STATE OF M.P. A

v.

RAMESH AND ANR.

(Criminal Appeal No. 1289 of 2005)

MARCH 18, 2011 B

[P. SATHASIVAM AND DR. B.S. CHAUHAN, JJ.]

Penal Code, 1860 – s.302 and s.302 r/w s.120B – Murder – Allegation that respondent no.1 and respondent no.2 murdered the husband of respondent no.2 – Prosecution C *primarily relying upon testimony of PW1, the 8 year old minor daughter of respondent no.2 and deceased – Conviction of respondents by trial court – Set aside by High Court – On appeal, held: Testimony of P.W.1 is affirmed by the statements of other witnesses, proved circumstances and* D *medical evidence – Her deposition being precise, concise, specific and vivid without any improvement or embroidery is worth acceptance in toto – High Court completely ignored the most material incriminating circumstances which appeared against the respondents-accused – Findings recorded by* E *High Court were contrary to the evidence on record and thus, were perverse – Judgment of the trial Court restored.*

Witness – Child witness – Evidence of – Appreciation – Held: Deposition of a child witness may require corroboration, F *but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence – The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring – Only* G *in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully – However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.*

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A *Appeal – Appeal against acquittal – Power of appellate court – Scope –Held: The appellate court being the final court of fact is fully competent to re-appreciate, reconsider and review the evidence and take its own decision – Law does not prescribe any limitation, restriction or condition on exercise*
B *of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused – If two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal.*

C *Criminal jurisprudence – Presumption of innocence – Held: Every person is presumed to be innocent unless he is proved guilty by the competent court.*

Code of Criminal Procedure, 1973 – ss.161(2); 313(3);
D *and proviso (b) to s.315 – Rule against adverse inference from silence of the accused – Held: Statement of accused u/ s.313 Cr.P.C. can be taken into consideration to appreciate the truthfulness or otherwise of the prosecution case – However, as such a statement is not recorded after*
E *administration of oath and the accused cannot be cross-examined, his statement so recorded u/s.313 Cr.P.C. cannot be treated to be evidence within the meaning of s.3 of the Evidence Act – Constitution of India, 1950 – Article 20(3) – Evidence Act, 1872.*

F *Evidence Act, 1872 – s.6 – Admissibility of evidence under – Discussed.*

Respondent no.2 lodged FIR stating that her husband 'C' died after falling during a spell of giddiness.
G **In respect of the same incident, another complaint was lodged by PW2 alongwith PW1, the 8 year old daughter of respondent no.2 and 'C', stating that respondent no.1 and respondent no.2 killed 'C'.**

H **The trial Court held that the injuries found on the**

person of the deceased could not have been received from a fall on the ground and convicted respondent No.1 under Section 302 of IPC and respondent No.2 under Section 302 r/w Section 120-B IPC, and sentenced them to life imprisonment. The conviction was set aside by the High Court. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on a oath and the import of the questions that were being put to him. [Para 10] [14-G-H; 15-A-B]

1.2. There is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the Court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to

A **satisfy the Court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature. [Para 11] [15-C-F]**

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1.3. Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into C **consideration for the purpose of corroboration as in the case of a hostile witness. [Para 12] [15-G]**

1.4. The deposition of a child witness may require corroboration, but in case his deposition inspires the D **confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there** E **is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition. [Para 13] [16-A-C]**

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Rameshwar S/o Kalyan Singh v. The State of Rajasthan **AIR 1952 SC 54; Mangoo & Anr. v. State of Madhya Pradesh AIR 1995 SC 959; Panchhi & Ors. v. State of U.P. AIR 1998 SC 2726;** *Nivrutti Pandurang Kokate & Ors. v. State of Maharashtra* **AIR 2008 SC 1460;** *Himmat Sukhadeo* G *Wahurwagh & Ors. v. State of Maharashtra* **AIR 2009 SC 2292; State of U.P. v. Krishna Master & Ors. AIR 2010 SC 3071 and** *Gagan Kanojia & Anr. v. State of Punjab* **(2006) 13 SCC 516 – relied on.**

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2. In an appeal against acquittal, in the absence of perversity in the impugned judgment, interference by this Court exercising its extraordinary jurisdiction, is not warranted. It is settled proposition of law that the appellate court being the final court of fact is fully competent to re-appreciate, reconsider and review the evidence and take its own decision. Law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court and there can be no quarrel to the said legal proposition that if two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal. [Para 14] [16-D-G]

3. The injuries found on the body of 'C' are in consonance with the deposition of P.W.1. The doctor found that blood had oozed from the mouth of the deceased and such injury could be possible as per the case of the prosecution. Evidently, the statement of P.W.1 is affirmed by the statements of other witnesses, proved circumstances and medical evidence. Her deposition being precise, concise, specific and vivid without any improvement or embroidery is worth acceptance in toto. [Paras 16, 23] [17-H; 18-A-B; 21-A-B]

4. Section 6 of the Evidence Act, 1872 is an exception to the general rule whereunder the hearsay evidence becomes admissible. However, such evidence must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statements sought to be admitted, therefore, as forming part of res gestae, must have been made

A contemporaneously with the acts or immediately thereafter. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" that it becomes relevant by itself. In the instant case, the B statement of PW.2 indicating that PW.1 had come to him and told that her father was beaten by respondent no.1 with the help of her mother, is admissible under Section 6 of the Evidence Act. [Paras 17, 18] [18-D-G]

Gagan Kanojia & Anr. v. State of Punjab (2006) 13 SCC C 516 – relied on.

5. The witness examined by the prosecution supported its case to the extent that the door of the room wherein the offence had been committed was bolted from D inside. It was only when PW5, the village Watchman threatened respondent no.2 saying he would call the police, the door was opened and, by that time, respondent no.1 had left the place of occurrence and the respondent no.2's husband had died. Thus, there is no E conflict between the medical and ocular evidence. The prosecution case is fully supported by PW.5 and partly supported by PW.7 and PW.3. Even the part of the depositions of hostile witnesses, particularly Sarpanch (PW.4) can be relied upon to the extent that on being F called, he reached the place of occurrence and found that the room had been bolted from inside. It is also evident from the evidence on record that PW.1 and PW.2 had called the persons from their houses and after their arrival, they found that the room had been bolted from G inside. So to that extent, the version of these witnesses including of the hostile witnesses, can be believed and relied upon. [Para 20] [19-C-G]

6. Respondent no.2 has admitted in her statement under Section 313 of CrPC that PW.1 was present inside

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the room/place of occurrence and she further admitted that PW.1 had gone to call PW.2 at the relevant time. Thus, it is evident from the aforesaid admission of the said accused itself that both the persons were present inside the room and are well aware of the incident. All the witnesses have affirmed in one voice that P.W.2 had entered the room and after coming out, he disclosed that 'C' has died. In fact, this fact had been affirmed by all the witnesses. It is evident from the material available on record that there was only one room house where the incident took place and no other space was available. The presence of respondent no.2 in the house is natural. [Paras 21, 22] [19-H; 20-A-E]

7. Respondent no.2 herself reached the Police Station and lodged the complaint that her husband 'C' died because of falling from giddiness when he went to ease himself outside the house. This version has been disbelieved by the I.O. as well as by the Trial Court. Respondent no.2 would not have moved in the night for 8 K.Ms. to lodge the FIR, if she was not at fault or having a guilty mind. Secondly, she lodged the complaint in the name of Madhav Bai and not in her own name. [Para 26] [22-C-D]

8. The cumulative effect of reading the provisions of Article 20(3) of the Constitution with Sections 161(2); 313(3); and proviso (b) to Section 315 Cr.P.C. remains that in India, law provides for the rule against adverse inference from silence of the accused. Statement of the accused made under Section 313 Cr.P.C. can be taken into consideration to appreciate the truthfulness or otherwise of the prosecution case. However, as such a statement is not recorded after administration of oath and the accused cannot be cross-examined, his statement so recorded under Section 313 Cr.P.C. cannot be treated to be evidence within the meaning of Section 3 of the

A **Evidence Act, 1872. Section 315 Cr.P.C. enables an accused to give evidence on his own behalf to disprove the charges made against him. However, for such a course, the accused has to offer in writing to give his evidence in defence. Thus, the accused becomes ready**
B **to enter into the witness box, to take oath and to be cross-examined on behalf of the prosecution and/or of the accomplice, if it is so required. In such a fact-situation, the accused being a competent witness, can depose in his defence and his evidence can be considered and**
C **relied upon while deciding the case. [Para 27] [22-E-H; 23-A-C]**

Tukaram G. Gaokar v. R.N. Shukla & Ors., **AIR 1968 SC 1050**; *Dehal Singh v. State of Himachal Pradesh* **(2010) 9 SCC 85 – relied on.**

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9. All the witnesses including those who turned hostile had admitted that the room was bolted from inside and the statement of respondent no.2 that PW2 had bolted the room from outside has not been corroborated
E **by any person. In case she and her husband 'C' were not having any relation with PW.2 for the last 8-10 years, it would be un-natural that she would send her daughter (PW.1) to call PW2 because he was her husband's elder brother. While lodging report Ext. D-7 she told her name**
F **as Madhav Bai. However, in cross-examination she has stated that police men recorded her name as Madhav Bai though her name is Bhaggo Bai. More so, she has not specifically denied having illicit relationship with respondent no.2, nor she has denied that she made a**
G **twisting statement to help the respondent no.2 to get acquitted in the rape case. [Para 28] [24-C-F]**

10. All the witnesses examined by the prosecution including those who have turned hostile are admittedly the neighbours of 'C' and PW2. Thus, they are the most
H **natural witnesses and the Trial Court has rightly placed**

reliance on their testimonies. The High Court has completely ignored the most material incriminating circumstances which appeared against the respondents/ accused. The findings so recorded by the High Court are contrary to the evidence on record and thus, are held to be perverse. The judgment of the trial Court convicting the respondents/accused under Section 302 IPC is hereby restored. [Paras 30, 31 and 32] [25-C-F]

Case Law Reference:

AIR 1952 SC 54	**relied on**	**Para 6**
AIR 1995 SC 959	**relied on**	**Para 7**
AIR 1998 SC 2726	**relied on**	**Para 8**
AIR 2008 SC 1460	**relied on**	**Para 9**
AIR 2009 SC 2292	**relied on**	**Para 10**
AIR 2010 SC 3071	**relied on**	**Para 11**
(2006) 13 SCC 516	**relied on**	**Para 12**
(1999) 9 SCC 507	**relied on**	**Para 17**
AIR 1968 SC 1050	**relied on**	**Para 27**
(2010) 9 SCC 85	**relied on**	**Para 27**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1289 of 2005.

From the Judgment & Order dated 31.3.2004 of the High Court of Madhya Pradesh at Jabalpur Bench at Gwalior in Criminal Appeal No. 262 of 1997.

Vibha Datta Makhija for the Appellant.

K. Sarada Devi for the Respondents.

The Judgment of the Court was delivered by

A **DR. B.S. CHAUHAN, J.** 1. This appeal has been preferred by the State of Madhya Pradesh against the judgment and order dated 31.3.2004 passed by the High Court of Madhya Pradesh at Jabalpur (Gwalior Bench) in Criminal Appeal No. 262 of 1997, reversing the judgment and order dated B 16.8.1996 passed by the Sessions Court, Guna in Sessions Trial No. 155/1995, convicting the respondent No.1 under Section 302 of Indian Penal Code, 1860 (hereinafter called as 'IPC') and respondent No.2 under Section 302 read with Section 120-B IPC, and sentencing them to life imprisonment.

C 2. **FACTUAL MATRIX:**

(A) Respondent No.2 Bhaggo Bai filed an FIR dated 31.1.1995 in Police Station, Ashok Nagar, mentioning her name as Madhav Bai stating that her husband Chatra died D after falling during a spell of giddiness at about 11.00 p.m. In respect of the same incident, another complaint was lodged by Munna Lal (PW.2) along with Rannu Bai (PW.1), daughter of deceased Chatra and Bhaggo Bai, aged about 8 years stating that both the respondents-accused had E murdered Chatra. After having a preliminary investigation, the Investigating Officer arrested respondent No.2 Bhaggo Bai and lodged the FIR formally on 4.2.1995.

(B) After completing the investigation, a charge-sheet was filed against both the accused for committing the murder F of Chatra. A large number of witnesses were examined by the prosecution. Both the respondents-accused examined themselves as defence witnesses alongwith some other witnesses. After concluding the trial, both the respondents-accused were convicted and sentenced, as mentioned G hereinabove, by the Sessions Judge vide judgment and order dated 16.8.1996.

(C) Being aggrieved, both the respondents –accused filed Criminal Appeal No.262/1997 which has been allowed by

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the impugned judgment and order and both of them stood acquitted. Hence, this appeal. A

3. Ms. Vibha Datta Makhija, learned counsel appearing for the appellant-State, has submitted that the judgment and order of the High Court is not sustainable in the eyes of law. The High Court has gravely erred in showing unwarranted sympathy towards the accused and dis-believed the prosecution case brushing aside the statement of Rannu Bai (PW.1), merely being a child witness and pointing out that there was contradiction in the medical and ocular evidence regarding the injuries found on the person of Chatra, deceased. The High Court further erred in holding that there was enmity between the accused Bhaggo Bai and Ramesh. At the time of death of Chatra, Ramesh accused was facing trial for committing rape on Bhagoo Bai; thus, question of conspiracy between the said two accused could not arise; several cases were also pending in different courts between Munna Lal (PW.2) and his wife Kusum Bai on one hand, and Chatra and Bhaggo Bai on the other hand. Thus, there was a possibility of false implication of Ramesh accused. Chatra died because of a fall when he went to urinate, as he was suffering from giddiness all the time because he used to take 'dhatura' and had become a Lunatic. Chatra used to eat soil etc. Rannu Bai (PW.1) though a child, was able to understand the questions put to her and her duty to speak the truth. She could not have any enmity with either of the accused. The rape case filed by deceased Chatra and Bhaggo Bai against accused Ramesh remained pending for a long time and Ramesh got acquitted after the death of Chatra, deceased. The Trial Court after appreciating the documentary evidence on record came to the conclusion that accused Ramesh committed rape upon Bhaggo Bai during the period between 24.6.1991 to 17.9.1994. In fact, they were having illicit relationship for a period of more than 3 years. The High Court brushed aside the said finding without giving any cogent reason. The allegation that Rannu Bai (PW.1) had been tutored by Munna Lal (PW.2) could not be spelled out from her B C D E F G H

A statement. The neighbours had come at the place of occurrence after being called by Rannu Bai (PW.1) and Munna Lal (PW.2). In spite of the fact that some of them had declared hostile, part of their evidence still could be relied upon in support of the prosecution case. Therefore, the judgment and order of
B the High Court, impugned is liable to be set aside, and appeal deserves to be allowed.

4. On the contrary, Ms. K. Sarada Devi, learned counsel appearing for the respondents, has submitted that the facts and circumstances of the case do not warrant interference by this
C Court against the judgment and order of acquittal by the High Court. The High Court being the first appellate court and the final court of facts had appreciated the entire evidence on record and came to the conclusion that it was not possible that Bhaggo Bai could have hatched a conspiracy with Ramesh
D accused for committing the murder of her husband Chatra during the pendency of the case filed by her against Ramesh under Section 376 IPC. Munna Lal (PW.2), his wife and son had also assaulted the deceased Chatra and Bhaggo Bai, accused and wanted to grab their property and so many civil
E and criminal cases were pending between them, his evidence cannot be relied upon. As per the medical evidence, it was possible that the injuries suffered by Chatra could have been received by fall caused by giddiness. More so, Chatra had become a lunatic and could not understand right or wrong. The
F testimony of Rannu Bai (PW.1), has been rightly dis-believed by the High Court as she had been tutored by Munna Lal (PW.2). Admittedly, she had been living with him since the death of her father Chatra. The High Court has rightly believed the defence version and appreciated the depositions of defence
G witnesses, including Radha Bai (D.W.1), elder daughter of Bhaggo Bai accused, in the correct perspective. The appeal lacks merit and is liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.
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CHILD WITNESS :

6. In *Rameshwar S/o Kalyan Singh v. The State of Rajasthan,* AIR 1952 SC 54, this Court examined the provisions of Section 5 of Indian Oaths Act, 1873 and Section 118 of Evidence Act, 1872 and held that every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age, extreme old age, disease whether of body or mind or any other cause of the same kind. There is always competency in fact unless the Court considers otherwise.

The Court further held as under:

> ".....It is desirable that Judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate...."

7. In *Mangoo & Anr. v. State of Madhya Pradesh,* AIR 1995 SC 959, this Court while dealing with the evidence of a child witness observed that there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The Court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.

8. In *Panchhi & Ors. v. State of U.P.,* AIR 1998 SC 2726, this Court while placing reliance upon a large number of its earlier judgments observed that the testimony of a child witness

must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law. It cannot be held 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 him and thus a child witness is an easy prey to tutoring."

9. In *Nivrutti Pandurang Kokate & Ors. v. State of Maharashtra,* AIR 2008 SC 1460, this Court dealing with the child witness has observed as under:

> "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 the 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 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, shaped 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."

10. The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate

between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on a oath and the import of the questions that were being put to him. (Vide: *Himmat Sukhadeo Wahurwagh & Ors. v. State of Maharashtra,* AIR 2009 SC 2292).

11. In *State of U.P. v. Krishna Master & Ors.,* AIR 2010 SC 3071, this Court held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the Court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the Court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature.

12. Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. (Vide: *Gagan Kanojia & Anr. v. State of Punjab,* (2006) 13 SCC 516).

13. In view of the above, the law on the issue can be summarized to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.

APPEAL AGAINST ACQUITTAL:

14. We are fully alive of the fact that we are dealing with an appeal against acquittal and in the absence of perversity in the said judgment and order, interference by this Court exercising its extraordinary jurisdiction, is not warranted. It is settled proposition of law that the appellate court being the final court of fact is fully competent to re-appreciate, reconsider and review the evidence and take its own decision. Law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court and there can be no quarrel to the said legal proposition that if two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal.

INJURIES:

15. Dr. D.K. Jain (P.W.8) has performed Post Mortem of Chatra, deceased. He found following injuries on his person vide Post Mortem Report Ex.P-8:

(i) A contusion of size 1 cm x 1 cm on the L of mandible on right side with an abrasion on upper part of contusion 1 cm x 0.3 cm obliquely. Sub-cutaneous haemorrhage present.

(ii) An abrasion of size 0.5 cm x 0.2 cm 1-1/2" below the above contusion over neck. Sub-cutaneous haemorrhage present.

(iii) An abrasion of size 0.5 cm x 0.2 cm 1.5 cm below and lateral to L of mandible right on neck.

(iv) An abrasion of size 3.5 cm x 0.5 cm over left side of neck posterior laterally on upper part, transversely oblique going upwards. Sub-cutaneous haemorrhage present.

(v) A contusion over lower lip right side near to L of mouth of size 0.5 cm x 0.5 cm sub-cutaneous haemorrhage present.

(vi) An abrasion over right shoulder posterior laterally of size 4 cm x 1.5 cm post mortem in nature.

Dr. D.K. Jain (P.W.8) opined that injury No.(vi) was after the death. On internal examination, he found the right pleura adherent to lung parietes. Both the lungs were enlarged. On further dissection, he found a sub-cutaneous haemorrhage present in supra sternal notch area. Blood mixed fluid with froth stood discharged through mouth and noise. According to the doctor, cause of death was on account of 'asphyxia' as a result of throttling. No piece of cloth or thread was found inside the mouth of the deceased. The deceased had an ailment of the lungs.

16. The Trial Court after considering the entire evidence on record came to the conclusion that the injuries found on the person of the deceased could not have been received from a fall on the ground. The injuries found on his body are in

consonance with the deposition of Rannu Bai (P.W.1), who has stated that after hearing the noise, she woke up and saw that accused Ramesh was beating her father with "Gumma" (a hard object made of cloth), and her mother had caught hold of the deceased by his legs. The doctor had found that blood had oozed from his mouth and such injury could be possible as per the case of the prosecution. Undoubtedly, Munna Lal (PW.2) has deposed that Ramesh had caused injuries with the knife. The High Court has given undue weightage to his statement. In fact, as per the prosecution case, Munna Lal (PW.2) was not an eye witness. He was called by Rannu Bai (PW.1) and reached the place of occurrence along with some other persons.

17. In *Sukhar v. State of U.P.*, (1999) 9 SCC 507, this Court has explained the provisions of Section 6 of the Evidence Act, 1872 observing that it is an exception to the general rule whereunder the hearsay evidence becomes admissible. However, such evidence must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statements sought to be admitted, therefore, as forming part of res gestae, must have been made contemporaneously with the acts or immediately thereafter. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" that it becomes relevant by itself.

18. Applying the ratio of the said judgment to the evidence of Munna Lal (PW.2), we reach the conclusion that his statement indicating that Rannu Bai (PW.1) had come to him and told that her father was beaten by Ramesh with the help of her mother, is admissible under Section 6 of the Evidence Act.

19. Mrs. K. Sarada Devi, learned counsel appearing for the respondents has drawn our attention to certain minor contradictions in the statement of Rannu Bai (PW.1) and Munna Lal (PW.2). She has placed a very heavy reliance on the

statement of Rannu Bai (PW.1) that first she had gone to the house of her grandfather Lala and the trial Court committed an error reading it as Munna Lal (PW.2). In view of the fact that Bhaggo Bai, respondent/accused herself stated in her cross-examination while being examined under Section 315 Cr.P.C. that she had sent Rannu Bai (PW.1) to call Munna Lal (PW.2), such argument looses the significance. Even otherwise, the omissions/contradictions pointed out by Mrs. K. Sarada Devi are of trivial nature and are certainly not of such a magnitude that may materially affect the core of the prosecution case.

20. The witness examined by the prosecution supported its case to the extent that the door of the room wherein the offence had been committed was bolted from inside. It was only when Ram Bharose, village Watchman (P.W.5) threatened Bhaggo Bai, accused saying he would call the police, the door was opened and, by that time, accused Ramesh had left the place of occurrence and Chatra had died. Thus, there is no conflict between the medical and ocular evidence. The prosecution case is fully supported by Ram Bharose (PW.5) and partly supported by Hannu (PW.7) and Anand Lal (PW.3). Even the part of the depositions of hostile witnesses, particularly Basori Lal, Sarpanch (PW.4) can be relied upon to the extent that on being called, he reached the place of occurrence and found that the room had been bolted from inside. It is also evident from the evidence on record that Rannu Bai (PW.1) and Munna Lal (PW.2) had called the persons from their houses and after their arrival, they found that the room had been bolted from inside. So to that extent, the version of these witnesses including of the hostile witnesses, can be believed and relied upon. The post mortem report clearly explained that Chatra died of 'Asphyxia' and this version has been fully supported by Dr D.K. Jain (PW.8).

21. Bhaggo Bai, accused/respondent has admitted in her statement under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter called as 'Cr.P.C.') that Rannu Bai

A (PW.1) was present inside the room/place of occurrence and she further admitted that Rannu Bai, (PW.1) had gone to call Munna Lal (PW.2) at the relevant time. Thus, it is evident from the aforesaid admission of the said accused itself that both the persons were present inside the room and are well aware of
B the incident.

22. Undoubtedly, there had been some minor contradictions in the statements of witnesses in regard to the fact as to who had reached the place of occurrence first. All
C the witnesses have affirmed in one voice that Munna Lal (P.W.2) had entered the room and after coming out, he disclosed that Chatra has died. In fact, this fact had been affirmed by all the witnesses. In view of the contradictions in the statements of witnesses as to whether torch was used to create artificial light in the room or not to find out the scene therein, becomes
D immaterial. It is evident from the material available on record that there was only one room house where the incident took place and no other space was available. Thus, in case the other witnesses had not deposed that Radha Bai (D.W.1) was also present in the house along with accused Bhaggo Bai, remains
E immaterial for the reason that her presence is natural.

23. The Trial Court after taking note of rulings of various judgments of this Court as what are the essential requirements to accept the testimony of a child witness held as under:

F

> "In the present case, statement of child witness gets affirmed by the circumstances of the incident, facts and from the activities of the other witnesses carried out by them on reaching at the place of occurrence. Thus, on the basis of above-said law precedents, statement of witness
G Rannu Bai not being unreliable in my opinion are absolutely true and correct.....Statement of child witness Rannu Bai gets affirmed by the statements of Munna and witness Hannu and from the medical evidence. Therefore, facts of the above-stated law precedents are not applicable to the

H

present case."

In view of the above, it is evident that the statement of Rannu Bai (P.W.1) is affirmed by the statements of other witnesses, proved circumstances and medical evidence. Her deposition being precise, concise, specific and vivid without any improvement or embroidery is worth acceptance in toto.

24. A very heavy reliance has been placed by defence counsel Ms. K. Sarada Devi on the statements of defence witnesses, particularly, Radha Bai (D.W.1). However, it may be relevant to point out the initial part of her statement made in examination-in-chief:

"In view of the witness's age before she was sworn she was asked as under:

Q. Are you literate? Have you gone to school for reading?

A. No.

Q. Do you understand right or wrong?

A. I do not understand.

Q. Do you understand Saugandh or Sau (Oath or hundred)

A. I do not know.

Considering the said answers of the witness it appears that the *witness does not understand right, wrong or oath,* therefore the witness was not sworn."

(Emphasis added)

In view of the above, we are of the view that it cannot be safe to rely upon her evidence at all.

A 25. So far as the deposition of Budha (DW.2), father of Bhaggo Bai, accused, is concerned, he was 80 years of age at the time of examination and not the resident of the same village. He has deposed only on the basis of the information he had received from his daughter Bhaggo Bai, accused. Thus, B he is not of any help to the defence as we see no reason to believe the theory put forward by the defence.

26. Complaint was lodged promptly at 6.00 a.m. on 1.2.1995 in the Police Station, Ashok Nagar at a distance of 8.00 K.Ms. It may also be relevant to mention herein that formal C FIR was lodged on 4.2.1995 after having preliminary investigation and arresting Bhaggo Bai accused. Bhaggo Bai herself has reached the Police Station and lodged the complaint that her husband Chatra died because of falling from giddiness when he went to ease himself outside the house. This version D has been dis-believed by the I.O. as well as by the Trial Court. In our considered opinion, Bhagoo Bai would not have moved in the night for 8 K.Ms. to lodge the FIR, if she was not at fault or having a guilty mind. Secondly, she lodged the complaint in the name of Madhav Bai and not in her own name Bhaggo Bai.

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27. The cumulative effect of reading the provisions of Article 20(3) of the Constitution with Sections 161(2); 313(3); and proviso (b) to Section 315 Cr.P.C. remains that in India, law provides for the rule against adverse inference from silence F of the accused.

Statement of the accused made under Section 313 Cr.P.C. can be taken into consideration to appreciate the truthfulness or otherwise of the prosecution case. However, as such a statement is not recorded after administration of oath G and the accused cannot be cross-examined, his statement so recorded under Section 313 Cr.P.C. can not be treated to be evidence within the meaning of Section 3 of the Evidence Act, 1872.

H Section 315 Cr.P.C. enables an accused to give evidence

on his own behalf to disprove the charges made against him. However, for such a course, the accused has to offer in writing to give his evidence in defence. Thus, the accused becomes ready to enter into the witness box, to take oath and to be cross-examined on behalf of the prosecution and/or of the accomplice, if it is so required. (Vide: *Tukaram G. Gaokar v. R.N. Shukla & Ors.,* AIR 1968 SC 1050; and *Dehal Singh v. State of Himachal Pradesh,* (2010) 9 SCC 85).

In such a fact-situation, the accused being a competent witness, can depose in his defence and his evidence can be considered and relied upon while deciding the case.

28. Bhaggo Bai, accused examined herself as a defence witness (DW.3) and entered into the witness box. She has also been cross-examined on behalf of the prosecution as well as on behalf of co-accused Ramesh. Bhaggo Bai/accused (DW.3) deposed that accused Ramesh had committed rape upon her 6 years ago and in that case, criminal prosecution was launched against him. She has further deposed that after her husband Chatra fell from giddiness, she had brought him inside the room with the help of her elder daughter Radha Bai (DW.1) and put him on the bed. She herself sent her younger daughter Rannu Bai (PW.1) to call Munna. Munna came and saw Chatra. The relevant part of her deposition reads as under:

> "...Then he (Munna) bolted the door from outside. He called the watchman. The watchman and Munna seeing me in the room went to the police station.....It is right that for the last 8-10 years, I, Chatra and Munna had no contact with Ramesh.....I got my name to be written as Bhaggo Bai at the time of report Ext.D-7. My name is not Madhav Bai. The Policemen recorded the report in the name of Madhav Bai. I sent Rannu Bai to call Munna because Munna was my husband's elder brother.
>
> .....

A Q.17 Had you illicit and immoral relations with the accused Ramesh when Chatra was alive?

A. What can I say?

B .....

Q. We are saying that you had given twisting statement in a rape case on which the accused Ramesh was acquitted?

C A. I gave statement."

Her aforesaid statement is not worth acceptance for the reason that all the witnesses including those who turned hostile had admitted that the room was bolted from inside and her statement that Munna had bolted the room from outside has not D been corroborated by any person. In case she and her husband Chatra were not having any relation with Munna (PW.2) for the last 8-10 years, it would be un-natural that she would send her daughter Rannu Bai (PW.1) to call Munna because he was her husband's elder brother. While lodging report Ext. D-7 she told E her name as Madhav Bai. However, in cross-examination she has stated that police men recorded her name as Madhav Bai though her name is Bhaggo Bai. More so, she has not specifically denied having illicit relationship with Ramesh accused, nor she has denied that she made a twisting F statement to help the accused Ramesh to get acquitted in the rape case.

29. The Trial Court after examining the entire material on record, particularly the documentary evidence came to the G conclusion as under:

"43....It appears on viewing all the above documents Exh. D-8 to D-42 that all these documents are related to incident of rape of Bhaggo Bai committed by accused Ramesh for the period 24.6.1991 to 17.9.1994..."

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The High Court did not deal with this aspect at all. A

30. All the witnesses examined by the prosecution including those who have turned hostile are admittedly the neighbours of Chatra deceased and Munna Lal. Thus, they are the most natural witnesses and the Trial Court has rightly placed B reliance on their testimonies.

31. After appreciating the entire evidence on record, we came to the inescapable conclusion that the High Court has completely ignored the most material incriminating circumstances which appeared against the respondents/ C accused. The findings so recorded by the High Court are contrary to the evidence on record and thus, are held to be perverse.

32. In view of the above, the appeal deserves to be allowed D and it is hereby allowed. The judgment and order of the High Court dated 31.3.2004 in Criminal Appeal No.262 of 1997 is hereby set aside and the judgment and order of the trial Court dated 16.8.1996 convicting the respondents/accused under Section 302 IPC in Sessions Trial No.155/1995 is hereby E restored. A copy of the judgment be sent to the Chief Judicial Magistrate, Guna, M.P. to take the said respondents into custody and to send them to jail to serve the remaining part of the sentence.

B.B.B. Appeal allowed. F