

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.171 of 2004

=====

Arun Singh, S/o Sri Brahmdeo Singh, R/o Village-Sabalpur, Police Station
-Laxmipur, District- Jamui

... .. Appellant/s

Versus

State Of Bihar

... .. Respondent/s

=====

with
CRIMINAL APPEAL (SJ) No. 296 of 2004

=====

Ajay singh, s/o sri brahmdeo singh, r/o village-sabalpur, police station
-laxmipur, district- jamui

... .. Appellant/s

Versus

State Of Bihar

... .. Respondent/s

=====

Appearance :

(In CRIMINAL APPEAL (SJ) No. 171 of 2004)

For the Appellant/s : Ms. Surya Nilambari, Amicus Curiae

For the Respondent/s : Mrs. Anita Kumari Singh, APP

(In CRIMINAL APPEAL (SJ) No. 296 of 2004)

For the Appellant/s : Ms. Surya Nilambari, Amicus Curiae

For the Respondent/s : Mrs. Anita Kumari Singh, APP

=====

CORAM: HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY

ORAL JUDGMENT

Date : 04-04-2025

1. The criminal appeal No. 171 of 2004 is preferred by the appellant/Arun Singh, who was arrayed as accused No. 2, and Criminal Appeal No. 296 of 2004 was preferred by appellant/Ajay Singh, who was arrayed as accused No. 1 in the FIR. However, in the judgment of the trial Court, Arun Singh was shown as accused No. 1 and Ajay Singh was shown as accused No. 2. Arun Singh and Ajay Singh are brothers. Both the Criminal Appeals i.e. 171 of 2004 and 296 of 2004 are arising out of the



common judgment in Sessions trial No. 170 of 2002 on the file of Additional District and Sessions Judge, Fast-Track Court (FTC), IV Jamui dated 26.02.2004. Both the appellants were tried for the offences punishable under Sections 302 read with 34 and under Section 323 of the Indian Penal Code for the murder of Ram Bilash Singh @ Karoo Singh on 05.05.1999, at about 12:00, noon at village Sabalpur and for causing hurt to Pawan Rekha Devi, wife of the deceased Ram Bilash Singh. It is relevant to mention that the father of the appellants, Brahmdeo Singh was arrayed as accused No. 3 in the FIR.

2. The case of the prosecution, as per the fardbeyan of the informant/Pawan Rekha Devi, is that she preferred the fardbeyan at 05:00 PM on 08.05.1999, before the Officer In-charge of Laxmipur, Police Station contending that on 08.05.1999 at about 08:00 A.M., Ram Bilash Singh @ Karoo Singh was repairing the fence towards the west of his land, situated adjacent to his house. While digging hole for fixing the poles, the neighbours i.e. Brahmdeo Singh and Arun Singh obstructed him, inspite of the



said protest, the husband of the informant i.e. Ram Bilash Singh @ Karoo Singh fixed the pegs. On prompting, Brahmadeo Singh and Arun Singh abused and threaten him, to teach a lesson and further stated that there will be bloodshed once, Ajay singh will come to know about the incident.

3. Further, it is the case of the prosecution that on same day, i.e., 08.05.1999 at about 12:00 Noon, Ajay Singh and Arun Singh, (the appellants) armed with iron rods and their family members namely, Brahmadeo Singh, (father of the appellants), Rubi Devi (wife of Arun Singh) and Sunita Devi (wife of Ajay Singh), holding brick bats, came to the fencing site of the informant and they all started removing the pegs, for which the informant/ Pawan Rekha Devi obstructed. On that, all the accused persons started assaulting the informant/ Pawan Rekha Devi and dragged her towards their house. Thereafter, when the deceased/Ram Bilash Singh, tried to intervene and save the informant from the hands of the accused, both the appellants allegedly assaulted the deceased/Ram Bilash Singh on tender



parts of his body, with iron rods for which, he, sustained injuries on his temple and fell down and died on the spot.

4. It is further alleged that Brahmdeo Singh, Rukmani Devi and Sunita Devi, caught hold of the deceased and Sunita Devi snatched the wrist watch of Ram Bilash Singh. In the said incident, the informant/Pawan Rekha Devi also sustained injuries on different parts of her body, including a cut below her right elbow. The contents of the fardbeyan further disclose that several people of the locality witnessed the occurrence. However, the names of the eye-witnesses were not mentioned in the fardbeyan.

5. Basing on the fardbeyan, a criminal case was registered against the appellants and three others (Brahmdeo Singh, Rubi Devi and Sunita Devi vide Case No. 38 of 1999 for the offences punishable under Sections 302, 323, 379 r/w 34 of Indian Penal Code on 08.05.1999 at 5:00 P.M. on the file of Laxmipur Police Station. Later, the Officer In-charge of the Police Station investigated the case and



submitted a charge-sheet on 12.12.1999/13.12.1999 only against Ajay singh and further investigation continued against the other accused. On 15/20.12.1999, a supplementary charge-sheet was filed against Arun Singh.

6. The Learned Chief Judicial Magistrate took cognizance for the offence on 13.12.1999 and committed the case to the Sessions Court on 11.03.2002. Subsequently, the case was transferred to the Additional District and Sessions Judge, Fast Track Court No. IV, Jamui on 19.12.2003. On 22.05.2003, charges were framed against the appellants for the offences punishable under Section 302 r/w 34 and Section 323 of IPC, read over and explained to the appellants, in Hindi for which, they pleaded not guilty and claimed to be tried.

7. On behalf of the prosecution, P.Ws. 1 to 18 were examined and Exhibits 1 to 9 were got marked.

Sl. No.	Name of prosecution witness	Prosecution Details
P.W. 1	Shashi Kumar Chaudhary	Doctor
P.W. 2	Chandra Shekhar Singh	Hostile
P.W. 3	Rajendra Singh	Not declared hostile but stated that he knows



		nothing
P.W. 4	Nuneshwar Yadav	Not declared hostile but stated that he knows nothing
P.W. 5	Basuki Ram	eye-witness
P.W. 6	Upendra Singh	eye-witness
P.W. 7	Jai Prakash Ram	Hostile
P.W. 8	Ram Awtar Singh	Eye-witness/ witness to fardbeyan and inquest report
P.W. 9	Surendra Kr Singh @ Babloo Singh	Eye-witness
P.W.10	Phuchhan Singh	Not declared hostile but stated that he knows nothing
P.W.11	Somar Manjhi	Not declared hostile but stated that he knows nothing
P.W.12	Raj Kumar Manjhi	Not declared hostile but stated that he knows nothing
P.W.13	Lalan Kumar Singh	Minor son of deceased/eye-witness
P.W.14	Pawan Rekha Devi	Wife of deceased/eye-witness/informed injured
P.W.15	Dr. Suresh Kr. Mandal	Doctor who examined P.W. 14
P.W.16	Shankar Dayal Singh	Investigating Officer- who recorded fardbeyan
P.W. 17	Devendra Narayan Singh	An advocate clerk
P.W. 18	Braj Nandan Singh	Declared hostile

Sl.No.	List of Exhibits	Exhibit Details
1	Exhibit-1	Postmortem Report of Ram Bilash Singh
2	Exhibit-2	Fardbeyan



3	Exhibit-3	Signature of P.W. 8/Ramavatar Singh on Inquest Report
4	Exhibit-3/1	Signature of witness Vishwanath Singh on Inquest Report
5	Exhibit-4	Signature of the informant on Fardbeyan
6	Exhibit-5	Injury Report
7	Exhibit-6	Carbon copy of the Inquest Report
8	Exhibit-7	Injury Slip of informant
9	Exhibit-8	Formal FIR
10	Exhibit-9	Protest-cum-complaint petition filed by the informant
11	Exhibit-9/1	Signatures of informant/P.W. 14 and her advocate on Protest-cum-complaint petition
12	Exhibit-9/2	Signature of informant/P.W. 14 and her advocate on Protest-cum-complaint petition

8. On considering the entire material on record, the trial Court has acquitted the appellants for the offence punishable under Section 323 of IPC. But convicted them for the offence punishable under Section 304 part-I of IPC and they were sentenced to undergo rigorous imprisonment for a period of ten years. Being aggrieved by the judgment of the trial Court, the appellants filed Criminal Appeal in the year 2004.



9. It is relevant to mention that the alleged incident occurred on 08.05.1999 and after full-fledged trial, the judgment was delivered by the trial Court on 26.02.2004. In spite of preferring the appeals in the year 2004, the criminal appeals were ultimately heard and being disposed of by a common order in the year 2025 which means it took five long years for conducting the trial and 21 years for disposing of the appeals.

10. As none appeared for the appellants since 2018, therefore, this Court was constrained to appoint Ms. Surya Nilambari as *Amicus Curiae* to assist the Court in these appeals.

11. Ms. Surya Nilambari, fairly reported to the Court that she had no contact with the appellants and therefore, this Court has called for the report from the Superintendent of Police, Jamui, regarding the status of the appellants. Accordingly, this Court received the report from the Superintendent of Police, Jamui, confirming that both the appellants are alive.



12. Heard Ms. Surya Nilambari, the Learned Amicus Curiae as well as Ms. Anita Kumari Singh, the Learned Additional Public Prosecutor for the State.

13. It is argued by the Learned *Amicus Curiae* that the genesis of the occurrence has not been established by the prosecution. She further submitted that the case of the prosecution is that the incident occurred on 08.05.1999, at 8:00 AM when the deceased and the informant were digging the holes for making fence in the land which was obstructed by Arun singh one of the appellant and Brahamdeo Singh, the father of the appellant and despite of the protest, the informant and the deceased continued to fence the land but there is no evidence on record to prove that there was a quarrel between the appellants and the deceased at 8:00 AM on 08.05.1999.

14. In order to support her contention, she relied on the citations of the Hon'ble Apex Court in case of **Arshad Hussain Vs. State of Rajasthan** reported in **(2013) 14 SCC 104** and **Rizan and Another Vs. State of Chhattishgarh** reported in



(2003) 2 SCC 661. The same shall be discussed at the relevant point. She further contended that the case of the prosecution is that initially, the appellants and others had attacked the informant at 12:00 noon, but no sufficient evidence to prove the alleged dragging of the informant as to establish it the same shall be discussed at the relevant point.

15. Secondly, the Learned *Amicus Curiae* submitted that the alleged incident, as per the fardbeyan is said to have occurred at 12:00 noon, the evidence of the Investigating Officer disclose that he received the information about the murder of the deceased at 03:30 PM for which, he made a Sanha. However, his evidence does not disclose that from whom, he received the information and as to why, there was a delay in recording the fardbeyan of the informant. To support her contention, she relied on the judgment of the Hon'ble Apex Court in case of **Mahesh Trivedi Vs. State of Bihar** reported in **2024 SCC OnLine Patna 4698.**

16. Thirdly, the Learned *Amicus Curiae* contended that the place of the occurrence itself is



doubtful. As per the evidence of the prosecution witnesses, the alleged incident occurred at the land adjacent to the house of the deceased where poles/pegs were inserted in the holes, which were alleged to have been dug by the deceased. However, the police found the dead body of the deceased, in the Verandah of the house of the deceased. Further, the Investigating Officer as well as the evidence of the informant clearly disclose that the fardbeyan was recorded by the SHO in the Verandah of the deceased. She further contended that there is no material before the Court to prove the place of occurrence and the prosecution has miserably failed to establish the place of occurrence which itself falsifies the story of the prosecution. She also contended that there is no material on record to explain how the dead body was moved from the place of occurrence to the Verandah. In support to her contention, she relied on the judgment of the Hon'ble Apex Court in the case of **Syed Ibrahim Vs. State of Andra Pradesh** reported in **(2006) 10 SCC 601**.



17. Fourthly, it is contended by the Learned *Amicus Curiae* that the testimony of the informant/injured cannot be relied upon to convict the appellants, as the medical evidence of the informant contradicts her oral evidence. She further contended that the presence of the informant at the place of occurrence itself is doubtful, as the evidence of P.W. 14 is inconsistent particularly at Para No. 21 of her evidence. The contents of para No. 21 reveals that the informant waited waiting for Daroga ji, at her house for giving the fardbeyan. But on the other hand, she claims to be unconscious, till the Police arrived at the place of occurrence. It is urged that the prosecution has miserably failed to prove the presence of the informant at the time of the incident.

18. The Learned *Amicus Curiae* further contended that the trial Court miserably failed to ask the preliminary questions to the child witness i.e. the eye witness P.W. 13/Lalan Kumar Singh, to assess his competency for deposing the evidence for which, she relied on the judgment of Hon'ble Apex Court in the



case of **Pradeep Vs. State of Haryana** reported in **2023 SCC OnLine SC 777**.

19. Lastly, it is contended by the Learned *Amicus Curiae* that the appellants never claimed any right to private defence, however, in absence of any such material, the trial Court considered the arguments of the defence counsel and convicted the appellants for the offence punishable under Section 304 part-I of IPC contending that the appellants failed to establish the right to private defence which is erroneous. It is also contended that the prosecution has miserably failed to prove any intention on the part of the appellants to commit murder. Hence, the appellants are entitled to the benefit of doubt. In view of the submissions and contentions, the Leaned *Amicus Curiae* prayed to set aside the judgment of the trial Court prayed to and acquit the appellants for the offence punishable under Section 304 part-I of IPC.

20. On the other hand, the Learned Additional Public Prosecutor contended that the evidences of the eye witnesses i.e. P.Ws. 5, 6, 8 and



9 corroborate with the evidence of P.Ws. 13 and 14 as to the manner of the incident. Further, the evidence of the official witnesses i.e. the Doctor and the Investigating Officer also corroborate the evidence of the eye witnesses and, further contended that there is no error or irregularity in the judgment passed by the trial Court and, therefore, prayed to uphold the judgment of trial Court.

21. The cardinal principles of the criminal jurisprudence are as follows:-

(i) The prosecution must prove the guilt of the accused beyond reasonable doubt.

(ii) The accused shall be presumed to be innocent till the guilt is proven.

(iii). It is the duty of the prosecution to establish a nexus between the accused and the commission of the offence.

22. It is not necessary to re-appreciate the entire evidence on record. The oral and documentary evidence shall be re-appreciated only to the extent necessary for determining the points of the appeal. The points of determination in the appeal are :-



(i) Whether the prosecution is able to prove the guilt of the appellants for the offence punishable under Section 304 part-I of IPC ?

(ii) Whether the trial Court has rightly convicted the appellants for the offence punishable under Section 304 Part-I of IPC ?

23. The initial charge-sheet was filed on 12.12.1999 against Ajay Singh, while the investigation against other accused was pending. The supplementary charge-sheet was filed against Arun Singh on 05.12.2001, almost after two years. However, the supplementary charge-sheet disclose that due to lack of evidence no charge-sheet was laid against Brahamdeo Singh, Ruby Devi and Sunita Devi. The Investigating Officer has not obtained any permission from his superior authorities for omitting the names of these accused from the charge-sheet. The record also reveals that Ajay Singh surrendered before the Court on 16.09.1999. It is also relevant to mention that the names of the eye-witnesses to the alleged incident were not mentioned in the fardbeyan of P.W. 14. The contents of the fardbeyan



disclose that all the accused assaulted the informant and dragged her towards their house, for which the deceased Ram Bilash Singh @ Karoo Singh tried to rescue her in that process Ajay Singh and Arun Singh/ the appellants assaulted the deceased with iron rods on his sensitive parts of the body i.e. the temple and ribs, for which he fell down and succumbed to injuries on the spot.

24. It is the further case of the prosecution that Brahmadeo Singh, Ruby Devi and wife of Ajay Singh allegedly caught hold of the deceased (who fell down) rendering him helpless and the wife of Ajay Singh snatched his wrist watch.

25. The contents of the fardbeyan also contradicts the alleged manner of the incident. After the death of the deceased, the question of deceased being helpless does not arise. Furthermore, the contents of the fardbeyan disclose that the informant sustained multiple injuries on different parts of her body including cut injury below her right elbow.

26. The evidence of P.W. 14 is crucial and it has to be appreciated first. The evidence of P.W.



14/Pawan Rekha Devi disclose that on 08.05.1999 at around 08:00 A.M. she and her husband (deceased) were fixing pegs and poles, beside their house for which Brahmadeo Singh and the appellant Arun Singh objected, abused them and threatened to have bloodshed once Ajay Singh arrives. Subsequently Ajay Singh, Arun Singh, Brahmadeo Singh, Ruby Devi and wife of Ajay Singh arrived to the place of occurrence where Ajay Singh and Arun Singh were armed with iron rods while rest of them were holding brickbats and started removing the pegs.

27. P.W. 14 further testified that when she tried to intervene, all the accused dragged her towards their house, and when her husband resisted them for their acts, Ajay Singh assaulted the deceased on his temple with an iron rod and Arun Singh hit his ribs. On that, Ram Bilash Singh (deceased) fell down, and the other accused beat P.W. 14 with brickbats and the wife of Ajay Singh snatched the wrist watch from the deceased.

28. The evidence of P.W. 14 further disclose that several people gathered at the scene including



P.W.5/Basuki Ram, P.W. 6/Upendra Singh, P.W. 8/Ram Avatar Singh, P.W.9/Surendra Singh @ Babloo Singh(not examined) and P.W. 13/Lalan Singh. Subsequently, she became unconscious and the Police came around 04:00 P.M., observed the dead body of the deceased and recorded her fardbeyan. Her signature on the fardbeyan is Exhibit-4

29. During the course of trial, for the first time, P.W. 14 has mentioned the names of alleged eye-witnesses i.e. P.Ws. 5, 6, 8, 9 and 13 which were not found in the fardbeyan.

30. In cross-examination at Para No 19, it is testified by P.W. 14 that the village watchman went to Police station, but she cannot say who informed the watchman about the occurrence and that she either did not send any message to the Police Station through any witness or went to the Police Station to inform about the incident.

31. In Para No. 21 of the cross-examination, it is testified by P.W. 14 that she waited for the police official near Khatian, was unconscious and unable to identify the people gathered and that she re-



gained conscious when the police officials arrived and did not explain about the incident to the villagers. She further testified that the accused objected for fixing the pegs in the morning and removed the pegs at around 12:00 noon for which she objected. She also testified that she raised alarm for which the people of the village gathered and in the meantime, the accused persons assaulted her husband and that she did not notice whether blood oozed out or not.

32. Further, P.W. 14 stated that blood oozed out from the nostril of her husband and he fell down on earth. She also stated that the Investigating Officer collected the blood-stained soil and remained at the place of occurrence till 02:00 A.M.. After ten days, the Investigating officer again recorded her statement along with statement of other witnesses. She also testified that she stated to the police about the specific overt-act of Ajay Singh and Arun Singh. However, Exhibit-2 does not contain the specific details.



33. P.W. 15 is the doctor, who examined P.W. 14. It is relevant to mention that the trial Court has acquitted the appellants for the charge framed under Section 323 of IPC. The evidence of P.W. 15 disclose that on 09.05.1999, he examined Pawan Rekha Devi/P.W. 14 and found the following injuries:-

(i) Lacerated wound 2 inches x $\frac{1}{2}$ inch x $\frac{1}{4}$ inch over posterior aspect of upper 3rd of right forearm. Age of the injury within 24 hours.

(ii) Swelling with pain over occipital region.

34. The doctor opined that above injuries are simple in nature and could have been caused by hard and blunt object.

35. His evidence further disclose that he examined the injured on the requisition of police on 09.05.1999, and issued Injury Report on 10.05.1999. The Injury Report of Pawan Rekha Devi is marked as Exhibit-5.

36. In cross-examination, it is testified by P.W. 15 that pain in body is not considered as an injury and that he did not mention the color of the injuries in the Injury Report. Further he stated that



such injuries may also be caused due to a fall. He denied the suggestion that the Injury Report was fabricated.

37. As per the evidence of P.W.14/informant, Brahmadeo Singh, Ruby Devi and Sunita Devi assaulted her on the elbow of her hand with brickbats. However, the evidence of P.W. 14 disclose that she sustained injuries on the different parts of her body and there was a was cut injury below the elbow of the right hand. However, the documentary evidence i.e. the Injury Report/ Exhibit-5 and the oral evidence of P.W. 15 contradicts, the nature and location of injury sustained by P.W. 14.

38. As per the evidence of P.W. 15, P.W. 14 sustained a lacerated wound measuring 2 inches × 1/2 inches × 1/4 over the posterior aspect of upper third of right forearm. But the oral evidence of P.W. 14 disclose that she sustained a cut injury on the right elbow. If at all, it is a cut injury, there should be an incised wound over the right elbow. As per the evidence of P.W. 15 and Injury Report of P.W. 14, contradicts the evidence of P.W. 14. As stated supra,



the trial Court did not find the appellants guilty for the offence punishable under Section 323 of IPC and the appellants were acquitted for the said offence. If at all, the trial Court disbelieved, the evidence of P.W. 14 as it is contending the evidence of P.W. 14 and is inconsistent with the Injury Report of P.W. 14 in connection with the same incident, the trial Court ought to have discarded the evidence of P.W. 14 in its entirety. But, the trial Court partially relied the evidence of P.W. 14 and convicted the appellants for the offence punishable under Section 304 Part-I of IPC.

39. It is specific defence of the appellant before the trial Court that they did not commit the murder of the deceased and they were falsely implicated in the case.

40. The trial Court record also reveals that the petitions were filed on behalf of the appellant under Section 294 of Cr.P.C. for marking certain documents. However the said petitions were kept pending by the trial Court and without passing any orders, the judgment was reordered. Those



documents on record clearly reflect that there were disputes between the deceased family and that of the appellants. The said documents were filed by the defence to substantiate that there was enmity between the parties and they were falsely implicated in this case.

41. On perusal of the judgment, it can be understood that the trial Court, while considering the submissions and arguments made by the defence counsel wrongly shifted the burden of proof upon the appellants, to establish that they acted in exercise of right to private defence. However, it is not the case of the appellants that they committed this act under the general exceptions of IPC i.e. right to private defence.

42. P.W. 16 is the Investigating Officer who recorded the fardbeyan of P.W. 14. His evidence disclose that he received rumours about the murder of the deceased, at about 03:30 P.M. on 08.05.1999 and on the basis of information, he registered Sanha No. 141 dated 08.05.1999 and left Sabalpur as per the orders of the Station House Officer (SHO). He



recorded the fardbeyan of Pawan Rekha Devi wife of the deceased Ram Bilash Singh, obtained her signature on the fardbeyan (Exhibit-2) and forwarded the same to SHO, Laxmipur Police Station for registering the FIR. His evidence disclose that he prepared the Inquest Report, in the presence of Ram Avatar Singh/P.W. 8 and one Vishwanath Singh and the carbon copy of the Inquest Report is Exhibit-6. He also obtained the signatures of P.W 8 and Vishwanath Singh on the Inquest Report and later forwarded the dead body for post-mortem examination through a constable/Mudrika singh and the watchman Brahmadeo Paswan. He also inspected the place of occurrence. As per the information given by P.W. 14 the place of occurrence was located at a distance of 10 to 15 gaj west and adjacent to the house of the deceased. There was an old fencing made of wild bushes and two or three hole were dug to fix the pegs. He also found two to three wooden poles lying at the place of occurrence and the fencing was old and pegs and poles were fixed to strengthen it. He observed that the house of



accused person were located towards the west, which is a vacant space in front of the house of the accused persons towards north and east. Further, the vacant space towards east extends to the fencing of the deceased's house. As per the evidence of Investigating Officer, the place of occurrence is a vacant area adjacent to the house of the deceased.

43. P.W. 16 also testified that he noticed the Injury Report of the informant, Pawan Rekha Devi and referred her to hospital at Laxmipur for treatment. The injury slip is Exhibit-7.

44. During the course of investigation, he received the Injury Report of Pawan Rekha Devi and the post-mortem report of the deceased Ram Bilash Singh. While investigating the case, he got retired and handed over the case to the SHO, Laxmipur. The formal FIR in the writing of SHO, Ram Vachan Singh is Exhibit- 8, marked through P.W. 16.

45. In cross-examination, it is admitted by P.W. 16 that he received the death information of Ram Bilash Singh @ Karoo Singh at the police station but the name of the said person was not mentioned



in the Sanha and the said information was received by him at 03:30 P.M. After that he proceeded to Sambalpur, but could not call the watchman of Sambalpur, because the post was kept vacant. Even the In-charge watchman was also not called for.

46. On the one hand, the evidence of P.W. 16 disclose that the dead body was forwarded to hospital through one constable and watchman. On the other hand, It is admitted by P.W. 16 that the watchman post was kept vacant and the In-charge watchman was not called for. He also admitted that he did not verify any documents to establish about the ownership of the land at the place of occurrence. He further admitted that he did not prepare any map of the place of occurrence. He also admitted that as per the statement of one Rajendra Singh, Ajay Singh was first assaulted and it was the deceased who had assaulted Ajay Singh, and as per the statement of Rajendra Singh, both Rajendra and Ram Bilash Singh had carried weapon from house and the assault occurred from both the sides.



47. He also testified that he has not collected any bloodstained clothes and he had not seen anything at the place of occurrence.

48. On scrutiny of the evidence of P.W. 14 and 16, it can be understood that the police received the information at 03:30 P.M. on 08.05.1999 through third parties and none of the prosecution witnesses approached the police station and it was the police who come to the village and received the information through P.W. 14 for which a fardbeyan was recorded.

49. The alleged incident took place at 12 noon, but there is no explanation from the prosecution, as to why the prosecution witnesses did not prefer any report to the police up to 05:00 P.M.. On one hand, P.W. 14 testified that she was unconscious up to 05:00 P.M. on the other hand, she stated that she waited for the police to arrive at the place of occurrence.

50. The conduct of any reasonable person in case of a cognizable offence, would be first prefer a report to the Police Station. If at all, P.W. 14 had witnessed the occurrence and saw the death of her



husband, her failure to report the matter to police till 5 P.M. is not at all explained by the prosecution.

51. Column No. 8 of the FIR deals with the cause for the delay in giving information by the informant, but the formal FIR/Exhibit- 8 is silent as no reasons were assigned in the FIR for the delay in preferring the information.

52. As per the evidence of P.Ws. 14 and 16, the dead body of the deceased was first seen by the Investigating Officer on the Verandah of the deceased's house and the information from P.W. 14 was also recorded there. There is no evidence or material on record as to who has shifted the dead body from the place of occurrence to the Verandah of the deceased house.

53. P.Ws. 2, 3, 7 and 18 were declared hostile and, therefore, there is no necessity to discuss.

54. The evidence of P.Ws. 4, 10, 11 and 12 is nowhere helpful for the prosecution to prove the case against the appellants, as they all in one tone stated that they knew nothing about the occurrence.



55. P.W. 1 is the doctor who conducted the post-mortem examination of the dead body of the deceased/Ram Bilash Singh @ Karoo Singh. His evidence disclose that on 09.05.1999, the dead body of Ram Bilash Singh was brought to the hospital and he commenced the post-mortem examination at 10:30 A.M. and found the following external injuries:

(i) Two parallel bruises 8 inches x $\frac{1}{2}$ inch x $1\frac{1}{2}$ inch, blackish in color, with depressed floor extending from right axilla to the right side of the chest up to upper part of right side of abdominal wall and obliquely placed.

(ii) Lacerated wound $3\frac{1}{2}$ inch x $3\frac{1}{4}$ inch x deep to bone over the right temporal region of scalp with hematoma in the floor of wound and bleeding from mouth and nostril.

(iii). Bruise 2 inch x 2 inch over the back of neck.

56. On dissection of the dead body of the deceased, there was fracture of right temporal bone and adjoining part right parietal bone with laceration of membrane of the brain and brain materials with



hematoma between the cranial bone and membrane of brain and hemorrhage in the anterior and middle cranial for ecchymosis underneath the skin or the side bruise, on right side of the chest with fracture of forth and fifth ribs, anteriorly and laceration of parietal pleura, hemorrhage in pleura cavity, rupture of right low of liver anta-superiorly with hemorrhage into peri cavity.

57. It is opined by P.W. 1 that all the above injuries are ante-mortem and caused by a hard and blunt object such as iron rod. Time between the injury and death was instantaneous. It is also opined by the P.W. 1 that the death of the deceased was instantaneous, due to injury to the brain and the postmortem examination was conducted between 8 to 24 hours after the death. The Postmortem Report of the deceased/Ram Bilash Singh is Exhibit-1.

58. In the cross-examination, it is testified by P.W. 1 that the dead body was identified by one constable No. 20 Mukindra Singh and Chaukidar Brahamdeo Paswan. Injuries 1, 2 and 3 are not possible due to fall from a motorcycle accident.



However, fractures of the temporal bone may be caused by a motor cycle accident and bruise may also result from the same. Parallel bruise may occur if a heavy material falls on the body. As per the evidence of P.W. 1, the death of the deceased is not natural, however, his evidence do not clarify whether the death was homicidal or the accidental.

59. On the one hand, the evidence of P.W. 1 disclose that the injuries sustained by the deceased may be caused due to hard and blunt objects and on the other hand, he admits in cross-examination that those injuries may also be possible, if a person sustains injuries in a motor cycle accident. It is for the prosecution to prove, whether the death was homicidal or not ?

60. In order to prove that the death of the deceased was homicidal, the prosecution has relied on the evidences of the alleged eyewitness i.e. P.Ws. 5, 6, 9, 13 and 14. This Court has already discussed the evidence of P.W. 14 who is the informant/injured witness as well as the wife of the deceased.



61. The evidence of P.W. 13 who is the minor son of the deceased disclose that the incident took place on 08.05.1999 at 08:00 A.M. His evidence further disclose that he witnessed the entire incident i.e. the first occurrence at 08:00 A.M. and the subsequent occurrence at 12:00 noon. His evidence is also in the same manner as that of P.W. 14.

62. It is specifically stated by P.W. 13 that the appellants and the other accused dragged P.W. 14 towards their house, for which the deceased objected and he was assaulted by Ajay Singh and Arun Singh with iron rods resulting in injuries on the right temple and left ribs. Later, Brahmadeo Singh, and Ruby Devi assaulted P.W. 14 with brickbats on her elbow and wife of Ajay Singh snatched the wrist watch from the body of his father. The presence of P.W. 13 at the place of incident was not mentioned in the fardbeyan i.e. Exhibit-2 and for the first time, P.W. 14 speaks about the presence of her son in her evidence.



63. On perusal of the deposition of P.W. 13, it could be understood that the age of the witness was mentioned as 13 years.

64. Section 118 of Indian Evidence Act, envisages Who may testify- which reads as follows:- All person shall be competent to testify unless the Court considers that they are prevented from the 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 same kind.

65. Evidence of a child witness must find adequate corroboration before it can be relied upon, it is more a “rule of prudence than law” A child witness can be a competent witness. The testimony of a child witness can be taken into account, but only after careful scrutiny of the evidence. As corroboration is a rule of prudence, a minor who is capable of give rational answers can be presented in the Court as a witness and if he/she does not pass “voir dire test”, (competency test) he/she cannot be treated as a reliable witness. If child of tender age



has the intellectual capacity to understand the questions and give rational answers thereto, he/she can be allowed to testify and can be a competent witness.

66. Generally the Courts cannot discard the evidence said by a child witness on the ground that it was made by a child. However, the Courts must evaluate the child evidence very carefully, as a child can be swayed easily by others guidance. 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 reasons of his tender age. Admittedly, the witness is aged 13 years as on the date of his deposition i.e. 02.05.2003, and the incident took place on 08.05.1999, by that time the witness was aged about nine years.

67. As regards to the administration of oath of a child witness, Section 4 of Oaths Act, 1969 is relevant which reads as follows:-

4. Oaths or affirmations to be made by witnesses, interpreter and jurors.—(1) Oaths or



affirmations shall be made by the following persons,
namely:—

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

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

(c) jurors:

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



68. However, in view of the requirement under Section 118 of the Indian Evidence Act, the trial Court 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 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 witness understands the duty of speaking the truth. It is a well settled principle that corroboration of testimony of a child witness is not a rule but a matter of caution and prudence. A child witness of tender age is easily susceptible to tutoring, however, that alone is not a ground to reject the evidence of a child witness. The Court must make careful scrutiny of the evidence of the child witness, the Court must apply its minds to the question, of whether there is a possibility of the child witness being tutored, therefore, scrutiny of the evidence of child witness is required to be made with care and caution.



69. Before recording the evidence of a minor, it is the duty of the Judicial Officer to ask preliminary questions with a view to ascertain whether the minor can understand the questions put to him and is in a position to give rational answers. Therefore, the role of the Judge who records the evidence is crucial. It is advisable to record the preliminary questions and answers so that the appellate Court can examine the correctness of the opinion of the trial Court.

70. The same proposition was also laid down by the Hon'ble Apex Court in the case of **Pradeep Vs. State of Haryana** reported in **2023 SCC OnLine SC 777**. In the present case, the preliminary questions were not put to the witness. Admittedly, there is no age proof placed before the Court as on the date of the examination of this witness i.e. P.W. 13. It is testified by P.W. 13 that he was aged about 13 years as on the date of his examination but the trial Court did not conduct any proper examination to determine the competency before recording his evidence.



71. In my view, the Learned Sessions Judge has failed to perform. Further, the fardbeyan also does not contain the name of P.W. 13 as an eye-witness to the incident. Therefore, significant reliance cannot be placed upon the evidence of this witness.

72. The remaining witnesses in these case are P.Ws. 5, 6, 8, 9 and 17. P.Ws. 5, 6, 8 and 9 are also alleged to be the eye-witness to the incident as previously stated. Their names were mentioned in the fardbeyan as an eye-witness by P.W. 14.

73. The evidence of P.W. 5/Basuki Ram disclose that on 08.05.1999 at about 06:00 A.M., he reached the house of the deceased on hearing an altercation between the appellants and the deceased regarding the fixing of pegs on the land of the deceased. He specifically testified that Brahmdeo Singh, Arun Singh and their wives created the dispute and again at about 12:00 to 12:15 in the noon again, there was an altercation between the parties and he witnessed both the appellants Brahamdeo Singh and wife of one of appellants



assaulting the deceased with iron rod on his ribs and temple resulting the deceased succumbed to injuries on the spot. He further witnessed the brickbats in the hands of Brahamdeo Singh, wives of Arun Singh and Ajay Singh.

74. In cross-examination, it is admitted by P.W. 5 that he is the resident of Pemadih village and owns land at Sabalpur. He admitted that the first incident occurred at 08:00 A.M.. However, in his chief-examination, he specifically deposed that the first occurrence regarding the fixing of the pegs and the altercation took place at 06:00 A.M.. He also admitted that he has not seen any pegs affixed, although, he saw the holes dug on the west side of the land. He also admitted that he has not seen any documents relating to the ownership of the land, as to whether it belong to the appellants or the deceased. By the time, he reached the place of occurrence, Ram Bilash Singh was lying on the ground and he did not saw any blood oozing from the body of the deceased. He also testified that deceased was picked up and brought to his house



and was laid on a charpoy, and that he noticed an injury on the hand of Pawan Rekha Devi.

75. In chief-examination, this witness has testified that he witnessed the incident, however, in cross-examination, he admitted that by the time, he reached the place of occurrence, he saw the body of the deceased lying on the ground and later, it was shifted to the house of the deceased. It is also admitted by P.W. 5 that he is the non-resident of this village and resides at Pemadih village. Therefore, the presence of this witness at the place of occurrence on the date of occurrence was not established by the prosecution. Therefore, this Court is of the considerable view, that he is not eye-witness to the incident and his evidence cannot be relied upon.

76. P.W. 6/Upendra Singh is also alleged to be an eye-witness of the incident. His evidence also disclose that he witnessed both the occurrence at 08:00 A.M. and 12:00 noon on 08.05.1999. His evidence is also in the same line as that of P.W. 5.

77. It is specifically testified by P.W. 6 that there was a boundary dispute and the land was an



uncultivated land, which is situated between the house of the deceased and the appellants. He also admitted that P.W. 13 was aged about 07 years at the time of incident, and that village watchman came to the scene of occurrence, found the dead body of the deceased lying at the place of occurrence and he went to the police station to inform the authorities. Later, the Sub-Inspector of Police arrived and saw the dead body of the deceased at the place of occurrence.

78. The evidence of P.Ws. 4, 5 and 6 are contradicting with each other, as to whether the dead body of the deceased was lying at the place of occurrence or at the door step of the deceased. P.W. 5 specifically testified that they have shifted the deceased/Ram Bilash Singh from the place of occurrence to the door step of the deceased and laid him on a charpoy(cot). However, the evidence of P.W. 6 contradicts in that aspect and it is his evidence that the body was at the place of occurrence till the Sub-Inspector arrived to the place of occurrence. The evidence of P.W. 15/Sub-Inspector also disclose that



the dead body was lying in the Verandah of the house of the deceased. Therefore, the version given by P.W. 6 cannot be believed and his presence at the place of occurrence is also doubtful.

79. P.W. 8/Ram Avatar Singh is another eye-witness to the second incident which occurred at 12:00 noon on 08.05.1999. His evidence disclose that on hearing a loud noise he rushed towards the house of Ram Bilash Singh and witnessed a quarrel between the deceased and Brahmadeo Singh regarding twenty years old fencing which is under repairing. His evidence is also in the same line as that of P.Ws. 5 and 6. Further he testified that the wife of Ajay Singh snatched the watch of the deceased after his death. The signatures of P.W. 8 and Vishwanath Singh on the Inquest Report were Exhibit-3 and Exhibit-3/1 respectively. His evidence further disclose that Sub-Inspector collected bloodstain soil in a plastic bag and the statement of the watchman was not recorded. The evidence of this witness cannot be relied upon as he has introduced a new story involving the role to the



village watchman directing him, to further go to the Police Station for giving a fardbeyan. However, the evidence of P.Ws. 14 and 15 do not disclose about the watchman. Further, the evidence of other witnesses disclose that watchman post was kept vacant and even In-charge watchman was not called for on the date of the incident. This witness denied the suggestions that a homicide case was registered against him at the instance of the accused.

80. P.W.9/Surendra Kumar Singh @ Babloo Singh is also alleged to be witness of the second incident, which occurred on 08.05.1999 at about 12:00 noon. His evidence is also in the same line as that of P.Ws. 5, 6 and 8. In the cross-examination, it is admitted by him that he was attending coaching class at classical tutorial, Patna which works in two shifts. At Para No. 10 of the cross-examination, he has admitted that some person had gone to police station to inform about the occurrence, and also admitted that he had not gone to the police station. It is not the case of the prosecution that prior to 05:00 P.M. on 08.05.1999, the people of the village



had gone to the police station to report about the incident. He also testified that he saw bloodstained soil on the western part of the land but did not witness the Investigating Officer collecting the bloodstained soil. The evidence of this witness is also contradicting with the evidence of the Investigating Officer and P.W. 14 on many aspects. Therefore, much reliance cannot be given to the evidence of this witness.

81. It is specific contention of the Learned Additional Public Prosecutor, Mrs. Anita Kumari Singh that the fardbeyan contains the signatures of P.Ws. 5, 6 and 8, one Chandrika Ram, and therefore, the presence of this witness cannot be ruled out.

82. However, the contention of the Learned Additional Public Prosecutor cannot be taken into consideration as the alleged second occurrence took place on 12:00 in the noon, however, fardbeyan was recorded at the door of the deceased at 05:00 P.M. by the Investigating Officer/P.W. 15 and the inquest proceedings were commenced prior to forwarding the fardbeyan to police station, therefore, the



presence of this witness at 12:00 noon cannot be established by the prosecution in any manner.

83. P.W.17/Devendra Narayan Singh is an Advocate clerk. His evidence disclose that one Vijay Kishor Singh an advocate prepared a protest-cum-complaint petition at the instance of P.W.14 and the same was typed by a private typist Narendra Tanti and that Pawan Rekha Devi/PW. 14 has put her signature and Vijay Kishor Singh also signed on 07.06.1999, The protest petition was marked as Exhibit-9 and the signatures of P.W. 14 and Vijay Kishor Singh are marked as Exhibit-9/1 and 9/2 respectively marked on 09.09.2000. P.W. 14 has not testified about Exhibit- 9 in her evidence.

84. Admittedly, P.W. 17 is not the author of Exhibit-9 documents.

85. The Learned *Amicus Curiae* relied on the judgment passed by this Bench in the case of **Noor Hassan Ansari & Ors. v. The State of Bihar passed in Cr. Appeal (SJ) No. 68 of 2004**, that deals with the criteria for marking a document which reads as follows:-



15. *It is pertinent to mention that followings are criteria for marking a document:-*

In order to have a documents marked by the Court as an Exhibit, a party must satisfy the Court that there is sufficient material in order for the Court to arrive at a prima facie view that:-

"It is evident that in order to have the documents marked by the Court as Exhibits, a party must satisfy the Court that there is sufficient material in order for the Court to arrive at a prima facie view that :

(a) The "contents" of the document are proved (i.e. the document exists).

(b) The signature or handwriting on the document, if any, are proved (i.e. the document is genuine).

(c) In some cases, the witness who seeks to tender the document in evidence has personal knowledge of the document (i.e. that the witness is in a position to prove the accuracy or truth of the contents of the document);



(d) *The document is not inherently or ab initio inadmissible on some other legal ground (e.g. irrelevance, privilege, non-registration) and*

(e) *The document has been appropriately stamped, if so required by law.*

16. (i). *In order to prove contents of a document, the witness through whom the document is sought to be tendered must produce the document in court. The Evidence Act provides, in essence, that the "contents" of documents must ordinarily be proved by "primary" evidence.*

(ii). *As the second step in getting a document marked, the witness who introduces the document must identify the signature or handwriting on the document, if there is any. 19 The mere production of a document is not sufficient for the document to be marked as an exhibit.*

(iii). *Thirdly, in order to lay a foundation for marking a document, if the document contains any statement(s) of fact, and the party*



propounding the document relies on the truth or accuracy of those statements, then the witness. who tenders the document must demonstrate personal knowledge and the familiarity of the document.

(iv). Fourthly, in some cases, irrespective of a party's ability to satisfy the criteria set out above, a law might prohibit some documents from being considered admissible in evidence. Such documents cannot be marked in evidence. Once a document is marked, it becomes the part of the record but has to be considered by the Court about its admissibility and relevancy of the such document. Marking of document alone will not give any right to read the contents of the documents or about the admissibility of the documents."

17. Furthermore, Rule 58 of the Criminal Rules Of Practice and Circular Orders, 1990 envisages about marking of exhibits which reads as follows:-

"58 Marking of exhibits:-

(1) Exhibits admitted in evidence shall be marked as follows:-



(i) if filed by the prosecution with the capital letter 'P' followed by a numeral, P1, P2, P3 and the like;

(ii) if filed by defence with the capital letter 'D' followed by a numeral, D1, D2, D3 and the like;

(iii) in case of Court exhibits with the capital letter 'C' followed by a numeral C1, C2, C3 and the like;

(2) All the exhibits filed by the several accused shall be marked consecutively.

All material objects shall be marked in Arabic numbers in continuous series as M.O. 1, M.O.2 and M.O.3 and the like, whether exhibited by the prosecution or the defence or the Court."

18. *This Court is unable to understand as to why the trial Court has not followed the procedure, while marking the Exhibits as per Rule 58 of Criminal Rules of Practice. Admittedly, the documents was said to be marked in 'X' Series through P.W.-4.*

19. *At this juncture, it is relevant to rely on the judgments of*



*Hon'ble Division Bench of this Court in the case of **Sukhi Yadav v. The State of Bihar** reported in **2014 SCC OnLine Pat 5721** wherein their Lordships have held as follows:-*

"9. We fail to appreciate as to which law permits such a thing and how a Judge of standing of Additional Sessions Judge could do such a thing. First thing we must notice that P.W.9 is an Assistant to an Advocate Clerk, who has nothing to do with the case, yet the Court permits him to step in as a prosecution witness. Moreover we have coined such witness as "Sankat Mochan witness". What more scandalized us is the trial court, which permits a person, who was nobody, to pick up the entire case diary from paragraphs 1 to 121 and prove it and make it a part of evidence. The court then proceeds further to mark it as Ext. 3 and then the court sits down to read entire case-diary in order to appreciate evidence. Nothing can be more scandalous. No such step is permissible in law. The trial court forgot the true import of section 172(2) of the Code of Criminal



Procedure (for short 'Cr.P.C.'), which clearly states that any criminal Court may use such diaries, not as evidence in the case, but to aid it in such enquiry or trial. What the trial court has done is using it as evidence, making it as evidence and appreciating it as evidence, which is wholly impermissible in law. The diary can never be proved in a Court, for it cannot be used as evidence. No part of diary can be proved because if any one is proving it for the purposes of making it an evidence, such act is prohibited by law. The law contemplates a reference to the diary only for the purposes of refreshing memory or contradicting the statements of witnesses in the Court with the statements made during the course of investigation. Only when it is used for refreshing memory, the procedure as envisaged under section 145 of the Evidence Act is to apply but that does not mean that diary can become evidence. Law prohibits such thing. We have found in cases after cases that in the State of Bihar, the Sessions Courts do not know or



understand this distinction in law and in cases after cases the statements of witnesses recorded under section 161 of the Cr.P.C. are proved as evidences or other materials in the case-diary are proved as evidence and marked as exhibits. This is a practice that should end, the sooner the better. The other thing is that as to who is permitted to prove a document. It appears that in this State every Tom, Dick and Harry, the expression we have formed now "Sankat Mochan Witness", could come and prove any official document. In this case, an Assistant to Clerk of an Advocate, who has nothing to do in the case, has been permitted by the trial court to prove the entire case-diary and mark it as exhibit. This practice is deprecated and it must come to an end. A person, who is author of a document or in absence of author, which absence has to be explained, a person familiar with the handwriting of the author can only prove the document. The procedure adopted by the trial court is unknown to law. No



sooner this practice ends than better it would be.”

20. *The above citation squarely applies to the facts of the present case. Their Lordships have held that a document may be proved either by a person who is author of the document, or in absence of the author, (whose absence has to be explained), a person familiar with the hand-writing of author can prove the documents. Their Lordships have further held that the procedures adopted by the trial Court are unknown to law, and such practices have to be ended.*

86. Admittedly, Exhibit-9 got marked through P.W. 17 who has no knowledge about the incident. On appreciation of the entire oral and documentary evidence on record, it can be construed that prosecution has miserably failed to establish or prove the guilt of the appellants for the offence punishable under Section 304 Part-I of IPC.

87. On perusal of the trial Court judgment, it is evident that trial Court was wrongly driven by the



plea of right to private defence relied by the counsels for the appellants. However, the record reflects that the appellants never advanced any such plea nor did they claimed to have committed the offence in defence either of persons property or right.

88. The judgment of the trial Court only disclose that the plea of private defence was taken by the defence counsel in the absence of any supporting evidence on record. The medical evidence in the case also contradicts with the oral evidence. Further, the case of the prosecution is that three of the accused were holding brickbats and they assaulted P.W. 14. However, the trial Court disbelieved the evidence of P.W. 14 in that aspect and has acquitted the appellants for the offence punishable under Section 323 of IPC.

89. It is also pertinent to mention that the names of Brahmdeo Singh, Ruby Devi, Sunita Devi were deleted at the time of filing the charge-sheet. At the time of such deletion, the duty is casted upon the trial Court to issue notice to the informant for



filing their objections or a protest petition. The protest petition in this case is Exhibit-9 is alleged to have been filed by P.W. 14, but it pertains to the inadequacy of investigation and not specifically to the deletion of the named of Brahmdeo Singh, Ruby Devi and Sunita Devi. Section 319 of Cr.P.C., gives ample power to the Court to proceed against the other persons appearing to be guilty of the offence. In present case P.Ws. 5, 6, 8, 9, 13 and 14 in one tone stated about the roles played by each of the accused including the role of Brahmdeo Singh, Ruby Devi and Sunita Devi. However, the trial Court failed to exercise its power under Section 319 Cr.P.C. to proceed against them.

90. At this juncture, it is necessary to reiterate the provisions of **Section 319 of Cr.P.C.** which reads as follows:-

“319 Power to proceed against other persons appearing to be guilty of offence,-

(1) Where, in the course of any inquiry into, or trial of, an offence. it appears from the evidence that any person not being the accused has



committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1) then-"

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of



the offence upon which the inquiry or trial was commenced.

91. As per the above section, the Court while exercising its powers, at any stage, during the course of trial, can summon any person as accused to face the trial, if it appears from the evidence that such person has committed any offence for which such person could be tried together with the appellants.

92. At this juncture, the Learned *Amicus Curiae* relied on the judgment of **Boya Kajje Pedda Ambaraju and others versus Andhra Pradesh** at **Amaravati** reported in **2020 SCC OnLine AP 5077** wherein his Lordships has held at Para-26 which reads as follows:-

26. Therefore, since the Magistrate of the committal Court, after the charge-sheet is filed in the said Court, has to only commit the case to the Court of Sessions for trial under Section 209 of Cr.P.C. as per the ratio laid down in the above judgment of the Supreme Court, the said Proceedings relating to committal of the case under Section 209 Cr.P.C. cannot be Construed as an inquiry for the purpose of Section 319 Cr.P.C., Therefore, even if any order



accepting the deletion of names of the other accused mentioned in the FIR in the charge-sheet albeit on the alleged memo said to have been filed by the de facto complainant, it does not preclude the trial Court in any manner to consider whether the persons who are named in the evidence given before it during the Course of trial also as assailants to be added as accused along with the other accused to face the trial or not. The said stage of considering whether to add any other person as accused comes into play only during the course of enquiry or the trial of the case. Since the proceedings of committal is not considered to be an enquiry for the purpose of Section 319 of Cr. P.C. in view of the ratio laid down in the above judgment, the said memo or the order if any passed on the said memo by the committal Court will not come in the way of exercising the power under Section 319 of Cr.P.C. subsequently during the course of the trial by the trial Court on the basis of the evidence adduced in the said case from which it appears that some other person or persons also committed the offence. Considering the above judgment of the Apex Court in Kishore



Prasad v. State of Bihar, the Constitution Bench of the Apex Court in Hardeep Singh's case (1 supra) also held that while considering the language employed in Section 319 of Cr. P.C. "in the course of any enquiry into, or trial of, an offence" and while considering the stage at which the power can be exercised under Section 319 of Cr.P.C. in the light of the above phrase used in the Section, the Constitution Bench of the Apex Court held that the power under Section 319 of Cr.P.C. can be exercised at any time after commencement of enquiry into an offence by the Court and before conclusion of trial, except during stage of Sections 207 to 209 of Cr.P.C. which is not a judicial step in the true sense.

93. It is also necessary to discuss about the citations of the Hon'ble Apex Court relied upon by the *Amicus Curiae* in the case of **Arshad Hussain Versus. State of Rajasthan** reported in **(2013) 14 SCC, 104** wherein their Lordships have held at Para No. 11, 12, 14, 15, 16, 17, 18 and 21 which reads as follows:-



11. *If we carefully scrutinize the contents of the FIR given by Nizam (PW 4), it is clear that the occurrence took place at 10.30 p.m. on 18-12-2000 when Iqbal (since deceased), Nizam (PW 4), Jamil (PW 6) and Moinuddin (PW 5) were returning to Khanji Peer on two scooters. When all the four reached near the house of Ashfaq, Shahjad (A-3) and his brother Muzaffar (A-2) came towards their scooters and stopped them. On seeing this, Iqbal got down and asked about the matter, by then Shahjad and Mujaffar both shouted "Arshad fire". On hearing the same, Arshad (A-1), the appellant herein, who was standing in the verandah of his house with a gun opened fire upon them. It is further stated that the appellant, who was having gun in his hand, fired three shots and in order to escape, Nizam (PW 4) sat down and the bullet hit in the chest and the shoulder of Iqbal as a result of which he fell down immediately. Afterwards, PWs 5 and 6 ran away from the scene. It is also stated that at that time, the streetlights as well as the light of the verandah of the house of Ashfaq were on. It is also seen that there was old enmity between Ashfaq and Iqbal. It is further clear that on seeing*



the deceased and the prosecution party and also on the shoutings of A-3 and A-4, the appellant herein (A-1), who was standing in the verandah, fired three shots which hit the deceased due to which he sustained fatal injuries.

12. *It is not in dispute that the High Court, after analyzing the evidence of prosecution witnesses, particularly PWs 4, 5, 6, 7 and 19 and the defence pleaded by A-2 and A-3, accepted the plea of alibi and categorically concluded that both of them were not present at the scene of occurrence. We have already stated that the State has not challenged the said order_of acquittal by filing appeal before this Court and it has become final. It is clear that with the acquittal of said persons viz. A-2 and A-3, the genesis of the prosecution case is completely falsified. Let us analyse this aspect in detail hereunder.*

14. *We have already noted the contents of the FIR and the conclusion of the High Court ordering the acquittal of A-2 and A-3. The first witness relied on by the prosecution is Nizam (PW 4), the complainant. A perusal of the evidence of PW 4 shows that the same is in conformity*



with the contents of the FIR. In other words, he reiterated what he has stated in the FIR. The important statement made by him as stated in the FIR is as under:

"Iqbal Bhai asked the accused as to what is the matter, by then Arshad fired. Arshad, who was already standing with gun inside the boundary wall of his house shot three fires on Iqbal. One shot hit on the right shoulder and right armpit."

It is clear from the above that only on the direction of Shahjad and Mujaffar, Arshad (the appellant herein) fired at Iqbal.

15. *The other witnesses examined on the side of the prosecution were PWs 5, 6 and 7. All of them made similar statements as that of PW 4. In other words, all the three witnesses once again reiterated similar assertion made in the FIR including the presence of Shahjad and Mujaffar, stopping of scooters and shouting Arshad to fire on Iqbal.*

16. *The High Court has found that Mujaffar and Shahjad were not present at the place of incident. The basis for such conclusion was that at the relevant time Mujaffar (A-2) was admitted in a hospital at Bombay and Shahjad, his brother, was*



attending him at the said place. In the absence of challenge as to the same by the State, it is clear that both the co-accused were not present at the place of incident and, therefore, three important aspects of the prosecution case have not been established, namely, (a) the party of the deceased was stopped by Shahjad and Muzaffar; (b) the deceased and his associates were stopped by Shahjad and Muzaffar near the gate of their house; and (c) Shahjad and Muzaffar had asked Arshad to open fire upon the deceased.

17. *A perusal of the contents of the FIR, the statements of the above mentioned prosecution witnesses as well as the reasoning of the High Court clearly show that the incident had not taken place as alleged by the prosecution. We are satisfied that the prosecution had suppressed genesis and the manner in which the incident took place.*

18. *In other words, in such circumstances, in the absence of specific assertion by PWs 4, 5, 6 and 7, the role of the appellant and also in the light of the conclusion by the High Court accepting the alibi pleaded by A-2 and A-3, the entire prosecution case could not be believed.*



21. *It is a well-settled principle of law that when the genesis and the manner of the incident is doubtful, the accused cannot be convicted for the offence punishable under Section 302 IPC. Inasmuch as the prosecution failed to establish the circumstances in which the appellant was alleged to have fired at the deceased, the entire story has to be rejected.*

94. As per the above citations, the genesis for the occurrence of the incident has to be established by the prosecution. In the present case, the prosecution has alleged that around 12:00 noon, the appellants along with other three accused i.e. Brahmadeo Singh, Ruby Devi and Sunita Devi have dragged P.W. 14 from the place of occurrence towards their house, while assaulting her. However, none of the prosecution witnesses i.e. PW. 5, 6, 8 and 9 have testified about this fact, therefore, this Court construes that the prosecution failed to establish the genesis of the occurrence in any manner.

95. In the case of **Mahesh Trivedi vs. State of Bihar** reported in **2024 SCC OnLine Pat 4698**, the Division Bench of this Court held at Para



Nos. 42 to 46 have dealt with the procedure to be followed by Courts relating to child witness and delay in lodging the FIR:-

42. *From perusal of the prosecution case, after hearing both the sides as also perusing the evidences of the witnesses, it is found that the date of occurrence is 05.07.2013, fardbeyan of the Informant was recorded 06.07.2013 at 8.30 AM in the morning but, the F.I.R. was instituted at 11.00 AM and there is no plausible explanation for delay in instituting the F.I.R. which creates a grave doubt in the prosecution. case. It is well known that when an FIR is delayed, in absence of proper explanation, the courts must be on guard and test the evidence meticulously to rule out possibility of embellishments in the prosecution story, inasmuch as, delay gives opportunity for deliberation and guess work.*

43. *From perusal of the records, It also appears that the the P.W.9/1.O. has deposed that a Sanha was lodged on 06.07.2013 at about 1.00 O'clock in the night in the Station Dairy bearing Sanha No. 84/13 but, the same was suppressed by the prosecution and was not made*



base of the F.I.R. and is also not on record. Whether the name of the appellant was there is also not known. What the allegation made therein is also not known to anyone. Thus, under this circumstances. the Sanha was the valuable piece of evidence and non-production of the same before the court has made the prosecution story doubtful and adverse inference can be drawn against the prosecution.

44. *The Criminal Law (Amendment Act) 2013, among its various sweeping changes, inserted a new provision SA (a) into the Section 164 of the CrPC, making it mandatory that when an offence of rape is committed and the same is brought to the knowledge of the police officer he is bound to take the victim to the nearest Judicial Magistrate for recording of her statement. Thus, the 1.0. has not followed the mandatory provision contained under Section 164 (5A) of the Cr. P.C. which creates a grave lacuna in the prosecution case. For the convenience, Section 164(5A)(a) of the Cr. P.C. is quoted herein below:*

"164 (5A) (a) In cases punishable under section 354, section 354A, section



3548, section 354C, section 354D, sub-section (1) or sub-section (2) of section 376, [section 376A, section 376AB, section 3768, section 376C, section 376D, section 376DA, section 376DB,] section 376E or section 509 of the Penal Code, 1860 (45 of 1860), the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police:

Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement:

Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be video graphed."

45. *This Court also finds that although the statement of victim girl under Section 161 was recorded by the 1.0. but, she was not produced before the competent*



Magistrate to get her statement recorded under Section 164 of the Cr. P.C. and she was directly examined as witness before the Trial Court which also creates a great doubt in the prosecution case. This Court also finds that the victim girl, who is a five years old girl at the time of occurrence, has not gone through the Voir dire test (a preliminary examination to determine the competency of witness or juror) before taking evidence. Under this, the court may ask questions to the child witness which are not connected to the case to test the competency, such as questions about name, name of parents, residence, education etc. It is very desirable that a trial judge, who has a child witness before him, should preserve on record, apart from the child witnesses evidence in the case, some other questions and answers which could help the higher courts or courts of appeal to come to conclusion whether the trial judge's decision of competency was right or wrong. If the testimony of the child witness is credible and truthful and supported by other evidence conviction can be based on it. Corroboration of evidence with testimony of a child is also desirable in order to



make conviction. Children are often the most dangerous witnesses, as they can be easily tutored or taught and hence be played like puppets in the hands of elders. Hence the testimony should always be relied upon only after the judge has recorded that the child is fit enough to testify and there is corroborative evidence for the same also, but not in all cases is the corroborative evidence necessary.

46. *At this stage, we would like to refer the decision passed by this Court in the case of Munna Sah (supra) wherein this Court has observed in paragraph nos. 24, 25, 26 and 27 which reads as follows:-*

"24. 18.1. In the case of Pradeep (supra), the Hon'ble Supreme Court has observed in Para-7 to 10 as under:-

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



administration of oath to a child witness, Section 4 of the Oaths Act, 1969 (for short "Oaths Act") is relevant. Section 4 reads thus:

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

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

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

(c) jurors:

Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of Section 5 shall not apply to such witness; but in any such case the absence of an oath or



affirmation shall not render Inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.

(2).....”

8. Under the proviso to sub-Section (1) of Section 4, it is laid down that in case of a child witness under 12 years of age, unless satisfaction as required by the said proviso is recorded, an oath cannot be administered to the child witness. In this case, in the deposition of PW-1 Ajay, it is mentioned that his age was 12 years at the time of the recording of evidence. Therefore, the proviso to Section 4 of the Oaths Act will not apply in this case. However, in view of the requirement of Section 118 of the Evidence Act, the learned Trial Judge was under a duty to record his opinion that the child is able to understand the questions put to him and that he is able to give rational answers to the questions put to him. The Trial Judge must also record his opinion that the child witness understands the duty of speaking the truth and state why he is of the opinion that the child understands the duty of speaking the truth.



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

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



appropriate questions to ascertain whether the minor is capable of understanding the questions put to him and is able to give rational answers. It is advisable to record the preliminary questions and answers so that the Appellate Court can go into the correctness of the opinion of the Trial Court."

25. 18.2. In the case of P. Ramesh (supra), the Hon'ble Supreme Court has observed in Paragraphs-13 to 16 as under:-"13. Section 118 [118. **Who may testify.** All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Explanation. A lunatic is not Incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."] of the Evidence Act, 1872 deals with the competence of a person to testify before the court. Section 4 [**4. Oaths or affirmations to be made by**



witnesses, interpreter and jurors.-(1)

Oaths or affirmations shall be made by the following persons, namely: (a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence; (b) interpreters of questions put to, and evidence given by, witnesses; and (c) jurors: Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of Section 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth. (2) Nothing in this section shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, unless



he is examined as a witness for the defence, or necessary to administer to the official interpreter of any court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties."] of the Oaths Act, 1969 requires all witnesses to take oath or affirmation, with an exception for child witnesses under the age of twelve years. Therefore, if the court is satisfied that the child witness below the age of twelve years is a competent witness, such a witness can be examined without oath or affirmation. The rule was stated in *Dattu Ramrao Sakhare v. State of Maharashtra* [*Dattu Ramrao Sakhare v. State of Maharashtra*, (1997) 5 SCC 341: 1997 SCC (Cri) 685], where this Court, in relation to child witnesses, held thus: (SCC p. 343, para 5)

"5.... A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational



answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

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

"5. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial



Judge, who sees the proposed witness, notices his manner, his apparent possession or lack of Intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record the decision of the trial Judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous."

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

"7. The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation



of Patna High Court CR. APP (DB) No. 1039 of 2015 dt. 01-11-2023 20/24 an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

16. In order to determine the competency of a child witness, the Judge has to form her or his opinion. The Judge is at liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to



understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. [Ratansinh Dalsukhbhai Nayak v. State of Gujarat, (2004) 1 SCC 64: 2004 SCC (Cri) 7] A child becomes incompetent only in case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. [Sarkar, Law of Evidence, 19th Edn., Vol. 2, Lexis Nexis, p. 2678 citing Director of Public Prosecutions v. M, [1998] Q.B. 913: [1998] 2 WLR 604: [1997] 2 All ER 749 (QBD)] If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined."

26. From the aforesaid decisions rendered by the Hon'ble Supreme Court, it can be said that before recording evidence of a



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



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

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

**96. In the case of Rizan and Another
Versus State of Chhattisgarh reported in**



(2003) 2 SCC 661, wherein there Lordships have held at Para No. 12 which reads as follows:-

12. *Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by PW 1 to a large extent to contend about the desirability to throw out the entire prosecution case. In essence the prayer is to apply the principle of "falsus in uno falsus in omnibus" (false in one thing, false in everything). This plea is clearly untenable. Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, his conviction can be maintained. It is the duty of the court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient, or to be not wholly credible. Falsity of material particular would not ruin it from the beginning to end. The maxim "falsus in uno falsus in omnibus" has no application in India and the witness or witnesses cannot be branded as liar(s). The maxim "falsus in uno falsus in omnibus" has not received general acceptance nor has this maxim come to*



occupy the status of the rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called a mandatory rule of evidence. (See Nisar Ali v. State of U.P.) In a given case, it is always open to a court to differentiate the accused who had been acquitted from those who were convicted where there are a number of accused persons. (See Gurcharan Singh v. State of Punjab.) The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because the witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for



placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respect as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See Sohrab v. State of and Ugar Ahir v. State of Bihar.) An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate grain from the chaff, truth from falsehood. Where it is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See Zwinglee Ariel v. State of M.P. and Balaka Singh v. State of Punjab.) As observed by this Court in State of Rajasthan v. Kalki normal discrepancies in evidence are



those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there, however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. The courts have to label the category into to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted in Krishna Mochi v. State of Bihar and Gangadhr Behera V. State of Orissa acquisition have been clearly established against the accused appellants in the case at hand. The court below have categorically indicated the distinguishing features in evidence so far as the acquitted and convicted accused are concerned.

97. It is relevant to note that the aforesaid principles have also been reiterated by the Hon'ble Supreme Court in the case of **Syed Ibrahim Vs. State of A.P.** reported in **(2006) 10 SCC 601** at



Para No. 10, further the following principles were laid down at Para No. 11 which reads as follows:-

11. *In the background of principles set out above it is to be seen how far the evidence of PW 1 is cogent and credible. Merely because he was the solitary witness who claimed to have seen the occurrence, that cannot be a ground to discard his evidence, in the background of what has been stated in Section 134 of the Evidence Act, 1872 (in short "the Evidence Act"). No particular number of witnesses are required for the proof of any fact; material evidence and not number of witnesses has to be taken note of by the courts to ascertain the truth of the allegations made. Therefore, if the evidence of PW 1 is accepted as cogent and credible, then the prosecution is to succeed. It is to be noted that PW 1, father of the appellant, claimed to have set law into motion. The testimony of PW 1 was to the effect that after witnessing a part of the occurrence he had run to the police station and had come back within about five minutes. The evidence on record disproves veracity of this part of his evidence. The occurrence is alleged to have taken place at about 10 p.m. The FIR*



was lodged at the police station at about 11.30 p.m. PW 1 and the investigating officer accepted that it will take nearly one hour for somebody on foot to reach the police station considering the distance of the alleged place of occurrence and the police station. There is another interesting factor: PW 1 accepted in the cross-examination that the report (Ext. P-1) was written in the police station in the presence of Sub-Inspector and a constable. But in his examination-in-chief, he had stated that he had got written the report by somebody at a hotel and the person normally writes petitions. No particulars of this person who allegedly scribed the report, not even his name, was stated by PW 1. His evidence is further to the effect that he alone had come to the police station where the report was lodged and that is how he admitted that the report was written at the police station. This may not appear to be that important a factor considering the illiteracy of PW 1. But there is another significant factor which completely destroys the prosecution version and the credibility of PW 1 as a witness. He has indicated four different places to be the place of occurrence. In his



examination-in-chief he stated that the occurrence took place in his house. In the cross-examination he stated that the incident took place at the house of his wife, the deceased's mother. This is a very important factor considering the undisputed position and in fact the admission of PW 1 that he and his wife were separated nearly two decades ago, and that he was not on visiting terms with his wife. Then the question would automatically arise as to how in spite of strained relationship he could have seen the occurrence as alleged in the house of his wife. That is not the end of the matter. In his cross-examination he further stated that the incident happened in the small lane in front of the house of his wife. This is at clear variance with the statement that the occurrence took place inside the house where allegedly he, the deceased, his son, PW 2 and daughters, PWs 3 and 6 were present. That is not the final say of the witness. He accepted that in the FIR (Ext. P-1) he had stated the place of occurrence to be the house of the deceased though the FIR is not a substantive evidence yet, the same can be used to test the veracity of the witness.



P.W. 1 accepted that what was stated in the FIR was correct. When the place of occurrence itself has not been established it would not be proper to accept the prosecution version.

98. As per the above said citations it can be understood that Sanha is a valuable piece of evidence and failure to produce the same before the Court renders the prosecution case doubtful and adverse interference can also be drawn against the prosecution. The above cited judgment also deals with the competency of the witness. In the present case also, the trial Court erred in not putting any preliminary questions to P.W. 13 who is alleged to be a minor witness, therefore, the above citations squarely apply to this case.

99. It is also the contention of the Learned *Amicus Curiae* that the place of occurrence is doubtful as per the case of the prosecution witness. According to the prosecution, the place of occurrence is a land adjacent to the house of the deceased, however, the evidence of Investigating Officer/P.W. 15 disclose that the body was found on the Verandah



and he received information regarding the incident from the varandah from the P.W. 14.

100. As per the above citations, it is duty of the trial Court to separate the grain from the chaff and where chaff can be separated from the grain it is open to the Court to exercise its discretion in either convicting or acquitting the accused. Admittedly, in the present case also as per the evidence of P.W. 14 and other eye-witnesses, the incident occurred on the vacant land but there is not a single iota of evidence before the trial Court as to who shifted the dead body from the place of occurrence to the house of the deceased and at what time the dead body was shifted and further who gave information to the police about the death of the deceased. The main and crucial witness in this case is P.W. 14, the testimony of P.W. 14, however, is also doubtful as her oral evidence contradicts with the medical testimony. She herself is said to be injured in the case. On the one hand, P.W. 14 deposed that she was unconscious from the time of second occurrence i.e. 12:00 noon to 05:00 P.M. On the other hand, she



testified that she was waiting for the police to arrive in order to give her report, therefore, this Court cannot rely upon on the evidence of P.W. 14 so convict the appellants.

101. The trial Court has erroneously shifted the burden on the accused to prove that they are not guilty of the offence considering the submissions made by the counsel for the defence on the context of right to private defence.

102. On perusal of the evidence on record, it is evident that the appellants have never taken the plea of right to private defence, and their defence is a complete denial of the case of the prosecution.

103. On appreciation of the evidence, it can be construed that the prosecution has miserably failed to bring home the guilt of the appellants either for the offence punishable under Section 302 of IPC or under Section 304 part-A of IPC, therefore, the judgment of the trial Court is liable to be set aside.

104. In result both the criminal appeals are hereby allowed. The judgment and conviction of the trial Court in Sessions Case No. 170 of 2002, on the



file of Additional District and Sessions Judge, Fast-Track Court (FTC), IV Jamui vide order dated 26.02.2004 is hereby set aside.

105. The record reveals that both the appellants were enlarged on bail by the Court vide order dated 06.07.2004. Hence, the bail bonds of the appellants shall stand cancelled.

(G. Anupama Chakravarthy, J)

Manish/-

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	16.05.2025
Transmission Date	16.05.2025

