

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 1174 of 2014**

- Lochan Das Mahant S/o Sukhidas Mahant, aged about 39 years. Occupation - Labour, R/o village - Purani Basti Kharsiya, P.S. - Kharsiya, Civil & Revenue District Raigarh (C.G.)

---- Appellant**Versus**

- State of Chhattisgarh Through : The District Magistrate, Raigarh, District Raigarh (C.G.)

---- Respondent

For Appellant	:	Shri Sunil Sahu, Advocate.
For Respondent.	:	Shri Ravindra Agrawal, Govt. Advocate

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Sanjay Agrawal

Judgment on Board**Pritinker Diwaker, J****15/03/2018**

This appeal arises out of the judgment of conviction and order of sentence dated 01.09.2014 passed by the 1st Additional Sessions Judge, Raigarh, in S.T. No.153/2011 convicting the accused/appellant under Section 302 IPC and sentencing him to undergo imprisonment for life with fine of Rs.10,000/-, in default of payment of fine amount to further undergo R.I. for one year.

02. In the present case, name of deceased is Neeraj @ Niras Bai, wife of the accused/appellant. Their marriage was solemnized about 9-10 years prior to the date of incident.

03. Case of the prosecution is that on 27.06.2011 in the evening accused/appellant assaulted his wife and when she became unconscious he left her as it was and went to attend the marriage in his relatives' house along with his son Roshan (PW/4), aged 9-10 years. In

the said party, accused/appellant consumed liquor and after returning to his house, at about 10:30 PM he poured kerosene oil on his wife Neeraj @ Niras Bai and set her ablaze in his bed room. After the incident, on 28.06.2011 at 1:00 AM, accused/appellant took his wife Neeraj to Community Health Center, Kharsiya where she was medically examined by Dr. R.K. Singh (PW/3) who gave MLC (Ex.P/6) noticing 90% burn injuries on her body. An information to this effect was sent to police station vide Ex.P/8. On 01.07.2011, during treatment deceased succumbed to her injuries and on 02.07.2011 merger intimation (Ex.P/5) was recorded to this effect. On the same day, inquest on the body of deceased was conducted vide Ex.P/19 and body was sent for postmortem examination to Government K.G. Hospital, Raigarh vide Ex.P/10-A which was conducted by Dr. Anil Kumar (PW/6) with Dr. (Smt.) Jyoti Ekka who gave his report (Ex.P/10) noticing burn all over the body including hand and face. No external injury was seen all over the body. The Autopsy Surgeon opined the cause of death of deceased to be shock due to excessive burn all over the body leading to septicemia infection.

04. On the basis of written report (Ex.P/11) dated 06.07.2011 lodged by Amrit Das (PW/7), father of the deceased, initially un-numbered FIR (Ex.P/13) was registered on 12.09.2011 under Sections 498-A, 304-B of IPC against the accused/appellant followed by numbered FIR (Ex.P/17) on the same day. After filing of the charge sheet, the trial Court framed the charge against the accused/appellant under Sections 498 (A), 304-B and 302 of IPC.

05. So as to hold the accused/appellant guilty, the prosecution

examined as many as 11 witnesses. Statement of the accused/appellant was also recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implication. In defence, he examined two witnesses.

06. The trial Court after hearing counsel for the respective parties and considering the material available on record has convicted and sentenced the accused/appellant as mentioned in para-1 of this judgment. Hence, this appeal.

07. Learned counsel for the appellant submits :

(i) That the accused/appellant has been convicted mainly on the basis of statement of Roshan (PW/4), a child witness aged 9-10 years. It has been argued that the child witness is not reliable as he has been tutored by the parents and relatives of the deceased.

(ii) That there is inordinate delay in recording 161 Cr.P.C. statement of PW/4. The incident occurred on 27.06.2011 and his diary statement was recorded on 24.08.2011.

(iii) That present appears to be a case of suicide where unfortunately the accused/appellant has been falsely implicated in the crime in question.

08. On the other hand, supporting the impugned judgment it has been argued by learned counsel for the State that Roshan (PW/4), son of the accused/appellant and deceased, is reliable and trustworthy witness and has categorically stated as to the manner in which his mother was burnt by the appellant. He further submits that prior to recording of 161 Cr.P.C. statement of PW/4, his merged statement was also recorded. Most

importantly this witness has not been confronted from his diary statement. He also submits that present is a case of house murder where accused/appellant and the deceased were residing along with two minor children and it is for the appellant to explain as to how the deceased died unnatural death. However, no probable explanation has been offered by the appellant in his statement recorded under Section 313 Cr.P.C.

09. We have heard learned counsel for the parties and perused the material available on record.

10. Dr. R.K. Singh (PW/3) medically examined the deceased when she was brought to CHC Kharsiya and gave MLC (Ex.P/6) noticing 90% burn injuries. He has stated that he noticed smell of kerosene oil on the clothes of the deceased.

11. Dr. Anil Kumar (PW/6) conducted postmortem of the deceased along with one Dr. (Smt.) Jyoti Ekka and opined the cause of death of deceased to be shock due to excessive burn all over the body leading to septicemia.

12. Jagjit Singh (PW/8) - Investigating Officer has duly supported the prosecution case.

13. Bharat Lal (PW/1) is a formal witness.

14. Padmalochan Yadav (PW/2) is a ward boy who gave information about the death of deceased to City Kotwali.

15. Hemeshwari (PW/5) is younger sister of the deceased who at the relevant time was residing with the appellant and deceased. She has stated that her sister was subjected to cruelty by the accused/appellant and that the appellant was a habitual drunkard.

16. Amrit Das (PW/7) is the father of deceased who made written report (Ex.P/11).
17. Rajendra Yadav (PW/9) is the photographer who did videography of the place of occurrence.
18. Uma Gupta (PW/10) is a witness to inquest made under Ex.P/19.
19. S.S. Khan (PW/11) - Assistant Sub Inspector, assisted in the investigation.
20. Vimal Das (DW/1) has stated that he was accompanying the accused/appellant when the deceased was being taken to hospital. He states that the deceased informed him that she burnt herself.
21. Sakir Ali Siddiqui (DW/2) has stated that after the incident deceased informed him that she set herself on fire.
22. In 313 Cr.P.C. statement, the accused/appellant has stated that out of anger the deceased committed suicide and at that time he was sleeping in the house. He has also stated that while the fire was being extinguished his hands were also burnt and that he has been falsely implicated in the crime by his in-laws. It is relevant to note that there is no medical report or any document showing the fact that the appellant had suffered any burn injury.
23. The case of the prosecution mainly rests on the testimony of Roshan (PW/4), who is a **child witness**, aged about 11 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 person 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.

24. 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.”

25. 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 reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

26. 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.

27. 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.

28. Having noticed the principles, we would now examine the

evidence of child witness Roshan (PW/4), son of the accused/appellant and deceased. At the time of recording of evidence of Roshan (PW/4), his age was about 11 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. He has stated that on the date of incident his aunt had given mobile to his mother for charging the same. After about half an hour his father came to the house and inquired about the said cell phone and being dissatisfied with the reply started beating his mother. After beating, his father went to shop and mother became unconscious. After about half an hour, his father came back to house and injected his mother, thereafter, his father took him in a marriage ceremony. He has also stated that he, his father and sister had gone to attend the marriage, there his father consumed liquor, however, they did not eat food there and came back to the house. After return, his father served food to his sister Nandani and thereafter went to puja room, brought kerosene oil and match box, poured the same on his mother and set her ablaze. After burnt, his mother was taken to Kharsiya hospital where she breathed her last and from hospital, he (this witness) was taken by his aunt. In lengthy cross-examination, but for minor contradictions he remained firm and has reiterated as to the manner in which his mother was burnt by the appellant. This witness has not been confronted from his diary statement.

29. Close scrutiny of the evidence makes it clear that on 27.06.2011 the accused/appellant was there in his house along with the deceased and his two minor children aged about 9 years and 5-6 years

respectively. On the same day at about 10.30 pm, deceased suffered 90% burn injuries, she was taken to hospital where she was medically examined by PW/3 who gave MLC (Ex.P/6) noticing 90% burn injuries and smell of kerosene oil coming from her clothes and on 01.07.2011 during treatment she succumbed to her burn injuries. The incident was witnessed by Roshan (PW/4), son of the accused/appellant and the deceased, aged 9 years at the time of incident and has described as to the manner in which the entire incident occurred and as to how his mother has been burnt by the accused/appellant. The statement of this witness is also supported from the medical evidence. According to Dr. Anil Kumar (PW/6), the cause of death was excessive burn all over the body leading to septicemia. No ulterior motive was assigned by the defence to the child witness to make a false statement or that being aged about 11 years there was any infirmity in his understanding of facts perceived or his ability to narrate the same correctly. Though there is delay in recording 161 Cr.P.C. statement of PW/4 but he has not been confronted from his diary statement. Considering the facts and circumstances, in particular the statement of PW/4, we have no reason to disbelieve the statement of this witness. In our considered view, PW/4 appears to be trustworthy and reliable witness & inspire full confidence of this Court.

30. Another circumstance pointing towards the guilt of accused/appellant is that in the house in question accused/appellant and his wife were residing along with their two minor children and the deceased died unnatural death in the house in question after sustaining 90 burn injuries.

31. In case where house murder is the issue, heavy burden is on the shoulders of accused to explain as to under what circumstances the deceased died. While dealing with the matter involving the murder committed inside the house it has been held by the Apex Court in the matter of **Trimukh Maroti Kirkan v. State of Maharashtra** reported in **(2006) 10 SCC 681** as under:

“ 14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecutions* (1944 AC 315) – quoted with approval by Arijit Pasayat, J in *State of Punjab v. Karnail Singh* (2003) 11 SCC 271). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be held. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

“(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him.”

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

32. Further in the matter of **State of Rajasthan v. Thajkur Singh** reported in **(2014) 12 SCC 211** it has been held by the Apex Court as under:

"17. In a specific instance in Trimukh Maroti Kirkan v. State of Maharashtra (2006) 10 SCC 681) this Court held that when the wife is injured in the dwelling home where the husband ordinarily resides, and the husband offers no explanation for the injuries to his wife, then the circumstances would indicate that the husband is responsible for the injuries. It was said: (SCC p. 694, para 22)

"22 Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime."

18. Reliance was placed by this Court on *Ganeshlal v. State of Maharashtra* {(1992) 3 SCC 106} in which case the appellant was prosecuted for the murder of his wife inside his house. Since the death had occurred in his custody, it was held that the appellant was under an obligation to give an explanation for the cause of death in his statement under Section 313 of the Code of Criminal Procedure. A denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant was a prime accused in the commission of murder of his wife.

19. Similarly, in *Dnyaneshwar v. State of Maharashtra* {(2007) 10 SCC 445} this Court observed that since the deceased was murdered in her matrimonial home and the appellant had not set up a case that the offence was committed by somebody else or that there was a possibility of an outsider committing the offence, it was for the husband to explain the grounds for the unnatural death of his wife.

20. In *Jagdish v. State of MP* {(2009) 9 SCC 495} this Court observed as follows: (SCC 503, para 22)

“22... It bears repetition that the appellant and the deceased family members were the only occupants of the room and it was therefore incumbent on the appellant to have tendered some explanation in order to avoid any suspicion as to his guilt.”

21. More recently, in *Gian Chand v. State of Haryana* {(2013) 14 SCC 420} a large number of decisions of this Court were referred to and the interpretation given to Section 106 of the Evidence Act in *Shambhu Nath Mehra* was reiterated. One of the decisions cited in *Gian Chand* is that of *State of WB v. Mir Mohammad Omar* which gives a rather telling example explaining the principle behind Section 106 of the Evidence Act in the following words: (*Mir Mohammad Omar case* (2000) 8 SCC p 393 para 35)

“35. During arguments we put a question to the learned Senior Counsel for the respondents based on hypothetical illustration. If a boy is kidnapped from the lawful custody of his guardian in the sight of his people and the kidnappers disappeared with the

prey, what would be the normal inference if a mangled dead body of the boy is recovered within a couple of hours from elsewhere. The query was made whether upon proof of the above facts an inference could be drawn that the kidnappers would have killed the boy. The learned Senior Counsel finally conceded that in such a case the inference is reasonably certain that the boy was killed by the kidnappers unless they explain otherwise.”

22. The law, therefore, is quite well settled that the burden of proving the guilt of an accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts.”

33. The accused/appellant in his 313 Cr.P.C. statement has merely stated that out of anger the deceased committed suicide after pouring kerosene oil on her and set herself ablaze and while he was extinguishing the fire he also sustained burn injury in his hand but there is no medical report (MLC) available on record to that effect and thus the stand taken by him gets falsified. The defence taken by the accused/appellant in his statement recorded under Section 313 Cr.P.C. and evidence of defence witnesses (DW/1 & DW/2) do not appear to be trustworthy in view of statement of PW/4.

34. Thus, the cumulative effect of the above is that evidence of Roshan (PW/4) 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. Therefore, it cannot be said that the trial Judge has erred in relying upon the testimony of Roshan (PW/4)

while convicting appellant of the offence punishable under Section 302 IPC.

35. Accordingly, the appeal being without substance is liable to be dismissed and it is dismissed as such. Since the accused/appellant is already in custody no extra direction is needed regarding his surrender etc.

Sd/-
(Pritinker Diwaker)
JUDGE

Sd/-
(Sanjay Agrawal)
JUDGE