

PRADEEP

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v.

THE STATE OF HARYANA

(Criminal Appeal No. 553 of 2012)

JULY 05, 2023

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[ABHAY S. OKA AND RAJESH BINDAL, JJ.]

Evidence – Testimony of child witness – Sole basis of conviction – When not proper – Appellant along with co-accused was convicted for the offences punishable u/s. 302 r/w s.34, IPC and ss. 449, 324 r/w s.34, IPC based on the testimony of PW-1, minor son of the deceased – Held: In view of the requirement of s.118, Evidence Act, the 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 – 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 – In the present case, the Sessions Judge did not do his duty – The preliminary examination of the minor is very sketchy – Only three questions were put to him on the basis of which Sessions Judge came to the conclusion that the witness was capable of giving answers to each and every question – On facts, after closely scrutinising the evidence of PW-1, the possibility of him being tutored cannot be ruled out – There is no support or corroboration to the testimony of PW-1, apart from other deficiencies in the prosecution case – Not safe to base the conviction only on the testimony of PW-1 which does not inspire confidence – Impugned judgments of the High Court and the Trial set aside – Appellant acquitted – Penal Code, 1860 – ss. 34, 302, 449, 324 – Evidence Act, 1872 – s.118 – Oaths Act, 1969 – s.4.

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Evidence – Testimony of Child Witness – Corroboration of – Held: 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 – Court must make careful scrutiny of the evidence of a child witness – It must apply its mind to the question whether there is a possibility of the child witness

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- A *being tutored – Therefore, scrutiny of the evidence of a child witness is required to be made by the Court with care and caution – Criminal Law.*

- Evidence – Testimony of Child Witness – Duty of Courts – Held: 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 – Criminal Law.*
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Allowing the appeal, the Court

- HELD: 1.1 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. 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. [Paras 8 and 9][1028-H; 1029-A-D]**
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- 1.2 In the facts of the case, the preliminary examination of the minor is very sketchy. Only three questions were put to the**
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minor on the basis of which the learned Sessions Judge came to the conclusion that the witness was capable of giving answers to each and every question. Therefore, the oath was administered to him. The Sessions Judge has not done his duty. In the examination- in- chief, he stated that on the night of 30th December 2002, the accused entered his house by breaking a window. While the appellant held his mother by his hands, accused no.1 assaulted her with a knife. When he tried to rescue his mother, accused no.1 gave a blow on his back by knife. He stated that he was hiding in the house after the accused fled and he disclosed the incident to milkman who came to the house at 5 a.m. In the examination- in -chief, he deposed about the incident of cutting of crops on their family land by accused nos.1 and 2, which had taken place 6 to 7 months prior to the date of the offence. He stated that though the accused indulged in the said act, no action was taken as the appellant's father apologised. In the cross-examination when the witness was confronted with his statement recorded by the police, he admitted that this incident was not recorded therein. In the cross-examination, the witness volunteered that the accused present in the Court had murdered his mother and they were drunk. However, he accepted that the allegation that the accused were drunk was not recorded in his statement recorded by the police. The incident had taken place after midnight. In the cross -examination, the witness stated that the accused, before coming to his house, had disconnected the electric supply. He denied the correctness of the suggestion that due to darkness; he did not recognise the assailant who assaulted his mother. He came out with the improved version in the cross -examination that accused no.1 had lit a matchstick and in the light of the matchstick, he recognised the assailants. It is very difficult to accept that accused no.1 who gave 6 to 7 blows by his knife on the person of the deceased, would light a matchstick while assaulting the deceased. PW-6, uncle of PW-1. He claims that on 31st December 2002 when he had gone to the cattle shed at about 5 am, he heard from milkman that S's wife has been done to death. He claims that he rushed to the house of the deceased. As PW-1 did not open the door, he jumped over the wall and entered the house. PW-1 stated that PW-6 did not enter by jumping over the wall as he opened the door to facilitate the

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A entry of PW-6. However, PW-6 claims that intimation was given to police only after his brother (husband of the deceased) arrived. PW-6 is not an eyewitness. [Paras 10-13][1029-D-E; G-H; 1030-A-G]

1.3 According to the prosecution's case till 5 am, PW-1 was
B hiding in his house and only when the milkman came at 5 am, he disclosed the incident to the said milkman. In fact, even PW-6 stated that he became aware of the incident from the said milkman. The prosecution has not explained why the milkman was not examined as a witness, though he was available. He was a very
C important witness who was the first person to whom PW- 1 disclosed what he had allegedly seen. Till the milkman came, there was no one who could have tutored PW-1. Therefore, what the witness conveyed to the milkman would have been crucial in the context of the allegation of tutoring. He was a very important witness available whose examination could have ruled out the
D possibility of the witness being tutored as he was the first person to meet the minor witness after the accident. Afterwards, the minor was in the company of his uncle (PW-6) and his father and according to the prosecution's case, there was some dispute between the family of PW-1 and the accused over property. His statement was recorded in the hospital in presence of his father.
E PW-6, in the cross-examination, stated that the milkman was present outside the Court when his evidence was recorded. His evidence was recorded on 22nd December 2003. On the same day, the Trial Judge recorded statement of the Public Prosecutor that he was not examining PW1's father as being unnecessary
F and he was dropping milkman as he was won over. Even the appellant's father was a crucial witness. This is a case where an adverse inference will have to be drawn against the prosecution for non-examination of the milkman and the appellant's father. There is another circumstance which is relevant as far as the
G appellant is concerned. According to the prosecution, there were foot marks of the shoes/footwear of the accused near the house where the incident took place. The prosecution took the moulds of the foot marks, as deposed by PW-6. The footwear/shoes of both the accused were taken into custody in the presence of PW-6. But, the shoes of the present appellant did not match the moulds
H of the imprint of the shoe taken by the prosecution. Apart from

the non-examination of the milkman, PW-11 Investigation Officer, did not make investigation by recording the statements of the elder brothers of PW1 for verifying whether they were away from the house on the date of the incident. After closely scrutinising the evidence of PW-1 and considering what we have already observed, the possibility of the witness being tutored cannot be ruled out. There is no support or corroboration to the testimony of PW-1, apart from other deficiencies in the prosecution case, as pointed out above. In the facts of the case, it will not be safe to base the conviction only on the testimony of PW-1 which does not inspire confidence. [Paras 14-16][1030-H; 1031-A-H; 1032-A]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 553 of 2012.

From the Judgment and Order dated 12.01.2009 of the High Court of Punjab & Haryana at Chandigarh in CRLA No. 227-DB/2005.

Sunil Kumar Verma, Yugal Kishor Prasad, Virender Kumar, Advs. for the Appellant.

Birender Kumar Choudhary, AAG, Samar Vijay Singh, Keshav Mittal, Ms. Sabarni Som, Ms. Purva, Advs. for the Respondent.

The Judgment of the Court was delivered by

ABHAY S. OKA, J.

FACTS

1. The present appeal is by accused no.2. The appellant-accused no.2 has challenged the judgment and order dated 12th January 2009 of the Punjab and Haryana High Court by which appeal preferred by the appellant and accused No.1 against the order of conviction by the Sessions Court has been dismissed. The Sessions Court convicted the appellant and accused no. 1 for the offences punishable under Section 302 read with Section 34 of the Indian Penal Code (for short 'IPC') and Sections 449 and 324 read with Section 34 of IPC. The appellant and accused no.1 were sentenced to suffer life imprisonment for the offence punishable under Section 302 read with Section 34. For the offence under Section 449 read with Section 34, they were directed to suffer rigorous imprisonment for seven years. For the offence punishable under Section 324 read with Section 34 of IPC, they were sentenced to undergo

A rigorous imprisonment for one year. Both the appellant and the accused no. 1 Devender alias Vikki preferred appeal before the High Court which has been dismissed by the impugned judgment.

2. First Information Report was registered on the basis of the statement of PW-1, Ajay who was 11 years old at the relevant time. He is the youngest of three sons of the deceased Bhanmati and Satpal. According to the prosecution's case, on 30th December 2002, Ajay and his mother (deceased) were sleeping in their house by locking their house from inside. Ajay's elder brother was staying in Ghaziabad for education and his second brother had gone to stay with his maternal uncle. Ajay's father Satpal was working as Mahant of a temple, and he was residing near the temple. He was not residing with the deceased. According to the prosecution's case, at about 1 am, PW-1 Ajay heard the noise of his mother. When he woke up, he saw that accused nos. 1 and 2 were grappling with his mother. Accused no.1 Vikki by knife inflicted 6 to 7 blows on the stomach and chest of the deceased. At that time, appellant-accused no.2 was holding the hands of his mother. When Ajay tried to rescue his mother, accused no.1 inflicted injuries on him with the same knife. Thereafter, both the accused fled away. They had entered the house through a window and they went back through the same window. According to Ajay, he was hiding in the house due to fear. At about 5 am, when one Surrender, milkman, who is described as Golu by PW-6, came to the house, Ajay came out and disclosed to the said milkman that the accused had murdered his mother with a knife. The said milkman reported the incident to Ajay's uncle Rajinder Singh (PW-6) who came to the site. Thereafter, Ajay's father Satpal also came. Injured Ajay was taken to hospital where his statement was recorded. Based on his statement, First Information Report was registered.

3. In his complaint, Ajay stated that on the earlier day, the accused had come to his house and untied the buffalo. When the deceased complained, both tried to assault the deceased. Ajay also stated that six to seven months prior to the incident, both the accused had entered the field of his family and they cut "daul" of their field. As the appellant's father tendered an apology to Satpal, a complaint was not filed.

4. Apart from PW-1 Ajay, the prosecution examined PW-6-Rajinder (Ajay's uncle), and PW-10 Dr Varsha, who had examined Ajay. The prosecution also examined PW-12 Dr Arun Garg, who conducted post-mortem on the body of the deceased.

SUBMISSIONS

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5. The learned counsel appearing for the appellant has taken us through the evidence of the material prosecution witnesses. He submitted that evidence of Ajay will have to be tested very carefully, as he is a minor witness. He pointed out that there is absolutely no corroboration to the testimony of the minor witness which is full of material contradictions and improvements. He submitted that evidence of PW-1 Ajay is not reliable. He pointed out that according to the prosecution's case, Ajay did not disclose the incident till early morning to anyone. He disclosed it for the first time to the milkman Golu alias Surender who came to his house around 5 am. In fact, PW-6 also claims that he heard the said milkman saying that the deceased has been murdered. He submitted that the prosecution has not examined the milkman, which is fatal to the prosecution case. He has submitted that the presence of Ajay at the time of the incident is extremely doubtful. He submitted that there was complete darkness in the house at the relevant time and therefore, it was not possible for the witness Ajay to see the accused. He urged that there is every possibility that the witness Ajay was tutored. In any event, he submitted that a very limited role has been ascribed to the appellant of holding the hands of the deceased while accused no.1 assaulted her with a knife.

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6. The learned counsel appearing for the State while supporting the impugned judgments submitted that there is no rule that for maintaining a conviction on the sole testimony of a minor witness, corroboration is necessary. He submitted that alleged contradictions and improvements in the testimony of minor witness Ajay are totally insignificant which do not make his evidence unreliable. He would, therefore, submit that no interference is called for with the view taken by both Courts.

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OUR FINDINGS

7. We have carefully considered the submissions. The fate of the case depends on the testimony of the minor witness Ajay (PW-1). Under Section 118 of the Evidence Act, 1872 (for short, "the Evidence Act"), a child witness is competent to depose unless the Court considers that he is prevented from understanding the questions put to him, or from giving rational answers by the reason of his tender age. As regards the administration of oath to a child witness, Section 4 of the Oaths Act, 1969 (for short "Oaths Act") is relevant. Section 4 reads thus:

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A **“4. Oaths or affirmations to be made by witnesses, interpreters and jurors.—**(1) Oaths or affirmations shall be made by the following persons, namely:—

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

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

(c) jurors:

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

(2)”

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

8. 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
H 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. A

9. 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. B C D

10. In the facts of the case, the preliminary examination of the minor is very sketchy. Only three questions were put to the minor on the basis of which the learned Sessions Judge came to the conclusion that the witness was capable of giving answers to each and every question. Therefore, the oath was administered to him. Following are the questions put to him:- E

“Q. In which school you are studying?

Ans. I am studying in Govt. Primary School, Barwashni.

Q. What is occupation of your father? F

Ans. My father is a Pujari in a Mandir named Hanuman, at Gohanba.

Q. Should one speak truth or false?

Ans. Truth.” G

11. We are of the view that the learned Sessions Judge has not done his duty. Nevertheless, we have carefully scrutinised the evidence of the minor witness Ajay. In the examination-in-chief, he stated that on the night of 30th December 2002, the accused entered his house by breaking a window. While the appellant held his mother by his hands, H

A accused no.1 assaulted her with a knife. When he tried to rescue his mother, accused no.1 gave a blow on his back by knife. He stated that he was hiding in the house after the accused fled and he disclosed the incident to milkman Surender who came to the house at 5 a.m. In the examination-in-chief, he deposed about the incident of cutting of crops on their family land by accused nos.1 and 2, which had taken place 6 to 7 months prior to the date of the offence. He stated that though the accused indulged in the said act, no action was taken as the appellant's father apologised. In the cross-examination when the witness was confronted with his statement recorded by the police, he admitted that this incident was not recorded therein. In the cross-examination, the witness volunteered that the accused present in the Court had murdered his mother and they were drunk. However, he accepted that the allegation that the accused were drunk was not recorded in his statement recorded by the police.

12. The incident had taken place after midnight. In the cross-examination, the witness stated that the accused, before coming to his house, had disconnected the electric supply. He denied the correctness of the suggestion that due to darkness; he did not recognise the assailant who assaulted his mother. He came out with the improved version in the cross-examination that accused no.1 had lit a matchstick and in the light of the matchstick, he recognised the assailants. It is very difficult to accept that accused no.1 who gave 6 to 7 blows by his knife on the person of the deceased, would light a matchstick while assaulting the deceased.

13. At this stage, we may make a reference to the evidence of PW-6 Rajinder Singh, uncle of Ajay. He claims that on 31st December 2002 when he had gone to the cattle shed at about 5 am, he heard from milkman Golu that Satpal's wife has been done to death. He claims that he rushed to the house of the deceased. As PW-1 Ajay did not open the door, he jumped over the wall and entered the house. PW-1 Ajay stated that PW-6 did not enter by jumping over the wall as he opened the door to facilitate the entry of PW-6. However, PW-6 claims that intimation was given to police only after his brother Satpal (husband of the deceased) arrived. PW-6 is not an eyewitness.

14. According to the prosecution's case till 5 am, PW-1 Ajay was hiding in his house and only when the milkman Golu/Surender came at 5 am, he disclosed the incident to the said milkman. In fact, even PW-6

stated that he became aware of the incident from the said milkman. The prosecution has not explained why the milkman was not examined as a witness, though he was available. He was a very important witness who was the first person to whom PW-1 Ajay disclosed what he had allegedly seen. Till the milkman came, there was no one who could have tutored Ajay. Therefore, what the witness conveyed to the milkman would have been crucial in the context of the allegation of tutoring. He was a very important witness available whose examination could have ruled out the possibility of the witness being tutored as he was the first person to meet the minor witness after the accident. Afterwards, the minor was in the company of his uncle (PW-6) and his father and according to the prosecution's case, there was some dispute between the family of Ajay and the accused over property. His statement was recorded in the hospital in presence of his father. PW-6, in the cross-examination, stated that the milkman was present outside the Court when his evidence was recorded. His evidence was recorded on 22nd December 2003. On the same day, the learned Trial Judge recorded statement of the Public Prosecutor that he was not examining Satpal as being unnecessary and he was dropping Golu (milkman) as he was won over. Even the appellant's father was a crucial witness. This is a case where an adverse inference will have to be drawn against the prosecution for non-examination of the milkman and the appellant's father.

15. There is another circumstance which is relevant as far as the appellant is concerned. According to the prosecution, there were foot marks of the shoes/footwear of the accused near the house where the incident took place. The prosecution took the moulds of the foot marks, as deposed by PW-6. The footwear/shoes of both the accused were taken into custody in the presence of PW-6. But, the shoes of the present appellant did not match the moulds of the imprint of the shoe taken by the prosecution.

16. Apart from the non-examination of the milkman, PW-11 Mehar Singh, Investigation Officer, did not make investigation by recording the statements of the elder brothers of Ajay for verifying whether they were away from the house on the date of the incident. After closely scrutinising the evidence of PW-1 Ajay and considering what we have already observed, the possibility of the witness being tutored cannot be ruled out. There is no support or corroboration to the testimony of PW-1 Ajay, apart from other deficiencies in the prosecution

A case, as pointed out above. In the facts of the case, it will not be safe to base the conviction only on the testimony of PW-1 Ajay which does not inspire confidence.

17. Accordingly, we allow the appeal. The impugned judgments of the High Court dated 12th January 2009 and the impugned judgment of the Trial Court dated 31st January 2005 are hereby set aside and the appellant is acquitted of the offences alleged against him. As the appellant is on bail, his bail bonds stand cancelled.

Divya Pandey
(Assisted by : Raoul Sawant and Roopanshi Virang, LCRAAs)

Appeal allowed.