

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.217 of 1996

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Garho Yadav, Son of Late Dahogi Yadav, resident of Village Bagri, Police
Station Kharik, District Bhagalpur

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Amish Kumar (Amicus Curiae)
For the Respondent/s : Mr. Ajay Mishra, APP

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CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH

and

HONOURABLE MR. JUSTICE CHANDRA PRAKASH SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 05-08-2022

The present appeal has been preferred against the judgment of conviction and order of sentence dated 15.05.1996, passed by the Additional District & Sessions Judge, Naugachia in Sessions Trial No.386 of 1995 arising out of Naugachia P.S. case No.268 of 1993, whereby and whereunder, the appellant has been convicted under Sections 302, 201 and 498A of the Indian Penal Code and has been sentenced to undergo imprisonment for life under Section 302 of the Indian Penal Code and seven years rigorous imprisonment under Section 201 of the Indian Penal Code. No separate punishment was awarded under Section 498A of the Indian Penal Code.

2. Prosecution case, in brief, is that the informant (P.W.5) gave a written report dated 31.12.1993 (marked Ext-1) to



the police, alleging therein that deceased Sabita Devi was married to the appellant in the year 1985. Thereafter, appellant developed illicit relation with his Bhabhi (accused Meena Devi), and this is why appellant and his Bhabhi (accused Meena Devi) used to assault deceased Sabita Devi very often. Further, it has been alleged that at times she was assaulted so brutally that she would not be in a position to move for about 15 days. A year prior to the occurrence, appellant had forced the deceased to go to her parents' house after assaulting her. Thereafter, due to intervention of society, a compromise was entered into and she was again brought to her Sasural at village Bagari. After that, she lived there continuously, but the cruelty upon her continued. In the night of 30.11.1993, Sabita (deceased) was assaulted by all the accused persons brutally and her cry was heard by the neighbours. Further, it has been alleged that she was strangled to death and her dead body was thrown in the Churher river. After the occurrence, someone went to the house of the informant, at his village, and informed him about it, whereupon the informant went to village Bagari, where his sister was found traceless and on making enquiry appellant told him that she had gone somewhere. Then the informant came to know from the villagers that Sabita Devi (deceased) had been thrown into Churher river after her murder.



Thereafter, the informant along with his own villagers went to river Churher, where the dead body of his sister was found on the bank of the river. It is also alleged in the F.I.R. that a month prior to the occurrence, appellant had demanded Rs.12,000/- from the informant in order to purchase a piece of land.

On the basis of the aforesaid written report of the informant, Naugachia P.S. case No.268 of 1993 was registered against the appellant, his brother Bagho Yadav and his Bhabhi Meena Devi. The police, then, proceeded to investigate the case. After completion of investigation, charge sheet was submitted against all three accused persons. The jurisdictional Magistrate after taking cognizance committed the case to the Court of Sessions. Thereafter, charges were framed against all three accused persons under Sections 302, 201 and 498A read with Section 34 of the Indian penal Code. All three accused persons pleaded not guilty and claimed to be tried. The learned trial court acquitted accused Barho Yadav and Meena Devi of the charges framed but convicted the appellant Garho Yadav.

3. During trial, the prosecution examined altogether nine witnesses. P.W.1 Neetu Kumari is daughter of the deceased. P.W.2 is Chandra Deo Yadav (declared hostile), P.W.3 is Kesho Yadav (declared hostile) and P.W.4 is Bhola Yadav (declared hostile).



P.W.5 Pramod Kumar Yadav is the informant and brother of the deceased. P.W.6 Diwakar Goswami is a witness on inquest report. P.W.7 is Subodh Yadav. P.W.8 Sitaram Hansda, is the Investigating Officer of the case. P.W.9 is Dr. Manoranjan Chaturvedi, who conducted the postmortem of the dead body of the deceased. The prosecution has also brought on record documents like the fard beyan (Ext-1), inquest report (Ext-4) and the postmortem report (Ext-5). The defence has not examined any witness in support of its case.

4. Learned counsel for the appellant submits that the only piece of evidence, which has been relied upon and taken into consideration by the learned trial court for convicting the appellant, is the ocular evidence of P.W.1 (daughter of the deceased). However, the learned trial court has not properly appreciated the competency certificate, which was recorded prior to recording of the deposition of P.W.1, who was aged 7 years at that relevant time. It has been argued by learned counsel for the appellant that there is material contradiction in the evidence adduced by P.W.1 and P.W.8, with regard to the weapon used in assaulting the deceased is concerned. Further, P.W.1 was residing with her maternal grandmother and the possibility of she giving statement under the influence of her maternal grandmother cannot



be overlooked. Therefore, the evidence of P.W.1 cannot be relied upon. Further, the learned trial court has also not taken into consideration that except P.W.1 all the material witnesses have retracted from the earlier statement made by them. It has been further argued that even the informant (P.W.5) has not supported his own case during trial. The learned trial court has fallen in error of law by convicting the appellant. It is further submitted that there is no evidence whatsoever on record to prove the guilt of the appellant.

5. Learned APP for the State has submitted that the evidence of a child witness cannot be outrightly rejected on the sole ground of the tender age of P.W.1. The ocular evidence of P.W.1 stands corroborated by the postmortem report of the deceased. The judgment of conviction under challenge requires no interference by this Court.

6. After hearing the arguments and perusing the material available on record, the only issue which arises for consideration is as follows: -

Whether the testimony of P.W.1 (child witness) can be relied upon, in the light of the certificate with respect to her intellectual capacity, recorded



by the trial court prior to recording her deposition?

7. Before advertng to the facts of this case, for answering the issue as formulated above, we find it relevant to discuss the position of law on the admissibility and reliability of the evidence given by a child witness. The Indian Evidence Act under Section 118 deals with the competency of the witnesses. Section 118 of the Indian Evidence Act reads as under:

Section 118. Who may testify.- 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 those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation- A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

8. From perusal of the aforesaid provision, it is clear that the evidence given by a child is not inadmissible per se and cannot be discarded just because of the tender age of the child. However, if in the opinion of the Court, a witness is prevented from



understanding the questions put to him or from giving rational answers to those questions, on account of his tender age, he cannot be considered to be competent to testify before the Court. The Hon'ble Supreme Court in the case of ***Ratansinh Dalsukhbhai Nayak Vs. State of Gujarat*** reported in (2004) 1 SCC 64 has held as follows:

“6. Pivotal submission of the appellant is regarding acceptability of PW-II's evidence. Age of the witness during examination was taken to be about 10 years. Indian Evidence Act, 1872 (in short the 'Evidence Act') 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.”

(emphasis supplied)

9. In order to test the intellectual capacity of a child witness, to understand the questions put by the Court and give rational answers thereto, the Courts have developed the practice to hold a preliminary test of competency. Such practice adopted by the Courts is not under the mandate of any law, but has been adopted as a rule of prudence. The decision with regard to the competency of a child of tender age, to give evidence, is to be taken by the trial court. Although, we clarify here that the evidence adduced by a child witness will ipso facto not become inadmissible, if such examination is not made.

Even if the trial court after conducting the test of competency reaches to the conclusion that the child is competent to adduce evidence, such evidence has to be dealt with utmost caution. The evidence of a child witness is required to be evaluated with great circumspection, for the reason that a child is susceptible to be swayed by what others tell him and thus becomes an easy prey to tutoring. In this regard, we would like to rely upon the decision of Hon'ble Supreme Court in the case of ***Dattu Ramrao Sakhare vs. State of Maharashtra*** reported in ***(1997) 5 SCC 341***, wherein it has been held as follows:



“6. The entire prosecution case rested upon the evidence of Sarubai (P.W. 2) a child witness aged about 10 years. It is, therefore, necessary to find out as to whether her evidence is corroborated from other evidence on record. 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 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. There is no rule or practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the corroboration to such evidence from other dependable evidence on record.”

(emphasis supplied)

10. Applying the aforesaid position of law in the facts of the present case, we find that the trial court before recording the



evidence of P.W.1 has asked few questions to her in order to ascertain her intellectual capacity. The said finding of the trial court is mentioned in the deposition of P.W.1 itself. A categorical remark made by the trial court on the intellectual capacity of P.W.1 is that she appeared innocent and does not understand anything. In spite of recording such a remark on the intellectual capacity of P.W.1, the trial court has proceeded to record the deposition of P.W.1. From the record, it is clear that the testimony of P.W.1 has been recorded on 02.03.1996 and on that date her age has been assessed to be 7 years. Whereas the occurrence, as per the F.I.R., has taken place on 30.11.1993. This brings us to the conclusion that on the date of the alleged occurrence, the age of P.W.1 was near about four years and she has deposed before the court after lapse of three years.

11. Further, it also transpires that in her deposition P.W.1 has stated that her mother (deceased) was assaulted by the appellant by means of *danda*. However, the Investigating Officer (P.W.8) in his examination-in-chief has categorically mentioned that P.W.1 had told him that her mother (deceased) was assaulted by her father by means of brick. This is a material contradiction with regard to the weapon used in assaulting the deceased, which has come on the record, in the depositions of the P.W.1 and P.W.8.



In view of such material contradiction, we do not find it safe to rely upon the deposition of P.W.1.

12. A bare perusal of the deposition of P.W.1 would reveal that P.W.1, perhaps because of her tender age, has not revealed the time of occurrence or place of occurrence or any specific detail regarding the manner of occurrence. In her cross-examination she has stated that she had not seen her father killing her mother (deceased). In absence of such vital details, it is again difficult to rely upon the evidence of P.W.1.

13. In her deposition, P.W.1 has also deposed that, at that time, her father (appellant herein) was in jail and she was residing with her maternal grandmother. Therefore, in our opinion, the possibility of P.W.1 being tutored by her maternal grandmother cannot be completely ruled out and it is possible that P.W.1 has deposed under the influence of her maternal grandmother.

14. In view of the aforesaid discussion, we are of the considered opinion that the evidence adduced by P.W.1 cannot be relied upon, so as to convict the appellant, in this case. Also, there is no other substantive evidence, brought on record by the prosecution, which proves the guilt of the appellant. Therefore, the conviction of the appellant is unsustainable.



15. Thus, this appeal stands allowed. The judgment of conviction and order of sentence dated 15.05.1996, passed by Additional District and Sessions Judge, Naugachia in Sessions Trial No. 386 of 1995 arising out of Naugachia P.S. Case No. 268 of 1993 is hereby set aside. Since the appellant is on bail, he is discharged from the liabilities of his bail bonds.

16. We cannot part away with this appeal, without recording our appreciation for the sincere efforts and able assistance given by Mr. Amish Kumar, learned advocate appointed as Amicus Curiae, at the cost of the State, to represent the appellant. This Court cannot quantify the labour put by him in this case, however, as a gesture of appreciation, we direct the Patna High Court Legal Services Committee to pay a sum of Rs.5000/- to Mr. Amish Kumar, learned advocate, appointed as Amicus Curiae by this Court by order dated 26.07.2022.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Narendra/-

AFR/NAFR	NAFR
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