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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL. A. 15/2019**

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Judgment reserved on: 05.12.2019

Judgment pronounced on: 23.12.2019

KRISHNA KUMAR RAO

.....Appellant

Through:

Mr. Kanhaiya Singhal, Ms. Heena
Tongri and Mr. Arshid Bashir,
Advs

versus

STATE NCT OF DELHI

..... Respondent

Through:

Ms. Aashaa Tiwari, APP for State
with Insp. Yash Pal Singh, IO
Sec. Unit, Insp. Rajender Khatri,
P.S. K.N.K. Marg and Insp.
Vishesh Kumar, PS Bhalswa
Dairy

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J.

1. The present appeal has been filed under Section 374(2) of the Code of Criminal Procedure, (hereinafter referred as 'Cr.P.C.'), against the judgment dated 22.10.2018 and order on sentence dated 19.11.2018 passed by the learned Additional Sessions Judge, Delhi in Sessions Case No. 58040/2016 in FIR No. 506/2011 registered under Sections 498A/302/304B and 174A of the Indian Penal Code (hereinafter referred as 'IPC') at Police Station KNK Marg, whereby the appellant was convicted and sentenced to imprisonment for a period of one year

for the offence punishable under Section 174A IPC and imprisonment for life along with a fine of Rs.10,000/- for the offence punishable under Section 302 IPC and in default of payment of fine to undergo further simple imprisonment for a period of three months. Both sentences were directed not to run concurrently.

2. Brief facts of the case, as noticed by the learned trial court, are as under: -

“1. that on 21.12.2011 Sh. Sudama Singh came to the police station and informed the police about his visit to matrimonial home of his daughter where he found lock on the main door and felt foul smell coming from the flat. He also alleged that husband of her daughter used to harass her daughter for bringing more dowry.

2. On his information, police went to flat No. 1-2/123, Sector -16, Rohini and got the lock of the door opened and found dead body of Menka, daughter of Sudama Singh lying on the bed at the first floor. Executive Magistrate, Saraswati Vihar was called at the spot and spot was also got inspected and photographed by the crime team. Executive Magistrate Sh. R.P Singh recorded statement of Sh. Sudama Singh, who levelled the allegations of demand of motorcycle and cash by the husband of his daughter.

3. It was also alleged that his son-in-law was also involved in a rape case, who was released from jail after four years and during the said period he had borne expenses of maintenance of his daughter and daughter's daughter aged four years. He also narrated various incidents when his daughter was beaten by his son-in-law. He also narrated about registration of case against his son-in-law Krishan Kumar Rao for demand of dowry at PS Bariya, Bihar and compromise in the said case. He further stated that his daughter had informed him that even after compromise her husband Krishan Kumar Rao was demanding money and motorcycle and used to beat

her.

4. He further stated that when the lock of the abovesaid flat was opened by the police, his son-in-law Krishan Kumar Rao and grand-daughter Mahi were not present in the house and that he had suspicion that his daughter was killed by his son-in-law.

5. On the basis of statement of Sh. Sudama Singh case u/s 498A/304B/34 IPC was registered. IO collected the exhibits from the spot and conducted investigation. He also got conducted postmortem of the deceased and collected documents including copies of other case registered against accused Krishan Kumar Rao. Exhibits were sent to FSL by IO. During investigation the daughter of deceased was recovered from village Lokariya, P.S Bariya, Bihar. Accused Krishan Kumar Rao had absconded and was declared proclaimed offender by the Court of concerned M.M. During investigation he was arrested and his disclosure statement was recorded. He also got recovered the car which was used by him for fleeing away to Bihar with his daughter and pointed out the place of occurrence, which had been purchased by Smt. Ruchi Baj in the auction of Oriental Bank of Commerce. IO also made interrogation from the brothers-in-law of deceased namely Surender Kumar Rao, Subhash Kumar Rao and Manmohan Rao. He collected FSL result and on the basis of disclosure statement, injuries reflected in the post-mortem report and cause of death, the opinion of Autopsy Surgeon on the weapons of offence found near the body of deceased, he added offence U/s 302 IPC.”

3. After completion of the investigation, a charge sheet was filed and charges for the offences punishable under Section 498A/302 of the IPC or alternatively under Sections 304B and 174A of the IPC were framed against the appellant/accused, to which he pleaded not guilty and claimed trial.

4. To bring home the guilt of the appellant/accused the prosecution has examined 28 witnesses in all. Statement of the appellant/accused was recorded under Section 313 of Cr.P.C wherein he claimed innocence and stated that he had been falsely implicated in the present case.
5. After hearing counsel for both the sides and on appreciation of entire evidence available on record, the learned Trial Court convicted the appellant for the offences under Section 302 and 174A of the IPC and giving the benefit of doubt to the appellant for the charges under Sections 498A/304B of the IPC, acquitted the appellant for the said charges.
6. Learned counsel for the appellant, Mr. K. Singhal opened his arguments contending that the case of the prosecution is primarily based on the ocular evidence of the child witness Mahi, who happens to be the girl child born out of the wedlock of the deceased and the appellant.
7. Learned counsel further argued that no statement of the girl child was recorded under section 164 of the Cr.P.C despite the fact that she is the prime witness to the alleged incident. Arguing along the same lines, the counsel for the appellant submitted that the statement of the PW-4 (Baby Mahi) was recorded before the Trial Court after a delay of 2 years, which gave the prosecution enough time to tutor the child witness with the story favourable to its case. Moreover, learned counsel for the appellant argued that from the testimony of PW-5 (Sh. Pramod Singh), the presence of PW-4 (Baby Mahi) is highly doubtful at the spot on the date of commission of the crime who deposed that the PW-4 (Baby Mahi) was residing with her Uncle

since Diwali. Negating the testimony of the girl child, the learned counsel argued that the child witnesses are dangerous witnesses as they are pliable and liable to be influenced, shaped and moulded easily. Learned counsel placed reliance on *Dattu Ramrao Sakhare vs. State of Maharashtra* reported in (1997) 5 SCC 341, *Ranjeet Kumar Ram vs. State of Bihar* reported in 2015 (6) SCALE 529 and *Abhay Kumar Mishra vs. State* reported in 2018 SCC Online Del 7851.

8. For his next contention, the learned counsel placed reliance on the medical and scientific evidence on record. On the basis of the post-mortem report, learned counsel argued that the record reflects that there were numerous injuries on the body of deceased which is contrary to the deposition made by the PW-4 (Baby Mahi) who deposed that only a single blow was given by the appellant on the victim. Moreover, learned counsel for the appellant argued that the FSL report is clearly contrary to the version put forth by the prosecution as no blood was recovered on the weapon of offence which has been alleged to be used in the commission of the crime.
9. In addition to the aforesaid learned counsel argued that the prosecution failed to lift any chance prints/finger prints from the spot/place of incident even though the place of occurrence was a locked house, which is a grave lacuna on part of the prosecution.
10. Further, the learned counsel contended that the trial court failed to take into consideration the plea of alibi raised by the appellant. He contended that the appellant had already left for his village 10-12 days prior to the date of incident and was not present at the spot which is evident from his statement under section 313 Cr.P.C. The learned

counsel further contended that the mere abscondence of the appellant cannot be taken as an incriminating factor against the appellant and placed reliance on *Bipin Kumar Mondal vs. State of West Bengal* reported in *AIR 2010 SC 3638* and *Sujit Biswaj vs. State of Assam* reported in *2013 (12) SCC 406*.

11. The learned counsel for the appellant contended that the prosecution failed to prove any motive on the part of the appellant which is also fatal to the case of the prosecution.
12. Finally, concluding the submissions on behalf of the appellant, the learned counsel contended that even if this court is of the view that the appellant is guilty, still, at best, the appellant is liable for an offence under section 304 Part I of the IPC as there was no intention on the part of the appellant to commit such an offence which is evident from the testimony of PW-4 (Baby Mahi). In support of his contention, he relied upon *Golla Yelugu Govindu vs. State of Andhra Pradesh* reported in *(2008) 16 SCC 769*, *K. Ravi Kumar vs. State of Karnataka* reported in *(2015) 2 SCC 638* and *Feroz vs. State* reported in *2018 SCC Online Del 6457*.
13. On the other hand, learned APP for the state contended that the learned trial court has convicted the appellant after having analysed each and every relevant material on record and that the well-reasoned judgment of the learned Trial Court does not call for any interference. Further, the learned APP contended that the testimony of PW-4 (Baby Mahi) who is the star witness in the present case duly supports the case of the prosecution. Placing reliance on the *Suryanaryana vs. State of Karnataka* reported in *2001 (1) SCALE 7*, she submitted that

the testimony of the child witness can form the basis of the conviction in the present case.

14. Further, the learned APP submitted that there is no doubt as to the presence of PW-4 (Baby Mahi) at the house of the appellant as the appellant in his statement under section 313 Cr.P.C has himself admitted that he was residing with his wife and daughter in that particular house. The learned APP further contended that the submission of the appellant that he was not at the spot of crime and had gone to his village is not supported with any material on record.
15. Learned APP further contended that the appellant has failed to mention any prior enmity or grudge with any other person in his statement under section 313 Cr.P.C. Moreover, the learned APP for the state contended that the conduct of the appellant after commission of the crime i.e. keeping his mobile phone switched off, leaving his four year old daughter at the mercy of his relatives is admissible as res gestae under section 6 and 8 of the Indian Evidence Act, from which, an adverse inference against the appellant can be drawn.
16. Further, negating the contention of the appellant as to plea of alibi, the learned APP argued that the testimony of PW-18 (HC Shiv Kumar) clearly reflects that the appellant was residing in Delhi for the past 10 months, which contradicts the stand of the appellant.
17. In addition to the aforesaid, learned APP contended that PW-22 (Dr. Sudesh Kumar) proved on record the post mortem of the deceased. Learned APP further argued that the charge under section 174A of the IPC i.e. the proclamation of the appellant as a Proclaimed Offender has been proved by the prosecution by relying on

Ex. PW-18/G and **Ex. PW-18/F** being the order of proclamation and the statement of HC Shiv Kumar who executed the proclamation order respectively.

18. Concluding her submissions, learned APP for the state argued that there exist certain contradictions, omissions, inconsistencies and embellishments in the testimony of the prosecution witnesses but the same are not such which go to the root of the present case and cannot form the basis of acquittal of the appellant. In support of her contention, learned APP relied on the case of **Yogesh Singh vs. Mahabeer Singh and Ors. reported in AIR 2016 SC 5160**.
19. We have heard the learned counsel for the appellant as well as the state.
20. The case of the prosecution is primarily based upon the testimony of the child witness Mahi, the daughter of the deceased and the appellant, who was examined as PW-4 (Baby Mahi). In order to finally adjudicate the present case, we deem it appropriate to refer to the well settled law in regard to the testimony of a child witness.
21. In **Digamber Vaishnav and Ors. vs. State of Chhattisgarh** reported in **AIR 2019 SC 1367**, the Apex Court has recently reiterated the well settled principles of the law relating to testimony of child witness. The relevant portions of the said judgment have been reproduced as under:

“21. The case of the prosecution is mainly dependent on the testimony of Chandni, the child witness, who was examined as PW-8. Section 118 of the Evidence Act governs competence of the persons to testify which also includes a child witness. Evidence of the child witness and its credibility could depend upon the facts and circumstances of each case. There is no Rule of

practice that in every case the evidence of a child witness has to be corroborated by other evidence before a conviction can be allowed to stand but as a prudence, the court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that witness must be a reliable one.

22. This Court has consistently held that evidence of a child witness must be evaluated carefully as the child may be swayed by what others tell him and he is an easy prey to tutoring. Therefore, the evidence of a child witness must find adequate corroboration before it can be relied upon. It is more a Rule of practical wisdom than law. [See *Panchhi and Ors. v. State of U.P.*, (1998) 7 SCC 177, *State of U.P. v. Ashok Dixit and Anr.* (2000) 3 SCC 70, and *State of Rajasthan v. Om Prakash*, (2002) 5 SCC 745].

23. In *Alagupandi alias Alagupandian v. State of Tamil Nadu*, (2012) 10 SCC 451, this Court has emphasized the need to accept the testimony of a child with caution after substantial corroboration before acting upon it. It was held that:

36. It is a settled principle of law that a child witness can be a competent witness provided statement of such witness is reliable, truthful and is corroborated by other prosecution evidence. The court in such circumstances can safely rely upon the statement of a child witness and it can form the basis for conviction as well. Further, 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 that there exists no likelihood of being tutored. There is no Rule or

practice that in every case the evidence of such a witness be corroborated by other evidence before a conviction can be allowed to stand but as a Rule of prudence the court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Further, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable.”

22. In *State Of M.P vs. Ramesh & Anr* reported in (2011) 4 SCC 786, the Apex Court while taking into consideration its previous decisions has held as under:

“7. In Rameshwar S/o Kalyan Singh v. The State of Rajasthan, AIR 1952 SC 54, this Court examined the provisions of Section 5 of Indian Oaths Act, 1873 and Section 118 of Evidence Act, 1872 and held that every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age, extreme old age, disease whether of body or mind or any other cause of the same kind. There is always competency in fact unless the Court considers otherwise.

The Court further held as under:

".....It is desirable that Judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate...."

8. In *Mangoo & Anr. v. State of Madhya Pradesh*, AIR 1995 SC 959, this Court while dealing with the evidence of a child witness observed that there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The Court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.

9. In *Panchhi & Ors. v. State of U.P.*, AIR 1998 SC 2726, this Court while placing reliance upon a large number of its earlier judgments observed that the testimony of a child witness must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law. It cannot be held 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 and 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."

10. In *Nivrutti Pandurang Kokate & Ors. v. State of Maharashtra*, AIR 2008 SC 1460, this Court dealing with the child witness has observed as under:

"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 the 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 that his conclusion was erroneous. This

precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped 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."

11. The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on a oath and the import of the questions that were being put to him. (Vide: Himmat Sukhadeo Wahurwagh & Ors. v. State of Maharashtra, AIR 2009 SC 2292).

12. In State of U.P. v. Krishna Master & Ors., AIR 2010 SC 3071, this Court held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the Court, his deposition does not require any corroboration whatsoever. The

child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the Court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature.

13. Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. (Vide: Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516).

14. In view of the above, the law on the issue can be summarized to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.

23. In ***State of U.P v. Krishna Master*** reported in (2010) 12 SCC 324 the Apex court has held as follows:

“36. The above stated reasons are the only grounds on which testimony of witness Madan Lal is disbelieved by the High Court. This Court fails to understand as to on what principle and on which experience in real life, the High Court made a sweeping observation that it is inconceivable that a child of Madan Lal's understanding would be able to recapitulate facts in his

memory witnessed by him long ago. There is no principle of law known to this Court that it is inconceivable that a child of tender age would not be able to recapitulate facts in his memory witnessed by him long ago. This witness has claimed on oath before the Court that he had seen five members of his family being ruthlessly killed by the respondents by firing gun shots. When a child of tender age witnesses gruesome murder of his father, mother, brothers etc. he 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 of his evidence.

37. This Court is of the firm opinion that it would be doing injustice to a child witness possessing sharp memory to say that it is inconceivable for him to recapitulate facts in his memory witnessed by him long ago. A child of tender age is always receptive to abnormal events which take place in its life and would never forget those events for the rest of his life. The child would be able to recapitulate correctly and exactly when asked about the same in future. Therefore, the spacious ground on which the reliable testimony of PW2, Madan Lal came to be disbelieved can hardly be affirmed by this Court.”

24. Returning to the facts of the case after having discussed the relevant provision of law, we deem it necessary to peruse the testimony of the star eye witness of the present case i.e. PW-4 (Baby Mahi). The deposition of PW-4 (Baby Mahi) is reproduced herein:

“Since the witness is a child, therefore, to understand that she is capable of understanding the questions and depose I asked certain preliminary questions.

Q: What is your name?

Ans: My name is Mahi.

Q. How old are you?

Ans: I am six years old.

Q. What is name of your mother?

Ans: Menka.

Q. In which class do you study?

Ans: I study in U.K.G.

Q. Do you know what is good or bad?

Ans: I know.

Q. What is name of your school?

Ans: Kiran Satsangi Higher Memorial Public School.

Q. Whether you should speak truth or lie?

Ans: I should always speak truth.

After questioning her I am satisfied that child appear to be normal and able to understand questions and she is answering rationally without any fear. Hence, I start recording her evidence without oath.

Q. What is your father's name?

Ans. My father's name is Krishna Rao. He is present in the court today (correctly identified by the witness).

Q. What had happened with your mother?

Ans. My mother was killed by my father.

Q: Whether you have seen killing your mother by you father?

Ans. Yes.

Q. How your father had killed your mother?

Ans. My mother did not do anything, but my father had hit her with danda (Meri Ma ne kuch nahi kiya, par mere papa ne dande se maar diya).

Q. What happened when your father hit with danda to your mother?

Ans. My mother started bleeding from her eyes, when my father hit her with danda (jab papa ne dande se mara aankh se khoon aa gaya).

Q. Where you were at the time of incident?

Ans. I was on the bed.

Q. At that time, where you live?

Ans. *Us samay hum ghar par rahte the.*

Q. *What happened when your father had beaten your mother?*

Ans. *Papa took me to his sister's house.*

Q. *How he took you to his sister's house?*

Ans. *He took me there by train.*

Q. *Do you know the name of papa's sister?*

Ans. *I do not know (Nahi Pata).*

Q. *Where your mother had left when your father took you?*

Ans. *My father put blanket on my mother and left (kambhal odha kar chale gaye).*

Q. *What is name of your mother?*

Ans. *My mother's name is Menka.*

Q. *Who else were residing in the house?*

Ans. *I, my mother and my father were residing in ground and other persons were residing on upper floor. (Main mummy aur papa neeche rehte the aur doosre log upper rahte the).*

Q. *Whether your father beat your mother earlier also?*

Ans. *He had beaten my mummy on that only, (Khali us din maratha).*

Q. *Do you know the length of the said danda, by which your father had beaten your mother?*

Ans. *Bahut Lamba danda tha.*

Q. *Do you recognized the said danda, if it will be shown to you?*

Ans. *Yes.*

Q. *Do you know the date on which your father had beaten your mother?*

Ans. *I do not know.*

Q. *Whether do you study, when your father beaten your mother?*

Ans. *I was studying in Nursery.*

At this stage, MHC(M) has produced parcel No. 5, sealed with the seal of court one sealed envelope sealed with the seal of court is produced and same is opened

and it found containing a danda. The same danda is shown to the witness, witness stated that it is not the same danda, she further stated that, by lifting her hand complete that, "Itna Lamba Tha'.

In her cross-examination, she deposed as under:

XXXXX by Shri R.K. Singh, Ld. Counsel for the accused.

It is wrong to suggest that I have stated the facts today, as told to me by my maternal grandparents. Vol. I had seen my father hitting on my mother. It is further wrong to suggest that today my Nana has told me to speak whatever he has told me today.

Q. It is put to you that you are speaking wrongly that, your papa hit your mother?

Ans. Papa ne mummy ko mara tha.

It is wrong to suggest that on the day when my mother was beaten, my papa was not at home. It is wrong to suggest that my papa was in Bihar, on the day when my mother had received injuries.

Q. Whether police had inquired from you?

Ans. Yes.

It is wrong to suggest that police had not recorded my statement. It is wrong to suggest that I am deposing falsely on the tutoring of my maternal grandfather."

25. Applying the law as discussed above to the facts of the present case, it has to be seen whether the Trial Court took the precautions as enunciated above to be satisfied with the mental understanding of the child to depose before the court. The testimony of PW-4 (Baby Mahi) as discussed above reflects that prior to the recording of the evidence of PW-4 (Baby Mahi) the court had satisfied itself that the child was capable of understanding the questions and giving rationale answers. It was only after the said exercise that the court went on to examine the child as a witness in the present case as PW-4 (Baby Mahi).

26. The law further mandates that the testimony of the child witness should be carefully scrutinized as there exists scope of tutoring and embellishments. In the present case, the witness was only 4 years old at the time the crime was committed. Further, her testimony was recorded after a period of two years before the court. The testimony of PW-4 (Baby Mahi) reflects that when asked about as to what happened to her mother, she clearly deposed that ***“My mother was killed by my father.”*** Further, when asked about as to how her mother was killed, she deposed that ***“My mother did not do anything, but my father had hit her with danda (Meri Ma ne kuch nahi kiya, par mere papa ne dande se maar diya).”***
27. The counsel for the appellant has contended that the chances of tutoring cannot be ruled out as PW-4 (Baby Mahi) was in the control of her maternal grandparents two years immediately preceding the recording of her testimony. In addition to the aforesaid he contended that no statement under Section 164 Cr.P.C. was got recorded by the investigation agency. Further, he has argued that the presence of the child at the spot is highly doubtful as PW-5 (Sh. Parmod Singh) has deposed that PW-4 (Baby Mahi) was residing with her uncle since Diwali.
28. The trial court, after being satisfied about the mental understanding of PW-4 (Baby Mahi), got her deposition recorded. The testimony of PW-4 (Baby Mahi) reflects that the child witness was not deposing against any other family member or a stranger, but her own father. She has elaborated upon the entire incident that took place on the day when her mother was killed by her father. It would call for courage

and conviction to name her own father, as the child was able to understand that she was a witness to a murder. In addition to the aforesaid, the submission that PW-4 (Baby Mahi) was in the custody of her maternal grandparents and the chances of tutoring cannot be ruled out do not sustain as the bare perusal of the testimony of PW-4 (Baby Mahi) would show that there exists no exaggerations or embellishments in her testimony. When asked about any such prior incident of beating, she has reiterated the present incident and has clearly deposed that ***“He had beaten my mummy on that only, (Khali us din mara tha).”*** Moreover, the child witness withstood the test of cross-examination by the counsel for the appellant during the trial proceedings and there is nothing on record which would shake the veracity of the said witness. Hence, the argument of the learned counsel for the appellant that the child witness is not trustworthy does not find favour of this court.

29. The learned counsel for the appellant has argued that the presence of the child witness, PW-4 (Baby Mahi) is highly doubtful at the spot. In support of his contention, he relies upon the cross-examination of PW-5 (Sh. Parmod Singh). PW-5 (Sh. Parmod Singh) in his cross-examination has deposed that:

“I came to know that, Mahi was living at her uncle’s house since Diwali and she had not visited Delhi till her recovery thereafter.”

30. The presence of PW-4 (Baby Mahi) is established by her own testimony wherein she has clearly deposed that:

*“Q. Where you were at the time of incident?
Ans. I was on the bed.”*

Q. At that time, where you live?

Ans. Us samay hum ghar par rahte the”

31. The cross-examination of the said witness i.e. PW-4 (Baby Mahi) reflects that nothing different was suggested to the witness in order to extract anything to the contrary. Moreover, the statement of the appellant under section 313 Cr.P.C. is against the stand taken by the appellant wherein the appellant has failed to give any valid explanation to counter the presence of PW-4 (Baby Mahi) at the spot. The appellant in his statement under section 313 Cr.P.C. has deposed as under:

“Q54. It is further in evidence against you that PW4 Mahi has also deposed that at the time of incident, she was on the bed. She further deposed that “us samay hum ghar par rehte the”. She also deposed that after the incident, papa took her to his sister’s house by train. She also deposed that at the time of leaving the house, her father put blanket on her mother and left “kambal odha kar chale gaye”. She also deposed the name of her mother as Menka. She also deposed that she, her mother and her father were residing on ground floor and other persons were residing on upper floor “Mein, mummy aur papa niche rehte the aur dushre log upar rehte the”. What have you to say?

Ans. It is incorrect. My daughter was tutored by my in-laws with whom she is residing.”

32. The contention of the appellant is further negated by the bare perusal of the statement of PW-5 (Sh. Parmod Singh) which reflects that he did not have the first-hand knowledge of the said fact as he deposed that *“I came to know that, Mahi was living at her uncle’s house since*

Diwali and she had not visited Delhi till her recovery thereafter.” The statement of PW-5 (Sh. Parmod Singh) reflects that he had only heard about the absence of PW-4 (Baby Mahi) from the spot and could not depose with conviction. Having regard to the aforesaid discussion, we are of the view that appellant has failed to counter the presence of the PW-4 (Baby Mahi) at the spot.

33. Having discussed the testimony of the child witness, we deem it appropriate to refer to the medical evidence on record. The post-mortem report (**Ex. PW-22/A**) was proved on record by Dr. Sudesh Kumar. Dr. Sudesh Kumar was examined as PW-22 before the learned trial court who deposed as:

“On 22.12.2011, I was posted at BJRM Hospital. On that day, I had conducted post-mortem on the body of Menka W/o Krishna Rao with alleged history to the effect that the dead body of Menka was found in a room on a bed and covered by quilt and sent to BJRM Hospital for autopsy vide case FIR No. 506/11.

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During post-mortem, the following external injuries were found on the body of Menka:

- i. abrasion mark present at the middle of the neck left side above adam's apple of size 2 x 1.5 cm blood clot present under the skin over abrasion mark.*
- ii. Bruised wound present on upper and lower lip at inner aspect on cut section.*
- iii. Bruised present at middle of the right thigh of size 5x8 cm at anterior aspect.*
- iv. Bruised present at middle of right leg at anterior aspect of size 4x1 cm.*

- v. Bruised present at the dorsal aspect of left hand of size 5x2 cm.
- vi. Bruised present at the dorsal aspect of left foot of size 3x2 cm.
- vii. Bruised present at medical aspect of right leg lower part of size 2x1 cm.
- viii. Bruised present at left inguinal region of size 4x3 cm.

During post-mortem, the following internal injuries were found:

- i. Sub scalp of haematoma present at right temporal region and frontal region of size 4x2 cm & 3x2 cm respectively.
- ii. SDH & SAH present right temporal region and frontal region blood clot present in right occipital region.
- iii. Effusion of blood present in trachea (neck).
- iv. Blood clot present in the pleural cavity, bilateral lungs oedematous, petechial haemorrhages present on the visceral surface on bilateral lungs on cut section, frothy haemorrhage fluid present on cut section of bilateral lungs.

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I had prepared the post-mortem report No. 1197 dated 22.12.2011, which bears my signature at point-A and the same is exhibited as Ex.PW22/A. After carrying post-mortem, I had opined cause of death as combined effect of coma, shock and asphyxia. All the injuries were found ante-mortem in nature. Time since death was about 12 days 10 hours approximately. I had taken the blood and viscera of deceased and after sealing the same, handed over the said pullanda to IO.

During investigation, I had received three parcels sealed with the seal of YP. Parcel No. 1 was found

containing one pillow, parcel No. 2 was found containing one stone and parcel No. 3 found containing one wooden rod. I had inspected the aforesaid articles and opined that injury No. 1 & 2 mentioned in post-mortem report Ex.PW22/A, can be caused by said pillow and injury No. 3 to 8 can be caused by said wooden rod and injury overhead can be caused by cylindrical stone. My opinion in this regard is Ex.PW22/B, which bears my signature at point A. After giving opinion, I had resealed the aforesaid articles with the seal of BJRM Mortuary and handed over the same to SI Jitender Joshi alongwith one sample seal. I had also mentioned the sizes and weight of wooden rod, stone and also the size of pillow in my opinion Ex.PW22/B.

In his cross-examination, he deposed as under:

It is wrong to suggest that I had not carried out the post-mortem properly or that prepared post-mortem report at the instance of IO. It is further wrong to suggest that I had given false subsequent opinion at the instance of IO.”

34. From the testimony of PW-22 (Dr. Sudesh Kumar), it is evident that the ***“cause of death was combined effect of coma, shock and asphyxia.”*** Further, PW-22 (Dr. Sudesh Kumar) has opined that ***“I had inspected the aforesaid articles and opined that injury No. 1 & 2 mentioned in post-mortem report Ex.PW22/A, can be caused by said pillow and injury No. 3 to 8 can be caused by said wooden rod and injury overhead can be caused by cylindrical stone. My opinion in this regard is Ex.PW22/B, which bears my signature at point A”*** and the recovery of the said weapon of offence has been established by the prosecution vide recovery memo (***Ex. PW-26/A***).

35. The investigation agency found the weapon of offence at the spot which were seized by the investigation agency vide seizure memo **Ex. PW-26/A**. In order to prove the recovery of the weapons, the prosecution examined PW-26 (SI Vishesh Kumar) and PW-28 (Insp. Yashpal Singh).
36. PW-26 (SI Vishesh Kumar) in his deposition before the court has deposed that:

“From the spot, IO had seized one quilt (razai), one bedsheet, one pillow and one stone which was found lying near the double bed and one wooden danda about 2 ½ feet, which was found lying under the double bed. IO had kept the said articles in separate cloth pullandas. IO had kept the quilt (Razai) in a plastic sac. IO had sealed the pullanda containing the aforesaid articles with the seal of YP and seized the same vide seizure memo Ex. PW26/A, which bears my signature at point-A.”

In his cross-examination, he has deposed as under:

“At the time when I reached at the house of accused situated at sector-16, Rohini, a lock was hangin at the door of the said house. We called one tala-chabiwala and with his help, the said lock was opened/broken.

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.... IO had called the crime team and crime team officials have made efforts to lift chance-prints.

....It is wrong to suggest that no such articles were seized from the said room or that the said articles were planted in order to falsely implicate the accused in the present case after due consultation with Sh. Sudama Singh.”

37. PW-28 (Insp. Yashpal Singh) in his deposition has deposed as under:

“ SHO had called Executive Magistrate Sh. Rampal Singh at the spot. SHO had called Crime Team at the spot and Crime Team Officials had also inspected the

spot. Photographer of Crime Team also took the photographs.

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From the spot, I had seized one quilt (razai), one bedsheet, one pillow and one stone which was found lying near the double bed and one wooden danda about 2 ½ feet, which was found lying under the double bed. I had kept the said articles in separate cloth pullandas and kept the said articles in separate cloth pullandas. I had also kept the quilt (razai) in a plastic sac. I had sealed the pullanda containing the aforesaid articles with the seal of YP and seized the same vide seizure memo already Ex. PW26/A, which bears my signature at point-X.

In his cross-examination, he deposed as:

It is wrong to suggest that I had not conducted fair and proper investigation of the present case. It is wrong to suggest that no such articles were seized from the said room or that the said articles were planted in order to falsely implicated the accused in the present case after due consultation with Sh. Sudama Singh.”

38. The recovery of the weapon from the spot of crime together with the medical evidence on record establishes the case of the prosecution.
39. The argument of the counsel for the appellant that only a single blow was given by the appellant to the victim is contrary to the post-mortem report which reflects multiple injuries. Moreover, PW-4 (Baby Mahi) has nowhere deposed that the appellant hit the deceased once but has deposed that “*He had beaten my mummy on that only, (Khali us din maratha).*”

40. The counsel has further contended that the absence of blood on the weapon of offence has not been explained by the prosecution. To meet the contention of the counsel for the appellant that no blood was present on the weapon of offence i.e. the wooden rod, cylindrical stone and pillow, we deem it necessary to refer to the FSL report (*Ex. PW15/A*) which reads as follows:

**“DESCRIPTION OF PARCELS & CONDITION OF
SEALS**

SEALS INTACT AS PER F.A.’s LETTER

<i>Sealed cloth parcels</i>	:	<i>05</i>
<i>Sealed envelope</i>	:	<i>01</i>
<i>Sealed plastic bag parcel</i>	:	<i>01</i>
<i>TOTAL</i>	:	<i><u>07</u> (Seven)</i>

**DESCRIPTION OF ARTICLES CONTAINED IN
PARCEL**

- Parcel ‘1’ : One sealed plastic bag parcel sealed with the seal of “YP” containing exhibit ‘1’.*
Exhibit ‘1’ : One quilt having brown stains.
- Parcel ‘2’ : One sealed cloth parcel sealed with the seal of “YP” containing exhibit ‘2’.*
Exhibit ‘2’ : One bedsheet having brown stains.
- Parcel ‘3’ : One sealed cloth parcel sealed with the seal of “FMT BJRM HOSPITAL DELHI” containing exhibit ‘3’.*
Exhibit ‘3’ : One pillow having brown stains.
- Parcel ‘4’ : One sealed cloth parcel sealed with the seal of “FMT BJRM HOSPITAL DELHI” containing exhibit ‘4’.*
Exhibit ‘4’ : One stone.
- Parcel ‘5’ : One sealed cloth parcel sealed with the seal of “FMT BJRM HOSPITAL DELHI” containing exhibit ‘5’.*

Exhibit '5' : One wooden danda.

Parcel '6' : One sealed cloth parcel sealed with the seal of "FMT BJRM HOSPITAL DELHI" containing exhibits '6a', '6b', '6c' & '6d'.

Exhibit '6a' : One salwar having brown stains.

Exhibit '6b' : One lady's shirt having brown stains.

Exhibit '6c' : One underwear having brown stains.

Exhibit '6d' : One socks.

Parcel '7' : One sealed envelope sealed with the seal of "FMT BJRM HOSPITAL DELHI" containing exhibit '7'.

Exhibit '7' : Foul smelling brown gauze cloth piece described as 'Blood gauze'.

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RESULTS OF ANALYSIS

- 1. Blood was detected on exhibits '1', '2', '3', '6a', '6b', '6c' and '7'.*
- 2. Blood could not be detected on exhibits '4', '5' and '6d'.*
- 3. Report of serological analysis in original is attached herewith.*

Note : *Remnants of the exhibits have been sealed with the seal of "P.Sh. FSL DELHI".*

41. The serological report of the biology division (**Ex. PW15/B**) reads as follows:

<i>Exhibits</i>	<i>Species of Origin</i>	<i>ABO Grouping/Remarks</i>
<i>'1' Quilt</i>	<i>Human</i>	<i>'A' group</i>
<i>'2' Bedsheet</i>	<i>Human</i>	<i>'A' group</i>
<i>'3' Pillow</i>	<i>Human</i>	<i>'A' group</i>
<i>'6a' Salwar</i>	<i>Human</i>	<i>No reaction</i>
<i>'6b' Lady's shirt</i>	<i>Human</i>	<i>No reaction</i>

'6c' Underwear	Human	No reaction
'7' Blood stained gauze cloth piece	Human	No reaction

42. The perusal of the FSL report (*Ex. PW15/A*) reflects that the pillow which was recovered from the spot contained Human Blood of 'A' group. Moreover, even though no blood was found on the wooden rod and the cylindrical stone, the opinion of doctor in this regard cannot be ignored. The opinion of the doctor PW-22 (Dr. Sudesh Kumar) that *“injury No. 3 to 8 can be caused by said wooden rod and injury overhead can be caused by cylindrical stone. My opinion in this regard is Ex.PW22/B, which bears my signature at point A”* is sufficient in the ordinary course to establish the case of the prosecution.
43. The counsel has further argued that the investigation carried out by the investigation agency is defective as the investigation agency failed to retrieve any fingerprints/chance prints from the spot. The learned APP has drawn our attention to the testimony of PW-3 (Retd. SI Prem Singh) who has deposed that *“No finger prints were found by finger prints proficient.”* We may further refer to the testimony of PW-26 (SI Vishesh Kumar) who in his cross-examination has deposed that *“IO had called the crime team and crime team officials have made efforts to lift chance-prints”*. The fact that no finger prints/chance prints could be lifted from the spot by the investigating agency despite best efforts, it cannot be a ground in favour of the appellant or be deemed as defective investigation. Hence, the contention of the

appellant that the failure of the prosecution to retrieve any chance prints from the spot has proved fatal to them is answered in the negative.

44. The learned counsel for the appellant has further contended that the trial court failed to consider the plea of alibi of the appellant. The counsel contended that the appellant was not present at the spot and had gone to his village 10-12 days prior to the date of incident to get his daughter admitted in a school in his native village. At this stage, we deem it appropriate to refer to the law in regard to plea of alibi. In ***Binay Kumar Singh v. State of Bihar*** reported in ***AIR 1997 SC 322*** the Apex court has held as under:

"22. We must bear in mind that an alibi is not an exception (special or general) envisaged in the Indian Penal Code or any other law. It is only a rule of evidence recognised in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant." Illustration (a) given under Section 11 of the Evidence Act is then partially reproduced in the decision, but it is fully reproduced below: "The question is whether A committed a crime at Calcutta on a certain date; the fact that on that date, A was at Lahore is relevant. The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant."

23. This Court then went on to say, "The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another

*person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. **But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence.** When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. **For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi.**"*

(emphasis supplied)

45. Applying the said principles of plea of alibi to the present case, it was for the appellant to prove that he was elsewhere and also to prove with absolute certainty to exclude his presence at place of occurrence by way of any oral or documentary evidence. The appellant failed to do so rather, to the contrary the prosecution has been able to prove the presence of the appellant at the spot of crime with the help of the testimony of PW-4 (Baby Mahi), which has stood the test of cross-

examination. Hence, the plea that the appellant went to his native village to get the admission of his daughter in a school fails.

46. The next contention of the counsel for the appellant relates to the absence of motive on the part of the appellant. The counsel has argued that the prosecution could not prove any motive on part of the appellant to commit the said crime. We tend to rely on the dicta of ***Bipin Kumar Mondal vs. State of West Bengal*** reported in ***AIR 2010 SC 3638***. The Apex court in the said case has held:

“19. It is settled legal proposition that even if the absence of motive as alleged is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only by the reason of the absence of motive, if otherwise the evidence is worthy of reliance. Vide Hari Shankar v. State of U.P.1996) 9 SCC 40; Bikau Pandey and Ors. v. State of Bihar (2003) 12 SCC 616; and Abu Thakir and Ors. v. State of Tamil Nadu (2010) 5 SCC 91.”

47. This court has time and again held that the importance of motive arises where there exists no ocular evidence i.e. a case based on circumstantial evidence. The relevance of proving motive loses its importance in a case where well-established ocular evidence is available. In the present case wherein, the prosecution has been able to establish its case on the basis of the testimony of PW-4 (Baby Mahi) which is corroborated by the medical evidence on record, the

mere absence of motive cannot be the basis to acquit the appellant. Hence, the contention of the appellant that the failure of the prosecution to prove the motive is detrimental to the case of the prosecution is answered in the negative.

48. The alternate submission of the counsel for the appellant is that the case of the appellant falls under Section 304 Part I IPC as there is no certain evidence to prove that the appellant had the intention to kill the deceased which is evident from the testimony of PW-4 (Baby Mahi) wherein she has mentioned that there was no previous altercation/fights between the appellant and the victim. In order to prove the factum of intention, we deem it necessary to refer to the case of ***Balu and Ors. vs. The State of Maharashtra*** reported in **(2015) 3 SCC 409**. The Apex Court has held as under:

17. Relying on the aforesaid principle of law, recently this Court in Pulicherla Nagaraju @ Nagaraja Reddy v. State of Andhra Pradesh (2006) 11 SCC 444, again examined the issue as to what relevant factors should be kept in consideration while deciding the question as to whether case in hand falls Under Section 302 or 304 Part-I or Part-II. Justice Raveendran speaking for the Court held in para 29 as under:

The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident

occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. Be that as it may.

49. Applying the principles as discussed hereinbefore to the present case, we find that there is nothing on record to show that the act of the appellant was due to sudden quarrel or in the heat of passion. Moreover, the deposition of PW-4 (Baby Mahi) further corroborates the aforesaid fact wherein she has mentioned that ***“My mother did not do anything, but my father had hit her with danda (Meri Ma ne kuch nahi kiya, par mere papa ne dande se maar diya).”*** In addition to the same, the appellant in his statement under 313 Cr.P.C has nowhere stated that the act was due to sudden quarrel or that was caused due to provocation. Further, the post-mortem report also diminishes any scope of converting the sentence of the appellant to a lesser one as it is reflected from the post-mortem report that around seven injuries with different weapons were caused on the body of the victim. Moreover, the report also suggests that the one of the causes of death was ***asphyxia*** which shows that the appellant had the clear

intention to murder the victim. Hence, in accordance with the aforesaid discussion, there is no possibility of altering the sentence of the appellant from section 302 to 304 Part I IPC.

50. To conclude, the testimony of the PW-4 (Baby Mahi) clearly establishes the guilt of the appellant to commit the act of murder upon his own wife. The said fact has been corroborated by the recovery of the weapon of offence and the post-mortem report on record. Moreover, the appellant has failed to shake the veracity of the child witness PW-4 (Baby Mahi) and put on record any evidence supporting his case. The plea of alibi has already been decided in the negative due to the failure of the appellant to put any ocular or documentary evidence on record. Hence, in terms of the above, the appeal of the appellant is dismissed. The findings of the trial court as to the sentencing under section 302 of the Indian Penal Code is upheld.
51. Trial Court Record be sent back along with a copy of this judgment.
52. A copy of this judgment be also sent to Superintendent of Jail, Tihar Jail Delhi.

SANGITA DHINGRA SEHGAL, J.

MANMOHAN, J.

DECEMBER 23, 2019
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