

(1971) 06 OHC CK 0002

In the Orissa High Court

Case No : Death Reference No. 3 of 1971 and Criminal Appeal No. 89 of 1971

The State

APPELLANT

Vs

Bhima Patra
 Bhima Patra Vs The State

RESPONDENT

Date of Decision : 21-06-1971

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 161, 164, 287, 288, 342
Evidence Act, 1872 — Section 24, 33
Penal Code, 1860 (IPC) — Section 302

Citation : (1971) 37 CLT 765

Hon'ble Judges : G.K. Misra, C.J;B.C. Das, J

Bench : Division Bench

Advocate : Government in D.R. No. 3/71 and S.C. Ghose, in Criminal A. No. 89/71, for the Appellant; S.C. Ghose in D.R. No. 3/71 and Government Advocate in Crl. A. No. 89/71, for the Respondent

Judgement

B.C. Das, J.—Bhima Patra, aged about 35 years, of village Jalsahi, Police Station-Badampahar, District Mayurbhanj has been convicted u/s 302, Indian Penal Code and sentenced to death by the Sessions Judge, Mayurbhanj-Keonjhar, Baripada. Hence this reference and The Criminal Appeal on behalf of Bhima Patra.

2. The prosecution case in brief is that on 23-4-1969 at about 8 A.M. the deceased Duli Bewa aged about 50 years, a resident of village Jalsahi had gone to attend to the call of nature near a stream referred to as Bhima Nala by the witnesses on the outskirts of the village Jalsahi. Just after she had her wash and was coming up the ridge of the Nala, the accused suddenly appeared with an axe and inflicted blows on her left leg with the sharp edge of the weapon. She fell down and when she was crying out that she was being killed, the accused dealt further blows on the left side of her neck and left the place towards the village. With the deceased there was a girl Sakuntala by name aged about seven years. As the two had left the village for the Nala, another girl Anami Dei (p.w. 1) was also following them to fetch water from the Nala. These two girls Sakuntala and Anami Dei were on the Ghat when this alleged occurrence took place. They were

however frightened and immediately left the spot for the village even as the attack was taking place.

3. Almost immediately thereafter on being informed of this attack on Duli Bewa, Purna Patra, father of Sakuntala along with some other villagers went to the spot and found Duli Bewa lying dead. The Grama Rakhi, Bhagaban Patra (p.w. 8) along with others immediately went to the house of the accused who is said to have made an extra judicial confession and produced the M.O.I. He was then taken to the police station where Purna Patra lodged an information at Badam Police Station on the basis of which a formal F.I.R. was registered. The axe, M.O.I. produced by the accused was seized and the investigation commenced and ultimately the charge-sheet was submitted on 14-10.1969.

4. The plea of the accused in the committing Court as well as in the Sessions Court was that the case was entirely false and that the witnesses had deposed falsely against him at the instance of the villagers. His further plea in the Sessions Court was that he was not present in the house on the date of occurrence and had gone to another village. He has denied the fact of having made any extra judicial confession before the villagers and also that he had produced the axe, M.O.I. before them. No defence witness has been examined on his behalf.

5. Broadly stated, the prosecution evidence is mainly based on The evidence of two eye witnesses, Anami Dei p.w. 1 already referred to and another Somanath Naik p.w. 2 of the neighbouring village Talapati who claims to have been cultivating a plot of land belonging to one of the villagers? of Jalsahi which the witness had held on Sanja basis. Sakuntala has not however been examined in the Sessions Court. p.w. 11 is the doctor who had conducted the post-mortem examination and deposes to the injuries found on the deceased. Some of the villagers of Jalsahi have also been examined to prove the discovery of the dead body which had been lying in the Bhima Nala soon after the occurrence and to prove the extra judicial confession of the accused and production of the axe, M.O.I. by him. The prosecution has further examined the ex-sarpanch Gopeswar Giri p.w. 9 and others with a view to establish a motive for the crime.

6. Thus, according to the prosecution story there were three persons who had witnessed the attack by the accused on Duli Bewa. Anami Dei, Somanath Naik and Sakuntala are these three persons. According to Anami Dei p.w. 1 who is resident of the village Jalsahi the deceased and Sakuntala had been to the Nala to fetch water and she was following them. While the deceased was going to the Ghat after attending to the call of nature the accused suddenly appeared with an axe and dealt a blow on the left leg of the deceased who immediately fell down. Thereafter he dealt two more blows with the sharp edge of the weapon on the left side of the neck, at the sight of which the witness got frightened and ran back to her house. The other witness Somanath Naik who was then engaged in cultivating his land deposes to the effect that he saw the accused inflicting two blows on the neck of the deceased and running away thereafter. He had noticed

the two girls of the village Jalsahi at the Ghat present at the time of this occurrence. No interestedness in respect of these two has been established. Anami Dei is a girl aged about 23 years as per the Sessions Court records. She is not in any way related to the deceased and has made it clear that the deceased is referred to by her 809 her grad mother only by way of village courtesy. A suggestion that her father had once been caught in the Act of committing theft from the house of a cousin brother of the accused and a further vague suggestion of her family being in inimical terms with the family of the accused have been denied and no other evidence appears on record to substantiate on behalf of the defence this alleged plea of interestness on the part of p.w. 1 and it is significant that nothing has been suggested to her that she had been tutored to depose against the accused as is the plea of the accused in his statement u/s 342, Code of Criminal Procedure in the Sessions Court.

7. Certain discrepancies have been brought out which relate either to the number of blows dealt with the axe or the parts of the body on which such blows had been struck. Her evidence in the committing Court has been brought on record u/s 288, Code of Criminal Procedure. There, her story was fully in conformity with what she subsequently deposed in the Sessions Court. No cross-examination was directed against any of the material aspects in the committing Court on behalf of the accused wherein, on the other hand, it has been brought out that she ran away from the spot even before Sakuntala had left. The fact remains that her story that the accused had suddenly appeared with an axe and attacked the deceased as the latter was coming out of the Nala stands unchallenged.

8. She stands fully corroborated by the evidence of p.w. 2 Somananath Naik who saw the occurrence from a distance of 50 cubits. His story about the occasion for his presence near the spot and his having seen the attack by the accused on the deceased stand unshaken in cross examination. His evidence in The committing Court has been brought on record u/s 288, Code of Criminal Procedure wherein he had deposed that he had noticed the attack on the deceased at a stage when the latter was lying on the ground and hat the blows were being aimed at the neck. Indeed, this has been his version throughout at all different stages. The omission in his story before the Investigating Officer as to the number of such blows is not material. He has been sough t to be discredited because of the omission in his statement u/s 164, Code of Criminal Procedure and before the Police about the presence of Sakuntala and Anami Dei. But in his cross examination before the committing Court this fact has been brought out by the defence itself namely that he had Been the two girls near the place of assault. No interestedness or enmity of any kind has even been suggested to him. He was no doubt examined by the police on 26-4-1969. But he is a resident of a different village and in the circumstances of the case the delay cannot serve to discredit him in any manner.

9. It would next be appropriate to examine the findings of the doctor p.w. 11 who conducted the post mortem examination with a view to judge the nature of

the injuries found on the deceased in the light of the evidence of these two eye witnesses. Death was due to the injuries to the spinal chord and big vessels of jugular vein and these injuries were sufficient in ordinary course of nature to result in death. The doctor further opines that the death must have been instantaneous.

On the left side of the neck there were two incised wounds, namely (1) An incised wound 1 1/2" x 3/4" over the left side of the neck starting 1/2" below the angle of the mandible and directed towards the middle line.

(ii) An incised wound 1 1/2" x 1" x 4" separated from the above injury by 1/2". On dissection the following internal injuries were found:

- (1) Spinal chord is out due to injury to the vertebrae 3rd and 4th cervical.
- (2) Jugular vein is out on the left side.
- (3) Trachea is out.
- (4) Oesophagus is out.
- (5) There was extravasation of blood in the entire neck region.

On the left leg there were two incised wounds namely:

- (1) An incised injury 1 1/2" x 1" over the left leg, 2" away from the knee joint over the left calf.
- (2) An incised injury 1 1/2" x 1" on the left leg, 4" below knee joint.

The rest of the injuries were:

- (1) An incised injury over the left shoulder 1 1/2" x 1 1/2".
- (2) An incised injury 1 1/2" x 1" on the left fore-arm.
- (3) An incised injury 1 1/2" x 1" over the left upper arm.
- (4) An incised injury on the scalp at the frontal part almost at the centre of the head.
- (5) An incised injury on the scalp over the temporal region.

10. An These injuries were incised wounds and antemortem. The doctor has given her opinion in Ext. 3 and also in Court that an these incised wounds could have been caused by the axe, M.O.I. But in cross-examination she says that in view of the length of the incised wound on the neck being 1 1/2" the sharp edge of the weapon used was likely to be less than 1 1/2" and accordingly M.O.I. with its sharp edge 2" in length was not likely to be the weapon by means of which these two neck injuries could be caused. Strong reliance therefore has been placed on behalf of the accused on this part of the medical evidence. But it would be wrong to ignore that the length of incised wounds must depend not only on the length of the sharp edge but also on the nature of the blade and the manner

in which and the force with which the blows are struck. The fact remains that the other injuries found on the person of the deceased particularly the incised wounds on the left leg were all of a length of half an inch. The three incised wounds over the left shoulder and on the left forearm are each of length of one inch only. In the immediate context there is no scope to hold that different weapons were used in causing the injuries found on the deceased during the course of the attack on her at the time of occurrence. Nor is there any suggestion whatsoever to that effect on behalf of The defence. There is thus no escape from the conclusion that the length of each of the two incised neck wounds is no decisive factor to justify a conclusion that M. O. I could not possibly have been the weapon with which these injuries were caused.

11. On the other hand that this weapon was seized from the accused at the police station has not been questioned. The reports of the Chemical Examiner and Serologist clearly show that blood stains were found on the blade, though the stains were disintegrated and the origin could not be traced. The fact that the axe, M.O.I was seized from the accused and the fact that there were blood stains on the blade though disintegrated are undoubtedly incriminating factors to be taken note of against the accused in the light of the other prosecution evidence on records.

12. This circumstance has not been placed before the accused in course of his examination u/s 342, Code of Criminal Procedure; but this can be of no account since the plea of the accused in his statement is that he had never produced this axe.

13. It will thus be seen that the evidence of the eye witnesses examined on behalf of the prosecution is fully in conformity with the medical evidence on record. Further corroboration is had from the fact that one Ugresen Patra, p.w. 4 who on the date of occurrence at 8 A.M. had been ploughing his field near the Nala had seen the accused returning from the Nala to his house. This witness belongs to the village of the accused and the deceased. He has no doubt been permitted to be cross-examined on behalf of the prosecution but on this aspect no manner of contradiction has been brought out either in the cross-examination by the prosecution or in the cross-examination on behalf of the defence. All that the cross-examination of this witness on behalf of the accused has been directed against is as to whether he had gone to the house of the accused and had seen him producing the axe before the villagers.

14. On the question whether the accused did produce the axe, M. 9 : I in the presence of the villagers, the evidence of this witness p.w. 4 is no doubt a little prevaricating, but ultimately he admits in answer to a Court question that he had seen the production of the axe by the accused at his house before the villagers. p.w. 3, Fakir Patra, p.w. 7, Jhagudu Naik and p.w. 8, Bhagaban Patra, Grama Rakhi fully bear this out. It is significant that this visit to the house of the accused on the part of the villagers took place at about 9 A.M. very soon after the occurrence. p.w. 3 had noticed Sakuntala at about 8 A.M. passing by his

house crying and advised her to inform her father, Purna Patra about it. It was Boon after that this witness along with Purna Patra and p.w. 8 called upon the accused at his house who was then present and produced the axe, M.O.I.

15. There is no reason to disbelieve p.w. 3 Fakir Patra. All that has been brought out against him is that he has figured as a witness on The side of The deceased against the accused but that by itself cannot discredit him. He stands fully corroborated by Bhagaban Patra p.w. 8 and also p.w. 7 against either of whom no manner of interestedness or enmity is alleged.

16. ?The next aspect of the prosecution evidence bears upon the question as to whether the accused on this occasion before the villagers when they visited his house at about 9 A.M. on the date of occurrence did confess his guilt or not. The learned Sessions Judge has accepted this part of the story of the relevant prosecution witnesses as true. As already pointed out, there is no rea eon whatsoever to doubt the veracity of p.w.s 3, 7, and M. Nothing has been put to p.w. 3, Fakir Patra questioning the truth of his story that the accused-had confessed before them about his having killed Duli Bewa except to the extent the interestedness has been suggested against him which has already been discussed. There is no suggestion in the cross-examination of p.w. 7, Jhagadu Naik that the confession that the accused is said to have made was the result of any inducement, threat or promise within The meaning of Section 24 of the Evidence Act. The Grama Rakhi p.w. 8, Bhagaban Patra has refuted the suggestion that there was threat on the part of the villagers for fear of which the accused brought out the axe or that he had confessed his guilt. As already pointed out, the seizure of the axe, M.O.I from the accused at the police station stands unquestioned in cross-examination. It must, therefore, be held that the accused had produced the axe, M.O.I before the villagers before it was seized by the police and further that he did admit his guilt before the villagers. Accordingly the learned Sessions Judge was fully justified in relying upon this extra judicial confession as an item of evidence against the accused. The story of the accused that he never made any such confession and never produced the axe, M.O.I. must be rejected.

17. It deserves to be again emphasised at this stage that there emerges from the above discussion of the prosecution evidence the clear fact that immediately after the occurrence the accused had been seen coming from the Nala to his house and that he was present in his house till the villagers cased upon him soon thereafter. These are circumstances which undoubtedly serve to corroborate the evidence of the eye witnesses. The plea of alibi urged on behalf of the accused in his statement u/s 342, Code of Criminal Procedure before the Sessions Court stands completely falsified and it is significant that he had never taken up any such plea in his examination before the committing Magistrate.

18. Another item of evidence brought on record on behalf of the prosecution is not to be lost sight of and that bears upon the question of a possible motive which the accused may have had in committing this dastardly crime. The ex-

sarpanch, Gopeswar Giri p.w. 9 is the most important witness in this regard. He has clearly deposed that the deceased had complained before him in November 1968 that the accused and his brother had caused trouble to the deceased in the harvest of the paddy crops that she had raised. She was living alone without any issue and was looking after her property. Gopeswar Giri had intervened. Again about 2 to 3 months after the occurrence the deceased had complained before him that her nephews namely the accused and his brother had, forcibly entered her house and removed the paddy. It was on the advise of the witness that she had started a criminal case against the accused and his brothers. From the evidence of p.w. 3 it further appears that at the time of occurrence there was, litigation pending between the deceased. There can be little doubt therefore that, this motive affords another item of circumstantial evidence which serves to strongly incriminate the accused in the alleged offence.

19. Over and above all these above factors there has been nothing brought on record on behalf of the defence to indicate that the villagers who have come forward to depose in Court could have at all any reason to combine together to come forward to implicate the accused falsely in this crime.

20. The only position that emerges from a proper scrutiny of the prosecution evidence is that the very nature of the injuries found on the deceased unmistakably reveals a diabolical act of murder by no other than the accused Bhima Patra. It is however urged on behalf of the defence that non-examination of Sakuntali, who on the clear evidence on behalf of the prosecution was a eye witness to the occurrence is fatal to the prosecution case and justifies an inference that The prosecution is guilty of a deliberate suppression of the true picture of how the deceased came to meet her death. It is true that Sakuntala has not been examined in Sessions Court; but The fact remains that she had been examined by the police during investigation and thereafter her statement had been recorded u/s 164, Code of Criminal Procedure by The Magistrate and further she had been examined before the committing Magistrate where her cross-examination by the defence was declined. It is unfortunate that notwithstanding an application on behalf of The prosecution before the Sessions Court for taking this deposition on record u/s 33 of the Evidence Act, the learned Sessions Judge did not think it fit to direct his mind judicially for the purpose of determining whether Sakuntala could not be found for examination in the Sessions Court. Instead, the learned Sessions Judge has observed that--

While The Court is at liberty to look into S. Rs. on record in Support of The statement of p.w. 13 to find out if there is any cogent explanation for the non-examination of Sakuntala Dei, it has to strictly confine itself to the evidence adduced in the case to find that The condition precedent u/s 33 of The Evidence Act have been duly complied with in order to let into evidence the earlier statement of a witness recorded by a competent authority with due opportunity to the other side to cross-examine.

It is somewhat difficult to appreciate this line of reasoning particularly in the face

of a specific application having been made before The learned Sessions Judge by the public prosecutor as is evident from the order-sheet of the Sessions Court record in order No. 7 dated 20-4-1971. If at all The learned Sessions Judge thought that the evidence already on record fell short of a proof of The non-availability of Sakuntala for examination in the Sessions Court, he was duty bound to allow the public prosecutor an opportunity of adducing such evidence. Even that does not appear to have been necessary. It is clear from The evidence of The Investigating Officer, p.w. 13 and The Service Returns that in spite of every possible effort no trace could be made about her whereabouts nor has anything been brought out in the cross-examination of p.w. 13 by the defence to cast any doubt on the fact that no effort had been spared by the prosecution to secure her attendance.

21. It has however been urged on behalf of The defence that Sakuntala was a child witness and as such her evidence is hardly worthy of any credence. For this purpose her deposition in The committing Court has been preferred to wherein no certificate has been recorded by the committing Magistrate to indicate that The Magistrate was satisfied that this child witness was capable of giving rational answers and of distinguishing truth from falsehood. This however by no means is a correct approach to the problem. The decision of this Court in the case of State of Orissa v. Machindra Majhi and Anr. AIR 1964 Orissa 100, relying upon the Supreme Court decision in the case of Surajpal Singh and Anr. v. The State AIR 1952 S.C. 54, is ample authority in this regard and suffice it to take note of the observations in the decision of this Court which are to the following effect:

Where there is no record of the Court's opinion that the child understands the questions put to him but yet the Court proceeds to record the evidence, it must be taken that the Court considered the witness as competent to testify. There is no provision in law to ask preliminary questions to test the capacity of a child witness to testify, though it is always a wholesome course to be adopted. The object of such preliminary questioning is not to legalise the evidence but only to some time of the Court not to further progress in the examination of such witness if it is satisfied that the child is not a competent witness. If in fact the child is examined as a witness, the best test, of his capacity to testify is the evidence itself and the manner in which it is given.

22. But be that as it may, since this deposition by Sakuntala before the committing Magistrate has not been brought on record by the learned Sessions Judge and necessarily since the accused has not had a chance to offer his statement u/s 342, Code of Criminal Procedure in respect of this witness, it would be fair to keep out of consideration this deposition of Sakuntla in support of the prosecution story.

23. But that does not mean however that any adverse inference would be justified in the circumstances as against the prosecution. The fact remains that Sakuntala's presence at the spot at the time of occurrence stands established by the unimpeachable evidence on record. Not only Anami Dei p.w. 1 deposes

to that effete but also p.w. 2 bears this out p.w. 3 had seen her coming sway crying from the Nala and so also p.w. 4 Ugresen Patra. p.w. 3 had asked her to tell her father about it and immediately after, her father along with other villagers went to the spot and found Duli Bewa lying dead and what is more, immediately thereafter, they all went to the house of no other than the accused to enquire about the matter. It is of the utmost significance that in the deposition of none of the villagers that have been examined is there any scope for an indication of The fact that any of Them had any information whatsoever from any other source except through what had been obtained from "Sakuntala. The only inference possible is that after Sakuntala had left The spot of occurrence she must have conveyed the story of attack by The accused on The deceased to her father and The rest of the villagers. It is not possible therefore to read into the conduct of the prosecution in so far as the non-examination of Sakuntala in the Sessions Court is concerned, any mala fide approach by the Prosecution in presenting its case before the Court. On the other hand, her conduct as established by clear evidence on record serves to further confirm the truth of the prosecution case.

24. In the light of the above discussions it must be held that on the evidence of the eye witnesses read in the light of another circumstantial evidence on record the guilt of the accused Bhima Patra stands proved beyond all reasonable doubt. His conviction by the learned Sessions Judge must therefore be sustained. The very nature of the injuries and also the manner in which the crime has been committed discloses nothing short of a diabolical and dastardly murder committed on a defenseless woman aged about 50 years which deserves nothing but the sentence of death.

25. In the result, therefore, the order of conviction passed by the learned Sessions Judge and sentence of death passed on the accused Bhima Patra hereby stand confirmed. The Reference is accepted and the Criminal Appeal on behalf of the accused Bhima Patra is dismissed.

26. I agree that the conviction is well founded even after ruling out of consideration the evidence of Sakuntala who was examined as p.w. 1 in the Committing Court. I also agree that the sentence of death is the appropriate sentence in the facts and circumstances of this gruesome murder.

27. My learned brother has, however, held in paragraph 22 of his judgment that since the deposition of Sakuntala before the committing Court had not been brought on record by the learned Sessions Judge and as the accused had not got a chance to offer his, statement u/s 342, Code of Criminal Procedure, in respect of this witness, it would be fair to keep out of the consideration the deposition of Sakuntala in the committing Court in support of the prosecution story. With respect I take a different view. The evidence of Sakuntala before the committing Court is admissible and should be taken into consideration, though, as I have already flatted, even without her evidence, the materials on record establish beyond reasonable doubt that the accused committed the murder.

28. Sakuntala was examined as p.w. 1 in the Committing Court. She was not found by the prosecution to be examined as witness in the Sessions Court. Unless her evidence before the committing Court is admissible u/s 33 of the Evidence Act, the same cannot be taken into consideration.

29. Section 33 of the Evidence Act runs thus:

Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided that the proceeding was between the same parties or their representative in interests;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation-A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

The explanation makes it clear that a Criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of the section.

In this case the only condition necessary to be fulfilled for the applicability of Section 33 is that the witness could not be found to be examined before the Sessions Court. Existence of other conditions is not disputed. My learned brother has elaborately referred to the evidence and has come to the conclusion that in fact despite serious efforts and diligent search on behalf of the prosecution Sakuntala could not be traceable to be examined as witness by the Sessions Judge. In fact both the deceased and the accused belonged to the same village and no suggestion had been made to any of the prosecution witnesses that Sakuntala is still in the village and the prosecution deliberately did not examine her. Defence has also not examined any witness that Sakuntala was available for being examined. I agree with the conclusion of my learned brother that despite diligent search she was not available to be examined in the Sessions Court.

The commitment proceeding and the Sessions trial were between the same prosecutor and the accused. The accused had the right and opportunity to- cross-examine Sakuntala before the Committing Magistrate. Questions in issue in the committing Court and the Sessions Court were identically the same. As despite

diligent search Sakuntala was not available, all the conditions of Section 33 have been fulfilled and Sakuntala's evidence is admissible before the Sessions Court.

30. The accused was examined u/s 342, Code of Criminal Procedure by the Committing Court. The committing Court's statement of the accused was tendered u/s 287, Code of Criminal Procedure. A question was put by the Committing Magistrate to the accused to the following effect:

Why p.w. 1, p.w. 2 and p.w. 3 have deposed against you?

The accused gave the answer:

They are deposing falsely at the instance of the villagers.

As has already been stated, Sakuntala was examined as p.w. 1. The accused was specifically asked in the Committing Court u/s 342, Code of Criminal Procedure as to why Sakuntala was deposing against him and he said that she was deposing falsely at the instance of The villagers.

31. Section 287, Code of Criminal Procedure lays down that the examination of the accused, if any, recorded by or before the Committing Magistrate shall be tendered by the prosecutor and read as evidence. The explanation of the accused as to why Sakuntala deposed against him in the Committing Court shall be read as evidence.

In the Sessions Court the accused has not been specifically asked as to what he has got to say about the evidence of Sakuntala in the Committing Court. Such a question could not be asked as the learned Sessions- Judge illegally refused to admit Sakuntala's Statement in the Committing Court as evidence. The accused has not been prejudiced as the identical question was put by the Committing Magistrate and the accused gave explanation that she was deposing falsely.

Even if The Committing Court's statement would have been admitted by the Sessions Judge and a question regarding the evidence of Sakuntala had been specifically asked to the accused, he would have given no different answer in view of his defence of denial. The accused had resorted to the plea of alibi and said that he did not commit the murder and was not in the village on the date of occurrence. In fact, the accused stated u/s 342, in Sessions Court that Anami (p.w. 1) and Somanath (p.w. 2) falsely deposed against him at the instance of the Court Sub-inspector. With such a defence the accused could give no answer regarding the witnesses except saying that they were falsely implicating him. For reasons discussed, absence of a question u/s 342, Code of Criminal Procedure in the Sessions Court does not prejudice the defence. The accused was being defended by a counsel before the Sessions Judge and it was on the objection of the accused that the committing Court statement of Sakuntala was illegally refused to be admitted into evidence.

32. It is now well settled that every error or omission in non-compliance with the provision of Section 342, Code of Criminal Procedure does not necessarily vitiate

the trial. The question whether the trial is vitiated in any particular case depends on the degree of error and upon whether prejudice has been or is likely to have been caused to the accused. *Jai Dev v. State of Punjab* AIR 1963 S.C 612. It is not necessary to cite a number of authorities.

In *Bimbadhar Pradhan v. State of Orissa* AIR 956 S.C. 469, the Court went even to the extent of saying that it is not ordinarily necessary to put the evidence of each individual witness to the accused in his examination u/s 342, Code of Criminal Procedure. As to what is or is not a full compliance of The Provisions of the section must depend upon the facts and circumstances of each case.

33. Sakuntala was a child witness and was about 10 years old when she was examined before the Committing Court. My learned brother has fully discussed the law on the point that from her evidence it appears that she was intelligent enough to understand the questions and to give rational answers. I need not repeat any discussion on that branch of law.

34. Sakuntala's evidence in the Committing Court fully supports the prosecution version. She was not cross-examined in the Committing Court with reference to her statements made u/s 164 and 161, Code of Criminal Procedure. To satisfy our conscience whether she made prevaricating statements, we looked into those statements. We are satisfied that there is no material contradiction in any of the statements so as to discard her statement before the Committing Court.

35. On the aforesaid analysis I am clearly of opinion that the evidence of Sakuntala is admissible u/s 33 of the Evidence Act and despite absence of any question to the accused in the Sessions Court as to why Sakuntala deposed against him before the Committing Magistrate, the accused has not been prejudiced. The Statement is to be used as a piece of evidence against the accused.