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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 68 OF 2007

1. Rajesh Chinanna Jumbrati
Aged 21 years, Occ: Domestic Servant
R/o Darsha Smruti, S.V. Road,
Santacruz (W), Mumbai – 54.
2. Pettirajan @ Ramesh Bhumaiyya
Kalleda
Aged 21 years, Occ: Domestic Servant
R/o Navjeevan Hutment Area,
Opp. Avaon Std. Linking Road,
Santracruz (W), Mumbai 54

.. Appellants
(Org. Accd.Nos.4 & 6)

Vs.

State of Maharashtra

.. Respondent

Dr. Yug Mohit Chaudhary for appellants.
Mr. H. J. Dedhia, APP for State.

CORAM: P. V. HARDAS &
DR. SHALINI PHANSALKAR-JOSHI, JJ.

RESERVED ON : FEBRUARY 04, 2015.

PRONOUNCED ON : FEBRUARY 23, 2015.

JUDGMENT [Per P. V. Hardas, J.]:

1. The appellants/ Original Accused Nos.4 and 6, who stand

convicted for offence punishable under Sections 452, 395 and 396 of the Indian Penal Code and sentenced to RI for five years and each accused to pay a fine of Rs.3000/-, in default of which to undergo further RI for six months under Sections 452 and 395 of IPC and imprisonment for life and each accused to pay a fine of Rs.3000/-, in default of which to undergo further RI for six months, with a direction that substantive sentences shall run concurrently, by the 12th Ad-hoc Additional Sessions Judge, Court Room No.5, Sewree, Mumbai, by judgment dated 28/08/2006, in Sessions Case No. 680 of 2003, by this appeal question the correctness of their conviction and sentence.

2. The present appellants had filed the present appeal, while the co-accused had filed Criminal Appeal Nos.871/07 and 883/07. During the pendency of these appeals, Original Accused No. 4 – Rajesh Chinanna Jumbrati had filed an application that he was a juvenile in conflict with law. By order of this court dated 18/3/2013, the hearing of the present appeal was separated from the other appeals i.e. Criminal Appeal Nos.871/07 and 883/07. The said appeals i.e. Criminal Appeal Nos.871/07 and 883/07 were dismissed by the judgment of this court dated 14/6/2013.

3. It appears that the claim of Original Accused No. 4 – Rajesh Chinanna Jumbrati that he was a juvenile in conflict with law was turned down by the Sessions Judge and the said report was accepted by this court by its order dated 26/11/2013. Meanwhile, the claim of Original Accused No. 6 – Ramesh Bhumaiyya Kalleda that he was a juvenile in conflict with law was enquired into by the City Civil & Sessions Court, Greater Bombay in Misc. Application No. 330 of 2013. The City Civil & Sessions Court, Greater Bombay, by its oral order dated 31/7/2014 upheld the contention of Original Accused No. 6 – Ramesh Bhumaiyya Kalleda that he was a juvenile in conflict with law. This court by its order dated 19/12/2014 directed that Original Accused No. 6 – Ramesh Bhumaiyya Kalleda be released as he had already undergone 11 years of imprisonment and had been held to be a juvenile in conflict with law. By the same order, this court directed that the appeal filed by Original Accused No. 4 – Rajesh Chinanna Jumbrati shall proceed in accordance with law.

4. Facts, as are necessary for the decision of this appeal may be stated thus:-

PW 10 – PSI Anil Desai, who, on 20/5/2003, was attached to the

Santacruz Police Station and was on duty, recorded the report of PW 1 – Ranendra regarding robbery and murder at Exh. 15. On the basis of the report at Exh. 15, PW 10 – PSI Desai registered an offence vide Crime No. 197 of 2003 under Sections 302, 452, 454, 457, 460 and 380 of the IPC against unknown persons. The registration of the offence was accordingly informed to his superiors.

PW 10 – PSI Desai, along with PW 1 – Rajendra and other police officers, went to the scene of the incident, after making necessary entry in the station diary. The scene of the incident was Flat No. 18 in Maheshwar Prakash Building No.1, Jain Dairasar Marg, 6th Floor, Santacruz (West), Mumbai, belong to PW 1 – Rajendra. After inspecting the entire flat in the presence of panchas, a scene of the offence panchanama was drawn at Exh. 30. The inquest panchanama was also drawn. One Dr. Sumit Shah had examined injured Nirmalaben and had opined that she was dead. One handkerchief, white coloured cable wire which was tied on her neck, some liquid which was found in the mouth, saree and one odhani were seized under panchanama at Exh. 30. An ADR form was then filled in triplicate and the dead body was forwarded for postmortem examination through a police constable. The ADR is at Exh.

42. The inmates of the house were instructed not to enter in any of the bedroom or in the kitchen as the police wanted to explore if there was possibility of any fingerprints. On 21/5/2003, the clothes of deceased Nirmalaben were seized in the presence of panchas under seizure memo at Exh. 31. On the earlier day, a message had been sent to the Fingerprint Expert to visit Flat No.18. On 21/5/2003 at about 8.30 a.m. API Kalaskar from the Fingerprint Bureau contacted PW 10 – PSI Desai. PW 10 – PSI Desai went to the scene of the incident along with API Kalaskar.

On the same day, the presence of two panchas was secured and Fingerprint Expert API Kalaskar inspected the spot by using powder and noticed seven fingerprints on the cupboard of the bed room. He sealed the fingerprints and panchanama was accordingly drawn at Exh. 33. PW 10 – PSI Desai returned to the police station and recorded the statements of the witnesses. Further investigation was then handed over to PW 11 – PI Subhash Khade.

PW 11 – PI Subhash Khade deposes that on 20/5/2003, he was attached to the Santacruz Police Station. At about 8.45 p.m. PW 1 – Rajendra had lodged his report with PW 10 – PSI Desai at Exh. 15. PW 10

– PSI Desai had accordingly registered an offence, on the basis of the said complaint. PW 11 – PI Khade was informed by PW 10 – PSI Desai about the incident and PW 11 – PI Khade had informed Sr. PI Anita Chavan. The Assistant Commissioner of Police had also been informed. PW 11 – PI Khade, accompanied by PI Shaikh, PSI Desai, and other police officers, had visited the scene of the incident, where PSI Desai had prepared the spot panchanama. According to PW 11 – PI Khade, they had enquired with PW 3 – Sudama, a watchman and after enquiry, accused nos.1 to 4 were arrested on the same day under arrest panchanama at Exh. 39. Since PW 11 – PI Khade had gone on leave, further investigation was then entrusted to PW 12 – Sr. PI Shaikh.

PW 12 – Sr. PI Shaikh who was also attached to the Santacruz Police Station was entrusted with the investigation as PW 11 – PI Khade was on leave. On 23/5/2003, the arrest slips of the four accused were prepared. On 23/5/2003 the arrest slips and the palm prints of the four accused along with the palm prints of the witnesses were sent with a forwarding letter. The letter is at Exh. 69. On 23/5/2003 accused – Rajendra Narsayya Tondrapalli was arrested. On 27/5/2003 the clothes of the deceased and other articles found at the scene of the offence were

forwarded to the Chemical Analyzer for examination along with forwarding letter at Exh. 67.

PW 11 – PI Khade, on resuming his duty, was entrusted with the investigation on 6/6/2003. On 13/6/2003 the reports of the Fingerprint Expert were received at Exhs. 57 and 58. On 24/6/2003 the Special Executive Magistrate was requested to conduct the Test Identification Parade. Accordingly, the Test Identification Parade was conducted on 24/6/2003 at the Arthur Road Jail, where PW 3 – Sudama and one Vipul Shashikant Gandhi had identified the accused. Thereafter, supplementary statements of the identifying witnesses were recorded. On 11/7/2003 information was received that accused no. 6 – Pettirajam @ Ramesh Bhumaiyya was coming to Santacruz and, therefore, accused no. 6 – Ramesh was arrested and on his personal search, one passport, election identity card, cash of Rs.120/-, one black coloured rexin purse, cinema tickets and two tickets of the State Transport Bus etc. were found and seized under a panchanama at Exh. 41. During custodial interrogation, the accused no. 6 has expressed his desire to point out the place where he had concealed the cash and jewelery. A memorandum to that effect was recorded in the presence of panchas at Exh. 17. The accused no. 6 led the

police and the panchas to the hut where he was residing and produced a plastic bag, which was concealed in a gunny bag. The plastic bag was found to contain gold ornaments and cash of Rs.10,000/-. The aforesaid articles were seized under panchanama at Exh. 17A. On the same day, the gold articles were examined through a goldsmith Laxman Thimbardas Pokale, who confirmed that they were gold ornaments. Statement of Laxman Pokale was recorded. On 11/7/2003 PW 1 – Rajendra and his wife were called to the police station, where they had identified ornaments. Supplementary statement of complainant was recorded and all the ornaments were sealed under a panchanama at Exh. 18.

On 4/8/2003, the Special Executive Magistrate conducted the Test Identification Parade at the Arthur Road Jail, where two witnesses identified accused – Ramesh. Further to the completion of investigation, a charge-sheet against the accused was submitted.

PW 5 – Balaji Kalaskar, a Fingerprint Expert, who was working in the office of the Fingerprint Bureau at Mumbai had received a message on telephone from the Santacruz Police Station on 20/5/2003 at about 10.45 p.m. He was called to the Santacruz Police Station, but as a vehicle

was not available at 10.45 p.m., he left for Santacruz Police Station on 21/5/2003 at about 5.45 a.m. He reached Santacruz Police Station at about 6.45 a.m. PW 5 – Balaji Kalaskar, along with PW 10 –PSI Desai and the staff left the Santacruz Police Station and visited the scene of the incident. On reaching the scene of the incident, he noticed that the articles in the flat were lying helter-skelter. Two panchas were present along with PSI Desai and in the presence of the panchas, PW 5 – Kalaskar went to the bed room and searched the almirah in order to get the fingerprint of the cupboard. Apart from the almirah in the bed-room, other almirah situated in the other bed-room as well as the drawers in the first bed-room was sprinkled with contrast colour powder. After sprinkling the powder, they noticed four chance prints from the door of one of the almirah situated in the bed-room. One chance print was obtained from the door of another almirah situated in the same bed-room. Two chance prints were obtained from the left door of the almirah situated in the children's room. No other chance print could be found. Thus, in all they had obtained seven chance prints. PW 5 – Kalaskar encircled the portion of the almirahs' with red ink where the chance prints appear and put his signature. He thereafter affixed plain paper in order to preserve the chance prints for obtaining photographs. A panchanama to that effect was scribed in the presence of the panchas.

On 23/5/2003 PW 5 – Kalaskar received the photographs of the chance prints from the office of the photographer. He scrutinized all the chance print photographs and out of the photographs of all the chance prints, found two of the chance print photographs fit for comparison. The remaining photographs of five chance prints were not fit for comparison.

On 26/5/2003, under a covering letter of the Santacruz Police Station, he received fingerprints and the palm prints of the family members of the PW 1 – Rajendra and arrested accused. He has given the names of the persons whose specimen fingerprints and palm prints were received under letter at Exh. 25 Colly. After receiving the fingerprints and the palm prints, he compared those prints with the chance print photographs received earlier. The two photographs of the chance print along with the negatives are at Exh. 28 Colly. The envelope is at Exh. 28A. According to him, one of the chance print matched with the fingerprint / palm print of accused – Rajendra Chinnappa Juvarathi. The chance print photograph marked “B” on comparison tallied with the fingerprint/palm print of accused – Ramesh Rajappa Bandini. A report was accordingly prepared and was forwarded to the panel of seven experts, who concurred with the findings of PW 5 –

Kalaskar. The prints were then circulated to another panel, consisting of three experts, who also confirmed the findings of PW 5 - Kalaskar. The report was ultimately submitted at Exh. 28. Original report is at Exh. 28A.

The postmortem at Exh. 60 indicates that deceased Nirmalaben had sustained the following injuries:

- (i) N.C. at mid-thyroid level is 35 cm.
- (ii) Soft, faint horizontal ligature mark over neck, encircling complete neck and it is hidden in neck fold. Posteriorly it is very faint. It is 30 cm. long and 1 cm. wide. It is 7 cm below chin and going laterally, horizontally backwards.
- (iii) Contused abrasion over inner aspect (mucosal aspect) of right side upper lip 2 cm x 1 cm. red.
- (iv) Contused abrasion over lower lip mucosa aspect mid-paint 1 cm x ½ cm., red.
- (v) Two nail marks over left side of face and just below italaе of nose each size 0.8 cm.

The Medical Officer, therefore, opined that deceased Nirmalaben had died due to violent asphyxia due to smothering associated with strangulation (unnatural).

5. On the case being committed to the Court of Sessions, trial court vide Exh. 3 framed charge against the accused for offence punishable under Section 396 of the IPC. The accused denied their guilt and claimed to be tried. Prosecution, in support of its case, examined 12 witnesses. The defence of the accused was of denial. Trial judge, upon appreciation of the evidence of the prosecution witnesses, convicted and sentenced the appellants and the other accused as afore-stated.

6. We have heard Mr. Yug Mohit Chaudhary, learned counsel for the appellants and the learned APP for the State. In order to effectively deal with the submissions advanced before us by the learned counsel for the parties, it would be useful to refer to the evidence of the prosecution witnesses.

7. Prosecution has examined PW 1 – Rajendra Salot, who is also the first informant. PW 1 – Rajendra deposes that he was residing in the flat along with his family consisting of his father, his mother – Nirmalaben, his wife – Hema, his daughter – Janvi, his son Parth and his brother Pankaj. According to him at the time of the incident, he had employed two

servants, namely, accused no.1 – Gangaram and accused no. 5 – Rajendra. Prior to employing Gangaram and Rajendra as servants, two other servants, namely, Chandresh and Pavan were working as servants in the house and since they had gone to their native place, accused no.1 – Gangaram and accused no. 5 – Rajendra had been employed. Accused No.1 – Gangaram used to come in the morning and used to return in the evening, while accused no. 5 - Rajendra used to come in the morning and used to work for a whole day and used to leave at about 9 to 10 p.m. On the day of the incident i.e. on 20/5/2003 both accused no.1 – Gangaram and accused no. 5 – Rajendra were on duty.

8. According to PW 1 – Rajendra, he was doing a business of importing plastic raw material and his office was situated in Andheri (East). According to him, he normally leaves the house for office at about 2 p.m. and returns at about 9 to 10 p.m. His brother looks after the manufacturing unit, while PW 1 – Rajendra looks after the import business. According to him whenever his mother visits the Jain Temple, his wife and children used to remain in the house along with the servants. His two sisters Ela and Nayna had visited their house about 10 to 12 days prior to the incident. On 20/5/2003, he had left the house at about 2 p.m. for attending his office,

while his sisters along with his father had left the house at about 4 to 4.30 p.m. for shopping. On the same day, his brother had also left the house at about 2 p.m. His wife, son and daughter had left the house for going to the clinic of an Eye Specialist. At that point of time, deceased Nirmalaben and servant Rajendra were the only persons present in the house. PW 1 – Rajendra further deposes that his wife had telephoned him, informing him about her going to the clinic. At about 7.30 or 7.45 p.m. his brother-in-law Vipul Gandhi had telephoned him that he would be coming to the house of PW 1 – Rajendra at about 7.30 to 7.45 p.m. Rajendra also deposes that on the same day his wife and his children had gone to hotel at Andheri at about 8 p.m. At about 8.30 p.m., while Rajendra was returning home, he picked up his wife and his children from the hotel and when he reached his house, he noticed his brother-in-law Vipul Gandhi waiting for him along with the driver of PW 1 – Rajendra on the ground floor. According to Rajendra, his flat is situated on the 6th floor. At about 8.45 p.m. they all reached the 6th floor and Rajendra rung the door bell, but no one opened the door. Rajendra opened the lock with the key which he was possessing and entered the bed-room of his parents. He noticed that the articles were scattered and the doors of the cupboards were opened. On entering the kitchen, he noticed his mother lying on the ground with her hands and legs

tied with cloth. Around her neck, there was cloth and a cable wire was also found around her neck. He, therefore, called Dr. Swami who resides in the same building and Dr. Swami, on examining Nirmalaben, declared her dead. Rajendra went to the Santacruz Police Station and lodged his report at Exh. 15. According to Rajendra, before going to the police station, he had ascertained that gold ornaments worth 500 gms. and cash of Rs.25,000/- had been stolen from the house.

He has admitted that after the police had arrived at the scene of the incident, the procedure was followed by the police. The stolen gold jewelery on its recovery was identified by his wife. According to him, he identified the currency notes on the basis of his initials on the first and last currency notes in the bundle.

9. In cross-examination, he has admitted that about four days prior to the incident, the key of the house had been lost and he had initially suspected that the person who had stolen the key must have been the person who had committed the robbery. He has also admitted as true that one person by name Sanjay had met him at the gate of the compound, who had informed him that he had rung the door bell of the flat but no one had

answered the door. He has admitted that he had reached the police station at about 9.10 p.m. He has admitted in cross-examination that there were 21 flats in the building, while his flat was a duplex flat on 6th and 7th floor. The distance from the gate upto the building was about 5 to 6 ft. and the lift was visible from the outer gate. He has admitted that even the stair-cases were not visible. He then corrected himself to say that it was visible. He corrected the distance between the lift and the gate to be about 15 to 20 ft. He has admitted as correct that the watchman of the building stands at the entry point and the Secretary of the Society Mr. Gandhi stays on the 5th floor. The Secretary had also come on hearing the commotion. He has denied that thereafter he had telephonically contacted the police station. He has also denied the suggestion that Accused – Rajendra had come to the flat at about 9 p.m. for reporting for duty. He has admitted that he had returned from the police station at about 9.10 to 9.15 p.m. He has admitted that the police had accompanied him when he had returned back to his house from the police station. He has denied the suggestion that Vipul Gandhi and his driver were not waiting on the ground floor when he had returned. He has denied the suggestion that Vipul Gandhi had arrived after father of PW 1 – Rajendra had arrived.

10. Prosecution has examined PW 3 – Sudama, who was working as a watchman at the scene of the incident. According to PW 3 – Sudama, on 20/5/2003, he was on duty as a watchman and his duty hours on that day were from 3 p.m. to 11 p.m. According to Sudama, he was standing near Gate No.1. Gate No.1 is between other two gates which are on either side of Gate No.1. According to Sudama, normally the people entered through Gate No.1 in the building, while the other gates are used for entry of the vehicles. According to him whenever any vehicle arrived at the flat of the building, he used to open the gate and after the entry of the vehicle, used to close the gate. He has admitted that he knows accused no.1 – Gangaram, who was employed by PW 1 – Rajendra Salot. He has also admitted that he knew accused no.5 – Rajendra who was also employed by PW 1 – Rajendra Salot. According to him, on the day of the incident, father of PW 1 – Rajendra left the building at about 4.30 p.m. At about 6 p.m. wife and children of PW 1 – Rajendra also left the building. After sometime, the servants of PW 1 – Rajendra i.e. Accused No.1 – Gangaram and accused no.5 – Rajendra came on the ground floor and then left the building. At about 7.30 p.m. accused no.1 – Gangaram alone returned. Accused No.1 demanded chewing tobacco from Sudama. Sudama informed him that he does not chew tobacco. For about 15 to 20 minutes, accused no.1 –

Gangaram was chit-chatting with PW 3 – Sudama. Thereafter accused no.1 – Gangaram went towards another gate. One scooter was parked outside the gate and, therefore, accused no.1 – Gangaram called PW 3 – Sudama. Sudama went upto the said gate and saw the scooter and noticed one girl talking with one boy. Sudama asked Gangaram as to why he was showing this to Sudama. PW 3 – Sudama, therefore, returned to Gate No.1. Immediately, accused no.5 – Rajendra returned back, accompanied by four persons. Gangaram also returned to Gate No.1 from the other gate. According to Sudama, he questioned Gangaram as to who these persons were and Gangaram replied that the four persons were from his native place. Thereafter, accused no.5 – Rajendra and four persons went on the 6th floor, while accused no.1 – Gangaram remained at the said place. About 4 to 6 minutes thereafter, accused no.1 – Gangaram also climbed the staircase. Within couple of minutes accused no.1 – Gangaram returned and was loitering at the said place. Gangaram appeared to be frightened and after about 20 to 25 minutes, accused no.5 – Rajendra and those four other persons also came to the ground floor. Accused No.5 – Rajendra, accused no.1 – Gangaram and one of the persons accompanied Rajendra were speaking in a language with which Sudama was not acquainted. They were speaking in Telgu. One of the persons, out of those four persons, was

holding a plastic bag and thereafter four persons left the premises and immediately accused no.1 – Gangaram also left the premises.

11. After sometime, one person who was an air conditioner mechanic had come at the house of PW 1 – Rajendra. According to PW 3 – Sudama, he used to question everybody who were entering the premises as to whom they wanted to meet. After sometime, the air conditioner mechanic came on the ground floor and informed Sudama that he had rung the call door bell of PW 1 – Rajendra, but no one had opened the door and, therefore, he had kept some articles in the adjoining flat. The said person also enquired from Sudama the time when PW 1 – Rajendra normally returns. Sudama asked the air conditioner mechanic to wait till 9 p.m. so that PW 1 – Rajendra would definitely be home. The air conditioner mechanic was waiting at the gate for PW 1 – Rajendra. At about 8.45 to 9 p.m. PW 1 – Rajendra returned along with his wife and children. PW 3 – Sudama, therefore, informed the air conditioner mechanic that PW 1 – Rajendar had returned home. The air conditioner mechanic thereafter had conversation with PW 1 – Rajendra. At that point of time, Vipul Gandhi, who was also waiting at the gate since 7.30 p.m. along with driver of PW 1 – Rajendra had also come there. The said driver had taken leave on that

day on account of illness and, therefore, was not on duty. Said driver Yadav was talking with Vipul Gandhi. Thereafter, PW 1 – Rajendra, his wife, their children, Vipul Gandhi and driver Yadav went towards their flat. PW 1 – Rajendra called Sudama on the intercom and therefore, Sudama rushed to the flat. PW 1 – Rajendra questioned Sudama as to who had come to his house and Sudama informed him that accused no.1 - Gangaram, accused no. 5 - Rajendra and four others had come to his flat. Thereafter PW 1 – Rajendra took Sudama to the kitchen and pointed out the dead body of Nirmalaben. Wife of PW 1 – Rajendra had slapped Sudama, but the others who were present there told her that it was not the fault of Sudama.

12. Sudama was then taken to the police station for interrogation, but his statement was recorded on the next day. He has admitted that on 24/6/2003 he had been called initially to the police chowky and from there, was taken to the Arthur Road Jail for identification parade. According to this witness, he had identified accused no. 6 and in the subsequent identification parade, had identified the remaining four accused. He states that he was again called for identification parade at the Arthur Road Jail and had identified one accused.

13. In cross-examination, he has admitted that no register is maintained for writing the names of the visitors. In further cross-examination, he has admitted that he was working as a watchman in the building since one and half months prior to the incident. He has admitted that after his duty hours were over, he used to be replaced by another watchman. In cross-examination, it is elicited that normally he used to contact the respective flat owner on the intercom and seek his permission to send the person who had come to meet him. He has admitted that he was not knowing the air conditioner mechanic, who had come in the building. It is elicited in the cross-examination that on intercom, he had tried to contact the flat owner, but no one had answered the phone. It is also elicited in the cross-examination that as the air conditioner mechanic had told him that it was essential to keep some articles, Sudama had allowed him to keep it in the adjacent flat. Omission has been elicited that he had not stated in his previous statement that he had noticed a scooter parked outside the gate and that Gangaram had invited his attention to the parked scooter. Omission is elicited that he had not stated in his previous statement that one girl and one boy were talking with each other standing by the side of the scooter. Omission is elicited that he had not stated in his previous statement that he asked Gangaram as to why he was showing this

to him. Omission is elicited that he had not stated in his previous statement that at that point of time Vipul Gandhi was also waiting at the gate since 7.30 p.m. along with one Yadav, driver of PW 1 – Rajendra. Omission is elicited that he had not stated that wife of PW 1- Rajendra had slapped him, but the others, who were present there, had said that it was not the fault of PW 3 – Sudama. He has then admitted that when he was present in the flat of PW 1 – Rajendra, PW 1 – Rajendra, his wife, Vipul Gandhi and driver by name Yadav were also present. He has also admitted that the accused were not present in the police station when he was present in the police station. He has admitted that when he was present in the police station, Rajendra and Gangaram and two others were also present. He has admitted that he was manhandled by the police when he was interrogated. He has denied the suggestion that he was frightened by the police to give a statement as per their desire or else they would involve Sudama in the case. Omission is also elicited that he had not stated that accused no. 5 – Rajendra, accused no.1 – Gangaram and one person accompanying them were speaking in Telgu.

14. Prosecution has examined PW 8 – Ramkishor Yadav, who deposes that he was employed by PW 1 – Rajendra as a driver for the last

17 years. According to him, on 20/5/2003 since he was indisposed, he had sought leave from PW 1 – Rajendra. According to him, he returned back to his residential quarters and took medicine and rested for some time. He was feeling better and after taking medicine again in the evening, he went for walk. While walking, he came near the building, where PW 1 – Rajendra was residing, at about 7.45 p.m. At that time he noticed Bipinkumar Gandhi, brother-in-law of PW 1 – Rajendra standing on the ground floor of the building. Bipinkumar enquired from PW 8 – Ramkishor as to why he had not attended the duty. They were conversing with each other, while standing on the ground floor in the compound and at that time accused no.1 – Gangaram was seen talking to PW 3 – Sudamad. At about 8 p.m. accused no. 5 – Rajendra also came there. Accused no.5 – Rajendra was accompanied by four other persons. Accused no. 5 – Rajendra had a talk with accused no.1 – Gangaram and they were speaking in Telgu. Accused no.1 – Gangaram and four other persons had then accompanied accused no.5 – Rajendra and went upstairs in the lift. According to PW 8 – Ramkishor, he and Bipinkumar were conversing with each other at the same place. After about 20 minutes, accused no. 5 – Rajendra along with four other persons came on the ground floor. PW 8 – Ramkishor corrected himself to state that accused no.1 – Gangaram did

not initially go along with accused no. 5 – Rajendra and others. On their return, accused no. 5 – Rajendra talked with Gangaram in Telgu. One of the persons who had accompanied Rajendra in the lift, was carrying a plastic bag containing some articles. Accused No.5 – Rajendra along with those four persons then left the building. Accused no.1 – Gangaram also went to the rear of the building.

PW 8 – Ramkishor Yadav deposes that he enquired from Bipinkumar whether PW 1 – Rajendra had returned from the office and Bipinkumar informed him that PW 1 – Rajendra had left the office and was likely to reach his residence at any time and, therefore, Bipinkumar was waiting on the ground floor. Around 8.30 p.m. PW 1 – Rajendra along with his wife and children arrived at the building. On his arrival, PW 1 – Rajendra enquired from Ramkishor Yadav as to how he was and Ramkishor Yadav replied that he was feeling much better. Ramkishor further deposes that he along with PW 1 – Rajendra, his wife and his children and Bipinkumar went to the residence of PW 1 – Rajendra on the 6th floor.

After reaching his flat, PW 1 – Rajendra pressed the door bell

twice or thrice, but there was no response. He, therefore, opened the door of the flat with the key in his possession and on entering the flat, articles were found strum helter-skelter. On going to the kitchen, dead body of deceased Nirmalaben was noticed. PW 8 – Ramkishor further deposes that he knew Gangaram since three years prior to the incident. He knew accused no.5 – Rajendra who had recently joined the service about 15 days prior to the incident. PW 8 – Ramkishor then identified accused nos.2, 3, 4 and 6 as the person who had accompanied accused no. 5 – Rajendra on the date of the incident. He has admitted that his statement was recorded on 21/5/2003. In cross-examination, his attention was drawn to his statement recorded during investigation, particularly to the portion which is reproduced below, which he has admitted to have been correctly recorded:-

“ Yesterday on 20/5/2003 since I was unwell and since I had requested Rajendrabhai, I did not attend my duty. However, today in the evening at 7.45 p.m. since I was feeling slightly better, I went to the house of Rajendrabhai in Maheshwar Prakash Building No.1 for casually standing there.....”

It is argued that this is stated in his statement dated 21/5/2003.

In our opinion, the use of the word “today” obviously has a reference to the

date, 20/5/2003, which is earlier referred in the said statement.

In further cross-examination, he has admitted that his employer PW 1 – Rajendra was owning three cars and another driver by name Sunny had been employed. He has further admitted that neither PW 1 – Rajendra nor his father know how to drive a vehicle. He has admitted that he does not remember in which car PW 1 – Rajendra was travelling on the day of the incident. He has further admitted that entrance gate for entry of the vehicles in the compound of the building was not visible from the place where he was standing along with Vipul Gandhi. He has further admitted that when he was standing along with Vipul Gandhi, one Indica car had gone out. Two remaining cars were parked in the compound. He has further admitted that Vipul Gandhi had good relations with his mother-in-law (deceased Nirmalaben) and father-in-law. He was unable to state if Vipul Gandhi used to visit the house of PW 1 – Rajendra in the absence of PW 1 – Rajendra. He has admitted that Pankajbhai knew how to drive. He could not state as to who was driving the car in which PW 1 – Rajendra and his family members were travelling on the day of the incident. He has also admitted that he was standing near Vipul Gandhi from 7.45 to 8.45 p.m.

In further cross-examination, he has admitted that on 20/5/2003 at about 10.45 a.m. parents of PW 1 – Rajendra, wife and two daughters of PW 1 – Rajendra and Pankajbhai were present in the flat when PW 8 – Ramkishor informed PW 1 – Rajendra that he could not attend duty as he was indisposed. He has admitted that he had disclosed his age as 46 years in his statement recorded during investigation. He has admitted that he had an opportunity to see servants along with four other persons for few seconds while coming in the building and going out of the building. Omission has been elicited that he had not stated in his previous statement that on coming to the building, PW 1 – Rajendra had asked PW 8 – Ramkishor as to how he was and that Ramkishor replied that he was feeling better. Omission is also elicited that he had not stated in his previous statement that accused no. 1 Gangaram had enquired from him as to when PW 1 – Rajendra was likely to go out of station.

15. Prosecution has examined PW 2 – Kuppu Swami, who was called as a panch to the police station. According to PW 2 – Kuppu Swami, on 12/7/2003, he was called to the police station, where accused no. 6 – Petti Rajan @ Ramesh was interrogated by the police. During interrogation, the appellant/accused no. 6 expressed his willingness to

point out the place where ornaments and cash had been concealed. His statement was accordingly scribed and the memorandum is at Exh. 17. The appellant/accused no. 6 asked the driver to stop the vehicle at the STD Booth near the Daulatnagar hutments and led the police and the panchas to a hut, which was two storied. The accused led the police and the panchas to the top floor and from the room produced one gunny bag. He removed one plastic bag, which was kept in the gunny bag and produced gold ornaments and cash from the plastic bag. There were in all 26 gold ornaments and one bag of 100 rupee currency notes. The panch witness has identified the gold ornaments, which are Articles A2 to A26. The plastic bag is identified as Article A1. The currency notes i.e. bag of 100 rupee currency notes is identified at Article A27. All these articles were seized under panchanama at Exh. 17A.

PW 2 – Kuppu Swami further deposes that he was again called by the police to the police station on 18/7/2003. Complainant PW 1 – Rajendra was also present there along with a lady, who identified the gold ornaments, which were then re-sealed. A panchanama was accordingly drawn at Exh. 18.

16. In cross-examination, he has admitted that as he was a watchman, police constable Satam was acquainted with him. He has admitted to have acted as a panch once in the past also. He was asked if he had acted as a panch in Crime No. 34 of 2001, Crime No. 1249 of 2001, Crime No. 629 of 2001 and Crime No. 273 of 2003 registered at the Santacruz Police Station. He has answered that he might have acted as a panch in these cases. He has admitted that the hut, where the accused had led them, was chained from outside, but was not locked. The owner of the hut was present on the ground floor.

In the seizure panchanama at Exh. 17A, in respect of the seizure of the bag of 100 rupee notes, it is scribed that there were initials on the currency notes.

17. Prosecution has examined PW 9 - Mohd. Zahir Gulam Shaikh, who was examined as a panch in respect of the arrest panchanama of accused nos.1 to 4 dated 21/5/2003 at Exh. 39. He deposes that on 11/7/2003, in his presence, accused no. 6 – Pettirajan @ Ramesh Bhumaiyya Kalleda was searched by the police and during his search, the following articles were found, viz.:

- (a) One pass-port
- (b) Election card.
- (c) Cash amount of Rs.120/-.
- (d) One cinema ticket.

A panchanama was accordingly scribed at Exh. 40.

In cross-examination, he has admitted that he had acted as a panch in 2 or 3 cases of Santacruz Police Station. He has also admitted that as he likes to extend his help to the police, he is selected as a panch by the police. He has further admitted that he was informed by the police that accused no.6 – Ramesh was in their custody but he does not remember whether police disclosed to him the place, date and the time when accused no. 6 – Ramesh was arrested. He has admitted that he was called as a panch at about 9 to 9.30 p.m. The trial Judge questioned this witness, whether a bus ticket of the Andhra Pradesh State Transport, one receipt of the Amravati Lodge, a telephone receipt and one black rexin purse were recovered from accused no. 6. He has answered the court question that he recollected that other items were also recovered, but does not distinctly remember their description. The arrest panchanama commenced at 2.30 and concluded at 3 p.m., while the witness has admitted that he had been

called by the police around 9 to 9.30 p.m.

18. Prosecution has examined PW 4 – Vinod Khajne, a Special Executive Officer, who had conducted the Test Identification Parade. PW 4 – Vinod deposes that he was working as the Special Executive Officer and on 24/6/2003 PI Khade of Santarcuz Police Station had requested him to conduct a Test Identification Parade in Crime No. 197 of 2003. According to PW 4 – Vinod at about 1.15 p.m. he reached the Arthur Road Jail. Prior to that, he had gone to the Santacruz Police Station and from Santacruz Police Station he had gone to the jail in a police vehicle along with two identifying witnesses, two panchas and PI Khade. According to him, the witnesses who had accompanied him were Vipul Gandhi and PW 3 – Sudama. He then deposes about the steps taken by him for conducting the Test Identification Parade. He also deposes that out of the dummies brought by the jail officers, he had picked up 30 dummies for Identification Parade, considering the general physic, height and general features of the face of the dummies by comparing the same with the accused. The accused and the dummies stood in a line and the panch witness was asked to bring one witness. After the panch had left the hall, he asked the accused to choose a place of their liking in the line-up and they may change their

clothes, if they desired. The accused, however, declined to change their clothes and stood at the places desired by them. Panch Rajeshkumar called witness Vipul Gandhi. PW 4 – Vinod apprised Vipul Gandhi the purpose of the parade and also instructed the witness that in case he identify any accused, he should touch the body of the person. Accordingly, Vipul Ghandi inspected identification parade and identified the accused. Vipul Gandhi was then asked to leave the hall and the jail officials took the witness out of the hall premises. Another panch Kuppu Swami was then asked to bring the other witness. After the said panch left the hall for brining the witness, PW 4 – Vinod asked the accused if they wish to change their place in the line-up and also offered them the choice to change their clothes. The accused, however, declined to change their position and also declined to change their clothes. Panch Kuppu Swami brought PW 3 -Sudama in the hall. The witness was then apprised the purpose of the identification parade and was also instructed in similar manner as Vipul Gandhi. Sudama identified all the five accused in the Test Identification Parade. Sudama was then asked to leave the hall and accordingly left the hall. The jail officials were called in the hall and were asked to take the dummies and the accused away. A panchanama of the Test Identification Parade was then drawn and read over to the panchas and was signed by the

panchas. The memorandum is at Exh. 22.

On 4/8/2003 PW 4 – Vinod was again requested to conduct a Test Identification Parade in respect of the 6th accused involved in the crime. He accordingly went to Santacruz Police Station, where two panchas and the two witnesses were present. He thereafter reached Arthur Road Jail at about 1.15 p.m. along with the panchas and the witnesses. The police officials presented a letter to the jail authorities and thereafter the jail authorities made preparation for the identification parade. The panchas and the identifying witnesses then were called inside the hall premises and were taken to a room. The witnesses were made to sit in the office. The dummies and the accused were already present and considering the description of the accused, PW 4 – Vinod chose the dummies. He, in all chose six dummies for the Test Identification Parade. He then requested the remaining dummies to leave the room. Panch Kuppu Swami was then requested to bring the identifying witness Vipul Gandhi. The accused was informed the purpose of the parade and was also asked if he wanted to change his position in the parade as well as change his clothes. The accused, however, declined to change his clothes and opted to stand at the place of his choice. Panch Kuppu Swami then brought the identifying

witness Vipul Gandhi for the identification parade. The identifying witness was given instructions similar to the instructions given to him in the earlier Test Identification Parade. Vipul Gandhi identified the accused. The witness was then taken out of the hall where the parade was held and precaution was taken to ensure that he does not meet the other identifying witness. The another panch was then asked to bring the other witness. The accused was asked if he wanted to change his place in the line-up and also to change his clothes. PW 3 – Sudama also identified the accused. After the conclusion of the parade, the jail authorities were called and were asked to take away the dummies and the accused. The memorandum of the Test Identification Parade is at Exh. 23.

19. In cross-examination, he has admitted as true that Vipul Gandhi and PW 3 -Sudama and the police officers were sitting in the same room. He has denied the suggestion that the police had already shown the accused to PW 3 – Sudama. In further cross-examination, he has admitted that before the identification parade, he did not ask the accused as to whether they were seen by the witnesses or not. He has admitted that he had not asked the witnesses whether the police had shown the accused to them. He has further admitted as correct that panch Kuppu Swami had acted as a

panch in 2 to 3 other identification parades. He has also admitted that even in respect of second identification parade, the police had brought the panchas. He has admitted that the first page of Exh. 23 does not bear the signature of the panchas nor does it bear the initials of PW 4 – Vinod. He has admitted that the pages were not numbered.

20. Prosecution has examined PW 6 – Mohd. Ghouse Rehman Khan, a panch to the panchanama at Exh. 33 in respect of the finding of the chance prints. PW 6 – Mohd. Ghouse deposes that he was called by the Santacruz Police Station at the scene of the incident and had gone to the 6th floor. He was introduced to one officer by a constable. The Inspector informed him that robbery had taken place and Fingerprint Expert was going to visit the scene of the offence. The Fingerprint Expert was present there along with the officer. He then deposes that he does not know any person by name Narendra Yusuf Patel. He deposes further that in his presence, the Fingerprint Expert sprinkled black powder on the door of the cupboards at 10 to 12 places. The Fingerprint Expert found chance print at four places. The four chance prints were found on one cupboard only. One chance print was found on another cupboard. He deposes that thereafter they went to the next room and the Fingerprint Expert sprinkled black

powder on the door of the cupboard. The Fingerprint Expert found two chance prints on the door of the cupboard. A panchanama was accordingly scribed and explained to him in Hindi. The said panchanama is at Exh. 33.

In cross-examination, he has admitted that the police must have come to call him at about 8.15 a.m. He has admitted that he might have reached the scene of the incident before 8.45 a.m. or 9 a.m. He has admitted that except him, Fingerprint Expert and the Police Officer, nobody else was present. The panchanama is at Exh. 33 states that the panchanama commenced at 8.45 and concluded at 9.30 a.m. The name of the other panch was disclosed as Narendra Yusuf Patel.

21. Prosecution has examined PW 5 – Balaji Kalaskar, the Fingerprint Expert, who has deposed about finding of the chance prints. According to him, he had reached Santacruz Police Station at about 6.45 a.m. and thereafter along with PW 10 – PSI Desai, had gone to the scene of the incident. In cross-examination, he has admitted that he had left the scene of the incident around 8.30 a.m. He has further admitted that in his presence, photographs had not been taken. He has further admitted that he had received Exh. 28A which was not sealed but was open. He has

admitted as correct that he had not given specific number to the seven chance prints found in Flat No. 18. He has denied the suggestion that though specific number was not given to the chance prints, he would be able to state from memory that photograph "B" is the chance print developed from the door of almirah in the first bed room.

22. Prosecution has examined PW 7 – Sanjay, a photographer who had taken the photographs of the chance prints. PW 7 – Sanjay deposes that he was attached to the DCB CID as a police photographer. On 21/5/2003 his office had received a message from the Santacruz Police Station. Since the message was incomplete, another message was received from the ACP's office giving complete details. In that message, photographer was asked to attend the case registered as Crime No. 197 of 2003 at the address of the scene of the incident. On 21/5/2003, he reached Santacruz Police Station in the evening and along with one constable went to the scene of the incident. He noticed certain fingerprints which had been found on the cupboard in the said flat. The fingerprints were covered with a white paper. According to him, there were in all five fingerprints covered with white papers. He has further deposed that two fingerprints were developed on the cupboard situated in one bed-room,

while there were three fingerprints found in another bed-room. He removed the white papers and took photographs of the chance prints found on the cupboards. He then took photographs of the chance prints found on the cupboard in another bed-room. He developed the negatives of the chance prints and the photographs on the next day i.e. on 22/5/2003 and forwarded the negatives as well as positives of the five chance prints to the Fingerprint Expert. According to him, he had made the necessary entry in respect of the five chance prints in the register. The entry in the register is at Exh. 36.

23. In cross-examination, he has admitted that no panchanama had been scribed in his presence when he took the photographs of the chance prints. He has also admitted that his statement had not been recorded by the police. He has admitted that he had not enlarged the photographs as shown in Exh. 29 Colly. He has admitted that one Shri Plave was assigned with the work of enlarging the chance prints developed by him. Exh. 36 refers to the crime number and there is also reference to taking of five photographs.

24. Mr. Yug Mohit Chaudhary, learned counsel for the appellants

has urged before us that in respect of the holding of the Test Identification Parades, there are several infirmities due to which no reliance can be placed on the Test Identification Parades. According to the learned counsel for the appellants, the officer conducting the Test Identification Parades had not, (1) asked the accused if they had been shown to the witnesses, (2) nor was such a question asked to the identifying witnesses, (3) five accused had been placed in one line-up which was contrary to instructions in the Criminal Manual, (4) witnesses had been kept in the same room, (5) accused no. 6 had a tattoo mark which is admitted by the Investigating Officer and there is no evidence that the Tattoo mark had been covered nor is there any evidence that the dummies too had a similar tattoo mark, (6) the panchas to the Test identification Parades were regular panchas on whom no reliance can be placed, (7) it was extremely suspicious that the Test Identification Parade of five accused was concluded in 15 minutes, while the Test Identification Parade in respect of one accused took 30 minutes, (8) the ages of the accused and the ages of the dummies differed substantially and (9) the identifying witnesses had been called to the police station where the accused had been arrested.

25. The learned APP has supported the findings arrived at by the

trial court and has urged before us that despite the infirmities in the Test Identification Parade, the Test Identification Parade corroborates the substantive identification of the accused by PW 3 – Sudama and PW 8 – Ramkishor in the court.

26. It is true that several infirmities have been pointed out in respect of the holding of the Test Identification Parade. A reference at this juncture may usefully be made to the observations of the Supreme Court in para 22 of the judgment in State of Maharashtra vs. Suresh [(2000) 1 SCC 471], which read as follows:-

“22. If potholes were to be ferreted out from the proceedings of the Magistrates holding such parades possibly no test identification parade can escape from one or two lapses. If a scrutiny is made from that angle alone and the result of the parade is treated as vitiated every test identification parade would become unusable. We remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to

satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. So the officer conducting the test identification parade should ensure that the said object of the parade is achieved. If he permits dilution of the modality to be followed in a parade, he should see to it that such relaxation would not impair the purpose for which the parade is held (vide *Budhsen v. State of U.P.*; *Ramanathan v. State of T.N.*).”

The memorandum of the Test Identification Parade does not constitute substantive piece of evidence. Test Identification Parade is a step in the investigation and the identification of the accused by a witness lends an assurance to the Investigating Officer that the investigation is proceeding in the right lines. The identification of the accused in the court is the substantive identification of the accused and the identification in the Test Identification Parade only lends corroboration to the substantive identification. Thus, even if the Test Identification Parade is not taken into consideration, the identification of the accused in the court cannot be faulted on that score.

27. Mr. Chaudhary, learned counsel for the appellants has urged

before us that no reliance can be placed on the disclosure memorandum of the accused leading to the discovery of the jewelery and the cash. According to the learned counsel for the appellants, (1) the panchas were habitual witnesses who had admitted to have worked as panchas in other cases, (2) jewelery has not been identified by PW 1 – Rajendra in the court, (3) the Serial Number of the currency notes was not mentioned in the FIR, (4) the FIR also does not refer to the fact that the first and the last currency notes in the bundle bore the initials of PW 1 – Rajendra. It is urged that there is no evidence of sealing of the articles immediately on their seizure.

The learned APP has urged before us that merely because the witnesses had been examined in respect of various panchanamas in the same case or that they had been examined as panch witnesses in other cases would not be a ground ipso facto to disbelieve the witnesses. According to the learned APP, the evidence of the Investigating Officer establishes the information given by the accused leading to the consequential seizure and thus, if the evidence of the panch witnesses is excluded, the disclosure as well as the seizure is proved on the basis of the evidence of the police officer.

28. In the present case, a reference may usefully be made to the judgment of the Supreme Court in *Khujji @ Surendra Tiwari vs. State of Madhya Pradesh* [**AIR 1991 SC 1853**]. The Supreme Court in the said judgment has held thus :-

“9.The mere fact that he was a witness to all the Panchanamas prepared by the investigating officer is by itself not sufficient to discard his evidence. Even in the case of an interested witness, it is settled law that his evidence cannot be overlooked merely on that ground but at the most it must receive strict scrutiny.....”

29. In our opinion, merely because the panchas had been examined as panch witnesses in few cases of the same police station would not render their evidence inadmissible. It would at the most put the court on guard and would entail a closer scrutiny of their evidence to determine if the witnesses are reliable. Error in stating the time would not brand the witnesses as liars. The panch witnesses were deposing on the basis of memory and, therefore, failure to state the exact time or giving of a wrong time of the drawing of the panchanama would not be a ground to suspect the credibility of the witnesses. At the close of their cross-examination, these panch witnesses have emerged as truthful witnesses and we do not

find any ground to discard their evidence on the sole ground that they had acted as a panch in the earlier cases. The currency notes found in the possession of accused have been identified by PW 1 – Rajendra on the basis of his initials. The fact that the currency notes bore the initials/signature of PW 1 – Rajendra is reflected in the seizure panchanam which was drawn immediately on seizure. Failure to mention the fact that the currency notes bore the initials/signature of PW 1 – Rajendra in the FIR cannot be a ground in recording a finding that currency notes had been tampered with, particularly as the seizure panchanama was drawn immediately, which reflects that the currency notes bore the signature / initials of PW 1 – Rajendra. It is true that the jewelery has not been identified by PW 1 – Rajendra. However, there is evidence on record by way of a panchanama which suggests that wife of PW 1 -Rajendra had identified the jewelery and a panchanama had been accordingly drawn. Though the said panchanama may be inadmissible in evidence, yet the fact of identification cannot be doubted. Moreover, a huge cache of jewelery was found at the behest of the accused and the accused has not offered any explanation regarding the possession of the jewelery. The accused has not claimed that the jewelery belongs to him. In our opinion, therefore, despite the fact that PW 1 – Rajendra does not identify the jewelery, the

information of the accused leading to the seizure of the jewelery is not affected at all. Failure of the police to lead evidence in respect of the sealing would not in any manner affect the seizure as there could be no question of tampering of the jewelery nor could there be a tampering of the currency notes, particularly no allegation could be made against the prosecution that signature of PW 1 – Rajendra was obtained on the currency notes subsequently as the panchanama reflects that the currency notes bore the signature of the complainant. In our opinion, therefore, the prosecution has proved beyond doubt that at the behest of accused no. 6, jewelery and cash was discovered.

30. Mr. Chaudhary, learned counsel for the appellants has urged before us that according to PW 7 – Sanjay he had taken only five photographs of the chance prints and had sent the photographs to the expert. It is urged before us that the time of the panchanama directly conflicts with the evidence of PW 5 – Balaji Kalaskar who states that he had left the flat at about 8.30, while the panchanama had commenced at 8.45 a.m. It is also urged before us that there is no evidence to show as to who had taken the specimen thumb and palm impressions of the accused. The names of the accused, whose specimen prints had been sent to PW 5 –

Kalaskar differ with the names of the accused. There is no evidence that print of accused no. 4 was sent to expert. In 313 statement the accused were not questioned regarding taking of their specimen prints.

31. We have carefully scrutinized the evidence of PW 5 – Kalaskar, PW 6 - Mohd. Ghouse and PW 7 – Sanjay in the light of the submissions of the learned counsel for the appellants. The evidence of PW 7 – Sanjay clearly establishes that only five chance prints were found and he had taken photographs of only five chance prints. The evidence of PW 5 – Kalaskar indicates that he found five chance prints not fit for comparison. There is no evidence as to who had taken the photographs of the remaining two chance prints. Thus, no link has been established by the prosecution regarding the chance prints and the specimen prints of the accused and in the absence of such evidence, linking them together, in our opinion, it would be wholly unsafe to place reliance on the evidence of the Fingerprint Expert.

32. The evidence of PW 3 – Sudama indicates that he had seen accused no.1 – Gangaram, accused no. 5 – Rajendra and the other accused. The evidence of PW 3 – Sudama further discloses that he did not have a

fleeting glimpse of the accused but that he had seen the accused for sufficiently long time so as to enable him to identify the accused in the Test Identification Parade, which he did. PW 3 – Sudama identified the accused in the court also. The learned counsel for the appellants has urged before us that it would be extremely hazardous to place implicit reliance on the evidence of PW 3 – Sudama in respect of identification of the accused, particularly in the light of the infirmities in the holding of Test Identification Parade and the fact that he had seen the accused at night.

It is not suggested to PW 3 – Sudama that there was darkness at the place where he was standing. He was working as a watchman and since there were gates, there would be adequate illumination of the exterior lights of the building. As pointed out by us above, the evidence of PW 3 – Sudama has a ring of truth and in our opinion he had sufficient time for observing the features of the accused. This fact is buttressed by the identification of the accused in the Test Identification Parade, though the Test Identification Parade may be riddled with infirmities. The identification in the court would not be rendered valueless merely because of the infirmities in the holding of the Test Identification Parade, particularly when the witness identifying the accused in the court had

sufficient time of observing the features of the accused. This witness had also heard the accused conversing with accused no. 1 – Gangaram and accused no. 5 – Rajendra. It is not as if the appellants entered the building and left the building immediately and PW 3 – Sudama had only a fleeting glimpse of the accused. These accused had stood at the place i.e. the gate where PW 3 – Sudama was standing. Thus, in our opinion, the identification of the accused by PW 3 – Sudama cannot be faulted in the least. The evidence of PW 3 – Sudama and the subsequent discovery establishes the offence against the appellants beyond reasonable doubt.

33. Failure of the prosecution to examine Vipul Gandhi would not in any manner affect the credibility of the evidence of PW 3 – Sudama. It is true that for reasons undisclosed, the prosecution chose not to examine Vipul Gandhi. However, the evidence of Vipul Gandhi was not essential for unfolding prosecution case further and, therefore, no adverse inference can be drawn as against the prosecution for its failure to examine Vipul Gandhi. The learned counsel for the appellants, by referring to the evidence of the Investigating Officer, has pointed out to us that there are several infirmities in the investigation and the accused, therefore, would be entitled to be given the benefit of doubt in the light of the infirmities. In our

opinion, infirmities in the investigation cannot be used as lever for otherwise discarding the reliable evidence of the other witnesses. There may be inconsistency in the date of arrest of the accused but that by itself is not enough to give benefits of doubt to the accused.

34. The learned counsel for the appellants has also urged before us that in the prescribed form of the FIR, the description of the stolen property is given as 500 gms. of gold ornaments and cash amount of Rs.2,75,000/-. The learned APP had invited our attention to Exh. 70 which is the remand form, which has clarified the description of the stolen property as ornaments weighing 500 gms. and cash of Rs.25,000/-, the total value being Rs.2,75,000/-.

35. Though the appeals filed by the other accused had been dismissed by the Division Bench of this Court by its judgment dated 14/7/2013, we had re-appreciated the evidence in order to determine if the offence against the appellants has been proved beyond reasonable doubt. On such appreciation, in our opinion, the offence against the appellants has been proved beyond reasonable doubt and the conviction of the appellants cannot be faulted with.

36. Thus, there is no merit in the present appeal and the appeal is therefore, dismissed confirming the conviction and sentence of the appellants/Original Accused Nos. 4 and 6. The original accused no. 6 – Pettirajan @ Ramesh Bhumaiyya Kalleda has been released as it has been established that he was a juvenile in conflict with law.

(DR. SHALINI PHANSALKAR-JOSHI,J.)

(P. V. HARDAS,J.)