examination to the Forensic Science Laboratory, Raipur vide Ex.P-7.

11. Bhojram Satnami (PW-5), Jwala Prasad (PW-6), Chhatram (PW-7) did not support the prosecution case and as such declared hostile.

12. Dr. N.P. Mishra (PW-8) is the doctor who performed autopsy on the body of deceased and noticed the injuries as described above. He has stated that incised wounds present on the body of deceased were caused by some sharp edged weapon, whereas bruises & abrasions found on the body of deceased were caused by hard & blunt object. This witness has opined that cause of death was shock due to cutting of trachea & keratin of carotid vessel (right side) due to neck injury and the death was homicidal in nature. The query- whether the injuries present on the body of deceased could be caused by the axe produced before him, has been answered by this witness in the affirmative vide Ex.P-22.

13. Onkar Prasad Dubey (PW-9) is a formal witness and he took the body of deceased to the Government Hospital Dabhra for post-mortem examination.

14. Rambati (PW-11) is the wife of deceased and lodger of FIR (Ex.P-25) & Merg Intimation (PW-33). She has stated that a day prior to the incident she alone had gone to her parents house at village Sukhda. Next morning accused Raghvendra & Raghunath came to her and informed that somebody had murdered her husband by cutting him. On receiving this information, she along with her parents returned her home and saw that her husband was lying with his half neck cut. There was no clothes on the

body except the underwear. She has further stated that on her return home, she was informed by her son Sanat (PW-10) that all the four accused/appellants had assaulted his father by axe. Thereafter she went to the police station and lodged the FIR. The defence has not been able to elicit anything incriminating in her cross-examination which makes her testimony unreliable or untrustworthy.

15. Shivalal (PW-12) is the father-in-law of the deceased. He has stated that upon receiving information relating to murder of his son-in-law, he along with Rambati (PW-11) & others had gone to village Kusmus. He has further stated that his grandson Sanat Kumar (PW-11) told that the accused/appellants have killed his father in the night. Thereafter he along with other villagers had gone to the police station and lodged the report. In the cross-examination this witness has denied the suggestion that nothing was disclosed to him by Sanat Kumar (PW-11).

16. Ramlal (PW-13) is also father-in-law of deceased in relation. He has also stated that younger son of the deceased told that all the four accused persons had killed his father.

17. Budhram Baghel (PW-14) is the investigating officer who has duly supported the prosecution case. He has stated that on 1.6.2005 at 10.30 a.m. complainant Rambati (PW-11) had lodged the report of murder of deceased against the accused persons. On 2.6.2006 the statements of witnesses under Section 161 CrPC were recorded by him in presence of the witnesses. On the basis of disclosure statement of accused/appellant Rameshwar, one bloodstained axe was seized at his instance vide seizure memo of Ex.P-15 in presence of the witnesses.

18. Narendra Singh (PW-15) is the Constable who helped in the initial investigation.

19. The case of the prosecution mainly rests on the testimony of Sanat Kumar (PW-10), who is **child witness**, and was aged 6 years when his evidence was recorded. Before discussing the evidence of the child witness, it would be advantageous to refer to the law relating to child witness. Section 118 of the Evidence Act deals with the question of competency of persons to testify. Under this section, all persons are competent to testify, unless they are, in the opinion of the Court, (a) unable to understand the questions put to them, or (b) to give rational answers to those questions, owing to (i) tender years, (ii) extreme old age, (iii) disease of mind or body, or (iv) any other such cause. Even a lunatic, if he is capable of understanding the questions put to him and giving rational answers, is a competent witness. With respect to children, no precise age is fixed by law within which they are absolutely excluded from giving evidence on the presumption that they have not sufficient understanding. A child is not an incompetent witness by reason of its age. A child of tender years is not, by reason of its youth, as matter of law, disqualified as a witness. There is no precise age which determines the question of competency. According to Section 118 of the Evidence Act, a child of tender age is a competent witness if it appears that it can understand the questions put to it and give rational answers thereto. This section vests in the Court the discretion to decide whether an infant is or is not disqualified to be a witness by reason of understanding or lack of understanding. When a young child is a witness, the first step for the Judge or Magistrate to take is to satisfy himself that the child is the competent witness within the meaning of Section 118 of the Evidence Act and for this purpose, preliminary inquiry should be held. It is the duty of the Court to ascertain in the best way, which it can, whether from the extent of his intellectual capacity and

understanding the child witness is able to give a rational account of what he has seen, heard or done at a particular occasion or in other words, the witness understands the duty of speaking truth or not. Competency of young children can be ascertained by putting a few questions to them in order to find out whether they are intelligent enough to understand what they had seen and afterwards inform the court thereof. The holding of a preliminary inquiry is merely a rule of prudence and is not a legal obligation upon the Judge. It is desirable that after holding a preliminary inquiry, Judges and Magistrates maintain record incorporating opinion that the child understands the duty of speaking truth. Though no precise criteria for appraising the evidence of a child witness can be laid down, yet one broad test is whether there was possibility of any tutoring. If this test is found in positive, the Court will not, as a rule of prudence, convict the accused of a major offence on the basis of child evidence unless it is corroborated to material extent in material particulars, directly connecting the accused with the crime. At the same time, if otherwise the testimony of a child witness is not shown to be tainted with any such infirmities, it calls for due credence. A child in the innocent purity of its mind and unsophistication is more likely to come forth with version which is unbiased, unsoiled, natural and forthright. It is less prone to manipulation, motivation and spirit of vendetta. It can as well be spontaneous and inspiring, once the child is enabled to overcome the initial shock and awe, and ensured protection, security, compassion and given confidence to come out with what was seen. Further, some of the children are fairly intelligent, truthful and straight forward, and there is no reason to start with a presumption of untrustworthiness in the assessment of their evidence. The merit of evidence has to be judged on the touchstone of its own inherent intrinsic

worth.

20. In the matter of **Panchhi v. State of UP** reported in **(1998) 7 SCC 177** the

Hon'ble Supreme Court has held as under;-

“.....It cannot be said 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 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.”

21. With regard to the testimony of child witness the Hon'ble Supreme Court in **State of Karnataka v. Shantappa Madivalappa Galapuji & others** reported in **(2009) 12 SCC 731** had noticed the case law and held as under:

"The Indian Evidence Act, 1872 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. 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. {See **Suryanarayana v. State of Karnataka (2001) 9 SCC 129**}. In **Dattu Ramrao Sakhare v. State of Maharashtra [(1997) 5 SCC 341]** it was held as follows: (SCC p. 343, para 5) ;-

"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 demeanour must be like any other competent witness and there is no likelihood of being tutored."

22. The position of law relating to the evidence of a child witness has been dealt with also by the Apex Court in **Nivrutti Pandurang Kokate and others V. State of Maharashtra** reported in **2008 (12) SCC 565** and **Golla Yelugu Govindu v. State of Andhra Pradesh** reported in **(2008 (4) SCALE 569)**. In the case of **State of U.P. vs. Krishna Master & Others** reported in **(2010) 47 OCR (SC) 263** the Hon'ble Apex Court also has gone a step ahead in observing that a child of tender age who has witnessed the gruesome murder of his parents 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 his evidence.
23. The legal position which can be culled out from the aforesaid decisions is that before recording conviction on the solitary testimony of a child witness, the court has to ensure that he is a reliable witness. If his testimony is found to be trustworthy and reliable then conviction can be recorded on his sole testimony.
24. Having noticed the principles, we would now examine the evidence of child witness Sanat Kumar (PW-10). At the time of recording of evidence of Sanat Kumar (PW-10), his age was about 6 years and therefore the trial

Judge had asked certain questions to him and after satisfying itself of the fact that he understands the duty to speak truth and is able to rationally answer the questions put to him, the Court has examined him. This witness has deposed that he knows the accused persons present in the Court. His father has died. Accused Ramesh assaulted his father by axe. Accused Rabendra, Bhailal & Raghunath were also with him. He reiterated that accused Ramesh assaulted by axe and other accused persons were holding hands and legs of his father. Incident is of night and at that time he was awake. He has further stated that after assaulting his father, the accused fled from there. In the cross-examination this witness had denied the suggestions put to him that at the time of incident nothing was visible due to darkness on the spot and that he did not see accused Ramesh assaulting his father by axe.

According to diary statement of this witness, PW-6 & PW-7 are the first persons to whom he informed about the incident and names of the assailants. Though both the aforesaid witnesses have confirmed the presence of PW-10 on the spot but they did not support the prosecution case on the point that names of the assailants were disclosed to them by PW-10. However, in the cross-examination by the Additional Public Prosecutor, PW-7 has admitted that when he reached the spot at that time Sanat (PW-10) was saying while crying that it is the accused/appellants who have killed his father.

Evidence of PW-10 gets corroboration from the evidence of Rambati (PW-11), mother of the child witness and wife of deceased, to the extent that on her return home, her son immediately informed the names of accused persons and the manner in which his father had been done to death. Statement of the child witness is also supported from the medical

evidence. According to Dr. N.P. Mishra (PW-8), all the injuries were ante mortem in nature. The cause of death was shock due to cutting of trachea & right side of carotid vessel. He had given his opinion that the injuries present on the body of deceased could be caused by the weapon like axe. No ulterior motive was assigned by the defence to the child witness to make a false statement or that being aged about six years there was any infirmity in his understanding of facts perceived or his ability to narrate the same correctly.

There is no doubt that child witness Sanat Kumar (PW-10) in his cross-examination had stated at one place that at the time of incident there was no light in the room and due to darkness nothing was visible, but from this answer only it cannot be concluded that his evidence to the effect that he had actually seen the occurrence was false. In **State of Karnataka v. Shariff** reported in **(2003) 2 SCC 473** the prosecution witness of the occurrence was also a child witness whose mother had been murdered by his father. He had supported the prosecution case, however, during his cross-examination it was elicited from him that at the time when his mother had caught fire he was in his grandmother's house. The Supreme Court, however, did not attach any importance to this answer given by the child witness and relied upon his evidence and observed that on account of this stray sentence in his cross-examination his otherwise reliable testimony cannot be discarded. Relevant portion of the aforesaid judgment is reproduced herein below:-

“.....We are of the opinion that the testimony of PW3 is fairly reliable on the factum of the incident and the same cannot be discarded only on account of a stray sentence in his cross- examination where he has stated that when his mother caught fire he was in his grand-mother's house. The High Court did not examine the testimony of

this witness carefully and we find ourselves unable to agree with the view taken by it.”

25. In the present case also, PW-10 Sanat Kumar firstly in his statement recorded under Section 161 CrPC named the accused/appellants and attributed a specific role to them in the crime and after that in the court evidence also he stuck to his statement made during investigation in all material particulars. The role attributed to the respective accused/appellants is that accused Ramesh assaulted his father by an axe and remaining three accused persons had caught hold of hands and legs of his father. The accused being neighbours were very well known to him. It is also not the case where the child witness had remained silent for some days and related the incident thereafter only to any of his relatives. In these circumstances, the statement that there was darkness on spot would be of no significance and cannot be made a ground for doubting the veracity of PW-10 Sanat Kumar, child witness.

26. Considering the evidence of PW-7, who had deposed that when they visited the place of incident in the morning at that time Sanat Kumar (PW-10) was present on the spot and he was saying while crying that it is the accused/appellants who killed his father and further considering the fact that Rambati (PW-11), mother of PW-10, came on the spot thereafter, we are of the view that there was hardly any chance of tutoring. Being so, we are of the view that evidence of Sanat Kumar (PW-10) inspires confidence and there exists no likelihood of being tutored.

Another circumstance pointing towards the guilt of accused/appellants is that on the basis of disclosure statement made by accused/appellants, bloodstained axe & clothing were seized by the Investigating Officer vide seizure memo of Ex.P-15 to P-17. The doctor who examined the said axe, had noticed the stains like blood on the axe

seized at the instance of accused/appellant No.1. The questions in this regard were put to accused/appellants during their statement under Section 313 Cr.P.C., but except vague denial, they said nothing more.

27. Looking to the vivid description made by the child witness that it was the accused/appellants who committed murder of his father is not vulnerable to the framework of imagination and therefore the legal mandates cited by the counsel for the accused/appellants drawing support to negate the testimony of the child witness is altogether distinguishable on facts involved in the present case.
28. Thus, the cumulative effect of the above is that evidence of Sanat Kumar (PW-10) is truthful, reliable and inspires confidence. He has narrated the incident in a most natural way and the manner in which he has narrated the incident, inspires confidence of this Court. His evidence does not show that he was tutored. His testimony is not only corroborated by the medical evidence but also from statements of other prosecution witnesses who reached the spot in the morning. Therefore, it cannot be said that the trial Judge has erred in relying upon the testimony of Sanat (PW-10) while convicting appellants of the offence punishable under Section 302/34 IPC.
29. Accordingly, the appeal being without substance is liable to be dismissed and it is dismissed as such. Since the accused/appellants are already in custody no extra direction is needed regarding their surrender etc.

(Pritinker Diwaker)
Judge

(R.P. Sharma)
Judge

roshan/-