

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.441 OF 2005

Futarmal Kapurji Borana	]	
Aged about 22 years,	]	
R/of Room No.37, Bldg. No.12,	]	
Funaswadi, Parsi Agiary Lane,	]	 Appellant /
Charni Road, Mumbai – 400 002.	]	(Org. Accused No.4)

Versus

The State of Maharashtra	]	
Through L.T. Marg Police Station	]	 Respondent

ALONG WITH

CRIMINAL APPEAL NO.663 OF 2014

Laxman Baburamji Parihar	]	
Age – 34 years,	]	
R/of Jana, Post Balpara, PS Sumerpur,	]	 Appellant /
Dist. Pali, Rajasthan.	]	(Org. Accused No.2)

Versus

The State of Maharashtra	]	
Through L.T. Marg Police Station	]	 Respondent

AND

CRIMINAL APPEAL NO.664 OF 2014

Shankar @ Sanjay Mangilal Rawal	]	
Age – 23 years,	]	
R/at Thomas Chawl, R. No.4,	]	
Ban Dongri, Kurar Village,	]	
Malad (E), Mumbai – 400 097.	]	
<u>And</u>	]	
Dist. Shiroi, Viyyajawal,	]	 Appellant /
Tehsil – Shivgankar, Post – Mandar.	]	(Org. Accused No.3)

Versus

The State of Maharashtra	]	
Through L.T. Marg Police Station	]	 Respondent

Mr. Aniket Vagal for the Appellants / Original
Accused Nos.2, 3 and 4.

Mr. H.J. Dedia, A.P.P., for the Respondent / State.

**CORAM : SMT. V.K. TAHILRAMANI, ACTING C.J. &
DR. SHALINI PHANSALKAR-JOSHI, J.**

RESERVED ON : 11TH DECEMBER 2015.

PRONOUNCED ON : 17TH DECEMBER, 2015

JUDGMENT : [Per Dr. Shalini Phansalkar-Joshi, J.]

1. These three Criminal Appeals are arising out of the one and same Judgment and Order dated 23rd November 2004 in Sessions Case No.270 of 2002 of Additional Sessions Judge, Greater Bombay; hence, they are being decided by this common Judgment. These Appeals are preferred by Original Accused Nos.2, 3 and 4 and, for the sake of convenience, in these Appeals also, the Appellants are referred by their original nomenclature as “Accused Nos.2, 3 and 4”. By the impugned Judgment, they have been convicted for the offence punishable under Section 396 of IPC and sentenced to suffer R.I. for life and to pay fine of Rs.1,000/- each, in default to suffer further R.I. for four months; for the offence punishable under Section 395 of IPC and sentenced to suffer R.I. for life and to pay fine of Rs.1,000/- each, in default to suffer further R.I. for four months; for the offence punishable under Section 449 of IPC and sentenced to suffer

imprisonment for life and to pay fine of Rs.500/- each, in default to suffer R.I. for four months, with a further direction that all the substantive sentences of imprisonments are to run concurrently.

2. Facts of the Appeals can be stated, in brief, as follows :-

PW-1 Chetan Shah has been doing the wholesale business of jewelery in the name of 'K.K. Jewellers' along with his father at Kalbadevi on the Second Floor, above Heera Mithan in Room No.5. On 11th October 2001, he attended the shop upto 7:45 pm, took the stock of gold ornaments, which were weighing about 2,300 gms., and kept those ornaments in the safe in drawers of the cupboard. He also counted the cash, which was of Rs.1,00,000/-. He kept it in another Godrej cupboard. Further, he kept the key of safe in the drawer and the key of the drawer in the cupboard of front cabin. As usual, he carried with him the key of the front cabin cupboard and the main door of the shop. The spare key of the main door of the shop used to be with the deceased Premaram, who was working in the said shop as skilled labour. On that day, Premaram remained in the shop, when PW-1 Chetan left the shop in the night at about 7:45 pm.

3. On the next day, when PW-1 Chetan came to the shop, as usual, at about 12:30 pm, he found that the main door of the shop was locked only

by its self-lock. He opened the door with the key with him, entered inside the shop and found all the articles therein lying scattered. The wooden cupboard and the Godrej Almirah was damaged and opened. The safe and drawers were also opened and all the gold ornaments were found missing from the shop. As he noticed that deceased Premaram was also not there, he phoned Jeevankumar Jain, his sister's husband, and also informed the said fact to his paternal uncle Kantilal Jain. Both of them came there within 10 to 15 minutes.

4. Kantilal Jain was having the shop adjacent to the shop of PW-1 Chetan and, there, the employees in both the shops used to sleep, as it was having the facility of kitchen, bath-room and latrine. Meanwhile, Premaram's brother Ruparam was also informed and he also rushed there. When Kantilal's shop was opened, they found the mattresses kept one upon another in disorderly manner. On looking carefully, they noticed the portion of the foot of a human being. On removal of the mattresses, they saw the dead body of Premaram with injuries on his chest and hands. His legs were tied with nylon rope from back side. His mouth was gagged with red cloth, whereas, his neck was compressed with clutch wire. The information was then, accordingly, given to L.T. Marg Police Station on phone.

5. On receipt of this information, PW-21 PSI Maruti Shinde, along with PW-25 ACP Anil Nalawade came to the spot of incident. There he recorded the complaint (Exhibit-18) of PW-1 Chetan Shah and on phone obtained Crime No.253/2001, which came to be registered for the offences punishable under Sections 452, 392, 394 and 302 of IPC. Thereafter he made Inquest Panchanama (Exhibit-31) and sent the dead body for postmortem examination. PW-21 PSI Shinde then made the Scene of Offence Panchanama (Exhibit-33) of both the shops and collected some incriminating articles, which he deposited after returning to L.T. Marg Police Station in the Muddemal Property Room.

6. Further investigation of the case was taken over by PW-25 ACP Anil Nalawade. He recorded the statements of witnesses and from the statement of PW-2 Ram Yadav, the names of the Accused were transpired. On 15th October 2001, PW-22 API Ramchandra Dhawale arrested Accused No.1 Chhagan and Accused No.2 Laxman and seized from their possession various stolen articles and gold ornaments, like, two gold pendants from Accused No.1 and one wrist watch of Titan Make and two gold pendants from Accused No.2. The blood stains were found on the shirt of Accused No.2 Laxman. These articles were seized under Panchanama. As abrasion marks of 3 to 4 days old were found on the chest of Accused No.2 Laxman and Accused No.1 Chhagan, both of them

were referred for medical examination.

7. On 16th October 2001, PW-22 API Dhawale arrested Accused No.3 Shankar. On his person also, 4 to 5 days old abrasions were found on his chest and hand. Hence, after the Arrest Panchnama (Exhibit-52), he was also referred for medical examination. On 17th October 2001, API Parab recorded the statement of PW-3 Venudas Vaishnava and seized stolen property produced by the said witness. On 19th October 2001, API Mallesh, who was assisting PW-25 ACP Nalawade, recorded the Memorandum Panchanama of Accused No.1 Chhagan, which led to the discovery of stolen property. It was identified by PW-1 Chetan Shah on 20th October 2001. On 22nd October 2001, at the instance of Accused No.3 Shankar, some more stolen property was discovered, which came to be seized in pursuance of Memorandum Panchanama (Exhibit-48) and Seizure Panchanama (Exhibit-48A).

8. On the basis of the information received, PW-25 ACP Nalawade sent PW-23 PI Tukaram Wahile to Bhuvneshwar. There, on 25th October 2001, Accused No.4 Futarmal and Accused No.5 Pradeep came to be nabbed. Their personal search was taken and they were arrested vide Panchanama (Exhibit-90). They were also referred for medical examination. They were produced at L.T. Marg Police Station on 27th

October 2001. During custodial interrogation, Accused No.5 Pradeep showed willingness to point out the place from where he has collected the clutch wire and also to point out the place where he had concealed stolen articles. Accordingly, the Memorandum Panchanama (Exhibit-42) was made and thereafter Accused No.5 guided the Police and Panch to the room where PW-10 Rajendra Vichare was present and at the instance of Accused No.5, he produced the key of the suite-case, in which various gold ornaments were kept. They were seized under Panchanama (Exhibit 42-A). On 7th November 2001, again at the instance of Accused No.4 Futarmal, some more stolen gold ornaments came to be seized from PW-15 Hajarimal Gujar on 2nd November 2001 and on 13th November 2001, Test Identification Parades of Accused Nos.1 to 3 and Accused Nos.4 and 5 were held, respectively, by PW-16 Special Executive Officer Dushant Oza. The Postmortem Report (Exhibit-83) was received on 2nd January 2002. Hence, further to completion of investigation, PW-25 ACP Nalawade filed Charge-Sheet in the Court of Metropolitan Magistrate, 28th Court, Esplanade, Mumbai, against the Accused.

9. On committal of the case to the Sessions Court, the Trial Court framed charge against the Accused vide Exhibit-6. The Accused pleaded not guilty to the charge and claimed trial, raising the defence of denial and false implication.

10. In support of its case, prosecution examined in all 25 witnesses and on appreciation of their evidence, the Trial Court was pleased to hold the guilt of all the 5 Accused to be proved beyond reasonable doubt and convicted and sentenced them, as aforesaid.

11. This Judgment of the Trial Court is challenged in these Appeals. As regards Accused No.1 Chhagan, his Criminal Appeal No.417 of 2005 came to be disposed of in pursuance of the finding that he was juvenile-in-conflict-with-law at the time of incidence and hence he was released from Jail on 21st July 2015.

12. As regards Accused No.5 Pradeep, as per the Report submitted by the Superintendent of Nashik Road Central Jail, he is reported to be dead on 24th August 2008, while he was undergoing the sentence of imprisonment in Jail and was released on parole. Hence Appeal preferred by him, if any, stands abated.

13. In these Appeals, we have heard learned counsel for Accused Nos.2 to 4 Mr. Vagal, who has challenged the Judgment of the Trial Court on the ground that the circumstances on which the prosecution has relied upon are not established satisfactorily beyond reasonable doubt, whereas, learned A.P.P. Mr. Dedia has supported the Judgment of the

Trial Court with a fervent plea that prosecution has not only established the incriminating circumstances against Accused, but those circumstances are also of a clinching nature and no other inference, but that of the guilt of the Accused can be drawn from those circumstances. In our considered opinion, before adverting to the rival submissions advanced by them, it would be useful to refer to the evidence on record.

14. As to the homicidal death of Premaram, there is evidence of PW-1 Chetan Shah, who was first in time to find his dead body concealed in the mattresses in Room No.5, where Deceased Premaram used to sleep. There is corresponding evidence of PW-21 PSI Shinde, who has conducted Inquest Panchanama (Exhibit-31) on the dead body and sent it for postmortem examination. The postmortem was conducted by PW-20 Dr. Kalyani Joshi at G.T. Hospital, Mumbai. On examination, she found following external and internal injuries :-

External Injuries :

- One ligature mark seen encircling right wrist over flexor aspect admeasuring 10 cm x 0.5 cm.
- One ligature mark seen encircling left wrist over flexor aspect and lateral part of extensor aspect measuring 15 cm x 0.05 cm.

- One ligature mark seen on left forearm measuring 5 cm above wrist over flexor aspect and lateral part of extensor aspect, measuring 15 cm x 0.5 cm.
- Two ligature marks seen (i) on left ankle and (ii) above lateral aspect of flexor part, both measuring 9 cm x 0.5 cm.
- One ligature mark seen above right ankle lateral aspect measuring about 6 cm x 0.5 cm.
- Ligature mark seen at the root of neck, below thyroid cartilage transverse encircling around the neck half cm in width, grooved in front and lateral aspect. Width is broader at back about one cm. Brownish colour. Haemorrhages seen around ligature marks, right lateral aspect and back. When neck is extended, ligature is 8 cm below chin and 4 cm below angle of mouth, when stretched to opposite side.

Internal Injuries :-

- On dissection of neck anteriorly and posteriorly in layers, haemorrhages seen in right submandibular region – platysma.

- Haemorrhages seen in back of neck muscles around ligature mark.
- Congestion of trachea present above ligature mark.
- Soft tissues congested above ligature mark.
- All bones of internal neck part are intact.

15. According to PW-20 Dr. Kalyani Joshi, the external injuries were antemortem and the death must have taken place 34 to 36 hours prior to the postmortem examination. She has opined the cause of the death as *“asphyxia due to strangulation by a ligature around neck i.e. unnatural”*. According to her, the ligature mark found surrounding the neck could be caused by the clutch wire (Article No.30), whereas, other injuries found on wrist, forearm and ankles were possible by the nylon rope (Article No.31) and green wire (Article No.29). In her cross-examination, it is also brought on record that the injuries found on the dead body are possible, if the force is applied by two to three persons for strangulation and for tying the hands and legs of the Deceased. There is absolutely nothing in her cross-examination to disprove the cause of the death. Otherwise also, learned counsel for the Accused has fairly conceded that, in the instant case, he is not disputing the fact that Deceased was subjected to homicidal death.

16. The only real question for consideration, according to learned counsel for the Accused, is, '*whether prosecution has succeeded in bringing cogent and reliable evidence on record to prove the involvement of the Accused either in the death of the Deceased or in the offence of dacoity?*'.

17. To prove the involvement of the Accused, the prosecution has mainly relied upon the evidence relating to recovery of stolen articles from the possession of the Accused or at their instance. The prosecution has also, to some extent, relied upon the evidence of PW-2 Ram Yadav, who was working as employee in the Sweet Meat and Farsan Shop of Hira Mithan and used to sleep in a room attached to the said shop along with other workers. In the same building, the shop of PW-1 Chetan in the name of K.K. Jewellers was situated on the Second Floor.

18. According to PW-2 Ram Yadav, he was knowing Accused No.4 Futarmal as he was earlier working in the shop of PW-1 Chetan Shah, which fact is deposed to by PW-1 Chetan also. His further evidence reveals that on the date of incident, i.e. on 11th October 2001, at about 9:30 pm, he came out of his room and sat on a bench near the Pan Stall adjacent to their building. He was sitting there upto 11 pm. At about 9:45 pm, he saw Accused No.4 Futarmal, along with four other persons, near

the gate of their building. They sat there for two – three minutes. Then they crossed the road and sat at the other side of the road in front of their building. After some time, again they came to the gate of their building. It was around 11 to 11:15 pm. At that time, he even talked with Accused No.4 Futarmal as to why he was not seen for many days. He has made enquiry with Accused No.4 Futarmal as to what he was doing and where he was working and Accused No.4 Futarmal told him that he was working as Commission Agent. At that time, he also saw those four persons, who were discussing among themselves, and then all the five of them entered inside the building, whereas, he himself went to his shop. On the next day, when he came to know about murder in the K.K. Jeweller's shop and Police made enquiries with him, he has narrated this entire incidence of seeing Accused No.4 Futarmal along with four other persons entering inside the building on that night. He also gave description and particulars of those four persons and Accused No.4. Thereafter, in the Test Identification Parade held by PW-16 SEO Dushant Oza on 2nd November 2001, he has identified Accused Nos.1, 2 and 3 and on 13th November 2001, he has identified Accused Nos.4 and 5. He has given evidence in detail about the Test Identification Parades.

19. The Memorandums of Test Identification Parades (Exhibits 69 and 70) are also proved on record through the evidence of PW-16 SEO

Dushant Oza. According to him, on 2nd November 2001, he held Test Identification Parade in two parts, as three Accused persons were to be identified. In the first round, two suspects, i.e. Accused No.1 Chhagan and Accused No.2 Laxman, were placed and in the second round, Accused No.3 Shankar was placed. PW-2 Ram Yadav had identified all the three Accused in two rounds of Test Identification Parade. Further Test Identification Parade was held by him on 13th November 2001, in which PW-2 Ram Yadav identified Accused Nos.4 and 5.

20. The evidence relating to the identification of the Accused by this witness PW-2 Ram Yadav is challenged by learned counsel for Accused on the ground that he had no sufficient opportunity to observe these Accused. It is submitted that, except for Accused No.4 Futarmal, he was not knowing any other Accused. He had seen them for the first time on that day, as admitted by him in his cross-examination. Further it is submitted that he has seen these Accused from the distance of about 11 to 20 feet. He has not given information about it to the Police immediately, but two days after the incident. Hence, according to learned counsel for the Accused, his evidence cannot be considered as reliable.

21. In our considered opinion, however, none of these grounds, on which the evidence of this witness is challenged, can be upheld, because

the evidence of this witness clearly goes to prove that he had sufficient opportunity to observe these five persons. Out of them, he was knowing Accused No.4 Futarmal very well; since prior to the incident as Accused No.4 Futarmal used to work in the shop of PW-1 Chetan Shah. As regards remaining Accused, at the first occasion, at 9:45 pm, he might have seen the Accused from a distance of 11 to 20 feet, but, as his evidence discloses, on the second occasion, at 10:45 to 11 pm, on the very night, he saw them from a very close distance as he has made enquiries with Accused No.4 Futarmal as to where he was working and why he was not seen for so many days. As per his evidence, at that time, Accused No.1 Chhagan and other three Accused were very much present there, discussing among themselves. His evidence also reveals that there was sufficient street-light for him to know their features and to remember them. He has given the description, including complexion of the Accused, in his statement recorded by Police and he has also identified them properly in the Test Identification Parades held immediately on 2nd November 2001 and 13th November 2001 i.e. within a period of one month from the date of incident. Not only that, he has identified them properly in the evidence before the Court also.

22. The evidence relating to Test Identification Parades is challenged also on the ground that PW-16 SEO Dushant Oza has not taken sufficient

precautions while conducting them. According to learned counsel for the Accused, Panchas were brought by the Police, then the dummies used for the two rounds of Test Identification Parades, held on 2nd November 2001, were the same. Those dummies were also not of the same age group and hence the evidence relating to the Test Identification Parades cannot be held admissible. To substantiate his submission, learned counsel for the Accused has relied upon ***Mahesh Rohidas Kinalkar & Ors. Vs. State of Goa, 2005 (2) Bom.C.R.(Cri.) 670.***

23. However, in our considered opinion, the above said case law cannot be made applicable to the facts of the present case, because, in that authority, it was brought on record that the Test Identification Parade was held in two phases. In the first phase, four Accused were paraded and in the second phase other four Accused were paraded; while the thirteen dummies in both the phases remained the same. Further, the Special Executive Officer, who conducted the Parade, admitted in his evidence that one of the Accused had requested him to allow him to remove the beard, but he had declined his request without ascertaining as to whether any other dummies were having such beard or not. Further it was pointed out in the said authority that some persons were standing and some persons were sitting at the time of Test Identification Parade, but Magistrate could not give the exact number of persons who were sitting.

The evidence of Magistrate gave the impression that Parade was organized not in the orderly but in chaotic manner and hence it was held that the identification of Accused in such Test Identification Parade cannot be relied upon.

24. As against it, in the present case, no such fatal infirmities or lapses on the part of PW-16 SEO Dushant Oza in conducting the Test Identification Parades are pointed out. Though it is submitted that Police had brought the Panchas, his evidence reveals that, out of the four persons brought by the Police, he himself has selected three persons to act as Panchas. He had made enquiry with them and got confirmed that those persons were not related with the crime under consideration. He also made enquiry about their antecedents and involvement in any other case. Even as regards the dummies, according to him, the age of Accused No.1 Chhagan was 25 years, whereas, age of Accused No.2 Laxman was about 30 to 32 years and the dummies were selected from the age group of 20 to 28 years. While selecting the dummies, he took into consideration the age, height, weight, mustache, beard etc. He also took precaution to see that the hall in which the Test Identification Parade was held was not having any window. Though he has admitted that he has personally not gone through the guidelines of the High Court laid down in Criminal Manual regarding holding of Test Identification Parade, he has

made himself acquainted with those guidelines from his senior colleagues. As per the guidelines, in one Test Identification Parade, he has put only two Accused and fourteen dummies. The entire procedure for conducting the Test Identification Parade was as per the procedure laid down in the Criminal Manual. It is recorded in the Memorandum Statement and his cross-examination does not reveal that any fatal lapses were committed by him in conduct of Test Identification Parades.

25. Otherwise also, even if it is assumed that there are some infirmities or lacunae in conduct of Test Identification Parade, as observed by the Apex Court in the case of ***State of Maharashtra Vs. Suresh, 2000 SCC (Cri.) 263***, no Test Identification Parade as such is full proof and if the lacunae, infirmities and pot-holes are to be ferreted out from the proceedings of the Magistrate holding such parades, possibly no TIP 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 TIP would become unusable. Hence, merely on the basis of some flaws in conduct of Test Identification Parade, the evidence relating thereto cannot be discarded.

26. Moreover, in the instant case, the evidence of PW-2 Ram Yadav is not a solitary piece of evidence on which prosecution is relying, but there

is ample other evidence on record which goes to connect and implicate the Accused with the offence. The first piece of evidence in this respect, on which the prosecution is placing reliance, is that of the evidence of Finger Print Expert PW-17 Arun Shinde. According to his evidence, on 12th October 2001, he was called by L.T. Marg Police Station at the scene of crime to take the search of finger prints. There PW-21 PSI Shinde was present at the spot. He examined the various articles found at the scene of crime and with the help of finger print development powder, he found chance palm prints on the sunmica of the table drawer and two chance finger prints on the internal part of the door of the safe. He also got one chance finger print on the side of small steel cupboard, which was broken. On the receipt of the specimen finger prints of the Deceased, PW-1 Chetan Shah and that of the Accused persons, he compared those chance finger prints with the specimen finger prints and found that those chance finger prints were that of Accused No.1 Chhagan, Accused No.2 Laxman and Accused No.3 Shankar. He further found that the chance finger prints on the internal part of the door of the safe was found to be identical with the middle left finger print of Accused No.4 Futarmal. The chance palm print was also found to be identical with the left hand palm print of Accused No.4 Futarmal. His expert opinion, along with the photographs of the chance finger prints, specimen finger prints and palm

prints, are produced on record at Exhibits 74 and 75. There is hardly any cross-examination of this witness. Thus, the presence of the finger and palm prints of the Accused at the scene of offence necessarily and unequivocally establishes their involvement in the crime, in the absence of any explanation offered by them about it.

27. The prosecution has also relied on the evidence of PW-18 Dilip Ahiwale, Government Handwriting Expert. As per evidence of PW-21 PSI Shinde, at the time of the Scene of Offence Panchanama, they found one white envelope containing one blank paper. On the envelope, it was written in Hindi as “Raju Ke Alawa Koi Na Khole” (nobody should open the envelop except Raju) and “Aai Lave Yu” (I love you). The same contents were repeated on the blank paper, which was inside the envelope. The said envelope and the blank paper therein was sent to PW-18 Handwriting Expert Ahiwale through C.I.D. Crime, Maharashtra State. PW-18 Dilip Ahiwale, who was working as Assistant State Examiner of Documents, C.I.D., Crime, Maharashtra at Pune, was given nine sheets of specimen handwritings of the Accused and on comparative examination, he found that the handwriting on the said envelope and the blank paper therein was identical to the specimen handwriting of Accused No.2 Laxman. This opinion of Handwriting Expert is not at all challenged or assailed in cross-examination in any way and it, thus, proves presence of Accused No.2

Laxman at the scene of crime. No explanation is offered by Accused No.2 Laxman about the same.

28. The third and material piece of evidence, on which the prosecution has placed reliance, is that of the recovery of various stolen articles from the possession of these Accused and at their instance. The evidence of PW-8 Panch Sandip Gamre and the evidence of PW-22 API Ramchandra Dhawale goes to prove that, on 15th October 2001, i.e. within three days from the date of incident, Accused Nos.1 and 2 were arrested. At that time, personal search of Accused No.1 Chhagan was taken and two gold pendants were found. In the personal search of Accused No.2 Laxman also, two gold pendants and one wrist watch of Titan Make were found. All these articles were seized, including the blood stained shirt of Accused No.2 Laxman. The evidence of PW-1 Chetan Shah, the Complainant, proves that he has identified these four gold pendants (Article No.4), as belonging to him as there was mark of their shop on the said gold pendants. He has also identified the wrist watch of Titan Make (Article No.3). The said Seizure Panchanama is produced on record at Exhibit-40.

29. There is further evidence relating to recovery of gold ornaments at the instance of Accused No.1 Chhagan, like, 4 ear rings, 22 ear tops in pursuance of the Memorandum Panchanama of the disclosure statement

given by him vide Exhibit-28. The evidence PW-12 Devraj Gaude and PW-25 ACP Nalawade further goes to prove that, during custodial interrogation, Accused No.3 Shankar gave a disclosing statement that he has sold the stolen gold ornaments (screws) to one person at Vitthalwadi, Kalbadevi and he would point out the said person. His statement was reduced to Memorandum Panchanama (Exhibit-48). Thereafter, Accused No.3 Shankar guided them to the stall of PW-11 Naresh Patil, who, at the instance of Accused No.3 Shankar, produced the metal screws used for ear-studs and ear-tops. They came to be seized under Panchanama (Exhibit 48-A).

30. There is corresponding evidence of PW-11 Naresh Patil, who does the work of purchasing gold from the skilled workers and then preparing gold ornaments. According to him, he was knowing Accused No.3 Shankar and he has purchased the gold screws used for ear-tops and ear-studs from Accused No.3 on 13th October 2001 at about 7:30 pm. Those gold screws were weighing 392 grams and 450 mili-grams. He has purchased the same for the cash of Rs.1,20,475/-. As per his evidence, on 22nd October 2001, when Accused No.3 Shankar came to his shop, along with Police, he has produced those screws before Police, which were seized under Panchanama (Exhibit-46). He has also signed on the said Panchanama and has identified Accused No.3 Shankar in the Court.

These screws were identified by PW-1 Chetan Shah in his evidence before the Court as belonging to his shop.

31. Prosecution has led the evidence of PW-24 one Ishwarbhai Joshi, at whose house Accused No.4 Futarmal had kept one suite-case. He was knowing Accused No.4 Futarmal as he used to take tiffin from his house. According to him, on 12th October 2001, Accused No.4, who has introduced himself as Sales-man, came to his residence along with brief-case and requested him to keep that brief-case. Accused No.4 has further told him that the brief-case was containing samples of ornaments and he wanted to keep it safely as he was residing with 4 to 5 other persons. This witness allowed him to keep that brief-case in his house and kept it below the cot. On that day, Accused No.4 also gave him Rs.500/- towards tiffin in advance. On 13th October 2001, Accused No.4 again came to his house at about 9:30 pm with one plastic bag containing currency notes and kept that bag also in the brief-case, which he had already kept under the cot, and went away with tiffin. On 14th October 2001, Accused No.4 again came to his house at 1 pm, took out some cash from the said brief-case and with the said cash and the brief-case, he left without taking the tiffin. This witness has identified Accused No.4 in the Test Identification Parade and also in evidence before the Court.

32. The evidence of PW-7 Panch Chandrashekhar Tatkare and PW-23 PI Tukaram Wahile proves that, during custodial interrogation, Accused No.4 Futarmal showed his willingness to point out the place at Jogeshwari, where he has kept the suite-case containing stolen gold ornaments and further he would also point out the person to whom some of the gold ornaments were handed over. His statement was reduced to Memorandum Panchanama (Exhibit-36). Thereafter, Accused No.4 guided them to one S.T.D. Booth at Jogeshwari. There, PW-15 Hajarimal Gujar was present. On the request of Accused No.4 Futarmal, PW-15 Gujar produced one suite-case and handed it over to him. Accused No.4 opened the same and there, in the shirt pieces, some plastic sachets were kept. Those plastic sachets were containing several gold ornaments, like, pendants, finger-rings, neck-laces, chains, ear-studs, ear-tops etc., which were seized under Panchanama (Exhibit-36A). All those gold ornaments are identified by PW-1 Chetan Shah as belonging to his shop.

33. There is corroborating evidence about this discovery, which is of PW-15 Hajarimal Gujar, who has deposed that he was knowing Accused No.4 Futarmal, as he was hailing from his village. His family had good relations with the family of Accused No.4. According to him, 20 to 25 days prior to 7th November 2001, Accused No.4 had come to his telephone booth along with one suite-case at about 4 pm and told him that he

wanted to go to Bhayander to collect the payment. He requested this witness to keep his suite-case at his telephone booth and he would collect it while returning from Bhayander after about one hour. According to this witness, he allowed Accused No.4 to keep his suite-case at his telephone booth. Accused No.4, however, did not return on that day. On the next day, Accused No.4 phoned this witness at about 8 am and confirmed that the suite-case was still with him and further asked him to keep it safely. Then, on 7th November 2001, when Police came to his telephone booth, along with Accused No.4, he produced the suite-case. At that time, he noticed that there were sachets of gold ornaments in pieces of shirt.

34. Prosecution has also led the evidence of PW-9 Panch Pervej Shaikh and PW-23 PI Wahile to prove that, at the instance of Accused No.5 Pradeep, since deceased, there was recovery of similar such gold ornaments, which came to be identified by PW-1 Chetan Shah. The prosecution has further relied upon the evidence of PW-10 Rajendra Vichare in respect of recovery of gold ornaments at the instance of Accused No.5 Pradeep, since deceased.

35. Another material circumstance relied upon by the prosecution is about presence of various marks of injuries on the persons of the Accused at the time of their arrest. PW-22 API Dhawale has arrested Accused

Nos.1 and 2 on 15th October 2001 and at that time, he not only found that the shirt on the person of Accused No.2 was having blood stains, but on removal of clothes on their person, he noticed abrasion marks of 3 to 4 days old on the chest of Accused Nos.1 and 2. These injuries are also noted in the Arrest Panchanama (Exhibit-40). On the next day, i.e. on 16th October 2001, he has arrested Accused No.3 Shankar and on his chest and hand also, abrasion marks of 4 to 5 days old were found. They are noted in the Arrest Panchanama (Exhibit-52). All these three Accused were referred for their medical examination and as per evidence of PW-20 Dr. Kalyani Joshi, on 16th October 2001, she has examined Accused Nos.1 and 2 with the history of injuries and on their examination, she found abrasions on their chest. As regards Accused No.2 Laxman, she found one healing linear abrasion on left side of lower back, admeasuring 3 cm x 0.1 cm and another similar abrasion lower to above abrasion, admeasuring 0.1 cm x 0.1 cm. She also noticed one healing abrasion, admeasuring 0.2 cm x 0.2 cm, on left side of lower back, lower to above said two abrasions. She had issued his Injury Certificates and also the O.P.D. Papers vide Exhibit-96. In her opinion, these injuries were possible in case victim tries to resist blows of assailants.

36. Accused No.3 Shankar was examined by Dr. Bobade on 16th October 2001 and on his person also one abrasion was found over right

hand, admeasuring 5 cm and one healing abrasion over upper part of chest. According to her opinion, these injuries were also possible when the victim was resisting the assault on him and such injuries are self-defence injuries by the victims. They can be caused by finger nails. Accused Nos.2 and 3 have not offered any explanation for the presence of these injuries on their person, which again necessarily leads to resistible inference of their involvement in the incident.

37. The prosecution has further relied upon the evidence of PW-13 Achhelal Vishwakarma, who is having the Workshop, from where, as per prosecution case, Accused No.5 Pradeep has collected the clutch wire, which came to be used in commission of the offence.

38. In our considered opinion, this entire evidence is more than sufficient to prove the involvement of the Accused in the commission of the offence. However, according to learned counsel for the Accused, the recovery evidence, in the instant case, is not convincing and reliable as none of the witnesses have stated that the articles like the gold ornaments seized from possession of the Accused or at their instance were sealed. Moreover, even if they were sealed at the time of recovery, as the evidence of PW-1 Chetan proves that he was shown those ornaments and articles for the purpose of identification, and there is no evidence to prove

that subsequent thereto, they were again sealed. To substantiate his submission, the learned counsel for the Accused has relied upon the two authorities that of ***Tulshiram Bhanudas Kambale & Ors. Vs. State of Maharashtra, 2000 CRI.L.J. 1566***, and ***Amarjit Singh alias Babbu Vs. State of Punjab, 1995 Supp. (3) SCC 217***.

39. In our considered opinion, however, none of these authorities can be made applicable to the facts of the present case, because, in the first authority, issue was relating to human blood found on the recovered articles, whereas, in the second authority the revolver found on the spot was not sealed, hence it was held that the possibility of tampering could not be ruled out. In the instant case, the articles seized are the gold ornaments. Therefore, there was neither the possibility of tampering nor that of the ornaments changing their character or colour in any way, even if they were not sealed.

40. The learned counsel for the Accused has then relied upon ***Ahmad alias Ahmad Chakri & Ors. Vs. The State of Maharashtra, 1994 CRI.L.J. 274***, which deals with delay in discovery of the weapon at the hands of Accused. This authority is also not applicable to the facts of the present case as here recovery is in respect of the ornaments and not the weapon.

41. The next submission advanced by the learned counsel for the Accused pertains to applicability of Section 396 of IPC. According to him, the question '*whether murder was committed while committing dacoity?*' is a pure question of fact and in deciding the said question, the Court has to consider whether the transaction of murder is separate or distinct from the transaction of dacoity. According to him, there are two distinct transactions in the present case, as the dead body was found in the adjoining room and not in the room where dacoity took place and, therefore, the Accused cannot be held liable for the murder of Premaram. The learned counsel for the Accused has, in support of his submissions, relied upon ***Laliya & Ors. Vs. State of Rajasthan, AIR 1967 Rajasthan 134***, and ***Raghunath Dey & etc. Vs. The State, 2003 CRI. L.J. 4592***. In the first case, after the dacoits looted the booty, the villagers chased them, then in the encounter, that took place at some distance, one person received the injuries and succumbed to those injuries. Hence, the argument was advanced that the transactions of dacoity and murder were different as both the incidents had happened at different places. However, this argument was rejected by the High Court and it was held that, *where the dacoits, by hot pursuit, immediately after commission of the loot, were overtaken at a short distance and there was an encounter between the dacoits and pursuers and the dacoits had not abandoned the entire booty before the murder*

was committed, the transaction of encounter and murder were not separate and distinct from the dacoity and as such the “murder was committed while committing dacoity”.

42. In this authority, it was further held that the question whether murder was committed while committing dacoity is a pure question of fact and of decree; not to be determined by any general rule, but by special circumstances of each case. Merely because the two incidents had taken place at different places, they will not invariably be treated as different transactions. Thus, this authority supports the prosecution and not the Accused, as in the present case also, merely because the dead body of Premaram was found in another room, considering the entire facts and evidence on record, it cannot be said that his murder has no connection with the offence of dacoity. He was very much having the key of the shop from where the property was looted and when he resisted to hand over the key of the shop to the Accused, the evidence on record proves that he was done to death. Therefore, it has to be held that the dacoity and commission of murder are forming part of one and same transaction. His murder was committed for the purpose of committing dacoity.

43. As per the settled position of law, the presumption, as laid down under Section 114(a) of the Evidence Act, applies to this case also;

considering that the Accused were found to be in possession of the stolen property, immediately after the incident, within a short gap of time of 2 to 3 days. No explanation being offered by the Accused for the possession of such a huge quantity of gold ornaments, the presumption under Section 114(a) of the Evidence Act needs to be invoked for proving the offence under Section 396 of IPC.

44. Lastly, an attempt is also made by learned counsel for the Accused to submit that, here in the case, the Trial Court has committed an error while recording the statements of Accused under Section 313 of Cr.P.C. as identical sets of questions were asked to the different Accused, which practice is deprecated by our own High Court and the Apex Court also. In support of his submission, he has relied upon the Judgment of this Court in ***Swapnali @ Sapana Sharad Mahadik Vs. The State of Maharashtra, (in Criminal Appeal No.415 of 2010, along with connected matters, dated 22nd April 2015)***, in which various Judgments of Supreme Court were relied upon. However, in our considered opinion, this Judgment cannot be made applicable to the facts of the present case, because in the said case the roles played by Accused Nos.5, 6 and 7, even according to prosecution case, were different one. Accused Nos.5 and 6 were guarding at the gate of the building and Accused No.7 passed on the information to Accused No.5, who executed the plan. Accused No.7 was

not present on the spot. Hence, it was held that there was no meaning in putting all 66 questions to each of the Accused. As against it, in the present case, the role of all the Accused persons is identical. At-least, no material is brought on record to show that they had played any different role.

45. Moreover, no material is brought on record to show as to what and in which manner the prejudice, if any, is caused to any of the Accused. More so, all the Accused were aware of the accusation and the charge against them. It is not the case of any of the Accused that some incriminating evidence was not put to them and hence they could not offer their explanation for the same; therefore, any prejudice was caused to them. Conversely, each and every piece of incriminating material and evidence is put up to them and their explanation for the same was obtained. Only when there is omission to put up the incriminating material, it can prove fatal to uphold the conviction. As a matter of fact, as per the law laid down by the Apex Court in ***Shivaji Vs. State of Maharashtra, 1973 SCC (Cri.) 1033***, mere omission to put incriminating material to the Accused also, does not ipso facto vitiate the proceedings. The burden lies on the Accused to prove that prejudice was occasioned by such defect.

46. Here in the instant case, the Accused have not succeeded in

bringing to the notice of this Court that any incriminating material was not put up to them and it has resulted into causing prejudice to them in their defence and thereby resulted in failure of justice. In such situation, the above said authority is also not applicable to the facts of the present case.

47. Further, even assuming that the statements of all the Accused in the present case are identical, considering the fact that the role played by them is identical, the evidence against them was also, more or less, the same in respect of the homicidal death and recovery of the gold ornaments, it cannot become fatal. If some additional material is also put to them in their statement recorded under Section 313 of Cr.P.C. than the actual role played by them, there is no question of any prejudice being caused to them, as the incriminating material appearing against each individual Accused was also put up to them in addition to incriminating material appearing against the other Accused. Thus, there was no omission in putting up to the Accused any incriminating material and hence no prejudice being caused to the Accused on account of mere irregularity in recording the statements of the Accused, it has to be held that this submission also fails.

48. The upshot of our discussion therefore is, we have no hesitation in holding that prosecution has succeeded in proving its case against the

Accused beyond reasonable doubt. The Appeals, therefore, hold no merit, hence, stand dismissed, confirming the conviction and sentence of the Accused, as recorded by the Trial Court.

49. As all the Accused are reported to be in Jail, Office to communicate this order to them through the Superintendent of Nashik Road Central Jail, Nashik.

[DR. SHALINI PHANSALKAR-JOSHI, J.] [ACTING CHIEF JUSTICE]

CERTIFICATE

Certified to be true and correct copy of the original signed judgment.