IN THE HIGH COURT OF JUDICATURE AT PATNA

Prabha Devi
vs.
The State of Bihar

CRIMINAL APPEAL (DB) No.731 of 2015

11 April 2025

(Hon'ble Mr. Justice Mohit Kumar Shah and Hon'ble Justice Smt. Soni Shrivastava)

Issue for Consideration

Whether the impugned judgment of conviction of Appellants for offence of murder is sustainable or not?

Headnotes

Indian Penal Code---section 302---Appeal against conviction for the offence of murder---Eyewitness testimony---Evidentiary value of Child witness testimony--Non-examination of I.O.---Motive for Occurrence--Appreciation of Evidence.

***Held*:** neither the formal FIR nor the seizure list attached to the same have been exhibited and this is precisely due to the reason that the I.O. has not come to depose as a witness----in absence of examination of the I.O., no contradiction could be drawn with regard to the statements of the prosecution witnesses made during investigation and authenticity of all the documentary evidences right from the FIR to the seizure list and the inquest report gets severely and adversely affected, hence they are not proved---prosecution has not come out with any special reason as to why the accused/appellant would make such a ghastly attack on the deceased, to almost severing the neck of the deceased from his body---entire prosecution rests on the sole testimony of a child witness who makes substantial and unignorable improvements and embellishments in the manner of occurrence during the course of trial and also introduces a motive which stood absent in his earliest statement being the *fardbeyan* of the present case---valuation of

the evidence of a child witness must be done with greater care and caution as a child witness is easy prey to tutoring---the trial court must record its satisfaction that the minor is able to understand the questions put to the witness who is able to respond and provide rational answers to the questions asked---child witness in the present case has only been asked as to whether he knows how to read to which he has responded in the affirmative and then he was made to read the oath with no related question as to whether he understands the contents of the oath---- learned trial court has not even taken the pains of asking a few more relevant questions to assess the capability of this witness, nor any demeanour of the witness has been recorded anywhere during the course of recording of his deposition----child witness upon whose testimony the entire prosecution rests, has not been able to pass the test of the two conditions laid down by the Hon'ble Apex Court which are (i) Possibility/opportunity of the witnesses to be tutored and (ii) Reasonable likelihood of tutoring---it is a settled law that evidence has to be weighed and not counted and that conviction can be based upon the testimony of a single eye witness, if the witness passes the test of reliability---in the present context, the only eye witness (PW-4) has made vital omissions, his *fardbeyan* was recorded after more than 16 hours of the occurrence and he has further cogitated stories during trial, introducing new facts and attributing new roles to people in his testimony, which virtually amounts to creation of a new story---the large mental distance between "may be true" or "must be true", must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, which does not seem to have been bridged/traversed in the instant case---impugned judgment of conviction set aside---appeal allowed. (Para-34-36, 39, 45, 47, 51, 54-58)

Case Law Cited

Lahu Kamlakar Patil and anr. vs. State of Maharashtra, **(2013) 6 SCC 417;** Bhagwan Singh and others vs. State of M.P., **(2003) 3 SCC 21;** Panchhi v. State of U.P., **(1998) 7 SCC 177;** Digamber Vaishnav and anr. vs. State of

Chhattisgarh, **(2019) 4 SCC 522;** K. Venkateshwarlu v. State of A.P., **(2012) 8 SCC 73;** Pradeep vs. State of Haryana, **2023 SCC Online SC 777;** State of U.P. v. Babu Ram, **(2000) 4 SCC 515;** Munshi Prasad v. State of Bihar, **(2002) 1 SCC 351;** State of Madhya Pradesh Vs. Balveer Singh, **2025 SCC OnLine 390**-Relied Upon.

List of Acts

Indian Penal Code; section 302; Code of Criminal Procedure; section 374(2), 389(1), 161, 313, 319; Indian Evidence Act; section 134, 118.

List of Keywords

Appeal Against Conviction; Murder; Eyewitness Testimony; Child Witness; Motive of occurrence; Non-examination of I.O.; Delay in lodging fardbayan; Appreciation of Evidence; Failure to mark exhibit; Benefit of Doubt.

Case Arising From

Judgment and order of conviction and sentence dated 29.06.2025 passed by the court of learned Additional District and Sessions Judge-III, Purnea in Sessions Case No.1074 of 2007.

Appearances for Parties

For the Appellant/s: Mr. Amresh Kumar Sinha, Advocate; Mr. Saroj Kumar Chaudhary, Advocate
For the Respondent/s: Ms. Shashi Bala Verma, APP

Headnotes Prepared by Reporter: Ghanshyam, Advocate

Judgment/Order of the Hon'ble Patna High Court

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.731 of 2015

Arising Out of PS. Case No.-27 Year-2007 Thana- ANGARH District- Purnia

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Prabha Devi wife of Madan Lal Harijan Resident of Village -Bigbar, P.s Angarh, District Purnea.

... ... Appellant/s

Versus

The State Of Bihar

... ... Respondent/s

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Appearance :
For the Appellant/s : Mr. Amresh Kumar Sinha, Advocate
Mr. Saroj Kumar Chaudhary, Advocate
For the Respondent/s : Ms. Shashi Bala Verma, APP

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CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH
and
HONOURABLE JUSTICE SMT. SONI SHRIVASTAVA

CAV JUDGMENT

(Per: HONOURABLE JUSTICE SMT. SONI SHRIVASTAVA)

Date : 11-04-2025

The present appeal under Section 374(2) read with Section 389(1) of the Code of Criminal Procedure Code, 1973 (hereinafter referred to as the 'Cr.P.C.) has been preferred against the judgment and order of conviction and sentence dated 29.06.2025 passed by the court of learned Additional District and Sessions Judge-III, Purnea in Sessions Case No.1074 of 2007, arising out of Rauta (Angarh) P.S. Case No.27 of 2007 dated 27.06.2007, whereby and whereunder the sole appellant has been convicted under Section 302 of the Indian Penal Code (hereinafter referred to as the 'IPC') and she has been sentenced

to undergo rigorous imprisonment for life with fine of Rs.50,000/- and in default thereof she has been directed to undergo simple imprisonment for six months.

2. The short facts of the case arising out of the First Information Report based on the fardbeyan of the informant Prem Lal Harijan (PW-4) recorded on 27.06.2007 at 10.30 AM, is that on 26.06.2007, the informant had gone to Majhgawan haat (market) along with his father Mahesh Lal Harijan (deceased) at 4.00 PM and his father after taking kerosene oil from the dealer, gave it to the informant and asked him to wait while he would go and get fish. It is alleged that after some time the father of the informant gave the fish to him and asked him to go to his house and also asked him to sell wheat and bring spices and other articles, whereafter the informant came back to his home with the fish, and went again to the village for selling the wheat at the shop. Meanwhile, the appellant and his father came together near the shop and the appellant Prabha Devi entered into a quarrel with the father of the informant and also tore his *Lungi*, whereupon the informant ran to the house of appellant Prabha Devi and informed her husband Chowkidar Madan Lal Harijan about the said quarrel and asked him to get the fight resolved, however, the later did not pay heed to his

request. The informant has further stated in his fardbeyan that while he was taking the *Lungi*, his father and Prabha Devi had both come to the house of Prabha Devi, where he saw his father sitting along with Madan Lal and in the meantime, Prabha Devi got a sword from the house and gave a blow on the neck of the father of the informant twice, owing to which, the neck of the father of the informant got cut and he fell down. It is further stated that the informant rushed to his house and informed about the incident to his mother whereupon his mother started weeping and screaming and other villagers also came to the place of occurrence. The informant has stated in his fardbeyan that the occurrence took place around 5.45 PM. The fardbeyan was read over to the informant, which he had understood and finding the same to be correct, he had made his signature over the same in front of two witnesses (not examined).

3. On the basis of the aforementioned fardbeyan, a formal FIR bearing Rauta (Angarh) P.S. Case No.27 of 2007 was instituted on 27.06.2007 at 3.00 PM under Section 302 of the IPC against the sole accused being the present appellant. After investigation and finding the case to be true qua the appellant, the police had submitted charge-sheet against the appellant under Section 302 of the IPC on 27.08.2007. The

learned court of C.J.M., Purnea had taken cognizance of the offence under Section 302 of the IPC vide order dated 26.10.2007. The case record was committed to the court of Sessions on 30.11.2007 and accordingly Sessions Case No.1074 of 2007 was instituted, whereafter the charges were framed by the learned trial court on 04.01.2008 under Section 302 of the IPC against the appellant to which he pleaded not guilty and claimed to be tried.

4. The prosecution, in order to substantiate its case, examined five witnesses during the course of trial, they being, PW-1 Pandit Lal Harijan (co-villager and cousin brother of the deceased), PW-2 Anti Lal Harijan (co-villager), PW-3 Jag Lal Harijan (brother of the deceased), PW-4 Prem Lal Harijan (son of the deceased as also the informant) and PW-5 Dr. C.M. Singh, who had conducted the postmortem examination of the dead body of the deceased. The Investigating Officer (hereinafter referred to as 'I.O.') of the case, has however not been examined.

5. The defence has also examined one witness in its favour, being Premwati, as DW-1 who happens to be the wife of the deceased and mother of the informant.

6. Mr. Amresh Kumar Sinha, learned counsel for the

appellant has submitted that the prosecution case is full of inconsistencies, embellishments and contradictions and has not been proved beyond reasonable doubt. It has been most emphatically contended that the entire prosecution case rests on the testimony of solitary eye witness and the alleged eye witness is a ten years old boy, who being a minor, has been tutored to give the version which he has stated in his fardbeyan as also during the trial, hence is not a reliable witness. With regard to evidence of this witness i.e. the informant (PW-4), it has been submitted that he has made a departure in his deposition during the course of trial from his initial statement made in the fardbeyan. With regard to the place of occurrence, the informant has stated in his fardbeyan that the first part of the occurrence i.e. quarrel took place in front of the shop whereas the actual act of assault took place inside the house of the appellant Prabha Devi, however, he has not specifically stated as to in which part of the house the occurrence actually happened. Nonetheless, in his evidence, PW-4 Prem Lal Harijan has categorically mentioned in paragraph 23 of the evidence that blood-stained mat (chatai) was found at the verandah of the house of Prabha Devi (appellant). It has also been submitted by the learned counsel for the appellant that the manner of occurrence as

narrated in the FIR is quite different from what has transpired subsequently, during the course of the trial, inasmuch as the informant has introduced the role of the husband of the appellant Prabha Devi in paragraph 20 of his deposition and added that it was the husband of the appellant who got up on the chest of the deceased and thereafter, the appellant Prabha Devi gave the sword blow on the neck of the deceased. The story of the informant's father (deceased) coming back home after quarrel with the appellant and after having food, being called by the appellant to her house through her husband Madan Lal, also surfaces during the course of trial which was missing in the fardbeyan and such vital omissions impeaches the credibility of the informant (PW-4) as an eye witness.

7. Learned counsel for the appellant further submits that so far as the motive or cause of dispute is concerned, the fardbeyan is completely silent over the same and the reason has subsequently been developed during the course of trial by introducing the fact that the appellant was asking for Rs.8,000/- from the deceased which he denied to give. Considering such discrepant statement of the informant who is said to be the sole eye witness and also a minor, it is submitted by learned counsel for the appellant that he is not at all trustworthy and it would be

unsafe and disastrous to arrive at a conclusion of guilt relying upon the testimony of this witness.

8. The contention with regard to other witnesses who have been examined during the course of trial, is that they are not the eye witnesses of the occurrence and on recall they have all stated that they came to know about the occurrence two days after the occurrence. It has also been submitted that the statement of the defence witness, who happens to be the wife of the deceased, demolishes the entire prosecution case. Learned counsel for the appellant has also pointed out towards the deposition of the informant (PW-4) in the separated sessions trial being SST 1074 of 2007 which has been marked as Exhibit-B on behalf of the defence, a perusal whereof would show that this witness has given a complete go-bye to the story propounded by him in the present trial and has rather stated that he was in his house at the time of occurrence and when he went to the house of the appellant Prabha Devi, he found his father dead with cut injury on his neck. It has also been pointed out that in cross-examination, the informant has stated that the I.O. has taken his statement on a plain paper. The judgment of acquittal passed in the separated sessions trial, marked as Exhibit -A on behalf of the defence, has also been brought to

our notice.

9. Learned counsel for the appellant has also questioned the sustainability of the judgment and order of conviction and sentence on the issue that the I.O. of the case has not been examined and his non-examination has caused extreme prejudice to the defence.

10. Per contra, Ms. Shashi Bala Verma, learned APP for the State has submitted that the facts and circumstances of the case do not warrant interference by this Court against the impugned judgment as there is direct and specific allegation of administering sword blow on the neck of the deceased by the present appellant Prabha Devi. She has also submitted that the informant (PW-4) happens to be the son of the deceased and there appears to be no reason why he would falsely implicate someone and would let the actual assailant go scot-free. It has also been submitted before us that the informant (PW-4), despite the fact that he is a minor, appears to be a totally trustworthy witness as he has supported his version given in the farbdeyan during his deposition in the trial substantially. It has been stated that there may be some minor discrepancies or exaggerations but the same would not go to the root of the case. It has also been submitted by the learned counsel for the State that the

place of occurrence stands proved as it has been consistently stated by all the witnesses that the dead body was found at the house of the appellant immediately after the occurrence. The version of the informant (PW-4) also stands supported by the evidence of PW-1 and PW-2 who had immediately reached the place of occurrence upon hulla (alarm) raised by the informant. However, in response to the submission of learned counsel for the appellant that on recall these witnesses have given the statement contrary to their examination-in-chief, the learned counsel for the State points out that the said recall was done after more than three years which creates a doubt on the veracity of these witnesses. The existence of motive has also been said to be proved from the evidence of the witnesses. It has been further submitted by the learned counsel for the State that the murder weapon i.e. sword was also recovered from beneath the bed/mattress of the appellant Prabha Devi from her house and further the medical evidence fully corroborates the oral account as given by the prosecution.

11. Besides hearing learned counsel for the parties, we have minutely perused the evidence both oral and documentary. Before proceeding further, it is necessary to cursorily discuss the evidence.

12. PW-1 (Pandit Lal Harijan) is the cousin brother of the deceased and has given a hearsay account of the occurrence. It has been stated by him that the occurrence happened 15 to 16 months earlier at around 5.45 in the evening while he was at his home and he came to the place of occurrence on hulla (alarm) raised by the informant Prem Lal Harijan (PW-4) and found the dead body of Mahesh Lal Harijan in the verandah of the house of the appellant. He has further stated that the informant (PW-4) told him that the appellant had committed the murder of the deceased. It has been further stated by this witness that the neck of the deceased was cut and was only attached to the body from the right side. He got to know that the cut injury was made by a sword. He further states that he informed the Mukhiya, Sarpanch etc. at the instance of Madan Lal Chowkidar who is the husband of the appellant and also sent information to the police station through another person. This witness identified the appellant in the court and further states that the police had come and prepared the inquest report upon which he had made his impression. It has also been stated by him that the I.O. recovered a sword from beneath the mattress/bed of the appellant Prabha Devi and also that the I.O. sent him for getting the postmortem done. So far as cross-examination of this

witness is concerned, it appears that on the said date i.e. 11.09.2008 no cross-examination was done despite repeated calls to the concerned Advocate of the appellant, this witness was discharged. It would further appear that more than three years after the date of discharge of this witness, the witness was once again recalled vide order dated 08.11.2011 and cross-examined on 16.11.2011 and his statement was taken on fresh oath by the defence wherein the witness has stated that he came to know about the occurrence two days after the occurrence.

13. PW-2, Anti Lal Harijan is a labour of the appellant as also a hearsay witness. In his examination-in-chief, this witness has stated that the occurrence happened one year back between 5.30 to 5.45 PM while he was at his home. He states that his house is adjacent to the house of the appellant Prabha Devi and he came to her house upon hulla (alarm) raised and upon going there he was informed by the informant (PW-4) that the appellant Prabha Devi had cut the deceased by means of sword and had fled away. He also makes a statement that the occurrence had happened at the verandah of the appellant and upon arrival of the police, document/requisition was made for postmortem whereupon his impression as also impression of PW-1 was taken. In paragraph 3 of his deposition, he states that

the police had recovered sword from the house of the appellant Prabha Devi and has further stated that he identifies the appellant and the dead body was sent for postmortem. It would also appear from the evidence of PW-2 that more than three years after the date of discharge of this witness, this witness was also recalled vide order dated 08.11.2011 and cross-examined on 16.11.2011 and his statement was taken on fresh oath by the defence wherein the witness has stated that he came to know about the occurrence two days after the occurrence.

14. PW-3, Jag Lal Harijan, brother of the deceased, is also a hearsay witness. In his examination-in-chief, this witness has admitted that the deceased Mahesh Lal Harijan was his brother and his murder had happened 16 months earlier at around 6.00 PM while he had gone at a distance of around 20 Bighas from his house for getting food for cattle. Upon alarm raised by the informant (PW-4) to the effect that his father had been killed, he went to the courtyard of the appellant Prabha Devi to find that that the neck of the deceased was cut and his nephew (PW-4) informed him that the appellant Prabha Devi had committed the murder by means of sword and had fled away. He has further stated that the police had come on the following day upon information and recovered a bloodstained

sword from beneath the mattress/bed of the appellant Prabha Devi. The police took the statements of his nephew i.e. the informant along with his statement and sent the dead body for postmortem to Purnea. He claims to have identified the appellant in court. In his cross-examination, this witness has expressed his ignorance about the issue of quarrel between the appellant and the deceased. He has further stated that when he reached the courtyard, he saw the dead body of the deceased with the neck of the body separated from the trunk and that the body was in two parts. This witness has further stated that when he reached the place of occurrence, he found that around 100-150 people had assembled at the place of occurrence and had taken the names of some witnesses. It has been further stated that on the next day of the occurrence, police had arrived in between 10.30 to 10.45 AM, while he was present at the place of occurrence and had taken the statement of Ram Prasad Chowkidar, the brother of the appellant Prabha Devi and had also made some enquiry from his nephew i.e. the informant. He has further stated that after one hour, the body was sent for postmortem and this witness gave his impression on the document that was prepared by the police of the dead body and this witness also went to Purnea along with the dead body for

postmortem examination of the same.

15. We now advert to the evidence of Prem Lal Harijan, the son of the deceased, who has been examined as PW-4 and who has given an eye witness account of the occurrence. Before recording his evidence, the preliminary questions have been asked by the court to him and he has answered the same and has also read the oath. In his examination-in-chief, this witness has initially reiterated the facts as disclosed in the FIR, however, subsequently it is stated that he went to the house of the appellant and informed her husband Madan Lal Harijan about the quarrel between the appellant Prabha Devi and his father. It has been further stated that Prabha Devi sent her husband to call his father and upon the same his father went to the courtyard of Prabha Devi and this witness also went along with him. PW-4 has further stated that the husband of the appellant Madan Lal Harijan asked his father in the courtyard at the behest of Prabha Devi as to when he would give the money to which his father responded that he did not have the money and it may be taken on Sunday. Prabha Devi insisted that the money be paid immediately to which the informant's father responded that she should have earlier told about it and started leaving the place whereafter, Madan Lal

Harijan, the husband of the appellant, administered two lathi blows on his father due to which he fell down and Madan Lal Harijan then climbed up on his chest and thereafter, Prabha Devi dealt three sword blows upon the neck of his father, as a consequence of which the neck was cut and only some part remained attached to the body. The informant raised hulla (alarm) and his mother became unconscious seeing this and the informant also subsequently became unconscious. It has been stated that the police arrived on the next day at 11.00 AM and took his statement as also recovered a blood-stained sword from beneath the mattress/bed of the appellant Prabha Devi. The informant states that he had made his signature on the fardbeyan, which he had identified and the same has been marked as Exhibit-1. This witness has also stated that police made the document of recovery of sword. He has identified the appellant standing in the dock. In cross-examination, this witness has stated that Prabha Devi is his mother and Jag Lal Harijan is his uncle with whom he had come to the court and he has also stated that his mother was ill and denied any tutoring by his uncle. In paragraph no. 8 of his cross-examination, this witness has stated that he did not go home after selling the wheat and had seen the quarrel taking place in between his

father and Prabha Devi. He further states that he had gone to his house, where he saw that quarrel was taking place in between his father and the appellant Prabha Devi was asking for Rs.8,000/- from the deceased, to which his father was expressing his inability to give the same and was saying that he would be able to give the same on Sunday. This witness has further stated that his father came back home from there and after he had taken his food, the appellant Prabha Devi had sent her husband to call the father of the informant and he also demanded for the money. It has further been stated that Madan Lal Harijan climbed up onto the chest of the deceased, while the appellant Prabha Devi had given sword blow on the neck of his father. This witness states that his statement was taken by the police one day after the occurrence, wherein he had narrated the factum of Madan Lal Harijan climbing up on the chest of his father and the demand of Rs.8,000/- having been made by Prabha Devi (appellant). Further in paragraph 23 of his cross-examination, this witness has stated that the blood-stained chatai (mat) on which the deceased was sitting, was not seized by the police. This witness has further stated that he had raised alarm that his father was going to be assaulted and upon such hulla Anti Lal Harijan (PW-2) arrived first at the place of occurrence

followed by Pandit Lal Harijan (PW-1) and Jag Lal Harijan (PW3) and others. This witness has also stated that he fell unconscious and regained consciousness at 12.00 in the midnight at his house and found himself lying along with his mother.

16. Dr.C.M. Singh (PW-5) is the doctor who has conducted the postmortem examination of the dead body of the deceased on 28.06.2007, when he was posted as Medical Officer at Sadar Hospital, Purnea and he found the following ante-mortem injuries:-

> "(i) On external examination rigour mortis present in all four limbs. Incised cut wound of whole neck with all structure, only attached with back of neck."

17. PW-5 has stated that time elapsed since death was within 24 hours and the cause of death is due to hemorrhage and shock on account of the neck injury caused by sharp cutting weapon. This witness has identified his signature on the postmortem report which has been marked as Exhibit-2. In his cross-examination, this witness has stated that he has not mentioned the size of injury in the postmortem report and has further stated that the injury on the neck may be caused by a straight sharp cutting weapon like sword.

18. After closing the prosecution evidence, the learned

trial court recorded the statement of the appellant Prabha Devi under Section 313 Cr.P.C. on 31.07.2012 for enabling her to personally explain the circumstances appearing in the evidence against her, however, she has not given any explanation and has only denied the allegations.

19. One witness has also been examined on behalf of the defence, Premwati, who is the wife of the deceased and the mother of the informant. This witness has stated in her examination-in-chief that her husband Mahesh Lal Harijan died five years back and on the date of his death, he had gone to Majgawan Hatia along with their son Prem Lal Harijan (PW-4) from where their son Prem Lal Harijan came back home and in the evening she heard that her husband has fallen on the road whereafter she, along with her son, Prem Lal Harijan (PW-4), went there and found her husband lying dead on the road. She further states that she had no knowledge as to who killed her husband. She has further stated in paragraph 2 of her examination-in-chief that she knows Prabha Devi and has cordial relations with her as also has the relationship of sister with her. She has further made a categorical statement that Prabha Devi did not kill her husband. In her cross-examination, this witness has stated that her son Prem Lal Harijan (PW-4)

was informed of the occurrence by the people and when she had gone to the place of occurrence she found that neck of her husband was hanging from the trunk. She has also stated that place of occurrence is a residential area and the house of the accused persons is also situated there.

20. The defence, besides the oral evidence of the above-mentioned witness, has also brought on record two documents. Exhibit-A is the certified copy of the judgment dated 19.12.2011 passed in SST no. 1074 of 2007 and Exhibit-B is the certified copy of the deposition of PW-4 Prem Lal Harijan recorded in SST no.1074 of 2007.

21. The Ld. Trial Court, upon appreciation, analysis and scrutiny of the evidence adduced at the trial has found the aforesaid appellant guilty of the offences and had sentenced her to imprisonment and fine, as noted above, by its impugned judgment and order.

Analysis and consideration

22. We have perused the impugned judgment of the learned trial court, the entire materials on the record and have given thoughtful consideration to the rival submissions made by the learned counsel for the appellant as well as the learned APP for the State.

23. The contents of the FIR have already been dealt with in detail earlier and a perusal of the same in nutshell, would indicate that son of the deceased Prem Lal Harijan is the informant and solitary eye witness to the occurrence. He has categorically stated in the FIR that he saw his father (deceased) sitting with Madan Lal Harijan (husband of the appellant) and in the meantime, the appellant Prabha Devi brought a sword from her house and dealt two blows on the neck of the deceased which led to his death with cut injury on his neck. It would be worth noting here that while the signature of the informant (PW-4) has been marked as Exhibit-1, neither the formal FIR, nor the seizure list appended therewith, has been proved by the prosecution

24. On going through the discussions made here-in-above in the preceding paragraphs, it would appear that out of the five witnesses examined by the prosecution in its favour, PW-4 Prem Lal Harijan, is the sole eye witness of the occurrence in question while PW-1, Pandit Lal Harijan, PW-2 Anti Lal Harijan and PW-3 Jai Lal Harijan are the witnesses who had reached the place of occurrence after the occurrence, upon hulla (alarm) being raised by the informant (PW-4). It would be apparent from the testimony of the witnesses that the

informant (PW-4) has tried to support the case of the prosecution but the question of his evidence being wholly acceptable, in the backdrop of his tender age, the delay in recording of his fardbeyan and other discrepancies and infirmities that have crept in his evidence, calls for a careful scrutiny of his evidence. So far as the other three witnesses PW-1, Pandit Lal Harijan, PW-2 Anti Lal Harijan and PW-3 Jag Lal Harijan lending support to the prosecution case on the basis of their hearsay account of the occurrence is concerned, it is true that they have supported the fact that the dead body of the deceased was found in the verandah/courtyard of the house of the appellant Prabha Devi and they had all reached the said place of occurrence upon hulla (alarm) raised by the informant (PW-4), who had then narrated the occurrence before them. Besides, these witnesses also stand in support of the fact that a blood-stained sword was recovered from beneath the mattress/bed of the appellant Prabha Devi with regard to which a seizure list was also prepared. Besides the seizure list, the witnesses have also stated about preparation of inquest report of the dead body of the deceased upon which they also made their impression. But neither the seizure list nor the inquest report has been proved as both the said documents have not been marked

as exhibits in the case and a perusal of the seizure list annexed with the FIR would rather demonstrate that it bears the signature of two witnesses along with the S.H.O., namely C. Kumar, none of whom have been examined as prosecution witness.

25. At this stage, it may be apt to mention that out of the above-noted prosecution witnesses, PW-1 Pandit Lal Harijan and PW-2 Antilal Harijan had been recalled after about more than three years of the occurrence and it is upon such recall that these witnesses were subjected to cross-examination on fresh oath wherein they have come up with a new story that they got to know about the occurrence two days after occurrence, which belies their earlier statement made in their examination-in-chief rendering their evidence totally untrustworthy and giving enough material to discredit their testimony. This issue requires consideration since the same has also been raised on behalf of the defence for assailing the credibility of the prosecution witnesses.

26. It though appears strange that despite repeated calls to the advocates of the accused persons, they chose not to appear for cross-examination of PW-1 and PW-2, hence no cross-examination could be held on behalf of the appellant whereafter, these witnesses were discharged on 11.01.2008.

After lapse of more than three years, these witnesses were recalled by an order dated 08.08.2011 for cross-examination which was then held on 16.11.2011. The inordinate delay and the time gap between the date of discharge of the witnesses and their recall, raises both doubt and concern in the mind of the court. It does not stand to reason as to why the two witnesses PW-1 Pandit Lal Harijan and PW-2 Antilal Harijan who had supported the prosecution case initially, changed their version after lapse of three years.

27. It is, however, not clear from the evidence of PW-1 and PW-2, as to when police had arrived at the place of occurrence and when their statements were recorded by the police. Be that as it may, the only conclusion that can be reached upon consideration of their evidence, is that it would not be safe to rely on the testimony of such witness with vacillating stands.

28. From consideration of the evidence of PW-3 Jag Lal Harijan, it would appear that he is also a hearsay witness and his statement is also based upon the information of the incident as narrated by PW-4 Prem Lal Harijan. Although this witness supports the factum of recovery of the blood-stained sword and that an inquest report of the dead body, which was lying in the courtyard of the appellant was prepared, it would

appear from paragraph nos. 2 and 9 of his evidence that the police came on the next day of the occurrence between 10.30 to 10.45 AM while the dead body of the deceased kept on lying in the house of the appellant Prabha Devi for the entire night. It would appear from his evidence that he had gone to a substantial distance from his home for getting food for his cattle and yet claims to have reached the place of occurrence upon hulla (alarm) raised by PW-4 Prem Lal Harijan. The evidence of this witness is also not free from doubt.

29. So far as the credibility of the testimony of the informant (PW-4) is concerned, it has to be kept in mind that he was a ten years old boy at the time of occurrence and about 11 years of age when his deposition was recorded during the course of trial. PW-4, being a child witness, is no doubt a vulnerable witness and his evidence giving the sole eye witness account of the occurrence has to be scrutinized with extreme care and caution, as one cannot overlook the fact that such witness can be susceptible to tutoring and give a coloured version of the occurrence. During the course of trial, PW-4 Prem Lal Harizan has introduced a new story of Madan Lal, the husband of the appellant Prabha Devi, giving two lathi blows upon the deceased on account of which he fell down, whereupon the said

Madan Lal had climbed upon his chest, while the appellant Prabha Devi, after getting a sword, dealt three sword blows on the neck of the deceased. He has also introduced a motive during his evidence and said that dispute between the appellant and the deceased was due to his father's refusal to pay Rs.8,000/- to the appellant. Further, it would appear from his evidence that he has made substantial departure from his fardbeyan with regard to the manner of occurrence. As against the narration of facts disclosed in the fardbeyan as discussed earlier, PW-4 Prem Lal Harijan has stated in his evidence as would appear from paragraph nos. 4 and 19 of his evidence that after the verbal altercation, followed by scuffle between the appellant and the deceased, his father had come back home and then the appellant Prabha Devi had sent her husband to call his father and it was on such call that his father went to the house of the appellant. This changes the entire sequence of events as disclosed in the fardbeyan. It would also appear from his evidence that the police had reached the place of occurrence on the next day at 11.00 AM and his statement was then taken. Although, this witness has also supported the factum of recovery of the sword from underneath the bed/mattress of the appellant Prabha Devi as also the preparation of documents with

regard to the dead body (inquest report), but neither the seizure list nor the inquest report has been exhibited in evidence in the present case. This witness has also referred to a blood-stained mat which was lying in the verandah of the appellant but the same has also not been seized by the I.O. The defence has also given a suggestion to this witness that his father (deceased) used to be in the company of some anti-social elements, hence, he was killed by some unknown persons and only due to earlier enmity the appellant has been falsely implicated, which he has denied.

30. At this juncture, it would be relevant to refer to the evidence of the defence witness Premwati who is the wife of the deceased as also mother of the informant (PW-4). A perusal of the evidence of defence witness (mother of the informant) would reveal a version totally inconsistent with the evidence of the informant (PW-4), inasmuch as she has made a categorical statement in her examination-in-chief that her son, Prem Lal Harijan, had come back home from the market and it is only in the evening that she heard that her husband had fallen on the road and found the deceased lying dead on the road. She had no idea as to who killed her husband and has made specific denial of the fact that the appellant Prabha Devi had killed the

deceased. Such evidence of the mother of the informant further takes away the credibility of the informant as an eye witness to the occurrence. The defence witness Premwati appears to be the wife of the deceased as also the mother of the informant, hence, there is no strong reason to doubt her version of the case.

31. We have also perused the evidence of the doctor (PW-5) who had performed the postmortem examination on the dead body of the deceased and on examination of the same, we find that no doubt the cause of death has been shown to be neck injury caused by sharp cutting weapon, but at the same time the time elapsed since death has been said to be within 24 hours. Now it needs to be considered whether time of occurrence as alleged by the prosecution, falls in line with this opinion of the doctor (PW-5). The occurrence is said to have taken place at around 5.45 PM on 27.06.2007 whereafter the FIR was lodged on 27.06.2007 at 3.00 PM while the postmortem was conducted upon the dead body of the deceased on 28.06.2007 at 11.00 AM which would also be apparent from the postmortem report itself which has been marked as Exhibit-2. This opinion given by the doctor, seems to be irreconcilably in conflict with the ocular version as going by the oral evidence, the time elapsed since death should have been around 41 hours and approximately it

can be said to be at least more than 36 hours. In view of this opinion of the doctor (PW-5), the date and the time of occurrence becomes a serious suspect.

32. The defence has also brought two documents on record while exhibiting them as Exhibit-A and B which are the certified copy of the judgment of acquittal of Madan Lal Harijan (husband of the appellant) delivered in SST no. 1074 of 2007 and the deposition of Prem Lal Harijan (PW-4) recorded in SST no.1074 of 2007 wherein he has not given an eye witness account of the occurrence and has rather stated that he heard hulla (alarm) while he was in the courtyard of his house and had subsequently, seen the dead body of his father with cut injury on the neck. In cross-examination, he has also stated that his signature was taken by the police on a blank paper. However, with regard to these two documents Exhibit-A and B produced by the defence, we are constrained to hold that the same cannot be considered by us while adjudicating the present matter in view of Section 33 of the Evidence Act, more so in view of the fact that the prosecution witnesses have not been confronted with these documents.

33. Another fact that has drawn our attention is the statement of the appellant under Section 313 Cr.P.C. The

question put to the accused/appellant is with regard to the allegation that a sword blow was given by the accused on the date of occurrence upon Mahesh Lal Harijan (deceased) from the back. It would appear from the evidence of the doctor (PW-5) that there was an incised cut wound of the whole neck with all structure cut, only skin attached with back of neck. This kind of injury, without any ambiguity, would go to show that blow by a sharp cutting instrument/weapon has been made upon the deceased from the front and such injury as indicated by the doctor would not be possible by inflicting any blow from the back.

34. Adverting to the issue of non-examination of the I.O. having caused prejudice to the defence, we find that the same is a valid contention, raised by learned counsel for the appellant. It is true that when there is totally cogent and creditworthy evidence available on record, mere non-examination of the investigating officer would not be fatal to the prosecution case but here is a case where the entire prosecution rests on the sole testimony of a child witness who makes substantial and unignorable improvements and embellishments in the manner of occurrence during the course of trial and also introduces a motive which stood absent in his earliest statement

being the fardbeyan of the present case. Although, he identifies his signature on the fardbeyan which is marked as Exhibit-1, it is to be noticed that neither SI, C. Kumar who recorded the fardbeyan of the informant nor the two witnesses to the said fardbeyan have been examined as witnesses by the prosecution in order to lend authenticity to this document. On the contrary, strangely enough, one of the witnesses to the fardbeyan being Madan Lal Harijan was subsequently made an accused in the case by the informant whereupon he was summoned under Section 319 Cr.P.C. as an additional accused and had faced a separated trial, though he had finally stood acquitted. In addition to the same, we also find that neither the formal FIR nor the seizure list attached to the same have been exhibited and this is precisely due to the reason that the I.O. has not come to depose as a witness. The seizure list to this case would have been an extremely significant document as it would have confirmed the recovery of the murder weapon i.e. sword from underneath the mattress/bed of the appellant from her house. The seizure list as enclosed along with the fardbeyan in the FIR, however, shows that the same was prepared on 27.06.2007 at 12.10 PM. This recovery of sword itself by the police from under the mattress of the appellant seems to be doubtful and does not inspire

confidence. The evidence of the informant is clear on the point that after inflicting sword blow on the neck of the deceased, the appellant had fled away. In such view of the matter, there can be no explanation, much less plausible, to indicate as to where was the occasion to conceal the blood-stained sword under the mattress of the appellant and why would she leave it back at home, making it easily available for seizure. Once again in the absence of SI, C. Kumar, SHO Rauta camp, Bizbar who is said to have prepared the seizure list as also the two witnesses who have signed the said seizure list, having not been examined in this case, makes the said seizure list totally unauthentic and consequent thereupon the very seizure of the murder weapon from the house of the appellant on the date indicated becomes shrouded in doubt, hence stands not proved.

35. We have also noticed that a number of other incriminating articles like blood-stained mat, torn *Lungi* of the deceased etc. allegedly lying in the house of appellant which would have constituted objective evidence in order to prove the genesis of the occurrence, the place of occurrence as also the manner of the occurrence, have not been seized. It would have been the I.O. to whom such questions would have been put to come to a conclusion as to whether such articles were even

present at the place of occurrence and whether the statements of other independent witnesses were recorded by the I.O. or not and if yes, what was their version of the case. Admittedly, the defence did not get an opportunity to elicit such information from the I.O.

36. In the backdrop of the fact that fardbeyan has been recorded after substantial delay giving enough time to the prosecution to give due thought and deliberation before recording of the same, the defence needed to have an opportunity to cross-examine the I.O. to elicit information as to when exactly the police reached the place of occurrence, was there any other statement made by any of the prosecution witnesses before the present fardbeyan was recorded, what was the reason for delay in recording of the fardbeyan and also who all were present at the time of recording of the fardbeyan. In absence of examination of the I.O., no contradiction could be drawn with regard to the 161 Cr.P.C. statements of the prosecution witnesses made during investigation.

37. In any view of the matter, we can safely reach to a conclusion that in absence of examination of the I.O., authenticity of all the documentary evidences right from the FIR to the seizure list and the inquest report gets severely and

adversely affected, hence they are not proved. In this respect, it would be relevant to note the judgment of the Hon'ble Supreme Court of India, passed in the case of ***Lahu Kamlakar Patil and another vs. State of Maharashtra,*** reported in ***(2013) 6 SCC 417***, dealing with the issue as to when the non-examination of the I.O. becomes fatal to the prosecution case. It would be relevant to quote Para No. 18 of the said judgment hereinbelow:-

> "**18.** Keeping in view the aforesaid position of law, the testimony of PW 1 has to be appreciated. He has admitted his signature in the FIR but has given the excuse that it was taken on a blank paper. The same could have been clarified by the investigating officer, but for some reason, the investigating officer has not been examined by the prosecution. It is an accepted principle that non-examination of the investigating officer is not fatal to the prosecution case. In *Behari Prasad* v. *State of Bihar* [(1996) 2 SCC 317 : 1996 SCC (Cri) 271] , this Court has stated that non-examination of the investigating officer is not fatal to the prosecution case, especially, when no prejudice is likely to be suffered by the accused. In *Bahadur Naik* v. *State of Bihar* [(2000) 9 SCC 153 : 2000 SCC (Cri) 1186] , it has been opined that when no material contradictions have been brought out, then non-examination of the investigating officer as a witness for the prosecution is of no consequence and under such circumstances, no prejudice is caused to the accused. It is worthy to note that neither the trial Judge

> nor the High Court has delved into the issue of non-examination of the investigating officer. On a perusal of the entire material brought on record, we find that no explanation has been offered. The present case is one where we are inclined to think so especially when the informant has stated that the signature was taken while he was in a drunken state, the panch witness had turned hostile and some of the evidence adduced in the court did not find place in the statement recorded under Section 161 of the Code. Thus, this Court in *Arvind Singh* v. *State of Bihar* [(2001) 6 SCC 407 : 2001 SCC (Cri) 1148] , *Rattanlal* v. *State of J&K* [(2007) 13 SCC 18 : (2009) 2 SCC (Cri) 349] and *Ravishwar Manjhi* v. *State of Jharkhand* [(2008) 16 SCC 561 : (2010) 4 SCC (Cri) 50] , has explained certain circumstances where the examination of investigating officer becomes vital. We are disposed to think that the present case is one where the investigating officer should have been examined and his non-examination creates a lacuna in the case of the prosecution."

38. In the facts of the present case also, we have already noted that there is substantial delay in recording of the fardbeyan of the only eye witness who is also a child witness, whose evidence suffers from discrepancies and embellishments as he has developed the story during the course of trial, deviating from the initial statement made in the fardbeyan, coupled with the fact that other witnesses have also changed their version and no objective evidence has been brought on

record. The examination of the I.O. in the present case would have set the records straight and provided answers to many a questions which remain unanswered.

39. Learned counsel for the appellant has also argued that the motive for a ghastly murder like this has not been proved at all. With regard to the issue of motive, the position stands clarified that in case of direct evidence, motive does not have a great role to play as it is said to be locked in the mind of the person committing the offence, however once a motive, even in a case of direct evidence is introduced by the prosecution, the conscience of the Court has to be satisfied with the existence and the truthfulness of the same. In the present case, we need to consider that the fardbeyan is totally silent on the point of any motive with which the offence would have been committed. However, during the course of his evidence, the informant (PW-4), has introduced a motive stating that the appellant was demanding an amount of Rs.8,000/- from his father (the deceased). It could be a possibility and a reasonable one, that subsequently the informant (PW-4) has been tutored to introduce a motive of the occurrence.

40. Even though considering the reason for dispute which was subsequently introduced, it needs to be appreciated

that the matter related to a mere demand of Rs.8,000/- by the appellant and the expression of inability of the deceased to pay the same at that point of time and that he would pay it on Sunday. We have no hesitation in forming an opinion that this is an extremely weak motive for which an offence of murder would be committed and that too by giving sword blow with such brutality. Besides this, the prosecution has not come out with any special reason as to why the accused/appellant would make such a ghastly attack on the deceased, to almost severing the neck of the deceased from his body. In this background, we are inclined to agree with the defence that firstly, the motive has not been proved at all by the prosecution and secondly the suggested motive, on the facts of the case, seems to be extremely vague and inexplicable.

41. Before we proceed to undertake analysis of the oral evidence of the informant (PW-4), who is not only the solitary eye witness as also a child witness, upon whose testimony the entire prosecution case rests, it would be essential to understand as to how the testimony of a child witness should be looked into and appreciated, as the Court has a bounden duty to see and analyze whether the evidence of such a witness is cogent, convincing and creditworthy or whether there has been

enough scope for tutoring of the witness. The law with regard to the testimony of a child witness has been laid down in several judicial pronouncements of the Hon'ble Supreme Court of India. A Three Judges Bench in the case of ***Bhagwan Singh and others vs. State of M.P.*** reported in ***(2003) 3 SCC 21*** has taken into consideration the competence of a child witness and has held that it would be hazardous to rely on the sole testimony of the child witness in case the same has not been made immediately after the occurrence giving scope of possibility of tutoring him. Paragraphs 19 and 22 of the said judgment are quoted hereunder:-

> **"19.** The law recognises the child as a competent witness but a child particularly at such a tender age of six years, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, is not considered by the court to be a witness whose sole testimony can be relied upon without other corroborative evidence. The evidence of a child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, always the court looks for adequate corroboration from other evidence to his testimony. (See *Panchhi* v. *State of U.P.* [(1998) 7 SCC 177 : 1998 SCC (Cri) 1561])
>
> **22.** It is hazardous to rely on the sole testimony of the child witness as it is not available immediately after the occurrence of the incident and before there were any possibility of coaching and tutoring him.

(See paras 14-15 of *State of Assam* v. *Mafizuddin Ahmed* [(1983) 2 SCC 14 : 1983 SCC (Cri) 325] .) In that case evidence of a child witness was appreciated and held unreliable thus: (SCC p. 20)

"*14*. The other direct evidence is the deposition of PW 7, the son of the deceased, a lad of 7 years. The High Court has observed in its judgment:

'… the evidence of a child witness is always dangerous unless it is available immediately after the occurrence and before there were any possibility of coaching and tutoring.'

15. A bare perusal of the deposition of PW 7 convinces us that he was vacillating throughout and has deposed as he was asked to depose either by his *nana* or by his own uncle. It is true that we cannot expect much consistency in the deposition of this witness who was only a lad of 7 years. But from the tenor of his deposition it is evident that he was not a free agent and has been tutored at all stages by someone or the other."

42. The evidentiary value of the evidence of a child witness was also considered in the case of ***Panchhi v. State of U.P.*** reported in ***(1998) 7 SCC 177,*** wherein it has been held that the valuation of the evidence of a child witness must be done with greater care and caution as a child witness is easy prey to tutoring. Paragraph nos. 11 and 12 of the said judgment is quoted hereinbelow:-

"**11**. …….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.

12. Courts have laid down that evidence of a child witness must find adequate corroboration before it is relied on. It is more a rule of practical wisdom than of law."

43. We may further refer to a judgment rendered by the Hon'ble Apex Court in the case of ***Digamber Vaishnav and another vs. State of Chhattisgarh*** reported in ***(2019) 4 SCC 522*** by extracting paragraph nos. 21 and 22 of the same hereunder:-

"21. The case of the prosecution is mainly dependent on the testimony of Chandni, the child witness, who was examined as PW 8. Section 118 of the Evidence Act governs competence of the persons to testify which also includes a child witness. Evidence of the child witness and its credibility could depend upon the facts and circumstances of each case. There is no rule of practice that in every case the evidence of a child witness has to be corroborated by other evidence before a conviction can be allowed to stand but as a prudence, the court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that witness must be a reliable one.

22. This Court has consistently held that evidence of a child witness must be evaluated carefully as the child may be swayed by what others tell him and he is an easy prey to tutoring. Therefore, the evidence of a

child witness must find adequate corroboration before it can be relied upon. It is more a rule of practical wisdom than law."

44. In the case of ***K. Venkateshwarlu v. State of A.P.,*** reported in ***(2012) 8 SCC 73,*** the careful evaluation of the evidence of a child witness has been emphasized, besides looking for corroboration of the evidence of the child witness for the purposes of coming to the conclusion that the child is not tutored and his evidence has a ring of truth. Paragraph 9 of the said judgment being relevant, is being quoted hereunder:-

"**9.** Several child witnesses have been relied upon in this case. The evidence of a child witness has to be subjected to closest scrutiny and can be accepted only if the court comes to the conclusion that the child understands the question put to him and he is capable of giving rational answers (see Section 118 of the Evidence Act). A child witness, by reason of his tender age, is a pliable witness. He can be tutored easily either by threat, coercion or inducement. Therefore, the court must be satisfied that the attendant circumstances do not show that the child was acting under the influence of someone or was under a threat or coercion. Evidence of a child witness can be relied upon if the court, with its expertise and ability to evaluate the evidence, comes to the conclusion that the child is not tutored and his evidence has a ring of truth. It is safe and prudent to look for corroboration for the evidence of a child witness from the other evidence on record, because while giving evidence a child may give scope to his

> imagination and exaggerate his version or may develop cold feet and not tell the truth or may repeat what he has been asked to say not knowing the consequences of his deposition in the court. Careful evaluation of the evidence of a child witness in the background and context of other evidence on record is a must before the court decides to rely upon it."

45. Another factor in connection with the reliability of the evidence of a child witness which is to be considered, is that the trial court must record its satisfaction that the minor is able to understand the questions put to the witness who is able to respond and provide rational answers to the questions asked. This satisfaction of the learned trial court is based upon certain preliminary questions which ought to be put to a child witness to understand capability of the witness to understand the questions and answering the same with some amount of rationality, in terms of Section 118 of the Indian Evidence Act, 1872. In this regard, we are tempted to make reference to a judgment passed by the Hon'ble Apex Court in the case of ***Pradeep vs. State of Haryana*** reported in ***2023 SCC Online SC 777,*** paragraph nos.9, 10 and 11 whereof are being reproduced hereinbelow:-

> "**9.** 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 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.

10. 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.

11. 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:—

"**Q.** In which school you are studying?

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

Q. What is occupation of your father?

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

Q. Should one speak truth or false?

Ans. Truth."

46. Now coming first and foremost to the preliminary questions put to the child witness in the present case, we would like to quote the said question and answer:-

" प्रश्न – पढ़ना जानते है?
उत्तर – यस सर
साक्षी शपथ स्वंय पढ़कर सुनाते है।"

47. A bare perusal of the above-mentioned question put to PW-4 would show that the said witness has only been asked as to whether he knows how to read to which he has responded in the affirmative and then he was made to read the oath with no related question as to whether he understands the contents of the oath. The learned trial court has not even taken the pains of asking a few more relevant questions to assess the capability of this witness, nor any demeanour of the witness has been recorded any where during the course of recording of his deposition.

48. Considering the sketchy nature of preliminary

question that has been asked, we are of the definite view that the learned court below has not satisfied itself with regard to the ability and capability of the witness of understanding questions and giving rational answers and has even not recorded his satisfaction with regard to the same, thus leaving the scope for doubting the credibility of such witness.

49. So far as scrutinizing the evidence of the child witness with greater circumspection is concerned, we have gathered from the initial statement of PW-4, made in the fardbeyan and from the evidence recorded during the trial that this witness has not been consistent in his version and the same is replete with inconsistencies, exaggerations and embellishments. Besides the fact that the fardbeyan of the informant (PW-4), the solitary eye witness as also the child witness, has been recorded after substantial delay of more than 16 hours on the next day of the occurrence, the other attending circumstances of there being no other eye witness, the other witnesses narrating the story as told by him and out of them, PW-1 and PW-2 subsequently stating upon recall that they came to know about the occurrence two days later, are all relevant circumstances for consideration. Even if we do not take into consideration the statements of PW-1 and PW-2 upon recall,

since it was recorded after a lapse of three years, yet the evidence of the two witnesses seems to be very sketchy and does not inspire confidence. The evidence of another witness PW-3 which is also based upon the narration of events as given by the informant (PW-4), does not seem to be worth reliance as according to his evidence, he had gone to far off place from the house to take food for the cattle at the relevant time, hence his presence at the place of occurrence immediately after the occurrence also seems to be extremely doubtful. Besides, he also happens to be the brother of the deceased and the uncle of the informant. His evidence also makes a reference to the fact that about 100 to 150 people had assembled at the place of occurrence, out of which some of the names have been disclosed by him, however, none of these witnesses have been examined as either eye witnesses or hearsay witnesses. Thus, evidence of PW-1, PW-2 and PW-3, who claim to have reached the place of occurrence upon hulla (alarm) raised by the informant, raises a serious doubt in the mind of this Court over their presence at the place of occurrence at the relevant time as it is unfathomable as to what deterred these witnesses from informing the police about this incident and in case they sent an information, then as to why the police reached the place of

occurrence only on the next day and recorded the fardbeyan at about 10.30 AM. Therefore, the aforesaid hearsay witnesses being PW-1, PW-2 and PW-3 have not lent strength or corroboration to the evidence rendered by the sole eye witness (child witness) so as to place reliance on his testimony.

50. The presence of the informant (PW-4) at the place of occurrence and having seen the occurrence as an eye witness further gets obliterated by the evidence of his own mother who has been examined as a defence witness. The defence witness Premwati has very categorically stated that her son Prem Lal Harijan (Informant/PW-4) was at home with her when she heard in the evening that her husband had fallen dead on the road and they did not have any idea as to who was the assailant. In this regard, we may also state that a defence witness has to be treated at par with the prosecution witness and it is a well settled law that the same treatment is required to be given to the defence witnesses as would be given to the prosecution witness. In this regard, the Hon'ble Supreme Court of India in the case of ***State of U.P. v. Babu Ram,*** *reported in* ***(2000) 4 SCC 515***, has observed in paragraph 23 as under:-

> "**23.** Depositions of witnesses, whether they are examined on the prosecution side or defence side or as court witnesses, are oral evidence in the case and

> hence the scrutiny thereof shall be without any predilection or bias. No witness is entitled to get better treatment merely because he was examined as a prosecution witness or even as a court witness. It is judicial scrutiny which is warranted in respect of the depositions of all witnesses for which different yardsticks cannot be prescribed as for those different categories of witnesses."

The same position of law has also been reiterated in the case of ***Munshi Prasad v. State of Bihar,*** reported in ***(2002) 1 SCC 351.***

51. Thus, examining the evidence of the solitary eye witness, the informant (PW-4) who is also a child witness, we come to a considered conclusion that this child witness upon whose testimony the entire prosecution rests, has not been able to pass the test of the two conditions laid down by the Hon'ble Apex Court in the case of ***State of Madhya Pradesh Vs. Balveer Singh,*** reported in ***2025 SCC OnLine 390,*** which are as under:-

(I) Possibility/opportunity of the witnesses to be tutored and

(ii) Reasonable likelihood of tutoring.

52. The delay in recording of the statement of the informant coupled with the fact that there is no reliable independent corroboration of his evidence and that his own

mother appearing as a defence witness has totally negated the presence of the informant at the scene of the occurrence thereby demolishing his evidence as an eye witness are indicative of the fact that the testimony of PW-4 does not have a ring of truth and in all likelihood, he has been subjected to tutoring.

53. We, thus, find that there was all possibility and opportunity of the said witness, i.e. PW-4, being tutored and the vacillating nature of his evidence by way of substantial improvements and embellishments appearing in his evidence, lead us to the unhesitant conclusion that traces of tutoring has been found in his evidence at all stages.

54. So far as the law on the issue of conviction being based upon solitary evidence, is concerned there is no doubt that conviction can be based upon the testimony of a single eye witness, if the witness passes the test of reliability. It also remains a fact that evidence has to be weighed and not counted, which is the mandate of Section 134 of the Indian Evidence Act, 1872 and the only determination that has to be made is whether it is cogent, credible and trustworthy. In the present set of facts and circumstances, the appreciation of the evidence has to be done on the touchstone of this legal exposition. The solitary eye witness, PW-4, for so many reasons as enumerated hereinabove,

does not appear to be reliable, hence conviction cannot be based upon the evidence of such witness.

55. The legal maxim "falsus in uno, falsus in omnibus" (false in one thing, false in everything) is admittedly not a rule of practice here and it is a fact that witnesses do exaggerate things or make certain omissions but upon careful scrutiny of the evidence, if it appears that these omissions, exaggerations and embellishments go to the core of the case, then they become a vital factor for consideration and the entire edifice built upon such evidence by the prosecution, crumbles. The prosecution cannot be permitted to reconstruct a whole new story.

56. In the present context, the only eye witness (PW-4) has made vital omissions, his fardbeyan was recorded after more than 16 hours of the occurrence and he has further cogitated stories during trial, introducing new facts and attributing new roles to people in his testimony, which virtually amounts to creation of a new story.

57. In a criminal case, the court has the duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The phrase "may be true" signifies a possibility or uncertainty, while "must be true" indicates a certainty or a

logical necessity. The difference lies in the degree of certainty or the level of evidence required to support the statement. The large mental distance between “may be true” or “must be true”, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, which does not seem to have been bridged/traversed in the instant case.

58. We are, thus, unable to accept the evidence of Prem Lal Harijan (PW-4), as an eye witness to the incident of murder, as projected by him. The testimonies of the other witnesses, PW-1, 2 and 3 do not lend the required support to the evidence of PW-4 in order to prove the charge against the appellant beyond all reasonable doubt. There are several loopholes in the prosecution case which cannot be overlooked and lightly brushed aside as they have significant bearing on the case. In such circumstances of glaring infirmities in the prosecution case, the appellant is entitled to the benefit of doubt.

59. Thus, taking an overall perspective of the entire case, emerging out of the totality of the facts and circumstances, as indicated hereinabove and for the foregoing reasons, we find that the prosecution has failed to prove the charges against the appellant beyond all reasonable doubts, hence by way of

extending benefit of doubt, the appellant deserves to be acquitted of the charge.

60. Accordingly, the finding of conviction recorded by the Ld. Trial Court, in our opinion, is not sustainable and requires interference, therefore, the judgment of conviction and order of sentence dated 29.06.2025, passed by the Additional District and Sessions Judge-III, Purnea in Sessions Case No.1074 of 2007 (arising out of Rauta P.S. Case No.27 of 2007) are hereby set aside.

61. The sole appellant, who is in custody, is directed to be released from the jail forthwith, if not required in any other case.

62. Accordingly, the appeal stands allowed.

(Soni Shrivastava, J)

Mohit Kumar Shah, J. I agree

(Mohit Kumar Shah, J)

arvind/-

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