

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.605 of 2004**

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1. Sudama Singh, Son Of Late Harbansh Singh Resident Of Village Kutubpur Dera, Police Station-Barhara District Bhojpur At Ara.
 2. Satendra Singh, Son Of Late Harbansh Singh Resident Of Village Kutubpur Dera, Police Station-Barhara District Bhojpur At Ara.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr.Rajesh Kumar Singh, Sr. Advocate
	:	Mr.Sushil Kumar Singh, Advocate
For the Respondent/s	:	Mrs.Anita Kumari Singh, APP

**CORAM: HONOURABLE JUSTICE SMT. G. ANUPAMA
CHAKRAVARTHY**

ORAL JUDGMENT

Date : 05-10-2024

1. The appeal is arising out of the judgment in Sessions Trial No. 224 of 1997 dated 24.08.2004 on the file of Additional Sessions Judge (Fast Track Court) No. IInd Ara, Bhojpur, whereby the appellants are convicted for the offences punishable under Section 307 read with Section 34 of the IPC and under Section 27 of the Arms Act and they were sentenced to undergo Rigorous Imprisonment for a period of 10 years and Rigorous Imprisonment for a period of 3 years respectively for the aforesaid offences. Both the appellants were



enlarged on bail vide order of this Court dated 24.02.2005.

2. The case of the prosecution, as per the Fardbeyan dated 08.03.1996 is that one Ram Sewak Bind (P.W. 5) is the informant as well as the injured. P.W. 5 made a Fardbeyan to the Sub-Inspector Police named A.H. Khan while undergoing treatment in the Sadar Hospital, Ara. As per the contents of the Fardbeyan the alleged occurrence took place on 07.03.1996 at about 02:30 P.M., when the wife of one Ganesh Bind (Darbi Devi)/ P.W. 6 gone to Basgit Badhar for cutting grass. At that time, the appellant No. 2/Satendra Singh attempted to outrage her modesty. On her alarm, the people of the surrounding areas including P.W. 5 reached to the first place of occurrence and on their intervention the appellant No. 2/Satendra Singh abused P.W. 5 and also asked him to pay the outstanding dues by the next day, otherwise he will drag his children and make them, to clean the dung in his *Ghoshala*. On intervention of the villagers, the quarrel was subsided.



On 08.03.1996 at about 07:00 A.M., while P.W. 5 was returning home after attending natural call, the father of the appellant No. 2/Jodha Singh (who was also arrayed as accused in the FIR, but died during the pendency of the trial) abused him and also abated the appellants to assault the informant. On that, Sudama Singh/appellant No. 1 and Satendra Singh/appellant No. 2 who were holding double barrel guns in their hands, came in the way of the informant. Therefore, P.W. 5 in order to save his life ran towards his house, whereupon both the appellants opened fire with their respective double barrel guns and also chased him up to his house. The contents of the Fardbeyan further disclose that along with P.W. 5 three others i.e. Arjun Bind/P.W. 9, Harendra Bind/P.W. 8 and Biteshwar Bind/ P.W. 10 also sustained firearm injuries in the said incident and that P.W. 5 out of fear hidden himself inside the house. The Fardbeyan also disclose that the appellants threatened the informant that they would set his house on fire. The Fardbeyan was recorded by the Sub-Inspector Ara,



Police Station, while P.W. 6 was undergoing treatment at Sadar Hospital, Ara.

3. Basing on the Fardbeyan, a case was registered vide Crime No. 35 of 1996 on the file of Barhara, Police Station for the offences punishable under Sections 354, 504, 324, 307 r/w 34 of the IPC and under Section 27 of the Arms Act. After completion of the investigation, the police have filed charge-sheet against the appellants and against one Jodha Singh, for the offences punishable under Section 448, 376 read with 511, 504, 323, 324, 376 read with 34 of IPC and Section 27 of the Arms Act.

4. The Learned Judicial Magistrate First Class Ara, Bhojpur has committed the case to the Court of Sessions vide order dated 31.07.1997 and later the case was transferred to Additional District & Sessions Judge Fast Track Court-IInd, Ara, Bhojpur for conducting the trial. The trial Court has framed charges against both the appellants for the offences punishable under Section 307 of IPC and Section 27 of the Arms Act, read over and



explained the same to both the appellants for which, the appellants denied the charges and claimed to be tried.

5. During the course of trial, on behalf of the prosecution P.Ws. 1 to 12 were examined and Exhibit-1, Exhibit-1/1, Exhibits-2, 2A, 2B, 2C, Exhibit- 3 and Exhibit-4 were got marked. On behalf of the appellants, five witnesses were examined i.e. D.Ws. 1 to 5. After appreciating the oral and documentary evidence on record, both the appellants were convicted for the offences punishable under Section 307 read with 34 of the IPC and under Section 27 of the Arms Act as stated supra.

6. Shri Rajesh Kumar Singh, Learned Senior counsel for the appellants contended that the entire case of the prosecution is that the incident occurred in continuation of the first date of occurrence dated 07.03.1996 but prosecution failed to prove the first occurrence for which the initial crime was registered under Section 354 of IPC which was charged under Section 376 r/w 511 of IPC.



7. It is further contended that the prosecution miserably failed to establish the place of occurrence and that there is a delay of three days in registering the case, which is fatal to the case of the prosecution and that no proper explanation was given by the Investigating Officer as to why the said delay occurred, in a case of cognizable offence.

8. It is further contended by the Learned Senior counsel that there are many contractions and major discrepancies from the evidence of the prosecution which goes to the root of the cause of the case of prosecution and therefore, benefit of doubt has to be extended to the appellants. It is also contended by the Learned Senior counsel that the injury reports of the injured i.e. P.Ws. 5, 8, 9 and 10 disclose that the nature of the injuries are simple, which do not satisfy the ingredients under Section 307 of the IPC and the prosecution has miserably failed to establish the motive or intention of the appellants to attempt murder of these witnesses/injured and therefore prayed to set aside the



judgment of conviction.

9. On the other hand, Smt. Anita Kumari Singh, Learned Additional Public Prosecutor contended that the prosecution was able to prove the guilt of the appellants beyond reasonable doubt, as the evidence of the injured witnesses is consistent with each other which also corroborates the documentary evidence i.e. injury report Exhibits- 2, 2/A, 2/B, 2/C and therefore, contended that there is no irregularity in the orders passed by the trial Court and prayed to uphold the judgment of the trial Court.

10. Heard the Learned counsel for the appellants as well as the Learned Additional Public Prosecutor for the State, perused the record.

11. On perusal of the record, the following points arose for determination of the appeal:-

(i) whether P.W. 5 alone was the injured in the incident or P.Ws. 8, 9 and 10 were also injured along with PW-5/injured?

(ii) Whether P.Ws. 1 to 4 are eye-witnesses to



the incident or not?

(iii) Whether the prosecution has established the place of occurrence?

(iv) Whether the evidence of the prosecution witnesses is consistent with each other as to the manner the incident, time of incident and motive for the incident?

(v) Whether the prosecution is able to prove the guilt of the appellants beyond reasonable doubt for the offence punishable under Section 307 read with 34 of IPC and Section 27 of Arms Act.

12. As the points were interlinked with each other, the appreciation of evidence, would be discussed together.

13. It is pertinent to mention that as per the Fardbeyan (Exhibit-4), the incident took place on 08.03.1996 at 07:00 A.M. while P.W. 5 was returning home after attending the natural call. But the evidence of prosecution witnesses i.e. P.W. 1 to 4 and the informant/P.W. 5 disclose that the incident took place at



about 06:00 A.M. in the morning. The timing of the incident is contradicting with that of the Fardbeyan and oral evidence of PWs. 1 to 5.

14. Admittedly, P.W. 5 himself is the author of the Fardbeyan (Exhibit-4) and Exhibit-1/1 is his signature on the Fardbeyan and Exhibit-1 is the signature of Tejan Bind/P.W. 4. It is specifically mentioned in the Fardebeyan that the incident took place at “07:00 A.M.” whereas he along with eye-witnesses testified it as “06:00 A.M”.

15. The Fardbeyan further disclose that on 07.03.1996 Darbi Devi w/o Ganesh Bind had gone to cut grass in the field and at around or in between 2 to 3 P.M. on 07.03.1996, appellant No. 2/Satendra Singh tried to outrage the modesty of Darbi Devi and on her cries, P.W. 5/Ram Sewak Bind along with others reached the place and on that Satendra Singh/appellant No. 2 abused and demanded for re-payment of the outstanding dues, by the next day of morning and left the place. In the cross-examination P.W. 5 specifically



stated that when he reached the field he saw Darbi Devi and Satendra Singh standing there. Further, P.W. 5 again stated that he saw appellant No. 2/Satendra Singh, catching the right hand of Darbi Devi.

16. On the other hand, P.W. 6/Darbi Devi testified that the appellant No. 2 caught hold of her hand and tried to outrage her modesty and that appellant No. 2 caught hold of her hand for more than half an hour and that two palm length of grass was cut by her in that field. It is also admitted by Darbi Devi/P.W. 6 that they have not taken any loan from Satendra Singh/appellant No. 2 and appellant No. 2 did not demand her, to pay the loan by next day or else for the consequences, thereof.

17. Darbi Devi/P.W. 6 also testified that her bangles were broken in the said incident and her wrist got injured and blood oozed out of it and that she wiped the blood with her clothes but either did not show the bloodstained clothes or handed over the blood stained clothes to the Inspector of Police. Her evidence further



disclose that she has not took treatment for her wound.

18. However, the evidence of P.W. 5 i.e. the informant disclose that the appellant No. 2/Satendra Singh tried to misbehave with Darbi Devi and caught hold of her hand and that on his intervention and others, appellant No. 2/Satendra Singh abused her and stated that the loan has to be repaid by the next day. Later, he brought Darbi Devi to Ara Sadar Hospital. On the scrutiny of the evidence of P.W. 6 i.e. Darbi Devi and the evidence of P.W. 5 the informant it is evident that the manner of first occurrence on 07.03.1996 stated by them is inconsistent with each other.

19. The Investigating Officer/P.W. 11 evidence disclose that first incident spot is located about 1 km north from the village Qutubpur Dera, at the field of Satendra Singh and that an attempt was made by appellant No. 2 to insult Darbi Devi, while she was cutting grass in the said field. His evidence further disclose that he did not find any broken pieces of bangles, at the place of first occurrence ie. at the field of



Satendra Singh and did not find any marks of cutting grass.

20. As to the time of occurrence and registering of the FIR are concerned, it is very much relevant to appreciate the dates on the Fardbeyans. The Fardbeyan i.e. Exhibit-4 was recorded by Shri A. H. Khan Sub-Inspector of Ara, Town Police Station, on 08.03.1996 at about 01:30 P.M. at Sadar Hospital, Ara. P.W. 5 Statement was recorded while he was undergoing treatment in the said hospital. Exhibit-4 clearly disclose the signature of Sub-Inspector, Ara Town Police Station dated 08.03.1996 which was forwarded to Barhara Police Station on the same day, by the Sub-Inspector, Ara Town Police Station. Further endorsement on the FIR Exhibit-4 is that of one Ramesh Dubey of Barhara Police Station which reads as follows:-

“ Upon registering Barhara P.S. Case No. 35 of 1996 dated 11.03.1996 under Section 354, 504, 324, 307, 34 of IPC and Section 27 of the Arms Act. I took up its investigation.”



21. It is pertinent to mention that Ramesh Dubey was examined as P.W. 11 in this case. In the cross-examination, it is admitted by P.W. 11 that Ara is 13 km far away from Barhara. As to why there is a delay in registering the FIR for three days, is not at all explained by the Investigating Officer in this case. Admittedly, the contents of the Fardbeyan disclose that it is cognizable offence.

22. Section 154 of the Cr.P.C. envisages that every information relating to commission of cognizable offence is given orally shall be recorded in writing and read it back to the informant, if such information is given in writing it shall be signed by the person giving it and the same shall be entered into a book kept by such officer in such a form as prescribed by the State Government.

23. Admittedly, there is delay of three days in lodging of the FIR. The Hon'ble Apex Court in the case of **Sekaran v. State of Tamil Nadu** reported in **(2024) 2 SCC 176: (2024) 1 SCC (Cri) 548 : SCC OnLine SC**



1653 have held:

14. We start with the FIR, to which exception has been taken by the appellant urging that there has been no satisfactory explanation for its belated registration. It is trite that merely because there is some delay in lodging an FIR, the same by itself and without anything more ought not to weigh in the mind of the courts in all cases as fatal for the prosecution. A realistic and pragmatic approach has to be adopted, keeping in mind the peculiarities of each particular case, to assess whether the unexplained delay in lodging the FIR is an afterthought to give a coloured version of the incident, which is sufficient to corrode the credibility of the prosecution version.

15. In cases where delay occurs, it has to be tested on the anvil of other attending circumstances. If on an overall consideration of all relevant circumstances it appears to the court that the delay in lodging the FIR has been explained, mere delay cannot be sufficient to disbelieve the prosecution case; however, if the delay is not satisfactorily explained and it appears to the court that cause for the delay had been necessitated to frame anyone as an accused, there is no reason as to why the delay should not be considered as fatal forming part of several factors to vitiate the conviction.



24. As per the abovesaid citation if the delay is not properly explained and if it appears to the Court that the cause for delay has been necessitated to frame anyone as accused there is no reason as to why the delay should not be considered as fatal for the prosecution.

25. The prosecution has miserably failed to give any proper explanation as to why there was delay of three days in registering the case, if the information has been given by P.W. 5 on 08.03.1996.

26. P.W. 9 and P.W. 8 injured persons were examined by P.W. 12 i.e. the Medical Officer, P.Ws. 5 and 10 injured persons were examined by P.W. 7 i.e. Medical Officer. The evidence of P.W. 12 clearly disclose that he examined P.W.8 Harendra Singh at 12.20 pm and also examined P.W. 9 Arjun Bind at 12.15 pm. on 08.03.1996. He found one pie size wound on right thigh on the lateral aspect of P.W. 8 and the said injury is simple in nature. However, he was not in a position to give any opinion as X-ray report was not produced before him. The Injury report of PW-8 also



got marked as exhibit 2/C.

27. His evidence further disclose that he found one pie size wound on right forearm on the dorsal aspect of PW-9 and the said injury is also simple in nature. The injury report of P.W. 9 is Exhibit 2B. P.W. 12 also testified that in the case of P.W. 9 he could not give any opinion since x-ray report was not produced. Though the injury report disclose that P.Ws. 8 and 9 were examined by P.W. 12 on 08.03.1996 on which date the injury reports were issued by P.W. 12 is unknown to this Court. The injury reports do not contain any specific date. It is important to note that the injuries found on the P.Ws. 8 and 9 are charred wounds.

28. P.W. 5/Ram Sevak Bind and P.W. 10/Biteshwar Bind were examined by P.W. 7-the Medical Officer on 08.03.1996. The Injury report of P.W. 5 is Exhibit-2, which clearly disclose that P.W. 5 sustained multiple charred wounds over whole body, thigh, leg, chest, abdomen and skull and one and two wounds are of size 1/8th inch. The X-ray was taken on



12.03.1996 which shows multiple radio opaque shadow resembling pellets. All the injuries sustained by P.W. 5 are simple in nature. Exhibit-2 is the Injury Report dated 20.03.1996. The Injury report of P.W. 10 is Exhibit 2/A which disclose that P.W. 10 sustained multiple charred wound injuries five in number at different distance of right leg 1/8th inch in size and charred wound on the right forearm of 1/8th inch in size. The X-ray of P.W. 10 was taken on 11.03.1996. It is opined by P.W. 7 the injury sustained by P.Ws. 5 and 10 are in simple in nature. The Injury report of PW 7 is Exhibit 2/A dated 20.03.1996.

29. On perusal of the entire Medical record of the injured P.Ws. 5, 8, 9 and 10, it is evident that there were pie size injuries found over the bodies of the injured by the Medical Officers i.e. P.W. 7 and 12.

30. P.W. 12 had not given any specific opinion as to the nature of wounds.

31. As to the place of occurrence is concerned, the evidence of injured witnesses is inconsistent with



each other, as per the evidence of P.W. 5, the appellants have fired from their house and moved on. If that is to be believed the pellets are to be found from the house of Jodha Singh till the place where they have moved on.

32. It is also testified by P.W. 5 that along with him three of others sustained injuries in the said incident i.e. P.Ws. 8, 9 and 10. He further deposed that bullet is still inside his body and he got the injury of bullet, while he was in the field which is situated outside his house. In the Fardbeyan, it is specifically mentioned by P.W. 5 that while he was returning from natural call, Jodha Singh instigated the appellants to kill him and on that the appellants surrounded and chased him up to his house and due to firing he ran towards his house, to save his life. The presence of other injured along with him at the time of firing was not mentioned in the Fardbeyan, which is the foremost document for making Criminal Law to put into motion.

33. The evidence of P.W. 8 disclose that he was playing in front of door of P.W. 5's house along with



P.Ws. 9 and 10 and saw Jodha Singh carrying stick and the appellants holding double barrel guns in their hands and at the instigation of Jodha Singh the appellants started firing and on that he along with P.Ws. 5, 9 and 10 got injured and after firing the appellants and Jodha Singh fled away.

34. In the cross-examination, it is deposed by P.W. 8 that he was playing at the door of P.W. 5, for about half an hour and again stated that they were playing on the street. The place of occurrence was not established as to whether it is near the door of P.W. 5's house or on the street. It is specifically testified by P.W. 8 that blood has not oozed out from the wounds, of any of the injured.

35. It is pertinent to mention that Chief Examination of P.W. 9 was not found on the record. It is specifically mentioned in the deposition that the witness did not answer all the questions correctly and further the Court permitted P.W. 9 for cross-examination.

36. It is relevant to note that the age of the



witness i.e. Arjun Bind is 12 years, as on the date of recording his examination i.e. 22.01.2000.

37. The Hon'ble Apex Court in **P. Ramesh vs. State** reported in **(2019) 20 SCC 593** have also made certain guidelines for recording of the evidence of child witness. Their Lordships have held as:-

13. Section 118 of the Evidence Act, 1872 deals with the competence of a person to testify before the court. Section 4 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, 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 on 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, 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 questions 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 is was erroneous.”

(emphasis supplied)

15. In Ratansinh Dalsukhbhai Nayak v. State of Gujarat, 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.”

(emphasis supplied)

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. A child becomes incompetent only in a case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensive manner. 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.

38. As per the guidelines, it is the duty of the court to ask simple and preliminary question to the child



of tender age to know whether he/she is able to understand the questions and capable of giving rational answer. Admittedly, the trial Court recorded in the deposition of P.W. 9 that “the witness does not answer all the questions correctly”. However, permitted the defence counsel to cross-examine the witness. The trial Court ought have not to permit PW-9 for cross-examination in the absence of any evidence on record.

39. In **Pradeep v. State of Haryana** reported in **2023 SCC OnLine SC 777 in Criminal Appeal No. 553 of 2012** the Hon’ble Court held as :

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.

40. As per the above citations, no preliminary questions have been asked to the witnesses before recording the evidence of PW-9/Arjun.

41. The evidence of PW-10/Biteshwar Bind, the time of occurrence is 6.00 am and the place of occurrence is near the door of PW-5. P.W. 10 testified that PW-8 and PW-9 were along with him and on that point of time Jodha Singh came shouting with a lathi and the appellants fired with double barrel guns and



they all sustained injuries in the said incident. One bullet hits his right leg and right hand. All four got treated in Sadar Hospital Ara. In the cross-examination, P.W. 10 stated that at the time of incident there are no other persons of the village, except P.W. 5 and he cannot say as to how many times the gun got fired after the arrival of P.W. 5. He deposed that he was playing at the door of PW-5 and he cannot state as to the time gap between the first firing and the subsequent firings and the firing took place from Jodha Singh's house.

42. As per the evidence of P.W. 10, he did not enter the house of P.W. 5 and cannot say that at what distance PW-8 and PW-9 were from him at the time of firing, but he ran to his house immediately after firing and fell down and did not pay any attention whether blood spilled at his house or not? and also did not informed anyone about the stains of blood.

43. As per the evidence of PW-8, PW-9 and PW-10 were adjacent to him at the time of firing.

44. On perusal of the entire evidence of the



prosecution witnesses, it is evident that the place of occurrence stated by each of the witnesses is inconsistent with each other. Prosecution has failed to establish whether the place of occurrence is at the door of PW-5 or at the field which is opposite to the door of PW-5 or at the street or on the pathway between the house of Jodha Singh and PW-5.

45. Further, the evidence of P.W. 11 (Investigating Officer) disclose that no blood stains have been found on the second date of incident ie. on 08.03.1996. The marks by firing bullets or rest parts of bullets (pellets) were not found at the place of occurrence. If at all, it is case of the prosecution that the appellants opened the fire at the scene of offence against the injured, the investigating officer ought to have collected the pellets form the place of occurrence. Admittedly, in the present case, the Investigating Officer has not recovered either the weapon or the pellet or the blood stained clothes of PW-5 which is fatal to the case of prosecution. The record reveals that appellants have



surrendered before the Court on 24.04.1996. It is surprising to note that even after surrender of the appellants the investigating officer has not taken any steps seeking for police custody of the appellants, in order to get any information from the accused as to the manner of offence.

46. On perusal of the entire cross-examination of the prosecution witnesses, it is evident that the defence of the appellants is that the informant PW-5, PW-8, PW-9 and PW-10 have participated in robbery of one Ram Chandra Singh in which they have sustained the charred injuries. Furthermore, the Fardbeyan of the informant was recorded into writing by A.H.Khan, Sub-Inspector of Ara Police Station but he was not examined before the Court for the best reason known to the prosecution. It is the case of the prosecution that the entire genesis for the occurrence started with the dispute between Darbi Devi and appellant no. 2 dated 07.03.1996. In spite of it, as there is no specific material before the Court and the trial Court has only framed



charge for the offence punishable under Section 307 read with 34 of the Indian Penal Code and Section 27 of the Arms Act, though, the chargesheet is filed under Section 376 read with Section 511 of Indian Penal Code. The trial court has disbelieved that the first incident took place on 07.03.1996, therefore, no charge was framed by the trial court for the offence punishable under Section 376 r/w 511 of the Indian Penal Code. On appreciation of evidence of prosecution witnesses, it is also evident that the prosecution has tried to prove that on 08.03.1996, the appellants went to the house of P.W. 6 and tried to murder Ganesh Bind and his brother. It is also admitted by the P.W. 5 (the informant) that after the first occurrence and the occurrence which is alleged to have been taken place on 08.03.1996 at 7.00 a.m., no incident has taken place in continuation of the first incident. As per the evidence of P.W. 5, appellant no. 2 has threatened PW-6 to repay the outstanding dues by the morning of the next day otherwise they have to face consequences and also threatened that they will see that



the children would carry dung. The entire evidence disclose that there were no disputes between the appellants and the informant/injured prior to the incident so as to prove that there is motive for incident. All the injuries which are found on the person of PWs -5, 8, 9 and 10 are simple in nature. The prosecution has miserably failed to prove the intention to attempt to commit the murder of the injured i.e. PWs – 5, 8, 9 and 10 in any manner. The evidences of the witnesses are contrary to the contents of the Fardbeyans and the evidence of the prosecution witnesses is inconsistent with each other. The evidence of the eye-witnesses cannot be believed as their presence was not stated by P.W. 5 in his Fardbeyan. It is evidence of PWs -1, PW-2, PW-3 and PW-4 that they have witnessed the incident on 07.03.1996 between 2.00 to 3.00 at the field, but P.Ws. 1 to 4 did not state, as to whom the field belongs. It is categorically stated by PW-11/Investigating Officer that the field belongs to appellant No. 2. P.W. 5 did not state either in the Fardbeyan or testified before the



Court about the presence of PWs 1 to 4 along with him, therefore, the presence of PWs 1 to 4 cannot be considered by this Court. Furthermore, the evidence of P.W. 4/Tejan Bind clearly disclose that after the incident, all the four injured fell down at the place of incident. But the evidence of P.W. 3 disclose the place of incident as Ram Sevak's house and that all the four got injured at the house of Ram Sevak and empty cartridges fell at the place of occurrence, but it was not shown to the Sub-Inspector. Further, as per the evidence of PW-2 blood spilled at the place of occurrence, at the house of injured and blood stains was shown to the investigating officer. It is not the case of P.W. 5/the injured that the blood spilled at PW-2's house. The evidence of P.W. 2 disclose the blood stains are found at the place of occurrence. Further, the evidence of P.W. 2 clearly disclose that the statement was not recorded by the investigating officer and there were no pellets at the place of offence. Therefore, the evidence of PWs 1 to 4 is nowhere helpful for the prosecution and to



corroborate with the manner of incident, time of incident or of the place of occurrence.

47. It is also relevant to mention that DWs 1 to 5 were examined before the Court D.W. 1 is Rajeshware Rai, D.W. 2 is Lalan Rai, D.W. 3 is Ram Chandra Singh, D.W. 4 is Dwarka Singh and D.W. 5 is Ganesh Singh. Their evidence clearly disclose that P.W. 5 had gone to the field of Ram Chandra Singh i.e. D.W. 3 to steal (loot) the Pea, Lentil and Broccoli crops and there were scuffle between the groups but did not see who has fired. The appellant tried to prove that the incident took place at the field of Ram Chandra Singh, where the injured informant tried to commit robbery of the harvested crops and in that incident firearms were used by both the groups in which the informant PW-5 and PWs 8 to 10 were injured.

48. The cardinal principle, principle of criminal Law is that the prosecution has (1) to prove the criminal case beyond all reasonable doubt. (2) the accused shall be presumed to be innocent till the guilt is proved. As



per the evidence of prosecution witnesses it is evident that PW-5, PWs 8 to 10 sustained multiple injuries and the injuries were charred wounds. Neither the bullets nor the pellets or weapons were recovered from the place of occurrence in this case by the investigating officer PW-11. Further, as per the Modi jurisprudence the injured will sustain charred injuries, if any firearm was used at a distance of 3 ft. There is no evidence on record to show that the appellants have used the double barrel guns against these injured PW-5, PW-8, PW -10 at a distance of 3 ft. It is for the prosecution to prove that these witnesses PW-5, PW-8, PW-10 sustained wounds on their body due to firing of the double barrel guns, in order to connect the crime with the appellants. The Medical officers who examined the injured did not find any bullets or entry or exit of bullet from the bodies of the injured. Accordingly, the points for determination of the appeal are answered, concluding that there is no evidence on record to prove that PWs 5, 8, 9 and 10 are injured in the hands of the appellants and that



prosecution failed to establish the place of occurrence, manner of incident, time of incident and motive for the incident. Further the evidence of PWs. 1 to 4 is not believable, as PW 5 did not mention about their presence in the Fardbeyan and prosecution has miserably failed to prove the guilt of the accused/appellants beyond reasonable doubt. In the absence of any corroborating and consistent evidence it is not proper to upheld the conviction against the appellants. In result, the judgment of the trial Court dated 24.08.2004 on the file of Additional Sessions Judge, Fast Track Court -IInd Ara, Bhojpur is hereby set aside. Accordingly, the appeal is allowed.

49. The bail bonds of the appellants shall stand cancelled.

(G. Anupama Chakravarthy, J)

Vinita,Manish/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	30.10.2024
Transmission Date	30.10.2024

