HIGH COURT OF MADHYA PRADESH

BENCH AT GWALIOR

DIVISION BENCH

BEFORE: G.S.AHLUWALIA

AND

RAJEEV KUMAR SHRIVASTAVA, JJ.

Criminal Appeal No. 215/2010

Naresh S/o Mangilal Kushwaha
R/o Village Mayapur, Tahsil Kolaras
District Shivpuri (MP)

Versus

State of Madhya Pradesh
Through Police Station Pohri
District Shivpuri (MP)

Shri A.K.Jain, Counsel for the appellant.
Shri C.P.Singh, Panel Lawyer for the respondent/ State.

Date of hearing : 30th July, 2021
Date of Judgment : 12th August, 2021
Whether approved for reporting: **YES**

J U D G E M E N T
(12/08/2021)

Per Rajeev Kumar Shrivastava, J.:

The present Jail Appeal has been preferred by the appellant, challenging the judgment dated 5.2.2010 passed in Sessions Trial No. 243/2009 by Third Additional Sessions Judge, Shivpuri, whereby the Trial Court convicted the appellant for commission of offence punishable under Section 302 of IPC and sentenced to undergo Life Imprisonment and fine of Rs.5000/-, with default stipulation.

2. The facts necessary to be stated for disposal of the instant appeal are that on 9.6.2009 at 7.30 Shrikrishna, Bhadai and

Shivcharan found a female deadbody lying in the field of Shyamlal. They informed to Village Kotwar Hakim Singh, who informed about the same to Police Station Pohri, on which merg was registered at Merg No. 16/2009. “Lash Panchnama” (Ex.P/3) was prepared and after seizing the materials from the spot, FIR at Crime No. 102/2009 was registered against unknown person. The dead body was sent for post-mortem, which was conducted on 10.6.2009. At that time, the dead body was identified to be of Vidhabai by Vaijayanti, Gayajit and Bhuribai. The statements were recorded and during investigation it was found that appellant Naresh had committed murder of deceased Vidhabai by pelting stone on her head. After completion of investigation, charge sheet was filed against the appellant under section 302 of IPC.

3. Appellant was tried for the offences under Section 302 of IPC. Appellant abjured his guilt. The trial Court after appreciation of evidence available on record, has convicted and sentenced the appellant as under :-

Name of accused	Section	Punishment	Fine	In default, punishment
Naresh	302 IPC	Life Imprison-ment	5000/-	Three Months RI

4. The grounds raised are that the judgment of conviction and sentence passed by the trial Court is illegal. The trial Court has erred in analyzing the evidence of prosecution. There was no reliable or cogent evidence despite the trial Court has convicted the appellant. It is further submitted that the appellant has been falsely implicated in the crime due to enmity. Appellant Naresh belongs to Kachhi caste while the deceased

Vidhabai was belonging to Badlayee caste. Deceased lived with appellant as a wife like kept lady, which was highly objected by her late husband's family member as well as by deceased's parents, who made a loathsome plan and played the gruesome game with the connivance of local police and falsely implicated the appellant in the alleged offence. The FIR is anti-dated and anti-timed. The prosecution story is false, fabricated, concocted and unnatural. Presence of eye witness Ku. Chanha (PW-7) at the time of alleged incident is doubtful. Even her statement seems to be incorrect, concocted, fabricated and she seems to be a tutored child witness. There are lots of contradictions and omissions in the statements given by the witnesses during investigation and during trial. It is also submitted that the incident had taken all of sudden under heat of passion and there was no previous meditation of mind. Therefore, the conviction under Section 302 of IPC is illegal. Hence, prayed for setting aside the impugned judgement of conviction and sentence.

5. Per Contra, learned State Counsel opposed the submissions and submitted that the prosecution has proved the case beyond doubt before the trial Court. Dr. Ramkumar Choudhary (PW-6) had found multiple injuries on the body of the deceased and he opined that the injuries were anti-mortem and were caused by hard and blunt object. The death was homicidal in nature. Chanha (PW-7) has specifically stated in her statement before the Court that appellant had committed murder of deceased by pelting stone on her head. Therefore, the trial Court after marshalling of evidence has rightly convicted and sentenced the appellant. Hence, no case is made out for interference.

6. Heard the learned counsel for the rival parties and perused the record.

7. The present case mainly depends upon the testimony of child witness, which requires thorough scrutiny of the evidence available on record.

8. India has adopted adversarial system used in the common law countries where two advocates advance their rival contentions or represent their position before a Judge, who analyzes it to determine the truth of the case and passes judgment accordingly. It is in contrast to the inquisitorial system, where a Judge investigates the case. It is well settled that no one can compel the accused to give evidence against him in a criminal adversarial proceeding, even he may not be questioned by the prosecutor or Judge unless he opts to do so.

9. Judges in an adversarial system are impartial in ensuring the fair play of due process or fundamental justice. In such system, the Judges decide, often when called upon by counsel rather than of their own motion, what evidence is to be admitted where there is a dispute. In an adversarial system if a dispute arises with regard to admission of evidence, it is always decided by the Judges. That means, the Judges play more of a role in deciding what evidence is to admit into the record or reject. It is true that improper application of judicial discretion may pave the way to a biased decision, rendering obsolete the judicial process in question. The rules of evidence are also developed based upon the system of objections of adversaries but the Presiding Officer/Judge of the Court is having powers to ask questions whether relevant or irrelevant under Section 165 of the Indian Evidence Act, 1872, which is reproduced below:-

> **“165. Judge's power to put questions or order production**. – The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question **he pleases**, in any form, at

> any time, of any witness, or of the parties, about **any fact relevant or irrelevant**, and may order the production of any document or thing; and ***neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question.***
>
> Provided that the Judgment must be based upon facts declared by this Act to be relevant, and duly proved;
>
> Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the questions were asked or the documents were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

10. In **Sidhartha Vashist v. State (NCT of Delhi), [AIR 2010 SC 2352]**, the Apex Court observed that the Judge cannot ask questions which may confuse, coerce or intimidate the witness. That means, the Judge should not sit in the Court as a silent spectator rather he should involve himself for quest of the truth under the provisions of law.

11. Section 118 of the Indian Evidence Act reads as follows:-

> "**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."

From the aforesaid provision, it is clear that all persons shall be competent to testify before the Court subject to provisions made under Section 118 of the Indian Evidence Act.

12. Now in the present case the question required to be determined is as to whether the child can understand the nature of an oath; has sufficient capacity or intelligence to give reliable evidence; and, distinguish between what's right or wrong.

13. According to Blacks Law dictionary, 'a witness is one who sees, knows, or vouches for something or one who gives a testimony under oath or affirmation in person by oral or written deposition. A witness must be legally competent to testify.'

14. The Courts have made some reconciliation between taking oath before a Court and facing the consequences of breaching the same on the one hand and on the other hand, the competency of giving testimony before the Court. In the interest of justice, Courts have held that a child witness is competent to give evidence though it may not be permissible to administer oath before giving such evidence. It is, in this context, there are several rulings of the Supreme Court as to competency of a child witness and necessary precautions to be taken in sifting of evidence given by such a child witness. A reference to these decisions is relevant in the present case for the admissibility or desirability of a child witness's evidence.

15. In **Mohamed Sugal Esa v. The King [AIR 1946 P.C. 3]**, it has been held as under:

> "Once there is admissible evidence a court can act upon it; corroboration, unless required by a statute, goes only to the weight and value of the evidence. It is a sound rule not to act on

> the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law."

16. In **Rameshwar vs. State of Rajasthan [AIR 1952 SC 54]**, the Apex Court held as under:

> "The rule, which according to cases has hardened into one of law, is not that corroboration is essential before there can be a conviction, but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge... The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand."

17. In The **State and others vs. Dukhi Dei and others [AIR 1963 ORISSA 144],** the Orissa High Court observed in paragraph 8 of the judgment as follows:

> "8. The question therefore is whether the evidence of P.W.2 as an eye-witness is reliable for conviction of the appellants. No doubt the evidence of a child witness is to be taken with great caution. Normally evidence of Child witnesses should not be accepted as it is notoriously dangerous unless immediately available and unless narrated before any possibility of coaching is eliminated; there should be closer scrutiny of the evidence of child witnesses before the same is accepted by a court of law."

18. In **Arbind Singh v. State of Bihar [1995 (Supp) 4 SCC 416]**, in paragraph 3 of the judgment, the Apex Court observed as follows:

> "3. ..... It is well-settled that a child witness is prone to tutoring and hence the court should look for corroboration particularly when the evidence betrays traces of tutoring....."

19. In **Jibhau Vishnu Wagh vs. State of Maharashtra [1996 (1) CRI.L.J. 803],** it was held in paragraph 15 of the judgment as follows:

> "15. ..... He firstly urged that the prosecutrix was a young girl aged about 8 years and the learned trial Judge should have conducted her preliminary examination in order to ascertain in the level of understanding and only thereafter should have proceeded to record her statement. There can be no dispute that it would have been certainly better for the learned Judge to have first conducted a preliminary examination of the prosecutrix by putting some questions to her and on the basis of answers given by her in reply to them satisfied himself whether she was possessed of sufficient understanding. However, the failure to hold a preliminary examination of a child witness does not introduce a fatal infirmity in the evidence....."

20. In **Panchhi and others vs. State of UP [(1998) 7 SCC 177]** in paragraphs 11 and 12, the Apex Court observed as follows:

> "11. ..... But we do not subscribe to the view that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell them and thus a child witness is an easy prey to tutoring.
>
> 12. Courts have laid down that evidence of a child witness must find adequate corroboration before it is relied on. It is more a rule of practical

wisdom than of law [Prakash v. State of MP (1992) 4 SCC 225 : (AIR 1993 SC 65)]; [Baby Kandayanathil v. State of Kerala, 1993 Suppl (3) SCC 667 : (1993 AIR SCW 2192)]; [Raja Ram Yadav v. State of Bihar, AIR 1996 SC 1613 : (1996 AIR SCW 1882)] and [Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341]."

21. In **Dhani alias Dhaneswar Naik vs. The State [1999 (3) CRI.L.J. 2712]** in paragraph 6 it has been held as under:

"6. P.W.4 undoubtedly is a child of ten years at the time his examination was made. So far as acceptability of evidence of P.W.4 is concerned, undisputedly he was a minor boy at the time of alleged commission of offence and while deposing in Court. Under Section 118 of the Indian Evidence Act, 1872 (in short, Evidence Act) all persons are competent to testify unless the Court considers that because of tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind they are prevented from understanding questions put to them, or from giving rational answers. All grounds of incompetency have been swept away by Section 118 under which competency of witnesses is the rule and their incompetency is the exception. Only incompetency that the section highlights is incompetency from premature or defective intellect. As to infancy, it is not so much the age as the capacity to understand which is the determining factor. No precise age-limit can be given, as persons of the same age differ in mental growth and their ability to understand questions and giving rational answers. The sole test is whether witness has sufficient intelligence to depose or whether he can appreciate the duty of speaking truth. The general rule is that the capacity of the person offered as a witness is presumed, i.e. to exclude a witness on the ground of mental or moral capacity, the existence of the incapacity must be made to appear. Under Section 118, a child is competent to testify, if it can understand the

> questions put to it, and give rational answers thereto....."

22. In **Bhagwan Singh and others vs. State of MP [(2003) 3 SCC 21],** the Apex Court observed as follows:

> "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 without other corroborative evidence. The evidence of 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."

23. In **Ratansingh Dalsukhbhai Nayak vs. State of Gujarat [(2004) 1 SCC 64]**, the Apex Court held in paragraph 7 as follows:

> "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 said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial Court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaked 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."

24. In **Sakshi vs. Union of India and others [(2004) 5 SCC 518],** the Apex Court took extra precaution in examining child witnesses before various forums especially in a criminal forum and it dealt with at length the desirability of recording certain statements in an atmosphere conducive for such recording. Paragraphs 27 and 28 of the judgment are extracted below:

"27. The other aspect which has been highlighted and needs consideration relates to providing protection to a victim of sexual abuse at the time of recording his statement in Court. The main suggestions made by the petitioner are for incorporating special provisions in child sexual abuse cases to the following effect :

(i) permitting use of a videotaped interview of the child's statement by the judge (in the presence of a child support person).

(ii) allow a child to testify via closed circuit television or from behind a screen to obtain a full and candid account of the acts complained of.

(iii) The cross-examination of a minor should only be carried out by the judge based on written questions submitted by the defence upon perusal of the testimony of the minor.

(iv) Whenever a child is required to give testimony, sufficient breaks should be given as and when required by the child.

28. The Law Commission, in its response, did not accept the said request in view of Section 273, Cr.P.C. as in its opinion the principle of the said Section which is founded upon natural justice , cannot be done away in trials and inquiries concerning sexual offences. The Commission, however, observed that in an

> appropriate case it may be open to the prosecution to request the Court to provide a screen in such a manner that the victim does not see the accused while at the same time provide an opportunity to the accused to listen to the testimony of the victim and give appropriate instructions to his counsel for an effective cross-examination. The law Commission suggested that with a view to allay any apprehensions on this score, a proviso can be placed above the Explanation to Section 273 of the Criminal Procedure Code to the following effect:
>
> "Provided that where the evidence of a person below sixteen years who is alleged to have been subjected to sexual assault or any other sexual offence, is to be recorded, the Court may, take appropriate measures to ensure that such person is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused."

25. Regarding credibility of evidence of child witness, the Apex Court in **Golla Yelugu Govindu v. State of A.P. [(2008) 16 SCC 769]** in para 11 held as under:-

> “11. The Evidence Act, 1872 (in short "the Evidence Act") does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that 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 these questions, because of tender years, extreme old age, disease--whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto.”

26. From the aforementioned legal position, following factors must be considered at the time of recording of evidence of

a child witness :-

(i) There is no disqualification for a child witness;

(ii) The Court must conduct a preliminary enquiry before allowing a child witness to be examined;

(iii) The Court must be satisfied about the mental capability of a child before giving evidence;

(iv) While sifting the evidence, the possibility of a bias or the child being tutored should be taken note of;

(v) The evidence of a child witness should be corroborated;

(vi) The child cannot be administered oath or affirmation and it is incompetent to do so;

(vii) The Court cannot allow a minor to make an affirmation;

27. In **Ratan Singh Dalsukhbai Nayak (supra),** it has also been observed as under:-

> "The law with regard to the testimony of child witnesses can be summed up thus. The conviction on the sole evidence of a child witness is permissible if such witness is found competent to testify and the court after careful scrutiny of its evidence is convinced about the quality and reliability of the same."

28. On the basis of above, the evidence of a child witness is not required to be discarded per se, but as a rule of prudence the Court can consider such evidence with close scrutiny and only on being convicted about the quality thereof and reliability can record conviction, based thereon.

29. All that is required in consideration of evidence of a child witness, if on scanning it carefully it is found that there is no infirmity or contradiction in the evidence of a child, then there is no impediment in accepting the evidence of a child. Normally a Court should look for corroboration in such cases but that is more by way of caution and prudence than as a rule of law.

30. It is relevant to mention that the reliability of a child witness is very important in the cases of domestic violance and other offences, which take place within the four walls of a home, where no outsider may be present, a child can be very important witness, especially being the sole eye-witness. Furthermore, in cases where a child may not always be a natural witness, children tend to have a very strong memory and may actually paint a clear picture of the alleged scene of crime. There are probabilities of exaggeration, but here again the role of the Court is important.

31. In the present case, PW7- Chanha, who is a child witness, has stated in her statement that the name of her mother is Vidhabai and name of her father is Naresh. She stated that accused Naresh present in the Court is her father and her mother has died. Her mother died due to crushed injury caused by pelting stone by her father Naresh. Her father Naresh caused injury over the head of her mother in front of her. This witness has also identified the seized stone and has specifically stated that accused Naresh crushed the head of her mother by stone, that caused injury crushing the whole head of her mother, thereafter her father took her to the house of his sister. When incident took place, she screamed and cried but no one turned up. Due to aforesaid stone injury her mother died.

32. The statement given by Ku. Chanha (PW-7) is totally natural and remained unrebutted in cross-examination. Her statement is also corroborated by medical evidence of Dr. Ram Kumar Choudhary (PW-6). The stone had been recovered. In the present case, child witness Ku. Chanha (PW-7) has also very well proved all the relevant facts relating to her, thereby the prosecution has proved its case beyond reasonable doubt.

33. In the light of the foregoing discussion, we are of the considered opinion that the trial Court has properly and legally analyzed and appreciated the entire evidence available on record and did not err in convicting and sentencing the present appellant. The appeal filed by the appellant appears to be devoid of any substance.

34. Consequently, the jail appeal by appellant-Naresh against his above-mentioned conviction and sentence as recorded by the trial Court is dismissed and his conviction and sentence are affirmed. Appellant-Naresh is in jail. He be intimated with the result of this appeal through relating Jail Superintendent.

With a copy of this judgment record of the trial Court be sent back immediately.

(G.S.Ahluwalia)
Judge

(Rajeev Kumar Shrivastava)
Judge

(Yog)