

Sequeira

*IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION*

CRIMINAL APPEAL NO. 771 OF 2010

1. Gopinath Vitthal Sable

Age : 23 yrs. Occ. Driver,
R/o Gangapur, Tal. Ambegaon
Dist. Pune.

(At present lodged in Yerawda
Central Jail.)

...Appellant /
Orig.Accused
No.3.

Vs.

The State of Maharashtra

(At the instance of Sr.P.I.

Chaturshringi Police Station,

Dist. Pune)

... Respondent

Mr.Vijay Garad, for the Appellant.

Mrs.M.M.Deshmukh, APP for the Respondent/State.

**CORAM : S.S.SHINDE &
A.S.GADKARI, JJ.**

DATE : 17TH OCTOBER 2018

JUDGMENT [PER S.S. SHINDE, J.] :

This Appeal is directed against the Judgment and order dated 17th July, 2010, passed by the Additional Sessions Judge, Pune in Sessions Case No.319 of 2007, thereby convicting the Appellant/Accused No.3 – Gopinath Vitthal Sable for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code [for short 'I.P. Code'] and sentencing him to suffer life imprisonment and to pay fine of Rs.1,000/-. The trial Court also convicted the Appellant/Accused No.3 – Gopinath Vitthal Sable for the offence punishable under Section 394 read with Section 34 of the I.P. Code and sentenced him to suffer rigorous imprisonment for seven years and to pay fine of Rs.500/-, in default of payment of fine he is directed to suffer further imprisonment for six months. All the sentences

were directed to be run concurrently. Hence this Appeal is filed by the Appellant challenging the conviction and sentence.

2. The prosecution case, in brief, is as under:

A) Ajay s/o Sakharam Kadu [Ajay for sake of brevity hereinafter would be referred as 'the deceased'] resident of D.P Road, Aundh, Pune was working as a car driver with Mr.Makhariya who operates tourist centre from Pune. On 8th April 2006 deceased Ajay was deputed by Mr.Makhariya on a passenger car bearing No.MH-14/V-7309 of Tata Indica make. The said car was hired by Praveen Krishnaswaroop Singhal [PW-2] as a passenger to Sahara Air-Port, Mumbai. Accordingly, deceased Ajay with the aforesaid Indica car arrived at Sahara Air-Port, Mumbai and left Praveen Singhal [PW-2] and started returning to Pune. However, he did not reach at Pune either at his house or place of his employer.

Hence his father Sakharam Seetaram Kadu [PW-1] filed missing complaint on 19th September 2006 with Chaturshringi Police Station. However deceased Ajay could not be traced out for considerable period and therefore, again with some details a second missing complaint was filed on 23rd September 2006 by Sakharam Kadu [PW-1]. The further search of deceased Ajay was continued.

3. It is further the prosecution case that in the meantime dead body of one unknown young person was found by Panvel Police Station by the side of the road near village Nere, on Nere Panvel road on 9th April 2006 i.e. on the next day of date of missing of Ajay Kadu. The Panvel police had therefore, registered the case as accidental death case. The Inquest panchanama was executed by the Police in presence of the panch witnesses. There were no external injuries found on the person of said dead body. Police as well as pancha thought that deceased died due to some illness. However since the dead body was found in suspicious condition by the

side of the road and since the accidental death case was registered, the dead body was sent for postmortem examination. The postmortem was conducted by Dr.Swati Bharat Naik [PW-9] on 9th April 2006. On examination Dr.Swati Naik [PW-9] found that the deceased was 45-35 years old. There were external injuries and abrasion around lower lip measuring 1 cm x 1 cm. Besides this the medical officer found fracture of thyroid cartilage and hyperamia and congestion of trachea, swelling of scrotum and contusion over testes was found and in the situation the medical officer opined that death had occurred due to cardial arrest and shock with asphyxia due to throttling and injury to testes. The clothes which were on the person of the deceased were seized by Panvel police in presence of the panch witnesses on 14 April 2006.

4. It is further the case of the prosecution that police from Chaturshringi Police Station continued the search. Parallel to the investigation of Chaturshringi Police station, the Crime Branch

Pune also started investigation. During the investigation A.P.I. Milind Vasantrao Gaikwad [PW-11] came to know that deceased Ajay was carrying with him mobile handset bearing IMEI No.357593009655302. In the said mobile phone a SIM card bearing No.9922057920 was also there. Police Officer gave the number of the mobile phone as well as Sim card to Idea Company. After some days, it was found that the mobile phone was used by somebody. Therefore, Police Inspector- Milind Gaikwad [PW-11] contacted mobile Company and obtained the name and address of the user. From the said Company he found that Mohan Maruti Barve [PW-8] resident of village Chas, taluka Ambegaon, District Pune was the user of the mobile. Therefore, on 7th January 2007, P.I Gaikwad [PW-11] along with panch witness went to said village. It was revealed from Mohan Barve [PW-8] that he had purchased the said mobile from Shivaji Nathu Pardhi [PW-7] of his own village. Therefore, the police reached said Shivaji. From him they gathered the information that he had purchased the said mobile

from Accused No.3 Gopinath Vitthal Sable i.e. Appellant herein. It is further the prosecution case that Mohan Barve [PW-8] himself had received a SIM card of B.S.N.L from Shivaji Pardhi [PW-7]. Accordingly, the mobile and SIM card were seized.

5. Accused Gopinath Sable i.e. Appellant herein, was arrested on 7th January 2007 and further investigation was continued which ultimately resulted into recovery of gold ring of the deceased. During the course of investigation, the P.I. of Chaturshringi Police Station called Amar Kadu [PW-4], the elder brother of the deceased Ajay, on 9th January 2007. They informed him about death of deceased Ajay and took Amar Kadu [PW-4] to Panvel Police Station. There at Panvel Police Station the clothes of the deceased were identified by Amar Kadu [PW-4]. On the basis of identification that said clothes are of deceased Ajay, by his brother Amar Kadu [PW-4], the Investigating Officer confirmed that the dead body which was found by Panvel Police was of

deceased Ajay.

6. It is further the case of the prosecution that on 10th January 2007, Accused Gopinath Sable made a statement before the police and the panch witnesses that he is ready to produce the gold ring of the deceased. Eventually he led the police and the panch witnesses to Thane to the jewellery shop of Satish Solanki [PW-6]. Satish Solanki [PW-6] upon seeing the Accused, produced the gold ring and gave information that Accused No.3 Gopinath i.e. Appellant herein, had kept the said gold ring with him by obtaining amount of Rs.1,600/-. The necessary panchanamas under section 27 of the Evidence Act were recorded and prepared. It further appears that Accused No.4-Raju Namdeo Dandekar was also arrested on 7th January 2007. It is further the prosecution case that on 11th January 2007, Accused No.4 -Raju Namdeo Dandekar made a statement leading to the recovery of wrist watch of Maxima make which according to the relatives of the deceased, was on

the person of deceased Ajay Kadu at the relevant time. The said wrist watch was recovered from his house at Mangaon, District Raigad and accordingly, the panchanama was prepared i.e. Exhibit-39.

7. It is further the case of the prosecution that Accused No.1-Selvan Kumar was arrested on 24th January 2007. On 26th January 2007, Accused No.1 – Selvan Kumar also made a statement leading to recovery of Car tape from his house situated in Andheri, Mumbai which was in the Indica car. Accordingly, the panchanamas at Exhibit 41 and 42 were recorded. Accused No.2-Iranna was arrested on 8th January 2007 from his village Nagarhalle in Andhra Pradesh State. It is further case of the prosecution that on 9th January 2007, Accused No.2-Iranna alias Shivappa Inchnal while in police custody also made a statement leading to the discovery of the place where the deceased was killed and also the place where the Tata Indica car was kept. The Accused showed the place as on the road leading

towards Nere where the dead body was found by Nerul Police Station. It is further case of the prosecution that pursuant to the statement of Accused – Iranna, the Indica car was found in Vikhroli area of Mumbai, on 9th January 2007.

8. After the investigation was over charge-sheet was filed. The learned Judicial Magistrate (First Class) found the case exclusively triable by the Sessions Court and committed the case to Session Court, Pune. The then Ad-hoc Additional Session Judge, Pune framed the charge against all the four Accused vide Exhibit 2, for the offences punishable under section 302 read with section 34 and under Section 394 read with 34 of the Indian Penal Code. The Accused did not plead guilty and claimed to be tried. Accordingly after framing the charge the Accused were tried and by the impugned Judgment and Order the trial Court was pleased to acquit Accused No.1- Selwan Kumar Chandran, Accused No.2- Iranna alias Shivappa Inchnal and Accused No.4 – Raju Namdev

Dandekar. However trial Court convicted Accused No.3 Gopinath Sable (i.e Appellant herein) for the offences punishable under section 302 read with 34 of the Indian Penal Code as per section 235 of the Code of Criminal Procedure and he was sentenced to suffer imprisonment for life and also to pay a fine of Rs.1,000/- in default of payment of fine he was directed to suffer further imprisonment for a period of one year. He was also convicted for the offence punishable under section 394 read with 34 of the Indian Penal Code as per section 235 of Code of Criminal Procedure and he was sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.500/- and in default of payment of fine he was directed to suffer further imprisonment for six months. However, the trial Court ordered both the substantive sentences shall run concurrently. Hence, this Appeal by the convicted Accused Gopinath Sable.

9. The learned counsel appearing for the Appellant submits that the entire prosecution case

rests upon the circumstantial evidence. There is no chain of circumstances so complete which would lead to hypothesis of guilt of the Appellant. It is further submitted that the dead body of deceased Ajay was not identified and only on the basis of alleged recovery of clothes on the person of Ajay, which clothes were shown to Amar Kadu [PW-4] belatedly in the month of January 2007, it is concluded that the prosecution has proved that the dead body which was recovered by the Panvel Police Station was of deceased Ajay. In fact neither Sakharam [PW-1] the father of the deceased Ajay nor Amar Kadu [PW-4], brother of deceased Ajay identified the dead body and therefore the further investigation has no any meaning, and the Appellant is entitled for the benefit of doubt. It is submitted that nobody has seen the deceased in the company of Appellant prior to the death of Ajay and therefore, there is no evidence brought on record by the prosecution that Ajay (deceased) was seen last in the company of Appellant and thereafter he was never seen. It is

submitted that the prosecution has not led any evidence to prove that the mobile handset which prosecution claims to have recovered from the Appellant, as it is seen from the evidence of Mohan Barve [PW-8] and Shivaji Pardhi [PW-7], was belonging to deceased Ajay. It is further submitted that no any employee from the Idea mobile company was examined so as to prove that the said mobile was of Idea Company make or the said mobile was used by the Appellant. It is submitted that PW-3 Rajesh Dattatraya Shinde is habitual panch witness, and acted as panch to other discoveries claimed to have been made at the instance of different Accused persons in various crimes. It is submitted that Satish Javedchand Solanki [PW.6], during his cross-examination admitted that he came to know the name of the present Appellant only when police brought him to his shop. Though it is alleged by the prosecution that gold ring was recovered pursuant to memorandum statement of the Appellant, the prosecution has not brought on record any receipt to suggest that the

said golden ring was sold by the Appellant to Satish Solanki [PW-6]. It is submitted that the prosecution rests upon two circumstances. Firstly, alleged recovery of mobile and secondly, of gold ring. Pursuant to alleged memorandum statement of the Appellant the said two alleged circumstances are not sufficient to hold the Appellant guilty for the offences alleged against him therefore, it is submitted that the Appellant is entitled for the benefit of doubt.

10. On the other hand, learned APP appearing for the State invites our attention to the evidence of the prosecution witnesses and also the fact that the mobile which was purchased by Mohan Barve [PW-8] was sold by the Appellant to Shivaji Pardhi [PW-7] and Shivaji sold the said mobile to Mohan Barve [PW-8]. It is submitted that the prosecution has proved through the Court witness -Suresh Mangilal Khandelwal that the said mobile was sold by him to Ajay (deceased) and to that effect the prosecution has

placed on record the satisfactory evidence. It is submitted that there are strong incriminating circumstances brought on record by the prosecution which lead to only conclusion of guilt of the Appellant and none else.

11. It appears that C.R No.424 of 2006 was registered at Chaturshringi Police Station, on 20 September 2006 under section 302, 394 read with section 34 of Indian Penal Code. Prior to it missing report was filed by Sakharam Kadu [PW-1] and Amar Kadu [PW-4]. On the basis of missing report and as already observed, Chaturshringi Police station investigated into the allegations in the said missing report and also the aforesaid crime. At the same time, parallel investigation was also going on with the Crime branch Pune. Sakharam Kadu [PW-1] is father of deceased Ajay and Amar Kadu[PW-4] is real brother of deceased Ajay. Sakharam [PW-1] deposed before the Court that on 8th April 2006, at about 6.30 p.m. his son Ajay (deceased) proceeded to Bombay

Air Port, with his Indica car No.MH-14/V-7309 and thereafter he did not come back. On next day i.e. on 9 April 2006, he received telephone call from owner of Indica car namely Makhariya, informing that Ajay did not come back with the car. Thereafter Sakharam Kadu [PW-1] went to Aundh police chowkie and filed missing complaint. It is further deposed by Sakharam Kadu [PW-1] that even after filing missing complaint, his son Ajay did not come back therefore, on 23 September 2006, he filed another complaint with the police. Pursuant to filing of said complaint he was called by police of Crime Branch, Pune, on January 2007. There he came to know that somebody committed murder of his son Ajay. He stated that at the relevant time mobile phone (9823408010) was with Ajay. Police showed him photograph and clothes of his son Ajay and he identified the same. On that day police recorded his statement. He stated that he can identify mobile phone of his son.

12. During the course of cross-examination he was shown the contents of the complaint filed by him

with Chaturshringi police station on 13 September 2006. He stated that contents of the said complaint are true and correct. Nothing useful to the defence has been elicited from his cross-examination.

. At this juncture, it would be appropriate to make reference to the evidence of Amar Sakharam Kadu [PW-4] who is real brother of deceased Ajay. In his deposition before the Court he stated that his brother Ajay was serving as driver at the Indica centre of Makhariya. On 8th April 2006, his brother informed him that he is going to Sahara Air Port at Mumbai, as he is required to take passenger. Accordingly, he proceeded by the said, vehicle to Mumbai. Ajay did not turn up till the morning of 9th April 2006. Upon receiving the phone call from Makhariya that Ajay did not return with the vehicle, missing complaint about Ajay and said Indica car was lodged with the police station. He further deposed that Ajay was having cell No.9823408010 at the relevant time. He tried to contact Ajay on said cell number. However, he could not contact him as he was

receiving the message 'not reachable'. They were following the search of Ajay's phone on subsequent dates. In the month of September 2006, again they lodged a complaint to Aundh police chowkie about missing of Ajay, however Ajay was not traced out.

13. On 9th January 2007, Amar Kadu [PW-4] received a call from Aundh police chowkie informing that four persons are arrested. Accused were traced out with the help of cell EMIE number. Thereafter Amar Kadu [PW-4] went to Aundh police chowkie from where he accompanied police at Panvel. Police at Panvel had shown him clothes which Ajay had worn, when he left Pune on 8th April 2006 to go to Sahara Airport at Mumbai. He identified his clothes. On the same day, he was called at Aundh police chowkie where he was shown gold ring, wrist watch and cell of deceased Ajay. He identified the said articles as belonging to Ajay. He denied the suggestion that the aforesaid articles which have been seized do not belong to Ajay. It appears that, he was further called for further examination by the Court, and

during his further examination he deposed that the mobile phone (Article 1) lying in the property produced before the Court is the same mobile phone which was identified by him as mobile phone of his brother Ajay (deceased). His brother had purchased said mobile phone (Article No.1) three months prior to the death. As far as gold ring is concerned, he deposed that Ajay was wearing gold ring since prior to five to six months of his murder. The gold ring (Article No.3) was identified by him before the Court.

14. The evidence of Sakharam Kadu [PW-1] and Amar Kadu [PW-4] as discussed hereinabove would clearly demonstrate that Ajay left for Mumbai Air Port on 8th April 2006, at about 6.30 p.m and thereafter he did not return. It further reveals from their evidence that they lodged two complaints and thereafter pursuant to the call received from the police stations they visited the police station and identified the clothes of the deceased, and also gold ring and mobile which was possessed by Ajay

[deceased], at the relevant time prior to his departure on 8th April 2006 to Bombay Air Port.

15. The prosecution examined Praveen Krishnaswaroop Singhal [PW-2], who deposed that he was working as Sales Manager in Siemens Company. On 8th April 2006, he was to go to America from Mumbai for some work in relation to routine affairs of Company. From Pune he went to Mumbai after hiring tourist car of Mr.Makhariya. Praveen Krishnaswaroop Singhal [PW-2] further deposed that, Driver of said car was one Ajay [i.e deceased]. On that day he started from Pune (in between 7.30 – 8.00 p.m.) and reached Sahara Air Port, at Mumbai, in the night at about 11.30 – 12.00 O'clock. Ajay (deceased) dropped him at Airport and started his return journey so as to come back to Pune. Praveen Singhal [PW-2], is the sole witness of the prosecution, who saw at last Ajay alive, and thereafter nobody saw him alive.

16. Prosecution examined Dr.Swati Bharat Naik [PW-9] who conducted autopsy on dead body of deceased

Ajay. In her deposition she stated that on 4 September 2006, she was attached as medical officer at Rural Hospital, Panvel. Police constable S.B.Patil of police station New Panvel has brought one dead body of one unknown person at 5.00 p.m. Dr.Swati Naik immediately started the postmortem examination and concluded at about 6.00 p.m. She noticed following external injuries on dead body of Ajay -

1] Swelling of scrotum and contusion having size 2 cm x 2 cm over the testicles. There was abrasion around lower lip 1 cm x 1cm. There was fracture over thyroid cartilage.

She also found the following internal injuries -

1] Fracture of thyroid cartilage and hyperamia and conjestion of trachea.

She further deposed that cause of death was due to cardial arrest and shock due to asphyxia due to throttlng and injuries to the testes. Accordingly she issued Postmortem report.

17. As already observed, Sakharam Kadu [PW-1] and Amar Kadu [PW-4] identified the clothes of the deceased which were worn by him on 8th April 2006 when he travelled from Pune to Mumbai and accordingly, prosecution proved that the dead body which was recovered by the New Panvel Police station was of Ajay.

18. There are two important incriminating circumstances which have been relied upon by the prosecution, and relying upon the evidence of relevant witnesses as led by the prosecution, the trial Court held the Appellant guilty for the offences alleged against him. Firstly, Accused No.3 -Gopinath Sable i.e Appellant herein, immediately after the incident of homicidal death of Ajay was found in custody or control of two articles, i.e. mobile phone at Article-1 and gold ring at Article-3, which were possessed by deceased Ajay. We would like to discuss the evidence of prosecution witnesses through whom the prosecution claims to have proved first incriminating circumstance in respect of

recovery of mobile phone as Article No.1 from the Appellant. The Prosecution examined Rajendra Surendra Joshi [PW-12] who was working as PI, Crime Branch, Pune City at the relevant time. In his deposition he stated that Crime No.424 of 2006 was registered at Chaturshringi police station. Sakharam Kadu [PW-1] was coming to police station and visiting the police station frequently for search of his son Ajay. Missing Ajay was using mobile No.9823408010. He obtained IMEI number of said mobile, that IMEI number was 357593009655300. Said number was given to all mobile companies at Pune for tracing. He was in contact with the mobile companies. In January 2007, information was received from Idea Company that the said handset is being used by one Mohan Maruti Barve, resident of Chas, taluka Ambegaon, District Pune and that his user number is 9922057920. He sent API Milind Gaikwad, working with him to Mohan Maruti to make inquiry. On 7th January 2007, API Milind brought Accused Gopinath Sable to him. It was stated by API Milind that the handset

was sold to Mohan Maruti [PW-8] by one Shivaji Pardhi [PW-7] and that Shivaji Pardhi [PW-7] had purchased the mobile phone handset from Accused Gopinath. Thus, through the investigation API Milind Gaikwad came to know about the involvement of the Accused Gopinath. Accordingly Accused Gopinath was arrested on 7 January 2007.

19. Prosecution examined Mohan Maruti Barve [PW-8]. In his evidence before the Court he stated that he is running flour mill at village Chas. He knows Shivaji Pardhi [PW-7]. He is residing in the same village. Shivaji Pardhi [PW-7] had been to his place. He sold mobile set to him for Rs.1,200/-. It was of Nokia make having black white colour. He used the said handset for about 1.1/2 months. Thereafter same was seized by police. He is able to identify the mobile. It appears that the said mobile set [Article No.1] was shown to him, and he deposed that it is the same mobile set which was seized from him.

20. Prosecution examined Shivaji Nathu Pardhi

[PW-7] at Exhibit 49. In his deposition Shivaji [PW-7] stated that he knows Vishvas Waman Borade. He is residing adjacent to his house. He knows that his relative is Gopinath Sable i.e. Appellant. He identified Appellant in the Court. He further deposed that in the month of August 2006, he went to market at Ghodegaon. After purchasing the items in the weekly market Accused Gopinath met him. He made inquiry with him when he came from Mumbai. Accused disclosed that just he has arrived from Mumbai. Shivaji [PW-7] disclosed his intention to purchase secondhand mobile set. Accused - Gopinath told him that new mobile was available at the cost of Rs.2,500/-. Accused- Gopinath told him that he is having one mobile set. Shivaji [PW-7] made inquiry at what cost Accused Gopinath is ready to sell the mobile. In reply, Accused - Gopinath told that he is ready to give said mobile for Rs.1,000/-. Accordingly said mobile was purchased by Shivaji [PW-7] from the Appellant - Gopinath. He further deposed that since his son became ill he was in financial

crisis so he sold the said mobile to Mohan Maruti Barve [PW-8] along with cell number and Sim card. He denied the suggestion that Gopinath had not sold said mobile set to him. At this juncture, it is appropriate to mention that Accused Gopinath in his statement under section 313 of Code of Criminal Procedure, in reply to question No.24 i.e. 'it has come in the evidence of Shivaji Pardhi [PW-7] that Accused No.3 is a relative of Vishwas Waman Borade who is residing adjacent to his house - what you have to say about it?', answered that 'it is true that Vishwas Waman Borade is my relative. I do not know that the house of Shivaji Pardhi [PW-7] is adjacent to the house of Vishwas Waman Borade'.

21. Thus, the prosecution has proved that Vishwas Waman Borade is relative of Accused Gopinath, and Shivaji Pardhi [PW-7], who is residing adjacent to the house of said Vishwas, has purchased the aforesaid mobile set from the Accused – Gopinath. It appears that the trial Court summoned Suresh Mangilal Khandelwal as Court Witness. Mr.Suresh [Court

Witness No.1] deposed that, he was owner and proprietor of the shop, named and styled as JM Moile Shoppe up to 2007. He used to sell mobiles from the said shop. He closed the said shop in the year 2007. He produced the certificate of CA to show that he was running the said shop till the year 2004-2005. He tried to search for the original cash and credit memo bearing No.1201 dated 25th December 2005. However, since his shop is closed he could not locate the original cash and credit memo. However, upon going through the photocopy of the said memo placed on record by the prosecution, he stated that the said cash and credit memo was issued from his shop. A perusal of original record shows that the photocopy of the cash or credit memo was placed on record by the prosecution at Article 'A'. We have carefully perused the certificate at Exh.124 which is part of record, wherein it is mentioned as under :

"This is to certify that Mr.Suresh Mangilal Khandelwal is proprietor of M/s.J.M.Mobile Shoppe and below mentioned bill entry has been

duly made in the books of accounts for the previous year 2004-2005 of j m mobile shoppe.

1. Bill no.1201 customer name : cash/ajai kadu Model no nokia 1100 amount at 2550/- incl taxes.

Further it is stated that the whole bill book not found for above series under the custody of proprietor.

This certificate is issued on specific request of proprietor". *(underlines added)*

22. We have discussed herein above the evidence of Mohan Barve[PW-8], Shivaji Pardhi [PW.7] and court witness-Suresh Khandelwal. It has come in the evidence of Amar Kadu [PW-4] that the said mobile handset was shown to him, and he identified the said mobile set, which belonged to Ajay. The prosecution by examining Mohan Barve [PW-8], Shivaji Nathu Pardhi [PW-7] and Suresh Mangilal Khandelwal as Court Witness and the API, Milind Vasantrao Gaikwad – [PW-11] has led the

satisfactory evidence, and proved that, Accused Gopinath immediately after the incident of homicidal death of Ajay was found in the custody of mobile phone [the Article 1], which was possessed by deceased Ajay prior to his death and also on relevant day and time of the incident.

23. In order to prove another incriminating circumstance against the Accused Gopinath that, on immediately after the incident of homicidal death of Ajay Kadu, Accused Gopinath was found in custody and control of gold ring [at Article 3], the prosecution examined Satish Javedchand Solanki [PW-6], Amar Sakharam Kadu [PW-4] and also the Investigating officer.

24. Satish [PW-6] deposed before the Court that, he is having business of gold smith at Thane. He knows Gopinath Vitthal Sable. He had been to his shop along with his brother. Brother of Gopinath is his regular customer. Accused Gopinath had been to his shop. He disclosed him that wife of his brother

is admitted in the hospital for delivery and he is in need of money. Accused Gopinath gave gold ring to him. He gave Rs.1600/- to Gopinath. Since then neither Gopinath nor his brother came to him. The gold ring remained with him. In the month of January 2007 Accused Gopinath along with police came to his shop. Satish Solanki [PW-6] returned the said gold ring to police. Accordingly police seized the said gold ring under panchanama. The said gold ring was identified by Amar Kadu [PW-4] brother of deceased Ajay. It is necessary to mention that aforesaid gold ring was recovered pursuant to memorandum statement of Accused Gopinath that he had sold the said gold ring to Satish Solanki [PW-6].

25. We have carefully perused the findings recorded by the trial Court, the trial Court has discussed in detail, the evidence in relation to aforesaid incriminating circumstances and reached to the conclusion that the Appellant Gopinath is guilty of offence punishable under section 302 read with section 34 of Indian Penal Code and also section 394

of the Indian Penal Code. Upon re-appreciation of entire evidence we are of the opinion that the findings recorded by the trial Court are in consonance with the evidence brought on record, and there is no perversity as such. The view taken by the trial Court, and confirmed by us is fortified by the exposition of law, in *Mukund alias Kundu Mishra and another Vs. State of Madhya Pradesh (AIR 1997 Supreme Court 2622)*, wherein stolen properties were recovered at the behest of the Accused in a prosecution for the offences of robbery and murder in one and same transaction. The Supreme Court held that presumption can be drawn not only of the fact that the person in whose possession the stolen articles were found committed robbery but also that he committed murder.

Though we have confirmed the finding of the trial Court, we have noticed that out of four accused tried before the trial Court, only Appellant has been convicted. Therefore, the question of conviction of Appellant - Gopinath Vitthal Sable,

being only convicted accused by invoking section 34 of Indian Penal Code would not arise. In that view of the matter, we hold the Appellant - Gopinath Vitthal Sable guilty of the offences punishable simplicitor under Section 302 and 394 of the Indian Penal Code, instead of under Section 302 read with section 34 and Section 394 read with section 34 of the Indian Penal Code, as held by the trial Court.

26. In the light of discussion in afore-going paragraphs, we are of the opinion that the Appeal is devoid of any merits. Hence, Appeal stands dismissed.

(A.S.GADKARI, J.)

(S. S. SHINDE, J.)