

Madan Kumar and anr. Vs. State of Assam

Madan Kumar and anr. Vs. State of Assam

SooperKanoon Citation : sooperkanoon.com/135626

Court : Guwahati

Decided On : Nov-27-2008

Judge : Aftab H. Saikia and A. Hazarika, JJ.

Appellant : Madan Kumar and anr.

Respondent : State of Assam

Disposition : Appeal dismissed

Judgement :

A. Hazarika, J.

1. Challenge in this appeal is to the judgment rendered by the learned Additional District and Sessions Judge (FTC) No. 1 Kamrup, Guwahati in Sessions Case No. 16(K) 2000 whereby and whereunder each of the appellants are convicted for offence punishable under Section 302/34, IPC and sentenced to imprisonment for life and a fine of Rs. 5,000/- in default R/I for 2 (two) months in the first count and convicted for offence punishable under Section 326/34, IPC and sentenced for imprisonment for 7 (seven) years and a fine of Rs. 1,000/- in default S/I for 15 days in the second count and has further convicted for commissioning of offence punishable under Section 460/34, IPC and sentenced to imprisonment for 10 (ten) years and fine of Rs. 5,000/- in default R/I for 2 (two) months for allegedly committing murder of Singha Ram Kumar and his wife Mina Kumari (hereinafter referred to as deceased) and also for, causing grievous injuries on the person of

Smt. Pramila Kumari alias Boro, Smt. Manju Doimari and Smt. Banti Pator, on 19-8-96, at 2.30 a.m. and ordered to run the sentences concurrently.

2. The Prosecution version in a nutshell is that on 19-8-96 at about 2.30 a.m. at night, some culprits entered the house of Singha Ram Kumar by breaking the dwelling house and committed murder of Singha Ram Kumar and his wife Mina Kumari. The culprits caused grievous injuries on the hand of Smti. Manju Kumar, the daughter of late Singha Ram Kumar and their guest Smti. Banti Pator by means of sharp weapon. The said information was lodged by P.W. 1 Arun Kumar before the Khetri Police Station vide Ext. 1 who later on came to know that the accused Pabitra Kumar, Tankeswar Kumar and Madan Kumar did the offence due to land dispute between the parties. The said ejahar Ext. 1 was registered as Khetri P.S. Case No. 129/96 under Section 460/ 302/326, IPC and the Investigating Officer during investigation visited the place of occurrence, made an inquest report on the dead bodies of the deceased, examined the witnesses, seized one dab along with soil stains with blood from the place of occurrence and seized some clothes with blood stains from the house of the accused persons and sent the dead bodies for autopsy to Guwahati Medical College and sent the soil with blood stains collected from the place of occurrence, the weapon, the hairs found fixed with the dao with blood to the Forensic Science Laboratory (FSL for short) examination. After collecting the post-mortem report along with the report from FSL and on completion of investigation, the Investigating Officer submitted the charge-sheet against the accused Tankeswar Kumar, Madan Kumar, Pabitra Kumar, Sukleswar Kumar, Smti Manju Kumari and Smti Urmila Kumari under Sections 460/302/307/34, IPC. Accordingly, GR Case No. 3569/96 under Sections 460/302/326, IPC was registered by the learned SDJM, Pragjyotispur. The case being triable by the Court of Session it was committed to the learned Sessions Judge, Kamrup, Guwahati, who in turn transferred it to the Court of learned Additional District & Sessions Judge (FTC) No. 1 Kamrup, Guwahati for disposal.

3. On appearance of the accused persons, viz. Tankeswar Kumar, Madan Kumar, Pabitra Kumar, Sukleswar Kumar, Smti Manju Kumari and Smti Urmila Kumari the learned Sessions Judge after hearing the parties framed charge against all the accused persons under Sections 460/302/ 307/34, IPC and had also framed

charges under Sections 460/302/307/34, IPC separately against the accused Tankeswar Kumar, Madan Kumar and Pabitra Kumar. The charges so framed were read over and explained to the accused to which they pleaded not guilty and claimed to be tried. However, during the pendency of the trial the accused Pabitra Kumar died and the case was abated against him.

4. In order to prove the commission of offence the prosecution has examined 26 (twenty six) witnesses including the doctors and the Investigating Officer. Out of 26 (twenty six) witnesses, there are four eyewitnesses to the scene of commission of crime viz. P.W. 2, Miss Pranita Kumari alias Boro, P.W. 3, Shri Bodheswar Kumar, P.W. 13, Smti Manju Doimari and P.W. 15, Smti Bonti Pator.

5. The defence adduced no evidence. The defence case is of complete denial. In the statements recorded Under Section 313, Cr. P.C. the accused persons denied their involvement in the case.

6. The learned trial Court relying on the materials on record, more particularly the evidences of eye-witnesses viz. P.W. 2, P.W. 3, P.W. 13 and P.W. 15 and the statements recorded Under Section 164, Cr. P.C. of P.W. 2, P.W. 3, the reports of FSL proved by P.W. 12, Dr. Puspa Kr. Baruah and the post-mortem report proved by P.W. 17, Dr. Pradip Kumar Sarma convicted the accused. Tankeswar Kumar and Madan Kumar as aforesaid and acquitted the other accused persons as they were not found guilty to the commission of the crime and hence, the appeal.

7. Heard Mr. HRA Choudhury, learned Senior Counsel assisted by Ms. S. K. Nargis, Advocate, appearing for the appellants. Also heard Mr. K. A. Mazumdar, learned Addl. PP, Assam.

8. Mr. HRA Choudhury, learned Sr. counsel assisted by Ms. S. K. Nargis, Advocate appearing for the appellants submitted that no credence should have been attached to the evidence of eye-witnesses P.W. 2, P.W. 3, P.W. 13 and P.W. 15, who were admittedly minors at the time of commission of offence and they are highly interested witnesses being tutored by the family members of the deceased, moreso, when their versions are highly contradictory which makes the prosecution case doubtful.

9. Mr. Choudhury has further contended that the commission of crime took place at the dead of night and the version of the eyewitnesses would show that they did not disclose the names of the assailants immediately after the occurrence and they could not recognize the assailants due to darkness though there were lamps burning in the house which makes the prosecution case doubtful, moreso, when the prosecution failed to seize any lamp and the prosecution has thus failed to prove the case against the accused appellants beyond all reasonable doubt.

10. The learned Counsel has also contended that the prosecution was launched on the basis of oral information of P.W. 5, Khargeswar Kumar to P.W. 25, Holi Ram Borah and a GD Entry was made being GDE No. 689/96 dated 19-8-1996 and the said GDE was suppressed and the formal writ-ten information was lodged by P.W. 1, Arun Kumar to P.W. 25; Holi Ram Borah after. 12 hours of the occurrence which would go to show that though originally he did not name the assailant but in the FIR lodged subsequently name of the assailants were mentioned which makes the case of the prosecution doubtful and would therefore urge that the conviction of the appellants are required to be interfered with in the facts and circumstances of the case.

11. The learned, counsel has drawn the attention of this Court to the version of one of the eye-witnesses, viz. P.W. 15, Bonti Pator, an injured person on the day of commission of crime who was in hospital for a month as indoor patient. Her statement was recorded Under Section 161 of Cr. P.C. after 1 (one) month from the date of occurrence and her injury was neither proved by attending doctor or by any other independent witnesses which is fatal to the prosecution case and therefore urged that it is fit case of acquittal. In support of his contention, he has referred the following decisions viz.:

i) (Prosenjit Debbarma v. State of Tripura),

ii) (Abdul Matlib v. State of Tripura),

iii) : 2008 CriLJ730 (Kapildeo Mandal v. State of Bihar),

(iv) : 2008 CriLJ686 (D. Sailu v. State of Andhra Pradesh),

- v) : 2004 CriLJ22 (Badam Singh v. State of M.P.),
- (vi) (2000) 1 GLT 220 (Jharna Debnath v. State of Tripura),
- vii) , (Kabiraj Tudou. v. State of Assam),
- viii) (1993) Supp (1) GLR 253 (Md. Bachhu Miah and Ali Noyaj v. State of Tripura),
- ix) Sukhram v. State of M.P.,
- x) : 2003 CriLJ1262 (Bhagwan Singh v. State of M.P.),
- xi) (Hazarat Ali v. State of Assam),
- xii) 2005 (4) GLT 517 (Anil Phukan v. State of Assam).

12. Mr. K. A. Mazumdar, learned Addl. PP appearing for the State on the other hand supported the judgment of conviction by contending inter alia that the witnesses examined by the prosecution are reliable, more particularly, the evidence of P.W. 2, P.W. 3, P.W. 13 and P.W. 15 are trustworthy and conviction can be maintained on the testimony of child witnesses. In support of his contentions he has relied on a decision reported in : (1997)5SCC341 , (Dattu Ram Rao Sukhare v. State of Maharashtra).

13. We shall deal with the submissions made by the parties in the later part of the Judgment. But there are certain other factors which also have relevance. Therefore, we refer the evidence of witnesses which have a direct bearing in determining the case in hand. P.W. 1 Arun Kumar lodged the FIR (Ext. 1) wherein he had named three accused persons as assailants. But during the trial he had deposed that a man came to him and informed him that somebody had cut the deceased. In cross, he had deposed that he had not mentioned in the ejahar as to who had cut Singha Ram and Mina Kumari because he was not aware as to who had cut them.

14. The prosecution thereafter examined P.W. 2 and P.W. 3 who are admittedly the eye-witnesses to the commission of crime. The trial Court before examining P.W. 2 had asked as to whether she understood the consequences of taking oath

in adducing evidence to which she replied in the affirmative and thereby taking the oath she deposed that on the night of occurrence she was sleeping with her mother and brother on one bed and her father was sleeping in another bed in the same room. She got up from sleep when her mother raised alarm and she saw the accused Madan and Tankeswar inflicting cut blows on her parents. She has further deposed that on the night of incidence another girl Bonti P.W. 15 was in their house as a guest and she was sleeping on the ground. She had specifically deposed that she saw Tankeswar inflicting cut blows on her father and the other accused Madan on her mother.

In the cross she had deposed that except Madan and Tankeswar none had gone to their house that night. There was darkness on the night of occurrence and she stated before the police that there was another accused with Madan and Tankeswar though she could not recognize the other accused. She had admitted that when P.W. 1 had gone to police station she did not mention the name of the assailants before him as to who had killed her parents and she even did not tell the names of the assailants when the neighbours visited their house after occurrence. The commotion had frightened them.

15. The deposition of P.W. 3, Bodheswar Kumar is on the same line as of P.W. 2, who has deposed that Tankeswar and Madan cut his parents with dao at night. He got up from sleep when his mother had cried out. They cut his mother holding her by the hairs and he did not know who among them had cut her. He has further deposed that he saw his father being cut while he was still under the mosquito net and there was somebody outside. His elder sister was inflicted cut in her finger. P.W. 3 had replied on a question that he slept with his father in the first room and that he had not disclosed the name of the assailants to anybody.

16. The evidence of P.W. 4, Amarendra Sarma has no direct bearing save and except he saw the deceased Singha Ram lying at the door step struggling in pain and saw blood in his body and that he had signed on the inquest report and seizure list.

17. The evidence of P.W. 5 Khargeswar Kumar is material to the effect that when police tried to enter the house of the accused, other accused Urmila and Manju

offered resistance though police did not stop and entered the house and brought a bundle of cloth stained with blood and deposed that no body had told him as to who had cut Singha Ram and his wife.

18. The evidence of P.W. 6 Govinda Murari related to the accused Madan and Tankeswar, who had lived in his house whereupon they were arrested by the police.

19. The evidence of P.W. 7 Mahim Ch. Kumar is hearsay and no relevance can be placed on his evidence except that when he went to the place of occurrence, on being asked, children of the deceased told him that Madan and Tankeswar had cut their parents.

20. The evidence of P.W. 8 Anti Ram Baishya related to a seizure of dao (Ext. 2) and Ext. 2(3) is his signature in the seizure list.

21. P.W. 9 Bishnu Orang is a seizure witness of blood stained bamboo and soil vide seizure list Ext. 8 and Ext. 8(1) is his signature.

22. P.W. 10 Mantu Saikia, a Police Constable is also a seizure witness relating to seizure of two gamochas and one mekhela vide Ext. 9, whereupon Ext. 9(1) is his signature.

23. P.W. 11 Rajbahadur Singh, also a Police Constable, is another seizure witness.

24. P.W. 12 Dr. Pushpa Kr. Barua is a Senior Scientific Officer, Forensic Science Laboratory, Guwahati, who had proved the forensic report submitted by one Ms. A. Barua, Senior Scientific Officer, FSL vide Ext. 10, whereupon Ext. 10(1) is the signature of P.W.I 2.

25. The Prosecution has examined Manju Doimari as P.W. 13 who is another eye-wit-ness to the occurrence of crime, P.W. 13 in her examination-in-chief has deposed that on the day of occurrence, she along with other inmates were sleeping closing the doors. She woke up at 2 1/2 a.m. when accused Madan was beating Mina Kumari, since deceased. She saw a cudgel in Madan's hand. She

got up from bed. So also 'mahidew' Banti Pator. Then taking a knife Madan went inside her mother's room. Entering her mother's room Madan cut her left hand with a dao which was in their house. Father, i.e. Singha Ram Kumar, the deceased was made to get up by pulling. He tried to go outside. But Tankeswar and Pabitra dragged Singha Ram to his bed room and cut him with dao. They inflicted many cuts. She along with her 'mahidew' had tried to offer resistance. When she tried to save mother, Madan inflicted cut blows in both of her hands whereby her left thumb finger was severed. She also sustained injuries in her right palm. Madan had inflicted cut blows on 'mahidew'. She had also sustained injuries in the left thumb finger. The body of the deceased remained lying on the ground. They became unconscious. Then the three accused persons left home through the broken walls of the house. They had entered into the house cutting open the walls.

In cross-examination, she had admitted that at the time of occurrence she was six years old. She Has further deposed that the police had seized the lamps. She could have identified the lamps if she saw the same but the lamps were not seen in the Court. Madan had been armed with dao and knife. Accused Tankeswar and Pabitra too had armed with dao. They had left behind the daos at the place of occurrence. All the three daos Had been stained with blood. She could be able to recognize the dao. She has deposed that Madan had entered into mother's room taking the dao from their room and had cut mother's left hand and Pabitra and Tankeswar had brought father inside by dragging and Madan had cut her thumb finger. Other suggestions put to her have been denied.

26. The Prosecution examined Barsing Tamuly as P.W. 14 who had sent one person to Khetri Police Station on being, in-formed of killing of Singha Ram Kumar and his second wife. P.W. 14 is a seizure witness of a dao (Ext. 2) found from the place of occurrence and a blood stained vest which was found in the wearing of Singha Ram.

27. P.W. 15 Bonti Pator is an eye-witness. She has stated that on the night of occurrence, both the deceased, i.e. her 'baidew' (elder sister) and 'vinihidew' (elder sister's husband) were in the same room. There were two beds in that room. Another bed was laid on the floor that day. Elder sister was sleeping in one bed

and 'vinihidew' in the other. Manju (Mina's daughter P.W. 13) and she were sleeping on the floor. At 2.30 a.m. Madan Kumar and Tankeswar entered into their room and hacked 'vinihidew' Singha Ram and elder sister Mina Kumari with a dao. When she tried to save her elder sister two cut blows were inflicted on her left hand. Tankeswar and Madan had cut 'vinihidew' Singha Ram. They left the place after inflicting cut blows. She could not save her elder sister. She was hacked in the neck. At first Madan had cut elder sister in the front side of the neck with a small weapon and after that he had hacked her in the neck with dao. The neck was almost severed. Both Tankeswar and Madan hacked Singha Ram. There was profuse bleeding. Madan and Tankeswar then left the place of occurrence by telling them, 'you do what you like, we are leaving'. She has further stated that she underwent treatment at the hospital for a month was indoor patient and Manju underwent treatment for two months as indoor patient.

In the cross-examination, nothing incriminating has come out in her evidence.

28. The evidence of P.W. 16 is hearsay, so is the evidence of P.W. 18. Both of them have stated that when they went to the place of occurrence, all the children of the deceased told them that Madan and Tankeswar had killed their parents. P.W. 19 Prabhat Baishya was declared hostile and accordingly he was cross-examined.

29. The Prosecution has examined Dr. Pratap Chandra Sarma as P.W. 17, who had made the autopsy on the body of the deceased Singha Ram Kumar and Mina Kumari and found the following injuries on the person of Singha Ram Kumar:

- 1) Cut wound 10 cm x 3 cm x skull cavity deep on the forehead;
- 2) Cut wound 6 cm x 1 cm x skull cavity deep present at 3 cm above roof of nose;
- 3) Cut wound 17 cm x 2 cm x skull cavity deep at 1 cm above injury No. 2;
- 4) Cut wound 10 cm x 3 cm x bone deep on the middle part, right ear;
- 5) Cut wound 9 cm x 3 cm x 1 cm deep on left cheek;

- 6) Cut wound 10 cm x 2 cm x 1 cm deep on left side of the neck, 3 cm below the chin;
- 7) Cut wound 7 cm x 2 cm x 1.5 cm deep on the right side of the neck, 2 cm below the thyroid prominence;
- 8) Cut wound 4 cm x 1 cm x 1 cm deep on the outer aspect of the right forearm;
- 9) Cut wound 4 cm x 1.5 cm x 1 cm deep on the back of right forearm 9 cm above the wrist joint (defence cut);
- 10) Cut wound 6 cm x 2 cm x bone deep on the back of right hand at middle (defence cut);
- 11) Cut wound 15 cm x 5 cm x bone deep on the back of left thigh;
- 12) Cut wound 14 cm x 2 cm x 1 cm deep on the back of right buttock;
- 13) contusion 4 cm x 2 cm obliquely on the back 7 cm below the seventh cervical spine.

In the opinion of the doctor, death was due to coma as a result of cut injuries on the head. All cut injuries were ante-mortem and caused by heavy sharp cutting weapon and homicidal in nature.

P.W. 17 has proved the post mortem report (Ext. 12) and in his opinion material Ext. 1 (dao) can cause above cut injuries.

P.W. 17 has made autopsy of another deceased Mina Kumari on the same day whereby and whereunder the following injuries were found:

- a) injuries (1) cut wound 8 cm above left ear under lined bone partly cut;
- 2) Cut wound 7 cm x 3 cm x 1.5 cm deep present on left shoulder at middle;
- 3) Cut wound 6 cm x 2 cm x bone deep transversely on the back of neck 5 cm below the occiput;

- 4) Cut wound 25 cm x 5 cm x bone deep on the back 3 cm below the 7th cervical spine;
- 5) Cut wound 21 cm x 4 cm x 3 cm deep on the back of left shoulder;
- 6) Cut wound 6 cm x 4 cm x 3 cm deep on the left side of neck;
- 7) Cut wound 40 cm x 7 cm x vertebrate deep present along the lower border of the lower jaw on right side, under lying carotid vessels and fracture cut completely;
- 8) Cut wound 7 cm x 4 cm x bone deep on the back of right forearm. Both the bones of right arm cut completely;
- 9) Cut wound 3 cm x 2 cm x 1 cm deep on the back of left forearm (defence cut).

In the opinion of the doctor, the cause of death was due to shock and haemorrhage as a result of cut injuries on the neck. All cut injuries were ante-mortem, caused by heavy sharp cutting weapon and homicidal in nature.

In the cross-examination, questions were put to P.W. 17 in regard to sharp cutting heavy weapon to which he replied that all the injuries of both dead bodies might have been caused by weapons of similar type of material Ext. 1.

30. The Prosecution has examined Ms. Arunima Baruah as P.W. 20 who has proved the report of FSL Ext. 10 and Ext. 11, P.W. 20 is the Senior Scientific Officer of the FSL. She did chemical analysis of the blood stained bamboo and soil collected from the place of occurrence. From Ext. 10 and 11 it appears that the blood stains found in the articles seized vide Ext. 2, 7 and 9 gave positive test of human blood. The hairs found on the seized dao with blood stains also identified by the expert as human hair.

31. P.W. 21 Purnima Devi is a witness of injuries sustained by P.W. 13 Manju Kumari whereby her fingers were cut by the accused Madan when she tried to resist to save the deceased Mina Kumari.

32. P.W. 22, Madav Ch. Deka was in the house of the deceased on the fateful night but could not recognize the assailants due to darkness and no reliance can

be placed on his deposition. The same version has been repeated by the Prosecution witness No. 23 Kamdev Namasudra who slept in a room of the verandah in the rear side of the deceased's house; but could not recognize the culprits.

33. The Investigating Officer was examined as P.W. 24 who made the inquest on the body of the deceased and seized certain clothes from the house of the accused having stained with blood and seized the dao (Ext. 1). P.W. 24 has also seized the blood stained soil along with earth with clotted blood in it. The witness proved material Ext. 1, the dao which was seized from the place of occurrence and material Ext. 2 is the vest of Singha Ram.

34. The Prosecution has examined Holi Ram Bora as P.W. 25. He was the officer-in-charge of Khetri Police Station who made a GD Entry on 19-8-1996 being GDE No. 689/96 and thereafter he had received the formal FIR submitted by P.W. 1 which was registered being Khetri PS Case No. 129/96 Under Section 460/302/326, IPC and P.W. 25 himself took up charge of investigation.

During cross-examination, P.W. 25 has admitted that no hurricane lamp had been seized at the time of seizure and on 20-8-96 the statements of P.W. 2 and P.W. 3 were recorded under Section 164 of the Cr. P.C. and at that time P.W. 2 was eight years old and P.W. 3 was six years old.

35. The Prosecution has examined Binay Kumar Sarma, judicial Magistrate First Class Guwahati as P.W. 26, who had recorded the statement of P.W. 2 and P.W. 3 under Section 164 of the Cr. P.C.

36. The main thrust of the argument made by counsel for the appellants relates to child witnesses and that the prosecution has committed wrong in relying the evidence of P.W. 2, P.W. 3, P.W. 13 and P.W. 15 who were admittedly minors at the time of occurrence. The other points raised relates to non-seizure of lamp, delay in filing the ejahar, non-disclosure of the name of the culprits in the commission of the offence by all the child witnesses to P.W. 1, Arun Kumar, who had lodged the FIR.

37. Apart from the version of child witnesses, the other factors have relevance in determining the guilt of the accused persons. P.W. 24 has recovered the offensive articles from the place of occurrence. P.W. 5 has deposed that when police tried to enter the house of the accused, Urmila and Manju offered resistance though police entered into their house and brought out clothes which were found stained with blood. Those evidence would definitely go against the accused appellants.

38. P.W. 2, P.W. 3, P.W. 13 and P.W., 15 have deposed categorically that Tankeswar and Madan inflicted cut blows with dao on the deceased. P.W. 2 saw the accused Tankeswar inflicting several cut blows on her father and Madan on her mother. P.W. 3 stated the same version implicating Tankeswar and Madan as assailants. P.W. 13 has also implicated Tankeswar and Madan in the commission of crime. P.W. 13 has further deposed that while she tried to resist Madan to save Mina Kumari, Madan had inflicted cut blows on both of her hands as a result of which her left thumb finger was severed. The evidence of P.W. 15 would show that she sustained injuries on her left hand when she tried to save her elder sister Mina Kumari, P.W. 15 had also implicated the accused appellants in the offence. Moreover the injuries sustained by the deceased as revealed from the Post Mortem examination does tally with the ocular evidence. The evidence of P.W. 2 and P.W. 3 are relevant because they stood in firm in naming the assailants since they were their step brothers and there were no difficulty in recognizing them.

39. The age of the child witnesses during examination were 8, 11, 16 and 22 years. The Indian Evidence Act, 1872 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 considered that they are prevented from understanding the questions put to them, or from giving rational answers to those questions because of tender years, extreme old age, disease, whether of body or 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 the questions and give rational answers thereto. This position was concisely stated by Brewer, J. in *Wheeler v. United States* 159 US 523. The evidence of a child witness is not required to be rejected per se, but the Court as a rule of prudence considers such evidence with close

scrutiny and only on being convinced about the quality thereof and reliability, can record conviction based thereon.

40. In *Dattu Ram Rao Sukhare* (supra), the decision cited by Mr. Mazumdar, the learned Addl. PP, the Apex Court while dealing with the case of child witness has observed as follows: 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 shall 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....

41. The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices their manners, their apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose their capacity and intelligence as well as their understanding of the obligations of oath. The decision of the trial Court may, however, be disturbed by the appellate 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, shaken 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 child witnesses.

42. In the instant case, the evidence of P.W. 2, P.W. 3, P.W. 13 and P.W. 15 are consistent except certain minor contradictions in regard to the commission of crime by the appellants herein and their evidence are trustworthy in respect of time of occurrence, assault of the deceased, injuries sustained by P.W. 13 and P.W.

15. The prosecution has proved the offensive articles, clothes, soil by seizure from the place of occurrence and from the house of the accused persons and when they are confronted with such questions under Section 313 of the Cr. P.C. the accused persons have no answer to such questions except denial and therefore the Prosecution has proved the guilt of the accused-appellants in the commission of the crime.

43. The case referred to and reported in (2008) 2 GLT 101: 2008 Cri LJ (NOC) 351 (supra), by the counsel of the appellants relates to recording of statement of important witnesses Under Section 161 of Cr. P.C. after 9 days delay and the same was held to be fatal to the prosecution. In the instant case, P.W. 13 and P.W. 15 were in the hospital for treatment and their statement was recorded later on, more so, the question of delay has not been agitated before the trial Court nor the same had been put to P.W. 24 and P.W. 25, the investigating authority and therefore the question of delay in recording the statement Under Section 161 of the Cr. P.C. cannot be allowed to be agitated in the appeal and hence, turned down. Same is the case reported in (2008) 3 GLT 245 : 2008 Cri LJ (NOC) 967 (supra) and (2008) 3 GLT 252 : 2008 Cri LJ (NOC) 1104. The decision referred to and reported in AIR 2008 SC 533 : 2008 Cri LJ 730 (supra), wherein the Apex Court has held that the accused were identified in torch and/or lantern but no lantern or torch seized by Investigating Officer and therefore held that identification is doubtful. The evidence of P.W. 13 and P.W. 15 who sustained injuries at the time of occurrence and identified by them while resisting to save Mina Kumari (since deceased) cannot be doubted merely for non seizure of lamp in the case and therefore the case referred to is not applicable in the instant case. The decision referred to and reported in AIR 2008 SC 505 : 2008 Cri LJ 686 (supra) would go against the appellants and therefore is not considered. The decision referred to and reported in (2003) 12 SCC 792 : 2004 Cri LJ 22 (supra), relates to appreciation of evidence and credibility of witnesses along with the consistent testimony of witnesses. The said decision left the Court to consider the evidence of a witness and its truthfulness at the time of cross-examination and in the instant case the trial Court was of the firm view that it was the appellants who had committed the crime as deposed by P.W. 2, P.W. 3, P.W. 13 and P.W. 15 and is therefore not applicable in the instant case. The decision referred to and reported

in (2000) 1 GLT 220 (supra) relates to child witness which has already been discussed in the preceding paragraphs of the Judgment and would be overburdened with the judgment if discussed; moreover, the decision referred to will not help the appellants. So also the case reported in and : 2003 CriLJ1262 . The last decision cited in the case and reported in relates to acquittal of one accused and benefit to the co-accused thereto. The decision would not be applicable in the instant case. The Prosecutor version right from the FIR to the end would show that the accused Tankeswar, Pabitra (now deceased) and Madan were named by P.W. 2, P.W.3, P.W. 13 and P.W. 15 and therefore the case is not applicable in the instant case.

44. The question of child witness and their truthfulness was again highlighted by the Apex Court in Ratan Singh Dalsukhbhai Nayak v. State of Gujarat reported in : 2004 CriLJ19 . Looked at from any angle the judgment of the trial Court do not suffer from any infirmity to warrant interference.

45. In the result this appeal fails and stands dismissed.

Send down the lower Court record immediately.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com