

APPELLATE CRIMINAL
Before Kapur and Dulat, JJ.,
Mst. Dato,—Convict-Appellant.
versus
THE STATE,—Respondent.
Criminal Appeal No. 410 of 1953

Evidence Act (I of 1872)—Section 118—Child of tender years—Evidence of—Rule of caution stated—Accused, a woman having a child, one year old—Whether good ground for reducing sentence from death to transportation for life.

1953

Oct. 27th.

A girl of 5 years appeared as a witness and stated that the accused, her step-mother, had thrown her and her younger sister aged about 3 years into the well. The question arose whether she was a competent witness because of her tender age.

Held, that a child of tender years is a competent witness. The question to be decided in each case is whether a particular child who has appeared in the witness-box is intelligent enough to be able to understand as to what evidence he or she is giving and to be able to understand the question and to be able to give rational answer.

Held, that the accused has got a child who was one year of age at the time of the offence and it is a fit case in which the sentence should be reduced from death to one of transportation for life.

Rameshwar v. The State of Rajasthan (1) relied on; *Abbas Ali v. Emperor (2)* and *Manni vs. Emperor (3)*, referred to.

Appeal from the order of Shri Jawala Dass, 3rd Additional Sessions Judge, Amritsar, dated the 30th July 1953, convicting the Appellant.

LABH SINGH, for Appellant.

K. S. CHAWLA, Assistant Advocate-General, for Respondent.

JUDGMENT

Kapur, J.

KAPUR, J. Mst. Dato, a woman of about 20 (who according to the learned Sessions Judge looked 25) has been convicted of murder and sentenced to death under section 302 of the Indian Penal Code and to seven years' rigorous imprisonment under section 307 of the Indian Penal Code. The matter is before us for confirmation of death sentence under section 374 of the Code of Criminal Procedure and Mst. Dato has come up in appeal through jail. We have heard Mr. Labh Singh, who has appeared for the appellant, and Mr. Kartar Singh Chawla for the State.

Mst. Dato appellant is the third wife of Geja Singh; the first two died and the second one left three daughters, Ambo, Chhimbo, P.W., and Bal-biro deceased also called Guddi. Mst. Dato has

(1) 1952 S. C. R. 377

(2) A. I. R. 1933 Lah. 667

(3) A. I. R. 1930. Oudh 406

also a daughter who was at the time of the occurrence one year old. According to the prosecution story Mst. Dato was not treating her step-children well, so much so that she did not even give them food. On the morning of the 7th November, 1952, it is stated, Mst. Dato took two of her step-children, Chhimbo and Balbiro alias Guddi, towards her husband's field which is near a well called Rohiwala well. She also took food for her husband. When they got to the well, first Chhimbo and then Balbiro were thrown into the well by Mst. Dato. Balbiro got drowned, but it appears that Chhimbo kept floating and was shouting "hai bhau lelai". Sadhu Singh, P.W. 8, heard this noise as he was near the well. He ran to the well and when he looked into the well he found a girl struggling in the water. He suspended his turban and asked the struggling girl to catch hold of it and raised an alarm whereupon Darshu, P.W.6, Bahadur Singh, P.W. 10, Vasan Singh, P.W. 11, and Sohan Singh (who is not a witness) came running to the well. Darshu went into the well and tied the child up to the turban and she was brought out. She was shivering at the time and as soon as her shivering stopped she told these witnesses that she and her sister Guddi had been thrown into the well by their *bibi*, meaning step-mother. According to Sadhu Singh they carefully looked into the well but could not find the other girl as the well was rather deep. The girl Chhimbo was then carried back to her father's house. Wasan Singh stated that he went to call the father of the girl and the grandfather Lehna Singh, P.W. 7 also arrived. The first information report was made at the Police Station Gharinda at 6 p.m. by Jiwan Singh P.W. 12, a Lambardar of the village.

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At the trial evidence was given by P.W. 8 Sadhu Singh, P.W. 9 Darshu, P.W. 10 Bahadur Singh and P.W. 11 Vasan Singh and after that, on the same day, the learned Judge examined the girl without oath; but before he did that he asked a number of questions to test her intelligence. The questions are given at page 16 of the paper

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book and from the answers he was satisfied that she had enough intelligence to be able to answer the questions in an intelligent manner. In Court she stated that she had been thrown into the well by her step-mother and that Guddi was also thrown into the well by the mother. She was cross-examined at great length and there are certain statements made from which it may be suggested that she had been told by her grandfather to keep accusing the mother, but on the whole the evidence shows that she gave her statement with due regard to what had happened to her. The learned Judge accepted the testimony of this girl and also the testimony of the four witnesses in whose presence she had made the statement after she had been taken out of the well. The assessors also unanimously gave verdict against the accused and the learned Judge thereupon convicted Mst. Dato of murder and sentenced her to death.

5 The main argument of Mr. Labh Singh has been confined to the question whether Mst. Chhimbo, the little girl, who is about 5 years of age, was or was not a competent witness. He has referred to a Division Bench judgment of the Lahore High Court in *Abbas Ali v. Emperor* (1), where it was observed that children are a most untrustworthy class of witnesses, for when of a tender age they often mistake dreams for reality, and repeat glibly also their own knowledge what they have heard from others. That was a case where the child witness was not herself the victim of an offence but was a witness of some occurrence. Similarly in *Manni v. Emperor*, (2), the Judge laid down a rule of caution as to the admissibility of the evidence by a child witness. Section 118 of the Evidence Act itself makes it quite clear that all persons are competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions, by

(1) A.I.R. 1933 Lah. 667

(2) A.I.R. 1930 Oudh. 406

tender years, * * * * *. This is, as I have said, a rule of caution. The question in each case which the Court has to decide is whether a particular child who has appeared in the witness-box is intelligent enough to be able to understand as to what evidence he or she is giving and to be able to understand the question and to be able to give rational answer. Quite recently their Lordships of the Supreme Court in *Rameshwar v. The State of Rajasthan*, (1) had occasion to examine this part of law and held a child of tender years to be a competent witness. They also held that a statement by a child witness soon after the occurrence would be corroboration of that statement and that a person may be convicted on the testimony of a child witness corroborated in that manner. In that case rape had been committed on a child of about 8 and she had made a statement to her mother when she went home. This statement made to the mother was held to be a good corroboration of her testimony in Court.

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In the present case as soon as the child was taken out of well and her shivering had stopped, which is stated by the witnesses to have gone on for about 15 minutes, she stated that she had been thrown into the well by her step-mother. This fact is deposed to by the four witnesses Sadhu Singh, P.W. 8, Darshu, P.W. 9, Bahadur Singh, P.W. 10 and Wasan Singh, P.W. 11, and nothing has been brought out against their testimony which would show they are in any way inimical towards the appellant or have made this statement falsely. They seem to be quite independent witnesses who had no concern with the family of Geja Singh, his father Lahna Singh or with Mst. Dato and in my opinion the learned Judge has rightly believed their statements.

Mr. Labh Singh has attacked the evidence of Lehna Singh, P.W. 7, and of Gopal Singh, P.W. 6. Lehna Singh is the grand-father of the child Chhimbo. It is true that Mst. Dato was not getting on well with Lehna Singh and his wife (the father and mother of Geja Singh), but there

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is nothing to indicate that either Lehna Singh or his wife had anything to do with the naming of Mst. Dato as the person who pushed the girls into the well. He has deposed that the step-mother was cruel and was not treating the step-daughters well, so much so that she did not even give them food, but this is only corroboration of the fact that the step-mother and the step-children were not affectionate or friendly towards each other. There is nothing to show that he had anything to do with the accusing of Mst. Dato as the person who was responsible for the offence.

Gopal Singh, P.W. 6, has stated that he saw Mst. Dato going towards the well with the children and half an hour later he found her coming alone. He did not appear before the police till the next morning and no reason is given why he did not, because after the girl was brought out, the whole village must have come to know as to what had happened and I am, therefore, not prepared to place any reliance on his testimony, but that does not take away from the guilt of the accused.

The accused threw both Chhimbo and Balbiro into the well. Balbiro being only three years of age got drowned and fortunately for her Chhimbo was taken out by persons who reached the place in good time.

This, in my opinion, is sufficient evidence to convict Mst. Dato of the offence of murder and of attempt to murder under section 307, I.P.C. and she has been rightly convicted. The question of sentence then arises. She has got a child who was one year of age at the time of the offence and therefore we think it is a fit case in which the sentence should be reduced from death to one of transportation for life. Excepting as to this the appeal is dismissed. The sentence of 7 years' R.I. under section 307 I.P.C. will become effective. I make it concurrent.

Dulat, J.

DULAT, J.—I agree.