REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No. 1013 of 2019
(@SLP (Crl.) No. 4169 of 2018)

P Ramesh **…Appellant**

Versus

State Rep by Inspector of Police **…Respondent**

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

1 Leave granted.

2 This appeal arises from a judgment dated 27 March 2018 of the High Court of Judicature at Madras at its Madurai Bench.

3 The appellant was tried for the murder of his wife. Besides the offence under Section 302, he was also tried for the commission of an offence under Section 498A of the Indian Penal Code[1]. On 24 June 2016, the appellant was convicted by the Sessions

1 "IPC"

Judge, Fast Track Mahila Court, Virudhunagar District at Srivilliputtur for offences under Section 302 and Section 498A. He was sentenced to life imprisonment for the offence punishable under Section 302 and to imprisonment for three years for the offence under Section 498A.

4 During the course of the trial, the prosecution sought to adduce the evidence of PW-3 'S' and PW-4 'H', the children of the appellant and the deceased[2]. On 19 May 2015 when their evidence was to be recorded, PW-3 was eight-years-old while PW-4 was six-years-old. The trial judge posed certain initial queries to both the witnesses to assess whether they were capable of deposing in evidence. One of the questions which was posed was whether they were aware of the person before whom they were standing. Both the witnesses stated that they were unaware of the person before whom they were standing in the court. At the same time, the child witnesses had stated that they had come to depose in evidence about the circumstances leading to the death of their mother.

5 The trial judge came to the conclusion that the testimony of PW-3 could not be recorded as PW-3 as a witness did not know the judge and the lawyers. Similarly, in regard to PW-4 the trial judge observed that he was unable to state who the judge was. As a result, he was considered to be incapable to depose in evidence. No evidence of PW-3 and PW-4 was recorded.

6 The exchange between the learned trial judge and PW-3 and PW-4, respectively is extracted below:

"Name: 'S'	Father's Name : Ramesh
Village : Virudhunagar	Taluk : Virudhunagar
Cast : BC	Calling :

2 The identity of the children, who are minors is withheld in this judgment.

Religion : Hindu Age : 8

Solemnly affirmed in accordance with provisions of Act X of 1873 on the day of : 19.05.2015

Question : What is your name?

Answer : 'S'

Question : What is your age?

Answer : 08-15

Question: What is your father's name?

Answer : Ramesh

Question : What is your village name?

Answer : Chinna Perali

Question : What are you doing?

Answer : I am studying.

Question : Do you know where have you come?

Answer : Court

Question : Do you know why you are being brought?

Answer : To give evidence

Question : Do you know before whom you are standing?

Answer : Do not know

Even though the witness answered all the questions, I asked her why have you come to depose evidence and she replied I have come to depose about my mother's death. Further replied that I do not know who is standing in front of me in court and the persons besides me. The court considers that the witness testimony is unacceptable as the witness does not know the judge and lawyers." (sic)

And

"Name: 'H' Father's Name : Ramesh
Village : Virudhunagar Taluk : Virudhunagar

Cast: BC Calling :

Religion : Hindu Age : 6
Solemnly affirmed in accordance with provisions of Act X of 1873 on the date of : 19.05.2015

Question: What is your Name?

Answer : 'H'

Question: What is your age?

Answer: 06-15

Question: What is your father's Name?

Answer: Ramesh

Question: What is your Village Name?

Answer: Perali

Question: What are you doing?

Answer: I am studying in 1st standard

Question: Did you know where have you come?

Answer: I do not know where I stand

Question: Did you know what have you been brought for?

Answer: I have come to tell about my mother's killing

Question: Do you know who are you standing in front of?

Answer: He stated that he has come to depose evidence before you. I asked him, who I am, he replied that I do not know who you are.

The court did not allow him to depose evidence because he was considered as incapable to depose evidence." (sic)

7 The trial judge came to the conclusion that there was sufficient evidence on the record to sustain the charge under Section 302 as well as that under Section 498A and that the prosecution had brought home the guilt of the accused beyond reasonable doubt. Aggrieved by the judgment of conviction, the accused appealed before the High Court.

8 The High Court came to the conclusion that the grounds which weighed with the trial judge in declining to allow the recording of the evidence of PW-3 and PW-4 after initial questions were put to them were erroneous. The High Court also observed that while on one hand, the Trial Court had adverted to the statements of the two child witnesses which were recorded under Section 164 of the Code of Criminal Procedure 1973[3], yet the trial judge had refused to allow the evidence of the child witnesses to be recorded on the ground that they were unable to identify the person before whom they were deposing. The High Court set aside the judgment of the Trial Court and remanded the case to the Trial Court with a direction to examine PW-3 and PW-4 after objectively

3"CrPC"

ascertaining their capacity to depose. The High Court has also directed that the Trial Court shall thereafter; furnish an opportunity to lead evidence in rebuttal to the accused.

9 Mr A Selvin Raja, learned counsel appearing on behalf of the appellant submitted that:

(i) After the incident took place on 18 January 2014, the appellant surrendered on 20 January 2014;

(ii) Though between 19 January 2014 and 21 January 2014, the investigating officer recorded 21 statements, the statement of the child witnesses under Section 164 of the CrPC were recorded by the Chief Judicial Magistrate belatedly on 10 March 2014;

(iii) After the trial judge on 19 May 2015 held that the two child witnesses were incompetent to depose, no revision was filed by the prosecution; and

(iv) Over five years have elapsed since the date of the incident and the direction to record the evidence of the two witnesses will cause serious prejudice to the accused-appellant particularly since the children have been in the custody of their maternal grandmother in the meantime.

On the above grounds, it was submitted that there was no justification on the part of the High Court to issue an order of remand. Hence, it was urged that it would be appropriate and proper if the High Court is directed to evaluate the appeal filed by the accused-appellant on the basis of the evidence available on the record. Learned counsel submitted that if he has the opportunity of doing so before the High Court, the appellant would be able to establish that the chain of circumstances is not complete and that having regard to the well settled principles governing the appreciation of circumstantial evidence, the appellant would be entitled to press for acquittal before the

High Court.

10 On the other hand, while supporting the decision of the High Court, Mr M Yogesh Kanna, learned counsel appearing on behalf of the State submitted that the submission on part of the appellant is based on a hypothesis that the child witnesses, if they are permitted to depose at this stage, could advance an account which would cause prejudice to the appellant. The statements of PW-3 and PW-4 were recorded under Section 164 of CrPC by the Judicial Magistrate. Moreover, the appellant would be entitled to cross-examine the witnesses. Learned counsel submitted that the order passed by the High Court should be affirmed in order to prevent a miscarriage of justice since the reasons which weighed with the Trial Court in declining to allow the recording of the testimonies of PW-3 and PW-4 were manifestly erroneous. As a consequence of the exclusion of their evidence, the prosecution has been disabled from adducing the evidence of the two children who were natural witnesses to the crime.

11 In assessing the rival submissions, we must at the outset advert to the grounds which weighed with the trial judge in coming to the conclusion that PW-3 and PW-4 were not competent witnesses and their testimonies ought not to be recorded. PW-3, the daughter of the accused and the deceased, was eight years of age while PW-4, their son, was six-years-old. The trial judge addressed certain preliminary questions to the witnesses. The question which weighed with the Trial Court in coming to the conclusion that both of them were incapable of deposing was whether the children knew the person they were standing before. To these questions, PW-3 and PW-4 stated that they were unaware of that person. The trial judge, purely on this basis, found that the testimonies of the child witnesses would be unacceptable on the ground that the witnesses did not know the judge and the lawyers.

12 We are in agreement with the view of the High Court that the reason which weighed with the trial judge in preventing the evidence of PW-3 and PW-4 from being recorded was manifestly erroneous and would result in a miscarriage of justice. Significantly, both PW-3 and PW-4 were aware of the reason for their presence in the court. They stated before the trial judge that they were in court to tender evidence in regard to the circumstances pertaining to the death of their mother. What the trial judge was required to determine was whether the children were in a fit and competent state of mind to depose and were able to understand the purpose for being present on the occasion. Prior to the recording of evidence of a child witness, the Trial Court must undertake the exercise of posing relevant questions to determine the capacity of the child witness to provide rational answers. This exercise would allow the court to determine whether the child has the intellectual and cognitive skills to recollect and narrate the incidents of the crime.

13 Section 118[4] of the Evidence Act 1872 deals with the competence of a person to testify before the court. Section 4[5] of the Oaths Act 1969 requires all witnesses to take oath or affirmation, with an exception for child witnesses under the age of twelve years.

4 **Section 118. Who may testify**.—
All persons shall be competent to testify unless the Court considers that they are prevented from understanding the question put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.
Explanation – A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

5 **Section 4. Oaths or affirmations to be made by witnesses, interpreter and jurors.—**
(1) Oaths or affirmations shall be made by the following persons, namely:— (a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence; (b) interpreters of questions put to, and evidence given by, witnesses; and (c) jurors: Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of section 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.
(2) Nothing in this section shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, unless he is examined as a witness for the defence, or necessary to administer to the official interpreter of any court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

Therefore, if the court is satisfied that the child witness below the age of twelve years is a competent witness, such a witness can be examined without oath or affirmation. The rule was stated in **Dattu Ramrao Sakhare** v **State of Maharashtra**[6], where this Court, in relation to child witnesses, held thus:

> "5. … A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

14 A child has to be a competent witness first, only then is her/his statement admissible. The rule was laid down in a decision of the US Supreme Court in **Wheeler** v **United States**[7], wherein it was held thus:

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

6(1997) 5 SCC 341
7159 U.S. 523 (1895)

In **Ratansinh Dalsukhbhai Nayak** v **State of Gujarat**[8], this Court held thus:

> "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." (emphasis supplied)

15 In order to determine the competency of a child witness, the judge has to form her or his opinion. The judge is at the liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto.[9] A child becomes incompetent only in case the court considers that the child was unable to understand the

8 (2004) 1 SCC 64. Subsequently, relied upon in Nivrutti Pandurang Kokate v State of Maharashtra (2008) 12 SCC 565

9 Dalsukhbhai Nayak v State of Gujarat (2004) 1 SCC 64

questions and answer them in a coherent and comprehensible manner.[10] If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined.

16 We are satisfied that the grounds which weighed with the learned trial judge were erroneous. In the circumstances, the High Court was in our view, justified in coming to the conclusion that the non-recording of the testimonies of PW-3 and PW-4 was on account of a palpably erroneous approach on the part of the learned trial judge.

17 We are mindful of the fact that the decision of the High Court was in an appeal preferred by the accused. In such a situation it is necessary to discuss the scope of the High Court's powers in an appeal filed against conviction. Section 374[11] of the CrPC provides for appeals against convictions and allows any person convicted by a Sessions Judge or an Additional Sessions Judge to appeal before the High Court. Section 386 of the CrPC[12] defines the powers of the Appellate Court while disposing of

10 Sarkar, "Law of Evidence" 19th Edition, Volume 2, Lexis Nexis, p. 2678 citing DPP v M (1977) 2 All ER 749 (QBD)

11 **Section 374.— Appeals from convictions** (1) Any person convicted on a trial held by a High Court in its extraordinary original criminal jurisdiction may appeal to the Supreme Court.
(2) Any person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge or on a trial held by any other Court in which a sentence of imprisonment for more than seven years has been passed against him or against any other person convicted at the same trial; may appeal to the High Court. (3) Save as otherwise provided in sub-section (2), any person,- (a) convicted on a trial held by a Metropolitan Magistrate or Assistant Sessions Judge or Magistrate of the first class or of the second class, or (b) sentenced under section 325, or (c) in respect of whom an order has been made or a sentence has been passed under section 360 by any Magistrate, may appeal to the Court of Session. (4) When an appeal has been filed against a sentence passed under section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E of the Indian Penal Code (45 of 1860), the appeal shall be disposed of within a period of six months from the date of filing of such appeal.

12 **Section 386.— Powers of the Appellate Court**
After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—
(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

an appeal against an order of conviction or acquittal. The power under this section is not unlimited. The provision is to be taken as giving the power to do only that which the lower court could and should have done in a criminal case.

18 A three judge Bench decision of this Court in **Mohd Hussain** v **State (Govt of NCT of Delhi)**[13] while dealing with the powers of the Appellate Court to order a retrial under Section 386(b) of the CrPC, held thus:

> "41. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A de novo trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no straitjacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked."

(b) in an appeal from a conviction—
(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or
(ii) alter the finding, maintaining the sentence, or
(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;
(c) in an appeal for enhancement of sentence—
(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or
(ii) alter the finding maintaining the sentence, or
(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;
(d) in an appeal from any other order, alter or reverse such order;
(e) make any amendment or any consequential or incidental order that may be just or proper;
Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:
Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.

13 (2012) 9 SCC 408

A similar position was adopted by this Court in **Ajay Kumar Ghoshal** v **State of Bihar**[14], where it was held thus:

> "11. Though the word "retrial" is used under Section 386(b)(i) CrPC, the powers conferred by this clause is to be exercised only in exceptional cases, where the appellate court is satisfied that the omission or irregularity has occasioned in failure of justice. The circumstances that should exist for warranting a retrial must be such that where the trial was undertaken by the court having no jurisdiction, or trial was vitiated by serious illegality or irregularity on account of the misconception of nature of proceedings**. An order for retrial may be passed in cases where the original trial has not been satisfactory for some particular reasons such as wrong admission or wrong rejection of evidences or the court refused to hear certain witnesses who were supposed to be heard.**" (emphasis supplied)

19 The power of an Appellate Court to order a retrial on the limited point of re-recording statements of witnesses was recently discussed in **Atma Ram and Ors v State of Rajasthan**[15], where the Trial Court had convicted the accused persons of offences under Section 302, 307, 452, 447, 323, 147, 148 and 149 IPC and sentenced them to death. During the trial, the court had recorded the evidence of twelve witnesses in absence of the accused persons. In an appeal against conviction preferred by the accused persons, the High Court exercised its powers under Section 386(b) of CrPC to quash and set aside the judgment of the Trial Court and remanded the matter back to Trial Court to the extent of recording statements of the twelve witnesses afresh after securing presence of the accused in the court. The High Court held in the following terms:

> "In view of the discussion made hereinabove and looking to the glaring facts of the case at hand, we feel that in order to do complete justice to the accused as well as to the victims, the entire case cannot be thrown out by holding the proceedings to be vitiated on account of the mistakes

14 (2017) 12 SCC 699
15 2019 SCC OnLine SC 523 : Crl. Appeal No. 656-657 of 2019

> committed by the trial Judge or the prison authorities concerned. A fresh trial/de-novo has to be ordered by directing the trial court to lawfully re-record statements of the witnesses indicated above whose evidence was recorded in the first round without ensuring presence of the accused in the court."[16]

The accused persons preferred a Special Leave Petition before this Court, challenging the High Court's order of a de-novo trial for re-recording of statements of witnesses. Affirming the view taken by the High Court, this Court held thus:

> "22. … Section 386 then enumerates powers of the Appellate Court which inter alia includes the power to "reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial". The powers of Appellate Court are equally wide. The High Court in the present case was exercising powers both under Chapters XXVIII and XXIX of the Code. **If the power can go to the extent of ordering a complete re-trial, the exercise of power to a lesser extent namely ordering de novo examination of twelve witnesses with further directions as the High Court has imposed in the present matter, was certainly within the powers of the High Court**. There is, thus, no infraction or jurisdictional error on the part of the High Court."

> "25. ... If there was an infraction, which otherwise does not vitiate the trial by itself, the attempt must be to remedy the situation to the extent possible, so that the interests of the accused as well as societal interest are adequately safeguarded. **The very same witnesses were directed to be de novo examined which would ensure that the interest of the prosecution is subserved and at the same time the accused will have every right and opportunity to watch the witnesses deposing against them, watch their demeanor and instruct their counsel properly so that said witnesses can be effectively cross-examined. In the process, the interest of the accused would also stand protected.** On the other hand, if we were to accept the submission that the proceedings stood vitiated and, therefore, the High Court was powerless to order *de novo* examination of

> the concerned witnesses, it would result in great miscarriage of justice. The persons who are accused of committing four murders would not effectively be tried. The evidence against them would not be read for a technical infraction resulting in great miscarriage. Viewed thus, the order and directions passed by the High Court completely ensure that a fair procedure is adopted and the depositions of the witnesses, after due distillation from their cross-examination can be read in evidence." (emphasis supplied)

20 In the present case, the High Court in the considered exercise of its appellate jurisdiction has remanded the proceedings back to the Trial Court to assess objectively the capacity of the two child witnesses and if the evidence is recorded, to furnish an opportunity to the accused to offer evidence in rebuttal. The accused will also be entitled to cross examine them. We have taken due note of the submissions which have been made on the part of the appellant in regard to the fact that there has been some lapse of time. As on date, though a little over four years have elapsed since the exclusion of their evidence by the trial judge, both the witnesses continue to be minors. Hence, the High Court has issued necessary directions to the learned trial judge to assess objectively the capacity of the two child witnesses before recording their evidence.

21 Consistent with the law which has been laid down by this Court in **State of Maharashtra** v **Bandu alias Daulat**[17], it would be appropriate for the learned trial judge to ensure that the evidence of PW-3 and PW-4 is recorded in a child friendly environment.

22 The appellant would undoubtedly have a right to cross-examine the witnesses

17 (2018) 11 SCC 163

once their evidence is recorded by the trial judge.

23 For the above reasons, we find no merit in the appeal. The appeal is accordingly dismissed. Pending application(s), if any, shall stand disposed of.

…….....J.
[Dr Dhananjaya Y Chandrachud]

…….....J.
[Indira Banerjee]

New Delhi;
July 9, 2019.

ITEM NO.1 COURT NO.11 SECTION II-C

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Crl.) No(s). 4169/2018

(Arising out of impugned final judgment and order dated 27-03-2018 in CRLA No. 351/2016 passed by the High Court Of Judicature At Madras At Madurai)

P. RAMESH Petitioner(s)

VERSUS

STATE REP. BY INSPECTOR OF POLICE Respondent(s)

(IA No. 70543/2018 - EXEMPTION FROM FILING O.T.)

Date : 09-07-2019 This matter was called on for hearing today.

CORAM :
HON'BLE DR. JUSTICE D.Y. CHANDRACHUD
HON'BLE MS. JUSTICE INDIRA BANERJEE

For Petitioner(s)
Mr. A. Selvin Raja, Adv.
Mr. Aniruddha P. Mayee, AOR
Mr. Rajinder Singh, Adv.
For Respondent(s)
Mr. M. Yogesh Kanna, AOR
Mr. S. Partha Sarathi, Adv.
Mr. S. Raja Rajeshvaran, Adv.

UPON hearing the counsel the Court made the following
O R D E R

Leave granted.

The appeal is dismissed in terms of the signed reportable judgment.

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

(MANISH SETHI) (SAROJ KUMARI GAUR)
COURT MASTER (SH) BRANCH OFFICER
(Signed reportable judgment is placed on the file)