

Form No. J(1)

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION**

Present :

**The Hon'ble Justice Rajasekhar Mantha
And
The Hon'ble Justice Ajay Kumar Gupta**

C.R.A. No. 21 of 2017
With
I.A. No. CRAN 1 of 2023

Jahangir Mallick @ Vekel @ Subho
Versus
The State of West Bengal

For the Appellant: Mr. Fazlur Rahman,
Md. Babul Hussain,
Ms. Dona Sanyal,
Mr. Syed Nazmul Hossain,
Ms. Syeda Musarrat Sahin,
Mr. Syed Raihanul Hossain.

For the State: Ms. Anasuya Sinha, Id. A.P.P.
Mr. Ashok Das.

Heard on: February 6, 2025 and February 7, 2025.

Judgment on: February 7, 2025.

Rajasekhar Mantha, J.:

1. The present criminal appeal arises out of a judgment of conviction dated 28th November, 2016 and sentence dated 30th November, 2016 passed by the learned Additional Sessions Judge-cum-Judge, Special Court, Chinsurah, Hooghly in Sessions Trial No. 02(09) of 2015 arising out of

Sessions Case No. 98 of 2015 wherein the appellant was convicted under Section 302 of the Indian Penal Code for life.

2. The prosecution case is that on 15th March, 2015 at about 8:00 P.M., the appellant came to the house of his mother-in-law, the victim (Bharati Mondal). An argument ensued between them as regards custody of the minor daughter of appellant who was residing with the victim. This led to a heated exchange. The appellant thereupon took out a knife and stabbed the victim, repeatedly on her neck and body. The victim also sustained an injury on her head.
3. At the relevant point of time PW-2, the granddaughter of the victim was studying inside the house. The conversation between the appellant and the victim took place initially outside the hut where the victim was sitting on the door way. The offence occurred inside the house after the appellant entered into the same following the victim.
4. On hearing the cries and commotion at the house, PW-1 the other daughter of the victim, residing with her, who had gone to a nearby tube-well to fetch water, came rushing back to her house. She found the appellant outside the house with a broken knife in his hand. While trying to stop the appellant, she was attacked by the appellant as he tried to throttle her. Hearing the commotion, the neighbours PW-3 and PW-4 immediately rushed to the place. The appellant fled from behind the house of the victim.

5. PW-3, Susanta Belei wrote the complaint on the instructions of PW-1 and filed the same with Dadpur Police Station, District – Hooghly. The police arrived later at the spot, collected the body, wearing apparel and a broken part of the knife that was lying inside the hut. Blood-stained earth from the PO was also collected. The evidence was seized in the presence of the witnesses, namely, PW-3 and PW-19, Investigating Officers of the case.
6. Inquest was performed in presence of witnesses and the body was sent for post mortem. Post mortem was conducted by PW-11, Dr. Jayanta Kumar Mishra. The weapon was recovered upon being indicated by the appellant in a recorded statement.
7. Investigation was completed and charge-sheet was filed. The Sessions Court framed charges under Section 302 of the Indian Penal Code against the appellant.
8. PW-1 was, Tuktuki Paik, separated daughter of the deceased, who was living with her. She narrated the entire incident as indicated hereinabove. She, therefore, was not an eye-witness to the incident. She, however, deposed that PW-2 (her daughter) was present in the house when the incident took place. After the appellant fled the scene after trying to throttle her, PW-1 entered the house and found her mother lying on the floor with blood-stained hair and clothes. She confirmed that the police arrived and performed inquest of the body and seized the wearing apparels of the victim. She also confirmed that the police seized the broken portion

of the knife and the blood-stained earth. Her evidence could not be shaken in the cross-examination.

9. PW-2 was a child witness, who was seven years old. She was the granddaughter of the victim and the niece of the PW-1. Her evidence is set out hereinbelow:-

*“My name is : Rajlakhi Roy
My father’s/husband’s name is : Shri Lakhan Roy
By religion : Hindu
My home is at : Goswami Mali para, P.S. Dadpur, Dist. Hooghly.*

Following questions are put to the witness:

- 1) *What class do you read in?*
A. *I am a student of class-III.*
- 2) *What is the name of your school?*
A. *The name of my school is Giribala Prathamick Vidyalaya.*
- 3) *What subject do you prefer most?*
A. *I like to read Bengali.*
- 4) *What is the colour of leaves?*
A. *Green.*
- 5) *How old are you?*
A. *I am eight years old.*

It is found from the reply that the witness understands the questions and able to give rational answers to the questions. Ld. Public Prosecutor is at liberty to adduce evidence of the witness. Bharati Mondal, since deceased, happened to be my ‘Dida’ (mother’s mother). Subho cut the throat of my maternal grandmother. I was there with my maternal grandmother when her throat was cut in the evening. I saw the incident in the electric light of the room. I know Subho. He is present in courtroom today (accused is identified in dock). Subho cut the throat of my maternal grandmother with a knife. After inflicting the said injury Subho caught hold of my arms with a view to assaulting me. I raised alarm. He then caught hold of my maternal aunt Tuktuki

Pyne who went fetch water from nearby tube-well. My maternal aunt was about to be assaulted by Subho. She raised alarm. Then Subho ran away. There was a dispute over the custody of myself and my brother in between Subho and my maternal grandmother. Subho was subsequently arrested. I saw the knife being carried by Subho. The knife was broken and a portion thereof slept in our room. I was interrogated by police. I was brought to Court and I made statement before the Court. The tube-well is at a little distance from our house.

Xxm n....

I cannot say exact time when did I leave my house to attend Court since I did not see the watch but I left at the same time as I leave for my school. I did not eat anything before leaving my house. I take food after coming to Court. I accompanied my maternal aunt to Court. I can give answers to my teachers in school. Not a fact I have been tutored by my maternal aunt what to be deposed today. Subho visited our house everyday. I sit to read in the evening. I have no teacher. I read myself. No one remains in the house when I sit to read in the evening. My maternal grandmother does not remain in the room where I sit to read. We have a single room house. 'Dida' remained sitting outside the room when I sit to read. On the date of incident my maternal grandmother was sitting on the doorsteps. Not a fact I did not see the alleged incident myself. I did not see Subho quarreling with the deceased prior to the date of incident but there was quarrel in between them. Not a fact Subho did not cut the throat of my maternal grandmother or he was not having any knife in his hand or Subho did not caught hold of my arms or he did not attack my maternal aunt on the said date or Subho did not visit our house on the date and time of alleged incident or I depose whatever I have been tutored today."

10. The preliminary round of questions conducted by the learned trial judge are questions children are most comfortable with and those in spoken language in which children prefer. The minor girl was alert and comfortable enough to understand that the subject and reason for her presence. This understanding of the the minor girl goes a long way establishing that she had a mature rational mind to understand the

questions and state facts adequately and truthfully, while answering the questions in the Trial. The appellant is the father of the minor girl and would not falsely implicate her father.

11. During her cross examination, the minor girl stated that she studies without the help of any private tutor. When asked that at what time she left her home for court, she said that although she had not seen the clock while leaving home however she can say that she has left for court at the time when she leaves for her school. The minor girl is having a sense of time since she could link the timing of the school with the timing of the court which was found correct, by the Trial Court. The school and the court proceedings commence at 10:30 a.m. Hence under the natural course of events, keeping in mind her candid deposition, the court in exercise of section 114 of the evidence act is bound to presume that the child has naturally and freely deposed.
12. The Supreme Court in ***Pradeep v. State of Haryana*** reported in **2023 SCC OnLine SC 777** has laid down what needs to be seen before giving credence to the eye witness of minor age:-

"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.

8.....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.

Emphasis applied

13. She was born out of the wedlock between the appellant and PW-8. the second wife of the appellant (belonging to a different religious community). It is, therefore, clear and explicit from the evidence of PW-2 that despite being a child, she was clearly narrated the entire incident. It does not appear to this Court that the PW-2 was at all tutored. The Trial Judge found that the PW-2 was capable of deposing evidence. She was deposing just about a year after the incident as was PW-1.
14. PW-3, Susanta Belel, was known to the deceased. He came to the scene at about 8:30 pm on the night after seeing a crowd of people outside the house of the victim. He was an inquest witness and also witness to the seizure list of the broken portion of the knife. He identified the broken part

which was produced in course of trial. He also identified signature on the seizure list and identified the weapon. He further deposed that the broken knife was recovered five days later on information provided by the accused. The deposition of the accused in terms of Section 27 of the Evidence Act was produced and marked exhibit in the trial. The broken knife was recovered next to the house of one Tarak Murmu.

15. PW-4, Sahadeb Murmu, who was a neighbor of the victim and knew the victim and PW-1. He was a witness to the inquest.
16. PW-7, ASI Binoy Krishna Shyam, was the seizure witness of the wearing apparels and viscera of the victim and signed on the seizure list.
17. PW-8, Champa Roy, is the second wife of the appellant, who deposed that the appellant forced her into the flesh trade and beat her up and tortured regularly if she did not part with the money received from her customers. She deposed that the appellant used to maintain the family out of his first marriage with the money extracted from her. She further deposed that the appellant often entered into a fight with her and the victim for the custody of PW-2. This court reasonably deduces that the appellant sought to forcibly obtain custody of PW-2 from victim and PW-2 for collateral purposes.
18. PW-9, Rajkumar Singh, was a seizure witness of the broken knife. He deposed that the accused identified the place where the broken knife was

lying and was recovered by the police. He signed on the seizure list. He identified the seizure list of the broken knife.

19. PW-10, Ismail Halder, was a local security. He put his LTI on the statement given by the accused on 20th March, 2015. The broken knife was recovered by the police on the same day based on the above statement.
20. PW-11, Dr. Jayanta Kumar Mishra, was the post mortem doctor. In his evidence he enlisted the following injuries on the body of the victim:-

“On examination I found the following injuries:-

- 1) *Lacerated Wound over the right shoulder 3” x ½”*
- 2) *Penetrating Wound 4” x 3” x 3” over the lower part of right side of neck.*
- 3) *One Incise Wound over the face from angle of the mouth (right angle of the mouth) to the lower part of right ear 8.5 cm x 3.5 cm x 2 cm depth.*
- 4) *Three Lacerrated Wound over the scalp behind the right ear lying horizontally parallel to each other a) 5 cm behind external right auricular canal 4 cm x 2 cm. b) 4.5 cm behind external right auricular canal 5 cm x 2 cm and c) 4 cm above external right auricular canal 3.5 cm x 2 cm.*
- 5) *Incise Wound over the back of the chest below right shoulder 13 cm x 3 cm x 2 cm.*

Cause of death was due to effects of the injuries stated above which is anti-mortem and homicide in nature. Injuries are caused sharp cutting weapon and the probable time of death within 24 hours of post mortem examination. The p.m report was prepared by me in carbon process. This is the carbon copy of p.m report. The same bears my date and signature with official seal.

*The PM report identified by witness is marked as **Exbt-7**.*

*I found altogether 6/7 injuries on the person of the dead body (one broken knife already marked as **MAT Exbt I and I/I** respectively is handed over to the witness) This is the weapon through which the injuries found on the dead body can be caused. The injury no. 3 and 5 can be caused by said weapon either by*

dragging or homicidal impact. Injury on the scalp can be caused by the said weapon by homicidal impact.”

21. PW-12, Samir Das, was also another seizure witness to the broken knife i.e. offending weapon.
22. PW-13, PW-14 and PW-15 was seizure witnesses, inter alia, to the videography conducted for re-construction of the place of occurrence.
23. PW-18, Mainak Dasgupta, was the Judicial Magistrate, who recorded the statements of PW-1 and PW-2 under Sections 164 of the Cr.P.C.
24. PW-19, Kanailal Ghosh, was the investigating officer, who narrated the entire process and steps taken towards investigation
25. The appellant was examined under Sections 313 of the Cr.P.C. After detailed examination of all the evidence on record, the Trial Judge convicted the appellant under Section 302 of the IPC and sentenced him for imprisonment for life and payment of fine of Rs.10,000/-.
26. Learned counsel for the appellant has first attacked the impugned order of conviction on the basis that it was entirely dependent on the evidence of a child witness. He relied upon the decisions of the Supreme Court in the case of ***Bhagwan Singh and Ors. Vs. State of M.P.*** reported in **(2003) 3**

SCC 21 particularly paragraph 19 thereof which is set out hereinbelow:-

“19. The law recognises the child as a competent witness but a child particularly at such a tender age of six years, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, is not considered by the court to be a witness whose sole testimony can be relied upon without

other corroborative evidence. The evidence of a child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, always the court looks for adequate corroboration from other evidence to his testimony. (See Panchhi v. State of U.P.)”.

27. He further relied upon the decision of the Supreme Court in the case of ***State of Madhya Pradesh Vs. Rajaram alias Raja*** reported in **(2019) 13 SCC 516** particularly paragraph 10 thereof which is set out hereinbelow:-

“10. Anju Kumari (PW 4), who is stated to be 12 years of age, categorically stated in para 12 of her cross-examination that on the next day of incident, when the police came, she did not tell anything about the incident to the police. Subsequently, after a week, police came again and at the instance of police, she made a statement. She also admitted that she was threatened by the police and due to that, she has made a statement in support of the prosecution case. It has been held in Bhagwan Singh v. State of M.P. [Bhagwan Singh v. State of M.P., (2003) 3 SCC 21 : 2003 SCC (Cri) 712] , that: (at SCC p. 32, para 19) ‘if the case is based on evidence of child witness, court should seek corroboration from other evidence’. Further, it was also held that ‘if possibility of tutoring the child witness appears to the court, it should be careful in accepting the evidence’. Therefore, it is difficult for this Court to rely on uncorroborated testimony/evidence of a 12-year-old girl, who is very likely to have been tutored or under influence while giving her testimony.”

28. He also relied upon the decision of the Supreme Court in the case of ***State of Assam Vs. Mafizuddin Ahmed*** reported in **(1983) 2 SCC 14** particularly paragraph 15 and 16 thereof which is set out hereinbelow:-

“15. A bare perusal of the deposition of PW 7 convinces us that he was vacillating throughout and has deposed as he was asked to depose either by his nana or by his own uncle. It is true that we cannot expect much consistency in the deposition of this witness who was only a lad of 7 years. But from the tenor of his

deposition it is evident that he was not a free agent and has been tutored at all stages by someone or the other.

16. He had told the police that he was in the mango grove at the time of occurrence. If this be a fact then he could not be an eyewitness of the occurrence but when he came to depose before the Court he said:

“Ahmed is my father's brother. He was not at home at the time of the occurrence. He came later. He told me to tell police that I had been in the mango grove at the time of occurrence. That is why I told police so. Later, in company with my maternal grandfather, Alimuddin I said what I had seen.”

Again, the first thing that he uttered when the house caught fire is “Gharat Jui Lagil” (the house has caught fire). This statement is more in consonance with the defence theory. His mother was more important for him and if it was a fact that his father had set fire to his mother by sprinkling kerosene to which he was a witness he would not have omitted to say so. In the next breath he deposed that his father poured scented oil on his mother's body and not kerosene.”

29. Placing reliance on the aforesaid decisions, learned counsel for the appellant submits that the evidence of PW-2 appears to be tutored. The conviction of the appellant appears to be based entirely on the evidence of PW-2 which is not permissible in law. He further argued that the impugned order of conviction must be set aside.
30. This Court has very carefully considered the aforesaid decisions. In the case of **Mafizuddin Ahmed (supra)** Hon'ble Supreme Court found from the evidence of child witness that she had stated more than one occasion before the Trial Court that she was asked to depose as such by her grandfather. The Court further found that there was a custody battle for

the witness between the grandparents and the child witness stayed with the grandfather most of the time although custody was given to grandmother. Paragraphs 17 and 18 of the said judgment are set out hereinbelow:-

“17. The fact that he was tutored is fully borne out by his own statement, as will be clear from the following portion of his deposition:

‘Nana’ accompanied me when I came to depose in the lower court, but stayed outside. I stated in that court that I had stated what ‘Nana’ asked me to. The day before I came to depose, I had told ‘Nana’ what I would say.”

18. It is also clear from the materials on the record that on the advice of the police Alimuddin Ahmed, the nana of PW 7 applied for his custody during the enquiry proceedings but the Magistrate instead of giving custody to the nana gave the custody of PW 7 to his nani, who was no other than the wife of Alimuddin. So to all intents and purposes the custody of the boy remained with Alimuddin Ahmed, the nana. Indeed, he took the boy for giving evidence in court. PW 7 was in the full control of the nana and deposed as he was asked to depose. In this setting the observation made by the High Court is fully justified.”

31. In the instant case, it is clear and explicit that evidence of PW-2 was confident, clear and not based on any tutoring. PW-2 did not state she was deposing on being instructed by anybody. Even in cross-examination, PW-2 has confidently stated that she was deposing on her own and not tutored by anyone. Her evidence is corroborated by the evidence of PW-2 and also supported by the other evidence of the other witnesses and the exhibits produced in the trial court.

32. The argument of learned counsel for the appellant that she was accompanied to the Court by her maternal aunt, therefore, cannot by itself lead to any conclusion of tutoring of PW-2. The PW2 being a minor has to be accompanied by someone to the trial Court which in this case happens to be her maternal aunt.
33. Applying the test laid down at paragraphs 10 of the ***Rajaram alias Raja (supra)*** decision, this Court finds that the evidence of PW-2 is wholly and completely corroborated by the evidence of PW-1. The other surrounding evidence also laid to the credence to the evidence of PW-2 and PW-1. In terms of the dicta in ***Pradeep (Supra)***, the need for corroboration of the deposition of a minor by other witnesses is not a *rule* but rather a matter of prudence and caution. Therefore, the testimony of the minor can also form the sole ground for conviction, more so when the testimony withstands cross-examination. Though in the present case, corroboration as regards the testimony of PW2 is eminently forthcoming, notwithstanding the same, her sole testimony is of sterling character establishing the guilt of the appellant.
34. The deposition of PW8 supplies the motive of the appellant to kill the victim. The character and conduct of the appellant towards women is also revealed from the deposition of PW 8. She has stated the existence of heated exchanges between the victim and the appellant for the custody of

PW2 therefore the attack on the victim by the appellant was not just in the heat of the moment.

35. In the above circumstances, this Court is not inclined to accept the argument of learned counsel for the appellant that the evidence of PW-2 should be distorted by the Court. The Trial Court has very rightly relied upon of evidence of PW-2 which was unshaken and clear and duly corroborated by PW-1 and the other evidence produced by the prosecution.
36. Learned counsel for the appellant next argued that the recovery of the offending weapon has to be supported by an appropriate memorandum and/or statement of the accused. In the absence thereof, mere production of the broken knife cannot affirm a vital part of the link in the chain of circumstances.
37. It appears from the evidence on record that the accused himself deposed on 20th March, 2015, about five days after the incident, and inform the police of the whereabouts of the weapon. It is only then that the weapon in question was recovered and seized by the police in the presence of witnesses. It is the accused, who showed the police himself in the presence of witnesses where he had hidden/thrown away the broken knife i.e. next of the house of Tarak Murmu.
38. The Supreme court in ***Perumal Raja @ Perumal v. State*** reported in **2024 INSC 13** has stated as follows :-

30. However, evidentiary value to be attached on evidence produced before the court in terms of Section 27 of the Evidence Act cannot be codified or put in a straightjacket formula. It depends upon the facts and circumstances of the case. A holistic and inferential appreciation of evidence is required to be adopted in a case of circumstantial evidence.

22. However, we must clarify that Section 27 of the Evidence Act, as held in these judgments, does not lay down the principle that discovery of a fact is to be equated to the object produced or found. The discovery of the fact resulting in recovery of a physical object exhibits knowledge or mental awareness of the person accused of the offence as to the existence of the physical object at the particular place. Accordingly, discovery of a fact includes the object found, the place from which it was produced and the knowledge of the accused as to its existence. To this extent, therefore, factum of discovery combines both the physical object as well as the mental consciousness of the informant accused in relation thereto. In *Mohmed Inayatullah v. State of Maharashtra*¹², elucidating on Section 27 of the Evidence Act, it has been held that the first condition imposed and necessary for bringing the section into operation is the discovery of a fact which should be a relevant fact in consequence of information received from a person accused of an offence. The second is that the discovery of such a fact must be deposed to. A fact already known to the police will fall foul and not meet this condition. The third is that at the time of receipt of the information, the accused must be in police custody. Lastly, it is only so much of information which relates distinctly to the fact thereby discovered resulting in recovery of a physical object which is admissible. Rest of the information is to be excluded. The word 'distinctly' is used to limit and define the scope of the information and means 'directly', 'indubitably', 'strictly' or 'unmistakably'. Only that part of the information which is clear, immediate and a proximate cause of discovery is admissible.

23. The facts proved by the prosecution, particularly the admissible portion of the statement of the accused, would give rise to two alternative hypotheses, namely, (i) that the accused had himself deposited the physical items which were recovered; or (ii) only the accused knew that the physical items were lying at that place. The second hypothesis is wholly compatible with the innocence of the accused, whereas the first would be a factor to show involvement of the accused in the offence. The court has to analyse which of the hypotheses should be accepted in a particular case.

32. In *State of Maharashtra v. Suresh*, this Court in the facts therein held that recovery of a dead body, which was from the place pointed out by the accused, was a formidable incriminating circumstance. This would, the Court held, reveal that the dead body was concealed by the accused unless there is material and evidence to show that somebody else had concealed it and this fact came to the knowledge of the accused either because he had seen that person concealing the dead

body or was told by someone else that the dead body was concealed at the said location. Here, if the accused declines and does not tell the criminal court that his knowledge of the concealment was on the basis of the possibilities that absolve him, the court can presume that the dead body (or physical object, as the case may be) was concealed by the accused himself. This is because the person who can offer the explanation as to how he came to know of such concealment is the accused. If the accused chooses to refrain from telling the court as to how else he came to know of it, the presumption is that the concealment was by the accused himself.

35. Apart from Section 27 of the Evidence Act, Section 8 of the said Act would be also attracted insofar as the prosecution witnesses, namely, the investigating officers, Chinta Kodanda Rao (PW-30), Inspector of Police, PS Grand Bazaar and T. Bairavasamy (PW32), Circle Inspector, PS Odiansalai, have referred to the conduct of the appellant – Perumal Raja @ Perumal with regard to any fact in issue or a relevant fact when the appellant – Perumal Raja @ Perumal was confronted and questioned.²⁷ Reference in this regard may also be made to the judgment of this Court in Sandeep v. State of U.P.²⁸ which held that:

“52. (...) It is quite common that based on admissible portion of the statement of the accused whenever and wherever recoveries are made, the same are admissible in evidence and it is for the accused in those situations to explain to the satisfaction of the court as to the nature of recoveries and as to how they came into possession or for planting the same at the places from where they were recovered.”

39. No explanation was forthcoming from the appellant in examination under Section 313 of the CrPC, as to how he has come to know about the presence of the knife in that particular place. Further, it is not the case of the appellant that he has seen some other person deposit that murder weapon or he has been asked by some other person to deposit the murder weapon in that place. Therefore, the recovery of the murder weapon on the appellant pointing out the place fell within the *exclusive mental awareness* of the appellant in terms of para no. 22 of **Perumal Raja (supra)**.

40. In the present case, two hypotheses formulated by the Supreme Court in para no. 23 of ***Perumal Raja (Supra)*** run against the innocence of the appellant since he has not denied that he deposited the murder weapon in that place. It is also not his case that some other people are also equally aware of the place from where the murder weapon is recovered.
41. The only defence launched by the appellant against the seizure of the murder weapon is that a proper memorandum as regards section 27 has not been made. In terms of para no 30 ***Perumal Raja (supra)*** there is no hard fast rule for upholding the application of Sec.27 in a given case. Therefore, the procedural attack so made is fallacious given the failure of the appellant to even touch the substantive exclusive mental awareness of the appellant about the place of the murder weapon, corroborated by the other witnesses. PW1 and PW2 both have stated the presence of a broken knife in the hands of the appellant, which goes on to indicate that the knife was used resulting into the breaking of the same.
42. Section 8 of the Evidence Act would be relevant in this regard which says that the conduct of an accused person in a criminal proceeding would be relevant provided his conduct influences any fact in issue. In the present case, the conduct of the appellant in pointing out the place which had the murder weapon has influenced the fact in issue namely

which weapon was used for killing the victim. Therefore in terms of paragraph number 35 of **Perumal Raja (supra)** which referred to Section 8 saying that it is for the appellant to explain his conduct which influences a fact in issue, namely the conduct of the appellant in pointing out the place which had the murder weapon. Therefore to dispel the case arising from section 27 against him, the appellant ought to have explained away his conduct of pointing out that particular place, which he has not done.

43. While it is true that the statement of the accused made in the custody of the police may not be used against himself in the course of trial in its entirety, the factum of recovery and the production thereof in the course of trial along with broken part of the knife under two separate seizure list, corroborated by the statement of the PW1 and PW2 to the effect that the appellant was seen to have a broken knife in his hand makes it extremely and highly probable that the weapon was used for commission of the offence.
44. In this regard, the decision of the Supreme Court in **Ramakant Rai v. Madan Rai, (2003) 12 SCC 395**, may be referred to for the proposition that the concept of proof beyond a reasonable doubt is not an absolute standard. What degree of probability would lead to proof beyond a reasonable doubt will depend on the facts of each case. Para no.23 of **Ramakant(supra)** is set out below:-

23. A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. **Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to —proof is an exercise particular to each case.** Referring to (sic) of probability amounts to —proof is an exercise, the interdependence of evidence and the confirmation of one piece of evidence by another, as learned author says :[see The Mathematics of Proof II : Glanville Williams, Criminal Law Review, 1979, by Sweet and Maxwell, p. 340 (342)].

45. Further evidence of the post mortem doctor has clearly indicated that the weapon in question as a whole could have caused the injury on the victim. The nature of injuries have been clearly identified and marked out hereinabove.
46. This Court is, therefore, of the view that the finding of the Trial Judge is not contrary to the dicta in paragraph 20 of the decision of **Nikhil Chandra Mondal Vs. State of West Bengal** reported in **(2023) 6 SCC 605** relied upon by the learned counsel for the appellant, since in that case not only the absence of memorandum vitiated the application of Section 27 but also the fact that the place from which the weapon was recovered was accessible to *all*.
47. In the present case it is not defense of appellant that the place from where the weapon was found was accessible to all. Even assuming that place was accessible to all, the defense has not been able to curtail down the testimony of PW1 and PW2 that the appellant used the knife for killing the victim and when PW1 entered into the house, she saw the appellant with the broken knife in his hands as by that time the murder

was already committed thereby indicating that the knife was used in commission of the crime, and hence it is only appellant who would be aware of the place where the murder weapon has been concealed. Para no. 20 of the **Nikhil Mondal decision (Supra)** is set out hereinbelow:-

“20. The trial court disbelieved the recovery of clothes and weapon on two grounds. Firstly, that there was no memorandum statement of the accused as required under Section 27 of the Evidence Act, 1872 and secondly, the recovery of the knife was from an open place accessible to one and all. We find that the approach adopted by the trial court was in accordance with law. However, this circumstance which, in our view, could not have been used, has been employed by the High Court to seek corroboration to the extra-judicial confession.”

48. Learned counsel for the appellant next relied upon the decision of the Supreme Court in the case of **Omwati (Smt) and Ors. Vs. Mahendra Singh and Ors.** reported in **(1998) 9 SCC 81** particularly paragraph 9 thereof The aforesaid decision was followed in the case of **Jaikam Khan Vs. State of U.P.** reported in **(2021) SCC OnLine SC 1256**. In paragraph 9 of the said decision the Hon’ble Supreme Court has held that failure on the part of the prosecution to obtain the fingerprints of the accused on the weapon in question would amount to omission on the part of the prosecution. Paragraph 9 of the decision of **Omwati (supra)** is set out hereinbelow:-

“9. At the outset, it must be pointed out that the motive for the murder as alleged by the prosecution has not been satisfactorily established. The case of the prosecution is that the deceased were working for Inder Pal Singh at the time of election of the Pradhan from Village Chawra held in 1982 in the village. Admittedly Inder Pal Singh was defeated in that election and Mahender won the

same. Neither of the deceased contested the election. If there was enmity on account of the election, the person against whom the accused would have borne a grudge was Inder Pal Singh who contested the election. The said Inder Pal Singh was present at the scene of occurrence sitting on the motorcycle in front of the accused. He was left untouched without even a scratch. If really the enmity between the accused and the deceased was on account of the election, the accused would have attacked the deceased as well as Inder Pal Singh, if not Inder Pal Singh alone. There is nothing on record to show that there were clashes between the accused on the one hand and the deceased or other supporters of Inder Pal Singh on the other at any time before this incident. It is wholly improbable that after lapse of three years from the election in which Inder Pal Singh was defeated, the accused should bear such a grudge as to kill the deceased. A look at the post-mortem reports, Exs. Ka 9 and Ka 10 show several deep incised wounds which according to PW 8 were caused by some sharp-edged weapon, say, by hasiya. There are several such wounds which indicate that the assailant had given repeated blows with the weapon to the deceased. It gives an impression that there was some deep-seated enmity between the deceased and the assailant. The evidence on record does not prove any such deep-seated enmity between the deceased and Raghu Raj Singh. Learned counsel for the respondents points out the lacunae in the evidence with reference to the hasiya produced before the court as the weapon used by Raghu Raj Singh. There is no evidence on record regarding the fingerprints or bloodstains on the said hasiya. The failure on the part of the police to check the fingerprints as well as the bloodstains on the weapon is a vital factor to be taken into account against the prosecution. The High Court has sent for the weapon and also examined Dr R.N. Katiyar, an expert who opined that the injuries on the body of the deceased could not be caused by a single blow of the hasiya. The said doctor stated that the post-mortem examination report does not show that the injury was caused by more than one blow. Considering the fact that as many as seventeen incised wounds were found on the body of Raj Kumar Singh, the High Court found it difficult to believe that he was assaulted by only one assailant with a sharp-cutting weapon. The High Court opined that there were more than one assailant armed with such sharp-cutting weapons. The opinion of the High Court cannot be considered to be totally baseless or perverse.”

49. Admittedly, the investigating officer has deposed in the trial that he did not make any effort to ascertain or obtain fingerprints on the knife or its broken part seized by the Investigating Officer of the case.
50. While this may be an omission on the part of the investigating officer, the same by itself will not throw out the case made out by the prosecution. Such case is made out on the basis of the other evidence that is on record both oral and documentary.
51. The last decision relied upon by the learned counsel for the appellant is the case of ***State of Uttar Pradesh Vs. Wasif Haider and Ors.*** reported in ***(2019) 2 SCC 303***. Between paragraphs 13 to 21 of the said decision the Hon'ble Supreme Court has pointed out eight vital lapses on the part of the prosecution.
52. It is in the light of the above, eight lapses that the Supreme Court found that the conviction of the appellant was not sustainable in law.
53. In the instant case, however, the only lapse on the part of the prosecution is not to obtain fingerprints on the offending weapon. Such a lapse however gets substantially diluted given the testimony of PW1 and PW2 wherein PW2 stated that the appellant killed the victim by use of that knife corroborated by PW1 that when she entered the house on hearing hue and cry, the appellant was found with the broken knife in his hand.

54. The finding of the presence of the fingerprint of an accused in the murder weapon is not a substantive and direct piece of evidence. It is rather a relevant fact which takes the case of the prosecution one step further. In this regard, the decision of the Supreme Court in ***Dharmendra Kumar @ Dhamma Versus State of Madhya Pradesh*** reported in **2024 INSC 480 1** maybe referred to for drawing useful parallels where the Court held that the non-conduction of the identification parade will not vitiate the case of the prosecution when the accused is identified by the prosecution witnesses in the open court. The broken knife was identified by the prosecution witnesses in the open court establishing that PW1 saw the appellant with the broken knife in his hand. Para no. 47 of ***Dharmendra (supra)*** is set out below:-

47. It is trite law that identification tests (TIP) do not serve as substantive evidence but are primarily intended to assist the investigating agency in ensuring that their progress in investigating the offence is on the correct path. Holding a TIP is not obligatory. Further, a failure to hold TIP cannot be a ground to eschew the testimony of witnesses whose evidence was concurrently accepted by the trial and appellate courts. Additionally, a failure to hold a parade would not make inadmissible the evidence of identification in the court.

emphasis applied

55. The Supreme Court in ***Shivaji Sahebrao Bobade v. State of Maharashtra***, reported in **(1973) 2 SCC 793**, it was held that Courts must be alive to the reality that police in India do not have that sophisticated training in using forensic evidence and therefore the absence of the conduction of a forensic examination in not tracing the

fingerprints of the appellant in the Knife cannot be fatal to the prosecution version which has the ring of truth. Para no. 6 of (supra) is set out below:-

“6. Even at this stage we may remind ourselves of a necessary social perspective in criminal cases which suffers from insufficient forensic appreciation....’

56. The decision of the Supreme Court in the case of **Wasif Haider and Ors. (supra)** is distinguishable in the facts of the case. **Wasif (supra)** may be distinguished based on the decision of the supreme court in **Munna Lal V. The State Of Uttar Pradesh** reported in **[2023] 3 S.C.R. 224** wherein it was held mere defective investigation will not vitiate case of prosecution. Para no. 28© and 40 are set below:-

28(c). A defective investigation is not always fatal to the prosecution where ocular testimony is found credible and cogent. While in such a case the court has to be circumspect in evaluating the evidence, a faulty investigation cannot in all cases be a determinative factor to throw out a credible prosecution version.

42. Although, mere defects in the investigative process by itself cannot constitute ground for acquittal, **it is the legal obligation of the Court to examine carefully in each case the prosecution evidence de hors the lapses committed by the Investigating Officer to find out whether the evidence brought on record is at all reliable and whether such lapses affect the object of finding out the truth. Being conscious of the above position in law and to avoid erosion of the faith and confidence of the people in the administration of criminal justice, this Court has examined the evidence led by the prosecution threadbare and refrained from giving primacy to the negligence of the Investigating Officer as well as to the omission or lapses resulting from the perfunctory investigation undertaken by him.** The endeavour of this Court has been to reach the root of the matter by analysing and assessing the evidence on record and to ascertain whether the appellants were duly found to be guilty as well as to ensure that the guilty does not escape the rigours of law. The disturbing features in the process of investigation, since noticed, have not weighed in the Court’s mind to give the benefit of doubt to the

appellants but on proper evaluation of the various facts and circumstances, it has transpired that there were reasons for which PW-2 might have falsely implicated the appellants and also that PW-3 was not a wholly reliable witness. There is a fair degree of uncertainty in the prosecution story and the courts below appear to have somewhat been influenced by the oral testimony of PW-2 and PW-3, without taking into consideration the effect of the other attending circumstances, thereby warranting interference.

57. In view of the discussions made hereinabove, this Court is of the unequivocal view that the decision of the Trial Judge based on the exhibits, oral and documentary evidence cannot be faulted.
58. The impugned judgment of conviction and sentence, therefore, calls for no interference whatsoever. Hence, C.R.A. 21 of 2017 fails and hereby dismissed.
59. In view of the dismissal of the instant appeal, the connected application being CRAN 1 of 2023 shall also stand dismissed.
60. Let a copy of this judgment be sent down to the Court below for information.
61. Let the T.C.R. be returned to the Court below at once.
62. Urgent photostat certified copy of this order, if applied for, be supplied to the parties as early as possible.

(Rajasekhar Mantha, J.)

I agree.

(Ajay Kumar Gupta, J.)