2025 INSC 261

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1669 OF 2012

THE STATE OF MADHYA PRADESH **…APPELLANT(S)**

VERSUS

BALVEER SINGH **…RESPONDENT(S)**

J U D G M E N T

J.B. PARDIWALA, J.:

For the convenience of exposition, this judgment is divided into the following parts: -

INDEX

1. This appeal is at the instance of the State of Madhya Pradesh and is directed against the judgment and order dated 29.06.2010 passed by the High Court of Madhya Pradesh of judicature at Gwalior in Criminal Appeal No. 524 of 2004 ('**Impugned Order**') whereby the High Court allowed the appeal filed by the respondent herein and acquitted him of the offence under Section(s) 302, 201 and 34 respectively of the Indian Penal Code, 1860 (for short, the '**IPC**').

A. CASE OF THE PROSECUTION

2. The deceased, namely, Birendra Kumari was married to the respondent accused. In the wedlock, two sons and a daughter named Rani were born. Rani at the time of the incident in 2003, was seven years of age.

i. The Incident.

3. On 15.07.2003 sometime during the midnight, Bhoora Singh alias Yashpal i.e., the complainant along with his father Bharat Singh; the maternal cousin brother of the deceased's father, heard cries and screams of the deceased coming from the house of the accused. After some time, the screams of the deceased stopped. At about in the morning, they learnt from the other inhabitants of the village that the deceased had died during the night and that her body had been cremated.

4. Accordingly, the complainant along with his father went to the Indar Police Station at around 9:00 AM and lodged an unnatural death report / information under Section 174 of the Code of Criminal Procedure, 1973 (for short, the '**Cr.P.C.**') in connection with the death of the deceased under suspicious circumstances, which was registered in entry no. 404 of the general diary as Morgue No. 07 of 2003 dated 16.07.2003. In the said report, the Complainants stated that on the fateful night of the incident, at around 12:00 AM, they heard the cries and screams of the deceased which eventually ceased. Shortly, thereafter they saw the accused along with his family members cremating the deceased in their field. It was further stated that when they went to the house of the accused to inquire about the incident, the daughter of the deceased (Rani) informed that her mother had died. The said unnatural death information report reads as under: -

> *"Informant Bhoora @ Yashpal along with his companion father Bharat Singh came to the police station and orally reported that tonight at around 12 o' clock from the house of Balveer Yadav of their village, the noise of her wife Virendra Kumari crying and screaming were coming out, after some time, the noise stopped coming, thereafter, around 3 o'clock in the night Balveer and his family members were cremating Virendra Kumari in their field, then I went to Balveer's house and inquired from her daughter Rani why dear, what happened, then she told that Mummy has died, then I got to know that Virendra Kumari has died, her body has been burnt, therefore I am reporting that an investigation be conducted. The report was read over and heard and has been written in the same manner as it was stated.*
>
> *Based on the aforesaid statement, Marg No. 7/03 under Section 174 Cr.P.C. was registered, taken under investigation, and the investigation was entrusted to ASI MP Singh."*

5. Upon receiving the information, enquiry was undertaken by ASI Mahendra Singh Chauhan. In the course of the enquiry, it was revealed that the respondent accused on the night of the incident had killed his wife i.e., the deceased in the porch on the first floor by throwing her to the ground and thereafter choking her neck with his leg. The enquiry further revealed that thereafter the body was cremated in the night itself with the help of his sister, Jatan Bai.

6. In view of the aforesaid, first information report bearing no. 142 of 2003 dated 20.07.2003 came to be registered against the respondent accused herein and her sister, Jatan Bai for the offence punishable under Section(s) 302, 201 read with 34 respectively of the IPC. The relevant contents of the FIR are reproduced below: -

> *"I am posted as Station in charge at Police Station Indar. On 16/7/03, on the basis of information received from Informant Bhoora @ Yashpal S/o Bharat Singh Yadav R/o Village Singharai, Marg No. 7/03 was registered in the General Diary Entry No. 404 and taken under investigation. Its investigation was conducted by ASI Mahendra Singh, on receiving the investigation report, it was attested by me, where offence under Section 302, 201, 34 IPC were found proven against Balvir Singh Yadav and Jatan Bhai, therefore, Crime No. 142/03 registered against both the accused under relevant offence sections and taken under investigation. Copy of Marg Intimation and Inquiry Report is as follows:*
>
> *Informant Bhoora @ Yashpal along with his companion father Bharat Singh came to the police station and orally reported that tonight at around 12 o' clock from the house of Balveer Yadav of their village, the noise of her wife Virendra Kumari crying and screaming were coming out, after some time, the noise stopped coming, thereafter, around 3 o'clock in the night Balveer and his*

family members were cremating Virendra Kumari in their field, then I went to Balveer's house and inquired from her daughter Rani why dear, what happened, then she told that Mummy has died, then I got to know that Virendra Kumari has died, her body has been burnt, therefore I am reporting that an investigation be conducted. The report was read over and heard and has been written in the same manner as it was stated. Sd/- Yashpal Singh. Based on above information, Marg No. 7/03 under Section 174 Cr.P.C. was registered and taken under investigation and investigation was entrusted to ASI M.S. Chauhan. Investigation Report – Respected SO Police Station Indar Subject: In relation to the commission of offence under Section 302, 201, 34 IPC on the investigation of Marg No. 7/03 Section 174 Cr.P.C., it is stated that on the basis of order issued by his good-self, I ASI Mahendra Singh conducted the investigation of Marg No. 7/03 under Section 174 Cr.P.C. after reaching the spot Village Singharai, during the course of investigation, recorded the statement of complainant Bhoora @ Yashpal Singh Yadav, Kumari Rani, D/o Balvir Singh Yadav, Bharat Singh Yadav R/o Village Singharai and Badal Singh Yadav, Police Station Badarvas. On spot map of the place of incident was prepared and seizure proceedings were conducted, from the investigation up till now and the statement of Kumari Rani Yadav, it has been found that Balvir Singh Yadav husband of the deceased Virendra Kumari murdered her by slamming Virendra Kumari on the floor of the porch of the house and choked her neck by pressing his foot and Kumari Jatan Singh helped her brother Balvir Singh in the murder, later on, during the night itself, Balvir Singh Yadav took the dead body of his wife on his shoulders to his field and discreetly burnt it. Therefore, prima facie the offence under Section 302, 201, 34 IPC has been found to be proven against Balvir Singh Yadav S/o Samadar Singh Yadav, Jatan Bhai D/o Samadar Singh Yada, residents of Singharai. Therefore, it is requested, the investigation report for further action along with case diary is forwarded to you. Mahendra Singh ASI Police Station Indar."

7. In the course of the investigation, the statement of the complainant and his father were recorded, spot map / site plan of the place of occurrence was prepared along with the seizure memo for the bones and burnt bangles found

at the place of cremation of the deceased along with a plastic diesel can in the presence of the complainant and the village watchman; Narain Singh. Accordingly, on 22.07.2003 the respondent accused was arrested.

8. Upon conclusion of the investigation, charge sheet was filed on 30.07.2003 against the respondent accused, Balveer Singh and the co-accused; Jatan Bai for the offences Section(s) 302, 201 read with 34 of the IPC. On 03.08.2003, the police statement of the child witness; Rani i.e., the daughter of the respondent accused and deceased was recorded. The investigation revealed that the co-accused at the time of incident was a juvenile, accordingly, her trial was separated. The case against the respondent accused was committed for trial to the Court of Session and registered as S.T. No. 197 of 2003. Charge was framed against the respondent accused for the offence enumerated above by the Addl. Session Judge to which the respondent accused pleaded not guilty and claimed to be tried.

ii. <u>Oral Evidence on Record</u>.

9. The prosecution examined a total of 8 witnesses in support of the charge. Narain Singh (**PW2**) the watchman of the village was examined as a panch witness to the seizure memo and for establishing the accounts of the fateful night of the incident. Bhoora Singh alias Yashpal (**PW3**) and Bharat Singh (**PW4**) were examined to establish the chain of events when the incident

occurred along with Badal Singh **(PW5)**, the father of the deceased to prove the harassment caused by the respondent accused towards his deceased wife. Rani (**PW6**) the daughter of the respondent accused and the deceased was examined as the sole eye-witness to the incident. Mahender Singh Chauhan (**PW7**) and Rajender Kumar Chhari (**PW8**) were examined to prove the contents of the unnatural death report, the FIR and the seizure memos. Mahesh Kumar Mishra (**PW1**) the Patwari of the village was also examined to establish the place of occurrence and cremation of the deceased.

10. Rani (PW6), the daughter of the accused and deceased and the sole eye-witness to the incident deposed that on the fateful night of the incident, the deceased was sleeping in the open courtyard of the house. She deposed that at that time, the deceased, her two infant brothers and her aunt Jatan i.e., the co-accused were present in the house. At that time, the respondent accused came and grabbed the deceased from her neck and hit a blow on her body with a stick causing her to fall. Thereafter, the respondent accused exerted pressure on her neck with his feet and as a result the deceased screamed for help. When she ran to help her mother, the respondent accused slapped her and the co-accused pulled her away. She deposed that she did not witness what happened next but later she saw her mother dead and her body being taken by the respondent accused to the barn. She further deposed that early in the morning she found the body of her mother burning. She deposed that she had informed

Bhoora Singh (PW3) in the morning that the deceased had been killed. In her cross examination, she denied the suggestion of being tutored at the instance of PW3 or PW4. She denied that Bhoora Singh and Bharat Singh had told her to repeat or memorize the police statement given by her. She admitted not having told the police about the respondent hitting the deceased with a stick before attempting to choke her. She further denied the suggestion that the deceased was suffering from ailment, clarifying that her mother had fallen sick only once i.e., three-months before the incident took place. She further revealed that when her mother asked the respondent accused to take her for treatment, the accused hit her. Apart from this, nothing substantial was elicited through her cross-examination.

11. Mahesh Kumar Mishra (PW1), the village patwari deposed that he had assisted the police in preparation of the site-map of the place of incident and identified his signatures on the same. In his cross, he stated that there are around 5-6 houses between the house of the Complainant and the accused. He further stated that there is also a Basti between the two houses where approximately 100 people live. In the last, he admitted that cremations are often done by the people of the village in their own fields or barns, wherever they find space. Apart from this, nothing substantial could be elicited from his cross-examination.

12. Narain Singh (PW2), the village chowkidar deposed that when the police checked the verandah of the deceased, they could find nothing and that the bangles belonging to the deceased were recovered and collected from the place where the body was burnt. He identified his signatures on the seizure memo drawn of the ashes, bones and bangles belonging to the deceased as-well as a green coloured diesel cannister. In his cross, he stated that the house of the Complainant is 5-6 furlongs away from the accused's house making it impossible for any noise of shouting to travel between them. He further admitted that there are houses of 150 people approx. between the two places. In his cross he also stated that, 4-5 years ago, there had been a dispute between the complainant and the accused, because of which they were not on talking terms. He also deposed that there is no designated area for cremation, and people usually hold it in their own fields. In the last, he also admitted that when he went to the house of the accused, nothing incriminating was noticed.

13. Bhoora Singh (PW3) deposed that the respondent accused and the deceased got married sometime in 1990 but their relationship turned sour about a year later. He deposed that the respondent accused had demanded a motorcycle, for which the deceased's father i.e., PW5 had arranged a certain sum of money. He further deposed that the deceased had also previously instituted a case seeking maintenance from the accused. He deposed that he lived near the house of the deceased and the accused and that on the fateful night of the

incident, he and his father heard the cries and screams of the deceased for about an hour, and assumed that there had been a quarrel between the two. When the screams stopped, they thought that the altercation had ended. However, the next morning they came to learn that the deceased had died in the night and that her body had been cremated in the accused's field. When he along with his father reached the spot where the body of the deceased was burning, the other inhabitants of the village gathered around. He deposed that the cremation of the deceased was unusually suspicious as typically the entire village would be called to attend the cremation, which was not the case here. He also recounted that two-three days before the incident, he had met the deceased who in turn had requested him to inform her father that there had been a fight between her and the accused. In the last, he deposed that, when the police reached the place of incident, they collected the ashes and remains of the deceased, her bangles and a diesel canister. In the cross, he denied the suggestion that he could not have heard the cries of the deceased due to the distance between their houses, and stated to have heard the screams between 12:00 to 1:00 AM. He admitted not calling the other village inhabitants upon hearing the screams as it was common for the accused and the deceased to often fight. He denied having gone to the house of the accused at 3:00AM in the night and further denied stating so when confronted with his statement recorded in the morgue enquiry proceedings. He deposed that he came to know that the deceased had died only in the morning after he was informed by other

people residing in the village at around 5:00 AM. He further deposed that when he reached the spot at around 6:00 AM with his father, the accused was not present however, he noticed that the other village inhabitants had already gathered. He admitted that he was not able to remember their names. He further deposed that the body of the deceased had been burned in the night itself but admitted not knowing who was responsible for it. He deposed that he only saw the burnt body of the deceased in morning and further admitted that none of the other villagers raised any issue. He stated that he met the daughter of the deceased i.e., PW6 after returning from the field. He in the last denied the suggestion that he was falsely deposing on account of an ongoing enmity.

14. Bharat Singh, PW4, deposed that withing two years of marriage the relationship between the deceased and accused turned sour. The accused would often harass the deceased with demands for dowry. The accused had already obtained a ring and a sum of money for a motorcycle from her father. He further deposed, that on the date of incident, they had heard cries and screams of the deceased in the night. When the screams eventually stopped, he along with his son went off to sleep. Later they came to know that the deceased had been killed. He deposed that they saw the wood and ashes lying near the field of the accused from a distance. He deposed that they then went to the police to file a report, after which he spoke to the deceased's daughter

who informed that the accused had killed the deceased. In the last, he deposed that usually cremation is not performed during the night hours and that all the inhabitants of the village would join the funeral. However, that was not the case and the accused surreptitiously burnt the body of the deceased on the fateful night of the incident. In his cross when confronted with his police statement, he denied the suggestion that he had not stated before police about the ring given to the accused. He admitted that he had not personally seen the money being given to the accused and rather had only heard about it from PW5. He acknowledged that there are a couple of houses between his place and the accused's house. He further admitted that, he could not identify whose screams they heard on the night of the incident, but later came to know from other villagers that it was the deceased. He denied the suggestion that he and his son had gone to the accused's house at night and reiterated that they learnt about the incident only in the morning. He further admitted to have only seen the wood pyre burning from a distance and as such was unable to recollect who all had gathered. He deposed that he had spoken to the deceased's daughter, after they brought the police with them, who then recorded his statement along with the statements of PW3 and PW6 respectively. He further denied the suggestion that there was no designated crematorium in the village. He also denied the suggestion that he was deposing falsely due to the strained relations with the accused, however, he admitted that two to four months before the incident, although the accused had stopped visiting him yet he used

to meet the accused's father occasionally. Apart from this, nothing substantial was elicited from his cross-examination.

15. Badal Singh, PW5 deposed that the accused had made demands for a motorcycle within 10-12 days of the marriage, for which he gave him a sum of Rs. 45,000/-. He further stated that the accused initially took care of the deceased but later began harassing her to the extent he used to beat her. He stated that he had filed a case against the accused when he had threatened to kill the deceased, and further identified the certified copy of the same in the exhibits. He also deposed bringing medicines and food for the deceased. He had also filed a maintenance case and identified the certified copy of the same in the exhibits. He deposed that on the day of the incident, the deceased had already been cremated by the time he arrived. In the cross, he admitted not mentioning to the police about the gold ring given towards dowry as it was a customary practice. He further deposed that on one occasion the accused had beaten the deceased in front of the PW3 & PW4 respectively, which had prompted them to take her to the police to lodge a complaint. He admitted that there is a village settlement or basti of approximately 100 lodgings between the house of the Complainant and the accused. He admitted that his relationship with the accused had strained due to the latter's constant demands and torturing of the deceased. Apart from this, nothing significant could be elicited through his cross-examination.

16. Mahendra Singh, PW7, the Assistant Sub-Inspector (ASI), stated in his deposition that on 16.07.2003 he was entrusted with the investigation of case under Morgue No. 07/2003. He further stated, that later on the same day, he prepared the site-map of the place of incident based on PW6's indications. He further seized and sealed pieces of broken bangles belonging to the deceased and the soil near the place of occurrence. He deposed that he then reached the field where the body of the deceased had been burnt, and collected her remains in the form of ashes and burnt pieces of bangles along with a diesel cannister. He further deposed that he then proceeded to record the statements of PW3, PW4, PW5 and PW6 respectively. In the last, he deposed that after the investigation he prepared a report *prima facie* opining that the deceased had died under suspicious circumstances and thereby suggesting the commission of offence under Section(s) 302, 201 read with Section 34 of the IPC by the accused persons. He further deposed that he accordingly handed over the report along with the morgue case diary to PW8, the Sub-Inspector, for further action. In his cross, he admitted that the statements recorded during the morgue enquiry were not produced along with the challan as he had carried out investigation only till 17.02.2003 after which the investigation was undertaken by PW8. He further admitted that he did not record the statements of both the brothers of PW6 as they could not be found. Apart from this, nothing substantial could be elicited through his cross-examination.

17. Rajendra Kumar Chhari, PW8, the Sub-Inspector (SI), deposed that upon completion of the investigation of case under Morgue No. 07/2003, he registered the First Information Report (FIR) as Crime No. 142 of 2003 against the accused persons. He further stated that during the investigation, he recorded the statements of PW3, PW4, PW5 and PW6 respectively, and that he neither added nor deleted anything from their police statement. In his cross, he stated that the statements recorded in morgue case diary by PW7 were handed over to him. He further admitted that the statements of PW6 Rani and her two younger brothers were not recorded during the morgue enquiry as well as in the course of the investigation as they were just 3-4 years old and found to be not competent. He further stated that the police statement of PW6 had been recorded on 03.08.2003 at the house of her maternal grandfather i.e., PW5. When confronted with the contradiction brought on record in PW3's testimony with his police statement, he stated that the PW3 had categorically stated in his police statement visiting the house of the accused at night and inquiring with PW6 as regards her mother's death and thus proving the said contradiction. He further admitted in his cross, that PW4 had not mentioned anything about the accused taking a ring from the deceased's father in his police statement. He also admitted, that PW6 in her police statement had neither mentioned that the accused hit the deceased with a stick nor was any such stick recovered. However, he confirmed that PW6 in her statement had

mentioned about the accused placing his leg on the neck of the deceased, but admitted that she did not use the word 'shoe' or indicate whether the accused was wearing one. Nevertheless, he reiterated that PW6 had mentioned in her statement that she was sleeping with the deceased in the veranda and that the accused had placed his leg on the neck of the deceased. In the last, he further admitted that PW6 had not stated in her police statement that the accused's mother had mixed something in the food and had offered it to the deceased.

18. Upon completion of the recording of oral as well as documentary evidence, the further statement of the accused was recorded under Section 313 of the Cr.P.C., in which he claimed himself to be innocent and had been falsely implicated in the alleged crime. When asked about PW6's testimony that she saw him reach the courtyard where the deceased was allegedly sleeping and the incident took place, the respondent accused answered that all the family members were sleeping inside the house. When questioned about PW6's deposition that she saw him pressing the deceased's neck with his leg on the night of the incident, the respondent accused answered that it was wrong. Similarly, the respondent accused refuted the PW6's deposition that she saw the deceased die at the spot and later found her body cremated the following morning, and dismissing it as wrong. The relevant extracts of the respondent accused's further statement read as under:-

"Que. No. 25: Witness Rani (PW-06) states that Birender Kumari was her mother you are her father. What do you want to say?
Ans: It is right.

Que. No. 26: This witness further states that on the day of incident her mother was sleeping in the corridor and this witness was not sleeping by that time. You came from the Khera in the night. What do you want to say?
Ans: It is wrong.

Que. No. 27: This witness further states that she was sleeping nearby in the Tibbara. What do you want to say?
Ans: It is wrong.

Que. No. 28: This witness further states that you caught 8 Birender Kumari from her neck. Then her mother rant towards the door. You attempted a blow of Lathi on her which hit her on her back so her mother fell down. Then you caught her mother from the neck. What do you want to say?
Ans: It is wrong.

Que. No. 29: This witness further states that her mother had fell down in the Dehri and you kept your leg on her neck. You were wearing shoes. What do you want to say?
Ans: It is wrong.

Que. No. 30: This witness further states that her mother said, "Rani save me". So, this witness rant towards here and you slapped on her cheek. What do you want to say?
Ans: It is wrong.

Que. No. 31: This witness further states that then her Bua Jatan caught this witness. What do you want to say?
Ans: It is wrong.

Que. No. 32: This witness further states that you 9 reached in the courtyard and Bua was also sleeping in the courtyard at that time. What do you want to say?
Ans: All were sleeping in the house.

Que. No. 33: This witness further states that her mother died on the spot. She saw the dead body of her mother. What do you want to say?

Ans: I don't know.

Que. No. 34: This witness further states that you took the dead body of her mother in the Kher during the night to cremate her and after cremating her you fled away from there. What do you want to say?
Ans: It is wrong.

Que. No. 35: This witness further states that you caught her mother before this witness and when she went to the field in the morning her mother was burning there. What do you want to say?
Ans: It is wrong.

xxx xxx xxx

Que. No. 48: Why do the witnesses speak against you?
Ans: They are afraid of the police.

Que. No. 49: Do you want to adduce defence witness?
Ans: Yes, Sir.

Que. No. 50: What do you want to say in defence?
Ans: I am falsely implicated in the case."

iii. <u>Trial Court's Judgment & Order</u>.

19. Upon appreciation of the oral as well as documentary evidence on record, the Trial Court vide its final judgment and order dated 09.08.2004 passed in Sessions Trial No. 197 of 2003 reached the conclusion that the respondent accused herein was guilty of the offence punishable under Sections 302, 201 read with 34 of the IPC. The findings recorded by the Trial Court in its judgment and order of conviction can be better understood in five parts: -

(i) **First,** it took note of the fact that the deceased was cremated in the night itself without informing her family members and the villagers too. This

fact stood proved through the testimony of PW6 who had deposed to have seen the accused take the deceased away. The Trial Court believed the version of the PW3 and PW4 who later found the body of the deceased burning in the field of the accused in the morning and also the say of the PW7, the ASI who conducted the inquest enquiry. The clandestine manner in which the body of the deceased came to be cremated was taken by the Trial Court as one of the incriminating circumstances against the accused establishing the death of the deceased was not natural. The Trial Court considered the strained relations of the accused with the deceased. Another incriminating circumstance against the accused that was looked into was the fact that the accused fled away from the place of incident after cremating the deceased. The relevant observations read as under:-

> *"13. <u>In evidence this fact is proved that the deceased Birender Kumari who is the wife of the accused, her cremation was done in the night in the fields of Samunder Singh and in evidence it has come that without informing the villagers or the family of the deceased she had been cremated</u>.*
>
> *xxx xxx xxx*
>
> *20. [...] The witness has stated that when her paternal aunt caught hold off her, after that she does not know what happened to her mother. She had seen her mother dead. Her father took her mother to the fields to burn her body which is at a little distance from the house. In the night itself her other was burnt after which her father ran away. The witness has stated that in her presence only her mother had been taken away but she was not burnt in her presence.*

When she went to the fields in the morning at that time her mother was burning there. [...]

xxx xxx xxx

22. PW-3 Bhoora has stated that Birender Kumari is his .. sister being the daughter of his maternal uncle. On the day of incident in the night he and his father were sleeping in their house upon which they had heard voices of Birender Kumari crying. [...] In the morning when he and his father got up then they came to know that Birender Kumari has died and that she has been burnt by the accused clandestinely in their fields itself. When he and his father and the entire village went to see then the dead body was burning which fact is confirmed by Bharat Singh also. [...] The accused used to harass and the motorcycle had not been given. He used to give beatings upon which the deceased used to come to him. Once the accused beat her very badly and did- not give her anything to eat also. Upon whiCh she had filed a case of maintenance in the JMFC Court, Kolaras of which the certified copy is Ex.P-8. The girl had been given beatings, the true copy of which report is Ex.P-9.

xxx xxx xxx

25. The deceased Birender Kumari in the night itself was taken to the fields and she was cremated which fact is confirmed apart from PW-3 Bhoora and PW-4 Bharat Singh, from the statement of Mahender Singh also that after the enquiry of report Ex.P-7 he had gone on the spot. The dead body of deceased Birender Kumari which was burnt in the fields of Balvir and Samunder Singh in which the bones of the deceased, her ashes and the burnt pieces of bangles were seized from the spot.

xxx xxx xxx

29. The accused had carried Birender Kumari to the fields in relation to which direct evidence has not come. It has come in the statement of Rani that the accused took her mother to the fields and Jatan had told that her mother had been taken for cremation. In the fields the deceased was cremated in the night which circumstance also goes against

the accused. If the death of deceased Birender Kumari was of ordinary nature then what was the reason that in the night without informing the reason to the family of the deceased she was cremated in the night especially when prior to the incident itself the mutual relations of the accused and deceased were not good and according to Ex.P-8 & P-9 the case in relation to not giving beatings and maintenance had been filed by the deceased in the Court. Another circumstance which indicate the involvement of the accused in the incident is that after cremation, according to Bhoora and Bharat the accused was not present in the fields. It has also come in the statement of Rani that accused and Jatan had fled from the spot. According to the arrest memo the accused has been arrested on 22.08.03. If in actual the accused was innocent then he would not have cremated the dead body of his wife clandestinely in the night without informing anyone nor he would have fled from the spot."

(Emphasis supplied)

(ii) **Secondly,** the Trial Court in order to ascertain how and in what manner the incident had taken place which led to the death of the deceased, accepted the testimony of PW6 to be true, trustworthy and reliable. The Trial Court believed the version of PW6 that her mother was sleeping in the courtyard, when the accused came and caught hold of her. The deceased tried to escape but fell down upon which the accused compressed her neck with his leg. The Trial Court recorded that PW6 had in clear terms categorically deposed that she saw her mother die on the spot itself, however had no idea what transpired thereafter except that the accused carried her body to the field. The relevant observations read as under: -

"19. Now it has to be seen whether according to the version of the prosecution what incident had taken place in the room of the accused and in what manner the incident took place, in relation to it the evidence which has been led from it whether the version of the prosecution can be believed or not?

20. Rani (PW6) aged about is aged about 7-8 years and is the daughter of deceased and accused. This witness has stated in her chief that on the date of incident she was sleeping with her mother and brothers Sandeep and Chotu. Her mother was in the courtyard and she herself was sleeping in the open room. The accused caught hold off her mother by her neck upon which her mother ran towards the door upon which her father· caught hold off her and L gave a lathi blow to her mother which landed on her back. Her mother fell down upon which, her father caught hold off the neck of her mother. Her mother fell on the threshold. Her father put his leg on the neck of her mother. Her mother shouted "save me Rani" upon which she ran to save her but her father / accused gave her a slap. Her Bua/paternal aunt caught hold off her. The witness has stated that when her father came at the courtyard, at that time her paternal aunt was also sleeping in the courtyard and she does not know what happened after it. The police had come in the morning. Her mother had died there itself. The witness has stated that when her paternal aunt caught hold off her, after that she does not know what happened to her mother. She had seen her mother dead. Her father took her mother to the fields to burn her body which is at a little distance from the house."

(Emphasis supplied)

(iii) **Thirdly,** the Trial Court found that although there had been a delay in recording the statement of PW6 under Section 161 of the Cr.P.C., yet the same, by itself, cannot be a ground to reject or doubt her testimony as an afterthought or unbelievable. No question was put by the accused to the IO in this regard nor any suggestion was put to the IO that he

deliberately recorded as belated statement only to create evidence against the accused. It further noted that the testimony of both the PW5 as-well as PW6 had been recorded on the same day. The Trial Court observed that even before recording of statement of PW6, the morgue case No. 70/2003, the enquiry report and the FIR had mentioned PW6 as the main witness to the incident. Thus, it held that it cannot be said that there was any attempt to falsely project her as an eye-witness to the incident. The relevant observations read as under: -

> *"18. [...] In his cross examination the witness has stated that the IO investigating the morgue had given the morgue diary with the enquiry report. The-statement of Rani has been recorded by the IO on 03.08.03. On the same day the statement of his maternal grandfather PW-5 Badal Singh had also been recorded the statement of both of them had been recorded in the house of Badal Singh. The registration of the case on the morgue enquiry report after delay by the IO or in relation to the recording of the statement of Rani after delay on 03.08.03 no questions have been put. Therefore, only on this ground that the IO recorded the statement of Rani on 03.08.03 and that her statement is an afterthought and on the basis of it the accused is not guilty, this statement is not believable and I do not agree with this argument. [...] in relation to the IO recording the statement of Rani after delay no question has been put, therefore, no benefit from the same can be given to the IO. [...] There are no such facts in the evidence that the IO deliberately recorded the statement of Rani after delay under section 161 Cr.P.C., so that she may be projected as an eye witness as is mentioned in the morgue intimation Ex.P-7, morgue enquiry Report Ex.P-11 and the FIR Ex.P-12 that Rani is the main witness in the incident."*
>
> (Emphasis supplied)

(iv) **Fourthly,** the Trial Court upon evaluation of the testimony of PW6 found the same to be reliable and inspiring confidence. It found that the presence of PW6 as an eye-witness to the incident was natural and believable, as it is common for a child of her age to be sleeping with her mother in the night. It further noted that the PW6 had been cross examined at length for approximately 1.5 hours, and her demeanour all throughout was observed and the same suggested that she was not tutored or deposing falsely. In the absence of any contradictions in the form of material omissions, her testimony cannot be discarded solely because she resides with her maternal grandfather or that she hates the accused. It further found that although the statement given by her during the morgue enquiry had not been produced by the prosecution, yet the same, by itself, is not fatal as no demand had been made by the accused to bring the same on record. Moreover, the Trial Court found that in both morgue inquiry report and the FIR the factum of PW6 stating that the accused killed the deceased by putting his leg on her neck is clearly recorded. The relevant observations read as under: -

> *"17. First of all Rani was present on the spot and whether she is actually an eye witness to the incident, this fact has to be seen. In the statement of Rani in para no.1 it has come that Birender Kumari was her mother. On the day of incident her mother was sleeping in the courtyard and near her in open room this witness was sleeping. This witness has stated that she has two younger brothers of whom the elder is Sandeep who used to sleep with Jatan and the younger is Chotu who used to sleep with her mother and she*

used to sleep alone. At the time of incident her mother was feeding milk to her younger brother when her father came. Rani was present with her mother on· the date of incident. There appears to be no reason to disbelieve her ·statement which is natural that a minor child was sleeping with his mother in the night.

18. The statement of Rani during investigation was recorded by PW-7 Mahender Singh. It is correct that the statements recorded during morgue enquiry have not been produced in evidence but Mahender Singh during his cross has stated that in the statement during morgue enquiry which he had recorded, his police diary is with the police. On behalf of the accused no demand has been made for the bringing on record of those statements in the case diary that statement is annexed according to which the statement of Rani has been recorded on 16.02.2003. After that on the morgue enquiry report the crime was registered on 20.02.2003. As has been stated by PW-8 Rajender Chhari that after recording the FIR Ex. P-12, its copy was sent to JMFC, Kolaras U/s 157 Cr.P.C. which is Ex.P-13. This fact has not been challenged during cross examination.

xxx xxx xxx

27. Here it will be proper to mention that PW-6 Rani has been cross examined at length and according to the record her statement was started at 12:45PM and she was cross-examined till 02:30PM and her cross examination no such fact has come which may warrant that she has deposed falsely or that she has been tutored. She has been found to be present on the spot. [...] there are no clear contradictions in the statements of PW-6 Rani. Her evidence appears to be believable. Her present on the spot and the circumstances of the incident are substantially proved. Only on the ground that the Rani resides with her maternal grandfather and hates her father and does not want to reside with her and after the death of mother she is residing with her maternal grandfather only, her statement cannot be disbelieved. The statement of Rani was recorded immediately after the incident at the time of morgue enquiry which fact is proved from evidence. Even if on behalf of the accused her statement has not been called in evidence, after that the

statement of Rani was recorded during the investigation on 03.08.03 as it has come alone. The reason of delay has not been asked from the IO . Only on that ground her statement given in the Court cannot be disbelieved.

28. The statement given by Rani in the Court where the incident is stated to have taken place and the manner in which the accused caused the death of Birender Kumari, there is no reason to disbelieve the same. It is correct that Bhoora was not told by Rani that the death of Biren·der Kumari has been caused by the accused or that in what manner, her death was caused but in the morgue enquiry report, FIR and statement section 161 Cr.P.C. Rani had stated the manner in which the accused put his leg on the neck of the deceased and caused her death which fact is confirmed from the statement of Rani given in the Court."

(Emphasis supplied)

(v) **Lastly,** the Trial Court also found the testimony of PW6 to be sufficiently corroborated with the other materials on record. It noted that the version of PW6 that the deceased stopped screaming after the accused pressed her neck with his leg is corroborated with the testimony of PW3 and PW4 respectively. Similarly, her version, that in the morning she told PW3 that the deceased had been killed and that she had found the burnt bangles of the deceased stands corroborated with the testimony of PW3. The relevant observations read as under: -

"16. [...] It is clear that on the statement of a child witness reliance should not be placed in the absence of corroboration. In relation to the statement of a child witness the real test is that as to what extent a child witness remains constant on his statement and in what manner a child witness faces the cross-examination and what extent the statement given by him find a suitable place in the other

evidence and the circumstances of the case. In view of these principles the investigation of the evidence given by PW-6 Rani is necessary.

xxx xxx xxx

20. [...] When she went to the fields in the morning at that time her mother was burning there. The witness has also· stated that she had met Bhoora who is the nephew of the maternal grandfather upon which she had told him that "mother has been killed". She had told this fact to Bhoora in the morning when the police had come. The witness has stated that the bangles of her mother were lying in the courtyard. [...]

xxx xxx xxx

26. Rani has also stated that the accused on the day of incident after putting his leg on the neck of mother had pressed it and she had seen her mother dead, upon which there is no reason to disbelieve the same. From the statement of PW-7 Mahender Singh as it has come above, he had recorded the statement of Rani during morgue enquiry and it has come in para 4 of the statement of Bharat Singh that the police had talked with Ranj- and had recorded her statement on the same day. This statement of Rani that she told to Bhoora that her mother has died is confirmed from the statement of Bhoora. [...] <u>The statement of Rani that when her mother had stopped screaming, this fact is confirmed from the statements of Bhoora and Bharat also that in the night the cries of Birender Kumari was heard and after sometime the voice has stopped</u>."

(Emphasis supplied)

20. Accordingly, the Trial Court vide its judgment and order dated 09.08.2004 in ST No. 197 of 2003 held that the prosecution had succeeded in proving its case beyond a reasonable doubt, and convicted the respondent accused for the

offence punishable under Sections 302, 201 read with 34 of the IPC. The operative portion of the order reads as under: -

> *"30. In view of the abovementioned entire facts Rani who is the eye witness of the incident and in view of the circumstantial evidence in which the deceased has been cremated, the prosecution has succeeded in proving its case the accused Balvir pressed the neck of his wife with his leg due to which she died and in order to hide that evidence he along with the co accused went to the fields with the dead body of the deceased Birender and cremated her without informing anyone.*
>
> *xxx xxx xxx*
>
> *32. In view of the abovementioned facts I find the accused guilty of the offence punishable under section 302 read with section 201/34 IPC. In order to hear the accused persons on the question of sentence, at this stage the decision is deferred."*

21. The Trial Court sentenced the accused to undergo rigorous imprisonment for life with fine of Rs. 1,000/- for the offence punishable under Section 302 IPC and four years of rigorous imprisonment along with fine of Rs. 2,000/- for the offence punishable under Section 201 of the IPC.

B. IMPUGNED ORDER

22. The accused convict being dissatisfied with the judgment and order passed by the Trial Court, went in appeal before the High Court by way of Criminal Appeal No. 524 of 2004. The High Court vide its impugned final judgment and order dated 29.06.2010 allowed the appeal and acquitted the respondent accused. The impugned judgment and order of the High Court is in three-parts.

In other words, the High Court allowed the appeal of the accused and set aside the Trial Court's order of conviction on three grounds: -

(i) **First,** the High Court held that although PW6 was found to be competent to depose, yet her testimony appeared to be very shaky not inspiring confidence, more particularly, in view of the inordinate delay of 18-days in recording her police statement under Section 161 Cr.P.C. The High Court took the view that the Investigating Officer (for short, the "**I.O.**") was aware that PW6 was a very important witness, yet for reasons unknown, her statement was not recorded immediately. Considering the delay, the High Court took the view that the possibility of tutoring cannot be ruled out, more particularly, since PW6 was at that time residing with PW3 i.e., the Complainant who is at inimical terms with the accused. It also held that even in the morgue inquiry report, PW6 never mentioned anything that would point a finger against the accused herein, thus, reinforcing the fact that PW6 had been tutored, as otherwise she would have mentioned about the accused killing the deceased in the said report, and this explains why PW6 had earlier simply stated that "her mother had died". The relevant observations read as under: -

> *"15. In the present case, from the testimony of the sole eye-witness Rani who has been examined as PW6 and who is daughter of the deceased and appellant, it is borne out that at the relevant point of time her age was seven years. We have no scintilla of doubt that the child witness is competent*

witness and his/her evidence cannot be thrown out just like a waste paper in a dustbin, merely because the witness happened to be a child witness, but, it is equally true that the testimony of the . child witness should be found to be clear, cogent and trustworthy and he or she should not have been tutored or her testimony should not be unnatural. By keeping this proposition in our mind we would like to scan the testimony of this witness Rani (PW.6).

16. [...] The case diary statement of this witness (Ex.D.2) was recorded on 3.8.2003 viz. after 18 days of the incident. At this juncture, we would like to mention that on the very next date of the incident i.e. 16.7.2003 it already came into the knowledge of the investigating agency that after enquiring the incident by complainant Bhura alias Yashpal (PW.3) from this child withess the merg report (Ex.P. 7) was lodged at 9:45 AM. Hence, why the statement of this witness was not recorded earlier to it, we are unable to digest. The case diary statement (Ex.D.2) of this witness was recorded after considerable long period on 3.8.2003, and hence, it cannot be ruled out that this child witness was tutored particularly when she was residing with her maternal uncle and it is borne out from the testimony of complainant Bhura alias Yashpal (PW.3) who is also the maternal uncle of this witness that they are in inimical terms with the appellant.

17. [...] Since it is borne out from the testimony of complainant Bhura alias Yashpal (PW.3) that there is enmity between appellant and his in-laws and the case · diary statement (Ex.D.2) of Rani (PW.6) was recorded on 3.8.2003 at the residence of' her maternal grandfather, according to us, the possibility of tutoring her cannot be ruled out, and therefore, according to us, it would be hazardous to place reliance on the statement of this witness and to convict the appellant on her solitary statement. [...]

xxx xxx xxx

19. [...] Bhura alias Yashpal (PW.3) (who is in inimical terms with appellant) has stated in the merg report that he saw appellant and his family members cremating the deceased at 3:00 in the late night and thereafter he went to

the house of the appellant and enquired from the child witness Rani (PW.6) that what has happened and this much only was told by her that her mother had died. Nowhere in the merg report it has been mentioned that Rani (PW.6) has stated anything accusing the appellant since it did not find place in the merg report. For this reason also we find that if the case diary statement (Ex.D.2) of Rani (PW.6) was recorded on 3.8.2003 she was already tutored because if she would have stated of the same night that appellant had killed the deceased, certainly this fact should have· been mentioned in the merg report."

(Emphasis supplied)

(ii) **Secondly,** the High Court observed that although the police had recorded PW6's statement during the morgue inquiry immediately after the incident, yet the accused never came to be arrested on the strength of the said statement. It further observed that the respondent accused came to be arrested on 22.08.2003, only after the statement of PW6 had been recorded under Section 161 of the Cr.P.C. on 03.08.2003. This according to the High Court indicates that prior to 03.08.2003 there was no evidence against the accused sufficient enough to effect his arrest. This necessarily would lead to a legitimate inference that the statement of PW6 recorded during the morgue enquiry must have been unfavourable to the prosecution & therefore, was suppressed during the trial. The relevant observations read as under: -

"17. In the present case the appellant was arrested on 22.8.2003 as it is borne out from the judgment of the learned Trial Court, and therefore, according to us till 3.8.2003 thee was no material and evidence against the

appellant with the investigating agency to arrest him. It is borne out from the testimony of the investigating officer that the merg statements were recorded and, according to us, since the appellant was arrested only on 22.8.2003 and earlier to the statement recorded under section 161 of Cr.P.C. of Rani (PW.6) on 3/8/2003, there was no evidence against the appellant with the investigating agency, and therefore, in these state of . affairs, according to us, the merg statements were quite relevant and the same have been suppressed by the investigating agency because they must be, against the prosecution. [...]"

(Emphasis supplied)

(iii) **Lastly,** the High Court held that apart from the oral evidence of PW6, being unreliable there were other reasons to extend the benefit of doubt to the accused, more particularly the contradictions in the form of material omissions in the testimony of PW3 and the fact that he was at inimical terms with the accused. It observed that the PW3 when confronted with his statement in the morgue report, he denied having stated that he went to the house of the accused at 3:00 AM in the night. He had further stated that during the cremation of the deceased, the other inhabitants of the village were also present and that none of them entertained any doubt over the death of the deceased nor did he interact with the accused. Thus, the High Court took the view that it was difficult to hold that the deceased had been cremated in the night or that she had been killed by the accused. Furthermore, placing reliance on the testimony of PW1 and PW2, the High Court held that it is equally

difficult to hold that the Complainant could have heard the screams of the deceased, particularly considering the distance between his house and that of the accused. The relevant observations read as under: -

> *"20. [...] Later-on in the same para this witness says that at 6:00 in the morning he went to the field of appellant along with his father, but they never interacted with appellant that how the deceased had died. In very specific words this witness has stated that earlier to 6:00 AM he did not go to the ' house of appellant where he was informed by the child witness Rani (PW.6) that the deceased had died. In very specific words this witness is saying that he did not go in the night at 3:00 to the house of appellant and he never saw his sister (the deceased) · being cremated in the field. [...] This witness was confronted with his merg report (Ex.P.7) and he admitted that it bears his signature, however, ,he has specifically stated that in the merg report (Ex.P. 7) he did not state to the police that at 3:00 in the night he went to the house of the appellant and if such type of statement is written in the merg report he cannot say how it has been written. Further he says that he did not . inform the police personnels that he made enquiry from the child witness Rani (PW.6) at 3:00 in the night [...]*
>
> *21. Hence, it is difficult to hold that during the odd ' hours in the night the deceased was cremated. If the testimony of complainant Bhura alias Yashpal (PW.3) is taken into consideration in proper perspective it is difficult to hold that during the odd hours in the night the deceased was cremated and she was not cremated during the dawn hours. It is also borne out from the testimony of this witness that during the cremation the inhabitants of the village were also present because specifically he is saying that when the deceased was being cremated no dispute raised by the inhabitants of the village [...] And therefore, if the deceased was cremated in presence of inhabitants of the village, it is difficult to hold that the deceased was killed by the appellant.*
>
> *22. The testimony of complainant Bhura alias Yashpal (PW.3) who keep inimical terms with the appellant is*

further more doubtful because in his statement he has admitted that he heard the sound of hue and cry during the late hours at 12:00 in the night in his house which is 4 to 5 furlongs far away from the house of appellant. In this context, para 4 of the cross examination of this witness may be seen. But, if this piece of evidence of this witness is kept in juxtaposition to the testimony of independent eye witness Narayan (PW.2) who is village chowkidar, who in para 2 of his cross-examination has categorically stated that the distance between the house of appellant and the complainant Bhura Singh alias Yashpal is 5 to 6 furlongs and if somebody would shout from the house of appellant the persons residing in the · house of appellant the persons residing in the house of complainant Bhura alias Yashpal would not hear the sound. It is borne out from the testimony of Patwari of the village namely Mahesh Kumar Mishra (PW.1) as well as Narayan (PW.2), who is chowkidar of the village that village people happen to cremate the dead body in the field itself and because there is no separate cremation ground, and therefore, if the deceased was cremated' in the field it was not an unnatural act."

(Emphasis supplied)

23. In such circumstances, referred to above, the appellant State is here before this Court with the present appeal.

C. ANALYSIS

24. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the High Court committed any error in passing the impugned judgment and order.

i. Evidence of Child Witness and Test for parsing Tutored Testimony.

25. The High Court, while setting aside the conviction, found the testimony of the child witness, Rani (PW6), to be unreliable and tutored. Before we proceed to undertake the analysis of PW6, Rani's oral evidence it is essential to understand how the testimony of a child witness should be looked into and appreciated.

26. The Indian Evidence Act, 1872 (in short, the "**Evidence Act**") does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages 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 these questions, because of tender years, extreme old age, disease - whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto.

27. In ***Dattu Ramrao Sakhare v. State of Maharashtra*** reported in **(1997) 5 SCC 341** this Court held that as long as a child witness is found to be competent to depose i.e., capable of understanding the questions put to it and able to give rational answers, the testimony of such witness can be considered as evidence

in terms of Section 118 of the Evidence Act, irrespective of their tender age or absence of any oath. The only additional factor to be considered is that the witness must be found to be reliable, exhibiting the demeanour of any other competent witness, with no likelihood of having been tutored. It further clarified that there is no requirement or condition that the evidence of a child witness must be corroborated before it can be considered, and rather the insistence of any corroboration is only a rule of prudence that would depend upon the peculiar facts and circumstances of each case. The relevant observation reads as under: -

> *"5. [...] A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the corroboration to such evidence from other dependable evidence on record."*
>
> (Emphasis supplied)

28. Similarly in ***Pradeep v. State of Haryana*** reported in **2023 SCC OnLine SC 777** this Court emphasized on the importance of preliminary examination of a child witness. It held that although oat cannot be administered to a child

witness under 12-years of age yet, as per Section 118 of the Evidence Act it is the duty of a Trial Judge to conduct a preliminary examination before recording the evidence of the child witness to ascertain if the child is able to understand the questions put to him and that he is able to give rational answers to the questions put to him. It held that the Trial Judge must record its opinion and satisfaction that the child witness understands the duty of speaking the truth and state why he is of the opinion that the child understands the duty of speaking the truth. It further held that the questions put to the child in the preliminary examination must also be recorded so that the appellate court can go into the correctness of the opinion of the Trial Court. The relevant observations read as under: -

> *"8. Under the proviso to sub-Section (1) of Section 4, it is laid down that in case of a child witness under 12 years of age, unless satisfaction as required by the said proviso is recorded, an oath cannot be administered to the child witness. In this case, in the deposition of PW-1 Ajay, it is mentioned that his age was 12 years at the time of the recording of evidence. Therefore, the proviso to Section 4 of the Oaths Act will not apply in this case. However, in view of the requirement of Section 118 of the Evidence Act, the learned Trial Judge was under a duty to record his opinion that the child is able to understand the questions put to him and that he is able to give rational answers to the questions put to him. The Trial Judge must also record his opinion that the child witness understands the duty of speaking the truth and state why he is of the opinion that the child understands the duty of speaking the truth.*
>
> *9. It is a well-settled principle that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. A child witness of tender age is easily susceptible to tutoring. However, that by itself is no ground to reject the evidence of a child witness. The Court must make careful scrutiny of the*

evidence of a child witness. The Court must apply its mind to the question whether there is a possibility of the child witness being tutored. Therefore, scrutiny of the evidence of a child witness is required to be made by the Court with care and caution.

10. Before recording evidence of a minor, it is the duty of a Judicial Officer to ask preliminary questions to him with a view to ascertain whether the minor can understand the questions put to him and is in a position to give rational answers. The Judge must be satisfied that the minor is able to understand the questions and respond to them and understands the importance of speaking the truth. Therefore, the role of the Judge who records the evidence is very crucial. He has to make a proper preliminary examination of the minor by putting appropriate questions to ascertain whether the minor is capable of understanding the questions put to him and is able to give rational answers. It is advisable to record the preliminary questions and answers so that the Appellate Court can go into the correctness of the opinion of the Trial Court."

(Emphasis supplied)

29. In ***Ratansinh Dalsukhbhai Nayak v. State of Gujarat*** reported in **(2004) 1 SCC 64**, this Court explained that although child witnesses are considered as dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded yet it is an accepted norm that if after careful scrutiny their testimony is found to inspire confidence and truthful, then there is no obstacle in accepting the evidence of such child witness. The relevant observation reads as under: -

"7. [...] The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from

what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

30. In ***Panchhi v. State of U.P.*** reported in **(1998) 7 SCC 177**, this Court held that the evidence of a child witness should not be outrightly rejected but the evidence must be evaluated carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and an easy prey to tutoring. The relevant observations read as under: -

"11. Shri R.K. Jain, learned Senior Counsel, contended that it is very risky to place reliance on the evidence of PW 1, he being a child witness. According to the learned counsel, the evidence of a child witness is generally unworthy of credence. But we do not subscribe to the view that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring.

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

31. This Court in ***Suryanarayana v. State of Karnataka*** reported in **(2001) 9 SCC 129** held that the evidence of a child witness who has withstood the test of cross-examination should not be rejected per se if his testimony is found to be

free from any infirmity. It reiterated that corroboration to the testimony of a child witness is not a rule but a measure of caution and prudence. The Court further held that while assessing the evidence of a child witness, courts must rule out the possibility of tutoring. However, in the absence of any allegation of tutoring or an attempt to use the child witness for ulterior purposes by the prosecution, the courts must rely on the confidence-inspiring testimony of such a witness in determining the guilt or innocence of the accused. The relevant observation reads as under: -

> *"5. [...] The evidence of the child witness cannot be rejected per se, but the court, as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of the child witness. The evidence of PW 2 cannot be discarded only on the ground of her being of tender age. The fact of PW 2 being a child witness would require the court to scrutinise her evidence with care and caution. If she is shown to have stood the test of cross-examination and there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix-up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not."*
>
> (Emphasis supplied)

32. In ***Arbind Singh v. State of Bihar*** reported in **(1995) Supp (4) SCC 416** this Court found the testimony of the child witness therein to be tutored due to the various inconsistencies and contradiction in her statements as regards the cause of death of the deceased therein, and due to the fact that the child witness was residing with her maternal uncle immediately after the incident occurred. This Court further held that implicit faith and reliance cannot be placed on a testimony that betrays traces of tutoring and the court must look for corroboration before relying on the same. The relevant observation reads as under: -

> *"3. The entire case hinges on the evidence of the child witness PW 2 Poonam Kumari, the daughter of the deceased and appellant Arbind Singh. The incident occurred late in the night and she claims she was awakened by the noise of quarrelling. She further claims to have seen her father tying and nailing her mother before hanging her. At the date of the incident she was aged about 5 years. When her evidence was recorded she was aged about 9 years. The learned Trial Judge did not undertake a 'voir dire' before recording her evidence on oath although he notes that she was capable of understanding and answering the questions. Be that as it may, the fact remains that there was a gap of 4 years between the incident and the date on which her evidence was recorded. Immediately after the incident she was interrogated but as she was weeping her statement was not recorded. Thereafter her statements were recorded on October 25, 1984, October 28, 1984 and November 5, 1984, the last being under Section 164 of the Criminal Procedure Code. In her first statement she did not say that her mother was hanged. Subsequently she said she was hanged by electric wire. She later said she was hanged with the help of a jute string. In her statement recorded under Section 164 of the Code of Criminal Procedure on November 5, 1984, she stated that her father had thrown a jute string around the neck of her mother and killed her. It will, therefore, appear from these statements that she has not been consistent in her version. That apart, we have carefully perused the evidence of this witness and*

we find traces of tutoring on certain aspects of the case. It appears from her evidence that she was very close to her maternal uncle with whom she was living when her mother had gone to Deoghar for training. Immediately after the incident she was taken away by her maternal uncle who happens to be a fairly important figure. In her evidence she stated that there used to be quarrels between her father and mother and the former used to ill-treat the latter without any rhyme or reason. Then she adds that her father wanted to remarry and, therefore, he was ill-treating her mother. Now the case put up was that the husband was ill-treating the wife as he wanted to sell her jewellery to purchase a scooter. Therefore, the statement made by PW 2 that her father was ill-treating her mother because he wanted to remarry could only be the result of tutoring. She also tried to involve all the other family members including her uncle Shambhoo whom she could not even recognize in the dock. This she could have done only at the behest of someone else. She also stated that neither her father nor her grandfather met her mother's expense at Deoghar, a fact of which ordinarily a child under five years of age would not be aware. She even tried to involve her father's sister whose name she had not mentioned earlier. There are also certain other statements made in the course of her deposition which would suggest that possibility of tutoring could not be ruled out. Having taken a careful look at the evidence of this child witness we are of the opinion that implicit faith and reliance cannot be placed on her testimony since it is not corroborated by any independent and reliable evidence. It is well-settled that a child witness is prone to tutoring and hence the court should look for corroboration particularly when the evidence betrays traces of tutoring. We, therefore, think that appellant 1 was entitled to benefit of doubt."

(Emphasis supplied)

33. Similarly in ***Digamber Vaishnav v. State of Chhattisgarh*** reported in **(2019) 4 SCC 522** this Court discarded the testimony of the child witness therein on the ground of being tutored as it found the same to be fraught with inconsistencies and in direct contradiction of the ocular evidence of other prosecution witnesses.

34. This Court in ***State of M.P. v. Ramesh*** reported in **(2011) 4 SCC 786** summarized the principles pertaining to the appreciation of evidence of a child witness as under: -

(i) **First,** it held that that a child witness must be able to understand the sanctity of giving evidence on oath and the import of the questions that were being put to him. The evidence of a child witness must reveal that he was able to discern between right and wrong, and the court may ascertain his suitability as a witness through either cross-examination or by putting questions to the child in terms of Section 165 of the Evidence Act or by determining the same from the evidence or testimony of the child itself. The relevant observation reads as under: -

> *"11. The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on oath and the import of the questions that were being put to him. (Vide Himmat Sukhadeo Wahurwagh v. State of Maharashtra (2009) 6 SCC 712.)"*
>
> (Emphasis supplied)

(ii) **Secondly,** if the evidence of the child explains the relevant events of the crime without improvements or embellishments, and the same

inspire confidence of the court, his deposition does not require any corroboration whatsoever. The relevant observation reads as under: -

> *"12. In State of U.P. v. Krishna Master (2010) 12 SCC 324 this Court held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature."*
>
> (Emphasis supplied)

(iii) **Thirdly,** even if the courts find that the child witness had been tutored, even then the statement of a child witness can be relied upon if the tutored part can be separated from the untutored part and the remaining untutored part inspires confidence. In such cases, the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. The relevant observation reads as under: -

> *"13. Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from the untutored part, in case such remaining untutored part*

inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. (Vide Gagan Kanojia v. State of Punjab (2006) 13 SCC 516.)"

(Emphasis supplied)

(iv) **Lastly,** it held that an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition. If the deposition of a child witness inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the court can reject his statement partly or fully and look for corroboration. The relevant observation reads as under: -

"14. In view of the above, the law on the issue can be summarised to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition."

(Emphasis supplied)

35. From the above exposition of law, it is clear that the evidence of a child witness for all purposes is deemed to be on the same footing as any other witness as long the child is found to be competent to testify. The only precaution which the court should take while assessing the evidence of a child witness is that such witness must be a reliable one due to the susceptibility of children by their falling prey to tutoring. However, this in no manner means that the evidence of a child must be rejected outrightly at the slightest of discrepancy, rather what is required is that the same is evaluated with great circumspection. While appreciating the testimony of a child witness the courts are required to assess whether the evidence of such witness is its voluntary expression and not borne out of the influence of others and whether the testimony inspires confidence. At the same time, one must be mindful that there is no rule requiring corroboration to the testimony of a child witness before any reliance is placed on it. The insistence of corroboration is only a measure of caution and prudence that the courts may exercise if deemed necessary in the peculiar facts and circumstances of the case.

36. In ***Ratansinh Dalsukhbhai Nayak*** (supra) this Court observed that merely because a child witness is found to be repeating certain parts of what somebody asked her to say is no reason to discard her testimony as tutored, if it is found that what is in substance being deposed by the child witness is something that he or she had actually witnessed. It added that a child witness

who has withstood his or her cross-examination at length and able to describe the scenario implicating the accused in detail as the author of crime, then minor discrepancies or parts of coached deposition that have crept in will not by itself affect the credibility of such child witness. The relevant observation reads as under: -

> *"8. The learned trial Judge has elaborately analysed the evidence of the eyewitness. There is no reason as to why she would falsely implicate the accused. Nothing has been brought on record to show that she or her father had any animosity so far as the accused is concerned. The prosecution has been able to bring home its accusations beyond the shadow of a doubt. Further, the trial court on careful examination was satisfied about the child's capacity to understand and to give rational answers. That being the position, it cannot be said that the witness (PW 11) had no maturity to understand the import of the questions put or to give rational answers. This witness was cross-examined at length and in spite thereof she had described in detail the scenario implicating the accused to be the author of the crime. The answers given by the child witness would go to show that it was only repeating what somebody else asked her to say. The mere fact that the child was asked to say about the occurrence and as to what she saw, is no reason to jump to a conclusion that it amounted to tutoring and that she was deposing only as per tutoring what was not otherwise what she actually saw. The learned counsel for the accused-appellant has taken pains to point out certain discrepancies which are of very minor and trifle nature and in no way affect the credibility of the prosecution version."*
>
> (Emphasis supplied)

37. Similarly in ***State of M.P. v. Ramesh*** reported in **(2011) 4 SCC 786** it was held that even if the statement of a child witness is found to be tutored it can be relied upon, if the same is found to be believable or inspire confidence after

separating the tutored part from the untutored portion. The relevant observation reads as under: -

> *"13. Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from the untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness."*

38. In the case at hand, the High Court held that the police statement of the child witness, Rani (PW6) under Section 161 of the Cr.P.C. had been recorded after a delay of more than 18-days, due to which the possibility of tutoring could not be ruled out, more particularly because PW6 at the time of recording of her statement was residing with PW3 i.e., the Complainant who was at inimical terms with the accused.

39. Indisputably the police statement of PW6 came to be recorded after 18-days of the incident. Although the police was well aware that she was a vital witness to the entire case and could guide the investigation in the right direction, yet to mechanically discard her testimony solely on the ground of delay alone was not warranted in the peculiar facts and circumstances of the case, particularly when no question in this regard was put to the IO so as to give him an opportunity to explain the reason for such delay.

40. In ***Ranbir & Ors. v. State of Punjab*** reported in **(1973) 2 SCC 444** this Court observed that the factum of delayed examination of a witness ought to be

specifically put to the IO so as to enable him to explain the reasons therefor. It further held that delay in examining a witness during investigation would be material only if it is indicative and suggestive of some unfair practice by the investigating agency for the purpose of introducing a got-up witness to falsely support the prosecution case. The relevant observation made therein reads as under: -

> *"7. [...] The appellants' counsel also faintly contended that Tota Ram PW 7 was examined by the police after considerable delay, the suggestion being that his evidence must be looked at with suspicion. We are not impressed by this submission. The fact of delayed examination of Tota Ram should, in our opinion, have been put to the investigating officer so as to enable him to explain the undue delay, if any, in examining Tota Ram. The question of delay in examining a witness during investigation is material only if it is indicative and suggestive of some unfair practice by the investigating agency for the purpose of introducing a got-up witness to falsely support the prosecution case. It is, therefore, essential that the investigating officer should be asked specifically about the delay and the reasons therefor. [...]"*
>
> (Emphasis supplied)

41. In ***State of U.P. v. Satish*** reported in **(2005) 3 SCC 114** this Court held that before the delay in examination of any particular witness can be taken into consideration to impeach their credibility, the IO must be first asked by the accused to explain the delay by putting a question in this regard. The relevant observation reads as under: -

> *"20. It is to be noted that the explanation when offered by the IO on being questioned on the aspect of delayed examination by the accused has to be tested by the court on the touchstone of credibility. If the explanation is plausible then no adverse inference can be drawn. On the other hand, if the explanation is*

found to be implausible, certainly the court can consider it to be one of the factors to affect credibility of the witnesses who were examined belatedly. It may not have any effect on the credibility of the prosecution's evidence tendered by the other witnesses."

(Emphasis supplied)

42. While it is true that primarily it was for the accused to question the IO to explain the delay in recording the statement of PW6, but at the same time the Trial Judge should not have remained a mute spectator, acting like a robot or a recording machine to just deliver whatever stands feeded by the parties. The role of a judge in dispensation of justice after ascertaining the true facts no doubt is very difficult one. In the pious process of unravelling the truth so as to achieve the ultimate goal of dispensing justice between the parties the judge cannot keep himself unconcerned and oblivious to the various happenings taking place during the progress of trial of any case. The presiding judge cannot afford to remain a mute spectator totally oblivious to the various happenings taking place around him, more particularly, concerning a particular case being tried by him. The fair trial is possible only when the court takes active interest and elicit all relevant information and material necessary so as to find out the truth for achieving the ultimate goal of dispensing justice with all fairness and impartiality to both the parties. In ***Munna Pandey v. State of Bihar*** reported in **2023 INSC 793** this Court held that a presiding judge must cease to be a spectator and a mere recording

machine and become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth.

43. Thus, even if the accused had failed in putting a question in regards to delay in examination of PW6, the presiding judge was duty bound to put this question to the IO in exercise of his powers under Section 165 of the Evidence Act. Since in the present case no question whatsoever was put to the IO to explain the reason for the delay in examination of Rani, PW6, we should not willingly jump to discard the testimony of PW6 on the ground of delay alone, and ought to be circumspect while scrutinizing the effect of such delay. The court in such a situation would be required to carefully see whether there is anything palpable on the face of it to indicate any malice at the end of the investigating agency in belatedly examining such witness.

44. There is nothing on record that would lead to the inference that the delay in recording the statement of PW6 was done deliberately in order to manipulate or concoct the case against the respondent accused herein, and rather such delay appears to be inadvertent with no sinister motive or design in mind. We say so because, the statement of PW6 had been recorded on the same date as the statement of PW5. If at all the investigating agency intended to allow the doctoring of the testimony of PW6 then it would have only delayed the examination of the child witness, Rani (PW6) and not of PW5 as-well, thus this delay in examination appears to be attributable to the routine manner in

which the IO proceeded with the course of investigation and the overall investigation inertia and not to give effect to any unfair practice.

45. One another reason for the High Court to discard the testimony of PW6 on the ground of being tutored was due to the fact that at the time of recording of her statement, PW6 was residing with PW3, the complainant herein who is her maternal uncle and was also at inimical terms with the accused. However, the High Court appears to have lost sight of the fact that PW6 at the relevant point of time was only of seven years of age. She had not only lost her mother but had also been abandoned by her father i.e., the respondent accused herein who went absconding. In such circumstances, the only option available to PW6 was to reside with her maternal uncle. Where else does the High Court expect a child of such tender age in such circumstances to reside? How could the High Court even possibly expect such child to go to the police station unaccompanied by any adult family member to give her statement? The testimony of PW6 could not have been discarded solely on the ground that it was recorded in the presence of PW3, an interested witness who is at inimical terms with the accused, especially in view of the facts narrated above. The courts are expected to deal with such cases in a more realistic manner and not discard evidence on account of procedural technicalities, perfunctory considerations or insignificant lacunas.

46. In the last what weighed with the High Court whilst discarding the testimony of PW6 was the fact that in the morgue inquiry report there was nothing to indicate that the witness had mentioned anything to implicate the respondent accused herein, as she had simply stated that "her mother had died". The High Court further observed that because the respondent accused came to be arrested only after the statement of PW6 had been recorded which according to the High Court meant that the earlier statement of PW6 made during the morgue enquiry must have been unfavourable to the prosecution which is why it was also never brought on record.

47. The incident is alleged to have occurred on 15.07.2003. On the very next date i.e., 16.07.2003, the inquest proceedings under Section 174 of the Cr.P.C. were carried out based on the information given by PW3. On that very date, PW7 recorded the statements of PW3, PW4, PW5 and PW6, respectively based on which the morgue report was submitted opining that the deceased had died under suspicious circumstances and suggesting the commission of offence under Section(s) 302, 201 read with 34 of the IPC by the accused persons. Accordingly, on 20.07.2003, the FIR came to be registered against the respondent accused herein.

48. No doubt, in the inquest report it has been mentioned that PW6 only stated that her "mother had died", however, this does not mean that her subsequent statements implicating the accused were tutored. This is because as per the

testimony of PW7, the death report that was prepared upon conclusion of the inquest proceedings specifically implicated the accused herein for the suspicious death of the deceased. In the FIR that was lodged, not only has the respondent been named as an accused but it also specifically mentions that from the statement of PW6 in the inquest proceedings, it has been found that the respondent accused, the husband of the deceased murdered her by slamming Virendra Kumari on the floor of the porch of the house and choked her to death by pressing his foot on her neck. At the cost of repetition, the relevant contents of the FIR are again reproduced hereunder: -

> *"[...]on the investigation of Marg No. 7/03 Section 174 Cr.P.C., it is stated that on the basis of order issued by his good-self, I ASI Mahendra Singh conducted the investigation of Marg No. 7/03 under Section 174 Cr.P.C. after reaching the spot Village Singharai, during the course of investigation, recorded the statement of complainant Bhoora @ Yashpal Singh Yadav, Kumari Rani, D/o Balvir Singh Yadav, Bharat Singh Yadav R/o Village Singharai and Badal Singh Yadav, Police Station Badarvas. On spot map of the place of incident was prepared and seizure proceedings were conducted, from the investigation up till now and the statement of Kumari Rani Yadav, it has been found that Balvir Singh Yadav husband of the deceased Virendra Kumari murdered her by slamming Virendra Kumari on the floor of the porch of the house and choked her neck by pressing his foot and Kumari Jatan Singh helped her brother Balvir Singh in the murder, later on, during the night itself, Balvir Singh Yadav took the dead body of his wife on his shoulders to his field and discreetly burnt it. [...]"*
>
> (Emphasis supplied)

49. Thus, although the statement of PW6 that was recorded during the course of the inquest proceedings was never produced before the court, yet it does not mean that the suppression was due to the same being unfavourable,

particularly when the respondent accused neither sought for its production during the course of trial nor did it question the relevant witnesses as to its contents. As regards the timing of arrest of the respondent accused, the High Court seems to have completely overlooked the fact that at the time of the incident, the accused was absconding. Both PW3 and PW6, respectively had deposed that after cremating the deceased, the respondent accused fled away, and even the Trial Court had taken a note of this. Thus, from the sequence of events narrated above, and the contents of the FIR, there is no doubt in our minds that the implication of the respondent accused was not an afterthought.

50. In order to obviate any confusion, we take this opportunity to explain what is meant by a "tutored testimony" and the test for determining or ascertaining a tutored testimony. Where there has been tutoring of any witness, the same can possibly produce two broad effects in their testimony; **(i)** improvisation or **(ii)** fabrication.

51. Improvisation refers to instances where the tutored witness in question adds new details, alters facts, or provides an inconsistent version of events that were not previously stated in their initial statements, such as those given to the police in their statement under Section 161 of the Cr.P.C. In such situations, the improvisation by way of tutoring must be eradicated only in the manner envisaged under Section 162 of the Cr.P.C. read with Section 145 of the Evidence Act. The principle of law in this regard is that the witness who

has improvised its testimony must be first confronted with that part of its previous statement that omits or contradicts the improvisation by bringing it to its notice and give the witness an opportunity to either admit or deny the omission or contradiction. Where such witness admits such omission or contradiction, there is no further need to prove the contradiction through the IO and its effect would be looked into while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when the investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction. It will then be said to have been proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. [See: ***V.K. Mishra v. State of Uttarakhand*** reported in **(2015) 9 SCC 588**]

52. However, where the allegation of tutoring pertains to fabrication – meaning that certain portions of both the testimony and the previous statement of a particular witness have been doctored or falsified – in such circumstances twin conditions would have to be proved, namely; **(i)** the possibility or

opportunity of the witness being tutored **AND (ii)** the reasonable likelihood of the tutoring.

53. The first condition, namely the '*possibility or opportunity of the witness being tutored*' can be established by demonstrating or laying down certain foundational facts that suggest the probability that a part of the testimony of the witness might have been tutored. This may be done either by showing that there was a delay in recording the statement of such witness or that the presence of such witness was doubtful, or by imputing any motive on the part of such witness to depose falsely, or the susceptibility of such witness in falling prey to tutoring. A mere bald assertion that there is a possibility of the witness in question being tutored is not sufficient.

54. The second condition '*reasonable likelihood of tutoring*' requires that the foundational facts established in the first step be further proven or cogently substantiated before any portion of the witness's testimony can be deemed tutored. This may be done by leading evidence to prove a strong and palpable motive to depose falsely that was imputed to the witness, or by establishing that the delay in recording the statement is not only unexplained but is indicative and suggestive of some unfair practice by the investigating agency for the purpose of falsely supporting the case of the prosecution as held in ***Ranbir*** (supra), or by proving that the witness fell prey to tutoring and was

influenced by someone else either by cross-examining such witness at length that leads to either material discrepancies or contradictions, or exposes a doubtful demeanour of such witness rife with sterile repetition and confidence lacking testimony, or through such degree of incompatibility of the version of the witness with the other material on record and attending circumstances that negates their presence as unnatural.

55. Irrespective of whether the testimony of a witness is tutored or not, the same, generally may be classified into three categories: -

(i) wholly reliable;

(ii) wholly unreliable;

(iii) neither wholly reliable nor wholly unreliable.

In the first category of proof, the court should have no difficulty in coming to its conclusion either way - it may convict or may acquit on the testimony of a single witness. If it is found to be beyond approach or suspicion of interestedness, incompetence or subordination. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts

were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subordination of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints, which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the prosecution. [See: ***Ramratan and others v. State of Rajasthan*** reported in **AIR 1962 SC 424**; ***Guli Chand and others v. State of Rajasthan*** reported in **AIR 1974 SC 276**; ***Badri v. State of Rajasthan*** reported in **AIR 1976 SC 560**]

56. The appreciation of testimony of a witness is a hard task. There is no fixed or straight jacket formula for appreciation of the ocular evidence. The judicially evolved principles for appreciation of ocular evidence in a criminal case can be enumerated as under: -

a. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out

in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.

b. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the Trial Court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.

c. When eye-witness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence.

d. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

e. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

f. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

g. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

h. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

i. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

j. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect

people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

k. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

l. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.

m. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness.

n. The evidence of an interested and/or related witnesses should not be examined with a coloured vision simply because of their relationship

with the deceased. Though it is not a rule of law, it is a rule of prudence that their evidence ought to be examined with greater care and caution to ensure that it does not suffer from any infirmity. The court must satisfy itself that the evidence of the interested witness has a ring of truth. Only if there are no contradictions and the testimony of the related/interested witness is found to be credible, consistent and reasonable, can it be relied upon even without any corroboration. At the end of the day, each case must be examined on its own facts. There cannot be any sweeping generalisation.

[See ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*** reported in **AIR 1983 SC 753**; ***Leela Ram v. State of Haryana*** reported in **AIR 1999 SC 3717**; ***Tahsildar Singh v. State of UP*** reported in **AIR 1959 SC 1012**]

57. To put it simply, in assessing the value of the evidence of the eyewitnesses, two principal considerations are whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them and secondly, whether there is anything inherently improbable or unreliable in their evidence. In respect of both these considerations, the circumstances either elicited from those witnesses themselves or established by other evidence tending to improbabilise their presence or to discredit the

veracity of their statements, will have a bearing upon the value which a Court would attach to their evidence. Although in cases where the plea of the accused is a mere bald assertion of tutoring, yet the evidence of the prosecution witnesses has to be examined on its own merits, where the accused raises a definite plea or puts forward a positive case which is inconsistent with that of the prosecution, the nature of such plea or case and the probabilities in respect of it will also have to be taken into account while assessing the value of the prosecution evidence.

58. We summarize our conclusion as under: -

(I) The Evidence Act does not prescribe any minimum age for a witness, and as such a child witness is a competent witness and his or her evidence and cannot be rejected outrightly.

(II) As per Section 118 of the Evidence Act, before the evidence of the child witness is recorded, a preliminary examination must be conducted by the Trial Court to ascertain if the child-witness is capable of understanding sanctity of giving evidence and the import of the questions that are being put to him.

(III) Before the evidence of the child witness is recorded, the Trial Court must record its opinion and satisfaction that the child witness understands the duty of speaking the truth and must clearly state why he is of such opinion.

(IV) The questions put to the child in the course of the preliminary examination and the demeanour of the child and their ability to respond to questions coherently and rationally must be recorded by the Trial Court. The correctness of the opinion formed by the Trial Court as to why it is satisfied that the child witness was capable of giving evidence may be gone into by the appellate court by either scrutinizing the preliminary examination conducted by the Trial Court, or from the testimony of the child witness or the demeanour of the child during the deposition and cross-examination as recorded by the Trial Court.

(V) The testimony of a child witness who is found to be competent to depose i.e., capable of understanding the questions put to it and able to give coherent and rational answers would be admissible in evidence.

(VI) The Trial Court must also record the demeanour of the child witness during the course of its deposition and cross-examination and whether the evidence of such child witness is his voluntary expression and not borne out of the influence of others.

(VII) There is no requirement or condition that the evidence of a child witness must be corroborated before it can be considered. A child witness who exhibits the demeanour of any other competent witness and whose evidence inspires confidence can be relied upon without any need for corroboration and can form the sole basis for conviction. If the evidence of the child explains the relevant events of the crime without

improvements or embellishments, the same does not require any corroboration whatsoever.

(VIII) Corroboration of the evidence of the child witness may be insisted upon by the courts as measure of caution and prudence where the evidence of the child is found to be either tutored or riddled with material discrepancies or contradictions. There is no hard and fast rule when such corroboration would be desirous or required, and would depend upon the peculiar facts and circumstances of each case.

(IX) Child witnesses are considered as dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded and as such the courts must rule out the possibility of tutoring. If the courts after a careful scrutiny, find that there is neither any tutoring nor any attempt to use the child witness for ulterior purposes by the prosecution, then the courts must rely on the confidence-inspiring testimony of such a witness in determining the guilt or innocence of the accused. In the absence of any allegations by the accused in this regard, an inference as to whether the child has been tutored or not, can be drawn from the contents of his deposition.

(X) The evidence of a child witness is considered tutored if their testimony is shaped or influenced at the instance of someone else or is otherwise fabricated. Where there has been any tutoring of a witness, the same

may possibly produce two broad effects in their testimony; **(i)** improvisation or **(ii)** fabrication.

(i) Improvisation in testimony whereby facts have been altered or new details are added inconsistent with the version of events not previously stated must be eradicated by first confronting the witness with that part of its previous statement that omits or contradicts the improvisation by bringing it to its notice and giving the witness an opportunity to either admit or deny the omission or contradiction. If such omission or contradiction is admitted there is no further need to prove the contradiction. If the witness denies the omission or contradiction the same has to be proved in the deposition of the investigating officer by proving that part of police statement of the witness in question. Only thereafter, may the improvisation be discarded from evidence or such omission or contradiction be relied upon as evidence in terms of Section 11 of Evidence Act.

(ii) Whereas the evidence of a child witness which is alleged to be doctored or tutored in *toto*, then such evidence may be discarded as unreliable only if the presence of the following two factors have to be established being as under: -

- **Opportunity of Tutoring of the Child Witness in question** whereby certain foundational facts suggesting or

demonstrating the probability that a part of the testimony of the witness might have been tutored have to be established. This may be done either by showing that there was a delay in recording the statement of such witness or that the presence of such witness was doubtful, or by imputing any motive on the part of such witness to depose falsely, or the susceptibility of such witness in falling prey to tutoring. However, a mere bald assertion that there is a possibility of the witness in question being tutored is not sufficient.

- **Reasonable likelihood of tutoring** wherein the foundational facts suggesting a possibility of tutoring as established have to be further proven or cogently substantiated. This may be done by leading evidence to prove a strong and palpable motive to depose falsely, or by establishing that the delay in recording the statement is not only unexplained but indicative and suggestive of some unfair practice or by proving that the witness fell prey to tutoring and was influenced by someone else either by cross-examining such witness at length that leads to either material discrepancies or contradictions, or exposes a doubtful demeanour of such witness rife with sterile repetition and confidence lacking testimony, or through such degree of incompatibility of the version of the witness with

the other material on record and attending circumstances that negates their presence as unnatural.

(XI) Merely because a child witness is found to be repeating certain parts of what somebody asked her to say is no reason to discard her testimony as tutored, if it is found that what is in substance being deposed by the child witness is something that he or she had actually witnessed. A child witness who has withstood his or her cross-examination at length and able to describe the scenario implicating the accused in detail as the author of crime, then minor discrepancies or parts of coached deposition that have crept in will not by itself affect the credibility of such child witness.

(XII) Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from the untutored part, in case such remaining untutored or untainted part inspires confidence. The untutored part of the evidence of the child witness can be believed and taken into consideration or the purpose of corroboration as in the case of a hostile witness.

59. As discussed in the foregoing paragraphs of this judgment, there is nothing on record to indicate that PW6 was a tutored witness. We may also refer to one finding of the Trial Court recorded in its judgment, wherein it has been noted that PW6 was cross examined at length for approximately 1.5 hours, and her

demeanour throughout the same was believable, with nothing to indicate that she had been tutored or was deposing falsely. It also has taken note of the fact that in the entire cross examination no significant contradictions were found. Thus, we are of the considered opinion that the High Court committed an egregious error in discarding the testimony of PW6.

ii. <u>Principles of Law relating to appreciation of Circumstantial Evidence</u>.

60. In 'A Treatise on Judicial Evidence', Jeremy Bentham, an English Philosopher included a whole chapter upon what lies next when the direct evidence does not lead to any special inference. It is called Circumstantial Evidence. According to him, in every case, of circumstantial evidence, there are always at least two facts to be considered; **(i)** the **Factum Probandum**, or say, the principal fact the existence of which is supposed or proposed to be proved; and **(ii)** the **Factum Probans** or the evidentiary fact or the fact from the existence of which that of the factum probandum is inferred.

61. Although there can be no straight jacket formula for appreciation of circumstantial evidence, yet to convict an accused on the basis of circumstantial evidence, the Court must follow certain tests which are broadly as follows: -

(i) Circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;

(ii) Those circumstances must be of a definite tendency unerringly pointing towards guilt of the accused and must be conclusive in nature;

(iii) The circumstances, if taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(iv) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused but should be inconsistent with his innocence. In other words, the circumstances should exclude every possible hypothesis except the one to be proved.

[See: **Sharad Birdhichand Sarda v. State of Maharashtra** reported in **(1984) 4 SCC 116**]

62. In an Essay on the 'Principles of Circumstantial Evidence' by William Wills by T. and J.W. Johnson and Co. 1872, it has been explained that circumstantial evidence implies the existence of a certainty in the relation between the facts and the inferences stemming therefrom. The relevant extract reads as under: -

> *"In matters of direct testimony, if credence be given to the relators, the act of hearing and the act of belief, though really not so, seem to be contemporaneous. But the case is very different when we have to determine upon circumstantial evidence, the judgment in respect of which is essentially inferential. There is no*

apparent necessary connection between the facts and the inference; the facts may be true, and the inference erroneous, and it is only by comparison with the results of observation in similar or analogous circumstances, that we acquire confidence in the accuracy of our conclusions.

The term PRESUMPTIVE is frequently used as synonymous with CIRCUMSTANTIAL EVIDENCE; but it is not so used with strict accuracy, The word" presumption," ex vi termini, imports an inference from facts; and the adjunct "presumptive," as applied to evidentiary facts, implies the certainty of some relation between the facts and the inference. Circumstances generally, but not necessarily, lead to particular inferences; for the facts may be indisputable, and yet their relation to the principal fact may be only apparent, and not real; and even when the connection is real, the deduction may be erroneous. Circumstantial and presumptive evidence differ, therefore, as genus and species.

The force and effect of circumstantial evidence depend upon its incompatibility with, and incapability of, explanation or solution upon any other supposition than that of the truth of the fact which it is adduced to prove; the mode of argument resembling the method of demonstration by the reductio ad absurdum."

63. It is settled principle of law that an accused can be punished if he is found guilty even in cases of circumstantial evidence provided, the prosecution is able to prove beyond reasonable doubt the complete chain of events and circumstances which definitely points towards the involvement or guilt of the accused. The accused will not be entitled to acquittal merely because there is no eye witness in the case. It is also equally true that an accused can be convicted on the basis of circumstantial evidence subject to satisfaction of the expected principles in that regard.

64. Thus, in view of the above, the court must consider a case of circumstantial evidence in light of the aforesaid settled legal propositions. In a case of circumstantial evidence, the judgment remains essentially inferential. The inference is drawn from the established facts as the circumstances lead to particular inferences. The Court has to draw an inference with respect to whether the chain of circumstances is complete, and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion that the accused alone is the perpetrator of the crime in question. All the circumstances so established must be of a conclusive nature, and consistent only with the hypothesis of the guilt of the accused.

a. Incriminating Circumstances emerging from the evidence on record.

65. We take note of the following circumstances emerging from evidence on record: -

a. The failure on the part of the respondent accused in not explaining in any manner as to what had actually happened to his wife i.e., the deceased or how she died on the fateful night of the incident, more particularly when he did not dispute that he was in the company of his wife at the relevant point of time. Though the respondent accused in his statement under Section 313 of the Cr.P.C. admitted that at the time of the incident everyone was sleeping in the house, yet, surprisingly, he maintained a

complete silence in regards to the cause of death of the deceased. At the cost of repetition, the relevant portion of the further statement of the accused is reproduced hereunder: -

> *"Que. No. 32: This witness further states that you reached in the courtyard and Bua was also sleeping in the courtyard at that time. What do you want to say?*
> *Ans: All were sleeping in the house."*

b. The unnatural conduct of the respondent accused in not informing the family members either about the death of their daughter or the cremation of her body, despite the fact that her family members were residing in the very same village.

c. The fact that the respondent-accused after clandestinely cremating the deceased's body fled away and could not be found either at the house or in the field where the body had been burnt as stated by PW3 and PW6, respectively, again raises suspicion about the cause of death of the deceased.

> ***Prosecution Witness No. 3 – Bhoora @ Yashpal***
> *"I saw the dead body burnt in the morning. The villagers did not create any ruckus and Balvir was not present there. Who burnt the dead body of Virendra Kumari, we do not know. Because we did not see it getting burn"*

> ***Prosecution Witness No. 6 – Rani***
> *"When the police came home, no one from the house was there. My father had ran away, and so had my aunt. My grandfather had also run away. I was the only one there and my brother. And my old grandfather was there. My mother's father in law, who is my grandfather was there."*

d. The suspicious circumstances under which the deceased died coupled with the fact that the accused had a fight with the deceased two to three days before the incident; their strained relationship and the accused frequently treating the deceased cruelly, as deposed by PW3, PW4, PW5, and PW6, respectively, further raise concerns and points towards the involvement of the respondent accused in the alleged crime. This is corroborated by the certified copies of the maintenance case and the complaint lodged by the deceased, which were exhibited and read into evidence. The relevant observations made by the Trial Court in this regard are reproduced herein below: -

> *"22. PW-3 Bhoora has stated that Birender Kumari is his .. sister being the daughter of his maternal uncle. On the day of incident in the night he and his father were sleeping in their house upon which they had heard voices of Birender Kumari crying. [...] In the morning when he and his father got up then they came to know that Birender Kumari has died and that she has been burnt by the accused clandestinely in their fields itself. When he and his father and the entire village went to see then the dead body was burning which fact is confirmed by Bharat Singh also. [...] The accused used to harass and the motorcycle had not been given. He used to give beatings upon which the deceased used to come to him. Once the accused beat her very badly and did- not give her anything to eat also. Upon whiCh she had filed a case of maintenance in the JMFC Court, Kolaras of which the certified copy is Ex.P-8. The girl had been given beatings, the true copy of which report is Ex.P-9.*
>
> *xxx xxx xxx*
>
> *29. <u>The accused had carried Birender Kumari to the fields in relation to which direct evidence has not come. It has come in the statement of Rani that the accused took her mother to the fields and Jatan had told that her mother had been taken for</u>*

cremation. In the fields the deceased was cremated in the night which circumstance also goes against the accused. If the death of deceased Birender Kumari was of ordinary nature then what was the reason that in the night without informing the reason to the family of the deceased she was cremated in the night especially when prior to the incident itself the mutual relations of the accused and deceased were not good and according to Ex.P-8 & P-9 the case in relation to not giving beatings and maintenance had been filed by the deceased in the Court. Another circumstance which indicate the involvement of the accused in the incident [...]"

(Emphasis supplied)

e. It is also not the case of the respondent accused that the deceased was suffering from any ailment nor is there any evidence worth the name to suggest the possibility of her death occurring due to any health issue. Thus, in this regard, it was all the more important for the respondent accused to explain in what circumstances and in what manner his wife suddenly died on the fateful night of the incident.

66. The High Court whilst passing the impugned judgment and order completely failed to advert to and refer to Section 106 of the Evidence Act, which was crucial in a case involving circumstantial evidence of such nature as aforementioned.

iii. Principles of Law governing the Applicability of Section 106 of the Evidence Act.

67. At this stage it would be apposite to refer to Section 106 of the Evidence Act, which states as under: -

> *"**106. Burden of proving fact especially within knowledge.—** When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.*
>
> *Illustration:*
> *(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.*
>
> *(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."*

68. Section 106 of the Evidence Act referred to above provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The word "especially" means facts that are pre-eminently or exceptionally within the knowledge of the accused. The ordinary rule that applies to the criminal trials that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by the rule of facts embodied in Section 106 of the Evidence Act. Section 106 of the Evidence Act is an exception to Section 101 of the Evidence Act. Section 101 with its illustration (a) lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible or at any rate disproportionately difficult for the prosecution to establish the facts which are, "especially within the knowledge of the accused and which, he can prove without difficulty or inconvenience".

69. In ***Shambhu Nath Mehra* v. *The State of Ajmer*** reported in **AIR 1956 SC 404**, this Court while considering the word "especially" employed in Section 106 of the Evidence Act speaking through Vivian Bose, J., observed as under: -

> *"9. [...] The word "especially" stresses that it means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not.*
>
> *It is evident that that cannot be the intention & the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle v. The King, 1936 PC 169 (AIR V 23) (A) and Seneviratne v. R. 1936-3 All ER 36 AT P. 49 (B)."*

70. The aforesaid decision of ***Shambhu Nath*** (supra) has been referred to and relied upon in ***Nagendra Sah* v. *State of Bihar*** reported in **(2021) 10 SCC 725**, wherein this Court observed as under: -

> *"22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the court can always draw an appropriate inference.*
>
> *23. When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act,*

such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused."

(Emphasis supplied)

71. In ***Tulshiram Sahadu Suryawanshi and Anr.*** **v.** ***State of Maharashtra*** reported in **(2012) 10 SCC 373**, this Court observed as under: -

"23. It is settled law that presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above position is strengthened in view of Section 114 of the Evidence Act, 1872. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process, the courts shall have regard to the common course of natural events, human conduct, etc. in addition to the facts of the case. In these circumstances, the principles embodied in Section 106 of the Evidence Act can also be utilised. We make it clear that this section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. It is useful to quote the following observation in State of W.B. *v.* Mir Mohammad Omar and Ors. *[(2000) 8 SCC 382 : 2000 SCC (Cri) 1516] : (SCC p. 393, para 38)*

> *"38. Vivian Bose, J., had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases*

in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. In Shambhu Nath Mehra *v.* The State of Ajmer *[AIR 1956 SC 404 : 1956 Cri LJ 794] the learned Judge has stated the legal principle thus :*

> *'11. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience.*
>
> *The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge.'"*

(Emphasis supplied)

72. In ***Trimukh Maroti Kirkan* v. *State of Maharashtra***, reported in **(2006) 10 SCC 681**, this Court was considering a similar case of homicidal death in the confines of the house. The following observations are considered relevant in the facts of the present case: -

> *"14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See* Stirland *v.* Director of Public Prosecutions *[1944 AC 315 : (1944) 2 All ER 13 (HL)] — quoted with approval by Arijit*

Pasayat, J. in State of Punjab *v.* Karnail Singh *[(2003) 11 SCC 271 : 2004 SCC (Cri) 135].) The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:*

> *"(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him."*

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

xxx xxx xxx

22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. ..."

(Emphasis supplied)

73. The question of burden of proof, where some facts are within the personal knowledge of the accused, was examined by this Court in the case of ***State of W.B.*** **v.** ***Mir Mohammad Omar and Ors.*** reported in **(2000) 8 SCC 382**. In this case, the assailants forcibly dragged the deceased from the house where he was taking shelter on account of the fear of the accused, and took him away at about 2:30 in the night. The next day in the morning, his mangled body was found lying in the hospital. The Trial Court convicted the accused under Section 364, read with Section 34 of the IPC, and sentenced them to ten years rigorous imprisonment. The accused preferred an appeal against their conviction before the High Court and the State also filed an appeal challenging the acquittal of the accused for the charge of murder. The accused had not given any explanation as to what happened to the deceased after he was abducted by them. The Sessions Judge, after referring to the law on circumstantial evidence, had observed that there was a missing link in the chain of evidence after the deceased was last seen together with the accused persons, and the discovery of the dead body in the hospital, and concluded that the prosecution had failed to establish the charge of murder against the accused persons beyond reasonable doubt. This Court took note of the provisions of Section 106 of the Evidence Act, and laid down the following principles in paras 31 to 34 of the report: -

> *"31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken*

as a recognized doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.

32. In this case, when the prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognized by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.

34. When it is proved to the satisfaction of the Court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the Court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the Court what else happened to Mahesh at least until he was in their custody."

(Emphasis supplied)

74. Applying the aforesaid principles, this Court while maintaining the conviction under Section 364 read with Section 34 of the IPC, reversed the order of

acquittal under Section 302 read with Section 34 of the IPC, and convicted the accused under the said provision and sentenced them to imprisonment for life.

75. Thus, from the aforesaid decisions of this Court, it is evident that the court should apply Section 106 of the Evidence Act in criminal cases with care and caution. It cannot be said that it has no application to criminal cases. The ordinary rule which applies to criminal trials in this country that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by the provisions contained in Section 106 of the Evidence Act.

76. Section 106 cannot be invoked to make up the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused. This section cannot be used to support a conviction unless the prosecution has discharged the onus by proving all the elements necessary to establish the offence. It does not absolve the prosecution from the duty of proving that a crime was committed even though it is a matter specifically within the knowledge of the accused and it does not throw the burden on the accused to show that no crime was committed. To infer the guilt of the accused from absence of reasonable explanation in a case where the other circumstances are not by themselves enough to call for his explanation is to relieve the prosecution of its legitimate burden. So, until a *prima facie* case is established by such evidence, the onus does not shift to the accused.

77. Section 106 obviously refers to cases where the guilt of the accused is established on the evidence produced by the prosecution unless the accused is able to prove some other facts especially within his knowledge which would render the evidence of the prosecution nugatory. If in such a situation, the accused offers an explanation which may be reasonably true in the proved circumstances, the accused gets the benefit of reasonable doubt though he may not be able to prove beyond reasonable doubt the truth of the explanation. But if the accused in such a case does not give any explanation at all or gives a false or unacceptable explanation, this by itself is a circumstance which may well turn the scale against him. In the language of Prof. Glanville Williams:

> *"All that the shifting of the evidential burden does at the final stage of the case is to allow the jury (Court) to take into account the silence of the accused or the absence of satisfactory explanation appearing from his evidence."*
>
> (Emphasis supplied)

78. To recapitulate the foregoing : What lies at the bottom of the various rules shifting the *evidential burden* or burden of introducing evidence in proof of one's case as opposed to the *persuasive burden* or burden of proof, i.e., of proving all the issues remaining with the prosecution and which never shift is the idea that it is impossible for the prosecution to give wholly convincing evidence on certain issues from its own hand and it is therefore for the accused to give evidence on them if he wishes to escape. Positive facts must always

be proved by the prosecution. But the same rule cannot always apply to negative facts. It is not for the prosecution to anticipate and eliminate all possible defences or circumstances which may exonerate an accused. Again, when a person does not act with some intention other than that which the character and circumstances of the act suggest, it is not for the prosecution to eliminate all the other possible intentions. If the accused had a different intention that is a fact especially within his knowledge and which he must prove (see Professor Glanville Williams—Proof of Guilt, Ch. 7, page 127 and following) and the interesting discussion—para 527 negative averments and para 528 — "require affirmative counter-evidence" at page 438 and foil, of *Kenny's outlines of Criminal Law*, 17th Edn. 1958.

79. But Section 106 has no application to cases where the fact in question, having regard to its nature, is such as to be capable of being known not only to the accused but also to others, if they happened to be present when it took place. The intention underlying the act or conduct of any individual is seldom a matter which can be conclusively established; it is indeed only known to the person in whose mind the intention is conceived. Therefore, if the prosecution has established that the character and circumstance of an act suggest that it was done with a particular intention, then under illustration (a) to this section, it may be assumed that he had that intention, unless he proves the contrary.

80. A manifest distinction exists between the burden of proof and the burden of going forward with the evidence. Generally, the burden of proof upon any affirmative proposition necessary to be established as the foundation of an issue does not shift, but the burden of evidence or the burden of explanation may shift from one side to the other according to the testimony. Thus, if the prosecution has offered evidence, which if believed by the court, would convince them of the accused's guilt beyond a reasonable doubt, the accused, if in a position, should go forward with countervailing evidence, if he has such evidence. When facts are peculiarly within the knowledge of the accused, the burden is on him to present evidence of such facts, whether the proposition is an affirmative or negative one. He is not required to do so even though a *prima facie* case has been established, for the court must still find that he is guilty beyond a reasonable doubt before it can convict. However, the accused's failure to present evidence on his behalf may be regarded by the court as confirming the conclusion indicated by the evidence presented by the prosecution or as confirming presumptions which might arise therefrom. Although not legally required to produce evidence on his own behalf, the accused may therefore as a practical matter find it essential to go forward with proof. This does not alter the burden of proof resting upon the prosecution [See: ***Balvir Singh v. State of Uttarakhand*** reported in **2023 SCC OnLine SC 1261** and ***Anees v. State Govt. of NCT*** reported in **2024 INSC 368**]

iv. What is "*prima facie case*" (foundational facts) in the context of Section 106 of the Evidence Act?

81. The Latin expression *prima facie* means "at first sight", "at first view", or "based on first impression". According, to *Webster's Third International Dictionary* (1961 Edn.), "*prima facie case*" means a case established "*prima facie*" by evidence which in turn means "evidence sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted". In both civil and criminal law, the term is used to denote that, upon initial examination, a legal claim has sufficient evidence to proceed to trial or judgment. In most legal proceedings, one party (typically, the plaintiff or the prosecutor) has a burden to prove, which requires them to present *prima facie* evidence for each element of the case or charges against the defendant. If they cannot present *prima facie* evidence, the initial claim may be dismissed without any need for a response by other parties.

82. Section 106 of the Evidence Act would apply to cases where the prosecution could be said to have succeeded in proving facts from which a reasonable inference can be drawn regarding guilt of the accused.

83. The presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved.

84. To explain what constitutes a *prima facie* case to make Section 106 of the Evidence Act applicable, we should refer to the decision of this Court in ***Mir Mohammad*** (supra), wherein this Court has observed in paras 36 and 37 respectively as under:

> *"36. In this context we may profitably utilize the legal principle embodied in Section 106 of the Evidence Act which reads as follows: "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."*
>
> *37. The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference."*
>
> (Emphasis supplied)

85. We should also look into the decision of this Court in the case of ***Ram Gulam Chaudhary & Ors.*** **v.** ***State of Bihar*** reported in **(2001) 8 SCC 311**, wherein this Court made the following observations in para 24 as under: -

> *"24. Even otherwise, in our view, this is a case where Section 106 of the Evidence Act would apply. Krishnanand Chaudhary was brutally assaulted and then a chhura-blow was given on the chest. Thus chhura-blow was given after Bijoy Chaudhary had said "he is still alive and should be killed". The appellants then carried away the body. What happened thereafter to Krishnanand Chaudhary is especially within the knowledge of the appellants. The appellants have given no explanation as to what they did after they took away the body. Krishnanand Chaudhary has not been since seen alive. In the absence of an explanation, and considering the fact that the appellants were suspecting the boy to have kidnapped and killed the child of the*

family of the appellants, it was for the appellants to have explained what they did with him after they took him away. When the abductors withheld that information from the court, there is every justification for drawing the inference that they had murdered the boy. Even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The appellants by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference. We, therefore, see no substance in this submission of Mr. Mishra."

(Emphasis supplied)

86. Cases are frequently coming before the Courts where the husbands, due to strained marital relations and doubt as regards the character, have gone to the extent of killing the wife. These crimes are generally committed in complete secrecy inside the house and it becomes very difficult for the prosecution to lead evidence. No member of the family like in the case on board, even if he is a witness of the crime, would come forward to depose against another family member.

87. If an offence takes place inside the four walls of a house and in such circumstances where the accused has all the opportunity to plan and commit the offence at the time and in the circumstances of its choice, it will be extremely difficult for the prosecution to lead direct evidence to establish the guilt of the accused. It is to resolve such a situation that Section 106 of the Evidence Act exists in the statute book. In the case of ***Trimukh Maroti***

Kirkan (supra), this Court observed that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. The Court proceeded to observe that a Judge also presides to see that a guilty man does not escape. Both are public duties. The law does not enjoin a duty on the prosecution to lead evidence of such character, which is almost impossible to be led, or at any rate, extremely difficult to be led. The duty on the prosecution is to lead such evidence, which it is capable of leading, having regard to the facts and circumstances of the case.

88. We are of the view that the following foundational facts, duly established by the prosecution, justify the invocation of the principles enshrined under Section 106 of the Evidence Act: -

a) The offence took place inside the four walls of the house in which the respondent accused, the deceased and their 7-year-old daughter were living. The respondent accused has not disputed his presence in the house at the time of the alleged incident.

b) The failure on the part of the accused to inform the family members about the death of their daughter and the clandestine manner in which her body was cremated, more particularly when her family members were residing in the very same village. By the time the Investigating Officer reached the place of incident the body of the deceased was fully burnt.

c) The dubious conduct of the respondent accused in fleeing away from home leaving behind his minor daughter of seven years age all alone.

d) The untimely death of the deceased in suspicious circumstances, occurring shortly after a fight with the respondent-accused two to three days before the incident, coupled with evidence of their strained relationship.

e) The respondent accused maintained complete silence. In other words, has failed to explain any of the incriminating circumstances pointing a finger against him.

89. We are of the view that the aforementioned circumstances constitute more than a prima facie case to enable the prosecution to invoke Section 106 of the Evidence Act and shift the burden on the accused husband to explain what had actually happened on the day & date his wife died.

90. This appeal reminds us of Justice V. R. Krishna Iyer's observations in ***Dharm Das Wadhwani v. State of U.P.*** reported in **(1974) 4 SCC 267**: "*The rule of benefit of reasonable doubt does not imply a frail willow bending to every whiff of hesitancy. Judges are made of sterner stuff and must take a practical view of legitimate inferences flowing from evidence, circumstantial or direct*." The role of courts in such circumstances assumes greater importance and it is expected of the courts to deal with like one on hand, cases in a more realistic manner and not allow the criminals to go scot-free on account of procedural

technicalities, perfunctory investigation or insignificant lacunas in the evidence as otherwise serious crimes would go unpunished. The courts are expected to be sensitive in cases involving crime against women.

D. CONCLUSION

91. In the result, the present appeal succeeds and is hereby allowed. The impugned judgment and order of acquittal passed by the High Court is hereby set aside, and the judgment and order of conviction passed by the Trial Court in S.T. No. 197 of 2003 stands restored.

92. The respondent accused shall surrender before the Trial Court within a period of four weeks from today to undergo the sentence as imposed by the Trial Court.

93. Pending application(s) if any, also stand disposed of.

..... J.
(J.B. Pardiwala)

..... J.
(Manoj Misra)

New Delhi;
24th February, 2025.