

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.41 OF 2015

1) AJAGARALI ABDULRAJAK SHAIKH)
2) JABBAR KADIR SHAIKH)
3) MEHAMMAD AKRAM MUJIBULLA KHAN)
4) RAHUL NANDU WAGHMARE)
5) MANGESH VISHNU SAKAT @ MANGYA)
6) MANOJ APPU NAIR @ MANNA)...APPELLANTS

V/s.

1) THE STATE OF MAHARASHTRA)
2) SENIOR INSPECTOR OF POLICE)...RESPONDENTS

WITH

CRIMINAL APPEAL NO.620 OF 2013

RAMESH SHRIRANG AKHADE)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Ganesh Bhujbal, Advocate for the Appellants.

Mr.S.V.Gavand, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 4th MAY 2018

JUDGMENT :

1 Criminal Appeal bearing No.41 of 2015 is filed by appellant/accused no.1 Ajagarali Shaikh, appellant/accused no.2 Jabbar Shaikh, appellant/accused no.3 Mehammad Akram Khan, appellant/accused no.5 Rahul Waghmare, appellant/accused no.7 Mangesh Sakat and appellant/accused no.8 Manoj Nair whereas Criminal Appeal bearing No.620 of 2013 is filed by appellant/accused no.6 Ramesh Akhade. They all along with acquitted accused no.4 Raju Vijay Bahadur Singh were tried for offences punishable under Sections 395 read with 397, 216A read with 34 and 411 read with 34 of the Indian Penal Code, vide Sessions Cases Nos.49 of 2012, 241 of 2012 and 503 of 2012. By the impugned judgment and order dated 26th April 2013, the learned Ad-hoc Additional Sessions Judge, Sewree, Mumbai, was pleased to convict the appellants/accused nos.1, 2, 3, 5, 7 and 8 of the offence punishable under Section 395 of the Indian Penal Code and similarly to convict appellants/accused nos.1, 2, 3 and 7 for the offence punishable under Section 395 read with Section

397 of the Indian Penal Code. They all came to be sentenced to suffer rigorous imprisonment for 10 years by each of them, apart from payment of fine of Rs.5,000/- by each of them, and in default, to suffer simple imprisonment for 2 months. Appellant/accused no.6 Ramesh Akhade came to be convicted for the offence punishable under Section 411 of the Indian Penal Code and by the impugned judgment and order, he came to be sentenced to suffer rigorous imprisonment for 3 years apart from payment of fine of Rs.500/-, and in default, to undergo simple imprisonment for 2 months. The appellants/accused persons came to be acquitted of other offences with which they were charged.

2 Facts, in nutshell, leading to the prosecution of appellants/accused persons along with the co-accused are thus :

- (a) PW1 Nathuali Shaikh along with his co-worker Mahindar Gaur were working in the night shift of Excel Plastic Factory at Sewree in the night intervening 9th September 2011 and 10th September 2011. Other workers, so also, PW4 Naresh

Paragi – a tea stall vendor, at that time were sleeping in the mezzanine floor of the said factory, which was owned by PW2 Asif Lakdawala. PW3 Ramkant Patel, worker of the said factory, was also one amongst other co-workers, who were sleeping at the mezzanine floor of the said factory.

- (b) At about 3 to 3.30 a.m. of 10th September 2011, 8 dacoits entered in the said factory. At that time, appellant/accused no.7 Mangesh Sakat was holding an axe. He declared that he is a “bhai” of Sewree. He demanded money from PW1 Nathuali Shaikh, who was working in the factory. Upon being informed that there is no money with him, appellant/accused no.7 Mangesh Sakat assaulted PW1 Nathuali Shaikh by means of an axe. The blow landed on the right elbow of PW1 Nathuali Shaikh. The accused persons assaulted Mahindar Gaur and robbed him of his two mobile phones and cash amounting to Rs.7500/-. PW1 Nathuali Shaikh was relieved of his mobile phone and cash amounting to Rs.1500/-. Four of the dacoits then went at

the mezzanine floor and appellant/accused no.7 Mangesh Sakat also joined them. By threatening the workers sleeping at the mezzanine floor, the dacoits looted their mobile phones and cash. While leaving the place, the dacoits took television set kept at the office of Excel Plastic Factory. On the way they assaulted a person sleeping in the truck.

- (c) The incident of dacoity was then informed telephonically to PW2 Asif Lakdawala – owner of the Excel Plastic Factory. He visited his factory and took PW1 Nathuali Shaikh to Police Station Sewree where PW1 Nathuali Shaikh lodged report Exhibit 51. He was then sent for medical treatment to J.J.Hospital, after registration of Crime No.83 of 2011 under Section 397 of the Indian Penal Code by PW6 Kundalik Aware, Assistant Police Inspector.
- (d) Appellant/accused nos.1 and 3, namely, Ajagarali Abdulrajak Shaikh and Mehammad Akram Mujibulla Khan came to be arrested on 13th September 2011. On the basis of their

voluntary disclosure statement (Exhibit 84) made in presence of PW10 Uliya Harjan, PW11 Prashant Mane, Police Sub-Inspector, recovered of two choppers and an axe from bushes near wall of Sewree Railway Station.

- (e) Appellant/accused no.5 Rahul Waghmare came to be arrested on 9th December 2011. Upon interrogating him, PW12 Samir Kedar, Police Sub-Inspector, seized stolen television set from the house of appellant/accused no.6 Ramesh Akhade on 18th December 2011, by preparing Seizure Panchnama Exhibit 87. On the basis of voluntary disclosure statement (Exhibit 89) of appellant/accused no.5 Rahul Waghmare made on 15th December 2011, two mobile phones and a knife came to be seized from his house, vide Seizure Panchnama Exhibit 90, in presence of panch witness PW13 Nasruddin Khan.

- (f) Accused persons were subjected to Test Identification Parade conducted by PW8 Suvidha Sawant and PW9 Vijay Shety,

Nayab Tahsildar / Special Executive Magistrate. They were identified by PW1 Nathuali Shaikh and PW3 Ramkant Patel. Three mobile phones looted during the incident came to be recovered on the basis of voluntary disclosure statement (Exhibit 66) made by appellant/accused no.1 Ajagarali Shaikh before PW5 Salim Khan. On completion of investigation, PW14 Baliram Chavan, Assistant Police Inspector, filed charge-sheet against the appellants/accused persons as well as the acquitted accused.

- (g) The learned trial court framed Charge for offences punishable under Sections 395 read with 397, 216A read with 34 and 411 read with 34 of the Indian Penal Code against the appellants/accused persons and the acquitted accused. They pleaded not guilty and claimed trial.
- (h) In order to bring home the guilt to the appellants/accused persons, the prosecution has examined in all fifteen witnesses. First Informant Nathuali Shaikh is examined as

PW1. First Information Report (FIR) lodged by him is at Exhibit 51. Asif Lakdawala – owner of Excel Plastic Factory is examined as PW2. Ramkant Patel – worker from Excel Plastic Factory is examined as PW3. Naresh Paragi – a tea stall owner, who was sleeping at the factory premises at the time of the incident is examined as PW4. Salim Khan – panch witness is examined as PW5. He, however, turned hostile to the prosecution. Assistant Police Inspector Kundalik Aware is examined as PW6 and Spot Panchnama prepared by him is at Exhibit 70. Dr.Minal Kusalkar, Medical Officer of J.J.Hospital is examined as PW7 and the Medico Legal Certificate issued by her is at Exhibit 75. Suvidha Sawant, Nayab Tahsildar, and Vijay Shetye, Nayab Tahsildar / Special Executive Magistrate, who conducted Test Identification Parades are examined as PW8 and PW9 respectively. Exhibits 78 to 80 are Memorandums of Test Identification Parades. Panch witness Uliya Harjan is examined as PW10 and Exhibit 84 is the voluntary disclosure statement and Recovery Panchnama at the

instance of appellants/accused nos.1 to 3. Police Sub-Inspector Prashant Mane is examined as PW11. PW12 Samir Kedar, Police Sub-Inspector is examined to prove Seizure Panchnama Exhibit 87 of seizure of Television set from appellant/accused no.6 Ramesh Akhade. PW13 Nasruddin Khan – panch witness is examined to prove voluntary disclosure statement Exhibit 89 of appellant/accused no.5 Rahul Waghmare and resultant Recovery Panchnama Exhibit 90 in respect of two mobile phones and a knife. Investigating Officer Baliram Chavan, Assistant Police Inspector, is examined as PW14. Investigating Officer Anil Sardal, Police Inspector, is examined as PW15.

- (i) The defence of the appellants/accused persons was that of total denial.
- (j) After hearing the parties, by the impugned judgment and order, the learned trial court was pleased to convict the

appellants/accused persons and to sentence them as indicated in the opening paragraph of this judgment.

3 I have heard Shri Ganesh Bhujbal, the learned advocate appointed to represent the appellants/accused persons at the cost of the State. He vehemently argued that evidence of prosecution witnesses shows that there was darkness in the factory premises and the workers sleeping at the mezzanine floor were not in a position to look and witness what was going on at the ground floor of the factory. Two mobile phones and a knife allegedly recovered from appellant/accused no.5 Rahul Waghmare was not identified by any of the prosecution witnesses. He was handcuffed during recovery. No specific role was attributed to appellants/accused persons nos.1 to 3, so also other accused persons by the prosecution witnesses. Except appellant/accused no.7 Mangesh Sakat, nobody is said to have used weapons during the course of the alleged incident. The learned advocate for appellants/accused persons relied on the judgment in the matter of Gorakh Pandurang Mare and Another vs. State of

Maharashtra¹ and the judgment in the matter of Anand Anil Raimokar vs. The State of Maharashtra & Others².

4 As against this, according to the learned APP, conviction and resultant sentence is proper and based on evidence on record. PW1 Nathuali Shaikh was, infact, working in the factory, and therefore, his evidence regarding identification of the appellants/accused persons needs to be accepted. The prosecution witnesses have identified the appellants/accused persons during Test Identification Parade and therefore, according to the learned APP, appeals deserve to be dismissed.

5 I have carefully considered the rival submissions and also perused the Record and Proceedings including oral as well as documentary evidence. According to the prosecution case, eight dacoits entered in the premises of Excel Plastic Factory in the night intervening 9th September 2011 and 10th September 2011 while armed with deadly weapons and committed dacoity by

1 2010 ALL MR (Cri) 2912

2 2017 SCC Online Bom 7829

looting cash and valuables including the Television set from workers of the said factory. According to the prosecution, PW1 Nathuali Shaikh – First Informant, PW3 Ramkant Patel and PW4 Naresh Paragi are eye witnesses to the incident of dacoity. Out of these witnesses, PW1 Nathuali Shaikh and PW3 Ramkant Patel participated in the Test Identification Parades conducted by PW8 Suvidha Sawant and PW9 Vijay Shety, Nayab Tahsildar / Special Executive Magistrate and they have duly identified all appellants/accused persons except appellant/accused no.6 Ramesh Akhade, who was not put up for Test Identification Parade. As such, evidence of these three witnesses assumes importance in order to infer guilt of appellants/accused persons in the crime in question. PW1 Nathuali Shaikh deposed that at about 9.00 p.m. of 9th September 2011, he resumed his work in the Excel Plastic Factory, Sewree, and when he was working with co-worker Mahindar Gaur, at about 3.30 a.m., eight dacoits entered in the factory. Appellant/accused no.7 Mangesh Sakat was one amongst them. He took out Rs.1500/- as well as his mobile phone and threatened PW1 Nathuali Shaikh. PW1 Nathuali

Shaikh further deposed that then appellant/accused no.7 Mangesh Sakat asked his associates to look after him and went to mezzanine floor. Thereafter, appellant/accused no.7 Mangesh Sakat asked him to show where the money was kept and when PW1 Nathuali Shaikh informed that there is no money, appellant/accused no.7 Mangesh Sakat assaulted him by means of an axe at his right elbow causing bleeding injury. PW1 Nathuali Shaikh further deposed that then appellant/accused no.7 Mangesh Sakat took gold chain from Mahindar Gaur, Rs.15,000/- from PW4 Naresh Paragi, Rs.400/- from Vishwanath and Rs.500 from Dinesh. While leaving the premises, as deposed by PW1 Nathuali Shaikh, the dacoits had taken out the television set kept in the office of the factory. Outside the factory premises, appellant/accused no.7 Mangesh Sakat had assaulted one person sleeping in the truck. This is how PW1 Nathuali Shaikh described the incident which took place in the factory premises.

6 PW1 Nathuali Shaikh further deposed that on 7th December 2011, he identified appellant/accused no.1 Ajagarali

Shaikh, appellant/accused no.2 Jabbar Shaikh and appellant/accused no.3 Mehammad Akram Khan in the Test Identification Parade. Then on 7th March 2012, he identified appellant/accused no.5 Rahul Waghmare in the Test Identification Parade. Lastly, on 17th May 2012, he identified appellant/accused no.7 Mangesh Sakat and appellant/accused no.8 Manoj Nair in the Test Identification Parade at the Arthur Road jail.

7 Though not described while narrating the incident of dacoity, upon being shown weapons, this witness has stated that appellant/accused no.2 Jabbar Shaikh had kept the chopper (Article no.2) on his neck, appellant/accused no.7 Mangesh Sakat assaulted him by means of big steel chopper (Article no.3) and appellant/accused no.1 Ajagarali Shaikh was holding the axe (Article no.1). This witness identified the television set looted from the factory. He identified one mobile (Article no.6) amongst some mobile phones, to be belonging to his colleague Mahindar Gaur. He was unable to identify rest of the mobile phones and weapons.

8 Cross-examination of this witness reveals that there was darkness in the factory premises as well as surrounding area and at the time of lodging the FIR, the dacoits were unknown to him. He further stated in his cross-examination that as the accused persons were calling each other by their names during the incident, he, therefore, knew their names. From cross-examination of this witness it is brought on record that as he used to see television in the factory premises daily, he was able to identify the same. If evidence of this witness is compared with the FIR lodged by him with promptitude, then it becomes clear that this witness has not stated in his FIR that one of the dacoits kept the chopper on his neck whereas one of them was holding an axe. The FIR categorically mentions that it was appellant/accused no.7 Mangesh Sakat who was holding the axe. In the FIR it is not mentioned that some other accused, than appellant/accused no.7 Mangesh Sakat, was holding the axe. Though this witness claims to have lost his mobile phone at the hands of dacoits in the incident, his evidence is specific to the effect that seized mobile

phones are not containing the mobile phone lost by him in the incident.

9 Let us now examine whether evidence of this witness is gaining corroboration from other eye witnesses viz. PW3 Ramkant Patel and PW4 Naresh Paragi. PW3 Ramkant Patel has deposed that after finishing his work in the factory and after watching the programmes on the television, at about 2.30 a.m. of 10th September 2011, he slept at the mezzanine floor of the factory. Thereafter, seven to eight dacoits entered in the factory. Three dacoits came to the mezzanine floor and one of them pointed knife at his throat and threatened to kill him. As per version of this witness, it was appellant/accused no.7 Mangesh Sakat, who had pointed knife at his throat and had threatened him. This witness further deposed that then the dacoits left the factory after looting the cash, mobile phones of the workers and television set of the factory. As per version of this witness, cash amounting to Rs.500/- kept in his clothes which were hanging on the wall was taken by the dacoits. While in the witness box, this

witness has identified appellant/accused no.1 Ajagarali Shaikh, appellant/accused no.2 Jabbar Shaikh, appellant/accused no.3 Mehammad Akram Khan, appellant/accused no.5 Rahul Waghmare, appellant/accused no.7 Mangesh Sakat and appellant/accused no.8 Manoj Nair. He identified the seized television set. He stated that Article no.2 chopper was pointed at his throat by appellant/accused no.7 Mangesh Sakat. As per version of this witness, muddemal Article no.6 mobile phone is the mobile phone owned by PW1 Nathuali Shaikh. This witness claims to have identified appellants/accused nos.1 to 3, 5, 7 and 8 in the Test Identification Parade.

10 In cross-examination, this witness has stated that while sleeping at the mezzanine floor of the factory, one is unable to witness the happenings at the ground floor. He stated that on 17th December 2011, he had gone to the Police Station and police asked him to identify the culprits at the Police Station.

11 When compared with evidence of PW1 Nathuali Shaikh, it is seen that PW3 Ramkant Patel had claimed that muddemal Article no.6 mobile phone is belonging to PW1 Nathuali Shaikh whereas PW1 Nathuali Shaikh is claiming that the said mobile phone belongs to co-worker Mahindar Gaur. Though PW1 Nathuali Shaikh has ascribed weapon to appellant/accused no.1 Ajagarali Shaikh and appellant/accused no.2 Jabbar Shaikh, PW3 Ramkant Patel has not claimed that they were holding any weapons. However, both these witnesses have congruously deposed about active role played by appellant/accused no.7 Mangesh Sakat in the dacoity by assaulting PW1 Nathuali Shaikh by means of an axe and pointing a knife at the throat of PW3 Ramkant Patel.

12 So far as PW4 Naresh Paragi is concerned, he is owner of a tea stall in the vicinity of the factory and at the relevant time he was sleeping at the mezzanine floor. As per his version, at about 3 to 3.30 a.m. of 10th September 2011, four persons came at the mezzanine floor, one of whom was appellant/accused no.7

Mangesh Sakat. By showing weapon to him, appellant/accused no.7 Mangesh Sakat snatched an amount of Rs.15,000/- from him. This witness has pointed out appellant/accused no.7 Mangesh Sakat while in the dock as the dacoit who had taken amount of Rs.15,000/- from him. PW4 Naresh Paragi had candidly stated that as he was frightened at the time of the incident, he had not seen other dacoits than appellant/accused no.7 Mangesh Sakat, and therefore, he is unable to identify them. PW4 Naresh Paragi has duly identified the seized television set before the court and in his cross-examination has stated that as he used to watch the programmes on that television set, he is in a position to identify the television set.

13 Undisputedly, appellants/accused persons were unknown to the prosecution witnesses. To fix their identity, the prosecution has conducted Test Identification Parades. Though the learned trial court exhibited Memorandum of Test Identification Parade conducted on 7th December 2011 by Prakash Kulkarni, Executive Magistrate, Mumbai, as Exhibit 78, said

Prakash Kulkarni, Executive Magistrate, was not offered for cross-examination by appellants/accused persons. It is claimed by the prosecution that on 7th December 2011, during the course of Test Identification Parade, PW1 Nathuali Shaikh and PW3 Ramkant Patel had identified appellant/accused no.1 Ajagarali Shaikh, appellant/accused no.2 Jabbar Shaikh and appellant/accused no.3 Mehammad Akram Khan. These three accused persons were arrested way back on 13th September 2011, whereas after about three months they were subjected to the Test Identification Parade by these two witnesses. There is no explanation coming on record from the prosecution for such belated Test Identification Parade of these three accused persons, apart from the fact that the Executive Magistrate, Prakash Kulkarni was not offered for cross-examination by accused persons.

14 PW8 Suvidha Sawant, Nayab Tahsildar/Special Executive Magistrate conducted the Test Identification Parade on 17th May 2012. The Memorandum of Test Identification Parade is at Exhibit 80. According to the prosecution case, PW1 Nathuali

Shaikh and PW3 Ramkant Patel had identified appellant/accused no.7 Mangesh Sakat and appellant/accused no.8 Manoj Nair during the course of that Test Identification Parade. These accused persons were arrested on 26th March 2012 whereas the Test Identification Parade was conducted after about two months from their arrest. The prosecution has not adduced any evidence to explain this delay in conducting the Test Identification Parade of these two accused persons. PW9 Vijay Shety, Nayab Tahsildar / Special Executive Magistrate conducted the Test Identification Parade on 5th March 2012, the Memorandum of which is at Exhibit 79. Appellant/accused no.5 Rahul Waghmare was subjected to the Test Identification Parade by PW1 Nathuali Shaikh and PW3 Ramkant Patel. Both these witnesses have identified appellant/accused no.5 Rahul Waghmare in the said Test Identification Parade. In this case also, appellant/accused no.5 Rahul Waghmare was arrested on 9th December 2011 whereas he was subjected to Test Identification Parade on 5th March 2011. Here also, the prosecution has not tendered any explanation for the resultant delay of about three months in conducting the Test

Identification Parade. On this backdrop, admission of PW3 Ramkant Patel in cross-examination that on 17th December 2011 at Police Station, police asked him to identify the dacoits assumes importance. Similarly, the Investigating Officer has not deposed that after their arrest, the accused persons were kept in the veil, while taking them to the court for the purpose of remand. There is no evidence on record to show that the identifying witnesses had no opportunity to see the accused persons after their arrest and prior to the Test Identification Parade. Conducting the Test Identification Parade soon after arrest of the accused is necessary to eliminate the possibility of the accused being shown to the witnesses prior to the Test Identification Parade. Though some delay in conducting such Test Identification Parade is not fatal to the prosecution, there should be explanation for such delay and there must be positive evidence to eliminate the possibility of showing the accused to the identifying witnesses. Therefore, in the case in hand, for these lacunas, evidence regarding Test Identification Parade is of no assistance to the prosecution.

15 According to the prosecution case, on the basis of voluntary disclosure statements of appellants/accused nos.1 to 3, one axe and two choppers came to be recovered. PW10 Uliya Harjan is the panch witness to the Memorandum statement at Exhibit 84 and the Recovery Panchnama. This part of the investigation was done by PW11 Prashant Mane, Police Sub-Inspector. Evidence of panch witness PW10 Uliya Harjan shows that recovery of these weapons was from open place and that too from near the wall of Sewree Railway Station, which is a populous area in Mumbai. Cross-examination of the panch witness shows that ticket booking counter of Sewree local Railway Station is situated near the spot of the incident. Thus, as recovery of the axe and two choppers was from open and populous place at the local railway station of Mumbai, the same cannot be used to infer complicity of appellants/accused nos.1 to 3 in the crime in question. So far as recovered weapons are concerned, PW1 Nathuali Shaikh has deposed that it was appellant/accused no.2 Jabbar Shaikh who was holding the chopper whereas PW3 Ramkant Patel has stated that, that chopper was touched to throat

by appellant/accused no.7 Mangesh Sakat. PW1 Nathuali Shaikh has deposed that the recovered axe was held by appellant/accused no.1 Ajagarali Shaikh whereas he also claimed that he was assaulted by means of the axe by appellant/accused no.7 Mangesh Sakat. How the axe came to be transferred from hands of appellant/accused no.1 Ajagarali Shaikh to appellant/accused no.7 Mangesh Sakat is not explained by PW1 Nathuali Shaikh. There is no clinching and convincing evidence to show that axe and choppers recovered allegedly at the instance of appellants/accused nos.1 to 3 were the same weapons which were used in commission of the crime in question.

16 PW10 Uliya Harjan was shown muddemal Article no.4 knife while in the witness box. He is a panch witness to the Memorandum Statement and Panchnama Exhibit 84. By this document, there was no recovery of the knife. Still, the knife (Article no.4) was shown to this witness and he has stated that the same was recovered at the instance of appellant/accused no.1 Ajagarali Shaikh. Infact, evidence on record shows that

muddemal Article no.4 knife was recovered under Panchnama Exhibit 89 in presence of PW13 Nasruddin Khan – panch witness. Thus, evidence of PW10 Uliya Harjan and that of PW11 Prashant Mane, Police Sub-Inspector, in respect of recovery under Section 27 of the Evidence Act is far from satisfactory. According to the prosecution case, three mobile phones came to be recovered at the instance of appellant/accused no.1 Ajagarali Shaikh. His voluntary disclosure statement is stated to have been recorded in presence of PW5 Salim Khan. PW5 Salim Khan is declared hostile by the prosecution as he failed to support the recovery. The Investigating Officers PW14 Baliram Chavan and PW15 Anil Sardal have not deposed about recovery of three cell phones on the basis of voluntary disclosure statement by appellant/accused no.1 Ajagarali Shaikh.

17 So far as appellant/accused no.5 Rahul Waghmare is concerned, apart from evidence of his dock identification by PW1 Nathuali Shaikh and PW3 Ramkant Patel, the prosecution is relying on evidence of seizure of looted television set at his

instance. It is in evidence of PW12 Samir Kedar, Police Sub-Inspector, that after arrest of appellant/accused no.5 Rahul Waghmare, he interrogated this accused and came to know that the looted television set is kept at the house of appellant/accused no.6 Ramesh Akhade. Accordingly, PW12 Samir Kedar, Police Sub-Inspector accompanied by appellant/accused no.5 Rahul Waghmare went to Village Ashti in Partur Taluka of Jalna District and seized the television set from the house of appellant/accused no.6 Ramesh Akhade. The house search panchnama at Exhibit 87 fully corroborates version of PW12 Samir Kedar, Police Sub-Inspector, regarding search of house of appellant/accused no.6 Ramesh Akhade and seizure of television set. PW2 Asif Lakdawala is owner of the Excel Plastic Factory. The television set was looted from the office of his factory. PW2 Asif Lakdawala has deposed that the television set (Article no.5) before the court is the same television set which was looted from the office of his factory. Apart from this witness, other prosecution witnesses namely PW1 Nathuali Shaikh, PW3 Ramkant Patel and PW4 Naresh Paragi have also identified the television set seized from the house of

appellant/accused no.6 Ramesh Akhade as the television set which was looted from Excel Plastic Factory.

18 PW13 Nasruddin Khan is a panch witness to the disclosure statement of appellant/accused no.5 Rahul Waghmare. As per version of this witness, on 15th December 2011, appellant/accused no.5 Rahul Waghmare made a disclosure statement that he would show two mobile phones and a knife and accordingly that statement (Exhibit 89) came to be recorded. This witness further deposed that then appellant/accused no.5 Rahul Waghmare led them to his house in Jai Bhim Nagar and produced two mobile phones and a button knife from the roof of his house and accordingly, those articles were seized by preparing Panchnama Exhibit 90. However, there is no evidence to show that two mobile phones recovered at the instance of appellant/accused no.5 Rahul Waghmare were the mobile phones which were looted from the workers of the Excel Plastic Factory at the time of the incident. Recovered knife is also not shown to have been used in commission of the crime in question. Hence, this evidence is of no

assistance to the prosecution.

19 Over all scrutiny of evidence of PW1 Nathuali Shaikh goes to show that his attention was focused only at appellant/accused no.7 Mangesh Sakat who was wielding a weapon and threatening the employees of the Excel Plastic Factory for extorting cash and valuables. During the course of his evidence, PW1 Nathuali Shaikh had not attributed any specific role to other accused persons except stating that appellant/accused no.7 Mangesh Sakat had asked the co-accused to look after him. He has not stated whether he was confined by other dacoits and if so, who were they. As such, a lurking doubt arises as to whether PW1 Nathuali Shaikh was in a position to see who were other dacoits to whom virtually no role came to be ascribed by him during the course of narrating the incident of dacoity. Except appellant/accused no.7 Mangesh Sakat, this star witness of the prosecution has not spoken about any overt act played by other accused persons in the incident in question. When pointed

out the weapons, this witness has tried to explain the use of weapon for threatening by some other accused persons, but that evidence of PW1 Nathuali Shaikh, apart from being self contradictory, is not even corroborated by other eye witnesses namely PW3 Ramkant Patel and PW4 Naresh Paragi. PW1 Nathuali Shaikh deposed that he was assaulted by appellant/accused no.7 Mangesh Sakat by an axe but when the weapon was shown to him, he has stated that appellant/accused no.7 Mangesh Sakat was holding a chopper. Similar is the case in respect of PW3 Ramkant Patel, who has also not ascribed any role to any other accused persons except appellant/accused no.7 Mangesh Sakat, who by claiming himself to be the “bhai” of the locality had threatened him. PW4 Naresh Paragi has not stated about identity of any other accused persons except appellant/accused no.7 Mangesh Sakat as a dacoit, who had looted the cash from him. The incident took place at about 3 to 3.30 a.m. of 10th September 2011 when except PW1 Nathuali Shaikh and his co-worker, who is not examined by the prosecution as a witness, other employees were sleeping in the mezzanine

floor. The incident, as narrated by PW1 Nathuali Shaikh, PW3 Ramkant Patel and PW4 Naresh Paragi, happened all of a sudden, naturally springing element of surprise and events took place in quick succession. Hence, considering the evidence of these three eye witnesses, it appears that except appellant/accused no.7 Mangesh Sakat, they might not have noticed as to who were other dacoits in order to enable them to identify them. The dock identification of appellants/accused persons except appellant/accused no.7 Mangesh Sakat is doubtful and suspicious because though PW1 Nathuali Shaikh and PW3 Ramkant Patel had identified the other appellants/accused persons, while narrating the incident of dacoity, they have not deposed about any overt act allegedly done by other accused persons. In the wake of this evidence of the prosecution, it cannot be said that the prosecution has proved the fact that appellant/accused no.1 Ajagarali Shaikh, appellant/accused no.2 Jabbar Shaikh, appellant/accused no.3 Mehammad Akram Khan and appellant/accused no.8 Manoj Nair were amongst those eight dacoits who entered in the Excel Plastic Factory in the night intervening 9th September 2011 and 10th

September 2011 and indulged in dacoity of cash and valuables. These appellants are certainly entitled for benefit of doubt. Evidence against them is discrepant and sketchy, and therefore, not worthy of placing explicit reliance. However, so far as appellant/accused no.7 Mangesh Sakat is concerned, evidence on record unerringly points out that he used deadly weapon and indulged in commission of dacoity in association with appellant/accused no.5 Rahul Waghmare and other dacoits totaling eight in number. Appellant/accused no.7 Mangesh Sakat had used deadly weapon while committing dacoity and caused hurt to PW1 Nathuali Shaikh and this fact is also established from evidence of PW7 Dr.Minal Kusalkar and contemporaneous Medico Legal Certificate Exhibit 75 showing sustaining of fresh wound on right forearm by PW1 Nathuali Shaikh. Therefore, conviction of appellant/accused no.7 Mangesh Sakat for the offence punishable under Section 395 read with 397 of the Indian Penal Code needs to be maintained, so also the resultant sentence. Similarly, conviction of appellant/accused no.5 Rahul Waghmare for the offence punishable under Section 395 of the Indian Penal Code

and the resultant sentence is required to be upheld.

20 Now let us consider the case of appellant/accused no.6 Ramesh Akhade. As per evidence of PW12 Samir Kedar, Police Sub-Inspector, upon interrogating appellant/accused no.5 Rahul Waghmare, he came to know that the looted television set is kept at the house of appellant/accused no.6 Ramesh Akhade. Accordingly, the same came to be seized vide house search panchnama Exhibit 87 on 18th December 2011. This evidence, at the most, shows that the looted television set was kept at the house of appellant/accused no.6 Ramesh Akhade. However, that by itself is not sufficient to prove the offence punishable under Section 411 of the Indian Penal Code. Shri Bhujbal, the learned advocate for appellant/accused no.6 Ramesh Akhade has rightly placed reliance on judgment of this court in the matter of **Anand Anil Raimokar vs. The State of Maharashtra & Others (supra)**, paragraphs 24 and 25 of which need reproduction. They read thus:

“24 Now let us examine whether the charge for

the offence punishable under Section 411 of the IPC can be held to be proved against the appellant / accused no.3 Anand Raimokar. Section 411 of the IPC reads thus :

Section 411 - Dishonestly receiving stolen property — Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.”

“25 Bare perusal of this penal section makes it clear that the prosecution must establish that the accused had reason to believe that the property which he receives is a stolen property. The word “believe” used in Section 411 of the IPC indicates that it is necessary to point out that the circumstances were such that a reasonable man must have felt convinced that the property in which he is dealing is a stolen property. Even if it is established that the accused suspected that the property might have been a stolen property, he is not liable to be guilty of the offence punishable under Section 411 of the IPC. Carelessness on the part of

the accused does not make him liable for penal consequences of Section 411 of the IPC. In the case in hand, it is the stand of the prosecution that appellant / accused no.3 Anand Raimokar is a goldsmith dealing in sale and purchase of gold ornaments, having a jewellery shop, named and styled as Shweta Jewellers. This implies that he must be purchasing and selling out gold ornaments and at the most one may infer that he was negligent in purchasing gold ornaments from the accused persons but it cannot be said that he had reason to believe that the articles purchased by him was stolen property. As such, conviction of appellant / accused no.3 Anand Raimokar for the offence punishable under Section 411 of the IPC must fail.”

Evidence on record does not show that appellant/accused no.6 Ramesh Akhade had dishonestly received and retained the looted television set, knowing or having reason to believe that the same is a stolen property. Therefore, this appellant/accused no.6 Ramesh Akhade needs to be given benefit of doubt.

21 In the result, the following order :

ORDER

- i) Criminal Appeal No.41 of 2015 is partly allowed.
- ii) Conviction of appellant/accused no.5 Rahul Waghmare for the offence punishable under Section 395 of the Indian Penal Code and conviction of appellant/accused no.7 Mangesh Sakat for the offence punishable under Section 395 read with 397 of the Indian Penal Code recorded by the learned trial court is maintained. Similarly, the sentence imposed on these appellants/accused persons by the learned trial court is maintained.
- iii) Conviction of appellant/accused no.1 Ajagarali Shaikh, appellant/accused no.2 Jabbar Shaikh, appellant/accused no.3 Mehammad Akram Khan and appellant/accused no.8 Manoj Nair for the offence punishable under Section 395 of the Indian Penal Code as well as conviction of appellant/accused no.1 Ajagarali Shaikh, appellant/accused no.2 Jabbar Shaikh and appellant/accused no.3 Mehammad Akram Khan for the offence punishable under Section 395 read with 397 of the Indian Penal Code as well as the

resultant sentences imposed on all of them for these offences by the learned trial court are quashed and set aside. They are acquitted of all the offences with which they were charged. These appellants/accused persons be set at liberty if not required in any other case.

- iv) Fine amount, if any deposited by these appellants/accused persons, be refunded to them.
- v) Criminal Appeal No.620 of 2013 is allowed.
- vi) Conviction of the appellant/accused Ramesh Akhade for the offence punishable under Section 411 of the Indian Penal Code as well as the resultant sentence imposed upon him by the learned trial court is quashed and set aside. Appellant/accused Ramesh Akhade is acquitted of the offence punishable under Section 411 of the Indian Penal Code. He be set at liberty if not required in any other case.
- vii) Fine amount, if any deposited by him, be refunded to him.

(A. M. BADAR, J.)