

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE

JURISDICTION CRIMINAL APPEAL NO.1256 OF 2017

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HARI OM @ HERO ...APPELLANT

VERSUS

STATE OF U.P. ...RESPONDENT

WITH

CRIMINAL APPEAL NO.

(ARISING OUT OF SPECIAL LEAVE PETITION (CRL.) NO.9087 OF 2017)

AND

CRIMINAL APPEAL NO. 4 OF 2021

(ARISING OUT OF SPECIAL LEAVE PETITION (CRL.) NO.9088 OF 2017)

**JUDGMENT**

**Uday Umesh Lalit, J.**

1. In Sessions Trial No.234 of 2008, six accused persons, namely, Sanjay @ Sonu, Rijwan, Haseen Khan, Hari Om @ Hero, Saurabh @ Sanju, Rafique @ Bhaiye @ Fareed were tried for having committed offences punishable under Sections 396, 412 of IPC1 and under Section 3(2)(v) of the SC/ST2 Act. These six accused were also tried by the Trial Court3 for offences under Section 25 of the Arms Act, 1959 in Sessions Trial Nos.235 of 2008, 239 of 2008, 237 of 2008, 238 of 2008, 236 of 2008 and 504 of 2011 respectively. By its common judgment in said seven trials, the Trial Court recorded as under: - "Convict Hariom @ Hero is awarded death sentence for the offence u/S 396 IPC. He shall be hanged till death. This order related to death sentence shall be in accordance with the confirmation of the Hon'ble High Court u/S 366 Cr.P.C.

Accused Hariom @ Hero is acquitted from Section 412 IPC and Section 3(2) 5 of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and from Section 25 Arms act in Crime No.371/2008.

Convicting accused persons Rijwan, Haseen, Bhaiye @ Fareed @ Rafique, Sanjay @ Sonu, Saurab @ Sanju u/S 396 IPC, they are awarded life imprisonment and Rs.25,000/- fine to each of the accused.

Accused persons Rijwan, Haseen, Bhaiye @ Fareed @ Rafique, Sanjay @ Sonu, Saurabh @ Sanju are discharged u/S 412 IPC and Section 3(2) 5 of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and accused Rijwan is acquitted from the offence u/S 25 Arms Act in Crime No.369/08, accused Haseen is acquitted from the offence under Section 25 Arms Act in Crime No.370/08, accused Bhaiye @ Fareed is acquitted from the offence under Section 25 Arms Act in Crime No.381/08, accused Sanjay @ Sonu is acquitted from the offence under Section 25 Arms Act in Crime No. 368/08 and accused Saurabh @ Sanju is acquitted from the offence under Section 25 Arms Act in Crime No.372/08.

75% of the amount of fine shall be given to the sole surviving member of the victim family i.e. Ujjawal. In case of default of payment of fine, accused persons shall serve 6 months of additional imprisonment."

2. Death sentence having been awarded to accused Hari Om, the matter stood referred to the High Court<sup>4</sup> by way Reference No.8 of 2015. All the aforementioned six accused also filed Criminal Appeal Nos.3316 of 2015, 3265 of 2015, 3317 of 2015, 3836 of 2015, Capital Appeal No.3086 of 2015 and Criminal Appeal No.3512 of 2015 respectively challenging their convictions and sentences.

3. The High Court by its common judgment and order dated 03.03.2017 passed in the aforesaid Reference and Appeals: -

(a) affirmed the conviction and sentence of death imposed upon accused Hari Om and dismissed his Appeal.

(b) affirmed the conviction and sentence awarded to accused Sanjay @ Sonu and Saurabh @ Sanju and dismissed their Appeals.

(c) accepted the Appeals of accused Haseen Khan, Rafique @ Bhaiye and Rijwan and acquitted them of the charges leveled against them.

4. Criminal Appeal No.1256 of 2017 is preferred by Hari Om while Special Leave Petition (Criminal) Nos.9087 and 9088 of 2017 are preferred by Sanjay @ Sonu and Saurabh @ Sanju respectively challenging the judgment and order dated 03.03.2017 passed by the High Court. No appeal has been preferred by the State challenging acquittal of Rijwan, Haseen Khan, Rafique @ Bhaiye.

5. Leave granted in aforesaid Special Leave Petitions.

6. The initial reporting in the instant matter was made by Kotwal Singh (later examined as PW1) at about 7.40 am on 28.10.2008 as under:-

"It is submitted that family of my elder brother Shaheed late Sh. Rajpal Singh had constructed a house in Nagla Mirja Bada and were living there. Today, in the night of 27 & 28/10 some unknown persons have committed murder of my sister-in-law Smt. Nirdosh Devi age 40 years, niece Ku. Poonam age 18 years, nephew Ashish age 12 years and nephew Anshul age 10 years in which neck of my sister-in-law is cut and murder of all the three has been committed by pressing neck/throttling. The incident has come to knowledge in the morning today when milkman came. All the four dead-bodies are lying separately in both two rooms and after breaking box, almirah, suitcase etc. they have taken away all the house-hold

articles, jewellery and cash. List of articles looted will be submitted subsequently. Report be registered and necessary action be taken."

Crime No.367 of 2008 under Section 394, 302 IPC was, therefore, registered with P.S. Ramgarh, Firozabad against unknown persons.

7. Thereafter, following steps were taken on 28.10.2008:-

A. The investigation into the crime was taken up by PW10 S.O. Gautam, who prepared Site Map (Ext.Ka-20). On the same day PW9 Sub-Inspector Ram Prasad conducted inquest on the dead bodies of Smt. Nirdosh Devi, Kumari Poonam, Masters Ashish and Anshul and sent them for autopsy. He had found these four dead bodies lying in supine condition.

B. In the presence of two witnesses, namely, PW3 Harpal Singh and one Mukesh Kumar:-

(i) Blood-stained earth from the floor below the cot where the body of Smt. Nirdosh Devi was lying and the portion of blood stained "baan" (rope) of the cot were taken (vide Ext. Ka-6).

(ii) Finger prints from certain articles like utensils, glasses from the house of the deceased were taken by Constable Dharmender Singh, DCRB (vide Ext. Ka-7).

C. Statements of Ompal Singh (later examined as PW2), Ram Prakash, Raju (owner of the house where accused Hari Om used to live) and Manoj Kumari (wife of Hari Om) were also recorded, which disclosed possible involvement of Hari Om and his associates.

D. The Post-Mortem on the dead bodies of Smt. Nirdosh Devi and Kumari Poonam was jointly conducted by PW7 Dr. R.A. Sharma and Dr. Ajay Agarwal, while the Post Mortem on the dead bodies of Masters Anshul and Ashish was conducted by PW7 Dr. R. A. Sharma. The injuries on the dead bodies were described by the High Court as under:-

**"a. Smt. Nirdosh Devi:** aged 40 years

"i. Incised wound 11 cm x 4 cm on lower part front of neck, more on left side, left side blood vessels cut trachea cut, right and left side muscle cut. Wound horizontal, marquis clean cut.

ii. Abraded contusion over right side of nose 1 cm x 0.1 cm.

On internal examination, trachea was found cut. Semi digested food was found in stomach. Brain was noted pale. Cause of death was due to shock and hemorrhage as a result of ante mortem injuries. Vaginal smear made. Slide prepared and sent to Pathologist SNMH Firozabad through S.O., P.S. Ramgarh."

**b. Kumari Poonam:** aged 18 years "i. Ligature mark 13 cm x 1.5 cm oblique, lower part of neck in middle part and extending upto right side upper part of neck. On dissection underlying muscles contused.

On internal examination membranes and brain were found congested, pleura, Jarynx, trachea were found congested. Hyoid bone was found fractured. Both lungs congested. Semi digested food was found in stomach. Cause of death was due to Asphyxia as a result of

strangulation. Vaginal smear made. Slide prepared and sent to Pathologist SNMH Firozabad through S.O., P.S. Ramgarh."

**c. Master Ashish:** aged 12 years

"i. Multiple contusion on right side, front of neck in an area 6 cm x 3 cm, Average size 1.5 cm x 0.3 cm.

ii. Contusion 3 cm x 1.5 cm on left side front of neck, middle part.

iii. Multiple contusion left side of face 6 cm x 3 cm, average size 1 cm x 0.3 cm.

Cricoid cartilage and Thyroid cartilage found fractured. Death was due to Asphyxia as a result of throttling."

**d. Master Anshul:** aged 10 years

i. Contusion brown dry over front of neck 12 cm x 5 cm over left side of neck, 2 cm over right side of neck.

ii. Contusion 1 cm x 2 cm below jaw left side.

iii. Contusion 1.5 cm x 2 cm lower part of neck left side.

On internal examination, cricoid cartilage, thyroid cartilage, Hyoid bone were found fractured. Pleura, trachea were found congested. Membranes, brain congested. Semi digested food present in stomach. Spleen and kidneys were noted congested. Cause of death was due to Asphyxia as a result of throttling."

8. Steps taken on the next day i.e. 29.10.2008, were:-

A) Pursuant to information received from the complainant, PW10 S.O. G.P. Gautam along with police party and the complainant went to "Sailai Choraha" and at about 11 a.m. apprehended five out of aforesaid six persons while one of them, namely, Rafiq @ Bhaiye ran away. These persons were found to be travelling in a Red Tavera vehicle bearing No.UP83J/7948. From the personal search of these five persons following articles were recovered:-

(a) from Sanjay @ Sonu : country made pistol and two live cartridges

(b) from Rijwan : one country made pistol of 12 Bore and 4 live country made cartridges

(c) from Haseen Khan: one country made pistol of 3.15 Bore with 3 live cartridges

(d) from Hari Om @ Hero: Double Barrel Pauna rifle and one live cartridge, one Nokia Mobile set of black colour (which was stated to be belonging to the deceased Smt. Nirdosh Devi)

(e) from Saurabh @ Sanju: a chhuri (knife).

From the collective possession of these five persons, following articles<sup>5</sup> were also recovered:

"one polythene bag containing one identity card of Rajpal and Pass-Book of Nirdosh Devi & one Pass-Book of joint account of Manju Devi & Sanjay, one Pass Book of joint account of Nirdosh Devi and Rajpal of Indian State Bank; two bangles of yellow metal (gold) from red colored Shaneel purse; a ring of yellow metal (gold) were recovered with cash of Rs.5,000/-; 02 ladies wrist watches from yellow colored Shaneel purse, one silver Kardhani (of 5 Lar) of white metal weighing about 250 gms from red Shaneel purse, one ½ silver Kardhani from Badami coloured Shaneel purse and one yellow metal of golden colour were recovered from red coloured Shaneel purse."

B. Crime Nos.368 to 372 of 2008 for the offences punishable under Section 25 of the Arms Act, 1959 were thereafter registered against Sanjay @ Sonu, Rijwan, Hari Om @ Hero, Haseen Khan and Saurabh @ Sanju respectively.

C. Apart from the arrest of the aforesaid five persons, the statement of Ujjwal, five years old son of Smt. Nirdosh Devi (the lone survivor) was recorded. According to the record, his statement could not be recorded on the previous day as Ujjwal was under shock and unable to make any statement.

D. A chhuri/knife was recovered at the pointing of accused Hari Om in the presence of Panchas.

E. The registration of Crime No.367 of 2008 was altered to that under Sections 396 and 412 IPC and in respect of offences punishable under the SC/ST Act.

9. On 30.10.2008 the investigation was taken over by PW11 Dr. B.K. Singh, Circle Officer, Firozabad during the course of which, he recorded statements of various persons. On 24.11.2008, he recorded the statements of PW1 Kotwal Singh, PW4 Shankar Lal (milkman), Dr. Satya Pal (elder brother of PW1 Kotwal Singh) and constables Dharmendra, Ramesh Chandra, Malkhan and Mawadh Singh.

10. The sixth person Rafique @ Bhaiye was apprehended on 05.11.2008.

11. On 03.12.2008, charge-sheet dated 24.11.2008 was filed by PW11 Dr. B. K. Singh. The basic information about the crime was stated as under:-

"Statement of Complainant of case, confirmed seizure-memo, statement of Shankar Lal, milkman, confirmed place of incident, statement of family doctor of deceased, Dr. Satyapal, confirmed statement of constable Shankar, statement of Constable Dharmendra Singh, confirmed finger-prints report, statement of the Constable who got conducted PM, confirmed PM, investigation against accused persons viz. Sanjay @ Sonu Sharma, Rizwan, Hassen Khan, Hariom @ Hero, Saurav @ Sanju, Bhaiye @ Fareed Khan.

Sd/-

24/11/2008

Charge-sheet u/S 396, 412 IPC & 3(2) 5 SC/ST Act

No.261

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24/11/08

Sent/proceeding of fingerprints match is remaining to be done for examination of case property."

It is relevant to note that in the charge-sheet there was no reference to the statement dated 29.10.2008 of Ujjwal, the youngest child of Smt. Nirdosh Devi nor did it say or suggest that he was a relevant witness.

12. On 04.12.2008 PW11 Dr. B. K. Singh sent the finger prints lifted from various articles, from inside the house of the deceased as well as sample finger prints of Sanjay @ Sonu, Rijwan, Haseen Khan, Hari Om @ Hero and Saurabh @ Sanju for analysis.

13. By its report dated 18.05.2009 the Office of the Director, Finger Print Bureau, Lucknow intimated to the Trial Court, the result of finger prints examination. The relevant portion of the report was as under:

"DISPUTED FINGER PRINTS: finger prints lifted through lifting tape were affixed on four papers. Finger prints have been marked as No.8898 to 8922. Sample of Finger prints: Sample finger prints of Sh. Sanju @ Saurabh, Bhaiye @ Farid, Rijwan, Hariom @ Hero, Sanju @ Sonu Sharma and Haseen Khan taken on slips/parchi dated 4.12.08. All the right & left 10 fingers print have been marked as No.8923 to 8982 respectively.

Sd/- (Illegible)

Sd/- (Illegible)

Sd/- (Illegible)

2. Examination of all the records was conducted in this office, result with reasons are as under :-

D.F.I./P. No.8909 is similar/identical to sample F.I. No.8923. Its formation and line pattern are same. In enlarged pictures, identical lining pattern have been shown in red lines. Details of which are mentioned in Matching list.

Para 2: D.F.P. impression No.8914 is similar/identical to Sample F.P. No.8963. Its formation and lining are same. In the enlarged picture, similar/identical lining pattern have been shown in red lines. Details of which are mentioned in Matching list.

Para 3 : D.F.P. impression No.8917 is similar/identical to Sample F.P. No.8964. its formation and lining pattern are same. Identical lining pattern have been shown in red lines (illegible) in enlarged pictures. Details of which are mentioned in Matching list.

Para 4 : Lining characteristic are not sufficient in disputed finger prints No.8904, 8905, 8906, 8907, 8908, 8916, 8919, & 8920 for giving definite opinion.

Para 5: Disputed Finger Prints No.8898 to 8903, 8910 to 8913, 8915, 8918, 8921, 8922 are not clear for matching."

It must be stated here that the disputed finger print No.8909 lifted from a glass in the kitchen of the house matched with the thumb impression of right hand, being sample No.8923, of Sanju @ Saurabh while the disputed finger print impressions 8914 and 8917 from another glass matched with the sample impressions of the thumb and index finger of right hand being sample Nos.8963 and 8964 of Sanjay @ Sonu.

14. Appropriate charges were framed on 23.11.2009 against all six accused. The charges framed in Sessions Trial No.234 of 2008 were as under:-

"I, Lukmanul Haque, Special Sessions Judge, Court no.4, Firozabad charge you accused persons namely Sanjay alias Sonu, Rijwan, Haseen Khan, Hari Om alias Hero, Saurabh alias Sanju, Fareed alias Rafique with following charges."

First:- This that on 28.10.2008 at the night, time unknown, place Nagla Mirza Bada at the house of deceased under Ramgarh police station area, District Firozabad, you murdered the complainant's sister-in-law, nephews, niece and decamped with the jewelry, cash etc which were kept at the house. This way you have committed an offence which is punishable u/s 396 of the IPC and is in cognizance of this Court.

Second:- This that the articles which were looted on the above date, time and place. Cash jewelry, watch etc were recovered from the possession of you people near the Sailai culvert at 11:00 on 29-10-08 under Ramgarh Police Station, District Firozabad, even after knowing that these items were looted you had kept these with you. This way, you committed an offence which is a punishable offence u/s 412 of the IPC and is in cognizance of this Court.

Third:- This that on the above date, time and place of occurrence, you committed heinous crimes like loot and murder on people of Scheduled Caste. This way, you committed such an offence which is punishable u/s 3(2)5 of the S.C.S.T. Act and is in cognizance of this Court.

I, hereby direct you be tried by this Court under the above charges."

They were tried by the Trial Court in Sessions Trial No.234 of 2008 and Nos.235-239 of 2008 and No.504 of 2011.

15. The Prosecution examined fifteen witnesses and produced the relevant material in support of its case, while two witnesses were examined on behalf of the Defence.

16. The relevant portions from the testimony of some of the Prosecution witnesses were as under:-

A. PW1 Kotwal Singh, brother in law of Smt. Nirdosh Devi, stated in his examination in chief:-

"My brother had become martyr in year 2005. His family consisted of wife Smt. Nirdosh Devi, daughter Ku. Poonam and sons viz. Ashish, Anshul and Ujjawal.

In the night of 27/28.10.2008, murder of my sister-in-law Nirdosh Devi, niece Poonam and nephews Ashish and Anshul was committed by miscreants in their house only. Sister-in-law was murdered by slitting throat, while others were murdered by throttling (strangulating), younger nephew Ujjwal was throttled to death but survived.

This incident came into knowledge when milkman arrived. I had also gone to the site of incident to see where all four dead-bodies were lying separately in different rooms. Household articles, box, Almirah and suitcase etc. were lying broken and its articles were scattered. Miscreants had looted cash and jewellery. The articles looted were in my knowledge and I had seen. I had submitted a written report of this incident to Police Station."

In his cross examination, the witness stated:-

"I came to know about the incident through my elder brother. My elder brother did not come to inform about the incident. Someone from the colony had given information. The said person had come to me in the morning at 6.45 am. This person had come to the house of my brother on foot; I do not know name of the person whom my brother Satyapal had sent to pass information. There were 4-6 more persons with the said person whose names I do not know. I reached the site of incident by running with these persons only, all reached by running. We had reached the site of incident within 5-7 minute. When I reached the site of incident, at that time main door of the house was open. Only my elder brother Satyapal was there inside the house, none else from the family. Family members from Nagau reached within an hour, they had been informed by elder brother through phone."

... ..

"I had gone to police station to give information on the day of incident and thereafter, I did not go again to police station. I wrote Exhibit Ka-1 by sitting on Kharanja outside the incident. I, after writing Exhibit 3, submitted in the evening at about 7 O'clock. I had taken advice of elder brother Dr. Satyapal in writing it"

... ..

"Till today I do not know name and residence of the milkman through whom I received information. The fact of receiving information from my brother Dr. Satyapal, is not written in Exhibit Ka-1. Milkman had informed my brother. My brother Satyapal informed me."

B. PW2 Ompal Singh who lived in the same neighbourhood stated in examination in chief:-

"...In the night of 27/28.10.2008 at about 11 P.M. and Ramprakash were returning back from home from work. House of Mulayam Singh is near house of Nirdosh Devi. Near to it, red colour four wheeler vehicle was parked. 4-5 people were sitting inside it. Hari Om @ Hero, one of them, was standing near the

vehicle and he was talking on phone. I asked Hari Om, 'brother why are you standing at this time' whereupon Hari Om replied that I am talking to Faujin Nirdosh Devi. Then we left for our home. I knew Hari Om @ Hero because he had been tenant at the place of Nirdosh Devi. In the same night, the incident had taken place. I had received information in the morning. I became sure that Hari Om @ Hero and his accomplices committed murder of Nirdosh Kumari and her three children and the miscreants committed loot."



This witness also proved recovery memo Ext.Ka-5 and deposed that on 29.10.2008 at about 05.00 p.m., accused Hari Om had taken out a chhuri/knife from the bricks lying near the southern wall of the house of one Sikia.

Nothing was suggested to the witness in his cross examination that Hari Om had not been the tenant of Smt. Nirdosh Devi. In his cross examination conducted on 01.03.2011, the witness stated:-

"On 28.10.08, when police came on the spot then I was on the spot. Then, neither I had any conversation with police nor made any attempt to talk to the police. I did not tell to the police about the Tavera vehicle being parked on 28.10.08."

But in his cross examination dated 10.03.2011, the witness stated:-

"On 1.3.11 I had given the statement that I did not have any conversation with police and I did not make any attempt to talk to the police. I had conversation with the police at police station and it did not take place on the spot.

I had been in police station from 28.10.08 to 29.10.08. I had seen all the accused persons in police station. I cannot say the name of any other persons except Hari Om. Neither I had seen any person talking on mobile near the vehicle at the spot on 28.10.08 nor did I have any conversation with the person talking on mobile."

C. PW3 Harpal Singh, witness in respect of Exhibits Ka-6 and Ka-7, proved those documents and stated:-

"Darogaji had collected the fingerprint on shelf, box, attachee, utensils and glasses of the kitchen form the spot in my presence as specimen. On it, my signature and the signature of Mukesh Kumar were taken. One Diwanji was also present with Darogaji. Memo was prepared on the spot. This witness has recognised signature on Memo (Paper No.5A/2). On this, Exhibit Ka 7 was marked."

D. PW4 Shankarlal, milkman stated in his examination in chief:-

"Family of late Fauzi Rajpal comprised of his wife, a daughter and three sons. I knew everyone. The date was 28th in the year 08. It was Deepawali festival. I had gone to the house of Fauzi Rajpal Singh to deliver the milk at about 6:45 AM.

I made a call at the entrance of their house. No one responded. I knocked the door even then no one responded. I pushed door whereupon door opened. Then, (Ujjwal) small child of late Rajpal came to me weeping from inside. Then I peeped inside the room of the house and found wife and elder son of Fauzi Rajpal lying dead on the cot. Blood was lying there. A girl and a boy were lying dead in the other room. On seeing them, I got perturbed. I took Ujjwal in my arms and informed Dr. Satyapal who is brother of Fauzi. Then I returned to the place of incident with him. By then, crowd had gathered. Thereafter, I had gone to deliver the milk to some other place from my bicycle."

The witness, in his cross examination, stated: -

"I did not have the meeting with Kotwal Singh on that day. I did not have meeting, therefore, I did not give any information to Kotwal Singh.

... ..

I took Ujjwal on my lap and went to Satya Pal. He had a ligature mark of marpeet on his neck. Neither I told this fact to CO nor he asked me. I'm telling this fact for the first time in the court.

... ..

Satya Pal did not go to PS to give information in my presence. I had given information about the incident to Satya Pal. Satya Pal had returned to the spot with me. Even then, I did not have any meeting with Kotwal Singh.

... ..

...I could not see the cloth of Faujin because she was inside the quilt (lihaaf). Ashish had worn chaukhane shirt and nicker. Ashish was lying dead on the cot. I did not see by touching. Blood was oozing out. Poonam was also inside the quilt. Her face was also visible. She was lying on the ground. Blood was oozing out. Blood had not dried up. I had seen the body of fauzin and her daughter. The blood was oozing out from their bodies. They had not dried."

E. PW5 Ujjwal, the youngest child of Smt. Nirdosh Devi, was of five years of age when the incident had occurred and about eight years of age when he was examined in Court. In his examination-in-chief, the witness stated:-

"It was Deepawali at the time of incident. The incident took place in the night. I was sleeping at my house. The phone of my mother rang on which my mother went to open the door. Thereafter, on opening the gate, Hari Om uncle and 5 other persons came inside the house. 5 uncle (persons) sat on the takht and Hari Om uncle sat on the cot. At that time, I was awake. Mother asked them for tea and water but these persons did not take tea. My sister Poonam came with 6 glasses of water and offered them water. Hari Om uncle demanded the key of almirah from my mother. I already knew Hari Om because he had been tenant at my house in the past.

My mother did not give the key when it was demanded by Hari Om. Then, Hari Om caught hold of the neck of my mother. 2 persons among the persons accompanying Hari Om held the hands and legs of my mother and Hari Om uncle cut the neck of my mother with iron knife.

One of the persons accompanying Hari Om caught the neck of my sister and killed my sister Poonam. One uncle pressed the neck of my brother Ashish. Thereafter, one uncle pressed the neck of my other brother Anshul. Then, Hari Om uncle and other 5 persons accompanying him i.e. total 6 persons looted the articles of my house and went. Hari Om uncle also pressed my neck and threw but I remained lying silently. On identifying Hari Om present in the court, stated that accused Hari Om is present in the court today.

On looking at accused persons present in the court, said that 5 other persons apart from Hari Om were involved in the incident. Today, they are present in the court."

... ..

"On next day of incident, in the morning, milkman came and milkman uncle pushed the door and gate opened. On the opening of gate, I narrated the entire facts to the milkman uncle."

In his cross examination, the witness stated:-

"...Witness was read over the statement u/s 161 CrPC with the help of ADGC and Shri Maheshwari, Counsel for the complainant. Then, the witness stated that in the morning, milkman uncle came. He pushed the door and opened the door. I had got this fact recorded to the police in my statement that I went to him and narrated entire facts. I cannot state the reason as to why it was not recorded."

... ..

"Darogaji has recorded this fact incorrect in my statement that in the morning, after rising of the Sun, my neighbours took me out from the house. Then I saw that my uncle Doctor Saab and many persons with him had come to the house. I cannot say as to how this fact got recorded."

... ..

"When I reached the house of my Tau then my uncle Kotwal also reached there and I narrated the entire incident of the night to Tau and Uncle and also told that Hari Om uncle and 5 other have committed the incident and also told that I witnessed the incident. After narrating entire facts to Tau and uncle, I went to my house with Milkman uncle and Tau and when police came after 5 minutes, in the morning, police came. Then, they were told that Hari Om and 5 uncles came in the night. They committed the incident. I have witnessed the incident. Told the incident to milkman uncle in the morning."

... ..

"After meeting milkman, met Tauji (elder brother of father). When I returned then police had come. Police stayed till evening and police had asked in my presence as to where mother was lying? Where was brother lying, where was sister lying and after throttling, where were (they) thrown. Police did not ask the milkman, my uncle Kotwal and elder uncle Satyapal. I had told all these facts to the police."

... ..

"I was sleeping on the takht. I had told this fact to the police. If Darogaji did not record this fact in my statement then I could not state the reason. I had told this fact to Darogaji cutting the neck with iron knife. If the fact of iron knife is not recorded in my statement then I cannot state the reason.

I had told police that two uncles (persons) were holding the hand and legs of my mother. I cannot state the reasons as to why this fact is not recorded in my statement.

I had told Darogaji in my statement as such that one uncle was pressing the neck of my sister. One uncle pressed the neck of Ashish. This fact is also not recorded separately in my

statement then I cannot state the reason. I had also told Darogaji that Hari Om had pressed my neck and threw in the other room. If this fact that Hari Om pressed my neck and threw in other room is not recorded, then I cannot state its reason. Hari Om demanded key from my mother. If it is not recorded then I cannot state the reason.

When the neck of my mother was cut, mother had been overpowered by them. Then, we brothers and sisters screamed loudly. The house of Hori Lal Darogaji does not exist opposite to my house. Even there is no house of Ram Prakash. No one came on our hue and cry. Hari Om tuned the TV in full volume. I had told this fact about the screaming of us (siblings) loudly and Hari Om opening TV and tuning with full volume to my uncle Kotwal Singh and my elder uncle Satyapal as well as to the police. These facts were also told to milkman. If this fact is not recorded then I cannot state the reason.

All the six glasses in which my sister carried the water, were kept in kitchen. The time when the neck of my sister Poonam was throttled then at that time she was lying in her room. When the neck of my sister was pressed then I was in my mother's room. The neck of Anshul was pressed and the neck of Poonam was pressed. After pressing the neck (illegible), I was thrown on the takht in my mother's room and I was sleeping on the takht itself.

When the accused persons went then I had gone to see my sister and brother. I had told this fact to Darogaji that after the departure of accused persons, I had gone to see my brother and sister. If this fact is not recorded in my statement then I cannot state the reason.

I had voluntarily gone to see my brother and sister. I was not sent by anyone. I was not thrown in the room of my brother and sister. I was thrown on the takht itself. This was the same room where I was sleeping. It was not other room. After seeing brother and sister, I again sat on the takht and began weeping. Thereafter, I slept. When the milkman pushed the door then I got up."

F. PW7 Dr. R.A. Sharma, who had conducted Post Mortem as stated hereinabove, proved the concerned Reports.

In his cross examination in relation to questions about the injury on the body of Smt. Nirdosh Devi, the witness stated:-

"This fact is correct that injury of neck was clean cut and in a single cut and it was more on left side and less on right side. It is possible that the time when the injury was caused, at that time, if the person had been lying. Left portion of the neck would be above and right part would be under where it was cut. On that side, it is possible to cause injury from heavy sharp-edged weapon. Such type of injury is possible if inflicted on the person who is sleeping or unconscious."

G. PW9 SI Ram Prasad who conducted inquest on the dead body of Smt. Nirdosh Devi, stated in his cross examination: -

"It is correct that at the time of Panchnama, four bangles in each hand of deceased were unbroken. It is correct that no broken bangle was found near deceased."

H. PW10 SO Gautam, who had conducted the investigation at the initial state, stated in his examination-in-chief:-

"On 29.10.08. Parcha No.2 was prepared in which arrest of 5 accused persons namely Sanjay @ Sonu, Rizwan, Hasin Khan, Hari Om @ Hero and Saurabh @ Sanju and the statement of eye-witness Ujjwal and copy of memo of Arrest of accused persons, recovery of illegal weapons and cartridges and the case properties of Crime No.367/08 were mentioned and Tavera vehicle bearing No.U.P 83J/7948 used in murder was seized."

In his cross examination, the witness stated:-

"It is correct that on 28.10.08, in Parcha No.IA, I recorded the statement of Ompal Singh s/o Hukum Singh, Om Prakash s/o Leeladhar and the name of Hari Om @ Hero is mentioned in those statements. Besides this, in the statement of Raju s/o Ram Kishan also, name of Hari Om @ Hero is mentioned and the fact that 4-5 boys were sitting in Tavera vehicle is mentioned in these three statements."

... ..

"First Parcha is in my hand-writing and second is in the hand-writing of Sub-Inspector whose name I do not recollect. This Parcha was written after the alleged recovery. It is incorrect to say that some foul play has been done."

... ..

"It is also correct to say that on 28.10.08, neither any search for milkman was made nor his name and address came into the light till the accused persons were arrested. Whereas apart from milkman, there was no other witness to give information to the complainant of the case."

... ..

"It is correct that it is not mentioned in FIR that child Ujjwal was left alive and he was the eye-witnesses. In site-map (Exhibit Ka-20), presence of child Ujjwal at the time of incident is not mentioned. In the statement u/s 161 Cr.P.C. of child Ujjwal, I had recorded that accused persons pressed the neck of Ujjwal but no medical examination of child Ujjwal has been got conducted in this regard as to whether there is any pressing mark on the neck or not."

... ..

"In my investigation, I did not find any quilt lying at the place of incident on the dead-bodies of Smt. Nirdosh and Kumari Poonam."

I. PW11 Dr. B. K. Singh, Circle Officer stated in his examination-in-chief:-

"On 24.11.08, I recorded the statement of complainant Kotwal Singh, witness Shankar Lal, Dr. Satya Pal, C/Dharmendra, C/Ramesh Chandra, C/Malkhan, C/Mawadh Singh....

... ..

"In the instant case, the gold and silver ornaments concerned with the alleged loot were stated to have been recovered, whether said ornament were of gold and silver, no such examination

was got conducted from the Forensic Science Laboratory in this regard. Recovered alleged looted article had not been got identified by Ujjwal (age 7 years)."

... ..

"I had perused record and statements written by previous Investigating Officer. I did not enquire Ujjwal, neither statement of Ujjwal was verified by previous Investigating Officer after reading over, nor I met with Ujjwal during investigation. I had read statement of Ujjwal written by G. P. Gautam (previous I.O.)."

... ..

"Owner of Tavera vehicle has not been identified in the investigation. I cannot say as to whether accused in Tavera vehicle were its owner or not."

... ..

"Witness Satyapal had also given statement that after receiving information, he at first reached the place of incident along with Kotwal Singh.

Statement of witness Shankar Lal was recorded 26 days after the incident. He was the same Shankar Lal who had informed the Complainant. After informing, he stated to have gone again on the spot along with Kotwal and Satyapal."

17. Smt. Manoj Kumari, wife of Hari Om was examined as DW1, who stated that she and her husband were not tenants of Smt. Nirdosh Devi at any time. Ms. Pratibha, Junior clerk working in Road Transport Office of District Firozabad was examined as DW2 who stated that as per official record, the owner of Tavera vehicle bearing No.UP83J7948, at the time the incident had occurred, was one Sunil Kumar s/o Om Prakash Aggarwal.

18. The Trial Court by its judgment dated 06.07.2015 accepted the case of prosecution against all six accused in so far as the offence punishable under Section 396 of the IPC was concerned. It, however, acquitted all the accused of the other offences with which they were charged. It was observed that no disclosure statement of the accused Hari Om in relation to recovery of knife was recorded, and as such the requirement of Section 27 of the Indian Evidence Act ("the Act", for short) were not satisfied, however, the recovery could still be admissible under Section 8 of the Act. It was also observed that there were certain omissions in the statement of Ujjwal recorded during investigation which were brought out in his cross examination, but those omissions were not enough to reject his evidence. By its order dated 13.07.015, sentences as quoted in paragraph 1 hereinabove were imposed by the Trial Court.

19. All six convicted accused preferred criminal appeals as stated earlier challenging their convictions and sentences and so also Reference No.8 of 2015 was made to the High Court for confirmation of the death sentence awarded to the accused Hari Om.

The High Court by its judgment and order presently under appeal affirmed the conviction and sentence of the accused Hari Om, Sanjay @ Sonu, Saurabh @ Sanju and acquitted the other three accused named Haseen Khan, Rijwan and Rafique @ Bhaiye of the charges levelled against them. The reason for their acquittal was:-

"As far as the accused-appellants Haseen Khan, Rijwan and Bhaiye are concerned, they were neither named nor the recovery from them, was proved beyond reasonable doubt, hence, the same was disbelieved and they were acquitted under Section 412 IPC and their fingerprints were also, did not tally with the disputed fingerprints collected from the spot. They were also not named by witness Ujjwal or any other witnesses. According to evidence against them, during investigation there was recovery and first time they were identified before the court by the witness Ujjwal along with other accused. It is also clear from the record that the accused-appellants appeared before the trial court on previous dates and on subsequent date, witness Ujjwal identified them.

Hence, there was sufficient time and opportunity to identify them. No identification parade took place in the present case. The incident is of the year 2008 and after about three years they were identified by child witness Ujjwal first time before the court, hence, this evidence is doubtful. Considering the entire facts and circumstances, including the identification for the first time before the court, it is clear that the prosecution failed to prove the case beyond doubt against the appellants Haseen Khan, Rijwan and Bhaiye alias Farid alias Rafique and they are entitled for acquittal."

20. In these appeals Mr. B. H. Marlapalle, learned Senior Advocate appeared as Amicus Curiae on behalf of the accused. His principal submissions were:-

a) In the face of glaring inconsistencies in the version given by PW5 Ujjwal and in the face of record as it stood, it would be extremely hazardous to accept the testimony of PW5 Ujjwal and make it the basis of conviction of accused Hari Om.

b) There was no link evidence suggesting that the fingerprints were correctly lifted from the house of the deceased, and were duly preserved before sending them for fingerprints expert's opinion.

c) The only material against accused Sanjay @ Sonu and Saurabh @ Sanju was the fact that their sample fingerprints tallied with those lifted from the house of the deceased. In the absence of any substantive evidence, this fact alone would be insufficient to sustain their conviction and sentence. Reliance was placed on the decision of this Court in Musheer Khan alias Badshah Khan and another vs. State of Madhya Pradesh.<sup>6</sup>

d) Out of six named accused charged of having committed the offence of dacoity, three accused having being acquitted, whose acquittal was not challenged, the remaining three accused could not be convicted under Section 396 IPC. Reliance was placed on the decisions of this Court in Ram Shankar Singh and Others vs. State of Uttar Pradesh<sup>7</sup> and Saktu and Another vs. State of Uttar Pradesh<sup>8</sup>.

21. Ms. Aishwarya Bhati, learned Additional Solicitor General appearing for the State, on the other hand, submitted that the testimony of PW5 Ujjwal was completely worthy of reliance and that even going by the rule of prudence, version given by PW5 Ujjwal was fully corroborated on material particulars. She relied upon the decisions of this Court in Suryanarayana vs. State of Karnataka<sup>9</sup>, State of Uttar Pradesh vs. Krishna Master and Others<sup>10</sup> and Manmeet Singh alias Goldie vs. State of Punjab<sup>11</sup>.

22. At the outset, we must note the perspective from which the evidence of a child witness is to be considered. The caution expressed by this Court in Suryanarayana<sup>9</sup> that "corroboration

of the testimony of a child witness is not a rule but a measure of caution and prudence" is a well-accepted principle. While applying said principle to the facts of that case, this Court in Suryanarayana<sup>9</sup> observed:-

"5. Admittedly, Bhavya (PW 2), who at the time of occurrence was about four years of age, is the only solitary eyewitness who was rightly not given the oath. The time and place of the occurrence and the attending circumstances of the case suggest no possibility of there being any other person as an eyewitness. The evidence of the child witness cannot be rejected per se, but the court, as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of the child witness. The evidence of PW 2 cannot be discarded only on the ground of her being of tender age.

The fact of PW 2 being a child witness would require the court to scrutinise her evidence with care and caution. If she is shown to have stood the test of cross-examination and there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony.

Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix-up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not.

6. This Court in *Panchhi v. State of U.P.*<sup>12</sup> held that the evidence of the 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 an easy prey to tutoring. The evidence of the child witness must find adequate corroboration before it is relied upon, as the rule of corroboration is of practical wisdom than of law

(vide *Prakash v. State of M.P.*<sup>13</sup>; *Baby Kandayanathil v. State of Kerala*<sup>14</sup>; *Raja Ram Yadav v. State of Bihar*<sup>15</sup>; *Dattu Ramrao Sakhare v. State of Maharashtra*<sup>16</sup>).

7. To the same effect is the judgment in *State of U.P. v. Ashok Dixit*<sup>17</sup>.

8. In this case Bhavya (PW 2) when appeared before the trial court was of 6 years of age. After questioning the witness, the Sessions Judge found, "though the girl is 6 years old she is active and she understands everything". Without administering the oath to the witness her statement was recorded wherein she stated:

"I know Saroja, I call her as ammayi, she is my aunt. The person sitting in the court box is my uncle. His name is Suryanarayana. Since I call him as uncle, he is my uncle.

My aunt Saroja is now dead. I know how she died. Several days back after taking lunch my ammayi i.e. my aunt Saroja and myself went to the lake to wash the clothes and to take bath.



On that day, my uncle Suryanarayana sitting in the court pierced with a knife the stomach and neck of my ammayi. Hence she suffered injuries and her entire body covered with blood. My ammayi while running after being injured, fell down, I screamed. Immediately I ran and told my father and mother that uncle killed the aunt. If the knife is shown I can identify (a white cloth bag sealed, was opened). I have seen the knife now. With the same knife that day my uncle pierced my ammayi (this was marked as Ext. P-01) on that day. Police asked me as to what happened, I have told everything to the police."

9. In her cross-examination the witness stated that before the date of occurrence the deceased was living with her (witness) parents. At the time of occurrence the witness used to go to aanganwadi school. The witness denied the suggestion that she had not gone with the deceased to wash the clothes. Nothing favouring the defence could be extracted out of her in the cross-examination. She denied the suggestion that "my uncle did not pierce my aunt with the knife. It is not correct that I have not seen the knife in the hands of my uncle". The trial court as well as the High Court accepted her testimony as no inherent defect was pointed out by the defence. We also find no reason to take a contrary view.

The mere fact that her mother had told that she did not know any other language except Malyalam and that the words spoken to by her were not in that language cannot be used as a ground to reject her testimony. The child and her parents conversed in Malyalam language at their residence which was explained to the investigating officer in the language which was understood by him. There is no ground of doubting the veracity of the testimony of this child witness as we find that her name is mentioned in the FIR which is proved to have been recorded immediately after the occurrence. P.H. Krishnappa, the Tahsildar who prepared the inquest report is also proved to have recorded the statement of this child witness, wherein, she is shown to have made similar deposition.

Otherwise also there is sufficient corroboration on record to rule out the possibility of PW 2 being tutored or used for ulterior purposes by some alleged interested persons. In the absence of any inherent defect we do not find any substance in the plea to reject the testimony of this child witness. The statement of PW 2 shows that the deceased and the appellant were living together as husband and wife and she used to address them as uncle and aunt. Her testimony to the effect of the deceased living with PW 1 is sufficiently corroborated by the other evidence led in the case. The factum of the deceased having received stabbed wound with a knife is proved by the medical evidence.

The recovery of the knife at the instance of the appellant, in consequence of his disclosure statement, leaves no doubt to believe her statement. The place of occurrence being near the water tank has not been seriously disputed. The report received from FSL as per Exhibit P-15 shows that blouse (MO 2), towel (MO 3) and the bangle pieces (MO 4) of the deceased and the knife (MO 1) which was used in the commission of the crime, the towel (MO 7), lungi (MO 6) and shirt (MO 5) of the appellant were found to be stained with blood. Dr Ram Dass (PW 12) has opined that the injuries found on the dead body of the deceased could be caused with a weapon like MO 1."

(emphasis supplied)

23. We may now consider the evidence of PW5 Ujjwal in the backdrop of the principles discernible from the decisions of this Court as stated above.

(A) The points on which the testimony of PW5 Ujjwal gets corroborated by other pieces of material or evidence on record are:

i) According to him, a call was received on mobile of his mother, whereafter she opened the door and let the accused in.

The mobile of his mother bearing number 9411926017 definitely received a call at about 9.27 p.m. from a mobile bearing number 9758835941. The call lasted for 20 seconds.

However, there is nothing on record that the concerned mobile was that of accused Hari Om, or any of the accused. The record does not throw any light, nor any efforts were made by the investigating machinery to trace the name of the person holding this mobile phone number.

However, there is some corroboration available from the testimony of PW2 Ompal Singh that on 28.10.2008 he had found Hari Om standing near a vehicle in the vicinity of the house of the deceased; and upon being asked, accused Hari Om had replied that he was calling Smt. Nirdosh Devi. However, according to PW2 Ompal Singh, that was at about 11.00 p.m. and not at or about 9.27 p.m.

ii) After being admitted into the house, tea and water was offered to accused Hari Om and his associates.

There were glasses which were found in the kitchen which fact certainly corroborates the version given by PW5 Ujjwal.

iii) It was stated that his mother was overpowered by two of the accomplices and her throat was slit by accused Hari Om. Thereafter, his three siblings were throttled to death, and an attempt was also made to throttle PW5 Ujjwal.

The manner in which his mother and siblings were done to death is corroborated by the medical evidence on record.

However, if the mother was being overpowered, there were no signs of struggle and none of her bangles was broken. Further, if her throat was slit and her left side blood vessels of the neck and trachea were cut, the blood would have instantaneously gushed out. But, there were no blood spots anywhere else except below the cot where the body of Smt. Nirdosh Devi was found lying in supine condition. One more striking feature of the matter is that there was no medical evidence either in the form of any documents, pictures or even a statement of any medical professional that PW5 Ujjwal was given medical attention as a result of attempts of throttling.

iv) The location of dead bodies, as mentioned by him, is undoubtedly corroborated by the site map, inquest panchanama and other material.

(B) Having dealt with the features which get corroborated to some extent, we will now deal with certain inconsistencies or infirmities which are evident from the record.

i) According to PW5 Ujjwal, in the morning of 29.10.2008, the first person to see him was PW4 Shankar Lal (milkman), who took him to the house of his doctor uncle (Dr. Satyapal Singh).

However, according to his statement recorded during investigation, he was taken to the house of his uncle by the neighbours.

ii) According to his court statement, after reaching the house of said uncle, he had narrated the entire incident to his other uncle PW1 Kotwal Singh and said Dr. Satyapal Singh and told them that Hari Om and his associates had committed the murders and also told them that he had witnessed the incident.

However, the FIR lodged by PW1 Kotwal Singh spoke otherwise. According to the reporting, the accused were unknown persons. The reporting also did not disclose that PW5 Ujjwal had survived, despite being attempted to be murdered, and that he had witnessed the incident. As a matter of fact the FIR did not make any reference to PW5 Ujjwal.

iii) According to PW5 Ujjwal, he had narrated the entire incident to PW4 Shankar Lal (milkman) and Darogaji.

On this score also, the record spoke otherwise, according to which, till 29.10.2008 the names of Hari Om and his associates had not surfaced as suspects at all. The initial registration of crime was against unknown persons.

iv) There are other inconsistencies and omissions with regard to the manner in which his siblings were done to death.

(C) Apart from the aspects referred to hereinabove touching upon the comparison of the version given in court, as against his statement recorded during investigation, certain other features are available from the record which must be noted at this stage.

i) If PW5 Ujjwal was attempted to be murdered and as disclosed by PW4 Shankar Lal (milkman) he had seen a ligature mark on the neck of PW5 Ujjwal, there was nothing on record supporting this fact.

ii) Parcha No.2 which was part of papers pertaining to investigation, did make a reference to the statement of PW5 Ujjwal recorded during investigation. However, as stated by PW10 S.O. Gautam, the said Parcha was not in his handwriting, though, he was incharge of investigation. He could not give any answer as to who had written that Parcha.

iii) If according to the Prosecution, PW4 Shankar Lal was the first person to reach the place of occurrence, his statement was recorded 26 days after the incident. The response given by the concerned Investigating Officer shows that no attempts were made to trace said Shankar Lal.

iv) The versions given by PW1 Kotwal Singh and PW4 Shankar Lal in court did not, in any way, suggest that the names of suspects were narrated to them by PW5 Ujjwal, or that he had told them about the entire incident. As a matter of fact, PW1 Kotwal Singh went to the extent of asserting that it was through Dr. Satyapal Singh that he came to know about the incident.

v) Thus, the version given by PW5 Ujjwal that he had narrated the entire incident to PW1 Kotwal Singh, PW4 Shankar Lal and Darogaji was not supported by any of them. Moreover, the other person namely Dr. Satyapal Singh to whom similar narration was given by PW5 Ujjwal, was not even examined by the prosecution.

vi) The charge-sheet did indicate Dr. Satyapal Singh to be one of the relevant witnesses, and yet he was not examined. On the other hand, the charge-sheet did not even speak of PW5 Ujjwal to be a relevant and material witness.

24. Having culled out the essential features emerging from the record, we must state that we find it difficult to place reliance upon the testimony of PW5 Ujjwal and in our view, the said version can not be made the basis of conviction of Hari Om.

It is true that the assertion made by him that Hari Om used to be a tenant in their house was supported by PW2 Ompal Singh. Even if we accept that accused Hari Om was a known face to PW5 Ujjwal, and the fact that the incident occurred inside the house where PW5 Ujjwal would naturally be available, but on the issue whether he had witnessed the incident, the glaring inconsistencies on record cannot be discarded.

In Suryanarayana<sup>9</sup> after setting out the guiding principles for appreciation and consideration of the evidence of a child witness, this Court had found in paragraph 9, that there were no doubts at all with regard to the veracity to the testimony of the child witness, nor were there any inherent defects. The name of the child witness figured in that case in the FIR and Inquest; and right from the initial stages, her presence was adverted to, which is why no doubts could be entertained. However, such doubts and defects are quite evident in the present matter.

25. In Digamber Vaishnav and Another vs. State of Chhattisgarh<sup>18</sup>, a bench of three Judges of this Court, while considering the matter in the light of the fact that the child witness had not disclosed about the accused in the first instance, observed:-

".....None of the other witnesses have identified the appellants. Therefore, heavy reliance was placed on the testimony of PW 8. She did not tell PW 1, Badridas about the appellants while disclosing about the incident for the first time. This is reflected from the FIR which has been registered against unknown persons. In such circumstances, it is risky to rely on the uncorroborated identification of the appellants at the instance of PW 8, who has not disclosed about the appellants at the first instance before PW 1 Badridas."

Similarly, in Radhey Shyam vs. State of Rajasthan<sup>19</sup>, the evidence of a child witness was not found to be inspiring confidence because of inconsistencies in the version of the witness, as well as because of the absence of corroboration from the other prosecution witnesses.

26. In the circumstances, we do not find it safe to rely on the version given by the child witness in the instant case, who was about five years of age when the incident had occurred.

27. There are other features from the evidence touching upon the involvement of accused Hari Om such as:-

(I) A chhuri or knife was said to have been recovered upon being pointed by accused Hari Om. In the absence of any memorandum, the trial court rejected the theory that such recovery would be admissible under Section 27 of the Act. It was however observed that such recovery would be admissible under Section 8 of the Act. Though the conclusion arrived at by the Trial Court is not inconsistent with some of the decisions rendered by this Court, the evidence in that behalf, by itself may not be enough to sustain the finding of guilt. It will be one of the factors to be taken into account in the ultimate analysis.

(II) Accused Hari Om was seen in the neighbourhood, or near the house of Smt. Nirdosh Devi next to a red Tavera vehicle by PW2 Ompal Singh and one Ram Prakash. During investigation, statement of one Raju, owner of the house where accused Hari Om resided, was also recorded. Ram Prakash and Raju were not examined during trial and, as such, apart from the statement of PW2 Ompal Singh, we do not have any material to support the version that accused Hari Om was either in the neighbourhood of Smt. Nirdosh Devi, or was moving about in a red Tavera vehicle on 28.10.2008.

If the names of accused Hari Om and his associates were not known as suspects to the police on 28.10.2008, which is the case of the prosecution, the link in that behalf has to be either through PW2 Ompal Singh or through Ram Prakash or Raju. When latter two were not examined at all, we have to rely only on the testimony of PW2 Ompal Singh. His cross-examination reveals that he made no attempts to talk to the police on 28.10.2008, though he asserted in his examination-in-chief that in the morning of 28.10.2008 he was sure that the culprits were accused Hari Om and his associates. The version given by PW2 Ompal Singh is, therefore, not free from doubt.

(III) The sample fingerprints of accused Hari Om did not match with any of the fingerprints taken from the house of the deceased.

(IV) With the acquittal of all the accused in respect of offences punishable under Section 412 IPC and under the Arms Act, there is no other material pointing towards the involvement of accused Hari Om.

28. Thus, out of three features which could possibly be put against accused Hari Om, the version given by the child witness being unworthy to be relied upon, we are left with the evidence of recovery of a knife, and the evidence of PW2 that he had spotted accused Hari Om near a red Tavera vehicle in the neighbourhood. The prosecution did not attempt to prove that the call received by Smt. Nirdosh Devi could be associated with accused Hari Om. Secondly, the time given by PW2 Ompal Singh again did not match with the time of the call received by Smt. Nirdosh Devi. Further, the evidence of PW2 Ompal Singh also contains inherent inconsistencies. In the premises, we do not find the material on record sufficient to record conviction of accused Hari Om for the offence under Section 396 IPC, and he must be held entitled to benefit of doubt.

29. We now turn to the submissions b) and c) of Mr. Marlapalle, learned amicus curiae.

Insofar as accused Sanjay @ Sonu and Saurabh @ Sanju are concerned, apart from the material that their sample fingerprints matched with those lifted from the house of the deceased, nothing was brought on record to suggest or suspect the involvement of said two accused. They were acquitted of the charges under Section 412 of IPC and under the Arms Act. Whether their liability in the instant case can be fastened with the help of the fingerprint expert's report is the question.

30. According to the record, Exhibit Ka 7 was the Panchnama testifying the lifting of the fingerprints from the house of the deceased by Constable Dharmender Singh. If the fingerprints were picked from the glasses there is nothing to indicate what method was applied to lift the fingerprints from the glasses allegedly used by the accused when they were offered water. What the record indicates is that some photographs were sent to the office of the Director, Fingerprint Bureau, Lucknow and nothing more. It does not show the procedure

adopted for taking such photographs, and whether such method is a trusted and tested one. The concerned person was not examined, who could have thrown light on these issues. The record also does not show whether those glasses by themselves were made available for appropriate analysis. There is, thus, no clarity in the process adopted by the investigating machinery.

31. In *Prakash vs. State of Karnataka*<sup>20</sup>, the evidence concerning fingerprints was examined in the light of the procedure prescribed under the relevant manual and it was observed:-

"33. Our attention was drawn to the Karnataka Police Manual and it appears that Nanaiah followed the guidelines laid down therein and perhaps acted in an overly cautious manner. Guideline 1543 provides as follows:

"1543. The opinion of the fingerprint expert is of paramount importance in the investigation of various crimes. The following instructions should be followed regarding chance finger and footprints and their developments, preservation of the scene, method of packing and other matters:"

34. Guideline 1544 in the Manual contains various provisions and clause (iv) and clause (v) are relevant for our purposes. They read as follows:

"1544. (i)-(iii) \* \* \*

(iv) If latent prints are found on portable articles they should be seized under a detailed panchnama duly packed and labelled and sent to the Fingerprint Bureau with a police officer with instructions regarding the care of the package during the journey.

(v) In sending the articles containing latent prints to the Bureau, proper attention must be given to their package. The following essential points should be borne in mind:

- It should be ensured that no portion of the article where prints may be found should get into contact with anything else and
- The articles should be securely packed in a suitable container."

Clause (iv) was clearly not followed when Nanaiah took the plastic cover along with him and this is an extremely serious lapse. However, we give him the benefit of doubt and assume that it is perhaps with clause (v) in mind that Nanaiah took the plastic cover along with him.

35. While we completely disapprove of the manner in which Ext. P-18 was taken away by Nanaiah (and the investigating officer did nothing about it), the case of the prosecution does not get strengthened even if a valid procedure was followed, since there is nothing on record to show that the "admitted" fingerprints on Ext. P-20 were those of Prakash which could be compared with the fingerprints on Ext. P-18 and the enlarged photograph being Ext. P-19.

36. Assuming that Ext. P-20 was a valid piece of evidence validly obtained, there is no explanation why it was kept by the investigating officer from 14-11-1990 till 9-1-1991 when it was received by Nanaiah. The Karnataka Police Manual highlights the importance of keeping safe an article containing fingerprints. In view of its importance, Nanaiah did not trust anyone with the plastic cover bearing the inscription "Canara Bank" (Ext. P-18) and carefully took it along with him to avoid its getting damaged by getting into contact with

anything else. On the other hand, we have the investigating officer keeping Ext. P-20 with him for almost two months and in circumstances that seem unclear. We cannot rule out the possibility of Ext. P-20 getting damaged due to careless handling.

37. We are of the opinion that there is no fingerprint evidence worth it linking Prakash to the murder of Gangamma."

32. The procedure detailed in the Karnataka Police Manual captures the importance of development and preservation as well as the method of packing and safe keeping. Such a procedure, if adopted, will not raise any doubts. Secondly, in the aforesaid decision, the conduct of the Investigating Officer in keeping the concerned material with him for almost two months, was not approved by this Court. In the present case, Constable Dharmender Singh was not examined by the Prosecution.

There is nothing on record regarding the competence of said Dharmender Singh, and whether he was adequately trained, or was an expert in lifting the fingerprints from material such as glasses; nor was any evidence led detailing out the procedure adopted by him. In the absence of any such material, it is extremely difficult to rely on the report that the lifted fingerprints from the glasses matched with the sample fingerprints of accused Sanjay @ Sonu and Saurabh @ Sanju.

33. In any case, apart from the fingerprints, there was nothing else on record against these two accused. It was observed by this Court in Musheer Khan alias Badshah Khan and another vs. State of Madhya Pradesh<sup>6</sup>:

"34. It will be noticed that under the Evidence Act, the word "admissibility" has very rarely been used. The emphasis is on relevant facts. In a way relevancy and admissibility have been virtually equated under the Evidence Act. But one thing is clear that evidence of fingerprint expert is not substantive evidence. Such evidence can only be used to corroborate some items of substantive evidence which are otherwise on record."

34. In Hukam Singh vs. State of Rajasthan<sup>21</sup>, the only circumstance against the concerned accused pertained to his fingerprints on a mirror. That circumstance by itself was not found to be sufficient by this Court to sustain the finding of guilt under Section 302 IPC against the accused. It was observed:-

"6. The last circumstance on which reliance was placed on behalf of the prosecution was the presence of fingerprints of the appellant on the mirror Ex. 1. We fail to see how this circumstance can be regarded as necessarily implicating the appellant in the commission of the murders. It was admitted by Sujan Singh that the appellant was on visiting terms with this family and it is, therefore, possible that during one of his visits, the appellant might have touched the mirror Ex. 1 and left his fingerprints on it.

It is also not altogether unlikely that even when the appellant was in the hutment of Sujan Singh for the purpose of committing the theft of ornaments and other articles belonging to Sujan Singh after the quadruple murders had been committed by some other persons, he might have touched the mirror Ex. 1 and in the process left his fingerprints upon it. The presence of the fingerprints on the mirror Ex. 1 is not such a circumstance as would necessarily lead to the inference that the appellant must have committed the murders of these four members of Sujan Singh's family.

7. It is now settled law that in case of circumstantial evidence, all the incriminating facts and circumstances should be fully established by cogent and reliable evidence and the facts so established must be consistent with the guilt of the accused and should not be capable of being explained away on any other reasonable hypothesis than that of his guilt. In short, the circumstantial evidence should unmistakably point to one and one conclusion only that the accused person and none other perpetrated the alleged crime. If the circumstances proved in a particular case are not inconsistent with the innocence of the accused and if they are susceptible of any rational explanation, no conviction can lie. Judged from this standpoint, it is not possible to affirm the conviction of the appellant for the offence of murder of any one or more of Bhanwar Singh, Roop Singh, Lad Kanwar and Inder Kanwar.

The three circumstances relied upon by the prosecution are not incompatible with the innocence of the appellant insofar as the murders of these four persons are concerned. They are capable of being explained away on a hypothesis other than that of guilt of the appellant. We may point out that in any event the view taken by the Sessions Court that the circumstances were not sufficient to found the conviction of the appellant was a reasonable view and the High Court was not justified in reversing it."

35. It must be stated that both Sanjay @ Sonu and Saurabh @ Sanju were unknown faces to PW5 Ujjwal, and were not subjected to any Test Identification. Apart from identification by PW5 Ujjwal in Court for the first time, there is no other material to establish their presence. Thus, even if we accept that fingerprints lifted from the house of the deceased could be associated with the said two accused, that by itself, in the absence of any substantive piece of evidence, cannot be made the basis of their conviction. These accused are therefore entitled to the benefit of doubt.

36. Having come to the conclusion that all three appellants are entitled to benefit of doubt, we need not go into the fourth submission advanced by Mr. Marlapalle, learned Amicus Curiae.

37. In the premises, we accept the appeals preferred by accused Hari Om, Sanjay @ Sonu and Saurabh @ Sanju. While setting aside the orders of conviction and sentence recorded against them, we acquit them of all the charges levelled against them. They be set at liberty, unless their custody is required in connection with any other offence.

38. Before we part, we must record our appreciation for the sincere efforts put in by Mr. B.H. Marlapalle, learned Amicus Curiae and for the assistance rendered by him.

.....J. [Uday Umesh Lalit]

.....J. [Indu Malhotra]

.....J. [Krishna Murari]

New Delhi;

January 05, 2021.

1 Indian Penal Code

2 The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989



- 3 Additional Sessions Judge-2, Firozabad
- 4 The High Court of Judicature at Allahabad
- 5 As stated by PW10 S.O. Gautam in his deposition
- 6 (2010) 2 SCC 748
- 7 AIR (1956) SC 441
- 8 (1973) 1 SCC 202
- 9 (2001) 9 SCC 129
- 10 (2010) 12 SCC 324
- 11 (2015) 7 SCC 167
- 12 (1998) 7 SCC 177 : 1998 SCC (Cri) 1561
- 13 (1992) 4 SCC 225 : 1992 SCC (Cri) 853
- 14 1993 Supp (3) SCC 667 : 1993 SCC (Cri) 1084
- 15 (1996) 9 SCC 287 : 1996 SCC (Cri) 1004
- 16 (1997) 5 SCC 341 : 1997 SCC (Cri) 685
- 17 (2000) 3 SCC 70 : 2000 SCC (Cri) 579
- 18 (2019) 4 SCC 522
- 19 (2014) 5 SCC 389
- 20(2014) 12 SCC 133
- 21 (1977) 2 SCC 99