PROMODE DEY

v.

STATE OF WEST BENGAL

(Criminal Appeal No. 405 of 2008)

MARCH 22, 2012

[A.K. PATNAIK AND SWATANTER KUMAR, JJ.]

Penal Code, 1860 – s.302 – Murder – Child witness PW2 – Conviction by trial court – Upheld by High Court – Justification – Held: PW2 gave a very natural account of the incident – Right from the time of the incident till the time she was examined in court, PW2 consistently said that accused-appellant had killed her mother with a 'daa' – It cannot, therefore, be held that PW2 was tutored to depose against the appellant – Evidence of PW2 also corroborated by the fact that a blood-stained 'daa' was recovered on the very date of the incident from a jungle by the side of the house of the appellant – Medical evidence of PW10 (the doctor who carried out post mortem) did not contradict the evidence of PW2 that appellant struck the deceased on her head, back, fingers and her throat – Guilt of appellant established beyond reasonable doubt – High Court right in sustaining the conviction of appellant on the basis of eyewitness account of PW-2 and the evidence of PW-1, PW-8 and PW-11 as well as the recovery of 'daa' at the instance of the appellant.

The mother of an eight year old girl PW2 was found murdered. PW2 stated appellant had entered into their house with a big *daa* and killed her mother. The *daa* allegedly used in killing PW2's mother was recovered from a jungle at the side of the house of the appellant. The trial court convicted the appellant under Section 302 IPC and sentenced him to rigorous imprisonment for life. On appeal, the High Court held that the evidence of PW-2 as corroborated by the evidence of PW-1(the

A grandmother of PW2), PW-8 (a resident of the village in which the house of the deceased was located) and PW-11 (the father of PW2) together with the fact of recovery of the *daa* at the instance of the appellant and its seizure soon after the incident had established that the appellant B was guilty of the offence of murdering the deceased and accordingly sustained the conviction and sentence of the appellant.

The conviction of appellant was challenged before this Court on grounds that the prosecution was not able C to prove that he had committed the murder of PW2's mother beyond reasonable doubt. It was contended that where the entire case is based on the evidence of a child witness (i.e. PW2), who is prone to tutoring, the conviction is not safe; that the Magistrate before whom D the statement of PW2 under Section 164 of the Cr.P.C. was recorded was not examined; that the granduncle of PW-2, who was present in the house, was also not examined; that PW-3, PW-4, PW-5, PW-6, PW-7 and PW-9 had all turned hostile and not supported the prosecution E case; and that from the evidence of PW-15, the I.O., who carried out the further investigation, it is clear that the blood-stained *daa* was sent for examination to the Forensic Science Laboratory (FSL) but the FSL report was not produced before the Court.

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Dismissing the appeal, the Court

HELD: 1. It is seen that PW-2 had answered the first few questions put by the Court very smartly and intelligently and the Court made a mention while G recording her evidence that she could become a witness in this case. That apart, she has given a very natural account of how the appellant killed her mother. Moreover, soon after the incident on 23.02.2002 she told her grandmother (PW-1) and her father (PW-11) that it was the H appellant who had killed the deceased and both PW-1

and PW-11 deposed before the Court in their evidence that they were told by PW-2 that the appellant had killed the deceased with a *daa*. PW-8, who was a resident of the area, has also stated in his evidence that soon after the incident he had heard PW-2 saying that the appellant had killed the deceased. Moreover, two days after the incident on 25.02.2002 she had given a statement before the Magistrate under Section 164, Cr.P.C., that the *Panchayat*, namely, the appellant, had killed the deceased by a *daa*. Thus, right from the time of the incident till the time she was examined in court, PW-2 has consistently said that the appellant had killed the deceased with the *daa*. It cannot, therefore, be held that PW-2 has been tutored to depose against the appellant. [Paras 7, 8] [895-B-C; 896-A-D]

Arbind Singh v. State of Bihar, 1994 SCC (Cri) 1418 – distinguished.

State of Madhya Pradesh v. Ramesh & Anr. (2011) 4 SCC 786 : 2011 (5) SCR 1 and *Ramappa Halappa Pujar & Ors. v. State of Karnataka,* (2007) 13 SCC 31: 2007 (5) SCR 832 – cited.

2. The evidence of PW-2 is also corroborated by the fact that a blood-stained *daa* was recovered on the very date of the incident from a jungle by the side of the house of the appellant. This is clear from the evidence of PW-14, the I.O., who had said that after the appellant was interrogated he took him to the jungle by the side of his house and he drew one *daa* from that jungle and the *daa* was blood-stained at that time and he seized a *daa* from him and prepared a seizure list in the presence of the witnesses, which is marked as Ext.6. The medical evidence of PW-10 (the doctor who carried out post mortem) does not also contradict the evidence of PW-2 that the appellant struck the deceased on her head, back, fingers and her throat. PW-10 has stated that there were

A sharp cutting injuries on the left side of neck, left cheek, both the upper arms and left thumb and the injures were *ante-mortem* in nature and are 100% sufficient for causing death of the victim and a sharp cutting weapon has been used to cause the injuries. [Para 9] [896-E-H]

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3. There is no merit in the submission of the appellant that the Magistrate before whom the statement under Section 164 Cr.P.C. was recorded has not been examined because the conviction of the appellant is based not on the statement of PW-2 recorded under Section 164 Cr.P.C.
C but on the evidence of PW-2 examined as a witness before the Court at the time of trial. In other words, even if the statement of PW-2 recorded under Section 164 Cr.P.C. is excluded from consideration, the offence is proved against the appellant by the substantive evidence
D of PW-2 and the evidence of PW-1, PW-8, PW-11 and by the fact of recovery of a *daa* at the instance of the appellant. Similarly, there is no merit in the contentions of the appellant that PW-3, PW-4, PW-5, PW-6, PW-7 and PW-9 do not support the prosecution case and that the
E FSL Report was not collected from the Forensic Science Laboratory if the guilt of the appellant is established beyond reasonable doubt through the evidence of PW-1, PW-2, PW-8, PW-11 and Ex.6. One cannot also draw any adverse inference from the fact that the granduncle
F of PW2, was not examined, as he was neither the eyewitness nor the complainant and was in fact not in the same house where the incident occurred as would be clear from the evidence of PW-2. [Para 10] [897-A-E]

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4. The High Court is right in sustaining the conviction of the appellant on the basis of the eyewitness account of PW-2 and the evidence of PW-1, PW-8 and PW-11 as well as the recovery of the *daa* under Ext.6 at the instance of the appellant. [Para 11] [897-F]

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Case Law Reference:

1994 SCC (Cri) 1418	**distinguished**	**Para 5**
2011 (5) SCR 1	**cited**	**Para 6**
2007 (5) SCR 832	**cited**	**Para 6**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 405 of 2008.

From the Judgment & Order dated 18.7.2006 of the High Court at Calcutta in C.R.A. No. 446 of 2004.

R.K. Gupta, S.K. Gupta, M.K. Singh, Shekhar Kumar for the Appellant.

Chanchal Kr. Ganguli, Abhijit Sengupta, Raja Chatterjee, Sampa Sengupta Ray for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. This is an appeal by way of special leave under Article 136 of the Constitution of India against the judgment dated 18.07.2006 of the High Court of Calcutta in C.R.A. No.446 of 2004 sustaining the conviction and sentence of life imprisonment on the appellant under Section 302 of the Indian Penal Code (for short 'the IPC') imposed by the Fast Track Court, Cooch Behar, in Sessions Case No.142 of 2002 (S.T. No.1(3)2002).

2. The facts very briefly are that one Puspa Nandi lodged a complaint before the Inspector-in-charge, Kotwali P.S., that on 23.02.2002 at about 10.00 a.m. she went to Nayarhat to purchase some ration and there she heard that her daughter-in-law Pratima Nandi had been murdered. She rushed to her house and saw that Pratima was lying dead at the southern side of her house and when she enquired, her grand daughter, Manika, told her that the appellant entered into their house with

A a big *daa* and killed her mother Pratima. The complaint was registered as an FIR and the appellant was arrested on 23.02.2002 and the *daa* alleged to have been used in killing the deceased was recovered from a jungle at the side of the house of the appellant. On 25.02.2002, the statement of Manika
B was recorded by a Magistrate under Section 164 of the Criminal Procedure Code (for short 'the Cr.P.C.'). The *post-mortem* was carried out by Dr. V. Kumar and after investigation, charge-sheet was filed against the appellant under Section 302 of the IPC and trial was conducted.

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3. Manika, who was aged only eight years at the time of trial, was examined as PW-2 and she gave a vivid account of how her mother Pratima was killed by the appellant with a *daa*. PW-1 (the complainant and the mother-in-law of the deceased), PW-8 (a resident of village Sajerpar in which the house of the
D deceased is located) and PW-11 (the husband of the deceased) who had heard soon after the incident from PW-2 that the appellant had killed the deceased with a *daa*, also supported the prosecution case. PW-3, PW-4 and PW-5, who were residents of village Sajerpar, however, turned hostile and
E said that they have not given any statement to the Police on how the deceased was murdered. PW-6, who was alleged to have scribed the FIR, also turned hostile saying that he had written the FIR on instructions from the Police, but he did not know the complainant PW-1. PW-7, who was a resident of
F village Sajerpar, said that he knew neither the appellant nor the deceased. PW-9, who was also a resident of the village Sajerpar, deposed that she did not know how the deceased was murdered. Dr. V. Kumar, who carried out the *post-mortem*, was examined as PW-10 and he described the injuries on the
G body of the deceased and opined that the injuries could be caused by a sharp-cutting weapon and the injuries are 100% sufficient for causing death of the victim. PW-12 is the Officer-in-charge of Kotwali P.S. and he received the complaint of PW-1 and entrusted the investigation to S.I. D. Jha. PW-13 is the
H constable of Kotwali P.S. who took the dead body of the

deceased to Sadar Hospital for *post-mortem*. PW-14 is S.I. D. Jha, the Investigating Officer, and he has said that the appellant took him to the jungle by the side of his house and he brought out one *daa* from the jungle which was blood-stained at that time and he seized a *daa* from him and prepared a seizure list (Ext.6) in the presence of the witnesses. PW-15 is S.I. D. Bhowmick to whom further investigation was entrusted and who after further investigation submitted the charge-sheet. On the basis of the evidence, the trial court convicted the appellant under Section 302, IPC. Thereafter, the trial court heard the appellant on the question of sentence and considering his age and other related factors, sentenced him to rigorous imprisonment for life.

4. The appellant carried an appeal to the High Court, but the High Court was of the view that the evidence of PW-2 as corroborated by the evidence of PW-1, PW-8 and PW-11 together with the fact of recovery of the *daa* (material Ext.1) at the instance of the appellant and its seizure under Ext.6 soon after the incident had established that the appellant was guilty of the offence of murdering the deceased.

5. Learned counsel for the appellant submitted that the conviction of the appellant is based on the sole testimony of a child witness PW-2. Relying on the decision of this Court in *Arbind Singh v. State of Bihar* [1994 SCC (Cri) 1418], he submitted that where the entire case is based on the evidence of a child witness, who is prone to tutoring, the conviction is not safe. He further submitted that the Magistrate before whom the statement under Section 164 of the Cr.P.C. was recorded has not been examined. He also submitted that Anath De, the granduncle of PW-2, who was present in the house, has also not been examined. He argued that PW-3, PW-4, PW-5, PW-6, PW-7 and PW-9 have all turned hostile and not supported the prosecution case. He submitted that PW-1 has also deposed that he wrote the FIR on the direction of the Police. He finally submitted that from the evidence of PW-15, the I.O.,

A who carried out the further investigation, it is clear that the blood-stained *daa* was sent for examination to the Forensic Science Laboratory (FSL) but the FSL report has not been produced before the Court. He submitted that the prosecution has, therefore, not been able to prove that the appellant has
B committed the murder of the deceased beyond reasonable doubt.

6. Learned counsel for the respondent, on the other hand, submitted that in *State of Madhya Pradesh v. Ramesh & Anr.* [(2011) 4 SCC 786] this Court has held that in case the
C deposition of a child witness inspires confidence, the Court may rely upon his evidence. He submitted that there is no reason to think that PW-2 was tutored to give her evidence against the appellant. He submitted that in any case, as has been found by the High Court, the evidence of PW-2 is corroborated by the
D evidence of PW-1, PW-8 and PW-11. He submitted that the *daa*, with which the deceased was killed by the appellant, was also recovered at the instance of the appellant from a jungle by the side of the house of the appellant as per seizure list (Ext.6). He argued that since the prosecution has proved by the
E evidence of PW-2 as corroborated by the evidence of PW-1, PW-8 and PW-11 and Ext.6 that the appellant had committed the murder of the deceased, he cannot be acquitted only on the ground that some of the prosecution witnesses have turned hostile and have not supported the prosecution case. He
F argued that the fact that the FSL report was not collected from the FSL may be a defect in the investigation but a defect in investigation cannot result in acquittal of an accused against whom enough evidence is available for conviction. In support of this proposition, he relied on the decision of this Court in
G *Ramappa Halappa Pujar & Ors. v. State of Karnataka* [(2007) 13 SCC 31].

7. We have perused the decision of this Court in *Arbind Singh v. State of Bihar* (supra) cited by learned counsel for the appellant and we find that in that case the Court took the view
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that implicit faith and reliance could not be placed on the evidence of a child witness as there were variations in her statement recorded on 25.10.1984, 28.10.1984 and 05.11.1984 and there were traces of tutoring on certain aspects of the case and it was not corroborated by any independent and reliable evidence. In the present case, on the other hand, we find that PW-2 had answered the first few questions put by the court very smartly and intelligently and the Court has made a mention while recording her evidence that she could become a witness in this case. That apart, she has given a very natural account of how the appellant killed her mother. The relevant portion of the evidence of PW-2 is extracted hereinbelow:

> "On 10th Falgun, Saturday at around 10.00 Hrs. she was killed by a person. Promode Dey killed my mother by striking on her head, back, fingers and throat with a Dao. I know that Promode Dey. He is now standing inside the Court room.
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> At the time of incident my mother Pratima Nandi was making bidi sitting in the courtyard of our house. I was sitting just beside her. That time Promode Dey came to that place and asked my mother as to why my mother gave him medicine. Promode Dey told my mother "you have tried to kill me by medicine. I shall kill you." By saying so Promode Nandi hit my mother's head with a Dao. My mother thus fled away and entered into our room. Promode Dey broke the said door and entered into that room and again hit my mother with Dao. Then my mother came out of that room and accused Promode Dey followed her and came out of that room and again assaulted her with Dao. Then my mother again ran and thereafter fell on the ground. The accused hit my mother on her throat with Dao and the major portion of her throat was thus out and only a remaining portion of the head was still attached with the neck. I have seen the entire incident. That time, I shouted

A to call my grand mother but none came at my shouting. In the meantime Promode Dey returned to his house along with Dao.

8. Moreover, soon after the incident on 23.02.2002 she has told her grandmother (PW-1) and her father (PW-11) that it was the appellant who had killed the deceased and both PW-1 and PW-11 have deposed before the Court in their evidence that they have been told by PW-2 that the appellant had killed the deceased with a *daa*. PW-8, who was a resident of the area, has also stated in his evidence that soon after the incident he had heard PW-2 saying that the appellant had killed the deceased. Moreover, two days after the incident on 25.02.2002 she had given a statement before the Magistrate under Section 164, Cr.P.C., that the *Panchayat*, namely, the appellant, had killed the deceased by a *daa*. Thus, right from the time of the incident till the time she was examined in court, PW-2 has consistently said that the appellant had killed the deceased with the *daa*. We cannot, therefore, hold that PW-2 has been tutored to depose against the appellant.

9. The evidence of PW-2 is also corroborated by the fact that a blood-stained *daa* was recovered on the very date of the incident from a jungle by the side of the house of the appellant. This is clear from the evidence of PW-14, the I.O., who had said that after the appellant was interrogated he took him to the jungle by the side of his house and he drew one *daa* from that jungle and the *daa* was blood-stained at that time and he seized a *daa* from him and prepared a seizure list in the presence of the witnesses, which is marked as Ext.6. The medical evidence of PW-10 does not also contradict the evidence of PW-2 that the appellant struck the deceased on her head, back, fingers and her throat. PW-10 has stated that there were sharp cutting injuries on the left side of neck, left cheek, both the upper arms and left thumb and the injures were *ante-mortem* in nature and are 100% sufficient for causing death of the victim and a sharp cutting weapon has been used to cause the injuries.

10. We do not find any merit in the submission of the learned counsel for the appellant that the Magistrate before whom the statement under Section 164 Cr.P.C. was recorded has not been examined because the conviction of the appellant is based not on the statement of PW-2 recorded under Section 164 Cr.P.C. but on the evidence of PW-2 examined as a witness before the Court at the time of trial. In other words, even if the statement of PW-2 recorded under Section 164 Cr.P.C. is excluded from consideration, the offence is proved against the appellant by the substantive evidence of PW-2 and the evidence of PW-1, PW-8, PW-11 and by the fact of recovery of a *daa* at the instance of the appellant. Similarly, we do not find any merit in the contentions of the learned counsel for the appellant that PW-3, PW-4, PW-5, PW-6, PW-7 and PW-9 do not support the prosecution case and that the FSL Report was not collected from the Forensic Science Laboratory if the guilt of the appellant is established beyond reasonable doubt through the evidence of PW-1, PW-2, PW-8, PW-11 and Ex.6. We cannot also draw any adverse inference from the fact that Anath Dey, the granduncle of Manika, was not examined, as he was neither the eyewitness nor the complainant and was in fact not in the same house where the incident occurred as would be clear from the evidence of PW-2.

11. In our considered opinion, the High Court is right in sustaining the conviction of the appellant on the basis of the eyewitness account of PW-2 and the evidence of PW-1, PW-8 and PW-11 as well as the recovery of the *daa* under Ext.6 at the instance of the appellant. The impugned judgment of the High Court is, therefore, sustained and the appeal is dismissed.

B.B.B. Appeal dismissed.