

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Acquittal Appeal No. 86 of 2015**

Smt. Kunti Bai Yadav W/o Santosh Yadav Aged About 40 Years R/o
Stationpara, Ward No. 11, Bapushala School, Rajnandgaon, District
Rajnandgaon, Chhattisgarh

---- Appellant

Versus

1. State Of Chhattisgarh through The Police Station Rajnandgaon, District
Rajnandgaon, Chhattisgarh
2. Ajhar Khan @ Aju S/o Mazid Khan Aged About 22 Years R/o Gali
No.2, Masjid Gali, Gauri Nagar, Rajnandgaon, P.S. Kotwali
Rajnandgaon, District Rajnandgaon, Chhattisgarh
3. Shainki @ Abhishek Masih S/o Mukesh Masih Aged About 19 Years
R/o Ward No. 11, Solah Kholi, Stationpara, Rajnandgaon, P.S. &
District Rajnandgaon, Chhattisgarh
4. Abhishek @ Bittu Verma S/o Lalit Verma Aged About 22 Years R/o
Ward No. 32, Aazad Chowk, Rajnandgaon, P.S., Tahsil & District
Rajnandgaon, Chhattisgarh

---- Respondents

And**Cr.M.P No. 229 Of 2015**

The State Of Chhattisgarh S/o Through - District Magistrate
Rajnandgaon Chhattisgarh

---- Petitioner

Vs

1. Ajhar Khan @ Aju, S/o Majid Khan Aged About 22 Years R/o Street
No. 2, Masjid Gali, Gauri Nagar, Rajnandgaon, P.S. Kotwali,
Rajnandgaon, Distt. Rajnandgaon Chhattisgarh
2. Shanky @ Abhishek Masih S/o Mukesh Masih Aged About 19 Years

R/o Ward No. 11, Solah Kholi, Station Para, Rajnandgaon, P.S. & Distt.
Rajnandgaon Chhattisgarh

3. Abhishek @ Bittu Verma S/o Lalit Verma Aged About 22 Years R/o
Ward No. 32, Ajad Chowk, Rajnandgaon, P.S., Tahsil & Distt.
Rajnandgaon Chhattisgarh

-----Respondents

For Appellant/:	Shri Kalayan Kalamkar, Advocate.
For Respondent/State:	Smt Madhu Nisha Singh, Panel Lawyer for the State.

Hon'ble The Chief Justice
Hon'ble Shri Justice P. Sam Koshy

Judgment on Board

Per Navin Sinha, Chief Justice

31/03/2016

1. The two appeals, one by the mother of the deceased and the other by the State assail the acquittal of the Respondents dated 15.10.2014 in Sessions Trial No.10 of 2014 by the Sessions Judge, Rajnandgaon from the charge under Sections 364, 302/34 and 120-B IPC.

2. A common submission in both the appeals was that the entire case rests on circumstantial evidence. (PW-2) Kunti Bai, mother of the deceased had deposed that he left home with Respondent No.3 Shanky never to return. This was per se evidence to invoke the last seen theory. The Trial Judge erred in rejecting this important evidence merely because the informant (PW-1) Gopi, brother of the deceased may not have mentioned this fact. Without appreciating the submission that the latter was inside the house and therefore did not see the deceased leaving home with the Respondents was erroneous mis-appreciation of evidence. The evidence of (PW-2) Kunti Bai,

was therefore admissible under Section 6 of the Evidence Act on the rule of *res gestae*.

3. Likewise, the Trial Court erred in concluding the absence of motive without appreciating that the girl Soumya who had been allegedly teased by the deceased was not examined in the Court despite her police statement having been recorded. The knife used for assault was recovered from the bushes on confession of the Respondent-Shanky @ Abhishek. The recovery was accessible to all, not from an open place but from a concealed state known to that person alone. Once blood was found on the knife and rope recovered on the confession of Respondent-Abhishek @ Bittu and on the jacket of Respondent-Shanky @ Abhishek, the fact that it could not be matched with the blood group of the deceased through a serologist report was insufficient to grant acquittal so long that the presence of blood was not explained.

4. We have considered the submissions on behalf of the Appellant.

5. There is no eye-witness to the assault and the case of the prosecution rests on circumstantial evidence invoking the last seen theory coupled with recovery on basis of confession.

6. According to (PW-2) Kunti Bai, the deceased left home accompanied by Respondent-Shanky @ Abhishek in the evening while she could not recognize the other two. (PW-1) Gopi was also home. Even if it is accepted that he was inside the house and may not have seen his brother leaving, surely when the deceased did not return till next day, the two witnesses must have discussed the events when (PW-2) Kunti Bai would have disclosed the fact of deceased having left home with Respondent-Shanky @ Abhishek. Had this been so, there would have been no occasion for (PW-1) Gopi to

lodge merg (Exhibit P-1) against unknown or for (PW-2) Kunti Bai to make this statement in Court for the first time. Even during the trial, (PW-1) Gopi did not support (PW-2) Kunti Bai on this aspect. The Trial Judge therefore rightly disbelieved the statement of (PW-2) Kunti Bai made in Court for the first time that the deceased had left home with Respondent-Shanky @ Abhishek.

7. Section 6 of the Evidence Act has no application in the facts of the case as (PW-2) Kunti Bai was not giving hear-say evidence but ocular.

8. Motive is not sufficient by itself for either conviction or acquittal. It may be a corroborating factor especially in a case of circumstantial evidence. But prior to this, the prosecution must establish all links in the chain of circumstances conclusively pointing towards the guilt of the accused. In the present case, the prosecution has not been able to establish the last seen theory. The applicability of motive at this stage does not arise.

9. Recovery of knife, rope and jacket on the confession are corroborative materials under Section 27 of the Evidence Act admissible in evidence based on the confession of an accused. It is not substantive evidence. The prosecution must establish the guilt by substantive evidence which in the present case would mean proof of the deceased and the Respondents having been last seen together. The fact that blood may have been found on the knife or clothes may raise suspicion but cannot constitute proof especially in a case of circumstantial evidence when other links are wanting, unless the blood group was matched based on the serologist report. There is no evidence of any finger prints of the Respondents on the butt of the knife even. To hold in a case of circumstantial evidence that merely because blood may have been found, the inescapable conclusion would be of guilt, may be

vesting dangerous and arbitrary powers in the police when false implications cannot be ruled out.

10. If all this were not enough, the Police seized the mobile of the deceased and mobile and SIM cards of the Respondents. There appears nothing on record to link up any communications between the deceased and the Appellant and the Respondents, even if we were to ignore non-compliance with Section 65-B of the Evidence Act. Surely, if the mobile phone of the deceased was switched off, the last tower location of both phones could well have been identified through the service provider. In the shoddy nature of investigation done by the police, we find no reason to entertain the acquittal appeals.

11. The appeals are dismissed.

Sd/-

(Navin Sinha)

CHIEF JUSTICE

Sd/-

(P. Sam Koshy)

JUDGE