
(2004) 08 AP CK 0029
In the Andhra Pradesh High Court
Case No : Criminal Appeal No. 87 of 1998

Boda Lokya

APPELLANT

Vs

State of A.P.

RESPONDENT

Date of Decision : 26-08-2004

Acts Referred:

Evidence Act, 1872 — Section 118, 45
Penal Code, 1860 (IPC) — Section 304

Citation : (2005) CriLJ 255

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : C. Praveen Kumar, for the Appellant; Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayana, J.—Heard Sri C. Praveen Kumar, the learned counsel representing the appellant and the learned Additional Public Prosecutor.

2. Boda Lokya the appellant-sole accused in Sessions Case No. 263 of 1994 on the file of Additional Sessions Judge, Khammam, aggrieved by the judgment dated 22-9-1997, had preferred the present appeal. The appellant-accused was convicted for the offence punishable u/s 304, Part II of the Indian Penal Code (for brevity IPC) and sentenced to undergo rigorous imprisonment for seven years and also to pay a fine of Rs. 2,000/-.

3. The case of the prosecution is that the deceased Boda Sakru and the appellant-accused are cousin brothers, and they belonged to Venkatayathanda. About six months back, the appellant-accused outraged the modesty of the complainant-Boda Bhadri (wife of the deceased) while she was alone in the field and in relation thereto a Panchayat was held in 9th mile thanda in the presence of caste elders. The elders admonished the appellant-accused stating that if the accused again quarrelled with the complainant-Bhadri, he has to pay Rs. 10,000/- towards compensation to this effect and a written document was drafted. The

appellant-accused was having grudge over the deceased Sakru and his wife Bhadri. It is also the version of the prosecution that on 3-3-1993 at about 7.30 p.m. L.W. 6 Dharavath Haridash brought liquor from the house of the appellant-accused and gave one glass of liquor to the deceased. But the deceased Sakru refused to take liquor since it was brought from the house of the appellant-accused. The appellant-accused having come to know about the said refusal of liquor by the deceased-Sakru, picked up quarrel with him at 8.00 p.m. While the deceased-Sakru and his wife Bhadri came to the house of Guguloth Poolaiah, stating that the wife of the deceased was having illicit intimacy with several people but the deceased did not find fault with her and for refusing to take liquor which was brought from his house. Complainant-Bhadri came to appellant-accused and asked him as to who are the people with whom she had illicit contacts and she also caught hold of the collar of the shirt of the appellant-accused and appellant-accused beat her. Immediately, the deceased-Sakru nearby, went to rescue her, then the appellant-accused removed a knife from his waist portion of dhoti and stabbed the deceased on the chest and twice on the stomach. The deceased fell down with bleeding injuries and became unconscious, which was witnessed by the neighbouring persons. The appellant-accused fled away and the deceased was shifted to Tekulapalli with the help of the persons gathered there, for medical aid, but the deceased Sakru succumbed to the injuries at about 9 p.m. on reaching to Tekulapalli bus stand.

4. On the oral complaint made by coraplainant-Bhadri, the police of Tekulapalli Police Station registered a case in Crime No. 6 of 1993 u/s 302 IPC. The investigation was taken up and ultimately a charge sheet was filed. The learned Judicial First Class Magistrate, Yellandu, had taken cognizance of the case as P.R.C. No. 17 of 1993 and had committed the same to the Court of Session and the learned Sessions Judge took cognizance of the same as S. C. No. 263 of 1994 and made over the same to Additional Sessions Judge, Khammam. In view of the stand taken by the appellant-accused, denying the commission of the offence, the learned Judge proceeded to record the evidence of P.Ws. 1 to 13, marked Exs. P-I to P-15 and also M.Os. 1 to 6 and ultimately arrived at the conclusion that the offence proved by the prosecution would attract Section 304 Part II IPC and not. Section 302 IPC and accordingly convicted the appellant-accused and sentenced him as already referred to supra.

5. Sri C. Praveen Kumar, the learned counsel representing the appellant-accused made the following submissions :

The learned counsel would submit that the learned Judge placed reliance on the evidence of P.W. 2 the son of the deceased, just a child witness and there is no acceptable corroboration to the evidence of P.W. 2. The learned counsel also would submit that P.Ws. 5 and 6 are the mediators and P.W. 6 is none other than the brother of the deceased. P.W. 4 is the sister of P.W. 1 and her evidence is artificial. P.Ws. 1, 9 and 10 were declared hostile. The learned counsel would submit that even the medical evidence would not support the version of the

prosecution since injury No. 1 is the fatal injury and the evidence of the doctor is that it is not possible to inflict injury No. 1 with a weapon like M.O. 6 and hence, this throws any amount of doubt about the version of the prosecution. The counsel also had pointed out the deposition of P.W. 2 who had referred to moonlight and the deposition of P.W. 3 who stated that the night to be a dark night. The learned counsel would conclude that on such uncorroborated testimony of P.W. 2, just a child witness, the conviction cannot be sustained. The learned counsel also placed reliance on *Lallu Manjhi and Another Vs. State of Jharkhand*, .

6. Per contra, the learned Additional Public Prosecutor would submit that it is no doubt true that P.W. 1 was declared hostile. But P.W. 2 is the son of the deceased who had clearly deposed about the incident and in view of the age of this witness, it can be taken that this witness had sufficient maturity on the date of deposing or on the date when he had witnessed the incident. The learned counsel also would submit that it is not a case of a child witness of very tender age. The learned counsel further submitted that even on solitary testimony, if it is trustworthy and believable, conviction can be sustained. Reliance was placed on *Vishvas Aba Kurane Vs. State of Maharashtra*, and *Dattu Ramrao Sakhare and Others Vs. State of Maharashtra*, . The learned Additional Public Prosecutor also would explain that injury No. .1 alone is not the cause of death, but the other injuries also are there, explained in the medical evidence. Hence, in the light of the reasons recorded by the learned Judge in detail, there are no inherent improbabilities in the version of the prosecution and on the contrary, the evidence of P.W. 2 is so natural and the other events also had been well deposed by other witnesses which definitely corroborated the evidence of P.W. 2 and hence, the conviction can be sustained.

7. Heard both the counsel and perused the oral and documentary evidence available on record.

8. P.W. 1 deposed that deceased Sakru is her husband and she knows the appellant accused Lokya, cousin of deceased. Her husband died four years back in a gallata near her house and she went to police station, and informed the police when quarrel had taken place in Thanda and her husband died in the said quarrel. The police had recorded whatever had been stated by her and visited the scene of offence and she does not remember whether she subscribed her thumb mark after the statement was reduced to writing and when the case was registered. This witness no doubt was declared hostile. Ex.P-1 is the statement u/s 161 Code of Criminal Procedure (for brevity Cr.P.C.) of P.W. 1 and Ex.P-2 is the complaint made by P.W. 1, recorded by police. Ex.P-2, which was recorded by the police as stated by P.W. 1, as per the version of the prosecution, reads as hereunder :

"I am native of 9th Mile Thanda. My marriage took place with Boda Sakru of Venkatayathanda. I am residing with my husband in Venkatayathanda. At about 6 months back my husband's junior paternal uncle namely Boda Lokya, while I

am going to fields, caught hold of my hand with mala fide intention. This matter was informed to my husband and my husband beat me and abused me. I left to my parents house at 9th mile Thanda on that pretext with angry. After some days at 9th mile Thanda Boda Lokya came, my sister Tejavath Koti stopped him and stated you caught hold of the hand of my sister, and her family ruled 9th mile Thanda elders, Goguloth Venkulu, Goguloth Veerabharan, Benoth Vengya of the villagers pertaining to Venkatayathanda and conducted panchayat. As per the panchayat, elders opined that Boda Lokya was at fault . The elders decided that Boda Lokya not to interfere with Bhadri, if any deviation causes, he shall pay Rs. 10,000/- as finally, and the same is reduced into writing and the elders also signed on it. After that my husband and myself came to Venkatayathyanda and lead marital life. Yesterday, i.e. on 2-2-1993 at about 7.30 p.m. when I and my husband were in our house, Daravath Haridas who is my husband's cousin brother by courtesy, came with a glass of liquor on the eve of purchasing bicycle and asked us to consume. On that, my husband asked Haridas from where the liquor brought, on that he replied and brought it from Boda Lokya's house. Then who told to Haridas, there are disputes between Boda Lokya and us, and Lokya might have mixed poison in the liquor, so we did not consume liquor. Then the Haridas returned glass i.e., to the wife of Boda Lokya i.e., Lakshmi who is standing in front of our house after my husband went to the house of Poolaiah, who is native of our village in the moon night for taking. I myself along with my husband Sakru, Poolaiah, Dharavath Bitcha and Dharavath Saji are taking. Boda Lokya came to us when he knows that who refused to consume his liquor, and he abused me in vulgar language and I caught hold of the shirt collar of Boda Lokya and questioned what I have done mistake. Then Lokya pushed me and beating me with his hands and fallen down then bangles are damaged. My husband Sakru watching all the events and came to us and asked Lokya, "why should beating my wife"? Then Lokya taking the knife from his Dhoti and stabbed the Sakru, who is my husband, on the chest and twice on the stomach. The deceased fell down with bleeding injuries and became unconscious which was witnessed by the neighbouring persons. Lokya lost his towel in the backside of the Poolaiah south. My husband lost his blood which is coming from his chest and stomach then immediately he became unconscious and fallen down in the presence of Bitcha, Saji, and Beemudu, in the moon night, I have observed blood stains on my son Beema's nicker. When my husband is having conscious on the way to Tekulpalli's doctor on the lorry. When we reached Tekulapalli bus and tried to get down from the lorry, my husband lost his life. I have reported this matter to the Takulapalli police."

9. The clear version of the prosecution had been narrated in detail in Ex.P-2 . No doubt certain suggestions were put to P.W. 13, that the contents of Ex. P-1 are not true, but the same had been denied.

10. P.W. 2 is the crucial witness the son of the deceased. The age of P.W. 2 on the date of examination i.e., on 2-9-1997 is shown as 16 years. This witness deposed that he knows appellant accused who is his paternal uncle by courtesy

and deceased is his father, and P.W. 1 is his mother. His father died four years back and appellant-accused killed his father by stabbing him in between the houses of L.W. 4 Bitchaiah and L.W. 5 Poolaiah at some distance away from his house. This witness also deposed that when there was altercation between appellant-accused and deceased, the appellant-accused stabbed his father, himself, Poolaiah and Bichayya witnessed the occurrence besides B. Saji. This witness further deposed that his mother also came before the occurrence. The appellant-accused ran away. When they were taking his father to hospital, his father died on way. This witness, P.W. 1 and L.Ws. 3 to 5 together went to the police. The police recorded the statement, visited the scene of offence, held inquest and observed the injuries on the body of his father. There were three stab injuries sustained by his father near chest and abdomen area.

11. In the cross examination, this witness clearly deposed that since beginning, he was present at the scene of offence and even at the time of gallatas, he was present there and men and women gathered from the Thanda. This witness specifically denied the suggestion that on the date of death of his father, all the male persons of Thanda having consumed liquor formed into two groups and beat each other and also denied the suggestion that his mother and he reached scene of offence after his father had sustained the injuries. This witness also deposed that about 15 minutes after he went there, his mother came to the scene of offence, his father was stabbed and fell down and he denied the other suggestions. This witness no doubt voluntarily deposed that it was a moonlit night. The other suggestions were denied.

12. P.W. 3 deposed that he knows P.Ws. 1,2, deceased Sakru and appellant-accused Lokya, and Sakru died four years back. As Poolaiah was shifting his residence, on that day, deceased Sakru came to the house of Poolaiah and there was an altercation between Sakru and appellant-accused. His house is situated by the side of the house of Poolaiah. He witnessed the gallata from his house. On hearing that appellant-accused stabbed the deceased, he rushed to the spot where many people gathered. P.Ws. 1 and 2 were present there. He heard the voice so happened though he had not seen them physically. Sakru thereafter was taken to hospital and police came to their village after the death of Sakru and he had stated before police what he had witnessed. No doubt this witness deposed that it was a dark night. The evidence of P.W. 3 is in corroboration to the evidence of P.W. 2 to the extent at least forming part of the same transaction just what exactly happened immediately after the incident. This witness specifically deposed that he witnessed the gallata from his house and on hearing that appellant-accused stabbing the deceased, he rushed to the spot where many people gathered. No doubt the discrepancy in the evidence of P.W. 2 deposing about moonlight and P.W. 3 deposing about dark night had been highlighted by the counsel for the appellant-accused.

13. P.W. 4 is the sister of P.W. 1 who had also deposed about what transpired prior to the incident and also about the death of the deceased and she came to

know the death of the deceased through P.W. 2 and went to see the deceased. No doubt in cross examination, this witness deposed that police informed her what all she has to depose. But, however, again when a question was put by the Court, she deposed that it is not true to suggest that she was deposing falsehood and that no panchayat had taken place nor P.W. 1 or appellant-accused came to Thanda.

14. P.Ws. 5 and 6 in categorical terms deposed about the panchayat held and this appears to be the main reason for the incident on the fateful day. P.W. 7 deposed about seizure of M.Os. 1 and 3 under Ex.P3 Panchanama. P.W. 8 deposed about Ex.P-4 Panchanama. P.Ws. 9, and 10 no doubt were declared hostile.

15. P.W. 11 deposed that on the strength of the requisition of police on 3-2-1993, she conducted autopsy over the dead body of the deceased Sakru and noticed the following external injuries :

" 1. Stab injury of $\frac{1}{2} \times \frac{3}{2}$ on the front of chest towards the left side middle of sternum.

On opening an injury about $\frac{3}{4} \times \frac{1}{2} \times 2\frac{1}{2}$ inches was seen on upper loop of left lung. Chest cavity filled with blood.:

2. Another stab injury of $1 \times \frac{1}{2} \times 1\frac{1}{2}$ inches in size over left lumbar region of abdomen. About $1\frac{1}{2}$ inch length of the loop of intestine protruded out of the wound.

3. Another stab injury of $1 \times \frac{1}{4} \times \frac{1}{2}$ inches in size at about 1 inch lateral injury No. 1."

16. This witness deposed that all the injuries are ante mortem in nature possible by a piercing object. Injury No. 1 is fatal. All the injuries are sufficient to cause death in ordinary course of nature, which is due to haemorrhage and shock caused by injury to lung. This witness opined to the effect. To that effect Ex.P-7 is the post mortem examination report with opinion. Injury No. 1 is not possible with M.O. 6. In the clarification, sought by the Court, this witness deposed that because M.O. 6 width is more and length is not to the required, the injury No. 1 cannot be possible if M.O. 6 is used the length be less than $3\frac{1}{2}$ inches.

17. P.W. 12 the Principal District Munsif deposed about his recording of 164, Cr.P.C. Statement. The statement of Boda Bhadri is Ex.P-8 and statement of B. Bheema is Ex. P-9, and statement of G. Poolaiah is Ex.P-10, and statement of B. Bitcha is Ex.P-11 and statement of B. Saji is Ex.P-12.

18. P.W. 13 had deposed about all the details, examining the witnesses, visiting the scene of offence, noticing one injury on the chest and two injuries on the stomach and seizing the M.Os., conducting Panchanama and preparing rough sketch and conducting autopsy and examining and recording statements and arresting the appellant-accused. This witness was cross -examined at length.

19. Ex.P-3 is the scene of offence panchanama conducted by Police., Ex.P-4 is the Inquest panchanama conducted by Police over the dead body of deceased Boda Sakru, Ex.P-5 is the Confessional panchanama of appellant-accused conducted by Police, Ex.P-6 is the seizure panchanama of M.O. 6 from the possession of appellant-accused conducted by Police , Ex.P-14 is the rough sketch of scene of offence prepared by P.W. 13 and Ex.P-15 is the Requisition given by Police to record 164, Cr.P.C. statement. It is no doubt true that P.W. 11 deposed that injury No. 1 is fatal and the same could not have been caused with a weapon like M.O. 6 but it is pertinent to note that this witness deposed that the death could have been caused of the other injuries also.

20. The main submission made by the learned counsel for appellant is that on the strength of this uncorroborated testimony of a child witness P.W. 2 especially in the light of the fact that P.Ws. 1 and 10 had not supported the version of the prosecution, conviction cannot be sustained. In the decision (cited Lallu Manjhi and Another Vs. State of Jharkhand, the Apex Court observed (Para 10) :

"The Law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony into three categories, namely (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon testimony of a single witness."

21. There cannot be any controversy relating to the said proposition, when conviction to be sustained in a criminal trial, on the strength of solitary testimony, especially when the testimony is that of a child witness, the evidence may have to be scrutinized with care and caution. It is no doubt true that P.W. 2 is the son of the deceased and in that way he is also an interested witness. Apart from the evidence of P.W. 2, the evidence of P.W. 3 is also available on record. No doubt the counsel had pointed out certain discrepancies in the evidence of P.W. 3 and would contend that this evidence also cannot be believed.

22. In Mohamed Sugul ESA v. The King AIR 1946 PC 3, Their Lordships of the Privy Council while dealing with not to act on uncorroborated evidence of child is a rule of prudence and not of law, held :

"In England where provision has been made for the reception of un sworn evidence from a child it has always been provided that the evidence must be corroborated in some material particular implicating the accused. But in the Indian Act there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence a Court can act upon it; corroboration, unless required by statute, goes only to the weight and value of the evidence. It is sound rule in practice not to act on the

uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law."

23. In *Rameshwar Vs. The State of Rajasthan*, , the Apex Court on this aspect held :

"The proviso quoted above must be read along with Section 118, Evidence Act and Section 13, Oaths Act. In my opinion, an omission to administer an oath, even to an adult, goes only to the credibility of the witness and not his competency. The question of competency is dealt with in Section 118. Every witness is competent unless the Court considers he is prevented from understanding the question put to him, or from giving rational answers by reason of tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind. It will be observed that there is always competency in fact unless the Court considers otherwise. No other ground of incompetency is given, therefore, unless the Oaths Act adds additional grounds of incompetency it is evident that Section 118 must prevail."

24. In *Suresh Vs. State of U.P.*, , the Apex Court while dealing with appreciation of the evidence of child witness of five years, on facts, arrived at a conclusion that such evidence also can be relied upon and can be acted upon.

25. In *Shivaji Genu Mohite Vs. The State of Maharashtra*, , the Apex Court no doubt had observed that the evidence of teenager may have to be scrutinized with care and caution by the Courts.

26. In *Caetano Piedade Fernandes and Another Vs. Union Territory of Goa, Daman and Diu Panaji, Goa*, , while dealing with the evidence of a child witness of six years on the ground that the evidence suffered from several infirmities, the Court was not inclined to accept such testimony.

27. In *Nandeswar Kalita Vs. State of Assam*, the Division Bench of Gauhati High Court observed (Para 7):

"In regard to the first question raised by the learned counsel for the appellant, we are of the view that there is no rule of law that Judge or Magistrate before recording statement of a child witness, should invariably put preliminary questions for the purpose of ascertaining the child's capacity to understand and give rational answers; and the mere fact that a Judge did not interrogate the child witness before the examination will not render his evidence inadmissible. The object of putting question is to enable the Judge to form his opinion whether the child has sufficient understanding to be qualified to be witness. But, in order to find this out, it is not obligatory that a preliminary investigation should be made. Another object of putting questions before examination is that time of the Court may not be wasted, if it is found afterwards that then child is not intelligent enough to give evidence. In the instant case, Bagai Das, who claimed to be the eye witness of the occurrence, was a child about 7/8 years, at the time of the evidence in the Sessions Court. After the examination in-chief and cross

examination of this child witness, the learned Sessions Judge from his demeanour and other circumstances, observed that he was a natural witness. We agree with the view of the learned Sessions Judge in this respect. The witness testified that the accused snatched the child from his lap and thrashed him on the courtyard and he raised alarm, when his mother Smt. Saruaiti Das (P.W. 6), rushed from inside the house and he reported to his mother about it. He also narrated the occurrence to Smt. Jaymoti Das (P.W. 5) who arrived first at the spot. The witness could stand the ordeal of cross-examination and could give rational answers to the questions put to him. His narrative is very natural and consistent."

28. While dealing with a similar fact situation in State of Maharashtra Vs. Prabhu Barku Gade, at p 1438, the Division Bench of Bombay High Court held (Paras 16 to 18) :

"Pramila deposed that the incident took place on the second day of month which was a Monday. On the date of the incident at about 7.30 p.m. when she was playing in the courtyard of her house, along with her younger sister, the appellant came and started abusing her father and grand father on the ground as to why they had cut the grass from his field. Her grand-father replied that he had not cut it. Thereafter the appellant pushed her grandfather. However, Chandrakant and Chindoba took the appellant away. The appellant, had threatened that he would see them. Then they had dinner and thereafter her father (Govind P.W. 4, the informant) went away to report the incident to the Sarpanch. Her grand-father also left for the hut in the field where he used to sleep. Her mother, younger sister and herself lay down on the bed. A lamp was burning inside the house. The appellant, while all of them were lying down, entered the house with a tikav in his hand and assaulted her mother on the head with it. She (Pramila) started crying and shouting. The appellant thereafter ran away. She stated that the frock, which she was wearing, got stained with the blood of her mother. Chandrakant and his wife also came, on hearing her shouts and she narrated the incident to them. Then all three of them gave calls to Govind (her father) and grandfather. Her grandfather did not respond. After some time her father and villagers came and she told her father that the appellant had assaulted her mother, with a tikav on head. Her father went to Police Station Chakan for lodging the F.I.R. The Police seized her frock (article No. 8). When the aforesaid frock and tikav were shown to her in Court she identified them.

It is unfortunate that since no evidence was adduced by the prosecution to prove that the aforesaid frock was throughout kept in a sealed condition, subsequent to its seizure and till its being sent to the Chemical Analyst, prosecution is deprived of the benefit of this clinching corroborative evidence. However, in spite of this lapse by the investigating agency her evidence, in our opinion, inspires confidence and is worthy of belief. The appellant, being her uncle, and living in her close proximity, was well known to her from before the incident and since a

kerosene lamp was burning at the place of the incident she would have had no difficulty in identifying him. We are at our wits end to understand as to why she would falsely implicate the appellant, who after all was her uncle.

Pramila's presence at the place of the incident, which was her own house, appears to be perfectly natural and understandable. Chandrakant P.W. 5 whose house is adjacent to her house also speaks about it. The informant Govind, (her own father) also deposes that it was she who immediately informed him about his wife's (Mirabai's) murder. The manner of assault as deposed to by her is corroborated by medical evidence. Dr. Madane, P.W. 7 who conducted the autopsy on the dead body of Mirabai deposed that the C.L.W. (contused lacerated wound) suffered by the deceased was attributable to the tikav shown to him. Finally we find that there was no opportunity to tutor her either. As seen earlier the incident took place at about 10 p.m 2nd Nov. and the evidence of P.W. 10 Station Duty Police Officer Ajit Vasantrao Patil is that the next day i.e. on 3rd Nov. he recorded her statement u/s 161, Cr.P.C.

For the aforesaid reasons we place reliance on her testimony and hold that her evidence inspires implicit confidence.

The first criticism is that the preliminary examination conducted by the trial Judge to ascertain the level of Pramila's understanding was done in a perfunctory manner inasmuch as the questions put to her in it have not been recorded and only her answers were recorded. In support of his contention learned counsel placed reliance on a Division Bench decision of the Orissa High Court reported in Ratna Munda and Another Vs. The State, .

In the aforesaid case their Lordships of the Orissa High Court observed in paragraph 9 (at p. 1365) thus :

It is always desirable that a trial Judge should leave on record not only the evidence of a child but also the questions he had put to the child witness in the preliminary examination."

It is true that the questions put to her in preliminary examination have not been recorded by the learned trial Judge but there is no rule of law thumb or of procedure warranting that such a omission would introduce such a infirmity in her evidence which would render it unworthy of acceptance. Even in the aforesaid decision it has been mentioned that "it is always desirable" and not that it is always imperative.

We may also mention that the answers given by Pramila to the questions put to her in preliminary examination themselves indicate as to what were the questions put to her. We have extracted those answers in paragraph No. 15 of this judgment. The real object of recording questions is that it should be clear as to what were the questions to which answers are given and the preliminary examination of Pramila shows that this object has been fulfilled.

Consequently we find the aforesaid submission to be without merit and reject it."

29. The Division Bench of the Allahabad High Court in Ram Achal Vs. State of U.P., on this aspect observed (Para 21) :

"The testimony of the child witness Ramu (P.W. 2) is challenged on the ground that he is a tutored witness. No doubt, the testimony of a child witness is to be scrutinized carefully with due caution. In the instant case , the child witness had developed sufficient understanding. After witnessing the occurrence, he could describe it and understood the questions and answers. The trial Court has satisfied itself in this connection before recording his deposition. He had given a vivid account of the occurrence just like Uma Kanti (P.W. 1). He was cross-examined at length by putting to him varied and diverse questions and his answers seem to have been given on his own. Himself being attacked and injured during the course of the occurrence, he was definitely in a position to watch and thereafter narrate the happenings. It will not be correct to say that Ramu is a tutored child witness. His testimony, which gets corroboration from other evidence, also, is reliable and inspires confidence."

30. The Division Bench of Orissa High Court, no doubt expressed slightly a different tone and in Ratna Munda and Another Vs. The State, , the Court expressed :

"Once the -extra judicial confession is ruled out, the only evidence against the appellants is the direct testimony of P.W. 9 who is the solitary eye witness. Law is well settled that conviction can be sustained on the basis of evidence of a solitary eye witness provided such evidence is entirely trustworthy and above board. P.W. 9 is a young boy of about nine years of age. Being the solitary eye witness and also being a child witness, the evidence of P.W. 9 must be scrutinized with great care and attention. In State of Bihar, etc. Vs. Kapil Singh, etc., , State of Bihar v. Kapil Singh it was held that while a child witness of about 12 years could often be expected to give out a true version because of its innocence, there was always the danger in accepting the evidence of such a witness, because, under influence, he might have been coaxed to give out a version by persons who might have influence on him. In Ulla Mahapatra Vs. The King, , Ulla Mahapatra v. King it was held that children of tender age generally speaking, were not to be regarded as trustworthy witnesses as they could easily repeat glibly a story put into their mind and did not possess the discretion to distinguish between what they had seen and what they had heard. Bearing in mind the principles laid down in the aforesaid decisions we proceed to examine the evidence of P.W. 9. At the outset we may point out that the learned Sessions Judge, no doubt, put some questions to P.W. 9 to test his power of understanding. Unfortunately the questions put to and the answers given by the witness have not been recorded, though they should have been. It is always desirable that a trial Judge should leave on record not only the evidence of a child but also the questions he had put to the child witness in the preliminary examination and the answers given by the witness so that, if necessary , the appellate Court can come to its own conclusion as to whether the child witness was competent to depose in the case. According

to P.W. 9, he was returning with his father and the two appellants from the weekly market. On the way his father and the appellants quarreled. Appellant 1 assaulted the deceased with a bahungi and appellant 2 assaulted the deceased with a lathi and then they went away. This is all that has been recorded in the examination-in-chief. In cross-examination the suggestion that the appellants had not accompanied him and the deceased from the weekly market has been denied. The learned Sessions Judge has observed more than once in the deposition sheet of P.W. 9 that he kept mum for long spells and gave answers with great difficulty after a lot of hesitation. That may be the reason why there has not been further cross-examination of P.W. 9. The statement of P.W. 9 in examination-in-chief is a bald and cryptic narration which does not inspire confidence. The evidence of P.W. 9 is no doubt supported to some extent by the evidence of his mother, P.W. 6. She has stated that on returning on the night of occurrence P.W. 9 had stated before her that the two appellants had assaulted his father and killed him. But the evidence of P.W. 9 is not at all trustworthy or reliable. Being the solitary eye witness and again a child witness who was not able to give clear answers in Court, it would not be reasonable or proper to sustain the conviction on the basis of his evidence. The recovery of the bloodstained bahungi on production by appellant 2 before P.W. 2 cannot by itself form the basis for conviction. On consideration we hold that the prosecution has failed to bring home the charge u/s 302, IPC against the two appellants."

31. In *Narayan Iranna Potkanthi Vs. State of Maharashtra*, while dealing with the duty of the Court to ascertain whether the child witness understood sanctity of the oath, the aspects to be considered had been dealt with at length.

32. The Division Bench of Kerala in *Kesavan v. State of Kerala* 1993 (3) Cri 19 observed :

"In England statutory provision has been made for exception of unsworn evidence from a child. The enactment is "Children and Young Persons Act, 1933". It provides that the evidence of a child witness must be corroborated in some material particulars implicating the accused. It is apposite in this context to make a reference to the observations made by Lord Lane, C.J. in *R. v. Z* (1990) 2 All ER 971) that the question in each case was whether having regard to the nature and circumstances of the case and the nature of the evidence the child was called on to give, the child possessed sufficient intelligence to justify the reception of her evidence and understood the duty of speaking the truth. Furthermore, the younger the child the more care which had to be taken before admitting the child's evidence. Even though the said observations were made while considering the scope of Section 38(1) of Children and Young Persons Act, 1933, they provide useful guidance for us also. Of course, there is no such provision in any statute in India and hence there is no legal hurdle in acting on the testimony of a child witness in India. All the same, Courts have cautioned from early times that it is only a sound rule in practice not to act on the uncorroborated evidence of a child witness, whether oath has been administered

to him or not. This was first observed by Lord Goddard in *Mohamed Sugal Esa v. The King*, AIR 1946 PC 3. This is more a rule of prudence than a rule of law. A Division Bench of this Court has sounded the same caution 30 years ago (vide *Varkey Joseph Vs. State of Kerala*,

The Supreme Court has directed that the aforesaid caution must be adopted as a rule of prudence when the Court has to consider the evidence given by a child witness (vide *Bharvad Bhikha Valu and Others Vs. The State of Gujarat*, and *Suresh Vs. State of U.P.*, ."

33. The Division Bench of Calcutta High Court in *Santosh Mandal Vs. State*, in a similar fact situation, observed (para 15):

"It is true that P.W. 4 is a child witness and P.W. 3 is, if not a child, at least a witness of very tender age. On the question of competency of witnesses, the relevant provisions of law are to be found in Section 118 of the Evidence Act. It provides that 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. As regards child witnesses there has been a mass of case law on the subject. It is now well settled that 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 may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation. The decision of the trial Court may however, be disturbed on review if from what is preserved in the records it is clear that he was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs."

34. The Division Bench of this Court in *Badi Guravaiah Vs. State of Andhra Pradesh*, in a similar fact situation, held (Para 9 and 10) :

"It is mainly contended by Sri T. Balireddy, learned counsel appearing for the accused that P.W. 2 is a child witness and his evidence ought not to have been accepted by the lower Court. P.W. 2 is stated to be aged about 14 years by the date of giving evidence in Court on 4-11-1991. P.W. 1 could not give the age of P.W. 2 though she stated that Munemma, the younger sister of P.W. 2 was aged about 13 years. She stated that Munaiah (P.W. 2) is elder than Munemma. The competence of a witness is determined by Section 118 of the Evidence Act. According to the said section, every person is competent to give evidence, except when the Court considers that he or she is unable to understand the questions put him or her or give rational answers. Such incompetency may arise from causes like tender years, old age, disease etc. The proviso to Section 5 of the Oaths Act prescribes that when a witness is a child under 12 years of age and the Court considers that though he understands the duty of speaking the truth, he does not understand what oath means, the Court may dispense with the

administration of oath. But the Judge should always, when dispensing with an oath, make a clear record that he was satisfied that the child understands the duty to speak the truth and should also state his reason for thinking so. At certain times when the age of the witness is in border case and the Court finds that the age of the so called child witness is beyond 12 years, the age of the so called child witness in this case being held to be about 14 years, and if the court proceeded with the recording of evidence of such a witness without preliminary examination by putting question to satisfy himself whether the witness is able to understand the questions and give coherent answers renders the evidence of child witness inadmissible or unreliable? In our considered opinion the answer to the above question must be in the negative. We are fortified by judgment of a Division Bench of this Court reported in *Kumara Pedda Anjanaiah v. State* 1972 AP HC 266. It is necessary to extract the relevant passage in that decision for a proper appreciation of the issue on hand. It runs as follows:--

"True, as stated by the counsel, the Court did not indicate in the deposition of P.W. 1 whether it put questions to the child witness and whether it was satisfied that he knows the duty of speaking the truth, but it may be noticed that the learned trial Judge, in para 19 of his judgment has categorically opined that "they (P.Ws. 1 to 3) have given rational answers and they are found to be fully competent to testify." The trial Judge would not have recorded the evidence of P.W. 1 if he was not satisfied that the child understood the duty of speaking the truth before the Court. The defence counsel did not raise any objection in this regard at the time of recording P.W. 1's evidence. Had he raised the point, the trial Court would have certainly recorded its opinion in this regard even before taking the evidence of P.W. 1. That apart, on a careful reading of the evidence of P.W. 1, we are satisfied that he is a competent witness and his evidence is admissible."

In *Jai Singh Vs. State*, it was held that omission of the trial Judge to put questions to a child witness to satisfy himself whether the witness is able to understand the questions and give coherent answers and to incorporate the preliminary examination in the record does not render the evidence of a child witness either inadmissible or unreliable. In yet another decision reported in *Santosh Mandal Vs. State*, it was also held that keeping of the record of preliminary examination of a child witness to assess its capacity to give evidence is not a condition precedent to the taking of evidence of a child witness. It is therefore clear that the evidence of a child witness recorded without putting a few preliminary questions to satisfy as to his competency cannot, as a matter of law, be treated as washed off the record altogether. Even on a careful examination of the answers given by the witness in his cross examination, we are satisfied that the witness was in a position to understand the questions put to him and that he was in a position to understand the distinction between truth and untruth and that he was able to give coherent answers. On a reading of the entire evidence of P.W. 2, we are satisfied that the omission of the trial Judge to put preliminary questions to P.W. 2 to satisfy himself whether the witness is able

to understand the questions and give coherent answers and his failure to incorporate the preliminary questions and answers in the deposition does not render the evidence of P.W. 2 either inadmissible or unreliable. No objection also appears to have been raised by the learned defence counsel at the time of recording the evidence of P.W. 2.

Another argument advanced by Shri T. Balireddy, learned counsel for the accused is that P.W. 2 is only a child witness and he is easily amenable to tutoring and therefore his evidence cannot be taken into consideration. After careful scrutiny of the evidence of P.W. 2 with reference to the other attendant circumstances we are impressed with the evidence of P.W. 2. Further, his evidence finds ample corroboration from the evidence of P.Ws. 1, 3 and 4. When there is sufficient corroboration to the evidence of P.W. 2 and when his evidence gives the impress of truth, it cannot be said that simply because he is a child witness his evidence cannot be looked into. In *In Re: Sheikh Umar Saheb alias Umra*, it was observed as follows :-

"Normally, a Court should look for corroboration in such cases, but it is more, as already pointed by way of caution and prudence and not as a rule of law. Children are liable and their evidence could easily be shaped and moulded. It is for this reason that a Court should see whether there are any signs or indication of tutoring. If after carefully scrutinizing the 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 such a child witness."

Although the unsworn testimony of a child is admissible, it must be received with great caution. Children of tender age, generally speaking, are pliable and their evidence can easily be shaped and moulded. They can be made to repeat glibly a story put into their mind. They do not possess the discretion to distinguish between what they have witnessed and what they have heard. It is, therefore, desirable that absolute reliance should not be placed on the evidence of a solitary child witness . One should look for corroboration of the same from other circumstances in the case. The tender years of the child, coupled with other circumstances appearing in the case, for example, its demeanour, unlikelyhood of tutoring and so forth, may render corroboration unnecessary. But that is a question of fact in every case. If, after carefully scrutinizing the evidence, the Court comes to the conclusion that there is a great impression of truth in it, there is no bar in law in the way of accepting the evidence of a child witness. The Court should look for corroboration as a matter of caution and not as a rule of law. It must be remembered P.W. 2 is no other than the son of the accused. We cannot expect that unless he saw the incident, he would not have come forward and testify to what he actually witnessed. His evidence appears to be natural. Therefore, the contention of the learned counsel for the accused that the evidence of P.W. 2 cannot be taken into consideration does not hold good and has to be rejected."

35. In *Prakash and another Vs. State of Madhya Pradesh*, :

"After giving our anxious consideration to the facts and circumstances of the case and the arguments advanced by the counsel for the parties and judgment delivered both by the Additional Sessions Judge and the High Court of Madhya Pradesh, it appears to us that the fatal injuries had been inflicted by Prakash with the gupti. The gupti was recovered at the instance of the accused and such recovery was not otherwise possible if the accused himself had not assisted for such recovery of the gupti. The said gupti was stained with human blood and no reasonable explanation has been given by accused for such bloodstain. The injuries found on the person of the deceased could be influenced by a gupti and complicity of Prakash inflicting the fatal injuries by gupti has been corroborated by the eye-witness. There may be some minor discrepancies in the evidence of the eye-witness but so far as the complicity of Prakash is concerned, the depositions of the eye-witnesses were consistent. In discarding the evidence of the brother of the deceased namely Ajay Singh the learned Additional Sessions Judge was influenced by the tender age of Ajay (about 14 years) and was of the view that he was likely to be tutored. We do not think that a boy of about 14 years of age cannot give a proper account of the murder of his brother if he has an occasion to witness the same and simply because the witness was a boy of 14 years it will not be proper to assume that he is likely to be tutored. The High Court has given very convincing reasons for accepting the evidence of Ajay Singh as an eyewitness of the murderous act and we do not find any infirmity in the finding made by the High Court. In so far as the dying declaration is concerned, we are inclined to accept the finding of the High Court that the deceased was alive at least up to half an hour after the assault. He had been taken to the hospital where he received some treatment for about 10-15 minutes. It is not borne out from the evidence of the doctor that the injuries were so grave and the condition of the patient was so critical that it was unlikely that he could make any dying declaration. In the ordinary course, the members of the family including the father were expected to ask the victim the names of the assailants at the first opportunity and if the victim was in a position to communicate, it is reasonably expected that he would give the names of the assailants if he had recognized the assailants. In the instant case there is no occasion to hold that the deceased was not in a position to identify the assailants because it is nobody's case that the deceased did not know the accused persons. It is therefore quite likely that on being asked the deceased would name the assailants. In the facts and circumstances of the case the High Court has accepted the dying declaration and we do not think that such a finding is perverse and requires to be interfered with. As a matter of fact, on second thought, the learned Additional Sessions Judge has accepted the dying declaration and has convicted Prakash on the basis of dying declaration. The injuries inflicted by Prakash were very serious on vital parts of the body causing death of the deceased within a very short time. In such circumstances, conviction u/s 302, IPC and sentence of life imprisonment of the accused Prakash is justified and no interference is called for. In our view, the High Court has taken a very reasonable view in convicting the other accused namely Shiv Narayan u/s

326 read with Section 34, IPC and has considered his case with such sympathy as the said accused deserved by sentencing him for imprisonment for the period already undergone by him, for an offence u/s 326 read with Section 34, IPC. We, therefore, find no reason to interfere with the conviction or the sentence passed against the accused Shiv Narayan."

36. In *Tehal Singh and Others Vs. State of Punjab*, :

"Hardip Singh is a lad of 13 years. In our country and particularly in the rural areas it is difficult to think of a lad of thirteen years as a child. A vast majority of boys round about that age go to the fields and do men's work. They are certainly capable of understanding the significance of the oath and the necessity to speak the truth. The learned Sessions Judge who had the opportunity of seeing the witness Hardip Singh in the witness box did not consider it necessary to treat him as a child witness. A perusal of his evidence also shows that he has certainly attained a measure of mature understanding. We do not think we can accept Dr. Chitale's argument and proceed on the basis that Hardip Singh is a child witness. Even otherwise, having gone through his evidence we are satisfied that his evidence does not suffer from any infirmity. He was cross-examined at great length but nothing was elicited from him to dub him as a false or a tutored witness. The mere circumstance that he is the son of one of the deceased person does not justify our looking at his evidence with any suspicion. The dying declaration refers to his presence. There was no reason for him to be influenced by anyone else to implicate the accused, nor was there any reason for anyone else to influence him to implicate the accused. The learned Sessions Judge found no hesitation in accepting the evidence of Hardip Singh about whom he made the following observation :

"The statement of Hardip Singh P.W. 18 is still fresh in my mind and when read as a whole it gives an impression that though this young lad of 13 years was subjected to a long detailed and searching cross-examination but he gave consistent and rational replies. The learned counsel for the accused was not able to bring any circumstances from which I may reject the testimony of Hardip Singh P.W. 18."

The High Court also observed :

"Though patently a young boy he has emerged from a long and protracted cross-examination as a truthful witness and nothing of any significance would be elicited from him which would in any way detract from the massive weight of testimony."

We endorse the opinion of the learned Sessions Judge and the High Court about the weight to be attached to the evidence of P.W. 18 Hardip Singh."

37. In *Dalip Singh and Others Vs. State of Punjab*, Their Lordships of the Supreme Court observed (para 7) :

"At the outset it may be mentioned that the prosecution had also led evidence of

recoveries of certain articles said to have been made at the instance of the accused. But finding infirmities in that evidence the Trial Court did not rely upon them. Apart from the fact that accused Baldev Singh was a lad of about 12 years of age at the time of the occurrence, the evidence against him was not free from doubt. He was, therefore, acquitted. The three appellants were convicted for the murder of Teja Singh, Sucha Singh and Pal Kaur chiefly upon the evidence of Darsho, P.W. 8, Anup Singh, P.W. 9 and partly upon the evidence of Balbir Singh, P.W. 6. Mr. Anthony asked us to reject the evidence of Darsho and Anup in its totality because they had implicated Baldev Singh also. On the facts and in the circumstances of this case we find no substance in this argument. The two Courts of fact have rightly believed their evidence. The other criticism was that Sarpanch Surti Singh and another Sarpanch named Jarnail Singh to whom one of the prosecution witnesses had gone were not examined. They were not eyewitnesses and it is not possible for us to take the view that their non-examination in any way affected the prosecution case. The third criticism against the evidence of these two witnesses was that they were tutored witnesses and had given the prosecution version parrot like. Both of them were teenaged children of Teja Singh and their version was so truthful that it was rightly believed by the Courts below."

38. In *Bharvad Bhikha Valu and Others Vs. The State of Gujarat*, while dealing with the appreciation of evidence in the case of murder trial, the Apex Court held that even if there are no infirmities in the evidence of a young boy it is desirable to seek corroboration of his evidence in view of his tender age.

39. It is pertinent to note that in the decision *Tehal Singh and Others Vs. State of Punjab*, wherein the witness was a boy of 13 years from rural area with mature understanding, it was held that he cannot be treated as a child witness. A similar fact situation, the son of the appellant-accused aged 14 years seeing the appellant-accused beating his wife and giving coherent answers had been well explained by the Division Bench of this Court in the decision (cited *Badi Guravaiah Vs. State of Andhra Pradesh*, (supra)). The Apex Court in the decision (cited *Prakash and another Vs. State of Madhya Pradesh*, (supra)) had an occasion to consider the credibility of a child witness, the victim's younger brother aged about 14 years giving proper account of the incident witnessed by him, it was held that his testimony cannot be discarded on the ground of likelihood of being tutored.

40. From the evidence available on record, it is no doubt true that the preliminary questions were not put to this witness P.W. 2. But it is pertinent to note that on the date of examination his age was shown as 16 years. The credibility of this witness cannot be discredited on the ground of non-putting preliminary questions to test whether the witness was capable of giving rational answers or not? In the considered opinion of this Court, this will not alter the situation in any way especially in the light of the age of this witness. It is needless to say that it is not a case of a child witness of a tender age but a

grown up boy having sufficient understanding. The hostility towards the prosecution version shown by P.W. 1 definitely may have to be viewed in the light of the background of the case also.

41. Viewed from any angle especially in view of the fact that a clear direct evidence of P.W. 2 is available on record, supported by P.W. 3 to the extent exactly what had happened just after the incident, the incident as such definitely cannot be doubted. It is no doubt true that there is some discrepancy in the medical evidence in relation to using of M.O. 6 and the non-possibility of inflicting the fatal injury i.e. injury No. 1. However, in the light of the evidence of the doctor to the effect that the death could have been caused even by other injuries, this discrepancy cannot be taken serious note of. It is needless to say that when direct evidence is available and often the minor discrepancy in the medical evidence may not play an important role. Hence, viewed from any angle, the prosecution was able to establish that on the fateful day, the appellant-accused stabbed the deceased, in consequence of which, the deceased died and no doubt, taking all the circumstances into consideration, the learned Judge ultimately recorded a finding to the effect that the offence falls u/s 304-Part II, IPC and accordingly sentenced him to undergo rigorous imprisonment for seven years and also to pay a fine of Rs. 2,000/-.

42. It is brought to the notice of this Court that appellant-accused is not healthy and the whole family is dependent on him and his parents are also very old who are also dependents on the appellant-accused. Taking the over all facts and circumstances, the sentence of rigorous imprisonment for 7 years is hereby modified to a period of four years and however, the payment of fine as imposed by the learned Judge is hereby confirmed. Except the modification of the sentence aforesaid, in all other particulars, the findings of the learned Judge are hereby confirmed.

43. The appeal shall accordingly stand dismissed subject to the above modification of the sentence.