

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1039 of 2015**

Arising Out of PS. Case No.-313 Year-2012 Thana- KAJI MUHAMMADPUR District-
Muzaffarpur

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Munna Sah son of Late Ganga Sah resident of Village - Maripur, Middle
School, P.S. - Kazi Mohammadpur, District - Muzaffarpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Ms. Surya Nilambari, *Amicus Curiae*
For the State : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 01-11-2023

This appeal has been filed by the appellant/convict under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred as the 'Code') challenging the order of conviction dated 06.11.2015 and order of sentence dated 09.11.2015 passed by learned 10th Additional Sessions Judge, Muzaffarpur in Sessions Trial No. 268 of 2013 arising out of Kazi Mohammadpur P.S. Case No. 313 of 2012, whereby the concerned Trial Court has convicted the present appellant for the offences punishable under Sections 302, 376 read with 511 of the Indian Penal Code (hereinafter referred as the 'I.P.C.'), whereby the



appellant has been sentenced to undergo R.I. for life for the offence under Section 302 of I.P.C. and a fine of Rs. 5,000/- has also been imposed, and in default of payment of fine, he has been awarded three months S.I. Further the appellant has been directed to undergo R.I. for five years for offence under Section 376/511 of I.P.C. and a fine of Rs. 5,000/- has been imposed and in default of payment of fine, he has been awarded three months simple imprisonment. Both the sentences have been directed to run concurrently.

2. The prosecution case, in brief, is as under:-

"On 14.09.2012, the informant Nikki Kumari went to to domestic work in the house of Dilip Kumar leaving her mother Kiran Devi and younger sister Aarti Kumari, aged about 7 years, in the house. Her mother was suffering from Diabetes. Since last one month, she was bed-ridden. When she came to her home at 9 O'clock, her sister Aarti Kumari told her that at 8:00 A.M. accused Munna Sah came to her home and lifted the saree worn by her mother and laid down on her body. Her sister saw this incident and she went to narrate the story and came back. In the meanwhile, fearing getting caught by the people of the *muhalla*, the accused pressed the neck of her mother and at 3 O'clock, as a result of which, she died at her home."

3. After recording the *fardbeyan* of the daughter of the deceased namely Nikki Kumari, a formal F.I.R. was registered. Thereafter, the Investigating Officer carried out the investigation and, during the course of the investigation, he had recorded the



statement of the witnesses, prepared the Inquest *Panchnama* and sent the dead body of the deceased for the *post mortem*. After the investigation was over, the Investigating Officer filed the charge-sheet against the appellant/accused before the concerned Magistrate Court. However, as the case was exclusively triable by the Court of Sessions, the concerned Magistrate Court committed the same to the Sessions Court where the same was registered as Sessions Trial No. 268 of 2013.

4. During the course of the trial, the prosecution examined ten witnesses and also produced the documentary evidence. Further statement of the accused under Section 313 of the Code was recorded. After conclusion of the trial, the Trial Court passed the impugned order, as observed hereinabove. Against the said order of conviction, the appellant/convict has preferred the present appeal.

5. At the outset, it is pertinent to note that when the matter was called out, the learned counsel for the appellant has not remained present and as the appeal is pending since the year 2015 and the appellant/convict is in custody since 27.09.2012, this Court had no option but to proceed with the matter. We, therefore, asked learned Advocate Ms. Surya Nilambari to assist the Court and she has been appointed as *Amicus Curiae* for the aforesaid purpose.



Hence, we have heard learned Advocate Ms. Surya Nilambari for the appellant/accused as *Amicus Curiae* and Mr. Bipin Kumar learned A.P.P. for the Respondent-State.

6. Learned counsel Ms. Surya Nilambari mainly contended that none of the independent witnesses has supported the case of the prosecution and they have turned hostile and the case of the prosecution rests only upon the deposition of PW-8 Aarti Kumari who has claimed that she is an eye-witness to the occurrence in question. It is submitted that PW-4 Nikki Kumari, who is the informant, is not an eye-witness to the occurrence and she had lodged the F.I.R. on the basis of the information given by PW-8 Aarti Kumari. Learned counsel, at this stage, has further submitted that at the time of occurrence the age of PW-8 was 7.5 years and at the time of giving her deposition before the Court she was aged about 10 years. However, the concerned Trial Court has not put question to her with a view to ascertain whether the said child witness is in a position to understand the question put to her. It is submitted that the Trial Court has convicted the appellant/accused only relying upon the deposition given by PW-8 who is a child witness. At this stage, learned *Amicus Curiae* would place reliance upon the decisions rendered by the Hon'ble Supreme Court in the case of **Pradeep Vs. State of Haryana**,



reported in **2023 SCC OnLine SC 777** and would refer to Para-7 to 10 of the said decision. At this stage, learned *Amicus Curiae* has also placed reliance upon the decisions rendered by the Hon'ble Supreme Court in the case of **P. Ramesh Vs. State represented by Inspector of Police**, reported in **(2019) 20 SCC 593**. Learned counsel has mainly placed reliance upon Para-13 to 16 of the said decision. After referring to the aforesaid decision, learned counsel has mainly contended that the deposition of child witness who is aged about 10 years at the time of giving her deposition is to be discarded.

7. At this stage, learned *Amicus Curiae* has also pointed out the contradictions in the deposition given by the prosecution witnesses. At this stage, learned counsel has referred the deposition given by PW-9 Dr. Bipin Kumar, who had conducted the *post mortem* of the dead body of the deceased. It is submitted that the said Doctor (PW-9) has specifically given the opinion that the deceased died due to asphyxia as a result of *ante mortem* throttling and the injuries were caused by impact of hard and blunt object. At this stage, learned *Amicus Curiae* pointed out from the deposition of PW-4 as well as PW-8 that as per the case of the prosecution, the occurrence took place at about 08:00 a.m. to 09:00 a.m. when PW-8 Aarti Kumari was playing in the



compound. However, as per the case of the prosecution, though the incident took place at about 08:00 to 09:00 a.m. in the morning, the deceased died at about 03:00 p.m. At this stage, learned counsel has referred '**A Textbook of Medical Jurisprudence and Toxicology**' by Jaising P Modi and specifically referred Chapter 20.3, i.e. on the point of Strangulation. Learned counsel has pointed out about the symptoms of the strangulation. It is contended that the "windpipe is compressed so suddenly as to occlude the passage of air altogether, the individual is rendered powerless to call for assistance, becomes insensible, and may die instantly. If the windpipe is not completely closed, the face becomes cyanosed, bleeding occurs from the mouth, nostrils and ears, the hands are clenched, and convulsions precede delayed death. As in hanging, insensibility is very rapid, and death is quite painless."

7.1. It is contended that in the present case, as per the case of the prosecution, the alleged incident of pressing the neck of the deceased took place at about 08:00 a.m., whereas death was caused at 03:00 p.m. as a result of the alleged strangulation. However, in view of the aforesaid Medical Jurisprudence, if the neck was pressed and the deceased was strangled by the



appellant, then the death was required to be caused immediately and not after 7 hrs.

8. Learned counsel, therefore, urged that when the prosecution has failed to prove the case against the appellant/accused beyond reasonable doubt, the Trial Court has committed grave error while recording the order of conviction. She, therefore, urged that the impugned order be quashed and set aside.

9. On the other hand, learned A.P.P. has vehemently opposed this appeal. Learned A.P.P. has specifically contended that PW-8 is the eye-witness to the occurrence. PW-8 is the natural witness who was present in the house when the occurrence took place. Merely because she is the child witness, her deposition may not be discarded. In fact, the case of the child witness i.e. the daughter of the deceased has been supported by the Doctor. Learned A.P.P. has referred the deposition given by PW-9 Doctor who had conducted the *post mortem* of the dead body of the deceased. It is submitted that the prosecution has proved the case beyond reasonable doubt that the deceased died because of homicidal death. Learned A.P.P. has referred the opinion given by the Doctor and contended that the deceased died due to asphyxia



as a result of *ante mortem* throttling. Learned A.P.P., therefore, urged that this appeal be dismissed.

10. We have considered the submissions canvassed by learned *Amicus Curiae* as well as learned A.P.P. We have also perused the material placed on record and the evidence led by the prosecution before the concerned Trial Court. It would emerge from the record that though the prosecution has examined independent witnesses i.e. PW-1 to PW-3 as well as PW-5 to PW-7, none of the independent witnesses have supported the case of the prosecution and they have been declared hostile. It would further emerge from the record that the case of the prosecution rests on the deposition of PW-4 and PW-8. PW-4 is Nikki Kumari who is the informant and the daughter of the deceased. The said witness had given the information to the Police in the form of *fardbeyan* on the basis of the information she received from her younger sister i.e. PW-8 Aarti Kumari who was aged about 7.5 years on the date of occurrence.

11. PW-4 Nikki Kumari has specifically stated in her examination-in-chief that the occurrence took place at about 08:00 a.m. When she returned to her house at about 10:00 a.m., her sister Aarti Kumari was playing in the compound outside the door and she informed her that one Munna came to the house and laid down



on the body of her mother. Therefore, she shouted and thereafter it is further stated by her that her mother died at about 03:00 p.m. She has further stated that she had put her signature on the *fardbeyan*.

11.1. However, during the course of the cross-examination, she has specifically admitted that her sister did not give the name of anybody and her mother died because of Diabetes. Her mother was suffering from Diabetes since last six months. She has further admitted that her signature was obtained on the blank paper and she had not read the document after signing the same.

12. PW-8 Aarti Kumari, aged about 10 years, has stated in her examination-in-chief that the incident took place 2.5 years back from the date of giving the said deposition. The occurrence took place at about 09:00 a.m. At that time, she was playing near the house. At that time, Munna came to her house and lay down on the body of her mother. Thereafter, he pressed the neck of her mother. She has further stated in the examination-in-chief that her mother died at about 03:00 p.m. and thereafter the Police was informed. The *fardbeyan* was given by her sister Nikki Kumari. Thereafter, the Inquest *Panchnama* was prepared and she had signed the said document.



12.1. During her cross-examination, the said witness stated that her mother was not suffering from Diabetes and on the date of occurrence, she was playing with one Sheela Devi. She has further stated that when she informed her sister about the occurrence, nobody was present. She has further stated that she is an eye-witness to the occurrence.

13. PW-9 Dr. Bipin Kumar was posted as tutor, Department of F.M.T., S.K.M.C.H., Muzaffarpur on 15.09.2012. The said witness has stated that he had conducted the *post mortem* of the dead body of the deceased Kiran Devi and he found following injuries:-

"2. Dead body was of thin built with vigor-mortis weakly present in lower limbs. Following ante-mortem injuries were found:-

(i) Abrasion $1\frac{1}{2}" \times 1\frac{1}{2}"$ over right side of neck just lateral to thyroid cartilage.

(ii) Abrasion $\frac{1}{2}" \times \frac{1}{4}"$ just below injury no. (i).

(iii) Abrasion $\frac{1}{4}" \times \frac{1}{4}"$ over inner part of lower lip.

3. On dissection of neck, subcutaneous tissues and muscle of the neck were lacerated, trachea was congested with fracture of trachea rings with blood clots. All the internal abdominal viscera were congested, both lungs were also congested.

4. There was no any injury in and around vagina and vulvar region. Vaginal swab examined under microscope, no any spermatozoa either dead or alive.



Opinion- Deceased died due to asphyxia as a result of ante-mortem throttling. Injuries were caused by impact of hand and blunt object. Time since death-12 to 24th hour from the time of examination."

14. PW-10 Umesh Mishra is the Investigating Officer who had carried out the investigation. The said witness stated that on 14.09.2012, he was posted at Kaji Mohammadpur Police Station. The said witness recorded the *fardbeyan* of informant Nikki Kumari. Thereafter, Nikki Kumari put her signature on the *fardbeyan*. The said *fardbeyan* was in his own writing. The said witness further stated that he had prepared the Inquest Report and thereafter, sent the dead body of the deceased for the purpose of *post mortem*. On the day of occurrence, i.e. on 14.09.2012, he had recorded the statement of one Sheela Devi. On 15.04.2012, the said witness recorded the further statement of the informant and on 15.09.2012, he recorded the statement of Aarti Kumari. The Investigating Officer further described about the place of occurrence and also stated in Para-4 that he had recorded the statement of a number of independent witnesses who are named in the said paragraph. After investigation was over, the said witness filed the charge-sheet against the appellant/accused.

14.1. During cross-examination, the Investigating Officer has stated that on 14.09.2012, the investigation was handed over to him at about 21:00 hrs. and he had recorded further



statement of the witness Aarti Kumari on 15.09.2012 at the place of occurrence. The said witness further admitted that he had not seized the clothe of the deceased.

15. From the aforesaid deposition given by the prosecution witnesses, it would emerge that PW-4 (informant), who is also the daughter of the deceased and elder sister of PW-8, during cross-examination has stated that her sister did not give name of any person and her mother died because of Diabetes. It is further revealed that she had put her signature on the blank paper. From the deposition of PW-4, it is also revealed that the occurrence took place at about 08:00 a.m. in the morning and the said witness returned the house at 10:00 a.m. At that time, Aarti Kumari (PW-8) was playing in the compound. It is further revealed that the deceased died at about 03:00 p.m. i.e. after almost 7 hrs. from the alleged incident of pressing the neck of the deceased by the accused. At this stage, it is to be recalled that as per the case of the prosecution, the occurrence took place at about 8 or 9 a.m. and it is alleged that the appellant/accused came to the house of the deceased and laid down on the body of the mother of the informant after lifting the *saree* worn by her mother. Sister of the informant saw this incident and because of the *hulla*, fearing getting caught by the people of the *mohalla*, the accused pressed



the neck of the mother of the informant, as a result of which, she died at 03:00 p.m. Thus, there is a time gap of 7 hrs. between the pressing of the neck and the death of the deceased because of the said occurrence.

15.1. At this stage, we would like to refer as per Modi's Medical Jurisprudence (Twenty Seventh Edition) in Chapter 20.3 'Strangulation' has been discussed. Thereafter, in Para-20.3.3 'Symptoms of Strangulation' is also discussed, wherein it has been observed as under:-

"If the windpipe is compressed so suddenly as to occlude the passage of air altogether, the individual is rendered powerless to call for assistance, becomes insensible, and may die instantly. If the windpipe is not completely closed, the face becomes cyanosed, bleeding occurs from the mouth, nostrils and ears, the hands are clenched, and convulsions precede delayed death. As in hanging, insensibility is very rapid, and death is quite painless."

16. From the aforesaid, it can be said that if the windpipe is compressed suddenly, the individual is rendered powerless to call for assistance and becomes insensible and may die instantly. Further, it can be said that if the windpipe is not completely closed, the face becomes cyanosed, and bleeding occurs from the mouth, nostrils and ears, the hands are clenched, and convulsions precede delayed death.



17. From the deposition of the Doctor, who had conducted the *post mortem* of the deceased, it can be said that none of the aforesaid symptoms were found. Thus, we are of the view that the theory of the prosecution that the appellant/accused pressed the neck at 08:00 to 09:00 a.m. in the morning, as a result of which, the mother of the informant died at 03:00 p.m. cannot be believed.

18. At this stage, we would also like to consider the submission canvassed by the learned *Amicus Curiae* on the point of appreciation of the deposition of the child witness.

18.1. In the case of **Pradeep (supra)**, the Hon'ble Supreme Court has observed in Para-7 to 10 as under:-

"7. We have carefully considered the submissions. The fate of the case depends on the testimony of the minor witness Ajay (PW-1). Under Section 118 of the Evidence Act, 1872 (for short, "the Evidence Act"), a child witness is competent to depose unless the Court considers that he is prevented from understanding the questions put to him, or from giving rational answers by the reason of his tender age. As regards the administration of oath to a child witness, Section 4 of the Oaths Act, 1969 (for short "Oaths Act") is relevant. Section 4 reads thus:



"4. Oaths or affirmations to be made by witnesses, interpreters and jurors.—(1) Oaths or affirmations shall be made by the following persons, namely:—

(a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence;

(b) interpreters of questions put to, and evidence given by, witnesses; and

(c) jurors:

Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of Section 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.

(2)"

8. Under the proviso to sub-Section (1) of Section 4, it is laid down that in case of a child witness under 12 years of age, unless satisfaction as required by the said proviso is recorded, an oath cannot be administered to the child witness. In this case, in the deposition of PW-1 Ajay, it is mentioned that his age was 12 years at the time of the recording of evidence. Therefore, the



proviso to Section 4 of the Oaths Act will not apply in this case. However, in view of the requirement of Section 118 of the Evidence Act, the learned Trial Judge was under a duty to record his opinion that the child is able to understand the questions put to him and that he is able to give rational answers to the questions put to him. The Trial Judge must also record his opinion that the child witness understands the duty of speaking the truth and state why he is of the opinion that the child understands the duty of speaking the truth.

9. *It is a well-settled principle that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. A child witness of tender age is easily susceptible to tutoring. However, that by itself is no ground to reject the evidence of a child witness. The Court must make careful scrutiny of the evidence of a child witness. The Court must apply its mind to the question whether there is a possibility of the child witness being tutored. Therefore, scrutiny of the evidence of a child witness is required to be made by the Court with care and caution.*

10. *Before recording evidence of a minor, it is the duty of a Judicial Officer to ask preliminary questions to him with a view to ascertain whether the minor can understand the questions put to him and is in a position to give rational answers. The Judge must be satisfied that the minor is able to understand the questions and respond to them and understands the importance of speaking the truth. Therefore, the role of the Judge who records the evidence is very crucial. He has to make a proper preliminary examination of the minor by putting appropriate questions to ascertain whether the minor is capable of understanding the questions put to him and is able to give rational answers. It is advisable to record the preliminary questions and answers so that the*



Appellate Court can go into the correctness of the opinion of the Trial Court."

18.2. In the case of **P. Ramesh (supra)**, the Hon'ble Supreme Court has observed in Para-13 to 16 as under:-

"13. Section 118 ["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."] of the Evidence Act, 1872 deals with the competence of a person to testify before the court.

Section 4 ["4. Oaths or affirmations to be made by witnesses, interpreter and jurors.—(1) Oaths or affirmations shall be made by the following persons, namely:(a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence;(b) interpreters of questions put to, and evidence given by, witnesses; and(c) jurors:Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of Section 5 shall not



apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.(2) Nothing in this section shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, unless he is examined as a witness for the defence, or necessary to administer to the official interpreter of any court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.”] of the Oaths Act, 1969 requires all witnesses to take oath or affirmation, with an exception for child witnesses under the age of twelve years. Therefore, if the court is satisfied that the child witness below the age of twelve years is a competent witness, such a witness can be examined without oath or affirmation. The rule was stated in *Dattu Ramrao Sakhare v. State of Maharashtra* [*Dattu Ramrao Sakhare v. State of Maharashtra*, (1997) 5 SCC 341 : 1997 SCC (Cri) 685] , where this Court, in relation to child witnesses, held thus : (SCC p. 343, para 5)

"5. ... A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."



14. *A child has to be a competent witness first, only then is her/his statement admissible. The rule was laid down in a decision of the US Supreme Court in Wheeler v. United States [Wheeler v. United States, 1895 SCC OnLine US SC 220 : 40 L Ed 244 : 159 US 523 (1895)] , wherein it was held thus : (SCC OnLine US SC para 5)*

"5. ... While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial Judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record the decision of the trial Judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous."

15. *In Ratansinh Dalsukhbhai Nayak v. State of Gujarat [Ratansinh Dalsukhbhai Nayak v. State of Gujarat, (2004) 1 SCC 64 : 2004 SCC (Cri) 7. Subsequently, relied upon in Nivrutti Pandurang Kokate v. State of Maharashtra, (2008) 12 SCC 565 : (2009) 1 SCC (Cri) 454] , this Court held thus : (SCC pp. 67-68, para 7)*

"7. ... 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."

16. *In order to determine the competency of a child witness, the Judge has to form her or his opinion. The Judge is at liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. [Ratansinh Dalsukhbhai Nayak v. State of Gujarat, (2004) 1 SCC 64 : 2004 SCC (Cri) 7] A child becomes incompetent only in case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. [Sarkar, Law of Evidence, 19th Edn., Vol. 2, Lexis Nexis, p. 2678 citing Director of Public Prosecutions v. M, 1998 QB 913 :*



(1998) 2 WLR 604 : (1997) 2 All ER 749 (QBD)] If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined."

19. From the aforesaid decisions rendered by the Hon'ble Supreme Court, it can be said that before recording evidence of a minor, it is the duty of Judicial Officer to ask preliminary question to him/her with a view to ascertain whether the minor can understand the questions put to him/her and is in a position to give rational answers. The Judge must be satisfied that the minor is able to understand the questions and respond to them and understands the importance of speaking the truth. The Judge has to make a proper preliminary examination of a minor by putting appropriate questions to ascertain whether the minor is capable of understanding the question put to him. It can be further said that in order to determine the competency of the child witness, the Judge has to form his/her opinion. The Judge is at liberty to test the capacity of a child witness. The competency of a child witness can be ascertained by questioning him to find out the capability to understand the occurrence witnessed and to speak the truth before the Court. In criminal proceedings, the person of any age, is competent to give evidence if he is able to understand questions put as a witness and give such answers to the questions that can be understood. A child of tender age can be allowed to



testify if he has the intellectual capacity to understand the questions and give rational answers thereto. However, a child becomes incompetent in a case the Court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner.

20. Keeping in view the aforesaid decisions, if the facts of the present case are examined, it transpires that the concerned Trial Judge has not carried out the aforesaid exercise by putting question to the child witness with a view to ascertain whether the PW-8 (child witness) is capable to understand the question put to her. Thus, we are of the view that the reliance placed by the learned Trial Court only on the deposition given by PW-8 who is the child witness, aged about 10 yrs. and was aged about 7.5 yrs. at the time of occurrence, is misplaced. Therefore, the Trial Court has wrongly placed the reliance upon the said deposition of the child witness.

21. At this stage, it is also pertinent to note that the appellant/accused has also been convicted for the offence punishable under Section 376 read with Section 511 of the I.P.C. and is sentenced to suffer 5 yrs. rigorous imprisonment. From the evidence given by PW-9 Dr. Bipin Kumar, who had conducted the *post mortem* of the dead body of the deceased, it is revealed that



there was no injury in and around vagina and vulvar region. Vaginal swab was examined under microscope and no spermatozoa, either dead or alive was found.

21.1. Thus, from the aforesaid, it can be said that even the medical evidence does not support the case of the so called eye-witness i.e. the child witness. Further, in view of the observation made hereinabove, the deposition given by the child witness cannot be believed. Thus, the conviction recorded by the Trial Court under Section 376 read with 511 is also not tenable in the eyes of law. Hence, the same is also required to be quashed and set aside.

22. Even otherwise, as discussed hereinabove, there are major contradictions in the deposition of the witnesses and most of the independent witnesses have turned hostile. Thus, in the facts and circumstances of the present case, we are of the view that the Trial Court has committed grave error by recording conviction of the appellant. Accordingly, the same is required to be quashed and set aside.

23. The impugned judgment of conviction dated 06.11.2015 and order of sentence dated 09.11.2015 passed by learned 10th Additional Sessions Judge, Muzaffarpur in Sessions Trial No. 268 of 2013 arising out of Kazi Mohammadpur P.S. Case



No. 313 of 2012 is quashed and set aside. The appellant, namely, Munna Sah is acquitted of the charges levelled against him by the learned trial court. He is directed to be released forthwith, if not required in any other case.

24. Accordingly, the appeal is allowed.

25. Before parting with the appeal, I record my appreciation for the able assistance rendered by Ms. Surya Nilambari, learned *Amicus Curiae*.

26. The Patna High Court, Legal Services Committee is, hereby, directed to pay ₹ 5,000 (Rupees Five Thousand) to Ms. Surya Nilambari, learned *Amicus Curiae* in Criminal Appeal (DB) No. 1039 of 2015 as consolidated fee for the services rendered by her.

(Vipul M. Pancholi, J)

(Chandra Shekhar Jha, J)

Sachin/-

AFR/NAFR	A.F.R.
CAV DATE	NA
Uploading Date	04.11.2023
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