IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.603 of 2016

Arising Out of PS. Case No.-76 Year-2013 Thana- BHELDI District- Saran

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Shambhu Baitha S/o- Late Bangali Baitha, Resident of Village- Jhauapatti, P.S- Bheldi, District- Saran.

... ... Appellant

Versus

The State Of Bihar

... ... Respondent

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Indian Penal Code, 1860- Sec.302/304- Appellant tried for murder of his wife by setting her on fire- during course of trial prosecution adduced the evidence of P.W.6/eyewitness/daughter of Appellant and deceased- P.W.6- only 8 years old- Indian Evidence Act- Sec.118, Oaths Act, 1969- Sec.4- Trial judge didn't posed initial queries from the said child witness for assessing her competency of deposing in evidence- Unless satisfaction recorded oath can't be administered to child witness- No satisfaction recorded- Ld. Judge failed to carry out the said exercise.

Judgement of conviction only upon relying the deposition of P.W.6- No opinion formed regarding her position to understand the question put to her or not- I.O. didn't seized any material from place of occurrence- prosecution failed to establish the substance/ material used for burning deceased- Kerosene oil as alleged not found from terrace- other co-accused tried separately and acquitted by trial court- prosecution failed to prove the case beyond reasonable doubt- judgement of conviction and order of sentence set-aside by HC-*Held*.

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Appearance :
For the Appellant/s : Mr. Amit Narayan, Advocate
Mrs. Ritika Roy, Advocate
Mr. Saroj Kumar Singh, Advocate
For the Respondent/s : Mr. Sujit Kumar Singh, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE RUDRA PRAKASH MISHRA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 18-01-2024

The present criminal appeal has been filed by the appellant under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Code') challenging the judgment of conviction dated 26.05.2016 and order of sentence dated 30.05.2016, passed by learned Sessions Judge, Saran at Chapra in Sessions Trial No. 542 of 2014, arising out of Bheldi P.S. case No. 76 of 2013, G.R. No. 2417/2013, whereby and whereunder the Trial Court has convicted the appellant for the offence under Section 302 read with Section 34 of the Indian Penal Code (hereinafter referred to as the 'I.P.C.') and sentenced to

undergo life imprisonment and a fine of Rs. 25,000/- and in default of payment of fine to further undergo R.I. for a period of four months.

2. The prosecution case, as emanated from the fardbeyan of the informant Upendra Baitha, the brother of the deceased Seema Devi, recorded by S.I. Sanjay Kumar of P.S. Bheldi, District- Saran on 07.06.2013 at 3.30 P.M. is that the informant on 07.06.2013 received information on his mobile No. 8804823007 that his sister Seema Devi, wife of the accused Shambhu Baitha, was in critical condition. The deceased was married to the accused Shambhu Baitha, resident of village Jhauapatti, P.S.- Bheldi, District- Saran in the year 2002 according to Hindu Law and customs. The deceased was blessed with two sons namely Priyansh Kumar, aged about 5 years, Himanshu Kumar, aged about 2 years and a daughter namely Nibha Kumari, aged about 8 years. On getting information about serious condition of the deceased, the family members of the informant got worried. When the informant reached the matrimonial home of his sister at about 2.30 P.M., he saw that his sister Seema Devi had been burnt to death and the members of her matrimonial family had fled away leaving the dead body in the house. The husband of the deceased, the elder brother of her husband, the wife and the son

of the elder brother of her husband used to assault and threaten to cause her death and on the relevant day, they had burnt her to death. The informant claimed that the accused Shambhu Baitha, his brother Kedar Baitha, the wife of Kedar Baitha and Mithilesh Kumar Baitha had caused the death of his sister by setting her on fire.

3. On the basis of fardbeyan of the informant, Bheldi P.S. case No. 76 of 2013 was registered under Section 302/34 of the I.P.C. Thereafter, the Investigating officer carried out the investigation and submitted charge-sheet. On the basis of charge-sheet, the Magistrate took cognizance of the case and the case was committed to the Court of Sessions. Charges were framed against the appellant on which he pleaded not guilty and claimed to be tried.

4. During the trial, in order to substantiate the charges against the accused person, the prosecution examined as many as eight witnesses, namely, P.W.1 Sheo Dayal Singh, P.W.2 Mukul Kumar Baitha, P.W. 3 Samresh Kumar Singh, P.W.4 Dularchand Baitha, P.W.5 Sanjay Kumar, P.W.6 Nibha Kumari, P.W.7 Upendra Baitha (informant) and P.W. 8 Dr. Shailendra Kumar Singh. In support of the case, the prosecution also produced documentary evidence as Ext. 1- signature of the witness Mukul

Kumar Baitha on fardbeyan, Ext. -2 fardbeyan, Ext. -3 map prepared in the case diary, Ext. 4-signature of informant on his fardbeyan, and Ext. 5 is the post-mortem report. The defence has also produced three witnesses namely D.W.1 Bimal Pandit, D.W.2 Manju Devi and D.W.3 Meera Devi. The defence has not produced any document in its support. The statement of the appellant was recorded under section 313 of the Cr.P.C and after conclusion of the trial, the learned trial Court convicted the appellant in the manner stated above.

5. Learned counsel appearing for the appellant has mainly submitted that for the alleged occurrence which took place about 12.00 hrs, fardbeyan of the informant was recorded at 15.30 hrs at the place of occurrence. It is submitted that even as per the case of the informant in the fardbeyan, he reached at the place of occurrence at about 14.30 hours and the F.I.R. was lodged after a period of one hour. The informant has not disclosed in the fardbeyan that his *bhanji* (niece) Nibha Kumari has stated that her father and other family members have killed her mother. However, thereafter the eight years old daughter of the deceased was projected as eye witness to the occurrence in question and thereby it is alleged that the appellant along with the other family members have killed the deceased. The theory

put forward by the prosecution cannot be believed on various counts. It is submitted that the child witness Nibha Kumari (P.W.6), who is aged about eight years, has stated in her deposition that her statement was not recorded by the police despite which she was produced as prosecution witness before the Court. It is further submitted that even while recording the deposition, the learned trial Court has not put certain questions to her with a view to ascertain whether she is in a position to stand the question put forth to her or not. It is also pointed out from the deposition of the said witness (P.W.6) that she came to the Court with her maternal uncle (*Mama*) i.e. informant and she was residing with her maternal uncle immediately after the date of occurrence. Learned counsel for the appellant has also pointed out major contradiction in the deposition of the said witness. It is submitted that the Trial Court has recorded the conviction of the appellant on the basis of deposition of socalled eye witness. At this stage, learned counsel for the appellant has placed reliance upon the decision rendered by the Hon'ble Supreme Court in the case of ***P. Ramesh Vs. State represented by Inspector of Police***, reported in ***(2019) 20 SCC 593*** as also another decision rendered in the case of ***Pradeep Vs. State of Haryana***, reported in ***2023 SCC OnLine SC 777*** and also placed reliance on a

judgment of this Court in the case of ***Munna Sah vs. State of Bihar*** since reported in ***2023 SCC Online Pat 5099*** in which this Hon'ble Court after considering the various decision rendered by the Hon'ble Supreme Court, has held that if the Trial Court has not carried out exercise of putting question to the child witness with a view to ascertain whether the said child witness is capable of understanding the questions put to him and is able to give rational answers, the deposition of such child witness cannot be relied upon more particularly in absence of any corroboration thereof.

5.1 Learned counsel for the appellant would, therefore, contend that from the deposition of Investigating officer, it is also revealed that he has not collected any incriminating material from the place of occurrence like can of kerosene oil or any other material from which it can be said that the appellant set the deceased on fire. It is also submitted that P.W. 8 Shailendra Kumar Singh (doctor who conducted post-mortem examination of the dead body of the deceased) has also stated that the time elapsed since death is within 12-24 hours. The post-mortem was conducted at 5.35 p.m.. It is, therefore, submitted that even the medical evidence does not support the theory put forth by the prosecution that the deceased died within 12-24 hours. Learned

counsel for the appellant, therefore, urges that when the prosecution has failed to prove the case of the appellant beyond reasonable doubt, the trial Court ought to have acquitted the appellant, however, the trial Court has passed the impugned judgment convicting the appellant. Learned counsel, therefore, has requested that this appeal be allowed and the impugned judgment be quashed and set aside.

6. On the other hand, learned A.P.P. has opposed this appeal and submitted that the present one is a case of direct evidence where the daughter of the appellant has given deposition against the appellant. It is submitted that the daughter of the appellant, who is a child witness, has supported the case of the prosecution and made specific allegation against the appellant. Learned A.P.P. has further submitted that merely because there are certain lacuna on the part of the investigating agency, benefit of the same cannot be given to the appellant. Learned A.P.P., therefore, urged that the present appeal be dismissed.

7. We have considered the submissions of learned counsel for the appellant and learned A.P.P. for the State and also perused the material placed on record including the deposition of prosecution as well as defence witnesses and the other evidence

produced before the Trial Court. It would emerge from the record that the prosecution had examined eight witnesses. P.W. 1 has not supported the case of the prosecution. P.W. 3 has also not supported the case of the prosecution. P.W. 2 Mukul Kumar Baitha is brother of the deceased. In his examination-in-chief, he has stated that on getting the news, he reached the place of occurrence along with his father Dularchand Baitha (P.W.4) and Shatrudhan Baitha and saw that she was burnt to death by her-in-laws and the dead body was lying on the ground. This witness further stated that sasural people were demanding dowry for some work and because of this, they killed her sister. P.W. 4 has stated in examination-in-chief that her daughter died due to burning and her in-laws collectively killed his daughter. The case of the prosecution rests only on the deposition given by the P.W. 6 Nibha Kumari, who is aged about eight years and is the daughter of the appellant and deceased. P.W. 6 Nibha Kumari has stated in her deposition that her maternal uncle has brought her before the Court for her deposition. P.W. 6 further deposed that her father has killed her mother. She further deposed in her examination-in-chief that where her father had beaten her mother, her *manjhali* mother, *manjhala* father, Kedar Baitha and Mithilesh Bhaiya were also present and there was no one else. In

paragraph 4 of her examination-in-chief, she has further stated that the police did not ask her. In her cross-examination, she has stated that she does not know whether it was winter or summer or rainy season. In paragraph 8 of her cross-examination, she has stated that her mother was burnt at the east side of the terrace and she was also there at the terrace. She has further stated in cross-examination that her mother was brought down after burning and after burning her mother, her father and others ran away. In paragraph 9 of her cross-examination, she has stated that her maternal relatives came after an hour of her mother death. In paragraph 10 of her cross-examination, she has stated that mustard, maize were there on the terrace but not in scattered condition. In paragraph 11 of her cross-examination, she has stated that it is not the case that her mother got burnt while cooking and it is not the case that her maternal uncle has filed a false case.

8. P.W. 7 Upendra Baitha is brother of the deceased and also the informant of the present case. The said witness has stated in his examination-in-chief that one Shatrohan Baitha had informed my uncle about the incident and when he reached, he saw that one body covered with a blanket was lying there and every one had fled away. He informed the police whereafter

police came and recorded his fardbeyan. In paragraph 4 of his examination-in-chief, he has stated that when he reached there, he found broken bangle in the courtyard and burnt hairs on the terrace. P.W. 7 has further stated on oath on 01.07.2015 that he was on visiting terms with sister's house. In paragraph 8, he has further stated that he has filed the case at the police station and he vaguely remember what was stated in it. In paragraph 10, he has stated that the entire body and hair was burnt. P.W. 7 has further stated that there was a stove near the dead body was lying. He has further deposed that in-laws of her sister used to torture her and demanded money. They took her to the terrace and burnt her. In paragraph 11 of the his statement on oath, P.W. 7 has further stated that it is not the case that his sister died because of cooking.

9. P.W. 5 Sanjay Kumar (I.O. of the case) who has taken investigation after the registration of the F.I.R. The said witness has recorded fardbeyan of the informant. During the course of investigation, the said witness has recorded the statement of witnesses. He has also visited the place of occurrence and prepared the map which was reflected in paragraph No. 12 of the Case Diary. The map was produced as Ext. 3. The said witness, during his cross-examination has

specifically admitted that he has not seized any material from the place of occurrence.

10. P.W. 8 Dr. Shailendra Kumar Singh is the doctor who conducted the post-mortem on the dead body of the deceased at about 5.35 p.m. on 07.06.2013 i.e. on the date of occurrence. The said witness has stated in his examination-in-chief that he conducted post-mortem on the body of the deceased. On external examination, he found that Rigour mortis was present. Superficial to deep burn all over body 100 %. Hair of scalp burnt. P.W. 8 has stated that cause of death is due to shock and sepsim due to above mentioned burn injuries which was ante-mortem and time elapsed since death within 12 to 24 hours from P.M. In his cross-examination, he has stated that 12 to 24 hours means not less than 12 hours and not more than 24 hours.

11. From the aforesaid depositions given by the prosecution witnesses, it is revealed that even as per the case of the prosecution that the only eye witness to the occurrence in question is P.W. 6 Nibha Kumari. From the deposition of the P.W. 6, it is revealed that in paragraph 4 of her examination-in-chief, she has stated that police has not inquired from her. It is pertinent to note at this stage that as per provisions contained in

Section 118 of the Evidence Act, all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Thus, even a child witness is competent to depose unless the Court considers that he is prevented from giving reasonable answer by reason of his tender age.

12. At this stage, we would also like to deal with the provisions of Section 4 of the Oaths Act, 1969, which is as under:

> ***"4. Oaths or affirmations to be made by witnesses, interpreters and jurors***.—*(1) Oaths or affirmations shall be made by the following persons, namely:—*
>
> *(a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence;*
>
> *(b) interpreters of questions put to, and evidence given by, witnesses; and*
>
> *(c) jurors:*
>
> *Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of Section 5 shall not apply to such witness; but in any such case the absence of an*

oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.
(2) .. .."

13. From the proviso of the aforesaid Act, it can be said that in case of child witness under twelve years of age, unless satisfaction is recorded, the oath cannot be administered to the child witness. In the present case, if the deposition given by P.W.6 (child witness) is examined, it is revealed that the concerned Court did not put question to the said child witness who was aged about 8 years . The Court also has not recorded satisfaction that the said child witness is in a position to understand the question put to her or not. Only one question sentence is referred in the deposition that she was brought from the house of her maternal uncle and she has come to the Court for giving deposition.

14. At this stage, we would like to refer the decision rendered by this Court in the case of ***Muna Sah versus Stated reported in 2023 SCC OnLine Pat 5099***, wherein a Division Bench of this Court after considering the decision rendered in the case of ***P. Ramesh Vs. State represented by Inspector of Police***, reported in ***(2019) 20 SCC 593*** and also another decision rendered in the case of ***Pradeep Vs. State of Haryana***, reported

in ***2023 SCC OnLine SC 777,*** has observed in paragraph Nos. 24, 25, 26 and 27 as under:

> *"**24**. 18.1. In the case of **Pradeep (supra)**, the Hon'ble Supreme Court has observed in Para-7 to 10 as under:-*
>
> > *"7. We have carefully considered the submissions. The fate of the case depends on the testimony of the minor witness Ajay (PW-1). Under Section 118 of the Evidence Act, 1872 (for short, "the Evidence Act"), a child witness is competent to depose unless the Court considers that he is prevented from understanding the questions put to him, or from giving rational answers by the reason of his tender age. As regards the administration of oath to a child witness, Section 4 of the Oaths Act, 1969 (for short "Oaths Act") is relevant. Section 4 reads thus:*
>
> ***"4. Oaths or affirmations to be made by witnesses, interpreters and jurors**.—(1) Oaths or affirmations shall be made by the following persons, namely:—*
>
> > *(a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence;*
> >
> > *(b) interpreters of questions put to, and evidence given by, witnesses; and*
> >
> > *(c) jurors:*
> >
> > > *Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of Section 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible*

any evidence given by such witness nor affect the obligation of the witness to state the truth.

(2) .. ..”

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

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."

25. *18.2. In the case of* ***P. Ramesh (supra)****, the Hon'ble Supreme Court has observed in Paragraphs-13 to 16 as under:-*

*"13. Section 118 ["**118. Who may testify**.— All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Explanation.—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."] of the Evidence Act, 1872 deals with the competence of a person to testify before the court. Section 4 [* ***"4. Oaths or affirmations to be made by witnesses, interpreter and jurors****.—(1) Oaths or affirmations shall be made by the following persons, namely:(a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence;(b) interpreters of questions put to, and evidence given by, witnesses; and(c) jurors:Provided that where the witness is a child under twelve years of age, and the*

court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of Section 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.(2) Nothing in this section shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, unless he is examined as a witness for the defence, or necessary to administer to the official interpreter of any court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties."] of the Oaths Act, 1969 requires all witnesses to take oath or affirmation, with an exception for child witnesses under the age of twelve years. Therefore, if the court is satisfied that the child witness below the age of twelve years is a competent witness, such a witness can be examined without oath or affirmation. The rule was stated in Dattu Ramrao Sakhare v. State of Maharashtra [Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341 : 1997 SCC (Cri) 685] , where this Court, in relation to child witnesses, held thus : (SCC p. 343, para 5)

"5. ... A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the

court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

14. A child has to be a competent witness first, only then is her/his statement admissible. The rule was laid down in a decision of the US Supreme Court in Wheeler v. United States [Wheeler v. United States, 1895 SCC OnLine US SC 220 : 40 L Ed 244 : 159 US 523 (1895)] , wherein it was held thus : (SCC OnLine US SC para 5)

> *"5. ... While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial Judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record the decision of the trial Judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous."*

15. In Ratansinh Dalsukhbhai Nayak v. State of Gujarat [Ratansinh Dalsukhbhai Nayak v. State of Gujarat, (2004) 1 SCC 64 : 2004 SCC (Cri) 7. Subsequently, relied upon in Nivrutti Pandurang Kokate v. State of Maharashtra, (2008) 12 SCC 565 : (2009) 1 SCC (Cri) 454] , this Court held thus : (SCC pp. 67-68, para 7)

> *"7. ... The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to*

disclose his capacity and intelligence as well as his understanding of the obligation of Patna High Court CR. APP (DB) No.1039 of 2015 dt.01-11-2023 20/24 an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of makebelieve. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

16. In order to determine the competency of a child witness, the Judge has to form her or his opinion. The Judge is at liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. [Ratansinh Dalsukhbhai Nayak v. State of Gujarat, (2004) 1 SCC 64 : 2004 SCC (Cri) 7] A child becomes incompetent only in case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. [Sarkar, Law of Evidence, 19th Edn., Vol. 2, Lexis Nexis, p. 2678 citing Director of Public Prosecutions v. M, 1998 QB 913 :(1998) 2 WLR 604 : (1997) 2 All ER 749 (QBD)] If the child understands the questions put to her/him and

gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined."

26. *From the aforesaid decisions rendered by the Hon'ble Supreme Court, it can be said that before recording evidence of a minor, it is the duty of Judicial Officer to ask preliminary question to him/her with a view to ascertain whether the minor can understand the questions put to him/her 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. The Judge has to make a proper preliminary examination of a minor by putting appropriate questions to ascertain whether the minor is capable of understanding the question put to him. It can be further said that in order to determine the competency of the child witness, the Judge has to form his/her opinion. The Judge is at liberty to test the capacity of a child witness. The competency of a child witness can be ascertained by questioning him to find out the capability to understand the occurrence witnessed and to speak the truth before the Court. In criminal proceedings, the person of any age, is competent to give evidence if he is able to understand questions put as a witness and give such answers to the questions that can be understood. A child of tender age can be allowed to testify if he has the intellectual capacity to understand the questions and give rational answers thereto. However, a child becomes incompetent in a case the Court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner.*

27*. Keeping in view the aforesaid decisions, if the facts of the present case are examined, it transpires that the concerned Trial Judge has not carried out the aforesaid exercise by putting question to the child witness with a view to ascertain whether the PW-8 (child witness) is capable to understand the question put to her. Thus, we are of the view that the reliance placed by the learned Trial Court only on the deposition given by PW-8 who is the child witness, aged*

about 10 yrs. and was aged about 7.5 yrs. at the time of occurrence, is misplaced. Therefore, the Trial Court has wrongly placed the reliance upon the said deposition of the child witness."

15. From the aforesaid decision, it can be said that before recording evidence of a minor, it is the duty of a Judicial Officer to ask preliminary question to him/her with a view to ascertain whether a minor can understand the questions put to him/her 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 to record the evidence is very crucial. He has to make a proper preliminary examination of a child by putting appropriate questions to ascertain whether the minor is capable of understanding the question put to him and he is able to give rational answer.

16. Keeping in view of the aforesaid decision and the facts of the present case are examined, we are of the view that in the present case, the learned Judge has failed to carry out the said exercise. In the present case, in order to determine the competency of the child witness, Judge has not formed any opinion as to whether P.W. 6 Nibha Kumari is in a position to understand the question put to her or not.

17. At this stage, it is pertinent to note that the Trial Court has recorded the judgment of conviction only upon relying the deposition given by the said child witness. Further, we would also like to refer the deposition given by the Investigating Officer. The Investigating Officer has specifially admitted during the course of cross-examination that he has not seized any material from the place of occurrence. At this stage, it is to be recalled that it is a case of the prosecution that the present appellant along with other co-accused have killed the deceased, who was wife of the present appellant and she died because of burn injuries. However, the prosecution has failed to establish the substance/material by which she was burnt, even kerosene oil was not found from the terrace. There is no reference with regard to the same in the deposition of the Investigating Officer. Now, it is a case of the appellant in his defence that the deceased died because of burn injury when she was preparing the food.

18. P.W.8 Dr. Shailendra Kumar Singh who had conducted the post-mortem of the deceased has specifically stated in his examination-in-chief that the time elapsed since death i.e. within 12-24 hours. It is pertinent to note that the post-mortem was conducted at 5.35 P.M. on the date of occurrence i.e. on 07.06.2013. In the cross-examination, the said witness has

explained the meaning “within 12-24 hours” by stating that 12-24 hours mean “not less than 12 hours and not more than 24 hours.” However, it is the case of the prosecution that the occurrence took place at about 12.00 hours in the noon. It is also relevant to note that the other co-accused have been separately tried and learned counsel for the appellant has specifically contended before us that in the said separate trial which was conducted against other co-accused, they have been acquitted by the Trial Court and the informant and the child witness have not supported the case of the prosecution.

19. We have also gone through the reasonings recorded by the Trial Court, however, we are of the view that the prosecution has failed to prove its case beyond reasonable doubt. Therefore, the Trial Court ought to have acquitted the present appellant.

20. Hence, the impugned judgment of conviction dated 26.05.2016 and order of sentence dated 30.05.2016, passed by learned Sessions Judge, Saran at Chapra in Sessions Trial No. 542 of 2014, arising out of Bheldi P.S. case No. 76 of 2013, G.R. No. 2417/2013, is quashed and set aside. The appellant is acquitted of the charges levelled against him by the learned Trial

Court. He is directed to be released forthwith, if not required in any other case.

21. The appeal is allowed.

(Vipul M. Pancholi, J)

(Rudra Prakash Mishra, J)

Pankaj/-

AFR/NAFR	AFR
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