

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 650 of 2012

- Nand Kumar Sahu S/o Shri Keshoram Sahu Aged About 49 Years
R/o Village - Amurda, Chowki-Patewa, Ps Tumgaon, Distt.
Mahasamund C.G. , Chhattisgarh

---- Appellant

Versus

- State Of C.G. S/o Through Ps- Tumgaon, Distt. Mahasamund C.G. ,
Chhattisgarh

---- Respondent

For Appellant	: Shri Jameel Akhtar Lohani, Advocate
For Respondent/State	: Shri Rahul Tamaskar, P.L.

Hon'ble Shri Justice Pritinker Diwaker

Hon'ble Shri Justice Sanjay Agrawal

Judgement on Board

06/03/2018

This appeal arises out of the judgment and order dated 26.03.2012 passed by the Second Additional Sessions Judge, Mahasamund in Sessions Trial No. 32/2011 convicting the accused/appellant under Section 302 IPC and sentencing him to undergo imprisonment for life and to pay fine of Rs. 1,000/- with default stipulation.

2. As per prosecution case, deceased Parvati Patel aged 30 years was having affair with the appellant. On 25.02.11 when deceased was guarding her field along with her minor son Ajay (PW-8) aged about 10 years, accused/appellant reached there and asked the deceased for sexual favour. When the deceased refused to accompany him for the same, he committed her murder by causing

several injuries. Unnumbered merg ExP-3 was recorded on 25.02.2011 by Makhan Lal Patel (PW-4) against unknown persons. On the next day numbered merg Ex.P-27 was recorded. Immediately thereafter *dehati nalishi* Ex.P-4 was registered at 10.55 p.m. Inquest Ex.P-18 on the body was prepared and body was sent for postmortem examination which was conducted by Dr. V.P.Singh vide Ex.P-12 and according to him, cause of death was cardiorespiratory arrest due to excessive hemorrhage and multiple chop injuries present on the body and death was homicidal in nature. Memorandum of accused/appellant Ex.P-6 was recorded on 26.02.2011 wherein he has stated as to the manner in which he killed the deceased. Based on this memorandum seizure of axe and clothes of the appellant were made vide Ex.P-6 & P-9. Seized articles were sent for FSL however there is no FSL report on record. After receiving the postmortem report and on the basis of memorandum of the appellant unnumbered FIR Ex.P-20 was registered on 26.02.2011 at Chowki Patewa under Section 302 IPC against the appellant. On the next day i.e. 27.02.11 FIR Ex.P-21 was registered against the appellant under Section 302 IPC. After filing of charge sheet, the trial judge has framed charge against the appellant under Sections 302 IPC.

3. In order to establish the guilt of the accused/appellant, prosecution has examined 16 witnesses. Statement of the accused/appellant was recorded under Section 313 of the Cr.P.C. in which he denied the charges levelled against him and pleaded his innocence and false implication in the case.

4. After hearing the parties, the trial Court by judgment impugned, has convicted and sentenced the accused/appellant as mentioned in

paragraph 1 of the judgment. Hence the present appeal.

5. Contention of counsel for the appellant is as under :

i) that the appellant has been convicted solely on the basis of statement of child witness Ajay (PW-8) but there are material contradictions in his court statement.

ii) that the child witness Ajay (PW-8) is not sure as to whether he had seen the incident from the front side or back side. It has been argued that the possibility of Ajay (PW-8) being tutored by his relatives cannot be ruled out.

lii) that other witnesses to the incident have not supported the prosecution case.

iv) that though on the memorandum of the accused/appellant certain seizures have been affected but in absence of FSL and serological report, seizure is of no consequence.

v) In support of the arguments he has placed his reliance on the judgments in the matter of Chamar Singh & Others Vs. State of CG reported in 2012 (2)CGLG 126; Surain Singh Vs. State of Punjab reported in 2017 (5) SCC 796 and Shivsharanappa Vs. State of Karnataka reported in 2013 (5) SCC 705.

6. On the other hand, State counsel while supporting the judgment impugned has submitted that the conviction of the 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 though Ajay (PW-8) is a child witness but in the court he is very firm and has categorically stated as to the manner in which his mother

was killed. He submits that PW-8 has not been confronted from his diary statement and thus it cannot be said by the appellant that PW-8 is not consistent. He further submits that immediately after seeing the occurrence PW-8 has narrated the entire incident to his grandmother (Hira Bai PW-12) who has also duly supported the prosecution case. He submits that if the statement of child witness after due scrutiny inspires confidence, the conviction can be based only on such statement.

7. Heard counsel for the parties and perused the material available on record.

8. Ajay (PW-8) is the son of the deceased aged about 10 years. After being satisfied that the witness is capable enough to make statement the court has recorded his statement. He has stated that on the date of incident he and his mother were guarding the field and at that time accused/appellant reached there abused his mother and asked her to accompany him but his mother refused to go with the appellant and thereafter the appellant left the said place. However immediately after sometime he again came and asked his mother to accompany him but she refused to go with him. He has stated that in the evening when they were leaving the field to their home, on the way accused/appellant again met them and asked his mother to come near the tube well but she refused and then accused/appellant after holding her hair dragged towards the tube well and assaulted with axe on her left shoulder. He has further stated that on seeing this he ran away and informed about the same to his grandmother. In cross-examination he remained firm and has reiterated as to the manner in which his mother was killed. It is relevant to note here that this witness

has not been confronted from his diary statement. Heera Bai (PW-12) is the grand mother of PW-8 and mother of the deceased while supporting the prosecution case has stated that on the date of incident deceased and his son had gone to guard the field and in the evening at about 5.00 p.m. Ajay (PW-8) returned to his house alone and when she asked him about the deceased he informed that it is the appellant who had killed the deceased. In cross-examination this witness also remained firm. Dr.Vijay Pratap Singh (PW-9) is the doctor who conducted postmortem examination on the body of deceased vide Ex.P-12 and according to him cause of death was cardiorespiratory arrest due to excessive hemorrhage and multiple chop injuries present on the body and death was homicidal in nature. Pramila Mandavi (PW-13) is the Investigating Officer who has duly supported the prosecution case. Nisha Ali (PW-1) is the patwari who prepared spot map Ex.P-1. Hariram Diwan (PW-2) has not stated anything and has turned hostile. Makhan Lal Patel (PW-4) is the lodger of merg, dehati nalishi and FIR. Preet Ram Sahu (PW-5) is a witness to memorandum Ex.P-6 and seizure Ex.P-7 by which axe was seized has supported the prosecution case. Uttam Sahu (PW-10) and Thanu Ram (PW-11) have not stated anything against the appellant and have turned hostile. Vishnu Prasad Sahu (PW-14) has lodged the merg intimation Ex.P-3. Kumar Singh Usendi (PW-15) and Subash Nand (PW-16) are the Head Constables who assisted in the investigation.

9. Case of the prosecution mainly rests on the testimony of Ajay (PW-8) son of the deceased, who is a child witness and was aged about 10 years at the time of recording his evidence. Before discussing the evidence of child witness, it would be beneficial 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.

10. In the matter of **Panchhi v. State of UP reported in (1998) 7 SCC 177** the Hon'ble Apex 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.”

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

"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."

12. 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.

13. The legal position which can be taken into consideration 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. The fact of PW-8 being a child witness would require the court to scrutinize

his evidence with care and caution. If he is shown to have stood the test of cross-examination and there is no infirmity in his evidence, the prosecution can rightly claim a conviction based upon his testimony alone.

14. Having noticed the principles, we would now examine the evidence of child witness Ajay (PW-8). At the time of recording of evidence his age was about 10 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. 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 purpose of holding the accused guilty.

15. Close scrutiny of the evidence makes it clear that on 25.02.11 when the deceased was keeping guard on her field along with her son Ajay (PW-8) accused/appellant reached there, has asked for sexual favour and when the deceased refused to accompany him he committed her murder by causing axe injuries. The incident has been witnessed by the son of the deceased Ajay PW-8 who has duly supported the prosecution case. Hence, we are of the considered view that the child witness PW-8 is firm, reliable and his statement inspires confidence of the Court. Furthermore immediately after seeing the incident PW-8 rushed to his house and narrated the entire incident to his grand mother Hera Bai (PW-12) who has also supported the prosecution case.

16. Taking the cumulative effect of the evidence we are of the view that the the evidence of child witness (PW-8) is truthful, reliable and inspires confidence. The trial court has been fully justified in convicting the accused/appellant under Section 302 IPC and the findings so recorded by it are based on correct appreciation of evidence on record. The material available on record leads this Court to arrive at one and the only conclusion that it is the accused/appellant who has committed murder of the deceased. Thus, the appeal appears to be without substance and it is dismissed accordingly. Judgment impugned being based on the correct appreciation of evidence is hereby affirmed. Being already in custody, no order in respect of arrest etc. of the accused is necessary.

Sd/-

(Pritinker Diwaker)
Judge

Sd/-

(Sanjay Agrawal)
Judge