

**IN THE HIGH COURT OF JUDICATURE AT PATNA  
CRIMINAL APPEAL (DB) No.22 of 2021**

Arising Out of PS. Case No.-120 Year-2015 Thana- SANJHOLI District- Rohtas

Rakesh Kumar @ Lal Babu, Son of Late Chhotu Singh, Resident of Village -  
Khetalpur, P.S.- Sanjhauli, District – Rohtas. ... .. Appellant  
Versus

The State of Bihar ... .. Respondent

**Appearance :**

|                   |   |                                                                                         |
|-------------------|---|-----------------------------------------------------------------------------------------|
| For the Appellant | : | Mr. Krishna Prasad Singh, Sr. Adv.<br>Mr. Vikas Kumar, Adv.<br>Mrs. Anjali Kumari, Adv. |
| For the State     | : | Mr. Dilip Kumar Sinha, APP                                                              |

**CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD  
and  
HONOURABLE MR. JUSTICE ASHOK KUMAR PANDEY  
ORAL JUDGMENT  
(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)**

**Date : 16-04-2025**

Heard learned Senior Counsel for the appellant and  
learned Additional Public Prosecutor for the State.

2. The present appeal has been preferred for setting aside the judgment of conviction dated 27.02.2020 (hereinafter referred to as the impugned judgment) and the order of sentence dated 27.02.2020 (hereinafter called the impugned order) in Sessions Trial No. 205 of 2016 arising out of Sanjhauli P.S Case No. 120 of 2015 dated 26.12.2015 registered for the offences punishable under Section 341, 324, 307, 302, 34 of the Indian Penal Code (in short 'I.P.C.') and Section 25(1-b)a/26/35 and Section 27 of the Arms Act, by the learned Presiding Officer, Fast Track court- 2, Civil court, Sasaram, Rohtas (hereinafter called the learned trial court).



3. By the impugned judgment and order the learned trial court has been pleased to convict the sole appellant for the offences punishable under Sections 302/34, 324 and 341 of the I.P.C. The appellant has been acquitted of the charges under Sections 25(1)(b), 26, 27 and 35 of the Arms Act and has been ordered to undergo rigorous life imprisonment till the remainder of his life for the offence committed under Section 302/34 I.P.C. No separate sentence has been awarded for the offence under Section 324 and 341 I.P.C.

**Prosecution Case**

4. The prosecution case is based on the *fardbeyan* of Ramadhar Singh (P.W.-3). In his *fardbeyan* recorded on 26.12.2015 at 21:00 hrs. (09:00 P.M.) at the door of the house of his son-in-law, namely Wakeel Singh (the deceased), the informant has stated that his youngest daughter Anita Devi was married to Vakil Singh of village-Khetalpur under Sanhauli Police Station. They had four daughters and one son. The eldest daughter Deepshikha was married and was living in her sasural. The second daughter Priya Kumari is aged about 16 years and son Sahil is about 8 years who were living with their parents in village Khetalpur. The two daughters namely, Radhika and Shreya were living with the informant and were studying at



Bikramganj.

5. The informant claimed that at about 20:00 hrs. (08 P.M.) he came to know through his second daughter Bimla Devi and his relatives that in village-Khetalpur his daughter Anita Devi, Son-in-law Wakeel Singh and *natni* (daughter's daughter) Priya Kumari have been shot dead. On getting this information, the informant together with his nephew Indrajeet Singh and other relatives reached village-Khetalpur at the house of his son-in-law Wakeel Singh where he saw that the dead body of his daughter Anita Devi was lying in outer *verandah* of the house, whereas the dead body of his *natni* Priya Kumari was lying in pool of blood inside the house. He also came to know from the persons present there and the neighbours that on the same date in the evening at 18:30 hrs., Anita Devi and Priya Kumari had returned their house from the field, then the two nephews of Wakeel Singh who were present at the main door, namely (i) Rakesh Kumar @ Lalbabu (appellant) and (ii) Sonu Kumar (declared juvenile) along with their other associates attacked on his daughter Anita Devi and *natni* Priya Kumari by *dagger*. In the meantime, his son-in-law Wakeel Singh came to save them then both the above named persons assaulted him by dagger and as a result thereof he fell down. *Natni* Priya Kumari, in order to



save her life fled inside the house, then both the accused persons chased her and shot at her. After receiving knife and pillet, Anita Devi and Priya Kumari died on the spot. The neighbours had taken the injured Wakeel Singh for treatment to hospital. His *naati* Sahil aged about 8 years who was present in his house at the time of occurrence was in trauma and he told that Rakesh bhaiya and Sonu bhaiya along with 2-3 persons assaulted his mother, father and sister by *dagger* and shot at them. From the neighbours also the informant came to know about the occurrence. It is alleged that Rakesh Kumar and Sonu Kumar along with their some friends came with a four-wheeler vehicle, they kept the vehicle parked at '*Aahar*' of the village and after executing the occurrence, they fled away. The informant further alleged that at the place of occurrence near the dead body of Priya Kumari one country made pistol was lying which is of the person who was involved in firing. The *fardbeyan* of the informant has been recorded by the S.I. Pradeep Kumar (P.W.-4) and it has been witnessed by Indrajeet Singh (P.W.-1).

6. Upon completion of investigation, police submitted a charge-sheet against the appellant and the learned Magistrate took cognizance of the offences as alleged in the charge-sheet. After finding that the offences of which the cognizance has been



taken would be triable by a Court of Sessions, the records were submitted to the Court of Sessions from where it was ultimately transferred to the Fast Track court -2.

7. It further appears that the appellant was explained the charges which he denied and claimed to be tract. On behalf of the prosecution as many as 5 witnesses were examined and some documentary evidences were produced which have been marked exhibits.

8. The statement of the appellant was recorded under Section 313 Cr.P.C. in which he claimed his innocence. The defence examined four witnesses in this case. The list of prosecution and defence witnesses and the documents exhibited on behalf of the parties are provided hereunder for a ready reference.

**List of Prosecution Witnesses**

|               |                            |
|---------------|----------------------------|
| <b>P.W.-1</b> | Indrajeet Singh            |
| <b>P.W.-2</b> | Sahil Kumar                |
| <b>P.W.-3</b> | Ramadhar Singh (Informant) |
| <b>P.W.-4</b> | Pradeep Kumar              |
| <b>P.W.-5</b> | Kumar Deo Pujan (Doctor)   |

**List of Prosecution Exhibits**

|               |                                             |
|---------------|---------------------------------------------|
| <b>Ext.-1</b> | Signature of P.W.-1 on the <i>fardbeyan</i> |
| <b>Ext.-2</b> | Photocopy of the death review               |



|          |                                                             |
|----------|-------------------------------------------------------------|
|          | report                                                      |
| Ext.-3   | <i>Fardbeyan</i>                                            |
| Ext.-4   | Seizure list near the dead body of Priya Kumari             |
| Ext.-5   | Seizure list near the dead body of Priya Kumari             |
| Ext.-5/1 | Seizure list from the outer <i>verandah</i> of Wakeel Singh |
| Ext.-6   | Death review report of Wakeel Singh                         |
| Ext.7    | Writing of Charge-sheet                                     |
| Ext.-8   | Post-mortem report of Priya Kumari                          |
| Ext.-8/1 | Post-mortem report of Wakeel Singh                          |
| Ext.8/2  | Post-mortem report of Anita Kumari                          |

**List of Defence Witnesses**

|        |                   |
|--------|-------------------|
| D.W.-1 | Santosh Singh     |
| D.W.-2 | Vikash Kumar      |
| D.W.-3 | Jay Prakash Singh |
| D.W.-4 | Pramod Kumar      |

9. The defence did not adduce any documentary evidence.

**Findings of the learned Trial Court**

10. The learned trial court having analyzed the evidences led on behalf of the parties came to a conclusion that the prosecution has been able to prove it’s case against the appellant beyond all reasonable doubt. It is recorded that the



only eye-witness of the occurrence is the witness Sahil Kumar (P.W.-2), who is a child witness and has supported the prosecution story with regard to the place and manner of occurrence. The trial court found that the defence witnesses i.e. DW-1, DW-2 and DW-3 are not reliable witnesses, they are the family members/cousins of the deceased Wakeel Singh whose conduct is not natural.

**11.** The trial court found that the defence witnesses did not take any step after the occurrence took place. It has been held that the defence witnesses have failed to demonstrate that there was any property dispute between the parties. There was no reason for the prosecution to falsely implicate the appellant who is a member of the family. Since there was no allegation/evidence against this appellant that he had fired from the country made pistol, the learned trial court found that the evidence under the Arms Act would not be attracted against this appellant. The learned trial court held that the eye-witness Sahil Kumar had fully supported the prosecution case. In its ultimate analysis the learned trial court convicted the appellant and sentenced him as stated above.

**Submissions on behalf of the Appellant**

**12.** Before this Court, learned Senior Counsel for the



appellant has assailed the impugned judgment and order on various grounds. It is submitted that the learned trial court could not appreciate that the only eye-witness of this case is said to be an eight years old boy. While recording his evidence in course of trial, the trial court has not tested his competence. It is further submitted that the learned trial court has committed error in convicting the appellant on the sole testimony of an eight year old boy, in absence of any corroboration to his evidence. At the same time, it is submitted that the trial court has not considered the defence witnesses and their depositions have been discarded by the learned trial court under a wrong notion that they being family members of the deceased, had not acted in their natural conduct by reporting the alleged occurrence to the police station.

**13.** Learned Senior Counsel submits that in this case, no witness from the village has been examined. The weapon of crime, i.e. the pistol has not been produced in course of trial and there is no ballistic report suggesting that any firing had taken place from the said pistol. Learned Senior counsel submits that there is no gun shot/ pistol injury on the body of the deceased, therefore, the prosecution story that the deceased were shot at, is not getting corroborated. It is submitted that a reading of the



statement of P.W.-3 in paragraph '11' and at the same time the statement of P.W.-3 in paragraph '1' would show that they are contradictory to each other. In para '1' of his deposition, P.W.-3 has stated that he had seen the country made pistol lying near the body of Priya Kumari. Further, in para '11', he has stated that he has not given the pistol to police and to his information no seizure list of the pistol was prepared.

14. It is submitted that P.W.-3 has stated in his deposition that his *naati* Sahil Kumar was present near the place of occurrence but P.W.-2 has stated that on the date of occurrence he had gone to his school.

15. Learned Senior Counsel has relied upon the judgment of the Hon'ble Supreme Court in the case of **Pradeep Vs. State of Haryana** reported in **AIR 2023 SC 3245** and **P. Ramesh Vs. State represented by Inspector of Police** reported in **(2019) 20 SCC 593** to submit that before recording of the 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. In this case the Judicial Officer has not done preliminary enquiry, therefore, it would not be safe to convict the appellant on the sole testimony of the



child witness P.W.-2. There is every possibility that the child witness may have been tutored.

**Submissions on behalf of the State**

16. On the other hand, learned Additional Public Prosecutor for the State has opposed the appeal. It is submitted that the learned trial court has duly examined and analyzed the evidence of the prosecution witnesses and the exhibits produced in course of trial. It is submitted that three members of a family have been killed. The appellant is none else but the nephew of one of the deceased Wakeel Singh and it has come in evidence that the family of Wakeel Singh and his brothers were living in the same house. The house of the deceased is the place of occurrence.

17. It is submitted that the occurrence took place on 26.12.2015 at about 06:30 PM. The minor son of the deceased Wakeel Singh is an eye-witness of the occurrence. He has supported the prosecution case and has withstood the test of cross-examination by the defence. The P.W.-2 has given the detail of the occurrence which had taken place in his presence. The defence did not suggest to this witness that he was not present at the place of occurrence. In paragraph '3' of his deposition, when he was suggested that his maternal grandfather



has told him about the occurrence and he had not seen the same, he denied it and specifically stated that he had seen the occurrence.

**18.** Learned Additional Public Prosecutor submits that on close scrutiny of P.W.-2, it would appear that his testimony remained intact. He is not a tutored witness and even as the learned Judicial Officer has not conducted a preliminary enquiry into the competence of this witness, that alone would not be the ground to reject the whole testimony of P.W.-2. He is a reliable witness and the circumstances showing the probability of the case are duly corroborating the evidence of P.W.-2.

**19.** Learned Additional Public Prosecutor has further pointed out that the conduct of the defence witnesses have been rightly taken note of by the learned trial court. These witnesses are the family members of the deceased but they despite their knowledge of the occurrence did not report the matter to the police, they did not depose as a witness to disclose the true and correct facts, rather they chose to come as a defence witness at a belated stage in course of trial in order to save the appellant who is one of the nephews of the deceased Wakeel Singh.

**Consideration**

**20.** We have heard learned counsel for the appellant



and learned Public Prosecutor for the State as also perused the trial court records. It is evident from the materials on the record that the whole prosecution case is based on the testimony of the eye-witness namely Sahil who is the minor son of the deceased Wakeel Singh. The *fardbeyan* of Ramadhar Singh (P.W.-3) is based on the information which he received from his *naati* Sahil aged about 8 years. The occurrence took place on 26.12.2015 at about 06:30 PM in the house of the deceased, the informant reached village Khetalpura within a short period after getting the information of the occurrence at 08:00 P.M. on the same day and his *fardbeyan* was recorded at 09:00 PM. Thus, within two and half hours of the occurrence the *fardbeyan* of P.W.-3 was recorded. During this period there was no occasion for P.W.-3 to tutor his *naati* Sahil.

**21.** In course of trial, the eye-witness Sahil Kumar (P.W.-2) has stated in his examination-in-chief that he was sitting at his *dalaan*, his elder father, Santosh Singh was sitting at some distance and his father was also sitting there. He has stated that Sonu bhaiya and Rakesh bhaiya were coming there, his elder father said that they have been given money recently so why they have come. At this time his mother and Priya didi were coming from the field, then Sonu bhaiya shot at his mother



and Rakesh bhaiya assaulted his mother by a dagger. He further deposed that Priya didi was fleeing away then Sonu bhaiya and Rakesh bhaiya assaulted her by dagger and when his Papa was coming then Sonu bhaiya and Rakesh bhaiya assaulted him from behind by dagger. This witness has stated that he had also gone with his father to the Doctor but his father died. P.W.-2 identified Sonu and Rakesh in the dock.

**22.** This Court finds that this witness has been cross-examined. He has given the detailed description of his family and that clearly shows his understanding and competence. He has stated that his maternal grandfather had not told him about the occurrence rather he had personally seen the occurrence. He has stated that *dalaan* and house are together and there is a room adjacent to the *dalaan* in which chicken was being prepared. This witness has stated that the family of the accused and his family are together. He had gone to the hospital when his maternal grandfather had reached to the place of occurrence. This Court finds that in his cross-examination, this witness was never suggested that he was not present at the place of occurrence, though it was suggested that he had not seen the occurrence but he denied the suggestion.

**23.** The Doctor (P.W.-5) who conducted the *post-*



*mortem* of the dead body of the three deceased found the following injuries on the body of the deceased:-

“Post-mortem examination done over dead body of **Priya Kumari** age-16 years, Female, D/o Wakil Singh, Vill-Khetalpur, P.S. Sanghauli, P.S. Rohtas on 27/12/15 at 11:30 AM at Sadar Hospital, Sasaram found following Anti-mortem Injuries –

External injuries – i. Sharp cutting wound on lower abdomen size 4"x2"x abdominal muscle deep and bulging of abdominal contents through wound. (ii) Sharp cut wound over left side of the abdomen above the umbilicus size 3"x2"x abdominal cavity deep. (iii) Sharp cut wound over right side of chest 3"x1½"x chest rib deep. (iv) Sharp cut wound on back of chest over left side of size 3"x2"x cavity deep. (v) Sharp cut wound over left shoulder joint left side 1½"x1/2"x muscle deep. (vi) Sharp cut wound over left side of face size 1"x1/2"x facial muscle deep. (vii) Sharp cut wound over left side of angle of mouth 1/2"x1/4"x muscle deep. (viii) Sharp cut wound over right elbow joint posteriorly. size 1/2"x1/4"x muscle deep.

Dissection:- Skull- Skullbone intact and Brain substance and meninges intact & pale.

Chest:- Bony cage of chest-intact-both lungs intact and pale. Heart-intact and both-chamber of heart empty. Stomach-cut and digested material scattered in abdominal cavity. Small intestine cut and fluid came out in cavity which was mixed with blood. Abdominal cavity containing blood, large intestine cut and faecal matter was found in Abdominal cavity, liver, spleen and both kidneys intact and pale. Urinary Bladder- 50 ml of urine, Uterus-non gravid.

Cause of Death- Haemorrhage and Shock-caused by above mention injuries. Time elapse since death till P.M. examination done- 12 hrs. to 24 hrs.

(2) Post-mortem examination done over dead body of **Wakil Singh** age-55 years, Male, s/o Late Bechan Singh R/o Vill. Khetalpur P.S. Sanjhauli



District-Rohtas on 27/12/15 at 11:30 AM at Sadar Hospital, Sasaram and found following Anti-mortem Injuries –

External Injuries – (i) Stitched wound over the left side of renal area of back side size 4" length, (ii)Stitched wound over the right side of back of chest below scapula size 4" length. (iii) Abrasion on left side of knee above upper part of knee 1"x1/4"x skin deep. (iv) Sharp cutting of wound over the middle of left thigh posteriorly size-2"x1/4"x muscle deep.

Dissection:- Skull- Skull bone intact and Brain substance and meninges intact & pale.

Chest:- Bony cage of chest ribs fracture on right side. After reunion of stitches wound was deeply situated in the deep cavity of chest with inverted margin wound was likely to penetrating of size 4"x2"x cavity deep. Inverted margin with clotted blood found in chest cavity. Both lungs intact and pale. Heart-right chamber of heart full of blood and left chamber of heart empty. Stomach-containing semi digested food material abdominal cavity containing blood fluid. After reunion of stitches of left renal area the wound was penetrating up to the left kidney where it was lacerated. Right Kidney intact and pale. Liver, spleen pale and intact. Small intestine and its loop-containing fluid and gases-large intestine containing fecal matter and gases. Urinary bladder containing 100ml. of urine.

Cause of Death- Haemorrhage and Shock due to above mention injuries.

Time elapse since death till PM Examination- 12 hrs to 24 hrs.

(3) Post mortem examination done over dead body of **Anita Devi** Age 45 years Female W/o Wakil Singh R/o Vill. Khetalpur P.S. Sanjhauli District-Rohtas on 27/12/15 at 9:30 AM at Sadar Hospital Sasaram found following anti-mortem injuries –

External Injuries – (i) Penetrating wound over the Back side of dorsal spine near lower border of left scapula of size 3"x 2" x cavity deep of chest with margin slightly decline lower part of wound with



inverted margin. Lower part of the wound was sharp cutting. (ii) Penetrating wound over right side of the front of neck size 3"x2"x cervical vertibre deep in right side of margin inverted lower part of the wound sharp cutting. (iii) Penetrating wound over dorsal spine between both scapula size 3"x2"x cavity deep margin inverted lower part of wound sharp cutting. (iv) Sharp cutting of wound over the right pinna of the Ear size 1-1/2"x1/4" x muscle deep. (v) Sharp cutting wound over right side of face size 1-1/2"x1/4"x muscle (facial) deep. (vi) Sharp cutting wound over right side of scapula and shoulder size 3"x1/4"x scapula bone deep.

Dissection: Skull- Skull bone intact. Brain and meninges intact & pale.

Chest:- Bone cage of chest rib of left side fracture. Clot blood found under the chest cavity. Massively lungs left side teared and right side intact. Heart-Intact and both chamber empty, Neck- large vessels of neck cut through up to the cervicle vertibra. Stomach-containing semi digested food. Spleen, liver and both kidney intact and pale. Small intestine and its loop-containing fluid and gases-large intestine containing fecal matter and gases. Urinary bladder containing 150ml. of urine. Uterus-non-gravid.

Cause of Death- Hemorrhage and shock due to above-mention injuries

Time elapse since death till PM Examination done- 12 to 24 hrs.”

**24.** This Court further finds that there is a seizure list (Ext.-4) which shows that a pistol which was misfired had been seized. This presence of seizure list showing that there was seizure of a misfired pistol clearly corroborates the evidence of the child witness P.W.-2 that one of the accused Sonu had shot at his mother. The firing however missed as it appears from the pistol described in seizure list (Ext.-4). The said pistol was also



produced in court on 09.03.2016 and the I.O. had sought permission to get tested the same but it seems that the I.O. had committed a mistake in not producing the pistol and seizure list initially with the FIR and in this connection, he had filed a petition in the court of learned Magistrate which is available on the record.

**25.** In the entire circumstances present on the record we find that even though the preliminary enquiry was not conducted with regard to the competence of P.W.-2, his testimony cannot be discarded. A child would be a competent witness if he has capacity and intelligence to understand the difference between truth and falsehood. In the case of **P. Ramesh** (supra), the Hon'ble Supreme Court has dealt with this aspect of the matter in paragraph '13' to '16' which we reproduce hereunder for a ready reference:-

“**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*<sup>5</sup>, where this Court, in relation to child witnesses, held thus : (SCC p. 343, para 5)”

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5. *Dattu Ramrao Sakhare v. State of Maharashtra*, (1997) 5 SCC 341 : 1997 SCC (Cri) 685



“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*<sup>6</sup>, 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.”

(Emphasis supplied)

**15.** In *Ratansinh Dalsukhbhai Nayak v. State of Gujarat*<sup>7</sup>, this Court held thus : (SCC pp. 67-68, para 7)

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6. *Wheeler v. United States*, 1895 SCC OnLine US SC 220 : 40 L Ed 244 : 159 US 523 (1895)

7. *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



*“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 case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible 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.

**26.** In the case of **Pradeep** (supra), the Hon'ble Supreme Court has held in paragraphs '8' and '9' as under:-

“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.”

27. At this stage we reproduce Section 118 of the Indian Evidence Act and Section 4 of the Oaths Act, 1969 hereunder :-

**Section 118 of the Evidence Act**

**“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.”

**Section 4 of the Oaths Act, 1969**

**“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.”

**28.** On a bare reading of the afore-mentioned provisions and the judgments of the Hon’ble Supreme Court, it would appear that proviso to Sub-section (1) of Section 4 of the Oaths Act talks of forming of an opinion by the Court as to the



understanding of the witness as his/her duty to speak the truth. If a child below 12 years of age does not understand this then the requirement of administering oath as mentioned in Sub-section (1) of Section 4 and provisions of Section 5 shall not apply 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. In none of the judgments, the Hon'ble Supreme Court has held that if the evidence of a child witness is recorded without conducting a preliminary examination by the learned trial judge, the evidence would be required to be discarded. In fact, it would appear from paragraph '9' of the judgment in the case of **Pradeep** (supra) that the Hon'ble Supreme Court has put an advisory note to record the preliminary questions and answers so that the Appellate Court can go into the correctness of the opinion of trial judge. In the opinion of this Court, the judgments of the Hon'ble Supreme Court would lead to a conclusion that it is for the court to apply its mind to the question as to whether there is a possibility of the child witness being tutored. The competence of the child witness may be judged from the ability of the child witness to understand the question and answer the same with a clear understanding as to the difference between speaking truth



and falsehood.

**29.** In the persent case, we have noticed that although the learned trial judge has not done his duty by conducting a preliminary examination as to the competence of the witness but the child witness in this case (PW-2) has understood all the questions put to him, his capacity and intelligence to understand the question and the difference between truth and falsehood cannot be doubted. His evidence inspires confidence of the Court. To this Court, P.W.-2 appears to be a ‘Sterling Witness’.

**30.** In the case of **Rai Sandeep @ Deepu versus State (NCT of Delhi)** reported in **(2012) 8 SCC 21**, the Hon’ble Supreme Court has considered as to who may be called “sterling witness”. Paragraph ‘22’ of the judgment in the case of **Rai Sandeep** (supra) is as under:-

“**22** In our considered opinion, the “sterling witness” should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness.



The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a “sterling witness” whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

**31. In the case of Lallu Manjhi and Another versus State of Jharkhand** reported in **(2003) 2 SCC 401**, the Hon’ble Supreme Court has reiterated the law of evidence with respect to the requirement of any particular number of witnesses to be examined in proof of a given fact. In paragraph ‘10’ of the judgment, their Lordships have held as under:-



“10. The law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the court may classify the oral testimony into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness. (See: *Vadivelu Thevar v. State of Madras*<sup>1</sup>.)”

**32.** It has been argued on behalf of the appellant that the child witness (PW-2) has stated in his evidence that the accused Sonu had fired from the pistol but no firearm injury has been found on the body of any of the deceased, therefore, the prosecution story that one of the deceased was shot at is not getting corroborated from the medical evidence.

**33.** On this point, this Court finds that the child witness (PW-2) has stated that Sonu Bhaiya had shot at his mother by a pistol. Rakesh Bhaiya (the appellant) had assaulted his mother by a dagger. He has further stated in his examination-in-chief that Priya Didi was fleeing away then Sonu Bhaiya and Rakesh Bhaiya both assaulted her by dagger and then when his father

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1. [AIR 1957 SC 614 : 1957 Cri LJ 1000]



was coming then Sonu Bhaiya and Rakesh Bhaiya both assaulted him by dagger. The defence has not suggested him in course of his cross-examination that what he had deposed in court was not stated by him in course of investigation before the I.O., therefore, the evidence of PW-2 is to be taken as consistent and there is no deviation from his statement made before police. His statement to the effect that Sonu Bhaiya had shot at his mother has to be considered in the light of the materials on the record showing that police had seized the pistol and the said pistol was having a misfired cartridge. This witness is consistent in his evidence that this appellant had assaulted all the three deceased by dagger. The injuries found on the body of the deceased have already been extracted by this Court hereinabove. The Doctor (PW-5) has found several sharp cut wound on the body of the deceased. There are also penetrative wound and there is no iota of doubt that these injuries which are duly noted in the post-mortem reports (Exhibit '8', '8/1' and '8/2' respectively) were caused by the pointed and sharp cutting weapons.

**34.** In the case of **Baso Prasad and Others versus State of Bihar** reported in **(2006) 13 SCC 65**, the Hon'ble Supreme Court has considered in paragraphs '27', '28' and '29' of the judgment as under:-

“**27.** In some cases, medical evidence may corroborate the prosecution witnesses; in some it may not. The court,



however, cannot apply any universal rule whether ocular evidence would be relied upon or the medical evidence, as the same will depend upon the facts and circumstances of each case. No hard-and-fast rule can be laid down therefor.

**28.** It is axiomatic, however, that when some discrepancies are found in the ocular evidence vis-à-vis medical evidence, the defence should seek for an explanation from the doctor. He should be confronted with the charge that he has committed a mistake. Instances are not unknown where the doctor has rectified the mistake committed by him while writing the post-mortem report.

**29.** In *Surinder Singh v. State of U.P.*<sup>7</sup>, it was held: (SCC p. 35, para 17)

“17. One of the pleas raised by the learned counsel for the appellants was that the injuries as noticed by the doctor are at variance with the ocular evidence. On a close reading of the evidence of the eyewitnesses and the doctor's report, there is no noticeable variance. The mere fact that the doctor said that injuries appeared to be on one side of the body and the witnesses said that attacks were from different sides, is too trifling an aspect. When three persons are attacking a person, the witnesses naturally get shocked. This is normal human conduct and the immediate reaction is to save the victim and to stop the assailants from further attacks. That is precisely what has been done by the eyewitnesses. It is only when the medical evidence totally improbabilises the ocular evidence, that the court starts suspecting the veracity of the evidence and not otherwise.”

**(See also State of Karnataka V. Papanaika<sup>8</sup>)**

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7. (2003) 10 SCC 26 : 2004 SCC (Cri) 717

8. (2004) 13 SCC 180 : 2005 SCC (Cri) 104



**35.** In our opinion, the statement of PW-2 that Sonu Bhaiya had shot at his mother but the injury report of his mother not showing any firearm injury would not take away the credibility of his ocular evidence. He is consistent in his deposition that all the three deceased were assaulted by dagger and this appellant had assaulted all of them by dagger. The medical evidence in this case lends corroboration to the evidence of PW-2.

**36.** This Court finds that in this case, the place of occurrence as well as the date and time of occurrence have been duly proved by the prosecution witnesses. Inderjeet Singh (PW-1) had gone with his uncle Ramadhar Singh (PW-3) to the village Kethalpur on getting information of the occurrence. On reaching Kethalpur, he had seen the dead body lying by the side of the door and inside the house. The statement was recorded by police. He is one of the witnesses to the inquest report (Exhibit '2') with objection. He has stated that papers for FIR was prepared and he had put his signature on the said paper. Police had also conducted search of the house. This Court finds that the defence has not been able to take any contradiction in the evidence of this witness.

**37.** The informant has been examined as PW-2 in this



case. He is the father of Anita Devi and son-in-law of Wakeel Singh. He had reached Village Kethalpur on getting information about the occurrence where he had seen the dead bodies lying in the outer Verandah and there he came to know that the two nephews of Wakeel Singh, namely, Sonu Kumar and Rakesh Kumar had assaulted the deceased by dagger. In his presence, police had arrived at the place of occurrence and his fardbeyan was recorded by the Officer Incharge of Sanjhauli, namely, Pradeep Kumar (PW-4). He identified his signature on the Fardbeyan. He also identified signature of Inderjeet Singh (PW-1). At his instance, the entire fardbeyan has been marked Exhibit '3'. This witness is not an eye witness to the occurrence but he reached the place of occurrence immediately after getting information of the occurrence. He had recieved dead bodies. When he reached the place of occurrence, he had seen two dead bodies and regarding one, he was told that one person was injured who had been taken to Sanjhauli Hospital for treatment.

**38.** This Court finds that PW-3 was suggested by the defence that the deceased Priya Kumari was living with him but when she developed bad character then she was sent to her father's place. Further, he denied the suggestion of the defence that Priya Kumari had relationship with many boys and for that



reason, the boys from outside had committed her murder. The kind of suggestions given by the defence is beyond comprehension as it cannot be believed that if some outsiders will come into the house and will kill three members of the family, the other members of the family who are now deposing as defence witnesses would not react and nobody would even make any attempt to chase those outsiders. It is worth noting that the prosecution witnesses were not suggested by defence that the accused persons were not present at the time of occurrence in the house.

**39.** From the evidence of the prosecution witnesses, it would appear that Santosh (DW-1) has stated that it was 06:00 PM when darkness had prevailed and Wakeel Singh who is his brother, Priya Kumari her niece and Anita Devi her *bhabho* were killed. He has stated in his examination-in-chief that Priya was living with her maternal grandfather in Bikramganj but her maternal grandfather brought her back to her father and told that she had developed bad relationship. According to this witness, two boys came on a motorcycle, he and all the three deceased and family members were in 'Khalihan' Anita was shot at by one boy by one pistol, the another boy stabbed his brother and Priya was killed in the said quarrel by stabbing.



40. D.W.-1 has stated that he is an old man and he is unable to see properly, therefore, he could not save them. Wakeel Singh was taken to Hospital by Vikash Singh. He has stated that Sahil Kumar (PW-2) had gone to attend tuition. He has raised *hulla* then villagers assembled. It is important that in paragraph '5' of his deposition, this witness has stated that he had not made any statement before police. He has stated in his cross-examination that he had not told the police that Sahil (PW-2) had gone to take tuition to Pramod Master. This witness was suggested that he was deposing in collusion with the accused persons to save Sonu and Rakesh.

41. Vikash Kumar (DW-2) has stated that on 26.12.2015 at 06-07:00 PM, he was teaching the children in his house, he came outside after hearing sound of firing. He has stated that two persons fled away after killing the deceased persons. He has stated that two persons were killed on the spot. He had taken Wakeel Singh in a tempo to Sanjhauli Hospital from where he was referred to Sasaram. At 11-11:30 PM, Wakeel Singh died whereafter post-mortem was conducted. He has also stated that Priya was not conducting well, she was sent back from her maternal grandfather's place. Two boys came on a motorcycle and they tried to take away Priya in which



arguments took place. In his cross-examination, this witness has stated in paragraph '6' that Wakeel Singh has his house in which he was residing. He has stated that when he came outside, he found that his uncle has been killed, he was in pool of blood, Priya was also assaulted by dagger, he had tried to catch the boys but both of them fled away by motorcycle. This witness has also stated in paragraph '7' of his cross-examination that he had not made statement before police. His attention was drawn towards paragraph '27' of the case diary which records his statement made before police wherein he had stated that when Sonu and Rakesh were assaulting his niece by dagger and gun then he ran and tried to catch them. This witness denied to have made such statements before police. He was suggested that Sonu and Rakesh are his cousin brothers whom he was trying to save.

**42.** Jai Prakash Singh (DW-3) has also deposed on the line of DW-1. This witness was suggested by the prosecution that in his statement before Darogaji, he had stated that when he ran towards the house, Sonu and Rakesh were having dagger in their hand and the deceased were lying on the earth in pool of blood.

**43.** One Pramod Kumar (DW-4) has stated that he was



teaching Sahil (PW-2) at the time of occurrence. He was suggested that he is not giving tuitions and being a neighbour he had falsely deposed in this case.

44. We have noticed from the evidence of the defence witnesses that they have come forward at a belated stage to save the appellant.

45. We have also gone through the evidence of the I.O. (PW-4). He has stated that he had recorded the fardbeyan of Ramadhar Singh (PW-3) at the house of Wakeel Singh. He has given the description of the place of occurrence. This witness has stated in paragraph '5' of his examination-in-chief that at the place where the dead body of Priya Kumar was lying, 0.315 bore loaded pistol (*katta*) was seized. He had prepared the seizure list of the *katta* which he has proved as Exhibit '4'. He has also proved the second seizure list of blood soaked bedsheet and the blood soaked soil (Exhibit '5' and Exhibit '5/1' respectively). He had recorded the statement of Vikash Kumar and the driver Munna chaudhary who is the tempo driver who had taken injured Wakeel Singh for treatment. He has also stated to have recorded the evidence of independent witness Jai Prakash Singh and Santosh Singh. It is evident that Jai Prakash Singh and Santosh Singh both have deposed as defence



witnesses in this case even as they are named as prosecution witnesses in the chargesheet. Vikash Kumar who has also deposed as a defence witness happened to be a chargesheet witness for the prosecution but instead of supporting the prosecution case they by changing their stand chose to support the defence at the stage of trial. Thus, the defence witnesses cannot be put in the category of wholly reliable witnesses. In the opinion of this Court, the defence witnesses are not at all reliable witnesses. They are closely related to the accused and are partisan witnesses.

**46.** We have noticed that the I.O. has recorded in paragraph '27' of the case diary, the statement of Vikash Kumar (DW-2). It is this paragraph '27' towards which the attention of Vikash Kumar (DW-2) was drawn by the prosecution. In his statement before police, he had stated to have seen his younger brother Rakesh Kumar @ Lal Babu (the appellant) and Sonu Kumar, son of Santosh Singh repeatedly assaulting upon deceased by dagger. It is evident that one of the accused of this case is none else but son of Santosh Singh and said Santosh Singh has deposed as a defence witness. It is re-iterated that these defence witnesses are not trustworthy as they are interested in saving the appellant by making a fabricated story.



47. Having examined the entire evidences available on the record, we are of the considered opinion that the learned trial court has not committed any error in appreciation of the evidences available on the record.

48. This appeal has no merit. It is dismissed accordingly.

(Rajeev Ranjan Prasad, J)

( Ashok Kumar Pandey, J)

Durgesh/-  
Shubham/-

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