Criminal Appeal
PRESENT: The Hon'ble Justice Ashim Kumar Banerjee
AND
The Hon'ble Justice Kishore Kumar Prasad
Judgment On : 12th FEBRUARY, 2010.
CRIMINAL APPEAL No. 562 of 2005
Sankar Chowdhury & Another
Vs
The State of West Bengal

Point:
Child Evidence: The evidence of a child witness whether required to be rejected per se, or the Court, as a rule of prudence considers such evidence with close scrutiny and on being convinced about the quality thereof and reliability, can record conviction, based thereon- Evidence Act, 1872-S.118

Fact: The appellants preferred the instant appeal challenging the judgment passed by the Ld. Additional Sessions Judge arising out of a Sessions Case by which the appellants were convicted for the offence punishable under Section 302 of Indian Penal Code read with Section 34 thereof. The point taken before the Appeal Court is that the admissibility of the evidence of P.W.4, the minor daughter of the deceased, who was aged 14 years at the time of the incident and her age was stated to be 15 years at the time of examination by the Trial Court who recorded her testimony.

Held: The Indian 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 for giving rational answers to those questions, because of tender years, extreme old age, disease - whether of mind, or any other cause of the same kind. (Paragraph – 17)
A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. 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. (Paragraph – 18)
Onus to prove the alibi is on the accused as it is a matter within his special knowledge and plea of alibi when taken by the accused must be conclusively proved by him. (Paragraph – 25)

Cases cited: AIR 1952 S.C. 54, AIR 2009 S.C. 2144, (2008) 7 S.C.C. 257, (1997) 5 S.C.C. 34,1Suryanarayana –vs- State of Karnataka, reported in (2001) 9 Supreme Court Cases 129, Dattu Ramrao Sakhare v. State of Maharashtra (1997) 5 SCC 34,12008 (12) SCC 565, AIR 1972 SC 109, AIR 1975 SC 1453, AIR1981 S.C. 1021, AIR 1984 SC 64, Mani Kumar Thapa –vs- State of Sikkim reported in 2002 Criminal Law Journal 4069 : AIR 2002 SC 2920.

Mr. Hari Narayan Mukhopadhyay,
Mr. Sabyasachi Mukhopadhyay,
Mr. Ayan Kumar Boral,
Ms. Aiswarjya Gupta ……For the appellants.
Mr. Swapan Mallick …… For the State.

Kishore Kumar Prasad, J.

1. This appeal is directed against the judgment and order dated. 13th July 2005 passed by the learned Additional Sessions Judge, Fast Track Court-I, Krishnagar in Sessions Trial No. III of April, 2005 arising out of Sessions Case No. 66 (10) 04 by which the appellants were convicted for the offence punishable under Section 302 of Indian Penal Code read with Section 34 thereof. The appellants were heard on the question of sentence on 14.7.2005 and thereafter by an order passed on the same day that is on 14.7.2005, they were sentenced to suffer rigorous imprisonment for life as also to pay fine of Rs. 5,000/- each, in default to suffer further rigorous imprisonment for one year each.

2. Being aggrieved by the judgment and orders of conviction and sentence passed by the learned Trial Judge, the appellants have preferred the present appeal.

3. The prosecution case as projected during trial in a nutshell is that on 1.8.2004 at about 4 p.m. Shanti Chowdhury aged 45 years, wife of the de facto complainant Chhoto Nanda Chowdhury (P.W.1), being accompanied by their daughter Bholia Chowdhury aged 14 years went to their field in the 'Char' (Fulbagan Char) on the bank of Ganges. Shanti Chowdhury was cleaning the weeds and her daughter was cutting grass. Suddenly, the appellants, Sankar Chowdhury and Haricharan Chowdhury of Fulbagan Char came out from the jute field on the western side of the land of the complainant and assaulted Shanti with sharp cutting weapon on her hands, neck and head at random. Her daughter raised shout. The de facto complainant and other villagers who were working in the 'Char' rushed to the spot and the appellants fled away. The victim Shanti Chowdhury died on the spot instantaneously. At about 8.35 hour on 1.8.2004 Chhoto Nanda Chowdhury, the husband of the deceased made a written complaint to P.W. 11, S.I, Harendra Nath Koley at the place of occurrence

which was forwarded to O.C. Kaliganj Police Station.

4. At Police Station, Kaliganj, which is about 38 kilometers away from the place of occurrence, on the basis of Chhoto Nanda's complaint, Kaliganj P.S. Case No. 148/04 dated. 1.8.2004 was registered under Section 302/34 of the Indian Penal Code against the appellants.
The Investigating Agency took up investigation. In the usual course, after completion of investigation, P.W. 11 S.I., Harendra Nath Koley, the Investigating Officer of the case submitted charge sheet against the appellants herein under Section 302/34 of the Indian Penal Code.
The case was committed to the Court of Sessions.

5. In the Trial Court, charge under Section 302 read with Section 34 of the Indian Penal Code was framed against the appellants. The appellants pleaded not guilty to the charge framed against them and claimed to be tried.
The prosecution examined as many as 11 witnesses in the Trial Court. Apart from leading oral evidence, the prosecution also tendered and proved a large number of exhibits which were marked as exhibit 1 to 9 and Mat exhibit I.

6. Though the appellants were examined under Section 313 of the Code of Criminal Procedure, yet there was no adduction of evidence by them.
The defence version as it appears from the trend of crossexamination of P.Ws. as also from the suggestion given to the witnesses was denial of the prosecution case as brought out in evidence.
The learned Trial Judge after considering the oral and documentary evidence and hearing the learned counsel for the parties passed orders of conviction and sentence against the appellant as indicated above.
The only point taken before us related to the admissibility of the evidence of Bholia Chowdhury (P.W.4), the minor daughter of the deceased, who was aged 14 years at the time of the incident. Her age was stated to be 15 years at the time of examination by the learned Trial Court who recorded her testimony.

7. Learned counsel submitted that since the learned Trial Judge had not put preliminary questions to P.W. 4 and did not certify that she understood the duty of speaking truth prior to recording her evidence, the testimony of P.W. 4 is not admissible in evidence and as such the learned Trial Judge committed error of law in convicting the appellants for the offence complained of on the basis of the testimony of P.W. 4, the sole eye witness of this case.
In support of his submission, the learned counsel appearing on behalf of the appellants relied on four decisions of the Hon'ble Apex Court

reported in ***AIR 1952 S.C. 54, AIR 2009 S.C. 2144, (2008) 7 S.C.C. 257, and (1997) 5 S.C.C. 341***.

8. Per contra, the learned counsel appearing for the State- respondent supported the impugned judgment passed by the learned Trial Court. It was argued that the learned Trial Judge had detailed and discussed the evidence adduced by the prosecution at length and had assigned adequate reasons for recording his finding against the appellants for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and no case has been made out for this Court to interfere with the impugned judgment and orders of conviction and sentence.

9. Placing reliance on the decisions cited by the learned counsel for the appellants, learned counsel for the State-respondent urged that a child witness if found competent to depose to the facts and reliable one, such evidence could be the basis of conviction and there is no rule or practice that in every case the evidence of such witness be corroborated before a conviction can be allowed to stand.

10. He further submitted that even in the absence of oath, the evidence of 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.

11. We have given our anxious and thoughtful consideration to the respective contentions of the learned counsel for the parties. We have perused the evidence both oral and documentary tendered and proved by the prosecution to substantiate its case and the impugned judgment.

12. At the outset, it needs to be mentioned here that it is not disputed that the deceased Shanti Chowdhury died instantaneously on account of injury sustained by her at Char known as ‘Fulbagan Char’ on the bank of Ganges within the limits of Kaliganj Police Station at the fateful time of occurrence while she was cleaning the weeds there with her daughter Bholia Chowdhury (P.W. 4).

13. The Investigation Officer (P.W.11) performed inquest on the dead body of the deceased at Char on 1.8.2004 at about 21.30 hours and thereafter the dead body of the deceased was taken to hospital for the purpose of Post Mortem examined by P.W. 7, Constable Haradhan Pal.
P.W. 3, Dr. Subhas Chandra Poddar who conducted Post Mortem on the dead body of the deceased on 2.8.2004 at Sadar Hospital Krishnagar found

the following ante mortem injuries on the person of the deceased: -
“ 1) Total amputation on right forearm just below elbow joint as a result of sharp cut injury through and through at that level and the amputed distal part also examined;
2) Sharp cut injury over ventral aspect, left palm and forearm measuring 8” in length and 3” wide in the central part of wound and muscle deep;
3) Two sharp cut injuries over vault of skull in antero posterior direction measuring 3” X 1” bone deep;
4)Multiple sharp cut injuries transversely around the neck cutting of muscles, trachea, oesophagus, vertebral column, all nerves and vessels. Leaving head attachment of the neck by a flap of shin in the right lateral side of neck.**”**
In the opinion of Dr. Subhas Chandra Poddar, the death was caused due to shock and haemorrhage of the multiple sharp cut injuries resulting antemortem
injuries sustained by the deceased.

14. That apart, the material witnesses of the prosecution in their evidence before Court also stated unambiguously that the deceased was murdered on the date of incident at 4 p.m. Thus, it is amply established that the deceased met a homicidal death at the place of occurrence (on their land in the ‘Char’ on the bank of Ganges) on account of multiple sharp cut injuries sustained by her on the date of incident that is on 1.8.2004 at about 4 p.m.

15. Now, we have to consider whether the appellants herein were responsible for causing the injuries to the deceased resulting her instantaneous death on the spot.
The prosecution case rested upon the evidence of Bholia Chowdhury (P.W. 4), a child witness aged about 14 years at the time of incident and stated to be aged 15 years on the date of her recording evidence by the learned Trial Court.

16. The omission to put preliminary questions to P.W.4 and satisfying that she was answering the question intelligently by the Trial Court prior to recording the testimony of P.W. 4 does not affect the admissibility of the evidence. The question of competency is dealt with in Section 118 of the Evidence Act. Every witness is competent unless the Court considers that he is prevented

from understanding the questions put to her, or from giving rational answers by reason of tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. It will be observed that there is always competency in fact unless the Court considers otherwise.

17. The Indian 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 for giving rational answers to those questions, because of tender years, extreme old age, disease - whether of mind, or any other cause of the same kind.

18. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. 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.

(See Suryanarayana –vs- State of Karnataka, reported in (2001) 9 Supreme Court Cases 129.)

In **Dattu Ramrao Sakhare v. State of Maharashtra (1997) 5 SCC 341** it was held 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 should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his /her demeanour must be like any other competent witness and there is no likelihood of being tutored. 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.**”**
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.
The position in law relating to the evidence of child witness has also dealt with in 2008 (12) SCC 565.
As regards the credibility of P.W. 4, the learned Trial Judge, who recorded her evidence and saw her in the witness box, had believed her. The learned Judge recorded his reasons and found that P.W. 4 was a competent witness and her evidence is unblemished. It is plain that the learned Trial Judge after administering oath to P.W. 4 went on to take her evidence. It is also an important fact that the appellants who were represented by counsel, did not object. Had he raised the point, the learned Trial Judge would doubtless have made good the omission. One can presume that the learned Trial Judge had that in mind from the material facts, which arise out of the instant case. We also do not see any reason to disagree with the observation of the learned Trial Judge as regards the evidence P.W. 4. We were taken through the judgment of the learned Trial Judge as well as the evidence of P.W. 4. P.W. 4 deposed inter alia as follows:
“ Deceased Shanti Chowdhuri was my mother. P.W. 1 is my father. My mother was murdered in the month of last Shraban at about 4 p.m. in our parble land adjacent to the river Ganges.
My mother was cleaning the weeds and I was cutting grass. At that time, Sankara and Ghurna came out from the jute land and began to assault my mother with Ramdaon (big daon). Seeing that I began to raise shout. On hearing my shout P.W. 1 came and also other villagers came. After assaulting my mother, those two persons fled away by the bank of the Ganges. Bijoy Chowdhuri and Hariprasad were among those villagers who came to P.O. My mother fell down on receiving the assault and died. She sustained cut injury in her throat, belly and hands. That Ghurna Chowdhuri and Sankara Chowdhuri who cut down my mother are present in Court (Identifies the accused persons on dock).**”**

19. We have carefully examined the evidence of P.W. 4 and we find that it is unblemished. Besides some minor contradictions or omissions on some minor matters, nothing could be elicited from her in cross- examination which

may render her evidence unreliable on the factum of the actual occurrence and infliction of the injuries by the appellants over the person of her mother. There is no challenge to her evidence that she was in the field along with her deceased mother. Her evidence finds corroboration from Hari Prasad Chowdhury (P.W. 6) and Bijay Chowdhury (P.W.7).

P.W. 6 deposed inter alia as follows:

“ I know P.W. 1. I also knew his wife Shanti Chowdhuri since deceased. She was murdered about 8/9 months ago at about 4 p.m. in the parble land of P.W. 1 adjacent to the Ganges. I was in that land at that time and I was cutting grass. Suddenly Bholia Chowdhuri, daughter of P.W. 1 raised shout “ Marlo go, marlo go” and on hearing that shout I rushed there and saw that Shankar Chowdhuri and Ghuran Chowdhuri @ Haricharan Chowdhuri were fleeing away through the kash jungle by the side of the Ganges. Shankar Chowdhuri was carrying a sickle like weapon in his hand. Looking into Shanti Chowdhuri I saw that she sustained bleeding injuries on her hands, head and neck and she was lying on the parble land and she had already died. Bholia Chowdhuri began to cry shouting that Shankar Chowdhuri and Ghuran Chowdhuri killed her mother and fled away. Both Shankar Chowdhuri and Haricharan Chowdhuri @ Ghuran Chowdhuri are present in Court (Identifies the accused on dock).**”**

P.W. 7 also deposed inter alia as follows: -

“ I knew the deceased Shanti Chowdhuri, wife of P.W. 1. She was murdered in the month of Ashar in the year 2004 A.D. in the parble land beside the Ganges. I was in distant field. It was then about 4 p.m. P.W. 1’s daughter Bholia Chowdhuri raised shout “ Doure eso, doure eso, amar-make kete fello”. On hearing such shout I rushed to that place and saw that Bholia was weeping and her mother Shanti Chowdhuri was lying dead sustaining cut injury on her head, hands and neck. On being asked Bholia told that Shankar Chowdhuri and Ghuran Chowdhuri had assaulted her mother and fled away. Police came at about 9 p.m. and searched for accused Shankar and Ghuran. They could not find them. Thereafter,

they again came to the P.O. and seized some blood stained earth and prepared a seizure list on which I signed.

20. This is my signature (Marked Ext. 3/1). Thereafter police took the deadbody to the P.S. Before that police held inquest and prepared a report. This is my signature on the report (Marked Ext. 1/1).**"**

From the evidence of the above witnesses, we see no hesitation in confirming the findings of the learned Trial Judge that P.W. 4 was present in the field along with her deceased mother at the time of incident.

The next circumstance which lends corroboration to the evidence of P.W. 4 is that P.W. 1, the de facto complainant in the First Information Report made by him on the spot at 8.35 p.m. on 1.8.2004 had given out the names of the appellants as assailants of the deceased and also corroborated the material facts as stated in the First Information Report. Dr. Poddar, (P.W.3), who held autopsy on the dead body of the deceased noted four sharp cutting injuries on the dead body of the deceased.

21. It is needless to set out the evidence of Dr. Poddar in detail since there is no challenge to the fact that the deceased Shanti Chowdhury met with a homicidal death due to sharp cutting injuries on her person. Having regard to the nature and size of the injuries, we have no manner of doubt that this ghastly attack could not be caused by one person. The learned Trial Court in our considered view rightly held that the medical evidence corroborates the evidence of P.W. 4.

22. In addition to the above substantive evidence, the prosecution also relied upon the circumstantial evidence, namely recovery of one incriminating article. One old 'Heso' (Mat exhibit I) was recovered at the instance of the appellant Sankar Chowdhury pursuant to his statement while he was in police custody from the jungle of the 'Fulbagan Char'. The said "Heso" was seized under seizure list (exhibit 5/1) by P.W. 11 in presence of P.W. 6 and the same was proved by P.W. 11 and P.W. 6.

23. That apart, the act of the appellants in absconding from the date of incident till their arrest by P.W. 11 on 5.9.2004 pursuant to W.P.A. issued by the learned Magistrate without any explanation whatsoever is also a relevant fact probabilising the guilty intent of their mind.

24. From the answer given by the appellants in reply to their examination under Section 313 of the Code of Criminal Procedure, it appears that the appellants had taken a specific stand that on the date of incident they were not present at the place of occurrence; that they went to sell vegetable in Kandra market at the material time and they have been falsely implicated out of political rivalry.

25. Onus to prove the alibi is on the accused as it is a matter within his special knowledge **(vide AIR 1972 SC 109 and AIR 1975 SC 1453)** and plea of alibi when taken by the accused must be conclusively proved by him. **(Vide AIR 1981 S.C. 1021 and AIR 1984 SC 64)**.

26. In the present case, there is no attempt on the part of the appellants to prove that they were so far off at the moment from the place of occurrence when the offence was committed. Moreover, the plea of alibi was disclosed for the first time in the statement recorded under Section 313 of the Code of Criminal Procedure without being suggested in cross- examination. This shows that the appellants had taken up a false plea of alibi. Therefore, a false alibi set up by them for the first time in their statement recorded under Section 313 of the Code of Criminal Procedure would also be a link in the chain of circumstances as held by the Hon'ble Apex Court in the case of **Mani Kumar Thapa –vs- State of Sikkim** reported in **2002 Criminal Law Journal 4069 : AIR 2002 SC 2920.**

27. For the reasons aforesaid and scrutinising the entire evidence on the touchstone of the settled principle of law enumerated above, this Court finds that there are enough materials to connect the appellants with the heinous crime, thereby causing instantaneous death of the deceased on the spot. This Court is also satisfied that sufficient evidence for sustaining conviction are available and no reasonable doubt is left in our mind with regard to the involvement of the accused / appellants in the alleged crime.

28. Consequently, this Court is not inclined to interfere with the orders of conviction and sentence passed by the learned Trial Judge.
In the result, the conviction recorded and the sentence imposed upon the appellants by the learned Trial Judge are affirmed.
The appeal is accordingly dismissed.

29. The appellants are now in jail. They are directed to serve out the remainder part of their sentence as imposed against them by the learned Trial Judge.

Send a copy of this judgment to the Superintendent of the concerned correctional home where the appellants are now under detention for information and necessary action.
Lower Court records with a copy of this judgment to go down forthwith to the Court of learned Trial Judge for information and necessary action.
Urgent xerox certified copy, if applied for, be supplied to the learned counsel for the parties upon compliance of all formalities.
(Kishore Kumar Prasad, J.)
I agree.
(Ashim Kumar Banerjee, J.)