**15 SCOB [2021] AD 58**

**APPELLATE DIVISION**

**PRESENT:**
**Mr. Justice Syed Mahmud Hossain**
**-Chief Justice**
**Mr. Justice Hasan Foez Siddique**
**Mr. Justice Md. Nuruzzaman**
**Mr. Justice Obaidul Hassan**

**JAIL APPEAL NO.13 of 2014.**
(From the judgment and order dated 09.10.2012 passed by the High Court Division in Criminal Appeal No.4239 of 2007 with Jail Appeal No.436 of 2007 and Death Reference No.35 of 2007).

| | | |
|---|---|---|
| **Md. Abdul Haque.** | : | .....Appellant |
| Vs. | | |
| **The State.** | : | .....Respondent |
| For the Appellant. | : | Mr. Helaluddin Mollah, learned Advocate. |
| For the Respondent. | : | Mr. Biswajit Debnath, Deputy Attorney General. |
| Dates of Hearing. | : | The 16th and 22nd September,2020. |
| Date of Judgment. | : | The 29th September,2020. |

**Editor's Note:**

**The Appellant was convicted under section- 11 (KA ) of the Nari-O –Shishu Nirjatan Daman Ain, 2000 and sentenced to death for killing his wife for dowry. The High Court Division confirmed the death sentence. The convict preferred Jail appeal before the Appellate Division. The Appellate Division dismissed the Jail Appeal and affirmed the judgment of the High Court Division. The Appellate Division also determined the competence of a child witness discussing the relevant laws and held that preliminary examination of a child witness is not at all necessary.**

**Key-words:**

Dowry, Wife-killing case, Child witness, alibi, competency, unnatural death.

**When presence of the witness at the place of occurrence is not challenged, his/her presence is deemed to be admitted:**
**What is remarkable to mention here is that presence of Laboni at the place of occurrence at the relevant time has not been challenged by the defence in her cross-examination. Therefore, it is deemed to have been admitted by the defence that Laboni a child aged about 7½ years was present at the time of occurrence. ...(Para 28)**

**Evidence Act 1872, Section 118**
**Competence of a witness:**
**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 answer to question by tender years, extreme old age, disease and the like. ... (Para 30)**

**Evidence Act 1872, Section 118**
**Competence of a child witness:**
**A child as young as 5/6 years can depose evidence if she understands the questions and answers in a relevant and rational manner. The age is of no consequence, it is the mental faculties and understanding that matter in such cases. Their evidence, however, has to be scrutinised and caution has to be exercised in each individual case. The Court has to satisfy itself that the evidence of a child is reliable and untainted. Any sign of tutoring will render the evidence questionable if the Court is satisfied, it may convict a person without looking for corroboration of the child's evidence. As regards credibility of child witness, it is now established that all witnesses who testify in Court must be competent or able to testify at trial. In general, a witness is presumed to be competent. This presumption applies to child witnesses also. ... (Para 34)**

**Evidence Act 1872, Section 118**
**Trial judge may resort to any examination of child witness which will tend to disclose his capacity and intelligence:**
**The competency 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. ... (Para 35)**

**Evidence Act 1872, Section 118**
**Preliminary examination of a child witness is not necessary:**
**Testing of intelligence of a witness of a tender age is not a condition precedent to the reception of his evidence. Therefore, preliminary examination of a child witness is not at all necessary. ... (Para 39)**

**Evidence Act 1872, Section 118**
**Evidence of a 12 years old witness is admissible even if the Tribunal does not test her intelligence when she answers rationally and withstands onslaught of cross-examination:**
**Having gone through the evidence of P.W.9, we find that at the time of deposing before the Court, Laboni was about 12 years old and as such, the Tribunal probably did not feel the necessity of testing her intelligence. Having gone through the evidence, we are of the view that P.W.9, Laboni could understand the question put to her and she answered the rational reply to the questions. Over and above, she withstood the onslaught of cross-examination before the Tribunal. ... (Para 40)**

**Evidence Act 1872, Section 106 and Nari-O-Shishu Nirjatan Daman Ain 2000, Section 11(Ka) Plea of alibi in a wife killing case:**
**In a wife killing case, it is always presumed that the husband was with the deceased wife at the time of occurrence unless any plea of alibi is set up by the defence. In that case,**

**the burden of proving such plea rests on the husband in order to absolve him of any criminal liability. ... (Para 43)**

**Evidence Act 1872, Section 106**
**The burden to prove the plea of alibi is heavy on the accused and the plea of alibi cannot be proved by preponderance of probabilities:**
**It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. Thus, the burden to prove the plea of alibi is heavy on the accused and the plea of alibi cannot be proved by preponderance of probabilities.**
**...(Paras 44 & 45)**

**Evidence Act 1872, Section 108**
**When long abscondence is to be treated culpable in nature:**
**Soon after the occurrence, the appellant-husband absconded and he surrendered before the Tribunal on 28.08.2002, that is, about 6 months after the occurrence. This long abscondence of the appellant-husband without any explanation whatsoever appears to be culpable in nature under section 8 of the Evidence Act. ... (Para 46)**

**Nari-O-Shishu Nirjatan Daman Ain 2000, Section 11(Ka) and Penal Code 1860, section 302:**
**When dowry demand has been proved and the murder was cold blooded, brutal and without provocation, death sentence should not be commuted:**
**The murder was cold blooded and brutal without any provocation. Therefore, the submissions of the learned Advocate for the appellant that imprisonment for life may be awarded to the appellant by converting his conviction from 11 (ka) of the Nari-O-Shishu Nirjatan Daman Ain to section 302 of the Penal Code do not hold good on the facts and in circumstances of the case in hand. Moreover, demand of Tk.10000/- as dowry has been proved by the satisfactory evidence as found by both the Courts below.**
**... (Para 51)**

## JUDGMENT

**Syed Mahmud Hossain, CJ:**

1. This jail appeal is directed against the judgment and order dated 09.10.2012 passed by the High Court Division. By the impugned judgment and order, the High Court Division

affirmed the death sentence passed by the learned Judge of the Nari-O-Shishu Nirjatan Daman Tribunal No.1, Rangpur against the appellant in Death Reference Case No.35 of 2007 and dismissed Criminal Appeal No.4239 of 2007 and Jail Appeal No.436 of 2007 preferred by the appellant before the High Court Division against conviction under section 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain,2000 and sentence of death awarded against him by the learned Judge of the Nari-O-Shishu Nirjatan Daman Tribunal No.1, Rangpur in Nari-O-Shishu Nirjatan Daman Case No.337 of 2002.

2. The appellant sent a petition from the jail, it was numbered as Jail Appeal No.13 of 2014.

3. The prosecution version of the case, in short, is that the daughter of the informant Abdul Hamiz Miah, namely, Beli was given in marriage to the appellant Md. Abdul Haque about 10/11 years back as per tenets of Islam. Anyway, at a subsequent stage, the appellant demanded a sum of Tk.10,000/- by way of dowry from the informant through his wife Beli. But the informant could not comply with the demand of dowry because of financial stringency. On 07.02.2002, the appellant assaulted the victim-wife for the above mentioned dowry amount of Tk.10,000/-. In order to resolve the dispute regarding the demand of dowry, a salish was held in the house of the appellant at village Vaktipur(Chowdhury Para), Police Station-Mithapukur, District-Rangpur. But the informant-party and the appellant could not come to any terms with reference to the demand of dowry. On the night following 08.02.2002 at about 11/12 o'clock, the appellant strangled the victim-wife Beli to death in his bed room for the failure to comply with the demand of dowry. The appellant gave out that she had committed suicide. Following the killing of the victim-wife by the accused-husband (Md. Abdul Haque), the informant Abdul Hamiz Miah lodged an ejahar with Mithapukur Police Station against the accused-husband and others.

4. The Investigating Officers of the case are Sub-Inspector Md. Shahriyar and Sub-Inspector Md. Rezaul Karim of Mithapukur Police Station, Rangpur. The Investigating Officer Md. Shahriyar conducted part of investigation. Subsequently, the Investigating Officer, that is to say, Sub-Inspector Md. Rezaul Karim took up investigation of the case and completed the rest of investigation. Having found a prima facie case, Sub-Inspector Md. Rezaul Karim submitted the charge-sheet No.167 dated 18.05.2002 against the accused-husband Md. Abdul Haque under Section 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain,2000; but the remaining accused were not sent up in the charge-sheet for dearth of pre-trial incriminating materials.

5. At the commencement of the trial of the case, the learned Tribunal Judge framed charge against the accused-husband Md. Abdul Haque under Section 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain,2000 and it was read over and explained to him in the dock; but he pleaded not guilty thereto and claimed to be tried as per law.

6. The defence version of the case, as it appears from the trend of cross-examination of the prosecution witnesses and the statement made by the accused-husband at the time of his examination under Section 342 of the Code of Criminal Procedure, is that he is not responsible for the unnatural death of the victim-wife and she committed suicide having suffered from tuberculosis and he has been falsely implicated in the case out of oblique motives.

7. After hearing both the prosecution and the defence and on an appraisal of the evidence and materials on record and regard being had to the attending circumstances of the case, the Tribunal below came to the finding that the prosecution brought the charge home and accordingly, it convicted and sentenced the appellant-husband by the judgment and order dated 03.05.2007.

8. Being aggrieved by and dissatisfied with the judgment and order of conviction and sentence passed by the Tribunal, condemned-prisoner filed Criminal Appeal No.4239 of 2007 along with Jail Appeal No.436 of 2007 before the High Court Division. The Tribunal also made Death Reference No.35 of 2007 to the High Court Division under section 374 of Code of Criminal Procedure for confirmation of death sentence. Upon hearing, the High Court division dismissed Criminal Appeal and Jail Appeal and accepting the Death Reference confirmed the death sentence imposed upon the condemned-prisoner.

9. Being aggrieved at and dissatisfied with the impugned judgment and order of conviction and sentence passed by the High Court Division, condemned-prisoner, Md. Abdul Haque from Central Jail, Rangpur, filed Memo of Jail Petition No.02 of 2013 before this Division which was registered on 30.10.2013 as Jail Appeal No.13 of 2014.

10. Mr. Helaluddin Mollah, learned Advocate, appearing on behalf of the appellant, submits that at the time of alleged occurrence, the accused was not present in his house, that is, the plea of alibi and that his wife committed suicide and that this case of the appellant was not taken into account by the learned Tribunal Judge causing failure of justice. He further submits that the learned Judge of the Tribunal did not test the intelligence of P.W.9 Laboni although she was aged about 12 while deposing before the Court and at the time of occurrence she was about 7½ years old. He then submits that the appellant-husband is in condemned cell for more than 13 years and as such, his sentence of death may be commuted to imprisonment for life. He continues to submit that the prosecution has miserably failed to prove that the appellant-husband demanded Tk.10000/- as dowry by examining any disinterested witness and as such, conviction of the appellant under section 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain,2000 is not only illegal but also without jurisdiction.

11. Mr. Biswajit Debnath, learned Deputy Attorney General, appearing on behalf of the State-respondent, on the other hand, submits that the prosecution has been able to bring home the charge under section 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain,2000 by oral and circumstantial evidence and as such no interference is called for. He further submits that P.W.9 Laboni aged about 12 years deposed spontaneously before the Tribunal and that she also withstood the onslaught of cross-examination of the learned Advocate for the defence and her evidence both examination-in-chief and cross-examination shows that she had adequate intelligence and understanding of the question put to her and as such, there cannot be any ground for discarding her evidence on the ground that before examining her as a witness, the learned Tribunal Judge did not test her intelligence as a witness. He then submits that there is no scope for commuting the sentence of the appellant from hanging to imprisonment for life as section 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain,2000 provides that for the offence charged under section 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain,2000 the only sentence is hanging. He lastly submits that the plea of *alibi* was not taken by the defence by examining any witness but during cross-examination of P.W.2, a question was put to him that the appellant-husband was not at his house or he was at village Belogram on the fateful night of occurrence and as such, this plea of the learned Advocate for the appellant, does not hold any water.

12. We have gone through the submissions of the learned Advocate for the appellant and the learned Deputy Attorney General for the State-respondent, perused the impugned judgment and order and the materials on record.

13. Admittedly, the victim Beli was given in marriage to the appellant Md. Abdul Haque about 10/11 years prior to the occurrence. The evidence on record transpires that the conjugal life between the appellant-husband and the victim-wife was not a happy one over the demand of dowry to the tune of Tk.10000/- by the accused-husband to the informant Abdul Hamiz Miah through the victim-wife. The marital incompatibility between them reached a new height when a 'salish' was held in the house of the accused-husband over the demand of dowry on 08.02.2002. The evidence on record reveals that the 'salish' ended in a complete failure. The rancorous relationship between the accused-husband and the victim-wife over the demand of dowry has been brought to our notice by the prosecution evidence.

14. P.W.1 Abdul Hamiz Miah, P.W.2, Md. Belal Hossain, P.W.3, Md. Anwarul Haque and others stated that on their arrival at the place of occurrence house, they did not find the accused-husband there. P.W.9 Laboni, the foster-daughter of the appellant-husband and the victim-wife stated in categorical and unequivocal terms that after killing of the victim-wife during night time the appellant-husband took to his heels on the following morning. Therefore, it appears that at the material time the appellant-husband and the victim-wife lived together at the place of occurrence house. Such being the case, a duty is cast upon the appellant-husband to explain about the unnatural death of the victim-wife as contemplated by section 106 of the Evidence Act,1872.

15. In the case of *Dipok Kumar Sarker Vs. The State (1998) 40 DLR (AD)139,* it has been held by this Division that the deceased was admittedly living with the appellant at the relevant time and thus he was obliged to give an explanation as to how his wife had met with her death although normally an accused is under no obligation to account for the death for which he is on trial. The consideration is bound to be different in a case like this.

16. In the case of *The State, represented by the Solicitor to the Government of the People's Republic of Bangladesh Vs. Md. Shafiqul Islam alias Rafique and another, (1991) 43 DLR (AD)92,* it has been held that in a wife killing case from its very nature, there could be no eye-witness of the occurrence, apart from the inmates of the house who may refuse to tell the truth and the neighbours may not also come forward to depose and the prosecution is, therefore, necessarily to rely on circumstantial evidence. In the said case, it has also been held that where it is proved that the wife died of assault in the house of her husband, there would be strong suspicion against the husband that at his hands the wife died and to make the husband liable, the minimum fact that must be brought on record, either by direct or circumstantial evidence, is that he was in the house at the relevant time.

17. In the case of *TRIMUKH MAROTI KIRKAN Vs. STATE OF MAHARASHTRA (2006)10 SCC 681*, it has been held that 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 took 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.

18. In the case of *Nika Ram* V. *State of Himachal Pradesh, (1972) 2 SCC 80,* it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with "Khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt.

19. In the case of *Ganeshlal* v. *State of Maharashtra, (1992) 3 SCC 106* the appellant was prosecuted for the murder of his wife which took place inside his house. It was held that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 of CrPC. The mere denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife.

20. In the case of *State of U.P.* v. *Dr. Ravindra Prakash Mittal* (1992) 3 SCC 300 the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene. The defence of the husband was that the wife had committed suicide by burning herself and that he was not at home at that time. The letters written by the wife to her relatives showed that the husband ill-treated her and their relations were strained and further the evidence showed that both of them were in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife by strangulation and accordingly the Supreme Court of India reversed the judgment of the High Court acquitting the accused and convicted him under Section 302 IPC.

21. In the case of *State of Tamil Nadu* Vs. *Rejendran* (1999) 8 SCC 679, the wife was found dead in a hut which had caught fire. The evidence showed that the accused and his wife were seen together in the hut at about 9.00 p.m. and the accused came out in the morning through the roof when the hut had caught fire. His explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation and not on account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the accused (husband) who was the perpetrator of the crime.

22. P.W.6, Dr. Md. Abdul Jalil deposed that he held an autopsy of the dead body of the victim-wife Beli Begum and found the following injuries on her person:

"Ligature found horizontal around the neck at the label of thyroid cartilage abrasion and ecchymoses found around the edge of the ligature mark.

On dissection: The sub-cutaneous tissue under the ligature mark was ecchymosed, neck muscles, laryngeal cartilage, tracheal rings and carotid arteries bruised and abraded. Extravasation of blood found corresponding to the wound."

23. He opined that the death of victim-wife was due to shock and asphyxia following ligature strangulation which was ante-mortem and homicidal in nature. In cross-examination, P.W.6 denies the defence suggestion that it is a case of suicide or that the autopsy-report is flawed.

24. The defence case is that at the material time, the victim-wife committed suicide because of her continuous sufferings from tuberculosis. The defence version has been belied by the medical evidence on record as stated above. The injuries found by P.W.6, Dr. Md.

Abdul Jalil during autopsy and the opinion given by him as to the cause of death of the victim-wife has been corroborated by the ocular evidence of P.W.9 Laboni. Therefore, the finding of the learned Judges of the High Court Division is that they had no doubt that the victim-wife was strangled to death by the accused-husband at the place of occurrence house at the relevant time. Under the circumstances, the defence version of the case appears to be a blatant falsehood. Accordingly, the explanation given on behalf of the appellant-husband about the unnatural death of the victim-wife falls to the ground.

25. P.W.1, Abdul Hamiz Miah and P.W.2, Belal Hossain and others have been able to prove the motive of killing of the victim-wife by the appellant-husband. According to their evidence, the 'salish' in respect of demand of dowry ended in fiasco on 08.02.2002. Soon after, the 'salish' the victim-wife was done to death at the place of occurrence on the night following 08.02.2002 at about 11/12 O'clock. Therefore, the prosecution witnesses have been able to bring home the charge against the appellant-husband under section 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain,2000.

26. The lone eye-witness, P.W.9, Laboni deposed that on the night following on 08.02.2002 she and her mother fell asleep and at that stage, the appellant-husband throttled her mother and she (P.W.9)woke up from sleep and raised a hue and cry and that her father pressed her mouth and hung her mother by means of a 'saree' from the ceiling of the room and the father stayed indoors during night time. She also deposed that on the following morning, she called out her elder paternal aunt and told her that her father had killed her mother and fled away.

27. In cross-examination, P.W.9, Laboni denied the defence suggestion that she did not see her father throttling her mother and that she did not witness any occurrence or that she is a tutored witness. In cross-examination, she admits that she has been residing in the house of the informant Abdul Hamiz Miah.

28. What is remarkable to mention here is that presence of Laboni at the place of occurrence at the relevant time has not been challenged by the defence in her cross-examination. Therefore, it is deemed to have been admitted by the defence that Laboni a child aged about 7½ years was present at the time of occurrence. Over and above, the evidence on record transpires that she successfully withstood the cross-examination though she was about 12 years at the time of her deposition before the Tribunal.

29. In this connection, the defence has raised about competency of child witness Laboni, who deposed before the Court. It is necessary to quote section 118 of the Evidence Act,1872:

> "118. Who may testify-All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.
>
> 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."

30. Having considered section 118 of the Evidence Act, we find 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 answer to question by tender years, extreme old age, disease and the like.

31. At this juncture, we are tempted to advert to the case of *SURYANARAYANA v. STATE OF KARNATAKA (2001) 9 SCC 129.* In the said case at paragraph-5, it has been stated as under:

> "5. Admittedly, Bhavya (PW 2), who at the time of occurrence was about four years of age, is the only solitary eyewitness who was rightly not given the oath. The time and place of the occurrence and the attending circumstances of the case suggest no possibility of there being any other person as an eyewitness. 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."

32. It was further held in the case that the Evidence Act,1872 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. This position was concisely stated by Brewer, J. in the case of *Wheeler Vs. United States, (1895)159 U.S.53: 40 L. Ed 244,* that the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness is clear. While no one should 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.

33. In the case of *DATTU RAMRAO SAKHARE AND OHTERS Vs. STATE OF MAHARASHTRA, (1997) 5 SCC 341,* it has been held that 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.

34. As regards competency of a child to depose in a case, it is now well settled by the reported cases cited above that a child as young as 5/6 years can depose evidence if she understands the questions and answers in a relevant and rational manner. The age is of no consequence, it is the mental faculties and understanding that matter in such cases. Their evidence, however, has to be scrutinised and caution has to be exercised in each individual case. The Court has to satisfy itself that the evidence of a child is reliable and untainted. Any sign of tutoring will render the evidence questionable if the Court is satisfied, it may convict a person without looking for corroboration of the child's evidence. As regards credibility of child witness, it is now established that all witnesses who testify in Court must be competent or able to testify at trial. In general, a witness is presumed to be competent. This presumption applies to child witnesses also.

35. The competency 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.

36. The defence has taken the plea that the competency of P.W.9 Laboni as a witness has not been tested by the learned Trial Judge and as such the evidence of P.W.9 Laboni should be left out of consideration.

37. In the case of *the State Vs. Badiuzzaman and another ((1973) 25 DLR (HCD) 41,* it has been held that testing of intelligence of a witness of tender age is not a condition precedent to the reception of his evidence. Preliminary examination of the child witness before receiving his evidence is not imperative. A person who can understand questions and can give rational answers to them is a competent witness to testify in Court.

38. Almost similar views have also been taken in the cases of *Abdul Gani and others Vs. The State (1959)11 DLR (Dhaka)338 and The State Vs. Abdur Rashid (1972)24 DLR (HCD)18.*

39. In view of the principle laid down in the cases referred to above and the provisions of section 118 of the Evidence Act,1872, there is no room for doubt that testing of intelligence of a witness of a tender age is not a condition precedent to the reception of his evidence. Therefore, preliminary examination of a child witness is not at all necessary.

40. Having gone through the evidence of P.W.9, we find that at the time of deposing before the Court, Laboni was about 12 years old and as such, the Tribunal probably did not feel the necessity of testing her intelligence. Having gone through the evidence, we are of the view that P.W.9, Laboni could understand the question put to her and she answered the rational reply to the questions. Over and above, she withstood the onslaught of cross-examination before the Tribunal.

41. The defence took the plea that appellant-husband was not at his house on the fateful night of occurrence and as such, he should be absolved from the charge of murdering his wife. Such a plea is termed as *alibi.*

42. In this case, the appellant did not take the defence of *alibi* that he was not at his house on the fateful night of occurrence and the defence did not examine any witness in support of the plea of *alibi*. During cross-examination of P.W.2, suggestions were given to him that on the fateful night, the appellant-husband was not at his house and that the victim-wife committed suicide while she was suffering from stomach pain, which P.W.2 denied.

43. In a wife killing case, it is always presumed that the husband was with the deceased wife at the time of occurrence unless any plea of *alibi* is set up by the defence. In that case, the burden of proving such plea rests on the husband in order to absolve him of any criminal liability. In this connection, reliance may be placed on the case of *Abdus Salam Vs. The State, (1999)19 BLD(HCD)98* where it has been held that in the absence of plea of *alibi*, the evidence on record is found to be sufficient to hold that the appellant was at home during the fateful night with his deceased wife. Since the defence has failed to succeed in creating a reasonable belief by proving any circumstance that she could take her life by committing suicide, the appellant as the husband cannot absolve himself of the criminal liability for causing death to his deceased wife.

44. In the case of *Binay Kumar Singh Vs. State of Bihar (1997) 1 SCC 283* it has been held that the latin word *alibi* means “elsewhere” and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is

alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of *alibi*. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of *alibi*, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy.

45. Thus, the burden to prove the plea of *alibi* is heavy on the accused and the plea of alibi cannot be proved by preponderance of probabilities.

46. Soon after the occurrence, the appellant-husband absconded and he surrendered before the Tribunal on 28.08.2002, that is, about 6 months after the occurrence. This long abscondence of the appellant-husband without any explanation whatsoever appears to be culpable in nature under section 8 of the Evidence Act.

47. In the case of *DHANANJOY CHATTERJEE ALIAS DHANA VS. STATE OF W.B (1994)2 SCC 220,* the Supreme Court of India held that abscondence by itself is not a circumstance which may lead to the only conclusion consistent with the guilt of the accused because it is not unknown that innocent persons on being falsely implicated may abscond to save themselves but abscondence of an accused after the occurrence is certainly a circumstance which warrants consideration and careful scrutiny. The appellant absconded soon after the occurrence why did the appellant disappear? The appellant has offered no explanation. No challenge has been made to the testimony of the investigation officers either when they testify that they successfully searched for the appellant from 5$^{th}$ to 8$^{th}$ March,1990 at different places or conducted raid at his village to apprehend him.

48. In the case in hand, the High Court Division has taken the abscondence as one of the circumstances and did not come to the conclusion which might lead to the only conclusion consistent with the guilt of the accused.

49. Even if the testimony of lone prosecution, eyewitness Laboni is left out of consideration the incriminating circumstances as enumerated by the High Court Division are

good enough to find that appellant-husband guilty of killing of victim-wife. The incriminating circumstances enumerated by the High Court Division are quoted below:

(a) On the night following 08.02.2002, both the accused-husband and the victim-wife lived together at the place of occurrence house and her dead body was found there;

(b) The evidence on record does not show that the accused-husband took any step for the treatment of the alleged tuberculosis of the victim-wife at or about the material time;

(c) The accused-husband's culpable and unexplained abscondence after the occurrence for about 6(six) months is relevant under section 8 of the Evidence Act, which is indicative of his *'mens rea'* in the commission of the offence;

(d) There is no evidence or suggestion or circumstance to show that the other inmates, if any, of the house of the accused-husband assaulted her to death;

(e) The accused-husband did not bring the matter of the unnatural death of the victim-wife to the notice of the police;

(f) The evidence on record does not indicate that the accused-husband attended the funeral rites of the victim-wife;

(g) It is the opinion of the Medical Officer Dr. Md. Abdul Jalil (P.W.6) that the death of the victim-wife was due to shock and asphyxia following ligature strangulation which was ante-mortem and homicidal in nature;

(h) The motive of killing of the victim-wife by the accused-husband has been firmly established; and

(i) The defence version of the case has been found to be a blatant falsehood.

50. The evidence of P.W.9, Laboni coupled with the medical evidence of P.W.6, Dr. Md. Abdul Jalil and the incriminating circumstantial evidence appearing against the appellant lead to the irresistible conclusion that the appellant-husband is the assailant of the victim-wife.

51. Section 11(ka) of the Nari-O-Shishu Nirjatan Daman Ain,2000 provides for capital punishment only. Therefore, the High Court Division took the view that it could not take any lenient view in respect of awarding punishment to the condemned-appellant. Moreover, in the present case, the savage nature of crime has shocked our judicial conscience. The murder was cold blooded and brutal without any provocation. Therefore, the submissions of the learned Advocate for the appellant that imprisonment for life may be awarded to the appellant by converting his conviction from 11 (ka) of the Nari-O-Shishu Nirjatan Daman Ain to section 302 of the Penal Code do not hold good on the facts and in circumstances of the case in hand. Moreover, demand of Tk.10000/- as dowry has been proved by the satisfactory evidence as found by both the Courts below.

52. In the light of the findings made before, we do not find any substance in the jail appeal. Accordingly, this jail appeal is dismissed.