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HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL NO. 277 OF 2016

[Judgment Reserved on : 12.10.2023]

[Judgment Delivered on : 31.10.2023]

1. Kishandas Mahant, S/o Adbad Dad Mahant, aged about 20 years, R/o Doma, P.S. Malkharoda, District Janjgir-Champa (C.G.)

2. Samaru Das Mahant, S/o Mahettar Das Mahant, aged about 20 years, R/o Doma, P.S. Malkharoda, District Janjgir-Champa (C.G.)

... Appellant(s)

Versus

1. State of Chhattisgarh, through: Station House Officer, Police Station City Kotwali, Raigarh, District Raigarh (C.G.)

... Respondent(s)

For Appellants	:-	Mr. Manoj Kumar Jaiswal, Advocate.
For Respondent/ State	:-	1. Mr. Ali Asgar, Deputy Advocate General. 2. Mr. Ashish Tiwari, Government Advocate. 3. Mr. Sudeep Verma, Deputy Government Advocate.

Division Bench

Hon'ble Shri Justice Sanjay K. Agrawal &
Hon'ble Shri Justice Radhakishan Agrawal

C A V Judgment

Sanjay K. Agrawal, J.

1. This criminal appeal preferred by the appellants, under Section 374(2) of CrPC, is directed against the

judgment of conviction and order dated 15.1.2016 passed by the First Additional Session Judge, Raigarh, District Raigarh in Sessions Trial No.2/2014, by which the two appellants herein have been convicted and sentenced in the following manner:-

Conviction	**Sentence**
<u>Appellant No.1 – Kishandas Mahant</u>	
1. Under Section **302** of IPC	Imprisonment for Life with fine of Rs.5000/- and in default of payment of fine amount, additional R.I. for 5 months.
2. Under Section **201/34** of IPC	R.I. for 1 year with fine of Rs.1000/- and in default of payment of fine amount, additional R.I. for 1 month.
<u>Appellant No.2 – Samaru Das Mahant</u>	
1. Under Section **302** of IPC	Imprisonment for Life with fine of Rs.5000/- and in default of payment of fine amount, additional R.I. for 5 months.
2. Under Section **201/34** of IPC	R.I. for 1 year with fine of Rs.1000/- and in default of payment of fine amount, additional R.I. for 1 month.
All the sentences have been directed to run concurrently.	

2. Case of the prosecution, in nutshell, is that on 3.9.2013 at about 2-2:30 p.m. at Village Sangitarai,

under Police Station Jute Mill, District Raigarh, the two appellants herein along with one juvenile co-accused Govinda in furtherance of their common intention, strangulated Kenvra Bai, wife of appellant No.1 herein Kishandas, to death and in order to screen themselves from the legal punishment, they hid *gamchha* (neck towel) used in the said offence in nearby place; thereby committed the aforesaid offences.

3. Further case of the prosecution is that the appellant No.1 Kishandas had developed relationship with Kenvra Bai other than marriage, on account of which she became pregnant. The matter was compromised in the Village Panchayat pursuant to which, appellant No.1 performed marriage with Kenvra Bai and thereafter both of them started living together as husband and wife at Village Sangitarai in the house of Gayatri (PW-11) on rent. Subsequently, on 2.9.2013, it is said that Kenvra Bai visited her father's house to collect rice and other eatable articles/cash and, on 3.9.2013, she returned for Sangitarai along with Manohar (PW-6)

and Mithun (PW-9) with some rice and vegetables. It is the case of the prosecution that when Kenvra Bai along with Manohar (PW-6) and Mithun (PW-9) reached to her husband appellant No.1's house at Sangitarai in the morning, at that time appellant No.1 Kishandas, appellant No.2 Samaru and juvenile co-accused Govinda were already present there. Thereafter, at about 9:00 p.m., appellant No.1 and appellant No.2 reached the house of Bodhidas (PW-2) and Shanti (PW-4) in their presence, who are father and mother of Kenvra Bai respectively, along with the body of Kenvra Bai citing the reason that she was unwell because of pregnancy and leaving the body of Kenvra Bai on the bed, appellant No.2 left immediately from the place and thereafter appellant No.1 also left from the said place. When Bodhidas (PW-2) and his other relatives noticed the ligature marks on the neck of Kenvra Bai, they informed the police on the next day i.e. on 4.9.2013.

4. On the report of Bodhidas (PW-2), Dehati Nalishi (Exhibit P-5), Merg Intimation (Exhibit P-7) and FIR (Exhibit P-4) were registered. Inquest proceeding

was conducted vide Exhibit P-12 and the dead-body of deceased Kenvra Bai was sent for postmortem which was conducted by Dr. Hemant Kumar Sahu (PW-13) who proved the post-mortem report (Exhibit P-18) in which the cause of death has been opined to be asphyxia due to constriction of neck and duration of death was within 24 to 36 hours. Pursuant to the memorandum statement (Exhibit P-13) of appellant No.1, one *gamchha* was seized at his behest, on which no blood is said to have been found. Statements of the witnesses were also recorded under Section 161 of CrPC and the appellants were arrested.

5. After completion of the investigation, both the appellants were charge-sheeted for the offence punishable under Sections 302, 201/34 of IPC before the concerned jurisdictional Criminal Court, from where the case was committed to the Court of Sessions and after committal, the matter was received by the Court of First Additional Session Judge, Raigarh for trial in accordance with law, in

which the appellants abjured their guilt, pleaded innocence and claimed to be tried.

6. During the course of trial, in order to bring home the offence, the prosecution has examined as many as 16 witnesses and exhibited 28 documents. Statements of the appellants were recorded under Section 313 of CrPC, in which they denied the circumstances appearing against them in the evidence brought at on behalf of prosecution, pleaded innocence and false implication.

7. After conclusion of the trial, the trial Court, by its judgment and order dated 15.1.2016, on appreciation of oral and documentary evidence available on record, convicted and sentenced the two appellants herein as mentioned in para-1 of this judgment. Feeling aggrieved and dissatisfied by the said judgment of conviction and order of sentence, the present appeal has been jointly preferred by the two appellants herein.

8. Mr. Manoj Kumar Jaiswal, learned counsel appearing for the appellants, would submit as under:-

(i) That the extra-judicial confession allegedly made by appellant No.1/appellant No.2 before PW-2 Bodhidas and PW-4 Shanti is not established at all and further it is also not proved in light of the statement of PW-9 Mithun as well as PW-10 Shobharam who have clearly stated that on being threatened, appellant No.1 has admitted the fact of strangulation of deceased Kenvra Bai with the help of appellant No.2 and juvenile co-accused Govinda. As such, the extra-judicial confession so made is neither true nor voluntary and therefore the trial Court could not have based the conviction on the said extra-judicial confession.

(ii) That the trial Court has recorded a finding in para-28 of the impugned judgment that on 3.9.2013 at about 10:00 p.m. when PW-6 Manohar and PW-9 Mithun along with the Kenvra Bai reached to the house of appellant No.1, at that time appellant No.1 Kishandas, appellant No.2 Samaru and juvenile co-

accused Govinda were also present there and thereafter the incident took place at about 2-2:30 p.m. and the body of Kenvra Bai was brought to the house of PW-2 Bodhidas on the same day, thus, Section 106 of the Indian Evidence Act, 1872 (in short, 'IEA-1872') shall not apply in absence of explanation under Section 313 of CrPC. According to learned counsel for the appellants, both the appellants have been convicted for the offence punishable under Section 302, 201/34 of IPC and in fact Section 106 of IEA-1872 would not apply in absence of clear evidence that in the house of appellant No.1, it was only appellant No.1 and his wife were present and no one else was present there.

(iii) That the *gamchha* which has been recovered pursuant to the memorandum statement of appellant No.1 and by which strangulation is said to have been caused by appellant No.1, according to the prosecution case itself, neither any stain of blood has been found on the same

nor was the said *gamchha* of any such special quality or style which is not easily available in the local market. As such, the seizure of g*amchha* has no evidentiary value in the eyes of law.

(iv) That appellant No.2 has been convicted for the said offence with the aid of Section 30 of IEA-1872 which is a very weak piece of evidence in absence of any corroborative piece of evidence available on record. As such, the conviction of appellant No.2 also is liable to be set-aside.

9. On the other hand, Mr. Ali Asgar, learned Deputy Advocate General, would support the impugned judgment and order and submit that the trial Court is absolutely justified in convicting the two appellants herein for the offence punishable under Section 302, 201/34 of IPC as the extra-judicial confession made by appellant No.1 to PW-2 Bodhidas, PW-4 Shanti, PW-9 Mithun and PW-10 Shobharam is true and voluntary and, as such, they have been rightly been convicted by the trial Court for the said offences. He would further submit that

in absence of appellants' explanation under Section 313 of CrPC, with the aid of Section 106 of IEA-1872, they have rightly been convicted for the said offences punishable under Sections 302, 201/34 of IPC, more particularly when the *gamchha* used in the commission of offence has been seized from the possession of appellant No.1 pursuant to his memorandum statement. As such, the trial Court has rightly convicted the two appellants herein and the instant appeal deserves to be dismissed.

10. We have heard learned counsels for parties and considered their rival submissions made herein-above and have also gone through the record with utmost circumspection.

11. The trial Court, in the absence of direct evidence, has culled out the following three incriminating circumstances in para-17 of its judgment to base conviction of the two appellants herein:-

(i) प्रथम – अभियुक्त द्वारा गवाहों के समक्ष की गई न्यायिक संस्वीकृति।

(ii) दूसरा – मृतिका का अभियुक्त के साथ निवास के दौरान मृत होना।

(iii) तीसरा – अभियुक्त से उसके मेमोरेण्डम के आधार पर उसकी निशानदेही पर अपराध में प्रयुक्त गमछे की जप्ती किया जाना।

12. The case of the prosecution is based on circumstantial evidence, therefore, it would be appropriate to notice the most celebrated judgement of the Supreme Court rendered in the matter of **Sharad Birhichand Sarda** v. **State of Maharashtra**[1] in which the five golden principles which constitute the panchsheel of the proof of a case based on circumstantial evidence, have been catalogued in para-153 which reads as under:-

> **"153.** A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:
>
> > (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra where the following observations were made:

1 (1984) 4 SCC 116

> Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
>
> (3) the circumstances should be of a conclusive nature and tendency,
>
> (4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.**"**

13. This would bring us to the three incriminating circumstances culled out by the trial Court to hold the two appellants guilty of offence of murder under Section 302 of IPC, which we will consider one by one:-

Extra-judicial Confession:-

14. Before considering the fact as to whether appellant No.1 has made extra-judicial confession to PW-2 Bodhi Das, PW-4 Shanti, PW-9 Mithun and PW-10 Shobharam and whether it is true and voluntary, it would be appropriate to notice the legal position *qua* the extra-judicial confession.

14.1 It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the Court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra-judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra-judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the Court to base a conviction on such a confession. In such circumstances, the Court would be fully justified in ruling such evidence out of

consideration. [**See** : **Sahadevan and Another v. State of Tamil Nadu**[2]]

14.2 In the matter of **Sahadevan** (supra), their Lordships of the Supreme Court further considered their earlier decisions including **Balwinder Singh v. State of Punjab**[3] and pertinently laid down the principle in paragraphs 15.1, 15.8 and 16 as under:-

> **"**15.1. In Balwinder Singh (supra) this Court stated the principle that: (SCC p. 265, para 10)
>
> "10. An extra-judicial confession by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extra-judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance."
>
> xxx xxx xxx
>
> 15.8. Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witnesses must be clear, unambigous and should clearly convey that the accused is the perpetrator of the crime. The extra-judicial confession can be accepted and can be the basis of conviction, if it passes the test of credibility. The extra-judicial confession should inspire confidence and the court should find out whether there are other cogent circumstances on record to support

2 (2012) 6 SCC 403
3 1995 Supp (4) SCC 259

it. (*Ref. Sk. Yusuf v. State of W.B.*[4] and *Pancho v. State of Haryana*[5].)

xxx xxx xxx

The principles

16. Upon a proper analysis of the abovereferred judgments of this Court, it will be appropriate to state the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These percepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused :

(i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

(ii) It should be made voluntarily and should be truthful.

(iii) It should inspire confidence.

(iv) An extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

(v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law.**"**

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4 (2011) 11 SCC 754
5 (2011) 10 SCC 165

14.3. The principle of law laid down in **Sahadevan** (supra) has further been followed with approval in the matter of **Pradeep Kumar v. State of Chhattisgarh**[6] and very recently in the matter of **Pawan Kumar Chourasia v. State of Bihar**[7] wherein the following principles of law have been laid down by their Lordships:-

> "**EVIDENTIARY VALUE OF EXTRA-JUDICIAL CONFESSION**
>
> 5. As far as extra-judicial confession is concerned, the law is well settled. Generally, it is a weak piece of evidence. However, a conviction can be sustained on the basis of extra-judicial confession provided that the confession is proved to be voluntary and truthful. It should be free of any inducement. The evidentiary value of such confession also depends on the person to whom it is made. Going by the natural course of human conduct, normally, a person would confide about a crime committed by him only with such a person in whom he has implicit faith. Normally, a person would not make a confession to someone who is totally a stranger to him. Moreover, the Court has to be satisfied with the reliability of the confession keeping in view the circumstances in which it is made. As a matter of rule, corroboration is not required. However, if an extra-judicial confession is corroborated by other evidence on record, it acquires more credibility. "

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6 Criminal Appeal No. 1304 of 2018, judgment dated 16/03/2023
7 2023 LiveLaw (SC) 197

15. Appellant No.1 has allegedly given extra-judicial confession first of all to PW-2 Bodhi Das, father-in-law of appellant No.1 and father of deceased Kenvra Bai. PW-2 Bodhi Das has only stated that on the fateful day at 9:00 p.m., appellant no.1 and appellant No.2 had knocked the door of his house and on opening the door, he saw that appellant No.1 and appellant No.2 were carrying his daughter Kenvra Bai and they kept her in the bed and thereafter appellant No.2 absconded immediately. He has further stated that, on enquiring, appellant No.1 has explained that since Kenvra Bai was sent by motorcycle therefore she got unwell and he noticed the dead-body of his daughter on the next day. He has been examined to some length of cross-examination, but there is nothing in his statement to hold that appellant No.1 has made any kind of extra-judicial confession of killing his daughter, along with appellant No.2 and other co-accused person. Except in para-5, PW-2 Bodhi Das has only stated that on being repeatedly asked in presence of police personnel, appellant No.1 disclosed some facts. As such, taking the statement of PW-2 Bodhi

Das as it is, it cannot be held that appellant No.1 has given any kind of extra-judicial confession to PW-2 Bodhi Das.

16. Similar is the statement of PW-4 Shanti, mother-in-law of appellant no.1 and mother of deceased Kenvra Bai. She has stated that appellant No.1 only informed her, after bringing her daughter Kenvra Bai to her house, that Kenvera Bai has become unwell and then he left the place to call the doctor to attend her daughter and she had seen that froth was coming from the mouth of her daughter. In para-4 of her examination-in-chief, she has simply stated that on being enquired, appellant no.1 had stated that he along with appellant No.2 and juvenile co-accused Govinda have killed Kenvra Bai. As such, there is nothing in the statement of PW-4 Shanti from which it can be said that appellant No.1 has given any kind of extra-judicial confession to PW-4 Shanti and which is true and voluntary, to hold appellants No.1 & 2 guilty of the aforesaid offences.

17. PW-9 Mithun has stated that when he and PW-6 Manohar had left Kenvra Bai in the house of her husband appellant No.1, at that time appellant No.1 Kishandas, appellant No.2 Samaru and juvenile co-accused Govinda were already present there. He has further stated that on the same day when he came to know about the dead-body of Kenvra Bai kept in the house of PW-2 Bodhi Das, he visited the house of PW-2 Bodhi Das where appellant No.1 on being asked by the villagers had made a confession that he along with appellant No.2 Samaru and juvenile co-accused Govinda had killed Kenvra Bai. As such, from the examination-in-chief of PW-9 Mithun itself it is clear that appellant No.1 has not given any kind of extra-judicial confession to him. Rather, on being enquired by the villagers, appellant No.1 has confessed to have killed Kenvra Bai, along with appellant No.2 and juvenile co-accused Govinda, which cannot be said to be true and voluntary, as no person would ordinarily give an extra-judicial confession in presence of so many villagers of his criminal act that too for the offence of murder. He would confide his extra-judicial confession only to

his man of confidence to seek protection under the hope that the person to whom confession is made would protect him from his criminal act. As such, it cannot be held that appellant No.1 has made any kind of extra-judicial confession to PW-9 Mithun also.

18. Similar is the statement of PW-10 Shobharam to whom appellant No.1 is said to have made an extra-judicial confession. In his examination-in-chief, PW-10 Shobharam has clearly admitted that when he repeatedly asked appellant No.1 and threatened him also, then only appellant No.1 has stated that he along with appellant No.2 and juvenile co-accused Govinda had killed Kenvra Bai. In cross-examination, PW-10 Shobharam has stated that at the time when appellant No.1 was being enquired upon, there were 50-100 persons present and appellant No.1 was cordoned off when he was being enquired upon.

19. As such, from careful perusal of the evidence of PW-2 Bodhi Das, PW-4 Shanti, PW-9 Mithun and PW-10 Shobharam, it is clearly established that the alleged

extra-judicial confession made by appellant No.1 before them is not at all an extra-judicial confession and which is neither true nor voluntary and no reliance can be placed on such confession. We therefore set-aside the finding of the trial Court of the alleged extra-judicial confession being an incriminating piece of evidence so as to base the conviction of the appellants for the aforesaid offences.

Siezure of Gamchha (Neck Towel) pursuant to Memorandum statement of appellant No.1:-

20. Now, the other incriminating circumstance is that pursuant to memorandum statement (Exhibit P-13) of appellant No.1, a *gamchha* was seized at his behest. Assuming the fact that *gamchha* was seized pursuant to the memorandum statement of appellant No.1 that would not connect appellant No.1 for the offence in question, for the two reasons that neither the *gamchha* was sent for chemical examination to the FSL nor any bloodstain was found on the said *gamchha* seized from the possession of appellant No.1. Moreover, the recovery of the said *gamchha* was made after three days from

the date of offence. Furthermore, the said *gamchha* seized is not of such a unique quality that it is not easily available in the local market and, in the villages, use of *gamchha* is quite prevalent and it is ordinarily used by most of the villagers at a time. Therefore, this incriminating circumstance is also not established to hold it an incriminating piece of evidence against appellant No.1.

Applicability of Section 106 of IEA-1872

21. The final incriminating circumstance that has been found proved against the two appellants herein is the death of Kenvra Bai occurred while she was residing with appellant No.1 in his house and upon which strong reliance has been placed by learned counsel appearing for the State.

22. It is apparent from the evidence which have come on record that Kenvra Bai was having advanced stage of pregnancy of 28 weeks. Furthermore, on the date of offence i.e. on 3.9.2013, PW-6 Manohar and PW-9 Mithun both had brought her from her parental home at Village Doma, Police Station Malkharouda, District Janjgir-Champa to the house

of her husband, appellant No.1, at Village Sangitarai under Police Station Jute Mill, District Raigarh in the morning along with some rice and vegetables and, at that time, as per the statement of PW-9 Mithun, appellant No.1 Kishandas, appellant No.2 Samaru and juvenile co-accused Govinda all were sitting in the house of appellant No.1 at around 10:00 O'clock in the morning and thereafter they both returned to their village. It is also established from the statement of PW-11 Gayatri that appellants No.1 & 2 both used to reside in her house as tenants. PW-5 Manbodh has also stated that appellant No.1 Kishandas, his wife Kenvra Bai and appellant No.2 Samaru all were living together in one house on rent. In cross-examination, PW-5 Manbodh has admitted that appellant No.1 Kishandas along with his wife Kenvra Bai was staying along with appellant No.2 Samaru in the said house of Gayatri (PW-11) as tenants and the courtyard of all the rented rooms was common. As such, it is clearly established that on the date of offence, in the morning at about 10:00 O'clock, when PW-6 Manohar and PW-9 Mithun reached

Raigarh in the house of appellant No.1 along with Kenvra Bai, at that time appellant No.1 Kishandas, appellant No.2 Samaru and co-accused Govinda all were present there in the house and thereafter on the same day at about 9:00 p.m. in the night, the body of Kenvra Bai was brought to the house of PW-2 Bodhi Das and PW-4 Shanti by appellants No.1 & 2. However, Dehati Nalishi (Exhibit P-5) was recorded on 4.9.2013 at 10:25 a.m. and FIR (Exhibit P-4) was lodged at 7:45 p.m. on 4.9.2013.

23. Now, the question would be, whether the trial Court is justified in invoking Section 106 of IEA-1872 to hold the two appellants herein guilty of the aforesaid offences in absence of an explanation in their statement recorded under Section 313 of CrPC.

24. Section 106 of IEA-1872 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."

25. This provision states that when any fact is specially within the knowledge of any person, the burden of

proving that fact is upon him. This is an exception to the general rule contained in Section 101, namely, that the burden is on the person who asserts a fact. The principle underlying Section 106 which is an exception to the general rule governing burden of proof applies only to such matters of defence which are supposed to be especially within the knowledge of the other side. To invoke Section 106 of IEA-1872, the main point to be established by prosecution is that the accused persons were in such a position that they could have special knowledge of the fact concerned.

26. In **Balvir Singh** v. **State of Uttarakhand**[8], their Lordships of the Supreme Court relying upon the earlier decision have held that Section 106 of IEA-1872 should be applied in criminal cases with care and caution and observed as under:-

> **"***41*. 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

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accused is not in any way modified by the provisions contained in Section 106 of the Evidence Act.

42. 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 of 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.

43. 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 gives 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."

44. 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.

45. 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 by the accused but also by others if they happened to be present when it took place. From the illustrations appended to the section, it is clear that an intention not apparent from the character and circumstances of the act must be established as especially within the knowledge of the person whose act is in question and the fact that a person found travelling without a ticket was possessed of a ticket at a stage prior in point of time to his being found without one, must be especially within the knowledge of the traveller himself : see Section 106 of the Indian Evidence Act, illustrations (a) and (b).

46. xxx xxx xxx xxx

WHAT IS "PRIMA FACIE CASE" IN THE CONTEXT OF SECTION 106 OF THE EVIDENCE ACT?

47. 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 by "prima facie evidence" which in turn means "evi-Ideuce 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 of proof, which requires them to present prima facie evidence for each element of the charges against the defendant. If they cannot present prima facie evidence, or if an opposing party introduces contradictory evidence, the initial claim may be dismissed without any need for a response by other parties.
>
> *48*. 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 death.**"**

27. Bearing in mind the principles of law laid down in **Balvir Singh** (supra), it is quite vivid that in the present case on 3.9.2013 when PW-6 Manohar and PW-9 Mithun had brought Kenvra Bai back to her husband appellant No.1's house at Village Sangitarai under Police Station Jute Mill, District Raigarh along with some rice and eatables/ vegetables and when they returned for their Village Doma, Police Station Malkharouda, District Janjgir-Champa, at that time, admittedly as per the showing of PW-9 Mithun, appellant No.1 Kishandas, appellant No.2 Samaru and juvenile co-accused Govinda all were present in the house and the incident said to have occurred on the same day at

2-2:30 p.m. as per FIR (Exhibit P-4) and Dehati Nalishi (Exhibit P-5) and thereafter in the night at 9:00 p.m., the two appellants came along with the body of Kenvra Bai at the house PW-2 Bodhi Das and PW-4 Shanti and, surprisingly, PW-2 Bodhi Das noticed the dead-body of Kenvra Bai next day in the morning of 4.9.2013 and also noticed the ligature marks on the neck of Kenvra Bai and reported the matter to the police on 4.9.2013 vide FIR (Exhibit P-4) and Dehati Nalishi (Exhibit P-5). However, as per PW-2 Shanti, though appellant No.2 had absconded immediately from their house and appellant No.1 had left after some time, but appellant No.1 went back for calling the doctor to attend Kenvra Bai and she had seen that froth was coming from the mouth of her daughter Kenvra Bai and she had also seen bloodstains on the neck of Kenvra Bai on the same day. However, surprisingly, the matter was reported to the police on the next day on which FIR was lodged on 4.9.2013 at 7:45 p.m. and thereafter wheels of investigation started running.

28. Though theory of last seen together of the two appellants and deceased Kenvra Bai is quite established from the statement of PW-9 Mithun who had seen appellants No.1 & 2 in the house at 10:00 a.m. in the morning and thereafter in the night, appellants No.1 & 2 had brought the body of Kenvra Bai to the house of PW-2 Bodhi Das and PW-4 Shanti, but the fact that non-reporting of the matter to the police immediately after the incident by PW-2 Bodhi Das and reporting the matter to the police by lodging FIR on 4.9.2013 at 7:45 p.m., creates doubt in the mind of the Court that when the two appellants had brought the body of Kenvra Bai at 9:00 p.m. in the night of 3.9.2013, Dehati Nalishi (Exhibit P-5) was lodged on 4.9.2013 at 10:25 a.m. and thereafter FIR (Exhibit P-4) was lodged. Furthermore, the delay in lodging of FIR has not been explained. As such, though death of Kenvra Bai has been proved to be homicidal in nature and further theory of last seen together of the two appellants and deceased Kenvra Bai is also proved, but the fact as to whether Kenvra Bai was

already died when she was brought to the house of PW-2 Bodhi Das and PW-4 Shanti or as to whether she died thereafter is not clearly established. Furthermore, though trial Court has held that Kenvra Bai died in the house of appellant No.1 but it has not been proved beyond reasonable doubt, as the death has occurred on 3.9.2013 at 2-2:30 p.m. and, as per the post-mortem report (Exhibit P-18) which was conducted on 4.9.2013 at 4:30 p.m., the duration of death was within 24 to 36 hours. Therefore, the prosecution has not been able to prove prima-facie case against the two appellants herein to discharge the burden of proof upon them for the offences punishable under Sections 302, 201/34 of IPC beyond reasonable doubt.

29. In that view of the matter, we hold that the alleged extra-judicial confession on the part of appellant No.1 to PW-2 Bodhi Das, PW-4 Shanti, PW-9 Mithun and PW-10 Shobharam has not been proved to be true and voluntary on which conviction can be rested. Furthermore, the *gamchha* which has been recovered from the possession of appellant No.1

pursuant to his memorandum statement has not been found stained with blood/human blood and the said *gamchha* was seized after three days of the incident which an ordinary person would not carry after such a long time after the incident and the said *gamchha* was not of such a special quality and style that it is not available easily in the local market. Moreover, though prosecution has been able to prove the death of Kenvra Bai to be homicidal in nature, but prima-facie case against the two appellants herein has not been proved beyond reasonable doubt so as to attract Section 106 of IEA-1872.

30. So far as appellant No.2 - Samaru is concerned, neither is there any extra-judicial confession nor any incriminating article has been recovered from his possession. He had no relationship with appellant No.1 Kishandas or his wife Kenvra Bai, except he was living with appellant No.1 and his wife and accompanied with the body of Kenvra Bai to the house of PW-2 Bodhi Das and PW-4 Shanti. The conviction of appellant No.2 is therefore liable to be set-aside.

31. Resultantly, this criminal appeal is allowed. The impugned judgment of conviction and order dated 15.1.2016 convicting the two appellants herein for the offences punishable under Sections 302, 201/34 of IPC is set-aside and they are acquitted from the said offences. Both the appellants are stated to be in jail since 7.9.2013 and 11.10.2013 respectively. They be released from jail forthwith, if not required in any other offence.

32. Let a certified copy of this judgment along with the original record be transmitted to the trial Court concerned and to the Superintendent of Jail where the appellants are presently lodged and suffering jail sentence, forthwith for necessary information and action, if any.

Sd/-
(Sanjay K. Agrawal)
Judge

Sd/-
(Radhakishan Agrawal)
Judge

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